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DENIAL OF ATOMIC VETERANS' TORT CLAIMS: THE ENDURING FALLOUT FROM *FERES v. UNITED STATES*

Between 1945 and 1962, the United States government, as part of its atomic bomb testing program, detonated approximately 181 nuclear devices at test sites in the southwestern United States and the Pacific Ocean.[1] These nuclear tests exposed approximately 400,000 military and Atomic Energy Commission personnel engaged in concurrent troop maneuvers to varying levels of atomic radiation.[2] Several veterans and their families have filed suit against the United States for wrongful exposure to nuclear radiation, alleging that they have a higher than average risk of disease and genetic damage.[3]

The statute under which veterans usually obtain compensation for service-related injuries, the Veteran's Benefits Act[4] (V.B.A.), provides little relief for these atomic veterans. The V.B.A. establishes a presumption that any disease manifesting itself within one year of a serviceman's discharge is service-related, and thus compensable under the Act.[5] Radiation-induced injuries, however, develop slowly; disease or cellular damage from radiation usually has a latency period of more than one year.[6] Consequently, atomic veterans can expect little success obtaining compensation under the V.B.A. Indeed, since 1967 the Veterans Administration has rejected ninety-two percent of the claims filed for radiation injuries arising from nuclear testing.[7] Additionally, the V.B.A. covers inju-

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1. *Grim Legacy of Nuclear Testing*, N.Y. Times, April 22, 1979 § 6 (Magazine), at 70.

2. *Id.*

3. One of the first veterans to bring suit for in-service irradiation, Orville Kelly, participated in 22 atomic bomb tests. In 1979, Mr. Kelly, with his wife Wanda, founded the National Association of Atomic Veterans in Burlington, Iowa. *See generally* Berrelry, *A Nuclear Time Bomb*, NAT'L L.J., Dec. 28, 1981, at 1, col. 1. Other organizations concerned with the plight of "atomic veterans" include the National Veterans Law Center and the Veterans Education Project, both based in Washington, D.C.

4. 38 U.S.C. §§ 320-1008 (1976 & Supp. III 1979).

5. 38 U.S.C. § 312(a)(1) (1976).

6. Favish, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933, 960 (1981).

7. *Grim Legacy of Nuclear Testing, supra* note 1, at 70. Atomic veterans may be more successful in recovering from the Veterans Administration after Gott v. Cleland, No. 80-

ries only to servicemen, while many of the radiation-induced injuries involve birth defects and other genetic injuries suffered by servicemen's children. The V.B.A., then, provides no compensation for radiation injuries to a veteran's family [8]

Frustrated by their inability to recover under the V.B.A., atomic veterans have turned to the Federal Tort Claims Act[9] (F T.C.A.) for relief. Although the F T.C.A. functions as a waiver of traditional sovereign immunity in many contexts, the United States Supreme Court, in *Feres v. United States*,[10] carved out an exception from the F T.C.A. for servicemen and veterans. In *Feres*, the Court held that the government is not liable under the F T.C.A. for injuries to servicemen if the injuries occur incident to military service.[11] This judicially created exception to the F.T.C.A. known as the *Feres* doctrine protects the government from liability for service-related injuries to soldiers and veterans.

This Note will survey and evaluate the suits brought by atomic veterans, with particular emphasis on the F T.C.A., the *Feres* doctrine, and the various legal theories employed by veterans attempting to circumvent the *Feres* doctrine. This Note will conclude that in virtually all cases, the *Feres* doctrine effectively precludes an atomic veteran or his family from recovering under the F.T.C.A. for in-service radiation injuries. Compensation for the victims of nuclear radiation exposure must come, therefore, not from the courts, but from congressional action.

0906 (D.D.C. Sept. 30 1981). In *Gott*, the court invalidated the rules used by the Veterans Administration and the Defense Nuclear Agency for evaluating claims by atomic veterans because the rules violated the notice and comment requirements for rulemaking under the Administrative Procedure Act. The court ordered the Veterans Administration and the Defense Nuclear Agency to promulgate new rules in accordance with required procedures.

8. The V.B.A. provides that the "United States will pay to *any veteran* compensation as provided in this subchapter [f]or disability resulting from personal injury suffered or disease contracted in line of duty, in the active military, naval or air service, during a period of war." 38 U.S.C. § 310 (1976) (emphasis added). The same basic entitlement is granted to veterans who are injured or contract a disease "during other than a period of war." 38 U.S.C. § 331 (1976).

9. 28 U.S.C. § 1346 (1976), *amended by* 28 U.S.C. § 1346(a)(2) (Supp. III 1979); 28 U.S.C. §§ 2671-2680 (1976).

10. 340 U.S. 135 (1950).

11. *Id.* at 146. "Incident to service" is a term used by the courts to describe activity related to or arising from one's service in the military. The term is not statutorily defined.

THE F T.C.A. AND THE *Feres* DOCTRINE

The F T.C.A. and the Serviceman

Congress enacted the F T.C.A. to establish a limited waiver of sovereign immunity by extending a judicial remedy to those who previously had none.[12] Prior to the enactment of the F.T.C.A., a citizen could recover for injuries caused by government agents only by filing a special bill in Congress.[13] By limiting sovereign immunity statutorily, Congress sought to avoid the time-consuming, inefficient, and often inequitable process of reviewing these private bills for relief.[14]

The F T.C.A. excludes thirteen types of claims from its broad waiver of sovereign immunity,[15] insulating the federal government from liability to military personnel when they are injured during combat[16] or while in a foreign country [17] Despite clear indications from the text[18] and the drafters[19] of the F.T.C.A. that the Act was

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12. Comment, *The Supreme Court and the Tort Claims Act: End of An Enlightened Era?*, 27 CLEV. ST. L. REV. 267, 271 (1978). Congress intended to mitigate sovereign immunity's often harsh and unjust consequences. *Id.*

13. Note, *The Effect of the* Feres *Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1242 (1982).

14. Comment, *supra* note 12, at 271.

15. 28 U.S.C. § 2680(a)-(n) (1976).

16. *Id.* § 2680(j).

17. *Id.* § 2680(k). *See* Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U.L. REV. 532 (1980). *See also infra* notes 24-26 regarding the "combatant activities" and "foreign country" exceptions to the F.T.C.A.

18. *See* 28 U.S.C. § 2680(j), (k) (1976). *See also infra* notes 24-26.

19. In United States v. Brooks, 169 F.2d 840 (4th Cir. 1948), *rev'd* 337 U.S. 49 (1949), the United States Court of Appeals for the Fourth Circuit held that all members of the armed forces were, by implication, excluded from the coverage of the F.T.C.A. Representative Emmanuel Cellars, a central figure in the passage of the Act, challenged the reasoning of the court in a statement delivered orally to the Yale Law Review on November 26, 1948:

> 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 had more to do with [the Act] 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. [T]he Government deliberately removes the defense of sovereignty except in cases where the Act specifically makes an exception. The exception cannot be implied; it must be expressed. The court cannot read the exception into the law.

not meant to prohibit tort claims by servicemen, courts have been reluctant to recognize such claims under the Act. One commentator suggested that the judicial reluctance to read the F T.C.A. as including tort suits by servicemen stems not from an attempt to adhere to legislative intent, but rather from important economic and political considerations.[20] The danger inherent in effective military training and the large number of personnel in the military make the consequences of potentially large awards to servicemen a legitimate economic concern. Moreover, courts may realize that taxpayers would bear the burden of paying damage awards, perhaps an undesirable consequence in light of recent voter animosity toward continually rising tax rates.[21] Whether for political or economic reasons, courts adhere to the *Feres* doctrine and imply an exception in the F.T.C.A. for servicemen and veterans.

Formulation of the Feres *Doctrine: Justification and Limitations*

In *Brooks v. United States*,[22] decided one year before *Feres*, the United States Supreme Court laid the foundation for the *Feres* doctrine. The Court in *Brooks* allowed a serviceman injured in an off-base auto accident while on furlough to recover damages under the F.T.C.A. After examining the legislative history of the F T.C.A.,[23] the Court noted that both the "overseas injuries"[24] and

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Statement from Representative Cellars to Yale Law Review (Nov. 26, 1948), *quoted in* Note, *Military Personnel and the Federal Tort Claims Act*, 58 YALE L.J. 615, 621 n.26 (1949). For a discussion of the Supreme Court's disposition of Brooks v. United States, 337 U.S. 49 (1949), see *infra* notes 22-29 and accompanying text.

20. Comment, *supra* note 12, at 270. Indeed, one justification for sovereign immunity "is that to allow recovery against the government would threaten a raid on the federal treasury, endanger important policies and goals, and ultimately affect the stability of the government." *Id.*

Addressing the court's failure in Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979) (*Jaffee I*) to delineate the constitutional rights of an atomic veteran, a second commentator argued that politics and economics, not statutory interpretation, prevent constitutional suits by servicemen: "While the posture of the judiciary cannot be fully justified with respect to this position [the failure to expand the protection of constitutional rights to atomic veterans cases], it can perhaps be explained with reference to unmentioned political and economic interests at stake in the controversy." Comment, *Sovereign Immunity - Armed Forces - Nuclear Liability* - Jaffee v. United States, 25 N.Y.L. SCH. L. REV. 377, 393 (1979).

21. Comment, *Sovereign Immunity - Armed Forces - Nuclear Liability* - Jaffee v. United States, 25 N.Y.L. SCH. L. REV. 377, 393, n.123 (1979).

