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FAIRNESS AND *FERES*: A CRITIQUE OF THE PRESUMPTION OF INJUSTICE

JOAN M. BERNOTT*

A survey of writing on this topic leads rapidly to the conclusion that, unbeknownst to the United States Supreme Court, there is something seriously wrong with the *Feres* doctrine.¹ Lower federal courts and commentators join in "widespread, almost universal criticism" of the doctrine.² Judges apply *Feres* "reluctantly,"³ "serious[ly] doubt[ing]" its theoretical bases,⁴ "regret[ting] [its] effects,"⁵ and suspecting or believing that the doctrine "should be reconsidered."⁶ But the High Court continues to embrace and proclaim it, without apology or dissent.⁷ Who is right?

Much current commentary promotes the so-called post-discharge duty theory as a welcome "inroad" on the doctrine,⁸ and decries *Feres*' "extension" to genetic injury claims predicated on in-service injuries to servicemen.⁹ These often heated discussions, however, almost invariably leave unexamined their premise: that the *Feres* doctrine intrinsically is unfair. Furthermore, the commentators assume the truth of the personal injury claims in issue, as is necessary given the requirements of Fed. R. Civ. P. 12(b).¹⁰ The image

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1. *Feres v. United States*, 340 U.S. 135, 146 (1950) ("conclude[s] that the Government is not liable under the Federal Tort Claims Act [28 U.S.C. § 1346(b); §§ 2671-80] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service").

2. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984).

3. *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

4. *Hunt v. United States*, 636 F.2d 580, 589 (D.C. Cir. 1980).

5. *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

6. *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir.), *cert. denied*, 414 U.S. 879 (1973).

7. *See, e.g.*, *United States v. Shearer*, 105 S. Ct. 3039, 3044 (1985).

8. *See, e.g.*, Szykowny, *Duty to Warn as an Inroad to the Feres Doctrine: A Theory of Tort Recovery for the Veteran*, 43 OHIO ST. L.J. 267, 271 (1982).

9. *E.g.*, Comment, *Pushing the Feres Doctrine a Generation too far: Recovery for Genetic Damage to the Children of Service Members*, 32 AM. U. L. REV. 1039, 1052 (1983); Note, *If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin*, U. ILL. L. REV. 317, 321 (1983).

10. Because *Feres* protects against "the suit, not [merely] the recovery," the *Feres* defense almost invariably is considered in the context of a motion to dismiss under Fed. R. Civ. P. 12(b). *See Henninger v. United States*, 473 F.2d 814, 815-816 (9th Cir.), *cert. denied*, 414 U.S. 819 (1973); *accord Gaspard v. United States*, 713 F.2d 1097, 1102 (5th Cir. 1983), *cert. denied sub nom Sheehan v. United States*, 466 U.S. 995 (1984); *see also* FED. R. CIV. P. 12(b).

they thus generate—of armies of remediless cancer-ridden veterans and birth-defective children—is a daunting obstacle to dispassionate doctrinal analysis.

An unexamined ethical premise coupled with the presumed existence of large numbers of persons in desperate need of judicial relief is a potent jurisprudential mix. It provides a better explanation than logic for post-discharge, genetic injury, and other recent decisions that openly “denigrate” the *Feres* doctrine and attempt to amend it.¹¹ Considering the national security and constitutional ramifications of *Feres*, examination of its supposed unfairness is overdue and useful. This article’s purpose is to begin that examination.

THE *Feres* DOCTRINE AS DECLARED BY THE SUPREME COURT

In 1946, after decades of debate, Congress passed the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) *et seq.*, which, with certain exceptions, waived sovereign immunity for the “ordinary, common law torts” of federal employees.¹² Three years later, the Supreme Court held that servicemen *qua* servicemen were entitled to FTCA relief, at least so long as the injuries for which they sued were not sustained “incident to service.”¹³ Almost immediately, the Court was confronted with the “wholly different case” of servicemen’s suits for injuries sustained incident to military service.¹⁴

Feres v. United States was a consolidation of three cases from three United States Circuit Courts of Appeals: Mrs. Feres’ decedent perished in an alleged negligently-caused barracks fire while on active duty, and the other two cases alleged medical malpractice committed against active duty servicemen.¹⁵ Of the twelve federal judges that considered the cases in the lower courts, nine had held that plaintiff failed to state a cause of action.¹⁶ All nine Supreme Court justices agreed with them.

In *Feres v. United States*, the Supreme Court stressed by way of introduction that, since “few guiding materials” illuminated their task of statutory interpretation, “no conclusion can be above challenge, but . . . at

11. *In re* “Agent Orange” Prod. Liab. Litig., 580 F. Supp. 1242, 1251 (E.D.N.Y. 1984); see *infra* notes 55-65 and accompanying text (discussing district court’s decision in *Agent Orange*).

12. See *Dalehite v. United States*, 346 U.S. 15, 28 (1952).

13. See *Brooks v. United States*, 337 U.S. 49, 52 (1949).

14. See *Feres v. United States*, 340 U.S. 135, 138 (1950).

15. See *Feres v. United States*, 177 F.2d 535, 536 (2d Cir. 1949), *aff’d*, 340 U.S. 135 (1950); *Jefferson v. United States*, 77 F. Supp. 706, 708-11 (D. Md. 1948), *aff’d*, 178 F.2d 518 (4th Cir. 1949); *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949).

16. A split Tenth Circuit panel reversed dismissal of the medical malpractice wrongful death complaint in *Griggs v. United States*. See *Griggs v. United States*, 178 F.2d 1, 3 (10th Cir. 1949). The dissenting judge in *Griggs* adopted the reasoning of the District Court in *Jefferson v. United States*. See *id.* (Huxman, J., dissenting); *Jefferson v. United States*, 77 F. Supp. 706, 711-16 (D. Md. 1948), *aff’d*, 178 F.2d 518 (4th Cir. 1949).

least Congress possess[ed] a ready remedy” for any misinterpretation of the FTCA.¹⁷ The Court then produced what lower courts since have rarely recognized for what it was: a statutory interpretation inspired by equity. “This Act,” stated the Court, “should be construed to fit . . . into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.”¹⁸ The Court evidently was not concerned about any deficit of relief for servicemen implicit in the result in *Feres*. However, it was compelled to note the *surfeit* of relief for servicemen implicit in *Brooks v. United States*, which permitted a tort suit for injuries already compensated under military law.¹⁹ The FTCA was intended to “extend a remedy to those who had been without; if it incidentally benefited those already well provided for [by a comprehensive system of relief],” wrote Justice Jackson for the *Feres* Court, “it appears to have been unintentional.”²⁰

The gravamen of *Feres* is that the FTCA created no “new causes of action;” that the liability proposed by petitioner *Feres* was new; and that, therefore, such liability a fortiori was not created by the FTCA.²¹ The Court also noted that basing federal liability to servicemen on “the law of the [state] where the act or omission occurred” made “no sense” in any incident-to-service case.²² “It would hardly be a rational plan,” said the Court, “of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.”²³

Finally, the Court observed that the statutory scheme of compensation for injuries or death to servicemen was “simple, certain, and uniform;”²⁴ was neither “negligible [n]or niggardly; and “normally require[d] no liti-

17. *Feres*, 340 U.S. at 138.

18. *Id.* at 139.

19. *Id.*; see *Brooks*, 337 U.S. at 52.

20. *Feres*, 340 U.S. at 140; see *id.* at 144 (discussing double recovery under both FTCA and servicemen’s compensation statutes).

21. See *id.* at 141. The point could not have been more emphatic:

[P]laintiffs can point to no liability of a ‘private individual’ even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any [private individual] liability ‘under like circumstances’ . . .

Id. (citation omitted) (quoting FTCA, 28 U.S.C. § 2674 (1982); see also *id.* at 142 (“[Even] if we indulge plaintiffs the benefit of [a] comparison [with states and their militia], claimants cite us no state, and we know of none, which has permitted members of its militia to maintain tort actions for injuries suffered in the service. . . .”); *id.* (“We find no parallel liability before, and we think no new one has been created by, this act. Its effect . . . was not to visit the Government with novel and unprecedented liabilities.”); *id.* at 146 (“We cannot impute to Congress such a radical departure from established law in the absence of express congressional command”).

