



1996

Comments: Gulf War Syndrome: Will the Injuries of Veterans and Their Families Be Redressed?

Kevin J. Dalton
Fisher & Phillips, LLP

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Law Commons](#)

Recommended Citation

Dalton, Kevin J. (1996) "Comments: Gulf War Syndrome: Will the Injuries of Veterans and Their Families Be Redressed?," *University of Baltimore Law Review*: Vol. 25: Iss. 2, Article 4.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol25/iss2/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

GULF WAR SYNDROME: WILL THE INJURIES OF VETERANS AND THEIR FAMILIES BE REDRESSED?

TABLE OF CONTENTS

I.	INTRODUCTION	180
II.	SOLDIERS RETURN HOME WITH GULF WAR SYNDROME	182
	A. <i>Symptoms of Gulf War Syndrome</i>	182
	B. <i>Spread of Gulf War Syndrome to Family Members</i>	184
	1. <i>Transmission of Gulf War Syndrome to Soldiers' Spouses</i>	184
	2. <i>Transmission of Gulf War Syndrome to Infants Conceived After the War</i>	184
	C. <i>Weighing the Evidence</i>	185
III.	EXPOSURE TO POSSIBLE CAUSES OF GULF WAR SYNDROME	186
	A. <i>In General</i>	186
	B. <i>"Investigational" Drugs Soldiers Were Required to Take</i>	189
	1. <i>Pyridostigmine Bromide</i>	189
	2. <i>Pentavalent Botulinum Toxoid Vaccine</i>	190
	3. <i>The Effects of the Combination of Investigational Drugs, Insecticides, and Pesticides Used by American Servicemen During the Gulf War</i>	191
	C. <i>Inhalation of Smoke From Burning Oil Wells</i>	192
	D. <i>Leishmaniasis</i>	193
	E. <i>Depleted Uranium</i>	194
	F. <i>Exposure to Chemical and Biological Agents</i>	195
IV.	COMPENSATION FOR GULF WAR SYNDROME	198
	A. <i>The Government's Sovereign Immunity In General</i>	198
	B. <i>The Federal Tort Claims Act</i>	198
	1. <i>Exceptions to the Federal Tort Claims Act That May Bar Recovery in Gulf War Syndrome Actions</i>	199
	C. <i>The "Feres" Doctrine and Its Progeny</i>	201
	1. <i>Feres v. United States</i>	201
	2. <i>United States v. Brown</i>	205
	3. <i>Stencel Aero Engineering Corp. v. United States</i>	206
	4. <i>Chappell v. Wallace</i>	207
	5. <i>United States v. Shearer</i>	208

6.	<i>United States v. Stanley</i>	208
7.	<i>Boyle v. United Technologies Corp.</i> and the Government Contractor Defense	210
8.	<i>In re "Agent Orange" Product Liability Litigation</i>	211
9.	Can Gulf War Syndrome Claimants Get Past the <i>Feres</i> Hurdle?	215
	a. <i>Veteran Claimants</i>	215
	b. <i>Family Members Suing for Derivative Claims</i>	216
	c. <i>Family Members Suing for Their Own Injuries</i>	216
	d. <i>Suits Against Government Contractors</i> ...	218
D.	<i>Violation of the Food, Drug, and Cosmetic Act or the Department of Defense Authorization Act</i>	219
E.	<i>Compensation Under the Veterans' Benefits Act</i> ...	222
	1. The Veterans' Benefits Act in General	222
	2. Benefits Under the VBA for Veterans with Gulf War Syndrome	224
	3. Benefits Under the VBA for Veterans' Family Members	226
	4. The Adequacy of the VBA for Those People Afflicted with GWS	226
V.	WILL THE <i>FERES</i> DOCTRINE BE AMENDED?	227
VI.	SHOULD THE <i>FERES</i> DOCTRINE BE CHANGED TO ALLOW RECOVERY OF DAMAGES FROM THE UNITED STATES BY SOLDIERS WHO ARE IN- JURED IN THE COURSE OF DUTY AND THEIR FAMILY MEMBERS?	227
VII.	CONCLUSION	229

I. INTRODUCTION

The Persian Gulf War began when Iraq invaded Kuwait on August 2, 1990.¹ Following this invasion, the United States deployed troops to Saudi Arabia and engaged in an offensive military operation against Iraq.² February 27, 1995 marked the fourth anniversary of the formal end of the Gulf War.³ For many Gulf War veterans, it

1. Caryle Murphy, *Iraqi Invasion Force Seizes Control of Kuwait*, WASH. POST, Aug. 3, 1990, at A1; see also 38 U.S.C. § 101(33) (Supp. V 1993) ("The term 'Persian Gulf War' means the period beginning on August 2, 1990, and ending on the date thereafter prescribed by Presidential proclamation or by law.').

2. *Doe v. Sullivan*, 756 F. Supp. 12, 13 (D.D.C.), *aff'd*, 938 F.2d 1370 (D.C. Cir. 1991).

3. Laura Flanders, *Mal de Guerre*, NATION, Mar. 7, 1994, at 292.

also marked their fourth year of coping with a debilitating illness commonly known as Gulf War Syndrome (GWS).⁴ Of the 695,000 veterans who served in the war, "at least 45,000 are suffering from symptoms [of GWS] connected with their service."⁵ The most common of these symptoms include: fatigue, respiratory problems, blurred vision, neurological damage, muscle pain, memory loss, bowel and bladder incontinence, nausea, skin rashes, headaches, and hair loss.⁶

Gulf War veterans, however, are not the only ones who have suffered from GWS; GWS symptoms have also spread to family members of afflicted veterans.⁷ The spread of the illness has become so great that in April of 1996, the Pentagon completed a two-year, \$80 million study of GWS.⁸ On December 13, 1994, the Department of Defense (DOD) granted two Army Medical Centers a total of \$20 million, collectively, for research into GWS.⁹ In addition, on May 23, 1995, the Pentagon announced the award of a \$5 million grant program to conduct research on the illness.¹⁰

Presently, there is no evidence of a "single, disease-causing agent"¹¹ of GWS. However, of the many possible causes, the follow-

-
4. Tina Adler, *Desert Storm's Medical Quandary: Do Iraqi Chemical and Biological Agents Explain Gulf War Syndrome?*, SCI. NEWS, June 18, 1994, at 394; Flanders, *supra* note 3, at 292; *Gulf War Illnesses Linked To Pills, Insect Repellents*, PHOENIX GAZETTE, Apr. 10, 1995, at A4.
 5. Laura Flanders, *A Lingering Sickness*, NATION, Jan. 23, 1995, at 94, 96; *see also* Susan Duerksen, *Two Gulf War Veterans Given Disability Checks*, SAN DIEGO UNION-TRIBUNE, Apr. 27, 1995; Kevin O'Hanlon, *Gulf War Vets Offer Evidence Of Chemicals*, HOUS. CHRON., Mar. 13, 1995, at 14.
 6. Adler, *supra* note 4, at 394; *Gulf War Illnesses Linked To Pills, Insect Repellents*, *supra* note 4, at A4; Elliott J. Schuchardt, *Walking a Thin Line: Distinguishing Between Research and Medical Practice During Operation Desert Storm*, 26 COLUM. J.L. & SOC. PROBS. 77, 113 (1992); Martin Walker, *Medicines Are Cited For Gulf War Syndrome*, MONTREAL GAZETTE, Apr. 13, 1995, at B13.
 7. Flanders, *supra* note 5, at 94, 96; Flanders, *supra* note 3, at 292, 293; David France, *The Families Who Are Dying For Our Country*, REDBOOK, Sept. 1994, at 114; *Mystery Gulf War Syndrome to be Investigated Gulf Panel Appointed*, THE VIRGINIAN-PILOT AND THE LEDGER-STAR, Mar. 13, 1995, at A6 [hereinafter *Mystery*]; Sarah Tippit, *What's Wrong With Our Children?*, LADIES HOME J., June 1994, at 100.
 8. *Scientists Report Duplicating Gulf War Syndrome*, ASSOCIATED PRESS POL. SERVICE, Apr. 19, 1996; *Pentagon Finds No Gulf War Syndrome*, PHOENIX GAZETTE, Apr. 3, 1996.
 9. Flanders, *supra* note 5, at 94, 96. On Dec. 13, 1994, the Walter Reed Army Medical Center and the Brook Army Medical Center were granted approximately \$20 million collectively for GWS research. *Id.*
 10. *Pentagon Backs Gulf Ills Study*, WASH. POST, May 24, 1995, at A23. Hospitals, universities, and research institutions will receive portions of the award in order to examine: (1) epidemiological studies on the health of veterans complaining of GWS; (2) the effects of pyridostigmine bromide, when used by itself and when used in combination with other chemicals to which Gulf War veterans were exposed; and (3) clinical research to study specific GWS cases and the possible transmission of GWS to family members. *Id.*
 11. O'Hanlon, *supra* note 5, at 14; *see Scientists Report Duplicating Gulf War Syndrome*, *supra* note 8.

ing agents were listed as the most likely causes of the illness: (1) the United States military's use of depleted uranium in artillery shells and on the armor of tanks; (2) the two types of "investigational" drugs that the DOD required Gulf War soldiers to take; and (3) the destruction of Iraqi weapons arsenals, which were possibly stocked with chemical and biological weapons.¹²

This Comment first outlines the symptoms of GWS and discusses the transmission of this illness to family members of veterans. Second, this Comment explores the possible causes of GWS. Third, this Comment discusses possible means of recovering monetary damages and/or compensation from the United States by injured soldiers and their families for GWS injuries. Finally, this Comment critiques and analyzes the *Feres*¹³ doctrine, which precludes soldiers who served in the Persian Gulf War from recovering damages under the Federal Tort Claims Act (FTCA) for injuries incident to service.

II. SOLDIERS RETURN HOME WITH GULF WAR SYNDROME

A. *Symptoms of Gulf War Syndrome*

After returning home, at least 45,000 of the approximately 695,000 veterans who served in the Persian Gulf War noticed that they were becoming ill¹⁴ and that the severity of their symptoms were increasing over time.¹⁵ Although Gulf War veterans complain of a variety of different symptoms, many soldiers' illnesses share common

12. Flanders, *supra* note 3, at 292.

13. *Feres v. United States*, 340 U.S. 135 (1950).

14. See Flanders, *supra* note 5, at 96; O'Hanlon, *supra* note 5, at 14; see also Tippit, *supra* note 7, at 100 (reporting that in a 1994 Department of Veterans Affairs Persian Gulf Family Support Program survey of 13,700 veterans, 71% reported having physical problems which included symptoms of GWS).

In 84% of the cases involving soldiers who suffer from post-war ailments, a clear diagnosis of health problems, such as an infectious disease or a psychological problem, can be made. *Chemical Agents Not Found In Gulf War Ills, Pentagon Says*, ARIZ. REPUBLIC, Mar. 10, 1995, at A16; see O'Hanlon, *supra* note 5, at 14 (stating that, in a study by microbiologist Howard Urnovitz, approximately 85% of veterans showed signs of antibodies that can be activated by exposure to radiation); Flanders, *supra* note 5, at 96 (stating that in a recent, extensive study conducted by the DOD, of the 1000 soldiers studied, 85% have been dismissed as having symptoms such as skin rashes and respiratory problems, which the DOD states are "things that are not unexpected").

15. France, *supra* note 7, at 114; William Lowther, *Mystery Illness and the Gulf War: Ailing Veterans of the 1991 Campaign Demand Compensation*, MACLEAN'S, Aug. 23, 1993, at 32.

characteristics.¹⁶ These debilitating symptoms have become commonly referred to as Gulf War Syndrome.¹⁷ The most common symptoms of GWS include: fatigue, skin rashes, nausea, headaches, body aches, hair loss, respiratory problems, fever, blurred vision, low blood pressure, neurological damage, and bowel and bladder incontinence.¹⁸ A Journal of the American Medical Association study found that:

The most frequent subjective complaints [of veterans with GWS] included joint pain (reported in 59% of the patients); rash (56%); shortness of breath and chest pain (38%); insomnia (37%); poor cognition (35%); fatigue (33%); and intermittent diarrhea (30%). Veterans also reported nightmares (24%), hair loss (19%), night sweats (14%), cold symptoms (11%), and bleeding gums (7%).¹⁹

GWS drastically affects the lives of its victims. For example, Carol Picou, once an active-duty Army nurse before serving in the Gulf War, is now on seventy percent disability retirement from the Army due to GWS.²⁰ Picou was in excellent health prior to serving in the war. Since her return from the Persian Gulf, however, Picou has been diagnosed with "depleted blood supplies reaching her left thalamus gland and neurological damage to the left side of her brain affecting her memory, vision and speech."²¹ She also suffers from respiratory problems, neck and facial rashes, abdominal distention, regular fevers, and bowel and bladder incontinence, which require catheterization and force her to wear diapers.²² Picou's menstrual period also comes in semi-monthly cycles, requiring continued usage of menstrual flow protection.²³ One week her period is "black and tarry, the next week clotted and profuse."²⁴

16. See Adler, *supra* note 4, at 394; *Gulf War Illnesses Linked To Pills, Insect Repellents*, *supra* note 4, at A4; Lowther, *supra* note 15, at 32 ("Among the most common symptoms of so-called Gulf War Syndrome are debilitating fatigue, diarrhea, hair loss, bleeding gums, aching joints, bronchitis, sore throat and rashes."); Schuchardt, *supra* note 6, at 113; Walker, *supra* note 6, at B13.

17. Adler, *supra* note 4, at 394.

18. See *id.*; *Gulf War Illnesses Linked To Pills, Insect Repellents*, *supra* note 4, at A4; Lowther, *supra* note 15, at 32 ("Among the most common symptoms of so-called Gulf War Syndrome are debilitating fatigue, diarrhea, hair loss, bleeding gums, aching joints, bronchitis, sore throat and rashes."); Schuchardt, *supra* note 6, at 113; Walker, *supra* note 6, at B13.

19. I. Boaz Milner et al., *Is There a Gulf War Syndrome?*, 271 JAMA 661, 661 (1994) (evaluating 166 Gulf War veterans).

20. Flanders, *supra* note 3, at 293.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

B. Spread of Gulf War Syndrome to Family Members

1. Transmission of Gulf War Syndrome to Soldiers' Spouses

After the veterans returned home, many soldiers' spouses began to notice that they, too, were developing GWS symptoms. In 1994, the Senate Banking, Housing and Urban Affairs Committee, chaired by Senator Donald Riegle, conducted a study involving 1200 sick male veterans.²⁵ The Committee found that "seventy-eight percent of [the veterans'] wives had been affected [by GWS], as had [twenty-five] percent of children born to them *before* the war and [sixty-five] percent born after."²⁶ After being reunited with their husbands, some wives began to experience "terrible vaginal infections, cysts, blisters and even bleeding sores."²⁷ These women have also complained that their husbands' semen caused a burning sensation upon skin contact during sexual intercourse.²⁸ According to former Senator Riegle: "The increasing number of cases of spouses and children who report the same symptoms as the veterans indicates a strong possibility of the transmissibility of [GWS]."²⁹

The Veterans Administration (VA), however, has denied that any connection exists between the veterans' service in the Gulf War and the ensuing development of GWS symptoms in their family members.³⁰ The VA stated that it has "found no clear-cut evidence that [GWS] is being transmitted either casually or sexually."³¹ The VA also stated that it was "'unable to detect any unifying diagnosis or any unifying exposure' among the Gulf War veterans and their families."³²

2. Transmission of Gulf War Syndrome to Infants Conceived After the War

GWS also appears to affect the unborn. Babies conceived by veterans claiming to suffer from GWS "have been born with crippling

25. Flanders, *supra* note 5, at 96.

26. *Id.*

27. *Id.*; see France, *supra* note 7, at 114.