22. 337 U.S. 49 (1949).

23. *Id.* at 51-52.

"combatant activities"[25] exceptions to that Act evidenced congressional concern with the effect of sovereign immunity on soldiers and veterans.[26]

Although statutory disability payments would be taken into account in awarding tort damages,[27] the Court held in *Brooks* that Congress did not mandate an election of remedies by injured servicemen simply because other statutes provided disability payments to veterans.[28] Thus, recovery under veteran's compensation statutes and the F T.C.A. was permissible. In dicta foreshadowing *Feres*, however, the Court suggested that an F T.C.A. recovery was not available to a soldier or his survivors in cases involving injuries or death occurring "incident to service."[29]

The "incident to service" dicta of *Brooks* became the dispositive criterion for servicemen's eligibility under the F T.C.A. in *Feres v. United States*[30] and its companion cases, *Griggs v. United States*[31] and *Jefferson v. United States*.[32] Unlike *Brooks*, each of these cases involved a claim brought under the F T.C.A. for the death of or injury to a serviceman occurring while the serviceman was on duty. The plaintiffs in *Jefferson* and *Griggs* alleged negligent treatment of servicemen by military doctors, while *Feres* was a survival action brought by the wife of a soldier killed in a barracks fire. After distinguishing *Brooks* because that case did not involve a service-related death or injury,[33] the Court enunciated the only ju-

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24. 28 U.S.C. § 2680(j) (1976) states that the "provisions of this chapter and section 1346(b) of this title [relating to the government as a defendant in tort suits], shall not apply to - (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

25. 28 U.S.C. § 2680(k) (1976) exempts the government from liability under § 1346(b) for "any claim arising in a foreign country."

26. "It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute [the F.T.C.A.] was passed. The overseas and combatant exceptions make this plain." 337 U.S. at 51.

27. *Id.* at 53-54.

28. *Id.* at 53. The Court found "nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy." *Id.*

29. *Id.* at 52.

30. 340 U.S. 135 (1950).

31. 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

32. 178 F.2d 518 (4th Cir. 1949), *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

33. 340 U.S. at 146.

dicially created exception to the F T.C.A., the *Feres* doctrine: "[T]he Government is not liable under the F T.C.A. for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[34]

The Court justified creating an exception to the F T.C.A. because tort claims by servicemen have two unique characteristics. First, the relationship between the government and its armed forces is "distinctively federal in character"[35] and has no analogous private counterpart. The F T.C.A. subjects the United States to liability for torts only "in the same manner and to the same extent as a private individual under like circumstances."[36] In *Feres,* the Court held that because no private relationship exists paralleling the distinctively federal soldier-government relationship, the government is not liable under the F T.C.A. for in-service torts against servicemen.

The second justification in *Feres* for prohibiting F T.C.A. claims for in-service torts was the existence of a military compensation scheme. Ignoring its own statement in *Brooks* that Congress, by enacting the F.T.C.A., had not mandated an election of remedies by servicemen,[37] the Court held that the existence of a military compensation scheme precluded recovery under the Act.[38] Because Congress had not provided for an adjustment of damages reflecting recovery under an existing military benefits scheme, the Court concluded that Congress had not contemplated tort recovery by servicemen in formulating the F T.C.A.[39]

Four years later in *United States v. Brown,*[40] the Court explained and limited the *Feres* doctrine. In *Brown,* the plaintiff sought an F.T.C.A. recovery for the negligence of military doctors in performing a routine knee operation. Although the original injury to the knee occurred while the plaintiff was on active duty, the surgery itself occurred after the plaintiff's honorable dis-

34. *Id.*

35. 340 U.S. at 143 (quoting United States v. Standard Oil Co., 332 U.S. 301, 305 (1947)).

36. 28 U.S.C. § 2674 (1976).

37. Brooks v. United States, 337 U.S. 49, 53 (1949). *See also supra* notes 22-29 and accompanying text.

38. 340 U.S. at 144.

39. *Id.*

40. 348 U.S. 110 (1954).

charge.[41] Notwithstanding its application of the *Feres* doctrine in *Griggs*[42] and *Jefferson*,[43] the Court allowed recovery in *Brown* because the military doctors were negligent in aggravating the plaintiff's injuries; the negligence was not incident to the plaintiff's military service.[44]

In *Brown*, the Court imposed an important limitation on the *Feres* doctrine. If a serviceman proves that the tort occurred either after his discharge or apart from his military service, he may proceed with his F T.C.A. claim. Additionally, *Brown* indicated that the "incident to service" criteria of *Feres* was not a strictly causal test. But for his military service, the plaintiff in *Brown* would not have been tortiously injured; nevertheless, he still recovered F T.C.A. damages.[45]

Although *Brown* provided a possible means of circumventing the *Feres* doctrine, *Brown* also established a third rationale for the existence of the doctrine. Reiterating the factors that had been dispositive in *Feres* — the distinctively federal relationship between servicemen and government, and the existence of a military compensation scheme — the Court recognized the difficulty, if not impossibility, of maintaining military discipline if servicemen could sue their decision-making superiors.[46] The military discipline rationale has survived extensive criticism and remains a strong justifi-

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41. *Id.*

42. *See supra* notes 31-34 and accompanying text.

43. *Id.*

44. 348 U.S. at 113.

45. The dissent in *Brown* read the "incident to service" test of *Feres* as mandating a strict causation test. The plaintiff's injuries, the dissent noted, were

> inseparably related to military service. But for this army service this veteran could not have been injured in the veterans hospital as he was eligible and admitted for treatment there solely because of war service which gave him veteran status. Moreover, he was actually being treated for an army service injury.

Id. at 114. (Black, J., dissenting).

Subsequent cases involving the *Feres* doctrine followed the strict causation test suggested by the dissent in *Brown*. In *In re* "Agent Orange" Product Liability Litigation, 506 F Supp. 762 (E.D.N.Y. 1980), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), the children of Vietnam veterans exposed to the herbicide Agent Orange were barred from recovering for alleged genetic and somatic injuries because the "injuries alleged by the children had their genesis in the exposure of their parents" and "arose out of and were incident to the service of the parent." 506 F Supp. at 781. The "genesis incident to service" test is discussed further *infra* notes 167-82 and accompanying text.

46. 348 U.S. at 112.

cation for the bar against servicemen's F T.C.A. suits.[47]

The Vitality of the Feres *Doctrine: Supreme Court Decisions After* Feres

Although the Supreme Court continues to adhere to the *Feres* doctrine, ambiguities and inconsistencies in recent decisions make the doctrine's rationale difficult to ascertain.[48] In *Dalehite v. United States*[49] the Court reversed an F T.C.A. award to plaintiffs who alleged government negligence in the storage and packaging of fertilizer which caused a disasterous shipboard fire. Although the principal reason for reversing the lower court award was the statutory "discretionary function" exception to the F T.C.A.,[50] the Court, quoting *Feres*, also denied recovery because the liability that plaintiff sought to impose on the government had no analogous private counterpart.[51] According to the Court, the effect of the F T.C.A. "is to waive immunity from recognized causes of action and . . . not to visit the Government with novel and unprecedented liability."[52]

Within five years of *Dalehite*, however, the Court twice renounced the analogous private liability rationale of *Feres* and *Dalehite*. In *Indian Towing v. United States*[53] the F T.C.A. plaintiff alleged that negligent operation of a lighthouse by the Coast Guard caused plaintiff's barge to run aground.[54] While acknowledging that operation of a lighthouse is "uniquely governmental,"

47. See *supra* notes 22-34 and accompanying text for discussion and criticism of *Feres*.

48. As recently as 1977, the Court reaffirmed the *Feres* doctrine in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), discussed *infra* notes 61-74 and accompanying text.

49. 346 U.S. 15 (1953).

50. *Id.* at 35. 28 U.S.C. § 2680 states that "[t]he provisions of this chapter and section 1346(b) of this title [relating to the United States as a defendant in tort claims suits] shall not apply to - Any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." The "discretionary function" exception provides the government with wide-ranging immunity from normal F.T.C.A. liability. *See generally* Clark, *Discretionary Functions and Official Immunity: Judicial Forays into Sanctuaries from Tort Liability*, 16 A.F.L. REV. 33 (1974).

51. 346 U.S. at 43.

52. *Id.* (quoting Feres v. United States, 340 U.S. 135, 142 (1950)).

53. 350 U.S. 61 (1955).

54. *Id.* at 62.

as is all governmental activity covered by the F T.C.A.,[55] the Court nevertheless held the Coast Guard responsible for the incident. The Court refused to predicate F T.C.A. liability on "such a completely fortuitous circumstance" as "the presence or absence of identical private liability."[56]

The Court specifically expressed in *Rayonier, Inc. v. United States*[57] the unarticulated conclusion of *Indian Towing* — that the analogous private liability rationale of *Feres* was no longer a consideration in F T.C.A. cases. *Rayonier* involved an F T.C.A. claim to recover from the United States Forest Service for negligent failure to extinguish a fire that started on government land and spread to plaintiff's property.[58] Noting that state law would not impose liability on local governments for their agents' negligent performance of uniquely governmental activities such as fire fighting, the government argued that the F.T.C.A. imposed liability on the United States only under circumstances in which governmental bodies traditionally have been responsible for their agents' negligence.[59] The Court rejected this argument and, in language expressly contradicting that in *Feres,* held 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 government liability."[60]

Although the *Rayonier* and *Indian Towing* rejection of the analogous private liability requirement suggested abandonment of the "distinctively federal" relationship rationale of *Feres,* the most recent Supreme Court case addressing the *Feres* doctrine, *Stencel Aero Engineering Corp. v. United States,*[61] provides a perplexing reaffirmation of that rationale. The plaintiff in *Stencel,* a National Guardsman injured when the cockpit ejection system of his aircraft malfunctioned, brought a personal injury suit against the United

55. *Id.* at 67.
56. *Id.*
57. 352 U.S. 315 (1957).
58. *Id.* at 318-19.
59. *Id.*
60. *Id.* at 319.
61. 431 U.S. 666 (1977). *See generally* Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to F.T.C.A. Recovery?,* 77 MICH. L. REV. 1099 (1979).

