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> Our citizens in uniform may not be stripped of basic [civil] rights simply because they have doffed their civilian clothes.[1]

For seventy-two years, federal courts have barred military servicemembers who are survivors of sexual assault from recovery under the Federal Tort Claims Act ("FTCA"). The Feres *doctrine, promulgated from the Supreme Court case* Feres v. United States*, became the foundation for federal courts' decisions that sexual assault is incident to one's service in the military. Courts' over-deference to the military has enabled a system that turns a blind eye to perpetrators and abusive environments on bases. However, the Ninth Circuit recently turned the tide in FTCA cases, holding in* Spletstoser v. Hyten *that military sexual assault survivors should be permitted to recover damages. Thus, this Note calls for all federal courts to bolster the analysis in* Spletstoser v. Hyten *and implement a bright-line rule that sexual assault is not incident to one's military service, arming survivors with the resources needed to hold their perpetrators accountable and promote a healthier environment in the military.*

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

INTRODUCTION

What do an Army Captain,[2] a Marine Second Lieutenant,[3] and an Air Force Airman[4] have in common? All three train for combat on domestic or international bases,[5] grow as a collective unit within their respective branches,[6] and foster values of perseverance and respect in their missions.[7] At the same time, however, they may be sexually assaulted, humiliated, and disowned by their peers and superiors—all forms of emotional anguish that some regard as incident to being a servicemember.[8]

Army Captain Erin Scanlon was raped by a Fire Support Officer at a charity event near Fort Bragg, an Army base in North Carolina.[9] Judicial responses were disheartening at best. In state court, a judge dismissed the case out of deference to the military court prosecuting the assailant.[10] In military court, jurors[11] acquitted her assailant of

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[2] *See generally* Ella Torres, *Army Officer Says She Was Raped, But Supreme Court Ruling Blocks Her from Justice*, ABC NEWS (Jan. 21, 2020), https://abcnews.go.com/US/army-lieutenant-raped-supreme-court-ruling-blocks-justice/story?id=67473953 [https://perma.cc/9L7M-9VF3] (referencing a story of an army officer that was sexually assaulted).

[3] *See generally* Klay v. Panetta, 924 F. Supp. 2d 8, 10 (D.D.C. 2013) (referencing a case that includes details of various Marines that were sexually assaulted).

[4] *See generally* Corey v. United States, No. 96-6409, 1997 WL 474521, at *1 (10th Cir. 1997) (referencing a case that includes details of an Air Force airman who was assaulted).

[5] SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., *Understanding the Military: The Institution, the Culture, and the People, Information for Behavioral Healthcare* 3 (2010), www.samhsa.gov/sites/default/files/military_white_paper_final.pdf [https://perma.cc/4VJH-WEX7].

[6] *Veterans Employment Toolkit*, U.S. DEP'T OF VETERANS AFFS. (Sept. 2, 2015), https://www.va.gov/vetsinworkplace/docs/em_missionOriented.asp [https://perma.cc/L2PY-M7AB].

[7] *Id.*

[8] Torres, *supra* note 2.

[9] *Id.*

[10] *Id.*

[11] Unlike jurors in state or federal courts, only military personnel serve on juries in military courts. *Military Juries*, THE LAW OFFICE OF MATTHEW BARRY PLLC (July 27, 2020), https://mattbarrylaw.com/2020/07/27/military-

sexual assault charges.[12] Captain Scanlon then sought damages from the federal government, "alleging negligent investigation and handling of [the] sexual assault case" with no success.[13] Second Lieutenant Elle Helmer[14] was unconscious when she was raped by another officer in the Marines.[15] Helmer's assailant also emerged unscathed from court proceedings and was later promoted.[16] Although she did not bring a negligence action, her claims of constitutional violations were barred, *inter alia*, by qualified immunity and because the Marines were not responsible for shielding servicemembers from rape and sexual misconduct.[17] Airman Cheryl Corey was sexually assaulted by a Lieutenant Colonel while stationed in Turkey.[18] Air Force investigations into this matter were quickly quashed and Corey's constitutional and tort actions in federal court were dismissed under the *Feres* doctrine.[19]

These women[20] exposed their minds, bodies, and souls each time they recounted the details of their sexual trauma to institutions and

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juries/#:~:text=Military%20juries%20are%20very%20unique,with%20updates%20to%20the%20UCMJ [https://perma.cc/S3QB-UTSY]. Additionally, jurors in military courts must be of a higher rank than the servicemember facing action, as opposed to the civilian court practice of a trial by a jury of one's peers. *Id.*

[12] Gailya Paliga, *Military Interference in Sexual Assault Case of Captain Erin Scanlon at Fort Bragg*, MS. MAG. (Aug. 4, 2020), https://msmagazine.com/2020/08/04/military-interference-in-sexual-assault-case-of-captain-erin-scanlon-at-fort-bragg/ [https://perma.cc/TF3B-UTKP].

[13] Torres, *supra* note 2.

[14] Second Lieutenant Helmer was one of twelve plaintiffs in an action against former Secretaries of Defense and other military officials for "creating and maintaining a hostile military environment that permitted sexual assault and retaliation to continue unabated." Klay v. Panetta, 924 F. Supp. 2d 8, 10 (D.D.C. 2013).

[15] Karisa King, *How Military Makes Target of Rape Victims*, SFGATE (May 19, 2013), https://www.sfgate.com/nation/article/How-military-makes-target-of-rape-victims-4529920.php [https://perma.cc/UCF9-5PT4].

[16] *Id.*

[17] *Klay*, 924 F. Supp. 2d at 23.

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

[19] *Id.* at *5–6; *see infra* Part I.

[20] This is not to say that only women are targeted for sexual assault in the Armed Forces. An estimated 7,500 male servicemembers "experience[ed] sexual assault" in 2018 out of 20,500 survivors. U.S. DEP'T OF DEF., APP. B:

courts that trivialized and dismissed their suffering. Sadly, they are just three of many military sexual assault plaintiffs whose lawsuits are dismissed or denied from federal court each year.[21] While survivors are forced to encounter their trauma daily by working with their assailants or overcoming mental health obstacles, their assailants and military superiors remain sheltered by a decades old doctrine established in the Supreme Court case *Feres v. United States*,[22] and the framers of the Federal Tort Claims Act ("FTCA").[23] The FTCA "waives the sovereign immunity of the United States and creates a cause of action against the United States with respect to torts of federal employees," including servicemembers.[24] However, *Feres* bars military claimants in particular from recovery under the FTCA if their injuries "ar[ose] out of or [were] in the course of activity incident to service."[25] As federal courts continue to label sexual assault an "activity incident to service,"[26] commentators have witnessed tension between military values and the actual practice of upholding them at the expense of female sexual assault survivors within these institutions.[27]

STATISTICAL DATA ON SEXUAL ASSAULT 11 (2021), www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_On_Sexual_Assault_FY2020.pdf [https://perma.cc/PZ75-94ZA]. Although a gender-stratified survey was not conducted in 2019 or 2020, approximately 6,290 servicemembers *reported* instances of sexual assault in 2020. *Id.*

[21] It is difficult to quantify the number of lawsuits filed and dismissed each year under the *Feres* doctrine that seek to recover for sexual assault. *See* Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 738 (2013). However, in recent years, servicemembers have filed at least a dozen lawsuits challenging the legitimacy of *Feres*. Meghann Myers, *New for 2020: Here's Why Troops Can't Sue the Military for Medical Malpractice, and How That's Changing*, MIL. TIMES (Dec. 23, 2019), https://www.militarytimes.com/news/your-military/2019/12/23/new-for-2020-heres-why-troops-cant-sue-themilitary-for-medical-malpractice-and-how-thats-changing/ [https://perma.cc/K7WN-GF66].

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

[23] 28 U.S.C. §§ 1346, 2680.

[24] Brief for the Respondent in Opposition at 1–2, Campos v. United States, 139 S. Ct. 1317 (2019) (No. 18-234).

[25] *Feres*, 340 U.S. at 146.

[26] *Id.*

[27] *See* Jenna Grassbaugh, *The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention, and*

The six service branches of the military encourage new members to exemplify many of the same moral values and characteristics.[28] Among the most common are honor, selfless service, and devotion to one's duty as a servicemember on and off the battlefield.[29] For example, an Army discussion of the ideal servicemember indicates that they must "pledge to 'treat others with dignity and respect while expecting others to do the same'" and "stand up for fellow Soldiers" in times of need.[30] Aside from maintaining personal responsibility, the ideal servicemember surrenders their individual identity for the good of the country and their peers.[31] In doing so, however, servicemembers may be required to "endur[e] physical duress and at times risk[] personal safety."[32] Polling shows that civilians

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Prosecution?, 11 OHIO ST. J. CRIM. L. 319, 349 (2014) (discussing how military values have exacerbated the occurrences of sexual assault).

[28] On December 20, 2019, the United States Space Force was made the sixth service branch of the United States Armed Forces. *See* 10 U.S.C. § 9081.

[29] *The Army Values*, U.S. ARMY, https://www.army.mil/values/ [https://perma.cc/33HS-35ZV] (last visited Oct. 13, 2022); *Our Core Values*, U.S. NAVY OFF. OF INFO., https://www.navy.mil/About/Our-Core-Values/ [https://perma.cc/G7HL-ZVZX] (last visited Oct. 13, 2022); *Vision*, U.S. AIR FORCE, https://www.airforce.com/mission/vision [https://perma.cc/L34Y-TAJM] (last visited Oct. 13, 2022); *What Are the Marine Corps Values?*, U.S. MARINE CORPS, https://www.hqmc.marines.mil/hrom/New-Employees/About-the-MarineCorps/Values/ [https://perma.cc/S3FC-JYJT] (last visited Oct. 13, 2022); *Training Center Cape May*, U.S. COAST GUARD, https://www.forcecom.uscg.mil/Portals/3/Documents/TCCM/Documents/Helmsmannew.pdf?ver=2017-05-23-160144093#:~:text=Our%20service%20and%20strength%20are,Respect%2C%20and%20Devotion%20to%20Duty.&text=Integrity%20is%20our%20standard.,accountable%20to%20the%20public%20trust [https://perma.cc/QYX8-DDZ7] (last visited Oct. 13, 2022).

[30] The values described are "what being a Soldier is all about." *The Army Values*, U.S. ARMY, *supra* note 29.

[31] *See* Morgan L. DeBusk-Lane, *Social Identity in the Military*, PENN STATE APPLIED SOC. PSYCH. (Feb. 27, 2015, 10:00 AM), https://sites.psu.edu/aspsy/2015/02/27/social-identity-in-the-military/ [https://perma.cc/8EQZ-K9Y9]; Leonard Pitts & Leonard Pitts Jr., *Army No Place for Individuality*, BUFFALO NEWS (Jan. 19, 2001), https://buffalonews.com/news/army-no-place-for-individuality/article_a5e4c75d-4fd6-509e-bfac-33b3cc74df41.html [https://perma.cc/HNE5-ZP2U].

