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POSTDISCHARGE FAILURE TO WARN: JUDICIAL RESPONSE TO VETERANS' ATTEMPTS TO CIRCUMVENT THE FERES DOCTRINE

I. INTRODUCTION

Former servicemen asserting claims against the United States for service-related injuries traditionally have been denied recovery under the United States Supreme Court's decision in Feres v. United States.1 In Feres, the Court held that the government is not liable under the Federal Tort Claims Act2 for injuries sustained by servicemen incident to military service.3 In an effort to circumvent this bar to recovery, plaintiffs have brought their actions against the government under a failure to warn theory.4 Although this theory of recovery presents little difficulty in nonmilitary cases,5 its application has been problematical in suits by former servicemen against the government. This note will discuss the variations of the failure to warn theory in the context of intramilitary cases, analyze the response of the judiciary, and assess the outlook for servicemen who seek redress from the government for service-related injuries. A survey of the judicial response to claims based on a failure to warn theory indicates that as a matter of stare decisis, this theory is not one upon which plaintiffs can confidently rely.

II. THE EVOLUTION OF THE FERES DOCTRINE

Under the doctrine of sovereign immunity, the federal government is immune from suit.6 Consequently, the government cannot be sued

1. 340 U.S. 135 (1950). For a discussion of the Supreme Court's opinion in Feres, see infra notes 12-21 and accompanying text. For a discussion of the Feres doctrine, see infra notes 12-26 and accompanying text.
3. Feres, 340 U.S. at 146.
4. For a discussion of this theory in the context of suits against the government, see Comment, Duty to Warn as an Inroad to the Feres Doctrine: A Theory of Tort Recovery for the Veteran, 43 OHIO ST. L.J. 267 (1982).
5. For a discussion of failure to warn as a theory of recovery in tort, see infra note 31.
6. See Feres, 340 U.S. at 139. This doctrine is derived from the medieval political theory that kings were endowed with a divine right to rule and, consequently, could do no wrong. Id. See also Note, There Is No Cause of Action Implied Under the Constitution Against Government Officials for Intentional Constitutional Torts Occurring Incident to Military Service, 27 VILL. L. REV. 858, 860 n.11 (1981). Chief Judge Franklin Waters of the Western District of Arkansas commented that "the 'Feres doctrine' is a modern-day exemplification of the powers of the absolute monarchy of the sixteenth century." Hampton v. United States, 575 F. Supp. 1180, 1183 (W.D. Ark. 1983).
without its express consent. In order to permit certain suits against the federal government, Congress, in 1946, enacted the Federal Tort Claims Act (FTCA). The FTCA provides that the United States can be held liable for torts of its employees, if committed within the scope of their 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." Congress and the judiciary, however, have cut back on this broad waiver of immunity, and have refused to permit suits against the government in certain instances. For example, the Feres doctrine provides for intramilitary immunity in suits by servicemen for injuries received incident to military service.

In Feres v. United States, the Supreme Court addressed the question of whether a serviceman could bring a tort action against the United States under the FTCA for torts committed against him while he was a member of the military. In Feres, one of three cases decided in the

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9. Id. § 1346(b). See also Feres, 340 U.S. at 141.
10. One statutory exception to this broad waiver of immunity is that the government cannot be held liable for punitive damages under the FTCA. 28 U.S.C. § 2674 (1982). With respect to military personnel, the FTCA specifically precludes individuals from bringing claims arising out of combat activities during wartime and from bringing claims arising out of military activities in foreign countries. Id. § 2680(j), (k).

In spite of these exceptions, it is apparent from the language of the FTCA that Congress did anticipate suits by military personnel. For example, Congress extended the phrase "employee of the government. . . acting within the scope of his office or employment" to include "a member of the military or naval forces of the United States . . . acting in [the] line of duty." Id. § 2671. For a general discussion of the statutory exceptions to the Federal Tort Claims Act, see 1 L. JAYSON, supra note 2, § 3.03. See also PROSSER AND KEETON, supra note 7, § 131, at 1037-38.

13. Id. at 138. The first time the Supreme Court addressed the issue of a serviceman's right to sue under the FTCA was at the end of the Second World War. See Brooks v. United States, 337 U.S. 49 (1949). In Brooks, the Court held that a suit could be maintained under the FTCA for the death of a serviceman who was killed while he was on furlough by a government employee. Id. at 51-52.

Initially, the Supreme Court addressed the question of whether it had jurisdiction under the FTCA to hear the case. Id. at 51. Examining the language of the FTCA, the Court determined that Congress did not intend to preclude suits by servicemen against the government when it provided jurisdiction over any suit in negligence brought against the United States. Id. The Court stated that "[t]he overseas and combatant activities exceptions make this plain." Id. For a discussion of the statutory exceptions under the FTCA, see infra notes 9-10.

Having established jurisdiction, the Court held that Brooks' death, which
same opinion, the executrix of Feres' estate brought suit against the United States for negligently causing the death of Feres who, while on active duty for the Army, perished in a fire in his barracks. The plaintiff claimed that the government was negligent in quartering Feres in barracks which it knew or should have known were unsafe due to a defective heating system. On the facts of each case, the Court denied recovery, holding 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." The Court offered several rationales in support of this conclusion, including the existence of alternative sources of compensation, the need to maintain military discipline, and the uniquely federal relationship between service members and the government. The Court also expressed concern over the

resulted from the negligent operation of a truck by a civilian employee of the Army, "had nothing to do with Brooks' army careers." Id. at 52. The Court went on to expressly reject a "but-for" analysis to deny recovery. Id. For a discussion of the use of the "but-for" analysis to deny recovery, see infra notes 71-75 and accompanying text.

14. 340 U.S. at 136-37. In one companion case, Jefferson v. United States, the complaint alleged that an army surgeon negligently left a towel in the plaintiff's stomach during an operation performed during the time plaintiff was on active duty. Id. at 137. In the second companion case, Griggs v. United States, the complaint stated that the decedent-serviceman had died as a result of negligence on the part of several army surgeons who treated him while he was on active duty. Id.

15. Id. at 136-37.
16. Id. The district court dismissed complaints that those in charge were negligent in that they knew or should have known the barracks were unsafe because of the defective heating plant, and that they were also negligent in failing to maintain an adequate fire watch. Id.
17. Id. at 146. The Court factually distinguished Feres from Brooks, stating that "Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders." Id.
18. Id. at 140, 145. The alternative sources of compensation referred to include benefits paid by the Veterans Administration, and other forms of relief provided by statute. See, e.g., 10 U.S.C. § 1475 (1982) (providing for payment of a death gratuity to eligible survivors of members of the service killed on either active duty or inactive duty training).

There is some indication, however, that the Veterans' Administration will not compensate veterans when the injury is caused by the government's failure to warn. See Comment, supra note 4, at 269. "A recent ruling from a regional Veterans' Administration office indicates that the Administration will not compensate veterans for exposure to nuclear radiation if the injury is diagnosed after the presumptive period allowed by the law, even if a post-discharge warning was not given." Id. at 269 n.25 (citing Letter from Veterans Administration to Charles Turgett (October 29, 1981)).

19. Although the Feres Court did not expressly assert this as a factor in its decision, subsequent courts have construed Feres to have implied this as a rationale for its decision. See, e.g., United States v. Brown, 348 U.S. 110, 112 (1954) (citing Feres v. United States); In re "Agent Orange," M.D.L. No. 381 (E.D.N.Y. Feb. 10, 1984). See also Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671 (1977).

20. Feres, 340 U.S. at 143. The Court noted a number of material provi-
possible creation of new sources of liability for the government.21

Several years later, in United States v. Brown,22 the Supreme Court refined the rule as enunciated in Feres, holding that a serviceman could recover against the United States under the FTCA when his injuries were incurred after his discharge from military service.23 In Brown, doctors operated on the plaintiff at a Veterans' Administration hospital subsequent to his discharge.24 The former serviceman's leg was permanently injured when a defective tourniquet was used during the operation.25 The Supreme Court allowed recovery because the plaintiff was a civilian at the time the tort was committed.26

sions in the FTCA that were not relevant in a military context. For example, the court mentioned that the state permitted suits against the United States in the same situations in which private individuals would be liable; however, the court found that "no private individual has power to conscript or mobilize a private army . . . ." Id. at 141. Therefore, the court determined, that portion of the statute had no meaning to the relationship between a soldier and the government. Id. at 142.

