

Ordnance Sacrifice: How Female Sexual Assault Victims Fight the Military While Fighting in the Military

BY RUSSELL SPIVAK*

*Over the last century, women have fought for the right to serve their nation in the exact same way men have: in uniform. Women have indeed made enormous strides toward serving in equal measure to their male counterparts. But women are still too often perceived and treated as second-class citizens, inhibiting a genuine realization of their equality in the armed forces. This is exhibited, if not reinforced, by the prevalence of women's sexual assault while serving their country and the insufficient prosecution thereof. By diagnosing and remedying the insufficiencies in the military justice system's legal regime governing the prosecution of military sexual assault as well as victim's insufficient means of redress in civilian courts, we may be able to secure more prosecutions of attackers. This article looks to address this problem. It begins with a background on women's growing participation in the military, both in how far women have come and what is left to achieve. Section II examines the specific problem of military sexual assault, including its prevalence, impact on the military at large, and the inadequate prosecution process. Section III looks at strategies, both enacted and untaken, to eradicate these underlying causes. Section IV discusses how to change the system to allow victims a realistic shot at pursuing and attaining justice. Section V details a recent case that may open the floodgates for female victims to assert their rights in federal courts, *Doe v. Hagenbeck*. The article concludes with a recap of the substantive points made as well as a few final thoughts.*

INTRODUCTION.....	79
I. IN PURSUIT OF SOCIAL CHANGE: WOMEN'S PURSUIT OF MILITARY EQUALITY	81
II. FRUIT FROM THE POISONOUS TREE: MILITARY SEXUAL ASSAULT AND PROSECUTIONS THEREOF	86
A. Military Sexual Assault: Current and Historical Statistical Realities .	86
B. The National Security Implications of Pervasive Sexual Assault	88
C. Prosecuting Sexual Assaults in the Military Justice System	89
1. A Parallel Universe: The Existence and Provisions of the Military Justice System	90
2. Venturing Down the Rabbit Hole: The Mechanics of Charging	

Copyright © 2017 by Russell Spivak

* J.D., Harvard Law School, 2017. I would like to thank Laura Bakst for her inimitable dedication to this topic and aid in editing as well as the entire editing team of the Duke Journal of Gender Law and Policy. I would like to dedicate this piece to the brave men and women putting on a uniform and facing dangers from enemies without and within. All mistakes are my own.

Sexual Assault in the Military Court System	91
D. How Does the Current Military Justice System Fail Female Victims of Military Sexual Assault?	93
1. Prosecutorial Authority and Discretion	93
2. A Jury of Peers?	95
3. Retribution and Retaliation	96
4. Insufficient Federal Legal Redress	97
a. The <i>Feres</i> Doctrine	98
b. The Political Question Doctrine	101
c. The Exhaustion of Remedies Doctrine	102
d. Standing	105
5. Back-filling Cycles and Self-Perpetuation	107
III. CURING THE ROOT: IMPROVEMENTS TO THE UNDERLYING SYSTEM	107
A. Allowing Women into the Service Academies and Combat-Oriented Roles	108
B. Improving the Military Justice System At Large	109
C. Offering Trauma-Related Care	110
D. Strategies Yet To Be Enacted	111
IV. CURING THE FRUIT: SEEKING SOURCES OF LEGAL REDRESS	111
A. Internal Changes: Amending the UCMJ	111
1. The Military Justice Improvement Act	111
2. The Protecting Military Honor Act	112
B. External Changes: Prying the Door Open for Suit	113
1. Jettisoning <i>Feres</i> In Part or In Whole	113
2. Amending Legislation Such As Title VII to Extend Protections ...	117
V. A SNAKEOIL ANTIDOTE: <i>DOE V. HAGENBECK</i>	117
A. Background	118
B. But How Are Hagenbeck and Rapp Connected?	119
C. Procedural History and The Trial Court's Decision	120
D. The Second Circuit's Reversal and Remand	121
E. Judge Chin's Dissent	124
F. Why Doe Matters	125
CONCLUSION	126

INTRODUCTION

[F]or those who are in uniform who have experienced sexual assault, I want them to hear directly from their Commander-In-Chief that I've got their backs And anybody in the military who has knowledge of this stuff should understand this is not who we are. This is not what the U.S. military is about. And it dishonors the vast majority of men and women in uniform who carry out their responsibilities and obligations with honor and dignity and incredible courage every single day. So bottom line is I have no tolerance for this I expect consequences. So I don't want just more speeches or awareness programs or training but, ultimately, folks look the other way. If we find out somebody is engaging in this stuff, they've got to be held accountable — prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period. It's not acceptable.

– Barack Obama¹

Earlier this year, Lynn Hall bravely detailed in the *New York Times* the harrowing story of her rape.² Having been offered help by a male superior, Ms. Hall agreed to meet.³ The meeting did not go as planned: her superior “raped [her] in a secluded area” where the two were supposed to work together.⁴ Ms. Hall’s horrifying story was just beginning:

I told no one, not even a few days later when I developed symptoms of a sexually transmitted disease — herpes. Not even two weeks later, when the herpes virus traveled to my nervous system and spread to my spinal cord and the tissue around my brain, causing meningitis. I was immediately admitted into the . . . intensive care unit, but when the . . . doctor asked me if I was sexually active, I said no. I wouldn't dare risk my career by telling him the truth of what had happened to me; so the virus that caused my infection went untreated.⁵

But there is one detail that makes Ms. Hall’s story both unique and entirely commonplace: it occurred while she was in military uniform.⁶ The episode took place when she was just 18 and a cadet at the United States Air Force Academy in Colorado Springs, Colorado.⁷ The superior was a senior cadet, and the risk of reporting the incident was unquestionably real: creating dissension within the ranks could most certainly have derailed her career trajectory as an aspiring pilot.⁸

1. Press Release, The White House, Remarks by President Obama and President Park of South Korea in a Joint Press Conference (May 7, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/07/remarks-president-obama-and-president-park-south-korea-joint-press-confe>.

2. Lynn K. Hall, Opinion, *What Happens When a Rape Goes Unreported*, N.Y. TIMES, Feb. 4, 2017, at SR6.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.* *See also* LINDSAY ROSENTHAL & LAWRENCE KORB, TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY’S SEXUAL ASSAULT PROBLEM, CENTER FOR AMERICAN PROGRESS, 9 (Nov. 2013),

Perversely, her silence undermined her promising career potential; Ms. Hall was medically discharged within two years of the alleged rape due to the enormous medical constraints of her meningitis and its subsequent treatments, including “a peripheral nerve stimulator implanted near [her] brain, which made it possible for [her] to work and exercise again” but nevertheless left her in “pain daily.”⁹

Even more strikingly, Ms. Hall’s tenure at the Academy overlapped with an infamous 2003 *20/20* news report in which seven female cadets came forward to speak about a systemic sexual culture permeating the student body, sharing similar stories of upperclassman preying on more junior cadets.¹⁰ In fact, Ms. Hall notes an exchange that took place between two classmates of hers regarding the report:

The senior cadet at the table asked, “What do you think of those whores who are tarnishing our academy?” The first-year across from me answered, “Sir, I think a woman who gets herself raped isn’t strong enough to defend herself, let alone the country, and shouldn’t be in the military.”

“Couldn’t agree more,” the senior cadet said.¹¹

Despite the fact that both Ms. Hall’s rape and the *20/20* report were over a decade ago, current statistics on military sexual assaults make it abundantly clear that the problem is far from eradicated;¹² indeed, it continues to permeate not just the Air Force Academy, but the military at large. Ms. Hall’s disturbing ordeal is unfortunately just one of thousands of sexual assaults perpetrated by and against members of our nation’s armed forces—particularly by males against females.

Admittedly, this problem is *not* solely borne by females: in fact, servicemen are subjected to sexual assault in higher gross numbers than servicewomen.¹³ But, there is one aspect of the problem that is *uniquely* female: despite significant progress, women remain relegated to second-class citizenship in the armed forces. With women in the military viewed as lesser than men, it is unsurprising that sexual assaults occur at startlingly higher *rates* against women than men.¹⁴ Such disproportionate rates are a substantial impediment to realizing genuine equality between our servicemen and servicewomen.

<https://www.americanprogress.org/wp-content/uploads/2013/11/MilitarySexualAssaultsReport.pdf> (“All too often, victims are forced out of the military as a means of retaliation for reporting the crimes committed against them. Others have left the careers they loved because the military could not or would not protect them from sexual violence at the hands of their peers and superiors.”)

9. Hall, *supra* note 3.

10. See *Air Force Academy Ignores Rapes, Women Say*, ABC NEWS (Feb. 28, 2003), <http://abcnews.go.com/2020/story?id=123748&page=1>.

11. Hall, *supra* note 3.

12. See *infra* notes 14–15 and accompanying text.

13. See NAT’L DEF. RESEARCH INSTITUTE, *SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY*, at xviii (Andrew R. Morral, Kristie Gore & Terry Schell, eds., 2014). (“Our best estimate in this range is that 20,300 active-component service members were sexually assaulted in the past year, out of 1,317,561 active-component members.”).

14. *Id.* at 9. (“The estimated rate of sexual assault varied significantly by gender: fewer than 1 in 100 men but approximately 1 in 20 women, resulting in an estimated 10,600 servicemen and 9,600 servicewomen who experienced a sexual assault in the past year.”).

This paper aims to address these problems head on so that we may begin to rectify these gross inequities, particularly military sexual assault.¹⁵

If we are to remedy these problems, we must begin by asking the right questions. Scholars must ask about the root cause of sexual assault's pervasiveness and impact throughout the military. Lawmakers must ask why victims have been barred from civil remedies and how such avenues may be reopened. And victims must ask how they can seek to have their right to be free from sexual assault and rape upheld. This paper aims to answer each of these questions.

To do so, this article begins with a background on the women's movement with respect to the military, both in how far women have come and what's left for women to achieve. Section II looks at the specific problem of military sexual assault from all angles, including how prevalent it is, its impact on the military at large, and how it is prosecuted—largely unsuccessfully. With these problems explained in depth, the article subsequently looks at how strategies, both ratified and unenacted, eradicate these underlying causes. Next, this article discusses how we may be able to change the system such that victims may have a realistic shot at pursuing and attaining justice. Then, the article details an important case that may well open the floodgates for female victims to assert their rights in federal courts: *Doe v. Hagenbeck*.¹⁶ The article then concludes with a recap of the substantive points made, as well as a few final thoughts.

I. IN PURSUIT OF SOCIAL CHANGE: WOMEN'S PURSUIT OF MILITARY EQUALITY

The U.S. Naval Act of 1916, also known as the "Big Navy Act," opened the military to female enlistment during World War I.¹⁷

"The Act," which called for a build-up of the U.S. Navy from ships to personnel used the term 'persons' when referring to recruitment, rather than 'men.'¹⁸ As a result, and due to Secretary of the Navy Josephus Daniels's support, the Navy opened recruitment to women in reserve ranks.¹⁹

15. Recognizing that some of the problems and solutions are universal across both genders, the paper denotes aspects of the social movement gender unanimity when appropriate.

16. 98 F.Supp.3d 672 (2015).

17. See 1917: *Yeomanettes*, UNITED STATES NAVAL WAR COLLEGE, <https://usnwcarchive.org/exhibits/show/nwc-women-in-navy/nwc-women-wwi> (last accessed Mar. 6, 2017).

18. See *id.*

19. *Id.* As the story goes, "Daniels was struggling to meet the needs of personnel required to handle jobs on naval shore stations. 'Is there any law that says a yeoman must be a man?' Daniels asked his legal advisors. When told that the answer was 'no', Daniels responded, 'Then enroll women in the Naval Reserve as yeoman.' On August 29, 1916, a new class of female yeoman, known as Yeoman (F), or, more popularly, 'yeomanettes', was established in the Navy. Approximately 12,000 women served on active duty as yeomanettes during World War I 'in order to release enlisted men for active service at sea.'" NATIONAL MUSEUM OF AMERICAN JEWISH MILITARY, WOMEN IN THE MILITARY: A JEWISH PERSPECTIVE 13 (1999). That said, the incredible stories of women like Deborah Sampson and Elizabeth Newcom who disguised themselves as men in the Revolutionary and Mexican Wars, respectively, see *Time Line: Women in the United States Military*, THE COLONIAL WILLIAMSBURG FOUNDATION, http://www.history.org/history/teaching/enewsletter/volume7/images/nov/women_military_timeline.pdf (last accessed Mar. 6, 2017), so that they could serve their countries prior to this official opening are worthy of unending admiration and praise.

Immediately after World War I ended, women largely left the military to return to “normalcy,”²⁰ but once the United States entered World War II, women once again *fought* for the right to serve their country. Edith Nourse Rogers, one of the first women to ever serve in Congress, proposed a bill to provide for a female contingent of non-combat, non-nurse troops.²¹ Notably, the bill was introduced months in advance of Pearl Harbor—May 28, 1941—but was only signed into law the following March *after* the United States had officially entered the fight.²² The day after the law was signed, President Franklin D. Roosevelt ordered the creation of the Women’s Army Auxiliary Corps (WAAC).²³ These women would be the first to serve their country in uniform in roles other than nursing,²⁴ and serve ably and valiantly they did.²⁵

After the Japanese surrendered on the deck of the USS Missouri, Dwight Eisenhower, then the Army Chief of Staff, encouraged women’s retention and re-enlistment for military service as part of the regular Army.²⁶ Given the program’s successes, Congress passed the Women’s Armed Services Integration Act in 1948,²⁷ enabling women to serve in all four branches of the military during peacetime.²⁸ Again, they proved equal to the task, answering the call to serve as needed. For example, “At the time the [Korean War] broke out in 1950, there were about 22,000 women in the armed forces, with roughly one-third in nursing or health-related jobs. . . . At its peak, the number of women in the armed forces during the Korean Conflict was 48,700, declining to about 35,000 by war’s end in June 1955.”²⁹

“During the 1960s, the clash between traditional views of women’s roles and the social movement for equal opportunity for women resonated throughout the

20. During this time period, however, military commanders continued to theorize how women could be utilized if and when future conflicts broke out. See MATTIE E. TREADWELL, *THE WOMEN’S ARMY CORPS 10–15* (1953), <http://www.history.army.mil/books/wwii/Wac/index.htm>.

21. See BETTIE J. MORDEN, *THE WOMEN’S ARMY CORPS, 1945–1978*, at 3 (2000), http://www.history.army.mil/html/books/030/30-14-1/cmhPub_30-14.pdf.

22. See An Act to establish a Women’s Army Auxiliary Corps for service with the Army of the United States, Pub. L. No. 77-554, 50 Stat. 278 (1942). MORDEN, *supra* note 21, at 5.

23. See Exec. Order No. 9163, 7 Fed. Reg. 3695 (May 15, 1942); MORDEN, *supra* note 21, at 5.

24. See EILEEN PATTEN & KIM PARKER, *WOMEN IN THE U.S. MILITARY: GROWING SHARE, DISTINCTIVE PROFILE 4* (2011), <http://www.pewsocialtrends.org/files/2011/12/women-in-the-military.pdf>.

25. For substantive review of women’s service, see generally Treadwell, *supra* note 20; LEISA D. MEYER, *CREATING GI JANE: SEXUALITY AND POWER IN THE WOMEN’S ARMY CORPS DURING WORLD WAR II* (1992).

26. See JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 105* (1994); MORDEN, *supra* note 22, at 35.

27. Women’s Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356 (1948).

28. See *id.* This section admittedly glosses over a lengthy history regarding the legislative fights undertaken regarding how women ought be integrated into the regular fighting force, if at all. For example, another bill—the WAC Integration Act of 1946—“provided for a separate women’s corps in the Regular Army whose officer, warrant, and enlisted strength could not exceed 2 percent of the men’s strength in each equivalent category. Women appointed to the Regular Army could not be permanently assigned to another branch of the Army.” MORDEN, *supra* note 21, at 41.

29. OFFICE OF POLICY & PLANNING, DEP’T OF VETERANS AFFAIRS, *WOMEN VETERANS: PAST, PRESENT AND FUTURE 4–5* (2007), https://www.va.gov/womenvet/docs/womenvet_history.pdf (citing HOLM, *supra* note 24, at 157).

military.”³⁰ What’s more, “[m]ilitary women were not posted to Southeast Asian combat zones in significant numbers for almost two years, *despite servicewomen’s requests for deployment to Vietnam* and despite the presence of civilian women in administrative and clerical positions or working with the American Red Cross and USO [United Service Organization].”³¹ Notably, the WAC Director, Brigadier General “Elizabeth Hoisington discouraged sending Army women to Vietnam, believing that public controversy over the issue of women in combat zones would deter progress in expanding the role of women in the Army.”³² While strategic, the diminished role women played in the Vietnam conflict, especially as compared to their roles in the United States’ three previous large-scale conflicts, could be viewed as a setback for the military equality movement. The decade was not lost entirely, however: 1967’s Public Law 90-130 was written and passed “in large part, to remove statutorily any obstacles to women becoming high ranking military officers,” kindling the hope of an equal role in the military for women.³³

The 1970s were a different story entirely. In 1973, the United States ended the practice of conscription to fill their ranks and established a volunteer-only military.³⁴ Subsequently, the government disbanded the WAAC.³⁵ “In 1975, the Department of Defense ordered the services to discontinue the practice of discharging women for pregnancy, although the debates about family policy did not lessen.”³⁶ And “[b]y 1976, one in every 13 recruits was a woman.”³⁷ 1976 also saw the first women begin their attendance at our nation’s prestigious military academies after the requirement to permit women’s entrance was included in that year’s defense appropriation bill.³⁸ Simultaneously, military equality was advanced by judicial rulings. In 1973, the Supreme Court ruled “that the civilian spouses of military women were to be afforded the same benefits as the civilian spouses of military men” and ensured that married housing was available at the same rates, regardless of the sex of the military member.³⁹

Substantial progress happened in the military’s rank and file as well:

Some mark the beginning of the trend toward greater gender equality in the military with the advent of the All-Volunteer Force (AVF) in 1973, when occupational roles within the military opened up considerably for women because of the need to fill those positions with a volunteer force. That is,

30. *1960s: The Decade*, WOMEN’S MEMORIAL, <http://www.womensmemorial.org/history/detail/?s=1960s-the-decade> (last accessed Apr. 3, 2017).

