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Sovereign Immunity--Federal Tort Claims Act--
Injuries to Armed Services Personnel [*Lee v. United
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FRED A. WATKINS

SOVEREIGN IMMUNITY — FEDERAL TORT CLAIMS ACT —
INJURIES TO ARMED SERVICES PERSONNEL

Lee v. United States, 261 F. Supp. 252 (C.D. Cal. 1966);
Sheppard v. United States, 369 F.2d 272 (3d Cir. 1966),
cert. denied, 87 Sup. Ct. 1286 (1967).

By enacting the Federal Tort Claims Act¹ (FTCA), the federal government partially waived its sovereign immunity from tort liability. However, immunity was retained in several situations,² two of which pertain to claims that arise out of combatant activities of the armed forces during time of war and to those that originate in a foreign country.³ Nevertheless, the FTCA does not state whether injuries to servicemen which are not incurred during combatant activities or in a foreign country would give rise to governmental liability. When presented with this specific question in 1950, the Supreme Court in *Feres v. United States*⁴ 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*."⁵ The recent cases of *Sheppard v. United States*⁶ and *Lee v. United States*⁷ emphasize the confusion and inconsistency which this "incident to service" rule has produced in the lower federal courts. Furthermore, these recent decisions create doubt as to whether the *Feres* doctrine is still valid in light of subsequent Supreme Court cases. An examination and comparison of the *Lee* and *Sheppard* cases will demonstrate these problems.

The facts of *Lee* and *Sheppard* arose out of the same occurrence

¹ Federal Tort Claims Act, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.) [hereinafter cited as FTCA].

² FTCA § 421, 28 U.S.C. § 2680 (1964).

³ FTCA §§ 412 (j), (k), 28 U.S.C. §§ 2680 (j), (k) (1964).

⁴ 340 U.S. 135 (1950).

⁵ *Id.* at 146. (Emphasis added.)

⁶ 369 F.2d 272 (3d Cir. 1966), *cert. denied*, 87 Sup. Ct. 1286 (1967).

⁷ 261 F. Supp. 252 (C.D. Cal. 1966) (appeal pending).

— an airplane accident in which the decedents, all United States Marines on active duty, were in the process of being transferred to Viet-Nam.⁸ In the course of taking off, the military plane crashed, killing many of its passengers including these servicemen. Thereafter, the personal representatives of the decedents instituted suits under the FTCA.⁹ The plaintiffs in the *Sheppard* case alleged that the crash had been caused by the negligence “‘of defendant’s agents, servants, and employees, to wit, members of the United States Air Force and others.’”¹⁰ In *Lee*, the personal representatives alleged negligence on the part of the Federal Aviation Agency.¹¹ Although the plane crash was definitely “incident to service,” the two cases nonetheless reached different results. The *Lee* court denied while the *Sheppard* court allowed dismissal of the action. The Third Circuit, in affirming the dismissal of the action in *Sheppard*, denied the appellants’ contention that *Feres* was no longer valid.¹² On the other hand, the district court in the *Lee* case decided that the incident-to-service rule was “no longer authoritative.”¹³ An analysis of the rationale of *Lee* will help explain why the court deemed the *Feres* doctrine no longer authoritative.

The district court first traced the development of the incident-to-service rule by discussing the two most important Supreme Court cases in this area. In *Brooks v. United States*,¹⁴ two servicemen on leave or furlough were riding in an automobile on non-military business. A United States Army truck, which was negligently driven by a civilian employee of the Army, struck the car and injured one of the servicemen, killing the other. The plaintiffs, the injured serviceman, and the administrator of the deceased’s estate were allowed to recover under the FTCA. The Court reasoned that the act did not expressly prohibit all claims of servicemen.¹⁵

⁸ See Brief for Appellant on Application for Leave To Take an Interlocutory Appeal, pp. 6, 12, *Lee v. United States*, 261 F. Supp. 252 (C.D. Cal. 1966), since the district court’s opinion for *Sheppard* is unreported and since the court of appeals’ decision does not present enough facts for a comparison with the *Lee* case.

