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Running Head: THE *FERES* DOCTRINE: A COMPREHENSIVE LEGAL ANALYSIS

Pepperdine University
Graduate School of Education and Psychology

THE *FERES* DOCTRINE: A COMPREHENSIVE LEGAL ANALYSIS

A dissertation submitted in partial satisfaction
of the requirements for the degree of
Doctor of Education in Organizational Leadership

by

Dwight D. Stirling

April, 2019

Kent Rhodes, Ed.D. – Dissertation Chair

This dissertation, written by

Dwight D. Stirling

under the guidance of a Faculty Committee and approved by its members, has been submitted to and accepted by the Graduate Faculty in partial fulfillment of the requirements for the degree of

DOCTOR OF EDUCATION

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DEDICATION

I dedicate this work to my lovely family, with special thanks my son and mother. David, my beautiful boy, you are my inspiration and motivation. As you grow, I encourage you to follow your own voice, doing what you feel called to do and pushing back on what others expect. The answers you are looking for are already inside your heart. Remember, money is a simply a tool to help us achieve our purpose – it is not an end in itself. There is enduring power in aligning one’s values with one’s conduct. Remember what Gandhi said, my son: “*Be* the change you want to see in the world.”

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I would like to thank my dissertation committee, Dr. Kent Rhodes, Dr. Michael Patterson, and Judge John Tobin. I am deeply appreciative these remarkable gentlemen and scholars agreed to assist me in my doctoral journey.

I would also like to thank and acknowledge the men and women in the California National Guard. It has been an honor to wear the uniform alongside these courageous men and women for the past two decades, a privilege I would not trade for anything. I love being a citizen soldier, continuing the tradition of our revolutionary fore-bearers. That I get to play a role in the preservation and defense of the nation, the greatest land on earth, is a source of immense pride.

RESEARCHER'S NOTE

As a long-time JAG officer in the California Army National Guard, I have personally witnessed the impact of the *Feres* doctrine on many occasions. To a number, these situations have made plain the harsh and frequently devastating effect the doctrine has on those defend the nation in uniform. For many years I was the senior prosecutor for the Cal Guard, specializing in sexual assault courts-martial. To see survivors unable to hold their assailants accountable in civil court had a profound effect upon me, especially in the many instances when the chain of command decided not to convene a court-martial against the alleged perpetrator. In those situations, survivors were unable to obtain *any* judicial review, locked out of both the military and civil systems. Curtailing a service member's ability to litigate civil suits for intentional wrongdoing never made sense to me, especially given the fact that civilians were allowed to sue in similar situations, e.g., when raped by a soldier. I struggled to understand why military personnel were afforded fewer civil protections than their civilian counterparts, particularly in light of the fact that the wrongdoing at issue (assault) is wholly unrelated to the military mission.

It was from this background that I approached my inquiry into the *Feres* doctrine. I acknowledge taking more than a little satisfaction in discovering over the course of my investigation that nearly every scholar or judge who has commented on the doctrine has been critical, troubled by its lack of equity and impact on accountability. While I gone about my work with an academic's detachment to the greatest extent possible, should an advocacy tone be observed during any aspect of my treatment of the material herein, its origin lies in the many negative experiences I have had with the doctrine as a senior military attorney.

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Recent Publications

The Feres Doctrine and Accountability. Journal of Law,
Policy & Military Affairs. 2019

*Closing the Courthouse Door to Servicemember Suits:
Understanding the Feres Doctrine*. GP Solo (ABA). 2018

*With All Due Respect, Mr. President, We're Not Going
to Follow That Order: How and Why States Decide What Rules
Apply to National Guard Personnel in a State Status*.
Texas Review of Law & Politics. 2017

- Wait, My Former Lawyer Represents Who?: How Lackadaisical Side-switching in the California National Guard Creates Conflicts of Interests, Imperils Client Confidences, and Erodes Trust in the Militia Legal System.* Boston University's Public Interest Law Journal. 2016
- Less Than Honorable: Understanding the Sociocultural Context of Military Life in which Sexual Trauma Takes Place.* Los Angeles Lawyer Magazine. 2016
- Actually, Sir, I'm Not a California Attorney: The California National Guard, the State Bar Act, and the Nature of the Modern Militia.* Western State Law Review. 2015

ABSTRACT

This study examines the *Feres* doctrine, the judicial policy that immunizes service members from civil liability when causing harm to each other. Created by the Supreme Court nearly 70 years ago, the insulation from judicial review is practically absolute, applying to nearly every variety of intra-military harm, from a negligent delivery that leads to the mother's death to intentional, abhorrent wrongdoing such as sexual assault. The doctrine bars service member suits across the board. The study traces the doctrine's theoretical and philosophical roots, assessing its historical development and documenting its current state. A comprehensive legal analysis, not only is every Supreme Court decision in the *Feres* context considered, account is taken of most lower court decisions as well as the academic scholarship. Significant findings include the fact that the doctrine, while receiving near universal criticism, has been dramatically expanded by lower courts. Today, immunity applies to wrongdoing where the "military aspect" of the activity is remote, such as malfeasance during off-duty recreational activities. It was also found that the judges applying the doctrine likely sustain moral injury as a consequence. Viewing the policy as unjust, judges violate deeply held beliefs when dismissing service members' claims, claims civilians in similar situations are allowed to bring. Finally, the study found that most courts also dismiss ancillary suits stemming from intra-military harm, including state-level claims filed against wrongdoers personally. The result is that military survivors of non-duty-related misconduct, such as survivors of sexual assault, are "effectively denied any civil remedy against a wrongdoer who was *not* acting within the scope of his military employment" (*Day v. Massachusetts*, 1999, p. 684 [italics in original]). The study concludes with a recommendation for curing the doctrine of its most objectionable aspects, a proposal intended to bring the policy into better alignment with traditional notions of justice and fair play.

Chapter 1: Introduction

Judicial review of the lawfulness of public employees' conduct is a fundamental national principle. The authority of judges to determine whether conduct complies with controlling legal norms, judicial review is an essential element of the American governmental system. Not only was the subject a central theme of the Federalist Papers (Rossiter, 1961), the Constitution's most important interpretative papers, it was enshrined as a part of the American way of life in the seminal case *Marbury v. Madison* (1803). Judicial review reflects the idea that courts are responsible for holding the executive and legislative branches accountable to the rule of law (Shane, 1993). Of such importance, the concepts of separation of powers and checks and balances would not have much practical meaning in its absence (Mashaw, 2005).

Consider what would happen if courts did not conduct judicial review of employees in the executive branch. In that event, the executive branch would be accountable only to itself, a self-regulating enclave able to call balls and strikes on its own conduct (Mashaw, 2005). Such a situation would give rise to the impression that public officials are "above the law" (Stirling, 2019). This type of dynamic—the exact one the Founders wanted to avoid—typically results in abuse of power and corruption (Peters, 2014).

For the most part, the American court system robustly embraces its role as arbiter of governmental conduct. Case law is replete with instances where judges have declared public action inconsistent with the law, invalidating the behavior and ordering that remedial measures be taken to repair the damages (Shapiro, 2012). There is one context, however, where courts have kept themselves on the sidelines. This is when a member of the military is injured by a fellow service member. There, courts have elected not to exercise their jurisdiction, choosing instead to dismiss the cases without even doing a cursory review (*U.S. v. Johnson*, 1987).

In this way, courts do not hear *intra-military* claims, claims where service members have harmed other service members (Feldmeir, 2011). While readily reviewing civilians' allegations of military misconduct, judges have charted a course where they summarily throw out the allegations of misconduct service members make against each other (*U.S. v. Stanley*, 1987). The judiciary follows this path despite the fact Congress has authorized judicial oversight of non-combat-related wrongdoing (Burns, 1988).

The Supreme Court has sought to justify the policy, known as the *Feres* doctrine, by saying the hands-off approach is good for military discipline (*U.S. v. Brown*, 1954). The high court asserts that judicial review of intra-military wrongdoing would disturb the superior-subordinate relationship, affecting good order and discipline within the ranks (Astley, 1988). It has offered no empirical evidence in support of this theory, one which has been harshly criticized by scholars and lower court judges (Turley, 2003). As Justice Scalia observed, a compelling argument can be made that the Court's approach gets it backwards. Denying military personnel their day in court damages discipline by undermining morale (*U.S. v. Johnson*, 1987). Widely considered unsound, concern about military discipline nevertheless remains the leading justification for the policy today (Bahdi, 2010).

The *Feres* doctrine affords wrongdoers within the military near total immunity from civil liability (Banner, 2013). The immunity applies to every kind of harm and bad behavior, from dormitories that catch on fire due to contractor's errors to unsanitary dining halls to medical malpractice to off-duty car accidents (Feldmeir, 2011). The immunity also applies to intentional misconduct, such as sexual assault and soldier-on-soldier murder (*Day v. Massachusetts National Guard*, 1999; *Perez v. Puerto Rico Nat. Guard*, 2013). As a result of the judiciary's refusal to adjudicate service members' suits, military officials handle the matters internally.

It is well-established that the Founders believed public officials were incapable of regulating themselves (Rossiter, 1961). To the Founders, ethical behavior is only guaranteed through a rigorous system of checks and balances, a division of power that pits officials against one another and makes each branch answerable to the others (Rossiter, 1961). Scholars have said that the important check on members of the executive branch is an independent, strong judicial branch (Bovens, 2014). As service members are the only category of public employee not subject to judicial oversight, the *Feres* doctrine not only creates doubts about accountability, it also raises questions regarding equal protection under the law and due process (*Costo v. U.S.*, 2001).

What are the contours of the *Feres* doctrine? Put another way, how frequently and under what conditions do judges refuse to act on intra-military lawsuits? This is not an insignificant matter—in fact it is an issue of particular significance to educators. Most of the nearly 2,165,000 service members in the United States armed forces enter military service directly out of high school (Lai, 2017). Having a working knowledge of service members' legal rights is critical information for high school administrators and guidance counselors. Understanding the origin and practical implications of the *Feres* doctrine would increase educators' capacity to advise and counsel students considering military service upon graduation. The knowledge would likewise enable college administrators to better advise veterans, providing sager guidance to the hundreds of thousands of former military personnel matriculating through the higher education system. Veterans are not a minor cohort in the academic community. Since the Post-9/11 GI Bill was implemented in 2009, more than 700,000 veterans have utilized the educational benefit to enroll in higher education coursework (U.S. Department of Veterans Affairs, n.d.).

Understanding the *Feres* doctrine is important in the college context for an additional reason. Many student veterans have incurred physical, emotional, or administrative injuries during their military service. While some of these injuries stem from the battlefield, most do not, the result instead of civilian-esque torts, e.g., wrongs commit by colleagues in non-duty-related situations. Unable to sue, a large number of veterans bear grievances related to their military tenure, unfinished business that frequently bleeds into their civilian lives, impacting their integration and achievement. While no studies have been conducted on the topic, it is likely that the damage stemming from these lingering wrongs affects veterans' ability to perform academically, socially, and emotionally. Being barred from suing, a right every other American has, can be seen as constituted the second half of a double injury. The first is the underlying wrong, e.g., the assault, botched surgery, etc. Compounding the harm is the second injury, the inability to hold the perpetrator accountable civilly. Although the relationship between veterans' inability to sue and their mental health has not been examined, it stands to reason that it contributes to the suboptimal mental health most veterans experience (Large and Van Valin, 2016). If educators are unformed about how the *Feres* doctrine may impact veterans' wellbeing, they cannot possibly interact with their veteran constituency in an ideal fashion.

Problem Statement

Tens of thousands of high school graduates enter military service each year (U.S. Department of Defense, 2016). At the same time veterans, e.g., former military service members, comprise a sizeable component of the national higher education student cohort (Cate, 2011). Under the *Feres* doctrine, most intra-military wrongdoing is disallowed from serving as the predicate of a civil lawsuit (*Feres v. U.S.*, 1950). Service members' inability to sue for injuries sustained in uniform represents a significant deviation from the standard collection of

rights individuals possess within the American legal system. In nearly every other context, injured parties have legal standing to force a co-worker who injured to justify the legality of the conduct in a court of law (Brou, 2007). Because high school and college-level administrators routinely interact with students either considering military service or who have recently finished it, administrators have a vocational obligation to have an understanding of the *Feres* doctrine. The analysis and findings contained in the study will provide that understanding. As a result, educators will be better equipped to render informed guidance to students on both the front end (considering enlistment) and back end (reentering civilian status) of military service.

Purpose Statement

The inquiry is a grounded theory study utilizing legal research. A grounded theory study of this nature constitutes a legal analysis (Ayers, 2016). The data consists of pre-existing legal documents such as constitutions, statutes, court decisions, and regulations (Russo, 1996). The result of evaluating the entire range of materials in an area of law is a comprehensive legal analysis (Waters, 2012). Dissertations by candidates for doctorates in education routinely conduct legal analyses to bring clarity to topics of pertinence to educational professionals (Ayers, 2016; Kriesel-Hall, 2013; Schroeder, 2012).

The purpose of the study is twofold. First, it is intended to evaluate the historical roots of the *Feres* doctrine, teasing out the philosophical and theoretical traditions which gave rise to it. Second, the study is intended to describe the doctrine's current state, taking inventory of the hundreds of appellate court decisions handed down in the past three decades. In performing these tasks, the study will document the relationship between the *Feres* doctrine and the legal principle of sovereign immunity, the concept that the government cannot be held liable without its prior consent.

The following research questions will guide the analysis:

1. What are the legal, philosophical, and theoretical roots of the *Feres* doctrine?
2. How has the *Feres* doctrine developed over time?
3. What is the current state of the *Feres* doctrine?

In a grounded theory study, the objective is to “move beyond description and to generate or discover a theory” (Corbin & Strauss, 2007, p. 62). This methodology is utilized here because the current state of the *Feres* doctrine is not well understood. Inspection of the relevant statutory, judicial, and academic data is needed in order to formulate a theory of the doctrine as it stands today. The research process will pay particular attention to the Supreme Court’s historical case law in the *Feres* arena, a timeframe extending from 1950 to 1987. Lower court case law will also be given emphasis, particularly appellate rulings from 1987 to the present, the period since the last Supreme Court decision. Assessment of these materials, along with the leading scholarship, will enable a theory and explanation to be generated about the doctrine’s historical evolution and current status.

The structure of a legal analysis dissertation frequently varies from the traditional format. In the traditional format, the pertinent background literature is considered in Chapter 2 and then the research questions are answered in Chapter 4. In a legal analysis by contrast, where the data consists of pre-existing legal materials and no new data is generated, research questions are often answered earlier in the process. This is the case in the current study. Here, the first two questions are answered in Chapter 2, the literature review section. Pertaining to the *Feres* doctrine’s theoretical origin and development over time, these topics are most appropriately considered as part of the literature review process. Question three, which pertains to the current state of the doctrine, is then addressed in Chapter 4, the findings section.

Background of the Problem

To a greater extent than probably any time in American history, there is a disconnect between civil society and the military establishment (Bacevich, 2013). A variety of factors contribute to the divide which separates those in and out of uniform. The most important is probably the absence of mandated military service (Roth-Douquet & Schaeffer, 2006). Whereas service in the military was a requirement for men for most the United States' history, universal military service ended in 1973, a casualty of the vast public distrust at the end of Vietnam War (Desch, 2001). Mandated service was replaced with an all-volunteer force, a dynamic where the decision as to whether to don a uniform or not is left up to each individual. As Bacevich has indicated, after 1973 “actual participation in war became entirely a matter of personal choice. Service (and therefore sacrifice) was purely voluntary. War no longer imposed collective civic duty—other than the necessity of signaling appreciation for those choosing to serve” (Bacevich, 2013, p. 32). As a result of the switch to an all-volunteer system, the military establishment became a self-selecting entity, one that soon saw stopped reflecting the country as a whole.

The shift to an all-volunteer military force brought about a dramatic change in the composition of the military (Cohen, 1985). Whereas the draft drew equally from all segments of societies, requiring participation by both the wealthy and the poor, the voluntary enlistment process has seen the elites virtually disappear from the ranks (Roth-Douquet & Schaeffer, 2006). As Desaulniers observed, an all-volunteer military meant that “[n]o longer would the country rely on many segments and demographics of the population to serve” (2009, p. 2), a step that “significantly narrowed the band of who serves” (2009, p. 2). Opting by and large to go to college and then pursue the most lucrative and prestigious options available, the 18-year-old children of parents with money, education, or both have virtually forsaken military service

(Finkel, 2013). Anecdotal evidence suggests that the idea of joining the Army, Marine Corps or another branch hardly enters into the minds of most high school with solid academic or vocational prospects, or wealthy parents. One commentator observed: “Why don’t the elites serve? They probably never even considered it. If asked, some in the opinion-making field might come with a political reason...The ‘reasons’ may change, but one thing remains constant: the expectation that military service is for the ‘other’ and never for the most privileged” (Roth-Douquet & Schaeffer, 2006, p. 7).

The result is a military establishment where the vast majority of its members are from economically distressed backgrounds, young men and women who signed up because that had no other viable option (Bacevich, 2005). While this phenomenon has exceptions, such as the cadets who enroll at West Point, the Naval Academy, and the other service academies, its occurrence is particularly observable in the enlisted ranks, the privates, seamen, and other junior-level personnel who form the backbone of the military’s rank and file (Roth-Douquet & Schaeffer, 2006). The vast majority of junior-level service members personnel are poor and from the margins of society when they join.

The voluntary approach has likewise changed the military’s relationship with the American people, giving rise to divide which separates the civilian and military components of society (Desaulniers, 2009). Known as the *civil-military gap*, most civilians have very little understanding of the military establishment or those who serve within it. The divide is particularly pronounced amongst elites, the well-to-do, well-educated members of society who exercise vast political and economic power (Roth-Douquet & Schaeffer, 2006). A largely urban demographic, elites have few opportunities to communicate with or even see service members over the course of their day-to-day lives (Roth-Douquet & Schaeffer, 2006). The situation is

exacerbated by fact that most military bases are located in remote, sparsely populated regions of the country. The one percent of the nation serving in uniform are virtual strangers to the 99% who do not. “It is akin to cheering for the local football team, but not knowing who the quarterback is or how the game is played. These Americans in uniform (are) still unknown to their own society...” (Desaulniers, 2009, p. 12). The problems, challenges, and struggles facing service members rarely enter the consciousness of their civilian counterparts, two-dimensional enigmas who appear during the national anthem or at halftime at NFL games and during other tributary situations, neatly kept young men and women in uniforms whose lives are mysterious and obscure (Finkel, 2013).

The *Feres* doctrine must be considered against the backdrop of the civil-military gap and the fact that the influential do not serve. A policy that takes away service members’ right to sue, a right Americans take for granted, it is important to remember that most educated, well-to-do Americans have no idea the policy exists. Commentators have said the *Feres* doctrine reduces service members to second-class citizens (Turley, 2003; Woods, 2014). That service members are the only segment of society denied the right to sue when injured, combined with the fact that most service members come from disadvantaged backgrounds, creates an unsettling appearance of exploitation (Feaver & Kohn, 2000). While policy-makers readily send military personnel abroad to fight and die, they simultaneously condone a policy where the troops cannot sue their doctors when a towel marked “Property of the U.S. Army” is left in their stomach after a routine surgery (Feldmeir, 2011). While it is hard to imagine policy-makers allowing their children to attend a college where rape survivors cannot sue their assailants, these same people do not seem to mind that such a rule exists in the military (Banner, 2013). Seen through this lens, the *Feres* doctrine raises disturbing questions of class, power, and morality. As Bacevich observed,

“When those wielding power in Washington subject soldiers to serial abuse, Americans acquiesce. When the state heedlessly and callously exploits the same troops, the people avert their gaze. Maintaining a pretense of caring about soldiers, state and society actually collaborate in betraying them” (2013, p. 14).

The civil-military gap gives rise to a dynamic where civilians are largely asleep at the wheel. Given supervisory responsibility over military activities in the American system of government, in their ignorance most civilians view the armed forces as a monolithic entity where all the members are essentially the same (Roth-Douquet & Schaeffer, 2006). When thanking a soldier for his service at the airport for instance, the distinction between a private and a colonel is largely lost on many civilians (Desaulniers, 2009). So is the difference between the day-to-day activities of an infantryman and a supply clerk. The imprecision which clouds civilian society’s comprehension of military affairs allows policies to develop and persist which would be decried—and quickly changed—if occurring in a civilian setting (Bacevich, 2008).

The reality is that the *Feres* doctrine affects service members in very different ways. Under it, those with organizational power benefit immensely. Managers are unable to be sued by their labor force, a dream scenario for any executive. Those at the bottom of the hierarchy, on the other hand, are in a much different position. These personnel, the rank and file, cannot get outside the military system, obtaining an independent review, when harmed by a superior (Stirling, 2018). It is unlikely that civilians would be comfortable managers at their places of employment being outside the reach of the judiciary system (Bahdi, 2010). The notion that members of management could be immune from civil liability is practically laughable, a rule that does not exist anywhere in the civilian world. Yet immunity has existed within the military context for nearly 70 years. The civil-military gap goes a long way to explaining this dichotomy.

Conceptual Framework

Sovereign immunity forms the conceptual framework of the study. The *Feres* doctrine is a manifestation of sovereign immunity, the legal principle that the government cannot be sued for wrongdoing or mistakes without its consent (Dickerson, 2014). The *Feres* doctrine could not exist if sovereign immunity was not the default position of the American judicial system (Randall, 2002). Should the default be the other way around, where the government was able to be sued unless a particular law protected it from liability, the doctrine would never had come into effect.

The doctrine is a product of the Supreme Court interpretation of the Federal Torts Claims Act (FTCA), the seminal 1940's-era statute where Congress waived most of the government's sovereign immunity. In deciding whether the FTCA applied to the governmental employees who served the nation in uniform, the Supreme Court held that military personnel were not covered by the FTCA (Feldmeir, 2011). As a result of this ruling, service members cannot sue their colleagues when wronged because their colleagues have sovereign immunity from suits (Feldmeir, 2011). In this way, the *Feres* doctrine and sovereign immunity are the same thing (Brou, 2007). Military personnel occupy the *original position*, the position all government employees would be in where there not a congressional waiver like the FTCA. As in the Supreme Court's opinion, Congress has never ceded the sovereignty which attaches to military personnel as governmental employees, the immunity persists (Chemerinsky, 2001).

The way the Supreme Court rendered its decision is cloaked in controversy. Under the Constitution, the judicial branch's job is to interpret the law, not write it (Rossiter, 1961). This rule notwithstanding, the Supreme Court rewrote the language of the FTCA in its *Feres* ruling (Bahdi, 2010). Nothing in the statute's language makes it inapplicable to the military (Feldmeir,

2011). In fact, the military is directly referenced, with Congress expressly exempting one aspect of military affairs, *combatant activities*, from the statute's scope (Zyznar, 2013). This action suggests Congress had the military in mind when it drafted the FTCA. According to judicial rules, when exempting only a certain aspect of an organization from a statute's scope, the legislature is thought to intend the statute to apply to the remaining aspects of the organization (Turley, 2003). Accordingly, most commentators have excoriated the Court for its *judicial legislation* calling it an egregious example of the judicial branch writing the law rather than interpreting it (Warshaw, 2017). Tacitly acknowledging its own overreach, the Supreme Court has said that if its interpretation of the FTCA is wrong, Congress should amend the statute, clarifying its applicability to military personnel (*U.S. v. Stanley*, 1987). That Congress has not responded legislatively since the doctrine's creation is offered up as a kind of validation of the Court's view (*U.S. v. Stanley*, 1987).

Regardless of questions of validation, the Supreme Court's action in the intra-military harm context has created confusion. The high court has not clearly enunciated either the doctrine's scope or rationale. The confusion can be observed in the vacillation which characterizes the case law, which is devoid of a logical anchor, having the feel of being made up as the Court goes along. Whereas a statute's legislative history usually serves as a helpful indicator as to lawmakers' intent, there is no legislative history to be consulted with regard to why Congress excluded the military from the FTCA. This is because Congress did not exclude the military from the FTCA—the Supreme Court did (Burns, 1988). That the *Feres* doctrine revolves around whether a service member's injuries are incident to service, barring claims where the injuries are incident to service and those that are not, represents a choice the Supreme Court made to give the policy intelligibility. There is nothing in the legislative record of the

FTCA suggesting a correlation between injuries and military service was germane to Congress' proceedings (Brou, 2010). Needing to hinge its policy to a test of some nature, the incident to service test is the one the Court has fashioned, something it came up with out of thin air.

The doctrine's rootlessness has incentivized attorneys to file cases with unusual fact patterns in an effort to escape its application. The Supreme Court, forced into a "whack-a-mole" reactionary posture, has modulated the justification underlying the doctrine in an effort to keep up (Gallagher, 1988). In the process, the original rationale has been abandoned in its entirety, a combination of qualms over double recovery and federal officials being subjected to a patchwork of state laws (Zyznar, 2013). This rationale was eventually replaced with military discipline, worry about undermining military managers' authority by second-guessing of their decisions (Brou, 2007). In the most recent Supreme Court case, the Court pivoted once again, deemphasizing the role a rationale plays at all (Zyznar, 2013). The why underlying the policy ultimately does not matter, the Court said. Injuries sustained incident to service cannot support an FTCA claim (*U.S. v. Stanley*, 2013). End of story.

