NOTES

MILITARY PERSONNEL AND THE FEDERAL TORT CLAIMS ACT*

JUDICIAL treatment of the Federal Tort Claims Act of 1946 [1] has already exemplified the reluctance of many courts to accede to the full measure of Congressional reforms. Frequent reiteration of the much-criticized maxim that "statutes in derogation of sovereign immunity must be strictly construed" serves to rationalize the courts' refusal to accept Congress' repudiation of immunity at its broad face value.[2] This circumscriptive reaction is

* United States v. Brooks (two cases), 169 F.2d 840 (4th Cir. 1948), *cert. granted*, 17 U.S. L. WEEK 3197 (U.S. January 3, 1949).

1. 60 STAT. 842 (1946), 28 U.S.C. §§ 921-946 (1946). The newly revised Judicial Code has redistributed and renumbered the provisions of the Tort Claims Act. It is contained in §§ 1291, 1346(b), 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680 of the new Code (1948). The revision has effected several changes in the wording of the Act, but the substance has not been altered. Since previous opinions and literature dealing with the Act, as well as the instant case, have been directed to the numbering used in the 1946 codification, that version will be cited throughout this Note. For those who wish to refer to the new Code, a conversion table may be found at p. 2047 of 28 U.S.C. CONG. SERV. (1948).

For analysis and historical background of the Tort Claims Act, see Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 COL. L. REV. 722 (1947); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946); Comment, 56 YALE L. J. 534 (1947). Cases arising in the first year since the passage of the Act are reviewed in Hulen, *Suits on Tort Claims Against the United States*, 7 F.R.D. 689 (1948).

2. *E.g.*, Bewick v. United States, 74 F. Supp. 730 (N.D. Tex. 1947) (subrogees have no standing to sue under Tort Claims Act); Long v. United States, 78 F.Supp. 35, 37 (S.D. Cal. 1948) ("scope of employment" narrowly construed to bar claim based on negligence of federal civilian employee who deviated from prescribed driving route); Spelar v. United States, 75 F.Supp. 967, 968 (E.D. N.Y. 1948) (airfield leased to United States in Newfoundland for 99 years is "foreign country" within the exclusion of the Tort Claims Act, notwithstanding previous rulings that the same area is a "territory or possession" of United States within coverage of the Fair Labor Standards Act), *rev'd* 171 F.2d 208 (2d Cir. 1948). With the strictness of these holdings, contrast Chief Judge Cardozo's oft-quoted comment: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinements of construction where consent has been announced." Anderson v. John L. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926). This more liberal approach has been evidenced by such decisions as Old Colony Insurance Co. v. United States, 168 F.2d 931 (6th Cir. 1948) (subrogees are included within coverage of Tort Claims Act); and Aetna Casualty & Surety Co. v. United States, 170 F.2d 469 (2d Cir. 1948) (subrogees may sue under Tort Claims Act). *See* Wallace v. United States, 142 F.2d 240, 243 (2d Cir. 1944); Hammond-Knowlton v. United States, 121 F.2d 192, 203 (2d Cir. 1941).

For a persuasive argument that the doctrine of sovereign immunity should never have been adopted by American courts in the first place, see Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 1, 757, 1039 (1926). The gist of Professor Borchard's thesis

illustrated by the recent decision of the Court of Appeals for the Fourth Circuit in *United States v. Brooks*,[3] a case involving the rights of military personnel under the Act.

Two American soldiers—both on furlough, driving in their own automobile, and not engaged in any military business—were struck by an Army truck, negligently operated by a civilian employee of the War Department. One of the soldiers was killed, while his brother and father were both injured. The survivors obtained judgments against the United States for these injuries and for the wrongful death of the deceased soldier.[4] On appeal, the judgments as to the two soldiers were reversed by the Fourth Circuit, with Chief Judge Parker dissenting, on the ground that all members of the Armed Forces are by implication excluded from the coverage of the Tort Claims Act. Though no other appellate courts have considered this question, two district courts in other circuits have reached an opposite conclusion in similar cases,[5] and the *Brooks* case is now before the Supreme Court.[6]

The Circuit Court readily conceded that a literal reading of the Act gave no indication that Congress intended to exclude servicemen. The Government's liability for negligence of its employees and agents is expressly ex-

is that sovereign immunity is inconsistent with the founding principle of the United States —that the King not only could, but did, do wrong. And see, *e.g.*, Mr. Justice Wilson, concurring in Chisholm v. Georgia, 2 Dall. 419, 453 (U.S.1793). *But see* The Siren, 7 Wall. 152, 153–4 (U.S. 1868).

3. 169 F.2d 840 (4th Cir. 1948), *cert. granted*, 17 U.S. L. WEEK 3197 (U.S. January 3, 1949).

4. Brooks v. United States, Civ. Nos. 545, 546, 547 (W.D. N.C. 1947) (opinion reprinted in Appendix B of Brief for United States, on appeal to U.S. Court of Appeals for the Fourth Circuit). The judgments awarded were: $5,000 to the father, for injuries; $4,000 to the injured soldier; and $25,425 to the father as administrator of the estate of the deceased soldier ($25,000 for wrongful death, and $425 for damages to the soldier's automobile).