States and Stencel, the manufacturer of the system.[62] Stencel cross-claimed against the United States seeking indemnity for any sums that the manufacturer might be required to pay the serviceman.[63] Because plaintiff incurred the injuries incident to service, the United States District Court for the Eastern District of Missouri dismissed his claim against the government; the United States Court of Appeals for the Eighth Circuit affirmed the dismissal.[64] The Supreme Court granted certiorari to determine whether the F T.C.A. required the United States to indemnify a third party who paid damages to an injured serviceman.[65] In holding that the *Feres* doctrine precluded even third party indemnity, the Court noted that such an action implicated the "distinctively federal" relationship between the government and its suppliers of ordnance.[66]

Uniform governmental liability among jurisdictions is an underlying consideration in both the *Feres* and *Stencel* decisions. *Feres* purportedly protected the soldier-government relationship by refusing to create "a new cause of action dependent on local law for service-connected injuries or death due to negligence."[67] Similarly, *Stencel* protected the "distinctively federal" government-supplier relationship by refusing to permit the situs of the alleged negligence to affect the government's liability to its suppliers and subcontractors.[68] Despite *Indian Towing* and *Rayonier*, which rejected the "distinctively federal" relationship rationale as a justification for denying F T.C.A. claims, *Stencel* indicates that this rationale remains viable if the suit involves negligence incident to service.

In addition to reviving the "distinctively federal" rationale, the Court in *Stencel* reaffirmed the two remaining justifications for the *Feres* doctrine. First, a military compensation scheme, the V.B.A., offers a swift and efficient remedy for injuries to servicemen. The Court asserted that the V.B.A. "clothes the Government in the

62. 431 U.S. at 666.

63. *Id.* at 668.

64. Donham v. United States, 395 F Supp. 52 (E.D. Mo. 1975), *aff'd*, 536 F.2d 765 (8th Cir. 1976), *aff'd sub nom.* Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

65. 431 U.S. at 670.

66. *Id.* at 672.

67. 340 U.S. at 146.

68. 431 U.S. at 673 (quoting Cooper Stevedoring Co. v. Kopke, Inc., 412 U.S. 106, 115 (1974)).

protective mantle of the Act's limitation-of-liability provision"[69] to place a ceiling on the government's liability for intra-military torts.[70] Thus, although the injured serviceman received the V.B.A. benefits, Stencel could not obtain indemnity for damages which it might be required to pay to the serviceman.[71] As in *Feres,* the existence of a military compensation statute insulated the United States from liability for negligent injuries incident to military service.

Finally, in *Stencel* the Court reemphasized the effect of F.T.C.A. suits for in-service torts on military discipline. Concerned that such actions would result in second-guessing military orders,[72] and wary of the disruptive effects of requiring one member of the armed forces to testify regarding the decisions and actions of another, the Court concluded that the military discipline factor weighed against permitting even third parties to recover damages from the United States.[73] "The effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party "[74] Thus, in its most recent consideration of the *Feres* doctrine, the Court indicated that protecting military discipline is a major consideration justifying a ban on F T.C.A. claims by servicemen.

The Feres *Doctrine as Applied in the Lower Courts*

Despite the Supreme Court's reaffirmation of the "distinctively federal" relationship rationale, lower courts, perhaps because of the confusion caused by *Rayonier* and *Indian Towing,* focus on the military discipline and alternate compensation scheme justifications in applying the *Feres* doctrine. In fact, the history of the *Feres* doctrine in the circuits is replete with judicial overemphasis of the military discipline justification, the one rationale not discussed in *Feres.*[75]

Interpretation of the "incident to service" test has been the most

69. 431 U.S. at 675.
70. *Id.*
71. *Id.* at 672.
72. *Id.* at 673.
73. *Id.*
74. *Id.*
75. *See infra* note 79.

ill-defined and confusing aspect of the lower courts' application of the *Feres* doctrine.[76] *Feres* bans F T.C.A. suits by servicemen only when injuries "arise out of or are in the course of activity incident to service."[77] Neither *Feres* nor subsequent Supreme Court decisions provided the criteria for determining when a soldier's activity is incident to service; consequently, lower courts have developed several tests for making this determination.

One "incident to service" test adopts the "effect on military discipline" rationale. Under this test, the *Feres* doctrine applies if the serviceman, when injured, was "performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom."[78] Although equating "incident to service" with "subject to military discipline" advances the policy of protecting military discipline, several courts have stretched this criteria to preclude suits in which the effect of an F T.C.A. suit on military discipline is speculative at best.[79] The large number of military medical malpractice suits which have been barred by *Feres* illustrates this point.[80]

A second "incident to service" test focuses on the situs of the injury A court may consider that an injury occurring within the confines of a military base was incurred incident to service. Although the fact that an injury occurred on a military base is strong evidence that the plaintiff was engaged in activity incident to service at that time,[81] the simplicity of the situs test can lead to harsh

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76. *See generally* Note, *In Support of the* Feres *Doctrine and a Better Definition of Incident to Service*, 56 ST. JOHNS L. REV. 485 (1982).

77. 340 U.S. at 146.

78. Downes v. United States, 249 F Supp. 626, 628 (E.D.N.C. 1965). *Accord* Bankston v. United States, 480 F.2d 495, 497-98 (5th Cir. 1973).

79. The plaintiff in Hass v. United States, 518 F.2d 1138 (4th Cir. 1975), failed to recover under the F.T.C.A. for injuries received while riding a horse rented from a Marine Corps stable. Similarly, in Keisel v. Buckeye Donkey Ball, Inc., 311 F Supp. 370 (E.D. Va. 1970), the application of *Feres* precluded a serviceman from recovering for an injury sustained while participating in a donkey softball game.

80. *See, e.g.*, Misko v. United States, 453 F Supp. 513, 516 (D.D.C. 1978) (considerations of military discipline apply equally to medical malpractice cases); Wisniewski v. United States, 416 F Supp. 599, 601 (E.D. Wis. 1976) (government doctor not liable for failing to notify soldier of results of physical examination); Henning v. United States, 446 F.2d 774, 778 (3d Cir. 1971) (government doctor not liable for issuing inaccurate health certificate).

81. Stanley v. C.I.A., 639 F.2d 1146, 1151 (5th Cir. 1981).

results. In *Chambers v. United States*,[82] for example, survivors of a serviceman who drowned in a base swimming pool were denied recovery because the court concluded that an accident occurring in an on-base recreational facility was incident to service even though the serviceman was not engaged in military activity at the time.[83]

Another "incident to service" test stresses the serviceman's status at the time of injury.[84] Focusing on the precise relationship between the plaintiff and the military at the time injury occurred promotes the *Feres* policy of protecting the "distinctively federal" relationship between the government and members of its armed forces.[85] Thus, the applicability of the *Feres* doctrine may depend on whether the injury occurred while the serviceman was on or off duty, on leave or furlough, or active or discharged.

The vague parameters of the various "incident to service" tests have allowed expansion of the *Feres* doctrine to deny claims having little or no relation to the policy considerations of insuring a well-disciplined fighting force, protecting the unique soldier-government relationship, and upholding military compensation schemes as the exclusive remedy for soldiers and veterans. The durability of the *Feres* doctrine, however, is unquestionable. Consequently, to litigate successfully an F T.C.A. claim, a serviceman must establish a tort unrelated to military service, or otherwise circumvent the *Feres* doctrine.

Radiation Cases and Circumvention of the *Feres* Doctrine

The Application of Feres *to Radiation Exposure Cases*

Despite the extremely large number of servicemen involved in nuclear weapons tests and the government's disregard for their safety,[86] courts have refused to recognize that claims of atomic veterans warrant special consideration. Because the nuclear tests were part of military maneuvers to demonstrate the effectiveness of

82. 357 F.2d 224 (8th Cir. 1966).

83. *Id.* at 226-27.

84. *See, e.g.*, Thornwell v. United States, 471 F Supp. 344 (D.D.C. 1979).

85. *Id.* at 350.

86. The inadequacy of precautions taken by the United States government in conducting troop movements in conjunction with nuclear test firings is discussed in Favish, *supra* note 6.

ground forces shortly after a nuclear explosion,[87] any resulting injuries clearly were incident to service. *Feres*, then applies to radiation exposure cases. Indeed, the United States District Court for the Southern District of Ohio, focusing on the military discipline rationale of *Feres*, found *Feres* to be dispositive because, short of combat, conducting military maneuvers in the field implicates the military's special discipline requirement in its purest form.[88] Consistent with that court's analysis, no court has allowed an atomic veteran to recover under the F T.C.A. for negligent inservice exposure to radiation from a nuclear explosion. Thus, veterans have resorted to a variety of novel legal theories and to what has been characterized as "artful pleading"[89] to circumvent the *Feres* doctrine.

