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1985 Department of Defense Authorization Act: Leaving Atomic Veterans at Ground Zero

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NOTES

1985 DEPARTMENT OF DEFENSE AUTHORIZATION ACT: LEAVING ATOMIC VETERANS AT GROUND ZERO

INTRODUCTION

As part of the atomic-weapons testing and development program, the United States Government, between 1945 and 1962, conducted 693 announced nuclear tests, 212 of which were conducted in the atmosphere.[1] In 1951, the Department of Defense began troop maneuvers in conjunction with many of these tests, in order to determine the effects of above-ground nuclear explosions on military personnel.[2] Over 220,000 members of the armed forces subsequently participated in the testing of nuclear devices.[3] As a result of their participation, military personnel were exposed to varying levels of radiation because of their proximity to ground zero during and after the detonation of atomic bombs.[4] A significant number of these former service members now

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1. S. REP. NO. 500, 98th Cong., 2d Sess. 374 (1984).

2. *See* H. ROSENBERG, ATOMIC SOLDIERS 24-25 (1980). The troop maneuvers were intended to serve dual purposes. First, soldiers would be better prepared to fight on nuclear battlefields in the future. Second, the psychological reaction of the participating troops and any subsequent deterioration in their combat performance could be studied. Note, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933, 934 (1981).

3. H.R. REP. NO. 592, 98th Cong., 2d Sess. 7 (1984).

4. At some tests, troops were positioned near detonation sites. At other tests, units were marched to the center of the explosion shortly after detonation and run through simulated combat maneuvers. *Veterans Exposure to Ionizing Radiation as a Result of Detonations of Nuclear Devices: Hearing Before the Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 5 (1983) (statement of Senator Arlen Specter) [hereinafter cited as *1983 Hearings*]; *see also* Jaffee v. United States, 592 F.2d 712, 714 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979) (plaintiff ordered to stand in open field near ground zero to witness nuclear bomb detonation); Hinkie v. United States, 524 F. Supp. 277, 278 (E.D. Pa. 1981) (plaintiff's decedent ordered to walk to ground zero after observing nuclear explosion); Fountain v. United States, 533 F. Supp. 698, 700 (W.D. Ark. 1981) (plaintiff ordered to crouch in a field 3500 yards from where atomic bomb was exploded and then ordered to march as close to the center of the explosion as possible). *See also* Note, *supra* note 2, at 935-36 (describing troop exercises at the Nevada Test Site, where the majority of atmospheric nuclear tests took place).

No special protective clothing was worn by troops participating in the atomic-testing program. Note, *supra* note 2, at 951. Radioactive dust, stirred up by troop advancement, helicopters, and other military vehicles, was easily inhaled and ingested by the soldiers. *Id.* The primary means of decontamination was the sweeping of per-

suffer from leukemia or cancer of the thyroid, lung, liver, skin and bone marrow and often produce children with severe congenital defects as well as mental retardation.[5]

Some of the irradiated veterans, asserting that their illnesses are traceable to the atomic-testing program, have brought claims against the United States Government, seeking monetary damages.[6] These claims have consistently been denied, however, on the basis of a doctrine first pronounced by the Supreme Court in *Feres v. United States*,[7] which effectively created intramilitary immunity for incident-to-service injuries.[8] The *Feres* doctrine has remained an insurmountable obstacle to irradiated veterans' suits against the government and its officials, despite the legal theory employed.[9] Atomic veterans have been equally unsuccessful in seeking redress from the Veterans' Administration because of their inability to establish a causal connection between their illnesses and the atomic-testing program.[10]

Unable to circumvent the broadly-scoped *Feres* doctrine or to recover disability benefits from the Veterans' Administration, atomic veterans have recently begun suing the operators of research institutions that participated in the atomic-weapons testing program.[11] This

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sonnel with brooms in order to remove contaminated dust. *Id. See also Fountain*, 533 F. Supp. at 700.

Moreover, there is evidence to suggest that the government knew of the dangers involved. Since 1902, when cancer was first attributed to overexposure to x-rays, the health hazards of exposure to radiation were known. *See* H.R. REP. No. 592, 98th Cong., 2d Sess. 7 (1984). Although for many years medical scientists assumed there were no adverse effects from low levels of exposure, in the 1940's and 1950's the medical community realized that there was no safe "threshold," that even low levels of exposure carried a degree of risk which increased linearly with dosage. *1983 Hearings, supra* note 4, at 98 (fact sheet prepared by Defense Nuclear Agency).

5. *See, e.g.*, Broudy v. United States, 661 F.2d 125, 126 (9th Cir. 1981) (radiation-related cancer, genetic damage); *Hinkie*, 524 F. Supp. at 279 (radiation-related chromosomal damage, birth defects such as lack of thumb joints, lack of esophagus, mental retardation); *Fountain*, 533 F. Supp. at 700 (radiation-related leukemia).

6. *See infra* notes 74-106 and accompanying text.

7. 340 U.S. 135 (1950).

8. *See infra* notes 48-73 and accompanying text.

9. *See infra* notes 74-137 and accompanying text.

10. *See infra* notes 138-46 and accompanying text.

11. An estimated 100 veterans' suits, filed in several states, are currently pending against companies and research facilities that participated in the testing program. Nat'l Law Journal, Nov. 12, 1984, at 26, col. 1. Such organizations were placed under government contract at the inception of the nuclear-weapons testing program in order to provide scientific, engineering, and technical support in the development of nuclear energy. S. REP. No. 500, 98th Cong., 2d Sess. 375 (1984). Veterans' suits currently pending against the contractors allege numerous causes of action including human experimentation, civil conspiracy, fraudulent concealment, violation of fundamental constitutional rights, and negligence. *See, e.g.*, In re Consolidated United States Atmospheric Testing Litigation, 616 F. Supp. 759 (N.D. Cal. 1985).

final avenue of redress has effectively been foreclosed, however, by the 1985 Department of Defense Authorization Act.[12] The Act provides that all pending and future charges brought against contractors involved in the atomic-testing program will now be converted into suits against the federal government, thereby invoking the *Feres* bar to recovery.[13]

This note will examine the overall impact of the 1985 Defense Authorization Act on atomic veterans' suits and will conclude that the new law effectively renders the irradiated veteran remediless.[14] Additionally, this note will raise several constitutional objections to the new legislation. First, it will be argued that the new law, by extinguishing accrued causes of action, in which there is a recognized property right, effects a "taking" under the fifth amendment for which compensation must be paid.[15] Secondly, it will be argued that the provisions of the 1985 Defense Authorization Act fail to comport with the right to due process guaranteed by the fifth amendment.[16]

FEDERAL GOVERNMENT AS EXCLUSIVE DEFENDANT: LEGISLATIVE INTENT

The 1985 Department of Defense Authorization Act, a $212 billion military appropriations bill, was signed into law on October 19, 1984.[17] Section 1631 of the Act limits private contractors' liability for injuries arising out of the atomic-testing program.[18] Although this five-

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12. Pub. L. No. 98-525, § 1631, 98 Stat. 2492, 2647-48 (1984). Section 1631 has been codified at 42 U.S.C. § 2212 (1985).

13. *Id.*

14. *See infra* notes 74-146 and accompanying text.

15. *See infra* notes 147-82 and accompanying text.

16. *See infra* notes 183-212 and accompanying text.

17. Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, 98 Stat. 2492 (1984). An 11th hour bill, the new law was hurriedly passed by Congress before the election recess.

18. Section 1631 provides, in relevant part:

> (a)(1) The remedy against the United States provided by sections 1346(b) and 2672 of title 28, United States Code, or by the Act of March 9, 1920 (46 U.S.C. 742-752 and 781-790), as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on the acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.
>
> (2) The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. The employees of a contractor referred to in paragraph (1) shall be considered to be employees of the Federal Govern-

paragraph provision was greatly overshadowed by controversial defense issues such as MX missile procurement,[19] its impact on suits brought by atomic veterans is profound.

The effect of section 1631 is two-fold. Initially, the new law converts all pending and future actions brought against private contractors for injuries incident to the atomic-testing program into suits

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ment, as provided in section 2671 of title 28, United States Code, for the purposes of any such civil action or proceeding, and the civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of such title and shall be subject to the limitations and exceptions applicable to those actions.
(b) A contractor against whom a civil action or proceeding described in section (a) is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (a), a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings shall be deemed a tort action brought against the United States under the provisions of section 1346(b), 2401(b), or 2402, of sections 2671 through 2680 of title 28, United States Code . . . .
(c) the provisions of this section shall apply to any action now pending or hereafter commenced which is an action within the provisions of subsection (a) of this section . . . .
(d) For purposes of this section, the term "contractor" includes a contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program for the Department of Energy (or its predecessor agencies, including the Manhattan Engineer District, the Atomic Energy Commission, and the Energy Research and Development Administration). Such term also includes facilities which conduct or have conducted research concerning health effects of ionizing radiation in connection with the testing under contract with the Department of Energy (or any of its predecessor agencies).

Id., § 1631, 98 Stat. at 2646-47. The contractor liability provision was included in the Senate version of the bill but not in the bill approved by the House. *See* S. 2723, 98th Cong., 2d Sess. § 330 (1984); H.R. 5167, 98th Cong., 2d Sess. (1984). H.R. 5167 was later, however, amended to contain S. 2723 and the bill was approved by a House-Senate subcommittee, with the atomic-testing provision intact, on Sept. 25, 1984. *See* H.R. REP. No. 1080, 98th Cong., 2d Sess. 162 (1984). The bill was approved by voice vote in both houses on Sept. 27, 1984.

