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Federal Tort Claims Act: Current Legislative and Judicial Issues

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Summary

The Federal Tort Claims Act is the statute by which the United States authorizes tort suits to be brought against itself. With exceptions, it makes the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment, in accordance with the law of the state where the act or omission occurred. Three major exceptions, under which the United States may not be held liable, even in circumstances where a private person could be held liable under state law, are the *Feres* doctrine, which prohibits suits by military personnel for injuries sustained incident to service; the discretionary function exception, which immunizes the United States for acts or omissions of its employees that involve policy decisions; and the intentional tort exception, which precludes suits against the United States for assault and battery, among some other intentional torts, unless they are committed by federal law enforcement or investigative officials.

This report discusses, among other things, the application of the *Feres* doctrine to suits for injuries caused by medical malpractice in the military, the prohibition of suits by victims of atomic testing, Supreme Court cases interpreting the discretionary function exception, the extent to which federal employees may be held liable for torts they commit in the scope of their employment, and the government contractor defense to products liability design defect suits.

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Federal Tort Claims Act: Current Legislative and Judicial Issues

Introduction

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, is the statute by which the United States authorizes tort suits to be brought against itself. As a result of the common law doctrine of sovereign immunity, "the United States cannot be sued without its consent."[1] "Congress alone has the power to waive or qualify that immunity."[2] In 1946, by enacting the FTCA, Congress waived sovereign immunity for some tort suits. With exceptions, it made the United States liable:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

Thus, the FTCA makes the United States liable for the torts of its employees[3] to the extent that private employers are liable under state law for the torts of their employees.[4] The fact that state law would make a state or municipal entity — as opposed to a *private* person — liable under like circumstances is not sufficient to make the United States liable under the FTCA.[5]

The FTCA, however, contains exceptions under which the United States may not be held liable even though a private employer could be held liable under state law. Three of these exceptions are examined in separate sections of this report: the *Feres* doctrine, which prohibits suits by military personnel for injuries sustained

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[1] Federal Housing Administration v. Burr, 309 U.S. 242, 244 (1940).

[2] United States v. Chemical Foundation, Inc., 272 U.S. 1, 20 (1926).

[3] The United States may be held liable under the FTCA for torts of employees of the executive, legislative, and judicial branches, but not for torts of government contractors. 28 U.S.C. § 2671.

[4] Another section of the FTCA provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. § 2674(a)), and the Supreme Court has noted that "like circumstances" are not limited to "the same circumstances," but include "analogous" circumstances. United States v. Olson, 126 S. Ct. 510, 513 (2005).

[5] United States v. Olson, *supra*, note 4.

incident to service;[6] the discretionary function exception; and the intentional tort exception. Among the other exceptions, the United States may not be held liable in accordance with state law imposing strict liability;[7] it may not be held liable for interest prior to judgment or for punitive damages (28 U.S.C. § 2674);[8] for the act or omission of an employee exercising due care in the execution of an invalid statute or regulation (28 U.S.C. § 2680);[9] for claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter";[10] for claims arising in respect of the assessment or collection of any tax[11] or customs duty; for claims caused by the fiscal operations of the Treasury or by the regulation of the monetary system; for claims arising out of combatant activities; or for claims arising in a foreign country.[12]

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[6] Federal civilian employees covered by the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101 *et seq*., are also prohibited from suing under the FTCA for work-related injuries. 5 U.S.C. § 8116(c).

[7] The requirement in 28 U.S.C. § 1346(b) that liability be based on a "negligent or wrongful act or omission" has been construed to preclude strict liability. *See*, Dalehite v. United States, 346 U.S. 15, 44-45 (1953). However, the National Swine Flu Immunization Program of 1976, Public Law 94-380, made the United States liable for injuries arising out of the administration of the swine flu vaccine to the extent that manufacturers would be liable under state law "including negligence, strict liability in tort, and breach of warranty."

[8] In *Molzof v. United States*, 502 U.S. 301 (1992), the Supreme Court held that damages for future medical expenses and loss of enjoyment of life for a veteran in a permanent vegetative state as a result of government hospital employees' negligence were not "punitive" and therefore could be awarded. The government had argued that these damages were punitive rather than compensatory in nature because the award for future medical expenses duplicated free medical services already being provided by the veterans' hospital, and the award for loss of enjoyment of life cannot redress a comatose patient's uncognizable loss. The Court held, however, "that § 2674 bars the recovery only of what are legally considered 'punitive damages' under traditional common-law principles." *Id*. at 312 (emphasis in original).

[9] Subsequent exceptions cited in the sentence also appear in 28 U.S.C. § 2680.

[10] In *Dolan v. United States Postal Service*, 546 U.S. 481 (2006), the Supreme Court held that the postal exception is inapplicable to a claim that mail left on the plaintiff's porch caused her to trip and fall, just as it is inapplicable to the negligent operation of postal motor vehicles. "Congress intended to retain immunity," the Court wrote, "only for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id*. at 489. Losses of this type, the Court added, "are at least to some degree avoidable or compensable through postal registration and insurance." *Id*. at 490.

[11] Section 6241 of the Technical and Miscellaneous Revenue Act of 1988, Public Law 100-647, authorizes taxpayers to sue the United States if "any officer or employee of the Internal Revenue Service recklessly or intentionally disregards" any provision of the Internal Revenue Code, and to recover up to $100,000 in "actual, direct economic damages" sustained as a result of such action. 26 U.S.C. § 7433.

[12] In *Smith v. United States*, 507 U.S. 197, 198 (1993), the Supreme Court held that Antarctica is a foreign country for this purpose even though it is "a sovereignless region without civil tort law of its own." In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004), the Supreme Court held "that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission

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Prior to filing suit under the FTCA, a claimant must present his claim to the federal agency out of whose activities the claim arises. 28 U.S.C. § 2675.[13] This must be done within two years after the claim accrues. 28 U.S.C. § 2401.[14] If, within six months after receiving a claim, the agency mails a denial of the claim to the claimant, then the claimant has six months to file suit in federal district court. 28 U.S.C. §§ 2401, 2675. No period of limitations applies to a plaintiff if the agency fails to act within six months after receiving his claim.[15] Suits under the FTCA are tried without a jury. 28 U.S.C. § 2402.[16]

An agency may not settle a claim for more than $25,000 without the prior written approval of the Attorney General or his designee, unless the Attorney General delegates to the head of the agency the authority to do so.[17] "Such delegations may not exceed the authority delegated by the Attorney General to United States attorneys to settle claims for money damages against the United States."[18] United States attorneys are authorized to settle claims in amounts up to $1 million.[19] Settlements

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[12] (...continued)
occurred." The plaintiff's suit therefore was dismissed even though his "abduction in Mexico was the direct result of wrongful acts of planning and direction by DEA agents located in California." *Id*. at 702. The Court was unwilling to adopt the "headquarters doctrine" because "it will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision — or even less than that, lack of careful training, selection or supervision — in the United States." *Id*.

[13] In *McNeil v. United States*, 508 U.S. 106 (1993), the Supreme Court disallowed a suit because the claimant had not first filed an administrative claim, even though the claimant was a prisoner without legal counsel and had filed an administrative claim (later denied) only four months after filing suit, before any substantial progress in the litigation had occurred.

[14] A claim accrues under the FTCA when "the plaintiff has discovered both his injury and its cause." United States v. Kubrick, 444 U.S. 111, 120 (1979). This rule benefits, among others, plaintiffs with latent diseases that are not discovered until years after exposure to a hazardous substance. *See also*, Sinclair and Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 Harvard Journal on Legislation 1 (1991); Annotation, *Statute of Limitations Under Federal Tort Claims Act (28 USCS § 2401(b))*, 29 ALR Fed 482.

[15] Pascale v. United States, 998 F.2d 186 (3d Cir. 1993).

[16] *See*, Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right*, 58 Texas Law Review 549 (1980).

[17] 28 U.S.C. § 2672, as amended by Public Law 101-552, § 8; 38 U.S.C. § 515. There appears to be no general limit on settlements effected with the prior written approval of the Attorney General or his designee. A limit applicable to the Department of Justice in non-FTCA situations is noted in footnote 44 of this report.