The Intentional Tort Theory

One tactic used by atomic veterans attempting to avoid the harsh impact of *Feres* is to allege that the government willfully, knowingly, or intentionally disregarded the veterans' safety, and that the *Feres* doctrine is limited strictly to barring negligence actions. Even though the Supreme Court has not addressed the question of whether *Feres* applies to intentional torts, every court considering that proposition has rejected it.[90] Atomic veteran plaintiffs, however, continue to plead the intentional tort exception to the *Feres* doctrine notwithstanding its universal rejection by the judiciary In *Jaffee v. United States (Jaffee II)*,[91] a former soldier

87. "The military believed that actual nuclear explosions were necessary to accomplish its goal for troop indoctrination and training and the enhancement of public relations." *Id.* at 934.

88. *See, e.g.*, Everett v. United States, 492 F Supp. 318, 321 (S.D. Ohio 1980). The court in *Everett* refused to characterize plaintiff's exposure to radiation during troop maneuvers as not incident to service despite the plaintiff's allegations that the maneuvers were in essence "human experimentation." *Id.* at 320.

89. Broudy v. United States, 661 F.2d 125, 128 n.6 (9th Cir. 1981).

90. Jaffee v. United States, 468 F Supp. 632, 634 (D.N.J. 1979), *aff'd* 663 F.2d 1226 (3d Cir. 1981).

91. 663 F.2d 1226 (3d Cir. 1981). Stanley Jaffee, a veteran of a 1953 nuclear detonation in Camp Desert Rock, Nevada, brought suit for his radiation-induced cancer in the United States District Court for the District of New Jersey. Counts One, Two, and Three of Jaffee's complaint joined the United States and individual government officials as defendants. Count Four was a class action seeking an injunction requiring the government to warn veterans of medical risks from radiation and to provide subsidization of medical care for all

failed to recover for in-service exposure to radiation allegedly resulting in breast cancer, even though he claimed that government agencies "intentionally and with full knowledge of the consequences of their actions, compelled thousands of soldiers to march into a nuclear explosion."[92] The United States District Court for the District of New Jersey concluded that the military discipline rationale applies equally to negligent and intentional torts.[93] The United States Court of Appeals for the Third Circuit agreed.[94]

The United States Court of Appeals for the Ninth Circuit similarly rejected the intentional tort theory in the atomic veteran context in *Broudy v. United States*.[95] Suing under the F T.C.A., the plaintiff in *Broudy* hoped to avoid *Feres* by characterizing the government's nuclear testing activities as "unconsented-to-experimentations."[96] The court dismissed the suit for failure to state a claim upon which relief could be granted, finding that "the *Feres* doctrine does not distinguish between claims based on the alleged level of culpability of the tortfeasor, whether a negligent, a reckless or even an intentional tort is alleged."[97]

Other radiation[98] and non-radiation[99] cases support the denial of the intentional tort claim illustrated by *Jaffee II* and *Broudy* The

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class members. The district court dismissed Count Four and certified it for immediate appeal. The United States Court of Appeals for the Third Circuit affirmed the dismissal as to the request for medical care, but reversed the district court's order as to the requested warning, thus requiring the government to issue warnings. Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979) (*Jaffee I*).

In Jaffee v. United States, 468 F Supp. 632 (D.N.J. 1979) (*Jaffee II*) the district court dismissed Counts One, Two, and Three of Jaffee's original complaint, holding that the *Feres* doctrine shielded the individual defendants from liability. A panel of the Court of Appeals for the Third Circuit originally reversed the district court, but, sitting *en banc*, the court eventually affirmed the dismissal of Counts One, Two, and Three in Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (*Jaffee III*). In the interest of clarity, these three cases will be referred to throughout this Note as *Jaffee I*, *Jaffee II*, and *Jaffee III*.

92. *Jaffee I*, 468 F Supp. 632, 633 (D.N.J. 1979).

93. *Id.* at 634-35.

94. *Jaffee III*, 663 F.2d at 1239.

95. 661 F.2d 125 (9th Cir. 1981).

96. *Id.* at 127 n.4.

97. *Id.*

98. *See, e.g.*, Everett v. United States, 492 F Supp. 318, 322 (S.D. Ohio 1980) (*Feres* bars suit for radiation-related injuries).

99. *See, e.g.*, Lewis v. United States, 663 F.2d 889 (9th Cir. 1981); Schnurman v. United States, 490 F Supp. 429 (E.D. Va. 1980).

intentional tort theory has been ineffective in mitigating the *Feres* ban because litigating intentional torts would disrupt military discipline and undermine military decision-making no less than suits for negligence.[100] Failure of the intentional tort theory to provide a limitation on *Feres* inspired veterans to pursue alternative theories for recovery

Suits Brought Directly Against Individual Military Personnel or Civilian Employees

By bringing the suit under the F T.C.A., the plaintiff in *Feres* attempted to place liability on the United States government. A second tactic to circumvent *Feres,* therefore, is to bring suit directly against an individual member of the armed forces, such as an officer or military physician, or against a civilian employee involved in the military operation. This tactic, like the intentional tort theory, has been uniformly unsuccessful.

In *Jaffee II,* the plaintiffs filed claims against the United States and against military officers and civilian employees.[101] The district court dismissed the claims against the individual defendants, rejecting plaintiff's contention that *Feres* applied only to F T.C.A. claims brought directly against the United States.[102] Conceding that *Feres* involved construction of the F T.C.A., the court pointed out that *Feres* did not turn on the language of the Act itself; rather, *Feres* turned on the special considerations of military discipline and the unique relationship of a soldier to his superiors. A suit against individual decision-makers implicates these considera-

100. *Jaffee III,* 663 F.2d 1235. The contention of the court in *Jaffee III* that the litigation of intentional torts will have the same effect on military discipline and decision-making as the litigation of negligent torts is questionable. By holding a military planner or field officer liable for his negligence, a court may disrupt discipline and decision-making. Aware that their colleagues have been liable for their ignorance or carelessness, officers are likely to refrain from exercising their discretion. Constantly in doubt about the propriety of his actions, the overly cautious and hesitant officer deprives the military of the benefit of his sound judgment and professional expertise. Suits for intentional torts by military officers, however, do not necessarily cause reluctance to exercise command powers. Holding an officer liable for an intentional tort will not inhibit his colleagues; the specific type of behavior to be avoided will be apparent to an officer because intentional torts imply an awareness that an act is in some sense wrong.

101. 468 F Supp. 632 (D.N.J. 1979).

102. *Id.* at 634.

tions as much as does a suit directly against the government.[103]

Affirming the dismissal of the claims against the individual officers, the United States Court of Appeals for the Third Circuit, in *Jaffee III*,[104] reinforced the policy justification suggested by the district court. "Suits against individuals have a far greater potential for chilling responsible decision-making than those against the government," because "[i]n suits against individuals, the person who makes the decision is held accountable in damages."[105]

The danger of inhibiting military decision-making does not turn on the military or non-military status of the defendant. The court of appeals in *Jaffee III* rejected the appellant's contention that civilian defendants not party to the relationship between a government and its servicemen should not benefit from *Feres* principles.[106] Military decisions made by civilian officials implicate many of the same policy considerations as do those of their subordinate commanders, because in either case a civilian court would examine the propriety of military orders.[107]

Other courts have agreed with *Jaffee III*. In *Fountain v. United States*,[108] the United States District Court for the Western District of Arkansas acknowledged that although *Feres* specifically addressed sovereign immunity, its reasoning applied to bar actions against the individual military officers and government officials for injuries occurring incident to service.[109] The dismissal in *Jaffee II* and *Fountain* of claims against the military and civilian officials responsible for planning and executing the relevant nuclear detonations is consistent with similar results in non-radiation cases.[110] The principle underlying the strict application of *Feres* to suits against individuals is that "an undisciplined army is a mob and he who is in it would weaken discipline if he can civilly litigate with

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103. *Id.*

104. 663 F.2d 1226 (3d Cir. 1981).

105. *Id.* at 1234.

106. *Id.* at 1238.

107. *Id.*

108. 533 F. Supp. 698 (W.D. Ark. 1981).

109. *Id.* at 703.

110. *See, e.g.*, Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Tirill v. McNamara, 451 F.2d 579 (9th Cir. 1971); Bailey v. De Quevedo, 375 F.2d 72 (3d Cir.), *cert. denied*, 389 U.S. 923 (1967); Misko v. United States, 452 F. Supp. 513 (D.D.C. 1978).

others in the army"[111] or civilians making military decisions.[112] Frustrated by the military discipline rationale in suits directly against the responsible military or civilian officials,[113] atomic veterans continue to seek recovery outside the F T.C.A. context.

Suits Alleging Violations of Constitutional Rights

Because *Feres* and its companion cases[114] involved allegations of common law negligence, many servicemen attempted to avoid the *Feres* doctrine by pleading intentional deprivation of their constitutional rights. Like the cases previously discussed in this Note, suits based on constitutional torts fall into two distinct categories — those proceeding against the government, and those naming individual government employees as defendants. Regardless of the choice of defendant, however, servicemen have failed to recover in suits alleging constitutional torts.[115]

Non-radiation suits best illustrate the failure of the constitutional tort theory in suits against the United States. In *Schnurman v. United States*,[116] the plaintiff sought damages under the

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111. Bailey v. De Quevedo, 375 F.2d 72, 74 (3d Cir.), *cert. denied*, 389 U.S. 923 (1967).