⁹ *Sheppard v. United States*, 369 F.2d 272 (3d Cir. 1966), *cert. denied*, 87 Sup. Ct. 1286 (1967); *Lee v. United States*, 261 F. Supp. 252, 253 (C.D. Cal. 1966).

¹⁰ Brief for Appellant, *supra* note 8, at 12 (citing plaintiff’s brief in *Sheppard v. United States*, Civil No. 40541, E.D. Pa., July 27, 1966).

¹¹ 261 F. Supp. at 253.

¹² “The flat statement is made on behalf of appellants in their brief that ‘. . . subsequent decisions of the Supreme Court destroyed the validity of that case.’ Nothing could be further from the true fact.” 369 F.2d at 272.

¹³ 261 F. Supp. at 254.

¹⁴ 337 U.S. 49 (1949).

¹⁵ *Id.* at 51.

Therefore, since the accident had nothing to do with the military careers of the servicemen and since the injuries were not caused by their military service, the FTCA did not preclude recovery in this type of situation.¹⁶ However, if the accident had been incident to the Brooks' military service, "a wholly different case would be presented."¹⁷

The "wholly different case" was presented a year later in *Feres v. United States*.¹⁸ There, in a consolidation of three cases,¹⁹ the Court was directly confronted with the question of whether the FTCA extended its remedy to injuries sustained incident to military service.²⁰ Answering in the negative,²¹ the Court presented several principal reasons for its decision. First, the act allowed claims only where there was an analogous liability on the part of an individual.²² Since an individual has no power to raise an army, an analogous liability did not even remotely exist, and thus the FTCA, by itself, precluded recovery.²³ Second, the presence of a comprehensive system of compensation for service personnel indicated that this was the exclusive remedy for injuries incurred incident to military service.²⁴ Third, since the FTCA provides that the law of the place where the act or omission occurred governs consequent liability,²⁵ it would be irrational to base recovery for servicemen on

¹⁶ *Id.* at 52.

¹⁷ *Ibid.*

¹⁸ 340 U.S. 135 (1950).

¹⁹ *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950) where the appellate court denied an army lieutenant's executrix recovery under the FTCA for the death of the deceased who, while on active duty, perished in a fire in his barracks due to the negligence of his superior officers in quartering him there. *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950), in which the court of appeals stated that a soldier could not maintain an action under the FTCA for injuries caused by the negligent failure to remove a thirty-inch towel from his body after an operation performed by an army surgeon. *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom. Feres v. United States*, 340 U.S. 135 (1950), where according to the appellate court, a cause of action under the FTCA was stated by the executrix of the deceased officer's estate for the active-duty death of the decedent due to the alleged negligence of members of the Army Medical Corps.

²⁰ 340 U.S. at 138.

²¹ See text accompanying note 5 *supra*.

²² See FTCA § 410 (a), 28 U.S.C. § 2674 (1964).

²³ 340 U.S. at 141-42. The Court even pointed out that there was no analogous liability upon a state towards its militiamen. *Ibid.*

²⁴ *Id.* at 144. For an example of some of the compensation provisions for servicemen, see 10 U.S.C. §§ 1201-12 (1964) and for veterans, see 38 U.S.C. §§ 314-15, 334-35 (1964). For a full discussion of the benefits under the compensation system, see Note, 49 MARQ. L. REV. 610, 614-15 (1965-1966).

²⁵ FTCA § 403 (a), 28 U.S.C. § 1346 (b) (1964).

such a provision since the serviceman has no control over the locations to which his military service might take him.²⁶

According to the district court in the *Lee* case, the aforementioned rationale of the *Feres* doctrine has been rejected in later Supreme Court cases.²⁷ However, the real rationale underlying *Feres*, as first enunciated in a subsequent Court case,²⁸ was

the 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 duty²⁹

Relying on this explanation of the *Feres* case, the *Lee* court developed its own test for liability under the act. According to the court the exclusion of military personnel from recourse to the act "would depend upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not."³⁰ Applying the above, the district court held that there was no official military relationship between the Federal Aviation Agency, a non-military body, and the decedents.³¹ Consequently, the FTCA did not preclude a remedy for the plaintiffs.