22. *Id.* at 142 (quoting 28 U.S.C. § 1346(b) (1982)).

23. *Id.* at 143.

24. *Id.* at 144.

gation," at which soldiers are at a "peculiar disadvantage" anyway.²⁵ The "vital distinction" between *Brooks* and *Beres* was that "the injury to Brooks did not arise out of or in the course of military duty."²⁶ The *Feres* Court unanimously concluded that "the 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."²⁷

In the ensuing thirty-six years, the Supreme Court refined the "incident to service" test by permitting a veteran to sue for a post-discharge injury caused by post-discharge federal negligence in *United States v. Brown*,²⁸ and firmly refusing to endorse an on-base, on-duty litmus test in *United States v. Shearer*.²⁹ The Court also confirmed that the *Feres* doctrine could not be avoided through third-party process,³⁰ or through suits against military officers in their individual capacities.³¹

CRITICAL INTERPRETATION AND APPLICATION OF THE *Feres* DOCTRINE BY LOWER COURTS

There was little in *Feres v. United States* that foretold the corrosive critical interpretations that now exist. While not strict statutory construction in the "plain meaning" sense, the *Feres* analysis was well-rooted in precedent and syllogistically reasoned. The analysis per se (i.e., the Supreme Court's reading of the statute and Congress's intent) provoked no substantial scholarly challenge at the time. Nor, unsurprisingly, is it commonly criticized even now; *Feres*' ever more prolonged congressional ratification has tended

25. *Id.* at 145.

26. *Id.* at 146.

27. *Id.*

28. 348 U.S. 110 (1954). The Court in *United States v. Brown* stressed that the nerve injury for which Brooks sued "was not incurred while [he] was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status." *Id.* at 112. "Since the negligent act giving rise to the injury . . . was not incident to the military service, the *Brooks* case governs and the judgment must be affirmed." *Id.* at 113. Troubled by the "unjustifiable discrimination" favoring veterans over active-duty servicemen, three justices dissented. See *id.* at 114 (Black, J., dissenting) (joined by Reed, J. and Minton, J., dissenting). The dissenters reasoned that "but for" his military entitlement to treatment in a veterans' hospital, "this veteran could not have been injured. . . ." *Id.* at 114 (Black, J., dissenting).

29. 105 S. Ct. 3039 (1985). In *United States v. Shearer*, all eight participating justices disavowed reduction of the *Feres* doctrine to a "few bright-line rules" such as on-base situs of injury. *Id.* at 3043. The Court reversed the Third Circuit's remand of a wrongful death action premised on one serviceman's murder by another serviceman while both were off-duty and off the military base, noting that the claims struck at the "core" of *Feres* concerns: i.e., they "went directly to the 'management' of the military; . . . question[ing] basic choices about discipline, supervision and control of a serviceman." *Id.* (footnote omitted).

30. See *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673-74 (1977). In *Stencel Aero Eng'g Corp. v. United States*, the Court affirmed dismissal of a third-party FTCA claim brought by an aircraft manufacturer sued by a military pilot injured when his ejection mechanism malfunctioned. *Id.* at 667-68, 674; see *infra* notes 99-101 and accompanying text (discussing Supreme Court's decision in *Stencel Aero*).

31. See *Chappell v. Wallace*, 462 U.S. 296, 298-304 (1983).

to moot criticism that the Supreme Court's interpretive analysis was inherently wrong.³² To a lesser degree, so has the broad international endorsement of *Feres*-type rules by countries all over the world.³³

Nevertheless, current commentators and courts express almost unanimous dismay at *Feres*' unfairness.³⁴ They subject its 'grounds' to an avalanche of critical re-examination,³⁵ implying that the judicial branch has discretion simply to reverse the statutory interpretation contained in *Feres*, notwithstanding thirty-seven years of congressional ratification. And some courts have re-read *Feres*, *Brown* and *Shearer* to mean that in certain kinds of cases, the FTCA *does* compensate in-service injuries. But the analyses on which these cases purport to rely are weak. Some have provoked criticism

32. Since *Feres* was decided, Congress repeatedly has ratified it. Of recent note, for example, several congresses have considered, but failed to enact, legislation that would allow service members to bring medical malpractice suits. See H.R. 1161, 99th Cong., 1st Sess., 131 CONG. REC. H541 (daily ed. Feb. 20, 1985); H.R. 1942, 90th Cong., 1st Sess., 129 CONG. REC. H887 (daily ed. March 4, 1983). Congress also has acted to extend *Feres*' application. See H.R. REP. NO. 384, 97th Cong., 1st Sess. 5, reprinted in 1981 U.S. CODE CONG. & ADMIN. NEWS 2692, 2695 (when Congress amended the FTCA in 1981 to include certain National Guardsmen, the House Judiciary Committee stated that its intent was that "the rule of the *Feres* case should apply to the acts or omissions of National Guard personnel"). Cf. 42 U.S.C. § 2212 (Supp. 1985) (statute substituting the United States for defendant-atomic test contractors specifies that *Feres* would apply to such suits). One commentator, however, has briefly argued that in *Feres* the Supreme Court ignored congressional intent. See Cyze, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U. L. REV. 527, 549-553 (1980).

33. A national tradition disallowing a serviceman tort recovery for "negligence, against either his superior officers or the government," generally is followed in democracies. *Feres*, 340 U.S. at 135. Suits by servicemen against their governments are barred in Canada, France, West Germany and curtailed severely in England. See, e.g., Crown Liability Act, § 4 R.S.C., Ch. C-38 (1970) (Canada); Law of France of Aug. 4, 1962 (supplemented by the law of Nov. 18, 1972) (France); Law on Rights of Civil Servants, BGB1.I (1977) (West Germany); HALSBURY'S STATUTES OF ENGLAND, 3d Ed., Vol. 8: Section 10, Crown Proceedings Act of 1947 (England); accord Parker v. Commonwealth, 38 AUSTRALIAN L.J. 444, 446 (1964-65) (Australia); T. ISON, ACCIDENT COMPENSATION: A COMMENTARY ON THE NEW ZEALAND SCHEME 13, 16 (1980) (New Zealand); State Redress Act, reprinted in LAWS OF THE REPUBLIC OF KOREA (3d Ed. 1975) at 293 (Korea).

34. See Scales v. United States, 685 F.2d 970, 974 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); Hunt v. United States, 636 F.2d 580, 589 (D.C. Cir. 1980); Peluso v. United States, 474 F.2d 605, 606 (3d Cir.), cert. denied, 414 U.S. 879 (1973); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246-47 (E.D.N.Y. 1984); see also Szykowny, *supra* note 8; Comment, *supra* note 9; Note, *supra* note 9; Hislop-Brumfield, *infra* note 80.

35. See, e.g., Cyze, *supra*, note 32; Comment, *The Prenatal Plaintiff and the Feres Doctrine: Throwing Baby out with the Bath Water?* 20 WILLAMETTE L.R. 495, 533 (1984) ("[T]he Supreme Court has never articulated a workable rationale for the *Feres* doctrine. . . ."); Smith, *The Feres Doctrine: Should it Continue to Bar FTCA Actions by Servicemen Who Are Injured While Involved in Activities Incident to their Service?* 49 J. AIR L. & COM. 177, 210 (1983) ("Many courts and commentators have attacked the underlying factors supporting *Feres*, and only the concern for military discipline retains any substantial validity"). *Feres*' 'grounds' are generally considered to include the anomaly of state law governing federal liability to servicemen; the availability of alternative compensation; the special relationship between servicemen and the government they serve; and the necessity for preserving military discipline. See *supra*, notes 20-27 and accompanying text.

as intense, if not widespread, as that showered on the *Feres* doctrine itself.