112. *Id.*

113. The wisdom of bringing suit directly against individual military or civilian officials is questionable because of the limited financial resources of individual defendants and the large number of potential claimants. These suits reflect the frustration experienced by atomic veterans in finding any source of compensation for their radiation-induced injuries.

114. Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

115. The exact nature of the constitutional injuries suffered by the atomic veteran is not evident from the cases. In Everett v. United States, 492 F Supp. 318 (S.D. Ohio 1980), the plaintiff alleged that the Atomic Energy Commission and the United States Air Force violated her husband's fifth and ninth amendment rights by failing to warn him of the "harmful and dangerous effects of exposure to radioactivity." 492 F Supp. at 325 n.5. The complaint of the atomic veteran in Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979) (*Jaffee III*) was similarly vague. Jaffee alleged only that by compelling him to participate in the nuclear tests, the government had violated his first, fourth, fifth, eighth, and ninth amendment rights. 592 F Supp. at 714. Finally, the constitutional claims of the plaintiff in Broudy v. United States, 661 F.2d 125 (9th Cir. 1981) centered on what the plaintiff termed the "unconsented-to-experimentations" conducted by the government. 661 F.2d at 127 n.4. *See generally* Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312 (1982); Note, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489 (1982); Note, *Government Liability for Constitutional Torts: Proposals to Amend the Federal Torts Claims Act*, 49 TENN. L. REV. 201 (1982).

116. 490 F Supp. 429 (E.D. Va. 1980).

F.T.C.A. for the alleged violation of his constitutional rights occurring when he voluntarily participated in a mustard gas experiment while serving in the Navy. The United States District Court for the Eastern District of Virginia dismissed the complaint, concluding that *Feres* confers immunity for claims of violations of constitutional rights.[117]

Plaintiffs suing the government directly have had no greater success. Naming the United States as the sole defendant in *Everett v. United States*,[118] the surviving spouse of a soldier who participated in nuclear weapons tests brought suit under the F T.C.A. and under the fifth and ninth amendments. The United States District Court for the Southern District of Ohio dismissed the counts seeking constitutional relief, concluding that an action sounding in constitutional tort, as opposed to common law tort, is not exempt from the *Feres* doctrine.[119]

The United States District Court for the District of Columbia reached a similar result in *Thornwell v. United States*,[120] a case in which the alleged constitutional violation involved Army experimentation with a hallucinogenic drug. Dismissing the plaintiff's constitutionally based claims, the court stated that "neither the language nor the rationale of [*Feres*] indicates that the legal theory of a soldier's claim ought to be a salient factor in determining the scope of intramilitary immunity."[121]

The atomic veteran in *Kelly v. United States*[122] also was unable to recover under a constitutional tort theory for injuries caused by his in-service exposure to nuclear radiation. Relying on the decision of the Court of Appeals for the Third Circuit in *Jaffee I*,[123] the United States District Court for the Eastern District of Penn-

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117. 490 F Supp. at 436. Focusing on the military discipline and alternative means of relief rationales of *Feres*, the district court in *Schnurman* added that "[c]haracterization of the government's conduct as intentional or unconstitutional or shocking to the conscience does not make the statutory substitute for tort liability any less adequate or the threat to discipline posed by suits against the military any less real." 490 F. Supp. at 437.

118. 492 F. Supp. 318 (S.D. Ohio 1980).

119. *Id.* at 322 (quoting Nagy v. United States, 471 F Supp. 383, 384 (D.D.C. 1979)).

120. 471 F Supp. 344 (D.D.C. 1979).

121. *Id.* at 348.

122. 512 F. Supp. 356 (E.D. Pa. 1981).

123. 592 F.2d 712 (3d Cir. 1979). For a discussion of the procedural history of the three *Jaffee* cases, see *supra* note 91.

sylvania in *Kelly* found the plaintiff's claims barred by the doctrine of sovereign immunity. Even a direct cause of action under the Constitution does not impose liability on the United States for the deprivation of constitutional rights unless the government has waived immunity from suit.[124] Consistent with *Feres,* the court concluded the United States had not waived its immunity in this context.[125]

Perhaps the *Jaffee* cases,[126] which proved controlling in *Kelly,* best illustrate the use of the constitutional tort theory by an atomic veteran against the United States and against individuals employed by the United States. Alleging that he had developed cancer as a result of involuntary participation in a nuclear testing maneuver, the plaintiff in *Jaffee II*[127] brought a class action suit against the United States and individual civilian and military officers.[128] Jaffee contended that the court should create an exception to the doctrine of sovereign immunity because he alleged deliberate violations of constitutional rights under the first, fourth, fifth, eighth, and ninth amendments. Citing *Bivens v. Six Unknown Named Agents,*[129] which recognized an implied cause of action against federal officers who violated the fourth amendment, and *Butz v. Economou,*[130] which limited the immunity of certain federal executive officials in *Bivens*-type actions, Jaffee argued that the United States was liable under the Constitution for wrongfully exposing him to radiation.[131]

The court of appeals on interlocutory appeal rejected Jaffee's contention and found his reliance on *Bivens* and *Butz* inappropri-

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124. 512 F Supp. at 362.

125. *Id.*

126. 468 F Supp. 632 (D.N.J. 1979), *aff'd,* 663 F.2d 1226 (3d Cir. 1981). For a discussion of the *Jaffee* decisions, see *supra* note 91. *See generally* Note, Jaffee v. United States: Feres *Doctrine at the Cliff's Edge?,* 42 U. PITT. L. REV. 115 (1980); Note, *Government Immunity and Liability — Armed Forces-Government Officials Charged with Violating Servicemen's Fifth Amendment Rights Not Entitled to Absolute Immunity* - Jaffee v. United States, 11 SETON HALL L. REV. 275 (1980).

127. 468 F Supp. 632 (D.N.J. 1979).

128. *Id.* at 633. For a discussion of the plaintiff's cause of action, see *supra* note 91.

129. 403 U.S. 388 (1971). Plaintiffs proceeded under an implied right of action theory rather than 42 U.S.C. § 1983, because § 1983 does not apply to agents of the federal government.

130. 438 U.S. 478 (1978).

131. *Jaffee I,* 592 F.2d at 117-18.

ate.[132] *Bivens* and *Butz* were suits against individual federal officers; Jaffee's complaint named the United States as a defendant. Because Jaffee had sued the government itself, "*Bivens* and *Butz* [did] not afford him a traversable bridge across the moat of sovereign immunity."[133] The court of appeals thus refused to create an exception to the doctrine of sovereign immunity even for deliberate violations of constitutional rights.

Although the decision of the court of appeals in *Jaffee I* rejected the constitutional tort theory when the plaintiff attacked the United States directly, Jaffee's complaint primarily alleged violations of constitutional rights by individuals. The United States District Court for the District of New Jersey addressed that part of Jaffee's complaint in *Jaffee II*.[134] Rejecting Jaffee's contention that *Feres* does not apply to claims against individual officers for intentional violations of constitutional rights, the district court dismissed the counts involving such claims.[135]

A three judge panel of the United States Court of Appeals for the Third Circuit reversed the decision of the district court, holding that *Feres* accords an individual defendant only a qualified immunity from suit.[136] Sitting en banc, however, the Third Circuit vacated the panel's decision and reheard Jaffee's argument in *Jaffee III*.[137] Distinguishing this case from *Bivens*,[138] the court of appeals held that Jaffee did not have a cause of action directly under the Constitution against individual defendants for unconstitutional torts occurring incident to service. The decision in *Bivens* "established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[139] The court in *Jaffee III* cautioned, however, that *Bivens* does not

132. *See supra* note 91.

133. 592 F.2d at 717.

134. 468 F. Supp. 632 (D.N.J. 1979).

135. *Id.* at 634. In holding the *Feres* ban applicable to suits against individual government officials, the district court in *Jaffee II* acted consistently with the cases denying claims against individual officers for nonconstitutional torts. *See supra* notes 100-12 and accompanying text.

136. This opinion is unreported. *See* 663 F.2d 1226, 1230 (3d Cir. 1981).

137. 663 F.2d 1226 (3d Cir. 1981).

138. 403 U.S. 388 (1971).

139. 663 F.2d at 1230 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).

apply in the face of an "explicit Congressional declaration" that plaintiffs be remitted to another, equally effective remedy or if special factors exist that suggest hesitation in the absence of affirmative Congressional action.[140]

Addressing the "special factors" limitation imposed by *Bivens*, the court in *Jaffee III* concluded that "the deleterious effects of service-related suits on military performance" and discipline constituted strong justification not to hold individual government officials liable for damages for intentional and unconstitutional torts in these circumstances.[141]

The court also cautioned that *Bivens* does not apply if an alternative remedy exists. Conceding that Congress had not established the Veteran's Benefits Act as a substitute for a private right of action under the Constitution, the court nevertheless stated that the existence of the V.B.A. "reinforces our decision to act with restraint."[142] Although the V.B.A. did not provide full compensation to Jaffee for his losses, Jaffee was not limited to "damages [under *Bivens*] or nothing."[143]

Jaffee III accurately states the law as applied by all courts in service-related radiation exposure cases.[144] When the constitutional tort theory has been employed against the United States by servicemen, courts have refused to recognize a waiver of sovereign immunity Similarly, because of military discipline considerations and compensation under the V.B.A., courts have refused to recognize *Bivens*-type constitutional claims when the serviceman has sued either the United States or individuals.