19. *See* Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 110, 98 Stat. 2492, 2504-07 (1984). Although the 1985 Department of Defense Act was the result of over three months of extensive hearings, the record is bereft of discussion relating to the contractor liability provision. In fact, plaintiffs' attorneys in pending atomic-testing cases have charged that the provision was "passed furtively." *Congress Drops Bombs on Vets*, Nat'l Law Journal, Nov. 12, 1984, at 24, col. 1.

against the federal government.[20] The federal government is thereby made the exclusive defendant in these atomic-testing cases. Secondly, the defense authorization bill mandates that all such suits be tried under the Federal Tort Claims Act (FTCA), pursuant to FTCA limitations and exceptions.[21] Accordingly, claimants will be forced to sue in federal court[22] and will be denied the opportunity to seek punitive damages.[23]

The legislative intent underlying section 1631, and the protection it affords atomic-testing contractors, was set forth by the Senate Armed Services Committee in a report issued in May, 1984.[24] Initially, the Committee suggested that although independent contractors are not normally shielded from liability under the FTCA,[25] contractors involved in the atomic-testing program are "unique."[26] Such contractors were considered atypical by the Committee on the grounds that the government, not the contractors, had plenary control of the atomic-testing program.[27] As such, the contractors were mere instrumentalities assisting in an "entirely governmental task."[28]

The Committee further justified extension of the FTCA's protective mantle to include atomic-testing contractors on the grounds that the contractors were vital to the development and utilization of atomic energy for military purposes.[29] The Committee noted that the atomic-weapons testing program was, from its inception, highly dependent on the scientific, engineering, and technical expertise provided by the contractors.[30] As such, the contractors made a significant con-

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20. Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1631, 98 Stat. 2492, 2646-47 (1984).

21. *Id. See* 28 U.S.C. §§ 1291, 1346(b)-(c), 1402(b), 2401(b), 2402, 2412, 2671-80 (1982).

22. *See* 28 U.S.C. § 1346(b) (1982).

23. *See id.* at § 2674.

24. *See* S. REP. No. 500, 98th Cong., 2d Sess. 374 (1984).

25. *Id. See also* 28 U.S.C. § 2671 (1982).

26. S. REP. No. 500, 98th Cong., 2d Sess. 374 (1984).

27. *Id.* at 374-75. The Committee emphasized that the Government alone set the policy and controlled the activities and circumstances surrounding the atomic-testing program. Furthermore, each nuclear test was conducted under the statutory direction of Congress, with prior approval by the President of the United States. The atomic-testing contractors did not set the times or places for the tests, nor did they direct military personnel to participate in the tests. *Id.* at 374-76.

28. *Id.* at 375.

29. *Id.* at 376. The Committee recognized that without the participation of these organizations, the atomic-weapons testing program could not have proceeded, either technically or economically. *Id.*

30. *Id.*

tribution to the development of atomic energy and thus to the nation's defense and security.[31] Accordingly, the Committee felt that abandoning the contractors to a flood of litigation arising from the atomic-testing program would be unjust.[32]

Next, the Committee set out three factors in support of section 1631's mandate that atomic-testing suits against independent contractors be tried under the FTCA. First, the consolidation of such cases under the FTCA would protect the United States from a variety of judgments based on the divergencies of state laws.[33] Secondly, the consolidation of suits would provide a uniform remedy, where a connection between the nuclear testing program and the harm alleged was established.[34] Thirdly, under the leadership of the Department of Justice, the government would be afforded the best defense possible.[35]

In summary, section 1631 converts all atomic-testing suits against private contractors into suits against the federal government in order to protect the "unique" organizations which merely functioned as governmental instrumentalities in a task vital to national security. Additionally, section 1631 requires that all such suits be tried under the FTCA in order that the United States may receive the best defense possible and so that remedies, if warranted, will be uniform. Where suits are brought by irradiated veterans, however, the "best defense possible" will come not from the Attorney General, but from the courts, who by broadly applying the *Feres* doctrine, will ensure that remedies are uniformly nonexistent.

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31. *Id.* As stated by Congress in the Atomic Energy Act of 1946, 'the development, utilization and control of atomic energy for military and all other purposes are vital to the common defense and security.' *Id.* at 375 (quoted by the Committee with approval).

32. *Id.* at 377. As noted by the Committee, literally thousands of plaintiffs to date have filed suits against the operators of government laboratories involved in the atomic-testing program, seeking billions of dollars in damages. *Id.* Moreover, since hundreds of thousands of military and civilian personnel participated in the tests, thousands more may be expected to file law suits. *Id.* at 376. Legislative concern for the private contractors over the flood of litigation is perhaps misplaced, however, since by the Committee's own admission, the contractors are "fully indemnified by the government under the terms of their contracts." *See id.* As such, the contractors would be completely reimbursed for any liability arising out of their participation in the testing program, including the costs of litigation. *Id.* at 375. Consequently, as the Committee admitted, the ultimate burden would fall not upon the contractors, but upon the taxpayers. *Id.* at 376.

33. *Id.* at 377.

34. *Id.*

35. *Id.*

FEDERAL GOVERNMENT AS EXCLUSIVE DEFENDANT: JUDICIAL EFFECT

The 1985 Department of Defense Act converts all pending and future actions against contractors involved in the atomic-testing program into suits against the federal government.[36] Additionally, the new law directs that all such suits be tried under the Federal Tort Claims Act (FTCA).[37] An analysis of the judicial effect which the new legislation will have on atomic veterans must accordingly begin with the FTCA and its waiver of sovereign immunity. More critically, however, a judicially-created exception to the waiver of sovereign immunity known as the *Feres* doctrine must be examined.

The Federal Tort Claims Act: Waiver of Sovereign Immunity

The Federal Tort Claims Act (FTCA),[38] enacted in 1946, allows tort actions to be brought against the federal government for injury caused by the negligence of government employees acting within the scope of their employment.[39] Prior to its enactment, the United States was insulated from such liability under the doctrine of sovereign immunity.[40] In restricting the doctrine through the FTCA, Congress provided that the United States would be liable in those circumstances under which a private individual would be liable under state law.[41]

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36. Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1631, 98 Stat. 2492, 2646-47 (1984).

37. *Id.*

38. 28 U.S.C. §§ 1291, 1346(b)-(c), 1402(b), 2401(b), 2402, 2412, 2671-80 (1982).

39. 28 U.S.C. § 1346(b) (1982).

40. The doctrine of sovereign immunity is grounded in the English common law concept that the King could do no wrong and the derivative American belief that the state could be sued only with its consent. Feres v. United States, 340 U.S. 135, 139 (1950). Additionally, it is suggested that "to allow recovery against the government would threaten a raid on the federal treasury, endanger important policies and goals, and ultimately affect the stability of the government." Comment, *The Supreme Court and the Tort Claims Act: End of an Enlightened Era*, 27 CLEV. ST. L. REV. 267, 270 (1978).

Prior to the enactment of the FTCA, relief could be sought for injuries caused by government agents only by filing a special bill in Congress. *Feres*, 340 U.S. at 140. Accordingly, the implementation of the FTCA served dual purposes. Initially, it relieved Congress of the cumbersome and inefficient task of reviewing these private bills of relief. *See id.*; Dalehite v. United States, 346 U.S. 15, 24-25 (1953). Secondly, it provided "much-needed relief to those suffering injury from the negligence of government employees." United States v. Muniz, 374 U.S. 150, 165-66 (1963). As such, the FTCA mitigated the harsh and often unjust consequences of sovereign immunity. *Feres*, 340 U.S. at 139 (1950).

41. *See* 28 U.S.C. § 2674 (1982) ("United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.").

Congress did, however, limit this broad waiver of sovereign immunity by excluding liability for punitive damages[42] and by delineating special exceptions to the government's general consent to be sued.[43]

Two such special exceptions are pertinent to military personnel. Service members may not bring claims against the government which arise out of military combat activities during wartime.[44] Additionally, claims arising in a foreign country are barred.[45] Notably, however, the FTCA contains no general exception barring all tort claims brought by service members.[46] Moreover, the FTCA does not bar intramilitary tort claims.[47]

Claims brought by members of the armed forces are therefore not expressly thwarted by the FTCA. Instead, such claims have been frustrated by the judiciary, which soon after the enactment of the FTCA carved out a further exception to the government's waiver of sovereign immunity, creating intramilitary immunity for claims of negligence brought under the FTCA.

The Feres *Doctrine: Reinstatement of Sovereign Immunity for Intramilitary Claims*

The Supreme Court first addressed the issue of whether intramilitary claims could be brought under the FTCA in *Brooks v. United States*[48] and, a year later, in *Feres v. United States*.[49] In both cases, the Court acknowledged that the FTCA did not expressly exclude claims brought by one member of the armed services against

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42. *Id.*

43. Thirteen special exceptions have been carved out by Congress. *See* 28 U.S.C. § 2680(a)-(f), (h)-(m) (1982).

44. *Id.* at § 2680(j).

45. *Id.* at § 2680(k).

46. Prior to the enactment of the FTCA, the majority of tort claims bills introduced into Congress did contain provisions denying recovery to members of the armed forces. Brooks v. United States, 337 U.S. 49, 51 (1948). Noting that Congress, in enacting the FTCA, chose not to include such provisions and further noting the specificity of the exceptions Congress did enumerate, the *Brooks* Court concluded that "it would be absurd" to believe that Congress intended to mandate a blanket exclusion of military claims. *Id.* at 51-52.

47. Government officials or employees upon whose negligence a cause of action may be based, include, by definition, "members of the military or naval forces of the United States . . . acting in the line of duty." 28 U.S.C. § 2671 (1982). Accordingly, it is contemplated within the FTCA that a wrongfully injured service member may bring a cause of action based on the negligence of a fellow military member or official.