28. Flanders, *supra* note 5, at 96; France, *supra* note 7, at 114 (reporting that one veteran's wife stated that her husband's semen caused her to have "sores—blisters which actually open and bleed," and another veteran's spouse claimed that her husband's semen caused her labia to crack and bleed).

29. Dennis Bernstein & Thea Kelley, *Birth Defects, Illness Mark Sick Vets' Kids; Gulf War Syndrome is Possibly Transmissible*, NAT'L CATH. REP., Oct. 28, 1994, at 5.

30. *Id.*

31. France, *supra* note 7, at 114.

32. Bernstein and Kelley, *supra* note 29, at 5 (quoting VA report).

birth defects, according to recent studies by Congress and independent veterans' groups."³³ For example, by December of 1994, thirteen of fifteen babies conceived by Gulf War veterans who had served in an Army National Guard Company based in Waynesboro, Mississippi were afflicted with such serious health ailments as respiratory problems, vomiting, diarrhea, high fevers, and blood disorders.³⁴ In two extraordinary cases, one child was born with three nipples, and another child was born with an enlarged liver.³⁵

Upon learning of the ailments affecting babies born to Waynesboro Army National Guard Unit veterans, the VA office in Jackson, Mississippi conducted a statewide survey of 251 Gulf War veterans and their children. The study revealed that sixty-seven percent of children conceived after the war were "afflicted with illnesses rated severe or ha[d] birth defects including missing eyes and ears, blood infections, respiratory problems and fused fingers."³⁶ Other birth defects afflicting these veterans' newborns included chronic skin conditions, difficulty in sitting or swallowing, missing arms or hands, and malformed brains.³⁷

Independent civilian studies have also shown tragically high rates of birth defects in babies conceived by veterans after the Gulf War. For example, Dr. Francis Waickman, an environmental pediatrician, conducted a study that compared birth defect statistics of babies conceived by Gulf War veterans following the war with those of other babies.³⁸ Dr. Waickman found "a 30 percent rate of abnormalities among the children of gulf veterans—'probably tenfold of what is in the normal population.'"³⁹

C. *Weighing the Evidence*

Over 45,000 people have been afflicted with an extremely debilitating illness.⁴⁰ The tragically large number of birth defects in children conceived by Gulf War veterans after the war presents compelling evidence that GWS is neither a mere psychological problem afflicting soldiers nor a side-effect of post-traumatic stress dis-

33. *Id.*

34. Flanders, *supra* note 3, at 293; Tippit, *supra* note 7, at 100.

35. Tippit, *supra* note 7, at 100.

36. Flanders, *supra* note 3, at 293 (reporting that the study revealed health problems in 37 of the 55 babies born to veterans following the war (or 67%)); Tippit, *supra* note 7, at 100.

37. Bernstein & Kelley, *supra* note 29, at 5.

38. *Mystery*, *supra* note 7, at A6.

39. *Id.*

40. Flanders, *supra* note 5, at 94, 96; *see also* Duerksen, *supra* note 5; O'Hanlon, *supra* note 5, at 14.

order.⁴¹ Studies reveal that many Gulf War veterans have symptoms of various debilitating illnesses.⁴² However, scientists still must determine: (1) the cause or causes of these ailments; (2) the extent of their transmission; and (3) the means to treat and to prevent the ailments. One would hope that scientists will not take twenty years to make these determinations, as they did to conclude that Agent Orange produced illnesses in Vietnam veterans.⁴³

III. EXPOSURE TO POSSIBLE CAUSES OF GULF WAR SYNDROME

A. *In General*

“What’s known for now is that other members of the anti-Iraq coalition in the [Gulf War] do not seem to have suffered from unusual health problems.”⁴⁴ This fact has led some scientists to believe that GWS was caused by something to which only American soldiers were exposed. Presently, however, “there is no concrete evidence of a single, disease-causing agent”⁴⁵ of GWS. According to Veterans Affairs Secretary Jesse Brown: “We don’t know what’s wrong with them, but we do know they’re sick.”⁴⁶

Because soldiers were exposed to many environmental hazards while in the Persian Gulf, determining the cause or causes of GWS is particularly difficult.⁴⁷ According to a 1992 study presented in the *Journal of the National Medical Association*, soldiers in the Gulf War were exposed to “health hazards unparalleled in the history of mankind.”⁴⁸ American veterans were “exposed to a ‘toxic cocktail’ of deadly and mutagenic hazards, including uranium, chemical and possibly biological warfare agents, pesticides, experimental drugs, oil

41. One theory posits that GWS is a psychological illness caused by the stress veterans suffered while serving in the Persian Gulf. Charles T. Hinshaw Jr., *Common Ailments Suggest a Pattern*, *INSIGHT*, Apr. 18, 1994, at 20. In a study conducted by the VA, however, 39 out of 42 Gulf War veterans with GWS symptoms were found not to have “mood or anxiety disorders, including post-traumatic stress disorder.” *Id.*

42. See, e.g., *supra* notes 4-6, 14-24 and accompanying text.

43. *Mrs. Clinton Urges Thorough Probe of Gulf War Illnesses*, *CHI. TRIB.*, Aug. 15, 1995, at 10.

44. *Dissecting a Medical Mystery, Federal Panel Will Seek Causes of Symptoms Suffered by Thousands of Gulf War Veterans*, *LOS ANGELES TIMES*, Mar. 13, 1995, at 4 [hereinafter *Dissecting a Medical Mystery*].

45. O’Hanlon, *supra* note 5, at 14; see *Scientists Report Duplicating Gulf War Syndrome*, *supra* note 8.

46. Duerksen, *supra* note 5.

47. *Dissecting a Medical Mystery*, *supra* note 44, at 4.

48. France, *supra* note 7, at 114.

smoke in the air, crude oil sprayed on the ground to keep the dust down and crude-oil-contaminated shower water."⁴⁹ Congress found:

(1) During the Persian Gulf War, members of the Armed Forces were exposed to numerous potentially toxic substances, including fumes and smoke from military operations, oil well fires, diesel exhaust, paints, pesticides, depleted uranium, infectious agents, investigational drugs and vaccines, and indigenous diseases, and were also given multiple immunizations. It is not known whether [they] were exposed to chemical or biological warfare agents. However, threats of [such] warfare heightened the psychological stress associated with the military operation.

(2) Significant numbers of veterans of the Persian Gulf War are suffering from illnesses, or are exhibiting symptoms of illness, that cannot now be diagnosed or clearly defined.⁵⁰

Some researchers have reported that there is no single cause of GWS.⁵¹ Rather, they believe that a combination of hazards faced by American troops during the Persian Gulf War caused the illness. For example, in late April of 1994, an advisory panel, formed by the National Institutes of Health, concluded that

the complex biological, chemical, physical, and psychological environment of the Southwest Asia theater of operations produced complex adverse health effects in Persian Gulf War veterans and that no single disease entity or syndrome is apparent. Rather, it may be that the illnesses suffered by those veterans result from multiple illnesses with overlapping symptoms and causes that have yet to be defined.⁵²

49. Bernstein & Kelley, *supra* note 29, at 5; see also Flanders, *supra* note 3, at 292 (citing depleted uranium, experimental drugs, destruction of Iraqi weapons, arsenals, and chemicals, and biological weapons as the greatest threats to veterans' health).

50. Veterans' Benefits Act, Pub. L. No. 103-446, 108 Stat. 4650 (codified at 38 U.S.C.A. § 1117 (West Supp. 1995)).

51. See Tippit, *supra* note 7, at 100 (stating that possible causes of GWS include chemical and biological agents, parasites, smoke from burning oil wells, inoculations soldiers were required to take, or a combination of these factors). Boaz Milner, M.D., a doctor with three board certificates, at the Allen Park, Michigan VA hospital who has treated over 300 sick veterans, has identified five different types of GWS. One type is the result of radiation; a second type is due to experimental drugs soldiers were required to take; a third type is due to environmental contaminants such as the soot produced from the hundreds of burning oil wells; a fourth type is the result of exposure to chemicals ranging from pesticides to nerve gas; and the fifth type is thought to be linked to Iraq's biological weapons. France, *supra* note 7, at 114.

52. France, *supra* note 7, at 394 (noting that this panel reached its conclusion after hearing testimony for two and a half days by military, health experts, and by veterans).

In addition, during the summer of 1995, the Pentagon reported that its study of 10,020 veterans and their family members did not produce evidence that GWS was attributable to one new mysterious illness.⁵³ The DOD concluded that a variety of ailments, such as tension headache, depression, arthritis, and post-traumatic stress disorder, caused what is commonly referred to as GWS.⁵⁴ The Pentagon's study, however, was scrutinized, and its results were, at first, labelled "inadequate."⁵⁵

The DOD requested that the Institute of Medicine, a research group affiliated with the National Academy of Sciences,⁵⁶ study the Pentagon's findings.⁵⁷ After examining the study, the National Academy of Sciences' Institute of Medicine reported, in August of 1995, that the "Defense Department had not adequately explained its conclusion that the illnesses did not constitute a definable syndrome unique to Persian Gulf Veterans."⁵⁸ In January of 1996, however, the National Academy of Sciences' Institute of Medicine changed its opinion regarding the Pentagon's findings. The January report issued by the Institute of Medicine stated that the DOD's study was "compassionate and comprehensive."⁵⁹ In addition, the Institute of Medicine reported that upon further review, the data obtained from the 10,020 veterans provided no evidence of a "previously unknown, serious illness among Persian Gulf veterans."⁶⁰

-
53. *Mrs. Clinton Urges Thorough Probe of Gulf War Illnesses*, *supra* note 43, at 10; *Close Look At 'Gulf War Syndrome' Urged*, SUN-SENTINEL, Aug. 15, 1995, at 3A; *Study of Vets Finds No Sign of Gulf War Syndrome*, HERALD, Aug. 2, 1995, at 10A.
 54. *Study of Vets Finds No Sign of Gulf War Syndrome*, *supra* note 53, at 10A; *Mrs. Clinton Urges Thorough Probe of Gulf War Illnesses*, *supra* note 43, at 10; *Close Look At 'Gulf War Syndrome' Urged*, *supra* note 53, at 3A.
 55. *See Medical Experts Fault Pentagon for Rejecting Gulf War Syndrome*, SAN DIEGO UNION-TRIBUNE, Aug. 15, 1995, at A7.
 56. *Close Look At 'Gulf War Syndrome' Urged*, *supra* note 53, at 3A.
 57. *Medical Experts Fault Pentagon for Rejecting Gulf War Syndrome*, *supra* note 56, at A7.
 58. *Close Look At 'Gulf War Syndrome' Urged*, *supra* note 53, at 3A; *60 Minutes: Gulf War Syndrome: Evidence Suggests Veteran Exposure to Chemical Weapons Despite Pentagon Assertion of No 'Widespread' Use* (CBS, Inc. television broadcast, Aug. 20, 1995) (transcript available in Westlaw, 60MIN database). The Institute of Medicine report stated "the reasoning for [the Pentagon's statement] is not well-explained, and the [Defense Department] states it as though it were self-evident." *Medical Experts Fault Pentagon for Rejecting Gulf War Syndrome*, *supra* note 56, at A7 (quoting the Institute of Medicine report). The Institute of Medicine recommended that the Defense Department "either be more cautious in making this conclusion or justify it better." *Id.*
 59. David Brown, *Gulf Vets' Treatment is Lauded; Panel Finds No Evidence of Serious New Syndrome*, WASH. POST, Jan. 5, 1996, at A19 (quoting National Academy of Sciences' Institute of Medicine report).
 60. *Id.*

On April 2, 1996, the Pentagon released the results of an \$80 million study on GWS.⁶¹ The two-year study of approximately 18,900 Gulf War veterans showed that although many veterans had headaches, fatigue, memory loss, and depression, there was no single cause behind these ailments, but, rather, a range of diagnoses existed.⁶² The study revealed that eighteen percent of the patients suffered from psychological ailments, eighteen percent had "musculoskeletal" ailments, eighteen percent had ailments with unknown causes, a smaller percent had nervous system, skin, digestive system, or respiratory system ailments, and ten percent were healthy.⁶³

Whether Gulf War veterans and their families suffer from one mysterious illness or from several diagnosable ailments, the following are among the agents listed as the most likely to cause GWS: (1) the two types of "investigational" drugs that the DOD required Gulf War soldiers to take; (2) the United States military's use of depleted uranium in artillery shells and on the armor of tanks; and (3) the destruction of Iraqi weapons arsenals, which may have been stocked with chemical and biological weapons.⁶⁴

B. "Investigational" Drugs Soldiers Were Required to Take

During the Persian Gulf War, the DOD required American soldiers to take two "investigational drugs":⁶⁵ pyridostigmine bromide and pentavalent botulinum toxoid vaccine.⁶⁶ The drugs were made by federal government contractors and were taken "as pre-treatment antidotes to Iraqi chemical and biological weapons."⁶⁷

1. Pyridostigmine Bromide

Since 1955, pyridostigmine bromide (pyridostigmine) has been prescribed for "some rare autoimmune diseases involving faulty transmission of nerve impulses to the muscles."⁶⁸ Prior to the Gulf War, animal testing showed that taking pyridostigmine greatly in-

61. *Scientists Report Duplicating Gulf War Syndrome*, *supra* note 8; *Pentagon Finds No Gulf War Syndrome*, *supra* note 8.

62. *Id.*; *Study of 19,000 Finds No 'Gulf War Syndrome'*, N.Y. TIMES, Apr. 4, 1996.

63. *Pentagon Finds No Gulf War Syndrome*, PHOENIX GAZETTE, Apr. 3, 1996; *Report Won't Affect VA Treatment for Gulf Vets*, COLUMBUS DISPATCH, Apr. 5, 1996.

64. Flanders, *supra* note 3, at 292.

65. "Investigational drugs" are drugs that the Food and Drug Administration has not approved for marketing to the general public. 21 U.S.C. § 355(a)(i) (1988).

66. Schuchardt, *supra* note 6, at 81.

67. *Id.* at 78.

68. Flanders, *supra* note 3, at 293.

creased one's chances of surviving a lethal exposure to nerve agents⁶⁹ by increasing the effects of atropine and pralidoxime chloride, two post-exposure nerve gas antidotes.⁷⁰ The Pentagon, therefore, requested that soldiers take this drug before combat to reduce the harmful effects of nerve gas in case of attack.⁷¹

Pyridostigmine, however, has severe side effects, including: watery eyes, diarrhea, nausea, vomiting, increased salivation, sweating, the urge to urinate, skin rashes, hair loss, weakness, and loss of muscle control.⁷² These side effects were experienced by some of the American troops during the Persian Gulf War. For example, according to one Army nurse who served in the war: "Soon after taking the [pyridostigmine], I couldn't control my eyes, nose and facial muscles. I was overtaken with chronic sneezing, a running nose and deltoid twitching."⁷³ The side effects of pyridostigmine are similar to the typical symptoms of GWS.⁷⁴

2. Pentavalent Botulinum Toxoid Vaccine

Pentavalent botulinum toxoid vaccine (botulinum toxoid) was the second investigational drug that the Pentagon required soldiers to take.⁷⁵ Since 1966, over 4000 scientists and laboratory technicians have taken this drug in order to prevent the contraction of botulism poisoning from their lab work.⁷⁶ Soldiers were vaccinated with this drug in order to prevent botulism poisoning from biological weapons.⁷⁷

Botulinum toxoid, like pyridostigmine, produced side effects in some of those soldiers who were vaccinated with it.⁷⁸ Approximately five to seven percent of the approximately 4000 scientists and lab

69. Schuchardt, *supra* note 6, at 103.

70. *Doe v. Sullivan*, 938 F.2d 1370, 1372 n.1 (D.C. Cir. 1991).

