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Atomic Veterans' Tort Claims: The Search for a Tort Remedy Dead Ends With the Veterans' Administration

From 1945 to 1963 the federal government detonated approximately 235 nuclear devices over southwestern United States and the Pacific Ocean. The Department of Defense estimates that approximately 220,000 military personnel participated in those tests. Many of those troops were exposed to low-level ionizing radiation.¹ Additional troop exposure may have occurred in the occupation forces of Hiroshima and Nagasaki, Japan after the bombings in 1945. Collectively these groups are known as atomic veterans.² These atomic veterans have pursued various avenues in attempting to recover for injuries caused by exposure to ionizing radiation. Recently Congress enacted section 1631 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985³ (Authorization Act) and the Veterans' Dioxin and Radiation Exposure Compensation Standards Act⁴ (Compensation Act). These acts have further restricted the avenues open to atomic veterans who seek tort remedies in court for their injuries.

Part I of this note discusses veterans' attempts to recover in tort against the federal government under the Federal Tort Claims Act⁵ (FTCA) and the difficulties they have encountered. Part II covers veterans' attempts to recover from private defense contractors involved in the manufacture and testing of nuclear weapons and the impact of section 1631 of the Authorization Act. Part III discusses available administrative remedies in light of the Compensation Act. Finally, Part IV concludes that Congress should ease the requirements for granting atomic veterans' administrative

1 Ionizing radiation is the type of radiation emitted from nuclear explosions. It includes: X and gamma rays, alpha and beta particles, electrons, protons, neutrons, and cosmic radiation. J. COGGLE, *BIOLOGICAL EFFECTS OF RADIATION* (2d ed. 1983) (preface). For an in-depth analysis describing the principles of radiation and nuclear physics involved in this type of case, see *Allen v. United States*, 588 F. Supp. 247 (C.D. Utah 1984).

2 H. REP. NO. 828, 98th Cong., 2d Sess. 15 (1984).

3 Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, Pub. L. No. 98-525, § 1631, 98 Stat. 2492, 2646-47 (1984) (codified at 42 U.S.C.A. § 2212 (Supp. 1985)).

4 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (to be codified at 38 U.S.C.) (see note accompanying 38 U.S.C.A. § 354 (Supp. 1985)).

5 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2411, 2412, 2671-2680 (1982).

claims to offset the barriers erected against atomic veterans tort claims by statutes like the Authorization Act.

I. Barriers to Atomic Veterans' Tort Claims Against the Government

Under the doctrine of sovereign immunity, a claimant cannot sue the federal government without the government's express consent.⁶ Under the FTCA, however, the federal government has waived its tort immunity,⁷ subject to a number of express exceptions.⁸ The two exceptions which most critically affect claims by atomic veterans are the discretionary function exception⁹ and the combatant activities exception.¹⁰

The discretionary function exception excludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved is abused."¹¹ The Supreme Court, in *Dalehite v. United States*,¹² applied the discretionary function exception, distinguishing planning activities from those which were merely opera-

6 W. Prosser & W. Keeton, *Prosser and Keeton on the Law of Torts* § 131 (5th ed. 1984).

7 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* § 52, at 2-6 to 2-9 (1985). Before the FTCA, the only method of obtaining redress for governmental torts was an individual petition for relief. This process burdened both Congress and individual parties attempting to bring claims. By limiting sovereign immunity statutorily, Congress sought to avoid the time consuming and often inequitable process of reviewing private bills for relief. See also Note, *Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 *FORDHAM L. REV.* 1241, 1242 (1982).

8 There are thirteen express exceptions to the government's waiver of sovereign immunity. 28 U.S.C. § 2680 (1982).

9 28 U.S.C. § 2680(a) (1982).

10 28 U.S.C. § 2680(j) (1982). Two other code sections which also act as barriers to atomic veterans' claims are 28 U.S.C. § 2680(k) (1982) (the foreign country exception) and 28 U.S.C. § 2674 (1982) (the punitive damages exception). The foreign country exception bars any claim arising in a foreign country. This section especially inhibits those atomic veterans claiming injuries related to the occupation of Nagasaki and Hiroshima. See, e.g., *United States v. Spelar*, 338 U.S. 217 (1949); *In re Consolidated U.S. Atmospheric Testing Litig.*, 616 F. Supp. 759 (N.D. Cal. 1985). The punitive damages exception states that the federal government cannot be held liable for punitive damages under the FTCA. See, e.g., *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982).

11 28 U.S.C. § 2680(a) (1982).

12 346 U.S. 15 (1953). In *Dalehite*, persons injured in an explosion of ammonium nitrate fertilizer brought suit against the federal government for negligent production and transportation of fertilizer. Production and distribution of fertilizer were carried out under the direction of the government for shipment to areas occupied by the Allied forces following World War II. Plaintiffs attacked the cabinet level decision to initiate the fertilizer export program, the failure to experiment to determine the possibility of an explosion, the drafting of the basic plan of manufacture, and the failure to police the loading and storage of the fertilizer.

tional.¹³ The Court found that a discretionary function included more than the initiation of programs and activities; it also included determinations made by executives or administrators in establishing plans, specifications, or schedules of options.¹⁴ The Court found that "where there is room for a policy judgment and decision there is discretion. It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."¹⁵ This broad definition of discretion operates to bar claimants' recovery when they bring negligence suits against the government or government personnel for inadequate safety procedures in atomic testing.¹⁶

The second and more controversial barrier to veterans' suits under the FTCA is the combatant activities exception. The Supreme Court's expansive reading of this exception created the *Feres* doctrine.¹⁷ The combatant activities exception bars "[a]ny

13 Three lines of analysis have developed for deciding discretionary function questions. First, and most common, is the planning-operational approach described in *Dalehite*. This approach looks at what level of government the challenged conduct originated. Commentators have criticized the planning-operational distinction because "planning" and "operational" are not self-defining terms. Courts have not suggested guidelines that satisfactorily distinguish between the two.

Second is the good samaritan test. Once the government exercises its discretion and undertakes a non-mandatory activity inducing reliance, it has a duty to perform its good samaritan task non-negligently. This test has also been criticized for failing to offer clear standards for its application.

