COMMENTS

THE PERSIAN GULF WAR SYNDROME: RETHINKING GOVERNMENT TORT LIABILITY

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I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

-Article I, Code of Conduct for
Members of the Armed Forces
of the United States[1]
President Dwight D. Eisenhower
August 17, 1955

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1. Exec. Order No. 10,631, 20 Fed. Reg. 6057 (1955).

I. INTRODUCTION

On August 2, 1990, Iraqi military forces invaded Kuwait.[2] Because of this invasion, the United Nations mandated the United States and its coalition partners to use military force and remove the Iraqi forces from Kuwait.[3] While preparing for the Persian Gulf War, the United States anticipated the use of chemical and biological weapons.[4] This anticipation was based on previous experiences

2. PHYLLIS BENNIS & MICHEL MOUSHABECK, BEYOND THE STORM 55 (1991).

3. *Id*. at 66–71. Among the various United Nations Resolutions, United Nations Resolution 660 was the first resolution involving the Gulf crisis and condemned the Iraqi invasion of Kuwait on August 2, 1990, the very day of the invasion. UNITED NATIONS SECURITY COUNCIL, UNITED NATIONS, RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL AND STATEMENTS BY ITS PRESIDENT CONCERNING THE SITUATION BETWEEN IRAQ AND KUWAIT 6 (Apr. 1994). United Nations Resolution 678 gave Iraq "one final opportunity" to comply with all earlier resolutions by January 15, 1991, and authorized the United States and its coalition partners to "use all necessary means to uphold and implement resolution 660." *Id*. at 16. Congress authorized the use of American troops to force Iraq from Kuwait on January 12, 1991, and the air war began on January 16, 1991. BENNIS & MOUSHABECK, *supra* note 2, at 66, 371.

4. *See* H. NORMAN SCHWARZKOPF & PETER PETRE, IT DOESN'T TAKE A HERO 389–90,

during the Cold War when the United States and its NATO allies recognized the Soviet Union's willingness to utilize chemical and biological warfare.[5] Further, Iraq had previously demonstrated a similar willingness to utilize chemical and biological weapons in its war with Iran.[6] Thus, the United States again prepared itself to defend against the familiar threats of chemical and biological warfare during Desert Storm.

The political and military objectives of the United States, which originated during the Cold War, forbid the first-use of chemical weapons by U.S. forces and specifically prohibit the use of biological agents by U.S. forces.[7] However, military strategists believe that a chemical retaliatory capability deters an enemy from utilizing chemical weapons.[8] Until recently, chemical weapons had not been employed since before World War II.[9] Although the United States

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416, 439 (1992).

5. *See*, *e.g.*, U.S. DEP'T OF THE ARMY, NBC OPERATIONS, FIELD MANUAL 3-100, at 1-1 (1985) [hereinafter NBC OPERATIONS]. The former Soviet Union considered chemical weapons as merely conventional rather than special weapons. *Id*. However, the United States considers the use of chemical weapons as an escalation of warfare. *Id*. Thus, the United States may retaliate against the use of chemical weapons with the use of a nuclear weapon. *Id*. at 1-2.

6. Doe v. Sullivan, 938 F.2d 1370, 1372 (D.C. Cir. 1991); Elliott J. Schuchardt, *Walking a Thin Line: Distinguishing Between Research and Medical Practice During Operation Desert Storm*, 26 COLUM. J.L. & SOC. PROBS. 77, 81 (1992). During the eight-year war between Iraq and Iran, the Iraqis used chemical weapons against Iranian forces first in 1982, and even on its own population of Kurds in 1988. JOHN BULLOCH & HARVEY MORRIS, THE GULF WAR 260–66 (1989) (discussing the effects of the war between Iraq and Iran prior to Desert Storm).

7. NBC OPERATIONS, *supra* note 5, at 1-2. However, the past and current U.S. policy regarding nuclear weapons allows the United States to use nuclear weapons first in order to terminate hostilities before the enemy's own use of nuclear weapons. *Id*. However, the United States chose to pursue a defensive posture rather than use nuclear weapons in a so-called "pre-emptive strike" against Iraq during Desert Storm. *See infra* text accompanying note 11.

8. *See*, *e.g.*, NBC OPERATIONS, *supra* note 5, at 1-2.

9. JANE'S NBC PROTECTION EQUIPMENT 13 (Terry J. Gander ed., 4th ed. 1991) [hereinafter JANE'S]. France was the first country to employ chemical weapons in battle, utilizing theirs against German infantry in August 1914 during the Battle of the Frontiers. *Id*. French efforts, however, were unsuccessful because they lacked an understanding of how to utilize chemical weapons effectively. *Id*. Modern chemical warfare, on the other hand, arrived on April 22, 1915, when the Germans effectively used prevailing winds to carry chlorine gas into allied trenches. *Id*.; *see* ROBERT HARRIS & JEREMY PAXMAN, A HIGHER FORM OF KILLING 1–4 (1982) (describing the first modern chemical warfare battle in historical detail). The beginning of pre-modern chemical warfare dates back to poisoned darts and poisoned water supplies and is as old as war itself. *See*, *e.g.*, ROBIN CLARKE, THE SILENT WEAPONS, 12–16 (1968) (documenting chemical and biological

did not deploy chemical munitions to the Persian Gulf, it tasked the U.S. Army Technical Escort Unit to verify the use of chemical or biological weapons by the enemy.[10]

Due to the potential Iraqi threat of chemical and biological warfare, the United States vaccinated American servicemembers against biological agents and provided oral anti-nerve agent antidotes to U.S. troops.[11] Although the drugs themselves were not new, the Food and Drug Administration (FDA) had not approved them for prophylactic use against chemical and biological agents.[12] The effect these "investigational drugs" would have on troops was simply unknown at the onset of Desert Storm.[13]

The Allied Forces' victory over Saddam Hussein's military was decisive.[14] The sole public outcry at the conclusion of the war concerned the numerous accounts of fratricide resulting from enhanced technological capabilities.[15] However, months after the return home

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warfare attacks prior to World War I). Why Germany, which first developed nerve gas, failed to utilize its stockpile of nerve agents to repel Allied forces during the Normandy invasion and during the fall of Berlin is a mystery. JANE'S, *supra*, at 13.

10. This was a departure from the traditional Technical Escort mission of escorting chemical agents and munitions worldwide. *See* U.S. DEP'T OF THE ARMY, TECHNICAL ESCORT OPERATIONS, TRAINING CIRCULAR 9-20, at 1-1 (1988). During Desert Storm, members of the Technical Escort unit obtained chemical and biological samples from the battlefield and, while maintaining a chain of custody, returned these samples to laboratories in the United States for verification of chemical or biological agent use. The Department of Defense determined that Iraqi forces did not use chemical or biological munitions in the Kuwait theater of operations. *See* COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, U.S. CHEMICAL AND BIOLOGICAL WARFARE-RELATED DUAL USE EXPORTS TO IRAQ AND THEIR POSSIBLE IMPACT ON THE HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, S. DOC. NO. 3, 103d Cong., 2d Sess. 3–4 (Oct. 7, 1994) [hereinafter HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR].

11. *See* Doe v. Sullivan, 938 F.2d 1370, 1372 n.1 (D.C. Cir. 1991); *see also* Schuchardt, *supra* note 6, at 81.

12. *Doe*, 938 F.2d at 1372 n.1.

13. *See* Schuchardt, *supra* note 6, at 81–83. Drugs not approved by the FDA for marketing to the public are investigational drugs. 21 U.S.C. § 355(i) (1988). Investigational drugs are approved by the FDA in life threatening situations where no approved drug is available. *See* 21 C.F.R. § 312.34(a) (1994).

14. SCHWARZKOPF & PETRE, *supra* note 4, at 468–70 (discussing General Schwarzkopf's decision whether to continue to attack fleeing Iraqi forces or to save lives). The cease-fire was ordered on February 27, 1991. *Id*. General Schwarzkopf, Commander of Allied Forces in the Gulf War, stated, "[W]e'd kicked this guy's butt, leaving no doubt in anybody's mind that we'd won decisively, and we'd done it with very few casualties." *Id*. at 469–70.

15. *Id*. Fratricide or friendly fire, the killing of a combatant by a combatant of the same side, was magnified in the Gulf War since so few American lives were lost in actual combat with the enemy. *See id*. at 500.

of American servicemembers, the Desert Storm veterans discovered that their service in the Persian Gulf resulted in an illness, the Gulf War Syndrome, that affected not only their lives but the lives of their families.[16] Thus, although the military victory was decisive, the United States has yet to determine its full cost to American servicemembers.

This Comment examines governmental tort liability with specific application to the potential liability of the United States Government for the Gulf War Syndrome. First, this Comment examines the characteristics of chemical warfare, identifies the Gulf War Syndrome, and suggests what the author believes to be the most likely cause of the syndrome. Although the disease has yet to be conclusively diagnosed, it has been recognized as an illness specifically associated with servicemembers serving in the Persian Gulf War.

Next, this Comment traces the development and expansion of the *Feres* Doctrine[17] and the exceptions authorized to the federal government's waiver of sovereign immunity under the Federal Tort Claims Act.[18] This Comment also addresses the application of the *Feres* Doctrine to Gulf War Syndrome claimants and the potential unjust bar of these servicemembers' claims. Finally, this Comment criticizes the deference that the judiciary grants to the military on the basis of separation of powers. The author concludes that the judicial reaction to the Gulf War Syndrome is destined to exhibit the same deference that has traditionally denied servicemembers a remedy for tort liability.

A. Chemical Warfare Agent Characteristics

Since the turn of the century and before effective chemical weapons were even invented, many nations have been concerned about the toxic effects of chemical warfare.[19] Chemical weapons are

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16. *See* Paul Cotton, *Veterans Seeking Answers to Syndrome Suspect They Were Goats in Gulf War*, 271 JAMA 1559 (1994).

17. *See infra* notes 134–76 and accompanying text.

18. 28 U.S.C. §§ 1346, 2671–2680 (1988); *see infra* notes 92–97 and accompanying text.

19. CLARKE, *supra* note 9, at 237. The Hague Treaty of 1899 prohibited the further invention of chemical weapons. *Id*. Treaty signatories included Germany, France, Russia and Great Britain, but did not include the United States. L.B. TAYLOR & C.L. TAYLOR, CHEMICAL AND BIOLOGICAL WARFARE 27 (1985); CLARKE, *supra* note 9, at 237.

classified by their military use or by their physiological action.[20] Their military uses are classified as either toxic or incapacitating.[21] Toxic chemical agents are agents capable of producing death or serious injury.[22] Incapacitating agents can create temporary physiological or mental effects.[23] Chemical agents can also be classified by their physiological effects as nerve agents, blister agents, blood agents, and toxic choking agents, and as incapacitating tearing and vomiting agents.[24] The type of chemical agent used depends upon the commander's particular military objectives.

