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Post-Discharge Failure to Warn: A New Theory Allowing Access to FTCA Recovery

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Comments

Post-Discharge Failure to Warn: A New Theory Allowing Access to FTCA Recovery

INTRODUCTION

The decision in *Feres v. United States*[1] effectively bars servicemen from bringing claims against the United States under the Federal Tort Claims Act[2] for injuries sustained while on active duty.[3] The interpretation of *Feres* has proved troublesome for the courts, especially with regard to recent claims by servicemen's children. Many of these claims allege genetic damage caused by their father's exposure to radiation[4] or chemical defolients[5] while on active duty.

This Comment examines the *Feres* doctrine as it has developed over the past four decades and the theories under which military plaintiffs sought to recover for injuries sustained while on active duty. It concludes that the post-service failure to warn theory is the most viable alternative to the *Feres* complete bar to recovery. This theory affords equitable relief to the military plaintiff while avoiding encroachment on traditional judicial deference to mil-

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[1] 340 U.S. 135 (1950).

[2] Pub. L. No. 79-601, § 101, 60 Stat. 842 (codified at 28 U.S.C.A. §§ 1346(b), 1402(b), 2401(b), 2402, 2411(b), 2412, 2671-2680 (West 1965, 1976, 1978 & Supp. 1986)) [hereinafter FTCA or Act].

[3] 340 U.S. at 146. The court concluded that the "Government is not liable under the Federal Torts Claim Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.*

[4] *See* Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983), *cert. denied,* 104 S.Ct. 1272 (1984); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied,* 459 U.S. 1210 (1983); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied,* 456 U.S. 989 (1982); Seveney v. United States, 550 F. Supp. 653 (D.R.I. 1982); Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981), *rev'd,* 715 F.2d 96 (3d Cir. 1983), *cert. denied,* 465 U.S. 1023 (1984).

[5] *In re* "Agent Orange" Prod. Liab. Litig. 506 F. Supp. 762 (E.D.N.Y. 1980), *rev'd,* 635 F.2d 987 (2d Cir. 1980), *cert. denied,* 104 S.Ct. 1417 (1984).

itary autonomy in making command decisions and in treatment of personnel.

I. *FERES* AND ITS PROGENY

For many years the doctrine of sovereign immunity[6] protected the United States from incurring any liability to its citizens.[7] In 1946, Congress[8] passed the Federal Tort Claims Act (FTCA),[9] waiving sovereign immunity and extending the time honored maxim of common law—that for every legal wrong there is a remedy[10]—to encompass government committed wrongs.

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[6] The explanation for the initial acceptance of the doctrine of sovereign immunity in the United States is obscure. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). Justice Marshall stated that because the Judiciary Act did not authorize any suits against the United States, none could be maintained. *Id.* at 411-12; In Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), Justice Holmes stated: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right against the authority that makes the law on which the right depends." *Id. See, e.g.,* United States v. Sherwood, 312 U.S. 584 (1941).

[7] *See* Gellhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1 (1955) (Since tort remedies could not be obtained in the courts, claimants resorted to petitioning Congress for relief in the form of private bills.).

[8] Prior to 1946, all tort claims were handled by members of Congress on behalf of their constituents. The congressional representative would introduce a private relief bill, which would then follow the steps of the legislative process until its eventual passage or defeat. *See id.*; Feres v. United States, 340 U.S. 135, 140 (1950) (Congress realized that the private bill procedure was an inadequate vehicle for handling tort claims against the government.). *See also* Note, *In Support of the Feres Doctrine and a Better Definition of "Incident to Service,"* 56 ST. JOHN'S L. REV. 485, 490 n.38 (1982) (The private bill procedure was unduly burdensome, unjust and inefficient.).

[9] The Act gives district courts:

> exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346(b) (West 1976). *See* Comment, *Military Medical Malpractice: Remedies for the Overseas Dependent*, 29 HASTINGS L.J. 589, 593-95 (1978) (brief discussion of the procedures required to recover under the FTCA). *See generally* RESTATEMENT (SECOND) OF TORTS, §§ 895A-895C (1979).