Third, and most favored by critics, is the quality of decision test. This test does not draw illusory distinctions between levels of government activity, but rather requires a showing that the decisionmaker, acting within his authority, considered policy factors in reaching a decision. See Comment, *Scope of the Discretionary Function Under The Federal Tort Claims Act*, 67 GEO. L.J. 879, 888-92 (1979). See also Harris & Schnepfer, *Federal Tort Claims Act: The Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161 (1976); Note, *The Discretionary Function Exemption to The Federal Tort Claims Act*, 42 ALB. L. REV. 721 (1978); Note, *The Nevada Proving Grounds: An Asylum For Sovereign Immunity?*, 12 SW. U.L. REV. 627 (1981); Comment, *Government Liability For Nuclear Testing Under The Federal Tort Claims Act*, 15 U.C.D. L. REV. 1003 (1982); Comment, *Federal Tort Claims: A Critique of the Planning Level-Operational Level Test*, 11 U.S.F.L. REV. 170 (1976).

14 346 U.S. at 35, 36.

15 *Id.* at 36.

16 See, e.g., *In re Consolidated U.S. Atmospheric Testing Litig.*, 616 F. Supp. 759 (N.D. Cal. 1985). In this case, the court stated that:

The responsibility for carrying out the Safety Plan was assigned to the officials in charge of the tests who had discretion to adopt and modify the Plan as necessary to achieve the objectives of the test. A court would be ill-equipped to evaluate the judgments concerning safety made by those officials based on the exigencies of the moment. Any attempt to do so would, moreover, require a comprehensive reexamination of the conduct of the tests and the decisions made during their course which would itself defeat the purpose of the exception.

Id. at 774.

17 The *Feres* doctrine relates to the series of cases stemming from *Feres v. United States*, 340 U.S. 135 (1950), which have fleshed out the meaning of military injuries arising "incident to service."

Courts and commentators have criticized the *Feres* doctrine since its inception in 1950.

claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war."¹⁸ The Court in *Feres v. United States*¹⁹ held that Congress did not intend to limit this exception to combat and time of war. The Court stated that, under this doctrine, 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."²⁰ Commentators have consistently attacked the Court's reading of the combatant activities exception as distorting the clear language of the FTCA²¹ and as inflicting undue hardship upon veterans.²² The Supreme Court, however, recently reaffirmed the *Feres* doctrine in *United States v. Schearer*.²³

In *Schearer*, the Supreme Court focused upon four rationales

It is the only court-made exception to the FTCA. See, e.g., *Laswell v. Brown*, 683 F.2d 261, 264 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983). See notes 19-43 *infra* and accompanying text.

18 28 U.S.C. § 2680(j) (1982).

19 340 U.S. 135 (1950). *Feres* was a consolidation of three cases. In *Feres*, the executrix of a serviceman killed in a barracks fire while on active duty brought suit. The suit alleged that the government negligently housed the serviceman in barracks which were known or which should have been known to be unsafe because of a defective heating plant and for failing to maintain an adequate watch. The latter two cases alleged negligent medical treatment. One plaintiff had abdominal surgery while in the army. Eight months later, after plaintiff was discharged, a towel was removed from his stomach. In the other case, plaintiff alleged that the death of a serviceman was due to negligent treatment by Army surgeons. "The common fact of the three cases [was] that each claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces." *Id.* at 138. The court barred all three claims. *Id.* at 146.

20 The Supreme Court has never considered the incident to service exception in a suit arising out of the military's nuclear testing program. It has largely left the task of defining "incident to service" claims to lower courts. See Comment, *Federal Tort Claims Act—Atomic Tests and The Feres Doctrine*, 32 U. KAN. L. REV. 433, 439 (1984).

The Court's decision in *Feres*, however, see note 19 *supra*, and its most recent endorsement of the doctrine in *Schearer*, see note 23 *infra*, demonstrate that the Court favors a broad interpretation of injuries that are barred as occurring incident to service.

Commentators have suggested that courts should apply standards to the discretionary function exception and abandon the *Feres* doctrine. See Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1102, 1126 (1979).

21 See, e.g., Note, *The Nevada Proving Grounds: An Asylum For Sovereign Immunity?*, 12 SW. U.L. REV. 627 (1981); Comment, *supra* note 20.

22 See Comment, *supra* note 20, at 440.

23 105 S. Ct. 3039 (1985). In *Schearer*, Private Schearer was kidnapped and killed by a fellow serviceman while off duty and away from the base. Schearer's mother brought a claim under the FTCA claiming that the Army's negligence caused the death of her son by failing to control the other serviceman, to warn others that he was at large, and to remove him from active military service. The court of appeals found that *Feres* did not bar the claim because, "[g]enerally an off duty serviceman [who is] not engaged in military activity at the time of injury, can recover under the FTCA" *Schearer v. United States*, 723 F.2d 1102, 1106 (3d Cir. 1983). The Supreme Court reversed the decision, finding that the situs of the murder was not nearly as important as whether the suit required a civilian court to second guess military decisions and whether the suit might impair essential military discipline. The Court found that Schearer's claim struck at the heart of those concerns. 105 S. Ct. at 3043.

supportive of the *Feres* decision: (1) the need to maintain military discipline;²⁴ (2) the uniquely federal relationship between service members and the government;²⁵ (3) the existence of alternative sources of compensation;²⁶ and (4) the anomalous results from allowing the government's duty to supervise servicemen to depend upon state law.²⁷ The *Schearer* Court found the first two rationales controlling:²⁸

[A]lthough the Court in *Feres* based its decisions on several grounds, "in the last analysis, *Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Torts Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.'"²⁹

While no longer controlling,³⁰ the Court mentioned the third and fourth rationales as factors which supported both its decision in *Schearer* and the overall *Feres* doctrine.³¹

The Court, however, refused to create a uniform test to determine which cases *Feres* barred. "The *Feres* doctrine cannot be re-

24 The need to maintain military discipline first appeared in the Court's decision in *United States v. Brown*, 348 U.S. 110 (1954), and did not appear in the actual *Feres* decision. The Supreme Court in *Schearer* found the claims in *Feres*, *Stencel*, see note 33 *infra*, and *Schearer* itself, "were the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." 105 S. Ct. at 3044 (1985).

25 *Id.* at 3043. Under the FTCA, the United States is only liable under those circumstances in which a private citizen would be liable. 28 U.S.C. § 1346(b) (1982). Because private citizens do not maintain military units, the FTCA did not open the door to suits by servicemen against their superior officers or the government. *Feres*, 340 U.S. at 142.

26 See *Schearer*, 105 S. Ct. at 3043, 3044 n.4.

27 *Id.*

28 *Id.* at 3043.

