Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	To James L. Branton from Carla S. Walgenbach re: Stephen and Bianca Miller (2 pages)	08/03/95	b(6)
001b. letter	To Stephen G. Miller from R. W. Palmer re: claim (1 page)	08/02/95	b(6)
001c. form	VA Form 21-6796 re: S G Miller (3 pages)	08/28/95	b(6)
002. statement	Re: symptoms (partial) (1 page)	n.d.	b(6)
003a. letter	To Dr. Zuckerman from Ruth G. McGill, M.D. re: panel (1 page)	04/05/95	b(6)
003b. letter	To Dr. Zuckerman from Ruth G. McGill, M.D. re: panel (2 pages)	03/20/95	b(6)
004a. letter	To Hillary Rodham Clinton from civilian re: Gulf War Syndrome (partial) (2 pages)	03/13/95	b(6)
004b. resume	Re: civilian (partial) (3 pages)	n.d.	b(6)
004c. letter	To Chief of Naval Operations from civilian (partial) (1 page)	12/01/94	b(6)
004d. letter	To Chief of Naval Operations from cilvilian (partial) (1 page)	10/11/94	b(6)
004e. envelope	To Hillary Rodham Clinton (partial) (1 page)	03/04/95	b(6)
005. letter	To President Bill Clinton from consituent re: illnesses (partial) (2 pages)	n.d.	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

FOLDER TITLE:

Letters [2]

2013-0359-S
ry1486

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. letter	To Ms. Zuckerman from veteran re: illnesses (partial) (2 pages)	03/07/95	b(6)

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Clinton Presidential Records
First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

FOLDER TITLE:
Letters [2]

2013-0359-S
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	To James L. Branton from Carla S. Walgenbach re: Stephen and Bianca Miller (2 pages)	08/03/95	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
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Withdrawal/Redaction Marker
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001b. letter	To Stephen G. Miller from R. W. Palmer re: claim (1 page)	08/02/95	b(6)

COLLECTION:
Clinton Presidential Records
First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

FOLDER TITLE:
Letters [2]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001c. form	VA Form 21-6796 re: S G Miller (3 pages)	08/28/95	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

FOLDER TITLE:

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Department of Veterans Affairs

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

IF YOU DO NOT AGREE WITH THIS ACTION

We have based our determination on the evidence of record and the applicable law. If you do not agree with the action we have taken, you have two choices. (1) You may reopen your claim by sending VA new and material evidence which we have not considered. (2) You may appeal to the Board of Veterans' Appeals (BVA).

REOPENING YOUR CLAIM

NEW EVIDENCE. You may give us evidence we do not have to strengthen your claim. Testimony may be that kind of evidence. To have a hearing before regional office personnel, see the instructions below. It is in your interest to send us any new evidence as soon as possible. We will consider it and let you know whether it changes our determination. You may also submit additional evidence, with some time limitations, if you appeal to the BVA.

HEARINGS BEFORE REGIONAL OFFICE PERSONNEL. We do not require you to have a hearing. You may testify in your own behalf before regional office personnel. You may also bring witnesses. To request a hearing before regional office personnel, send a letter to this office. We will arrange a time and place for the hearing. You can request a hearing before regional office personnel at any time. VA will furnish the hearing room, provide hearing officials and make a transcript of the hearing. The transcript will be placed in your claims folder. Regional office personnel will decide, based on the testimony and other evidence, whether your claim is successfully reopened and whether it can be granted. If your claim remains denied, you may appeal to the BVA. The record sent to the BVA will include the transcript of the hearing. If you appeal our decision, you may also request a hearing before the BVA. See Your Appellate Rights below. You may have a hearing before both regional office personnel and the BVA.

YOUR APPELLATE RIGHTS

This notice summarizes your procedural and appellate rights. For complete information, refer to the Rules of Practice of the Board of Veterans' Appeals (38 CFR Part 20)

APPEAL OF THIS DETERMINATION. You may appeal our determination to the BVA. To appeal, send this office a Notice of Disagreement within 1 year from the date of the letter which accompanies this form. A Notice of Disagreement is a letter telling this office that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. After you have filed a Notice of Disagreement, we will send you a Statement of the Case containing the facts, the applicable laws and regulations, and the reasons for our determination.

HEARINGS. You may still have a hearing before regional office personnel even after you file a Notice of Disagreement. If you want a hearing before regional office personnel, see the instructions above. In addition, you may have a hearing before the BVA after you appeal the determination contained in the letter which accompanies this form. The BVA does not require a hearing. You may present evidence and argument, and bring witnesses. The testimony will be a part of the record. VA will set the time and date of the hearing, provide the hearing room and hearing officials, and record the hearing. VA cannot pay any other expenses of a hearing. The BVA holds hearings in Washington, D.C., or at a VA regional office. If you request a hearing before the BVA in Washington, D.C., the BVA will tell you the time and date of the hearing. To request a hearing before the BVA at a regional office, write to this office. We fill these requests in the order of receipt. This office can tell you the expected waiting period for a BVA hearing at this office.

REPRESENTATION. An accredited representative of a recognized service organization may represent you without charge. An agent or attorney, such as a legal aid attorney or one in private practice, may also represent you. VA cannot pay fees of agents or attorneys.

ATTORNEY OR AGENT FEE LIMITATION. Except in loan cases, no fee may be charged, allowed, or paid for services provided by agents or attorneys before the BVA first makes a final decision in your claim. After the first final BVA decision in your claim, an attorney or accredited agent may charge you a fee under certain circumstances for representing you before VA, including the BVA, or the United States Court of Veterans Appeals. An attorney or agent may charge you a reasonable fee in writing in connection with any proceeding in a case arising out of a loan made, guaranteed, or insured under chapter 37 of title 38, United States Code for services provided after October 9, 1992. For more information, refer to Section 5904, Title 38, United States Code. If an attorney or accredited agent represents you before VA, a copy of any agreement between you and the attorney or accredited agent about the payment of the attorney's or agent's fees must be filed at the following address: Counsel to the Chairman (01C3), Board of Veterans' Appeals, 810 Vermont Avenue, N.W., Washington, D.C. 20420.

APPEAL OF BVA DECISION. You may appeal a final BVA decision to the United States Court of Veterans Appeals (the Court). You must file a Notice of Appeal with the Clerk of the Court within 120 days from the date on which the BVA mailed the notice of the BVA decision.

In re AGENT ORANGE
PRODUCT LIABILITY LITIGATION
MDL 381

Listing of Cases

Docket No.	Title	Date Filed in EDNY	Original District
CV 80-1492	Huckabay v. Dow	6/5/80	ND Cal
CV 80-1493	White v. Dow	6/5/80	ED Mich
CV 80-[illegible]	[illegible] v. Dow	6/5/80	D Colo
CV 80-1495	Cline v. Dow	6/3/80	SD Tex
CV 80-1496	Patrick v. Dow	6/3/80	WD Wash
CV 80-1497	[illegible] v. Dow	[illegible]	ED Mich
CV 80-1538	Johnston v. Dow	6/12/80	ED La
CV 80-1609	Thomas v. Dow	6/12/80	MD La
CV 80-1610	[illegible] v. Dow	6/12/80	MD La
CV 80-1611	Clemons v. Dow	6/12/80	WD NY
CV 80-1865	[illegible] v. Dow	7/7/80	WD La
CV 80-1866	Willis v. Dow	7/7/80	ED Tenn
CV 80-1867	Peterson v. Dow	7/7/80	D Colo
CV 80-1868	Lombardi v. Dow	7/21/80	[illegible]
CV 80-1900	[illegible] v. Dow	7/21/80	D Minn
CV 80-1901	[illegible] v. Dow	7/21/80	D Neb
CV 80-1992	Lester v. Dow	7/21/80	SD Tex
CV 80-2001	Brooks v. Dow	7/22/80	D DC
CV 80-2003	[illegible] v. Dow	7/22/80	ND Ill
CV 80-2004	Bogdan v. Dow	7/22/80	ED Mich
CV 80-2005	Bunby v. Dow	7/22/80	D Mass
CV 80-2006	Joyce v. Dow	7/22/80	[illegible]
CV 80-2007	Ross v. Dow	7/22/80	ED Tenn
CV 80-2008	Fox v. Dow	7/22/80	ED Tex
CV 80-2009	Prichard v. Dow	7/22/80	SD Tex
CV 80-2010	Albert v. Dow	7/22/80	WD Wash
CV 80-[illegible]	[illegible] v. Dow	[illegible]	ED Mo
CV 80-2152	Schneider v. Dow	8/5/80	WD Wash
CV 80-2205	Currier v. Dow	8/12/80	D Minn
CV 80-2206	Singewald v. Dow	8/12/80	D Minn
CV 80-2207	Abrams v. Dow	8/12/80	SD Tex
CV 80-2257	Hamilton v. Dow	8/18/80	EDNY
CV 80-2280	Thornhill v. Dow	8/20/80	ED Tenn
CV 80-2281	[illegible] v. Dow	8/20/80	ND Pa
CV 80-2282	[illegible] v. Dow	[illegible]	SD Me
CV 80-2283	[illegible] v. Dow	8/20/80	ED Tenn
CV 80-2284	[illegible] v. Dow	8/28/80	D Me
CV 80-2285	Hale v. Dow	8/28/80	ND Cal
CV 80-2438	Jenkins v. Dow	9/8/80	ND Ga
CV 80-2439	[illegible] v. Dow	9/8/80	WD Mo
CV 80-2440	Vietnam Veterans v. Dow	9/8/80	ED La
CV 80-2441	Morgan v. Dow	9/8/80	ED Tex
CV 80-2442	Suykendall v. Dow	9/8/80	[illegible]
CV 80-2443	Harris v. Dow	9/8/80	D Kan
CV 80-2522	Wilson v. Dow	9/15/80	SD Tex
CV 80-2553	[illegible] v. Dow	[illegible]	SD Tex
CV 80-2571	Alexander v. Dow	9/19/80	MD La
CV 80-2631	[illegible] v. Dow	9/24/80	D Md
CV 80-2632	Williams v. Dow	9/24/80	D Mass
CV 80-2633	[illegible] v. Dow	9/24/80	ED Tenn
CV 80-2634	Johnson v. Dow	[illegible]	WD Tenn
CV 80-2635	[illegible] v. Dow	9/24/80	MD Tenn
CV 80-2796	[illegible] v. Dow	10/8/80	ED Tenn
CV 80-2797	Talbot v. Dow	10/8/80	SD [illegible]
CV 80-2798	McQuain v. Dow	10/8/80	D Colo
CV 80-2799	[illegible] v. Dow	10/8/80	WD Wash
CV 80-2800	[illegible] v. Dow	10/8/80	MD Pa
CV 80-2801	[illegible] v. Dow	10/8/80	SD Tex
CV 80-2802	McInnis v. Hooker	10/8/80	[illegible] Tex
CV 80-2905	McKay v. Dow	10/10/80	D Colo
CV 80-2906	Davis v. Dow	10/10/80	ND Ill
CV 80-2907	[illegible] v. Dow	10/10/80	SD Tex
CV 80-2908	[illegible] v. Dow	10/10/80	[illegible] Va
CV 80-2993	[illegible] v. Dow	[illegible]	[illegible]

In re AGENT ORANGE
PRODUCT LIABILITY LITIGATION
MDL 381

Listing of Cases

Docket No.	Title	Date Filed in EDNY	Original District
CV 80-3004	Brawley v. Dow	10/28/80	ND Pa
CV 80-3005	[illegible] v. Dow	10/28/80	ND Ala
CV 80-3006	Taliaferro v. Dow	10/28/80	[illegible]
CV 80-3007	[illegible] v. Dow	10/28/80	WD [illegible] Pa
CV 80-3145	Estate of Adams v. Dow	11/13/80	ED La
CV 80-3146	Paxton v. Dow	11/13/80	MD La
CV 80-[illegible]	[illegible] v. Dow	11/13/80	ND Ala
CV 80-3248	Schweitzer v. Dow	11/25/80	ED Pa

* Order for inclusion in MDL 381 filed in EDNY, 5/14/[illegible]

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KEY NUMBER SYSTEM

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

MDL No. 381.

United States District Court, E. D. New York.

Dec. 29, 1980.

Vietnam veterans and members of their families commenced actions against defendant chemical companies, which, in turn, served third-party complaints against the United States. On various motions, the District Court, George C. Pratt, J., held that: (1) claims by servicemen arising out of activities incident to military service were not maintainable under Federal Tort Claims Act, and the Act accordingly did not permit tort defendants to impead United States as third-party defendant under theory of indemnity or contribution; (2) Vietnam veterans' Agent Orange claims, arising from alleged exposure during military service, were "incident to service" and thus could not be brought under Federal Tort Claims Act and same was true even if exposure occurred within United States or places other than Southeast Asia during military service, and it was not necessary that there be individual factual hearings on circumstances of each veteran's exposure to the Agent; (3) postdischarge negligence asserted by Vietnam veterans was not separate and distinct from the numerous acts of negligence allegedly occurring incident to their military service, and thus could not be brought under Federal Tort Claims Act, there being no allegation of intentional act or of any separate and distinct act of postdischarge negligence; (4) judicial decision under which military servicemen may not sue under Federal Tort Claims Act for injuries suffered incident to service bars suits by serviceman's family, and application of rule also bars claims of mental anguish suffered by family members and claims of veterans' spouses who alleged damages that actually were result of harm done to servicemen; (5) claims of children of servicemen for genetic injury and birth defects from exposure of their veteran parents to Agent Orange likewise were injuries suffered "incident to and arising out of service;" and defendant government contractors could not obtain indemnity or contribution against United States for any liability incurred as result of such claims; (6) requirements of class action were met; and (7) factual issues precluded summary judgment for contractors on so-called government contract defense.

Government's motion to dismiss granted and third-party complaints against government deemed to have been made in all actions under MDL 381 dismissed; plaintiffs' motion for serial trials denied without prejudice; motion to amend complaint denied without prejudice; motion for class action certification granted in part and otherwise denied; defense motion for summary judgment denied; stay of discovery previously imposed vacated; pretrial conference ordered.

1. United States ⚷78(2)

In enacting Federal Tort Claims Act, Congress sought to relieve itself of overwhelming pressures and time-consuming burdens of considering and passing upon numerous private relief bills and to provide judicial remedy for deserving claimants who had suffered injuries or losses at hands of governmental officials and employees. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

2. United States ⚷78(1)

Waiver by Federal Tort Claims Act is limited by terms of Act's exceptions, and if claim falls within any exception, sovereign immunity has not been waived and court is without jurisdiction to hear case. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

3. United States ⚷78(2)

Congress' failure for 30 years to amend Federal Tort Claims Act so as to "correct" judicial decision was sub silentio acquiescence in its holding, suggesting that Supreme Court correctly interpreted congressional intent, and same was true even though later decisions repudiated some of clues to intent that Supreme Court relied upon in reaching such earlier decision. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

4. United States ⚷78(16)

Federal Tort Claims Act did not waive sovereign immunity with respect to claims by servicemen arising out of activities incident to their military service. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

5. United States ⚷78(17)

Claims by servicemen arising out of activities incident to military service being not maintainable under Federal Tort Claims Act, Federal Tort Claims Act did not permit tort defendants to implead United States as third-party defendant under theory of indemnity or contribution. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

6. United States ⚷78(16)

Principle that Federal Tort Claims Act did not waive sovereign immunity with respect to claims by servicemen arising out of activities incident to their military service applies to suits against individual servicemen, claims by servicemen who served in Vietnam, claims of intentional torts and claims styled as constitutional torts. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k)

7. Courts ⚷96(3)

Federal district court could not reconsider underlying rationale of United States Supreme Court decision where same was case of statutory interpretation and neither Supreme Court nor Congress had altered basic holding of such judicial decision. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

8. United States ⚷78(16)

Phrase "incident to service" as used in determining whether suit for injuries to servicemen may be brought under Federal Tort Claims Act is not to be narrowly applied or restricted to actual military operations such as field maneuvers or small arms instruction, but, rather, is broad concept depending on rational connection between claim or loss and status as member of the armed forces. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

See publication Words and Phrases for other judicial constructions and definitions.

9. United States ⇔78(16)

It is status of claimant as serviceman rather than legal theory of his claim which governs whether he may sue under Federal Tort Claims Act. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

10. United States ⇔78(16)

For claim of serviceman or ex-serviceman to be "incident to service" and thus not cognizable under Federal Tort Claims Act, it is not required that plaintiff at time of his injury be on any military mission or subject to military discipline. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

11. United States ⇔78(16)

Vietnam veterans' Agent Orange claims, arising from alleged exposure during military service, were "incident to service" and thus could not be brought under Federal Tort Claims Act and same was true even if exposure occurred within United States or places other than Southeast Asia during military service, and it was not necessary in class action that there be individual factual hearings on circumstances of each veteran's exposure to the Agent. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

12. United States ⇔78(16)

Postdischarge negligence asserted by Vietnam veterans in Agent Orange claims was not separate and distinct from numerous acts of negligence allegedly occurring incident to their military service, and thus could not be brought under Federal Tort Claims Act, there being no allegation of intentional act or of any separate and distinct act of postdischarge negligence. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

13. United States ⇔78(16)

Principles of judicial decision under which claims incident to military service cannot be brought under Federal Tort Claims Act cannot be circumvented by inventive presentation or artful pleading which attempts to create actionable post-discharge claim out of what is in reality claim of continuing neglect. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

14. United States ⇔78(16)

Where Australian veterans had been present in Southeast Asia as direct result of their country's participation in joint military operations with United States, and such Australian veterans had compensation scheme similar to that provided by United States government, there was no waiver of sovereign immunity with respect to tort claims of such foreign servicemen in cases in which there was no waiver as to American servicemen. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

15. Damages ⇔51

United States ⇔78(16)

Judicial decision under which military servicemen may not sue under Federal Tort Claims Act for injuries suffered incident to service bars suits by serviceman's family for damages resulting from injuries suffered by serviceman incident to service, even though derivative action is technically personal in character such as, e.g., wrongful death, or loss of consortium, and application of rule also bars claims of mental anguish suffered by family members and claims of veterans' spouses who alleged damages that actually were result of harm done to servicemen. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k).

16. United States ⇔78(16, 17)

Claims of children of servicemen for genetic injury and birth defects from exposure of their veteran parents to Agent Orange were injuries suffered "incident to and arising out of service" and thus could not be recompensed in action maintained directly against government, nor could defendant government contractors seek indemnity or contribution against United States for any liability incurred as result of

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See publication Words and Phrases for other judicial constructions and definitions.

17. Federal Courts ⟹1139

Where third-party complaints were essentially contractual in nature, and involved more than $10,000, district court did not have concurrent jurisdiction. 28 U.S.C.A. §§ 1346(a)(2), 1491.

18. Federal Civil Procedure ⟹165

Whenever common issues were presented in multidistrict litigation certified as class action, common trial was to be had, if practicable. Fed.Rules Civ.Proc. Rule 23(b)(3), 28 U.S.C.A.

19. Federal Civil Procedure ⟹839

Issues sought to be raised by plaintiffs through amendment of complaint to add United States government and many of its officials on theory of constitutional tort were sufficiently different from those presented by already complex litigation to require that such constitutional claims be separately pursued, and motion to amend complaint was thus denied without prejudice.

20. Federal Civil Procedure ⟹171

Under class action rule, order for certification of class action would be subject to such later modification as court might find appropriate and necessary in light of further developments in case. Fed.Rules Civ. Proc. Rules 23, 23(a, b), (b)(3), (c)(1), (d), 28 U.S.C.A.

21. Federal Civil Procedure ⟹181

In multidistrict Agent Orange litigation, requirements of rule allowing class action certification if members of class are so numerous that joinder of all in same action is impracticable and if there are questions of law or fact common to the class and if claims or defenses of representative parties are typical of claims or defenses of class and if representative parties will fairly and adequately protect interests of the class and if requirements of Rule 23(b) are satisfied were met. Fed.Rules Civ.Proc. Rules 23, 23(a), (a)(1-4), (b), (b)(1)(A, B), (b)(2, 3), (b)(3)(A, B), (c)(1, 2), (c)(2)(A-C), (d), 28 U.S.C.A.

22. Federal Civil Procedure ⟹161.1

Rule authorizing class action when prosecution of separate actions would create risk of inconsistent or varying adjudications establishing incompatible standards of conduct focuses on difficulties that class action certification might visit on party opposing class action, and is designed to prevent situations in which different courts establish incompatible standards of conduct for that party, but is not meant to apply where risk of inconsistent results is mere possibility that defendants will prevail in some cases and not in others. Fed.Rules Civ.Proc. Rule 23(b)(1)(A), 28 U.S.C.A.

23. Federal Civil Procedure ⟹161.1

Rule authorizing class action when separate actions would create risk of adjudications which would as practical matter be dispositive of interest of other class members not parties or substantially impair or impede their ability to protect their interest emphasizes possible undesirable effects on class members, rather than on opposing party, and permits class action if separate suits might have undesirable effects on class members. Fed.Rules Civ.Proc. Rule 23(b)(1)(B), 28 U.S.C.A.

24. Federal Civil Procedure ⟹161.1

Numerous plaintiffs and large ad damnum clause should not alone guarantee certification of class action under rule authorizing same where separate actions would create risk of adjudications which would as practical matter be dispositive of interest of other members not parties or substantially impair or impede their ability to protect their interest. Fed.Rules Civ.Proc. Rule 23(b)(1)(B), 28 U.S.C.A.

25. Federal Civil Procedure ⟹161.1

Rule authorizing class action treatment where party opposing class has acted or refused to act on grounds generally applicable to class does not extend to cases in which appropriate final relief relates exclusively or predominately to money damages but, rather, applies when injunctive relief or declaratory relief on which injunctive relief could be based is proper. Fed.Rules Civ.Proc. Rule 23(b)(2), 28 U.S.C.A.

26. **Federal Civil Procedure** ⇐173

Plaintiffs' request that trust be established to apply defendants' future profits for benefit of plaintiff class did not serve as sufficient basis for class certification under rule authorizing class action where party opposing class has acted or refused to act on grounds generally applicable to class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to class as a whole. Fed.Rules Civ. Proc. Rule 23(b)(2), 28 U.S.C.A.

27. **Torts** ⇐21

Tort liability principles properly seek to impose liability on wrongdoer whose act or omission causes injury, not on otherwise innocent contractor whose only role in causing injury was proper performance of plan supplied by government. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k); Defense Production Act of 1950, § 1 et seq., 50 U.S.C.A.App. § 2061 et seq.

28. **United States** ⇐78(16)

Policy considerations that lend continuing vitality to governmental immunity argue for "extension" of that freedom from liability to some government contractors, and such considerations take on increased significance when government contracts with manufacturers of military ordinance in war time. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k); Defense Production Act of 1950, § 1 et seq., 50 U.S.C.A.App. § 2061 et seq.

29. **Torts** ⇐16

So-called government contract defense remains viable. 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k); Defense Production Act of 1950, § 1 et seq., 50 U.S.C.A.App. § 2061 et seq.

30. **Federal Civil Procedure** ⇐2492

In multidistrict Agent Orange litigation, wherein defendant government contractor filed third-party complaints against United States, factual issues precluded summary judgment for contractors on so-called government contract defense. Fed. Rules Civ.Proc. Rule 56, 28 U.S.C.A.; 28 U.S.C.A. §§ 1346 et seq., 2680(a, j, k); Defense Production Act of 1950, § 1 et seq., 50 U.S.C.A.App. § 2061 et seq.

31. **Federal Civil Procedure** ⇐1261

First wave of discovery, as defined in manual for complex litigation, is designed to disclose all preliminary matters necessary before proceeding to discovery on the merits.

32. **Federal Courts** ⇐423

Federal courts sitting in diversity apply state law on questions involving statute of limitations. 28 U.S.C.A. § 1332.