1. Post-discharge negligence and the *Broudy* cause of action.

Surely the most tortuously developed and controversial "exception" to the *Feres* doctrine is the theory that a serviceman may bring an FTCA suit to redress an injury he sustained incident to his active service if he alleges some federal breach of an independent or separate post-discharge tort of omission.³⁶ Purportedly premised on *Brown*, the theory's true antecedents are *Thornwell v. United States*,³⁷ and *Everett v. United States*,³⁸ which are among the most criticized federal cases of their time.³⁹

The *Broudy* theory contradicts the plain language of *Feres*. Serviceman Broudy's post-discharge cancer, allegedly the latent result of in-service radiation exposure during atomic tests twenty years previously, plainly "ar[ose] out of or [was] in the course of activity incident to [his] service."⁴⁰ While the *Broudy* court stressed the need for independence or separateness of the "post-service negligent act,"⁴¹ that "separate [post-discharge] injury" was a fiction.⁴² Indeed, it is doubtful that any post-discharge federal tort of complete omission can cause a truly separate post-discharge injury for purposes of *Feres*.⁴³ The Ninth Circuit implicitly conceded as much in a

36. See *Broudy v. United States (Broudy I)*, 661 F.2d 125, 128-29 (9th Cir. 1981); *Broudy v. United States (Broudy II)*, 722 F.2d 566, 569-70 (9th Cir. 1983).

37. 471 F. Supp. 344 (D.D.C. 1979).

38. 492 F. Supp. 326 (S.D. Ohio 1980).

39. *Thornwell* held that the government's post-discharge negligent failure to inform plaintiff that he had been exposed to LSD while in the service was "distinctly separate" from the in-service willful exposure, thus was actionable despite *Feres*. 471 F. Supp. at 351. The *Thornwell* analysis has been squarely rejected as "inconsistent with *Feres*" in *Laswell v. Brown*. See *Laswell v. Brown*, 683 F.2d 261, 267 (8th Cir. 1982), cert. denied sub nom *Laswell v. Weinberger*, 459 U.S. 1210 (1983). Moreover, the analysis has been questioned even in its own circuit. See *Lombard v. United States*, 690 F.2d 215, 220 n.10 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983). With the exception of *Everett*, every court that considered *Thornwell* or a *Thornwell*-style claim in the context of a toxic substance case rejected it. See *Stanley v. CIA (Stanley I)*, 639 F.2d 1146, 1153-56 (5th Cir. Unit B 1981); *Fountain v. United States*, 533 F. Supp. 698, 701-702 (W.D. Ark. 1981); *Kelly v. United States*, 512 F. Supp. 356, 359-60 (E.D. Pa. 1981); *Schnurman v. United States*, 490 F. Supp. 429, 437 (E.D. Va. 1980); cf. *infra* note 52 (discussing *Stanley I* and Eleventh Circuit's decision in *Stanley II*).

In *Everett* the district court held that a serviceman could state a claim for damages caused by the government's post-discharge negligent failure to warn of radiation dangers where that failure was a "distinctly separate pattern of conduct" from the government's alleged intentional tort of exposing the serviceman to radiation for experimental purposes. 492 F. Supp. at 326. *Everett* specifically has been rejected by the D.C. Circuit in *Lombard, supra*, at 230; the Eighth Circuit in *Laswell, supra*, at 266-67; the Fifth Circuit in *Stanley, supra*, at 1153; and the Third Circuit in *Heilman v. United States*. See *Heilman v. United States*, 731 F.2d 1104, 1107 n.3 (3d Cir. 1984). Plaintiff in *Everett* ultimately voluntarily dismissed her complaint.

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

41. *Broudy I*, 661 F.2d at 128-29; *Broudy II*, 722 F.2d at 570.

42. See *Broudy I*, 661 F.2d at 128-29; *Broudy II*, 722 F.2d at 568-70.

43. Cf. *United States v. Brown*, 348 U.S. 110, 111-13 (1954); *supra* note 28 (discussing Supreme Court's decision in *Brown*).

later case by reducing *Broudy I*'s "independent, post-discharge act" to a mere legal "theory of recovery" in a later case.⁴⁴

Apart from this difficulty of contradicting *Feres*, the *Broudy* analysis suffers other weaknesses. On later hearing of the case, the Ninth Circuit further fictionalized the supposed independent post-discharge tort for purposes of the FTCA's jurisdictional administrative claim requirement: it excused Mrs. Broudy's failure to file a claim on the post-discharge tort.⁴⁵ The same panel also skated over the evident absence of another FTCA jurisdictional requisite—analogue private person liability under state law.⁴⁶

Other circuits have produced a landslide of authority contrary to *Broudy*, recognizing the supposed post-discharge tort as a *Feres*-barred "continuing tort."⁴⁷ Also, tension exists even within the Ninth Circuit, where post-discharge case law has taken on the contours of a contest between an appellate bench insisting that servicemen's radiation claims be tried, and a trial bench insisting that, given *Feres*, there is nothing that can be tried.⁴⁸

44. *Shipek v. United States*, 752 F.2d 1352, 1356 (9th Cir. 1985).

45. After the district court dismissed *Broudy I* on remand because the plaintiff had not filed an administrative claim on the post-discharge tort, the *Broudy II* court reversed. See *Broudy II*, 722 F.2d at 568-69. The Ninth Circuit similarly reversed the district court in *Shipek v. United States*, which understandably had reasoned that, if the post-discharge act truly was independent of the in-service tort, an administrative claim for only the former was an inadequate jurisdictional predicate for the latter. See *Shipek v. United States*, 752 F.2d 1352, 1356 (9th Cir. 1985). "[T]he district court erred," said the Ninth Circuit panel, "in stating that appellant 'cannot have it both ways,' i.e., that she could not allege a post-discharge tort sufficiently separate from her husband's military service to evade *Feres* yet sufficiently related to his service to have been included in her administrative claim. *Broudy II* is to the contrary." *Id.*

46. In *Broudy II*, the Ninth Circuit "note[d] for the purpose of providing guidance [on remand] that California law imposes a duty upon those who create a foreseeable peril, not readily discoverable by the endangered person, to warn them of such potential peril." *Broudy II*, 722 F.2d at 569 n.1. But the case that the court cited, *Johnson v. California*, imposed no duty to warn of unforeseeable consequences, and the unforeseeability (at the time of in-service exposure) of the post-discharge injury was absolutely crucial to its theoretical separateness or independence from military service. See *Johnson v. Calif.*, 69 Cal.2d 782, 785-786, 447 P.2d 352, 355 (1968). As the district court in *Broudy II* had observed, no court in any state had imposed on an employer a free-floating duty to warn former employees of hazards associated with employment conditions previously considered harmless. *Broudy II*, 722 F.2d at 569.

47. See *Hamilton v. United States*, 719 F.2d 1, 1 (1st Cir. 1983); *Gaspard v. United States*, 713 F.2d 1097, 1101 (5th Cir. 1983), cert. denied sub nom *Sheehan v. United States*, 466 U.S. 975 (1984); *Lombard v. United States*, 690 F.2d 215, 220 n.10 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Laswell v. Brown*, 683 F.2d 261, 266 (8th Cir. 1982), cert. denied sub nom *Laswell v. Weinberger*, 459 U.S. 1210 (1983); *Stanley v. CIA*, 639 F.2d 1146, 1154 (5th Cir. 1981); *Henning v. United States*, 446 F.2d 774, 777 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972); *Fountain v. United States*, 533 F. Supp. 698, 701-02 (W.D. Ark. 1981); *Kelly v. United States*, 512 F. Supp. 356, 359-61 (E.D. Pa. 1981); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 779 (E.D.N.Y. 1980) (Vietnam veterans' claims dismissed because they "neither allege nor support a conclusion that the post-discharge failure to warn was sufficiently separate and distinct from the underlying 'incident to service' tort claims"); *Schnurman v. United States*, 490 F. Supp. 429, 437 (E.D. Va. 1980); *Wisniewski v. United States*, 416 F. Supp. 599, 601 (E.D. Wis. 1976).