The changeable nature of the Court's application of—and rationale for—the *Feres* doctrine frames this study conceptually. In a sense, the study can be seen as an effort to take the measure of the elastic approach the Court has employed. It is an attempt to map the contours of a judicial policy grounded not in what Congress said, but in what the Supreme Court believed it had intended to say. Judicial revision of legislative pronouncements is always a tricky business, having unintended second and third order effects. This study seeks to discern these unintended consequences in the *Feres* context.

Limitations of the Study

The research was limited to a review of existing case law and scholarship on the *Feres* doctrine. Every Supreme Court decision considering the doctrine has been assessed, as has every academic article published in legal journals. Additionally, most of decisions handed down by federal circuit courts since 1987, the date of the last Supreme Court decision, have been evaluated. The review of the lower courts' decisions has brought to light the doctrine's current state, clarifying what a service member can expect when initiating intra-military litigation.

No original data was generated during the inquiry. This is because the inquiry employed grounded theory utilizing legal research, a methodology which draws upon preexisting data, namely judicial decisions and legal scholarship. The judicial decisions evaluated in the study were limited to those which have been published, a certification that signals a case's importance and assigns it precedential value. Decisions which have precedential value bind how judges must rule in later cases involving similar facts or issues.

The study did not evaluate the effectiveness of civil litigation as a means of holding wrongdoers accountable for their misconduct. Nor did it seek to assess the impact on military officials of modifying or abolishing the *Feres* doctrine so as to allow injured service members to maintain suits under the FTCA. These considerations were beyond the study's scope. The inquiry was limited to a review of the doctrine from a judicial and scholarship perspective. The objective was to examine how it has been interpreted and understood by jurists and legal scholars.

Significance of the Study

The civil-military gap which divides the enormous civilian component of the population from the tiny military component also divides educational administrators from students either

considering military enlistment or having recently ended their military membership. There is currently a dearth of materials designed to inform administrators of the special conditions which characterize military service, evidence of the lack of attention civilian educational officials have afforded the military in general. There do not appear to be any materials intended to inform administrators how the change of status from civilian to service member affects the rights and liabilities of the individual involved. The educational sector's failure to ensure its officials possess a basic competency in this field is unfortunate, damaging the connectedness between administrators and military-involved students while also denying these students with the individualized, high quality guidance administrators are expected to deliver. The situation suggests the education establishment suffers from the same disinterest which infects society at large, a blasé disregard for the uniqueness of the military experience and the manner in which it transforms a person's relationship with his/her government (Bacevich, 2013).

This study begins to move the needle in the right direction, providing school administrators—and the public at large—with up-to-date information on how military service impacts service members' right to sue. The knowledge imparted will enable higher education officials to better understand their student veteran population, increasing the empathy they display and the appreciation they exhibit. While few administrators are lawyers capable of delivering legal advice, acquiring the information will be better equip administrators to “spot the issue,” enabling them to identify situations where students would benefit from one-on-one legal guidance. The information contained in the study will also allow high school administrators to sharpen the guidance they dispense to students considering military service, cautioning as to a potential downside of donning the uniform. Apprising students at the pre-induction stage will position these young people to avoid the shock of learning for first time after being injured that

their right to seek redress through the judicial branch largely ended when they took the oath to defend their country.

The explanation of the *Feres* doctrine will concurrently provide critical information to other stakeholders concerned about how service members are treated. This includes legislative personnel such as members of Congress, state legislators, and their staffs. As legislators regulate the military establishment, having current, up-to-date information about military members' access to the civil court system will allow them to formulate more responsive policies.

Summary

For decades, scholars and lower courts have been relentless in their condemnation of the *Feres* doctrine:

[T]he *Feres* Doctrine was fundamentally flawed from its inception on both a constitutional and statutory basis. Despite language in the Federal Torts Claims Act that only exempts combat-related injuries from liability, the Supreme Court engaged in what can be viewed as a quintessential act of judicial activism—crafting an immunity system to achieve values and objectives of its own design. In addition to the obvious harm caused to thousands of service members, this doctrine has played a significant role in maintaining a separate military society...*Feres* has little legal or practical foundation and should be rejected in its entirety. (Turley, 2003, p. 6)

Despite the widespread renunciation, the *Feres* doctrine is stronger and more routinely utilized as a mechanism for dismissing service member-filed lawsuits than ever. Resting on a variety of justifications, rationales which have changed over the years, the policy is currently explained on the grounds that judicial review of military officials' conduct would interfere with military discipline, disrupting the relationship between superior and subordinate (Feldmeir, 2011).

Whereas courts systematically resolve intra-agency claims from the Federal Bureau of Investigation, the Central Intelligence Agency, and other paramilitary law enforcement agencies, the nation's high court has declared that the judicial branch must pull its punches when it comes to intra-military suits, allowing the military establishment to adjudicate claims itself (*U.S. v.*

Johnson, 1987). The Supreme Court has indicated that it believes preservation of military discipline is so fragile that even nominal judicial intervention should be avoided, any involvement having the potential to disturb the military's finely tuned ecosystem in uncertain, potentially disastrous ways (*U.S. v. Stanley*, 1987). The high-minded philosophical rhetoric used to keep service members from accessing civil courthouses, however, takes on a less charitable quality when observing that most service members hail from economically-distressed backgrounds, are poorly educated, and possessed few other viable career options when they enlisted. That quality further darkens when noting that members of the elite segments of American society, the social and economic strata of society most judicial offers come from, almost never serve in uniform (Roth-Douquet & Schaeffer, 2006).

This study was designed traces the legal, philosophical, and academic roots of the *Feres* doctrine from its inception to the present day. In Chapter 2, the study elucidates the concept of sovereign immunity and describes the FTCA, the sweeping statutory waiver of immunity enacted in 1946. The chapter also outlines how the Supreme Court modified the FTCA to exempt the military establishment from its scope, something Congress had not done. Legal scholars' reaction to the Court's controversial action is also considered. The study's methodology is discussed in Chapter 3, a grounded theory design utilizing legal research, specifically case law and legal scholarship. The theoretical tools employed by the study are also described, reasoning by analogy and legal realism. Chapter 4 assesses the current state of *Feres* doctrine jurisprudence. Case law from federal circuit courts of appeal from 1987 to the present day is examined. Finally, the study's findings are summarized in Chapter 5. A recommendation for future legislative action is also presented, state-level action which would cure the doctrine of its most objectionable aspects.

Chapter 2: Literature Review

This chapter provides an overview of the significant theoretical elements which constitute the *Feres* doctrine. In so doing, it answers the first two research questions. The first research question is: What are the legal, philosophical, and theoretical roots of the *Feres* doctrine, and how has the *Feres* doctrine developed over time? The second is how has the doctrine developed over time? As both of these questions are backward-looking, assessing where the doctrine came from, they are properly answered within the literature review, a chapter intended to take inventory of the existing situation.

The first section of the chapter examines sovereign immunity, the starting point in any effort to understand the doctrine in a meaningful way. The second section evaluates the steps Congress has taken over time to allow the American people to hold federal governmental officials liable for wrongdoing or misbehavior in courts of law. The third section examines how the Supreme Court has responded to service members' attempts to sue the Department of Defense and individual military personnel for tort injuries which occurred in a military status. Eight cases comprise the essential aspects of the Supreme Court's jurisprudence, each of which is described and assessed. Lastly, section four takes inventory of how scholars have reacted to the creation, development, and evolution of the *Feres* doctrine. Nearly every academic treatment has been critical of the doctrine, expressing disapproval and even outrage about what is widely considered a judicial abnegation of Congress' attempt to hold military officials accountable to the rule of law.

Sovereign Immunity

The *Feres* doctrine is a by-product of sovereign immunity, the principle that the government cannot be sued without its consent (Turley, 2003). The two concepts are so

theoretically intertwined that it is impossible to understand the *Feres* doctrine without understanding sovereign immunity. Protection from civil liability lies at the core of both concepts. The federal government has been deemed to possess sovereign immunity by virtue of its role as society's supreme actor, the foundational entity that creates and enforces the rules (Randall, 2002). The federal government's position as supreme actor has been determined to imbue it with singular powers, including the power to avoid being held to answer in court for its agents' wrongdoing (Sisk, 2005). While Congress has passed legislation over time waiving most of the government's immunity, steps which make governmental officials available to be sued in the same way non-governmental parties are, vestiges of immunity persist (Sisk, 2008). The most notable context where it persists is within the military.

The history of sovereign immunity as a legal concept is enshrouded in controversy. A creature of common law, e.g., a rule created by the judiciary rather than the legislature, the sway it held in England—where it originated—is unclear (Randall, 2002). How much the Founders subscribed to its tenets is equally ambiguous—judges, scholars, and commentators have lined up on both sides of the debate (Sisk, 2005). Nevertheless, the Supreme Court, after considerable vacillation, has said that sovereign immunity is the law, installing it into the judicial landscape (Sisk, 2008). Unless expressly waived, the federal government's immunity from private civil lawsuits is absolute and incontrovertible (*Murphy v. U.S.*, 1995). While ostensibly built on a sturdy platform, an analysis of sovereign immunity's history reveals that the Supreme Court's reasoning rests on far more tenuous material than one might imagine.

Scholars define sovereign immunity as the “immunity of the government from suit without its express permission” (Sisk, 2005, p. 440). Part of English common law, the concept was introduced to the United States at the country's inception, many of the Founders steeped in

England's legal traditions (Seidman, 2004). The popular belief is that the principle was applied without exception in England. The conventional view holds that the approach outlined in Sir William Blackstone's well-known *Commentaries on the Law of England* can be taken as ground truth for how the English system operated (Randall, 2002). In one passage of the *Commentaries*, Blackstone stated: "[The King] owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him" (Randall, 2002, p. 26). Elsewhere in the *Commentaries*, Blackstone stated: "Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute *perfection*. The King can do no wrong" (Randall, 2002, p. 27 [italics in original]). The standard view is captured by a passage from the Supreme Court, which observed in a 1999 decision: "[I]t is well established that in English law that the Crown could not be sued without consent in its courts" (*Alden v. Maine*, p. 715) in ancient England.

While Blackstone frames the crown's immunity from civil suit as unequivocal and absolute, scholars and judges have suggested that the famous commentator overstated the case, exaggerating the actual prevalence of the King's civil immunity in pre-Revolutionary War England (Jackson, 2003). Lawsuits, in fact, were routinely brought against the English monarchy without consent before and after the drafting of *Commentaries* (Randall, 2002). Vendors doing business with the King, for instance, were allowed to petition for full payment without royal permission. Allowing a petition for redress to proceed, the House of Lords observed at one point: "We are all agreed that [the King's creditors] have a right; and if so, then they must have some remedy to come at it too" (Randall, 2002, p. 29). Many argue that instead of looking to actual English practice, Blackstone's statement on English practice has mistakenly been taken for historical fact (Dorenberg, 2005). According to Professor Susan Randall, a

constitutional scholar, the prevailing view of “sovereign immunity is based on a modern misunderstanding of eighteenth century English law as prohibiting any form of recovery against the sovereign” (2002, p. 3). The more accurate view, she says, is to see the English rules as prescribing the way the King could be held accountable, the process that must be followed in pursuing a claim as opposed to an outright ban (Randall, 2002).

The lack of scholarly agreement with regard to the English approach is seen in even sharper relief with regard to the Founders’ view on sovereign immunity. The uncertainty and controversy over how the Founders’ conceived of the issue can partially be attributed to the fact that the text of the Constitution makes no mention of sovereign immunity (Chemerinsky, 2001). A clear statement in the nation’s seminal document would have certainly resolved the matter, providing guidance for future generations. Making matters more challenging, there is no record of the topic ever being discussed during the Constitutional Convention (Chemerinsky, 2001). The lack of clarity has left future generations to sift through less authoritative, less certain sources to frame their arguments (Jackson, 2003).

Scholars and judges who claim the Founders operated on the assumption the federal government was immune from suit ground their position on three specific passages, post-Constitutional Convention remarks by Alexander Hamilton, James Madison, and John Marshall, respectively (Sisk, 2005). Critics observe that each comment was made regarding state, rather than federal, sovereignty, the idea that a state could not be sued in federal court without prior consent (Randall, 2002). (This concept, known as state sovereign immunity, is a distinct legal principle from federal sovereign immunity, the topic under consideration here. State sovereign immunity pertains to whether states are autonomous political entities possessing their own type of legal immunity [Chemerinsky, 2001].) The remarks were made as part of an effort to assuage

states' fears that they would be made bankrupt by collection suits under the new governmental structure, forced to defend themselves in the nascent federal court system against private parties seeking repayment of loans (Holtzoff, 1942). They were not intended to suggest that either the federal government or its agents were insulated from suits by citizens alleging violations of law (Sisk, 2008). The first statement, made by Hamilton in Federalist Paper No. 81, a series of essays drafted to convince states to ratify the Constitution, reads: "It is inherent in the nature of sovereignty not to be amenable to suit of an individual *without its consent*" (Rossiter, 1961, p. 10 [italics in original]). Madison, for his part, made a similar statement during the Virginia ratification convention, opining: "It is not in the power of individuals to call any state into court" (Randall, 2002, p. 11). Marshall's comment, also made during the Virginia convention, echoes the earlier two: "With respect to disputes between *a state and citizens of another state*...I hope that no future generation will think that a state will be called at the bar by the federal court" (Randall, 2002, p. 23 [italics in original]).

With the pro-sovereign immunity camp relying entirely on these three statements, the scholars who say the Founders did not embrace across-the-board immunity point to an assortment of factors. First, they note that the text of Article III, the section of the Constitution outlining the power of the federal judiciary, grants courts the power to hear "controversies to which the United States shall be a party" (U.S. Const. art. 3, § 2, cl. 1). This judicial power trumps federal sovereign immunity, scholars say, setting up a system where courts determine how much civil liability the government should have on a case-by-case basis. The very fact courts were given the authority to hear cases against the federal government is proof the Founders did not intend it to be categorically immune from suit (Randall, 2002). These scholars also observe the significant divergence the notion of governmental immunity and the principles

animating the Constitution. One such commentator, constitutional scholar Erwin Chemerinsky, remarked:

A doctrine derived from the premise that “the King can do no wrong” deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives. American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion. The doctrine is inconsistent with the United States Constitution. (Chemerinsky, 2001, p. 1202)

The courts’ power to uphold and enforce the Constitution, Chemerinsky asserts, is rendered void by sovereign immunity, a policy which makes insulates from courts’ inquisitorial jurisdiction (2001).

Finally, anti-immunity scholars note the plethora of comments made by the Founders—even later statements by Hamilton, Madison, and Marshall—rejecting the concept of governmental sovereignty (Randall, 2002). The Founders who roundly condemned the concept include James Wilson, Edmund Randolph, Edmund Pendleton, Patrick Henry, George Mason, and George Nicholas. Hamilton, Madison, and Marshall’s support have been called into question (Davis, 1970). The context in which their statements were made suggest a political calculus rather than a principled one (Davis, 1970). With ratification hanging in the balance and states nervous about being bankrupted by debt-enforcement lawsuits, statements that gave states assurance their fears would not materialize can be seen as political expedience triumphing over these men’s actual beliefs (Randall, 2002). The upshot, according to anti-sovereignty scholars, is that it is impossible to characterize the Founders’ position on the issue with any precision or to suggest they were universally wedded to its furtherance. As Justice Souter wrote in dissent in 1999, “[t]here is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable” (*Alden v. Maine*, 1999, p. 716 [Souter, J. dissenting]).

Notwithstanding the compelling nature of the anti-immunity arguments, the pro-sovereign immunity camp has carried the day. Over the past century, the Supreme Court has held in a series of landmark decisions that the doctrine is core American judicial principle, a policy to be given enforcement to the maximum extent possible, entrenching it in to the legal landscape (*Larson v. Domestic & Foreign Commerce Corporation*, 1949; *Malone v. Bowdoin*, 1962). According to Sisk, a constitutional scholar, the current status of the doctrine can be characterized as follows: “The United States may not be sued without its consent, that is, without a statutory waiver of sovereign immunity” (2005, p. 456). If an aggrieved individual files a civil lawsuit against either the federal government, alleging the government’s malfeasance caused him harm, the court will dismiss the suit unless it can identify a statutory waiver applicable to the fact pattern of the plaintiff’s situation (Sisk, 2003). The same result will occur if a suit is brought against a governmental employee for actions pertaining to his official duties, the court extending sovereign immunity to the employee (Sisk, 2003). Exceptions to the policy will be made if the employee acted beyond his statutory authority or in violation of the Constitution (Sisk, 2005). There, suits against employees will be allowed to continue, the court viewing rogue behavior as disqualifying government officials from judicial protection (Sisk, 2010).

Given the reality that sovereign immunity has been anointed a core tenet of American jurisprudence, a policy whose future does not appear in jeopardy, most constitutional scholars appear to have reached an easy certain peace has it. While some continue to frame it as an illegitimate, medieval anachronism (Chemerinsky, 2001; Davis, 1970), others cast in a prudential light, describing it as a practical rule that strikes a balance between competing societal values (Jackson, 2003). By entrusting Congress rather than the judiciary with the power to decide when the government can be held liable, these critics interpret the Supreme Court as recognizing the

importance of democratic decision-making, the power of the legislature rather than the court to control under what circumstances suits are acceptable (Jackson, 2003). Allowing individuals to use civil suits to paralyze the legislative process is not wise, the belief goes. “Surely every reasonable individual must agree,” Sisk writes, “that because federal government represents the whole community and thus often must act in ways that a private party cannot or should not, the government exposure to liability must be controlled” (2005, p. 442). While most agree with this idea, the flashpoint is whether the legislature or the judiciary should set the terms of that liability (Turley, 2003). How the competing sides come down on the issue can be seen as reflecting which institution of government they trust more (Randall, 2002). While conservatives tend to have the greatest trust in Congress, the ultimate reflection of majoritarian rule, liberals tend to repose greater confidence in the judiciary, the body charged with protecting of individual rights and the marginalized (Sisk, 2008). Viewed through a political lens then, the doctrine of sovereign immunity can be correctly viewed as a victory of the conservative perspective over the liberal one (Turley, 2003). The triumph, though, is not without condition, however. As Sisk notes in a passage with major implications in the *Feres* doctrine context, “when government conduct becomes removed from policymaking, the arguments for sovereign immunity are at their weakest” (Sisk, 2005, p. 442). As critics argue, for instance, that protecting a military doctor or a sexually predatory drill sergeant from tort liability has nothing to do with policymaking, the fallout from Sisk’s observation is a subject of examination in section four of this chapter, the discussion of the *Feres* doctrine.

Congressional Waivers of Sovereign Immunity

As explained above, under prevailing Supreme Court precedent, courts will summarily dismiss civil suits filed against governmental entities or governmental agents unless Congress

has explicitly exposed that component of the government to civil liability. If it is determined that immunity has not been waived in a particular situation, the aggrieved parties' only remedy is to lobby a member of Congress for a *private bill*, that is, legislation authorizing the payment of a specific amount of money to particular individuals (Sisk, 2003). Prior to waiving immunity to money claims against the government in 1855, Congress found itself inundated by contractors and other claimants alleging breach of contract against agencies and seeking payment through private bills (Stirling & Warshaw, 2018). Similarly, prior to exposing governmental personnel to negligence actions in 1948, Congress would routinely be asked by those injured by federal agents to enact legislation authorizing compensation (Sisk, 2003). Together, the money and tort claims created such an administrative burden on Congressional representatives that they sought to offload the responsibility of adjudicating and paying claims to judicial officers. Bowing to public pressure and buckling under the weight of having to deal with claims itself, Congress set up three separate processes for holding federal agencies and agents to account, the first for money claims, the second for challenging actions of administrative agencies, and the third for suing agents and officers for tort damages. While each is discussed in turn, the latter—suing agents in tort—is the most important for purposes of the instant inquiry.

Money Claims Against the Federal Government

The first major waiver of sovereign immunity occurred in the arena of money claims. Money claims are disputes between a private citizen and the government about money. Claims typically take the form of allegations that a federal agency, such as the Internal Review Service Social Security Administration, owes a person or contractor money (Sisk, 2006). The primary venue for resolution of claims is the United States Court of Federal Claims (“Court of Claims”; Holtzoff, 1942). Created through the Tucker Act, a famous mid-19th century statute, the Court of

Claims has jurisdiction to resolve claims of any amount. So-called “Big Tucker Act” claims, ones greater than \$10,000, can only be handled by the Court of Claims (Sisk, 2003). For “Little Tucker Act” claims, ones for \$10,000 or less, district courts have concurrent jurisdiction (Sisk, 2003). Commentators have said that creation of the Court of Claims marked an important advancement in democratic theory (Hadfield, 1999). By allowing itself to be bound and sued in contract, the federal government “took an important step in the evolution of the modern democratic state. By honoring its contracts, the government reinforced its democratic legitimacy as a government subject to the rule of law” (Hadfield, 1999, p. 467).

Challenging Administrative Actions

The second major waiver of immunity occurred in 1946 via the Administrative Procedures Act (“APA”; Nathanson, 1975). The APA makes federal agencies subject to judicial review, an oversight process intended to protect the public from unfair, unjust, or unauthorized behavior. According to Congress, agency officials are inclined to overstep their allotted power when unable to be challenged in court (Rubin, 2003). Prior to enactment of the APA, citizens harmed by federal agencies had little ability to seek redress (Nathanson, 1975). The APA mandates that agencies provide notice of intended actions, allowing for an opportunity for the public to object (Rubin, 2003). Additionally, the APA authorizes aggrieved parties to sue over alleged wrongful conduct, forcing agency officials to justify their decisions in court (Nathanson, 1975). In conducting judicial review, courts evaluate whether the challenged action is consistent with the pertinent enabling statute and/or with fundamental fairness (Nathanson, 1975). In most instances, an agency action will be upheld as long as it is not to be “arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law” (5 U.S.C. § 706(2)). When performing adjudicative functions, though agency actions will only be upheld if supported by

“substantial evidence” based on a review of the “whole record,” a more stringent standard (5 U.S.C. § 556).

Suits Seeking Compensation for Tortious Conduct

Congress’ third and most important major rollback of sovereign immunity was the Federal Torts Claims Act (FTCA). Enacted in 1946, the FTCA allows people injured by the wrongful conduct of agencies or agency officials to sue for monetary damages (Warshaw, 2017). Allowing civil suits marked a significant change in how claims of public misconduct were handled. Prior to enactment, injured parties had to lobby Congress for private compensation bills (Warshaw, 2017). The process was not only complex, time-consuming, and frequently unfair to injured parties, it also placed an enormous burden on legislators personally and on Congress as an institution. In an earlier article, a colleague and I described the burden:

As the size of the country’s administrative apparatus grew, so did the number of people injured by government malfeasance. Legislators buckled under the burden of reviewing and approving compensation bills individually, an increasingly monumental task. The injured parties likewise grew weary of waiting for legislative remedies. (Stirling & Warshaw, 2018, p. 51)

Presidents and legislators alike lamented the absence of a workable approach to settling tort claims. Writing in his diary in 1832, John Quincy Adams observed:

There ought to be no private business before Congress...It is judicial business, and legislative assemblies ought to have nothing to do with it. One half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice. (Holtzoff, 1942, p. 330)

Scholars credit a spectacular military mishap in 1945 as the decisive factor underlying passage of the FTCA (Feldmeir, 2011). On July 28, 1945, Army pilot Lieutenant Colonel William F. Smith, Jr., lost visibility while flying above New York City in inclement weather, ultimately crashing his B-25 bomber into the seventy-ninth floor of the Empire State Building

(Feldmeir, 2011). The crash and subsequent fire killed Smith, two other military passengers, and eleven civilians who were working in the building (Rosenberg, 2017). While Congress made settlement offers to victims and their families, most of the payouts were rejected, the injured instead opting to sue in federal court (Rosenberg, 2017). The civil suits were summarily dismissed under the doctrine of sovereign immunity (Feldmeir, 2011). With the public's attention firmly trained on the inequity of a national policy that categorically barred all tort suits against the government—even when fault was undeniable and the damages so extraordinary—Congress finally acted, passing the FTCA less than a year after the crash (Stirling & Warshaw, 2018).

The framework of the FTCA is straight-forward. The statute authorizes civil suits for an “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission” of governmental employees “acting within the scope of their employment” (28 U.S.C. § 2674-2675). Under the statute, a government employee's conduct is wrongful “to the same extent as a private individual under like circumstances” (28 U.S.C. § 2674). The injured party must first give the agency at issue the right to settle the claim (28 U.S.C. § 2675). An FTCA claim is authorized if a settlement cannot be reached or if the agency fails to respond within six months (28 U.S.C. § 2675). When the conditions are met, an FTCA claim against the United States is the injured party's sole remedy (28 U.S.C. § 2679(b)(1)). Personal suits against individual employees are not permitted (28 U.S.C. § 2679(b)(1)). The FTCA is considered an elegant statutory scheme. One scholar observed: “The FTCA succeeds at the task Congress set for it. It generally waives the United States' sovereign immunity for the torts of federal employees and provides an effective mechanism to resolve claims against the government administratively or judicially” (Figley, 2009, p. 1145).

