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Rethinking *Feres*: Granting Access to Justice for Service Members

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RETHINKING *FERES*: GRANTING ACCESS TO JUSTICE FOR SERVICE MEMBERS

ANDREW F. POPPER

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ANDREW F. POPPER*

Abstract: In 1946, the ancient wall of sovereign immunity gave way with the passage of the Federal Tort Claims Act (FTCA) opening the courthouse doors to persons harmed by those acting on behalf of the federal government. From the outset, FTCA liability was limited by the expansive discretionary function exception and other express limitations on civil actions. Unresolved in the FTCA was the fate of members of our armed forces injured by actions “incident to service” but outside of armed conflict. Four years later, in *Feres v. United States*, the Court addressed this question placing dramatic limits on civil tort claims of service members. The limitations were rationalized on the need to maintain order, discipline, and chain-of-command. From *Feres* forward, most of those injured incident to military service have been denied access to the very system of justice they pledge their lives to defend. That injustice has persisted for seven decades. This Article discusses *Feres*, the expansion of the “incident to service” prohibition, and recommends overturning *Feres*, amending the FTCA to allow access to justice in Article III courts for acts neither incident to nor essential for military service. It is time for victims of sexual assault, rape, and medical malpractice to have their day in court. Holding accountable the federal government and those engaged in misconduct will enhance, not undermine, respect for order, discipline, and chain-of-command. It is time for uniformly condemned acts to be subjected to the light of day in Article III courts.

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 Justice Scalia, joined by Justices Brennan, Marshall, and Stevens¹

You’re old enough to kill but not for votin’ This whole crazy world is just too frustratin’

—P.F. Sloan, “Eve of Destruction”²

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¹ *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (quoting *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)).

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 deter others from similar misconduct, the federal government positioned itself safely,⁴ immune and unaccountable,⁵ behind the ancient principle that the “king can do no wrong.”⁶ The injustice this inflicted needs no documentation.⁷ This Article is premised on the idea that the core of our government is now and has always been essential, representative, and supportive of the best and most important goals that our nation represents. Nevertheless, 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.⁸

² P.F. SLOAN, *EVE OF DESTRUCTION* (Dunhill Records 1965). This Article is not about drafting eighteen-year-olds who are “old enough to kill” but not twenty-one, the voting age at the time. That one who serves is denied rights accorded all others (not in the military) is instead the topic of this piece.

³ See *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846) (“[T]he [federal] government is not liable to be sued, except with its own consent, given by law.”).

⁴ See *THE FEDERALIST NO. 81*, at 397 (Alexander Hamilton) (J. & A. McLean eds., 1810) (“[I]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”).

⁵ See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 *GEO. WASH. INT’L L. REV.* 521, 527 (2003) (detailing how sovereign immunity was invoked to bar courts from hearing some claims of legal wrongs).

⁶ See *OLIVER WENDELL HOLMES, JR., THE COMMON LAW 8* (Mark 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.”); *WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 548–69* (5th ed. 1942) (explaining that the historic rationale of sovereign immunity was the belief in the divinity of the King; to allow such suits would contradict perfection).

⁷ Suffice it to say that almost any civil tort claim against the United States government contemplated by a person in our armed forces would have been blocked by the defense of sovereign immunity prior to 1946. For that reason, there are no cases to cite for this point, only the argument that this shield from liability was outdated and unjust. See *infra* note 8 and accompanying text.

⁸ Early efforts to address the need for governmental accountability were documented in a famous series of law review articles by Professor Edwin M. Borchard covering municipal and governmental immunity, an international perspective on public liability, and more. See generally Edwin M. Borchard, *Government Liability in Tort*, 34 *YALE L.J.* 1, 3 (1924) (“The difficulty, of course, lies in the fact that we consider ourselves bound by the fetters of a medieval doctrine. . . .”) (criticizing the immunity of government and dismissing the historical roots of sovereign immunity); Edwin M. Borchard, *Governmental Responsibility in Tort*, *VI*, 36 *YALE L.J.* 1 (1926); Edwin M. Borchard, *Governmental Responsibility in Tort*, *VI*, 36 *YALE L.J.* 1039 (1927) (outlining the political theories underpinning the relationship between state and law); Edwin M. Borchard, *Theories of Governmental Responsibility in Tort*, 28 *COLUM. L. REV.* 734 (1928) (focusing on liability for wrongful acts including wrongful confinement).

In 1946, the ancient wall of sovereign immunity gave way with the passage of the Federal Tort Claims Act (FTCA).⁹ 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.¹⁰ Although liability was limited from the outset by the vast, vague, and vexing discretionary function exception (DFE),¹¹ the federal government could now be accountable in Article III courts for acts of misconduct, negligence, malpractice, and similar claims.¹²

Beyond the DFE, the FTCA had explicit limits¹³ 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-the-administrative-remedies requirement, a bar on claims for injuries sustained abroad, and a bar on claims

⁹ 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–2680 (2012) (originally enacted as Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (amended 2006)).

¹⁰ See generally PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT (2d ed. 2018) (explaining the content of the Federal Tort Claims Act (FTCA), discussing the central substantive issues, and setting out the process for pursuing an FTCA claim).

¹¹ See 28 U.S.C. §§ 1346(b)(1), 2680(a); *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 claim that is facially outside of the discretionary function exception.” (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.”); Mark C. Niles, “Nothing but Mischief”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1334 (2002) (arguing that the discretionary function exception (DFE) 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); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 82 (1968) (characterizing the DFE as “vague and ambiguous”).

¹² See U.S. CONST. art. III, § 1 (creating Article III courts); 28 U.S.C. § 1346(b)(1) (providing jurisdiction for “civil actions on claims against the United States”).

¹³ See 28 U.S.C. §§ 1346(b), 2680 (listing most of the exceptions to the FTCA as codified by § 1346(b)). See generally Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105 (2009) [hereinafter Figley, *A Different Metaphor*] (explaining how the FTCA works as a “limited waiver” of sovereign immunity); David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375 (2011) (providing an overview of the exceptions to the FTCA).

for injuries sustained in combat or armed conflict.¹⁴ These exceptions, particularly those related to injuries sustained in combat or armed conflict, were not controversial at the time the FTCA was enacted, are not controversial today, 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, in 1950, the Supreme Court decided *Feres v. United States*,¹⁵ and in broad strokes placed dramatic limits on the civil-litigation rights of millions of Americans who were serving or have served in our armed forces.¹⁶ 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.¹⁷ 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.¹⁸ The limitations in *Feres* did not affect the complex and comprehensive intra-military benefits compensation system¹⁹ and the expansive military health care program.²⁰ Likewise, *Feres* had no effect on intra-military sanctions for wrongdoing or failure to comply with lawful orders, rules, regulation, prac-

¹⁴ 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–2680 (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 amended in non-sequential sections of title 28 of the U.S. Code. See generally 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 (examining judicial treatment of the combat exception).

¹⁵ 340 U.S. 135 (1950).

¹⁶ See Joseph J. Dawson, Note, *In Support of the Feres Doctrine and a Better Definition of "Incident to Service,"* 56 ST. JOHN'S L. REV. 485, 493 (1982) (explaining the holding of *Feres*).

¹⁷ *Feres*, 340 U.S. at 143–46.

¹⁸ See 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, 699 (2005) (stating that the *Feres* doctrine has expanded to preclude many possible civil claims brought by servicemen); 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, 404 (2010) (explaining how the *Feres* doctrine has been applied to bar all medical malpractice claims by active-duty servicemen).

¹⁹ *DoD Warrior Care*, U.S. DEP'T OF DEF., <https://warriorcare.dodlive.mil/> [<https://perma.cc/VA2D-58G2>] (describing the mission of Warrior Care 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”). See generally U.S. DEP'T OF DEF., WOUNDED, ILL, AND/OR INJURED COMPENSATION AND BENEFITS HANDBOOK (2018), http://warriorcare.dodlive.mil/files/2018/05/DoD_Compensation-Benefits-Handbook_Apr-2018.pdf [<http://perma.cc/GQ8F-2STV>] (setting out the array of benefits available through an intra-service compensation claims system).

²⁰ See *About the Military Health System*, HEALTH.MIL, <https://www.health.mil/About-MHS> [<http://perma.cc/W3JR-YQ3B>] (describing the Military Health System).

tices, and standards governed by the Uniform Code of Military Justice (UCMJ).²¹ Instead, *Feres* affected 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. This Article relies on the premise that the frequency of some of the wrongs experienced by service members (e.g., sexual assault, rape, and clear or gross malpractice) has increased to epidemic levels²² because of the absence of the accountability and deterrence that would otherwise flow from civil tort actions.²³

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 sixty-eight years. Misconduct that forever changes 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.”²⁴

It is understandable that those who run the risk of sanction would oppose changing a system that immunizes their misconduct. The desire to be free from sanction is not irrational—but it is unacceptable. That said, there is no easy path to change. A robust and responsive military is essential to our peaceful survival. A change that undermines discipline, chain-of-command, existing compensation systems,²⁵ sanctions under the UCMJ,

²¹ See 10 U.S.C. §§ 801–946 (2012) (codifying the Uniform Code of Military Justice (UCMJ)); see also Ann-Marie Woods, Note, *A “More Searching Judicial Inquiry”: The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. REV. 1329, 1348–52 (2014) (providing a brief history of the UCMJ’s enactment and describing the insular process for bringing a claim, specifically of sexual assault, under the UCMJ).

²² See *Mission: Ending the Epidemic of Military Rape*, PROTECT OUR DEFENDERS, <https://www.protectourdefenders.com/about/> [<http://perma.cc/H4MY-GMEN>] (describing military rape as an “epidemic”); *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> [<http://perma.cc/LAB2-J9UV>] (reporting that “the scourge of sexual assault in the military remains the status quo”).

²³ See generally Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181 (2012) (arguing that deterrence is an important virtue of the tort system).

²⁴ See *Feres*, 340 U.S. at 146 (providing the “incident to service” exception).

²⁵ See generally U.S. DEP’T OF DEF., *MILITARY COMPENSATION BACKGROUND PAPERS: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS THEIR PURPOSES AND LEGISLATIVE BACKGROUNDS* (8th ed. 2018), https://www.loc.gov/rr/frd/pdf-files/Military_Comp-2018.pdf [<https://perma.cc/NAV9-49WN>] [hereinafter *MILITARY COMPENSATION BACKGROUND PAPERS*] (presenting an impressive array of benefits designed for service members, ranging from

and efficient operation of our defense establishment is dangerous and irrational. Yet in our democracy, power, efficiency, and 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.²⁶ Members of the armed forces take an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic”²⁷ Every service member understands the solemnity of that promise. The oath includes an implicit recognition that defense of our country may entail engagement in combat, in armed conflict, where the gravest of injuries are a possibility for all and an inevitability for some. That oath and understanding does not include the concession that service members would be without recourse should they be injured by egregious and impermissible misconduct that advances 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, *Feres* has ended up shielding a vast array of deeply troubling tortious misconduct rather than protecting discipline and the chain-of-command.²⁸ More than a half century ago, the late Supreme Court Chief Justice Earl Warren stated that “citizens in uniform”

compensation after suffering combat-related harms or toxic exposure, to life insurance). 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 generally *id.*

²⁶ See 10 U.S.C. §§ 801–946 (providing the UCMJ).

²⁷ 10 U.S.C. § 502.

²⁸ See Froelich, *supra* note 18, at 699 (explaining that courts have expanded the *Feres* doctrine to bar a number of different claims); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) (drawing a distinction between military due process and civilian due process); Tara Willke, *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*, 2016 WIS. L. REV. 263, 276 (noting that the Supreme Court has not provided much guidance as to the “incident to service” exception); Melvani, *supra* note 18, at 405–10 (detailing an egregious example of a military medical claim barred by the *Feres* doctrine); 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> [http://perma.cc/549Q-VC5R] (reporting that approximately 8,600 women and 6,300 men were sexually assaulted in the armed forces in 2016, and that most victims were assaulted more than one time). See generally Captain Robert L. Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976) (outlining how the *Feres* doctrine has been applied inconsistently by circuit courts); David E. Seidelson, *The Feres Exception to the Federal Tort Claims Act: New Insight into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983) (surveying when and why federal courts have applied the *Feres* doctrine).

should not be stripped of their basic rights simply because they are members of the armed forces.²⁹ Yet, to date, *Feres* is the law of the land.

In 2013, the United States Court of Appeals for 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.”³⁰ Recently, the Ninth Circuit again explored an “incident to service” tort claim in a case involving clear malpractice and “regretfully” concluded that the claims were barred by the *Feres* doctrine.³¹ As noted by the United States Court of Appeals for the Tenth Circuit, regret is a common judicial theme regarding the continued force of *Feres* as a bar to legitimate claims: “Suffice it to say that when a court is forced to apply the *Feres* doctrine, it frequently does so with a degree of regret.”³²

In recent years, those who serve in our armed forces have been thanked for their service by presidents³³ and lauded at the start of nationally broadcast sporting events.³⁴ Service members are routinely called heroes³⁵—and they are. It is the highest public calling. Yet these gestures seem, at best, incomplete when accompanied by a deprivation of one of the basic rights due to all citizens.

²⁹ Warren, *supra* note 28, at 188.

³⁰ *Ritchie v. United States*, 733 F.3d 871, 878–79 (9th Cir. 2013) (quoting *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting)).