5. Alansky v. Northwest Airlines, 77 F. Supp. 556 (D.Mont. 1948) (action against United States and against Northwest Airlines for death of Army officer killed in crash of Government-operated airplane); Samson v. United States, 79 F.Supp. 406 (S.D. N.Y. 1947) (action for death of soldier in a negligently operated Army bus). Trials in both cases have been postponed pending final appellate ruling on the *Brooks* case. The *Samson* ruling has recently been counterbalanced by the dismissal of a similar action by Judge Rifkind in the same district. Ostrander v. United States, Civ. No. 43–131 (S.D.N.Y. 1949) (action for death of soldier from negligence of Army doctors).

Another case posing substantially the same question is Jefferson v. United States, 74 F.Supp. 209 (D.Md. 1947), noted in 61 HARV. L. REV. 550 (1948), 34 VA. L. REV. 360 (1948), where a soldier sued the United States for the negligence of an Army surgeon in performing an operation for a non-combat-incurred illness. The Government's motion to dismiss was denied "without prejudice." At the end of trial, however, Judge Chesnut reconsidered the motion and ruled that the soldier had no standing to sue under the Tort Claims Act. 77 F. Supp. 706 (1948). This latter opinion was persuasive to the majority in the *Brooks* case. The Fourth Circuit, however, has deferred decision on Jefferson's appeal pending the ruling of the Supreme Court on its *Brooks* holding.

6. Certiorari was granted on January 3, 1949. 17 U.S. L. WEEK 3197.

tended ". . . to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances." [7] Twelve exceptions are enumerated; [8] the only one pertaining to military personnel is that which bars all claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." [9] None of the exceptions applies to the instant case. But the court, on the theory that the literal reading may be broader than the intended meaning, disregarded the familiar rule of construction that *expressio unius est exclusio alterius*, and read an additional exception into the Act through a questionable interpretation of the intent of its framers.

The Tort Claims Act was enacted as an integral part of the Legislative Reorganization Act of 1946.[10] As such, it has a double-barreled purpose: to remove the previous barrier to suits against the Government in tort, and, by so doing, to relieve Congress of the burden of handling the thousands of private bills for relief that were, in the absence of any other remedy, sub-

7. 28 U.S.C. § 931(a) (1946).

8. 28 U.S.C. § 943 (1946). The twelve exceptions fall generally into two distinct categories: first, claims arising out of those activities in which the Government should not, for various reasons, be held to any tort liability (execution of laws or of executive discretion; transmission of mail; revenue collection; administering of the Trading With The Enemy Act; establishment of quarantine; monetary operations by the Treasury; combatant activities in time of war; and willful torts by Government agents, such as assault, false arrest, libel, misrepresentation, etc.); and second, those activities where sufficient remedies for injury or death are already provided under other legislation (suits in admiralty; ship accidents in the Panama Canal; claims arising in foreign countries; and claims arising out of the activities of the Tennessee Valley Authority). Servicemen's claims might have been included under either of these two categories of exceptions, but Congress failed to do so. That Congress was aware of the legal problems posed by the Armed Forces is clearly indicated, however, by the fact that the Act expressly includes military and naval personnel as "employees" for whose negligent acts or omissions the Government will be liable. 28 U.S.C. § 921(b) (1946).

Apropos of the second category of exceptions, it should be noted that a thirteenth exception, excluding "all claims for which compensation is provided by the Federal Employees' Compensation Act, as amended, and the World War Veterans Act of 1924, as amended" was included in earlier drafts of the Tort Claims bill in the House, H.R. 7236, 76th Cong., 1st Sess. (1939), and H.R. 181, 79th Cong., 1st Sess. (1946). But this exception was dropped, without explanation, from the final version of the Act. From these circumstances, it might be inferred that servicemen's claims, though partially compensated by other laws, are not excluded from the purview of the Tort Claims Act. This argument was urged in the dissenting opinion, 169 F.2d 840, 849 (4th Cir. 1948).

9. 28 U.S.C. § 943(j) (1946). This section as originally drawn excluded any claim arising out of ". . . activities . . ." of the military or naval forces or Coast Guard during time of war. The "combatant" qualification was inserted, without recorded explanation, by the House during the final passage of the bill in 1946. See 92 CONG. REC. 10139, 10150 (1946).

Barring "combatant" claims gives rise to no inference as to the permissibility of other soldiers' claims, since the exception concerns the circumstances under which the injury occurs, rather than the status of the injured party. The exception applies to claims of soldiers and civilians alike; see note 51 *infra*.

10. 60 STAT. 812, 842 (1946). 28 U.S.C. § 921–46 (1946).

mitted to it each year.[11] The court asserted that before the Act's passage private laws were frequently sought by civilians, but almost never by servicemen,[12] and inferred from this state of affairs a Congressional intent to withhold from servicemen the remedies of the Tort Claims Act.

But the court in so reasoning seems to have overlooked the other facet of the new law—its sweeping waiver of immunity to actions in tort. Though cognate to the object of abolishing private bills, the waiver of sovereign immunity also has independent significance.[13] The Act expressly grounds the Government's liability in the tort law of the several states.[14] It affords no basis for assuming that recovery is or should be limited to those claims which in practice were passed upon by the Claims Committees of the Senate and House.[15]

Lacking the guidance of any explicit statements of Congressional intent relevant to this problem,[16] the court also relied heavily on the existence of

11. See SEN. REP. No. 1400, 79th Cong., 2d Sess. (1946); H.R.REP.No. 1287, 79th Cong., 1st Sess. (1946). For discussion of the nature and the faults of the "private bill" remedy, see Note, 50 YALE L.J. 328(1940).

