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***FERES* AND THE PRIVACY ACT: ARE MILITARY PERSONNEL RECORDS PROTECTED?**

ERIC JUERGENS[†]

INTRODUCTION

A book author is permitted to observe the training of a group of Navy aviators as they learn the intricacies of flying a high-powered fighter jet.¹ During this training, one of the pilots, Mary Louise commits serious errors, including aligning her aircraft with the wrong runway and causing another pilot to take evasive action while flying in formation.² The Navy launches an investigation into whether Mary Louise should continue to fly, producing hearings and documentary evidence, and ultimately, Mary Louise is allowed to keep her position.³ The book this author later releases quotes from the negative reports on Mary Louise that the Navy had permitted him to see.⁴ Mary Louise sues the Navy for violations of the Privacy Act for releasing her private information without her consent.⁵ This may seem like a fairly obvious and egregious violation of the Privacy Act, but the inquiry is not nearly that simple. Indeed, she may not even be able to bring the suit because she is a member of the United States Armed Forces.⁶

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¹ See *Cummings v. Dep't of the Navy*, 279 F.3d 1051, 1053 (D.C. Cir. 2002). This case is discussed in more detail below. See discussion *infra* Part II.A.2.

² See Brief for Appellee at 2, *Cummings*, 279 F.3d 1051 (Nos. 00-5348, 98-1183).

³ See *Cummings*, 279 F.3d at 1052-53.

⁴ See *id.* at 1053.

⁵ See *id.* The Privacy Act, as discussed *infra* Part I.B, essentially states that an agency cannot disclose any record without the written consent of the individual to whom the record pertains. 5 U.S.C.A. § 552a(b) (West 2011).

⁶ Her claim may be barred because of the *Feres* doctrine, which is discussed in great detail below. The *Feres* doctrine bars claims by members of the military

The Privacy Act protects individuals from the release of confidential records by the United States government without that person's consent.⁷ Not everyone, however, is so protected. The Court of Appeals for the Eighth Circuit in *Uhl v. Swanstrom* barred Privacy Act claims by members of the military,⁸ while the Court of Appeals for the District of Columbia in *Cummings v. Department of the Navy* allowed such a claim.⁹ This Note suggests that, upon close scrutiny, these two seemingly irreconcilable decisions are actually in accord with each other and in harmony with the congressional intent of the Privacy Act.

The United States Armed Forces rely on an all-volunteer force to accomplish the military missions of this nation and protect its citizens from harm at home and abroad.¹⁰ The military has long been subject to a system of justice different from that which the general citizens are subject.¹¹ This alternate system of justice governed soldiers during World War I and World War II, even though many of them were drafted into service.¹² In response to the astonishing number of courts-martial during World War II, Congress passed the Uniform Code of Military Justice ("UCMJ").¹³ This legislation, implemented through executive orders, formed the Manual for Courts-Martial ("MCM") and was a major revision of the law governing the military.¹⁴ The preamble to the MCM states its objectives: "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

against the United States government for various torts and other causes of action. See *Feres v. United States*, 340 U.S. 135, 146 (1950); *infra* Part I.A.

⁷ 5 U.S.C.A. § 552a(b).

⁸ See 79 F.3d 751, 755 (8th Cir. 1996).

⁹ See 279 F.3d 1051, 1052 (D.C. Cir. 2002).

¹⁰ See *Military Justice Fact Sheets: The Military Justice System*, U.S. MARINE CORPS, http://www.marines.mil/unit/judgeadvocate/Documents/JAM/Mil_Justice_Materials/Resources/MJFACTSHTS.htm#Military%20Justice (last visited Mar. 26, 2011) [hereinafter U.S. MARINE CORPS].

¹¹ See *id.*

¹² *Id.* There were approximately two million courts-martial during World War II. *Id.*

¹³ *Id.*; see also 10 U.S.C. §§ 801–946 (2006 & Supp. I 2010).

¹⁴ See U.S. MARINE CORPS, *supra* note 10.

the United States.”¹⁵ Since the military is governed by this alternate justice system, the question thus arises whether members of the military, or the military branches themselves, are subject to more general civil laws such as the Federal Torts Claim Act (“FTCA”),¹⁶ *Bivens* claims,¹⁷ and the Privacy Act.¹⁸

Despite the waiver of sovereign immunity in the FTCA, the Supreme Court prohibited members of the military from bringing claims under the FTCA. This bar began in *Feres v. United States*,¹⁹ where, as explored below, the Court held, in a ruling now known as the *Feres* doctrine, that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”²⁰ After *Feres*, the Supreme Court extended the *Feres* doctrine beyond its original scope, and the rationales behind the doctrine evolved. Claims for injuries that “arise out of or are in the course of activity incident to service” are prohibited.²¹ Such a service-related claim must, according to *United States v. Johnson*, be barred because it “necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.”²²

Over the next few decades, the *Feres* doctrine expanded beyond personal injury claims and became relevant in the context of privacy. In 1974, amidst concerns over an increased threat to personal privacy because federal agencies increasingly used computers to store and retrieve information, Congress enacted the Privacy Act.²³ This Act compels notice of systems of records, requires the opportunity to amend inaccurate records,

¹⁵ JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES pt. I, at 1 (2008 ed.), available at <http://www.jag.navy.mil/documents/mcm2008.pdf>.

¹⁶ 28 U.S.C. § 2671 (2006).

¹⁷ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

¹⁸ 5 U.S.C.A. § 552a (West 2011).

¹⁹ 340 U.S. 135 (1950).

²⁰ *Id.* at 146.

²¹ *Id.*

²² 481 U.S. 681, 691–92 (1987).

²³ See John F. Joyce, *The Privacy Act: A Sword and a Shield But Sometimes Neither*, 99 MIL. L. REV. 113, 118 (1983). There was also unease about the increasing computerization of sensitive personal data and the potential for abuse by the government, including possible secret systems of records. See *id.*

and protects the “individual’s interest in limiting the government’s acquisition and disclosure of personal information.”²⁴

Currently, there appears to be a circuit split on whether the *Feres* doctrine is applicable to claims based on violations of the Privacy Act. In *Uhl v. Swanstrom*, the Eighth Circuit determined that the *Feres* doctrine did apply to the Privacy Act, barring the claims asserted.²⁵ Affirming the district court’s determination, the court stated that it was “equally reluctant, yet legally bound, to hold that plaintiff’s claims in the present case are non-justiciable under the *Feres* doctrine.”²⁶ Six years later, in *Cummings v. Department of the Navy*,²⁷ the D.C. Circuit held that the *Feres* doctrine was not a bar to Privacy Act claims.²⁸ The court held that it did not have to “‘enlarge’ by any stretch the Privacy Act’s purview in order for the statute to avoid the effects of the *Feres* doctrine.”²⁹ The court indicated that none of the rationales enunciated by the Supreme Court, such as the effect on military discipline and decisionmaking, were implicated in a lawsuit under the Privacy Act.³⁰ The Eastern District of New York recently highlighted this issue in *MacQuill v. Killian*,³¹ where the court documented the apparent split in circuits and sided with the D.C. Circuit, allowing Privacy Act claims notwithstanding the *Feres* doctrine.³²

This Note contends that *Uhl* and *Cummings* are actually in harmony, and therefore, the *Feres* doctrine should apply to bar some claims under the Privacy Act, but not others. Claims by military personnel under the Privacy Act should be barred when the records are released solely within the military structure because the release is truly “incident to service” and invokes the rationales of the *Feres* doctrine. In cases where the military

²⁴ *Id.* at 126–27.

²⁵ 79 F.3d 751, 755 (8th Cir. 1996). *Uhl* claimed violations of due process and equal protection under 42 U.S.C. § 1983, violations of the Privacy Act, 5 U.S.C. § 552a, and a pendent state law claim under the Federal Tort Claims Act. *Id.* at 752.

²⁶ *Id.* at 755 (adopting the rationale of the district court).

²⁷ 279 F.3d 1051 (D.C. Cir. 2002).

²⁸ *See id.* at 1058.

²⁹ *Id.* at 1055.

³⁰ *See id.* at 1055–56. For an extensive description of the rationales underlying the doctrine see discussion *infra* Part I.A, II.B.

³¹ No. 07-CV-1566 (E.D.N.Y. Mar. 25, 2008).

³² *See id.* at 10–12.

releases a serviceperson's records to persons outside the military, however, the rationales of *Feres* are not applicable and should not bar recovery. Part I explores the background of the *Feres* doctrine and its progeny and discusses the Privacy Act in general. Part II highlights the two circuit court decisions, *Uhl v. Swanstrom*³³ and *Cummings v. Department of the Navy*³⁴ and their apparent conflict. This Part also analyzes the rationales that underlie the doctrine and the normative arguments for and against the continued use of the doctrine and its expansion to Privacy Act claims. Part III proposes that the Supreme Court consider a new test. First, the Court should look at whether the release of records occurs incident to service and should focus on the recipient of the released information. If the information protected by the Privacy Act was released within the military command structure, and thus subject to the rules and regulations of the military, the claims should be barred. But, if the release is made to an outside civilian party, then the claims should be allowed. This approach would protect military discipline and decisionmaking while still giving plaintiffs a remedy in appropriate cases.

I. HISTORY AND DEVELOPMENT OF THE *FERES* DOCTRINE AND THE PRIVACY ACT

The *Feres* doctrine is a major aspect of the law governing the military, barring many tort claims.³⁵ The *Feres* doctrine has just begun to intersect with the Privacy Act, an act that seeks to protect individual's records.³⁶ Part A discusses sovereign immunity and the wide-scale waiver by Congress in the FTCA in general. It then examines the evolution of the *Feres* doctrine from a principle that barred some claims by military personnel under the FTCA to one that withdraws nearly all judicial inquiry in the area. Finally, this Part discusses the arguments that the Court has made in support of and against the doctrine, earning

both the approval and condemnation of the doctrine by

³³ 79 F.3d 751 (8th Cir. 1996).

³⁴ 279 F.3d 1051.

³⁵ See *Feres v. United States*, 340 U.S. 135, 146 (1950).

³⁶ See 5 U.S.C.A. § 552a (West 2011).

commentators. Part B offers an overview of the Privacy Act, its various provisions, and its civil and criminal remedies.

A. *The Development of the Feres Doctrine*

The United States' doctrine of sovereign immunity has its roots in English law, which prohibited suit against the King without his consent.³⁷ In *Chisholm v. Georgia*,³⁸ the Supreme Court allowed for suits against states, rejecting the English notion of sovereign immunity.³⁹ The Eleventh Amendment was adopted in response to *Chisholm* and effectively overturned the decision.⁴⁰

The Eleventh Amendment, however, is silent on whether the United States is immune from suit. The Supreme Court, in *Cohens v. Virginia*,⁴¹ interpreted the Eleventh Amendment and the doctrine of sovereign immunity to also bar suits against the United States.⁴² As a result of this immunity, Congress required individuals to petition Congress for a private bill that would

³⁷ See Christopher G. Froelich, Comment, *Closing the Equitable Loophole: Assessing the Supreme Court's Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs*, 35 SETON HALL L. REV. 699, 701–02 (2005); see also Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 7 (2007). See generally Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963) (discussing the concept of sovereign immunity and its development from English law).