[32] *The Army Values*, U.S. ARMY, *supra* note 29.

maintain similar perceptions of servicemembers, namely their unwavering duty to country and steadfast emphasis on discipline and structure above all.[33]

The prevalence of sexual assault in the military reveals a blind spot in its values. Branches have publicly condemned sexual violence,[34] but servicemembers have failed to tackle issues impacting women in an attempt to avoid threatening the military unit as a whole.[35] For example, if the perpetrator is a "high performer" in his physical tests, that fact may outweigh his superior's desire to pursue sexual assault allegations because of his integral role to missions, thus making the survivor a weaker contributor to military efforts.[36] Even if the survivor were a "high performer," military leaders would view her[37] inability to prevent the assault as a failure to display personal courage in life-threatening environments.[38] By deemphasizing the perpetrator's actions, military leaders "destroy[ ] the trust needed among service members responsible for protecting

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[33] *Chapter 5: The Public and the Military*, PEW RSCH. CTR. (Oct. 5, 2011), https://www.pewresearch.org/social-trends/2011/10/05/chapter-5-the-public-and-the-military/ [https://perma.cc/6QZQ-V58A]; *see also* Diane H. Mazur, *Military Values in Law*, 14 DUKE J. GENDER L. & POL'Y 977, 994 (2007).

[34] *Sexual Harassment Assault Response Prevention*, U.S. ARMY GARRISON JAPAN, https://home.army.mil/japan/index.php/my-fort/all-services/sharp#:~:text=The%20Army's%20Sexual%20Harassment%2FAssault,member%20of%20the%20Army%20family [https://perma.cc/JPL7-E2V7] (last visited Oct. 13, 2022) ("Sexual harassment and sexual assault are inconsistent with Army Values and will not be tolerated."); U.S. COAST GUARD, SEXUAL ASSAULT IN THE U.S. COAST GUARD (FY 2019) 1 (2020), https://www.dcms.uscg.mil/Portals/10/CG-1/cg111/docs/SAPR/Sexual%20Assault%20in%20the%20US%20Coast%20Guard_FY2019.pdf?ver=WEg_mpzFjvofsNt7NjtILg%3D%3D&timestamp=1618497396663 [https://perma.cc/GK4T-N62D] ("Sexual assault is not only a crime but also a violation of the Service's Core Values of 'Honor, Respect, and Devotion to Duty.'").

[35] *See* Mazur, *supra* note 33, at 993.

[36] Carl Andrew Castro et al., *Sexual Assault in the Military*, 17 CURR PSYCHIATRY REP. 1, 5 (2015).

[37] In this Note, I will be using the pronoun "her" for survivors and "him" for perpetrators for simplicity and to highlight the prevalence of sexual assault against women by men in the military. However, my choice of pronouns does not undermine assault against men and gender non-conforming people.

[38] *See* Mazur, *supra* note 33, at 997.

each other's lives."[39] Thus, because blind deference to a value system and structure threatens the safety and dignity of female servicemembers, it is necessary to address the impact that military values have on the behavior of male servicemembers and military leaders.[40]

This Note examines how federal courts, through their interpretations of the *Feres* doctrine, bar sexual assault survivors from recovery under the FTCA and enable a system that turns a blind eye to perpetrators and abusive environments in military academies and on bases. Part I provides a history of *Feres* and the subsequent cases that elaborate on the *Feres* doctrine. Part II deconstructs the "incident to service" component of the *Feres* doctrine and contextualizes federal courts' analyses of "incident to" in situations outside the military. Part III discusses the impact of courts' analyses of the *Feres* doctrine on the wider military community, specifically how military values, such as camaraderie and respect for peers and superiors, are extensively present in both military and civilian court proceedings. Finally, Part IV argues that courts should apply the Ninth Circuit's approach taken in *Spletstoser v. Hyten*[41] to legitimize the harm survivors experience and hold ranking military officials responsible for their inactions in the context of sexual assault.

I. PROCEDURAL BARRIERS: THE FTCA AND THE *FERES* DOCTRINE

The enactment of the FTCA in 1946[42] "mark[ed] the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit."[43] In other words, private citizens were finally permitted to bring civil actions in federal court for

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[39] *See* Megan N. Schmid, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 477 (2010).

[40] *See* Mazur, *supra* note 33, at 1004.

[41] Spletstoser v. Hyten, 44 F.4th 938, 958–59 (9th Cir. 2022).

[42] *Federal Tort Claims Act (FTCA)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/ogc/federal-tort-claims-act-ftca [https://perma.cc/6RRD-HLG9] (last updated Oct. 28, 2022).

[43] Feres v. United States, 340 U.S. 135, 139 (1950).

money damages against the United States[44] when an employee of the United States is harmed "within the scope of his office of employment."[45] These civil actions were originally confined to "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission."[46] However, Congressional concerns over heightened "exposure to monetary damages"[47] resulted in a lengthy list of exceptions to the FTCA, namely a bar on suits "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[48] The "time of war" exception has since been expanded to include injuries stemming from "noncombatant activities in peace."[49] With Congress broadening the scope to bar essentially *any* negligence-based claims against or toward members of the Armed Forces,[50] federal court intervention was necessary to retract the limitation on liability.

Thus, in 1949, the Supreme Court decided its first FTCA claim involving a member of the Armed Forces.[51] In 1945, a civilian employee of the Army, driving off-base, crashed his military-issued truck into a car containing three family-members, two of whom were military service members.[52] The accident resulted in the death of one brother, and two others were gravely injured.[53] The administrator of one of the passengers' estates sought to recover damages due to negligence.[54] Writing for the majority, Justice Murphy held in *Brooks v. United States* that the "time of war"

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[44] "[T]he only proper defendant in an FTCA claim is the United States." Jude v. Comm'r of Soc. Sec., 908 F.3d 152, 157 n.4 (6th Cir. 2018).

[45] 28 U.S.C. § 1346(b)(1).

[46] *Id.*

[47] KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW (2019).

[48] 28 U.S.C. § 2680(j).

[49] Feres v. United States, 340 U.S. 135, 138 (1950).

[50] R. Craig Anderson & John M. Pellett, *Personal Civil Liability for Federal Employees and Their Representation by the Department of Justice in the Aftermath of the* Westfall *Legislation–An Introduction for the Base Judge Advocate*, 33 A.F. L. REV. 19, 28 (1990).

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

[52] *Id.*

[53] *Id.*; *see also* James L. Tapley, *Torts—Federal Tort Claims Act—Servicemen's Suits*, 28 N.C. L. REV. 137, 137 (1949).

[54] *Brooks*, 337 U.S. at 50.

exception to the FTCA was inapplicable to the factual circumstances, thus permitting the plaintiffs to receive monetary damages.[55] Moreover, the car accident "had nothing to do with the Brooks' army careers."[56] However, if the accident had been "incident to the Brooks' service," the Court would have held otherwise.[57] After *Brooks*, all military FTCA cases were assessed under the controversial and vague "incident to service" standard, thus inviting the never-ending stream of litigation that Congress sought to avoid when drafting the FTCA exceptions.

Less than two years later, the Supreme Court set out to resolve the "incident to service" standard's ambiguity.[58] *Feres v. United States* combined three military FTCA claims: one for a soldier burning to death in his barracks at present-day Fort Drum and two for military surgical operations, one of which resulted in death and the other in a medical cloth being left in the servicemember's stomach.[59] Distinguishing the case from *Brooks*[60] and denying recovery for the three individual plaintiffs, Justice Jackson established the infamous *Feres* doctrine, holding that "the Government [shall not be] 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."[61] The Court offered three reasons for why the military should, in essence, remain immune from negligence suits. First, enabling members of the military to allege negligence against their superiors or their branches as a whole would subject the government to "novel and unprecedented liabilities."[62] Second, state-law claims should not disrupt the "distinctively federal" relationship between the government and the

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[55] *Id.* at 51, 54.

[56] *Id.* at 52.

[57] *See id.*

[58] Feres v. United States, 340 U.S. 135, 138 (1950).

[59] *Id.* at 137.

[60] According to Justice Jackson, the plaintiffs in *Brooks* were injured "while on leave," while the plaintiffs here faced injuries and death "while performing duties under orders." *Id.* at 146.

[61] *Id.*

[62] *Id.* at 142.

military.[63] Finally, soldiers should not be required to expend their already limited resources toward litigation[64] since pathways to compensation already existed under the Veterans' Benefits Act.[65]

Four years after *Feres*, the Supreme Court mentioned a fourth reason for narrowing the scope of the FTCA in *United States v. Brown*, in which the plaintiff incurred permanent nerve damage after a negligent surgical operation.[66] The *Brown* court, citing the *Feres* court's reasoning, discussed that if military plaintiffs were permitted to sue their superiors, such litigation would interfere with disciplinary measures unique to the military.[67] Although Justice Douglas held that the plaintiff's surgical injuries in *Brown* were not incident to his military service,[68] the Court's concern with military discipline has become the most prominent reason why claims have been dismissed under the *Feres* doctrine.[69]

As the scope of the *Feres* doctrine has expanded over the past seventy-one years, the underlying reasons for denying recovery have become more restrictive under two interwoven analyses.[70] First, the Supreme Court has barred claims in which the injuries suffered "'are even remotely related to the individual's status as a

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

[64] *Id.* at 145.

[65] *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671 (1977) (discussing the "'no fault' compensation scheme" under the Veterans' Benefits Act).

[66] United States v. Brown, 348 U.S. 110, 110–11 (1954).

[67] *Id.* at 112.

[68] *Id.* at 113.

[69] *See, e.g.*, United States v. Shearer, 473 U.S. 52, 59 (1985); Mackey v. United States, 226 F.3d 773, 777 (6th Cir. 2000); Lovely v. United States, 570 F.3d 778, 784 (6th Cir. 2009); Buchanan v. United States, 102 F. Supp. 3d 935, 943 (W.D. Ky. 2015).

