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A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims

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A "MORE SEARCHING JUDICIAL INQUIRY": THE JUSTICIABILITY OF INTRA-MILITARY SEXUAL ASSAULT CLAIMS

Abstract: More than seventy members of the U.S. military face abusive sexual contact, aggravated sexual assault, or rape every day, equating to three victims every hour. Congress and the Department of Defense have proposed reforms that focus on changes to the criminal justice system under the Uniform Code of Military Justice (UCMJ) in addition to tactical safety and informational efforts for prevention and response. Although deterrent measures and a transparent criminal justice system are both necessary components for meaningful reform, this Note argues that lasting institutional change and true individual justice can only be achieved by providing a civil remedy. To date, Article III courts deny military personnel civil remedies against both their perpetrators and the institutions charged with protecting military service members. This Note argues for the U.S. Supreme Court to overturn its 1950 decision in *Feres v. United States* to comport with the text and legislative intent of the Federal Tort Claims Act, and calls upon the Court to recognize its role in protecting a discrete and insular minority—military victims of sexual assault—suffering from the traumatic personal and professional effects of a system that provides no civil redress.

INTRODUCTION

In fiscal year 2013, the U.S. military received 5,061 reports of sexual assault or "unwanted sexual contact."[1] This number represents a fifty percent increase in complaints from the previous year.[2] Moreover, Department of De-

[1] Dep't of Defense, *Annual Report of Sexual Assault in the Military, Fiscal Year 2013*, at 2 (2014). Of the 5,061 reports of sexual assault in Fiscal Year 2013, 4,113 of the victims were service members. *Id.* Additionally, approximately fifty-four percent of the 5,061 reports involved service member on service member crime. *Id.*

[2] *Compare id.* (reporting that in Fiscal Year 2013, there were 5,061 reports of sexual assault involving one or more service members), *with* Dep't of Defense, *Annual Report of Sexual Assault in the Military, Fiscal Year 2012*, at 3 (2013) (reporting that in Fiscal Year 2012, there were 3,374 reports of sexual assault involving service members). Though a vastly underreported crime in both military and civilian life, the Pentagon attributed the significant rise in reports within the military not to an increase in incidents of unwanted sexual contact, but rather to increased victim willingness to come forward and make official complaints. *See* Chris Good, *Military Sex Assault Reports Up 50 Percent This Year*, ABC NEWS (Dec. 27, 2013, 3:19 PM) http://abcnews.go.com/blogs/politics/2013/12/military-sex-assault-reports-up-50-percent-this-year/, *archived at* http://perma.cc/QM9P-BNE7 (reporting that Col. Metzler believes the numbers are from increased reporting, not an increased number of sexual as-

fense officials reported that approximately 26,000 service members experienced some type of unwanted sexual contact or sexual assault in fiscal year 2012.[3]

Despite departmental and legislative efforts to curb these numbers, female military service members face a higher risk of sexual assault by a fellow military comrade than death by enemy fire.[4] Likewise—and not to be overlooked—men represent the majority of service members who are sexually assaulted each year.[5] Consequently, war does not cease when these military men and women return home.[6] Rather, despite their sacrifice for their country, vic-

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saults); Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES, Nov. 7, 2013, at A24, *available at* http://www.nytimes.com/2013/11/07/us/reports-of-military-sexual-assault-rise-sharply.html, *archived at* http://perma.cc/6CYY-L93S. In addition to intra-military sexual assault, this number includes sexual assaults by civilians on service members and by service members on civilians. Steinhauer, *supra*. As defined in the report, sexual assault includes rape, sodomy and other unwanted sexual contact, including touching of private body parts, but does not include sexual harassment. *See* Dep't of Defense, *supra* at 2 n.7.

[3] *See* Dep't of Defense, *supra* note 2, at 4, 71; Chris Carroll, *Reports of Sexual Assault in the Military Climbed in FY 2013*, STARS AND STRIPES, Feb. 26, 2014, http://www.stripes.com/news/us/reports-of-sexual-assault-in-the-military-climbed-in-fy-2013-1.270162, *archived at* http://perma.cc/3TVQ-J544 (reporting that the survey collecting this data indicated that fewer than twenty percent of sexual assault incidents are reported). The estimate from Defense Department officials was based on an anonymous "prevalence survey" given to troops. *Id.* The survey is conducted every second year and, therefore, no estimate is available for Fiscal Year 2013. *Id.*

[4] *See Sexual Assault in the Military: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 1 (2008) (statement of Jane Harman, Cong. Rep.); Megan N. Schmid, Comment, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 475–76 (2010) (noting the significant risk of sexual assault for female military members).

[5] *See* Moni Basu, *Veteran Confronts Rape, Suicide: "I am angry that others are going through this*," CNN (Sept. 21, 2013), http://www.cnn.com/2013/09/21/us/military-suicide-rape/index.html, *archived at* http://perma.cc/YZ76-WJCN; James Dao, *In Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES, June 24, 2013, at A12, *available at* http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html, *archived at* http://perma.cc/RTN7-R8UG; *see also* JUSTICE DENIED: MILITARY SEXUAL TRAUMA THE MEN'S STORIES (9 Point Productions 2013) (detailing the "super-silent epidemic" of male victims of military sexual assault). Of the estimated 26,000 cases of unwanted sexual contact in 2012, the Pentagon reported fifty-three percent involved attacks on men, mostly by other men. *See* Dao, *supra*. Although women, who represent an estimated fifteen percent of the military force, face a greater probability of sexual assault than men, military sexual assault also affects male service members at prevalent rates. *See id.*

[6] *See* Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 728 (2013) (documenting the struggles military victims face when they return home as a result of intra-military sexual assault, including high rates of post-traumatic stress disorder, military sexual trauma, other psychological trauma, difficulty accessing treatment and services for mental and physical conditions, high rates of divorce, domestic violence rates two to five times higher than for private citizens, and even suicide).

tims of intra-military sexual assault continue to fight a losing battle for criminal and civil protections in the American legal system.[7]

The enemy in this case is the *Feres* doctrine, a judicially created exception to the Federal Tort Claims Act ("FTCA") barring all military personnel claims arising out of injuries incurred incident to service.[8] In 1950, in *Feres* v. *United States*, the U.S. Supreme Court held that the FTCA's broad waiver of sovereign immunity did not extend to claims brought by service members against the government and its officials.[9] This wholesale deference to military discipline and decision making by the Court strips military plaintiffs of standing to hold the military or the government responsible for injuries suffered while on active duty.[10]

For countless victims of military sexual assault, the *Feres* doctrine has closed the doors of civilian courthouses.[11] Efforts to hold government and

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[7] *See* Cioca v. Rumsfeld, 720 F.3d 505, 506, 517–18 (4th Cir. 2013) (affirming dismissal of military sexual assault claims against Department of Defense officials); Klay v. Panetta, 924 F. Supp. 2d 8, 18–20 (D.D.C. 2013) (dismissing claims action against Department of Defense officials brought by victims of intra-military sexual assault); Banner, *supra* note 6, at 724–25, 738–40 (describing the legal battles facing the plaintiffs in *Cioca* and *Klay*, as well as other similar intra-military sexual assault claims).

[8] Feres v. United States, 340 U.S. 135, 146 (1950); *see* Banner, *supra* note 6, at 725 (noting that victims of intra-military sexual assault seeking legal recourse in civilian courts face a "Sisyphean battle" primarily on account of *Feres* principles that "bar justiciability of claims by military personnel against superior officers not only for negligence and intentional torts, but also for blatant violations of constitutional rights"). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680 (2012), provides a limited waiver of sovereign immunity for certain tort actions "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1); *see* § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .").

[9] *See* 340 U.S. at 142–46. In later decisions, the Court expanded the rationales of *Feres*, citing the need to provide sovereign immunity to avoid infringing on the military's decision making. *See* United States v. Stanley, 483 U.S. 669, 680–81 (1987); United States v. Johnson, 481 U.S. 681, 687–88, 691–92 (1987); Banner, *supra* note 6, at 727 n.20 (arguing that as the *Feres* doctrine has devolved over several decades, courts have focused on the maintenance of military discipline as the primary rationale for barring FTCA claims by military personnel); Christopher G. Froelich, Comment, *Closing the Equitable Loophole: Assessing the Supreme Court's Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs*, 35 SETON HALL L. REV. 699, 713 (2005) (noting the broad sphere of sovereign immunity created by *Feres*, and addressing the criticism in courts and academia of the decision and its subsequent application in later decisions).

[10] *See* David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine*, 95 YALE L.J. 992, 996–97 (1986) (noting that the *Feres* doctrine is problematic because it bars claims without regard for whether other adequate intra-military remedies exist).

[11] *See* Banner, *supra* note 6, at 725 (arguing that the *Feres* doctrine is a significant obstacle facing victims of intra-military sexual assault seeking a remedy in civilian court); Schwartz, *supra* note 10, at 993 (noting that the *Feres* doctrine forecloses to military plaintiffs the two avenues by which citizens can sue the government). In particular, civilians can bring suit against the government (1) under the FTCA, which waives the sovereign immunity of the United States; or (2) under a *Bivens* claim, alleging an implied remedy under the Constitution for tortious conduct violating constitutional rights.

military officials accountable fall on the deaf ears, as courts continue to dismiss such claims without considering their merits.[12] Sovereign immunity trumps individual liability under the *Feres* doctrine, even in the face of clear injustices suffered by military service members.[13]

This Note argues that the *Feres* doctrine should be overturned because it does not comport with the text and legislative intent of the FTCA, and because principles of judicial review demand that the Supreme Court step in where, as here, the rights and legal protections of a discrete and insular minority are at risk.[14] Part I provides a critical examination of the development and current state of the *Feres* doctrine and the use of sovereign immunity as a basis for judicial abstention in intra-military claims.[15] Part II discusses the limitations of the military justice system and the effect of the *Feres* doctrine on claims against the government and its officials in the context of intra-military sexual

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Schwartz, *supra* note 10, at 993 n.7; *see* 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391–92, 396 (1971) (allowing claims to be brought directly against individual government officials, who are protected by official immunity, but not sovereign immunity).

[12] *See, e.g.*, *Cioca*, 720 F.3d at 506, 517–18; Smith v. United States, 196 F.3d 774, 777–78 (7th Cir. 1999); *Klay*, 924 F. Supp. 2d at 20. Specifically, the class actions filed against Department of Defense officials in *Cioca* and *Klay* alleged that the defendants violated the military plaintiffs' constitutional rights by failing to (1) investigate rapes and sexual assaults; (2) prosecute perpetrators; (3) provide an adequate judicial system as required by the Uniform Military Justice Act; and (4) abide by congressional deadlines to implement institutional reforms to stop rapes and other sexual assaults. *See Cioca*, 720 F.3d at 507; *Klay*, 924 F. Supp. 2d at 10–11.

[13] *See, e.g.*, Gonzales v. U.S. Air Force, 88 F. App'x 371, 375–76 (10th Cir. 2004) (affirming the dismissal of a FTCA claim brought by an active duty female military plaintiff who was raped by a fellow service member while sleeping in her barracks); *Smith*, 196 F.3d at 777–78 (7th Cir. 1999) (barring former military service member's FTCA claim against the government for negligent supervision of her drill sergeant who committed a series of off-post, off-duty sexual assaults against her); Day v. Mass. Air Nat'l Guard, 167 F.3d 678, 680 (1st Cir. 1999) (denying serviceman's state tort and civil rights claims against the United States and individual guardsmen for assault and battery during a "despicable" on-base hazing); Press Release, The White House Office of the Press Secretary, Statement by the Press Secretary on New DOD Initiatives to Eliminate Sexual Assault in the Armed Forces (Aug. 15, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/15/statement-press-secretary-new-dod-initiatives-eliminate-sexual-assault-a, *archived at* http://perma.cc/B6Q5-2L2N (reiterating the President's disapproval with the military leadership's efforts to combat sexual assault, and reporting the need for the Department of Defense, including the senior civilian leadership and each of the Services, to fulfill the President's call to action). Notably, in many decisions denying relief to military victims, lower courts have expressed dismay over the *Feres* doctrine and the inability of district and appellate courts to change the doctrine. *See, e.g.*, *Day*, 167 F.3d at 683 (suggesting that *Feres* may deserve reexamination by the U.S. Supreme Court since the decision's original reasons are no longer persuasive); *Smith*, 196 F.3d at 778 (finding that the plaintiff's suit is barred by *Feres* but asserting that this determination in no way suggested the court minimized the seriousness of the alleged misconduct).

[14] *See infra* notes 143–189 and accompanying text.

[15] *See infra* notes 20–88 and accompanying text.

assault.[16] Part III then argues that the judicial doctrine must be re-examined by the Supreme Court because judicial review is necessary to protect the rights of victimized military personnel, hold the government and military officials accountable, and bring the Court's construction of the FTCA in line with the text and true intent of the enacting Congress.[17] Part III proposes that the Court abandon the *Feres* doctrine and reinterpret the FTCA's combatant activities exception narrowly to comport with Congress's intent and a common sense definition of the term combatant.[18] Doing so, the Court will avoid further tinkering with a doctrine already on unstable ground.[19]

I. THE *FERES* DOCTRINE & INTRA-MILITARY IMMUNITY: A HISTORICAL BACKGROUND

Part I of this Note details the history of the *Feres* doctrine and the trajectory of intra-military immunity in the American legal system, beginning with Congress's enactment of the FTCA in 1946 and proceeding through the Supreme Court's expansion of the sovereign immunity exception in intra-military disputes.[20] Section A discusses the history and legislative purpose of the FTCA.[21] Section B then reviews the Court's 1950 decision in *Feres*.[22] Section C analyzes the evolution and expansion of *Feres* and discusses the current reasoning articulated by courts for upholding the doctrine today.[23] Finally, Section D addresses notable dissents within the Court that form the basis for much of the critique against the expansive interpretation of the *Feres* doctrine.[24]

A. Federal Tort Claims Act of 1946

Prior to the passage of the FTCA, there was a gradual but distinct shift in intra-military immunity jurisprudence in American common law.[25] Courts initially recognized a civil cause of action for military personnel against superior

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[16] *See infra* notes 89–142 and accompanying text.
[17] *See infra* notes 143–189 and accompanying text.
[18] *See infra* notes 143–189 and accompanying text.
[19] *See infra* notes 143–189 and accompanying text.
[20] *See infra* notes 25–88 and accompanying text.
[21] *See infra* notes 25–42 and accompanying text.
[22] *See infra* notes 43–62 and accompanying text.
[23] *See infra* notes 63–69 and accompanying text.
[24] *See infra* notes 70–88 and accompanying text.
[25] *See* John Astley, Note, United States v. Johnson: Feres *Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 189–90 (1988) (identifying the balance courts tried to strike between concerns about the effects intra-military tort claims could have on military discipline and fears regarding potential harm from granting oppressive officers absolute immunity); Froelich, *supra* note 9, at 706–08 (detailing the history of government immunity from damages involving intra-military torts).

officers acting maliciously or outside the scope of their authority.[26] The advent of separate military systems of recourse, however, led courts to take a more deferential approach to military immunity.[27] For these later courts, respect for military discipline and decision making demanded judicial abstention, particularly where other available forums existed for military personnel to seek justice.[28]

In 1946, however, Congress enacted the FTCA, providing individuals with a statutory basis for damage suits against the United States for injuries caused by any government employee's negligent acts within the scope of his or her employment.[29] The FTCA originated amidst growing concern in Congress over the injustice of permitting citizens to go uncompensated for the tortious acts of their government.[30] Accordingly, the FTCA was the product of substan-

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[26] *See* Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 402–05 (1851) (balancing the dueling public interests of protecting military discipline and providing individual military personnel with a right to recovery for injuries suffered at the hands of superior officers). Articulating the scope of sovereign immunity in the military, Chief Justice Taney explained: "[I]t must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice." *See id.* at 403.