Blister agents include mustard gas, which is dark brown when in liquid form, and typically causes painful blisters and burns.[25] Nerve agents are often colorless and disrupt the transmission of nerve impulses in the central nervous system, causing muscles in the body to twitch uncontrollably.[26] These chemical agents can be used in combination with other weapons.[27] The United States feared that these two chemical agents would be used by Iraq in Desert Storm since Iraq had used them earlier in its war with Iran.[28]

Modern military forces are no longer able to inflict large numbers of chemical casualties upon their enemy due to modern defensive measures that can be taken before and after the initial chemical attack.[29] Once a military unit is properly protected and prepared for a chemical attack, chemical warfare merely reduces its combat efficiency.[30] Because chemical agents may be colorless or odorless, a major part of chemical warfare defense is the detection and decontamination of chemical contamination.[31] This was the mission of the

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20. U.S. DEP'T OF THE ARMY, TREATMENT OF CHEMICAL AGENT CASUALTIES AND CONVENTIONAL MILITARY CHEMICAL INJURIES, FIELD MANUAL, 8-285, ¶ 1-10 (1990).

21. *Id*.

22. *Id*.

23. *Id*.

24. *Id*.

25. *Id*. ¶¶ 4-1 to 4-8.

26. *Id*. ¶¶ 2-1 to 2-4.

27. *Id*. ¶ 1-8.

28. SCHWARZKOPF & PETRE, *supra* note 4, at 437, 445; *see*, *e.g.*, BENNIS & MOUSHABECK, *supra* note 2, at 322; BULLOCH & MORRIS, *supra* note 6, at 236–37, 261 (discussing Iraq's and Iran's chemical industrial capabilities and the fears of nerve and mustard gas use in missiles during the Iraq-Iran war).

29. JANE'S, *supra* note 9, at 13.

30. *Id*.

31. *See* U.S. DEP'T OF THE ARMY, NBC DECONTAMINATION, FIELD MANUAL 3-5, at 1-1 (1985); U.S. DEP'T OF THE ARMY, NBC OPERATIONS, FIELD MANUAL 3-100 (1985).

U.S. Army Technical Escort Unit in Desert Storm.[32]

B. Gulf War Syndrome

Approximately 20,000 veterans of the Persian Gulf War believe that they became ill as a result of their service in Desert Storm.[33] Although there were few direct American casualties as a result of actual combat,[34] the true casualties from the Persian Gulf War are only now being recognized. The illness resulting from the "myriad of symptoms" plaguing the once healthy veterans is called the Gulf War Syndrome.[35] This illness has many signs and symptoms, including short term memory loss, fatigue, rashes and sores, swollen extremities, twitching, psychiatric problems, and birth defects.[36] The Syndrome has not been conclusively diagnosed and servicemembers remain largely untreated.[37]

In addition to veterans already discharged from service who have eagerly sought medical treatment, thousands of servicemembers currently on active duty likely suffer from the Gulf War Syndrome yet are reluctant to seek medical treatment for fear of being forcibly discharged from military service.[38] Since returning from Desert Storm, some veterans have died after exhibiting the Gulf War Syndrome symptoms.[39] Disturbingly, family members of Desert Storm veterans are now suffering from similar symptoms.[40] An estimated three quarters of Desert Storm veterans and their spouses complain that they are suffering from symptoms of the Syndrome.[41] The deadly scope of this enigmatic disease has yet to be

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32. *See supra* note 10 and accompanying text.

33. Barbara Reynolds, *Once Cheered, Ailing Gulf Vets Now Get Snubbed*, USA TODAY, May 27, 1994, at 11A.

34. *See* BENNIS & MOUSHABECK, *supra* note 2, at 18–19, 132.

35. HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 2.

36. Paul Cotton, *Gulf War Symptoms Remain Puzzling*, 268 JAMA 2619 (1992); Cotton, *supra* note 16, at 1559; *see also* HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 2 (listing numerous other symptoms of the Gulf War Syndrome).

37. Scott J. Brown, *"Protective" Drug Could Be Culprit in Gulf War Veterans' Mysterious Ailments*, FAM. PRAC. NEWS, Aug. 1, 1994, at 28; Cotton, *supra* note 36, at 2619; Cotton, *supra* note 16, at 1559.

38. HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 2.

39. *Id*.

40. *Id*.

41. COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, U.S. CHEMICAL AND BIOLOGICAL WARFARE-RELATED DUAL USE EXPORTS TO IRAQ AND THEIR POSSIBLE IMPACT ON THE HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, 103d Cong., 2d Sess. 7 (May

discovered.

Members of Congress are investigating the circumstances surrounding the Gulf War Syndrome.[42] However, their investigations are focused on the possible improper exports to Iraq of sensitive technical material that could be used in the implementation of chemical warfare.[43] Accordingly, this approach has led members of Congress to believe prematurely that the illnesses of our veterans are a direct result of chemical munitions. Although these investigations have led to greater public awareness of the Gulf War Syndrome and to the documentation of servicemembers' claims,[44] it has also potentially led Congress to the wrong conclusions about the probable cause of the Gulf War Syndrome.

Congress' main contention is that the probable cause of the Gulf War Syndrome is biological and chemical agents.[45] Incredibly, many in Congress view the conclusions of their own senior military officials regarding chemical use as untrustworthy.[46] Congress bases its theories of Iraqi chemical use on reports by foreign military units[47] and unverified reports by soldiers.[48] Moreover, merely finding stockpiles of chemical munitions fails to prove that the Iraqis utilized such weapons.[49] Not one instance of chemical munition use against any member of the Allied Forces has been confirmed. Even the commander of the coalition forces, General Schwarzkopf, considers the detection of chemical agents during the ground offensive as "bogus."[50] Thus, other probable causes of the Gulf War Syndrome require closer examination.

25, 1994) [hereinafter CHEMICAL AND BIOLOGICAL EXPORTS IMPACT].

42. *Id*.; *see* HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 1.

43. *See* HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 1.

44. *Id*. at 24 (indicating the number of Desert Storm veterans with Gulf War Syndrome that have registered with the Department of Veterans Affairs has grown nearly 700%).

45. *Id*. at 1–3. *But see generally* COMMITTEE ON VETERANS' AFFAIRS, IS MILITARY RESEARCH HAZARDOUS TO VETERANS' HEALTH? LESSONS SPANNING HALF A CENTURY, 103d Cong., 2d Sess. (1994) [hereinafter LESSONS SPANNING HALF A CENTURY].

46. *See* HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 4, 23.

47. *See* CHEMICAL AND BIOLOGICAL EXPORTS IMPACT, *supra* note 41, at 3–5, 89–93.

48. *Id*. at 58–85.

49. *See id*. at 21–23.

50. *Id*. at 83 (citing John Harwood & David Dahl, *Allies Overrun Iraqis; Capture Thousands*, ST. PETERSBURG TIMES, Feb. 25, 1991, at 1A).

C. Proposed Culprit of the Gulf War Syndrome

The United States' protective posture during Desert Storm included the vaccination of servicemembers participating in the offensive.[51] These vaccinations consisted of a series of three shots of pentavalent botulinum toxoids to protect against biological agents.[52] The United States also provided military personnel serving in the Persian Gulf a pretreatment for nerve agent exposure called pyridostigmine bromide.[53] Neither the vaccination nor the nerve agent pretreatment were approved by the FDA for these uses by the military.[54] Moreover, although not specifically developed in response to the Iraqi threat, self-administering hypodermic autoinjectors containing 2 Pam Chloride and Atropine were issued to American troops to be used in the event of nerve agent exposure.[55] These precautions would have enabled Desert Storm soldiers to carry out their missions in case their environment became biologically or chemically contaminated. However, these investigational drugs may have also had unanticipated synergistic effects with other drugs or chemicals in such an environment.[56]

Yet, despite the concerns of Iraqi unpredictability, no chemical weapons were used in the Kuwait theater of operations in Desert Storm.[57] The Commander of Allied Forces in Desert Storm, Gener

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51. *See* Doe v. Sullivan, 938 F.2d 1370, 1372 n.1 (D.C. Cir. 1991) (indicating FDA waived consent requirement for experimental vaccination's use on servicemembers); Memorandum from Diana Zuckerman & Patricia Olson, *Is Military Research Hazardous to Veterans' Health?: Lessons from the Persian Gulf*, Summary of Preliminary Staff Findings to Senator Rockefeller, May 5, 1994, at 1.

52. *See Sullivan*, 938 F.2d at 1372 n.1; Zuckerman & Olson, *supra* note 51, at 3.

53. *See Sullivan*, 938 F.2d at 1372 n.1; Zuckerman & Olson, *supra* note 51, at 1–3.

54. *See Sullivan*, 938 F.2d at 1372 n.1. Investigational drugs that are not approved by the FDA require informed consent before they can be used on humans. *Id*. at 1372.

55. TREATMENT OF CHEMICAL AGENT CASUALTIES AND CONVENTIONAL MILITARY CHEMICAL INJURIES, *supra* note 20, at app. ¶ H. After symptoms of nerve agent exposure are experienced, the nerve agent antidote is administered in the thigh or buttocks by two spring loaded needles. *Id*. Additionally, an anthrax vaccine was administered to 18 times as many servicemembers during Desert Storm to combat anthrax, a biological disease. *See* CHEMICAL AND BIOLOGICAL EXPORTS IMPACT, *supra* note 41, at 135. However, the anthrax vaccine is not experimental and the FDA approved it in 1971. *Id*.

56. CHEMICAL AND BIOLOGICAL EXPORTS IMPACT, *supra* note 41, at 135; *see* Carol J. Castaneda, *Insecticides May Cause Gulf Illness*, USA TODAY, Apr. 10, 1995, at 1A (explaining how insect repellants and insecticides reacting with anti-nerve gas pills cause nervous system damage).

57. HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 3–4 (stat-

al Norman Schwarzkopf, required Iraqi officials to disclose any stockpiles of chemical munitions as a condition of the cease-fire agreement.[58] The fact that no chemical munitions were in Kuwait virtually eliminates the possibility of exposure to toxic chemicals as the cause of the Gulf War Syndrome.[59] The possibility of chemical weapon use seems even more remote considering that despite the number of veterans complaining of symptoms of the Gulf War Syndrome, none have evinced the recognized signs and symptoms caused by direct chemical agent exposure on the battlefield.[60] None of the casualties during Desert Storm suffered from the blisters, burns, or convulsions that would normally have resulted from a direct chemical attack by the Iraqis.

Moreover, a federal government study evaluated the long-term effects of short-term exposure of chemical agents on human subjects.[61] Volunteers had been directly exposed to various agents in experiments conducted to ascertain the agents' effectiveness.[62] Generally, the study revealed that there were no adverse health effects following exposure.[63] Any adverse health effects experienced beyond the duration of the experiments did not differ significantly from those experienced by the unexposed population.[64]

The possibility that ill Desert Storm veterans are suffering from chemical agent exposure seems extremely remote.[65] Further, Desert Storm veterans are suffering from a myriad of unexplained symptoms never reported before and none of these veterans have reported

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ing the Department of Defense maintains that Iraq did not use chemical munitions during Desert Storm).