With the aforementioned rationale of the *Lee* case in mind, it might be questioned whether the *Lee* court was correct in stating that subsequent Supreme Court cases have rejected the reasoning underlying the incident-to-service rule, or whether the *Sheppard* case is accurate in saying that the *Feres* doctrine and its rationale are still viable. An analysis of the reasoning of the *Feres* case as

²⁶ 340 U.S. at 142-43. The Court also presented two other reasons for its decision. One, the FTCA was enacted to alleviate the volume of private bills introduced in Congress regarding compensation for Government-inflicted injuries. However, this influx of private bills on behalf of the armed forces was not burdensome. *Id.* at 140. Two, the relationship between the Government and members of the armed forces was purely governed by federal law. Federal law, however, did not recognize the type of recovery which the servicemen sought. *Id.* at 143-44. For a complete examination of the *Feres* rationale, see *United States v. Muniz*, 374 U.S. 150, 159-62 (1963).

²⁷ *Lee v. United States*, 261 F. Supp. 252, 255-56 (C.D. Cal. 1966). The subsequent cases are discussed in the text accompanying notes 32-47 *infra*.

²⁸ *United States v. Brown*, 348 U.S. 110, 112 (1954). See also *United States v. Muniz*, 374 U.S. 150, 162 (1963) and *Lee v. United States*, 261 F. Supp. 252, 256 (C.D. Cal. 1966), where this rationale is also stated and followed.

²⁹ *Ibid.* See Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316, 341-42 (1954), where the author questions whether suits under the FTCA would truly affect military discipline.

³⁰ 261 F. Supp. at 256.

³¹ *Id.* at 257.

applied in succeeding Supreme Court decisions will evidence that neither case is completely correct in its assumption. In light of the inconsistencies and contradictions by the Court, the most that can be said is that the persuasiveness of the *Feres* rationale is questionable.

For example, the *Lee* case argued that the *Feres* reasoning, that the presence of a comprehensive system of compensation prevented suit under the act, had been specifically rejected in two subsequent Court decisions. In *Brown v. United States*³² a veteran, whose service injury was exacerbated by the negligence of a doctor in a Veterans Administration hospital, was permitted to recover under the act although he had already received compensation under the Veterans Act.³³ Similarly, in *United States v. Mumiz*,³⁴ the Court stated that "the presence of a compensation system, persuasive in *Feres*, does not of necessity preclude a suit for negligence."³⁵ Conversely, the Court has recently upheld its *Feres* rationale concerning the exclusiveness of a comprehensive system of compensation. The Supreme Court, in *United States v. Demko*,³⁶ denied a federal prisoner recovery under the FTCA since there was a remedy available under another federal statute.³⁷ In reaching its decision the Court stated that "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it *presumably* is the exclusive remedy to protect that group."³⁸ Consequently, the Court decisions after *Feres* are inconsistent as to whether the presence of a comprehensive system of compensation precludes recovery under the FTCA.

³² 348 U.S. 110 (1954).

³³ *Id.* at 113. The Court further stated that the amount received under the Veterans Act should be reduced from the judgment under the FTCA. *Ibid.*

³⁴ 374 U.S. 150 (1963) (federal prisoners could sue under the FTCA for injuries negligently received during their confinement in prison).

³⁵ *Id.* at 160 (dictum).

³⁶ 385 U.S. 149 (1966).

³⁷ See 18 U.S.C. § 4126 (1964), a statute granting compensation for injuries to federal prisoners suffered in the Federal Prison Industries.

