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## Tort—Federal Tort Claims Act—Feres Doctrine Bars Post-Discharge Failure to Warn Claim

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TORT—FEDERAL TORT CLAIMS ACT—*FERES* DOCTRINE BARS POST-DISCHARGE FAILURE TO WARN CLAIM. *Laswell v. Brown*, 683 F.2d 261 (8th Cir. 1982).

Charles Laswell was a soldier in the United States Army in 1947 and 1948. During this time, Laswell participated in three nuclear weapons tests in the Marshall Islands. Laswell and the other participants observed each explosion from nearby ships. After the third blast, Laswell helped build a landing strip approximately one mile from the blast site.

In January 1975, Laswell learned he had Hodgkins disease, a form of cancer that attacks the lymph glands. The plaintiffs, Laswell's widow and their three children, contended the exposure to radiation in 1947 and 1948 caused Laswell's cancer. In addition, the plaintiffs contended the cancer and its treatment caused the massive coronary infarction which resulted in Laswell's death on September 1, 1979.

The plaintiffs filed suit against the United States and certain named individuals for damages resulting from the disability and death of Laswell. The children also sought recovery for their increased risk of genetic damage. The complaint stated four causes of action.<sup>1</sup> The first, grounded on the fifth amendment, alleged that Laswell, without his knowledge, was made the subject of an experiment "to determine how well combat troops could physically and psychologically withstand atomic blasts and the subsequent radioactivity."<sup>2</sup> The second cause of action, also grounded on the fifth amendment, alleged that the defendants failed to warn Laswell of the health dangers he and his progeny faced and failed to provide preventive treatment. The third and fourth causes of action were based on allegations of negligence.

The United States District Court for the Western District of Missouri granted the defendants' motion to dismiss.<sup>3</sup> The Eighth Circuit Court of Appeals affirmed, holding that the doctrine of sovereign immunity precluded the exercise of jurisdiction. *Laswell v. Brown*, 683 F.2d 261 (8th Cir. 1982).

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1. *Laswell v. Brown*, 683 F.2d 261, 263 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1205 (1983).

2. *Id.*

3. *Laswell v. Brown*, 524 F. Supp. 847, 850 (W.D. Mo. 1981).

The concept of sovereign immunity has its roots in early common law<sup>4</sup> where it developed as an outgrowth of the political and social structure of feudal England.<sup>5</sup> By the middle of the thirteenth century it was settled doctrine that the King could not be sued in his own courts.<sup>6</sup>

The doctrine of sovereign immunity was justified by the concept of *rex gratia dei*, or King by the grace of God.<sup>7</sup> This concept, supported by the King and the Church, was based on the conceit that the King was ordained by God and, as ultimate secular authority, was answerable only to God.<sup>8</sup>

Sovereign immunity, however, did not completely preclude recovery from the Crown.<sup>9</sup> A request to waive immunity—the petition of right—developed into a regular procedure for obtaining relief from the Crown.<sup>10</sup> In addition, a statutory remedy, *monstrans de droit*,<sup>11</sup> developed in the fourteenth century.<sup>12</sup> Although only available in certain land title cases, *monstrans de droit* became the most frequently used procedure for obtaining relief from the Crown

4. Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). For the suggestion that the doctrine has its roots in Roman law, see Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167 (1952).

5. L. HURWITZ, *THE STATE AS DEFENDANT: GOVERNMENTAL ACCOUNTABILITY AND THE REDRESS OF INDIVIDUAL GRIEVANCES*, 3-28 (1981). See 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, 3-8 (3d ed. 1944); Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947). William the conqueror's barons established manorial courts in which the barons, by virtue of their lordship, exercised jurisdiction over their vassals. A baron was immune from suit in his own court. He was, however, subject to the jurisdiction of his own lord's court and, ultimately, the King's courts. The King, at the apex of the feudal pyramid, enjoyed a broad immunity. See generally L. HURWITZ, *supra*, at 3-28; W. STUBBS, *Early Judicial Systems*, in *LECTURES ON EARLY ENGLISH HISTORY* (A. Hassall ed. 1906).

6. Jaffee, *supra* note 4, at 3.

7. L. HURWITZ, *supra* note 5, at 12-20. See also Gellhorn & Schenck, *supra* note 5, at 722.

8. See L. HURWITZ, *supra* note 5, at 12-20.

9. See generally 2 W. BLACKSTONE, *COMMENTARIES* \*254-57; C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY*, 5-8 (1972); 9 W. HOLDSWORTH, *supra* note 5, at 7-45; Jaffee, *supra* note 4, at 5-15.

10. The petition of right developed out of practices in the reign of Edward I (1272-1307). It was a complicated and expensive procedure. For a general discussion, see 9 W. HOLDSWORTH, *supra* note 5, at 13-22. Consent to maintain the suit was given by the Crown's endorsement of the petition. Once the petition was endorsed, the claim against the sovereign was disposed of in accordance with the substantive law, "as in suits between subject and subject." 3 W. BLACKSTONE, *supra* note 9, at 256.