31. *1960s: In Vietnam*, WOMEN’S MEMORIAL, <http://www.womensmemorial.org/history/detail/?s=1960s-in-vietnam> (emphasis added) (last accessed Apr. 3, 2017).

32. *Id.*

33. OFFICE OF POLICY & PLANNING, *supra* note 30, at 5–6.

34. See Selective Service Amendment Act of 1969, Public L. No. 91-124, 83 Stat. 220, 220 (1969).

35. See MORDEN, *supra* note 19, at 395–97.

36. *1970s: The Decade*, WOMEN’S MEMORIAL, <http://www.womensmemorial.org/history/detail/?s=1970s-the-decade> (last accessed Apr. 3, 2017).

37. *Id.*

38. See Department of Defense Appropriations Authorization Act, 1976, Pub. L. No. 94-106, § 803, 89 Stat. 531, 537 (1975).

39. *1970s: The Decade*, *supra* note 34.

personnel demands could not be met with a force of male volunteers alone.⁴⁰

This viewpoint is substantiated statistically:

The numbers of women on active duty in the military have risen dramatically since the beginning of the all-volunteer force. The number serving as enlisted personnel has grown from 42,278 in 1973 to 166,729 in 2010, and the number serving as commissioned officers has increased from 12,750 to 35,341 over that same period. At the same time, the size of the military as a whole has been declining steadily.⁴¹

Military servicewomen made arguably the most significant strides in serving as equals to their brothers in arms in the past twenty-five years:

The first woman to command a U.S. Navy vessel did so in 1990. In 1991, women were cleared to fly fighter jets in combat; two years later, Congress authorized women to serve on combat ships at sea. 1998 marked the first female fighter pilots to fly combat missions off of an aircraft carrier. The first women to command a U.S. Navy warship and U.S. Air Force fighter squadron were given their commands in 1998 and 2004, respectively. By 2010, women were cleared to serve aboard submarines . . . [And in 2015] we also saw women soldiers graduate from the Army's Ranger School.⁴²

The final change referenced, women's attendance and graduation from Ranger School, was only made possible because the rule barring women from combat roles was rescinded. Ranger School—"one of the toughest training courses for which a Soldier can volunteer"—trains soldiers "in combat arms related functional skills . . . to engage in close combat and direct-fire battles."⁴³ Ranger School was inaccessible to those who could not serve in combat, meaning women were barred under previous rules.

However, in January 2013, Secretary of Defense Leon Panetta and Chairman of the Joint Chiefs of Staff General Martin Dempsey rescinded a rule from 1994 that barred women from serving in billets—military parlance for jobs—that would compel them to "engage in direct combat on the ground."⁴⁴ This rescission required all service branches to formulate a plan for implementation by May 15, 2013 and execute their plans by January 1, 2016.⁴⁵

By the self-imposed deadline, Secretary Ash Carter, Panetta's immediate

40. OFFICE OF POLICY & PLANNING, *supra* note 30, at 7.

41. PATTEN & PARKER, *supra* note 25, at 4.

42. See Russell Spivak & Adam Aliano, *Should Women Register for Selective Service? The Legacy of Rostker v. Goldberg*, *LAWFARE* (Dec. 23, 2016), <https://www.lawfareblog.com/should-women-register-selective-service-legacy-rostker-v-goldberg> (citations and quotations omitted).

43. *Ranger School*, U.S. ARMY, <https://www.goarmy.com/soldier-life/being-a-soldier/ongoing-training/specialized-schools/ranger-school.html> (last visited Oct. 24, 2017).

44. Memorandum from Leon Panetta, Sec'y, Dep't of Def., & General Martin Dempsey, Chairman of the Joint Chiefs of Staff General Martin Dempsey to the Chiefs of Mil. Servs. 1 (Jan. 24, 2013), <http://www.defense.gov/news/WISRJointMemo.pdf>; Memorandum from Les Aspen, Sec'y, Dep't of Def. to the Secretaries of Mil. Servs. and Asst. Sec'ys of Def. 1 (Jan. 13, 1994), <http://www.govexec.com/pdfs/031910d1.pdf>.

45. Memorandum from Leon Panetta, Sec'y, Dep't of Def., & General Martin Dempsey, Chairman of the Joint Chiefs of Staff General Martin Dempsey to the Chiefs of Mil. Servs. 1 (Jan. 24, 2013), <http://www.defense.gov/news/WISRJointMemo.pdf>.

successor, executed this policy shift: “Anyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position.”⁴⁶ And since the change, women have continuously pushed to break the military’s glass ceiling:

For example, Army Capt. Kristen Griest, one of the first women to graduate the Army’s Ranger School, became the first female infantry officer in history in April. The same month, “[t]he Army approved requests from 22 women . . . to enter as 2nd Lieutenants into the Infantry and Armor branches” should they complete the training requirements. The Marine Corps approved its first female rifleman and machine gunner in May, and the Army graduated its first women from Infantry and Armored officer training courses in October and December, respectively (the latter on the same day as the President announced his support for female registrants for Selective Service).⁴⁷

Undoubtedly, however, much progress is yet unrealized. For example, no woman has served in many of the top military roles in our government, including the Secretary of Defense, Chairman and Vice Chairman of the Joint Chiefs of Staff, and Secretary of the Army.⁴⁸ We have also never had a female Secretary of Veterans Affairs, a position traditionally filled by a veteran.⁴⁹

Yet, measures of equality cannot be limited to titles earned; equality must also be measured by the sacrifices military servicewomen have shouldered. The following examples demonstrate the fact that women are increasingly bearing the costs of war as compared to their historical place as nurses and non-combat service persons.

“During Operations Desert Shield/Desert Storm in Iraq and Kuwait, women played a more prominent role than in previous conflicts.”⁵⁰ Out of the 147 deaths suffered by United States service members,⁵¹ “[a]pproximately 16 women were killed during the conflict.”⁵² What’s more, “two women were taken prisoner.”⁵³

Women’s roles also grew exponentially post-9/11. “An estimated 300,000 women in uniform have served in the wars in Iraq and Afghanistan.”⁵⁴

46. Memorandum from Ashton Carter, Sec’y, Dep’t of Def., to the Chiefs of the Military Servs., Implementing Guidance for the Full Integration of Women in the Armed Forces 1 (Dec. 3, 2015), <http://www.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf>.

47. See Spivak & Aliano, *supra* note 43.

48. Though women have served as the Secretaries of the Air Force and Navy: Sheilla Widnall and Deborah James both served as Secretary of the Air Force, while Susan Livingstone served as Secretary of the Navy, albeit as Acting Secretary.

49. The current Veterans Affairs Secretary, David Shulkin, is the first non-veteran to serve in that position. See Connor O’Brien, *Veterans Affairs secretary confirmed 100-0*, POLITICO (Feb. 13, 2017), <http://www.politico.com/story/2017/02/veterans-affairs-secretary-confirmed-100-0-234979>.

50. KRISTY N. KAMARCK, *WOMEN IN COMBAT: ISSUES FOR CONGRESS* 8 (2016), <https://fas.org/sgp/crs/natsec/R42075.pdf>.

51. *Fast Facts About Operations Desert Storm/ Desert Shield*, Office of the Special Assistant for Gulf War Illnesses, OFFICE SEC’Y DEF., http://www.gulflink.osd.mil/timeline/fast_facts.htm (last accessed Apr. 3, 2017). Notably, this fact sheet claims only 15 women were killed in action (KIA), whereas the CRS report claims that number is 16. Compare *id.* with KAMARCK, *supra* note 51, at 8.

52. KAMARCK, *supra* note 51, at 8.

53. *Id.*

54. Gayle Tzemach Lemmon, Opinion, *Women in combat? They’ve already been serving on the front*

And though they were barred from serving in combat positions,

[a]s of November 2016, 166 women had lost their lives and 1,033 had been wounded in action in combat operations since 2003. In addition, in modern combat operations, over 9,000 women have received Army Combat Action Badges for “actively engaging or being engaged by the enemy,” and two have received Silver Stars for “gallantry in action against an enemy of the United States.”⁵⁵

Their service is nothing more than paradigmatic. As it relates to the social change of achieving equality, it demonstrates how far women have come since the days when they were relegated to serving exclusively as nurses because of prevailing gender norms. Women’s demonstration that they not only can, but have, served as genuine equals to their male counterparts in defending their country furthers the cause of acceptance as equals within the military more broadly.

II. FRUIT FROM THE POISONOUS TREE: MILITARY SEXUAL ASSAULT AND PROSECUTIONS THEREOF⁵⁶

This section begins by laying out some of the basics of military sexual assault. Particularly, it addresses three questions to provide the proper context for the rest of the article’s analysis: 1) *How prevalent has sexual assault been historically and how prevalent is it today?*; 2) *How are sexual assaults prosecuted in the military justice system?*; and 3) *How does the current military justice system fail female victims of military sexual assault?*. We turn first to the statistics.

A. Military Sexual Assault: Current and Historical Statistical Realities

Despite women’s lengthy time in uniform, scant data exists to paint a comprehensive picture of military sexual assault historically. In fact, according to the Center for American Progress, “[t]he issue first gained widespread media attention in 1992 after Paula Coughlin, then a Navy lieutenant, came forward

lines, with heroism, L.A. TIMES (Dec. 4, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-1204-lemmon-women-combat-20151204-story.html>.

55. KAMARCK, *supra* note 51, at 8.

56. It is imperative to point out the military sexual assault perpetrated against women is but one of the—unfortunately—many fruits of this poisonous tree. Take, for example, the recent and ongoing scandal involving the publishing of naked photographs of female service members online. *See, e.g.,* David Martin, *Marines nude photo scandal expands to all branches of military*, CBS NEWS (Mar. 9, 2017), <http://www.cbsnews.com/news/marines-nude-photo-scandal-expands-to-military-wide-explicit-message-board/?ftag=CNM-00-10aab6a&linkId=35311723> (outlining the scandal and noting that while originally believed to be just female Marines, photographs of females serving in all four branches have been posted online). The act of posting another’s naked photograph without their permission is in itself illegal, *see, e.g., State Revenge Porn Laws*, C.A. GOLDBERG, PLLC, <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/> (last updated Mar. 17, 2017) (citing sources), not to mention reprehensible. But this scandal actually delves deeper: the women whose photographs were taken were often identified by name and or where they are stationed. *See* Martin, *supra*. More, men have been seen on these message boards posting a non-scandalous photograph of a female soldier *soliciting* an illicit counterpart from among the rest of the online community. *Id.* Degradation of this scale to those who put their lives on the line is unfathomable and unconscionable.

about the cover-up of her assault at the 35th Annual Tailhook Symposium the previous year.”⁵⁷ The *New York Times* laid out quite the scene: one officer told the ‘paper of record’ that the conference was “a hot, drunken, messy mass of humanity.”⁵⁸ Meanwhile, “some of the Navy’s most elite young officers were grabbing at female colleagues and civilian women and shoving them down a gantlet, all the while keeping an eye out for approaching admirals.”⁵⁹ “[A]fter more than 1,500 interviews with officers and civilians who attended,” the Navy “pieced together a rough account that implicated more than 70 officers either in assaults against at least 26 women, of whom 14 were officers, or in a subsequent cover-up.”⁶⁰

“Despite public outrage and a slew of promises by military leaders, very little meaningful action was taken in the decade that followed . . . [while a] steady stream of scandals continued to make headlines in the wake of Tailhook.”⁶¹ Only in 2005 did Congress finally take action by establishing the Sexual Assault Prevention and Response Office, or SAPRO, to combat sexual assault in the military.⁶² Yet according to the GAO’s Director of Defense Capabilities and Management, as recently as September 2008 SAPRO was “not able to conduct comprehensive cross-service trend analysis of sexual assault incidents.”⁶³

The intervening years have not been without their problems. The Lackland Air Force Basic Training Scandal saw “62 trainees identified as victims of assault or other improper conduct by 32 training instructors between 2009 and 2012 at Lackland, a sprawling base outside San Antonio that serves as the Air Force’s basic training center for enlisted personnel.”⁶⁴ The scandal ended the careers of not only those convicted of the crimes, but also of the superiors along the chain of command.⁶⁵

57. ROSENTHAL & KORB, *supra* note 9, at 7 (citing Michael Winerip, *Revisiting the Military’s Tailhook Scandal*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html?_r=0).

58. Eric Schmitt, *Wall of Silence Impedes Inquiry Into a Rowdy Navy Convention*, N.Y. TIMES (June 14, 1992), <http://www.nytimes.com/1992/06/14/us/wall-of-silence-impedes-inquiry-into-a-rowdy-navy-convention.html?pagewanted=all&src=pm>.

59. *Id.*

60. *Id.*

61. ROSENTHAL & KORB, *supra* note 9, at 7.

62. *Id.*

63. *Sexual Assault in the Military—Part II: Hearing before the Subcomm. on National Security and Foreign Affairs of the H. Comm. On Oversight and Government Reform*, 110th Cong. 75 (2008) (statement of Brenda S. Farrell, Director, Defense Capabilities and Management, U.S. Government Accountability Office), <https://permanent.access.gpo.gov/fdpl1555/pt2.pdf>. See also U.S. GOV’T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: DOD’S AND THE COAST GUARD’S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS FACE IMPLEMENTATION AND OVERSIGHT CHALLENGES, REPORT NO. GAO-08-924 (2008), <http://www.gao.gov/new.items/d08924.pdf> (“[A]s of July 2008, the task force had not yet begun its review.”).

64. James Risen, *Attacked at 19 by an Air Force Trainer, and Speaking Out*, N.Y. TIMES, Feb. 27, 2013, at A1.

65. See Larry Shaughnessy, *Sex scandal ends Air Force colonel’s career*, CNN (Aug. 10, 2012), <http://www.cnn.com/2012/08/10/us/military-sex-misconduct>; Bryant Jordan, *AF Commander Fired Amid Squadron Sex Scandal*, MILITARY TIMES (Jun 22, 2012), <http://www.military.com/daily-news/2012/06/22/af-commander-fired-amid-squadron-sex-scandal.html>.

Today, the statistics are not much better. The most recent Pentagon study on military sexual assault was released in May of 2016.⁶⁶ The study “found that a total of 6,083 reports of sexual assault involving military service members were received during the year, 48 lower than the 6,131 in 2014.”⁶⁷ In other words, 4.3% of servicewomen are victims of sexual assault. Yet, the lower raw numbers are not so much a sign of encouragement as a sign of external factors: “while the number of reports has decreased, so has the size of [the] military, meaning that proportionally the rates are the same.”⁶⁸

The likelihood of sexual assault is even worse for those in more extreme situations: “Some 48.6% said they had been sexually harassed during their time in a war zone. Sexual assaults during deployment, up to and including rape, were reported by 22.8% of women.”⁶⁹ Rape is horrible, regardless of whether someone is serving on front lines or not, but there is a cruel irony that those who are at the highest risk of loss of life or limb are *simultaneously* at the highest risk of unwanted sexual contact.

Then comes the question of reporting, discussed in greater detail *infra*. Of these thousands of incidents, the numerical realities of those who actually choose to pursue legal action is staggering. Only 657 total formal complaints were filed, 315 of which were substantiated.⁷⁰ And yet, only 19—or 7%—resulted in courts martial, discharge, or both.⁷¹

B. The National Security Implications of Pervasive Sexual Assault

Those that would dismiss this problem as a secondary concern do not understand its ramifications: not addressing sexual assaults has *severe* national security implications.

[S]exual assault has a uniquely greater damaging effect on the military, such that even one incident is unacceptable. Incidents of sexual assault are detrimental to morale, destroy unit cohesion, show disrespect for the chain of command, and damage the military as a whole, both internally as well as externally.

66. U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, FISCAL YEAR 2015 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FACT SHEET (May 2016), http://sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_Fact_Sheet.pdf [hereinafter 2015 FACT SHEET].

67. Jessica Sarhan, *Pentagon: Sexual assault cases in the military remain constant*, CNN (May 5, 2016), <http://www.cnn.com/2016/05/05/politics/pentagon-sexual-assault-annual-report> (citing 2015 FACT SHEET).

68. *Id.* Notably, the levels of sexual assault perpetrated against women vary across the different branches. See Brendan McGarry, *Study: Female Marines, Sailors at Higher Risk of Sexual Assault*, MILITARY TIMES (Dec. 4, 2014), <http://www.military.com/daily-news/2014/12/04/study-female-marines-sailors-at-higher-risk-of-sexual-assault.html>.

69. Gregg Zoroya, *VA finds sexual assaults more common in war zones*, USA TODAY (Dec. 26, 2012), <http://www.usatoday.com/story/news/nation/2012/12/26/va-finds-sexual-assaults-more-common-in-war-zones/1793253/>.

70. 2015 FACT SHEET, *supra* note 67.