[10] Marbury v. Madison, 1 U.S. 368, 378, 1 Cranch 137, 163 (1803). The Court stated: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id. See* Waynick

There are, however, several types of claims exempt from the scope of the FTCA.[11] Two of these exempt claims directly af-

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v. Chicago's Last Dept. Store, 269 F.2d 322, 325 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960).

[11] Exceptions to the waiver of immunity are delineated in 28 U.S.C.A. § 2680 (West 1965 & Supp. 1986):

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any good or merchandise by any officer of customs or excise or any other law-enforcement officer.
>
> (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.
>
> (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
>
> (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
>
> (g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.
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> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
>
> (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
>
> (j) Any claim arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war.
>
> (k) Any claim arising in a foreign country.
>
> (l) Any claim arising from the activities of the Tennessee Valley Authority.
>
> (m) Any claim arising from the activities of the Panama Canal Company.
>
> (n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

In 1974 Congress amended (h) to read:

> with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law.

28 U.S.C.A. § 2680(h) (West Supp. 1986).

fecting military personnel[12] are claims arising out of a combatant's service during wartime and any claim arising in a foreign country.[13]

Shortly after passage of the FTCA, the government argued in *Brooks v. United States*[14] that all tort claims of military personnel should be barred under the FTCA.[15] The United States Supreme Court rejected this argument, holding that military personnel had the right to sue the United States for tortious acts under the FTCA.[16] The Court, however, qualified its ruling, stating that if the accident was "incident to [the soldier's] service, a wholly different case would [have been] presented."[17] The Court noted that this was an accident involving a negligently operated army truck that struck a privately owned automobile. The Court, however, expressed no further opinion as to how the outcome of the case would differ had the accident been incident to Brooks' service.[18]

This different case was presented in *Feres v. United States*[19] and the companion cases decided with it.[20] In each of these cases, servicemen who suffered injuries sought recovery under the FTCA.[21] The United States Supreme Court unanimously held

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[12] "Employee" is defined under the FTCA to include "members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504 or 505 of title 32. . . ." 28 U.S.C.A. § 2671 (West Supp. 1985).

[13] 28 U.S.C.A. § 2680(j), (k).

[14] 169 F.2d 840 (4th Cir. 1948), *rev'd,* 337 U.S. 49 (1949). (Two soldiers were off the military base and on furlough when an army truck struck their vehicle killing one soldier and badly injuring the other. The Supreme Court reversed the Court of Appeals and reinstated the trial court's decision.).

[15] *Id.* at 50.

[16] *Id.* at 51 (The United States Supreme Court reversed the Court of Appeals and reinstated the trial court's decision.).

[17] *Id.*

[18] *Id.*

[19] 340 U.S. 135 (1950).

[20] Feres v. United States, 177 F.2d 535 (2d Cir. 1949), *aff'd,* 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); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), *aff'd sub. nom.*, Feres v. United States, 340 U.S. 135 (1950).

[21] In *Feres* a serviceman on active duty died when the barracks in which he was sleeping caught fire. His executrix claimed the barracks were unsafe and therefore the United States was negligent to quarter men in them. The *Griggs* and *Jefferson* cases involve injuries and death resulting from the alleged negligence of Army surgeons. In both of these cases, the servicemen were on active duty during the operations.

the government "not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[22]

Examining the legislative history of the FTCA, the *Feres* Court noted that the Act did not refer specifically to the exclusion of suits by servicemen injured on active duty.[23] The Court, however, discerned no congressional intent to waive immunity for active duty suits from the Act's scheme.[24]

The Court based this conclusion on several factors.[25] First, the "distinctively federal nature" of the relationship between the government and members of its military was governed traditionally by federal rather than local law.[26] Because the FTCA relies upon the law of the jurisdiction where the act or omission occurred, the Court reasoned that fortuitous circumstances should not control the government's liability.[27] Second, Congress established a comprehensive system of relief available to all injured service personnel and their dependents under the Veterans' Benefit Act, which provides a statutory "no fault" compensation scheme.[28] A third factor, clarified in *United States v. Brown*,[29] was the potentially adverse effect on military discipline. The *Brown* Court emphasized:

> [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders

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[22] 340 U.S. at 146. The chief distinction was that in *Brooks* the soldiers had been injured by a military vehicle while on furlough, whereas in *Feres* and its companion cases, the men were on active duty at the time of their injury. Thus, the United States Supreme Court distinguished *Brooks* in that the "injury to Brooks did not arise out of or in the course of military duty.") *Id.*

[23] *Id.* at 144.