[18] 28 U.S.C. § 2672, as amended by Public Law 101-552, § 8; *see also*, 38 U.S.C. § 515.

[19] 28 C.F.R. § 0.168(d)(2); *see*, Lester Jayson, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES, § 15.05[1] (2005). The Attorney General has delegated the authority to settle tort claims of up to $200,000 to the Secretary of Veterans
(continued...)

of $2,500 or less shall be paid by the agency out of appropriations available to the agency; settlements of more than $2,500 shall be paid from general revenues. 28 U.S.C. § 2672.

Attorneys who represent claimants under the FTCA may not charge claimants more than 25 percent of a court award or a settlement made by the Attorney General or his designee after suit is filed, or more than 20 percent of a settlement made by the agency with whom a claim is filed. 28 U.S.C. § 2678.[20] A court may not order the United States to pay a claimant's attorneys' fees unless the court finds the United States to have acted in bad faith. 28 U.S.C. § 2412(b).[21]

The *Feres* Doctrine and Medical Malpractice

In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court unanimously held that, although the FTCA contains no explicit exclusion for injuries sustained by military personnel incident to service, such an exclusion results from construing the act "to fit, so far as will comport with its words, into the entire statutory scheme of remedies against the Government to make a workable, consistent and equitable whole." 340 U.S. at 139. One reason the Court found that to prohibit recovery for injuries sustained incident to service would fit the entire statutory scheme was that the act, at 28 U.S.C. § 2674, makes the United States liable only "to the same extent as a private individual under like circumstances." This limitation could be construed to exclude service-connected injuries because, the Court found,

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[19] (...continued)
Affairs, the Postmaster General, and the Secretary of Defense, and of up to $100,000 to the Secretary of Transportation. 28 C.F.R. Part 14, App.

[20] *See*, Annotation, *Calculations of Attorneys' Fees Under Federal Tort Claims Act — 28 USCS § 2678*, 86 ALR Fed 866. A California statute that limited the amount of attorneys' fees that may be charged a client in a medical malpractice action was held to be preempted to the extent that it would apply in an action brought under the FTCA. Jackson v. United States, 881 F.2d 707 (9th Cir. 1989).

[21] The pertinent part of this provision, which is part of the Equal Access to Justice Act, states: "The United States shall be liable for such fees [i.e., reasonable attorneys' fees] and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." No statute provides for fee awards under FTCA, and another part of the Equal Access to Justice Act, which authorizes fee awards against the United States in some instances where other parties would not be liable for fee awards, does not apply to "cases sounding in tort." 28 U.S.C. § 2412(d)(1)(A). However, under the common law, parties other than the United States may be held liable for attorneys' fees when they act in bad faith. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259 (1975).

In *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989), the court found a lack of the requisite bad faith and therefore did "not reach the issue whether an award of attorneys fees would . . . be barred by the FTCA prohibition against punitive damages [28 U.S.C. § 2674]." Subsequently, however, in *Molzof v. United States*, *supra*, note 8, the Supreme Court, in a different context, held "that § 2674 bars the recovery only of what are legally considered 'punitive damages' under traditional common-law principles."

> that plaintiffs 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 liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.

340 U.S. at 141-142.

Another basis for the Court's decision in *Feres* was that the act makes "the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b)) govern liability, yet, in the case of a soldier, who is not free to choose his habitat, "[t]hat the geography of an injury should select the law to be applied to his tort claims makes no sense." *Id*. at 143. The Court also was influenced by the fact that Congress has enacted laws that "provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services," yet Congress made no provision as to how recovery under the FTCA would affect entitlement to such compensation. "The absence of any such adjustment is persuasive that there was no awareness that the act might be interpreted to permit recovery for injuries incident to military service." *Id*. at 144. The Court 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. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting the Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

340 U.S. at 146.

In *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-672 (1977), the Supreme Court identified three rationales as the foundation for the *Feres* doctrine:

> First, the relationship between the Government and members of its Armed Forces is "'distinctively federal in character,'". . . ; it would make little sense to have the Government's liability to members of the Armed Services depend on the fortuity of where the soldier happened to be stationed at the time of the injury.
>
> Second, the Veterans' Benefits Act establishes as a substitute for tort liability, a statutory "no fault" compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government.
>
> A third factor was explicated in *United States v. Brown*, 348 U.S. 110, 112 (1954), namely, "[t]he 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 Tort Claims Act were allowed

> for negligent orders given or negligent acts committed in the course of military duty...."

The Supreme Court reaffirmed the *Feres* doctrine in *United States v. Shearer*, 473 U.S. 52 (1985), and again addressed the reasons for its adoption. "*Feres* seems best explained," the Court wrote:

> "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 Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.'" The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases.

473 U.S. at 57 (citations omitted).

The Court emphasized that significant factors in determining whether the *Feres* doctrine bars a suit are "whether the suit requires the civilian court to second-guess military decisions . . . and whether the suit might impair military discipline." *Id*. at 57. It noted that "other factors mentioned in Feres" are "no longer controlling." *Id*. at 58 n.4. These other factors apparently were the distinctively federal nature of the relationship between the government and military personnel, and the alternative compensation system available to military personnel. Subsequently, however, in *United States v. Johnson*, 481 U.S. 681 (1987), discussed below, the Court reaffirmed these factors.

In *Atkinson v. United States*,[22] a panel of the United States Court of Appeals for the Ninth Circuit, relying primarily on *Shearer*, allowed a medical malpractice suit to be brought under the FTCA by a servicewoman who suffered injuries "incident to service" in an Army hospital. The government sought a rehearing, and, in the interim, the Supreme Court decided *United States v. Johnson*, *supra*, which caused the Ninth Circuit's panel to grant the rehearing and issue a new opinion in *Atkinson*, reversing itself. The Supreme Court subsequently declined to review the case. These three decisions — the panel's first decision in *Atkinson*, *Johnson*, and the panel's second decision in *Atkinson* — are now examined in turn.

The plaintiff in *Atkinson* alleged that negligence on the part of Army hospital personnel had caused her to deliver a stillborn child and to suffer physical and emotional injuries. The panel, in its first decision, wrote:

> [T]he *Feres* doctrine bars suit only where a civilian court would be called upon to second-guess military decisions or where the plaintiff's admitted activities are of the sort that would directly implicate the need to safeguard military discipline.... In *Shearer*, the Supreme Court also confirmed that courts should take a case-by-case, rather than *per se*, approach to claims [by the government] of immunity.

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[22] 804 F.2d 561 (9th Cir. 1986), *modified*, 813 F.2d 1006 (9th Cir. 1987), *withdrawn*, 825 F.2d 202 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

804 F.2d at 563. Taking such an approach, the court wrote:

> At the time Atkinson sought treatment, she was "not subject in any real way to the compulsion of military orders or performing any sort of military mission." . . . No command relationship exists between Atkinson and her attending physician. No military considerations govern the treatment in a non-field hospital of a woman who seeks to have a healthy baby. No military discipline applies to the care a conscientious physician will provide in this situation. . . . There is simply no connection between Atkinson's medical treatment and the decisional or disciplinary interest protected by the *Feres* doctrine.

Id. at 564-565.

Note that this decision did not hold that all military malpractice suits are exempt from the *Feres* doctrine. In taking a case-by-case approach, the court allowed for the possibility of a situation in which there is a connection between a serviceman or servicewoman's "medical treatment and the decisional or disciplinary interest protected by the *Feres* doctrine."

In 1987, in *United States v. Johnson*, *supra*, the Supreme Court, in a 5-to-4 decision, held that the *Feres* doctrine bars suits on behalf of military personnel injured incident to service even in cases of torts committed by employees of civilian agencies. The plaintiff in *Johnson* was the widow of a serviceman killed incident to service in a helicopter crash allegedly caused by the negligence of the Federal Aviation Administration. Reexamining the reasons for the *Feres* doctrine, the Court concluded that whether the tortfeasor was a civilian or a military employee was not significant. The reasons for the *Feres* doctrine that it reexamined, and reaffirmed, were the three cited in *Stencel*, set forth on page 5 of this report. Thus, it removed any doubts that it had cast in *Shearer* upon the significance of those factors.