³⁸ 385 U.S. at 152. (Emphasis added.) It is interesting to note that although the statute did not *specifically* provide for an exclusive remedy, the *Demko* decision followed the reasoning of *Johansen v. United States*, 343 U.S. 427 (1952) (civilian employee could not receive compensation under Public Vessels Act because exclusive remedy was under Federal Employees Compensation Act (FECA)) and of *Patterson v. United States*, 359 U.S. 495 (1959) (exclusive remedy for civilian employees injured on merchant vessels was FECA and thus no recovery under suits in Admiralty Act). The Supreme Court had previously distinguished the *Johansen* case in *United States v. Brown*, 348 U.S. 110 (1954). There, the Court emphasized that Congress had *specifically* provided for the exclusiveness of remedy under the FECA, while under the FTCA there was no such provision. *Id.* at 113.

Another inconsistency of the Court, also discussed in *Lee*, is its view that it would be irrational for a soldier to base his recovery under the act upon the law of the place of injury inasmuch as he has no control over his military assignments. Likewise, a federal prisoner also has no command over the place where he will be located. Nonetheless, in *United States v. Muniz*³⁹ the Court allowed a federal prisoner who was negligently injured by a Government employee the right to compensation under the FTCA.⁴⁰ Therefore, the *Muniz* case appears to contradict this "place of injury" rationale.

Moreover, the *Feres* rationale that the FTCA applied only in a situation where there was an analogous private liability has been somewhat modified in a later Supreme Court case.⁴¹ Although a private individual does not operate a lighthouse or conduct a fire-fighting forest service, the federal government was still held liable for damages caused by the negligence of its employees performing such activities.⁴² In these situations, the Court overturned the *Feres* rationale that the analogous liability pertains to a *similar private activity* and replaced it with the test of "whether a private person would be responsible for *similar negligence* under the laws of the State where the acts occurred."⁴³ This shift from similar activity to similar negligence seems to have partially undermined the persuasiveness of the analogous liability rationale.⁴⁴

This rationale has been controverted in still another way. In *Feres*, the Court argued that the FTCA provided for governmental liability in the same manner as a private individual so as "not to visit the Government with *novel and unprecedented liabilities*."⁴⁵ However, this specific reason was completely rejected in *Rayonier, Inc. v. United States*.⁴⁶ There, the Court stated that "the very purpose of the Tort Claims Act was to waive the government's traditional all-encompassing immunity from tort actions and to *establish novel and unprecedented governmental liability*."⁴⁷

In addition to the contradictions prevalent in the use of the

³⁹ 374 U.S. 150 (1963).

⁴⁰ *Id.* at 161-62.

⁴¹ *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

⁴² *Id.* at 69; *Rayonier, Inc. v. United States*, *supra* note 41, at 321.

⁴³ *Id.* at 319.

⁴⁴ See Note, 40 KY. L.J. 438, 441 (1951-1952) which considers as frivolous the Court's argument that individuals do not maintain armed forces.

⁴⁵ *Feres v. United States*, 340 U.S. 135, 142 (1950). (Emphasis added.)

⁴⁶ 352 U.S. 315 (1957).

⁴⁷ *Id.* at 319. (Emphasis added.)

aforementioned *Feres* rationale, the incident-to-service rule itself has produced confusion and inconsistency in its application by the lower federal courts⁴⁸ as exemplified by the *Lee* and *Sheppard* cases.⁴⁹ Such inconsistencies can be attributed to several causes. First, the courts inconsistently stress various phases of the principal cases in this area — that is, *Brooks*, *Feres*, and *Brown*.⁵⁰ Some of the courts, for example, emphasize the *military status* of the serviceman at the time of injury.⁵¹ Thus, the judges decide the cases on several grounds — whether the injury was incurred (1) while the serviceman was acting in the line of duty,⁵² (2) while he was on pass, furlough, or leave,⁵³ or (3) while he was engaged in an activity incident to service.⁵⁴ Other tribunals have accentuated the *exact location* of the claimant at the time of injury.⁵⁵ Still others deny recovery on the ground of the availability to the serviceman of a comprehensive system of compensation, in lieu of the FTCA.⁵⁶ Finally, as in the *Lee* case, courts also stress the peculiar and special relationship of the soldier to his superiors.⁵⁷ Accordingly, the variously accentuated phases of *Brooks*, *Feres*, and *Brown* lead the lower federal courts to confusion and inconsistency.