Furthermore, the FTCA required the law of the place where the act or omission occurred to govern any consequent liability. Id. at 142-43 (citing 28 U.S.C. § 1346(b)). The Court reasoned that it would be palpably unfair for a soldier on active duty to find himself subject to the laws of the foreign country in which he was serving at the government's behest. Id. at 143.


21. Feres, 340 U.S. at 142. The Court found that the Act's purpose was to waive immunity from already recognized causes of action, "not to visit the Government with novel and unprecedented liabilities." Id.


23. Id. at 112. Although the Court frequently refers to the point in time of the injury, it is apparent that the relevant point in time is the time of the negligent act. See also Bankston v. United States, 480 F.2d 495 (5th Cir. 1973). In Bankston, the decedent's mother sought recovery under the FTCA for the alleged wrongful death of her son due to malpractice by the staff of a government hospital. Her son had been admitted to the hospital on the day he was discharged from the armed services. Id. The Fifth Circuit held that liability for the government's conduct existed only if the decedent had been discharged before the claimed negligence occurred. Id. at 497.

24. 348 U.S. at 110-11.

25. Id.

26. Id. at 112. In Brown, the Court noted that it had granted certiorari to resolve the dispute over whether Feres or Brooks was controlling. Id. at 111. See Feres v. United States, 340 U.S. 135 (1950); Brooks v. United States, 337 U.S. 49 (1949). For a discussion of Brooks, see supra note 13.

The Court ruled that Brown was controlled by the Brooks case, rather than Feres, since the accident which gave rise to the injury was not incident to military service. Brown, 348 U.S. at 112. The Court also noted that the Feres concern over creating new sources of liability for the government was not at issue in Brown, since "this claim is one which might be cognizable under local law, if the defendant were a private party." Id. at 113. For further discussion of liability for failure to warn at common law, see infra note 31.
III. Negligent Failure to Warn Theory

In order to come within the parameters established by Brown,27 and survive a government motion to dismiss or motion for summary judgment based on Feres,28 military personnel bringing actions for service-related injuries have claimed that they were injured by the government’s commission of two separate torts: the first occurring before discharge, the second occurring after discharge.29 Although the first claim is barred by Feres,30 the plaintiffs contend that the second is actionable under Brown. The second claim is usually brought under a negligent failure to warn theory.31 Under this theory, the plaintiff alleges that a

27. See Brown, 348 U.S. at 112-13.

28. For examples of claims that have not survived the government’s motion to dismiss on grounds of sovereign immunity, see Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982) (alleging a postdischarge negligent failure to warn of the hazards of radiation poisoning), cert. denied, 103 S. Ct. 3086 (1983); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982) (alleging both a negligent failure to warn and a failure to provide postdischarge preventive treatment), cert. denied, 103 S. Ct. 1205 (1983); Broudy v. United States, 661 F.2d 125 (9th Cir. 1981) (alleging failure to warn of and monitor injuries arising from exposure to radiation subsequent to discharge); Targett v. United States, 551 F. Supp. 1231 (N.D. Cal. 1982) (alleging postdischarge negligent failure to warn of dangers of radiation exposure); Kelly v. United States, 512 F. Supp. 356 (E.D. Pa. 1981) (alleging negligent failure to warn the serviceman of the dangers of radiation exposure as separate tort occurring entirely after discharge); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (alleging negligent failure to warn of harmful effects of radiation as an independent act occurring entirely after discharge); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (alleging a negligent failure to provide follow-up treatment after discharge); Schwartz v. United States, 290 F. Supp. 536 (E.D. Pa. 1964) (alleging negligent failure to take reasonable steps to determine the nature of a substance in the plaintiff’s sinus and remove it, notwithstanding repeated evidence of plaintiff’s sinus condition).


30. For a discussion of the implications of categorizing the initial in-service tort as negligent or intentional, see infra notes 120-27 and accompanying text.

31. See, e.g., Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982) (alleging that the government disregarded danger to the plaintiff in ordering him to handle radioactive material in the service, and then compounded the injury by hiding information concerning the harmful effects in the years after his military service), cert. denied, 103 S. Ct. 7086 (1983); Kelly v. United States, 512 F. Supp. 356 (E.D. Pa. 1981) (alleging tortious acts by the government by exposing the plaintiff to radiation while in the army, and by subsequently failing to warn him of potential dangers once he left the service); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (alleging an intentional tort where the government conducted drug experiments on the plaintiff, and negligence on the part of the government in failing to advise the plaintiff that the symptoms of his later illness were attributable to the drugs administered during the experiments).

The common law of negligence distinguishes between liability based on "misfeasance" and that which is based on "nonfeasance." PROSSER AND KEETON, supra note 7, § 56, at 373-75. Liability for misfeasance arises when the active misconduct of a party results in actual injury to another. Id., at 374. Nonfeas-
duty to warn arose subsequent to discharge, giving rise to an actionable
tort wholly distinct from the tort alleged to have been committed by the
government while the plaintiff was still in the service. A court faced
with these complaints must decide whether these alleged torts are truly
two separate torts.

One of the earliest cases in which the federal courts recognized gov-
ernmental liability under the FTCA for a postdischarge failure to warn was
Schwartz v. United States. In Schwartz, a serviceman received treat-

sance, on the other hand, leads to liability only where a party has failed to fulfill a
positive duty to take action that would reduce the degree of harm to another. 

Id., at 373.

The courts typically impose a duty to act in relationships where the plaintiff
is particularly vulnerable and dependent upon the defendant. Id. at 373-74. See also M. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, AND PUBLIC POLICY (1977). Furthermore, the Second Restatement of Torts provides that

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

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

The duty to act may require the defendant to warn the plaintiff of existing
danger, especially in cases where the defendant is responsible for creating the
perilous situation. PROSSER AND KEETON, supra note 7, § 56, at 377. This duty to
warn can arise even where the defendant does not intend to harm anyone by his
conduct. Id.

32. Some courts have indicated that they may completely reject the propo-
sition that a plaintiff's claim for postdischarge failure to warn can ever circum-
vent the Feres doctrine. For a discussion of this "but for" theory of denying recovery, see infra notes 71-75 and accompanying text.

33. See Thornwell, 471 F. Supp. at 351. For a discussion of what constitutes a
"continuous tort" as opposed to two separate tortious acts, see infra notes 76-
105 and accompanying text.

34. Not all plaintiffs have alleged a negligent failure to warn as the actionable
conduct which occurred entirely after discharge. Some allege a negligent failure to provide follow-up or preventive treatment; others allege both. See, e.g., Laswell, 683 F.2d at 263 (8th Cir. 1982) (plaintiff alleged that the government
was liable in negligence for both failure to warn and treat decedent and for fail-
ure to provide him with preventive treatment); Thornwell, 471 F. Supp. at 346
(plaintiff alleged failure to provide examinations and treatment). For purposes
of analysis, however, most courts seem to proceed similarly under these two the-
ories of recovery. See, e.g., Schwartz v. United States, 250 F. Supp. 536, 540
(E.D. Pa. 1964). In response to plaintiff's allegations of a negligent failure to
provide follow-up treatment, the Schwartz court held that the negligence was "in
not having affirmatively sought out those who had been endangered after there
was knowledge of the danger in order to warn them . . . ." Id. Though the
court was analyzing the sufficiency of plaintiff's claim for negligent failure to
provide follow-up treatment, it made no distinction between this case and one
based on allegations of a negligent failure to warn. Id. But see Laswell, 683 F.2d
at 267 (implying that it would treat allegations of the government's failure to
remedy the in-service injury different than claim that the government negligi-
gently failed to warn the plaintiff).