48. Compare *Broudy I*, 661 F.2d at 128-29 (which reversed and remanded case "to be heard

Nevertheless, the *Broudy* theory recently won a new and strong adherent when the Eleventh Circuit reversed and remanded dismissal of a claim of post-discharge failure to warn of radiation hazards in *Cole v. United States*.⁴⁹ The *Cole* court belittled its own concern that the trial "may adversely affect future practices of the armed forces, particularly where, as here, the need for the [challenged] decision arises out of the government's treatment of an active-duty serviceman."⁵⁰ As has happened repeatedly in the Ninth Circuit, the *Cole* district court dismissed the remanded case on a pretrial motion.⁵¹ The *Broudy* cause of action, however, will doubtless be heard from again. The Eleventh Circuit already has displayed sufficient determination to sustain the theory that it will create opportunities to do so even without the assistance that litigants normally provide.⁵²

2. Civilian Genetic Injuries Arising Out of In-Service Injuries to Servicemen

Every appellate court that has considered the question has ruled that the United States is not liable under the FTCA for birth defects of servicemen's offspring that allegedly arose out of injuries their parents

on the merits" despite absence of analogous state law duty) with *Broudy v. United States*, No. 79-2626, slip op. at 6 (C.D. Cal. Dec. 17, 1985), *appeal docketed* No. 86-5553 (9th Cir. Jan. 24, 1986) (district court dismissed case for third time on defendant's pretrial motion); *see also In re Consol. United States Atmospheric Testing Litig.*, 616 F. Supp. 759, 779 (N.D. Cal. 1985), *appeal docketed* No. 85-2842 (9th Cir. Dec. 2, 1985) (forty-three servicemen's radiation cases dismissed because "[n]o facts . . . put forward by plaintiffs . . . permit a trier of fact to find the commission of an 'independent post-service negligent act' "necessary, under *Broudy*, to evade *Feres*); *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th Cir.) (dismissed after remand in consolidation with *In re Consol. United States Atmospheric Testing Litig.*, *supra*), *cert. dismissed*, 106 S. Ct. 30 (1985); *Shipek v. United States*, 752 F.2d 1352, 1356 (9th Cir. 1985) (remanded to district court and presently pending on defendant's motion for summary judgment).

49. 755 F.2d 873 (11th Cir. 1985), *reh. denied*, 765 F.2d 1123 (11th Cir. 1985).

50. *Id.* at 879.

51. *Cole v. United States*, 635 F. Supp. 1185, 1191 (N.D. Ala. 1986).

52. *See, e.g., Stanley v. United States (Stanley II)*, 786 F.2d 1490, 1499 (11th Cir.), *reh. denied*, 794 F.2d 687 (11th Cir.), *cert. granted*, 107 S. Ct. 642 (1986). In *Stanley II*, relying on *Cole* and *Johnson v. United States*, the Eleventh Circuit first resuscitated, then reversed the former Fifth Circuit's preclusion of an FTCA claim brought by a veteran who had participated voluntarily in an LSD experiment while on active duty in the Army. *Id.*; *see Stanley v. CIA (Stanley I)*, 639 F.2d 1146, 1159-60 (5th Cir. Unit B 1981); *see also Cole*, 755 F.2d at 880; *Johnson v. United States*, 749 F.2d 1530, 1540 (11th Cir. 1985), *aff'd en banc*, 779 F.2d 1492 (11th Cir.), *cert. granted*, 107 S. Ct. 59 (1986); *supra* notes 49-51 and accompanying text (discussing Eleventh Circuit's decision in *Cole*); *infra* notes 66-69, 90 and accompanying text (discussing Eleventh Circuit's decision in *Johnson*). The prior panel had erred, stated the Eleventh Circuit, by ending inquiry with the "finding that Stanley was acting incident to military service at the time of the incident," and not proceeding to the "next level of inquiry to determine whether the considerations underlying the *Feres* doctrine militated against" the suit. *Stanley II*, 786 F.2d at 1498. Plaintiff Stanley took no appeal at the time, nor did he take the *Stanley II* appeal; it was brought by certain individual defendants who, like Stanley, neither raised nor briefed the FTCA issue in the appellate court. The issue was decided because the appellate court—not the parties—wanted it decided.

suffered incident to active military service.⁵³ The case law nevertheless is noteworthy because of the extreme dismay these courts express at *Feres'* ineluctable effect on such claims. Courts "sense the injustice . . . of [the] result" and note that "[r]arely does the law visit upon a child the consequences of actions attributed to the parents."⁵⁴

Genetic injury case law also is noteworthy for the analytic gymnastics the occasional dissenting district court will perform to avoid *Feres*. In what one commentator described as a "flagrant violation" of *Feres*, the United States District Court for the Eastern District of New York in *In re "Agent Orange" Product Liability Litigation* determined to try FTCA genetic injury claims that arose out of servicemen's exposure to herbicide used in the Vietnam War.⁵⁵ The declared centerpiece of the court's analysis was the "degree" of the trial's predicted effect on military discipline and effectiveness.⁵⁶ This would seem to have settled the question in favor of the *Feres* bar since the gravamen of the claims was the United States' negligent selection and deployment of combat materiel in a foreign war: a virtual archetype of the *Feres*-barred lawsuit.⁵⁷ The United States accordingly argued that the trial would be indistinguishable from trial of the exposed servicemen's own claims (which the court had held barred by *Feres*).

Relying in part on a rationale taken from the lower court opinion in *Hinkie v. United States*,⁵⁸ the *Agent Orange* district court responded by saying merely that "[t]his may be true but it is irrelevant" because some twenty years had elapsed since the exposure.⁵⁹ Neither the *Agent Orange*

53. See *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984) ("An action for damages by [plaintiff] would raise the same issues, and take the same form, as an action by her [serviceman] father. . . . The complaint avers that [plaintiff's] injuries derive from her father's exposure to radiation. At trial, [plaintiff] would be required to contest the prudence of exposing her father to radiation. This examination is foreclosed by *Feres*."); see also *Hinkie v. United States*, 715 F.2d 96, 98-99 (3d Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); *Gaspard v. United States*, 713 F.2d 1097, 1098 (5th Cir. 1983), *cert. denied sub nom Sheehan v. United States*, 466 U.S. 975 (1984); *Lombard v. United States*, 690 F.2d 215, 223-26 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983); *Scales v. United States*, 685 F.2d 970, 971-72 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Monaco v. United States*, 661 F.2d 129, 133-34 (9th Cir. 1981), *cert. denied*, 467 U.S. 989 (1982); cf. *West v. United States*, 744 F.2d 1317, 1318 (7th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985).

54. *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984). Compare *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) ("[w]e are not blind to the tragedy of [the child's] condition, and we regret the effects of our conclusion"), *cert. denied*, 460 U.S. 1082 (1983) with *Monaco v. United States*, 661 F.2d 129, 134 (9th Cir. 1981) ("[t]he result in this case disturbs us, particularly with respect to [the child]. . . . Unfortunately, we are bound [by law]. . . ."), *cert. denied*, 467 U.S. 989 (1982).

55. See P. SCHUCK, *AGENT ORANGE ON TRIAL* 131 (1986); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1253-54 (E.D.N.Y. 1984).

56. See *Agent Orange*, 580 F. Supp. at 1250-52.

57. Cf. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1952).

58. 524 F. Supp. 277 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984).

59. *Agent Orange*, 580 F. Supp. at 1253.

nor the *Hinkie* district court explained how this theory—a sort of reverse statute of limitations that renders a cause more actionable as decades pass—might work; nor did either attempt to find support for it in the FTCA.