48. 337 U.S. 49 (1949). A service member was injured while on furlough in an off-base collision with an Army truck. *Id.* at 50.

49. 340 U.S. 135 (1950).

another.[50] However, although an injured serviceman was allowed to bring an FTCA action in *Brooks*,[51] the Court emphasized that the accident was unrelated to the plaintiff's military service and declined to address the issue of whether an incident-to-service injury would be actionable.[52] This issue was settled a year later in *Feres*, wherein the Court held that the government is not liable under the FTCA for injuries to service members "when the injuries arise out of or are in the course of activity incident to service."[53]

The Supreme Court in *Feres* based its broad holding which barred FTCA claims for in-service torts on three basic factors. Initially, the Court justified its holding by referring to the FTCA prescription that the government shall be liable "in the same manner and to the same extent as a private individual under like circumstances."[54] The Court found that because no American law had ever permitted a member of the armed forces to recover for the negligence of either a superior officer or the government, there was no parallel liability in an individual.[55] Moreover, the Court reasoned that no analogous liability existed "under like circumstances" because no private individual can "conscript or mobilize a private army."[56]

A second reason for the in-service exception offered by the Court was that the FTCA's application of state law to service members' tort actions would be inconsistent with the "distinctively federal" character of the relationship between the government and military personnel.[57] The Court expressed concern that under the FTCA, a service member's recovery would depend on the geographical fortuity of

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50. *Id.* at 138-39.

51. 337 U.S. at 54.

52. The Court noted that "[w]ere the accident incident to Brooks' service, a wholly different case would be presented. We express no opinion as to it." *Id.* at 52. In so stating, the Court set the stage for the *Feres* holding.

53. *Feres*, 340 U.S. at 146. *Feres* is actually a compilation of three cases. In the first, the plaintiff's decedent died in a fire which resulted from a defective heating system in his barracks. Feres v. United States, 177 F.2d 535 (2d Cir. 1949). In the second, the plaintiff alleged that a towel 30 inches long by 18 inches wide, marked "Medical Department U.S. Army," was negligently left in his abdomen during an operation which he underwent while in the Army. Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949). The third suit also related to medical malpractice by army surgeons. Griggs v. United States, 178 F.2d 1 (9th Cir. 1949). In consolidating the cases, the Court noted the common underlying factor in each case was that "each claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces." *Feres*, 340 U.S. at 138.

54. *Id.* at 141. *See also* 28 U.S.C. § 2674 (1982).

55. *Feres*, 340 U.S. at 141-42.

56. *Id.*

57. *Id.* at 143.

a particular duty assignment.[58] Since service members on active duty have no control over their assignments, the Court felt that protection from the divergencies of state tort law was needed.[59]

Lastly, the Court reasoned that the existence of an alternative compensatory scheme, under the Veterans' Benefits Act,[60] justified disallowing federal tort claims resulting from activities incident to military service.[61] The Court noted that veterans' benefits require no litigation and are not "negligible or niggardly."[62] Additionally, the Court felt that if Congress had intended the FTCA to apply to in-service torts, it undoubtedly would have provided for an adjustment of veterans' benefits and other military compensation schemes with any tort recovery.[63]

While the cogency of the rationales offered in the *Feres* opinion has been substantially undermined by subsequent Supreme Court and lower court decisions,[64] a more compelling "military discipline" rationale emerged in *United States v. Brown*[65] in 1954, and has since been incorporated as a factor to be considered in disallowing military tort claims.[66] In *Brown*, the Court explained that the *Feres* exception to the FTCA was based on the unique relationship of the soldier to his superiors, the potential effect of such suits on military discipline, and the "extreme results" that might ensue from judicial review of negligent orders given or negligent acts committed by military personnel.[67] This military discipline argument has since become the primary justification for the *Feres* doctrine[68] and has served as the

58. *Id.*

59. *See id.* at 142-43.

60. *See* Compensation for Service-Connected Disabilities or Death, 38 U.S.C. §§ 301-62 (1982).

61. *Feres*, 340 U.S. at 144.

62. *Id.* at 145.

63. *Id.* at 144.

64. *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61, 67 (1955) (Court concluded Congress did not intend to predicate the government's FTCA liability on a "completely fortuitous circumstance—the presence or absence of identical private liability."); United States v. Muniz, 374 U.S. 150, 162 (1963) (Court conceded that relationship of federal prisoners to national government is federal in nature like that of soldiers and officers, but nonetheless allowed federal prisoner to sue under the FTCA for injuries sustained during confinement in federal penitentiary); Hunt v. United States, 636 F.2d 580, 598 (D.C. Cir. 1980) ("[I]t cannot be said that the presence of an alternative compensation system either explains or justifies the *Feres* doctrine, it only makes the effect of the doctrine more palatable.").

65. 348 U.S. 110 (1954).

66. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1973).

67. *Brown*, 348 U.S. at 112.

68. Chappell v. Wallace, 103 S. Ct. 2362, 2365 (1983); *Hunt*, 636 F.2d at 599

basis for denying a wide range of service members' suits,[69] including those based on radiation-induced injuries.[70]

While the *Feres* doctrine has been widely criticized in the past three decades,[71] "it is beyond question that it is the law."[72] The doctrine's validity continues to be reaffirmed by the Supreme Court.[73] Accordingly, the 1985 Defense Act will, by converting all atomic-

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("[T]he protection of military discipline . . . serves largely if not exclusively as the predicate for the *Feres* doctrine.").

69. *See, e.g.*, Brown v. United States, 739 F.2d 362 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 3524 (1985) (national guardsman injured in "mock lynching" that occurred during training exercises); Miller v. United States, 643 F.2d 481 (8th Cir. 1981) (en banc) (off-duty serviceman electrocuted when ladder he was working with came in contact with uninsulated wire on military base); Veilette v. United States, 615 F.2d 505 (9th Cir. 1980) (service member died as a result of the alleged negligence of naval hospital personnel); Troglia v. United States, 602 F.2d 1334 (9th Cir. 1979) (Air Force sergeant injured when his car was struck head on by vehicle driven on wrong side of road by motorist who had been sold intoxicating beverages at air force base club); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (service member suffered severe mental illness allegedly as a result of participation in "Operation Third Chance," a covert military program designed to test the usefulness of LSD as an aid to interrogation); James v. United States, 358 F. Supp. 1381 (D.R.I. 1973) (serviceman fatally beaten by naval security guard following arrest for causing a public disturbance); Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal. 1971), *aff'd per curiam*, 455 F.2d 1380 (9th Cir. 1972) (marine injured in collision with railroad switch engine on military base, allegedly because of military's failure to properly mark railroad crossing).

70. *See, e.g.*, Broudy v. United States, 661 F.2d 125 (9th Cir. 1981); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981); Kelly v. United States, 512 F. Supp. 356 (E.D. Pa. 1981); Lombard v. United States, 530 F. Supp. 918 (D.D.C. 1981), *aff'd*, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980).

71. *See* Laswell v. Brown, 683 F.2d 261, 269 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983) (that *Feres* barred recovery, even assuming the plaintiffs could prove their case, labelled "troubling"); *Monaco*, 661 F.2d at 132 ("The *Feres* doctrine today stands on shaky ground with its precise justification confused."); James v. United States, 358 F. Supp. 1381, 1386 (D.R.I. 1973) ("I hold that the *Feres* doctrine bars recovery under the Federal Tort Claims Act in this case. This holding gives me little pleasure. An injustice has been done in this case and it ought to be remedied."). *See also* Note, *Denial of Atomic Veterans' Tort Claims: The Enduring Fallout from Feres v. United States*, 24 WM. & MARY L. REV. 259 (1982); Comment, *Expansion of the Feres Doctrine*, 32 EMORY L.J. 237 (1981); Comment, *The Nevada Proving Grounds: An Asylum for Sovereign Immunity?*, 12 SW. U.L. REV. 627 (1981); Comment, *Government Liability for Nuclear Testing Under the Federal Tort Claims Act—Atomic Tests and the Feres Doctrine*, 32 U. KAN. L. REV. 433 (1984).

72. *Laswell*, 683 F.2d at 265. *See also* Hunt v. United States, 636 F.2d 580, 589 (D.C. Cir. 1980) ("[T]he *Feres* doctrine clearly lives, although its theoretical bases remain subject to serious doubt.").

73. United States v. Shearer, 105 S. Ct. 3039 (1980).

testing suits against private contractors into suits against the Government and thereby bringing the *Feres* doctrine into play, effectively preclude any recovery by veterans for radiation-induced, incident-to-service injuries. Alternative avenues of relief will likewise be lacking.

LACK OF ALTERNATIVE SOURCES OF RELIEF

By invoking the *Feres* doctrine, the 1985 Defense Authorization Act extinguishes the possibility of veterans' gaining judicial relief through suits against atomic-testing contractors. The new law's ultimate impact on atomic veteran recovery will therefore depend on the availability of alternative sources of relief. Accordingly, the prospects of veterans' finding judicial relief by circumventing the *Feres* doctrine will be analyzed. Also, the likelihood of veterans' gaining administrative relief through the veterans' benefits scheme will be reviewed.

Suits Based on an Intentional Tort Theory

In an effort to circumvent the harsh impact of the *Feres* doctrine, atomic veterans have brought claims alleging that the government knowingly, deliberately, and recklessly disregarded the soldiers' safety by compelling them to participate in the testing of nuclear devices.[74] While the *Feres* ruling addressed only the government's liability for *negligent* torts, the judiciary has uniformly extended the *Feres* bar to suits alleging intentional torts as well.[75] The courts' universal rejection of the intentional tort theory has been predicated upon the belief that the considerations underlying the *Feres* doctrine[76] apply "with equal vigor" to claims alleging intentional torts.[77]

Most notable among these considerations are the need for maintaining military discipline and the need for avoiding judicial review

74. *See, e.g.*, Broudy v. United States, 661 F.2d 125 (9th Cir. 1981); Jaffee v. United States, 468 F. Supp. 632 (D.N.J. 1979), *aff'd*, 663 F.2d 1226 (3d Cir. 1981) (*Jaffee II*); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980).

