Duty to Warn as an Inroad to the *Feres* Doctrine: A Theory of Tort Recovery for the Veteran

I. INTRODUCTION

Soldiers' tort claims against the United States that are incident to military service traditionally have been barred by what has come to be known as the "*Feres* doctrine."[1] Recently, however, courts have made inroads to alleviate the harsh results caused by this intramilitary immunity, most significantly through the development of a "failure to warn" theory.[2] This Comment will discuss the origin, theory, and ramifications of intramilitary immunity and the effectiveness of a failure to warn analysis of soldiers' tort claims.

II. HISTORY AND DEVELOPMENT OF INTRAMILITARY IMMUNITY

A. *Governmental Immunity and the Federal Tort Claims Act*

The doctrine of intramilitary immunity[3] originated in the political theory that kings were endowed with a divine right to rule and that therefore "the King could do no wrong."[4] In the evolution of the modern republican state, the government inherited the King's sovereign immunity. As a result, the United States government cannot be sued without its own consent.[5] In fact, early in American jurisprudence Justice Marshall noted, "The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . . ."[6]

Prior to the adoption of a statutory right to bring suit, relief from this harsh doctrine was sought through private petitions that were addressed to Congress and that prayed for consent to commence suits against the United States government. Increasing numbers of petitions, however, made the individual petition method an inefficient mechanism for monitoring disputes and one that was characterized by the capricious adjudication of tort claims against the government.[7]

---

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

2. *See* Broudy v. United States, 661 F.2d 125 (9th Cir. 1981); Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964), *aff'd*, 381 F.2d 627 (3d Cir. 1967); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979). For a case challenging the underlying policy factors governing the *Feres* doctrine, see Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981). *Contra* Monaco v. United States, 661 F.2d 129 (9th Cir. 1981); *In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980).

3. While a "privilege" defense avoids tort liability according to the circumstances of the particular case, an "immunity" bars tort liability in all circumstances. Immunities are conferred because of the defendant's status. An immunity defense does not deny the tortious conduct; it merely discounts liability. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970 (4th ed. 1971) [hereinafter cited as W. PROSSER].

4. Feres v. United States, 340 U.S. 135, 139 (1950); W. PROSSER, *supra* note 3, § 131, at 970–71.

5. *See* Feres v. United States, 340 U.S. 135, 139 (1950); W. PROSSER, *supra* note 3, § 131, at 971.

6. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821).

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

In response to the need for a more efficient method to resolve disputes against the government, Congress passed the Federal Tort Claims Act (FTCA),[8] which waives governmental immunity from tort claims under certain circumstances.[9] The FTCA provides that

> the United States District Court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[10]

Congress, however, placed several limitations on the right to sue. For example, the FTCA requires that before a tort claim can be adjudicated it must be "presented in writing to the appropriate Federal agency."[11] Moreover, the government cannot be liable for punitive damages under the FTCA.[12] Congress further limited its general consent to tort claims by providing numerous exceptions. Immunity prevails, for example, against claims based on injuries that result from an agency's or employee's performance of a discretionary function or duty or from combatant activities of military or naval forces during war, or that arise in foreign countries.[13] Despite these exceptions, Congress was willing to extend the term "employee of the government . . . acting within the scope of his office or employment"[14] to include "members of the military or naval forces of the United States . . . acting in [the] line of duty."[15] Thus, the military clearly could be held liable under the FTCA for tortious acts not otherwise exempted. The *Feres* doctrine created just such an exemption.

B. *The* Feres *Doctrine*

1. *Background*

Although the FTCA grants district courts jurisdiction over tort claims against the United States, the Act does not specify which types of tort claims the courts should recognize.[16] The Supreme Court first addressed the issue of tort claims against the military in 1949 in *Brooks v. United States.*[17] While on

8. Federal Tort Claims Act of 1946, ch. 753, tit. IV, 60 Stat. 812 (codified at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671–2680 (1976)).

9. *See* text accompanying note 13 *infra.*

10. 28 U.S.C. § 1346(b) (1976).

11. 28 U.S.C. §§ 2675(a), 2401(b). *Cf.* Annot., 13 A.L.R. Fed. 762 (1972 & Supp. 1981) (collecting § 2675(a) cases).

12. 28 U.S.C. § 2674 (1976).

13. *Id.* § 2680 (1976).

14. *Id.* § 1346(b) (1976).

15. *Id.* § 2671 (1976).