³¹ *Daniel v. United States*, 889 F.3d 978, 980 (9th Cir. 2018).

³² *Ortiz v. United States ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 822 (10th Cir. 2015).

³³ See Marisa Schultz, *Trump Delivers Thanksgiving Message [to] America's Military*, N.Y. POST (Nov. 22, 2018), <https://nypost.com/2018/11/22/trump-delivers-thanksgiving-message-america-military/> [<http://perma.cc/FQ72-ZJJQ>] (reporting that President Donald Trump thanked members of the military serving in Afghanistan); 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-america-troops-and-marks-milestone-afghanistan-war> [<http://perma.cc/39L8-PWVW>] (detailing President Barack Obama's 2014 visit to a New Jersey military base, where he thanked military members and their families); George W. Bush, President of the U.S., *President Thanks Military Personnel and Families For Serving Our Country* (Dec. 7, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041207-2.html> [<http://perma.cc/HQ45-XQYM>] (providing a transcript of President George W. Bush's address to military personnel).

³⁴ See 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/> [<http://perma.cc/5R8S-7UC4>] (quoting the NFL senior vice president of social responsibility in describing members of the military as “heroes”); *NFL Honors Veterans and Military Members with “Salute to Service,”* NFL COMM'NS (2016), <https://nflcommunications.com/Pages/NFL-Honors-Veterans-and-Military-Members-with-Salute-To-Service.aspx> [<http://perma.cc/RMN5-DVG9>] (describing the NFL's annual recognition of members of the military).

³⁵ See, e.g., HIRE HEROES USA, <https://www.hireheroesusa.org/> [<http://perma.cc/E3AX-FE3K>] (referring to military members and veterans as heroes).

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.”³⁶

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 justice, and those most willing to fight and die for it, have not experienced the great promises of our legal system: fair and open hearings and an adversary system founded on a level playing field. In short, they have not experienced the blessings of simple justice.³⁷

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 undone. There is a flip-side, however, 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.³⁸ 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

³⁶ 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).

³⁷ See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* 191 (1976) (discussing “simple justice”). Here, the term “simple justice” is less a reference to Richard Kluger’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 to seek justice in Article III courts. See *id.*

³⁸ See Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 907 (2010) (arguing that whether elected or not, civil court judges should not be reviewing policy choices affecting military chain-of-command or other discretionary decisions).

country have sought positions in the various Judge Advocate General's Corps in the different branches of the armed forces.³⁹

The challenge of this Article is that the same immunity that shields wrongdoers, leaving individuals and institutions within the government unaccountable, 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*,⁴⁰ the FTCA, the expansion of the "incident to service" prohibition, and 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 deadly substances, and invidious discrimination.

I. *FERES V. UNITED STATES*

In the four years after the adoption of the FTCA and before the *Feres* decision, the Supreme Court decided several cases involving civil tort liability for service members. In *Jefferson v. United States*, decided in 1948, the plaintiff, an active-duty service member, filed a medical malpractice claim after undergoing abdominal surgery.⁴¹ Eight months after discharge and during a subsequent surgery, a towel marked "Medical Department U.S. Army" was found in his stomach.⁴² Plaintiff filed an FTCA malpractice claim, but the case was dismissed based on a finding that the FTCA did not

³⁹ See Ilana Kowarski, *5 Traits for Would-Be Military Lawyers*, U.S. NEWS & WORLD REPORT (Nov. 11, 2016), <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> [<https://perma.cc/M9YK-Q3Z3>] (identifying versatility, self-reliance, physical fitness, humility, and adventurousness as the five traits that a prospective JAG attorney should possess); Julie L. Massing, *The Making of a JAG Attorney: Where the Law and the Military Meet*, FED. L., Mar. 2017, at 24, 25, 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 [<http://perma.cc/VQ75-XXZB>] (profiling a law student who sought a position as a Judge Advocate General's (JAG) Corps attorney because she wanted to "help people" and "serve [her] country"); Alison Monahan, *JAG Corps: Military Lawyer*, BALANCE CAREERS (Feb. 6, 2019), <https://www.thebalancecareers.com/want-to-be-a-military-lawyer-learn-about-jag-4039991> [<http://perma.cc/YH5G-XUDZ>] (outlining the requirements for joining the JAG Corps).

⁴⁰ *Feres*, 340 U.S. 135.

⁴¹ *Jefferson v. United States*, 77 F. Supp. 706, 708 (D. Md. 1948).

⁴² *Id.* at 709.

cover harms suffered in the course of military service.⁴³ While the *Jefferson* appeal was pending, the Supreme Court decided *Brooks v. United States* in 1949, 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.⁴⁴ The father was on leave at the time.⁴⁵ One service member died in the accident and others were severely injured. The surviving service member sued under the FTCA, and prevailed at the trial-court level before losing the case on appeal at the United States Court of Appeals for the Fourth Circuit.⁴⁶ The plaintiffs ultimately prevailed at the Supreme Court.⁴⁷

Although the government in *Brooks* argued that grave disruption of order and discipline would result if service members had access to Article III courts, the Court found that the accident had nothing to do with military service, and if the claim were barred, the Court reasoned, it would prevent innocent victims from being compensated.⁴⁸ 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.⁴⁹ The Court also found that resolution of the fate of claims "incident to service" would have to wait for a "wholly different case."⁵⁰ That different case was presented the following year in *Feres v. United States*.

A. *Feres v. United States: The Origin of the Controversy*

Feres v. United States consolidated three conflicting federal circuit court cases⁵¹ 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.⁵²

Feres involved an active-duty service member who died in a barracks fire.⁵³ An FTCA wrongful death action alleged that the fire was the result of

⁴³ *Id.* at 712.

⁴⁴ *Brooks v. United States*, 337 U.S. 49, 50 (1949).

⁴⁵ *Id.*

⁴⁶ *United States v. Brooks*, 169 F.2d 840 (4th Cir. 1948), *rev'd*, 337 U.S. 49.

⁴⁷ *Brooks*, 337 U.S. at 50–51.

⁴⁸ *Id.* at 51.

⁴⁹ *Id.* at 49.

⁵⁰ *Id.* at 52.

⁵¹ *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949); *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949); *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135.

⁵² *Feres*, 340 U.S. at 146 ("[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 service.").

⁵³ *Id.* at 137.

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. Specifically, it considered whether the FTCA allowed 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 of the FTCA⁵⁴ or in the legislative history of the statute,⁵⁵ the Court determined that the FTCA waiver of immunity was not applicable to the alleged injuries in the cases before the Court (and thus the claims were barred) because each was somehow incident to service.⁵⁶ The opinion did not terminate the right to pursue a civil judgment in all such cases and left room for review of FTCA claims on a case-by-case basis.⁵⁷ The stage was set, however, 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.⁵⁸

Although 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,⁵⁹ it held there was no basis in the FTCA to extend that right to members of the armed forces injured incident to their service.⁶⁰ The Court emphasized that the relationship between those in the armed forces and the federal government is “distinctively federal in nature”⁶¹ and that such

⁵⁴ *Id.* at 139 (“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.”).

⁵⁵ *Id.* at 138 (describing the lack of “guiding materials” and highlighting that if the Court misinterprets the Act, “at least Congress possesses a ready remedy”).

⁵⁶ *Id.* at 146; see John Astley, Note, *United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 195 (1988) (“An analysis of the FTCA legislative history does not clearly indicate whether Congress intended to exclude military personnel from FTCA protection. From the Act’s history, however, it is reasonable to conclude that Congress intended servicemembers to be covered.”).

⁵⁷ See *Feres*, 340 U.S. at 141 (noting that “it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law”); Seidelson, *supra* note 28, at 631 (explaining that the *Feres* decision was intended to allow courts to determine the applicability of the FTCA at their discretion).

⁵⁸ See Turley, *supra* note 36, at 10 (summarizing the “bizarre and disturbing rulings” that *Feres* has produced); Melvani, *supra* note 18, at 428–29 (2010) (discussing potential claims that would be barred by *Feres*); 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) (describing “decades of unwillingness” on the part of the Supreme Court and Congress to reduce or eliminate the application of the *Feres* doctrine).

⁵⁹ *Feres*, 340 U.S. at 141.

⁶⁰ *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.”).

⁶¹ *Id.* at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947)).

harms were covered or compensable through other venues.⁶² The Court reasoned that if Congress had intended to provide access to Article III courts for intra-military civil tort claims, it would have done so explicitly.⁶³ 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.⁶⁴ The lack of overwhelming numbers of such private bills (and the cumbersome and seemingly arbitrary nature of such relief) between 1935 and 1945 suggested to the Court that the intra-military compensation system was not only workable, but should be the exclusive mechanism for redress of grievances, not Article III courts and not private bills.⁶⁵

The Court in *Feres* reasoned in dicta that were intra-military civil tort claims common, it would be problematic at many levels.⁶⁶ This position, however, is driven by a more basic set of issues—tort liability, the Court suggested, could undermine essential respect for and compliance with the chain-of-command, and would be a “radical departure” from established practices.⁶⁷

⁶² *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.”). Every branch of the armed forces has a compensation claims system and all are administrative. See generally MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 25 (providing an overview of the military compensation system).

⁶³ *Feres*, 340 U.S. at 144. Members of Congress have, on occasion, tried to undo *Feres* but have been unable to garner the votes needed. See H.R. NO. 111-466, at 2 (2009) (proposing an amendment to the FTCA that would “allow service members to sue for damages when they are harmed by medical malpractice”); *The Feres Doctrine: An Examination of This Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 1–3 (2002) (statement of Sen. Arlen Specter), <https://www.govinfo.gov/content/pkg/CHRG-107shrg88833/pdf/CHRG-107shrg88833.pdf> [<http://perma.cc/322Z-FD4Q>] (introducing legislation to amend the *Feres* doctrine); 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) (advocating for the discretionary function exception as a solution to the problems created by the *Feres* doctrine); Melissa Feldmeier, Note, *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 58, at 497–98 (noting that Congress has had “many opportunities” to change the *Feres* doctrine but “has always resisted doing so”).

⁶⁴ 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).

⁶⁵ See *Feres*, 340 U.S. at 139 (“Congress, as author of the confusion [should have 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.”).

⁶⁶ *Id.* at 143 (articulating concerns that even included choice of law and conflict of laws problems: “[t]hat the geography of an injury should select the law to be applied to his tort claim makes no sense”).

⁶⁷ *Id.* at 146.

B. Evolution of the *Feres* Doctrine

The prohibition against civil tort actions applicable to active-duty (and even post-discharge) service members in *Feres*⁶⁸ initially co-existed with the marginally permissive interpretations of the FTCA.⁶⁹ In *United States v. Brown*,⁷⁰ decided by the Supreme Court in 1954, four years after *Feres*, a discharged veteran underwent knee surgery at the Veterans Administration (VA) Hospital and sustained permanent harm to his leg.⁷¹ Although the original injury was “incident to service,”⁷² 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.”⁷³ 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.⁷⁴ Although all important considerations, no single factor was dispositive, and each could be viewed in light of the totality of the circumstances of a given case.⁷⁵

In 1996, forty-six years after *Feres*, these factors were reduced to a list by the Ninth Circuit in *Dreier v. United States*.⁷⁶ The court stated that it

⁶⁸ *Id.* at 144 (noting that Congress was aware that it was barring common law tort claims incident to service: “there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service”); see *Lewis v. United States*, 663 F.2d 889, 891 (9th Cir. 1981) (finding that Congress’s failure to take 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 28, at 24 (stating that the “incident to service” language in *Feres* has “frustrated many injured military members and a few federal judges”).

⁶⁹ See *Brooks*, 337 U.S. at 50 (examining whether members of the military can recover for injuries that are not incident to service).

⁷⁰ *United States v. Brown*, 348 U.S. 110 (1954).

⁷¹ *Id.* at 110.

⁷² *Id.* at 112.

⁷³ *Id.* at 111, 113.

⁷⁴ Figley, *A Different Metaphor*, *supra* note 13, at 1116–17.

⁷⁵ *Stanley v. CIA*, 639 F.2d 1146, 1151 (5th Cir. 1981).

⁷⁶ *Dreier v. United States*, 106 F.3d 844, 845 (9th Cir. 1996) (holding that 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).

would look to the following factors to determine whether an activity is incident to service: “(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.”⁷⁷ *Dreier* suggested that parties should be given the chance to assess “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.”⁷⁸ The decision regarding whether an injury is incident to military service⁷⁹ resulted in “considerable confusion among the circuits”⁸⁰ and has led to uncertainty no matter what factors a court applies.⁸¹

C. *Expansive Application of “Incident to Service”*

Following *Feres* and *Brown*, courts continued to broaden the definition of “incident to service,”⁸² applying the prohibition to medical malpractice,

⁷⁷ *Dreier*, 106 F.3d at 848 (citing *Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir. 1986)). See Jennifer L. Zynnar, Comment, *The 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).

⁷⁸ *Dreier*, 106 F.3d at 852 (internal quotations omitted).

⁷⁹ See Kelly L. Dill, Comment, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 78 (2001) (describing which injuries have been categorized as “incident to service”).

⁸⁰ Zynnar, *supra* note 77, at 614 n.53 (citing Anne R. Riley, Note, *United States v. Johnson: Expansion of the Feres Doctrine to Include Servicemembers’ FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233, 244 (1989)) (describing “incident to service” as a “seemingly simple phrase” that has resulted in significant confusion at the circuit court level); see *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.”).