71. *Id.*

Service members are trained for situations in which it is essential to trust both enlisted members of the unit and the chain of command completely. Sexual assault in the military destroys that trust, which can detract from the readiness of America's armed forces.⁷²

Said another way by Gen. Ray Odierno, former Chief of Staff of the United States Army, "Our profession is built on a bedrock of trust—the trust must inherently exist among soldiers, and between soldiers and their leaders to accomplish their mission in the chaos of war. Recent incidents of sexual assault and sexual harassment demonstrate that we have violated that trust."⁷³ Losing that faith can "do real harm to the military by discouraging young women from joining the armed forces and convincing those already in uniform to get out."⁷⁴

Secondarily, "the drain on military resources because of the Pentagon's failure to deal with this problem is staggering. . . . [I]n 2010 alone, the VA spent about \$872 million on sexual assault-related health care expenditures."⁷⁵ As healthcare costs continue to rise, these costs will only continue to bloat the defense budget. This is *not* to say that we should not address the issue because it's cost-prohibitive. To the contrary, we ought to address it immediately, as a failure to do so will accumulate millions in the defense budget.

It is beyond contestation that sexual assault in the military undermines our national security. But recognizing the problem's prevalence and its national security implications is not enough; it is necessary to understand how sexual assaults are dealt with *ex post facto*.

C. Prosecuting Sexual Assaults in the Military Justice System

This subsection reviews both the framework and practical process of prosecuting sexual assaults in the military justice system.

72. CHARLES STIMSON, *SEXUAL ASSAULT IN THE MILITARY: UNDERSTANDING THE PROBLEM AND HOW TO FIX IT* (2013), <http://www.heritage.org/defense/report/sexual-assault-the-military-understanding-the-problem-and-how-fix-it>. Notably, Stimson was just nominated to the Senate Armed Services Committee by the Navy's general counsel. See Joe Gould, *White House advances Navy secretary, two other DoD picks to Senate*, DEFENSE NEWS (June 7, 2017), <http://www.defensenews.com/congress/2017/06/07/white-house-advances-navy-secretary-two-other-dod-picks-to-senate>.

73. *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Services*, 113th Cong. 12 (2013) (statement of Gen. Raymond T. Odierno, USA, Chief of Staff of the Army), https://www.armed-services.senate.gov/imo/media/doc/pendinglegislation_sexualassaults_inmilitary_fullcomm_hearing_060413.pdf.

74. Martin, *supra* note 57.

75. ROSENTHAL & KORB, *supra* note 9, at 11 (citing Service Women's Action Network, "Rape, Sexual Assault and Sexual Harassment in the Military," available at http://www.ncdsv.org/images/SWAN_Rape-SA-and-Sexual-Harassment-in-the-Military-the-Quick-Facts_4-2012.pdf).

1. A Parallel Universe: The Existence and Provisions of the Military Justice System

The Fifth Amendment of the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger[.]⁷⁶

Under Article 1, Section 8, “Congress shall have Power To ... make Rules for the Government and Regulation of the land and naval Forces[.]” The power is manifested in the Uniform Code of Military Justice (UCMJ),⁷⁷ the comprehensive set of laws governing the U.S. armed forces. Constitutional protections still bear on service members, providing a floor for their protections: indeed “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.”⁷⁸

But such protections are *only* a floor. Upon enlisting, individuals have contracted their right to be subject to a separate court system.⁷⁹

The Supreme Court, for more than a century, has acknowledged that while the soldier is also a citizen, the military, as a “specialized community governed by a separate discipline,” may regulate or permit service members’ conduct in ways which would be constitutionally impermissible in civilian society.⁸⁰

Simply having two different systems is not inherently wrong—or rather it is not inherently susceptible to patriarchal supremacy and the implicit subjugation of women. That problem manifests itself in the distinct incentives of the different structures. As a member of the military’s legal arm notes:

Unlike its domestic counterpart, whose *raison d’être* is to dispense justice, the purpose of the military’s system of justice “is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁸¹

76. U.S. CONST. amd. V.

77. 10 U.S.C. §§ 801–946, 64 Stat. 109 (2012).

78. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

79. An enlistment contract states outright: “My enlistment/reenlistment agreement is more than an employment agreement. It effects a change in status from civilian to military member of the Armed Forces. As a member of the Armed Forces of the United States, I will be: . . . Subject to the military justice system, which means, among other things, that I may be tried by military courts-martial.” Dep’t of Defense, DD Form 4/3 (2007), <http://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0004.pdf>.

80. Michael F. Noone, *Chimera or Jackalope? Department of Defense Efforts to Apply Civilian Sexual Harassment Criteria to the Military*, 6 DUKE J. GENDER L. & POL’Y 151, 152 (1999) (footnotes omitted) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

81. Dana Michael Hollywood, *Creating A True Army of One: Four Proposals to Combat Sexual Harassment in Today’s Army*, 30 HARV. J.L. & GENDER 151, 177 (2007) (quoting MANUAL FOR COURTS-MARTIAL pt. I, Preamble (2005 ed.)).

After a checkered past,⁸² the UCMJ finally adopted definitions of—and thus criminalized—rape, sexual assault, aggravated sexual contact, and abusive sexual contact in line with civilian criminal statutes.⁸³ But the statutes are not the only things distinct from the civilian world: the mechanics of *how* a military prosecutor charges a perpetrator with one of these offenses is different, and demonstrates where the disparate treatment originates.

2. Venturing Down the Rabbit Hole: The Mechanics of Charging Sexual Assault in the Military Court System

The charging process for a court-martial is not dissimilar to its civilian analogues: preliminary hearings in the civil setting and grand juries in the criminal setting.⁸⁴

82. See Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice Re-Traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 441–43 (2014). The original UCMJ defined rape as: “Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.” Act of 5 May 1950, ch. 169 §1 (Art. 120), 64 Stat. 108, 140 (1950). This definition “became widely criticized as antiquated.” Schenck, *supra*, at 442 (“[B]ecause ‘force’ lacks ‘obvious or plain’ meaning, the statutory scheme focused attention on the victim’s conduct as opposed to the accused’s conduct, and culpability-based gradations of conduct and punishment are more effective in deterring crime. ‘The requirement that a woman resist her assailant grew out of the law’s suspicion of the credibility of unchaste or vengeful women.’ As views of women’s place in society changed, however, the law eventually followed.” (internal citations omitted)). See also *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005). Congress demanded the Secretary of Defense “propose changes to the existing sex offenses in the UCMJ, ‘to conform . . . more closely to other [f]ederal laws and regulations that address [sexual assault].’” Schenck, *supra*, at 443 quoting Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 1920 (2004). Though the “Joint Service Committee [JSC] provided an 826-page report focused on statutory changes to assist Congress in bringing the UCMJ up to date,” Schenck, *supra*, at 442, the subcommittee “unanimously concluded that change is not required” because it believed no illegal actions were beyond prosecution under the definition. MARK HARVEY, *SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 1* (Feb. 2005), http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ.pdf. Nevertheless, Congress would enact one of the options suggested by the report. *Id.*

83. 10 U.S.C. § 920 (2012).

84. DEP’T OF LAW, U.S. MILITARY ACADEMY AT WEST POINT, *BALANCING ORDER AND JUSTICE: THE COURT-MARTIAL PROCESS 5* (2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/01-1_court_martial_process.authcheckdam.pdf.

The Article 32 investigation has often been compared to both the civilian preliminary hearing and the civilian grand jury since it is functionally similar to both. All three of these proceedings are theoretically similar in that each is concerned with determining whether there is sufficient probable cause (reasonable grounds) to believe a crime was committed and whether the person accused of the crime committed it. The Article 32 investigation, however, is broader in scope and more protective of the accused.

For example, there is a defined procedure, specific rules of evidence, and each side has the right to an attorney: a party will be provided a military lawyer, called a JA or JAG in military parlance,⁸⁵ but is also permitted to hire a civilian lawyer.⁸⁶

Once an attack is alleged, the victim can report it with the hope of prosecuting her attacker (“an unrestricted report”) or do so *only* with the aim of receiving medical support (“a restricted report”) and subsequent benefits.⁸⁷ If she chooses the former, she must go to a superior in her chain of command to detail it.⁸⁸ “After a preliminary inquiry and consideration of administrative, nonpunitive[sic] and nonjudicial[sic] actions, the unit commander may determine that the matter is sufficiently serious to warrant trial by court-martial.”⁸⁹

UCMJ Article 32 “requires a thorough and impartial investigation of charges and specifications before they may be referred to a general court-martial (the most serious level of courts-martial).”⁹⁰ The commanding officer will detail another commissioned officer to investigate and schedule an investigative hearing as soon as reasonably practicable.⁹¹ This hearing is reminiscent of a miniature trial, but there are some important differences: the investigating officer reviews all non-testimonial evidence and examines witnesses, though the majority of the rules of evidence do not apply.⁹² “Upon completion of the hearing, the investigating officer submits a written report of the investigation to the commander who directed the investigation,” which essentially recaps the evidence and the investigating officer’s conclusions about the nature and merits of the charges.⁹³ Once the defense

85. This is short for Judge Advocate General. The lead lawyer for each branch of the military is The Judge Advocate General, and all subordinates are technically members of the JAG Corps, but the lawyers are nevertheless referred to as JAGs. Interestingly, the term Judge Advocate was originally reserved for an individual appointed to prosecute a court martial, “neither a judge nor a trained advocate.” C. Peter Dungan, *Avoiding “Catch-22s”: Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31 (2006) (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 179 (1920)). In fact, the judge advocate was not required to have any formal training. See Winthrop, *supra*, at 179.

86. MANUAL FOR COURTS-MARTIAL, UNITED STATES § 506 (2012 ed.) [hereinafter MANUAL].

87. See U.S. COMM’N ON CIVIL RIGHTS, *SEXUAL ASSAULT IN THE MILITARY* 18 (2013), http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf. She may also choose to report it while *not* seeking to charge her attacker, too.

88. The chain-of-command requirement is problematic. See *infra* Section III.D.1. Prosecutorial Authority and Discretion.

89. DEP’T OF LAW, *supra* note 6, at 1. Notably, “Battery/Company commanders [officers with typically under 6 years of experience in charge of anywhere from 100 to 200 soldiers] normally cannot convene courts-martial. They may only recommend trial and forward the entire case file up the chain of command. Each subsequent higher commander must exercise personal discretion in disposing or recommending disposition of the case.” *Id.*

90. *Id.* at 2. This provision is necessary for principles of due process because “[t]he Fifth Amendment constitutional right to grand jury indictment is expressly inapplicable to the Armed Forces.” *Id.*

91. *Id.* at 3–5.

92. *Id.* at 4. (“The investigating officer will, generally, review all non-testimonial evidence and then proceed to examination of witnesses. Except for a limited set of rules on privileges, interrogation, and the rape-shield rule, the military rules of evidence (which are similar to the federal rules of evidence) do not apply at this investigative hearing.”).

93. *Id.* at 5.

council and the accused have a copy of the report, the convening authority again confers with the SJA office before deciding whether charges ought to be pressed.⁹⁴

Once the decision has been made to prosecute, the procedures follow the Manual for Courts-Martial, which sets out a trial much like any civilian analog.

D. How Does the Current Military Justice System Fail Female Victims of Military Sexual Assault?

Several factors contribute to the military justice system's failure of female victims of military sexual assault: a convening authority's prosecutorial discretion, the improper chain of command influence, manipulative jury practices, retributive practices after reporting, and insufficient civilian redress. This sub-section explains each in turn.

1. Prosecutorial Authority and Discretion

The civilian justice system serves only one mistress: lady justice. In the oft-repeated words of Chief Justice John Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁹⁵ On the other hand, the military justice system is susceptible to dueling muses: justice and discipline. The Manual for Courts-Martial concedes this much:

The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.⁹⁶

Being the servant of two mistresses has dubious implications. For example, what if a high-ranking commander deployed in a war zone and facing combat daily hears a generally inept female soldier credibly claim that the commander's deputy and an otherwise outstanding officer sexually assaulted her. The commanding officer has all the evidence he needs to convict the deputy, but also knows that the effectiveness of his unit—and thus the lives and wellbeing of all others in his command—will likely be jeopardized without one of the most important figureheads of the battalion. In no way should a commander forego justice for the victim, but the rules permit such an action: though the staff judge advocate will tender advice and recommendations on the charge,⁹⁷ "the final decision" of whether to prosecute remains in the commander's hands.⁹⁸

Consider the incentives of the commanding officer. He or she also receives fitness reports that dictate career trajectory. Certainly it looks awful when a

94. *Id.* at 6.

95. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

96. MANUAL, *supra* note 8, at I-1. "This bifurcated approach contemplates strengthening the national security of the United States by maintaining good order and discipline in the ranks." Mitsie Smith, Comment, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 BUFF. J. GENDER, L. & SOC. POL'Y 147, 160 (2011).

97. 10 U.S.C. §834 (2012).

98. Lorelei Laird, *Military lawyers confront changes as sexual assault becomes big news*, AM. BAR ASSOC. J. (Sep. 2013), http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news.

candidate competing for a promotion has the black mark of a convicted sexual assault in his or her unit: it can project negative leadership in myriad ways. Thus, commanding officers have their own incentives to bury these indiscretions.

This cruel tempting of fate has another dimension to it: the victim can—and unfortunately has—been prosecuted simply because bringing forward the claim disrupts the unit, thereby “prejudic[ing] good order and discipline” in violation of UCMJ Article 134.⁹⁹ Silencing dissention by prosecuting those who name their attackers metes out perverse injustices.

There is yet another element of unjust command influence that bears upon the discussion of military sexual assault: vociferously advocating its demise has been interpreted as undue influence in favor of conviction. In 2015, the military appeals court judge found that “counsel’s multiple improper references to Army-wide efforts to respond to and prevent sexual assault . . . were a source of an unfair trial,” and that such unfairness prejudiced the trial “because the panel may have been swayed by the constitutionally impermissible derogations contained in government counsel’s arguments.”¹⁰⁰

This line of thinking is not new. It in fact mirrors the Executive’s efforts to combat sexual assault in the military. As one report states:

This issue would not exist, but for the repeated public statements by senior Army officials, and other government officials, about the need to eradicate sexual assault from the military. It is this means of improper influence that is so difficult to remove from a military trial, even with a military judge vigilantly policing the arguments of the prosecutor.¹⁰¹

99. See Dorothy J. Samuels, *The Military’s Hail Mary*, N.Y. TIMES: TAKING NOTE (Oct. 14, 2013, 4:38 PM), http://takingnote.blogs.nytimes.com/2013/10/14/the-militarys-hail-mary/?_r=0 (citing Article 134, UCMJ, 10 U.S.C. § 934 (2012)).

100. *United States v. Garcia*, ARMY 20130660, 2015 WL 4940266, at *10 (A. Ct. Crim. App. Aug. 18, 2015)).

101. See James Joyner & James W. Weirick, *Sexual Assault in the Military and the Unlawful Command Influence Catch-22*, WAR ON THE ROCKS (Oct. 7, 2015), <https://warontherocks.com/2015/10/sexual-assault-in-the-military-and-the-unlawful-command-influence-catch-22/>. This reports states, for example:

In order to address the burgeoning issue of sexual assault in the ranks and combat the perception that dealing with it was not a priority, President Obama, service secretaries, service chiefs, and commanders down to the lowest levels mounted an aggressive campaign to highlight the severity of the issue to service members. Thousands of speeches were given and extensive training was instituted. This very campaign was found to constitute “unlawful command influence[.]”

The recent spate of unlawful command influence rulings began with a Navy judge’s finding that President Obama’s comments about sexual assault unduly influenced any potential sentencing.

[In another case], the military judge ruled that unlawful command influence had tainted the trial. Former Commandant of the Marine Corps Gen. James Amos, was also found to have exercised unlawful command influence when he commenced on a worldwide speaking tour addressing the Corps about the problem of sexual assault. His actions resulted in a military court of appeals overturning a conviction for sexual assault. [Another] opinion noted that “with multiple references — some overt and others thinly veiled — to the Army’s efforts to confront sexual assault, the government attempted to impermissibly influence the panel’s findings by injecting command policy into the trial.” In the Garcia case, the prosecutor repeatedly, and improperly, mentioned

Military appeals courts that ascribe to this thinking are unable to separate the politicking and policy-promoting for genuine influence. But “Commander-in-chief is only one of many hats the president wears and declining to speak out in the face of public perception that sexual assault is rampant in our armed forces would be unthinkable.”¹⁰² Instead the military appeals courts seem to be offering women a catch-22: damned if their leaders care, and damned if they don’t. This line of thinking only further perpetuates the male-male alliances that enable these actions.

Nevertheless, these rulings should not deter voicing change: while both terrible and nuanced, these are short-term costs to long-term solutions, overcorrections on the pendulum of justice that will diminish proportionally to the mitigation of sexual assault. In short, perfection should not be the enemy of good.

2. A Jury of Peers?

There are many ways in which the jury of a sexual assault case in a court martial favors the defendants. In the courts-martial system, the convening authority initially assigns nine jurors, called panel members.¹⁰³ Thereafter, there is a typical voir dire process, in which either party can strike for cause and each party has one peremptory challenge. As the American Bar Association states outright,

The use of the peremptory challenge by the defense could be used to gain a slight mathematical advantage. For example, with nine members on the panel, the prosecution needs six votes for conviction. If the defense strikes a member, leaving eight members, the prosecution still needs six votes to convict because two-thirds of eight is slightly more than five.¹⁰⁴

But even beyond the numerical manipulation, there are more human factors at work. In a court-martial, panel members are themselves members of the military. This is important because of the military’s gender demographics. As of January 2017, women comprise 17.36% of the officer corps and 16.01% of all soldiers across the Department of Defense, as enlisted soldiers are 15.63% female.¹⁰⁵ (This effect is slightly more profound when the accused is an enlisted soldier: when an officer is being court-martialed, all panel members are officers, whereas when an enlisted soldier is on trial, he may request enlisted soldiers be empaneled.¹⁰⁶) Therefore, when a man is on trial for sexually assaulting a female, he is *exceedingly* likely to be judged by his brethren, who have their own incentives to protect the patriarchy via their male-male alliances.

