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Rethinking Feres: Granting Access to Justice for Service Members

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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[1]

"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

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United States v. Johnson, 481 U.S. 681, 700 (Scalia, J., dissenting) *(*citing *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (EDNY), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)).

[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,[4] immune and unaccountable,[5] behind the ancient premise that the "king can do no wrong."[6] 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.[7]

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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.").

5 Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 527 (2003) ("'[S]overeign immunity' has never been a complete immunity . . . for the government; it has never barred all remedies for governmental wrongs. . . .").

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).[8] 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.[9] Although liability was limited from the outset by the vast, vague, and vexing discretionary function exception (DFE), [10] in limited circumstances the federal

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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. . . .").

8 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–80 (2018) (originally enacted as Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (amended 2006)).

9 Paul Figley, A GUIDE TO THE FEDERAL TORTS CLAIMS ACT, SECOND EDITION (American Bar Association 2018) (explaining content of the Federal Tort Claims Act (FTCA), discussing the central substantive issues, and setting out the process for pursing an FTCA claim).

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]

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claim that is facially outside of the discretionary function exception."); (internal citations omitted) Rosebush v. United States, 119 F.3d 438, 444 (6th Cir. 1997) (Merritt, J., dissenting) ("Our Court's decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the [FTCA]. It decimates the Act."); Tippett v. United States, 108 F.3d 1194, 1196 (10th Cir. 1997) ("If the discretionary function exception applies to the challenged governmental conduct, the United States retains its sovereign immunity, and the district court lacks subject matter jurisdiction to hear the suit."); William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 56 (1993) ("[T]he discretionary function exception is not susceptible to ready formulae and precise tests."); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 82 (1968) (characterizing the Discretionary Function Exception (DFE) as "vague and ambiguous"); Mark C. Niles, *Nothing But Mischief: The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 Admin. L. Rev. 1275, 1334 (2002) (the discretionary function exception has become a "veritable reassertion of [the] discarded limitation" of sovereign immunity); Cornelius J. Peck, Laird v. Nelms: *A Call for Review and Revision of the Federal Tort Claims Act*, 48 WASH. L. REV. 391, 415–18 (1973) (suggesting changes to the DFE).

11 U.S. CONST. ART. III § 1.

Beyond the DFE, the FTCA had explicit limits[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.[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 *Feres v. United*

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12 Federal Tort Claims Act, 28 U.S.C., §§ 1346(b), 2671 (2018); David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375 (2011); Paul Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL INSUR. PRACT. L.J. 1105 (2009).

13 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–80 (2006). The statute was enacted as Title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, which was codified and later mended in non-sequential sections of 28 U.S.C. (2006). *See* Major Jeffrey B. Garber, *The (Too) Long Arm of Tort Law: Expanding the Federal Tort Claims Act's Combatant Activities Immunity Exception to Fit the New Reality of Contractors on the Battlefield*, 2016 ARMY L. 12 (2016)

States,[14] 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.[15] 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.[16] The limitations in *Feres* did not affect the complex and comprehensive intra-military benefits

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14 340 U.S. 135 (1950).

15 Joseph J. Dawson, *In Support of the Feres Doctrine and a Better Definition of "Incident to Service,"* 56 ST. JOHN'S L. REV. 485, 498 (1982).

16 *See* Earl Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 396 (2010); Christopher G. 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 (2005).

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

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17 U.S. DEP'T OF DEF. WARRIOR CARE, WOUNDED, III, AND/OR INJURED COMPENSATION AND BENEFITS HANDBOOK (Apr. 2018), 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, https://www.health.mil/About-MHS* (last acessed Jan. 17, 2019).

19 10 U.S.C. §§ 801–946 (2018).

increased to epidemic levels[20] *because* of the absence of the accountability, of deterrence, that would otherwise flow from civil tort actions.[21]

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."[22]

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-

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20 Idrees Ali, *U.S. Military Sexual Assaults Down as Reports Reach Record High*, REUTERS (May 1, 2017), https://www.reuters.com/article/us-usa-military-sexualassault/u-s-military-sexual-assaults-down-as-reports-reach-record-high-idUSKBN17X2CF (last visited Jan. 17, 2019); *Mission: Ending the Epidemic of Military Rape*, PROTECT OUR DEFENDERS, https://www.protectourdefenders.com/about/ (last visited Jan. 17, 2019).

21 Andrew F. Popper, *In Defense of Deterrence*, 75 ALBANY L. REV. 181 (2012).

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

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

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23 Nearly a thousand pages long, the "Military Compensation Background Papers" present an impressive array of benefits designed for service members ranging from combat related harms to toxic exposure to life insurance. U.S. DEP'T OF DEF., MILITARY COMPENSATION BACKGROUND PAPER: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS THEIR PURPOSES AND LEGISLATIVE BACKGROUNDS (8th ed. July 2018), https://www.loc.gov/rr/frd/pdf-files/Military_Comp-2018.pdf/. This compilation of "background papers" covers Persian Gulf War injuries, all current benefits for traumatic injury treatment and recovery, rehabilitation options after injury, compensation for incapacitation, death benefits generally, special compensation for parachute injuries, and more. *See id*.

24 10 U.S.C. §§ 801–946.

25 Oath of Enlistment, 10 U.S.C. § 502.

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.[26] 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,[27] and yet, to date, *Feres* is the law of the land.

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[26] Samantha Kubek, *Over 70,000 Military Sexual Assaults Took Place Last Year -- Congress Must Take Action*, FOX NEWS (Nov. 16, 2017), https://www.foxnews.com/opinion/over-70000-military-sexual-assaults-took-place-last-year-congress-must-take-action (last visited Jan. 17, 2019); Earl Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 396 (2010); Froelich, *supra* note 16, at 699; Tara Wilke, *Three Wrongs Do Not Make a Right: Federal Sovereign Immunity, the Feres Doctrine, and the Denial of Claims Brought by Military Mothers and their Children for Injuries Sustained Pre-Birth,* 263 WIS. L. REV. 263, 276 (2016); David E. Seidelson, *The Feres Exception to the Federal Tort Claims Act: New Insight Into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983); Captain Robert L. Rhodes, The Feres Doctrine after Twenty-Five Years, 18 A.F. L. REV. 24 (1976); Earl Warren, *The Bill of Rights and the Military*, 27 N.Y.U. L. REV. 181, 188 (1962).