[27] *See* Froelich, *supra* note 9, at 706–09 (discussing the transition of courts becoming less likely to allow civil remedies with the advent of independent military systems for recourse); *see, e.g.*, Dobson v. United States, 27 F.2d 807, 808–09 (2d Cir. 1928) (reading into the Public Vessels Act, 46 U.S.C. §§ 781–790 (1926) (current version at 46 U.S.C. §§ 31101–31113 (2012)) (granting authority to sue the United States in admiralty when public vessels caused damages), a prohibition against military civil damages claims, despite acknowledgment that no statutory language barred claims by members of the military); Goldstein v. State, 24 N.E.2d 97, 99–100 (N.Y. 1939) (noting that under military law, the army constitutes a class separate and apart from the civil officers of the state, and therefore, members of the military shall not be civilly or criminally liable for any acts done by them in the performance of their active service duties).

[28] *See* Froelich, *supra* note 9, at 708–09.

[29] *See* Federal Tort Claims Act, ch. 753, Title IV, 60 Stat. 812, 842–47 (codified as amended at 28 U.S.C. §§ 1346(b), 2671–2680 (2012)); *Johnson*, 481 U.S. at 692–93 (Scalia, J., dissenting) (noting that "[m]uch of the sovereign immunity of the United States was swept away in 1946 with the passage of the FTCA"). The FTCA renders the government liable for:

> money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable . . . .

28 U.S.C. § 1346(b)(1).

[30] *See* Federal Tort Claims Act, §§ 1346(b), 2671–2680; S. Rep. No. 1400, 79th Cong., 2d Sess. 30–31 (1946) (noting that the system for tort claim recovery prior to the FTCA was subject to criticism for "being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but base[d] any award that may be made on considerations of grace"); Astley, *supra* note 25, at 193 (asserting that the purpose of the FTCA was to provide a fair and accessible forum for injured persons and to relieve Congress of the burden of considering thousands of private bills each year, which had previously been a vehicle for claimants to recover from the government for tortious conduct); Froelich, *supra* note 9, at 709–10

tial congressional effort to mitigate the unjust consequences of sovereign immunity felt by victims.[31]

Although the FTCA waived sovereign immunity, Congress carved out thirteen enumerated exceptions to the statute.[32] In limiting governmental liability with respect to military personnel, Congress precluded "[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*."[33] Known as the "combatant activities exception," the provision has been the source of confusion and disagreement regarding the scope of the rights of service members to bring suit against the government.[34]

The text and legislative history of the FTCA, however, provide insight into Congress's considerations in drafting exceptions to the waiver of sovereign immunity.[35] First, the language of the combatant activities exception evidences

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(noting that the FTCA was a response to general concerns over the injustices presented when citizens, injured by the tortious acts of government officials, were denied recovery on the basis of sovereign immunity).

[31] *See* Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957) (acknowledging the equity of a system in which all parties who benefit from government services share equally when government employees cause injury); *Feres*, 340 U.S. at 139 (recognizing the FTCA's intent to mitigate unjust consequences of sovereign immunity); Froelich, *supra* note 9, at 709–10.

[32] *See* FTCA, 28 U.S.C. § 2680 (2012).

[33] § 2680(j) (emphasis added).

[34] *See id. Compare* Brooks v. United States, 337 U.S. 49, 51–52 (1949) (asserting that the FTCA's terms were "clear" insofar as to establish that immunity did not turn on military active duty status alone, but rather, that a closer nexus between the injury and the conduct before that injury must exist before that injury can be categorized as "incident to service"), *with Feres*, 340 U.S. at 138, 146 (distinguishing *Brooks* on the basis of active duty versus civilian status and holding that the government is not liable under the FTCA for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service). *See also Johnson*, 481 U.S. at 692 (Scalia, J., dissenting) (arguing that the exception did not generally preclude suits brought by servicemen under the FTCA, but rather, "demonstrat[es] that Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for [the Court] to supplement—*i.e.,* revise—that congressional disposition"); Jennifer L. Zyznar, Comment, *The* Feres *Doctrine: "Don't Let This Be It. Fight,"* 46 J. MARSHALL L. REV. 607, 628 (2013) (arguing that the interpretation of the combatant activities exception as an "incident to service" standard has caused confusion regarding its application and has permitted an unacceptably broad interpretation of immunity).

[35] *See Johnson*, 481, U.S. at 693 (Scalia, J., dissenting) (emphasizing that the use of "combatant activities" and "during time of war" in the FTCA exception demonstrates that Congress considered and provided an exception to account for the special requirements of the military); *Brooks*, 337 U.S. at 51–52; Astley, *supra* note 25, at 194–96 (noting that the text of the FTCA appears to permit suits on behalf of service members). In particular, the versions of the FTCA considered by Congress did not include the word "combatant" until just prior to the passage of the Act. *See, e.g.*, S. Rep. No. 1400, 79th Cong., 2d Sess. (1946) ("Any claim arising out of the activities of the military or naval forces, or the Coast Guard, during the time of war."); H. Rep. No. 2245, 77th Cong., 2d Sess. (1942) (same). An amendment to insert the explanatory term "combatant" before the word "activities" was offered and agreed to without debate just one week prior to the passage of the law. *See* 92 Cong. Rec. 10,093 (1946) (amending section 421(j) to include "combatant" without debate); *see also* Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 548 n.99 (1947) (noting that "no explanation of the intended scope of the term is to be found in committee hearings or reports" and arguing that "[t]he

Congress's intent to narrow the scope of immunity to claims arising out of *combatant* activities during *time of war*, rather than expand the exception to deny recovery to military personnel entirely.[36] Additionally, as the legislative history reveals, Congress considered a broader exception to preclude tort claims by all military service members, but ultimately removed the language in the final version of the FTCA.[37] Moreover, of the eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two contained explicit provisions denying recovery to members of the military; thus, Congress's decision to provide only a narrow military exception to the FTCA reflects its specific intention.[38]

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amendment may have been inserted in view of the uncertain meaning of the companion phrase 'during time of war'"). Statutory construction conventions mandate that when a statute is clear and unambiguous on its face, it is not subject to construction and should be held to mean what it plainly expresses. *See* 2A Norman J. Singer & Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed., rev. vol. 2014). Moreover, the statutory construction principle *expressio unius est exclusio alterius* provides that where a statute includes express exceptions, implication of other exceptions is precluded. *See id.* § 47:23; *see also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 188 (1978) (articulating this principle in the context of the Endangered Species Act of 1973, stating that where Congress creates a number of limited exceptions to a statute's broad sweep, the Court presumes no other exemptions were intended).

[36] 28 U.S.C. § 2680(j); *see Johnson*, 481 U.S. at 693, 695 (Scalia, J., dissenting) (arguing that the plain language of the statute renders the United States liable to *all* persons, including military personnel injured by government employees' negligence, and rejecting the interpretation of the combatant activities exception to preclude suits brought by service members under the FTCA); Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 50 & n.180 (1946) (noting that no other tort claim bills at the time used the word "combatant" and asserting that the amendment during debate to include the word "combatant" indicates a clarification of Congress's intent to exclude tort claims arising only from true combat in the military sense rather than all military operations); Froelich, *supra* note 9, at 710–11 (asserting that Congress considered provisions for significantly limiting the government's liability in the context of military tort suits but settled on a narrower limitation for combatant activities only); Richard W. McKee, Note, *Defending an Indifferent Constitution: The Plight of Soldiers Used as Guinea Pigs*, 31 ARIZ. L. REV. 633, 635 (1989) (arguing that the FTCA, by its terms and exceptions, does not exclude service members' tort claims); Zyznar, *supra* note 34, at 626 (noting the strong presumption that the plain language of a statute expresses congressional intent and that courts may only consider legislative history if a term appears ambiguous).

[37] *See* Froelich, *supra* note 9, at 710–11 (noting Congress's consideration and ultimate preclusion of a broader waiver of immunity for military personnel tort claims); Zyznar, *supra* note 34, at 626 (arguing that the legislative history makes clear that Congress never intended to bar all service members' claims); *see also supra* note 35 (detailing the FTCA's legislative history).

[38] *See Brooks*, 337 U.S. at 51–52 (asserting that the eighteen tort claim bills introduced between 1925 and 1935, with the majority containing explicit provisions regarding members of the military, support the Court's view that Congress intended for the FTCA to allow claims by armed service members); H.R. 12178, 68th Cong. (1925); H.R. 12179, 68th Cong. (1925); S. 1912, 69th Cong. (1925); H.R. 6716, 69th Cong. (1926); H.R. 8914, 69th Cong. (1926); H.R. 9285, 70th Cong. (1928); S. 4377, 71st Cong. (1930); H.R. 15428, 71st Cong. (1931); H.R. 16429, 71st Cong. (1931); H.R. 17168, 71st Cong. (1931); H.R. 5065, 72d Cong. (1932); S. 211, 72d Cong. (1932); S. 4567, 72d Cong. (1932); S. 1833, 73d Cong. (1933); H.R. 129, 73d Cong. (1933); H.R. 8561, 73d Cong. (1934); H.R. 2028, 74th Cong. (1935); S. 1043, 74th Cong. (1935); *see also* Astley, *supra* note 25, at 194–96 (arguing that "[b]ecause the [FTCA] does not contain an exception excluding military suits, the *ex-*

Additionally, the U.S. Supreme Court's first interpretation of the FTCA in 1949 in *Brooks v. United States* provides further insight into Congress's intent in enacting the statute.[39] Noting "it would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed," the Court concluded that the plain language of the FTCA could not be interpreted to exclude all military personnel tort claims.[40] Using the phrase "incident to service" synonymously with the FTCA's combatant activities exception, the Court held that the FTCA permitted military service members to bring suits involving injuries not incident to service, even if an alternative compensation system was available.[41] In articulating the "incident to service" standard, however, the Court did not define the scope or boundaries of the criterion, leaving room for further interpretation by the Court.[42]

B. Feres v. United States*: A Judicial Exception to the FTCA*

Just one year after *Brooks*, the Supreme Court revisited the FTCA, reading into the combatant activities provision a broader exception to the waiver of sovereign immunity for damage suits brought by military personnel.[43] In *Feres*, the Court held that the FTCA immunizes the government from service member suits where the alleged injuries arise out of or were in the course of

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pressio unius est exclusio alterius principle of statutory construction implies that Congress did not intent to create such an exception").

[39] *See* 337 U.S. at 51–53.

[40] *Id.* at 51; *see* 28 U.S.C. § 2680(j). In *Brooks*, two claims were filed against the government alleging negligence at the hands of military personnel driving an Army truck off-base. *Brooks*, 337 U.S. at 50. The accident resulted in the injuries of one off-duty serviceman and the death of another. *Id.*; *see Feres*, 340 U.S. at 146 (noting furlough status of plaintiffs in *Brooks*). Though the Court neither defined nor provided any guidance on the meaning and scope of "incident to service," the Court allowed the plaintiffs' claims to proceed, explaining that recourse under the FTCA was predicated on whether the servicemen were engaged in military activities at the time of the accident. *Brooks*, 337 U.S. at 52, 54.

[41] *See Brooks*, 337 U.S. at 51–52 (concluding that claims non-incident to service injuries were permitted unless they fell within one of the exceptions in the FTCA); Astley, *supra* note 25, at 198 (concluding that claims non-incident to service injuries were allowable under the FTCA, even if an alternative compensation scheme existed).

[42] *See Feres*, 340 U.S. at 146 (distinguishing *Brooks*); *Brooks*, 337 U.S. at 51–52; Hunt v. United States, 636 F.2d 580, 587 (D.C. Cir. 1980) (noting that the term "incident to service" does not appear in the FTCA nor has it ever been defined by the Supreme Court, and that lower courts are left to ascertain a definition by comparing and distinguishing *Brooks* and *Feres*); Astley, *supra* note 25, at 198–201, 200 n.106 (remarking that the term "incident to service" remains the key determination in ascertaining whether an injured service member can bring a cause of action under the FTCA).

[43] *See Feres*, 340 U.S. at 146 (concluding that the FTCA did not provide for claims by service members against the government where injuries arose out of or were in the course of activity incident to service); Froelich, *supra* note 9, at 713 (asserting that *Feres* created a "relatively broad sphere of immunity for government officials from military claims by establishing such a significant exception to the FTCA").

activity "incident to service."[44] Interpreting the FTCA as denying military personnel the ability to recover for injuries resulting from the alleged negligence of government employees, the Court's limitation to the FTCA's broad waiver of sovereign immunity represented an expansive interpretation of the combatant activities exception.[45]

Despite acknowledging a congressional purpose aimed at ameliorating the ill effects of sovereign immunity on innocent victims, the Court interpreted the FTCA as inapplicable to military service members' claims for redress.[46] Specifically, the Court created a dichotomy between *Feres* and *Brooks*, asserting that because the *Feres* plaintiffs' injuries occurred during activities "incident to service," the *Feres* decision was "wholly different" from the plaintiff's cause of action in *Brooks*, which occurred off-base.[47] The phrase "incident to service," undefined in *Feres* and absent from the text of the FTCA's combatant activities exception, serves as the genesis of the jurisprudential exclusion of military personnel's claims under the FTCA.[48]

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[44] *Feres*, 340 U.S. at 146. *Feres* arose out of three separate negligence claims brought by service members against the government for injuries suffered while on active duty. *Id.* at 136–37. The first claim involved a wrongful death action brought by the widow of a serviceman killed in a barracks fire while the other two alleged medical malpractice. *Id.* The Second and Fourth Circuits held that the FTCA did not waive sovereign immunity for military personnel claims based on injuries incident to service, whereas the Tenth Circuit reasoned that the plain language of the FTCA permitted the service member's claim. *See* Jefferson v. United States, 178 F.2d 518, 519–20 (4th Cir. 1949), *aff'd*, 340 U.S. 135 (1950); Griggs v. United States, 178 F.2d 1, 2–3 (10th Cir. 1949), *rev'd*, 340 U.S. 135 (1950); Feres v. United States, 177 F.2d 535, 536–37 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950).