Victor J. Yannacone, Jr., Yannacone & Yannacone, Patchogue, N. Y., Schlegel & Trafelet, Ltd., L. Steven Platt, Daniel C. Sullivan, Sullivan Associates, Ltd., Chicago, Ill., Hy Mayerson, Spring City, Pa., David Jaroslawicz, New York City, Newton B. Schwartz, P. C., Benton Musslewhite, Inc., Houston, Tex., Dorothy Thompson, Los Angeles, Cal., W. T. McMillan, W. T. McMillan & Co., associated counsel for Australian plaintiffs, Brisbane, Queensland, Australia, Jerry G. Wieslander, Frank G. Wieslander, Altoona, Iowa, Lewis A. Royal, Samuel Zelden, Des Moines, Iowa, David C. Anson, Deconcini, McDonald, Brammer, Yetwin & Lacy, Tucson, Ariz., Phillip E. Brown, Hoberg, Finger, Brown, Cox & Molliga, San Francisco, Cal., Melvin Block, Brooklyn, N. Y., Marshall A. Bernstein, Bernstein, Bernstein & Harrison, Philadelphia, Pa., Louis B. Merhige, New Orleans, La., Dennis M. O'Malley, Grant & Artesani, Boston, Mass., Leslie Hulnick, Wichita, Kan., Sidney W. Gilreath, Knoxville, Tenn., Stephen J. Cavanaugh, Bellaire, Tex., Robert P. Schuster, Spence, Moriarty & Schuster, Jackson, Wyo., Alton C. Todd, Brown & Todd, Alvin, Tex., Jules B. Olsman, Southfield, Mich., Gerald J. Adler, Crow, Lytle, Gilwee, Donoghue, Adler & Weninger, Sacramento, Cal., Jack E. London, Miami, Fla., David J. Ghilardi, Madison, Wis., William G. Morgan, Denver, Colo., Dante Mattioni, Philadelphia, Pa., Elgin L. Croll, Louisville, Ky., Charles

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J. Traylor, Grand Junction, Colo., Victor L. Marcello, Talbot, Sotile, Carmouche, Waquespuck & Marchand, Donaldsonville, La., Janet T. Phillips, Rodgers, Monsley, Woodbury & Berggreen, Las Vegas, Nev., William D. Nelsch, William A. Cohan, Denver, Colo., William J. Risner, Tucson, Ariz., James L. Witzel, McKeivey, Cottom & Witzel, East Lansing, Mich., Robert I. F. Pasternak, Jane R. Kaplan, Berkeley, Cal., Norton Frickey, Denver, Colo., Robert C. Huntley, Jr., Racine, Huntley & Olson, Pocatello, Idaho, Jacque B. Pucheu, Pucheu & Pucheu, Eunice, La., Jeffrey M. Stopford, Litvin, Blumberg, Matusow & Young, Philadelphia, Pa., Joseph D. Jamail, Jamail & Kolius, Houston, Tex., Leonard W. Schroeter, J. Kathleen Learned, Schroeter, Goldmark & Bender, P. S., Seattle, Wash., Bennett, DiFilippo, Davison, Henfling & Alessi, East Aurora, N. Y., James A. George, George & George, Baton Rouge, La., Robert M. Salzman, Pfeffer, Becker, Gabric & Cerveny, Chicago, Ill., Arden C. McClelland, McClelland Law Offices, Missoula, Mont., Daniel E. Becnel, Jr., Becnel & Faucheux, Reserve, La., Don S. Willner, Willner, Bennett, Bobbitt & Hartman, Portland, Or., Robert A. Taylor, Jr., Ashcraft & Gerel, Washington, D. C., John J. Lowrey, Chicago, Ill., Donald H. Dawson, Harvey, Kruse & Weston, P. C., Detroit, Mich., Jonathan N. Garver, Cleveland, Ohio, Dennis B. Francis, Gillenwater, Whelchel & Nichol, Knoxville, Tenn., Russell L. Cook, Jr., Fisher, Roch & Gallagher, Houston, Tex., Irwin E. Schermer, Schermer, Schwappach, Borkon & Ramstead, Minneapolis, Minn., David D. Noel, Jenkins & Jenkins, Knoxville, Tenn., Thomas E. Allen, Curtis, Crossen, Hensley, Allen, Curtis & Altman, St. Louis, Mo., Kenneth N. Molberg, Dallas, Tex., Phil M. Cartmell, Jr., Gage & Tucker, Kansas City, Mo., Wayne B. Harbarger, III, Littlefield, McDermand & Harbarger, Sacramento, Cal., William T. Jorden, Erie, Pa., Devine & Morris, Atlanta, Ga., Byron N. Fox and Gary K. Hoffman, Brown & Fox, Kansas City, Mo., Ernest L. Caulfield, New Orleans, La., Thomas E. Connolly, Schneider, Reilly, Zabin, Connolly & Costello, P. C., Boston, Mass., Gary W. Anderson, Erler, Taylor & Anderson, Louisville, Ky., John F. Vecchio, Houston, Tex., Caenen & Niederhauser, Mission, Kan., John T. Golden, Robert F. Stein and William J. Stradley, Stradley, Barnett & Stein, Houston, Tex., Douglass D. Hearne & Associates, Austin, Tex., Lawrence M. Ludwig and Kirby G. Upright, Scranton, Pa., Epstein & Kesselman, Chicago, Ill., Brenda S. Jenkins, Werner & Rusk, Houston, Tex., Richard R. Ravreby, Ravreby & Connolly, Carlsbad, Cal., Robert A. McNess, III, and Robert W. Knolton, Layton & McNess, P. C., Oak Ridge, Tenn., Henry E. Weil and Ronald S. Canter, Belli, Weil & Jacobs, Rockville, Md., Cletus E. Amlung and J. Michael Poole, Louisville, Ky., Synchef & Synchef, Chicago, Ill., Percy J. Blount, Saul, Blount & Martin, P. C., Augusta, Ga., Richard C. McLean, Denver, Colo., Carlton T. Wynn, Hare, Wynn, Newell & Newton, Birmingham, Ala., Owen J. Bradley, New Orleans, La., Elliot E. Brown, Metairie, La., James R. Dawson, Johnston, Thornton, Dawson & Hunter, Shreveport, La., Roger J. Larue, Jr., Metairie, La., William M. Beasley, Mitchell, Eskridge, Vogo, Clayton & Beasley, Tupelo, Miss., Avram G. Adler, Adler, Barish, Levin & Creskoff, Philadelphia, Pa., Ned W. Johnson, Benckenstein, McNicholas, Oxford, Radford, Johnson & Nathan, Beaumont, Tex., Paul D. Rheingold, New York City, Fred D. Shapiro, Shapiro, Turoff & Gisser, Cleveland, Ohio, for plaintiffs.

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Wendell B. Alcorn, Jr., Cadwalader, Wickersham & Taft, New York City, for Diamond Shamrock.

Townley & Updike, New York City, for Monsanto.

Bud G. Holman and William Krohley, Kelley, Drye & Warren, New York City, for Hercules, Inc.

Joan Bernott, Dept. of Justice, Washington, D. C., for third-party defendant U. S.

Roy L. Reardon, James P. Barrett and Michael V. Corrigan, Simpson, Thacher & Bartlett, New York City, for Ansul Co.

Armand E. Capanna, Lewis, Overbeck & Furman, Chicago, Ill., for Riverdale Chemical Co.

Lawrence D. Lenihan, Thomas B. Kinzler and Alfred H. Hemingway, Jr., Arthur, Dry & Kalish, P. C., New York City, for Uniroyal.

Les J. Weinstein, McKenna & Fitting, New York City, for Occidental Petroleum Co.

William H. Sanders, William A. Lynch and Paul G. Lane, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo., for N. A. Phillips.

John M. Fitzpatrick, Dilworth, Paxson, Kalish, Levy & Kauffman, Philadelphia, Pa., for Hooker Chemical Co.

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INTRODUCTION

GEORGE C. PRATT, District Judge.

Plaintiffs, Vietnam war veterans and members of their families claiming to have suffered damage as a result of the veterans' exposure to herbicides in Vietnam[1], commenced these actions against the defendant chemical companies.[2] Defendants, seeking

1. Plaintiffs' complaints allege injury as a result of their exposure to a variety of herbicides including Agents Orange, Pink, Purple and Green. For convenience, the court will refer to these herbicides collectively as "Agent Orange".

2. At the present time 19 companies or divisions have been named as defendants in actions consolidated before this court as MDL 381. Alphabetically listed, the defendants named to date are: Agrisect, Inc.; Amchem Products, Inc.; Ansul Company; AKA Wormald America, Inc.; Diamond Alkali Company; Diamond Shamrock Corporation; Dow Chemical Company; GAF Corporation; Hercules, Inc.; Hoffman-Taff, Inc.; Hooker Chemical Company; Monsanto Company; North American Philips Corporation; Northwest Industries, Inc.; Occidental Petroleum Company; Private Brands Inc.; Riverdale Chemical; Syntex Corporation; Uniroyal, Inc. Although an individual action may name some of the chemical companies and not others, the court will refer to these companies collectively as "defendants".

Additionally, some of these named defendants have sought dismissal from some actions on the ground that they did not manufacture any of the herbicides in question. In some indemnification or contribution in the event they are held liable to plaintiffs, then served third party complaints against the United States.[3] Five motions are now considered: (1) the government's motion to dismiss the third party complaint on grounds of sovereign immunity; (2) plaintiffs' motion for class action certification; (3) defendants' motion for summary judgment; (4) plaintiffs' motion to proceed with "serial trials"; and (5) plaintiffs' motion to serve and file a fifth amended verified complaint.

I. SUMMARY OF CLAIMS

There are four groups of plaintiffs: Vietnam veterans, their spouses, their parents, and their children. They assert numerous theories of liability, including strict products liability, negligence, breach of warranty, intentional tort and nuisance. Plaintiff veterans seek to recover for personal injuries caused by their exposure to Agent Orange. The family members seek to recover on various derivative claims; some of the children assert claims in their own right for genetic injury and birth defects caused by their parents' exposure to the Agent Orange; and some of the veterans' wives seek to recover in their own right for miscarriages.

In their third party complaints against the government defendants allege negligence, misuse of product, post-discharge failure to warn, implied indemnity, denial of due process and failure to comply with herbicide registration laws.

II. GOVERNMENT'S MOTION TO DISMISS THIRD PARTY COMPLAINTS

Moving to dismiss under F.R.C.P. 12(b)(6), the government claims "intra-military immunity" under the rule of *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), questions defendants' standing to assert some of their claims, urges that other claims may only be considered in the Court of Claims, and argues the applicability of three statutory exceptions to federal court jurisdiction under the Federal Tort Claims Act: (1) the discretionary function exception, 28 U.S.C. § 2680(a); (2) the combatant exception, 28 U.S.C. § 2680(j); and (3) the foreign country exception, 28 U.S.C. § 2680(k).

A. FTCA AS A GENERAL WAIVER OF SOVEREIGN IMMUNITY

[1] Under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) *et seq.*, the United States government waives its sovereign immunity from suits in tort, and vests jurisdiction over such claims exclusively in the United States District Courts. 28 U.S.C. § 1346(b). Its legislative history reveals two dominant congressional objectives. First, Congress sought to relieve itself of the overwhelming pressures and time consuming burdens of considering and passing upon the numerous private relief bills sought by claimants barred by the doctrine of sovereign immunity. *Feres v. United States*, 340 U.S. 135, 139–140, 71 S.Ct. 153, 156, 95 L.Ed. 152 (1950). Second, Congress sought to provide a judicial remedy for deserving claimants who had suffered injuries or losses at the hands of government officials and employees. 1 *Jayson, Handling Federal Tort Claims* § 65.01 at 3–3 (1980).

[2] Although the FTCA "waives the Government's immunity from suit in sweeping language", *United States v. Yellow Cab Company*, 340 U.S. 543, 547, 71 S.Ct. 399, 402, 95 L.Ed. 523 (1951), the waiver is limited by the terms of the act's exceptions. If a claim falls within any exception to the FTCA, sovereign immunity has not been waived and the court is without jurisdiction to hear the case. *United States v. Orleans*, 425 U.S. 807, 814, 96 S.Ct. 1971, 1975, 48 L.Ed.2d 390 (1976); *Dalehite v. United States*, 346 U.S. 15, 30–31, 73 S.Ct. 956, 965, 97 L.Ed. 1427 (1953).

cases, plaintiffs have consented to a conditional dismissal of those defendants.

3. As part of an on-going effort to avoid the service and filing of excessive quantities of duplicative papers, the court has deemed the answers and third party complaints of the defendants to be served in all actions.

B. THE *FERES* DOCTRINE

In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court determined that the FTCA did not waive sovereign immunity with respect to claims of servicemen arising out of activities incident to or arising out of their military service. The *Feres* Court considered three separate cases, two claims of medical malpractice and the claimed negligent quartering of a serviceman in a barracks containing a defective heating unit. All three presented the same basic question: whether a serviceman who sustained injury due to the negligence of others in the armed forces could maintain suit under the FTCA. The Court recognized its task as one of statutory interpretation, stating: "The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong." 340 U.S. at 138, 71 S.Ct. at 155. After carefully considering the limited legislative history on point, the *Feres* Court concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159. Since much of the government's immunity defense turns on the Supreme Court's decision in *Feres*, a more detailed analysis of that case is appropriate.

At the outset, the *Feres* Court recognized the difficulty of interpreting a statute having so little legislative history:

> There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.
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> 340 U.S. at 138, 71 S.Ct. at 155.

Digging deeper, the Court uncovered two clues to Congress' intent in enacting the FTCA. First, because the relationship between the government and members of the armed forces is "distinctively federal in character", 340 U.S. at 143, 71 S.Ct. at 158, the Court determined that Congress did not intend the government's liability to members of the armed services to depend upon the law of the place where the soldier happened to be stationed at the time of injury:

> It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.
>
> 340 U.S. at 143, 71 S.Ct. at 158.

Second, the Court examined Congress' failure to integrate a serviceman's possible remedy in tort with the statutory "no fault" compensation scheme provided under the Veterans Benefits Act and concluded that

> If Congress had contemplated that this Tort Act would be held to apply in cases of this kind [where a serviceman sued the government], it is difficult to see why it should have omitted any provision to adjust these two types of remedy [FTCA and Veterans Benefit Act] to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.
>
> 340 U.S. at 144, 71 S.Ct. at 158.

A third factor supporting the "*Feres* doctrine" was later enunciated in *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), where the Supreme Court considered "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on [military] 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." 348 U.S. at 112, 75 S.Ct. at 143; *see also Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2057, 52 L.Ed.2d 665 (1977).

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[3] Although it concluded that Congress did not intend to include in the FTCA's waiver of sovereign immunity injuries sustained by a serviceman incident to his service, the *Feres* Court freely admitted that the issue was not free from doubt, and it invited congressional correction by calling attention to Congress' ability to legislatively remedy any erroneous interpretation of the statute. 340 U.S. at 138, 71 S.Ct. at 155. Many courts have questioned the wisdom of the *Feres* decision,[4] but its continued vitality is beyond dispute even to them.[5] Moreover, Congress's failure for 30 years to amend the FTCA and legislatively "correct" the *Feres* holding is a *sub silentio* "acquiesc[ence] in the holding of *Feres*", *United States v. Lee*, 400 F.2d 558, 561 (CA9 1968), *cert. denied*, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969), that strongly suggests that the Supreme Court correctly interpreted congressional intent.[6]

[4] Any doubt as to the validity of the *Feres* doctrine was laid to rest in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), which extended the reach of the "well established doctrine of *Feres v. United States*" to third party claims against the government, 431 U.S. at 670, 97 S.Ct. at 2057, see discussion, *infra*.[7] Even the Third Circuit Court of Appeals, the court most critical of the *Feres* doctrine,[8] concedes *Feres*' continuing validity and broad application:

Although the current climate of academic and judicial thought finds governmental immunity from suit in disfavor, a plausible explanation appears for its continued application to members of the armed forces injured while in the course of active duty, regardless of whether that injury is caused by the negligence of a superior officer or by a direct command. If claims for injuries sustained by members of the armed forces in the execution of military orders were subjected to the scrutiny of courts of justice, then the civil courts would be required to examine and pass upon the propriety of military decisions. The security and common defense of the country would quickly disintegrate under such meddling. "[A]ctions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States". *Jefferson v. United States*, 178 F.2d 518, 520 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 [71 S.Ct. 153, 95 L.Ed. 152] (1950). Even if we were inclined to reconsider the doctrine in connection with an injury sustained as a result of a deliberate military command, we are foreclosed from so doing by the Supreme Court's recent reiteration of the doctrine, although in a different context in *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976).

4. *See e. g., Peluso v. United States*, 474 F.2d 605, 606 (CA3), *cert. denied*, 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973) ("If the matter were open to us we would be receptive to appellants' argument that *Feres* should be reconsidered, and perhaps restricted"); *Thomason v. Sanchez*, 398 F.Supp. 500, 503 (D.N.J. 1975) ("we previously expressed reservations about the continued validity of the broad *Feres* doctrine. Upon reconsideration we reiterate that concern.")

5. *See Peluso v. United States*, *supra*, at 606 ("[Feres] is controlling. Only the Supreme Court can reverse it."); *Thomason v. Sanchez*, 539 F.2d 955, 957 (CA3 1976) ("[W]e are powerless to jettison Feres or to dislodge it sufficiently to create an exception [here].") *See also Watkins v. United States*, 462 F.Supp. 980 (S.D.Ga.1977), *aff'd on opinion below*, 587 F.2d 279 (CA5 1979).

6. This conclusion follows even though later decisions have repudiated some of the clues to intent that the Supreme Court relied upon in reaching that decision. *See Schwager v. United States*, 279 F.Supp. 262, 263 (E.D.Pa.1968).

7. *See also Jaffee v. United States*, 592 F.2d 712, 717 (CA3 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Dilworth v. United States*, 387 F.2d 590, 591 (CA3 1967); *Buckingham v. United States*, 394 F.2d 483, 484 (CA4 1968).

8. *See e. g., Thomason v. Sanchez*, 539 F.2d 955 (CA3 1976); *Peluso v. United States*, 474 F.2d 605 (CA3), *cert. denied*, 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973).

Jaffe v. United States, 592 F.2d 712, 717 (CA3 1979) (citations and footnote omitted).

C. THIRD PARTY ACTIONS AGAINST THE GOVERNMENT

[5] The same court that determined in *Feres* that the FTCA did not waive sovereign immunity with respect to claims by servicemen arising out of activities incident to their military service also decided *United States v. Yellow Cab Company*, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523 (1951), which held that the FTCA permits a tort defendant to implead the United States as a third party defendant under a theory of indemnity or contribution. This created a new question whether such a third party claim may be maintained when plaintiff's direct claim against the government would be barred by the principles of *Feres*.

The Supreme Court did not consider this question until 1977, when, in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), it resolved the "tension between *Feres* and *Yellow Cab*" by holding that third party claims against the government are barred

> for essentially the same reasons that the direct action [against the government by plaintiff] is barred by *Feres*. * * * [T]he right of a third party to recover in an indemnity action against the United States recognized in *Yellow Cab*, must be held limited by the rationale of *Feres* where the injured party is a serviceman. 431 U.S. at 670, 673–4, 97 S.Ct. at 2058.

To permit recovery against the government, the Court observed, "would be to judicially admit at the back door that which has been legislatively turned away at the front door". 431 U.S. at 673, 97 S.Ct. at 2058, *quoting Laird v. Nelms*, 406 U.S. 797, 802, 92 S.Ct. 1899, 1902, 32 L.Ed.2d 499 (1972).

D. *FERES/STENCEL* IN THE CONTEXT OF THIS ACTION

To the extent that plaintiffs' complaints seek recovery against the defendant chemical companies, of course, the *Feres* doctrine has no application. 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5–66 n.9 and 5–77 n.24. Under *Stencel Aero Engineering Corp. v. United States*, however, any damages recovered by plaintiffs against defendants that plaintiffs could not recover directly from the United States may not be the subject of a third party complaint against the United States. 1 Jayson, *Handling Federal Tort Claims* § 164 at 5–220.

> [N]either contribution nor indemnity may succeed without the support of the initial negligence. * * * [A]s the claimed contribution and indemnity must depend for success upon the alleged negligence of the Government towards plaintiffs, and that is a negligence which is not actionable, the claim must fail. *Drumgoole v. Virginia Electric and Power Company*, 170 F.Supp. 824, 825–26 (E.D.Va.1952).

See also Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977); *Certain Underwriters at Lloyds v. United States*, 511 F.2d 159 (CA5 1975); *Barr v. Brezina Construction Company*, 464 F.2d 1141 (CA 10 1972). For the sake of clear presentation in this opinion, however, the court will consider plaintiffs' claims as if they were asserted directly against the United States government, for, to the extent that plaintiffs may not maintain actions directly against the government, under the principles of *Stencel Aero*, the defendants' third party claims against the government must fall as well.[9]

[6] At the outset, it is clear that *Feres* applies to suits against individual servicemen,[10] claims by servicemen who served in

9. For convenience the court will refer to the principle that the government is immune from third party claims that would be barred by *Feres* if directly asserted against the government as "Feres/Stencel".

10. *Tirrill v. MacNamara*, 451 F.2d 579 (CA9 1971); *Bailey v. DeQuevedo*, 375 F.2d 72 (CA3 1967), *cert. denied*, 389 U.S. 923, 88 S.Ct. 247, 19 L.Ed.2d 274 (1967); *Misko v. United States*, 453 F.Supp. 513, 514 (D.D.C.1977), *aff'd*, 593 F.2d 1371 (C.A.D.C.1979); *Pisciotta v. Ferrando*, 428 F.Supp. 665, 666 (S.D.N.Y.1977).

Vietnam,[11] claims of intentional torts,[12] and claims styled as constitutional torts.[13] This leaves two issues: first, whether the court should apply the principles of *Feres/Stencel* to this action at all; and second, whether plaintiffs' injuries arose out of or were suffered "in the course of activity incident to service." *Feres v. United States*, 340 U.S. at 146, 71 S.Ct. at 159.

E. SHOULD *FERES/STENCEL* APPLY TO THIS ACTION?

The government seeks to dismiss the third party complaints on the ground that the claims of the defendant chemical companies are barred by a straightforward application of *Feres/Stencel* principles. Defendants, however, argue that the court should undertake "a detailed and fresh examination of the rationale underlying those holdings [*Feres* and *Stencel*] in the light of other great and * * * superceding policy considerations", Hercules/Diamond Shamrock/Monsanto Memorandum at 10, to determine if the Feres doctrine should be applied in this case.[14] In support, defendants cite the "number of occasions [the Supreme Court has] reexamined and redefined or abandoned certain reasons for its holding in [the *Feres*] case." Hercules/Diamond Shamrock/Monsanto Memorandum at 7.[15]

[7] Defendants' attempts to reargue the underlying rationale of *Feres* must be rejected, however, for two reasons. First, *Feres* was a case of statutory interpretation. 340 U.S. at 138, 71 S.Ct. at 155. *Adams v. General Dynamics Corp.*, 385 F.Supp. 890, 891 (N.D.Cal.1974), *aff'd*, 535 F.2d 489 (CA9), *cert. denied*, 432 U.S. 905, 97 S.Ct. 2949, 53 L.Ed.2d 1077 (1976). Even were this court to believe the Supreme Court's reasoning to be erroneous,[16] neither the Court nor Congress itself has altered *Feres'* basic holding, that in enacting the FTCA Congress did not intend to waive sovereign immunity with respect to injuries or loss suffered by servicemen in the course of activity incident to their service.[17]

11. *Rotko v. Abrams*, 338 F.Supp. 46, 47 (D.Conn.1971), *aff'd*, 455 F.2d 992 (CA2 1972); 1 Jayson, *Handling Federal Tort Claims* § 155.08[4][i] at 5–138.

12. *Citizens National Bank of Waukegan v. United States*, 594 F.2d 1154 (CA7 1979); *Jaffe v. United States*, 592 F.2d 712 (CA3 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Everett v. United States*, 492 F.Supp. 318, 321 (S.D.Ohio 1980); *Schmid v. Rumsfeld*, 418 F.Supp. 19, 21 (N.D.Cal.1979).

13. *Everett v. United States*, 492 F.Supp. 318, 322 (S.D.Ohio 1980); *Nagy v. United States*, 471 F.Supp. 383, 384 (D.D.C.1979); *Misko v. United States*, 453 F.Supp. 513, 515 (D.D.C. 1978), *aff'd*, 593 F.2d 1371 (C.A.D.C.1978); *Calhoun v. United States*, 475 F.Supp. 1, 4–5 (S.D. Cal.1977), *aff'd on opinion below*, 604 F.2d 647 (CA9 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 761 (1980).

14. *See also* Dow's Memorandum at 20; Thompson-Hayward's Memorandum at 12; Hooker's Memorandum at 5.

15. *See also* Dow's Memorandum at 16.

16. Although some of the principles relied upon by the *Feres* Court have since been discredited or repudiated, *see* 1 Jayson, *Handling Federal Tort Claims*, § 155.05 at 5–86 through 5–91, much of the Court's reasoning remains valid and persuasive. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672–73, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977); *Jaffe v. United States*, 592 F.2d 712, 717 (CA3 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Coffey v. United States*, 324 F.Supp. 1086, 1087, 1088 (S.D.Cal.1971), *aff'd*, 455 F.2d 1380 (CA9 1972).

17. That Congress, despite ample opportunity, has failed to right any possible judicial misinterpretation indicates the soundness of the *Feres* conclusion regardless of whether specific elements of the Court's reasoning remain valid. *See United States v. Lee et al.*, 400 F.2d 558 (CA9 1968), *cert. denied*, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969), wherein the court found that

> Congress has acquiesced in the holding of *Feres* [by] permitting the decision to remain undisturbed for eighteen years. * * * "[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.
>
> 400 F.2d at 561, quoting *United States v. South Buffalo Railway Company et al.*, 333 U.S. 771, 774–75, 68 S.Ct. 868, 870, 92 L.Ed. 1077 (1948)

The reasoning of *Lee* is now twelve years stronger

Jar ... he government im- ervicemen the Su- ed with more than men recovering , the Court was ... about the disruptive effects caused by the very commencement of actions by servicemen complaining about the conduct of superiors. As the Court later observed in *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954):

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if such suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [Feres] Court to read [the Federal Tort Claims] Act as excluding claims of [servicemen for injuries incident to their service]. 348 U.S. at 112, 75 S.Ct. at 143

Thus, it is the suit itself as much as the possibility of recovery, that the Supreme Court feared would disrupt military discipline and the orderly conduct of military affairs. *Henninger v. United States*, 473 F.2d 814, 815-16 (CA9), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973). To reexamine the *Feres* rationale in light of the circumstances of this case as defendants suggest, would itself defeat one of the very factors defendants seek to have the court reconsider. As the Supreme Court noted long ago in discussing the relationship between a soldier and his superiors:

> An army is not a deliberate body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other. *United States v. Grimley*, 137 U.S. 147, 153, 11 S.Ct. 54, 55, 34 L.Ed. 636 (1890).

For these reasons, this court will neither reconsider the underlying rationale of the *Feres* decision nor weigh the circumstances here presented against the "*Feres* factors".[18] Right or wrong, the Supreme Court's conclusion that Congress did not intend passage of the FTCA to act as a waiver of sovereign immunity as to claims of servicemen injured incident to their service remains the law of the land. The *Feres/Stencel* doctrine bars defendants' attempt to seek contribution or indemnity from the United States based on any recovery plaintiffs may obtain for injuries that arose out of or were suffered incident to service.

F. DID PLAINTIFFS' INJURIES ARISE OUT OF OR INCIDENT TO MILITARY SERVICE?

The second issue is whether the claims of particular plaintiffs arose out of or in the course of activity incident to service. As Professor Jayson has noted, "neither the [Federal Tort Claims] Act nor the opinions of the Supreme Court have indicated definitively the full meaning of the phrase 'incident to service' ". 1 Jayson, *Handling Federal Tort Claims* § 155.01 at 5–65.[19] This lack of definition complicates the task of applying the standard considerably, 1 Jayson *Handling Federal Tort Claims* § 155.01

18. Other courts have rejected similar attempts to reargue the "*Feres* factors" on a case-by-case basis. *See e. g., Torres v. United States*, 621 F.2d 30, 32 (CA7 1980) (*Feres* applies even without nexus between military discipline and injury); *Joseph v. United States*, 505 F.2d 525, 527 (CA7 1974) (denial of veterans benefits "completely independent" from consideration of applicability of *Feres* doctrine); *Henninger v. United States*, 473 F.2d 814, 815-16 (CA9), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973) (although negligence at discharge does not affect military discipline, *Feres* still applies); *Healy v. United States*, 192 F.Supp. 325, 328 (S.D.N.Y.1961) *aff'd on opinion below*, 295 F.2d 958 (CA2 1961) (availability of veterans benefits not controlling); *Morgan v. United States*, 366 F.Supp. 938, 939 (N.D.Fla.1973) (*Feres* bars claim even though plaintiff not subject to military discipline at time of injury); *see also*, 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5–74.