[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 clams: "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]

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28 Ritchie v. United States, 733 F.3d 871, 878–79 (9th Cir. 2013) (citing United States v. Johnson, 481 U.S. 681, 703).

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

30 Ortiz v. U.S. ex rel. Evans Army Cmty. Hosp., 786 F.3d 817, 822 (10th Cir. 2015).

In recent years, those who serve in our armed forces have been thanked for their service by presidents[31] and lauded at the start of nationally broadcast sporting events.[32] Service members are routinely called heroes[33] – and they are. It is the highest public calling. Yet these

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31, President Thanks Military Personnel and Families For Serving Our Country, PRESS RELEASE, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Dec. 7, 2004), https://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041207-2.html (last visited Jan. 17, 2019); Marisa Schultz, *Trump Delivers Thanksgiving Message* [sic] *America's Military*, N.Y. POST (Nov. 22, 2018), https://nypost.com/2018/11/22/trump-delivers-thanksgiving-message-americas-military/ (last visited Jan. 17, 2019); Tanya Somanader, *President Obama Thanks America's Troops and Marks a Milestone in the Afghanistan War*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Dec. 15, 2014), https://obamawhitehouse.archives.gov/blog/2014/12/15/president-obama-thanks-americas-troops-and-marks-milestone-afghanistan-war) (last visited Jan. 17, 2019).

32 NFL Honors Veterans and Military Members with "Salute to Service," NATIONAL FOOTBALL LEAGUE COMMUNICATION (2016), https://nflcommunications.com/Pages/NFL-Honors-Veterans-and-Military-Members-with-Salute-To-Service.aspx (last visited Jan. 17, 2019); Associated Press, *NFL Honoring Military Service with November Campaign*, MILITARY TIMES (Nov. 4, 2018), https://www.militarytimes.com/off-duty/military-sports/2018/11/04/nfl-honoring-military-service-with-november-campaign/ (last visited Jan. 17, 2019).

33 The "hire heroes" online employment site in a good example of this HIRE HEROES USA, https://www.hireheroesusa.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

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34 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, 89 (2003).

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]

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36 Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 907 (2010) (whether elected or not, civil court judges in civil courts should not be reviewing policy choices affecting military the chain-of-command or other discretionary decisions).

37 Julie L. Massing, *The Making of a JAG Attorney: Where the Law and the Military Meet*, FED. L. 24 (Mar. 2017), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/March/Features/The-Making-of-a-JAG-Attorney-Where-the-Law-and-the-Military-Meet.aspx?FT=.pdf; Alison Monahan, *JAG Corps: Military Lawyer*, BALANCE CAREERS (Jan. 13, 2018), https://www.thebalancecareers.com/want-to-be-a-military-lawyer-learn-about-jag-4039991(last visited Jan. 17, 2019); Ilana Kowarski, *5 Traits for Would-Be Military Lawyers*, U.S. NEWS & WORLD REPORT (Nov. 11, 2016),

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

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https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2016-11-11/5-traits-law-students-can-develop-to-be-a-military-attorney (last visited Jan. 17, 2019).

[38] 340 U.S. 135 (1950).

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

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[39] Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948).

[40] *Id.* at 709.

[41] *Id.* at 712.

[42] Brooks v. United States, 337 U.S. 49, 50 (1949).

[43] *Id.*

[44] *Id.* at 50–51.

compensated.[45] 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.[46] The Court also found that resolution of the fate of claims "incident to service" would have to wait for a "wholly different case."[47] 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[48] 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.[49]

Feres involved an active duty service member who died in a barracks fire.[50] 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

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[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[51] or in the legislative history,[52] 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.[53] 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.[54] 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.[55]

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[51] *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.").

[52] *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").

[53] 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.").

[54] 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).

[55] 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–

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,[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.[57] The Court emphasized that the relationship between those in the armed forces and the federal government is "distinctively federal in nature"[58] and that such harms were covered or compensable through other venues.[59] The Court reasoned that if Congress had intended to provide access to Article III courts[60] for intra-military civil tort claims, it would have

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(2010); Kenneth R. Wiltberger, Note, *The Carmelo Rodriguez Military Medical Accountability Act of 2009: An Opportunity to Overturn the Feres Doctrine As It Applies to Military Medical Malpractice*, 8 AVE MARIA L. REV. 473, 497–98 (2010); Turley, *supra* note 34, at 10.

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.[61] Prior to *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.[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.[63]

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https://www.govinfo.gov/content/pkg/CHRG-107shrg88833/pdf/CHRG-107shrg88833.pdf; Melissa Feldmeier, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009,* 60 CATH. U. L. REV. 145, 153 (2010) (discussing legislation that could modify the harsh impact of *Feres*); Wiltberger, *supra* note 55 at *497–98*; Jennifer L. Carpenter, Comment, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine,* 26 U. HAW. L. REV. 35, 59–60 (2003).

61 340 U.S. at 144.

62 James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic,* 85 N.Y.U. L. REV. 1862, 1863, 1877–82 (2010).

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

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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.

67 Brooks v. United States, 337 U.S. 49, 50 (1949).

68 348 U.S. 110 (1954).

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]

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[69] *Id.* at 110.

[70] *Id*. at 112.

[71] *Id.* at 111, 113.

[72] Paul Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor,* 44 TORT TRIAL INSUR. PRACT. LAW J. 1105, 1116–17 (2009).

[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*:[74] "(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."[75] *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."[76] No matter what factors a court applies,[77] the decision

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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[78] resulted in "considerable confusion among the circuits."[79]

C. Expansive Application of "Incident to Service"

Following *Feres* and *Brown,* courts continued to broaden the definition of "incident to service,"[80] applying the prohibition to medical malpractice, exposure to toxic substances,

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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, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL INSUR. PRACT. LAW J. 1105, 1116 (2009).