58. SCHWARZKOPF & PETRE, *supra* note 4, at 479.

59. HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 3; *see also* Steve Komarow, *Vietnam "Mistakes" Aid Ill Gulf Vets*, USA TODAY, June 10–12, 1994, at 5A (stating that the Pentagon's evidence about chemical weapon exposure is scant).

60. *See* Cotton, *supra* note 16, at 1560 (stating Defense Intelligence Agency officials have ruled out biological and chemical agents); see *supra* notes 19–32 and accompanying text for explanation of the effects chemical agents have on the human body.

61. *See generally* 3 NATIONAL RESEARCH COUNCIL, U.S. DEP'T OF THE ARMY, POSSIBLE LONG-TERM HEALTH EFFECTS OF SHORT-TERM EXPOSURE TO CHEMICAL AGENTS (1985) [hereinafter NATIONAL RESEARCH COUNCIL].

62. *Id*.; see *infra* notes 148–54 and accompanying text for related litigation regarding a servicemember's exposure during these experiments.

63. NATIONAL RESEARCH COUNCIL, *supra* note 61, at vi.

64. *Id*. at 25–31.

65. *See infra* note 67.

any direct contact with chemical agents from Iraqi hostilities.[66] The Department of Defense supports this conclusion by consistently maintaining that chemical and biological agents were never found in Kuwait.[67]

In addition to Iraq's use of chemicals, some potential causes of the Gulf War Syndrome are depleted uranium munitions, pesticides, parasites, electro-magnetic radiation, and psychological disorders.[68] Although the true culprit may never be determined, the most probable cause is the synergistic effects of experimental vaccinations and nerve agent antidote pills given to troops in forward units in anticipation of a chemical and biological attack.[69]

Indeed, the medical community has now identified these investigational drugs as a likely cause of the Gulf War Syndrome.[70] These drugs were previously believed to be innocuous based on their relatively safe use for decades.[71] For example, the unapproved botulism vaccine has been used for the limited purpose of vaccinating scientists who worked with botulism in laboratory experiments.[72] Although the nerve agent pretreatment drug, pyridostigmine bromide, has been approved for treating neurological disorders, it has not been approved for general public use.[73] Moreover, neither drug has been approved for large scale use as a vaccine for otherwise healthy individuals.[74] Specifically, the FDA had not approved the Depart-

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66. *See infra* note 67.

67. *See*, *e.g.*, HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR, *supra* note 10, at 3–4. My personal experience as a member of the United States Army Technical Escort Unit, tasked with the mission of verifying the use of chemical weapons by the Iraqis, indicated that none of the samples retrieved for analysis testing for chemical use were verified as positive.

68. *Id*. at 7; Cotton, *supra* note 16, at 1559.

69. Brown, *supra* note 37, at 28. Because Iraq's chemical use has been ruled out, medical specialists have suggested that the normal side effects associated with investigational drugs given to troops were prolonged when the troops were given additional experimental drugs. *See id*. Problems with the investigational drugs have now become apparent because of their wide-scale use on the military population.

70. *See* CHEMICAL AND BIOLOGICAL EXPORTS IMPACT, *supra* note 41, at 134–38; *see also* Brown, *supra* note 37, at 28.

71. Brown, *supra* note 37, at 28.

72. *Sullivan*, 938 F.2d 1372 n.1; Kim M. Lanphear, *FDA Grants Informed Consent Waiver to DOD for Use of INDs*, INFECTIOUS DISEASE NEWS, Mar. 1991, at 4.

73. *Sullivan*, 938 F.2d at 1372 n.1; Zuckerman & Olson, *supra* note 51, at 1–3.

74. *Sullivan*, 938 F.2d at 1372 n.1; Lanphear, *supra* note 72; Zuckerman & Olson, *supra* note 51. Before Desert Storm, in order for investigational drugs to be used in the United States, their use must have been proven to be safe and effective by the FDA for

ment of Defense's repeated use of these experimental drugs on healthy servicemembers.[75] Notwithstanding this lack of approval, the FDA hastily modified its rules to permit the Department of Defense to utilize investigational drugs in certain combat-related situations without informed consent.[76] Consequently, the Department of Defense administered the investigational drugs to reduce the effects of Iraqi chemical and biological weapons on military personnel.[77]

Pyridostigmine bromide enhances the effectiveness of the subsequent treatments for nerve agent poisoning after a soldier has been exposed to nerve agents.[78] However, this pretreatment has adverse side effects that include respiratory and liver problems, gastrointestinal disturbances, and memory loss. All of these side effects are strikingly similar to those associated with the Gulf War Syndrome.[79] The botulinum toxoid vaccine was designed to increase the body's antibodies in the event of exposure to the bacteria.[80] The synergistic effects of these experimental drugs on servicemembers remain unknown.[81] Similarly, the prospect of governmental liability as a result of the military's use of experimental drugs and their role in the Gulf War Syndrome remain unresolved.

II. GOVERNMENT TORT LIABILITY

A. The FTCA

Based on English common law, sovereign immunity against civil torts protected governments from actions for damages.[82] This governmental immunity developed from the idea that "the King can do no wrong."[83] Colonial America accepted the doctrine of sovereign immunity to protect the federal government from any suit to which

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specific uses and doses. *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(b)(1) (1988).

75. *Sullivan*, 938 F.2d at 1372; Zuckerman & Olson, *supra* note 51.

76. *Sullivan*, 938 F.2d at 1381–82 (determining that it would not be "feasible" to require informed consent from servicemembers in combat situations).

77. Schuchardt, *supra* note 6, at 81–84; Zuckerman & Olson, *supra* note 51.

78. Zuckerman & Olson, *supra* note 51.

79. *Id*. at 2.

80. CHEMICAL AND BIOLOGICAL EXPORTS IMPACT, *supra* note 41, at 135.

81. *Id*. at 134.

82. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984).

83. *Id*.

it had not consented.[84] No general consent to tort suits was available before 1946; a citizen could, however, maneuver a private bill through Congress to obtain relief from hardship due to an injury by the government.[85] Because of the burden on Congress to legislate private tort relief and the lack of a remedy to address injuries by the government, Congress waived traditional sovereign immunity with the enactment of the Federal Tort Claims Act (FTCA) in 1946.[86] Today, Congress has considered special legislation to address the injuries sustained by servicemembers serving in the Gulf War,[87] similar to legislation enacted to address the hardships endured by American servicemembers as a result of Agent Orange.[88]

The waiver of governmental immunity under the FTCA exposes the United States to tort liability "in the same manner and to the same extent as a private individual under like circumstances."[89] The FTCA forces the government to accept liability for some personal injuries and property damage caused by the negligence of government employees.[90] Military personnel are included in the definition of "employee," allowing claims against the military by servicemembers.[91] Excluded from the waiver of immunity are claims

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84. *Id*. The Supreme Court recognized the sovereign immunity doctrine in 1821. Martin J. Kenworthy, Comment, *The Feres Doctrine: Should it Bar Claims By Military Personnel Against Civilian Federal Employees?*, 15 N. KY. L. REV. 559, 561 (1988) (citing Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821)).

85. Kenworthy, *supra* note 84, at 561.

86. Federal Tort Claims Act, ch. 753, Title IV, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.); *see* United States v. Muniz, 374 U.S. 150, 154 (1962) (allowing suit under the FTCA by federal prisoners injured during confinement); Dalehite v. United States, 346 U.S. 15, 24–25 (1953) (allowing suit under FTCA for negligent supervision of export program).

87. Reynolds, *supra* note 33, at 11A.

88. Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (codified as amended at 38 U.S.C. § 1116 (Supp. V 1993)).

89. 28 U.S.C. § 2674 (1988).

90. Dalehite v. United States, 346 U.S. 15, 24–25 & n.10 (1953). The FTCA did not create a new cause of action since no cause of action existed. *Id*. at 43. The FTCA merely waived government sovereign immunity. *Id*. (citing Feres v. United States, 340 U.S. 135, 142 (1950)).

91. 28 U.S.C. § 2671 (1988). The FTCA classifies members of the military as employees where the servicemember is "acting in the line of duty." *Id*. However, members of the national guard, who have not been called to active duty, are not employees of the United States. McCranie v. United States, 199 F.2d 581–82 (5th Cir. 1952) (indicating that national guard members are not federal employees although paid with checks issued by the United States), *cert. denied*, 345 U.S. 922 (1953).

"arising out of combatant activities of the military"[92] and "any claim arising in a foreign country."[93] These express exceptions to the waiver of sovereign immunity only allow claims against the government that do not involve combatant activity.[94] Congress has never created a substantive exception to the FTCA that would preclude servicemembers from suing the government for any negligent acts other than those on foreign soil and during combat.

Discretionary functions, where government officials exercise judgment in making policy, are also expressly exempt from the waiver of immunity.[95] Specifically, there is no governmental liability for the negligent exercise of a uniquely governmental function because the FTCA restricts the waiver of immunity to situations where a private person would be liable.[96] The discretionary function exception, as all other exceptions, illustrates that Congress neither intended to preclude all claims of military personnel merely because they were in the service, nor allow negligent government employees to hide behind any legislative defense. Congress accepted liability for torts in order to compensate victims of the government's negligent conduct subject to the express exceptions.[97]

B. The *Feres* Doctrine

Immediately after World War II and the enactment of the FTCA, the Supreme Court held in *Brooks v. United States* that servicemembers could bring claims for injuries not incident to their military service because an exception simply did not exist in the FTCA to prevent the bringing of such claims.[98] Although no legisla-

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92. 28 U.S.C. § 2680(j) (1988).

93. *Id*. § 2680(k).

94. *Id*. § 2680(n).

95. *Id*. § 2680(a).

96. *See id*. §§ 1346(b), 2674; *see also* Dalehite v. United States, 346 U.S. 15 (1953) (plaintiff alleging the government was negligent in conceiving and implementing a fertilizer export program for export of fertilizer to western Europe and Japan after World War II). Fertilizer has explosive characteristics and leveled much of Texas City, Texas, killing over 560 people. *Id*. at 48. The Supreme Court held that the discretionary functions, exempted from liability under the FTCA, include the acts of subordinates carrying out official directions as well as the government's implementation of programs. *Id*. at 36, 42.

97. *See supra* text accompanying notes 86–94.