[70] Although more recent cases fall into one, or both, of these categories, the Supreme Court has also precluded third parties from suing the government as a result of a servicemember's injuries. *See Stencel Aero Eng'g Corp.*, 431 U.S. at 673 (holding that third-party plaintiff manufacturer was precluded from indemnifying the federal government since the relationship between the government and "its suppliers of ordnance" is "'distinctively federal in character'").

member of the military'."[71] Second, claims that involve any "military judgments and decisions" made in relation to "service-related activity" are precluded, even if the plaintiff does not present a negligence-based theory for recovery.[72] As a result, activities that even a civilian can partake in, or that may appear quite happenstance, are roped into the *Feres* doctrine. While the "typical *Feres* factual paradigm" traditionally involves a "suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the United States,"[73] servicemembers have asserted more tenuous claims in some circumstances. Servicemember plaintiffs whose newborn babies are injured and poorly cared for,[74] who drown on a recreational rafting trip,[75] and who are injured while watching television because fragments of a ceiling collapsed on them[76] are not entitled to monetary damages because federal courts continue to attribute each injury to the plaintiff's role in the military. In fact, courts make similar conclusions when a civilian is responsible for a servicemember's injuries.[77] While certain courts have held the opposite regarding injuries that do not implicate a plaintiff's position and duties in the military,[78] the lack of clarity and consistency of the "incident to service" standard deserves attention, particularly in cases that involve sexual assault.

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[71] Pringle v. United States, 208 F.3d 1220, 1223–24 (10th Cir. 2000) (quoting Persons v. United States, 925 F.2d 292, 296 n.7 (9th Cir. 1991)).

[72] *See* United States v. Johnson, 481 U.S. 681, 691 (1987); *see also* Latchum v. United States, 65 F. App'x 171, 172 (9th Cir. 2003).

[73] Johnson v. United States, 749 F.2d 1530, 1537 (11th Cir. 1985).

[74] Ortiz v. United States (*ex rel.* Evans Army Cmty. Hosp.), 786 F.3d 817, 818 (10th Cir. 2015).

[75] Costo v. United States, 248 F.3d 863, 864, 869 (9th Cir. 2001).

[76] Schnitzer v. Harvey, 389 F.3d 200, 202 (D.C. Cir. 2004).

[77] *See Johnson*, 481 U.S. at 682–83 (holding that the *Feres* doctrine applies when a servicemember's death was a result of negligent guidance from civilian controllers during a rescue mission).

[78] *See* Lutz v. Sec'y of Air Force, 944 F.2d 1477, 1479, 1487, 1489 (9th Cir. 1991) (holding that sexual harassment was not incident to plaintiff's service); Regan v. Starcraft Marine, L.L.C., 524 F.3d 627, 640, 643 (5th Cir. 2008) (holding that injuries from a recreational activity were not incident to plaintiff's service).

II. FEDERAL COURTS' ANALYSIS OF THE "INCIDENT TO" STANDARD

The concept of injuries being incident to one's service in the military was first introduced in *Brooks v. United States*.[79] The Supreme Court sought to provide a framework for lower courts to utilize when evaluating the admissibility of a servicemember's claims under the FTCA. The *Brooks* majority assessed the plaintiff's circumstances—a car accident occurring off-base, having "nothing to do with the [plaintiffs'] [A]rmy careers"—and determined that their claims were not barred by the FTCA.[80] However, "[w]ere the accident incident to the Brooks' service, a wholly different case would be presented."[81] The *Feres* majority glossed over the easily administrable analysis in *Brooks* and seemingly permitted "incident to service" to morph into an all-encompassing phrase. Moreover, the inability of judges to remove themselves from their roles as government employees and view the injuries from the perspective of a servicemember or ordinary civilian[82] has unduly prevented recovery for families and withheld accountability served on military officials due to their desire to not meddle with "sensitive military affairs."[83] Thus, the aforementioned analysis begs the question: what does "incident to" mean?

A. A General Understanding of "Incident to"

In a legal context, "incident [to]" encompasses activities and situations that are "dependent on, subordinate to, arising out of, or otherwise connected with something else, usually of greater

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[79] Brooks v. United States, 337 U.S. 49, 52 (1949).

[80] *Id.* at 52, 54.

[81] *Id.* at 52.

[82] Professor Paul Figley suggested that "the [*Feres*] doctrine has survived because the Supreme Court does not want to inadvertently hamstring the military." Dave Philipps, *U.S. Troops Could Soon Be Able to Sue Over Medical Blunders*, N.Y. TIMES (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/us/military-lawsuit-malpractice-feres.html [https://perma.cc/RGU3-YTK9]. In addition, courts have tended to defer to military judgment when determining the constitutionality of military practices or the imposition of liability on a servicemember. *See* Mazur, *supra* note 33, at 993.

[83] United States v. Johnson, 481 U.S. 681, 690 (1987).

importance."[84] The earliest Supreme Court reference of "incident to" dates to the 1793 case *Chisholm v. Georgia*, where the Court mentioned the phrase in the context of corporations[85] and government powers[86] without further indication of how the standard should be applied. Twentieth-century Supreme Court jurisprudence, however, featured thorough analyses of the standard in business and interpersonal contexts. Aside from the famous "search incident to arrest" standard[87] articulated in *Chimel v. California*,[88] justices have discussed the scope of "incident to" in employment,[89] childbirth,[90] and expenses associated with investment accounts.[91] In these cases, courts consistently apply "incident to" by describing the activity in question as being necessary to the circumstance or context.

However, the "incident to service" standard has not enjoyed similar consistency. In fact, the Supreme Court has yet to supply a

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[84] *Incident*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[85] Chisholm v. Georgia, 2 U.S. 419, 448 (1793) ("except such laws as are necessarily incident to all corporations").

[86] *Id.* at 467 ("Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremeties [sic] and to an appeal to the sword, a national tribunal was necessary . . . .").

[87] Anthony M. Ruiz, *Defining* Gant*'s Reach: The Search Incident to Arrest Doctrine After* Arizona v. Gant, 89 N.Y.U. L. REV. 337, 342 (2014). Under the search incident to arrest doctrine, police officers are permitted to search an arrestee's person and the arrestee's reaching area. *Id.* Both police officers and the general public criticize the standard outlined in *Chimel* for, respectively, restricting officers' duties to protect themselves and other citizens and infringing on personal privacy. *See generally* Chelsea Oxton, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 CREIGHTON L. REV. 1157, 1190 (2010).

[88] Chimel v. California, 395 U.S. 752, 760 (1969).

[89] Boldt v. Pa. R. Co., 245 U.S. 441, 445 (1918) ("At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment . . . .").

[90] Maher v. Roe, 432 U.S. 464, 479 (1977) ("The subsidizing of costs incident to childbirth is a rational means of encouraging childbirth.").

[91] Comm'r of Internal Revenue v. Groetzinger, 480 U.S. 23, 31 (1987) ("[E]xpenses incident to caring for one's own investments, even though that endeavor is full time, are not deductible as paid or incurred in carrying on a trade or business . . . .").

concrete definition for lower courts to follow.[92] *United States v. Shearer*[93] marked the Supreme Court's first attempt, albeit in dicta, to outline the appropriate standard for lower courts, largely emphasizing the "military discipline" rationale from *Feres*.[94] The Court assessed "whether the suit requires [a] civilian court to second-guess military discipline" and "whether the suit might impair essential military doctrine."[95] Still dissatisfied by the return to the vague and inconsistent *Feres* analysis, various circuit courts proposed a broader standard that evaluated the negligence action based on a totality of the circumstances. The Fifth Circuit, Eighth Circuit, and Eleventh Circuit considered "the duty status of the servicemember," "the place where the tort occurred," and "the activity the servicemember was engaged in at the time of the injury."[96] The Ninth Circuit, on the other hand, prescribed more fact-intensive factors for lower courts to follow: "(1) the place where the negligent act occurred;" "(2) the duty status of the plaintiff when the negligent act occurred;" "(3) the benefits accruing to the plaintiff because of his status as a service member;" and "(4) the nature of the plaintiff's activities at the time the negligent act occurred."[97]

In *United States v. Stanley*, Justice Scalia praised the circuit courts' departure from the traditional emphasis on military discipline for its ease of applicability and good-faith effort to preserve judicial resources.[98] While the aforementioned analyses of the Fifth, Eighth, Ninth, and Eleventh Circuits exceed the traditional considerations in *Feres* and require judges to consider the full

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[92] *See* Kaitlan Price, Comment, Feres*: The "Double-Edged Sword*," 125 DICK. L. REV 745, 757 (2021).

[93] United States v. Shearer, 473 U.S. 52, 57 (1985).

[94] Thomas M. Gallagher, *Servicemembers' Rights Under the* Feres *Doctrine: Rethinking "Incident to Service" Analysis*, 33 VILL. L. REV. 175, 189 (1988).

[95] *Shearer*, 473 U.S. at 57–58 (finding plaintiff's claim that the Army maintained an unsafe working environment "call[ed] into question basic choices about the discipline, supervision, and control of a serviceman").

[96] Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980); Brown v. United States, 739 F.2d 362, 367–68 (8th Cir. 1984); Pierce v. United States, 813 F.2d 349, 353–54 (11th Cir. 1987).

[97] Johnson v. United States, 704 F.2d 1431, 1436–41 (9th Cir. 1983).

[98] *See* United States v. Stanley, 483 U.S. 669, 683 (1987) ("The 'incident to service' test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.").

circumstances of the case, plaintiffs in lower courts have yet to see the benefits of an approach with a consistently applied broader scope.[99] Under a totality of the circumstances standard, perhaps relatives would have been able to recover for their servicemembers' drowning on a recreational trip[100] or suicide due to overt religious discrimination.[101]

B. Incidents Not "Incident to Service"

A small minority of cases decided since *Shearer* have held that certain injuries are *not* incident to one's service in the military.[102] In 1984, Major Marsha Lutz's lucrative career in the Air Force came to a halt.[103] Major Lutz's subordinates impermissibly entered her office and searched through her desk to find intimate correspondence between Lutz and her female intimate partner, also her civilian secretary.[104] Her subordinates then distributed the letters to other personnel.[105] Lutz was "compelle[d] . . . to resign" as a result of actions taken by her superiors and subsequently filed various claims[106] against both the subordinates and the Secretary of

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[99] *See* Katherine Shin, *How the* Feres *Doctrine Prevents Cadets and Midshipmen of Military-Service Academies from Achieving Justice for Sexual Assault*, 87 FORDHAM L. REV. 767, 783 (2018) ("In sum, depending on where the service member raises his or her claim, the results might differ due to the differences in each circuit's *Feres* analysis.").

[100] Costo v. United States, 248 F.3d 863, 864, 869 (9th Cir. 2001).

[101] *See* Siddiqui v. United States, 783 F. App'x 484, 486 (6th Cir. 2019).

[102] Lutz v. Sec'y of Air Force, 944 F.2d 1477, 1477 (9th Cir. 1991); Regan v. Starcraft Marine, L.L.C., 524 F.3d 627, 645 (5th Cir. 2008).

[103] *See Lutz*, 944 F.2d at 1479.