[78] Kelly L. Dill, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 78 (2001).

[79] Taber v. Maine, 67 F.3d 1029, 1032, 1038 (2d Cir. 1995) ("[I]t is difficult to know precisely what the [*Feres*] doctrine means today. . . [it is] an extremely confused and confusing area of law"); Jennifer Zyznar, *Feres Doctrine: "Don't Let This Be It. Fight*!, 46 J. MARSHALL L. REV. 607, 614 (2013) (quoting Anne R. Riley, *United States v. Johnson: Expansion of the Feres Doctrine to Include Service Members' FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233, 244 (1989).

[80] *See* 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); *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.[81] A brief look at those harms follows.

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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.*

[81] 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.[82] The malpractice began during a physical exam, one of the final steps that was to lead to plaintiff's discharge. When a "double hernia"[83] 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.[84] 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.

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enlistment papers); Kelly Dill, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 78 (2001). Courts have even incorporated non-combat torts, reckless or knowing acts, and cases of alleged cover-up into what constitutes circumstances that are "incident to service." John W. Hamilton, *Contamination at U.S. Military Bases: Profiles and Responses*, 35 STAN. ENVTL. L.J. 223, 242-43 (2016).

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.[85] When courts assess such claims based on *Feres*, the "incident to military service"[86] bar was and is almost insurmountable. However, courts that moved beyond *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."[87] That is not to say that victims of military medical malpractice have ready or predictable access to Article III courts under the FTCA; [88] it is the case that many health care cases involve discretionary

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85 Carpenter, *supra* note 60 at 50–52.

86 *Id.* (citing Romero v. United States, 954 F.2d 223 (4th Cir. 1992)) (declining to apply *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). *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 *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).

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

88 Patricia Kime, *Tragedy and Injustice: The Heartbreaking Truth About Military Medical Malpractice*, MILITARY TIMES (July 10, 2016), 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 promptly[91] 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

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benefits/military-benefits/health-care/2016/07/10/tragedy-and-injustice-the-heartbreaking-truth-about-military-medical-malpractice/ (statement of Former Assistant Secretary of Defense for Health Affairs. Dr. Jonathan Woodson).

[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); Martinez v. Maruszczak, 168 P.3d 720, 729 (Nev. 2007) (applying Nevada's FTCA-like waiver 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."[92] The view of the expansiveness of the incident to service exception has not changed over the last two decades. In *Daniel v. United States*,93 decided in 2018, a Navy nurse died after delivery of her child due to postpartum hemorrhaging.94 The Ninth Circuit dismissed the claims of medical malpractice and wrongful death based on *Feres*.95

The concern expressed in *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 *Mondelli v. United States*,96 the child of a service member was born with retinal blastoma, a genetically transferred form of cancer.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—

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[92] *Id.* at 1486–87 (emphasis added).

93 889 F.3d 978 (9th Cir. 2018).

94 *Id.* at 980.

95 *Id.* at 980, 982 (citing Atkinson v. United States, 825 F.2d 202, 203, 205-06 (9th Cir. 1987)) (relying on application of the *Feres* doctrine to bar the claimof 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).

96 711 F. 2d 567 (3rd Cir. 1983).

97 *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]

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[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]

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104 *Id.* at 878.

105 *Feres*, *supra* note 22 at 135.

106 United States v. Shearer, 473 U.S. 52 (1984).

107 *Id.*

108 *Id*. at 53.

109 *Id.* at 58.

Feres was made applicable to suicide in *Purcell v. United States,*[110] 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, Prucell's superiors took no action and the sailor subsequently took his life.[111] The Seventh Circuit explained that even though the family had not received any benefits related to the suicide and thus would not recover twice[112] (dual recovery is a common concern expressed in *Feres* cases), the court barred recovery, seemingly across the board, in cases involving homicide or suicide.[113]

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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,* Costo 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,[114] and violent hazing[115] have been deemed incident to service much like murder and suicide.[116] 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

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114 *Mission: Ending the Epidemic of Military Rape,* Protect Our Defenders, https://www.protectourdefenders.com/about/; *Sexual Assault Reports in U.S. Military Reach Record High: Pentagon*, NBC NEWS (May 1, 2017), https://www.nbcnews.com/news/us-news/sexual-assault-reports-u-s-military-reach-record-high-pentagon-n753566; Samantha Kubek, *Over 70,000 military sexual assaults took place last year -- Congress must take action*, FOX NEWS (Nov. 16, 2017), https://www.foxnews.com/opinion/over-70000-military-sexual-assaults-took-place-last-year-congress-must-take-action.

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

120 Evan R. Seamone & David M. Traskey, Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates, 26.2 COLUM. J. GENDER & L. 343 (2014) (providing a useful guide for those who represent victims of sexual assault in the military).

121 Lisa Ferdinando, *DoD Releases Annual Report on Sexual Assault in Military*, DEP'T OF DEFENSE (May 1, 2018), https://dod.defense.gov/News/Article/Article/1508127/dod-releases-annual-report-on-sexual-assault-in-military/.

122 Naomi Himmelfarb et al., *Posttraumatic Stress Disorder in Female Veterans with Military and Civilian Sexual Trauma*, 19 J. TRAUMATIC STRESS, 837, 838 (2006) (stating that approximately 23% of females report being sexual assaulted in the military).

123 #ME TOO: YOU ARE NOT ALONE, https://metoomvmt.org/.

124 TIME'S UP, https://www.timesupnow.com/.

those within and outside the armed forces.[125] That laudable vision of human interaction is patently incompatible with a jurisprudence that characterizes sexual assault as incident to military service.[126]

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,[127] or other actions that bear no meaningful relationship to acceptable military service.[128]

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125 *Getting the Lowdown on Customs and Courtesies*, MILITARY.COM, https://www.military.com/join-armed-forces/getting-the-lowdown-on-customs-and-courtesies.html (last visited Jan. 18, 2019).