29 *Id.* (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963); *United States v. Brown*, 348 U.S. 110, 112 (1954)).

30 105 S. Ct. at 3044 n.4.

31 *Id.* Under 28 U.S.C. § 1346(b) (1982), "the law of the place where the act or omission occurred" governs consequent liability under the FTCA. The *Feres* Court found it irrational for a plan providing for those disabled in service to be dependent upon geographic considerations (noting divergency among state laws) over which servicemen have no control (noting that civilians have freedom over their locations) and to laws which fluctuate in existence and value (noting the need for uniformity). Further, the Court was persuaded by the fact that most states had adopted workmen's compensation statutes which provided the sole basis of liability in most employer-employee tort cases. *Feres*, 340 U.S. at 142, 143.

Subsequent Court decisions have weakened these rationales. See, e.g., *United States v. Muniz*, 374 U.S. 150 (1963). In *Muniz* the Court allowed two federal prisoners to sue under the FTCA to recover damages from the government for personal injuries sustained during confinement in federal prison. The prisoners' injuries allegedly resulted from the negligence of government employees. The Court allowed the suits despite the government's control over prisoner location, and despite the divergent state laws which might have allowed for different recoveries. 374 U.S. at 161, 162.

duced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in light of *Feres* and subsequent cases."³²

One of the most important cases after *Feres* is *Stencel Aero Engineering Corp. v. United States*.³³ In *Stencel*, a National Guardsman injured by a malfunction in a cockpit ejection system sued both the United States and the manufacturer in tort.³⁴ The manufacturer sought indemnity from the United States for any possible sums it might be required to pay in tort damages.³⁵ The Supreme Court, affirming earlier dismissals by the district and circuit courts, held that the *Feres* doctrine precluded third party indemnity suits for injury to military personnel. The Court reasoned that allowing the suits would result in the second guessing of military decisions that the *Feres* decision attempted to prevent.³⁶ Therefore, under *Stencel*, veterans cannot successfully bypass *Feres* and recover from the government by suing private contractors in tort and then having the government indemnify the contractors for damages awarded to veterans.

The rationales given for *Feres*,³⁷ and the subsequent application of the doctrine in cases like *Stencel*, have created a broad definition of what injuries are "incident to military service."³⁸ This broad definition has forced atomic veterans to try alternative theories of recovery.³⁹ The theory of a post-discharge failure to warn has been

32 See 105 S. Ct. at 3043.

33 431 U.S. 666 (1977).

34 *Id.* at 667, 668.

35 *Id.* at 668.

36 *Id.* at 673, 674.

37 See notes 24-32 *supra* and accompanying text.

38 Many lower courts have taken a "but for" approach in determining which claims are barred. The "but for" approach looks to whether the claim could have arisen had the plaintiff never been in the service. If the court determines that the injury would not have occurred "but for" the plaintiff's enlistment in the armed services, then it is barred as incident to service under *Feres*.

Commentators have long criticized this type of analysis as mechanical jurisprudence, and have instead favored an analysis which bars claims as incident to service only if they address the policy concerns of *Feres*. The Court's decision in *Scheerer* supports this latter form of analysis. See 105 S. Ct. at 3043. See also Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U.L.J. 353 (1985); Note, *In Support of the Feres Doctrine and a Better Definition of Incident to Service*, 56 ST. JOHNS L. REV. 485 (1982); Comment, *The Feres Doctrine: Has it Created Remediless Wrongs For Relatives of Servicemen?*, 44 U. PITT. L. REV. 929, 953 (1983).

39 A complete analysis of all the attempts by veterans to circumvent the *Feres* doctrine is beyond the scope of this note. Several categories of claims exist: intentional tort claims, suits brought against individual military personnel or civilian employees, constitutional tort claims, claims by servicemen's wives and children, and finally, claims of separate post-discharge torts of failure to warn. See generally Note, *Denial of Atomic Veterans' Tort Claims: The Enduring Fallout From Feres v. United States*, 24 WM. & MARY L. REV. 259 (1983).

the most successful of these other approaches.⁴⁰ Under this doctrine, the serviceman must prove a separate act of negligence occurring after discharge which aggravated a preexisting injury.⁴¹ A majority of jurisdictions considering the issue, however, have found that failure to warn of the dangers of being exposed to ionizing radiation is not a separate tort. Rather, it is a continuing tort having its origin during active military service.⁴² Therefore, *Feres* generally prevents these suits.⁴³ Unable to recover from the government in tort in the great majority of cases, atomic veterans' have turned to the contractors involved in the weapons development and testing program for recovery.

II. Private Defense Contractors

A. *The Government Contractor Defense*

Unable to recover from the government in tort, atomic veterans sought compensation directly from private contractors involved in the weapons development and testing program.⁴⁴ *Stencel* bars tort indemnification of contractors by the government for injuries

40 The post-discharge failure to warn theory is an attempt to bypass the *Feres* bar for injuries occurring incident to service. Currently there are three views concerning post-discharge torts: (1) recovery should be allowed only if the original tort is intentional; (2) recovery should be allowed only if the government learned of the harm to the serviceman after his discharge; and (3) the post-discharge tort is merely a continuation of an incident to service tort. See Comment, Heilman v. United States, 24 DUQ. L. REV. 309, 325 (1985).

Under the post-discharge theory, veterans do not attempt to recover for their original injury, rather they attempt to recover for the negligent aggravation of those injuries caused by subsequent failure by the government to warn of the long term health consequences. The success of this theory, though limited, is greater than other methods attempted by veterans. Most courts, however, have not recognized the failure to warn as an independent tort. Most see the injury as a continuous tort, having its origin incident to military service and therefore barred by *Feres*. See Comment, *Validity of the Failure to Warn in the Context of the Feres Doctrine*: Heilman v. United States, 58 TEMP. L. Q. 221 (1985). See also Note, *Postdischarge Failure to Warn: Judicial Response to Veterans Attempts to Circumvent the Feres Doctrine*, 30 VIL. L. REV. 263 (1985).

41 See note 40 *supra*.

42 See note 40 *supra*.

43 For applications of the differing views on post-discharge torts, see, e.g., Laswell v. Brown, 683 F.2d 261, 267 (8th Cir. 1982) (treating the claim as a continuous tort); Broudy v. United States, 661 F. Supp. 125 (9th Cir. 1981) (requiring knowledge on the government's part to be obtained after discharge); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (requiring an intentional tort). See also Comment, Heilman v. United States, 24 DUQ. L. REV. 309 (1985).