12. Actually, there is no available compilation of data as to the classes of people who submitted private bills to Congress. But the Statutes at Large disclose several instances of private laws awarding to survivors of deceased military personnel a sum equal to the decedent's pay for six months. *E.g.*, 47 STAT. 1686 (1932); 47 STAT. 1701 (1932). Most of these laws seem to have been awarded in lieu of statutory pensions, from which the survivors were for some reason disqualified. These six-months-pay awards are now institutionalized as a regular statutory gratuity. 41 STAT. 367 (1919), as amended, 10 U.S.C. § 903 (1946). Another type of private law—*e.g.*, 55 STAT. 902 (1941)—compensates military personnel for property losses in service, supplementing a general policy which dates from the Act of March 3, 1885, 23 STAT. 350, replaced by the Military Personnel Claims Act of 1945, 59 STAT. 225 (1945), 31 U.S.C. § 222(c) (1946), U.S. WAR. DEPT., AR 25-100 (1945). Apart from these laws, however, the Statutes at Large disclose no other private bills successfully brought by or in behalf of servicemen.

13. Professor Borchard has characterized this aspect of the Tort Claims Act as ". . . a revolution in legal principles." *Government Liability in Tort*, 26 CAN. B. REV. 399 (1948).

14. 28 U.S.C. § 931(a) (1946). This provision in effect incorporates the *Erie-Tompkins* doctrine into the Act.

15. It seems clear that the coverage of the Act was not intended to correlate precisely with the jurisdiction formerly exercised by the Claims Committees. There was no theoretical limitation on the types of claims which could be submitted to Congress, but the procedure often consumed large amounts of the claimant's time and money, and thus many valid claims were either not brought or else never reached final approval. See Note, 50 YALE L.J. 328 (1940). The decentralized adjudication provided by the Tort Claims Act now makes it practicable to prosecute many claims which in the past were left to die merely because of the difficulty of pursuing a private bill to a successful passage. Conversely, many private laws compensated claims involving no "fault" on the part of the Government; see, *e.g.*, 50 STAT. 1081 (1937) ("An Act to provide for the reimbursement of certain enlisted men . . . of the Navy for the value of personal effects lost . . . during the hurricane in Samoa on January 15, 1931."). Such claims would not be cognizable under the Tort Claims Act, and the private law is still the only means of recovery.

16. Most of the legislative opinion and debate on the Act is recorded in H.R.REP.No. 1287, 79th Cong., 1st Sess.(1946); SEN. REP. No. 1400, 79th Cong., 2d Sess. (1946);

the various servicemen's welfare laws, such as those providing for disability and medical benefits, survivors' pensions, life insurance, and education subsidies.[17] From the generous and comprehensive nature of these laws, the court concluded that Congress did not intend to confer an additional, and in some respects overlapping, benefit on servicemen.[18]

This reliance on the alternate coverage of soldiers' benefits suggests a partial analogy to workmen's compensation statutes, where—on a somewhat dubious "bargain" theory [19]—the assured minimum of compensation was made available in return for abandonment by the workmen of the more lucrative but less certain tort action against the employer. It might be argued that a similar "bargain" may be inferred with respect to soldiers' compensation, and that all soldiers therefore lack standing to sue the Government which protects them. The unrelated histories of soldiers' benefits and the Tort Claims Act, however, seem to detract from the validity of the "bargain" rationale.[20] Unlike workmen's compensation, soldiers' benefits

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and 86 CONG. REC. 12015-32 (1940). None of these includes any discussion of the instant problem.

17. The laws pertaining to welfare and compensation of servicemen and veterans are too numerous to be cited individually. Most of them are contained in Titles 10, 38, and 50 (Appendix) of the United States Code. An encyclopedic treatment of these laws is provided by KIMBROUGH AND GLEN, AMERICAN LAW OF VETERANS (1946).

18. The court relied heavily upon the decisions in Dobson v. United States, 27 F.2d 807 (2d Cir. 1928), *cert. denied,* 278 U.S. 653 (1929), and Bradey v. United States, 151 F.2d 742 (2d Cir. 1945), *cert. denied,* 326 U.S. 795 (1946). The survivors of Dobson and Bradey, Navy personnel who died in collision or sinking of the ships on which they served, brought suit for the wrongful deaths under the Public Vessels Act of 1925, 43 STAT. 1112 (1925), 46 U.S.C. § 781 *et seq.* (1925), alleging negligent construction and operation of the ships. In both cases, however, the court barred the actions on the ground that the relief already provided by the pension acts of Congress was the exclusive remedy for injury or death of naval personnel.

It should be noted that the waiver of immunity afforded by the Public Vessels Act ("A libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States. . . . ," 46 U.S.C. § 781 (1925), is much more limited than the liability now announced in the Tort Claims Act for ". . . any claim . . . in the same manner, and to the same extent as a private individual under like circumstances." 28 U.S.C. § 931(a) (1946). It seems not unreasonable to suppose that a less strict result might have been reached if the Public Vessels Act had provided as extensive and sweeping a waiver of immunity as is now contained in the Tort Claims Act.