71. *Id.* at 1372.

72. Flanders, *supra* note 3, at 293; Schuchardt, *supra* note 6, at 102.

73. Flanders, *supra* note 3, at 293. When Army nurse Carol Picou requested to cease pyridostigmine treatment in order to regain control over her eyesight, her request was denied and her local health officer demanded that she resume taking the tablets. *Id.*

74. *See Adler*, *supra* note 4, at 394; Flanders, *supra* note 5, at 94 (stating that on December 7, 1994, the outgoing chairman of the Senate Veterans Affairs Committee, Jay Rockefeller, listed pyridostigmine as one of three medications that may have caused GWS); *Gulf War Illnesses Linked To Pills, Insect Repellents*, *supra* note 4, at A4; Schuchardt, *supra* note 6, at 113; Walker, *supra* note 6, at B13.

75. The makers of botulinum toxoid did not seek FDA approval "simply because of the limited market for the agent." Schuchardt, *supra* note 6, at 102.

76. *Id.*

77. *Sullivan*, 938 F.2d at 1372 n.1.

78. *See infra* notes 79-80 and accompanying text.

technicians who took the drug experienced some mild reactions, usually in the form of redness of the skin.⁷⁹ In rare cases, those scientists and lab technicians who were vaccinated with the drug had sore joints, nausea, vomiting, dizziness, and fever.⁸⁰

3. The Effects of the Combination of Investigational Drugs, Insecticides, and Pesticides Used by American Servicemen During the Gulf War

Chlorpyrifos, an insecticide sold under the trade name Dursban, was used by American troops during the Persian Gulf War.⁸¹ A team of Duke University researchers has found that nervous-system damage occurs in chickens that are exposed to combinations of chlorpyrifos and pyridostigmine.⁸² Additionally, the Duke team found that the same toxic effects on the chickens' nervous system occurred when chlorpyrifos was used in combination with two other pesticides, permethrin and N,N-diethyl-m-toluamide (DEET), which were both used by American soldiers during the Gulf War to protect them from insects in the desert and from the diseases that those insects carried.⁸³ Testing showed that these chemicals, when used individually, did not produce the toxic symptoms in the chickens that they produced when used in combination.⁸⁴

During the course of the experiments, the chickens were first exposed to pyridostigmine.⁸⁵ Next, the chickens were exposed to various combinations of the insecticides used by American troops in the Gulf War.⁸⁶ The chemical combinations reduced the activity of neurotoxic esterase, an enzyme found in brain tissue.⁸⁷ Each combination resulted in nerve damage or in symptoms common to GWS.⁸⁸

The results obtained from this research have been confirmed. First, through preliminary studies, the Duke team discovered "a certain profile among the blood samples from veterans that is consistent with [the team's] research that animals' exposure to multiple

79. Schuchardt, *supra* note 6, at 102.

80. *Id.*

81. *Gulf War Studies Cast Doubt On Common Bug-killer*, THE VIRGINIA-PILOT AND THE LEDGER-STAR, Apr. 17, 1995, at B2.

82. *Id.* The Environmental Protection Agency is presently conducting its own study on the effects of chlorpyrifos, fearing that, by itself, the pesticide may injure people. *Id.*

83. *Id.*; see *Scientists Report Duplicating Gulf War Syndrome*, *supra* note 8.

84. *Scientists Report Duplicating Gulf War Syndrome*, *supra* note 8; *Chemical Combo May Be Linked To 'Gulf Syndrome'*, CHI. TRIB., Apr. 19, 1996.

85. Walker, *supra* note 6, at B13.

86. *Id.*

87. *Id.*

88. *Id.*

chemicals results in central nervous-system damage."⁸⁹ Second, a Duke researcher, a toxicologist at the University of Texas Southwestern Medical Center, and a Kansas State toxicology professor, together, conducted a separate study on the effects of combinations of DEET, permethrin, and pyridostigmine bromide on chickens.⁹⁰ In mid-April of 1996, this study revealed that the combination of the three chemicals in chickens produced many of the symptoms reported by Gulf War veterans.⁹¹ When the chickens were exposed to any two combinations of the chemicals, they developed such symptoms as shortness of breath, weight loss, tremors, and staggering.⁹² In addition, some chickens that were exposed to the combination of all three chemicals died or were paralyzed.⁹³ Third, the Pentagon confirmed the findings of the Duke University study through its own testing of rats and hens.⁹⁴

When exposed to chemicals, the human nervous system responds in a manner similar to that of chickens.⁹⁵ Therefore, the same nervous-system damage that resulted in the chickens is likely to have occurred in the Gulf War veterans who took pyridostigmine and who were also exposed to chlorpyrifos, permethrin, or DEET.⁹⁶ As a result, some scientists hypothesize that the exposure of Gulf War veterans to combinations of pyridostigmine, herbicides, and insecticides used during the Gulf War is one of the most likely causes of GWS.⁹⁷ For now, however, this theory is based solely on preliminary data obtained from animals.⁹⁸

C. *Inhalation of Smoke From Burning Oil Wells*

Approximately 700 burning oil wells are thought to have emitted 5000 tons of dense smoke each day while American soldiers were

89. *Id.* (quoting Mohamed Abou-Donia, a member of the Duke University research team).

90. *Scientists Report Duplicating Gulf War Syndrome*, ASSOCIATED PRESS POL. SERVICE, Apr. 19, 1996; *Chemical Combo May Be Linked To 'Gulf Syndrome'*, *supra* note 84.

91. *Scientists Report Duplicating Gulf War Syndrome*, *supra* note 8.

92. *Id.*

93. *Id.*

94. *Id.*; Tinker Ready, *Duke Research Suggests Cause for Gulf Illness*, NEWS & OBSERVER, Apr. 11, 1995, at A1; *Scientists Report Duplicating Gulf War Syndrome*, *supra* note 8. The Pentagon stated that "[p]reliminary results indicate that, in rats, the combination of the anti-nerve gas drug with insecticides is more toxic than when the chemicals are used separately." Walker, *supra* note 6, at B13.

95. Tinker Ready, *Scientist Works to Solve Puzzle of Gulf War Illness*, NEWS & OBSERVER, Apr. 16, 1995, at B1.

96. *Id.*

97. *Id.*

98. *Id.*

fighting in the Gulf War.⁹⁹ Inhalation of soot emitted from the burning oil wells is thought to be one of the causes of GWS.¹⁰⁰ The American Academy of Environmental Medicine has hypothesized that GWS is caused by “multiple factors encountered by our armed forces in the Persian Gulf region and that the chief inciting factor was exposure to hydrocarbons from burning oil wells and spilled crude oil.”¹⁰¹

There is, however, strong evidence showing that the inhalation of soot from the burning wells does not cause GWS. In the summer of 1992, the United States Army Environmental Hygiene Agency reported that, based upon its testing of ground and soil samples from various areas of Saudi Arabia and Kuwait, the Persian Gulf air during the spring and summer of 1991 “was about as dirty as that of Houston and Philadelphia.”¹⁰² In addition, American civilian workers who helped to extinguish the oil fires in Kuwait have experienced very few GWS symptoms.¹⁰³ Of the 400 civilian men who worked as firefighters in Kuwait, only two have died.¹⁰⁴ One man died of a brain tumor and the other man died of lung cancer, diseases that doctors cannot definitely link to the firefighting.¹⁰⁵ No other workers have reported symptoms consistent with GWS.¹⁰⁶

The small number of American civilian firefighters now displaying symptoms of GWS indicates that the inhalation of soot from the fires did not cause the illness. Instead, these statistics imply that GWS is caused by something else — to which the soldiers were exposed but the civilians were not. For example, the firefighters were not injected with the same inoculations as the soldiers.¹⁰⁷ The fact that the civilians were not inoculated points, once again, to the theory that GWS was in some way caused by the investigational drugs that the soldiers were required to take.¹⁰⁸

D. *Leishmaniasis*

Leishmaniasis is also listed as a possible cause of GWS. Leishmaniasis is “a parasitic infection that enters the bloodstream through

99. France, *supra* note 7, at 114; Hinshaw, *supra* note 41, at 20; see also David Brown, *The Search for Causes Series: Diagnosis Unknown: Gulf War Syndrome Series*, WASH. POST, July 24, 1994, at A19 (“The army of Iraq ignited 605 oil wells and uncapped 46 others as it fled Kuwait in February, 1991.”).

100. France, *supra* note 7, at 114.

101. Hinshaw, *supra* note 41, at 20.

102. Brown, *supra* note 99, at A19.

103. Dick Foster, *Oil-field Firefighters in Iraq Didn't Get Ill*, ROCKY MOUNTAIN NEWS, Apr. 2, 1995, at 14A.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

sand fly bites.”¹⁰⁹ By September of 1994, only thirty-one cases of Leishmaniasis had been diagnosed in Gulf War veterans.¹¹⁰ However, based on the infection rate of this disease which ranged from twenty-one to forty-three percent of all Gulf War veterans,¹¹¹ the Pentagon, in November of 1991, banned blood donations from veterans of the Gulf War.¹¹² The ban was lifted in January of 1993, after test results showed that few Gulf War veterans had the parasitic infection.¹¹³ While the infection has not been found in many Gulf War veterans, tens of thousands of veterans have displayed GWS symptoms.¹¹⁴ Thus, Leishmaniasis is probably not one of the causes of GWS.

E. Depleted Uranium

Depleted uranium releases radioactive uranium oxide particles upon impact.¹¹⁵ Additionally, radiation experts state that depleted uranium “burns at extreme temperatures and creates an oxide dust that can be easily inhaled and ingested.”¹¹⁶ The Pentagon used depleted uranium to coat artillery shells to enable the shells to “smash through armor plate.”¹¹⁷ Depleted uranium was also used on the armor of American tanks during the war to protect them from enemy fire.¹¹⁸ Therefore, when soldiers were in the vicinity of shells from American artillery that hit their targets, or when soldiers were near American tanks which were hit by enemy fire, the troops could have inhaled radioactive uranium oxide particles. The inhaled particles could possibly have caused their GWS.¹¹⁹

Soldiers who came in contact with the depleted uranium soon began to show signs of GWS. For example, Sergeant Carol Picou was an active-duty Army nurse who, along with her squad, set up

109. David Brown, *Parasite Proteins May Help Track a Disease to its Origin*, WASH. POST, Oct. 2, 1995, at A3; France, *supra* note 7, at 114.

110. France, *supra* note 7, at 114.

111. *Id.*

112. Flanders, *supra* note 3, at 293.

113. *Id.*

114. Brown, *supra* note 109, at A3; France, *supra* note 7, at 114. One possible reason for the relatively few cases of diagnosed leishmaniasis in Gulf War veterans, however, could be the result of the impracticality of testing thousands of veterans for the disease. “The only test with a good chance of finding [leishmaniasis] requires the removal of cells from the bone marrow, a painful and moderately expensive procedure.” France, *supra* note 7, at 114.

115. Lowther, *supra* note 15, at 32.

116. Flanders, *supra* note 3, at 293.

117. Lowther, *supra* note 15, at 32.

118. *Id.* This author is unaware whether the source of the depleted uranium came from a federal government contractor, or whether it was supplied directly to the military by the United States.

119. Flanders, *supra* note 3, at 293.

camp two miles away from a battlefield contaminated by the depleted uranium shells fired by American tanks and helicopters.¹²⁰ After several weeks, Picou had lost all urinary control, could not keep food down, and “was passing black, tarry stools that Army doctors attributed to ‘drinking too much water’ and the change in diet.”¹²¹ The theory that depleted uranium is a cause of GWS is further supported by the fact that many of the birth defects found in the children of Gulf War veterans “would be consistent with the effects of radiation from depleted uranium.”¹²²

F. Exposure to Chemical and Biological Agents

During the war, Iraq had many chemical weapons¹²³ in its possession.¹²⁴ Presently, various United States agencies claim that none of these chemical weapons were used in the Persian Gulf War.¹²⁵ The DOD has taken the position that there is no proof, either classified or unclassified, that Gulf War veterans were exposed to Iraqi chemical and biological agents.¹²⁶ In a *60 Minutes* interview that aired on March 12, 1995, then Deputy Secretary of Defense John Deutch¹²⁷ stated: “To my knowledge, we have no confirmation of any soldier having actually been injured by any chemical agent

120. Flanders, *supra* note 5, at 96.

121. Flanders, *supra* note 3, at 293.

122. *Id.*

123. Chemical weapons are typically used to “annihilate unequipped adversary populations without harming roads, buildings, or physical infrastructure.” Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755, 763 (1994). Nerve agents comprise the most common form of chemical weapons. *Id.* at 762.

124. Adler, *supra* note 4, at 394 (stating that CIA agent Gordon Oehler testified before a Senate hearing that “United Nations inspectors found 5,000 tons of [Iraqi] stockpiled chemical agents and more than 46,000 filled munitions, including 30 missile warheads, bombs filled with mustard gas, and nerve gas containers”).

125. *60 Minutes: Gulf War Syndrome* (CBS, Inc. television broadcast, Mar. 12, 1995) (transcript available in Westlaw, 60MIN database) [hereinafter *60 Minutes*]; David Brown, *No Evidence Chemical Weapons Used in Gulf War, Panel Says*, WASH. POST, Jan. 5, 1995, at A6; Brown, *supra* note 99, at A19; O’Hanlon, *supra* note 5, at 14; Robert Burns, *CIA Hunts for Evidence on Gulf War Syndrome*, FRESNO BEE, Apr. 26, 1995, at A9.

126. *Id.*; O’Hanlon, *supra* note 5, at 14 (reporting that in May 1994, a DOD memorandum stated: “There is no information, classified or unclassified, that indicates that chemical or biological weapons were used in the Persian Gulf”). Biological weapons are comprised of “living organisms that infect attacked victims, causing disease, incapacitation, and often death.” Kellman, *supra* note 123, at 763. The military uses both biological and chemical weapons to kill the enemy without destroying the infrastructure of the area attacked. *Id.*

127. John Deutch is presently the Director of the CIA.

during the Gulf War."¹²⁸ Mr. Deutch also stated: "I am quite sure that there were no findings of chemical agents — Iraqi chemical agents or anyone else's chemical agents — south of Basra in the area where U.S. troops and other allied troops were deployed."¹²⁹

The DOD is not the only federal agency to deny that Iraq used chemical and biological weapons during the Gulf War. Dr. Steven Joseph, the Assistant Secretary of Defense for Health Affairs, informed the House Veterans' Affairs Subcommittee that test results have shown that biological and chemical agents were not the cause of the many veterans' ailments.¹³⁰ Additionally, on January 4, 1995, a panel appointed by the National Academy of Sciences' Institute of Medicine comprised primarily of physicians, epidemiologists, and environmental health specialists, reported that no evidence exists that either biological or chemical weapons were used against American soldiers during the Gulf War.¹³¹ The panel also stated that GWS was not "the result of chemical, biological, or toxin warfare, or accidental exposures to stored weapons or research material."¹³²

Because of their own experiences, many veterans do not believe the statements made by these federal agencies. During the Gulf War, tens of thousands of chemical alarms sounded, indicating the presence of chemical weapons in the area.¹³³ Many of the chemical sensors sounded alarms, signaling that the deadly chemical nerve agent sarin had reached a level one thousand times over the level considered hazardous by the Army.¹³⁴

The Pentagon's official answer was that every one of the chemical alarms that sounded was a false alarm.¹³⁵ Former Senator Donald Riegle, who led hearings on GWS, agrees with the veterans who believe that military leaders were mistaken when they said that veterans were not exposed to chemical weapons in the Gulf War.¹³⁶ Senator Riegle stated that the Pentagon's answer was "totally unbelievable."¹³⁷

On March 12, 1995, Gulf War veterans presented recently declassified DOD documents that "refute[] the federal government's assertion that [the veterans] were not exposed to chemical and biological agents during the [Gulf War]."¹³⁸ The document revealed a

128. *60 Minutes*, *supra* note 125.

