Rethinking Feres: Granting Access to Justice for Service Members

Andrew F. Popper
RETHINKING _Feres_

Andrew F. Popper*

“In sum, neither the three original Feres reasons nor the post hoc rationalization of ‘military discipline’ justifies our failure to apply the FTCA as written. Feres was wrongly decided and heartily deserves the ‘widespread, almost universal criticism’ it has received.”

Dissenting opinion of Justices Scalia, joined by Justices Brennan, Marshall, and Stevens

“You’re old enough to kill but not for voting. . . This whole crazy world is just too frustratin’ . . .”

_P. F. Sloan, “Eve of Destruction”_ 2

I INTRODUCTION

Prior to 1946, sovereign immunity provided an almost complete bar to civil tort actions against the federal government. 3 While almost all individuals and institutions of every type, shape, and size were subject to tort claims that held out the potential to make victims whole and

---

1* Andrew F. Popper is the Bronfman Distinguished Professor of Law at American University, Washington College of Law. This article is in part premised on the author’s experience with the Marine Corps, and, after his honorable discharge, his subsequent service to the United States government.

2 Lyrics: P.F. Sloan, _Eve of Destruction_, Dunhill Records (1965) (This article is not about drafting 18-year-olds in the 1960s “old enough to kill” but not 21, the voting age. However, that one who serves is denied rights accorded all others (not in the military) is the topic of this piece.)

3 United States v. McLemore, 45 U.S. 286, 288 (1846) (“[T]he [federal] government is not liable to be sued, except with its own consent, given by law.”).
deter others from similar misconduct, the federal government positioned itself safely, immune and unaccountable, behind the ancient premise that the “king can do no wrong.” The injustice this inflicted needs no documentation; while a premise of this article is that the core of our government is now and has always been essential, representative, and supportive of our best and most important goals, an institution with millions of employees and with the variety, mass, and depth of our government is bound to harbor a small number of individuals, institutions, and entities who act outside conventional notions of due care and fairness.

4 The Federalist No. 81, at 397 (Alexander Hamilton) (Terence Ball ed., 2003) (“[I]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”).


6 Oliver Wendell Holmes, Jr., The Common Law 8 (M. Howe ed., 1963) (“[T]he rule remains. . . . The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.”); W. Holdsworth, A History of English Law 548–69 (5th ed. 1942)( the rationale of sovereign immunity is based on the belief in the divinity of the King; to allow such suits would contradict perfection).

7 Early efforts to address the need for governmental accountability were documented in a famous series of law review articles by Professor Edwin Borchard covering municipal and governmental
In 1946, the ancient wall of sovereign immunity gave way with the passage of the Federal Tort Claims Act (FTCA). By allowing individuals to pursue claims against the United States for negligence, the FTCA opened the courthouse doors for a limited number of those allegedly harmed by the misconduct of individuals and entities acting on behalf or under the imprimatur of the United States government. Although liability was limited from the outset by the vast, vague, and vexing discretionary function exception (DFE), in limited circumstances the federal immunity, an international perspective on public liability, and more. See Edwin M. Borchard, *Theories of Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928) (focused on liability for wrongful acts including wrongful confinement); Edwin M. Borchard, *Governmental Responsibility in Tort, VII*, 36 YALE L.J. 1039 (1927); Edwin M. Borchard, *Governmental Responsibility in Tort, VI*, 36 YALE L.J. 1 (1926); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 3 (1924) (criticizing the immunity of government and dismissing the historical roots: “The difficulty, of course, lies in the fact that we consider ourselves bound by the fetters of a medieval doctrine. . .”).


10 28 U.S.C. §§ 1346(b)(1), 2680(a) (2018); Freeman v. United States, 556 F.3d 326, 334 (5th Cir. 2009) (“At the pleading stage, plaintiffs must invoke the court’s jurisdiction by alleging a
government, like those it governs, could now be accountable for acts of misconduct, negligence, malpractice, and similar claims in the forum created in the Constitution for resolution of such grievances, Article III courts.11


11 U.S. CONST. ART. III § 1.
Beyond the DFE, the FTCA had explicit limits\textsuperscript{12} including (but not limited to) a ban on punitive damages, limitations on the right to a jury trial, caps on attorney’s fees, an exhaustion of administrative remedies requirement, a bar for claims for injuries sustained abroad, and a bar on claims for injuries sustained in combat or armed conflict.\textsuperscript{13} These exceptions, particularly those related to injuries sustained in combat or armed conflict, were not controversial then, are not controversial now, and are not the subject of this article. Unresolved, however, was the fate of members of our armed forces and their families injured by actors and actions incident to military service outside of armed conflict or combat.

Within four years of the passage of the FTCA, the Supreme Court, faced with legislation that did not resolve the fate of those injured incident to military service, decided \textit{Feres v. United}


and in broad strokes placed dramatic limits on the civil litigation rights of millions of Americans were serving or have served in our armed forces. The Court rationalized these limitations on, *inter alia*, the need to maintain order and discipline, chain-of-command, military tradition, uniformity, avoidance of unjust enrichment, military preparedness, and efficiency. The force of this decision was apparent immediately: most of those injured incident to military service would be denied access to the very system of justice they pledged to defend. The limitations in *Feres* did not affect the complex and comprehensive intra-military benefits.

---


compensation system[17] and the expansive military health care program. [18] Likewise, *Feres* had no effect on intra-military sanctions for wrongdoing or failure to comply with lawful orders, rules, regulation, practices, and standards governed by the Uniform Code of Military Justice[19] (UCMJ). Affected instead was the legal capacity of the vast majority of service members harmed by wrongdoing to seek civil damages in Article III courts for their injuries. Also affected (or more accurately, lost) was the potent deterrent effect of civil tort sanctions and the corresponding accountability those sanctions generate. One premise of this paper is that the frequency of some of the wrongs (e.g., sexual assault, rape, and clear or gross malpractice) has

---


http://warriorcare.dodlive.mil/files/2018/05/DoD_Compensation-Benefits-Handbook_Apr-2018.pdf (setting out the array of benefits available through an intra-service compensation claims system described by the Department of Defense as “[p]roactively supporting wounded, ill, and/or injured Service members in their recovery and reintegration or transition to civilian life”).

[18] Military Health Sys., About the Military Health System, Health.Mil,


increased to epidemic levels because of the absence of the accountability, of deterrence, that would otherwise flow from civil tort actions.

This limitation on the rights of those who protect and defend our country and way of life, our soldiers and sailors, Marines and Air Force members, Coast Guard members, reservists, and even their families – has persisted for 68 years. Misconduct that changes forever the lives of so many of our fellow citizen soldiers was and is undeterred by civil tort sanction. A vast array of actions ordinarily addressed and resolved in Article III courts for citizens in the private sector go unpunished and undeterred when the victim (or in some instances only the perpetrator) is a service member and the misconduct is, broadly defined, “incident to service.”

It is understandable that those who run the risk of sanction would oppose changing a system that immunizes their misconduct. The desire to be free from sanction is not irrational – but it is unacceptable. That said, there is no easy path to change. A robust and responsive military is essential to our peaceful survival. A change that undermines discipline, chain-of-


command, existing compensation systems, 23 sanctions under the UCMJ, and efficient operation of our defense establishment is dangerous and irrational. Yet in our democracy, power, efficiency, and the fear of change cannot be the basis for the deprivation of justice and access to the courts.

On enlistment, service members agree to be bound by a separate set of rules and accept a system bounded by discipline and unquestioning compliance with lawful orders. 24 Members of the armed forces take an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic . . . .” 25 Every service member understands the solemnity of that promise. The oath includes an implicit recognition that defense of our country may entail engagement in combat, in armed conflict, where the gravest of injuries are a

________________________


possibility for all and an inevitability for some. That oath, that understanding, does not include the concession that service members would be without recourse should they be injured by egregious and impermissible misconduct that advance no policy or goal of our armed forces.

Over time, as courts struggled with the term “incident to service” and more and more claims were barred, rather than protecting discipline and chain-of-command, *Feres* has ended up shielding a vast array of deeply troubling tortious misconduct. More than a half century ago, the late Chief Justice Warren stated that “citizens in uniform” should not be stripped of their basic rights simply because they are members of the armed forces, and yet, to date, *Feres* is the law of the land.

---


27 Warren, *supra* note 26, at 188.
In 2013, the Ninth Circuit lamented that “unless and until Congress or the Supreme Court . . . ‘confine[s] the unfairness and irrationality . . . Feres has bred,’ we are bound by controlling precedent.” 28  Recently, the Ninth Circuit again explored an “incident to service” tort claim in a case involving clear malpractice and found: “regretfully . . . reach[ed] the conclusion that [these] claims are barred by the Feres doctrine . . . .” 29  As noted by the Tenth Circuit, regret is a common judicial theme regarding the continued force of Feres as a bar to legitimate claims: “Suffice it to say that when a court is forced to apply the Feres doctrine, it frequently does so with a degree of regret.” 30


29 Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018).

In recent years, those who serve in our armed forces have been thanked for their service by presidents and lauded at the start of nationally broadcast sporting events. Service members are routinely called heroes— and they are. It is the highest public calling. Yet these


33 The “hire heroes” online employment site in a good example of this HIRE HEROES USA, https://wwwhireheroesusa.org/ (last visited Jan. 17, 2019).
gestures seem at best incomplete when accompanied by a deprivation of one of the basic rights due to all citizens.

The position taken in this article is that the FTCA did not preordain Feres. The Feres Court was not completing a task Congress started. It was legislating. Professor Jonathan Turley, who studied the Feres doctrine in depth, concluded as follows: “The Feres doctrine stands as one of the most extreme examples of judicial activism in the history of the Supreme Court. . . . The Court's sweeping assumptions about the necessity of immunity have produced significant costs for service members and society at large.”34

The costs to which Professor Turley refers are not subtle: Egregious misconduct has been neither sanctioned nor deterred, victims of unquestionably wrongful acts have not been made whole, and serious harms have not been redressed. Those most entitled to it, those willing to fight and die for it, have not experienced the great promise of our legal system: fair and open hearings, an adversary system founded on a level playing field – in short, the blessings of simple justice.35

The wrongs inflicted and discussed in this article – sexual assault, rape, clear or gross malpractice, physical torment that meets the definition of torture – require action. Feres must be


35 The term “simple justice” is less a reference to Richard Klugar’s magnificent text on Brown v. Board of Education, than to the basic right of every person subject to the laws of the United States government. See, e.g., Richard Klugar, SIMPLE JUSTICE (1976).
 undone. However, there is a flip-side that makes this far more complex than a simple recommendation to overturn *Feres*. The immunity *Feres* provides has allowed for the efficient and disciplined operation of our armed forces. 36 Regard for the chain-of-command has meant that lawful orders are followed, even those orders that, of necessity, can and do result in a risk of great harm. Advanced training, pushing service members to their physical and psychological limits, has gone forward without interference from civil courts. Moreover, military justice, through the implementation of statutes, rules, and regulations of all manner, and through the remarkable system of intra-military process governed by the UCMJ, has evolved. Outstanding law students and lawyers committed both to being the best in the profession and to serving their country have sought positions in the various Judge Advocate Generals Corps in the different branches of the armed forces.37


The challenge of this article is that the same immunity that shields wrongdoers, leaving unaccountable individuals and institutions within the government, has also played a role in the evolution of our unquestionably extraordinary and exceptional armed forces. These are potent competing forces. Against this backdrop, it is time to rethink *Feres*.

This article discusses *Feres v. United States*,38 the FTCA, the expansion of the “incident to service” prohibition, the case law and literature in the field, and makes the following recommendation: *Feres* should be overturned and the FTCA amended to allow access to justice in Article III courts for those injured by actions that are neither incident nor essential to military service. These actions include sexual assault, rape, vicious and unjustified physical violence, gross or reckless medical malpractice, repetitive incidents of driving under the influence of narcotics or alcohol, nonconsenting and unknowing exposure to deathly substances, and invidious discrimination.