16. Feres v. United States, 340 U.S. 135, 140–41 (1950).

17. 337 U.S. 49 (1949).

furlough, the petitioner in *Brooks* was negligently killed by a government employee.[18] The Court held that the FTCA permitted servicemen to bring tort claims against the government if the claims were not incident to military service. The Court, observing that the FTCA granted the district courts jurisdiction over any claims founded on the alleged negligence of the United States, was "not persuaded that 'any claim' means 'any claim but that of servicemen.'"[19] The Court noted in dicta, however, that "a wholly different case" would have been presented had Brooks' accident been incident to his military career.[20]

This "wholly different case" was presented to the Supreme Court the following year in *Feres v. United States*.[21] In *Feres*, the Court was confronted with the question of whether the right to bring a tort action against the United States under the FTCA applies to negligence allegations that originated in military service. The plaintiff alleged that the United States negligently housed servicemen in unsafe barracks, an action that led to the decedent's death in a fire. The Court also reviewed two companion cases, *Jefferson v. United States* and *Griggs v. United States*. In *Jefferson*, the complainant alleged that the government was liable for an army surgeon's negligent loss of a towel in Jefferson's stomach during abdominal surgery. In *Griggs*, a serviceman's executrix alleged that the decedent died as a result of unskilled medical treatment by military surgeons.[22]

After reviewing the facts of each case, the Court held, "[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[23] The Court construed the FTCA as part of an entire statutory scheme in which individuals could recover for the tortious conduct of the government. The Court concluded that "[t]he primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional."[24] The Court apparently concluded that since each soldier could have received benefits from the Veterans' Administration, he would be sufficiently compensated for his service-related injuries and therefore would not need the tort remedy.[25]

---

18. *Id.* at 50.

19. *Id.* at 51.

20. *Id.* at 52. The Court noted that a battle commander's poor judgment or an army surgeon's negligent slip of hand would pose a different liability issue. Accordingly, the Court stated that the accident and injuries were not "caused by [his] service except in the sense that all human events depend upon what has already transpired." *Id.*

21. 340 U.S. 135 (1950).

22. *Id.* at 137.

23. *Id.* at 146.

24. *Id.* at 140.

25. *Id.* at 140, 145. A recent ruling from a regional Veterans' Administration office indicates that the Administration will not compensate veterans for exposure to nuclear radiation if the injury is diagnosed after the presumptive period allowed by law, even if a post-discharge warning was not given. Letter from Veterans' Adminstration to Charles Turgett (October 29, 1981). This denial seems to open the door to governmental immunity in failure to warn cases. *See* text accompanying note 98 *infra*.

The Court in *Feres* further reasoned that the relationship between the military and the government ought to continue to be governed by federal law.[26] In this vein, the Court concluded that the FTCA was not intended to create "a new cause of action dependent on local law for service-connected injuries or death due to negligence."[27] Also apparent in the Court's decision was its recognition of the unique nature of the soldier's relationship to the alleged tortfeasor. In distinguishing *Brooks* the Court stated, "This Court rejected the contention [of a bar to liability], primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."[28] Thus, the Court identified three reappearing concerns that justified its exception: alternative compensation, applicability of federal law, and the need to maintain military order.

2. *Reaffirmation of* Feres

The Supreme Court in *Feres* acknowledged that it may have misconstrued the purposes of the FTCA, especially given the lack of discussion in the committee reports and floor debates to aid its interpretation.[29] Amidst this uncertainty the Court concluded, "[I]f we misinterpret the Act . . . Congress possesses a ready remedy."[30] Congress, however, did not act in this regard. Accordingly, when the Supreme Court had the opportunity to review the *Feres* doctrine recently in *Stencel Aero Engineering Corp. v. United States,*[31] it reaffirmed the military exception to the FTCA.[32]

The Supreme Court in *Stencel* summarized several reasons for the continuing applicability of the *Feres* doctrine. First, the Court pointed out that intramilitary immunity preserves the distinctively federal character of the relationship between the government and the soldier.[33] The Court suggested that the tort liability of the federal military should not depend on the laws of the state where the tort occurred. Second, the Court opined that veterans' benefits already provide compensation and ought to serve as an upper limit of liability.[34] Last, it determined that permitting suits by servicemen for injuries received while on duty would have an adverse impact on military discipline.[35]

---

26. 340 U.S. 135, 146 (1950).

27. *Id.*

28. *Id. See* United States v. Brown, 348 U.S. 110, 112 (1954) (Court explicitly recognized military's interest in discipline); *cf.* Parker v. Levy, 417 U.S. 733, 758 (1974) ("[F]undamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

29. 340 U.S. 135, 138 (1950).

30. *Id.*

31. 431 U.S. 666 (1977). In *Stencel,* a National Guard pilot was injured by an ejection system that malfunctioned. The guardsman sued the manufacturer of the system, who in turn sought indemnity from the United States government. The Court affirmed the *Feres* doctrine and did not grant the indemnification. *Id.* at 674.

32. *Id.* at 670–72.

33. *Id.* at 672.

34. *Id.* at 673.

35. *Id.*

Thus the Court has formalized the *Feres* decision and in so doing has asserted that an intramilitary immunity is essential for incidents related to military service.[36]

III. Penetrating Intramilitary Immunity

A. *Classifying Attacks on Intramilitary Immunity*

The *Feres* doctrine, as reaffirmed in *Stencel,* has been subject to much academic and judicial comment and criticism.[37] In the various attempts to avoid the *Feres* bar,[38] plaintiffs have urged, with varying success, three exceptions to the doctrine:[39] (1) a "continuing tort" theory, which permits recovery if the single negligent act occurred while the individual was in the service and the effects of the initial act have lingered after discharge; (2) a "separate negligent acts" theory, which applies if the military has performed two negligent acts, one that occurred while the individual was in the service and a second that was inflicted by the military after the individual had attained civilian status; and (3) a "failure to warn" theory, which allows recovery if the military has committed "an intentional act and then negligently fail[ed] to

---

36. *Id.* at 672–73. However, in a recent case, Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981), a federal district court examined the three principles underlying the *Feres* "incident to military service" test and held that an action brought by an injured veteran's family alleging birth defects in a child that were caused by chromosomal alterations to the veteran would not be barred by *Feres*. Rather than automatically applying the *Feres* doctrine, which would view the damage to family members as incident to military service, see *In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 781 (E.D.N.Y. 1980), the court reasoned that "this oversimplification would avoid the necessary analysis of policies underlying the *Feres* doctrine which the Supreme Court requires in determining its application to novel cases." 524 F. Supp. 277, 282 (E.D. Pa. 1981).