[104] *Id.*

[105] *Id.*

[106] *Id.* Instead of bringing an action under the FTCA, Lutz asserted violations of her constitutional rights. *Id.* Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, civilians and servicemembers alike were permitted to assert damages claims against the federal government for constitutional violations. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). Servicemembers hoped, to their eventual disappointment, that these *Bivens* claims would offer them a path to recovery as the *Feres* doctrine grew broader in scope. *See* Shin, *supra* note 99, at 777. Although it is not uncommon for servicemembers to bring causes of action under both *Bivens* and the FTCA, this Note will focus solely on FTCA claims. *See*

the Air Force.[107] The district court held, and the Ninth Circuit affirmed, that the subordinates' actions were not incident to their military service because they "further[ed] no conceivable military purpose and [were] not perpetrated during the course of a military activity."[108] Most importantly, the court noted that the presence of military uniforms should not be used as a form of immunity when the same tortious conduct at issue would render a civilian liable.[109] The Ninth Circuit skirted the traditional consideration of military discipline as a blanket on claims implicating the *Feres* doctrine, yet suggested that a factually analogous action involving superiors as the perpetrators may result in an outcome similar to previous *Feres* cases.[110]

Other courts have applied similar analyses for injuries stemming from leisure activities.[111] Army Staff Sergeant Daniel Regan's livelihood was permanently impacted in 2005 when Regan and his acquaintances rented a pontoon boat for recreational use from an Army-sponsored facility, unaware of its structural defects.[112] At one point during the day, Regan slipped off the boat and suffered leg injuries that required amputation.[113] Seeking to avoid direct liability for Regan's injuries, the pontoon's manufacturer filed a third-party claim[114] against the federal government with allegations of negligence.[115] After Regan and his family endured various procedural obstacles, the Fifth Circuit concluded that Regan's injuries were not incident to his service, elaborating on findings

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United States v. Stanley, 483 U.S. 669, 672 (1987); Colon v. United States, 320 F. Supp. 3d 733, 736 (D. Md. 2018).

[107] *Lutz*, 944 F.2d at 1479.

[108] *Id.* at 1487–89.

[109] *Id.* at 1487.

[110] *See id.* at 1485–87.

[111] *See* Regan v. Starcraft Marine, L.L.C., 524 F.3d 627, 641 (5th Cir. 2008); Kelly v. Panama Canal Comm'n, 26 F.3d 597, 600 (5th Cir. 1994).

[112] *See Regan*, 524 F.3d at 629–30.

[113] *Id.*

[114] Regan's initial claims against Starcraft Marine, insurance companies, and his companion on the trip were removed to federal court based on a finding of federal question jurisdiction. *See id.* at 630. Starcraft's complaint arose after the district court remanded the case due to improper "evidence of federal authority over the site of the accident." *Id.*

[115] *Id.*

raised in *Lutz*.[116] Circuit Judge Southwick criticized previous courts' sweeping applications of the military discipline rationale to all cases involving a servicemember's injuries.[117] Moreover, Regan's injuries were only coincidental and not necessary to his Army duties given the recreational purpose of the trip.[118] Finally, the Fifth Circuit proposed a new standard for discerning the applicability of *Feres*: "the further from uniquely military functions an activity may be, and the further from a military base the incident occurs, the less justified is the *Feres* bar."[119]

Challenging the all-encompassing nature of the "incident to service" test, both *Regan*[120] and *Lutz*[121] highlight the benefits of an individualized approach to injuries and propose new standards with promising applicability to more nuanced circumstances.[122]

C. Sexual Assault as "Incident to Service"

Servicemembers continue to remain without legal remedy under an unclear application of "incident to service" even after circuit courts established stronger standards. In particular, survivors of sexual assault continue to be one of the more vulnerable subgroups in FTCA litigation under this analysis.[123] *Dexheimer v. United States*, the first military sexual assault case brought under the FTCA, set forth the precedent for courts' detachment from survivors'

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[116] *Id.* at 630, 646.

[117] *See id.* at 645. In fact, "active duty service members are always subject to discipline for their actions, not just when they are in uniform or performing military duties." *Id.* at 637.

[118] *Id.* at 640, 643.

[119] *Id.* at 645.

[120] *See id.* at 644.

[121] Lutz v. Sec'y of Air Force, 944 F.2d 1477, 1487–88 (9th Cir. 1991).

[122] For additional cases where plaintiffs' injuries or death were held to be not incident to their military service, *see* Brown v. United States, 462 F.3d 609, 616 (6th Cir. 2006); Hall v. United States, 130 F. Supp. 2d 825, 829 (S.D. Miss. 2000); Bartholomew v. Burger King Corp., 21 F. Supp. 3d 1089, 1100 (D. Haw. 2014).

[123] *See* Tara Murtha, *Fighting for Justice for Military Sexual Assault Survivors at the U.S. Supreme Court*, WOMEN'S LAW PROJECT (Dec. 4, 2020), https://www.womenslawproject.org/2020/12/04/fighting-for-justice-for-military-sexual-assault-survivors-at-the-u-s-supreme-court/ [https://perma.cc/A485-3M4J].

realities and reluctance to interfere with military discipline.[124] In 1975, the plaintiff, a male private in the Army, was sexually assaulted by other inmates while in detention at the United States Disciplinary Barracks at Fort Leavenworth.[125] His subsequent negligence action against the government was tossed away in a shocking two-page decision.[126] According to Judge Palmieri, the plaintiff was a member of the Army and thus had a "military service relationship" with the government; the *Feres* doctrine "absolutely bars Federal Tort Claims actions" by active duty servicemembers; and therefore, the plaintiff, a servicemember, cannot recover.[127] Most importantly, the court did not hesitate to hold that the plaintiff's injuries were incident to his service, even though the plaintiff was sexually assaulted and was in custody during the assault[128]—both of which are fully distinct from his duties as a private.

Twenty years later, the Seventh Circuit applied a similar standard to a female private in *Smith v. United States*.[129] The plaintiff was raped by her drill sergeant on multiple occasions, each time at an off-base location while she was off-duty.[130] Despite the evidence, Circuit Judge Ripple reemphasized the importance of the "distinctively federal" relationship between the government and the military in *Feres*[131] and made no distinction between activities on-base and on-duty and the sexual assault at issue.[132] Moreover, the Seventh Circuit indicated that the location of the sexual assault did not change the fact that the assault and its resulting injuries arose incident to the plaintiff's service in the military.[133] Judge Ripple then attempted to qualify his decision, emphasizing that the holding "in no way suggest[ed] that [the court] minimize[d] the seriousness

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[124] *See* Dexheimer v. United States, 608 F.2d 765, 766 (9th Cir. 1979).

[125] *Id.* at 765.

[126] *Id.*

[127] *Id.* at 765–67.

[128] *Id.*

[129] Smith v. United States, 196 F.3d 774, 776–77 (7th Cir. 1999).

[130] *Id.* at 775–76.

[131] Feres v. United States, 340 U.S. 135, 143 (1950).

[132] *Smith*, 196 F.3d at 777–78.

[133] *Id.*

of the alleged misconduct."[134] The performative recognition of the assault does not erase the plaintiff's subsequent emotional anguish,[135] nor does it condemn the continual practice of other federal courts to defer to military supervision and discipline. Discipline may be incident to military service, but rape and emotional suffering certainly should not be.

Although federal courts at all levels have echoed the disapproval of the "incident to service" standard, no majority has effectively overruled *Feres*. Justice Scalia was the first justice to vehemently oppose the *Feres* doctrine after witnessing the impact on servicemembers' claims, most notably stating in *United States v. Johnson* that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received."[136] Lieutenant Commander Horton Winfield Johnson,[137] a Coast Guard pilot, sought assistance from the Federal Aviation Administration ("FAA") after severe weather conditions clouded his visibility on a mission to rescue a civilian boat.[138] The FAA, a non-military federal agency, "assumed positive radar control over the helicopter,"[139] but its failure to provide adequate safeguards[140] resulted in plaintiff's

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[134] *Id.* at 778.

[135] Scott Wilson, *'The Game' Results in a Living Casualty Sarah Smith Joined the Army Reserve to Help PayFor* [sic] *College. But When She Arrived at Aberdeen, She Says, She Was Raped Repeatedly by Her Drill Instructor*, BALT. SUN (Aug. 17, 1997, 12:00 AM), https://www.baltimoresun.com/news/bs-xpm-1997-08-17-1997229024-story.html [https://perma.cc/UE3H-MRFU].

[136] United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (quotations omitted). Numerous circuit and district courts have cited this quote both when upholding the *Feres* doctrine and when permitting claims to proceed under the FTCA. *See also* Appelhans v. United States, 877 F.2d 309, 313 (4th Cir. 1989); Purcell v. United States, 656 F.3d 463, 466 (7th Cir. 2011); Smith v. Saraf, 148 F. Supp. 2d 504, 508 (D.N.J. 2001).

[137] Johnson's wife filed suit in this case after his death. *Johnson*, 481 U.S. at 683.

[138] *Id.*

[139] *Id.* at 681. When the FAA assumes positive radar control over an aircraft, the FAA controller is instructed to devise a "course for the . . . pilot to follow and actively guide[ ] the aircraft through the inclement weather." John Astley, United States v. Johnson*:* Feres *Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 211 n.174 (1988).

[140] Plaintiff asserted that "the civilian FAA controllers were negligent in their control and guidance over decedent's helicopter and negligently guided the

death.[141] While the majority held that plaintiff's injuries were sustained incident to his military service,[142] in his dissent, Justice Scalia reminded the Court that the plaintiff's family would have been able to recover if he "had been piloting a commercial helicopter at the time of his death."[143] Moreover, even though the plaintiff in *Johnson* was flying pursuant to Coast Guard orders, his death was "incident to" the inability of a non-military governmental organization to ensure the plaintiff's safety[144]—not the judgments or decision-making involved in one's service to which federal courts are so quick to defer.

More recently, Justice Thomas[145] authored the sole dissent to the denial of certiorari in *Doe v. United States*,[146] in which a student at the United States Military Academy brought *Bivens*[147] claims against Lieutenant General Hagenbeck and Brigadier General Rapp after she was sexually assaulted at the Academy.[148] Justice Thomas noted the confusion lower courts face when determining which injuries are incident to service and which are not.[149] Most importantly, he noted that this standard will likely be shocking to ordinary citizens who "might be concerned to find out that a student's *rape* is considered an injury incident to military service."[150] Those who begin their careers in the military understand that they will be subject to scrutiny on various levels for their

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helicopter directly into the side of a mountain . . . In fact, [the then] FAA Administrator admitted in a public interview that the FAA erred in guiding the helicopter." Brief of Respondent at 3–4, United States v. Johnson, 481 U.S. 681 (1987) (No. 85-2039).

[141] *Johnson*, 481 U.S. at 683.

[142] *Id.* at 691–92.

[143] *Id.* at 700 (Scalia, J., dissenting).