Moreover, when in a civilian jury, while there is a foreperson, there is no distinct hierarchy. Yet when empaneled, members are not stripped of rank;

the Army’s stance on sexual assaults. The military judge failed to provide the proper limiting instructions to the jury, i.e., to ignore the prosecutor’s repeated references to the Army’s stance on the problem of sexual assault.

102. *Id.*

103. MANUAL, *supra* note 8, § 501.

104. DEP’T OF LAW, *supra* note 6, at 10.

105. DEP’T OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE: JANUARY 31, 2017, <https://www.dmdc.osd.mil/appj/dwp/rest/download?fileName=rg1701.pdf&groupName=milRankGrade>.

106. 10 U.S.C. § 825 (2012).

everyone remains aware of their rank and the rank of their colleagues. As men are more represented at the highest rank, they likely influence the panel. If even from a subconscious bias, they could inadvertently favor a male defendant who allegedly attacked a female victim. Especially when facing the male-male alliance within the deliberation and aware of the retaliation forces at work, there is certainly reason to believe that a female panel member—statistically only one will be detailed to the panel—would be wary of speaking up.

3. Retribution and Retaliation

Arguably scarier than having to reimagine this trauma without vindication—and with the knowledge that none is imminent—there is a very real possibility that victims will be retaliated against. The problems associated with retaliation are endless.

To start, the Defense Department has had some trouble getting its own house in order. Despite the prevalence of the problems for *years*, the April 2016 Department of Defense Retaliation Prevention and Response Strategy Regarding Sexual Assault and Harassment Reports confirms that “the current definitions vary across the Services and lack consistency and clarity in approach.”¹⁰⁷ Thankfully, this problem can largely be considered cured now. Upon passing the National Defense Authorization Act (NDAA), which included the Military Justice Improvement Act,¹⁰⁸ the NDAA explicitly made retaliation a punishable offense (for the first time) and included a definition: the UCMJ defines retaliation as when someone,

with the intent to retaliate against any person for reporting or planning to report a criminal offense, or making or planning to make a protected communication, or with the intent to discourage any person from reporting a criminal offense or making or planning to make a protected communication (1) wrongfully takes or threatens to take an adverse personnel action against any person; or (2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person.¹⁰⁹

Then, just like with sexual assault itself, there are problems with retaliation both in its pervasiveness and in individuals’ fear of reporting it. First, the pervasiveness: In 2014, “[o]f the 4.3% of [all service women] who indicated experiencing unwanted sexual contact in the past year and who reported the matter to a military authority or organization, 62% perceived some form of [retaliation].”¹¹⁰ This number unfortunately “has not changed significantly” from

107. DEP’T OF DEFENSE, DOD RETALIATION PREVENTION AND RESPONSE STRATEGY: REGARDING SEXUAL ASSAULT AND HARASSMENT REPORTS 5 (Apr. 2016), http://sapr.mil/public/docs/reports/retaliation/DoD_Retaliation_Strategy.pdf.

108. See *infra* notes 196–200 and accompanying text.

109. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 (2016).

110. SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, DEP’T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, 10 (2015), http://www.sapr.mil/public/docs/reports/FY14_Annual/DoD_FY14_Annual_Report_on_Sexual_Assault_in_the_Military.pdf (citing 2 SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE MILITARY, at xviii (Andrew R. Morral, Kriste L. Gore & Terry L. Schell eds., 2014), http://www.rand.org/pubs/research_reports/RR870z2-1.html).

2012.¹¹¹ As Human Rights Watch states, “military service members who reported sexual assault were 12 times more likely to suffer retaliation for doing so than to see their offender, if also a service member, convicted for a sex offense.”¹¹²

Simultaneously, “the majority of individuals who perceive retaliation associated with these forms of misconduct do not officially report their allegations.”¹¹³ The reasoning behind that reticence makes sense: the consequences outweigh the benefits. Personal retribution ranged from being “[a]ssailed with obscenities and insults” to being “[t]hreatened with death by ‘friendly fire.’”¹¹⁴ The professional consequences are just as apparent and harmful, with retaliation in the form of demotions, poor performance reviews, severe penalties for minor infractions, and outright bans on promotions.¹¹⁵

It is therefore no surprise that “[m]any survivors . . . considered the aftermath of the sexual assault—bullying and isolation from peers or the damage done to their career as a result of reporting—worse than the assault itself. Survivors . . . felt they were viewed as ‘troublemakers’ who brought negative attention to their unit.”¹¹⁶ What’s more, the retaliation can come from many sources. From commanders assigning useless and undignified busy work to receiving outright physically abusive hazing from colleagues, victims who report their crime—and bring alleged “shame” to their unit—are vulnerable to retribution by all surrounding parties.¹¹⁷ Under such conditions, no one can blame survivors for choosing to forego reporting.

4. Insufficient Federal Legal Redress

Given the fraught—and apparently likely fruitless—process of seeking to obtain vindication in military courts, it is important to examine how sexual assault victims in the military can seek redress outside of the UCMJ framework. Unfortunately, obtaining such remedies is made nearly impossible due to several impediments, which this sub-section explicates. Particularly thorny among them are the *Feres* doctrine, the political question doctrine, the exhaustion doctrine, and standing.

111. 2 SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE MILITARY 69 (Andrew R. Morral, Kriste L. Gore & Terry L. Schell eds., 2014), http://www.rand.org/pubs/research_reports/RR870z2-1.html.

112. SARA DAREHSHORI & MEGHAN RHOAD, EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY 3 (2015), https://www.hrw.org/sites/default/files/report_pdf/us0515militaryweb.pdf.

113. SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, DEP’T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015, 40 (2016), http://sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

114. DAREHSHORI & RHOAD, *supra* note 114, at 3. This report catalogues an extraordinarily yet incomplete range of retributive actions.

115. See generally DAREHSHORI & RHOAD, *supra* note 114.

116. *Id.* at 5–6.

117. See generally *id.*

a. The *Feres* Doctrine

The largest obstacle to civil remedy is the *Feres* doctrine.¹¹⁸ In *Feres v. United States*,¹¹⁹ the Supreme Court took up and combined three causes of action filed by the executrixes of estates of three United States servicemen suing the United States under the Federal Tort Claims Act (FTCA) for injuries arising out of or in the course of activity incident to military service.¹²⁰ The Court interpreted the FTCA to open the government up to “liability under circumstances that would bring private liability into existence.”¹²¹ What’s more, lacking historical precedent for laws permitting soldiers to sue the government,¹²² the Court “conclude[d] that the Government is not liable under the Federal Tort Claims Act to recover money damages for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”¹²³ Some thirty years later, “the U.S. Supreme Court extended *Feres* to ‘*Bivens*-type claims.’”¹²⁴

Now, “[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases.”¹²⁵ Therefore, each court must assess the unique and particular facts of a matter, as “[w]hether *Feres* applies to a particular claim turns on whether the injury arose incident to military service.”¹²⁶ That determination has historically been a multi-factor case-by-case adjudication. Among these factors,

no single one [is] dispositive. Important factors in resolving whether an injury

118. Dana Michael Hollywood, a member of the Judge Advocate General Corps, exhaustively details the history of the *Feres* doctrine in *Creating A True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 185–92 (2007). Her article was instrumental in the formation of this sub-section.

119. 340 U.S. 135 (1950).

120. *Id.* at 136–38.

121. *Id.* at 141.

122. *Id.* at 141–42 (“We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability ‘under like circumstances,’ for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command. The nearest parallel, even if we were to treat ‘private individual’ as including a state, would be the relationship between the states and their militia. But if we indulge plaintiffs the benefit of this comparison, claimants cite us no state, and we know of none, which has permitted members of its militia to maintain tort actions for injuries suffered in the service, and in at least one state the contrary has been held to be the case.”).

123. 340 U.S. at 146.

124. *Doe v. Hagenbeck*, 98 F Supp. 3d 672, 684 (S.D.N.Y. 2015) (citing *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)). A *Bivens* claim, named for *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), stands for the principle that an individual has a private right of action for money damages against federal agents for a violation of the individual’s constitutional right. *Id.* at 395–397.

125. *United States v. Shearer*, 473 U.S. 52, 57 (1985).

126. Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1116 (2009). The *Feres* Doctrine has also been applied in rare cases when “the type of claim[] that, if generally permitted [under the FTCA], would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.” *Id.* at 1116 n.81 (citing *Shearer*, 473 U.S. at 59 (1985)).

arose incident to service include the following: 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.¹²⁷

But because no factor is determinative, courts have preferred to look holistically at the “totality of the circumstances.”¹²⁸ Notably, “numerous circuits have found that individuals on reserve status fall within the *Feres* bar.”¹²⁹

The examples of cases that have been brought before federal courts and barred from adjudication on the merits because of the *Feres* doctrine are staggering. The *Feres* doctrine barred an Army sergeant from seeking damages for being swindled into “volunteering” to test the effects of LSD without his knowing consent.¹³⁰ In another example, the Supreme Court held that:

a widow could not sue for the death of her husband in a barracks fire resulting from the negligent maintenance of a heating system. Similarly, the Court held that a widow could not sue for the death of her husband in a Coast Guard helicopter crash where the Federal Aviation Administration (FAA) had taken control of the helicopter’s radar. The executor of a sailor’s estate could not sue for the sailor’s death from falling off a pier on return to his ship, and an off-duty marine could not sue for injuries received when he was run over on base by an on-duty military policeman. The estates of sailors who drowned while participating in a Navy-led rafting trip also were barred from suing, as was the mother of an off-duty soldier who was murdered by a fellow soldier.¹³¹

But as it relates to this essay, the *Feres* doctrine has a heinous legacy in preventing the vast majority of sexual assault victims from having their day in

127. *Id.* at 1116–17 (footnotes omitted). These tests are also slightly varied depending on the jurisdiction. The Ninth Circuit, for example, has laid out particular four particular foci: “(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.” *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001).

128. *Millang v. United States*, 817 F.2d 533, 535 (9th Cir. 1987).

129. *Wake v. United States*, 89 F.3d 53, 59 (2d Cir. 1996) (citing *Quintana v. United States*, 997 F.2d 711, 712 (10th Cir.1993) (rejecting argument that “the *Feres* doctrine does not bar [plaintiff’s] claim because she was on reserve status, rather than active duty status”); *Duffy v. United States*, 966 F.2d 307, 312 (7th Cir.1992) (“status as a reservist . . . unquestionably is a military status”); *Norris v. Lehman*, 845 F.2d 283, 286–287 (11th Cir.1988) (per curiam); *Estate of Martinelli v. United States Department of the Army*, 812 F.2d 872, 873 (3d Cir. 1987), *cert. denied*, 484 U.S. 822, 108 S.Ct. 82 (1987) (reservist’s military status barred FTCA claim for injuries sustained during weekend drill); *Mattos v. United States*, 412 F.2d 793, 794 (9th Cir. 1969) (per curiam) (same); *United States v. Carroll*, 369 F.2d 618, 620 (8th Cir. 1966) (“There is no doubt that the *Feres* decision applies also to reservists.”). *See also Doe*, 98 F. Supp. 3d at 686 (citing *Collins v. United States*, 642 F.2d 217, 220 (7th Cir. 1981) (FTCA suit by cadet at Air Force Academy for medical malpractice dismissed because under *Feres* injuries occurred “incident to service”); *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013) (suits for sexual assault incurred while on active duty in the military dismissed); *Klay v. Panetta*, 758 F.3d 369 (D.C.Cir. 2014) (same)).

130. *See United States v. Stanley*, 483 U.S. 669 (1987).

131. Melissa Feldmeier, Comment, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. U.L. REV. 145, 147 (2010) (footnotes omitted).

federal court,¹³² even as courts go out of their way to “emphasize that [barring] suit . . . by the *Feres* doctrine in no way suggests that we minimize the seriousness of the alleged misconduct.”¹³³ (The *Feres* doctrine also has an equally horrific legacy in barring negligence claims for what would otherwise amount to medical malpractice.¹³⁴)

Importantly, the actual *Feres* doctrine and nearly all of its progeny only restrict the collection of money damages. But, as spelled out earlier, because many victims only come forward after they leave the military or are reassigned to new posts to guard against retaliation and career stagnation, it would logically follow that plaintiffs would prefer to pursue money damages. Moreover, for the many that have left the military as a result of their treatment, they may see pursuing an injunction against practices that would no longer impact them personally insufficiently compensatory.¹³⁵ (No such cross-sectional studies of what military sexual assault victims most typically pursue have been performed to my knowledge.)

And when courts “find that [they] do not have jurisdiction under *Feres*,” they often forego discussions of other issues, such as the political question doctrine, the exhaustion doctrine, and standing.¹³⁶ However, in cases where *Feres* would not apply—namely actions seeking injunction—the judiciary’s arsenal of tools stands at the ready to block such claims.

132. See, e.g., *Mackey v. Milam*, 154 F.3d 648, 649–50 (6th Cir. 1998), cert. denied, 527 U.S. 1035 (1999); *Gonzalez v. U.S. Air Force*, 88 Fed. Appx. 371, 375 (10th Cir. 2004); *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013); *Stubbs v. United States*, 744 F.2d 58, 60–61 (8th Cir. 1984) (concluding that *Feres* barred a claim against the United States for a service member’s suicide allegedly caused by her drill sergeant’s sexual harassment and assault); *Matreale v. New Jersey Dep’t of Military & Veterans Affairs*, 487 F.3d 150, 152–54 (3d Cir. 2007) (holding that a FTCA claim that superiors retaliated against the plaintiff for supporting a sexual assault claim by a fellow soldier was barred by *Feres*); *Mackey v. United States*, 226 F.3d 773, 774–77 (6th Cir. 2000) (finding that a FTCA claim that superior officers sexually harassed the plaintiff was barred by *Feres*); *Smith v. United States*, 196 F.3d 774, 776–78 (7th Cir. 1999) (concluding that a FTCA claim that superiors negligently supervised a sergeant who allegedly raped the plaintiff was barred by *Feres*); *Davis v. Marsh*, 876 F.2d 1446, 1450 (9th Cir. 1989) (finding that a *Bivens* claim alleging sexual harassment by superior officers was barred by *Chappell*, which itself relies on *Feres*); *Dexheimer v. United States*, 608 F.2d 765, 767 (9th Cir. 1979); *Bartley v. Dep’t of the Army*, 221 F.Supp.2d 934, 936, 948–49, 955–56 (C.D.Ill. 2002) (holding that FTCA and *Bivens* claims that superiors sexually assaulted and harassed the plaintiffs were barred by *Feres* and *Chappell*); *Morse v. West*, 975 F.Supp. 1379, 1380–82 (D.Colo. 1997) (holding that FTCA and *Bivens* claims alleging sexual harassment by ROTC personnel were barred by *Feres*); *Klay v. Panetta*, 924 F. Supp. 2d 8, 24 (D.D.C. 2013), aff’d, 758 F.3d 369 (D.C. Cir. 2014); *Perez v. Puerto Rico Nat. Guard*, 951 F. Supp. 2d 279, 296 (D.P.R. 2013); 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, 1366 n.89 (2014); Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 728 (2013); Scott A. Liljegren, Note, *Winning the War Against Sexual Harassment Battle by Battle: Why the Military Justice Model Works—A Proposal for Federal and State Statutory Reform*, 38 WASHBURN L.J. 175, 201-03 (1998).

133. *Smith v. United States*, 196 F.3d 774, 777 (7th Cir. 1999).

134. See generally Feldmeier, *supra* note 133.

135. See *infra* Section III.D.v.d. Standing.

136. *Smith*, 196 F.3d at 778 n.2.

b. The Political Question Doctrine

If a claimant is not foreclosed by *Feres* because she seeks an injunction, she may yet be foreclosed by the political question doctrine. Though the political question doctrine can trace its roots to the Federalist Papers¹³⁷ and has long been accepted in federal courts,¹³⁸ the foundational test of what constitutes a nonjusticiable political question is the Supreme Court's 1962 decision in *Baker v. Carr*.¹³⁹ Couched "as essentially a function of the separation of powers," Justice Brennan, writing for the Court, articulated a six-factor test to be adjudicated on a "case-by-case" basis to determine if a matter before a court is a political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁴⁰

But "[l]ower federal courts often erroneously cite the 'political question doctrine' to dismiss as nonjusticiable individual rights claims arising in foreign or military affairs contexts" ¹⁴¹ In considering *why* courts misapply the doctrine, one reason stands out: it grants courts "an invitation to dismiss cases they do not want to adjudicate."¹⁴²

For example, when a member of the Sikh religion sued the Army for *refusing* his enlistment, the Ninth Circuit Court of Appeals felt it was prudent to defer to the military instead of getting to the constitutional issue at heart:

[T]he doctrine of limited reviewability of certain military regulations and decisions is a matter of justiciability, analogous to the political questions doctrine.

137. See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 248 (2002) (citing Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 424 (1996)); THE FEDERALIST NO. 78, at 467 (Alexander Hamilton). Pushaw delves deep into The Federalist Papers to demonstrate Hamilton's "foreshadow[ing of] the political question doctrine." *Supra* at 424, 424 n.149 (citing THE FEDERALIST NO. 78, at 467 (Alexander Hamilton)); THE FEDERALIST NO. 53, at 360-61 (Madison).