³⁸ 2 U.S. 419 (1793), superseded by U.S. CONST. amend. XI.

³⁹ *Id.* at 472, 479 (upholding federal jurisdiction of a suit by an individual against a state); Brou, *supra* note 37.

⁴⁰ See Brou, *supra* note 37. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The Eleventh Amendment was extended in *Hans v. Louisiana* to confer sovereign immunity on the states from suit by a citizen of the state in federal court even when the claim is based on federal law or the Constitution. See 134 U.S. 1, 15, 20–21 (1890). The current interpretation of the Eleventh Amendment by the Supreme Court would require it to read:

No state may be sued in federal court by any person or foreign government unless the state consents to the suit or Congress has clearly and unequivocally abrogated this immunity by exercise of its powers under section 5 of the Fourteenth Amendment. For purposes of this amendment a state official is not a state unless the remedy sought against a state official would require the state to pay compensation for past actions.

CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 122 (3d ed. 2009).

⁴¹ 19 U.S. 264 (1821).

⁴² See Brou, *supra* note 37; see also *Cohens*, 19 U.S. at 411–12.

provide redress from the federal government.⁴³ This process eventually proved to be inadequate because of the volume of claims received.⁴⁴ Finally, Congress enacted the FTCA in 1946 and effectively waived sovereign immunity for a wide variety of tort claims.⁴⁵ In short, the current version of the FTCA provides that “[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual in like circumstances, but shall not be liable for . . . punitive damages.”⁴⁶

The relationship between the military and the United States government’s liability under the FTCA was first examined in *Brooks v. United States*.⁴⁷ In that case, Brooks had been riding in an automobile, which was struck by an Army truck driven by a civilian employee.⁴⁸ Brooks and his father were seriously injured, and his brother was killed.⁴⁹ The government contended that recovery should be barred because Brooks and his brother were in the armed services at the time of the accident.⁵⁰ In this case of first impression, the Court rejected the government’s interpretation of the FTCA and held that the brothers could recover because they had been off-duty, on leave, and in a civilian automobile at the time the accident occurred.⁵¹ The Court, however, noted that “[w]ere the accident incident to the Brooks’ service, a wholly different case would be presented.”⁵²

The Court considered such a “wholly different case” less than a year later. That case, *Feres v. United States*, established the exclusion of claims by members of the military.⁵³ *Feres* consolidated three cases brought under the FTCA.⁵⁴ In one case,

⁴³ See R. Matthew Molash, Note, *If You Can’t Save Us, Save Our Families: The Feres Doctrine and Servicemen’s Kin*, 1983 U. ILL. L. REV. 317, 319–20.

⁴⁴ See *id.* at 320 (discussing the Court of Claims and the development of the private bill process).

⁴⁵ See Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 534–35 (1947).

⁴⁶ 28 U.S.C. § 2674 (2006).

⁴⁷ 337 U.S. 49, 50 (1949).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 50–52. The Court had never before confronted a case under the FTCA by a member of the armed forces. See Jon F. Arnold, Note, *Kitowski v United States: Another Military Injury Is Written off as “Incident to Service,”* 23 U. TOL. L. REV. 469, 470 (1992).

⁵² *Brooks*, 337 U.S. at 52.

⁵³ 340 U.S. 135, 146 (1950).

⁵⁴ *Id.* at 136.

the decedent perished in a barracks fire while on duty, and his executrix alleged that the military was negligent for housing him in barracks known to be unsafe due to a defective heating system and for failure to keep a sufficient fire watch.⁵⁵ The second case involved a soldier who underwent surgery and eight months later endured another operation where “a towel 30 inches long by 18 inches wide, marked ‘Medical Department U.S. Army,’ was discovered and removed from his stomach.”⁵⁶ The Plaintiff alleged that the army surgeon negligently left the towel in his abdomen.⁵⁷ The third case alleged that the decedent died “because of negligent and unskillful medical treatment by army surgeons.”⁵⁸

The only question presented to the Court was whether the FTCA extended to injuries that were incurred “incident to . . . service.”⁵⁹ The Court discussed the legislative history of the FTCA and the “long effort to mitigate unjust consequences of sovereign immunity from suit.”⁶⁰ Nonetheless, the Court held, in a ruling now known as the *Feres* doctrine, that “the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”⁶¹

The Court identified three rationales for its decision to exclude claims by members of the military against the U.S. government. The first rationale was based on the theory of double recovery.⁶² The Supreme Court reasoned that a comprehensive system of benefits already existed for members of the military and their families and that allowing suits would

⁵⁵ *Id.* at 136–37 (discussing the *Feres* case).

⁵⁶ *Id.* at 137 (relating the facts of the *Jefferson* case).

⁵⁷ *Id.*

⁵⁸ *Id.* (recounting the facts of the *Griggs* case).

⁵⁹ *Id.* at 138.

⁶⁰ *Id.* at 139. The Court acknowledged that there are not any committee reports or floor debates to aid in the interpretation of the statute. *Id.* at 138. The Court, however, recognized that there was a remedy if they did not properly interpret the statute—Congress could clarify what it meant with a new law. *Id.* Special significance was paid to the fact that “eighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces.” *Id.* at 139. The FTCA does define an employee of the government to include members of the armed forces. 28 U.S.C. § 2671 (2006).

⁶¹ *Feres*, 340 U.S. at 146.

⁶² *See id.* at 140; Brou, *supra* note 37, at 15.

provide a double recovery for successful plaintiffs.⁶³ Essentially, these injuries were better handled by the Veterans' Administration ("VA") compensation system, which is analogous to a no-fault workers' compensation system.⁶⁴ This system provides for "simple, certain, and uniform compensation for injuries or death of those in armed services."⁶⁵

The second rationale the Court discussed was the lack of analogous liability of a private individual.⁶⁶ Here, the Court looked at the language of the FTCA which states that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."⁶⁷ This language presented a problem for plaintiffs because there was no corresponding liability for a private individual, and "no American law . . . has permitted a soldier to recover for negligence, against either his superior officers or the Government."⁶⁸ In addition, even if the term "individual" in the FTCA was defined to include the states, no state allowed for suits by members of its militia.⁶⁹

The third rationale the Court cited was the desire to avoid forcing state law on a federal relationship. The Court reasoned that "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character,'" and thus, if soldiers could sue, state law would be imposed onto that relationship.⁷⁰ As a result, "sheer luck of assignment" in a specific geographical area would determine the recovery a soldier could receive, if any at all, because it would be based on state law.⁷¹ These resulting inconsistencies "would disrupt the

⁶³ See *Feres*, 340 U.S. at 140 ("The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional.")

⁶⁴ *Id.* at 145; see also Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 15–16 (2003) (discussing the "[a]vailability of [v]eterans' [b]enefits and [c]ompensation").

⁶⁵ *Feres*, 340 U.S. at 144.

⁶⁶ *Id.* at 141; see Brou, *supra* note 37, at 16.

⁶⁷ *Feres*, 340 U.S. at 141 (second alteration in original) (quoting 28 U.S.C. § 2674 (2006)).

⁶⁸ *Id.*

⁶⁹ See *id.* at 142.

⁷⁰ *Id.* at 143–44 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947), *superseded by* 42 U.S.C. §§ 2651–2653 (2006)).

⁷¹ Brou, *supra* note 37, at 16; see also *Feres*, 340 U.S. at 142–43.

uniformity necessary to the effective operation of the armed forces.”⁷²

Following *Feres*, the “incident to service” test became the most important aspect in determining whether a military plaintiff could recover against the government. This test is vital because the Court in *Feres* distinguished *Brooks v. United States* on the grounds that “[t]he injury to Brooks did not arise out of or in the course of military duty.”⁷³ Similarly, *Feres* held that The Military Personnel Claims Act⁷⁴ specifically excluded recovery when the injury occurred “incident to their service.”⁷⁵ The “incident to service” test was the most effective way to delineate those claims that could proceed and those that were barred. Thus, “[t]he ‘incident to service’ test . . . provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.”⁷⁶

1. Post-*Feres* Expansion of the Doctrine

After *Feres*, the Court further developed both the “incident to service” test and the *Feres* doctrine. For example, in *United States v. Brown*, the Court allowed members of the military whose injuries were sustained after their departure from the military to recover under the FTCA.⁷⁷ In *Brown*, the Plaintiff injured his leg on active duty, but did not suffer permanent nerve damage until after his discharge when he had surgery at a VA hospital.⁷⁸ The Court applied *Brooks* and allowed the action

⁷² Brou, *supra* note 37, at 16; *see also* Turley, *supra* note 64, at 12–15 (comparing the Court’s desire for uniformity with the non-uniformity it actually creates).

⁷³ *Feres*, 340 U.S. at 146. *Brooks* was the first case decided under the FTCA with military plaintiffs and allowed recovery. *See* Arnold, *supra* note 51. Therefore, to bar recovery in *Feres*, the Court needed either to distinguish or overrule *Brooks*, and it chose to distinguish the injuries in *Brooks* as not “incident to service.” *See Feres*, 340 U.S. at 146.

⁷⁴ 31 U.S.C. § 223b (1952), *repealed by* Act of Aug. 10, 1956, ch. 1041, § 53(b), 70A Stat. 641.

⁷⁵ *Feres*, 340 U.S. at 144 (quoting 31 U.S.C. § 223b).

⁷⁶ *United States v. Stanley*, 483 U.S. 669, 683 (1987).

⁷⁷ 348 U.S. 110, 112–13 (1954) (applying the *Feres* rationales: (1) no analogous liability for private individuals, (2) veteran’s benefits were not made an exclusive remedy by Congress, and (3) the fact that there would be no impact on military discipline because Brown was no longer on active duty or subject to military discipline).

⁷⁸ *See id.* at 110–11.

because the injury was sustained after his discharge, and therefore was not incident to service.⁷⁹

Additionally, the Court expanded the *Feres* doctrine to bar third-party indemnification claims. In *Stencel Aero Engineering Corp. v. United States*, a National Guard member's ejection seat malfunctioned during an in-air emergency, and he was permanently injured.⁸⁰ The Plaintiff received a lifetime disability pension, but sued the United States government and Stencel, claiming that their negligence caused the seat malfunction.⁸¹ Stencel, who had manufactured the seat in accordance with the parameters required by the United States, cross-claimed against the United States, seeking indemnity if it were ordered to pay the Plaintiff.⁸² The Supreme Court applied *Feres* and held "that the third-party indemnity action in this case is unavailable for essentially the same reasons that the direct action by [Plaintiff] is barred by *Feres*."⁸³ These reasons include: (1) the "distinctively federal" nature of the relationship between the United States and its suppliers, (2) a comprehensive compensation system that limits the tort liability exposure of the United States, and (3) the effect on military discipline even though a third party is bringing the claim.⁸⁴

The Supreme Court next considered whether the *Feres* doctrine barred claims for violations of constitutional rights in *Chappell v. Wallace*,⁸⁵ which involved a *Bivens* action⁸⁶ seeking non-statutory damages. Five enlisted men in the United States Navy claimed "that because of their minority race [their officers] failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of

⁷⁹ See *id.* at 113.