35. 230 F. Supp. 536 (E.D. Pa. 1964). Other cases prior to Schwartz have
similarly recognized governmental liability for its failure to take steps to alleviate
postdischarge harm arising from an in-service injury. See Hungerford v. United
ment in a naval hospital for a sinus condition while he was on active duty. Part of the treatment included placing a radioactive contrast dye in the plaintiff's sinus for X-ray purposes. Use of the dye, then known to be extremely hazardous, resulted in serious and permanent damage to Schwartz' face and left eye.

Although Feres barred his recovery for the naval hospital's negligent use of the dye, Schwartz brought suit in the Eastern District of Pennsylvania, claiming that the doctors who subsequently treated him at a Veterans Administration clinic negligently failed to take reasonable steps to identify and remove the substance. The court determined that once the government became aware of the properties of the dye, it was under a duty to contact all patients who had been exposed, and to warn them of its potential dangers. Without discussing whether the government's duty to warn arose before or after the plaintiff's discharge from the navy, the Schwartz court concluded that the Feres bar was

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37. Id.
38. Id. at 540. The dye, known as unbrathor, was used on Schwartz in 1944, before plaintiff was discharged on January 27, 1945. Id. at 537. The court noted that the grave warnings of the drug's dangers had been circulating in the medical community since the 1930's, and that its carcinogenic properties were confirmed in the 1940's. Id. at 540. "Long before 1957, when the ravages of the disease had made necessary the radical surgery upon the plaintiff, the Government doctors . . . should have been aware of the dangers of the drug." Id.
39. Id. at 539.
40. Id. at 540.
41. Id. In spite of the fact that the complaint alleged only a negligent failure to discover the substance and remove it, the court imposed upon the government an affirmative duty to warn:

The negligence here is not in its installation, but rather in not having affirmatively sought out those who had been endangered after there was knowledge of the danger in order to warn them that in the suppos-
edly innocent treatment there had now been found to lurk the risk of devastating injury.

42. 230 F. Supp. at 540. Although the court concluded that the government knew of the dangers of unbrathor while the plaintiff was still in the service, it did not discuss whether Feres might bar an action based on the negligent failure to warn if the duty arose while the serviceman was on active duty. To the extent that knowledge of the dangers while the plaintiff was in service also means that the duty to warn arises in-service, the Schwartz case has been overruled by Heilman v. United States, 731 F.2d 1104 (3rd Cir. 1984). This exact question remains unanswered, however, because the Third Circuit did not refer to Schwartz at any point in the Heilman opinion. For a discussion of Heilman on
inapplicable.\textsuperscript{43}

The United States District Court for the District of Columbia also permitted a serviceman to bring suit against the United States in \textit{Thornwell v. United States}.\textsuperscript{44} In \textit{Thornwell}, a former serviceman sought recovery for injuries sustained when the army subjected him to harsh interrogation techniques that included the experimental use of LSD.\textsuperscript{45} Thornwell alleged that the government intentionally harmed him while he was on active duty, and then negligently failed to provide him with follow up treatment, examinations, and supervision after he was discharged from the military.\textsuperscript{46}

The court held that Thornwell had stated a valid claim against the government under the FTCA, and was not barred by \textit{Feres}.\textsuperscript{47} The court distinguished this case from those in which the plaintiff alleged "a mere continuing negligent omission"\textsuperscript{48} on the ground that Thornwell alleged that the government committed an intentional tort while he was in the service and a separate negligent act after discharge.\textsuperscript{49} The court reached the issue of when a duty to warn arises, see infra notes 101-05 and accompanying text.

\textsuperscript{43} Schwartz, 230 F. Supp. at 540. Because the court had the rare opportunity to go to the merits of the case, it ruled on the question of damages. \textit{Id.} at 542-43. In allowing compensation in excess of the veteran's benefits to which plaintiff was entitled, the Schwartz court provided future plaintiffs with an indication as to what factors might be considered in making an award. \textit{Id.} at 542-43. The court allowed damages for past and future medical expenses and loss of income, but allowed the government a credit for past and future disability payments to the plaintiff. \textit{Id.}

\textsuperscript{44} 471 F. Supp. 344 (D.D.C. 1979).

\textsuperscript{45} \textit{Id.} at 346. Judge Richey characterized Thornwell's ordeal as "a brutal and shameless scheme of human experimentation" and chastised the government officials who, for 16 years, "successfully barred him from discovering the cause of the mental anguish which has shattered his life." \textit{Id.}

\textsuperscript{46} \textit{Id.} at 349. Although in Thornwell, as in Schwartz, the plaintiff never alleged a negligent failure to warn, subsequent courts have cited Thornwell as authority for allowing recovery in failure to warn cases. See, e.g., Everett v. United States, 492 F. Supp. 318, 325 (S.D. Ohio 1980). For a discussion of Everett, see infra notes 55-61 and accompanying text.

\textsuperscript{47} Thornwell, 471 F. Supp. at 349. In reaching this conclusion, the court relied to a great extent on Schwartz. \textit{Id.} at 352 (citing Schwartz, 230 F. Supp. at 540). The court was careful to point out that the injuries for which the plaintiff could recover had to be apportioned since he could recover only to the extent that the defendant's postdischarge negligence aggravated or prolonged his condition. \textit{Id.} at 353. Implicit in the court's reasoning is the notion that to hold otherwise would be contrary to the basis tort requirement of proximate cause in negligence, since the government could not be liable for those injuries arising out of any tortious conduct occurring while the plaintiff was still on active duty. \textit{Id.} (citing Prosser, \textit{Handbook of the Law of Torts} § 52 (4th ed. 1971)).

\textsuperscript{48} 471 F. Supp. at 351. For a discussion of those cases denying recovery on a continuous tort analysis, see infra notes 76-105 and accompanying text.

\textsuperscript{49} By focusing on the intentional-negligent distinction, the court circumvented \textit{Feres}, relying on the difference in the two theories of recovery to indicate that the government committed two separate torts, the first in-service and barred by \textit{Feres}, and the second postdischarge and actionable under the FTCA.
sioned that "[j]ike the plaintiff in Brown, Mr. Thornwell was civilian at the time the defendants allegedly failed to provide him with adequate care and treatment, and thus, under Brown, he has stated elements of [a] valid claim."\textsuperscript{50} Moreover, the court stated that allowing recovery for these postdischarge injuries was completely consistent with the rationale underly ing the \textit{Feres} decision.\textsuperscript{51}

Although the \textit{Thornwell} court expressly relied on \textit{Brown} in its holding, in dictum it summarized the relevant precedent in the duty to warn area, asserting that there were three separate categories of personal injury cases which involved postdischarge negligence.\textsuperscript{52} The court stated:

In the first case, the military performs separate negligent acts (i.e., two improper operations), one before, and one after, discharge: \textit{United States v. Brown} and \textit{Hungerford v. United States} both clearly indicate that the injured veteran may recover for the later act. In the second case, a single negligent act occurs and its effects linger after discharge; \textit{Feres v. United States} holds that, under some circumstances, this one act is subject to intramilitary immunity. Third, the military may commit an intentional act and then negligently fail to protect a soldier turned civilian from the dire consequences which will flow from the

\textit{Id.} The \textit{Thornwell} court distinguished its case from one in which there is "a mere act of negligence which takes place while the plaintiff is on active duty and which then remains uncorrected after discharge . . . ." \textit{Id.}

In support of this distinction, the court cited \textit{Henning v. United States}, 446 F.2d 774, 777 (3d Cir. 1971), \textit{cert. denied}, 404 U.S. 1016 (1972). In \textit{Henning}, plaintiff brought an action against the government for negligently misreading his x-rays while he was in the service and failure to advise him of his tubercular condition after his discharge. \textit{Id.} at 775, 777. \textit{Thornwell}'s reliance on \textit{Henning} in support of the "continuous tort" distinction was erroneous as, in \textit{Henning}, the Third Circuit held that any duty to warn begins and ends at the time the government knew or should have known about the danger. \textit{Id.} at 778. Thus, the \textit{Henning} court did not recognize the concept of a "continuous tort." \textit{Id.} \textit{Accord Heilman v. United States}, 731 F.2d 1104 (3d Cir. 1984). For a discussion of the Third Circuit's position on this issue, see infra note 99.