138. Barkow, *supra* note 139, at 248 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.")).

139. 369 U.S. 186 (1962).

140. *Id.* at 217.

141. Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" As A Justiciability Doctrine*, 29 J. L. & POL. 427, 427 (2014) (footnotes omitted).

142. *Id.* at 430.

Although subject matter jurisdiction may indeed exist, the claim may prove unsuitable for review by a court acting in its traditional judicial role.¹⁴³

Because cases involving military sexual assault are often foreclosed by *Feres*, judicial restraint would typically militate against a court *also* explaining that jurisdiction is barred for reasons of the political question doctrine. Thus, it is extraordinarily rare for such a claim to have judicial ink spilt on the issue. Indeed, among the subset of cases on Westlaw that discusses the doctrine within the universe of cases on military sexual assault, only one of them touches on the political question doctrine. In that case, *Saum v. Widnall*,¹⁴⁴ the trial court laid out a common-sense framework:

It is beyond such cavil that civilian courts may review military matters when substantial constitutional rights are in jeopardy or when the military has acted in violation of applicable statutes or its own regulations. Thus, federal courts may review matters of internal military affairs (1) to determine whether military officials “acted outside the scope of [their] powers” or (2) “violat[ed] their own regulations”; (3) to “question [] the constitutionality” of statutes, executive orders, or regulations relating to the military; (4) to review court-martial convictions alleged to involve errors of “constitutional proportions” as well as (5) selective service induction procedures. *See id.* (citations omitted). Review is not permitted to “secondguess[sic] judgments requiring military expertise,” “substitute court orders for discretionary military decisions,” or where review “might stultify the military in the performance of its vital mission.”¹⁴⁵

The court in *Saum* correctly found that questions of fact relating to her alleged sexual abuse was within the court’s jurisdiction. Yet a court that does not wish to enter this thorny area of jurisprudence may nevertheless choose to avail itself of hiding behind the political question doctrine.¹⁴⁶

c. The Exhaustion of Remedies Doctrine

If a claimant pursues an injunction and can survive motions to dismiss under the political question doctrine, she may also be blocked from pursuing the claim by the exhaustion of remedies doctrine, or exhaustion doctrine, which applies in some jurisdictions.¹⁴⁷ The doctrine stands for the proposition that “a party must exhaust the remedies available to him within the military before he can seek federal court review of a military determination[.]”¹⁴⁸ “The logic of the rule implies that the remedy is (a) available to him on his initiative (b) more or less immediately

143. *Khalsa v. Weinberger*, 779 F.2d 1393, 1395 (9th Cir. 1985), *aff’d*, 787 F.2d 1288 (9th Cir 1985).

144. 912 F. Supp. 1384 (D. Colo. 1996).

145. *Id.* at 1391 (quoting *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971) (alteration in original)).

146. *See Baldwin v. Dep’t of Def.*, No. 1:15-cv-00424, slip op. at 9–11 (E.D. Va. Oct. 14, 2016).

147. Though the doctrine is grounded in Supreme Court precedent, the doctrine itself is not universally recognized in all jurisdictions but is still active in some. *See, e.g., NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980) (the doctrine “requires a court contemplating review of an internal military determination first to determine . . . whether intraservice remedies have been exhausted.” (emphasis added)); *Dooley v. Plogar*, 491 F.2d 608, 610 (4th Cir. 1974).

148. Edward F. Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 48 MIL. L. REV. 91, 105 (1970).

and (c) will substantially protect his claim of right.”¹⁴⁹ But the rule itself:

has its roots both in common law and administrative law By postponing civil court review of a military determination until the military has had an opportunity to apply its expertise, exhaustion, like nonreviewability, prevents unnecessary civilian interference in military matters and ensures military autonomy over its own business.¹⁵⁰

In a law review article penned in 1962, then-Chief Justice Earl Warren echoed these sentiments:

It is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment’s broad power to deal with its own personnel. The most obvious reason is that the courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.¹⁵¹

Thirteen years later, the Court issued one of the foundational cases to espouse the rule, *Schlesinger v. Councilman*.¹⁵² In *Councilman*, “court-martial charges were preferred . . . alleg[ing] that Captain Councilman had wrongfully sold, transferred, and possessed marihuana[sic].”¹⁵³ As the *Councilman* majority stated,

implicit in the congressional scheme embodied in the [Uniform Code of Military Justice] is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen’s constitutional rights. We have recognized this, as well as the practical considerations common to all exhaustion requirements[.]¹⁵⁴

But this does not only act as a shield protecting the government from would-be habeas petitioners, as was the case in *Councilman*.¹⁵⁵ Indeed “the unique relationship between military and civilian society counsels strongly against the exercise of equity power to enjoin courts-martial” more broadly.¹⁵⁶

Thus, *Councilman* stands for the proposition that “federal district courts *should not intervene in military trials in most situations* for equitable reasons even though they have statutory jurisdiction to entertain suits seeking to prohibit the military from trying certain cases.”¹⁵⁷

149. Louis L. Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 327 (1962).

150. Sherman, *supra* note 50, at 105–06.

151. Warren, *supra* note 78, at 187.

152. 420 U.S. 738 (1975).

153. *Id.* at 739.

154. *Id.* at 758.

155. *See generally id.*

156. Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 72 (1985) (citing *Schlesinger v. Councilman*, 420 U.S. 738, 756–57 (1975)). In the opinion, Justice Powell compares the comity rationale to “the peculiar demands of federalism preclude[ing] equitable intervention by the federal courts in state criminal proceedings.” Rosen, *supra* at 72–73 (citing *Councilman*, 420 U.S. at 757).

157. H. Michael Bartley, *Military Law in the 1970’s: The Effects of Schlesinger v. Councilman*, 17 A.F.L. REV. 65, 65 (1975) (emphasis added).

Therefore, while the exhaustion principle does not preclude military sexual assault defendants from pursuing vindication of their rights in federal court, it nevertheless exacts a toll on assault victims. To the contrary, those still in uniform must bear the “heavy burden [of] undergo[ing] a process they know will be painful and likely ineffective”¹⁵⁸ while maintaining their professionalism. This is especially difficult when victims serve alongside or under their alleged assailants. Indeed, according to the Department of Defense’s 2015 Annual Report on Sexual Assault in the Military,¹⁵⁹ “75 percent of the men and women in uniform who have been sexually assaulted lack the confidence in the military justice system to come forward and report the crimes committed against them.”¹⁶⁰

The toll of forcing a victim to relive the traumatic attack—also known as re-victimization¹⁶¹—cannot be understated. Victims repeatedly discuss how agonizing it is to have intimate details shared and scrutinized by the public. Consider the case of a female midshipman at the U.S. Naval Academy, who, after being attacked by another student, “was forced to spend more than 25 hours—over the course of five days—on the stand and was questioned repeatedly about her attire, her mental health, how she danced, and how she performed oral sex.”¹⁶²

158. *Recent Case, Baldwin v. Dep’t of Defense*, No. 1:15-cv-00424-GBL-TCB (E.D. Va. Oct. 14, 2016), 130 HARV. L. REV. 2243, 2249 (2017).

159. See SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, DEP’T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015 (2016), http://sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

160. Kirsten Gillibrand, *Comprehensive Resource Center for the Military Justice Improvement Act*, U.S. SENATE, <http://www.gillibrand.senate.gov/mjia>. Kirsten Gillibrand, *Gillibrand Statement on Latest DOD Report on Sexual Assault in The Military*, U.S. SENATE, <https://www.gillibrand.senate.gov/news/press/release/gillibrand-statement-on-latest-dod-report-on-sexual-assault-in-the-military-2015>.

161. See generally AMANDA KONRAD, *TAKING THE STAND: RAPE SURVIVORS AND THE PROSECUTION OF RAPISTS* (2007); GREGORY MATOESIAN, *REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM* (1993). This has also been termed “second rape,” albeit in other contexts. See Diane Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 364 (2015) (citing Diane L. Rosenfeld, *Schools Must Prevent the “Second Rape”*, HARV. CRIMSON (Apr. 4, 2014), <http://www.thecrimson.com/article/2014/4/4/Harvard-sexual-assault/>). Countless examples illustrate this point. One rape victim describes the traumatic process in the following terms: “The embarrassment. . . I had to talk about the most intimate things that I hadn’t shared with anyone except a police officer, to relive all those moments I had only been brave enough to tell the police officer and never anyone else. You don’t have to bring back the memories – they don’t go away – but it is difficult to talk about them because of the shame you feel as a victim.”

Amelia Gentleman, *Prosecuting sexual assault: ‘Raped all over again’*, THE GUARDIAN (Apr. 13, 2013), <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court>. In a more famous example, the victim of the infamous Stanford Swimmer viewed her attacker’s decision to go to trial as “add[ing] insult to injury and forc[ing her] to relive the hurt as details about [her] personal life and sexual assault were brutally dissected before the public.” See Katie J.M. Baker, *Here Is The Powerful Letter The Stanford Victim Read Aloud To Her Attacker*, BUZZFEED NEWS (June 3, 2016), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-hera?utm_term=.gcOLow4D#.ekPJYgOA.

162. ROSENTHAL & KOB, *supra* note 8, at 9 (citing Anny Shin, *Naval Academy rape case investigator testifies that one midshipman changed his story*, WASH. POST (Sep. 3., 2013), <https://www.washingtonpost.com/local/naval-academy-rape-case-investigator-testifies-about-her->

No prose can encapsulate the anguish such testimony caused.

Re-victimization is impossible to eradicate so long as we continue to uphold a fair judiciary—as we obviously should. But the perfect cannot be the enemy of the good, and mandating an initial trial in military court keeps the victim stationed either alongside her attacker or those who would wish to retaliate against her. It is therefore no surprise that this requirement discourages victims from coming forward who rightfully “have the impression that reporting crimes can lead to public and degrading questioning and open them up to ill will at campuses and military installations.”¹⁶³

d. Standing

Finally, if a party can survive the minefield that is the political question and exhaustion of remedies doctrines in pursuit of an injunction, she may also parry challenges to her standing in the case.

“In limiting the judicial power to ‘Cases’ and ‘Controversies,’ Article III of the Constitution restricts it to the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law.”¹⁶⁴ Justice Scalia, in *Lujan v. Defenders of Wildlife*,¹⁶⁵ penned the “the irreducible constitutional minimum of standing,” comprised of three requirements:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’”[.] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”¹⁶⁶

According to the Court, justification for this requirement is to ensure that “the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.”¹⁶⁷

Therein lies the source of courts’ claims that military sexual assault victims pursuing an injunction lack standing: victims may “fail to demonstrate immediate, irreparable, and imminent harm based on the challenged conduct.”¹⁶⁸ *Baldwin v. Department of Defense*¹⁶⁹ provides a perverse example. In *Baldwin*, Judge Lee felt that the plaintiffs “failed to plead any facts demonstrating that future injury is imminent and actual.” Besides those plaintiffs who had been separated, the court

interviews-with-alleged-victim/2013/09/03/9f604298-14ae-11e3-a100-66fa8fd9a50c_story.html?utm_term=.335cb0551965).

163. *Id.*

164. *Summers v. Earth Is. Inst.*, 555 U.S. 488, 492 (2009) (citing U.S. CONST. art III).

165. 504 U.S. 555 (1992).

166. *Id.* at 560–61 (citations omitted) (amendments in original).

167. *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

168. *Baldwin v. Dep’t of Def.*, No. 1:15-cv-00424, slip op. at 7 (E.D. Va. Oct. 14, 2016).

169. *See generally id.*

was unpersuaded that “any woman [still in uniform] can assert facts that predict she will be assaulted in the future such that a tribunal can intervene to stop an anticipated assault.”¹⁷⁰ Such claims, the judge decided, were “speculative and lack[ed] legal factual support.”¹⁷¹

This begs the question of probabilistic standing, or establishing standing via asserting that the cause of action an increased likelihood that a harm will arise: Indeed “[t]here is an unbroken historical practice of federal courts exercising jurisdiction over claims for prospective relief to prevent threatened injuries that have not yet occurred.”¹⁷² Certainly not all claims are granted standing simply because there’s a puncher’s chance the plaintiff may be harmed at some undetermined point in the future. Therefore, “for a plaintiff to have standing, the threat of injury must be ‘real.’”¹⁷³ In addition to the tangible harm requirement, it must be “imminent.”¹⁷⁴ In *Baldwin*, for example, when Judge Lee also offered his opinion on the question of standing, he claimed that the victims who were still in uniform did not demonstrate a sufficiently high likelihood that they will be attacked again, undermining their assertion of standing.¹⁷⁵

Unfortunately, Judge Lee’s interpretation is of no surprise. Over the years, probabilistic standing has been inconsistent at best.¹⁷⁶ Recent Supreme Court jurisprudence is no exception: “The [Roberts] Court has failed to develop a unitary formula for determining how likely it must be that a threat will ripen into a more palpable injury, or that a judicial ruling would redress an injury or threat thereof, in order for a plaintiff to have standing.”¹⁷⁷ If anything, “the Court has demanded elevated showings of likely injury by parties seeking injunctive relief from policies that relate closely to national security.”¹⁷⁸

This has obvious and long-lasting deleterious effects on plaintiffs.

[The Court’s] narrow construction [of probabilistic standing] is consistent with “anxieties about judicial competence that . . . frequently underlie rulings that plaintiffs who seek injunctive remedies against sensitive governmental operations have no standing” and functionally requires a victim to choose between removing herself from ongoing harm by resigning and obtaining

170. *Id.* at 8.

171. *Id.* at 9.

172. F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 61 (2012) (citing *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82 (1902) (holding that a “threatened” injury from illegal activity presented an actual case)); *see also* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (recognizing standing for a party who “personally has suffered some actual or threatened injury” (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979))).

173. *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–91 (1947)).

174. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

175. *Baldwin v. Dep’t of Def.*, No. 1:15-cv-00424, slip op. at 7–9 (E.D. Va. Oct. 14, 2016).

176. *See generally* Hessick, *supra* note 172.

177. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1069 (2015).

178. *Id.* at 1090.

judicial recourse.¹⁷⁹

In addition to offering judges an avenue by which to avoid deciding controversial cases, the discretion created by the, the “incoherence of the [probabilistic standing] doctrine gives scope for ‘the strong tendency of judges to engage in ideologically driven doctrinal manipulation in standing cases.’”¹⁸⁰ As Professor Richard Pierce demonstrated empirically, “a Republican judge was almost four times as likely as a Democratic judge to vote to deny an environmental plaintiff standing.”¹⁸¹ Thus, be it for political reasons or simply to avoid upsetting the balance of power in military affairs, courts have more than enough precedent to hide behind on standing grounds.

5. Back-filling Cycles and Self-Perpetuation

Each of these failures may be containable when isolated, but because they are so intimately interwoven, together they produce a back-filling cycle that perpetuates, if not exacerbates, each. Victims will bring forward charges, face tough sledding to get charges preferred against her attacker, and proceed at the whim of a panel that can be manipulated to militate against a conviction. So the victim must sit through her re-victimization knowing her infinitesimally low odds of vindication as well as the practical impossibility of seeking alternatives in federal courts.

This takes place as the victim is retaliated against and faces new charges *against* her simply for bringing up her attack. It truly is no wonder victims hesitate to come forward.

Yet their hesitance only emboldens attackers. Akin to those who would violate restraining orders without punishment,¹⁸² those who would attack their fellow soldier without so much as a peep in response crystallize their belief both that they are above the law and that those whom they attack are unworthy of its protections.

III. CURING THE ROOT: IMPROVEMENTS TO THE UNDERLYING SYSTEM

Many have already discussed the ways the United States military has already improved and can continue to improve the underlying currents discussed *infra*. It is worth briefly recounting some strategies that have been theorized or implemented. But before expounding on a few key strategies, we should also note that implementation of legal regimes may not prove 100% effective. As Justice Sandra Day O’Connor once wrote: “appearances do matter.”¹⁸³ Taking each of the above steps would undoubtedly go a long way toward curbing the sentiment that

179. *Recent Case*, *supra* note 158, (citing Fallon, *supra* note 177, at 1111).

180. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 502 (2008) (citing Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1760 (1999)).

181. Pierce, *supra* note 180, at 1760.

182. See, e.g., Diane L. Rosenfeld, *Correlative Rights and Boundaries of Freedom: Protecting the Civil Rights of Endangered Women*, 43 HARV. C.R. C.L.L. REV. 257, 262 (2008). (“This feature is important because violations of an order of protection signify that the offender believes he can violate the court order with impunity.”).

183. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

women are undeserving of equal status in protecting our country. But making hay—and doing so genuinely—while enacting these policies and trumpeting their successes is vital to the cause. Conversely, it must also be stated that simply offering the occasional few words on the problem does little to combat these deep-seated issues. Success will only be the byproduct of both serious rhetoric and serious action.¹⁸⁴ Thankfully, *some* strategies have been enacted and executed to begin to attack the stronghold of sexism within the military. These are discussed in greater detail below.

A. Allowing Women into the Service Academies and Combat-Oriented Roles

As shown above, women have made substantial progress in serving equally in our nation's armed forces. But if even a sliver of male soldiers' motivation to sexually assault their female counterparts is the belief that female servicepersons have less, if any, value to the military, increasing the role of women such that they may be able to demonstrate their inherent value as equals will go a long way.