The court's evaluation of the policies underlying the immunity doctrine revealed that on the facts presented (1) no distinctly federal relationship existed between the plaintiff family and the United States, (2) veterans' benefits may not compensate chromosomal damages under the basic entitlement of 38 U.S.C. § 331 (1976), and (3) because of the lapse of time before the action was brought, no undermining of discipline would occur. *Id.* at 282–84.

Clearly, the court's analysis of policy factors overriding a strict interpretation of "incident to military service" leaves little of the *Feres* doctrine as a bar to a suit by the veteran's family against the government. It should also be noted that since the children have become the necessary parties for such an action, the claim exists only for the families of those veterans who had children with genetic defects. A veteran who refrained from having children because he was warned of such genetic dangers would not be able to recover for the damage to himself.

37. *See* Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979). The article calls for the abolishment of the *Feres* doctrine. Its author recommends that in lieu of *Feres* the discretionary exception to the FTCA, 28 U.S.C. § 2680(a), be used as the test to determine whether a claim could penetrate intramilitary immunity. The author advocates replacing the incident to service test with an inquiry into whether the claim either arose from a policy decision of the military, in which case the immunity would prevail, or concerned the operational activities of the military, in which case a cause of action could be stated. *Id.* at 1122–23. The author intended to preserve the policy behind the *Feres* doctrine while attempting to mitigate its harshness and therefore argued that courts ought to take into account the following: whether the injury arose due to a decision requiring professional judgment, whether there are significant disciplinary reasons to bar a claim, whether an applicable military regulation prescribes a standard of conduct, and whether the injury arose due to an emergency that would justify a lesser standard of care. *Id.* at 1123–25.

38. For a good discussion of the types of cases that arise in the area of intramilitary immunity, see generally Annot., 31 A.L.R. Fed. 146 (1977).

39. Thornwell v. United States, 471 F. Supp. 344, 352 (D.D.C. 1979) (mem.). This division, which will be employed throughout this analysis, was originally used by Judge Richey in *Thornwell* to explain and predict how courts will pigeon-hole various claims against the military.

protect the soldier turned civilian from the dire consequences which flow from the original wrong."[40] Typically, courts have not permitted recovery based on a "continuing tort" theory[41] but have permitted inroads into intramilitary immunity based on the "separate negligent acts" theory[42] and on the "failure to warn" theory.[43]

1. *Continuing Tort*

A "continuing tort" theory, best characterized by *Feres* and its progeny, has failed to penetrate the intramilitary immunity.[44] Since the *Feres* test for intramilitary immunity is "whether plaintiff's injuries have as their genesis injuries allegedly sustained incident to the performance of military service,"[45] courts have rejected the view that an injury does not occur until its manifestations become apparent.[46] Under a continuing tort analysis, injuries that can be traced to the service are not compensable, even if the injuries do not manifest themselves until after a person has attained civilian status. Like a single tort, a continuing tort can be viewed as one that extends from the military into the civilian life of an individual. However, it is doubtful whether the theory and policy underpinning the *Feres* bar to recovery are amenable to a continuing tort problem.[47]

2. *Separate Negligent Acts*

In *United States v. Brown*[48] the plaintiff successfully argued that a separate negligent act created an inroad to intramilitary immunity. The plaintiff-

---

40. *Id.* This Comment will not discuss the various *single* tort theories that have evolved to deal with cases in which the tort is incident to military service. Courts have had little problem in dismissing these claims under the rubric of *Feres*. For example, in Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980), the court barred the plaintiff's claim that the decedent was killed in a plane in which he had reserved a military space seat. Since the injury was sustained incident to service, no recovery was permitted. *Id.* at 1251. In Citizens Nat'l Bank v. United States, 594 F.2d 1154, 1157 (7th Cir. 1979), the court refused recovery to a serviceman who was attacked by marine guards.

41. *See* note 44 *infra*.

42. *See* note 48 *infra*.

43. *See* note 51 *infra*.

44. *See, e.g.*, Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980); Monaco v. United States, C-79-0859, slip op. (N.D. Cal. Nov. 2, 1979), *aff'd*, 661 F.2d 129 (9th Cir. 1981).