[24] *Id.* at 142-43. *But see* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 675-76, *reh'g denied*, 434 U.S. 882 (1977) (Marshall, J., dissenting) (maintaining that congressional silence supports the inference of nonexclusivity at least as well as exclusivity).

[25] 340 U.S. at 143-45.

[26] *Id.* at 143.

[27] *Id.* ("That the geography of an injury should select the law to be applied to his tort claims makes no sense." *Id.*)

[28] *Id.* at 144.

[29] 348 U.S. 110 (1954).

> given or negligent acts committed in the course of military duty. . . .[30]

Subsequent decisions weakened the importance of the first two factors[31] and emphasized the third factor[32] until the United States Supreme Court ruling in *Stencel Aero Engineering Corporation v. United States*.[33]

Deciding whether to apply *Feres* or *Brooks* has been difficult for the lower courts because the United States Supreme Court never fully defined the term "incident to service."[34] Despite the confusion, the *Feres* decision effectively amended the FTCA to restrict servicemen's right to sue the federal government[35] and thus "plunged a large class of potential claimants back into the era of sovereign infallibility."[36]

Although *Feres* was criticized by the lower courts[37] and legal scholars,[38] in 1977 the United States Supreme Court reaffirmed

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[30] *Id.* at 112.

[31] *See* Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957) ("[T]he test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred."); Indian Towing Co. v. United States, 350 U.S. 61 (1955) (distinguishing Feres v. United States).

[32] United States v. Muniz, 374 U.S. 150, 159 (1963) (declining to extend the *Feres* rationale to Federal Penitentiary inmates); United States v. Carroll, 369 F.2d 618 (8th Cir. 1966) (applying *Feres* to Reservists).

[33] 431 U.S. 666, *reh'g denied*, 434 U.S. 882 (1977). The "effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Id.* at 673.

[34] *E.g.*, Hale v. United States, 416 F.2d 355, 360-61 (6th Cir. 1969), *on remand*, 334 F. Supp. 566 (M.D. Tenn. 1970), *aff'd*, 452 F.2d 668, 669 (6th Cir. 1971) (demonstrating the confusion caused by the lack of definition for the term "arising out of or in the course of service").

[35] *See* Note, *Malpractice Protection for Military Medical Personnel and the Feres Doctrine: Constitutional Tension for the Military Plaintiff?*, 12 U.S.F.L. REV. 525 (1978).

[36] Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1099 (1979) [hereinafter Note, *From Feres to Stencel*].

[37] *See* 416 F.2d at 360 (The court criticized the vagueness of the *Feres* standard and held the proper test was whether the injury "arose out of or in the course of military duty."); Schwager v. United States, 279 F. Supp. 262, 263 (E.D. Pa. 1968) (The court suggested "an analysis of the relevant links between the 'activity' and the service."). *See also* Scales v. United States, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) (emphasizing the importance of military discipline); Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) (holding that the *Feres* doctrine is not applicable to military personnel claims under the Swine Flu Act).