129. *Id.*

130. *Dissecting a Medical Mystery*, *supra* note 44, at 4.

131. Brown, *supra* note 125, at A6.

132. *Id.*

133. *60 Minutes*, *supra* note 125.

134. Adler, *supra* note 4, at 394.

135. *Id.*

136. *60 Minutes*, *supra* note 125; Daniel Williams, *U.S. Hides Evidence of Gulf Chemical Arms, Senator Says*, WASH. POST, Oct. 9, 1994, at A48.

137. *60 Minutes*, *supra* note 125.

138. O'Hanlon, *supra* note 5, at 14.

January 20, 1991, Operation Desert Storm command log entry which stated that "Czechoslovakian troops had detected chemical agents 'flowing down from [a] factory/storage [facility that had been] bombed in Iraq.'"139 A Czechoslovakian team also spotted "borderline life-threatening concentrations of the chemical agents" near American troops, according to a Senate Banking, Housing, and Urban Affairs Committee report.140 The Pentagon's Edwin Dorn told the Senate committee: "We have . . . accepted those [Czech] detections as likely valid detections."141

Furthermore, at the Gulf War Veterans' Conference of March 12, 1995, microbiologist Howard Urnovitz "presented findings [that] suggest . . . chemical and biological agents may be causing [GWS]."142 Urnovitz stated that in a study of forty Gulf War veterans, eighty-five percent "showed signs of antibodies that normally appear when a substance in the body know[n] as HERVs is activated."143 According to Urnovitz, the causes of HERV activation include radiation and/or exposure to toxins.144

In mid-March of 1995, the Central Intelligence Agency (CIA) began to review data concerning the possibility of United States soldiers' exposure to chemical or biological agents during the Persian Gulf War.145 As of late April of 1995, the CIA had found no evidence that such exposure had ever occurred.146 The study, however, is not yet complete.147

139. *Id.*; *60 Minutes*, *supra* note 125. A group of veterans stated that the chemical alarms were real. *60 Minutes*, *supra* note 125. The soldiers claim they were called to MOPP 4, which required them to put on all chemical and biological protective gear, over a radio broadcast which stated that chemicals were in the area. *Id.* The soldiers further stated that all exposed skin felt like it was on fire and that three to four days following the attack, they had symptoms which included burning skin, a numb face, rashes, and night sweats. *Id.* Logs show that on this night there was an unconfirmed report of a chemical attack. *Id.* A Czechoslovakian chemical team located several hundred miles away detected a deadly nerve agent, sarin, in the air. *Id.* At a briefing on Nov. 10, 1993, then Deputy Secretary of Defense John Deutch said the Czech findings were believed to be valid. During the *60 Minutes* interview, however, Deutch claimed the Czech report was presently not believed to be accurate, and that the Czechs actually detected a contaminant instead of sarin. *Id.*

140. Adler, *supra* note 4, at 395.

141. *Id.* The Czechoslovakian report cannot be confirmed, however, because no samples were saved. Brown, *supra* note 99, at A19.

142. O'Hanlon, *supra* note 5, at 14.

143. *Id.*

144. *Id.*

145. Robert Burns, *CIA Studying Gulf War Data on Iraqi Chemical Weapons*, *FRESNO BEE*, Apr. 26, 1995, at A9.

146. *CIA Hunts For Evidence on Gulf War Syndrome*, *STAR-LEDGER*, Apr. 26, 1995, (page unavailable online).

147. *Id.*

Determining whether chemical or biological agents were used by Iraq against United States military personnel during the Gulf War could be crucial to determining whether GWS was caused by exposure to these weapons. Military research shows that low-level doses of the chemical nerve agent sarin cause symptoms, such as headaches, nausea, and weakness, that are virtually identical to those symptoms found in veterans who have GWS.¹⁴⁸

IV. COMPENSATION FOR GULF WAR SYNDROME

Regardless of the cause, an issue of tremendous importance to injured veterans is whether they may be compensated for their GWS. In order to receive compensation from the United States, those afflicted with GWS must show that the United States has waived its sovereign immunity from suit under the Federal Tort Claims Act.¹⁴⁹

A. *The Government's Sovereign Immunity In General*

The doctrine of sovereign immunity, as it is known today, originated in England, where, under the theory that the King could do no wrong, the Crown was immune from any suit to which it did not consent.¹⁵⁰ This philosophy has remained in effect in the United States as well, "partly on the ground that it seem[s] illogical to enforce a claim against the very authority that create[s] the claim in the first place."¹⁵¹ The doctrine of sovereign immunity protects the federal government from liability for tortious acts committed by its agents or employees, unless it agrees to be held liable.¹⁵²

B. *The Federal Tort Claims Act*

In 1948, Congress enacted the Federal Tort Claims Act (FTCA).¹⁵³ The FTCA "mark[ed] the culmination of a long effort to mitigate

148. 60 Minutes, *supra* note 125.

149. 28 U.S.C. § 2674 (1988).

150. *Feres v. United States*, 340 U.S. 135, 139 (1950); W. PAGE PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984).

151. KEETON, *supra* note 150, at 1033.

152. *Id.*

153. 28 U.S.C. § 2674 (1988). Several of the provisions of the FTCA are found in Title 28, §§ 2674 (United States is liable in same manner and to same extent as a private individual would be), 1291 (the federal courts of appeals have jurisdiction of appeals from all final decisions of federal district courts), 1346(b) (federal district courts have exclusive jurisdiction of civil claims against the United States Government for injury or loss of property, personal injury, or death caused by a federal government employee's negligent or wrongful act or omission while acting in the scope of employment), 1402(b) (in any section 1346(b) action, only the judicial district in which the plaintiff resides or the

unjust consequences of sovereign immunity from suit.”¹⁵⁴ The FTCA partially waives the federal government’s immunity from tort liability; section 2674 states that “[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . .”¹⁵⁵ Additionally, section 1346(b) of the FTCA, in essence, creates a qualified consent by the United States to be sued based on tort liability. Section 1346(b) provides that the federal district courts have exclusive jurisdiction over civil claims against the United States for

personal injury or death caused by the negligent or wrongful act or omission of any *employee* of the Government while acting . . . 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.¹⁵⁶

Section 2671 of the FTCA states that members of the military or naval forces of the United States are federal government employees.¹⁵⁷ Additionally, section 2671 states that, for a member of the Armed Services, “acting within the scope of his office or employment” means “acting in the line of duty.”¹⁵⁸ Therefore, by applying section 2671 of the FTCA to section 1346(b) of the FTCA, it would appear that a qualified consent to be sued for tort liability is provided by the federal government when a soldier commits a tort in the line of duty. The FTCA provides exceptions to section 2674, however, in which its sovereign immunity is not waived.¹⁵⁹

1. Exceptions to the Federal Tort Claims Act That May Bar Recovery in Gulf War Syndrome Actions

If a claim falls within one of the exceptions to section 2674, the federal government’s sovereign immunity is not waived, and federal district courts do not have jurisdiction under the FTCA to hear the

district where the cause of action arose may try the case), 1502 (United States Court of Federal Claims does not have jurisdiction over claims arising out of treaties with foreign governments), 2401(b) (suit must be filed in every tort claim against the United States within two years after the claim accrues or else the claim is barred), 2402 (tort claims shall not be tried by a jury), 2412(b) (awarding costs and attorneys fees to prevailing party in suits against the United States), and 2671-2680 (tort claims procedure).

154. *Feres v. United States*, 340 U.S. 135, 139 (1950).

155. 28 U.S.C. § 2674 (1988).

156. *Id.* § 1346(b) (1988) (emphasis added).

157. *Id.* § 2671.

158. *Id.*

159. These exceptions may be found in 28 U.S.C. § 2680 (1988).

case.¹⁶⁰ There are three primary exceptions to section 2674 which may allow the United States to claim sovereign immunity if sued by veterans and their family members for their GWS.

First, section 2680(a), known as the "discretionary function exception,"¹⁶¹ excepts "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."¹⁶² The "military departments" of the United States are considered to be federal agencies under the FTCA.¹⁶³ Therefore, the United States can argue that it may not be sued for veterans' GWS if GWS is caused by the investigational drugs the soldiers were required to take during the war or if it is due to the military's use of depleted uranium in artillery shells.

In support, the United States may claim that both requiring soldiers to take investigational drugs and coating artillery shells and tanks with depleted uranium involved discretionary decisions in the exercise of the military's duty to protect the lives of its soldiers. As is necessary in order to fall within the discretionary function exception, each of these decisions was made solely by agencies or employees of the federal government. The decision to require soldiers to take the investigational drugs was made by the Pentagon. The Pentagon required all soldiers to take pyridostigmine and botulinum toxoid after concluding that the military mission in the Gulf War would have been jeopardized if soldiers were given the choice whether to take the two drugs.¹⁶⁴ The Pentagon was able to require the soldiers to take the drugs because the FDA Commissioner concluded that the informed consent of the soldiers was not feasible for these specific investigational drugs during the Gulf War.¹⁶⁵

In addition, the coating of artillery shells and tanks with depleted uranium will likely be deemed by the courts to have been a discretionary function of the United States. The United States Supreme Court has stated that selecting "the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretion-

160. *United States v. Orleans*, 425 U.S. 807 (1976); *Dalehite v. United States*, 346 U.S. 15, 30-31 (1953).

161. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 769 (E.D.N.Y. 1980), *rev'd*, 635 F.2d 987 (2d Cir. 1980) [hereinafter *Agent Orange*].

162. 28 U.S.C. § 2680(a) (1988).

163. *Id.* § 2671.

164. Schuchardt, *supra* note 6, at 80.

165. *Doe v. Sullivan*, 756 F. Supp. 12 (D.D.C.), *aff'd*, 938 F.2d 1370, 1374 (D.C. Cir. 1991); Schuchardt, *supra* note 6, at 79 (citing Judy Foreman, *Ethicists Assail a Plan to Give Troops Unapproved Vaccine*, BOSTON GLOBE, Jan. 9, 1991, at 10).

ary function within the meaning of [section 2680 of the FTCA].”¹⁶⁶

Second, section 2680(j) of the FTCA, known as the “combatant exception,”¹⁶⁷ excepts from the FTCA “[a]ny claim arising out of the *combatant* activities of the military or naval forces, or the Coast Guard, *during time of war*.”¹⁶⁸ Congress has declared that the Persian Gulf War was a “period of war.”¹⁶⁹ It appears from the plain language of this exception that the United States can claim sovereign immunity from liability for veterans’ GWS because GWS arose out of the combatant activities of the Persian Gulf War.

Third, section 2680(k), referred to as the “foreign country exception,”¹⁷⁰ excepts “[a]ny claim arising in a foreign country.”¹⁷¹ The purpose of the “foreign country exception” is to ensure that “the United States [is not subject] to liabilities dependent upon the laws of a foreign power.”¹⁷² Therefore, the United States may not successfully claim that a suit is barred under section 2680(k) of the FTCA in any GWS cases as long as the party suing does not contend that foreign law should be applied.

These FTCA exceptions are merely the first hurdle that veterans must overcome in order to bring suit against the federal government. Even if claims for tort liability against the United States for veterans’ GWS are not barred by any of these exceptions, the claims may, nevertheless, be barred by the *Feres*¹⁷³ doctrine.

C. The “*Feres*” Doctrine and Its Progeny

1. *Feres v. United States*

The United States Supreme Court has shown through its holdings in several cases that courts should not apply the FTCA to claims

166. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

167. *Agent Orange*, 506 F. Supp. at 769.

168. 28 U.S.C. § 2680(j) (1988) (emphasis added).

169. 38 U.S.C. § 101(11) (Supp. V 1993).

The term “period of war” means the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War, and the period beginning on the date of any future declaration of war by the Congress and ending on the date prescribed by Presidential proclamation or concurrent resolution of the Congress.

Id.

170. *Agent Orange*, 506 F. Supp. at 769.

171. 28 U.S.C. § 2680(k) (1988).

172. *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1254 (E.D.N.Y. 1984) (quoting Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 35 (Jan. 29, 1942)).

173. *Feres v. United States*, 340 U.S. 135 (1950).

arising out of the relationship between soldiers and the military.¹⁷⁴ In the landmark case, *Feres v. United States*,¹⁷⁵ the Supreme Court strictly interpreted the FTCA to preclude recovery of damages from the federal government under the FTCA for "injuries to servicemen where the injuries ar[ose] out of or [we]re in the course of activity incident to service."¹⁷⁶ This holding is commonly referred to as the "*Feres* doctrine." This doctrine creates an insurmountable hurdle that soldiers and their families presently face in their attempts to recover monetary damages from the United States under the FTCA.

In *Feres*, the Court consolidated three cases for review. The first of the cases was *Feres v. United States*.¹⁷⁷ In that case, a United States Army soldier on active duty died as a result of a fire in his barracks.¹⁷⁸ The soldier's widow sued the federal government for negligently quartering her husband in barracks that the Army knew or should have known were unsafe owing to a defective heating plant and for failing to maintain a sufficient fire watch.¹⁷⁹

The second of the three consolidated cases was *Jefferson v. United States*.¹⁸⁰ The plaintiff in *Jefferson* was a former Army soldier who required abdominal surgery while on active duty.¹⁸¹ Eight months after his discharge, the plaintiff had a towel measuring thirty inches in length and eighteen inches in width removed from his stomach.¹⁸² The towel had the phrase "Medical Department U.S. Army" inscribed on it.¹⁸³ Jefferson alleged that the surgeon who performed his original abdominal surgery negligently left the towel in his stomach.¹⁸⁴

The third case that was consolidated in *Feres* was *United States v. Griggs*.¹⁸⁵ Griggs's executrix alleged that Griggs died while on active military duty as a result of "negligent and unskillful medical treatment by Army surgeons."¹⁸⁶

174. See *Chappell v. Wallace*, 462 U.S. 296 (1983); *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Feres v. United States*, 340 U.S. 135 (1950).

175. 340 U.S. 135 (1950).

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

177. 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950).

178. *Feres*, 340 U.S. at 137.

179. *Id.*

180. 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.*, *Feres v. United States*, 340 U.S. 135 (1950).

181. *Jefferson v. United States*, 178 F.2d 518, 518-19 (4th Cir. 1949), *aff'd sub nom.*, *Feres v. United States*, 340 U.S. 135 (1950).