Courts have attacked the post discharge tort as little more than artful pleading. See, e.g., Kelly v. United States, 512 F. Supp. 356, 361 (E.D. Pa. 1981) (dismissing an atomic veteran's claim finding the pre- and post-discharge distinction artificial). See also Note, *supra* note 40.

44 It is virtually impossible to predict whether a veteran may pursue a failure to warn claim against the United States or must seek his remedy from the contractor. Miller, *Liability and Relief of Government Contractors for Injuries to Service Members*, 104 MIL. L. REV. 1, 12 (1984).

to veterans.⁴⁵ By contract, however, the government reimburses atomic weapons contractors for any liability arising out of their assistance in the weapons program, including the costs of litigation.⁴⁶ Through this mechanism of suing only the contractor, combined with the government's subsequent *contractual* reimbursement of the contractor, atomic veterans sought to recover for their injuries. Because of the government's degree of control over the entire nuclear weapons testing program,⁴⁷ however, such claims are rarely successful.⁴⁸

Many suits by military personnel in both nuclear and non-nuclear contexts are dismissed upon the government contractor defense.⁴⁹ This defense is essentially an admission by state and federal courts that manufacturers lack the requisite control over specifications in weapons systems and that the federal government is the proper defendant to sue.⁵⁰ This doctrine, however, developed on an ad hoc basis, is highly dependent on state tort law.⁵¹ In *Feres*, the Supreme Court stated that it was unfair to subject the military to fifty different jurisdictions.⁵² Arguably, it is even more unfair to subject defense contractors, who lack control over the specifications and testing of atomic weapons, to the laws of fifty

45 *Stencel*, 431 U.S. at 674.

46 S. REP. NO. 500, 98th Cong., 2d Sess. 375, 376 (1984).

47 Only the government sets policy, makes decisions, and controls the activities and circumstances regarding atomic weapons testing. See S. REP. NO. 500, 98th Cong., 2d Sess. 375 (1984).

48 The Supreme Court recognized a type of vicarious sovereign immunity for contractors in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). In *Yearsley*, an Army Corps of Engineers contractor diverted the course of a river causing erosion to plaintiff's land. The Court found that the liability of the contractor depended on whether the diversion of the river was outside the scope of the contractor's authority. *Id.* at 21.

49 "[T]he government contractor defense derives from the doctrine of federal immunity established by *Feres* and *Stencel*." *In re Air Crash Disaster at Manheim Germany*, 769 F.2d 115, 121 (3d Cir. 1985) (citations omitted), *cert. denied*, 106 S. Ct. 851 (1986).

50 The defense is based on the premise that a contractor who complies with required specifications provided by the government ought to be insulated from liability for any harm resulting from those specifications. Miller, *supra* note 44, at 57.

The Ninth Circuit developed a checklist for applying the government contractor defense. First, a contractor must demonstrate that the government is immune from liability under the *Feres-Stencel* doctrine. Second, the contractor must prove that the government established reasonably precise specifications for the allegedly defective equipment. Third, the contractor must show that the equipment conformed to those specifications. Fourth, the contractor must show that it warned the government about errors or dangers involved in the use of the equipment that were known to contractors but unknown to the government. See *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

51 *Bynum v. FMC Corp.*, 770 F.2d 556, 568 (5th Cir. 1985). In suits by members of the armed services for defects in designs supplied by the government, *federal common law* provides a basis for the application of the government contractor defense. But a "clear majority of courts that have considered the availability of the government contractor defense under applicable *state law* have decided to adopt the defense." *Id.* at 571 (emphasis added).

52 *Feres*, 340 U.S. at 142-43. See also note 31 *supra*.

jurisdictions than it is to subject the military, which had such control, to those laws.⁵³

Six additional policy considerations support the government contractor defense. First, holding the government contractor liable, without regard to the government's activity in fixing the product's design or specifications, undercuts the *Feres-Stencel* doctrine by allowing suppliers to pass the costs of accidents on to the United States, despite the government's tort immunity.⁵⁴ Second, a member of the armed services would be allowed to question military decisions and obtain relief for the actions of military officials, regardless of whether the litigation for defective design named the government or the military contractor.⁵⁵ Third, civilian courts would be compelled to second-guess professional military judgment concerning the conduct of the armed services.⁵⁶ Fourth, military contractors often lack power to negotiate alterations in product design specifications. Military efforts to push technology to the limit requires that specifications be complied with, even if doing so means taking risks beyond those ordinarily acceptable for consumer goods.⁵⁷ Fifth, the availability of the government contractor defense is conditioned on military contractors informing the government of all known risks.⁵⁸ Because the government contractor has already fully disclosed all known risks to the government, the government should bear responsibility and not the contractor.⁵⁹ Sixth, fairness dictates that the contractor should not be ultimately held liable for a dangerous design when the responsibility properly

⁵³ See note 31 *supra*.

⁵⁴ Courts have stated that without the government contractor defense, contract prices would increase and render governmental immunity meaningless by circumventing the *Feres* doctrine. Additionally, courts are concerned that costs to the government will increase because of increased cost or unavailability of liability insurance for the contractor. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 794 (E.D.N.Y. 1980), *reh'g denied in part*, 534 F. Supp. 1046 (E.D.N.Y. 1982). But see Miller, *supra* note 44, at 51 ("attempting to obtain sovereign immunity for a contractor on the basis that the government would lose its immunity because of the common law of contractual indemnification appears to be a false argument"); Comment, Schoenborn v. Boeing Co.: *The Government Contractor Defense Becomes a "Windfall" for Military Contractors*, 40 U. MIAMI L. REV. 287, 295-97 (1985) (arguing that the concerns expressed above ignore other liability costs and that there has been no showing of increased costs to the government following the *Stencel* decision).

⁵⁵ "[A] trial between a serviceman and a military contractor in which government specifications are at issue would inevitably implicate the same concerns that underlie the Supreme Court's *Feres* and *Stencel* decisions." *Bynum*, 770 F.2d at 565.

⁵⁶ *Id.*

⁵⁷ *Id.* at 566.

⁵⁸ *Id.* The burden of proof is on the government contractor to establish that the government's knowledge was equal to or greater than theirs. *Koutsoubos v. Boeing Vertol Div. of Boeing Co.*, 553 F. Supp. 340 (E.D. Pa. 1982).