⁸¹ See Figley, *A Different Metaphor*, *supra* note 13, at 1116 (suggesting 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 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”).

⁸² See *Johnson*, 481 U.S. at 681 (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); *Potts v. United States*, 723 F.2d 20, 20 (6th Cir. 1983) (per curiam) (denying recovery to a Navy corpsman for injuries sustained after being struck by a cable while on leave); see also *Major v. United States*, 835 F.2d 641, 644–45 (6th Cir. 1987) (per curiam) (barring an action for recovery from injuries sustained in an on-base motor vehicle accident, which occurred because of the actions of an intoxicated, noncommissioned officer). The court stated that in years prior, “the [Supreme] 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

exposure to toxic substances, murders or suicides, sexual assaults, and more—hardly activity that could or should be considered incident to or an essential part of military service.⁸³ A brief look at those harms follows.

1. 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 a Navy serviceman's left testicle.⁸⁴ The malpractice began during a physical exam, one of the final steps that was to lead to plaintiff's discharge. When a "double hernia"⁸⁵ (generally referred to as a bilateral inguinal hernia) was found, 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, which resulted 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.⁸⁶ An explanation as to how this decision enhanced military discipline or forwarded any rational interest other than avoidance of accountability and limiting public exposure of wrongdoing was left unexplained by this judicial opinion.

That said, varying interpretations of the DFE in medical malpractice claims have allowed some cases to go forward in highly limited circum-

even remotely related to the individual's *status* as a member of the military." *Major*, 835 F.2d at 644.

⁸³ See *Chappell v. Wallace*, 462 U.S. 296, 297–98, 305 (1983) (barring a claim based on racial discrimination); *Doe v. Hagenbeck*, 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 told 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-enlistment papers); *Dill*, *supra* note 79, at 78 (noting that some courts have reasoned around the bar to recovery for service members). 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). 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, Note, *Contamination at U.S. Military Bases: Profiles and Responses*, 35 STAN. ENVTL. L.J. 223, 242–43 (2016).

⁸⁴ *Henninger v. United States*, 472 F.2d 814, 815 (9th Cir. 1973).

⁸⁵ *Id.*

⁸⁶ *Id.* at 815–16.

stances.⁸⁷ When courts assess such claims based on *Feres*, the “incident to military service” bar was and is almost insurmountable.⁸⁸ Courts that have moved beyond *Feres*, however, 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.”⁸⁹ That is not to say that victims of military medical malpractice have ready or predictable access to Article III courts under the FTCA;⁹⁰ many health care cases involve discretionary judgments (and thus are off limits due to the DFE) but this does not bar all medical malpractice cases.⁹¹

In *Jackson v. United States*, decided by the Ninth Circuit in 1997, a reservist lacerated his hand at a weekend drill.⁹² The military doctor treating the reservist did not inform him of the prompt need to have surgery, and this resulted in permanent damage to his hand.⁹³ Again, when examining the application of *Feres*, the court found that “the development of the doctrine . . . has broadened to such an extent that ‘practically any suit that implicates

⁸⁷ Carpenter, *supra* note 63, at 50–52.

⁸⁸ *Id.* (citing *Romero v. United States*, 954 F.2d 223 (4th Cir. 1992)) (declining to apply *Feres* to a claim for negligence that allegedly caused a child’s 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, 1128 (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, 288 (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, 971 (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).

⁸⁹ *See* *Sigman v. United States*, 217 F.3d 785, 795 (9th Cir. 2000) (citing numerous cases that have allowed such medical malpractice claims to move forward).

⁹⁰ *See* Patricia Kime, *Tragedy and Injustice: The Heartbreaking Truth About Military Medical Malpractice*, MIL. 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/> [http://perma.cc/A7NM-Z77F] [hereinafter Kime, *The Heartbreaking Truth About Military Medical Malpractice*] (quoting Former Assistant Secretary of Defense for Health Affairs Dr. Jonathan Woodson as stating that allowing service members to bring suit for injuries sustained while on duty could create “chaos”).

⁹¹ *See* Feldmeier, *supra* note 63, at 176–77 & n.211 (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 immune from claims involving discretionary policy-based decisions on the distribution of limited medical resources but is not immune from claims related to the “actual administration of medical care by its employees”); *Martinez v. Maruszczak*, 168 P.3d 720, 729 (Nev. 2007) (interpreting the FTCA’s discretionary function exception to the waiver of sovereign immunity and explaining that “while a physician’s diagnostic and treatment decisions involve judgment and choice, thus satisfying the [*Berkovitz-Gaubert*] test’s first criterion, those decisions generally do not include policy considerations, as required by the test’s second criterion”).

⁹² *Jackson v. United States*, 110 F.3d 1484 (9th Cir. 1997).

⁹³ *Id.* at 1486.

the military judgments and decisions runs the risk of colliding with *Feres*.”⁹⁴ The view of the expansiveness of the incident to service exception has not changed over the last two decades. In *Daniel v. United States*, decided in 2018 by the Ninth Circuit, a Navy nurse died after delivery of her child due to postpartum hemorrhaging.⁹⁵ The Ninth Circuit dismissed the claims of medical malpractice and wrongful death based on *Feres*.⁹⁶

The concern expressed in *Jackson*, that any suit implicating 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*, decided by the United States Court of Appeals for the Third Circuit in 1983, 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 court lamented that barring the claim would be an injustice—punishing a child for the harm the parents had sustained—but did so 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 *Brown v. United States*, decided by the United States Court of Appeals for the Sixth Circuit in 2006, 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 court 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

In the Ninth Circuit’s 2013 opinion *Ritchie v. United States*, involving a claim similar to that in *Brown*, however, a mother was ordered to continue military training while pregnant contrary to the admonitions of the mother’s physician.¹⁰¹ Stresses in training led to the premature birth and subsequent

⁹⁴ *Id.* at 1486–87 (emphasis added) (citation omitted).

⁹⁵ *Daniel*, 889 F.3d at 980.

⁹⁶ *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 claim of a pregnant United States Army Specialist who had been sent home from the hospital multiple times before being diagnosed with preeclampsia and delivering a stillborn child).

⁹⁷ *Mondelli v. United States*, 711 F.2d 567, 568 (3d Cir. 1983).

⁹⁸ *Id.* But see *Romero*, 954 F.2d at 224–26 (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 *Brown v. United States*, 462 F.3d 609, 610 (6th Cir. 2006).

¹⁰⁰ *Id.* at 616.

¹⁰¹ *Ritchie*, 733 F.3d at 878 (allowing a child in utero to recover, but not the mother).

death of her infant.¹⁰² In a wrongful death action for the loss of the child, the court 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.¹⁰³

2. 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*.¹⁰⁴ In *United States v. Shearer*, decided by the Supreme Court in 1984, a service member was kidnapped and killed by another serviceman while away from his base.¹⁰⁵ Previously, the assailant had been convicted of an unrelated manslaughter in Germany,¹⁰⁶ a fact known to the assailant’s superiors who, nonetheless, allowed him to stay on the base.¹⁰⁷ The deceased’s parents alleged that the Army had been negligent by failing to remove or identify the assailant, and that led to the death of their son. Relying on *Feres*, the Court barred the claim on the premise that allowing the case to go forward would affect military discipline, even though the murder occurred off the base.¹⁰⁸

Feres was made applicable to suicide in *Purcell v. United States*, decided by the United States Court of Appeals for the Seventh Circuit in 2011, which involved the death of a twenty-one-year-old sailor.¹⁰⁹ Although a phone call beforehand expressed concern that the sailor had a gun and planned on killing himself, the sailor’s superiors took no action and he subsequently took his life.¹¹⁰ Even though the family had not received any benefits related to the suicide and thus would not recover twice¹¹¹ (dual recovery is a common concern expressed in *Feres* cases), the Seventh Circuit barred recovery, seemingly across the board, in cases involving homicide or suicide.¹¹²

¹⁰² *Id.* at 873.

¹⁰³ *Id.* at 878.

¹⁰⁴ See *Feres*, 340 U.S. at 135 (providing the “incident to service” exception).

¹⁰⁵ *United States v. Shearer*, 473 U.S. 52, 53 (1985).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 53.

¹⁰⁸ *Id.* at 58.

¹⁰⁹ *Purcell v. United States*, 656 F.3d 463, 464 (7th Cir. 2011).

¹¹⁰ *Id.* at 465.

¹¹¹ *Id.* at 467. See *Ritchie*, 733 F.3d at 875 (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).

¹¹² See *Purcell*, 656 F.3d at 467; 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*).

3. Sexual Assault and Other Egregious Misconduct

Sexual assault, currently at epidemic levels in the military,¹¹³ and violent hazing¹¹⁴ have been deemed incident to service much like murder and suicide.¹¹⁵ Accordingly, any deterrent effect the tort system would produce to lessen similar misconduct is lost. In *Klay v. Panetta*, decided by the United States Court of Appeals for the D.C. Circuit in 2014, the plaintiff had argued that “being victimized by a sexual assault cannot possibly be considered to be an ‘activity’ incident to military service”¹¹⁶ The court rejected plaintiff’s claim,¹¹⁷ explaining that the question was not whether being raped is an activity incident to military service, but rather, whether the connection to service came from the fact that the *assailant* was a service member.¹¹⁸

Sexual assault is not incident to military service.¹¹⁹ It is a crime, prosecuted, albeit internally, in our armed forces.¹²⁰ Prosecution, however, does

¹¹³ See Kubek, *supra* note 28 (calling for reform to end sexual assault in the military); PROTECT OUR DEFENDERS, *supra* note 22 (describing military rape as an “epidemic”); *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> [<http://perma.cc/6WYE-L5E8>] (reporting on the high number of sexual assaults in the military in 2016).

¹¹⁴ See *Veloz-Gertrudis v. United States*, 768 F. Supp. 38, 39 (E.D.N.Y. 1991) (involving a brutal beating that included being hung upside down by the ankles until the individual’s bones separated).

¹¹⁵ See *Klay v. Panetta*, 758 F.3d 369, 374 (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*, 768 F. Supp. at 39 (holding that a former service member was barred from bringing an FTCA claim against the government for an incident of hazing that led to post-traumatic stress disorder).

¹¹⁶ *Klay v. Panetta*, 924 F. Supp. 2d 8, 13 (D.C. Cir. 2013), *aff’d*, 758 F.3d 369; *Klay*, 758 F.3d at 375 (noting the claim flowed from the defendant’s alleged mismanagement of the military).

¹¹⁷ *Klay*, 758 F.3d 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, 681–84 (1987) (noting that *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 CHERMERINSKY, *FEDERAL JURISDICTION* 621–22 (5th ed. 2007); see, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390–95 (1971) (expounding the relationship between federal agents and private citizens generally).

¹¹⁸ *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 judgments).

¹¹⁹ See generally Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 *COLUM. J. GENDER & L.* 343 (2014) (providing a useful guide for those who represent victims of sexual assault in the military).

¹²⁰ See Lisa Ferdinando, *DoD Releases Annual Report on Sexual Assault in Military*, DEP’T OF DEF. (May 1, 2018), <https://dod.defense.gov/News/Article/Article/1508127/dod-releases-annual->

not equate with justice for a victim. Victims deserve their day in court.¹²¹ With public focus on this issue by virtue of the “#MeToo”¹²² and “Time’s Up”¹²³ 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,” and providing a model for those within and outside the armed forces.¹²⁴ That laudable vision of human interaction is patently incompatible with a jurisprudence that characterizes sexual assault as incident to military service.¹²⁵

Beyond sexual assault, the FTCA has prevented individuals with traumatic brain injuries, post-traumatic stress disorder (PTSD), 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,¹²⁶ or other actions that bear no meaningful relationship to acceptable military service.¹²⁷

report-on-sexual-assault-in-military/ [http://perma.cc/8K4L-DWHG] (reporting on sexual assault prosecutions in the military).

¹²¹ See 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 twenty-three percent of females report being sexually assaulted in the military).

¹²² See ME TOO MOVEMENT, <https://metoomvmt.org/> [http://perma.cc/FP9J-3S7P].

¹²³ See TIME’S UP, <https://www.timesupnow.com/> [http://perma.cc/UC4K-J8P5].

¹²⁴ See *Getting the Lowdown on Customs and Courtesies*, MILITARY.COM, <https://www.military.com/join-armed-forces/getting-the-lowdown-on-customs-and-courtesies.html> [http://perma.cc/6EAP-5HAB].

¹²⁵ See *Klay*, 758 F.3d at 377 (concluding sexual assault was incident to service).

¹²⁶ See *Stanley*, 483 U.S. at 671 (considering the claim of a sergeant who was “secretly administered doses of [LSD] pursuant to an Army plan to study the effects of the drug on human subjects”); *Sweet v. United States*, 687 F.2d 246, 248 (8th Cir. 1982) (examining a tort claim based on a plaintiff’s participation in a military drug experiment); *Veloz-Gertrudis*, 768 F. Supp. at 39 (discussing a tort claim arising out of plaintiff’s compulsory participation in a military hazing exercise).