The FTCA is not a complete waiver of immunity for government employees' wrongful conduct, however. The statute contains a series of exceptions, categories of conduct still unable to serve as the basis for litigation. One exception is for intentional misconduct. When government officials intentionally injure someone, the injured party cannot sue the government under the FTCA. The idea is that intentional wrongdoing is outside the scope of public employment. The sole judicial remedy in that instance is a suit against the employee personally.¹ Another exception pertains to acts of discretion. The FTCA bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary or duty on behalf of a federal agency or an employee of the Government" (28 U.S.C. § 2680(a)). The policy behind the exception is that poor judgment should not afford a cause of action, a slippery slope that could give rise to litigation any time a person has an unpleasant interaction with a public official.

Most importantly, the statute also bars "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" (28 U.S.C. § 2680(j)). Under this exception, injured parties can only sue for injuries sustained in the military context if the injuries are unrelated to combat. This exception reflects a congressional belief that the

¹ The intentional tort exception does not apply to law enforcement officials who engage in assault, battery, and similar forms of misconduct. There, the injured parties can sue the government under the FTCA (28 U.S.C. § 2680(h)); *Millbrook v. U.S.*, 2013).

battlefield is ill-suited to claims of negligence or wrongdoing (Warshaw, 2017).² Combat activities are the only aspect of military endeavors placed outside the scope of the FTCA.

The Supreme Court' Jurisprudence

Since the FTCA's passage in 1946, the Supreme Court has rendered six decisions in situations where injured military members sued under the FTCA. The first decision, *Brooks v. U.S.* (1949), involved injuries incurred on leave away from a military base. The other five pertained to situations where the injuries were sustained either on duty or while the members were engaged in activities "incident to their military service." The five latter cases, *Feres v. U.S.* (1950), *U.S. v. Brown* (1954), *Stencel Aero Engineering Corporation v. U.S.* (1977), *U.S. v. Shearer* (1985), and *U.S. v. Johnson* (1987), comprise the Supreme Court's firsthand jurisprudence on the *Feres* doctrine, the judicial policy that the FTCA does not apply to service members who are injured incident to their military service. Two other Supreme Court cases from outside the FTCA context are so connected to the *Feres* line of cases that they also constitute part of the high court's essential jurisprudence. These decisions, *Parker v. Levy* (1974) and *Chappell v. Wallace* (1983), amplify and augment the rationales outlined in the *Feres* line of cases, rooted in its same animating philosophy. Together, these seven cases evince a belief that the military is separate organizationally and culturally from civilian society, showing a deep deference towards military decision-making and an overriding reluctance to do anything

² The combat exception makes intuitive sense. It is hard to see how civil liability could be extended to combat situations, where preserving evidence, determining causation, and establishing fault are impractical (Stirling & Warshaw, 2017).

which would disturb so-called “good order and discipline.” Each case is described below, starting with *Brooks v. U.S.* (1949), the anomaly.

Brooks v. U.S. (1949)

Brooks v. U.S. (1949) involved a fatal car accident where one service member was killed and a second badly injured. Arthur Brooks, an Army soldier, was driving his brother, Welker, also a soldier, and their father, James, along a public highway late at night during a rainstorm in North Carolina. Bringing the vehicle to rest at a stop sign, when Arthur accelerated into the intersection an Army truck barreled into the driver’s side of Arthur’s car, killing him and badly injuring Welker and James. The truck was driven by an Army civilian who had not observed the signage and failed to stop. After a bench trial on the ensuing FTCA suit against the United States, the district court handed down a plaintiffs’ verdict, ruling that the Army civilian had been negligent and awarding \$25,425 in compensatory damages (*Brooks v. U.S.*, 1949). The Fourth Circuit Court of Appeal proceeded to reverse the verdict, however, holding that service members lacked standing to sue under the FTCA.

In its decision, the Supreme Court overturned the court of appeal and reinstated the trial court’s verdict. On the issue of standing, the Court held that service members were not categorically banned under the FTCA from suing for injuries (*Brooks v. U.S.* 1949). Saying “the statute’s terms are clear,” the Court sarcastically observed that “any claim” did not mean “any claim but that of servicemen” (*Brooks v. U.S.* 1949, p. 51). None of the statute’s exceptions excluded suits by military personnel, the Court observed. In support of its position the Court noted that Congress had considered—and rejected—legislation which would have left service members out, with sixteen of the eighteen iterations of the FTCA containing exclusionary language. The version enacted was devoid of such language, the Court said (*Brooks v. U.S.*,

1949). Rejecting the government's argument that allowing recovery in an off-duty auto accident case would open the door to suits stemming from "a battle commander's poor judgment," the Court said the auto accident "had nothing to do with the Brooks' Army careers, injuries not caused by their service except in the sense that all human events depend on what has already transpired" (*Brooks v. U.S.*, 1949, p. 52). Portending the seminal case that would come before it barely a year later, though, the Court finished by observing that "[w]ere the accident incident to the Brooks' service, a wholly different case would be presented" (*Brooks v. U.S.*, 1949, p. 52).

Feres v. U.S. (1950)

In *Feres v. U.S.* (1950), the Supreme Court faced the question of whether a member of the military had standing to sue for damages under the FTCA when those damages were "incident to the service." The issue had been left unresolved by *Brooks v. U.S.* (1949), where the injuries were expressly not incident to service. *Feres v. U.S.* (1950) was in actuality a consolidation of three appellate court cases, *Feres v. U.S.* (1949), *Jefferson v. U.S.* (1949), and *Griggs v. U.S.* (1949). In each case, a service member suffered injuries as a consequence of a wrong or omission in a non-combat situation (*Feres v. U.S.*, 1950). Wrongfulness was not at issue in any case; it was undisputed that the complaining service members' injuries stemmed from fellow service members' negligence. In *Feres v. U.S.* (1949), a lieutenant was killed in a barracks, e.g., dormitory fire resulting from a contractor's faulty wiring. In *Jefferson v. U.S.* (1949), a service member suffered injuries after Army doctors left a towel in his abdomen following a routine operation, the towel bearing the label "Medical Department of the U.S. Army." In *Griggs v. U.S.* (1949), a service member died as a result of Army surgeons' malpractice. The issue in each matter was purely legal, namely, whether service members had standing under the FTCA to sue for tort injuries sustained incident to service, that is, whether

Congress had intended its waiver of sovereign immunity to extend to service members. If the Court held the service members were legally entitled to sue, they would prevail in their suits. If the Court held, however, that they could not, their cases would be dismissed permanently, the doors of the courthouse sealed shut.

In its ruling, the Supreme Court in *Feres v. U.S.* (1950) decided to seal the courthouse doors shut. It held that Congress had not intended to allow military members to sue for tort injuries sustained incident to service under any circumstances. In reaching its decision, the Court acknowledged that there was no legislative history on which it could rely, the Congressional record devoid of references to service members wrongfully hurt in non-combat situations. Its decision, it said, would therefore amount to an educated guess about what Congress had intended, no testimony or other evidence to consult. The Court also acknowledged that Congress had contemplated service members functioning as plaintiffs in FTCA suits, a point shown by the fact that an “employee of the Government” is defined in the statute to include “members of the military or naval forces of the United States” (*Feres v. U.S.*, 1950, p. 138). The only express limitation on service members’ ability to sue was in the arena of “combatant activities,” the Court said (*Feres v. U.S.*, 1950, p. 138). Additionally, the Court acknowledged that most of the rejected versions of the FTCA had excluded service members from its scope, while the version Congress ultimately settled upon had not.

Nevertheless, the Court in *Feres v. U.S.* (1950) said Congress did not intend service members to be covered. When considered in its wider context, it determined, the FTCA could not rightly be found to apply to those protecting the nation in uniform. Three factors were essential to the Court’s decision-making process. First, the Court observed that the FTCA made the United States liable “in the same manner and to the same extent as a private individual under

like circumstances” (*Feres v. U.S.*, 1950, p. 140). Saying that “no private individual has the power to conscript or mobilize a private army” (*Feres v. U.S.*, 1950, p. 141), the Court said it was impossible for a “private individual” (p. 141) to be liable for torts inflicted upon a member his/her private military. The fact that individuals were unable to raise armies meant that Congress had not intended to expose the federal government negligence suits from service members. Second, the Court zeroed in on the statutory language that made the “law of the place where the [negligent] act or omission” (*Feres v. U.S.*, 1950, p. 142), the controlling law for FTCA-purposes. Congress, the Court reasoned, could not have intended a patch work of local, substantively diverse rules to control the distinctively federal relationship which existed between the government and its service members. Unable to countenance a system where the outcome of service member suits could be disparate and even contradictory, the Court found this point helpful to its position. Third and finally, the Court noted that service members were able to recover under the Veterans Benefits Act for service-related injuries. To allow service members to obtain disability compensation and tort damages would be tantamount to double-dipping, a double reward for which the Court could find no statutory support in either the language of the Veterans Benefit or the FTCA. Offended by the unjust dessert aspect of a service member FTCA claim, the Court added it to its basis for denying service members’ standing to sue under the statute (*Feres v. U.S.*, 1950).

Finding these three rationales persuasive, the Supreme ended its decision by stating:

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. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command. (*Feres v. U.S.*, 1950, p. 146)

U.S. v. Brown (1954)

U.S. v. Brown (1954) involved a medical malpractice suit that a veteran brought against the Veterans Administration for a botched operation to the veteran's knee. The surgery had been performed to repair damage incurred while the veteran was on active duty in the military. But the malpractice had been perpetrated by doctors with the Veterans Administration after the veteran left military service, suing the Veterans Administration under the FTCA on a negligence theory. There was no dispute that the veteran fell outside the incident to service ambit of the *Feres* doctrine. The only issue before the Supreme Court was whether its decision in *Feres v. U.S.* (1950) had nullified its earlier decision in *Brooks v. U.S.* (1949), where the Court had held that tort damages service members sustain which are not incident to their service can serve as the basis of an FTCA claim (*U.S. v. Brown*, 1954).

In its decision, the Supreme Court held that *Brooks v. U.S.* (1949) survived *Feres v. U.S.* (1950). That is, the Court held that a service member had standing to sue under the FTCA for tort damages incurred outside the line of duty, damages that were not incident to service (*U.S. v. Brown*, 1954). This meant that veterans, e.g. former service members, have standing to sue when they are wrongfully injured after they are discharged from the military, even where those injuries were initially obtained during their service. The significance of the Court's decision lay in the fact that set the term "incident to service" in high relief. *Feres v. U.S.* (1950) had not wiped away the in-service/out-of-service distinction, the Court said. Service members were not outside the scope of the FTCA categorically in all situations; the wrongdoing had to connect to military activities in some way. The significance also lay in the fact that the Court, for the first time, used protection of military discipline as the primary justification for barring suits where the injuries are incident to service, a justification that would go on to become the primary one (*U.S. v.*

Brown, 1954). Civil suits in any in-service context would, in the Court's belief, interfere with the "peculiar and special relationship of the soldier to his superiors" (*U.S. v. Brown*, 1954, p. 112) and have a baleful effect on discipline. This rationale would be fully developed in later cases within the *Feres* doctrine jurisprudence.

Parker v. Levy (1974)

While not a case arising under the FTCA, *Parker v. Levy* (1974) is correctly considered part of the Supreme Court's *Feres* doctrine jurisprudence. This is because it rests on the belief that the military establishment is a "specialized society separate from civilian society" (p. 743), the same principle that animates and underpins the *Feres* doctrine (*Parker v. Levy*, 1974). In fact, many of the most famous judicial phrases about the military stem from *Parker v. Levy*, including the term *specialized society*. Arguably the apogee of the Court's philosophical treatment of military service, *Parker v. Levy* (1974) stands for the notion that the military is fundamentally different from the civilian world, a culture based on different tradition and revolving on a different axis. According to *Parker v. Levy* (1974), the differences are so substantial that core American legal concepts such as notice of wrongdoing and due process of law apply in dramatically different ways in the military sector. This rationale serves as the basis for an extreme form of judicial deference, a hands-off approach which largely allows the military to regulate itself, the only segment of the executive branch where the judiciary pulls its punches, narrowly circumscribing its check and balance function.

The fact pattern of *Parker v. Levy* (1974) centered on the remarkable actions of Captain Levy, an Army doctor serving in the late 1960's who was openly critical of the Vietnam War. Considering the war immoral, he refused to conduct the training required under his job position, eventually defying a superior when ordered to set aside his personal views and instruct the

medical personnel within his department (*Parker v. Levy*, 1974). He also actively encouraged black service members to be insubordinate, refusing to take part in the war being fought against the Vietnamese. His leadership wound up court-martialing him for disobeying a lawful, engaging in conduct unbecoming an officer and a gentleman, and taking steps that were prejudicial to good order and discipline. Convicted and incarcerated by the court-martial, he filed a writ of habeas corpus, arguing that the crimes for which he was punished were so vague and ambiguous, they did not pass constitutional muster (*Parker v. Levy*, 1974). Losing at the district court level, Levy prevailed at the circuit court which voided his convictions on the grounds the crimes were unconstitutionally vague. Granting the government's writ of certiorari, the Supreme Court disagreed with the appellate court, issuing a monumental decision.

The Supreme Court ruled against Captain Levy. It held that, even though the crimes were in fact vague and while the language in which the crimes were couched did not meet accepted constitutional standards of notice and due process, Levy's conviction was nonetheless valid and enforceable. The Court grounded its ruling on the theory that the military is fundamentally unlike civilian society. The differences between the two—the military as an institution on the one hand and civilian society on the other—endow military officials with the legal authority to deviate from established civilian norms, even constitutional norms, as needed. “This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, by necessity, developed laws and traditions of its own during its long history” (*Parker v. Levy*, 1974, p. 743). Quoting its 1955 ruling in *Toth v. Quarles*, the Court said the purpose of the military is what makes it different: “[I]t is the primary business of armies and navies to fight or ready to fight wars should the occasion arise” (p. 17). To be effective at fighting wars, the Court went on, a strict chain of

command was necessary, one where subordinates obeyed superiors without question or delay. Quoting its 1890 ruling in *In re Grimley*, the Court said: “An Army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left as to the right to command in the officer, or the duty of obedience in the soldier” (*In re Grimley*, 1890, p. 153). With obedience the overarching principle, the Court said that the standard set of civilian rights afforded all Americans and guaranteed under the Constitution must be truncated in the military context. Quoting its 1953 decision in *Orloff v. Willoughby*, the Court wrote: “[T]he rights of men in the armed forces must perforce be conditioned to meet the overriding demands of discipline and duty” (p. 94).

While not a case arising under the FTCA, the importance of *Parker v. Levy* (1974) lies in the fact that its theoretical underpinnings serve to animate the modern incarnation of the *Feres* doctrine. The decision’s emphasis on the military as a unique component of government that must be given special leeway from the rules that apply everywhere else has been incorporated into the *Feres* context (*Parker v. Levy*, 1974). The view that the military is what separates the United States’ constitutional democracy from marauding outsiders intent on subjecting Americans to authoritarianism comprises the spiritual energy that infuses the *Feres* doctrine with its emotional impact. Indeed, it is no easy task to convince the highest civilian judicial body to roll back constitutional protections for a subset of the federal workforce. The Supreme Court has in fact never approved such a roll back in any other situation. Service members are the only group of federal employees whose constitutional rights have been downgraded. The justification outlined in *Parker* for why downgrading is allowable in the military sphere now serves to justify why service members are not be allowed to sue when raped by a superior or put into a coma by a military dentist’s administration of an excessive amount of anesthesia during a routine

procedure. The importance the Court assigned to a subordinate's adherence to a superior's orders, and the central role such obedience plays in a military body's efficacy, have become the ultimate trump court to the Constitution's universal application. While never citing to empirical evidence which supports its belief that allowing civil suits would disrupt obedience, the Court has nonetheless demonstrated that creating the conditions where such obedience is ensured is of greater importance than service members' individual rights.

Stencel Aero Engineering Corp v. U.S. (1977)

In *Stencel Aero Engineering Corp v. U.S.* (1977), the Supreme Court considered an FTCA claim filed by a service member for the first time since the *Feres* decision itself, a period of 27 years. The Court used the occasion to expand the scope of the doctrine. The case involved a National Guard pilot injured when his ejector seat malfunctioned during a mid-air emergency. The pilot filed suit against two parties on a negligence claim under the FTCA, the Department of Defense and the federal contractor which had assembled the plane, alleging that the "eject system malfunctioned as result of 'the negligence and carelessness of the defendants individually and jointly'" (*Stencel Aero Engineering Corp v. U.S.*, 1977, p. 676). In response to the suit, the federal contractor filed a cross-claim against the United States, stating that "any malfunction in the egress life-support system used by (the plaintiff) was due to faulty specifications, requirements, and components provided by the United States..." (*Stencel Aero Engineering Corp v. U.S.*, 1977, p. 676). The contractor said it was entitled to indemnification by the federal government should it be found liable for negligence.

The novel issue facing the Court in *Stencel Aero Engineering Corp v. U.S.* (1977) was whether suits filed by non-service members that nonetheless pertained to injuries sustained by service members incident to service came within the ambit of the *Feres* doctrine. Answering that

question in the affirmative, the Court dismissed the action in its entirety, both the pilot's suit as well as the contractor, finding that neither parties had standing under the FTCA. The logic underlying the dismissal was that any suit which alleged a service member was wrongfully injured while on duty fell within the scope of the *Feres* doctrine. It was the subject matter of the suit that mattered, the Court said, not the identity of the party filing the suit. As long as the subject matter pertained to injuries sustained by service members incident to service, the doctrine applied.

In expanding the reach of the doctrine beyond the parties to the subject matter, the Court relied on the military discipline rationale, applying the philosophical assertion explicated at length in *Parker v. Levy* (1974). Regardless of who files the suit, suits that involve "an injury sustained by a soldier while on duty" (*Stencel Aero Engineering Corp v. U.S.*, 1977, p. 671) would disrupt the strict obedience to orders essential to a military body's efficacy. The Court said that the "trial, in either case, would involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions" (*Stencel Aero Engineering Corp v. U.S.*, 1977, p. 672). Seeking to protect military officials from being second-guessed by judges in any context, even with regard to why a plane was built the way it was, the Court brought military officials' thought process within the parameters of the *Feres* doctrine. This expansion of the doctrine to the thought process is the most important aspect of *Stencel Aero Engineering Corp v. U.S.* (1977). Under this line of reasoning, military officials were given immunity from civil liability in any situation where a suit would require them to explain why they did what they did, to provide an account of their actions. The breadth of activity covered by the thought process rationale significantly increased the doctrine's reach, moving far beyond injuries caused to service members. Under this theory, any

decision was beyond the reach of judicial review, regardless of whether the decision led to physical or emotional injuries. Within *Stencel Aero Engineering Corp v. U.S.* (1977) lay the seeds of the “nonreviewability” doctrine, a judicial policy related to, but philosophically distinct from, the *Feres* doctrine. The nonreviewability doctrine fully bloomed in the Court’s next important military decision, *Chappell v. Wallace* (1983).

Chappell v. Wallace (1983)

When evaluated alongside its jurisprudential kin, *Chappell v. Wallace* (1983) is most similar to *Parker v. Levy* (1974). This is because, while neither case directly dealt with service members’ tort claims, both were decided under the military discipline rationale that also has come to underlie the *Feres* doctrine. Additionally, both cases contain protracted descriptions of military culture, passages where the Court aspired to describe its conceptual understanding of the military as opposed to simply rendering a legal decision on the facts. In *Chappell v. Wallace* (1983) in particular, the explication included lengthy musings of ready-made quotable material, the pithiest sound bites routinely turning up in lower court cases. Revolving around the role obedience plays in the effective functioning of military unit, both cases describe the harm the Court believes is created when military officials are exposed to judicial oversight. An express commitment to do whatever is necessary—including pulling its punches—to avoid hamstringing military officials is the central theme of both.

The fact pattern in *Chappell v. Wallace* (1983) centered on a lawsuit filed by four enlisted sailors against eight member of a ship’s leadership team, including the commanding officer and four lieutenants. The sailors’ lawsuit did not pertain to tort damages, but rather to alleged violations of their constitutional right to equal treatment under the law as specified in the 14th Amendment. Basing their suit on *Bivens v. Six Unknown Narcotics Agents* (1971), a seminal

case from 1971 that authorized lawsuits against federal agents for constitutional rights violations, the sailors contended they were assigned unfavorable duties, threatened, given poor performance evaluations, and administered excessive punishment as result of their race. They also alleged a conspiracy to deprive them of their statutory civil rights (42 U.S.C § 1985).

In a decision handed down in 1983, the Supreme Court dismissed the action in its entirety, finding against the sailors on every issue. The technical grounds on which the Court ruled was that the suit was not the kind allowed under *Bivens v. Six Unknown Narcotics Agents* (1971), saying the matter contained special factors which made it inappropriate for judicial intervention (*Chappell v. Wallace*, 1983). These factors began and ended with the fact that the plaintiffs were active duty service members whose lawsuit pertained to their service. Because of this, the Court said, the matter was subject to the philosophical framework contained in the *Feres* doctrine and must be analyzed pursuant to the doctrine's methodology. Involving the relationship between superiors and subordinates, and thereby implicating military discipline, "the Court's analysis of *Feres* guides our analysis in this case" (*Chappell v. Wallace*, 1983, p. 299).

The Court began its analysis with one of the most memorable passages in the *Feres* arena:

The need for special regulation in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands of its personnel "without counterpart in civilian life." The inescapable demands of military discipline and obedience to orders cannot be taught on the battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection... This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. (*Chappell v. Wallace*, 1983, p. 300)

After laying down this theoretical perspective on what makes a military unit function effectively, the Court was ready to apply its theory to itself, describing the proper role the judiciary should play in ensuring military officials act in accordance with law. The Court stated: “Civilian courts must, at the very least, hesitate long before entertaining a suit which would ask the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment” (*Chappell v. Wallace*, 1983, p. 301). A deferential approach by the judiciary, in fact, was implied by the design of the Constitution, the Court said, which allotted to Congress the power to regulate the military and to the president to power to command it. The judicial branch, it said, was not given any direct responsibility. The Court then went out to describe the due process protections Congress had built into the system, including the ability for subordinates to ask a commander to redress wrongs and the oversight role played by the board of correction of military records. In light of these measures, courts did not to get involved: “Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life...The resulting system provides for the review and remedy of complaints and grievances such as those presented by (the sailors)” (*Chappell v. Wallace*, 1983, p. 302). As they were “ill-suited to determine the impact upon discipline of any particular” (*Chappell v. Wallace*, 1983, p. 302) action a court may take, judges should avoid exercising jurisdiction over military matters except in the most extreme circumstances. It did not explain, however, under what conditions intervention would be appropriate, a job it left to lower courts to flesh out.

U.S. v. Shearer (1985)

In *U.S. v. Shearer* (1985), the Supreme Court expanded the *Feres* doctrine to include all cases that contained a military discipline component, even those where the injuries occurred off base and were not incurred incident to service. The issue in *U.S. v. Shearer* (1985) was whether an FTCA suit could be maintained against the military for “negligently and carelessly” (*U.S. v. Shearer*, 1985, p. 58) failing to manage and control a dangerous service member. The case stemmed from a tragic chain of events, most importantly the cold-blooded murder of Private Shearer by Private Heard, both of whom were active Army soldiers. It was not Heard’s first such killing; he had been convicted of manslaughter five years earlier while stationed in Germany, serving a lengthy period of incarceration in a German prison. Upon release, Army officials assigned him to a new unit in Texas and assimilated him with the base’s troops without taking special precautions to guard against another incident (*U.S. v. Shearer*, 1985). A short time later, Heard kidnapped and killed Shearer while the two were on leave and away from the base. In the subsequent civilian criminal trial, Heard was convicted of murder and sentenced to 15 to 50 years in prison. Asserting Army officials had a duty to protect her son from a known danger, Shearer’s mother sued the Army under the FTCA, saying Army officials’ negligent and careless supervision of Heard was the cause of her son’s death (*U.S. v. Shearer*, 1985).

Rejecting the claim, the Supreme Court ruled that it did not matter where a soldier’s injuries were sustained or whether the injuries were incurred incident to service for purposes of determining whether the claim is precluded by the *Feres* doctrine. The only pertinent factor in the determination was whether the claim “would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness” (*U.S. v. Shearer*, 1985, p. 59). Such was the case here, the Court held, where military managers were alleged to have been negligent in the

performance of their management obligations. Should the matter proceed to trial, “commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier’s off-base conduct” (*U.S. v. Shearer*, 1985, p. 58). All other considerations were irrelevant, the Court said, if a case required it to “hale Army officials into court to account for their supervision and discipline” of a service member” (*U.S. v. Shearer*, 1985, p. 58). Where judicial review would involve evaluating the wisdom of military managers’ decisions, the matter fell within the ambit of the *Feres* doctrine and could not serve as the basis for an FTCA claim.

U.S. v. Shearer (1985) represented a significant expansion of the *Feres* doctrine. No longer were all torts which occurred off base and off duty cognizable under the FTCA, the former state of affairs under *Brooks v. U.S.* (1949) and *U.S. v. Brown* (1954). Even such attenuated situations were barred, the Court’s inquiry no longer circumscribed by the location of the injuries or the status of the service member at the time. As such, *U.S. v. Shearer* (1985) represents a kind of final victory of the military discipline aspect of the *Feres* doctrine over the other competing rationales. The other factors were effectively jettisoned, assigned little to no value, slipping out of view behind the enormous shadow cast by military discipline.