Justice Scalia, joined by three other justices in dissent, noted that the *Feres* doctrine is not in the FTCA as enacted by Congress, and found the reasons offered by the Court for adopting the doctrine to be unsatisfactory:

> [N]either the three original *Feres* reasons nor the post hoc rationalization of "military discipline" justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received.

481 U.S. at 700.[23]

Citing *Johnson*, the Ninth Circuit's panel subsequently reversed itself in *Atkinson*:

> Significant for our purposes [the panel wrote] is the Court's articulation, with apparent approval, of all three rationales associated with *Feres*.... Simply put, *Johnson* appears to breathe new life into the first two *Feres* rationales, which until that time had been largely discredited and abandoned. . . . Although we

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[23] The three original reasons Justice Scalia referred to were that "the parallel private liability required by the FTCA was absent" and the first two reasons mentioned in *Stencel*; the "military discipline" rationale was the third reason mentioned in *Stencel*.

> believe that the military discipline rationale does not support application of the *Feres* doctrine in this case, the first two rationales support its application.... We are . . . reluctant to carve out an exception to *Feres* after five members of the Court appear to have emphatically endorsed *Feres* and all three of its rationales. That task, if it is to be undertaken at all, is properly left to the Supreme Court or to Congress.

825 F.2d at 205-206.[24]

In *Del Rio v. United States*, 833 F.2d 282 (llth Cir. 1987), a servicewoman who had given birth to twins brought a medical malpractice suit under the FTCA, alleging that, as a result of negligent prenatal care at a military hospital, one of her twins suffered bodily injury and the other died. The Eleventh Circuit held that the *Feres* doctrine, as interpreted in *Johnson*, barred her claim. It agreed with the Ninth Circuit's second decision in *Atkinson* that the first two *Feres* factors operated to preclude suit, but, unlike the Ninth Circuit, believed that even the third factor did so. "Obviously," the court wrote, "the suit '*might* impair essential military discipline' . . . ."[25]

In *Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988), *cert. denied*, 488 U.S. 975 (1988), another servicewoman alleged that negligent prenatal care by the military had resulted in her infant's death, and another court of appeals held that the *Feres* doctrine barred suit under the FTCA.

In *Bowers v. United States*, 904 F.2d 450 (8th Cir. 1990), the court held that the *Feres* doctrine precludes an individual from recovering for medical malpractice allegedly committed at his pre-induction physical. Although the plaintiff was not a service member at the time of the alleged negligence, and was not eligible for either veterans' benefits or treatment in a military hospital, the court found that two of the three *Feres* rationales spelled out in *Johnson* were applicable: "the relationship between Bowers and the armed forces is distinctively federal," and a decision for Bowers "would have a direct effect upon military judgments and decisions." *Id*. at 452.

Thus, the *Feres* doctrine stands and contains no exception for medical malpractice cases. Because the first two *Stencel* factors — the federal nature of the relationship between the government and military personnel, and the alternative compensation scheme — would seem to apply in every case, there may not even be occasion for courts to use the case-by-case approach of *Shearer*. This could change, however, as a result of action by either the Supreme Court or Congress.

As for the Supreme Court, it is not beyond the realm of possibility that it could completely overrule *Feres*. In *Johnson*, as noted, the four dissenting justices said that *Feres* had been wrongly decided, and even downplayed the significance of the fact that Congress since 1950 has not overturned *Feres*. 481 U.S. at 702 (Scalia, J.,

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[24] The three rationales referred to are those cited in *Stencel* and by the majority in *Johnson*.

[25] 833 F.2d at 286 (citing *Shearer*, 473 U.S. at 56, and adding emphasis).

dissenting). As for Congress, some Members in the past have shown interest in amending the *Feres* doctrine to the extent of authorizing medical malpractice suits.[26]

Although *Feres* was an interpretation of the FTCA, it has been applied to bar suits against the United States under other statutes, including the Privacy Act. *Cummings v. Department of Navy*, 116 F. Supp.2d 76 (D.D.C. 2000).

The application of the *Feres* doctrine to spouses and children of military personnel is discussed below, at the beginning of the section on "Suits by Victims of Atomic Testing."

The Discretionary Function Exception

The discretionary function exception is the most significant exception to government liability that is explicitly provided for in the FTCA. This exception immunizes the United States from claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. § 2680(a). It precludes liability even if a federal employee acted negligently in the performance or nonperformance of his discretionary duty.[27] In *Dalehite v. United States*, 346 U.S. 15 (1953), the Supreme Court said that the discretion protected by the exception:

> is the discretion of the executive or administrator to act according to one's judgment of the best course.... It . . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 34, 35-36 (footnotes omitted).

In *United States v. Varig Airlines*, 467 U.S. 797 (1984), victims of airplane accidents alleged that the Federal Aviation Administration (FAA) had acted negligently in certifying certain airplanes for operation. The FAA had established a program of "spot-checking" manufacturers' compliance with minimum safety standards, and had certified the airplanes involved in the accidents without inspecting them. The Supreme Court, applying the principles it had set forth in *Dalehite*, held:

> Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accommodates the goal of air

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[26] *See*, e.g., *Medical Malpractice Suits for Armed Services Personnel: Hearings on S. 2490 and H.R. 1054 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 100th Cong., 2nd sess. (1988).

[27] Congress has provided that the discretionary function exception does not apply in any action based upon the act or omission of a participant in the swine flu immunization program. P.L. 94-380; *see also*, note 7, *supra*. Congress has also provided that the exception does not apply to certain claims based upon gross negligence by employees of the Consumer Product Safety Commission. 15 U.S.C. § 2053(h)(1)(B).

> transportation safety and the reality of finite agency resources. Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function.... It follows that the acts of FAA employees in executing the "spot-check" program in accordance with agency directives are protected by the discretionary function exception as well.... The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments.

Id. at 820.[28]

In *Berkovitz v. United States*, 486 U.S. 531 (1988), the Supreme Court held that the United States could be held liable under the FTCA, because the plaintiffs had proved that federal employees had failed to follow regulations that specifically prescribed a course of action. The plaintiffs were an infant, who had contracted a severe case of polio from a dose of Orimune, an oral polio vaccine, and his parents. They claimed that the Division of Biologic Standards, then a part of the National Institutes of Health, had violated a federal statute and accompanying regulations in issuing a license to a vaccine manufacturer to produce Orimune, and that the Bureau of Biologics of the Food and Drug Administration had violated federal regulations in approving the release of the particular lot that contained the dose that injured the infant. The regulatory scheme governing licensing in *Berkovitz*, unlike the one challenged in *Varig*, did not permit spot-checking; it required the agency, "prior to issuing a product license, to receive all data the manufacturer is required to submit, examine the product, and make a determination that the product complies with safety standards." *Id*. at 542. The regulatory scheme governing release of vaccine lots apparently would have given the agency the power to establish a spot-checking program as was used in *Varig*. However, the plaintiffs alleged that the agency had "adopted a policy of testing all vaccine lots for compliance with safety standards and preventing the distribution to the public of any lots that fail to comply. [Plaintiffs] further allege that notwithstanding this policy, which allegedly leaves no room for implementing officials to exercise independent policy judgment, employees of the Bureau knowingly approved a lot that did not comply with safety standards." *Id*. at 547. The Court sent the case back for trial, holding that if these allegations were

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[28] More generally, the Court noted:

> As in *Dalehite*, it is unnecessary — and indeed impossible — to define with precision every contour of the discretionary function exception. From the legislative and judicial materials, however, it is possible to isolate several factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a). First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.... Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.

467 U.S. at 813-814.

proved, then the discretionary function exception would not bar the claim.[29] The Court thus rejected the view expressed by the court below "that the discretionary function exception exempts the United States from claims based on . . . non-discretionary operational level acts and omissions taken in furtherance of planning level discretionary decisions." 822 F.2d 1322, 1329 (3d Cir. 1987).

In *United States v. Gaubert*, 499 U.S. 315 (1991), the Court held that the discretionary function exception barred suit against the United States for the activities of federal bank regulators in connection with a failing savings and loan association, the Independent American Savings Association (IASA). The regulators became "involved in IASA's day-to-day business. They recommended the hiring of a certain consultant to advise IASA on operational and financial matters; they advised IASA concerning whether, when, and how its subsidiaries should be placed into bankruptcy; they mediated salary disputes; they reviewed the draft of a complaint to be used in litigation; they urged IASA to convert from state to federal charter; and they actively intervened when the Texas Savings and Loan Department attempted to install a supervisory agent at IASA." *Id*. at 319-320.