[144] *Id.* at 691.

[145] Justice Thomas was also the lone dissenter in the denial of certiorari to another FTCA case involving a servicemember. Lanus v. United States, 133 S. Ct. 2731, 2732 (2013) (Thomas, J., dissenting in denial of certiorari).

[146] Doe v. United States, 141 S. Ct. 1498 (2021) (Thomas, J., dissenting in denial of certiorari).

[147] *See infra* Part IV.

[148] Doe v. Hagenbeck, 870 F.3d 36, 38 (2d Cir. 2017).

[149] *Doe*, 141 S. Ct. at 1499.

[150] *Id.*

behavior and performance.[151] At the same time, however, they expect the highest quality training and supervision, particularly in academic settings.[152] Although the plaintiff in *Doe* was denied the opportunity to triumph over her supervisors after her assault in the most recent, and perhaps most infamous, case since *Feres* was decided, the impact of this dissent cannot be ignored. Until the "incident to service" standard is resolved in light of the numerous sexual assault claims in the military, higher-ranking military officials and the federal judiciary will continue to silence servicemembers who were sexually assaulted and reinforce the stigmas of deference and hypermasculinity in the military.

III. INSTITUTIONAL CONSEQUENCES OF SEXUAL ASSAULT BEING "INCIDENT TO SERVICE"

Despite recent backlash and evidence of inconsistent application over the past seventy-one years, the *Feres* doctrine and its "incident to service" standard remain protected by values present in military institutions and later applied in federal courts across the country.[153] Namely, as long as hypermasculinity and *over*-deference to military officials become more rampant on bases and in courts, female servicemembers will remain ostracized from their once-cherished careers.[154] For sexual assault survivors, the trauma endured from a

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[151] *See* Elaine Donnelly, *Constructing the Co-Ed Military*, 4 LIB. U. L.R. 617, 737 (2010) ("Military society 'is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable in civilian society.' Military standards of conduct 'apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.'").

[152] *See generally Hagenbeck*, 870 F.3d at 51 (Chin, J., dissenting) (" . . . [I]nstead, [plaintiff] seeks recourse for injuries caused by purported failures on the part of school administrators acting in an academic capacity overseeing a learning environment for students.").

[153] *See supra* Part II.

[154] For a discussion of hypermasculinity and gender stereotypes present in the military, *see* Castro, *supra* note 36, at 2; Cheryl Abbate, *Uprooting the Culture of Sexual Assault of the Armed Forces Through a Gender Aware Perspective*, COMMAND & GEN. STAFF COLL. FOUND., INC., https://www.cgscfoundation.org/wp-content/uploads/2014/03/Abbate-

single act of violence outweighs the perpetrator's sworn duty to their soldiers.[155]

A. Military Values and Their Effect on Sexual Assault

Aside from the values plastered on the branches' websites, male servicemembers reinforce hypermasculine ideals imbedded in military culture in their official duties and in casual interactions with their peers.[156] Hypermasculine traits emerge as a result of a man's attempt to offset vulnerable characteristics (e.g., appearance, emotional intelligence, physical abilities) with activities or situations of dominance (e.g., bodybuilding, controlling a conversation).[157] To an extent, military institutions encourage the development of hypermasculinity by emphasizing physical strength, deference to one's superiors, and the desensitization of violence and trauma.[158] Those who are unwilling or unable to meet these

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UprootingCulture.pdf [https://perma.cc/CE4M-4NQB] (last visited Oct. 13, 2022).

[155] *See* Castro, *supra* note 36, at 5. ("Reporting a fellow team member for harassment or even sexual assault can be seen as a form of betrayal . . . Paradoxically, perpetrators of sexual assault can easily take advantage of the trust and allegiance of service members to each other to avoid reports being made, although it is the perpetrator who is the one who betrayed the team.").

[156] *See* Karley Richard & Sonia Molloy, *An Examination of Emerging Adult Military Men: Masculinity and U.S. Military Climate*, 21 PSYCH. OF MEN & MASCULINITIES 686, 687, 689, 690 (2020) ("Ron, an enlisted air traffic controller, alluded to how this expectation forms a hierarchical structure of power in the traditional home, ' . . . take care of those beneath you . . . you are taking care of your family.' . . . Shawn, an enlisted National Guard member, presented physical fitness as a method of displaying one's own masculinity stating, 'Definitely through means of physicality . . . displays of dominance . . . like "hey I can bench press more than you can."'").

[157] *See* Jamie R. Abrams, *Debunking the Myth of Universal Male Privilege*, 49 U. MICH. J.L. REFORM 303, 311–12 (2016) (discussing the roots of gender-based violence in the military).

[158] *See* Richard & Molloy, *supra* note 156, at 687, 689–90.

standards[159] are outright excluded from military activities or are ostracized from certain divisions.[160]

Female servicemembers have consciously and unconsciously become the targets of these patterns of behavior.[161] A career in the military is as appealing for women as it is for men.[162] In fact, women may be uniquely qualified for certain roles,[163] as stances continue to

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[159] "The modern military . . . is largely designed around masculinity and is entrenched in a 'combat, masculine-warrior' paradigm that tacitly endorse[s] excluding others who contradict their image of the combat, masculine warrior." Abrams, *Debunking the Myth of Universal Male Privilege*, *supra* note 157, at 313–14.

[160] For example, civilians commonly envision an Army soldier in the Infantry branch since infantrymen serve directly on the battlefield and are fully versed in combat and weaponry techniques. *See Infantry (CMF 11) Career Progression Plan*, U.S. ARMY FORT BENNING & THE MANEUVER CTR. OF EXCELLENCE, https://www.benning.army.mil/infantry/ocoi/content/pdf/CMF%2011%20Infantry.pdf [https://perma.cc/9FV9-Q4WP] (last visited Oct. 13, 2022) (discussing how the prerequisites for Infantrymen and Indirect Fire Infantrymen "exclude many" NCOs, and those selected "must meet prerequisites that their peers do not or cannot achieve"). Infantry training is mentally and physically taxing, and thus has a considerable attrition rate for those deemed unfit. *See* Dave Phillips, *For Army Infantry's 1st Women, Heavy Packs and the Weight of History*, N.Y. TIMES (May 26, 2017), https://www.nytimes.com/2017/05/26/us/for-army-infantrys-1st-women-heavy-packs-and-the-weight-of-history.html [https://perma.cc/APX2-Q9BY].

[161] Jamie R. Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 710 (2010).

[162] *See* Sandra Sidi, *What I Wish I'd Known About Sexual Assault in the Military*, ATL., https://www.theatlantic.com/magazine/archive/2019/10/get-a-weapon/596677/ [https://perma.cc/GD6S-84ZR] (last visited Oct. 13, 2022) (indicating how women join the military for "love of country, for patriotism, for money").

[163] *See* William Denn, *Women in Combat Roles Would Strengthen the Military*, WASH. POST (Apr. 3, 2014), https://www.washingtonpost.com/opinions/women-in-combat-roles-would-strengthen-the-military/2014/04/03/f0aeb140-bb50-11e3-9a05-c739f29ccb08_story.html [https://perma.cc/NN47-XNVX] ("Our country's most recent conflicts have demonstrated that the military needs women on the battlefield. We need their creativity, insight and empathy, qualifies often lacking in male-dominated units."); GEORGETOWN INSTITUTE FOR WOMEN, PEACE AND SECURITY, CULTURE, GENDER, AND WOMEN IN THE MILITARY: IMPLICATIONS FOR INTERNATIONAL HUMANITARIAN LAW COMPLIANCE (2021), at 12,

shift about appropriate standards for gender-stratified physical tests and training.[164] However, when men and women coexist in less than glamorous living conditions, the values that every servicemember is expected to uphold can become an afterthought.[165] After a taxing day of combat, the hypermasculine servicemember may desire easily attainable comfort—comfort just long enough to distract him from his duties. Given the limited "availability" of women in a combat area, this servicemember may assert his dominance both over his peers when seeking a female servicemember and over the female servicemember herself who is likely unwilling to provide sexual pleasure.[166] But, men who fail to meet expectations of hypermasculinity or the traditional warrior ethos are branded as "girls" or derogatory words referring to female anatomy.[167] As men continue to comprise a substantial majority of the military population, their sexual desires and innuendos are further reinforced by the surrounding male-dominated environment without the presence of reproaching eyes reminding them to honor and respect their fellow servicemembers.

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https://giwps.georgetown.edu/wp-content/uploads/2021/10/Culture_Gender_Women_in_the_Military.pdf [https://perma.cc/QXW8-28P7] ("Our operating environment today requires all hands on deck, and gender diversity gives [the military] a more complete picture of the operating environment and then they bring that skill set . . . especially in my field where we're working with the civil society, when I walk in I don't look threatening, so they come to me.") (internal quotations omitted).

[164] *Compare* Micah Ables, *Women Aren't the Problem. Standards Are.*, MOD. WAR INST. AT W. POINT (Feb. 5, 2019), https://mwi.usma.edu/women-arent-problem-standards/ [https://perma.cc/Q46V-8AF5] (arguing that "appropriate, realistic, age- and gender-neutral standards for combat arms" should be implemented), *with* Heather MacDonald, *Women Don't Belong in Combat Units*, WALL ST. J. (Jan. 16, 2019), https://www.wsj.com/articles/women-dont-belong-in-combat-units-11547411638 [https://perma.cc/RRL9-F39C] (arguing that current-gender stratified standards dictate that women are ill-equipped for combat roles).

[165] *See generally* Sidi, *supra* note 162.

[166] Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 676 (1996).

[167] Abrams, *supra* note 161, at 719 (discussing how the term "girl" is used as an insult); Sidi, *supra* note 162 ("One day, I asked the co-worker who called me 'Twat' what the word meant. His face flushing, he haltingly explained, and never called me that again.").

B. Intra-Military Sexual Assault Court Proceedings and Military Values

Although female servicemembers can consult administrative programs within the military whose sole purposes are to assist survivors of sexual assault,[168] the bureaucratic nature of military, local, and federal courts often causes government officials to defer to military values imbedded in the structure of military discipline.[169] Thus, by dismissing investigations and handing down military-friendly holdings, courts have made clear that honoring and respecting the internal policies of military branches is more important than honoring and respecting the dignity of the survivor and her experiences.

If a servicemember desires to pursue remedies within her branch after an assault, she can file either a restricted or an unrestricted report.[170] A restricted report allows the servicemember to confidentially state the details of the assault "and receive counseling and health care."[171] The Department of Defense made this option available to servicemembers as reluctance to report assaults due to fear of retaliation became a growing concern.[172] Because a restricted report does not initiate an investigation of the assault,[173] these

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[168] Within the military, sexual assault survivors can turn to the Victim/Witness Assistance Program, helplines, Internet resources, and more. *Victim Assistance*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, https://www.sapr.mil/victim-assistance [https://perma.cc/FLL6-9UMH] (last visited Oct. 13, 2022).