[45] *See Feres*, 340 U.S. at 146; Froelich, *supra* note 9, at 713 (noting that *Feres* broadened the scope of sovereign immunity in the context of military tort claims against the government). In broadening the scope of the FTCA's combatant activities exception, the Supreme Court created the only judicially created exception to the FTCA. *See* Astley, *supra* note 25, at 201 (asserting that the exclusion of all military personnel claims under the "incident to service" test in *Feres* is the sole judicially created exception to the FTCA); *see also Johnson*, 481 U.S. at 693, 695 (Scalia, J., dissenting) (arguing that the statutory interpretation of the combatant activities exception in *Feres* is inconsistent with the text of the FTCA's enumerated exceptions).

[46] *See Feres*, 340 U.S. at 138–39, 146 ("We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.")

[47] *See id.* at 138, 146 (quoting *Brooks*, 337 U.S. at 52). Specifically, the Court focused on the location of the injuries in both cases, noting that the claimant in *Brooks* was injured off-base while off-duty whereas the claimants in *Feres* were injured on military property while on-duty. *See id.*; *Brooks*, 337 U.S. at 52.

[48] *See* Astley, *supra* note 25, at 199–201 (arguing that the term "incident to service" was never defined in *Feres* and does not appear in the text of the FTCA, but that it remains the key determination for courts when deciding whether an injured service member can bring suit under the FTCA); Zyznar, *supra* note 34, at 614 (noting that the Court neither defined the term "incident to service" nor provided guidance on how to determine whether an injury was incident to service, leading to considerable confusion in the lower courts).

The Court provided several rationales for dismissing the military plaintiffs' claims for relief under the FTCA.[49] In an appeal to tradition, the Court first relied on American common law, reasoning that courts customarily denied recovery for servicemen injured during the course of military duty.[50] In looking at the language of the FTCA, the Court determined that the statute waived sovereign immunity only in circumstances where there existed a corresponding private right of action that would impose liability.[51] Because the Court found no parallel private action, permitting intra-military suits under the FTCA would impose novel and unprecedented liability on the government—a judicial leap the Court was unwilling to make.[52]

Second, the Court reasoned that because the FTCA applies the substantive state tort law of the place where the act or omission occurred, burdensome choice-of-law questions would inevitably arise, and tort recovery would depend on geographic considerations over which military personnel have no control.[53] The Court reasoned that Congress could not have intended to subject military suits to the law of the state where a service member is stationed by mere fortuity, or perhaps misfortune, depending on the recovery allowed by the jurisdiction's laws.[54]

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[49] *See Feres*, 340 U.S. at 139–45 (asserting that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government" and noting that the FTCA did not result from "an isolated and spontaneous flash of congressional generosity. It mark[ed] the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit").

[50] *See id.* at 139–42.

[51] *See id.* at 141–42 (requiring a showing that the alleged government wrongdoing has a counterpart in the private sector). Citing the text of the FTCA itself, the Court explained:

> [T]he Act goes on to prescribe the test of allowable claims, which is, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .," with certain exceptions not material here. It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence.

Id. at 141 (alterations in original) (citations omitted).

[52] *See id.* at 141–42; *see also* Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 433–44 (2010) (describing the Court's analysis under the parallel private liability rationale).

[53] *See Feres*, 340 U.S. at 142–43 (noting that it would be irrational to allow the location of an injury to control the outcome of an active duty soldier's tort claim who was involuntarily stationed in a certain jurisdiction and therefore subject to that particular law). The Court identified what it regarded as a key distinction between that of the active duty service member and the off-duty or civilian claimant in a suit dependent on the law of the jurisdiction where the claim arises. *See id.* Specifically, the Court distinguished the circumstances of military personnel from that of a non-service member claimant who "is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury." *Id.*

[54] *See id.* (indicating that state tort laws differ in permissible recovery, defenses, and limitations of liability, which would ultimately result in an unfair and inconsistent system of tort recovery for

Under a similar line of reasoning, the Court's third rationale focused on the "distinctly federal in character" relationship between the government and the military.[55] This relationship—derived from the Constitution and federal statutes—has never been governed by state law.[56] Because the structure of the FTCA looks directly to state law to resolve tort claim disputes, the Court reasoned that Congress did not intend for the FTCA to apply to a service member's injuries suffered incident to service.[57]

Finally, the Court reasoned that the statutory compensation system afforded to military personnel through the Veterans' Benefits Act precluded the conclusion that Congress sought to provide service members with any other form of compensation.[58] The Court did not rely on the text of the FTCA, but instead cited the automatic compensation for injuries and death under the Veterans' Benefits Act, favorably comparing military compensation to civilian workmen's compensation statutes.[59] Characterizing the compensation scheme under the Veterans' Benefits Act as a "system of simple, certain, and uniform compensation for injuries or death of those in armed services," the Court rationalized that Congress would have adjusted this remedy to conform with the FTCA if it intended the FTCA to provide a cause of action for injured service members.[60]

By interpreting the FTCA this way, the Court returned sovereign immunity to the United States in matters of many claims for injuries of military personnel.[61] Acknowledging the potential inaccuracy of its statutory interpretation, however, the Court afforded deference to Congress, noting that any incor-

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military personnel). The Court expressed further concerns regarding litigation hardship, particularly the time, expense, and procurement of witnesses for military personnel. *See id.* at 145.

[55] *See id.* at 143.

[56] *See id.* at 143–44.

[57] *See id.*; *see also* Figley, *supra* note 52, at 434 (describing the "distinctly federal" relationship rationale and the Court's observance that no federal law would permit recovery on the claims alleged).

[58] *See* Veterans' Benefits Act, 38 U.S.C. §§ 101–1002 (2012); *Feres*, 340 U.S. at 145 (describing the various types of compensation provided by the Veterans' Benefits Act to military personnel injured or killed in the line of duty).

[59] *See Feres*, 340 U.S. at 145; *see also* Barry Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U. L.J. 383, 401–02 (1985) (characterizing the Court's reasoning as superficial and critiquing the Court's decision to replace non-uniform recovery with the Veterans' Benefits Act); Astley, *supra* note 25, at 203 n.125 (explaining that despite the Court's suggestion, recovery under the Veterans' Benefits Act is neither automatic nor certain like recovery under workmen's compensation statutes); Note, *From* Feres *to* Stencel*: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1106–07 (1979) (arguing that unlike workers' compensation, military compensation systems are not certain enough to justify depriving military personnel the option of a tort claim).

[60] *See Feres*, 340 U.S. at 144–45 (interpreting silence by Congress as evidence of its intent to exclude military personnel from seeking recovery under the FTCA).

[61] *See id.* at 146; Froelich, *supra* note 9, at 713 (asserting that after *Feres*, service members are precluded from bringing suit under the FTCA for injuries suffered during military activity).

rect interpretation by the Court could be remedied by an amendment to the FTCA expressly permitting a cause of action for military personnel.[62]

C. The Evolution and Expansion of the Feres *Doctrine in Intra-Military Claims Under the FTCA*

Although the *Feres* doctrine remains good law today, the Supreme Court's decisions since *Feres* represent a shift in, and expansion of, the original principles underlying the opinion.[63] In particular, the doctrine has become synonymous with three core principles: (1) respect for and deference to decisions made in the context of intra-military supervision, under the "incident to service" exception to the FTCA; (2) the existence of an alternative compensation scheme and system of justice that is more than sufficient and capable of providing service members with an alternative to tort recovery; and (3) the concern regarding undercutting, and thereby destabilizing, the military discipline structure if soldiers are permitted to hold their superior officers and other government officials liable in Article III courts.[64] While many courts focus on the third principle—maintenance of military discipline—the Court has acknowledged all three as justifications for keeping intra-military claims for relief out of civilian courts.[65]

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[62] *See Feres*, 340 U.S. at 138 (observing the limited guiding materials for statutory construction of the FTCA and noting that no conclusion by the Court could be above challenge by Congress). Justifying its statutory interpretation, the Court stated in conclusion, "[w]e cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 146.

[63] *See Stanley*, 483 U.S. at 680–84; *Johnson*, 481 U.S. at 687–88, 691–92; Chappell v. Wallace, 462 U.S. 296, 304–05 (1983); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673–74 (1977) (upholding the *Feres* doctrine under new rationales); *Day*, 167 F.3d at 682 (noting that in the half-century following *Feres*, the Court has reaffirmed and expanded the doctrine, while also adjusting the underlying rationales).

[64] *See Johnson*, 481 U.S. at 688–91 (articulating and adopting the modified *Feres* rationales advanced by the Court in *Stencel*); *Stencel*, 431 U.S. at 672–73 (opining that the key factors for analysis under *Feres* include the distinctively federal relationship between the government and the military, the alternative compensation system available to military personnel through the Veterans' Benefits Act, and the potential deleterious effect on military discipline and decision making that might attend government tort liability); Banner, *supra* note 6, at 726 (explaining the three core principles underlying *Feres* as articulated by the Court).

[65] *See Johnson*, 481 U.S. at 688–91 (endorsing three broad rationales for the *Feres* doctrine and applying them to preclude an action under the FTCA by a Coast Guard helicopter pilot killed during a search and rescue mission); Brown v. United States, 739 F.2d 362, 368–69 (8th Cir. 1984) (noting that the three factors "determine whether there is a relevant relationship between the service member's activity at the time of the injury and the military service"); Astley, *supra* note 25, at 209 (noting that the Court's decisions led some lower courts to infer that the military discipline justification was the only relevant rationale in analyzing the applicability of *Feres* and whether a cause of action could be brought under the FTCA). *But see* Pierce v. United States, 813 F.2d 349, 354 (11th Cir. 1987) (holding that allowing a claim under the FTCA would not threaten the military discipline system when the accident occurred on a public highway during a serviceman's lunch break).

Because of the Court's continual tinkering with the rationales to conform to the various intra-military claims brought under the FTCA, however, none of the current cases concerning the *Feres* doctrine articulate a consistent rationale for barring intra-military FTCA claims.[66] Nevertheless, one principle routinely expressed in all *Feres* doctrine cases is the preservation of and deference to military decision making and discipline, viewed by the Court as necessary for the effective and efficient functioning of the military.[67] Without defining "military discipline" and "decision making," the Court has adopted a broad standard of deference to protect military discipline and decision making from the effects of civil suits.[68] Accordingly, the scope of the combatant activities exception has grown to exclude most claims brought by military personnel alleging injury during active duty.[69]

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[66] *See* Schwartz, *supra* note 10, at 996–97 (asserting that none of the *Feres* doctrine cases articulate a clear and consistent rationale for barring service member tort suits under the FTCA). For example, in 1954, in *United States v. Brown*, the Court attempted to clarify the "incident to service" test by distinguishing *Brooks* and *Feres*. *See* 348 U.S. 110, 112–13 (1954). In his dissenting opinion, however, Justice Hugo Black recognized the malleable rule created by the Court in *Feres* and the inconsistency in the Court's interpretation of the FTCA. *See id.* at 114 (Black, J., dissenting) ("To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require.").

[67] *See Stanley*, 483 U.S. at 682 ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decision making would itself require judicial inquiry into, and hence intrusion upon, military matters."); *Johnson*, 481 U.S. at 691 ("Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."); *Brown*, 348 U.S. at 112 (arguing that the "peculiar and special relationship of the soldier to his superiors," the effects of tort suits on military discipline, and the "extreme results" that would occur if the FTCA permitted claims for negligent acts committed in the course of military duty, led the Court to read the FTCA as excluding these claims); *see also* Astley, *supra* note 25, at 217 (arguing that the military discipline rationale best articulates the Court's modified foundation for the *Feres* doctrine).

[68] *See* Schwartz, *supra* note 10, at 996–97 (noting the Court's reliance on the deleterious effect allowing suits against superior officers or the government could have on discipline, and arguing that the *Feres* doctrine sweeps too many claims under its bar); Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 1, 3–4 (2007) (noting the Court's view that the military must not be inhibited by fear of judicial scrutiny in civil court when making decisions and implementing policies). As one scholar identified, military decision making involves a balance between the demands of the military mission and the safety of individual service members and the unit. Brou, *supra* at 3–4.

[69] *See. e.g.*, *Cioca*, 720 F.3d at 517–18 (citing *Feres* and the need for deference to military decision making when affirming the dismissal of claims brought by victims of intra-military sexual assault); *Smith*, 196 F.3d at 775–78 (holding that a military plaintiff raped by a supervisor at an Army facility in Maryland could not bring a claim against the Army under the FTCA for failure to supervise because *Feres* cautioned that such a case would call into question the management decisions of those who exercise military leadership); United States v. Lee, 400 F.2d 558, 564–65 (9th Cir. 1968) (acknowledging that Supreme Court jurisprudence had eroded the significance and authority of the rationales in *Feres*, but denying relief under the FTCA given the appellate court's limitations under *Feres*); *see also* Banner, *supra* note 6, at 727 n.20 (arguing that, as the *Feres* doctrine has devolved

D. Growing Discord: Dissents to the Feres *Doctrine*

Notwithstanding the *Feres* doctrine's momentum and evolution in the Supreme Court, four significant dissenting opinions highlight the disagreement within the Court over the decision in *Feres* and the core principles it has come to represent.[70] Coupled with disapproval in the lower courts, these judicial critiques of the *Feres* doctrine suggest that it is not a matter of if, but when, the Court will reexamine the decision.[71]

Critics of the *Feres* doctrine often cite Justice Antonin Scalia's dissent in the U.S. Supreme Court's 1987 decision in *United States v. Johnson*.[72] In the 5-4 *Johnson* decision, Justice Scalia authored a vigorous dissent concluding that *Feres* was wrongly decided.[73] Grounded in a literal reading of the text of the FTCA as well as a thorough analysis of both the original and the post-*Feres* rationales, Justice Scalia's dissent asserted that Congress unambiguously intended to permit service members' tort claims against the military under the FTCA.[74] Justice Scalia, admitting that such suits could adversely affect mili-

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over several decades, courts have focused on the maintenance of military discipline as the primary rationale for barring claims under the FTCA by military personnel); Froelich, *supra* note 9, at 713 (discussing the criticism of *Feres* and its subsequent rationales).

