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FERES DOCTRINE—A POLICY IN NEED OF REFORM?

HEARING

BEFORE THE

SUBCOMMITTEE ON MILITARY PERSONNEL

OF THE

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HOUSE OF REPRESENTATIVES

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FERES DOCTRINE—A POLICY IN NEED OF REFORM?

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON MILITARY PERSONNEL,
Washington, DC, Tuesday, April 30, 2019.

The subcommittee met, pursuant to call, at 2:12 p.m., in room 2118, Rayburn House Office Building, Hon. Jackie Speier (chairwoman of the subcommittee) presiding.

OPENING STATEMENT OF HON. JACKIE SPEIER, A REPRESENTATIVE FROM CALIFORNIA, CHAIRWOMAN, SUBCOMMITTEE ON MILITARY PERSONNEL

Ms. SPEIER. Good afternoon. This hearing will come to order.

I want to welcome everyone to the Military Personnel Subcommittee of the Armed Services Committee on a hearing that we are having today on what has been dubbed the *Feres* doctrine on military personnel, and the prohibition of Active Duty service members from bringing suit against the U.S. Government, specifically for medical malpractice.

Feres is the product of judicial activism and Congress' silence. As no less an authority than my favorite Supreme Court Justice, Antonin Scalia, said, quote, "There is no justification for this Court to read exemptions into the act beyond those provided by Congress. If the act is to be altered, then it is a function for the same body that adopted it," unquote. The court overreached, and Congress' response is long overdue.

Today, we have a panel to help inform us of the issues surrounding the *Feres* doctrine. Our first three witnesses are pained victims who have been aggrieved firsthand by the outdated judicial doctrine.

I want to thank you all for being here. You are representing yourselves, your families, and countless others despite what you have lost and will lose. Your commitment to fixing this policy is admirable and greatly appreciated.

Our first witness is Sergeant First Class Richard Stayskal, whose radiologic diagnostic test was misread at an Army treatment facility and who currently has stage 4 terminal cancer.

Sergeant Stayskal, I want to take this moment to thank you in particular. Because of the malpractice you suffered, your time is numbered in days and weeks, not years and decades. I know you would rather spend this time that you have left with your family and loved ones closer to home, not here at Congress, but I am greatly indebted to you for doing so. You have moved me, by the conversation we had months ago, so much that I felt compelled to hold this hearing today.

So I know you are here not because I invited you but because your commitment to your fellow service members runs so deep, your desire to achieve justice for them so profound, that you continue to look out for them as best as you can and as long as you can. And I promise you that we will all remember your commitment, your honor, and your sacrifice and that I will keep working on this to fix it as long as I am here.

Our second witness is Ms. Alexis Witt, the widow of Air Force Staff Sergeant Dean Patrick Witt, who was hospitalized in 2003 for what should have been a routine appendectomy at Travis Air Force Base in Fairfield, California. Following surgery, a nurse administered a lethal dose of fentanyl, causing respiratory and cardiac arrest, and incorrectly inserted a breathing tube into his esophagus, depriving his brain of oxygen. Staff Sergeant Witt remained in a vegetative state for 3 months until Ms. Witt removed his feeding tube.

Our third witness is Ms. Rebecca Lipe, a former judge advocate for the Air Force who now practices in the civilian sector, who, while deployed in Iraq, had to wear ill-fitting, MacGyvered body armor that caused her debilitating abdominal pain. Military physicians repeatedly misdiagnosed and mistreated her, making the problem worse and causing chronic pain and permanently damaging her reproductive system.

These three witnesses represent the countless hundreds, if not thousands, of victims denied justice over the 69 years the *Feres* doctrine has been in place.

I hope to learn more about the malpractice the three of you have suffered and how the *Feres* doctrine amplified the harm.

The families of *Feres* victims, both here and around the country, suffer too. They lose loved ones in the prime of their lives and are left with a one-size-fits-all compensation system that cannot hope to adjust for the damage done in severe malpractice cases.

When our service members suffer from medical malpractice, when doctors fail to perform or woefully misread tests, when nurses botch routine procedures, when clinicians ignore and disregard pain, service members deserve their day in court. When lives are disrupted, ruined, and cut short by negligence, service members deserve a chance to receive just compensation.

We are not talking about special treatment. We are talking about giving service members the same rights as their spouses, Federal workers, and even prisoners when compensation schemes are insufficient. When administrative redress processes fail, service members should have their claims heard in the justice system under the Federal Tort Claims Act.

And we are not talking about service members who, in Active Duty, are in combat. We are talking about service members who are here in the United States or elsewhere not in a combative role.

In our country, we rightfully revere service members for their bravery and sacrifice. It is disrespectful and shameful that for 69 years, Congress has refused to give them the same rights as everyone else or just the same rights as the rest of their families.

But this isn't just a matter of justice; it is a question of accountability. Because behind the shield of *Feres,* DOD's [Department of Defense's] health providers act with impunity. We have heard

countless stories from service members of procedures, big and small, botched in ways that are always frustrating and occasionally catastrophic. Gauging the full extent of this problem is difficult, but ask any service member you meet or their family, and they will have a story.

Allowing service members to sue the Department of Defense for medical malpractice will help root out this rot. There are few incentives better than the threat of legal action to push an organization to change its behavior. This would lead to better quality care for our service members and higher levels of readiness.

We will also hear from two legal experts who have studied the *Feres* doctrine. We look forward to gaining a better understanding of the legal foundation for *Feres* and why it has remained in place for 69 years just because the Supreme Court decided to legislate and Congress has sat back idly. We would like our legal experts to share any recommendations on how the *Feres* doctrine may be changed in ways that respect the unique nature and needs of the U.S. military.

The legal experts on our panel are Dr. Dwight Stirling, chief executive officer of the Center for Law and Military Policy, a think tank dedicated to strengthening the legal protections of those who serve the Nation in uniform. Dr. Stirling is also a Reserve JAG [Judge Advocate General] officer in the California National Guard and co-founder of Veterans Legal Institute.

Also joining us is Mr. Paul Figley, professor and associate director of legal rhetoric, American University Washington College of Law, that has published on the defense of the *Feres* doctrine.

Before hearing from our panel, let me offer Ranking Member Kelly an opportunity to make his opening remarks.

[The opening statement of Ms. Speier can be found in the Appendix on page 37.]

STATEMENT OF HON. TRENT KELLY, A REPRESENTATIVE FROM MISSISSIPPI, RANKING MEMBER, SUBCOMMITTEE ON MILITARY PERSONNEL

Mr. KELLY. Thank you, Chairwoman Speier.

I want to thank each of our witnesses for being here today. I particularly want to thank Sergeant First Class Stayskal, Ms. Witt, and Ms. Lipe, who graduated from the same law school as I did, for your service to our great Nation.

I wish to extend my profound sympathy for what each of you has gone through and are going through. No one should have to experience what you have experienced. Our service members, who sacrifice so much, deserve the best medical care that we can provide, and we, as an institution, let you down.

I am glad that you are able to tell your stories here today and bring public attention to this very important issue. But the unfortunate reality is that the Judiciary Committee, not the Armed Services Committee, has jurisdiction over this issue and should be holding this hearing instead of us. I encourage our colleagues on the Judiciary Committee to do so and to have an open debate on this issue that impacts our brave men and women who serve this great Nation.

But even if the *Feres* doctrine is changed, we know it will not make you or the other victims of military medical malpractice whole. We know that nothing can take away the profound wrongs that have been done to you. Therefore, we must focus on preventing these mistakes from happening again.

My primary concern is to make sure that the failures you experienced in the military medical health system do not happen to other service members. The quality of care in our Military Health System is something that is squarely within the jurisdiction of this committee.

In reading through the written statements of Sergeant First Class Stayskal, Ms. Witt, and Ms. Lipe, it is clear that the medical malpractice in these cases was not isolated to just one doctor. For example, Sergeant First Class Stayskal visited multiple doctors and the ER [emergency room] on several occasions, and not one of those doctors correctly diagnosed his cancer. In Ms. Lipe's case, she was treated in a combat zone, then at Landstuhl, and then back in the United States before anyone found her source of pain. These repeated failures, which occurred at military medical treatment facilities all around the world, indicate systemic problems within the military healthcare system.

Based on the language of the 2017 NDAA [National Defense Authorization Act], the Military Health System is currently undergoing the largest reform in a generation. This includes standardizing patient experience, improving quality of care, and increasing access to care—reforms that are essential to fixing the types of issues highlighted by your cases.

However, there are aspects of the Defense Department's reform plan that deserve great scrutiny. The services are contemplating a reduction of up to 20 percent of uniformed medical personnel, the Defense Department is evaluating whether medical facilities should be closed down, and many service members and beneficiaries are concerned.

I fear that these changes may damage the Military Health System and that these profound changes will happen without proper oversight from Congress. That is why I have asked for this subcommittee to hold a hearing on the status of military health reform.

In addition, The Military Coalition, a consortium of organizations representing 5.5 million service members, veterans, their families, and survivors, recently wrote the subcommittee urging the committee to hold a hearing on military health reform.

Madam Chairwoman, I ask that The Military Coalition's letter be made part of the record.

Ms. SPEIER. Without objection.

[The letter referred to was not available at the time of printing.]

Mr. KELLY. I urge the subcommittee to have a hearing on military healthcare reform prior to the National Defense Authorization Act markup so that members can address these important issues.

While I look forward to hearing from each of the witnesses today to discuss the *Feres* doctrine, I also want to learn more about your medical experiences and what we can do to make sure that these failures don't happen to any other service members.

With the military healthcare reforms currently underway, we have a rare opportunity to fix many of the problems that you en-

countered. So I look forward to your testimony, and I thank you for discussing this very important subject.

With that, Madam Chairwoman, I yield back.

Ms. SPEIER. Thank you, Mr. Kelly.

I ask unanimous consent to allow Members not on the subcommittee to participate in today's hearing and be allowed to ask questions after all subcommittee members have been recognized. Any objection?

Mr. KELLY. Without objection.

Ms. SPEIER. Each witness will have the opportunity to present his or her testimony, and each member will have an opportunity to question the witnesses for 5 minutes.

We respectfully ask the witnesses to summarize their testimony in 5 minutes or less. Your written comments and statements will be made part of the hearing record.

Also, we had hoped to have Professor Andy Popper of the American University Law School testify today. Though personal issues precluded his participation, I would like to ask unanimous consent to enter his article on this subject in the record.

Mr. KELLY. Without objection.

Ms. SPEIER. Without objection, so ordered.

[The information referred to can be found in the Appendix on page 141.]

Ms. SPEIER. With that, Sergeant First Class Stayskal, you will make your opening remarks. Thank you so much again for being here.

STATEMENT OF SFC RICHARD STAYSKAL, USA, SPECIAL FORCES GREEN BERET

Sergeant STAYSKAL. Chairwoman Speier, Ranking Member Kelly, and members of the subcommittee. I am grateful for your support, Chairwoman Speier, and thank you for the opportunity to appear here before you today in the subcommittee to present my story.

I very much appreciate being invited to testify about the *Feres* doctrine. This is the first time I have ever been called to testify, and I wish it could have been under different circumstances, but, nonetheless, I feel this is an important issue to address.

I feel this is a very important issue to the military community that requires congressional intervention to address and fix how this mistaken doctrine is used to strip hundreds of service members like myself and their families of the same rights that the rest of the citizens of our country have when it comes to medical malpractice.

By way of introduction, I served as a Marine for 4 years and am currently serving as a Green Beret in the United States Army Special Forces, stationed at Fort Bragg, North Carolina. I have devoted my entire career to the military, with this June marking my 17th year of service.

I first enlisted into the United States Marine Corps in 2001 and served as a machine gunner and a scout sniper for 4 years. During my 2004 tour to Al Anbar province, Ramadi, Iraq, I was critically wounded in action by heavy insurgent sniper fire. Following my recovery, I was honorably discharged from the Marine Corps.

By 2008, I had joined the Army and become special forces. I was assigned to the 10th Special Forces Group, Fort Carson, Colorado,

and later assigned 1st Special Warfare Training Group. I have been on multiple deployments throughout areas of responsibility in support of national interests during global war on terrorism. I have held numerous positions throughout my military career.

I was selected by the Army Special Forces Group to attend special forces underwater school Combat Dive Qualification Course, CDQC. Because of my previous gunshot wound, it was mandatory that I could not attend this school without having a CT [computerized tomography] scan done of my lungs to ensure the safety of myself and other divers within the course. When the imaging was done, my physical went forward, and I was cleared in January. A civilian had reviewed my scans and cleared me to go, and I went down to school.

Until about 6 months later, I found out that a Womack Army doctor failed to identify an abnormally (over 1.5 centimeter) large tumor located in the upper right lobe of my lung.

While attending dive school around the end of March 2017, I was experiencing difficulty breathing, and by April 2017 I had begun noticing signs of declining health—something I had never experienced before in my career or life. I was wheezing, coughing, had difficulty breathing. Anytime I would lay flat on my back, I felt like I was suffocating, and the weight on my chest was—it was unbearable. I had also begun coughing up a bit of blood at this time.

Typically, I am not one to complain. My training doesn't allow it. We continue to work without complaint. I started to express my concerns to my wife, Megan, and my coworkers. Finally, I had enough. I had to admit myself for help. I went down to the SWCS [Special Warfare Center and School] clinic to seek treatment, and they called an ambulance and sent me down to the Womack Army Hospital.

As I was wheeled into Womack Army Hospital, I went straight through the triage room and went out to the waiting room, where I was placed to wait with everybody else. By the time I saw the nurse and she had taken my vitals and I told her my symptoms and signs, she pretty much told me there was no way I could be in serious pain or any kind of discomfort due to my age and my condition of my job. She pretty much just disregarded it.

By the time I went back and I saw the ER doctor, he had ordered an x-ray, reviewed the x-ray, and said it was probably walking pneumonia. So he did a couple breathing treatments and sent me on my way.

Later that week, things continued to progress. By 1 week later, May 22nd, I was back into the ER. This time, I was calling my wife, I called TRICARE, I called the Army hospital; I begged and begged and begged for somebody to see me. I knew something was wrong at this point. My vision was going out, I couldn't concentrate, and I couldn't see.

My commander, not wanting me to go back to Womack Army Hospital and suffer the same thing, put me in my car and had somebody drive me out to meet my wife in town. By the time I got out there, I was practically unconscious. My wife picked me up, along with a friend, put me in a wheelchair, and they wheeled me inside.

While I was waiting to be seen, I completely passed out at this time. They took me in the back, where I was told a nurse did a sternum rub on my chest to bring me back and wake me up. From there, I did more treatments, and the ER discharged me with potential walking pneumonia and gave me prednisone. They didn't find anything either.

It was also stated that when I left Fort Bragg Army Womack Hospital that something had been seen and it was noted, but they didn't tell me what it was or what condition it was, that I was just to wait to follow up.

By the time I had been seen out in town, 6 months had passed by. The tumor had doubled in size; 2.8 by 2.2 centimeters was present on my upper right lung, and the CT scan showed a follow-up that should have been scheduled for me. Like I said, nobody ever told me.

It wasn't until finally my commander went down to the hospital and demanded that I either be seen or released to go off-post. At that time, the officer in charge said it was fine, I could go off-post. He released me, but, yet again, it took within the system several weeks for me to get off-post and be seen.

Once I was off-post and seen, immediately the doctor called me within a matter of a day, told me I needed more scans and I needed to bring everything in that I had. I brought that all in. Within 2 more days, I was seen, did a breathing treatment test. And then the last question he asked me, he says, have you been coughing up blood? I said, yes, I have. He says, you need to go downstairs immediately and do a scan.

He called me within the next day and said, if I could have you in here tomorrow for a test, I would, but I have to wait until the following week. So the following week I went in, and I had a biopsy done on my lung. And when I awoke, I was woken up to my wife crying and learning that I had, at the time, stage 3A lung cancer.

This life-changing news that could have been addressed nearly 6 months earlier while the cancer was still contained to one area of my lung—sorry—is inexcusable.

Later, around Christmas of 2017, I began to cough up more, in tremendous amounts of pain. By the beginning of January 2018, I had to go to the ER, where I was seen again for exhibiting difficulties breathing. This was an overall physically painful time due to my cancer spreading throughout my body.

I eventually did a PET [positron emission tomography] scan, and the PET scan revealed that my cancer had been metastatic and had spread. It now was in the left side of my neck in my lymph nodes, my spleen, liver, ilium crest, spine, and right hip joint. Beginning on January 22, 2018, I was diagnosed stage 4, terminal.

The failure of the military doctor's gross negligence and the failure to detect my cancer when it was first noted on the CT scan done on me in January of 2017 is a mistake that allowed an aggressive tumor to double in size and rob me and my family of my life without any recourse due to a 1950s Supreme Court court case that created the *Feres* doctrine.

Because of all that has taken place, I am no longer able to complete the Warrant Officer Course which I was selected for, and I am now currently being separated due to a medical discharge.

I have endured countless CT scans, MRIs [magnetic resonance imagings], PET scans, radiation, chemo, spleen biopsy, lung biopsy, as well as surgery to remove my upper right lobe. I have had countless other procedures, and no end in sight.

Lastly, I want to say that this does affect me, obviously, but my children are definitely the true victims, along with my wife. The hardest thing I have to do is explain to my children when they ask me, this doesn't make sense, how is this happening, and I have no good answer to give them. And I say, that is why I am coming up here to help convince these folks in Congress to change this.

This doctrine has effectively barred hundreds of service members and their families any chance to be made whole for receiving negligent medical care that is given by the government provider when service members are on Active Duty. Regardless of whether injury was a result of combat service or deployment, the doctrine has been utilized by branches of the military to shield negligent medical care given by military providers. This is medical care in which there is no element of military judgment.

In truth, the only difference between a military provider and a civilian provider is the military provider wore fatigues to work that day and his or her patients do not have a choice accepting their services.

This is why I am up here today, to call upon you folks to hear our cases and hopefully make a change within Congress in legislation.

I want to thank again my attorneys, Natalie Khawam and Daniel Maharaj, and again my family, and again Chairwoman Speier and Ranking Member Kelly for holding this and hearing my story.

[The prepared statement of Sergeant Stayskal can be found in the Appendix on page 40.]

Ms. SPEIER. Sergeant Stayskal, that was profound testimony. Thank you so very much.

Ms. Witt.

STATEMENT OF ALEXIS WITT, WIDOW OF SSGT DEAN WITT AND ADVOCATE FOR FERES DOCTRINE REFORM

Ms. WITT. Thank you, Chairwoman Speier, and to the members of the subcommittee for the opportunity to speak today.

As you know and as you mentioned earlier, in October 2003, my husband, Staff Sergeant Dean Witt, underwent a routine appendectomy. The nurse anesthetist was faulted for having administered a lethal dose of fentanyl, resulting in respiratory and cardiac arrest. She failed to call a code blue, used pediatric equipment for resuscitation, and misdirected a breathing tube.

Each mistake delayed critical seconds, and Dean suffered severe brain damage and remained in a vegetative state until I removed his feeding tube 3 months later.

I later filed a wrongful death suit, but my case was dismissed on the grounds of the *Feres* doctrine.

Sixty-nine years ago, the *Feres* doctrine was wrongly decided by the Supreme Court, because it leads to not only medical malpractice but also the abuse of power, mistreatment of survivors, lack of transparency, and lack of accountability.

After the malpractice incident and while my husband was still in the intensive care unit, I met with two JAG officers, a death casualty officer, Dean's major and first sergeant to discuss permanently retiring Dean. I was outnumbered, I was alone, and I was without legal representation. I knew signing these documents was serious, but I didn't understand all the implication or consequences it would impose.

In my distress, I told the JAG officers I preferred to wait. I was threatened with the removal of my medical benefits and Dean's pay frozen until I signed these documents. Later, I would learn that the rush to have Dean retired came down to eligibility for survivors' benefits, as Active Duty death benefits differ from retired benefits.

I was also told a formal investigation would take place and would result in changes to safety protocols within the hospital to prevent another tragedy from occurring. When I asked about the details of these safety measures and for a copy of the investigation, I was told that the information was protected by title 10 of the United States Code, would not be made available to me or to anybody in the public, and I would never fully know what happened to my husband in the OR [operating room].

The nurse responsible for my husband's death was also responsible for the death of another airman just 1 year prior. A colleague had stated she was considered the weakest link in their department. Despite her performance being merited as unsatisfactory, no preventive measures were taken to curtail her advancement, and she went on to kill two patients. If the appropriate action had been taken on this nurse during her first lethal negligent episode, Dean would still be alive today.

Before I end my time today, I would like to discuss one last topic that is delicate in nature. And I don't want to come across as indelicate, but it is a matter worth mentioning because it affects all survivors that are affected by the *Feres* doctrine.

It comes down to survivors' benefits. They are often cited by the opposition as the reason not to move forward with the *Feres* reform. Military law expert Eugene Fidell has quoted survivor benefits as being robust, yet they do not take into account pain and suffering. These benefits also come with restriction, whereas an award settlement would not have such restrictions.

To name a few of these restrictions and what I experience each year, I have to sign a certificate of eligibility form proclaiming that I have not married in the past year. I have to do this twice a year, for each of my dependents.

SBP [Survivor Benefit Plan] and the DIC [Dependency and Indemnity Compensation] offset cut 65,000 spouses out of nearly $12,000 a year in compensation. The SBP is an insurance annuity, and DIC is a VA [Veterans Affairs] benefit, but they count against one another when they shouldn't. If the survivor remarries, he or she forfeits the VA benefit.

There are also earned income restrictions. With the DIC, I cannot take a job that would go over $8,000 a year.

The Department of Defense survivors' benefit is taxable. The SBP is treated the same as a trust or estate, which means minor children can be taxed at a rate as high as 37 percent. The Department of Veteran Affairs' Dependency and Indemnity Compensation

is not taxable. With an award settlement, the IRS [Internal Revenue Service] does not tax award settlements for personal injury cases or wrongful death cases.

I hope my experience with the *Feres* doctrine has served a higher purpose and gives you a well-rounded view of its effects on our military and their dependents. And thank you for holding this hearing and thank you for listening.

[The prepared statement of Ms. Witt can be found in the Appendix on page 51.]

Ms. SPEIER. Thank you so much for your testimony. I think we have struggled for a long time on the issue of widowhood and the compensation issue, and it is one that has to be fixed. But you have raised some other additional issues that we will get to during the rest of the hearing. Thank you so much.

Ms. Lipe.

STATEMENT OF REBECCA LIPE, J.D., FORMER AIR FORCE JUDGE ADVOCATE AND ASSOCIATE ATTORNEY, STEPTOE & JOHNSON, LLP, SERVICE WOMEN'S ACTION NETWORK

Ms. LIPE. Madam Chairwoman, Ranking Member Kelly, honorable members of the subcommittee, my name is Rebecca Lipe, and today I have the unique privilege to speak to you as a disabled Air Force veteran and a representative of the Service Women's Action Network.