19. "The *Brooks-Feres-Brown* line of cases illustrates that the incident to service test is not easy to define and apply." *Woodside v. United States*, 606 F.2d 134, 141 (CA6 1979).

at 5–65, but certain principles do emerge from an examination of the cases.

1. *General Principles*

[8] First, the phrase "incident to service" is not to be narrowly applied or "restricted to actual military operations such as field maneuvers or small arms instruction." *Hass v. United States*, 518 F.2d 1138, 1141 (CA4 1975). Rather, "incident to service" is a broad concept that depends on a rational connection between the plaintiff's claim or loss and his status as a member of the armed forces. *Woodside v. United States*, 606 F.2d 134, 141 (CA6 1979); *Harten v. Coons*, 502 F.2d 1363, 1365 (CA 10 1974), *cert. denied*, 420 U.S. 963, 95 S.Ct. 1354, 43 L.Ed.2d 441 (1975). Professor Jayson summarizes this concept:

> [I]f the serviceman's injury or loss, when viewed in all the surrounding circumstances, has a real and substantial relationship to his military service, it will be regarded as incident to service and consequently barred under the *Feres* doctrine. 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5–66.[20]

[9] Second, the cases applying the *Feres* doctrine emphasize that "it is the *status* of the claimant as a serviceman rather than the legal theory of his claim which governs." *Rotko v. Abrams*, 338 F.Supp. 46, 47 (D.Conn.1971) (emphasis added), *aff'd on opinion below*, 455 F.2d 992 (CA2 1972).[21] Thus, the *Feres* doctrine has barred the claims of off duty servicemen injured before leaving their military base, *Watkins v. United States*, 462 F.Supp. 980, 988 89 (S.D.Ga.1977), *aff'd on opinion below*, 587 F.2d 279 (CA5 1979), of off duty serviceman injured while "hitching" a ride home on military aircraft, *Archer v. United States*, 217 F.2d 548, 552 (CA9 1954), *cert. denied*, 348 U.S. 953, 75 S.Ct. 441, 99 L.Ed. 745 (1955); *Homlitas v. United States*, 202 F.Supp. 520 (D.Ore.1962); *Fass v. United States*, 191 F.Supp. 367 (E.D.N.Y.1961), and the wrongful death claim of the widow of a serviceman killed in an air crash while receiving flight instruction toward a commercial pilot's license. *Woodside v. United States*, 606 F.2d 134 (CA6 1979).

[10] Third, at the time of his injury plaintiff need not be on any military mission. *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (serviceman died when barracks he was sleeping in burned due to defective heating unit),[22] nor subject to military discipline, *Hall v. United States*, 451 F.2d 353, 354 (CA1 1971) (no "connection between the activity which injured plaintiff and [military] discipline" necessary).[23]

Professor Jayson concisely and fairly synthesizes the "incident to service" cases as follows:

> The duty status of the serviceman-claimant is of particular significance in determining whether the injury or loss was incident to service. The [Supreme Court's rationale in *Feres/Stencel*] applies to almost every situation which can be envisaged in which the injury or loss was sustained by a serviceman while on duty (as distinguished from one who is on

20. *See also Healy v. United States*, 192 F.Supp. 325, 327 n.8 (S.D.N.Y.1961), *aff'd*, 295 F.2d 958 (CA2 1961) ("special soldier-Government relationship which embraces the incident-to-service concept covers those wrongs which, although not sustained in the course of active duty, are so closely related to it that they may be deemed 'incident' to that duty"); 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5–79 through 5–80 ("in order for a claim to be service-incident, there does not have to be any proximate causation in the common law tort sense, between the military service or employment in the damage. All that is required is that as an incident of his service or employment the claimant is placed in a position where he is surrounded with conditions giving rise to the claim").

21. *See also U. S. v. Lee*, 400 F.2d 558, 562 (CA9 1968), *cert. denied*, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969); *Knoch v. United States*, 316 F.2d 532, 534 (CA9 1963); *Frazier v. United States*, 372 F.Supp. 208, 210 (M.D.Fla.1973).

22. *See also Hass v. United States*, 518 F.2d 1138, 1141 (CA4 1975) (*Feres* bars claim of off-duty serviceman injured while riding a dangerous horse rented from a Marine Corps stable).

23. *See also Hass v. United States*, 518 F.2d 1138, 1140 (CA4 1975); *James v. United States*, 358 F.Supp. 1381, 1385 (D.R.I.1973), *aff'd*, 530 F.2d 962 (CA1), *cert. denied*, 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608 (1976).

leave or furlough), and it seems safe to say that the *Feres* doctrine will always apply in such circumstances. 1 Jayson, *Handling Federal Tort Claims* § 155.02 at 5-69 through 5-71.

[I]f the serviceman's injury or loss occurs while he is off duty, while he is not within the physical confines of his military base, while he is not engaged in any military mission, and is not directly under military discipline, it is likely that the *Brooks* doctrine allowing Tort Claims Act recovery will apply:[24] in other words, that the injury or loss will be regarded as not incident to service. It should be noted, however, that the application of *Brooks* generally requires all of the mentioned factual elements to be present. Contrariwise, if the injury or loss occurs while the serviceman is on duty, or—without regard to whether he is on or off duty—if it occurs on the military base where he is stationed or on a military aircraft where he is directly under military control and discipline, or if it occurs while he is engaged in a military mission, it is likely that the *Feres* doctrine excluding the claim will apply. Again speaking generally, the presence of any one of the mentioned factual elements will bring application of the *Feres* doctrine. Jayson, *Handling Federal Tort Claims* § 155.02 at 5-67 through 5-68.

2. *Application of Feres/Stencel to Plaintiffs' Claims*

(a) Plaintiff Veterans' Claims of Exposure

[11] The veterans' claims of injury clearly arise from their alleged exposure to Agent Orange during their military service. While virtually all of the veterans allege that their exposure took place in southeast Asia as a direct result of government efforts to defoliate the forests during the Vietnam war, the circumstances of each veteran's claimed exposure may vary. Some claim to have been directly sprayed with Agent Orange; some claim to have come into contact with Agent Orange as a result of being transported through sprayed areas; others claim to have been exposed to Agent Orange by ingesting water or food contaminated with the herbicide; and still others claim exposure during the transportation and handling of Agent Orange or its containers.

Whatever the facts surrounding a particular veteran's claim of exposure may be,[25] each veteran's presence in southeast Asia resulted solely from their military service, and, as to each veteran, "as an incident to his service or employment [he was] placed in a position where he [was] surrounded with conditions giving rise to the claim" of exposure. *See* 1 Jayson *Handling Federal Tort Claims* § 155.02 at 5–78 through 5–79. Even veterans who claim injury as the result of exposure to Agent Orange while off duty are within the parameters of the *Feres* doctrine because "when viewed in all the surrounding circumstances", a veteran's exposure in southeast Asia to a herbicide used for military purposes "has a real and substantial relationship to his military service * * * and consequently [his claim] is barred under the *Feres* doctrine." 1 Jayson, *Han-*

24. In *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), the Supreme Court held that a serviceman may recover under the FTCA on claims which have no relationship to his military service. Anticipating the issues ultimately considered in *Feres* one term later, the Court stated:

> we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it * * *. 337 U.S. at 52, 69 S.Ct. at 920.

25. Defendants' attempts in connection with this motion to require individual factual hearings on the circumstances of each veteran's exposure to Agent Orange must be rejected. Such rejection, however, does not preclude later examination of individual plaintiffs concerning the circumstances of their exposure to the extent that they may bear on other issues, e.g. individual liability or damage questions.

dling Federal Tort Claims § 155.02 at 5–66.[26]

The analysis is similar for those veterans who claim that their exposure to Agent Orange occurred within the United States or places other than southeast Asia during their military service. Their handling, transportation or distribution of Agent Orange during the course of their military duties was incident to their service, and their claims are equally barred under the *Feres* doctrine.

(b) Post-Discharge Failure to Warn

Only one of plaintiff veterans' claims does not fall easily under this analysis, i. e., that defendants breached a post-discharge duty to the veterans by failing to notify them of new scientific information concerning the possible harm that could result from exposure to Agent Orange. Plaintiff veterans allege that defendants' failure to inform them of possible dangers associated with exposure to Agent Orange prevented them from seeking more frequent medical examinations and thereby insuring early detection and treatment of disease. Defendants seek indemnity and contribution from the government on this claim too.

Defendants rely on three cases in opposition to the government's motion to dismiss these "post-discharge" claims: *Schwartz v. United States*, 230 F.Supp. 536 (E.D.Pa. 1964); *Thornwell v. United States*, 471 F.Supp. 344 (D.D.C.1979); *Everett v. United States*, 492 F.Supp. 318 (S.D.Ohio 1980).

In *Schwartz v. United States* a serviceman treated for a sinus condition during the course of his military service had a radioactive dye, umbrathor, inserted into his sinus. After discharge from the military, plaintiff sought additional medical treatment for his sinus difficulties, but the Veterans Administration hospital that considered his treatment failed to obtain and examine his medical records, and, as a result of the hospital's negligence, the continued presence of the earlier-inserted umbrathor went undetected. As a result plaintiff contracted cancer. The court held that *Feres* did not bar plaintiff's claim against the government, because plaintiff's claim of negligence lay not in the original insertion of the umbrathor at the time he was in the military; rather, the court found that the actionable negligence was the hospital's failure to take reasonable steps to diagnose and solve plaintiff's problem, the continued presence of the umbrathor in his sinus. 230 F.Supp. at 539–40. The court further opined that the government was negligent for its failure to followup its umbrathor patients in order to inform them of newly discovered dangers associated with the drug. 230 F.Supp. at 540.

In the second case relied on by the defendants, *Thornwell v. United States*, a former serviceman alleged that he was intentionally drugged with LSD as part of a secret government experiment and that the government negligently failed to warn plaintiff that his exposure to the drug subjected him to certain medical risks. The *Thornwell* court, noting the difficulties that courts encounter when the acts complained of commence while plaintiff is on active duty and then continue until well after discharge, 471 F.Supp. at 350, held that Thornwell's claim against the government was not barred by the principles of *Feres* because he did not allege merely continuing negligence. Rather,

> [h]e claim[ed] that he was *intentionally* harmed while he was on active duty and he further claim[ed] that, after he became a citizen [left the military], the defendants failed to exercise their duty of care by neglecting to rescue him from the position of danger which they had created, * * * two distinctly separate patterns of conduct, one intentional and [one] negligent. 471 F.Supp. at 351.

26. *See also Woodside v. United States*, 606 F.2d 134, 141 (CA6 1979) ("Where the two [the injury causing activity and the Armed Forces] are closely associated or naturally related, the activity will be deemed "incident to service" even though not an essential or integral part of the mission of the Armed Forces and even though not directly involving a command relationship between the soldier and the military").

The *Thornwell* court then found that plaintiff had alleged "two entirely different torts", and since the "complaint [was] perfectly clear in its allegation that the negligent act occurred, *in its entirety*, after [plaintiff] attained civilian status", 471 F.Supp. at 351 (emphasis in original), plaintiff's claim of governmental negligence was not barred by *Feres*. *Id.* The *Thornwell* court divided the cases involving servicemen's claims of post-discharge negligence into three types:

> To summarize the relevant precedent, it appears that there are three types of personal injury cases which involve post-discharge negligence. In the first case, the military performed separate negligent acts (i. e., two improper operations), one before, and one after, discharge: *United States v. Brown*, 348 U.S. 110 [75 S.Ct. 141, 99 L.Ed. 139], and *Hungerford v. United States*, 192 F.Supp. 581 (N.D. Cal.1961), *rev'd on other grounds*, 307 F.2d 99 (9th Cir. 1962), both clearly indicate that the injured veteran may recover for the later act. In the second case, a single negligent act occurs and its effects linger after discharge; *Feres v. United States*, 340 U.S. 135 [71 S.Ct. 153, 95 L.Ed. 152] (1950), holds that, under some circumstances, this one act is subject to intra-military immunity. Third, the military may commit an intentional act and then negligently fail to protect a soldier turned civilian from the dire consequences which will flow from the original wrong. This Court holds that, under such circumstances, the injured civilian may have a valid claim against the tort feasors. The later negligence is a separate wrong, a new act or omission occurring after civilian status is attained; the perpetrators of this wrong must be held accountable for their conduct. 471 F.Supp. at 352.

In defendants' third case, *Everett v. United States*, 492 F.Supp. 318 (S.D.Ohio 1980), the wife of a deceased serviceman sued the government claiming that her husband's death by cancer was the result of his being intentionally exposed to large doses of radiation when he was forced to participate as an Air Force enlisted man in military maneuvers in a nuclear blast area less than one hour after detonation of the nuclear device. Plaintiff argued that her husband's march through the hazardous area was part of an experimental project to test the effects of nuclear radiation. Refusing to dismiss plaintiff's claim of post-discharge negligence, the *Everett* court found that the fact picture "properly falls in the third category" of the *Thornwell* analysis—intentional act incident to service, plus a separate wrong of post-discharge negligence. 492 F.Supp. at 325.

[12, 13] These cases are distinguishable from the facts at bar in several important respects. First, unlike the *Schwartz* case, the post-discharge negligence asserted here is not separate and distinct from the numerous acts of negligence alleged to have occurred incident to plaintiff's service. Schwartz, who sought medical treatment after his discharge, had a predischarge condition that was improperly diagnosed and negligently treated after discharge. That the condition arose due to government installation of the umbrathor in plaintiff's sinus while he was a serviceman does not alter the fact that the governmental negligence occurred, in its entirety, long after plaintiff became a civilian. Unsupported dicta aside, *Schwartz* stands only for the proposition that recovery for negligent performance of post-discharge medical treatment is not barred merely because the original condition arose from medical treatment that is not actionable under *Feres*.

Thus, *Schwartz* properly falls under *Thornwell's* "first case", where "the military performed separate negligent acts (i. e., two improper operations), one before, and one after, discharge". 471 F.Supp. at 352. Here, plaintiff's claim of post-discharge failure to warn does not present a separate and distinct act of post-discharge negligence on the part of the government. Of course, any veteran in this case who faces a situation analogous to *Schwartz*, that is, who seeks post-discharge medical assistance from the government for an

Agent Orange related malady and is negligently treated at a government hospital, may prosecute his claim for negligent treatment without the *Feres* impediment.

Second, unlike the *Thornwell* and *Everett* cases, plaintiffs here do not allege that the government caused them intentional harm by subjecting them to a form of human experimentation. *Thornwell*, joined by *Everett*, emphasized the distinction between cases of predischarge torts that were intentional and those that were negligent:

> Mr. Thornwell * * * does not allege a mere continuing negligent omission [which would be barred by *Feres*]. He claims he was *intentionally* harmed while he was on active duty and he further claims that, after he became a civilian, the defendants failed to exercise their duty of care by neglecting to rescue him from the position of danger which they had created. * * * Mr. Thornwell's claims for in-service, and out-of-service, injuries, certainly involve two distinctly separate patterns of conduct, one intentional and [one] negligent. 471 F.Supp. at 351 (emphasis in original)

Thus, both the *Thornwell* and *Everett* courts were presented with the "third case" in the *Thornwell* analysis, where the military "commit[s] an intentional act and then negligently fail[s] to protect a soldier turned civilian from the dire consequences which will flow from the original [intentional] wrong." 471 F.Supp. at 352. Here, the parties do not dispute that the government's motives in using Agent Orange in southeast Asia were valid military objectives: defoliate jungle growth to deprive enemy forces of ground cover and destroy enemy crops to restrict enemy's food supplies. Unlike *Thornwell* and *Everett*, plaintiffs here do not allege that the government committed "an intentional act and then negligently fail[ed] to protect [them]", *Thornwell v. United States*, 471 F.Supp. at 352; *Everett v. United States*, 492 F.Supp. at 325. Accordingly, the facts at bar do not present the "third case" of the *Thornwell* analysis.

If this case fits within the *Thornwell* analysis at all, it is the "second case", where "a single negligent act occurs and its effects linger after discharge." 471 F.Supp. at 352. Despite all the inconsistencies pervading this difficult area of analysis, "it is clear, at the very least, that a mere act of negligence which takes place while the plaintiff is on active duty and which then remains uncorrected after discharge, is not grounds for suit". *Thornwell v. United States*, 471 F.Supp. at 351.

Plaintiffs' complaints here neither allege nor support a conclusion that the post-discharge failure to warn was sufficiently separate and distinct from the underlying "incident to service" tort claims. Moreover, the *Feres* doctrine bars claims that are not only "incident to service" but also those which, like these, "arise out of" military service. The injuries here alleged are "inseparably entwined" with, and directly related to, plaintiffs' military service, *see Healy v. United States*, 192 F.Supp. 325, 328 (S.D.N.Y.1961), *aff'd on opinion below*, 295 F.2d 958 (C.A.2, 1961); *Kilduff v. United States*, 248 F.Supp. 310, 312 (E.D.Va.1960); I Jayson, *Handling Federal Tort Claims* § 155.08[3][b] at 5–124. The important and well established principles of the *Feres* doctrine cannot be circumvented by inventive presentation or artful pleading which attempts to create an actionable post-discharge claim out of what is in reality a claim of continuing neglect. *See Thornwell v. United States*, 471 F.Supp. at 352.

(c) The Australian Veterans' Claims

[14] The above analysis applies with equal force to the claims of the Australian veterans.[27] The only reported case on point, *Daberkow v. United States*, 581 F.2d 785 (C.A.9, 1978), reached a similar conclusion. There, the claims of a West German serviceman, killed performing duties incident to joint military activity conducted by the United States and West German

27. In *McMillan v. Dow*, CV 80 1143 (EDNY GCP), and *Elder v. Dow*, CV 80 1241 (EDNY GCP), 270 plaintiffs, all claiming to have been Australian war veterans who had served jointly with American Forces in Vietnam, seek damages for injuries caused by Agent Orange.

governments, were held barred under *Feres*. The *Daberkow* court undertook an analysis of the three "*Feres* factors" and concluded that *Feres* applies with equal force to foreign servicemen injured incident to joint military activities because (1) the scope of the United States government's liability should not depend on the fortuity of the location of any serviceman's duty station, whether that serviceman is an American or foreign serviceman; (2) the foreign government there involved had provided a means of compensating veterans and their families for injuries incident to service; and (3) the possible disruption of military discipline resulting from servicemens' claims is similar whether the serviceman is American or not. 581 F.2d at 788.

Here, the claims of the Australian plaintiffs clearly fall within the *Daberkow* analysis. The Australian plaintiffs concede that their presence in southeast Asia during the period in question was the direct result of their country's participation in joint military operations with the United States. memorandum of Australian plaintiffs at 3, and they acknowledge the existence of a compensation scheme for Australian veterans similar to that provided by the United States government. Memorandum of Australian plaintiffs at 8. Moreover, to rule that the United States government has waived sovereign immunity with respect to the tort claims of foreign servicemen but not with respect to the claims of American servicemen would distort the underlying purposes of the FTCA, defy common sense, and almost certainly be contrary to the intent of an elected Congress. Since the court determines that the Australian veterans could not maintain an action directly against the United States, defendants in turn may not maintain their third party action for indemnity or contribution based on any recovery the Australian veterans may obtain from them. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977).

(d) Derivative Claims of Spouses, Parents and Children

[15] Although the *Feres* doctrine does not apply to the servicemen's next of kin insofar as their own direct injuries or deaths are concerned, 1 Jayson, *Handling Federal Tort Claims* § 156 at 5–142 through 5–143 and cases cited therein, *Feres* does bar suits by a serviceman's family for damages resulting from injuries the serviceman suffered incident to service, 1 Jayson, *Handling Federal Tort Claims* § 156 at 5–144, even where the derivative action is technically personal in character (e. g., wrongful death, loss of consortium). *Van Sickel v. United States*, 285 F.2d 87, 91 (CA9 1960). This principle is demonstrated by *Feres* itself, where two of the three suits barred in that decision were wrongful death actions instituted on behalf of widows of servicemen who had died from injuries suffered incident to their service. *Feres v. United States, United States v. Griggs*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (Deciding appeals from *Feres v. United States*, 177 F.2d 535 (CA2 1949), and *Griggs v. United States*, 178 F.2d 1 (CA 10 1949)).

Further, application of this rule bars claims of mental anguish suffered by family members, *DeFont v. United States*, 453 F.2d 1239, 1240 (CA1 1972), *cert. denied*, 407 U.S. 910, 92 S.Ct. 2436, 32 L.Ed.2d 684 (1972) (wife's mental anguish over inadequate care provided serviceman husband not separate and distinct claim under *Feres*), and also bars the claims of veterans' spouses who allege damages that actually were the result of harm done to servicemen, *Harten v. Coons*, 502 F.2d 1363, 1365 (CA 10 1974), *cert. denied*, 420 U.S. 963, 95 S.Ct. 1354, 43 L.Ed.2d 441 (1975) (mother of accidentally conceived child cannot recover for negligent vasectomy performed on serviceman husband).

Applying these principles to the case at bar, it is clear that members of the veterans' families may not maintain actions against the United States based on their derivative claims (e. g., loss of society, comfort, companionship, services, consortium, guidance and support), or claims that result from a serviceman's injury (e. g., miscarriage). Accordingly, under the principles of *Stencel Aero*, the defendants may not seek indemnity or contribution from the United States for any liability imposed on them for claims of this nature.

(e) Claims of Direct Injury to Veterans' Children

Only the veterans' children's claim of direct injury requires additional analysis. Here, children of Vietnam veterans allege that they have suffered genetic and somatic injury as a result of a parent having been exposed to Agent Orange. This presents the difficult question of whether the injuries suffered by these children, who are not and never were members of the military, are derivative injuries suffered "incident to or arising out of military service", or whether they are direct injuries independent of those of their parents.

The closest precedent is *Monaco v. United States*, No. C 79-0860 (N.D.Cal. Nov. 2, 1979), where plaintiff, the daughter of a serviceman exposed to radiation during his military service, claimed the government's negligence towards her father caused her to be affected with "chromosomal and genetic change" which in turn resulted in her being born with a birth defect. *Monaco v. United States*, slip op. at 3. There, the court held that "[t]he test of *Feres* is whether plaintiff's injuries have as their genesis injuries allegedly sustained incident to the performance of military service", slip op. at 3, and found plaintiff's claim barred under this standard because "[plaintiff's] injuries are directly related to and arise out of the injury sustained by her father at the time he was a member of the United States Army." Slip op. at 4.

In the case at bar, the children's claims of genetic and physical harm are indirect because they arise only as the result of injuries to their veteran parents.[28] The injuries alleged by the children had their genesis in the exposure of their parents and, assuming that Agent Orange could produce the genetic changes alleged, the injuries were inflicted on the serviceman at the time of exposure. Thus, although Agent Orange may ultimately be found to have caused injuries in subsequently conceived children, those injuries, nevertheless, arose out of and were incident to the service of the parent. To hold otherwise might open the door for governmental liability to countless generations of claimants having ever diminishing genetic relationship to the person actually injured.

[16] For these reasons, the court holds that the children's claims for genetic injury and birth defects from Agent Orange exposure of their veteran parents are injuries suffered "incident to and arising out of service" under *Feres* and cannot be recompensed in an action maintained directly against the government. Consequently, the defendants may not seek indemnity or contribution against the United States for any liability they ultimately may incur as a result of these claims. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977).

G. DEFENDANTS' REMAINING CLAIMS AGAINST THE UNITED STATES

Defendants have sought to style the remaining claims of their third party complaints in terms of constitutional deprivation and torts committed directly against them by the United States. This appears to be another exercise in pleading in an attempt to avoid statutory jurisdictional problems because, notwithstanding the defendants' characterizations, these remaining claims against the government are not tort claims; rather, they are essentially contractual in nature and must be so treated.

[17] Congress has conferred on the courts jurisdiction over contract claims that is different from that over tort claims. Un-

28. Somewhat analogous is *Harten v. Coons*, 502 F.2d 1363 (CA 10 1974), *cert. denied* 420 U.S. 963, 95 S.Ct. 1354, 43 L.Ed.2d 441 (1975), where a serviceman and his wife sued the United States for the costs of raising a child accidentally conceived after a negligent vasectomy on the husband. There, the court considered only the damage done to the husband and dismissed the complaint under *Feres* without regard to the wife's claim of independent injury. 520 F.2d at 1364.

der the Tucker Act, 28 U.S.C. § 1491, jurisdiction for any claim founded upon an express or implied contract with the United States is conferred on the Court of Claims, where cases sounding in tort may not be maintained. The United States District Courts have concurrent jurisdiction over contract claims, but only when the claim does not exceed $10,000. 28 U.S.C. § 1346(a)(2). Here, it is beyond dispute that defendants' remaining third party claims against the government involve more than the $10,000 that deprives this court of jurisdiction over them. Consequently, the government's motion to dismiss must be granted as to the remaining claims. Of course, dismissal of defendants' third party claims here is without prejudice to defendants' right to pursue their claims against the government in the proper forum.

II. OTHER CLAIMS OF IMMUNITY

Arguing in the alternative, the United States seeks to dismiss defendants' third party complaints under three statutory exceptions to the FTCA: the combatant exception, 28 U.S.C. § 2680(j) (immunity not waived for "[a]ny claim arising out of the combatant activities of the military * * * during time of war"); the foreign country exception, 28 U.S.C. § 2680(k) (immunity not waived for "any claim arising in a foreign country"); and the discretionary function exception, 28 U.S.C. § 2680(a) (immunity continues for "act or omission of an employee of the government * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of [the government]").

Notwithstanding the apparent application of these exceptions to some of the claims here asserted, the court's determination that the *Feres/Stencel* doctrine operates to bar all tort claims advanced in the third party complaint makes it unnecessary to consider whether these exceptions do apply.