¹²⁷ See Helen D. O’Connor, *Federal Tort Claims Act Is Available for OIF TBI Veterans, Despite Feres*, 11 DEPAUL J. HEALTH CARE L. 273, 275 (2008) (examining the difficulties veterans face in obtaining additional compensation to cover issues arising from inadequate medical and rehabilitative care received through the military). It is estimated that twenty percent of troops deployed since 2001 have been affected by a traumatic brain injury. Jesse Bogan, *Afghan War Vets, St. Louis Researchers Seek Answers on Head Injuries*, ST. LOUIS POST-DISPATCH (Jan. 27, 2014), https://www.stltoday.com/news/local/metro/afghan-war-vets-st-louis-researchers-seek-answers-on-head/article_daad0082-4d39-5d0d-899a-7e942109c103.html [http://perma.cc/5459-3C36]; see *Gros v. United States*, 232 F. App’x 417, 417 (5th Cir. 2007) (per curiam) (denying recovery to service members who were exposed to toxic chemicals in the water on a United States military base); *Baker v. United States*, No. CIV.A. 5:05-221-JMH, 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*, 768 F. Supp. at 39

In *Baker v. United States*, decided by the United States District Court for the Eastern District of Kentucky in 2006, a military police officer was injured in the course of a training exercise when the role that officer played was misunderstood by others who, seemingly without provocation, reacted violently and caused a life-altering traumatic brain injury.¹²⁸ 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.¹²⁹

The United States District Court for the Northern District of Illinois' 1991 decision, *Katta v. United States*,¹³⁰ offers more complicated facts and demonstrates the force of *Feres* in PTSD cases. Ted Katta served in Vietnam in 1969, was discharged one 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, and horrific night terrors. Finally, he stepped in front of a train, taking his life. Katta's mother sued the VA alleging that the treatment her son received for his PTSD was wholly inappropriate. The court rejected her claim based on *Feres*, relying on the premise that PTSD was incident to Katta's service, even though the condition first manifested after he entered civilian life.¹³¹

Like in the case of *Katta*, the fate of Alexis Veloz-Gertrudis is deeply troubling. To say that seaman Veloz-Gertrudis was the victim of a "hazing incident" hardly captures the gravity of the occurrence.¹³² While assigned to the U.S.S. Forrester, 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."¹³³ 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-

(denying recovery to a former service member who experienced post-traumatic stress disorder as a result of a hazing incident); *Agent Orange Prod. Liab. Litig.*, 580 F. Supp. at 746, 753–54 (rejecting claims against the United States involving exposure to Agent Orange in Vietnam).

¹²⁸ *Baker*, 2006 WL 1635634, at *1.

¹²⁹ *Id.* at *1, *6.

¹³⁰ *Katta*, 774 F. Supp. at 1136–37, 1141 (appealing a claim denied by the Veterans Administration).

¹³¹ *Id.* at 1141. Although the outcome in *Katta* is the norm, there are a few cases that have found liability possible for misdiagnosis of post-traumatic stress disorder coupled with the provision of improper medication. See, e.g., *Wojton v. United States*, 199 F. Supp. 2d 722, 733 (S.D. Ohio 2002) (allowing the claim to survive because the negligence of the Veterans Administration created injuries "separate and distinct from the PTSD itself").

¹³² See *Veloz-Gertrudis*, 768 F. Supp. at 38–39 (describing the so-called "hazing incident").

¹³³ *Id.*

Gertrudis heard his ankle ‘pop’ and began screaming with pain”¹³⁴ In response to the screaming, the crew members “continued to strike him, one delivering a series of particularly hard blows”¹³⁵ 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 the alleged horrific harms he suffered, he was barred, because, *inter alia*, “pursuit of [his] claim would impermissibly 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 the perpetrators were undeterred—contributes to an environment where this type of misconduct can take place with seeming impunity.

The cases of egregious conduct just described would be actionable if the recommendations in this Article are implemented. Even so, many simple negligence cases and even certain intentional tort cases (e.g., emotional distress) that would be actionable outside of 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*, decided by the United States Court of Appeals for the Fifth Circuit in 2017, where the plaintiff alleged significant harm as a consequence of exposure to contaminated water on a military base.¹³⁹ The Fifth Circuit found that exposure to contaminated water in the plaintiff’s home (on a military base) was activity “incident to service.”¹⁴⁰ Although 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

¹³⁴ *Id.* at 39.

¹³⁵ *Id.*

¹³⁶ *Id.* at 39–40.

¹³⁷ *Id.* at 41.

¹³⁸ *Id.* at 39.

¹³⁹ *Gros*, 232 F. App’x at 418; see also “Agent Orange” Prod. Liab. Litig., 597 F. Supp. at 753–54 (applying *Feres* to bar claims against the United States involving exposure to Agent Orange in Vietnam); Hamilton, *supra* note 83, at 242–43 (suggesting removal of the bar on cases for non-combat torts, reckless or knowing acts, and cases of alleged cover-up).

¹⁴⁰ *Gros*, 232 F. App’x at 418–19 (noting that *Gros* was on active duty when the harm occurred, 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”).

this Article accepted—a simple maintenance failure is not within one of the seven proposed exceptions to the FTCA.

Gros is simply different than cases involving rape, violent beatings, clear or gross malpractice, or nonconsensual exposure to toxins.¹⁴¹ 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 1987, the Supreme Court held in *United States v. Stanley* 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.¹⁴² 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.¹⁴³ Barring cases where nonconsenting and unknowing service members have been used as human subjects for experiments hardly seems to advance discipline or any other interest used to defend *Feres* or that is otherwise central to the DFE, other than avoidance of accountability.¹⁴⁴

4. Avoiding *Feres*: A Few Exceptions to the Bar

Although 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 it is unlikely that most courts would issue such injunctions.¹⁴⁵ A second possibility stems from a few cases involv-

¹⁴¹ See JONATHAN D. MORENO, *UNDUE RISK: SECRET STATE EXPERIMENTS ON HUMANS* 13–52 (2001).

¹⁴² *Stanley*, 483 U.S. at 671–72.

¹⁴³ *Id.* at 680 (stating that 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, 1075 (D.S.D. 1981), *aff’d*, 687 F.2d 246 (barring a former serviceman from bringing a claim from injuries that arose when the government forced him to take LSD as part of an experiment and failed to provide him with the necessary follow-up treatment and care). The U.S. District Court for the District of South Dakota in *Sweet* noted that the injuries sustained were “inseparably entwined and directly related to the injury he allegedly sustained while in the service.” 528 F. Supp. at 1075.

¹⁴⁴ See MORENO, *supra* note 141, at 13–52.

¹⁴⁵ Compare *Speigner v. Alexander*, 248 F.3d 1292, 1296 (11th Cir. 2001) (holding that the doctrine of non-justiciability extends to cases for injunctive relief, with a few unspecified exceptions), with *Wigginton v. Centracchio*, 205 F.3d 504, 512 (1st Cir. 2000) (holding that intra-military suits alleging constitutional violations, but not seeking damages, are justiciable).

ing misconduct by independent contractors retained by the armed forces,¹⁴⁶ where a former service member was harmed by actions of the contractor including, in one instance, a claim based on a post-discharge failure to warn.¹⁴⁷ Service members may also be able to sue state governments, as opposed to the federal government, although such cases have little or nothing to do with accountability under the FTCA.¹⁴⁸

In 1991, in *Lutz v. Secretary of the Air Force*, decided by the Ninth Circuit, three service members broke into the office of Major Marsha Lutz and stole documents that disclosed her sexual orientation.¹⁴⁹ Major 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.”¹⁵⁰ The court reasoned that acts 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*.”¹⁵¹ 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.¹⁵² This case is part of a very limited “private acts” exception recognized in *Durant v. Neneman*, decided by the Tenth Circuit in 1989: “[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

¹⁴⁶ See *Campbell-Ewald Co. v. Gomez*, 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 holding that “[w]hen a contractor violates both federal law and the Government’s explicit instructions . . . no ‘derivative immunity’ shields the contractor from suit by persons adversely affected by the violation”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 510–12 (1988) (neglecting to directly adopt the *Feres* doctrine for independent contractors, but nonetheless holding that there could be a significant conflict between federal interests and state tort laws); *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 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).

¹⁴⁷ *Perez v. United States*, No. 09-22201-CIV-JORDAN, 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 when a post-discharge failure to warn about toxic chemicals in the drinking water caused non-Hodgkin’s lymphoma).

¹⁴⁸ *Trankel v. Dep’t of Military Affairs*, 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 federal government).

¹⁴⁹ *Lutz v. Sec’y of Air Force*, 944 F.2d 1477, 1478 (9th Cir. 1991).

¹⁵⁰ *Id.* at 1487 (citations omitted).

¹⁵¹ *Id.*

¹⁵² *Id.*

or authority of the military”¹⁵³ *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 to escape responsibility . . . because those involved were wearing military uniforms. . . . [M]ilitary personnel . . . engaged in distinctly nonmilitary acts . . . should be subject to civil authority.”¹⁵⁴ Of course, the problem is that almost all of 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 1984, the Fifth Circuit in *Adams v. United States* reversed a summary-judgment dismissal of a claim by the family of a service member who had a fatal heart attack following a circumcision.¹⁵⁵ That plaintiff had not received payments from the military, was on indefinite leave, and was awaiting the completion of separation paperwork.¹⁵⁶ *Adams* suggests that a victim of military medical malpractice may circumvent *Feres* when the plaintiff was not returning to military service.¹⁵⁷ Again, although it is tempting to classify this as an exception, it is not. For example, almost all PTSD claims involve veterans who do not intend to return to military service—and almost all are kept out of Article III courts.¹⁵⁸

In *Hall v. United States*, decided in 2000 by the United States District Court for the Southern District of Mississippi, a widow sued the federal government for the wrongful death of her husband (a petty officer), his two children, and his two step-children, all of whom died from carbon monoxide poisoning in their home on a naval base after the Navy failed to replace gas appliances.¹⁵⁹ 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 because the officer was off-duty and asleep, factors prompting the court to consider whether this was personal activity and not incident to service.¹⁶⁰ This decision does not square with many of the cases already discussed, including *Gros*, involving harm caused by contaminated water

¹⁵³ *Durant v. Neneman*, 884 F.2d 1350, 1353 (10th Cir. 1989).

¹⁵⁴ *Id.* at 1354.

¹⁵⁵ *Adams v. United States*, 728 F.2d 736, 737–38 (5th Cir. 1984).

¹⁵⁶ *Id.* at 737, 739–40.

¹⁵⁷ *See id.* at 740 (emphasizing the service member’s duty status as the controlling factor in the analysis).

¹⁵⁸ *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) (noting that all appeals for claims denied under the FTCA must be filed only with the United States Court of Appeals for the Federal Circuit).

¹⁵⁹ *Hall v. United States*, 130 F. Supp. 2d 825, 826–29 (S.D. Miss. 2000).

¹⁶⁰ *Id.* at 829.

(used for drinking and bathing) in a home on a base.¹⁶¹ Frankly, although “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.¹⁶²

5. Reluctance to Follow *Feres*

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*, decided by the Supreme Court in 1987,¹⁶³ left little doubt of his point of view; the case, he wrote, was “wrongly decided.”¹⁶⁴ In a dissenting opinion regarding the denial 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’”¹⁶⁵

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*, 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.”¹⁶⁶ Yet, the current understanding of “incident to service” precluded the Ninth Circuit from allowing an otherwise legitimate claim (from the standpoint of substantive tort law) to go forward.¹⁶⁷

Although 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 inju-

¹⁶¹ See *Gros*, 232 F. App’x at 417 (denying recovery to service members who were exposed to toxic chemicals in the water on a United States military base).

¹⁶² 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).

¹⁶³ *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting).

¹⁶⁴ *Id.* (quoting “*Agent Orange*” *Prod. Liab. Litig.*, 580 F. Supp. at 1246).

¹⁶⁵ *Lanus v. United States*, 570 U.S. 932, 933 (2013) (Thomas, J., dissenting from denial of certiorari).

¹⁶⁶ *Daniel*, 889 F.3d at 982.

¹⁶⁷ See *Hinkie v. United States*, 715 F.2d 96, 98 (3d Cir. 1983) (concluding that the *Feres* doctrine barred an otherwise viable claim); see also *Zyznar*, *supra* note 77, at 623 n.125 (citing *Matreale v. N.J. Dep’t of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (discussing the *Feres* doctrine’s ripeness for reconsideration)).

ries to servicemen where the injuries arise out of or are in the course of activity incident to service.”¹⁶⁸ Given the enormity of this declaration, it is worth exploring whether the justifications on which the Court predicated its opinions are convincing.¹⁶⁹

II. THE *FERES* RATIONALES

Although the *Feres v. United States* Court found that the FTCA was explicitly designed to hold the government liable, “in the same manner and to the same extent as a private individual under like circumstances,”¹⁷⁰ 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,’”¹⁷¹ (2) an accessible compensation process exists 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.¹⁷² 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.¹⁷³ It does not follow, however, that the existence of that relationship must automatically mean denial of access to justice for members of the armed forces in Article III courts.

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.¹⁷⁴ 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 aggressively fought every

¹⁶⁸ *Feres*, 340 U.S. at 146.

¹⁶⁹ Willke, *supra* note 28, at 276 (referencing the three rationales articulated in *Feres*).

¹⁷⁰ *Feres v. United States*, 340 U.S. 135, 141 (1950).

¹⁷¹ *Id.* at 143 (citation omitted).

¹⁷² *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671–72 (1977); *Feres*, 340 U.S. at 143–44.

¹⁷³ See Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 434 (2010) [hereinafter Figley, *In Defense of Feres*] (articulating that no private citizen has ever had a relationship comparable to the power the government has over its armed forces).

