ATOMIC BOMB TESTING AND THE WARNER AMENDMENT: A VIOLATION OF THE SEPARATION OF POWERS

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Abstract: Hundreds of thousands of American soldiers and civilians were exposed to radiation during atmospheric tests of atomic bombs between 1946 and 1963. An undetermined number of them are now ill or dead from diseases traceable to that exposure. In the early 1980s, some of the soldiers and civilians, or their survivors, brought damage suits against the private contractors that had helped the United States government carry out the tests. In 1984, Congress interfered with the judicial process by passing the Warner Amendment, which retroactively provided sovereign immunity to the contractors and required dismissal of the suits. Professor Fletcher shows that the Warner Amendment was passed for the specific purpose of requiring dismissal of the suits, thereby protecting the government and its contractors from the legal consequences of acts long since completed. Professor Fletcher then argues that the Warner Amendment's intrusion into the judicial process violates the Separation of Powers.

This is a story of irresponsibility, deceit, and betrayal. It begins shortly after World War II, in 1946, when the United States tested two atomic bombs at Bikini Atoll in the Marshall Islands. The atmospheric testing of atomic weapons went on intermittently for the next seventeen years, both in the Pacific and in Nevada. The last American atmospheric testing was performed in 1963 at the Nevada Test Site northwest of Las Vegas. During this testing, hundreds of thousands of active duty servicemen were exposed to significant doses of radiation. Over one hundred thousand more civilians downwind from the

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1. Estimates of the exact number vary. The United States Defense Department estimates that 210,000 soldiers participated in the tests. The National Association of Atomic Veterans estimates the figure at between 250,000 and 400,000. H. WesserMAN & N. SOlOMON, KILLING OUR OWN: THE DISASTER OF AMERICA'S EXPERIENCE WITH ATOMIC RADIATION 303 n.12 (1982).
Nevada tests were exposed to significant radiation. An undetermined number of those people are now ill or dead from radiation-induced diseases traceable to that exposure.

The United States government is immune from suit by those who were soldiers at the time of their exposure under the sovereign immunity-based doctrine of *Feres v. United States*, and is significantly protected against suits by exposed civilians under the sovereign immunity-based “discretionary function” exception to the Federal Tort Claims Act. But the government has been significantly assisted in performing these tests by a number of private contractors that did not have the sovereign immunity-based defenses of the government. Those contractors include Lawrence Livermore Laboratory and Los Alamos Laboratory, both run by the University of California; Sandia Laboratory, a subsidiary of American Telephone and Telegraph; and Reynolds Electrical and Engineering Company. The government and the contractors early recognized that the contractors might be sued for their actions during the testing program. They therefore entered into indemnification contracts under which the United States would reimburse the contractors for any attorneys’ fees and any judgments against them in suits arising out of the atomic weapons testing.

Beginning in the early 1980s, a number of lawsuits were filed against these private contractors. Rather than defend the suits on the merits—by arguing, for example, that they had acted properly given what was known about radiation at the time of the tests, or that the illness and death had not been caused by radiation—the contractors, assisted by the Reagan Administration, sought help from the Congress. Their first attempt was rebuffed when, after hearings, a subcommittee of the House Judiciary Committee found that the statute they sought would be unconstitutional. The next year, Senator Warner of Virginia, at the request of the administration, introduced the statute as a rider to the defense appropriation bill. It passed without hearing or publicity, and was signed into law by President Reagan in 1984.

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7. *See infra* text accompanying notes 100-115.
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The statute, commonly called the “Warner Amendment,” allowed the United States government to be substituted as a defendant, in place of the private contractors, in pending suits arising out of the atomic weapons testing program. Once the government replaced the contractors, it asserted its sovereign immunity defenses and obtained dismissal of the suits. The Warner Amendment thus short-circuited the pending suits and retroactively immunized the contractors from the consequences of their conduct. Two federal Circuit Courts have held that the Warner Amendment is constitutional, and the Supreme Court has denied certiorari in the one case in which it was sought. Several attempts have been made to repeal the Warner Amendment. None has yet been successful.

In the materials that follow, I allow several of the victims to speak for themselves in telling the stories of what happened to them. I also tell in detail the story that led to the adoption of the Warner Amendment. My ultimate conclusion is a legal one—that Congress violated the separation of powers in passing the amendment. But a proper understanding of the Warner Amendment, and the reasons why it violates the separation of powers, cannot be separated from the tales of those who have been injured or killed by the atomic weapons, from the motivations of the contractors and the government who today refuse to acknowledge either the extent of the victims’ injuries or their role in causing those injuries, and from the manner in which Congress has sought to protect the contractors and the government.

I. THE TESTING

In 1946, two bombs were exploded in the Marshall Islands in the South Pacific, in a massive military exercise called, aptly, “Operation Crossroads.” Thousands of servicemen were exposed to radiation from fallout from the explosions themselves and from exposure to the water, ships, and beaches that were made radioactive by the explo-

Testing thousands of miles from the continental United States was difficult and expensive, however, and after three more Pacific tests, the government brought the tests closer to home. Beginning in 1951, most atmospheric tests of atomic bombs were conducted in the desert northwest of Las Vegas, at what has come to be known as the Nevada Test Site. Between January, 1951, and August, 1963, there were 201 “announced” tests at the Nevada test site. Testing continued offshore as well. Between April, 1951, and November, 1962, there were a total of 99 “announced” tests in the Pacific, and three more in the Atlantic.

A. The Soldiers

At a number of these tests, both in the Pacific and in Nevada, American soldiers were deliberately exposed to radiation. It is not feasible to give an exhaustive account of the testing, partly because of the scope of the narrative task and partly because governmental secrecy has so far kept much of the information out of the public domain. A sampling of the testimony of the soldiers that is now available, however, conveys much of what they went through.

Lieutenant Colonel James Dennis, a highly decorated veteran, recounted,

On March 22, 1955 ... I participated in Atomic Test Shot BEE, the detonation of a new type atomic bomb emplaced on a 500 foot tower. Three hundred other Army personnel and I were seated backs to the blast in a hip deep trench 3500 yards from the atomic explosion. . . . With eyes closed as told, on detonation of the atomic bomb, I saw the brightest light of my life from the nuclear fireball. We were told to stand immediately, turn around and observe the atomic cloud. As we turned we were hit in the face by radioactive fallout as the wind had shifted, covering us all with a thick, black, sooty radioactive dust. . . . When I looked at the atomic cloud, I knew that a faulty detonation had

13. Id. at 56.
14. Id. at 112-122.
16. Col. Dennis was awarded the Distinguished Service Cross twice, the Silver Star five times, and the Purple Heart four times. Oversight on Issues Pertaining to Veterans' Exposure to Ionizing Radiation, supra note 10, at 28 (testimony of Lt. Colonel James A. Dennis).
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occurred. . . . [T]he BEE shot was one of the most radioactive dirty atomic detonations of all US atomic tests.

Thirty minutes after the atomic detonation, I and the other 300 personnel walked to 700 yards from ground zero where we assessed equipment damage for three hours.[17] No Nevada test personnel were present to prevent our going to ground zero. . . . Neither I nor any of the other 300 personnel were equipped with film badges to measure penetrating gama [sic] radiation. No one was measuring gama [sic] radiation with a Geiger counter. More importantly, no one was measuring the alpha and beta radiation levels which are the most lethal internal radiation that is inhaled into the nose and ingested into the mouth. . . . I had to wear these same clothes the next day while participating in atomic shot ESS on March 23, 1955. Moreover, we were unable to take showers because shower facilities at Camp Desert Rock had been destroyed by windstorms.

On March 23, 1955 I participated in atomic test shot ESS, an atomic bomb detonated 67 feet underground. I and 356 other personnel observed the test . . . in the open, not in trenches, about 9000 yards from ground zero. . . . As with the BEE atomic shot, the detonation contaminated us all with radioactive dusty fallout. Again we had no protective clothing or equipment, especially respirators, nor was anyone equipped with film badges. No Desert Rock personnel monitored either penetrating gama [sic] radiation or alpha/beta emitter internal radiation. Again, shower facilities were not available at Camp Desert Rock after our three hour return bus trip.[18]

Marine Second Lieutenant Thomas Saffer participated in two tests in Nevada in 1957, “Priscilla” and “Hood.” For “Priscilla,” Saffer was positioned with his men in open trenches about two miles from the explosion of a bomb suspended beneath a balloon.