My story begins in 2011, when I deployed to the Combined Joint Special Operations Task Force in Balad, Iraq. In my role as the deputy staff judge advocate, I oversaw six subordinate commands and their respective JAGs. These duties required me to travel around the country in full gear, which included the standard-issue ballistic vest.

Now, the ballistic vests are not designed to fit a woman's body. In order for the gear to protect my vital organs, I actually had to remove the side panels, and I had to place foam inserts on the shoulders in order to remove some of the slack. I also was required to overtighten the gear around my waist so that it would remain in place. Ironically, this made the gear less protective.

Five and a half months into my deployment, I began having acute and debilitating pain in my abdomen. At the same time, we were withdrawing from Iraq—excuse me—so there were limited resources at the medical facility in Balad to actually address my pain.

However, instead of conducting an actual, thorough exam, they first accused me of having an extramarital affair, which was blatantly false, told me I must have had STDs [sexually transmitted diseases], and then—excuse me.

Ms. SPEIER. Ms. Lipe, take your time. Take a little swig of water if you would like.

Ms. LIPE. And then they chalked up my pain to normal women's problems.

From Iraq, I was medically evacuated to Landstuhl, Germany. Landstuhl is one of the most premier hospitals in the military's arsenal. Even with the extensive resources available at Landstuhl, the doctors determined without any objective evidence that I had

pelvic inflammatory disease, which is considered a normal, like, typical woman's problem.

They also, without any evidence, treated me on antibiotics for malaria, which I also did not have, and decided to medically evacuate me all the way back to Hurlburt Field.

From there, the mistakes continued for more than a year. The medical providers at Eglin Air Force Base were certain it was a female reproductive issue and performed two random, unnecessary surgeries on me and prescribed medicine that placed me into temporary menopause at 27 years old. This caused catastrophic hormonal depletions, organ and vaginal tissue atrophy, prevented sexual intimacy of any kind with my husband, and caused severe levels of depression to the point I was suicidal.

Throughout this trauma, I was also accused by military medical professionals of malingering and making up the debilitating pain.

Thankfully, though, after a year and a diligent review of my medical records by one doctor at Moody Air Force Base, my care changed. He was appalled at the previous treatment I received at the hands of the military and referred me to a civilian reproductive endocrinologist and a general surgeon. These two doctors immediately and correctly diagnosed me with sports herniation as a result of wearing the ballistic gear.

The civilian doctors subsequently corrected eight areas of my abdominal wall and attempted to reverse the effects of the unnecessary medical treatment I received at the hands of the military medical providers, but the damage was already done. I now deal with chronic abdominal pain and complications due to that medical treatment.

Further, my husband and I were completely unable to have children except through in vitro fertilization [IVF]. To date, we have undergone seven rounds of IVF at the personal cost of over $60,000.

Sadly, through much of this process I continued to receive substandard care at the hands of the military. During my first pregnancy, the doctors at Andrews Air Force Base misdiagnosed an ectopic pregnancy, resulting in an emergency surgery and the loss of my fallopian tube.

During our fifth round of IVF, I suffered a miscarriage and had to wait 4 days for a D&C [dilation and curettage] at Walter Reed, which should have been an emergency surgery. And then, after the surgery, the hospital subsequently lost the remains of our baby.

During our sixth round of IVF, after I had separated from the Air Force and switched exclusively to civilian providers, I received a level of care I had never received while on Active Duty and was able to deliver a healthy baby girl in July 2017.

This fall, my husband and I attempted our last round of IVF, but I experienced potentially fatal complications, and as a result, we can no longer have children.

The compound effect of this revelation along with the years of medical maltreatment and physical pain took its toll, causing me to seek hospitalization once again.

Now I sit before you, 10 abdominal surgeries later, as a broken but not defeated advocate for service members. Even as a JAG and experienced advocate, I had to fight hard to receive appropriate

medical care from the military system. The majority of other military members are not in the same position I am, especially our enlisted members, to be able to be an advocate.

Additionally, service women are still being issued ill-fitting gear when the technology is out there to outfit every single female with the right gear if Congress would only appropriate the funds to do so.

Members of the committee, as our champions and advocates, you can and must ensure that service members have access to and receive appropriate care from trained healthcare professionals. This includes providing the full range of women's health services in light of the growing number of female service military members defending our country.

You must also ensure that the military medical providers are held responsible for their incompetent actions.

Most importantly, you can ensure that service members who have suffered from medical malpractice are able to be compensated under the Federal Tort Claims Act for their injuries.

No service member should have to fight as hard as I did for their health with the military itself. We have the greatest military in the world, and our medical care should be no different.

Thank you for the opportunity to offer my testimony, and I look forward to answering any questions you have.

[The prepared statement of Ms. Lipe can be found in the Appendix on page 62.]

Ms. SPEIER. Ms. Lipe, thank you for your service to our country and for your riveting testimony.

Dr. Stirling.

STATEMENT OF DWIGHT STIRLING, J.D., LL.M., CHIEF EXECUTIVE OFFICER, CENTER FOR LAW AND MILITARY POLICY

Dr. STIRLING. Honorable Chairwoman Speier, Ranking Member Kelly——

Ms. SPEIER. Could you put the microphone closer to you?

Dr. STIRLING. Yes—and members of the committee, I am honored to be here today to address this important topic.

I am the CEO [chief executive officer] of the Center for Law and Military Policy, a nonprofit think tank. I am also a law professor at the USC [University of Southern California] Gould School of Law and a JAG officer in the Army Guard.

I recently completed a doctoral dissertation on the *Feres* doctrine. My testimony today is a product of having read every case and every article that has ever been written about the *Feres* doctrine and my nearly two decades as a military lawyer.

The *Feres* doctrine is the most disparaged and discredited legal doctrine in modern history. The condemnation has been constant and vociferous and nearly universal. The critiques that are the most hard-hitting have been made by the conservatives, in particular the late Justice Scalia and Professor Jonathan Turley.

To Justice Scalia, the doctrine was simply judicial legislation. The plain language of the FTCA [Federal Tort Claims Act] includes the personnel who are in the military, yet the Supreme Court had rewritten the act to exclude them. To him, this was activism at its worst.

He also condemned the fact that there was a double standard at the heart of the doctrine. It only applies to members of the military, not to their dependents or to people who are retirees.

Within the military healthcare system, more than three-fourths are civilians. They are the dependents and the retirees. Yet, when a doctor does a surgery and leaves a tool in their stomach afterwards, they can sue. Or if any of these events that we heard here by my colleagues had taken place to a civilian, to a dependent, they can sue. But when it happens to a service member, they can't.

If civil liability was so detrimental to the system, why isn't it banned? Why doesn't the ban then apply to everybody? Instead, it only applies to the few, to the less than 20 percent who are actually wearing a uniform.

Professor Turley, for his part, said that the way the doctrine operates reduces the quality of care. Applying a cost-benefit analysis, government officials overuse folks who are military doctors, who can't be sued, and they will underuse the civilians who are the specialists, who can be sued. They capitalize on a loophole, and they limit the access to the specialists who are civilians. As a consequence, according to Turley, we are putting our service members' lives at risk.

This particularly affects the young, the 18- to 22-year-olds, who are forced to receive almost all their care at a base hospital. I, as a major, and folks who are senior officers can often get off-post to see a civilian, but the junior enlisted can't. They don't have that kind of pull.

The upshot of all of this is concerning. While our policy makers are sending our military personnel to fight and die abroad, they fail to protect them at home.

Let's keep this in mind: Even those in prison can sue when a doctor makes a mistake. We are giving more rights and protections to those in prison than to those who wear our uniform. I keep having the question, does this reflect our values? I have a hard time in responding to that in the affirmative.

Okay. Thank you.

[The prepared statement of Dr. Stirling can be found in the Appendix on page 73.]

Ms. SPEIER. Thank you, Dr. Stirling.

Mr. Figley.

STATEMENT OF PAUL F. FIGLEY, J.D., PROFESSOR OF LEGAL RHETORIC, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Mr. FIGLEY. Madam Chair, Mr. Ranking Member, members of the committee, by way of experience, I spent three decades representing the United States in the Civil Division of Department of Justice in Federal Tort Claims Act litigation. For the last 15 of those years, I was second in command in the office responsible for most of the tort litigation of the government. For over a decade now, I have been in academia, where I teach torts and where I write about sovereign immunity, the FTCA, and the Judgment Fund.

At the outset, we can all agree that government negligence or malpractice does cause real injuries and can have a tragic impact

on the lives of service members and their families. It is understandable that such people are frustrated when they perceive that they or their loved ones are being treated unfairly.

From the perspective of one injured service member or one family, the remedy may seem obvious: allow the injured service member to sue in tort. From the perspective of fostering the long-term success of a critically important institution, the United States military, that remedy is mistaken.

Simply put, Congress should not alter the *Feres* doctrine. Doing so would disrupt the vital and special relationship between the government and its service members. That relationship has roots in the military's unique disciplinary system, its special and exclusive system of military justice, and its comprehensive compensation system.

The military compensation is similar to State workers' compensation programs in that it provides a prompt, fixed, administrative remedy without a showing of employer negligence or the time, expense, and emotional burdens of litigation.

The military system is more encompassing than workers' compensation laws because it applies to injuries arising during a service member's period of service, not just those arising in the course of employment at the workplace. Its benefits are substantially broader than those of State workers' compensation laws and include programs ranging from education to housing to medical home improvements, lifelong care, and sexual trauma. The VA booklet describing benefits fills 70 pages.

If Congress overturns the *Feres* doctrine, attorneys for injured service members will litigate whether someone in the government wrongfully caused those injuries. And as the Supreme Court has repeatedly recognized, the unique relationship between the United States and its service members would be undermined if exposed to our adversarial tort system.

One key part of that relationship is the military's obligation to take care of its own and to treat similarly situated service members equally. Similarly situated service members cannot be treated equally if Congress overturns *Feres*.

If three service member amputees share a hospital ward, one having lost a leg in combat, one suffering the same loss in a tank accident in France, and one because of malpractice by a military doctor in New York, each will have the full panoply of military benefits. The two who suffered their loss in combat or overseas would be barred from suing by the FTCA's exceptions for claims arising in combatant activities or foreign countries. An FTCA suit by the one injured in New York would likely recover a million-dollar judgment. The other two service members would know it and may well feel unfairly treated. Such feelings undermine military morale and cohesion.

This is not an idle concern. A key lesson of the September 11th compensation fund is that providing different, individualized awards to members of a group who have suffered a similar loss can cause frustration and ill will.

As the report of that fund's special master explained, "There are serious problems posed by a statutory approach mandating individualized awards for each eligible claimant. The statutory mandate

of tailored awards fuel divisiveness among claimants and undercut the very cohesion and united national response reflected in the act. The fireman's widow would complain, 'Why am I receiving less money than the stockbroker's widow? My husband died a hero. Why are you demeaning the value of his life?' "

Presidents Truman and Eisenhower understood this when they vetoed private bills for the benefit of single service members. President Eisenhower explained, quote, "Uniformity and equality of treatment to all who are similarly situated must be the steadfast rule if the Federal programs for veterans and their dependents are to be operated successfully."

For these reasons, Congress should not alter the *Feres* doctrine.

[The prepared statement of Mr. Figley can be found in the Appendix on page 114.]

Ms. SPEIER. All right. Thank you all for your testimony.

Let me start with you, Mr. Figley. Do you think allowing service members to sue the government for medical malpractice in a noncombat setting would create a worrisome number of lawsuits that you might characterize as frivolous?

Mr. FIGLEY. No. I don't believe so.

Ms. SPEIER. Okay. So that would not be an issue.

You also referenced the trust relationship that exists. And there is a special kind of trust that exists between the military leadership and service members and their families. There is this trust in part because there is a sense that we are family and that we will take care of you.

I want to ask those of you who have suffered the losses and the medical malpractice if you feel that the DOD's subsequent response has violated that relationship of trust.

Sergeant Stayskal.

Sergeant STAYSKAL. I believe it violates the trust completely.

I mean, you know, when I signed up to do my job, I was told: This is your job. You will do this job. You will do it to the best of your abilities, no questions asked.

Well, I believe that when the DOD said that they—whoever—they said that they would provide me adequate medical care to a standard, and they failed that portion.

So, therefore, my trust is completely broken with them, not all of them, but the ones—but then it goes back to, well, which one is it? Who knows now? They are blended in, and they disappear within the system.

So the trust is lost completely there. So I don't—I don't——

Ms. SPEIER. All right.

Ms. Witt.

Ms. WITT. I have to agree with Sergeant Stayskal.

In my particular situation, because of transparency issues, even down to making medical choices for my husband at that time, I was not, first, aware that he went so long without oxygen. I was only told that it was a couple of minutes and that they were just observing him until I actually arrived on the base and saw the state that he was in. He was in a medically induced coma, so I could not tell, like, how severe his brain damage was at that time.

Had I known, I probably would not have had him suffer in his hospital room for 3 months. I probably would have taken him off

life support at that time, which was a ventilation, and he probably would have been able to at least have donated his organs. And that affects, like, 10 other people in the world that were probably waiting on those organs.

So that trust right there was lost because I couldn't even trust the medical providers who were providing him with care.

Ms. SPEIER. You know, Ms. Witt, we have very similar experiences. My first husband was on life support, and that is exactly what I was concerned about, whether or not I would be able to donate his organs. So I totally understand what you are going through.

Ms. Lipe, your comments?

Ms. LIPE. I have completely lost faith in the DOD to be able to take care of me.

I still am actually a Navy spouse. My husband is still serving Active Duty in the Navy. And so, therefore, both myself and my daughter are entitled to TRICARE benefits and could receive all of our care on base for limited cost.

Instead, I pay an exorbitant amount of money to pay for my private insurance with my current employer because I don't trust them. I will not let them touch me or my daughter because I no longer trust that they can take care of us appropriately.

Ms. SPEIER. Dr. Stirling, you know, those who are proponents of the *Feres* doctrine—and, certainly, Mr. Figley made mention of this in his testimony—suggest that depriving service members of an ability to sue is a fair trade in the circumstances, given the generosity and comprehensiveness of the military workers' comp scheme.

Why do you think enabling service members to take legal action in malpractice cases is necessary despite the generosity of the scheme?

Dr. STIRLING. Because, Chairwoman, it is simply not the case. This idea that VA disability is a substitute for a lawsuit in the case of malpractice has been exposed as a fallacy by every scholar that I have ever read except for Mr. Figley. He is in the minority. I think he is the only one who has made that kind of a contention.

And the reason is this. When you apply for VA disability, you have to show that there was a cause. You have to show that there was some kind of a military act that led to the injury that you are claiming has occurred. Well, in malpractice, you can't do that, because all the evidence of the cause is—that is the negligence. You can't get to the negligence because you can't file a lawsuit.

So how can you show, when you are submitting a VA disability claim, that because of the appendectomy, you know, now I don't have any feeling within my fingers? It is because of the mistake that I lost the feeling. I don't have evidence of the mistake because I can't get to those documents. I can't sue.

And, as we have heard, when I then—you know, if I am the patient and I am adversarial to the DOD, they shut down the information. So what happens? I have seen it time and time again as a veteran advocate. When you are hurt due to malpractice and you file a claim, the claim is denied. So you don't get that claim. That is a fallacy, and it should be rejected. And it has been by everyone except for my colleague, by Mr. Figley.

Ms. SPEIER. Ms. Lipe, you referenced a traumatic experience in terms of gynecological services within the military. And it is an issue that I have been concerned about for some time, because I worry that there aren't enough sophisticated medical professionals with gynecological training in the military.

I just toured a number of bases over the recess, and, talking to spouses, I heard that over and over again, that they don't diagnose, you know, cysts, for instance.

What do you think we should do in order to make sure that service members who are women, who are going to need gynecological services, can get the kind of care they deserve?

Ms. LIPE. I think especially given the lack of service, either increase the amount of the service providers who have those specialty skills in the military or allow those service members and the spouses, in certain circumstances, to go off-base and seek out civilian specialty.

Because, for example, like, a reproductive endocrinologist, there are very few of them in the military. If they are not going to have one—if you are at Altus Air Force Base, they are not going to have an endocrinologist there. They should be able to seek out a civilian provider who has that.

So I think it is allowing greater access to the civilian sector, which will also improve the standard of care and it will allow the most up-to-date care possible.

Ms. SPEIER. Thank you.

Sergeant Stayskal, in our conversation, I would just like some clarification. I was under the impression that when you went in for your initial scan before going to dive school that they actually noted on the results that you had a lesion and that you should be referred, and the powers that be just never followed up. Was that my error in my recollection?

Sergeant STAYSKAL. Yes, ma'am. It was seen—or it was missed—it was missed in the beginning but noted the—they noted the second—the first time I went to the ER, they noted that it was actually seen on the first scans, and nobody ever told me. They never followed up.

When I was discharged from the ER also, the doctor said, there is something there, we have seen something, but we are not sure of what it is, so you will have to go see a specialist.

Ms. SPEIER. So the first scan actually did detect the error. It just wasn't—you weren't informed, and you weren't referred. And it wasn't until your second visit, which was then to the ER, that they said that there was something on your scan.

Sergeant STAYSKAL. Yes, ma'am.

Ms. SPEIER. And then were you referred?

Sergeant STAYSKAL. Then I was referred, but by the time I had heard from pulmonology, I had an appointment that was about 30 days out before they would even talk to me. And that was what I was fighting to call back and say, hey, I need to be seen there. And they said, well, you have to be over a certain amount of days before you can be seen off-post, and new patients are not priority; existing patients are priorities. So that was where I had to keep waiting.

But, again, even once you are referred off-post, you have to wait for the specialty referral to go through the system, and that has to

go to the provider out in town. Then they have to call you and schedule an appointment. And by that time, about 6 weeks had gone by, again, from my first ER trip to where it had, from that point, spread from my lung over.

And that was when I started coughing up blood profusely, I mean, to the point, when I was sleeping, I mean, it felt like I was being waterboarded. I couldn't breathe. I felt like I was drowning constantly.

Ms. SPEIER. Thank you.

Dr. Stirling, in your dissertation, you reference that two-thirds of those who are provided services at military hospitals are actually dependents. Is——

Dr. STIRLING. Yes.

Ms. SPEIER [continuing]. That correct?

And that being the case, you would think that we should prioritize our service members in terms of getting services. But it appears that these facilities are providing services, first and foremost, to the spouses and the dependents.

So, in Sergeant Stayskal's situation, he had to wait because there were all those other appointments before him of dependents. Is that correct?

Dr. STIRLING. Yes. Yes.

But what is, I think, you know, particularly a problem is this idea that if we allow those hurt through malpractice to bring a lawsuit that somehow that is going to cause a dissension within the troops. And I love when that kind of claim is made by someone who didn't serve. Because I have served, and I know that that kind of claim is ridiculous.

In fact, you know, it plays upon the worst kind of ideas, because what it does is it takes this idea that—we all are thankful for the infantry. Without the infantry, we wouldn't, you know, be here. They are the ones out in the field. And when they are hurt, it is important. But it is also important when a service member is hurt through the malpractice of a doctor.

So the idea isn't which injury is more important or what one service member feels about another. It is, where is liability, you know? It is, where should we have civil liability? You know, there is no one—and I am at the top of the list—who wants there to be liability in combat. That is why our Congress and the FTCA said this doesn't apply to combat. That is why the bill that is in front of the committee doesn't apply to combat. No one wants a commander concerned about a suit on the battlefield. Nobody wants that. But what we do want is a doctor to be concerned.

And so, you know, I ask, you know, how do we know that we want our doctors to be concerned? Because in every other aspect of our healthcare system, if a doctor is incompetent, he can be sued. If we don't like the idea of liability, you know, why do we have it everywhere else except for the military in the context of medical malpractice? It exists everywhere else except for one place, for the 1 percent who are fighting and dying for us.

Is it the right kind of a policy to, you know, have their doctors, the ones who are fighting and dying, you know, not concerned about a lawsuit but every other doctor, to include the ones that do

work on each of the Members here—you know, they have liability, and they do a good job because of that.

Ms. SPEIER. Thank you.

Ranking Member Kelly.

Mr. KELLY. Thank each of you again. And it was powerful and moving testimony, and I appreciate that.

Sergeant First Class Stayskal, you know, I want to reiterate again, it is not—the problem with this is we are talking about the *Feres* doctrine and we are in the wrong committee.

Ms. SPEIER. Well——

Mr. KELLY. We are talking about differences between equity and law and equity—or cases of equity and cases of law, dicta versus real law. And so I hope the Judiciary Committee is listening to this, because these are very, very real discussions that need to be had in a committee that can actually do something about it.

We are doing something here, and I thank the chairwoman for bringing this. We are doing something because we are highlighting their need to address this. But the reality is—but—so, Sergeant First Class Stayskal, I want to focus on what we can do in this committee on military personnel to help other soldiers from doing what you have—the wrongs that you have been done.

So did you report any of these incidents to DOD? And what actions were taken to investigate the failures of the medical treatment?

Sergeant STAYSKAL. So, once my wife and I began reading back through the notes, the doctors' notes and everything, you know, it became very evident that something was wrong. Even when I finally got to see my civilian provider out in town, he was actually the first one to go, "Why weren't you seen in January? There is clearly a mass there." And that was what sparked us. And my wife just started reading and reading, and before we knew it, it didn't make sense.

At that point, I actually scheduled a meeting with the OIC [officer in charge] of the hospital at the time at Womack. I invited my chain of command to go down there with me. They went with me. I am not going to speculate where the commander was, but he just came off of leave at the time. When I went into his office, explained everything that had happened to him, I was met with, "Things do happen."

From there, I—pretty much, I mean, there was a lot of back and forth, but there was no real answer on—there was nothing they could do, you know. So I really got no feedback after that. That was pretty much the answer I got, sir.

Mr. KELLY. I hope that you will let DOD—and hopefully some of those guys are listening today, but I hope that you will file a complaint so that we can do some systemic things that maybe can keep someone else from doing this in the future.

And I thank you for your service both in the Marine Corps—and I actually was in the same area but a little bit after when you were there. And so thank you for your service.

Ms. Lipe, you and I met in my office earlier today. And one of the stated goals of the 2017 NDAA Military Health System reform is to standardize patient experiences, that service members receive excellent care regardless of where they are seen. And you have cov-

ered a little bit of those, but tell me the differences in where you have received care.

And you don't have any confidence in the military healthcare system now to care for you and your daughter. Is that correct?

Ms. LIPE. Yes, sir. I was seen at Landstuhl, Eglin Air Force Base, Hurlburt Field, Moody Air Force Base. I have seen a number of—and Walter Reed. Two, Walter Reed and Landstuhl, are one of the most premier hospitals that the military has, and I have received medical malpractice in each of those locations.

So it doesn't give me faith that I am going to be listened to, especially when it got to the point of the medical doctors telling me I was making it up and that it was in my head. That is not treating you. So I had already had the mental health issues because of the hormonal depletion, but when you have a medical provider just telling you you are making it up, you lose faith in their ability to even listen or treat you.

So now I see only civilian providers and my daughter sees only civilian providers. My husband, unfortunately, because he is still Active Duty, doesn't have the option to see anything but military providers, and that terrifies me.