19. "It was part of the original bargain, giving rise to this legislation, that, if the employer should be made liable without fault, he should also be given an immunity from the hazards of a common-law suit." STEFFEN, CASES ON THE LAW OF AGENCY 192 (1933). Quite apart from any discussion of the relative merits of tort actions and compensation, the "bargain" aspect of the trade seems questionable, especially since it applied also to the minority of workers who preferred not to yield their rights in tort in return for the lower scale of compensation.

20. A detailed historical review of pension laws and veterans legislation is contained in H.R. Doc.No. 136, 79th Cong., 1st Sess. (1946). For background of the Tort Claims Act, see articles by Gottlieb, Gellhorn and Schenck, *supra* note 1.

are essentially acts of sovereign grace,[21] and are not expressly designated as exclusive remedies. The financial extent of their coverage,[22] though often substantially equivalent to that of a tort recovery, may sometimes fall far short of the measure of damages to which any non-military claimant would be entitled, particularly in actions for wrongful death; if benefits were intended as a universal substitute for tort recoveries by soldiers, expansion and equalization are in order.[23] Moreover, similar benefits have been conferred upon civilian employees of the Government under the Federal Employees' Compensation Act [24] and other statutes, but the mere *availability* of such compensation does not bar a tort action by those employees against the United States for the negligence of other Government agents.[25]

In retrospect, the court's interpretation of Congressional intent seems mistaken. Representative Emmanuel Celler, who drafted the Tort Claims Act and nursed it through three sessions of Committee and House debate to final passage, stated unequivocally when he learned of the court's decision that these other laws are quite unrelated to the remedy afforded by

21. See KIMBROUGH AND GLEN, AMERICAN LAW OF VETERANS § 647 (1946). And *see, e.g.,* Donnelly v. United States, 17 Ct. Cl. 105, 108 (1881).

22. A statistical compilation of the current scale of disability compensation and pension payments is contained in H.R. COMM. PRINT No. 380, *Compensation or Pension to Veterans or their Dependents: Analysis of Elements of Entitlement to and Rates of Compensation or Pension,* 80th Cong., 2d Sess. (1948). Disability payments run from a minimum of $13.80 monthly for 10 percent disability to $138 monthly for total disability, with additional amounts for specific disabilities—*e.g.,* loss of both arms or legs, total blindness—to a maximum of $360. A disability rating of 60 percent or more entitles the veteran to additional payments for dependents, the maximum being $91 per month. Thus the maximum combination of total disability (with specific crippling features) and dependent relatives will command a maximum compensation of $451 per month. The great majority of injured soldiers, of course, are compensated at much lower rates.

23. The kind of discrepancy that may arise is strikingly illustrated by the facts of the instant case. Welker Brooks, the injured soldier, was awarded a monthly compensation of $27.60, for 20 percent disability. When computed over a period of years, these payments, plus the value of free medical care provided by the Army and the Veterans' Administration, are a close approximation to the $4,000 damages awarded by the District Court. For the death of his brother Arthur, however, the total compensation was a $468 death gratuity (six months pay) to his mother, plus the value of his burial paid for by the Army. The parents' application for a pension was denied because they failed to prove dependency upon the deceased son. Thus, even if the $5,000 service life insurance policy—which Arthur Brooks had paid for himself—is added to the award, the total compensation for this wrongful death is still far below the $25,000 judgment that the District Court awarded to the estate. (It should be noted, however, that the size of the tort judgment will vary considerably among the several states).

While the major inequity thus lies in the area of death actions, even in injury cases the claimant might prefer the immediate lump-sum recovery rather than small payments spread out over a period of years. A seemingly equitable solution would be to make both alternatives available, with the claimant entitled to the larger but not both of the two possible recoveries. See notes 34 and 35 *infra.*

24. 39 STAT. 742 (1916), as amended, 5 U.S.C. § 751 *et seq.* (1946).

25. See notes 33 and 34 *infra.*

the Tort Claims Act, and that Congress never intended to exclude servicemen from the coverage of the Act.[26]

The court's assumption that soldiers' claims were never previously recognized by Congress also seems questionable in view of the provisions and history of the Military Claims Act of 1943.[27] This law provided for administrative settlement by the War Department of any claims not exceeding $1,000 for property losses, personal injury, or death caused by military personnel or civilian employees of the War Department acting within the scope of their employment, or otherwise incident to noncombat activities of the Army, provided no contributory negligence was involved. The Act expressly excluded claims of military personnel and civilian employees based on death or injury incurred "incident to their service." [28] By implication, it would seem that "non-incident" claims were intended to be allowed.[29]

26. Representative Celler's statement, delivered orally to the YALE LAW JOURNAL on November 26, 1948, is as follows:

"The opinion of the Fourth Circuit is utterly erroneous when it says that it was the intent of Congress to exclude a member of the Armed Forces from the benefits of the Tort Claims Act. I am the author of the bill, and I piloted it through the Subcommittee of the House Judiciary Committee, the House Judiciary Committee, and the House. Prior to its passage I worked on this bill for many years, and I repeatedly offered it to successive Congresses before its final passage. I had more to do with it than any other member. I never intended to preclude a suit by a soldier. Despite the fact that the latter might have various and sundry remedies for compensation, pensions, hospitalization, preferences, etc., these benefits had nothing whatsoever to do with, and are utterly unrelated to the right to sue under the Federal Tort Claims Act. The only place where soldiers were even mentioned was in a section that was cut out of the Act. [see note 8 *supra*]. We start off with the proposition in general that the Government deliberately removes the defense of sovereignty, except in the cases where the Act specifically makes an exception. The exception cannot be implied; it must be expressed. The court cannot read the exceptions into the law."