I felt an intense heat on the back of my neck. A brilliant flash accompanied the heat, and I was shocked when, with my eyes tightly closed, I could see the bones in my forearm as though I were examining a red x-ray.[19] . . . Within seconds, a thunderous rumble like the sound of

17. Col. Dennis' estimate of 700 yards in his congressional testimony was based on official government figures. He later indicated that he had gone directly to ground zero. "According to the official Defense Nuclear Agency record, we marched to 700 yards from ground zero and inspected equipment. But I walked directly to ground zero and everyone else did too. The troops were not afraid. Like me, they felt we were being cared for properly. We trusted them." Quoted in J. Lerager, In the Shadow of the Cloud 92 (1988) (footnote added).
19. The soldiers' ability to see their bones is almost certainly due to the intensity of the visible light, which penetrated and made translucent the ordinarily opaque soft tissue of the hands and arms. Colonel Darrell W. McIndoe, M.D., Director of the Armed Forces Radiobiology Research Institute of the National Naval Medical Center, testified in 1978, "I have no doubt that
thousands of stampeding cattle passed directly overhead, pounding the trench line. . . . The earth began to gyrate violently, and I could not control my body. I was thrown repeatedly from side to side and bounced helplessly off one trench wall and then off the other. . . . Within minutes, the brilliant, sunlit day became gray-black. . . . A column of dark, powdery dust from the vicinity of ground zero had been sucked up several hundred feet by the force of the blast. . . . I glanced at my right sleeve and noticed a white-gray ash about the size of a small button. . . . The ash continued to fall, and we had nowhere to go for shelter. . . .

By the time we boarded the armored personnel carriers, our green utilities looked as though they had been splattered with beige paint. . . . We were to inspect the equipment that had been placed in front of us, three hundred yards from ground zero. After an extremely rough ride, we stopped. . . . Where trucks and tanks had stood before the detonation, there was nothing. Everything had been vaporized or tossed hundreds of yards from its original position. . . . The ground felt hot beneath my feet.

[An Atomic Energy Commission field man] had driven seven miles from his position to near ground zero. . . . to recover an instrument. . . . [H]e was attired in special radex protective clothing. All his skin was covered, and he was wearing a hooded respirator. . . . He planned to retrieve the instrument, place it in a lead box, and leave the area within three minutes. . . . To his surprise, he saw a group of marines, dressed as though they were taking a casual stroll in the desert, standing in the contaminated area. . . .

Standing there with the other marine officers, dumfounded by what I was seeing, I became aware of a figure in white approaching us from the left. . . . Without uttering a word, he gestured for us to leave at once. . . . Finally, our major said, “All right, men, let’s go. We’ve seen enough.”20

Marine Sergeant Israel Torres recounted his participation in the “Hood” test.

[T]here was a big, loud blast and a very bright light appeared. . . . My trench began to cave in, and I got scared. . . . I tried to avoid getting buried, and I had moved about a foot when . . . suddenly I was buried up to my chest. . . . A strong wind hit me in the face and knocked me backward, even though I was partly buried. My head snapped back,
and my helmet went flying off behind me. . . . I managed to free my arms, and using both hands I wiped away the thick layer of dust and dirt that covered my face and eyes and looked down. . . . I shook all over and began to vomit . . . .

My platoon had been delayed in its mission, and we had to conduct our field exercise. We began to sweep the area. As we approached ground zero, I saw tanks melted down, and other heavy equipment burned to cinders. We continued sweeping for about two hours. . . . Later we were force marched to a place where trucks were waiting for us. Before boarding the vehicles, we were checked with some type of an instrument that I think was a Geiger counter. When I was checked, the thing ticked loudly, and the man who monitored me told me something that I have never forgotten. He said, "Marine, you have had it. You get in that truck over there with the other men." Before I got in the truck, my [film] badge was taken away by a young lieutenant.21

[I saw] something else horrible . . . out there in the desert after we'd been decontaminated and were in our trucks. We'd only gone a short way when one of my men said, "Jesus Christ, look at that!" I looked at where he was pointing, and what I saw horrified me. There were people in a stockade—a chain-link fence with barbed wire on top of it. . . . Their hair was falling out and their skin seemed to be peeling off. They were wearing blue denim trousers but no shirts. When we passed those people—there were ten or twelve—they tried to cover their faces with their hands. . . . Good God, it was scary.

While I was in the hospital I told my nurse what I'd seen. . . . The next day when [the doctor] looked in on me, he said, "The nurse told me a most unusual story. What about those people you say you saw at the test site in Nevada?" . . . [Torres was questioned on two occasions during the next two days. He thought that one of the questioners was a psychiatrist.]

A couple of nights later they woke me up and gave me a pill to "help you rest more comfortably." The next morning they took me to the Balboa Naval Hospital in San Diego [where four men questioned him at length]. . . . I told the story of the people behind the chain-link fence again. They told me I imagined I saw those people. I said I was telling the truth, and offered to take a lie detector test. . . . One of them called me a liar and forced a large pill down my throat. . . . I must have been kept drugged for days, because I woke up back at Camp Pendleton in the hospital. The day I left to return to my unit a doctor told me not to repeat the "bizarre" story about the people I'd seen. He said if I did, he'd see to it I was thrown out of the corps.22

21. Id. at 76-78.
22. Id. at 248-250.
Many atomic veterans and their children have suffered serious health problems.\textsuperscript{23} Lieutenant Saffer later suffered severe neuromuscular disorders of the type common to many atomic veterans.\textsuperscript{24} In the years immediately following the test, Sergeant Torres suffered from dizziness, double vision, severe headaches, muscles spasms, and back problems. He was given a medical discharge from the Marine Corps in 1963, six years after his participation in "Hood."\textsuperscript{25} Torres was diagnosed as having leukemia in 1980.\textsuperscript{26}

Dale Beaman was a boiler tender who converted salt to fresh water before and after the tests at Bikini Atoll during Operation Crossroads. He has had colon cancer, kidney surgery, migratory muscle spasms, musculoskeletal deterioration, and suffers from diabetes and hypertensive heart disease. "I don't recall feeling tired when I went in the service, but I've been tired ever since I was eighteen. I've had a lot of pain over the years and I just took it. I've suffered terrible." Mr. Beaman's son has severe musculoskeletal and connective tissue abnormalities, and is mentally retarded. His daughters have congenital joint abnormalities.\textsuperscript{27}

Pat Hinkle served on a seagoing tugboat that towed targets to Eniwetok and Bikini Atolls in 1956. After each explosion, his boat went to ground zero to take depth soundings. He was exposed to seventeen explosions during a four month period. In 1974, he was diagnosed as having cancer. He survived three operations, and died of an inoperable brain tumor in 1981. Mr. Hinkle had three daughters. All have had spinal alignment problems. One was born without a left hand.\textsuperscript{28}

\section*{B. The Civilians}

The area downwind of the Nevada Test Site is dotted with ranches and small towns, particularly in the southwest corner of Utah where

\begin{itemize}
\item \textsuperscript{23} At the time of his testimony before Congress in 1985, Colonel Dennis was suffering from cancer. He was blind in his right eye as a result of bleeding caused by the cancer. \textit{Oversight on Issues Pertaining to Veterans' Exposure to Ionizing Radiation}, \textit{supra} note 10, at 25-26. Dennis had testified at a hearing on a proposal to repeal the Warner Amendment a month earlier. At that hearing, the government conceded that Dennis had cancer, but denied that it was caused by radiation. \textit{Litigation Relating to Atomic Testing}, \textit{supra} note 10, at 129 (testimony of Deputy Assistant Attorney General Robert L. Willmore).
\item \textsuperscript{24} \textit{T. Saffer \\ & O. Kelly, supra} note 15, at 237-239.
\item \textsuperscript{25} \textit{Id.} at 250-251.
\item \textsuperscript{26} At the time Sgt. Torres was interviewed for \textit{Countdown Zero}, he was forty-six years old. "He wore leg, arm, and back braces. He had lost most of his teeth, all of his hair, and his sight was failing." \textit{T. Saffer \\ & O. Kelly, supra} note 15, at 245.
\item \textsuperscript{27} \textit{J. Lerager, supra} note 17, at 12.
\item \textsuperscript{28} \textit{Id.} at 16.
\end{itemize}
the land is less arid than in Nevada. As with the soldiers, it is not possible to give an exhaustive account of the impact of the testing on the civilian population, now commonly called the "downwinders." Two stories give a sense of what happened.

Shot Harry exploded early in the morning of May 19, 1953. Wind conditions carried a cloud containing large amounts of fallout over the towns of southwest Utah. A Public Health Service "offsite monitor," Frank Butrico, took radiation readings between 9:15 and 9:30 a.m. in the center of St. George, Utah. The readings were "offscale," and he telephoned his superior, William Johnson, back at the test site for instructions. Johnson told Butrico to wait. Butrico again called Johnson for instructions at 9:45. Johnson instructed Butrico to warn the residents to stay indoors, but neither man knew if St. George had a radio station. Butrico found the mayor of St. George, who called the nearest radio station in Cedar City, fifty miles to the north. At about 10:15 a.m., the station broadcast a warning to St. George residents to stay indoors. The warning was not addressed to other towns east of St. George. Butrico and a police officer cruised up and down a few streets and warned people they found outdoors. They drove past school children playing outdoors at recess. A significant number of people never received any warning.

On the advice of Johnson, Butrico bought new clothing in St. George and discarded his old clothing. He took "a number" of showers that afternoon and shampooed his hair repeatedly. No instruction was ever given to the residents of St. George that they should decontaminate themselves by changing clothes or showering. Butrico was instructed to give only vague statements about the amount of fallout. When asked, he responded that radioactivity was "a little above normal [but] not in the range of being harmful." Activity in St. George returned to normal by the early afternoon.

