

## Gulf War Syndrome Sub Judice

After ten years, 192 studies, and hundreds of millions of public and private research dollars, the jury is still out as to whether there is a Gulf War Syndrome or merely a collection of unrelated illnesses, let alone definitive answers as to a cause or a cure.<sup>32</sup> Nevertheless, the lack of definitive answers has not stopped a variety of litigation and legislative efforts to compensate Persian Gulf War veterans and their families. This article examines the more prominent of these efforts designed to aid those suffering from Gulf War Syndrome, why litigation will most likely fail, and why relief, if any, will probably have to come from the United States government.

One of the first targets for litigation by ill veterans and their families was the federal government. In *Minns et al. v. United States of America*,<sup>33</sup> three families sued the United States for negligence under the Federal Tort Claims Act (FTCA),<sup>34</sup> alleging that their respective children's birth defects were the result of experimental and defective vaccinations given to the servicemen fathers.<sup>35</sup> The district court dismissed their claims for lack of subject matter jurisdiction.<sup>36</sup> Almost any claim filed by a service member or their family member would meet with a similar fate due to the *Feres* Doctrine.<sup>37</sup> In *Feres v. United States*, the Supreme Court held that the United States has not waived its sovereign immunity for service members "where the injuries arise out of or are in the course of activity incident to [military] service."<sup>38</sup> The Court stated that civilian courts should not second-guess military decisions. Not only does the *Feres* Doctrine prevent suits by service members, but also derivative suits by their family members arising out of a service member's injuries.<sup>39</sup>

Applying the *Feres* Doctrine bar in Gulf War Syndrome cases follows a long list of precedents. Claims by family members for injuries were likewise barred in the Vietnam era Agent Orange defoliant cases and the atomic bomb test radiation exposure cases; cases in which the government's culpability was clearer than with the potential Gulf War Syndrome.<sup>40</sup> Any result other than dismissing these plaintiffs' claims would result in judicial review of the military's determination to inoculate, how, and with what.

In dismissing the plaintiff's claims, the *Minns* court found that the government's decision to vaccinate service members, and to not warn them or their family members of any potential side effects of these vaccinations, were "discretionary" functions.<sup>41</sup> Discretionary functions of the government are specifically excluded from the FTCA waiver of federal sovereign immunity.<sup>42</sup> Just as the *Feres* Doctrine is in part designed to prevent judicial second-guessing of military decisions, the discretionary function exception to the FTCA is also designed to prevent judicial review of the policy decisions of the executive and legislative branches of government. The district court's opinion was upheld on appeal, and the Supreme Court refused to hear the case on certiorari.<sup>43</sup>

The lawsuits on behalf of veterans and their families, however, have not been aimed solely at the federal government. *Marshall Coleman et al. v. Alcolac et al.*<sup>44</sup> involves a current class action of potentially 100,000 veterans claimed to have been injured by exposure to chemical and biological weapons allegedly used during the Persian Gulf War.<sup>45</sup> Filed in a Texas state court against twenty-seven companies, the plaintiffs allege that the defendant corporations were negligent in con-

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32. *Hearing on Gulf War Illness Before the Senate Comm. on Appropriations, Subcomms. on Labor, Health and Human Services, Education and related Agencies*, 106th Cong. (2000).

33. 974 F. Supp. 500 (D. Md. 1997).

34. 28 U.S.C. §§ 2671-2680 (2000).

35. *Minns*, 974 F. Supp. at 502.

36. *Id.* at 508.

37. *Feres v. United States*, 340 U.S. 135 (1950). For an overview of the *Feres* Doctrine and its application to the Gulf War Syndrome, see Kevin J. Dalton, *Comment: Gulf War Syndrome: Will the Injuries of Veterans and Their Families Be Redressed?*, 25 U. BALT. L. REV. 179 (1996); Claire Alida Milner, *Comment: Gulf War Guinea Pigs: Is Informed Consent Optional During War?*, 13 J. CONTEMP. H.L. & POL'Y 199 (1996); and William Brook Lafferty, *Comment: The Persian Gulf War Syndrome: Rethinking Government Tort Liability*, 25 STETSON L. REV. 137 (1995).

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

39. *Minns*, 974 F. Supp. at 503.

40. *Id.*

41. *Id.* at 506.

42. *Id.* at 505.

43. 155 F.3d 445 (4th Cir. 1998), *cert. denied*, 525 U.S. 1106 (1999).

44. 888 F. Supp. 1388 (S.D. Tx. 1995).

structing, manufacturing, and selling to Iraq chemical components or equipment used to make Iraqi chemical and biological weapons.<sup>46</sup> Begun in 1995, the litigation continues today.