75. *Id.* Although the Supreme Court has not yet addressed the issue of whether intentional torts constitute an exception to the *Feres* rule, every court which has considered the proposition has rejected it. *Jaffee II*, 468 F. Supp. at 634.

76. *See supra* text accompanying notes 54-63.

77. *See, e.g., Everett*, 492 F. Supp. at 321 (claim barred by *Feres* although plaintiff alleged that maneuvers which required her decedent to march through a nuclear blast area less than one hour after detonation of a nuclear device constituted "human experimentation"). *See also Broudy*, 661 F.2d at 127 n.4 (although plaintiff characterized the government's nuclear-testing activities as "unconsented-to experimentations," claim barred because "[t]he *Feres* doctrine does not distinguish between claims based on the alleged level of culpability of the tortfeasor, whether a negligent, a reckless, or even an intentional tort is alleged.").

of military orders.[78] As noted in *Jaffee v. United States* (*Jaffee I*),[79] if intramilitary claims were subjected to judicial scrutiny, the courts would be required to examine and rule upon the propriety of military decisions.[80] The security and common defense of the country might quickly "disintegrate under such meddling."[81] On this basis, the irradiated plaintiff in *Jaffee* was denied recovery although he alleged that governmental agencies "intentionally and with full knowledge of the consequences of their actions, compelled thousands of soldiers to march into a nuclear explosion."[82] In barring the claim, the court reasoned that litigation over intentional torts would disrupt military discipline and undermine military decision-making to the same degree that suits alleging negligence would.[83] Moreover, the court cautioned that if recovery was contingent upon whether the complained-of act was negligent or intentional, recovery could be ensured merely through "scholastic exercises in pleading."[84]

In ruling that claims based on an intentional tort theory fall within the purview of the *Feres* doctrine, the judiciary has effectively created intramilitary immunity for incident-to-service conduct, no matter how egregious.[85] By extending the *Feres* bar to intentional

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78. *Jaffee II*, 468 F. Supp. at 634-35.

79. 592 F.2d 712 (3d Cir), *cert. denied*, 441 U.S. 961 (1979).

80. *Id.* at 717.

81. *Id.*

82. *Jaffee II*, 468 F. Supp. at 633.

83. Jaffee v. United States, 663 F.2d 1226, 1235 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982) (*Jaffee III*). In fact, the court inferred that litigation involving intentional torts might have an even greater deleterious effect because often such a claim would turn on the exercise of discretionary military judgment. *Id.*

84. *Id.*

85. In a strongly worded dissent, the *Jaffee III* result was denounced as "radical totalitarianism." *Jaffee III*, 663 F.2d at 1250 (Gibbons, Sloviter, JJ., dissenting). The dissent charged that "[t]he real but unarticulated reason for the result is that the availability of a private remedy for intentional torts will encourage public accountability of the military, while foreclosing such a remedy will encourage concealment (the coverup principle)." *Id.*

In an eloquent passage, Judge Gibbons observed:

> The Twentieth Century has witnessed time and again, in this country and elsewhere, the fragility of those protections which the legal order affords against human rights violations. One of those fragile protections is the admonitory law of intentional torts, designed to require public accountability for individual conduct, official or private, going beyond the bounds of social acceptability. Certainly the conduct charged in the complaint, if proved, transgressed those bounds. Indeed the complaint alleges conduct which would violate the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Convention, the Declaration on the Protection of all Persons from Being Sub-

torts, the courts set up a further obstacle to veterans seeking recovery for radiation-induced injuries, thus compelling the atomic veterans to employ alternate theories of relief.

Suits Alleging Constitutional Violations

Atomic veterans have also attempted to avoid the broad-based *Feres* doctrine by alleging intentional violations of their constitutional rights.[86] Although the *Feres* ruling addressed only common law negligence actions, this seemingly inherent limitation has not prevented the courts from extending the *Feres* obstacle to constitutional claims as well.[87]

The judicial disposition of constitutional claims is best typified by the ruling in *Jaffee v. United States (Jaffee III)*.[88] In *Jaffee III*, the plaintiff alleged that he and other soldiers were ordered "to stand in a field without benefit of any protection while a nuclear device was exploded a short distance away."[89] Jaffee further asserted that the government and various United States officials, by knowingly, deliberately, and recklessly exposing the group of soldiers to the grave risk of injury and death, deliberately violated rights guaranteed by the Constitution.[90]

In determining whether a constitutional cause of action existed, the Third Circuit initially analyzed three Supreme Court cases wherein

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> jected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Nuremberg Code. The international consensus against involuntary human experimentation is clear. *A fortiori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt. That any judicial tribunal in the world, in the last fifth of this dismal century, would choose to place a class of persons outside the protection against human rights violations provided by the admonitory law of intentional torts is surprising. That it should be an American court will dismay persons the world over concerned with human rights and will embarrass our Government.

Id. at 1249-50 (footnotes omitted). *See also supra* note 71.

86. *See, e.g., Jaffee III*, 663 F.2d 1226; Lombard v. United States, 530 F. Supp. 918 (D.D.C. 1981), *aff'd*, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983); *Everett*, 492 F. Supp. 318.

87. *See Jaffee III*, 663 F.2d 1226; *Lombard*, 530 F. Supp. 918; *Everett*, 492 F. Supp. 318.

88. 663 F.2d 1226 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982).

89. *Id.* at 1229.

90. *Id.* Jaffee alleged violations of the first, fourth, fifth, eighth, and ninth amendments. He averred that his exposure to radiation caused inoperable lymphatic cancer, diagnosed in 1977, and breast cancer, for which he had undergone surgery. *Id.*

a private right of action for constitutional violations by a federal official had been recognized,[91] despite the absence of any statute conferring such a right.[92] From these Supreme Court decisions, a two-pronged test had emerged. Under the first prong, a constitutional cause of action could not be implied if "Congress has provided an alternative remedy . . . explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[93] Secondly, if there were "special factors counseling hesitation in the absence of affirmative action by Congress," then a constitutional cause of action would not be warranted.[94]

Applying the first prong of the test to the case at bar, the *Jaffee III* court found that relief provided by the Veterans' Benefits Act (VBA)[95] was an appropriate "alternative remedy."[96] The court did, however, acknowledge that Congress had not expressly declared the VBA to be a substitute for a private right of action under the Constitution in enacting the FTCA.[97] Moreover, the court acknowledged that Jaffee would not be fully compensated for his losses under the veterans' benefits scheme.[98] Notwithstanding these considerations, the court found that Supreme Court interpretations of this administrative remedy and the failure of Congress to amend the FTCA since the *Feres* decision, sufficiently warranted the dismissal of Jaffee's constitutional claims.[99]

The court's conclusion that no constitutional cause of action existed was reinforced by consideration of the second prong of the Supreme Court test. The court found that suits based on service injuries generally involve "special factors counseling hesitation."[100] Citing the *Feres* doctrine, the court emphasized the deleterious effects of

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91. Carlson v. Green, 446 U.S. 14 (1980) (federal prison officials amenable to suit under eighth amendment); Davis v. Passman, 442 U.S. 228 (1979) (direct cause of action recognized against U.S. Congressman for sex discrimination under fifth amendment); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (federal law enforcement agents sued directly under fourth amendment).

92. *Jaffee III*, 663 F.2d at 1230-31.

93. *Carlson*, 446 U.S. at 18-19 (emphasis in original).

94. *Bivens*, 403 U.S. at 396-97.

95. *See* 38 U.S.C. §§ 101-5228 (1982).

96. *Jaffee III*, 663 F.2d at 1236.

97. *Id.* at 1237. Arguably, the first element of the "alternative remedy" prong was therefore not met.

98. *Id.* at 1236 n.11. This factor seemingly undermines the second element of the "alternative remedy" prong—that the substitute remedy be "equally effective."

99. *Id.* at 1237.

100. *Id.* at 1235.

service-related suits on military performance[101] and accordingly cautioned that judicial intervention in the area of military affairs "should only be undertaken with care and circumspection."[102] Thus, the court concluded that immunity under the *Feres* doctrine was a "special factor" of sufficient import to preclude constitutional tort claims.[103]

Although the creation of intramilitary immunity for incident-to-service conduct which violates constitutional guarantees is arguably an "unjust application of the *Feres* rule,"[104] inequity has not prevented the judiciary from universally extending the *Feres* bar to constitutional claims.[105] As a number of courts have stressed, it is the suit itself and not the theory of the cause of action which implicates the concerns underlying the *Feres* doctrine.[106] In light of this rationale, atomic veterans have been equally unsuccessful in pleading alternative theories of recovery.

Claims Brought Against Individual Government Officials

The *Feres* obstacle has been similarly insurmountable in claims brought directly against individual military officers and government officials.[107] Since *Feres* dealt only with *sovereign* immunity for claims arising from incident-to-service injuries, atomic veterans have urged that the individual officers and officials who compelled the soldiers' participation in the atomic-testing program should not enjoy *Feres* protection.[108] This argument has been uniformly rejected by the judiciary,

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101. *Id.*

102. *Id.* at 1237-38.