Butrico later prepared a report for Johnson concerning the public health measures taken after Shot Harry. The report did not survive in

29. H. BALL, supra note 2, at 152.
32. P. FRADKIN, supra note 30, at 15.
34. H. BALL, supra note 2, at 43-44; P. FRADKIN, supra note 30, at 18.
35. H. BALL, supra note 2, at 43-44.
the form written by Butrico. Unidentified Atomic Energy Commiss-
ion staff employees lowered Butrico's reported radiation readings and
changed the amount of time that elapsed before St. George officials
and school principals were notified.37 The revised report claimed,
Falsely, that school children were indoors when the fallout cloud
passed over St. George.38 The report concluded, in words not written
by Butrico, that the "effectiveness of the safety program was
amazing."39

The population in southern Nevada and southwestern Utah is
predominantly Mormon. As a matter of religious conviction they do
not smoke, drink alcohol, or drink coffee. Up until the atomic testing,
they generally lived remarkably long and healthy lives. After the test-
ing, many began to die of radiation-induced diseases, primarily can-
cer.40 In testimony before Congress in 1982, Gloria Gregerson
recounted what happened to the small town of Bunkerville, Nevada.

In an informal survey of my town, I located 4 families in about 50, who
did not have some type of cancer in their family. One family had seven
different people in their family with cancer, and had over a dozen mis-
carriages. . . . [W]e hardly ever heard of cancer before the testing began
but, soon after, these types of cancer became commonplace to us.41

Mrs. Gregerson recalled her own experiences:

I remember the day the nuclear testing started in Nevada. [I was ten
years old.]42 The first blast came without any warning. We were awak-
ened out of a sound sleep. . . . We lived in an old two-story home. It
broke out several of our windows and cracked our house on two sides
the full length of the house. . . . After this my parents would not let us
stay in the house. They took us, still in our pajamas, to the top of a hill
where we would watch the blast from there. We could see the flash
immediately, and a few minutes later the rumble would come up the

37. H. Ball, supra note 2, at 44.
38. Id. at 153.
39. Id. at 44.
40. For example, according to a 1979 study, childhood leukemia in high-fallout areas of
southern Utah occurred at a rate 2.44 times higher than the normal Utah childhood leukemia
rate. Lyon, Klauber, Gardner & Udall, Childhood Leukemia Associated with Fallout from
Nuclear Testing, 300 New England J. of Medicine No. 8 (1979); see also Vol. 1, Health
Effects of Low-Level Radiation, supra note 19, at 355-361 (testimony of Dr. Joseph Lyn). The
District Court in Allen, 588 F. Supp. 429-447, found that ten of twenty-four "bellwether"
plaintiffs had suffered radiation-induced cancers. See infra text accompanying notes 88-95.
Labor and Human Resources, Senate, 97th Cong., 2d Sess. 24 (1982) (testimony of Gloria
Gregerson).
42. Id. at 20.
river and bounce back and forth between the different mountain ranges.

The radioactive cloud, as it came over, was really distinct. It would usually come over our school campus between 9 and 10 in the morning. Later the Government officials would come to our school to talk to us in assemblies, but they never came until after several blasts had already been shot off. They would preface their remarks saying: "There is nothing to be alarmed about. There is nothing to hurt you, so don't worry, but wash your cars every day; wash your clothes twice before you wear them; don't eat the plants and the vegetables; be sure you wash everything off with water before you even walk on it; don't drink the local milk," yet that is the only way we had to get milk, through our cows. They just kept emphasizing one point, and that was: "Nothing to worry about. There is no danger." I remember playing under the oleander trees, and the fallout was so thick it was like snow. We liked to play under the trees and shake this fallout onto our heads and our bodies, thinking that we were playing in the snow. I remember writing my name on the car because the fallout dust was so thick. Then I would go home and eat. If my mother caught me as a young child, I would wash my hands; if not, then I would eat with the fallout on my hands.

I don't recall ever being sick in elementary school. However, within a few months after the testing started I did become ill. I began to suffer spells of nausea and headaches all the time. By the time I was 17 I had ovarian cancer, which spread to the intestines and stomach and involved 13 major surgeries. Needless to say, this meant I would never be able to bear children. Having a family was and still is the most important factor in my life. My husband and I have adopted five children. In 1970 I was diagnosed as having squamous cell carcinoma in the vagina and had more surgery. [In January, 1980] I was hospitalized and later diagnosed as having acute myelomonocytic leukemia and given 3 weeks to live. It was horrifying to suddenly have all of my hair gone and my face nothing but big blistering sores. My skin would tear if I moved wrong. I was confined to the hospital for 4 solid months. My temperature would keep going [up] ... [and] I got frostbite from the ice blankets that were used to keep my fever down. I am in remission right now [April 8, 1982], but lately I have had more problems and I am scheduled for a bone marrow transplant on April 27.

Mrs. Gregerson died of cancer the next year, at age 42.

43. Id. at 22-24.
44. H. BALL, supra note 2, at 92.
II. THE WARNER AMENDMENT

The government strenuously resisted providing compensation to veterans and civilians exposed to radiation during the atomic bomb testing. Possible avenues of redress against the government were few. Veterans could seek statutory benefits from the Veterans' Administration on the ground that their illness and injury was service-related, but until a very recent statutory enactment, atomic veterans’ claims were almost invariably denied. Even when they were granted, the statutory schedule of benefits provided far less than full compensation for the injuries they had suffered. Veterans could seek compensation for the full amount of their injuries under the Federal Tort Claims Act, not limited to the statutory benefits provided by the Veterans’ Administration, but the sovereign immunity of the government turned out to be an insuperable obstacle. Civilians could seek compensation from the government under the Federal Tort Claims Act, but sovereign immunity has similarly proved to be an insuperable obstacle. Redress against the contractors was more easily available, however, because the contractors did not share the sovereign immunity of the government, and suits against the contractors held out significant promise until defeated by the Warner Amendment.

A. Redress Against the Government

1. Veterans’ Benefits

Attempts by veterans to obtain benefits from the Veterans’ Administration on the ground that their injuries were service-related were, during the period leading up the passage of the Warner Amendment, almost entirely unavailing.45 Claims for veterans’ benefits were heard in an administrative proceeding, with no judicial review of a decision of the Veterans’ Administration.46 The veteran could present testimony from those who appear voluntarily, but had no power to sub-


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The Veterans Administration had the power to subpoena documents that would assist a veteran in making a claim, but rarely exercised it. Attorneys were prohibited, by a criminal statute, from charging more than $10.00 for assisting a veteran in seeking benefits from the Veterans Administration.

Veterans' Administration claims hearings are, in theory, informal and solicitous of the veteran. In practice, for the atomic veterans, they were complex and hostile. A new statute providing benefits for atomic veterans has just been passed, but until its passage atomic veterans' claims were routinely denied. Figures available in 1982 indicated that approximately 1800 claims for benefits had been filed by atomic veterans. Twelve had been granted. Behind those few cases in which benefits were granted lie stories of bureaucratic tangles and political pressures that should have no place in a well-run administrative system.

The case of Orville Kelly is the most well-known of those in which benefits were granted. Kelly was first denied benefits in August, 1974. He was denied again in June, 1978. He was denied a third time in April, 1979. Finally, in November, 1979, the Board of Veter-

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49. Between 1979 and 1984, the Veterans' Administration issued only five subpoenas, and "some of these may have been issued in an attempt to disprove rather than help support a claim." Walters, 589 F. Supp. at 1321.
50. 38 U.S.C.A. §§ 3404-3405 (West 1979) (amended at 38 U.S.C.A. § 3404 (West Supp. 1989)). Under the new provisions, codified at 38 U.S.C. § 3404(c)(1)-(c)(1) (West Supp. 1989), no fee can be charged for services performed before the Board of Veterans' Appeals first makes a final decision in the case; attorneys' fees may be charged for services performed thereafter, but limited to no more than 20% of the amount of "past-due benefits awarded."
51. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985) ("The process is designed to function throughout with a high degree of informality and solicitude for the claimant.").
52. "The undisputed factual evidence submitted by the plaintiffs in this case shows that both the procedures and the substance entailed in presenting [Service-Connected Death and Disability] claims to the [Veterans' Administration] are exceedingly complex." Walters, 589 F. Supp. at 1319.
55. Id. at 30-34 (Memorandum prepared by the Veterans' Administration, put into the record by Senator Orrin Hatch).
57. Id. at 170.
58. Id. at 182.
ans' Appeals reversed the denial. 59 Behind this bare narrative, however, lie years of bureaucratic maneuvering and political pressure, 60 including full-scale congressional hearings on the difficulties facing atomic veterans making claims before the Veterans' Administration. 61 Kelly died in June, 1980. After his death, his widow received statutory benefits that fell far short of full compensation for the injuries suffered. As of 1982, those benefits amounted to $562 per month for "dependency and indemnity compensation"; his child received $342 per month "to pursue an undergraduate degree." 62