11. *I.e.*, "manifestation of right." BLACK'S LAW DICTIONARY 908 (rev. 5th ed. 1979).

12. 34 Edw. III. ch. 14; 36 Edw. II ch. 13, *cited in* 9 W. HOLDSWORTH, *supra* note 5, at 25 nn.2 & 3. See also 2 & 3 Edw. VI. ch. 8 (expanding the remedy), *cited in* 9 W. HOLDSWORTH, *supra* note 5, at 26 n.2.

during the fifteenth and sixteenth centuries.<sup>13</sup>

If, as suggested, the structure of feudal government and the concept of *rex gratia dei* led to the development of sovereign immunity, the seventeenth century witnessed an end to the existing rationales for the doctrine. A civil war,<sup>14</sup> the execution of a king,<sup>15</sup> a brief attempt to establish a republican government,<sup>16</sup> and a bloodless revolution<sup>17</sup> firmly established the ascendancy of Parliament.<sup>18</sup> Any pretensions of absolutism and any claims of rule by divine right were quashed.<sup>19</sup>

Although the conditions that gave birth to the doctrine of sovereign immunity changed, the doctrine itself maintained a vigorous existence. However, the doctrine was modified to meet economic changes brought about by an increase in commerce and industry. In 1860, courts of ordinary jurisdiction were given the authority to hear petitions of right as a matter of course.<sup>20</sup> In 1874, the Queen's Bench held that a petition of right was appropriate for breach of

13. See generally 9 W. HOLDSWORTH, *supra* note 5, at 25-28. *Monstrans de droit*, like the petition of right, was prosecuted in chancery. In the seventeenth century, however, the court of Exchequer began playing an active role in the adjudication of property rights involving the sovereign. *E.g.*, *Pawlett v. Attorney Gen.*, Hardres 465, 145 Eng. Rep. 550, 552 (Ex. 1668) (The Exchequer granted an equity of redemption on land that had escheated to the Crown. "[I]t would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him."); *The Case of the Bankers in the Court of Exchequer*, (1690-1700) collected in 4 T.B. HOWELL, STATE TRIALS 1-114 (1812) (enforcing payment of grants made by Charles II). See also Jaffee, *supra* note 4, at 6-9.

14. The English Revolution (1640-1660) began as a conflict between Charles I and Parliament. Both sides fielded an army and Charles was soundly defeated. Parliament, however, lost control of the government to the army and Oliver Cromwell. After Cromwell's death, Parliament restored the Crown to Charles II in 1660. See generally *infra* note 17.

15. On January 30, 1649, Charles I was executed by the army for treason. See generally *infra* note 17.

16. After the execution of Charles I, Cromwell attempted to establish a republican government. This attempt, however, merely masked control by the army. In 1653, dissatisfied with the progress of reforms, Cromwell formally took the reins of government as Lord Protector of England. See generally *infra* note 17.

17. In 1688, Parliament again clashed with the King, James II, a Catholic. James' eldest daughter, Mary, a Protestant, and her husband, William of Orange, were invited to bring an army to England. James fled without a fight and Parliament settled the Crown on William and Mary. See generally *infra* note 17.

18. For a summary of English history in the 17th century, see 1 C. ROBERTS & D. ROBERTS, A HISTORY OF ENGLAND 325-440 (1980); C. FRIEDRICH & C. BLITZER, THE AGE OF POWER 119-49 (1957).

19. Philosophically, the century saw a renewed interest in the function and form of government. The view of government as a "social contract" between the governors and the governed was introduced. See T. HOBBS, LEVIATHAN (1651); J. LOCKE, TWO TREATISES OF GOVERNMENT (1698).

20. Petitions of Right Act, 1860, 23 & 24 Vict., ch. 34, § 2 (repealed), cited in Jaffee, *supra* note 4, at 8 n.20.

contract by the Crown.<sup>21</sup> In the field of tort law, however, sovereign immunity remained a bar to relief. In 1865, the Queen's Bench held that a petition of right did not lie for a tort committed by a servant or agent of the Crown.<sup>22</sup>

In addition to a direct remedy against the Crown, individuals had the option of bringing an action against an officer of the Crown. Local officials could be sued at common law without the consent of the Crown.<sup>23</sup>

Sovereign immunity became an issue in the courts of the United States in 1793 with *Chisholm v. Georgia*,<sup>24</sup> a case in which the Supreme Court held that a state could be sued by a citizen of another state. The Court based its holding on article III, section 2 of the United States Constitution, which extends the judicial power of the United States to "[c]ontroversies between a State and Citizens of another State." The State of Georgia argued that this grant of power was impliedly qualified by the doctrine of sovereign immunity. *Chisholm* was effectively overruled by the rapid ratification of the eleventh amendment.<sup>25</sup> Thereafter, the eleventh amendment and sovereign immunity were continually asserted by the states in efforts to limit the jurisdiction of the federal courts.<sup>26</sup>

21. *Thomas v. The Queen*, 10 Q.B. 31 (1874).