103. *Id.*

104. *Jaffee II*, 468 F. Supp. at 635. In dismissing Jaffee's constitutional tort claims on the basis of *Feres* immunity, the court acknowledged that the application of *Feres* may produce unjust results, as best illustrated by the following colloquy between the court and the government at oral argument: "The court: [A]s I read the law, it doesn't matter if they stood up there and said 'one, two, three, left, right, left' and marched them over a cliff . . . .You'd be protected under *Feres* . . . ? [The Government]: "Yes, your Honor." *Id.* (quoting oral argument) (ellipses in original).

105. *See, e.g., Lombard*, 530 F. Supp. at 923 *(Feres* bars constitutional tort claims against government); *Everett*, 492 F. Supp. at 322 (action sounding in constitutional tort not exempt from application of *Feres* doctrine).

106. *See, e.g., Everett*, 492 F. Supp. at 322; Thornwell v. United States, 471 F. Supp. 344, 348 (D.D.C. 1979).

107. *See, e.g., Jaffee III*, 663 F.2d 1226; Fountain v. United States, 533 F. Supp. 698 (W.D. Ark. 1981); *Lombard*, 530 F. Supp. 918 (D.D.C. 1981); Kelly v. United States, 512 F. Supp. 356 (E.D. Pa. 1981).

108. *See, e.g., Lombard*, 530 F. Supp. at 919, 922 (claim by former serviceman who had handled radioactive materials while assigned to atomic bomb project brought against various government officials for fraudulent concealment of risk of chromosomal damage).

however, on the grounds that the triad of *Feres* rationales[109] is equally dispositive of claims against government officials.[110]

Government officials have been afforded absolute immunity primarily because the courts have felt that suits brought against these individuals would have a "chilling effect" on responsible military decision-making.[111] As the *Jaffee III* court explained, military decision-makers might not act as quickly and forcefully as necessary, if they knew they might later be forced to explain their actions in a civilian court.[112] On this basis, *Feres* protection has uniformly been extended to government officials and military officers, thus foreclosing another of the atomic veterans' avenues for redress.

Claims Based on a Post-Discharge Failure to Warn Theory

A final legal theory offered by atomic veterans in attempting to circumvent the *Feres* doctrine, is that the government negligently failed to warn the veterans after their discharge from the service, that exposure to radiation would increase the risks of contracting cancer.[113] The veterans have charged that the concealment of data linking radiation exposure to cancer and the lack of follow-up medical monitoring have greatly aggravated their radiation-related health problems.[114] By characterizing the government's failure to warn as a *post-discharge* tort, plaintiffs have attempted to avoid *Feres* intramilitary immunity for "incident-to-service" tortious conduct.[115] As with other legal theories employed by atomic veterans, the post-discharge failure to warn theory offers little hope of relief.

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109. *See supra* notes 54-63 and accompanying text.

110. *See Fountain*, 533 F. Supp. at 703; *Kelly*, 512 F. Supp. at 361.

111. *Jaffee III*, 663 F.2d at 1234. The *Jaffee III* court emphasized that suits against individuals would have an even greater chilling effect on military decision-making than suits brought against the government because in the former, the person who made the decision would be accountable for damages. *Id.*

112. *Id.* at 1232.

113. *See, e.g.*, Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983); *Broudy*, 661 F.2d 125; Gaspard v. United States, 544 F. Supp. 55 (E.D. La. 1982), *aff'd*, 713 F.2d 1097 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984).

114. *See, e.g.*, *Fountain*, 533 F. Supp. at 700 (veteran alleged government's failure to warn and failure to provide adequate medical examinations prevented early discovery of leukemia).

115. *See, e.g.*, *Broudy*, 661 F.2d at 128. By alleging a post-discharge tort, veteran plaintiffs have hoped to invoke the exception to *Feres* established in Brown v. United States, 348 U.S. 110 (1954). In *Brown*, a former service member was allowed recovery for the negligence of Veterans' Administration physicians in performing surgery on the veteran's knee after his discharge. *Id.* at 111. The Court found that because the surgery occurred after the plaintiff's discharge, the negligence was not "incident to service" and therefore not barred by *Feres*. *Id.* at 111-12.

The decisional model for claims alleging post-discharge torts was set forth in *Thornwell v. United States*.[116] There, the plaintiff alleged that his unconsented-to participation in a covert, army drug experimentation program later caused severe mental illness.[117] Thornwell further averred that the government was negligent in failing to examine and treat him for medical problems caused by the drug experimentation, subsequent to his release from military service.[118]

In allowing Thornwell's claim for a post-discharge negligent omission, the court delineated three types of personal injury cases involving post-discharge negligence.[119] In the first type, the military commits two separate negligent acts, one occurring prior to discharge and one occurring after.[120] In the second type of case, a single negligent act is committed during military service, but its effects linger after discharge.[121] In the third situation, the military commits an intentional tort during military service and then, after discharge, negligently fails to advise the service member of the adverse consequences that may result from the initial wrong.[122]

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116. 471 F. Supp. 344 (D.D.C. 1979).

117. *Id.* at 346.

118. *Id.* at 347.

119. *Id.* at 352.

120. *Id.* As examples of this type of case, the *Thornwell* court cited *Brown*, 348 U.S. 110 and Hungerford v. United States, 192 F. Supp. 581 (N.D. Cal. 1961), *rev'd on other grounds*, 307 F.2d 99 (9th Cir. 1962). In *Hungerford*, the plaintiff was injured in combat and subsequently suffered blackouts. After discharge, military physicians misdiagnosed Hungerford's condition as a psychiatric problem when, in fact, his condition resulted from an organic brain injury of traumatic origin. The court characterized the military physician's misdiagnosis as a separate tort, not "incident-to-service," and accordingly not within the purview of *Feres*. *Hungerford*, 192 F. Supp. at 583-84.

121. *Thornwell*, 471 F. Supp. at 352. This type of case is best exemplified by Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949) (medical malpractice during in-service surgery caused injuries not discovered until after discharge; recovery barred), *aff'd sub nom.* Feres v. United States, 340 U.S. 135 (1950).

122. *Thornwell*, 471 F. Supp. at 352. As an example, the *Thornwell* court cited Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964). In *Schwartz*, the plaintiff was treated for sinusitis by army physicians while on active duty. Radioactive contrast dye was injected in Schwartz's sinus cavity prior to taking x-rays. After discharge, Schwartz continued to experience pain and sought follow-up medical care from VA clinics on numerous occasions. Each time there were symptoms of abnormality where the dye had been injected but the VA physicians made no attempt to review Schwartz's prior records to determine possible causes. The dye had, in fact, been proven to be carcinogenic and was later determined to be the cause of the plaintiff's facial cancer. The court held that once the dye was found to be dangerous, government physicians had a duty to search past medical records and warn those who had been treated with the dye of its dangers. Accordingly, the failure to warn Schwartz constituted post-discharge tortious conduct, actionable under the FTCA. *Schwartz*, 230 F. Supp. at 540.

Thornwell's claim fell within the third category, in that he alleged an intentional tort in the in-service drug experimentation program and negligence in the post-discharge failure to provide follow-up medical care.[123] The court held that although the two acts were related, the post-discharge negligence was wholly separate from the intentional, in-service tort, and was therefore actionable.[124] Moreover, the court noted that recovery for post-discharge tortious conduct was fully consonant with the rationale underlying the *Feres* doctrine.[125]

The lower courts are in disagreement, however, as to whether the *Thornwell* analysis governs claims brought by atomic veterans based on a post-discharge failure to warn theory. Although irradiated veterans consistently allege intentional, in-service exposure and post-discharge negligent omissions, pursuant to the *Thornwell* model, courts are reluctant to recognize failure to warn as a separate, actionable tort.[126] Instead, the lower courts have generally concluded that the plaintiffs' pre-discharge and post-discharge allegations together constitute one "continuing tort" arising out of the in-service exposure to radiation, and therefore are barred by *Feres*.[127]

The "continuing tort" theory was first enunciated in *Kelly v. United States*.[128] In *Kelly*, claims were brought against the United States for deliberate in-service exposure to radiation and negligent concealment of the dangers posed by radiation exposure after the plaintiff's discharge from the military.[129] The court concluded that the duty to warn Kelly arose at the time of his exposure and therefore the government's subsequent failure to warn him about the adverse effects of radiation exposure was merely "a continuation of the original wrong."[130] As such, it was not an independent, actionable tort.[131] Di-

123. *Thornwell*, 471 F. Supp. at 351.

124. *Id.*

125. *Id.* at 350. Initially, the court noted that the maintenance of suits based on post-discharge injuries would not adversely affect military discipline since the unique relationship of the soldier to his superiors ceases once the service member attains civilian status. *Id.* Moreover, the court noted that the "distinctively federal relationship" between the government and members of the armed forces is completely vitiated by an individual's change to civilian status. *Id.* Finally, the court acknowledged that the possibility of "no fault" recovery through the Veterans' Administration is more remote when the claimant was injured after discharge. *Id.*

126. *See, e.g., Laswell*, 683 F.2d 261; Sheehan v. United States, 542 F. Supp. 18 (S.D. Miss. 1982); Gaspard v. United States, 544 F. Supp. 55 (E.D. La. 1982).

127. *See, e.g., Laswell*, 683 F.2d at 267; *Sheehan*, 542 F. Supp. at 21; *Gaspard*, 544 F. Supp. at 58.

128. 512 F. Supp. 356 (E.D. Pa. 1981).

129. *Id.* at 358.

130. *Id.* at 361.