⁵⁹ 770 F.2d at 566. This defense provides contractors an incentive to work closely with military authorities in the development and testing of equipment.

lies with the government.⁶⁰

B. *The Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985*

Congress passed section 1631 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act⁶¹ for three reasons. First, Congress wanted to minimize the uncertainty faced by nuclear weapons contractors with regard to liability for servicemen's exposure to low-level radiation.⁶² Second, Congress recognized the government's own fiscal responsibility to defend and contractually indemnify contractors in such suits.⁶³ Finally, Congress wanted to further the policy considerations underlying the government contractor defense.⁶⁴

Section 1631 removes atomic veterans' state tort claims against the contractors to federal court and requires them to overcome the nearly insurmountable barrier of the FTCA.⁶⁵ Essentially, section 1631 is a federal codification of the government contractor defense for those contractors involved in the atomic weapons testing program. Section 1631, like the government contractor defense, recognizes the unique relationship between the government and atomic weapons contractors⁶⁶ and the control exercised by the gov-

⁶⁰ *Id.*

⁶¹ Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, Pub. L. No. 98-525, § 1631, 98 Stat. 2492, 2646-47 (1984) (codified at 42 U.S.C.A. § 2212 (Supp. 1985)).

⁶² The purpose of the Authorization Act is to:

clarify the status of certain contractors that operate or operated Government-owned facilities relating to atomic energy national defense activities and are in litigation arising from those activities. . . . [L]iterally thousands of plaintiffs have filed suit against the operators of the government laboratories that have participated in the government's nuclear weapons tests. . . . Plaintiffs are seeking tens of billions of dollars in damages. Because the contractors are fully indemnified by the government under the terms of their contracts, the taxpayer will ultimately bear this burden.

S. REP. No. 500, 98th Cong., 2d Sess. 374, 376 (1984).

⁶³ *Id.* at 376.

⁶⁴ See notes 44-60 *supra* and accompanying text.

⁶⁵ Representative Barney Frank of Mass. described the operation of the Authorization Act as follows: "[T]he government can walk in and say, 'Time out, new defendant; we're now the defendant. Those people are not the defendant, and there is something called the *Feres* doctrine and you're out of court.'" *Litigation Relating To Atomic Testing: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 26 (1983) [hereinafter cited as *Atomic Testing Hearings*]. See also notes 6-43 *supra* and accompanying text.

⁶⁶ S. REP. No. 500, 98th Cong., 2d Sess. 376 (1984); see notes 53-57 *supra* and accompanying text. See also *Atomic Testing Hearings*, *supra* note 65, at 20, 23, 31 (testimony of Bernard W. Vance, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice) (stating that the proposed Act would not legitimize the government contractor defense, would not include other types of contractors, but would avail the exemptions and exclu-

ernment over weapons testing.⁶⁷ Furthermore, section 1631 recognizes the uncertainty created by differing state laws,⁶⁸ the unfairness of leaving the contractor solely accountable to the public,⁶⁹ and the government's ultimate responsibility to pay for damages despite the *Feres* bar to veterans' tort claims.⁷⁰

Unlike the government contractor defense, however, section 1631 does not require that the contractor demonstrate full disclosure to the government to obtain the Act's protection.⁷¹ The Authorization Act apparently assumes full disclosure by the contractor. Without requiring contractors to demonstrate full disclosure, courts will undoubtedly dismiss more atomic veterans' cases at an earlier level of trial—if not on a motion for a judgment on the pleadings.⁷²

Section 1631 provides that an action against the United States shall be the *exclusive* remedy for injuries "due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United

sions available to the United States under the FTCA and *Feres* to atomic weapons contractors).

67 See notes 47-50 *supra* and accompanying text.

Under the Federal Tort Claims Act (FTCA), the United States is not liable and cannot be sued for the acts of independent contractors providing goods and services to the United States. The contractors operating nuclear testing facilities for the Department of Energy or its predecessor agencies, or those participating in the atomic weapons testing program, however, are unique. They are not typical of contract suppliers of commercially provided goods or services. Only the government sets the policy, makes the decisions, and controls the activities and circumstances regarding atomic weapons research, development, and testing. Consequently, these contractors were utilized by the United States as instruments of national policy to assist in this entirely governmental task.

Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985: Hearings Before the Subcomm. on Procurement and Military Nuclear Systems of the House Comm. on Armed Services, 98th Cong., 2d Sess. 38 (1984) (letter to the Speaker of the House by Theodore Garrish, General Counsel for the Department of Energy).

68 See note 51 *supra* and accompanying text.

69 See note 60 *supra* and accompanying text. See also note 72 *infra*. Congress was concerned that negative perception of the contractors' role in the weapons program could jeopardize some contractors continued participation. See generally S. REP. NO. 500, 98th Cong., 2d Sess. (1984); *Atomic Testing Hearings*, *supra* note 65, at 43-47, 52.

70 See notes 54 and 62 *supra*.

Without consolidation of these many cases under the leadership of the Department of Justice, with the United States as a co-defendant, a variety of judgments are possible based on the provisions of a different state law [sic] . . . [T]he government's interest should receive the best uniform defense available. In addition, the committee does not believe that any contractor should be used as an instrumentality of the government and then be abandoned when inundated by a flood of litigation arising from that same government activity.

S. REP. NO. 500, 98th Cong., 2d Sess. 377 (1984).

71 See notes 58-59 *supra* and accompanying text.

72 While not mandating dismissal, § 1631's removal of the state tort claim to federal court under the FTCA will cause courts to dismiss cases against government contractors more quickly. See notes 73-80 *infra* and accompanying text.

States.”⁷³ The Act requires litigants to maintain any action against these contractors solely against the United States pursuant to the FTCA.⁷⁴ The Act applies to alleged acts or omissions of contractors “without regard to when the act or omission occurred.”⁷⁵ Also, the contractor’s employees are treated as employees of the federal government.⁷⁶ Therefore, even the employees have access to the discretionary function defense.

Section 1631 operates in the following manner: When a litigant files a civil action against an atomic weapons contractor for personal injury, loss of property, or death due to exposure to radiation from United States atomic weapons testing programs, the contractor must promptly deliver all process served upon him to the Attorney General of the United States.⁷⁷ Upon certification by the Attorney General, the state court suit against the contractor is removed to federal district court, without bond, at any time before trial.⁷⁸ The United States replaces the contractor as the defendant and the proceedings are deemed a tort action against the United States under the FTCA.⁷⁹ For the purposes of removal, certification by the Attorney General under this subsection establishes contractor status conclusively.⁸⁰

Because of the harsh limitations on veterans recovering under the FTCA,⁸¹ the constitutionality of section 1631 has been questioned. In *In re Consolidated U.S. Atmospheric Testing Litigation*⁸² (*Atmospheric Testing*), a federal district court found that national defense concerns provided Congress with a rational basis to pass the Au-

73 42 U.S.C.A. § 2212(a), (b) (Supp. 1985).