[38] *Compare* Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316 (1954) (analyzing the *Feres* rationale) *with* Note, *From Feres to Stencel*, *supra* note 36 at 1101 (arguing that the FTCA should be extended to military claims).

the *Feres* doctrine in *Stencel*. The case involved injuries suffered by Captain John Donham of the Air National Guard when he was forced to eject from his jet and the egress life-support system malfunctioned. Donham sued Stencel, manufacturer of the system, and the United States. The district court dismissed both claims against the United States on the basis of *Feres*.[39] Although Donham did not appeal, the Court of Appeals for the Eighth Circuit reviewed Stencel's appeal and upheld the district court.[40]

The United States Supreme Court affirmed, thus denying Stencel's indemnity claim from the federal government[41] and extending the *Feres* doctrine to bar third party indemnity actions against the United States for damages paid to cover service connected injuries.[42]

The Court reached its decision only after analyzing the three factors.[43] As to the first factor, the federal nature of the relationship between the government and military personnel, the *Stencel* Court noted the unique function of the Armed Forces in protecting the United States and that this requires large groups of personnel and equipment to be moved across both the nation and the world.[44] The Court reasoned that the relationship between a soldier and his superiors makes it illogical to "permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman. . . ."[45] As was held in *Feres*,[46] "it [then] makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury."[47] Thus, the *Stencel* court applied

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[39] Donham v. United States, 395 F. Supp. 52 (E.D. Mo. 1975) (Stencel cross-claimed against the United States for indemnity and the district court dismissed both claims against the United States).

[40] Donham v. United States, 536 F.2d 765 (8th Cir. 1976).

[41] Stencel cross-claimed against the United States for indemnity. Basing its decision on *Feres*, the district court dismissed both claims against the federal government. *See also* Donham v. United States, 395 F. Supp. 52 (E.D. Mo. 1975), *aff'd*, 536 F.2d 765 (8th Cir. 1976).

[42] 431 U.S. at 673.

[43] 431 U.S. at 670-73. *See* Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979) (upholding the *Feres* three-prong rationale for the "incident to service" rule).

[44] 431 U.S. at 672.

[45] *Id.*

[46] 340 U.S. at 143.

[47] 431 U.S. at 672.

the first factor of *Feres* with equal force to third party claimants.

In applying the second factor, the Court found that the Veterans' Benefit Act serves a dual purpose: to provide compensation to injured soldiers[48] and to provide an upper limit of liability for the Government as to service-connected injuries.[49] Therefore, to grant FTCA recovery where this act limited recovery would frustrate an essential purpose of the Veterans' Benefit Act.[50]

The Court held the third factor, adverse effects on military discipline, to be equally applicable to *Stencel*. The Court stated that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party because the trial would still involve "second-guessing of military orders, and . . . require members of the Armed Services to testify in court as to each other's decisions."[51]

Thus, *Stencel* extends the *Feres* bar to third party indemnity claims. The Court used deference to military automony in making command decisions as its rationale.[52] Military personnel, therefore, continue to be deprived of recourse through the FTCA.

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[48] *Id.* at 673. In a 1948 letter responding to an inquiry regarding the Tort Claims Act, the Solicitor of the Veterans' Administration was quoted as stating:

> . . . at the time veterans' benefit laws were enacted there was no necessity for the Congress to exclude military personnel from recoveries under the Tort Claims Act as that act was not in existence, but throughout the history of legislation awarding benefits to ex-servicemen, the Congress had exhibited care to avoid duplication of benefits. . . . [I]n enacting the Tort Claims Act, the Congress did not in specific terms exclude from coverage under the said act those entitled to either veterans' benefits or Federal employees' benefits and that under applicable statutes such benefits would be payable notwithstanding the claimant may have recovered under the Tort Claims Act.

Hitch, *supra* note 38, at 328-29.

[49] 431 U.S. at 672. *See* Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981), *cert. denied* 456 U.S. 972 (1982) (The existence of an alternative remedy under the Veterans' Benefit Act in conjunction with the effect of suits on military effectiveness barred the suit of a former serviceman and his wife for injuries he sustained as a result of radiation exposure while on active duty.).

[50] 431 U.S. at 672.

[51] *Id.* at 673.