Perhaps another factor relevant to the legislative intent is the date on which the Tort Claims Act was enacted. August 2, 1946, the date of passage, was just before a Congressional election, and less than a year after the end of the Second World War. In this context, the realities of politics make it reasonable to assume, in the absence of any concrete evidence to the contrary, that Congress did not intend to exclude all servicemen from the coverage of the Act.

27. 57 STAT. 372 (1943), as amended, 31 U.S.C. § 223(b) (1946).

28. *Ibid.* The phrase "incident to their service" has been defined by the Judge Advocate General's Department to mean ". . . while engaged in the actual performance of some official duty." It is less inclusive than the phrases "line of duty" and "scope of employment." JUDGE ADVOCATE GENERAL'S SCHOOL, CLAIMS BY AND AGAINST THE GOVERNMENT 30, 31 (text no. 8, 1945).

29. That part of the Military Claims Act which applied to *negligently* caused injuries, as distinguished from pure "accidents," was repealed and replaced by part 2 of the Tort Claims Act, 28 U.S.C. § 921 (1946), which is phrased in similar language except that the exclusion of claims of military personnel and civilian employees "incident to their service," *supra* note 28, is omitted. No reason for this omission appears in the legislative history of the Act. It might be construed as evidencing a Congressional intent to abandon the limitation and thus allow all military claims except those arising out of "combatant activities," or to allow no military claims at all, or else to reenact by implication the previous

This inference is supported by War Department regulations, which require that claims of military personnel first be considered under the medical attendance and burial expense provisions of Army Regulations, but permit claims not within the scope of those provisions to be payable under the Military Claims Act ". . . on the same basis as are claims of persons not military personnel. . . ." [30]

Although the court did not touch upon the problem directly, it might be feared that recognition of soldiers' rights under the Tort Claims Act would pose a danger of over-compensation. While the veteran is not permitted to collect more than one award of statutory compensation under the veterans' laws,[31] nothing in the statutes appears to preclude an additional recovery from the Government as tort-feasor under other laws outside the jurisdiction of the Veterans' Administration. Judicial precedent, however, suggests two possible solutions. Most cases have held that acceptance of compensation under one law constituted an "election of remedies" which barred a recovery from the Government under other statutes,[32] although the mere

limitation. The War Department, in administering this portion of the Act, has chosen the third alternative by reiterating the "incident to their service" limitation. U.S. WAR DEPT., AR 25-70 § 15(1) (1947), thus by implication allowing other claims by military personnel.

If soldiers may obtain administrative settlement of claims for less than $1,000 under the Tort Claims Act, it would seem illogical to bar similar claims exceeding that sum under the remaining portions of the Act, for Congress presumably would not have made a distinction as to soldiers between small and large claims without expressly saying so. This presumption is supported by the fact that the substantive-law provisions of the Act are expressly made applicable to both the administrative-settlement and judicial-disposition parts of the Act. It is at least arguable, therefore, that a partial inclusion of soldiers was intended to be continued when the tort claims portion of the Military Claims Act was substantially reenacted as a part of the Tort Claims Act; neither statute expresses any distinction between soldiers and civilians. Concededly, however, Congress' failure to make explicit reference to the problem, together with a total lack of previous court or Army decisions, makes uncertain any conclusions based on the face of the statutes alone.

30. U.S. WAR DEPT., AR 25-25 § 13 (1946). In practice, however, those claims which are seemingly permitted by these regulations are virtually non-existent. Military medical attendance and disability benefits are available to all personnel injured "in line of duty," which since 1944 has included all injuries except those occasioned by willful misconduct, desertion, absence without official leave, or incurred while under sentence of court martial or civil court. 58 STAT. 752 (1944), Vet. Reg. No. 10, ¶ VIII, 38 U.S.C. p. 4276 (1946). Since the Military Claims Act limits damages to medical, hospital, and burial expenses actually incurred, 31 U.S.C. § 223(b) (1946), there have been few, if any, instances of soldiers' injury claims which were not covered by free Army treatment and therefore allowable under the Act.

31. "Not more than one award of pension, compensation, or emergency officers' or regular retirement pay, shall be made concurrently to any person based on his own service. . . . This paragraph is hereby made applicable to all laws administered by the Veterans' Administration." Vet. Reg. No. 10, ¶ XIII, 38 U.S.C. p. 4276 (1946).