\textsuperscript{50} \textit{Thornwell}, 471 F. Supp. at 350. According to the \textit{Thornwell} court, this case fell squarely within \textit{Brown} because the plaintiff, in alleging a postdischarge negligent failure to warn, demonstrated that the government committed a tortious act subsequent to his discharge. \textit{Id.} For a discussion of the facts of \textit{Brown}, see supra notes 22-26 and accompanying text.

\textsuperscript{51} 417 F. Supp. at 350. The court advanced several reasons for permitting servicemen to recover for postdischarge injuries: first, since the plaintiff is a civilian at the time of the alleged wrongful act, there can be no detrimental effect on military discipline; second, because the distinctly federal relationship has ceased to exist, judicial action does not interfere with what may have been a political question; and third, because the possibility of alternative compensation is more remote for veterans than it is for servicemen, the only recovery available to veterans may be in the courts. \textit{Id.} at 350-51. For a discussion of this aspect of the \textit{Feres} decision, see supra notes 18-21 and accompanying text.

\textsuperscript{52} 417 F. Supp. at 352.
original wrong.\textsuperscript{58}

Although the \textit{Thornwell} court’s holding addressed only the third category of cases, this dictum has been the subject of close scrutiny by subsequent courts faced with claims for postdischarge negligent failure to warn.\textsuperscript{54} For example, one year later in \textit{Everett v. United States},\textsuperscript{55} the Southern District of Ohio adopted the \textit{Thornwell} court’s approach and permitted suit to be brought against the federal government under the FTCA.\textsuperscript{56} In \textit{Everett}, the surviving spouse of a former serviceman brought an action against the government for negligently failing to warn her husband of the harmful effects of radiation to which he was exposed while on active duty.\textsuperscript{57} In rejecting the United States’ motion to dismiss, the court held that this case fell within one of the actionable categories of cases noted in \textit{Thornwell}.\textsuperscript{58} The relevant category covered those situations in which the military committed an intentional act and then negligently failed to warn a soldier of the associated risk of danger subsequent to discharge.\textsuperscript{59} In \textit{Everett}, the court seized on the language in \textit{Thornwell} that where the plaintiff alleges the government committed an intentional tort in-service and a postdischarge negligent failure to warn, the latter is a separate act sufficient to form the basis of a suit against the government under the FTCA.\textsuperscript{60} The \textit{Everett} court then found that in light of the plaintiff’s allegation that the government committed a willful tort in ordering the decedent into an atomic test area, the plaintiff’s further allegation that the government was subsequently negligent in failing to warn the decedent “amount[ed] to a second and ‘distinctly separate pattern[ ] of conduct,’ for which relief can be granted.”\textsuperscript{61}

Although no other court has expressed such apparent support for the decision in \textit{Thornwell}, the First Circuit affirmed a district court’s implied approval of the intentional-negligent distinction in a \textit{per curiam} opinion in \textit{Hamilton v. United States}\textsuperscript{62}. In the district court, the plaintiff alleged that her husband was diagnosed and treated for a skin lesion

\textsuperscript{53} \textit{Id.} (citations omitted).
\textsuperscript{54} See, \textit{e.g.}, \textit{Everett}, 492 F. Supp. at 325.
\textsuperscript{55} 492 F. Supp. 318 (S.D. Ohio 1980).
\textsuperscript{56} \textit{Id.} at 322.
\textsuperscript{57} \textit{Id.} at 320. The decedent was ordered to march with other servicemen through a nuclear blast area in Yucca Flats, Nevada, less than one hour after the detonation of a nuclear device. \textit{Id.} at 319.
\textsuperscript{58} \textit{Id.} at 325. For a discussion of the different categories of servicemen’s claims as explained in \textit{Thornwell}, see \textit{supra} note 51 and accompanying text.
\textsuperscript{59} 492 F. Supp. at 325.
\textsuperscript{60} \textit{Id.} The practical effect of this approach was that \textit{Brown}, not \textit{Feres}, was controlling. For a discussion of \textit{Brown}, see \textit{supra} notes 22-26 and accompanying text. For a discussion of \textit{Feres}, see \textit{supra} notes 12-21 and accompanying text.
\textsuperscript{61} \textit{Id.} at 326 (quoting \textit{Thornwell}, 471 F. Supp. at 351).
\textsuperscript{62} 719 F.2d 1 (1st Cir. 1983), \textit{aff’d} 564 F. Supp. 1146 (D. Mass.).
while he was on active duty.\textsuperscript{63} Several years after discharge, the same condition was diagnosed as cancer.\textsuperscript{64} The plaintiff alleged that a separate cause of action which was not barred by \textit{Feres} arose at this later date.\textsuperscript{65} After a thorough analysis of \textit{Thornwell}, the Hamilton court held that its case was distinguishable from \textit{Thornwell} in that there was no evidence of an initial, intentional misdiagnosis of the disease.\textsuperscript{66} By making the case turn on this factual distinction, the court implicitly approved of the intentional-negligent distinction as enunciated in \textit{Thornwell}.

In \textit{Broudy v. United States},\textsuperscript{67} the Ninth Circuit was the first court of appeals to permit a serviceman to recover under the FTCA on a failure to warn theory. In \textit{Broudy}, the plaintiff's husband was ordered to participate in military exercises while atmospheric nuclear tests were being conducted nearby.\textsuperscript{68} Plaintiff alleged both an in-service negligent act and a postdischarge negligent failure to warn. The court held that if the plaintiff could allege and prove that the government learned of the dangers posed by exposure to nuclear testing after Major Broudy left the service,\textsuperscript{69} and that the government failed to warn him of these dangers and monitor any possible resulting injuries, her claim would be cognizable under the FTCA.\textsuperscript{70}

\begin{itemize}
  \item \textsuperscript{63} 564 F. Supp. at 1147. Although the lesion was surgically removed prior to his discharge, the removal did not prohibit the spread of cancer which ultimately led to the serviceman's death. \textit{Id}.
  \item \textsuperscript{64} \textit{Id}.
  \item \textsuperscript{65} \textit{Id}. at 1150.
  \item \textsuperscript{66} \textit{Id}. Rather, the claim was based on the negligent in-service misdiagnosis. \textit{Id}. at 1150-51.
  \item \textsuperscript{67} 661 F.2d 125 (9th Cir. 1981) (\textit{Broudy I}). \textit{See also} \textit{Broudy v. United States (Broudy II)}, 722 F.2d 566 (9th Cir. 1983) (on appeal after remand by the Ninth Circuit in \textit{Broudy I}).
  \item \textsuperscript{68} \textit{Broudy I}, 661 F.2d at 126.
  \item \textsuperscript{69} The plaintiff was aware of the possibility that the government might have known of the danger at the time the tests were conducted, as evidenced by her allegation that the purpose of the maneuvers was to "see how well combat troops could withstand . . . radioactive fall out." \textit{Id}. at 126.
  \item \textsuperscript{70} \textit{Id}. at 128-29. The court emphasized that the government's failure to warn and monitor Broudy's condition would constitute a postdischarge negligent act if the government did not know of the dangers while Broudy was still in the service. \textit{Id}. at 129.

On remand, however, the district court again granted the government's motion to dismiss. The court simply refused to recognize a duty to warn on the part of the government. \textit{See Broudy II}, 722 F.2d at 569 (discussing proceedings of the district court on remand). On appeal, in \textit{Broudy II}, the Ninth Circuit reversed the motion to dismiss and in dictum attempted to clarify what it saw as a gross misunderstanding of \textit{Broudy I} by both the government and the lower court. \textit{Broudy II}, 722 F.2d at 569-70. The court rejected the government's assertion that because Brody's injuries would not have occurred but for his military service, his claim was barred under \textit{Feres}. \textit{Id}. In so doing, the Ninth Circuit reaffirmed its holding in \textit{Broudy I} that a separate injury inflicted upon a serviceman as a result of an independent failure to warn constituted a valid cause of action even if the injury occurred while he was enlisted. \textit{Id}.