II. *Feres v. United States*

In the four years after the adoption of the FTCA and before the *Feres* decision, the Supreme Court decided several cases involving civil tort liability for service members. In


Jefferson v. United States, 39 decided two years before Feres, the plaintiff, an active-duty service member, underwent abdominal surgery. Eight months after discharge and during a subsequent surgery, a towel marked “Medical Department U.S. Army” was found in his stomach.40 Plaintiff filed an FTCA malpractice claim but the case was dismissed based on a finding that the FTCA did not cover harms suffered in the course of military service.41 While the Jefferson appeal was pending, the Supreme Court decided Brooks v. United States, 42 a case involving a deadly accident between a government vehicle driven by an off-duty service member and a car carrying a father (a service member) and his two sons. The father was on leave at the time.43 One service member died in the accident and others were severely injured. The surviving service member sued under the FTCA, prevailed at trial, lost on appeal, but ultimately prevailed in the Supreme Court. 44

While the government argued that grave disruption of order and discipline would result if service members had access to Article III courts, the Court found the accident had nothing to do with military service and if the claim were barred, it would prevent innocent victims from being


40 Id. at 709.

41 Id. at 712.


43 Id.

44 Id. at 50–51.
This finding was predicated on the Court’s view that the language of the FTCA did not exclude all claims by service members, particularly those not incident to service. The Court also found that resolution of the fate of claims “incident to service” would have to wait for a “wholly different case.” That different case was presented the following year in Feres v. United States.

A. Feres v. United States

Feres v. United States consolidated three conflicting federal circuit court cases and held that the FTCA barred the vast majority of service members from pursuing civil actions in tort in any Article III court for injuries incident to military service.

Feres involved an active duty service member who died in a barracks fire. An FTCA wrongful death action alleged that the fire was the result of the government’s negligence in failing to maintain reasonably safe housing for troops. The question on which the Court focused, however, was not fire safety but rather whether the suit could go forward at all. Did the FTCA

45 Id. at 51.
46 Id. at 49.
47 Id. at 52.
48 Feres v. United States, 177 F.2d 535 (2d Cir. 1949); Griggs v. United States, 178 F.2d 1, 3 (10th Cir. 1949); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949).
49 Id. at 159 (“[T]he 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 the service.”).
50 Id. at 137.
allow civil actions against the federal government in cases where an injury was in some way – in almost any way – incident to service? Despite the lack of clarity in the text\footnote{Id. at 156 (“These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears.”).} or in the legislative history,\footnote{Id. at 155 (describing the lack of “guiding materials” and highlighting that if the Court misinterprets the Act, “at least Congress possesses a ready remedy”).} the Court determined that in the cases before it, the FTCA waiver of immunity was not applicable to the alleged injuries (and thus the claims were barred) since each was somehow incident to service.\footnote{John Astley, United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow, 38 Am. U. L. Rev. 185 (1988) (“An analysis of the FTCA legislative history does not clearly indicate whether Congress intended to exclude military personnel from FTCA protection . . . it is reasonable to conclude that Congress intended service members to be covered.”).} The opinion did not terminate the right to pursue a civil judgement in all such cases and left room for review of FTCA claims on a case-by-case basis.\footnote{David E. Seidelson, The Feres Exception to the Federal Tort Claims Act: New Insight Into an Old Problem, 11 Hofstra L. Rev. 629, 631 (1983).} However, the stage was set for what was to follow. From Feres forward, the fate of service members injured incident to service was, in the vast majority of cases, sealed.\footnote{Nicole Melvani, Comment, The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members, 46 Cal. W. L. Rev. 395, 428–29}

\begin{itemize}
\item \footnote{Id. at 156 (“These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears.”).}
\item \footnote{Id. at 155 (describing the lack of “guiding materials” and highlighting that if the Court misinterprets the Act, “at least Congress possesses a ready remedy”).}
\item \footnote{John Astley, United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow, 38 Am. U. L. Rev. 185 (1988) (“An analysis of the FTCA legislative history does not clearly indicate whether Congress intended to exclude military personnel from FTCA protection . . . it is reasonable to conclude that Congress intended service members to be covered.”).}
\item \footnote{David E. Seidelson, The Feres Exception to the Federal Tort Claims Act: New Insight Into an Old Problem, 11 Hofstra L. Rev. 629, 631 (1983).}
\item \footnote{Nicole Melvani, Comment, The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members, 46 Cal. W. L. Rev. 395, 428–29}
\end{itemize}
While the *Feres* court made clear that the purpose of the FTCA was to hold the United States accountable in Article III courts for certain types of tortious misconduct,\(^\text{56}\) it found there was no basis in the FTCA to extend that right to members of the armed forces injured incident to their service.\(^\text{57}\) The Court emphasized that the relationship between those in the armed forces and the federal government is “distinctively federal in nature”\(^\text{58}\) and that such harms were covered or compensable through other venues.\(^\text{59}\) The Court reasoned that if Congress had intended to provide access to Article III courts\(^\text{60}\) for intra-military civil tort claims, it would have

\(^{56}\) 340 U.S. at 141.

\(^{57}\) *Id.* (“[P]laintiffs can point to no liability of a ‘private individual’ even remotely analogous to that which they are asserting against the United States.”).

\(^{58}\) *Id.* at 143 (quoting United States v. Standard Oil Co., 332 U.S. 301 (1947)).

\(^{59}\) *Id.* at 144 (“This Court . . . cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services.”).

\(^{60}\) Members of Congress have, on occasion, tried to undo *Feres* but have been unable to garner the votes needed. *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing before the Subcomm. on Commercial and Administrative Law*, 111th Cong. 7 (2009); *The Feres Doctrine; An Examination of This Military Exception to the Federal Torts Claim Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002),
done so explicitly.\textsuperscript{61} Prior to \textit{Feres}, in the event the internal systems within the military failed, service members could seek direct assistance from a member of Congress who could advocate for a “private bill” that, if passed, redressed their grievances.\textsuperscript{62} The lack of overwhelming numbers of such private bills (and the cumbersome and seemingly arbitrary nature of such relief) between 1946 and 1950 suggested to the Court that the intra-military compensation system was not just workable but should be the only mechanism for redress of grievances, not Article III courts and not private bills.\textsuperscript{63}

\textsuperscript{61} 340 U.S. at 144.


\textsuperscript{63} 340 U.S. at 139.
Dicta in *Feres* reasoned that were intra-military civil tort claims common, it would be problematic at many levels.64 However, the opinion is driven by a more basic set of issues – tort liability, the Court suggested, could undermine essential discipline and respect for and compliance with the chain-of-command, and would be a “radical departure” from established practices.65

B. Evolution of the *Feres* Doctrine

The prohibition against civil tort actions applicable to active duty (and even-post-discharge) service members in *Feres*66 initially co-existed with the marginally permissive interpretations of the FTCA.67 In *United States v. Brown*,68 decided four years after *Feres*, a

---

64 *Id.* at 143 (concerns even included choice of law/conflict of laws problems: “That the geography of an injury should select the law to be applied to his tort claim makes no sense.”).

65 *Id.* at 146.

66 *Id.* at 144 (noting that Congress was aware that it was barring common law tort claims incident to service: “[T]here was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.”); *Lewis v. United States*, 663 F.2d 889, 891 (9th Cir. 1981) (that Congress has not taken action to address the Court’s “incident to service” interpretation of the FTCA supports the view that Congress is disinclined to change the incident to service bar to civil tort claims); *Rhodes*, supra note 26, at 24.


discharged veteran underwent knee surgery at the Veterans Administration Hospital\(^69\) and sustained permanent harm to his leg. While the original injury was “incident to service,”\(^70\) the negligence (medical malpractice) occurred after he had been discharged and would, the Court found, be “cognizable under local law, if the defendant were a private party.”\(^71\) The Court held that the claim should be allowed, suggesting that if an Article III court would be available to a civilian, it should also be available to post-discharged service members.

At that juncture, access to Article III courts became unpredictable, dependent on a series of factors including when and where the negligent act occurred, the duty status of the plaintiff, whether the service member was performing a military activity as opposed to taking advantage of a privilege or enjoying a benefit conferred as a result of military service, and whether the service member was subject to military discipline or control at the time of the injury.\(^72\) While all important factors, no one was dispositive, and each could be viewed in light of the totality of the circumstances of a given case.\(^73\)

---

\(^69\) *Id.* at 110.

\(^70\) *Id.* at 112.

\(^71\) *Id.* at 111, 113.


\(^73\) Stanley v. CIA, 639 F.2d 1146, 1151 (5th Cir. 1981).
Thirty-six years after *Feres*, these factors were reduced to a list in *Dreier v. United States*:

“(1) the place where the negligent act occurred; (2) the duty status of the plaintiff when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a service member; and (4) the nature of the plaintiff’s activities at the time the negligent act occurred.”

*Dreier* suggested that parties should be given the chance to make an assessment of “whether the suit requires the civilian court to second-guess military decisions, . . . and whether the suit might impair essential military discipline,” as well as, “the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.”

No matter what factors a court applies, the decision

74 Dreier v. United States, 106 F.3d 844 (9th Cir. 1996)( a widow was not barred from recovering against the United States after her husband was fatally injured when he fell into a negligently-maintained wastewater drainage following an afternoon of drinking while off duty).

75 Dreier v. United States, 106 F.3d 844 (9th Cir. 1996) (citing Bon v. United States, 802 F.2d 1092, 1094 (9th Cir.1986) (citing Johnson v. United States, 704 F.2d 1431, 1436–41 (9th Cir. 1983)); Jennifer Zyznar, *Feres Doctrine: “Don’t Let This Be It. Fight!”*, 46 J. MARSHALL L. REV. 607, 623–24 (2013) (assessing the factors that may or may not lead to access to Article III courts).

76 *Dreier*, 106 F.3d at 853 (internal quotations omitted).

77 Professor Paul Figley suggests the following test: “whether the injury arose while a service member was on active duty; whether the injury arose on a military situs; whether the injury arose during a military activity; whether the service member was taking advantage of a privilege or
regarding whether an injury is incident to military service\textsuperscript{78} resulted in “considerable confusion among the circuits.”\textsuperscript{79}

C. Expansive Application of “Incident to Service”

Following \textit{Feres} and \textit{Brown}, courts continued to broaden the definition of “incident to service,”\textsuperscript{80} applying the prohibition to medical malpractice, exposure to toxic substances, enjoying a benefit conferred as a result of military service when the injury arose; and whether the injury arose while the service member was subject to military discipline or control.” Paul Figley, \textit{Understanding the Federal Tort Claims Act: A Different Metaphor}, 44 \textit{TORT TRIAL INSUR. PRACT. LAW J.} 1105, 1116 (2009).


\textsuperscript{80}See \textit{United States v. Johnson}, 481 U.S. 681 (1987) (barring a wrongful death action even though the harm was caused by the Federal Aviation Administration, a civilian agency, in large part because the decedent was a service member); \textit{See also} Potts v. United States, 723 F.2d 20 (6th Cir. 1983) (per curiam) (denying recovery to a Navy corpsman for injuries sustained after
murders or suicides, sexual assaults, and more – hardly activity that could or should be considered incident to or an essential part of military service. A brief look at those harms follows.

being struck by a cable while on leave). See, e.g., Major v. United States, 835 F.2d 641, 644–45 (6th Cir. 1987) (per curiam) (barring an action for recover from injuries sustained in an on-base motor vehicle accident,, which occurred due to an intoxicated, noncommissioned officer). The court stated that in years prior, “the Court ha[d] embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military.” Id.

The courts have also extended the doctrine to apply to cadets at military academies. See Collins v. United States, 642 F.2d 217, 218 (7th Cir. 1981) (barring a cadet from bringing a medical malpractice claim for vision loss experienced while at the academy). See e.g. Chappell v. Wallace, 462 U.S. 296, 297-98, 305 (1983) (barring a claim based on racial discrimination); Doe v. Hageneck, 870 F.3d 36, 37 (2d Cir. 2017) (barring a sexual assault claim); Futrell v. United States 859 F.3d 403, 404-05 (7th Cir. 2017) (barring a claim for the military’s failure to pay a retired member’s salary and insurance for a year); Filer v. Donley, 690 F.3d 643, 645-49 (5th Cir. 2012) (barring a claim based on a hostile work environment in which a superior hung a noose around a grenade in his office with the number one on it and additionally, would tell the air reserve technicians to take a number to wait for the “complaint department”); Wetherill v. Geren, 616 F.3d 789, 790 (8th Cir. 2010) (barring a claim by a dual-status National Guard member). But see Jackson v. Tate, 648 F.3d 729, 730 (9th Cir. 2011) (allowing a discharged serviceman to bring a claim against a recruiter who forged the serviceman’s signature on re-
(i) Post-Feres Medical Malpractice Cases

In *Henninger v. United States*, decided in 1973, the Ninth Circuit barred a medical malpractice claim involving negligent acts that resulted in the atrophy of the Navy serviceman’s left testicle. The malpractice began during a physical exam, one of the final steps that was to lead to plaintiff’s discharge. When a “double hernia” was found (generally referred to as a bilateral inguinal hernia), the plaintiff asked to have the condition treated in a non-military hospital after he became a civilian. The military doctor refused to sign the release authorizing civilian care and performed the operation, resulting in irreparable harm. The court found that these circumstances fit the definition of “incident to military service,” barred recovery, and rationalized the decision based on the mandate in *Feres* and the availability of veteran’s compensation benefits. Just how this decision enhances military discipline or forwards any rational interest other than avoidance of accountability and limiting public exposure of wrongdoing is a mystery that would need to be resolved outside this particular judicial opinion.