Mr. KELLY. And I think we talked about some of those things, things that are within—that we can fix on this committee, or this subcommittee. And we talked about the body-armor issue.

Ms. LIPE. Yes, sir.

Mr. KELLY. And those are the things we can fix, because there is the root cause of this. And we still haven't fixed that problem.

And we also talked about the number of female—not female physicians—physicians who are capable of treating uniquely female problems. And do you feel there are enough, or do you think there are things that our military healthcare system could do so that we can better take care of our females in service?

Ms. LIPE. I don't believe there are enough.

For example, at Walter Reed, you have—the GYNs [gynecologists] are dual-hatted in both the IVF clinic as well as the GYN clinic. So that is one of the reasons why Walter Reed can only provide so many IVF treatment cycles per year. They are dual-hatted and trying to serve multi purposes, where you need to have specialized care where they can focus on specific areas. If you are going to do in vitro, focus on just in vitro.

If you are going to be a GYN, make sure they are the best GYNs available. And make sure there are enough of them so you are not having to see, necessarily, a nurse practitioner; you can see an actual GYN. We need more specialists, and we need them to account for the amount of women that are in the military.

And in regards to the gear, the technology is already there. It just is outfitting it. We can look at the number of women serving in the military, and we can count what the gear costs and figure out what the appropriate level of appropriations is.

Mr. KELLY. Would you agree with me that, depending on the location that you are, what you need is the best health care you can get, whether that is military treatment or outside treatment? Someplaces that is available, sometimes it is better in the military, sometimes it is better on the civilian world, depending on where you are located.

But would you agree we need to look at how we make sure we have the right assets, the right people with the right skills in the right place at the right time?

Ms. LIPE. Absolutely. That is the only reason that I was referred to the reproductive endocrinologist who got me healthy. I had to drive 2 hours each way to see him, but it was worth it. And it was thankfully from one doctor at Moody Air Force Base who understood that he did not have the experience and knowledge to treat me, and he got me to the doctor who could.

Mr. KELLY. And Ms. Witt, I understand that you have advocated for changes to patient safety when administering anesthesia. What changes would you make to the military medical practices regarding the use of anesthesia?

Ms. WITT. That is a complicated question, because I am not a medical expert, and I haven't—even though I am in school right now for prerequisites for nursing, I don't plan on going into anesthesia as a nurse.

I have advocated with medical boards to—I don't necessarily think that nurses should be doing anesthesia. I think it should just be an anesthesiologist, that they are more well-rounded in health care. I believe that they have about 50,000 more clinical hours and experience and additional schooling in order to become an anesthesiologist.

Therefore, if something happens, you have critical seconds to apply medical care to someone, to get an airway opened up again if it has become closed off. And a nurse anesthetist cannot open up an emergency trach [tracheotomy] to do that. Only an anesthesiologist would be able to do that.

Mr. KELLY. I thank each of you three again for your testimony here today. And I am sorry for the travesties that each of you have deserved. And I want to make that better for our soldiers, sailors, airmen, and Marines and our DOD people and their spouses in the future.

So thank you for your service, and I am sorry from the bottom of my heart. I just want each of you to know it never should have happened. But let's please do what we can to keep it from happening again. Thank you.

And I yield back.

Ms. SPEIER. Thank you.

Let me clarify for everyone that this committee has full jurisdiction over the quality of medical health care in the military, and that is why we are having this hearing. I think it is very informative to all of us.

And the amendment to the Federal Tort Claims Act is an amendment that I am introducing as a bill later today. And it will be named after Sergeant Stayskal.

And I would like to give this to you, Ranking Member Kelly, to look at, to see if you would like to join me in that bill.

Next is Mr. Gallego.

Mr. GALLEGO. Thank you, Madam Chair.

I understand the current interpretation of the law is that military malpractice is an incident to military service. I mean, that shocks me, as a combat infantry Marine.

Sergeant Stayskal, Semper Fi, brother. Thank you for being here today.

When you were training to become a United States Marine and later Green Beret, were you ever taught that malpractice is incidental to serving in the military?

Sergeant STAYSKAL. No. Nobody ever—you never—it wasn't a discussion, because, you know, when I was young in my career, you had faith in everybody. You know, you didn't know any better at the time. But I had faith. You know, I figured I am serving with the best of the best, everywhere I was at. So to assume that, you know, you would need to worry about something like that just wasn't a thought on your mind, you know? And you assume that your command, your chain of command all the way to the top had your support and they would take care of you.

And I would also like to share with you, when I was shot in 2004, I have documentation in my records, a bandage that was stuffed in my back from the battlefield itself wasn't found and pulled out until I was stateside, all the way back in my duty station. Never complained about it, never had an issue with it. That was part of my service, that was a part of combat, and we accepted stuff like that. Things were going to happen; decisions were going to be made.

But when I walk in in civilian clothes and I have a scheduled appointment and I am seeking medical care and treatment at that point, you know, I mean, there is no battlefield decisions at that point. It is just a standard of care that should be there.

Mr. GALLEGO. That is right, Sergeant. When I joined, even though I was enlisted, I already had a college degree, but never knew anything about this type of exception that they found under the law.

Madam Chair, some of my colleagues have told me that changing this policy would be difficult because of the high cost involved—in other words, that there is so much medical malpractice in the military, it could cost billions of dollars to allow service members the same rights as their fellow citizens.

I wonder, Madam Chair, what it says about our military medical system that it is so bad that we have to actually shield it, that it could cost multiple billions of dollars to fully allow tort claims, you know, which I think should scare us all.

Madam Chair, the interpretation of *Feres* by multiple administrations is frustrating. This administration is worse, obviously, that it is willing to steal billions of dollars from recruitment, from counternarcotics accounts, and from crucial military construction accounts to make policy choices about what it likes, but somehow the billions it might cost to provide a more expansive reading of the governing statute and Supreme Court decision is too expensive. The lack of moral prioritization by this administration is galling.

Speaking frankly, Madam Chair, the situation we have right here is just unjust. It is wrong. Sergeant Stayskal and Ms. Witt, both of whom have chosen to spend some of this time with us this afternoon, instead of their families, deserve better. I hope that there is something that we can do about the situation, because the moral imperative is clear. This is unjust to our service members and their families.

And with immense thanks to all the witnesses, and your time and your sacrifice and your anger, I yield back.

Ms. SPEIER. Thank you, Congressman.

Next is Congressman Mitchell.

Mr. MITCHELL. Thank you, Madam Chair.

I would join Mr. Kelly in noting that, while certainly health care of our military is within the purview of this subcommittee in House Armed Services, the judiciary, the process by which who can and cannot sue the Federal Government or other institutions is, in fact, not the purview of this committee. So I am confused.

But since we are here, we will proceed with discussing the——

Ms. SPEIER. Will the gentleman yield?

Mr. MITCHELL. If you yield me time to make up for it——

Ms. SPEIER. Absolutely.

Mr. MITCHELL [continuing]. I certainly will.

Ms. SPEIER. We will stop the clock for a moment.

There seems to be a refrain coming from the Republican side of the aisle that is, I think, unwarranted. This is a hearing that we are having about the quality of health care in the military by service members who are not in combat situations. They all have referred to what are medical malpractice cases that indeed come under *Feres,* but we have every right and responsibility to have a hearing on the quality of health care in the military.

And, with that, I will start the clock again.

Mr. MITCHELL. If you give me a moment to respond to your question——

Ms. SPEIER. Certainly can.

Mr. MITCHELL [continuing]. I would appreciate it, Madam Chair.

The reality is, the title of the hearing is "*Feres* Doctrine—A Policy in Need of Reform." So the reality is, if it was about health care, if it was about the provision of health care, which is clearly needing, it is not working well, that would be fine. But it is not.

But given we are here today, we will talk about *Feres,* we will talk about its application, because I think it is important.

I will note for my colleague down at the other end that it is not the current administration only that has said that this is a problem and expensive. The *United States* v. *Johnson* case was decided May 18, 1987.

I think, Mr. Figley, you can help us with how long the *Feres* doctrine has been in place.

Mr. FIGLEY. It has been in place since 1950.

Mr. MITCHELL. And there has been no effort on the part of the administration to change that that I am aware of.

Mr. FIGLEY. It comes up every few years, and I don't believe any administration has supported changing the *Feres* doctrine.

Mr. MITCHELL. I will surprise Madam Chair by saying that I am deeply troubled by the *Feres* doctrine. I have had a chance to read the dissent from the late Justice Scalia to the *United States* v. *Johnson* case, and I couldn't agree more with his logic, with his rationale.

And I would like to talk to you about your rationale, the one you have hung on to, about—explain to me your rationale as to why *Feres* should not be addressed.

Mr. FIGLEY. My point overall is that *Feres* serves in a way that treats everybody in the military the same. It is not that military physicians can't be sued. No government position can be sued.

Mr. MITCHELL. Okay. Let me——

Mr. FIGLEY. They all have immunity.

Mr. MITCHELL. If we are going to talk about *Feres* and its uses and application——

Mr. FIGLEY. Yes.

Mr. MITCHELL [continuing]. And if you are concerned about variations of it based on State claims in various States, then, in fact, we could modify it or amend it to say they all have to be done through Federal court, at which point they would be uniform, would it not?

Mr. FIGLEY. No.

Mr. MITCHELL. Why?

Mr. FIGLEY. The basic substance of the FTCA applies the law of the State where the negligent or wrongful act took place. So California malpractice law is different from Oklahoma law.

But deeper than that, if you suffer medical malpractice overseas, suit is barred by the foreign tort exception.

Mr. MITCHELL. You have read the—I assume, I am willing to bet you have read the Scalia——

Mr. FIGLEY. Yes.

Mr. MITCHELL [continuing]. Dissent in which he was joined by three other Justices, correct?

Mr. FIGLEY. Yes.

Mr. MITCHELL. And, I mean, what response do you have to a pretty compelling argument that *Feres* simply should not apply? That, in fact, by going for the uniformity you seek, we are mistreating our military members, treating them—a Federal prisoner has more rights to sue the Federal Government than does a member of the military for medical malpractice, among other items.

Mr. FIGLEY. Yes, a Federal prisoner can sue the government for medical malpractice. A Federal prisoner cannot sue the Federal Government for an injury suffered in prison industries as a——

Mr. MITCHELL. Well, but if you would just answer my question. You have tried to parse it. But if you could just answer it. They can sue for medical malpractice.

Mr. FIGLEY. Yes.

Mr. MITCHELL. Military members cannot. They can't.

Mr. FIGLEY. They can—they cannot if it is part of—yes, you are right. Typically, they cannot sue, but——

Mr. MITCHELL. So explain to me the rationale, why you would argue at this point in time—and I have looked at your biography and history—that military members should have less rights, which is finally what you said, than a Federal prisoner to pursue claims that they have suffered medical malpractice.

Mr. FIGLEY. Because the Federal prisoner does not have the overall compensation——

Mr. MITCHELL. Well, you have just explained it from the perspective of a Federal prisoner. What about the perspective of a military member?

Mr. FIGLEY. A military member has all of the support systems, put in place by Congress, whether they are adequate or not—and I think——

Mr. MITCHELL. With all due respect——

Mr. FIGLEY [continuing]. They are certainly more generous than workers' compensation.

Mr. MITCHELL. With all due respect, they don't. I mean, we hear from numerous witnesses here—and I apologize. I had a press conference I had to go to, so my apologies. I have read your opening statements. So please understand it is not just out of the blue. And I am offended by it.

But, more importantly, Madam Chair, I believe that *Feres* needs to be addressed not just for medical malpractice. There are other claims that military members should be able to pursue that, in fact, *Feres* and its subsequent rulings have prohibited. The idea of uniformity.

The other is—the other which amazes me is military chain of command. Are you kidding me? We have people being injured because of negligence outside of duties as a combatant. You go to combat, you understand that is the deal. You are in a combat environment, people are taking adverse action, that is the deal. But outside of that, why should they be stripped of their rights while they are sitting on base and someone hits them by a car? Why?

Mr. FIGLEY. For the same reason that if you are a bus driver for Greyhound Bus and you are struck by a Greyhound Bus, you can't sue Greyhound Bus as workers' compensation. Now, you could——

Mr. MITCHELL. Dr. Stirling, go ahead. Join us, please. I only have a little bit of time, and I apologize, but——

Dr. STIRLING. When something happens at a hospital on base, that is between the doctor and the patient. That information doesn't get back to the chain of command. It can't——

Mr. MITCHELL. Certainly hopefully not.

Dr. STIRLING [continuing]. Because of HIPAA [Health Insurance Portability and Accountability Act]. I work as a JAG officer in the Army. It cannot. If it gets back, then the person who has relayed it back will get into trouble.

The idea that being able to sue a doctor would affect the good order and discipline of the unit is ridiculous, and it has been rejected by every scholar that I have ever read, to include in the *Johnson* case.

The idea—well, here. I will tell the group this. I have worked for many years as a JAG, as a prosecutor. And what I do is I handle the accusations typically in the sexual assault case, of a survivor of a sex assault who is making an accusation against someone who is in the chain of command. Oftentimes that is against the commander. So here we have a charge made within the unit between a survivor of assault and the commander, and we let those cases go forward. And they don't hurt good order and discipline.

So this idea that—if I could just finish. So the idea that if we allow a suit between a patient and a doctor that is completely removed from the chain of command, that it would somehow affect the good order and discipline is just ridiculous.

Mr. MITCHELL. Well, let me, because I have gone well over my time—and I apologize, Madam Chair.

I believe that discussing it solely in terms of medical malpractice is inadequate. I believe that since the courts have failed to deal with this effectively—I don't even agree with the logic of the *Feres* doctrine to actually believe it——

Dr. STIRLING. And I agree with you on that.

Mr. MITCHELL [continuing]. We need to address this on a more holistic basis so that, in fact, our military should not have fewer rights to protect themselves, to recover in circumstances of negligence, than do other citizens. And right now they do, and it is morally wrong.

So, with all due respect, thank you for the additional time. I appreciate it. Thank you very much for being here. I appreciate your service, sir—all of you. I am sorry.

Ms. SPEIER. Thank you, Mr. Mitchell.

Mr. Cisneros.

Mr. CISNEROS. Thank you, Madam Chair.

Thank you, Staff Sergeant, Ms. Witt, and Ms. Lipe, for being here today.

Ms. Witt, I want to ask you a question just basically based on your testimony. You said you have to apply on an annual basis for you, and I think you said your children biannually, for VA compensation to your husband's death.

How much do you get from the VA on a yearly basis, if you don't mind me asking?

Ms. WITT. I can give you an approximate number, because I don't have my taxes in front of me.

So I believe that there are two different types of benefits. So the Department of Defense has the survivors' benefit, which is taxable. That is paid to my children. And then the Department of Veterans Affairs has the Dependency and Indemnity Compensation that is not taxable, nor is it transferable.

If I did not have children, say, if I was a widow to someone who I had not had children with, I would not be able to receive both these benefits together.

To answer your question directly, I believe that my children each get about $450 each from the Department of Defense for survivors' benefits, so you can do the math on that if you want.

Ms. SPEIER. And it is taxed.

Ms. WITT. And now it is increasingly taxed because of the recent tax codes that have gone up, but——

Mr. CISNEROS. Right.

Ms. WITT [continuing]. I mean, it can be as much as 37 percent, because it is being treated like a trust for a very wealthy child.

Mr. CISNEROS. Right. So I will just say, it is not very much.

So, Dr. Stirling, if she was permitted to allow a suit for malpractice, I mean, based on your experience, how much do you think she could have gotten?

Dr. STIRLING. From what I have heard here, Congressman, you know, $10 million or more. That kind of negligence, of the injection of a drug during a routine appendectomy that results in the death of the patient, where there is no explanation for it, it is just an error by the nurse, it would be, you know, $10 million or more.

And the idea there is that if we are concerned about a sense of a double compensation, if we are concerned that, oh, she could get

a claim for, let's say, $10 million and receive from the VA, we do adjustments like this within the government all the time, where we could reduce the amount of her claim that she got from the FTCA by the amount that she receives from the VA. We can make that adjustment. We do it all the time.

There is a lot of concern that I have heard from Mr. Figley about the double-dipping idea, that, oh, there would be a judgment on a lawsuit and—no. We can make that adjustment. We do it all the time. That was one of the points within the dissent within the *Johnson* case, is we were told by Justice Scalia that these kind of adjustments are done on a routine basis.

For instance, I work in the National Guard. I have applied for a claim under the VA for a disability. If I get that claim, if I prevail on that claim and I get some kind of a rating, I won't be able to receive my money from the VA until I am out of the Guard, because, otherwise, it would be seen as a double compensation. We can make those adjustments.

Mr. CISNEROS. Right.

And just one other question. I know, Mr. Figley, you had mentioned that one of the reasons for doing this is because all members of the military are treated equal and to make sure, if one person was able to sue for one injury that they had, when somebody was sitting in the—sharing a hospital room with them, would feel mistreated because of that. And you brought up the fact that after 9/11 those individuals received equal payments. That——

Mr. FIGLEY. No, they did not receive——

Mr. CISNEROS. Right. That is not true.

Mr. FIGLEY. They received unequal payments. That was the problem.

Mr. CISNEROS. Correct. So if they received unequal payments in that situation, why couldn't we do that, the same thing for our military folks? It should be, if somebody was treated wrongly and done wrong, why shouldn't they be justified there through the means of being able to sue and get compensation for that mistake and that injustice that was done to them?

Mr. FIGLEY. Certainly, Congress can decide to do that. The disadvantage is that people with similar injuries could receive drastically different amounts. If you are injured in Toronto, you would get nothing. If you are injured in Kansas, you would get much less than if you had exactly the same injury in California or New York.

Mr. CISNEROS. Well, I mean, this is done in Federal—go ahead, Dr. Stirling.

Dr. STIRLING. Well, it is just, that happens all the time under the FTCA. Under the FTCA, the way that it is written is it is the State law in that State that controls. That happens all the time right now. So why are we using this as an argument to stop a service member from being able to recover when everybody else can?

Mr. CISNEROS. Right. Yeah. People are able and allowed to sue now for malpractice in different States, and they are not always going to get the same compensation, there is no equality there.

Dr. STIRLING. Right.

Mr. CISNEROS. So why should we go on and continue?

So my time has expired. Thank you very much.

Ms. SPEIER. Thank you.

Ms. Escobar.

Ms. ESCOBAR. Thank you, Madam Chair, for bringing us together for this very important hearing.

I want to thank all of our witnesses for being here today. I really appreciate your testimony, especially the three of you who have been so deeply, traumatically impacted by what happened to you. Your stories are moving and horrifying and powerful.

And, Ms. Witt, your sister is a constituent of mine in El Paso, and she reached out to me. And it is a privilege to get to meet you—all of you, really.

My question—and it is somewhat along the lines of what my colleague Mr. Cisneros started talking about with regard to compensation. The purpose of being able to sue when you have been wronged is so that you can receive compensation for your pain, for your suffering, for the time and money that you are out as a result of someone's negligence.

And, Ms. Lipe, you mentioned a little bit about the extraordinary amounts of money that you have had to expend personally so you can have a family.

And so I am wondering if each one of you wouldn't mind, just very briefly, if you had to put a number on what this has cost you—and I know that it is impossible to put a number on the trauma and the pain and the loss, especially you, Ms. Witt—but the lost income, amount that you have had to spend on physicians. Have you thought about that cost? Have you calculated that before?

Ms. Lipe, you are nodding, so maybe we start with you and then we work our way over.

Ms. LIPE. I have thought about it, because, to Mr. Figley's point that the VA compensation is adequate, is completely a misstatement. I receive disability compensation. It would have taken me 35 months of my disability compensation to actually pay for what I have paid in for IVF.

Additionally, my VA compensation can't—there is no accountability or diagnostic code for infertility. There is no diagnostic code for abdominal pain without any cause. So you can't have everything if you don't have a code to claim.

I see it as not only the money I have spent to have my daughter, the money we would need to spend, up to $50,000 probably, to have another child if we would pursue adoption; the pain and suffering I feel every day. I take eight pills a day just to function. As Dr. Stirling said, it would be in the millions, because I don't know for how long I will be able to work. So there is loss of earning capacity.

Now, I will say that, yes, I am a lawyer, so I think about it a little more practically, but, for me, it is more the noneconomic, the pain and suffering, the lost time with my family, the days I have to lay on the couch while my husband plays with my daughter and trying to explain to an almost-2-year-old why Mommy can't play with her.

I would say it would be in the millions, just for noneconomic. And that is something you can never recover through a VA claim.

Ms. ESCOBAR. Right. Thank you.

Ms. WITT. I don't know if I have ever actually thought of a dead figure. I know, when I first filed my wrongful death suit, we had

to fill in the block for, like, how much money do you want to sue for. And I think we came up with just the loss of income and the fact that my husband was 25 at the time. He was approaching the peak of his earning income, because he wanted to start going to school, start using his benefits for education and become a commissioned officer. So the number that we had figured was about $5 million.

And to raise a child, it costs $270,000 from zero to 18. And that barely covers, like, just their basic care. That doesn't cover extras like going on family vacations or extracurricular activities that they want to do. Nor does it cover their education benefits, even though my children will receive education benefits.

And then there is just loss of time with my children. I am a single parent. Employers are not very forgiving to single mothers, and it is very difficult to find a job and an employer who is compassionate, that knows, hey, I can't drop off my kids to daycare this day because they have a 104-degree temperature. And even going to school at the time, professors were not very forgiving of me having to miss days or even bring my sick child into the classroom so that I could complete my degree.

And then there is just the severity of the loneliness. I have chosen not to remarry because of this, because I will lose this income that is coming in that I will say has major disparities in it that need to be fixed.

So I would say, at the time it was $5 million, but I would say, I believe the lawyer at the time that was filing that for me told me that was a very conservative number given what we had gone through as a family and the fact that my husband was essentially brain dead after an appendectomy.

Ms. ESCOBAR. Thank you.

Sergeant STAYSKAL. First off, you know, when this illness finally takes me, my wife will join Ms. Witt in all of the same things firsthand. So I don't need to repeat any of that.

I am not going to answer, truthfully, ma'am. I am sorry, but I can't put a number on my life. There isn't an amount. You know, I think my kids would probably pay you money to get my life back.

But I know, over the last year since we have been off-post to see specialty referrals down in Tampa, Florida, I mean, we drive our own car, we pay for our own gas. I mean, we are 8, 9, 10 hours, 11 hours in the car, every 3 months. Sometimes there was charitable donations that helped us with gas cards; a lot of times there wasn't.

You know, I didn't make the law, I didn't pass the law about how best to handle these things was through amounts of money. But my answer would be: whatever amount keeps that practitioner from practicing again.

Ms. ESCOBAR. Yeah.

Sergeant STAYSKAL. So that is not up to me to decide. That is up to attorneys and lawyers. That is up to you all in Congress to make those decisions about money. But that would be my answer. Whatever stops that person from making that same mistake again, put that number on it, and that would be my answer.

Ms. ESCOBAR. Thank you, Madam Chairwoman.