¹⁷⁴ *Id.*

case that was brought,¹⁷⁵ 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, the Supreme Court decided *Brooks v. United States*, in which the government argued unsuccessfully that all FTCA claims involving activity in any way incident to service should be barred.¹⁷⁶ A year later, in *Feres*, this argument succeeded, notwithstanding the fact that, as Justice Thomas later noted, the FTCA says nothing to explicitly support this conclusion.¹⁷⁷

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 tort law,¹⁷⁸ there has been in the military an epidemic of sexual assault,¹⁷⁹ significant unchecked acts of medical malpractice,¹⁸⁰ and impermissible physical abuse.¹⁸¹ It is no won-

¹⁷⁵ See *Brooks v. United States*, 337 U.S. 49, 50 (1949) (indicating that the government moved to dismiss the plaintiff's tort actions on the grounds that the plaintiffs were service members at the time of the alleged injuries); *Feres v. United States*, 177 F.2d 535, 537 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (holding that the FTCA was not designed to allow recovery by soldiers engaged in military service); *Jefferson v. United States*, 77 F. Supp. 706, 708 (D. Md. 1948) (stating, similarly, that the FTCA did not allow recovery from torts arising connected to a service member's military service). The government's argument in each of these cases was not that the governmental actors' behavior conformed with due care, but rather that the government was immune. See *Brooks*, 337 U.S. at 50; *Feres*, 177 F.2d at 537; *Jefferson*, 77 F. Supp. at 708.

¹⁷⁶ *Brooks*, 337 U.S. at 50.

¹⁷⁷ See *Lanus v. United States*, 570 U.S. 932, 933 (2013) (Thomas, J., dissenting from denial of certiorari) (noting a complete lack of support for the "incident to service" exception in the text of the FTCA).

¹⁷⁸ See *supra* note 113–115 and accompanying text.

¹⁷⁹ See *Klay v. Panetta*, 758 F.3d 369, 376–77 (D.C. Cir. 2014) (affirming the district court's dismissal, and thus rejecting a sexual assault victim's claims, by stating: "we do not take lightly the severity of plaintiffs' suffering or the harm done by sexual assault and retaliation in our military[.] . . . [b]ut the existence of grievous wrongs does not free the judiciary to authorize any and all suits that might seem just"); *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 military premises, because civil liability would adversely affect military discipline); see also *Sexual Assaults in the Military: Hearing Before the Subcomm. on Pers. of the S. Comm. on Armed Servs.*, 113th Cong. 15–18 (2013) (statement of Rebekah Havrilla, Former Sergeant, U.S. Army) (providing sworn congressional testimony setting forth a harrowing narrative of rape and sexual abuse in the military); 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, 232 (2015) (describing nonconsensual sexual contact as a "prevalent feature" of military service); 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, 116 (2017) (reporting that servicewomen are more likely to be "raped by fellow servicemen than to be killed by adversaries in combat"); Stella Cernak, Note, *Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Lines*, 22 MICH. J. GENDER & L. 207, 212 (2015) (arguing that sexual assault within the military is a widespread human rights issue).

¹⁸⁰ See Turley, *supra* note 36, at 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

der that even judicial conservatives (namely, Justices Scalia and Thomas) took the position that *Feres* was a mistake from the outset.¹⁸²

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

B. Sufficient Alternative Remedies

A second rationale for *Feres* is the availability of existing remedies within the system of military justice.¹⁸³ 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.¹⁸⁴ 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 arena.”¹⁸⁵ 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.”¹⁸⁶ Moreover, the “simple, certain, and uniform” compensation system results in “re-

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.”); Melvani, *supra* note 18, at 398 (arguing that *Feres* has rendered service members “second-class citizens, whose rights fall below even those of the nation’s criminals . . . [and that] 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”).

¹⁸¹ See *Veloz-Gertrudis v. United States*, 768 F. Supp. 38, 39 (E.D.N.Y. 1991) (involving a brutal beating of a service member as part of a compulsory hazing exercise).

¹⁸² See, e.g., *Lanus*, 570 U.S. at 933 (Thomas, J., dissenting from denial of certiorari) (including a complete rejection of the *Feres* doctrine).

¹⁸³ *Feres*, 340 U.S. at 140.

¹⁸⁴ *Id.*; see *Stencel Aero Eng’g Corp.*, 431 U.S. at 671–72 (describing the Veterans’ Benefits Act as a substitute for tort liability).

¹⁸⁵ Figley, *In Defense of Feres*, *supra* note 173, at 427; see Leo Shane III, *The Argument for Keeping the Feres Doctrine*, STARS & STRIPES (Apr. 2, 2012), <https://www.stripes.com/news/the-argument-for-keeping-the-feres-doctrine-1.173370> [<http://perma.cc/58RP-5PLY>] (noting the government’s argument that service members are duly compensated for on-duty injuries through the provision of military benefits).

¹⁸⁶ Shane, *supra* note 185.

coveries [that] compare extremely favorably with those provided” by other federal compensation schemes, such as workers’ compensation.¹⁸⁷

Detractors of the current system assert that it is neither sufficient in amount nor reliable enough to cover the harms that service members and their families experience and certainly insufficient to produce a deterrent to future violations.¹⁸⁸ Particularly in post-discharge compensation cases, veterans face significant barriers.¹⁸⁹ 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 judgments, 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.¹⁹⁰

The premise of this particular rationale is that an administrative compensation system within our armed forces (broadly defined) would be frus-

¹⁸⁷ *Feres*, 340 U.S. at 143–45; see Froelich, *supra* note 18, at 716 (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.” Froelich, *supra* note 18, at 728 (quoting *Kreis v. Sec’y of Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989)).

¹⁸⁸ Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 45–47 (2007) (arguing that the veterans’ 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); O’Conor, *supra* note 127, at 274 (arguing that the benefits available through veteran statutes do not adequately cover life-long impairments).

¹⁸⁹ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-260, DOD HEALTH: ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS 12 (2017), <https://www.gao.gov/assets/690/684608.pdf> [<http://perma.cc/E3QG-74VM>] (examining the numbers of service members discharged for misconduct who have trouble accessing certain benefits and services); *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> [<http://perma.cc/H3PU-4V4R>] (describing the filing of a class-action lawsuit 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 received a less-than-honorable discharge).

¹⁹⁰ See *Compensation for Victims of Military Malpractice: Hearing Before the Military Pers. and Comp. Subcomm. of the H. Comm. on Armed Servs.*, 100th Cong. 65 (1987) (statement of H. Lawrence Garrett III, General Counsel, Department of Defense) (“The Department believes that amendment of the Military Claims Act . . . may very well provide . . . a solution.”).

trated 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 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 in certain workers' compensation systems¹⁹¹ and a number of other administrative compensation programs.¹⁹²

C. Chain-of-Command and Military Discipline

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

¹⁹¹ See *Grammatico v. Indus. Comm'n*, 90 P.3d 211, 213 (Ariz. Ct. App. 2004) (noting that it is possible to opt out of workers' compensation and pursue 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, e.g., *Suarez v. Dickmont Plastics Corp.*, 698 A.2d 838, 840 (Conn. 1997) (discussing how the exclusivity bar of the Workers' Compensation Act may be overcome by an intentional tort claim); *Bazley v. Tortorich*, 397 So. 2d 475, 482 (La. 1981) (discussing this "intentional act" exception); *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505, 510 (N.J. 1985) (discussing the limits of the exclusivity bar); *Woodson v. Rowland*, 407 S.E.2d 222, 224 (N.C. 1991) (considering how the exclusivity bar of the Workers' Compensation Act may be overcome by an intentional tort claim); *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 579 (Okla. 2005) (recognizing an intentional tort exception to workers' compensation exclusivity); *VerBouwens v. Hamm Wood Prods.*, 334 N.W.2d 874, 877 (S.D. 1983) (discussing this "intentional acts exception").

¹⁹² See 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 claimant's right to pursue civil tort options); COMCAST SET-TOP BOX SETTLEMENT (2019), <https://settopboxsettlement.com/> [<https://perma.cc/Q3W6-YS3D>] (describing a program that provides subscribers the option to receive limited funds from settlement, or, alternatively, to opt out and initiate independent litigation); SEPTEMBER 11TH VICTIM COMPENSATION FUND, <https://www.vcf.gov/> [<http://perma.cc/LXS4-YC9Y>] (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).

would undermine those vital aspects of military life.¹⁹³ The argument underlying *Feres* is that civil tort litigation, “if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.”¹⁹⁴ 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 . . . [and taking] scarce resources away from compelling military needs to avoid legal actions.”¹⁹⁵

Notwithstanding the important concerns expressed above, there is no concrete data, studies, or 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 governing service members.

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. Nothing in the structure of the rules and regulations governing the armed forces need change if service members are given this form of access to justice in Article III courts. 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, would service members regularly question the judgment of their superiors in the absence of *Feres*? If so, the doctrine should not change.¹⁹⁶ There is no demonstrated reason to believe, however, 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

¹⁹³ See *Feres*, 340 U.S. at 141–42 (“[N]o private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command”).

¹⁹⁴ *Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 634 (5th Cir. 2008); see Dawson, *supra* note 16, at 488 (claiming that the “often maligned ‘military discipline’ rationale, standing alone, is sufficient to support the *Feres* doctrine”).

¹⁹⁵ Shane, *supra* note 185 (referring, *inter alia*, to comments made by the Solicitor General).

¹⁹⁶ *Stencel Aero Eng’g Corp.*, 431 U.S. at 671–72 (suggesting that adherence to the mandates of the chain-of-command would be placed in jeopardy if service members were free to bring civil actions in tort without any limitations); *Feres*, 340 U.S. at 141, 143–44 (suggesting the same).

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 belief¹⁹⁷ in the essential nature of the kind of training and discipline that has characterized our military since its very beginning.¹⁹⁸

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;¹⁹⁹ (4) if *Feres* did not bar recovery, the frequency of isolated controversial or injurious practices might be curtailed;²⁰⁰ (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;²⁰¹ (6) subjecting the federal government to the light of day for systemic misconduct including invidious

¹⁹⁷ The conclusions in this section draw more heavily on the author's personal experiences noted briefly at the outset of the Article.

¹⁹⁸ This is not a debatable point, but it is discussed regularly. See Adam Taylor, *Why Is Discipline Important in a Military?*, QUORA (2017), <https://www.quora.com/Why-is-discipline-important-in-a-military> [http://perma.cc/B9YR-A842]; *Strict Behavior Standards for Military Personnel*, MILITARY.COM, <https://www.military.com/veteran-jobs/security-clearance-jobs/strict-behavior-standards-for-military-personnel.html> [https://perma.cc/2455-LMTT] (discussing the strict behavior standards for service members).

¹⁹⁹ See generally MORENO, *supra* note 141 (providing a history of the U.S. military's use of human subjects in atomic, biological, and chemical warfare experiments).

²⁰⁰ See *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983) (barring civil liability in a radiation-exposure case where not only was a service member a victim, but his spouse and child were, as well); *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979) (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, 829 (S.D. Miss. 2000) (holding that the widow of a petty officer could recover for her husband's death and the death of their children from carbon monoxide poisoning in their home at a naval base).

²⁰¹ *Gros v. United States*, 232 F. App'x 417, 417 (5th Cir. 2007) (per curiam) (denying recovery to service members who were exposed to toxic chemicals in the water on a United States military base). The federal government also fought successfully all claims involving exposure to dioxin (Agent Orange) in Vietnam, among other claims. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 746, 753–54 (E.D.N.Y. 1984) (barring claims for exposure to Agent Orange); Dill, *supra* note 79, at 80 (explaining how courts have barred claims where exposure to chemicals or radiation has led to birth deformities); see also Molly Kokesh, Comment, *Applying the Feres Doctrine to Prenatal Injury Cases After Ortiz v. United States*, 93 DENVER L. REV. ONLINE 1, 1 (2016) (discussing the genesis test for the "in utero" exception) (citing *Ortiz v. United States ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817 (10th Cir. 2015)), <http://www.denverlawreview.org/dlr-onlinearticle/2016/5/6/applying-the-feres-doctrine-to-prenatal-injury-cases-after-o.html> [https://perma.cc/5NV8-Z75P].

discrimination should have a powerful corrective effect;²⁰² and (7) when there are no consequences for tortious misconduct, there is no meaningful deterrence for repetition of that same act.²⁰³

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 judicial “gap filling” of an ambiguous statute.²⁰⁴ The Court was legislating. It is one thing for the Court to give clarity to a statute. It is 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.²⁰⁵ 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 to the statute (e.g., the DFE), and the matter of how service members would be impacted was considered (e.g., the addition of the word “combatant” in House debates).²⁰⁶ 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, it could have easily blocked the vast majority of civil tort claims emanating from the single largest branch of government, the Department of Defense.²⁰⁷ It could have easily done so—but it did not. Seen in that light,

²⁰² See David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992, 1015–16 (1986) (“[C]ases involving particularly egregious or widespread military misconduct are more appropriately resolved by civilian courts.”).

²⁰³ See Popper, *supra* note 23, at 181 (arguing that deterrence is a “real and present virtue of the tort system”).

²⁰⁴ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining that Congress sometimes leaves interpretative “gaps” in legislation to allow administrative agencies to insert their expertise).

²⁰⁵ See Astley, *supra* note 56, at 195 (“An analysis of the FTCA legislative history does not clearly indicate whether Congress intended to exclude military personnel from FTCA protection. From the Act’s history, however, it is reasonable to conclude that Congress intended servicemembers to be covered.”).