U.S. v. Shearer (1985) also represents a dramatic increase in the hands-off approach with which the judiciary performed its oversight responsibilities of military affairs. Unwilling to hear any case which would require military personnel to have to explain why they did what they did in court, the Court in *U.S. v. Shearer* (1985) laid the groundwork for placing military officials beyond the reach of judicial review in virtually every situation. Discriminatory personnel decisions, illegal retaliation against whistleblowers, reckless supervisory actions—these and

nearly any other type of misconduct committed by military managers were immune from judicial oversight. Because ensuring governmental officials are accountable to the rule of law is a core judicial function, *U.S. v. Shearer* (1985) can also be seen as the apex of the Supreme Court's abdication of its constitutional obligation in the military sector.

U.S. v. Stanley (1987)

The *Feres* case with the most remarkable fact pattern is *U.S. v. Stanley* (1987). There, Army officials surreptitiously administered LSD to an Army sergeant, part of a secret testing program to study the effects of hallucinogenic drugs on human subjects. Stanley, the sergeant, did not find out about the situation for nearly twenty years, informed for the first time upon receiving a letter in 1975. The government correspondence sought the participation of those who had gone through the program, assessing the long-term effects. Stanley was shocked to learn he had been unwittingly used as scientific guinea pig (*U.S. v. Stanley*, 1987). But at least he better understood what had happened to him in the interceding years, including hallucinations, incoherence and memory loss, and violent episodes where he would wake up in the middle of the night and beat his wife and children, having no recollection of doing so afterwards.

Seeking to right to wrong he had suffered, Stanley filed suit against the federal government, asserting both a constitutional violation under *Bivens v. Six Unknown Narcotics Agents* (1971) and a tort claim under the FTCA. Stanley argued that the constitutional violation was distinguishable from *Chappell v. Wallace* (1983) because that case was limited to situations where a subordinate was challenging an action by a superior, a situation that implicated military discipline and required a judge to evaluate the wisdom of military managers' decisions (*U.S. v. Stanley*, 1987). His claim, by contrast, did not have a military discipline component, pertaining

to actions taken by doctors rather than officers, most of whom were civilians and operating in a laboratory setting.

U.S. v. Stanley (1987) presented a challenge to the Supreme Court for the simple reason that the sergeant's reason was correct. *Chappell v. Wallace* (1983) was in fact grounded on the theory that the superior-subordinate relationship needed to be protected from judicial interference. Wayward conduct by civilian doctors had little to do with how enlisted service members interacted with officers above him. Either the rationale of *Chappell v. Wallace* (1983) had to be expanded or Stanley had to be permitted to pursue a claim that his constitutional rights had been violated. Faced with this predicament, the Supreme Court opted to expand the rationale, bringing it into alignment with the original ruling in *Feres v. U.S.* (1950). From now on, the Court said, service members' constitutional claims under *Bivens v. Six Unknown Narcotics Agents* (1971) were prohibited as long as the claims "arise out of or are in the course of activity incident to service" (*U.S. v. Stanley*, 1987, p. 681) The Court continued: "[W]e see no reason why it should differ in the *Bivens* and the *Feres* contexts" (*U.S. v. Stanley*, 1987, p. 681). A test for liability that depends on the "extent to which particular suits call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters" (*U.S. v. Stanley*, 1987, p. 681), it went on. "Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime" (*U.S. v. Stanley*, 1987, p. 682). According to the Court, the rule enunciated in *Feres v. U.S.* (1950) was also the right one in situations arising under *Bivens v. Six Unknown Narcotics Agents* (1971).

In reaching its conclusion, the Supreme Court expressly acknowledged an important point. No empirical evidence existed supporting the Court's view that judicial review disrupted

military discipline. The Court said its point of view was an exercise of discretion, a position it reached using its best judgment and that reasonable people could certainly disagree about the wisdom of its approach. Its belief that the incident to service rule was the best approach “was essentially a policy judgment” (*U.S. v. Stanley*, 1987, p. 681), the Court wrote, one for which “there is no scientific or analytic demonstration of the right answer” (p. 681). How one designs the rule for when a judge should review the propriety of a military activity or decision “depends on how harmful and inappropriate judicial intrusion upon military discipline is thought to be” (*U.S. v. Stanley*, 1987, p. 681). That the Supreme Court adopted a broad incident to service rule demonstrated that it viewed the intrusion to be substantial. But such a belief could never be proven or shown to be correct definitively. This acknowledgement is remarkable for the honest, almost vulnerable nature of its admission, an explicit nod of the head to readers, i.e. Americans at large, that the Court was simply making a choice, one of many that could be made under the circumstances. The implication was clear. Should a different choice better reflect popular values, it should be made through the elected branches of government via the legislative process.

U.S. v. Johnson (1987)

The final case in the *Feres* doctrine line of cases is *U.S. v. Johnson*, decided in 1987, the same year as *U.S. v. Stanley*. The wrinkle *U.S. v. Johnson* (1987) presented the Supreme Court was a situation where a service member’s service-related damages were caused not by a fellow service member’s misconduct, but instead by a civilian’s. The fact pattern involved a Coast Guard pilot named Lieutenant Johnson who participated in the maritime rescue of a vessel lost at sea near the Hawaiian Islands. After the passengers were successfully reeled up to Johnson’s helicopter, officials with the Federal Aviation Agency “assumed positive radar control over the helicopter” (*U.S. v. Johnson*, 1987, p. 683). A short time later, the helicopter crashed into the

side of a mountain on the island of Molokai. All the passengers, including Lieutenant Johnson, died. Johnson's wife subsequently filed suit under the FTCA, arguing the *Feres* doctrine did not apply because of the civilian status of the officials with the Federal Aviation Agency. The suit was dismissed by the district court, but the Eleventh Circuit Court of Appeals reversed the dismissal in an en banc decision. "[W]hen negligence is alleged on the part of a Federal Government employee who is not a member of the military," the Court wrote, "the propriety of the suit should be determined by examining the rationales that underlie the *Feres* doctrine" (*U.S. v. Johnson*, 1987, p. 684), particularly the military discipline rationale. Applying this rationale, the Court found "absolutely no hint...that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial" (*U.S. v. Johnson*, 1987, p. 685). Finding the ruling to reflect a misunderstanding of the *Feres* doctrine, the government appealed to the Supreme Court.

The Supreme Court agreed with the government, overturning the appellate court decision and dismissing the lawsuit in its entirety. While it was true that the most compelling justification for the *Feres* doctrine is the protection of military discipline, the Court said, the rule itself was not limited to situations where military discipline would be disturbed. It applied categorically. Every situation where a service member was injured incident to service fell within the scope, regardless of whether the subsequent judicial inquiry would interfere with military discipline or require analysis of officials' decision-making. In other words, the Court held that the most compelling rationale was not the rule itself. The two should not be confused:

Although all the cases decided by this Court under *Feres* have involved allegations of negligence on the part of members of the military, this Court has never suggested that

military status of the alleged tortfeasor is crucial to the application of the doctrine.” (*U.S. v. Johnson*, 1987, p. 685)

The only pertinent factor was whether the injuries were incident to service. As there was no dispute that Johnson’s death was caused while he was performing military duties, his death was incident to his service and the case must be dismissed, the Court concluded.

U.S. v. Johnson (1987) is significant for three reasons. First, it expanded the application of *Feres* to situations where service members were injured or killed by non-service members, establishing that impact on military discipline was an important, but not necessary, component in the analytical process. Second, it introduced a new rationale for the doctrine: lawsuits’ impact on loyalty. The Court wrote:

Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one’s service and to one’s country. 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. (*U.S. v. Johnson*, 1987, p. 691)

Suits were allowed, in other words, because service members were disloyal to their leadership and their country when they sought to have the judiciary right a wrong they had sustained in uniform. The remarkable implications of this view are examined below.

Finally, *U.S. v. Johnson* (1987) is significant because of the fact it was decided on a 5-4 vote, with Justices Scalia, Brennan, Marshall, and Stevens dissenting. The dissenting opinion, written by Justice Scalia, constituted a blistering indictment of the philosophical underpinnings of the *Feres* doctrine, the most powerful critique ever posited by a group of Supreme Court

justices in the doctrine's nearly 70-year history. The structure, basis, and import of Justice Scalia's dissent are examined in section four.

Scholarly Commentary

Considering the significance of the policy and the radical effect it has had on members of those serving in uniform, the scholarship on the *Feres* doctrine is notably sparse. Besides the case-specific articles written on the various Supreme Court cases handed down over the years there around ten academic articles specifically addressing the doctrine itself. Notably, every commentator who has considered the broader policy implications of the doctrine has been critical of the position taken by the Supreme Court, denouncing the rule that all bars service members as a class from suing for tort damages. A similar phenomenon is observed relative to the statements made about the *Feres* doctrine by members of the judiciary. While there are a multitude of trial and appellate court opinions expressing skepticism—and even outright enmity—with the doctrine (*Bozeman v. U.S.*, 1985; *C.R.S. v. U.S.*, 1991; *LaBash v. U.S. Dept. of the Army*, 1982), not a single lower court decision has been identified where the court has endorsed the rule on a philosophical level. The most renowned of the judicial critiques was delivered by Supreme Court Justice Antonin Scalia, a scorching denunciation delivered by the conservative demigod in dissent in *U.S. v. Johnson* (1987).

Schwartz (1985) was the first scholar to examine the deleterious impact of the *Feres* doctrine and propose an alternative. Writing in the *Yale Law Journal*, Schwartz challenged the assumption that judges lack the competency to scrutinize military-based torts. He pointed out that the military as an institution is not substantially different from other specialized settings, such as civilian law enforcement agencies and complex financial sectors (Schwartz, 1985). Courts manage to assess alleged wrongful conduct occurring in these latter contexts; there is no

reason why they could not do so in the military situations, especially in the non-combat setting in which the language of the FTCA allows lawsuits. He posited that by placing military managers beyond the scope of judicial review, the *Feres* doctrine undermines accountability in the leadership ranks (Schwartz, 1985). Schwartz proposed allowing military members to sue once they left active military service. Only injuries which continued to ail the members after active duty service would be cognizable. “In order to bring a tort action, an ex-soldier would have to allege a harm that was so serious its effects were still felt after his or her discharge from the military” (Schwartz, 1985, p. 1012). By allowing long-lasting, intentional wrongs to be addressed post-service, Schwartz believed service members’ rights would be restored with minimal infringement upon military discipline.

Two years later, in 1987, Justice Scalia penned the infamous dissent in *U.S. v. Johnson*. A strict constructionist who believed statutes should not be expanded beyond the words Congress used, Scalia found the Supreme Court’s decision in *Feres* to be an untenable instance of judicial legislation. “If the Act is to be altered,” he said, referring to the FTCA, “that is a function of the same body who adopted it” (*U.S. v. Johnson*, 1987, p. 702). His criticism of the *Feres* doctrine also included the majority’s claim that exposing military officials to civil liability undermines military discipline. Not only did Congress not believe this was the case, the Supreme Court itself apparently did not think so either in its original *Feres* decision, never mentioning military discipline in *Feres v. U.S.* (1950). Instead, it was a “later conceived of” rationale the Court developed to justify its improper intrusion upon the legislative prerogative (*U.S. v. Johnson*, 1987, p. 703). While certain types of lawsuits could theoretically affect the superior-subordinate relationship, Scalia expressed skepticism that the effect could be confidently predicted: “I do not think the effect upon military discipline is so certain, or so

certainly substantial, that we are justified in holding (if we can ever be justified in holding), that Congress did not mean what it plainly stated in the statute before us” (*U.S. v. Johnson*, 1987, p. 702). Until such time as Congress, the statute’s author, saw fit to modify the FTCA, Scalia said the Court had no business changing the plain meaning of the words, saying the military discipline rationale lacked both empirical evidence and force of logic.

The next scholarly treatment of the *Feres* doctrine occurred sixteen years later, when Professor Turley published a lengthy article in 2003. Castigating the *Feres* doctrine without reservation, Turley said the judicially-promulgated policy “was fundamentally flawed from its inception on both a constitutional and statutory basis” (Turley, 2003, p. 3). Utilizing a risk management perspective, Turley explained that when neither managers nor the organization they work for can be sued when managerial decisions cause injuries, the amount of risk managers take increases. The result, according to Turley, is as easy to predict as it is unconscionable: “[T]he level of malpractice and negligence in the military appears much higher than in the private sector” (p. 4), an arrangement where the value of service members’ lives are lowered pursuant to a perverse cost-benefit analysis (Turley, 2003). Blanket immunity has had the second-order effect of encouraging military leaders to operate in areas better reserved to civilian contractors, the most problematic of which is medical services. While there is no operational reason to have military officials run large United States-based hospitals, the cost savings provided by medical staff being immune from malpractice suits inures in favor of keeping hospitals within direct military control, a more cost-effective approach than offloading these services to private medical personnel. Professor Turley’s solution is a total repeal of the doctrine and strict adherence to the language of the FTCA. Describing the development of the doctrine as poorly considered, Turley states that “*Feres* ultimately shows the perils of judicial legislation meant to craft a special

enclave” (2003, p. 6). By so doing, the judiciary has failed in its obligation of ensuring that all government officials are subject to the rule of law. Courts instead have authorized the military establishment to operate as a “separate society,” an immoral abdication of responsibility that “has a terrible cost for the citizens of this pocket republic” (p. 6), exposing the men and women who protect the country in uniform to be abused by the personnel to whom they report (Turley, 2003).

In 2007, Major Brou, then an Army JAG officer, conducted a comprehensive review of the *Feres* doctrine while attending the Army JAG Corps’ graduate school program. Summarizing her findings in a masters thesis, Brou suggested that affording military members blanket immunity was unnecessary in light of the discretionary exception, the aspect of the FTCA that maintained sovereign immunity where government officials’ actions constituted an exercise of discretion (2007). By doing away with *Feres*’ blanket protection, tort actions filed by service members would instead be analyzed by assessing whether the subject matter of the lawsuit implicated a military official’s judgment or discretion. This approach, Brou argued, would appropriately expose military officials to liability in conventional, garden variety tort situations while shielding officials from liability when making complex policy or managerial decisions (2007). She illustrated the efficacy of the approach by applying it to a variety of tort scenarios. In a routine off-duty negligence situation such a river-rafting accident where guides were reckless in taking service members down certain rapids, civil liability would attach. Guides’ failure to take the proper precautions during a recreational activity is a straight-forward tort situation, a fact pattern indistinguishable from the multitude of tort suits courts evaluate every day (Brou, 2007). By contrast, where a soldier alleges the officers in his chain of command erred in the planning and execution of a military operation, the officers’ judgment and

discretion would be at issue. There, the discretionary exception would place the allegations outside the scope of judicial scrutiny, the exemption insulating the officers from a situation where a judge second-guesses the complex military decision-making from the comfort and safety of a courtroom (Brou, 2007). Brou concludes that the discretionary exception constitutes a sufficient shield to military officials and that, therefore, the *Feres* doctrine's across-the-board immunity is both overly broad and unnecessary.

A story aired by CBS in 2009 about an egregious military medical malpractice situation sparked intense public interest in the *Feres* doctrine as well as legislative and scholarly attention. The story described the tragic death of Sergeant Rodriguez, a soldier who unnecessarily died from melanoma due to the fact that a military doctor failed to recommend he receive a routine treatment (Bahdi, 2010). The resulting public outcry caused Congress to consider legislation creating a medical malpractice exception to the *Feres* doctrine, a bill called the Carmelo Rodriguez Military Medical Accountability Act of 2009. Although the bill ultimately failed to pass, it inspired two noteworthy academic articles.

In the first, Major Bahdi, an Army JAG officer, picked up the thread developed by Justice Scalia in *U.S. v. Johnson*, arguing that there was no logical connection between medical malpractice suits and military discipline (2010). He observed how a variety of judges had openly questioned that such a nexus existed, including the district court in *C.R.S. v. U.S.*. There, the court stated:

The government fails to demonstrate how permitting this claim to go forward would imperil decisions about national security and the military mission. Allowing a suit by a former member of the military for acts unrelated to the military mission does not, on these facts, threaten the integrity of military decision making. Furthermore, *some* [italics in original] inquiry into military activities and decision making is not a sufficient rationale for barring all suits. The same, or even greater, level of inquiry may result when a civilian sues the government for conduct related to military activities.

Finally, these claims do not present the treat of a soldier haling his superior into court. (*C.R.S. v. U.S.*, 1991, p. 668)

Bahdi also noted that a logical consistency underlying military discipline argument, namely, that courts overtly scrutinize the rectitude of military doctors' conduct when civilians, rather than service members, file suit (2010). Spouses and children of service members do not fall within the scope of the *Feres* doctrine. Accordingly, they are able to file medical malpractice suits under the FTCA when injured by a military doctor's mistake. Litigation stemming from family members' suits is identical to service member suits with regard to how the judiciary assesses military doctors' behavior (Bahdi, 2010). That family-member suits are allowed reveals the fallacy of the argument that military discipline is impaired when courts evaluated the medical decisions made by military medical personnel, Bahdi concluded (2010).

The second article, published in the *Catholic Law Review*, was authored by Melissa Feldmeir. According to Feldmeir, service members become "second-class" or "discount" citizens in a system where they cannot sue when victimized by medical malpractice (Feldmeir, 2011, p. 166). Even though service members amount to only one-third of patients seen at military hospitals—the other two-thirds being dependents—service members are the only population prevented from receiving a judicial remedy. Such a distinction between military and civilian patients was irrational, she said. Feldmeir pointed out that exposing military doctors to civil liability would increase the quality of care provided at military hospitals, "which is often perceived as substandard" (Feldmeir, 2011, p. 151). She also said that service members' remedies under the existing system were inadequate, a workers compensation system where injuries sustained due to doctors' errors are compensated based on a formal scale. Disability pay does not compare to what civilian victims of comparable negligence receive under the tort system, she said, where compensatory damages, along with pain and suffering, are determined

by a judge or jury based on the totality of the circumstances (Feldmeir, 2011). In the end, however, Feldmeir recommended expansion of the Military Claims Act rather than modification of the *Feres* doctrine. An administrative process where federal officials determined if service members had suffered an injury and assessed the financial remedy, the existing system under the Military Claims Act allows for recovery from “noncombatant activities of a peculiarly military nature” (Feldmeir, 2011, p. 181). She said the Act’s scope should be expanded to include medical malpractice injuries. An intra-military review process of this type would allow for redress without interfering with military discipline through intrusion by courts. Such an approach “may, once and for all, defeat the inequities of the controversial *Feres* doctrine, but not at the expense of military discipline and command discretion—the overriding justifications in barring service members’ claims against the government under the FTCA” (Feldmeir, 2011, p. 182).

In 2013, Jennifer Zyznar examined the logical inconsistencies and incoherent justifications underlying the *Feres* doctrine. In her estimation, it was absurd to conclude that Congress did not intend service members to be included within the scope of the FTCA (Zyznar, 2013). There was nothing ambiguous about the language of the statute itself, which only excluded tort claims stemming from “combatant activities.” “Even assuming ‘combatant’ was ambiguous,” she said, “delving into the legislative history should have made it clear (to the Supreme Court) that Congress never intended to bar all service members’ claims” (Zyznar, 2013, p. 625). The upshot of the Court’s judicial activism is that “service members are left with no legal recourse, often under devastating consequences” (Zyznar, 2013, p. 626). According to Zyznar, the only credible solution was a legislative renunciation of the *Feres* doctrine (2013).

She even outlined the draft language of bill effectuating this objective, language which would constitute a simple, straight-forward abnegation of *Feres*:

The rights of service members under the FTCA shall not be denied on the determination that injuries are “incident to service.” The United States shall be liable to service members for personal injuries unless those injuries arise from combatant activities during time of war. A “combatant activity” means an activity in which a service member is engaging in active fighting with enemy forces. (Zyznar, 2013, p. 627)

Such a statute would restore the FTCA’s original intent, Zyznar asserted, without improperly burdening military discipline, a concern she believes the Court wrongly understood (2013).

Zyznar said: “When balancing the interests of military discipline and service members’ rights, it is prudent to protect individual rights. This is especially true when evidence and reasonableness suggest that the *Feres* doctrine breeds distrust of authority rather than preserving it” (Zyznar, 2013, p. 625).

Francine Banner’s 2013 article in the *Lewis and Clark Law Review* recasts military sexual trauma as a matter of class, power, and exploitation. Noting how most service members are young, poorly educated, and coming from the margins of society, Banner said the failure of military managers to protect service members from sexual assault represents a moral abdication (2013). The courts, she argued, have contributed to the imbroglio by protecting the military from judicial scrutiny, giving military wrongdoers a pass by immunizing it from judicial review. The courts’ failure to force accountability is both unconscionable and in conflict with its approach to the Don’t Ask/Don’t Tell policy. There, courts applied a heightened level of scrutiny to a policy facially discriminatory against gay service members, an approach which led to injunctions halting implementation of the policy in many instances (Banner, 2013). The judicial activism brought significant public attention to the military’s discriminatory rules and eventually forced Congress to respond to the outcry. At that point, “when the military was, at last, forced to

provide evidence for [its] claims, the policy collapsed like a house of cards” (Banner, 2013, p. 785). According to Banner, should a similar technique be utilized in the military sexual assault context, with courts employing a higher level of scrutiny and forcing military officials to answer, the claim that military discipline would be damaged by judicial review would likewise collapse. The result, she says, would be a wave of public attention which would lead to a legislative remedy (2013).

In 2014, Julie Dickerson proposed to solve the problem by creating a new administrative process, one which would provide victims of military sexual assault a method of receiving compensation. The so-called Military Crime Victims Compensation Board would be housed in the Department of Defense and function in a similar manner to victim compensation boards operated by state governments (Dickerson, 2014). The monies given to victims would come directly from perpetrators, a form of restitution where the parties responsible for causing harm would be forced to foot the bill. Victims would be able to file claims within a certain amount of time after the perpetrator was convicted at a court-martial, or in the event criminal charges were not filed, after the decision not to file charges. Compensation would include pain and suffering, an amount calculated through a formula based on the total medical expenses stemming from the victims’ injuries. “A separate military crime compensation board would provide military victims a more efficient, equitable, and expansive system of support than the patchwork state systems,” Dickerson asserted (2014, p. 213). She said an internal compensation board is better solution than repealing the *Feres* doctrine through legislation because military sexual assault victims were not eligible for compensation under the FTCA notwithstanding the *Feres* doctrine (Dickerson, 2014). This was due to the fact that the FTCA limited recovery to situations where government

officials were acting within the scope of his office or employment whereas sexual assault, an intentional tort, was never considered “official conduct” (Dickerson, 2014, p. 213).

Later in 2014, Ann-Marie Woods authored the penultimate scholarly treatment of the *Feres* doctrine. Noting former Chief Justice Earl Warren’s statement that “our citizens in uniform may not be stripped of basic rights simply because they have doffed civilian clothes” (Warren, 1962, p. 186), Woods concluded that the *Feres* doctrine had done exactly that (Woods, 2014). Under it, service members were the only cohort of Americans denied any remedy when enduring the horror of a sexual assault. Not only are military victims unable to sue the federal government under the FTCA, they are likewise unable to sue their perpetrators under state tort laws (*Perez v. Puerto Rico Nat. Guard*, 2013). She said the judiciary must reexamine its approach to service member-related torts, particularly sexual assaults, an issue made more urgent in light of the vulnerable position junior level service members are in (Woods, 2014). “The Supreme Court,” she said, “should not abandon its vital role in American democracy as a protector of ‘discrete and insular minorities’” (Woods, 2014, p. 1362). In light of the failure of political solutions, it was incumbent upon the Supreme Court to “overturn its statutory interpretation in *Feres* and adopt a narrow construction of the combatant exception,” putting an end to the “misguided reality that—although citizens for purposes of protecting the United States from foreign enemies—do not enjoy equal protection against the very government they defend” (Woods, 2014, p. 1364).

The final detailed treatment of the doctrine occurred earlier this year, in an article I wrote entitled “The *Feres* Doctrine and Accountability.” The thesis of the article is that, by immunizing military officials from civil liability and judicial review, the *Feres* doctrine frees of military managers of any meaningful accountability regime and thereby allows them to act with

impunity (Stirling, 2019). The result is that “managers in the military establishment operate in a setting where the potential for abuse of power and corruption is greater than in any other component of the executive branch” (Stirling, 2019, p. 3). Drawing upon the research in social psychology, I employed social contingency theory to explain the effect on people’s behavior of not having to account to an independent third party. According to social contingency theory, the “expectation that one is to justify one’s actions—that one is accountable—has a marked influence on those judgments, actions, and decisions” (Bovens, 2014, p. 8). This expectation enhances critical reflection and fosters precision in judgments. Conversely, when not forced to answer to an objective third party, people capitulate to their selfish, lazy impulses. Applying the theory to the military context, I stated: “Relieved from judicial oversight, military managers do not have to be careful or deliberate” (Stirling, 2019, p. 12). I also observed how a situation where governmental officials are not accountable to the other two branches of government is the exact kind of situation the Founders sought to avoid. Understanding that corruption and abuse of power are the natural by-products of unified power, the Founders instituted an intricate system of checks and balances to prevent any one branch from accumulating too much power (Stirling, 2019). The article concluded by noting the remarkable irony that it was the Supreme Court which voided Congress’ efforts to make the military accountable to the judiciary.