Thank you all.

And my point with that was not to try to measure what a life is valued at, but the fact that you were not able to sue and to get compensation. You are losing more than just through pain and suffering, but there is a real cost to the fact that this is happening to all of you.

Ms. SPEIER. Before going to Mr. Crist, I have one question for Ms. Witt.

You said that you can't make more than $8,000 a year or you lose your veterans benefit? Could you just clarify?

Ms. WITT. Yes, that is right. That is about a round figure from the last time that I checked the website.

I receive from the Department of Veterans Affairs the DIC payment, which I think is rated for about half of what my husband's retirement would be if he were to have gone about 20 years in the military and retired in full.

As I was looking at that, I don't know how often this is enforced, but I do know that there is an earned-income restriction right around $8,000 or $9,000. And there are also earned-income restrictions with Social Security as well.

It is very difficult to find an employer and a job, let alone one that is part-time, that is graded for someone my age. I mean, usually, part-time work usually goes to students and to people who are much younger than me and also don't have children. So unless I had found an employer that can meet those restrictions, I have chosen at this time not to work and just be home with my family.

Ms. SPEIER. So you would probably have taken a full-time position if you didn't have that restriction on a cap of making no more than $8,000 a year.

I mean, it is sort of like, you know, adding insult to injury to have that kind of a restriction. I mean, you have been widowed by malpractice in the military system, and you are now struggling to try and maintain a quality of life for your family, all due to the fact that there was malpractice at a military hospital.

So we are going to pursue this more.

Mr. Crist.

Mr. CRIST. Thank you. And, Chairwoman Speier, I want to thank you, particularly, for your graciousness in allowing me, as not a committee member, to participate in this hearing today. And so thank you for your leadership, and for all the advocates.

And to the three witnesses who have been subject to this horrific *Feres* doctrine, I can't thank you enough for your courage in being here today, sharing with us your personal story about how this has affected your lives and your families' lives. It takes a lot of strength to do that, and you are commended for it.

And it is Sergeant First Class Richard Stayskal? Am I saying that correctly, sir?

Sergeant STAYSKAL. Yes, sir. "Stayskal."

Mr. CRIST. Great. I am curious, how did you first learn that you would not be able to file a case, you know, in conjunction with what happened to you?

Sergeant STAYSKAL. Well, when I first started talking about it with coworkers and just family and everybody else, you know, the thought was, how is your wife going to provide for herself, how is she going to take care of the kids on a single income, and all that.

You know, I am not a big fan of the whole thing, but it made sense. You know, like Ms. Witt was saying, it is a fact; it takes money to raise children and provide for them.

So, when I started looking into it first, I believe the first place I went was on Womack down to JAG, and that was my first question. I said, "Hey, I would like some information about how I would file a lawsuit against a civilian practitioner who works at Womack." And the answer I was met with was, "You cannot." And I said, "Well, why not?" "I don't know why exactly, but there is a law that says you cannot." That was the best answer he could give me at the time.

And then I pretty much just went on from there. So after that, I figured, well, no military JAG was going to help me, so we thought, let's look off-post. So my wife—I think we rounded the number—well, let's call it 10. She called about 10 offices, crying, telling the story over and over and over again. And every time, they said, that is a compelling story, but I am sorry, nobody is going to take your case, and nobody is going to listen to you.

That was pretty much how that went until we met a whistleblower law firm down in Tampa, who—they saw the same thing you all are seeing here today, that this is egregious and it needs a fix.

Mr. CRIST. Well, thank you.

I found out about your case, in particular, in Tampa Bay. I represent St. Petersburg and Clearwater on the other side of Tampa Bay from Tampa. And I was with a reporter with our NBC [National Broadcasting Company] affiliate, Steve Andrews. And, you know, we were at Bay Pines, which is our VA hospital in Pinellas County, talking about a different story. And he mentioned to me what was happening to you. And he said, well, what do you think about that? I said, that sounds ridiculous. And he said, well, what do you think ought to be done? I said, we ought to reverse the law. And because of the chairwoman's leadership, we are at that point.

But, but for having found out about your circumstance and your situation, similar to the ones that the other two of you have suffered, we wouldn't be here right now, I don't think.

And so the leadership by this chairwoman is extraordinary. It is appropriate to be in this committee. You all are related to military or military yourself. This is the Armed Services Committee. I mean, maybe other committees could weigh in too, and maybe they should.

But I just can't thank the three of you enough for being here and your courage and your strength, and God bless you.

Ms. SPEIER. Thank you.

All right. Do you have any closing remarks you would like to make, Ranking Member?

Mr. KELLY. Thank you, Chairwoman.

And I don't contest that we shouldn't be hearing this in the committee. My problem is not with Chairwoman Speier in having this hearing, because we have brought this to the attention of the people who can do something. We need to have this hearing in the committee of jurisdiction which can make a change.

And my second point to that is, we need to change the things that we can to make it better. Healthcare reform is important, and

it is part—this is something we can do, not to help you, but we can keep it from happening to someone else.

And, Chairwoman, I appreciate your leadership in having this. And I am going to help you push the Judiciary Committee to do their job and have this hearing over there, where they can fix this part of the problem. So thank you, Chairwoman.

Ms. SPEIER. Okay. Thank you, Ranking Member Kelly.

We have been in conversation with a number of members on the Judiciary Committee. They are very anxious to work with us. We wanted to do this jointly with them today, but they had a markup, so that wasn't something that we were able to arrange.

But let me just say that this has been a very powerful hearing. Powerful because the three of you came forward to tell what are truly reprehensible experiences. They deserve to be dealt with the way we deal with cases like that that happen to your spouses or your children or that happen through the VA system or that happen to a felon in jail. So this has got to be fixed.

The fact that this has been on the books for 69 years because the judges—the Justices, I should say, of the Supreme Court decided to legislate, is wrong.

And it is wrong that it has gone on as long as it has without the Congress of the United States putting their big-people britches on and doing the hard work to come up with a solution that is going to provide justice and that is going to treat service members like others are treated in Federal service in a noncombatant setting.

So we have lots to do, but you have given us the grist that we will use in order to make sure that we move forward on this. So we are deeply grateful to all of you, and also to you, Dr. Stirling and Mr. Figley, for bringing your perspectives to this hearing.

We now stand adjourned.

[Whereupon, at 3:53 p.m., the subcommittee was adjourned.]

A P P E N D I X

APRIL 30, 2019

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

APRIL 30, 2019

Statement of
Representative Jackie Speier
"Feres Doctrine—A Policy in Need of Reform?"
Military Personnel Subcommittee

April 30, 2019

The hearing will now come to order. I want to welcome everyone to this hearing of the Military Personnel subcommittee on the effects of the Feres Doctrine on military personnel and the prohibition of active duty service-members from bringing suit against the US Government, specifically for medical malpractice.

Feres is the product of judicial activism and Congress's silence. As no less an authority than my favorite supreme court justice, Antonin Scalia said, "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered, that is a function for the same body that adopted it." The court overreached and Congress's response is long overdue.

Today we will have one panel to help inform us of the issues surrounding the Feres Doctrine. Our first three witnesses are pained victims who have been aggrieved first hand by this outdated judicial doctrine. I want to thank you all for being with us today. You are representing yourselves, your families, and countless others, despite what you've lost and will lose. Your commitment to fixing this policy is admirable and greatly appreciated.

Our first witness is Sergeant First Class Richard Stayskal, whose radiologic diagnostic test was misread at an Army treatment facility and who currently has stage 4 terminal cancer.

Sergeant First Class Stayskal, I want to take a moment to thank you in particular. Because of the malpractice you suffered, your time is numbered in days and weeks instead of years and decades. I know you would rather spend the time you have left with your family and loved ones closer to home, not with Congress in DC. You deserve to.

But I cannot tell you how moved I am that you came here and generously gave us one of the precious few days you have left. And I know it's not because I invited you.

It's because your commitment to your fellow servicemembers runs so deep, your desire to achieve justice for them so profound, that you continue to look out for them as best as you can, as long as you can. And I promise you that we will all remember your commitment, honor, and sacrifice, and that I will keep fighting to fix Feres as long as I am here.

Our second witness is Ms. Alexis Witt, the widow of Air Force Staff Sgt. Dean Patrick Witt, who was hospitalized in 2003 for what should have been a routine appendectomy at Travis Air Force Base in Fairfield, Calif. Following surgery, a nurse administered a lethal dose of Fentanyl, causing respiratory and

cardiac arrest, and incorrectly inserted a breathing tube into his esophagus, depriving his brain of oxygen. Staff Sgt. Witt remained in a vegetative state for three months until Ms. Witt removed his feeding tube.

Our third witness is Ms. Rebecca Lipe, a former judge advocate for the Air Force who now practices in the civilian sector, who while deployed in Iraq had to wear ill-fitting, McGuivered, body armor that caused her debilitating abdominal pain. Military physicians repeatedly misdiagnosed and mistreated her, making the problem worse and causing chronic pain and permanently damaging her reproductive system.

These three witnesses represent the countless—hundreds if not thousands–of victims denied justice over the sixty-nine, seventy years the Feres doctrine has been in place. I hope to learn more about the malpractice the three of you suffered and how the Feres doctrine amplified the harm.

The families of Feres victims, both here and around the country, suffer too. They lose loved ones in the prime of their lives and are left with a one-sized fits all compensation system that cannot hope to adjust for the damage done in severe malpractice cases.

When our servicemembers suffer from medical malpractice—when doctors fail to perform or woefully misread tests, when nurses botch routine procedures, when clinicians ignore and disregard pain—servicemembers deserve their day in court.

When lives are disrupted, ruined, and cut short by negligence, servicemembers deserve a chance to receive just compensation.

We're not talking about special treatment. We're talking about giving servicemembers the same rights as their spouses, federal workers, and even prisoners—when compensation schemes are insufficient, when administrative redress processes fail, servicemembers should have their claims heard in the justice system.

In our country, we rightfully revere servicemembers for their bravery and sacrifice. It is disrespectful and shameful that for sixty-nine years Congress has refused to give them the same rights as everyone else. Or just the same rights as the rest of their families.

But this isn't just a matter of justice. It's a question of accountability. Because behind the shield of Feres, DOD's health providers act with impunity. We've heard countless stories from servicemembers of procedures big and small botched in ways that are always frustrating and occasionally catastrophic. Gauging the full extent of this problem is difficult, but ask any servicemember you meet or their family, and they'll have a story.

Allowing servicemembers to sue the Department of Defense for medical malpractice will help root out this rot. There are few incentives better than the threat of legal action to push an organization to change its behavior. This would lead to better quality care for our servicemembers and higher levels of readiness.

We will also hear from two legal experts who have studied the Feres Doctrine. We look forward to gaining a better understanding of the legal

foundation for Feres and why it has remained in place for sixty-nine years as an antiquated vestige of a previous time and how Congress's failure to act has allowed this injustice to continue.

We would like our legal experts to share any recommendations on how the Feres Doctrine may be changed in ways that respect the unique needs of the U.S. military. The legal experts on our panel are:

Dr. Dwight Stirling, Chief Executive Officer of the Center for Law and Military Policy. A think tank dedicated to strengthening the legal protections of those who serve the nation in uniform. Dr. Stirling is also a reserve JAG officer in the California National Guard and co-founder of Veterans Legal Institute.

Also joining us is Mr. Paul Figley, Professor and Associate Director of Legal Rhetoric American University, Washington College of Law that has published on the defense of the Feres Doctrine.

Before hearing from our first panel, let me offer Ranking Member Kelly an opportunity to make any opening remarks.

FERES DOCTRINE–A Policy in Need of Reform?

Testimony of Richard
Stayskal

Sergeant First Class, United States Army

Before the House Committee on Armed Services
Subcommittee on Military Personnel

U.S. House of Representatives

April 30, 2019

Chairwoman Speier, Ranking Member Kelly, and Members of the Subcommittee:

I am grateful for your support Chairwoman Speier and thank you for the opportunity to appear before you today and the Subcommittee to present my story. I very much appreciate being invited to testify about the *Feres* Doctrine. This is the first time I have testified before Congress and I wish it could have been under a different set of circumstances. Nonetheless, I am here to share my story of how this antiquated doctrine has affected my, and my family's lives, in an effort to convince members of Congress why they must act and enact legislation that will prevent any further injustices, that result all too frequently from the Feres Doctrine.

I feel this is a very important issue to the Military community that requires Congressional intervention to address and fix how this mistaken doctrine is used to strip hundreds of service members, like myself, and their families, of the same rights that the rest of the citizens of our Country have when it comes to medical malpractice.

By way of introduction, I am a Marine, and currently serving as Green Beret with the Army Special Forces, stationed at Fort Bragg, NC. I've devoted my entire career to the military, with this June marking my seventeenth (17th) year of service. I first enlisted into the United States Marine Corps in 2001 and served as a machine gunner and scout sniper for four years. During my 2004 tour to the Al Anbar Providence Ramadi, Iraq, I was critically wounded in action by heavy insurgent sniper fire. Following my recovery I was honorably discharged from the Marine Corps in 2005.

In 2006 I enlisted into the United States Army and served four months as an Infantryman with the 101st Airborne Division at Fort Campbell, Kentucky before attending the Special Forces Assessment and Selection (SFAS). After my completion of SFAS, I was selected to attend the Special Forces Qualification Course and was subsequently awarded the Green Beret and Military Occupational Specialty of 18B Special Forces Weapons Sergeant.

By 2008, I was assigned to the 10th SFG (A) in Fort Carson, Colorado and later assigned to the 1st Special Warfare Training Group (A) at Fort Bragg North Carolina in 2015. I have been on multiple deployments throughout special operations central command, special operations command Africa, and special operations command Europe areas of responsibility in support of national interests during the global war on terrorism. I have held numerous positions throughout my military career including: Infantry rifleman, infantry team leader 101AB, Special Forces senior weapons sergeant on a maritime operational detachment alpha, cell leader in a reinforced Special Forces company, and Special Forces senior sniper instructor and program of instruction writer.

I was selected by the Army Special Forces Group to attend Special Forces Under Water School/ Combat Dive Qualification Course (CDQC). Because of my previous gunshot wound, I was required to have CT imaging done on my lungs as part of the required dive school physical examination on January 27, 2017, at the Womack Army Medical Center in Fort Bragg. A civilian physician reviewed my CT scan and cleared me for dive school. It wasn't until six months later that I found out that the Womack doctor failed to identify an abnormally (over 1.5 cm) large tumor located in the right upper lobe of my lung.

While, attending Dive School around the end of March 2017, I was experiencing difficulty breathing and by April 2017 I began noticing signs of his health declining rapidly. I was wheezing and

was having difficulty breathing anytime I would lay flat on my back. I had also began coughing up a bit of blood around this time. I'm not one to complain but I started to express my concerns to my wife Megan and some of the guys at work. Finally, the symptoms got the best of me, and by May 15, 2017, I was taken to the ER at Womack Hospital from the SWCS Clinic by ambulance where I was brought in on a gurney and placed in the waiting room after I described my difficulty breathing and chest pain. I was on the verge of passing out, when I had my vitals taken in preparation to be seen in the ER. I explained my symptoms to the nurse and was told it was highly unlikely that anything could be wrong with me due to my age. The nurse basically disregarded all of my symptoms when she asked why I was there to be seen. The ER doctor then completed an x-ray and didn't find anything but thought my symptoms were associated with walking pneumonia. It wasn't until about a month or two later that I found out that prior to me being discharged, another ER doctor had done a retrospective reread of the original CT scan completed for my physical on January 27, 2017, and noted that a mass about 2.8 x 2.2 cm was present on right upper lung at the time of the CT Scan and that a follow up should be scheduled for me. However, I was never informed of this until a few months later, and no follow up was ever scheduled for me.

After leaving the ER I knew something wasn't right so I called the pulmonary clinic on based and begged to be seen, but I was told that they could not get me in and there was nothing that they could do for me. They advised me that I needed to continue to go the ER until my appointment date because I as a new patient, I was not given a priority to be seen. On May 22, 2017, I was again having problems breathing at work and called my wife to discuss that I thought something was wrong. I called the WOMACK Pulmonary clinic and begged to be seen; but unfortunately I was met with the same response as the first time. So, I called my wife to notify her that I was being driven to the ER, because my Chain of Command came to my aid and didn't want to have me waiting in the waiting room again in my current condition. Upon arrival to the ER, I was practically unconscious, barely coherent, slouched over and unable to keep my upright. My wife woke me by pounding her fist on my chest and had to assist me into a wheel chair to bring me into triage where I was put in a room right away. After running some tests, they sent me home with prednisone. Around the first of June I began coughing up significantly more blood than I had previously and each day it got worse with more sizeable amounts of blood being coughed up continuously each day. On June 15, 2017, my wife made me go to the ER again to be seen due to the blood I had been coughing up.

It wasn't' until I was finally allowed to go off base to see a specialist on June 27, 2017, that a biopsy was done which revealed I had cancer. I can remember waking up to my wife and then learning that the reason I had been feeling like I was dying, was because I had lung cancer. This life-changing news, that could have been addressed nearly six months earlier while the cancer was still contained to my lung. On October 23, 2017, I had a lobectomy, where they were able to remove a part of my right upper lobe. Around Christmas 2017, I began to cough more and my health seemed to be declining due to being unable to eat and drink liquids without being in tremendous amounts of pain. I also noticed that I was rapidly losing weight due to my inability to consume any food or liquid. By the beginning of January 2018, I had to go to the ER where he was seen right away after exhibiting symptoms of difficulty breathing.

At this time, I was beginning to notice that the left side of my neck had begun to swell rapidly and very largely, almost comparable to the size of a fist placed under my skin running from my jaw line to my collar bone. This was overall a physically painful time due to the cancer spreading throughout my body. The medical center found a mass on my spleen, not sure what it was they sent me down for an ultrasound where they determined that it could be a cyst or a tumor, only at PET

would tell. I then completed a PET scan on January 16th, which revealed the cancer had spread to my lymph nodes in my neck on the left side of my body, my spleen, liver, ilium crest (butt bones), spine and right hip joint. Beginning on January 22, 2018, I was diagnosed with stage IV lung cancer.

The failure of the military doctor's gross negligence/failure to detect and treat my cancer when it was first noted on the CT scan done on me in January 2017 is the mistake that allowed the aggressive tumor to double in size and rob me and my family of my life, without any recourse due to a 1950's Supreme Court case that created the Feres Doctrine. Because of all that has taken place, I no longer am able to complete the Warrant Officer course which I was to start in July 2017 after being selected. Now instead because of the medical malpractice I have had to endure countless CT scans, MRI's, PET scans, radiation, chemo, spleen biopsy, lung biopsy as well as surgery to remove my upper right lobe, I have had countless other procedures and no end in sight of what's to come.

Lastly, I want to say that this does affect me obviously, but my children are the true victims. They now will grow up without a father. Someone that will teach them how to drive, walk them down the isle when they get married. They seek counseling and special treatment at school. One of the biggest things they try and understand is how this happened.

This doctrine has effectively barred hundreds of service members and their families any chance of recourse for receiving negligent medical care that is given by a government provider when the service member is on active duty, regardless of whether the injury was the result of combat service, or deployment. The doctrine has been utilized by the branches of military to shield negligent medical care given by military providers. This is medical care in which there is no element of "military judgment" at play. In truth, the only difference between a military provider and a civilian provider is the military provider wore fatigues to work that day and his or her patients do not (as a practical matter) have a choice about accepting their services.

The reasoning underlying the Feres doctrine is that military service members are routinely injured in the course of duty when following the orders or directions of their superiors. Some examples are when medical care is rendered in a combats situation or when emergency care is needed in a training environment in which a service member is unexpectedly injured, and military providers need to make a split-second call in enormously stressful conditions. It is understandable why Feres would apply in those circumstances and why service members' should not be able to sue a military provider for treating someone in triage situations arising in combat or training. These situations present a tough choice in a tough situation and the Supreme Court did not want to compromise the ability of military providers in those situations to make fast (and potentially lifesaving) decisions about care at the sacrifice of following the appropriate standard of care.

In the end, it is essential to the underlying fairness of our country to overturn the Feres Doctrine. The Feres Doctrine is a judicially created atrocity which should not be allowed to continue. As multiple Supreme Court Justices have stated, this is a mistaken doctrine, and is something Congress can easily fix and should fix.

There is no reason for the disparity in rights between our active duty military and the rest of our country's citizens. We deserve equal protections under the law.

I would like to thank my wife Megan and my two beautiful daughters Carly and Addison for their constant unconditional love and support. It is for them and my fellow brothers and sisters in arms that will go on to serve our Country as honorably as I have that I am waging this civil battle so that those future victims of military medical malpractice injustice will be compensated fairly and hopefully able to live to see their own children grow up, the love and joy of which that I will not be able to share in with my own beautiful children.

I also want to thank my Attorneys Ms. Natalie Khawam, and Mr. Daniel Maharaj who are sitting beside me, for taking my case when no other attorneys would take it on due to the Feres Doctrine. Natalie and the Whistleblower Law Firm have been a driving force through this important fight for justice, and I would not have been sitting here today in front of you if it was not for her countless hours of dedication to my family and countless other active duty men and women.

I would be happy to answer any questions you may have.

SFC Richard Stayskal enlisted into the United States Marine Corps in 2001 and served as a machine gunner and scout sniper for four years. During his 2004 tour to the Al Anbar Providence Ramadi, Iraq Stayskal was critically wounded in action by heavy insurgent sniper fire. Following his recovery SFC Stayskal was honorably discharged from the Marine Corps in 2005.

In 2006 SFC Stayskal enlisted into the United States Army and served four months as an Infantryman with the 101st Airborne Division at Fort Campbell, Kentucky before attending the Special Forces Assessment and Selection (SFAS). After his completion of SFAS, Stayskal was selected to attend the Special Forces Qualification Course and was subsequently awarded the Green Beret and Military Occupational Specialty of 18B Special Forces Weapons Sergeant.

In 2008 SFC Stayskal was assigned to the 10th SFG (A) in Fort Carson, Colorado and later assigned to the 1st Special Warfare Training Group (A) at Fort Bragg North Carolina in 2015. SFC Stayskal has multiple deployments throughout special operations central command, special operations command Africa, and special operations command Europe areas of responsibility in support of national interests during the global war on terrorism. SFC Stayskal has held numerous positions throughout his military career including. Infantry rifleman, infantry team leader 101AB, Special Forces senior weapons sergeant on a maritime operational detachment alpha, cell leader in a reinforced Special Forces company, and Special Forces senior sniper instructor and program of instruction writer.

SFC Stayskal's military education includes:

Army infantry military occupational specialty training, the special forces qualification course, sere school, the special forces weapons sergeant course, basic airborne school, static line jump master, air assault course, the military free fall course, military free fall jump master and advanced infiltration techniques course, the special forces sniper course, the special forces advanced recon and exploitation techniques course, Advanced Special Operations level two course, and the special operations instructor course. SFC Stayskal was selected to attend the Special Forces Warrant Officer Course.