22. *Feather v. The Queen*, 6 B. & S. 257, 295, 122 Eng. Rep. 1191, 1205 (Q.B. 1865) (reasoning that since the King can do no wrong, he can not authorize wrong). For a criticism of the case, see 9 W. HOLDSWORTH, *supra* note 5, at 43-44.

23. See generally Jaffee, *supra* note 4, at 9-16. These officers were, however, subject to the direct control of the Privy Council. As a result, the Crown could remove such proceedings from the regular courts into the Privy Council. Such removals undoubtedly increased the tension between the courts, the Crown and Parliament over the independence of the judiciary and contributed to the constitutional upheavals of the seventeenth century. The great number of suits against Crown officers in the early seventeenth century is indicated by a statute of James I which provided that a losing plaintiff would pay double costs in suits against certain officers. Public Officers Protection Act, 1609, 7 Jac. 1, ch. 5 (repealed), cited in Jaffee, *supra* note 4, at 10 n.28. After the Glorious Revolution (1688-1689), the common law action against Crown officers continued to be used, but without interference from the Privy Council. Jaffee, *supra* note 4, at 13. See, e.g., *Ashby v. White*, 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1702), *rev'd*, 1 Brown P.C. 45, 1 Eng. Rep. 417 (H.L. 1703) (suit against an election officer for the corrupt rejection of a vote in a parliamentary election).

24. 2 U.S. (2 Dall.) 419 (1793).

25. The 11th amendment was ratified in 1798. It provides that the "[j]udicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The reason for the swift ratification of the 11th amendment has been the subject of some disagreement. One view is that the amendment resulted from the financial instability of the states following the war. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821); Gellhorn & Schenck, *supra* note 5, at 722. But see C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 4 (1972).

26. E.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *United States v. Peters*, 9

Sovereign immunity was also asserted on behalf of the United States.<sup>27</sup> As the courts applied the doctrine, two corollaries developed.<sup>28</sup> First, only Congress may waive the immunity of the United States.<sup>29</sup> Second, legislative enactments which grant a waiver of sovereign immunity should be strictly construed.<sup>30</sup>

The doctrine of sovereign immunity has been vigorously applied by the courts of the United States.<sup>31</sup> However, the courts have seldom analyzed the reasons for its adoption and continued application.<sup>32</sup> The doctrine, even in the earliest references, is generally cited simply as "settled."<sup>33</sup> Three basic rationalizations for sovereign immunity have appeared, however.<sup>34</sup> A historical rationale was the first.<sup>35</sup> This rationale stresses the sovereign immunity doctrine's firm entrenchment in the common law and emphasizes the position of the United States as the successor to the attributes of sovereignty possessed by the English monarchy.

Later, Justice Davis voiced a public policy rationale for the doctrine.<sup>36</sup> "The principle [of sovereign immunity] is fundamental, applies to every sovereign power, and but for the protection it affords, the government would be unable to perform the various duties for which it was created."<sup>37</sup>

Lastly, a conceptual rationale for the doctrine was advanced by Justice Holmes.<sup>38</sup>

Some doubts have been expressed as to the source of the immu-

U.S. (5 Cranch) 115 (1809). See generally C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972).

27. *E.g.*, *Ickes v. Fox*, 300 U.S. 82 (1937); *Reeside v. Walker*, 52 U.S. (11 How.) 272 (1850); *United States v. McLemore* 45 U.S. (4 How.) 286 (1846).

28. 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 51 (1964).

29. *E.g.*, *United States v. Shaw*, 309 U.S. 495 (1940); *Munro v. United States*, 303 U.S. 36 (1938); *Stanley v. Schwalby*, 162 U.S. 255 (1896); *Finn v. United States*, 123 U.S. 227 (1887); *Reeside v. Walker*, 52 U.S. (11 How.) 272 (1850).

30. *E.g.*, *United States v. Sherwood*, 312 U.S. 584 (1941); *United States v. Shaw*, 309 U.S. 495 (1940); *Price v. United States*, 174 U.S. 373 (1899); *Schillinger v. United States*, 155 U.S. 163 (1894).

31. *E.g.*, cases cited *supra* note 26.

32. See C. JACOBS, *supra* note 25, at 150-64. Jacobs expresses some doubt as to whether the doctrine of sovereign immunity should have been recognized as part of the common law heritage of the United States. He also suggests that the doctrine may conflict with due process requirements. See also *United States v. Lee*, 106 U.S. 196, 208-09 (1882).

33. *E.g.*, cases cited *supra* note 26.

34. C. JACOBS, *supra* note 25, at 150.

35. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793).

36. *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1868).

37. *Id.* at 126.