---

82 See *Henninger v. United States*, 472 F.2d 814, 815 (9th Cir. 1973).

83 *Id.* at 815.

84 *Id.* at 815-16.
That said, varying interpretations of the DFE in medical malpractice claims have allowed some cases to go forward in highly limited circumstances.\textsuperscript{85} When courts assess such claims based on \textit{Feres}, the “incident to military service”\textsuperscript{86} bar was and is almost insurmountable. However, courts that moved beyond \textit{Feres} have found that the DFE was created to “shield the government from liability for the exercise of governmental discretion, not to shield the government from claims of garden-variety medical malpractice.”\textsuperscript{87} That is not to say that victims of military medical malpractice have ready or predictable access to Article III courts under the FTCA; \textsuperscript{88} it is the case that many health care cases involve discretionary

\textsuperscript{85} Carpenter, \textit{supra} note 60 at 50–52.

\textsuperscript{86} \textit{Id.} (citing Romero v. United States, 954 F.2d 223 (4th Cir. 1992)) (declining to apply \textit{Feres} to a claim for a child with cerebral palsy even though the negligent prenatal care that caused the injury was given to an active duty servicewoman); West v. United States, 729 F.2d 1120 (7th Cir. 1984) (declining to bar liability for the wrongful death of one twin and the birth defects of another). \textit{But see} Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (deciding a servicewoman’s injuries received during negligent prenatal care were incident to service); Scales v. United States, 685 F.2d 970 (5th Cir. 1982) (applying \textit{Feres} to a suit brought by the parents of a boy who was born with mental and physical delays resulting from a rubella vaccination during his servicewoman-mother’s pregnancy).

\textsuperscript{87} Sigman v. United States, 208 F.3d 760, 770 (9th Cir. 2000).

\textsuperscript{88} Patricia Kime, \textit{Tragedy and Injustice: The Heartbreaking Truth About Military Medical Malpractice}, \textit{Military Times} (July 10, 2016), \url{https://www.militarytimes.com/pay-}
judgements (and thus are off limits due to the DFE) – but this does not bar all medical
malpractice cases.89

In *Jackson v. United States*,90 decided in 1997, a reservist at a weekend drill lacerated his
hand. The military doctor treating Jackson did not inform him of the need to have surgery
promptly91 resulting in permanent damage to his hand. Again, when examining the application
of *Feres*, the Ninth Circuit found that “the development of the doctrine . . . has broadened to such

89 Feldmeier, *supra* note 60 at 176–77 (citing *Collazo v. United States*, 850 F.2d 1, 3 (1st Cir.
1988)) (“[W]here only professional, nongovernmental discretion is at issue, the ‘discretionary
function’ exception does not apply.”). See also *Fang v. United States*, 140 F.3d 1238, 1241–42
(9th Cir. 1998) (holding that the United States is not immune from claims related to the “actual
administration of medical care by its employees,” but is immune from claims related to
discretionary policy decisions involving the allocation of medical personnel and resources);
of sovereign immunity and finding that “while a physician's diagnostic and treatment decisions
involve judgment and choice, thus satisfying the [*Gaubert*] test's first criterion, those decisions
generally do not include policy considerations, as required by the test's second criterion”).

90 110 F.3d 1484 (9th Cir. 1997).

91 *Id.* at 1486.
an extent that practically any suit that implicates the military judgments and decisions runs the risk of colliding with Feres.\textsuperscript{92} The view of the expansiveness of the incident to service exception has not changed over the last two decades. In \textit{Daniel v. United States},\textsuperscript{93} decided in 2018, a Navy nurse died after delivery of her child due to postpartum hemorrhaging.\textsuperscript{94} The Ninth Circuit dismissed the claims of medical malpractice and wrongful death based on Feres.\textsuperscript{95}

The concern expressed in \textit{Jackson}, that any suit “that implicates” the military is barred, is even more troubling when it is extended to claims of civilian children of service members. In \textit{Mondelli v. United States},\textsuperscript{96} the child of a service member was born with retinal blastoma, a genetically transferred form of cancer.\textsuperscript{97} The cause of the child’s condition was linked to a genetic anomaly that was a consequence of her father’s exposure to radiation during nuclear device testing. The Third Circuit lamented that barring the claim would be an injustice—

\textsuperscript{92} \textit{Id.} at 1486–87 (emphasis added).

\textsuperscript{93} 889 F.3d 978 (9\textsuperscript{th} Cir. 2018).

\textsuperscript{94} \textit{Id.} at 980.

\textsuperscript{95} \textit{Id.} at 980, 982 (citing Atkinson v. United States, 825 F.2d 202, 203, 205-06 (9th Cir. 1987)) (relying on application of the \textit{Feres} doctrine to bar the claim of a pregnant United States Army Specialist who had been sent home from the hospital multiple times before being diagnosed with preeclampsia and delivering a stillborn child).

\textsuperscript{96} 711 F. 2d 567 (3\textsuperscript{rd} Cir. 1983).

\textsuperscript{97} \textit{Id.}
punishing a child for the harm the parents had sustained—but barred the claim nonetheless because her harm arose from the initial injury to her father that was incident to his service.98

The courts have, however, allowed recovery on behalf of a child injured in utero in some cases. In United States v. Brown, a doctor’s negligent action in the course of routine treatment of a pregnancy allegedly resulted in the child being born with spina bifida.99 The Sixth Circuit held that the Feres doctrine did not apply in such a situation because the FTCA, “does not preclude recovery for negligent prenatal injuries to the child of a military service person that are independent of any injury to the child’s parent.”100

However, in Ritchie v. United States,101 a claim similar to Brown, a mother was ordered to continue military training while pregnant contrary to the admonitions of the mother’s physician.102 Stresses in training led to a premature birth and subsequent death of her infant.103

98 Mondelli, 711 F.2d 567 (3d Cir. 1983). But see, Romero v. United States, 954 F.2d 223, 224-26 (4th Cir. 1992) (allowing recovery for a child born with cerebral palsy because of the mother’s untreated incompetent cervix, reasoning that the treatment would have guaranteed the health of the child—a civilian—and therefore cannot be governed by Feres).

99 See Brown v. United States, 462 F.3d 609 (6th Cir. 2006).

100 Id. at 615.

101 733 F.3d 871 (9th Cir. 2013).

102 Id. at 873, 878 (allowing a child in utero to recover, but not the mother).

103 Id. at 873.
In a wrongful death action for the loss of the child, the Ninth Circuit held that the “in utero” exception did not apply in this instance because the mother had suffered the injury to her child incident to service.104

(ii). Murder and Suicide

Civil tort actions following a murder or suicide have also been barred under the expansive interpretation of “incident to service” in Feres.105 In United States v. Shearer, a service member was kidnapped and killed another while away from his base.106 Previously, the assailant had been convicted of an unrelated manslaughter in Germany, 107 a fact know to the assailant’s superiors who, nonetheless, allowed him to stay on the base.108 The deceased’s parents alleged the Army had been negligent by failing to remove or identify the assailant, leading to the death of their son. Based on Feres, the Supreme Court barred the claim even though the murder occurred off the base on the premise that allowing the case to go forward would affect military discipline.109

104 Id. at 878.

105 Feres, supra note 22 at 135.


107 Id.

108 Id. at 53.

109 Id. at 58.
Feres was made applicable to suicide in Purcell v. United States, a case involving the death of a twenty-one-year-old sailor. Although a phone call beforehand expressed concern that the sailor had a gun and planned on killing himself, Purcell’s superiors took no action and the sailor subsequently took his life. The Seventh Circuit explained that even though the family had not received any benefits related to the suicide and thus would not recover twice (dual recovery is a common concern expressed in Feres cases), the court barred recovery, seemingly across the board, in cases involving homicide or suicide.

110 656 F.3d 463, 464 (7th Cir. 2011).

111 Id. at 465.

112 See id. at 467. See also, Ritchie, 733 F.3d 871, 875 (9th Cir. 2013) (citing Persons v. United States, 925 F.2d 292, 295-97 (9th Cir. 1991)) (holding that the family of a man who committed suicide as an off-duty member of the military, after the naval hospital released him, could not recover under the FTCA due to the Feres bar).

113 See also, Costco v. United States, 248 F.3d 863, 864–65, 867–68 (9th Cir. 2001) (holding that the family of a sailor who drowned during a Navy-led recreational rafting trip cannot recover under the FTCA because the totality of the circumstances test determined that certain unrelated military activities fall under Feres).
(iii). Sexual Assault and Other Egregious Misconduct

Sexual assault, currently at epidemic levels, have been deemed incident to service much like murder and suicide. Accordingly, any deterrent effect the tort system would produce to lessen similar misconduct is lost. In *Klay v. Panetta*, the plaintiff had argued that “being victimized by a sexual assault cannot possibly be considered to be an


115 Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991) (involving a brutal beating after having been included hung upside down by the ankles until the individual’s bones separated).

116 See, e.g., *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014) (applying the *Feres* doctrine to bar plaintiff’s relief sought for a sexual assault that occurred while serving in the military); Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991) (holding that a former service member was barred from bringing a FTCA claim against the government for an incident of hazing that led to post-traumatic stress disorder).
‘activity’ incident to military service….” 117 The court rejected plaintiff’s claim, 118 explaining that the question was not whether being raped is an activity incident to military service, but rather, the connection to service came from the fact that the assailant was a service member. 119

117 Klay, 758 F.3d at 375 (noting the claim flowed from the defendant’s alleged mismanagement of the military).

118 Id. at 377 (acknowledging this was a civil rights/Bivens claim, and such claims are simply unavailable to members of the armed forces). See United States v. Stanley, 483 U.S. 669 (1987) (“Bivens suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement.”); Erwin Chemerinski, FEDERAL JURISDICTION 621–22 (5th ed. 2007). See, e.g. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

119 Klay, 758 F. 3d at 375–76 (reasoning that because the assailant was a service member subject to discipline in the military, a civil case focused on the same behavior would interfere with military judgements).
The absurdity of the reasoning in *Klay* needs no elaboration; sexual assault is not incident to military service.120 It is a crime, prosecuted, albeit internally, in our armed forces.121 Prosecution, however, does not equate with justice for a victim. Victims deserve their day in court.122 With public focus on this issue by virtue of the “#me too”123 and “time’s up now”124 movements, this is the right moment to break free of such preposterous reasoning, particularly in terms of our armed forces. Our military justifiably takes pride in teaching respect and decency, insisting on proper decorum, referring to civilians as “Sir” or “Ma’am,” providing a model for


123 #Me Too: You Are Not Alone, [https://metoomvmt.org/](https://metoomvmt.org/).

124 Time’s Up, [https://www.timesupnow.com/](https://www.timesupnow.com/).
those within and outside the armed forces. That laudable vision of human interaction is patently incompatible with a jurisprudence that characterizes sexual assault as incident to military service.

Beyond sexual assault, the FTCA has prevented individuals with traumatic brain injuries, post-traumatic stress disorder, and complications from chemical exposure from recovering in Article III tort cases even when such injuries are the result of nonconsenting experimentation, exposure to toxins, or other actions that bear no meaningful relationship to acceptable military service.


126 Klay, supra 116.

127 See Stanley, 483 U.S. at 671, 683–84; Veloz-Gertrudis, 768 F. Supp. at 39; Sweet, 687 F.2d 246; Campbell, supra note 2, at 138–40, 152–53.