98. 337 U.S. 49, 54 (1949) (allowing claims of two off-duty servicemen, hit by an Army vehicle off-post, because the injuries were not incident to their military service).

tive act expressly precludes all suits against the government brought by injured military personnel, the Supreme Court held one year later in *Feres v. United States* that the government is immune from suits by military personnel who have been negligently injured in connection with military service.[99] This judicially created exception to the FTCA relieves the government of liability under the FTCA for injuries of servicemembers which "arise out of or are in the course of activity incident to service."[100]

The determination of what conduct is incident to service has been inconsistently applied in the past to various activities of servicemembers.[101] The mere fact that an injured plaintiff is an active duty servicemember at the time of the injury may mean that the injuries suffered by the plaintiff are incident to service and therefore preclude governmental liability under the FTCA.[102] The *Feres* Doctrine currently remains a valid exception to the FTCA's waiver of immunity.[103] However, no rationale exists for the abandonment of judicial oversight of the constitutional protections for which American servicemembers have fought and died.[104]

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99. 340 U.S. 135, 146 (1950). The *Feres* decision comprised three different claims against the United States, all involving the negligence of the military. *Id*. at 136–37. Two of the claims were medical malpractice claims against the Army, while the third was a wrongful death action brought by Bernice B. Feres, the wife and executrix of a serviceman killed in a barracks fire. *Id*. *Feres* is distinguished from *Brooks* because all servicemembers in *Feres* were injured on active duty, whereas in *Brooks*, the servicemen were injured while off-duty. *Id*. at 138, 146.

100. *Id*. at 146. The Supreme Court stated that "[t]he common fact underlying the three cases [in *Feres*] is that each claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces." *Id*. at 138.

101. *See* Michael Rust, Comment, *Expansion of the* Feres *Doctrine*, 32 EMORY L.J. 237, 240 n.15 (1983). Often a decision of what constitutes incident to service is determined by whether the plaintiff is injured on-post or off-post. *Id*.

102. *See id*. at 241 n.15 (citing Shults v. United States, 421 F.2d 170 (5th Cir. 1969) (holding plaintiff's injury to be incident to service because he could not have been admitted to a military hospital but for his active duty status)).

103. *See*, *e.g.*, Chappell v. Wallace, 462 U.S. 296 (1983); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977).

104. *See* Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597, 1649–53 (suggesting there should be limits to judicial deference to military matters). Deference rather than abdication of judicial oversight ensures a balance between the legitimate command of military authority and adequate judicial review. *Id*.

C. Judicial Rationale Behind the *Feres* Doctrine

The judiciary has supported governmental tort immunity based upon the Supreme Court's decision in *Feres*. The initial rationale for *Feres* was the statutory provision of the FTCA requiring a parallel private cause of action.[105] Under the FTCA, the government is held liable only on claims for which the United States would be liable if it were a private individual.[106] Since there can be no military relationship between private individuals, there is no parallel cause of action or liability that would allow a servicemember to sue the government.[107] There is no tort liability created by the FTCA because there is no similar liability outside the FTCA based upon a military relationship.[108]

Yet the parallel liability rationale was eliminated from the *Feres* Doctrine in the decision of *Indian Towing Co. v. United States*.[109] In *Indian Towing*, the United States was found liable to private parties who were injured when the Coast Guard was negligent in repairing a lighthouse.[110] Even though no parallel private liability existed, the Supreme Court held that no private liability for a FTCA claim must be shown to hold the government liable.[111] The Supreme Court reaffirmed its elimination of the parallel liability rationale from the *Feres* Doctrine in *Rayonier, Inc. v. United States*.[112]

A second rationale for the *Feres* Doctrine was that the application of state tort law to the federal government would be too burdensome.[113] The Supreme Court reasoned that it would be unfair to re-

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105. 28 U.S.C. § 2674 (1988); *Feres*, 340 U.S. at 141–42.

106. 28 U.S.C. § 2674.

107. *Feres*, 340 U.S. at 141. "[N]o private individual has power to conscript or mobilize a private army. . . ." *Id*.

108. *Id*. at 142. The FTCA does not create a new cause of action against the United States. *Id*.

109. 350 U.S. 61 (1955).

110. *Id*. at 69.

111. *Id*. at 64–65. The Supreme Court's reasoning was based upon the FTCA "imposing liability `in the same manner and to the same extent as a private individual under like circumstances. . . .'" *Id*. at 64 (quoting 28 U.S.C. § 2674).

112. 352 U.S. 315 (1956) (holding the government liable for the negligence of Forest Service fire fighters because local law under similar circumstances would impose liability upon a private person).

113. *Feres*, 340 U.S. at 142–43. The FTCA provides that the applicable law in a suit

quire the application of varying state tort laws to military families who have no control over their duty station assignment.[114] Because the relationship between the servicemembers and the government is "`distinctively federal in character'" and rather than leave servicemembers dependent upon "laws which fluctuate in existence and value," the Supreme Court held that the claims of an active duty servicemember are precluded.[115] This rationale for the *Feres* Doctrine, however, has been weakened by *United States v. Muniz*, which held that the denial of tort recovery by a plaintiff based upon the application of disparate state laws is prejudicial to the plaintiff.[116] Thus, as with the parallel private liability rationale, the problem of the application of local tort law is no longer a sound reason for continued support of the *Feres* Doctrine.

The Supreme Court's final rationale in *Feres* involves the availability of benefits under the Veterans' Benefits Act.[117] The Supreme Court found in *Feres* that Congress intended veterans' benefits to be the exclusive remedy for the injuries of military personnel.[118] To prevent servicemembers from being compensated twice for the same injury, the Supreme Court stated Congress should have provided for an adjustment of tort recovery against veterans' benefits.[119] Therefore, *Feres* implies that servicemembers whose claims are barred by the *Feres* Doctrine are better compensated with veterans' benefits.[120]

Finally, the Supreme Court in *United States v. Brown* created a fourth rationale that was not expressly presented in *Feres* for deciding FTCA claims.[121] In *Brown*, the Supreme Court stated that the

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brought under the FTCA should be "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1988).

114. *Feres*, 340 U.S. at 143.

115. *Id*. at 143, 146 (quoting United States v. Standard Oil Co., 332 U.S. 301 (1947)). The Supreme Court stated that the relationship between the servicemembers and the government should dictate the "scope, nature, and legal incidents and consequences of the relationship" rather than state tort law. *Id*. at 143–44 (quoting United States v. Standard Oil Co., 332 U.S. 301 (1947)).

116. 374 U.S. 150, 164 (1963). Claims of federal prisoners based on negligence of prison employees were allowed because nonuniform recovery was better than uniform nonrecovery and because the claims were not expressly precluded by the FTCA. *Id*. at 162.

117. Veterans' Benefits Act, 38 U.S.C. §§ 101–5228 (1988).

118. *Feres*, 340 U.S. at 144.

119. *Id*.

120. Rust, *supra* note 101, at 244.

121. 348 U.S. 110 (1954). The Supreme Court in *Brown* reaffirmed the *Brooks* decision holding that veterans' benefits and recovery under the FTCA are not mutually

potential disruption of military discipline precluded suits by injured military personnel against their negligent supervisors in the course of military service.[122] The fear that a soldier who was injured because of a commander's decision would pursue a civil tort claim and jeopardize the effectiveness of his unit has been accepted as the most persuasive rationale for the *Feres* Doctrine.[123] This judicial fear of military dissension brought on by judicial intervention in military matters is currently the dominant rationale for the *Feres* exception to the waiver of immunity under the FTCA. This rationale results in judicial deference to military authority.

The judicial fear of interfering with military discipline comprises three different concerns regarding discipline in the armed forces.[124] First, judicial review would allow second-guessing of military orders and cause dissension among the ranks.[125] Second, military commanders often have to make unpopular and controversial decisions with short notice which must be resolutely obeyed in order to have an effective military.[126] This type of fear over discipline would allow indiscriminate protection for decisions, other than those that are combat-related, that do not require absolute protection.[127]

The last concern over discipline is based upon soldier disobedience in the leader-follower relationship.[128] The fear that subordinates would be more likely to challenge the orders of their superiors if the *Feres* Doctrine was not broadly interpreted to bar the claims of

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exclusive. *Id*. at 111, 113.

122. *Brown*, 348 U.S. at 112. The Supreme Court excluded these claims for three reasons:

> [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . .

Id.

123. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671–73 (1976).

124. David S. Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine*, 95 YALE L.J. 992, 1003 (1986).

125. *Id*. at 1004. However, this type of judicial inquiry does not prevent suit by civilians against the military for tort-related injuries. *Id*. at 1005.

126. Schwartz, *supra* note 124, at 1005. Making a tactical decision on the battlefield that will affect the lives of troops has to be made decisively or more lives than necessary could be lost because of procrastination.

127. *Id*. at 1005–06 (citing Stubbs v. United States, 574 F. Supp. 474 (S.D. Fla. 1983)). Thus, the type of military decision needs to be ascertained before a court determines that a claim does not require judicial review.

128. *Id*.

servicemembers was based upon the judicial fear of soldier disobedience.[129] Hence, the judicial concern for the prevention of dissension within the Armed Forces developed independently of *Feres*. Nonetheless, this discipline theory is the dominant rationale for barring servicemembers' claims.

D. Development and Expansion of the *Feres* Doctrine

The *Feres* Doctrine has not been consistently construed to justify the reasoning for exempting the government's waiver of immunity under the FTCA.[130] In fact, the *Feres* Doctrine itself has been expanded beyond the original holding in *Feres*, even though two of the expressed rationales for the *Feres* Doctrine have been abrogated.[131] In *United States v. Shearer*, the Supreme Court stated that the availability of veterans' benefits and the federal relationship rationale were no longer controlling factors in the bar of servicemembers' claims.[132] The Supreme Court's holding in *Shearer* was based primarily upon the military discipline rationale for the *Feres* Doctrine.[133] However, the military discipline rationale was not expressly provided for in *Feres*.[134]

In *Shearer*, the Court found that the potential for second-guessing the military by the judiciary and the impairment of military discipline were more important than either the servicemember's duty status or the location of the tortious incident.[135] The incident-to-service test provided for in *Feres* as a judicial exception appeared to have been abandoned with the Supreme Court's emphasis of the

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129. *Id*. at 1006. The "consciousness of one's rights makes any person less inclined to obey authority." *Id*.

130. *See infra* notes 134–46 and accompanying text.

131. *See supra* notes 105–16 and accompanying text.

132. 473 U.S. 52 (1985). In *Shearer*, a soldier kidnapped and murdered another soldier while both were off duty and off post. *Id*. at 53. The claim against the government was based upon the Army's knowledge of the murderer's violent nature, its failure to warn others, and its refusal to remove the violent soldier from active duty. *Id*. at 54. The Supreme Court distinguished the *Brooks* decision even though it similarly involved servicemembers injured off post by reasoning that Shearer's claim would require testimony regarding the propriety of officers' decisions regarding the murderer's service. *Id*. at 58. See *supra* notes 105–23 and accompanying text for a discussion of veterans' benefits and parallel private liability as rationales behind the *Feres* Doctrine.

133. *See supra* notes 123–28 and accompanying text.

134. *See Feres*, 340 U.S. at 146 (failing to mention discipline rationale).