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140. 663 F.2d at 1230 (quoting Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396-97 (1971)).

141. 663 F.2d at 1235.

142. *Id.* at 1236.

143. *Id.*

144. Two additional radiation cases illustrate the ineffectiveness of the constitutional tort theory. Relying primarily on *Jaffee III*, the district court in Fountain v. United States, 533 F Supp. 698 (W.D. Ark. 1981) rejected the constitutional claims of an atomic veteran, holding that "the United States has not waived its sovereign immunity with respect to actions alleging violations of constitutional rights." 533 F Supp. at 702. Similarly, the district court in Lombard v. United States, 530 F Supp. 918 (D.D.C. 1981), without even mentioning *Jaffee III*, rejected the constitutional tort theory on the basis of *Feres* and the long line of non-radiation cases interpreting *Feres:* "[T]he courts have repeatedly read *Feres* to bar constitutional tort claims against the government." 530 F Supp. at 920.

Suits by Servicemen's Wives and Children

The impact of *Feres* extends beyond suits by military personnel: *Feres* effectively insulates the United States from all claims based on in-service injuries regardless of the party asserting the claim.[145] Indeed, *Feres* and one of its companion cases[146] barred a wrongful death action by the widow of a serviceman killed as a result of in-service injuries. Thus, *Feres* bars claims of former military personnel as well as claims by their spouses or children who never were in the military.[147] The articulated justification for the total bar to claims is that the effect upon military discipline is identical whether the suit is brought by a soldier or by a third party.[148]

In the face of the clear bar to derivative claims by members of a veteran's family, wives and children of atomic veterans nevertheless have brought suit against the United States seeking damages for injuries arising from the veteran's in-service exposure to nuclear radiation. In *Monaco v. United States*[149] the daughter of an atomic veteran[150] filed an F.T.C.A. claim alleging that her father's exposure to radiation caused him mutagenic injuries and consequently caused her to suffer various birth defects. The daughter argued that *Feres* did not preclude her claim because she could not recover under the Veteran's Benefits Act[151] and, because she was a civilian, her suit could not jeopardize military discipline.[152]

Citing *Stencel Aero Engineering Corp. v. United States,*[153] the United States Court of Appeals for the Ninth Circuit rejected the

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145. *See generally* Note, *supra* note 13.

146. Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

147. Monaco v. United States, 661 F.2d 125, 133 (9th Cir. 1981).

148. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1977).

149. 661 F.2d 125 (9th Cir. 1981).

150. David Monaco, the father of the plaintiff in *Monaco,* is not a true atomic veteran in that his exposure to nuclear radiation did not occur due to an atomic bomb detonation. Monaco was exposed to radiation while participating in military training at the University of Chicago between 1943 and 1946. Monaco performed calisthentics on a field directly above the laboratories for the Manhattan Project, the program that developed the first atomic bomb.

151. 38 U.S.C. §§ 310, 331 (1976). The Veteran's Benefits Act provides compensation for any *veteran* who is injured or contracts disease in the line of duty during military service. *See supra* note 7.

152. 661 F.2d at 133.

153. 431 U.S. 666 (1977).

daughter's arguments, noting that the V.B.A. limits the government's liability [154] To allow the daughter to recover damages in addition to her father's V.B.A. proceeds would circumvent and frustrate an essential V.B.A. function, which is to provide definite and limited compensation for qualifying veterans with specific injuries.[155] Addressing the military discipline issue, the court explained that even in a suit by a serviceman's relative, "a court must still examine the Government's activity in relation to military personnel on active duty."[156] Because one of the primary purposes of the *Feres* doctrine is to prevent this type of examination, *Feres* precluded the daughter's claims.

The children of an atomic veteran also failed to recover for their alleged mutagenic injuries in *Lombard v. United States.*[157] Noting the "distinctively federal" character of the children's claims, the United States District Court for the District of Columbia refused to grant the children relief because their claims were "no different from claims by the descendents of soldiers who might be exposed to radiation on the battlefield during some future limited nuclear war, claims surely barred by *Feres.*"[158] The children did not recover because military discipline would be affected adversely by claims based on these indirect consequences of military orders.

Feres likewise bars derivative claims by wives of atomic veterans seeking damages for in-service radiation injuries suffered by their husbands. In *Broudy v. United States,*[159] for example, the widow of an officer irradiated while participating in military maneuvers involving atomic weapons testing brought suit against the United States alleging that negligent exposure and failure to warn, monitor, and treat the serviceman after his discharge caused his death from cancer.[160] The district court, relying on *Feres,* dismissed both the negligent exposure and failure to warn claims. The United

154. 661 F.2d at 134 (quoting Stencel Aero Engineering Corp. v. United States, 431 U.S. at 673).

155. 661 F.2d at 134.

156. *Id.*

157. 530 F. Supp. 918 (D.D.C. 1981).

158. *Id.* at 919 n.1. Plaintiff's father was exposed to radiation while participating in the transportation and handling of materials used in the atomic bomb project at Los Alamos. *Id.* at 922.

159. 661 F.2d 125 (9th Cir. 1981).

160. *Id.* at 126.

States Court of Appeals for the Ninth Circuit affirmed the dismissal of the claim for in-service negligent exposure.[161] Interpreting *United States v. Brown*[162] as standing for the proposition that "[r]ecovery will only be allowed for a claimant whose injury was not the result of negligence directed toward a person on active duty,"[163] the court found that *Brown* as well as *Feres* barred recovery by the veteran's widow.[164]

Some courts, however, do not apply *Feres* to derivative suits based on in-service irradiation of veterans. In *Hinkie v. United States*,[165] the wife, son, and estate of a deceased son of an atomic veteran brought an F.T.C.A. suit alleging, respectively, mental anguish causing miscarriage, severe birth defects due to chromosomal alterations, and pain, mental anguish, and death due to genetic defects caused by radiation exposure.[166] Despite *Feres*, the United States District Court for the Eastern District of Pennsylvania denied the government's motion to dismiss these claims. Conceding that the plaintiff's injuries may have had their genesis incident to service,[167] the district court refused to apply *Feres* to

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161. *Id.*

162. 348 U.S. 110 (1954). *See generally supra* notes 40-46 and accompanying text.

163. 661 F.2d at 127.

164. The court of appeals reversed that part of the district court's order dismissing the wife's claim for a post-discharge failure by the government to warn, monitor, and treat her husband. The dispositive factor with regard to this claim, however, was not the status of the claimant, but the fact that the wife brought suit for a post-discharge tort as opposed to one arising incident to service. The significance of this distinction is discussed *infra* notes 184-223 and accompanying text.

165. 524 F. Supp. 277 (E.D. Pa. 1981).

166. *Id.* at 278-79.

167. The "genesis incident to service" criteria evolved from litigation initiated in 1979 concerning the chemical defoliant, Agent Orange. In *In re* Agent Orange, 506 F. Supp. 762 (E.D.N.Y. 1980), Vietnam veterans sought to recover for personal injuries caused by exposure to the defoliant, and they named as defendants the manufacturers of Agent Orange. Members of the veterans' families also sought to recover on various derivative claims, the children alleging that the chemical had caused birth defects and other genetic injuries, and the wives alleging that their husbands' exposure to the chemical had induced miscarriages. *Id.* at 769.

The defendant chemical companies served third-party complaints against the United States seeking indemnification or contribution in the event the companies were held liable to the plaintiffs. The United States District Court for the Eastern District of New York applied *Feres* and dismissed the third-party claims against the United States. *Id.* at 773-80.

Focusing on the children's claims of genetic and somatic injuries, the court concluded that the children had not suffered "direct injuries independent of [the injuries] of their parents."

"every action somehow involving an injured serviceman."[168]

The court in *Hinkie* rejected the bare "incident to service" test because the court considered the three factors enumerated by the Supreme Court in *Stencel Aero Engineering Corp. v. United States*[169] to control application of *Feres*.[170] The first factor in *Stencel*, the "distinctively federal" relationship between the government and its soldiers, carried little weight in *Hinkie* because the plaintiffs' relationship to the federal government was based solely on the veteran status of their husband or father.[171] Because compensation under the Veteran's Benefits Act is payable only to any veteran disabled in line of duty,[172] the court in *Hinkie* concluded that the second *Stencel* factor, the availability of military benefits, similarly did not require dismissal of the plaintiffs' claims.[173] Even if the injured father could recover under the V.B.A. for chromosomal damages, an issue the court characterized as "unclear,"[174] the wife would receive nothing for her own physical injuries or for her son's death.[175] Thus, because the V.B.A. benefits were, in a practical sense, unavailable to the plaintiffs, the second *Stencel* factor carried little weight. Finally, the effect of F T.C.A. suits on military discipline, the third *Stencel* factor, presented the

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Id. at 780-81. Rather, any chromosomal or genetic injuries to the children had their genesis in the exposure of their parents and thus were incident to the parent's service. *Id.* at 781. Because the children, in effect, were injured by a governmental action while their parents were in the armed force, they met the "incident to service" test of *Feres*, and the *Feres* bar applied.