The plaintiff, who was IASA's chairman of the board and largest shareholder, alleged that these activities were performed negligently and cost him $100 million in damages. The United States argued that, even if the regulators' activities had been performed negligently, the discretionary function exception precluded recovery. The court of appeals found that only some of the regulators' activities were protected by the discretionary function exception: while "policy decisions" fall within the exception, "operational actions" do not. *Id*. at 321. The Supreme Court disagreed:

> A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly require[s] judgment as to which of a range of permissible courses is the wisest.

Id. at 325.

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[29] More generally, the Court held that, in determining the applicability of the discretionary function exception,

> a court must first consider whether the action is a matter of choice for the acting employee.... [C]onduct cannot be discretionary unless it involves an element of judgment or choice.... Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.... The [discretionary function] exception . . . protects only governmental actions and decisions based on considerations of public policy.

486 U.S. at 536-537.

The discretionary function exception thus applies to decisions based on policy, whether made at the policy or planning level, on the one hand, or at the operational level, on the other.[30]

Suits by Victims of Atomic Testing

From 1946 to 1962, approximately 235 tests of atomic weapons were performed by federal government contractors. Many military and civilian personnel who participated in these tests claim to have suffered cancer and other long-term medical injuries as a result. Current federal law generally precludes either military or civilian personnel from recovering in tort against either the federal government or the contractors in these cases.

Military personnel are barred from recovering against the United States because of the *Feres* doctrine. "The doctrine of the *Feres* case does not apply to the spouse or child of a serviceman insofar as their own injuries or death are concerned . . . . Conversely, the *Feres* doctrine clearly bars a suit by a serviceman's next of kin for damages resulting from the death or of injuries to the serviceman if his death or injuries are incident to service."[31] The distinction is between a spouse's or child's injury that is caused directly by the military and a spouse's or child's injury that results from the soldier's service-connected injury: the former is recoverable but the latter is not. Thus, courts of appeals have held that the *Feres* doctrine bars spouses of soldiers from recovering for their own injuries that resulted from the soldiers' being ordered into nuclear blast areas.[32]

Similarly, courts of appeals have held that the *Feres* doctrine bars recovery by children born with birth defects that resulted from genetic changes in their fathers that occurred when they were exposed to radiation while on military duty.[33] However, "the *Feres* doctrine does not bar an action against the United States for a service-related injury suffered by a veteran as a result of independent post-service

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[30] The Court noted that some discretionary acts are not protected by the discretionary function exception because they are not "based on the purposes that the regulatory regime seeks to accomplish." If an official engaged in an act protected by the discretionary function exception drove an automobile in connection with that act and negligently caused an accident, the exception would not apply. "Although driving requires the constant exercise of discretion, the official's decisions in exercising this discretion can hardly be said to be grounded in regulatory policy." *Id*. at 325 n.7.

[31] Jayson, *supra*, note 19, § 5A.09 (footnotes omitted). *See*, Annotation, *Right of Member of Family of Serviceman to Maintain Action Under Federal Tort Claims Act (28 USCS §§ 1346(b), 2671-2680) Against United States Based Upon Injuries Sustained By Serviceman While on Active Duty*, 69 ALR Fed 949.

[32] E.g., Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) (barring a suit for the soldier's spouse's miscarriages and children's birth defects where these injuries were caused by chromosonal damages resulting from "the Army's negligent exposure of their husband and father to harmful levels of radiation in the course of his former military service").

[33] *Id*.

negligence," such as failure of the government to warn or monitor a veteran who had been exposed to radiation.[34] A district court has held that the *Feres* doctrine does *not* bar suit by the daughter and grandson of a soldier who was the victim of such negligence.[35]

Civilians have also been denied recovery against the United States for injuries caused by atomic testing — denied it on the basis of the discretionary function exception to the FTCA. (This exception applies to all plaintiffs, so even if the *Feres* doctrine were overturned, military personnel would be barred from recovering to the same extent as civilians in atomic testing cases.) The Supreme Court has not considered the applicability of the discretionary function exception to atomic testing cases, but it has declined to review two federal courts of appeals decisions that held that the discretionary function exception bars recovery in such cases.

In *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 993 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), the court of appeals stated that "*Dalehite* is squarely on point." In both *In re Consolidated* and *Dalehite*, "a detailed and extensive Operation Plan was adopted on orders from the highest levels of the Executive Department. An integral part of that Plan was an extensive Safety Plan...." *Id*. at 994. The plaintiffs in *In re Consolidated* argued that the negligent failure of Atomic Energy Commission and military officials to follow safety guidelines established in the plan, such as decontamination measures and the use of protective clothing and gear, had resulted in the overexposure of many hundreds or thousands of test participants. The Ninth Circuit held:

> The Safety Plan incorporated into the Operation Plan contemplated that judgments and decisions concerning exposure to radiological hazards and the degree of protection to be afforded would be made in light of the objectives and the needs of the test program. Safety decisions, therefore, were part of the policy decisions made in the conduct of the weapons tests, [ ] and they fall squarely within the articulation in *Dalehite* that
>
> > [w]here there is room for policy judgment and decision there is discretion.

Id. at 995, citing 346 U.S. at 36.

The plaintiffs also argued that the government had been negligent in failing to warn the plaintiffs "of the dangers to which they had been exposed or to monitor test participants for health problems resulting from radiation exposure." 820 F.2d at 996. The court held:

> This is not a case of failing to warn river users of hidden obstructions beneath the surface; or park users of the risk of flash floods; or a treating physician of his patient's dangerous propensities. The kind of "warning" that these [atomic testing] cases involve ... entailed a commitment of substantial resources, including the assignment of a large number of employees and the expenditure of

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[34] Broudy v. United States, 722 F.2d 566, 570 (9th Cir. 1983).

[35] Seveny v. United States Government, Department of Navy, 550 F. Supp. 653 (D. R.I. 1982).

> large sums of money.... The program required difficult judgments balancing the magnitude of the risk from radiation exposure — of which there was only fragmentary knowledge — against the risks and burdens of a public program. Those risks included the potential consequences of creating public anxiety and the health hazards inherent in the medical responses to the warning.
>
> Thus, any decision whether to issue warnings to thousands of test participants ... calls for the exercise of judgment and discretion at the highest levels of government....
>
> The conclusion is inescapable that every aspect of a warning program is a matter that falls within the discretionary function exception as defined in *Dalehite* and *Varig*....[36]

In *Allen v. United States*, 816 F.2d 1417 (l0th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), the Tenth Circuit, two months earlier, had reached the same conclusion as the Ninth Circuit reached in *In re Consolidated*. The plaintiffs in *Allen* "singled out the alleged failure of the government ... to fully monitor offsite fallout exposure and to fully provide needed public information on radioactive fallout." 816 F.2d at 1419. They contended that these activities did not involve "the kind of policy judgments protected by" the discretionary function exception. 816 F.2d at 1421. The court disagreed:

> In the case before us, as in *Varig*, the government actors had a general statutory duty to promote safety; this duty was broad and discretionary. In the case before us it was left to the AEC, as in *Varig* it was left to the Secretary of Transportation and the FAA, to decide exactly *how* to protect public safety.... In the instant case, no evidence was presented of any act or omission of the AEC or its employees that clearly contravened a specific statutory or regulatory authority. There was no evidence, for example that the Test Information Officer failed to give out, or that the Radsafe Officer failed to take a specific radiation measurement that had been decided upon. Plaintiffs' entire case rests on the fact that the government *could* have made better plans. This is probably correct, but it is insufficient for FTCA liability.

Id. at 1421, 1424.