Summary

The preceding review of the literature brought to light the various theoretical components that produced the *Feres* doctrine. In so doing, it answered the first two research questions, describing the legal and philosophical roots of the doctrine and outlining how it has developed over time. The first part of the chapter illuminated sovereign immunity, the principle that neither the government nor governmental officials can be sued without prior consent. Despite the lack

of clarity about how much ancient England or the early America subscribed to the idea, the sovereign immunity has nonetheless become controlling judicial precedent. Section two looked at the various ways Congress has sought to soften the impact of sovereign immunity by exposing much of the governmental establishment to civil liability. The centerpiece of the rollback, the Federal Torts Claims Act, largely abrogated government officials' ability to avoid answering in court for their misbehavior.

Section three showed how, shortly after Congress has exposed military officials to judicial review, the Supreme Court took action to once again cover them with a blanket of impunity, a nearly impenetrable shield from having to explain their wrongful conduct to courts of law. Case by case from 1950 to 1987, the Supreme Court has given the military stronger and stronger protections from civil liability to the point where tort claims by service members are virtually "unreviewable." Finally, section four described how scholars reacted to the whipsaw chain of events with frustration, astonishment, and disgust. While their remedial recommendations varied, ranging from the creation of administrative bodies to adjudicate intra-military tort claims to the Supreme Court's reversal of course to Congressional nullification of the *Feres* doctrine, nearly all commentators have condemned the policy that makes those who protect the uniform the only cohort of Americans who cannot obtain judicial protection when suffering serious, sometimes horrific, wrongdoing at the hands of their co-workers.

Chapter 3: Methodology

This inquiry is a grounded theory study utilizing legal research, specifically case law and scholarly articles. In a grounded theory study of this type, the data consists of pre-existing legal documents such as constitutions, statutes, court decisions, and regulations (Russo, 1996).

Qualitative studies utilizing legal research format seek “to make sense of the evolving reality known as law” by “[looking] to past, present, and future” (Russo, 1996, p. 35). One author observed: “The reliance by courts on precedent to guide in the disposition of current cases requires legal researchers to consult previous cases for legal authority relevant to the legal issue under consideration” (Hutchins, 2007, p. 46).

To guide the examination of how the judicial system has applied the *Feres* doctrine to service members, this study utilizes two theoretical tools: reasoning by analogy and legal realism. Reasoning by analogy is a type of legal analysis wherein judges decide the cases before them by drawing analogies to past cases. Similarities in the fact patterns are shown as a way of demonstrating that a rule of law used in a previous case is applicable to an instant matter (Levi, 1949). Reasoning by analogy is the standard practice within case law because the process of showing similarities with past, established cases strengthens the credibility of a judicial decision, infusing it with a sense of legitimacy at minimum and, ideally, with a sense of inevitability. Reasoning by analogy is recognized as the most reliable of mode of examination within the academic legal community due to its rigor, systematic nature, and built-in fail-safes (Hutchins, 2007).

Legal realism, for its part, is a philosophy for understanding judicial decisions that stresses the human aspect of the process. Legal realists believe that judges make decisions based on their personal view of what the most equitable outcome is (Sunstein, 1993). Unlike legal

traditionalists, realists hold that formal rules are not essential in judicial decision-making, only coming into play afterwards, once the judge has decided what the best, e.g., most fair, result is. Formal rules are then utilized to explain or rationalize the decision, a process that grounds the outcome within the existing body of jurisprudence, showing why it was the product required under the legal framework at issue. Where the past rules, however, are out of step with what a judge believes to be the correct outcome, the judge discards the rules and makes up a new one. The animating principle behind legal realism is that judges are “reacting primarily to the fact of particular cases and not to abstract legal rules” (Levi, 1949).

Reasoning by Analogy

Analogical reasoning will be outlined first, after which legal realism will be discussed. Both concepts are closely associated with Edward Levi, former dean of University of Chicago School of Law. According to Levi, three essential steps are entailed in legal reasoning: (1) “similarity is seen between cases;” (2) “the rule of law inherent in the first case is announced;” and (3) “the rule of law is made applicable to the second case” (Levi, 1949, p. 2). A dynamic quality characterizes the process, one where legal standards are impacted and changed by the factual circumstances of new cases. Determining the extent to which a current situation is similar to the ones in previous cases is the essence of the process (Levi, 1949). The dynamic quality also extends to the fact that the cyclical nature of the endeavor, where legal rules are revised and reformulated based on the changing social norms, attitudes, and constitutional interpretations (Hutchins, 2007). The process involves a variety phases, the first being where the legal rule is built up as courts attempt to enunciate intelligible rules after comparing and contrasting cases. The second phase the rule is “more or less fixed, although reasoning by example continues to classify items inside and outside the concept” (Levi, 1949, p. 9). In the

third phase, a transformation and reformulation of the rule occurs in response to changing social and political conditions. The value of reasoning by analogy lies in the fact that it “fosters a kind of legal tectonics in which legal standards constantly are formed and reformed by comparing circumstances of prior cases to new factual situations in contemporary disputes” (Hutchins, 2007, p. 47).

One of the complexities inherent in reasoning by analogy involves assessing whether factual differences in cases are germane. According to Sunstein, determining whether differences are relevant contains four features. The first, principled consistency involves identifying a standard or doctrinal component that allows cases to be harmonized with one another, even where the outcomes of the cases are inconsistent (Sunstein, 1993). The second feature, called a *focus on particulars*, is a bottom-up approach where the objective is to develop theories or principles that hold true throughout disparate cases. Guiding principles stem from this step, principles which represent the essence of the courts’ thinking on a specific topic (Sunstein, 1993). The third feature, referred to as “incompletely theorized judgments” (p. 754) acknowledges that in practice, lawyers and judges often make judgments or advance arguments without articulating a complete legal theory. This step in the process seeks to account for the need to unpack how the argument is constructed, working backwards to trace the inferences and assumptions which underlie it (Sunstein, 1993). The fourth and final stage of analogical reason “is a degree of abstraction concerning development and application of generalized principles to compare and contrast factual situations” (Hutchins, 2007, p. 48).

A valuable aspect of analogical reasoning is its historical component. When researchers look at how a particular legal theory or doctrine has developed over time, the researcher engages in historical-legal research (Sherwin, 1999). Due to *stare decisis* (more commonly known as

legal precedent), the outcomes of earlier judicial decisions control the outcome of later decisions (Huhn, 2003). The present study constitutes historical-legal research because it traces the development of the *Feres* doctrine from its formation in 1950 to the present day. The historical orientation of analogical reasoning can be observed throughout the inquiry process, with each Supreme Court decision reformulating and reinterpreting earlier decisions, updating and sometimes dramatically changing the Court's enunciation of the doctrine's rationale and scope.

Legal Realism

The particular strand of legal realism enunciated by Levi serves as the second theoretical cornerstone of the inquiry (Leiter, 2007). Levi's view on judicial decision-making is that judges determine which party will prevail in a particular lawsuit by consulting their gut instead of previous judicial decisions. In this way, his view differs dramatically from formalists and traditionalists, legal scholars who believe judges behave much more logically, only rendering final rulings after extensive consultation with previous case law and other authoritative materials (Horwitz, 1992). According to Frederick Schauer, a law professor at the University of Virginia who wrote the introduction to the 2013 version of Levi's classic treatise, *An Introduction to Legal Reasoning*, Levi subscribed to the perspective that "judges first reached a result principally on nonlegal grounds, and only thereafter consulted the formal law in order to provide a legal justification or rationalization for the non-law produced outcome" (Levi, 1949, p. vii). In other words, in Levi's opinion, neither prior judicial decisions nor canonical legal doctrine are important factors in how a judge selects winners and losers in a litigated matter.

In one of the more famous passages of his treatise, Levi is astonishingly blunt about the role previous case law plays in judicial decision-making. As Schauer explained, "the formal

statement of law, just like the ‘meaning of a statute or constitution,’ is ‘window dressing’” (Levi, 1949, p. ix). Toward this end, Levi states:

Particularly when a concept has broken down and reasoning by example is about to build another, textbook writers, well aware of the unreal aspect of old rules, will announce new ones, equally ambiguous and meaningful, forgetting that the legal process does not work with the rule but on a much lower level.” (Levi, 1949, p. 9)

The “much lower level” (p. 10), according to Levi, was the specific details of the particular case before the judge (Levi, 1949). After considering the fact pattern of a case, judges take into account policy and equitable considerations, advancing a position consistent with how these considerations interact with the facts. While traditionalists viewed these factors as being outside the law, realists in the Levi school believed they were the paramount touchstones by which judges steered their ships. What is the best or most equitable result in the case before me? The answer to this question, not a thorough examination of relevant legal authorities, guided how judicial outcomes were delivered (Levi, 1949, p. ix).

The overt tension between Levi’s emphasis on reasoning by analogy and his belief that judges decided cases based on non-legal matters can in fact be resolved. The way to harmonize the two concepts is to understand how they relate to each other. Consider an example, one where a judge evaluates the equities of a case before him and determines that the defendant should be held liable. After reaching this position, assume then that the outcome is inconsistent with the existing case law, that it does not follow the prevailing rule applicable to the situation. Said differently, assume that when the judge reasons by analogy to the existing jurisprudence in the field of law in which he is operating, the previous cases do not support the outcome he has reached. In such a situation, the judge would have a choice: he could either modify the outcome to align with the existing rules or he could distinguish his case from previous cases, thereby making a new rule (or a corollary). Under the Levi approach, the judge would choose the latter

option, keeping his preferred outcome and bending the law as needed to accommodate how he thought the case should be decided. It would be the law which would yield in such a situation, not the right result. Schauer said:

And thus for Levi, like other Realists, formal legal rules were best understood not as guides to judicial decision but more as revisable summaries of decisions reached in the past. There rule might operate as useful heuristics or “rules of thumb” for the judge, but if the judge believed the right result (determined by some other and typically unwritten rule or principle) for some case was in tension with the indications of the previously understood rule, then it was the rule and not the best outcome that would be forced to give way. (Levi, 1949, p. ix)

In this way, reasoning by analogy can be described as form of logical thinking, while legal realism can be seen as a philosophical understanding about the way judges behave, an explanation of what motivates them. When the performance of analogical reasoning causes a judge to conclude that a conventional disposition of a case would be improper or inequitable, the judge will shift gears, distinguishing past cases and previous statements of the law from the pending matter (Sunstein, 1993). The result is that the strict adherence to analogical reasoning is jettisoned. Said differently, analogical reasoning takes a subordinate position, a secondary role, one that is always in service of the right result as opposed to the other way around. Realists believe that formalists, their ideological counterparts, are unreasonably slavish in their commitment to the analogical reasoning, adopting a belief system that holds that judges allow their minds to trump their hearts (Levi, 1949). Judges in reality do not operate like this, realists believe. In reality, judges allow neither logic, past precedent, or anything else that stands in the way of the most appropriate result.

As scholars—and Levi himself—observed, it would seem that legal realism and its emphasis on gut-level decision-making are much more applicable in the common-law context rather than with regard to statutory interpretation. Common-law adjudication involves judicial

decisions that are made in the absence of legislative pronouncements, that is, in the absence of statutes (Hutchins, 2007). There, the entire body of law is judge-made, consisting of case law where past precedents are applied to current cases to determine outcomes, an approach grounded on the doctrine of *stare decisis* (past cases control).

Statutory Interpretation

While at first it seems counterintuitive, according to Levi legal realism's application in situations of statutory interpretation is equally as significant as in case law situations. One of the reasons for this is so-called "selection effect," the reality that the only cases parties choose to litigate are those where the application of the statute at issue is unclear. In those situations, straight-forward applications of statutory language are impossible. As a consequence, judges are forced to look beneath the words the legislature used to the intent it had in writing the law in the first place (Levi, 1949). As soon as the words themselves are not dispositive, that is, as soon as other information must be brought to bear to resolve the dispute, the same dynamic which exists in the common-law context comes into play. At that point statutes come to mean whatever judges want them to mean, a setting perfectly suited to the legal realism philosophy. Instead of constituting cut-and-dried instruments for resolving disputes, ambiguous statutes are malleable, able to be molded or changed in whichever way best supports a judge's preferred outcome (Sunstein, 1993).

Legal realism's utility in the statutory realm increases when it is observed that, according to Levi and other legal realists, most, if not all, statutes are ambiguous. The ambiguity drafting does not occur by accident. To be sure, Levi asserts it is intentional, a necessary and purposeful by-product of the conditions which surround the legislative process. Thus, when Levi writes "the difficulty is what the legislature intended is ambiguous" (Levi, 1949, p. 30), he is speaking

not of sloppy draftsmanship, but instead providing insight into the structural dynamics legislators face when they write bills. As Levi explains it, legislators use general terms and vague phrasings as a coping mechanism. Frequently forced to take action by media attention given a particular issue, legislators operate in an environment where they must pass something on the topic. The specifics of the bill are not nearly as important as the very act of passing the bill. In fact, the specifics in this type of situation are much more useful to individual legislators if obscured by general, enigmatic language. Indeterminate language is preferred because it increases the chances of producing consensus within the legislative body, especially where there is polarization or divisions within the body. There, “[a]greement is...possible only through escape to a higher level of discourse with greater ambiguity. This is one element which makes compromise possible” (Levi, 1949, p. 31).

In addition to facilitating compromise, loose language can also be helpful to individual legislators, providing them safe harbor when explaining their votes on certain bills to their constituencies. In those situations, legislators can put the gloss on the ambiguity they know will be most acceptable to the voters, saying that while the bill says x, it really means y. Levi’s comment on the safe harbor aspect of vague wordage is illuminating:

Moreover, from the standpoint of the individual member of the legislature there is reason to be deceptive. He must escape from pressures at home. Newspapers may have created an atmosphere in which some legislation must be passed. Perhaps the only chance to get legislation through is to have it mean something not understood by some colleagues.” (1949, p. 31)

Controversy, however, is a condition precedent to statutory ambiguity. The very mechanics which underlie any collective body’s attempt to write a statement that reflects the entire body’s position on particular point beget a certain lack of certainty. Individuals may not share the same meaning of certain words. They may in fact have different definitions or connotations in mind

with regard to key terms during debates and discussions. “The result is that even in a non-controversial atmosphere just exactly what has been decided will not be clear” (Levi, 1949, p. 32).

The reality that structural considerations cause legislatures to resort to vague language when drafting bills means that courts are frequently faced with the task of interpreting vague statutes. When this happens, courts engage in a search for intent, looking for what the legislature meant by the words it used. Such an inquiry will also be undertaken where the words of statute lead to what judges consider to be “absurd or futile results” (Levi, 1949, p. 29). In both instances, judicial officers look “beyond the words to the purpose of the act” (Levi, 1949, p. 29), engaging in a highly speculative exercise of trying to ascertain what the legislators were thinking. Such an endeavor is fraught with complexity for the simple reason that any attempt to understand what a group—rather than a single individual—meant involves conjecture and speculation. Commentators point out that in conducting these exercises, judges are constantly susceptible to allowing their own perspective to improperly enter into the equation, a danger described by Justice Reed: “Obviously there is danger that the courts’ conclusion as to legislative purpose will be unconsciously influenced by the judges’ own view or by factors not considered by the enacting body” (Levi, 1949, p. 30). As realists see it, the danger of unconscious subjective interpretation represents an immutable feature of the interpretive process. Preventing subjectivism in this aspect of the judicial function is neither possible nor desirable, a flexibility that keeps decisions in general alignment with the communal values.

As judges respond to ambiguous statutory language or situations where statutory language yields unsatisfactory results, they give the language meaning, definition, and clarity. The clarifying process usually takes multiple decisions and unfolds over time, the first

pronouncement on the topic rarely the final or complete one (Sunstein, 1993). The jurisprudence tends to harden and mature as a consensus around a certain construction coalesces. While a leading understanding is formed, there is never, however, absolute permanence. That is, a judicial interpretation is never finally and totally fixed, unable to be changed by later decisions. According to Levi, a sizeable amount of uncertainty persists at all times. This is because a vague term “could change meaning,” Levi says, “and if frequent appeals as to what the legislature really intended are permitted, it may shift radically from time to time” (1949, p. 32). Such changeability is worrisome. “When this is done,” Levi says, “a court interpreting legislation has really more discretion than it has with case law. For it can escape from prior cases by saying that they have ignored the legislative intent” (1949, p. 32).

As Levi sees it, not only do shifting constructions of statutory language sow instability within society, they also damage the political vitality of the legislature as an instrument of government. This is because when courts act in this manner, they are essentially writing new pieces of legislation, acting more like legislative bodies than judicial bodies. Presumably courts are motivated to engage in reinterpretations when contemporary societal conditions have become out-of-step with the existing interpretation (Sunstein, 1993). Each new interpretation of a vague terms revises the meaning of the statute, affecting its meaning and effect. When courts act in this way, calibrating legal norms to what they believe are society’s best interests, they relieve legislatures of having to perform this role.

Of course, this is exactly the role legislatures are supposed to perform. It is legislatures, not courts, which are accountable to the public. Holding judges to answer for their actions is a far more indirect, complex endeavor for constituencies affected by judicial actions than holding

legislators to answer. Legislators have little motivation to act in the face of judicial activism, especially where the subject matter at issue is controversial. Levi observed:

If legislation which is disfavored can be interpreted away from time to time, then it is not to be expected, particularly if controversy is high, that the legislature will ever act. It will always be possible to say that new legislation is not needed because the court in the future will make a more appropriate interpretation.” (Levi, 1949, p. 32)

The shirking of responsibility the dynamic creates within legislatures is harmful, Levi argues. The pressure legislators are intended to be under to ensure their sensitivity to the public’s preferences is undermined. As a result, the public does not have an effective way to bring about change. A kind of paralysis ensues, a situation where no one knows what to do to modify a societal rule. When the judiciary behaves like this, the conditions are ripe for laws that are deeply unpopular. This is because courts are not designed to make sophisticated policy decisions, lacking the structural architecture to act forcefully in the face of controversy. Levi observed this feature of judicial demeanor: “Moreover, the court’s own behavior in the face of pressure is likely to be indecisive. In all likelihood it will do enough to prevent legislative action and not much more” (Levi, 1949, p. 32). A perversion of the intended rule-making process, the maladies unleashed by the judicial branch’s appeal to legislative intent as a reason for reinterpreting statutory language have long-lasting, wide-ranging effects. Courts should instead stick to their original interpretation as much as possible, according to Levi, allowing legislators to correct their interpretations via statutory amendments as needed. “The democratic process seems to require controversial changes should be made by the legislative body,” he says (Levi, 1949, p. 33). “This is not only because there is a mechanism for holding legislators responsible. It is also because courts are normally timid” (Levi, 1949, p. 33).

Summary

This study is a legal analysis utilizing legal research to evaluate case law and scholarly articles. As in all legal analysis inquiries, the data consists of pre-existing legal documents such as constitutions, statutes, court decisions, and regulations. The philosophical lens through which the legal analysis will be conducted are reasoning by analogy and legal realism. Reasoning by analogy is a form of logical thinking wherein judges and lawyers compare current factual situations to previous ones, using similarities to apply principles from past situations to current ones. Three essential steps are entailed in legal reasoning: (1) “similarity is seen between cases;” (2) “the rule of law inherent in the first case is announced;” and (3) “the rule of law is made applicable to the second case” (Levi, 1949, p. 2). Legal realism is a philosophical understanding about the way judges behave, an explanation of what motivates them. According to legal realism, decisions are reached through appeal to equitable considerations. The primary concern is the most appropriate result, not a loyal application of existing doctrinal rules. Legal realism is equally applicable to statutory construction as it is common-law adjudication. In judges’ attempt to obtain the “right result,” they ignore or change the meaning of statutory language in however they deem necessary in the given circumstance. This action is justified on the grounds of legislative intent, a justification which functions as a kind of judicial Pandora’s box that, once opened, has unpredictable, debilitating effects.

Chapter 4: Findings

This chapter sets forth the findings of the comprehensive legal research on the *Feres* doctrine. Specifically, the chapter answers the third and final research question: What is the current state of the *Feres* doctrine? The first two research questions were answered in Chapter 2, the literature review. Question one examined the legal, philosophical, and theoretical roots of the *Feres* doctrine, while question two looked at the doctrine's development over time. Chapter 4 completes the analysis by outlining the current state of the doctrine.

The findings section provides a global assessment of how lower courts have shaped and molded the policy in the 30 years since the last Supreme Court case. The chapter is divided into four parts. In the first part, a series of overarching observations are presented, themes and axioms deduced from an analysis of the entire range of the appellate caselaw. In the second part, the analytical framework that lower courts have created is described, the methodological approach courts take when adjudicating an intra-military lawsuit. Attention is given to the fact that appellate judges have wholly jettisoned the Supreme Court's framework, finding it unworkable, instead fashioning their own approach from whole cloth. In the third part, the lower courts' understanding of incident to service is outlined, the beguiling concept at the heart of the *Feres* doctrine. A series of rulings are explicated, cases illustrative of how broadly the concept has been expanded. Mention is also made of the rare instances where intra-military suits are allowed to proceed, situations where courts found the military aspect of the injuries to be too remote to justify dismissal under *Feres*. The section concludes with a description of how the doctrine's scope has been extended far beyond the federal active duty context. Lower courts have applied the bar to prohibit suits by reservists, state national guard personnel, civilians, and even private suits brought against military wrongdoers in their personal capacities.

Lack of Coherence

The first overarching observation is that appellate courts have expressed frustration with the lack of coherence contained in the Supreme Court's case law (*Estate of McAllister*, 1991; *Persons v. U.S.*, 1991; *Taber v. Maine*, 1995). The complaints registered by lower courts are noteworthy both for their quantity and intensity (*Costo v. U.S.*, 2001). Whereas American appellate judges normally exhibit a marked respect when discussing rulings from higher courts, a decorum displayed even when taking issue with the rulings, the gloves have been taken off in the *Feres* context (*Ortiz v. U.S.*, 2015). Confounded by the logical inconsistencies and shifting explanations which characterize the Supreme Court's decisions, the criticisms have been explicit, constant, and forceful, expressed in a manner which pulls no punches (*Ritchie v. U.S.*, 2013). The very language the judges have utilized is remarkable for its candor, fervor, and directness (*Atkinson v. U.S.*, 1987; *Daniel v. U.S.*, 2018).

A good example of the criticism is *Taber v. Maine*, a ruling from the Fifth Circuit in 1995. There, a three-judge panel said that the Supreme Court's *Feres* jurisprudence constituted "a singular tangle of seemingly inconsistent rulings" that had "lurched toward incoherence" (*Taber v. Maine*, 1995, p. 1032). The doctrine's theoretical underpinnings were so jumbled that discerning its precise contours amounted to an impossibility: "We would be less than candid if we did not admit that the *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today" (*Taber v. Maine*, 1995, p. 1032). The

court said the source of incoherence stemmed from its origin as judge-made law.³ The Supreme Court's "reading of the FTCA was exceedingly willful and flew directly in the face of a relatively recent statute's language and legislative history" (*Taber v. Maine*, 1995, p. 1038). By creating the policy out of thin air, and by contradicting the letter of the law, the Supreme Court assumed the responsibility of fashioning a sound rationale for its action. On that, it had failed abjectly, the court concluded (*Taber v. Maine*, 1995).

The chaos the Supreme Court interjected into the judicial system by inserting its will over Congress' has been profound. The Ninth Circuit has found making sense out of the high court's jurisprudence unfeasible. "We have reluctantly recognized, however, that a reconciliation of prior pronouncements on the [*Feres* doctrine] is not possible" (p.1477), the Ninth Circuit said in *Estate of McAllister* (1991). "It is entirely unclear which of the doctrine's original justifications survive" (p. 296), it said elsewhere (*Persons v. U.S.*, 1991). In the Ninth Circuit, judges rely almost exclusively on reasoning by analogy to past cases when resolving pending intra-military cases. "A comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases" (*Persons v. U.S.*, 1991, p. 296). This is far from the ideal approach.⁴ Under it, courts look to prior cases "most factually

³ Other courts have echoed this sentiment, finding "fault with the Supreme Court's creation of a judicial exception to a clear statutory pronouncement and the unfairness that the rule has often produced" (*Estate of McAllister*, 1991).

⁴ The standard (and preferable approach) is to draw a series of coherent principles from past decisions and then to logically apply the principles to the pending matter.

analogous to the case at bar to determine whether the *Feres* doctrine bars” the suit at issue (*Dreier v. U.S.*, 1997, p. 848).

The process of identifying similar cases and then mechanically applying them to pending matters is cumbersome, inefficient, and unsatisfying from a judicial perspective. The process is not only factually-intensive, it is also highly case-specific. Instead of working them concisely formulated postulates, judges must sift through entire fact patterns, examining how the details are similar to or distinguishable from the current matter. A two-dimensional analytical task, the act of comparing requires neither special legal training nor experience. It is more suitable to a first-year law student than a seasoned jurist, a far cry from the complex adjudicative processes judges are used to. That appellate judges, the most able and agile legal minds in the country, must resort to such a basic methodology is an acknowledgement that “the *Feres* doctrine today stands on shaky ground with its precise justification somewhat confused” (*Monaco v. U.S.*, 1981, p. 134).