182. *Feres*, 340 U.S. at 137.

183. *Id.*

184. *Id.*

185. 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.*, *Feres v. United States*, 340 U.S. 135 (1950).

186. *Feres*, 340 U.S. at 137.

In all three cases, an active duty soldier had "sustained injury due to negligence of others in the armed forces."¹⁸⁷ The common issue, therefore, was "whether the [FTCA] extend[ed] its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong."¹⁸⁸ Based primarily on four different theories, the Supreme Court determined that the FTCA did not waive the sovereign immunity of the United States for injuries to active duty soldiers incurred incident to military service.¹⁸⁹

First, the Court noted that the language of the FTCA indicated that Congress intended only to waive the federal government's sovereign immunity where an analogous private liability existed.¹⁹⁰ The Court stated that the FTCA's effect was "to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."¹⁹¹ Because no American law in existence allowed soldiers to recover damages caused by the negligence of their superior officers or the federal government,¹⁹² the Court ruled that the FTCA did not allow soldiers to recover for injuries incident to service.¹⁹³ The Supreme Court opined that to hold otherwise would be to provide new causes of action against the United States which, the Court determined, was not Congress's intention.¹⁹⁴

A second rationale for the *Feres* Court's holding was the lifestyle of the soldier. Soldiers often are transferred to different bases throughout the United States and its territories and possessions.¹⁹⁵ Under the FTCA, the federal government's liability is determined pursuant to "the law of the place where the act or omission [of the government employee] occurred."¹⁹⁶ Therefore, under the FTCA, suits by soldiers would be governed by the law of the state in which the injury took place.¹⁹⁷ Many states have completely different laws

187. *Id.* at 138.

188. *Id.*

189. *Id.* at 141-45.

190. *Id.* at 141. FTCA § 2674 states that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1988). The Court construed § 2674 as solely providing "acceptance of liability under circumstances that would bring private liability into existence." *Feres*, 340 U.S. at 141.

191. *Feres*, 340 U.S. at 142.

192. The Court stated it knew of "no American law which ever ha[d] permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." *Id.* at 141.

193. *Id.* at 142.

194. *Id.* at 141.

195. *Id.* at 143.

196. *Id.* at 142 (quoting 28 U.S.C. § 1346(b) (1988)).

197. *Id.* at 143-44.

regarding an employer's liability for injuries to its employee, such as workman's compensation, common law actions for damages between employer and employee, limitations of liability, and doctrines of assumption of risk.¹⁹⁸ Additionally, a soldier who was injured in the state where he was stationed and who was transferred to a base in another state or country during the suit would encounter extraordinary problems — such as dealing with witness procurement, time, and expense — during the litigation that would not be experienced by civilians.¹⁹⁹ The Court, in *Feres*, stated that it was unreasonable that the location of a soldier's injury would determine the law to be applied to a soldier's tort claim, especially when the soldier had no choice but to go where ordered by the federal government.²⁰⁰ Therefore, the Court concluded that soldiers were barred from suing under the FTCA.²⁰¹

The Court's third rationale for barring suits by soldiers against the United States under the FTCA was that the relationship between the soldier and the armed forces was "distinctively federal in character."²⁰² The Court noted that liability arising out of this relationship should be "fundamentally derived from federal sources and governed by federal authority."²⁰³ The Court noted that there was no federal law which provided for the recovery that the plaintiffs in the three cases sought.²⁰⁴ Therefore, because Congress had never subjected this distinctively federal relationship to state law, the Court reasoned that Congress did not intend for the FTCA to be applicable in suits against the United States, by soldiers injured incident to service.²⁰⁵

Finally, the *Feres* Court noted the existence of the Veterans' Benefits Act (VBA),²⁰⁶ which provides a no-fault-based scheme to compensate veterans for service-connected and non-service-connected disabilities and which compensates the veterans' families for service-connected and non-service-connected deaths of veterans.²⁰⁷ The Court reasoned that if Congress had intended to permit soldiers to recover under the FTCA, Congress would have created a provision in the FTCA explaining how recovery under the FTCA and compensation

198. *Id.* at 143.

199. *Id.* at 145.

200. *Id.* at 143. The Court stated "[t]hat the geography of an injury should select the law to be applied to [a soldier's] tort claims makes no sense." *Id.*

201. *Id.* at 146.

202. *Id.* at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947)).

203. *Id.* at 144 (quoting *Standard Oil Co.*, 332 U.S. at 305-06).

204. *Id.*

205. *Id.*

206. 38 U.S.C. §§ 101 to 1701 (1988 & Supp. V 1993).

207. *See id.*

under the VBA offset each other.²⁰⁸ Because no such provision existed, the Court concluded that Congress did not intend for the FTCA to establish federal governmental liability for injuries to service members arising out of or during the course of "activity incident to service."²⁰⁹

Based on these four rationales, the *Feres* Court concluded that Congress did not intend for the FTCA to allow service members to recover from the United States under tort liability for service-related injuries or death.²¹⁰ The Court stated, however: "[I]f we misinterpret the [FTCA], at least Congress possesses a ready remedy."²¹¹

2. *United States v. Brown*

Four years later, in *United States v. Brown*, the Supreme Court allowed a plaintiff to recover from a VA hospital by distinguishing *Feres*.²¹² In *Brown*, the plaintiff had injured his knee while on active duty in the Armed Services and was honorably discharged as a result of the injury.²¹³ Six years after the discharge, the plaintiff had knee surgery at a VA hospital.²¹⁴ Following the operation, the plaintiff's knee continued to dislocate, requiring a second operation one year after the first operation had been performed.²¹⁵ The second surgery was also performed at a VA hospital.²¹⁶ During the second surgery, an allegedly defective tourniquet was used, which resulted in permanent nerve damage to Brown's leg.²¹⁷

Brown filed suit for damages under the FTCA, claiming that he suffered injury due to the VA hospital's negligent treatment of his knee.²¹⁸ The *Brown* Court noted that the *Feres* decision was based on the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might [be] obtain[ed] if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty."²¹⁹ Because the actual nerve damage occurred after Brown was discharged from the Armed Services, the Court held that Brown's suit would not affect the special

208. *Feres v. United States*, 340 U.S. 135, 143 (1950).

209. *Id.* at 144-46.

210. *Id.* at 146.

211. *Id.* at 138.

212. 348 U.S. 110 (1954).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 110-11.

218. *Id.* at 110.

219. *Id.* at 112 (citing *Feres v. United States*, 340 U.S. 135, 141-43 (1950)).

relationship of a soldier to his superiors and, therefore, that the suit was not barred by *Feres*.²²⁰ The *Brown* Court adhered to the "line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty."²²¹

The Court also recalled that the *Feres* opinion stated that the FTCA waived federal government immunity from recognized causes of action.²²² A hospital's liability for negligence to its patients was a recognized cause of action under local laws concerning private parties.²²³ Therefore, the Court held that the FTCA waived the federal government's sovereign immunity in *Brown*.²²⁴

3. *Stencel Aero Engineering Corp. v. United States*

The next United States Supreme Court case that dealt explicitly with recovery against the federal government under the FTCA for injuries sustained by soldiers during the course of duty was *Stencel Aero Engineering Corp. v. United States*.²²⁵ In *Stencel*, a National Guard Officer, Captain John Donham, sustained injuries when the ejection system of his fighter aircraft malfunctioned during a mid-air emergency.²²⁶ Stencel Aero Engineering Corporation (Stencel) manufactured the ejection system with some parts provided by the United States and according to the United States Government's specifications. Captain Donham sued both the United States (under the FTCA) and Stencel, alleging that their individual and joint negligence caused the ejection system's malfunction.²²⁷ Stencel cross-claimed against the United States (under the FTCA) for indemnification, claiming that any malfunctions were caused by the faulty components provided, and the faulty specifications required, by the United States.²²⁸

The Court looked to *Feres* and stated: "The relationship between the Government and its suppliers of ordnance is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers."²²⁹ Therefore, the *Stencel* Court found that the distinctively federal relationship between the United States and its supplier of ordnance would make the application of state law to determine liability pursuant to FTCA section 1346(b) inappropri-

220. *Id.* at 113.

221. *Id.*

222. *Id.* at 112-13.

223. *Id.* at 113.

224. *Id.*

225. 431 U.S. 666 (1977).

226. *Id.* at 667.

227. *Id.* at 668.

228. *Id.*

229. *Id.* at 672.

ate.²³⁰ As a result, Stencel's cross-claim against the United States for indemnification for any recovery Donham might receive from Stencel was barred.²³¹

In addition, the *Stencel* Court stated that one of the underlying reasons for the holding in *Feres* — that the federal government was not liable under the FTCA for a soldier's injuries incurred incident to military service — was the effect that the action might have on military discipline.²³² The *Stencel* Court expanded the *Feres* holding by stating that the claim's effect on military discipline was the same whether the suit against the federal government under the FTCA was brought by an injured soldier or by a third party.²³³ "The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."²³⁴ For this reason as well, the third party indemnity action by Stencel against the United States was barred by the *Feres* doctrine, just as the direct action under the FTCA by Donham against the federal government was barred.²³⁵

4. *Chappell v. Wallace*

Following the *Stencel* decision, the Supreme Court, in *Chappell v. Wallace*,²³⁶ expanded the *Feres* doctrine to explicitly bar claims by soldiers against their superiors for constitutional violations.²³⁷ *Chappell*, unlike the cases previously discussed, did not involve a claim against the United States made under authority of the FTCA. In *Chappell*, enlisted soldiers brought a suit against their superior officers to recover damages for alleged constitutional rights violations of racial discrimination.²³⁸ The Court stated that, based on the strict demands necessary for discipline and immediate compliance to orders required by the military on the battlefield, which must be taught to soldiers through their everyday training, "[c]ivilian courts must . . . hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers."²³⁹ Therefore, the Court held that *Feres*

230. *Id.* at 671.

231. *Id.* at 673.

232. *Id.* at 671-72.

233. *Id.* at 673.

234. *Id.*

235. *Id.* The Court stated that "the right of a third party to recover in an indemnity action against the United States . . . must be held limited by the rationale of *Feres* where the injured party is a service-man." *Id.* at 674.

236. 462 U.S. 296 (1983).

237. *Id.* at 305

238. *Id.* at 297. The soldiers also alleged that their superiors conspired "to deprive them of [their] rights in violation of 42 U.S.C. § 1985." *Id.*

239. *Id.* at 300.

barred any claim by enlisted military personnel against their superior officers for constitutional violations.²⁴⁰

5. *United States v. Shearer*

In *United States v. Shearer*,²⁴¹ the mother of a murdered Army Private sued the United States under the authority of the FTCA, claiming that the Army's negligence resulted in her son's death.²⁴² The Army knew that Private Shearer's murderer, Private Heard, had previously been convicted of manslaughter while he was assigned to an Army base in Germany.²⁴³ The respondent claimed that her son's Army superiors negligently failed to: (1) control Private Heard; (2) warn others that Private Heard was at large; and (3) remove Private Heard from active duty.²⁴⁴

The Court stated that the mother's three claims against the United States were barred by *Feres* because the claims went "directly to the 'management' of the military; [calling] into question basic choices about the discipline, supervision, and control of a serviceman."²⁴⁵ The Court found that these claims "would require Army officers 'to testify in court as to each other's decisions and actions'"²⁴⁶ and that *Stencel* specifically barred such claims.²⁴⁷ Because the claims would involve the courts in the second-guessing of military officers, the *Shearer* Court ruled that the suit could not be maintained under the authority of the FTCA.²⁴⁸ Therefore, the *Shearer* Court expanded the *Feres* doctrine to prohibit families from recovering damages from the United States under the FTCA for the alleged wrongful death of a soldier when the death occurred during military service.²⁴⁹

6. *United States v. Stanley*

In 1987, the United States Supreme Court, in *United States v. Stanley*,²⁵⁰ again applied the *Feres* Doctrine. In the late 1950's, Master Sergeant James B. Stanley was "secretly administered doses of lysergic acid diethylamide (LSD), pursuant to an Army plan to study

240. *Id.* at 305.

241. 473 U.S. 52 (1985).

242. *Id.* at 53-54.

243. *Id.* at 54.

244. *Id.* at 58.

245. *Id.*

246. *Id.* (quoting in part *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977)).

247. *Id.* at 58-59.

248. *Id.* at 59.

249. *Id.*

250. 483 U.S. 669 (1987).

the effects of the drug on human subjects.”²⁵¹ In 1969, Stanley was discharged from the Army.²⁵² It was not until 1975 that Stanley learned, from a letter sent to him by the Army, that he had been injected with LSD.²⁵³

Stanley filed suit under the FTCA “alleging negligence in the administration, supervision, and subsequent monitoring of the drug testing program.”²⁵⁴ Stanley claimed that the LSD caused him to suffer hallucinations and memory loss, hurt his military performance, and also caused him to beat his wife and children.²⁵⁵ Stanley also claimed that his constitutional rights were violated by individual federal officers.²⁵⁶ Furthermore, the veteran alleged that the United States was negligent in failing to warn, monitor, or treat him following his discharge.²⁵⁷

The Court found that, although Stanley was not acting under orders from superiors when the LSD was injected, the administration of the LSD occurred “incident to service.”²⁵⁸ The Court refused to look into the “extent to which particular suits would call into question military discipline and decisionmaking”²⁵⁹ because such an inquiry would be intruding into military matters.²⁶⁰ The Court stated that focusing solely on the “incident to service” test helped to ensure that the inquiry into military matters was minimized.²⁶¹

Therefore, the *Stanley* Court reaffirmed *Chappel*’s holding—that owing to “the unique disciplinary structure of the Military Establishment and Congress’s activity in the field,”²⁶² claims against the United States by Armed Service members for violations of constitutional rights that occurred incident to service would not be allowed.²⁶³ These claims would not be allowed regardless of whether an actual chain-of-command, officer-subordinate relationship existed with the defendants at the time of the alleged constitutional violation and regardless of whether the claimed wrongs involved military discipline in acting on direct orders in performing one’s military duty.²⁶⁴ Because the injection occurred incident to service, the Court ruled that the United

251. *Id.* at 671.

252. *Id.*

253. *Id.* at 671-72.

254. *Id.* at 672.

255. *Id.* at 671.

256. *Id.* at 674.

257. *Id.* at 672-73.

258. *Id.* at 680-81.

259. *Id.* at 682.

260. *Id.*

261. *Id.* at 683.

262. *Id.* (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)).

263. *Id.* at 683-84.

264. *Id.*

States, according to *Feres*, was excepted by the FTCA from liability for any constitutional violations to Stanley.²⁶⁵

7. *Boyle v. United Technologies Corp.* and the Government Contractor Defense

In 1988, the Court revisited the *Feres* doctrine in *Boyle v. United Technologies Corporation*.²⁶⁶ David Boyle, a United States Marine helicopter pilot, crashed off the coast of Virginia Beach, Virginia during a training exercise.²⁶⁷ Boyle survived the impact of the crash but subsequently drowned because he could not escape from the helicopter.²⁶⁸

Employing two theories of liability under Virginia tort law, Boyle's father sued the builder of the helicopter, United Technologies Corp. (United).²⁶⁹ Mr. Boyle claimed that United had defectively repaired one of the parts of the helicopter's automatic flight control system.²⁷⁰ He alleged that the improperly repaired part malfunctioned and caused the crash.²⁷¹ Mr. Boyle also alleged that the emergency escape system of the helicopter had been defectively designed, had trapped his son in the downed helicopter, and had caused his son's drowning.²⁷²

The Court stated that because "*Feres* prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should prohibit all service-related tort claims against the manufacturer."²⁷³ The Court held that the design of the military helicopter, including its emergency escape system, was a discretionary function of the federal government.²⁷⁴ Section 2680(a) of the FTCA exempts the federal government from liability for "[a]ny claim . . . based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty"²⁷⁵ by the United States. Therefore, the Court held that the United States was exempt from the suit under section 2680(a) of the FTCA.²⁷⁶ The Court then went one step further and stated:

265. *Id.* at 684.