[52] *See id.*

II. EXCEPTION TO *FERES*: POST-SERVICE FAILURE TO WARN?

A possible exception to the *Feres* bar to recovery under the FTCA[53] is the post-service failure to warn theory of negligence.[54] One issue in analyzing a claim under this theory is whether the alleged post-service negligence is separate and distinct from the negligent injury sustained while in the military.[55]

For example, in *Stanley v. Central Intelligence Agency*,[56] a former serviceman alleged the United States was negligent in failing to obtain his informed consent, as well as failing to debrief and monitor him[57] following his participation in a chemical warfare experimentation program.[58] The *Stanley* court relied on *Thornwell v. United States*,[59] which involved a veteran's claim against the United States for covert administration of LSD during his imprisonment while on active duty in the military.[60] *Thornwell* allowed recovery for the government's negligence in failing to provide the former serviceman with any follow-up

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[53] *See* Note, *The Nevada Proving Grounds: An Asylum for Sovereign Immunity?*, 12 SW. U.L. REV. 627 (1980-81) (supporting application of this cause of action for cases brought by ex-servicemen who developed cancer allegedly as a result of their exposure to radiation during atomic weapons testing in Nevada).

[54] Another cause of action is a suit directly under the Constitution against individual government defendants for intentional and unintentional torts occurring incident to service. *See* Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312 (1981). The conclusion advocates a form of qualified immunity instead of absolute immunity for military defendants giving greater flexibility to courts. This would allow maintenance of an effective military and also establish greater protection for constitutional rights. *Id.* at 333. *See also* Note, *Government Immunity and Liability*, 11 SETON HALL 275 (1980). *But see* Schmid v. Rumsfeld, 481 F. Supp. 19, 21 (N.D. Cal. 1979) (*Feres* doctrine barred claim of former Marine based on failure of superior to provide protection); Nagy v. United States, 471 F. Supp. 383, 384 (D.D.C. 1979) (former serviceman could not sue United States for damages arising out of LSD experiments); Thornwell v. United States, 471 F. Supp. 344, 347-49 (D.D.C. 1979) (United States immune from liability for covert administration of drugs, harassment, interrogation and imprisonment that left former serviceman a "cripple"). In each of these cases the claims brought directly under the Constitution were dismissed.

[55] *See* United States v. Brown, 348 U.S. 110, 112 (1954).

[56] 639 F.2d 1146 (5th Cir. 1981).

[57] *Id.* at 1149. During the clinical testing program, Stanley was given Lysergic Acid Diethylamid (LSD) without his knowledge. As a result of government negligence, appellant claimed he suffered severe physical and mental injuries. *Id.*

[58] *Id.* An Army administered voluntary program was designed to develop and test methods of defense against chemical warfare.

[59] 471 F. Supp. 344 (D.D.C. 1979).

[60] *Id.* at 346-47.

examinations or treatment after his discharge.[61] Whereas Thornwell could not recover for the covert administration of the LSD, he could recover for the failure of the government to follow-up because this failure was a separate act.[62] This second act was negligent and had occurred entirely after Thornwell obtained civilian status, thus making it a valid claim.[63]

In *Stanley*, however, the Fifth Circuit Court of Appeals reasoned that because Stanley had remained in the Service eleven years after administration of the LSD, the alleged failure to warn could not have taken place totally after discharge.[64] The court concluded:

> Stanley has at best alleged two negligent acts, the administration of the LSD and the negligent failure to monitor his condition, both of which occurred at least in part during his time as a serviceman even if they or their effects lingered after his discharge. Allegations of such "continuing torts" do not escape application of the *Feres* doctrine.[65]

Therefore, in order for Stanley to escape the *Feres* doctrine, he needed to state a separate cause of action for negligent failure to monitor after he was discharged.[66] To fall within the separate tort theory of *Thornwell*, he needed to allege an intentional tort injuring an active duty serviceman and a negligent failure to provide follow-up care after discharge from the service.[67] Other courts have given greater consideration to the time at which the government learned of the danger to the claimant as determinative in analyzing post-discharge failure to warn claims.[68]

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[61] *Id.* at 349-53.

[62] *Id.* at 351.

[63] *Id. See* Hungerford v. United States, 192 F. Supp. 581 (N.D. Cal. 1961) (The court recognized the unnecessary continuation of an early injury.), *rev'd on other grounds,* 307 F.2d 99 (9th Cir. 1962).