For all these reasons, the government's motion to dismiss the third party complaints is granted, and the third party complaints against the government deemed to have been made in all actions under MDL 381, are dismissed.[29]

III. THE CASE MANAGEMENT PLAN

There have been pending for some time motions by various parties urging the court to make various orders affecting the overall management of this action, including such matters as class action treatment, summary judgment, discovery, and division of the action into various parts for pretrial and trial purposes. The court has reserved decision on all these motions pending resolution of two major questions that greatly affect how the case might be managed efficiently: (1) whether the United States was to be a party to the action, and (2) whether jurisdiction lies under federal common law or whether the principles and consequences of diversity jurisdiction must be considered. Now that both of these questions have been answered,[30] it is time to get on with orderly

29. Plaintiffs are cautioned that the issues here are, to some extent, novel, and the strong arguments advanced by all parties should make it clear that the views expressed and rulings made in this decision are not entirely free from doubt. Accordingly, any plaintiff who believes that (s)he may have a valid claim against the United States government in the event that one or more of the above rulings are ultimately reversed on an appeal from this court's decision, should protect his/her interests to the greatest extent possible by filing a notice of claim form (Standard Form 95) with the proper agency of the United States government and taking whatever additional steps may be necessary to protect his/her rights.

30. The first question is answered by the earlier part of this memorandum and order. The second question was answered by a decision and order of the Second Circuit Court of Appeals dated November 24, 1980 (Feinberg, C. J. dissenting) which held that this litigation should not be governed by federal common law but rather must be controlled by the laws of the several states applied under diversity of citizenship principles. Technically, that question is still open because plaintiffs have filed a petition for en banc consideration by the Second Circuit. In addition, plaintiffs have indicated their desire to have the issues reviewed by the United States Supreme Court. However, enough light has now been shed on the problems to permit substantial progress in the

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In developing the case management plan described in this section, the court has weighed and considered many problems presented by this litigation. Some of them are:

1. There are a large number of plaintiffs and potential plaintiffs who claim to have been injured by exposure to Agent Orange. There are now approximately 167 suits pending in the Eastern District of New York involving over 3,400 plaintiffs. The court has been informed that there are many thousands more who have, at the court's request and pending decision of the class action motion, refrained from bringing individual actions.

2. There are numerous chemical companies named as defendants.[31] The fact that they may have had differing degrees of involvement in manufacturing and supplying Agent Orange for the government may or may not cause differing levels of responsibility for the effects of Agent Orange on plaintiffs.

3. The present plaintiffs come from most of the 50 states and from Australia. This may require consideration of varying standards of conduct, rules of causation and principles of damages that may substantially affect the results in individual cases.

4. The causation issues are difficult and complex. Clearly this is not the "simple" type of "disaster" litigation such as an airplane crash involving a single incident, having a causation picture that is readily grasped through conventional litigation techniques, and presenting comparatively small variations among the claimants as to the effects upon them of the crash. With the Agent Orange litigation, injuries are claimed to have resulted from exposure to a chemical that was disseminated in the air over southeast Asia during a period of several years. Each veteran was exposed differently, although undoubtedly patterns of exposure will emerge. The claimed injuries vary significantly. Moreover, there is a major dispute over whether Agent Orange can cause the injuries in question, and there are separate disputes over whether the exposure claimed in each case did cause the injuries claimed. The picture is further complicated by the use in Vietnam of other chemicals and drugs that also are claimed to be capable of causing many of the injuries attributed to Agent Orange.

5. The litigation presents numerous questions of law that lie at the frontier of modern tort jurisprudence. Among them are questions of enterprise liability, strict products liability, liability for injuries that appear long after original exposure to the offending substance, and liability for so-called genetic injuries.

6. Many of the people exposed to Agent Orange may not even yet have experienced the harm it may cause.

7. Numerous scientific and medical issues are presented, and there are serious questions of whether there is adequate data to reach scientifically sound conclusions about them. There is the further question of whether legally permissible conclusions may nevertheless be reached on data that would not permit "scientific" conclusions.

8. Various agencies of the government have expressed concern but as yet have shown little tangible action about the problems claimed to have been caused by the government's use of Agent Orange.

9. There are important and conflicting public policies that run as crosscurrents through many phases of both the substantive and procedural problems of this litigation.

trial court regardless of future actions by the Second Circuit or the Supreme Court. Managing this case under diversity of citizenship principles is by far the more difficult route to travel, but the court feels that it can develop a plan for efficient management even without the aid of federal common law for jurisdiction and for substantive law purposes. If further review of the federal common law issue produces a change, then the remaining work of the court and of all parties will be simplified and the management plan can be easily adapted at that time.

31. *See* footnote 2 *supra*.

10. There is a wide choice available among the many procedural devices that could be used for addressing and ultimately deciding this controversy.

All of these problems are compounded by the practical realities of having on one side of the litigation plaintiffs who seek damages, but who have limited resources with which to press their claims and whose plight becomes more desperate and depressing as time goes on, and having on the other side defendants who strenuously contest their liability, who have ample resources for counsel and expert witnesses to defend them, and who probably gain significantly, although immeasurably, from every delay that they can produce.

Overarching the entire dispute is a feeling on both sides that whatever existing law and procedures may technically require, fairness, justice and equity in this unprecedented controversy demand that the government assume responsibility for the harm caused our soldiers and their families by its use of Agent Orange in southeast Asia.

Out of these and other problems it is this court's task as the transferee judge in this multidistrict litigation to supervise and manage the action so as to bring it to a "just, speedy and inexpensive determination", Rule 1 FRCP, either in this court, or if that is not possible, then in the transferor courts after completion here of as much of the litigation as may fairly and reasonably be resolved under the supervision of this single judge.

With the foregoing and other problems in mind, the court has considered a variety of possibilities for managing this multidistrict litigation. Each possibility has both advantages and disadvantages. Among the numerous possibilities are the following:

1. Transfer all actions to the Eastern District of New York for trial before this court.

a. Advantages: All parties would know precisely where they stand, and how the action would be handled. There would tend to be consistency in the results to the extent permitted by the varying applicable laws.

b. Disadvantages. Handling the cases would take the full time of this court, which would be able to handle no other cases, a result that would be unfair not only to the other judges in the Eastern District of New York who are already overburdened with one of the heaviest criminal workloads in the nation, but also to other civil litigants in the Eastern District, who would be further delayed in getting their cases to trial. Moreover, to separately try these actions would take far too long a time; probably neither the litigants nor this court would live long enough to see the last case tried.

2. Supervise all discovery, prepare a pretrial order, and then remand the cases for separate trials in the transferor districts around the country.

a. Advantages: This is by far the easiest course of action for this court to take. In many MDL cases this is an acceptable and proper technique and achieves all of the MDL benefits available to those cases. It accomplishes coordinated discovery, a single plan for processing up through the pretrial order, and a shared workload in the actual trial of the individual actions.

b. Disadvantages: This technique would require separate trials of each action in the transferor courts, a technique that would be repetitious and wasteful with respect to the issues that are common to all actions. Although testimony of key expert witnesses might be made available to each of the transferor courts through use of videotape so that the need for those witnesses to personally appear at each trial would thereby be eliminated, the opportunity to cross-examine the experts on special problems that relate to the individual plaintiffs would still be lost. The greatest disadvantage of this method is that it would place unnecessary burdens on each of the transferor judges, each of whom would have to struggle with identical legal and factual issues, and it would thus fail to reach the level of judicial efficiency and economy that MDL procedures were designed to achieve.

3. Coordinate discovery and other pretrial work, consolidate the actions for trial of the common issues of fact and law, and then remand to the transferor districts for separate trials of the individual issues such as specific causation and damages.

a. Advantages. A single trial of common issues has obvious benefits in economy and efficiency. Spreading to other courts the workload of trying individual cases at least makes a judicial solution to this litigation possible in terms of time and workloads.

b. Disadvantages. The consolidation technique addresses only the pending actions, that is, it involves those situations where the plaintiff has seized the initiative and brought suit. However, there are many people with valid claims who for one reason or another have not asserted them by bringing suit and who would therefore not recover for damages inflicted, including damages of which they might not yet even be aware.

4. Certify the litigation as a class action, using all the flexibility of that device, including subclasses, to determine common issues before this court and ultimately determine the individual issues either under the direct supervision of this court or after remand to other courts.

a. Advantages: Class action treatment would give this court full control over the entire litigation. Any determinations reached in the class action would bind all defendants as well as all members of the class except those who chose to opt out, and as to them, their suits could be consolidated for joint trial with the class action. By use of subclasses to be certified as the need later arises, additional trials on issues common to identified subclasses may be conducted either here in the Eastern District of New York, or by the transferor courts after remand, or by a combination of both. This method provides the greatest flexibility and the greatest opportunity for judicial efficiency and economy of time and money.

b. Disadvantages: The disadvantages with class action treatment lie largely in technical and procedural problems that have arisen with the class action device in other contexts. Such problems have proved particularly troublesome in the context of mass tort cases. Having considered carefully the nature of those technical problems, this court is satisfied that they can be overcome by following the case management plan described in this section and the steps described under the section entitled "Class Action".

After considering the submissions and arguments of the parties and after weighing all of the foregoing and many other considerations, the court has developed the following plan for management of the Agent Orange litigation assigned to it under MDL No. 381:

1. Class action. The Agent Orange litigation will be certified as a class action under F.R.C.P. 23(b)(3). (See discussion below entitled "Class Action")

2. Statutes of limitations. The court will take up immediately the problems of statutes of limitations. (See discussion below entitled "Statutes of Limitations").

[18] 3. Separate trials of some issues. Whenever common issues are presented, a common trial should be had, if practicable. These trials will be held as promptly as possible in the Eastern District of New York, preserving at all times the parties' right to a jury trial when properly demanded. Plaintiffs have moved for so-called "serial" trials, describing in some detail the issues they would like tried and the order in which they should be tried. Except insofar as plaintiffs' plan is adopted by this decision, that motion is denied. As appears in the discussion below entitled "Summary Judgment" there is an issue that can be separately tried at the threshold of this action: whether the defendants are protected by the "government contract defense". The court intends to try that issue separately. After that, if needed, there may be an additional trial addressing liability questions such as negligence, product liability, and general causation, where a jury will be able to hear all of the evidence relating to the development, manufacture and use of

Agent Orange, and the scientific and medical evidence relating to its potential effects, and report its findings in carefully drafted special verdicts. Those special verdicts can then serve as a framework for later disposition of the issues of individual causation (whether a particular veteran was exposed, to what degree, and with what results) and damages. The court has not yet determined whether the individual issues can be best resolved under the direct supervision of this court or by remand of subclass actions to transferor courts for processing in ways appropriate to the circumstances of the subclasses. Those determinations necessarily must be made at a later date.

4. Discovery. Until now the court has stayed all discovery except that conducted voluntarily. That stay will now be lifted, and mandatory discovery shall now proceed according to the plan described in the section below entitled "Discovery"

5. Miscellaneous.

[19] a. Plaintiffs' motion to amend the complaint by adding the United States government and many of its officials on a theory of constitutional tort is denied. The issues sought to be raised by plaintiffs through the amendment are sufficiently different from those presented by this already complex litigation to require that the constitutional claims against government officials and the government itself be pursued by one or more separate actions, if plaintiffs are so inclined. Denial of the motion, therefore, is without prejudice to whatever rights plaintiffs may have to assert those claims in separate proceedings.

b. Jurisdiction and pleadings. There is some confusion as to the precise state of the pleadings in the many pending actions. The court has not yet determined what precise disposition will be made of the various individual actions in light of the class certification. Unless a party files in a particular action a notice disclaiming the benefit afforded by the following, all of the pleadings in all cases now or hereafter filed under MDL 381 are deemed amended as follows:

1. The complaints are deemed amended to allege the residence of the plaintiffs, and to name and allege the residence of each of the defendants whose citizenship is diverse from that of the plaintiff. All plaintiffs are deemed to have joined all diverse defendants as defendants in their individual actions.

2. All defendants are deemed to have answered all complaints brought against them, with general denials plus all affirmative defenses thus far raised in filed answers to any of the Agent Orange MDL cases. All answers are deemed to include crossclaims for indemnification and contribution against all other defendants. All crossclaims are deemed denied.

The court recognizes that (1) any case management plan may have to be changed in order to adapt to new or unforeseen circumstances; (2) not every facet of the plan adopted for this Agent Orange litigation will please everyone; and (3) this litigation presents problems of a type and magnitude that differ substantially from the established precedents so that it cannot proceed in one of the well established patterns for lawsuits. Under these circumstances, it is the court's obligation to control the case, seeking always the goal of a "just, speedy and inexpensive determination" of the litigation.

Lawsuits, of course, must be guided and decided by the principles of substantive law and rules of procedure established by Congress, by the legislatures of the various states, and by the principles of common law where applicable. The rules of procedure, however, are not intended to require rigid adherence to preordained steps; instead, they are standards and requirements to be used, molded and adapted so as to achieve just, speedy and inexpensive determination of lawsuits. Although "speedy" and "inexpensive" are relative terms having almost ironic implications in the context of the Agent Orange litigation, this court is satisfied that the plan described will, with the cooperation of counsel, attain at least a "just" determination of these lawsuits, and will do so at less cost and in less time than would a more conventional approach.

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IV. CLASS ACTION

[20] Contending that many of the issues here presented are best determined by class action to avoid duplicitous litigation by the individual members of the proposed class, plaintiffs have moved for a conditional order pursuant to F.R.C.P. 23 permitting the suit to proceed as a class action on behalf of all persons exposed to Agent Orange and various members of their families. Under Rule 23(c)(1) and 23(d), the order would be subject to such later modification as the court may find appropriate and necessary in light of future developments in the case.

[21] Before a class action may be maintained under Rule 23, the action must meet the prerequisites of Rule 23(a) and one set of the alternate requirements of Rule 23(b). Defendants oppose class treatment, but continue to advance some outrageous arguments in the name of advocacy; detracting from whatever valid arguments they might otherwise have, they argue that plaintiffs fail to satisfy even one of the elements necessary under Rule 23. Plaintiffs, equally undiscriminating in their advocacy, argue that *every* element of *every* alternative of Rule 23 is met here.

The court has carefully read and considered the voluminous submissions of the parties and has heard and considered oral arguments of counsel on this issue. After due consideration, the court determines that plaintiffs have demonstrated that a class action is appropriate under Rule 23(b)(3). Accordingly, plaintiffs' motion for conditional class action certification is granted as herein provided. Certain specific findings are required.

A. THE PREREQUISITES OF RULE 23(a)

1. Numerosity

The members of the plaintiff class here are so numerous that joinder of all members of the class in the same action is impracticable. Rule 23(a)(1). Indeed, if the only members of the class were the plaintiffs in the 167 actions now pending in this court, "numerosity" would be satisfied.

2. Commonality

Rule 23(a)(2) states that a class action may only be maintained if "there are questions of law or fact common to the class." Here, the action raises numerous questions of law *and* fact common to the class. Whatever may be the individual questions relating to the manner and extent of each veteran's exposure to Agent Orange, and relating to the particular effects of Agent Orange on the veteran when considered along with his/her medical history, circumstances, lifestyle and other unique conditions, all of these claims share a common ground when proceeding through the many factual and legal issues relating to the government contract defense, negligence by the defendants, whether Agent Orange was a "defective product", and the many questions embodied in the concept of "general causation". In part, the requirement of commonality is one aimed at determining whether there is a need for combined treatment and a benefit to be derived therefrom. Here the need is compelling, and the benefits are substantial.

3. Typicality

Rule 23(a)(3) requires that in a class action "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." As already noted, plaintiffs' claims of negligence, products liability and general causation, as well as the defendants' government contract defense are not just "typical" of the entire class, they are identical. In a few areas, such as the rules governing liability and the application of various statutes of limitations, the claims may fall into groups that are "typical", but even there the different groups' claims can be efficiently managed either on a subclass basis or directly by way of separately determining the issues. Although the named plaintiffs for purposes of the class action are yet to be designated, the court is satisfied that out of the extremely large pool available representative plaintiffs can be named who will present claims typical of those of the class. As already indicated, the issues of specific causation and damages will, of course, ultimately require individual consideration, but until that point in the litigation is reached, a class action appears to be the only practicable means for managing the lawsuit.

4. Adequacy

Rule 23(a)(4) provides that a class action may only be maintained if "the representative parties will fairly and adequately protect the interests of the class." Adequacy of representation depends on the qualifications and interests of counsel for the class representatives, the absence of antagonism or conflicting interests, and a sharing of interests between class representatives and absentees. 7 Wright & Miller *Federal Practice and Procedure* §§ 1765–1769 at 615–657. Here, the court will select from among the hundreds of plaintiffs representative persons who have a substantial stake in the litigation, who lack conflicts, antagonisms or reasons to be motivated by factors inconsistent with the motives of absentee class members, and who will fairly and adequately protect the interests of the class. Further the class will be represented by experienced, capable counsel, Yannacone and Associates,[32] who have shown themselves willing to undertake the considerable commitment of time, energy and money necessary for the vigorous prosecution of the claims here asserted.

5. Additional Requirements

Courts have implied two additional prerequisites to class action certification that are not specifically mentioned in Rule 23: (1) there must be an identifiable class, and (2) the class representatives must be members of the class. 7 Wright and Miller *Federal Practice and Procedure* §§ 1760, 1761 at 579–592. Here, the plaintiff class can be readily identified; they are persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom. The court has intentionally defined the class in broad terms consistent with the demands of this litigation. If we begin with the broadest possible class, the issues common to all members of that class can be resolved. It may later prove advantageous to create subclasses for various purposes, e.g., for resolving statute of limitations claims, for determining liability in "negligence" as opposed to "product liability" states, and finally, perhaps, for preserving the class action format prior to remand to the transferor judges so as to provide them with the greatest possible flexibility in ultimately determining the issues remaining after multidistrict treatment has ended.

B. THE REQUIREMENTS OF RULE 23(b)

Plaintiffs seek certification of a plaintiff class under Rule 23(b)(1)(A), (b)(1)(B), (b)(2) & (b)(3).[33] For the reasons set forth below,

32. Yannacone and Associates is a consortium of lawyers who have banded together for purposes of this lawsuit under the leadership of Victor Yannacone, who brought the initial actions and who was designated as lead counsel for the plaintiffs shortly after the cases were transferred to this court by the multidistrict panel. Some of the lawyers in the consortium represent plaintiffs in one or more of the component Agent Orange actions; others apparently have been brought into the group because of special expertise and experience. This case is too complex and too demanding for any single attorney to handle it on behalf of plaintiffs. Yannacone and Associates has already demonstrated that the combined efforts of its twenty or so members will fairly and adequately protect the interests of the class and that together they have the expertise and desire to prosecute this demanding action properly.

33. Rule 23(b) provides that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

however, the court concludes that class certification is appropriate only under Rule 23(b)(3).

1. Rule 23(b)(1)

Rule 23(b)(1), the "prejudice" class action provision, authorizes class action treatment if some prejudice would result to any party if members of the class were required to litigate their claims in a series of individual actions, and the resulting prejudice can be obviated by using a class action. The provision is broken down into two separate clauses.

[22] Rule 23(b)(1)(A) authorizes a class action when the prosecution of separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class". This section focuses on the difficulties that class action certification may visit on the party opposing the class action. It is designed to prevent situations in which different courts establish "incompatible standards of conduct" for that party.

Rule 23(b)(1)(A) is *not* meant to apply, however, where the risk of inconsistent results in individual actions is merely the possibility that the defendants will prevail in some cases and not in others, thereby paying damages to some claimants and not others. *McDonnell Douglas Corporation v. United States District Court, Central District of California*, 523 F.2d 1083, 1086 (CA9 1975), *cert. denied sub nom., Flanagan v. McDonnell Douglas Corporation*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976). "The risk of paying money [damages] to some and not others is not what the rulemakers intended by the words 'incompatible standards of conduct'". A. Miller, *An Overview of Federal Class Actions: Past, Present and Future* at 43 [1977]. Since the only effect of inconsistent decisions here would be the payment of damages to some claimants and not others, class certification under Rule 23(b)(1)(A) would be inappropriate.

[23] Rule 23(b)(1)(B) authorizes a class action when separate actions would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest." This rule emphasizes possible undesirable effects on the class members, rather than on the opposing party, and permits a class action if separate suits might have undesirable effects on the class members. "The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund * * * and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for the late-comers." A. Miller *An Overview of Federal Class Actions: Past, Present and Future* at 45 (1977). *See also Administrative Committee's Note, Rule 23*, 39 F.R.D. 69, 101 (1966).

[24] However large the potential damages may appear here, plaintiffs offer no evidence of the likely insolvency of defendants and apparently do not, in defendant Dow's words, "have the temerity to argue that the aggregate claims of the purported class exceed the total assets of the five named defendants."[34] Defendant Dow's

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

34. Since that statement was made the number of named defendants has increased, see footnote 2 *supra*, thus rendering class certification under Rule 23(b)(1)(B) even more inappropriate.

memorandum in opposition to class certification at 20. For good measure, Dow adds "[s]uch an argument would be ludicrous on its face." *Id.* As one court has noted, "without more, numerous plaintiffs and a large *ad damnum* clause should [not] guarantee (b)(1)(B) certification." *Payton et al. v. Abbott Labs et al.*, 83 F.R.D. 383, 389 (D.Mass.1979). Thus, certification under Rule 23(b)(1)(B) is not appropriate.

2. Rule 23(b)(2)

[25, 26] Rule 23(b)(2) authorizes class action treatment where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This subdivision "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages", *Advisory Committee's Note, Rule 23*, 39 F.R.D. 69, 102 (1966); rather, it applies when injunctive relief or declaratory relief on which injunctive relief could be based is proper. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (CA2 1968), *vacated on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Here, the relief requested relates predominately to money damages so the class may not be certified under Rule 23(b)(2).[35]

3. Rule 23(b)(3)

Rule 23(b)(3) authorizes a class action when the court finds "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to all other available methods for the fair and efficient adjudication of the controversy." The rule lists four matters pertinent to a consideration of these issues: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or un-desirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Considering the circumstances of this action, and bearing in mind the manner in which the class action will proceed, the court determines that the interest of class members in individually controlling the prosecution of separate actions is minimal, especially at this early stage of the litigation when the issues under consideration concern the relationship between the defendants and the government, issues that impact equally on every plaintiff's claim. Rule 23(b)(3)(A). Later stages of this litigation, especially those concerned with individual causation and damages, may require reconsideration of this element and possibly decertification, but at this stage, individual class members have almost no interest in individually controlling the prosecution of separate actions. Indeed, the problems inherent in every one of the individual actions are so great that it is doubtful if a single plaintiff represented by a single attorney pursuing an individual action could ever succeed.

With respect to the extent and nature of currently pending litigation, almost all the Agent Orange litigation currently pending is before this court under the multidistrict litigation procedures. All those cases are advancing simultaneously, and certification of a class action will serve the goals of judicial economy and reduce the possibility of multiple lawsuits. Rule 23(b)(3)(B). In addition, it will significantly expedite final resolution of this controversy.

With respect to the desirability of concentrating the litigation of the claims in this forum, the actions have already been concentrated before this court through the use

35. The court is aware that plaintiffs have requested that a trust be established to apply defendants' future profits for the benefit of the plaintiff class. While this possible relief has not been excluded from the case, it does not serve as a sufficient basis for class certification pursuant to F.R.C.P. 23(b)(2).

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With respect to the difficulties likely to be encountered in the management of a class action, the court has carefully and humbly considered the management problems presented by an action of this magnitude and complexity, and concluded that great as they are, the difficulties likely to be encountered by managing these actions as a class action are significantly outweighed by the truly overwhelming problems that would attend any other management device chosen. While the burdens on this court might be lessened by denying class certification, those imposed collectively on the transferor courts after remand of the multidistrict cases would be increased many times.

Having carefully considered the above factors and all other circumstances of this action, the court is satisfied that at this time the questions of law and fact common to the members of the class predominate over questions of law or fact affecting only individual members, and that a class action is superior to any other available method for the fair and efficient adjudication of the controversy.[36]

Because over a year ago this court requested plaintiffs not to file actions pending decision on the class action motion, because the facts and issues in all of the pending and future cases are to a great degree identical, or at least parallel, and because this action presents a variety of questions in relatively untested areas of the law, this court sees the objectives of F.R.C.P. Rule 1 and Rule 23, as well as the interests of justice, best served by determining here, and for all parties, as many legal and factual issues as may properly be decided. [illegible] will certify this to be a class action under F.R.C.P. 23(b). Formal certification will be by separate order to be processed under the court's instructions.

C. NOTICE

Rule 23(c)(2) states that "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Two problems with notice must be considered: how the notice shall be given and what the notice shall say. In the order to be prepared and signed which will officially certify the class, the court will direct both the manner and content of notice.

As to the manner of notice, both the rule and the court decisions display a preference for individual notice whenever possible, and ordinarily the financial burden of giving notice falls on the plaintiffs. Individual notice to all members of the broad class to be certified may be impossible. The rule requires, however, only "the best notice practicable under the circumstances". Counsel are invited to submit suggestions in writing as to how "the best notice practicable" may be given to the over two million Vietnam veterans and their families who are included in the class by January 23, 1981. Certain possibilities have already been suggested, including having the Veterans Administration mail copies of the notice to all Vietnam veterans on their mailing list, and soliciting the aid of veterans' organizations around the country to circularize their memberships.

It may be that other persons or organizations are willing to assist in resolving the notice problem. The news media in particular might volunteer space or time to assure "the best notice practicable" to veterans and their families. Still other means by which the notice requirement can be fairly

36. There being no need to certify subclasses of plaintiffs at this time, the court will postpone consideration of the subclass issues to a later time when the most efficient and logical course to follow will be clearer.

and reasonably fulfilled may exist. After considering all suggestions received by January 23, 1981, the court will determine how notice shall be given.

As to the form of notice, Yannacone and Associates is directed to serve and file by January 7, 1981 a *proposed form of notice* which shall include at least the following information in as simple and direct a form as possible:

1. It shall state briefly the nature of plaintiffs' suit, their causes of action and their claims for relief.

2. It shall set out the definition of the plaintiff class and in general terms the issues that will have to be determined.