74 *Id.* § 2212(a)(2).

75 *Id.*

76 *Id.*

77 *Id.* § 2212(b).

78 *Id.*

79 *Id.*

80 *Id.*

81 See notes 6-43 *supra* and accompanying text.

82 616 F. Supp. 759 (D.C. Cal. 1985). The First Circuit recently upheld the Act’s constitutionality, affirming the district court’s decision in *Hammond v. E G & G Co.*, No. 84-2432 (MA), slip op. (D. Mass. 1985). In *Hammond*, the district court applied the Authorization Act to a former civilian employee of the Department of Defense, substituted the government as defendant in place of the weapons testing contractor, and dismissed the case for plaintiff’s failure to file a claim under the FTCA.

The First Circuit affirmed the decision, rejecting the plaintiff’s claims that the Act constituted an uncompensated taking of property, an “unexpected” law without procedural due process, a violation of equal protection, a denial of the seventh amendment right to a jury trial, was beyond Congress’ power under the tenth amendment, constituted a violation of the general constitutional right of access to the courts, and violated the Article I prohibitions against ex post facto laws, bills of attainder, and laws impairing contracts. *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986).

The question of the Act’s constitutionality is also pending in district court in Nevada. See *Prescott v. United States*, No. 80-142 (RDF) (D. Nev. filed May 14, 1980).

thorization Act.⁸³ The court also held the application of the Authorization Act to *pending* actions constitutional. The court stated that such application did not violate procedural due process,⁸⁴ operate as a taking of property without just compensation,⁸⁵ violate the separation of powers,⁸⁶ nor deprive atomic veterans of their seventh amendment right to a jury trial.⁸⁷

On appeal, the constitutionality of the Act would likely be upheld for several reasons. First, courts give Congress great deference in the area of national defense.⁸⁸ Second, Congress has demonstrated its preference for handling veterans' claims administratively rather than under the FTCA.⁸⁹ Third, the nature of the relationship between servicemen and the government is unique.⁹⁰ Fourth, all of the policy considerations addressed by the government contractor defense continue to apply.⁹¹ The contractors did not order the tests, did not set the times or the places for the tests, nor direct military or government personnel to participate in

83 616 F. Supp. at 768.

84 *Id.* at 768, 769. The court cited several previous cases where Congress had abrogated pending claims to support its decision that the Act did not violate procedural due process: *United States v. Heinszen & Co.*, 206 U.S. 370 (1907) (Claims for refund on import duties of sugar which had been collected without the requisite congressional authority were abrogated by a congressional grant retroactively authorizing their collection. Even if the right to recover the payments was a vested right, the right would be subject to congressional power to legislate in the area.); *de Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir.) (The district court set aside a Veterans' Administration order and awarded attorneys' fees to plaintiffs. Congress then amended the governing statute to preclude judicial review of Veterans' Administration orders. The court of appeals upheld the retroactive application of the amendment, interpreting it as Congress' preexisting intent to preclude judicial review of all benefits decisions of the Veterans' Administration), *cert. denied*, 409 U.S. 949 (1972).

85 616 F. Supp. at 770. The court found no taking of property without just compensation under the fifth amendment.

Unlike contract claims, the tort claims asserted here lack "investment backed expectations." Not only are they contingent in nature, but they also arise in a field in which the law remains to be developed. The governmental action, moreover, does not abrogate the claims but subjects them to the tort claims procedure which the plaintiffs could reasonably expect might be applied.

Id. (citations omitted).

86 *Id.* at 770-71. The court found no violation of Article III separation of powers in attempting to alter the rule of decision in a pending case in favor of the government. This decision, based upon finding the Authorization Act does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases. It substitutes remedies but leaves the application of the rules of law, including any defenses, for judicial determination.

87 *Id.* at 768 n.6. The plaintiffs argued that the Act deprived them of their right to a jury trial. The court held that the retroactive application of preclusive defenses was not barred by the Constitution.

88 See notes 1-60 *supra* and accompanying text.

89 See notes 61-80 *supra* and accompanying text.

90 See note 25 *supra*.

91 See notes 44-60 *supra* and accompanying text.

them.⁹² Each nuclear test since 1946 has been made under the statutory direction of Congress, approved before the fact by the President, and directly supervised by government officials.⁹³

Section 1631 provides certainty for atomic weapons contractors. Under the language of the statute it seems clear that with the entire range of FTCA defenses available to contractors, courts will dismiss most atomic veterans' claims before a trial on the merits is held. While the Authorization Act provides the consistency that was lacking under the government contractor defense, this consistency does not necessarily mean an equitable result for atomic veterans.

III. The Administrative Recovery Scheme For Atomic Veterans

In light of all the barriers to recovery for tort claims, the only remaining remedy available for most veterans is an administrative claim through the Veterans' Administration. Commentators have criticized the handling of radiation exposure cases by the Veterans' Administration.⁹⁴ The Veterans' Dioxin and Radiation Exposure Compensation Standards Act⁹⁵ (Compensation Act), however, does provide some improvement. Prior to this Act, an atomic veteran had to overcome serious administrative hurdles. He was required to prove his presence at the atomic test site,⁹⁶ the extent of his exposure to radiation,⁹⁷ and the causation of his injury through that radiation exposure.⁹⁸

These requirements were difficult for the veterans to satisfy. Many veterans found proving presence at a test site difficult, if not impossible, because the records of persons taking part in such tests were destroyed by a fire in 1973.⁹⁹ Veterans also had difficulty

92 See S. REP. NO. 500, 98th Cong., 2d Sess. 376 (1984).

93 *Id.*

94 See, e.g., Bennett, *The Feres Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U.L.J. 383, 394 (1985); Comment, *An Interpretation of the Feres Doctrine After West v. United States and In re "Agent Orange" Product Liability Litigation*, 70 IOWA L. REV. 737, 749-50 (1985).

95 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (to be codified at 38 U.S.C.) (see note accompanying 38 U.S.C.A. § 354 (Supp. 1985)).