The Warner Amendment and the Radiation Exposure Compensation Act. Military and civilian victims of atomic testing have also sought to sue the government contractors involved in the testing. Under state tort law, a company engaged in atomic testing would likely be subject to strict liability (liability even in the absence of negligence) for injuries resulting from such testing,

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[36] *Id.* at 996-998 (quoting the district court's opinion). The court's reference to the levels of government at which decisions were made should be read in the light of the following language from the Supreme Court's decision in *Varig* (already quoted in footnote 27 of this report), which the court in *In re Consolidated* had itself quoted earlier in its opinion (820 F.2d at 995): "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."

as atomic testing is an "abnormally dangerous" activity.[37] Federal law, however, bars victims of atomic testing from suing federal government contractors. Section 1631 of Public Law 98-525, 42 U.S.C. § 2212 (known as the "Warner Amendment"),[38] provides that an action against the United States under the FTCA 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 States." Under this provision, a contractor's employees shall be considered federal employees for purposes of any lawsuit.[39]

Thus, the Warner Amendment makes suits against the United States under the FTCA the exclusive remedy for claims based on atomic testing injuries. This remedy, however, is illusory, because the *Feres* doctrine precludes recovery by military personnel and the discretionary function exception precludes recovery by anyone.[40] The constitutionality of the Warner Amendment has been upheld by two

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[37] See, Prosser and Keeton, THE LAW OF TORTS (5th ed. 1984) § 79, p. 558.

[38] This provision was repealed and re-enacted (as the Atomic Testing Liability Act, 42 U.S.C. § 2210 note) by sections 3140 and 3141 of Public Law 101-510. This, according to the accompanying conference report, was "in order to recodify this section together with the revised Radiation Exposure Compensation Act. The conferees do not intend for this action to have any effect whatsoever on pending or past cases involving this provision of law." H.Rept. 101-923, 101st Cong., 2nd sess. 763 (1990); *reprinted in* 1990 U.S.C.C.A.N. 3270.

[39] The reason for the Warner Amendment was that the government contractors —

> provided scientific, engineering and technical support for nuclear tests carried out by the government and for the government in the exercise of a governmental function, i.e., providing for the national defense. These organizations did not order the tests to be performed; they did not set the times or places for the tests; nor did they direct military or civilian government personnel to participate in them. It should appear, without question, that these contractors were acting as the de facto instruments of the United States Government in carrying out a governmental purpose.
>
> In the litigious atmosphere that now pervades the United States, especially where atomic energy matters are concerned, literally thousands of plaintiffs have filed suits 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. 98-500, 98th Cong., 2nd sess. 376 (1984). Although the contractors were indemnified,

> Congress has nevertheless perceived these lawsuits to constitute a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear the bad publicity generated by the suits.

Hammond v. United States, 786 F.2d 8, 14 (lst Cir. 1986).

[40] H.Rept. 99-567, 99th Cong., 2nd sess. 3 (1986), states that "the real effect of the Warner (continued...)

federal courts of appeals.[41] Repeal of the Warner Amendment, it should be noted, would not necessarily result in liability on the part of contractors; there would still be the possibility that they could raise the government contractor defense. (On the government contractor defense, see the final section of this report.)

In 1990, Congress enacted the Radiation Exposure Compensation Act, 42 U.S.C. § 2210 note, a compensation program for victims of atomic testing and uranium mining. It authorizes $50,000 to be paid to any person who contracted leukemia or certain listed cancers and was physically present in an area affected by atmospheric nuclear tests for specified periods from 1951 through 1962. It also authorizes $75,000 to be paid to any person who contracted leukemia or certain listed cancers after having participated onsite in an atmospheric nuclear test. Finally, it provides $100,000 to any person employed in a uranium mine at any time from 1947 to 1971 who contracted lung cancer or a nonmalignant respiratory disease, if he was exposed to specified levels of radiation. (In none of these cases is a claimant required to prove that radiation exposure actually caused his disease.) A person who accepts compensation under the act forfeits all right to sue the United States or any federal contractor for claims arising out of the same radiation exposure. "This act was patterned in part on the Radiation-Exposed Veterans Compensation Act of 1988 (Public Law 100-321)."[42] Department of Justice regulations under the Radiation Exposure Compensation Act appear at 28 C.F.R. Part 79.

The Intentional Tort Exception

The intentional tort exception, 28 U.S.C. § 2680(h), provides that the FTCA does not apply to claims:

> arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

However, the United States may be held liable for any of the first six torts in this list if committed by an "investigative or law enforcement officer of the United States Government." 28 U.S.C. § 2680(h).[43] This exception to the intentional tort

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[40] (...continued)
Amendment is to leave the harmed individuals with no remedy at all."

[41] In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); Hammond v. United States, 786 F.2d 8 (lst Cir. 1986).

[42] H.Rept. 101-923, 101st Cong., 2nd sess. 762 (1990); *reprinted in* 1990 U.S.C.C.A.N. 3269.

[43] There are other exceptions to the intentional tort exception. The United States may be held liable for "misrepresentation or deceit on the part of the [Consumer Product Safety] Commission or any employee thereof...." 15 U.S.C. § 2053(h)(1)(A). (The CPSC is also the subject of an exception to the discretionary function exception; *see*, note 27, *supra*.) In addition, several statutes make the intentional tort exception inapplicable to causes of action arising out of negligence in the performance of medical or legal services by specified federal (continued...)

exception was enacted in 1974 and "grew out of widespread publicity given to several incidents in which federal narcotics agents engaged in what a Senate Committee described as 'abusive, illegal and unconstitutional "no-knock raids."'"[44]

In *Sheridan v. United States*, 487 U.S. 392 (1988), three naval corpsmen found a naval enlisted man named Carr unconscious from alcohol consumption and attempted to take him to a hospital emergency room. Before they reached the emergency room, Carr regained consciousness, broke away from the corpsmen, and displayed the barrel of his rifle to them. The corpsmen fled and did not alert any authority that Carr was inebriated and armed. Carr ended up near a public street and began shooting at passing vehicles, hitting one of the plaintiffs.

Because of the intentional tort exception, the plaintiffs in *Sheridan* could not sue the government based on Carr's shooting. Therefore, they sued the government based on the three corpsmen's negligence in failing to alert authorities as to the threat posed by Carr. The government argued that the intentional tort exception barred this claim because, even though it was based on negligence, it was a claim "arising out"

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[43] (...continued)
employees. If these statutes did not make the intentional tort exception inapplicable, then the intentional tort exception could bar recovery in malpractice actions arising out of negligence because "a particular type of claim can be viewed, under traditional concepts, as one type of tort rather than another, for example as an assault and battery rather than negligence.... Illustrative is the case of *Moos v. United States* [225 F.2d 705 (8th Cir. 1955)] where the claimant entered a Veterans Administration hospital for an operation on his left leg and hip; the surgeons, instead, erroneously operated on his right leg and hip; the claim was held barred on the sound technical theory that the unconsented operation on the right leg and hip constituted an assault and battery and that such was the basis of the claim even though it may have been accompanied by or preceded by negligence." Jayson, *supra*, note 19, at § 13.06[1][a]. *See also*, Franklin v. United States, 992 F.2d 1492, 1495 (10th Cir. 1993) ("intentional tort exclusion bars a claim for damages based on the unauthorized performance of surgery.... [H]owever..., the operation of that exclusion is nullified . . . by an immunity statute [38 U.S.C. § 4116(f), today § 7316(f)] dealing specifically with medical tort claims arising out of the actions of Veterans Administration (VA) personnel").

The statutes that make the intentional tort exception inapplicable in these circumstances include 10 U.S.C. § 1054(e) (legal malpractice by employees of the Department of Defense); 10 U.S.C. § 1089(e) (medical malpractice by employees of the armed forces, National Guard, Department of Defense, United States Soldiers' and Airmen's Home, or Central Intelligence Agency); 22 U.S.C. § 2702(e) (medical malpractice by Department of State employees); 38 U.S.C. § 7316(f) (medical malpractice by Department of Veterans Affairs employees); 42 U.S.C. § 233(e) (medical malpractice by Public Health Service employees); 42 U.S.C. § 2458a(e) (medical malpractice by National Aeronautics and Space Administration employees).