When the announcement was made that the Pentagon was opening combat positions to women, Martin Dempsey, the Chairman of the Joint Chiefs of Staff (the highest ranking uniformed serviceperson) and a graduate of the United States Military Academy was asked to comment on the policy change. "Recalling his days at West Point, Dempsey told reporters that the military academy had become a much higher quality institution after the admission of women. The same transformative property would hopefully be seen in changing the culture of the military regarding sexual assault" by opening positions to women.¹⁸⁵ He continued:

When you have one part of the population that is designated as 'warriors' and one part that is designated as something else, that disparity begins to establish a psychology that — in some cases — led to that environment [of sexual assault]. I have to believe the more we treat people equally, the more likely they are to treat each other equally.¹⁸⁶

Chairman Dempsey's comments could not have been more on the mark.¹⁸⁷ As women continue to pursue and thrive in newly opened roles, the belief that they are in any way undeserving of equal respect will diminish.

184. Admittedly, the idea of seriousness is a tough line to toe: being *too* vocal can perversely influence command in favor of prosecuting sexual assault, leading to further convictions. See *supra* notes 100–102 and accompanying text.

185. Hayes Brown, *Allowing Women On The Front Lines Could Reduce Sexual Assault, Joint Chiefs Chairman Says*, THINKPROGRESS (Jan. 24, 2013), <https://thinkprogress.org/allowing-women-on-the-front-lines-could-reduce-sexual-assault-joint-chiefs-chairman-says-e1c19a6b4344#h8ic71mg>.

186. *Id.*

187. Notably, among the first class of women graduates of the service academies, men's "attrition rate due to academic failure was twice that of women." *Women Enter the Military Academies*, WOMEN'S MEMORIAL, <http://www.womensmemorial.org/history/detail/?s=women-enter-the-military-academies> (last visited Apr. 3, 2017).

B. Improving the Military Justice System At Large

In the last decade alone, there have been *significant* amendments to the court-martial system to correct some of the inadequacies of the system. Senator Claire McCaskill (D–MD) offers a partial list:

Commanders have been stripped of the power to overturn convictions & are accountable under rigorous new standards.

Every victim who reports a sexual assault gets their own independent lawyer to protect their rights and fight for their interests

Civilian review is now required if a commander decides against a prosecution in a sexual assault case when a prosecutor wants to go to trial.

Dishonorable discharge is now a required minimum sentence for anyone convicted of a sexual assault. . . .

It is now a crime for any servicemember to retaliate against a victim who reports a sexual assault. . . .

The pre-trial “Article 32” process . . . has been reformed to better protect victims.

The statute of limitations in these cases has now been eliminated

The “good soldier” defense has been eliminated for servicemembers accused of sexual assault under most circumstances

Survivors can now challenge their discharge or separation from service.

The role of the prosecutor in advising commanders on going to court-martial has been strengthened.

Accountability over commanders has been boosted for setting appropriate command climate.

Protections have been extended to the Military Service Academies.¹⁸⁸

Last year, Senator McCaskill introduced the Military Retaliation Prevention Act alongside Senator Joni Ernst “to help protect survivors of sexual assault from peer-to-peer retaliation.”¹⁸⁹ Thankfully, the Act was signed into law “as part of the 2017 national defense bill.”¹⁹⁰

188. SEN. CLAIRE MCCASKILL, *COMBATTING SEXUAL ASSAULTS IN THE MILITARY* (2015), <http://www.mccaskill.senate.gov/imo/media/doc/CombatingSexualAssaultsintheMilitary.pdf>.

189. *Combating Sexual Violence*, SEN. CLAIRE MCCASKILL, <https://www.mccaskill.senate.gov/violence> (last visited Apr. 3, 2017).

190. *Id.*

As Senator McCaskill's literature states:

[The Military Retaliation Prevention Act] expands on previous efforts to combat retaliation by making it its own unique offense under the Uniform Code of Military Justice and requiring specific training for investigators on how to handle claims of retaliation including all military criminal investigators, IG investigators, or any personnel assigned by commanders to investigate the complaint.¹⁹¹

These are all incredibly important corrections that will likely improve victims' ability to obtain justice.

C. Offering Trauma-Related Care

The Department of Veterans Affairs is responsible for the treatment and care of those who have since separated from the military. Given the disparities in combat service between the sexes, treating only physical and mental wounds stemming from combat would decidedly favor men. But that isn't the case. Indeed the VA offers counseling service for victims of military sexual assault (which, as detailed earlier, impacts women at far greater rates¹⁹²):

VA provides all care for mental and physical health conditions related to MST [Military Sexual Trauma] free of charge, and Veterans do not need to have reported their experiences of MST at the time or have other documentation that they occurred in order to receive free MST-related health care. Service connection (VA disability compensation) is also not required, and Veterans may be able to receive free MST-related care even if they are not eligible for other VA care.¹⁹³

The VA and the military in general signal the equal value placed on male and female veterans by taking military sexual assault seriously enough to offer such widespread counseling at no cost to those suffering from subsequent trauma.

However, it must be noted that the picture is not *all* rosy. This treatment assumes that the veteran victim is eligible for VA benefits. A 2016 report from Human Rights Watch:

found that many rape victims suffering from trauma were unfairly discharged for a "personality disorder" or other mental health condition that makes them ineligible for benefits. Others were given "Other Than Honorable" discharges for misconduct related to the assault that shut them out of the Department of Veterans Affairs healthcare system and a broad range of educational and financial assistance.¹⁹⁴

191. *Id.*

192. *See supra* note 14.

193. Kayla Williams, *VA offers free Military Sexual Trauma health care services to Veterans regardless of service-connected status*, DEP'T OF VETERANS AFFAIRS: VANTAGE POINT (Mar. 10, 2017, 10:58 A.M.), <http://www.blogs.va.gov/VAntage/35859/va-offers-free-military-sexual-trauma-health-care-services-to-veterans-regardless-of-service-connected-status-2/>.

194. *US: Raped in Military – Then Punished*, HUMAN RIGHTS WATCH (May 19, 2016), <https://www.hrw.org/news/2016/05/19/us-raped-military-then-punished> (citing SARA DAREHSHORI, *BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS* (2016),

If survivors are unfairly marked with “bad papers,” they would become ineligible for the care they deserve and often need. To take full advantage of the VA’s efforts to offer counseling and other medical services, this practice must be stopped.

D. Strategies Yet To Be Enacted

Though many of these strategies have been enacted, too many languish on policy room floors. For example, there is reason to believe that the single-sex selective service requirement is unconstitutional on equal-protection grounds because of the growing importance and participation of our nation’s servicewomen.¹⁹⁵ But on a policy ground, making the requirement apply to both men and women would be both an important symbol as well as an important step in demonstrating the military is a viable option for women. There are other important steps the military could take outside of the arguably symbolic selective service modification, such as more extensive trainings on sexual assault from day one, more robust protections for those serving, and better representation and treatment for survivors, including mental health benefits.

IV. CURING THE FRUIT: SEEKING SOURCES OF LEGAL REDRESS

Eradicating some of these deep-seated views and beliefs may well prove generational. Until such a change gains a stronghold in society, we must critically consider how to better serve victims and mere out justice to their attackers, both within and outside of the military justice system.

A. Internal Changes: Amending the UCMJ

Two major bipartisan legislative proposals have been put forward by members of Congress to amend the UCMJ in order to better protect victims of sexual assault. Each is discussed below; Congress would be wise to enact both pieces of legislation wholesale.

1. The Military Justice Improvement Act

To directly combat the role of undue command influence in prosecuting decisions relating to sexual assault charges, Senator Kirsten Gillibrand has championed the Military Justice Improvement Act.¹⁹⁶ This Act, which has twice gained majority support but could not overcome the Senate’s 60-vote filibuster threshold,¹⁹⁷ “would remove commanders from the decision to prosecute serious crimes, such as sexual assault and murder, while leaving uniquely military crimes

<https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors>).

195. Spivak & Aliano, *supra* note 42; Russell Spivak & Adam Aliano, *G.I. Jane and the Selective Service: Equal Protection Challenges to Male-Only Selective Service in the Modern Military*, HARV. J. LEG. ONLINE (Aug. 5, 2016), <http://harvardjole.com/2016/08/05/gi-jane-and-the-selective-service-equal-protection-challenges-to-male-only-selective-service-in-the-modern-military/>.

196. See Military Justice Improvement Act, S. 1752, 113th Cong. (2013).

197. See Emily Crockett, *Military Sexual Assault Reform Blocked Again in Senate*, REWIRE (Jun 17, 2015, 2:54 PM), <https://rewire.news/article/2015/06/17/military-sexual-assault-reform-blocked-senate/>.

to the chain of command.”¹⁹⁸ Therefore, when sexual assault is alleged, a prosecution’s potential disruption to the unit is irrelevant: only the likelihood that the crime was committed is determinative to whether it’s charged. But, for example, charging decisions relating to allegations of fraudulent enlistment, desertion, absent without leave, mutiny, and other obviously military crimes remain squarely in the commander’s jurisdiction and within his prerogative.¹⁹⁹

According to Gillibrand, these measures would ensure that prosecution “decisions [would be] based on evidence rather than the interest in preserving good order and discipline.”²⁰⁰ Indeed “[t]he shared experiences of our allies — the United Kingdom, Canada, and Australia — have demonstrated that removing felonies [including sexual assault] from their systems of military justice has increased the fairness and transparency of criminal trials, while maintaining the commander’s ability to ensure good order and discipline.”²⁰¹ Senator Gillibrand’s website features testimonials from high-ranking officials of all three countries that vouch that such frameworks have not yielded negative consequences in their own armed forces.²⁰²

2. The Protecting Military Honor Act

In July, 2017, Senator Richard Blumenthal introduced the Protecting Military Honor Act²⁰³; Representative Jaime Herrera Beutler introduced a nearly identical bill in the House.²⁰⁴ The multi-faceted bill aims to cure many of the ills found in the discharge process for victims of sexual assault.²⁰⁵ For example, for victims who were mischaracterized in their discharge and thus were not entitled to health care related to a sexual assault, the bill:

Codifies requirements for how each military branch handles cases related to sexual assault survivors and improves the process by which sexual assault survivors may challenge the terms or characterization of their discharge or separation from the armed forces

[R]equires military to give victims proper examination to ensure they don’t have a mental health condition that was caused by the trauma from the sexual assault

198. Joyner & Weirick, *supra* note 101.

199. *Military Justice Improvement Act: Excluded Offenses*, SEN. KRISTEN GILLIBRAND, <https://www.gillibrand.senate.gov/mjia/excluded-offenses> (last visited Aug. 15, 2017).

200. Joyner & Weirick, *supra* note 101 (quoting Senator Gillibrand).

201. *Id.*

202. *Military Justice Improvement Act: Allies Testimony*, SEN. KRISTEN GILLIBRAND, <https://www.gillibrand.senate.gov/mjia/allies-testimony> (last visited Aug. 15, 2017) (testimonials from Maj. Gen. Blaise Cathcart, Advocate General of the Canadian Armed Forces; Maj. Gen. Steve Noonan, Deputy Commander, Canadian Joint Operations Command; Air Comm. Paul Cronan, Director General, Australian Defense Force Legal Service; Comm. Andrei Spence, Commodore Naval Legal Services, Royal Navy, UK stating that “implementation of similar policies” “[w]ill [n]ot [d]isrupt [g]ood [o]rder [a]nd [d]iscipline”).

203. S.1543, 115th Cong. (2017).

204. H.R. 3209, 115th Cong. (2017).

205. *See supra* note 194.

Ensures sexual assault survivors have the right to a hearing to request a discharge upgrade

Allows victims to appeal to federal court for review and ensures the Discharge Review Boards are accountable to judicial review.²⁰⁶

Additionally, the bill removes statutes of limitations for such challenges, strengthens protections against whistleblower retaliation, and requires the boards making such determinations have additional protections for victims.²⁰⁷

Congress should immediately adopt both of these measures. The MJIA would remove command influence from the equation, making it easier for victims to report when they have been assaulted. This both reduces fear of reprisals and does not disrupt a commanding officer's prerogative to prosecute military-specific offenses. The PMHA, on the other hand, would minimize many crucial negative effects victims face beyond the proceedings themselves, particularly as they relate to victims' long-term care. By adopting both of these bills simultaneously, Congress could address the problem holistically. Leaving either unenacted means victims remain vulnerable to substantial wrongs.

B. External Changes: Prying the Door Open for Suit

Undoubtedly, the inability to amend the UCMJ for victims to seek justice more readily within the court martial would be a setback for justice: but all would not be lost, as adjustments could still be made in the surrounding avenues to effectively mete out justice in the federal system. Discarding—or at least amending—the *Feres* doctrine is the most likely avenue of success.

1. Jettisoning *Feres* In Part or In Whole

The *Feres* doctrine has been stretched *far* beyond anything the Supreme Court intended it to cover. More, the underlying justifications of the holding have been debunked and or no longer apply. It is therefore eminently reasonable to jettison the doctrine in part, if not in whole. This idea is thoroughly unoriginal. But because the doctrine rests upon what can only be charitably deemed as dubious footholds, it is certainly worth reviewing why such an option is so attractive.

In *Feres*, the Supreme Court stated “servicemen could not recover under the FTCA for injuries that ‘arise out of or are in the course of activity incident to service.’”²⁰⁸

206. Press Release, Rep. Jaime Herrera Beutler, Jaime Herrera Beutler Introduces Bill to Protect Military Sexual Assault Survivors (July 12, 2017) (https://herrerabeutler.house.gov/news/document_single.aspx?DocumentID=398928).

207. See *id.*; Press Release, Senator Richard Blumenthal, Blumenthal Introduces Bill to Reform Military Discharge Process, Aid Survivors of Sexual Assault (July 12, 2017) (<https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-introduces-bill-to-reform-military-discharge-process-aid-survivors-of-sexual-assault>).

208. *United States v. Johnson*, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting) (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)) (emphasis added).

The Court gave three reasons for its holding:

First, the parallel private liability required by the FTCA was absent. Second, Congress could not have intended that local tort law govern the “distinctively federal” relationship between the Government and enlisted personnel. Third, Congress could not have intended to make FTCA suits available to servicemen who have already received veterans’ benefits to compensate for injuries suffered incident to service. Several years after *Feres* [the Court] thought of a fourth rationale: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline.²⁰⁹

But the year before the Court decided *Feres*, it examined a similar case: *Brooks v. United States*.²¹⁰

In *Brooks*, the Supreme Court permitted recovery under the FTCA to two servicemen, the Brooks brothers, who had been “on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission [when] a government owned and operated vehicle collided with [them].” Attempting to distinguish its previous holding in *Brooks*, the *Feres* court noted that “[t]he injury to Brooks did not arise out of or in the course of military duty,” and that the “Brooks’s relationship [to the government] while on leave was not analogous to that of a soldier injured while performing duties under orders.”

But the plaintiffs in *Brooks* were eligible for precisely the same set of government benefits as were the plaintiffs in *Feres*, and indeed they originally collected them in addition to receiving their FTCA awards.²¹¹

Therefore, it appears as if the Court, and lower courts by extension, has constructively overturned *Brooks* in stretching *Feres* to its utmost limits over time. Given the original holding of *Brooks* made up of the exact same court, stretching *Feres* so broadly was clearly not the Court’s intent. Thus at a minimum, it is necessary to revisit the doctrine.

Since deciding *Feres*, the Supreme Court itself “subsequently recognized [its] error and rejected *Feres*’ “parallel private liability’ rationale.”²¹² *Feres*’s other factors have “similarly been denominated ‘no longer controlling.’”²¹³ So if the reasoning the *Feres* doctrine rests on has been self-immolated, that alone should be sufficient to overturn it.²¹⁴

209. *Id.*

210. 337 U.S. 49 (1949).

211. *Taber v. Maine*, 67 F.3d 1029, 1039 (2d Cir. 1995) (citations omitted).

212. *Johnson*, 481 U.S. at 694–95 (Scalia, J., dissenting) (citing *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66–69 (1955)).

213. *Id.* at 697 (Scalia, J., dissenting) (citing *United States v. Shearer*, 473 U.S. 52, 58, n.4 (1985)).

214. This meets the “fairly settled” factors required to overturn a case. See Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U.L. REV. 1137, 1141 (2006) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (“whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see; or whether facts have so changed, or come

As stated above, the Court has already acknowledged that the issue has been seen differently so “as to have robbed the old rule of significant . . . justification.” Moreover, circuit courts of appeal have outright *admitted* that “[a]pplication of the *Feres* doctrine does not depend on the extent to which its rationales are present in a particular case. Rather, the test is whether the injuries are based on ‘service-related activities.’”²¹⁵ This is nothing more than an admission of defeat. The only remnant of the original doctrine is its outcome, not its justification. It is therefore a prime candidate for rebuffing the doctrine of *stare decisis*.

But even beyond its fading justification, there are other reasons to question the doctrine, namely its equal protection concerns and the separation of powers.

First, there is reason to believe that the doctrine “runs afoul of the Equal Protection clause of the 14th and 5th Amendments.”²¹⁶ Put simply, those that already sacrifice for their country are forced to make even greater sacrifices by foregoing just compensation for harm to which they would otherwise be entitled. In Justice Scalia’s own words:

Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country’s Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received.²¹⁷

The separation of powers argument is similarly strong. The FTCA explicitly waives sovereign immunity, but it does have some exceptions. Notable here, “Congress excluded claims arising out of a number of government activities, including ‘[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war.*”²¹⁸ *Feres* stretched that language to mean “that service members cannot bring tort suits against the Government for injuries that ‘arise out of or are in the course of activity incident to service.’”²¹⁹ Courts have further extended this theory to the point that it “displaces the plain language of the Tort Claims Act.”²²⁰

to be seen so differently, as to have robbed the old rule of significant application or justification” (internal quotations and citations omitted)).