This "but for" argument asserted by the government in \textit{Broudy} previously
Servicemen bringing claims against the government under the FTCA for negligent failure to warn are frequently unsuccessful in their attempts to recover. The courts have taken at least two approaches to reach the conclusion that these actions are barred under Feres: a "but for" analysis and a "continuous tort" analysis.

Under the "but for" analysis, the court examines the serviceman's complaint to see whether the claims therein could have arisen had the plaintiff never been in the service. If the court concludes that the wrong could not have occurred "but for" the plaintiff's enlistment in the armed services, then the complaint is barred as incident to service under Feres.

In Sheehan v. United States, a former serviceman and his wife alleged that Sheehan was ordered to participate in service-related activities exposing him to dangerous levels of radiation. The complaint had been rejected by the Supreme Court of the United States. See Brooks v. United States, 337 U.S. 49 (1949). But see Sheehan v. United States, 542 F. Supp. 18 (S.D. Miss. 1982) (adopting a "but for" analysis to deny recovery), aff'd sub nom. Gaspard v. United States, 715 F.2d 1097 (5th Cir. 1983), cert. denied, 104 S. Ct. 2354 (1984).

See also Seveney v. United States, 550 F. Supp. 653 (D.R.I. 1982). In Seveney, another case involving exposure to radiation, the widow, daughter, and grandson of a deceased serviceman sued on the theory that the government negligently failed to warn the plaintiffs of the decedent's harmful exposure to radiation. Id. at 660. The plaintiffs alleged that as a result of the government's inaction, they failed to take medical precautions which they claim would have alleviated the genetic, physical, and psychological harm that both the decedent and his family suffered. Id. at 656, 660. The court allowed the plaintiffs leave to amend on the grounds that it would have been inappropriate to foreclose prematurely the plaintiff's claim based on the record, as it should be left to the plaintiffs to decide whether or not to go forward in light of the court's opinion. Id. at 661. The court stated:

The government cannot spread its cloak of tort immunity for service-related injuries to embrace and smother its embryonic liability for independent post-service acts or negligence. While the rigors, demands and disciplines of military service and of national defense may mandate curtailment of conventional civil liabilities within, or trailing directly in the wake of, the ambit and time-frame of active duty itself, such an abridgement of otherwise accepted remedies must not be permitted to expand beyond the natural boundaries which in the first instance stake out the terrain for the logical implementation of the theorem. Both the law and the profundity of the debt which we owe to our courageous veterans and to families and dependents of veterans require, in the eyes of this Court, strict judicial patrol of these boundaries. Feres and its offspring, as this Court interprets them, are not at variance with this concept, and do not in any way require a contrary result. The Feres-inspired foxhole thus is not accessible to the government as a place of refuge as against claims for tortious actions (not constituting simply a continuation of a previously-inaugurated in-service tort) allegedly occurring after the date of Seveney's honorable discharge.

Id.


72. Id. at 19. Sheehan's complaint stemmed from activities that took place
alleged that the government was negligent in failing to warn Sheehan while he was in the service and after he was discharged of the latent injury that might later manifest itself as a result of his exposure to radiation.\textsuperscript{73} Although disposing of the case on alternative grounds,\textsuperscript{74} the court recognized the "but for" theory in dictum when it stated that "a failure to warn cannot under any circumstances constitute a separate post-discharge tort, arising as it does out of the serviceman’s exposure to radiation during his military service."\textsuperscript{75}

The "continuous tort" analysis employed by courts denying recovery for a postdischarge failure to warn has presented itself in several different forms. In each of these variations, however, the court concluded that the in-service tort and the postdischarge failure to warn were so connected that together they constituted one continuous tort, which began while the plaintiff was in the service, and thus was barred under Feres.

For example, in Kelly v. United States,\textsuperscript{76} the plaintiff brought suit in the Eastern District of Pennsylvania, alleging that the government negligently failed to warn him after his discharge from the navy of the dangers of his in-service exposure to radiation.\textsuperscript{77} Examining the complaint, in Japan in 1952 during his participation in a chemical, biological and radiological school, and in Camp Desert Rock, Nevada, in 1953 where he participated in the "evaluation" of three atomic blasts. \textit{Id.}

\textsuperscript{73} \textit{Id.} at 20.

\textsuperscript{74} \textit{Id.} at 21. In dismissing the complaint, the court held that these allegations, when combined, constituted a "continuous tort" and thus were unequivocally barred by Feres. \textit{Id.} (citing Stanley v. CIA, 639 F.2d 1146 (5th Cir. 1981)). This aspect of Sheehan was affirmed on appeal \textit{sub nom.} Gaspard v. United States, 713 F.2d 1097, 1101 (5th Cir. 1983). For a discussion of the "continuing tort" theory, see infra notes 76-105 and accompanying text.

\textsuperscript{75} Sheehan, 542 F. Supp. at 21. At least one other jurisdiction similarly ruled that any harm from radiation that plaintiff suffered as a result of the government’s failure to warn related back to the original in-service exposure and was, therefore, not actionable. \textit{See} Fountain v. United States, 533 F. Supp. 698 (W.D. Ark. 1980).


Furthermore, the Supreme Court of the United States expressly rejected this approach to denying recovery under the FTCA. \textit{See} Brooks v. United States, 337 U.S. 49 (1948). There, the Court stated that "we are dealing with an accident which had nothing to do with the Brooks’ army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." \textit{Id.} at 52. Similarly, the Court in \textit{Brown} refused to apply a "but for" analysis to find Feres controlling. \textit{Brown}, 348 U.S. at 113. For further discussion of Brooks, see supra note 13.


\textsuperscript{77} \textit{Id.} at 358. The exposure occurred while Kelly and numerous other servicemen were aboard ship in the South Pacific, participating in Navy testing of
the court found that the plaintiff’s allegations were defective in that they failed to establish two separate negligent acts: one occurring in-service and the other postdischarge.\textsuperscript{78} The court rejected the plaintiff’s attempt to distinguish the in-service conduct from the alleged postdischarge tort on the grounds that one was intentional and the other was negligent.\textsuperscript{79} Moreover, the court found that the duty to warn Kelly of the danger existed at the time he was first exposed, and any subsequent failure to warn was merely a continuation of the original wrong.\textsuperscript{80}

One year later, in \textit{Lombard v. United States},\textsuperscript{81} the United States Court of Appeals for the District of Columbia Circuit invoked this same reasoning to deny a serviceman recovery under the FTCA. In \textit{Lombard}, the plaintiff-serviceman attempted to rely on the \textit{Thornwell} court’s language in order to circumvent the \textit{Feres} bar.\textsuperscript{82} Thus, the plaintiff alleged that he had been injured by the commission of two separate torts: the first consisted of intentionally exposing him to radioactive substances; the second of negligently failing to warn him after discharge of the hazards of the overexposure.\textsuperscript{83} Although this theory had been successful in nuclear weaponry. \textit{Id.} at 357. The court ruled that the complaint was properly brought under the FTCA, despite the government’s claim that admiralty rules should apply. \textit{Id.} at 357-58.

78. \textit{Id.} at 360.

79. \textit{Id.} at 361. The court noted that “[a]lthough Kelly’s claims give rise to different legal theories, for purposes of the analysis here this distinction is an artificial one, because in the final analysis the factual predicate for Kelly’s claim would be virtually the same under either theory.” \textit{Id.}

The court went on to express the need to ensure that governmental liability exists only for conduct distinct from military actions. \textit{Id.} According to the court, “military planners who have knowledge of particular risks associated with an operation may well be inhibited in their planning by the consideration that at some future date they might be obligated to reveal the details of the operations and the risks involved.” \textit{Id.}

This aspect of the court’s holding rejecting the intentional-negligent distinction was a clear repudiation of \textit{Thornwell} and \textit{Everett}, each of which recognized the validity of plaintiff’s claims based on an intentional tort exacerbated by a subsequent negligent failure to provide postdischarge warnings or treatment. For a discussion of \textit{Thornwell}, see supra notes 44-54 and accompanying text. For a discussion of \textit{Everett}, see supra notes 55-61 and accompanying text.