45. Monaco v. United States, No. C-79-0859, slip op. at 3 (N.D. Cal. Nov. 2, 1979), *aff'd*, 661 F.2d 129 (9th Cir. 1981). In *Monaco*, the plaintiff-father attempted to circumvent the *Feres* doctrine by arguing that his cancer, which manifested itself some thirty years after his original exposure to radiation while in the service, was not incident to service since it was not discovered until the plaintiff had become a civilian. The court, however, decided that since the cancer stemmed from his original exposure to radiation in the service, it was incident to service and hence barred by *Feres*. *Id.* The Ninth Circuit reluctantly affirmed the application of the *Feres* doctrine, noting that the doctrine had been consistently applied to prevent courts from examining negligent acts of the military. 661 F.2d 129, 131 (9th Cir. 1981). Nevertheless, the court seemed uncomfortable with the resulting inequity—denial of relief to a child born with birth defects caused by the genetic alteration that resulted from her father's exposure to radiation in service. *Id.* at 134.

46. 661 F.2d 129, 131 (9th Cir. 1981).

47. For example, permitting a *civilian* to recover under a continuing tort theory does not pose the threat to military discipline that has been said to support intramilitary immunity. *See* Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1977). It can be argued, however, that *any* liability for military acts will necessarily interfere with military discipline. *Id; see also* notes 25 and 37 *supra*.

48. 348 U.S. 110 (1954); *see also* Hungerford v. United States, 192 F. Supp. 581 (N.D. Cal. 1961), *rev'd on other grounds*, 307 F.2d 99 (9th Cir. 1962).

respondent had been discharged from the service as a result of an injury he received due to the military's negligence. After his release, Brown suffered a second injury: a Veterans' Administration hospital's negligent application of a defective tourniquet. The Supreme Court did not bar Brown's recovery, because the second negligent act had occurred while Brown was a civilian and was found not to be incident to military service.[49] The Court indicated that Brown was no longer on active duty nor subject to military discipline; therefore, the rationale behind the *Feres* bar to recovery was absent.[50]

3. *Failure to Warn*

The "failure to warn" theory is a hybrid of the "continuing tort" and "separate tort" analyses. The theory permits plaintiffs to recover on the ground that the military owes a certain duty of care to veterans if it intentionally and harmfully exposed them to dangerous substances while they were in the service.[51] While the *Feres* doctrine still effectively bars a veteran's recovery for the original harmful exposure that was incident to the service, under the failure to warn theory liability attaches to the military when its failure to warn a veteran aggravates the original wrong by increasing the danger over time or by causing the veteran to believe that the danger has been removed.[52]

Because some courts have held that a failure to warn following discharge is incident to service and barred by *Feres*, the failure to warn theory must be distinguished from a continuing tort.[53] To be successful, the plaintiff apparently must assert a failure to warn along the lines of *United States v. Brown*;[54] that is, he must show that two distinct torts occurred: one while in the service, the other after discharge.[55]

The origin of this duty to warn is relatively recent. Historically, a duty to warn did not exist since no liability attached for nonfeasance.[56] Later in the

---

49. 348 U.S. 110, 112 (1954). Arguably, if Brown had not injured his leg in the service, there would have been no need for the subsequent operation at the Veterans' Administration hospital. The Court, however, chose not to view the claim as a continuing tort since there was not a direct connection between the original injury and the subsequent application of the tourniquet and the injury was one normally compensable under the Tort Claims Act. *Id.*

50. *Id.* The court relied on Brooks v. United States, 337 U.S. 49, 52 (1949), in which the Supreme Court had held that the intramilitary immunity did not apply when injuries were not caused by service-related incidents.

51. *See* Broudy v. United States, 661 F.2d 125 (9th Cir. 1981); Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964), *aff'd*, 381 F.2d 627 (3d Cir. 1967); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (memorandum opinion).

52. *See* text accompanying notes 61–87 *infra*.

53. *See* Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). In *Henning*, the alleged misreadings of X-rays occurred while the plaintiff was in the service. The failure to warn Henning of the correct interpretation of the X-rays in the months following his discharge was deemed incident to service. Thus, the *Feres* doctrine struck down the claim as a continuing tort.

54. 348 U.S. 110 (1954).

55. Broudy v. United States, 661 F.2d 125 (9th Cir. 1981). In *Broudy*, the court permitted a veteran to prove post-discharge negligence but cautioned that had the government learned of the problems with radiation exposure while Broudy was still in the hospital, the failure to warn would have been incident to service and therefore barred by *Feres*. *Id.* at 128–29. Application of the bar in the latter case could lead to an absurdity: the government would have to argue that the military knew that the radiation was dangerous and decided not to warn. By thus showing more reprehensible conduct, the government can avail itself of the *Feres* umbrella.