135. *Shearer*, 473 U.S. at 57–58.

military discipline rationale for the bar against servicemembers' claims.[136]

However, in *United States v. Johnson* the Supreme Court revived the incident-to-service bar to claims against the United States.[137] In a five–to-four decision, the Supreme Court reversed the United States Court of Appeals for the Eleventh Circuit which had determined that military discipline would not be detrimentally affected if the claims were allowed to go forward.[138] Instead, the Supreme Court held that the *Feres* Doctrine bars all negligence suits incident to service, and noted that the status of the tortfeasor as a civilian employee of the government is irrelevant.[139] Along with the military discipline rationale, the Court evaluated the three original rationales for the *Feres* Doctrine's incident-to-service bar.[140] The inconsistent application of the *Feres* Doctrine, as illustrated in *Shearer* and *Johnson*, exemplifies the inappropriate extension of the judicial exception to Congress' waiver of sovereign immunity.[141]

Moreover, in *United States v. Stanley*, the Supreme Court extended the *Feres* Doctrine to exclude servicemembers' claims where government civilian employees intentionally violate servicemembers' constitutional rights.[142] In *Stanley*, an army master sergeant volunteered to participate in a study examining the effects of lysergic acid diethylamide (LSD) on human psyche defenses.[143] The effects of LSD

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136. The military discipline rationale was not originally provided for in *Feres*, but was identified four years later. *See supra* notes 121–29 and accompanying text.

137. 481 U.S. 681 (1987). A claim by a Coast Guard helicopter pilot who requested assistance from an air traffic controller of the Federal Aviation Administration (FAA) because of inclement weather and who crashed into the side of a mountain was barred by *Feres*. *Id*. at 683, 687–88.

138. *Johnson*, 481 U.S. at 686. The Eleventh Circuit determined that the suit would not affect military discipline because it was a suit against a civilian government employee. Johnson v. United States, 779 F.2d 1492, 1494 (11th Cir. 1986) (en banc).

139. *Johnson*, 481 U.S. at 686.

140. *Id*. at 688–92; *see supra* notes 105–20 and accompanying text.

141. *See Johnson*, 481 U.S. at 692–703 (Scalia, J., dissenting) (concluding that the *Feres* Doctrine has been wrongly extended to bar claims of civilian negligence where the original *Feres* holding only barred claims against the United States rather than individuals).

142. 483 U.S. 669, 683–84 (1987).

143. U.S. ARMY HEALTH SERVICES COMMAND, U.S. ARMY MEDICAL DEP'T, LSD FOLLOW-UP STUDY REPORT 1 (1980) [hereinafter LSD REPORT]. The demographics compiled in the report indicate that at least five different Army installations conducted experiments including Edgewood Arsenal, Md.; Fort McClellan, Ala.; Fort Benning, Ga.; Fort Bragg, N.C.; and Dugway Proving Ground, Utah, from 1955 through 1967. *Id*. at 74.

on troops were studied by both the Central Intelligence Agency and the military in anticipation of the use of LSD by enemy forces for interrogation purposes and behavioral control.[144] As a result of a congressional investigation arising from public interest concerning these experiments, a subsequent study was carried out in order to locate and study the long term effects on the LSD volunteers.[145] Although LSD and other chemical agents may not have been identified by name,[146] written consent was obtained from the volunteers before receiving a psychoactive agent.[147] The study concluded that the illnesses discovered in the medical volunteers were of the same type and with the same frequency as those found in the general population who had not participated in any such chemical experimentation.[148]

In *Stanley*, the suit was based on a FTCA and a constitutional claim alleging deprivation of liberty.[149] The plaintiff argued that the

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144. *Id*. at 1–2. LSD was considered an "ideal chemical warfare agent" during the cold war because it was "effective in incredibly small amounts and conveniently colorless, odorless and tasteless." *Id*. at 1. The hallucinogenic effects of LSD were discovered in Switzerland in 1943 by accident. *Id*.

145. *Id*. at 2. Of the 320 volunteers evaluated in the follow-up study, only 10 did not have at least a high school education and at least 146 had obtained a bachelor's degree. *Id*. at 74. One hundred-ten were officers. *Id*. at 73. The soldiers exposed to LSD "appeared to be relatively stable socially, unusually well educated, and economically successful." *Id*. at 63. LSD flashbacks, reexperiencing the effects of LSD, are the most widely known reaction to LSD but were only reported in eight percent of the cases in the study. *Id*. at 46–48.

146. *Id*. at 76–77. Specific agents other than LSD include riot control agents, nerve agents, nerve agent antidotes, other hallucinogenic drugs, and other military chemical agents. *Id*. Of the soldiers studied, 281 were exposed to LSD while 39 were not. *Id*. at 77.

147. *Id*. at 1. The Army believed that 741 soldiers had volunteered for the initial chemical warfare experiments, but only 320 were evaluated in the follow-up study because some were deceased, missing, or not interested in participating. *Id*. at 62–63.

148. LSD REPORT at 61–62. Although the military conducted experiments with LSD during the cold war, the military's nominal use of the drug is dwarfed by the experimentation done by the civilian medical community. *Id*. at 151–52. Moreover, the Army psychologically screened soldiers and rejected between 30–50% of potential volunteers. *Id*. at 153. In contrast, the civilian subjects included "alcoholics, schizophrenics, brain-damaged patients, maximum security prisoners, sexual deviants, and mentally disturbed children." *Id*. at 153–54. Consent in the civilian community was not universally obtained and it is doubtful that informed consent would be valid from anyone other than a healthy subject. *Id*. at 154.

149. Stanley's FTCA claim was dismissed by the Supreme Court. *Stanley*, 483 U.S. at 677–78. Where an individual's constitutional rights are violated, claims for damages are allowed even though suits of that nature are not expressly provided for by Congress. *Id*.

military discipline rationale did not apply because he was not under the command of superiors where military discipline would be a concern, but rather was under the control of medical supervisors.[150] The Supreme Court stated that the constitutional claim of deprivation of liberty without due process was barred based on military discipline since "intrusion into military affairs by the judiciary is inappropriate."[151] Due to the judicial fear of involvement in military affairs, the *Stanley* Court extended the *Feres* Doctrine to bar claims of intentional constitutional violations caused by civilian employees of the government.[152]

Although the *Feres* holding prohibited claims of servicemembers against the United States, courts have also expanded the *Feres* Doctrine to bar actions by one servicemember against another. This expansion is premised upon the *Feres* Court's statement that there is "no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."[153] With the prohibition of claims against individual members of the military, the concern for military discipline is being served.[154] Before barring a servicemember's claim based upon the *Feres* Doctrine, a court should question whether military discipline is being served.[155]

Courts interpreting the language in *Feres* have extended the *Feres* Doctrine to exclude suits that allege intentional torts, as well as negligence, because the *Feres* Court held that the government is immune from all suits "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[156]

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150. *Id*. at 679–81.

151. *Id*. at 683.

152. *Id*. at 686. However, Justice O'Connor stated in her dissenting opinion that the government's conduct in the LSD experiments was "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." *Id*. at 709 (O'Connor, J., dissenting) (comparing the government's experimentation conduct to the human experimentation performed by the Germans in World War II).

153. Feres v. United States, 340 U.S. 135, 141 (1950).

154. *See supra* text accompanying notes 121–29.

155. *See* Rust, *supra* note 101, at 252.

156. *Feres*, 340 U.S. at 146; *see*, *e.g.*, Jaffee v. United States, 592 F.2d 712 (3d Cir.) (alleging that the government intentionally ordered the plaintiff to march into an atomic bomb blast during military above-ground testing), *cert. denied*, 441 U.S. 961 (1979); Citizens Nat'l Bank v. United States, 594 F.2d 1154 (7th Cir. 1979) (barring intentional tort claim against military correctional officers under the FTCA). The court in *Citizens* held that both a suit in negligence as well as a suit alleging intentional torts would disrupt

Therefore, the status of the claimant as a servicemember determines whether the *Feres* Doctrine applies, rather than the theory upon which a plaintiff sues.[157] However, federal courts traditionally impose greater liability upon the United States when it is an intentional tortfeasor.[158]

Another area where the *Feres* Doctrine has been expanded is derivative suits by servicemembers' families who have been harmed as a result of injuries sustained during the servicemembers' military service.[159] The harm to children due to genetic damage is considered a derivative injury because the injury was not directly inflicted upon the children but occurred solely as a result of the servicemember's original injury.[160] Courts have recognized the seriousness of such claims by injured children whose parents were injured during their service, pleading to Congress to allow such recoveries.[161] In derivative injury suits by a servicemember's family, because of the longer time lapse between the birth of the injured child and the military decision that exposed the servicemember, there is nominal concern for adverse effects on military discipline as a result of judicial review.[162] The negligence claims of a child with birth defects should

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military discipline. *Citizens*, 594 F.2d at 1157–58; *see also* Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (barring claim alleging the United States intentionally injured servicemember ordered to march through atomic bomb blast cloud).

157. Rust, *supra* note 101, at 253; *see*, *e.g.*, Rotko v. Abrams, 338 F. Supp. 46, 47 (D. Conn. 1971) (stating that the Supreme Court has indicated that one's status as a servicemember controls a case rather than the plaintiff's legal theory).

158. Rust, *supra* note 101, at 256 (discussing the differences between a negligent and an intentional cause of action). When there is an intentional invasion of one's rights the courts impose greater responsibility upon the intentional wrongdoer. *Id*. at 256 n.83 (citing WILLIAM L. PROSSER, LAW OF TORTS § 8, at 34 (4th ed. 1971)).

159. Although claims for direct injuries to servicemembers' families are permitted against the United States, where a military dependant's injuries occur as a result of their parents' service, the dependant's claims are incident to their parents' service and consequently barred under the *Feres* Doctrine. *See In re* Agent Orange Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980) (holding birth defects of servicemembers' family were a derivative of their parents' injury and not a direct injury upon the children). Agent Orange is a toxic herbicide used during the Vietnam War as a defoliant. *Id*. at 776.

160. *See* Monaco v. United States, 661 F.2d 129 (9th Cir. 1981) (barring claim of daughter who suffered severe birth defects as a result of her father's exposure to radiation), *cert. denied*, 456 U.S. 989 (1982).

161. *Id*. at 134 n.3 (suggesting that if Congress was made aware of the seriousness of children's injuries as a result of their parents' service and their inability to gain relief through the judicial system under the FTCA, it would provide relief to families indirectly injured).

162. *See* Hinkie v. United States, 524 F. Supp. 277, 283 (E.D. Pa. 1981) (servicemember sustained chromosomal damage during participation in nuclear testing pro-

not be absolutely barred under the *Feres* Doctrine merely due to a parent's injuries incident to service because military discipline would not be adversely affected by judicial review.

Lastly, the Supreme Court has expanded the *Feres* Doctrine to bar constitutional claims based on the Fifth Amendment even though the *Feres* Doctrine only dealt with tort claims.[163] Federal courts have typically barred intramilitary constitutional claims under the *Feres* Doctrine because of the need for military discipline.[164] Thus, the *Feres* Doctrine is often applied regardless of whether the suit is based on tort law or on the Constitution.

III. OVERVIEW OF THE FERES *DOCTRINE EXPANSION*

The judicially created *Feres* Doctrine was not intended to be an absolute bar against the claims of servicemembers. The FTCA expressly provides for the waiver of sovereign immunity for the negligent or wrongful acts of a government employee.[165] A soldier fits within the definition of a government employee.[166] The only congressional limitations upon this waiver of immunity for servicemembers are claims from combat activities and claims arising in a foreign country.[167] Congress did not intend the judiciary to bar claims of servicemembers merely because they were voluntarily serving their country.

