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On February 29, 1988, the U.S. Supreme Court denied a petition for a writ of certiorari in the case of *Konizeski v. Livermore Labs*,[1] thus ending the litigation battle between "atomic victims" and the federal government over damages allegedly caused by radioactive fallout from nuclear weapons testing in Nevada. Coming on the heels of *Bulloch v. United States*[2] and *Allen v. United States*,[3] both of which went against the atomic victims, the Court's decision in *Konizeski* dashed any remaining hopes of victim remedy by upholding the 1984 Warner Amendment,[4] which named the federal government and not its private contractors as the sole defendant in any liability case involving nuclear weapons. As one of the lawyers commented upon hearing the decision, "[m]aybe Congress will come through for [the claimants] now, but this is the end of the line as far as legal action goes."[5] In May 1988 Congress did just that for the affected veterans, but the other "atomic litigants" have thus far been left out in the cold.

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1. 108 S. Ct. 1076 (1988), *denying cert. to*, *In re* Consolidated United States Atmospheric Testing Litigation, 616 F. Supp. 759 (N.D. Cal. 1985), *aff'd*, 820 F.2d 982 (9th Cir. 1987).

2. 474 U.S. 1086 (1986), *denying cert. to*, 145 F. Supp. 824 (D. Utah 1956), *vacated*, 95 F.R.D. 123 (D. Utah 1982), *rev'd*, 721 F.2d 713 (10th Cir. 1983), *rev'd on rehearing*, 763 F.2d 1115 (10th Cir. 1985).

3. 108 S. Ct. 694 (1988), *denying cert. to*, 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987).

4. 42 USC § 2212 (Supp. IV 1986).

5. Las Vegas Rev. J., Jan. 12, 1988, at 1A, col. 1.

I. HISTORICAL BACKGROUND

Prompted by the Soviet detonation of an atomic bomb in September 1949 and U.S. involvement in the Korean conflict, President Truman, on December 18, 1950, approved the opening of a continental atomic weapons testing center at the Nevada-Tonopah Bombing and Gunnery Range, situated in the desert some sixty-five miles northwest of Las Vegas. Six weeks later, on January 27, 1951, the first test was conducted. Over the next seven years, the government conducted 121 atmospheric tests of atomic bombs at the site. The bombs were both single and multi-shot and were up to six times more powerful than those dropped on Japan. There followed a short-lived voluntary moratorium on nuclear testing, agreed to by the United States and the U.S.S.R. between October 1958 and August 1961. At the end of that period the Soviets broke the moratorium, and atmospheric testing resumed. Two years later, when the Limited Test Ban Treaty went into effect on August 5, 1963, the testing moved underground, where some 650 announced shots have been fired at the Nevada Test Site to date.[6]

It has been established that during the period of atmospheric testing in Nevada thousands of American citizens were unwittingly exposed to various dosages of low-level radiation.[7] Soldiers stationed at Camp Desert Rock participated in maneuvers at ground zero to develop tactical skills for nuclear combat and to build up appropriate psychological attitudes towards the bomb.[8] Civilian test site workers were required to enter "hot" areas and retrieve radioactive equipment.[9] People living downwind of the test site, especially in Southern Utah, were frequently sprinkled with radioactive dust.[10]

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6. A. TITUS, BOMBS IN THE BACKYARD: ATOMIC TESTING AND AMERICAN POLITICS 1-85 (1986).

7. *See generally* H. ROSENBERG, ATOMIC SOLDIERS: AMERICAN VICTIMS OF NUCLEAR EXPERIMENTS (1980); A. TITUS, *supra* note 6.

8. For detailed accounts of military involvement at the test site see HUMAN RESOURCES RESEARCH OFFICE, DESERT ROCK I, A PSYCHOLOGICAL STUDY OF TROOP REACTION TO AN ATOMIC EXPLOSION (1951); H. ROSENBERG, *supra* note 7; T. SAFFER & O. KELLY, COUNTDOWN ZERO (1982); M. UHL & T. ENSIGN, G.I. GUINEA PIGS (1980).

9. REYNOLDS ELEC. AND ENG'G CO., RADIOLOGICAL SAFETY DIV., BASIC RADIOLOGICAL SAFETY TRAINING MANUAL (1979); H. WASSERMAN & N. SOLOMON, KILLING OUR OWN 118-21 (1982); P. DUCKWORTH, BANEBERRY: A NUCLEAR DISASTER (1978).

10. *Citizens' Hearings for Radiation Victims Before the National Committee for Radiation Victims*, Wash., D.C., April 11, 1980 (available at 317 Pennsylvania Avenue, S.E., Wash., D.C. 20003); H. BALL, JUSTICE DOWNWIND: AMERICA'S NUCLEAR TESTING PROGRAM IN THE FIFTIES (1986); J. FULLER, THE DAY WE BOMBED UTAH: AMERICA'S MOST

Throughout the entire time, however, the Atomic Energy Commission (AEC) maintained the public position that the fallout from the tests was not dangerous.[11] The administration hushed up reports to the contrary; those who persisted in complaining were accused of ignorance, hysteria, or even involvement in communist conspiracies.[12] Reinforced by the Soviet Sputnik launch, such Cold War scare tactics made both the Congress and the public reluctant to oppose the testing program.

By 1976, however, things had changed considerably. Disillusioned by Vietnam and Watergate, people were no longer as naive and trusting of government activities as they had been during the decade of the fifties.[13] Consequently, the political climate was receptive to the stories of two soldiers, Paul Cooper and Donald Coe, who had participated in the "Smoky" blast in Nevada on August 31, 1957, and who had subsequently contracted myelogenous leukemia, allegedly as a result of exposure to radioactive fallout.[14]

Many people, upon learning that they suffered from ailments possibly caused by radiation from weapons testing, turned to the courts for redress, suing the government under the Federal Tort Claims Act (FTCA).[15] Unfortunately for these litigants, certain limitations and exclusions were included in the FTCA that work in favor of the sovereign state and against the claimant, especially in low-level radiation cases.

II. THE FEDERAL TORT CLAIMS ACT

The FTCA provides that federal district courts, sitting without a jury and subject to the Federal Rules of Civil Proce-

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LETHAL SECRET (1984).