[70] *See* Lanus v. United States, 133 S. Ct. 2731, 2732 (2013) (Thomas, J., dissenting); *Stanley*, 483 U.S. at 700, 704–06, 708 (Brennan, J., dissenting); *id.* at 709–10 (O'Connor, J., dissenting); *Johnson*, 481 U.S. at 693–95, 700 (Scalia, J., dissenting).

[71] *See, e.g.*, *Cioca*, 720 F.3d at 514, 518 (acknowledging the severity and troubling nature of plaintiffs' claims but affirming dismissal because the principles expressed in *Chappell*, *Stanley*, and *Feres* dictate judicial abstention); Ruggiero v. United States, 162 F. App'x 140, 143 (3d Cir. 2006) ("We have no choice but to apply *Feres* to the instant case, despite the harshness of the result and our concern about the doctrine's analytical foundations."); Costo v. United States, 248 F.3d 863, 869–70, 876 (9th Cir. 2001) (Ferguson, J., dissenting) (characterizing the *Feres* doctrine as unconstitutional insofar as it violates service members' equal protection rights and violates constitutional separation of powers principles, and advocating for the Supreme Court to overturn the decision); Bowers v. United States, 904 F.2d 450, 452 (8th Cir. 1990) ("We conclude that we are obligated to affirm this judgment. We reach this result with a pronounced lack of enthusiasm."); *see also* Banner, *supra* note 6, at 730–31 (noting that the "emphatic and relatively unanimous disapproval of the Feres doctrine by lowers courts suggests that the question is not if the Court will revisit the doctrine but when," and arguing that the "moment is ripe" for the Court to do so today).

[72] *Johnson*, 481 U.S at 693–95, 698–700 (Scalia, J., dissenting); *see Lanus*, 133 S. Ct. at 2732 (Thomas, J., dissenting) (agreeing with Justice Scalia that Feres was wrongly decided and should be reconsidered); Banner, *supra* note 6, at 747, 751–52 (noting that Justice Scalia's dissent is often cited in support of revisiting the *Feres* doctrine); Astley, *supra* note 25, at 222 (arguing that the dissent in *Johnson* suggested support for overruling *Feres*). *But see* Figley, *supra* note 52, at 447–49 (maintaining that Justice Scalia's arguments regarding the parallel private liability requirement were flawed).

[73] *See Johnson*, 481 U.S. at 692–93, 695, 699–700 (Scalia, J., dissenting). Justice Scalia was joined by Justices William J. Brennan, Jr., Thurgood Marshall, and John Paul Stevens. *Id.* at 692.

[74] *See id.* at 699–700 (regarding the three original *Feres* rationales and the post hoc rationalization of military discipline as inadequate to support the Court's failure to apply the FTCA as written). Justice Scalia concluded:

tary discipline or decision making, nevertheless relied on the text of the FTCA to conclude that claims could not be precluded on the grounds of deference to military decision making.[75]

First discrediting the original rationales articulated by the Court in *Feres*, Justice Scalia concluded that none justified the judicially created doctrine and none were controlling on the Court.[76] Moreover, Justice Scalia highlighted the inaccuracy of the Court's military deference in post-*Feres* decisions, maintaining that the Court's submissiveness for fear of affecting military discipline and decision making was not only unsupported by the FTCA's text, but also entirely unnecessary.[77] For the dissent, the potential effect of undermining the military's management did not appear so substantial as to warrant a bar on all suits by military personnel.[78] Justice Scalia's dissent, echoed by courts and critics disapproving of the *Feres* doctrine, reflects a call to action for the Court to rethink its "outlandish" interpretation of the FTCA.[79]

Supporting this call for judicial review, in 1987, in *United States v. Stanley*, Justices Sandra Day O'Connor and William J. Brennan, Jr. voiced con-

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> Read as it is written, this language renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees. Other provisions of the Act set forth a number of exceptions, but none generally precludes FTCA suits brought by servicemen. One, in fact, excludes "[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*," § 2680(j) (emphasis added), demonstrating that Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for us to supplement—*i.e.,* revise—that congressional disposition.

Id. at 693 (alterations in original).

[75] *Id.* at 699 (arguing that Congress meant what it plainly and unambiguously said in both the waiver of sovereign immunity and the explicit exceptions to that waiver).

[76] *See id.* at 694–95 (critiquing the majority's reliance on and acceptance of the *Feres* rationales). In particular, the dissent discussed the history of the three original rationales and explained how none was controlling on the Court because of subsequent decisions refuting or dismissing their logic. *See id.* at 694–99; *see also* Astley, *supra* note 25, at 214–15 (noting the dissent's critique of the *Feres* principles).

[77] *See Johnson*, 481 U.S. at 699–700 (Scalia, J., dissenting).

[78] *See id.* at 699 (contending that even if the Court were interpreting an ambiguous statute and could take into consideration the adverse effect of lawsuits on military discipline, "the effect upon military discipline is [not] so certain, or so certainly substantial").

[79] *See id.* at 699–700 (disagreeing with the majority's argument that allowing military service member claims under the FTCA would require civilian courts to examine military decision making and therefore *influence* military discipline); *see, e.g.*, *Lanus*, 133 S. Ct. at 2732 (Thomas, J., dissenting) (agreeing with Justice Scalia's reasoning in asserting that *Feres* was wrongly decided); *Costo*, 248 F.3d at 869–70, 876 (Ferguson, J., dissenting) (disagreeing with the principles of the *Feres* doctrine and finding the doctrine's effect unconstitutional); Anne R. Riley, Note, United States v. Johnson: *Expansion of the* Feres *Doctrine to Include Servicemembers' FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233, 265 (1989) (asserting that, based on Justice Scalia's dissent, if the plaintiffs in *Johnson* had asked the Court to overrule *Feres*, four of the nine justices likely would have done so, and arguing that *Feres* will eventually be overruled).

cerns with what they considered unjust outcomes of the *Feres* doctrine.[80] Expressing dismay at the majority's characterization of the non-consensual administration of psychotropic drugs as "incident to service," Justice O'Connor regarded the act at issue as "so far beyond the bounds of human decency that as a matter of law it simply [could not] be considered a part of the military mission."[81] Justice O'Connor's dissent suggests that certain acts should not receive the insulation of sovereign immunity and that the scope of "incident to service" must be tailored so as not to exclude inhumane acts from liability under the FTCA.[82]

Most recently, in the context of a denied petition for certiorari refusing to re-examine the *Feres* doctrine, Justice Clarence Thomas articulated a renewed appeal to the Court to revisit *Feres*.[83] In his dissent, Justice Thomas disagreed with the Court's interpretation of the FTCA, concluding that the preclusion of *all* claims by military personnel arising out of activities incident to service is not supported by the text of the statute.[84] Justice Thomas, recognizing the thousands of claims denied on the basis of judicial abstention, wrote that the *Feres* doctrine has the "unfortunate consequence" of divesting service members of any remedy, despite suffering injuries caused by the negligence of the government and its employees.[85] Looking closely at the text of the FTCA, Justice Thomas concluded that, at the very least, the Supreme Court should reconsider *Feres* and the subsequent cases that comprise the doctrine.[86]

Although these dissents have yet to become the majority opinion, they have provided greater authority and ammunition for lower courts and critics who advocate the overturning of the *Feres* doctrine.[87] Moreover, the opinions

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[80] *See Stanley*, 483 U.S. at 704–06 (Brennan, J., dissenting); *id.* at 709–10 (O'Connor, J., dissenting).

[81] *See id.* at 709 (O'Connor, J., dissenting). In his separate dissent, Justice Brennan highlighted the historical rationale for permitting intentional tort claims against military superiors, asserting that while errors of judgment in the discharge of duty should be protected by sovereign immunity, private injury inflicted by superior officers as a result of "malice, cruelty or any species of oppression" should not be shielded in the same way. *See id.* at 699–700, 704–06 (Brennan, J., dissenting) (quoting *Dinsman*, 53 U.S. at 403).

[82] *See id.* at 709 (O'Connor, J., dissenting); Banner, *supra* note 6, at 754–55 (noting that Justice O'Connor's dissent underscores the central issues of basic justice at stake in cases of intra-military rape and sexual assault).

[83] *Lanus*, 133 S. Ct. at 2732 (Thomas, J., dissenting).

[84] See *id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*; *Stanley*, 483 U.S. at 699–700, 704–06, 708 (Brennan, J., dissenting); *id.* at 709–710 (O'Connor, J., dissenting); *Johnson*, 481 U.S. at 692–93, 695, 699–700 (Scalia, J., dissenting); *Costo*, 248 F.3d at 869–70, 876 (Ferguson, J., dissenting) (citing Justice Scalia's dissent in *Johnson* in arguing for the overruling of the *Feres* doctrine); *Day*, 167 F.3d at 683 (citing Justice Scalia's dissent in *Johnson* for the proposition that *Feres* possibly deserves re-examination given that some of its rationales are no longer persuasive).

reflect the percolating sentiment held by current and former members of the Court that *Feres* must be, at a minimum, re-examined.[88]

II. Waging a War Without Ammunition: The Effect of the Military's Inadequate Legal System and the *Feres* Doctrine on Victims of Intra-Military Sexual Assault

Victims of intra-military sexual assault directly suffer the impact of the U.S. Supreme Court's 1950 decision in *Feres v. United States*.[89] Whereas civilian victims have opportunities for civil redress, military service members do not have a comparable judicial forum or legal standing to seek a civil remedy when they experience sexual assault while serving their country.[90] Whatever civil remedy Congress intended to provide to military service members to bring suit against their government under the FTCA, the *Feres* doctrine has effectively foreclosed the statute's application to claims arising out of intra-military sexual assault.[91] Moreover, courts have employed the principles underlying the *Feres* doctrine to impede the efforts of victims of intra-military

[88] *See Lanus*, 133 S. Ct. at 2732 (Thomas, J., dissenting) (calling for the Court to re-examine *Feres*); *Stanley*, 483 U.S. at 699–700 (O'Connor, J., dissenting) (noting the absurdity of the *Feres* doctrine's "incident to service" standard as applied to the facts in *Stanley*); *Johnson*, 481 U.S. at 699–700 (Scalia, J., dissenting) (arguing *Feres* was wrongly decided and has been rightly criticized); Astley, *supra* note 25, at 222 (highlighting the importance of the dissent in *Johnson* as indicative of members of the Court's support for overturning the *Feres* doctrine); Riley, *supra* note 79, at 265 (arguing *Feres* will eventually be overturned given the support of members of the Court in the *Johnson* dissent).

[89] Feres v. United States, 340 U.S. 135, 146 (1950); *see, e.g.*, Cioca v. Rumsfeld, 720 F.3d 505, 517–18 (4th Cir. 2013) (holding that the claims asserted by the victims of intra-military sexual assault were barred by the *Feres* doctrine because the injuries alleged arose out of activities incident to military service); Stubbs v. United States, 744 F.2d 58, 60–61 (8th Cir. 1984) (concluding that *Feres* barred a claim against the United States for a service member's suicide allegedly caused by her drill sergeant's sexual harassment and assault); Klay v. Panetta, 924 F. Supp. 2d 8, 20 (D.D.C. 2013) (dismissing the class action complaint of victims of intra-military sexual assault, citing the court's inability to provide a remedy in light of the *Feres* doctrine); Banner, *supra* note 6, at 738 (noting that military sexual assault claims brought in district court are dismissed based on courts' application of the *Feres* principles); *see also* Scott A. Liljegren, Note, *Winning the War Against Sexual Harassment Battle by Battle: Why the Military Justice Model Works—A Proposal for Federal and State Statutory Reform*, 38 Washburn L.J. 175, 201–03 (1998) (noting that the *Feres* doctrine prohibits military service members from pursuing a civil claim against anyone for sexual harassment inflicted while on-duty).

[90] *See* Banner, *supra* note 6, at 725 (noting that *Feres* has been interpreted to bar negligent and intentional tort claims by service members against the government and military officers, along with claims for blatant constitutional rights violations); Schwartz, *supra* note 10, at 993–94 (arguing that the *Feres* doctrine forecloses the two methods by which private citizens can sue the government).

[91] *See Cioca*, 720 F.3d at 517–18; *Klay*, 924 F. Supp. 2d at 20; Elizabeth A. Reidy, Comment, Gonzalez v. United States Air Force*: Should Courts Consider Rape to Be Incident to Military Service?*, 13 Am. U. J. Gender Soc. Pol'y & L. 635, 656, 665 (2005) (noting that the *Feres* doctrine limits the access of service members to civil remedies).

sexual assault pursuing a civil remedy under other statutory or constitutional grounds.[92]

Section A of this Part briefly addresses the forums for justice within the military for sexual assault victims and identifies the limitations inherent in the military justice system for providing redress.[93] Section B then provides examples of the effect of the *Feres* doctrine on service members seeking a remedy in Article III courts for injuries arising out of intra-military sexual assault.[94]

A. Military Justice: A System Set Apart

The uncomfortable reality of rampant sexual assault, subverting all ranks of the military, coupled with frequently unsatisfying court-martial decisions, has captured the attention of Congress.[95] Moreover, the intra-military sexual

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[92] *See Cioca*, 720 F.3d at 517–18; *Klay*, 924 F. Supp. 2d at 20, 23–24; Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 751 (2002) (noting the limitations to civil redress in cases of intra-military sexual harassment). For example, in 1983, in *Chappell v. Wallace*, the U.S. Supreme Court relied on the military deference rationale in *Feres* to preclude military service members from seeking a *Bivens* remedy. *See* 462 U.S. 296, 304–05 (1983). Similarly, Title VII of the Civil Rights Act of 1964 applies only to civilian employees and does not extend to uniformed members of the armed forces. *See* 42 U.S.C. §§ 2000e–2016(a) (2012); Roper v. Dep't of Army, 832 F.2d 247, 248 (2d. Cir. 1987) ("[W]e refuse to extend a judicial remedy for alleged discrimination in civilian employment to the dissimilar employment context of the military, especially given the need for deference to the military in matters involving hierarchy and structure of command."); *accord* Gonzalez v. Dep't of Army, 718 F.2d 926, 928–29 (9th Cir. 1983); Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981).

[93] *See infra* notes 95–131 and accompanying text.

[94] *See infra* notes 132–142 and accompanying text.