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]

A case with more complicated facts, *Katta v. United States*,[131] demonstrates the force of *Feres* in post-traumatic-stress-disorder (PTSD) cases. Ted Katta served in Vietnam in 1969, was

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exposed to toxic chemicals in the water on a United States military base); Baker v. United States, 2006 WL 1635634, at *1, 6 (E.D. Ky. June 8, 2006) (denying recovery to a military officer who experienced a traumatic brain injury while participating in a military role playing exercise); Katta v. United States, 774 F. Supp. 1134, 1136–37, 1141 (N.D. Ill. 1991) (denying recovery to a mother who alleged that her son received inadequate treatment for post-traumatic stress disorder subsequent to service); Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991) (denying recovery to a former service member who experienced post-traumatic stress disorder as a result of a hazing incident); *In re* Agent Orange Product Liability Litigation, 597 F. Supp. 740, 746, 753–54 (E.D.N.Y. 1984) (rejecting claims against the United States involving exposure to Agent Orange in Vietnam).

129 2006 WL 1635634, at *1 (E.D. Ky. June 8, 2006).

130 *Id.* at *1, 6.

131 Katta v. United States, 774 F. Supp. 1134, 1136–37, 1141 (N.D. Ill. 1991) (appealing a claim denied by the Veterans' Administration).

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"

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132 While the outcome in Katta is the norm, there are a few cases, e.g., Wojton v. United States, 199 F. Supp. 2d 722, 727, 732–33 (S.D. Ohio 2002) which states that liability is possible for misdiagnosis of post-traumatic stress disorder coupled with the provision of improper medication.

133 Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991).

134 *Id.*

and began screaming with pain. . . .”[135] 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.[136] 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.”[137]

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.[138] The very fact that a civil action in tort was unavailable – and thus undeterred[139] – 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

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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[140] on a military base.[141] The Fifth Circuit found that exposure to contaminated water in the plaintiff's home (on a military base) was activity "incident to service."[142] 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.

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[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 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.[143] 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,*[144] 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.[145] 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.[146] Barring cases where nonconsenting and unknowing

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143 *See* Jonathan D. Moreno, UNDUE RISK: SECRET STATE EXPERIMENTS ON HUMANS 13-52 (2001).

[144] 483 U.S. 669 (1987).

[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

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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.

147 See Jonathan D. Moreno, UNDUE RISK: SECRET STATE EXPERIMENTS ON HUM ANS 13-52 (2001).

148 *Compare* Speigner v. Alexander, 248 F.3d 1292, 1296 (11th Cir. 2001) (holdng 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

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[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 . . . .[M]ilitary personnel . . . engaged in distinctly nonmilitary acts . . . should be subject to civil authority."[158] 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*,[159] 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.[160] 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.[161] *Adams* suggests that a victim of military medical malpractice may circumvent *Feres* when the plaintiff was not returning to military service.[162] 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.[163]

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[158] *Id.*

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

[160] *Id.* at 737–38.

[161] *Id.* at 737, 739–40.

[162] Adams v. United States, 728 F.2d 736, 741 (5th Cir. 1984).

[163] Amitis Darabnia, *To Care for Him Who Shall Have Borne the Battle: Government's Response to PTSD*, 25 FED. CIR. B.J. 453, 480 n. 224 (2016).

In *Hall v. United States*,[164] a widow sued the federal government for the wrongful death of her husband (a petty officer), his two children, and his two step-children,[165] 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.[166] 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. 167 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.[168]

(v) Reluctance to Follow *Feres*

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[164] 130 F. Supp. 2d 825 (S.D. Miss. 2000).

[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

169 United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting).

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

171 Lanus v. United States, 570 U.S. 932, 933 (2013).

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

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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.

176 Tara Wilke, *Three Wrongs Do Not Make a Right: Federal Sovereign Immunity, the Feres Doctrine, and the Denial of Claims Brought by Military Mothers and their Children for Injuries Sustained Pre-Birth,* 263 WIS. L. REV. 263, 276 (2016) (quoting 481 U.S. 681, 692–703 (1987) (Scalia, J. dissenting)).

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.

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177 340 U.S. at 141.

178 *Id*. at 143.

[179] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977); Feres v. United States, 340 U.S. 135, 141, 143-44 (1950).

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.[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,[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,*[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.[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

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181 *Id.*

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.

183 *See, e.g.*, *Brooks,* 337 U.S. at 50.

184 Lanus v. United States, 570 U.S. 932, 933 (2013).

tort law,[185] there has been an epidemic of sexual assault,[186] significant unchecked acts of medical malpractice, [187] and impermissible physical abuse.[188] It is no wonder that even

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185 *Supra*, note 114.

186 Cioca v. Rumsfeld, 720 F.3d 505, 512 (4th Cir. 2013) (denying relief sought by a victim of sexual assault in the military, occurring on the military premise, because civil liability would affect adversely military discipline); Klay v. Panetta, 758 F.3d 369, 376-77 (D.C. Cir. 2014)(in affirming the district court's dismissal, thus rejecting a sexual assault victim's claims, the court stated: "[W]e do not take lightly the severity of plaintiffs' suffering or the harm done by sexual assault and retaliation in our military. But the existence of grievous wrongs does not free the judiciary to authorize any and all suits that might seem just."). *See Sexual Assault in the Military: Hearing Before the Subcomm. on Pers. of the S. Comm. On Armed Servs*., 113th Cong. (2013) (statement of Rebekah Havrilla, Former Sergeant, U.S. Army) (sworn congressional testimony setting forth a harrowing narrative of rape and sexual abuse in the military); Kelsey L. Campbell, Note, *Protecting Our Defenders: The Need to Ensure Due Process for Women in the Military Before Amending the Selective Service Act*, 45 HASTINGS CONST. L.Q. 115 (2017); Alexandra Lohman, *Silence of the Lambs: Giving Voice to the Problem of Rape And Sexual Assault in the United States Armed Forces*, 10 NW. J. L. & SOC. POL'Y 230 (2015); Stella Cernak, Note, Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Line, 22 Mich. J. Gender & L. 207 n. 9 (2015) (citing Amy Goodman & Denis Moynihan, *Addressing the* Epidemic *of* Military Sexual *Assault*, DEMOCRACY NOW (May 9, 2013), http://www.democracynow.org/blog/2013/5/9/addressing_the_epidemic_of_military_sexual_asault); Molly O'Toole, Military Sexual *Assault* Epidemic *Continues to Claim Victims as Defense*

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

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Department Fails Females, HUFFINGTON POST (Oct. 6, 2012), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense- department n 1834196.html.