The central effort of both the *Agent Orange* and the *Hinkie* courts was to conjure a series of “eve[r] more esoteric hypothetical” FTCA claims in search of one “analytically identical” to those at bar, but which nevertheless seemed triable despite *Feres*.⁶⁰ The courts’ hypotheticals included, among others, an imaginary Buick accident near the Brooklyn Port Authority;⁶¹ an exploding prosthetic implant;⁶² a military plane crash;⁶³ and a nuclear test causing harm to civilians.⁶⁴ The courts thus sought the answer to the cases at hand by departing as far from them as imagination could go. Additionally, neither court explained why the existence of an analogous hypothetical, not barred by *Feres*, more readily supports reducing *Feres* to permit the suits at bar than it supports reading *Feres*—or a related jurisdictional bar like the discretionary function or combatant activities exceptions to the FTCA—to cover the hypothetical.⁶⁵

3. *United States v. Shearer* Construed as a Reduction of *Feres*

Shearer held that *Feres* does bar suit for an injury not typically classifiable as incident to service (i.e., an injury occurring off-base to an off-duty serviceman) if it implicates certain “core” *Feres* concerns (military discipline, management of the military establishment). The Eleventh Circuit *en banc* and the Ninth Circuit have interpreted this holding to discard the rest of the *Feres* apple: that is, to rescind the classic indices of incidence to service, e.g., on-base situs of injury, active-duty status of claimant and availability of alternative compensation.

In *Johnson v. United States*,⁶⁶ an Eleventh Circuit panel reversed a district court’s unremarkable decision that *Feres* barred an FTCA suit to redress negligence by the Federal Aviation Administration that allegedly caused the crash of decedent-serviceman’s military aircraft during a military mission. The panel first noted the “widespread, almost universal criticism”

60. *Id.* at 1252.

61. *Id.*

62. *Id.*

63. *Hinkie*, 524 F. Supp. at 277.

64. *Id.* at 284.

65. Because of its expressly “tentative” nature, the *Agent Orange* ruling was denied mandamus and collateral appeal. See *In re “Agent Orange” Prod. Liab. Litig.*, 733 F.2d 10 (2d Cir. 1984) (denial of mandamus); *In re “Agent Orange” Prod. Liab. Litig.*, 745 F.2d 161 (2d Cir. 1984) (denial of collateral appeal). It now pends as one element of the consolidated final appeals in *In re “Agent Orange” Prod. Liab. Litig.*, C.A. Nos. 85-6153 and 86-6127 (2d Cir. 1986). It has never been followed. Cf. *West v. United States*, 744 F.2d 1317, 1318 (7th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985) (on rehearing *en banc*, the Seventh Circuit affirmed dismissal of an FTCA claim for birth defects allegedly caused by the Army’s mistyping of the parent’s blood during his preinduction physical examination). *Hinkie*, of course, was reversed on appeal. See *Hinkie*, 715 F.2d at 99.

66. 749 F.2d 1530 (11th Cir. 1985), *aff’d en banc*, 779 F.2d 1492 (11th Cir.), *cert. granted*, 107 S. Ct. 59 (1986). Interestingly, during oral argument of *Johnson* in the United States Supreme Court, the Court voiced concern over academic criticism of the *Feres* doctrine.

of the "much maligned" *Feres* doctrine,⁶⁷ then decided that when something called:

the *Feres* factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service. . . . If, however, the alleged tortfeasor is not a member of the armed forces, [the issue is whether permitting recovery would] 'circumvent the purposes of the [FTCA]. . . .'⁶⁸

On rehearing, the *en banc* court, split nine to three, found *Shearer* to be "most helpful . . . reinforce[ment]" of this analysis.⁶⁹

In *Atkinson v. United States*,⁷⁰ the Ninth Circuit reversed dismissal of an active-duty, pregnant servicewoman's medical malpractice action, for the interesting reason that since "pregnant servicewomen did not serve on active duty in 1950 when *Feres* was decided . . . the Supreme Court, in barring the two malpractice claims involved in *Feres*, could not have" intended to bar Ms. Atkinson's claim.⁷¹ "Congress did not exclude military personnel from FTCA coverage," said the court; the Supreme Court did.⁷² "Given *Shearer's* command that in each case we determine the effect of a suit on military decisions or discipline,"⁷³ the panel countenanced the suit despite on-base situs of injury; on-duty status of claimant, but for whose military service the medical care would not have been rendered; and the availability to Ms. Atkinson of alternative compensation.

By the reasoning of *Johnson* and *Atkinson*, *Shearer* effectively revokes *Feres* in a large family of cases, including medical malpractice, vehicle accidents, slip-and-falls, etc., wherein an on-base, active duty serviceman compensated by military benefits enjoys FTCA relief merely because the claim strikes beside—not into—"the core of [*Feres*] concerns."⁷⁴ *Shearer* thus becomes an admission by the High Court that, in *Feres*, it misinterpreted the FTCA.

It is doubtful that the Supreme Court could, consistent with accepted

67. *Id.* at 1535, 1538.

68. *Id.* at 1537 (citation omitted).

69. See *Johnson v. United States*, 779 F.2d 1492, 1493 (11th Cir.), cert. granted, 107 S. Ct. 59 (1986); see also *Pierce v. United States*, No. 86-8339, slip op. (11th Cir. March 29, 1987) (split panel reversed dismissal of serviceman's suit to redress injuries suffered in a collision with a government-owned vehicle driven by a Navy recruiter).

70. 804 F.2d 561 (9th Cir. 1986).

71. *Id.* at 8.

72. *Id.* at 3-4.

73. *Id.*

74. *Shearer*, 105 S. Ct. at 3043. The Third Circuit has expressly rejected the case-by-case approaches to *Feres* analysis that *Johnson* and *Atkinson* represent. *Martinelli v. United States*, No. 86-3530, slip op. (3d Cir. Feb. 27, 1987). It instead has reaffirmed the view "held . . . by the majority of courts that *Feres* is a per se bar of damage actions against the United States and military officers arising out of injuries to military personnel." *Id.* But the Second Circuit subsequently also endorsed a reductionist interpretation of *Shearer*. See *Sanchez v. United States*, No. 86-6198, slip op. (2d Cir. March 12, 1987) (panel reversed dismissal of a serviceman's suit for vehicle collision injuries allegedly caused by a military base service station's negligent repair of the serviceman's car in which he was a passenger).

legal precepts, derogate so well-ratified a statutory interpretation as the *Feres* doctrine.⁷⁵ It is doubtful that the Court would want to do so.⁷⁶ And it is most doubtful of all that the Court would do so without even straightforwardly saying so—in a case, no less, wherein it refused to reduce the doctrine to a “bright-line” litmus test, and reversed an appellate court’s rejection of the doctrine.⁷⁷

Despite this, a noteworthy minority of courts held to the contrary. And despite the dictates of *Feres*, some district courts accept FTCA genetic injury claims that arise out of in-service injuries to service members, and some appellate courts stubbornly endorse a controversial post-discharge ‘exception’ to the doctrine. Such decisions best seem explained less by logic or analysis than by courts’ visceral dislike of the doctrine, their regret that it has “refused to die the quiet death that some had anticipated,”⁷⁸ and their belief that equity demands erosion of *Feres*. How legitimate are these concerns?

THE EQUITY QUESTION

Because critics do not precisely explain *Feres*’ “draconian harshness” toward servicemen,⁷⁹ some speculation about it is necessary. Of course, the bare conclusion that it is invariably unfair to deny judicial recovery to a serviceman is overly simple. Yet that is the tone of some comment.⁸⁰ A certain indulgence toward servicemen is, of course, understandable and appropriate. They are owed a profound debt for services rendered and sacrifices made in the nation’s defense. But, perhaps because it is so

75. See *supra*, note 32 (discussing Congressional ratification of *Feres* doctrine).

76. Consistency on the Court in preserving the *Feres* doctrine has only two noteworthy exceptions: two justices dissented from the decision in *Stencel Aero Eng’g Corp. v. United States*, and two justices dissented from the decision in *Brooks v. United States*. See *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 674-77 (1967) (Marshall, J., dissenting) (joined by Brennan, J., dissenting); *Brooks v. United States*, 337 U.S. 49, 54 (1959) (Frankfurter, J., and Douglas, J., dissenting without opinion). There is little evidence that the doctrine is under reconsideration, much less attack, in the High Court. See, e.g., *Graver v. Int’l Playtex Corp.*, 786 F.2d 1146 (3d Cir.), cert. denied sub nom *Graver v. United States*, 107 S. Ct. 184 (1986) (service member’s medical malpractice case held barred by *Feres*, in which Supreme Court declined certiorari); *Johnson v. United States*, 749 F.2d 1530, 1539 (1986) (wrongful death action permitted despite decedent’s active duty status and performance of military mission because negligence alleged was committed by non-military federal agency), *aff’d en banc*, 779 F.2d 1492 (11th Cir.), cert. granted, 107 S. Ct. 59 (1986).