215. *Maas v. United States*, 94 F.3d 291, 295 (7th Cir. 1996). *See also* *Dreier v. United States*, 106 F.3d 844, 848–49 (9th Cir. 1996); *Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir. 1986); *Pringle v. United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Schoemer v. United States*, 59 F.3d 26, 28–29 (5th Cir. 1995).

216. *Costo v. United States*, 248 F.3d 863, 870 (9th Cir. 2001) (Ferguson, J. dissenting).

217. *Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting). *See also* *Costo*, 248 F.3d at 875–76 (Ferguson, J. dissenting) (“The articulated “rational bases” for the *Feres* doctrine lead in this case, as in many cases, to inconsistent results that have no relation to the original purpose of *Feres*. Less than half of the persons on the rafting trip that claimed the lives of *Costo* and *Graham* were identified as members of the armed services. The holding today would have allowed any of the civilians injured or killed on the trip to sue, but barred such recourse to the military personnel, despite the fact that the two suits would have implicated virtually identical policy concerns regarding the law of the situs and military decision-making. On the other hand, had *Costo* and *Graham* participated in a similar rafting trip run entirely by civilians, they may have been able to sue, yet still collect veteran’s benefits.”).

218. *Costo*, 248 F.3d at 869 (Ferguson, J. dissenting) (citing 28 U.S.C. § 2680(j) (emphasis added)).

219. *Johnson*, 481 U.S. 681, 686 (1987) (citing *Feres*, 340 U.S., at 146).

220. *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 674 (1977) (Marshall, J., dissenting).

By creating this extended theory out of whole cloth, the judiciary has re-written an otherwise constitutional statute, in violation of the separation of powers.²²¹

There may be a slightly more palatable alternative: creating an exception to the *Feres* doctrine. Many of the incidents in which the *Feres* doctrine barred suit have a direct relation to the plaintiff's service. For example, soldiers' alleged maltreatment at military medical facilities,²²² injuries sustained while being transported to a military hospital for a mandatory physical,²²³ and injuries stemming from exposure to harmful materials while serving²²⁴ all have distinct relevance to a soldier's actual service.

Ms. Hall's sexual assault while studying at the Air Force Academy cannot in any way be fairly understood as "aris[ing] out of or . . . in the course of activity incident to service." Put another way, "where there is no relevant relationship between the service member's behavior and the military interests that might be jeopardized by civil suits, the *Feres* doctrine cannot bar recovery."²²⁵ But in practice, *Feres* has been overextended to encompass anyone and anything remotely or tangentially related to the military. Thus, we ought to reexamine what truly defines being "incident to" or "arising out of" military service.

These key phrases connote, if not demand, a causal connection. In the case of Ms. Hall, for example, her studies as a cadet and her actions taken under official orders encompass activities that would be incident to service. Her gender and sexual objectification, on the other hand, are not. The same holds true for all other women that have been victimized while serving their country.

Therefore, even if the judiciary incorrectly believes that the *Feres* doctrine ought to remain intact, there is room "for a sexual assault exception."

221. See *id.* at 674 (Marshall, J., dissenting). Cf. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194–195 (1978).

222. See, e.g., *Matthew v. United States*, 311 Fed. Appx. 409, 412 (2d Cir. 2009); *Loughney v. United States*, 839 F.2d 186, 188 (3d Cir. 1988).

223. See, e.g., *Wake v. United States*, 89 F.3d 53, 62 (2d Cir. 1996);

224. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 194, 200 (2d Cir. 1987); *Mondelli v. United States*, 711 F.2d 567, 568 (3d Cir. 1983).

225. *Johnson v. United States*, 704 F.2d 1431, 1440–41 (9th Cir. 1983) (citing *Woodside v. United States*, 606 F.2d at 141, 142 ("*Feres* requires that there be some proximate relationship between the service member's activities and the Armed Forces. . . . [W]here the soldier demonstrates that the activity has no significant link to the Armed Forces and is remote to his military service, suit under the Act has been allowed."); *Camassar v. United States*, 400 F.Supp. 894, 897 (D.Conn.1975) ("the more realistically critical test of whether" *Feres* should apply "is the existence or absence of meaningful causal connection between the injury occurrence and the injured person's military service") *aff'd*, 531 F.2d 1149 (2d Cir.1976); *Schwager v. United States*, 279 F.Supp. 262, 263 (E.D.Pa.1968) (application of *Feres* depends on the "relevant links" between the military and the service member's activity and requires "a measuring of the degree to which the activity is divorced from or related to military service."); *Downes v. United States*, 249 F.Supp. 626, 628 (1965) (stating that *Feres* should only be applied when the service member is "performing duties of such a character" so that a civil suit would "undermine the traditional concepts of military discipline.")).

2. Amending Legislation Such As Title VII to Extend Protections

In 1995, a former enlisted Airman in the United States Air Force named Cheryl Corey filed suit against the Air Force for, among other things, violating Title VII of the Civil Rights Act.²²⁶ The Tenth Circuit upheld the trial court's dismissal of the suit: "Unfortunately for Ms. Corey, it [was and remains] well settled [that] Title VII does not afford protections to uniformed personnel of the various armed forces."²²⁷ The statute explicitly "extends Title VII coverage to 'employees . . . in military departments as defined in section 102 of Title 5.'"²²⁸ But employees are *not* the same as military personnel in uniform. Indeed, in discussing the distinction between the two, "the Ninth Circuit concluded '[t]he two differing definitions show that Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees, the latter of uniformed military personnel.'"²²⁹ The Tenth Circuit was reassured that its sister circuits came to similar conclusions.²³⁰

Although these circuit courts were correct in their interpretation, these bars can and should be amended through legislative action. Correcting the Title VII oversights and similar gaps in other Acts²³¹ will allow women to pursue justice when it is unattainable elsewhere.

V. A SNAKEOIL ANTIDOTE: *DOE V. HAGENBECK*

Returning to the main culprit, *Feres*, there was a temporary—but dashed—glimmer of hope: *Doe v. Hagenbeck*.²³² The plaintiff, Jane Doe,²³³ was a female cadet at the United States Military Academy at West Point. Doe, who was raped on campus, alleged "rampant sexual hostility . . . forced her to resign as a cadet and be honorably discharged."²³⁴ She sued the Superintendent of West Point, Lt. Gen. Franklin Hagenbeck, and the Commandant of Cadets at West Point, Brig. Gen. William Rapp, the two men in charge of the school at the time of the alleged conduct.²³⁵ The trial court granted motions to dismiss on all of her claims save one: an assertion that her constitutional right to Equal Protection of the laws was violated.²³⁶ On appeal, however, the Second Circuit Court of Appeals reversed the

226. *Corey v. United States*, No. 96-6409, 1997 WL 474521, at *1 (10th Cir. 1997).

227. *Id.*

228. *Id.* at *2 (citing 5 U.S.C. § 102 (1994)).

229. *Id.* (citing *Gonzalez v. Department of the Army*, 718 F.2d 926, 928–29 (9th Cir. 1983)).

230. *See Corey*, 1997 WL 474521, at *2 (citing *Roper v. Department of Army*, 832 F.2d 247, 248 (2d Cir. 1987) ("we cannot agree to the extension of Title VII to uniformed members of the armed forces."); *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981)).

231. *See* Natasha Tidwell, Note, *Soldiers of Misfortune: The Justiciability of Injunctive Relief Actions in the Federal Courts and the U.S. Military's Mandatory Anthrax Inoculation Program*, 37 NEW ENG. L. REV. 429, 442 (2003) (listing Acts that could be amended to offer women a legal remedy).

232. 98 F.Supp.3d 672 (S.D.N.Y. 2015).

233. District Judge Alvin Hellerstein granted the plaintiff's motion to proceed under a fictitious name. *See id.* at 676 n.1.

234. *Doe*, 98 F.Supp.3d at 676.

235. *Id.*

236. *Id.* at 692.

trial court's denial.²³⁷ While disappointing, conflicting precedent makes it possible that the entire circuit rehears the case *en banc* or that the Supreme Court finally takes up such a case to clarify the *Feres* progeny's "incoheren[t]" area of law.²³⁸

A. Background

The underlying factual history is vital to understanding *Doe's* holdings as well as its potential legal significance. Thus, this section first explains the facts and law underlying the claim. Then, I extrapolate how this holding—if upheld—could be a powerful lever for victimized service members.

Ms. Doe's complaint states that she thrived in her first years as a West Point cadet—at least until she was allegedly raped by a classmate and friend.²³⁹ After taking a prescribed sedative, she claims to have consumed alcohol offered to her by a male classmate and soon thereafter, lost consciousness.²⁴⁰ Her complaint reads:

He attacked Ms. Doe and had forcible, non-consensual intercourse with her. Ms. Doe remembers lying on the concrete floor of a boiler room, not understanding what was going on. She does not remember the details of the attack.

Ms. Doe woke up a few hours later in her bed, on or about the morning of May 9, 2010, with dirt on her clothes and hair, bruises on her lower back, and blood between her legs. Ms. Doe was confused and alarmed. She confided in a friend, who advised her to obtain emergency contraception.²⁴¹

Doe heeded her friend's advice in addition to getting an STD test and a vaginal examination, which showed signs of tearing.²⁴² The clinic "did not conduct a forensic examination to collect evidence (as is required by DOD regulations)."²⁴³

In the wake of the attack, Doe was referred and met once with Maj. Maria Burger, West Point's Sexual Assault Response Counselor, who informed Doe of her ability to report the assault.²⁴⁴ Doe received only one follow-up from West Point staff to check in on her mental and emotional wellbeing.²⁴⁵

237. See *Doe v. Hagenbeck*, 870 F.3d 36, 50 (2d Cir. 2017).

238. *Taber v. Maine*, 67 F. 3d 1029, 1039 (2d Cir. 1995).

239. Second Amended Complaint at 3, *Doe*, 98 F.Supp.3d 672 (S.D.N.Y. 2015) (No. 13 CIV. 2802) ("A representative faculty evaluation stated, 'CDT [Doe] has what it takes . . . she is one of the most professional and internally motivated cadets I've worked with . . . I am confident that she will excel as an Army officer. I would gladly recruit her to serve on my team, regardless of the mission.'" [hereinafter Second Amended Complaint].

240. *Id.* at 6.

241. *Id.* at 7.

242. *Doe v. Hagenbeck*, 98 F.Supp.3d 672, 679 (S.D.N.Y. 2015).

243. *Id.*

244. Second Amended Complaint, *supra* note 239, at 7. Particularly, Maj. Burger told Doe she could report it either as unrestricted or restricted. The reporting types are explained above. See *supra* notes 87–88 and accompanying text.

245. *Id.* at 8.

Doe's subsequent trauma brought about her decision to leave West Point altogether:

Her anxiety after the sexual assault became intolerable. Ms. Doe knew that if she left West Point after the start of her third year, she would be contractually required to repay the cost of her education. This was a financial risk that Ms. Doe was unable to take.²⁴⁶

That is only half the story. Now, I turn to the defendants.

B. But How Are Hagenbeck and Rapp Connected?

Doe alleges that Hagenbeck and Rapp failed to uphold their duties, leading to an infringement on her rights. Citing a “misogynistic culture at West Point that marginalized Ms. Doe and other female cadets, [which] caused them to be subjected to routine harassment, suffer emotional distress and other harms, and be pressured to conform to male norms,”²⁴⁷ Doe alleges that Hagenbeck and Rapp failed to uphold their duties to protect cadets against sexual assault.²⁴⁸ Doe points to a rash of specific instances of gender discrimination, often tacitly endorsed by faculty.²⁴⁹ Doe claims that this cycle is perpetuated in part because only 15% of cadets were female and because “West Point has been unwilling to increase the number of female cadets in each entering class, despite having enough qualified candidates to do so.”²⁵⁰ Finally, Doe refers to the Administration's substandard handling of her own attack as a manifestation of Hagenbeck's and Rapp's failures.²⁵¹

There is quantifiable evidence to support Doe's claim. For example, for the time Doe was a cadet, the Defense Department “cited the academy for failing to provide clear and complete information on how to report a sexual assault” and “determined that West Point failed to provide required training to all cadets, thus falling short of DoD's minimum standards, and lacked an institutionalized comprehensive sexual assault prevention and response curriculum.”²⁵² And

246. *Id.* Cadets who resign from West Point before beginning their third year do not have an obligation to enlist, see 10 U.S.C. § 4348; 32 C.F.R. § 217.4(d), nor do they have to pay for their time in school, see Cadet Oath, 10 U.S.C. § 4348.

247. Second Amended Complaint, *supra* note 239, at 3.

248. *Doe v. Hagenbeck*, 98 F.Supp.3d 672, 677 (S.D.N.Y. 2015) (“10 U.S.C. § 4361 provides that the Secretary of Defense and the Superintendent of West Point are to “prescribe a policy on sexual harassment and sexual violence applicable to the cadets and other personnel of the Academy”, and provide “required training on the policy for all cadets and other Academy personnel”. Further, the Superintendent of West Point is given a statutory responsibility to conduct yearly assessments of the effectiveness of policies, training, and procedures intended to reduce sexual harassment and sexual violence. 10 U.S.C. § 4361(c). The Superintendent of West Point is also required to conduct an annual evaluation of the number of sexual assaults, rapes, and other offenses involving cadets or West Point faculty and report these statistics to the Department of Defense (“DOD”). 10 U.S.C. § 4361(d).”).

249. Second Amended Complaint, *supra* note 239, at 3–4 (citing instances of sexual chants around campus, derogatory comments made towards women and discussions of sexual exploits ignored or encouraged by faculty members.).

250. *Id.* at 3.

251. See generally *id.*

252. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Plaintiff-Appellee,

“[a]ccording to 61% of female cadets who chose not to report, concerns about harm to their reputations and standing at West Point were reasons they did not report.”²⁵³ These statistics suggest Hagenbeck’s and Rapp’s leadership over West Point’s Corps of Cadets did not adequately protect female cadets’ ability to serve equally and without fear of assault.

C. Procedural History and The Trial Court’s Decision

In her original and first amended complaints, Doe put forth causes of action under the Federal Tort Claims Act (FTCA), the Tucker Act, and the Fifth Amendment’s Due Process and Equal Protection Clauses. The Defendants filed a motion to dismiss on all counts. Judge Hellerstein of the Southern District of New York ruled in favor of the defendants on all but the equal protection claim, directing Doe to amend her complaint to reflect the ruling, which she did.²⁵⁴

Doe’s FTCA claims were dismissed because Hagenbeck’s and Rapp’s discretion in carrying out their duties shielded them from liability.²⁵⁵ The FTCA grants a private right of action for damages when a government agent or employee, acting within the scope of his or her employment, causes an injury.²⁵⁶ However, there is a statutory exception that bars claims “based upon [a government official’s] exercise or performance or the failure to exercise or perform a *discretionary function*.”²⁵⁷ Because Hagenbeck and Rapp were acting *within their discretion* in implementing the Army’s sexual assault policies throughout West Point, Judge Hellerstein ruled that the two Generals fell under the exception.²⁵⁸

The Tucker Act²⁵⁹ deals with claims against the government “for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.”²⁶⁰ If the recovery is over \$10,000, the U.S. Federal Court of Claims has exclusive jurisdiction; if the claim is for under \$10,000, the Court of Claims and District Court have concurrent jurisdiction.²⁶¹ Doe claimed that her Oath of Allegiance to serve upon acceptance to West Point created an “educational contract.”²⁶² Though the Oath did constitute a contract,²⁶³ Judge

Doe v. Hagenbeck, 870 F.3d 36, at *8 (2d Cir. 2017), https://www.aclu.org/sites/default/files/field_document/2016.3.17_doe_-_west_point_amicus_brief_final_refiled.pdf (citing Department of Defense, SAPR, Annual Report on Sexual Harassment and Violence at the Military Service Academies, Academic Program Year 2010-2011, 33, 24, 28 (2011), <http://bit.ly/22dG4MD>).

253. *Id.* at 8–9 (citing DEFENSE MANPOWER DATA CENTER, 2010 SERVICE 8 ACADEMY GENDER RELATIONS SURVEY 48, Table 20 (2010), <http://bit.ly/21jGf3e>.)

254. Doe v. Hagenbeck, 98 F.Supp.3d 672, 692 (S.D.N.Y. 2015).

255. *See id.* at 690.

256. 28 U.S.C. § 1346(b)(1).

257. 28 U.S.C. § 2680(a) (emphasis added).

258. *See Doe*, 98 F.Supp.3d at 690.

259. 28 U.S.C. § 1346.

260. *Id.* § 1346 (a)(1).

261. *Id.* § 1346 (a)(2).

262. *Doe*, 98 F.Supp.3d at 692.

263. *Id.* (“An educational services contract can be the basis of such a claim. The United States, itself,

Hellerstein held that because “[t]he government did not stop providing Doe with an education, room, and board,” the government did not in fact fall short of its contractual obligation.²⁶⁴

In 1971, the Supreme Court held in *Bivens v. Six Unknown Agents*²⁶⁵ that a violation of one’s Fourth Amendment rights by government agents gives the victim an implied cause of action for damages. A *Bivens* claim “employs the tort principle of proximate causation.”²⁶⁶ However in this case, “the actions taken by Hagenbeck and Rapp were too attenuated from Doe’s rape to be a proximate cause of her injuries,”²⁶⁷ compelling the Due Process claim’s dismissal.