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.

189 Lanus v. United States, 570 U.S. 932, 933 (2013).

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.[190] 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.[191] 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."[192] 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."[193] Moreover, the "simple, certain, and uniform" compensation system results in "recoveries [that]

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190 Feres v. United States, 340 U.S. 135, 140 (1950).

191 *See* Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671–72 (1977).

192 Leo Shane III, *The Argument for Keeping the Feres Doctrine,* STARS AND STRIPES (Apr. 2, 2012); Figley, *supra* note 211 at 427.

193 Shane III, *supra* note 173.

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

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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.[196] 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.[197]

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196 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, DOD HEALTH: ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS 12 (May 2017), https://www.gao.gov/assets/690/684608.pdf; *Clinic Files Class Action on Behalf of Marine Corps Vets with PTSD,* YALE LAW SCH. (Mar. 2, 2018), https://law.yale.edu/yls-today/news/clinic-files-class-action-behalf-marine-corps-vets-ptsd (describing the filing of a class action law suit on behalf of thousands of Navy and Marine Corps veterans of Iraq and Afghanistan who developed post-traumatic stress disorder and other mental health conditions during military service but were separated with less-than-honorable discharge).

197 *Compensation for Victims of Military Malpractice: Hearing Before the Military Pers. and Comp. Subcomm. of the H. Comm. on Armed Servs.,* 100th Cong. 1 (1987) (statement of H.

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

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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[198] and a number of other administrative compensation programs.[199]

C. Chain-of-Command and Military Discipline

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198 Grammatico v. Indus. Comm'n, 90 P.3d 211, 213 (Ariz. Ct. App. 2004) (on opting out of Workers' Compensation and pursuing remedies in tort, based on ARIZ. REV. STAT. § 23-906.A). Several cases provide examples of allowing a worker to opt out of workers' compensation when they are victims of an intentional tort. *See* Parret v. UNICCO Serv. Co., 127 P.3d 572 (Okla. 2005); Suarez v. Dickmont Plastics Corp., 698 A.2d 838 (Conn. 1997); Woodson v. Rowland, 407 S.E.2d 222 (N.C. 1991); Millison v. E.I. du Pont de Nemours & Co., 501 A.2d 505 (N.J. 1985); VerBouwens v. Hamm Woods Prods., 334 N.W.2d 874 (S.D. 1983); Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981).

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.

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[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").

[202] Leo Shane III, *The Argument for Keeping the Feres Doctrine*, STARS AND STRIPES 216 (Apr. 2, 2012) (referring, *inter alia*, to comments of the Solicitor General).

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.[203] 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[204] in the essential nature of the kind of training and discipline that has characterized our military since its very beginning.[205]

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[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), https://www.military1.com/army/article/538486-why-is-the-military-so-strict-and-tough/; Adam

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;[206] (4) if *Feres* did not bar recovery, the frequency of isolated controversial or injurious practices might be curtailed; [207] (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;[208] (6) subjecting the federal government to the

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Taylor, (coder, ret.), *Why Is Discipline Important in a Military?*, QUORA (2017), https://www.quora.com/Why-is-discipline-important-in-a-military.

206 Jonathan D. Moreno, UNDUE RISK: SECRET STATE EXPERIMENTS ON HUMANS (2001)

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

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Gros, 232 Fed. Appx. 417, 417 (5th Cir. 2007); *In re* Agent Orange Product Liability Litigation, 597 F. Supp. 740, 746, 753–54 (E.D.N.Y. 1984); Kelly L. Dill, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 80 (2001) (explaining how courts have barred claims where exposure to chemicals or radiation has led to birth deformities); see also Molly Kokesh, *Applying the Feres Doctrine to Prenatal Injury Cases After Oriz v. United States*, 93 DENVER L. REV. ONLINE 1, 1 (2016) (citing Ortiz v. United States Evans Army Cmty. Hosp., No. 12-CV-01731-PAB-KMT, 2013 WL 5446057, at *7 (D. Colo, Sept. 30, 2013) (discussing the genesis test for the "in utero" exception)).

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. . . .")

210 Andrew F. Popper, *In Defense of Deterrence,* 75 ALB. L. REV. 181 (2012).

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

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211 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

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

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

[215] *See* 28 U.S.C. § 2680 (2018); Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 60–72 (2007).

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

[217] Figley, *supra* note 179, at 443 (explaining Stencel 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

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218 *Mission: Ending the Epidemic of Military Rape,* PROTECT OUR DEFENDERS (last accessed Jan. 17. 2019), https://www.protectourdefenders.com/about/; *Sexual Assault Reports in U.S. Military Reach Record High: Pentagon*, NBC NEWS (May 1, 2017), https://www.nbcnews.com/news/us-news/sexual-assault-reports-u-s-military-reach-record-high-pentagon-n753566; Samantha Kubek, *Over 70,000 military sexual assaults took place last year -- Congress must take action,* FOX NEWS (NOV. 16, 2017), https://www.foxnews.com/opinion/over-70000-military-sexual-assaults-took-place-last-year-congress-must-take-action.

219 *See* United States v. Stanley, 483 U.S. 669, 671, 683–84 (1987); Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991); Sweet v. United States, 528 F. Supp. 1068, 1070 (D.S.D. 1981), *aff'd*, 687 F.2d 246 (8th Cir. 1982); Campbell, *supra* note 2, at 138–40, 152–53.

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

powers.[222] Over time, *Feres* has left countless victims without full remediation, wrongdoers without accountability, and foreseeable injurious misconduct unchecked.

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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.").