128 See Helen D. O’Conor, Federal Tort Claims Act is Available for OIF TBI Veterans, Despite Feres, 11 DePaul J. Health Care L. 273, 274 (2008). It is estimated that twenty percent (20%) of troops deployed since 2001 have been affected by traumatic brain injury. Jesse Bogan, Afghan War Vets, St. Louis Researchers Seek Answers on Head Injuries, ST. LOUIS POST-DISPATCH (Jan. 27, 2014), http://www.stltoday.com/news/local/metro/afghan-war-vets-st-louisresearchersseek-answers-on-head/article_daaa0082-4d39-5d0d-899a7e942109c103.html. See Gros v. United States, 232 Fed. Appx. 417, 417 (5th Cir. 2007) (denying recovery to service members who were...
In *Baker v. United States*, 129 in the course of a training exercise, a military police officer was injured when the role that officer played was misunderstood by others who, seemingly without provocation, reacted violently resulting in a life-altering traumatic brain injury. Making a conventional negligence case based on these facts was a simple matter – and yet, the officer was unable to recover in tort in an Article III court. 130


130 *Id.* at *1, 6.

discharged a year later, and returned home to recover from numerous injuries. After discharge and during the course of his recovery, he began to show signs of PTSD. The disorder persisted and intensified, and over time, he threatened family members, was hospitalized by the VA, released, had episodes of uncontrolled screaming, horrific night terrors, and finally, stepped in front of a train, taking his life. Katta’s mother sued the VA alleging that the treatment received for his PTSD was wholly inappropriate. Her claim was rejected based on Feres, on the premise that PTSD was incident to his service, even though the condition first manifested after Katta entered civilian life.132

Like Katta, the fate of Alexis Veloz-Gertrudis is deeply troubling. To say that Seaman Veloz-Gertrudis was the victim of a hazing incident really does not capture what happened.133 While assigned to the U.S.S. Forrestal, Veloz-Gertrudis alleged that “[s]enior crewmen tied him up with rope and suspended him upside down from an air pressure valve. He was stripped to the waist and grease was smeared over his stomach. Crew members then took turns slapping him on the stomach and chest.”134 At one point, “a crew member yanked on the rope by which plaintiff was hanging, forcing his ankles over the top of the valve. Veloz-Gertrudis heard his ankle "pop"
and began screaming with pain. . . .”

In response to the screaming, the crew members “continued to strike him, one delivering a series of particularly hard blows. . . .” When he threatened to report what had happened, he was punched in the head and neck and, at some point, a crew member jumped up and down on his back. These events scarred him physically and, not surprisingly, resulted in PTSD. Yet when he sought recovery for alleged horrific harms he suffered, he was barred, because, inter alia, “pursuit of plaintiffs' claim would intrude on military discipline.”

It does not take a great leap of logic or a scintilla of disrespect for our armed forces (and none is intended) to conclude that the circumstances alleged by Veloz-Gertrudis reflect a failure of military discipline. The very fact that a civil action in tort was unavailable – and thus undeterred – contributes to an environment where this type of misconduct can take place with seeming impunity.

The cases of egregious conduct just described would be actionable if the recommendations in this article are implemented. Even so, many simple negligence and even certain intentional tort cases (e.g., emotional distress comes to mind) that would be actionable

135 Id.

136 Id. at 39–40.

137 Id. at 41.

138 Id. at 39.

139 See supra, note 13 and accompanying text.
outside the military would still be blocked and compensation limited to the intra-service administrative system. An example of what that might look like is Gros v. United States, where the plaintiff alleged significant harm as a consequence of exposure to contaminated water on a military base. The Fifth Circuit found that exposure to contaminated water in the plaintiff’s home (on a military base) was activity “incident to service.” While exposure to contaminated water was the consequence of a breach of a reasonable duty of care to maintain an essential service and probably actionable in the private sector, plaintiff’s harm was purely a consequence of life on a military base and thus genuinely incident to service. Gros would not be actionable were the recommendations in this article accepted – a simple maintenance failure is not within one of the seven proposed exceptions to the FTCA.

140 John W. Hamilton, Contamination at U.S. Military Bases: Profiles and Responses, 35 STAN. ENVTL. L.J. 223, 242-43 (2016) (suggesting removal of the bar on cases for non-combat torts, reckless or knowing acts, and cases of alleged cover-up.

141 See Gros v. United States, 232 Fed. Appx. 417, 419 (5th Cir. 2007) (barring claims brought against the government by service members who were exposed to toxic chemicals in the water on a United States military base); In re Agent Orange Product Liability Litigation, 597 F. Supp. 740, 746, 753–54 (E.D.N.Y. 1984) (applying Feres to bar claims against the United States involving exposure to Agent Orange in Vietnam).

142 Gros, 2007 WL 1454486, at *1 (noting that Gros was on active duty when the harm, and as such “the Feres doctrine bars suit when the injuries ar[i]se on base while plaintiffs were off-duty and attending to personal activities”).
Gros is simply different than cases involving rape, violent beatings, clear or gross malpractice, or nonconsenting exposure to toxins. The FTCA was written to allow for accountability when accountability was essential and would not disrupt the ability of our government to exercise discretion. It is inconceivable that the discretion Congress had in mind was the capacity to subject service members to torture, sexual crimes, or toxins.

In United States v. Stanley, the Supreme Court held that the Feres doctrine barred a claim against the government for long-term effects of lysergic acid diethylamide (LSD) administered to the plaintiff after he consented to participate in a study to test the effectiveness of protective gear against chemical warfare. The Court found it immaterial that Stanley was deceived and that he was not acting under direct orders of his superiors in taking the LSD, invoking chain-of-command concerns. Barring cases where nonconsenting and unknowing

---


145 Id. at 671–72.

146 Id. at 680 (stating the officer-subordinate relationship is not crucial under Feres, and noting that the court, instead, applied an “incident to service” test). See also Sweet v. United States, 528 F. Supp. 1068 (D.S.D. 1981), aff’d, 687 F.2d 246 (8th Cir. 1982) (barring a former serviceman from bringing a claim from injuries that arose when that the government forced him to take LSD as part of an experiment and failed to provide him with the necessary follow-up treatment and
service members have been used as human subjects for experiments hardly seems to advance discipline or any other interest used to defend Feres (or central to the DFE) other than avoidance of accountability.147

(iv). Avoiding Feres: A Few Exceptions to the Bar

While success rates are low and options few, there are certain instances where Feres may not apply. For example, the Feres doctrine does not explicitly bar claims for injunctive (as opposed to monetary) relief, although a cursory look at the case law suggests that it is unlikely that most courts would issue such injunctions.148 A second possibility stems from a few cases involving misconduct by independent contractors retained by the armed forces, 149 where a care). The court in Sweet noted that the injuries sustained were “inseparably entwined and directly related to the injury he allegedly sustained while in the service.” Id. at 1070, 1075.


148 Compare Speigner v. Alexander, 248 F.3d 1292, 1296 (11th Cir. 2001) (holding that the doctrine of nonjusticiability extends to cases for injunctive relief, with a few unspecified exceptions), with Wigginton v. Centracchio, 205 F.3d 504, 512 (1st Cir. 2000) (holding intra-military suits alleging constitutional violations, but not seeking damages, are justiciable).

149 Gomez v. Campbell-Ewald Co., No. CV 10-02007 DMG (CWx), 2013 WL 655237, at *6 (C.D. Cal. Feb. 22, 2013), vacated, 768 F.3d 871 (9th Cir. 2014), aff’d in part, 136 S. Ct. 663, 672 (2016) (acknowledging that both sovereign immunity and the government contractor defense make it difficult to pursue claims against a government contractor, but when on to hold that
former service member was harmed by actions of the contractor including, in one instance, a claim based on a post-discharge failure to warn.150 Service members may also be able to sue states governments, as opposed to the federal government, although such cases have little or nothing to do with accountability under the FTCA.151

"when a contractor violates both federal law and the Government's explicit instruction . . . no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation"). See, Boyle v. United Technologies Corp., 487 U.S. 500, 510–12 (1988) (neglecting to directly adopt the Feres doctrine for independent contractors, but holding nonetheless holding that there could be a significant conflict between federal interests and state tort laws); Lessin v. Kellogg Brown & Root, 2006 WL 3940556, at *1 (S.D. Tex. June 12, 2006) (refusing to dismiss a claim against an independent contractor for negligence in inspecting, maintaining, and repairing a truck that injured him, causing a traumatic brain injury, while providing a military escort).

150 Perez v. United States, 2010 WL 11505508, at *1 (S.D. Fla. June 15, 2010) (holding the Feres doctrine did not bar a claim under the FTCA for negligence in post-discharge failure to warn about toxic chemicals in the drinking water consumer while stationed that caused non-Hodgkin’s lymphoma).

151 Trankel v. Montana, 938 P.2d 614, 619 (Mont. 1997) (holding that a former service member could bring a claim for negligence related to military service because the claim was against the state of Montana, and not the U.S. Government).
In *Lutz v. Secretary of the Air Force*, 152 three service members broke into the office of Maj. Marsha Lutz and stole documents that disclosed the sexual orientation of Maj. Lutz. 153 Maj. Lutz filed suit alleging that the theft was tortious, designed to harm her reputation, and not incident to service in any way. The Ninth Circuit agreed, recognizing that, “even *Feres* concatenations must come to an end.” 154 The court reasoned that an act by one service member toward another with “no conceivable military purpose and . . . not perpetrated during the course of a military activity surely are past the reach of *Feres*.” 155 The court found that service members should not be able to avoid responsibility simply because they wore a military uniform at the time they committed an unquestionably wrongful act. 156 This case is part of a very, very limited “private acts” exception recognized in *Durant v. Neneman*: “[O]ur evolving jurisprudence has created a zone of protection for military actors, immunizing [them from] civilian courts. It is our conclusion, however, that this zone [created by *Feres*] was never intended to protect the personal acts of an individual when those acts in no way implicate the function or authority of the military. . . .” 157 *Durant* states the obvious: “When a soldier commits an act that would, in civilian life, make him liable to another, he should not be allowed

152 944 F.2d 1477 (9th Cir. 1991).

153 *Id.* At 1470.

154 *Id.* at 1487 (internal citations omitted).

155 *Id.*

156 *Id.*

157 884 F.2d 1350, 1353, 1354 (10th Cir. 1989)
to escape responsibility . . . because those involved were wearing military uniforms . . .

. . . military personnel . . . engaged in distinctly nonmilitary acts . . . should be subject to civil authority.”

Of course the problem is that almost all the actions described in this article involve misconduct which could be seen as incident to service when that term is defined as being virtually anything in any way related to our armed forces.

In *Adams v. United States*, the Fifth Circuit reversed a summary judgment dismissing the claim of the family of a service member who had a fatal heart attack following a circumcision. That plaintiff had not received payments from the military, was on indefinite leave, and awaiting separation paperwork to be completed, persuaded the Fifth Circuit to reverse the summary judgment. *Adams* suggests that a victim of military medical malpractice may circumvent *Feres* when the plaintiff was not returning to military service. Again, while it is tempting to classify this as an exception, it’s not. For example, almost all PTSD claims involve veterans who do not intend to return to military service – and almost all are kept out of Article III courts.

158 *Id.*

159 728 F.2d 736 (5th Cir. 1984).

160 *Id.* at 737–38.

161 *Id.* at 737, 739–40.


In Hall v. United States, a widow sued the federal government for the wrongful death of her husband (a petty officer), his two children, and his two step-children, all of whom died from carbon monoxide poisoning in their home on a naval base after the Navy failed to replace gas appliances. The government moved to dismiss based on Feres but lost when the court found that the harm was not incident to the officer’s military service since the officer was off-duty and asleep, factors prompting the court to consider whether this was personal activity and not incident to service. This decision does not square with many of the cases already discussed including Gros v. United States involving harm caused by contaminated water (used for drinking and bathing) in a home on a base. Frankly, while “personal activity” does seem a legitimate way to describe behavior not “incident to military service,” there is little to suggest it is a reliable distinction.

(v) Reluctance to Follow Feres

165 Id. at 826.
166 Id. at 829.
167 Gros v. United States, 232 Fed. Appx. 417, 417 (5th Cir. 2007) (denying recovery to service members who were exposed to toxic chemicals in the water on a United States military base
168 See Warner v. United States, 720 F.2d 837, 839 (5th Cir.1983) (noting that activities such as shopping might be incident to service if they occur during brief off-duty periods).
That *Feres* is problematic is hardly debatable – but is the case an incorrect reading of the FTCA? Justice Antonin Scalia’s dissent in *United States v. Johnson*, 169 left little doubt of his point of view; the case, he wrote, is “wrongly decided.”170 In a dissenting opinion denying a grant of certiorari, Justice Clarence Thomas observed that the FTCA simply does not mandate blocking claims across-the-board of service members: “There is no support for this conclusion in the text of the statute, and it has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees. I tend to agree with Justice Scalia that ‘*Feres* was wrongly decided’ . . . .”171

Assuming Justices Scalia and Thomas are right, the case is nonetheless controlling precedent, prompting courts to search, often in vain, for exceptions. For example, in *Daniel v. United States*,172 after the court barred the claim based on the *Feres* doctrine, it stated that the plaintiff, a dedicated lieutenant, was “ironically professionally trained to render the same type of care that led to her death. If ever there were a case to carve out an exception to the *Feres* doctrine, this is it.”173 Yet, the current understanding of “incident to service” precluded the


170 Id. at 700 (quoting *In re “Agent Orange” Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y.)).


172 889 F.3d 978, 982 (9th Cir. 2018).