SFC Stayskal's awards include the Bronze Star Medal, the Purple Heart, the Army Commendation Medal, Army Achievement Medal, Meritorious Unit Citation, Army Good Conduct Medal, the National Defense Service Medal, Iraq Campaign Medal, the Global war on terrorism expeditionary medal, the global war on terrorism service medal, Noncommissioned Officer professional development ribbon 3, Army service Ribbon, and the overseas service ribbon.

Rich is married to Megan Stayskal and they have two daughters Carly and Addison.

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U.S. HOUSE OF REPRESENTATIVES

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Hearing Date: Tuesday, April 30, 2019

Hearing Subject:

Feres Doctrine - A Policy in Need of Reform?

Witness name: Richard Stayskal

Position/Title: Sgt. 1st Class, U.S. Army Special Forces

Capacity in which appearing: (check one)

● Individual ○ Representative

If appearing in a representative capacity, name of the organization or entity represented:

n/a

Federal Contract or Grant Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

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n/a			

STATEMENT PREPARED FOR THE RECORD
BEFORE THE COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENATIVES

ALEXIS WITT
WIDOW OF SSGT. DEAN WITT

APRIL 30, 2019

Thank you Chairwoman Speier and to members of the subcommittee for the opportunity to speak today.

In October 2003 my husband SSGT Dean Witt underwent a routine appendectomy. The nurse anesthetist (CNRA) was faulted for having administered a lethal dose of Fentanyl resulting in respiratory and cardiac arrest. She failed to call a code blue, used pediatric equipment for resuscitation, and misdirected a breathing tube. Each mistake delayed critical seconds and Dean suffered severe brain damage and remained in vegetative state until I removed his feeding tube 3 months later. I later filed a wrongful death suit but my case was dismissed on grounds of the Feres Doctrine.

The Feres Doctrine was wrongly decided by the Supreme Court because it leads to not only medical malpractices but also the abuse of power and mistreatment of survivors, lack of transparency and lack of accountability.

Abuse of Power and Mistreatment

After the malpractice incident I met with two JAG officers, a Death Casualty Officer, and Dean's Major and First Sergeant to discuss permanently retiring Dean. I was outnumbered and without legal representation. I knew signing those documents was serious but I didn't understand all the implications or consequences it would impose. In distress I told the JAG officers I preferred to wait. I was threatened with the removal of my medical benefits and Dean's pay frozen until I signed the documents. Later on I would learn that the rush to have Dean retired came down to eligibility of survivor benefits as active duty death benefits differ from retired benefits.

Lack of Transparency

I was told a formal investigation would take place and would result in changes to safety protocols to prevent another tragedy from occurring. When I asked about details of these safety measures and for a copy of the investigation I was told that information was protected by Title 10 of the United States Code would not be made available to me or to anyone in the public and I would never fully know what happened to Dean in the O.R.

Lack of Accountability.

The nurse responsible for my husband's death was also responsible for the death of another Airmen just one year prior. A colleague stated she was considered the weakest link in their department. Despite her performance as being merited as unsatisfactory, no preventative measures were taken to curtail her advancement and she went on to kill two patients. If appropriate action had been taken on this nurse during her first lethal negligent episode Dean would still be alive today.

Compensation

Survivors Benefits are often cited by opposition as a reason not to move forward with Feres Reform. Military law expert Eugene Fidell, has quoted survivors benefits robust yet the do not take into account pain and suffering. These benefits also come with restrictions whereas an award settlement would not have such restrictions:

COMPENSATION	AWARD SETTLEMENT
Every year twice a year I have to fill out Certificate of Eligibility (COE) proclaiming that I have not remarried in the past year.	Survivors would not have an unnecessary reminder that their spouse is dead or injured.
SBP DIC Offset cuts 65,000 spouses out of nearly $12,000 a year in compensation. SBP is an insurance annuity and DIC is VA benefit but yet they count against one another and they shouldn't.	No offset with an award settlement.
If the survivor remarries he or she forfeits the VA benefit.	No remarriage restriction with an award settlement.
Earned Income Restrictions.	No Earned Income Restrictions.
Department of Defense Survivors Benefit (SBP) is Taxable. SBP is being treated same as trust or estate, which means minor children can be taxed at rate as high 37%. Department of Veteran Affairs Dependency and Indemnity Compensation (DIC) is not Taxable, nor is it transferable	The IRS does not tax award settlements for personal injury cases, wrongful death cases.

I hope my experiences with Feres Doctrine have served a higher purpose and gives you a well-rounded view of its effects on our military and their dependents. Thank you for holding this hearing and for your time.

Alexis Witt

Experience

Dunn & Dunn , P.C. (Defense Litigation)

Legal Assistant February 2016- December 2017

- Managed Attorney's calendar. Scheduled appointments & followed up with clients to confirm.
- Assisted lead paralegal with E-files and managing documents of cases.
- Updated clients on the status of the cases.
- Timekeeping for billing clients.

York Howell and Guymon

Administrative Assistant March 2015- October 2015

- Managed Attorney's calendar. Scheduled appointments & followed up with clients to confirm.
- Maintained legal documents and files in an organized manner; Cloud, Rocket Matter, PC and MAC drives.
- Assisted two paralegals with administrative tasks, such as writing letters, filing documents, and preparing basic documents.
- Collections
- Managed expenses, receipts and spreadsheets for legal team.
- Notary Services
- Visited Retirement homes to speak to clients about their end of life wishes.

Planned Estate Benefits

Paralegal April 2013 – June 2014

- Drafted estate planning documents using Amicus Attorney.
  Draft Deeds, trusts, wills powers of attorney and healthcare documents.
  Formatted probate petitions using Adobe Acrobat for E-File.
  Recording of deeds.
  Assembled estate planning folders.
  Maintained and organized client files on site.
  Notarized documents for clients and all other Attorney's within the building.

- Maintained Attorney's calendar.
- Drafted and mailed sales correspondence to bring in clients for updates to their estate plans.
- Researched and pulled property information from various counties across the country.
- Notary Public for Utah.

Jones Waldo

Hospitality/Runner May 2008 - August 2008

- Provided hospitality to clients in reception area.
- Greeted and escorted clients to conference rooms.
- Prepared conference rooms for mediations, meetings, sales promotions, etc.
- Receptionist duties: answering incoming calls for clients and directing call traffic to designated Attorney's.

Education

Salt Lake Community College January 2018- Present

Prerequisites for Nursing Division

Market Campus- Certificate for Digital Marketing Earned- May 2015

- Technical SEO, Content Strategy
- Google Analytics, Keyword Targeting
- Conducting Site Audits and site architecture

Salt Lake Community College

Paralegal Studies – Associates of Applied Science (A.A.S) Graduated –May 2014

- American Bar Association (ABA) approved program.
- Completed 2-year program in 18 months.

Business – Associates of Science (A.S) Graduated - May 2012

- Delta Epsilon Chi (DEX) Student Officer 2009–2010.

- Public Speaker at the SLCC Student Conference on Writing and Social Justice 2014.

Skills

- Unflappable disposition in fast paced and crisis environments.
- Strong oral and written communication skills.
- Rocket Matter for back up files and maintaining client origination.
- Microsoft Word, PowerPoint, Excel, & Adobe Acrobat.
- Ability to work independently and within a team setting.
- Education related experience with Concordance and Case Map and other legal software.
- Eligible for 10 Federal Prefcrence Points by law as a military widow. Will provide DD214 to verify.

Notable Experience

- Alexis Witt vs. United States: taken to the threshold of Supreme Court to challenge the Feres Doctrine in a military medical malpractice claim for the death of my husband. The Supreme Court denied the Petition for Writ of Certiorari June 2014, after 8 years of litigation.
- Spokes model in a Public Service Announcement for the American Society of Anesthesiologist for their 2012 Lifeline Campaign to warn of dangers related to anesthesia without the proper care of a qualified Anesthesiologist present.
- Provided written testimonial to Congress for the Carmelo Rodriguez Military Malpractice Accountability Act.
- In May 2008 I traveled to Uganda, Africa with several students on a freelance self-funded humanitarian project to provide restoration to Namuyenj Church of Uganda Primary School.
- January of 2019 began serving on the Advisory Council for the Center for Law and Military Policy with my focus on Feres Doctrine Reform.

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Witness name: Alexis Witt

Position/Title: Widow of SSGT Dean Witt

Capacity in which appearing: (check one)

● Individual ○ Representative

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SERVICE WOMEN'S ACTION NETWORK
1015 15th Street NW, Suite 600
Washington, DC 20005
www.servicewomen.org

Rebecca A. Lipe
3614 N. Springfield Ave.
Chicago, IL 60618
rlipe@steptoe.com

COMMITTEE ON ARMED SERVICES

SUBCOMMITTEE ON MILITARY PERSONNEL

"Feres Doctrine – A Policy in Need of Reform?"

U.S. House of Representatives

Tuesday, April 26, 2019

Written Testimony

Madam Chairwoman, Ranking Member, honorable members of the Subcommittee, my name is Rebecca Lipe and today I have the unique opportunity to speak to you as a Disabled Air Force Veteran and representative of the Service Women's Action Network. I appreciate your time and consideration of the current application of the Feres Doctrine, and I hope that in the end you will agree that the Feres Doctrine is an outdated exception to the Federal Tort Claims Act that deprives thousands of service member's recourse should they experience malpractice at the hands of a military medical practitioners.

First, let's be clear: The Feres Doctrine as intended should protect battlefield injury and battlefield medical care. But today we are here to discuss care beyond the battlefield.

My story begins in 2011 when I deployed to the Combined Joint Special Operations Task Force in Balad, Iraq. In my role as the Deputy Staff Judge Advocate I was responsible for overseeing 6 subordinate commands and their respective JAGs. These responsibilities required me to travel around the country in full gear to include the issued body armor. Now the unique issue with the body armor is that it was not designed to fit a woman's body. In order for the gear to protect vital organs I had to modify it by removing the side plates and placing foam inserts on the shoulder straps to get rid of the slack created by the size and fit of the gear. I was also required to overtighten the gear around my waist to ensure it remained in place.

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Please know that it is devastating to see that service women are still being issued ill-fitting gear when the technology is available to outfit every service woman with the appropriate gear for training and deployment if only Congress provided the appropriations for the gear.

Five and a half months into my deployment my life was profoundly changed when I began having immediate and debilitating pain in my abdomen. This occurred at the same time that we were withdrawing from Iraq and there were limited resources available to address women's health issues at the medical facility in Balad. However, instead of conducting a thorough examination with the resources available, the doctors first insisted that I must have had an extramarital affair in which I contracted an STD which was completely false, and then chalked my pain up to "normal women problems." From there I was medically evacuated to Landstuhl, Germany for further evaluation and treatment. Even with the extensive resources available in Landstuhl, the doctors determined without any objective evidence that I had pelvic inflammatory disease, a typical "women's issue," treated me on an antibiotic for malaria, and further evacuated me to my home base, Hurlburt Field.

Thus began a year's long journey of figuring out the source of my pain. The medical providers at Eglin Air Force Base were certain it was a female reproductive issue so they put me through two unnecessary surgeries, and treated me on medicine that placed me in a temporary menopause, at 27 years old, whose only affect was to cause catastrophic hormonal depletions that prevented my body from functioning correctly as a female, caused organ and vaginal tissue atrophy preventing sexual intimacy of any kind, and caused severe levels of depression to the point I was experiencing suicidal ideations. Throughout this time I was also accused of malingering and making up the debilitating symptoms by medical professionals.

It was only through the diligent review of my medical record by one doctor at Moody Air Force Base almost a year later that I had any change in my care. Appalled at the previous treatment I received at the hands of the military, he referred me to a civilian reproductive endocrinologist and general surgeon. These two doctors immediately diagnosed me with sports herniation as a result of wearing the ballistic vests in two-one hour appointments. They subsequently corrected eight areas of my abdominal wall and attempted to reverse the effects of the unnecessary medical treatment I experienced prior to their diagnosis, but the damage was already done. I now deal with chronic abdominal pain and complications due to that medical treatment. Further, I was completely unable to have children except through in-vitro fertilization.

I have since undergone 7 rounds of in-vitro fertilization at the personal cost of over $60,000. I would like to say that this is where the medical malpractice ends, but sadly I continued to receive substandard care at the hands of the military. During my first pregnancy,

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the doctor at Andrews Air Force Base misdiagnosed my ectopic pregnancy that resulted in emergency surgery and the loss of my fallopian tube. During our fifth round of IVF I suffered a miscarriage and had to wait four days for Walter Reed to fit in my dilation and curettage, and then the hospital subsequently lost the remains of our baby following surgery. I was finally able to deliver a healthy baby girl through an emergency C-section in July of 2017. This fall I attempted one more round of IVF in order to have another child but the cycle resulted in potentially fatal complications due to all my previous medical issues that prevent me from having more children. The compound effect of this revelation along with the years of medical maltreatment and physical pain took its toll causing me to seek hospitalization for suicidal ideations, depression, and anxiety.

Now I sit before you 10 abdominal surgeries later as a broken, but not defeated advocate for service members. For years I had to be my own advocate to receive any sort of care in the military medical system, but I was uniquely placed as a JAG to be an advocate. The majority of other service members, especially our enlisted members, do not have that benefit.

Madam Chairwoman, you and your colleagues on this Committee now have the opportunity to be our champion and advocate. First and foremost, you can ensure that service members are provided appropriately trained health care professionals utilizing the most up-to-date practices to include women's health services especially in light of the growing number of female service members. However, in situations where inadequate healthcare is provided and, worse, where there is malpractice, service members need to have a path to (a) obtain necessary healthcare, and (b) there must be accountability for poor or inadequate medical service. You can ensure that military medical providers are held responsible for their incompetent actions. Most importantly, you can ensure that service members who have suffered from medical malpractice have the opportunity to get the care they need and be appropriately compensated for injuries caused by the malpractice.

Thank you for the opportunity to offer my testimony.

Rebecca A. Lipe

EXPERIENCE

STEPTOE & JOHNSON, LLP *July 2016 – Present*
ASSOCIATE: AVIATION, TRANSPORTATION, UNMANNED AIRCRAFT, GOVERNMENT CONTRACTS
Washington, D.C.

- Expertly represents aviation service providers in diverse state court lawsuits with potential damages over $25 million.
- Adjudicated 38 claims and provided sound analysis regarding contractual liability requirements following a major Department of Defense (DoD) contractor aviation incident preventing litigation and over $2 million in damages.
- Effectively defended a lawsuit challenging a $40 billion TRICARE contract award to Humana at the Government Accountability Office and U.S. Court of Federal Claims; counseled clients on matters relating to federal procurement statutes and regulations to include compliance, contract changes, federal procurement, and procurement integrity.
- Conducts internal audits and investigations for regulatory compliance violations and whistleblower actions; provides representation in front of the National Transportation Safety Board (NTSB); authors comments on Advanced Notice of Proposed Rulemakings (ANPRM) and applications for exemptions from transportation regulations.
- Identified and rectified over 200 regulatory compliance errors prior to a client's purchase of an aviation parts manufacturer preventing subsequent Federal Aviation Administration ("FAA") action of suspected unapproved parts; conducts due diligence regulatory reviews prior to purchase of aviation entities for compliance with FAA regulations.
- Represents clients in connection with Department of Transportation (DOT) and FAA certificate actions, investigations, enforcement proceedings, and FAA drug and alcohol testing program compliance and enforcement.
- Assisted in the representation of a major Class I railroad in federal court litigation involving the transportation of hazardous materials; researched international funding opportunities and limitations for hyperloop developer.
- Obtained unmanned aireraft systems (UAS) Remote Pilot Certificates, Certificates of Anthorization and Waivers, and completed applications for the UAS Integrated Pilot Program for commercial operators; created operations manual for Fortune 500 company integral to incorporating UAS into commercial entities.

JUDGE ADVOCATE GENERAL, UNITED STATES AIR FORCE *January 2010-July 2016*
ATTORNEY, AVIATION AND ADMIRALTY LAW BRANCH July 5, 2014 – July 5, 2016
Joint Base Andrews, MD

- Rated number one of sixteen junior litigation attorneys. Secured dismissals in $60 million and $6 million aviation lawsuits. Identified a critical defense in a $96 million fatal aviation lawsuit.
- Analyzed regulatory concerns, litigation risks, and policy considerations for senior leadership. Reviewed 13 high-interest aviation accident investigation reports identifying over 2,500 regulatory compliance errors requiring accident investigation boards to amend reports for legal sufficiency.
- Provided regulatory guidance and policy advice to senior leadership on 40 aviation accident investigations.
- Researched novel and complex aviation, missile, and unmanned aerial system issues to develop regulatory changes.
- Handpicked to brief the Secretary of the Air Force, Chief of Staff of the Air Force, and eight senior officers on a high-profile investigation with national security implications, and advised on the proper course of action.
- Principal attorney leading 5-10 person teams on 5 fatal and non-fatal mishaps. Conducted witness interviews, and oversaw the collection, preservation, and testing of evidence. Produced a written report appropriate for public release.
- Rated as the number one of six instructors for the Air Force's accident investigation courses teaching 120 attorneys and paralegals and 118 senior officers investigation statutory and regulatory requirements.

CHIEF OF MILITARY JUSTICE, CONTRACTS, AND ETHICS December 9, 2011 – July 4, 2014
Moody Air Force Base, GA

- Primary legal advisor on criminal law to commanders of 2 military wings with more than 6,000 personnel. Managed 6 paralegals and guided 5 attorneys in effecting 20 trials, 192 non-judicial punishments, 109 administrative discharges, and 53 administrative hearings; rated top ten percent of 580 junior officers by the base Commander.
- Represented the United States as counsel in pretrial hearings, trials, and administrative hearings for crimes involving charges of rape, child pornography, fraud, assault and battery, child abuse, theft, and drugs.
- Principal legal advisor to the Air Force Office of Special Investigations and military police. Advised law enforcement personnel in the areas of search and seizures, interrogations, pre-trial detention, and evidence assembly.
- Reviewed $3.2 million in government contracts to include processing an override of a protest stay that averted a delay in the deployment of military members. Defended two Government Accountability Office protests. Mitigated the effects of an inadvertent release of contract bidder's pricing data on a $1.3 million dollar. Marshalled eight chaplain contracts through award in only six weeks averting a loss of service during sequestration.
- Organized and ensured timely ethics training and financial disclosures for 70 federal filers. Leveraged ethics expertise in evaluating a $10,000 community gift to stage an aircraft on base, and assisted the acceptance of a $10,000 painting.

DEPUTY STAFF JUDGE ADVOCATE February 1, 2011 – July 7, 2011
Joint Base Balad, Iraq

- Deputy Staff Judge Advocate to 2,500 person Combined Joint Special Operations Task Force; responsible for supervising the work of five Judge Advocates and eight paralegals in Task Force locations throughout Iraq.
- Analyzed 62 lethal operations and time-sensitive-targeting for compliance with the Rules of Engagement and Law of War. Legal research directly impacted special operations missions in Iraq.
- Reviewed over 300 contracting requests totaling $18.1 million, ensuring compliance with federal fiscal rules.
- Examined and adjudicated 21 interrogation requests and 16 detainee abuse allegations, preserving the rule of law and improving security gains; served as advisor to Iraqi judges in the prosecution of terrorists at the Iraqi Criminal Court.

CHIEF OF ADVERSE ACTIONS AND LEGAL ASSISTANCE January 2, 2010 – December 9, 2011
Hurlburt Field, FL

- Trial counsel and government representative for administrative hearings and criminal trials. Prosecuted 10 courts-martial with 100% conviction rate. Prosecuted Air Force's first synthetic marijuana case; co-authored article analyzing proper case litigation practices shared by Air Force senior leadership to entire Judge Advocate Corps.
- Advised 50 commanders on administrative actions. Directed a rare in absentia administrative discharge hearing of an active duty member following a high-visibility murder conviction.
- Principal legal advisor to pilot flight evaluation boards. Revitalized the flight evaluation board process that evaluates operator certifications and operator requirements within Air Force regulations. Expert advice improved the quality of the board reports and protected pilots' due process rights.
- Responsible for the provision of legal assistance services for 22,000 personnel. Advised 380 legal assistance clients and prepared over 700 legal documents saving clients $135,000 in legal fees.

ADJUNCT PROFESSOR *September 2012-May 2014*
Embry Riddle Aeronautical University, Moody Air Force Base, Georgia

- Instructor for two senior-level aviation law courses, teaching aircraft leasing, medical requirements, environmental impact, aviation labor and employment law, and accident investigations.

EDUCATION

University of Mississippi School of Law, *Juris Doctor* May 2009
Certificate from the Center for Remote Sensing, Air and Space Law
Aviation Externship Focusing on Aviation Capacity Building in Developing Countries (Malawi)

Embry Riddle Aeronautical University, *Masters of Science Certificate* May 2014
Aerospace and Aviation Safety

Michigan State University, *Bachelor of Arts* December 2005
Political Science/Pre-Law

ADDITIONAL PROFESSIONAL TRAINING

- ABA Forum on Air and Space Law Conference - 2018
- AUVSI XPONENTIAL - 2018
- FAA/AUVSI UAS Symposium - 2018
- ABA Forum on Air and Space Law Conference - 2018
- West Government Contracts Year in Review - 2018
- Mobility Unmanned - 2017
- AUVSI XPONENTIAL - 2017
- FBA Transportation Security in the Era of "Drones" - 2017
- FAA/AUVSI UAS Symposium - 2017
- ABA Forum on Air and Space Law Update Conference - 2017
- International Aviation Women's Association Annual Conference - 2016
- ABA Forum on Air and Space Law - 2016
- ABA Litigation Fundamentals in Modern Times – Aviation and Space Law – 2015
- ABA Tort Trial and Insurance Practice, Aviation and Space Law Litigation Program – 2014
- Army Federal Litigation Course – 2014
- Air Force Board President's Course – 2014
- Air Force Staff Officer School – 2014Army Contract Attorney's Course – 2013
- Air Force Trial and Defense Advocacy Course – 2012
- Army Advanced Trial Advocacy Course -2011
- Court Appointed Special Advocate Training – 2013
- Air Force Military Justice Administration Course – 2012
- Army Domestic Operations Law Course – 2011
- United States Special Operations University Joint Operational Law Training – 2010
- Air Force Special Operations Command Introduction to Special Operations Course – 2010
- Air Force Operations Law Course – 2010
- Air Force Deployment Fiscal Law and Contingency Contracting Course – 2010
- Air Force Accident Investigation Course – 2010
- Air Force Judge Advocate Staff Officer Course - 2012

BAR ADMISSIONS

- United States Supreme Court
- United States Court of Federal Claims
- Supreme Court of Tennessee
- Supreme Court of Illinois
- Court of Appeals for the Armed Forces
- Air Force Court of Criminal Appeals
- District of Columbia Bar

PROFESSIONAL AFFILIATIONS

- International Aviation Women's Association
- Association for Unmanned Vehicle Systems International
- Service Women's Action Network
- American Bar Association: Forum on Air and Space Law; Drone Committee
- American Bar Association: Torts, Trials, and Insurance Practice Section

SELECTED PUBLICATIONS AND PRESENTATIONS

- Federal District Court Finds Challenged Portions of City Drone Ordinance to Be Preempted, September 22, 2017
- Using Unmanned Aircraft Systems for Infrastructure Inspection Webinar, June 13, 2017, *A Steptoe-sponsored event*
- FAA to Release New Drone-Specific Regulations, April 11, 2017
- Unmanned Aircraft Systems and The National Transportation Safety Board, UAS Magazine, May 2018
- Safety Challenges and the National Transportation Safety Board, ABA Drone Conference, June 5, 2018
- After the Crash: NTSB Investigations Must Be Factored Into AV Testing, Automotive World, June 20, 2018
- FAA Certification of UAS Commercial Delivery Operations, Unmanned Aerial, March 20, 2019

DISCLOSURE FORM FOR WITNESSES
COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(5), of the Rules of the U.S. House of Representatives for the 116th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants), or contracts or payments originating with a foreign government, received during the current and two previous calendar years either by the witness or by an entity represented by the witness and related to the subject matter of the hearing. As a matter of committee policy, the House Committee on Armed Services further requires nongovernmental witnesses to disclose whether they are a fiduciary (including, but not limited to, directors, officers, advisors, or resident agents) of any organization or entity that may have an interest in the subject matter of the hearing. Committee policy also requires nongovernmental witnesses to disclose the amount and source of any contracts or grants (including subcontracts and subgrants), or payments originating with any organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years either by the witness or by an entity represented by the witness.