[64] 639 F.2d at 1154.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See* Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964) (allowing recovery for failure to warn where dangerous effects of radioactive contrast dye were not discovered until post-service).

III. RECOGNITION OF POST-SERVICE FAILURE TO WARN THEORY

In *Broudy v. United States*,[69] the spouse of a serviceman brought an action against the United States government for negligent failure to warn or monitor injuries her husband sustained as a result of his exposure to radiation while in military service.[70] Whereas the court concluded that a claim against the government for its decision to expose Broudy to radiation was barred by *Feres*, it reasoned that if the appellant could prove an independent post-service negligent act on the part of the government, her claim would be cognizable under the FTCA.[71] To constitute such an act, the government must have learned of the danger after the serviceman's discharge.[72] The Ninth Circuit Court of Appeals harshly criticized the government's argument that, because the duty to warn arose from Broudy's in-service exposure to radiation, the claim was barred by *Feres*.[73] The court stated:

> The *Feres* doctrine does not speak to the existence of a duty; it only precludes claims against the government where the injury is incident to service. The question of an actionable duty is an inquiry separate from the application of the *Feres* doctrine. Without looking to appropriate state law, the government assumes that no duty can exist independent of Broudy's relationship to the armed services. By collapsing the two inquiries, the government never reaches the issue of which state's law governs and whether that state imposes a duty to warn or monitor.[74]

The court, therefore, ruled that the claim would receive a hearing on the merits in district court.[75]

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[69] 661 F.2d 125 (9th Cir. 1981), *rev'd in part*, 722 F.2d 566 (9th Cir. 1983) (en banc).

[70] 661 F.2d at 126. During 1957, Major Broudy was ordered to participate in military exercises in the immediate vicinity of two nuclear tests conducted in Nevada. He was discharged in 1960 and died of cancer in 1977. *Id.*

[71] *Id.* at 128-29.

[72] *Id.* at 129.

[73] 722 F.2d at 570.

[74] *Id.*

[75] *Id. See* Molsbergen v. United States, 757 F.2d 1016 (9th Cir. 1985), *cert. denied* 106 S. Ct. 30 (1985). Mr. Molsbergen was exposed to radiation as a result of the atomic

In neither *Broudy* nor *Molsbergen v. United States*[76] did the Ninth Circuit rely on the three-factor *Feres* rationale as exemplified in *Stencel*.[77] Since the United States Supreme Court as recently as 1977[78] reiterated its concern for these factors, no claim can be successful without first addressing them. The three issues addressed are: (1) whether the post-failure to warn theory will upset the federal relationship between the government and its armed forces; (2) whether the post-failure to warn theory will ignore the congressional intent behind the Veterans Benefit Act to have it as the system of no-fault compensation; and (3) whether the post-service failure to warn theory will alter the relationship between soldiers and their superiors. By skirting the three-factor rationale of *Stencel*, the Ninth Circuit provided no logical basis for courts to prescribe this theory of negligence is allowable under the *Feres* doctrine.

Other district courts found judicial review of military decisions to be a major stumbling block for allowing the post-service failure to warn claim to go forward.[79] *Kelly v. United States*[80] illustrates this point well. Kelly alleged that he developed cancer as a result of his exposure to radiation while serving in the South

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bombing of Nagasaki, Japan. Appellant alleged the government breached a duty to warn Mr. Molsbergen once it became aware of the danger of his exposure. *Id.* at 1018. The court reaffirmed *Broudy* and stated that since California law imposed a duty to warn on a private employer, the government was under the same duty. *Id.* at 1024-25. *See also* Cole v. United States, 755 F.2d 873 (11th Cir. 1985), *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985) (allowing amendment of complaint to assert post-service failure to warn claim against the government).

[76] 757 F.2d 1016 (9th Cir. 1985).

[77] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, *reh'g denied*, 434 U.S. 882 (1977). The three factors were: (1) "the relationship between the government and members of its armed forces is 'distinctively federal' in character"; (2) Congress has provided a uniform system of "no fault" compensation for those injured in military service under the Veterans Benefit Act; and (3) "the peculiar and special relationship of the soldiers to his superiors such that tort actions between them have not been allowed." *Id.* at 671.