Although the court dismissed third-party indemnification claims against the United States, the district court refused to dismiss the complaint against the defendant companies. On appeal, the United States Court of Appeals for the Second Circuit, conceding that the government had an obvious interest in the welfare of the parties to the litigation, reversed the order denying the companies' motion to dismiss for lack of subject matter jurisdiction. *In re* Agent Orange Product Liability Litigation, 635 F.2d 987 (2d Cir. 1980). *See generally Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U.L. REV. 601 (1980).

168. 524 F Supp. at 282.

169. 431 U.S. 666 (1977).

170. 524 F Supp. at 282.

171. *Id.* If the Hinkies were related to a civilian government employee, their F.T.C.A. suits would not be barred; the court found no reason to reach a different result in this case. *Id.*

172. 38 U.S.C. §§ 310, 331 (1976).

173. 524 F Supp. at 283.

174. *Id.*

175. *Id.* at 284.

court in *Hinkie* with a more difficult issue. The court conceded that such suits would involve second-guessing of military orders.[176] This fact, however, did not warrant dismissal of the instant suit under *Feres* or *Stencel,* because the nuclear testing program at issue had ended more than twenty years prior to the suit.[177] Furthermore, the court reasoned that the injuries "were not apparent at the time the military orders were given nor soon thereafter."[178]

Another case suggesting that the families of atomic veterans may be able to recover under the F T.C.A. despite *Feres* is *Laswell v. Brown.*[179] The wife and children of a deceased serviceman brought suit against the United States, the Secretary of Defense, and other government agencies alleging that, by exposing the serviceman to nuclear radiation, the defendants subjected the decedent and the plaintiffs to a high risk of disease and cellular damage. Because the decedent was on active military duty at the time he was exposed to radiation, the United States District Court for the Western District of Missouri held that *Feres* precluded the plaintiffs from recovering for any injuries personal to the decedent.[180] The court also dismissed the claims of the decedent's children for their abnormally high risk of disease and cellular damage caused by their father's irradiation. The claims were dismissed, however, not because the alleged genetic injuries had their genesis incident to service, but because the children alleged merely "the possibility of some future harm."[181] The court indicated that the children could bring an F.T.C.A. suit for injuries actually sustained; however, merely alleging a high risk of disease and cellular damage did not state a claim upon which relief could be granted. Thus, the claims of an atomic veteran's children in *Laswell* failed because of inadequate proof of actual harm to the children, not because of *Feres.*[182]

Despite the *Laswell* decision and the dicta in *Hinkie* suggesting that suits by wives and children of atomic veterans do not implicate any of the three policy considerations underlying the *Feres*

176. *Id.*
177. *Id.*
178. *Id.*
179. 524 F. Supp. 847 (W.D. Mo. 1981).
180. *Id.* at 849.
181. *Id.* at 850.
182. *Id.*

doctrine, the vast majority of military tort cases indicate that derivative claims disrupt military discipline, subvert the Veteran's Benefits Act, and interfere with the "distinctively federal" relationship between the government and its soldiers. *Monaco v. United States*[183] illustrates that courts recognize the ban on derivative suits even within the context of atomic veteran cases. Indeed, *Hinkie* and *Laswell* are unique in holding that *Feres* does not bar derivative claims by family members for injuries having their basis in an in-service tort. An atomic veteran or a member of his family can expect more success by alleging a separate post-discharge tort than by arguing that *Feres* simply does not apply.

A Separate Post-Discharge Tort: The Failure to Warn

Because the *Feres* doctrine presents an almost insurmountable obstacle to an F.T.C.A. recovery, an atomic veteran or members of his family injured by in-service exposure to radiation should abandon claims for in-service injuries and allege instead a separate post-discharge injury. By establishing a tort not occurring incident to service, an atomic veteran can avoid, rather than attempt to circumvent, the *Feres* doctrine.

The United States Supreme Court, in the 1954 case of *United States v. Brown,*[184] allowed a former serviceman to recover under the F T.C.A. for the negligence of Veterans' Administration physicians in performing surgery In explaining the nonapplicability of the *Feres* doctrine, the Court found that because the surgery occurred after the serviceman's discharge, the alleged negligence was not incident to service and *Feres* did not bar the suit.[185] Thus, *Brown* illustrates that the "incident to service" test does not encompass separate injuries inflicted by the government after a soldier's discharge. Recent cases cite *Brown* for the proposition that recovery for post-discharge injuries is not only consistent with *Feres,* but is compelled by *Brown.*[186]

Most servicemen claiming post-discharge torts have been suc-

183. 661 F.2d 125 (9th Cir. 1981).
184. 348 U.S. 110 (1954). *See supra* notes 40-46 and accompanying text.
185. 348 U.S. at 112.
186. Thornwell v. United States, 471 F Supp. 344, 349 (D.D.C. 1979).

cessful. In *Schwartz v. United States,*[187] a discharged serviceman recovered under the F.T.C.A. for government doctors' negligent failure to determine the nature of a substance in the plaintiff's sinuses. The substance, a radioactive dye, had been administered to the plaintiff while he was in the service.[188] Although the government doctor knew of the dangerous characteristics of the substance prior to administering it, *Feres* and the "incident to service" test precluded recovery for the initial use of the drug.[189] Plaintiff then based his claim on the government's failure to review the records of all former servicemen to whom the drug had been administered and to alert their physicians.[190] The United States District Court for the Eastern District of Pennsylvania concluded that the dispositive factor in *Schwartz* was that government doctors committed a separate tort after the plaintiff had been discharged.[191]

Servicemen whose intentional and constitutional tort theories failed also have been successful employing the post-discharge tort theory. In *Thornwell v. United States,*[192] the plaintiff had been an unwitting participant while in the service in an experiment testing the effectiveness of L.S.D. as an aid to interrogation. Only after his discharge did he learn of his exposure to the drug. As in *Schwartz, Feres* barred the plaintiff in *Thornwell* from recovering for the initial in-service administration of the drug.[193] The government's failure to provide Thornwell with any follow-up examination, however, supported an F.T.C.A. claim because the failure occurred after Thornwell's discharge.[194]

By pleading a separate post-discharge tort, the servicemen in *Brown, Schwartz, Thornwell,* and similar cases[195] avoided the "in-

187. 230 F Supp. 536 (E.D. Pa. 1964).

188. *Id.* at 537.

189. *Id.* at 539-40.

190. "The negligence here is in not having affirmatively sought out those who had been endangered [by the drug] after there was knowledge of the danger." *Id.* at 540.

191. *Id.*

192. 471 F Supp. 344 (D.D.C. 1979).

193. *Id.* at 347-48.

194. *Id.* at 349.

195. *See, e.g.,* Hungerford v. United States, 192 F Supp. 581 (N.D. Cal. 1961), *rev'd on other grounds,* 307 F.2d 99 (9th Cir. 1952) (recovery allowed for post-discharge aggravation of injuries due to failure to diagnose brain injury while plaintiff was in service); Nagy v. United States, 471 F Supp. 383 (D.D.C. 1979) (victim of Army L.S.D. experiments could have recovered for post-discharge injuries but for the fact that plaintiff voluntarily took

cident to service" hurdle of *Feres* and recovered under the F T.C.A. The post-discharge tort theory, however, is not universally accepted. Several courts characterize the post-discharge tort as a continuation of the in-service occurrence. Under this continuing tort theory, "a mere act of negligence which takes place while the plaintiff is on duty and which then remains uncorrected after discharge is not grounds for suit."[196]

The court in *Thornwell* attempted to explain the tension between the post-discharge tort and the continuing tort theories by recognizing three types of post-discharge tort cases. In the first type of case, the government performs two separate negligent acts — one before discharge and one after discharge. In this situation, governmental liability extends only to the second act.[197] In the second type of case, the effect of the government's in-service act "lingers" after discharge. This situation is factually similar to *Feres* and therefore is barred.[198] The third type of case involves an intentional tort by the government while the plaintiff is on military duty, followed by a negligent failure to protect the soldier from the consequences of the tort after he is discharged. The government's failure to protect the ex-serviceman in this case is actionable.[199] Only in the first and third cases, in which the government commits a separate and distinct tortious act after a serviceman's discharge, may a serviceman recover.

Wary of the "possibility that artful pleading may be employed to elevate one continuing act of negligence into separate wrongs,"[200] courts carefully scrutinize evidence supporting a separate post-discharge tort. In *Schnurman v. United States*,[201] for example, a veteran brought an F.T.C.A. suit for in-service exposure to mustard gas during a 1949 Navy experiment. The United States District Court for the Eastern District of Virginia dismissed the plaintiff's claims, partially because the evidence presented at trial did not

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drug 50 to 100 times after discharge).

196. *See, e.g.*, Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).

197. 471 F Supp. at 350.

198. *Id.* at 352.

199. *Id.*

200. *Id.*

201. 490 F Supp. 429 (E.D. Va. 1980).

substantiate the claims of a post-discharge failure to warn.[202] Plaintiff presented no testimony that post-discharge negligence by the government aggravated or multiplied his injuries, nor did he show that follow-up treatment could have prevented any long-term effects of exposure to the mustard gas.[203] *Schnurman* illustrates that successful use of the post-discharge tort theory requires both an allegation of an after-service injury and convincing evidence that the injury was separate and distinct from an underlying in-service tort.

Atomic veterans advancing the post-discharge tort theory generally plead that the government failed to warn the servicemen of the hazardous effects of radiation. The failure to warn theory has been employed successfully by the victims of in-service nuclear testing, although the exact source of a duty to warn, monitor, and treat an injury has not been articulated by the courts.[204] In *Everett*

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202. *Id.* at 436-37. The applicable statute of limitations also barred the claim.