⁴⁸ Cf. *Knecht v. United States*, 144 F. Supp. 786, 789 (E.D. Pa. 1956), *aff'd*, 242 F.2d 929 (3d Cir. 1957); 19 GA. B.J. 381, 382 (1956-1957); Annot., 64 A.L.R.2d 679, 680 (1959).

⁴⁹ See text accompanying notes 12-13 *supra*. See also note 12 *supra*.

⁵⁰ See *Knecht v. United States*, 144 F. Supp. 786, 789 (E.D. Pa. 1956), *aff'd*, 242 F.2d 929 (3d Cir. 1957).

⁵¹ See, e.g., *Layne v. United States*, 190 F. Supp. 532 (S.D. Ind.), *aff'd*, 295 F.2d 433 (7th Cir. 1961), *cert. denied*, 368 U.S. 990 (1962) (court questioned whether deceased, a National Guardsman, was member of United States armed forces at the time of death); *Herring v. United States*, 98 F. Supp. 69, 70 (D. Colo. 1951) (dictum).

⁵² *Archer v. United States*, 217 F.2d 548, 551 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955); *O'Brien v. United States*, 192 F.2d 948, 950 (8th Cir. 1951).

⁵³ *Barnes v. United States*, 103 F. Supp. 51, 55 (W.D. Ky. 1952); *Brown v. United States*, 99 F. Supp. 685, 687 (S.D.W. Va. 1951). See *Zoula v. United States*, 217 F.2d 81, 82-83 n.1 (5th Cir. 1954) for an explanation of the difference between a pass and a furlough or leave.

⁵⁴ *Chambers v. United States*, 357 F.2d 224, 229 (8th Cir. 1966) (governmental, recreational facility); *Callaway v. Garber*, 289 F.2d 171, 173 (9th Cir.), *cert. denied*, 368 U.S. 874 (1961) (travel here was incident to service); *Richardson v. United States*, 226 F. Supp. 49, 50 (E.D. Va. 1964) (recreational facility incident to service).

⁵⁵ Compare *Orken v. United States*, 239 F.2d 850 (6th Cir. 1956) (officer killed in quarters located on military base; no recovery), with *Sapp v. United States*, 153 F. Supp. 496 (W.D. La. 1957) (injury to serviceman while sleeping in home situated off military base; recovery). The reason for a distinction between on-base and off-base claims is discussed in *Gursley v. United States*, 232 F. Supp. 614 (D. Colo. 1964).

⁵⁶ *Zoula v. United States*, 217 F.2d 81 (5th Cir. 1954); see Annot., 64 A.L.R.2d 679, 685 (1959).

⁵⁷ *United States v. Carroll*, 369 F.2d 618, 621 (8th Cir. 1966); *Lee v. United States*, 261 F. Supp. 252, 256 (C.D. Cal. 1966). For a complete discussion of this relationship, see text accompanying note 29 *supra*.

A second reason for this turmoil in the federal courts is the inappropriate analysis of whether the *Brooks*, *Feres*, and *Brown* cases complement or supplant one another.⁵⁸ Thus, the courts have asserted that (1) the *Feres* case presents the controlling principle and the *Brooks* case should be confined to its precise facts;⁵⁹ (2) the *Feres* and the *Brooks* decisions are entirely consistent;⁶⁰ (3) *Brooks* and *Brown* are exceptions to *Feres*;⁶¹ or (4) *Feres* can be best explained by the rationale in *Brown* that pertains to the peculiar and special relationship of a soldier to his superiors.⁶²

Moreover, the incident-to-service rule has been termed a "vague and meaningless standard,"⁶³ the use of which can, at times, produce factually inconsistent decisions. For instance, in *Brown v. United States*⁶⁴ and *Chambers v. United States*⁶⁵ the deceased servicemen both drowned in a base swimming pool due to the negligence of employees of the federal government. Although the facts were similar, different decisions were rendered. The father of the decedent in the *Brown* case could sue under the FTCA, whereas the parents of the deceased serviceman in *Chambers* could not.⁶⁶ Furthermore, the incident-to-service rule has proved unworkable in difficult and unanticipated situations. In *Callaway v. Garber*,⁶⁷ for example, an airman, while under orders and traveling in a private

⁵⁸ See *Knecht v. United States*, 144 F. Supp. 786, 789 (E.D. Pa. 1956), *aff'd*, 242 F.2d 929 (3d Cir. 1957).