80. 512 F. Supp. at 361. The court’s analysis on this point is slightly confusing because, while the court states that “the defendant’s failure to warn him was but a continuation of the original wrong,” the court also cites \textit{Henning} for the proposition that a failure to warn occurs but once. \textit{Id.} (citing \textit{Henning}, 446 F.2d at 778). Under either analysis, the plaintiff’s claim cannot survive.


82. \textit{Lombard}, 690 F.2d at 220.

83. \textit{Id.} Between 1944 and 1946, while working in the army on the “Manhattan Project” in Los Alamos, Lombard allegedly handled radioactive material, resulting in both physical and genetic damage. \textit{Id.} at 216. The plaintiffs also alleged that the army compounded this injury by failing to disclose to Lombard the hazardous effects of this exposure. \textit{Id.}
Three, the Lombard court found the two cases factually distinguishable. In contrast to Thornwell, the plaintiff in Lombard admitted in his pleadings that the army knew of the dangers at the time of the exposure. Thus, the Lombard court held that the complaint merely alleged one continuous tort that had its origins in military service, rather than two separately cognizable torts, since "[t]he negligent act of 'failing to inform'...began at the time of initial exposure and continued through to the present."

In Stanley v. CIA, the Fifth Circuit, while similarly denying recovery to a plaintiff who brought an action for negligent failure to monitor his condition after discharge, did not expressly reject Thornwell. The court pointed out that Stanley failed to allege an in-service intentional tort, and thus was foreclosed from taking advantage of "the clearest way to fall within the theory of Thornwell." The court went on to state, however, that the actual basis for denying recovery consisted of evidence that the negligent failure to warn did not occur entirely after discharge.

Instead of distinguishing its case on the facts as did the Lombard and Stanley courts, the Eighth Circuit in Laswell v. Brown impliedly rejected the intentional-negligent formula set forth by Thornwell. In Laswell, the plaintiff's decedent was allegedly ordered to attend and participate in

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84. See supra notes 44-54 and accompanying text.
85. Lombard, 690 F.2d at 220.
86. Id. From this, the court reasoned that the failure to warn arose while the plaintiff was in the military and to "rule on the merits of [this] suit would embroil the Court in passing on matters of intramilitary concern, something the Supreme Court clearly sought to avoid." Id. at 221.
87. Id. (emphasis omitted). Judge Ginsburg, however, found that the Lombards were "not...sufficiently informed to state with any degree of precision whether, or the extent to which, the government's knowledge of such risks increased following Theodore Lombard's discharge from service." 690 F.2d at 230 (Ginsburg, J., concurring in part and dissenting in part). Consequently, Judge Ginsburg suggested that the court should, as did the Ninth Circuit in Broudy I, restate their claim. Id. at 230-31. For a discussion of this aspect of Broudy I, see infra notes 128-30 and accompanying text.
88. 639 F.2d 1146 (5th Cir. 1981).
89. Id. at 1153. The plaintiff volunteered for an army program supposedly designed to prepare defenses against chemical warfare, during the course of which he was given LSD without his knowledge. Id. at 1148-49.
90. Id. at 1154. The court noted that language in Thornwell indicated that an in-service negligent act will sometimes suffice, but also pointed out that the plaintiff in Everett had also relied on allegation of an intentional in-service tort. Id.
91. Id. Distinguishing Thornwell on the fact that the plaintiff there was discharged four months after he was administered the LSD, the court reasoned that since the plaintiff in Stanley remained in the service for eleven years, the failure to warn occurred at least in part while he was still in the service. Id.
93. Id. at 267.
the testing of nuclear bombs. The decedent was allegedly exposed to radiation during the United States' atmospheric nuclear weapons testing following World War II. Id. at 262. The court distinguished Brown, noting that in Laswell there was no affirmative, identifiable negligent act which occurred after discharge. Id. In support of its decision, the court invoked the same rationale as did the court in Kelly. Id. (citing Kelly, 512 F. Supp. at 356). For a discussion of the court's rationale in Kelly, see supra note 79.

Similarly, in the case of In re "Agent Orange" Product Liability Litigation, the Eastern District of New York rejected the plaintiff's claim for postdischarge failure to warn. "Agent Orange," 506 F. Supp. 762 (E.D.N.Y. 1980) (agreed with in subsequent proceedings, M.D.L. No. 381 (E.D.N.Y. Feb. 10, 1984)). The court did not reject Thornwell in toto, but rather found that the facts as alleged brought the plaintiff's claims within the second category as enunciated in Thornwell. Id. at 779. “Here, the parties do not dispute that the government’s motives in using Agent Orange in southeast Asia were valid military objectives . . . .” Id. Unlike Thornwell and Everett, the Agent Orange plaintiffs did not allege that the government committed “an intentional act and then negligently fail[ed] to protect [them].” Id. (citing Thornwell, 417 F. Supp. at 352).

There is a more recent decision which addresses the failure to warn issue, but only as a minor issue. See Punnett v. United States, No. 79-29 (E.D. Pa. Oct. 25, 1984). In Punnett, plaintiffs sought an order compelling the defendants to inform servicemen who participated in nuclear testing of potential dangers to their health. Id., slip op. at 1. Although the court addressed the question of failure to warn, the court held only that plaintiffs' complaint must be dismissed for failure to exhaust administrative remedies. Id. at 10.

98. 731 F.2d 1104 (3d Cir. 1984).

99. Id. at 1107. The Heilman court takes the analysis one step further than the other courts which have denied recovery, stating that a “'failure to warn' does not constitute a 'continuous tort' which would terminate only when the plaintiff was finally notified of his condition.” Id. In so concluding, the court relied on an earlier decision by the Third Circuit, in which the court held that any negligence in failing to warn servicemen occurs only once. Id. (citing Henning v. United States, 446 F.2d 774, 778 (3d Cir. 1971) (“While it cannot be disputed on the present record that Henning’s tubercular condition grew steadily worse after the negligence of the . . . authorities properly to read his x-rays prior to his discharge, that failure occurred but once and Henning’s disaster is due to that failure.”), cert. denied, 404 U.S. 1016 (1972)). Although the Heilman court added to the scope of the analysis by denying
contracted cancer allegedly as a result of exposure to radiation while he was in the service and later while he was employed as a civilian consultant to the navy. The complaint contended that the government was negligent in failing to warn the decedent of the dangers inherent in exposure to radiation after the decedent left the service. The court found, however, that the complaint suffered from the same defect as the complaint in Lombard: the plaintiffs alleged that the government knew of the dangers of radiation at the time of exposure. Rather than distinguishing Thornwell as had the Lombard court, however, the Heilman court rejected Thornwell "[t]o the extent that Thornwell would allow a cause of action for failure to warn, when any duty to warn arose during the course of military service." 

As the cases both allowing and denying recovery indicate, the crucial issue before the courts is whether the postdischarge failure to warn is part of a "continuous tort" or is a separate negligent act occurring entirely after discharge. In most cases, this often confusing issue

the existence of a continuing duty to warn, the same result would be reached under traditional Feres analysis. Because the court concluded that the government's duty to warn arose in-service, the plaintiff's claims were barred under Feres. Id. at 1107. The same result would be reached if the court accepted the continuing duty to warn theory, because the duty first arose while the plaintiff was in-service. For a discussion of the "continuous tort" analysis, see supra notes 76-105 and accompanying text.