⁸⁰ 431 U.S. 666, 667–68 (1977).

⁸¹ See *id.* at 668 (alleging that both parties were liable individually and jointly even though plaintiff was receiving \$1,500 a month in a lifetime pension award pursuant to the Veterans' Benefit Act).

⁸² See *id.*

⁸³ *Id.* at 673.

⁸⁴ See *id.* at 672–73.

⁸⁵ 462 U.S. 296, 297 (1983).

⁸⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971) (allowing for a suit for damages to be brought against federal officials whose actions violated a person's constitutional rights, even though Congress had not authorized such a suit). The Court cautioned that a remedy would not be available if there were "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

unusual severity.”⁸⁷ These actions allegedly resulted in a deprivation of their constitutional rights.⁸⁸ The Court barred their claim because “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 their superior officers.”⁸⁹

In the cases following *Feres*, the Court gradually repudiated many of the rationales for barring claims under the FTCA that it had originally identified. Instead, the Court began to focus on a single rationale: a desire to avoid a judicial intrusion into military matters by calling into question military discipline and decisionmaking.⁹⁰ The Court made this shift explicit in *United States v. Shearer*,⁹¹ where the government was sued for negligent hiring after a soldier, who had previously been convicted of manslaughter in Germany, murdered another soldier.⁹² The Supreme Court acknowledged that while *Feres* was based on a variety of rationales, it was best explained by the

peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and

the extreme results that might obtain if suits under the Tort

⁸⁷ *Chappell*, 462 U.S. at 297.

⁸⁸ *See id.*

⁸⁹ *Id.* at 304. This decision was reaffirmed by the Supreme Court in *United States v. Stanley*, when the Court ruled that a *Bivens*-type monetary damage remedy was unavailable to military plaintiffs because of the special factors that *Chappell* discussed. 483 U.S. 669, 683–84 (1987). The Court applied the “incident to service” to bar the *Bivens* remedy. *Id.* at 684. Here, a further factor was “not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.” *Id.* at 683. The Court in *Stanley* also clarified the types of relief that would be available, saying that their statement that the court had “‘never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service’” had been misinterpreted. *Id.* (quoting *Chappell*, 462 U.S. at 304). Instead, the Court explained that it was referring to injunctive or equitable relief and not money damages. *See id.*

⁹⁰ *See United States v. Shearer*, 473 U.S. 52, 58 (1985); *see also* Brou, *supra* note 37, at 18–20 (discussing the focus on military discipline in a few Supreme Court cases).

⁹¹ 473 U.S. 52 (1985).

⁹² *See id.* at 53–54.

Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.⁹³

Specifically, the Court held:

To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But . . . such "complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments."⁹⁴

Then again, this was not the first time that the Court acknowledged its reluctance to make judicial inquiries into matters of military discipline or decisionmaking. In using *Chappell's* "incident to service" test, the Court said "The special status of the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel."⁹⁵ Likewise, in *Stencel*, the Court acknowledged that a "trial would . . . involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."⁹⁶ The Court did not want to become involved with this potential disruption to the military and its ability to function effectively.

The Court's unwillingness to interfere with military discipline and decisionmaking was prominent in the last two decisions regarding the application of the *Feres* doctrine. In *United States v. Johnson*,⁹⁷ Johnson's widow filed suit under the FTCA alleging that FAA flight controllers acted negligently after her husband's Coast Guard helicopter, under FAA radar control, crashed into the side of a mountain.⁹⁸ The Supreme Court

⁹³ *Id.* at 57 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)).

⁹⁴ *Id.* at 58 (second alteration in original) (quoting *Chappell*, 462 U.S. at 302).

⁹⁵ *Chappell*, 462 U.S. at 303–04.

⁹⁶ *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977).

⁹⁷ 481 U.S. 681 (1987).

⁹⁸ *Id.* at 683. Johnson, a helicopter pilot, was searching for a lost boat. *Id.* at 682–83. "The FAA . . . assumed positive radar control over the helicopter" after inclement weather caused a drop in visibility. *Id.* at 683. "Shortly thereafter, the helicopter crashed into the side of a mountain" and killed all crew members aboard. *Id.*

applied the *Feres* doctrine and barred the claim because the death occurred “incident to service,”⁹⁹ which is “the ‘type[] of claim[] that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.’”¹⁰⁰ The Court stated that the military is a unique, distinctive culture that “must foster instinctive obedience, unity, commitment, and esprit de corps” in order to carry out its missions.¹⁰¹ Discipline is essential to the military accomplishing its missions and involves “duty and loyalty to one’s service and to one’s country.”¹⁰² In fact, “[s]uits brought by service members against the government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.”¹⁰³

Underscoring the disagreement on the doctrine, Justice Scalia dissented and argued that the doctrine should not apply here because a civilian, and not the military, was negligent.¹⁰⁴ He pointed out that the Court discarded its original rationales because they were insufficient to support the doctrine.¹⁰⁵ Instead, the entire *Feres* doctrine rested on the weak “military discipline” rationale.¹⁰⁶

In its final decision on the *Feres* doctrine, the Court confirmed its commitment to abstaining from involvement in military discipline and decisionmaking. Justice Scalia authored the majority opinion in *United States v. Stanley*¹⁰⁷ and used *Feres*

⁹⁹ *Id.* at 692 (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)). The main issue in this case was whether the *Feres* doctrine would apply even though the negligence alleged was on the part of a civilian agency. *Id.* at 682.

¹⁰⁰ *Id.* at 690 (quoting *Shearer*, 473 U.S. 52, 59 (1985)).

¹⁰¹ *Id.* at 691 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 703 (Scalia, J., dissenting).

¹⁰⁵ *Id.* at 698.

¹⁰⁶ *See id.* at 694–700 (articulating the three rationales that were originally relied on in *Feres* and the fourth, military discipline, which was later added by the Court and has increasingly been the rationale relied on).

¹⁰⁷ 483 U.S. 669 (1987). In *Stanley*, the plaintiff “volunteered to participate in a program . . . to test the effectiveness of protective clothing and equipment as defenses against chemical warfare.” *Id.* at 671. Instead, he was secretly administered LSD and years later suffered from hallucinations, which often caused him to beat his wife and child in the middle of the night without the ability to recall it. *Id.* *Stanley* sued and the Supreme Court barred his claims because of the *Feres* doctrine. *Id.* at 683–84, 686.

to bar a *Bivens*-type claim for damages.¹⁰⁸ The Court focused on the impact of litigation on military discipline and decisionmaking, noting that “Congress . . . ‘ha[s] exercised [its] authority to establis[h] a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure.’”¹⁰⁹ Therefore, the Court withdrew from these military matters because such cases

would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime.¹¹⁰

The Supreme Court has not had occasion to consider the *Feres* doctrine since its decision in *Stanley*. New issues, however, arise when the military releases its personnel’s information.

B. *The Privacy Act*

The courts originally recognized the individual right to privacy as a common law tort. This individual right first received some attention in Justice Brandeis’s famous dissent in *Olmstead v. United States*,¹¹¹ when he said, “The [framers] conferred, as against the government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men.”¹¹² The Supreme Court initially recognized a constitutional right to privacy in 1965¹¹³ and has since refined it in a variety of areas.¹¹⁴ Indeed, the right to privacy has moved out of case law and has been codified by Congress.¹¹⁵ One major statute that governs information maintained by the federal government is the

¹⁰⁸ *Id.* at 683–84.

¹⁰⁹ *Id.* at 679 (fourth alteration in original) (quoting *Chappell v. Wallace*, 462 U.S. 296, 302 (1983)).

¹¹⁰ *Id.* at 682–83.

¹¹¹ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

¹¹² *Id.* at 478 (emphasis added).

¹¹³ See *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965) (describing how the specific guarantees in the Bill of Rights contain “peripheral rights,” which include the right to privacy, and protects the interests of married persons in using contraceptives).

¹¹⁴ See Joyce, *supra* note 23, at 115 n.12 (collecting cases dealing with the right to privacy).

¹¹⁵ See 5 U.S.C.A. § 552a (West 2011); 12 U.S.C. § 3402 (2006) (“Right to Financial Privacy Act”).

Privacy Act.¹¹⁶ The Privacy Act is a vast piece of legislation that reaches nearly every agency in the federal government and seeks to protect the individual's right to privacy in today's world of easy access to an abundance of personal information.¹¹⁷ Congress enacted this legislation in response to fears of a mounting threat to personal privacy resulting from the increased use of computers by the federal government to maintain and retrieve information.¹¹⁸

The Privacy Act was passed in 1974 "to promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and databanks of the Federal Government."¹¹⁹ Its goal is to "strike[] a balance between the individual's right to privacy and the need for government to function effectively."¹²⁰ Additionally, the Computer Matching and Privacy Protection Act of 1988 amended the original Privacy

¹¹⁶ 5 U.S.C.A. § 552a. Another major statute governing the federal government's informational practices is the Freedom of Information Act ("FOIA"). *See id.* § 552; Joyce, *supra* note 23, at 117. FOIA provides for a "judicially enforceable right of access to agency records except to the extent that" they fall within one of the enumerated exceptions to the law. Joyce, *supra* note 23, at 117. Much litigation surrounds the exceptions and their applicability in certain circumstances. *See id.* at 118. The exceptions are discretionary, however, so an agency can choose to release a record that would otherwise be exempt if there is no "legitimate governmental purpose for withholding" it. *Id.*

¹¹⁷ *See* 5 U.S.C.A. § 552a(b); Joyce, *supra* note 23.

¹¹⁸ *See* Joyce, *supra* note 23. Joyce's article also discusses the extensive legislative history that occurred with this bill. *See id.* For example, a Department of Health, Education, and Welfare report "recommended the enactment of a federal 'Code of Fair Information Practices' for all automated personal data systems." *Id.* at 119. This Code had five main principles:

[T]here should be no records whose very existence is secret, an individual must be able to discover what information about him is in a record and how it is used, an individual must be able to prevent information collected for one purpose from being used for another purpose without his consent, an individual must be able to correct or amend erroneous information, and any organization creating, maintaining, using or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and take precautions to prevent misuse of the data.

Id. All of those suggestions would eventually be placed into the Privacy Act in some form. *Id.*

¹¹⁹ Judith Beth Prowda et al., *A Lawyer's Ramble Down the Information Superhighway*, 64 *FORDHAM L. REV.* 697, 744 (1995) (quoting S. REP. NO. 93-1183, at 6916 (1974)).

¹²⁰ Gregory R. Firehock, *The Increased Invulnerability of Incorrect Records Maintained by Law Enforcement Agencies: Doe v. FBI*, 60 *GEO. WASH. L. REV.* 1509, 1512 (1992).