32. *E.g.*, Dahn v. Davis, 258 U.S. 421 (1922) (railway mail clerk, injured while working for United States, was barred from suing Government under Railroad Control Act of 1918 by his previous election of benefits under the Federal Employees' Compensation Act); Sandoval v. Davis, 288 Fed. 56 (6th Cir. 1923) (soldier, injured by wreck on

availability of alternate compensation does not bar a tort action elected by the claimant in lieu of compensation.[33] And a less restricted basis for recovery is suggested by the recent decision in *White v. United States*, holding that civilian employees who had already received benefits under the Federal Employees' Compensation Act were not thereby barred from suing the Government under the Tort Claims Act for the same injury, although their compensation awards would be applied in mitigation of damages in their tort judgments.[34] This more generous approach, which in effect leaves the claimant with the larger, but not both, of two available benefits, would seem to offer the best solution to the parallel problem of possible double recovery by military personnel.[35]

Government operated railroad, barred from bringing tort action under Railroad Control Act by previous receipt of compensation from the Bureau of War Risk Insurance).

33. Payne v. Cohlmeyer, 275 Fed. 803 (7th Cir. 1921) (action may be brought under Railroad Control Act of 1918 when potential remedy under Federal Employees' Compensation Act was not claimed); United States v. Marine, 155 F.2d 456 (4th Cir. 1946) (action may be brought under Suits in Admiralty Act when claimant had not previously pursued his remedy under the Federal Employees' Compensation Act). See KIMBROUGH AND GLEN, AMERICAN LAW OF VETERANS § 717 (1946).

Thus the assertion of the court in the *Brooks* case that existence of servicemen's benefits barred their right to sue in tort seems to confuse the mere *availability* of a statutory benefit with actual *acceptance* of the benefit.

34. 77 F. Supp. 316 (D.N.J. 1948). This decision, however, is not a clear precedent for future action because of the special circumstances of the case. Both claimants had been injured and had received their compensation in 1945, prior to the passage of the Tort Claims Act. They were subsequently enabled to sue only by virtue of the retroactive coverage of the Act to January 1, 1945. Thus they could not be said to have "elected" compensation in preference to their tort claim, since the tort remedy was not then in existence. The *Brooks* case, however, is identical to the *White* case in this respect, since Welker Brooks was also injured and awarded his disability compensation in 1945, prior to the passage of the Tort Claims Act.

A similarly generous decision was given in the recent case of United States v. Wade, 170 F.2d 298 (1st Cir. 1948), in which plaintiffs had received in 1945 a settlement of their claim from the War Department under the Military Claims Act, and later brought suit under the Tort Claims Act for the damages not already compensated by the $1,000 settlement. The court held that the earlier compensation was only partial, not covering such items as pain and suffering and impairment of earning power, and could not, therefore, be held as a "full satisfaction and final settlement" of their subsequently acquired cause of action under the Tort Claims Act; plaintiffs were therefore granted the remainder of their damages. *Contra:* Jordan v. United States, 170 F.2d 211 (5th Cir. 1948). It remains to be seen, however, whether parallel recoveries would be similarly extended to a claimant who in fact has both remedies available from the time of his injury.

35. In cases where the claimant's injury was caused by a third party, a similarly generous result is provided by the Federal Employees' Compensation Act, 39 STAT. 742 (1916), as amended, 5 U.S.C. § 751 *et seq.* (1946), and the World War Veterans Act of 1924, 43 STAT. 607 (1924), as amended, 38 U.S.C. § 421 *et seq.* (1946). Both laws provide that claimants may be required, as a condition precedent to receiving their statutory compensation, to assign their claims against third party tort-feasors to the Government; any judgment recovered against the third party would be credited to the claimant's compensation, and the surplus, if any, paid to the claimant. 5 U.S.C. §§ 776, 777 (1946); 38 U.S.C.

Apparently underlying the court's decision was the notion, largely unarticulated, that the "special and unique" nature of the Government-soldier relationship itself should bar the soldier's action under the Tort Claims Act. The court seems to have been thinking primarily in terms of the special protection accorded soldiers by the Government in the form of disability compensation and other benefits. But the difference in the aims and application of compensation and the Tort Claims Act remedy,[36] and particularly the inadequacy of compensation in wrongful death cases,[37] cast doubt on the conclusiveness of this factor. Nor does the general nature of the military relationship provide any decisive answer.[38] To be sure, the soldier is subject at all times to military law and discipline; [39] and, unlike other employees, he is without power to terminate his status at will. On the other hand, the soldier is still a citizen; for the most part, his military status does not relieve him of his rights and duties under the civil and criminal law of the community.[40] He still may sue and be sued as a private person.[41] Moreover, as the Armed Forces take on more and more the characteristics of a citizens' army, fed by an unprecedented peacetime draft and maintained at substantial size, there seems to be less reason than ever for treating the soldier as different from the civilian, except in the peculiarly military aspects of his life.

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§ 502 (1946). Thus the claimant would in effect receive the larger of two possible recoveries, whether compensation or tort judgment, with the other deducted from the combined total. The current veterans laws, however, contain no such provision.

36. In addition to the differences between workmen's compensation and tort recoveries, several factors distinguish veterans' benefits from the usual compensation award. Benefits are awarded, for example, not only for accidents but also for illness contracted in service, without any regard to its relation to employment. Moreover, veterans' compensation is rigidly geared to the concept of permanent disability. There is no compensation at all for such injuries as a broken arm or fractured skull if the injury is not permanent, except for the free medical care provided by the Government.