266. 487 U.S. 500 (1988).

267. *Id.* at 502.

268. *Id.*

269. *Id.* at 502-03.

270. *Id.* at 503.

271. *Id.*

272. *Id.*

273. *Id.* at 510.

274. *Id.* at 511 ("We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [§ 2680 of the FTCA].").

275. 28 U.S.C. § 2680(a) (1988).

276. *Boyle*, 487 U.S. at 511.

It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.²⁷⁷

The Court adopted a three-part test, the satisfaction of which would establish a Government contractor's immunity from liability for design defects in military equipment under the FTCA.²⁷⁸ First, the United States must have provided the contractor with "reasonably precise specifications."²⁷⁹ Second, the equipment provided by the contractor must have conformed to those specifications.²⁸⁰ Finally, the supplier must have warned the federal government about dangers known to the supplier but not known by the United States.²⁸¹ According to the *Boyle* Court, if all three factors are met, the federal government contractor will be free from liability for injuries to service members resulting from the product's design defects.²⁸²

The three-part test adopted in *Boyle* is relevant to claims for damages from the United States by veterans and their families for injuries caused by GWS. Claimants may try to sue the federal government contractors who made the investigational drugs that soldiers were required to take. Claimants may also try to sue any federal government contractors who manufactured the depleted uranium used by the United States military to coat tank armor and artillery shells.

8. *In re "Agent Orange" Product Liability Litigation*

Between 1961 and 1971, over fifty-thousand tons of a toxic defoliant called Agent Orange was sprayed on Southeast Asia forests.²⁸³ Agent Orange, used during the Vietnam War, got its name

277. *Id.* at 512.

278. *Id.*

279. *Id.*

280. *Id.* The first two factors place the suit within the "discretionary function" exception to liability provided by § 2680(a) of the FTCA, because, if met, a federal government officer must have made some of the decisions regarding the military equipment. *Id.*

281. *Id.*

282. *Id.*

283. *Mystery, supra* note 7, at A6.

because it was shipped in orange-striped barrels.²⁸⁴ It was made from a combination of two herbicides: 2,4-D and 2,4,5-T,²⁸⁵ and it was used in an attempt to defoliate the Vietnam forests, which would thereby reduce enemy concealment.²⁸⁶ The defoliant was also used to destroy crops in Vietnam, which would thereby deprive enemy soldiers of food.²⁸⁷ In early 1970, the DOD ceased military operations that used Agent Orange in Vietnam.²⁸⁸

Many Vietnam veterans became ill following the Vietnam War with a wide range of health problems including: cancer, skin conditions, nervousness, numbness, hearing impairments, vision impairments, and reduced libido.²⁸⁹ In addition, some children of Vietnam War veterans were born with birth defects.²⁹⁰ In *In re "Agent Orange" Product Liability Litigation*, Vietnam veterans and their family members sued nineteen chemical companies that produced the Agent Orange used in Vietnam.²⁹¹ The veterans alleged that the companies negligently manufactured and sold the defoliant to the federal government, knowing it contained dioxin,²⁹² and that exposure to Agent Orange caused their injuries.²⁹³ Some of the families of the Vietnam veterans also claimed that the soldiers' exposure caused the spouses of the veterans to have miscarriages and also caused birth defects in the soldiers' children.²⁹⁴ The defendant chemical companies filed third-party complaints against the United States, under Rule 14(a) of the Federal Rules of Civil Procedure, seeking indemnification in the event that they were found liable to the plaintiffs.²⁹⁵

284. Ellen Tannenbaum, *The Pratt-Weinstein Approach to Mass Tort Litigation*, 52 BROOK L. REV. 455, 456 n.4 (1986).

285. *Id.* at 456.

286. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 776 (E.D.N.Y. 1980); Tannenbaum, *supra* note 284, at 457 n.12 (stating Agent Orange made up 94% of the defoliants used in Vietnam).

287. *Agent Orange*, 506 F. Supp. at 779.

288. Tannenbaum, *supra* note 284, at 459.

289. *Id.* at 458-59.

290. *Id.*

291. *Agent Orange*, 506 F. Supp. at 768. Although *Agent Orange* was not decided by the United States Supreme Court, it is examined in this Comment because of the similarity in the injuries to veterans and their families caused by Agent Orange and the injuries sustained by veterans and their families as a result of GWS.

292. Tannenbaum, *supra* note 284, at 461.

293. *Agent Orange*, 506 F. Supp. at 769. The plaintiffs alleged their injuries were caused by exposure to Agents Orange, Pink, Purple and Green, which will be grouped together and referred to as "Agent Orange" for the purposes of this paper. *Id.* at 768 n.1.

294. *Id.* at 769.

295. *Id.* at 768-69.

In a pretrial ruling, the United States District Court for the Eastern District of New York dismissed the third-party claims of the defendant chemical companies against the federal government.²⁹⁶ In light of *Stencel*, the court determined that if the plaintiff would be barred from direct action against the government, the third-party claims at issue would also be barred.²⁹⁷ The district court, therefore, first considered if the plaintiff's would have a cause of action directly against the government.²⁹⁸ Addressing each class of plaintiff in turn, the court held that all such claims would be barred by *Feres* because the injuries arose from, or were incident to, the veterans' alleged exposure during their military service.²⁹⁹

The district court, therefore, held that, as all plaintiff claims would have been barred, all third-party complaints against the United States for indemnity or contribution were also barred.³⁰⁰ The court, following *Feres*, therefore, dismissed the third-party complaints against the United States as exempt from the FTCA.³⁰¹

The court then turned its attention to the motions between the named parties.³⁰² The court declined to grant the defendants' motion for summary judgment.³⁰³ The defendants relied on the federal government contractor defense.³⁰⁴ The court acknowledged the relevance of the affirmative defense to the instant litigation. Finding numerous facts in dispute, however, the court declined to grant the summary judgment motion.³⁰⁵

Subsequently, at another motions hearing,³⁰⁶ the court reasoned that the federal government contractor defense could be asserted in strict liability suits, including those filed in the Agent Orange litigation.³⁰⁷ In order for the defendants to be free from liability,

296. *Id.* at 776-81.

297. *Id.* at 772.

298. *Id.*

299. *Id.* at 776-81. The four plaintiff groups included Vietnam Veterans, their spouses, their parents, and their children. *Id.* at 769. The Veterans' claims would have been barred by *Feres*, as their injuries arose directly out of their exposure to Agent Orange during their military service. *Id.* at 776. Family member claims would also have been barred as they were indirectly caused by the veterans' military exposure. *Id.* at 781. Thus, any subsequent loss or injuries would be considered incident to the veterans' military service, and barred by *Feres*. *Id.*

300. *Id.* at 781.

301. *Id.* at 782. The federal district court also stated that the *Feres* doctrine was not applicable to the direct litigation between the plaintiffs and the defendant chemical companies. *Id.* at 772.

302. *Id.* at 794.

303. *Id.* at 795.

304. *Id.*

305. *Id.*

306. *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982).

307. *Id.* at 1055.

however, the court stated that *Boyle's* three requirements had to be met.³⁰⁸ Each defendant had to prove that the specifications for Agent Orange were established by the government; that the defendants met these specifications in all material respects; and that the government knew at least as much as the defendants about the hazards to humans created by Agent Orange.³⁰⁹ Absent proof of all three of these elements, the affirmative contractor defense would fail.³¹⁰

Upon reconsideration in 1984, the court affirmed the dismissal of the third-party claims against the federal government concerning the injuries of the servicemen and the derivative claims of their families for wrongful death and loss of consortium.³¹¹ The court, however, reversed its earlier dismissal of the third-party claims against the United States which pertained to the independent claims by the family members for genetic damage, birth defects, and miscarriages.³¹² The court relied on *Orken v. United States*,³¹³ in which the federal government conceded that *Feres* did not bar the wrongful death actions on behalf of a soldier's spouse and children who were killed when an Air Force plane crashed into their house on the military base.³¹⁴ Therefore, the court held that although *Feres* and *Stencel* barred the claims of injured servicemen and the derivative claims of their families, the cases did not bar *independent*³¹⁵ claims by the family members against the federal government and that the United States could be a third-party defendant in the action.³¹⁶

308. *Id.*

309. *Id.*

310. *Id.* In its discussion of the *Boyle* elements, the court identified the third element as central to the success or failure of the affirmative defense. *Id.* at 1057. The court stated that the third element would not be met by a defendant if it was found that the defendant failed to disclose to the Government any hazards known to the defendant that might have affected the Government's decision whether to use Agent Orange during the Vietnam conflict. *Id.* at 1057-58. The determination of whether this third requirement had been satisfied was to be made at trial. *Id.* at 1058.

311. *Agent Orange*, 506 F. Supp. at 1244; see *supra* notes 292-94 and accompanying text.

312. *Id.*

313. 239 F.2d 850 (6th Cir. 1956).

314. *Agent Orange*, 580 F. Supp. at 1248 (citing Government Brief at 3, cited in 1 LESTER S. JAYSON, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE & JUDICIAL REMEDIES* § 156, at 5-146.10 (1964)).

315. The *Agent Orange* court stated that family member claims which would not have occurred if not for the fact that a servicemember was exposed to a harmful substance are claims that are "derivative" of the servicemember's claim. *Id.* Family members suing for their own direct injuries (such as injuries sustained by a military plane crash that injures the family member and the servicemember simultaneously) are independent claims. *Id.*

316. *Id.* at 1244.

Unfortunately for family members who have independent claims based on GWS, the *Agent Orange* case never went to trial. On the scheduled trial date, May 7, 1984, the veterans and the defendants reached a settlement in which the chemical companies agreed to pay \$180 million dollars into a trust fund.³¹⁷ The court agreed to accept the settlement after finding that it was reasonable.³¹⁸ In 1989, over 39,000 Vietnam veterans, whose illnesses were allegedly caused by Agent Orange, began receiving compensation checks from this settlement with the defoliant's manufacturers.³¹⁹

9. Can Gulf War Syndrome Claimants Get Past the *Feres* Hurdle?

a. Veteran Claimants

The *Feres* doctrine will bar claims under the FTCA by Armed Service members and veterans against the United States for tort liability resulting from GWS. In *Feres*, the Court held that soldiers were precluded from recovering damages from the federal government under the FTCA for "injuries to servicemen where the injuries ar[o]se out of or [were] in the course of activity incident to service."³²⁰ Any injuries caused by GWS arose out of the veterans' service in the Persian Gulf War. Therefore, *Feres* precludes veterans with GWS from suing the federal government under the FTCA for damages for their illnesses.

317. *Agent Orange*, 506 F. Supp. at 748. In addition, the terms of the settlement included the defendants' denial of "any liability or wrongdoing whatsoever." *Id.* at 862.

318. *Id.* at 857.

319. *Mystery*, *supra* note 7, at A6. The settlement, however, was not the only means that veterans had to recover for injuries resulting from contact with Agent Orange. Additionally, section 1116 of the VBA provided that veterans who served on active duty in the Republic of Vietnam during the Vietnam era, and who were exposed during this time to Agent Orange and other defoliants used by the United States, shall be presumed to have incurred any of the several designated diseases during their service. 38 U.S.C. § 1116 (1994). Section 1116 list of diseases includes non-Hodgkin's lymphoma, soft-tissue sarcoma, and chloracne, all of which must have manifested a minimum of a 10% disability in the veteran in order for the presumption to take place. *Id.* § 1116(2)(A)-(C). Hodgkin's disease and respiratory cancers, if either result in a minimum of a 10% disability, have also recently been added to the list of diseases presumed to have been incurred during the veteran's service in Vietnam during the Vietnam era. *Id.* § 1116 (1994). Therefore, section 1116 authorized monthly compensation to Vietnam veterans for their injuries caused by Agent Orange according to the monthly compensation scheme stated in 38 U.S.C. § 1114 of the VBA.

320. *Feres v. United States*, 340 U.S. 135, 146 (1950).

b. *Family Members Suing for Derivative Claims*

Family members of soldiers with GWS will also be barred from suing the federal government under the FTCA for derivative claims based on the veterans' illnesses. The *Shearer* Court expanded the *Feres* doctrine to prohibit families that file derivative suits from recovering damages under the FTCA from the United States when the claim arose from an injury incurred incident to military service.³²¹ Derivative claims, such as wrongful death claims owing to GWS, therefore, are barred under *Feres* because the claim, as with the claim in *Shearer*, would go "directly to the 'management' of the military; [calling] into question basic choices about the discipline, supervision, and control of a serviceman."³²² The Court, in *Stencel*, specifically stated that such claims under the FTCA were barred.³²³ The *Shearer* Court's holding bars derivative suits under the FTCA by family members of veterans with GWS because such claims would require a court to second-guess military officers.³²⁴

c. *Family Members Suing for Their Own Injuries*

A court following the 1984 *Agent Orange* holding might allow independent claims of GWS made by a spouse or a child of a veteran. The *Agent Orange* court held that although *Feres* and *Stencel* barred claims of injured servicemen and the derivative claims of their families, the cases did not bar *independent* claims by the family members against the United States.³²⁵

The substantial weight of authority, however, shows that family members of veterans with GWS most likely will not be able to sue the United States for their own injuries attributable to the servicemember's injury. Although the Court has not explicitly addressed a case involving an injury to a family member attributable to a servicemember's injury, the Court, in *Stencel*, stated:

[W]here the case concerns an injury sustained by a soldier while on duty, the effect of a action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's

321. United States v. Shearer, 473 U.S. 52, 59 (1985).

322. *Id.* at 58.

323. *Stencel Aero Eng'g Corp v. United States*, 431 U.S. 666, 673-74 (1977).

324. *Shearer*, 473 U.S. at 59.

325. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1244 (E.D.N.Y. 1984). See *supra* notes 312-16 and accompanying text for a discussion of an "independent" claim by a veteran's family member.

agents and the effect upon the serviceman's safety.³²⁶

This statement implies that the Court would not allow family members of a veteran with GWS to sue for their own injuries attributable to the veteran's GWS.

Further support for the theory that the Court will bar such claims by family members is revealed through several federal circuit cases, which have held that *Feres* prohibits family members of soldiers from suing the government for their own injuries, such as birth defects, genetic damages, and miscarriages, attributable to the servicemember's injury. For example, in *Mondelli v. United States*³²⁷ the plaintiff, Rosemarie Mondelli, brought suit under the FTCA for her genetic injuries,³²⁸ which were allegedly caused by her father's radiation exposure when he was on active duty in the Army.³²⁹ The United States Court of Appeals for the Third Circuit stated that Mondelli's suit raised the same *Feres* doctrine issues that would have been raised if her father had sued for his injuries.³³⁰ The court also stated: "[T]he Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline."³³¹ Therefore, the court concluded that *Feres* barred Mondelli's suit under the FTCA because the injuries were derived from her father's exposure to radiation and because such exposure occurred incident to military service.³³²

In *Lombard v. United States*,³³³ the United States Court of Appeals for the District of Columbia reached a holding similar to the *Mondelli* decision. Theodore Lombard worked on the "Manhattan Project" from 1944 to 1946, while serving on active duty in the Army.³³⁴ During his work on the project he handled radioactive substances.³³⁵ Lombard's four children allegedly suffered from genetic injuries caused by their father's radiation exposure during his military service.³³⁶ Additionally, Lombard's wife claimed to have suffered emotional distress and mental anguish as a result of the care that

326. *Stencel*, 431 U.S. at 673 (emphasis added).