173 Id at 982.
Ninth Circuit from allowing an otherwise legitimate claim (from the standpoint of substantive tort law) to go forward.174

While Congress did not resolve the matter of tort claims “incident to service,” Feres left little room for other interpretations: “We conclude 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.”175 Given the enormity of this declaration, it is worth exploring whether the justifications on which the Court predicated its opinions are convincing.176

III. THE FERES RATIONALES

While the Feres Court found that the FTCA, explicitly, was designed to hold the government liable, “in the same manner and to the same extent as a private individual under like

174 See Hinkie v. United States, 715 F.2d 96, 97 (3d Cir. 1983); see also Jennifer Zyznar, Feres Doctrine: Don’t Let This Be It. Fight!, 46 J. MARSHALL L. REV. 607, 623 n. 125 (2013) (citing Matraele v. N.J. Dep’t of Military & Veterans Affairs, 487 F.3d 150, 159 (3d Cir. 2007) (discussing the Feres doctrines ripeness for reconsideration)).

175 340 U.S. at 146.

circumstances...", 177 the Court also found compelling reasons to bar liability when an injury was incident to military service. These include the following: (1) “[t]he relationship between the Government and members of its armed forces is distinctly federal in character,” 178 (2) an accessible compensation process for illness and injury, and (3) an understandable concern that the presence of many and varied civil tort claims would undermine discipline, chain-of-command, the willingness to follow lawful orders unquestioningly, and more. 179 In addition, the Court was concerned that expansive civil liability would lead to unequal treatment of service members. These and other rationales bear scrutiny.

A. Unique Relationship

That there is a unique relationship between members of the armed forces and the federal government is not debatable. 180 However, it does not follow automatically that the existence of that relationship must mean denial of access to justice in Article III courts.

177 340 U.S. at 141.

178 Id. at 143.


180 See Paul Figley, In Defense of Feres: An Unfairly Maligned Opinion, 60 AM. U. L. REV. 393, 434 (2010) (articulating that no private citizen has ever had a relationship comparable to the power the Government has over its armed forces).
It has been suggested that evidence of the unsuitability of civil tort litigation to this unique relationship can be derived from looking at the small number of cases and scant case law generated between the adoption of the FTCA in 1946 and before the 1950 Feres decision.\footnote{181} That there is limited precedent in this time period is in no way surprising or indicative of much of anything for two reasons: first, the government fought aggressively every case that was brought,\footnote{182} and second, there was no time for the doctrine to evolve and thus no chance to work through various quirks unique to intra-military litigation. In 1949, in Brooks v. United States,\footnote{183} the government argued unsuccessfully that all cases in any way incident to service should be barred. A year later, in Feres, the argument succeeded, notwithstanding the fact that, as Justice Thomas later noted, the FTCA says nothing of the kind.\footnote{184}

If any conclusion is to be drawn from the limited litigation history prior to 1950 and the almost nonexistent precedent thereafter, it is that in the absence of the potent deterrent effect of

\footnote{181}{Id.}

\footnote{182}{Brooks v. United States, 337 U.S. 49, 50 (1949), Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948), and the lower court decision in Feres are good examples of this. The Government’s argument in each of these cases was not that that the Governmental actors behavior conformed with due care, but rather that the Government was immune.}

\footnote{183}{See, e.g., Brooks, 337 U.S. at 50.}

\footnote{184}{Lanus v. United States, 570 U.S. 932, 933 (2013).}
tort law, there has been an epidemic of sexual assault, significant unchecked acts of medical malpractice, and impermissible physical abuse. It is no wonder that even

185 *Supra*, note 114.

judicial conservatives (Justices Scalia and Thomas) took the position that *Feres* was a mistake from the outset.189

The nature of the unique relationship that service members have with the country they serve is potent, suffused with mandates of command and order, discipline and responsibility, a

__________________________________________________________
*Department Fails Females*, HUFFINGTON POST (Oct. 6, 2012),


187 Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 398 (2010) (arguing that Feres has rendered service members “second-class citizens, whose rights fall below even those of the nation's criminals . . . . [The] *Feres* bar undermines the quality of healthcare provided to the nation's military forces by preventing accountability for egregious mistakes and shortcomings in medical treatment.”); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. WASH. L. REV. 1, 43 (2003) (“Military medical malpractice has long been a subject of intense criticism. This record may reflect the absence of malpractice as a deterrent in the military medical system due to the application of the Feres doctrine. While early cases did allow recovery for injuries to family members of service members, the courts have largely cut off even that element of deterrence by extending Feres to cover such cases.”).

188 *Katta*, *supra*, note 106 at 1136–37, 1141.

commitment to country, a respect for rules, regulations, statutes, and, of course, the UCMJ. A lack of accountability for overt wrongdoing is nowhere in that set of critical obligations and values.

B. Sufficient Alternative Remedies

A second rationale for *Feres* is the availability of remedies within the system of military justice. Service members, the Court noted, were “already well-provided for” under the Veteran’s Benefit Act, a compensation scheme providing funds to those who are injured incident to military service regardless of fault. The argument is that service members are better off because (1) there is no obligation to prove fault, (2) any needed medical care is free, and (3) there are generous insurance, retirement, and other general benefits “outside of the tort area.” Arguably, allowing those with such benefits to recover in an Article III court could be seen as dual recovery or unjust enrichment and create an “uneven system for compensating troops.” Moreover, the “simple, certain, and uniform” compensation system results in “recoveries [that]

---


compare extremely favorably with those provided” by other federal compensation schemes, such as workers’ compensation.194

Detractors of the current system assert that it is neither sufficient in amount nor reliable enough to cover the harms service members and their families experience and certainly insufficient to produce a deterrent to future violations.195 Particularly in post-discharge

194 Feres, 340 U.S. at 143–45. See Froelich, Closing the Equitable Loophole: Assessing the Supreme Court’s Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs, 35 SETON HALL L. REV. 699, 716 (2005) (emphasizing that the President has exclusive authority over military rights, duties, responsibilities, regulations and procedures). Circuit courts have expressed concern that “judicial meddling in such instances would violate the separation of powers” and further that “civilian courts are inherently unsuitable and incompetent to oversee such matters. Id. at 728 (citing Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989)).

195 Deirdre G. Brou, Alternatives to the Judicially Promulgated Feres Doctrine, 192 MIL. L. REV. 1, 45–47 (2007) (arguing that the veteran’s compensation system may require litigation, and further, it is inefficient, slow, not always accurate, and not as generous as the Feres court might have believed); Helen D. O’Conor, Federal Tort Claims Act is Available for OIF TBI Veterans, Despite Feres, 11 DEPAUL J. HEALTH CARE L. 273, 274 (2008) (arguing that the benefits available through veteran statutes do not adequately cover life-long impairments).
compensation cases, veterans face significant barriers. In fact, there is simply no basis to argue and no record to support the proposition that the compensation system available within the military is comparable to the civil justice system in terms of the amount of individual judgements, deterrent effect, and fairness. The question is whether adding the potential for access to Article III courts in highly limited and well-defined circumstances would do more harm than good.

To be sure, mechanisms for discipline, strict adherence to lawful orders, and respect for the chain-of-command are essential. That those critical components of our armed forces are undermined by making the government civilly accountable in select cases involving unquestionably wrongful conduct simply does not ring true and is not justified by an imperfect administrative and internal system of compensation.


The premise of this particular rationale is that an administrative compensation system within our armed forces (broadly defined) would be frustrated or cannot co-exist when a small number of victims of overt wrongdoing have access, in limited circumstances, to civil justice in Article III courts. First, there is literally no empirical evidence to support this justification. Second, the idea that a victim would be unjustly enriched wrongfully presupposes that courts would permit a person to be awarded twice for the same costs and that the damages one would seek and receive in an Article III court are the same one would receive in an administrative tribunal. Presumably, an administrative award for costs or damages could be off-set against a judgment for those same costs and damages. Alternatively, it is possible to avoid the unjust enrichment problem by providing a service member an opt-out option from the military administrative compensation system to pursue a civil tort claim as is done with intentional torts

Lawrence Garrett III, General Counsel, Department of Defense) ("The Department believes that amendment of the Military Claims Act . . . may very well provide . . . a solution.").
in certain workers compensation systems and a number of other administrative compensation programs.

C. Chain-of-Command and Military Discipline


199 Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1673 (2015) (discussing the Vaccine Act opt-out option found at 42 U.S.C. § 300aa-11(a)(2)(A)(i), 300aa-21(b) pertaining to retention of vaccine claimants retention of the right to pursue civil tort options). See COMCAST CABLE ARBITRATION OPT OUT AGREEMENT (2007), http://comcast.com/arbitrationoptout/default.ashx (an opt-out program where the option was limited funds from settlement versus independent litigation); SEPTEMBER 11TH VICTIM’S COMPENSATION FUND, https://www.vcf.gov/ (creating a fund to pay victims of the 9/11 terrorist disaster in which victims have the option to take the settlement distribution or opt out and litigate independently).
Respect for and adherence to rules, discipline, tradition, training/conditioning regimes, and the chain-of-command is vitally important to the effective and efficient operation of our armed forces. The limitations in *Feres* are driven, in meaningful part, by the concern that exposure to liability would undermine those vital aspects of military life. 200 The argument is that civil tort litigation, “if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.” 201 The discipline and the very nature of the command structure would, “get bogged down in lengthy and possibly frivolous lawsuits [that may ] substantially disrupt the military mission, by requiring officers … to testify in court as to their decisions and actions. . . .[taking] scarce resources away from compelling military needs’ to avoid legal actions.” 202

Notwithstanding the important concerns expressed above, there is no concrete data, no studies, not even any documented history to support the proposition that providing access to justice in Article III courts to address egregious misconduct means undoing the UCMJ, rules related to discipline, training regimens, or, for that matter, any rules and regulations regarding service members. Nothing in that structure need change.

200 340 U.S. at 146

201 Regan v. Starcraft Marine LLC, 524 F.3d 627, 634 (5th Cir. 2008). See Dawson, supra note 18 at 488 (claiming that the “often maligned military discipline rationale, standing alone, is sufficient to support the *Feres* doctrine”).

Access to justice means only that there would be a remedy in a court of law for isolated, undeniably unacceptable misconduct clearly not essential to military operations, order, or discipline. Undoing *Feres* is not an invitation for a free-for-all, for chaos, for the end of tradition, or anything of the sort. Being accountable for discernible wrongdoing does not equate with the behavioral Armageddon and mayhem *Feres* devotees fear. The converse seems more realistic: systemic avoidance of liability for clearly actionable behavior shields wrongdoers, fosters distrust and resentment, enshrines unequal treatment, and nurtures a culture of secrecy.

On the more pointed question of chain-of-command, in the absence of *Feres*, would service members regularly question the judgment of their superiors? If so, the doctrine should not change. However, there is no demonstrated reason to believe that long-standing military practices, including unquestioned compliance with all lawful orders, would vanish simply because a very small number of people who engage in overtly unacceptable misconduct are held accountable for their actions. Making the recommendation to amend the FTCA and end the *Feres* bar is accompanied by the deeply held belief in the essential nature of the kind of training and discipline that has characterized our military since its very beginning.

---

203 *Stencel Aero Eng’g Corp.*, 431 U.S. at 671–72; *Feres*, 340 U.S. at 141, 143–44.

204 The conclusions in this section draw more heavily on the author’s personal experiences noted briefly at the outset of the article.

205 This is not a debatable point, but it is one that is discussed regularly. Jon Mixon, USAF (ret.), *Why is the Military So Strict and Tough?*, MILITARY1 (2018),

The discipline/command arguments are not complicated: (1) holding wrongdoers accountable does not undermine discipline; (2) holding wrongdoers accountable does not cause the collapse of the chain-of-command or otherwise invite insubordination; (3) findings of civil liability in tort make it less likely that unlawful, unreasonable, and indefensible risks to human welfare will take place in the future; (4) if *Feres* did not bar recovery, the frequency of isolated controversial or injurious practices might be curtailed; (5) given the exposure and fiscal potential of tort liability, lifting the *Feres* bar would make it more likely the federal government would acknowledge wrongdoing rather than fight tooth and nail the very existence of responsibility for actions that cause harm; (6) subjecting the federal government to the

________________________


207 *Hinkie v. United States* 715 F.2d 96, 97 (3d Cir. 1983) (barring civil liability in a radiation exposure case where not only was there service member a victim, but his spouse and child as well); *Jaffee v. United States*, 1980 U.S. App. LEXIS 20332 (3rd Cir. 1980) (blocking service members’ claims based on *Feres* despite a commanding officer’s awareness of risk from exposure to deadly radiation); *Hall v. United States*, 130 F. Supp. 2d 825 (S.D. Miss. 2000) (holding that widow of a petty officer could recover for her husband’s death and death of their children from carbon monoxide poisoning in their home at a naval base)

208 The federal government fought successfully all claims involving exposure to dioxin (Agent Orange) in Vietnam, as well as chemicals in the water on military basis, among other claims. See
light of day for systemic misconduct including invidious discrimination should have a powerful corrective effect, 209 and (7) when there are no consequences for tortious misconduct, there is no meaningful deterrence for repetition of that same act. 210

It is simply illogical to assume that discipline and respect for authority are optimized in a setting where accountability is circumscribed. It is more logical to assume that the presence of unchecked egregious misconduct advancing no service related goal is the consequence of insufficient accountability and deterrence.