222 Erwin Chemerinsky, *Supreme Court - October Terms 2009 Foreword: Conservative Judicial Activism,* 44 LOY. L.A. L. REV. 863, 866-67 (2011) ("Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public"); David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 250-51 (2009) ("The basic vice of judicial activism … is that it violates the fundamental American constitutional principle of separation of powers. . . ."); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 581 (2007) ("[J]udicial activism [is at odds with basic notions of] separation of powers principles because the Constitution renders such authority to Congress rather than the federal judiciary. . . .").

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.[223] 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,[224] 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

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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.[225] 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.[226] 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.

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225 That cases involving the armed forces can end up in non-military courts is not a novel concept. Schlesinger v. Councilman, 420 U.S. 738 (1975) (anticipating cases originating in the armed forces but finding an exhaustion requirement for such cases); Parker v. Levy, 417 U.S. 733 (1974) (habeas corpus review of court martial); Parisi v. Davidson, 405 U.S. 34 (1972); O'Callahan v. Parker, 395 U.S. 258 (1969).

226 SUPREME COURT OF THE UNITED STATES, THE COURT AND CONSTITUTIONAL INTERPRETATION, https://www.supremecourt.gov/about/constitutional.aspx (last accessed Jan. 17, 2019).

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

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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

228 5 U.S.C. § 8101 *et seq.;* 20 C.F.R. §§ 10, 20 (2018).

229 5 U.S.C. §§ 8103-8193.

230 U.S. DEPARTMENT OF LABOR, WORKERS' COMPENSATION, https://www.dol.gov/general/topic/workcomp (last accessed Jan. 18, 2019).

231 Wallace v. United States, 669 F.2d 947, 951 (4th Cir. 1982) (citing United States v. Demko, 385 U.S. 149, 151 n.1 (1966)).

232 *See generally*, *Wallace*, 669 F.2d 947 (1982).

233 Ezekiel v. Michel, 66 F.3d 894 (7th Cir. 1995).

physician after an injection with a contaminated hypodermic needle.[234] Because the physician was a federal employee acting in the scope of his employment, the plaintiff's remedies were limited to FECA.[235]

FECA provides for wage loss compensation, medical care, rehabilitation, attendant's allowance, and survivors' benefits.[236] As with workers compensation and cases barred by *Feres*, FECA is, [237] for the most part, an exclusive remedy.[238] 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."[239] Federal employees have "the right to receive

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234 *Ezekiel*, 66 F.3d at 895.

235 *Id.*

236 Howard L. Graham, FED. EMPLOYEES COMP. ACT PRAC. GUIDE § 1:1 (2d ed.) (2017).

237 5 U.S.C. § 8116(c); Lockheed Aircraft Corp. v. U.S., 460 U.S. 190, 193–94 (1983).

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).

239 Tredway v. District of Columbia, 403 A.2d 732, 734 (D.C. Ct. App. 1979).

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."[240] 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.[241] 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. [242] 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.[243] While such claims *might* affect prison discipline, the Court found the parties presented no evidence that tort

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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)).

241 Kristin Sommers Czubkowsk, Comment, *Equal Opportunity: Federal Employees' Right to Sue on Title VII and Tort Claims,* 80 U. CHI. L. REV. 1841 (2013).

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).

[243] United States v. Muniz, 374 U.S. 150, 150 (1963).

recovery would affect discipline.[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)[245] establishing an administrative compensation system for federal inmates or their dependents for work-related injuries occurring during incarceration.[246] Pursuant to IACA, the Federal Prison Industries Board maintains the Prison Industries Fund as the sole means of compensation for inmates,[247] effectively barring inmates from maintaining an FTCA suit.[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

[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)).

245 18 U.S.C. § 4126 (2012).

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

247 18 U.S.C. § 4126.

248 U.S. v. Demko, 385 U.S. 149 (1966); *see also* Campbell, *supra* at §2[a]; Mushlin, *supra* note 239, at § 8:22.

that group."[249] Parenthetically, the claims of federal prison *employees*, as opposed to inmates, were discussed in *Wilson v. United States,*[250] 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[251] civil rights action[252] or *Bivens* claim.[253] *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 possesse[s] very little deterrent value, and there [is] no explicit indication from Congress [barring] *Bivens* action[s]."[254] The same statutory deficiencies are applicable to

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249 *Demko*, 385 U.S. at 151–52 (citing Patterson v. U.S., 395 U.S. 495 (1959); *Johansen*, 343 U.S. 427 (1952)).

250 Wilson v. United States, 959 F.2d 12 (2d Cir. 1992).

251 42 U.S.C. § 1983.

252 Koprowski v. Baker, 822 F.3d 248 (6th Cir. 2016); Smith v. U.S., 561 F.3d 1090 (10th Cir. 2009); Bagola v. Kindt, 131 F.3d 632 (7th Cir. 1997); Scott v. Reno, 902 F. Supp. 1190 (C.D. Cal. 1995).

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."[255] This distinction is of consequence when considering the range of alleged (unchecked and thus undeterred) acts[256] of invidious discrimination.[257]

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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.

257 J. Stephen Clark, *But-For Sex: Equal Protection and the Individual Right to Marry a Specific Person Without Regard to Sex,* 60 S.D. L. REV. 389, 398 (2015) (on the history of discrimination in the military); Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 Yale L.J. 2082, 2084-86 (1987) (detailing the history of discrimination); *Overview of the Annual Report on Sexual Harassment and Violence at the Military Service Academies*, Hearing Before the Subcomm. on Military Personnel of the H. Comm. On Armed Servs., 115th Cong. 64 (2017).

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] When the LHWCA

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258 "[A]n inmate may seek judicial review of a final IACA decision under the Administrative Procedures Act. . . ." Johnson v. United States, 2018 U.S. Dist. LEXIS 195074 (D. Ore. 2018); Peguero v. Unicor Indus., 2014 U.S. Dist. LEXIS 59900, at 5 (D.N.J. 2014) (an inmate can seek review of an IACA decision based on, "procedural safeguards and assessment for abuse of discretion . . . ." (citing Thompson v. Federal Prison Industries, 492 F.2d 1082 (5th Cir. 1974))).