3. It shall notify the recipient that at his/her request the court will exclude him/her from the class so long as the request is received by a date specified in the notice that counsel and the court will set. Rule 23(c)(2)(A).

4. It shall make clear that any findings, whether favorable or not, will be binding on all class members who do not request exclusion. Rule 23(c)(2)(B).

5. It shall explain that any class member who does not request exclusion may enter an appearance through his/her counsel. Rule 23(c)(2)(C).

Counsel for defendants shall meet on or before January 16, 1981 to discuss and, if possible, agree upon suggested modifications to plaintiffs' proposed form of notice and serve and file their suggested changes, if any, with the court by January 23, 1981. To the extent that agreement among defense counsel is not possible, they may make separate submissions.

By January 16, 1981 Yannacone and Associates shall submit to the court a list of no more than 12 persons whom they propose as representative plaintiffs for the class action. Defendants may, if they choose, submit any comments, objections or suggestions with respect to the proposed representative plaintiffs by January 23, 1981. The court will then determine who will be the named plaintiffs in the class action, and plaintiffs' attorneys will be directed by further order of this court to prepare an appropriate class action order and class action complaint.

V. SUMMARY JUDGMENT

On this motion, defendants argue that they are entitled to summary judgment against plaintiffs because, acting under compulsion of federal law, they were forced to manufacture Agent Orange under circumstances carefully controlled by the government. Cases analyzing similar arguments have utilized various terminology to describe this defense, the most common being that defendants seek to "share in the government's immunity", *Green v. ICI America, Inc.*, 362 F.Supp. 1263, 1264 (E.D. Tenn.1973), or that defendants assert a "government contract defense". *See Merritt, Chapman & Scott Corporation v. Guy F. Atkinson Company*, 295 F.2d 14, 16 (CA9 1961).

A. THE GOVERNMENT CONTRACT DEFENSE

Whatever its label, the government contract defense[37] in this case essentially seeks to avoid manufacturer liability on the ground that the circumstances surrounding Agent Orange's manufacture and use were controlled and dictated by the United States government acting in a capacity in which the government is protected from liability by sovereign immunity and the *Feres/Stencel* doctrine.

In the seminal case of *Yearsley et al. v. W. A. Ross Construction Company*, 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940), the Supreme Court recognized the possibility that contractors who properly perform their work pursuant to contracts with the United States government might avoid liability for injuries resulting from the work done. Plaintiff, who sought to recover damages for erosion of his waterfront property

37. For purposes of convenience this defense will be called the "government contract defense" for the remainder of this decision.

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caused by defendant's construction of dikes in the Missouri River, conceded that defendant had acted "pursuant to a contract with the United States Government, under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States, for the purpose of improving navigation of the Missouri River." 309 U.S. at 19, 60 S.Ct. at 414. The Court held that the contractor was not liable, because the work done had been properly authorized and properly performed. Summarizing the relevant principles, the Court stated

> [I]t is clear that if [the] authority to carry out the project was validly conferred * * * there is no liability on the part of the contractor for executing [the government's] will. (citations omitted). Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. 309 U.S. at 20 21, 60 S.Ct. at 414.

Following these principles, subsequent cases have stated the rule in various ways:

> To the extent that the work performed by [the contractor] was done under its contract with the [government], and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by [plaintiffs]. *Myers v. United States*, 323 F.2d 580, 583 (CA9 1963);

> The [contract work] was pursuant to validly conferred authority under a contract [with the government]. The question of foreseeability of harm and the possible need to protect against it arose when the Government framed its terms. There is no charge that what the contractor did was not what it was required to do. * * [The question of taking measures to safeguard against harm caused by the plans] was a decision which rested with the Government. The Government did not provide for such additional precautions in the plans, and the [contractor] is not to be held liable for this omission. *Dolphin Gardens, Inc. v. United States*, 243 F.Supp. 824, 827 (D.Conn.1965);

> Where the act, or failure to act, which causes an injury is one which the [government] contractor was employed to do, and the injury results not from the negligent manner of doing the work, but from the performance thereof or failure to perform it at all, the contractor is entitled to share the immunity from liability which the public enjoys, but * * * the contractor is not entitled to the immunity of the public body from liability where the injury arises from the tortious manner of performing the work." *Green v. ICI America, Inc.*, 362 F.Supp. 1263, 1265 (E.D.Tenn.1973) *quoting* 9 A.L.R.3d 382, 386 (1966).[38]

[27] Behind this rule lie considerations of fairness and public policy. First, tort liability principles properly seek to impose liability on the wrongdoer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government. The imposition of tort liability on a wrongdoer can have a strong prophylactic effect: tortfeasors held liable for damages that flow from their wrongdoing have a strong incentive to prevent the occurrence of future harm. *See* W. Prosser, *Law of Torts* § 4 at 23 (4th ed. 1971). Before any societal benefit can be derived from the deterrent effects of tort liability, however, the party in a position to correct the tor-

38. *See also Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Company*, 295 F.2d 14, 16 (CA9 1961) ("where the plans and specifications were drawn and adopted *prior* to the contract * * * the contractor is entitled to follow such plans and specifications, exercising due and proper care and skill, and require parties damaged to look to the government, which has required such a contract, for relief.") (emphasis in original); *O'Grady v. City of Montpelier*, 474 F.Supp. 186, 188 (D.Vt.1979), *rev'd on other grounds*, 573 F.2d 747 (CA2 1978) (no action lies against contractor who entered contract with city, performed work in accordance with detailed specifications provided by the city, did not act outside scope of authority, and performed work in non-negligent manner).

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military use for over 20 years; (3) knew dioxin would be a byproduct of the manufacture of 2,4,5–T, an ingredient in Agent Orange; (4) knew the toxicity of dioxin as early as 1962; (5) compelled the defendants to manufacture Agent Orange using the mandatory provisions of the Defense Production Act, 50 U.S.C.App. § 2061 et seq., and various economic and "informal" pressures to coerce defendants; (6) refused to allow defendants to produce phenoxy herbicides for their civilian markets; (7) unilaterally determined the terms and specifications of the contracts under which the defendants manufactured Agent Orange, including complete control over the chemical composition, volume, weight, purity, acidity, appearance, quality, inspection, testing procedures, packaging, marking and method of shipment used; (8) visited defendants' plants regularly to conduct inspections and tests to ensure the defendants' compliance with the contract terms; (9) assured the availability to defendants of the raw materials needed to produce Agent Orange on a high priority basis; (10) unilaterally determined the nature and extent of the use in southeast Asia of the Agent Orange produced, with concentrations of component herbicides far in excess of any commercially manufactured product; and (11) exercised exclusive control over the use of Agent Orange in southeast Asia.

Defendants argue (1) that they merely manufactured and supplied Agent Orange to the government pursuant to validly authorized contracts, (2) that Agent Orange was not manufactured before and has not been manufactured since; (3) that they completed their compelled manufacture of Agent Orange in strict compliance with the specifications supplied by the government, specifications that contained no obvious or "glaring" defects that would have alerted the defendants of any impending danger in following them; and (4) that they manufactured Agent Orange without any negligence on their part.

In short, the defendants claim to have served their country's military needs without any shortcomings in their performance. They contend that but for the government's decision to use Agent Orange in southeast Asia the defendants would not have manufactured Agent Orange and the harm claimed to have been caused by the herbicide would never have occurred. Defendants further note that they were in no position to question the government's military judgment to use the herbicide as a tactical weapon during the Vietnam war, and had no choice under federal law but to comply with the government's order to produce Agent Orange.

Thus, defendants argue that they were merely agents of the government acting under the compulsion of federal law in patriotic furtherance of the Vietnam war effort. They claim to have produced an effective product that met, in every respect, the government's detailed specifications and expectations. Defendants argue that well established legal principles, sound social policy, and general principles of fairness dictate that they not be held liable for injuries resulting solely from their strict compliance with government contracts for war related products that performed exactly as expected in their military uses.

Plaintiffs argue (1) that defendants should not be permitted to "hide" behind government specifications to avoid liability, and (2) that summary judgment is inappropriate because the defendants "bald assertion that the [government] specifications were, in fact, complied with" cannot be accepted by the court as true without a trial to determine whether defendants' allegations with respect to the government contract defense are factually correct.

C. SUMMARY JUDGMENT DENIED

[30] The standards for consideration of a motion for summary judgment pursuant to F.R.C.P. 56 are well established and need not be repeated here except to note that on a motion for summary judgment the court "cannot try issues of fact; it can only determine whether there are issues to be tried", *American Manufacturers Mutual Insurance Company v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (CA2 1967), *cert. denied*, 404 U.S. 1063,

tious act or omission must be held accountable for the damages caused and thus motivated to prevent future torts.

[28] Second, the policy considerations that lend continuing vitality to governmental immunity argue for "extension" of that freedom from liability to some government contractors. As one court put it:

> To impose liability on the contractor [for the government's planning failures] would render the Government immunity * * * meaningless, for if the contractor was held liable, contract prices to the Government would be increased to cover the contractor's risk of loss from possible harmful effects of complying with decisions of [governmental] officers authorized to make policy judgments. *Dolphin Gardens, Inc. v. United States*, 243 F.Supp. 824, 827 (D.Conn.1965).[39]

These considerations take on increased significance when the government contracts with manufacturers of military ordnance in war time. Where, as here, manufacturers claim to have been compelled by federal law to produce a weapon of war without ability to negotiate specifications, contract price or terms, the potential for unfairly imposing liability becomes great. Without the government contract defense a manufacturer capable of producing military goods for government use would face the untenable position of choosing between severe penalties for failing to supply products necessary to conduct a war, and producing what the government requires but at a contract price that makes no provision for the need to insure against potential liability for design flaws in the government's plans.

A recent New York State court decision, *Casabianca v. Casabianca*, 104 Misc.2d 348, 428 N.Y.S.2d 400 (S.Ct. Bronx County 1980), recognized the problem of a manufacturer who provides products necessary to conduct a war under contract with the government. In *Casabianca* the court held that, as a matter of public policy, a manufacturer who supplies equipment to the United States Army in a time of war pursuant to government specifications may not be held liable for any inadequacy in the plans because:

> A supplier to the military in time of war has a right to rely on such specifications and is not obligated to withhold from the United States armed forces material believed by the latter to be necessary because the manufacturer considers the design to be imprudent or even dangerous. His conformance, under such circumstances, to the specifications provided to him should be, and is, a complete defense to any action based on design, whether faulty or not. *Casabianca v. Casabianca*, 104 Misc.2d 348, 428 N.Y.S.2d 400, 401–402 (S.Ct. Bronx County 1980) (Stecher, J.)

[29] Although some courts ignore or deny its existence,[40] the Supreme Court's recognition of the defense in *Yearsley v. W. A. Ross Construction Company* and the application of the defense in numerous other decisions certifies its continuing viability.[41]

B. THE POSITIONS OF THE PARTIES

As defendants would apply the government contract defense here, plaintiffs' claims against the corporate defendants could not be actionable because the United States Government (1) invented Agent Orange, (2) experimented with herbicides for

39. This may even understate the effect of imposing liability on government contractors so situated, because those contractors would presumably seek to insure against possible liability for the government's inadequacies and insurance companies do not spread the risk of loss without some financial benefit to themselves. If taken to the extreme, the government might ultimately find it less expensive to waive immunity under the circumstances, accept liability for injuries caused by its planning failures, and thereby avoid the expensive middleman.

40. *See Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867, 873–74 (CA8 1974); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1013–15 (CA5 1969).

41. *See e. g., A. J. Myers v. United States*, 323 F.2d 580, 583 (CA9 1963); *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Company*, 295 F.2d 14, 16 (CA9 1961).

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is immune under the
nted. *See discussion*
s beyond dispute that
ed by defendants here
e of war

the court's considered view, the approach here outlined balances the numerous interests in a way that will best serve those goals.

VI. DISCOVERY

Under the case management plan set forth in section III of this pretrial order, it is appropriate for discovery to proceed now as efficiently and expeditiously as possible on all Phase I issues. Most of the material necessary to support the defendants' government contract defense is in defendants' own control. Plaintiffs have continually urged an early trial, and lead counsel has repeatedly represented to the court that depositions of a limited number of Dow employees are the only discovery necessary before proceeding to trial. Although the government is no longer a party to this action, the Department of Justice has promised the court cooperation with all parties in facilitating full and complete discovery of all material within the government's control.

To date, very little discovery has taken place. By practice and procedure order dated May 18, 1979, this court stayed all discovery proceedings until further court order; by order dated February 5, 1980, this stay was modified to allow the parties to "conduct voluntary discovery by agreement among themselves". In addition to whatever voluntary discovery has taken place, the court on specific motions has permitted the depositions of certain plaintiffs with a "high risk of unavailability for trial" to be taken. *E. g., Hartz v. Dow Chemical Company*, 79 C 2752 (EDNY GCP) (memorandum and order of January 18, 1980).

[31] The first wave of Phase I discovery is to commence immediately, and the stay is vacated, but only for this purpose. The first wave of discovery, as defined in § 1.50 of the Manual for Complex Litigation, is designed to disclose all preliminary matters necessary before proceeding to discovery on the merits, specifically:

(1) the names and location of witnesses whose written interrogatories or depositions upon oral interrogatories may be sought on the merits; (2) the existence, location and custodian of documents and other physical evidence, the production of which may be sought on the merits; and (3) information concerning the transactions upon which the claims for relief are based.

The parties are directed to serve and file first wave interrogatories by January 15, 1981. Any objections to these interrogatories shall be served and filed on or before January 23, 1981. Defendants shall confer and submit joint interrogatories and objections. Failure to timely object will operate as a waiver of any and all objections. The objections will be discussed and ruled on at the conference scheduled for January 30, 1981. The court does not anticipate frivolous objections to any interrogatories, but any objections made without a good faith basis will be summarily denied as well as subject their proponent to sanctions. The answers to all first wave interrogatories are to be served and filed by February 13, 1981.

The court has previously received and reviewed several suggestions for orderly discovery advanced by the parties. However, those proposals were made without the benefit of the court's case management plan. Counsel are to submit memoranda outlining their thoughts and proposals for the remainder of Phase I discovery by January 23, 1981. Proposals should focus on the scope and type of material to be discovered, as well as the sequence and timing that discovery should take. Those proposals should have as their goal the expeditious, free and open exchange of information contemplated by the Federal Rules of Civil Procedure and required by this court in all cases before it. At the January 30, 1981 conference the court will hear argument about the various proposals and soon thereafter will establish a comprehensive discovery and trial schedule to govern the remainder of Phase I.

VII. STATUTES OF LIMITATIONS

[32] In light of the Second Circuit's decision that federal question jurisdiction is inappropriate in the context of this action,

92 S.Ct. 737, 30 L.Ed.2d 752 (1972) and the court "must resolve any doubts in favor of the party opposing the summary judgment motion". *SEC v. Research Automation Corp.*, 585 F.2d 31 (CA2 1978).

Having considered all the authorities cited and the arguments of counsel, the court is satisfied that a government contract defense exists and has possible application to the facts at bar. Plaintiffs are correct, however, to the extent that they argue the presence of fact issues which preclude summary judgment since any application of the government contract defense in this context will require that defendants prove that their relationship with the government and performance under the government contract was essentially as they describe it. In short, whatever the minimum showing necessary to support a finding for defendants on the government contract defense may be, allegations with respect to their contract performance and relationship with the government present issues of fact requiring trial.

Resolution of the fact issues by separate trial will determine whether defendants have a complete defense to the claims asserted against them. This is the reason the court has chosen the government contract defense for the Phase I trial as discussed in section III above. The elements of the defense will be uniquely adapted to consideration and adjudication, separate and apart from the issues of liability, causation and damages. As a practical matter, discovery as to these discrete issues will be rather narrow compared to the discovery that some of the other fact issues presented by this action may require.

Although satisfied that the government contract defense exists and has possible application here, however, the court is not satisfied that the parties have sufficiently focused their attention on the precise standards applicable and the specific facts defendants need to prove to make out the defense under the circumstances of this action.[42] Accordingly, the parties are to prepare (1) briefs focusing on this issue, and (2) proposed special verdicts to be presented to the jury in the Phase I trial. Of course, the proposed special verdicts will not be binding at this stage; rather, they are to assist counsel and the court in focusing upon the issues that require discovery and trial in Phase I. These items are to be served and filed by January 23, 1981. The court will hear argument on the standards and elements of the government contract defense as applied to this case and will discuss the proposed special verdicts at the pretrial conference to be held January 30, 1981 at 9:00 a. m.

As noted above, the court believes that early resolution of this potentially dispositive issue will serve the interests of justice and judicial efficiency. Although justice is always served by the efficient management of any action, this is especially true in this case where any other procedure adopted might subject the parties to years of discovery and trial only to have later generations of judges, lawyers, and litigants discover that an early trial of the government contract defense might have preempted the need for almost all of the discovery undertaken and saved thousands of person-hours and millions of dollars associated with those unnecessary efforts. The parties here are entitled to have this action handled as efficiently and expeditiously as possible and, in

42. For example, some courts view the government contract defense as coupling the government's sovereign immunity with the contractor's obligation to follow the government's directions, *see Green v. ICI America, Inc.*, 362 F.Supp. 1263, 1265 (E.D.Tenn.1973). It may well be that the sovereign's immunity from suit is not an essential element of the defense. *See Dolphin Gardens, Inc. v. United States*, 243 F.Supp. 824, 827 (D.Conn.1965); *A. J. Myers v. United States*, 323 F.2d 580, 583 (CA9 1963). Similarly, other courts frame the elements of the defense in terms of military necessity. *See Casabianca v. Casabianca*, 104 Misc.2d 348, 428 N.Y.S.2d 400, 401–402 (S.Ct. Bronx County 1980) (Stecher, J.). Whether these elements are essential to the successful assertion of the government contract defense, however, need not be determined because the court has determined that the sovereign is immune under the circumstances here presented, *see discussion* Section II *supra*, and it is beyond dispute that the Agent Orange produced by defendants here was manufactured in time of war.

In re Agent Orange, 2 Cir., 635 F.2d 987 (1980), diversity jurisdiction under 28 U.S.C. § 1332 may provide the sole basis for subject matter jurisdiction. Since federal courts sitting in diversity apply state law on questions involving the statute of limitations, *Guarantee Trust Company of New York v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945), and since this action will ultimately involve the statute of limitations of most, if not all, of the states, counsel shall submit briefs setting forth the applicable law of each state on the subject. Even if the pending petition for rehearing before the Second Circuit en banc is granted and federal question jurisdiction is ultimately determined to be a valid ground for subject matter jurisdiction, this survey would be helpful, even necessary, in determining what the federal common law is or should be. The briefs shall be served and filed by January 30, 1981, and reply briefs, if necessary, shall be served and filed by February 6, 1981.

VIII. CONCLUSIONS

Government's Motion to Dismiss:

The government's motion to dismiss is granted, and the third party complaints against the government deemed to have been made in all actions under MDL 381 are dismissed.

Case Management Plan:

The case will be tried in "phases" and in accordance with the procedures and principles outlined above in the section of this order entitled "The Case Management Plan".

Plaintiffs' Motion for "Serial Trials":

Plaintiffs' motion for serial trials is denied except insofar as the case management plan adopted by the court incorporates the suggestion to use "phased" trials. The denial of the motion is without prejudice to renewal at some future date when the court may seek additional input as to the future course of this litigation.

Plaintiffs' Motion to Amend the Complaint:

Plaintiffs' motion to amend the complaint by adding the United States government and many of its officials on a theory of constitutional tort is denied without prejudice to the commencement of a separate action.

Class Action:

Plaintiffs' motion for class action certification is granted to the extent of conditional class action certification pursuant to F.R.C.P. 23(b)(3). In all other respects the motion is denied. In addition:

By January 23, 1981 counsel are to submit their suggestions as to how "the best notice available" may be given to the members of plaintiff class.

By January 7, 1981 counsel for plaintiffs shall serve and file a proposed form of notice. Counsel for defendants shall meet by January 16, 1981 to discuss and, if possible, agree upon suggested modifications to the proposed notice. Defendants' suggested modifications, if any, shall be served and filed by January 23, 1981.

By January 16, 1981 counsel for plaintiffs shall submit a list of no more than 12 persons as proposed class representatives. By January 23, 1981 defendants shall serve and file any suggestions, objections or comments they have with respect to the proposed representative plaintiffs. At the January 30, 1981 conference the court will determine who the named plaintiffs will be.

Defendants' Motion for Summary Judgment:

Defendants' motion for summary judgment is denied because the defendants' assertion of the government contract defense presents fact issues requiring trial. In addition:

By January 23, 1981 the parties are to serve and file (1) briefs focusing on the precise standards applicable and the specific facts defendants need to prove in order to successfully establish the government contract defense, and (2) proposed special verdicts to be presented to the jury in the Phase I trial. The court will hear argument on the standards and elements of the government contract defense as applied to this case and will discuss the proposed special verdicts at the pretrial conference to be held January 30, 1981.

Discovery:

The stay of discovery previously imposed is vacated to the extent that the parties are to engage in first wave discovery of Phase I issues. In addition:

The parties are to serve and file first wave interrogatories by January 15, 1981. Any objections to these interrogatories shall be served and filed on or before January 23, 1981. Defendants are to confer and submit joint interrogatories and objections. Failure to file timely objections will operate as a waiver of any and all objections. The objections will be discussed and ruled upon at the January 30, 1981 conference. The answers to all first wave interrogatories are to be served and filed by February 13, 1981.

Counsel are to submit memoranda outlining their thoughts and proposals regarding a comprehensive plan and timetable for Phase I discovery by January 23, 1981. The court will hear argument about the various proposals for Phase I discovery at the January 30, 1981 conference.

Statutes of Limitations:

Counsel shall serve and file briefs setting forth the applicable law relating to the statutes of limitations of every state by January 30, 1981. Reply briefs, if necessary, shall be served and filed by February 6, 1981.

Next Conference:

The next pretrial conference will be held before the undersigned at the Long Island Courthouse on January 30, 1981 at 9:00 a.m. Any party wishing to propose additions to the agenda should do so by letter to the court received no later than January 27, 1981.

SO ORDERED.

Steven Clair DICK, an incompetent, by Gordon Clair Dick, his guardian ad litem, Plaintiff,

v.

Dr. Asle Kingsley LEWIS, Lisbon Memorial Hospital, and Jane Doe and Rachel Roe, whose true names are to plaintiff unknown, Defendants.

Civ. No. A78-3018.

United States District Court,
D. North Dakota,
Southeastern Division.

Jan. 28, 1980.

Medical malpractice action was brought against physician attending plaintiff's mother on birth, claiming that alleged negligent treatment resulted in plaintiff's cerebral palsy, spastic paraplegia and mental retardation. Motion for dismissal was made at close of plaintiff's evidence. The District Court, Benson, Chief Judge, held that even assuming perinatal asphyxia to be a cause of cerebral palsy plaintiff failed to prove that such a condition existed, in that, among other things, there was no showing of any need for caesarean delivery in that subsequent pelvimetry revealed that mother's pelvic measurements were slightly larger than average and although mother entered hospital 72 hours prior to birth she was in actual, as opposed to false, labor for approximately 14 hours and no unusual condition of the child was noted on birth.

Judgment of dismissal.

Judgment affirmed, 8th Cir., 636 F.2d 1168.

1. Physicians and Surgeons ⇐15(12)

Even assuming perinatal asphyxia was cause of plaintiff's cerebral palsy, North Dakota physician who delivered plaintiff in 1960 was not guilty of malpractice in failing

VETERANS OF FOREIGN WARS OF THE UNITED STATES

THE EXECUTIVE DIRECTOR
WASHINGTON OFFICE

March 31, 1995

Mrs. Hillary Clinton
The White House
Washington, D.C. 20500

Dear Mrs. Clinton:

I am writing to once again thank and commend you for your direct involvement on behalf of those Persian Gulf veterans who are sick or disabled as a consequence of their service in the Persian Gulf. Your meeting with VFW Commander in Chief Allen F. "Gunner" Kent in February of this year clearly bespoke a sincere commitment to work toward a resolution of the issues confronting these brave young Americans. I can assure you that the VFW's commitment is no less in this matter. This organization will exert its every influence to ensure that Persian Gulf veterans are fully and compassionately provided for.

In this regard, as the White House sets about establishing the President's Advisory Committee on Gulf War Veterans Illnesses, we are concerned that rank-and-file Persian Gulf veterans be represented on that body along with senior military personnel and members of the scientific and medical community. The VFW views it as absolutely critical that veterans representing the average Persian Gulf military enlistee -- the men and women who actually fought the war -- be included as members of the Committee. Not only have they earned such representation through their heroic actions in the Gulf, but it is only these former enlisted personnel who have the shared experience and empathy to fully see to the interests of their comrades in arms.

Additionally, it is our estimation that many Persian Gulf veterans will find it suspect if no such former enlisted personnel are included on the Committee. We point to the fact that of the over 2,500 respondents to the VFW's Persian Gulf Registry, 46% reported not being on either the VA or DoD's registries. While it is likely there are a number of reasons for this, it is evident that there is a certain distrust of the "system" among some Persian Gulf veterans. In our estimation a failure to include representatives of the non-career combat soldier on the Advisory Committee will undermine its creditability among members of the very group it would seek to help.

Mrs. Hillary Clinton
Washington, D.C. 20500
March 31, 1995

So I would conclude by again thanking you on behalf of the entire VFW membership for your direct involvement in this issue, and urge that former enlisted non-active duty Persian Gulf veterans be included as members of the President's Advisory Committee on Gulf War Veterans Illnesses.

Sincerely,

James R. Currieo
JAMES R. CURRIEO
Executive Director

FACSIMILE MESSAGE

TO: Susan, Agency Liaison Office
The White House
FAX #202/456-2992

FROM: *DESERT STORM JUSTICE FOUNDATION*
GINA WHITCOMB, PUBLIC AFFAIRS OFFICER

DATE: August 9, 1995

PHONE: 405/230-4552 (day), 405/348-1722 (evening)

NO. OF PAGES: 3 (including this page)

MESSAGE

Susan, thank you for your calls - sorry I was out of the office when you called. I look forward to hearing from Mrs. Clinton's office, and even more so to hearing Mrs. Clinton speak to the group on Monday.