Act.¹²¹ “The purpose of th[is new] amendment was to regulate the use of data-matching procedures in federal agencies.”¹²²

The Privacy Act provides in pertinent part that “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.”¹²³ While this is the main crux of the Privacy Act, defined terms in the statute refine its meaning. “Agency” is defined as “any executive department, *military department*, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”¹²⁴ “Individual” is defined as “a citizen of the United States or an alien lawfully admitted for

¹²¹ Prowda et al., *supra* note 119, at 745.

¹²² *Id.* Data-matching occurs when government files are compared, as “a cost-efficient way to allocate public resources and detect waste, fraud, and abuse of government programs.” *Id.* at 745–46. The Matching Act establishes a procedure for giving notice, and requiring reporting by the government. *Id.* at 746.

¹²³ 5 U.S.C.A. § 552a(b) (West 2011). The Privacy Act also provides individuals with access to their records and the opportunity to correct it if it is wrong. It provides:

Each agency that maintains a system of records shall (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof in a form comprehensible to him . . . [and] (2) permit the individual to request amendment of a record pertaining to him

Id. § 552a(d)(1)–(2).

¹²⁴ *Id.* § 552(f)(1) (emphasis added). Section 552a(a)(1) says “the term ‘agency’ means agency as defined in section 552(e) of this title.” *Id.* § 552a(a)(1). This is an incorrect cite that should refer to 5 U.S.C. § 552(f)(1), which provides the definition that is cited in the above text. However, even this section refers the reader to a third section, 5 U.S.C. § 551(1). *See id.* § 552(f)(1). That section states:

“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory

5 U.S.C. § 551(1) (2006).

permanent residence.”¹²⁵ Therefore, the Privacy Act does not cover foreign nationals or business entities.¹²⁶ In addition, “record,” is defined as

any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.¹²⁷

Another pertinent definition is “system of records,” defined as “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.”¹²⁸

Congress also fashioned two types of exceptions to the Privacy Act: general and specific. General exceptions include any system of records that is “maintained by the Central Intelligence Agency” (“CIA”) and any system of records maintained by any agency that enforces criminal laws.¹²⁹ This includes records maintained by police, “prosecutors, courts, correctional, probation, pardon, or parole authorities” if the information contained in the record is gathered to identify criminal offenders, to investigate a crime, or to otherwise enforce the law.¹³⁰

In addition, the Privacy Act provides for specific exemptions, two of which are relevant for this Note. First, records that are “investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for . . . *military service*,” can be exempted from coverage under the Privacy Act.¹³¹ Second, “evaluation material used to determine potential for promotion in the *armed services*” is exempt, but only to the extent that the name of the individual who provided the information would be disclosed, even though the government promised that it would not be disclosed.¹³²

¹²⁵ 5 U.S.C.A. § 552a(a)(2).

¹²⁶ See Joyce, *supra* note 23, at 125.

¹²⁷ § 552a(a)(4).

¹²⁸ *Id.* § 552a(a)(5).

¹²⁹ *Id.* § 552a(j).

¹³⁰ *Id.* § 552a(j)(2).

¹³¹ *Id.* § 552a(k)(5) (emphasis added).

¹³² *Id.* § 552a(k)(7) (emphasis added).

Violations of the Privacy Act may result in criminal penalties for the responsible employee or officer. The criminal penalties are triggered when

[a]ny officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this [Act], and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it.¹³³

That officer or employee is guilty of a misdemeanor and can be fined up to \$5,000.¹³⁴ Essentially, officers or employees of an agency cannot willfully release records that they know are protected by the Privacy Act to parties not entitled to receive those records. The same penalties are also operative if an officer or employee “willfully maintains a system of records without meeting the notice requirements.”¹³⁵ This sanction flows from the Privacy Act’s goal of preventing secret systems of records because the public has a right to know about the very existence of such a system.¹³⁶ Additionally, “[a]ny person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses” is subject to the same criminal liability.¹³⁷ This is presumably to prevent someone from posing as an individual to receive access to that individual’s records.¹³⁸ The criminal provisions of the Act do not give rise to a civil cause of action against the employee or officer and are solely penal in nature. Therefore, the individual must pursue a common law action for invasion of privacy if a third party has wrongfully acquired access to their records.¹³⁹

The Privacy Act also provides for civil remedies against federal agencies.¹⁴⁰ These claims are allowed if the agency “fails

¹³³ *Id.* § 552a(i)(1).

¹³⁴ *Id.*

¹³⁵ *Id.* § 552a(i)(2).

¹³⁶ *See Joyce, supra* note 23, at 161.

¹³⁷ § 552a(i)(3).

¹³⁸ *See Joyce, supra* note 23, at 161.

¹³⁹ *See id.*

¹⁴⁰ § 552a(g). An agency is defined by 5 U.S.C.A. § 552(f) and would include entities such as the Securities and Exchange Commission, the Federal Trade Commission, and the Environmental Protection Agency. *Id.* § 552(f). The remedies available include attorney fees and costs, injunctive relief, and damages. *See id.* § 552a(g)(4)–(5).

to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.”¹⁴¹ If any of these provisions are violated, the individual can bring a civil action against the agency in the district courts of the United States.¹⁴² For actions brought under § 552a(g)(1)(D), an individual may recover actual damages, and any individual so entitled will receive a minimum of \$1,000.¹⁴³ In addition, an individual can recover attorney fees and the costs of the action from the United States.¹⁴⁴ For the individual to recover, however, the court must determine that the “agency acted in a manner which was intentional or willful.”¹⁴⁵

II. THE APPLICATION OF *FERES* TO THE PRIVACY ACT AND THE APPARENT CIRCUIT SPLIT

With the expansion of the *Feres* doctrine into other areas beyond the FTCA, the circuit courts appear to be split on whether this doctrine applies to claims brought by members of the armed services against the United States government for violations of the Privacy Act. Part A describes, in detail, the two cases, *Uhl v. Swanstrom*¹⁴⁶ and *Cummings v. Department of the Navy*,¹⁴⁷ that

¹⁴¹ *Id.* § 552a(g)(1)(D).

Civil remedies are also available when any agency (A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection; (B) refuses to comply with an individual request under subsection (d)(1) of this section; [or] (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual.

Id. § 552a(g)(1)(A)–(C). This Note focuses on when the records are released to outside parties and does not deal with amendment or review of such records, so these sections are not pertinent for the purposes of this Note but complete the list of available remedies.

¹⁴² *Id.* § 552a(g)(1).

¹⁴³ *Id.* § 552a(g)(4)(A). If the action is brought under § 552a(g)(1)(A), the court may order injunctive relief and “order the agency to amend the individual's record.” *Id.* § 552a(g)(2)(A). If the action is brought under § 552a(g)(1)(B), then “the court may enjoin the agency from withholding records and order the production” of those records to the individual. *Id.* § 552a(g)(3)(A).

¹⁴⁴ *Id.* § 552a(g)(4)(B).

¹⁴⁵ *Id.* § 552a(g)(4).

¹⁴⁶ 79 F.3d 751 (8th Cir. 1996).

¹⁴⁷ 279 F.3d 1051 (D.C. Cir. 2002).

considered the issue and took differing positions on the application of *Feres* to the Privacy Act. Part B identifies the normative arguments for and against the continued use of the *Feres* doctrine and its application to the Privacy Act.

A. *Should Feres Bar Privacy Act Claims by Members of the Military? The Circuits Disagree*

1. *Uhl v. Swanstrom*—The Eighth Circuit Bars Privacy Act Claims

The issue in *Uhl v. Swanstrom* was whether members of the military could bring Privacy Act claims.¹⁴⁸ Kenneth Uhl was a dual-status employee in the Iowa Air National Guard (“IANG”).¹⁴⁹ As a dual-status employee, Uhl was a full-time civil engineer at the IANG base and a part-time IANG member.¹⁵⁰ To continue working as a civil servant, he needed to remain eligible for military service.¹⁵¹ On June 9, 1988, a medical evaluation board declared Uhl mentally unfit for worldwide military service.¹⁵² Consequently, he was removed from his employment as a civil engineer with the IANG.¹⁵³ Uhl then contested his discharge through the procedures provided by the military.¹⁵⁴ Uhl filed a complaint with the Department of Defense Office of the Inspector General (the “Inspector”), which investigated.¹⁵⁵ The Inspector concluded that the “process leading to Plaintiff’s discharge [was] flawed and the decision to discharge plaintiff [was] inappropriate and invalid.”¹⁵⁶ The Inspector “recommended that [Uhl] be reinstated to the positions he would have occupied had he not had a break in [his] service.”¹⁵⁷ Uhl filed a claim with the Air Force Board for Correction of Military Records, which agreed with the Inspector’s recommendations and also recommended that his records be “expunged of all references to

¹⁴⁸ *Uhl*, 79 F.3d at 752.

¹⁴⁹ *Id.* at 753.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Uhl v. Swanstrom*, 876 F. Supp. 1545, 1548 (N.D. Iowa 1995), *aff’d*, 79 F.3d 751 (8th Cir. 1996).

¹⁵³ *Uhl*, 79 F.3d at 753.

¹⁵⁴ *Uhl*, 876 F. Supp. at 1548.

¹⁵⁵ *Uhl*, 79 F.3d at 753.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

the medical disqualification.”¹⁵⁸ Notwithstanding these findings, the IANG refused to reinstate Uhl.¹⁵⁹ After the state court dismissed Uhl’s claim because of the *Feres* doctrine, Uhl filed the federal action.¹⁶⁰

In the federal action, Uhl alleged that the Department of the Air Force failed to accurately maintain his records and inserted incorrect information without notifying or corroborating with him.¹⁶¹ He also maintained that defendants distributed that incorrect information “with the express purpose of injuring Uhl’s reputation.”¹⁶² The district court considered all of Uhl’s claims and concluded that his Privacy Act claims were barred by the statute of limitations.¹⁶³ The court said, “[h]owever, even if . . . the statute of limitations had not run before Uhl filed suit, Uhl’s Privacy Act claim also runs afoul of the *Feres* doctrine.”¹⁶⁴ The court concluded that all of the claims in Uhl’s amended complaint were barred by the *Feres* doctrine.¹⁶⁵

The district court applied a two-step multifactor test and the “incident to service” test to determine if the doctrine should be applied.¹⁶⁶ The multifactor test looked at “(1) whether there is a relevant relationship between the service member’s activity and the military service, and (2) whether military discipline will be impeded if the challenged conduct is litigated in a civil action.”¹⁶⁷ The court concluded that these claims were incident to service

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Plaintiff also filed an administrative claim under the FTCA with the Department of the Air Force, which was denied. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Uhl v. Swanstrom, 876 F. Supp. 1545, 1549 (N.D. Iowa 1995), *aff’d*, 79 F.3d 751.

¹⁶² *Id.*

¹⁶³ *Id.* at 1561.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1564–65. Uhl had urged the court to use the two-step multifactor test. *Id.* at 1565.