2. Suits Against the Government

a. Veterans

Suits against the government to obtain full compensation have been uniformly unsuccessful because of the sovereign immunity-based doctrine of Feres v. United States, 63 under which all damage claims against the United States or its officers for compensation for injuries suffered by active duty servicemen are barred. For example, in Jaffee v. United States, 64 plaintiff Jaffee and other soldiers

were ordered by their commanding officers to stand in a field [in a 1953 test] without benefit of any protection while a nuclear device was exploded a short distance away. Even though the defendants allegedly knew they were exposing Jaffee and the other soldiers to grave risk of injury and death, they "knowingly, deliberately and recklessly disregarded this knowledge by compelling Jaffee and the other soldiers to participate in the test." . . . As a result of this exposure to radiation, Jaffee developed inoperable cancer. 65

Even while recognizing "what some might call a harsh result in our holding," 66 the Court of Appeals held that Feres barred any damage

59. Id. at 198.
60. Id. at 177-196.
61. Veterans' Claims for Disabilities from Nuclear Weapons Testing: Hearing Before the Comm. on Veterans' Affairs, Senate, 96th Cong., 1st Sess. (1979). Kelly's testimony was read into the record at the hearing by Mr. O. T. Weeks, id. at 6-9, because he was hospitalized.
62. Radiation Exposure Compensation Act of 1981—Part 2, supra note 41, at 31 (Memorandum prepared by the Veterans' Administration). The case is identified in the Veterans' Administration memorandum only as "CASE 2."
65. 663 F.2d at 1229. The Court of Appeals assumed for purposes of its ruling that the allegations were true.
66. Id. at 1228.
recovery. The Supreme Court denied certiorari.67 Other cases have produced the same result.68

The strength of the sovereign immunity-based bar protecting the government from damage judgments is not limited to what the government did, and did not do, during a soldier's tour of duty. It extends, as well, to acts and omissions of the government after a soldier has been discharged from service. In Broudy v. United States69 the Ninth Circuit in 1981 held that Feres did not protect the government from a claim for damages resulting from a post-discharge failure to warn an exposed veteran of the risk that he might develop cancer, and that a cause of action under the Federal Tort Claims Act70 was available in a case where the government failed to provide reasonable post-discharge warning.71 But what the Ninth Circuit gave with one hand, it took away with the other. Four years later, it held that the “discretionary function” exception to the Federal Tort Claims Act72 protected the government’s failure to warn.73

b. Civilians

Civilians have been equally unsuccessful in obtaining compensation from the government. Two cases illustrate the difficulties civilian plaintiffs have faced. The first was a damage suit for the loss of sheep. During the spring and early summer of 1953, a series of eleven atmospheric explosions called “Upshot-Knothole” was conducted at the Nevada Test Site. At the time of the explosions, 11,710 sheep were

68. See, e.g., Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981) (holding that Feres does not bar suit for damages brought by wife and son for miscarriages and chromosomal damage), rev'd, 715 F.2d 96, 97 (3d Cir. 1983) (“We are forced once again to decide a case where ‘we sense the injustice . . . of [the] result’ but where nevertheless we have no legal authority, as an intermediate appellate court, to decide the cases differently.”), cert. denied, 465 U.S. 1023 (1984); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982) (veteran, spouse, and children barred from suing for exposure while on active duty and for failure to warn after discharge), cert. denied, 465 U.S. 1023 (1984); Monaco v. United States, 661 F.2d 129, 134 (9th Cir. 1981) (“If developed doctrine did not bind us we might be inclined to make an exception in a case such as this. Unfortunately, we are bound . . . .”), cert. denied, 456 U.S. 989 (1982); Kelly v. United States, 512 F. Supp. 356 (E.D. Pa. 1981) (veteran barred from suing for exposure while on active duty); Fountain v. United States, 533 F. Supp. 698 (W.D. Ark. 1981) (veteran and spouse barred from suing); Everett v. United States, 492 F. Supp. 318, 325 (S.D. Ohio 1980) (surviving spouse barred from suing except on post-discharge failure to warn).
71. 661 F.2d at 128-129.
73. In re Consolidated United States Atmospheric Testing Litig., 820 F.2d 982, 999 (9th Cir. 1987) (Broudy was one of the consolidated cases), cert. denied, 108 S. Ct. 1076 (1988).
grazing in an area north and east of the test site. Of these sheep, 1,420 (or twelve percent) of the lambing ewes, and 2,970 (or twenty five percent) of the new lambs died.\textsuperscript{74}

At hearings before Congress in 1979, Mr. Kern Bulloch, one of the sheepherders, described his experience:

We were on the trail home from our Nevada range. . . . [The sheep] were grazing, and these airplanes came over. . . . [A]nd all at once this bomb dropped . . . . And, of course, the cloud came up and drifted over us. . . . [I]t was a little bit later that day that some of the Army personnel that had four-by-fours and jeeps . . . came through there . . . and they said, “Boy, you guys are really in a hot spot. [You better get out of here]”. . . .

Well, we had to herd the sheep. We had to move as fast as they walked . . . and that’s not very fast. . . . [W]e trailed into Cedar City [Utah]—I guess it was 200 and some odd miles . . . and when we got into our lambing yards . . . we started to los[e] the sheep. . . . [T]he lambs were born with little legs, kind of pot-bellied. As I remember some of them didn’t have any wool, kind of skin instead of wool. . . . [W]e just started to losing [sic] so many lambs that my father . . . just about went crazy. He had never seen anything like it before. Neither had I; neither had anybody else.\textsuperscript{75}

Dr. Stephen Brower, the Iron County Agricultural Agent living in Cedar City, recounted:

[I] was present at the time the first AEC veterinarians and personnel arrived. . . . [In February I wrote to the Governor of Utah] that the AEC didn’t ignore the data, they covered it up. There was a specific policy. . . .

The policy was stated to me originally by the . . . Chief of the Biological Branch of the Division of Biological Medicine of the AEC, Dr. Paul Pearson. Dr. Pearson told me . . . that the AEC could under no circumstances afford to have a claim established against them and have that precedent set.\textsuperscript{76} . . . by the end of 1954 they had a battery of people coming through telling us that the levels of radiation could not have caused the damage . . . .

. . . During the first month or two of the initial investigation, the scientists who were there were . . . saying and specifying this was radia-

\textsuperscript{74} Bulloch v. United States, 95 F.R.D. 123, 129 (D. Utah 1982), rev’d, 721 F.2d 713 (10th Cir. 1983).

\textsuperscript{75} Volume I, Health Effects of Low-Level Radiation, supra note 19, at 227-28 (testimony of Kern Bulloch).

\textsuperscript{76} P. Fradkin, supra note 30, at 152, writes, “Brower’s account of the conversation has been given publicly four times since early 1979. Three of the times Brower was under oath. Pearson later said in a sworn deposition that he had no recollection of the conversation, to which Brower replied at the Allen trial, ‘I’m not surprised.’”
tion damage. . . . [these scientists] were not allowed to testify [in the Bulloch case] . . . .

. . . They were taken off the case. In fact, Dr. Thompsett, who said he would give me a copy of the report and provide a copy of his report to the livestock men indicating the readings and the appearance of the animals definitely were similar to an experimental radiation damage done on animals, told me later that his report was picked up—even his own personal copy—and he was told to rewrite it and eliminate any reference to speculation about radiation damage or effects.77

Six sheep owners, including Bulloch, filed suit in federal District Court in Utah against the government for damages in 1955.78 The District Judge found that recovery was not barred by the discretionary function exception to the Federal Tort Claims Act,79 and set the case for trial. At trial, the government’s witnesses denied that the death of the sheep was due to radiation. The District Judge found plaintiffs’ account of the cause unpersuasive and held for the government.80 So things rested until 1979, when testimony before a joint congressional committee brought out additional facts concerning radiation from atomic testing and its effects, prompting the plaintiffs to make further

77. Volume I, Health Effects of Low-Level Radiation, supra note 19, at 232-233, 238 (testimony of Dr. Stephen Brower). For Dr. Brower’s formal written memorandum to the same effect, see id. at 234-237.
80. 145 F. Supp. 824, 827 (D. Utah 1956) (“Of the three professional men who originally suggested radiation damage, two, upon further consideration, questioned their original diagnosis. None of them claimed to be particularly qualified in the field of radiation. On the other hand, some of the best informed experts in the country expressed considered and convincing judgment that radiation damage could not possibly have been a cause or contributing cause.”), vacated, 95 F.R.D. 123 (D. Utah 1982), rev’d, 721 F.2d 713 (10th Cir. 1983).
investigations into the sheep deaths. In 1981, the plaintiffs moved to vacate the earlier judgment for fraud on the court.

In August, 1982, the same District Judge filed a twenty-one page opinion analyzing in detail the testimony given at the trial in the 1950s. He compared it to the facts now available about those same events and vacated the earlier judgment. He concluded that "one or more" of the government's attorneys knowingly participated in a program for the concealment from the Court of facts which he or they knew or in good conscience should have known the Court was entitled to have placed before it in order properly to rule upon the determinative issues of the case. It appears by clear and convincing evidence that representations made as the result of the conduct of government agents acting in the course of their employment were intentionally false or deceptive; that improper but successful attempts to pressure witnesses not to testify as to their real opinions, or to unduly discount their qualifications and opinions were applied; that a vital report was intentionally withheld and information in another report was presented in such a manner as to be deceitful, misleading, or only half true; that interrogatories were deceptively answered; that there was deliberate concealment of significant facts with reference to the possible effects of radiation upon the plaintiffs' sheep . . . .