[169] *See supra* Part III, Section A.

[170] *Restricted vs. Unrestricted Reports – Know Your Options*, MARINE CORPS COMM. SERVS., https://www.usmc-mccs.org/articles/restricted-vs-unrestricted-reports-know-your-options/ [https://perma.cc/YX94-KZGQ] (last visited Aug. 18, 2022).

[171] Melinda Wenner Moyer, *'A Poison in the System': The Epidemic of Military Sexual Assault*, N.Y. TIMES MAG. (Oct. 11, 2021), https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html [https://perma.cc/X9QW-DESC].

[172] Schmid, *supra* note 39, at 486.

[173] Moyer, *supra* note 171.

reports are less common.[174] By contrast, filing an unrestricted report commences an investigation in which the survivor has to reveal her identity.[175] Additionally, more channels of authority, such as law enforcement and victim advocates, become involved.[176] Although unrestricted reports are generally more intrusive and time-consuming,[177] some servicemembers who file restricted reports later convert their findings to unrestricted reports to secure more administrative support and potentially safer work conditions.[178]

After a survivor files an unrestricted report, the commander then begins investigating by reviewing physical evidence gathered by healthcare officials and conducting a round of invasive questioning about the servicemember's recollections of the assault.[179] Once the investigation concludes, the commander, who is given authority through the Uniform Code of Military Justice, has wide discretion[180] to proceed with the investigation or dismiss the allegations.[181] If the commander dismisses the allegations in the report, this concludes

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[174] Department of Defense data indicates that, in 2020, 4,644 unrestricted reports were filed as opposed to 2,712 restricted reports. U.S. DEP'T OF DEF., *supra* note 20, at 12, 31.

[175] *See Restricted Reporting*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, https://sapr.mil/restricted-reporting [https://perma.cc/45BN-DNP7] (last visited Oct. 13, 2022).

[176] *Unrestricted Reporting*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, https://sapr.mil/unrestricted-reporting [https://perma.cc/3M94-KP5Q] (last visited Oct. 30, 2021).

[177] *See id.*

[178] In 2020, twenty percent of servicemembers who initially filed restricted reports converted them to unrestricted reports. U.S. DEP'T OF DEF., *supra* note 20, at 31; *see also* Moyer, *supra* note 171. Servicemembers may feel safer at work after being transferred to units away from the assailant. Moyer, *supra* note 171.

[179] *Unrestricted Reporting*, *supra* note 176; *see* Moyer, *supra* note 171.

[180] Military personnel are governed under the Uniform Code of Military Justice (the "UCMJ"). 10 U.S.C. §§ 801–946(a); *see also* THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., *Commander's Legal Handbook* 11 (2019), https://www.jagcnet.army.mil/Sites/jagc.nsf/0/EE26CE7A9678A67A85257E1300563559/$File/CommandersLegalHandbook.pdf [https://perma.cc/AS33-2ASG] ("The commander plays a quasi-judicial role in the system, making decisions that in the civilian sector would be made by professional prosecutors or judges.").

[181] Moyer, *supra* note 171.

the process, even without any investigation.[182] If the commander decides to launch an investigation, an in-person meeting or a conference call may be arranged with the survivor and the perpetrator in hopes of obtaining a confession and other information about the assault.[183]

Even if the perpetrator does not confess to the assault, sufficient evidence will propel the investigation to formal judicial proceedings via a court-martial and/or discharge.[184] The results of recent unrestricted reports demonstrate that the military is more willing and capable of commencing an action against an assailant now than in years past.[185] However, approximately twenty-nine percent of investigations that passed evidentiary muster in 2020 did not result in court martial charges or administrative punishment, including but not limited to discharge or rank reduction.[186]

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[182] Alexandra Lohman, Note, *Silence of the Lambs: Giving Voice to the Problem of Rape and Sexual Assault in the United States Armed Forces*, 10 NW. J. L. & SOC. POL'Y 230, 261 (2015).

[183] *See* Moyer, *supra* note 171.

[184] U.S. DEP'T OF DEF., *supra* note 20, at 22. A court-martial is "an ad hoc military court convened under military authority to try someone, particularly a member of the armed forces, accused of violating the Uniform Code of Military Justice." *Court-Martial*, BLACK'S LAW DICTIONARY (11th ed. 2019). When a servicemember is discharged from their duties, the servicemember essentially is "release[d] from their obligation to continue service in the armed forces." *Military Discharge Status and What It Means for Your Entitlement to VA Benefits*, CHISHOLM, CHISHOLM & KILPATRICK LTD. (Apr. 24, 2017), https://cck-law.com/blog/military-discharge-status-and-what-it-means-for-your-entitlement-to-va-benefits/ [https://perma.cc/236X-R5QE].

[185] Out of the 5,640 unrestricted reports filed in 2020, 3,358 investigations were "considered for possible action by DoD commanders" either through judicial or administrative punishment. U.S. DEP'T OF DEF., *supra* note 20, at 7, 19. This percentage is higher than those in years past, *see id.* at 21, although there are still thousands of cases that do not result in any disciplinary action. *See* Andrew Tilghman, *Military Sex Assault: Just 4 Percent of Complaints Result in Convictions*, MIL. TIMES (May 5, 2016), https://www.militarytimes.com/veterans/2016/05/05/military-sex-assault-just-4-percent-of-complaints-result-in-convictions/ [https://perma.cc/6HKH-U5GR].

[186] U.S. DEP'T OF DEF., *supra* note 20, at 22. ("In 2,295 cases, commanders had sufficient evidence and the legal authority to support some form of disciplinary action for an alleged sexual assault offense or other misconduct . . . The following outlines the command actions taken in the 1,632 cases for which it was determined a sexual assault offense warranted

Critics have pointed out the lack of transparency and the absence of neutral parties in intra-military sexual assault investigations.[187] While civilian sexual assault cases are overseen by civilian law enforcement agencies, military sexual assault cases are managed by superior officers, some of whom may have a working relationship with the perpetrator.[188] As a response, current Secretary of Defense Lloyd J. Austin III approved plans to replace commanders with officials specifically dedicated to prosecuting sexual assault to ensure victim-focused responses and to eliminate the persistent biases related to the chain of command that tend to favor the perpetrator.[189] While the law itself has not yet been formulated, a roadmap is available.[190] However, it is unlikely that these proposals will receive meaningful adherence, particularly among servicemembers with lengthy careers. In 2019, Navy Vice Admiral John G. Hannink cautioned that replacing commanders with other leaders in the prosecution of sexual assault and other crimes "would have a detrimental impact on the ability of those commanders—and other commanders—to ensure good order and discipline."[191] The military values of discipline and duty to one's officers are often evidenced in commanders' decisions to recommend against court proceedings based on the perpetrator's upstanding character in the

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discipline . . ."). A rank reduction, or demotion, is a form of non-judicial punishment authorized under Article 15 of the Uniform Code of Military Justice. *Article 15s*, U.S. ARMY TRIAL DEF. SERV. PACIFIC RIM, https://8tharmy.korea.army.mil/tds/assets/info-papers/Article_15s-170914.pdf [https://perma.cc/K5SE-D56L] (last visited Oct. 13, 2022).

[187] *See* Moyer, *supra* note 171; *see also* Darren Samuelsohn, *Military Still Secretive on Sex Crimes*, POLITICO (Sept. 25, 2013, 5:10 AM) https://www.politico.com/story/2013/09/military-sexual-assault-transparency-097314 [https://perma.cc/DUZ9-5K7K].

[188] *See* Nick Schifrin & Dan Sagalyn, *Victim Advocates Say U.S. Military Gets an 'F' on Sexual Assault Prevention*, PBS NEWS HOUR (Mar. 1, 2021, 6:45 PM) https://www.pbs.org/newshour/show/victim-advocates-say-u-s-military-gets-an-f-on-sexual-assault-prevention [https://perma.cc/EP25-SB7Q].

[189] *See* Andrew Dyer, *Military Sexual Assault Cases Will Be Removed from Chain of Command*, SAN DIEGO UNION-TRIB. (Sept. 22, 2021, 6:40 PM) https://www.sandiegouniontribune.com/news/military/story/2021-09-22/military-sexual-assault-cases [https://perma.cc/L9RQ-GB6C].

[190] In fact, this proposal is not to take full effect until 2027. *Id.*

[191] Moyer, *supra* note 171.

community[192] and fear of damaging a fellow servicemember's career prospects.[193] Because these values are deeply ingrained in servicemembers' minds, both their adherence to past procedures and willingness to come to the defense of their accused brethren at the risk of their female counterparts are likely to remain a constant.

C. The Long-Term Effects of Sexual Assault

In the eyes of ranking officials, filing a sexual assault investigation suggests that the survivor is willing to challenge the integrity of a fellow servicemember and put the servicemember's career at risk.[194] What military institutions often fail to consider, however, is how the survivor is ostracized either informally from one's social circle or formally through a discharge from service.[195] An "honorable discharge" is the highest and most common distinction a servicemember can receive at the end of their career, commending the servicemember for their diligence and competency, whereas an "other than honorable discharge" is granted when a servicemember has received punishment for criminal and administrative offenses.[196] Within the military's strata of discharges, anything below an honorable discharge closes the door to many civilian career prospects, Veterans' Administration benefits, and the Post-9/11 G.I. Bill.[197]

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[192] *Id.*

[193] Ella Torres, *Military Sexual Assault Victims Say the System Is Broken*, ABC NEWS (Jan. 21, 2020, 5:03 AM), https://abcnews.go.com/US/military-sexual-assault-victims-system-broken/story?id=72499053 [https://perma.cc/9L7M-9VF3].

[194] *Id.*; *see also* Dwight Stirling & Laura Riley, *Less than Honorable*, 39 L.A. LAW. 32, 36 (2016) ("The perception of being disloyal to one's unit—a military member's surrogate family—is fraught with risk.").

[195] *See* Stirling & Riley, *supra* note 194, at 36; *see also* Moyer, *supra* note 171.

[196] *Types of Military Discharge and What They Mean for Veterans*, L. FOR VETERANS (Apr. 20, 2022), https://lawforveterans.org/work/84-discharge-and-retirement/497-military-discharge [https://perma.cc/9AWS-VEUB].