Please forward the attached to Mrs. Clinton as it illustrates what is repeatedly happening all over the U.S. with Gulf War Veterans, and probably Veterans in general. In the V.A. hospital's efforts to move Veterans through their appointments in a very few minutes, misdiagnosis are occurring at alarming rates. So much of the time the attitude of V.A. hospital personnel is **apathy** - from the clerks on up to the doctors. I have personally visited with Veterans all over the country that report similar incidents. And, of course, I have first-hand knowledge of the horrors that have happened to my son, even at the so-called "special referral centers for Gulf War Veterans". The most recent problem is that Jason returned from the West L.A. referral center in May and **<u>still does not have any diagnosis, plus his file is still there, both preventing any follow-up appointments, all while his condition worsens.</u>**

Susan, again - thank you for your help and your caring attitude. I hope to someday thank you in person.

Gina Whitcomb

DJ tried to meet with Gina but was unable to set up a time

950809/0648/jcs
FAX-405-230-5638

From: SFC Johnny C. Stansbury
515 East Seventh Street
Ada, Oklahoma 74820

To: Mrs. Cina WHITCOMB
Desert Storm Justice Foundation

Subj: Testimony of Illness from service in the Gulf War

First off, I will tell you that I am a career soldier, have served in Vietnam/Special Operations in Korea/Cuban Relocation and the Gulf War. I was called up for Active duty for Desert Storm on 01 September 1991 and served in the Gulf until 01 May 1992.

I arrived back in the states on 04 May 1992 at Fort Jackson, during my out processing physical I found out that I had suffered Vision loss, and was issued glasses at Fort Jackson, my vision before that was 20-20.

I arrived back in Oklahoma on 08 May 1992, and became ill on 24 May 1992, while on leave, I finaly went to go to Valley View Hospital on the 29 of May 1992, and was under doctors care until 31 August 1992. During the later part of November 1992, I became ill again, I went to the Hospital on 05 December 1992, for what I thought was the Flu. I suffered Massaive Congestive Heart Failure.

I remained at Valley View Hospital until 15 December 1992, do to the fact they tried to get me transfered to the Veterans Hospital in Oklahoma City, but they were told that I was not a veteran because I had never been wounded. I was finaly transfered to the Veterans Hospital on 15 December 1992 and stayed there until 21 December 1992, then was placed in a out-patient status. During my service in the Gulf, I was in Daharan, King Kalid Military City, Kuwait, and Post of Daman, Rayiad.

I am now service connected for my heart condition, this took Seven Hundred and Forty days, form the Veterans Office in Kentucky I was denied, after my file was transfered to TN. I was later awarded 30%, then it was upgrade to 60% on 25 July 1995.

As for all of the other illnees that I have from the Gulf I have been denied benefits, my skin condition was original listed as exposure to gamma rays and or Radition, now I have been told that i have Keriosee which people get from sun bathing I do not sun bath, (I have red hair and am light complected.) I have had 24 skin leasion removed from my hand arms and feet, I have been told to give up my job as a mechnic, because this is what causing the skin problems, (I have never been a mechnic) also I have been told that is was do to Posion Oak/Ivy, there none around my house.

I suffere from massive joint pain, in my legs feet, back ,hips and neck I was told that this was cause from scraple left in my knees from service in Vietnam, (I have never been wounded) even after I showed the doctor's that there were no scars they still listed it as war wounds.

I also suffer from blacks out, I have wreck my truck twice during these black out. And have had them taking showers or just standing in the house

950809/0856/jcs
FAX-405-230-5638

Testimony continued: page two

I have requested through the Army for Medical Retirement, this was done in December 1994, but I was called up for Active duty in January 1995, but had to decline do to bad health.

I just received my paper work back from, Nashville and once again I had been denied disability, for all of the other major problems that I have suffered from since my return from the Gulf.

I have been in a Heart Research Program, using a new type of drug for people with bad hearts, I have been in this program for two years now, if the medicine does not work then a Heart Transplant is recommended, but my blood is bad so that rules out the Heart Transplant.

They have said that they could do the corrective surgery on my joints, but since I have a bad heart they will not do it.

Since my return from the Gulf, in May of 1992, I have been unable to work, if it were not for the fact that my Mother, lives in Ada, I would have ended up in the street.

The bigest problem other than my health is that after serving in two wars, and serving my country that I find I only suffered injurys by my own side. (Vietnam/Agent Orange and White/Desert Storm, exposure to radations and Chemical war fare again.

Since I have asked for Medical Retirement from the Army I have only been told that they will wait until my enlistment runs out and will most likely just discharge me with no benefits this is after 24yrs 09mos 20das. My enlistment is up on 06 March 1998, that is if I am still alive. My chances of recovery are set at 5%.

Respectfully Submitted

Johnny C. Stansbury
Sargeant First Class
United States Army
Veteran/Vietnam/Korea/
Cuban Relocation/Desert Storm

Hi Bryan,

These are some of the letters I get and there is one I wa
s
looking for and couldn't put my hands on it tonight... and now my eyes are starting toburn so will try to look tomorrow if I can.. B
ut at least these are some to start..

Before, Vet can join group (Online) they have to submit a profile.
It gives an idea as to symtoms and area etc.. So by reading Mrs Cl
inton will get an idea of what they are going through...

Have some on the spouses and children (one I was looking for to
send to you). If I can't get it tomorrow.. Will fax to Mrs. Clinto
n during
the week.. so you might alert her to expect.. OK? Thanks..

Hate to put a damper on your evening, my friend.. but the amount of wives, girlfriends, and children are starting to surface big time.. Think they are getting braver due to media exposure...

Have a good day, and sloooooooooooowwwww down... How DOES your wife keep up with you... <BG>

DStormMom

==

Dear Mom,

I recieved your reply this A.M.,sorry to hear that one of your so
ns is sick.
I hope he gets better.You were right,I was in the Army.I was relea
sed Feb. 93. I served in the 82nd Airborne Div. at Ft. Bragg,N.C., in the 3/319 A.F.A.R. (airborne field artillery regiment). I serve
d in
the Gulf from Aug.21- April 03 (90-91 reps.).I am married with two kids
(1yr.-3 mnth).I started getting sick within a month of returning h
ome.
The first sign was an infection on my chest that balloned up to th
e size
of a golfball in 2 days.I had this removed,but it still leak,s mat
ter to this day.The V.A. told me the only thing they could do is cut out the
whole area and pull the skin together and sew it up.Since the infe
ction I've developed other problems,I.E.:hairloss,respitory proble
ms,joints hurting,and more infections (though none as bad as the f
irst)
This seems to be the most common of ailments aflicting D.S. vets.I don't know if I was exposed to chemical agents or not (a scud wa
s blown up
over us once but the chem. alarms never went off,maybe because we never
set them up?) Maybe its caused by exposure to the oil fires?I was in Iraq for 29 days about half of which it looked like evening al
l day because of smoke,one day we had rain that had oily soot in i

t (very irritating).
You can't know how much I appreciate the work you are doing.If you think
it will help,feel free to use any information I have supplied.
Thank you for your time,sorry this letter was so long.
Bill ==

Hi Mom,
Until 08 December 1993 I was active duty Army. I deployed to Saudi Arabia on 15 October 1990. My primary job was medicalsupply, but in Saudi I had many jobs as did others. I was in charge of field sanitation. This included getting fuel for my unit, burning urin and feces, cleaning latrines, spraying pesticides, and driving to various areas to pick up supplies. On 13 November 1990 I had a sudden onset of abdominal pain.
I was sent to various units and diagnosed with an ovarian cyst. My pain continued to increase. I had a culdocentisis, and a laparoscopy done in Saudi. In January I was sent back to the United States. Since my return I have had a hysterectomy, appendectomy, cystectomy, liceing of adhesions multiple abdominal and vaginal injections. I have been on many drugs, seen many Doctors. I have been told by all that they do not know what is wrong with me. This is every Doctor from neurology, orthopedics, GYN, internal medicine, PM&R, psychology etc... While in the military they looked at everything except the fact that this started in Saudi. I asked repeatedly about this. I have documents that date back as far as Jan. 1991 that state alot af my symptoms. My condition today is much worse than it was in 1990. I still have extreme abdominal pain, pain that runs down both my legs (I loose the use of my legs often), headaches, muscle and joint pain, I get shakes in my upper and lower extremities (my bones in
my arms and legs hurt during this time),pain after bowel movements and urination. I was medically discharged, but because the military didn't have a diagnosis I was sent to see more psychiatrists. I had seen five to this point. The last two I saw (making this seven in all) came up with the daignosis that got my medical discharge. I was diagnosed with Somatic Pain Disorder. I was told this was the only way to maintain my medical benifits. I am now living in Arizona. I was stationed in Fort Meade, Maryland prior to my discharge. I came to Arizona to be near my Parents. I am not able to drive, I need help going to the bathroom, I can't even do things that most of us take for granted, like wash the dishes. I use a wheelchair to shop (when I'm not feeling so bad that I can). my life has drastically changed. I hope that someday very soon someone can put a name to what I have. This alone would be a big relief.
Karen ==

Dear DStormMom,

A brief profile follows:

Possible contact with chemical agents, as we were camped in Dhahran's infamous "Scud Alley", where numerous Scud missiles were inter

t (very irritating).
You can't know how much I appreciate the work you are doing.If you think
it will help,feel free to use any information I have supplied.
Thank you for your time,sorry this letter was so long.
Bill ===

Hi Mom,
Until 08 December 1993 I was active duty Army. I deployed to S audi Arabia on 15 October 1990. My primary job was medicalsupply, but in Saudi I had many jobs as did others. I was in charge of fi eld sanitation. This included getting fuel for my unit, burning ur in and feces, cleaning latrines, spraying pesticides, and driving to various areas to pick up supplies. On 13 November 1990 I had a sudden onset of abdominal pain.
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Karen ==

Dear DStormMom,

A brief profile follows:

Possible contact with chemical agents, as we were camped in Dhahra n's infamous "Scud Alley", where numerous Scud missiles were inter

cepted above us by Patriots.
Ordered by C.O. to take Pyristignone Bromide tablets, which caused shaking in my hands and twitches in my facial muscles. I disconti nued use on my own accord, even after threat of Article 15 Punishm ent. I also received shots before deployment that were for "Anthra x", and in-country for reasons unknown. These shots were not inclu ded in my Military shot record, and I have been denied access to i t and my Medical Records by the Arizona State Dept. of Military Af fairs.
Possible GWS symptoms: Increased allergic reaction to dust, smuts, molds, and pollen. Chronic upper respiratory infections. General feeling of fatigue. Muscle cramps in arms, legs, and back. Joint p ain in knees, wrists, elbows, neck and back.
I underwent counselling to stop nightmares and violent behavior fo llowing DStorm.I returned stateside 6 JUN 91.

I am not registered with the VA, as I fear they will use me as a G uinea Pig, just like the Army did with the Pyristign one Bromide tablets.

I hope this is the info you were looking for. May God aid you in y our crusade.

Thank you. Mike ---

Smith
RR 1 Box 426
Beech Creek, PA 16822.

PM
7 FEB
1995

Bryan Hall
918 Catawba Ct
Baltimore, MD
21227

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. statement	Re: symptoms (partial) (1 page)	n.d.	b(6)

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Clinton Presidential Records
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Maggie Williams (Subject Files)
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FOLDER TITLE:
Letters [2]

2013-0359-S
ry1486

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

DZ Called (b)(6) Trying 8
contact HRC

(b)(6)

My symptoms come and go. Back pain, fatigue, dental situation is stable-- trying to get crowns to stay on. Loose teeth, gums bleeding since I got home but that had stopped, fillings, root canals, caps, extract one. Memory problems and spelling ability went down hill. When I sleep its a dead sleep. I sleep in on weekends but I'm still tired. Pap smear, VA was concerned, second opinion said it was infection. Took antibiotics and it cleared up. Bone pains back and legs. Nerve twitching. Vision ok now, blurry in the past. Chest pains went away. [002]

My daughter (is 8) has 2 spots on her cheek for 3 months. Some bone pains. Pediatrician said it looks like excema. They say the same about mine (mine responds to cortisone cream but goes away). Respiratory infections, need to change antibiotics a lot. Has chest pains. Doctor says there's nothing there. She's been sick about a year and a half. I keep her home from school sometimes; she wasn't like this before.

I got a horrendous flu the summer that I got home. High fevers, etc. My daughter got it too.

She can still play soccer sometimes. She has some kind of spot on the back of her eye. Another vet in Colorado Springs had a kid with the same problem.

(b)(6) is a nurse.

She had 8 cavities in one year, one tooth got absessed and had to be pulled. I asked if this was normal. He said it was unusual.

Meeting is set for March 10-12. Dr. Hyman, Dr. Nicholson, Betty Mekdeki, update on the class action suit, invited Dr. Ray, invited press for panel presentation.

Group leaders/activists, those who testified, etc. Paul Sullivan, etc. Jim Tuite is coming to brief us. He wants to set up a medical foundation.

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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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RUTH GORDON MCGILL, M.D.
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Written Testimony to the House Veterans' Affairs
Subcommittee on Oversight and Investigation
on Health Issues and Gulf War Veterans
June 8, 1993

Good morning. My name is Ruth Gordon McGill. I am a psychiatrist, a millionaire, and a civilian. I have Gulf War Syndrome (GWS). To the best of my knowledge, I am the first sick physician in the world to be given the double diagnoses "oxidative phosphorylation disorder (OxPhos) aka mitochondrial encephalomyopathy (MEM) plus "multiple chemical sensitivity (MCS)." I am certainly the first physician so afflicted to admit this in a Congressional hearing.

Prior to this hearing, I had interviewed eighteen sick veterans, about half in person and half by phone. Their symptoms were my symptoms, and their story is mine. I spent twelve years and more than $700,000 with more than twenty consultants in at least three major medical centers and half a dozen states. We found my answer,and I want to share the shortcuts and the price cuts with the military physicians in a technical briefing.

As a psychiatrist, I cringed every time I heard a witness or Congressman at this hearing use the word "stress," as it has too often been equated with lack of moral fiber, poor intestinal fortitude, and weak ego strength, and further used to so designate any group of political undesirables. The technical misuse of the word "stress" has contributed tremendous semantic confusion to our misunderstanding of GWS. Let us delete "just stress," which can be expected to clear up with rest, good food, peace of mind, and time. To further differentiate GWS from "psychogenic stress" or "psychogenic fatigue," I prefer the term "pathological fatigue." There are many kinds of pathological fatigue, but the unifying principle is this: none will clear up without medical treatment. Psychotherapy alone won't touch them.

I believe GWS is not one disease but a spectrum, that each veteran has more than one disease but in different combinations, and that one veteran's combination may or may not overlap another's so that at first they may not appear to be related. I believe that the combinations need be lumped into only four categories for which the diagnostic criteria are already known, that the connection between the four is the nervous system, and that the impact of nervous system dysfunction on each category has been grossly underestimated for decades.

Attachment I, Fig. 1 shows a Venn diagram with sets of patients or sets of symptoms of GWS. On my set diagram there is a place for all of the contributions offered by the nine physician witnesses, and for each of the six veterans, including Rep. Buyer and Mrs. Zuspann, who testified orally. It is an encompassing system offering a unifying pattern; nothing I say need be construed to conflict with anything offered by the other witnesses.

By far the largest group of patients has the mildest disease. I have included in one large circle those patients with mild nutrient deficiency, mild neurotoxicity, or both. The dual-cause theme is carried throughout the four sets, and deficiency/toxicity are the fundamental pillars of the nervous system connection. In both conditions the signs and symptoms, such as periperal neuropathy, mouth lesions, and rashes, may be similar. That the twin pillars, deficiency and toxicity, are two different causes does not matter; the basic treatment, i.e. aggressive repletion of vitamins, minerals, and other essential nutrients, is the same for both, although for each patient the regimen must be individualized, secondary effects must be managed, and determination of particular toxins may indicate particular treatments.

The moderately sick fall into two related sets, fibromyalgia (FM) and Chronic Fatigue Syndrome (CFS). Researchers agree that FM and CFS are "sister diseases," distinguishable but strongly overlapping. Again, I believe that the link between FM and CFS is neurological, and that the dual theme deficiency/toxicity applies to both to different degrees. Fibromyalgia bears the nickname "soldier's disease," so I have shown FM overlapping the largest circle more than CFS. Witness Hyman's ideas fit into the CFS set, and its area of overlap can be enlarged if Dr. Hyman's ideas prove to apply to more veterans.

By far the most sick, and I believe the smallest (less than 1%) group, are those who fit into the small circle labeled "OxPhos." These patients have the worst nutrient depletion, the worst toxic damage, and the worst neurological symptoms. I propose that the most expensive neurological testing be reserved for this group, including tests at the research level. The moderately sick must be given conventional neuro tests, but I believe that positive research test results for the very sick can be applied backwards by inference to the less sick, especially since the treatment is the same for mild, moderate, and severe.

Attachment I, Fig. 2, shows the similarity of GWS to Environmental Illness (EI) of Randolph. Almost all EI patients have pathological fatigue. Nutritional deficiencies have been documented in major subsets of this population. Probably a third have FM, and another fraction fulfils criteria for CFS. There is strong overlap with allergic disease, some classical but many atypical due to the chaotic interaction of allergies with more than one complication/variable. MCS/allergic disease is a cloud over <u>all</u> EI patients; on Fig. 2 I leave open circles for those GWS patients who do not complain of hypersensitivity to chemicals.

I propose that the veterans fell ill in a spectrum, with the largest mild group losing water-soluble vitamins, and that the most ill proceded to deep, profound depletion of nutrients rarely found to be deficient, such as choline, carnitine, and CoQ10. Toxins are known to compete with and to deplete nutrients, and restoration of nutrients has been found to improve and speed recovery from toxicity of many kinds.

Given its modern description in World War II, FM probably appeared in survivors of the Lewis and Clark expedition and Napoleon's disastrous campaign in Russia. These campaigns were attended by incredible physical hardships over a period of weeks and months, exceptional even in combat and usually avoided by the modern army. Critical to my concept of GWS is my idea that grueling physical labor in the hot desert is such an exceptional hardship. Last year chiropractor Chris Chalk told the Associated Press that the soldiers' excessive sweating caused vitamin depletion. In this case, the M.D. agrees with the D.C. GWS veterans share generalized nutrient depletion with MCS patients in whom vitamin deficiencies are common. Both sets of patients are well fed, but neither set is well nourished because plenty of good food is not enough. Illness drains the MCS patient. I propose that the demands of hot, heavy labor literally exceeded the capacity of the soldiers' digestive systems. Military physicians, dieticians, and MRE's are not to blame. Rather, neither the RDA nor the human digestive system was equal to the exceptional speed of ground deployment demanded in this war far more than any other (3). The RDA for combat and other exceptional stress conditions must be drastically raised. I propose that at least some soldiers drove themselves beyond their unique normal human capacity and paid for it.

The only area in which I depart from textbook nutrition is my own hypothesis that FM is caused by chronic choline deficiency/malutilization/hypersensitivity. We will have to be careful to distinguish the less serious choline deficiency of FM from the CoQ10 deficiency of more serious acquired MEM, as CoQ10 is an expensive supplement. I have lived with both conditions, I have controlled my own FM with choline metabolites, and I am still improving. Any textbook diagram of the cholinergic nervous system shows connections of numerous otherwise unrelated body systems and organs, and the organs so connected figure prominently in the complaints of veterans with GWS. The only surprise is that we have overlooked this for so long. There is no proof for the accepted view that FM is a rheumatoid disease; as a patient, I challenge this view.

Physicians have difficulty accepting GWS as a distinct disease because symptoms of lungs, skin, guts, muscle, and brain do not seem to be related. Witness Picou described neurogenic bladder; witness Zuspann described neurogenic hypersensitivity of guts and bronchi; witness Robertson described neurogenic pain and weakness of muscles. All complained of foggy thinking and neurogenic rash. We arrive at a pattern by widening our perspective to consider the connections of the nervous system. Now I propose that we find the target defect in the nervous sytem by enlarging our perspective with the electron microscope and considering the dysfunctional or damaged mitochondria, the particles in every cell of the body which generate the energy to keep the cell alive and doing its job.

The mitochondrion is a living battery. It even looks like a tiny battery, with the same arrangement of fluid-filled chambers we see in a car battery, with the same purpose to separate negative charge from positive charge. The problem with the vets' nervous systems is that their cellular batteries are low. The nervous system is the first to show dysfunction as a result of too little energy because its cells are the most demanding of energy and they heal poorly. Nevertheless, in severe acquired OxPhos all cells of the body may ultimately suffer from lack of energy. Like other specialists, neurologists are not accustomed to closely examining systems and organs other than their own interest, and I took my third neurologist by surprise by showing dysfunction of my pancreas, guts, endocrine glands, skin, bone marrow, and kidneys/bladder. That damage to mitochondria has many causes has been known for decades. We are about to learn that mitochondrial damage has more effects than we had previously estimated.

"OxPhos" is the name for low battery disease that refers to the target process of energy generation that is damaged. "Acquired mitochondrial encephalomyopathy (AMEM)" is the name for the same disease that refers to the target structures, brain and muscles, that suffer. No physician who has not lived with low battery disease could realize from the neurological literature that this is what our vets have, because patients described in the literature have much more striking neurological damage. My OxPhos is mild and I have reason to hope that the disease of most of the sick vets is even milder than mine. However, I second witness Roberts's statement that no soldier so afflicted before the war could have made it through boot camp. It is typical of the history of research in a new disease that the sickest patients are identified and studied first, and the milder cases turn up later, being gradually connected to the earlier, severe cases.

OxPhos was not identified in the veterans for three reasons. It is a concept of disease new to most neurologists, so only a few researchers readily recognize it. The VHA is chronically underserved in neurology; the veterans I interviewed had inadequate and inappropriate neuro exams and testing, and this is not a problem new to the Gulf War. The causes of mitochondrial damage are legion, as physicians will understand immediately from their biochemistry training alone. Most vets were exposed to more than one cause, and some exposures will not overlap in any way with others. This means we will not find a linear cause-effect relationship and the sooner we give up that idea, the better. The dogged, dogmatic search for the linear relationship is the single worst obstacle to the diagnosis of OxPhos in the vets. The relationship of multiple causes and effects in OxPhos, MCS, and other baffling disease is "chaotic," a mathematical term that has found wonderful application in biology.(5) It is possible to reason backwards from a chaotic situation, as I did, to discover the initial event (mitochondrial damage) and contributing variables (deficiency and toxicity); it is not possible to predict the effect in the individual patient except in the most general terms. Because of the mathematical impossibility of prediction, the burning question from witnesses and Congressmen about a screening test may not be answerable. If the vulnerable are pre-selected out by flunking boot camp, then acquired OxPhos in the fit remainder would be a matter of bad luck, and control a matter of prevention. Prevention of toxicity and deficiency is relatively easy and potentially very fruitful.

Physicians unacquainted with environmental illness complain that it is poorly defined. This is not true. It is, however, mathematically chaotic because every patient presents with at least three variables. A logical system of criteria for EI of Randolph, not shown on the set diagram, is as follows:

1. Multiple chemical sensitivity, with or without
2. Underlying metabolic or constitutional weaknesses and pre-esisting conditions, with or without
3. Allergic hypersensitivity, classical or atypical, and
4. Secondary complications of (1), (2), and/or (3).

Under each heading are potentially inumerable known and diagnosable conditions. It remains to be seen whether all GWS vets have allergies and/or MCS on formal testing, but even if some vets prove simple to diagnose, we are well into a chaotic pattern, and confusion over GWS shows that EI of Randolph is not just one disease, but a whole new paradigm of cause and effect, and a whole new specialty of training.

Despite the chaos, it will not be difficult to meet witness Blanck's goal of diagnostic criteria. Accepted criteria for occupational asthma and FM are in place. Criteria for pre-clinical nutrient deficiencies are a political, not a medical problem, but will have to be expanded; we should be ashamed of ourselves for hearing complaints of bleeding gums and not thinking of scurvy. Diagnostic criteria for both OxPhos and CFS will have to be enlarged; they are designed for research, not application. There remains the knotty problem of criteria for MCS.

The other physician witnesses will crucify me, but as a patient in distress I must expose this fact: the peer-reviewed literature on MCS is rotten with dirty intramural politics. In no other medical controversy have physicians used sick people as political footballs for personal, financial, and political advancement. Even the scientific method has been corrupted.(1,4) Only an article that concludes that MCS is psychiatric is politically correct and acceptable for publication. This conclusion is easily reached by performing the wrong procedures on the wrong patients at the wrong time under the wrong conditions, producing negative findings and "proving" that MCS is psychiatric by default. According to the principles of logic, it is impossible to prove a negative; according to medical politicians, even a negative is proof as long as it is p.c.

Everyone in medicine knows that it is career suicide to champion the MCS patient as a medical and not as a psychiatric problem. As a patient I can say this because chronic illness blew my career to smithereens years ago. Academicians who testify in toxic torts that MCS patients are psychiatric may expect to advance in the hierarchy and to collect more fees and more grant money to "prove" that MCS is not a medical problem, over and over again. Policians know well the adage that the more a lie is repeated, the more it is believed to be true. The great American psychologist William

James called this kind of group dynamic, this evolving group mindset, not a conspiracy but a "tyrannical machine." A sign of the intrusion of politics into diagnosis is the fact that the conclusion of Maj. Ann Norwood, MC, the Walter Reed team's own psychiatrist, that "relatively few described symptoms highly suggestive of PTSD," has been widely ignored. Maj. Norwood's work is honest but it has been twisted in use, just as have the psychiatric findings in civilian literature. Where positive psychiatric findings for MCS patients are described, they show that MCS patients have the same psychometric profile as pregnant women, cancer patients, and others with uncomfortable physicial conditions, but this finding has been explained away. It is generally known and just as readily disavowed that sixty percent of patients who score high on the MMPI scale for psychiatric complaints eventually turn out to have an undiagnosed medical problem. Such civilian patients are written off with the diagnosis of "somatization disorder," a diagnosis abused, like PTSD, as a wastebasket label.