The committee report that resulted from the hearings is STAFF OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE AND SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, 96TH CONG., 2D SESS., "THE FORGOTTEN GUINEA PIGS": A REPORT ON HEALTH EFFECTS OF LOW-LEVEL RADIATION SUSTAINED AS A RESULT OF THE NUCLEAR WEAPONS TESTING PROGRAM CONDUCTED BY THE UNITED STATES GOVERNMENT (1980). The report concluded:

[B]ecause the agency charged with developing nuclear weapons was more concerned with that goal than with its other mission of protecting the public from injury, the government totally failed to provide adequate protection for the residents of the area. . . . In addition, the government's program for monitoring the health effects of the tests was inadequate and, more disturbingly, all evidence suggesting that radiation was having harmful effects, be it on the sheep or the people, was not only disregarded but actually suppressed.

The greatest irony of our atmospheric nuclear testing program is that the only victims of U.S. nuclear arms since World War II have been our own people.

Id. at 37.

82. 95 F.R.D. at 131.
84. Id. at 142.
85. Id. at 144.
The Court of Appeals for the Tenth Circuit reversed, over a strong dissent. The Supreme Court denied certiorari, over the dissents of Justices White, Blackmun, and O'Connor.

The second case was a class action damage suit brought by civilian downwinders in federal District Court in Utah. The District Judge wrote a two-hundred sixteen page opinion in which he held that the discretionary function exception to the Federal Tort Claims Act did not provide immunity to the government. The decision of the government “to try to stabilize the restless balance of world power . . . [by] open air atomic testing” was discretionary and protected. But “[a]t the operational level employees of the United States had a duty to prepare and conduct tests carefully with full regard for public safety,” and violations of the duty of care were not protected by the discretionary function exception. The judge concluded that the government had violated its duty of care, for example, by failing to provide warning to the citizens of St. George on the morning of May 19, 1953. Finally, the judge analyzed twenty-four representative, or “bellwether,” cases drawn from the members of the class, and concluded that ten of the twenty-four could establish sufficient causal relation between their illnesses and the radiation to which they had been exposed.

The Court of Appeals for the Tenth Circuit reversed, holding that the government’s actions were protected by the discretionary function exception. The United States Supreme Court denied certiorari, with no notation of dissent.

86. 721 F.2d 713 (1983).
87. 474 U.S. 1086 (1986) (Chief Justice Burger did not participate). P. FRADKIN, supra note 30, at 159-161, indicates that Chief Justice Burger, while Deputy Attorney General in charge of the Civil Division, was involved in decisions concerning the first litigation in Bulloch, 95 F.R.D 123.
90. 588 F. Supp. at 336.
91. Id.
92. Id. at 340.
93. For the description of the actions of Frank Butrico, see supra text accompanying notes 29-39. The story of Butrico’s actions is publicly known only because the litigation in Allen was permitted to go forward. It is told in summary form in Allen, 588 F. Supp. at 390-392; and is recounted in greater detail in H. BALL, supra note 2, at 43-44, 152-153, and in P. FRADKIN, supra note 30, at 10-18, 21-22, both of which rely on the trial transcript and depositions in the case.
94. 588 F. Supp. at 429-447.
95. 816 F.2d 1417 (10th Cir. 1987).
B. Redress Against Contractors: The Warner Amendment

The combination of the government's sovereign immunity and its aggressive and disingenuous public relations and litigation strategies made full compensation from the government unattainable. The contractors of the government stood on a different footing, however, for the sovereign immunity bar of *Feres* and the "discretionary function" exception to the Federal Tort Claims Act did not protect the contractors. They were protected by the "government contractors defense," which shields contractors from liability when they act at the specific direction of the government, but this protection is narrower than the *Feres* and discretionary function defenses.

During the early 1980s, a number of atomic veterans and civilians filed state law tort suits, primarily in California, against the contractors. The government and the contractors had long anticipated the possibility of such suits. In the 1940s, when atomic weapons development and testing began, the United States signed indemnification contracts with all the contractors. Recognizing that the nature of the work entailed risk of injury and death, and consequent risk of suits against the contractors, the United States agreed to indemnify the contractors for all attorneys' fees and for any judgments that might be recovered in suits arising out of the atomic weapons program. Those contracts were in force in the early 1980s, and are still in force today.

The contractors were unwilling to trust the ordinary processes of litigation in these suits. The government contractors' defense, the defense that they acted in the exercise of due care given the state of knowledge at the time, and the defense that the injuries of the veterans were not fairly traceable to the radiation to which they were exposed, were all available to the contractors. But the contractors sought to avoid litigation altogether. They went to Congress seeking a statute

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77. See, e.g., Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2518 (1988) (government contractor immune from suit for design defect in equipment supplied to the government 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").

78. *In re Consolidated United States Atmospheric Testing Litig.*, 616 F. Supp. 759 (N.D. Cal. 1985), aff'd sub. nom., Konizeski v. Livermore Labs, 820 F.2d 982 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988). Of the twenty-nine individuals exposed to radiation, twenty-four were in the armed forces at the time of the exposure, four were civilians, and one was a serviceman for three test series and a civilian for a fourth. Petition for Writ of Certiorari at 4-5, Konizeski v. Livermore Labs, 108 S. Ct. 1076 (1988) (No. 87-953) (cert. denied). Other suits were filed in Massachusetts, see *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986) (single plaintiff), and Nevada, see *Prescott v. United States*, No. 80-143 (D. Nev. dismissed September 19, 1985) (consolidated cases).

that would retroactively immunize them from their conduct, short-circuiting the lawsuits without reaching the merits.

The contractors proposed an amendment to a Department of Energy bill that would have characterized a contractor involved in “atomic defense national defense activities” as an “instrumentality” of the federal government, with the anticipated consequence that the contractors, once so characterized, could assert the government’s sovereign immunity defenses that were otherwise unavailable to them. The proposed amendment was referred to the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, which then held hearings. Representatives from the Justice Department and the Department of Energy appeared in support of the contractors, and proposed a substitute bill that, instead of characterizing the contractors as “instrumentalities” of the government, would permit the government to be substituted in place of the contractors in any litigation arising out of the atomic weapons testing program.

There is no question that the proposals of the contractors and the government were motivated by the pending suits that had been filed by the atomic veterans and civilians, in which the contractors were unwilling to trust their fate to the defenses available to them. Deputy Assistant Attorney General Bernard Vance testified to the House Subcommittee:

The purpose of this [proposed] section is to substitute the United States as the sole party in suits alleging damages arising from radiation exposure in the U. S. testing of atomic weapons. At present, there is widespread litigation against independent contractors or contractors who worked closely with the United States in carrying out its atomic weapons testing program.

Theodore Garfish, General Counsel for the Department of Energy, was equally clear in his testimony:

Several of these contractors have become involved in extensive litigation in which Plaintiffs are alleging specifically that radioactive fallout from the United States’ testing of nuclear devices in the Pacific and in the


102. Id. at 20, 33-38 (testimony and statement of Bernard W. Vance), 40-41 (statement of Theodore Garfish).

103. Id. at 20 (testimony of Bernard W. Vance).
continental United States caused cancer and other injuries. . . . The Department of Energy would welcome a remedy to this circumstance that would alleviate the burden on these government contractors to defend the atomic weapons testing program and decisions.¹⁰⁴

There is also no question that the purpose of the proposed amendment was to obtain dismissals in the pending suits. Attorney General Vance, in his testimony before the Subcommittee, tried to make this consequence inconspicuous, but in the end he was forced to admit it openly:

[Representative] Hall. Doesn’t sovereign immunity bar claims of this type brought against the United States under the Federal Tort Claims Act? Doesn’t the Feres doctrine preclude suits by active military personnel, and the discretionary function exemption and the other exceptions in 28 U.S.C. 2680 would preclude many if not all of the other claims; is that not correct?

Mr. Vance. The defenses under the Federal Tort Claims Act, as we envision it, would stay in place, and if the Feres doctrine would apply to particular plaintiffs, we believe it would apply here; yes.¹⁰⁵

. . . .

[Representative] Frank. Now the effect then of the amendment you’re presenting would be for us to go into pending cases and say to plaintiffs who may have a case ‘you no longer have a case, you’re out of court’; is that correct?

Mr. Vance. If the Feres doctrine —

[Representative] Frank. Not if, Mr. Vance. Is that correct?

Mr. Vance. The Feres doctrine applying, we would have that.¹⁰⁶

The Subcommittee of the House Judiciary Committee concluded that the proposals of the contractors and the administration were an unconstitutional interference with the vested causes of action of the plaintiffs.¹⁰⁷ Because of the adverse report of the Committee, neither

¹⁰⁴. Id. at 40-41 (statement of Theodore Garrish). Deputy Assistant Attorney General Robert Willmore testified to the same effect at congressional hearings on a proposed bill to repeal the Warner Amendment in 1985: “[I]t was as a result of the development of these lawsuits, particularly the very large growth in this litigation in California, that brought the contractors and the administration to Congress, and that necessitated some congressional action; section 1631 [the Warner Amendment] was the result.” Litigation Relating to Atomic Testing, supra note 10, at 155 (testimony of Robert Willmore).