¹⁶⁷ *Id.* at 1564. Three factors are used to determine if there is a relevant relationship, including “the duty status of the service member, the location of the injury, and the nature of the activity.” *Id.* at 1564–65. The district court discussed at length the Eighth Circuit decision in *Watson v. Arkansas National Guard*, 886 F.2d 1004, 1010–11 (8th Cir. 1989), which provided exceptions to the application of the *Feres* doctrine. These exceptions include judicial review of the constitutionality of a statute and claims for limited judicial review of final agency action. *See Wood v. United States*, 968 F.2d 738, 740 (8th Cir. 1992); *Watson*, 886 F.2d at 1010–11. Here, the court decided that neither of these exceptions applied to make these claims justiciable. *See Uhl*, 876 F. Supp. at 1567.

and satisfied the multifactor test.¹⁶⁸ Therefore, the claims were nonjusticiable under the *Feres* doctrine because they involved the “review of a discrete intraservice [sic] personnel decision involving an assessment of an individual’s military qualifications for world-wide service.”¹⁶⁹ Thus, as the court noted in the first sentence of its decision, “[t]his case is a stark and troublesome reminder that the law does not always provide a remedy for every wrong.”¹⁷⁰ The Eighth Circuit affirmed on appeal, approving “the district court’s interpretation of the law regarding the *Feres* doctrine and its application to the facts of the present case.”¹⁷¹

2. *Cummings v. Department of the Navy*—The D.C. Circuit Allows Privacy Act Claims

The court in *Cummings v. Department of the Navy* also considered whether the *Feres* doctrine bars Privacy Act claims, and this case stands in stark contrast to *Uhl*.¹⁷² Mary Louise Cummings, a graduate of the United States Naval Academy, was assigned to a flight squadron in Florida to begin training on the Strike Fighter Attack 18 (the “F/A-18”).¹⁷³ After about seven months of training, the Navy assembled a Field Naval Aviator Evaluation Board (“FNAEB”) “to assess her flying skills and potential.”¹⁷⁴ The FNAEB recommended that the Navy terminate Cummings’ flying status due to a failure to meet flight safety standards after four serious errors.¹⁷⁵ Notwithstanding

¹⁶⁸ *Uhl*, 876 F. Supp. at 1568.

¹⁶⁹ *Id.* at 1570.

¹⁷⁰ *Id.* at 1547.

¹⁷¹ *Uhl v. Swanstrom*, 79 F.3d 751, 756 (8th Cir. 1996).

¹⁷² 279 F.3d 1051, 1052 (D.C. Cir. 2002).

¹⁷³ *Id.* at 1052. Cummings was one of the nation’s first female Naval aviators. See *M.I.T. Humans and Automation Lab*, MASS. INST. OF TECH., <http://web.mit.edu/aeroastro/labs/halab/people.shtml> (last visited Mar. 31, 2011). The F/A-18 is more commonly known as the Hornet. See *Cummings*, 279 F.3d at 1052.

¹⁷⁴ *Cummings*, 279 F.3d at 1052–53.

¹⁷⁵ *Id.* at 1053. The errors included (1) aligning her aircraft with the wrong runway, (2) “violat[ing] Navy procedures governing deployment of landing gear while flying,” (3) an inability to correctly position her aircraft “during . . . simulated air-to-air combat mission, which resulted in poor tactical performance,” and (4) creating a dangerous flight pattern while flying in formation, causing another pilot to take evasive action. Brief for Appellee, *supra* note 2, at 5. This decision was made after examining the records from her four training flights and hearing testimony from her commanding officers and flight instructors. *Cummings*, 279 F.3d

this conclusion, Cummings retained her flight status and continued to train under the same command.¹⁷⁶ While Cummings was training, the Navy let an author “follow specific squadron personnel without their knowledge as they proceeded throughout the [Hornet] training program” as research for a book about fighter pilot training.¹⁷⁷ The book starred a character that Cummings alleged was based on her because it included “specific details and direct quotes from her negative [FNAEB] report.”¹⁷⁸ Consequently, “her military and civilian career prospects ha[d] been severely damaged” and “she . . . suffered severe mental distress, embarrassment, and humiliation, both personally and professionally.”¹⁷⁹ Cummings sued for violations of the Privacy Act, and the district court dismissed her case because it found the *Feres* doctrine barred her claims.¹⁸⁰ Specifically, the court feared that the possibility that “‘every time a serviceman were demoted or saddled with less than a perfect performance rating he could resort to the courthouse’ could be a very real one if Privacy Act suits were not subject to the *Feres* doctrine.”¹⁸¹

In contrast to the Eighth Circuit, the D.C. Circuit disagreed with the district court and ultimately concluded that *Feres* did not bar claims under the Privacy Act.¹⁸² The court began with the Privacy Act itself and considered Congress’s language. The court decided that the statute was unambiguous and, thus, that the plain language controlled.¹⁸³ The court determined Congress used explicit language that identified the Privacy Act as applying to military departments and provided exceptions for some military activities, concluding, therefore, that Congress did not

at 1053. It was recommended that she retain her flight status, but under a different administrative command. *See Cummings v. Dep’t of the Navy*, 116 F. Supp. 2d 76, 77 (D.D.C. 2000), *rev’d*, 279 F.3d 1051 (D.C. Cir. 2002).

¹⁷⁶ *Cummings*, 279 F.3d at 1053.

¹⁷⁷ *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Cummings*, 116 F. Supp. 2d at 78).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (internal quotation marks omitted) (quoting *Cummings*, 116 F. Supp. 2d at 78).

¹⁸⁰ *See Cummings*, 116 F. Supp. 2d at 84.

¹⁸¹ *Id.* at 82 (quoting *Bois v. Marsh*, 801 F.2d 462, 471 (D.C. Cir. 1986)).

¹⁸² *See Cummings*, 279 F.3d at 1058.

¹⁸³ *Id.* at 1054. The court started with the presumption that Congress means what it says in the statute and said, “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Id.* at 1053–54 (internal quotation marks omitted) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

intend for the courts to create additional exceptions.¹⁸⁴ The court did not stop there, however. It next addressed the argument that Congress was not explicit in shielding the Privacy Act from the *Feres* doctrine, even though Congress knew that the *Feres* doctrine existed.¹⁸⁵ The court found that Congress has no reason to “insulate” the Privacy Act from the *Feres* doctrine because, at the time that the Privacy Act was enacted, the doctrine had not been expanded beyond the context of the FTCA.¹⁸⁶ Applying these rationales,¹⁸⁷ the court concluded that although the judiciary should not get involved in military matters under many circumstances, “Congress clearly enlisted the federal courts to inquire into potential military violations of the Privacy Act.”¹⁸⁸ Allowing recovery in these circumstances would not create a race to the courthouse by members of the military, as the district court feared, because the Privacy Act only provides a remedy if a “military department has unlawfully released the performance rating and if the claimant establishes that she was injured as a result.”¹⁸⁹

3. The Eastern District of New York Allows Privacy Act Claims

Recently, this apparent circuit split was recognized by the Eastern District of New York in *MacQuill v. Killian*, which sided with the D.C. Circuit in allowing military personnel claims to be brought under the Privacy Act.¹⁹⁰ James R. MacQuill was a master sergeant in the New York Air National Guard (“NYANG”) and was employed as a warehouse materials handler.¹⁹¹ Killian sent a request to a local police department “seeking information regarding the status of MacQuill’s driver’s license” and “any information [regarding] . . . any other matter involving Sgt. MacQuill, civil or criminal.”¹⁹² In the request, Killian also stated that MacQuill lied to the National Guard, disclosed an employer

¹⁸⁴ *Id.* at 1054–55; see 5 U.S.C.A. § 552a(k)(5) (West 2011) (military service exemption); *id.* § 552a(k)(7) (armed services exemption).

¹⁸⁵ *Cummings*, 279 F.3d at 1055.

¹⁸⁶ *Id.* The court applied the maxim, *cessante ratione legis, cessat et ipsa lex*—“when reason for law ceases, so does law itself”—because none of the rationales of the *Feres* doctrine were applicable there. *Id.* at 1055–56.

¹⁸⁷ See discussion *supra* Part I.A; see also discussion *infra* Part II.B.

¹⁸⁸ *Cummings*, 279 F.3d at 1056–57 (emphasis omitted).

¹⁸⁹ *Id.* at 1057.

¹⁹⁰ *MacQuill v. Killian*, No. 07-CV-1566, at 11–12 (E.D.N.Y. Mar. 25, 2008).

¹⁹¹ *Id.* at 2. MacQuill’s wife was a lieutenant colonel in the NYANG. *Id.*

¹⁹² *Id.* at 2–3 (internal quotation marks omitted).

meeting, named witnesses, disclosed MacQuill's social security number, and asserted that MacQuill drove illegally because he did not have a valid driver's license, and therefore, jeopardized the safety of other National Guard members on the base.¹⁹³ Killian wrote a similar memorandum to another police department, but it refused his request.¹⁹⁴ Impervious to this rejection, Killian filed a Freedom of Information Law request with the police department, which rebuffed his request, saying that it was an "unlawful invasion of privacy."¹⁹⁵ Nevertheless, Killian somehow obtained the records that he wanted, records that pertained to domestic disputes between MacQuill and his wife.¹⁹⁶ Subsequently, these records were disseminated to various military officials, state officials adjudicating a non-judicial punishment action, and MacQuill's military defense counsel representing him in that disciplinary action—who then had to withdraw from representation.¹⁹⁷ The records were also sent to the officials adjudicating MacQuill's pending employment adverse action proceedings and to off-base civilian addresses.¹⁹⁸ MacQuill alleged various Privacy Act violations resulting from the dissemination of his records.¹⁹⁹ On a motion to dismiss, the court agreed with the D.C. Circuit and held that MacQuill's claims were not barred by the *Feres* doctrine because "Congress's decision to exclude certain military documents . . . from protection under the Privacy Act would have been superfluous and redundant if the service members were barred from bringing suit under the Act."²⁰⁰ Therefore, the court concluded, "Congress clearly intended to permit Privacy Act suits by service members against the military."²⁰¹

¹⁹³ *Id.* at 3.

¹⁹⁴ See Amended Complaint and Demand for Jury Trial, *MacQuill*, No. 07-CV-1566, at 4 (E.D.N.Y. June 13, 2007).

¹⁹⁵ *MacQuill*, No. 07-CV-1566, at 3.

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* at 4.

¹⁹⁸ *Id.* at 3–4.

¹⁹⁹ See Amended Complaint and Demand for Jury Trial, *supra* note 194, at 7. The court recognized the circuit split on whether the *Feres* doctrine barred Privacy Act claims. *MacQuill*, No. 07-CV-1566, at 12.

²⁰⁰ *MacQuill*, No. 07-CV-1566, at 11–12.

²⁰¹ *Id.* at 12.