[44] Jayson, *supra*, note 19, at § 13.06[1][b]. The Attorney General may settle, for not more than $50,000 in any one case, a claim for damages caused by an investigative or law enforcement officer as defined in 28 U.S.C. § 2680(h) who is employed by the Department of Justice acting within the scope of employment that may not be settled under the FTCA. *See*, 31 U.S.C. §§ 3724 and 3724 note. *See also*, note 17, *supra*. In addition, the Tariff Act of 1930 authorizes the Secretary of Homeland Security to settle claims of up to $50,000 that cannot be settled under the FTCA. 19 U.S.C. § 1630.

of assault or battery within the meaning of 28 U.S.C. § 2680(h). The Supreme Court did not rule on the government's argument because it decided for the plaintiff on another ground: that the intentional tort exception should "be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity.... The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not itself give rise to Government liability, whether that conduct is intentional or merely negligent." *Id*. at 400-401. This is because the FTCA makes the government liable only for torts committed by an employee while acting "within the scope of his office or employment." 28 U.S.C. § 1346(b). Thus, since the government could not be liable for Carr's acts, the intentional tort exception did not apply to bar a suit based on the negligence of others that led to Carr's acts, even if, as the government argued, the suit arose out of Carr's intentional tort. Had Carr not been a federal employee at all, the result would have been the same: since the government could not be liable for Carr's acts, whether such acts were negligent or intentional, the intentional tort exception would not apply to bar a suit based on the negligence of federal employees that led to Carr's intentional tort.

The Court left open the question whether a suit based on the "negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee [acting within the scope of his employment]." *Id*. at 403 n.8. On this question, there was subsequently a split in the federal circuits. *See*, *Billingsley v. United States*, 251 F.3d 696, 698 (8th Cir. 2001).

Justice Kennedy concurred in the judgment, but expressed the fear "that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors." *Id*. at 407.

Suits Against Federal Employees

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Public Law 100-694 (commonly know as the Westfall Act, after the Supreme Court case it overturned), amended the FTCA to make it the exclusive remedy for torts committed by federal employees within the scope of their employment.[45] In other

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[45] This statute overturned *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that "absolute immunity from state law tort actions should be available only when the conduct of federal officials is within the scope of their official duties *and* that conduct is discretionary in nature." *Id*. at 297-298 (emphasis in original). Prior to enactment of this statute, however, some federal employees were already immune from suit. For example, 28 U.S.C. § 2679(b), prior to its amendment by Public Law 100-694, made the FTCA the exclusive remedy for injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." (This was known as the Federal Drivers Act.) Other statutes made the FTCA the exclusive remedy for damages resulting from legal malpractice by employees of the Department of Defense (10 U.S.C. § 1054), and medical malpractice by employees of the Department of Veterans Affairs (38 U.S.C. § 7316 (renumbered by Public Law 102-40 from 38 U.S.C. § 4116)), the Department (continued...)

words, it precludes federal employees from being sued for torts committed within the scope of their employment. 28 U.S.C. § 2679(b)(1).

The Westfall Act, however, provides immunity only from liability under state tort law; a federal employee may still be sued for violating the Constitution or violating a federal statute that authorizes suit against an individual. 28 U.S.C. § 2679(b)(2). Such cases are barred, however, if the claimant sues the United States under the FTCA and a judgment in the FTCA case is handed down before a judgment in the case against the employee is handed down.[46] 28 U.S.C. § 2676.[47]

In *United States v. Smith*, 499 U.S. 160 (1991), the Supreme Court held that the Westfall Act made federal employees immune from suit under state tort law even when an FTCA exception precludes recovery against the United States. In this case, the United States was immune because the claim had arisen in a foreign country.[48]

Certification. If a federal employee is sued under state tort law, in federal or state court, for conduct that may have occurred within the scope of his employment, then he may turn over papers that were served on him to the Attorney General, and the Attorney General may certify that the federal employee "was acting within the scope of employment at the time of the incident out of which the claim arose."[49] If the Attorney General makes this certification, the United States is substituted for the

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[45] (...continued)
of State (22 U.S.C. § 2702), the Public Health Service (42 U.S.C. § 233), the National Aeronautics and Space Administration (42 U.S.C. § 2458a), or the armed forces, Department of Defense, United States Soldiers' and Airmen's Home, or Central Intelligence Agency (10 U.S.C. § 1089).

[46] The case against the employee is barred whether the judgment in the FTCA case is for or against the United States. Farmer v. Perrill, 275 F.3d 958, 963 n.7 (10th Cir. 2001). If the judgment in the case against the employee is handed down first, then the plaintiff may secure judgments on both claims, but may not recover damages more than once. Turner v. Ralston, 409 F. Supp. 1260 (W.D. Wis. 1976).

[47] In *Will v. Hallock*, 546 U.S. 345 (2006), the Supreme Court held that, if a federal district court rules on a motion that § 2676 constitutes a bar against a suit against a federal employee, then 28 U.S.C. § 1291 precludes an appeal of that ruling, as the "collateral order doctrine" does not apply. By contrast, rulings that reject an employee's claim of absolute or qualified immunity are immediately appealable under the collateral order doctrine.

[48] As to the immunity for such claims, *see*, page 2, *supra*. The employee who allegedly committed the tort in this case was a military physician, and claimed immunity under the Gonzalez Act, 10 U.S.C. § 1089 (*see*, note 45, *supra*). The Ninth Circuit held that the Gonzalez Act protects only military medical personnel who commit torts within the United States. The Supreme Court did not rule on this issue, because it found the defendant immune under Public Law 100-694. *See also*, Annotation, *Construction and Application of Westfall Act Provision Providing Federal Employee Immunity From Ordinary Tort Suits if Attorney General Certifies that Employee was Acting Within Scope of Office or Employment at Time of Incident Out of Which Claim Arose (28 USCS § 2679(d))*, 120 ALR Fed 95.

[49] 28 U.S.C. § 2679(d)(1).

employee as a defendant in the action.[50] The Attorney General's certification conclusively establishes that the defendant had been acting within the "scope of office or employment for purposes of remov[ing]" a case from state court to federal district court.[51] If the Attorney General refuses to certify that the federal employee "was acting within scope of employment," then the employee may petition the court in which he was sued for certification that he had been acting within the scope of employment.[52] If the court certifies that he had been acting within the scope of employment, then the United States will be substituted as a defendant.[53] If the court that made this certification was a state court, then the Attorney General may remove the case to a federal district court, but if the federal district court finds that the employee's actions were not within the scope of employment, then the case must be remanded to state court.[54]

The Supreme Court has decided two cases addressing the certification provisions. In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), the Supreme Court held that the Attorney General's certification that a federal employee acted within the scope of employment is reviewable in court. The majority opinion explained:

> When a federal employee is sued for a wrongful or negligent act, the [Westfall Act] empowers the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose...." 28 U.S.C. § 2679(d)(1). Upon certification, the employee is dismissed from the action and the United States is substituted as defendant. The case then falls under the governance of the [FTCA].... If, however, an exception to the FTCA shields the United States from suit, the party may be left without a tort action against any party.

Id. at 419-420. This is what occurred in this case, so, "[e]ndeavoring to redeem their lawsuit, plaintiffs ... sought review of the Attorney General's scope-of-employment certification, for if the employee was acting outside the scope of his employment, the plaintiffs' tort action could proceed against him. The lower court held the certification unreviewable." *Id*. at 420. The Supreme Court reversed, finding that "Congress did not address this precise issue unambiguously, if at all," and "that judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Id*. at 424.[55]

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[50] *Id.*

[51] § 2679(d)(2). As noted on page 3 of this report, suits under the FTCA may be heard only in federal district court.

[52] § 2679(d)(3).

[53] *Id.*

[54] *Id.*

[55] A hypothetical issue of federal jurisdiction arose in the case, on which there was no majority opinion. If a suit against a federal employee is brought in state court and the Attorney General certifies that the employee was acting within the scope of his employment, the resulting FTCA case must be removed to federal court. Then, if the federal court rejects

(continued...)