11. UNITED STATES ATOMIC ENERGY COMMISSION, ATOMIC TESTS IN NEVADA (1957); *see* A. TITUS, *supra* note 6, at 70-85; UNITED STATES ATOMIC ENERGY COMMISSION PRESS RELEASES (National Archives, Record Group 326); R. PFAU, NO SACRIFICE TOO GREAT: THE LIFE OF LEWIS STRAUSS (1984).

12. *See* P. GOODCHILD, J. ROBERT OPPENHEIMER: SHATTERER OF WORLDS (1981); P. STERN, THE OPPENHEIMER CASE: SECURITY ON TRIAL (1969).

13. *See, e.g.*, T. CRONIN, THE STATE OF THE PRESIDENCY (2d ed. 1980); D. HALBERSTAM, THE BEST AND THE BRIGHTEST (1972); T. WHITE, BREACH OF FAITH (1975).

14. Martin, *Paul Cooper was the Army's Nuclear Guinea Pig*, PEOPLE, Aug. 1, 1977 at 25; H. WASSERMAN & N. SOLOMAN, *supra* note 9, at 92-98; T. SAFFER & O. KELLY, *supra* note 8, at 149-79; M. UHL & T. ENSIGN, *supra* note 8, at 89-94.

15. Federal Tort Claims Act, Pub. L. No. 79-601, § 401, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C., pricipally located at 28 U.S.C. §§ 2671-80 (1982)) [hereinafter FTCA]. For a legislative history of the FTCA, see S. REP. No. 1400, 79th Cong., 2d Sess. (1946).

dure, will have exclusive jurisdiction over claims against the United States government for injuries negligently caused by its employees acting within the scope of their employment.[16] Congress included, however, twelve specific exceptions to this general waiver of immunity in order to protect the government from "undue judicial interference."[17] Of special significance to radiation claimants is the "discretionary function exclusion," which relates to claims based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the government, whether or not the discretion be abused."[18] In atomic testing cases, government lawyers have invariably begun their defense by asking for a dismissal based on this exclusion, arguing that nuclear weapons testing was a program authorized at the highest level for the public benefit. Furthermore, the government has contended that all of the important testing decisions, from preparation to final detonation, were made at that level; therefore, any actions relating to the program fall within the scope of the discretionary function exclusion.[19]

Establishing liability is only the first of several hurdles that atomic litigants have faced under the FTCA. A second is the restrictive statute of limitations which states: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ."[20] Atomic plaintiffs did not suspect the cause of their injuries until relevant information became available during the late 1970s. Furthermore, ailments

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16. *See* L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES (1964); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 25-43 (1946); Wellig, *The Breadth of the Tort Perspective: Judicial Review for Tortious Conduct of Government Agencies and Agents*, 45 MO. L. REV. 621 (1980); Zellman, *Changing Meanings of Discretion: Evolution in the FTCA*, 76 MIL. L. REV. 1 (1977); Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534 (1947).

17. FTCA, § 421 (codified at 28 U.S.C. § 2680 (1982)).

18. FTCA, § 421(a) (codified at 28 U.S.C. § 2680(a) (1982)).

19. The courts' interpretations of this exclusion have varied over the years. *See* Doe v. McMillan, 412 U.S. 306 (1973); Indian Towing Co. v. United States, 350 U.S. 61 (1955); Dalehite v. United States, 346 U.S. 15 (1953); United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); Blaber v. United States, 332 F.2d. 629 (2d Cir. 1964); Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957); Kuhne v. United States, 267 F. Supp. 649 (E.D. Tenn. 1967).

20. 28 U.S.C. § 2401(b) (1982); *see also* Note, *The Application of the Statute of Limitations to Actions for Tortious Radiation Exposure:* Garrett v. Raytheon Co., 31 ALA. L. REV. 509 (1980); Note, Wollman v. Gross*: Statute of Limitations and the FTCA*, 15 CREIGHTON L. REV. 1073 (1981).

caused by exposure to low-level radiation can have latency periods of up to thirty years.[21] Therefore, a critical question is when the statute-of-limitations clock should start.

The third and most serious barrier under the FTCA is establishing causation—showing that radiation from the tests more likely than not caused the victims' illnesses. Litigants have been fairly successful in demonstrating negligence on the part of the government, but proving that damages actually resulted from that negligence has been extremely difficult. It is impossible to establish an absolute causal connection between radiation exposure and a case of radiogenic cancer because the clinical features of radiogenic cancer are indistinguishable from the features of other cancers.[22]

As a result of the difficulty of directly proving causation, claimants are forced to rely on epidemiological evidence to provide the missing causal link. Epidemiological evidence uses statistical comparisons to prove causation: because the rate of cancer occuring among victims exposed to the radiation of atmospheric testing is greater than that which occurs otherwise, it follows that the radiation is the cause of the victims' ailments.

There is extensive disagreement within both the scientific and legal communities over the validity of epidemiological approaches. Some argue that such evidence merely establishes an association in time and place and will never give 100% proof.[23] Others point out that risk estimates for low-dose levels of radiation depend heavily on extrapolation of observable cancer rates corresponding to higher dose levels.[24] Faced with such uncer-

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21. *The Forgotten Guinea Pigs: Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (1980).

22. *See* Delgado, *Beyond* Sindell*: Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 CALIF. L. REV. 881 (1982); Estep & Forgotson, *Legal Liability for Genetic Injuries from Radiation*, 24 LA. L. REV. 1 (1963); Keyes & Howarth, *Approaches to Liability for Remote Causes: The Low Level Radiation Example*, 56 IOWA L. REV. 531 (1971); Maleson, *Historical Roots of the Legal System's Response to Nuclear Power*, 55 S. CAL. L. REV. 597 (1982); O'Toole, *Radiation, Causation, and Compensation*, 54 GEO. L.J. 751 (1966); Stason, *Tort Liability for Radiation Injuries*, 12 VAND. L. REV. 93 (1958); Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 SW. L.J. 414 (1974).

23. *Hearings on Low Level Radiation Effects on Health Before the House Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 363 (1979) (testimony of Dr. Chase Peterson).