B. Normative Arguments for and Against the Feres Doctrine

There are arguments both for and against expansion of the *Feres* doctrine to bar claims under the Privacy Act. Since its inception, the *Feres* doctrine has been widely disparaged by commentators, including those serving in the military, as being unnecessary and having unintended results for those affected by the inability to recover.²⁰² On the other hand, members of the Department of Justice and commanders of the armed services have applauded the doctrine and stressed its benefits for the country.²⁰³

There are three main arguments in favor of the continued application and expansion of the *Feres* doctrine to Privacy Act claims: (1) the desire to stay out of military discipline and decisionmaking; (2) the availability of statutorily prescribed remedies; and (3) the failure of Congress to take any action to overrule the *Feres* doctrine.²⁰⁴ First, the intrusion of the judiciary into military decisionmaking and discipline would be a detriment to the effectiveness of the military in accomplishing its missions.²⁰⁵ This is a powerful argument that has captured the Supreme Court, which adopted it as their foremost rationale for preserving the doctrine.²⁰⁶ High-ranking officers in the armed services and members of the Department of Justice advanced the argument that the relationship between soldiers and their superiors is a unique and special one.²⁰⁷ American courts and Congress recognized the “unique nature” of military service and have been “reluctan[t] to intervene in military affairs” because of the potential disruption.²⁰⁸ For example, litigation is highly disruptive and inherently divisive, which goes against the cohesion that is necessary in the military.²⁰⁹ As Major General

²⁰² See *infra* notes 228–247 and accompanying text.

²⁰³ See generally *The Feres Doctrine; An Examination of This Military Exception to the Federal Torts Claim Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=493> [hereinafter *Hearing*].

²⁰⁴ See *infra* notes 205–227 and accompanying text.

²⁰⁵ See, e.g., Brou, *supra* note 37, at 53–59.

²⁰⁶ See *United States v. Stanley*, 483 U.S. 669, 682–83 (1987); *United States v. Johnson*, 481 U.S. 681, 690–91 (1987); discussion *supra* Part I.A.

²⁰⁷ See *Hearing*, *supra* note 203.

²⁰⁸ *Id.* (testimony of Hon. Paul Harris, Deputy Assistant Att’y Gen. of the U.S.).

²⁰⁹ *Id.*

Nolan Sklute²¹⁰ indicated, “certain absolutes” are required for unit cohesiveness, including “strict obedience to orders; total loyalty to one’s organization, one’s service and our Nation; total loyalty up and down the chain of command; complete trust among and between members of one’s organization; and discipline.”²¹¹ If lawsuits were permitted, that cohesiveness, loyalty, trust, and obedience to orders would be for naught.²¹² Litigation is also time-consuming and “assures this result: military plaintiffs and witnesses will be summoned to attend depositions and trials, and they will have to take time from their regularly assigned duties to confer with counsel and investigators.”²¹³ This poses a problem because our troops are stationed around the world and “may have to be recalled from distant posts,” which is expensive and difficult.²¹⁴ Such a result would be disruptive to our national security and defense because national security demands that our fighting forces are “ready to perform their duties at all times.”²¹⁵ It would also be disruptive because “[c]ommanders and other military members would . . . be deposed and summoned into court to justify their decisions.”²¹⁶ If litigation were allowed, it would involve the judiciary in an area where it has “no specialized knowledge of [the] unique challenges and requirements” of military service, which “would undermine [military leaders’] ability to train the force effectively.”²¹⁷ Additionally, military leaders fear that such a practice would allow the court to second guess low level decisions and engender

²¹⁰ Major General Nolan Sklute is a former United States Air Force Judge Advocate General, the chief military attorney for that branch. See *Biographies: Major General Nolan Sklute*, U.S. AIR FORCE, <http://www.af.mil/information/bios/bio.asp?bioID=7160> (last visited Mar. 31, 2011). He was responsible for providing a full range of legal services to the Air Force and supervised over 1,500 attorneys, military and civilian. See *id.*

²¹¹ *Hearing, supra* note 203 (testimony of Nolan Sklute, Major General, Retired and Judge Advocate General, U.S. Air Force).

²¹² See *id.* (testimony of Hon. Paul Harris, Deputy Assistant Att’y Gen. of the U.S.).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* (testimony of Nolan Sklute, Major General, Retired and Judge Advocate General, U.S. Air Force).

²¹⁷ *Id.* (testimony of John Altenberg, Major General, Retired, and Assistant Judge Advocate General, U.S. Army).

the belief that no order or decision is final until a civilian court has ruled.²¹⁸

The second argument in favor of the *Feres* doctrine is that there are statutorily prescribed remedies and procedures that military plaintiffs can take advantage of to recover for their injuries and vindicate their rights. For example, Congress enacted the UCMJ, which criminalizes acts such as “[f]ailure to follow orders” or “conduct unbecoming an officer” to preserve discipline and order in the military.²¹⁹ In addition, military plaintiffs can take other “administrative, nonjudicial and judicial courses of action.”²²⁰ The “chain of command and the uniform system of accountability” are in place so that the rights of service members are protected without having to resort to litigation.²²¹ The chain of command as well as the criminal investigative services, inspector generals, safety officers, judge advocates, and the article 138 process hold military personnel accountable.²²² These processes, combined with the comprehensive benefit system for both soldiers and veterans, are sufficient and provide another reason why the Court should retain the *Feres* doctrine and expand it to cover Privacy Act claims.²²³

Finally, Congress has had sixty years to overrule the Supreme Court by clarifying the meaning of the FTCA and other statutes such as the Privacy Act but has failed to do so. Since this is a question of statutory interpretation, “Congress can

²¹⁸ See *id.*; see also *id.* (testimony of Christopher E. Weaver, Rear Admiral and Commandant, U.S. Navy) (“Disruption of military operations would almost be inevitable, as service members might elect to weigh obedience to orders and compliance with directives with contemplated litigation to achieve an objective more to their liking or interests.”).

²¹⁹ *Id.* (testimony of John Altenberg, Major General, Retired, and Assistant Judge Advocate General, U.S. Army).

²²⁰ *Id.* (testimony of Christopher E. Weaver, Rear Admiral and Commandant, U.S. Navy).

²²¹ *Id.*

²²² See *id.* (testimony of John Altenberg, Major General, Retired, and Assistant Judge Advocate General, U.S. Army); see also *id.* (testimony of Mr. Eugene Fidell, Counsel, Feldesman, Tucker, Leifer, Fidell, & Bank, LLP). In simple terms, article 138 is a procedure for soldiers to complain about the actions of their superior officers. See 10 U.S.C. § 938 (2006); Robert W. Ayers, *Clarifying the Article 138 Complaint Process*, ARMY LAW., Apr. 2008, at 26–29 (describing the article 138 process from when a soldier submits a complaint, through the investigation, to the eventual decision).

²²³ See, e.g., *United States v. Johnson*, 481 U.S. 681, 689–90 (1987); *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673 (1977).

correct [an] inaccurate . . . interpretation[].”²²⁴ As the Supreme Court originally acknowledged in *Feres*,²²⁵ “if we misinterpret the [FTCA], at least Congress possesses a ready remedy.”²²⁶ The Court looked at this inaction again saying, “Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress ‘possesses a ready remedy’ to alter a misinterpretation of its intent.”²²⁷ Therefore, the Supreme Court has blatantly suggested that Congress should correct the interpretation if it is wrong, and Congress has not taken any action.

Nevertheless, many commentators and those affected by the doctrine denigrated the doctrine and called for it to be judicially overturned or legislatively repealed.²²⁸ Critics advanced three main arguments for overturning the *Feres* doctrine and not expanding it to bar claims such as those under the Privacy Act: (1) the doctrine is not grounded in any statute and should be overruled; (2) the *Feres* doctrine distorts the risk-reducing benefits of liability; and (3) civilians are able to sue for injuries from military actions.²²⁹ First, critics argue that the doctrine is not grounded in the FTCA and has distorted what Congress intended by enacting the FTCA and other statutes.²³⁰ For instance, the FTCA and Privacy Act both provide exceptions for when the military is engaged in combat operations or for when records are used for promotion purposes, and these are sufficient to avoid any interference with military decisionmaking.²³¹ The effect of these exceptions on military decisionmaking and

²²⁴ See Brou, *supra* note 37, at 74.

²²⁵ 340 U.S. 135 (1950). Congress has even held hearings, taking testimony from a variety of military officers, lawyers, and people affected by the *Feres* doctrine, but Congress has never taken action. See *Hearing, supra* note 203.

²²⁶ *Feres*, 340 U.S. at 138.

²²⁷ *Johnson*, 481 U.S. at 686 (quoting *Feres*, 340 U.S. at 138). The Court also noted that Congress considered but did not enact legislation that would have allowed members of the armed forces to file medical malpractice suits against the federal government. *Id.* at 688 n.6.

²²⁸ See *infra* notes 229–247 and accompanying text.

²²⁹ See *infra* notes 230–244 and accompanying text.

²³⁰ See Turley, *supra* note 64. See generally Jonathan P. Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93 (1990).

²³¹ 5 U.S.C.A. § 552a(k)(5), (7) (West 2011) (Privacy Act exemptions); *Feres*, 340 U.S. at 146 (interpreting the FTCA to exclude injuries “incident to service”).

discipline is unknown, however, because the Supreme Court has always barred these claims.²³²

Additionally, critics believe there should be less concern about the effect on discipline because in contrast to the beliefs underlying many of the judicial decisions, coercive discipline—defined as the “blind obedience to orders to avoid punishment”—is the “least effective means of motivating soldiers to do their duty.”²³³ The real motivation is “to protect their comrades and to get home safely.”²³⁴ Furthermore, the military “de-emphasizes discipline as a major component of combat leadership,” by requiring that soldiers disobey illegal orders and take initiative.²³⁵ Therefore, there is no need to preserve discipline by avoiding lawsuits since the specter of possible lawsuits will not affect discipline.²³⁶ Moreover, overturning *Feres* would not interfere with military decisionmaking because claims of negligence that can happen in civilian life—such as medical malpractice and traffic accidents—are barred claims that do not seem likely to have any influence on the types of decisions that

military commanders make.²³⁷ In addition, repealing this doctrine should not affect military commanders’ decisions because they would still be free from personal liability.²³⁸

Second, critics argue that the *Feres* doctrine distorts the risk-reducing benefits that liability for wrongful actions creates.²³⁹ Because the military and, by extension, the United States government, are not liable for the violation of a person’s rights or for negligent actions, the federal government has expanded into many collateral areas where it can compete with private companies at a much lower cost due to this lack of liability.²⁴⁰ As such, there is no incentive for the United States government to

²³² See *Hearing, supra* note 203 (testimony of Daniel Joseph, Counsel, Akin, Gump, Strauss, Hauer & Feld, LLP).

²³³ Tomes, *supra* note 230, at 108.

²³⁴ *Id.*

²³⁵ *Id.* at 109.

²³⁶ *Id.* at 110.

²³⁷ See *Hearing, supra* note 203 (testimony of Daniel Joseph, Counsel, Akin, Gump, Strauss, Hauer & Feld, LLP).