131. *Id.*

rectly contrary to the rationale applied in *Thornwell*, the court reasoned that the distinction between Kelly's negligence and intentional tort claims was an "artificial one" and labelled the post-discharge concealment claim a mere "reformulation of a complaint for in-service negligence."[132] Moreover, the court found that barring Kelly's post-service negligence claim was compelled by *Feres*.[133] The rationale set forth in *Kelly* has since become the basis for denying the vast majority of atomic veterans' post-discharge negligence claims.[134]

A few courts have, however, recognized that veterans' post-discharge failure to warn allegations might constitute actionable claims.[135] Persuaded by *Thornwell* analysis, these courts have held that if the plaintiff can establish post-discharge governmental concealment, *Feres* immunity will not attach.[136] As the courts have acknowledged, however, establishing a cause of action based on post-service negligence will involve difficult issues of proof.[137] Accordingly, the post-discharge failure to warn theory, like other theories employed, affords atomic veterans little hope of judicial relief. The prospects of obtaining adequate administrative relief are similarly remote.

The Veterans' Benefits Act

Compensation for military service-related injuries is normally sought under the provisions of the Veterans' Benefits Act.[138] The

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132. *Id.*

133. *Id.* The court reasoned that military decision-making might be inhibited by the duty to reveal the details and risks involved in military operations. *Id.*

134. *See, e.g.*, Heilman v. United States, 731 F.2d 1104, 1108 (3d Cir. 1984) (duty to warn originated when exposure occurred and merely continued after discharge; recovery barred by *Feres*); *Laswell*, 683 F.2d at 267 (*Feres* controlling; allegations constituted "continuing tort"); *Gaspard*, 544 F. Supp. at 58 (*Feres* cannot be circumvented by what is in reality a claim of continuing neglect); *Sheehan*, 542 F. Supp. at 21 (allegations together state a "continuing tort" of the sort barred by *Feres*). *See also Fountain*, 533 F. Supp. at 700 (since act which gave rise to duty to disclose not actionable, subsequent omissions also within scope of *Feres*).

135. *See* Molsbergen v. United States, 757 F.2d 1016, 1025 (9th Cir.), *cert dismissed*, 106 S. Ct. 30 (1985); Cole v. United States, 755 F.2d 873, 880 (11th Cir. 1985); *Broudy*, 661 F.2d at 128; Seveney v. United States Gov't., Dept. of Navy, 550 F. Supp. 653, 660 (D.R.I. 1982); Everett v. United States, 492 F. Supp. 318, 326 (S.D. Ohio 1980).

136. *See, e.g., Broudy*, 661 F.2d at 128, 129 (if plaintiff could prove an independent, post-service tort, by showing that the government learned of the dangers of radiation exposure after plaintiff's decedent left the service, claim would be actionable under the FTCA).

137. *See Seveney*, 550 F. Supp. at 661 ("plaintiffs might have such rigorous hurdles to overcome as to duty, proximate cause, damages and the like that the game might not be worth the proverbial candle").

138. *See* 38 U.S.C. §§ 301-362 (1982).

Veterans' Administration (VA) will only award compensation, however, for those personal injuries or diseases which are "connected to service."[139] The claimant must establish service connection, either by demonstrating that his disability is of a type presumed to be service-related under VA regulations, or by "affirmatively showing" that the inception or aggravation of his illness occurred coincident with military service.[140]

Claimants seeking relief for radiation-induced injuries have been unable to benefit from VA presumptions regarding service connection. Although the VA presumes service connection for certain chronic diseases,[141] the diseases must manifest themselves within one year from the service member's discharge for the presumption to apply.[142] Since the cellular damage caused by radiation exposure generally has a latency period of more than one year,[143] the VA presumptions regarding service connection have been of no avail to atomic veterans.

Atomic veterans have been equally unsuccessful in "affirmatively showing" a causal connection between their illnesses and the atomic-testing program. Causation has been difficult to prove because of the evidentiary void involved in these cases.[144] Moreover, available medical

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139. 38 U.S.C. §§ 310, 331 (1982) (basic entitlement provisions for injuries resulting from activities during war and peacetime, respectively). *See also* 38 C.F.R. §§ 3.301-.305 (1984).

140. 38 C.F.R. § 3.303 (1984).

141. 38 U.S.C. §§ 301, 312 (1982). Chronic diseases currently given presumptive status are listed at 38 C.F.R. § 3.309(a) (1984).

142. 38 C.F.R. § 3.307(a)(3) (1984).

143. *See* Note, *Tort Actions for Cancer: Deterrence Compensation, and Environmental Carcinogenesis*, 90 YALE L.J. 840 (1981) (cancer symptoms generally latent for many years after exposure to carcinogens).

144. Initially, the claimant is often unable to produce evidence establishing the level of radiation to which he or she was exposed because most of the participants in the atomic-testing program were not issued film badges to record their exposure to radiation. Moreover, the film badges which were issued did not provide a complete measure of radiation exposure, since they were not capable of recording inhaled or ingested doses of radiation. Furthermore, the accuracy of the readings taken is questionable because the film badges were often shielded during the detonation and were worn for only limited periods during and after each detonation. *See* Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 2(9), 98 Stat. 2725, 2726 (1984) (requiring Administrator of Veterans' Affairs to prescribe guidelines for the adjudication of claims based on exposure to radiation or Agent Orange). *See also* Note, *supra* note 2, at 949-51. New VA regulations do provide however, that the possible inaccuracy of the dosimetry measurements will be considered in the adjudication of claims. *See* 38 C.F.R. § 3.311b(e)(1) (1985).

Claimants also have had difficulty establishing their attendance at a nuclear blast. Because the government failed to maintain a central depository for radiation

data on the relationship between low-level radiation and cancer is not sufficiently dispositive.[145] Not surprisingly, therefore, the VA has rejected the overwhelming majority of claims filed for radiation injuries arising from the nuclear-testing program.[146]

Atomic veterans' claims for relief have therefore been effectively thwarted by both administrative and judicial impediments. In light of the veterans' inability to sue either the United States or government officials because of the broadly-based *Feres* doctrine, or to recover adequate compensation under the veterans' benefits scheme, suits brought against private contractors were presumably the

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dosimetry records, many records were lost. Moreover, in 1973, millions of military personnel records were destroyed by a fire in a government building. *See* Note, *supra* note 2, at 956-57. Recent VA regulations do, however, create a presumption in favor of the claimant when the veteran's presence or absence at a nuclear test site cannot be established by the Department of Defense. *See* 38 C.F.R. § 3.311b(a)(4)(i) (1985).

The new VA regulations, found at 38 C.F.R. §§ 3.102, 3.311b (1985), were promulgated pursuant to the Veterans' Dioxin and Radiation Exposure Compensation Standards Act. *See* Pub. L. No. 98-542, § 5, 98 Stat. 2725, 2727-29 (1984). Although the Act was intended to ensure compensation for veterans exposed to ionizing radiation, critics have charged that the new VA guidelines and adjudication procedures fall short of this goal. *See Atomic Veterans Relief Act of 1985: Hearings on H.R. 1613 Before the Subcomm. on Compensation, Pension, and Insurance of the House Comm. on Veterans Affairs*, 99th Cong., 1st Sess. 114 (1985) [hereinafter cited as *1985 Hearings*]. As such, new legislation has recently been introduced to remedy the inadequacies of the VA regulations, by creating a presumption of service connection for radiation-related illnesses. *See* S. 707, 99th Cong., 1st Sess. (1985); H.R. 1613, 99th Cong., 1st Sess. (1985).

145. Congress has recently responded to the medical and scientific uncertainty in this area by requiring the Administrator of Veterans' Affairs to consider the feasibility of conducting an epidemiological study of the effects of radiation on veterans who participated in the nuclear-testing program. *See* Veterans' Health Care Amendments of 1983, Pub. L. No. 98-160, § 601, 97 Stat. 993, 1006-09 (1983). In addition, Congress has authorized the development of radioepidemiological tables showing the probabilities of causation between various types of cancers and exposure to radiation. *See* Orphan Drug Act, Pub. L. No. 97-414, § 7(b), 96 Stat. 2049, 2060 (1983). These studies may take a great deal of time to complete, however. In the interim, the lack of available information specifically related to radiation exposure during the atomic-testing program can only work to the veterans' disadvantage. As recently noted by the House Committee on Veterans' Affairs, "Although current evidence indicates that some veterans exposed to ionizing radiation are experiencing serious medical problems, available data falls far short of meeting the test that . . . these disabilities are related to military service." H.R. REP. NO. 592, 98th Cong., 2d Sess. 9 (1984). Interestingly, this conclusion was reached notwithstanding the Committee's awareness that a study conducted by the Center for Disease Control indicated an increased frequency of leukemia and bone marrow disease in troops present at a 1957 nuclear blast called "Smokey." *Id.* at 8.

146. *1985 Hearings*, *supra* note 144, at 12 (99.5% of all claims for radiation-related diseases have been rejected by the VA).

veterans' last avenue of relief. By foreclosing this source of recovery, the 1985 Defense Authorization Act has effectively left the atomic veterans remediless.

CONSTITUTIONAL ANALYSIS

The fifth amendment provides that "[n]o person . . . shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."[147] The constitutionality of section 1631 of the 1985 Department of Defense Authorization Act, under the fifth amendment, will therefore depend on a two-part analysis. First, it must be determined whether atomic veterans' claims against private contractors involved in the atomic-testing program constitute constitutionally-protected property interests. Secondly, it must be decided whether section 1631's deprivation of these interests meets constitutional standards.

The Takings Issue

While there is "no set formula" for determining whether government regulation is so extensive as to amount to a "taking" of private property for which compensation must be paid,[148] there are two prerequisites for establishing a violation of the fifth amendment takings clause. As pertinent to section 1631 and its impact on atomic veterans' suits, it must initially be shown that the veterans' causes of action are a constitutionally-protected species of "property" under the fifth amendment.[149] Secondly, it must be established that section 1631, by extinguishing veterans' pending and future claims against atomic-testing contractors, effectuated a "taking" for which just compensation is due.[150]

The Supreme Court has uniformly recognized that a cause of action is a constitutionally-protected property interest.[151] As early as 1881, the Court acknowledged that a vested right of action is property in the same sense in which tangible things are property and is equal-

147. U.S. CONST. amend V.

148. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

149. *See* Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984).