In *Osborn v. Haley*, No. 05-593 (U.S. January 23, 2007), a federal employee had been sued in state court, and the Attorney General had certified that the employee had been acting within the scope of employment. The federal district court had invalidated the Attorney General's certification, finding it improper because the government maintained that the incident in dispute never happened. The federal district court then remanded the suit to the state court, thereby preventing the United States from substituting itself as a defendant. The court of appeals vacated the district court decision and the Supreme Court affirmed the court of appeals decision. The Supreme Court held that the Attorney General's certification was proper and that the United States must remain as a substitute defendant "unless and until the District Court determines that the employee, *in fact* ... engaged in conduct beyond the scope of his employment."[56] Next, the Supreme Court examined two conflicting statutory provisions to determine whether a case that the Attorney General had certified and that had been removed from a state court to a federal district court could be remanded to the state court. One provision, 28 U.S.C. § 2679(d)(2), states that the Attorney General's certification is conclusive for the purposes of removing a case from a state court to a federal district court. The other provision, 28 U.S.C. § 1447(d), bars appellate review of "[a]n order remanding a case to the State court from which it was removed." The Supreme Court held that 28 U.S.C. § 2679(d)(2) controls, so that once an Attorney General certifies, requiring the action to be removed from state court to federal district court, the federal district court must retain jurisdiction and cannot remand.

Constitutional Torts: Federal Employees' Liability and Immunity. Although the FTCA does not immunize federal employees when they violate the Constitution, common law sometimes does. Before examining federal employees' immunity from liability for constitutional torts, however, it is necessary to discuss their liability for such torts.[57] In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), federal agents, without a warrant, entered and searched the plaintiff's apartment and arrested the plaintiff for alleged narcotics violations. A state official who commits such a tort, in addition to being subject to liability under state tort law, may be sued under 42 U.S.C. § 1983, which provides that any person who, under color of any state statute, deprives another person of rights secured by the Constitution or a federal statute, shall be liable to the person injured. A federal

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[55] (...continued)
the certification and the employee is again made the defendant, what is the basis for federal jurisdiction? If the plaintiff and the employee are of diverse citizenship, then there is no problem, but, if they are not, then there arguably is no basis for federal jurisdiction. However, the plurality opinion found that the fact that, in this hypothetical case, "there was a nonfrivolous federal question [whether the employee was acting within the scope of his federal employment], certified by the local U.S. Attorney, when the case was removed to federal court," is an adequate basis to find that the case "arises under" federal law (emphasis in original). *Id*. at 435. All this was dictum, as there was diversity jurisdiction in the case before the Court.

[56] Osborn v. Haley, 127 S. Ct. 881, 888 (2007).

[57] "The Supreme Court uses the term 'constitutional tort' for any constitutional violation for which a court may award damages." K. Davis, 5 ADMINISTRATIVE LAW TREATISE § 27:1 (2d ed. 1984).

official who commits a constitutional tort is not subject to liability under state tort law (because of the Westfall Act), and no statute similar to § 1983 makes federal officials liable under federal law for violating another person's constitutional rights. In *Bivens* and subsequent cases, however, the Supreme Court held that such a statute is not necessary for an injured party to recover damages from a federal official who commits a constitutional tort.[58] "Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, *supra*, at 390-395, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." *Id*. at 397.[59]

Subsequently, however, the Supreme Court indicated "that such a remedy may not be available when 'special factors counselling hesitation' are present." *Chappell v. Wallace*, 462 U.S. 296, 298 (1983). In *Chappell*, five Navy enlisted men charged their superior officers with treating them differently because of their minority race. Guided by "the Court's analysis in *Feres*" (*id*. at 299), the Supreme Court in *Chappell* held:

> Taken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.

Id. at 304.

In *United States v. Stanley*, 483 U.S. 669 (1987), the Army had given a serviceman LSD without his knowledge, which caused him to suffer severe personality changes that led to his discharge and the dissolution of his marriage. The Supreme Court indicated that *Feres* barred his claim against the government, and that *Chappell* barred his claim against the officers involved. The plaintiff had sought to distinguish his case from *Chappell* on the grounds that, unlike in *Chappell*,

> the defendants in this case were not Stanley's superior military officers, and indeed may well have been civilian personnel, and that the chain-of-command concerns at the heart of *Chappell* . . . are thus not implicated. Second, Stanley argues that there is no evidence that this injury was "incident to service,"....

Id. at 679-680. The Court found that the second argument was not available to Stanley because the issue of service incidence had been decided adversely to him previously.

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[58] In *Davis v. Passman*, 442 U.S. 228 (1979), the Court held that a Member of Congress could be found liable for damages for violating the Due Process Clause of the Fifth Amendment by firing a member of his staff because of her sex. In its opinion the Court indicated that all "justiciable constitutional rights are to be enforced through the courts." *Id*. at 242.

[59] The statute of limitations for *Bivens* actions has not been addressed by the Supreme Court, but lower courts have held "that *Bivens* actions are governed by the same state personal injury limitations period applicable to [42 U.S.C.] section 1983 actions...." Cook and Sobieski, 2 CIVIL RIGHTS ACTIONS, ¶ 4.01[B] (2006).

> As for his first argument, Stanley and the lower courts may well be correct that *Chappell* implicated military chain-of command concerns more directly than do the facts alleged here.... It is therefore true that *Chappell* is not strictly controlling, in the sense that no holding can be broader than the facts before the court.

Id. at 680. However, the Court added:

> Since *Feres* did not consider the officer-subordinate relationship crucial, but established instead an "incident to service" test, it is plain that our reasoning in *Chappell* does not support the distinction Stanley would rely on.... Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits, where we adopted an "incident to service" rule.

Id. at 680-681. Thus, with respect to injuries incurred incident to service as a result of constitutional torts, the principle behind the *Feres* doctrine applies equally to preclude military personnel from suing either the government under the FTCA or federal officials under *Bivens*.[60]

In addition to situations with "special factors counselling hesitation," *Bivens*-type actions are not permitted "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis in original).[61] The Court in *Carlson v. Green* allowed a *Bivens*-type action against a federal prison official for violating the Cruel and Unusual Punishment Clause of the Eighth Amendment. The defendant argued that Congress had intended a suit against the United States under the FTCA as an alternative remedy, but the Court held:

> When Congress amended the FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement

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[60] The principle behind the *Feres* doctrine, however, should be distinguished from the doctrine itself, which applies only to suits against the United States. In *Cross v. Fiscus*, 830 F.2d 755, 756 (7th Cir. 1987), the court of appeals wrote: "The doctrine of *Stanley* and *Chappell* tracks *Feres*.... But its source is different. *Feres* is a construction of a statute. *Stanley* and *Chappell* are constructions of the Constitution based on considerations similar to those that, the Court believes, influenced Congress when enacting the FTCA. If Congress amended the FTCA, the principles of *Stanley* and *Chappell* would be unaffected — though Congress could create a federal remedy against service personnel by passing a separate statute."

[61] In *Carlson v. Green*, the Court spoke of "special factors counselling hesitation" and the availability of an "alternative remedy which is explicitly declared to be a substitute" as distinct situations in which *Bivens* actions are unavailable. In *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988), the Court said that "the concept of 'special factors counselling hesitation . . .' has proved to include an appropriate judicial deference to indications . . . that Congress has provided what it considers adequate remedial mechanisms." In *McCarthy v. Madigan*, 503 U.S. 140 (1992), the Court held that, where Congress had not required exhaustion of remedies, a prisoner could bring a *Bivens* action solely for money damages without resorting to an internal grievance procedure.

> officers, 28 U.S.C. § 2680(h), the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.

Id. at 20.

In subsequent cases, the Supreme Court has continued to limit the availability of *Bivens* actions. In *FDIC v. Meyer*, 510 U.S. 471 (1994), the Court declined "to extend *Bivens* to permit suit against a federal agency, even though the agency — because Congress had waived sovereign immunity — was otherwise amenable to suit."[62] In *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001), the Court held that *Bivens* actions may not be brought "against private entities acting under color of federal law" (*id*. at 66) — in this case "against a private corporation operating a halfway house under contract with the Bureau of Prisons" (*id*. at 63). Explaining its decisions in both *Meyer* and *Malesko*, the Court in *Malesko* said that the purpose of *Bivens* is to deter individual officers, not policymaking entities, from committing unconstitutional acts. Does this mean that an individual officer of a private entity acting under color of federal law would be subject to a *Bivens* action? The Court in *Malesko* did not decide the question.