¹⁰⁶. Id. at 25.

¹⁰⁷. “The Committee is concerned that [the amendment] would eliminate property interests in pending causes of action in violation of the fifth amendment.” House Comm. Adverse Report, supra note 100, pt. 4, at 5 (Adverse Report submitted by S. Hall, House Committee on the Judiciary). The Committee also concluded, “To eliminate the right to trial by jury in cases against these contractors would violate the seventh amendment.” Id.
the contractors' nor the administration's proposed amendments reached the floor of the House. But the contractors and the administration did not give up.

The next year, the administration requested Senator Warner of Virginia, a former Secretary of the Navy and a member of the Senate Armed Services Committee, to introduce the version favored by the administration, under which the government would be substituted into pending litigation in place of the defendant contractors. Although Senator Warner later testified that he was not aware of the nature of the amendment that he was asked to introduce, he obliged the administration, introducing the legislation as a rider, or amendment, to the Defense Department's then-pending appropriation bill. No hearings were held on Senator Warner's amendment, and neither the House nor the Senate Judiciary Committees ever saw or considered it.

Senator Warner's amendment was consistently misrepresented as it made its way through the legislative process. The report of the Senate Armed Services Committee described the Warner Amendment as permitting "the consolidation of these many cases under the leadership of the Department of Justice, with the United States as a co-defendant." In actuality, of course, the amendment made the United States the sole defendant, eliminating the contractors entirely from the suits and preparing the way for dismissal when the United States asserted its sovereign immunity. The Conference Committee Report misrepresented the Warner Amendment in a slightly different way. It stated, "This section would provide a remedy against the United States for injury, due to loss of property, personal injury, or death due to exposure to radiation emissions by a contractor carrying out atomic weapons tests under a contract with, or under the direction and control of, the United States." In actuality, of course, the amendment did not "provide a remedy." Rather, it took away a remedy that had been previously available against the contractors. The "remedy" provided against the United States was non-existent because of the sovereign immunity defense.


110. I have been unable to determine who was responsible for the misrepresentations I describe in the text.


112. CONFERENCE COMM. REPORT, supra note 108, at 349.
Deputy Assistant Attorney General Vance had admitted under questioning by Representatives Hall and Frank in 1983 that the administration's purpose was to obtain dismissals in the suits brought by the atomic veterans. Now, on the printed page with no questioning in prospect, the Warner Amendment was described as a benign, even generous, provision under which the United States could intervene as a co-defendant to whom the atomic veterans could look for a remedy. Thus described, the Warner Amendment was approved without debate by the House of Representatives on September 26, and by the Senate on September 27, 1984. It was signed into law by President Reagan on October 19.

After the passage of the Warner Amendment, the United States moved to be substituted in the pending litigation in the federal District Court in the Northern District of California, and for summary judgment based on the sovereign immunity defenses under Feres and the discretionary function exception to the Federal Tort Claims Act. At the time of the government's motions, virtually no discovery had taken place. The District Court granted the government's motions, and the Court of Appeals affirmed. The Supreme Court denied certiorari.

From the standpoint of the contractors and the government, the Warner Amendment accomplished two things. First, the government saved an unknown but potentially large amount of money in attorneys' fees and, possibly, in judgments. Given the existence of the indemnification contracts between the contractors and the government, the government would have borne those expenses. Second, and probably more important, the Amendment cut short the judicial process. Had Congress permitted the suits to proceed, the plaintiffs would have been able through civil discovery to compel the production of a great deal of information about the manner in which the government and the contractors carried out the atomic tests, about the numbers and identities of exposed veterans, about what the contractors and the government knew of the hazards of radiation at the time of the tests, and

113. See supra note 106 and accompanying text.
118. 820 F.2d 982 (9th Cir. 1987).
about the degree to which the government or the contractors controlled the tests. That information is now unknown to the general public, or is known only in a fragmentary and anecdotal way. From what is now known, however, one may assume that the information is likely to be highly embarrassing to both the contractors and the government. Had the suits gone to trial, much of the information obtained through discovery would have been spread on the public record in open court.

The story of the Warner Amendment may be summarized as follows. The government and the contractors jointly carried out atomic weapons testing that exposed hundreds of thousands of soldiers and civilians to significant amounts of radiation. During the course of these tests, the soldiers and civilians were misled as to the degree of danger to which they were being exposed. After the soldiers and civilians became ill in significant numbers and began to seek redress, the government took refuge behind the defense of sovereign immunity. When the contractors—who did not share the government’s sovereign immunity—were sued, the government and the contractors secured by subterfuge and misrepresentation the passage of a statute that retroactively changed the legal rules governing the liability of the contractors. The change of rules was specifically designed to avoid an unfavorable outcome in suits already pending in the federal courts, and to provide a sovereign immunity defense for acts that had never previously been protected by that defense. To put it another way, the government and the contractors declined to behave as ordinary litigants by relying on the defenses that were available to the contractors. Rather, they interfered with the judicial process by retroactively changing the rules to their own advantage.

III. A VIOLATION OF THE SEPARATION OF POWERS

The question posed by the foregoing story is not whether the government and the contractors behaved appropriately in securing the passage of the Warner Amendment. I consider it beyond serious debate that they behaved reprehensibly. The question is, rather, whether they behaved illegally.120 A number of powerful arguments

120. Academic commentary on the Warner Amendment has been uniformly unfavorable. Titus & Bowers, Konizeski and the Warner Amendment: Back to Ground Zero for Atomic Litigants, 1988 B.Y.U. L. Rev. 387, 408 ("further action on compensation for downwinders or repeal of the Warner Amendment will have to come from Congress. We would argue that either, or both, actions are warranted."); Comment, Section 2212: A Remedy for Veterans—With a Catch, 75 Calif. L. Rev. 1513, 1558 (1987) [hereinafter Comment, A Remedy with a Catch] ("The courts should recognize the unfairness of the catch in section 2212 [§ 2212 is the Warner
can be made against the Warner Amendment, including that it violates the takings clause of the Fifth Amendment, and that it violates the jury trial guarantee of the Seventh Amendment. I do not wish to take away from the strength of those arguments, but I will focus here on the argument that more than any other goes to the heart of what is wrong with the Warner Amendment: it violates the principle of separation of powers.

A. United States v. Klein

The principle of separation of powers prevents the concentration of power in any single branch by confining a branch to the exercise of only its own powers and forbidding it to interfere with the proper exercise of power by another branch. In Justice Jackson's words in the Steel Seizure Case, "the Constitution diffuses power the better to secure liberty." In the words of the Court in Buckley v. Valeo, separation of powers is a "vital check against tyranny." Deciding what are the powers to which a particular branch should be confined, and what constitutes improper interference with the powers of another branch, demands attention to the details of the particular action being challenged.
Modern cases provide very little help in analyzing what is wrong with the Warner Amendment.\textsuperscript{127} The familiar landmarks generally fall into two not particularly useful categories. First, many concern contests between the executive and legislative branches. They include, for example, the attempted seizure of privately owned steel mills by the President without legislative authorization;\textsuperscript{128} and, more recently, the attempted delegation of power to the Comptroller General to suggest budget cuts to the President;\textsuperscript{129} and the appointment of an independent counsel to investigate and prosecute suspected criminal acts by executive branch officials.\textsuperscript{130} Second, many are attempts to accommodate strict notions of a tripartite government to the modern administrative state. They include, for example, attempts to establish or expand the jurisdiction of "legislative," or administrative, courts to adjudicate questions that could be decided by Article III federal courts,\textsuperscript{131} and the attempted one-house veto of an administrative adjudication.\textsuperscript{132}

The only modern case of even arguable relevance is United States v. Nixon,\textsuperscript{133} in which the United States Supreme Court compelled the production of tape recordings, made by the President of conversations with his White House staff, for use in the criminal prosecution of one of those staff members. The articulated rationale of the Court was that the President could not interfere with the criminal process in the


\textsuperscript{128} Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1953).
\textsuperscript{129} Bowsher v. Synar, 478 U.S. 714 (1986).
\textsuperscript{130} Morrison v. Olson, 108 S.Ct. 2597 (1988).

\textsuperscript{132} Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).
\textsuperscript{133} 418 U.S. 683 (1974).
federal courts by withholding material evidence.\textsuperscript{134} So understood, the case can stand for the principle that the political branches cannot interfere with an ongoing judicial proceeding. But this is a naive reading of the case itself and an overreading of any principle it contains. \textit{Nixon} can only be understood against the backdrop of the impeachment inquiry then under way in the House of Representatives, in which these same tape recordings were being sought, and of the assistance provided by the Supreme Court’s order in averting a threatened confrontation between the President and the Congress. I regard the Court’s proffered explanation under such circumstances as little more than a plausible rationale for results reached on other (and possibly fully legitimate) grounds. Further, the broad reading ignores the unchallenged power of the executive branch to withhold evidence in an ordinary criminal case, on pain of having the charge dismissed if the evidence is sufficiently material to the case.\textsuperscript{135}

The uniqueness in this century of the Warner Amendment was not understood by either of the two courts of appeals that have considered it. For example, the Ninth Circuit, in \textit{Konizeski v. Livermore Labs}, concluded, “In adopting [the Warner Amendment], Congress broke no new ground. In a number of other acts, Congress substituted the [Federal Tort Claims Act] remedy against the government for remedies available against private parties, and these acts have been uniformly upheld.”\textsuperscript{136} The court cited two kinds of statutes in support of its assertion that Congress “broke no new ground” with the Warner Amendment.\textsuperscript{137}

First, the court cited the Swine Flu Act, which provided that the United States be substituted as a defendant for swine flu vaccine man-

\textsuperscript{134} \textit{Id.} at 707:
To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III. (emphasis added).