77. *Shearer*, 105 S. Ct. at 3043.

78. *Johnson*, 749 F.2d at 1534 (citation omitted).

79. *Uncle Sam’s Hold Over Vets*, DISTRICT LAW. (March-April 1982), reprinted in *The Feres Doctrine as it Relates to Private Claims, Hearings Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 8 (1982).

80. E.g., Hislop-Brumfield, *Judicial Recovery for the Post-Service Tort: A Veteran’s Last Battle*, 14 PAC. L.J. 333, 355 (1983). See *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 862 (E.D.N.Y. 1984) related appeal docketed, No. 85-6083 (2d Cir. April 2, 1985) (district court stated that whether Agent Orange actually caused veterans’ injuries was “beside the point,” and condemned government’s failure to contribute to settlement as “cruel abandonment of veterans”); *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1221, 1222 (E.D.N.Y. 1985), appeal docketed, No. 85-6153 (2d Cir. June 11, 1985).

appropriate and compelling, such indulgence may do more to obscure than illuminate equity.⁸¹

The substance of *Feres* criticism doubtless involves a more refined equitable principle than preference for servicemen. It rather presupposes a belief that servicemen have less access to relief for their government-caused personal injuries than nonservicemen similarly situated. Popular disdain for *Feres* is compelling evidence that this belief is widely held. But not only is it false, the opposite is true. In fact, servicemen enjoy more relief for their government-caused personal injuries than their closest counterparts—nonmilitary federal employees.⁸²

The applicable statutes demonstrate how this occurs. First, the military compensation scheme, including the Veterans Benefits Act (VBA),⁸³ is exceedingly broad. It is so broad that it more closely resembles a universal health and disability insurance policy than ordinary workmen's compensation. Unlike the compensation scheme for nonmilitary federal employees, the Federal Employees Compensation Act (FECA),⁸⁴ the military scheme provides benefits for substantially *all* disabilities or injuries sustained or aggravated during a serviceman's federal service. There is no scope of employment test, thus no standard claimant's burden of proof of employment-connection;⁸⁵ there is not even a typical adversary claims process.⁸⁶

81. See *Casado v. Schooner Pilgrim, Inc.*, 171 F. Supp. 78, 80 (D. Mass. 1959), wherein the court criticizes an equitable indulgence toward seamen, saying ". . . I do not believe that to say 'seaman are the favorites of admiralty' should be to create a corresponding class of villains on whom to impose a new type of liability." *Id.*

82. This broad generalization involves some imprecision that is important to recognize. That is, active servicemen are not entitled to veterans benefits (discussed below), only veterans are. The general term "servicemen" nevertheless is used here because more exact subcategorization complicates the comparisons drawn here, yet highlights details that have attracted no particular critical attention. For example, the "victim" of the post-discharge tort is not a serviceman, but a veteran, though servicemen are the commonly perceived "victims" of *Feres*.

The relative insignificance of the serviceman-veteran distinction is readily illustrated. An in-service injury without permanent disability will not generate veterans benefits to a serviceman. But, in effect like his civilian counterpart whose medical expenses and lost wages will be statutorily reimbursed, that serviceman will not incur any out-of-pocket medical expenses or lost wages. Nor is his injury of a type that has been the focus of recent *Feres* criticism.

83. 38 U.S.C. §§ 101-5228 (1982 & Supp. III 1985).

84. 5 U.S.C. §§ 8101-8193 (1982 & Supp. III 1985). See 5 U.S.C. § 8116(c) (1982) (United States' liability under FECA "is exclusive and instead of all other liability of the United States. . ."). When injured "while in the performance of his duty," the federal employee has no election of remedies. See 5 U.S.C. § 8102(a) (1982); *United States v. Demko*, 385 U.S. 149, 152-53 (1966). And it is the administrative appeal board, not the federal bench, that resolves questions of coverage in close cases. See 5 U.S.C. § 8128(b)(2) (1982); *Heilman v. United States*, 731 F.2d 1104, 1109-10 (3d Cir. 1984).

85. See 38 U.S.C. § 310 (1982). Section 310 of Title 38 of the United States Code prescribes basic entitlements for injury or disease suffered or aggravated "in line of duty, in the active military . . . during period of war," but this apparently limiting language is abrogated by other statutory and regulatory provisions. *E.g.*, 38 U.S.C. § 105 (1982); 38 C.F.R. § 3.301 (1986). The fact is that VBA covers virtually every disability resulting from injury or disease occurring coincident with military service. For benefits to be awarded, it is not necessary to relate a current disability to the performance of some military task or duty.

86. See 38 C.F.R. § 3.103 (1986). Section 3.103(a) of title 38 of the Code of Federal

Barring his own willful misconduct that results in disability, the government compensates the serviceman for whatever physical adversity affects or befalls him so long as he is a member of the military.

Second, unlike FECA, VBA is *not* exclusive. There is an epidemic of confusing comment on the nonexclusivity of the VBA, even in the Supreme Court. *Shearer*, for example, stated that availability of VBA death benefits to a plaintiff, is “no longer controlling” of the applicability of *Feres*.⁸⁷ But the availability of VBA benefits never controlled the *Feres* inquiry; the Supreme Court allowed FTCA recovery for VBA-covered injuries in *Brooks* before it decided *Feres*, and again afterwards in *Brown*. Thus, as long ago as 1949, the Supreme Court recognized that servicemen injured by the negligence of a federal employee could recover both veterans benefits and FTCA damages so long as their injuries were not “incident to service.” In this respect, the VBA is not only unlike FECA, it is unlike—and more generous than—the vast majority of workmen’s compensation statutes.⁸⁸

Third, the VBA affords more compensation than the FTCA, not merely because proof of the normal elements of tortious wrongdoing are no prerequisite to VBA relief, but also because the FTCA’s many express exemptions and exceptions—the residue of sovereign immunity—do not apply under the VBA.⁸⁹

The result of all this is a simple but unappreciated situation. Of all federal wrongs that cause lasting disability to servicemen, *all* are compen-

Regulations provides in pertinent part, that “[i]t is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government.” *Id.*; see also 38 C.F.R. § 3.103(c) (1986) (“[I]t is the responsibility of the Veterans Administration . . . to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position.”); Veterans Administration Manual M21-1, § 4.03(a) (1985); *Walters v. Nat’l Ass’n of Radiation Survivors*, 105 S. Ct. 3180, 3183 (1985).

87. *Shearer*, 105 S. Ct. at 3043 n.4.

88. See *United States v. Demko*, 385 U.S. 149, 151 (1966) (“[C]ompensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions.”); *Brooks*, 337 U.S. at 53. As the *Brooks* Court observed, “[u]nlike the usual workmen’s compensation statute . . . there is nothing in the Tort Claims Act or the veterans’ laws which provides for exclusiveness of remedy.” *Id.* (citation omitted).

VBA’s lack of exclusivity is not surprising. The veterans’ compensation scheme long predated the 1946 enactment of the FTCA. At the time it originally was formulated, Congress had no reason to think the scheme could be anything *but* exclusive. Not only did sovereign immunity proscribe federal tort lawsuits across-the-board, but also such lawsuits by servicemen were for all practical purposes unimaginable. See *Feres*, 340 U.S. at 142 (calling federal tort lawsuits “novel and unprecedented”); *id.* at 146 (and a “radical departure from established law”); *id.* at 141 (“We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving”). Since the FTCA was enacted and *Brooks* was decided, Congress has not modified the VBA’s nonexclusivity nor its comprehensiveness; nor made it more typical of other workers’ compensation schemes. On the contrary, Congress has broadened VBA in some respects. See *infra*, note 95.