[95] *See* Darren Samuelsohn, *Claire McCaskill's Sexual Assault Bill Passes*, POLITICO (Mar. 10, 2014, 6:30 PM), http://www.politico.com/story/2014/03/claire-mccaskill-military-sexual-assault-bill-104499.html, *archived at* http://perma.cc/VF49-LB94 (documenting the 97–0 vote in the Senate on legislation that establishes new protections for victims of military sexual assault, including eliminating the "good soldier" legal defense from evidence rules, which allows evidence of a military service member's military record, behavior, and achievements in the military as part of their defense); David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, ARMY NEWS SERVICE (Jan. 8, 2014), http://www.defense.gov/news/newsarticle.aspx?id=121444, *archived at* http://perma.cc/NK5U-5MWQ (reporting on the recent changes to the Uniform Code of Military Justice ("UCMJ") in the latest National Defense Authorization Act, many of which address how sexual assault cases are handled in the military justice system); *see also* Helene Cooper, *Senate Rejects Blocking Military Commanders from Sex Assault Cases*, N.Y. TIMES, Mar. 7, 2014, at A11 (reporting on the Senate's rejection of the Military Justice Improvement Act of 2013, which sought to remove military commanders from the decision-making process in deciding whether to prosecute intra-military sexual assault cases); Press Release, Greg Jacob, Policy Director, Serv. Women's Action Network, Statement in Response to Sentencing Announcement in the Case Against Brig. Gen. Jeffrey A. Sinclair (Mar. 20, 2014), *available at* http://servicewomen.org/wp-content/uploads/2011/01/Press-Release-Sinclair-Sentence.pdf, *archived at* http://perma.cc/A7YS-GV69 ("Today's sentencing is reflective of a case that fell apart long before today. . . . A system shaky enough to be rocked by allegations of undue command influence cannot provide justice for our troops. The General Sinclair case will go down in history as yet another reason we need . . . [the] Military Justice Improvement Act [of 2013].").

assault crisis raises further questions about the limitations of military justice more generally—particularly the lack of substantive and procedural due process available to military service members.[96] This Section identifies the legal and institutional deficiencies military service members face in seeking justice.[97] Specifically, it highlights (1) the inadequacy of the Uniform Code of Military Justice ("UCMJ"); (2) the lack of standing under Title VII; and (3) the failures of the Department of Veterans Affairs disability compensation structure.[98]

1. The Inherent Injustices and Limitations of the UCMJ

On May 5, 1950, Congress enacted the UCMJ.[99] The statute represented a reaction to widespread perceptions of fundamental unfairness inherent in the disciplinary Articles of War and the Articles for the Government of the Navy, which, until the UCMJ, served as the statutory basis for military justice in the United States.[100] The UCMJ remedied many abuses and infused integrity into

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[96] *See* Rachel Natelson, *A Case for Federal Oversight of Military Sexual Assault*, 43 CLEARINGHOUSE REV. 277, 277, 281 (2009) (arguing that civil courts offer a considerably more active forum in which victims can vindicate their rights and obtain redress for injuries suffered as a result of sexual assault); *see also Sexual Assault in the Military: Briefing Before the U.S. Commission on Civil Rights*, 113th Cong. 10–18 (2013) (statement of Rachel Natelson, Legal Director for the Service of Women's Action Network) [hereinafter Natelson Statement], *available at* http://www.eusccr.com/Transcript%20of%20briefing%20on%20Military%20Sexual%20Assault-FINAL.pdf, *archived at* http://perma.cc/QXW9-M7YN (highlighting the importance of the civil courts for victims of intra-military sexual assault in pursuing claims against both individual assailants and against their employer, the military, for negligence).

[97] *See infra* notes 99–131 and accompanying text.

[98] *See infra* notes 99–131 and accompanying text.

[99] *See* Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) [hereinafter UCMJ] (codified at 10 U.S.C. §§ 801–941 (2012)). The UCMJ is implemented through Executive Orders of the President of the United States pursuant to his authority under Article 36 of the UCMJ. 10 U.S.C. § 836. Those Executive Orders form a comprehensive volume of law known as the Manual for Courts-Martial (MCM). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, I-1 (2012 ed.), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf, *archived at* http://perma.cc/CB9L-MAYF ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[100] *See* Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57, 57–58 (noting that the UCMJ originated out of public outcry over the military justice system, particularly the prevalence of "unlawful command influence" in the court-martial system). Significantly, however, the new statute did not remove the military commander from the court-martial process, and in fact preserved a very substantial role for commanders, in order to ensure that the military justice system would remain responsive to the special needs and exigencies of the military. *See id.* at 70 (noting the UCMJ drafters' deference to the historical role of the commander and their maintenance of the commander's function in judicial processes); John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 8–9 (1998) (recog-

the military justice system by, among other changes, increasing the role of lawyers and establishing important rights for service members.[101] Since its enactment, however, fundamental notions of fairness have shifted and the UCMJ remains limited in its ability to fully and fairly protect the constitutional rights of service members in the same way the civilian judicial system guarantees certain rights and protections to private citizens.[102]

The United States military justice system enjoys unique autonomy from the purview of civilian oversight.[103] This self-contained legal framework also lacks independence from the military's hierarchal structure.[104] Moreover, the Supreme Court has abstained from intervening in any claim that even remotely calls into question military decision making and discipline.[105] This judicial

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nizing Congress's efforts in the UCMJ to create a true judicial system within the military, but critiquing the commander's central role in the process).

[101] *See* Barry, *supra* note 100, at 70 (stating that the UCMJ increased the role of lawyers and established a number of important appellate rights for service members); Cooke, *supra* note 100, at 7–9 (noting the critical role of extensive appellate rights and of the Court of Military Appeals in protecting the integrity of the military justice system).

[102] *See* Barry, *supra* note 100, at 59–60 (recognizing that the UCMJ was a step forward in transforming military courts into instruments of justice rather than vehicles for discipline, but arguing that the reform was incomplete); Liljegren, *supra* note 89, at 202–03 (noting that military service members who "stand ready to fight for the preservation of the nation and its federal law are many times the same individuals denied the protections of that law"). Some argue that convictions under the UCMJ could not withstand an appellate court's review when applying the constitutional standards applicable to every other criminal justice system in the United States. *See* Barry, *supra* note 100, at 60.

[103] *See* Banner, *supra* note 6, at 773 ("The Court's 30-year silence with regard to issues of intra-military affairs has led to the development of a mythological idea that the military is wholly and properly removed from civilian oversight."). The justification for this isolated structure is rooted in the historical concept that the military should have the discretion to discipline its own members, free of outside interference, because of the unique circumstances of the military structure and demands in times of battle and war. *See id.* at 728–29; *see also* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441, 443 (1999) (noting the Supreme Court's great deference to the military institution); Mazur, *supra* note 92, at 712 (describing military discipline as "entire[ly] outside the bounds of the civilian legal system"); Schwartz, *supra* note 10, at 1010 n.74 (noting that the congressional rulemaking process provides a significant amount of discretion to the military).

[104] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-579, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS (2011) [hereinafter GAO REPORT]; Natelson, *supra* note 96, at 278 (noting the inherent conflict of interest due to the relationship between the decision-making commander and the offender); Schmid, *supra* note 4, at 489 ("The military justice system is commander-driven—that is, individual commanders have discretion in deciding whether to pursue criminal charges in response to allegations of sexual misconduct."). According to the United States Government Accountability Office ("GAO"), the commanding officer has oversight in determining the course of justice for violations of the UCMJ. *See* GAO REPORT, *supra* at 4–5 (noting that "military commanding officers are responsible for good order and discipline in their commands," and ultimately, they "are accountable for disposing of allegations of offenses in a timely manner and at the lowest appropriate level of disposition").

[105] *See* Chemerinsky, *supra* note 103, at 443 (noting that the Court's decisions keep "those in the military from receiving any judicial redress for even the most egregious violations of rights"); *see,*

deference, coupled with the military's legal system positioned as an island within America's civil legal and social framework, together form much of the barrier to justice faced by military victims.[106]

Currently, the commanding officer holds the position of primary investigator, fact finder, and first adjudicator in military sexual assault cases.[107] Rather than having the adequacy of a commanding officer's supervision and management of his unit called into question during court-martial proceedings, a commanding officer has significant incentives to dismiss claims.[108] Commanding officers often choose to deflect blame by attacking the credibility of the victims and their allegations rather than fairly and impartially investigating and permitting viable claims to proceed through the military justice system.[109]

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e.g., United States v. Stanley, 483 U.S. 669, 682–84 (1987) (reasoning that the risk of erroneous judicial decisions and the disruption litigation would cause to the military regime counsels against judicial intervention); United States v. Johnson, 481 U.S. 681, 691 (1987) (noting that suits brought by service members could undermine military discipline and therefore should not be permitted).

[106] *See* DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 4 (2010) (arguing that the military increasingly is a social order of its own, separated from the civilian population); Banner; *supra* note 6, at 728–29; *see also* Kristen E. Gillibrand, *Ariana and Ben Klay Give Emotional Testimony at Bipartisan MJIA Press Conference* (Nov. 6, 2013), http://www.gillibrand.senate.gov/newsroom/video/ariana-and-ben-klay-give-emotional-testimony-at-bipartisan-mjia-press-conference, *archived at* http://perma.cc/M6GM-8UT7 [hereinafter Klay Statement] (describing the crisis in the justice system and the problem created by the Supreme Court prohibiting private suits and the insular procedures for handling rape claims within the military).

[107] *See* GAO REPORT, *supra* note 104, at 4–5; GREG JACOB & ESTEFANIA PONTI, LEARNING FROM OUR ALLIES: REFORMING THE U.S. MILITARY TO STOP SEXUAL VIOLENCE (2011), *available at* http://servicewomen.org/wp-content/uploads/2011/01/Learning-From-Our-Allies_Final.pdf, *archived at* http://perma.cc/YZY5-56WE [hereinafter SWAN Report]. A commanding officer can decide not to pursue an investigation, deny prosecution, or prescribe other non-judicial punishments. *See* GAO REPORT, *supra* note 104, at 4–5; SWAN Report, *supra* at 5. In 2010, over 40% of sexual assault perpetrators were punished through non-judicial punishments or other administrative actions. SWAN Report, *supra* at 5. In six percent of cases, perpetrators were given the option to resign in lieu of court-martial. *Id.*

[108] *See* Sarah Childress, *Why the Military Has a Sexual Assault Problem*, PBS FRONTLINE (May 10, 2013, 11:49 AM), http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/why-the-military-has-a-rape-problem/, *archived at* http://perma.cc/S4Z5-BPVN (noting the strong incentive for commanders to avoid pursuing sexual assault allegations because of the possible risk to their careers); Klay Statement, *supra* note 106 (noting that military officials have "an interest in avoiding the exposure of their commands' serious failures, a natural disinclination against believing their commands could commit such failures, a strong interest in destroying the credibility of any who would allege such failures, and no legal training that would make them qualified to properly perform these tasks anyway"). As a former Navy petty officer third-class and victim of intra-military rape observed, "You don't want to be the commander that calls your superior to say you've had an allegation of rape in your unit. . . . It makes you look bad, and affects your ability to be considered for a promotion." Childress, *supra*.

[109] *See* Natelson, *supra* note 96, at 278; Childress, *supra* note 108. As one critic of this system stated:

> The results of [a military justice system without independence from the military hierarchy] are tendencies to cover-up crimes that could reflect poorly on the leadership, and retaliate against those who would allege such crimes. Cover-up is often far less risky

Military victims who choose to proceed with a sexual assault claim under the UCMJ have two options—restricted or unrestricted reporting.[110] While restricted reporting allows the victim to receive medical treatment and counseling, it does not initiate an investigation within the military and is regarded as a means to deal with an admittedly hostile climate by ensuring anonymity and safety within the unit.[111] A disclosure of sexual assault through unrestricted reporting, on the other hand, triggers a report to the victim's commanding officer who then has discretion to pursue criminal charges, non-judicial punishment or no action in response to allegations.[112]

Due to the risk of retaliation and further abuse after reporting the crime, victims experience pressure to refrain from reporting altogether.[113] For those victims that do come forward with an unrestricted report, the court-martial process further denies the due process and justice afforded civilians in parallel criminal cases, primarily because of the commanding officer's role in initializing the court-martial process and the additional influence from the military hierarchy on judges adjudicating the claims and sentencing offenders.[114] For

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> than exposing an ugly truth, and retaliation serves the purposes of scaring people away from making serious allegations, and destroying the credibility of those who do make them. Where cover-up is infeasible, the tendency is to assign and isolate blame at the lowest plausible level.

Klay Statement, *supra* note 106.

[110] *See* SWAN Report, *supra* note 107, at 4; Schmid, *supra* note 4, at 485–86.

[111] *See* SWAN Report, *supra* note 107, at 4; Schmid, *supra* note 4, at 485–86; Department of Defense Sexual Assault Prevention and Response Office, *Reporting Options—Restricted Reporting*, http://www.myduty.mil/index.php/reporting-options/restricted-reporting, *archived at* http://perma.cc/986L-NF3X. The natural consequence of anonymity through restricted reporting, however, is the ability of the alleged perpetrator and his supervisors to escape any form of investigation or justice. *See* Department of Defense Sexual Assault Prevention and Response Office, *supra*.

[112] *See* SWAN Report, *supra* note 107; Schmid, *supra* note 4, at 485–86; Department of Defense Sexual Assault Prevention and Response Office, *Reporting Options—Unrestricted Reporting*, http://www.myduty.mil/index.php/reporting-options/unrestricted-reporting, *archived at* http://perma.cc/86AE-U99L. According to the Department of Defense's Sexual Assault Prevention and Response Office ("SAPRO"), unrestricted reporting is "recommended for victims of sexual assault who desire medical treatment, counseling and an official investigation of the crime." Department of Defense Sexual Assault Prevention and Response Office, *supra*. The benefits of unrestricted reporting as set forth by SARPO include a "sense of closure or healing (which aids recovery);" the "ability for military to potentially hold the offender accountable;" and "ensur[ing] the safety of others." *Id.*

[113] *See* Banner, *supra* note 6, at 737–38 (noting that "[o]ne-third of the 36 plaintiffs in the *Klay* and *Cioca* cases were officially reprimanded, sanctioned, or discharged in retaliation for making complaints. Others resigned after having been ordered to continue to serve under direct command of alleged rapists or their friends and protectors"); Schmid, *supra* note 4, at 480 (regarding sexual assault in the military as a "vastly underreported crime").

[114] *See* SWAN Report, *supra* note 107, at 4–5. Service member victims do have some recourse against undue commander influence under Article 138 of the UCMJ, which provides that:

> [a]ny member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress,

many offenders, rather than being court-martialed, they face much lesser charges under either Article 15 of the UCMJ for non-judicial penalties or Article 134 of the UCMJ for adultery, both of which significantly reduce the sentence and in some cases, allow the offender to continue serving in the military.[115] Accordingly, the military criminal justice system, intended to vindicate victims' rights and punish and deter sexual assault offenders, often proves entirely ineffective in its stated purposes.[116]

2. Military Service Members Lack the Civil Protections the Civil Rights Act of 1964 Provides to Civilians in the Workplace

The consequences of the military justice system's shortcomings become even more deleterious because the military as an institution enjoys immunity from vicarious liability.[117] Whereas civilian employees can seek recourse from their employers for intra-office sexual harassment and assault, military service members do not benefit from the same workplace protections.[118] Specifically, military service members have no recourse under Title VII of the Civil Rights Act of 1964 or other similar civil protections that would otherwise provide military victims with a means to hold their employer—the United States Mili-

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> may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.