56. W. PROSSER, *supra* note 3, § 56 at 338.

development of the law of torts, however, courts held that certain relationships raised a duty to take affirmative action to protect others; custom, public sentiment, and social policy determined which relationships raised that duty.[57] In a further refinement in cases in which the defendant's negligence was responsible for the plaintiff's predicament, the courts established a constructive relationship by which the defendant had an additional duty of giving assistance that would help the plaintiff avoid further harm. In fact, this duty was recognized even when the defendant's prior conduct that caused the predicament was innocent.[58] Dean Prosser had argued that while the development of the duty to warn has been slow and cautious,

> there is reason to think that it may continue until it approaches a general holding that the mere knowledge of serious peril, threatening death or great bodily harm to another, which an identified defendant might avoid with little inconvenience, creates a sufficient relation, recognized by every moral and social standard, to impose a duty of action.[59]

The *Restatement (Second) of Torts* similarly recognizes the duty to take affirmative action (which includes warning). Section 322 of the Restatement provides that

> if the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.[60]

Intramilitary immunity is not consistent with either the Restatement's or Dean Prosser's view of the duty to warn. Since the relationship of the military to the soldier still in the service is characterized by the latter's dependency and lack of free choice, it would be a rather harsh doctrine that disavowed *any* obligation to a veteran. When the military has knowledge of the potentially lingering effects of a dangerous exposure of a serviceman, the moral and just result of warning the serviceman outweighs any inconvenience to government that may accompany such a duty. Within this apparent framework, several courts have adopted the failure to warn theory to avoid the *Feres* bar.

B. *Application of the Failure to Warn Theory to the Military*

1. Schwartz v. United States

In *Schwartz v. United States*[61] the plaintiff was treated for sinusitis while serving in the Navy. A radioactive dye, umbrathor, was used as a contrast dye for purposes of the X-rays. Schwartz continued to experience

---

57. *Id.* at 339.

58. *Id.* at 342. Thus, it will be shown that while initial acts of negligence by the military are subject to an immunity according to *Feres*, the military has a subsequent duty to warn a veteran.

59. *Id.* at 343.

60. RESTATEMENT (SECOND) OF TORTS § 322 (1965).

61. 230 F. Supp. 536 (E.D. Pa. 1964), *aff'd*, 381 F.2d 627 (3d Cir. 1967).

sinus problems following his medical discharge in 1945. When Schwartz went to a veterans' hospital for follow-up treatment, doctors at the hospital failed to send for his medical records, which would have revealed that Schwartz had been previously exposed to a chemical that had since been discovered to cause cancer. By the time doctors discovered the cancer, the plaintiff had lost an eye as well as his voice. Because a claim based on negligent treatment would have been barred by *Feres*, Schwartz based his claim on the government's failure to warn him about the known dangers of umbrathor.[62] The court held that the military should have reviewed the records of all patients who had been given umbrathor and warned them about the potentially deleterious condition posed by lingering amounts of the dye retained in their bodies. The court concluded that "[t]he negligence here is not in its installation, but rather in not having affirmatively sought out those who had been endangered after there was knowledge of the danger in order to warn them that in the supposedly innocent treatment there had now been found to lurk the risk of devastating injury."[63] The court thus held the *Feres* bar inapplicable: the duty to warn was breached by the *continuing* failure of military doctors to notify patients who had been exposed to a known carcinogen.[64] By avoiding a *Feres* conclusion, the court concluded that Schwartz's recovery was not restricted to the $84,928 he received in veterans' benefits. The court held that the Veterans' Administration payments only partially mitigated past and future damages and awarded an additional $725,000 damages for future medical cost, loss of wages, and pain and suffering.[65]

The *Schwartz* decision does not conflict on policy grounds with the reasons typically employed by the courts to support the *Feres* decision.[66] For example, military discipline will not be endangered if a plaintiff has, like Schwartz, attained civilian status. Second, Veterans' Administration benefits would serve only to mitigate the damage recovery that the failure to warn tort will provide. It should be noted that the *Schwartz* decision does no more than restore to a plaintiff the right to trial by jury at the expense to government of weakening a blanket immunity and obviating some administrative decisions of the Veterans' Administration.

2. Thornwell v. United States

A similar factual pattern arose some fifteen years later in *Thornwell v. United States*.[67] Thornwell brought charges against the government for

62. 230 F. Supp. 536, 537–40 (E.D. Pa. 1964).

63. *Id.* at 540.

64. *Id.* The court did not address the question of whether the duty to warn must arise after discharge, as might be implied by *Feres*. Interestingly, the court pointed out that the dangers of umbrathor were noted long before Schwartz left the service. *Id.* If this was the case, the duty to warn Schwartz arguably arose while he was still in the service, and the result is thus seemingly inconsistent with *Feres*.

65. *Id.* at 542–43.

66. *See* text accompanying note 36 *supra*.

67. 471 F. Supp. 344 (D.D.C. 1979) (mem.). Note, however, that in *Schwartz* the military's initial conduct was apparently innocent (at most negligent), 230 F. Supp. 536, 538–40 (E.D. Pa. 1964); in *Thornwell* the military's initial conduct was highly culpable, 471 F. Supp. 344, 351 (D.D.C. 1979).

harassment, interrogation, imprisonment, and the covert administration of drugs (most notably LSD) during his active military career. He also charged the government with concealment and the failure to provide follow-up examinations and treatment after his military discharge.[68] Citing the *Feres* doctrine, the court dismissed the claims for injuries sustained while Thornwell was on active duty.[69] The court, however, permitted Thornwell to bring suit for those post-discharge injuries that were exacerbated by the lack of adequate care and treatment afforded to Thornwell, the civilian, by the military. This second act of negligence occurred after Thornwell attained civilian status. Thus, he was able to avoid the *Feres* bar.[70]