96 *Review of Federal Studies on Health Effects of Low-Level Radiation Exposure and Implementation of Public Law 97-72: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs of the House of Representatives*, 98th Cong., 1st Sess. 310 (1983) (testimony of John Smitherman of the National Association of Atomic Veterans) [hereinafter cited as *Radiation Exposure Hearings*].

97 *Id.*

98 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, §§ 2, 3, 98 Stat. 2725, 2725-27 (1984).

99 In 1973, a fire destroyed 17 million service records. Approximately 80% of the records were from the period during which the Nevada tests took place. See 1 *Effect of Radiation on Human Health—Health Effects of Ionizing Radiation: Hearings before the Subcomm. on Health*

proving exposure levels. The "film badges,"¹⁰⁰ originally issued to some members of the Armed Forces in connection with the atmospheric nuclear testing program,¹⁰¹ provided an incomplete measure of radiation exposure because they were not capable of recording inhaled, ingested, or neutron doses¹⁰² of radiation.¹⁰³ The readings of these badges were further distorted because many badges were shielded during the detonation and were worn only for limited periods during and after each detonation.¹⁰⁴ Moreover, most test participants were never issued "film badges."¹⁰⁵ Finally, veterans found the burden of proving that radiation caused their injuries impossible to overcome unless they suffered from an extremely limited number of rare ailments associated almost exclusively with radiation exposure.¹⁰⁶ As a result of these factors, less than two percent of veterans' exposure-related claims received compensation.¹⁰⁷

Congress apparently recognized that its disposition of cases under the *Feres* doctrine and the newly enacted section 1631 of the Authorization Act depended on the existence of an administrative scheme for its justification.¹⁰⁸ If the government was going to handle military claims for radiation exposure injuries in an administrative workmen's compensation context, it had to provide a realistic

and the Environment of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 1099-1100 (1978). See also Note, *The Cancer Spreads: Atomic Veterans Powerless in the Aftermath of Feres v. United States*, 6 CARDOZO L. REV. 391 (1984).

100 The film badges measured radiation exposure and were a primary source of dose information.

101 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, §§ 2(8), 2(9), 98 Stat. 2725, 2726 (1984).

102 A neutron dose is a type of radiation emitted near nuclear explosions incapable of being measured by film badges. See *Veterans' Exposure to Ionizing Radiation as a Result of Detonation of Nuclear Devices: Hearings Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 101 (1983) [hereinafter cited as *Veterans' Exposure Hearings*].

103 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, §§ 2(8), 2(9), 98 Stat. 2725, 2726 (1984).

104 *Id.* § 2(9).

105 *Id.* §§ 2(8), 2(9).

106 "[T]he U.S. government has spent close to \$2 billion for research of the health effects of exposure to low-level ionizing radiation. At least 80,000 scientific papers on the subject have been written worldwide. While much has been learned about the carcinogenic effects of high doses of radiation exposure, scientists are still uncertain how low-level ionizing radiation exposure causes cancer, and how to predict the effects of exposure to low doses of ionizing radiation." H. REP. NO. 828, 98th Cong., 2d Sess. 15 (1984).

Centers For Disease Control studies found a statistically significant portion of atomic veterans suffering from leukemia and polycythemia vera (a bone marrow disease) compared to the rest of the population. The study, however, did not find evidence of increased frequency of cancer or death from cancer for atomic veterans. H. REP. NO. 592, 98th Cong., 2d Sess. 7-9 (1984).

107 *Radiation Exposure Hearings*, *supra* note 96, at 35 (testimony of Max R. Woodall, Director of Compensation and Pension Services of the Veterans' Administration). See also 130 CONG. REC. S6144, S6417 (daily ed. May 22, 1984).

108 *Atomic Testing Hearings*, *supra* note 65, at 27.

prospect of obtaining compensation. The Compensation Act attempts to facilitate atomic veterans' administrative claims by easing their burden of proof as to presence and dosage levels at the test site.¹⁰⁹ The Act also attempts to ease atomic veterans' burden of proving causation by requiring further study of the health effects of low-level radiation exposure.¹¹⁰

Under the Compensation Act, atomic veterans are not required to produce evidence substantiating their exposure, if the information in the veteran's service records and other records of the Department of Defense *do not conflict* with the claim that the veteran was present at the test site when the claimed exposure occurred.¹¹¹ This allows a presumption of presence at the exposure site for those veterans whose records were destroyed.¹¹² The Act, in addition, officially recognizes the unreliability of the film badge readings,¹¹³ mandates review of devices and techniques which may be useful in determining previous radiation exposure,¹¹⁴ and requires the establishment of minimum standards for preparing dose estimates.¹¹⁵ Finally, the Act creates an independent board of medical experts to study the more than 800,000 medical reports which describe the effects of low-level radiation.¹¹⁶ This board makes its recommendations to the Administrator of Veterans' Affairs,¹¹⁷ who evaluates the board's findings¹¹⁸ and prescribes regulations to establish guidelines, standards, and criteria for resolving atomic veterans' claims.¹¹⁹

Although the Compensation Act reforms appear extensive, they are inadequate to enable most veterans to overcome their burden of demonstrating causation.¹²⁰ Experts disagree about the health effects of ionizing radiation exposure,¹²¹ and the problem is further complicated by the multiple dosage variables involved in

109 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, §§ 2, 5, 98 Stat. 2725, 2725-26, 2727-29 (1984).

110 *Id.* §§ 6, 7.

111 *Id.* § 5(b)(3)(B).

112 See note 99 *supra* and accompanying text.

113 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 2(8), 2(9), 98 Stat. 2725, 2726 (1984).

114 *Id.* § 7(a)(2)(a).

115 *Id.* § 7.

116 *Id.* § 6.

117 *Id.* § 6(d)(3).

118 *Id.* § 5(b)(1)(A), (1)(B).

119 *Id.* § 5(a).

120 See generally *Examining How Liability Should Be Assessed For Damages Caused By Low-Level Radiation Effects Which Appear As Cancer Years After Exposure: Hearings Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. 61-192 (1984) [hereinafter cited as *Radiation Damage Hearings*].