10 U.S.C. § 938 (2012). The effectiveness of an Article 138 complaint, however, is limited because the response to the complaint is still at the discretion of the command structure. *See* SWAN Report, *supra* note 107, at 8.

[115] *See* Banner, *supra* note 6, at 737–38 (describing the lesser charges often brought against offenders and noting that in the *Klay* and *Cioca* class action lawsuits, many alleged perpetrators were promoted, with one featured in a Marine Corps calendar after allegations were brought against him); Greg Botelho & Marlena Baldacci, *Brigadier General Accused of Sex Assault Must Pay Over $20,000; No Jail Time*, CNN (Mar. 20, 2014, 6:10 PM), http://www.cnn.com/2014/03/20/justice/jeffrey-sinclair-court-martial/, *archived at* http://perma.cc/4983-FYWH (reporting that Brig. Gen. Jeffrey Sinclair pled guilty to adultery and mistreating one of his accusers in a deal that dropped the sexual assault and sodomy charges against him).

[116] *See* Banner, *supra* note 6, at 736–38, 769.

[117] *See* Natelson, *supra* note 96, at 279 ("While Title VII's applicability to military personnel has yet to reach the Supreme Court, a consensus has emerged among federal appellate courts that the law does not apply to uniformed members of the armed services."); *see also* Gonzalez v. United States Air Force, 88 F. App'x 371, 378 (10th Cir. 2004) ("[T]his Court has clearly held Title VII inapplicable to members of the armed forces."); *accord Gonzalez*, 718 F.2d at 928–29 ("In light of [the] cases, the legislative history, and the pertinent statutory language, we hold section 717(a) does not make Title VII of the Civil Rights Act of 1964 applicable to uniformed members of the armed forces.").

[118] *See Gonzalez*, 88 F. App'x at 378 (dismissing service member's claim for relief under Title VII, noting Title VII's inapplicability to members of the armed forces); Natelson, *supra* note 96, at 281 (noting that "unlike their civilian counterparts, military harassment victims have virtually no avenue for relief when their employer fails to take appropriate corrective action in response to their complaints").

tary—responsible for affecting their employment, unreasonably interfering with their work performance, or creating a hostile or offensive work environment.[119]

Workplace protections in the civilian legal system affect employers and institutions by functioning as an important deterrent.[120] Military and Department of Defense officials lack this institutional incentive that a statutory scheme like Title VII provides, namely dissuading bad actors, prompting the institution to act with greater care in protecting its employees, and encouraging the institution to afford justice to victims.[121] Despite an Equal Opportunity ("EO") office at each military base responsible for reviewing complaints of discrimination or sexual harassment, this reporting structure has no enforcement authority and is not intended to serve as an advocate for victims.[122] Similarly, the Inspector General ("IG") responsible for independently investigating fraud, waste, and abuse, including sexual harassment and sexual assault, has no enforcement authority and can only make findings and recommendations, implementation of which is subject to commander discretion.[123]

Without the threat of a civil suit, military tolerance of sexual harassment and assault in the "workplace" goes unchecked and undeterred, weakening the institution both internally and in its outward reputation.[124] An effective penalty

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[119] 42 U.S.C. §§ 2000ee–2016(a) (2012); *see Gonzalez*, 88 F. App'x at 378 (dismissing service member's claim for relief under Title VII and noting Title VII's inapplicability to members of the armed forces); *accord* Smith v. United States, 196 F.3d 774, 778 (7th Cir. 1999) (recognizing the impact of employer tolerance of sexual assault and harassment in the workplace, particularly where the workplace is the Armed Forces of the United States).

[120] *See* Natelson Statement, *supra* note 96 ("By holding powerful institutions financially accountable for inaction, successful civil suits exercise an important deterrent effect against workplace crime."); *see also* Anne E. Craige, *The Separation of Liability and Remedy in Mixed Motive Title VII Actions:* Bibbs v. Block, 28 B.C. L. REV. 119, 119 (1986) ("The central objectives of Title VII are to deter employer discrimination, compensate victims of discrimination, and vindicate a public interest in eliminating discrimination.").

[121] *See Gonzalez*, 88 F. App'x at 378; Natelson, *supra* note 96, at 279–81; Natelson Statement, *supra* note 96.

[122] *See* Natelson Statement, *supra* note 96 (noting that the EO generally has a greater responsibility to the military than to the individual complainant, and many service members who report incidents of sexual harassment or assault to the EO experience retaliation, particularly when the subject of the complaint is a supervisor); SWAN Report, *supra* note 107, at 6 (stating that one flaw with EO complaints is that EOs lack enforcement authority and can only make recommendations).

[123] *See* Natelson Statement, *supra* note 96; SWAN Report, *supra* note 107, at 7. The IG determines at the outset whether to investigate a complaint. Natelson Statement, *supra* note 96. Because of the conflict of interest between the IG and command, few complaints are investigated. *See id.* (noting that "[a]ccording to a recent [GAO] study, the IG fully investigated only 29% of all reprisal complaints between 2006 and 2011, and substantiated only a fifth of those investigated").

[124] *See Smith*, 196 F.3d at 778. As the Seventh Circuit explained:

> [E]mployer tolerance of sexual assault and sexual harassment in the workplace is a serious matter. Sexual assault and sexual harassment is always demeaning and often permanently scars the victim. Furthermore, it renders the workplace less productive and

structure is necessary to affect institutional changes to the military culture of sexual assault and retaliation.[125]

3. The Department of Veterans Affairs ("VA") Disability Compensation System for Military Sexual Trauma Is Sorely Lacking

The alternative compensation system available to military service members—namely veteran's disability benefits—is a particularly arduous process, involving years of struggle and ultimately providing insufficient compensation, if any at all.[126] In order to obtain disability compensation through the VA for military sexual trauma—the only form of monetary relief available to victims of intra-military sexual assault—victims must prove that (1) they had an incident of military sexual trauma while on active duty; (2) they are currently diagnosed with a mental or physical disability; and (3) their disabilities were caused or worsened by the military sexual trauma they suffered in service.[127]

> stifles the initiative and creative capacity of the organization. When the organizations involved are the Armed Forces of the United States, the victim, in addition to the suffering experienced by all such victims, is deprived of the very special satisfaction that military service to the Country should bring. Tolerance of such behavior also results in a warping of military discipline, a lack of military readiness, and a weakening of national security. Democratic support for military institutions is eroded when citizens do not believe that their children, and those of their neighbors, will be treated with dignity and respect during their period of service.

Id.

[125] *See* Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 194–95 (2007) (noting that the primary justification for excluding service member claims under Title VII rests on the military discipline rationale); Natelson, *supra* note 96, at 279–81 (asserting that the "time is ripe" for removing the institutional immunity which prevents outside judicial review that could operate as a deterrent).

[126] *See* Banner, *supra* note 6, at 726, 764–67 (describing veterans' disability benefits as particularly elusive for victims of intra-military sexual assault and detailing the many barriers to receiving compensation); THE INVISIBLE WAR (Chain Camera Pictures 2011) (documenting the epidemic of sexual assault in the military and the struggle of victim veterans trying to obtain benefits from the VA).

[127] *See* Service Women's Action Network & Vietnam Veterans of America, Petition for Rulemaking to Promulgate Regulations Governing Service-Connection for Mental Health Disabilities Resulting from Military Sexual Assault, at 1–2 (June 27, 2013), *available at* http://www.law.yale.edu/documents/pdf/Clinics/vlsc_SWAN_petitionRuleMaking.pdf, *archived at* http://perma.cc/5RENH6G4 [hereinafter SWAN Petition]. "Military sexual trauma" (MST) is defined in the UCMJ as "psychological trauma . . . result[ing] from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty, active duty for training, or inactive duty training." 38 U.S.C. § 1720D(a)(1) (2012), *amended by* Veteran's Access, Choice and Accountability Act of 2014, Pub. L. No. 113-146, 128 Stat. 1754. Sexual harassment is defined as "repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character." § 1720D(2)(d), *amended by* Veteran's Access, Choice and Accountability Act, 128 Stat. 1754.

Because service members often do not report incidents of sexual assault, however, little to no documentation exists to prove that a sexual assault or harassment occurred.[128] Moreover, many military men and women who report sexual assault by another service member are later medically discharged for a personality disorder, regardless of the veracity of the diagnosis.[129] Because the VA considers personality disorders to be non-compensable pre-existing conditions, benefits are routinely denied for a vast majority of victims of intra-military sexual assault.[130] Accordingly, the procedural and institutional flaws inherent in the VA's disability benefits compensation structure for victims of military sexual trauma further entrench victims in a legal and administrative system without rights or recourse.[131]

B. Broad Application of the Feres *Doctrine Seals Shut the Doors to Civilian Courthouses for Military Victims of Sexual Assault*

The *Feres* doctrine has guaranteed the inability of service members to sue in federal court for injuries arising out of or in the course of activity incident to service—interpreted to include nearly all activity during the tenure of an active duty soldier.[132] The deleterious effects of the *Feres* doctrine are readily appar-

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[128] *See* U.S. Department of Veterans Affairs, *Disability Compensation for Personal Assault or Military Sexual Trauma* (MST) (Sept. 2012), http://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/MST.pdf, *archived at* http://perma.cc/4B85-V2V2. The VA asserts that the evidentiary requirements are "relaxed" for a victim establishing an incident of military sexual trauma. *See id.* In particular, the VA maintains that "markers" (i.e. signs, events, or circumstances) are sufficient proof, and incidents of sexual trauma may be proven by police records, pregnancy tests, statements from friends in service, family members, counselors or clergy, documentation of a request for transfer, evidence of a drug or alcohol problem, changes in job performance or social or economic behavior, marital and/or sexual difficulties, or incidents of depression or anxiety for which no other cause has been identified. *Id.* Notwithstanding the VA's stated policies on levels and types of proof, the VA denies many veterans' disability benefits claims on account of insufficient evidence. *See* SWAN Petition, *supra* note 127, at 3, 23–29 (asking the VA to promulgate new regulations to allow victims of rape, sexual assault, and sexual harassment to provide the documentation necessary to corroborate their claims); Greg Botelho, *Report: Troops Filing Sexual Trauma Claims Less Likely to Get PTSD Benefits*, CNN (Nov. 7, 2013, 5:33 PM), http://www.cnn.com/2013/11/07/us/aclu-military-sexual-trauma/, *archived at* http://perma.cc/34MA-MUYH (reporting that a study from Service Women's Action Network and American Civil Liberties Union found that troops who reported suffering post-traumatic stress disorder as a result of sexual trauma have significantly lower success rates in obtaining benefits compared to those who say they suffer from PTSD for other reasons).

[129] *See* David S. Martin, *Rape Victims Say Military Labels Them 'Crazy,'* CNN (Apr. 14, 2012, 12:29 PM), http://www.cnn.com/2012/04/14/health/military-sexual-assaults-personality-disorder/, *archived at* http://perma.cc/JHW6-ENZG (reporting on the pattern of the military using psychiatric diagnoses to get rid of women who report sexual assault).

[130] *See id.*

[131] *See* SWAN Petition, *supra* note 127, at 3, 23–29.

[132] *See* Banner, *supra* note 6, at 725–27. The *Feres* doctrine insulates the activities of military officers, particularly military commanders charged with overseeing rape investigations and trials, providing these officials with immunity from civil lawsuits for the wrongs they commit, whether neg-

ent in two recent class action lawsuits filed by military men and women, seeking to hold Department of Defense and other military officials accountable for alleged institutional failings that contributed to pervasive intra-military sexual assault in the military.[133] In 2012, *Cioca v. Rumsfeld*, filed in the United States District Court for the Eastern District of Virginia, and *Klay v. Panetta*, filed in the United States District Court for the District of Columbia, a combined total of thirty-six victims of intra-military sexual assault sought justice in civilian court against former Defense secretaries Donald Rumsfeld, Robert Gates, and Leon Panetta, as well as other current and former heads of the Marine Corps and Navy.[134] Pointing to the military's repeated failure to take affirmative steps to prevent and prosecute sexual assault crimes, the complaints allege that these defendants created a culture tolerant of sexual violence and permissive of retaliatory responses to claims of sexual assault by service members.[135]

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ligently or intentionally, in the scope of their authority in the military. *See id.* at 768–69, 782; Natelson, *supra* note 96, at 281.

[133] *See Cioca*, 720 F.3d at 517–18 (affirming the dismissal of a class action lawsuit brought by service members against Department of Defense officials); *Klay*, 924 F. Supp. 2d at 20 (dismissing intra-military service members' class action against Department of Defense officials).

[134] *See Cioca*, 720 F.3d at 506–07; *Klay*, 924 F. Supp. 2d at 10–11; Banner, *supra* note 6, at 732. The stories of Plaintiffs Kori Cioca and Ariana Klay provide a glimpse of the sexual assault and harassment thousands of military men and women face on a daily basis while serving in the armed forces. *See Cioca*, 720 F.3d at 506–07, 513–14; *Klay*, 924 F. Supp. 2d at 10–11; Banner, *supra* note 6, at 732–33, 738.

Kori Cioca was sexually harassed, physically assaulted and eventually raped by her direct supervisor in the Coast Guard. *See* Banner, *supra* note 6, at 732–33. The physical assault dislocated her jaw and left her with permanent nerve damage in her face. *See* THE INVISIBLE WAR, *supra* note 126. Cioca reported the assault to military command, but she did not receive a response. Banner, *supra* note 6, at 733. After multiple attacks, command transferred Cioca but warned her to drop her allegations of rape, threatening her with a court-martial. *Id.* Command required Cioca to sign a paper referring to the rape as an inappropriate consensual relationship with her direct supervisor. *Id.* She was eventually discharged from her post for reason of a "history of inappropriate relationships." *Id.* Her discharge came two months before her two-year service obligation, thus disqualifying her from any veterans' benefits. *Id.* Her attacker received no corrective action and is still stationed at the post where he attacked Cioca. *See id.*; THE INVISIBLE WAR, *supra* note 126.