D. The “Feres is a Fair Interpretation of the FTCA” Rationale

The FTCA, like most statutes, has gaps – but the Court in Feres was not engaged in

__________________________


209 David Saul Schwartz, Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine, 95 YALE L.J. 992, 1015-1016 (1986) ([C]ases involving particularly egregious or widespread military misconduct are more appropriately resolved by civilian courts. . . .”)

judicial “gap filling” of an ambiguous statute. 211 The Court was legislating. It’s one thing for the Court to give clarity to a statute. It’s quite another to craft a massive exception to liability in a statute designed to create accountability, blocking countless claims, when the statute on which those claims would be based, the FTCA, does not do so. 212 The idea that Congress was unaware of the importance of specifying exceptions to the FTCA when it opened the door to tort liability is indefensible. Exemptions or exceptions, e.g., the DFE, were discussed, and the matter of service members considered – e.g., the addition of the word “combatant” 213 in House debates. A blanket bar of liability would have been a political decision of great moment – but it did not happen.

When Congress passed the FTCA and waived sovereign immunity, had Congress been inclined to block the vast majority of civil tort claims emanating from the single largest branch of government, the Defense Department, 214 it easily could have done so – but it did not. Seen in


212 John Astley, United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow, 38 AM. U. L. REV. 185 (1988) (“An analysis of the FTCA legislative history does not clearly indicate whether Congress intended to exclude military personnel from FTCA protection . . . it is reasonable to conclude that Congress intended service members to be covered.”).

213 Id.

214 THE WHITE HOUSE, THE EXECUTIVE BRANCH (last accessed Jan. 17, 2019), https://obamawhitehouse.archives.gov/1600/executive-branch (“The Department of Defense is the largest government agency, with more than 1.3 million men and women on active duty,
that light, *Feres* is not just overly broad,215 it is an incorrect interpretation of the FTCA and thus wrongly decided.216

To be fair, there is thoughtful and compelling scholarship defending the Court’s decision as consistent with the FTCA.217 There is also the fact that the Court crafted limitations on civil actions in *Feres* as the best way to solve what it perceived as the problem of maintaining discipline and the chain-of-command, both understandable and undeniably valid goals. Regardless of the motivation when the case was decided, the immunity *Feres* spawned has

_____________________

nearly 700,000 civilian personnel, and 1.1 million citizens who serve in the National Guard and Reserve forces.”).


216 *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting).

217 Figley, *supra* note 179, at 443 (explaining Stencil Aero Eng’g Corp. v. United States, 431 U.S. 666, 671–72 (1977) and reiterating the reasoning behind the *Feres* doctrine); *Feres*, 340 U.S. at 143–44 (describing the alternative methods of recovery as one of the rationales behind the adoption of its nonjusticiability doctrine).
played a role in the aforementioned epidemic of sexual assault, 218 inexcusable negligence, 219 and more. Quite obviously, these actions have not been deterred – and they are not “incident to service.” 220 Without a Congressional imperative in the FTCA on service related harms, the Court, for legitimate reasons, took a shot at setting public policy engaging in the kind of “judicial law making” often condemned 221 violating one of the most basic notions of separation of


220 Klay, 924 F. Supp. 8, 13 (D.C.D.C. 2013) (“[B]eing victimized by a sexual assault cannot possibly be considered to be an ‘activity’ incident to military service.”).

221 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in part and dissenting in part) ("The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life tenured [judges] . . . with the
Over time, *Feres* has left countless victims without full remediation, wrongdoers without accountability, and foreseeable injurious misconduct unchecked.

somewhat more modest role envisioned for these lawyers by the Founders."); Turley, *supra* note 34, at 89; Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 143 (2002) ("Judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation."); *Representative Trent Franks*, *United States House of Representatives, Franks Denounces Ninth Circuit Ruling Against Parental Rights* (Nov. 4, 2005) http://www.house.gov/apps/list/press/az02_franks/110405_ParentalRights.html ("This is just the latest outrage to come from the Ninth Circuit, which has become the poster child for judicial activism.").

E. The Unequal Treatment Rationale

Another rationale underlying *Feres* was the concern that access to Article III courts in select and unpredictable cases would result in unequal treatment of service members. While it is important for similarly situated service members to be treated equally and while equal treatment is the promise of the entire justice system, fear of unequal treatment is just that – a fear. Again, there is nothing in the Court’s opinion that demonstrates just how access to justice is discriminatory – because it is not. That an injured person seeks a remedy in a court of law hardly seems a basis to cry foul.

There is one other aspect to equal treatment. Military justice pursuant to the UCMJ is remarkably efficient and fair. Yet in any military process of any kind, rank and regard for the command structure are appropriately of consequence. While rank does not make one above the law under the UCMJ, rank matters in the way parties are addressed and treated. This is not in any way a criticism – the system of military justice is a stunning example of how, in a very

223 See Shane III, *supra* note 173 (arguing that not only would such claims affect the concept of equality of treatment for all troops in the armed services, but that without imposition of limits, “the armed forces would get bogged down in lengthy and possibly frivolous lawsuits”).

224 Discussing the possibility of unequal treatment and litigation by prisoners, the Court rejected the contention outright: “[W]e conclude that the prison system will not be disrupted by the application of Connecticut law in one case and Indiana law in another to decide whether the Government should be liable to a prisoner for the negligence of its employees.” United States v. Muniz, 374 U.S. 150, 162 (1963).
unique setting, an enviable quantum of justice can take place. With multiple and potent interests in play, the system strikes an almost miraculous balance between disciplined efficiency and fairness. That said, it is simply be untrue to say that this system is no different than that which takes place in an Article III court.

In civil, non-military courts, rank does not dictate credibility assumptions, respect, or deference. The judge is not an officer in the same branch of the service as the parties before the court. There is no convening authority (often a commanding officer) with special authority to activate the proceeding or review the outcome of a case. Civil courts, by design and tradition, prize equal justice under law, a level playing field, justice, and compassion. Those notions, particularly equal justice under law, are the dominant hallmarks of the entire system of justice. It cannot be that the possibility of a fair and open trial where all stand on equal footing is to be avoided because it reveals undue advantage and unequal treatment.


The *Feres* Court rationalized its decision based on legitimate fears. Over the next 68 years, those fears did not manifest. Instead, the wrongs described in this paper have. Harkening back to undocumented fears without evidence that they will ever occur is not an acceptable rationale to justify the deprivation of rights explicit in *Feres*.227

IV. ANALOGIES TO OTHER FEDERAL PROGRAMS

To see if *Feres* was the norm for federal employees, it is worth looking at a few other federal agency programs. Several large programs involving government employees and others have somewhat similar limits on access to Article III courts. However, none of those programs have seen widespread unchecked discrimination or the same levels of sexual assault or multiple

227 Author’s note: Fear of what might happen should not be the basis for denying our service members so fundamental a set of rights – or any set of rights. For example, we condemn legislation that constitutes a prior restraint on speech even knowing that some speech may, in the end, be horrific and injurious, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (prior restraints on speech that restrict news and commentaries are inherently unconstitutional). We cherish the notion of a presumption of innocence in criminal cases even knowing that we run the risk of acquitting those who have committed crimes. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995) (deconstructing innocence and its place in American jurisprudence). We do so, predicated on our belief in the strength of our system of justice, not on fear that the system might fail. A fear driven legal system is an open-ended invitation to totalitarianism.
instances of egregious malpractice. Moreover, while limiting injured government employees or others to administrative relief is not unusual, as it turns out, based on *Feres*, our service members, the best among us, get the least protection from tortious misconduct.

A. Federal Employees outside the Armed Forces: FECA

There is a limitation on access to Article III courts for federal employees via the Federal Employees’ Compensation Act (FECA). 228 Their claims, more often than not, are pursued administratively229 (much like workers compensation claims in the private sector230). “Federal employees' injuries that are compensable under FECA cannot be compensated under other federal remedial statutes, including the Federal Tort Claims Act.”231

The difficulties federal employees face bringing civil actions in tort based on the FTCA232 surfaced in *Ezekiel v. Michael*.233 There, a federal employee sued a resident VA


230 U.S. DEPARTMENT OF LABOR, WORKERS’ COMPENSATION,


233 Ezekiel v. Michel, 66 F.3d 894 (7th Cir. 1995).
physician after an injection with a contaminated hypodermic needle. Because the physician was a federal employee acting in the scope of his employment, the plaintiff’s remedies were limited to FECA.

FECA provides for wage loss compensation, medical care, rehabilitation, attendant’s allowance, and survivors’ benefits. As with workers compensation and cases barred by Feres, FECA is, for the most part, an exclusive remedy. In making FECA the sole remedy, Congress intended to “limit the government’s liability to a low enough level so that all injured employees c[ould] be paid some reasonable level of compensation for a wide range of job-related injuries, regardless of fault.” Federal employees have “the right to receive

234 Ezekiel, 66 F.3d at 895.
235 Id.
238 Williamson v. United States, 862 F.3d 577, 583 (6th Cir. 2017) (citing Spinelli v. Goss, 446 F.3d 159, 161 (D.C. Cir. 2006)); Elman v. United States, 173 F.3d 486, 492 (3d Cir. 1999); Votteler v. United States, 904 F.2d 128, 130–31 (2d Cir. 1990); Wilder v. United States, 873 F.2d 285, 288–89 (11th Cir. 1989) (per curiam); Vilanova v. United States, 851 F.2d 1, 7 n.24 (1st Cir. 1988); see also Lance v. United States, 70 F.3d 1093, 1095 (9th Cir. 1995) (per curiam) (proposing that FECA is an exclusive remedy).
immediate, fixed benefits, regardless of fault and without need for litigation from their federal employer, but in return they lose their right to sue the government.”

However, claims of discrimination by federal employees including sexual harassment, unlike similar claims in the armed forces, may be heard in an Article III court. In addition, FECA claims can be judicially reviewed in an Article III courts when there is a (1) cognizable constitutional claim, and (2) when there is an explicit statutory violation. No such exceptions exist for service members.

b. Federal Inmates

In United States v. Muniz, the Supreme Court addressed the question of whether a prisoner could recover under the FTCA for injuries sustained while in the prison. While such claims might affect prison discipline, the Court found the parties presented no evidence that tort

240 Patnaude v. Gonzales, 478 F. Supp. 643, 650 (D. Del. 2007) (citing 5 U.S.C. § 8116(c) (limits the rights of service members as well as civilians doing business with the military to pursue claims for injuries in Article III courts)).


242 Staacke v. United States Secretary of Labor, 841 F.2d 278, 281 (9th Cir. 1988); Rodrigues v. Donovan, 769 F.2d 1344, 1348 (9th Cir. 1985) (for constitutional challenges); and Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 238-39 (1968); Leedom v. Kyne, 358 U.S. 184, 188-89 (1958) (for claims involving a statutory violation).

recovery would affect discipline.\textsuperscript{244} Muniz, however, did not result in anything remotely resembling regular access to Article III courts. Instead, Congress passed the Inmate Accident Compensation Act (IACA)\textsuperscript{245} establishing an administrative compensation system for federal inmates or their dependents for work-related injuries occurring during incarceration.\textsuperscript{246} Pursuant to IACA, the Federal Prison Industries Board maintains the Prison Industries Fund as the sole means of compensation for inmates,\textsuperscript{247} effectively barring inmates from maintaining an FTCA suit.\textsuperscript{248} In deciding the exclusivity of the IACA, the Supreme Court echoed the reasoning related to FECA (and Feres): “[W]here there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect

\textsuperscript{244} Muniz, 374 U.S. at 163 (“It is also possible that litigation will damage prison discipline, as the Government most vigorously argues. However, we have been shown no evidence that these possibilities have become actualities in the many States allowing suits against jailers, or the smaller number allowing recovery directly against the States themselves.”); Melvani, supra note 16, at 429–430 (citing United States v. Muniz, 374 U.S. 150, 162-62 (1963)).