[197] Stirling & Riley, *supra* note 194, at 34. Thirty-two percent of servicemembers listed government benefits as a significant reason why they enlisted in their respective branch. Jared Keller, *The Top 5 Reasons Why Soldiers Really Join the Army, According to Junior Enlisted*, TASK & PURPOSE (May 14,

Some servicemembers receive less-than-honorable discharges to various degrees as retaliation for reporting their sexual assault.[198] Because this type of discharge must arise from the servicemember's employment conduct, a survivor's superiors may point to psychological trauma, substance abuse, and overall detachment from one's duties as reasons for not awarding an honorable discharge.[199] For example, Panayiota Bertzikis, a Coast Guard veteran, pleaded with her then-superiors to initiate disciplinary action against her assailant and, as a result, received a less-than-honorable discharge for being unfit for duty.[200] After receiving a less-than-honorable discharge, the only available remedy for Ms. Bertzikis and other similarly situated survivors is to appeal their discharge status through their respective branch's Discharge Review Board ("Board") within fifteen years of their last day of active duty service.[201] Board administrators assess evidence as to whether the servicemember was subject to erroneous "procedure or discretion" prior to the discharge award or whether the servicemember's overall "quality of service" was improperly evaluated.[202] While evidence can be presented through live, verbal testimony or document production, servicemembers have a greater chance of success by opting for the emotional appeal of live testimony.[203] No matter the method of evidence, the Board evaluates the appellant's career contributions as a whole and assesses whether the appellant's discharge status was influenced by "arbitrary or capricious action"

2018, 5:56 PM), https://taskandpurpose.com/joining-the-military/5-reasons-soldiers-join-army/ [https://perma.cc/26VZ-7TYF]. Many servicemembers consider the breadth and depth of these benefits when pursuing a career in the military since healthcare and education coverage in particular can be extended to dependents even after a servicemember completes their active duty. *See Military Benefits at a Glance*, MIL. (May 11, 2021), https://www.military.com/join-armed-forces/military-benefits-overview.html [https://perma.cc/T769-K2YE].

[198] Lohman, *supra* note 182, at 264.

[199] Stirling & Riley, *supra* note 194, at 36; Lohman, *supra* note 182, at 265.

[200] Grassbaugh, *supra* note 27, at 330.

[201] *See* Stirling & Riley, *supra* note 194, at 34.

[202] *Id.*

[203] *Id.*

by the appellant's superiors[204]—a higher standard of review than that found in military-led sexual assault investigations.

The Board is a promising option for servicemembers who desire the benefits and accolades well appreciated by those whose post-military lives have not been tainted by sexual assault. In reality, however, the appeals process is still a product of the military, where administrative efficiency and maintenance of the status quo often takes precedence over the individual needs and experiences of servicemembers. A decision from the Board takes between twelve to twenty-four months, and the likelihood of a servicemember receiving an honorable discharge is still slim.[205]

Because a servicemember's sexual assault claim must travel through various channels of authority, it becomes more apparent why military officials treat sexual assault as an activity incident to service. The existence of sexual assault and other similar claims challenge the military's professed values of respect, duty, and loyalty to one's soldiers and thus operates as an attack on institutional competency. However, this reality for military sexual assault survivors can and should vanish as a result of recent federal court decisions.

IV. RECOMMENDATIONS: *SPLETSTOSER* AND A BRIGHT LINE RULE

Over the years, courts have implemented additional obstacles—whether they are a narrow-minded view of activities *not* incident to military service or an unwavering deference to administrative efficiency—for military sexual assault survivors to overcome and have thus weakened the remedies intended for servicemembers under the FTCA.[206] Media backlash over the rising number of sexual assault cases will only cease once courts provide the necessary and

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[204] 32 C.F.R. § 70.9(c)(3)(i–ii) (2021).

[205] VETERANS LEGAL CLINIC AT THE LEGAL SERVS. CTR. OF HARVARD L. SCH. ET AL., TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTH CARE TO VETERANS WITH BAD PAPER DISCHARGES 1, 8 (2020), https://www.legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf [https://perma.cc/MW4N-53WA].

[206] *See supra* Parts II–III.

deserved protection to survivors.[207] Fortunately, the Ninth Circuit's ruling in *Spletstoser v. Hyten* appropriately considers the reality that sexual assault is a tragedy *not* incident to one's service and should be emulated in future *Feres* cases involving sexual assault to reinforce the legislative intent of the FTCA.[208]

In 2016, former Army Colonel Kathryn Spletstoser was selected for an esteemed leadership position in the United States Strategic Command ("STRATCOM")[209] under Air Force General John E. Hyten's supervision based on her "record of exemplary leadership, education, and accomplishment."[210] STRATCOM members, including Colonel Spletstoser and General Hyten, attended the Reagan National Defense Forum in December of the following year, where government and military officials, executives of defense contracting agencies, and "media leaders" gathered to discuss matters of "national defense and peacetime efforts."[211] Colonel Spletstoser, General Hyten, and most military and civilian attendees stayed at a nearby hotel for the duration of the forum.[212] As Spletstoser was preparing for bed on the second night of the forum, Hyten, dressed in "workout clothes," wished to speak to Spletstoser.[213] Spletstoser opened her hotel room door to have Hyten

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[207] *See, e.g.*, Miriam Becker-Cohen, *How the Supreme Court Can Help Sexual Assault Survivors in the Military*, WASH. POST (Mar. 4, 2021, 9:00 AM), https://www.washingtonpost.com/opinions/2021/03/04/how-supreme-court-can-help-sexual-assault-survivors-military/ [https://perma.cc/DS78-6V6A]; Gailya Paliga, *#MeToo Movement Exposes Failure of U.S. Military to Take Seriously Sexual Assault*, NC POL'Y WATCH (Jul. 29, 2020), http://www.ncpolicywatch.com/2020/07/29/metoo-movement-exposes-failure-of-u-s-military-to-take-seriously-sexual-assault/ [https://perma.cc/4KHJ-WWPK].

[208] *See generally* Spletstoser v. Hyten, 44 F.4th 938 (9th Cir. 2022).

[209] STRATCOM is comprised of members of the executive branch and high-ranking military officials and works to "deter strategic attack and employ forces . . . to guarantee the security of our Nation and our Allies." *About*, U.S. STRATEGIC COMMAND, https://www.stratcom.mil/About/ [https://perma.cc/4Y3H-635X] (last visited Oct. 13, 2022).

[210] Spletstoser v. United States, No. 19-CV-10076-MWF (AGRx), 2020 WL 6586308, at *4 (C.D. Cal. 2020).

[211] *Id.* at *4–5.

[212] *Id.* at *5.

[213] *Id.*

forcefully kiss her and squeeze her buttocks upon entering.[214] The five-foot-seven colonel unsuccessfully fought against the six-foot-four general who then "kissed her against her will and rubbed against her until he ejaculated."[215] This marked General Hyten's ninth assault against Colonel Spletstoser in her two-year tenure at STRATCOM.[216]

Two years later, Colonel Spletstoser commenced an action against the federal government, asserting seven state law claims,[217] all of which the government moved to dismiss under the *Feres* doctrine.[218] Surprisingly, District Judge Fitzgerald denied the government's motion.[219] Judge Fitzgerald grounded his analysis in the context of the assault, the absence of disciplinary measures, and most importantly, the notion that sexual assault "cannot conceivably serve any military purpose."[220] While the December 2017 forum served a military purpose, the assault occurred "off-base, off-duty, and in a location not subject to military judgment or operating procedures."[221] Judge Fitzgerald then severed federal courts' time-honored deference to military discipline because no such actions were imposed on Hyten.[222] Lastly, like the plaintiff in *Lutz v.*

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[214] *Id.* at *6.

[215] *Id.*

[216] *See Spletstoser*, 2020 WL 6586308 at *2–3. The eight previous instances of assault were not alleged in the current action. *Id.* at *4.

[217] Spletstoser alleged (1) sexual battery in violation of Cal. Civ. Code § 1708.5; (2) assault; (3) gender violence in violation of Cal. Civ. Code § 52.4; (4) intentional infliction of emotional distress; (5) battery; (6) violation of the Ralph Act, Cal. Civ. Code § 51.7; and (7) violation of the Tom Banes Civil Rights Act, Cal. Civ. Code § 52.1. *Spletstoser*, 2020 WL 6586308, at *4.

[218] *Spletstoser*, 2020 WL 6586308, at *6.

[219] *Id.* at *15.

[220] *See id.* at *13–14.

[221] *See id.* at *13.

[222] "The Court agrees with Plaintiff that potential interference with military discipline is not a persuasive factor when no actual military discipline action is implicated." *Id.* Before she commenced the lawsuit, Spletstoser presented her allegations to the Air Force Office of Special Investigations. Manuel Roig-Franzia, *Retired Col. Kathy Spletstoser Wasn't Able to Stop Joint Chiefs Vice Chairman Gen. John Hyten from Being Confirmed. But She's Not Done with Him.*, WASH. POST (July 22, 2020), https://www.washingtonpost.com/lifestyle/style/retired-col-kathy-spletstoser-

Secretary of the Air Force whose subordinates impermissibly distributed intimate correspondence without any military directive,[223] Spletstoser's sexual assault was neither triggered by nor indistinguishable from Hyten's military duties.[224] Hyten's superior rank and possible intent to discuss work matters with Spletstoser may have been relevant to the sexual assault claim, but these factors were not dispositive under the *Feres* doctrine.[225]

The United States and General Hyten appealed,[226] and on August 11, 2022, Circuit Judge Rawlinson contentedly affirmed the district court's holding.[227] In her decision, Circuit Judge Rawlinson applied the Ninth Circuit's four-factor test[228] for the *Feres* doctrine established in *Johnson v. United States*.[229] First considering the location of the tort, the Ninth Circuit held that the hotel where the assault occurred "was equally open to members of the military and non-military," and was not subject to military supervision as compared to facilities on a military base.[230] Second, although Spletstoser was an active-duty Army colonel at the time of the assault, Hyten assaulted her while she was settling for bed like any civilian would.[231] Third, Spletstoser was not granted access to the hotel solely based on her military membership, thus distinguishing this case from others where plaintiffs "had access to the various recreational and medical benefits only because of their status as military personnel."[232] Finally, Circuit Judge Rawlinson found it

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wasnt-able-to-stop-joint-chiefs-vice-chairman-gen-john-hyten-from-being-confirmed-but-shes-not-done-with-him/2020/07/21/47855cfa-a1c1-11ea-9590-1858a893bd59_story.html?itid=ap_manuelroig-franzia [https://perma.cc/Z2SE-JMG4]. As is the case with most military-conducted sexual assault investigations, the court-martial declined to probe any further into Spletstoser's allegations and enact any form of punishment on Hyten. *Id.*

[223] *See* Lutz v. Sec'y of Air Force, 944 F.2d 1477, 1487, 1479 (9th Cir. 1991); *Spletstoser*, 2020 WL 6586308, at *15.

[224] *Spletstoser*, 2020 WL 6586308, at *14.