259 33 U.S.C. §§ 901 et seq. (2012).

260 42 U.S.C. §§ 1651–54 (2012).

261 DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION, U.S. DEPARTMENT OF LABOR, LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT FREQUENTLY ASKED QUESTIONS (last visited Sept. 22, 2018) https://www.dol.gov/owcp/dlhwc/FAQ/lsfaqs.htm.

applies, it is an exclusive remedy barring civil tort actions in Article III courts pursuant to the FTCA.[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.[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. . . ."[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).[265]

Each of these programs reflects the values and trade-off in what has been called the "grand bargain" underlying workers compensation:[266] In exchange for foregoing the right to

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[262] 1 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).

[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.

[264] *Id.* (citing Eagle-Picher Industries, Inc. v. U.S., 937 F.2d 625 (D.C. Cir. 1991)).

[265] Warner v. Contract Claims Servs., Inc., 2017 LEXIS 182567 (E.D.N.C. 2017).

[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.

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.[267] 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,[268] 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

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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).

267 Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U. L. REV. 891 (2017); *but see* Price V. Fishback, *Long-Term Trends Related to the Grand Bargain of Workers' Compensation*, 69 RUTGERS L. REV. 1185 (2017) (commenting on and disagreeing in part with Emily Speiler's article).

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,[269] has been the topic of endless discussions and the target of frequent criticism.[270] While there is no general agreement on the

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269 Jonathan A.Bruna, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Torts Claims Act*, 49 HARV. J. ON LEGIS. 412 (2012); Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exemption to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259 (2009); Lawrence Kaminski, Comment, *Torts – Application of Discretionary Function Exception of Federal Tort Claims Act*, 36 MARQ. L. REV. 88 (1952) (noting the confusion generated by the discretionary function exception).

270 Jennifer L. Zyznar, Comment, *The Feres Doctrine: "Don't Let This Be It. Fight!*, 46 J. MARSHALL L. REV. 607, 626 (2013); Melvani, *supra* note 16, at 428-29; Kenneth R. Wiltberger, Note, *The Carmelo Rodriguez Military Medical Accountability Act of 2009: An Opportunity to Overturn the Feres Doctrine As It Applies to Military Medical Malpractice*, 8 AVE MARIA L. REV. 473, 497-98 (2010); Turley, *supra* note 34, at 10; David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992, 996-97 (1986); Feldmeier, *supra* note 49, at 150; Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 15 (2007); Jennifer L. Carpenter, Comment, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to*

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

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the Feres Doctrine, 26 U. HAW. L. REV. 35, 59-60 (2003); Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091, 1109-10; Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?* 47 CLEV. ST. L. REV. 335, 345 (1999).

271 Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, § 3 (2006); 38 C.F.R. § 3.307, 3.309 (2018).

272 Dignified Burial and Other Veterans' Benefits Improvement Act of 2012, Pub. L. No. 112-260, § 201(a)(1), 126 Stat. 2417, 2422 (2013).

273 Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439 (2005) (reviewing various routes through and around the discretionary function exception); Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93 (1985) (arguing that too many intra-military actions are barred).

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.[275] 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,[276] was presented to Congress in 2009.[277] The bill[278] 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]."[279] The bill was to honor Sgt. Carmelo Rodriguez who died after a military doctor misdiagnosed a deadly malignant

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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).

275 Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and Harassment*, 222 MIL. L. REV. 211, 240-59 (2014).

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

277 Byron Pitts, *Case Sheds Light on Military Law*, CBS NEWS (Oct. 12, 2008, 7:20 PM), https://www.cbsnews.com/news/case-sheds-light-on-military-law/.

278 U.S. CONGRESS, ACTIONS OVERVIEW: H.R. 1478 — 111TH CONGRESS (2009-2010).

279 U.S. CONGRESS, SUMMARY: H.R. 1478 — 111TH CONGRESS (2009-2010).

melanoma.[280] Even after hearings[281] which made clear that service members, "would not be allowed to bring suits 'arising out of . . . armed conflicts,'"[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 *Feres*.[283]

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

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[280] Byron Pitts, *Military Can't Be Sued For Malpractice*, CBS NEWS (Mar. 24, 2009, 6:43 PM), https://www.cbsnews.com/news/military-cant-be-sued-for-malpractice/.

[281] *See generally, Carmelo Rodriguez Military Medical Accountability Act of 2009*, Hearing before the Subcomm. on Comm. and Admin. Law, 111th Cong. 7 (2009).

[282] *Id*. at 2.

[283] U.S. CONGRESS, *supra* note 277; U.S. CONGRESS, ACTIONS OVERVIEW: S. 1347 — 111TH CONGRESS (2009-2010).

[284] Patricia Kine, *Tragedy and Injustice: The Heartbreaking Truth About Military Medical Malpractice*, MILITARY TIMES (Jul. 10, 2016), https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2016/07/10/tragedy-and-injustice-the-heartbreaking-truth-about-military-medical-malpractice/.

[285] United States v. Johnson, 481 U.S. 681, 682 (1987).

civilian FAA air traffic controllers.[286] 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[287] 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. . . ." [288] 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.289 As noted earlier in this article, it is in the *Johnson* dissent that Justice Scalia and others concluded that "*Feres* was wrongly decided. . . ."[290] At different points, Justices Ginsburg and Thomas also imply that the *Feres* doctrine, at a minimum, deserves

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[286] *Id*.

[287] *See generally id*.

[288] *Id*. at 686.

289 *Id.*

[290] *Johnson*, 481 U.S. at 700–701 (Scalia, J., dissenting) (quoting *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)).

a second look,[291] but despite having a number of opportunities to do so, the Court has left *Feres* unchanged.[292]

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."[293]

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. [294] Maj. Gen. John Altenburg, Jr. (Ret.), would instead prefer to improve the

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[291] Kine, *supra* note 283.