Justice Ferguson, a well-known Ninth Circuit jurist, outlined the doctrine’s theoretical disarray:

We have recognized the impossibility of applying the *Feres* rationales and instead retreated to the four-prong factual inquiry described by the majority in this case. We have, in short, abandoned any pretense that there is a rational basis for the classifications drawn in the original *Feres* opinion, and yet we have continued to apply the “incident to service” test with little thought to the constitutional principles at stake. Nor have we been the only circuit to take this approach. This blind adherence has proved virtually unworkable... (*Costo v. U.S.*, 2001, p. 876)

The primary driver of the policy’s incoherence is the military discipline rationale. The “danger to discipline has been identified as the best explanation for *Feres*” (*Costo v. U.S.*, 2001, p. 866). The problem with this explanation, though, is that it is entirely undercut by the Supreme Court’s own actions, namely, the fact that the court allows civilians to sue when injured by

service members' negligence or misconduct. "If the danger to discipline is inherent in soldiers suing their commanding officers, then *no* [italics in original] such suit should be permitted, regardless of whether the 'injuries arise out of or are in the course of activity incident to service'" (*U.S. v. Johnson*, 1987, p. 699), Justice Scalia, a critic of the doctrine, wrote in dissent. "If the fear is that civilian courts will be permitted to second-guess military decisions, then even civilian suits that raise such questions should be barred. But they are not" (*Costo v. U.S.*, 2001, p. 867), the Ninth Circuit added. The selective application of the bar undercuts the discipline rationale's force and logic. Contending judicial scrutiny of military activities is harmful, while engaging in judicial scrutiny of judicial activities when the claimants are civilians, bathes the Supreme Court's decisions in a farcical glow. Oddly, the Supreme Court has never tried to explain or rationalize the contradiction.

As a result, "[f]or the past [sixty-nine] years, the *Feres* doctrine has been criticized by countless courts and commentators across the jurisprudential spectrum" (*Ritchie v. U.S.*, 2013 p. 874). The negative feedback has been steady and enduring: "With all of this confusion and lack of uniform standards, it comes as no surprise that the *Feres* doctrine, while the law of the land, has received steady disapproval..." (*Ortiz v. U.S.*, 2015, p. 822). Even the essence of the doctrine, the incident to service standard, has been disparaged: "The notion of 'incident to service' is a repository of ambiguity" (*Persons v. U.S.*, 1991, p. 295). The collective criticism has created a remarkable dissonance within the judicial branch, giving rise to a severe and pervasive disconnect between the higher and lower echelons of the court system. As one lower court observed, "[d]espite the development of elaborate policy reasons for the *Feres* doctrine, the basis for the exception has become the subject of some confusion. This confusion has led to widespread questioning of the *Feres* exception" (*Monaco v. U.S.*, 1981, p. 132).

Notwithstanding the “widespread questioning” (*Persons v. U.S.*, 1991, p. 295), however, the Supreme Court has not seen fit to change course in any way.

In that the *Feres* doctrine is a judge-made policy, lower courts have not had the benefit of consulting the FTCA’s legislative history for guidance. Congress’ pre-passage comments normally provide judges useful interpretive aids in deducing a statute’s purpose. The value of the FTCA’s legislative history, though, has been undermined by the Supreme Court’s express nullification of the statute’s language. By holding the FTCA is not applicable to military members, despite the fact that the statutory language makes it applicable, the high court has eliminated the value of the FTCA’s legislative history. Lower court judges have been left to make sense of the doctrine by themselves.

Expansion

The second general observation is that, in the thirty years since the last Supreme Court decision, appellate courts have dramatically expanded the *Feres* doctrine’s application, scope, and reach. Under this broadened approach, even injuries bearing little connection to military duties have been swept within the policy’s scope. Noting the phenomenon, the Tenth Circuit observed: “As a result of the broad application of the incident to service test, the *Feres* doctrine has been applied consistently to bar *all* [italics in original] suits on behalf of service members against the Government based upon service-related injuries” (*Ricks v. Nickels*, 2002, p. 1128). The Ninth Circuit has echoed this sentiment: “In recent years, the [judiciary] has broadened *Feres* to the point where it now encompasses, at a minimum, *all* [italics in original] injuries suffered by military personnel that are *even remotely related* [italics in original] to the individual’s *status* [italics in original] as a member of the military” (*Persons v. U.S.*, 1991, p. 296).

The expansion of the doctrine's reach by lower courts elicits a question of causation. Why exactly has an expansive even remotely related standard been adopted? There appears to be two reasons. The first is the sense of awe judges appear to feel when they consider military matters. The second is the loose definition given to the concept of military discipline. Each reason is described in turn.

Sense of Awe

According to the Ninth Circuit, much of the lower courts' enlargement of the *Feres* doctrine has little to do with logic, reason, or even precedent. Instead, it is a by-product of a much more visceral and emotional consideration, specifically, the sense of awe judges feel when reviewing conduct occurring in a military context. The Ninth Circuit described the situation in

Persons:

For all the complexity of the evolution of the (*Feres*) doctrine, what is *not* [italics in original] unclear...is its overall trend. From *Brooks*, the first Supreme Court case addressing an FTCA suit brought by a service person, to *Johnson*, (the most recent,) the jurisprudence has been guided by an *increasing sense of awe for things military* [italics in original]. (*Persons v. U.S.*, 1991, p. 295)

Emotion, as such, is apparently a driving force behind judges' decision to pull their punches. According to this explanation, judges are too star-struck to perform judicial review when it comes to evaluating whether intra-military conduct is consistent with controlling legal norms. Instead, judges opt to avert their gaze from the alleged wrongdoing and, regardless of how serious or egregious it is, allow it to occur with impunity. One could hardly be blamed for concluding that this is both an odd and disconcerting way for judges to behave.

In addition to being troubling, the sense of awe theory helps explain the extreme form of deference judges exhibit. The deference is so immense that "practically any suit that implicates military judgments and decisions runs the risk of colliding with *Feres*" (*Pringle v. U.S.*, 2000, p.

1223). The deference “prohibits not only those suits that directly call into question military decisions, but also the type of claims that...would involve the judiciary in sensitive military affairs” (*Millang v. U.S.*, 1987, p. 535). That such an extreme brand of deference has an emotional origin, while disquieting on one level, is oddly satisfying on another. It is hard to conceive of a rational reason for judges to willfully fail to perform their jobs. Ascertaining that the behavior is emotional in nature, while hard to square with conventional notions of judicial behavior, is at least explanatory.

Loose Definition of Military Discipline

The second reason for the broadening can be traced to the concept of military discipline. Unwilling (or unable) to give the concept a fixed definition, courts have allowed the term to remain amorphous and open-ended. The ambiguity has been resolved by finding discipline to be implicated practically everywhere. According to *Dreier v. U.S.*, courts “have given a broad reach to *Feres*’ ‘incident to service’ test and have barred recovery by members of the armed services for injuries that at first blush may not have appeared to be closely related to their military service or status” (1997, p. 848).

Consider *Millang v. U.S.* (1987), a Ninth Circuit case. There, a service member drove over another in a civilian automobile during an off-duty picnic. The injured member subsequently filed suit under the FTCA alleging the driver of the vehicle had been negligent. Dismissing the suit, the court said that military discipline would be disturbed should it examine the matter and assess fault: “Although [the injured party] does not specifically challenge a military decision in this case, a claim that an on-duty soldier acted negligently while discharging his responsibilities in an area subject to military control is the type of claim that could well call military decisions into question” (*Millang v. U.S.*, 1987, p. 535).

Such an elastic interpretation of military discipline leaves little activity outside its reach. Instead of assessing whether the driver had behaved recklessly, an assessment judges routinely perform, the *Millang* court said it would be inappropriate for civilian judges to evaluate why the driver, a service member, “was sent to the area by his superiors” (1987, p. 535). Such an inquiry, the court said, would open the door to other service members “bringing similar suits could allege inadequate supervision or training, requiring military personnel to defend their actions in court” (*Millang v. U.S.*, 1987, p. 535). As such, a garden variety car accident between two off-duty service members was converted into a military discipline matter. Something which would be a conventional tort suit in any other context became a sensitive military matter.

Unfair Effect upon Service Members

The third overarching observation is that appellate courts have repeatedly complained about the harsh and unjust effect the *Feres* doctrine has on service members. Judges have repeatedly characterized their rulings as unfair, inequitable, and severe. In doing so, they have pointed out the unreasonableness of a policy that bars suits by injured service members yet allows injured civilians to sue. Negligence stemming from off-duty recreational activities frequently injury both service members and civilians. The civilians can sue but the service members cannot. The only distinction between the two categories of injured party is their military membership, a factor of little to no relevance in the context of recreational events. Judges have indicated that the distinction smacks of arbitrariness and unfairness.

The sentiment is captured in *Costo v. U.S.* (2001). There, both service members and civilians were injured during an off-duty recreational river-rafting trip conducted under the sponsorship of a military welfare program. Finding the *Feres* doctrine barred the service members’ suits, the court drew attention to the ruling’s unfairness:

As we noted at the outset, we apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. Rather, in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes. But until Congress, the Supreme Court, or an en banc panel of this Court reorients the doctrine, we are bound to follow this well-worn path. (*Costo*, 2001, p. 869)

Dissenting, Justice Ferguson was struck by the arbitrariness of the distinction between how civilians and service members were treated. Saying it was not rational, he laid bare the doctrine's internal contradictions:

The holding today would have allowed any of the civilians injured or killed on the trip to sue, but barred such recourse to the military personnel, despite the fact that the two suits would have implicated virtually identical policy concerns regarding the law of the situs and military decision-making. On the other hand, had *Costo* and *Graham* participated in a similar rafting trip run entirely by civilians, they may have been able to sue, yet still collect veteran's benefits. I cannot find a rational basis for the court to engage in such line-drawing on the basis of an "incident to service" test. (*Costo*, 2001, p. 875)

Atkinson v. U.S. (1987) underscores the inequity of the distinction. There, a service member died during childbirth due to military medical staff's negligence. Fortunately, the service member's child survived. A civilian, the child was allowed to file a claim under the FTCA, but the mother's estate's suit was barred. Noting the irony, the court said: "So here the government settles the claim of the estate of Baby *Atkinson* and refuses the claim of the baby's mother" (*Atkinson v. U.S.*, 1987, p. 206). The court went on: "Common sense suggests that a single tortious act should not result in different legal consequences for different victims. But *Feres* dictates differently" (*Atkinson v. U.S.*, 1987, p. 206).

Moral Injury Incurred by Lower Court Judges

The fourth general observation pertains to impact applying the *Feres* doctrine has on judges personally. The data suggests the *Feres* doctrine has a "corrupting effect" upon jurists who have to deal with it. That is, judges have expressed deep feelings of guilt, remorse, and

regret at having to implement the policy, expressions suggestive of self-hate and a sense of repulsion at being forced to act in a manner which violates their values and ethics. To observe such a sentiment at the appellate level of the federal judiciary is truly remarkable. The view can be summarized as follows: Having to dismiss a righteous lawsuit filed by service member sickens us, but we have no choice—the Supreme Court’s *Feres* line of cases requires us to do so, forcing us to act in a manner we consider both immoral and unjust.

The sentiment is observable in *Monaco*. “The result in this case disturbs us,” the Ninth Circuit said. “If developed doctrine did not bind us we might be inclined to make an exception in cases such as this. Unfortunately, we are bound, and the decision of the district court must accordingly be AFFIRMED [emphasis in original]” (*Monaco v. U.S.*, 1981, p. 134. In *Persons v. U.S.* (1991), the court noted the “discomfort” judges experience when applying the policy: “It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*” p. 299). The court in *Persons v. U.S.* (1991) went on to say that reluctance accompanies the application of the troubled doctrine: “In light of the foregoing, we must affirm. In so doing, we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine” (p. 299).

It is hard to characterize the fact that judges are bound to apply a policy they consider legally and morally wrong as anything other than piteous. Observing a loss of agency is always saddening on a moral level. But it is where the obligated behavior contradicts the actor’s values that a pathetic quality is produced, giving rise to a dynamic of self-abnegation. The nihilism associated with having to be a party to *Feres*’ unjustness is visceral: “Seemingly manacled by precedent, this Circuit has repeatedly expressed its strong reservations [about the *Feres* doctrine] before ultimately overcoming them” (*Persons v. U.S.*, p. 299). The nihilism is likewise

observable in *Daniel v. U.S.* (2018), a case where a Navy nurse died during childbirth. The nurse's death stemmed from egregious negligence of Navy medical personnel. Dismissing the suit with great reluctance, the Ninth Circuit said: "Lieutenant Daniel served honorably and well, ironically professionally trained to render the same type of care that led to her death. If ever there were a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so" (*Daniel v. U.S.*, 2018, p. 982).

Scholars indicate that a moral injury is sustained when a person is obligated to act in a manner that violates their moral conscience (Litz, 2014). Moral injury can be the cause of profound emotional and spiritual shame (Shay, 1998). At the core of the concept is a sense of helplessness, of being unable to affect the outcome of a situation which is deemed to be indecent or inhumane (Vargas, 2013). Scholars have found the damage stemming from moral injuries to be most severe when people are forced to take part in the objectionable conduct, that is, when direct participation is required as opposed to observation (Brock, 2012).

Seen through this theoretical lens, it would appear that appellate judges are operating in an environment where moral injury is likely to occur. Compelled to override their strong reservations about the justness and propriety of the *Feres* doctrine, appellate judges are obligated to hand down rulings they believe to be repugnant. This includes denying the family of a Navy nurse who died in childbirth the opportunity to hold the negligent medical staff accountable (*Daniel v. U.S.*, 2018). It also includes preventing rape victims from holding the officials accountable who allowed the rapes to occur (*Cioca v. Rumsfeld*, 2013). If the scholarship in the field of moral injury is accurate, it can be expected that guilt and shame, along with feelings of self-contempt and disgust, are the psychological byproducts of these judicial rulings.

Analytical Framework

In this part, the analytical framework developed by the lower courts is outlined. Lower courts have fashioned a standard analytical framework to resolve intra-military FTCA lawsuits, that is, a way to think through and decide who prevails. Instructed by the Supreme Court that they cannot review injuries that are incident to service, lower courts have had to figure out a way to determine what incident to service means in any given situation. They have concluded that using the Supreme Court's approach is impracticable. According to the Ninth Circuit, the Supreme Court's reasoning is so riddled with logical inconsistencies that "[w]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable" (*Costo v. U.S.*, 2001, p. 867). The "various cases applying the *Feres* doctrine defy reconciliation" (*Costo v. U.S.*, 2001, p. 867). As a consequence, the Ninth Circuit, like most circuits, "have shied away from attempts to apply [the Supreme Court's] rationales" (*Costo v. U.S.*, 2001, p. 867).

The most popular analytical framework lower courts have developed is a four-prong test, referred to as the "Johnson Factors." The test involves a fact-based assessment:

We have identified four non-exclusive factors relevant to determining whether *Feres* bars an action: (1) the place where the negligent act occurred; (2) the plaintiff's duty status when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a service member; and (4) the nature of the plaintiff's activities at the time of the negligent act. None of these factors is dispositive; instead, we look to the totality of the circumstances." (*Schoenfeld v. Quamme*, 2007, p. 1019).

The test represents an effort to give meaning to the term incident to service, a term the Supreme Court has never defined. The ideal situation is when a previously-decided case is analogous to the one under consideration. "Comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases" (*Costo v. U.S.*, 2001, p. 867). There, the judges' job becomes much easier from an analytical perspective, able to employ a straight-forward factual comparison.

The Fifth Circuit employs a more succinct version of the test, using only three factors: “This Circuit uses a three-factor analysis for whether a service member's injury was incident to military service: (1) duty status, (2) site of injury, and (3) activity being performed” (*Regan v. Starcraft Marine*, 2008, p. 634). The First Circuit, for its part, utilizes a slightly different formulation:

The First Circuit takes a very broad view of “incident to service.” After a plaintiff is determined to be a member of the armed services, her injuries must be incident to service for *Feres* to bar civil actions. To determine whether an injury was incident to service the court considers, whether it occurred on a military facility, whether it arose out of military activities or at least military life, whether the alleged perpetrators were superiors or at least acting in cooperation with the military ... whether the injured party was himself in some fashion on military service at the time of the incident. (*Day v. Mass. Nat. Guard*, 1999, p. 682)

Each of the tests is intended to determine one question: do the injuries under review contain a distinctively military component? If the injuries are deemed to be military in nature, courts will dismiss the case, not letting it proceed: “The important question is whether the service member on active duty status was engaging in an activity that is related in some relevant way to his military duties” (*Johnson v. U.S.*, 1983, p. 1436). The courts’ concern is with interference with the military’s disciplinary system: “The most relevant line of inquiry is whether or not the service member’s activities at the time of the injury are of the sort that could harm the disciplinary system if litigated in a civil action” (*Johnson v. U.S.*, 1983, p. 1439). The stated goal is to avoid taking cases that involve “the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review” (*Johnson v. U.S.*, 1983, p. 1439).

How Lower Courts Apply the Concept of Incident to Service

Part three looks at how lower courts have significantly broadened the concept of incident to service. Courts have found injuries to be military in nature where the military aspect of the injuries is remote, such as when the injuries were sustained during an off-duty recreational

activity. The fact patterns considered by lower courts have been much wider and more varied than those considered by the Supreme Court. In each of the cases considered by the Supreme Court, the military component of the plaintiff's injuries was relatively straightforward (*Costo v. U.S.*, 2001). There, the suits involved either a situation where a service member was injured while performing assigned military duties (such as in *U.S. v. Johnson* [1983], where a Coast Guard service member was killed while performing an ocean rescue) or one where the court was asked to evaluate the propriety of senior officials' operational decisions (such as in *U.S. v. Shearer* [1985], where the suit challenged management's handling of a service member with a violent streak).

With the exception of *Brooks v. U.S.* (1949), an off-duty car accident case, the Supreme Court has not heard cases where the military aspect of the injuries is remote. Remote injury cases have been the exclusive province of lower courts, meaning the analyses have not had the benefit of direct high court precedent.⁵ Lower courts have dealt with the absence of direct binding authority by erring on the side of finding a military connection. The prevailing approach is epitomized by *Persons v. U.S.* (1991), where, the Ninth Circuit observed that "the Supreme Court has broadened *Feres*, to the point where it now encompasses, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military" (p. 296). The incident to service test has been interpreted to encompass even those injuries "that are attenuated from the servicemember's duty status" (*Ricks v. Nickels*,

⁵ Lower courts have acknowledged this point, saying "it bears note that the Supreme Court has not had occasion to apply *Feres* nearly so broadly as have the circuit courts" (*Costo v. U.S.*, 2001, p. 869).

2002, p. 1128). Courts have only found the injuries to be so remote that they have allowed the litigation to move forward in a handful of situations, escaping the *Feres* bar. A representative sampling of cases is outlined below.

Remote Injuries Found to be Incident to Service

Most lower courts have held that a service member's remote injuries are incident to service. This includes injuries stemming from off-duty recreational activities. Even though the activities giving rise to the injuries were unrelated to combat, operations, or training—and even occurred off-base while the service member was not on duty—the injuries have nonetheless been swept within the ambit of *Feres*. Consider *Costo v. U.S.* (2001) and *Bon v. U.S.* (1986). In both cases, service members were killed during off-duty boating activities due to the negligence of their civilian guides. The activities in both were run by the Military, Welfare, and Recreation (MWR) program, a military-sponsored organization that conducts recreational events. That the service members were not performing military duties and were far away from their bases at the time they were injured was of no consequence, the courts said. “It has long been recognized—in our court, at least—that military-sponsored activities fall within the *Feres* doctrine, regardless of whether they are related to military duties,” the court remarked (*Costo v. U.S.*, 2001, p. 868). Notably, neither court made any attempt to explain how judicial review would impair military discipline. Instead, they relied on the fact that previous decisions had extended *Feres* to the recreation context. For better or for worse, this precedent was binding: “Whatever the original scope of the *Feres* doctrine, it is clear that it has been interpreted through the lower courts—and, specifically, by [the Ninth Circuit]—to include military-sponsored recreational programs. Therefore, we are compelled to hold the estates' suit is barred” (*Costo v. U.S.*, 2001, p. 869).

The same reasoning has been applied to a wide assortment of recreational situations. The Tenth Circuit held that off-duty soldier beaten up by gang members outside an MWR-operated social club was barred from suing (*Pringle v. U.S.*, 2000). The Seventh Circuit tossed out a suit by service members training for the Olympics (*Jones v. U.S.*, 1997). Even though the service members' injuries were totally unrelated military duties, the court held they were "a consequence solely of their status as members of military" (*Jones v. U.S.*, 1997, p. 301). The Eleventh Circuit said a lightning strike on a Navy-run golf course was incident to service (*Starke v. U.S.*, 2007). So were injuries sustained while playing in pool (*Chambers v. U.S.*, 1966), running on a softball diamond (*McVan v. Bolco*, 1984), and riding a horse (*Hass v. U.S.*, 1975).

Disturbingly, even injuries from sexual assault have been deemed incident to service. The Sixth Circuit barred a suit by a college student who was sexually assaulted while participating in a ROTC program (*Lovely v. U.S.*, 2009), while the Second Circuit dismissed a suit by a female cadet who was assaulted at a military academy (*Doe v. Hagenbeck*, 2017). The Ninth Circuit said that an incarcerated service member sexually assaulted by another inmate in not able to sue (*Dexheimer v. U.S.*, 1979), as has the Tenth Circuit (*Ricks v. Nickels*, 2002). Both the Seventh (*Smith v. U.S.*, 1999) and Eighth Circuit (*Stubbs v. U.S.*, 1984) have ruled that female soldiers sexually assaulted by drill sergeants during basic training are barred from suing, even where the trauma is so severe it leads to the soldier's suicide (*Stubbs v. U.S.*, 1984). Courts have even said that sexual assaults occurring during routine medical exams are incident to service (*Pottle v. U.S.*, 1996). High school students sexually assaulted by recruiters have likewise been banned from suing, notwithstanding the fact they were civilians at the time (*Doe v. Hagee*, 2007). Not only have courts stopped survivors from suing the government under an FTCA claim, they have

also barred survivors from suing the perpetrators individually in state court proceedings (*Perez v. Puerto Rico Nat. Guard*, 2013).

Remote Injuries Found Not to be Incident to Service

In a tiny fraction of cases, the military aspect of the harm-producing event has been considered so unrelated to military duties, they were not incident to service. In these instances, the service members' suits were allowed to proceed through the litigation process, clearing the motion to dismiss stage. Many of the cases emanate from the Fifth Circuit, which has been reluctant to extend the doctrine to recreational activities. In one case, for instance, the Fifth Circuit ruled that an off-duty boating accident was not incident to service: "The further from uniquely military functions an activity may be, and the further from a military base the incident occurs, the less justified is the *Feres* bar" (*Regan v. Starcraft Marine, LLC*, 2001, p. 631). In another, the Fifth Circuit ruled that a service member injured during a recreational boating accident could sue (*Kelly v. Panama Canal Com'n*, 1994). "Captain Kelly was not directly subject to military control," the court said, but instead "away from his command engaged in recreation that had little if any oversight by the military" (*Kelly v. Panama Canal Com'n*, 1994, p. 601). Performing judicial review in such a situation, the court concluded, would not interfere with military discipline in any meaningful way. Interestingly, both cases are practically indistinguishable from the litany of recreational cases cited earlier where *Feres* bars were imposed, a fact further underscoring the case law's incoherence.

In *Dreier v. U.S.* (1997), the Ninth Circuit held that the death of an off-duty soldier killed in a freak accident during "an afternoon of relaxation and beer drinking" (p. 848) was not incident to service. Although factually similar to *Bon* and *Costo*, cases where the Ninth Circuit sustained a *Feres* bar, the *Dreier* court nevertheless said military discipline was not implicated:

“We are not dealing with a case where the government’s negligence occurred because of a decision requiring military expertise and judgment” (*Dreier v. U.S.*, 1997, p. 850). The Ninth Circuit has also held that car accidents which are off-duty and unrelated to military duties are beyond *Feres*’ scope (*Green v. Hall*, 1993; *U.S. v. Johnson*, 1983). Similarly, a court in Hawaii allowed a service member to sue when a sandwich he purchased at an on-base Burger King contained a needle (*Bartholomew v. Burger King*, 2014). Military discipline was not at issue, the court said:

Although it is possible that some decisions of the Garrison Commander regarding management of a Burger King could conceivably become implicated if *Feres* did not bar this type of suit, such “military decisions” could be questioned in a suit brought by a civilian—a possibility under the FTCA that necessarily exists precisely because the Burger King was open equally to civilians and military personnel. That is, barring this suit could not further this *Feres* justification. The same types of “military decisions” could be questioned in a different suit (not “incident to service”) by a civilian. (*Bartholomew v. Burger King Corp.*, 2013, p. 1102)

One of the most noteworthy case where injuries were deemed unrelated to service is *Taber v. Maine* (1995). *Taber v. Maine* (1995) is significant because in it, the three-judge panel from the Seventh Circuit reformulated the standard analytical framework. Instead of applying the four-part *Johnson* test or a variation thereof, the court utilized an employment law perspective, modified slightly for the military context. The court asked two questions. First, was the injured service member acting the scope of their employment? Second, would judicial review of the incident interfere with military discipline?