\textsuperscript{246} Michael B. Mushlin, 2 RIGHTS OF PRISONERS § 8:22 (5th ed., 2017).

\textsuperscript{247} 18 U.S.C. § 4126.

\textsuperscript{248} U.S. v. Demko, 385 U.S. 149 (1966); see also Campbell, supra at §2[a]; Mushlin, supra note 239, at § 8:22.
Parenthetically, the claims of federal prison employees, as opposed to inmates, were discussed in *Wilson v. United States*, and found to be outside IACA and limited to the FECA.

Looking at basic civil rights, members of the armed forces, unlike other federal employees or even convicted felons, do not have the option to bring a 1983 civil rights action or *Bivens* claim. *Wilson* found that prisoners, on the other hand, have those options: “[T]he statutory scheme lack[s] procedural safeguards for the prisoner’s constitutional rights, the statute possess[e] very little deterrent value, and there [is] no explicit indication from Congress [barring] *Bivens* action[s].” The same statutory deficiencies are applicable to


253 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (involving a civil rights claim against what was then the Federal Bureau of Narcotics for a violation of plaintiff’s Fourth Amendment rights to be free from unreasonable search).

254 *Smith*, 561 F.3d at 1102 (citing *Bagola*, 131 F.3d at 644–45).
service members – and yet, Dean Irwin Chemerinski’s summation of their civil rights options, or lack thereof, is telling. Unlike federal employees or prisoners, “Bivens suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement.” This distinction is of consequence when considering the range of alleged (unchecked and thus undeterred) acts of invidious discrimination.

255 Erwin Chemerinski, FEDERAL JURISDICTION 621–22 (5th ed. 2007).

256 Overt discrimination resulting in disparate treatment, normally within Title VII (42 U.S.C. § 2000e-2 (1982)) does not apply directly to the military. McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). While recent cases, e.g., Ortiz v. Werner Enter., Inc., 834 F.3d 760 (7th Cir. 2016), have expanded and clarified the reach of Title VII, applicability to the military via a civil rights case brought in an Article III court is not part of that change.

Finally, unlike service members, an inmate can seek judicial review of an IACA decision predicated on a violation of procedural safeguards or abuse of discretion.258

C. Longshoremen and Harbor Workers

The last of the alternate programs assessed is the Longshoremen and Harbor Workers’ Compensation Act (LHWCA),259 which provides governmental and non-governmental employees disability and death compensation for harms sustained on navigable waterways. The statute originally covered “employees in traditional maritime occupations such as longshore workers, ship-repairers, shipbuilders or ship-breakers, and harbor construction workers,” but coverage expanded substantially with the enactment of the Defense Base Act (DBA)260 which included those who “work for private employers on U.S. military bases or . . . lands used by the U.S. for military purposes outside of the United States,” among others.261


applies, it is an exclusive remedy barring civil tort actions in Article III courts pursuant to the

FTCA.\textsuperscript{262} However, similar to FECA, if the federal court believes there is a “substantial

question” regarding whether LHWCA applies to the employee’s claim, it will generally hold the
case in abeyance.\textsuperscript{263} The LHWCA is similar to FECA in that a “third party . . . subject to
liability for injuries covered under LHWCA may maintain an indemnity action against the
United States. . . .”\textsuperscript{264} (something service members cannot do), The LHWCA does not bar
discrimination claims (again, something that is barred for service members), and LHWCA cases
are appealable in federal court (not so for service members).\textsuperscript{265}

Each of these programs reflects the values and trade-off in what has been called the
“grand bargain” underlying workers compensation: in exchange for foregoing the right to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{262} I CIV. ACTIONS AGAINST THE U.S. § 2:10 (2018) (because LHWCA disputes are between
two private parties, the question of whether LHWCA bars constitutional claims is generally not
at issue).
\item \textsuperscript{263} Id. (citing Wilder v. U.S., 873 F.2d 285 (11th Cir. 1989)). Unless an administrative decision
is made on the applicability of the LHWCA, an employee’s acceptance of a voluntary LHWCA
award is not conclusive in barring the employee’s ability to sue under the FTCA.
\item \textsuperscript{264} Id. (citing Eagle-Picher Industries, Inc. v. U.S., 937 F.2d 625 (D.C. Cir. 1991)).
\item \textsuperscript{265} Warner v. Contract Claims Servs., Inc., 2017 LEXIS 182567 (E.D.N.C. 2017).
\item \textsuperscript{266} Hendrix v. Alcoa, Inc., 506 S.W.3d 230 (Ark. 2016); Cross v. Slayter Trucking Cos., 206
So. 3d 1124, 1130-31 (La. App. 2016); Collins v. COP Wyo., LLC, 366 P.3d 521, 527 (Wyo.
2016); Vasquez v. Dillard's, Inc., 381 P.3d 768, 786, (Okla. 2016); Baker v.
\end{enumerate}
\end{footnotesize}
bring a civil action in tort, a person gains access to a more simplified administrative no-fault system to address the costs of an injury. However, all of the programs, except the military compensation scheme, allow for discrimination claims in federal court. All of the programs, except the military compensation scheme, rely on federal courts to determine if the various compensation programs are applicable. While there are undoubtedly other distinctions, e.g., most of these programs exclude intentional torts, one thing is clear: while the idea of limiting access to civil tort actions in certain situations is not unique to the armed forces, the incidence of unchecked and undeterred misconduct in the military described in this article powerfully suggest the need for change. In the closed universe of military justice and administrative compensation, something is amiss. It stands to reason that the *Feres* bar has played a central role by greatly

---

Bridgestone/Firestone, 872 N.W.2d 672, 676-77 (Iowa 2015); Whedbee v. N.D. Workforce Safety & Ins. Fund, 845 N.W.2d 632, 637 (N.D. 2014).


268 Matthew K. Brown, Note, *How Exclusive Is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret*, 65 OKLA. L. REV. 75 (2012); see Okla. Stat. § 302 (2011) (access to court is barred "except in the case of an intentional tort, or where the employer has failed to secure the payment of compensation for the injured employee...").
limiting the deterrent impact of civil judgements, allowing gross misconduct to occur without consequences.

V. THE CURRENT FERES ENVIRONMENT

The Feres doctrine, like the scope of the DFE, has been the topic of endless discussions and the target of frequent criticism. While there is no general agreement on the


best next step in a post-*Feres* legal universe, a real change, and not just juridical side-stepping, is needed. Isolated examples of “work-arounds” where *Feres* did not block a claim, e.g., the *Agent Orange* decision,271 or the compensation provided for exposure injuries and open pit burns,272 are hardly an answer. Most cases end up with limited or no recourse.273 For example, the attempt to address water toxicity at Camp Lejeune provided for notification and only limited benefits – and then only to those stationed at the camp.274 There was also a proposal to create a separate compensation

____________


274 *See, e.g.*, S. 277, 112th Cong. (2011) (providing hospital care, medical services, and nursing home care for any illness acquired by veterans and family members who were stationed at Camp
system for military victims of sexual assault and harassment. None of these examples, however, would open the courthouse doors to claims by service members.

The last major legislative proposal, the Carmelo Rodriguez Malpractice and Injustice Act, was presented to Congress in 2009. The bill sought to amend the FTCA to “allow claims for damages to be brought against the United States for personal injury or death . . . arising out of . . . medical, dental, or related [malpractice].” The bill was to honor Sgt. Carmelo Rodriguez who died after a military doctor misdiagnosed a deadly malignant

Lejeune); Janey Ensminger Act, H.R. 4555, 111th Cong. (2010) (directing the Secretary of Veterans Affairs to furnish hospital care, medical services, and nursing home care to veterans who were stationed at Camp Lejeune).


276 Feldmeier, supra note 49 (broad discussion of the Carmelo Rodriguez Military Accountability Act).


melanoma.\textsuperscript{280} Even after hearings\textsuperscript{281} which made clear that service members, “would not be allowed to bring suits ‘arising out of . . . armed conflicts,’”\textsuperscript{282} negotiations broke down and the bill died when differences could not be resolved between those who wanted to enhance the intra-military compensation system and those seeking to undo \textit{Feres}.\textsuperscript{283}

The last time the Supreme Court granted \textit{cert} in a \textit{Feres} case where major change seemed quite possible was \textit{United States v. Johnson} in 1987.\textsuperscript{284} In \textit{Johnson}, plaintiff died in a rescue mission while on board a HH-52 Seaguard.\textsuperscript{285} The crash was attributed to the negligence of

\begin{itemize}
\item \textsuperscript{281} \textit{See generally, Carmelo Rodriguez Military Medical Accountability Act of 2009}, Hearing before the Subcomm. on Comm. and Admin. Law, 111th Cong. 7 (2009).
\item \textsuperscript{282} \textit{Id.} at 2.
\item \textsuperscript{283} U.S. CONGRESS, \textit{supra} note 277; U.S. CONGRESS, \textit{ACTIONS OVERVIEW: S. 1347 — 111TH CONGRESS} (2009-2010).
\item \textsuperscript{285} United States v. Johnson, 481 U.S. 681, 682 (1987).
\end{itemize}
The decedent’s estate argued that *Feres* should not apply because (1) the FAA is a civilian agency, and (2) the actions leading to the crash were not incident to service. The Court, however, rejected both arguments and left little room for doubt regarding *Feres*: “This Court has never deviated from this characterization of the *Feres* bar. . . in the close to 40 years since it was articulated. . . .” Passing the buck somewhat, the Court noted that Congress has the power to alter the rule if it determines that *Feres* was a misinterpretation of the FTCA. As noted earlier in this article, it is in the *Johnson* dissent that Justice Scalia and others concluded that “*Feres* was wrongly decided. . . .” At different points, Justices Ginsburg and Thomas also imply that the *Feres* doctrine, at a minimum, deserves

---

286 *Id.*

287 See generally *id.*

288 *Id.* at 686.

289 *Id.*

a second look, but despite having a number of opportunities to do so, the Court has left *Feres* unchanged.

Frustration with the expansive interpretation of “incident to service,” (and without expressing whether Congress or the Court should act) Professor Richard Custin wrote, “the ruling should be addressed because it unfairly discriminates against military personnel, essentially stripping them . . . of a civil right . . . [B]abies? Birth injuries? That’s not incident to service. [Malpractice causing] your appendix [to] rupture. . . . That’s not incident to service.”

Notwithstanding the concerns and criticisms noted in this article, there remains clear and understandable opposition to change. Within the ranks, Dr. Jonathan Woodson, former Assistant Secretary of Defense for Health Affairs, warned that “chaos” would result if troops were allowed to sue for injuries. Maj. Gen. John Altenburg, Jr. (Ret.), would instead prefer to improve the

---


294 Pitts, *supra* notes 276, 279.
current benefits system. In academia, there is also meaningful and solid scholarship supporting *Feres* including Professor Paul Figley’s eloquent defense of the doctrine (along with a suggestion of how the doctrine could be clarified). Professor Figley’s analysis is consistent with the reasoning in *Feres* and *Stencel Aero Engineering v. United States*. 

*Stencel* applies *Feres* to a broad range of claims that could be brought by various third parties and government contractors against the federal government. It relies on the same reasoning as *Feres*: the necessity of preserving the chain-of-command, the unique nature of the military, and the importance of allowing discretionary and command judgements to remain in the military and not second-guessed by federal courts. The *Feres-Stencel* doctrine has also barred claims initiated by injured service members against third parties and government contractors.

---


299 Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 237 (1963) (arguing that courts are not the proper forum to “determine whether complex government decisions are ‘reasonable’.”).
contractors, rendering those contractors practically immune from civil tort litigation in fields as diverse as product liability and medical services.300

Notwithstanding the stubbornly unchanging position of the Court, in the ranks, and in some corners of the legal professoriate, the tone of a number of circuit courts is wistful, unenthusiastic, decrying the unsoundness, harsh impact, or basic unfairness of Feres, while recognizing the case as binding precedent. 301 Consider Daniel v. United States, 302 a wrongful death/malpractice case. After childbirth in a military hospital, Lt. Daniel began hemorrhaging. Those entrusted with her care failed to take the appropriate steps to stop the bleeding and she died in a few hours.303 The District Court found it had no option but to dismiss the claim based on Feres “unless and until Congress or the Supreme Court choose to confine the unfairness and


301 See generally Daniel v. United States 889 F.3d 978 (9th Cir. 2018); Ortiz v. United States, 786 F.3d 817 (10th Cir. 2015); Read v. United States, 536 Fed. Appx. 470 (5th Cir. 2013); Ritchie v. United States, 733 F.3d 871 (9th Cir. 2013); Witt v. United States, 379 Fed. Appx. 559 (9th Cir. 2010); Hafterson v. United States, 2008 WL 4826097, No. 3:08-cv-533-J-16MCR (M.D. Fl. 2008).