²³⁸ See *id.* (testimony of Eugene Fidell, Counsel, Feldesman, Tucker, Leifer, Fidell, & Bank LLP).

²³⁹ See Turley, *supra* note 64, at 46–47.

²⁴⁰ See *id.* at 39.

put procedures in place to avoid risk because it does not feel the financial cost of its actions.²⁴¹ For example, the military maintains long-term confinement facilities, and the court has extended the *Feres* doctrine to claims brought by members of the armed services held in these prisons.²⁴² By doing so, “the courts have effectively cut off the most significant pressure for reform in correctional institutions.”²⁴³ Therefore, critics argue, the *Feres* doctrine should be abrogated, because abrogating the doctrine would make the federal government more risk-adverse and would better protect servicepersons.

A third argument made by critics to repeal the *Feres* doctrine is that civilians can sue for injuries resulting from military actions. There is no evidence that civilian recovery, uninhibited by the *Feres* doctrine, has led to a significant increase in claims or affected military decisionmaking in any way.²⁴⁴

Moreover, these concerns have led to constitutional questions of whether the Supreme Court overstepped its bounds in creating this doctrine. The *Feres* doctrine has no basis in the text of the FTCA or Privacy Act “and constitutes a judicially imposed limitation on a right to sue granted by Congress.”²⁴⁵ In addition, the Constitution itself expressly gives Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”²⁴⁶ Therefore, the Supreme Court arguably exceeded its power under the Constitution to second-guess what Congress did in the area of military governance by not following the language of the statute. Since the judiciary did this “at the behest of the Executive,” Congress must act to “restore the appropriate Constitutional balance.”²⁴⁷

²⁴¹ *Id.*

²⁴² *Id.* at 35–37. Other examples given include the military’s expansion into transportation, recreation activities, and a medical system that goes beyond that necessary for combat operations. *Id.* at 40–46. All of these areas can be operated at a lower cost than a private company because the military is “not . . . forced to internalize the costs of accidents and negligence.” *Id.* at 39.

²⁴³ *Id.* at 37–38.

²⁴⁴ See *Hearing, supra* note 203 (testimony of Daniel Joseph, Counsel, Akin, Gump, Strauss, Hauer & Feld, LLP) (giving a hypothetical case). *But see* Turley, *supra* note 64, at 49–50.

²⁴⁵ *Id.* (testimony of Daniel Joseph, Counsel, Akin, Gump, Strauss, Hauer & Feld, LLP).

²⁴⁶ U.S. CONST. art. I, § 8, cl. 14.

²⁴⁷ *Hearing, supra* note 203 (testimony of Daniel Joseph, Counsel, Akin, Gump, Strauss, Hauer & Feld, LLP).

III. *UHL* AND *CUMMINGS* IN PERFECT HARMONY

As the *Uhl* and *Cummings* cases demonstrate, there are strong arguments on both sides as to whether the *Feres* doctrine should apply to Privacy Act claims brought by members of the military. On one hand, applying the *Feres* doctrine would keep the federal courts out of military affairs since judicial inquiry in that area will have an adverse impact on military discipline and effectiveness.²⁴⁸ Conversely, the court could decline to apply the doctrine because the *Feres* doctrine is not applicable to claims under the Privacy Act since military personnel deserve a remedy, and no other recovery is available.²⁴⁹ Neither of these approaches is ideal because they are based on a Hobson's choice: Providing members of the Armed Forces with a Privacy Act remedy when they have been injured or putting military discipline and effectiveness seriously at risk. A workable solution, however, might appear if the courts in those cases had asked one additional question: Who was the recipient of the released information?

A test could be applied to the facts of each case to determine if the *Feres* doctrine is applicable. First, the court should apply the "incident to service" test to the release of information. If the information is not incident to service, then the *Feres* doctrine is inapplicable and the claim should proceed. Subsequently, if the release is incident to service, the court should look at the recipient of the information. If it is released to another member of the military and kept within the military, then the rationales of the *Feres* doctrine apply to bar such claims. If, however, the information is released to someone outside of the military command structure, then the rationales of the *Feres* doctrine are inapplicable and the claims should be allowed. Any allowable claims, of course, would also be subject to the limitations of the Privacy Act, which require that the release be unlawful and that the plaintiff show an adverse effect.²⁵⁰

Part A of this Section discusses why this test should be used to apply the *Feres* doctrine to Privacy Act claims that arise as a result of information being released within the military itself. Part B demonstrates that the doctrine need not be applied to

²⁴⁸ Chappell v. Wallace, 462 U.S. 296, 304 (1983).

²⁴⁹ Cummings v. Dep't of the Navy, 279 F.3d 1051, 1056 (D.C. Cir. 2002).

²⁵⁰ See, e.g., 5 U.S.C.A. § 552a(g)(1)(D) (West 2011).

information that is released to outside parties who are not subject to the military command structure.

A. *Applying Feres to Claims Within the Military Command Structure*

Claims that arise within the command structure of the military are barred if they are incident to service because they invoke the rationales of the *Feres* doctrine and administrative remedies are available for military personnel to vindicate their rights.²⁵¹ First, the “incident to service” test should be used to determine whether the claims are within the military command structure because the “‘incident to service’ test . . . provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.”²⁵² This test helps the court decide if it should even become involved with a release of information because it asks if the scope of the release was something that arose out of or was in the course of military duty.²⁵³ On the other hand, if the claim is not incident to service, then the *Feres* doctrine is likewise inapplicable and the claim should be allowed to proceed.²⁵⁴

After determining that the release of information was incident to service,²⁵⁵ the court should then look at the recipient of the information. If the information was released to another member of the military, the courts are “ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have”²⁵⁶ because judges have “no specialized knowledge of [the] unique challenges and requirements” of military service and should not interfere.²⁵⁷ The rationales of the *Feres* doctrine would thus apply to bar such claims.

²⁵¹ See *infra* Part II.

²⁵² *United States v. Stanley*, 483 U.S. 669, 683 (1987).

²⁵³ See *Feres v. United States*, 340 U.S. 135, 146 (1950).

²⁵⁴ See *Brooks v. United States*, 337 U.S. 49, 52 (1949).

²⁵⁵ This will arguably occur very frequently since the record itself is often something that arises out of military service, such as a personnel record.

²⁵⁶ *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (internal quotation marks omitted) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

²⁵⁷ *Hearing, supra* note 203 (testimony of John Altenberg, Major Gen., Retired, and Assistant Judge Advocate Gen., U.S. Army).

The Supreme Court has identified many rationales, but the one that has received the most support is the reluctance to interfere with military discipline and effectiveness.²⁵⁸ This rationale is directly implicated when records are released to other members of the military because the disruptive nature of a lawsuit will undermine the need for “immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.”²⁵⁹ Therefore, courts should “hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers.”²⁶⁰ This is exactly the “type of claim[] that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness”²⁶¹ because the court would be conducting an inquiry into whether a particular release fell

under the Privacy Act or if it implicated one of the exceptions in the Act.²⁶² Accordingly, a bright-line prohibition of these suits would prevent extremely disruptive and fractious litigation.²⁶³

In addition, the district court in *Cummings* acknowledged that the fear that “every time a serviceman were demoted or saddled with a less than perfect performance rating he could resort to the courthouse could be a very real one if Privacy Act suits were not subject to the *Feres* doctrine.”²⁶⁴ This statement is a slight exaggeration because the record must be released unlawfully and the plaintiff must show some type of injury.²⁶⁵ This fear, however, is valid to the extent that it recognizes that many members of the military would then be able to sue if others found out about their performance rating.

Courts should also bar Privacy Act suits when information is released to other members of the military because Congress has

²⁵⁸ See *United States v. Johnson*, 481 U.S. 681, 684 (1987).

²⁵⁹ *Chappell*, 462 U.S. at 300.

²⁶⁰ *Id.*

²⁶¹ *United States v. Shearer*, 473 U.S. 52, 59 (1985) (emphasis omitted).

²⁶² See 5 U.S.C.A. § 552a(j)–(k) (West 2011).

²⁶³ See *Hearing*, *supra* note 203 (statement of Hon. Paul Harris, Deputy Assistant Att’y Gen. of the United States).

²⁶⁴ *Cummings v. Dep’t of the Navy*, 279 F.3d 1051, 1056 (D.C. Cir. 2002).

²⁶⁵ *Id.* at 1057. Section § 552a(g)(1)(D) requires an adverse effect, which may include financial injury. See *id.* at 1053. For example, in *Cummings*, the plaintiff alleged that she had suffered serious consequences to her career and that she suffered from humiliation, embarrassment, and severe mental distress. See *id.*

“establish[ed] a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure.”²⁶⁶ While these remedies are not often used and are frequently ineffective, they do exist and provide another reason for the courts to bar these cases.²⁶⁷ These remedies include article 138 claims,²⁶⁸ which allow soldiers to complain about the decisions of his or her commanding officers.²⁶⁹ Article 138 provides a remedy for the plaintiff and resolves grievances without involving civilian courts.²⁷⁰ Some commentators have posited that asking a “commander . . . before sending [a] complaint through the chain of command, [is] hardly a confidence-inspiring procedure when the commander is the one who committed the [wrong].”²⁷¹ While the article 138 process may not be the most effective way of seeking redress, it still provides a process for seeking redress that is sufficient to keep civilian courts out of military affairs because it addresses the exact concerns with which courts have been reluctant to interfere.²⁷²

²⁶⁶ *United States v. Stanley*, 483 U.S. 669, 679 (1987) (quoting *Chappell v. Wallace*, 462 U.S. 296, 302 (1983)).

²⁶⁷ *See Ayers*, *supra* note 222, at 25 (noting that article 138 claims are “not often sought” and as a result, “many junior Judge Advocates (JAs) are unaware of how to properly counsel a Soldier”).

²⁶⁸ *See* 10 U.S.C. § 938 (2006). This section codifies the Uniform Code of Military Justice Article 138 claims and states,

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Id. Each branch of the military also has a board for the correction of records, which would satisfy the other parts of the Privacy Act, and allow recovery and injunctive relief for inaccurate records. *See* 10 U.S.C.A. § 1552 (West 2011) (establishing a corrections board); *see also* 5 U.S.C.A. § 552a(g)(1) (West 2011) (providing civil remedies for violations of the Privacy Act). This part of the Privacy Act is not discussed in this Note, but the *Feres* doctrine should apply as well because there is already a system in place.

²⁶⁹ *See* 10 U.S.C. § 938.

²⁷⁰ *See id.*

²⁷¹ *Tomes*, *supra* note 230, at 115.