⁵⁹ *Zoula v. United States*, 217 F.2d 81, 83 (5th Cir. 1954).

⁶⁰ *Knecht v. United States*, 144 F. Supp. 786 (E.D. Pa. 1956), *aff'd*, 242 F.2d 929 (3d Cir. 1957).

⁶¹ *Fass v. United States*, 191 F. Supp. 367, 369 (E.D.N.Y. 1961).

⁶² *Lee v. United States*, 261 F. Supp. 252, 256 (C.D. Cal. 1966).

⁶³ 19 GA. B.J. 381, 382 (1956-1957). The author further pointed out that in *Cardillo v. Liberty Mut. Co.*, 330 U.S. 469, 479 (1947), a workmen's compensation case, the Supreme Court condemned similar language — the injury arose out of and in the course of employment — "as deceptively simple and litigiously prolific." *Ibid.*

See also *Hitch*, *supra* note 29, at 333-34, where the author calls the incident-to-service rule "judicial legislation." The writer also emphasizes that the *Feres* doctrine is incompatible with the Veterans Administration's and the Department of the Army's interpretation of injuries suffered during military service. *Id.* at 333. Furthermore, the author points out that the incident-to-service rule can produce absurd results — that is, a deserter would be able to recover under the FTCA while a loyal serviceman would not. *Id.* at 341.

⁶⁴ 99 F. Supp. 685 (S.D.W. Va. 1951).

⁶⁵ 357 F.2d 224 (8th Cir. 1966).

⁶⁶ *Brown v. United States*, 99 F. Supp. 685 (S.D.W. Va. 1951). *Contra*, *Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966). For a further factual inconsistency, but in relation to property damage, compare *United States v. United States Servs. Auto. Ass'n*, 238 F.2d 364 (8th Cir. 1956), with *Lund v. United States*, 104 F. Supp. 756 (D. Mass. 1952).

⁶⁷ 289 F.2d 171 (9th Cir.), *cert. denied*, 368 U.S. 874 (1961).

automobile in order to attend a special service school, was killed when the car of a naval recruiting officer, who was also on official business, struck the auto in which the decedent was a passenger. The next of kin of the deceased airman was denied recovery under the act even though the court noted that "the facts here are of an isolated nature and could be said to be not within the contemplation of the Supreme Court in deciding the *Feres* case."⁶⁸

At the time the Supreme Court decided *Feres*, the Court failed to envisage the confusion and inconsistencies that the rationale of the incident-to-service rule and the rule itself would generate in its own decisions and in those of the lower federal courts. The turmoil, nonetheless, exists. This confusion underscores the necessity of a re-evaluation of the *Feres* doctrine by either the Supreme Court or Congress.⁶⁹ This re-evaluation is further necessitated by the alteration in the Court's membership which has resulted in a shift from a strict to a liberal construction of the Federal Tort Claims Act.⁷⁰ Only with this re-examination of a serviceman's right to sue under the act for injuries incurred during military service will there be an answer to the question posed by the recent conflicting decisions of *Sheppard* and *Lee*, namely, is the *Feres* doctrine still authoritative?

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⁶⁸ *Id.* at 173. The circuit court further stated that it was the Supreme Court's responsibility to settle the problem. *Ibid.*

⁶⁹ See 19 GA. B.J. 381, 382 (1956-1957), where the author suggests that the confusion in this area should be corrected by Congress.

⁷⁰ Caruso, *An Analysis of the Evolution of the Supreme Court's Concept of the Federal Tort Claims Act*, 28 FED. B.J. 35, 45 (1966). See also Pound, *The Tort Claims Act: Reason or History?*, 30 NACCA L.J. 404 (1964).