302 Daniel, 889 F.3d at 980.

303 Id.
irrationality that Feres has bred. . . .”\textsuperscript{304} The Ninth Circuit agreed,\textsuperscript{305} acknowledging that “[i]f ever there were a case to carve out an exception to the Feres doctrine, this . . . is it,” but noted that “only the Supreme Court has the tools to do so.”\textsuperscript{306} A petition for certiorari is currently pending.\textsuperscript{307}

Similarly, in Ortiz v. United States,\textsuperscript{308} a malpractice case where errors made during a caesarian section led to significant deficits in a child,\textsuperscript{309} the Tenth Circuit declared that “the facts . . . exemplify the over breadth (and unfairness) of the doctrine, but Feres is not ours to


\textsuperscript{305} See generally Daniel, 889 F.3d at 978.

\textsuperscript{306} Daniel, 889 F.3d at 982.


\textsuperscript{309} Ortiz, 2013 WL 5446057, at 1-2.
overrule.” 310 Quoting Costa v. United States the court, “join[ed] the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine’s original purposes.”311

Similar sentiments were voiced in Ritchie v. United States, 312 a wrongful death action filed after malpractice during pregnancy led to the death of plaintiff’s infant son.313 The District Court acknowledged that “a child’s premature birth and subsequent death would be devastating to any parent,” but dismissed the claim “[b]ecause the Feres doctrine applies. . . .”314 The Ninth Circuit affirmed: “In light of Supreme Court and our own precedent, we regretfully conclude that [Feres bars the claim].”315[emphasis added]

310 See generally Ortiz, 2013 WL 5446057 at 7; see generally Ortiz v. United States, 786 F.3d 817, 818 (10th Cir. 2015).

311 Id. at 823 (quoting Costa v. United States, 248 F.3d 863, 869 (9th Cir. 2001)).

312 Claims Against the Military, MILITARY LAW CENTER (last accessed Oct. 14, 2018, 7:33 PM), https://militarylawcenter.com/practice-area/claims-government/ (exploring the possibilities and process a service member might use without any change to Feres to initiate a civil tort claim in an Article III court.).


315 Ritchie, 733 F.3d at 873.
In *Witt v. United States*, \textsuperscript{316} surgical malpractice left plaintiff in a permanent vegetative state. The District Court dismissed, noting that “the alleged facts [were] so egregious and the liability of the Defendant [seemed] so clear,” the court “did give serious consideration to Plaintiff’s argument that this Court should allow [the] claim in spite of *Feres* . . .” \textsuperscript{317} On appeal the court found it was “bound by precedent of the Supreme Court . . . to affirm the . . . dismissal.” \textsuperscript{318} In *Hafterson v. United States*, another malpractice/wrongful death case, \textsuperscript{319} the court found that “[d]espite Plaintiffs' well-reasoned opposition to [the] application of the *Feres* doctrine, it is clear that this case cannot escape the doctrine's broad reach.” \textsuperscript{320}

In *Colton Read v. United States*, a military surgeon sliced into the plaintiff’s aorta in the course of routine gallbladder surgery. \textsuperscript{321} The court held as follows: “Irrespective of criticism of


\textsuperscript{317} Witt v. United States, 2009 U.S. Dist. LEXIS 9451 at 5.

\textsuperscript{318} Witt v. United States, 379 Fed. Appx. 559, 560 (9th Cir. 2010); Witt v. United States, 2010 U.S. App. LEXIS 9953 (9th Cir. Cal. 2010).


\textsuperscript{320} Id. at 2.

the *Feres* doctrine . . . the government remains immune [because] Colton Read’s injuries were ‘incident to service’ and not actionable under the FTCA.”322

As the above cases suggest, while there are expressions of regret regarding the doctrine, there is also nearly uniform adherence to *Feres*. Those who have studied the doctrine,323 urge “comprehensive change,”324 to “permit the adjudication of personal injury and death claims. . . .”325 Others urge an “impact on military discipline” test to “define ‘incident to service,’” to

---


323 See generally Melvani, *supra* note 16, at 398 (*Feres* has rendered service members “second-class citizens, whose rights fall below even those of the nation's criminals. . . . [The] *Feres* bar undermines the quality of healthcare provided to the nation's military forces by preventing accountability for egregious mistakes and shortcomings in medical treatment.”); Turley, *supra* note 34, 43 (“Military medical malpractice has long been a subject of intense criticism. This record may reflect the absence of malpractice as a deterrent in the military medical system due to the application of the *Feres* doctrine.” [footnotes omitted]); Feldmeier, *supra* note 49; Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992).


“cure the ills of this doctrine and protect the rights of our nation's service members.”326 If one assumes there are currently injuries and related claims that are in no way incident to anything remotely resembling military service (sexual assault and clear or gross malpractice come to mind), what options exist to provide access to justice in Article III courts? The Court and Congress unquestionably have the capacity to undo *Feres*,— but then what?

VI. RECOMMENDATIONS AND CONCLUSION

There are, at a minimum, three options:

(1) Leave *Feres* and the FTCA as is;

(2) By congressional or judicial action, overrule *Feres* and do nothing further, in which case, service related civil tort claims against the government would have to be based on the FTCA, limited unpredictably by the DFE, mimicking the uncertain civil tort environment between 1946 and 1950;

(3) Overrule *Feres*, amend the FTCA, and specify those behaviors, events, practices, or actions that are not incident to or essential for service and therefore potentially actionable.327


327 If this set of options sounds familiar, perhaps it is because they boil down to the same options facing Congress as it debates healthcare – leave the ACA as is, repeal, or repeal and replace. Sean Sullivan, *Republicans abandon the fight to repeal and replace Obama’s health*
Option three is the best course.

To start, option one is out – as is suggested throughout this article, *Feres* has run its course, spawned an epidemic of undeterred misconduct, and left countless thousands of innocent victims without remedy, without justice, and without their day in court.

Option two is also inadvisable. Were *Feres* overruled without further clarification, there would be unpredictable and discordant exposure to tort liability under the FTCA as well as a continuation of irrational limitations on liability due to the multiple exceptions in the FTCA including, of course, the expansive DFE.328 The DFE has expanded beyond any fair interpretation of the text of the statute and precludes meritorious claims while securing “nothing of value except perhaps a modest savings in litigation costs.”329 Without amendments, the

____________

care law, *Washington Post* (Nov. 7, 2018),
https://www.afp.org/media-center/kits/aca-repeal-replace.html

328 *Id.* at 59–60 (“the [DFE] has more flexibility than the *Feres* doctrine because the DFE allows [for] a case-by-case analysis. . . .”).

FTCA alone would leave victims in the Neverland of the DFE, the “broadest and most criticized” of the thirteen enumerated exceptions to that Act.330

That more of a change is needed seems obvious – hence, option three. The goal would be to help courts determine what actions are an essential component of military service (and therefore not actionable) and those that do not involve an essential component of military service (and are potentially actionable claims).

While this solution, at least initially, cannot resolve with certainty the question of the effect of civil liability on military discipline and chain-of-command, it would leave untouched the existing array of potent sanctions for misconduct, failure to follow lawful orders, or failure to comply with a host of regulations currently in place. These powerful mechanisms should be sufficient to prevent the chaos defenders of Feres fear. A limited number of civil tort cases focused on undeniable misconduct seem unlikely to prompt insubordination or a collapse of order and discipline. Instead, it is far more likely that overruling Feres and amending the FTCA will give justice to victims of wrongdoing and deter future misconduct.

On that point, it is fair to wonder whether the incidence of sexual assault, domestic violence, clear or gross medical malpractice, physical abuse, and similar wrongs would decline in the presence of the potential for governmental tort liability. Does the potential for money

330 Feldmeier, supra note 49.
damages in a civil court deter future misconduct if the actors in question do not pay but the federal government does?331

First, at a personal level, litigation forces victims and alleged wrongdoers to re-live some of the worst moments of their lives. Cases of this type are painful and jarring. No one with even a passing understanding of our legal system would look forward to the essential rigors of civil litigation. That alone is a deterrent force. Second, a finding of fault in civil courts may have a real and direct effect on those accused of wrongdoing. It takes no imagination to anticipate that a finding of liability in an Article III court predicated on a determination of misconduct could activate an inquiry and may be the opening shot for the initiation of disciplinary proceedings within the military justice system. Third, at a governmental level, it would be fanciful to assume there would be no deterrent effect from civil tort litigation. Like any entity anywhere, our military services will do what they can to make sure they are not hauled into court. There is, then, much to be gained (and unfortunately much to be deterred) from the imposition of liability.

Whether there will be beneficial consequences from opening the courthouse doors is a question more easily answered than the extent to which civil liability will affect the command structure on which the military must depend. The necessity of following lawful orders without question is vital to all missions our military undertakes. Similarly, unlike many walks of public and private life, there is a physicality to the military training experience that is both essential and,

331 Figley, supra note 286, at 464 (“if Feres did not exist, the Department of Defense would be no more responsive to financial deterrence than it is with Feres.”).
on occasion, painful and harsh. Training is not just athletic conditioning. Troops training for combat must be pushed to the limits of their endurance, both physically and psychologically. To create individuals and units that act with a common purpose, a willingness to risk one’s life for one’s comrades, the starting point is often stripping recruits of practices, habits, and ideas they bring with them to the service and replacing those beliefs with the values of mission, task, country, command, service, and more.

The kind of training and service just described involves actions, outside of the military, that could be seen as tortious but in fact are vitally important. Such actions cannot be the basis of civil tort liability. Like injuries sustained in combat or armed conflict, these would be harms sustained in actions not just incident to but essential to military service and for such harms, there is no place for civilian courts to be reassessing essential military judgments.

Accordingly, the best approach is not an open-ended civil tort universe where any potentially actionable behavior in the military could become the subject of litigation. Instead, this recommendation identifies only seven specific behaviors that are actionable. The following


333 Chappell v. Wallace, 462 U.S. 296, 300 (1983) (“Civilian courts must . . . hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.”).
actions or behaviors should be excluded from the rights limiting regime spawned by the DFE and Feres:

1. Sexual assault (is not essential to military service).

2. Rape (is not essential to military service).

3. Extreme physical violence or acts that fall within the definition of torture, domestic violence, and child abuse (are not essential to military service).

4. Acts of clear or gross medical malpractice (are not essential to military service). 334

5. Exposure of service members to pharmaceuticals, narcotics, or toxins without informed and voluntary consent (is not essential to military service). 335

6. While in military service, acts of driving under the influence of drugs or narcotics on more than one occasion (is not essential to military service).

7. Acts or patterns of invidious discrimination on the basis of race, religion, ethnicity, or gender (are not essential to military service).

334 There are many definitions of “gross” but the term is used here to connote actions that are, by clear measure, undeniably malpractice. W. PAGE W. KEETON, ET. AL, PROSSER AND KEETON ON TORTS § 34, at 211, 212 (5th ed. 1984). See e.g., NMP Corp. v. Parametric Tech. Corp., 958 F. Supp. 1536, 1546 (N.D. Okla. 1997); Kenneth W. Simmons, Rethinking Mental States, 72 B.U.L. REV. 463 (1992) (discussing the many and varied meanings of the term “gross”).

The above actions are as intolerable in military life as in civilian life. Those who have been victims of such acts should be able to pursue their claims in Article III courts, the system of justice they pledged to defend. In this model, the UCMJ is unchanged and unaffected. The approved intense, demanding, painful, and harsh physical and psychological demands of training are not lessened. Discipline, chain-of-command, tradition, efficiency, following unquestioningly all lawful orders, all paramount considerations, are not disrupted.

When those who engage in misconduct are held accountable, when government is obligated to remedy those wrongs, respect for order, discipline, and all standards will increase. When uniformly condemned actions are subjected to public scrutiny in Article III courts, the probability of future similar misconduct will decline.

Assuming this recommendation is followed, it would only make sense for Congress to revisit the impact of the amendment to the FTCA within a few years and assess whether limited exposure to tort liability impedes, improves, or has no discernible effect on the capacity of our armed forces to carry out all essential functions.336 In the meantime, as the courthouse doors open partially, those who engage in the unquestionable misconduct described throughout this article will be subject to legal sanctions, and those victimized will finally have their day in court.

336 Attribution: Special thanks to Washington College of Law students Megan Masingill, Marissa Ditkowsky, Sienna Haslup, Katelyn Davis, and Riley Horan, and the American Association for Justice Robert L. Habush Endowment for providing support for those students.