150. *See id.*

151. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (right to seek redress for employment discrimination is property right); Martinez v. California, 444 U.S. 277 (1980) (state tort claim is species of property); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (right to have trustee answer for negligence is protected property right).

ly protected against arbitrary interference.[152] This view was most recently affirmed by the Court in *Logan v. Zimmerman Brush Co.*[153] In *Logan*, an Illinois statute prohibited employment discrimination against the physically handicapped.[154] Pursuant to the statute, a claimant alleging unlawful conduct had to first bring his charge before a state commission.[155] The commission then had 120 days within which to convene a fact-finding conference to investigate the claim and facilitate negotiations between the parties.[156] Logan filed a charge with the commission, alleging unlawful termination of employment, but the commission inadvertently failed to schedule a fact-finding conference until after the expiration of the 120-day statutory period.[157] Accordingly, the issue presented was whether Logan's constitutional rights would be violated if the commission's error was allowed to extinguish his cause of action.[158]

The Court concluded that Logan's cause of action was a constitutionally protected property right,[159] relying on its earlier decision in *Mullane v. Central Hanover Bank & Trust Co.*[160] In *Mullane*, a state law provided for the binding and conclusive judicial settlement of common trust fund accounts by fiduciaries, upon notice through newspaper publication.[161] The *Mullane* Court found that the law would unconstitutionally deprive the trust fund beneficiaries of property, by extinguishing their rights to have the trustee answer for negligent or

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152. Pritchard v. Norton, 106 U.S. 124, 132 (1882). The common law concept of property was embodied in the Blackstonian theory that property required some "external thing" to serve as the object of property rights. Vandeveld, *The Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 331 (1980). In the late nineteenth and early twentieth centuries, this notion gave way to a dephysicalized concept of property which viewed property not as a right over "things," but as a set of legal relations such as rights, powers, privileges, and immunities. *See id.* at 333-66. Consonant with this view, many types of intangible property are now recognized as deserving constitutional protection. *See, e.g.*, Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984) (trade secrets); Matthews v. Eldridge, 424 U.S. 319 (1976) (social security benefits); Goss v. Lopez, 419 U.S. 565 (1974) (public education); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Vail v. Bd. of Educ. of Paris Union School Dist. No. 95, 706 F.2d 1435 (7th Cir. 1983), *aff'd*, 466 U.S. 377 (1984) (public employment).

153. 455 U.S. 422 (1982).

154. *Id.* at 424.

155. *Id.*

156. *Id.*

157. *Id.* at 426.

158. *Id.* at 426-27.

159. *Id.* at 428-31.

160. 339 U.S. 306 (1950).

161. *Id.* at 308-09.

illegal impairment of the beneficiaries' interests.[162] Accordingly, the *Logan* Court reasoned that there was no meaningful distinction between the "right to have the trustee answer" in *Mullane* and Logan's right to redress discrimination; both causes of action were protected forms of property.[163]

Not all causes of action are recognized as constitutionally protected property rights, however. Only accrued causes of action are forms of property; unaccrued causes of action are not.[164] As such, veterans, whose cause of action against atomic-testing contractors have accrued under state tort laws, possess vested property rights which cannot be taken without just compensation.

While the recognition of causes of action as "property" has primarily been in the due process context, it has recently been acknowledged that the extinguishment of causes of action may give rise to "takings" claims. In *Dames & Moore v. Regan*,[165] the Supreme Court recognized that the President's suspension of American creditors' claims against the Iranian government, pursuant to a hostage release agreement, might effect a "takings" claim against the United States.[166] Similarly, in 1982, the Ninth Circuit concluded that Warsaw Convention limitations on liability arising out of airline crashes, if applicable, might precipitate a taking of the plaintiffs' wrongful death actions.[167] The court reasoned that the plaintiffs had a right, under state law, to recover damages for the wrongful death of their decedents and accordingly their claims for compensation were property interests which could not be unreasonably impaired by legislative provisions without just compensation.[168]

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162. *Id.* at 313.

163. *Logan*, 455 U.S. at 429.

164. Pitts v. Unarco Indus., 712 F.2d 276 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983). This distinction is perhaps best explained by the theory that the cause of action *itself* is not the "property" interest at issue. Instead, the set of legitimate expectations upon which the cause of action is based is the underlying property interest. *See* Terrell, *Causes of Action as Property: Logan v. Zimmerman Brush Co. and the "Government-as-Monopolist" Theory of the Due Process Clause*, 31 EMORY L.J. 491, 510 (1982). *See also* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."). In addition, expectations giving rise to property interests must be more than merely abstract or unilateral. *Id.* at 577. Instead, to be "legitimate," they must be based on positive legal sources, such as existing state and common laws. *Id.*

165. 453 U.S. 654 (1981).

166. *Id.* at 690-91.

167. In re Aircrash in Bali, Indonesia, 684 F.2d 1301 (9th Cir. 1982).

168. *Id.* at 1312.

Although an analysis of whether unreasonable impairment has occurred is essentially an "ad hoc, factual" inquiry,[169] the Supreme Court has identified several factors to be considered when determining whether governmental action has gone beyond mere "regulation" so as to effect a "taking." The first factor is the economic impact of the regulation on the claimant, including the extent to which the regulation has interfered with reasonable expectations.[170] A second consideration is the character of the governmental action.[171] Applying these factors, a "taking" will be found if the regulation has an unduly harsh impact upon the owner's use of his property or if the regulation is not reasonably necessary to effectuate substantial public goals.[172]

In determining the economic impact of a given regulation, courts focus on the particular "thing" injuriously affected and ask what proportion of its value is destroyed by the measure in question.[173] If the proportion is so large as to approach totality, a taking has occurred; otherwise it has not.[174] As such, mere diminution in property value, although substantial, has been insufficient to sustain a takings claim.[175] Similarly, regulations depriving the property owner of only the most profitable use of his property interests have been upheld against takings challenges.[176] On the other hand, governmental actions which so substantially interfere with property rights as to render the property worthless or useless, have been held to have effectuated a taking.[177]

Section 1631 of the 1985 Defense Authorization Act, as it affects veterans' claims against atomic-testing contractors, is of this latter variety. Section 1631 does more than merely diminish the value of

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169. *Penn Central*, 438 U.S. at 124.

170. *Id.*

171. *Id.*

172. *Id.* at 127. The *Penn Central* Court also noted that a "taking" will more readily be found when a physical invasion of the owner's property by the government has occurred. *Id.* at 124. Since a cause of action is a dephysicalized form of property which cannot logically be "physically invaded," the physical interference factor is not pertinent to the discussion of whether section 1631 effectuated a taking of veterans' vested causes of action.

173. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967).

174. *Id.*

175. Haddacheck v. Sebastian, 239 U.S. 394 (1915) (87½% diminution in value insufficient).

176. Andrus v. Allard, 444 U.S. 51 (1979) (no taking where regulation merely prohibited plaintiffs from selling their property).

177. United States v. Causby, 328 U.S. 256, 261 (1946); United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

the irradiated veterans' property interests, by, for example, placing a limit on the amount of their recovery. Instead, by converting the veterans' claims into suits against the government, thereby invoking the *Feres* bar to recovery, section 1631 effectively renders the veterans' causes of action worthless. As such, it extinguishes the veterans' expectations, grounded in state tort laws, of obtaining compensation for their radiation-induced injuries. Accordingly, section 1631 may be characterized as the type of regulation which has an impact so "unduly harsh" as to effectuate a taking.[178]

In addition to measuring a regulation's impact on property interests, the character of the governmental action must also be examined, in determining whether a "taking" has occurred. To withstand a takings challenge, the regulation must be reasonably necessary to effectuate legitimate public goals.[179] The goals advanced by section 1631 are two-fold. First, section 1631 was intended to shield the institutions that performed services vital to national security from liability arising out of their participation in the atomic-weapons testing program.[180] Section 1631 was not needed, however, to effectuate this goal, because the atomic-testing contractors were already shielded from liability by indemnity agreements with the government.[181] Section 1631's second goal was to ensure that uniform remedies would be provided, where a connection between the nuclear testing program and the harm alleged was established.[182] Section 1631 similarly fails to effectuate its second goal, because it ensures only that remedies will be uniformly non-existent.

In summary, section 1631 completely abrogates atomic veterans' claims for injuries arising out of the atomic-testing program, thereby rendering the veterans' constitutionally-protected property interests useless. Moreover, section 1631 fails to advance legitimate public goals.

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178. *But see* In re Consolidated United States Atmospheric Testing Litigation, 616 F. Supp. 759 (N.D. Cal. 1985). In this case, a consolidation of forty-three actions brought by irradiated veterans against atomic-testing contractors, the court held that section 1631 did not effect a taking of the veterans' claims. *Id.* at 770. The court reasoned that section 1631 does not abrogate the veterans' claims but merely "substitute[s] the remedy against the government under the FTCA for any cause of action against the contractors arising under state law." *Id.* at 765-66, 770. That such a conclusion was reached notwithstanding the court's recognition that *Feres* immunity would attach to FTCA actions is indeed remarkable.

179. *Penn Central*, 438 U.S. at 127.

180. S. REP. NO. 500, 98th Cong., 2d Sess. 374 (1984).

181. *Id.* at 375-76.

182. *Id.* at 377.

As such, section 1631 has effectuated a "taking" of the veterans' causes of action, for which compensation in the form of damages must be paid.