89. See 28 U.S.C. § 2680(a)-(n) (1982) (excepting from VBA’s coverage claims “based upon” discretionary functions, and claims “arising in” a foreign country or “arising out of” a wide range of intentional torts and protected federal activities, e.g., military combat, delivery

sated by VBA and some, *in addition*, also are compensated under the FTCA. By contrast, of all federal wrongs that cause such disability to nonmilitary federal employees some are compensated *only* by the FECA; some are compensated *only* under the FTCA; and some are not compensated at all. If servicemen enjoyed other federal employees' freedom from *Feres*, and suffered other federal employees' FECA and FTCA limitations, *fewer* of their injuries would entitle them to federal relief.

Thus, a court that amends *Feres* to alleviate its "draconian harshness," instead broadens the already fuller access to federal compensation that servicemen enjoy over and above other federal employees. In this respect, it is far from obvious why revoking *Feres* would strike a blow for justice.

Consider, for example, *Johnson v. United States, supra*, wherein decedent-serviceman perished during a military mission. Plaintiff-administratrix clearly qualified for widows' VBA death benefits. Yet the Eleventh Circuit creatively redefined the "maligned" *Feres* doctrine to reverse dismissal because the administratrix's claim was "based solely upon the conduct of civilian employees of the [FAA] . . . who were not in any way involved in military activities."⁹⁰ An opinion dissenting from denial of rehearing *en banc* illuminates the majority's analytical errors. But neither the majority nor the dissent recognized a major anomaly of the result. Had the air crash been a civilian event, that is, had a civilian federal employee died in a crash while on a purely civilian mission for the government, *his* administratrix would have *no* access to FTCA relief, *Feres* notwithstanding.⁹¹ One can only speculate whether the Eleventh Circuit, if faced with this hypothetical case, would have worked as hard to avoid FECA as it worked in *Johnson* to avoid *Feres*.

These observations may not completely dispel concern that *Feres* is unfair to servicemen, but two criticisms can be anticipated and set aside. First, it is no retort to say that all plaintiffs—servicemen or civilian—prefer judicial tort relief to statutory compensation, and that servicemen are harmed by reduced FTCA access. Workmen's compensation schemes, including VBA and FECA, are compromises that generally benefit employees.⁹² Certainly, neither federal nor state employee compensation schemes have triggered the flood of protest that *Feres* has. Furthermore, the FTCA's

of mail, customs, etc.); see also 28 U.S.C. § 1346(b) (1982) (government is neither vicariously nor strictly liable under FTCA); 28 U.S.C. § 2674 (1982) (no punitive damages are available under FTCA); 28 U.S.C. § 2402 (1982) (FTCA plaintiffs may not have a jury trial); 28 U.S.C. § 2675 (1982) (FTCA plaintiffs must exhaust administrative remedies before filing suit); 28 U.S.C. § 2678 (1982) (there is a statutory limit on attorney's fees payable in FTCA actions).

90. *Johnson*, 749 F.2d at 1535-36.

91. See *Johnson*, 779 F.2d at 494-97 (Johnson, J., dissenting); see also *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 191 (1983); *Grijalva v. United States*, 781 F.2d 472, 474 (5th Cir. 1986).

92. See *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983) ("In enacting [FECA's exclusive liability] provision, Congress adopted the principal compromise—the '*quid pro quo*'—commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without the need for litigation, but in return they lose the right to sue the Government."); see also *Grijalva v. United States*, 781 F.2d 472, 474 (5th Cir. 1986).

express exceptions as well as its other limiting provisions reduce the advantage to plaintiffs of judicial—as opposed to statutory—relief for federal wrongs.⁹³

Second, it is no complaint against *Feres* that the Veterans Administration (VA) disputes service-connection for certain kinds of injuries, e.g., cancer allegedly caused by exposure to radiation or Agent Orange.⁹⁴ A VBA claimant's burden of proof, if it may be called that, is ephemerally light by comparison to the standard he would face in court.⁹⁵ A failed VBA claim for such injuries is a fortiori a failed FTCA claim for them. *Feres* does not even enter the picture. Nor does *Feres* deprive a VBA claimant of access to judicial review of a denial of his claim. That review is flatly precluded by statute.⁹⁶ A statutory bar also applies to judicial review of FECA claim rulings.⁹⁷ If it is true that the VA awards VBA benefits with undue restraint, amending or revoking the *Feres* doctrine not only will fail to correct the problem, it conceivably could aggravate it by casting a shadow of adversariness over the VA's processing of active servicemen's claims.⁹⁸

Even discarding these inapt protests, however, doubt about the equity of *Feres* may outlive demonstration that servicemen have greater access than civilian federal employees to government compensation for personal injuries. For example, it remains true that *Feres*, by its terms, cuts off tort relief for non-servicemen outside the umbrella of VBA protection, such as tort defendants whose third-party FTCA actions are barred by *Feres*, and persons claiming genetic injuries that arose from servicemen's in-service exposure to radiation or herbicides. Of course, this fact is irrelevant to *Feres*' fairness to servicemen, whose welfare has been the central concern of *Feres* critics. More importantly, the equitable dilemma posed is often more apparent than real.

93. See *supra* text following note 88.

94. E.g., Hislop-Brumfield, *supra* note 80 ("The government exposed thousands of servicemen to radiation and Agent Orange. These veterans are not receiving any redress for their injuries. Unless the courts accept the post-service tort, these veterans will remain uncompensated.").

95. Compare 38 U.S.C. § 310 (1982) (VBA's ready compensation of all "injury suffered or disease contracted in line of duty," or aggravated therein), with PROSSER AND KEETON, THE LAW OF TORTS § 103 (1984) (Usual preponderance-of-the-evidence standard in tort). Ironically, considering the storm of indignation surrounding denial of radiation- and herbicide-associated claims, this dichotomy is exaggerated *apropos* such etiologically complicated claims. Congress has recently lightened the VBA claimant's already slight burden, transforming it into a presumption of service-connection unless the VA can prove other causation for certain conditions associated with toxic substances. See Pub. L. 98-542, § 4, 98 Stat. 2727 (1984) (appearing as a note to 38 U.S.C. § 354 (1982) (Veterans' Dioxin and Radiation Exposure Compensation Standards; Congressional Findings and Statement of Purpose). Some courts, meanwhile, are tightening standards of proof for etiologically uncertain claims. See, e.g., Fontenot v. Upjohn Co., 780 F.2d 1190, 1193 (5th Cir. 1986).

96. 38 U.S.C. § 211(a) (1982).

97. 5 U.S.C. § 8128(b)(2) (1982).

98. See *supra* note 86.

Consider first *Feres*' preclusion of third-party FTCA claims brought by defendants sued for redress of injuries to active servicemen. The prototypical fact pattern is set out in *Stencel Aero Engineering Corp. v. United States*,⁹⁹ wherein a government subcontractor was sued for product liability by a serviceman injured when his ejection system malfunctioned. The Supreme Court affirmed dismissal of the subcontractor's third-party FTCA claims against the United States, noting that the trial of the third-party action would "take virtually the identical form" to trial of the serviceman's own FTCA action—one obviously barred by *Feres*.¹⁰⁰

This result is certainly less harsh than it seems. As the *Stencel Aero* Court put it, "since the relationship between the United States and [third-party] is based on a commercial contract, there is no basis for a claim of unfairness. . . ." ¹⁰¹ Moreover, a government contractor defense has been held to shield military contractors from tort liability under various tests that examine both equitable concerns and *Feres*.¹⁰²

A more compelling challenge to equity is made by *Feres*' preclusion of claims for genetic injury that arise out of incident-to-service injuries of military personnel. Even here, however, exaggeration of *Feres*' unfairness arguably has occurred because of the novelty and uncertain scientific validity of genetic injury claims.

In this setting, it is one thing to assume the truth of a claim for purposes of assessing jurisdiction, Fed. R. Civ. Pro. 12(b), but another to accept its truth for purposes of deciding whether a lack of jurisdiction is unfair. Actionable prebirth negligence is a relatively new idea; so is the allegation that the federal government is responsible for prebirth injuries on a large scale in connection with military deployment of atomic weapons and chemical herbicides. Until evidence better supports causation, neither the executive branch (by administering VBA) nor the legislative branch (by amending VBA) will have a meaningful opportunity to consider bringing genetically-injured persons within the scope of federal statutory compensation. It is premature to condemn *Feres* for cutting off so nascent and uncertain a cause of action.¹⁰³

99. 431 U.S. 666 (1977).