203. *Id.* at 437.

204. In Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979), the plaintiff sought damages from the United States for injuries he sustained as a result of his participation in an Army L.S.D. experiment. The plaintiff alleged both pre-discharge and post-discharge torts, including the government's failure "to exercise their duty of care by neglecting to rescue him from the position of danger which [the government] had created." 471 F. Supp. at 351. Addressing the ill-defined parameters of this alleged duty, the district court noted that "it is not clear whether [the plaintiff] is relying on a general duty of care or a duty arising out of official regulations or public promises." *Id.* at 357 n.7.

The "general duty of care" referred to in *Thornwell* is the most viable source of a governmental duty to warn veterans who participated in nuclear tests of the possible effects of radiation exposure. An accepted principle of tort law holds that "if [an] actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." RESTATEMENT (SECOND) OF TORTS § 321 (1966).

Based on the general tort theory, the United States government could be held to a duty to warn atomic veterans of the consequences of their irradiation. One case indicating that the government is held to this standard is Fountain v. United States, 533 F. Supp. 698 (D. Ark. 1981). Addressing the failure to warn theory, the court in *Fountain* explained that "[t]he law never imposes a duty to warn, instruct, or disclose unless there is some other nexus between the parties." 533 F Supp. at 702. The court conceded that the government, having subjected the plaintiff to a danger, "arguably became under a duty to take remedial steps to minimize [the plaintiff's] risk." *Id.* The court found, however, that any harm to the plaintiff caused by the government's failure to warn "arose directly and actually from his exposure to radioactive fallout" while in the service. *Id.* Because the failure to warn was a continuation of the in-service injury covered by the *Feres* doctrine, the failure to warn claims likewise were barred by *Feres*.

v. United States,[205] the atomic veteran alleged that the United States, "acting by and through its servants and employees conceal[ed], minimiz[ed] and fail[ed] to warn of or disclose knowledge of the causal relation between [the serviceman's] exposure to radioactivity and subsequent contracting . of cancer."[206] The United States District Court for the Southern District of Ohio dismissed the veteran's F T.C.A. claim based on intentional and constitutional torts, but refused to dismiss the F T.C.A. claim for post-discharge failure to warn.[207] The court concluded that the government's failure to warn was not a mere continuation of an in-service act, because the initial exposure to radiation was willful while the subsequent failure to warn was negligent. The government's post-service negligence amounted to a "distinctly separate pattern of conduct," and thus was actionable despite *Feres*.[208]

The failure to warn theory received less favorable treatment in *Broudy v. United States*.[209] In *Broudy*, the wife of a deceased atomic veteran brought an F T.C.A. suit for both the in-service irradiation of her husband and the government's subsequent failure to warn, monitor, and treat her husband after his discharge. The United States Court of Appeals for the Ninth Circuit affirmed dismissal of the in-service exposure claim because of "the clear applicability of the *Feres* doctrine."[210] Addressing the failure to warn claim, the court acknowledged that a claim is cognizable under the F T.C.A. if the plaintiff can allege and prove an independent, post-discharge, tortious act by the government.[211] Because the appellant's allegations did not indicate clearly any post-discharge negligence, the appellate court vacated the district court's dismissal and remanded the case to allow appellant to develop her failure to warn claim. In remanding the case, the court indicated that the government's alleged failure to warn might constitute an independent tort only if the government learned of the danger after

205. 492 F. Supp. 318 (S.D. Ohio 1980).
206. *Id.* at 325 n.5.
207. *Id.* at 325.
208. *Id.* at 326.
209. 661 F.2d 125 (9th Cir. 1981).
210. *Id.* at 127.
211. *Id.* at 128.

Broudy left the service.[212]

By suggesting that a post-discharge failure to warn is actionable only if the government acquired knowledge of the danger of nuclear radiation after the serviceman's discharge, the court in *Broudy* appears to characterize such failure as a continuing tort for which recovery is precluded if the duty to warn arose during the victim's military service. In other words, *Broudy* indicates that if the government had a duty to warn a serviceman prior to his discharge, the failure to warn occurs but once;[213] because the initial failure to warn occurs incident to service, *Feres* prevents an F T.C.A. recovery for the government's breach of its duty to warn.

Other courts addressing failure to warn claims in the context of suits by atomic veterans have agreed with the court of appeals decision in *Broudy*.[214] In *Kelly v. United States*,[215] the United States District Court for the Eastern District of Pennsylvania dismissed an atomic veteran's failure to warn claim, finding that the distinction between pre-discharge and post-discharge failure to warn was artificial.[216] Unpersuaded that the plaintiff's complaint alleged post-discharge conduct factually distinct from the alleged tortious conduct occurring while the plaintiff was still in the service, the court in *Kelly* found no essential difference between the government's initial failure to warn and its failure to warn the plaintiff thereafter.[217] The court concluded that plaintiff's claim of a post-discharge tort was "in reality but a skillful reformulation of a com-

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212. *Id.*

213. *Id.* at 128-29.

214. In Henning v. United States, 446 F.2d 774, 778 (3d Cir. 1971), the plaintiff alleged that government doctors failed to warn him, both before and after his discharge, of his tubercular condition. The court rejected plaintiff's claim based on a post-discharge failure to warn, stating that any resulting injuries were merely continuations of the previous tort. Similarly, the atomic veteran in Lombard v. United States, 530 F Supp. 918 (D.D.C. 1981) failed to recover under the post-discharge tort theory. By exposing Lombard to nuclear radiation and subsequently failing to warn him of the dangers of such exposure, the government committed only one continuing act of negligence. *Id.* at 920. The continuing tort theory produced the same result in Fountain v. United States, 533 F. Supp. 698 (W.D. Ark. 1981). Focusing on the "nexus between the act of exposing [the plaintiff] to radioactive fallout and the government's failure to take subsequent remedial measures," the court in *Fountain* held that *Feres* barred "the tortious acts and omissions of the government occurring after [the plaintiff's] discharge." 533 F. Supp. at 702.

215. 512 F Supp. 356 (E.D. Pa. 1981).

216. *Id.* at 361-62.

217. *Id.* at 360.

plaint for in-service negligence"[218] and barred by *Feres*.

The United States District Court for the Western District of Missouri in *Laswell v. Brown*[219] also characterized an alleged post-discharge failure to warn as a mere continuation of an in-service tort. The plaintiffs in *Laswell*, the widow and children of an atomic veteran, in part based their F T.C.A. action on the government's intentional and negligent failure to warn the veteran and his offspring of the high risk of disease and cellular damage associated with radiation exposure. The complaint also included an allegation that the government failed to provide follow-up medical treatment.[220] Acknowledging the split of authority between courts accepting the post-discharge failure to warn as a separate tort and those courts refusing to characterize such failure as a distinct act,[221] the court in *Laswell* followed the latter approach. Acknowledging the breadth of *Feres*, the court reasoned that the doctrine would be restricted severely if a serviceman was prevented from recovering for his in-service irradiation while his survivors recovered for failure to monitor and treat injuries resulting from the same tort.[222]

Although post-discharge torts clearly are actionable under *United States v. Brown*,[223] most courts addressing post-discharge failure to warn claims do not concede the presence of two separate torts. Additionally, because no clear criteria exists for establishing the "separateness" of post-discharge failure to warn, an atomic veteran advancing a failure to warn claim cannot know what he is expected to prove. Consequently, the failure to warn theory, like the alternative theories previously discussed, provides little hope for the atomic veteran.

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218. *Id.* at 361.

219. 524 F Supp. 847 (W.D. Mo. 1981).

220. *Id.* at 848.

221. *Id.* at 849-50. *Compare* Everett v. United States, 492 F Supp. 318 (S.D. Ohio 1980) *and* Thornwell v. United States, 471 F Supp. 344 (D.D.C. 1979) (accepting the post-discharge failure to warn theory) *with* Broudy v. United States, 661 F.2d 125 (9th Cir. 1981) *and* Kelly v. United States, 512 F Supp. 356 (E.D. Pa. 1981) (refusing to characterize failure to warn as a separate post-discharge tort).

222. 524 F Supp. at 850.

223. 348 U.S. 110 (1954). *See supra* notes 40-46 and accompanying text.

CONCLUSION

The *Feres* doctrine may be an unwarranted judicially created exception to the F T.C.A.'s broad waiver of sovereign immunity; nevertheless, the doctrine remains an obstacle to suits under the Act by servicemen for in-service injuries. Since announcement of the doctrine more than thirty years ago, neither the Supreme Court nor Congress has initiated significant change despite extensive criticism of the doctrine. Because of *Feres,* military personnel alleging injuries caused by in-service exposure to nuclear radiation have been unsuccessful in recovering under the F T.C.A. or directly under the Constitution. If these veterans and their families are to be compensated, "it is for Congress, not the courts, to fashion the remedy. The Court will not carve out an exception to sovereign immunity in a situation where the rationale underlying *Feres* does not clearly mandate such an extraordinary step."[224] Unless Congress acts, atomic veterans can expect little success in attempts to recover for injuries due to in-service exposure to nuclear radiation.

J. THOMAS MORINA

224. Lombard v. United States, 530 F Supp. 918, 922 (D.D.C. 1981) (suit by atomic veteran).