38. *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907).

nity of a sovereign power from suit without its own permission, but the answer has been public property since before the day of Hobbes. 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 as against the authority that makes the law on which the right depends.<sup>39</sup>

The first broad waiver of sovereign immunity was the establishment of the Court of Claims by Congress.<sup>40</sup> This waiver did not reach tort claims, however, and in 1868, the Supreme Court held that the sovereign remained immune from suit in tort.<sup>41</sup> In 1887, the Tucker Act expanded the claims jurisdiction of the federal courts,<sup>42</sup> but, again, suits sounding in tort were excluded.<sup>43</sup>

It was not until 1946 that Congress enacted the Federal Tort Claims Act (FTCA)<sup>44</sup> which created a broad waiver of immunity in tort actions against the United States.<sup>45</sup> The FTCA was enacted for two basic purposes.<sup>46</sup> The first was to relieve Congress of the overwhelming burden of private relief bills relating to tort claims.<sup>47</sup> The second was to provide for the just adjudication of claims without

39. *Id.* at 353.

40. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. Congress conferred on the Court of Claims jurisdiction to determine all claims based on a law of Congress, a regulation of an executive department, or a contract with the United States. The decisions of the Court of Claims, however, did not have the effect of a regular judicial determination, but were subject to the approval of Congress. In 1863, the Court of Claims was reorganized and given the power to enter final judgments, subject to a right of appeal to the United States Supreme Court. Act of March 3, 1863, ch. 91, 12 Stat. 765.

41. *Gibbons v. United States*, 75 U.S. (8 Wall.) 269 (1868).

42. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C.). The Tucker Act, among other things, granted the district courts jurisdiction concurrent with the Court of Claims over claims not exceeding \$10,000. 28 U.S.C. § 1346(a) (1976). Under the Federal Courts Improvement Act of 1982, 96 Stat. 25, the Court of Claims was abolished and its trial jurisdiction was absorbed by the new U.S. Claims Court.

43. 28 U.S.C. § 1491 (1976).

44. Federal Tort Claims Act, ch. 753, 60 Stat. 812, 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680 (1976)).

45. *See Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951). *But see Feres v. United States*, 340 U.S. 135 (1950). In the years preceding the enactment of the FTCA, Congress enacted a number of statutes which provided limited remedies for torts in certain areas. *See, e.g.*, Small Tort Claims Act, Pub. L. No. 67-375, 42 Stat. 1066 (1922) (repealed); Suits in Admiralty Act, Pub. L. No. 66-156, 41 Stat. 525 (1920) (codified at 46 U.S.C. § 741 (1976)); Patent Infringement Act, Pub. L. No. 65-305, 36 Stat. 851 (1910) (codified as amended at 28 U.S.C. § 1498 (1976)).

46. *See Feres v. United States*, 340 U.S. 135, 140 (1950).

47. *See H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2 (1945)* (describing the then existing system as unduly burdensome to Congress). *See also United States v. Yellow Cab Co.*, 340 U.S. 543, 549 (1951); *Feres v. United States*, 340 U.S. 135, 140 (1950).

depending on the "caprice . . . of individual private laws."<sup>48</sup>

The broad language of the FTCA granted the district courts 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.<sup>49</sup>

Congress did make specific exceptions to the application of the FTCA.<sup>50</sup> If a claim fell within one of these exceptions, the doctrine of sovereign immunity would prevent the courts from exercising jurisdiction.<sup>51</sup>

The structure of the FTCA indicated, to some extent, its application to military personnel. There was a clear indication that the United States would sometimes answer for the negligence of military personnel. "Employee of the government" was defined by the FTCA to include "members of the military or naval forces of the United States."<sup>52</sup> In addition, "acting within the scope of his office or employment, in the case of a member of the military or naval forces of the United States, means acting in the line of duty."<sup>53</sup>

The FTCA, to a limited extent, covered claims of military personnel against the government. One indication of this coverage was the fact that between 1925 and 1935, eighteen tort claims bills were introduced in Congress and all but two expressly denied recovery to members of the armed forces.<sup>54</sup> The FTCA, as enacted, made no similar exclusion. However, the FTCA specifically disallowed claims arising out of "the combatant activities of the military or naval forces, or the Coast Guard, during time of war."<sup>55</sup> Also specifically disallowed are claims arising in a foreign country.<sup>56</sup>

The first claim by a serviceman under the FTCA to reach the Supreme Court was *Brooks v. United States*.<sup>57</sup> In *Brooks*, the Court

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48. *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

49. 28 U.S.C. § 1346(b) (1976). In 1974, the FTCA was extended to cover intentional torts of federal investigative or law enforcement officers. 28 U.S.C. § 2680(h) (1976).

50. 28 U.S.C. § 2680 (1976).

51. *See Dalehite v. United States*, 346 U.S. 15, 30-31 (1953).

52. 28 U.S.C. § 2671 (1976).