[225] *Id.*

[226] Spletstoser v. Hyten, 44 F.4th 938, 942 (9th Cir. 2022).

[227] *Id.*

[228] *Id.* at 948.

[229] Johnson v. United States, 704 F.2d 1431, 1436–41 (9th Cir. 1983).

[230] *Spletstoser*, 44 F.4th at 954.

[231] *Id.* at 955.

[232] *Id.*

impossible that Spletstoser would be using military judgment when submitting to Hyten's sexual acts.[233] By focusing on the reality of the assault and detracting from the increasingly encompassing nature of the *Feres* doctrine,[234] the Ninth Circuit's four-part analysis emphasized that military status should not immunize perpetrators from liability.

Based on its survivor-focused characterization of the "incident to service" standard,[235] federal courts should bolster the analysis in *Spletstoser v. Hyten* and implement a bright-line rule that sexual assault is not incident to one's service to advance policy objectives within the FTCA, the *Feres* doctrine, and the sexual assault investigatory process within the military branches.

First, allowing sexual assault survivors to pursue tort-based actions against the federal government is consistent with the legislative intent of the FTCA. Various Congressional representatives asserted that the driving force behind the FTCA was to permit actions against federal employees based on the specific relationship between the employment and the tort, not the plaintiff's job duties in general.[236] Moreover, federal employees should have the same avenue for relief for injuries incurred from negligent or intentional acts of their employers just as civilians utilize workers' compensation schemes through their employers for the same acts.[237] During the seventy-six years since its enactment, federal courts at every level have disregarded Congress's intent for servicemembers

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[233] "It is unimaginable that Plaintiff would have been 'under orders' to submit to Hyten's sexual advances or that she was performing any sort of military mission in conjunction with the alleged assault." *Id.* at 957.

[234] *See id.* at 958.

[235] *See* Spletstoser v. United States, No. 19-CV-10076-MWF (AGRx), 2020 WL 6586308, at *9 (C.D. Cal. 2020).

[236] *See The Federal Tort Claims Act*, 56 YALE L.J. 534, 538 (1947).

[237] *But see* U.S. House Armed Services Committee, *Feres Doctrine- A Policy in Need of Reform?*, YOUTUBE (Apr. 30, 2019), https://www.youtube.com/watch?v=7w2GDluoisA at 1:09:36-1:09:52 (prepared statement of Paul F. Figley, Acting Director, Legal Rhetoric Program, American University, Washington College of Law arguing that the *Feres* doctrine should remain intact because the military compensation scheme sufficiently provides relief for injured servicemembers).

in the FTCA[238] and sexual assault survivors in particular.[239] However, retired Colonel Spletstoser was the first sexual assault survivor in decades[240] whose pathway for relief has remained open, in part due to the FTCA's explicit waiver of the "federal government's sovereign immunity in tort actions."[241] Thus, *Spletstoser v. Hyten*'s departure from the habitual "judicial re-writing of [the] unambiguous and constitutional [FTCA]"[242] via the *Feres* doctrine serves as a reminder for judges to reconsider Congressional intent to provide military sexual assault survivors with the maximum relief possible.

Second, by recognizing that sexual assault "cannot conceivably serve any military purpose,"[243] federal courts will resolve the discrepancies inherent in the application of the *Feres* doctrine's "incident to service" standard. Courts have found the "incident to service" standard difficult to apply because it produces different results based on the individual circumstances.[244] Thus, creating a bright-line rule that sexual assault is not incident to one's service promotes judicial efficiency[245] and leaves no room for faulty

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[238] "*Feres* is the product of judicial activism and Congress' silence." *See id.* at 29:06-29:15 (opening statement of Hon. Jackie Speier, a Representative from California, Chairwoman, Subcommittee on Military Personnel).

[239] *See* Smith v. United States, 196 F.3d 774, 778 (7th Cir. 1999) (denying sexual assault survivor's FTCA claim as being barred under the *Feres* doctrine); *see also* Shiver v. United States, 34 F. Supp. 2d 321, 322 (D. Md. 1999) ("Given the Supreme Court's continuing adherence to the *Feres* doctrine . . . this Court has no alternative but to dismiss the FTCA claim.").

[240] Recent district court decisions that denounced the *Feres* doctrine's application to sexual assault cases were appealed and reversed. *See, e.g.*, Doe v. Hagenbeck, 870 F.3d 36, 50 (2d Cir. 2017); Soppe v. United States, No. 20-CV-1161, 2021 WL 3832835, at *5 (W.D. Tex. 2021).

[241] Spletstoser v. United States, No. 19-CV-10076-MWF (AGRx), 2020 WL 6586308, at *9 (C.D. Cal. 2020).

[242] Costo v. United States, 248 F.3d 863, 871 (9th Cir. 2001) (Ferguson, J., dissenting).

[243] *Spletstoser*, 2020 WL 6586308, at *14.

[244] *See* Taber v. Maine, 67 F.3d 1029, 1038 (2d Cir. 1995) ("[W]e believe we should try to clarify what has become an extremely confused and confusing area of law."); *see also Spletstoser*, 2020 WL 6586308, at *14 ("There is no perfectly analogous case . . . ").

[245] The Supreme Court has preferred bright-line rules over fact-specific analyses in various contexts. *See* Arizona v. Roberson, 486 U.S. 675, 681 (1988)

interpretations of the FTCA, even though doing so departs from the Supreme Court's intent in *Shearer*.[246] Through this rule, courts will no longer need to consider factors such as whether the survivor was on base, on duty, or even in uniform when the assault occurred.[247] Despite bright-line rules being criticized for harnessing judicial discretion[248] and failing to promote fairness based on the circumstances,[249] an intentional tort as "egregious" as sexual assault is deserving of concrete guidelines.[250] Moreover, although *Spletstoser v. United States* asserted that, no matter "the pretense of work-related purposes, it is not conceivable that General Hyten's military duties would require him to sexually assault Plaintiff,"[251] those opposed to the *Feres* doctrine's inconsistency[252] will take

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("We have repeatedly emphasized the virtues of a bright-line rule in cases . . . ."); Martinez v. Illinois, 572 U.S. 833, 834 (2014) ("Our cases have repeatedly stated the bright-line rule that 'jeopardy attaches when the jury is empaneled and sworn.'"). For discussions about the benefits of bright-line rules, *see also* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 646, 646 (2014) ("With rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes."); Jacob D. Briggs, Gonzales-Lopez *and Its Bright-Line Rule: Result of Broad Judicial Philosophy or Context-Specific Principles?*, 2007 BYU L. REV. 531, 532 (2007) ("When universal rules govern each litigant's case, the system fosters a sense of true equality before the law.").

[246] *See* United States v. Shearer, 473 U.S. 52, 57 (1985) ("The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and in subsequent cases.").

[247] *See Spletstoser*, 2020 WL 6586308, at *5, *13.

[248] *See* Ryan Kerfoot, *The Speedy Trial Clause and Parallel State-Federal Prosecutions*, 71 CASE W. RES. L. REV. 325, 339–40 (2020) (arguing that bright-line rules can prompt judges to ignore context and circumstances of proceedings).

[249] *See* Nicholas A. Kahn-Fogel, *Probabilistic Presumptions in Fourth Amendment Decision-Making*, 59 HOUS. L. REV. 313, 317 (2021).

[250] Spletstoser v. Hyten, 44 F.4th 938, 958 (9th Cir. 2022).

[251] *Spletstoser*, 2020 WL 6586308, at *14.

[252] "[O]ne might be concerned to find out that a student's *rape* is considered an injury incident to military service." Doe v. United States, 141 S. Ct. 1498, 1499 (2021) (Thomas, J., dissenting in denial of certiorari). "While we do not, of course, have the authority to overrule *Feres*, we should not be extending the doctrine. By holding that [plaintiff's] injuries sustained as a cadet incident to being a student are barred as injuries incident to military service, the majority does precisely that." Doe v. Hagenbeck, 870 F.3d 36, 61–62 (2d Cir. 2017) (Chin, J., dissenting) (citation omitted).

comfort in knowing that survivors are afforded the protections of a bright-line rule instead of likely being denied relief under familiar subjective analyses.

Lastly, the bright-line rule about sexual assault in federal courts would improve transparency and accountability in sexual assault investigations and in work environments for female survivors in their respective branches. Disciplinary measures within the military stem from each branch's explicit chains of command.[253] As a result, a survivor of, or witness to, sexual assault may feel hesitant to report the action out of fear of retaliation or unusual punishment.[254] However, an unequivocal rule that survivors' claims are not barred under the *Feres* doctrine would prompt military officials to instead crack down on servicemembers who deter such reports or incite violence against survivors. By doing so, the rule legitimizes survivors' experiences and eases their burden to hold officials accountable for the "dire mismanagement of sexual . . . assault."[255] Respect and duty to one's soldiers will most effectively be demonstrated when survivors are supported in their vulnerable states and perpetrators are held accountable in civil court for their actions.[256] Thus, the combination of military court and federal court remedies appropriately balances the need for discipline, responsibility, and transparency across the institutions at play.

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[253] *See* SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., *supra* note 5, at 7–9.

[254] Survivors have been, among other things, "spat on," "deprived of food," and "threatened with death by 'friendly fire'" after reporting their assault. *Embattled*, HUM. RTS. WATCH (May 18, 2015), https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military [https://perma.cc/LE9D-SJ29].

[255] Shin, *supra* note 99, at 805.

[256] *See* Chelsea M. Austin, *Who's Got Your Six? Ramifications of the Court's Refusal to Define "Incident to Service" in the* Feres *Doctrine on Military Sexual Assault Survivors*, 2018 MICH. ST. L. REV. 987, 1018 (2018) ("When a service member is sexually assaulted by one of the military's own, loyalty and trust are immediately destroyed. When nothing is done about the assault or if judicial recourse is not available, unit cohesion, discipline, and order are negatively affected, which could be the difference between life and death in a war zone.").

CONCLUSION

Although the FTCA was enacted to provide injured servicemembers a path to relief, the continued application of the *Feres* doctrine has done exactly what the late Chief Justice Earl Warren evoked.[257] *Feres*'s "incident to service" standard has precluded sexual assault survivors from holding perpetrators and their superiors accountable in federal court under tort theories of liability. Military courts offer no better prospects for success, as deference to military values and intra-military disciplinary measures often take precedence over the safety and well-being of survivors. A light in *Feres*'s darkness, the Ninth Circuit's holding in *Spletstoser v. Hyten* has paved the way for survivors in the future. However, the tension between the FTCA and the *Feres* doctrine will not be resolved until more courts expressly declare that sexual assault is not incident to military service. Only then will survivors of sexual assault be fully equipped for battle in court, armed with the law on their sides.

[257] Warren, *supra* note 1, at 188 ("Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.").