100. 731 F.2d at 1105-06.
101. Id. at 1106. More specifically, this portion of the complaint alleged that subsequent to Heilman's discharge the United States was negligent in failing to 1) obtain, compile, and review records of Heilman's participation in atomic testing; 2) affirmatively seek out Heilman and warn him of the dangers of exposure; and 3) provide Heilman with the necessary follow up treatment. Id.
102. Id. at 1108.
103. Id. at 1110.
104. For a discussion of this aspect of Lombard, see infra note 127 and accompanying text.
105. 731 F.2d at 1109 n.5. For an analysis of this aspect of the court's opinion in Heilman, see infra notes 131-32 and accompanying text.
106. Because the "but for" theory has not been widely adopted, its application will not be discussed further. For a general discussion of the "but for" theory, see supra notes 71-75 and accompanying text.
107. One particularly poignant illustration of this confusion is found in Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980). In Schnurman, a plaintiff alleging that he was exposed to toxic war gases during a navy experiment was denied recovery for the injuries he sustained. Id. at 430. After a detailed discussion of the facts, the court paraphrased the plaintiff's complaint: the "plaintiff argues that two separate torts are involved in this action: the initial alleged tort resulting in plaintiff's exposure during the mustard gas tests, and a second continuing alleged tort of a failure by the government to warn plaintiff after discharge . . . or to provide follow-up treatment . . . ." Id. at 436. It is unclear from the opinion whether the plaintiff actually used the term "continu-
is brought immediately to the court’s attention by the government’s motion to dismiss or motion for summary judgment. One means by which a plaintiff can demonstrate that the failure to warn is a distinct postdischarge tort and, thus, overcome these procedural obstacles is simply to state it as such in the complaint. If the government invokes the Feres doctrine in a motion to dismiss or motion for summary judgment, the court must accept as true the allegations in the plaintiff’s complaint. However, not all courts adhere to this rule as closely as others. Courts have developed two distinct approaches to reviewing the sufficiency of the plaintiff’s complaint.

One approach is to simply examine the complaint on its face. If the court concludes that the plaintiff has alleged a postdischarge tort distinct from any in-service tortious conduct on the part of the government, then the complaint will survive the government’s motion to dismiss. For example, in Targett v. United State, the former serviceman simply preceeded each of his allegations of misconduct with the phrase “subsequent to discharge.” On the government’s motion to dismiss, the Targett court held that the claim was not barred by the Feres doctrine because it was based entirely on alleged postservice negligence and not upon a continuation of any alleged in-service tortious conduct.

Some courts, however, flatly reject the proposition that a plaintiff’s claim should go forward simply because he is capable of such “artful pleading.” In contrast to Targett, in In re “Agent Orange” Product Liability Litigation, a federal district court in New York emphasized that it would not allow the Feres doctrine to be circumvented by “inventive presentation” or “artful pleading” which sought to create a postdischarge tort to describe his theory of recovery, or if this is merely an indication of the court’s conclusion that the plaintiff’s claims constituted allegations of one continuous tort. Furthermore, the court went on to use the terms “continuous tort” and “separate tort” synonymously. The court then concluded that “application of this continuing or separate tort theory to plaintiff’s case would be inconsistent both with the instant facts and with the language and rationales of Feres.” Id. at 437.

This is just one example of confusion in the area, however, and should not be singled out. As Third Circuit Judge Garth has stated, the cases in this area do “not always appear logical or consistent.” See Shearer v. United States, 723 F.2d 1102, 1108 n.1 (3d Cir. 1984) (Garth, J., dissenting).


110. Id.

111. Id. at 1235. Targett alleged, among other things, that the government failed to inform him after discharge of the hazards associated with his service-related irradiation. Id.

112. Id.


charge claim out of what was essentially a claim of continuing negligence.\textsuperscript{115} Thus, the court denied recovery.\textsuperscript{116}

IV. FAILURE TO WARN CASES: STREAMLINING THE ANALYSIS

As the existing body of caselaw in the duty to warn area indicates, "aggrieved parties have turned more and more frequently to the courts for relief and have developed more and more creative theories to circumvent the Feres bar. This ha[s] done little good for these claimants or a system of jurisprudence based on \textit{stare decisis}."\textsuperscript{117} Although this observation by Judge Adams of the Third Circuit is accurate, the role of the judiciary in bringing about this state of affairs cannot be overlooked.

When faced with a complaint by a former serviceman against the United States for negligent failure to warn, the court must decide whether the duty to warn arose while the plaintiff was still in the service or whether it arose subsequent to discharge. The answer to this inquiry is critical, because if the duty to warn arises while the plaintiff is still in the service, the government's breach is committed while the plaintiff is on active duty, and the action will be barred as incident to service under the \textit{Feres} doctrine.\textsuperscript{118} Conversely, if the duty to warn arises subsequent to discharge, the breach of that duty constitutes a separate tort, which is actionable under the Supreme Court's decision in \textit{Brown}.\textsuperscript{119} Unfortunately, courts have strayed from this basic analysis and have instead unnecessarily confused the issue by relying on labels and categories rather than conducting an extensive inquiry into this underlying legal question.

For example, in \textit{Thornwell}, the court analyzed the plaintiff's complaint for negligent failure to warn by comparing the character of the alleged in-service tort to that of the alleged postdischarge tort.\textsuperscript{120} The court concluded that the postdischarge failure to warn was not a continuation of the in-service tort committed by the government, looking only at the fact that the first tort was intentional and the second was negligent.\textsuperscript{121} This intentional-negligent distinction, which points solely to the characterization of the torts, was enough to convince the \textit{Thornwell} court that the latter negligence was a completely separate wrong.\textsuperscript{122} It is submitted that by allowing the case to turn on this intentional-negli-

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 779.
\item \textsuperscript{116} \textit{Id.} at 778-79.
\item \textsuperscript{117} \textit{Heilman}, 731 F.2d at 1112-13 (Adams, J., concurring).
\item \textsuperscript{118} For a discussion of \textit{Feres}, see \textit{supra} notes 12-21 and accompanying text.
\item \textsuperscript{119} For a discussion of \textit{Brown}, see \textit{supra} notes 22-26 and accompanying text.
\item \textsuperscript{120} For a discussion of \textit{Thornwell}, see \textit{supra} notes 44-54 and accompanying text.
\item \textsuperscript{121} \textit{Thornwell}, 471 F. Supp. at 351.
\item \textsuperscript{122} \textit{Id.} Having decided that the postdischarge negligent failure to warn was not a part of the in-service intentional tort, the court concluded that the action was not barred by \textit{Feres} as incident to service. \textit{Id.}.
\end{itemize}
gent distinction, the Thornwell court glossed over the essential inquiry of when the government's duty to warn arose.

At least one district court, in Everett, found this intentional-negligent formula to be an attractive solution to a difficult question, but at the same time realized the distinction's inherent weaknesses, and purported to include language in the opinion that would support recovery independent of Thornwell. Thus, while the Everett court stated that it was "persuaded by the thoughtful opinion . . . in Thornwell," it was careful to append a discussion of the fact that the plaintiff was seeking damages for the government's failure to warn him solely during the period subsequent to his discharge. Although the fact that the plaintiff only sought damages for the government's postdischarge failure to warn did not compel the court to concentrate on the crucial question of when the duty to warn arose, it is submitted that this discussion indicates the court's unwillingness to rest recovery entirely on the intentional-negligent distinction.

In addition to Everett, other courts relying on the intentional-negligent distinction as a method of analysis have demonstrated a reluctance to do so unequivocally. It is suggested that Everett and similar decisions indicate that the authority of Thornwell as an approach to recovery has been seriously eroded. Despite Thornwell's questionable precedential value in other jurisdictions, the Lombard court, when faced with an opportunity to overrule Thornwell, chose instead to distinguish its case on the facts. The Lombard opinion, however, contains indications that the circuit court disapproved of Thornwell. It is submitted that the District of Columbia Circuit, if presented with a case that is factually indistinguishable from Thornwell, would reject the intentional-negligent

123. The court did mention that the complaint alleged that the negligent act occurred entirely after the plaintiff was discharged, but relied on the intentional-negligent distinction to reach this conclusion. Id. It is submitted that this reliance was misplaced. See supra and infra notes 117-132 and accompanying text.


125. The court's unwillingness to base its decision solely on the Thornwell approach was further evidenced by the court's statement that it would allow the complaint to go forward: "[P]articularly in view of plaintiff's . . . allegations that the act of ordering the decedent into the atomic test area for 'experimentation' was, inter alia, a willful tort, the subsequent claim that the defendant was negligent in failing to warn the decedent" constituted a separate tort. Id. at 326 (emphasis added).