²⁰⁶ *Id.* at 196.

²⁰⁷ *The Executive Branch*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/1600/executive-branch> [<http://perma.cc/CBZ9-3UF2>] (“The Department of Defense is the largest government agency, with more than 1.3 million men and women on active duty, nearly 700,000 civilian personnel, and 1.1 million citizens who serve in the National Guard and Reserve forces.”).

Feres is not just overly broad,²⁰⁸ but also an incorrect interpretation of the FTCA and thus wrongly decided.²⁰⁹

To be fair, there is thoughtful and compelling scholarship defending the Court's decision as consistent with the FTCA.²¹⁰ 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 that *Feres* spawned has played a role in the aforementioned epidemic of sexual assault,²¹¹ inexcusable negligence,²¹² and more. Quite obviously, these actions have not been deterred, nor should they be considered "incident to service."²¹³ Without a congressional imperative in the FTCA on service-related harms, the Court, for legitimate reasons, took a shot at setting public policy to engage in the kind of "judicial law making" often condemned,²¹⁴

²⁰⁸ See 28 U.S.C. § 2680 (2012) (providing the language of the FTCA); Brou, *supra* note 188, at 60–72 (arguing for an alternative to the *Feres* doctrine).

²⁰⁹ See *United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting) (stating that *Feres* was "wrongly decided").

²¹⁰ See *Feres*, 340 U.S. at 143–44 (describing the alternative methods of recovery as one of the rationales behind the adoption of its non-justiciability doctrine); Figley, *In Defense of Feres*, *supra* note 173, at 443 (explaining *Stencel Aero Engineering Corp.* and reiterating the reasoning behind the *Feres* doctrine).

²¹¹ See *supra* note 113 and accompanying text.

²¹² See *United States v. Stanley*, 483 U.S. 669, 671, 683–84 (1987) (concerning a claim arising from a serviceman's long-term exposure to LSD as part of a military experiment); *Veloz-Gertrudis*, 768 F. Supp. at 39 (concerning a claim arising out of a violent military hazing exercise); *Sweet v. United States*, 528 F. Supp. 1068, 1070 (D.S.D. 1981), *aff'd*, 687 F.2d 246 (8th Cir. 1982) (concerning a claim by a former serviceman 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 care); *Campbell*, *supra* note 179, at 138–40, 152–53 (describing how servicewomen have unsuccessfully tried to establish causes of action for negligence contributing to the "military culture of tolerance for sexual crimes").

²¹³ See *Klay v. Panetta*, 924 F. Supp. 2d 8, 13 (D.D.C. 2013), *aff'd*, 758 F.3d 369 ("[B]eing victimized by a sexual assault cannot possibly be considered to be an 'activity' incident to military service.").

²¹⁴ See *Planned Parenthood of Se. Pa. 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 somewhat more modest role envisioned for these lawyers by the Founders."); Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 143 (2001) ("[J]udicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation."); Turley, *supra* note 36, at 89 (stating that the *Feres* doctrine "stands as one of the most extreme examples of judicial activism in the history of the Supreme Court"); Trent Franks, *Franks Denounces Ninth Circuit Ruling Against Parental Rights*, VOTE SMART (Nov. 4, 2005), <https://votesmart.org/public-statement/134997/franks-denounces-ninth-circuit-ruling-against-parental-rights#.XJOLUa3Mwgc> [<http://perma.cc/ZP8G-PB3F>] ("This is just the latest outrage to come from the Ninth Circuit, which has become the poster child for judicial activism.").

violating one of the most basic tenets of separation of powers.²¹⁵ Over time, *Feres* has left countless victims without full remediation, wrongdoers without accountability, and foreseeable injurious misconduct unchecked.

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.²¹⁶ Although it is important for similarly situated service members to be treated equally, and although equal treatment is the promise of the entire justice system,²¹⁷ 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. Although 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 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

²¹⁵ See Erwin Chemerinsky, *Supreme Court—October Term 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”).

²¹⁶ See Shane, *supra* note 185 (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”).

²¹⁷ See *United States v. Muniz*, 374 U.S. 150, 162 (1963) (discussing the possibility of unequal treatment and litigation by prisoners and rejecting the contention outright by stating: “we 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”).

simply untrue to say that the justice available to service members through 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.²¹⁸ There is no convening authority (often a commanding officer in military courts) 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, and compassion. Those notions, particularly equal justice under law, are the hallmarks of the entire system of justice.²¹⁹ It cannot be that the possibility of a fair and open trial where all stand on equal footing is to be avoided because it reveals undue advantage and unequal treatment.

The *Feres* Court rationalized its decision based on legitimate fears. Over the next sixty-eight years, however, those fears did not manifest. Instead, the wrongs described in this Article 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*.²²⁰

III. ANALOGIES TO OTHER FEDERAL PROGRAMS

To see if the requirements imposed by *Feres v. United States* on service members are 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

²¹⁸ That cases involving the armed forces can end up in non-military courts is not a novel concept. See generally *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) (conducting a habeas corpus review of court martial); *Parisi v. Davidson*, 405 U.S. 34 (1972) (considering a habeas corpus petition from a serviceman who claimed that the Army unjustly denied his application for discharge as a conscientious objector); *O'Callahan v. Parker*, 395 U.S. 258 (1969) (conducting a habeas corpus review of court martial).

²¹⁹ See *The Court and Constitutional Interpretation*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/about/constitutional.aspx> [<http://perma.cc/DWC9-UB2P>] (stating that the words “equal justice under law” express “the ultimate responsibility” of the Supreme Court).

²²⁰ 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. See, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 539 (1976) (holding that 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. See generally 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.

Article III courts. None of those programs, however, have seen widespread unchecked discrimination or the same levels of sexual assault or multiple instances of egregious malpractice. Moreover, although limiting injured government employees or others to administrative relief is not unusual, *Feres* has resulted in our service members, who are the best among us, getting the least protection from tortious misconduct.

A. Federal Employees Outside of the Armed Forces: FECA

There is a limitation on access to Article III courts for federal employees via the Federal Employees' Compensation Act (FECA).²²¹ Their claims, more often than not, are pursued administratively²²² (much like workers' compensation claims in the private sector).²²³ As the United States Court of Appeals for the Fourth Circuit explained, "[f]ederal employees' injuries that are compensable under FECA cannot be compensated under other federal remedial statutes, including the Federal Tort Claims Act."²²⁴

The difficulties federal employees face bringing civil actions in tort based on the FTCA²²⁵ surfaced in *Ezekiel v. Michael*, decided by the United States Court of Appeals for the Seventh Circuit in 1995.²²⁶ In that case, a federal employee sued a resident VA physician after an injection with a contaminated hypodermic needle.²²⁷ Because the physician was a federal employee acting in the scope of his employment, the plaintiff's remedies were limited to the FECA.²²⁸

The FECA provides for wage loss compensation, medical care, rehabilitation, attendant's allowance, and survivors' benefits.²²⁹ As with workers' compensation and cases barred by *Feres*, the FECA is, for the most part, an exclusive remedy.²³⁰ In making the FECA the sole remedy, Con-

²²¹ 5 U.S.C. § 8101–8193 (2012); 20 C.F.R. §§ 10, 20 (2018).

²²² 5 U.S.C. §§ 8103–8193. The statute specifies that compensation claims are to be delivered to the Secretary of Labor or to an individual designated by regulation. *Id.* § 8121.

²²³ See *Workers' Compensation*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/workcomp> [<http://perma.cc/BY4A-N6PU>] (providing an overview of the Office of Workers' Compensation Programs, which administers the workers' compensation programs).

²²⁴ *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)).

²²⁵ See *id.* (noting that a federal employee cannot file a claim under the FTCA if it is possible that the FECA applies).

²²⁶ *Ezekiel v. Michel*, 66 F.3d 894 (7th Cir. 1995).

²²⁷ *Id.* at 895.

²²⁸ *Id.*

²²⁹ HOWARD L. GRAHAM, *FED. EMPLOYEES COMP. ACT PRAC. GUIDE* § 1:1 (2d ed. 2017).

²³⁰ 5 U.S.C. § 8116(c); see *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193–94 (1983) (discussing FECA's exclusive-liability provision); *Williamson v. United States*, 862 F.3d 577, 583 (6th Cir. 2017) (referencing the same (citing *Spinelli v. Goss*, 446 F.3d 159, 161 (D.C.

gress 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.”²³¹ Federal employees have “the right to receive immediate, fixed benefits, regardless of fault and without need for litigation from their federal employer, but in return they lose the right to sue the government.”²³² Claims of discrimination by federal employees, including sexual harassment, however, may be heard in an Article III court, unlike similar claims in the armed forces.²³³ In addition, FECA claims can be judicially reviewed in an Article III court when there is (1) a cognizable constitutional claim, and (2) an explicit statutory violation.²³⁴ No such exceptions exist for service members.

B. Federal Inmates

In 1963, 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 prison.²³⁵ Although such claims *might* affect prison discipline, the Court found the parties presented no evidence that tort recovery would affect discipline.²³⁶ *Muniz*, however, did not result in anything re-

Cir. 2006)); *Elman v. United States*, 173 F.3d 486, 492 (3d Cir. 1999) (citing to exclusive-liability provision to bar a plaintiff from bringing a claim under the FTCA as well as the FECA); *Votteler v. United States*, 904 F.2d 128, 130–31 (2d Cir. 1990) (describing the FECA as the “exclusive remedy” for work-related injuries sustained by federal employees); *Wilder v. United States*, 873 F.2d 285, 288–89 (11th Cir. 1989) (per curiam) (discussing the FECA’s exclusive-liability provision); *Villanova v. United States*, 851 F.2d 1, 7 n.24 (1st Cir. 1988) (noting that Congress explicitly rejected the so-called “dual capacity doctrine” in the FECA); *see also Lance v. United States*, 70 F.3d 1093, 1095 (9th Cir. 1995) (per curiam) (proposing that the FECA is an exclusive remedy).

²³¹ *Tredway v. District of Columbia*, 403 A.2d 732, 734 (D.C. 1979).

²³² *Patnaude v. Gonzales*, 478 F. Supp. 2d 643, 650 (D. Del. 2007) (citing 5 U.S.C. § 8116(c)) (limiting the rights of service members as well as civilians doing business with the military to pursue claims for injuries in Article III courts).

²³³ *See generally* Kristin Sommers Czubkowski, Comment, *Equal Opportunity: Federal Employees’ Right to Sue on Title VII and Tort Claims*, 80 U. CHI. L. REV. 1841 (2013) (discussing federal employees’ right to sue their employers in Title VII actions).

²³⁴ *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 238–39 (1968) (reviewing a FECA claim involving a statutory violation); *Leedom v. Kyne*, 358 U.S. 184, 188–89 (1958) (reviewing the same); *Staacke v. U.S. Sec’y of Labor*, 841 F.2d 278, 281 (9th Cir. 1988) (reviewing a FECA claim involving a constitutional challenge); *Rodrigues v. Donovan*, 769 F.2d 1344, 1348 (9th Cir. 1985) (reviewing the same).

²³⁵ *United States v. Muniz*, 374 U.S. 150, 150 (1963).

²³⁶ *Id.* 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 18, at 429–30 (citing *id.* at 162–63).

motely resembling regular access to Article III courts. Instead, Congress passed the Inmate Accident Compensation Act (IACA),²³⁷ establishing an administrative compensation system for federal inmates or their dependents for work-related injuries occurring during incarceration.²³⁸ Pursuant to IACA, the Federal Prison Industries Board maintains the Prison Industries Fund as the sole means of compensation for inmates,²³⁹ effectively barring inmates from maintaining an FTCA suit.²⁴⁰ In deciding the exclusivity of the IACA, the Supreme Court echoed the reasoning related to the 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 that group.”²⁴¹ Parenthetically, the claims of federal prison *employees*, as opposed to inmates, were discussed by the United States Court of Appeals for the Second Circuit in 1992 in *Wilson v. United States*, and held to be outside IACA and limited to the FECA.²⁴²

Looking at basic civil rights, members of the armed forces, unlike other federal employees or even convicted felons, do not have the option to bring a § 1983 civil rights action²⁴³ or *Bivens* claim.²⁴⁴ *Wilson* found that prisoners, on the other hand, have those options. As the United States Court of Appeals for the Tenth Circuit stated in its 2009 decision in *Smith v. United States*, “the statutory scheme lack[s] requisite procedural safeguards for the prisoner’s constitutional rights, the statute possess[e] very little deterrent value, and there [is] no explicit indication from Congress [barring] *Bivens* action[s].”²⁴⁵ The same statutory deficiencies are applicable to ser-

²³⁷ 18 U.S.C.A. § 4126 (West 2018).

²³⁸ MICHAEL B. MUSHLIN, 2 RIGHTS OF PRISONERS § 8:22 (5th ed. 2017).

²³⁹ 18 U.S.C.A. § 4126.

²⁴⁰ See *Demko*, 385 U.S. at 152 (describing the IACA as the exclusive remedy for inmates); MUSHLIN, *supra* note 238, at § 8:22.

²⁴¹ *Demko*, 385 U.S. at 151–52 (citing *Patterson v. United States*, 359 U.S. 495 (1959)); see *Johansen v. United States*, 343 U.S. 427, 438 (1952) (reasoning that FECA is an exclusive remedy).