The court also needed to distinguish the *Thornwell* case from a continuing tort in which the negligent act occurs while the plaintiff is on duty and lingers after discharge and in which recovery is barred by the *Feres* doctrine.[71] In rejecting the applicability of the doctrine of intramilitary immunity, the court concluded, "[P]ost-discharge negligence involved a course of conduct distinct and separate from the intentional wrongs which had occurred while he was on active duty."[72] As in *Schwartz,* the court was also able to distinguish its decision from *Feres* because the rationale used to support the intramilitary immunity was absent. For example, since Thornwell was no longer subject to military discipline, the distinctively federal relationship between the military and the soldier was not disturbed.[73] Importantly, the court in *Thornwell* recognized a potential difficulty with the failure to warn theory, that is, that artful pleading must be closely scrutinized to ensure that a continuing act of negligence was not arbitrarily divided into separate wrongs.[74] Since the *Thornwell* decision, courts have sought to distinguish claims arising from failure to warn on their facts since this penetration of intramilitary immunity arguably could be

68. 471 F. Supp. 344, 346 (D.D.C. 1979). Thornwell also alleged that his constitutional rights had been violated. This aspect of the case will not be discussed although the following language of the court should be noted: "[I]f the military deprives a veteran of his constitutional rights, it may not look to *Feres* for immunity." *Id.* at 353.

69. *Id.* at 347–48.

70. *Id.* at 349–53. The court cited United States v. Brown, 348 U.S. 770 (1954), for the proposition that *Feres* does not bar tort claims that are not incident to military service. *Id.* at 350. *See* text accompanying notes 48–50 *supra.*

71. 471 F. Supp. 344, 351 (D.D.C. 1979). Critically, the court found a second locus of facts in the plaintiff's complaint to conclude that a separate duty of care both existed and was breached after the plaintiff left the service. *Id.*

72. *Id.* at 353. It would have been more difficult for the court to distinguish between the two torts had the court viewed the initial tort as negligence rather than an intentional tort. After all, negligent torts are likely to overlap, thereby clouding the incident to service test. This overlap is clearly demonstrated in *In re* "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 779 (E.D.N.Y. 1980), in which the court found that since the exposure of soldiers to the defoliant "Agent Orange" in Vietnam was pursuant to a valid military objective of defoliation, the military's acts were only negligent, and therefore its failure to warn did not present a separate and distinct act of post-discharge negligence.

73. 471 F. Supp. 344, 350 (D.D.C. 1979).

74. *Id.* at 352.

applicable in all instances in which the injuries do not manifest themselves until after a soldier is discharged.[75]

3. Everett v. United States

A third case involving the failure to warn theory was *Everett v. United States*.[76] The executrix in *Everett* sued the United States government on behalf of her deceased husband for injuries that he sustained as an enlisted man in the Air Force. In 1953, Everett and other servicemen were ordered to march through a nuclear blast area less than one hour after the detonation of a bomb at Camp Desert Rock, Nevada. Everett claimed that the harmful doses of radiation that her husband received as a result of this service experience were the proximate cause of his death from cancer in 1977.[77]

The court applied the *Feres* doctrine and denied Everett any recovery on the plaintiff's claim that the defendant was guilty of reckless conduct.[78] The court noted that the rationale behind the *Feres* doctrine still applied to the case at bar even though the degree of culpability was based on reckless or intentional conduct rather than negligence.[79] The long judicial history of insulating military affairs from judicial scrutiny mandated that even truly unpleasant service-related torts be barred by *Feres*.[80] Thus, the court determined that intramilitary immunity would not be circumvented by any pleading variations of a tort theme, so long as the tort was incident to service.[81]

The court, however, ruled that Everett had stated a cause of action based on his claim "that the government was negligent in failing to warn the decedent of the harmful effects of the radiation to which he was exposed."[82] The court was influenced by Judge Richey's post-discharge negligence scheme established in the *Thornwell* decision.[83] Using Richey's third category, liability for failure to warn the soldier-turned-civilian of the consequences of an

---

75. *See, e.g.*, Schnurman v. United States, 490 F. Supp. 429, 437 (E.D. Va. 1980). In *Schnurman*, the plaintiff alleged injuries resulting from exposure to toxic war gas in a Navy experiment. Recovery for post-discharge negligence was denied since the injuries "were not shown to be caused in any way by the government's failure to treat plaintiff after discharge or to warn him of the true nature of the gas to which he had been exposed." *Id.* at 437. The plaintiff needed to show either that the injuries were aggravated by the failure to warn or that follow-up treatment could have avoided long-term effects of the exposure. *Id.* The court distinguished this case from *Thornwell* on the grounds that the initial act was not intentional since the plaintiff had volunteered for the experiment. *Id.* at 437.

76. 492 F. Supp. 318 (S.D. Ohio 1980).

77. *Id.* at 319.

78. *Id.* at 320.

79. *Id.* at 321. The court cited *Stencel* and noted that allowing liability to attach to the government would have invaded the distinctively federal relationship between the military and the soldier, thus making liability hinge on the law of the state in which the injury occurred. *Id.* Second, the court deemed Veterans' Adminstration benefits to be a type of "no-fault" compensation that was afforded to veterans without regard to a finding of tort liability against the government. *Id.* Last, the court was reluctant to examine the propriety of military decisions, an action that could subvert the discipline and authority needed in the military. *Id.*

80. *Id.* at 322.