Ariana Klay was sexually harassed by numerous superior officers while stationed at the Marine Barracks in Washington, D.C., including a major, a captain, and a lieutenant colonel. *See* Banner, *supra* note 6, at 733. Klay was told to "deal with it" when she reported the verbal harassment to command. *Id.* The verbal assaults escalated, and in 2010 a senior officer and his civilian friend forcefully entered her residence and raped her. *Id.* After reporting the rape, she was told that her clothes and makeup suggested she likely welcomed the attack. *Id.* One of her rapists was court-martialed, but convicted only of the lesser crimes of adultery and indecent language—not rape. *Id.* One of her harassers was even promoted. *Id.*

[135] *See Cioca*, 720 F.3d at 506–07; *Klay*, 924 F. Supp. 2d at 10–11; Banner, *supra* note 6, at 737–38. These class actions asserted that in addition to the Fifth Amendment violations to bodily integrity, the inaction and retribution by military officials in response to reports of sexual assault impeded the plaintiffs' due process rights and First Amendment rights, including unfair terminations, demotions, and other mistreatment. *See Cioca*, 720 F.3d at 506–07; *Klay*, 924 F. Supp. 2d at 10–11. Additionally,

The plaintiffs brought their claims as a *Bivens* cause of action, rather than under the FTCA.[136] Because of the courts' reliance on *Feres* to articulate a standard in a military *Bivens* claim, however, both class actions have suffered defeat at the hands of the *Feres* doctrine jurisprudence.[137] Pointing to the "incident to service" and deference to military discipline rationales of *Feres*, the district courts in both suits dismissed the claims for lack of justiciability, citing the unique disciplinary structure of the military as a "special factor" counseling against judicial intrusion.[138]

As understood by the judges in the *Klay* and *Cioca* decisions—and others like them—lower courts' hands are tied by the judicial exception to the waiver of sovereign immunity in intra-military claims, which began with *Feres* and has grown into broad deference for military decision making and discipline.[139] The reasonableness and validity of denying military service members recourse and relief in Article III courts is questionable, however, particularly when these very same crimes are undoubtedly justiciable for private citizens.[140] Where military remedies have failed to adequately deter and compensate victims, lower courts and critics have advocated for a re-examination of the *Feres* doc-

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plaintiffs contended that their equal protection rights were violated. *See Cioca*, 720 F.3d at 506–07; *Klay*, 924 F. Supp. 2d at 10–11; Banner, *supra* note 6, at 732.

[136] *See Cioca*, 720 F.3d at 506–07; *Klay*, 924 F. Supp. 2d at 9–10. A *Bivens* claim is a judicially-created action permitted against federal officials for violations of an individual's constitutional rights. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971) (imposing constitutional tort liability on government officers or employees in their personality capacity). Courts construe *Bivens* narrowly and only permit *Bivens* actions where Congress has not provided a cause of action and no special factors exist. *See id.*; *see e.g.*, *Chappell*, 462 U.S. at 304; *Cioca*, 720 F.3d at 508–10.

[137] *See Cioca*, 720 F.3d at 516–18 (applying the *Feres* doctrine to bar the *Bivens* action); *Klay*, 924 F. Supp. 2d at 18, 20 (dismissing plaintiffs' claims on the basis that the court did not have jurisdiction under the principles of *Feres*).

[138] *See Cioca*, 720 F.3d at 516–18 (concluding that it was beyond the court's "judicial cognizance" to determine whether a *Bivens* action would help or hinder military decision making and discipline, and deeming Congress better suited to provide a statutory remedy as it deems necessary); *Klay*, 924 F. Supp. 2d at 10, 12, 20 (granting defendants' motion to dismiss, citing the court's lack of judicial power to provide the recourse sought in light of the Supreme Court's decision in *Feres*). In *Bivens*, the Supreme Court explained that a legal remedy is not available when "special factors counseling hesitation" exist. 403 U.S. at 396. At the time, the Court declined to articulate what these "special factors" were. *See id.* In 1983, in *Chappell v. Wallace*, however, the Court clarified that the factors counseling hesitation were the same as the rationales articulated in the *Feres* doctrine. *See Chappell*, 462 U.S. at 298.

[139] *See Cioca*, 720 F.3d at 516, 518; Ruggiero v. United States, 162 F. App'x 140, 143 (3d Cir. 2006); *Klay*, 924 F. Supp. 2d at 20.

[140] *See* Schwartz, *supra* note 10, at 992 (asserting that *Feres* began as a reasonable rule when it was designed to limit the government's liability for accidental injuries to soldiers covered by military benefits, but now, the doctrine no longer appears reasonable in light of the claims it denies).

trine by the Supreme Court.[141] The sentiment of one critic nearly twenty years ago rings true even more so today: "[the *Feres* doctrine] seems to say that the military has the power of life and death over its personnel, with no limit recognized in the constitution or a tort claim. The courts cannot mean that the military has such far-reaching authority."[142]

III. Revisiting *Feres*: The Need for a More Searching Judicial Inquiry to Protect a Discrete and Insular Minority

In light of multiple lower court decisions dismissing intra-military sexual assault claims while expressing disdain for the current state of the law, former Chief Justice Earl Warren's sentiment regarding the military and the justice system is particularly poignant: "[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[143] The *Feres* doctrine has divested victims of intra-military sexual assault of the right to hold their government accountable for the torts and constitutional violations committed against them, contrary to the plain language of Congress in the FTCA and the due process and equal protection rights afforded all citizens under the constitution.[144] The time is now for the Supreme Court to revisit its interpretation of the FTCA—not only to bring its statutory construction in line with the statute's plain text and congressional intent, but also to recognize the rights the doctrine has denied service members since the U.S. Supreme Court's

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[141] *See id.* at 992, 996–97 (noting that the necessary outcome of the *Feres* doctrine no longer appears reasonable because it sweeps too many valid tort claims under its bar without regard for whether another adequate intra-military remedy exists to compensate a legitimate claim).

[142] *See id.* at 992.

[143] *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962); *see, e.g.*, Ruggiero v. United States, 162 F. App'x 140, 143 (3d Cir. 2006) ("We have no choice but to apply *Feres* to the instant case, despite the harshness of the result and our concern about the doctrine's analytical foundations."); Bowers v. United States, 904 F.2d 450, 452 (8th Cir. 1990) (stating that "perhaps a remedy ought to be available" but noting that the decision to provide relief was for Congress or the Supreme Court); *see also* Banner, *supra* note 6, at 729 (arguing that, despite Chief Justice Earl Warren's cautioning, this is exactly what is happening to victims of military sexual assault); Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. Rev. 1, 133 (2002) (observing the "striking discontinuity in the duty of our servicemembers to defend liberties and rights with which they are only partially vested").

[144] *See* Costo v. United States, 248 F.3d 863, 869–71 (9th Cir. 2001) (Ferguson, J., dissenting) (asserting that the *Feres* doctrine has created a classification that runs afoul of the equal protection clause of the Fourteenth and Fifth Amendments by effectively declaring that military service members' rights against their government are less than the rights of their fellow Americans); Hollywood, *supra* note 125, at 190–92 (highlighting the arguments advanced against the *Feres* doctrine by the dissent in *Costo*, including the Court's unconstitutional re-writing of an unambiguous and constitutional statute); Liljegren, *supra* note 89, at 203 (arguing that the *Feres* doctrine should be ruled unconstitutional because it denies members of the armed forces the ability to bring a civil claim against anyone for sexual harassment while on active duty).

1950 decision in *Feres v. United States*.[145] In the context of intra-military sexual assault specifically, *Feres* removes all of the civil protections and remedies against sexual assault and harassment afforded to their civilian counterparts.[146]

Section A of this Part argues that the Court should reconsider the *Feres* doctrine because it is inconsistent with the text and legislative intent of the FTCA.[147] Section A further contends that the Court's reliance on judicial abstention where matters of military decision making and discipline are at issue is misplaced in the context of intra-military sexual assault; rather, judicial review is necessary to ensure the constitutional rights of military victims are not read out of the FTCA.[148] Section B of this Part proposes that the Court should overturn *Feres* and limit the combatant activities exception to an objective analysis focusing on whether an activity is truly combative in nature.[149] The Court should not shy away from intra-military sexual assault claims, particularly because the constitution demands oversight of military decision making and discipline when it denies citizens in uniform of their constitutional rights.[150]

A. Certiorari Granted: Judicial Review of the Feres *Doctrine*

"*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision."[151] In fulfilling its mission to explain the law, the Supreme Court, on occasion, inevitably declares the law to be what it is not.[152] Though the fallacy may not become apparent until many years and decisions later, *stare decisis* does not require the Court to remain tethered to a decision—like *Feres*—that is manifestly absurd or unjust.[153] As argued in Subsection 1 of this Part, the Court's statu-

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[145] 340 U.S. 135, 146 (1950); *see* Lanus v. United States, 133 S. Ct. 2731, 2732 (2013) (Thomas, J., dissenting); United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting); *Costo*, 248 F.3d at 869–71 (Ferguson, J., dissenting); Chemerinsky, *supra* note 103, at 461; Hollywood, *supra* note 125, at 190–92.

[146] *See* Schwartz, *supra* note 10, at 992, 996–97; Liljegren, *supra* note 89, at 201–03.

[147] *See infra* notes 151–167 and accompanying text.

[148] *See infra* notes 168–180 and accompanying text.

[149] *See infra* notes 181–189 and accompanying text.

[150] *See infra* notes 151–189 and accompanying text.

[151] Payne v. Tennessee, 501 U.S. 808, 828 (1991) (internal quotations omitted).

[152] *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 783, 797 (2009) (overturning *Michigan v. Jackson*, 475 U.S. 625 (1986), to avoid adopting an unworkable standard or forcing lower courts to make "arbitrary and anomalous distinctions"); *Payne*, 501 U.S. at 827 (noting that unworkability is a rationale for changing a legal standard).

[153] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *69–70 ("For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm as has been erroneously determined."); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 477 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989) (12th ed. 1873) (observing that courts "are replete with hasty and crude deci-

tory interpretation of the FTCA in 1950 was erroneous insofar as it granted broad sovereign immunity for combatant activities far beyond what Congress prescribed in the statute and requires re-examination.[154] Moreover, as Subsection 2 of this Part further argues, the circumstances in which the *Feres* doctrine is being applied to preclude a civil remedy fall within the categorical realm of mandatory judicial review set forth in *United States v. Carolene Products*.[155]

1. The Supreme Court Must Re-Examine the FTCA

The text and legislative history of the FTCA do not suggest Congress intended to create a dichotomy between private citizens and military service members when providing a tort remedy against the government for the ill effects of sovereign immunity.[156] Rather, the legislative history reveals that Congress specifically considered this kind of line drawing and ultimately decided against creating a total bar for the armed forces, instead limiting the grant of sovereign immunity to injuries arising out of the "combatant activities" of the military.[157] Nevertheless, the Court in *Feres* and subsequent *Feres* doctrine cases read beyond the text of the statute in order to conform its interpretation of the FTCA to general principles of judicial abstention and corresponding military deference.[158] Although *Feres* may have made sense from a policy perspective in 1950, the doctrine's lack of statutory support explains the problem-

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sions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error").

[154] *See infra* notes 156–167 and accompanying text.

[155] *See infra* notes 168–180 and accompanying text.

[156] *See Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (stating that "[r]ead as it is written, [the] language [of the FTCA] renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees"); Froelich, *supra* note 9, at 710–11 (arguing that Congress considered provisions for significantly limiting the government's liability in military tort suits but determined sovereign immunity should only apply to a narrow subset of military activity—namely, combatant activities).

[157] *See Johnson*, 481 U.S. at 693–94 (Scalia, J., dissenting) (noting that the legislative history "demonstrat[es] that Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for [the Court] to supplement—*i.e.,* revise—that congressional disposition"); *see also supra* note 35 (detailing the legislative history of the FTCA); *supra* note 38 and accompanying text (noting that of the eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two contained explicit provisions denying recovery to members of the military).

[158] *See Costo*, 248 F.3d at 873 (Ferguson, J., dissenting) (arguing that *Feres* evaluated the FTCA rather than clarifying it, and because the Court "simply did not agree with Congress," it "searched in puzzling ways to declare that military personnel are not equal to civilians"); Banner, *supra* note 6, at 725–26 (describing one of the substantial obstacles for victims of intra-military sexual assault is the "specter of 'judicial activism' and its mirror, 'military deference,' the reluctance of the judiciary to usurp Congressional responsibility for the conduct of military affairs").

atic nature of the decisions it produces today, particularly in light of different facts and a different social and legal landscape.[159]

When drafting the thirteen explicit exceptions to the FTCA's broad waiver of sovereign immunity, Congress strived to create a workable statute to remedy the individual injustices of the government's immunity from suit.[160] The Supreme Court complicated these categorical exceptions in *Feres* by reading into the combatant activities exception an expansive definition of "combatant" not intended by Congress.[161] As a result, nearly any act undertaken or suffered by military service members falls outside the purview of Article III courts under the FTCA.[162]

In the context of intra-military sexual assault, the Court's current statutory interpretation reduces the brutal crimes of rape and sexual assault to one of many activities "incident to service" of one's country as a member of the U.S. Military.[163] This inconsistent legal reality alone should prompt the Court to rethink its broad interpretation of the FTCA.[164] Significantly, the primary concern underlying the "incident to service" test is the Court's aversion to prying

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[159] *See Costo*, 248 F.3d at 870 n.1 (Ferguson, J., dissenting) (arguing that the inequity of the *Feres* doctrine is readily apparent in situations where courts have applied *Feres* to "bar claims arising from *non-combatant* activities engaged in during times of *peace*"); Banner, *supra* note 6, at 727–29; Hollywood, *supra* note 125, at 188–89 (noting that the *Feres* doctrine today rests on the "shaky military discipline rationale"); Schwartz, *supra* note 10, at 992, 996–97.

[160] *See* Rayonier Inc. v. United States, 352 U.S. 315, 320 (1957) (noting that Congress decided it would be unfair for an individual to bear the burden of the government's negligence, and arguing that there is no justification for the Court to read exemptions beyond those set forth in the FTCA).

[161] *See* Banner, *supra* note 6, at 749–50 (noting the expansive interpretations of *Feres*); *see, e.g.*, United States v. Stanley, 483 U.S. 669, 709 (1987) (O'Connor, J., dissenting) (asserting that the conduct at issue was "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission).

[162] *See Costo*, 248 F.3d at 871–72 (asserting that *Feres* took "a fairly small, clearly defined, legislatively-created classification and broadened it considerably"); Schwartz, *supra* note 10, at 996–97 (noting the problematic result of the *Feres* doctrine's sweeping reach).