²⁴² *Wilson v. United States*, 959 F.2d 12, 13 (2d Cir. 1992).

²⁴³ 42 U.S.C. § 1983 (2012); see *Koprowski v. Baker*, 822 F.3d 248, 261 (6th Cir. 2016) (“The IACA does not displace this otherwise available [*Bivens*] claim just because the alleged unconstitutional conduct occurred in the context of a prison workplace injury.”); *Smith v. United States*, 561 F.3d 1090, 1106 (10th Cir. 2009) (allowing *Bivens* claims against individuals but barring *Bivens* actions against the federal government); *Bagola v. Kindt*, 131 F.3d 632, 637–38 (7th Cir. 1997) (holding that *Bivens* claims are not fully precluded under IACA but courts are cautious in extending *Bivens* without giving careful consideration to the consequences of that action).

²⁴⁴ *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).

²⁴⁵ *Smith*, 561 F.3d at 1102 (citing *Bagola*, 131 F.3d at 644–45). The *Bivens* doctrine permits a plaintiff to bring a private cause of action against a federal official acting to vindicate certain

vice members—and yet, Dean Irwin Chemerinsky’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.”²⁴⁶ This distinction is of consequence when considering the range of alleged (unchecked and thus undeterred) acts²⁴⁷ of invidious discrimination.²⁴⁸ 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.²⁴⁹

C. Longshoremen and Harbor Workers

The last of the alternate programs assessed is the Longshoremen and Harbor Workers’ Compensation Act (LHWCA), which provides governmental and non-governmental employees disability and death compensation for harms sustained on navigable waterways.²⁵⁰ 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),²⁵¹ which included those who “work for private employers on U.S. military bases or . . . lands used by the U.S. for

constitutionally protected rights. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). If *Bivens* does not apply, the plaintiff may pursue an action under 42 U.S.C. § 1983; *Iqbal*, 556 U.S. at 676.

²⁴⁶ CHEMERINSKY, *supra* note 117, at 621–22.

²⁴⁷ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (providing an instance of a private plaintiff bringing an action under Title VII for discrimination and disparate treatment). Title VII does not apply directly to the military. See 42 U.S.C. § 2000e-2 (2012) (stating the scope of Title VII). Although recent cases 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. See, e.g., *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016).

²⁴⁸ See 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) (discussing the history of discrimination in the military); Mary C. 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 Pers. of the H. Comm. on Armed Servs.*, 115th Cong. 64 (2017) (statement of Annie Kendzior).

²⁴⁹ *Johnson v. United States*, No. 3:18-CV-00823-MK, 2018 WL 6004659, at *2 (D. Or. Nov. 15, 2018) (“[A]n inmate may seek judicial review of a final IACA decision under the Administrative Procedures Act”); *Peguero v. Unicorn Indus.*, No. CIV.A. 14-2371 RMB, 2014 WL 1716448, at *2 (D.N.J. Apr. 30, 2014) (stating that an inmate can seek review of an IACA decision based on “procedural safeguards and assessment for abuse of discretion” (citing *Thompson v. Fed. Prison Indus.*, 492 F.2d 1082 (5th Cir. 1974))).

²⁵⁰ 33 U.S.C. §§ 901–950 (2012).

²⁵¹ 42 U.S.C. §§ 1651–1654 (2012).

military purposes outside of the United States,” among others.²⁵² When the LHWCA applies, it is an exclusive remedy barring civil tort actions in Article III courts pursuant to the FTCA.²⁵³ Similar to the FECA, however, if the federal court believes there is a “substantial question” regarding whether the LHWCA applies to the employee’s claim, it will generally hold the case in abeyance.²⁵⁴ The LHWCA is similar to the FECA in that a “third party . . . subject to liability for injuries covered under LHWCA may maintain an indemnity action against the United States”²⁵⁵ (something service members cannot do). The LHWCA also 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).²⁵⁶

Each of these programs reflects the values and trade-off in what has been called the “grand bargain” underlying workers’ compensation.²⁵⁷ In exchange for foregoing the right to 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.²⁵⁸ All of the programs, however, except the military compensation scheme, allow for discrimination claims in federal court and rely on federal courts to determine if the various compensation programs are applicable. Although there are undoubtedly other distinctions (e.g., most

²⁵² *Longshore and Harbor Workers’ Compensation Act Frequently Asked Questions*, U.S. DEP’T OF LABOR, <https://www.dol.gov/owcp/dlhwc/FAQ/lsfaqs.htm> [<http://perma.cc/LF6L-AHAQ>].

²⁵³ See 1 CIVIL ACTIONS AGAINST THE U.S., ITS AGENCIES, OFFICERS AND EMPLOYEES § 2:10 (2018) (explaining that the question of whether the Longshoremen and Harbor Workers’ Compensation Act (LHWCA) bars constitutional claims is generally not at issue because LHWCA disputes are between two private parties).

²⁵⁴ *Id.* (citing *Wilder v. United States*, 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. *Villanova*, 851 F.2d at 5–6.

²⁵⁵ 1 CIVIL ACTIONS AGAINST THE U.S., ITS AGENCIES, OFFICERS AND EMPLOYEES, *supra* note 253, § 2:10 (citing *Eagle-Picher Indus., Inc. v. United States*, 937 F.2d 625 (D.C. Cir. 1991)).

²⁵⁶ See *Warner v. Contract Claims Servs., Inc.*, No. 7:17-CV-17-FL, 2017 WL 5075250, at *1 (E.D.N.C. Nov. 3, 2017) (providing an example of a LHWCA case appealed in federal court).

²⁵⁷ See *Hendrix v. Alcoa, Inc.*, 506 S.W.3d 230, 238 (Ark. 2016) (Danielson, J., dissenting) (referring to workers’ compensation as a “grand bargain”). The following cases refer to workers’ compensation using the same language. See, e.g., *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672, 676–77 (Iowa 2015); *Cross v. Slayter Trucking Cos.*, 206 So. 3d 1124, 1130–31 (La. App. 2016); *Whedbee v. N.D. Workforce Safety & Ins. Fund*, 845 N.W.2d 632, 637 (N.D. 2014); *Vasquez v. Dillard’s, Inc.*, 381 P.3d 768, 786 (Okla. 2016); *Collins v. COP Wyo., LLC*, 366 P.3d 521, 527 (Wyo. 2016).

²⁵⁸ Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 RUTGERS U. L. REV. 891, 916 (2017). *But see generally* 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 Spieler’s article).

of these programs exclude intentional torts),²⁵⁹ one thing is clear: although 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 suggests 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 limiting the deterrent impact of civil judgments, allowing gross misconduct to occur without consequence.

IV. THE CURRENT *FERES* ENVIRONMENT

The *Feres v. United States* doctrine, like the scope of the DFE,²⁶⁰ has been the topic of endless discussion and the target of frequent criticism.²⁶¹ Although there is no general agreement on the best next step in a post-*Feres* legal universe, a real change, and not just juridical side-stepping, is needed. Isolated examples of “work-arounds” where *Feres* did not block a claim (e.g., *In re “Agent Orange” Product Liability Litigation*),²⁶² and the compensation provided for exposure injuries and open pit burns,²⁶³ are hardly an answer. Most cases result in limited or no recourse.²⁶⁴ For example, the at-

²⁵⁹ See 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, 79 (2012) (discussing the intentional tort exception to workers’ compensation).

²⁶⁰ See generally Stephen L. Nelson, *The King’s Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259 (2009) (explaining how the discretionary function exception operates); Jonathan R. Bruno, Note, *Immunity for “Discretionary” Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 412 (2012) (discussing the discretionary function exception and the controversy surrounding it); 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).

²⁶¹ See Brou, *supra* note 188, at 15 (criticizing the *Feres* doctrine). The following represents an abbreviated list of scholars who have criticized the doctrine as well. See, e.g., Schwartz, *supra* note 202, at 996–97; 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); Turley, *supra* note 36, at 10; Carpenter, *supra* note 63, at 59–60; Feldmeier, *supra* note 63, at 150; 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; Melvani, *supra* note 18, at 428–29; Wiltberger, *supra* note 58, at 497–98; Zyznar, *supra* note 77, at 626.

²⁶² See *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 746, 749 (E.D.N.Y. 1984) (approving a settlement in a product liability action for servicemembers affected by the use of Agent Orange during the Vietnam War). Later, the Agent Orange Act was passed. Agent Orange Act of 1991, Pub. L. No. 102-4, § 3, 105 Stat. 11; see also 38 C.F.R. §§ 3.307, 3.309 (2018).

²⁶³ See Dignified Burial and Other Veterans’ Benefits Improvement Act of 2012, Pub. L. No. 112-260, § 201(a)(1), 126 Stat. 2417, 2422 (2013) (amending the United States Code to “ensure that deceased veterans with no known next of kin can receive a dignified burial”).

²⁶⁴ See Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93, 137 (1985) (arguing that too many intramilitary actions are barred); Gregory C. Sisk, *A*

tempt to address water toxicity at Marine Corps Base Camp Lejeune provided for notification and only limited benefits—and only then to those stationed at the camp.²⁶⁵ There was also a proposal to create a separate compensation system for military victims of sexual assault and harassment.²⁶⁶ 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,²⁶⁷ was presented to Congress in 2009.²⁶⁸ The bill sought to amend the FTCA to “allow claims for damages to be brought against the United States for personal injury or death . . . arising out of . . . medical, dental, or related [malpractice].”²⁶⁹ The bill was to honor Sergeant Carmelo Rodriguez, who died after a military doctor misdiagnosed a deadly malignant melanoma.²⁷⁰ Even after hearings that made clear that service members “would not be allowed to bring suits ‘arising out of . . . armed conflict,’”²⁷¹ 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*.²⁷²

The last time the Supreme Court granted certiorari in a *Feres* case where major change seemed quite possible was *United States v. Johnson* in 1987.²⁷³ In *Johnson*, the plaintiff died in a rescue mission while on board a

Primer on the Doctrine of Federal Sovereign Immunity, 58 OKLA. L. REV. 439, 456–58 (2005) (reviewing various routes through and around the discretionary function exception).

²⁶⁵ 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 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).

²⁶⁶ Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and Harassment*, 222 MIL. L. REV. 211, 240–59 (2014) (proposing a special military compensation board).

²⁶⁷ See generally Feldmeier, *supra* note 63 (providing a broad discussion of the Carmelo Rodriguez Military Accountability Act).

²⁶⁸ Byron Pitts, *Case Sheds Light on Military Law*, CBS NEWS (May 19, 2008), <https://www.cbsnews.com/news/case-sheds-light-on-military-law/> [<http://perma.cc/4JH9-X2V9>].

²⁶⁹ H.R. 1478, 111th Congress (2010).

²⁷⁰ Byron Pitts, *Military Can't Be Sued for Malpractice*, CBS NEWS (Mar. 24, 2009), <https://www.cbsnews.com/news/military-cant-be-sued-for-malpractice/> [<http://perma.cc/5QPP-HWTU>].

²⁷¹ See generally *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing on H.R. 1478 Before the Subcomm. on Comm. and Admin. Law*, 111th Cong. 2 (2009) (statement of the Hon. Steve Cohen, Chairman of the Subcomm.).

²⁷² See Feldmeier, *supra* note 63, at 171–78 (detailing the debate over the Rodriguez Act).

²⁷³ See *United States v. Johnson*, 481 U.S. 681, 685 (1987) (granting certiorari to review the *Feres* doctrine); Kime, *The Heartbreaking Truth About Military Medical Malpractice*, *supra* note 90 (stating that the *Johnson* case was the last time the Supreme Court granted certiorari to review the *Feres* doctrine).

HH-52 Seaguard.²⁷⁴ The crash was attributed to the negligence of civilian FAA air traffic controllers.²⁷⁵ 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 arguments²⁷⁶ 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 . . ." ²⁷⁷ 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.²⁷⁸ As noted earlier in this Article, it is in the *Johnson* dissent that Justice Scalia and others concluded that "*Feres* was wrongly decided . . ." ²⁷⁹ At different points, Justices Ginsburg and Thomas also implied that the *Feres* doctrine, at a minimum, deserves a second look.²⁸⁰ Despite having a number of opportunities to do so, however, the Court has left *Feres* unchanged.²⁸¹

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.²⁸² Major General John D. Altenburg, Jr. (Retired), would instead prefer to improve the current benefits system.²⁸³ In academia, there is also

²⁷⁴ *Johnson*, 481 U.S. at 682.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 692.

²⁷⁷ *Id.* at 686.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 700–01 (Scalia, J., dissenting) (quoting "*Agent Orange*" *Prod. Liab. Litig.*, 580 F. Supp. at 1246).

²⁸⁰ See Kime, *The Heartbreaking Truth About Military Medical Malpractice*, *supra* note (reporting that other Supreme Court opinions indicate that Justices Ginsburg and Thomas "believe *Feres* should be reviewed").

²⁸¹ See, e.g., *Ortiz v. United States*, 137 S. Ct. 1431 (2017) (denying certiorari for a claim barred by the *Feres* doctrine), *denying cert. to* 786 F.3d 817 (10th Cir. 2015). The following represents a sample list of similar cases in which a tort claim was barred by the *Feres* doctrine and the Supreme Court denied certiorari. *Ritchie v. United States*, 733 F.3d 871 (9th Cir. 2013), *cert. denied*, 572 U.S. 1100 (2014); *Read v. United States*, 536 F. App'x 470 (5th Cir.), *cert. denied*, 571 U.S. 1095 (2013); *Witt v. United States*, 379 F. App'x 559 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011). Frustrated 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." Kime, *The Heartbreaking Truth About Military Medical Malpractice*, *supra* note 90.