53. *Id.*

54. *Brooks v. United States*, 337 U.S. 49, 51 nn.2-3 (1949).

55. 28 U.S.C. § 2680(j) (1976).

56. 28 U.S.C. § 2680(k) (1976).

57. 337 U.S. 49 (1949).

held that a serviceman could recover against the United States under the FTCA. The scope of the decision raised questions, however. The Court noted that the plaintiffs' accident had nothing to do with their army career. "Were the accident incident to the Brooks' service, a wholly different case would be presented."<sup>58</sup>

In *Feres v. United States*, the Supreme Court addressed the issue reserved in *Brooks*.<sup>59</sup> In *Feres* the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service."<sup>60</sup> *Feres* created a judicial exception to the waiver of sovereign immunity contained in the FTCA.<sup>61</sup>

The Court based its decision in *Feres* on three major considerations. First, the Court noted the language of the FTCA which provided that the liability of the United States is to be the same as that of a private individual under like circumstances.<sup>62</sup> Since private persons cannot conduct military activities, there would be no liability of a private individual analogous to the three claims that were asserted in *Feres*. The Court concluded that, if allowed, such suits would "visit the Government with novel and unprecedented liabilities."<sup>63</sup>

The second consideration emphasized by the Court was the distinctly federal character of the relationship between the Government and members of the armed forces. The FTCA provided that the law of the place where the tort occurred was to govern.<sup>64</sup> The Court felt that this was inappropriate in a relationship so distinctly federal in nature.<sup>65</sup> Finally, the Court emphasized that there were other "enactments by Congress which provide systems of simple,

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58. *Id.* at 52.

59. 340 U.S. 135 (1950). *Feres* was a consolidation of three cases. The *Feres* case involved the death by fire of a serviceman on active duty. The fire was allegedly caused by a defective heating plant. The *Jefferson* case involved the alleged negligence of an army surgeon who left a towel in a serviceman's stomach. The *Griggs* case also involved allegations of medical malpractice by army surgeons.

60. *Feres*, 340 U.S. at 146.

61. *Feres* is the only clearly recognized judicial exception to the FTCA. *But see* *Johansen v. United States*, 343 U.S. 427 (1952) (construing the Federal Employees' Compensation Act (FECA), ch. 458, 39 Stat. 742 (1916) (codified as amended in scattered sections of 5 U.S.C.) as an exclusive remedy before the express provision making it the exclusive remedy for the employees covered by the Act), *cited in* 2 L. JAYSON, *supra* note 27, at § 237 (discussion of the implied exclusions in the FTCA).

62. *See supra* note 48 and accompanying text.

63. *Feres*, 340 U.S. at 142.

64. *See supra* note 48 and accompanying text.

65. *Feres*, 340 U.S. at 143.

certain, and uniform compensation for injuries or death of those in the armed services."<sup>66</sup>

Four years later the Court discussed another reason for the holding in *Feres*: the disruptive effect such suits would have on military discipline.<sup>67</sup> Today, this is generally considered the primary rationale for the *Feres* doctrine.<sup>68</sup>

In *United States v. Brown*<sup>69</sup> the Supreme Court refined the distinction between *Brooks* and *Feres*. A veteran sought damages for the negligent treatment of his knee in a Veterans Administration Hospital. The original injury to the knee occurred while the veteran was still on active duty. The Court held that such a suit could be maintained, noting that the alleged negligence on which the suit was based occurred after discharge.<sup>70</sup> *Brown* has since become the main support for claimants seeking to avoid the harsh application of the *Feres* doctrine.<sup>71</sup>

The Supreme Court has recently extended the scope of the *Feres* doctrine to indemnity claims.<sup>72</sup> The Court held in 1951 that the United States could be sued under the FTCA for contribution or indemnity;<sup>73</sup> but, in 1977, the Court, when faced with a claim for indemnity by a third party for injury to a serviceman on active duty, relied on *Feres* to bar the claim because the serviceman was injured in the course of military service.<sup>74</sup>

The *Feres* "incident to service" test has not been construed by the Supreme Court. The lower courts, however, have indicated a number of factors to be considered in applying the test. These factors include whether or not the claimant 1) was on active duty;

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66. *Id.* at 144.

67. *United States v. Brown*, 348 U.S. 110, 112 (1954).

68. *See, e.g.*, *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); *Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980); *Kelly v. United States*, 512 F. Supp. 356 (E.D. Pa. 1981); Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979).

69. 348 U.S. 110 (1954).

70. *Id.* at 112.

71. *See, e.g.*, cases cited *infra* note 78.

72. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977) (manufacturer of a malfunctioning ejection system in a fighter aircraft sought indemnity).

73. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

74. *Stencel Aero Eng'g Corp.*, 431 U.S. 666. Notwithstanding this reaffirmation of the *Feres* doctrine, a number of lower courts have continued to express reservations about the continued validity of *Feres*. *E.g.*, *Labash v. United States Dep't of the Army*, 668 F.2d 1153 (10th Cir. 1982), *cert. denied*, 102 S. Ct. 2299 (1982); *United States v. Monaco*, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2269 (1982); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); *Thomason v. Sanchez*, 539 F.2d 955 (3d Cir. 1980). *See also* Note, *From Feres to Stencel*, *supra* note 67.

2) was injured on base; 3) was subject to military control at the time of the injury; or 4) was involved in an activity related to or dependent on military status.<sup>75</sup>

In recent years, a number of claims based on the FTCA have arisen out of military activities that created long-term health problems. A number of these claims were based on the claimant's exposure to radiation while in service.<sup>76</sup> Others were based on the claimant's exposure to hazardous chemicals.<sup>77</sup> Still others were based on the military's experimentation with drugs.<sup>78</sup> The success of these claims varied. Generally, the claimants attempted to escape the *Feres* doctrine by alleging a post-discharge negligent failure to warn or offer preventive treatment.<sup>79</sup>

Based upon the reasoning of *Brown*, three federal courts have recognized a claim for negligent post-discharge failure to warn a veteran of the health consequences of an in-service act.<sup>80</sup> The first

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75. See generally *Miller v. United States*, 643 F.2d 490 (8th Cir. 1981) (en banc). For a thorough analysis of the cases applying the incident to service test in a wide range of fact patterns, see 1 L. JAYSON, *supra* note 27, at § 155.

76. *E.g.*, *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983), (exposure to radiation during work on the "Manhattan Project" caused children's genetic damage); *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981) (participation in military exercises in the immediate vicinity of atmospheric nuclear tests conducted in Nevada caused cancer); *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2269 (1982) (exposure to radiation in connection with the "Manhattan Project" caused cancer and a birth defect); *Kelly v. United States*, 512 F. Supp. 356 (E.D. Pa. 1981) (exposure to radiation during the Navy's test of nuclear weapons in the South Pacific caused cancer); *Everett v. United States*, 492 F. Supp. 318 (S.D. Ohio 1980) (participation in nuclear weapons test in Nevada caused cancer).

77. *E.g.*, *Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) (chemical companies sought indemnification for damages resulting from the exposure of veterans to herbicides in Vietnam); *Schnurman v. United States*, 490 F. Supp. 429 (E.D. Va. 1980) (exposure to toxic gases during a Navy experiment).

78. *E.g.*, *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981) (voluntary participant in a program intended to develop and test methods of defense against chemical warfare was given LSD without his knowledge); *Sweet v. United States*, 528 F. Supp. 1068 (C.D.S.D. 1981) (voluntary participant in chemical warfare experiments was given a chemical substance which he claimed caused subsequent behavioral problems); *Nagy v. United States*, 471 F. Supp. 383 (D.D.C. 1979) (participation in two LSD medical experiments conducted by the Army); *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979) (imprisoned serviceman was given LSD without his knowledge in an experiment designed to test the ability of the drug as an aid to interrogation).

79. *E.g.*, *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981); *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981); *Sweet v. United States*, 528 F. Supp. 1068 (C.D.S.D. 1981); *Kelly v. United States*, 512 F. Supp. 356 (E.D. Pa. 1981); *Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980); *Everett v. United States*, 492 F. Supp. 318 (S.D. Ohio 1980); *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979).

80. *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981); *Everett v. United States*, 492 F. Supp. 318 (S.D. Ohio 1980); *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979).

of these decisions was *Thornwell v. United States*.<sup>81</sup> While in service, Thornwell was administered lysergic acid diethylamide (LSD) without his knowledge. The district court held that the *Feres* doctrine precluded recovery for any injury which occurred while Thornwell was on active duty. The court concluded, however, that the failure to warn or provide follow-up medical care was cognizable under *Brown*. The court emphasized the fact that the in-service injury was intentional and that the post-service injury resulted from negligence. This was emphasized despite the court's holding that recovery for the in-service injury was barred no matter if the tort was negligent, intentional, or constitutional.<sup>82</sup> Also, this fact pattern appears irrelevant to a disposition of the post-discharge claim.<sup>83</sup> The court was apparently emphasizing the fact that this was not "a mere act of negligence which takes place while the plaintiff is on active duty and which then remains uncorrected."<sup>84</sup>

Subsequent to *Thornwell*, two other courts reached similar conclusions in suits based on a veteran's exposure to nuclear radiation while on active duty.<sup>85</sup> However, a number of other courts have applied the *Feres* doctrine and dismissed post-discharge failure to warn claims for want of subject matter jurisdiction.<sup>86</sup> Generally, in rejecting these claims, the courts have relied on two major considerations. First, the courts have expressed their concern that allowing the maintenance of such suits would undermine the *Feres* doctrine.<sup>87</sup> Second, the courts have relied on a conceptual argument in rejecting the claims.<sup>88</sup> Basically, this argument is that any obligation to warn is inseparable from the source of that obligation, which

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*See also* *Schwartz v. United States*, 230 F. Supp. 536 (E.D. Pa. 1964) (dicta places an affirmative duty on the government to warn of the health risks involved).