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gram that resulted in birth defects in his children, but the claim was not barred by the *Feres* Doctrine because the court stated the incident-to-service test was an oversimplification), *rev'd*, 715 F.2d 96, 98 (3d Cir. 1983), *cert. denied*, 465 U.S. 1276 (1984). The district court in *Hinkie* stated that it was difficult to see how military discipline in this case would be adversely affected by judicial review since the injuries claimed were not yet apparent when the orders were given. *Id*. at 284. However, reluctantly, the appellate court reversed the district court's decision because of controlling precedent that bars a child's claims under the *Feres* Doctrine. Hinkie v. United States, 715 F.2d 96, 98 (3d Cir. 1983), *cert. denied*, 465 U.S. 1276 (1984).

163. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The Supreme Court has broadened the allowable causes of action against federal officials to include the Due Process Clause of the Fifth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment. Davis v. Passman, 442 U.S. 228 (1979) (sexual discrimination by Congressmember violated the Fifth Amendment); Carlson v. Green, 446 U.S. 14 (1980) (medical needs of inmate were ignored).

164. *See* Jaffee v. United States, 663 F.2d 1226, 1239 (3d Cir. 1981), *cert denied*, 456 U.S. 972 (1982); *see supra* notes 121–29 and accompanying text.

165. 28 U.S.C. § 2674 (1988).

166. *Id*. § 2671; *see supra* note 91.

167. 28 U.S.C. § 2680(j), (k).

Barring individual suits against a plaintiff's commander is a clear circumstance where a bar against claims would be necessary based on concerns of dissents. However, derivative suits by children with birth defects do not challenge the command structure of the military establishment because the children themselves are not subordinates and their injuries are not proximate in time to the orders given by the commanders. Also, intentional government misconduct would not be discouraged by an absolute bar to servicemembers' claims merely because the servicemembers are actively serving their country. Intentional misconduct by the government would only create dissension within the ranks of the military services.

Moreover, the Court in *Feres* dealt exclusively with negligent acts of the government that injured servicemembers during their active service. It is unconscionable to believe that volunteers serving their country could unconditionally waive the very constitutional protections that they enlisted to protect. The development of the *Feres* Doctrine represents a habitual judicial fear of involvement in military affairs that has deprived servicemembers of the sacred rights they serve to protect.

IV. INADEQUACY OF INTRAMILITARY REMEDIES

The role of the judiciary is concededly limited by the executive and legislative branches of the federal government.[168] Each branch of the federal government has expertise over subject matter related to its particular role, to which other branches defer.[169] Deference is based upon the legitimate exercise of authority undertaken by authorized officials.[170] However, there are limits to judicial deference to military matters that result in injuries to military personnel.[171] The dismissal of a servicemember's claim merely because it would constitute judicial review of military matters is an abdication of the judiciary's role as a balance in our system.[172] The FTCA vests jurisdiction in the federal courts to hear tort claims against the United States for the acts of government employees within the scope of

168. U.S. CONST. art. III, §§ 1–2.
169. Kellman, *supra* note 104, at 1649.
170. *Id*. at 1649.
171. *Id*. at 1652.
172. *Id*.

their employment.[173] The FTCA does not, however, expressly exclude claims incident to military service. In light of the Supreme Court's reliance on the adequacy of intramilitary remedies, the Court created the *Feres* Doctrine to achieve a balance between military discipline and a servicemember's personal rights.[174]

The Supreme Court has stated that veterans' benefits are better suited to resolve intramilitary torts.[175] A servicemember is entitled to benefits upon establishing eligibility and entitlement.[176] A soldier is eligible for benefits if he is a veteran with an honorable discharge.[177] Even if status as a veteran is successfully established, entitlement to veterans' benefits must also be established by showing that the claimed injury is connected to the veteran's service.[178] Convincing the Veterans' Administration (VA) that a veteran's illness is service-related is a difficult burden to undertake because the VA will presume only in limited cases, as provided in the Veterans' Benefits Act, that a veteran's illness is related to his service.[179] For example, veterans' illnesses that occur as a result of long-time exposure to minimal amounts of toxic substances provide a difficult burden of proof for a veteran to overcome.[180] Moreover, if a veteran's claim for compensation is denied by the Veterans' Administration, the only avenue of appeal is through the same administrative agency.[181]

Alternatively, Congress may enact legislation to compensate injuries and provide a remedy other than veterans' benefits to a

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173. 28 U.S.C. § 1346(b) (1988).

174. Schwartz, *supra* note 124, at 996 n.23.

175. Feres v. United States, 340 U.S. 135, 144–45 (1950); *see* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672–73 (1976) (stating that servicemembers will be compensated regardless of their culpability).

176. Veterans' Benefits Act, 38 U.S.C. §§ 101–5228 (1988).

177. *Id*. § 101(2).

178. *Id*. § 1131.

179. *Id*. § 1133.

180. *See*, *e.g.*, *In re* Agent Orange Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980).

181. 38 U.S.C. § 211(a). The administrative denial of veterans' benefits is not subject to review by the judiciary. *Id*.

specific harm created by the government.[182] Generally, the process of obtaining relief is modified to allow easier qualification for veterans' benefits. For example, Congress enacted legislation to make it easier for Vietnam veterans who were exposed to Agent Orange to establish entitlement to benefits.[183] Moreover, Congress is currently addressing Gulf War Syndrome considerations.[184] Without specific intervention and reform from Congress, intramilitary remedies fail in some instances to address the veterans' injuries.

V. THE FAILURE-TO-WARN THEORY OF RECOVERY

The *Feres* Doctrine does not prohibit veterans' claims due to torts occurring after their discharge from military service.[185] Some courts allow recovery where an intentional tort occurred in-service in conjunction with a separate post-service negligence tort.[186] For example, some courts have created an exception to the *Feres* Doctrine that allows injured servicemembers to assert a cause of action for the government's failure to warn of the possible adverse effects of the hazards that caused the servicemembers' injuries after their discharge.[187] This cause of action allows the servicemembers to recover

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182. Lora Tredway, Comment, *When a Veteran "Wants" Uncle Sam: Theories of Recovery for Servicemembers Exposed to Hazardous Substances*, 31 AM. U. L. REV. 1095, 1107 (1982). Congress can provide three basic types of relief: 1) FTCA amendments to eliminate immunity under the *Feres* Doctrine, 2) revision of the administrative process for veterans' claims, and 3) establish a special benefits program. *Id*.

183. Agent Orange Act of 1991, 38 U.S.C. § 1116 (Supp. V 1993).

184. CHEMICAL AND BIOLOGICAL EXPORTS IMPACT, *supra* note 41, at 1; *see* Steve Komarow, *Gulf Syndrome Vets May Get Congress' Help*, USA TODAY, June 10–12, 1994, at 1A.

185. *See* M.M.H. v. United States, 966 F.2d 285 (7th Cir. 1992) (failing to inform patient of AIDS misdiagnosis); Cole v. United States, 755 F.2d 873 (11th Cir. 1985) (alleging failure to warn of radioactive contamination); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (failing to warn of harmful effects from nuclear weapons testing); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (alleging failure to provide follow-up medical treatment).

186. *See* Tredway, *supra* note 182, at 1130–32. There are three types of cases involving post-discharge negligence: 1) the government commits two negligent acts with the same plaintiff, 2) the government commits one negligent act that continues after the servicemember is discharged from the service, and 3) the government commits two separate acts with respect to the same individual with the first occurring while in-service and the second occurring after the individual's discharge. *Id*.

187. *See Everett*, 492 F. Supp. at 326; *Thornwell*, 471 F. Supp. at 357; *see also* Thomas E. Szykowny, Comment, *Duty to Warn as an Inroad to the* Feres *Doctrine: A Theory of Tort Recovery for the Veteran*, 43 OHIO ST. L.J. 267, 273–74 (1982).

where the government intentionally exposed them to hazardous substances while on active duty and then negligently failed to warn the veterans of the harmful consequences after their discharge from service.[188] Courts will allow recovery if the in-service tort was intentional and the tort after discharge was negligent.[189] The government has a duty to prevent further harm to the servicemember after the intentional in-service tort and failing to warn the veteran of the hazards will aggravate the original tort by making the veteran believe that there is no further danger, thus delaying discovery of the injury and treatment.[190]

There is a distinction between the failure to warn an active duty servicemember of possible adverse effects after discharge and the applicability of the *Feres* Doctrine to a servicemember's claim.[191] This distinction is that the post-service tort occurred after the servicemember has been discharged from active duty and, consequently, is not incident to his service.[192] The *Feres* Doctrine would not be applicable to the tortious failure to warn occurring after the servicemember's discharge. Since the veteran is no longer a part of the active military, there is no conflict with the military discipline rationale typically employed to support the *Feres* Doctrine.[193] Thus, the FTCA waiver of immunity would make the United States accountable for tortious conduct.

Additionally, the torts must be separate rather than continuous.[194] A tort is continuous when it extends from the in-service act while on active duty into the veteran's civilian life.[195] For example, injuries resulting from government conduct while on active duty, but which are not discovered until after the servicemember has been discharged, are continuous torts.[196] If the tortious conduct is continuous, then the government will not be held liable because the *Feres*

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188. *See* Szykowny, *supra* note 187, at 273.

189. *See, e.g.*, *Thornwell*, 471 F. Supp. at 352.

190. *See* Szykowny, *supra* note 187, at 273–74.

191. *See Thornwell*, 471 F. Supp. at 353.

192. *Id.*

193. *See* Szykowny, *supra* note 187, at 275–76 (discussing cases where the *Feres* Doctrine was circumvented).

194. Tredway, *supra* note 182, at 1132–33.

195. *See* Szykowny, *supra* note 187, at 272 (explaining the continuing tort theory).

196. *Id.*; *see*, *e.g.*, Maddick v. United States, 978 F.2d 614 (10th Cir. 1992) (holding that former Navy diver was barred by the *Feres* Doctrine because he only alleged a post-service continuation of an in-service tort).

Doctrine is applicable.[197] The government is not liable for the "continuation of the original wrong."[198]

In the Gulf War scenario, the negligent failure-to-warn theory of recovery may be utilized to find governmental tort liability. Arguably, the United States intentionally exposed servicemembers to a lethal toxin. Although this may appear to be an act of negligence, the government intentionally injected servicemembers with an experimental vaccination without their informed consent.[199] This is an intentional tort. Further, since discovery of the wide range of symptoms associated with the syndrome, the government has been negligent in failing to warn servicemembers and their families of the baneful consequences of service in Desert Storm.