But, in Judge Hellerstein’s words, “Doe’s equal protection claim is different.”²⁶⁸ The court found that *Feres* did not bar a finding of monetary action because the alleged actions were too unrelated to military service. Having cleared that hurdle, the opinion addresses the merits of the claim: Quoting Justice Ginsberg’s opinion in *United States v. Virginia*,²⁶⁹ the Court concluded, “Doe’s equal protection claim is that she was denied her constitutionally-protected right to an ‘equal opportunity to aspire, achieve, participate in and contribute to society based on [her] individual talents and capacities.’”²⁷⁰ Given the substantial facts Doe alleged,²⁷¹ Doe sufficiently stated a cause of action: if true, these facts indicate “Hagenbeck and Rapp were indifferent to their constitutional and statutory obligations to foster equal conditions and equal protection between male and female cadets.”²⁷² Subsequently, the Court concluded that Doe’s “equal protection claim . . . ha[d] sufficient legal basis to withstand Defendants’ motion to dismiss.”²⁷³

D. The Second Circuit’s Reversal and Remand

More than two years after the trial court’s ruling, a Second Circuit panel ruled on the government’s appeal.²⁷⁴ Resting heavily on three Supreme Court cases,

has sued prior cadets successfully when they failed to reimburse the United States in accordance with the contract’s terms” (citing *United States v. China*, 2007 WL 775615 (D.S.C. Mar. 8, 2007); *United States v. Chrzanowski*, 358 F.Supp.2d 693 (N.D.Ill. 2005); *O’Rourke v. Dep’t of Air Force*, 2005 WL 3088611 (N.D. Ohio Nov. 16, 2005)).

264. *Id.* Instead, Judge Hellerstein concluded that the violation is a “claim sounding in tort,” which is explicitly prohibited by the Tucker Act. *Id.* (citing 28 U.S.C. § 1346 (a)(2)).

265. 403 U.S. 388.

266. *Doe*, 98 F.Supp.3d at 687 (citing *Higazy v. Templeton*, 505 F.3d 161, 175 (2d Cir. 2007)).

267. *Id.*

268. *Id.*

269. 518 U.S. 515 (1996) (adjudicating the constitutionality of the Virginia Military Institute’s single-sex student body under the Equal Protection Clause).

270. *Doe*, 98 F.Supp.3d at 687 (citing *Virginia*, 518 U.S. at 532).

271. See *supra* notes 247–249 and accompanying text.

272. *Doe*, 98 F.Supp.3d at 688.

273. *Id.* at 689.

274. See *Doe v. Hagenbeck*, 870 F.3d 36 (2d Cir. 2017).

Chappell v. Wallace,²⁷⁵ *United States v. Shearer*,²⁷⁶ and *United States v. Stanley*,²⁷⁷ the panel held that Doe's injuries did arise from her military service and were thus barred by *Feres*.²⁷⁸

First, the panel noted the Supreme Court's explicit cautioning against extending *Bivens* remedies, as laid out in *Chappell*: "The Court, in *Bivens* and its progeny, has expressly cautioned, however, that such a remedy will not be available when 'special factors counselling [sic] hesitation' are present."²⁷⁹ In *Chappell*, the Court found two such factors: *first*, Congress's decision to explicitly exclude military-based injuries in the FTCA's language.²⁸⁰ *Second*, that "[t]he special nature of military life – the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted officers and personnel – would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."²⁸¹ In *Shearer*, the Court reaffirmed this principle.²⁸² The *Stanley* Court, in adjudicating yet another analogous claim, held that by the same reasoning such a suit "require[s] abstention."²⁸³

Based on this precedent, the court read the complaint, as "lead[ing] ineluctably to the conclusion that Doe cannot maintain her *Bivens* claim."²⁸⁴ The majority was convinced by Doe's status as a cadet, the nature of West Point itself, and context surrounding the alleged injuries:

The allegations in Doe's Amended Complaint do not merely invite, but require a most wide-ranging inquiry into the commands of Lieutenant General Hagenbeck and Brigadier General Rapp. Specifically, as they relate to these defendants' conduct, Doe's allegations center on the implementation and supervision of allegedly inadequate and harmful training and education programs relating to sexual assault and harassment; on the alleged failure to provide properly both for the report and investigation of sexual assault claims, and for the support of cadets who are assaulted; on the alleged lack of sufficient numbers of female faculty and administrators at West Point and on the failure to recruit female cadets; on the allegedly inadequate punishment meted out not only to perpetrators of sexual violence but also to those who engage in misogynistic chants, slurs and comments; and, most broadly, on the assertedly culpable tolerance of a hostile culture toward women at West Point. Adjudicating such a money damages claim would require a civilian court to engage in searching fact-finding about Lieutenant General

275. 462 U.S. 296 (1983).

276. 473 U.S. 52 (1985).

277. 483 U.S. 669 (1987).

278. *See generally Doe*, 870 F.3d 36.

279. *Chappell*, 462 U.S. at 298 (internal citations omitted).

280. *See id.* at 304.

281. *Id. See also id.* ("Taken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against [other military personnel].").

282. *See United States v. Shearer*, 473 U.S. 52, 55–59 (1985).

283. *United States v. Stanley*, 483 U.S. 669, 683 (1987).

284. *Doe v. Hagenbeck*, 870 F.3d 36, 44 (2d Cir. 2017).

Hagenbeck and Brigadier General Rapp’s “basic choices about the discipline, supervision, and control” of the cadets that they were responsible for training as future officers. In such circumstances, we conclude that *Chappell* and *Stanley* squarely foreclose Doe’s *Bivens* claim.²⁸⁵

Next, the majority addressed and disposed of Doe’s counterarguments head on, primarily Doe’s reliance on *United States v. Virginia (VMI)*,²⁸⁶ which mandated the Virginia Military Institute, a state-run military college, open its doors to female students. The Second Circuit held that “VMI is simply not germane to the remedial inquiry” because Hagenbeck and Rapp argued only that “the remedy of money damages is unavailable to members of the armed services for violations of those rights where Congress has not acted and the incident-to-service rule is satisfied” rather than moving to dismiss the case based on equal protection defenses. Thus, the court found *VMI* to be inapposite.²⁸⁷

Lastly, the court tackled the argument of whether Doe’s injuries arose incident to her military service, as well as her—and the dissent’s—reliance on *Taber v. Maine*.²⁸⁸ In *Taber*, one off-duty serviceman injured another while driving drunk.²⁸⁹ But, according to the *Doe* panel, *Taber* turned on “whether a person in *Taber*’s position would be entitled to workers’ compensation benefits on the theory that when injured he was engaged in activities that ‘fell within the scope of [his] military employment.’”²⁹⁰ Thus, the *Doe* court viewed *Taber* as inapposite because it applied only to cases in which the servicemembers would not otherwise be entitled to damages under the FTCA if the incident occurred in civilian life (as servicemembers driving off-duty and off-base would not be entitled to damages on FTCA claims, whereas servicemembers assaulted on a base while on duty would be).²⁹¹

Lastly, the *Doe* panel argued that *Taber* didn’t apply because that case lacked specific indicia of command discretion. The *Taber* panel held that “the incident-to-service rule (regardless of workers’ compensation considerations) is properly invoked when adjudicating the claim of a service member would require ‘commanding officers . . . to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions.’”²⁹² The *Doe* majority felt that *Taber* did not apply because unlike the plaintiff in *Taber*, Jane Doe would need to call military officials as witnesses and have a civilian court and jury adjudge principles of military wisdom.²⁹³

285. *Id.* (internal citations omitted).

286. 518 U.S. 515 (1996).

287. *Doe*, 870 F.3d at 46–47. Seeking power in numbers, the court also noted that its conclusion is “consistent with the recent decisions of at least two other circuits,” citing the two most recent challenges to *Feres* adjudicated and dismissed by sister circuits—*Lebron v. Rumsfeld*, 670 F.3d 540, 551 (4th Cir. 2012), and *Klay v. Panetta*, 758 F.3d 369, 375 (D.C. Cir. 2014).

288. 67 F.3d 1029 (2d Cir. 1995).

289. *Id.* at 1032.

290. *Doe*, 870 F.3d at 47 (citing *Taber v. Maine*, 67 F. 3d 1029, 1050 (2d Cir. 1995)).

291. *Id.*

292. *Taber v. Maine*, 67 F. 3d 1029 (2d Cir. 1995) (quoting *United States v. Shearer*, 473 U.S. 52, 58 (1985)).

293. *Doe*, 870 F.3d at 48.

E. Judge Chin's Dissent

Judge Denny Chin dissented from the panel's holding, resting primarily on the nature of the incident and the circuit's precedent under *Taber*.

First, Judge Chin spoke on the nature of Equal Protection claims broadly. The Equal Protection clause, he wrote, does not just protect a minority student's acceptance or matriculation to a university "but to the continued treatment of students after they have been admitted"²⁹⁴; such principles, he explains, have been applied to the military and military institutions.²⁹⁵ Judge Chin cites several Army "regulations [that] address the issue of gender discrimination and sexual harassment."²⁹⁶ Therefore, he believed that "Doe was entitled, under the Fifth Amendment and the Army's own regulations, to an environment free from gender discrimination and sexual harassment."²⁹⁷

Next, the dissent attacked *Feres's* application via two prior Second Circuit cases: *Taber* and *Wake v. United States*.²⁹⁸ In *Taber*, a drunken sailor on liberty collided with another sailor in an automobile accident.²⁹⁹ Upon hearing an FTCA claim related to the accident, the Second Circuit concluded "the link between *Taber's* activity when he was injured and his military status is too frail to support a *Feres* bar."³⁰⁰ In *Wake*—adjudicated the following year—an enlisted Navy reservist and member of the reserve officer training corps ("ROTC") was injured in another automobile accident; her car, driven by a Marine Corps sergeant, was taking her and other ROTC students back from their precommissioning physical exam, a requisite step to become an officer.³⁰¹ Importantly, *Wake* held that courts ought to examine "the totality of the germane facts."³⁰² "In examining whether a service member's injuries were incurred 'incident to service,' the courts consider various factors, with no single factor being dispositive"³⁰³:

[T]he relationship of the activity to the individual's membership in the service, as well as the location of the conduct giving rise to the underlying tort claim . . . Also relevant is whether the activity is limited to military personnel and whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service.³⁰⁴

294. *Id.* at 54 (Chen, J., dissenting) (citing *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009)).

295. *Id.* (Chen, J., dissenting) (citing *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *VMI*, 518 U.S. at 535–36, 547–54; *Schlesinger v. Ballard*, 419 U.S. 498 (1975)).

296. *Id.* 54–55.

297. *Id.* at 55.

298. 89 F.3d 53 (2d Cir. 1996).

299. 67 F.3d 1029 (2d Cir. 1995).

300. *Id.* at 1050.

301. *Wake v. United States*, 89 F.3d 53, 56 (2d Cir. 1996).

302. *Id.* at 57.

303. *Id.* at 58.

304. *Id.* at 58.

As Judge Chin applied the facts of the case,³⁰⁵ he found *Feres* inapplicable.

First, as to the activities immediately preceding Doe's rape, her ultimate injury, she was engaged in purely recreational activity: she was out for an evening walk on a college campus, after curfew, with another student who was a friend. Second, as to her broader activities at West Point, she was a student attending college: she was taking classes, participating in extracurricular activities, and learning to grow up and to be a self-sufficient and healthy individual. . . . There was "nothing characteristically military" about what she was doing, and her injuries did not arise out of military employment.³⁰⁶

Additionally, Judge Chin believed that "the 'special factors counseling hesitation' in the intramilitary immunity cases" were not implicated:

First, Doe's claims do not implicate "delicate questions involving military discipline." Her claims do not call into question "the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." The actions and decisions of the individual defendants being challenged here do not implicate, except perhaps in the most abstract sense, military discipline or military judgment or military preparation. . . . Second, the "federal system of military death and disability benefits" established by Congress for injuries sustained by military personnel incident to service, apparently is not available to Doe. . . . Third, the district court's decision to permit Doe to proceed with her federal constitutional claim does not implicate the Court's concern that a "uniform federal scheme" not be displaced by "the contingencies of local tort law."³⁰⁷

And finally, Judge Chin offered compelling distinctions of Doe's allegations and the cases the majority relied upon, ranging from the type and nature of the incident to remedies available to complainants in those cases.³⁰⁸ Ultimately, however, this reasoning could not swing a second vote on the panel.

F. Why Doe Matters

Had Judge Hellerstein's ruling held up, it would have been an important development for servicewomen everywhere, the first significant chink in the *Feres* doctrine's armor. The Circuit court's reversal and remand, however, only serves to broaden *Feres'* reach.

As in cases cited above,³⁰⁹ whether to apply *Feres* remains a threshold issue. Specifically, *Feres'* applicability to a rape on a school campus—a blatantly non-military action—presents the opportunity to recast what conduct arises out of one's military service. This is especially so because "the primary reason for exercising judicial restraint with cases concerning the military is 'the need to

305. Which, on a defendant's motion to dismiss, are presumed true. *Doe v. Hagenbeck*, 870 F.3d 36, 39 n.1 (2d Cir. 2017) (citing *Starr Int'l Co. v. Fed. Reserve Bank*, 742 F.3d 37, 40 (2d Cir. 2014)).

306. *Id.* at 59 (Chin, J., dissenting).

307. *Id.* at 57 (Chin, J., dissenting) (citations omitted).

308. *Id.* at 58–61 (Chin, J., dissenting). For example, Judge Chin noted the other service academy-based cases whose plaintiffs, in his opinion, sustained injuries far more related to their military service.

309. *See supra* Part II.D.iv.a.

preserve the military disciplinary structure and prevent judicial involvement in sensitive military matters.”³¹⁰

But *Hagenbeck’s* application of *Feres* to the conduct in question—the hostile and gender-discriminatory environment—was adjudged first and foremost by its military context rather than the nature or purpose of the incident giving rise to the cause of action. A purposivist reinterpretation looking primarily at the gendered treatment of those involved—as Judges Chin and Hellerstein saw it—would pry open the door for female servicewomen in other contexts who can similarly plead gender discrimination or sexual assault without having the claim be barred simply because it transpired in a military setting.

Instead, the force and reach of the bar only grew, as the Second Circuit held that the relevance of the military context trumps other factors. *Doe* is important as the Court was presented with an opportunity to clarify and narrow *Feres’s* reach but instead made it more difficult to achieve justice for aggrieved service members. Thus, in essence “[t]he law demanding a woman’s entry through the schoolhouse gates . . . abandon[s] its protection beyond the gates[.]”³¹¹ As Judge Chin concluded in dissent, “While we do not, of course, have the authority to overrule *Feres*, we should not be extending the doctrine. By holding that *Doe’s* injuries sustained as a cadet incident to being a student are barred as injuries incident to military service, the majority does precisely that.”³¹²

CONCLUSION

American women have long fought for the right to fight for their country. They have continued to break glass ceiling after glass ceiling simply for the chance to risk their lives defending both genders’ freedoms.³¹³ This fact alone should compel us to ask what we are doing to help safeguard these soldiers of misfortune.

This article began by tracking women’s limited—but growing—history in the military, noting the different milestones they have achieved along the way. The article next turned to military sexual assault itself, discussing its prevalence, national security implications and important, how assault is prosecuted—or not. The prosecution, as detailed, has untold obstacles to seeing perpetrators brought to justice.

Next, the article looked at remedies, both realized and potential: first, detailing a few affirmative steps the military has taken to bring women to equal standing in the military at large. Then, the essay reviewed certain changes to the military justice system itself, which has shown some marked improvements. But these changes do not in any way suggest that the push is over: unfortunately, *much* work remains undone for women to fully gain equal footing in the military. Part of this work includes a more thorough and earnest prosecution of sexual assault,

310. *Doe v. Hagenbeck*, 98 F. Supp. 3d 672, 687–88 (S.D.N.Y. 2015) (citing *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996)).

311. *Id.* at 689.

312. *Doe*, 870 F.3d at 61–62 (2d Cir. 2017) (Chin, J., dissenting) (citation omitted) (citing *Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) (“While lower courts are bound by the Supreme Court’s decision in *Feres*, they are hardly obliged to extend the limitation . . .”).

313. See *supra* Part I. In Pursuit of Social Change: Women’s Pursuit of Military Equality

which plagues women at nearly five times the rate of men. This article has tried to proffer a few suggestions as to how to sufficiently tinker with the legal mechanisms such that victims may finally see their attackers brought to justice.

* * * * *

To be sure, the march for women to gain genuine equality in the eyes of our armed forces is, at best, a slog. It can and will deplete and exasperate the most perseverant and steadfast among us. This is no different for those aiming to see the day in which a pervasive societal norm is changed. The yardstick for such progress is measured in generations, if not centuries. As Dr. King said, the “arc of the moral universe is long.”

Much work remains to keep this arc ever-bending toward justice—in this case, women’s equality in the military. This essay has aimed to cover one niche of this multi-faceted battle, military sexual assault, and I simultaneously encourage others to take up the mantle in other similarly important realms.

Make no mistake, the suggestions discussed—and others that will arise as needed—will be every inch as hard to pass, if not harder, than those that have come before them. Not only are prevailing attitudes about women’s inferior suitability for military service ever present, but also those already reluctant to change will undoubtedly take the attitude that those fighting for progress have already gotten what they sought, being ever more indignant at demand for further reform. This intractability simply cannot deter those in pursuit of change because without them, progress will always remain at arm’s length. What’s more, if these corrections languish unenacted en masse, we tacitly permit the further perpetration of these attacks and, more broadly, inhibit the development we seek., by letting these status-driven crimes go unabated, we only encourage the cycle of subservient attitudes and perpetuate wrongdoings including but not limited to sexual assault.

Let us all begin bending history’s arc by standing up for the rights of those who risk their lives protecting our way of life.