24. *See* S. EPSTEIN, THE POLITICS OF CANCER 38-53 (1976); J. GOFMAN, RADIATION AND HUMAN HEALTH 162-233 (1981); A. LILIENFELD, FOUNDATIONS OF EPIDEMIOLOGY (1976); B. MACMAHON & T. PUGH, EPIDEMIOLOGY: PRINCIPLES AND METHODS (1970); A. STEWART, AN

tainties, the courts are often forced to decide cases by weighing the prospective harm to human health against the social and economic value of the program in question. Such a difficult decision is only compounded by the fact that the policy in question is one which greatly affects national security.

The difficulty of gaining compensation for illnesses related to atmospheric tests has been greater for soldiers than for either civilian workers or downwinders. The reason for this increased difficulty lies with the *Feres* doctrine, which came from a Supreme Court ruling in 1950 that interpreted the FTCA exclusion for damages arising out of combat as covering "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[25] Scholars and politicians alike, including Democratic Representative Emanuel Celler, of New York, who drafted the FTCA, have argued that this strict interpretation was not the intention of Congress.[26] Instead, the law was meant to exclude claims by soldiers only for injuries arising out of wartime combat. Nonetheless, the Court established and has continued to uphold this doctrine based on three main rationales. First, the relationship between soldiers and the government is distinctly federal in character and should not be hampered by the application of varying state tort laws.[27] Second, judicial interference in such matters would undermine critical military discipline.[28] Finally, there already exists a comprehensive system of benefits and compensation available to servicemen through the Veterans Administration.[29]

EPIDEMIOLOGIST TAKES A LOOK AT RADIATION RISKS 1-10 (1973); Land, *The Hazards of Fallout or of Epidemiological Research*, 300 NEW ENG. J. MED. 431-32 (1979).

25. Feres v. United States, 340 U.S. 135, 146 (1950).

26. A. TITUS, *supra* note 6, at 127.

27. Note, *Military Personnel and the Federal Tort Claims Act*, 58 YALE L.J. 615, 615-27 (1949).

28. *Id.*

29. *See* Kalnen, *The Legal Quandary*, 39 BULL. OF THE ATOMIC SCIENTIST 27 (1983); Comment, *When a Veteran "Wants" Uncle Sam: Theories of Recovery for Servicemembers Exposed to Hazardous Substances*, 31 AM. U.L. REV. 1095 (1982); Note, *Effects of the* Feres *Doctrine on Tort Actions Against the U.S. by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241 (1982); Note, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933 (1981); Note, *From* Feres *to* Stencel*: Should Military Personnel Have Access to FTCA Recovery?* 77 MICH. L. REV. 1099 (1979); Comment, *Judicial Recovery for the PostService Tort: A Veteran's Last Battle*, 14 PAC. L.J. 333 (1983); Note, *In Support of the* Feres *Doctrine and a Better Definition of "Incident to Service"*, 56 ST. JOHN'S L. REV. 485 (1982); Note, *Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U.L. REV. 527 (1980); Note, *Military Personnel and the Federal Tort Claims Act*, 58 YALE

III. Related Cases

Some of the more noteworthy cases in the unfolding drama leading up to the *Konizeski* decision include the Bulloch sheep case,[30] the Baneberry test site workers case,[31] a class action suit filed by former Secretary of Interior, Stewart Udall, representing 1200 downwinders,[32] and several cases involving atomic soldiers.[33] In every case, the claimants felt that the government should be held accountable for its actions and made to pay for its mistakes.

In the spring of 1953, the AEC conducted an eleven-shot series code-named "Upshot-Knothole" at the Nevada Test Site. The series was plagued by three especially dirty shots that sprinkled heavy fallout on Southern Utah—"Nancy," fired on March 24; "Simon," fired on April 25; and "Harry," fired on May 19. The human damage caused by this exposure did not become evident until years later, but animals were affected immediately. Of 11,710 sheep grazing in the contaminated zone 40 miles north to 160 miles east of the test site, 1,420 lambing ewes (12.1%) and 2,970 new lambs (25.4%) died within weeks of the three shots.[34]

The Bullochs, a family of sheepranchers in Iron County, Utah, brought action against the federal government for injuries to their livestock. U.S. District Court Judge Sherman Christensen ruled that the government had indeed been negligent and chastised the AEC for not taking greater precautions; he nonetheless ruled against the sheepherders because of their failure to prove that the sheep deaths had actually been caused by radioactive fallout.[35]

L.J. 615 (1949).

30. Bulloch v. United States, 145 F. Supp. 824 (D. Utah 1956), *vacated*, 95 F.R.D. 123 (D. Utah 1982), *rev'd* 721 F.2d 713 (10th Cir. 1983), *rev'd on rehearing*, 763 F.2d 1115 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986).

31. Roberts v. United States, Civil LV 1766 RDF (D. Nev. 1984) (Foley, J., in Findings of Fact and Conclusions of Law).

32. Allen v. United States, 816 F.2d 1417 (10th Cir. 1987), *cert. denied* 108 S. Ct. 694 (1988).

33. *See, e.g.*, Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982); Broudy v. United States, 661 F.2d 125 (9th Cir. 1981); Lombard v. United States, 530 F. Supp. 918 (D.D.C. 1981); Kelley v. United States, 512 F. Supp. 356 (E.D. Pa. 1981); Everette v. United States, 492 F. Supp. 318 (S.D. Ohio 1980).

34. *The Forgotten Guinea Pigs: Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (1980).