[78] *Id.* at 673.

[79] *See, e.g.*, Fountain v. United States, 533 F. Supp. 698, 701 (W.D. Ark. 1981); Schnurman v. United States, 490 F. Supp. 429, 436 (E.D. Va. 1980). *See also* Everett v. United States, 492 F. Supp. 318, 321 (S.D. Ohio 1980) (The court held even suits alleging intentional or reckless conduct would be disruptive to the soldier/superior relationship.).

[80] 512 F. Supp. 356 (E.D. Pa. 1981). After considering the *Stencel* three-factor test, the court held that failure to warn the decedent of dangers posed by his exposure to radiation was a separate tort actionable under the FTCA. *Id.* at 358.

Pacific in 1946.[81] He claimed that the failure of the government to warn him of the dangers of his exposure constituted a separate negligent act and was not barred by *Feres*.[82] The district court, however, could see no difference between the failure to warn him initially and the failure to warn him after discharge.[83] Kelly contended the former constituted an intentional tort and the latter a negligent tort. The court, however, concluded that his claim would be the same under either theory and thus was barred under *Feres*.[84] The court stated:

> Acceptance of Kelly's theory would lead to the kind of problems the Supreme Court wanted to avoid in *Feres*. Unless liability for post-discharge negligent omission by the government is carefully limited to situations in which the conduct challenged is clearly distinct from military actions immune under *Feres*, military planners . . . may well be inhibited in their planning by the consideration that at some future date they may be obligated to reveal the details of the operation and the risks involved. . . .[85]

In *Laswell v. Brown*,[86] the Eighth Circuit Court of Appeals quoted this same passage as rationale for denying the plaintiff's post-discharge failure to warn claim.[87] The *Laswell* court also noted that in light of the *Kelly* decision, the district court's ruling in *Thornwell v. United States*[88] was inconsistent with the *Feres* rationale.[89] Relying on *Kelly*, the court concluded that the decision by the United States Supreme Court in *Feres*, tipping

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[81] *Id.* at 358-59.

[82] *Id.* at 358.

[83] *Id.* at 360-61.

[84] *Id.* at 361. *See also* Stanley v. Central Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981), *aff'd in part, rev'd in part*, 786 F.2d 1490, *reh'g denied*, 794 F.2d 687 (11th Cir. 1986).

[85] 512 F. Supp. at 361.

[86] 683 F.2d 261 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1984).

[87] 683 F.2d at 267. The wife and children of Laswell claimed against the Secretary of Defense and other administration officials for his death and injuries to themselves as a result of Laswell's exposure to radiation during nuclear weapons testing in 1946. *Id.* at 262.

[88] 471 F. Supp. 344 (D.D.C. 1979).

[89] 683 F.2d at 267.

the scales in favor of an unfettered military, controlled the resolution of this issue.[90]

Despite the Supreme Court's decision in *Feres*[91] and subsequent reaffirmation of its validity in *Stencel*,[92] much confusion continues among the circuit courts concerning its application.[93] The post-service failure to warn theory of negligence is not yet a viable alternative to the *Feres* bar to recovery.[94] A recent Eleventh Circuit Court decision,[95] however, indicates a possible trend toward recognition of this theory of negligence. In *Cole v. United States*,[96] the court allowed the plaintiffs to amend their complaint to assert that the government was negligent in failing to warn a serviceman of the hazards of radiation after military discharge.[97] Additionally, the amended complaint asserted that the government's knowledge concerning the hazards of radiation after the plaintiff left the service was sufficient to give rise to a new duty to warn.[98]

This case is of particular importance because the court took the opportunity to distinguish the factors test of *Stencel*. First, the court unequivocally stated that this case would not turn on any of the government's orders involving servicemen. "[T]he need to protect military discipline does not extend to dealings between the government and veterans."[99] Second, the court found

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[90] *Id. See also* Miller v. United States, 643 F.2d 481 (8th Cir. 1980) (applied *Feres* to bar a claim by parents of a serviceman who was killed on base while working for a private construction company after his normal military duty hours).