Witness Mather has accurately testified that the widely accepted (read "p.c.") definition of MCS a) limits the pool of patients to those with documented exposure to known toxins and b)states that there is no widely accepted test for MCS. Mather is not to blame that this definition is widely accepted. It is even more narrow than the "Cullen definition" on which it is based. It is so narrow that it almost eliminates MCS as an operational topic altogether, although poor Cullen probably didn't intend this. Lawyers and politicians can see more readily than the physician what the problem with this definition is. a) It excludes almost all MCS patients by assigning them the burden of proof of their exposure and b) dismisses out of hand any test that might come up for MCS, because that would not fit the definition. In the military, this is known as Catch 22. Indeed, more than ten such tests have been gleefully dismissed by medical politicians. The whole point of the widely accepted definition is to anathematize MCS. It was written as if by a lawyer to protect the academician. It is the ultimate absurdity in defensive medicine, where medicine is written out altogether. It circumscribes a small domain, a "King's X" safe territory where the academician may perform research free from the harassment given to the mostly private physicians who dare to champion MCS in court and in public. It makes the patient prove to the researcher that he has MCS and relieves the researcher of any responsibility for proof whatsoever.

Academicians almost never testify for the MCS plaintiff because they observe that private physicians who do frequently get hauled before the state medical boards and slapped in turn for the "malpractice" of offering medical treatment to "psychiatric" patients who are a priori judged incompetent to select their own personal physicians. To say that academicians are terrified of losing their posts, their grant money, and their prestige over this controversy is an understatement. Witness Wall has testified that there are at least 1100 experts in occupational medicine who could be called upon to help the V.H.A. He is mistaken. Research in occupational medicine on MCS has been severely curtailed by terroristic politics and few academicians know beans about it. Instead, they have limited their efforts to very high quality work in the tiny circumscribed areas that are politically acceptable. Last fall I attended a convention where one of the nation's top occupational experts told us that he had worked with only three MCS patients. Academic occupational medicine is on the same learning curve as the V.H.A.

The honor roll of physicians who have been harassed for championing the MCS patient is a matter of public record. The list of articles "proving" MCS is psychogenic is available through Medline. Public statements from the American College of Physicians, the California Medical Association, and the American College of Allergy and Immunology say that MCS is psychogenic if not ridiculous.

Polite consensus at the 1991 National Research Council workshop on MCS held, gently, that the ACP statement is suspect because it was crafted by an internist who earns fees as an anti-MCS professional witness. The unsavory enforcement process of the CMA statement was struck down for violating the Bill of Rights and restraint-of-trade laws, although the substance was allowed to stand. The ACAI position is based upon the efforts of some allergists, also anti-MCS professional witnesses, who wandered out of their field and declared MCS a psychiatric disease; their psychiatric expertise can only be suspect. A handful of over-eager psychiatrists have pronounced MCS psychogenic based upon self-reporting psychometric profiles, although there is still no such thing as a laboratory test for psychiatric disease of any kind. The eager beavers threaten the entire premise of psychiatry by holding MCS researchers to higher standards of proof than they themselves can muster or abide, and they are outvoted by the sheer number of psychiatrists who actually suffer from MCS.

When witness Holsinger was asked if nations other than the U.S. knew and accepted MCS, he said he was not aware of any. It is true that most U.S. physicians are unaware of the positions of other nations on MCS; it is not true that it is unknown and not accepted abroad. In 1982 I obtained a Medline printout of references to "chemical hypersensitivity" in all languages. It was two inches thick, and the best references seemed to be abstracted from articles in eastern European languages I couldn't read. With the fall of the Iron Curtain and unveiling of ghastly pollution in eastern Europe and the former U.S.S.R., it is now clear why physicians in those nations had so much to write about. The definitive Canadian document, a report to the government of Ontario by a panel chaired by AAEM member Dr. John Gerrard (analogous to Miller and Ashford's report to the State of New Jersey), has been so misrepresented and distorted in the U.S. medical press that it is nigh unrecognizable. Most U.S. physicians mistakenly believe that it condemns MCS, but it says pretty much the same thing as the NRC report calling for more research. My own regimen includes CoQ10, known to improve tissue damage by "free radicals," a class of chemicals including pollutants. The Japanese take CoQ10 like candy; maybe we should be worried.

Any flat declaration that there is no accepted test for MCS is a lie, but few physicians realize this. Many tests have shown abnormalities in MCS patients in a chaotic pattern, but these tests have systematically been declared "okay" for patients with disease other than MCS and "not okay," "lab error," "poor quality control" (read p.i.) for MCS patients. New advances in neurological technology are ready to detonate the safe, limited, accepted definition. The new technology cannot be explained away. It differentiates between pathological (neurogenic) fatigue and psychogenic (depression) fatigue. I have been hospitalized five times in an environmental unit for prostration. I have taken the advanced tests and they show I have OxPhos. The sick veterans must be given these tests and the indicated treatment. I have made a matching grant of $30,000 to the AAEM for this purpose. The veterans shouldn't have to be millionaires, and they shouldn't have to overthrow the tyrannical machine, to get the diagnosis and treatment they have earned. It is not difficult.

No one will be more surprised than the neurologist to learn that MCS is a neuro logical disease. Given the political climate, the neurologist, who like most physicians has accepted the psychiatric misdiagnosis of the patient, will also be dismayed, appalled, and horrified to find the hot potato in his lap. I am pleased to help the neurologist find peace of mind by offering a physician-patient's definition of MCS.

> Multiple chemical sensitivity is neurotoxic, neuroinflammatory, neurometabolic hypersensitivity to environmental levels considered acceptable of chemicals considered to be of low toxicity. Most important target organs of MCS are brain, lungs, guts, and skin, in that order, as these are first in line to take the impact of chemical bombardment and/or are difficult to heal.

The acceptability of environmental levels and the toxicity of chemicals will vary with time and with more research. This sliding standard is not central to my physician's definition of MCS; it is the lawyer who would make it so. My definition is aligned with arguments from witnesses Violante, Wall, and Robertson that the disability of the patient should be adjudicated based on the condition of the patient and not upon the circumstances in which the condition was incurred, and that the "higher incidence standard" should not apply to persons demonstrably sick. My definition is proactively medical, not politicolegal or operational. There are different kinds of definitions, and mine offers no diagnostic criteria. Witness Miller has offered an operational definition that can be tested readily and which will generate the diagnostic criteria sought by the military team. The diagnostic criteria so generated will dramatically broaden the Cullen definition of MCS.

There are at least three good models in basic neuroscience which can easily apply to MCS. But these models, due to the political contamination of science, have been allowed to to applied only to animals, not humans. When Miller stubbornly defended the need for a long-term research unit in the face of aggressive questioning by ideological opposites Rep. Buyer and Rep. Kennedy, her stock soared with a scientific community that believes that a closed book is a closed mind is an obstacle to progress. I am delighted to second her request for said research unit.

It is not an accident that GWS turns out to be a neurological disorder mistaken for psychiatric, because it is a fact that disorders of the brain affect the mind. It is also a fact that psychiatric treatment will not heal a neurological disease. Neurologists and psychiatrists still flinch at the memory that once patients with atypical seizures, post-encephalitic Parkinson's disease, and Tourette's syndrome were written off as psychiatric.

Political intrusion into applied nutrition is second only to political intrusion into environmental medicine. Textbook knowledge in nutritional biochemistry was overlooked in the GWS puzzle because it is politically incorrect to diagnose deficiency in the well-fed U.S. population, and more so in the well-fed military. Intrusion has reached a crisis in the past several years, as FDA Commissioner Kessler has moved to ban and recall as many over-the-counter nutritional supplements as possible. His move is based on the FDS's mandate from the 1950's, long since rendered obsolete, but the FDA is not being nice about it.

In the past twelve years I have survived documented deficiencies of at least five essential nutrients, requiring hospital repletion followed by lengthy outpatient therapy. OxPhos patients are known to suffer a grab-bag of underlying and secondary metabolic problems, many relieved by supplements. My latest regimen was prescribed by a distinguished neurologist at a distinguished university medical center, and it is illegal. The veterans' grapevine hums with reports of improvement of GWS with supplements, and they are also illegal. The only thing more embarrassing than the fact that the treatments for GWS were discovered by the patients themselves is the fact that the treatments are against the law, so the law must be changed. Congress must pass the Hatch-Richardson bill (S.784 and H.R. 1709) to stop Commissioner Kessler from arresting Gen. Colin Powell for trafficking in illegal substances.

The mind is only responsible for itself, that is for maintaining its own sanity. The mind has very little control over the function of the nervous system and no control whatsoever over its structure. The most cockeyed optimist in in psychology still denies that a causal relation between emotion and structural lesions has been proven. (2) Recent breakthroughs demonstrating connections between n the nervous system and the immune system, impressive on their own, have been abused and twisted by premature claims that these studies have something to do with psychology. Such speculative elaboration leaps several quanta to the conclusion that they "prove" that the mind causes structural lesions by bad feelings. It is cruel to demand of our veterans that they cure themselves by thinking happy thoughts.

Civilian medicine has served the military badly, and the military ought to be hopping mad. The mystery illness is no mystery, but the military was caught unprepared as a consequence of the malevolent political suppression of research and communication about MCS, and an unacceptably large number of gallant soldiers are paying the price. The military should abandon civilian constraints and champion their own work. From time to time the military just can't help but make a wonderful contribution to medicine at large because they have to innovate out of dire necessity, although they are not primarily mandated to perform research. Now is the time.

Summary:

1. The veterans have pathological fatigue, ranging from mild to OxPhos, the most serious. Pathological fatigue manifests in the nervous system first and worst.
2. Multiple chemical sensitivity is a major aspect in nervous system dysfunction in GWS.
3. The target organs (structures) and target neurotransmitter systems (functions) may vary from patient to patient depending upon individual differences and circumstances of exposure.
4. MCS is reversible in early stages. MCS is treatable to a limited extent and improves slowly if at all, because the nervous system heals itself poorly.
5. Vitamin deficiency is a known cause of nervous system damage and dysfunction, and is notorious for being overlooked.
6. Toxicity is another known cause of nervous system damage.
7. Mitchondria are damaged and rendered dysfunctional by many kinds of nutritional and toxic insults. Consequences of mitochondrial damage are manifold.
8. Manifold variables dictate a chaotic mathematical pattern and negate a linear cause-effect relationship.
9. There is no medical controversy over MCS. This controversy is entirely political.
10. Speed of treatment is of the essence. Proper treatment is cheaper than neglect and prompt action is cheaper than delayed action.

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Wish List, Recommendations, and Proposed Legislation:

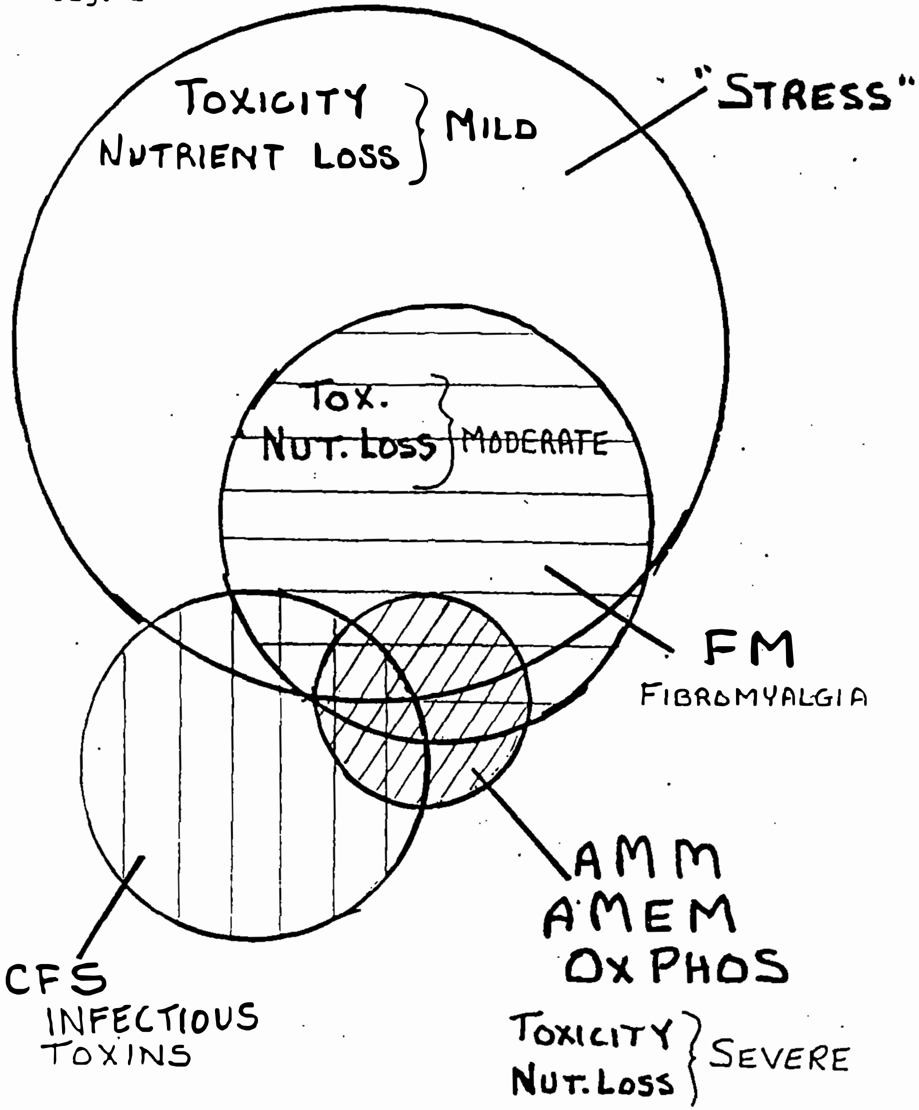
1. Support Hatch-Richardson bill (S.784) to revise FDA's mandate to regulate nutritional supplements.
2. Immediately fund Title 38 to provide reimbursement to private phsycians and facilities for care of both veterans and active military, in cases where military capability is inadequate.
3. Ask Secretary Brown to authorize civilian consultants, especially in Environmental, Occupational, and Nuclear Medicine and Neurology to certify Gulf War and earlier veterans for disability and treatment; ask VHA to accept such certification.
4. Fund $450,000 matching grant to U.T. H.S.C. San Antonio jointly with U.S. military for environmental research and treatment center. With private pledge in place, this would be in irresistable bargain and would more than pay for itself.
5. Match Ruth G. McGill's grant to AAEM for research on oxidative phosphorylation disorder in G.W. veterans. Funding is already in place in at least one V.A. - university joint facility for part of this research.
6. Fund NIH for more research in OxPhos and earmark funds for proposed San Antonio center.
7. Increase VHA budget specifically for recall and re-evaluation of veterans turned down for environmental disability.
8. Enlarge definition of qualification for purple heart medal to include metabolic injury.
9. Call on vendors of high-tech diagnostic and experimental equipment to give the military some free deomonstrations on GW veterans. They will probably be delighted, as availability of this equipment is still too limited anywhere.
10. Fund active military for 20-year mass statistical epidemiological study of recruits for screening test(s) for Gulf War Syndrome.
11. Authorize military to admit civilians into proposed San Antonio unit on space available basis so as to minimize expense to military and maximize capability to treat all sick U.S. citizens. Limited number of most sick veterans will soon be restored to outpatient status, but cases continue to arise among civilians, for whom facilities are inadequate. Military would not be competing with civilian facilities because there is only one other.
12. Protect physicians for championing GWS and MCS patients. Stop kangaroo courts. Stop politicolegal harassment of these physicians.
13. Enlarge Medicare and Medicaid coverage for treatment of environmental illness in civilians and veterans without disability. Ask Hilary Rodham Clinton.
14. Enlarge registry to include late complications, cancer, and birth/defects and dying infants born to veterans. Autopsies of such infants to medical centers with capability in molecular genetics.
15. Ask military physicians and scientists to debrief me. I have technical information to share.
16. Presidential Medal of Freedom for Dr. Theron Randolph. Pass the word.

Thank you for reading, listening, and hearing. I feel better already.

Ruth G. McGill, M.D.

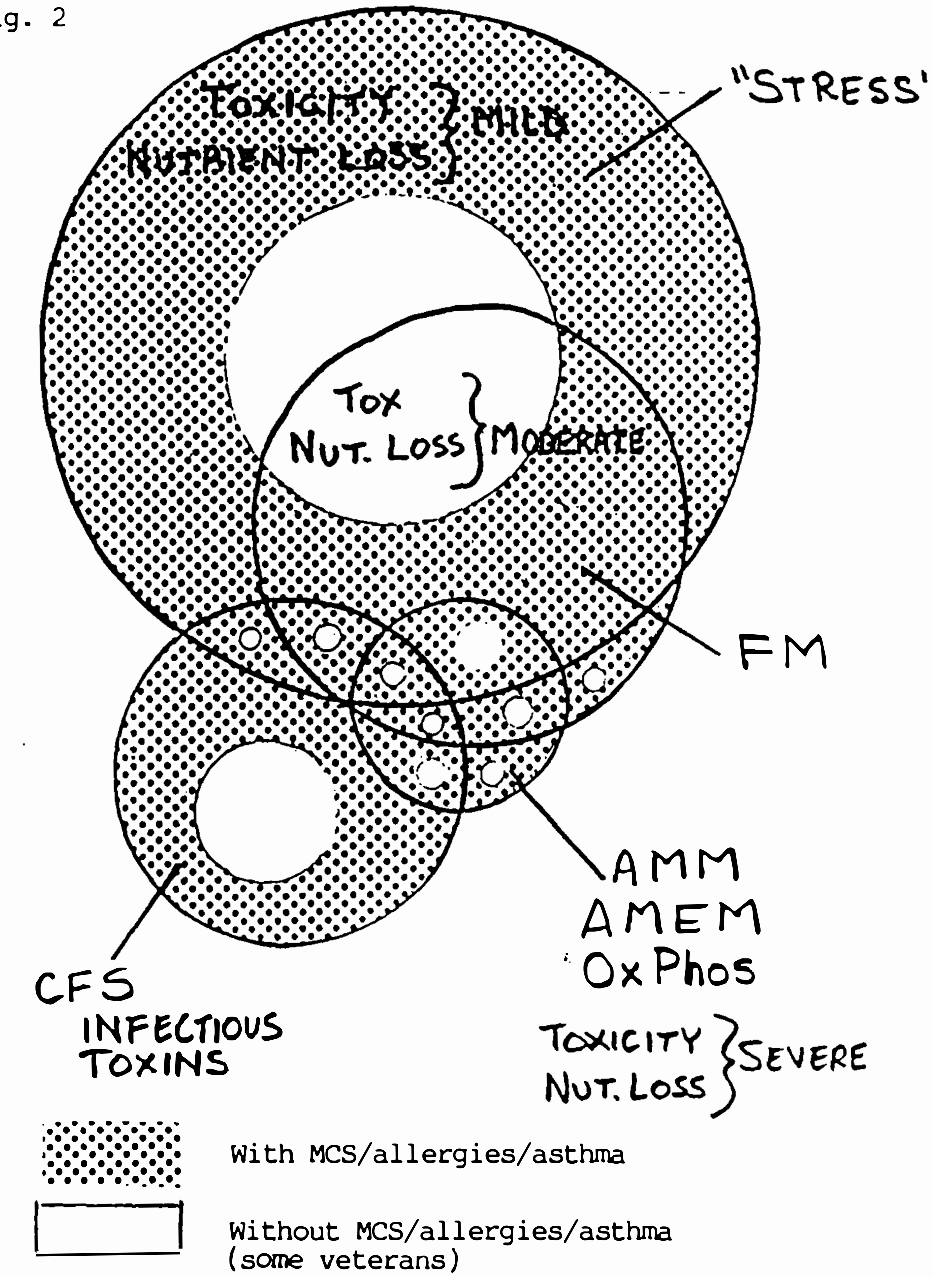
ATTACHMENT I. Relationship of Pathological Fatigue, Gulf War Syndrome, and Environmental Illness of Randolph. All patients in all circles have pathological fatigue. Four subgoups can be distinguished with existing diagnostic criteria. Psychiatric patients are excluded.

Fig. 1



Areas outside largest circle may be used to designate civilians with same disorders.

Fig. 2



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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003b. letter	To Dr. Zuckerman from Ruth G. McGill, M.D. re: panel (2 pages)	03/20/95	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

FOLDER TITLE:

Letters [2]

2013-0359-S
ry1486

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Gulf War
Syndrome
letters go to:
Donna Zuckerman
Room 102

NA; called 4/18/95 + approx 2 wks earlier

After several
efforts to reach
her, we finally
talked on
5/12/95. She is
gathering proof
of chem weapons
+ will send it
to me.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004a. letter	To Hillary Rodham Clinton from civilian re: Gulf War Syndrome (partial) (2 pages)	03/13/95	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

FOLDER TITLE:

Letters [2]

2013-0359-S
ry1486

RESTRICTION CODES

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(b)(6)

13 March 1995

[004a]

Hilary Rodham Clinton
The White House
Washington, D.C. 20500

Dear Ms. Clinton:

I am writing to offer you additional evidence about the Gulf War illness which I have been studying since my return from Kuwait in June, 1991. I have also sent my credentials to President Clinton in application for a position on his new panel named to study the Gulf War Syndrome illness, but I am also interested in simply getting you as many facts as possible so that you can help us shed light on this problem.

I was the Navy's civilian historian for Desert Storm, was in Kuwait and throughout the theater shortly after the end of the war to study its effects, and have a first-hand knowledge of the types of elements which could be causative agents in this illness. I became ill while in Kuwait, and was diagnosed with the parasitic disease Leishmaniasis shortly after my return. Worker's Compensation accepted my claim on this basis in spring 1992.

I have, however, many other symptoms indicative of chemical sensitivity and neurological disorder. I am now in the slow process of going through testing and analysis at Bethesda and Walter Reed, for which I am very grateful. I lost my government job as a visiting Associate Professor at the Naval War College due to chronic illness and neurological incapacity which has been continuous and increasing since I left Kuwait. Unfortunately, both Worker's Compensation and OPM's retirement process require far more substantial documentation of the exact diagnosis <u>before</u> benefits are available for <u>civilian</u> workers. I am in the process of attempting to gather this evidence as fast as I can, but am running perilously close to their deadlines. I have waited for months to get the appropriate appointments and tests through the military system, and my Freedom of Information Act (FOIA) requests for release of documents relating to my case have been stalled since October; I have found no way to hurry up the bureaucratic system which itself requires that I prove my illness in a timely fashion.

Unlike the many other thousands of veterans with this illness, I am alone. I am a civilian. I am repeatedly told that I am ineligible for compensation and treatment afforded by law to the military and reservists. Civilian doctors haven't a clue. Meanwhile I have severe neurological problems that prevent me from finding full-time employment. Without the love and support of my new husband, I would be completely broke and out of work, merely due to the fact that I obeyed direct orders and went to Kuwait to document that war.

I believe that I can add documentation to assist in helping solve the questions we face.

Enclosed is my resume, and a copy of my FOIA requests. I have 60 days to prove the existence of the Gulf War Illness and my own symptoms to meet the requirements of the federal retirement program, or I will lose all hope of keeping my health insurance and regaining a federal job. Any documentation which your people working on this program can offer me to help me figure out the causes and extent of my illness would be much appreciated.

Meanwhile, I would like to volunteer to assist your own Persian Gulf task force in looking into these problems on a part-time basis. If you are interested, please have someone call me at (b)(6) after March 21.

Sincerely,

(b)(6)

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004b. resume	Re: civilian (partial) (3 pages)	n.d.	b(6)

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2013-0359-S
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Freedom of Information Act - [5 U.S.C. 552(b)]

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[C0046]

[redacted]

Home Address:

[redacted]

Business Address:

Techmatics, Inc.,
Center for Security
Strategies and Operations
Three Crystal Park
2231 Crystal Dr., #1000
Arlington, VA 22202-3742
(703) 802-8300

Employment

November 1994 to present Consultant, Techmatics, Inc., Center for Security Strategies and Operations, Arlington, Virginia.

Senior Analyst (Part-time) for naval policy, strategy, and operational issues in underwater warfare. Completing declassification and production of book on Desert Storm mine warfare for publication in late 1995. Research and writing on issues relating to the Navy's emerging Mine Warfare Plan.

August 1992 to September 1994 Professor, Naval War College, Newport, Rhode Island. Associate Professor, Strategy and Policy Department, 1992-1993; Research Fellow (at rank of Professor), 1993-1994. (As Tamara Moser Melia).

Teaching: Graduate-level core teaching duties in M.A. program of War Studies, covering military history from the Peloponnesian War to Desert Storm. Primary duties: Faculty Civil War specialist; Seminar moderator for two weekly seminars in strategy and policy issues, lecturer on Civil War, Naval History, and Contemporary Middle East, and faculty advisor in both Strategy and Policy and Operations Departments on mine warfare and Civil War research projects.

Research: Awarded Research Fellowship (sabbatical) 1993-1994 to complete research and writing of classified book on the Navy's experience in mine warfare during Desert Storm.

October 1982 to August 1992 Historian, Department of the Navy, Naval Historical Center. (As [redacted]).

1988-1992: Historian and Fleet Liaison. Primary duties: Documenting current naval operations and policy; researching and writing classified and unclassified monographs. Specialty: U.S. Navy mine countermeasures and Persian Gulf operations. Three tours of combat-area duty with U.S. Navy and allied naval operating forces in Persian Gulf: two deployments as historian assigned to Middle East Force/Joint Task Force Middle East covering EarnestWill operations, October-November 1988 and February-March 1989; and one as historian to Middle East Force/U.S. Naval Forces Central Command covering Desert Storm multinational naval operations, May-June 1991. Assigned to Commander, Mine Warfare Command, on special duty, 1992.

1987-1988: Historian, Contemporary History Branch. Primary Duties: Researching and writing classified monographs and short histories, 1945-present.

1982-1987: Historian, Research Branch. Primary duties: Civil War specialist; directed and produced writing and research on Civil War topics; Assistant, later Associate Editor, volume one, and primary Associate Editor, volume two, The Naval War of 1812: A Documentary History; and Assistant Editor, Naval Documents of the American Revolution. Committee Work: Head, Computer Committee, 1985-1987; Special Assistant for EEO, 1987-1988.