\textsuperscript{135} \textit{Jencks v. United States}, 353 U.S. 657, 671-72 (1956) (quoting United States v. Reynolds, 345 U.S. 1, 12 (1953)).

\textsuperscript{136} 820 F.2d 982, 988 (9th Cir. 1987) (quoting 616 F. Supp. 759, 766 (N.D. Cal. 1985)), \textit{cert. denied}, 485 U.S. 905 (1988); see also \textit{Hammond v. United States}, 786 F.2d 8, 12-13 (1st Cir. 1986) (“This is not the first time Congress has substituted the government as defendant in a certain category of tort suits and relegated plaintiffs to [a Federal Tort Claims Act] remedy. Statutory schemes similar to § 2212 [the Warner Amendment] have been enacted in the Federal Drivers Act, 28 U.S.C. §§ 2679(b)-(c) . . . and in the Swine Flu Act, 42 U.S.C. §§ 247b(k)-(l) (1976) (repealed 1978) . . . . These two acts have withstood constitutional challenges . . . .”).

\textsuperscript{137} 820 F.2d at 988.
manufacturers in suits arising out of the swine flu inoculation program.\textsuperscript{138} But unlike the Warner Amendment, the Swine Flu Act was entirely prospective.\textsuperscript{139} It was designed to induce the drug companies to manufacture vaccine, and was passed into law before any vaccine was manufactured and distributed. Moreover, unlike the Warner Amendment, the Swine Flu Act did not permit any defenses for the government that were not previously permitted to the vaccine manufacturers. All immunities and exceptions for the Federal Tort Claims Act were expressly waived.\textsuperscript{140} Thus, far from providing precedent and support for the Warner Amendment, the Swine Flu Act provides a model for what the Warner Amendment should have done but did not.

Second, the court cited a series of statutes under which the United States is substituted as the defendant when employees of the government are sued for torts.\textsuperscript{141} These statutes include the Federal Drivers Act,\textsuperscript{142} and statutes covering health providers for the Armed Forces,\textsuperscript{143} the Foreign Service,\textsuperscript{144} the Veterans Administration,\textsuperscript{145} and the Public Health Service.\textsuperscript{146} All of these statutes implement the longstanding principle that damage suits against employees of the sovereign are, for purposes of sovereign immunity, suits against the sovereign itself.\textsuperscript{147} Such suits have always been distinguished from suits against independent contractors with the government, who are protected by the government contractors’ defense but not by the full extent of the government’s sovereign immunity.\textsuperscript{148}


\textsuperscript{139} 42 U.S.C.A. § 247b(k)(2)(A) (“The United States shall be liable with respect to claims submitted after September 30, 1976 for personal injury or death arising out of the administration of swine flu vaccine under the swine flu program”).

\textsuperscript{140} Id. § 247(k)(2)(A)(i) (“the exceptions specified in Section 2860(a) of title 28 [the Federal Tort Claims Act], shall not apply in an action based upon the act or omission of a [Swine Flu program participant]”).

\textsuperscript{141} 820 F.2d at 988.

\textsuperscript{142} 28 U.S.C.A § 2679(b)-(c) (West 1965).

\textsuperscript{143} 10 U.S.C.A. § 1089 (West 1983).

\textsuperscript{144} 22 U.S.C.A. § 817 (West 1979) (repealed 1980).

\textsuperscript{145} 38 U.S.C.A. § 4116 (West 1979).

\textsuperscript{146} 42 U.S.C.A. § 233 (West 1982).

\textsuperscript{147} See, e.g., Lombard v. United States, 690 F.2d 215, 226-27 (D.C. Cir. 1982) (holding that \textit{Feres} bars suits against officers of the United States as well as against the United States itself), \textit{cert. denied}, 462 U.S. 1118 (1983). “As officials of the federal Government, the eight named officials/defendants in this suit are part of ‘the Government he is serving’ and are thus immune from appellants’ claims.” \textit{Id.} at 227.

\textsuperscript{148} See United States v. Orleans, 425 U.S. 807, 814-16 (1976) (holding that suits against federal contractors do not come within the Federal Tort Claims Act because the government does not “control the detailed physical performance of the contractor.”).
We must go back more than a century, to find a case comparable to that presented by the Warner Amendment.\(^{149}\) In *United States v. Klein*, decided in 1878, the Supreme Court found a statute similar to the Warner Amendment unconstitutional. After the Civil War, southerners whose property had been confiscated by the Union brought suit for recovery of the property or proceeds from its sale. The 1863 statute under which recovery was permitted required that the claimant never have “given any aid or comfort to the present rebellion.”\(^{150}\) A certain Wilson accepted the pardon of the President of the United States and in return swore an oath of allegiance on February 15, 1865. Some time prior to Wilson’s acceptance of the pardon,\(^{151}\) cotton belonging to him, valued at slightly over $125,000, had been seized by the United States.\(^{152}\) After the war, the executor of Wilson’s estate, Klein, sued in the Court of Claims for recovery of the proceeds of the sale of the cotton. The Court of Claims, relying on the pardon, held that Wilson had been loyal within the meaning of the 1863 statute.\(^{153}\) Appeal was taken to the Supreme Court. While the appeal was pending, the Supreme Court decided in *United States v. Padelford*,\(^{154}\) as the Court of Claims had just held in *Klein*, that a presidential pardon entitled a claimant to recovery irrespective of what the claimant had actually done during the war.

Congress reacted to the *Padelford* case by adding an amendment to the 1870-71 governmental appropriations bill then pending in Congress, much as Senator Warner added his amendment to the then-pending defense appropriation bill in 1984. The amendment provided that a presidential pardon should not be regarded as proof of loyalty under the 1863 act.\(^{155}\) The consequence of the amendment was to


\(^{150}\) 80 U.S. (13 Wall.) at 131.

\(^{151}\) *Id.* at 148, 150 (Miller, J., dissenting) (arguing that *Klein* is different from *Padelford* on the ground that the cotton was seized prior to the pardon).

\(^{152}\) *Id.* at 132.

\(^{153}\) The Court of Claims originally gave judgment to Klein on the assumption that Wilson had not been disloyal. *Kline* [sic] v. United States, 4 Ct. Cl. 559 (1868), aff’d, 80 U.S. (13 Wall.) 128 (1871). The case was later reopened at the request of the government on the ground that Wilson had served as a surety on the bond of a quartermaster in the confederate army. *Klein* v. United States, 7 Ct. Cl. vii addenda; Young, *supra* note 149, at 1199. This fact was stipulated, and the Court of Claims then found Wilson loyal on the strength of his presidential pardon. 7 Ct. Cl. at vii addenda.

\(^{154}\) 76 U.S. (9 Wall.) 531 (1870).

\(^{155}\) 80 U.S. (13 Wall.) at 134:

[In all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant [through proof of loyalty based on a presidential pardon the Supreme
require the Supreme Court to dismiss the case, not merely the appeal, if the claimant relied on a presidential pardon. Confiscated property cases where the claim rested on any other ground were unaffected by the statute. When Klein came before the Court, the government moved for dismissal of the case.

The Supreme Court refused to dismiss, on two grounds. One, which does not concern us, was that Congress did not have the power by statute to interfere with the President’s pardoning power. The other, which is directly relevant to the Warner Amendment, was that Congress had violated the separation of powers: “The court is required [under the challenged statute] to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial department of the government in cases pending before it? We think not. . . . We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.”

Modern academic readings of Klein have focussed on the withdrawal of jurisdiction dictated by the statute—in part because of the temporal pairing with the great jurisdiction withdrawing case of the post-Civil War period, Ex parte McCordle, and in part because of twentieth century concerns with congressional withdrawals of jurisdiction as a way of influencing the Supreme Court or of avoiding its deci-

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156. The statute did more than require that the Supreme Court dismiss the appeal in Klein. If the appeal had been dismissed, Klein’s judgment would have been left intact. Congress intended, and the Court understood, the statute to require the dismissal of the cause of action. See Young, supra note 149, at 1203-09, for a description of the debates in Congress on this point.

157. The United States moved “that the case be remanded to the Court of Claims with a mandate that the same be dismissed for want of jurisdiction, as now required by law.” 80 U.S. (13 Wall.) at 147.

158. 80 U.S. (13 Wall.) at 147. The Court gave this reason second, after its discussion of the separation of powers issue.