In all likelihood, however, this attempt will fail just as the attempts against the federal government have failed. In the litigation dealing with Agent Orange, Vietnam veterans and their families claimed that the military's use of the defoliant caused injuries and sued the companies that produced it for, among other things, their failure to warn of the dangers of exposure to the chemical.<sup>47</sup> Those plaintiffs that did not accept a settlement offer lost in federal district court, in part because they were unable to prove successfully that their injuries were caused by exposure to Agent Orange.<sup>48</sup> In the case of Gulf War Syndrome, it is also likely, with the research to date, that the plaintiffs would be unable to prove, by a preponderance of the evidence, that the chemicals or equipment sold by the defendant corporations are responsible for the various illnesses they or their family members experience. It is more likely that the plaintiffs anticipate a settlement similar to that in the Agent Orange litigation, in which the defendant corporations created a 180 million-dollar fund for the sick veterans and their families.<sup>49</sup> The nexus between the hazards of Agent Orange and the manufacturer's failure to warn of its dangers is stronger, however, than that of the chemicals and equipment produced and sold by the defendant corporations and the existence, or foreseeability, of a Gulf War Syndrome.

Both avenues of litigation against the government and private corporations are therefore likely to fail. As stated in the appellate court decision of *Minns et al. v. United States*, while

the court recognized that the parents of the disabled children were without a judicial remedy, it felt that it was up to Congress to provide the relief to these and other veterans and families suffering from the effects of the Gulf War Syndrome.<sup>50</sup> Congress has taken some steps in this direction. In 1992, Congress passed the Persian Gulf War Veterans' Health Status Act, creating a database of Gulf War veterans' health information to facilitate later research.<sup>51</sup> In 1994, Congress gave the Veteran's Administration the authority to pay disability payments to Persian Gulf War veterans suffering from chronic illness manifesting itself in any of thirteen symptoms, including fatigue, muscle pain, and sleep disturbances.<sup>52</sup> Reportedly, however, over ninety-three percent of the claims have been denied.<sup>53</sup> Congress also passed The Persian Gulf War Veterans Act<sup>54</sup> of 1998, establishing a presumption of a service-connection, and therefore a means of compensation and treatment, for illnesses associated with exposure to one or more of over thirty toxic agents present in the Persian Gulf War, much like the Agent Orange Act of 1991.<sup>55</sup> The Act will apply, however, only after a link is established between one of the toxins and the Gulf War Syndrome, a connection that has not yet been made.

Other legislative initiatives have been proposed. The Persian Gulf War Syndrome Compensation Act of 1999<sup>56</sup> would recognize Gulf War Syndrome as a war-related injury, and would make it easier for veterans and their families to receive disability and death benefits, even if the veteran's symptoms did not arise during their military service.<sup>57</sup> The bill has remained in committee since its introduction in August of 1999.<sup>58</sup> The Gulf War Veterans' Iraqi Claims Protection Act of 1999 is another legislative initiative to aid veterans.<sup>59</sup> It pro-

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45. *Id.* at 1394.

46. *Id.*

47. *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984).

48. *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985) (appellate court affirmed motion to dismiss on basis of Government Contractor Defense).

49. *Hercules, Inc. v. United States*, 516 U.S. 417, 420 (1996).

50. *Minns v. United States*, 155 F.3d 445, 453 (4th Cir. 1998).

51. Pub. L. No. 102-585, 106 Stat. 4975 (1992).

52. Compensation for Certain Disabilities due to Undiagnosed Illnesses, 38 C.F.R. § 3.317 (2000).

53. Don Manzullo, *Manzullo Unveils Legislation to Help Veterans with Gulf War Syndrome* (1999), at <http://www.house.gov/manzullo/pr092799.htm>.

54. Pub. L. No. 105-277, 112 Stat. 2681 (1998).

55. Pub. L. No. 102-4, 105 Stat. 11 (1991).

56. H.R. 2697, 106th Cong. (1999).

57. *Id.*

58. H.R. 2697, 106th Cong. (1999), LEXIS 1999 Bill Tracking H.R. 2697.

59. H.R. 618, 106th Cong. (1999).

poses to authorize the Foreign Claims Settlement Commission of the United States to process claims of Gulf War veterans against the billions of dollars of Iraqi assets frozen in United States banks. Veterans would have priority of awards and would be eligible to receive up to \$100,000 each. The Act was passed by the House and is now before a Senate committee.<sup>60</sup>

While no legislation can cure ill veterans or their families, Congress has at least taken initial steps towards helping them. As stated in *Minns et al. v. United States*, there is unlikely to be any judicial remedy for these plaintiffs. If there is to be any relief for the victims of Gulf War Syndrome, it will have to be provided by Congress. Captain (Retired) Swank.

### ***Reserve Component Note***

#### **New Rights for Reserve and National Guard Soldiers Suffering Heart Attack or Stroke**

A fifty-year-old sergeant first class in the United States Army Reserve reports for inactive duty “drill” weekend on Saturday at 0700. He feels fine. In fact, he has always enjoyed excellent health. At 1500, he departs on a formation run with his unit. At 1510, he remarks to the soldier next to him that his left arm feels “funny.” At 1513, he collapses. The emergency room diagnosis is quick and certain: the soldier suffered a serious, permanently disabling heart attack. Until recently, this sergeant first class would not have been eligible for veterans’ benefits.