81. *Thornwell*, 471 F. Supp. 344.

82. *I.e.*, a *Bivens*-type action. *See infra* text accompanying notes 89-99.

83. *See Brown*, 348 U.S. 110.

84. *Thornwell*, 471 F. Supp. at 351. *But cf.* *Henning v. United States*, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (involving the negligent reading of a serviceman's x-rays and a post-discharge failure to warn claim).

85. *See Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981); *Everett v. United States*, 492 F. Supp. 318 (S.D. Ohio 1980).

86. *See Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983); *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981); *Henning v. United States*, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); *Sweet v. United States*, 528 F. Supp. 1068 (C.D.S.D. 1981); *Kelly v. United States*, 512 F. Supp. 356 (E.D. Pa. 1981); *Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980); *Schnurman v. United States*, 490 F. Supp. 429 (E.D. Va. 1980).

87. *E.g.*, *Agent Orange Prod. Liab. Litig.*, 506 F. Supp. at 779; *Schnurman*, 490 F. Supp. at 437.

88. *See, e.g.*, *Stanley*, 639 F.2d 1146; *Kelly*, 512 F. Supp. 356.

would typically be an in-service injury.<sup>89</sup>

In addition to seeking recovery under the FTCA, veterans who have experienced long-term health problems as a result of their service have also relied on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>90</sup> In *Bivens* the Supreme Court created a federal cause of action for damages for violations of the fourth amendment<sup>91</sup> by federal officials.<sup>92</sup> Subsequently, the Court implied a cause of action under the fifth amendment<sup>93</sup> and under the eighth amendment.<sup>94</sup>

It is clear that a suit directly against the United States for the violation of an individual's constitutional rights by federal officials is barred by sovereign immunity.<sup>95</sup> Suits against federal officers may also be barred by sovereign immunity if the *Feres* doctrine is applicable. The majority of courts that have decided the issue have held that the *Feres* doctrine applies to *Bivens*-type actions.<sup>96</sup> The Ninth Circuit, however, has held that at least some constitutional claims escape *Feres*.<sup>97</sup>

The Court in *Bivens* indicated two situations that might preclude implying a cause of action directly under the Constitution.

89. *Id.*

90. 403 U.S. 388 (1971). See, e.g., *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 102 S. Ct. 2234 (1982) (*Jaffee II*); *Schnurman v. United States*, 490 F. Supp. 429 (E.D. Va. 1980); *Nagy v. United States*, 471 F. Supp. 383 (D.D.C. 1979); *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979); *Misko v. United States*, 453 F. Supp. 513 (D.D.C. 1978), *aff'd mem.*, 593 F.2d 1371 (D.C. Cir. 1979). See also *Bailey v. DeQuevedo*, 375 F.2d 72 (3d Cir. 1967), cert. denied, 389 U.S. 923 (1967) (*Feres* immunizes an army doctor in a common law negligence action).

91. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

92. See generally *Lehmann, Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977).

93. *Davis v. Passman*, 442 U.S. 228 (1979). "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

94. *Carlson v. Green*, 446 U.S. 14 (1980). "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

95. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring) ("However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."). See also *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), cert. denied, 441 U.S. 961 (1979) (*Jaffee I*); *Duarte v. United States*, 532 F.2d 850 (2d Cir. 1976).

96. See cases cited *supra* note 88.

97. See *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981), cert. granted, 103 S. Ct. 292 (1982) (a racial discrimination suit based, in part, on the fifth amendment). See also *Stanley v. C.I.A.*, 639 F.2d at 1159 (negligence action dismissed, though court noted in dicta that there is a "colorable constitutional claim" based on *Bivens*).

The first situation would involve the existence of "special factors counseling hesitation in the absence of affirmative action by Congress."<sup>98</sup> The second situation would exist when Congress had expressly provided for an alternate remedy.<sup>99</sup> In *Jaffee II*,<sup>100</sup> the Third Circuit reviewed this standard along with the policy considerations underlying the *Feres* doctrine and concluded that *Feres* does limit the *Bivens* remedy.

The application of the *Feres* doctrine to claims by the family of military personnel raises additional questions.<sup>101</sup> In *Monaco v. United States*,<sup>102</sup> the Ninth Circuit dealt with a claim by a child with a birth defect allegedly caused by the in-service exposure of her father to radiation. The court held that since the child's injury had its "genesis" in the injury of the father, it was similarly barred by the *Feres* doctrine.<sup>103</sup> The majority of the courts that have decided the issue are in accord with *Monaco*.<sup>104</sup>

The Eighth Circuit began its analysis of *Laswell* with a discussion of the FTCA claims. The court first noted that Laswell's exposure to radiation was incident to service. Laswell was on active duty and was participating in military operations at the time of the exposure.