The Practical Side of *Bivens* Actions. According to one commentator, "[i]ndividual liability under *Bivens* is fictional . . . because the federal government in practice functions as the real party in interest, paying for representation and reimbursing the sued individuals when they settle or pay judgments."[63]

"*Bivens* has, however," the commentator continues, "proved to be a surreptitiously progovernment decision. Although it appears to provide a mechanism for remedying constitutional violations, its application has rarely led to damages recoveries. Government figures reflect that, out of approximately 12,000 *Bivens* claims filed between 1971 and 1985, *Bivens* plaintiffs actually obtained a judgment that was not reversed on appeal in only four cases. While similar figures have not been systematically kept since 1985, recoveries from both settlements and litigated judgments continue to be extraordinarily rare. According to one estimate, plaintiffs obtain a judgment awarding them damages in a fraction of one percent of *Bivens* cases and obtain a monetary settlement in less than one percent of such cases."[64]

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[62] Correctional Services Corporation v. Malesko, 534 U.S. 61, 69 (2001).

[63] Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Georgetown L.J. 65 (1999). Department of Justice regulations at 28 C.F.R. § 50.15(a) provide: "Under the procedures set forth below, a federal employee . . . may be provided representation in civil, criminal, and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity . . . when the actions for which representation is requested reasonably appear to have been performed with the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interests of the United States."

[64] *Id*. at 66 (footnotes omitted).

Qualified Immunity to *Bivens* Actions. Having summarized the law governing federal employees' liability for constitutional torts, we return to the question of their common law immunity from liability for such torts. (The FTCA, it will be recalled, gives them immunity only from state tort law.) Such immunity is generally qualified, yet "[q]ualified immunity is undoubtedly the most significant bar to constitutional tort actions."[65] In *Butz v. Economou,* 438 U.S. 478, 507 (1978), the Supreme Court held

> that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business.

In *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974), referred to in this quotation, the Supreme Court held that state executive officers are immune from liability under 42 U.S.C. § 1983

> in varying scope..., the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Because, under *Butz*, the *Scheuer* standard applies to federal as well as to state officials, if a federal official, in the exercise of a discretionary function, violates a person's constitutional rights, he may be subject to liability, even though the discretionary function exception of the FTCA would preclude liability on the part of the government.[66] Congress, however, has the power to grant additional immunity to federal officials. *See*, *Butz*, 438 U.S. at 500.

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[65] *Id.* at 80.

[66] In *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), the Supreme Court applying the *Butz* qualified immunity standard, held that a federal law enforcement officer is not liable for participating in a search that violates the Fourth Amendment if "he could, as a matter of law, reasonably have believed that the search ... was lawful." In *Nixon v. Fitzgerald*, 457 U.S. 731, 750, 754 (1982), the Court held that "[t]he President's unique status under the Constitution" entitles him to absolute immunity from "private suits for damages based on [his] official acts." (He is not immune, however, for actions allegedly taken before his term began. *Clinton v. Jones*, 520 U.S. 681 (1997)). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that Presidential aides are entitled only to qualified immunity; specifically, they are immune unless their actions violate clearly established law. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court held that the holding in *Harlow* applied even for acts performed by the Attorney General in the interest of national security. Additional discussion of the immunity of federal officials for constitutional torts may be found in Cook and Sobieski, 1 CIVIL RIGHTS ACTIONS ¶ 2.11 (2006).

The Government Contractor Defense

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988), the Supreme Court held that "uniquely federal interests" in the government's procurement of equipment require that a "government contractor defense" be available in certain cases. This is a defense that manufacturers may assert in products liability cases alleging design defects. These are cases, brought under state law, in which the plaintiff alleges that his injuries were caused by a product that was defective in that the manufacturer failed to use the safest feasible design for the product. In its defense, the manufacturer may assert that it manufactured the product pursuant to a government contract and that the design it used was required by contract specifications. In *Boyle*, the Supreme Court held that, notwithstanding state law, "federal common law" requires that the government contractor defense be available in certain cases.[67] This is because "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id*. at 507.

The Court found that displacement of state law will occur only where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' ... or the application of state law would 'frustrate specific objectives' of federal legislation...." *Id*. A significant conflict may exist, the Court found, where "the state-imposed duty of care that is the asserted basis of the contractor's liability ... is precisely contrary to the duty imposed by the Government contract." *Id*. at 509. In some cases, however, the state-imposed duty of care will not conflict with the federal contract, or, even if it does, will not be significant, as where "a federal procurement officer orders, by model number, a quantity of stock [items that happen to have a design defect]." *Id*. In such cases, the government contractor defense would not be available.

Boyle was a suit by the father of a Marine who had been killed incident to service in a helicopter accident, allegedly caused by the helicopter's having been defectively designed. The lower court had allowed the government contractor defense on the basis of the reasoning behind the *Feres* doctrine. As the Supreme Court explained: "Military contractor liability would conflict with this doctrine, the Fourth Circuit reasoned, since the increased cost of the contractor's tort liability would be added to the price of the contract, and '[s]uch pass-through costs would ... defeat the purpose of the immunity for military accidents conferred upon the

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[67] The Court noted "that a few areas, involving 'uniquely federal interests,'... are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts — so-called 'federal common law.'" *Id*. at 504. Justice Brennan, in his dissent in *Boyle*, objected that "[j]ust as '[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it,'... federal common law cannot supersede state law *in vacuo* out of no more than an idiosyncratic determination by five Justices that a particular area is 'uniquely federal.'" *Id*. at 517.

government itself.'" *Id*. at 510.[68] The Supreme Court did not adopt the *Feres* doctrine as the basis for the government contractor defense:

> Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by jet engines. Yet we think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the Armed Services.

Id. at 510-511. Rather, the Court found that the reasoning behind the discretionary function exception furnished a better basis for the government contractor defense:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. . . . The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs.... In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.

Id. at 511-512. Delineating these circumstances, the Court ruled:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated — *i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks . . . [thereby] cutting off information highly relevant to the discretionary decision.

Id. at 512.

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[68] The Supreme Court has held that in cases in which the United States is immune under *Feres*, a government contractor that is held liable may not recover indemnification from the United States because to allow indemnification would make the United States indirectly liable to the injured party. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977). The Federal Employees' Compensation Act precludes federal civilian employees from suing under the FTCA for work-related injuries. 5 U.S.C. § 8116(c). The Supreme Court has held that, if a federal civilian employee recovers damages from a government contractor for a work-related injury, the government contractor may recover indemnification from the United States. The Court did not follow its reasoning in *Stencel* because, unlike in the military context of *Stencel*, "[i]t is clear that the Government has waived its sovereign immunity here." Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 197 n.8 (1983).

Although the defendant in *Boyle* was a military contractor, and the Court throughout its opinion refers to military equipment, the fact that it based its opinion on the discretionary function exception and not on the *Feres* doctrine seems to indicate that the government contractor defense is available to both civilian and military contractors. In *Nielson v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990), the court acknowledged that the Supreme Court's reliance on the discretionary function exception meant that the government contractor defense can in principle apply to civilian equipment. "Yet," it added, "the policy behind the defense remains rooted in considerations peculiar to the military." *Id*. at 1455. In the case before it, which involved civilian equipment, it found "no reason to hold that the application of state law would create a 'significant conflict' with federal policy requiring a displacement of state law." *Id*. There is currently a split in the circuits over the applicability of the government contractor defense to non-military contractors.[69]

In *Hercules, Inc. v. United States*, 516 U.S. 417 (1996), the Supreme Court rejected a claim by Agent Orange manufacturers that they were entitled to reimbursement from the government for the costs of defending and settling tort claims brought against them by Vietnam veterans who were injured by the chemical. The government had "prescribed the formula and detailed specifications for manufacture" (*id*. at 419), but the settlement with the veterans occurred before *Boyle* established the government contractor defense.

The manufacturers sued the United States under the Tucker Act, 28 U.S.C. §§ 1346(a), 1491(a), which authorizes suits against the United States founded upon "any express or implied contract." They alleged an implied agreement by the government to reimburse them for tort liability, and a breach of the contractual warranty of specifications. As to the first, the Court held that there was no contract either express or implied in fact; as to the second, the Court held that the government "warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications" (*id*. at 425), but that this warranty does not extend to third-party claims against the contractor.

[69] *See*, Sean Watts, Boyle v. United Technologies Corp. *and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense*, 40 William and Mary Law Review 687 (1999).