35. Bulloch v. United States, 145 F. Supp. 824 (D. Utah 1956), *vacated*, 95 F.R.D.

Some thirty years later, after evidence had been uncovered during congressional hearings about AEC activities during this period, the plaintiffs asked the district court to set aside the earlier judgment. Still on the bench, Christensen heard testimony in May 1982 on the case that led him to conclude that the government had used "improper means" that were "unacceptable as part of the judicial process" and that "clearly and convincingly demonstrate a species of fraud upon the court for which a remedy must be granted even at this late date."[36] He vacated the 1956 judgment, ordered the government to pay court costs of about $120,000, and scheduled a new trial.[37]

The U.S. Court of Appeals for the Tenth Circuit, in Denver, heard the case in the fall of 1983 and struck down Christensen's ruling. The appellate court stated: "We have considered this carefully . . . and must conclude that nothing was demonstrated which would constitute fraud."[38] They further accused Christensen of "abuse of discretion" and suggested that the ranchers' defeat in 1956 was perhaps more attributable to their own attorney than to any government misconduct.[39] According to the court, reports that may have assisted their case were available at the time of the original trial. It was also noted that the only thing that had changed since 1956 was the growing public awareness of the dangers of radiation and in the court's determination, that was no reason to overturn the previous decision.[40]

Nonetheless, six months later in April 1984, the Tenth Circuit granted a reargument *en banc*. Almost a year passed before the arguments were again presented on March 14, 1985. Unfortunately for the ranchers, on May 22, 1985, the court, by a vote of five to two, once again ruled in favor of the government. The plaintiffs filed a petition for certiorari before the Supreme Court in March 1986, but the Court refused to hear the case, thereby leaving intact the Tenth Circuit's ruling.[41]

A second major atomic testing case to be heard by the courts involved test site workers. On December 18, 1970, the

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123 (D. Utah 1982), *rev'd*, 721 F.2d 713 (10th Cir. 1983), *rev'd on rehearing*, 763 F.2d 1115 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986).

36. *Bulloch*, 95 F.R.D. at 143.

37. Las Vegas Rev. J., August 4, 1983, at 4B, col. 1.

38. *Bulloch*, 721 F.2d at 719.

39. *Id.*

40. *Id.* at 717-18.

41. *Bulloch*, 474 U.S. at 1086.

"Baneberry" underground shot vented unexpectedly and sent a cloud of radioactive particles into the air. The wind carried the cloud west over Area 12 of the test site where 900 Nevada Test Site workers were stationed. The employees were evacuated, and Area 12 was closed down until after the New Year's holiday. In the years following the accident, two workers—Harley Roberts, a security guard, and William Nunamaker, a shop foreman for Reynolds Electrical and Engineering Company, a private contractor at the test site—developed leukemia that they alleged had been caused by their exposure to radiation from the venting. They filed suit against the federal government on February 2, 1972, seeking damages in excess of $8 million. Both men died in 1974, but their widows pursued the suits.[42]

After years of postponement, the trial began in January 1979. The plaintiffs relied heavily on epidemiological evidence and expert testimony from the scientific community to establish a link between exposure to radiation from the venting accident and subsequent death from leukemia. U.S. District Court Judge Roger Foley ruled on June 8, 1982, that the government had indeed been negligent on two counts—in the manner in which persons were evacuated from Area 12 after the accidental venting occurred, and in the attempts to decontaminate persons who had been exposed to radiation.[43]

The plaintiffs' victory was short-lived, however. Seven months later on January 20, 1983, Judge Foley ruled against granting compensation to the widows.[44] Referring to their epidemiological evidence as "experimental, speculative, and lacking in credible medical support," he stated:

> The burden of proof relative to dose and causation is upon the plaintiffs to establish by a preponderance of evidence that the dose of radiation received did, to a reasonable degree of medical certainty, cause the leukemias from which Roberts and Nunamaker died. Plaintiffs have not met this burden of proof.[45]

On May 4, 1984, the claimants filed a motion to either reopen the case or hold a new trial to allow them to present additional

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42. P. DUCKWORTH, *supra* note 9.

43. Roberts v. United States, Civil LV 1766 RDF at 3 (D. Nev. 1984) (Foley, J., in Findings of Fact and Conclusions of Law).

44. *Id.* at 114.

45. *Id.*

evidence about radiation doses that became available as a result of *Allen v. United States*.[46] Judge Foley refused to modify his earlier decision, again stating that the dosage levels were too low to have resulted in leukemia.[47]

Notwithstanding Judge Foley's refusal to modify his decision, *Allen v. United States*, filed in Salt Lake City by some 1,200 downwinders in August 1979, received great public attention.[48] The trial began on September 20, 1982, and lasted nine weeks, producing 6,000 pages of testimony and twenty crates of evidence. District Court Judge Bruce Jenkins deliberated for another seventeen months before announcing his decision on May 10, 1984.[49]

Ruling on twenty-four bellwether cases of cancer allegedly caused by exposure to radioactive fallout that descended on citizens in Southern Utah, Arizona, and Nevada regularly throughout the 1950s, Judge Jenkins decided in favor of ten of the litigants. In a landmark decision, he held the government liable for eight cases of leukemia, one of breast cancer, and one of thyroid cancer, and he awarded $2.66 million to be distributed to the claimants in sums depending upon their particular losses.[50] As to the others, Jenkins concluded that "as a matter of law" the evidence was "insufficient in each instance to demonstrate with the requisite weight that the defendant's negligence proximately caused the condition of which each complain[ed]."[51]

In response to Jenkins's ruling, the government appealed the case. On April 20, 1987, the Tenth Circuit reversed the ruling without even hearing the evidence. The decision to reverse was made not on the basis of lack of proof but on the court's judgment that the government could not be held liable under the FTCA because the atomic testing program's public informa-

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46. 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988); *see infra* text accompanying notes 48-53.

47. Roberts v. United States, Civil LV 1766 RDF (D. Nev. 1984) (Foley, J., in Findings of Fact and Conclusions of Law).

48. 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988).

49. H. Ball, The Nevada Test Site Nuclear Testing Litigation: The Role of the Federal Courts in Negligence Suits Brought by "Downwinders": Civilians Under the Federal Tort Claims Act (March 24, 1983) (paper presented at the Western Political Science Association meeting at Seattle).

50. *Allen*, 588 F. Supp. at 443-44.

51. *Id.* at 448.

tion plans amounted to a discretionary function. In a concurring opinion, Judge Monroe McKay wrote:

> While we have great sympathy for the individual cancer victims who have borne alone the costs of the AEC's choices, their plight is a matter for Congress. Until Congress amends the discretionary function exception to the FTCA or passes a specific relief bill for individual victims, we have no choice but to leave them uncompensated.[52]

The plaintiffs then appealed to the Supreme Court, which, in refusing to hear the case on January 11, 1988, upheld the circuit court's ruling.[53]

Several cases involving atomic soldiers have also been decided in recent years. Because of the *Feres* doctrine,[54] servicemen and veterans have been forced to develop new legal theories by which to overcome the problem of military immunity. One strategy followed by atomic veterans has been to circumvent the FTCA and bring a cause of action against individual officers and Defense Department officials alleging that these individuals denied soldiers their constitutional rights by exposing them to dangerous substances without notice. Such a claim was made recently in *Jaffee v. United States*,[55] where the plaintiff charged that the order to stand in an open area near the explosion of an atomic bomb without any protection against radiation exposure violated his rights guaranteed by the first, fourth, eighth, and ninth amendments.