Concurrent Position Adjunct Faculty, Georgetown University, Department of History

1985-1992 — and School for Summer and Continuing Education, Washington, DC 20057. (As (b)(6) (b)(6))

Taught both upper-level and graduate courses in military history (yearly course in American Civil War and one U.S. Naval History course, 1775-1990) and American History survey during summer and spring sessions.

August 1981 to October 1982 — Graduate Assistant, Southern Illinois University, Carbondale, Illinois. (As (b)(6)).

Studied under Dissertation Research Award and taught solo course in Western Civilization (History 205B).

October 1979 to August 1981 — University Fellow, Graduate School, Southern Illinois University, Carbondale, Illinois. (As (b)(6)).

Lectured in Civil War and American Social and Intellectual History courses.

August 1977 to October 1979 — Graduate Assistant, Department of History, Southern Illinois University, Carbondale, Illinois. (As (b)(6)).

Teaching and research. Four semesters as assistant in editing The Papers of Ulysses S. Grant. Three semesters teaching sections of American History and Pre-Law.

July 1976 to July 1977 — Admissions Counselor, Sterling College, Sterling, Kansas. (As (b)(6)).

Counseled entering students and served on college committees.

September 1974 to May 1976 — Research Assistant, Department of History and Political Science, Sterling College, Sterling, Kansas. (As (b)(6)).

Teaching assistant in American and European history courses.

Education

Ph.D., Historical Studies, Southern Illinois University, Carbondale, Illinois. **Major Fields:** American History: Colonial; United States 1776-1865; United States, 1865-1919; American literature. European History: Early Modern Europe, 1450-1815. **Specialization:** American Civil War. **Dissertation Title:** "James B. McPherson and the Ideals of the Old Army," directed by John Y. Simon. **Honors and Awards:** University Fellowship, 1979-80, 1980-81; Dissertation Research Award, 1981-82; President, Sigma Kappa Chapter, Phi Alpha Theta, 1981-82; American Association of University Women Graduate Scholarship, 1982. **Completion Date:** August 8, 1987. (As (b)(6)).

M.A., History, Southern Illinois University, Carbondale, Illinois. **Major Fields:** United States to 1877; United States, 1865 to present. **Thesis:** "The Gallant Knight: The Life and Early Career of James Birdseye McPherson," directed by John Y. Simon. **Honors and Awards:** Graduate Assistantships, 1977-78; 1978-79; University Fellowship, 1979; Vice-President, Sigma Kappa Chapter, Phi Alpha Theta; Phi Kappa Phi. **Completion Date:** December 21, 1979. (As (b)(6)).

B.A., History, Political Science, and French, Sterling College, Sterling, Kansas. **Major Fields:** European history, political philosophy, French literature, theater. **Honors and Awards:** Magna Cum Laude; Alpha Psi Omega; Best Actress, 1975; European History Award, 1976. **Completion Date:** May 16, 1976. (As (b)(6)).

"Science and Technology in Newport: The Torpedo Station, 1869-1950." Newport Historical Society Winter Lecture Series, 25 March 1993.

Publications

(As [redacted] (b)(6))

"Mine Warfare: What Are We Doing Wrong?" Surface Warfare 19 (no. 1, January/February 1994): 24-26.

(As Associate Editor). The Naval War of 1812: A Documentary History. Volume 2: 1813. Washington, DC: Naval Historical Center, 1992. (Winner of Thomas Jefferson Award for excellence in Documentary Editing, Society for History in the Federal Government, 1993).

"Damn the Torpedoes!": A Short History of U.S. Naval Mine Countermeasures, 1777-1990. Washington, DC: Naval Historical Center, October 1991. Chinese edition published 1993. Sold out, 1994. Second edition (1777-1995) currently being prepared for hardback publication by the U.S. Naval Institute Press.

"David Dixon Porter: Fighting Sailor." In James C. Bradford, ed., Captains of the Old Steam Navy. Annapolis, Md.: Naval Institute Press, 1986, pp. 227-49.

"John Gross Barnard" and "John McAllister Schofield." In Patricia L. Faust, ed., Encyclopedia of the Civil War. New York: Harper & Row, 1986, pp. 40, 661.

"David G. Farragut" and "The MONITOR vs. the MERRIMACK." In Book of Days, 1987: An Encyclopedia of Information Sources on Historical Figures and Events Keyed to Calendar Dates. Ann Arbor, Mich.: Pierian Press, 1986, pp. 111-12; 347-48.

"Benjamin F. Butler," "David Farragut," and "Winfield Scott." In Robert Muccigrosso, ed., Research Guide to American Historical Biography 3 vols. Washington, D.C.: Beacham Publishing, 1988, 1: 218-23, 493-98; 3: 1364-68.

References

Professor George Baer, Chairman, Strategy Department, Naval War College, 686 Cushing Rd., Newport, RI 02841-1207, (401) 841-2032/33/34.

Dr. Ronald H. Spector, Professor of History, George Washington University, Washington, D.C. 20052, (202) 994-6425.

Dr. William S. Dudley, Senior Historian, Naval Historical Center, Washington Navy Yard, Building 57, Washington, DC 20374, (202) 433-2364.

Professor John Y. Simon, Executive Director, Ulysses S. Grant Association, Morris Library, Southern Illinois University, Carbondale, Illinois 62901, (618) 453-2773.

Emeritus Distinguished Professor Betty L. Fladeland, Department of History, Southern Illinois University, Carbondale, Illinois 62901, (618) 549-1572.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004c. letter	To Chief of Naval Operations from civilian (partial) (1 page)	12/01/94	b(6)

COLLECTION:

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First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

FOLDER TITLE:

Letters [2]

2013-0359-S
ry1486

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

[redacted]

[004c]

1 December 1994

Chief of Naval Operations (N09B30)
Room 5E521
2000 Navy Pentagon
Washington, D.C. 20350-2000

Dear Sir:

On October 11 I requested copies of three documents under the Freedom of Information Act (FOIA) (copy enclosed). I have received no response to my request to date, nor has the Center for Naval Analyses been contacted to identify the documents requested.

I have, however, identified two additional documents which I which to add to my FOIA request. They are as follows:

1. Page 3 of "D-Day Air Tasking Orders and Targets," "Chemical Targets," in file # 49 001356.00, Center for Naval Analyses, identifying chemical and biological warfare targets bombed in areas where I later became ill.

2. 141600Z Mar 91, NP 1037 A Det to RBDNPA/FCDG Portsmouth, in file # 49 002139.00, COMUSMCMGRU Sitreps and other Misc. Reports, Center for Naval Analyses, which identifies atmospheric and oil pollutants as cause of skin rashes and headaches in personnel at Ash Shuaybah.

Please ask someone in this office to respond to my request in some fashion so that I can be assured that this request has been received. I can be reached by fax and phone at [redacted].

I will, of course, be happy to pay all copying costs involved.

My thanks.

Sincerely,

(Dr.) [redacted]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004d. letter	To Chief of Naval Operations from cilvilian (partial) (1 page)	10/11/94	b(6)

COLLECTION:

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First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

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Veterans Issue /
Coor

[redacted] (b)(6)

[004d]

11 October 1994

Chief of Naval Operations (N09B30)
Room 5E521
2000 Navy Pentagon
Washington, D.C. 20350-2000

Dear Sir:

I would like to request copies of the following three documents under the Freedom of Information Act. These are currently housed at the Center for Naval Analyses, Technical Information Center, 4401 Ford Avenue, Alexandria, Virginia, and relate to illnesses I contracted in Kuwait while an employee of 09BH during Operation Desert Storm.

1. 240730Z Mar 91, CTG 151.6 to CTF 151, in file number 49 002518.00, COMINERON TWO, U.S. EOD MCM OPS, (EOD Sitreps section). Describes finding possible chemical agent dispersal devices intact in a Kuwaiti port.

2. 141600Z Mar 91, NP 1037 A Det to FCDG Portsmouth, in file number 49 002526.00, COMINERON TWO, British MCM Ops/MW-130, FDU Status Report Folder. Mentions sudden illnesses affecting personnel at the port of Ash Shuaybah, Kuwait.

3. 091130Z June 91, CTU 321.1.9 to CTG 623.5, in file number 49 002525.00, COMINERON TWO, British MCM Ops/Formex 101, MCMRs, MW-125s and Daily Sitreps. Places author of this letter aboard allied ship off Kuwait.

I am, of course, willing to pay any fees required for copying of these documents up to $25.00. If you need additional information, I can be reached by phone or fax at (703) 519-1854.

My thanks for your assistance.

Sincerely,

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004e. envelope	To Hillary Rodham Clinton (partial) (1 page)	03/04/95	b(6)

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[004e]

[redacted] (b)(6)

MAR 14
1995

Old Glory
USA G
For U.S. addresses only

Old Glory
USA G
For U.S. addresses only

Hilary Rodham Clinton
The White House
Washington, D.C. 20500

376 South Burnham Hwy.
Lisbon, CT 06351

March 7, 1995

Pennsylvania Avenue
The White House
Washington D.C. USA

Dear Mrs. Hillary Clinton:

My brother, Sgt. David W. Robb, a veteran of Desert Storm, passed away on December 21, 1994 from an unidentifiable form of cancer. He was diagnosed with this cancer just three weeks prior and was given six to eight months to live. Since the doctors could not identify the type of cancer, it was impossible for them to treat it effectively and thus my brother lasted less than one sixth of his death sentence.

This hurt me personally because my brother was the closest human being to me, and before meeting my fiance, he was my closest confidante. I'm planning my wedding for July 1995. Had my brother lasted his full death sentence, he would have seen me walk down the aisle. The most important person in my life will not be there and I'm angry about that. I feel he was unjustly taken from me and from his family. He left behind a beautiful little girl.

Looking back, I recall his complaining about minor symptoms as early as six months after his return from Saudi Arabia. Everything was overlooked because we were assured there were no dangerous substances used during Desert Storm. My brother was a brave soldier and never would have turned his back on his country. He was proud to have fought for us. But I can't help but feel like our country turned it's back on him. I find it unusual that even the top cancer clinic in our country, the Mayo Clinic, couldn't diagnose my brother's cancer. It leads me wonder where it came from. My entire family is left with nothing but questions.

We are not looking for a settlement from the government. We are only searching for answers. If there is any chance that other soldiers could be in danger, they should be alerted. While my parents were thrilled by the certificate honoring my brother that was sent to them bearing your husband's signature, my siblings and I want more. We want to know why three years after Desert Storm, when we thought our brother had survived the war, was he taken from us. Please help us find an answer.

Respectfully,
Rebecca J. Robb
Rebecca J. Robb

Please find enclosed a copy of an editorial my sister submitted to our local newspaper.

BAYLOR COLLEGE OF MEDICINE

DEPARTMENT OF MEDICINE

Section of General Internal Medicine
George W. Zeluff Section of International Medicine

~~To Patti~~
~~fr Wendy~~

Clifford C. Dacso, M.D., M.B.A.
Chief, General and International Medicine

Areas of Concentration

Alan E. Cororve, M.D.
General Internal Medicine & Cardiology

Clifford C. Dacso, M.D., M.P.H.
Infectious Disease & Geriatrics

Barry H. Goodfriend, M.D., F.A.C.P.
General Internal Medicine

Raye C. Hurwitz, M.D., M.P.H.
General Internal Medicine & Adolescent Medicine

Mary Ann Khoury, M.D.
Occupational & Preventative Medicine

Susan M. Miller, M.D., M.P.H.
Primary Care & HIV-Associated Illness

Charles H. Miranda, M.D.
General Internal Medicine & Adolescent Medicine

William A. Myerson, Ph.D.
Clinical Psychology

James H. Runnels, M.D.
Travel Medicine

February 17, 1995

To: Diana Zuckerman

Ms. Hilary Rodham Clinton
The White House
Washington, D.C. 20500

Dear Ms. Clinton:

As the staff physician for the Persian Gulf Referral Service at the Houston Veteran's Administration Hospital, it is my understanding that you are considering a visit here. I would like you to know that I am eager to discuss our program with you.

On a lighter note, I am active with a stable near the hospital and would like to invite you to join us for a horseback ride through Hermann Park.

Sincerely yours,

Raye Hurwitz MD

Raye C. Hurwitz, M.D.

RCH/slm

6550 Fannin, Suite 1200 -- Houston, Texas 77030
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Ms. Hilary Rodham Clinton
The White House
Washington, D.C. 20500

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. letter	To President Bill Clinton from consituent re: illnesses (partial) (2 pages)	n.d.	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Maggie Williams (Subject Files)
OA/Box Number: 12631

FOLDER TITLE:

Letters [2]

2013-0359-S
ry1486

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Only response was a form generic thank you. Our President is too busy to listen. Oct. 1993

[005]

[redacted] (b)(6)

President Bill Clinton
The White House
1600 Pennsylvania Avenue
Washington DC

Dear Mr. President,

I am writting to you about a problem that my family has. I believe this problem originated back in 1953, before I was even born. I don't know where else to turn. Everywhere I turn to is like slamming into a brick wall.

As I stated before, my family's story starts back in April, 1953. My Dad was in the Army. He received orders to go to Nevada to participate in an Atomic Bomb Test--to be specific, OPERATION UPSHOT. My Dad and his buddies were ordered to GROUND ZERO. They had no protective gear. The men were told to cover their eyes during the blast. My Dad says he could see the bones in his hands-like an x-ray, during the actual blast. After the blast, the men were told to march through the area of the crater.

My Dad told us he saw charred remains of cattle and sheep. They lay smoldering in the blast area.

The GIs were instructed not to talk about what they saw. Quite conveniently, Army records of the men there in Nevada, were destroyed in a fire. So there is no official proof that my Dad and others were in the bomb blast.

My Dad's Army Buddies who were with him have died of cancer in recent years. In the last ten years, my Dad has gone from a robust 185 pounds, to 100 pounds! He looks like George Burns. Nothing against George, but my Dad is only 60! He is literally skin and bones. He eats like a truck driver too.

In 1984, after two years, and one surgical procedure to get pregnant (and one miscarriage); my husband and I had our baby. I would like to add here, that I have never done drugs, drank excessively, or ever smoked. During my pregnancies I never even drank coffee. Erin was born full-term via C-section. She was a dream baby, the answer to all my prayers. As far as I was concerned, my world was complete.

Well, the world crashed on November 1,1986, shortly after Erin's second birthday. She was diagnosed Autistic. She also has a severe sleep disorder. The only way for her to

Copy

on the East Coast. When I give the family history, and mention my Dad's participation in the Atomic Bomb Test, every doctor has gotten nervous, and refuses to comment.

I know, most people would say, coincidence-bad luck. But wait, my family's story gets more tragic, and cries out for answers.

On January 23, 1990, My brother and his wife had their only child-a boy, Sean. He is severely developmentally disabled. His head is badly misshapened. He is grossly overweight and oversized. He weighs over sixty pounds at the age of three years old. My brother and his wife have never had the joy of Sean calling them Mom and Dad.

On September 14, 1990, I gave birth to Catherine. Currently, she has the diagnosis of Speech Delay, and Atypical Development of Speech. Cat is attending Early Intervention. Her therapists feel she will be formally identified with Special Needs when she turns three.

My Dad belongs to the National Association of Radiation Survivors. The association has started a registry of veterans and their families, which does include their grandchildren.

Mr. President, I implore you. No doctor, or person in authority wants to address what took place in those bomb tests some forty years ago. Nobody wants to acknowledge the legacy of broken lives. Mrs. Clinton is so in tune about children, and she is so enthusiastic in her quest for health care for all. Could you look into this problem? I am aware from talking to the folks at the National Association of Radiation Survivors, that Erin, Sean, and Catherine are not the only grandchildren with heartbreaking diseases, and lifelong challenges. Also, that my Dad, and his Buddies were not the only GIs stricken. These men and their families deserve answers and help, as for example the Vietnam Vets, and their families.

I know you have problems facing our country today, that have to be solved. But if you could look into this, and at least get somebody to look into this, it would help.

Thank you for your time. We look forward to hearing from you. The address of the NARS is:

National Association of Radiation Survivors
PO Box 278
Live Oak California 95953
1-800-798-5102

Copy

Sincerely,

[redacted] (b)(6)

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. letter	To Ms. Zuckerman from veteran re: illnesses (partial) (2 pages)	03/07/95	b(6)

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[redacted] (b)(6)

[redacted] (b)(6)

[006]

Ms. Hillary R. Clinton
C/O
Ms. Diana Zuckerman
Room 100
Old Executive Office Building
Washington, D.C. 20500

March 7, 1995

Dear Ms. Zuckerman,

I am writing this letter per your request after our conversation this morning concerning the special advisory panel President Clinton has promised to create concerning illness related to the Persian Gulf.

As I told you during our conversation, I am very interested in serving on this panel. I have included a copy of an article that appeared in the Belleville News Democrat, a local paper, on todays date, concerning this panel.

In our conversation, you asked me to discuss my areas of expertise and expierence. I can not say I am an expert in any field concerning this illness. I can only say that I am a Hospital Corpsman Second Class who served in the Persian Gulf and ever since we came back, I have been trying to find answers for my shipmates as to why they are not feeling well and why they have so many mysterious ailments.

I am a Hospital Corpsman, assigned to a Seabee unit with the Naval Reserve.
I was stationed in the island nation of Bahrain during the Persian Gulf war and believe that our compound and the personel assigned there were exposed to something that caused numerous people to become ill.
We expierenced fall out from the oil well fires. We expierenced nightly scud missile attacks and watched as these missiles were destroyed over our compound.
Several of us had assignments into Saudi Arabia and Kuwait .
We ate food purchased on the economy and drank water supplied by the locals.
We bathed in de salinated water and washed our clothes in the same type of water.
Not all of our people went to Kuwiat or Saudi Arabia. Some of them never left our compound yet they still have the same complaints associated with PGI. (Persian Gulf Illness)

Upon our return from the Persain Gulf , I began to get complaints from several of the Seabees assigned to my unit, of various illness and discomfort. These complaints ranged from night sweats, to lack of sleep, to irratability and anger, to mild rashes that would not go away, to difficulty breathing, to shortness of breath, to disappearence of skin pigmentation, to forgetfullness, to numbness and tingling in the arms and hands , to lack of fine motor skills, to bleeding gums etc. etc. . Others have complained of joint and muscle pain, inability to control bowel leakage, unexplained tumors and on and on and on.
As the medic for the unit I wanted to find out what was causing these problems and what was the common denominator. I read and researched everything I could find on similar complaints and talked with other Seabees who were stationed over in Southwest Asia and found that no matter where we were all stationed, the complaints were similar and often the same and that Seabees were not getting answers and neither was I. More and more information came out in newspapers andin magazines and the government and the military all said the same thing...... not related to

service in the Persian Gulf. Over the last 3½ years, I have talked to numerous Persian Gulf vets and to other medics and nurses and we all have come to the same conclusion..... it is related to Persian Gulf service.
But we are the voices that are not heard. In fact, when I went to the VA hospital in St. Louis and asked to speak to the Persian Gulf co-ordinator to find out what the VA was looking for and for any information I could pass on to the fellows in my unit, I was told the information I was seeking was classified and that I did not have aneed to know. When I tried to argue with this individual, and when I tried to explain that I was a medic in a unit that had served in the theater, I was asked to leave his office and escorted to the door!
Of course that was 3½ years ago and the VA has supposidly become more sensitive to the issue, but in all honesty, I have not found that to be so.

We held hearings here in the state of Illinois on the Persian Gulf illness last year and there were a number of vets who testified both in Chicago and in Springfield. At both hearings, the representatives from the VA were extreemly condesending and rude. At one point, the doctor who spoke as the voice for the VA stated that he thought that the majority of Viet Nam vets and the Persian Gulf vets who were complaining of various illness were nothing more then malingerers and individuals who just wanted something for nothing from their government! We had several vets who served in Viet Nam in our group and I took care of Viet Nam wounded for a number of years and several of our group walked out of the hearing! This is the same individual that the Persian Gulf vet had to go through to be considered for any type of treatment or diagnosis for service connected disabilities! Hardly sensitive to the vet he is suppose to serve! That is just one of several examples of the dealings I have had with the VA when it comes to trying to get answers. I will site one more example that I found to be particularly reprehensible and then I will move on.
I have talked for months to my unit to get the fellows to at least get on the VA's Persian Gulf registry. One young man went to sign up and take the initial physical and was asked in a very rude and snide tone of voice if it was possible that his rapid weight loss and fatigue was caused because he was gay (not the term used in the questioning) and possibly HIV positive! This young Seabee was neither gay nor HIV positive. He was ill from something else and believed it to be PGI. He was extreemly angry and irate at his treatment and refused to have anything further with the VA. I can't say that I blame him! There are other horror stories of lack of concern and professionalism told to me by the men I encouraged to contact the VA regarding the registry but I won't continue along this vein. I think you get the point. I hope you get the point!

I have been in contact with several individuals across the country and with other Seabees from all over the country trying to share information and gather information on what is causeing this illness. I think there has to be a better way! I know there is a better way and I would like to help put that program into effect!

There has to be a way to share information with those who need to know and who want to know what was used over seas against us. There has t o be answers provided to those of us who were forced to take injections of medication and then told we could not talk about it and who had our medical records altered to remove any indication that we wer given anthrax vaccines etc. This happened to me! My medical records were altered when I returned to the States because the doctor who administered the vaccine entered it into my records. I was told at my Reserve Center that it should not have been entered into my records, that the information was classified and the entry was completely removed from my record!

There has to be people involved with these panels and committees who are not working for their own personal agenda and schedule but who are truely interested in obtaining the information, in shareing the information with other agencies who are seeking the same answers and who have no vested interest other than to find the answers so that these answers can be given to any vet seeking them! There should be no territorial disputes or egos involved in this information gathering. The people involved should be interested only in finding out what is causeing the illness and what if any thing can be done to assist in the comfort and or cure for these illnesses. And if there is nothing that can be done, then there should be an honest policy set forth to tell the vet inquireing just that!

This should be a panel made up of vets who are wanting to assist vets and of people who truely care about geting this information out tothe people who need to know and who have a right to know. A lot of lip service has gone into these panels and committees that have made the news, and that seems to be just what it has been... lip service.

I want to be part of this committee or panel to answer the questions that are raised, to help the others out there like me, the people who are simply just citizens who have answered the call to serve and now want answers to what they volunteered for...... There isn't a question of why they served... just a question of what happened to them while they were serving. What did they let themselves in for medically? I can honestly tell you that the majority of my shipmates have no bad feelings about going.... and most would go again if asked. The bad feelings have come about because the government seems to have turned its back on them as far as answering these questions openly and honestly.

Lets put people in charge that are willing to do just that. Lets put people on this panel that have no political agenda, that have no personal agenda other than to again serve those who served their country. Lets put people like myself on this panel that can talk to and with the enlisted person who isnt comfortable talking to rank about the problems of health since the return from the Gulf. Lets have people who can talk to these agencies and gather information with out bias and compile this information into common every day language and disceminate it to those who have a need and a right to know what they were exposed to.
Lets put people like myself on this panel who have COMMON SENSE!!!

I have had health problems since returning to the States and so have a number of my friends and Seabees. I refuse to let it defeat me or keep me from being all that I can be. I also refuse to believe that there are not answers out there to all the questions and I want to help provide the answers !

I want to be on your panel to do just that. I feel that if you want to have a panel that the majority of Persian Gulf Vets will find believable, you need to have people like me on it. I hope you will see that and consider this request seriously! To restore the confidence and faith of thousands like me, it is time to put people like me on your panels and in your committees.
Put the citizen back into the government and the system! The professional politician and the ranking officers that have lost touch with the common citizen and the enlisted citizen solidier and sailor have lost their credibility.
If you want to make this panel sucessful, restore that credibility.

If I can be of any help, I would like to try to do just that. And I think...know that I can.

I will close with that and hope that you consider this request seriously. I know that there are numerous typing errors and probably more that a few spelling errors in this letter. But I am not a typist... I use two or three fingers to get the job done. I am just what I told you on the phone that I was.... I am no one special...just a medic trying to get answers to questions for my guys and for myself. I am a week end warrior who served very proudly with some of the finest men and women I know and would go again in a heartbeat if asked to live up to our motto of CAN DO ! And I will not give up on trying to get the answers for and to my fellow sailors and shipmates.

I respectfully close with the hope that you will consider this request seriously and will take a few moments to respond.

Respectfully,

[redacted] (b)(6)

Panel to study Gulf War Syndrome

Houston Chronicle

WASHINGTON — President Clinton promised Monday to create a special advisory panel to determine the cause of the so-called Gulf War Syndrome.

Addressing the concerns of veterans about the government's slow response to mysterious illnesses believed to be related to the war with Iraq, Clinton also pledged to step up treatment of sick Gulf War veterans.

He said the nation cannot afford to turn its back on the men and women who sacrificed so much for their country, and criticized Republican proposals that would cut $200 million from veterans affairs programs, including some directly affecting Gulf War veterans.

"There are thousands of veterans ... who served their country in the Gulf War and came home to find themselves ill. And neither they nor their doctors know how they got it," Clinton said in Washington at the annual meeting of the Veterans of Foreign Wars.

"Even though in so many of these cases we do not know the causes of their symptoms, we know their problems are real and cannot be ignored while we wait for science to provide all the answers," he said.

The president said he was ordering the establishment of a presidential advisory panel made up of scientists, physicians and veterans to advise him on the possible cause of the Gulf War Syndrome and what can be done to improve the health care available to veterans of the 1991 Persian Gulf fighting.

He said the panel would "leave no stone unturned" as it tries to find out why thousands of veterans of the Gulf War have been stricken with fatigue, skin rashes, memory loss, muscle and joint pain, severe headaches and other medical problems that have so far defied diagnosis.

He said $13 million would be spent on new research examining the potential effects of pesticides and other environmental toxins with which veterans may have come in contact as well as uranium-laced anti-tank ammunition and drugs administered to soldiers during the war to protect against the possible use of Iraqi chemical and biological weapons.

"We must listen to what the veterans are telling us (about their illnesses) and respond to their concerns," Clinton said to heavy applause. "Just as we relied on these men and women to fight for our country, they must now be able to rely on us to try to determine what happened to them in the Gulf and to help restore them to full health."