The application of the failure-to-warn theory of recovery to the Gulf War Syndrome may be demonstrated through analogy. In *Everett v. United States*, the surviving spouse of an airman successfully argued that the government was negligent in failing to warn her husband of the harmful effects of exposure to nuclear weapons tests.[200] The airman was ordered to march through a nuclear blast area shortly after the detonation.[201] The court found that ordering the airman into the nuclear cloud was intentional experimentation.[202] Thus, the *Everett* court held that the government was negligent in failing to warn the airman of the dire consequences that resulted from his service and that this failure to warn was distinguishable from the intentional in-service tort for experimentation.[203] Thus, the duty to warn of the dire consequence of his service arose after his discharge from active duty and was not incident to his active service.[204] Although the in-service tort for experimentation was barred, the post-service negligence theory circumvented the *Feres* Doctrine.

Post-service negligence can also be established by asserting that the government has failed to examine and treat the adverse conse-

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197. *Maddick*, 976 F.2d at 616; *see* Stanley v. CIA, 639 F.2d 1146, 1155 (5th Cir. 1981).

198. Kelly v. United States, 512 F. Supp. 356, 360–61 (E.D. Pa. 1981).

199. *See* text accompanying note 76.

200. Everett v. United States, 492 F. Supp. 318, 319 (S.D. Ohio 1980).

201. *Id*.

202. *Id*. at 325–26.

203. *Id*.

204. *Id*. at 326.

quences of the in-service tort.[205] For example, in *Thornwell v. United States*, a soldier was administered LSD while on active duty.[206] Claims were brought against the government that included in-service claims as well as claims for post-service injuries.[207] The court dismissed the in-service claims based upon the *Feres* bar;[208] however, the post-service claims were able to avoid the incident-to-service bar.[209] Thornwell established that the government intentionally drugged him while on active duty and was negligent in failing to examine and treat him after his discharge.[210] Thus, the requirement of an intentional in-service tort, in conjunction with a separate post-service negligence tort, circumvented the *Feres* Doctrine and established the government's liability for the servicemember's injuries.

However, in *Stanley v. CIA*, the servicemember was unsuccessful in arguing an intentional in-service tort separate from a post-service tort.[211] The veteran claimed that the government negligently failed to monitor him after administering LSD to him while he was in the service.[212] The court determined that the veteran "failed to allege an intentional tort committed while he was in the service" that was separate from the negligent treatment occurring after discharge.[213] The veteran's entire suit was barred by the *Feres* Doctrine due to his failure to establish two distinct torts. However, a post-service negligent tort would have survived because it was not incident to the veteran's service.

More recently, in *M.M.H. v. United States*, the court held that the veteran's claims for post-service negligence were not barred by the *Feres* Doctrine.[214] The veteran was tested for the HIV virus while on active duty and was misdiagnosed.[215] The Army later tested her a second time but failed to inform her that she was not infected.[216] Although the initial misdiagnosis occurred while on active

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205. Thornwell v. United States, 471 F. Supp. 344, 349–53, 357 (D.D.C. 1979).
206. *Id*. at 346.
207. *Id*. at 347.
208. *Id*. at 347–48.
209. *Id*. at 349–53, 357.
210. *Id*. at 349–51.
211. 639 F.2d 1146, 1153–56 (5th Cir. 1981).
212. *Id*. at 1149.
213. *Id*. at 1154.
214. 966 F.2d 285, 291 (7th Cir. 1992).
215. *Id*. at 286–87.
216. *Id*. at 287.

duty, the subsequent failure to rectify the diagnosis occurred after her discharge from the service.[217] The government argued that it merely failed to rectify a mistake and thus the misdiagnosis was a continuous tort barred by the *Feres* Doctrine.[218] However, the court determined that since the government obtained evidence after her discharge that indicated that its diagnosis was incorrect, the negligent failure to warn occurred subsequent to and independent of her active duty service.[219] The *Feres* Doctrine was not a bar because the government's failure to notify the veteran of the correct diagnosis was a distinct tort from the government's original faulty diagnosis.[220]

Therefore, a post-service act of negligence such as a failure to warn appears to be a successful theory of recovery where the veteran's counsel is artful in pleading a distinct tort independent of the veteran's active duty service.[221] The pleading should be scrutinized to ensure that a truly continuous tort is not divided into separate torts.[222] Pleading a separate tort of post-service negligence would circumvent the *Feres* Doctrine and hold the military responsible following the discharge of servicemembers who sacrificed liberties while on active duty. Since no change in the policies of the Veterans' Administration or judicial review is probable, the most realistic theory of recovery would be based on a post-discharge duty to warn, separate from the duty to warn during active duty.[223]

VI. THE FERES *DOCTRINE AND THE GULF WAR SYNDROME*

The *Feres* Doctrine poses an obstacle to a successful tort claim against the government by a servicemember ailing from the Gulf War Syndrome. Injuries or illnesses acquired while serving in the Persian Gulf War could appear to be incident to service and subsequently barred under the *Feres* Doctrine.[224] The Gulf War Syndrome

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217. *Id*. at 289.
218. *Id*. at 288.
219. *Id*. at 289.
220. *Id*.
221. Szykowny, *supra* note 187, at 276.
222. *Id*.
223. Tredway, *supra* note 182, at 1139.
224. *See supra* text accompanying notes 98–103.

has been primarily attributed either to the possibility of chemical weapons use or to experimental drugs used on troops to counter the effects of chemical weapons.[225] In the event either possibility is determined to be the cause of the Gulf War Syndrome, the American government will be protected by the *Feres* Doctrine. The fact that the cause of servicemembers' illnesses has not been conclusively diagnosed creates an additional hurdle that prevents judicial review.

Furthermore, the vaccinations, in and of themselves, appear to be incident to service because the military was preparing for war.[226] Judicial review of the military's decision would impact the relationship between servicemembers and their commanders.[227] This impact could adversely affect military discipline.[228] However, the United States Court of Appeals, District of Columbia Circuit, noted that the government recently admitted "that it would be `nonsense' to maintain that `military matters are categorically immune from judicial review.'"[229] If this experimental drug use by the military was not incident to a servicemember's service, an ill veteran may be able to sustain a suit against the government without a *Feres* Doctrine bar.[230] Without reform of the *Feres* Doctrine, however, recovery for injuries sustained in preparation for war and during Desert Storm are unlikely because of the judiciary's fear of adversely affecting military discipline.

Moreover, ailing servicemembers' claims could be barred because the FTCA expressly exempts the waiver of immunity for injuries sustained in combat.[231] Although the possibility of chemical attack has not been ruled out, such an attack that results in injuries to American military personnel would be a result of their combat activity. Combat injuries in a chemical environment are included in

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225. *See* Doe v. Sullivan, 756 F. Supp. 12 (D.D.C.), *aff'd*, 938 F.2d 1370 (D.C. Cir. 1991) (holding use of unapproved drugs on troops without their informed consent was a military decision not subject to judicial review); *see also* Castaneda, *supra* note 56, at 1A.

226. *Sullivan*, 756 F. Supp. at 17. In *Sullivan*, the vaccinating of military personnel was judicially reviewed, notwithstanding the *Feres* Doctrine, because the plaintiff was not asking to review military matters in preparation of war. Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1991). Rather, the plaintiff asked for review of the authority of the FDA delegated by Congress. *Id*.

227. *Sullivan*, 756 F. Supp. at 14.

228. *Id*.

229. *Sullivan*, 938 F.2d at 1380 n.15 (citing Brief for Appellees at 27).

230. *See id*. at 1380–81.

231. 28 U.S.C. § 2680(j) (1988).

the combat exception to the FTCA's waiver of immunity.[232] Any claim indicating that a servicemember contracted the Gulf War Syndrome from activities incident to Desert Storm would not succeed under the FTCA.

The veterans' benefits system provides an additional hurdle to establishing that veterans' ailments were related to their service in the military.[233] Establishing entitlement to veterans' benefits could be difficult while the cause of the Syndrome has yet to be diagnosed. However, legislation is pending that would change the rules to allow veterans with the Gulf War Syndrome to receive benefits without proving that their illnesses are related to their service during Desert Storm.[234]

Irrespective of proposed legislation, a servicemember may obtain judicial relief by pursuing a negligent failure-to-warn theory.[235] Although any post-service negligence is actionable, the government's failure to warn of the adverse synergistic effects of the vaccinations and other antidote pills after the servicemember's discharge is the most sensible theory upon which to predicate a claim. Once the servicemember is discharged from active duty, a duty arises to avoid further harm; the government is no longer protected by the judicial concerns for military discipline.[236] Moreover, since the vaccinations were administered to military personnel, a duty can arise as a result of newly discovered information about the harmful effects of the vaccinations and the nerve antidote pills.[237] Any new duty to warn, resulting in a tort subsequent to the servicemember's active duty, could result in governmental liability regardless of the *Feres* Doctrine.

An in-service tort for liability under a failure-to-warn theory may be established by the government's failure to obtain informed consent for the administration of experimental drugs on troops.[238] In

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232. *Id*.

233. *See supra* notes 176–82 and accompanying text.

234. CHEMICAL AND BIOLOGICAL EXPORTS IMPACT, *supra* note 41, at 1; *see* Komarow, *supra* note 184, at 1A.

235. Tredway, *supra* note 182, at 1128–38.

236. *Id*. at 1138.

237. Desert Storm veterans were notified in March of 1993 that if they are experiencing symptoms they feel are related to their service in the Persian Gulf they should seek treatment at the nearest military medical facility.

238. Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991) (denying claim where servicemembers sought to enjoin the Department of Defense from using experimental drugs not

Doe v. Sullivan, the plaintiff argued that it was necessary for the government to obtain the informed consent of the servicemember for the investigational use of the drugs on troops prior to the start of Desert Storm.[239] The court, disagreeing, held that the Department of Defense had the authority, under a new FDA rule permitting the use of investigational drugs on military personnel in certain combat situations, to use these drugs without the servicemember's informed consent.[240] However, the deadly consequences from the use of these experimental drugs on healthy servicemembers had yet to be discovered. The symptoms of the Gulf War Syndrome would not begin to appear until after the conclusion of Desert Storm.

Generally, the use of investigational drugs on human beings is only authorized with their informed consent.[241] The Department of Defense is specifically prohibited from utilizing experimental drugs without the servicemember's informed consent.[242] However, because of the immediate desire to utilize the experimental drugs on troops, the FDA created a new administrative rule that allowed the Department of Defense to use unapproved investigational drugs on servicemembers without their consent.[243] Previously, in order for investigational drugs to be used in the United States, their use needed to be proven safe and effective by the FDA for specific uses and doses.[244] This interim rule waived the informed consent requirement for military personnel in combat situations where such a requirement would be infeasible.[245] Traditionally, the determination of whether informed consent was feasible had focused upon the pa-

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approved for use by the FDA on military personnel).

239. *Id*. at 1374–75.

240. *Id*. at 1381–83.

241. Food, Drug, and Cosmetic Act, 21 U.S.C. § 355 (1988 & Supp. V 1993). This requirement of consent is only required where it is feasible. *See Sullivan*, 938 F.2d at 1375.