[292] *See generally* Ortiz v. United States, 137 S.Ct. 1431 (2017); Ritchie v. United States, 134 S.Ct. 2135 (Mem.) (2014); Read v. United States, 571 U.S. 1095 (2013); Witt v. United States, 564 U.S. 1037 (2011); and Hafterson v. United States, 558 U.S. 948 (2009).

[293] Patricia Kine, *Tragedy and injustice: The heartbreaking truth about military medical malpractice*, MILITARY TIMES (July 10, 2016), https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2016/07/10/tragedy-and-injustice-the-heartbreaking-truth-about-military-medical-malpractice/.

[294] Pitts, *supra* notes 276, 279.

current benefits system.[295] In academia, there is also meaningful and solid scholarship[296] supporting *Feres* including Professor Paul Figley's eloquent defense of the doctrine (along with a suggestion of how the doctrine could be clarified).[297] Professor Figley's analysis is consistent with the reasoning in *Feres* and *Stencel Aero Engineering. v. United States*.[298]

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.[299] The *Feres-Stencel* doctrine has also barred claims initiated by injured service members *against* third parties and government

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295 An up-to-date comprehensive summary of many benefits are available in: MILITARY COMPENSATION BACKGROUND PAPERS (8th ed. 2018), https://www.loc.gov/rr/frd/mil-comp.html.

296 Dawson, *supra* note 15, at 498.

297 Paul Figley, *supra* note 179; Joan M. Bernott, *Fairness and Feres: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51 (1987).

298 Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977).

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

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[300] McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983) (Feres-Stencel provides de facto immunity for tort claims), *cert. denied* 464 U.S. 1043 (1984).

[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. . . ."[304] The Ninth Circuit agreed,[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."[306] A petition for certiorari is currently pending.[307]

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

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[304] Daniel v. United States, 2016 U.S. Dist. LEXIS 7443 (W.D. Wash. 2016).

[305] *See generally Daniel*, 889 F.3d at 978.

[306] *Daniel*, 889 F.3d at 982.

[307] Rehearing, en banc, denied by Daniel v. United States, 2018 U.S. App. LEXIS 19540 (9th Cir. Wash. 2018), Petition for certiorari filed at, 10/11/2018; JoNel Aleccia, *Widower Takes Ban on Military Injury Claims to Supreme Court*, MILITARY.COM (Oct. 14, 2018), https://www.military.com/daily-news/2018/10/14/widower-takes-ban-military-injury-claims-supreme-court.html.

[308] Ortiz v. United States, 2013 WL 5446057, No. 12-cv-01731-PAB-KMT, 1 (2013); Patricia Kine, *Military Family Pushes Supreme Court to Consider Malpractice Claim*, MILITARY TIMES (Dec. 21, 2015), https://www.militarytimes.com/news/your-military/2015/12/21/military-family-pushes-supreme-court-to-consider-malpractice-claim/.

[309] *Ortiz*, 2013 WL 5446057, at 1-2.

overrule." [310] Quoting *Costo 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]

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[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 Costo 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.).

[313] Ritchie v. United States, 733 F.3d 871 (9th Cir. 2013), *cert. denied* 2014 U.S. LEXIS 3142 (U.S. 2014).

[314] Ritchie v. United States, 2011 U.S. Dist. LEXIS 45057 (D. Haw. 2011).

[315] *Ritchie*, 733 F.3d at 873.

In *Witt v. United States*,[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*. . . "[317] On appeal the court found it was "bound by precedent of the Supreme Court . . . to affirm the . . . dismissal."[318] In *Hafterson v. United States*, another malpractice/wrongful death case,[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."[320]

In *Colton Read v. United States*, a military surgeon sliced into the plaintiff's aorta in the course of routine gallbladder surgery.[321] The court held as follows: "Irrespective of criticism of

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[316] Witt v. United States, 2009 WL 10690924, No. 2:08-CV-02024, 1 (E.D.C.A. 2009).

[317] Witt v. United States, 2009 U.S. Dist. LEXIS 9451 at 5.

[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).

[319] Hafterson v. United States, 2008 WL 4826097, No. 3:08-cv-533-J-16MCR, 1 (M.D.F.L. 2008); Hafterson v. United States, 2008 U.S. Dist. LEXIS 91811 at 6.

[320] *Id.* at 2.

[321] Read v. United States, 2012 WL 5914215, No. SA-12-CV-910-XR, 1 (W.D.T.X. 2012).

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

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[322] Read v. United States, 536 Fed. Appx. 470, 472-73 (5th Cir. 2013).

[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).

[324] Feldmeier, *supra* note 49, at 178 (citing Maj. Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine,* THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 102–103 (2007)).

[325] Feldmeier, *supra* note 49, at 180 (citing *The Feres Doctrine and Military Med. Malpractice: Hearing on S. 489 and H.R. 3174,* Before the Subcomm. on Admin. Prac. and Proc. of the Senate Comm. on the Judiciary," 99th Cong. 64, 77 (1986) (statement of Michael F. Noone)).

"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]

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[326] Thomas M. Gallagher, *Servicemembers' Rights under the Feres Doctrine: Rethinking Incident to Service Analysis*, 33 VIL. L. REV. 175, 202-203 (1988).

[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

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care law, WASHINGTON POST (Nov. 7, 2018), https://www.washingtonpost.com/powerpost/republicans-abandon-the-fight-to-repeal-and-replace-obamas-health-care-law/2018/11/07/157d052c-e2d8-11e8-ab2c-b31dcd53ca6b_story.html?utm_term=.b32a0712d191; *ACA Repeal/Replace*, 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. . . .").

329 Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. LEGIS. 411, 414–15 (2012).

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,

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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.[332] 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.[333] 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 judgements.

Accordingly, the best approach is <u>not</u> 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

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332 Jon Mixon, U.S.A.F. (Ret.), *Why is the Military So Strict and Tough?* MILITARY1 (2018), https://www.military1.com/army/article/538486-why-is-the-military-so-strict-and-tough/.

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).

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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").

335 Jonathan D. Moreno, UNDUE RISK: SECRET STATE EXPERIMENTS ON HUMANS 13-52 (2001).

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.

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