126. In Stanley, the Fifth Circuit expressed only a tenuous acceptance of the intentional-negligent distinction. Stanley, 639 F.2d at 1154. Although the court discussed the Thornwell approach, it went on to analyze when the duty to warn arose: "[E]ven if the Thornwell court is correct in its conclusion that a mere failure to provide information is a separate actionable tort, we are not persuaded that the negligent failure to warn in Stanley's case occurred entirely after discharge." Id. Thus, the court acknowledged that the intentional-negligent distinction is an insufficient basis on which to either deny or allow recovery, emphasizing the need to discover when the duty to warn arose.
As other courts have shown, however, the demise of the intentional-negligent formulation of Thornwell does not undermine a plaintiff’s ability to successfully bring an action against the government for negligent failure to warn. These courts have dispensed with Thornwell and, instead, have identified and addressed the issue of when the duty to warn arose. As the Ninth Circuit illustrated in Broudy, a court can firmly permit a plaintiff’s claim to go forward without straying from an analysis of basic tort principles. Rather than relying upon labels or categories of torts, the Broudy court focused immediately on the pertinent issue of when the government learned of the danger. Because the plaintiff’s complaint was ambiguous on this point, the court granted the plaintiff leave to amend to permit him to specify in his pleadings when the government learned of the dangers, thereby identifying when the duty to warn arose. It is suggested that the court, in resolving the issue in this manner, adopted a straightforward, logical approach for handling an ambiguous complaint. The court refused to be distracted by these ambiguities, and instead properly seized on the pivotal question in Feres cases: whether the government’s negligent failure to warn occurred entirely after the plaintiff terminated his relationship with the military.

In other cases, this straightforward approach has compelled courts to grant the government’s motions to dismiss or motions for summary judgment. In Heilman, the Third Circuit was presented with a complaint in which the plaintiff actually alleged that the government knew of the dangers at the time of the in-service tort. Thus, there was no question that the government’s duty to warn arose in-service and therefore that the action was barred under Feres.

127. For example, in a footnote to its statement that Thornwell is distinguishable, the Lombard court stated, “[i]n addition, at least one other circuit has determined that the decision in Thornwell was . . . incorrectly decided.” Lombard, 690 F.2d at 220 n.10 (emphasis added). It is submitted that the Lombard court was referring to jurisdictions in addition to its own which overruled Thornwell on the grounds that it was inconsistent with Feres. It is suggested that this language indicates that when faced with the need to do so, the District of Columbia Circuit will squarely overrule Thornwell.


129. The court impliedly concluded that the duty to warn arises at the time the government learned of the danger. Id. at 570. It is submitted that this analysis is accurate as a matter of tort law. See supra note 31. Cf. Prosser and Keeton, supra note 7, § 99, at 697 (in the context of strict product liability, no liability attaches without showing that the defendant knew or should have known of the danger about which he failed to warn).

130. 722 F.2d at 568.

131. Heilman, 731 F.2d at 1108. See also Lombard v. United States, 690 F.2d 215, 220 (D.C. Cir. 1982).

The Fifth Circuit has also focused on the appropriate question of when the duty to warn arose. See Stanley, 639 F.2d at 1154. In this case, however, the complaint did not allege that the government knew of the dangers at the time of the in-service tort. Rather, the court had to decide at what point in time the
In reaching this conclusion, not only did the Heilman court focus on the correct question, but it also analyzed Thornwell and Everett in order to set forth the Third Circuit’s position on the intentional-negligent distinction. The Heilman court’s position can be summarized as follows: when a plaintiff alleges that the government committed an intentional tort, the plaintiff implicitly alleges that at that time the government knew of the dangers to which he was exposed. Thus, the duty to warn arose while the plaintiff was in the service and the action for failure to warn is barred by Feres. This construction of Heilman is supported by the court’s statement that “[t]o the extent that Thornwell would allow a cause of action for failure to warn, when any duty to warn arose in the course of military service, we decline to follow it.”

It is further suggested that the court’s decision to set forth its position on the possible interpretations of Thornwell constitutes a clear example of how courts should attempt to remove labels and refrain from putting cases into neat, yet meaningless, categories. Although the Heilman court’s analysis is properly considered dictum, it is submitted that in the context of duty-to-warn cases courts should take advantage of every opportunity to clarify the law in their jurisdiction. Only then will the existing body of confusing caselaw begin to be replaced with opinions that offer guidance not only to lower courts but also to plaintiffs attempting to recover.

Although the straightforward approach taken by courts such as Broudy and Heilman will result in more thoughtful opinions with sound precedential value, it has presented its own set of problems for potential plaintiffs. Courts which focus on the question of when the duty to warn arose will be reading the plaintiff’s complaint with this inquiry in mind. Consequently, plaintiffs must frame their complaints carefully in order to avoid alleging facts that could be misunderstood as an allegation that the duty to warn arose in-service. It is suggested, however, that the plaintiff should not engage in “artful pleading”; a plaintiff faced with a motion to dismiss should not be able to withstand the motion by artful pleading if the underlying cause of action is nonmeritorious. Rather, if the plaintiff is unclear as to when the duty to warn arose, he should attempt to obtain as much information as possible from the government.

negligent failure to warn took place. Id. According to the court, its case was distinguishable from Thornwell on the ground that Thornwell was discharged four months after the government’s in-service tort was committed, while Stanley remained in the service for 11 years after the government’s initial tort against him. Id. Apparently, the court reasoned that the duty to warn could not have arisen in the course of 4 months but it would certainly arise over the course of 11 years. It is submitted that the court’s reliance on this distinction was erroneous, because the factual question of when the duty to warn actually arose was never directly resolved.

132. Heilman, 731 F.2d at 1109 n.5.
133. For a discussion of those courts criticizing the use of “artful pleading” to circumvent the Feres doctrine, see supra notes 113-16 and accompanying text.
This will enable the plaintiff to frame his complaint accurately, avoiding the possibility that a lack of information or the inclusion of misinformation will lead the court to conclude on the face of the complaint that the government's duty to warn the plaintiff arose in-service. Empirically, obtaining this information can present a serious obstacle for plaintiffs given the secretive nature of the context in which many of these injuries to servicemen are incurred.134

V. Conclusion

Plaintiffs can prevail within the present judicial framework without devising clever theories. So long as a plaintiff can demonstrate that the government's failure to warn arose subsequent to discharge, the complaint will survive the government's motion to dismiss or motion for summary judgment based on the Feres doctrine. If the duty to warn in fact arose in-service, then no amount of creativity on the part of the plaintiff or leniency on the part of the courts should result in circumvention of the Feres doctrine.

Thus, it is imperative that the court focus on those aspects of the plaintiff's complaint which are relevant to the disposition of the case brought under the failure to warn theory. Furthermore, courts, particularly at the appellate level, should attempt to clarify their position on the approaches set forth by other courts such as Thornwell.

Not all courts, however, are confident that the courts are the appropriate forum for this transition. According to Judge Adams of the Third Circuit,

a system must be developed by which those who have suffered for their county can be compensated. However, this responsibility under our form of government belongs not to the judiciary, but the legislature. . . . [I]t would appear most appropriate for Congress to consider legislation that shifts the cost of defending our country to society as a whole and away from veterans and their families.135

It is submitted that a legislative response is in order, but this hypo-

134. The government is in the best position to determine at what point in time the duty to warn arose because it possesses the information concerning its knowledge of the damages at the time of the in-service tort. Legally, this presents a situation where it may be appropriate to put the burden of production on the government. Ironically, however, if the government could prove that it knew of the dangers to which it was exposing plaintiff while he was in-service, the duty to warn would have arisen in-service and plaintiff's claim would be barred.

135. Heilman, 731 F.2d at 1113 (Adams, J., concurring).
theoretical alternative cannot be relied upon prematurely. Today, the burden still remains upon the judiciary.136

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136. In the future, the need for this litigation may be unnecessary if the government gives the warnings that plaintiffs claim they have negligently failed to provide. For example, in Punnett, the government presented the court with a significant amount of information demonstrating that the Defense Nuclear Agency “is making a concerted effort to contact atomic vets, supply them with relevant information, and encourage follow-up medical exams in Veterans Administration hospitals.” Punnett v. United States, No. 79-29, slip op. at 5 (E.D. Pa. Oct. 25, 1984). It is submitted that the government’s efforts in this respect will serve to alleviate the substantial burden which presently rests on the judiciary.