The wrongdoer in *Taber v. Maine* (1995), a sailor named Maine, got drunk at a Navy-sponsored party while on base. He then left the base and caused a car accident due to his drunkenness, injuring a fellow on-duty sailor named Taber. Answering the first question, the court said Taber was not acting within the scope of his employment when he Maine injured him:

[W]e hold that the link between Taber’s activity — the injured party — when he was injured and his military status is too frail to support a *Feres* bar. Put another way, given the circumstances surrounding Taber’s collision with Maine, it is hard to imagine that the government would have been vicariously liable if Taber had driven negligently and injured a third party. If Maine’s actions fit the traditional pattern of a “detour,” which gives rise to employer liability even where the employee’s activity does not directly benefit the employer, so Taber’s actions represent the classic “frolic,” which describes behavior that is not properly part of the employer’s enterprise.

There is nothing characteristically military about an employee who, after working-hours are done, goes off to spend a romantic weekend with a companion. Nor is there anything particularly military about having dinner with that companion’s family at their home, and helping to fix their car. Finally, there is nothing especially military about returning to the companion’s house intending to spend the rest of the weekend engaged in more intimate rest and recreation. (*Taber v. Maine*, 1995, p. 1051)

The court then turned to the second question, whether judicial inquiry would interfere with military discipline. Holding discipline would not be disturbed, the court said:

It is difficult to see how FTCA damage awards can, except in the rarest of cases, interfere with a disciplinary relationship between the government and the military tortfeasor. The issue in is typically not whether the military is permitted to do certain things. It is, instead, whether a member of the armed services has behaved negligently or otherwise wrongfully. If that employee committed a tort—did something that if done by a civilian would give rise to liability—and the act was in the scope of government employment, the government is *prima facie* liable unless something about the injured plaintiff—like military ties—bars liability. If the government is liable the government is held to pay damages. But paying damages does not mean that the military is told by a court that it must do things differently, or even that it must take steps to control its employees. (*Taber v. Maine*, 1995, p. 1047)

The court’s analysis is significant because it represents a much narrower reading of military discipline. Under the court’s reading, the only type of judicial action which could interfere with military discipline is the active kind, where a court directs a military official to do or not do a particular thing. This would include issuing an injunction or directing specific performance. The simple act of evaluating after the fact whether certain conduct comports with accepted society norms for carefulness does not interfere with military activities, the court said. Nor does the assessment and imposition of money damages under the FTCA. These are passive activities which do not impact military decision-making or operations. “Injunctions and

regulations tell people what they must do and what they must not do, and it is these types of intrusions that would entangle courts in military affairs,” the court said (*Taber v. Maine*, 1995, p. 1048). “Tort judgments do neither of these things. Of course, the military or other agencies of government may themselves decide to alter some forms of military behavior as a result of a damage award. But that decision, that interference, is not the court’s” (*Taber v. Maine*, 1995, p. 1048). Under this analytical framework, nearly all suits stemming from intentional wrongdoing, recreational activities, and medical malpractice suits would be allowed to proceed. Only situations where the performance of military duties was directly at issue would military discipline be implicated, forcing an incident to service finding and dismissal. As such, *Taber v. Maine* (1995) represents an alternative to the prevailing judicial approach to intra-military suits.

Application Beyond the Federal Active Duty Context

This section describes how lower courts have broadened the scope of the *Feres* doctrine, applying it to situations far beyond the federal active duty context. In the standard intra-military suit, the plaintiff is a service member on federal active duty (such as a soldier in the Army or a sailor in the Navy) who has incurred physical injuries due to the negligence of other service members. While this is the standard case, it is not the only variation of intra-military suit. Lower courts have reviewed suits filed by reservists (as opposed to active duty service members) as well as suits filed by members of state national guards (as opposed to the federal military). Lower courts have also reviewed cases involving non-physical injuries such as constitutional or statutory violations. Suits filed by civilians working along-side service members have likewise been reviewed, as have those filed by the children of service members where the children’s injuries stem from their parents’ military service. In the vast majority of these non-standard

situations, lower courts have held that the injuries are incident to service and the service members cannot sue. Each variation is examined in turn.

Reservists

Lower courts have held that the injuries sustained by reservists fall within the scope of the doctrine. As the Tenth Circuit said, “[a]lthough most of our *Feres* doctrine cases, like *Feres* itself, involve servicemembers who held active duty status when they were injured, we have previously held that active duty status is not necessary for the *Feres* ‘incident to service’ test to apply” (*Quintana v. U.S.*, 1993). Reservists are part-time service members who typically perform military duty called “inactive duty training” one weekend per month and two weeks in the summer (*Mattos v. U.S.*, 1969). It is not uncommon for reservists to sustain injuries due to the negligence or wrongful conduct of fellow service members during periods of inactive duty training. Courts have held that inactive duty training is the same as active duty for purposes of the *Feres* doctrine, declaring that injuries incurred during training periods are non-reviewable.

In *Wake v. U.S.* (1996), for instance, a reservist in a ROTC program could not sue for injuries sustained in a car accident. There, the driver, an ROTC instructor, was driving the reservist to campus after an ROTC-related activity. If the case was allowed proceed, the Second Circuit said, the court would have to scrutinize how the instructor, a military officer, operated the vehicle. Such scrutiny implicated the military discipline rationale of the *Feres* doctrine:

[The reservist’s] suit would undoubtedly implicate military judgments concerning the training and supervision of military personnel as well as decisions concerning the maintenance of military vehicles, such as the one involved in this accident.

The *Feres* doctrine was intended to avoid civilian court scrutiny of military discipline and policies such as those necessarily implicated by an accident in a military vehicle driven by a military officer. Thus, *Feres*’ third rationale urges a bar to [the reservist’s] FTCA claim so as to avoid disruption of military order. (*Wake v U.S.*, 1996, p. 62)

The Eighth Circuit employed the same rationale in *U.S. v. Carroll* (1966) to dismiss a suit where a reservist was hurt traveling to a weekend drill. There, a reservist voluntarily opted to utilize a military aircraft to fly to his duty station, sustaining injuries en route due to the pilot's negligence. That the reservist voluntarily chose to utilize military transportation was of import to the court. Adjudicating the case, the court wrote, would force it to second-guess the operation of a military aircraft. The simple fact the injured party was a reservist on his way to training implicated military discipline to a sufficient degree to necessitate the case's dismissal (*U.S. v. Carroll*, 1966).

State National Guards

Lower courts have likewise held that state national guard personnel come within the ambit of the doctrine. Service members in state national guards are state employees (*Clark v. U.S.*, 2003; *U.S. v. Hutchings*, 1997). Most state guard personnel serve in a reserve capacity, participating in inactive duty training one weekend per month and two weeks in the summer (Stirling & Lindgren, 2015). Courts have found the rationale underlying the *Feres* doctrine, particularly the military discipline aspect, applies equally to injuries sustained by guard service members (*Schoemer v. U.S.*, 1995). According to the Third Circuit, the "*Feres* doctrine of intramilitary immunity bars a suit raising state law claims for damages for injuries arising from, or in the course of activity incident to, military service brought against a state national guard by a guardsman" (*Matreale v. N.J. Dep't of Military & Veterans Affairs*, 2007). The Ninth Circuit has echoed this sentiment, saying "[i]t is beyond question that the *Feres* doctrine generally applies to claims brought by National Guard members" (*Stauber v. Cline*, 1988, p. 399).

The animating principle underlying courts' decision to treat state military personnel in the same manner as federal military personnel is that judicial intrusion into military matters would

be involved either way (*Jones v. Crittenden*, 2002). The state nature of the military institution is not pertinent to this consideration (*Zaccaro v. Parker*, 1996). The germane issue is the act of second-guessing of military officials, something courts say occurs with intra-military suits in general, regardless of whether the suit stems from the state or federal military context (*McComas v. Ohio Nat. Guard*, 1981). The Third Circuit underscored the point, saying the concern over intrusion is “equally as compelling in the context of lawsuits brought by [full-time state duty] guardsmen ... as it is in the context of lawsuits brought by [federal active duty] guardsmen” (*Matreale v. N.J. Dep't of Military & Veterans Affairs*, 2007, p. 156).

Non-Physical Injuries

Lower courts have also held that the non-physical injuries fall within the scope of the doctrine. They have taken their lead in this regard from the Supreme Court’s actions in *Chappell v. Wallace* (1983) and *U.S. v. Stanley* (1987), cases where the Supreme Court said that service members could not maintain suits for constitutional violations under *Bivens v. Six Unknown Narcotics Agents* (1971). As the Fifth Circuit explained, extending deference to the non-physical context is “premised on the disruptive nature of judicial second-guessing of military decisions” (*Walch v. Adjutant Gen'ls Dept. of Tex.*, 2008, p. 295).

Courts have taken the view that unless a statute expressly applies to service members, the legislature at issue did not intend the protection to apply in the military context (*Coffman v. Michigan*, 1997). As a result, courts have dismissed suits filed by service members where the statutory language is silent as to application to the military, including the American with Disabilities Act (*Coffman v. Michigan*, 1997), the California Fair Housing and Employment Act (*Estes v. Monroe*, 2004), and state whistleblower laws (*Dudney v. State of Ga DOD*, 2013). Suits have also been dismissed where service members have alleged constitutional violations

under section 1983 of the United States Code (*Crawford v. Tex. Army Nat'l Guard*, 1986), Title VII of the United States Code (*Overton v. N.Y.*, 2004), and racial discrimination (*Stinson v. Hornsby*, 1987).

Judges have rested their rulings on the fact that neither Congress nor state legislatures have expressly applied any of these protections to apply to service members (*Estes v. Monroe*, 2004). Judges have added, though, that if they are wrong in any way and that the statutes were intended to apply to the military, legislatures are free to amend the relevant statutes accordingly. That legislative modification has not occurred is offered up as a kind of proof of the propriety of their position: “Neither Congress nor the Supreme Court has seen fit to reverse course” (*Ortiz v. U.S.*, 2015, p. 825), the Tenth Circuit said.⁶ The subject of legislative modification of the *Feres* doctrine is revisited in Chapter 5.

Suits by Civilians

Lower courts have held that civilians who work alongside service members fall within the scope of the *Feres* doctrine most of the time. The most common category of civilian filing suit against service members is the so-called “dual status military technician.” These are federal civilian employees who augment active duty personnel, working military installations and other facilities (*Leistiko v. Stone*, 1998). Dual status technicians are called dual status because they

⁶ The strength of this argument is questionable. The Supreme Court itself has criticized the notion that congressional silence is a sign of agreement: “The fact that Congress has remained silent or has re-enacted a statute which we have construed, or that congressional attempts to amend a rule announced by this Court have failed, does not necessarily debar us from re-examining and correcting the Court's own errors.” (*James v. U.S.*, 1961, p. 220)

must be reservists themselves. That is, they must be members of a reserve component of some kind, such as a state national guard or the Army Reserves. Because of their close association with full-time military officials, and because of their simultaneous membership in a reserve unit, lower courts have said that dual-status technicians' employment is "irreducibly military" in nature (*Leistikio v. Stone*, 1998, p. 820). Accordingly, courts have barred technicians from suing where the injuries pertain to the performance of their duties (*Overton v. N.Y. State Div. of Military and Naval Affairs*, 2004). Dual status ROTC instructors have also been barred from suing for allegations of wrongdoing stemming from their activities in teaching cadets, e.g., officers-in-training (*Norris v. Lehman*, 1998).

Not all civilians who work with military personnel, however, are prohibited from suing. The Tenth Circuit has held, for instance, that civilians without any type of military membership are entitled to sue when incurring injuries, be they physical or non-physical. In *Newton v. Lee* (2012), a civilian air traffic controller alleged that his supervisor, a full-time National Guard officer, had retaliated against him. While the plaintiff had formerly been a member of the military, he no longer had any military affiliation at the time he was injured. Even though he worked closely with service members, this fact placed him outside *Feres*' ambit: "The Supreme Court has never suggested that *Feres* applies to suits brought by civilian employees of the military. Instead, the Court has consistently cabined the doctrine to reach only injuries to service members" (*Newton v. Lee*, 2012, p. 1028). On these grounds, the court found the case to fall outside of the doctrine's scope: "We are persuaded by this fundamental distinction between military life and civilian life that [the plaintiff's] suit cannot be barred by the *Feres* doctrine. Injuries cannot arise 'incident to service' if a plaintiff's claims are wholly unrelated to his current or former military service" (*Newton v. Lee*, 2012, p. 1029).

Private Suits Against Service Members in Their Individual Capacities

With a few notable exceptions, circuit courts have extended the doctrine to claims made in state court against service members in their personal capacities. This is a substantial and remarkable extension. The upshot of the extension is that, in most circuits, service members are stripped of any judicial remedy against the person who injured them, even where the injury occurred during an activity wholly unrelated to military duties such as sexual assault or theft. A state suit is qualitatively different from a suit filed under the FTCA. A suit filed pursuant to the FTCA is a federal claim that seeks monetary damages from the federal government due to the wrongful conduct of a governmental employee. A state claim, on the other hand, is a private suit filed by the injured party against the individual perpetrator, one which seeks direct monetary recovery from the person who caused the injuries. State suits occur most commonly in the intra-military context when wrongful conduct is of an intentional nature, such as a rape or murder. A service member is incentivized to file a state suit in such circumstances because the FTCA does not apply to intentional misconduct, meaning state-level recourse suit is the only way to recover compensation from the party causing the damage.⁷

For the most part, circuit courts have applied the *Feres* doctrine to dismiss state suits. In *Perez v. Puerto Rico Nat. Guard* (2013), for instance, the court dismissed a service member's state suit against the individual service member who raped her. Because the plaintiff's injuries, e.g., the emotional distress caused by the rape, were incurred while she was performing military

⁷ As explained in Chapter 2, the federal government has not waived sovereign immunity for intentional wrongful acts committed by governmental employees outside the civilian law enforcement context.

duties, the court said the injuries were “incident to her service” (*Perez v. Puerto Rico Nat. Guard*, 2013, p. 293). Adjudicating the case would require the court to review an intra-military situation, the court concluded, a step which might interfere with military discipline. “The judicial shield extends beyond guardsmen in their official capacity, and bars claims against guardsmen in their personal capacity,” the court said (*Perez v. Puerto Rico Nat. Guard*, 2013, p. 293). On these grounds, the court dismissed the service member’s state suit against her alleged rapist. The court’s action meant the survivor was devoid of a judicial remedy, barred from seeking redress in either the federal or state court systems.

Most circuits have reached similar conclusions. In *Stauber v. Cline* (1988), a reservist was severely harassed both on and off duty by his supervisor. As harassment is an intentional tort not recognized by the FTCA, the plaintiff sued the supervisor for emotional distress in state court. Ruling the state suit was barred by *Feres*, the Ninth Circuit said:

It is clear from the record that the off-base, after-hours harassment was merely an extension of on-base events to which intra-military immunity properly applies. To examine the relationship between on- and off-base events in this case, beyond determining that the conduct involved was incident to service, would result in an impermissible intrusion upon military matters. (*Stauber v. Cline*, 1988, p. 400)

The Third Circuit reached a similar conclusion: “Suits founded on state law have the same potential for undermining military discipline as federal tort claims” (*Jaffee v. U.S.*, 1981, p. 1239). The Third Circuit reiterated its hardline position in a subsequent decision: “The *Feres* doctrine of intramilitary immunity bars a suit raising state law claims for damages for injuries arising from, or in the course of activity incident to, military service brought against a state national guard by a guardsman” (*Matreale v. N.J. Dep’t of Military & Veterans Affairs*, 2007, p. 152).

Not every circuit, however, has disallowed state claims. A variety of circuits have held that certain misconduct is so sinister, no deference should be given to it: “Intentional tortious and unconstitutional acts directed by one servicemember against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres*” (*Lutz v. Secretary of Air Force*, 1991, p. 1487). Under this theory, the Ninth Circuit allowed a state claim to go forward when service members burglarized a colleague’s office (*Lutz v. Secretary of Air Force*, 1991), while the Eighth Circuit allowed a state case to proceed with regard to a mock lynching (*Brown v. U.S.*, 1984). Also, the First Circuit allowed a private state claim to proceed where the plaintiff was sexually assaulted during a training exercise (*Day v. Mass. Nat. Guard*, 1999). In its ruling, the First Circuit observed:

[T]he claims thus preserved involve only a narrow class of cases, namely, ones where the plaintiff’s injury is “incident to military service” but defendant’s misconduct is so patently unconnected to his or her official duties as to fall outside the scope of employment. (*Day v. Mass. Nat. Guard*, 1999, p. 684)

The Seventh (*Cross v. Fiscus*, 1987) and Tenth (*Durant v. Neneman*, 1989) circuits have likewise held that certain wrongful acts simply go too far. In denying *Feres* protection to a service member who intentionally drove his car over a colleague during a training activity, the Tenth Circuit said:

Our evolving jurisprudence has created a zone of protection for military actors, immunizing actions and decisions which involved military authority from scrutiny by civilian courts. It is our conclusion, however, that this zone was never intended to protect the personal acts of an individual when those acts in no way implicate the function or authority of the military. When a soldier commits an act that would, in civilian life, make him liable to another, he should not be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act*. When military personnel are engaged in distinctly nonmilitary acts, they are acting, in effect, as civilians and should be subject to civil authority. (*Durant v. Neneman*, 1989, p. 1354 [italics in original])

As such, there is a split in the circuits with regard to whether *Feres* should be extended to state suits filed against the wrongdoers in their individual capacities. This split creates the potential for state-level modification of the *Feres* doctrine, legislative action that charts a clear path for granting a judicial remedy for injuries stemming from nonmilitary acts. One potential legislative modification is described in Chapter 5.

Summary

A comprehensive review of the appellate case law of intra-military lawsuits yields a series of findings. Lower courts have characterized the Supreme Court's case law in the *Feres* arena as incoherent, complaining that it is so beset with logical inconsistencies as to be unintelligible. Lower courts have also lamented the harsh consequences the doctrine has on service members, consequences characterized as unfair and irrational. The contradiction contained in the fact service members cannot sue for a military doctor's incompetence, yet civilians can, has been observed. While lodging complaints, however, lower courts have at the same time broadened its application far beyond the contours established by the Supreme Court. It has been applied to situations where the military component of the injuries is remote, such as recreational rafting accidents and sexual assault. The broadening has been driven by judges' sense of awe for the military and the vagueness enshrouding the concept of military discipline. Lower courts have also extended the doctrine's scope, expanding its reach to state service members, reservists, civilians working with service members, and state suits brought against service members in their individual capacities. Under their formulation of the policy, only exceptional intra-military suits are allowed to proceed, ones where no possibility of second-guessing decisions is foreseen.

That lower court judges have steadfastly increased the scope and reach of the *Feres* doctrine, a policy most openly loath, gives rise to a remarkable contradiction. The tension likely gives rise to moral injury, producing feelings of regret and shame at having to participate in behavior that violates deeply held beliefs. Having to apply an inequitable policy they are bound to follow, lower court judges take on a sad, piteous quality. Accomplished scholars and public servants, they are obligated to treat service members as second-class citizens, sealing shut the courthouse doors to the men and women who protect the country in uniform, denying them their day in court. A distressing position for anyone to be in, the distress is most likely heightened for morally sensitive jurists, well-to-do members of society who, for the most part, have never donned a uniform themselves. Their shame is practically visceral: “We apply the *Feres* doctrine here without relish...But until Congress, the Supreme Court, or an en banc panel of this Court reorients the doctrine, we are bound to follow this well-worn path” (*Costo v. U.S.*, 2001, p. 869). In this way, the *Feres* doctrine’s corrupting influence is far-ranging and extensive.

Chapter 5: Study Conclusion and Recommendation

This chapter summarizes the study and presents a recommendation for future action. The theoretical and judicial concepts described in the paper are recapped, a process bringing the individual themes along with the larger picture into sharper relief. The summary is followed by a recommendation for next steps. The proposed course of action seeks to bring the *Feres* doctrine into better alignment with prevailing societal values, eliminating its most controversial and objectionable aspects.

Restatement of Findings

The legal research conducted herein described how the judiciary handles lawsuits filed by service members against fellow service members. Utilizing a grounded theory methodology, the study's objective was to use case law and legal scholarship to trace the judiciary's treatment of intra-military litigation from the implementation of the FTCA, the sweeping waiver of governmental immunity enacted in 1946, to the present day. The purpose of the study was to strengthen educators' ability to advise students either considering military service or who have recently completed it. Few educators have served in uniform, meaning they possess little knowledge of military policy and culture, a fact that leads to a disconnect with their military-affiliated students. Increasing educators, administrators, and the overall academic community's knowledge of the *Feres* doctrine foster for the conditions for higher quality interactions. By elucidating how the judiciary treats intra-military lawsuits, the study gives educators critical information, knowledge allowing them to better able to understand and advise their student veteran population. In so doing, the information presented assists in closing the civil-military gap, the divide separating the civilian and military components of society which also pervades academia. It also lays the groundwork for legislative change.

The study consisted of a comprehensive legal analysis of the *Feres* doctrine. The *Feres* doctrine is the judicial policy created by the Supreme Court that exempts military personnel from the FTCA's scope. The effect of the doctrine is to make service members immune from civil liability, meaning they cannot be sued for the harm they cause to colleagues. While immunizing service members from civil liability, the doctrine also prevents injured service members from suing for damages. The effect of the doctrine is to place the entire spectrum of bad behavior outside the reach of the civilian judiciary system. This includes negligent actions such as medical malpractice as well as egregious, intentional forms of misconduct such as sexual assault and other forms of batteries.

The study sought to answer three specific questions:

1. What are the legal, philosophical, and theoretical roots of the *Feres* doctrine?
2. How has the *Feres* doctrine developed over time?
3. What is the current state of the *Feres* doctrine?

In addressing these questions, the study places the doctrine in its historical context. As the only cohort of Americans categorically barred from accessing the judicial system, issues of fairness and justice present themselves. The issues included normative matters such as whether we should be treating service members in this way. They also included issues of accountability and being answerable to the law, such as whether it is a good thing for military officials to be insulated from judicial review? That the one percent of Americans who comprise the rank and file of the military largely come from disadvantaged backgrounds gives these issues a moral relevance, as does the fact that the judicial officers who created doctrine—and who continue to apply it—have little stake in the matter, their military-age children going to college than into military service. The data ascertained for each question is set forth below.

Legal, Philosophical, and Theoretical Roots

The legal, philosophical, and theoretical roots of *Feres* doctrine trace back to the concept of sovereign immunity. The principle that the federal government is the ultimate societal organizer, sovereign immunity in the judicial arena affords governmental actors absolute amnesty from civil liability (Sisk, 2003). Unless expressly waived, this immunity prevents people injured by public actors' wrongful acts from filing civil lawsuits for compensation (Randall, 2002). A controversial concept, many scholars find the notion that public employees are exempt from judicial oversight to be antithetical to the structure and history of the United States, a representative democracy founded on the notion that no one—particularly public officials—is above the law (Chemerinsky, 2001). Nevertheless, the Supreme Court, after considerable vacillation, has held that sovereign immunity is a foundational American principle (Jackson, 2002).

Over time, Congress has waived the United States' sovereign immunity in nearly every aspect of public action (Sisk, 2005). The waivers have been catalyzed by the inefficiency of requiring injured parties to lobby Congress for private bills as well as concerns about government accountability (Stirling & Warshaw, 2018; Stirling, 2018). With one exception, judicial review of public action now extends across the full spectrum of activities (Jackson, 2003). Under the Tucker Act, the government can be sued for money claims, forced to pay debts owed both to individuals and companies (Hadfield, 1999). Under the APA, agencies can be sued when their actions are arbitrary or otherwise unlawful (Rubin, 2003). Most importantly, public employees can be sued under the FTCA when injuries stem from their "negligent or wrongful act or omission" (28 U.S.C. § 2674). The effect of these statutory waivers is that public officials are

required to justify the propriety of their conduct in courts of law when challenged by those they hurt.

Development Over Time

There is one notable exception to the rollback of sovereign immunity—intra-military injuries. Pursuant to the *Feres* doctrine, the waiver of immunity contained in the FTCA does not extend to the harm service members do to each other (Feldmeir, 2011). As a result, service members are barred from suing under the FTCA when a colleague causes them injury (Bahdi, 2010). The suits, when filed, are summarily dismissed on the grounds that service members are immune from intra-military civil liability, still protected by the federal government’s original sovereign immunity (Banner, 2013). While civilians have standing to sue when hurt by service members’ negligent or wrongful acts, fellow service members are barred (Brou, 2007).

The *Feres* doctrine was created by the Supreme Court in 1950. In *Feres v. U.S.* (1950), the Court interpreted the FTCA not to apply to intra-military harm. In handing down its decision, the Court said that where military personnel were injured “incident to their military service” (p. 143), their injuries fell outside scope of the FTCA (*Feres v. U.S.*, 1950). The Court’s decision contradicted the language of the FTCA, which did not exclude military personnel (Woods, 2014). The only type of injury Congress exempted were ones stemming from “combatant activities” (28 U.S.C. § 2680(j)). Because it effectively rewrote the statute, inserting its will over Congress’, the Supreme Court’s interpretation has been harshly criticized by scholars and lower courts (Turley, 2003). Nevertheless, it has been expanded widely over the past 69 years to the point where nearly every variety of intra-military suits are barred (*U.S. v. Johnson*, 1987). Only cases where the injuries bear little to no connection to the service members’ military duties are allowed to proceed (*Costo v. U.S.*, 2001).

The Supreme Court has justified the *Feres* doctrine by saying that courts should not interfere with military discipline (*U.S. v. Brown*, 1954). Performing judicial review of military officials' conduct and decisions would do just that, it has said (*U.S. v. Shearer*, 1985). It has neither provided empirical evidence for its belief nor given a definition of military discipline, instead saying that in the event its interpretation is wrong, Congress is free to pass a statutory amendment (*U.S. v. Stanley*, 1987).