Although Jaffee did not bring his claim under the FTCA, the Court of Appeals for the Third Circuit made it clear that servicemen making constitutional claims against individuals will still face the roadblocks created by *Feres*. The majority's analysis was based on three earlier Supreme Court cases in which there had been a private claim against individual government officials for a violation of constitutional rights: *Carlson v. Green*,[56] *Davis v. Passman*,[57] and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[58]

An examination of those cases revealed that such causes of

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52. *Allen*, 816 F.2d at 1427 (McKay, J., concurring).
53. Allen v. United States, 108 S. Ct. 694 (1988).
54. *See supra* notes 25-29 and accompanying text.
55. 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).
56. 446 U.S. 14 (1980).
57. 442 U.S. 228 (1979).
58. 403 U.S. 388 (1971).

action were permissible only when there was no "alternative remedy . . . explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective"[59] and where there were "no special factors counseling hesitation in the absence of affirmative action by Congress."[60] The Third Circuit found the existence of both types of factors in the *Jaffee* case. As to the former, the court observed that the *Feres* principles created a unique relationship between servicemen and the government.[61] Moreover, the relief provided by the Veterans' Benefits Act[62] was an alternative remedy to litigation even though that had not been explicit in congressional action.[63]

As to the latter factor, the Third Circuit concluded that the *Feres* doctrine and the Supreme Court's stance of deference to Congress and the executive in military matters counseled hesitation and judicial restraint in such affairs. That is, to allow suits such as that in *Jaffee*, even though not based on the FTCA, would result in the type of interference with congressional and executive discretion in military matters which both the FTCA and the Supreme Court had previously rejected.[64] As a result of *Jaffee*, the *Feres* doctrine applies beyond the FTCA and creates an absolute bar to servicemen suits against constitutional violations as a result of incident-to-service conduct.[65]

Veterans have also attempted to overcome governmental immunity by using the postservice tort, which involves a claim for injuries which were "caused after" discharge even though the original injury occurred during service. The first case to allow recovery for such a claim was *United States v. Brown*, in 1954.[66] Brown was injured while on military duty and later, after his discharge, treated at a VA hospital. The VA doctor negligently harmed Brown during the surgery, for which Brown sued the government. The Supreme Court ruled in favor of Brown, allowing him to recover for the injuries caused by the doctor after discharge even though the injury that had precipitated the sur-

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59. *Carlson*, 446 U.S. at 18-19 (citing *Bivens*, 403 U.S. at 399, and *Davis*, 442 U.S. at 245-47).

60. *Bivens*, 403 U.S. at 396.

61. Jaffee v. United States, 663 F.2d 1226, 1235 (3d Cir. 1981), *cert. denied* 456 U.S. 972 (1982).

62. *Id.* at 1236. *See* 38 U.S.C. §§ 101-5228 (1982).

63. *Jaffee*, 663 F.2d at 1237.

64. *Id.* at 1237-38.

65. *See, e.g., id.* at 1250 (Gibbons, J. and Sloviter, J. dissenting).

66. United States v. Brown, 348 U.S. 110 (1954).

gery occurred during active military duty. The Court also ruled that Brown could collect both VA benefits for this inservice injury and damages in tort under the FTCA for injuries caused by the government's negligence that occurred after his discharge.[67]

The first nonmedical malpractice claim to apply the post-service tort was *Thornwell v. United States* in 1979.[68] Thornwell, an army private stationed in Germany, was injected with LSD for the purpose of determining the utility of the drug in interrogations. Since that time, he has suffered severe mental illness and physical pain. Thornwell did not learn the details of the experiment until seventeen years later, at which time he filed suit against the government for failing to provide follow up medical treatment and for failing to inform him after his discharge that he had been given LSD. The District Court for the District of Columbia ruled in favor of Thornwell, recognizing a cause of action for this separate tort of failure to warn.[69]

Since *Thornwell*, several veterans have attempted to use that decision as a precedent to recover for injuries caused by exposure to radiation. The courts' responses have been varied, and the current state of the law remains undefined because most of the relevant cases have yet to reach the appellate stage. Given the recent passage of a veterans' compensation package, however, these cases are not likely to receive any further consideration.[70]

IV. *Konizeski, Broudy*, AND THE WARNER AMENDMENT

In the midst of these ongoing legal battles, Congress took action that erected additional roadblocks to the atomic litigants. This adverse measure came as the result of a little noticed provision inserted by Republican Senator John Warner of Virginia as an amendment to the Defense Department Authorization Bill signed by President Reagan on October 19, 1984. At the request of the administration, Warner attached the amendment, making the government rather than defense contractors the sole defendant in all pending and future lawsuits involving atomic weapons testing: "The employees of a contractor . . . shall be considered

67. *Id.* at 112-13.

68. 471 F. Supp. 344 (D.D.C. 1979).

69. *Id.* at 352-53.

70. *See* Lasswell v. Brown, 524 F. Supp. 847 (W.D. Mo. 1981), *aff'd*, 683 F.2d. 261 (8th Cir. 1982); Kelley v. United States, 512 F. Supp. 356 (E.D. Pa. 1981); Everette v. United States, 492 F. Supp. 318 (S.D. Ohio 1980).

employees of the Federal Government; . . . the civil action or proceeding shall proceed in the same manner as any action against the United States . . . and shall be subject to the limitations and exceptions applicable to those actions."[71]

In effect, this amendment did two things. First, it left atomic veterans with no one to sue. Unlike the agent orange veterans who could and did successfully sue the chemical companies that manufactured the dangerous substance for the government,[72] the atomic veterans were deprived of such a fall back position under Warner's amendment. Second, the amendment denied test site workers the right to sue their employers, the government contractors, sending them back to square one, along with the downwinders, to fight against the inherent difficulties of the FTCA.