159. Id. at 146-47.


161. 74 U.S. (7 Wall.) 506 (1869).
The modern academic lesson drawn from *Klein* is obvious enough—that Congress cannot use a jurisdictional withdrawal as a means to an otherwise unconstitutional end. That is, the Court will not allow the fact that the statute operates as a jurisdictional withdrawal or limitation to foreclose inquiry into what is actually accomplished by that withdrawal or limitation. In the words of the *Klein* Court itself, the jurisdictional aspect of the statute was disregarded because it was but "a means to an end."

But the problem posed by the Warner Amendment is distinct from the jurisdictional aspect of *Klein* that has preoccupied modern scholars. The part of *Klein* relevant to the Warner Amendment is its holding unconstitutional what is actually accomplished by the statute—the statute's "end"—rather than the Court's disregard of the statute's jurisdictional garb. The *Klein* Court explicitly concluded that in

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163. See, e.g., Gunther, supra note 160, at 910 ("even if Congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases, or require a court to decide cases in disregard of the Constitution"); Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposal in Congress Today*, 65 JUDICATURE 190, 194 (1981)(symposium)("The statute in *Klein* was declared unconstitutional because, under the guise of limiting jurisdiction, it attempted to dictate to the Court how and by what processes it should decide the outcome of a particular class of cases."); Sager, supra note 160, at 71 ("It was clear to the *Klein* Court that Congress could not manipulate jurisdiction to secure unconstitutional ends."); P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, *Hart and Wechsler's The Federal Courts and the Federal System* 369 (3d ed. 1988) ("Does *Klein* in fact do more than hold that it is an unconstitutional invasion of the judicial function when Congress purports, not to withdraw appellate jurisdiction completely, but to bind the Court to reverse a decision below in accordance with a rule of law independently unconstitutional on other grounds?").


166. One could argue that the Warner Amendment is a restriction on the jurisdiction of the federal courts by pointing to the sovereign immunity defense that the United States employs after the amendment permits its substitution as a defendant. The sovereign immunity defense is, in its origin, a kind of jurisdictional defense in which the sovereign asserts that the court does not have jurisdiction to provide a remedy against an unconsenting sovereign. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which the State of Georgia asserted that it was immune from suit in federal court on the claim of private citizen for money damages, and declined to
passing a statute effectively dictating the outcome of the pending case, Congress had overstepped its authority and had improperly intruded into the authority of the judiciary.

What, precisely, was the basis for the *Klein* Court’s conclusion? Two factors are readily apparent. Congress passed the statute in direct response to the Court’s decision in *Padelford*, intending to change the outcome in the pending appeal in *Klein*. Further, it did so as an interested party in the sense that the changed outcome favored the government at the expense of the private litigant. One may conclude that these two factors, taken together, are enough to make the statute unconstitutional. The Supreme Court in *United States v. Sioux Nation of Indians* has recently characterized *Klein* in much this way, explaining that the Court held the statute unconstitutional because “it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government’s favor.”  

Yet the Court’s explanation in *Sioux Nation* may sweep too broadly. Without more, it could mean that retroactive effect could never be given to a statute that favors the government in pending litigation, no matter how unimportant the pending litigation was in motivating the passage of the statute, and no matter how compelling the forward-looking reasons behind its passage.

The basis for invalidating the statute in *Klein* is actually stronger than that proposed by the Court in *Sioux Nation*, for there was an additional factor not included in the *Sioux Nation* formulation. The statute at issue in *Klein* did not apply to pending litigation by happenstance; rather, Congress’ desire to change the outcome in pending cases significantly motivated its adoption of the statute. With that added factor, the result in *Klein* seems correct, even obvious.

Strong as the rationale for invalidating the statute in *Klein* is, it is stronger still for invalidating the Warner Amendment. In *Klein*, the statute, if upheld, would have had prospective (and intended) consequences for primary conduct, for it would have affected future presi-
dential pardons as well as pardons already given. In other words, the *Klein* statute had a non-pretextual purpose of regulating future conduct. The Warner Amendment can make no such claim. Although the statute is written in terms that encompass ongoing testing of nuclear weapons,¹⁶⁹ large-scale exposure to atomic radiation during tests ended in 1963 when the Partial Nuclear Test Ban Treaty required the abandonment of atmospheric testing of atomic weapons.¹⁷⁰ There have been no massive exposures of soldiers for over twenty-five years, and there are none in prospect. There has been some exposure of downwinders due to accidental “venting” from underground explosions,¹⁷¹ but on a greatly reduced scale from the exposure resulting from the atmospheric explosion. In fact, the purpose of the Warner Amendment was entirely retroactive. Its sole purpose was to change the result in litigation arising out of events long past and not likely ever to be repeated.

**B. General Principles**

The conclusion that follows from a parsing of *Klein* is reinforced by more general thinking about the appropriate roles of the judicial and legislative branches. Attempts to isolate and define the essence of the judicial and executive roles are often simplistic or misleading, for the functions served by the different branches are complex, multifarious, and overlapping. But an essentialist approach can be useful in certain plain cases, of which the Warner Amendment is one.¹⁷²

The analysis begins with the elementary stuff of civics lessons. The essential role of the judiciary is to decide actual disputes between litigants, based on rules in effect at the time of the parties’ actions.¹⁷³ The essential law-making role of the legislature is to pass prospective laws of general application to be applied by the judiciary.¹⁷⁴ The judiciary can, and does, decide cases based on common law rules that are newly created in the course of the decision, but the new rule must be

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¹⁷². See, e.g., United States v. Nixon, 418 U.S. 683, 707 (1974) (“Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.”) (emphasis added).
fairly derivable from pre-existing rules or principles. Similarly, the legislature can in some circumstances pass statutes that apply retroactively to attach new consequences to completed acts, but the change cannot be too radical a departure from the prior law and must accompany the prospective application of that same rule.

The Warner Amendment is inconsistent with these principles. If the Warner Amendment is permitted to become a legitimate mode of retroactive rule change, the legislature may interfere with pending litigation to avoid a feared result whenever it likes. It need not justify its action by arguing that the new rule is derived from pre-existing rules or principles. Nor need it limit its action to situations where the new law has a plausible prospective application. The legislature may simply change the rule because it suits its purpose to do so. The reasons need be no more dignified than the government’s desire to avoid having to honor an indemnification contract with a litigant, or its desire to avoid having embarrassing information discovered by the litigants and revealed to the general public during trial.

Finally, the courts ordinarily accord a strong presumption of constitutionality to any legislation that is enacted in accordance with the formally required process. We should be very reluctant to abandon the presumption when a statute has fulfilled the formal prerequisites, but in certain circumstances such an abandonment may be justified. The reason behind the presumption is that if Congress has seriously considered and then passed a statute, the judiciary should not lightly upset the (often implicit) Congressional judgment that the statute is constitutional. Such an assumption seems to me fully warranted in


177. See, e.g., Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

178. We may analogize this to Professor Hart’s “rule of recognition.” H. L. A. Hart, The Concept of Law 97-107 (1961).

179. For a similar but more far-reaching suggestion, see C. Black, Structure and Relationship in Constitutional Law 85-86 (1969) (suggesting that lack of consideration by Congress, and understanding by the President, is ground for judicial skepticism).


The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field

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cases where there is evidence that Congress has actually given thought to the constitutionality of a statute, and even where there is no evidence on the point.\textsuperscript{181}

But the rationale behind the presumption in favor of the constitutionality of duly enacted legislation only emphasizes the unusual nature of the Warner Amendment. Congress did give serious consideration to the constitutionality of the amendment. But that fact cuts against, rather than in favor of, the presumption. After the 1983 hearings before a subcommittee of the House Judiciary Committee, the committee found that the proposed statute was unconstitutional, and the bill was killed because of the committee's adverse report. The next year, the amendment was introduced as a rider to a defense appropriation bill. No committee hearings were held, and the amendment was consistently misrepresented in the covering legislative reports as providing, instead of denying, a remedy against the government for those injured or killed by radiation. Thus, in the case of the Warner Amendment, we do not have evidence of Congress having concluded that the statute was constitutional; nor do we have a simple absence of evidence about congressional deliberations. We have, instead, affirmative evidence that the one body in Congress that seriously considered the amendment found it unconstitutional. Moreover, we know that the bill was passed thereafter only by avoiding hearings and misrepresenting the bill's character. Under such circumstances, the Warner Amendment can hardly lay claim to the traditional presumption in favor of a statute's constitutionality.

IV. CONCLUSION

The soldiers and civilians exposed to radiation during the atomic bomb testing may rightly ask what kind of country they have served. Our ideals of truth, fair play, and justice under law are hardly in evidence at any point in this sorry tale. Holding an act of Congress unconstitutional is a serious business. It is a particularly serious business when the ground for so holding is that Congress improperly interfered with the judiciary, for in such a case the judiciary is in some sense acting as a judge in its own cause. Yet in the case of the Warner

Amendment the interference by Congress with the judicial role is so extraordinary, and the reasons for Congress' interference are so egregious, that the federal judiciary has no choice. So far, however, the judiciary has failed to find the Warner Amendment unconstitutional, and Congress, despite repeated pleas, has failed to repeal it. In a narrow sense, only the soldiers and civilians suffer from this wrong. But in a broader sense, we all suffer. If the Warner Amendment remains law, it diminishes the "vital check against tyranny" that protects us all.