The court rejected with little discussion the plaintiffs' argument that *Feres* does not apply to intentional torts. "The purposes for which *Feres* was created and continues to exist are equally advanced regardless of whether a simple negligence case is presented or the allegations constitute a more willful act."<sup>105</sup>

The post-discharge claims proved more difficult. The plaintiffs' contention was that the failure to warn Laswell and his family of the health hazards they faced and the failure to provide preventive treatment were post-discharge acts or omissions which are cognizable under the FTCA on the authority of *United States v. Brown*.<sup>106</sup>

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

99. *Id.* at 397.

100. 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 102 S. Ct. 2234 (1982).

101. See generally Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241 (1982). Derivative suits, such as wrongful death actions, are clearly subject to the *Feres* doctrine since *Feres* itself involved two wrongful death claims.

102. 661 F.2d 129 (9th Cir. 1981), cert. denied, 102 S. Ct. 2269 (1982).

103. *Id.* at 133.

104. See *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 3086 (1983); *Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980). But see *Hinkie v. United States*, 524 F. Supp. 277 (E.D. Pa. 1981).

105. *Laswell*, 683 F.2d at 265.

106. 348 U.S. 110 (1954).

The court reviewed the decisions of *Thornwell v. United States*<sup>107</sup> and *Everett v. United States*<sup>108</sup> and concluded these decisions were not mandated by *Brown* since *Brown* involved an affirmative negligent act after discharge. The court characterized the failure to warn or provide medical treatment as a mere omission which was, in effect, a continuation of the in-service tort.

The court seemed particularly concerned with the possible effects that the maintenance of such suits would have on military planning and discipline. This is one of the major rationales supporting the *Feres* doctrine. In addition, the court was concerned that such suits could result in creative pleadings that would undermine that doctrine.

The plaintiffs' constitutional claims failed for two reasons. First, the United States was not a proper defendant in a *Bivens* action. Second, the individually named defendants were improperly joined. There was no allegation that they participated or acquiesced in the alleged constitutional violations. The court, however, was quick to point out that the result would be the same even if the plaintiffs were to amend their complaint to name the correct defendants. The court extended the application of *Feres* to claims based on constitutional grounds.

The claim of Laswell's children was dismissed because it was based upon "the mere possibility of some future harm."<sup>109</sup> Increased risks of genetic damage will not sustain a lawsuit for personal injuries. Actual damage is required. The court also noted that the negligent act took place during Laswell's military service. This triggers the application of the *Feres* doctrine and operates to bar the claims of the children also.

The court stated its awareness of the harsh results of its decision. However, it felt that the policy considerations involved necessitated congressional action to establish a remedy.

The importance of *Laswell* lies in its complete rejection of the post-discharge claims. The Eighth Circuit has relieved the United States of any affirmative duty to warn veterans of long-term health risks resulting from their service. This is true despite the fact that the government may be the only one in a position to know exactly what health hazards the veteran was exposed to while in service.

Such claims, of course, have to be analyzed in light of the pol-

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107. 471 F. Supp. 344 (D.D.C. 1979).

108. 492 F. Supp. 318 (S.D. Ohio 1980).

109. *Laswell*, 683 F.2d at 269.

icy considerations underlying *Feres*. The most important of these considerations is the effect the claim would have on military planning and discipline. *Kelly v. United States*<sup>110</sup> was a case factually similar to *Laswell*. In discussing the effect such claims would have on the military, the district court asked, "[W]hat would be the consequence if military planners had found it necessary not to reveal that nuclear testing had occurred, or the amount of radiation generated? Would not the duty urged by Kelly require such revelation?"<sup>111</sup> The *Kelly* court expressed legitimate concerns which should be considered to determine whether or not the United States had an affirmative duty to warn.

It is this author's opinion that these concerns are not sufficient to completely relieve the United States of a duty to warn veterans of the health problems they will face as a result of their service. The effect on military discipline of post-discharge failure to warn claims seems to be minimal. Such claims would not involve the second-guessing of military orders. It would be unnecessary to determine if the United States was negligent in exposing the veteran to the health hazard in the first place. The facts underlying the in-service injury would be relatively unimportant.<sup>112</sup> In addition, by their very nature, such claims would only arise after the claimant had left military service.

All that would be necessary for an adjudication of such claims would be to 1) determine if the veteran had been exposed to a health hazard; 2) determine if this was sufficient to create an affirmative duty to warn; 3) determine if the United States breached its duty to warn; and 4) determine if the breach caused the veteran's injury. Such claims should be cognizable under the FTCA on the basis of *United States v. Brown*.<sup>113</sup>

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110. 512 F. Supp. 356 (E.D. Pa. 1981).

111. *Id.* at 361.

112. *See Brown*, 348 U.S. 110.

113. *Id.*