Please note that a copy of these statements, with appropriate redactions to protect the witness's personal privacy (including home address and phone number), will be made publicly available in electronic form not later than one day after the witness's appearance before the committee. Witnesses may list additional grants, contracts, or payments on additional sheets, if necessary. Please complete this form electronically.

Hearing Date: Tuesday, April 30, 2019

Hearing Subject:

Feres Doctrine - A Policy in Need of Reform?

Witness name: Rebecca A. Lipe

Position/Title: Disabled Veteran

Capacity in which appearing: (check one)

● Individual ○ Representative

If appearing in a representative capacity, name of the organization or entity represented:

Service Women's Action Network

Federal Contract or Grant Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2018

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2017

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

Foreign Government Contract or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts or subgrants) or payments originating from a foreign government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2018

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2017

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

Fiduciary Relationships: If you are a fiduciary of any organization or entity that may have an interest in the subject matter of the hearing, please provide the following information:

Organization or entity	Brief description of the fiduciary relationship

Organization or Entity Contract, Grant or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts or grants (including subcontracts or subgrants) or payments originating from an organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years, please provide the following information:

2019

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
Payment	Bryan, Cave, Leighton, and Paisner LLP	$2500	Donation

2018

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
Grant	Novo Foundation	$200,000	General Operating Funds
Grant	Mental Insight Foundation	$30,000	General Operating Funds
Grant	MKM Foundation	$20,000	General Operating Funds
Grant	Phillip Grand Fund	$25,000	CRM Transition
Payment	Robert Kaufman	$10,000	Donation

2017

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
Grant	Novo Foundation	$100,000	General Operating Fund
Grant	Mental Insight Foundation	$30,000	General Operating Fund
Grant	MKM Foundation	$20,000	General Operating Fund
Grant	Groundswell	$25,000	Program Support
Grant	Moriah Fund	$7,000	Research

STATEMENT OF DWIGHT STIRLING

CHIEF EXECUTIVE OFFICER OF THE CENTER FOR LAW AND MILITARY POLICY

BEFORE THE HOUSE COMMITTEE ON ARMED SERVICES

SUBCOMMITTEE ON MILITARY PERSONNEL

APRIL 30, 2019

Good afternoon, Chairman Speier and other members of the Subcommittee.

I am the Chief Executive Officer of the Center for Law and Military Policy (CLMP), a nonprofit think tank dedicated to strengthening the legal protections of those who serve our nation in uniform. Based out of Huntington Beach, California, the CLMP aims to improve the lives of the nation's protectors by developing solutions for many of the most pressing problems that lead all too often to homelessness, unemployment, and suicide. I am also an adjunct law professor at the University of Southern California's Gould School of Law and a long-time JAG officer in the California National Guard. The primary focus of my legal research has been the *Feres* doctrine. I have written numerous academic articles on the doctrine and am the only academic to write a doctoral dissertation on the topic, a 2019 study entitled "The Feres Doctrine: A Comprehensive Legal Analysis."

Judicial review of the lawfulness of public employees' conduct is a fundamental American principle. The authority of judges to determine whether conduct complies with controlling legal norms, judicial review is an essential element of our 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 judiciary 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 when reviewing wrongful conduct by members of the executive branch. 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).

Courts' refusal to hear intra-military suits stems from the *Feres* doctrine. The *Feres* doctrine comes from U.S. v. Feres, a 1950 Supreme Court decision. The doctrine is a product of the Supreme Court's interpretation of the Federal Torts Claims Act (FTCA), a statute from 1946 that waived most of the federal government's sovereign immunity. Under the FTCA, injured parties can file torts suits when governmental employees engage in wrongful conduct that causes harm. In U.S. v. Feres (1950), the Supreme Court held that Congress did not intend military personnel to be covered by the FTCA (Feldmeir, 2011). As a result of this ruling, service members cannot sue when wrongfully injured by injured by other service members, including when they receive incompetent medical care at an on-base hospital. According to the Supreme Court's holding in Feres v. U.S. (1950), Congress has never ceded sovereign immunity in the military context.

"For 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 *Feres* Doctrine is considered by most scholars, lawyers, and appellate court justices to be an act of judicial legislation. Under the Constitution, tbe judicial branch's job is to interpret the law, not to write law (Rossiter, 1961). This rule notwithstanding, the consensus is that the Supreme Court

rewrote the language of the FTCA in its *Feres* ruling (Bahdi, 2010). Earlier versions of the bill directly excluded service members from the bill's scope, but these versions failed (Feldmeir, 2011). The version that passed included service members in the definition of government employee (28 U.S.C. § 2671). Only one aspect of service member-related conduct was excluded by the version that passed, injuries stemming from "combatant activities" (Zyznar, 2013). No injuries that occurred on the battlefield can serve as a basis for an FTCA claim (28 U.S.C. § 2680(j)). Scholars and lower courts believe that by excluding only one aspect of military activity from the statute's scope, Congress intended all other aspects to be covered (Banner, 2013).

The Supreme Court has sought to justify 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-solider 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.

The *Feres* doctrine in many ways compels judges to become agents of injustice. The most vigorous criticism of the Feres doctrine has come from conservative justices and scholars, notably conservative icon Justice Scalia and Jonathan Turley, a law professor at George Washington University. In *U.S. v. Johnson* (1987), the Supreme Court narrowly upheld the *Feres* doctrine on a 5-4 vote. Justice Scalia wrote a scathing dissent in the case. In his dissent, Justice Scalia laid bare the philosophical errors underpinning the doctrine, the most powerful critique ever lodged against the nearly 70-year-old judicial policy. A strict constructionist who believed statutes should not be expanded beyond the words Congress used, Scalia said the *Feres* doctrine represented an untenable act of judicial legislation. "If the Act is to be altered," he said, "that is a function of the same body who adopted it," e.g., Congress (*U.S. v. Johnson*, 1987, p. 702). His criticism also touched upon the majority's claim that exposing military officials to civil liability undermines military discipline. Not only did Congress not believe this was the case, he said, 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, the preservation of military discipline 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 saw fit to modify the FTCA, the Supreme Court had no business changing the plain meaning of the words.

Professor Turley, a prominent conservative scholar, has also denounced the *Feres* doctrine. In an article entitled "Pax Militaris: The *Feres* Doctrine and the Retention of Sovereign Immunity in the Military System of Governance," 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).

Turley said that blanket immunity also 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. 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).

The *Feres* doctrine must be considered against the backdrop of the civil-military gap and the fact that the well-to-do do not serve for the most part. 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 (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 Professor 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 *Feres* doctrine affects service members within the DoD in very different ways. Managers and others who possess organizational power benefit immensely. Under it, managers are unable to sued by their labor force, a dream scenario. Those at the bottom of the hierarchy 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 policy makers would be comfortable with corporate executives operating outside the reach of the judicial system (Bahdi, 2010). A rule that immunizes senior executives from civil liability does not exists anywhere in the civilian world. Yet immunity has existed for nearly 70 years within the military.

Scholars and judges' criticisms of the *Feres* doctrine fall into three categories: the policy's lack of coherence, its unfair effect upon service members, and the moral injury it causes to the judges forced to implement it. Each is addressed in turn.

1. Lack of Coherence

Lower court judges' criticism of the *Feres* doctrine's logical soundness has been explicit, constant, and forceful (*Ritchie v. U.S.*, 2013). The language judges have used in lodging their critics is remarkable for its candor, fervor, and directness (*Atkinson v. U.S.*, 1987; *Daniel v. U.S.*, 2018). A good example 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. 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).

Judges have said they are unable to discern any rationality in the policy. "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).

Justice Ferguson, a well-known jurist, described the *Feres* 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 the rationale 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 wrote in his famous 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, makes the Supreme Court's logic contradictory. The Supreme Court has never tried to explain the contradiction.

Judges' criticisms have 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).

2. Unfair Effect upon Service Members

Judges and scholars have also noted 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. Calling the distinction irrational, he described 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).

3. Moral Injury

A review of the case law suggests the *Feres* doctrine has a "corrupting effect" upon the jurists who have to deal with it. Judges have expressed deep feelings of guilt, remorse, and regret at having to implement the policy. 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. "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 sentiment 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 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.

Arguments for the *Feres* Doctrine

Proponents of the *Feres* doctrine have traditionally made three standard arguments. Each is addressed in turn.

1. The Existing No-Fault Compensation System Is Sufficient

Proponents note that service members already have access to a no-fault compensation system through the VA. This argument, originally made by the Supreme Court in U.S. v. Feres (195), has since been expressly rejected by the Court. In United States v. Shearer (1985), the Supreme Court said the argument was so unpersuasive that it was being officially abandoned as "no longer controlling" (p. 58, n.4).

Justice Scalia also addressed the argument in U.S. v. Johnson (1987). There, Scalia said "the credibility of this rationale is undermined severely by the fact that before and after *Feres* we permitted inured servicemen to bring FTCA claims, even though they had been compensated by the VA" (p. 697). Scalia noted that in Brooks v. U.S. (1949), a pre-*Feres* decision, the Supreme Court allowed two service members injured off-duty by a civilian Army employee to sue under the FTCA. "The fact that they had already received VA benefits troubled us little," he said (p. 697). He also noted that in Brooks v. U.S. (1949), the Supreme Court said: "Nothing in the FTCA or the veterans' laws…provides for exclusiveness of remedy" (p. 53). VA disability compensation could of course be taken into account "in adjusting recovery under the FTCA," Scalia said (U.S. v. Johnson, 1987, p. 698). Scalia went on: "That Brooks remained valid after Feres was made clear in United States v. Brown (1954), in which we stressed again that because 'Congress had given no indication that it made the right to compensation [under the VA system] the veteran's exclusive remedy…the receipt of disability payments…did not preclude recovery under the FTCA'" (U.S. v. Johnson, 1987, p. 698).

Scalia also said that the VA disability compensation system is not "identical to federal and state workers' compensation statutes in which exclusivity provisions almost invariably appear" (U.S. v. Johnson, 1987, p. 698). "Recovery is possible under workers' compensation more often under the VA disability system, and VA benefits can be terminated more easily than can workers compensation" (U.S. v. Johnson, 1987, p. 698). Proving service-connection can also be difficult, he noted. Scalia's point can be observed when considering a hypothetical situation involving a botched appendectomy. Assume medical incompetence during the procedure caused numbness in the service member/patient's fingers after the fact. Also assume the service member applies

for VA disability compensation after leaving military service. What evidence would he have that the numbness was service-connected? That is, what evidence could he present that the numbness was the result of military-related act as a opposed to pre-existing condition? Showing service-connection is a prerequisite for approval of a VA disability claim. Competently performed appendectomies do not result in numbness. Yet the evidence of malpractice in this instance is entirely in the possession of the DoD healthcare system. DoD officials do not share information about medical errors with patients as a rule. Accordingly, the VA will likely deny the claim on the grounds the veteran cannot show causation. Unable to prove that the appendectomy was negligently performed, he will never be able to establish that the medical mistake caused the finger numbness. The only way to obtain the needed documentation is to initiate civil litigation. But litigation is barred by the *Feres* doctrine. The result is that the veteran would not be able to recover at all for the injuries, locked out of both systems. As the D.C. Circuit said: "The presence of an alternative compensation system neither explains nor justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable" (Hunt v. U.S., 1980, p. 326).

The argument is also undermined by the fact that veterans can file both FTCA claims *and* VA disability compensation claims if they are injured due to malpractice by a VA medical doctor. Why are veterans, e.g., former service members, treated differently from current service members with regard to being able to take these steps?

2. Amending Feres would unfairly create a remedy for a service member injured due to a medical mistake, but not one injured in combat.

The problem with this argument is that it conflates the combat environment with day-to-day life on a military base. No one wants commanders or leaders on the battlefield to be concerned about civil liability. This would lead to hesitation in an environment where decisiveness is required. It is largely agreed upon that this is precisely why Congress excluded "combatant activities" from the scope of the FTCA.

By contrast, day-to-day life on a military base is practically indistinguishable from civilian life, akin to being on a college campus. Going to a medical facility on a base is the same experience for all intents and purposes as seeing a campus doctor. The same privacy laws apply, preventing doctors from sharing medical information with the patient's military leadership without permission. Scholars have observed that there is no reason for service members not to have access to civilian-like remedies, including civil litigation, when injured by an on-base medical provider's incompetence. Different situations should be treated differently under the law. What is appropriate in a combat situation is not appropriate in an on-base health care situation.

In fact, as Justice Scalia pointed out, denying service members access to FTCA claims in non-combat situations most likely hurts service members' morale. In U.S. v. Johnson (1987), Scalia discussed the Feres' doctrine's negative effect on morale and discipline: "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) (italics in original).

3. Recovery via litigation would be dependent on the local tort laws where the service member was stationed.

The concern here is that FTCA litigation will lead to uneven results. Compensation should be standard, according to this argument, not dependent on variable state laws. The Supreme Court expressly rejected this argument in United States v. Shearer (1985), finding it unpersuasive. The problem with the argument is that, under existing policy via *Feres*, there is no compensation at all because service members are categorically barred from suing in civil court. In U.S. v. Johnson (1985), Justice Scalia said: "The unfairness to servicemen or geographically varied recovery is, to speak bluntly, an absurd justification, given that, as have pointed out in another context, nonuniform recovery cannot possibly be worse than uniform nonrecovery" (p. 695-696). "We have abandoned this peculiar rule of solicitude in allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities" (p. 696). Scalia went on: "There seems to me nothing 'unfair' about a rule which says that, just as a serviceman injured by a negligence civilian must resort to state law, so must a serviceman injured by a negligent government employee" (p. 696).

Conclusion

In a representative democracy, military officials do not call the shots on the policies that prevail in the military establishment. The military 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 policy makers 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 it feel like to be told by your government that, although you have defended it with your life, you lack standing to file a civil lawsuit after an egregious medical error caused your child to due during delivery. 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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PROFESSIONAL EXPERIENCE

2018 – Pres.	**Center for Law and Military Policy** Founder and Chief Executive Officer
2016 – Pres.	**University of Southern California, Law School** Adjunct Professor in Military and Veterans Law
2001 – Pres.	**California National Guard (Major)** Active duty from 2007 to 2014; reservist from 2001 to 2007 and 2014 to present. Past assignments include Chief of Military Justice, General Counsel for the Joint Forces Training Base, and Brigade Judge Advocate for 79th Infantry Brigade Combat Team. Tried most general courts-martial in Cal Guard's history.
2014 – 2018	**Veterans Legal Institute** Co-Founder and Chief Executive Officer
2014	**University of California, Irvine, Law School** Law Lecturer in Military and Veterans Law
2013 – 2018	**Columbia College of Missouri (Los Alamitos, California Campus)** Adjunct Professor, Criminal Justice and Military Law
2011 – 2014	**Chapman University** Clinical Professor at the Institute for Military Personnel, Veterans, Human Rights & International Law
2001 – 2007	**StirlingLaw** Founding partner of boutique law firm specializing in civil litigation
2000 – 2001	**Jeffer Mangels Butler & Mitchell, LLC** Litigation associate
1993 – 1997	**English Teacher** High school and middle school

CIVILIAN EDUCATION

2019 (May)	**Doctorate in Education (Organizational Leadership)** Pepperdine University, Graduate School of Education and Psychology
2000	**Juris Doctorate** University of Southern California School of Law
1996	**Master of Education** Whittier College
1992	**Bachelor of Arts (Philosophy)** Pomona College

MILITARY EDUCATION

2013	**Staff Judge Advocate's Course** The Judge Advocate General's Legal Center and School
2012	**Military Justice Manager's Course** The Judge Advocate General's Legal Center and School
2007	**Army Judge Advocate Advanced Course** The Judge Advocate General's Legal Center and School
2004	**Officer Candidate School** Camp San Luis Obispo
2002	**Basic Combat Training (United States Army)** Fort Jackson, South Carolina

MILITARY RANK, BRANCH
Major, California Army National Guard, Judge Advocate General Corps

MILITARY DEPLOYMENT

2009	**Kosovo Force, Multi-National Task Force (East)** Chief of Military Justice

MILITARY COURSES - INSTRUCTOR

2013	California Court-Martial Course
2011, 2013	Trial Advocacy Training

RECENT PUBLICATIONS

Stirling, D. The Feres Doctrine: A Comprehensive Legal Analysis. Doctoral Dissertation (Pepperdine University). Proquest No. 13859621.

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ASSOCIATIONS AND COMMITTEES
Chair, Veterans & Military Committee, Orange County Bar Association
Vice Chair, Standing Committee on Military and Veteran's Affairs, California Lawyers Association

MILITARY AWARDS
Meritorious Service Medal
Army Commendation Medal
Army Achievement Medal

DISCLOSURE FORM FOR WITNESSES
COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(5), of the Rules of the U.S. House of Representatives for the 116th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants), or contracts or payments originating with a foreign government, received during the current and two previous calendar years either by the witness or by an entity represented by the witness and related to the subject matter of the hearing. As a matter of committee policy, the House Committee on Armed Services further requires nongovernmental witnesses to disclose whether they are a fiduciary (including, but not limited to, directors, officers, advisors, or resident agents) of any organization or entity that may have an interest in the subject matter of the hearing. Committee policy also requires nongovernmental witnesses to disclose the amount and source of any contracts or grants (including subcontracts and subgrants), or payments originating with any organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years either by the witness or by an entity represented by the witness.

Please note that a copy of these statements, with appropriate redactions to protect the witness's personal privacy (including home address and phone number), will be made publicly available in electronic form not later than one day after the witness's appearance before the committee. Witnesses may list additional grants, contracts, or payments on additional sheets, if necessary. Please complete this form electronically.

Hearing Date: Tuesday, April 30, 2019

Hearing Subject:

Feres Doctrine - A Policy in Need of Reform?

Witness name: Dwight Stirling

Position/Title: Chief Executive Officer, Center for Law and Military Policy

Capacity in which appearing: (check one)

○ Individual ◉ Representative

If appearing in a representative capacity, name of the organization or entity represented:

Center for Law and Military Policy

Federal Contract or Grant Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2018

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2017

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

Foreign Government Contract or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts or subgrants) or payments originating from a foreign government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2018

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2017

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

Fiduciary Relationships: If you are a fiduciary of any organization or entity that may have an interest in the subject matter of the hearing, please provide the following information:

Organization or entity	Brief description of the fiduciary relationship

Organization or Entity Contract, Grant or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts or grants (including subcontracts or subgrants) or payments originating from an organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years, please provide the following information:

2019

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment

2018

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment

2017

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment

Statement of Paul F. Figley[1]
Before the Committee on Armed Services
Subcommittee on Military Personnel
United States House of Representatives

"Feres Doctrine – A Policy in Need of Reform?"

April 30, 2019

Madam Chair, Mr. Ranking Member, Members of the Subcommittee:

Thank you for this opportunity to share my views.

My testimony will address reasons why Congress should not alter the *Feres* Doctrine[2] — that body of law which has developed from the Supreme Court's unanimous 1950 decision in *Feres v. United States*.[3] In that opinion the Court held "the Government is not liable under the Federal Tort Claims Act for injuries which arise out of or are in the course of activity incident to service."[4] It reached that decision not as a matter of judicial fiat, but as a good faith determination of Congressional intent.[5] I will not address whether the Supreme Court correctly

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[1] Acting Director, Legal Rhetoric Program, American University, Washington College of Law.

[2] Much of my testimony is based on my article, Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 Am. U. L. Rev. 393 (2011), and my book, Paul Figley, A Guide to the Federal Tort Claims Act (ABA, 2d ed. 2018). Please see them for a more complete exposition of these points.

[3] 340 U.S. 135 (1950).

[4] Id.. at 146.

[5] *See id.* at 138 *("*No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.").

interpreted Congress' intent when it decided *Feres* other than to note that, in my opinion, it clearly did.

At the outset, we can all agree that government negligence or malpractice does cause real injuries and can have a tragic impact on the lives of service-members and their families. It is understandable that such people are frustrated when they perceive that they or their loved ones are being treated unfairly. From the perspective of one injured service-member or one family, the remedy may seem simple and obvious – allow the injured party to sue in tort. From the perspective of fostering the long-term success of a critically important institution – the United States military – that remedy is mistaken. Simply put, Congress should not alter the *Feres* doctrine because such legislation is unnecessary in light of the comprehensive military compensation system (which is more favorable in scope and remedy than state workers compensation programs), and because it would disrupt the vital and unique military relationship between the government and its service-members.

This presentation will briefly review the current state of the law regarding the Federal Tort Claims Act, *Feres*, and its application to service-members. It will then address why the outcome mandated by *Feres* is correct.

I. The Federal Tort Claims Act & Service-Members

Prior to 1946 there was no general waiver of the United States' sovereign immunity for suits in tort. As a consequence, people injured by the acts of federal employees could not sue the government for those injuries.[6] They were not

[6] Lane v. Pena, 518 U.S. 187, 192 (1996) (citing United States v. Nordic Vill., Inc., 503 U.S. 30, 33-34, 37 (1992), and Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)); *accord* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 514 (1940)

without a remedy. From the beginning of the Republic, individuals using their First Amendment right to petition the government for redress of grievances had sought special, private legislation granting them relief for damages caused by the government.[7] Congress sometimes granted them relief. Also since the nation's beginnings, members of Congress have recognized that legislation is a poor way to resolve private claims against the government. On February 23, 1832, John Quincy Adams wrote that deciding private claims "is judicial business, and legislative assemblies ought to have nothing to do with it."[8] Members of the congressional Claims Committees simply could not know the details of each of the thousands of claims presented in every Congress.[9] The Claims Committee process was subject to interminable delays and arbitrary actions.[10] It imposed substantial burdens on the time and attention of Congress.[11] To resolve these problems and

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("Consent alone gives jurisdiction to adjudge against a sovereign. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.").