New lawsuits were immediately filed challenging the constitutionality of the amendment. Professor William Fletcher, constitutional law expert at the University of California, argued that the amendment clearly violated states' rights normally allowing a citizen to sue a corporation, and it also failed to allow servicemen and women the right to a jury trial guaranteed in the Constitution. Furthermore, he argued that the amendment was an unconstitutional *ex post facto* law.[73]

The validity of the Warner Amendment was tested in *Konizeski v. Livermore Labs*,[74] which was a consolidation of a number of cases involving civilian victims at the Court of Appeals for the Ninth Circuit.[75] The cases were actions for personal injury and wrongful death on behalf of individuals who contracted cancer after participating in the atmospheric testing program. The appeal contested the constitutionality of the Warner Amendment and the summary dismissal of the plaintiffs' claims under the *Feres* doctrine.[76] The Ninth Circuit affirmed.[77]

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71. 42 U.S.C. § 2212 (Supp. IV 1986).

72. Nicholson, *Agent Orange Products Liability*, 24 A.F. L. REV. 97 (1984); Sand, *How Much is Enough: Observations in Light of the Agent Orange Settlement*, 9 HARV. ENVTL. L. REV. 283 (1985); Los Angeles Times, Aug. 29, 1986, at 16 (Sunday Magazine); Los Angeles Times, Jan. 8, 1985, at 4 (Sunday Magazine).

73. Las Vegas Sun, Oct. 10, 1985, at 6B, col. 1.

74. 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1076 (1988).

75. *Id.*

76. *Id.* at 984.

77. *Id.* at 1000. Except for its determination of the *Broudy* appeal, another case consolidated with *Konizeski*, the Ninth Circuit merely adopted the opinion of the district court. *Id.* at 984 (adopting appropriate portions of the district court's opinion, *In re* Consolidated United States Atmospheric Testing Litigation, 616 F. Supp. 759 (N.D. Cal.

The appellants challenged the Warner Amendment on four grounds: fifth amendment taking;[78] procedural and substantive due process;[79] separation of powers;[80] and the seventh amendment right to a jury trial.[81] In each instance, the government prevailed.

As to the taking argument, the court noted at least six other instances, all constitutionally valid, where Congress had substituted the FTCA remedy against the government for remedies available against private parties. Perhaps most notable was the Swine Flu Act,[82] which had been upheld by the Fifth Circuit in *Ducharme v. Merill-National Laboratories*,[83] and had substituted the United States as sole defendant. Using a two-step analysis, the court concluded in these cases that "the tort claims asserted here lack 'investment-backed expectations,' "[84] and they are "not only . . . contingent by their nature, but they also arise in a field in which the law remains to be developed."[85] Although these causes of action were a "species of property protected by the Fourteenth Amendment's Due Process clause,"[86] the court noted that "[a] claim of *deprivation* of property without due process of law cannot be blended as one and the same with the claim that property has been *taken* for public use without just compensation."[87] Moreover, the contingent nature of the property interest was further weakened by the fact that the Warner Amendment "does not abrogate the claims but [only] subjects them to the tort claims procedure which the plaintiffs

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1985)).

78. *Konizeski*, 820 F.2d at 988. The U.S. Constitution states, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

79. *Konizeski*, 820 F.2d at 988. The U.S. Constitution states, "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." U.S. CONST. amends. V, XIV.

80. *Konizeski*, 820 F.2d at 988. *See generally* U.S. CONST. arts. I, II, III (separating powers by structuring the legislative, executive, and judicial branches of government).

81. *Konizeski*, 820 F.2d at 988. The U.S. Constitution states, "[i]n Suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

82. 42 U.S.C. § 201 (1982).

83. 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978).

84. *Konizeski*, 820 F.2d at 989 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

85. *Konizeski*, 820 F.2d at 988.

86. *Id.*

87. *Id.* (quoting Kizas v. Webster, 707 F.2d 524, 539 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984)) (emphasis in original).

could reasonably expect might be applied."[88] Consequently, the court determined that the plaintiffs did not have a valid taking claim.

The recognition by the circuit court that a cause of action is protected property under the due process clauses, however, was not dispositive of the appellants' claim since it remained to be determined what process was due.[89] Given that "a cause of action does not afford the holder the traditional bundle of rights associated with the ownership of property,"[90] the court concluded that the appellants were entitled only to "adjudication . . . preceded by notice and opportunity for hearing appropriate to the nature of the case."[91] Since the appellants had been given notice and an opportunity to present their claims at the district courts, these minimal procedural due process standards had been met.

In analyzing the substantive due process claim the appellate court held that since no fundamental right or suspect classification was involved, the appropriate standard of review was rational basis, which placed on the appellants the burden of proof—a burden which they failed to meet. It was legitimate, the court concluded, for Congress to put an end to such suits against private contractors since litigation not only "constitute[d] a threat to the continued participation of the private contractors in the nuclear weapons program"[92] but also "led the public to blame them for the formulation, implementation and execution of the atomic weapons testing policy of the United States."[93] Such suits also seriously disrupted the contractors' participation in the program by diverting resources away from research and testing into litigation.[94]

If the goals of the Warner Amendment were legitimate, the means used were no less reasonable. "It was neither arbitrary nor irrational for Congress to change the law so as to place putative [atomic plaintiffs] in the same position as any other party suing the United States in tort."[95] Furthermore, since the "ret-

88. *Konizeski*, 820 F.2d at 989.

89. *Id.*

90. *Id.*; *cf.* United States v. Security Indus. Bank, 459 U.S. 70, 75-76 (1982).

91. *Konizeski*, 820 F.2d at 989 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

92. *Id.* at 990.

93. *Id.* at 991.

94. *Id.*

95. *Id.*; *see also Litigation Relating to Atomic Testing, 1983: Hearings on H.R. 2797*

roactive application of a federal statute . . . is not forbidden under the Constitution so long as due process requirements are met,"[96] the statute was not an impermissible *ex post facto* law given the appellants' failure to make a valid due process claim.