Substantive Due Process Challenge

Under substantive due process analysis, economic legislation such as section 1631 carries a strong presumption of constitutionality.[183] This presumption can be overcome only by a clear showing of arbitrariness or irrationality.[184] Under this highly deferential, "minimal scrutiny" standard,[185] legislation such as section 1631 will be upheld against due process challenges unless it can be established that the legislation is not rationally related to legitimate governmental objectives.[186]

A substantive due process model for analyzing legislation which limits liability in the area of atomic energy was set forth by the Supreme Court in 1978, in *Duke Power Co. v. Carolina Envtl. Study Group*.[187] In *Duke Power*, citizen groups and other individuals challenged the constitutionality of the Price-Anderson Act, which limits liability for nuclear accidents resulting from the operation of private nuclear power plants.[188] In determining whether the Act contravened the right to due process guaranteed by the fifth amendment, the Court noted that the Act, as a legislative balancing of economic interests, carried

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183. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (Federal Coal Mine Health and Safety Act of 1969 presumed to be constitutional); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (Kansas statute making it unlawful to engage in "debt adjusting" carried presumption of constitutionality; Court refused to "sit as a superlegislature to weight the wisdom of legislation").

Social or economic regulations which impinge upon "fundamental rights," however, are not afforded a presumption of constitutionality. Hodel v. Indiana, 452 U.S. 314, 331 (1981). Instead, if this type of legislation is to withstand judicial scrutiny, a "compelling" governmental interest must be shown. Holman v. Hilton, 542 F. Supp. 913, 920 (D.N.J. 1982), *aff'd*, 712 F.2d 854 (3d Cir. 1983). Although the Supreme Court has recognized that the right of access to the courts is a "fundamental constitutional right," right of access to the judiciary is not considered a "fundamental right" for due process purposes. *Id.* at 919-20. In fact, "fundamental rights" in the due process and equal protection contexts have primarily been limited to the right to privacy and the related right to procreate. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983) (woman's right to terminate pregnancy considered a "fundamental right"); Roe v. Wade, 410 U.S. 113 (1973) (woman's right of privacy and autonomy to make abortion decision deemed a fundamental right).

184. *Hodel*, 452 U.S. at 331-32.

185. *Holman*, 542 F. Supp. at 920. *See also Ferguson*, 372 U.S. at 729-732 (discussion of the evolution of the "minimal scrutiny" test).

186. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 85 (1978).

187. 438 U.S. 59 (1978).

188. *Id.* at 68.

a presumption of constitutionality.[189] As such, the Act would be upheld absent clear proof of arbitrariness or irrationality.[190]

Under this "rational basis" standard, the Court initially reviewed the intended purposes of the Price-Anderson Act.[191] The Act's objectives were two-fold. First, the law was intended to stimulate the involvement of the private sector in the development of atomic energy, by protecting investors from the risks of potentially vast liability.[192] Secondly, the Act was designed to protect the public, by ensuring prompt and equitable compensation in the event of a nuclear disaster.[193]

After reviewing the intended purposes of the Price-Anderson Act, the Court next considered whether the provisions of the Act bore a rational relationship to the Act's dual objectives.[194] The Court initially concluded that the law effectively protected the interests of private enterprise, by placing a statutory ceiling on liability.[195] Secondly, the Act was considered an effective means of protecting public interests because it provided for adequate and certain compensation without proof of fault.[196] Hence, the Court concluded that the Act was rationally related to legitimate public goals and therefore comported with due process requirements.[197]

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189. *Id.* at 84-85.

190. *Id.*

191. *Id.* at 65.

192. *Id.* at 65, 84. Congress initially intended that the development of nuclear power would be monopolized by the government. *Id.* at 64. It was later determined, however, that the national interest would be best served if the private sector became involved in atomic energy development, under a program of federal regulation and licensing. *Id.* Although incentives were offered to encourage investment, the risk of potentially vast liability in the event of a nuclear accident was a major impediment to private industry involvement. *Id.* at 65. Finally, spokesmen for the private sector informed Congress that they would be forced to totally withdraw from the atomic energy field if their liability was not limited by legislation. *Id.* Congress responded by passing the Price-Anderson Act. *Id.*

193. *Id.* at 65, 84.

194. *Id.* at 64-68.

195. *Id.* at 65-68. Under the statutory scheme, the private nuclear industry was to take out the maximum amount of public liability insurance, $60 million. If damages from a nuclear incident exceeded $60 million, the government would indemnify the private investors up to $500 million. Thus, the actual ceiling on liability from a single nuclear accident was $560 million. If damages exceeded this amount, Congress agreed to take "whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." *Id.* at 65-68.

196. *Id.* at 66-67. Persons indemnified under the Act were required to waive all legal defenses in the event of a nuclear accident. *Id.*

197. *Id.* at 85.

The constitutionality of the Price-Anderson Act was reinforced by the Court's finding that the Act provided a reasonably just substitute for the state and common law remedies it abrogated.[198] In fact, recovery under the Act would be more certain and efficient because the Act provided a secure source of funds[199] as well as a firm basis for legal liability.[200] As such, the *Duke Power* Court held that the legislation sufficiently withstood due process challenges.[201]

Under the *Duke Power* model, a substantive due process analysis of section 1631 of the 1985 Defense Authorization Act must include the examination of three factors. First, the intended goals of the legislation must be outlined. Secondly, it must be determined whether the provisions of section 1631 bear a rational relationship to the stated objectives. Finally, it must be decided whether the new law provides a fair and reasonable substitute for the remedies it replaces.

Section 1631 of the 1985 Defense Authorization Act has dual goals, both closely parallel to the legislative objectives advanced in *Duke Power*.[202] First, section 1631 was intended to protect private institutions from liability arising out of their participation in the atomic-weapons testing program.[203] Congress felt that such protection was duly warranted on the grounds that the contractors merely functioned as government instrumentalities in the testing program and provided services vital to the development of atomic energy for military purposes.[204] Section 1631's second objective was to provide persons injured as the result of the atomic-testing program with uniform remedies.[205]

Section 1631 fails to bear a rational relationship to either of these stated goals. First, although section 1631's conversion of suits against atomic-testing contractors into claims against the government would seemingly protect the contractors from tort liability, such refuge was not warranted because the contractors were already fully indemnified by the government under the terms of their contracts.[206] As such, even

198. *Id.* at 89.

199. *Id.* at 90. Moreover, the Court noted that the Act's aggregate level of compensation, $560 million, would generally exceed the amount recoverable in private litigation. *Id.* at 94.

200. *Id.* at 90. The Act provided for strict liability. *Id.* at 66-67.

201. *Id.* at 85.

202. *See supra* notes 192-93 and accompanying text.

203. *See* S. REP. No. 500, 98th Cong., 2d Sess. 374-75. *See also supra* notes 24-32 and accompanying text.

204. *See* S. REP. No. 500, 98th Cong., 2d Sess. 374-75.

205. *Id.* at 377.

206. *Id.* at 376.

in the absence of section 1631's purportedly "protective" cloak, the contractors would be completely reimbursed for any liability arising out of their participation in the atomic-testing program, including the costs of litigation.[207] Section 1631 also fails to bear a rational relation to its second goal, that injured claimants be afforded uniform remedies. Section 1631's consolidation of atomic-testing cases under the FTCA will ensure only that *judgments* are uniform.[208] Since *Feres* implications will attach to section 1631 FTCA actions, no remedies will result.[209]

Additionally, section 1631 fails to provide a just and reasonable substitute for the state and common law tort remedies it replaces. While FTCA claims against the federal government are the purported "reasonable substitute," such claims will be uniformly barred by the *Feres* doctrine.[210] Alternative sources of judicial and administrative relief will be similarly unavailable.[211] Accordingly, in denying atomic veterans any means of redress, section 1631 is antithetical to the fundamental notions of due process[212] and is therefore unconstitutional.

CONCLUSION

A significant number of the armed service members who were exposed to radiation during their forced participation in the United States atomic-testing program now suffer from various types of cancers. The atomic veterans have been unable to recover for their radiation-induced injuries, however, due largely to a Supreme Court ruling known as the *Feres* doctrine, which created intramilitary immunity for incident-to-service negligence. The *Feres* doctrine has not only served as the basis for dismissing veterans' negligence claims against the United States, but has been uniformly judicially extended so as to bar service members' intentional tort claims, constitutional claims, claims brought against individual military officers, and claims based on an independent, post-discharge tort theory. Administrative relief under the Veterans' Benefits Act has been equally lacking. In a final attempt at gaining redress, atomic veterans recently began suing private contractors who participated in the atomic-testing program.

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207. *Id.* at 375.

208. *See supra* text accompanying note 33.

209. *See supra* notes 36-73 and accompanying text.

210. *Id.*

211. *See supra* notes 74-146 and accompanying text.

212. *See* Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

In response to the veterans' efforts to obtain relief, Congress enacted the 1985 Department of Defense Authorization Act. Section 1631 of the Act converts all pending and future claims brought against atomic-testing contractors into suits against the federal government, thereby invoking the *Feres* bar to recovery. In foreclosing this final avenue of redress, Congress has effectively rendered the atomic veteran remediless.

Section 1631, as the legislature's response to the plight of irradiated veterans, is not only disingenuous but is disheartening. Moreover, section 1631 is constitutionally objectionable. First, by extinguishing veterans' accrued causes of action, in which there is a constitutionally-protected property right, section 1631 effects a "taking" under the fifth amendment for which just compensation in the form of monetary damages is due. More importantly, the new law bears no rational relationship to its intended goals, and therefore fails to comport with the right of due process guaranteed by the fifth amendment. Accordingly, section 1631 of the 1985 Department of Defense Authorization Act is constitutionally defective and should therefore be repealed.

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