121 *Veterans' Exposure Hearings*, *supra* note 102, at 16-100, 293-302, 371-81.

each test.¹²² Some experts doubt whether the actual health effects on individuals in these cases will ever be known,¹²³ or that if a correlation between exposure and disease is found, it will not be during the atomic veterans' lifetimes.¹²⁴ The Compensation Act requires a showing of "sound medical and scientific evidence."¹²⁵

In evaluating scientific studies, the Administrator must take into account whether the results are "statistically significant, are capable of replication, and [are able to] withstand peer review"¹²⁶ before the Administrator can accept the disease's connection with service exposure.¹²⁷ These requirements are simply too difficult to be of much assistance to atomic veterans given the current state of scientific disagreement over radiation's effects on health. The Compensation Act, like previous attempts to increase the availability of administrative remedies,¹²⁸ will likely have little impact. In fact, the Compensation Act may be harmful to atomic veterans by giving the false appearance of increasing the chances of recovery without eliminating the real barrier: causation.

An earlier proposed version of the Compensation Act¹²⁹ created a temporary presumption of causation¹³⁰ in favor of atomic veterans where evidence indicated a possible connection between

122 See generally *Radiation Damage Hearings*, *supra* note 120, at 61-192.

123 It is presently impossible to determine the cause of cancer, even when people have received a moderate to large amount of radiation. The numbers of specific cancers can be statistically estimated, but we cannot predict which individuals will develop cancer, and if the cancer develops, we cannot state with certainty whether it was caused by radiation. *Id.* at 70. Experts cannot even agree upon the usefulness of statistical models because of the large number of assumptions required before any calculation of cancer incidence can begin. *Id.* at 152-211.

124 *Id.* at 187-90.

125 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, §§ 3, 5(b)(2)(A)(i), 98 Stat. 2725, 2727-29 (1984).

126 *Id.* § 5(b)(1)(A).

127 *Id.* § 5(a).

128 Veterans' Health Care, Training and Small Business Loan Act of 1981, Pub. L. No. 97-72, § 102, 95 Stat. 1047, 1048 (codified at 38 U.S.C. § 601 (1982)) (authorized priority medical care at Veterans' Administration facilities for any disability of an atomic veteran who may have been exposed to radiation unless the disability is found to have a cause other than exposure); Veterans Health Care Amendments of 1983, Pub. L. No. 98-160, § 601, 97 Stat. 993, 1006-08 (codified at 38 U.S.C. § 219 (1982)) (the conduct of epidemiological studies); Orphan Drug Act, Pub. L. No. 97-414, § 7, 96 Stat. 2059, 2060 (1983) (codified at 42 U.S.C. § 214 (1982)) (the development of radioepidemiological tables setting forth the probabilities of causation between various cancers and exposure to radiation).

129 See H. REP. NO. 592, 98th Cong., 2d Sess. 10 (1984).

130 Congress intended this earlier version of the Compensation Act to provide atomic veterans with certain benefits, "notwithstanding that there is insufficient medical evidence to conclude that such diseases are service connected." *Id.* This early version also required that the disease manifest itself within 20 years. *Id.* The Compensation Act as adopted leaves this latency period up to the Administrator's determination. Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 5(b)(3)(A), 98 Stat. 2725, 2729 (1984).

in-service exposure and later disease manifestation.¹³¹ This presumption in favor of atomic veterans, while scientific investigation continued, better carried out the government's stated policy of resolving doubts in favor of veterans than the version of the Compensation Act which Congress ultimately adopted.¹³² This earlier version of the Compensation Act would have, if adopted, given atomic veterans a reasonable prospect of compensation during their lifetimes.¹³³

IV. Conclusion

In light of the Supreme Court's reaffirmation of *Feres* in *Schearer* and the passage of both the Authorization Act and the Compensation Act, the federal government is sending a clear signal that it prefers to handle atomic veterans cases administratively. Veterans who wish to pursue tort claims will continue to face a difficult battle. The Authorization Act partially cleared the muddled waters of atomic veterans' tort claims by barring most veterans' suits against atomic weapons contractors.

Unfortunately, the Compensation Act fails to create a corresponding increase in the availability of administrative remedies by

131 This earlier version of the Compensation Act would have established the causation presumption in favor of veterans with leukemia, polycythemia vera, and carcinoma of the thyroid. H. REP. No. 592, 98th Cong., 2d Sess. 11, 14 (1984). The additional cost of this presumption was expected to be minimal. *Id.* at 14, 15. The Compensation Act as adopted lists the above categories as having some evidence of causation through radiation exposure, but also lists malignancies of the lung, bone, liver, skin, and female breast as suspect. Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 2(5), 98 Stat. 2725 (1984). These additional categories, without the 20-year manifestation requirement found in the earlier proposal, would undoubtedly increase the cost of granting a statutory presumption of causation. But the increased cost would be partially offset by earlier dismissals of claims against atomic weapons contractors under the Authorization Act. See notes 61-93 *supra* and accompanying text. Concerns that atomic veterans would be treated differently than veterans exposed to agent orange are counteracted by the fact that atomic veterans have been singled out as a distinct group under the Authorization Act. See notes 61-93 *supra* and accompanying text.

132 Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 2(13), 98 Stat. 2725, 2726 (1984).

133 Other barriers exist to veterans' compensation by either tort claims or administrative hearings: 28 U.S.C. § 2675(a) (1982) requires as a prerequisite to suing the United States that the plaintiff first present the claim to the appropriate federal agency. The agency must deny the claim or six months must lapse before suit may be brought on the claim. See, e.g., *Shipek v. United States*, 752 F.2d 1352, 1353 (9th Cir. 1985). 38 U.S.C. § 211(a) (1982) provides that federal courts cannot review benefit decisions of the Veterans' Administration except on constitutional grounds. 38 U.S.C. § 3404(c) (1982) imposes a flat ten dollar fee limit on all work performed by an attorney in representing a veteran pursuing a service-connected death or disability claim; the Supreme Court upheld its constitutionality in *Walters v. National Association of Radiation Survivors*, 105 S. Ct. 3180 (1985). 38 U.S.C. § 3405 (1982) provides harsh penalties for violations of the previous code section. Congress is investigating modifications of these restrictions on veterans' compensation. See generally S. REP. No. 100, 99th Cong., 1st Sess. (1985).

not fully addressing the problem of causation. Establishing a presumption that atomic veterans' diseases are caused by radiation exposure, for administrative recovery purposes, would be a step in the right direction. This is a necessary change if the government is going to share its broad range of tort defenses under the FTCA and *Feres* doctrine with private weapons contractors. Without additional congressional action, most atomic veterans will be forced to fight their diseases without compensation while awaiting the results of government tests and studies which are likely to return inconclusive results.

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