[7] U.S. CONST. AMEND. I; *see Hearings on H.R. 5373 and H.R. 6463 Before H. Comm. on the Judiciary*, 77th Cong, 2d Sess., at 49-55 (1942) [hereinafter *Hearings on H.R. 5373 and H.R. 6463*].

[8] *Hearings on H.R. 5373 and H.R. 6463*, at 49 (noting, "[o]ne-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").

[9] *See Hearings on H.R. 5373 and H.R. 6463*, at 54 (quoting *Debates on H.R. 7236*, 86 CONG. REC. 18212 (1940)).

[10] *See id. (*statement of Rep. Luce) (noting the waste of time and inequity of procedures and stating that "nothing is so disgraceful in the conduct of the Congress of the United States as its treatment of claims").

[11] *See, e.g.*, S. REP. NO. 1400, 79th Cong., 2d Sess., at 30-31 (1946); H.R. REP. NO. 1287, 79th Cong., 1st Sess., at 2 (1945); *Hearings on H.R. 5373 and H.R. 6463*, at app. II, 49-55 ("Criticisms by Congressmen of Existing Procedure of Relief by Private Claim Bills").

to meet the need for a practical way to pay valid, run-of-the-mill tort claims against the government, the 79th Congress enacted the Federal Tort Claims Act as Title IV of the Legislative Reorganization Act of 1946.[12]

The FTCA provides a general waiver of the United States' sovereign immunity for suits in tort, subject to exclusions and exceptions. In *FDIC v. Meyer*,[13] the Court analyzed the language of the FTCA's jurisdictional grant:

> Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. *Richards v. United States*, 369 U.S. 1, 6, 82 S. Ct. 585, 589, 7 L. Ed. 2d 492 (1962). This category includes claims that are:
>
> > "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).
>
> A claim comes within this jurisdictional grant—and thus is "cognizable" under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above.[14]

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[12] Pub. L. No. 79-601, 60 Stat. 812 (codified as amended in scattered sections of 28 U.S.C.). Pertinent to the FTCA, Title I prohibited private bills in circumstances where the FTCA might provide a remedy.

[13] 510 U.S. 471 (1994).

[14] *Id.* at 477.

Thus, claims that would not lie against a private person under state law are not cognizable under the Act.[15]

The FTCA also contains a number of explicit exceptions to its waiver of sovereign immunity,[16] including two that obviously would block some suits by injured service-members. The combatant activity exception bars "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[17] The foreign tort exception bars "[a]ny claim arising in a foreign country."[18]

In *Feres*, the Supreme Court examined the FTCA and concluded that Congress had not intended to waive sovereign immunity for injuries that arise incident to the claimant's military service.[19] Whether the *Feres* doctrine applies to a particular claim turns on whether the injury arose incident to military service.[20] In determining that issue courts consider a variety of factors, with no single one being dispositive.[21] These factors include whether the injury arose while a service

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[15] *See id.* (holding that § 1346(b) does not waive sovereign immunity for constitutional tort claims because "federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right"); *see also* United States v. Olson, 546 U.S. 43, 43 (2005) (recognizing that § 1346(b)(1) waives sovereign immunity under circumstances where the United States if a private person, rather than the United States, if a state or municipal entity, would be liable and that the Court had consistently adhered to the private person standard).

[16] *See* 28 U.S.C. § 2680 (2006).

[17] *See id.* § 2680(j).

[18] *See id.* § 2680(k).

[19] *Feres v. United States, 340 U.S. 135, 146 (1950).*

[20] United States v. Johnson, 481 U.S. 681, 686 (1987) ("This Court has never deviated from [the incident to service test] of the *Feres* bar.").

[21] Richards v. United States, 176 F.3d 652, 655 (3d Cir. 1999).

member was on active duty;[22] on a military site;[23] engaged in a military activity;[24] subject to military discipline or control;[25] or receiving a benefit conferred as a result of military service.[26] *Feres* does not bar service-members' claims that arise after one has left the service,[27] or for non-incident to service injuries to family members.[28]

II. Reasons to Keep the *Feres* Bar

A. The Military's Uniform & Comprehensive Compensation System

Workers compensation laws in every state provide fixed monetary compensation to workers who are injured in the course of employment at their workplace. Injured workers receive lost wages, medical expenses, rehabilitation, and fixed recoveries for permanent injuries. Recovery is assured, even if the employer was without fault. In exchange, the statutes prohibit injured workers from suing their employers in tort for those injuries.

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[22] *See* Kohn v. United States, 680 F.2d 922, 925 (2d Cir. 1982) (shot by fellow soldier).
[23] *See* Morey v. United States, 903 F.2d 880, 881 (1st Cir. 1990) (sailor falling off pier on return to ship).
[24] *See* Galligan v City of Phila., 156 F. Supp. 2d 467, 474 (E.D. Pa. 2001) (*Feres* barred claim of West Point cadet injured while watching Army-Navy football game).
[25] *See* Pringle v. United States, 208 F.3d 1220, 1226-27 (10th Cir. 2000) (*Feres* barred claim of soldier injured when ejected from on-base social club under the operational control of base commander).
[26] *See* Herreman v. United States, 476 F.2d 234, 237 (7th Cir. 1973) (*Feres* barred claim of soldier hitching ride on military aircraft while on leave).
[27] *See* United States v. Brown, 348 U.S. 110, 112 (1950) ("The injury was not incurred while [Brown] was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status.").
[28] *See* Hicks v. United States, 368 F.2d 626, 633 (4th Cir. 1966) (serviceman may recover for wrongful death of civilian wife after treatment in military hospital).

Generally, workers compensation claims are resolved administratively, without resort to litigation. Prompt, mandatory administrative resolution saves both parties the time and expense of litigation. It also allows the plaintiff-employee to avoid the psychic and emotional burdens of litigation – the worry, loss of privacy, pressures of discovery and trial, the putting of one's life on hold, and the lost opportunity costs – that occur with any personal injury suit, regardless of the outcome.[29] With litigation, the outcome is never certain. A judge or jury may rule for the defendant-employer because negligence was not proven, causation was not proven, the plaintiff-employee was found negligent, or some other defense applies. Even with a plaintiff's victory on liability, the judgment may be disappointingly low. If plaintiff does prevail at trial, the defendant-employer may appeal – certainly delaying payment and possibly reversing the outcome.

The policies of assured, administrative, no-fault recovery that support barring employees from bringing tort suits against their employers apply with greater force in suits by service-members for injuries incurred incident to service. The "simple, certain, and uniform"[30] military compensation system covers a wider range of injuries and provides more benefits.

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[29] See Andrew F. Popper, *Rethinking Feres*, 60 B.C.L. Rev. (forthcoming 2019) (manuscript at 93) (arguing against Feres, but noting "at a personal level, litigation forces victims and alleged wrongdoers to re-live some of the worst moments of their lives. . . . No one with even a passing understanding of our legal system would look forward to the essential rigors of civil litigation.").

[30] Feres, 340 U.S. at 145.

First, civilian employees are eligible for workers compensation for injuries arising in the course of employment at the workplace. Service-members receive benefits for injuries arising during their "period of service."[31]

> A service connection for veterans' disability-compensation purposes will generally be awarded to a veteran who served on active duty during a period of war, or during a post-1946 peacetime period, for any disease or injury that was incurred in, or aggravated by, a veteran's active service . . . ."[32]

Second, the range of benefits provided by the military compensation system is substantially broader than those provided by state workers compensation laws. In *United States v. Johnson* the Supreme Court spoke to these "generous statutory disability and death benefits . . . ," and recognized that these swiftly provided benefits "compare extremely favorably" to benefits provided by most workers compensation systems.[33] It further noted:

> Servicemembers receive numerous other benefits unique to their service status. For example, members of the military and their dependents are eligible for educational benefits, extensive health benefits, home-buying loan benefits, and retirement benefits after a minimum of 20 years of service. See generally Uniformed Services Almanac (L. Sharff & S. Gordon eds. 1985).[34]

Benefits for active duty service members include free medical care, 10 U.S.C. §§ 1071 *et seq.* Survivors are entitled to death gratuity benefits, 10 U.S.C. §§ 1475 *et seq.*, and subsidized life insurance. 10 U.S.C. §§ 1447 *-et seq.*

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[31] 38 U.S.C. §§ 1110, 1131.
[32] 77 Am. Jur. 2d Veterans and Veterans Laws § 29 (2019).
[33] United States v. Johnson, 481 U.S. 681, 689-90 (1987) (citing Stencel Aero Engen. Corp. v. United States, 431 U.S. 666, 673 (1977); Feres, 340 U.S. at 145).
[34] *Id.* at 690, n.10.

Veterans have a comprehensive disability retirement system. 10 U.S.C. §§ 1201 *et seq.*, and 1401 *et seq.* The Veterans Benefits Act provides compensation for Service-Connected Disability or Death, 38 U.S.C. §§ 1101 *et seq.;* Dependency and Indemnity Compensation for Service Connected Deaths, 38 U.S.C. §§ 1301 *et seq.;* Pension for Non-Service Connected Disability or Death or for Service, 38 U.S.C. §§ 1501 *et seq.;* Hospital, Nursing Home, or Domiciliary Care and Medical Treatment, 38 U.S.C. §§ 1701 *et seq.;* and National Life Insurance, 38 U.S.C. §§ 1901 *et seq.* A wide range of these and other benefits and programs are set forth in the seventy-page booklet FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS.[35] The described benefits and programs include, *inter alia*, Health Care, pp. 1-13 (including Military Sexual Trauma, p. 5; Home Improvement and Structural Alterations, p. 9; and Long-term Services, p. 11), Benefits, pp. 13-61 (including Disability Compensation, p.13; Housing Grants for Disabled Veterans, p. 15; Education and Training Benefits, p. 21; and Survivors Pension, p. 55), and Burial and Memorial Benefits, pp. 61-68.

This expansive, generous military compensation system should be the exclusive remedy for service-members injured incident to their military service, just as civilian worker compensation systems are the exclusive remedy against employers for work place injuries. In *United States v. Demko*,[36] the Supreme Court held that the Prison Industries Fund is the exclusive remedy for federal

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[35] U.S. Dept. of Veterans Affairs, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS (2018), available at https://www.va.gov/opa/publications/benefits_book.asp .

[36] 385 U.S. 149 (1966).

prisoners injured while working for Federal Prison Industries, Inc., even though that agency's statute does not contain exclusivity language.[37] The Court stated:

> Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions . . . . [38]

The military compensation system should be the exclusive remedy for injuries incurred incident to service, just as workers compensation is the exclusive remedy for other Americans injured on the job.[39]

B. Tort Litigation Would Disrupt the Military Relationship

If Congress overturns the *Feres* doctrine, injured service-members could obtain their benefits from the military compensation system and then seek tort damages. They, or their attorneys, would argue in our adversarial court system that someone in the government was at fault for causing their injuries. Having members of the military litigate about who was at fault for a training accident, ill-fated combat mission, or surgical procedure would disrupt the relationship of mutual trust necessary to an effective fighting force.

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[37] *See id.* at 151-52. Federal Prison Industries, Inc. is the federal corporation that provides training and rehabilitation programs for prisoners. 18 U.S.C. § 4126 (2006).

[38] *Id.* at 151.

[39] *See* Lester S. Jayson & Robert C. Longstreth, Handling Federal Tort Claims § 5A.05 (2019) ("It would certainly be strange to conclude that Congress intended that servicemen, virtually alone among American workers, be given free rein to sue their employer.")

In a series of opinions, the Supreme Court has explained how the disruption to military discipline that would flow from allowing suit for injuries to service-members arising from their service. In *Stencel Aero Engineering Corp. v. United States*, the Court ruled that third-party actions against the United States arising from injuries to servicemen (there, a National Guard pilot injured by an airplane ejection system) incident to their military service are barred by *Feres*.[40] It reasoned:

> [T]he effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. . . . The trial would, in either case, 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.[41]

In *Chappell v. Wallace*, the Supreme Court held that the policies underlying the *Feres* doctrine also bar suit by service-members against other service-members for Constitutional torts.[42] The Court declined to recognize such a cause of action, reasoning that:

> The special nature of military life -- the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel -- would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.[43]

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[40] 431 U.S. 666 (1977).
[41] *Id.* at 673.
[42] 462 U.S. 296 (1983).
[43] *Id.* at 304.

In *United States v. Shearer*, the Supreme Court barred suit against the government for the off-base, off-duty murder of one serviceman by another.[44] It concluded that the military's allegedly negligent personnel practices relating to the murderer and its failure to warn others about him would require "the civilian court to second-guess military decisions," and "the suit might impair essential military discipline . . . ."[45] The Court ruled these claims "were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[46]

In *United States v. Johnson*, the Court held that *Feres* barred suit by members of the Coast Guard injured in a helicopter crash allegedly caused by negligence of a federal civilian employee.[47]

> In every respect the military is, as this Court has recognized, "a specialized society." *Parker v. Levy,* 417 U.S. 733, 743 (1974). "[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger,* 475 U.S. 503, 507 (1986). Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. 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.[48]

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[44] 473 U.S. 52 (1985).
[45] *Id.* at 57 (citations omitted).
[46] *Id.* at 59 (emphasis by Court).
[47] 481 U.S. 681 (1987).
[48] *Id.* 690–91 (parallel citations and internal footnotes omitted).

In *United States v. Stanley*, the plaintiff alleged that his constitutional rights were violated when he unwittingly participated in a drug testing program during his military service.[49] In declining to recognize such a cause of action, the Court stated:

> A test for liability that depends upon the extent to which particular suits would call into question military discipline and decision making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision making), the mere process of arriving at correct conclusions would disrupt the military regime. The "incident to service" test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.[50]

The military compensation system is uniform. It treats all service-members the same. Aside from the disruption to military discipline and trust caused by litigation and the adversary process, trust and goodwill would be undermined when service-members in similar circumstances receive drastically different remedies. Because the FTCA applies the substantive tort law of the state where the negligent or wrongful act took place, absent *Feres*, some service-members might have successful state law tort claims for negligent government actions (*e.g.* negligently written instructions or badly maintained brake systems) when service-members in other states injured by the same negligent act would not. For

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[49] 483 U.S. 669 (1987).
[50] 483 U.S. at 682-83.

example, some states recognize contributory negligence as a complete defense; other states have adopted comparative negligence. Indeed, given the "'distinctively federal'" relationship between the government and its service-members, "Where a service member is injured incident to service—that is, because of his military relationship with the Government—it 'makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman."[51]

Absent *Feres,* service-members with identical, service-related injuries may receive disparate treatment because some claims are barred by federal defenses and others are not. The FTCA bars claims that arise in foreign countries[52] or in combatant activities.[53] If three service-member amputees share a military hospital ward, one having lost a leg when his helicopter was shot down by the Taliban, one suffering the same loss in a military transport accident in Germany, and one in a military training flight in California, each will have the full panoply of service-members' and veterans' benefits. The two who suffered their loss in combat or overseas could not sue under the FTCA because the Act's exceptions bar those claims.[54] If the one injured in California could bring an FTCA suit under California tort law he would likely recover a million dollar judgment, the others would know it, and may well feel unfairly treated.[55]

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[51] United States v. Johnson, 481 U.S. at 689 (quoting Feres, 340 U.S. at 143; Stencel Aero Eng., 431 U.S. at 672).

[52] 28 U.S.C. § 2680(k).
[53] 28 U.S.C. § 2680(j).
[54] *See* 28 U.S.C. §§ 2680(j), (k).
[55] *See* Edwin F. Hornbrook & Harold Hongju Kirschbaum, *The* Feres *Doctrine: Here Today - Gone Tomorrow?*, 33 A.F. L. REV. 1, 11 (1990) ("[A]bolishing *Feres* would

This is not an idle concern. One lesson of the September 11th Victim Compensation Fund is that providing different, individualized awards to members of a group who have suffered a similar loss can cause frustration and ill-will:

> [T]here are serious problems posed by a statutory approach mandating individualized awards for each eligible claimant. The statutory mandate of tailored awards fueled divisiveness among claimants and undercut the very cohesion and united national response reflected in the Act. The fireman's widow would complain: "Why am I receiving less money than the stockbroker's widow? My husband died a hero. Why are you demeaning the value of his life?" . . . The statutory requirement that each individual claimant's award reflect unique financial and family circumstances inevitably resulted in finger-pointing and a sense among many claimants that the life of their loved one had been demeaned and undervalued relative to others also receiving compensation from the Fund.[56]

The concern that similarly situated service-members receive uniform treatment was understood by Presidents Truman and Eisenhower. On August 2, 1946, the same day he signed the FTCA into law, President Truman vetoed a

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splinter military cohesion by creating a privileged class of claimants who could bring suit, and an underprivileged class who would still be barred by the combat, foreign country, and discretionary function exceptions."). S*ee generally* United States v. Brooks, 169 F.2d 840, 844 (4th Cir. 1948).

[56] Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, at 82 (August 5, 2008) (noting that a better approach would have been to provide the same amount for all eligible claimants); *accord* Kenneth R. Feinberg, What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11 71 (Public Affairs 2005) (describing his encounters with the 9/11 families at town meetings and their reactions of resentment, anger, and disbelief when faced with the "raw truth that each claimant would receive a different award depending on the economic wherewithal of the victim . . . .").

service-member's private bill because it would undermine the established uniform system for the compensation of those injured while in military service.[57] The President was typically succinct in explaining why he decided to veto the serviceman's remedy:

> Ensign Lanser was on active duty with the Navy at the time of the accident. He was hospitalized in a naval hospital and is entitled to the same rights and benefits extended to all other members of the armed forces who sustained personal injuries while in an active duty status. No reason is evident why special treatment should be accorded this officer.[58]

President Eisenhower stated in a veto message of a similar private bill, "Uniformity and equality of treatment to all who are similarly situated must be the steadfast rule if the Federal programs for veterans and their dependents are to be operated successfully."[59]

The nation has been well served by the distinctly federal relationship between the government and members of the Armed Forces,[60] with its unique disciplinary system, special and exclusive system of military justice,[61] and comprehensive compensation program.

> [C]enturies of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before

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[57] H.R. Doc. No. 79-767, at 1-2 (1946) (returning H.R. 4660, a bill for the Relief of Mrs. Georgia Lanser and Ensign Joseph Lanser, without his approval).
[58] *Id.*
[59] H. R. Doc. No. 83-426, at 1-3 (1954) Message from the President of the United States (June 14, 1954) ((returning H.R. 3109, a bill for the Relief of Theodore W. Carlson, without his approval).
[60] United States v. Johnson, 481 U.S. at 689 (quoting Feres, 340 U.S. at 143).
[61] Chappell v. Wallace, 462 U.S. at 300.

> entertaining a suit which asks 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.[62]

That relationship should not be disrupted by legislation altering the *Feres* doctrine.

[62] *Id.*

PAUL F. FIGLEY

PROFESSIONAL HISTORY

Washington College of Law, American University, Washington, D.C.
Legal Rhetoric Program – Associate Director (2006 to present)
Classes Taught – Torts, Legal Rhetoric
Honors – Emalee C. Godsey Scholar Award (for Faculty Scholarship), 2017
WCL Student Bar Association *Faculty Member of the Year* for 2014-15
WCL Student Bar Association *Professor of the Year* for 2012-13

U.S. Department of Justice, Washington, D.C.
Civil Division, Torts Branch, Federal Tort Claims Act Staff
Deputy Director (1991-2006) - Second in command in office that manages the tort litigation of the federal government.
Prior service in various roles in Civil Division offices responsible for Federal Tort Claims Act, Freedom of Information Act, and Privacy Act litigation.
Honors – Civil Division Award for Dedicated Service, 2005
(One of six to receive this award from among 700 attorneys.)
Two Civil Division Special Commendation Awards
Numerous Special Achievement Awards

EDUCATIONAL HISTORY

Southern Methodist University School of Law, Dallas, Texas - Juris Doctor
Leading Articles Editor, JOURNAL OF AIR LAW & COMMERCE
Hatton W. Sumners Scholar
(One of five in class to receive three-year grant for full tuition and expenses.)
Admissions Committee

Franklin & Marshall College, Lancaster, Pennsylvania - B.A. *Cum Laude*
History major, Office of Public Relations, Varsity Soccer (MVP), Varsity Baseball.

PUBLICATIONS

Paul Figley, A GUIDE TO THE FEDERAL TORT CLAIMS ACT (ABA, 2d ed. 2018).

Paul Figley, *The Judgment Fund: America's Deepest Pocket & its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145 (2015).

Paul Figley, *Using Problems to Teach Quantitative Damages in a First Year Torts Class*, 63. J. OF LEGAL ED. 113 (2013).

Paul Figley, *Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys,* 8 ST. THOMAS U. L. J. 347 (2011).

Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion,* 60 AM. U. L. REV. 393 (2011).

Paul Figley, *Teaching Rule Synthesis with Real Cases*, 61. J. OF LEGAL ED. 245 (2011).

Paul Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009).

Paul Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TR. & INS. PRAC. L.J. 1105 (2009).

Paul Figley, *Calls for Justice & "Joint and Several Liability,"* in MATERIALS ON TORT REFORM 89-91 (Andrew F. Popper ed., 2010).

AREAS OF SPECIALIZATION

Torts, Sovereign Immunity, Federal Tort Claims Act, Legal Writing

SELECTED PRESENTATIONS

Congressional Testimony on "Oversight of the Judgment Fund" before the Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, United States House of Representatives (Washington, D.C., March 2, 2017).

Congressional Testimony on "Oversight of the Judgment Fund: Iran, Big Settlements, and the Lack of Transparency" before the Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, United States House of Representatives (Washington, D.C., September 2, 2016).

Congressional Testimony on the "Stop Settlement Slush Funds Act of 2016," before the Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, United States House of Representatives (Washington, D.C., April 28, 2016).

"An Overview of American Tort Law," at the Embassy of Kazakhstan (Washington, D.C., March 18, 2016).

"Minimizing Medical Liability Exposure in Clinical Decision Making: A Prescription for Improving Patient Outcomes and Avoiding Litigation" – Panel, at the MedStar Health Legal Symposium (Washington, D.C., June 11, 2014).

"Development of Legal Drafting Skills," at the Profile of the Judicial Officer Seminar, The Washington Center (Washington, D.C., May 12-14, 2014).

"Creating Better Documents: Planning, Revising, and the Review Process," at the Dept. of Commerce, Office of the General Counsel Attorney Retreat (National Archives, Washington, D.C., October 13, 2011).

"Ethical Issues in Defending Federal Tort Claims Act Cases," at the Symposium: Official Wrongdoing and the Civil Liability of the Federal Government and Officers, University of St. Thomas School of Law (Minneapolis, March 17-18, 2011).

"Writing the Brief: How to Write (and Re-Write) a First-Rate Appellate Brief," at the Appellate Practice Conference of the National Attorney General Training and Research Institute (Washington, D.C., March 2009).