81. *Id.*

82. *Id.* at 325. *See also* Broudy v. United States, 661 F.2d 125 (9th Cir. 1981).

83. 492 F. Supp. 318, 325 (S.D. Ohio 1980). *See* text accompanying note 39 *supra*.

intentional act of the military, the court found that the failure to warn Everett of the dire consequences that flowed from his military service was a separate actionable wrong not barred by the *Feres* doctrine.[84]

The reasoning of the *Everett* court is especially interesting, for the court could have concluded that the duty to warn following Everett's discharge was a duty that arose out of events incident to his military service.[85] Instead the court reasoned that the negligent failure to warn was distinguishable from the *Feres*-barred willful tort involved in the initial experimentation.[86] In keeping with the two-tort analysis, the *Everett* court further demonstrated that the failure to warn must enhance damages that could have been contained and limited to the damage created by the initial exposure to the radiation.[87]

IV. ASSESSMENT OF THE FAILURE TO WARN THEORY AND ITS IMPACT ON INTRAMILITARY IMMUNITY

A. *Potential for Broad Implications*

As the court noted in *Everett*, intramilitary liability will be severely challenged in the years to come as the deleterious effects of service-related exposures to such things as defoliants, atomic radiation, and drugs manifest themselves in the civilian lives of veterans.[88] In discussing the effects of past atomic testing, for example, former Interior Secretary Stewart Udall commented, "The problem is larger than anyone has thought—and more tragic."[89] The problem is further exacerbated since it takes anywhere from five to thirty years for many cancers to develop. And, in the interim, it is difficult to distinguish post-military exposures to carcinogenic agents from the original military exposure.[90] Thus, the potential liability is almost incalculable if the *Feres* doctrine is limited significantly as suggested by the recent case developments.

---

84. 492 F. Supp. 318, 325 (S.D. Ohio 1980). But see Kelly v. United States, 512 F. Supp. 356, 361 (E.D. Pa. 1981), in which the court held that cancer allegedly sustained from exposure to nuclear radiation while plaintiff was in the Navy fell within the *Feres* doctrine since there was no essential difference between the failure to give initial warning and failure to warn thereafter.

85. *See, e.g.*, Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); Wisniewski v. United States, 416 F. Supp. 599 (E.D. Wis. 1976). By employing a broad reading of *Feres*, these decisions view the failure to warn as part of the initial tort that was incident to service—a continuing tort perspective.

86. 492 F. Supp. 318, 325–26 (S.D. Ohio 1980).

87. *Id.* It logically follows that separate torts ought to lead to separate injuries. Thus, if it could be determined that the radiation exposure to Everett created "instant" cancer, there would have been no valid second tort claim for failing to warn. Conversely, the decision reached by the court in *Everett* is a just one if a warning could well have arrested the spread of Everett's cancer.

88. *Id.* at 320.

89. *A Nuclear Danger Zone*, NEWSWEEK, Jan. 1, 1979, at 27.

90. *Id.* The article reveals that the Atomic Energy Commission had knowledge of the harmful effects of radiation as early as 1955. Local residents near a nuclear test site received a letter which stated, "At times, some of you have been exposed to potential risks from flash or fallout." *Id.* The military's knowledge of the danger makes its failure to warn soldiers or civilians like Everett of the possible repercussions of their exposures all the more reprehensible. *See also* H. ROSENBERG, ATOMIC SOLDIERS ix, 57, 134, 139 (1980).

The factual patterns of *Schwartz, Thornwell,* and *Everett,* however, apparently persuaded the courts in those cases to make inroads into the court-created *Feres* doctrine in order to reach a morally just and compelling result. In fact, these decisions may mark the beginning of a judicial trend toward dispensing with a continuing tort analysis that will bar recovery in cases in which the moral ends justify permitting suit. By dispensing with the often difficult determination of where one tort ends and another begins, the failure to warn theory affords the veteran the same opportunity to sue under the FTCA that his civilian counterpart has enjoyed.

Concommitantly, governmental liability based on the failure to warn will force the military to inspect and update its records of the military history of former soldiers. Moreover, attaching this liability to the military will subject its actions to judicial review but will not affect disciplinary relations. In addition, courts will be in a position to assess whether certain Veterans' Administration settlements mitigate damages for failure to warn and will necessarily be forced to examine other facets of military decisions that have managed to escape judicial review over the years. The job of balancing the needs of the military with the needs of injured veterans—that is, just compensation for their injuries—should belong to the courts, whose recognition of a broadly construed duty to warn will make the military more accountable to its veterans who have faithfully served their country.