The separation of powers challenge was likewise unsuccessful. Separation of powers is offended when Congress "attempts to alter the rule of decision in pending cases in favor of the government."[97] Although the Warner Amendment substituted remedies, it did not "deprive a party of the benefit of a judgment, and [did] not mandate the outcome of particular cases."[98] Consequently, the doctrine of separation of powers was not offended because there was no attempt by the legislative branch "to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction) [and] bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.' "[99]

Finally, the court held that the statute did not violate the appellants' seventh amendment right to a jury trial in civil cases over twenty dollars. Citing the opinion of the Court of Appeals for the First Circuit in *Hammond v. United States*,[100] the Ninth Circuit concluded:

> There is no right to a jury trial against the sovereign under the Seventh Amendment. If the United States can abolish the right to a cause of action altogether it can also abolish the right to a jury trial that is part of it. When the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, as it has [with section 2212] the Seventh Amendment does not require that it must also provide a jury trial.[101]

Having rejected the appellants' arguments as to an uncon-

Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 46-49; S. REP. No. 500, 98th Cong., 2d Sess. 377 (1984).

96. *Konizeski*, 820 F.2d at 991 (quoting *In re* Reynolds, 726 F.2d 1420, 1422 (9th Cir. 1984) (which cites C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 41-03 (4th ed. 1973))).

97. *Konizeski*, 820 F.2d at 992; *see* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1871).

98. *Konizeski*, 820 F.2d at 992.

99. *Id.* (quoting United States v. Brainer, 691 F.2d 691, 695 (4th Cir. 1982) (which quotes P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 316 n.4 (2d ed. 1973))).

100. 786 F.2d 8 (1st Cir. 1986).

101. *Konizeski*, 820 F.2d at 992.

stitutional taking, procedural and substantive due process, separation of powers and the right to a jury trial, the Ninth Circuit panel[102] unanimously upheld the constitutionality of Congress' power to enact the Warner Amendment and thereby substitute the United States as sole defendant in place of the contractors.

With the validity of the Warner Amendment now upheld, the court treated the claims under the FTCA's limited waiver of sovereign immunity with all the exceptions previously discussed in this article.[103] The government raised the discretionary function exception as an absolute defense against the appellants' claims.[104]

The first category of claims by the appellants was based on acts of omission and negligence on the part of the appellees. They claimed that those who had prepared the tests "failed to appreciate or prepare for the magnitude of the hazards that would result"[105] and that "their negligent failure to carry out [a safety plan required by the government itself] resulted in the overexposure of many hundreds or thousands of test participants."[106] Nevertheless, since safety decisions were part of the policy decisions made in the conduct of the weapons tests, the court concluded that they fell within the discretionary function exception that "[w]here there is room for policy judgment and decision there is discretion."[107] To hold otherwise would force the courts to second-guess "judgments concerning safety made by [safety] officials based on the exigencies of the moment"[108] and would "hamper the government in its future conduct of weapons tests and similar operations affecting the national security."[109]

The second category of claims by the appellants was based on the government's failure, prior to 1977, to warn them of the danger to which they were exposed. Although the appellate court assumed that the government had failed to warn, a duty to do so would exist only if the appellants could show

(1) the government has information relating to a serious risk to

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102. Circuit Judges Anderson, Alarcon and Hall.
103. *Supra* notes 16-29 and accompanying text.
104. *Konizeski*, 820 F.2d at 992-93.
105. *Id.* at 994.
106. *Id.*
107. *Id.* at 995 (quoting Dalehite v. United States, 346 U.S. 15, 36 (1953)).
108. *Konizeski*, 820 F.2d at 995.
109. *Id.*

> the life, safety or health of a participant; (2) the conduct of the government gave rise to the risk; (3) the burden resulting from imposition of a duty to warn is not onerous; (4) there is reason to believe that a warning would have some practical effect.[110]

The appellants, however, were unable to make this showing. The costs of such a program, the fragmentary knowledge available, and the public anxiety created by such a program were all elements to be considered. Thus a decision to warn "calls for the exercise of judgment and discretion at high levels of government."[111] Furthermore, formulating and issuing such warnings would have required the government "to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding."[112] It was, therefore, "inescapable" that the decision to warn was one which fell within the discretionary function exception of the FTCA.[113]

Since the Ninth Circuit agreed with the district court's treatment of the case, it accordingly affirmed the summary dismissal. The Supreme Court's decision on February 29, 1988, to deny a writ of certiorari, allowed that decision to stand.[114]

V. EPILOGUE

Faced with substantial obstacles in the courts, many "atomic litigants" turned to Congress in search of a legislative remedy for their problems. From the outset, Congress appeared more receptive. Indeed, over the years, beginning with Senator Edward Kennedy's sponsorship of Senate Bill 1865 in 1979, numerous proposals have been introduced calling for various compensation packages.[115] Substantive gains were slow in coming,

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110. *Id.* at 996 (quoting Molsbergen v. United States, 757 F.2d 1016, 1020 (9th Cir. 1985)).

111. *Id.* at 997.

112. *Id.* at 998 (quoting United States v. S.A. Empressa de Viacao Aerea Rio Grandense, 467 U.S. 797, 820 (1984)).

113. *Konizeski*, 820 F.2d at 998.

114. Konizeski v. Livermore Labs, 108 S. Ct. 1076 (1988).

115. S. 1865, 96th Cong., 1st Sess. (1979). Examples of proposals include the following: Congressman Gunn McKay, of Utah, introduced H.R. 4766 on July 12, 1979; Congressman Tim Lee Carter, of Kentucky, introduced H.R. 8278 on Oct. 3, 1980; Congressman Norman Mineta, of California, introduced H.R. 1773 on Feb. 5, 1981; Congressman Henry Gonzales, of Texas, introduced H.R. 872 on Jan. 16, 1981; Congressman Tony Coelho, of California introduced H.R. 2229 on March 2, 1981; Congressman Robert Davis, of Michigan, introduced H.R. 4012 on June 25, 1981; and Senator Orrin Hatch, of Utah, introduced S. 1483 on July 14, 1981, and S. 921 on March 24, 1983.

however. Although Congress frequently conducted hearings,[116] most of the proposals simply died in committee. Two important exceptions were Senator Alan Cranston's 1982 amendment, which extended medical care eligibility under the VA to veterans whose disabilities could be linked to service-related exposure to nuclear weapons test radiation,[117] and Senator Orrin Hatch's provision in the 1984 Headstart Act, which appropriated some $10 million for the establishment of cancer screening and research centers in Utah.[118] Congress also passed a third measure, the 1984 Warner Amendment to the Defense Department Authorization Bill. Nevertheless, as previously discussed, that bill actually worked against the alleged victims.[119]