327. 711 F.2d 567 (3rd Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984).

328. The plaintiff was born with retinal blastoma, a cancer of the retina which is genetically transmitted. The retinal blastoma caused her to lose the use of her left eye. *Mondelli v. United States*, 711 F.2d 567, 568 (3rd Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984).

329. *Id.* at 567.

330. *Id.* at 569.

331. *Id.* at 570.

332. *Id.* at 569.

333. 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983).

334. *Lombard v. United States*, 690 F.2d 215, 216 (D.C. Cir. 1982).

335. *Id.*

336. *Id.* at 216-17.

she was required to give to injured family members.³³⁷ The court ruled that the claims under the FTCA, for injuries to the children and to the mother incurred as a result of Mr. Lombard's exposure to radiation, were barred by *Feres* because "each claim had its 'genesis' in an injury to a serviceman incident to military service."³³⁸

The Supreme Court never had the opportunity to review the *Agent Orange* holding because the case was settled. Therefore, less weight must be given to this holding than to those cases which the Supreme Court had the opportunity to review. Based on the Supreme Court's holding in *Stencel*, and based on the holdings of federal circuit courts in cases such as *Mondelli* and *Lombard*, it appears that the Court will bar suits by family members based upon their individual injuries which are attributable to GWS.

d. Suits Against Government Contractors

Veterans with GWS and their family members may attempt to sue the manufacturers of pyridostigmine, botulinum toxoid, or chlorpyrifos. They may also attempt to sue the manufacturers of the depleted uranium used by the United States military during the Persian Gulf War. The claimants may allege that these manufacturers negligently produced their product and that such negligence caused their GWS.

However, these claims will be barred under the *Feres* doctrine if the three-part test of *Boyle* is satisfied. According to *Boyle*, if a government contractor shows that the United States provided the contractor with "reasonably precise specifications;"³³⁹ that the equipment provided by the contractor conformed to those specifications;³⁴⁰ and that the supplier warned the federal government about dangers known to the supplier but not known by the United States,³⁴¹ then the contractor will be immune from tort liability for injuries caused by the product.

However, any government contractors who fail to meet the *Boyle* test will not be immune from liability. Additionally, such contractors will be unable to cross-claim for indemnification from the United States for their liability under the Supreme Court's holding in *Stencel*.

337. *Id.* at 217.

338. *Id.* at 226.

339. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988).

340. *Id.* The first two factors place the suit within the "discretionary function" exception to liability provided by section 2680(a) of the FTCA because, if met, a federal government officer must have exercised discretion in making some of the decisions regarding the military equipment. *Id.*

341. *Id.*

E. Violation of the Food, Drug, and Cosmetic Act or the Department of Defense Authorization Act

Both pyridostigmine and botulinum toxoid are regulated by the Food, Drug, and Cosmetic Act (FDC Act),³⁴² which prohibits the interstate transport of "investigational" drugs.³⁴³ According to section 355(i) of the FDC Act, physicians are required to obtain the informed consent of their patients before treating them with investigational drugs unless their consent is "not feasible" or unless obtaining informed consent would not be in their best interests.³⁴⁴ Furthermore, the FDA has approved the use of investigational drugs to treat "life-threatening" conditions in which "no comparable drug therapy is available."³⁴⁵

In *Doe v. Sullivan*, the plaintiffs challenged a Pentagon policy that required all soldiers to take the investigational drugs pyridostigmine and botulinum toxoid based upon Iraq's use of chemical and biological weapons in past conflicts.³⁴⁶ The soldiers' informed consent was not obtained before they were given the investigational drugs.³⁴⁷

The Pentagon concluded that the military mission in the Gulf War would have been jeopardized if soldiers had been given the choice as to whether to take the two drugs because many soldiers would have chosen to stay "drug free."³⁴⁸ The Pentagon contended that those soldiers who refused would have become liabilities on the battlefield.³⁴⁹ Furthermore, the medical community tested these drugs prior to the Gulf War and knew that "the drugs could be safely ingested by humans and that the drugs were effective antidotes to Iraqi chemical and biological weapons."³⁵⁰ The known side effects to the drugs "were much less harmful than the lethal consequences of botulism and nerve gas."³⁵¹ Based on these factors, the Pentagon convinced the FDA to promulgate Rule 23(d)(1).³⁵²

342. 21 U.S.C. §§ 301-395 (1994).

343. 21 U.S.C. § 355(a) (1994). Drugs that the FDA has not approved for marketing to the general public are called "investigational drugs." *Id.* § 355(a),(i).

344. 21 U.S.C. § 355(i) (1994) (stating in part:

[E]xperts using [investigational] drugs . . . will inform any human beings to whom such drugs . . . are to be administered . . . and will obtain the consent of such human beings or their representatives, except where [the experts] deem it not feasible or, in their professional judgment, contrary to the best interests of such human beings.)

345. 21 C.F.R. § 312.34(a) (1995).

346. *Doe v. Sullivan*, 756 F. Supp. 12, 13 (D.D.C.), *aff'd*, 938 F.2d 1370, 1372 (D.C. Cir. 1991).

347. Schuchardt, *supra* note 6, at 80.

348. *Id.* at 83.

349. *Sullivan*, 756 F. Supp. at 17.

350. Schuchardt, *supra* note 6, at 103 (footnote omitted).

351. *Id.* at 103-04 (footnotes omitted).

352. 21 C.F.R. § 50.23(d) (1995).

Rule 23(d)(1), promulgated on December 21, 1990, allows the FDA Commissioner to determine that informed consent of military personnel is not required for investigational drugs during specific military operations involving either combat or the immediate threat of combat, owing to the existence of military combat exigency (actual or threatened).³⁵³ Under the rule, informed consent of armed service members is unnecessary if the soldiers must take the drugs in order to accomplish the mission and to preserve the individual's health and the safety of other military personnel.³⁵⁴ Informed consent can only be denied when the Commissioner determines that treatment is in the best interests of the military personnel and that an alternative method of treatment does not exist.³⁵⁵ The Commissioner waived the DOD's informed consent requirement under Rule 23(d) for botulinum toxoid on December 31, 1990, and for pyridostigmine on January 8, 1991, upon a determination that obtaining the informed consent of the soldiers was not feasible.³⁵⁶

Section 1401(c)(1) of the 1985 DOD Authorization Act (DAA)³⁵⁷ provides that DOD funds may not be used for experimental research on humans unless the person's informed consent is obtained prior to the experiment or, if the research is intended to be beneficial to the subject, the informed consent of the legal representative of the person is obtained.³⁵⁸ According to the language of the statute, therefore, the military must obtain a soldier's informed consent before the DOD conducts "research" on him, regardless of whether the research is intended to benefit the subject. Therefore, section 1401(c)(1) of the DAA only would apply to Gulf War veterans if the Pentagon used investigational drugs on the soldiers for "research" purposes.

In *Doe v. Sullivan*,³⁵⁹ a Gulf War soldier using a fictitious name, sued to enjoin the FDA and the DOD from requiring that soldiers

353. *Id.* Rule 23(d)(1) allows the FDA Commissioner to determine that informed consent is not feasible in situations "involving combat or the immediate threat of combat." *Id.*

354. *Id.*

355. *Id.*

356. *Doe v. Sullivan*, 938 F.2d 1370, 1374 (D.C. Cir.), *aff'g*, 756 F. Supp. 12 (D.D.C. 1991); Schuchardt, *supra* note 6, at 84.

357. Pub. L. No. 98-525, § 1401(c)(1), 1984 U.S.C.A.N. (98 Stat.) 2492, 2615 (1984) (codified at 10 U.S.C. § 980 (1988)).

358. *Id.* Section 1401(c)(1) states:

Funds appropriated to the Department of Defense may not be used for research involving a human being as an experimental subject unless—

- (1) the informed consent of the subject is obtained in advance; or
- (2) in the case of research intended to be beneficial to the subject, the informed consent of the subject or a legal representative of the subject is obtained in advance.

Id.

359. 756 F. Supp. 12 (D.D.C.), *aff'd*, 938 F.2d 1370 (D.C. Cir. 1991).

take the investigational drugs used by soldiers in the Gulf War.³⁶⁰ Doe contended that the FDA waiver of the military's informed consent obligations violated section 505(i) of the FDC Act.³⁶¹ Doe also contended that the Pentagon violated section 1401(c)(1) of the DAA because the use of investigational drugs on the soldiers constituted "research," thereby necessitating the informed consent of the soldiers.³⁶²

The federal district court dismissed Doe's complaint after finding the issue to be non-justiciable because of the relationship between soldiers and their superior officers.³⁶³ The court stated that even if the issue had been justiciable, the court would have found that the DAA was not violated because the Pentagon was not conducting "research" by requiring soldiers to take the drugs.³⁶⁴ The district court found that "the primary purpose of administering the drugs [was] military, not scientific."³⁶⁵ Therefore, the DOD requirement that informed consent be obtained from human subjects prior to conducting research was held to be inapplicable to Doe's case.³⁶⁶

The court also stated that the FDC Act was not violated because the FDA could reasonably find that informed consent was not feasible during war and that the waiver of the informed consent requirement was, therefore, lawful.³⁶⁷ On appeal, the United States Court of Appeals for the District of Columbia held that the case was justiciable³⁶⁸ and affirmed the district court's decision on the merits.³⁶⁹

The *Doe* court correctly held that the military did not violate section 1401(c)(1) of the DAA by requiring soldiers to take the investigational drugs. The Pentagon did not give the soldiers the drugs for the purpose of conducting human "research." Hundreds of thousands of soldiers took pyridostigmine and botulinum toxoid. Therefore, the Gulf War administration of investigational drugs did not involve the small test size population common in research experiments. In addition, soldiers in different units were given different quantities of the drugs depending on each unit commander's orders, which were based on the likelihood of the unit's contact with nerve agents.³⁷⁰ The unit commanders' control over the quantity of the

360. *Doe v. Sullivan*, 938 F.2d 1370, 1374 (D.C. Cir. 1991).

361. *Id.*

362. *Id.* at 1375.

363. *Sullivan*, 756 F. Supp. at 14-15.

364. *Id.* at 15-16.

365. *Id.*

366. *Id.* at 16.

367. *Id.* at 16-17.

368. *Sullivan*, 938 F.2d at 1380.

369. *Id.* at 1382-83.

370. Schuchardt, *supra* note 6, at 104.

drugs taken indicates that the military was not conducting human research but was instead trying to keep troops safe and healthy. Because human "research" was not conducted, section 1401(c)(1) was not violated.

In addition, no violation of the FDC Act occurred because the FDA Commissioner's waiver of informed consent under Rule 23(d)(1) was necessary to accomplish the mission and to preserve the health and safety of American soldiers.³⁷¹

The goal of keeping military casualties to a minimum justified the use of the two drugs in the Gulf War. The drugs were not used for research but were used to protect American soldiers. Concern for military discipline and control justified the Government's decision not to inform Gulf War soldiers of the possible dangers associated with the two drugs. Furthermore, there is no evidence to show that the federal government was aware, at the time it required the soldiers to take the drugs, of the dangerous side-effects of using combinations of pyridostigmine and the herbicides used in the war. Neither the Food, Drug, and Cosmetic Act nor the DAA were violated by the military's requirement that soldiers take pyridostigmine and botulinum toxoid without the soldiers' informed consent.

F. Compensation Under the Veterans' Benefits Act

1. The Veterans' Benefits Act in General

The Veterans' Benefits Act (VBA)³⁷² "establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government."³⁷³ The Act "serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the 'protective mantle of the Act's limitation-of-liability provisions."³⁷⁴

The VBA presumes that veterans are in sound physical condition after their examination and after their acceptance into the military.³⁷⁵ Therefore, any injuries or diseases suffered or contracted by a veteran while on active service in the Armed Forces are deemed by the Act

371. *Id.* at 83; *Sullivan*, 756 F. Supp. at 17.

372. 38 U.S.C. §§ 101-8527 (1994).

373. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671 (1977).

374. *Id.* at 673 (quoting in part *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 115 (1974)). "Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, . . . the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries." *Id.*

375. 38 U.S.C. § 1111 (1994).

to have been incurred in the line of duty as long as the injury was not the result of the injured party's own willful misconduct.³⁷⁶ Additionally, for any chronic disease³⁷⁷ that becomes "manifest to a degree of [ten] percent or more *within one year from the date of separation*"³⁷⁸ of any veteran who served for at least ninety days during a period of war, is considered to have been incurred in or aggravated by the military service.³⁷⁹ In other words, the veteran is deemed to have incurred the chronic disease in the line of duty as long as the disease develops to the required status within one year of his separation from the war, even if the veteran does not leave the military until thirty years after fighting in a war. Any soldier suffering a disease or injury in the line of duty, whether during a period of war or not, will be compensated by the United States.³⁸⁰

Section 1114 of the VBA lists the rates for wartime disability compensation.³⁸¹ For example, if the veteran has a ten percent disability, the monthly compensation is \$87.³⁸² If there is a one hundred percent disability, monthly compensation is \$1774.³⁸³ Section 1114 also provides monthly compensation rates for the loss of, or the loss of use of, arms, legs, eyesight, and hearing and provides a maximum ceiling compensation amount that can be obtained from all of the combined disabilities.³⁸⁴ A veteran whose service-connected one hundred percent disability renders him permanently housebound shall receive monthly compensation of \$1985.³⁸⁵ In addition, veterans with a minimum of a thirty percent disability receive additional compensation depending on the number of dependents they have.³⁸⁶

If a veteran dies as a result of a service-connected or compensable disability and the veteran was never dishonorably discharged from the Armed Services, the Secretary of Veterans Affairs "shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents."³⁸⁷ The monthly amount of compen-

376. *Id.* § 105(a).

377. The term "chronic disease" includes, for example: progressive muscular atrophy, arthritis, peptic ulcers, and malignant tumors of the brain or spinal cord or peripheral nerves. *Id.* § 1101(3).

378. *Id.* § 1112(a)(1) (emphasis added).

379. *Id.* § 1112(a).

380. *Id.* §§ 1110 (compensation for injuries incurred during a period of war) and 1131 (compensation for injuries incurred during a non-war period). These sections apply as long as the injury did not occur due to the soldier's willful misconduct.

381. *Id.* § 1114.

382. *Id.* § 1114(a).

383. *Id.* § 1114(j).

384. *Id.* § 1114(k)-(p).

385. *Id.* § 1114(s).

386. *Id.* § 1115.