B. *Conformity with the* Feres *Perspective*

Since the *Feres* doctrine has become somewhat entrenched in our law,[91] it is crucial that the failure to warn theory comport with the logic and reasoning behind the *Feres* decision.[92] Claimants must demonstrate that clever pleading has not been used to disguise a tort that was actually "incident to military service" and thus barred by *Feres*.[93] In *Everett,* for example, this objective was accomplished by distinguishing the initial tort of reckless conduct from the second, negligent failure to warn.[94] Moreover, for the failure to warn theory to succeed, it must be shown that the duty to warn did not arise until after the individual had left the service.[95] Thus, the plaintiff may

---

91. *See* Annot., 31 A.L.R. Fed. 146 (1977). While courts readily admit that intramilitary immunity is a judicial interpretation of the FTCA, they are quick to point to tacit congressional approval of their decision: Congress has neither amended the FTCA nor criticized the courts' interpretations. *See* text accompanying notes 30–32 *supra*; *see also* Monaco v. United States, 661 F.2d 129 (9th Cir. 1981). *But see* Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981) (challenging application of the *Feres* doctrine to nonderivative claims of a veteran's family).

92. *See* Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977). The courts have realized that some aspects of the military's decisions must escape judicial review if the military is to be effective (e.g., combatant activities, planning, and strategy).

93. *See* note 72 *supra.*

94. 492 F. Supp. 318, 326 (S.D. Ohio 1980).

95. The court in *Everett* did not discuss when the military acquired knowledge of the harmful effects of its action on servicemen. *See* note 55 *supra.*

have to show that the duty to warn arose after discharge in order to escape the continuing tort analysis of *Feres*.[96]

It is also necessary to show that even if failure to warn claims are distinguishable from *Feres*, the policies supported by the *Feres* bar will not be undermined by the adoption of this new theory.[97] To this end, since claimants are civilians, this limited accountability of the military to the courts is arguably less likely to undermine military discipline, especially in cases in which many years have passed between actual military service and the manifestation of the injury. Moreover, judicial review that examines whether a warning should have been given, not whether the acts leading up to the need for the warning were tortious, will not endanger military policy decisions. For example, the court in *Everett* did not review the soundness of the policy of human experimentation with atomic radiation. Instead, the court merely reviewed the military's post-discharge policy towards veterans. And the *Feres* doctrine's assumption that the Veterans' Administration will provide sufficient compensation is inapplicable in failure to warn cases; in some instances there may be no compensation for this post-discharge negligence.[98] Hence, the integrity of *Feres* is preserved by this limited review.

Implicit in the *Schwartz, Thornwell,* and *Everett* decisions, however, is the recognition that the courts retain the prerogative to construe the "incident to service" test established in *Feres*. A broad reading of "incident to service" would bar claims for failing to warn since there would have been no duty to warn had the individual not been exposed to something harmful while in the service. The policies that the *Feres* doctrine is designed to support, however, do not require that the doctrine be defined so broadly that it prevents the equitable results obtained in *Schwartz, Thornwell,* and *Everett*.

C. *Utility as a Compromise Approach*

The decisions that have employed a failure to warn theory as an inroad into intramilitary immunity have effectively struck a compromise between the view of courts that have chosen to bar all military claims by using a broad reading of *Feres* and the view espoused by individuals who advocate the total abandonment of intramilitary immunity.[99] Failure to warn theory still preserves military autonomy; yet, it also restores veterans' right to sue under the FTCA for some injuries, affirms the government's responsibility to those who

96. Claimants would do well to present their additional demand for damages for the failure to warn to the proper administrative agency (Veterans' Administration), in order to show formally that the injuries that resulted from the failure to warn were not compensated by the government and that judicial action appears just and necessary.

97. *See* note 36 *supra*.

98. *See* note 25 *supra*.

99. It is doubtful whether the plaintiffs in *Everett, Schwartz,* and *Thornwell* would pass the discretionary exception test employed in Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1123–25 (1979); *see* note 37 *supra*. The advantage of the failure to warn approach is that it relies on established *Feres* principles rather than on the wholesale departure recommended by many critics.

have faithfully served in the military, and better allocates to government the risk of those losses from military service. On balance, the morally just results created by this theory override the shortcomings that it may have as a legal theory distinguishable from the *Feres* doctrine.

V. CONCLUSION

The failure to warn inroad into intramilitary immunity comports with the traditional tort law recognition that society holds certain nonfeasance morally reprehensible.[100] The military ought to be held to some standard of care following the discharge of soldiers who have been forced to sacrifice various liberties while in the military. While it is necessary for military discipline to forego claims incident to service, individuals cannot be expected to forego their right to prompt care and treatment when the military learns that it has exposed persons in its service to harmful substances. On balance, it does not appear unreasonable to impose a duty to warn on the military given the years of faithful service by veterans and the needless pain and suffering that a warning might alleviate.[101] At the very least, the expense should be distributed to society at large rather than placed on veterans or their survivors. The words of Abraham Lincoln that are inscribed on the Veterans' Administration building in Washington, D.C. are most appropriate: "We must care for those who have borne the battle . . . ."[102]

Thomas E. Szykowny

---

100. *See* text accompanying notes 57–59 *supra*.

101. *See generally* H. ROSENBERG, ATOMIC SOLDIERS (1980); Note, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933 (1981).

102. H. ROSENBERG, ATOMIC SOLDIERS 169 (1980). Rosenberg describes the frustrations encountered by veterans who are unable to recover benefits from the Veterans' Administration for the effects of radiation. *Id.* at 174.