Current State

Lower courts have responded to the ambiguity by finding military discipline implicated practically anytime a service member is hurt, even when the injuries are sustained during off-duty rafting accidents or the result of abhorrent conduct such as sexual assaults (*Bon v. U.S.*, 1986; *Doe v. Hagenbeck*, 2017). Most lower courts have even extended the *Feres* doctrine to prohibit injured parties from suing wrongdoers personally in state court (*Matreale v. N.J. Dep't of Military & Veterans Affairs*, 2007). Under this rule, injured parties such as survivors of military sexual assault have no judicial avenue for holding the wrongdoers accountable in a court of law (*Stauber v. Cline*, 1988).

While broadening the doctrine's scope and application, lower courts have simultaneously criticized it (*Estate of McAllister v. U.S.*, 1991). The Supreme Court's case law is so pocked with logical inconsistencies as to be incoherent, judges have said (*Persons v. U.S.*, 1996). They have also complained about policy's impact on service members, characterizing the effect as unjust, unfair, and cruel (*Atkinson v. U.S.*, 1987). If the goal is to avoid judicial review of military decision-making, it makes no rational sense that civilians are allowed to sue service members, courts have said (*Taber v. Maine*, 1995). As suits filed by civilians require judges to

second-guess military decisions to the same extent those filed by service members do, the policy's primary rationale is farcical, courts have said (*Taber v. Maine*, 1995).

As lower court judges are compelled to hand down rulings they consider dishonorable, it is likely that application of the *Feres* doctrine causes moral injury. Moral injury is sustained when a person, in adhering to obligations, acts in a manner that violates deeply held beliefs (Litz, 2014). It is produced most frequently from participating in activities where the outcome is considered indecent or inhumane (Vargas, 2013). Moral injury can be the source of profound emotional and spiritual shame (Shay, 1998). It is a sad and remarkable state of affairs to observe federal judges express regret at being bound to apply a troubled doctrine they consider unjust. The quantity and intensity of the resentment is suggestive of a center that cannot hold. A dynamic so unstable, that transformative change will occur before long seems to be inevitable.

Recommendation

This section presents a recommended course of action to cure the *Feres* doctrine of its most objectionable elements. As explained in Chapter 4, most lower court judges bar any litigation stemming from intra-military injuries. This includes dismissal of state-level suits filed against wrongdoers personally for intentional, egregious misconduct. In this way, the bar on lawsuits extends far past the FTCA context, encompassing claims brought against the individual wrongdoers. The result of this categorical bar is that survivors of sexual assault and other forms of reprehensible misconduct cannot seek compensatory damages from their assailants. Service members are the only category of Americans unable to sue after suffering personal acts of violence. The rule also means that perpetrators are able to operate above the law. This aspect of the *Feres* doctrine—its application to personal suits in the context of egregious misconduct—goes too far.

In order to bring the policy into better alignment with societal and legal norms, legislatures should modify the *Feres* doctrine via statute. Specifically, legislators should enact laws enabling survivors to maintain individual suits against their assailants in state court. Legislative action has been needed for years. Since the doctrine's inception in 1950, courts have said that if their hands-off approach of intra-military harm is wrong, legislatures should correct it. The Ninth Circuit has said the *Feres* doctrine "is judicial doctrine leaving matters incident to service to the military, in the absence of congressional direction to the contrary" (*Stauber v. Cline*, 1988, p. 399). The Sixth Circuit has said that "courts of appeals have consistently refused to extend statutory remedies available to civilians to uniformed members of the armed forces absent a clear direction from Congress to do so" (*Coffman v. State of Michigan*, 1997, p. 59). Underlying these statements is an invitation to legislators, and by extension, to the American people, to take ownership of intra-military harm. Courts clearly want elected officials to establish an approach reflective of societal values. Legislators should accept the judiciary's invitation without delay.

The Judiciary's Blueprint for Legislative Action

Fortunately, courts have not remained silent as to how to improve the policy. To the contrary, the federal judiciary has provided a blueprint to legislatures for how to grant survivors standing to sue while preserving military discipline. The roadmap, outlined by the First Circuit in *Day v. Massachusetts Air National Guard* (1999), creates a clear and logical line between the behavior which should be protected by *Feres* and the behavior that is undeserving of judicial

immunity.⁸ The line is based on a scope of employment analysis, the standard approach courts use when determining whether governmental actors outside the military context are protected from personal liability. Under the Westfall Act, a federal statute, government employees cannot be sued personally for acts occurring in the scope of their employment (28 U.S.C. §§ 2671 *et seq.*). When their behavior does not relate to official duties, they can be sued personally. In *Day v. Massachusetts Air National Guard* (1999), the First Circuit applied the conventional scope of employment analysis to the intra-military harm context. The result was to infuse the judicial treatment of service members with both common sense and decency.

Day v. Massachusetts Air National Guard (1999) involved reprehensible conduct. The plaintiff, a member of Massachusetts National Guard, was sexually assaulted by fellow service members. In defending the alleged assailants, the U.S. Attorney sought to dismiss the survivor's entire lawsuit, including the state battery suits against the perpetrators, pursuant to *Feres*. As the assault had been incident to the plaintiff's military service, the entire incident was nonreviewable, the U.S. Attorney argued. Agreeing, the district court dismissed the survivor's lawsuit in its entirety. The *Feres* bar was absolute, the district court said, extending to every aspect of an injured service member's litigation. In so ruling, the district court followed the prevailing framework (*Jaffe v. U.S.*, 1981; *Stauber v. Cline*, 1988; *Matreale v. N.J. Dep't of Military & Veterans Affairs*, 2007; *Perez v. Puerto Rico Nat. Guard*, 2013). Under this

⁸ Other circuits have endorsed the same approach, including the Ninth Circuit (*Lutz v. Secretary of Air Force*, 1991) and the Tenth Circuit (*Durant v. Neneman*, 1989). *Taber v. Maine* (1995), a noteworthy case discussed at length in Chapter 4, also utilized a scope of employment analysis.

framework, judicial review of intra-military sexual assaults had the “same potential for undermining military discipline as federal tort claims” (*Jaffee v. U.S.*, 1981, p. 1239).

The First Circuit reversed the district court on appeal. The survivor’s state law battery claims against the alleged perpetrators should have been allowed to proceed, the First Circuit said. The assaults had occurred outside of the defendants’ scope of employment. As the defendants’ behavior was unrelated to their military duties, they were not entitled to protection from personal liability under the Westfall Act. Neither was *Feres* applicable, the court said. The doctrine was never intended to apply to intentional, egregious misconduct such as “one serviceman deliberately shooting another in the course of an on-base card game, or the on-base rape of one enlistee by another” (*Day v. Massachusetts Air National Guard*, 1999, p. 684). Litigating intentional torts of these types would not disturb military discipline because intentional misconduct by one service member against another does not require review of the military decision-making process. As the First Circuit observed, the Supreme Court has never converted “*Feres* into an immunity for individuals against state law claims” (*Day v. Massachusetts Air National Guard*, 1999, p. 684).⁹ Nor was the high court likely to take such a step: “To do so would mean that military service personnel who were the victims of serious intentional torts inflicted by other service personnel on base would effectively be denied any civil remedy against a wrongdoer who was *not* [italics in original] acting within the scope of his military employment” (*Day v. Massachusetts Air National Guard*, 1999, p. 684). When their

⁹ The Supreme Court has exhibited a deep protectiveness of state sovereignty, extorting federal courts not interfere with to state actions “without a clear Congressional mandate” (*Wisconsin Public Intervenor v. Mortier*, 1991, p. 605).

actions are “patently unconnected to...official duties” and “in no way implicate the function or authority of the military” (*Day v. Massachusetts Air National Guard*, 1999, p. 684), *Feres* protection is inappropriate.

The distinction in *Day v. Massachusetts Air National Guard* (1999) between conduct that pertains to official duties and conduct that does not represents a paradigm shift in the judicial treatment of intentional wrongdoing by service members. According this case, immunity should only apply to official conduct, that which relates to a service member’s job. For official conduct, not only does *Feres* protection apply, immunity from personal liability also flows from the Westfall Act. But when service members engage in unofficial conduct, that which unrelated to their job and is private in nature, immunity from civil liability should not apply. Under the *Day* analysis, service members should be accountable for their private bad behavior in the same way civilians are.

Other courts have agreed. One said service members “should not be allowed to escape responsibility for their acts just because [they] were wearing military uniforms at the time of the act...When military personnel are engaged in distinctly nonmilitary acts, they are acting, in effect, as civilians and should be subject to civil authority” (*Durant v. Neneman*, 1989, p. 1354). Another court said: “Intentional tortious and unconstitutional acts directed by one servicemember against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres* (*Lutz v. Secretary of Air Force*, 1991, p. 1487).

The distinction in *Day v. Massachusetts Air National Guard* (1999) between official and private conduct offers a straight-forward, logically sound blueprint for legislative action. As described in Chapter 4, most lower courts interpret the *Feres* doctrine to bar all litigation

stemming from intra-military harm. Most courts do not distinguish between conduct flowing from military duties and private conduct, sweeping all conduct in which service members engage within the doctrine's scope. But the Supreme Court, as *Day v. Massachusetts Air National Guard* (1999) pointed out, has never extended the doctrine this broadly. Nor is such a broad extension necessary to preserve military discipline. It cannot be seriously argued that judicial review of vile acts such as sexual assault and cold-blooded murder disturbs discipline. Nothing related to the military decision-making process is at issue when courts evaluate non-job-related misconduct of this nature. In fact, as Justice Scalia famously said, it works the other way around. Not allowing injured parties their day in court—a right every other American has—most likely undermines discipline (*U.S. v. Johnson*, 1987).¹⁰

Codification by State Legislatures

State legislatures should codify the official conduct/private conduct distinction within state law, making it applicable to the military personnel residing in their states. By articulating exactly where the “zone of protection for military actors” (*Durant v. Neneman*, 1989, p. 1354) begins and ends, codification would bring clarity to service members, the legal community, and the public at large. Such a step would produce a variety of positive outcomes. First, it would

¹⁰ The full text of Justice Scalia's statement is illuminating: “Or perhaps—most fascinating of all to contemplate—Congress thought that *barring* recovery by servicemen might adversely affect military discipline. After all, the moral of Lieutenant Commander Johnson's comrades-in-arms will likely not be boosted by the news that his widow and children will only receive a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death” (*U.S. v. Johnson*, 1987, p. 700).

inform military personnel located within the state that, should they engage in deliberate, reprehensible wrongdoing against a fellow service member, the colleague will be able sue them for damages in state court. This information would likely have a deterrent effect on misconduct. It would also increase survivors' confidence in, and utilization of, the civilian judicial system. Additionally, codification would discourage federal courts from dismissing claims service members make under state law. As explained above, federal judges typically dismiss intra-military suits in their entirety absent clear direction by lawmakers to do otherwise (*Coffman v. State of Michigan*, 1997, p. 59). A state statute indicating that intentional injuries unrelated to military duties can serve as the basis for state-level legal action would provide that direction. Federal courts would be more inclined to remand the matter to the state judiciary for adjudication.

Lastly, codification would encourage state court judges to exercise jurisdiction over service members' state claims. As with federal judges, state judges are disinclined to apply state legal protections to military personnel. The California judiciary, for instance, has said: "Like our brethren on the federal bench, we will not attribute an intent to the Legislature to include military personnel absent *clear evidence* that the Legislature specifically intended to extend it..." (*Estes v. Monroe*, 2004, p. 1360 [italics added]). Codification of the official conduct/private conduct distinction would constitute the clear evidence state judges are looking for in the intra-military context.

To codify blueprint set forth in *Day v. Massachusetts Air National Guard* (1999), legislatures would need to add a statute to their state code. Here is a model:

A service member wrongfully injured by another service member while in the State of California may file a civil lawsuit against the alleged wrongdoer in certain circumstances.

Lawsuits are authorized where the alleged wrongdoing (1) was of an intentional nature and (2) was unrelated to the alleged wrongdoer's military duties. Sexual assault and other forms of battery are presumed to be unrelated to military duties. It is the intent of the legislature, in enacting this section, to treat military personnel located within the State of California as civilians when causing injury to other service members as a result of private, tortious conduct.

This model closely tracks the court's mode of analysis *Day v. Massachusetts Air National Guard* (1999). It distinguishes between harm-producing conduct that pertains to military duties and harm-producing conduct of a strictly private and personal variety. While leaving the immunity attaching to duty-related activities under *Feres* undisturbed, it exposes private, civilian-esque wrongdoing to civil liability. The model also explicitly establishes the presumption that sexual assault and other batteries committed by military personnel are non-duty-related in nature, acts almost always occurring outside the scope of employment. The presumption would benefit judges, aiding in their determination of whether intra-military harm is employment-related or not in a particular case.

The statutory language also interlocks neatly with the Westfall Act, the federal law which affords governmental employees immunity from personal liability when performing official duties. Should the U.S. Attorney certify under Westfall that the defendant-service member caused the injury while "acting within the scope of his office or employment," the plaintiff would bear the burden of establishing otherwise (28 U.S.C. 2679(d)). If the burden was not met, the defendant would be granted immunity from personal liability, resulting in the substitution of the United States as the defendant, taking the service member's place (28 U.S.C. 2679(d)). In that event, as the lawsuit would be challenging official military conduct, the suit would be

automatically dismissed pursuant to *Feres*. But, of course, it is highly unlikely that sexual battery and other kinds of batteries would be deemed to be duty-related.

To see the value of a statute like this, consider the effect it would have on civil litigation stemming from an intra-military sexual assault in the California National Guard. Let's assume a situation occurs which is similar to the one described in *Stubbs v. U.S.* (1984). There, a drill sergeant sexually assaulted a female service member. The fact pattern is as follows:

In the latrine, Drill Sgt. Sookdeo accosted decedent and said that if she would have sex with him, he would make the rest of her six-week stay there easier but if she refused it would be rougher on her. He also touched her breasts and genital area against her will. Decedent refused his advances. (*Stubbs v. U.S.*, 1984, p. 59)

If the absence of a statute like the model, the plaintiff's lawsuit would immediately be dismissed pursuant to *Feres*. The only pertinent consideration to the court reviewing action would be whether the assault was incident to the plaintiff's service. Case law is teeming with instances where judges have said sexual assault is incident to service (*Doe v. Hagenbeck*, 2017; *Lovely v. U.S.*, 2009; *Pottle v. U.S.*, 1996; *Smith v. U.S.*, 1999). In fact, in *Stubbs v. U.S.* (1984) itself, the Eighth Circuit denied the survivor's right to sue pursuant to *Feres v. U.S.* (1950). In its ruling the court in *Stubbs v. U.S.* (1984) said the assault had been incident to the survivor's service. It did not assess whether the drill sergeant's conduct pertained to his job duties. Applying the standard version of the policy, the court focused solely on the fact that the survivor and assailant were both in the military at the time the assault occurred, the pertinent information in an incident to service determination (*Stubbs v. U.S.*, 1984).

Had a statute like the model been in place, however, the survivor would have standing to litigate a state battery claim against the drill sergeant. There, the reviewing court would be required to perform a scope of employment analysis pursuant to the statute's directive. The court would have no choice but to find the drill sergeant's actions to be non-duty related. Any doubt

in the court's mind would be resolved by the presumption set forth in the statute: "Sexual assault and other forms of battery are presumed to be unrelated to military duties." The court would then allow the suit to move forward. The survivor would subsequently have her day in court, an opportunity for the lawfulness of the conduct to be evaluated and a verdict rendered.

The court in *Day v. Massachusetts Air National Guard* (1999) sought to insulate lawsuits from a *Feres* bar where a service member's actions are "patently unconnected to...official duties" and "in no way implicate the function or authority of the military" (p. 684). The model statute achieves the court's intent. The model also aligns with the Tenth Circuit's sentiment: "When a soldier commits an act that would, in civilian life, make him liable to another, he should not be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act*. When military personnel are engaged in distinctly nonmilitary acts, they are acting, in effect, as civilians and should be subject to civil authority (*Durant v. Neneman*, 1989, p. 1354 [italics in original]).

Finally, it is worth noting how the lawsuit would play out within California judiciary in the absence of a model statute. Assuming, as we have, that the plaintiff is in the California National Guard, California court system would have exclusive jurisdiction over the suit. This is not only because the wrongdoing would have transpired in California, it is also because the California National Guard is a state agency and the service members assigned to it are state employees (*Charles v. Rice*, 1994). The California Court of Appeal has indicated that it will not extend state law protections to state service members unless the California legislature has explicitly indicated the protections apply in this way. In *Estes v. Monroe* (2004), a disabled state service member alleged that he was fired due to his disability. He argued that the termination violated the Fair Employment and Housing Act (FEHA), a state statute that required employers

to make reasonable accommodations to employees with disabilities. Asserting the California National Guard's action was wrongful, he filed suit, asking the judiciary to reinstate him or award damages (*Estes v. Monroe*, 2004).

The California Court of Appeals rejected the request, dismissing the plaintiff's suit. The FEHA did not apply to state service members, the court said. The court based its decision on the fact that the California legislature, in enacting the statute, did not extend it to the California National Guard. Without evidence it applied to military personnel, the court was bound by *Feres* to interpret it as being inapplicable:

We hold, therefore, that the Legislature did not express the requisite intent to extend the FEHA to cover claims by those on active duty when the challenged personnel actions are incident to service...Certainly the Legislature has the prerogative to subject the California National Guard to the same obligation to provide reasonable accommodation for disabled guard members as other California employers, but employing the *Feres* rationale, we conclude the Legislature will have to explicitly extend a FEHA remedy to military personnel to overcome a judicial predisposition to defer to military wisdom. Hence, in the absence of express statutory language extending the FEHA to military personnel, we must reject plaintiff's claim as a matter of law. (*Estes v. Monroe*, 2004, p. 625)

Under *Estes v. Monroe* (2004), the California judiciary would be compelled to dismiss the hypothetical lawsuit in the absence of a model statute. With nothing on the books indicating civil liability applies to non-duty-related wrongdoing, the court would have no choice but to impose a *Feres* bar. In this way, enacting of a statute like the model would infuse the doctrine with decency, better aligning it with societal values. As the Ninth Circuit has said, "Intentional tortious and unconstitutional acts directed by one servicemember against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres*" (*Lutz v. Secretary of Air Force*, 1991, p. 1487).

Congressional Action

State-level legislative action affording victims of intentional wrongdoing standing to sue their assailants in state court would constitute a meaningful step toward resolving the unfairness associated with *Feres*. Such a measure, however, represents a stop gap rather than a cure. As Congress is the primary regulator of the military establishment, authorized by the Constitution to set the rules for the armed forces, more substantial, structural change requires Congressional action. Under the Supremacy Clause, federal law takes precedence over state law in most instances, particularly in the military arena. To make more wide-ranging changes beyond the one detailed above—an area the Supreme Court has left open to state action—federal legislators would need to enact legislation outlining when and under what circumstances service members could access civil court when suffering wrongdoing at the hands of a colleague.

Because it is a judicial doctrine stemming from the Supreme Court's interpretation of the FTCA, a federal statute, the *Feres* doctrine can be modified or adjusted by Congress at any time. The Supreme Court has said many times that should Congress disagree with the policy, finding the ban on service members contrary to the legislative intent, Congress should take remedial action to make its intent clear (*U.S. v. Stanley*, 1987). Congress could in fact nullify the doctrine in its entirety without difficulty. A total rollback could be effectuated by adding language to the FTCA that expressly made the statute applicable to service members. An unambiguous statement declaring that service members fall within the FTCA's scope would have the effect of overruling the policy, removing it from the legal landscape altogether. Such an action would authorize service members to file claims in the same way and to the same extent as civilians, including when harmed by medical malpractice, the errors of recreational personnel, and the negligence of off-duty drivers. A total rollback would not, however, grant standing to service

members victimized by intentional wrongdoing such as assault and battery. The FTCA in its current form excludes claims stemming from intentional harm.

Rather than completely extinguishing the *Feres* doctrine, Congress could instead implement more modest change, taking incremental steps directed at the most unjust outcomes. This could include the state-level action described above, the empowering of service members harmed by the intentional misconduct (rape and other kinds of assault) to sue their assailants in state court. Federal action would be a quicker way to extend this right to all service members universally, a more efficient process than passing bills in every state and territories.

A slightly larger scale change toward the same end would be to enable victims of sexual assault to file claims under the FTCA. By creating organizational liability, an amendment of this type would give military managers a financial and professional incentive to eradicate this most vile and reprehensible form of intra-military harm, one that researchers have found affects up to 84% of female service members (Turchick & Wilson, 2010). It would also align the treatment of victims who serve in the military with victims serving prison terms. Under the so-called “law enforcement proviso,” prison inmates who are sexually assaulted by guards can file claims under the FTCA (28 U.S.C. § 2680(h); *Millbrook v. U.S.*, 2013). The law enforcement proviso gives prison officials a financial motivation to protect inmates from sexual abuse. It also reflects the extreme power discrepancy which exists in the prison setting, an atmosphere where guards exercise near total control over inmates. In light of the power imbalance and the ease with which abusive conduct can occur in these conditions, Congress found it appropriate to make the government liable for the sexual violence guards perpetrate against the wards subject to their orders.

The same type of power imbalance exists in the military establishment. Functioning in an environment where discipline permeates every aspect of day-to-day life, a service member is virtually powerless to resist a supervisor's commands. To be sure, disobeying a superior's orders exposes a soldier or sailor to criminal liability and involuntary separation (10 U.S.C. § 892). By any measure, placing the government on the hook for sexual misconduct would appear every bit as appropriate in the military setting as it is in the prison setting, an acknowledgement of the power and control which underlies the military's strict chain of command culture. Extending governmental liability would also rectify the morally dubious situation where prison inmates have more rights than service members, and where prison wardens have a greater structural incentive to stop sexual violence from ravaging the vulnerable than senior military officials.

Concluding Remarks

Service members represent a legal anomaly. They are the only cohort of Americans categorically denied access to the judicial system when raped, assaulted, or otherwise injured. That less than one percent of the American population serves in the military—and that those who do are largely 18-year-olds from disadvantaged circumstances—are contextual factors which observers ignore at their peril. Mindful of the context, the Supreme Court's decision to bar intra-military lawsuits takes on an exploitative quality, a point amplified by the fact that rarely do judges' children serve. The self-loathing which underlying judges' application of the *Feres* doctrine, combined with the fact that it was the court system, not Congress, who chose to deny service members' legal standing, infuse the entire situation with both poignancy and dissonance.

As mentioned above, it is hard to see how the center can hold. A policy that causes moral injury to the jurists required to implement is not sustainable. In a representative democracy, the military does not call the shots. It is accountable to the people and, by extension, to lawmakers.

Winston Churchill once observed: “You can always count on Americans to do the right thing after they’ve tried everything else” (McSherry-Forbes, 2013). It is time for Americans, particularly the well-to-do and well-educated who control the levers of power, to revisit the sagacity of a policy that denies service members’ standing to sue. The policy tarnishes everyone and everything it touches. Jurists are compelled to violate deeply held beliefs, injured service members are denied justice, military officials do not have to comply with civil legal standards, and society at large endures the shame of treating the men and women who protect it as second-class citizens. Imagine what it must feel like to be told by your government that, although you have defended it with your life, you lack standing to sue the service member who raped you. Such a policy runs counter to everything America stands for. The time to correct the error, as much moral as legal, has arrived.

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APPENDIX A

IRB Approval Letter

PEPPERDINE UNIVERSITY

Graduate & Professional Schools Institutional Review Board

April 12, 2019

Protocol #: **4122019**

Project Title: The Feres Doctrine: A Comprehensive Legal Analysis

Dear Dwight,

Thank you for submitting a “GPS IRB Non-Human Subjects Notification Form” related to your *The Feres Doctrine: A Comprehensive Legal Analysis* project for review to Pepperdine University’s Institutional Review Board (IRB). The IRB has reviewed your submitted form and all ancillary materials. Upon review, the IRB has determined that the above titled project meets the requirements for *non-human subject research* under the federal regulations 45 CFR 46.101 that govern the protection of human subjects.

Your research must be conducted according to the form that was submitted to the IRB. If changes to the approved project occur, you will be required to submit *either* a new “GPS IRB Non-Human Subjects Notification Form” or an IRB application via the eProtocol system (<http://irb.pepperdine.edu>) to the Institutional Review Board.

A goal of the IRB is to prevent negative occurrences during any research study. However, despite our best intent, unforeseen circumstances or events may arise during the research. If an unexpected situation or adverse event happens during your investigation, please notify the IRB as soon as possible. We will ask for a complete explanation of the event and your response. Other actions also may be required depending on the nature of the event. Details regarding the timeframe in which adverse events must be reported to the IRB and documenting the adverse event can be found in the *Pepperdine University Protection of Human Participants in Research: Policies and Procedures Manual* at <https://community.pepperdine.edu/irb/policies/>.

Please refer to the protocol number denoted above in all further communication or correspondence related to this approval.

On behalf of the IRB, we wish you success in this scholarly pursuit.

Sincerely,

Institutional Review Board (IRB)
Pepperdine University

cc: Mrs. Katy Carr, Assistant Provost for Research
Dr. Judy Ho, Graduate School of Education and Psychology IRB Chair