[163] *See* Cioca v. Rumsfeld, 720 F.3d 505, 516–18 (4th Cir. 2013) (applying the *Feres* doctrine to bar claims arising out of intra-military sexual assault); Klay v. Panetta, 924 F. Supp. 2d 18, 20 (D.D.C. 2013) (same); Banner, *supra* note 6, at 730 (arguing that Feres has been extended to "the point of unrecognizability"); Hollywood, *supra* note 125, at 188–89 (noting that in the majority of cases there is a "tight enough fit" between the circumstances surrounding the injury and the military discipline rationale, forcing courts to apply *Feres* to bar service members' claims).

[164] *See* Banner, *supra* note 6, at 759 (maintaining that when the *Feres* doctrine bars intra-military sexual assault claims, "neither the legislative intent in passing the FTCA nor the intuitively, morally correct idea . . . that the little guy should be protected from immoral conduct, is being realized"); *see also* Payne, 501 U.S. at 829–30 (noting that reconsideration may be necessary where a decision has "been questioned by Members of the Court in later decisions" and has "defied consistent application by the lower courts"); BLACKSTONE, *supra* note 153, at *69–70 (noting that decisions that are "manifestly absurd or unjust" should not be maintained).

into military affairs at the expense of military discipline and effectiveness.[165] Yet military discipline and effectiveness have been compromised because of the sexual assault crises, both internally and in the eyes of an otherwise respecting American public.[166] Where the *Feres* doctrine's rationale no longer achieves its purpose and lacks any support in the statutory language, the Court should give pause when allowing the perpetuation of a decision that has taken on a life of its own, wholly separated from the text from which it originates.[167]

2. Violations of Service Members' Constitutional Rights at the Hands of the *Feres* Doctrine Demand Judicial Review

In addition to re-examining the *Feres* doctrine to better comport with the statutory language and intent of the FTCA, the Supreme Court should also consider *Feres'* effect on intra-military sexual assault claims and the rights of service members.[168] The Supreme Court should not abandon its vital role in American democracy as a protector of "discrete and insular minorities."[169] This duty is imperative where, like here, political processes have failed to provide adequate legal protections, leaving thousands of military men and women without recourse or remedy for crimes committed against them that would otherwise be redressed in civilian courts.[170] The risk of infringing on military dis-

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[165] *See, e.g.*, *Johnson*, 481 U.S. at 691 ("Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.").

[166] *See* Banner, *supra* note 6, at 729 (noting the significant "threat of erosion of the military command structure if sexual violence is permitted to continue unabated"); Zyznar, *supra* note 34, at 621–22 (arguing that "military order and efficiency is undermined when the federal government shirks legal accountability for its negligent conduct"); *see also* Smith v. United States, 196 F.3d 774, 778 (7th Cir. 1999) ("Tolerance of [intra-military sexual assault] results in a warping of military discipline, a lack of military readiness, and a weakening of national security. Democratic support for military institutions [erodes] when citizens do not believe that their children . . . will be treated with dignity and respect during their period of service.").

[167] *See Johnson*, 481 U.S. at 700, 702–03 (Scalia, J., dissenting); *Costo*, 248 F.3d at 876 (Ferguson, J., dissenting) (arguing that "blind adherence" to the unworkable "incident to service" requirement is intolerable and the Supreme Court must revisit the *Feres* doctrine to prevent further constitutional and statutory violations).

[168] *See* Chemerinsky, *supra* note 103, at 459 (noting that a "more searching judicial inquiry" is appropriate when it is a law that interferes with individual rights, a law that restricts the ability of the political process to repeal undesirable legislation, or a law that discriminates against a "discrete and insular minority").

[169] United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (proposing a new standard of judicial review for claims involving "discrete and insular minorities" not adequately protected by the political processes); *see* Banner, *supra* note 6, at 726 (arguing that "blind application of outdated caselaw in [intra-military sexual assault cases under *Feres* and *Bivens*] is legally and morally unsound").

[170] *See Carolene Prods.*, 304 U.S. at 152–53 n.4; *Costo*, 248 F.3d at 869–71, 876 (Ferguson, J., dissenting); Holley Lynn James Act, H.R. 1517, 112th Cong. § 4 (2011) (seeking, unsuccessfully, to

cipline and decision making should not deny legal protections to military servicemen and women.[171]

The constitutional crisis springing from the *Feres* doctrine demands a "more searching judicial inquiry," as articulated by the U.S. Supreme Court in *United States v. Carolene Products* in 1938.[172] The *Feres* doctrine is responsible for the misguided reality that members of the military—although citizens for purposes of protecting the United States from foreign enemies—do not enjoy equal protection against the very government they defend.[173] Allowing sovereign immunity to trump civil liability in intra-military sexual assault cases denies injured military personnel the redress they would otherwise enjoy as civilians.[174] Moreover, prioritizing immunity results in a system that fails to hold accountable individual perpetrators and the military institutions that shield them.[175]

The Supreme Court maintains that this is a matter for the political branches to resolve because they are better suited to deal with matters pertaining to the special relationship between soldiers and superiors.[176] Yet the Court has

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amend the FTCA to explicitly allow claims by members of the armed forces against the United States for certain injuries relating to or arising out of sexual assault or domestic violence); Chemerinsky, *supra* note 103, at 459–60 (arguing that the Court must step in when a law restricts the ability of the political process to repeal undesirable legislation).

[171] *See Johnson*, 481 U.S. at 699 (Scalia, J., dissenting) (maintaining that the effect on military discipline is not so certain or substantial as to justify such a broad interpretation of *Feres* to bar service member suits); United States v. Muniz, 374 U.S. 150, 162 (1963) (reasoning that the failure to provide any tort recovery to prisoners would be more prejudicial than the application of non-uniform state tort laws).

[172] *See Carolene Prods.*, 304 U.S. at 152–53 n.4 (indicating that "a more searching judicial inquiry" is necessary in cases where "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); Banner, *supra* note 6, at 729 (arguing that "in the case of serious, widespread, and unremedied constitutional violations, the biggest threat to democracy is not judicial intervention but judicial complacency").

[173] *See Costo*, 248 F.3d at 870 (Ferguson, J., dissenting) (holding that the *Feres* doctrine "effectively declares that the members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans"); Turley, *supra* note 143, at 3 (noting that service members "hold a type of dual citizenship: citizens of both the national republic . . . and a pocket republic that supplants many of [our democratic] principles with an endogenous system of rules and traditions").

[174] *See* Natelson, *supra* note 96, at 281 (stating that unlike civilians, military harassment victims have "virtually no avenue for relief when their employer fails to take appropriate corrective action in response to complaints"); Schwartz, *supra* note 10, at 992, 996–97 (noting that the *Feres* doctrine "sweeps too many qualitatively distinct tort claims under its bar without regard for the actual adequacy of intramilitary remedies to resolve a particular claim").

[175] *See* Natelson, *supra* note 96, at 281 (arguing that institutional immunity precludes outside judicial review that could function as a real deterrent in the battle against intra-military sexual assault and harassment).

[176] *See* Chappell v. Wallace, 462 U.S. 296, 304–05 (1983) (stating that "[i]t is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and respon-

also recognized that the protections of the political process do not always reach discrete and insular minorities, and the Court must, therefore, intervene.[177] In cases of intra-military sexual assault, the Court undoubtedly possesses the capacity to intervene, and it must do so.[178]

In his dissent to the U.S. Supreme Court's 2013 denial of certiorari in *Lanus v. United States*, Justice Clarence Thomas's succinct call for judicial reconsideration of *Feres* and the doctrine's impact on service members reflects mounting concern over the "troubling" and "egregious" consequence of the Court's jurisprudence in denying the legal rights of soldiers.[179] Whereas the Court should generally presume laws are constitutional, because of the Court's problematic re-writing of the FTCA, the *Feres* doctrine requires an intensive judicial review.[180]

B. Overturning Feres*: Removing the Judge-Made Ambiguity from an Intentionally Unambiguous Statute*

With the clarity of hindsight, the Court should overturn its statutory interpretation in *Feres* and adopt a narrow construction of the combatant activities exception that limits sovereign immunity to only those injuries arising out of the act of engaging in or preparing for combat as understood in the context of the military mission at the time.[181] A circumscribed approach to the exception, grounded in a common-sense understanding of the term "combatant," would

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sibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view"); United States v. Brown, 348 U.S. 110, 112 (1954) (holding that the "peculiar and special relationship of the soldier to his superiors" counsels against judicial intervention).

[177] *See Carolene Prods.*, 304 U.S. at 152–53 n.4 (holding that the Court must intervene where the rights of discrete and insular minorities are not protected by a statute as applied); Chemerinsky, *supra* note 103, at 458–60 (noting that judicial review is necessary where a law interferes with individual rights or discriminates against a "discrete and insular minority").

[178] *See* Chemerinsky, *supra* note 103, at 458–60 (arguing that judicial review is justified because insular minority groups, such as military service members, cannot trust the other branches of government to protect their rights).

[179] *See Lanus*, 133 S. Ct. at 2731 (arguing that *Feres* was wrongly decided and stating that "at a bare minimum, it should be reconsidered"); *Cioca*, 720 F.3d at 508, 514, 517–18 (dismissing the plaintiffs' complaint while characterizing the claims as "egregious" and "troubling"); *Ruggiero*, 162 F. App'x at 143 ("We have no choice but to apply *Feres* to the instant case, despite the harshness of the result and our concern about the doctrine's analytical foundations.").

[180] *See* Chemerinsky, *supra* note 103, at 459 (stating that courts should generally presume laws are constitutional, but a "more searching judicial inquiry" becomes necessary when a law interferes with individual rights or restricts the ability of the political process to repeal bad legislation).

[181] *See Lanus*, 133 S. Ct. at 2732 (Thomas, J., dissenting); *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting); *Costo*, 248 F.3d at 876 (Ferguson, J., dissenting); Zyznar, *supra* note 34, at 628.

not only comport with the text of the FTCA but would also reflect Congress's intent.[182]

Moreover, a narrowed interpretation of the FTCA's combatant activities exception would prevent the current bar to intra-military sexual assault claims, which have no logical connection to combatant activities.[183] In the 2013 holding in *Cioca v. Rumsfeld*, the Fourth Circuit concluded that, in reference to the alleged *Bivens* action, "Congress has never created an express cause of action as a remedy for the type of claim that Plaintiffs allege here."[184] To the contrary, Congress *has* provided a remedy for victims of intra-military sexual assault through the FTCA, but it is the judiciary that has denied this remedy to military victims.[185]

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[182] *See* 92 CONG. REC. 10,093 (1946) (revealing that the descriptor "combatant" was proposed as an amendment to the exception prior to the passage of the FTCA and adopted without discussion); Gottlieb, *supra* note 36, at 50–53 (arguing that the term "combatant" was intended as a clarification of the FTCA provision rather than a "radical departure from the obvious purpose of the exception"); Astley, *supra* note 25, at 195–96 (asserting that legislative intent to narrow the combatant activities exception is evidenced by debate on an earlier version of the FTCA, in which a member of Congress stated immunity was waived except for the specifically enumerated exceptions in the bill (citing 86 CONG. REC. 12,019 (1940) (statement of Rep. Celler)). Writing immediately after the enactment of the FTCA, one scholar relied on the definition of the word "combatant," the legislative history of the Act, and an assessment of the military conditions at the time the FTCA was approved by Congress to devise a reasonable construction of the exception. Gottlieb, *supra* note 36, at 50–53. Specifically, he opined:

> [The combatant activities exception] was intended to exclude from the operation of the Act, after December 8, 1941 and until the cessation of actual hostilities all claims, otherwise cognizable hereunder, which arose out of the actual training operations in the United States, its territories and possessions of all personnel of the armed forces being prepared for combat activity. Such a definition, of course, is not completely self-executing, and would be determined upon the facts of each case as it may arise. Such construction gives "hospitable scope" to the expressed desire of Congress to immunize from threat of damage suits certain activities of the United States which should in their very nature operate unhampered. Conversely, it would appear that after cessation of hostilities, or in the time of peace, all negligent acts of the military or naval forces, or the Coast Guard, causing injury or death or property damage would be cognizable under this Act.

Id. at 52–53. Additional commentary on the FTCA immediately after its passage noted that the term "combatant activity" was narrowly construed in Army Regulations and decisions by the Judge Advocate General of the Army. *See* Comment, *supra* note 35, at 549. Specifically, the commentary noted that the use of "combatant activity" in other military contexts even excluded activities reasonably understood to relate to combat, such as practice and training maneuvers and operations not directly connected to engaging the enemy. *See id.*

[183] *See* Banner, *supra* note 6, at 732, 759; Reidy, *supra* note 91, at 636–37, 665–66.

[184] *See* 720 F.3d at 517.

[185] *See* Banner, *supra* note 6, at 732, 759; Reidy, *supra* note 91, at 636–37, 665–66.

By overturning the *Feres* doctrine, the Court would undo the artificial ambiguity for an otherwise unambiguous statute.[186] Even without the clarity of hindsight, the text and legislative history of the FTCA provide a clear roadmap for the Court to interpret the combatant activities exception narrowly and pragmatically.[187] Military service members should not have to consent to sexual assault as one of the many consequences of military service.[188] The Court must conform its interpretation of the combatant activities exception to avoid the categorical treatment of intra-military sexual assault claims as merely "incident to service."[189]

Conclusion

The Court is long overdue in its re-examination of the *Feres* doctrine. In light of the sexual assault crisis permeating the military and the absence of an adequate civil remedy for military victims, the Court must closely review its interpretation of the FTCA in *Feres* as well as critically examine the *Feres* doctrine's subsequent rationales. The Court would be amiss to rely on judicial abstention as a justification for dismissing military personnel's claims for relief under the FTCA, particularly where the text and legislative intent of the statute provide a cause of action. Most significantly, however, the Court is faced with a constitutional crisis of judicial review and must take up its proper role as protector of discrete and insular minorities, where the rights of military victims of sexual assault have been effectively written out of the FTCA.

Ann-Marie Woods

[186] *See Costo*, 248 F.3d at 871, 876 (arguing that the *Feres* doctrine is a "judicial re-writing of an unambiguous and constitutional statute" and noting that "[i]t is time for the Supreme Court" to revisit its decision).

[187] *See* Gottlieb, *supra* note 36, at 50–53 (interpreting the "combatant activities" exception as excluding only those negligent acts that arise out of actual hostilities or training operations in preparation for combat activity, and permitting all other negligent acts of the military causing injury or death).

[188] *See Stanley*, 483 U.S. at 709 (O'Connor, J., dissenting) (arguing that the non-consensual administrative of psychotropic drugs was "so far beyond the bounds of human decency that as a matter of law it simply [could not] be considered part of the military mission"); Banner, *supra* note 6, at 729–30; Natelson, *supra* note 96, at 281; Reidy, *supra* note 91, at 636–37, 665–66.

[189] *See Costo*, 248 F.3d at 871, 876; Banner, *supra* note 6, at 729–30.