²⁷² *See Chappell v. Wallace*, 462 U.S. 296, 302 (1983). The Court relied on the article 138 process to dispose of the constitutional tort claims that were brought by the petitioners in that case. *Id.* at 302–04. The Court acknowledged that Congress

The *Cummings*²⁷³ court also identified as part of its rationale that the Privacy Act must provide for the coverage of military personnel because it does not explicitly exclude them.²⁷⁴ Similarly, although the FTCA likewise did not expressly exclude claims by members of the military, the court nevertheless barred the claims.²⁷⁵ Due to the similarity between the Privacy Act and the FTCA—the language used, the lack of specification, and certain enumerated exceptions—there is no reason to think that the claims should also not be barred unless there is a clear statement by Congress.²⁷⁶ As noted by the dissent in *Cummings*, “*Feres* itself represents a refusal to read statutes with their ordinary sweep. The unique setting of the military led the *Feres* Court to resist bringing the armed services within the coverage of a remedial statute in the absence of an express Congressional command.”²⁷⁷ Moreover, Congress has possessed a ready remedy for over fifty years and has never acted to restrict the use of the *Feres* doctrine.²⁷⁸

B. *Allowing Claims if Records Are Released to Outside Parties*

Although the rationales of the *Feres* doctrine are clearly applicable when the records are released to other members of the military, they seem less relevant when the records are released to outside parties. Therefore, when records are released to outside parties, claims should be allowed for three reasons. First, there is no impact on military discipline or effectiveness because the records released are not being used for any internal military purposes, whether or not they are exempt under the Privacy Act.²⁷⁹ Under the Privacy Act, if records were released to an outside party, the court would not be getting involved solely in internal military decisions and procedures, but would be looking

has control over the military and has enacted statutes regulating military life by creating a judicial system that should not be interfered with by the judiciary. *Id.* at 302.

²⁷³ 279 F.3d 1051 (D.C. Cir. 2002).

²⁷⁴ *Id.* at 1054–55.

²⁷⁵ *Id.* at 1055–56.

²⁷⁶ *Id.* at 1058 (Williams, J., dissenting).

²⁷⁷ *Id.* at 1059 (emphasis omitted) (internal quotation marks omitted) (quoting *Bois v. Marsh*, 801 F.2d 462, 470 n.13 (D.C. Cir. 1986)).

²⁷⁸ See *Feres v. United States*, 340 U.S. 135, 138 (1950).

²⁷⁹ See 5 U.S.C.A. § 552a(j)–(k) (West 2011) (exempting from coverage information that is used for investigation or promotion decisions).

at military decisions to release records to the public. If records are kept within the military, even if the recipient is not entitled to see them, there is much less damage than if the recipient is a book author or newspaper who could be widely disseminate those records into the public arena. The military is a specialized culture and community,²⁸⁰ which has its own procedures in place to ensure that those affected receive a remedy,²⁸¹ but the secrecy of that community is pierced once records are released to an outside party, opening the door for courts to examine the decision. Because the damage to a person will often be greater if the information is released to the outside world, a proper damage remedy in the federal courts is appropriate to vindicate the rights of that person, military or not.

Secondly, these types of suits are unlikely to be sufficiently related to the person's service that they "necessarily implicate[] the military judgments and decisions that are inextricably intertwined with the conduct of the military mission."²⁸² Therefore, the release of information by a commanding officer to an outside party is not likely to get the court involved in military decisionmaking or discipline. This is because the plaintiff will not want the information to be released to that outside party and there will be no valid purpose for the release because the Privacy Act will prohibit the release. These releases are not likely to be entangled with any particular military mission, and a judicial inquiry would therefore be appropriate.

Finally, the other rationales that the Supreme Court has identified for the *Feres* doctrine are likewise inapplicable in this case. These rationales are: (1) a lack of parallel liability for private individuals; (2) the "distinctively federal" relationship between the United States and its military forces"; and (3) double recovery.²⁸³ First, the rationale of no parallel liability in the private sector is inapposite because this statute specifically applies to private individuals and the Court has rejected that rationale.²⁸⁴

²⁸⁰ See *United States v. Johnson*, 481 U.S. 681, 690–91 (1987). See generally Guy L. Siebold, *Core Issues and Theory in Military Sociology*, 29 J. POL. & MIL. SOC. 140 (2001).

²⁸¹ See 10 U.S.C. § 938 (2006).

²⁸² *Johnson*, 481 U.S. at 691.

²⁸³ See *Cummings v. Dep't of the Navy*, 279 F.3d 1051, 1056 (D.C. Cir. 2002).

²⁸⁴ See *Feres v. United States*, 340 U.S. 135, 141–42 (1950). This rationale was rejected in *Indian Towing Co. v. United States*, 350 U.S. 61, 66–69 (1955).

Second, even though there is a distinctly federal relationship between the United States and its military,²⁸⁵ that relationship is only implicated when the release is within the military, but not when it is released to outside parties. Congress is not clear on whether this law would apply to the military,²⁸⁶ thus it is up to the courts to define the application of the Privacy Act to members of the military. Since the Privacy Act is a federal statute, it would not subject members of the military to the vagaries of local law. This makes the Privacy Act more applicable than the FTCA to military personnel under the rationales of *Feres* because recovery would not be based on luck of geographic assignment.²⁸⁷ In addition, the terms of the Privacy Act are specifically defined to include the military branches.²⁸⁸ Thus, in cases of outside release, the rationale of avoiding results based on local law is also inapplicable.

Finally, the Court was worried about a double recovery for members of the military under the FTCA.²⁸⁹ This is similarly inapplicable because there is no other provision for recovery by members of the military unless they obtain one under the provisions of the Privacy Act. The VA compensation system will not provide a remedy for violations of the Privacy Act, and therefore military personnel will not be receiving a windfall if they recover in a lawsuit.²⁹⁰ Accordingly, recovery should be allowed for releases to parties outside of the command structure of the military because, as Justice Scalia pointed out, “nonuniform recovery cannot possibly be worse than . . . uniform nonrecovery [sic].”²⁹¹

²⁸⁵ *Feres*, 340 U.S. at 143.

²⁸⁶ Compare *Cummings*, 279 F.3d at 1055 (“[O]n its face, the Privacy Act would appear to permit actions brought by military personnel.” (internal quotation marks omitted) (quoting *Cummings v. Dep’t of the Navy*, 116 F. Supp. 2d 76, 81 (D.D.C. 2000), *rev’d*, 279 F.3d 1051 (D.C. Cir. 2002)), with *id.* at 1058 (Williams, J., dissenting) (“I see neither any greater hint from Congress that *Feres* should not govern, nor any indication that Privacy Act damage claims pose less risk of interference with command relations.”).

²⁸⁷ See *Feres*, 340 U.S. at 143.

²⁸⁸ See 5 U.S.C.A. § 552(f)(1) (West 2011).

²⁸⁹ See *Feres*, 340 U.S. at 144.

²⁹⁰ See *Cummings*, 279 F.3d at 1056. Compare with Justice Scalia’s dissent in *United States v. Johnson*, where he posits that suits under the FTCA should be allowed regardless of whether the plaintiffs were previously compensated under the Veterans’ Benefits Act. 481 U.S. 681, 697–98 (1987) (Scalia, J., dissenting).

²⁹¹ *Johnson*, 481 U.S. at 695–96 (Scalia, J., dissenting).

The cases previously discussed achieved the right result within this rubric, but should have made one further factual distinction—to whom the information was released. Applying this test to *Cummings*, Mary Louise Cummings would be allowed to bring her claims because the release of her information was not incident to her service and was to an outside party.²⁹² The discipline and decisionmaking of the military is not compromised when the information is released to a book author, and this is the type of claim that the Privacy Act was intended to protect.²⁹³ Similarly, *Uhl* was also correctly decided. In that case, the medical records and other information were only released to other parts of the military that were deciding if Uhl should be discharged from his military and civilian positions within the military.²⁹⁴ Therefore, the court correctly barred these claims because of the *Feres* doctrine.²⁹⁵ Correspondingly, in *MacQuill*, the court correctly allowed the claims under this framework because the records were released to state officials adjudicating non-military matters, civilian addresses, and non-military police departments.²⁹⁶ The officials and civilians given access to these records were outside of the military chain of command; dissemination of the criminal records to these officials was unlawful under the Privacy Act; and thus the rationales of the *Feres* doctrine do not apply. Accordingly, the claims were properly allowed to proceed because the records were sent to civilian addresses off-base that were home to both members of the NYANG and civilians outside of the military command structure.²⁹⁷

CONCLUSION

The *Feres* doctrine has become an important part of the Supreme Court's jurisprudence in the realm of military affairs.²⁹⁸

²⁹² *Cummings*, 279 F.3d at 1053.

²⁹³ *Joyce*, *supra* note 23 (recognizing “the alarming tendency of the government to put information technology to uses detrimental to individual privacy”). The author's name was Robert Gandt and the book he published was *Bogeys and Bandits: Making of a Fighter Pilot*. *Cummings*, 279 F.3d at 1053.

²⁹⁴ *Uhl v. Swanstrom*, 79 F.3d 751, 753 (8th Cir. 1996).

²⁹⁵ *Id.* at 756.

²⁹⁶ *MacQuill v. Killian*, No. 07-CV-1566, at 3–4 (E.D.N.Y. Mar. 25, 2008).

²⁹⁷ Amended Complaint and Demand for Jury Trial, *supra* note 194, at 6 (E.D.N.Y. June 13, 2007).

²⁹⁸ *See Feres v. United States*, 340 U.S. 135 (1950).

It has been extended from its original application to the FTCA into a variety of areas—from *Bivens* claims to Americans with Disabilities Act claims.²⁹⁹ The rationales underlying the use of the doctrine have changed from the lack of parallel liability in the private sector, double compensation problems, and the application of state tort law to the military, to the most important rationale—the effect that allowing claims would have on military discipline and decisionmaking.³⁰⁰

The Privacy Act makes it unlawful for agencies to release records of individuals without proper consent.³⁰¹ It provides some exceptions but seems to apply at least in most instances across all agencies within the federal government.³⁰² Civil remedies including damages and equitable relief are provided, and criminal sanctions can be imposed for a willful and intentional breach.³⁰³

The cases discussed, *Cummings v. Department of the Navy* and *Uhl v. Swanstrom*, seem to reflect a disagreement as to whether to apply the *Feres* doctrine to claims by members of the military under the Privacy Act, but are actually in harmony with each other due to a significant factual distinction—to whom the information was released. In short, this Note proposes that the courts first apply the “incident to service” test, and if the release is incident to the plaintiff’s service, then look at the recipient of the released information. If the recipient is a member of the military within its command structure, the claim is properly barred by the *Feres* doctrine. But if the information is released to an outside, civilian party, there is no compelling reason—military or otherwise—to bar claims. This rationale would help plaintiffs obtain relief while still respecting military discipline and decisionmaking.

²⁹⁹ See *Cummings*, 279 F.3d at 1060–61 & nn.1–5 (D.C. Cir. 2002) (Williams, J., dissenting) (collecting cases).

³⁰⁰ See *United States v. Johnson*, 481 U.S. 681, 684 & n.2 (1987).

³⁰¹ 5 U.S.C.A. § 552a(b) (West 2011).

³⁰² *Id.* § 552a(j)–(k).

³⁰³ *Id.* § 552a(g)(1) (civil penalties); *id.* § 552a(i)(1) (criminal penalties).