37. See note 23 *supra*.

38. Apart from its discussion of servicemen's benefits, and a brief observation that soldiers are subject to military discipline, United States v. Brooks, 169 F.2d 840, 842 (4th Cir. 1948), the court merely cited from two old cases dealing with breach of the "contract" of enlistment, *In re* Grimley, 137 U.S. 147, 152 (1890), and *In re* Morrissey, 137 U.S. 157, 159 (1890), and the more recent decision in United States v. Standard Oil Co. of California, 332 U.S. 301, 305 (1947). None of these cases provides much relevant discussion of the Government-soldier relationship, except for the cryptic comment in the *Standard Oil* opinion that the relationship is "distinctively federal." *Id.* at 305.

39. See McCOMSEY AND EDWARDS, THE SOLDIER AND THE LAW (1941) and GLENN, THE ARMY AND THE LAW (Schiller ed. 1943).

40. See ANDERSON, LEGAL STATUS OF SOLDIERS AND SAILORS UNDER CIVIL RELIEF ACTS (1941). See also c. 8 of GLENN, *op. cit. supra* note 39.

41. See Note, 135 A.L.R. 10 (1941) for a review of authority on this subject. Civil liability of servicemen is, of course, subject to the qualifications of such laws as the Soldiers' and Sailors' Civil Relief Act, 54 STAT. 1178 (1940), as amended, 50 U.S.C. § 501 *et seq.* (App. 1946), which protect them from any loss or hardship suffered on account of their absence from the state or their inability to attend to legal proceedings affecting them.

Is the answer to be found in the fact that the soldier's claim is against the Government rather than against a private party? The court warned that recognition of the soldier's right to sue would lead to extensive litigation by servicemen on all sorts of claims, resulting in the "devastation of military discipline and morale." [42] This fear might conceivably be justified if the soldier's action were against the individual officer or fellow-soldier responsible for his injury; but imposition of liability upon the Government seems too remote from the individual relationships to cause any substantial subversion of discipline or morale.[43] Moreover, possible disciplinary problems would seem to be considerably reduced by the fact that most injuries which are serious enough to engender an action in tort are also sufficient grounds for medical discharge from the service. Allowance of soldiers' tort claims will, to be sure, impose a somewhat increased burden upon the Governmental agencies which must handle them; [44] but this task is essentially similar to the job currently performed by the Judge Advocate General's Department in processing claims of both soldiers and civilians under the Military Claims and Tort Claims Acts.[45] Investigatory techniques and procedure developed there can easily be utilized to minimize the additional burden of military claims in court.

There are, of course, good reasons for the Tort Claims Act's exclusion of claims by soldiers and civilians alike for injuries arising out of wartime combat.[46] By the very nature of war, the Armed Forces cannot be held to

42. United States v. Brooks, 169 F.2d 840, 845 (1948). On the other hand, Chief Judge Parker argued in dissent that less harm would result from allowing a soldier to sue, at least on certain types of claims, than from denying him that right which civilians now possess. *Id.* at 850.

43. Military morale might conceivably be affected by such factors as the bad feeling which could be engendered by adverse testimony of a fellow soldier at the trial of a tort action, or the possible disrespect of the litigant toward the officer whose negligence forms the grounds for the action; but such consequences would hardly be so disastrous or numerous as to warrant a prohibition of all military tort claims.

44. It is impossible to estimate how many soldiers' claims may subsequently be brought if the instant case be allowed. A few are currently pending in the courts; see note 5 *supra*. The one year statute of limitations imposed by the Tort Claims Act, 28 U.S.C. §942 (1946), would, of course, eliminate all claims incurred more than a year ago and not yet brought to court. Future claims may, subject to the laws of several states, be considerably limited by the Government's use of the common law defenses of contributory negligence, assumption of risk, and the fellow servant doctrine. Moreover, United States Attorneys might prevent needless litigation by exercising their power to settle or compromise valid claims, 28 U.S.C. §934 (1946). Finally, the volume of potential litigation should be limited by the likelihood that many injured soldiers will find little advantage in resorting to court action, with its attendant costs and attorneys' fees, to supplement their already generous benefits under the various compensation laws. This would be much less likely, however, in cases of wrongful death; see note 23 *supra*.

45. This procedure is governed by the provisions of U.S.WAR DEPT., AR 25-20, AR 25-25, and AR 25-70. A detailed description of its operation is given in JUDGE ADVOCATE GENERAL'S SCHOOL, CLAIMS BY AND AGAINST THE GOVERNMENT (text no. 8, 1945).

46. 28 U.S.C. §943(j) (1946); see note 9 *supra*.

any ordinary standards of "due care" toward their own personnel or civilians in the prosecution of war and its incident activities.[47] Moreover, the soldier necessarily must bear certain risks and hardships in military service.[48] But these considerations are inapplicable to the case at the other extreme, where the soldier is injured by a non-combat military vehicle while he is on furlough and engaged in his own private business. Such an injury is not one which could have been incurred only by a soldier, nor did it arise from the fact of his being a soldier.[49]

If some military claims are to be allowed, the remaining problem is to draw the line in the amorphous area between these two extremes: when and where should the Government be held liable in tort for violation of a duty of "due care" toward its military personnel? The Tort Claims Act, from its expressed provisions alone, apparently draws the line at actual combat in time of war,[50] a relatively flexible criterion which the courts can shape as cases arise.[51] The Act might also be construed as incorporating the Military

47. "In practice or training remote from combat, there would be the same opportunity for care and caution as in peace time; whereas, in actual fighting, the attention and energies of the military personnel would be directed and devoted to the destruction of the enemy and its property, as well as to the protection of the lives of their own forces, citizens and property by the use of force immediately applied. . . ." Skeels v. United States, 72 F.Supp. 372, 374 (W.D. La. 1947).