It was not until 1988, ten years after the first hearings on the effects of nuclear weapons testing were conducted by the House Subcommittee on Public Health and the Environment,[120] that Congress finally instituted an actual atomic compensation package, albeit limited in scope. Passed by a Senate vote of 48 to 30 on April 25, 1988, and overwhelmingly passed by a House vote of 326 to 2 just a week later on May 3, 1988, the new program makes the presumption that certain kinds of cancer suffered by veterans exposed to radiation are service-connected; consequently, the ailing individuals are automatically eligible for disability compensation.[121] Thirteen diseases are recognized as service-connected, including leukemia and thyroid, breast, esophagus, stomach, and gall bladder cancer. The cancers must be diagnosed within forty years after the veteran was last exposed while in the service, with the exception of leukemia, which

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116. *See Hearings Before the House Comm. on Public Health and the Env't*, 95th Cong., 2d. Sess. (1978); *Hearings on Low Level Radiation Effects on Health Before the House Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. (1979); *The Forgotten Guinea Pigs: Hearings Before the Senate Comm. on Veterans' Affairs*. 96th Cong., 2d Sess. (1980); *Hearings Before the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. (1981).

117. Veterans Health Care, Training, and Small Business Loan Act of 1981, Pub. L. No. 97-72, 95 Stat. 1047 (1981) (codified as amended in scattered sections of 38 U.S.C.).

118. Human Services Reauthorization Act, Pub. L. No. 98-558, 98 Stat. 2878 (1984) (codified as amended in scattered sections of 42 U.S.C. & 20 U.S.C.).

119. Department of Defense Authorization Act, Pub. L. No. 98-525, 98 Stat. 2492 (1984) (codified as amended at 42 U.S.C. § 2212 (Supp. IV 1986). *See infra* text accompanying notes 71-102.

120. *Hearings before the House Subcomm. on Public Health and the Env't*, 95th Cong., 2d Sess. (1978).

121. Las Vegas Sun, April 26, 1988, at 1A, col. 2; Las Vegas Sun, May 3, 1988, at 1A, col. 4; Las Vegas Rev. J., May 2, 1988, at 1A, col 4.

must be diagnosed within thirty years. Some 250,000 veterans are eligible under the statute, including members of the U.S. occupation forces in Hiroshima and Nagasaki from August 6, 1945, to July 1, 1946, and servicemen who participated in post-war weapons tests in the South Pacific and in Nevada during the fifties and early sixties. The measure will cost an estimated $15 million in fiscal year 1988 and an additional $36 million in fiscal year 1989.[122]

There was some speculation that President Reagan might veto the bill. Indeed, a similar measure, H.R. 2616, was passed on April 13 of this year as part of the Omnibus Veterans Bill.[123] The radiation provision was pulled out during a conference committee battle, however, after the President threatened to veto the package if the compensation were included.[124] Apparently President Reagan had a change of heart; on May 20, 1988, he signed the new legislation, which Norman Solomon, Washington spokesman for the Alliance of Atomic Veterans, called "a long overdue step toward taking care of a very large and serious problem."[125]

This landmark veterans compensation package takes "the burden off the backs of those brave Americans and recognizes their suffering," as Congressman Roy Rowland has noted.[126] It will not, however, provide any redress for the downwinders, the sheepherders, or the test site workers who likewise allege that their problems were caused by radioactive fallout. At best, the Act may give these people some hope that, having come to a dead end in the courts, they still have a chance of getting Congress to accept responsibility for, what they consider to be, negligent acts by the government during the period of atmospheric weapons testing. Along these lines, Senator Orrin Hatch and Congressman Wayne Owens, both of Utah, have reintroduced a 1985 bill which will provide similar compensation for the downwinders suffering from various cancers.[127]

Additional legislation was pending which, if enacted, would

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122. Cowan, *Veterans Have Good Week on Capitol Hill*, CONG. Q. WEEKLY REP., April 30, 1988, at 1176; *Congress Clears Bill Adding Veterans' Benefits*, CONG. Q. WEEKLY REP., May 7, 1988, at 1246.

123. Cowan, *Conferees Agree on Omnibus Veterans Bill*, CONG. Q. WEEKLY REP., April 16, 1988, at 1030.

124. *Id.*; Las Vegas Sun, May 3, 1988, at 1A, col. 4.

125. Las Vegas Rev. J., May 21, 1988, at 1A, col. 1.

126. Las Vegas Rev. J., May 3, 1988, at 1A, col. 5.

127. Las Vegas Rev. J., May 29, 1988, at 1A, col. 6.

have repealed the Warner Amendment. On February 26, 1987, Senator Paul Simon introduced legislation (Senate Bill 612)[128] "[t]o repeal a provision of Federal tort liability law relating to the civil liability of Government contractors for certain injuries, losses of property, and deaths and for other purposes."[129] He has since been joined in his efforts by forty-one other co-sponsors, including John Warner himself. The Subcommittee on Courts and Administrations Practice approved the bill for full committee consideration on February 16, 1988. The bill died in October 1988 for lack of action during the waning days of the 100th Congress.

It is clear at this point that any further action on compensation for downwinders or repeal of the Warner Amendment will have to come from Congress. We would argue that either, or both, actions are warranted.

With the passage of the Atomic Veterans Compensation Bill it would appear that downwinders are the last major affected group in need of aid. Indeed, it is notable that their argument for compensation may be stronger given that they are not eligible for veterans' benefits, and, unlike soldiers who were drafted or enlisted knowing that they were at risk (although unknowledgeable of the specifics), downwinders were in the classic sense innocent bystanders.

The Warner Amendment is a case of unintended consequences flowing from policy decisions. The cosponsorship of Senate Bill 612 by Senator Warner would seem evidence enough of the need to repeal or at the very least reexamine the Warner Amendment in light of what we now know its effects to be on those seeking fairness, equity, and justice.

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128. S. 612, 100th Cong. (1987).

129. Las Vegas Sun, Oct. 26, 1987, at 3B, col. 1.