100. *Id.* at 673.

101. *Id.* at 674.

102. Like *Feres*, the government contractor defense has constitutional roots. It has been held available where, e.g., the equipment that injured plaintiff conformed to reasonably precise specifications established or approved by the United States, and the contractor warned the United States about known errors or inherent dangers in the product as specified. See *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448-51 (9th Cir.), *cert. denied*, 464 U.S. 1043 (1983); cf. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740-41 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 2243 (1986).

103. *But see Scales v. United States*, 685 F.2d 970, 971-72 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) (*Feres* held to bar child's claim for congenital rubella associated with serviceman-mother's negligent medical treatment). Of course, the military dependent is not without statutory relief. See Civilian Health and Med. Program of the Uniformed Serv. (CHAMPUS), 10 U.S.C. § 1090 (1982). The rare case in which Title 10 does not apply and

Even more pertinent to this inquiry, however, is the fact that such genetic injury claims would doubtless not be actionable under the FTCA even if *Feres* did not bar them. A court already has so held *apropos* the gravamen of the typical genetic injury claim, the nuclear test program.¹⁰⁴ Indeed, it appears that FECA would bar such claims in the civilian setting.¹⁰⁵

THE ACCOUNTABILITY QUESTION

Of greater concern than the arguable phantoms of unfairness discussed above is the fact that the government is not answerable in tort to servicemen for much of the negligence of the military services. Is *Feres* thus "unfair" in some sense to all of us by reducing the military's accountability for its wrongs?

This is a difficult question that raises many others. What, for example, is the fruit of accountability? Individual accountability would seem to improve individual performance. Yet, some have made a case for the opposite proposition in the field of medicine, for example, where increased exposure to tort liability may encourage the practice of defensive medicine that is not always in all patients' best interests.¹⁰⁶ And even if individual accountability does generally improve individual performance, it does not readily follow that institutional accountability improves individual performance. Moreover, Department of Defense-related FTCA judgments are paid out of a general judgment fund—a permanent indefinite appropriation.¹⁰⁷ Because such judgments impose no specific liability on particular military agencies, the chain of accountability in the area of civil torts, and its influence toward excellence, is extremely attenuated—certainly more attenuated than the chain of accountability in the existing military justice system.

Even assuming that FTCA liability would increase the excellence of military performance, one is met with a possibly knottier question. What kind of military excellence would it be? Perhaps safer barracks would be built by a government made liable for failing to prevent barracks fires, but would future wars be better fought by a government made liable for

Feres cuts off an otherwise actionable and valid genetic injury claim poses a wrong without a remedy; it raises the question whether relief is appropriate by private congressional bill. See *Dalehite v. United States*, 346 U.S. 15, 25 n.9 (1953).

104. See *In re* Consol. United States Atmospheric Testing Litig., 616 F. Supp. 759, 776 (N.D. Cal. 1985).

105. See *Grijalva v. United States*, 781 F.2d 472, 474 (5th Cir. 1986). In *Grijalva*, a daughter's claim for loss of support derived from her mother's work-related injuries, and thus was a FECA-barred derivative claim like loss of consortium. *Id.*; see *Smither & Co. v. Coles*, 242 F.2d 220, 224-25 (D.C. Cir. 1957); *Levine v. United States*, 478 F. Supp. 1389, 1391 (D. Mass. 1979).

106. *E.g.*, Middleton, *The Medical Malpractice Wars*, Nat'l L.J., Aug. 27, 1984, at 9, col. 2; STAFF OF SENATE COMM. ON LABOR AND HUMAN SERVICES, 98TH CONG., 2D SESS., REPORT ON DEFENSIVE MED. AND MED. MALPRACTICE 10 (Comm. Print 1984); Report, Board of Trustees (American Medical Association), Study of Professional Liab. Costs (Substitute Resolution 8, A-82) Report: N(I-83) p. 14 (1983).

107. See 31 U.S.C. § 1304 (1982).

undertaking a high-risk military mission? Or deploying novel combat weaponry? As demonstrated in the case of *Agent Orange*, FTCA jurisdictional exceptions are no guarantee that actions like the latter two will not be the focal point of civil tort trials, so this concern is worth pondering.

Were it somehow resolved, the most important question would still remain. While more military accountability may well be preferable to less, is accountability to the judicial branch of government preferable to accountability to the political branches "directly responsible—as the Judicial Branch is not—to the electoral process?"¹⁰⁸ For reasons that are obvious in a democracy, the reverse seems more likely.¹⁰⁹

As these questions demonstrate, *Feres* is not so much the cause of limited federal tort liability for military negligence as it is the fruit of other causes—constitutional separation of powers¹¹⁰ and the "inescapable demands of military discipline."¹¹¹ Neither of these has been criticized seriously as "unfair" to anyone, and neither should be regarded as a removable roadblock to some court's rough sense of justice.

Because of *Feres*' constitutional dimension, this fairness inquiry includes the question: fairness to whom? Besides the plaintiff serviceman and the federal defendant, such lawsuits indirectly involve the citizens to whom the political branches (and through them the military services) answer. Is it fairer to risk military effectiveness and compromise military accountability to the political branches in order to afford unusual judicial relief to federal employees who are servicemen? Or fairer to protect the former interests and confine servicemen to more ordinary statutory relief for work-related injuries that federal employees generally receive?

In applying and preserving the *Feres* doctrine, the Supreme Court continues to respect Congress's quite reasonable choice of the latter course.

CONCLUSION

There is good reason for the Supreme Court to remain unbuffeted by popular prejudice against the *Feres* doctrine. Servicemen already enjoy

108. See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

109. One wonders whether the Ninth Circuit panel that revoked *Feres* in *Ms. Atkinson's* medical malpractice action realized that, just last term, Congress declined to pass legislation that would have the same effect. See *supra* note 88. The Congressmen who voted against that bill may well take umbrage at the Ninth Circuit's preemption of their legislative decision. So might their constituents.

110. See *Chappell v. Wallace*, 462 U.S. 296, 301-302 (1983). Separation of powers also is served by section 2680(a) of title 28 of the United States Code, an FTCA exclusion so peculiarly implicated in *Feres* that at least one commentator has suggested that the "inequitable" doctrine be discarded because the discretionary function exception serves some of its purposes. See 28 U.S.C. § 2680(a) (1982); Note, *From Feres to Stencil: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1126 (1979). But *Feres* protects against the judicial inquiry, not merely damage recovery. See *supra*, note 10. Section 2680(a), however well-intentioned to perform the same service, frequently does not. See, e.g., *United States v. S.A. Empresa de Viacao Aeria Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820-21 (1984) (reversed judgment entered after trial of claim barred by § 2680(a)).

111. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

greater access to federal relief for most injury than do all other federal employees; equity does not compel exacerbating this disparity by revoking or limiting *Feres*.

Given *Feres*' equitable neutrality, judicial undermining of this congressionally ratified doctrine seems inappropriate. The "power of oversight and control of military force by elected representatives and officials . . . underlies our entire constitutional system;"¹¹² and restraint of judicial relief for government negligence to servicemen is internationally recognized as necessary to military discipline and effectiveness.¹¹³ If the United States is to assume the risk to national security of interposing tort liability into the "peculiar and special relationship of the soldier to his superiors,"¹¹⁴ the "least dangerous" branch should leave that pathbreaking decision to the others.

112. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (cited in *Shearer*, 105 S. Ct. at 3044). See *Friedberg v. Resor*, 453 F.2d 935, 937 (2d Cir. 1971); *Hammond v. Lenfest*, 398 F.2d 705, 710 (2d Cir. 1968). Cf. U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2.

113. See *supra* note 32.

114. *Shearer*, 105 S. Ct. at 3043 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963), quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).