48. The familiar tort doctrine of voluntary assumption of risk seems largely inapplicable here, for only the so-called "professional" soldier could be said to have assumed voluntarily all the risks of Army service. Yet every citizen or resident bears a constitutional obligation to serve in the Armed Forces when the need arises, and the risks and hazards of war are a necessary concomitant of the duty to bear arms. In certain cases, therefore, military service must be placed above and beyond the safeguards of ordinary tort law.

As to both the conscripted soldier and the voluntarily enlisted "professional," the risks and the fundamental duty are the same; it seems unlikely that courts would distinguish between them in terms of the risks they must face without protection of tort doctrine.

49. Even if "assumption of risk" were argued as a basis for denying recovery—see note 48 *supra*—it certainly would not apply to the extreme "non-service-caused" injuries in the *Brooks* case.

50. 28 U.S.C. § 943(j) (1946); see note 9 *supra*.

51. The first case to involve any interpretation of the "combatant activities" exception was Skeels v. United States, 72 F.Supp. 372 (W.D. La. 1947), in which a civilian plaintiff sued for injuries caused by a piece of machinery which fell upon him from an Army plane engaged in target practice over the Gulf of Mexico during 1945. The court held that "combatant activity" meant only actual wartime combat against the enemy, and that target practice remote from the scene of actual combat, even in wartime, was not within the exception to the coverage of the Tort Claims Act. *Accord:* Johnson v. United States, 170 F.2d 767 (9th Cir. 1948). *But cf.* Perucki v. United States, 80 F.Supp. 959 (M.D.Pa. 1948) (veteran's action for negligence of Veterans Administration doctor in reexamining an old war injury in late 1946 to determine proper compensation rate, held barred by "combatant activities" exception of Tort Claims Act).

If "combatant activities" is to be the criterion of non-permissible military claims, however, a broader definition may be desirable. The "time of war" requirement seems too strict, for it would seem reasonable to include war games, target practice, bayonet prac-

Claims Act's exclusion of recovery for injuries "incident to service" [52]—again a matter for judicial interpretation.

If the "time of war" limitation is deemed too strict,[53] or if the courts fail to develop a practicable solution, legislative revision may be necessary. Perhaps the "incident to service" limitation should be expressly incorporated into the Act. Or the revision might borrow from the recent British waiver of sovereign immunity in the Crown Proceedings Act of 1947,[54] which bars military personnel from suing their government for injuries caused by fellow servicemen only when the injured man was "on duty," or when the injury or death occurred on military premises, or on a ship, aircraft, or vehicle used for military purposes.[55] The use of this sort of criterion, supplementing the "combatant activities" exception already stated by the Tort Claims Act, should be strict enough to forestall the "floods of litigation" feared by the court.[56] At the same time, it would remove the inequity of denying a tort recovery to the soldier whose injury or death is completely unrelated to his military status.

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tice, and similar necessary preparation for actual combat within the meaning of the exception. Depending upon the particular facts involved, the same activity might be "combatant" with respect to military participants and "non-combatant" with respect to civilians who are accidentally injured thereby.

52. See notes 28 and 29 *supra.*

53. See note 51 *supra.*

54. 10 & 11 GEO. VI, c. 44 (1947), 6 HALSBURY'S STATS. OF ENGLAND 46 (2d ed. 1948). See generally, J.R.B. SMITH, THE CROWN PROCEEDINGS ACT (1948); Barnes, *The Crown Proceedings Act, 1947,* 26 CAN. B. REV. 387 (1948).

55. The Act provides that in all cases the Minister of Pensions must certify that the injury was or was not incurred "on duty"—*i.e.,* attributable to military service for purposes of eligibility for disability or death compensation. 6 HALSBURY'S STATS. OF ENGLAND 55 (2d ed. 1948). If incurred "on duty," and therefore eligible for compensation, the injury may not be sued upon under the Act; compensation and tort claims are thus mutually exclusive. The British criterion of "on duty," however, seems to be considerably narrower than the "line of duty" test employed by the United States Veterans' Administration for purposes of compensation eligibility; see note 30 *supra.* The American soldier injured on furlough is eligible for all benefits, with certain limited exceptions where his injury is attributable to willful misconduct, absence without leave, or desertion, while his British counterpart injured in similar circumstances is not eligible.

56. The "floods of litigation" argument was raised in a more generalized context by Representatives Hancock and Taber in an attempt to defeat the passage of the Tort Claims Act entirely. 86 CONG. REC. 12023, 12025 (1940). Dean Green points out that this objection has been urged since time immemorial by judges and legislators who feared the consequences of acknowledging new rights and remedies which society had come to consider essential. Green, *The Duty Problem,* 28 COL. L. REV. 1014 (1928).