[91] 340 U.S. 135 (1950).

[92] 431 U.S. at 673-74.

[93] *See, e.g.*, Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984) (claim by serviceman's child for genetic damage from exposure to radiation was barred); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982) (claims by serviceman and child for injuries and birth defect due to radiation were barred).

[94] *Compare* Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964) (43 year old attorney recovered for cancer that was caused by radioactive dye administered when he was in the Navy) *with* 639 F.2d 1146 (serviceman failed to allege negligent act occurring entirely after his discharge and could not recover for injuries caused by LSD testing).

[95] Cole v. United States, 755 F.2d 873 (11th Cir. 1985), *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985).

[96] *Id.*

[97] *Id.* at 880.

[98] *Id.* at 876.

[99] *Id.* at 879.

the Veterans' Benefit Act did not preclude a recovery because it was not a dispositive factor but only one of several to consider.[100] Third, nothing in the case required a hindsight judgment on the government's orders involving Cole or any other serviceman.[101] The court's analysis appears to be the best avenue available to afford a remedy for government committed wrongs against military personnel.

IV. CONCLUSION

Since the *Stencel* ruling, some courts[102] have stated their disdain for applying the *Feres* rationale and have asked Congress to settle the matter.[103] Although there have been some attempts to amend the FTCA,[104] Congress has not yet enacted a remedy[105] for these service personnel or their families who, but for their military status, would have some recourse in the courts.

The United States Supreme Court is unwilling thus far to review the post-service failure to warn theory of negligence.[106] A

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[100] *Id.* at 880.

[101] *Id.* at 878.

[102] *See, e.g.,* Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983), *cert. denied,* 465 U.S. 1021 (1984); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied,* 456 U.S. 989 (1982). *But see* Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981), *rev'd,* 715 F.2d 96 (3rd Cir. 1983), *cert. denied,* 465 U.S. 1023 (1984) (allowing wife, son, and estate of deceased son to recover on theory of chromosomal damages to serviceman which in turn caused son's birth defects and wife's miscarriages and mental anguish).

[103] *See, e.g.,* 661 F.2d at 134 n.3.

[104] *See* Note, *Malpractice Protection for Military Medical Personnel and the Feres Doctrine: Constitutional Tension for the Military Plaintiff?,* 12 U.S.F.L. REV. 525, 545-550 (1978) (passim); Note, *From Feres to Stencel, supra* note 36.

[105] Telephone Interview with Florence McGrady, House Judiciary Committee Staff (August 23, 1985). H.R. 1338 as introduced in the House of Representatives on February 28, 1985 would allow suits against the United States resulting from atomic weapons testing programs. H.R. 1338, 99th Cong., 1st Sess. (1985). The bill is scheduled for hearings before the House Judiciary Subcommittee on Administrative Law and Governmental Relations, September 11, 12, 1985. There is no similar legislation pending in the United States Senate.

[106] *See* Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), *cert. denied,* 466 U.S. 975 (1984); 711 F.2d 567 (3d Cir. 1983), *cert. denied,* 104 S.Ct. 1272 (1984); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied,* 459 U.S. 1210 (1984); 661 F.2d 129 (9th Cir. 1981), *cert. denied,* 456 U.S. 989 (1984); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972); 524 F. Supp. 277 (E.D. Pa. 1981), *rev'd,* 715 F.2d 96 (3d Cir. 1983), *cert. denied,* 465 U.S. 1023 (1984); *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y.), *rev'd,* 635 F.2d 987 (2d Cir. 1980), *cert. denied,* 104 S.Ct. 1417 (1984).

remedy, therefore, must come from the circuit courts. The post-service failure to warn theory is a viable alternative to the *Feres* bar to recovery and should be accepted by the courts. This theory affords equitable relief to the military plaintiff while avoiding encroachment on military autonomy in making command decisions and in treatment of its personnel. Finally, this theory extends the common law maxim, that for every legal wrong there is a remedy, to encompass claims by military plaintiffs.

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