Congress recently amended Title 38 of the United States Code to correct this problem by expanding eligibility for veterans’ benefits. Legal advisors involved in line of duty investigations need to understand the scope—and limitations—of this change.

Section 301 of the Veterans Benefits and Health Care Improvement Act of 2000<sup>61</sup> now defines any period of service in which an individual was disabled or died from an acute myocardial infarction (heart attack), a cardiac arrest, or cerebrovascular accident (stroke) as “active military, naval, or air service” for purposes of veterans’ benefits laws.<sup>62</sup> The reason for the change appears clear from the legislative history. The provision was enacted to render heart attacks or strokes suffered during any type of military duty as “service-connected.”<sup>63</sup>

The Department of Veterans Affairs (VA) is implementing the law in accord with that intent. The director of the VA recently disseminated written guidance establishing entitlement to service connection for heart attacks and strokes incurred while performing (or in transit to or from) inactive duty for training.<sup>64</sup>

Neither the statutory change nor the VA guidance address the question of whether a heart attack or stroke which is the natural progression of long-term disease, as opposed to an acute injurious event, is now covered. Line of duty (LOD) officers often struggle with this question. The September 1986 version of *Army Regulation 600-8-1*<sup>65</sup> states that medical evidence of natural progression overcomes the normal presumption that military service aggravates a medical condition.<sup>66</sup> Courts have drawn the same conclusion, determining that heart attacks during periods of short duty were the manifestations of disease existing prior to the duty—that is, existing prior to service (EPTS)—rather than injuries or aggravation of injuries suffered during duty.<sup>67</sup>

The new law authorizes no change to this process in military line of duty investigations. If an EPTS condition is not aggravated by military service, *Army Regulation 600-8-1* directs a finding of “not in line of duty—not due to own misconduct.”<sup>68</sup>

Line of duty officers may still have to make a “not in line of duty” finding for heart attacks or strokes incurred during short

60. H.R. 618, 106th Cong. (1999), LEXIS 1999 Bill Tracking H.R. 618.

61. Pub. L. 106-419, 114 Stat. 1822 (2000).

62. *Id.* § 301, 114 Stat. 1822, 1852 (amending 38 U.S.C. § 101(24) (2000)).

63. See 146 CONG. REC. H 9944 (2000) (statement Rep. Stupak). “My bill closes an exceptionally problematic loophole . . . My bill would consider heart attacks and strokes suffered by Guard and Reserve personnel while on ‘inactive duty for training,’ to be service-connected for the purpose of VA benefits.” *Id.*

64. Fast Letter 00-90 from Director, Department of Veterans Affairs to All VBA Regional Offices and Centers (Dec. 4, 2000) [hereinafter Fast Letter] (directing VA examiners to obtain LOD determination or other supporting documentation to verify that disease or injury occurred while on duty)(copy on file with the author).

65. U.S. DEP’T OF ARMY, REG. 600-8-1, PERSONNEL—GENERAL: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986) [hereinafter AR 600-8-1 (1986)], *superseded by* U.S. DEP’T OF ARMY, REG. 600-8-1, PERSONAL AFFAIRS: ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE (20 Oct. 1994). Practitioners should note that although AR 600-8-1 (1986) was replaced with the 1994 version, the later does not address Line of Duty (LOD) investigations. At present, there is no current regulation addressing LOD investigations, and practice has been to rely on the 1986 regulation as non-binding guidance.

66. AR 600-8-1 (1986), *supra* note 65, para. 41-9(e), (f).

67. See *Stephens v. United States*, 358 F.2d 951 (Ct. Cl. 1966); *Gwin v. United States*, 137 F. Supp. 737 (Ct. Cl. 1956).

68. AR 600-8-1 (1986), *supra* note 65, para. 41-9 (e).

periods of military duty. However, they should remember that the VA uses the LOD factual record to help make its own determination of eligibility for veteran's benefits.<sup>69</sup> This makes an accurate and complete LOD investigative record critically important.

Line of duty investigating officers might be inclined to articulate a simple finding that a heart attack or stroke occurring during a short period of military duty is an EPTS condition, and leave it at that. However, the LOD record must accurately

reflect the timing and progression of symptoms in these cases, in relation to both the period of duty and the period of travel to and from the duty. This will allow the fairest possible determination of the facts and entitlement by the VA.

The new liberalized law may also provide recourse for veterans previously ineligible for VA benefits as the result of heart attack or stroke suffered during short periods of military duty.<sup>70</sup> Affected veterans may want to consider reapplying for benefits. Major Culver.

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69. Fast Letter, *supra* note 64.

70. See 38 C.F.R. § 3.114 (2000). If a "liberalizing" law is passed, this regulation lays out rules for calculating retroactive entitlement.