²⁸² Kime, *The Heartbreaking Truth About Military Medical Malpractice*, *supra* note 90.

²⁸³ An up-to-date comprehensive summary of many benefits are available in MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 24.

meaningful and solid scholarship²⁸⁴ supporting *Feres*, including Professor Paul Figley's eloquent defense of the doctrine (along with a suggestion of how the doctrine could be clarified).²⁸⁵ Professor Figley's analysis is consistent with the reasoning in *Feres* and *Stencel Aero Engineering v. United States*, decided by the Supreme Court in 1977.²⁸⁶

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 judgments to remain in the military and not be second-guessed by federal courts.²⁸⁷ The *Feres-Stencel* doctrine has also barred claims initiated by injured service members against third parties and government contractors, rendering those contractors practically immune from civil tort litigation in fields as diverse as product liability and medical services.²⁸⁸

Notwithstanding the stubbornly unchanging position held by the Court, in the ranks, and in some corners of the legal professoriate, the tone of a number of circuit courts is wistful and unenthusiastic. These courts decry the unsoundness, harsh impact, and basic unfairness of *Feres*, while recognizing the case as binding precedent.²⁸⁹ Consider *Daniel v. United States*, a wrongful-death/malpractice case, decided by the United States Court of Appeals for the Ninth Circuit in 2018. After childbirth in a military hospital,

²⁸⁴ See Dawson, *supra* note 16, at 498–500 (refuting criticisms of *Feres*).

²⁸⁵ Figley, *In Defense of Feres*, *supra* note 173; see Joan M. Bernott, *Fairness and Feres: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51, 51–52 (1987) (critically examining the “almost universal” criticisms of the *Feres* doctrine).

²⁸⁶ *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671–72 (1977).

²⁸⁷ See 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’”).

²⁸⁸ See *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983) (stating that *Feres-Stencel* provides de facto immunity for tort claims).

²⁸⁹ See generally *Daniel v. United States*, 889 F.3d 978, 982 (9th Cir. 2018) (“Lieutenant Daniel served honorably and well, 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. But only the Supreme Court has the tools to do so.”); *Ortiz*, 786 F.3d at 832 (“In sum, the *Feres* doctrine applies to the injuries alleged here. We wish, frankly, that were not the case.”); *Read*, 536 F. App'x at 472 (“Irrespective of criticism of the *Feres* doctrine, the Supreme Court since *Feres* has clearly held that the government remains immune from suits by servicemembers”); *Witt*, 379 F. App'x at 560 (“Although we acknowledge the tragic circumstances underlying this lawsuit, we are bound by precedent of the Supreme Court and our court to affirm the district court’s dismissal.”); *Hafterson v. United States*, No. 3:08-cv-533-J-16MCR, 2008 WL 4826097, at *4 (M.D. Fla. Nov. 4, 2008) (“Despite Plaintiffs’ well-reasoned opposition to courts continued application of the *Feres* doctrine, it is clear that this case cannot escape the doctrine’s broad reach. Thus, the Court has no jurisdiction to hear this case and Plaintiffs are barred from proceeding.”).

Lieutenant Daniel began hemorrhaging.²⁹⁰ Those entrusted with her care failed to take the appropriate steps to stop the bleeding and she died in a few hours.²⁹¹ The district court found that it had no option but to dismiss the claim based on *Feres* “[u]nless and until Congress or the Supreme Court choose to confine the unfairness and irrationality that *Feres* has bred”²⁹² The Ninth Circuit agreed,²⁹³ 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.”²⁹⁴ A petition for certiorari is currently pending.²⁹⁵

Similarly, in *Ortiz v. United States*, decided by the United States Court of Appeals for the Tenth Circuit in 2015, a malpractice case where errors made during a caesarian section led to significant deficits in a child,²⁹⁶ the Tenth Circuit declared that “the facts . . . exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not ours to overrule.”²⁹⁷ Quoting *Costo v. United States*, a 2001 Ninth Circuit decision, the Tenth Circuit “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.”²⁹⁸

In *Witt v. United States*, a 2009 case from the United States District Court for the Eastern District of California, surgical malpractice left the

²⁹⁰ *Daniel*, 889 F.3d at 980.

²⁹¹ *Id.*

²⁹² *Daniel v. United States*, No. 15-5748 RJB, 2016 WL 258619, at *6 (W.D. Wash. Jan. 21, 2016), *aff’d*, 889 F.3d 978 (quoting *Ritchie*, 733 F.3d at 878).

²⁹³ *Daniel*, 889 F.3d at 978.

²⁹⁴ *Id.* at 982. Similar sentiments were voiced in 2013 by the United States Court of Appeals for the Ninth Circuit in *Ritchie v. United States*, a wrongful death action filed after malpractice during pregnancy led to the death of a pregnant plaintiff’s infant son. 733 F.3d at 872. The United States District Court for the District of Hawaii had 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” *Ritchie v. United States*, No. CIV. 10-00209JMS-BMK, 2011 WL 1584353, at *8 (D. Haw. Apr. 26, 2011). The Ninth Circuit affirmed: “In light of Supreme Court and our own precedent, we *regretfully* conclude that [*Feres* bars the claim].” *Ritchie*, 733 F.3d at 873 (emphasis added).

²⁹⁵ Petition for Writ of Certiorari, *Daniel v. United States*, No. 18-460 (U.S. Oct. 11, 2018); See 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> [http://perma.cc/2VQK-TNP3] (reporting on the *Daniel* case).

²⁹⁶ See *Ortiz v. United States*, No. 12-CV-01731-PAB-KMT, 2013 WL 5446057, at *1–2 (D. Colo. Sept. 30, 2013) (detailing the facts of the case); Patricia Kime, *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/> [http://perma.cc/62E3-G4Y5].

²⁹⁷ *Ortiz*, 786 F.3d at 818.

²⁹⁸ *Id.* at 823 (quoting *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001)).

plaintiff in a permanent vegetative state.²⁹⁹ The district court dismissed, noting, however, that the alleged facts were “so egregious and the liability of the Defendant [seemed] so clear,” that the court “did give serious consideration to Plaintiff’s argument that this Court should allow [the] claim in spite of *Feres*”³⁰⁰ On appeal, the Ninth Circuit held that it was “bound by precedent of the Supreme Court . . . to affirm the . . . dismissal.”³⁰¹ In *Hafterson v. United States*, another malpractice/wrongful-death case decided by the United States District Court for the Middle District of Florida in 2008,³⁰² 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.”³⁰³

In 2013, the United States Court of Appeals for the Fifth Circuit decided *Read v. United States*, in which a military surgeon sliced into the plaintiff’s aorta in the course of routine gallbladder surgery.³⁰⁴ The Fifth Circuit held as follows: “Irrespective of criticism of the *Feres* doctrine . . . the government remains immune [because] Colton Read’s injuries were ‘incident to service’ and not actionable under the FTCA.”³⁰⁵

As the above cases suggest, although there are expressions of regret regarding the doctrine, there is also nearly uniform adherence to *Feres*. Many who have studied the doctrine³⁰⁶ urge comprehensive change³⁰⁷ to “permit the adjudication of personal injury and death claims”³⁰⁸ Others urge an “impact on military discipline” test to “define ‘incident to service,’”

²⁹⁹ *Witt v. United States*, No. 2:08-CV-02024-JAM-KJM, 2009 WL 10690924, at *1 (E.D. Cal. Feb. 10, 2009).

³⁰⁰ *Id.* at *5.

³⁰¹ *Witt*, 379 F. App’x at 560.

³⁰² *Hafterson*, 2008 WL 4826097, at *1.

³⁰³ *Id.* at *2.

³⁰⁴ *See Read v. United States*, No. SA-12-CV-910-XR, 2012 WL 5914215, at *1 (W.D. Tex. Nov. 26, 2012) (detailing the facts of the case).

³⁰⁵ *Read*, 536 F. App’x at 472–73.

³⁰⁶ *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1533 (1992) (analyzing government tort law); Turley, *supra* note 36, at 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 63, at 149 (identifying a need for a solution to the problems *Feres* has created); Melvani, *supra* note 18, at 398 (stating that *Feres* has rendered service members “second-class citizens, whose rights fall below even those of the nation’s criminals . . . [and that] 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”).

³⁰⁷ Feldmeier, *supra* note 63, at 178 (citing Brou, *supra* note 188, at 66–67, 72–73).

³⁰⁸ *Id.* 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 S. Comm. on the Judiciary*, 99th Cong. 64, 77 (1986) (statement of Michael F. Noone)).

to “cure the ills of this doctrine and protect the rights of our nation’s servicemembers.”³⁰⁹ If one assumes there are currently injuries and related claims that are in no way incident to anything remotely resembling military service (e.g., sexual assault and clear or gross malpractice), 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?

RECOMMENDATIONS AND CONCLUSION

There are, at a minimum, three options:

1. Leave *Feres v. United States* 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.³¹⁰

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.³¹¹ 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

³⁰⁹ Thomas M. Gallagher, Note, *Servicemembers’ Rights Under the Feres Doctrine: Rethinking “Incident to Service” Analysis*, 33 VIL. L. REV. 175, 202–203 (1988).

³¹⁰ 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 Affordable Care Act as is, repeal the law, or repeal and replace it. Sean Sullivan, *Republicans Abandon the Fight to Repeal and Replace Obama’s Health Care Law*, WASH. 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 [http://perma.cc/7WUY-4LW7].

³¹¹ Carpenter, *supra* note 63, at 59–60 (“The [DFE] has more flexibility than the *Feres* doctrine because the DFE allows [for] a case-by-case analysis.”).

costs.”³¹² Without amendments, the FTCA alone would leave victims in the Neverland of the DFE, the “broadest and most criticized” of the thirteen enumerated exceptions to that Act.³¹³

That more of a change is needed seems obvious, which is why option three is preferable. 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).

Although 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 that defenders of *Feres* fear. A limited number of civil tort cases focused on undeniable misconduct seems 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 damages in a civil court deter future misconduct if the actors in question do not pay but the federal government does?³¹⁴

First, at a personal level, litigation forces victims and alleged wrongdoers to relive 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 subject to litigation, our military services will do what they can to make sure they are not hauled into court. There is, then, much to be

³¹² Bruno, *supra* note 260, at 414–15.

³¹³ Feldmeier, *supra* note 63, at 175.

³¹⁴ Figley, *In Defense of Feres*, *supra* note 173, at 464 (noting that “if *Feres* did not exist, the Department of Defense would be no more responsive to financial deterrence than it is with *Feres*”).

gained (and unfortunately much to be deterred) from the imposition of liability.

Whether there will be beneficial consequences from opening the courthouse doors to claims currently barred by *Feres* 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, on occasion, painful and harsh. Training is not just athletic conditioning. Troops training for combat must be pushed to the limits of their endurance, both physically and psychologically. To create individuals and units that act with a common purpose and 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 that could be seen outside of the military as tortious but in fact are vitally important.³¹⁵ Such actions cannot be the basis of civil tort liability.³¹⁶ Like injuries sustained in combat or armed conflict, these would be harms sustained in actions not just incident to but essential to military service. or such harms, there is no place for civilian courts to reassess essential military judgments.

Accordingly, the best approach is *not* an open-ended civil tort universe where any potentially actionable behavior in the military could become the subject of litigation. Instead, this recommendation identifies only seven specific behaviors that are actionable. The following actions or behaviors should be excluded from the rights-limiting regime spawned by the DFE and *Feres* because they are not essential to military service:

1. Sexual assault.
2. Rape.
3. Extreme physical violence or acts that fall within the definition of torture, domestic violence, and child abuse.
4. Acts of clear or gross medical malpractice.³¹⁷

³¹⁵ See *Strict Behavior Standards for Military Personnel*, *supra* note 198 (discussing the importance of holding military personnel to strict behavioral standards).

³¹⁶ See *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.”).

³¹⁷ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 34 (5th ed. 1984) (providing a definition of “gross” within the malpractice context). There are many definitions of “gross” but

5. Exposure of service members to pharmaceuticals, narcotics, or toxins *without informed and voluntary consent*.³¹⁸
6. While in military service, acts of driving under the influence of drugs or narcotics on more than one occasion.
7. Acts or patterns of invidious discrimination on the basis of race, religion, ethnicity, or gender.

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, and the unquestioning following of all lawful orders 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 other 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 these recommendations are followed, it would only make sense for Congress to revisit the impact of the proposed 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.³¹⁹ 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.

the term is used here to connote actions that are, by clear measure, undeniably malpractice. See *NMP Corp. v. Parametric Tech. Corp.*, 958 F. Supp. 1536, 1546 (N.D. Okla. 1997) (discussing the many and varied meanings of the term “gross”); Kenneth W. Simmons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 465 (1992) (discussing the same).

³¹⁸ See Moreno, *supra* note 141, at 13–52 (providing a history of the U.S. military’s use of human subjects in atomic, biological, and chemical warfare experiments).

³¹⁹ Attribution: Special thanks to Washington College of Law students Megan Masingill, Marissa Ditkowsky, Sienna Haslup, Katelyn Davis, and Riley Horan, and the Robert L. Habush Endowment for providing support for those students.