242. Defense Authorization Act, 10 U.S.C. § 980 (1994). However, the FDA's authority to promulgate rules permitting the Department of Defense to use investigational drugs, without informed consent, was not barred by the Defense Authorization Act. *Sullivan*, 938 F.2d at 1383. See Suzanne B. Seftel, *Waiving for the Flag: Should Informed Consent Rules Apply in the Context of Military Emergencies?*, 60 GEO. WASH. L. REV. 1387 (1992), for a discussion of the FDA's informed consent waiver during Desert Storm.

243. *Sullivan*, 938 F.2d at 1381 (holding the new administrative rule within the FDA's rule-making authority).

244. 21 U.S.C. § 355 (1988).

245. 21 C.F.R. § 50.23(d) (1994).

tient's capacity to prevent abuse, rather than the surrounding circumstances.[246]

The circumstances of Desert Storm and its expected combat activity were within the accepted definition of what was feasible in order to require informed consent.[247] However, the FDA expanded the definition to include situations where there is expected or actual combat to allow the investigational drugs' use without informed consent.[248] Yet, there are limitations upon FDA waivers of informed consent that require the availability of safety and efficacy data to support new uses without informed consent.[249] Considering the current health status of numerous Desert Storm veterans and the medical profession's inability to diagnose the cause of their illnesses, a determination that their injuries were due to the synergistic effects of experimental drugs would indicate the FDA's informed consent waiver was not consistent with the veterans' best interests and was in error.[250]

Also, the battle over informed consent requirements considered whether the investigational drugs used on servicemembers were categorized as treatment or research.[251] Under the Defense Authorization Act (DAA), informed consent is required for all activities, such as investigational drug experiments, deemed to be research.[252] Arguably, the use of drugs on large populations for purposes other than what they were originally intended, and in a manner that had never been tried before, constitute experimentation prohibited by the DAA.[253] Due to the military's medically unethical haste in utilizing investigational drugs without proper informed consent,[254] an in-

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246. *See id*. § 50.23(a).

247. *See Sullivan*, 938 F.2d at 1373.

248. 21 C.F.R. § 50.23(d) (1994).

249. *Id*. § 50.23(d)(2)(i); see Seftel, *supra* note 242, for a discussion of other limitations.

250. Most Desert Storm veterans claim they did not receive information about the risks of investigational drugs. *See* LESSONS SPANNING HALF A CENTURY, *supra* note 45, at 22.

251. *See Sullivan*, 756 F. Supp. at 15–16. However, the court of appeals affirmed the district court's holding on other grounds. *Sullivan*, 938 F.2d at 1383.

252. Defense Authorization Act, 10 U.S.C. § 980 (1994).

253. *See* LESSONS SPANNING HALF A CENTURY, *supra* note 45, at 25. Also, it should be pointed out that the *Sullivan* court held that the DAA limits the DOD's authority, and not the FDA's promulgation of a rule that no longer requires informed consent from military personnel in combat situations. *Sullivan*, 938 F.2d at 1382–83.

254. *See*, *e.g.*, Schuchardt, *supra* note 6, at 79.

service tort of medical malpractice, combined with the military's post-service negligence, could establish governmental liability for the Gulf War Syndrome based on a negligent failure-to-warn theory.

VII. PROPOSED REFORM OF THE FERES *DOCTRINE*

As a result of the inconsistent and uncertain application of the *Feres* Doctrine and the inherent unfairness that results from the dismissal of a servicemember's claim, numerous proposals for modification of the *Feres* Doctrine have been presented. Although suits against an immediate supervisor that truly interfere with military discipline should be barred, the absolute bar of a servicemember's claim is unjust.

Congress could enact legislation authorizing the courts to hear servicemembers' claims that arise from weapons testing which results in injuries.[255] New legislation would allow recovery for claims of servicemembers that have most notably been denied.[256] Nevertheless, this proposal recognizes that the judicial fear of interference into military affairs may still persist, leaving legitimate claims for injuries unadjudicated.[257]

Alternatively, a less restrictive proposal evaluates whether a judicial remedy should be utilized to resolve a servicemember's claim.[258] This proposal suggests that intramilitary claims are appropriately before the judiciary where "the plaintiff alleges more than simple negligence" and "is not an active duty servicemember."[259] Such a proposal would permit claims for constitutional and intentional torts, but bar simple negligence or medical malpractice claims as well as claims for injuries that do not persist beyond active duty service.[260] Effects of an injury would have to persist beyond the service obligation when there is no longer a judicial concern with interfering with military discipline.[261] Although the judicial concern for military discipline would remain a factor in adjudication under ei-

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255. Kellman, *supra* note 104, at 1651–53.

256. *Id*. The military personnel exposed to radiation as a result of nuclear testing and those exposed to LSD could possibly recover under this proposed reform. *See supra* text accompanying notes 143–53.

257. Kellman, *supra* note 104, at 1652.

258. Schwartz, *supra* note 124, 1010–16.

259. *Id*.

260. *Id*.

261. *Id*.

ther proposal, these proposals are merely exemplary of the original holding of *Feres* and the incident-to-service test. Simple negligence claims, as well as suits to recover from experimentation, that do not adversely impact military discipline should be advocated.

VIII. MILITARY DISCIPLINE

Due to the judicial fear of disrupting the balance of the separation of powers among all three branches of government, the substantive exceptions to the FTCA and the judicially created *Feres* Doctrine have allowed the federal government's exemptions from liability to include almost any government conduct. Only where the tortious conduct is subsequent to the servicemember's service is there no conflict with the military discipline rationale typically employed to support the *Feres* Doctrine. The fear of the judiciary is that its review of military matters might establish it as the supreme branch of government.[262]

Regardless of the judiciary's fear of reviewing military affairs that could adversely affect military discipline, fairness in the judicial system is what our legal system is founded upon. Military veterans are owed a debt for their service. It is ironic that American soldiers are asked to defend a Constitution that does not provide them protection. Federal prisoners are afforded more rights than American servicemembers and their families.[263] Moreover, the claims of a family member with birth defects or other symptoms associated with the Gulf War Syndrome should not be absolutely barred under the *Feres* Doctrine since military discipline would not be adversely affected by judicial review. A servicemember's family does not follow the orders of military leadership.

The *Feres* Doctrine remains valid today because of intolerance for dissension in the American military. However, the concern for military discipline as the primary justification for the *Feres* Doctrine has recently become less compelling. Some dissension in the military is now tolerated in order to serve certain goals. For example, the intolerance for homosexuality in the military based on commanders' concerns for discipline in honoring a code of conduct no longer

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262. *See* KEETON ET AL., *supra* note 82, at 1039 (discussing judicial fear of becoming the supreme arbiter when reviewing executive policies).

263. *See*, *e.g.*, United States v. Muniz, 374 U.S. 150 (1963) (allowing negligence claims of federal prisoners against the government under the FTCA).

exists.[264]

In *Meinhold v. Department of Defense*, a servicemember sought reinstatement into the Navy after being discharged for stating on national television that he was a homosexual.[265] The *Meinhold* decision did not involve the so-called "don't ask/don't tell" policy which has since been implemented.[266] Prior to the implementation of this new policy, a discharge from the military for homosexuality could be based on conduct or statements.[267] The military would discharge homosexuals based merely on servicemembers publicly classifying themselves as homosexual.

However, in *Meinhold* the court reinstated the servicemember because this policy focused on conduct and a servicemember's likelihood to engage in prohibited conduct.[268] The court stated that the servicemember's statement alone did not impair the mission of the military.[269] Thus, even though allowing homosexuals to serve openly in the military would likely cause dissension among some heterosexual soldiers, the court ruled that the military could no longer discharge a servicemember solely based on a statement devoid of any "expressed desire or intent to act on his homosexual propensity."[270] A servicemember simply may not be discharged for indicating a particular sexual orientation; however, the servicemember may not express an intention to engage in homosexual conduct. The military subsequently fashioned its "don't ask/don't tell" policy that recognizes military discipline is not adversely affected by the mere service of homosexual individuals who follow the established code of conduct.[271]

The tolerance for dissension in the military was also evident from the admission of women into some combat roles that were traditionally considered suitable only for men. The military is slowly integrating women into combat service despite historic concerns of disciplinary problems. Women are now able to perform roles which have the potential for actual combat. Although the integration of

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264. *See* 10 U.S.C. § 654 (1994).
265. 34 F.3d 1469 (9th Cir. 1994).
266. *Id*. at 1472 n.2.
267. *Id*. at 1477.
268. *Id*. at 1479.
269. *Id*.
270. *Id*. at 1472.
271. *See* 10 U.S.C. § 654 (1994).

women might have posed a disciplinary problem to troops in combat, the military nevertheless modernized its operations to meet the needs of women. The military demonstrated its ability to adapt to social conditions and the fear of disciplinary problems has subsided.

Unlike the years before the conclusion of the Vietnam Conflict, the American military today is comprised of all volunteers. Volunteers in today's military could potentially be more disciplined knowing that the government cannot experiment on them without informed consent and that they have a remedy against the government for injuries resulting from inappropriate government conduct. The United States cannot depend on volunteers who mistrust their own leadership or who fail to believe in the fairness of their democratic system. Our society is constantly changing and the laws that govern our society must keep up with those changes.

IX. CONCLUSION

Since returning from Desert Storm, thousands of American servicemembers have experienced the signs and symptoms of the Gulf War Syndrome. These include memory loss, fatigue, twitching, swollen extremities, psychiatric problems, as well as intestinal and heart problems. Families of these ill servicemembers are now suffering from these same symptoms. Due to physicians' inability to diagnosis or treat this illness, some veterans have subsequently died. The full impact of this deadly disease remains unknown.

The most probable culprit is the combination of the experimental vaccines and nerve agent antidote pills given to troops prior to Desert Storm in anticipation of an Iraqi chemical and biological attack. The deadly consequences of these investigational drugs were unknown to medical experts. Although the authority for the utilization of such medical measures was a military decision, military discipline will not be adversely affected by a tort claim against the government allowed many years after this decision.

Moreover, medical malpractice claims against government personnel do not adversely affect discipline where medical personnel are not in the servicemember's direct line of supervision. Also, a claim by a servicemember who has since left active duty service will not adversely affect discipline. The failure to allow such suits to proceed beyond the *Feres* bar may adversely affect the effectiveness of today's volunteer military if these volunteers sense that there is

no recourse against an unfairly tortious government.

Servicemembers inflicted with the debilitating Gulf War Syndrome eagerly await judicial revision of the *Feres* Doctrine allowing judicial review or congressional legislation to expedite their assistance and relief. To deny recovery to American servicemembers who volunteered to serve their country would be an extreme injustice. Although the actual casualties of Desert Storm were minimal, the true cost of the servicemembers' commitment to "our way of life" remains unknown.[272] Abraham Lincoln once said that "we must care for those who have borne the battle."[273] The Persian Gulf War veterans have "borne the battle" to guard our great country and way of life, but our federal government has not borne its share of the cost.

272. *See supra* text accompanying note 1.
273. Szykowny, *supra* note 187, at 281.