387. *Id.* § 1310(a).

sation is dependent upon the veteran's rank at the time of death.³⁸⁸

2. Benefits Under the VBA for Veterans with Gulf War Syndrome

According to the VBA, the Persian Gulf War is listed as a "period of war."³⁸⁹ The soldiers who were injured while serving in this war, therefore, are entitled to the established disability benefits for injuries incurred during a period of war. However, soldiers with GWS faced problems in receiving compensation and hospital care under the VBA because there was no VA diagnosis for the GWS symptoms.³⁹⁰ GWS was not recognized as a disease because the symptoms commonly referred to as GWS had not been formally diagnosed, and "without a diagnosis for their illness, veterans do not qualify for medical compensation [under the VBA] from the government."³⁹¹ Thus, veterans with GWS could not be compensated in the past under the VBA for their GWS because the VA stated that "there [was] no proof that their illnesses were caused by service in the Gulf."³⁹²

The inability of veterans to be compensated under the VBA for GWS, however, changed in 1994 with the enactment of section 1117 to the VBA.³⁹³ Congress stated: "veterans who are seriously ill as the result of [GWS] . . . should be given the benefit of the doubt and be provided compensation benefits to offset the impairment in earnings capacities they may be experiencing."³⁹⁴ In support of this philosophy, section 1117 was added to the VBA.³⁹⁵ Section 1117 provides compensation for Persian Gulf veterans:

suffering from a chronic disability resulting from an *undiagnosed illness* (or combination of undiagnosed illnesses) that—

(1) became manifest during service on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War; or

388. *See id.* § 1311.

389. *Id.* § 101(11).

390. *60 Minutes*, *supra* note 125; Daniel Williams, *U.S. Hides Evidence of Gulf Chemical Arms, Senator Says*, WASH. POST, Oct. 9, 1994, at A48. Before veterans can receive compensation for an illness, the VA ordinarily must recognize that the illness is a disease that was caused by, or occurred during, the veteran's active military service.

391. *Gulf War Syndrome Research Boosted*, SCI. NEWS, Oct. 15, 1994, at 252.

392. Tippet, *supra* note 7, at 100.

393. 38 U.S.C. § 1117 (1994).

394. Veterans' Benefits Act, Pub. L. No. 103-446, 108 Stat. 4650 (codified at 38 U.S.C. §§ 101-1701 (1994)).

395. 38 U.S.C. § 1117 (1994).

(2) became manifest to a degree of [ten] percent or more within the presumptive period [of time following service prescribed by the Secretary of Veterans Affairs].³⁹⁶

The Secretary of Veterans Affairs must establish the symptoms of GWS for which benefits under the VBA may be received.³⁹⁷

Section 1152 of the VBA states that the death and disability benefits of Chapter 11 of the VBA³⁹⁸ are granted to persons recognized as having a compensable status.³⁹⁹ Because the Gulf War veterans have a compensable status according to section 1117, section 1152 authorizes them to be compensated for any disabilities from GWS pursuant to the rates established in section 1114 of the VBA.

Section 1117 has allowed the VA to "deviate from standard procedure and begin paying disability claims to Persian Gulf veterans even though the illness has not been defined."⁴⁰⁰ As of April 13, 1995, veterans may receive compensation of up to \$1823 per month in disability payments and subsidized medical care for GWS.⁴⁰¹ Also, veterans with GWS shall receive hospital care and may receive nursing home care.⁴⁰² Furthermore, any veteran who was exposed to a toxic substance or an environmental hazard while serving in the Persian Gulf theater during the Persian Gulf War "is eligible for hospital care and nursing home care . . . for any disability."⁴⁰³ As of April 27, 1995, eighty-five Desert Storm veterans had received disability checks under the VBA for injuries caused by GWS.⁴⁰⁴ Those veterans

396. *Id.* § 1117(a) (emphasis added).

397. *Id.* § 1117(c). The Secretary of Veterans Affairs is to prescribe regulations which describe the "period and geographical area or areas of military service in connection with which compensation . . . may be paid," the illnesses which can be compensated, and the relevant medical characteristics of each of these illnesses. *Id.*

398. Chapter 11 of the Veterans' Benefits Act is titled: "Compensation for Service-Connected Disability or Death."

399. 38 U.S.C. § 1152 (1994).

400. Duerksen, *supra* note 5.

401. Walker, *supra* note 6, at B13.

402. 38 U.S.C. § 1710(a)(1)(A) (1994).

403. *Id.* § 1710(e)(1)(C). Additionally, the Secretary of Veterans Affairs may also furnish, either on an outpatient or on an ambulatory basis, medical services for any disability to a Gulf War veteran who may have been exposed to an environmental hazard or to a toxic substance while serving in the Southwest Asia theater of operations during the Gulf War. *Id.* § 1712. Persian Gulf War veterans can find out more information concerning available medical care and other benefits by dialing (800) 749-8387, a toll-free number set up by the Department of Navy Affairs. *Military Briefs, THE VIRGINIAN-PILOT AND THE LEDGER-STAR*, Mar. 13, 1995, at B5. Veterans with symptoms of GWS should contact their local VA hospital to have a physical exam and should add their name to the national Persian Gulf Registry. Tippit, *supra* note 7, at 100.

404. Duerksen, *supra* note 5.

with GWS will continue to be compensated under the VBA for as long as they remain disabled.⁴⁰⁵

3. Benefits Under the VBA for Veterans' Family Members

"Normally, the [Department of Veterans Affairs] neither monitors nor treats family members [of injured veterans]."⁴⁰⁶ Section 1713 of the VBA, however, authorizes the provision of health care for the spouse or child of a veteran who has a total, permanent, and service-connected disability.⁴⁰⁷ Surviving spouses and children are also to receive medical care if the veteran: "(A) died as a result of a service-connected disability, or (B) at the time of death had a total disability permanent in nature, resulting from a service-connected disability."⁴⁰⁸ If the veteran is only partially disabled by GWS and the GWS does not cause the veteran to die, then the spouse and child of the veteran may not receive health care even if, as a result of the transmission of the illness from the veteran to the family member, the spouse or child has a one hundred percent disability.

4. The Adequacy of the VBA for Those People Afflicted With GWS

Although veterans with GWS can now receive benefits under the VBA, the small amount of monthly compensation they receive is grossly disproportionate in value to the debilitating injuries that many of them sustained defending the United States. Many veterans with GWS can no longer work as a result of their illness. With the federal government's maximum \$1823 monthly compensation check, many veterans will be unable to pay their bills. Congress should amend the VBA to compensate the veterans in proportion to their income at the time of their injuries. Veterans and their families should not be forced to endure a lower standard of living because they defended their country.

In addition, the VBA should be amended so that the spouse or the child to whom GWS has been transmitted is entitled to treatment for the illness. As previously mentioned, the *Feres* doctrine prohibits the injured spouse and child from suing the federal government to recover damages for injuries caused by GWS. Congress should not leave such injured family members without any means of compensation. For example, studies show that many infants conceived by veterans after the war have been, and continue to be, born with

405. *Id.*

406. *Gulf War Syndrome Research Boosted*, SCI. NEWS, Oct. 15, 1994, at 252.

407. 38 U.S.C. § 1713 (1994).

408. *Id.* § 1713(a)(2).

birth defects which are attributable to GWS.⁴⁰⁹ Forcing veterans to bear the entirety of the enormous costs of health care for these deformed children is an injustice, especially after one considers that these birth defects are linked to the soldiers' service to the United States.

V. WILL THE *FERES* DOCTRINE BE AMENDED?

It is highly unlikely that either the Supreme Court or Congress will make changes to the *Feres* doctrine any time in the near future. The Court will most likely maintain the status quo and reaffirm *Feres*. The *Feres* Court stated: "[I]f we misinterpret the [FTCA], at least Congress possesses a ready remedy."⁴¹⁰ Congress has not changed the standard in the forty-five years since *Feres* was decided. The Court, therefore, may naturally conclude that Congress does not intend for soldiers or veterans to recover under the FTCA for injuries which arise out of or incident to service in the Armed Forces. Additionally, although four dissenting Justices in the Supreme Court case of *United States v. Johnson*⁴¹¹ stated they would have overruled *Feres* if they had been asked to do so,⁴¹² two of the four dissenters, Justices Brennan and Marshall, no longer serve on the Court. Based on Congress's failure to amend the FTCA and based on the philosophies of the Justices now on the Court, it is not likely that the *Feres* doctrine will be changed by either the Supreme Court or Congress any time soon to allow veterans to recover for their GWS.

VI. SHOULD THE *FERES* DOCTRINE BE CHANGED TO ALLOW RECOVERY OF DAMAGES FROM THE UNITED STATES BY SOLDIERS WHO ARE INJURED IN THE COURSE OF DUTY AND THEIR FAMILY MEMBERS?

One of the arguments for changing the *Feres* doctrine is to prevent atrocities such as soldiers being subjected to LSD experiments⁴¹³

409. Flanders, *supra* note 3, at 293; Tippit, *supra* note 7, at 100.

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

411. 481 U.S. 681 (1987).

412. *Id.* at 703. In *Johnson*, the dissenting opinion stated that *Feres* had been "wrongly decided." *Id.* at 700 (Scalia, J., dissenting). However, the dissent stated that because "[we] have not been asked by the [plaintiff] to overrule *Feres*, [we] need not resolve whether considerations of *stare decisis* should induce us, despite the plain error of the case, to leave bad enough alone." *Id.* at 703 (Scalia, J., dissenting).

413. See *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981); *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979).

or being ordered to participate in atomic radiation experiments.⁴¹⁴ However, section 1401(c)(1) of the DAA⁴¹⁵ ensures that such deplorable acts will not occur and leaves the *Feres* doctrine in its present state. Section 1401(c)(1) provides that DOD funds may not be used for experimental research on humans unless “(1) the informed consent of the subject is obtained in advance; or (2) in the case of research intended to be beneficial to the subject, the informed consent of the subject or a legal representative of the subject is obtained in advance.”⁴¹⁶ Soldiers, therefore, may no longer be used as test subjects without their informed consent.

In addition, soldiers already have forms of redress for harms done to them. They may recover compensation for their injuries under the VBA.⁴¹⁷ Furthermore, injured soldiers may press charges against superior officers for committing offenses that are punishable by court-martial under the Uniform Code of Military Justice (UCMJ).⁴¹⁸ Examples of court-martial offenses under the UCMJ include the following: “cruelty toward, or oppression or maltreatment of, any person subject to [one’s] orders,”⁴¹⁹ unlawful detention,⁴²⁰ murder,⁴²¹ assault,⁴²² and conduct unbecoming an officer.⁴²³ These court-martial offenses ensure that officers will not order their soldiers to undertake dangerous missions or activities without good reason.

Furthermore, in order for the military to maintain its effectiveness, it requires “strict discipline and regulation that would be unacceptable in a civilian setting.”⁴²⁴ In order for soldiers to learn this discipline, some freedoms and rights they enjoyed in civilian life must be subordinated. Suits by soldiers and their family members against the United States should be barred “because they [are] the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.”⁴²⁵ If soldiers were allowed to recover damages in

414. See *Jaffee v. United States*, 663 F.2d 1226, 1229 (3rd Cir. 1981) (en banc) (alleging that radiation exposure during training maneuvers at nuclear testing sites caused severe long-term injuries to themselves and their families), *cert. denied*, 456 U.S. 972 (1982).

415. 10 U.S.C. § 980 (1994).

416. *Id.*

417. See Veterans’ Benefits Improvement Act of 1994, Pub. L. No. 103-446, 108 Stat. 4650 (codified at 38 U.S.C. §§ 101 to 3510 (1994)).

418. 10 U.S.C. §§ 801-940 (1994).

419. *Id.* § 893.

420. *Id.* § 897.

421. *Id.* § 918.

422. *Id.* § 928.

423. *Id.* § 933.

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

425. *United States v. Shearer*, 473 U.S. 52, 59 (1985).

civilian courts for injuries caused by the actions of their superior officers, the integrity of the hierarchical military chain-of-command system would be severely damaged. Soldiers would be able to step outside of their chain-of-command and force superior officers to justify their actions in a civilian court. "Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."⁴²⁶

The necessity of preventing judicial interference into the military's effective operation justifies the *Feres* doctrine's bar against FTCA claims involving service members where the injury arises out of, or is in the course of, activity incident to military service.

VII. CONCLUSION

At least 45,000 American Persian Gulf War veterans suffer from symptoms commonly known as GWS.⁴²⁷ In addition, GWS has spread to the family members of some afflicted veterans.⁴²⁸

Veterans afflicted with GWS are presently unable to recover damages for their injuries because any suits against the United States by Gulf War veterans are barred by either the FTCA's "discretionary function exception"⁴²⁹ or its "combatant exception."⁴³⁰ Even if a veteran's suit should get over the hurdle created by these two exceptions to the FTCA, the claim would be barred by the *Feres*⁴³¹ doctrine.

In addition, family members of soldiers with GWS are barred from suing the federal government under the FTCA for derivative claims, such as wrongful death actions, which are based on the veterans' illnesses.⁴³² Family members who have GWS also will be

426. *United States v. Johnson*, 481 U.S. 681, 691 (1987).

427. *Flanders*, *supra* note 5, at 96.

428. *Id.* (stating that a 1994 study by the Senate Banking, Housing and Urban Affairs Committee found that "seventy-eight percent of the [veterans'] wives had been affected [with GWS], as had twenty-five percent of children born to them before the war and sixty-five percent born after"); *France*, *supra* note 7, at 114; *Tippit*, *supra* note 7, at 100.

429. 28 U.S.C. § 2680(a) (barring "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused").

430. 28 U.S.C. § 2680(j) (1988) (excepting from the FTCA "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"). Congress has declared that the Persian Gulf War was a "period of war." 38 U.S.C. § 101(11) (1994).

431. *Feres v. United States*, 340 U.S. 135 (1950).

432. *See United States v. Shearer*, 473 U.S. 52, 59 (1984).

unable to sue the United States for their own independent GWS-related injuries.⁴³³

The only means for compensation available to veterans afflicted with GWS is through the Veterans' Benefits Act (VBA).⁴³⁴ For those family members of veterans to whom GWS has been transmitted, however, there is no means of compensation from the federal government for their individual GWS-related injuries. In addition to not being eligible for compensation, a veteran's spouse or child to whom GWS has been transmitted may only receive health care under the VBA if (1) the veteran has a one hundred percent disability which is permanent and which was caused by GWS; (2) the veteran with GWS died as a result of the syndrome; or (3) the veteran had a total disability at the time of death.⁴³⁵

The federal government should increase the aid it provides to Gulf War veterans and their family members afflicted with GWS. This increased aid, however, should not come in the form of a change to the *Feres* doctrine, which is essential for military discipline and effectiveness. The increased aid to veterans and their families should be provided through the VBA. The current \$1823 maximum monthly compensation check that veterans with GWS may receive is grossly inadequate and will prevent veterans from living somewhat comfortably with their debilitating injuries, many of which were sustained in defense of the United States. At the very least, Congress should amend the VBA to compensate veterans in proportion to their income at the time of their injuries. In addition, the VBA should be amended to authorize the provision of health care to veterans' family members with GWS. The government should take better care of those American veterans who are ill today as a result of their service to the United States in the Persian Gulf War.

Kevin J. Dalton

433. See *Mondelli v. United States*, 711 F.2d 567, 570 (3rd Cir. 1983) (stating "the Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline"); *Lombard v. United States*, 690 F.2d 215, 226 (D.C. Cir. 1982) (barring claims under the FTCA for genetic injuries to children allegedly caused by their father's radiation exposure during his military service and claims by the veteran's wife for emotional distress and mental anguish resulting from her care for the injured family because "each claim had its 'genesis' in an injury to a serviceman incident to military service").

434. 38 U.S.C. §§ 101 to 1701 (1994).

435. See *id.* § 1713.