DISCLOSURE FORM FOR WITNESSES
COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(5), of the Rules of the U.S. House of Representatives for the 116th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants), or contracts or payments originating with a foreign government, received during the current and two previous calendar years either by the witness or by an entity represented by the witness and related to the subject matter of the hearing. As a matter of committee policy, the House Committee on Armed Services further requires nongovernmental witnesses to disclose whether they are a fiduciary (ineluding, but not limited to, direetors, officers, advisors, or resident agents) of any organization or entity that may have an interest in the subject matter of the hearing. Committee policy also requires nongovernmental witnesses to disclose the amount and source of any contracts or grants (including subcontracts and subgrants), or payments originating with any organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years either by the witness or by an entity represented by the witness.

Please note that a copy of these statements, with appropriate redactions to protect the witness's personal privacy (including home address and phone number), will be made publicly available in electronic form not later than one day after the witness's appearance before the committee. Witnesses may list additional grants, contracts, or payments on additional sheets, if necessary. Please complete this form electronically.

Hearing Date: Tuesday, April 30, 2019

Hearing Subject:

Feres Doctrine - A Policy in Need of Reform?

Witness name: Paul F. Figley

Position/Title: Prof. of Rhetoric, American Univ., Washington College of Law

Capacity in which appearing: (check one)

(●) Individual ( ) Representative

If appearing in a representative capacity, name of the organization or entity represented:

Federal Contract or Grant Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2018

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2017

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

Foreign Government Contract or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts or subgrants) or payments originating from a foreign government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2018

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2017

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

Fiduciary Relationships: If you are a fiduciary of any organization or entity that may have an interest in the subject matter of the hearing, please provide the following information:

Organization or entity	Brief description of the fiduciary relationship

Organization or Entity Contract, Grant or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts or grants (including subcontracts or subgrants) or payments originating from an organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years, please provide the following information:

2019

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment

2018

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment

2017

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment

DOCUMENTS SUBMITTED FOR THE RECORD

APRIL 30, 2019

Forthcoming in 60 BOSTON COLLEGE LAW REVIEW (June 2019)

RETHINKING *FERES*

Andrew F. Popper*

"In sum, neither the three original Feres *reasons nor the post hoc rationalization of 'military discipline' justifies our failure to apply the FTCA as written.* Feres *was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."*
Dissenting opinion of Justices Scalia, joined by Justices Brennan, Marshall, and Stevens[1]

"You're old enough to kill but not for voting. . . This whole crazy world is just too frustratin'...."
P.F. Sloan, "Eve of Destruction" [2]

I INTRODUCTION

Prior to 1946, sovereign immunity provided an almost complete bar to civil tort actions against the federal government.[3] While almost all individuals and institutions of every type, shape, and size were subject to tort claims that held out the potential to make victims whole and deter others from similar misconduct, the federal government positioned itself safely,[4] immune

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[1]* Andrew F. Popper is the Bronfman Distinguished Professor of Law at American University, Washington College of Law. This article is in part premised on the author's experience with the Marine Corps, and, after his honorable discharge, his subsequent service to the United States government.

United States v. Johnson, 481 U.S. 681, 700 (Scalia, J., dissenting) *(*citing *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (EDNY), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)).

[2] Lyrics: P.F. Sloan, *Eve of Destruction*, Dunhill Records (1965) (This article is not about drafting 18-year-olds in the 1960s "old enough to kill" but not 21, the voting age. However, that one who serves is denied rights accorded all others (not in the military) is the topic of this piece.)

[3] United States v. McLemore, 45 U.S. 286, 288 (1846) ("[T]he [federal] government is not liable to be sued, except with its own consent, given by law.").

[4] THE FEDERALIST NO. 81, at 397 (Alexander Hamilton) (Terence Ball ed., 2003) ("[I]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.").

and unaccountable,[5] behind the ancient premise that the "king can do no wrong."[6] The injustice this inflicted needs no documentation; while a premise of this article is that the core of our government is now and has always been essential, representative, and supportive of our best and most important goals, an institution with millions of employees and with the variety, mass, and depth of our government is bound to harbor a small number of individuals, institutions, and entities who act outside conventional notions of due care and fairness.[7]

In 1946, the ancient wall of sovereign immunity gave way with the passage of the Federal Tort Claims Act (FTCA).[8] By allowing individuals to pursue claims against the United States for negligence, the FTCA opened the courthouse doors for a limited number of those allegedly harmed by the misconduct of individuals and entities acting on behalf or under the imprimatur of the United States government.[9] Although liability was limited from the outset by the vast, vague,

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5 Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 527 (2003) ("'[S]overeign immunity' has never been a complete immunity . . . for the government; it has never barred all remedies for governmental wrongs. . . .").

6 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 8 (M. Howe ed., 1963) ("[T]he rule remains. . . . The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."); W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 548–69 (5th ed. 1942)(the rationale of sovereign immunity is based on the belief in the divinity of the King; to allow such suits would contradict perfection).

7 Early efforts to address the need for governmental accountability were documented in a famous series of law review articles by Professor Edwin Borchard covering municipal and governmental immunity, an international perspective on public liability, and more. *See* Edwin M. Borchard, *Theories of Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928) (focused on liability for wrongful acts including wrongful confinement); Edwin M. Borchard, *Governmental Responsibility in Tort, VII,* 36 YALE L.J. 1039 (1927); Edwin M. Borchard, *Governmental Responsibility in Tort, VI,* 36 YALE L.J. 1 (1926); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 3 (1924) (criticizing the immunity of government and dismissing the historical roots: "The difficulty, of course, lies in the fact that we consider ourselves bound by the fetters of a medieval doctrine. . . .").

8 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–80 (2018) (originally enacted as Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (amended 2006)).

9 Paul Figley, A GUIDE TO THE FEDERAL TORTS CLAIMS ACT, SECOND EDITION (American Bar Association 2018) (explaining content of the Federal Tort Claims Act (FTCA), discussing the central substantive issues, and setting out the process for pursing an FTCA claim).

and vexing discretionary function exception (DFE), 10 in limited circumstances the federal government, like those it governs, could now be accountable for acts of misconduct, negligence, malpractice, and similar claims in the forum created in the Constitution for resolution of such grievances, Article III courts.11

Beyond the DFE, the FTCA had explicit limits12 including (but not limited to) a ban on punitive damages, limitations on the right to a jury trial, caps on attorney's fees, an exhaustion of administrative remedies requirement, a bar for claims for injuries sustained abroad, and a bar on claims for injuries sustained in combat or armed conflict.13 These exceptions, particularly those

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10 28 U.S.C. §§ 1346(b)(1), 2680(a) (2018); Freeman v. United States, 556 F.3d 326, 334 (5th Cir. 2009) ("At the pleading stage, plaintiffs must invoke the court's jurisdiction by alleging a claim that is facially outside of the discretionary function exception."); (internal citations omitted) Rosebush v. United States, 119 F.3d 438, 444 (6th Cir. 1997) (Merritt, J., dissenting) ("Our Court's decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the [FTCA]. It decimates the Act."); Tippett v. United States, 108 F.3d 1194, 1196 (10th Cir. 1997) ("If the discretionary function exception applies to the challenged governmental conduct, the United States retains its sovereign immunity, and the district court lacks subject matter jurisdiction to hear the suit."); William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 56 (1993) ("[T]he discretionary function exception is not susceptible to ready formulae and precise tests."); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 82 (1968) (characterizing the Discretionary Function Exception (DFE) as "vague and ambiguous"); Mark C. Niles, *Nothing But Mischief: The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 Admin. L. Rev. 1275, 1334 (2002) (the discretionary function exception has become a "veritable reassertion of [the] discarded limitation" of sovereign immunity); Cornelius J. Peck, Laird v. Nelms: *A Call for Review and Revision of the Federal Tort Claims Act*, 48 WASH. L. REV. 391, 415–18 (1973) (suggesting changes to the DFE).

11 U.S. CONST. ART. III § 1.

12 Federal Tort Claims Act, 28 U.S.C., §§ 1346(b), 2671 (2018); David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act,* 8 U. ST. THOMAS L.J. 375 (2011); Paul Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL INSUR. PRACT. L.J. 1105 (2009).

13 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–80 (2006). The statute was enacted as Title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, which was codified and later mended in non-sequential sections of 28 U.S.C. (2006). *See* Major Jeffrey B. Garber, *The (Too) Long Arm of Tort Law: Expanding the Federal Tort Claims Act's Combatant Activities Immunity Exception to Fit the New Reality of Contractors on the Battlefield*, 2016 ARMY L. 12 (2016)

related to injuries sustained in combat or armed conflict, were not controversial then, are not controversial now, and are not the subject of this article. Unresolved, however, was the fate of members of our armed forces and their families injured by actors and actions incident to military service outside of armed conflict or combat.

Within four years of the passage of the FTCA, the Supreme Court, faced with legislation that did not resolve the fate of those injured incident to military service, decided *Feres v. United States*,[14] and in broad strokes placed dramatic limits on the civil litigation rights of millions of Americans were serving or have served in our armed forces.[15] The Court rationalized these limitations on, *inter alia*, the need to maintain order and discipline, chain-of-command, military tradition, uniformity, avoidance of unjust enrichment, military preparedness, and efficiency. The force of this decision was apparent immediately: most of those injured incident to military service would be denied access to the very system of justice they pledged to defend.[16] The limitations in *Feres* did not affect the complex and comprehensive intra-military benefits compensation system[17] and the expansive military health care program.[18] Likewise, *Feres* had no effect on intra-military sanctions for wrongdoing or failure to comply with lawful orders, rules, regulation, practices, and standards governed by the Uniform Code of Military Justice[19] (UCMJ). Affected instead was the legal capacity of the vast majority of service members

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14 340 U.S. 135 (1950).

15 Joseph J. Dawson, *In Support of the Feres Doctrine and a Better Definition of "Incident to Service,"* 56 ST. JOHN'S L. REV. 485, 498 (1982).

16 *See* Earl Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members,* 46 CAL. W. L. REV. 396 (2010); Christopher G. Froelich, *Closing the Equitable Loophole: Assessing the Supreme Court's Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs,* 35 SETON HALL L. REV. 699 (2005).

17 U.S. DEP'T OF DEF. WARRIOR CARE, WOUNDED, III, AND/OR INJURED COMPENSATION AND BENEFITS HANDBOOK (Apr. 2018), http://warriorcare.dodlive.mil/files/2018/05/DoD_Compensation-Benefits-Handbook_Apr-2018.pdf (setting out the array of benefits available through an intra-service compensation claims system described by the Department of Defense as "[p]roactively supporting wounded, ill, and/or injured Service members in their recovery and reintegration or transition to civilian life").

18 *Military Health Sys., About the Military Health System, Health.Mil, https://www.health.mil/About-MHS* (last acessed Jan. 17, 2019).

19 10 U.S.C. §§ 801–946 (2018).

harmed by wrongdoing to seek civil damages in Article III courts for their injuries. Also affected (or more accurately, lost) was the potent deterrent effect of civil tort sanctions and the corresponding accountability those sanctions generate. One premise of this paper is that the frequency of some of the wrongs (e.g., sexual assault, rape, and clear or gross malpractice) has increased to epidemic levels[20] *because* of the absence of the accountability, of deterrence, that would otherwise flow from civil tort actions.[21]

This limitation on the rights of those who protect and defend our country and way of life, our soldiers and sailors, Marines and Air Force members, Coast Guard members, reservists, and even their families – has persisted for 68 years. Misconduct that changes forever the lives of so many of our fellow citizen soldiers was and is undeterred by civil tort sanction. A vast array of actions ordinarily addressed and resolved in Article III courts for citizens in the private sector go unpunished and undeterred when the victim (or in some instances only the perpetrator) is a service member and the misconduct is, broadly defined, "incident to service."[22]

It is understandable that those who run the risk of sanction would oppose changing a system that immunizes their misconduct. The desire to be free from sanction is not irrational – but it is unacceptable. That said, there is no easy path to change. A robust and responsive military is essential to our peaceful survival. A change that undermines discipline, chain-of-command, existing compensation systems,[23] sanctions under the UCMJ, and efficient operation

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20 Idrees Ali, *U.S. Military Sexual Assaults Down as Reports Reach Record High*, REUTERS (May 1, 2017), https://www.reuters.com/article/us-usa-military-sexualassault/u-s-military-sexual-assaults-down-as-reports-reach-record-high-idUSKBN17X2CF (last visited Jan. 17, 2019); *Mission: Ending the Epidemic of Military Rape*, PROTECT OUR DEFENDERS, https://www.protectourdefenders.com/about/ (last visited Jan. 17, 2019).

21 Andrew F. Popper, *In Defense of Deterrence*, 75 ALBANY L. REV. 181 (2012).

22 Feres v. United States, 340 U.S. 135, 146 (1950).

23 Nearly a thousand pages long, the "Military Compensation Background Papers" present an impressive array of benefits designed for service members ranging from combat related harms to toxic exposure to life insurance. U.S. DEP'T OF DEF., MILITARY COMPENSATION BACKGROUND PAPER: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS THEIR PURPOSES AND LEGISLATIVE BACKGROUNDS (8th ed. July 2018), https://www.loc.gov/rr/frd/pdf-files/Military_Comp-2018.pdf/. This compilation of "background papers" covers Persian Gulf War injuries, all current benefits for traumatic injury treatment and recovery, rehabilitation options after injury, compensation for incapacitation, death benefits generally, special compensation for parachute injuries, and more. *See id.*

of our defense establishment is dangerous and irrational. Yet in our democracy, power, efficiency, and the fear of change cannot be the basis for the deprivation of justice and access to the courts.

On enlistment, service members agree to be bound by a separate set of rules and accept a system bounded by discipline and unquestioning compliance with lawful orders.[24] Members of the armed forces take an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic . . . ."[25] Every service member understands the solemnity of that promise. The oath includes an implicit recognition that defense of our country may entail engagement in combat, in armed conflict, where the gravest of injuries are a possibility for all and an inevitability for some. That oath, that understanding, does not include the concession that service members would be without recourse should they be injured by egregious and impermissible misconduct that advance no policy or goal of our armed forces.

Over time, as courts struggled with the term "incident to service" and more and more claims were barred, rather than protecting discipline and chain-of-command, *Feres* has ended up shielding a vast array of deeply troubling tortious misconduct.[26] More than a half century ago, the late Chief Justice Warren stated that "citizens in uniform" should not be stripped of their basic rights simply because they are members of the armed forces,[27] and yet, to date, *Feres* is the law of the land.

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24 10 U.S.C. §§ 801–946.

25 Oath of Enlistment, 10 U.S.C. § 502.

26 Samantha Kubek, *Over 70,000 Military Sexual Assaults Took Place Last Year -- Congress Must Take Action*, FOX NEWS (Nov. 16, 2017), https://www.foxnews.com/opinion/over-70000-military-sexual-assaults-took-place-last-year-congress-must-take-action (last visited Jan. 17, 2019); Earl Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 396 (2010); Froelich, *supra* note 16, at 699; Tara Wilke, *Three Wrongs Do Not Make a Right: Federal Sovereign Immunity, the Feres Doctrine, and the Denial of Claims Brought by Military Mothers and their Children for Injuries Sustained Pre-Birth*, 263 WIS. L. REV. 263, 276 (2016); David E. Seidelson, *The Feres Exception to the Federal Tort Claims Act: New Insight Into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983); Captain Robert L. Rhodes, The Feres Doctrine after Twenty-Five Years, 18 A.F. L. REV. 24 (1976); Earl Warren, *The Bill of Rights and the Military*, 27 N.Y.U. L. REV. 181, 188 (1962).

27 Warren, *supra* note 26, at 188.

In 2013, the Ninth Circuit lamented that "unless and until Congress or the Supreme Court . . . 'confine[s] the unfairness and irrationality . . . *Feres* has bred,' we are bound by controlling precedent."[28] Recently, the Ninth Circuit again explored an "incident to service" tort claim in a case involving clear malpractice and found: "regretfully . . . reach[ed] the conclusion that [these] claims are barred by the *Feres* doctrine...."[29] As noted by the Tenth Circuit, regret is a common judicial theme regarding the continued force of *Feres* as a bar to legitimate clams: "Suffice it to say that when a court is forced to apply the *Feres* doctrine, it frequently does so with a degree of regret."[30]

In recent years, those who serve in our armed forces have been thanked for their service by presidents[31] and lauded at the start of nationally broadcast sporting events.[32] Service members are routinely called heroes[33] – and they are. It is the highest public calling. Yet these gestures seem at best incomplete when accompanied by a deprivation of one of the basic rights due to all citizens.

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28 Ritchie v. United States, 733 F.3d 871, 878–79 (9th Cir. 2013) (citing United States v. Johnson, 481 U.S. 681, 703).

29 Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018).

30 Ortiz v. U.S. ex rel. Evans Army Cmty. Hosp., 786 F.3d 817, 822 (10th Cir. 2015).

31, President Thanks Military Personnel and Families For Serving Our Country, PRESS RELEASE, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Dec. 7, 2004), https://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041207-2.html (last visited Jan. 17, 2019); Marisa Schultz, *Trump Delivers Thanksgiving Message* [sic] *America's Military*, N.Y. POST (Nov. 22, 2018), https://nypost.com/2018/11/22/trump-delivers-thanksgiving-message-americas-military/ (last visited Jan. 17, 2019); Tanya Somanader, *President Obama Thanks America's Troops and Marks a Milestone in the Afghanistan War*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Dec. 15, 2014), https://obamawhitehouse.archives.gov/blog/2014/12/15/president-obama-thanks-americas-troops-and-marks-milestone-afghanistan-war) (last visited Jan. 17, 2019).

32 NFL Honors Veterans and Military Members with "Salute to Service," NATIONAL FOOTBALL LEAGUE COMMUNICATION (2016), https://nflcommunications.com/Pages/NFL-Honors-Veterans-and-Military-Members-with-Salute-To-Service.aspx (last visited Jan. 17, 2019); Associated Press, *NFL Honoring Military Service with November Campaign*, MILITARY TIMES (NOV. 4, 2018), https://www.militarytimes.com/off-duty/military-sports/2018/11/04/nfl-honoring-military-service-with-november-campaign/ (last visited Jan. 17, 2019).

33 The "hire heroes" online employment site in a good example of this HIRE HEROES USA, https://www.hireheroesusa.org/ (last visited Jan. 17, 2019).

The position taken in this article is that the FTCA did not preordain *Feres*. The *Feres* Court was not completing a task Congress started. It was legislating. Professor Jonathan Turley, who studied the *Feres* doctrine in depth, concluded as follows: "The *Feres* doctrine stands as one of the most extreme examples of judicial activism in the history of the Supreme Court. . . . The Court's sweeping assumptions about the necessity of immunity have produced significant costs for service members and society at large."[34]

The costs to which Professor Turley refers are not subtle: Egregious misconduct has been neither sanctioned nor deterred, victims of unquestionably wrongful acts have not been made whole, and serious harms have not been redressed. Those most entitled to it, those willing to fight and die for it, have not experienced the great promise of our legal system: fair and open hearings, an adversary system founded on a level playing field – in short, the blessings of simple justice.[35]

The wrongs inflicted and discussed in this article – sexual assault, rape, clear or gross malpractice, physical torment that meets the definition of torture – require action. *Feres* must be undone. However, there is a flip-side that makes this far more complex than a simple recommendation to overturn *Feres*. The immunity *Feres* provides has allowed for the efficient and disciplined operation of our armed forces.[36] Regard for the chain-of-command has meant that lawful orders are followed, even those orders that, of necessity, can and do result in a risk of great harm. Advanced training, pushing service members to their physical and psychological limits, has gone forward without interference from civil courts. Moreover, military justice, through the implementation of statutes, rules, and regulations of all manner, and through the remarkable system of intra-military process governed by the UCMJ, has evolved. Outstanding

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34 Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance,* 71 Geo. WASH. L. REV. 1, 89 (2003).

35 The term "simple justice" is less a reference to Richard Klugar's magnificent text on *Brown v. Board of Education*, than to the basic right of every person subject to the laws of the United States government. *See, e.g.*, Richard Klugar, SIMPLE JUSTICE (1976).

36 Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity,* 55 VILL. L. REV. 899, 907 (2010) (whether elected or not, civil court judges in civil courts should not be reviewing policy choices affecting military the chain-of-command or other discretionary decisions).

law students and lawyers committed both to being the best in the profession and to serving their country have sought positions in the various Judge Advocate Generals Corps in the different branches of the armed forces.[37]

The challenge of this article is that the same immunity that shields wrongdoers, leaving unaccountable individuals and institutions within the government, has also played a role in the evolution of our unquestionably extraordinary and exceptional armed forces. These are potent competing forces. Against this backdrop, it is time to rethink *Feres*.

This article discusses *Feres v. United States*,[38] the FTCA, the expansion of the "incident to service" prohibition, the case law and literature in the field, and makes the following recommendation: *Feres* should be overturned and the FTCA amended to allow access to justice in Article III courts for those injured by actions that are neither incident nor essential to military service. These actions include sexual assault, rape, vicious and unjustified physical violence, gross or reckless medical malpractice, repetitive incidents of driving under the influence of narcotics or alcohol, nonconsenting and unknowing exposure to deathly substances, and invidious discrimination.

II. *Feres v. United States*

In the four years after the adoption of the FTCA and before the *Feres* decision, the Supreme Court decided several cases involving civil tort liability for service members. In *Jefferson v. United States*,[39] decided two years before *Feres*, the plaintiff, an active-duty service

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37 Julie L. Massing, *The Making of a JAG Attorney: Where the Law and the Military Meet*, FED. L. 24 (Mar. 2017), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/March/Features/The-Making-of-a-JAG-Attorney-Where-the-Law-and-the-Military-Meet.aspx?FT=.pdf; Alison Monahan, *JAG Corps: Military Lawyer*, BALANCE CAREERS (Jan. 13, 2018), https://www.thebalancecareers.com/want-to-be-a-military-lawyer-learn-about-jag-4039991(last visited Jan. 17, 2019); Ilana Kowarski, *5 Traits for Would-Be Military Lawyers*, U.S. NEWS & WORLD REPORT (Nov. 11, 2016), https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2016-11-11/5-traits-law-students-can-develop-to-be-a-military-attorney (last visited Jan. 17, 2019).

38 340 U.S. 135 (1950).

39 Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948).

member, underwent abdominal surgery. Eight months after discharge and during a subsequent surgery, a towel marked "Medical Department U.S. Army" was found in his stomach.[40] Plaintiff filed an FTCA malpractice claim but the case was dismissed based on a finding that the FTCA did not cover harms suffered in the course of military service.[41] While the *Jefferson* appeal was pending, the Supreme Court decided *Brooks v. United States*,[42] a case involving a deadly accident between a government vehicle driven by an off-duty service member and a car carrying a father (a service member) and his two sons. The father was on leave at the time.[43] One service member died in the accident and others were severely injured. The surviving service member sued under the FTCA, prevailed at trial, lost on appeal, but ultimately prevailed in the Supreme Court.[44]

While the government argued that grave disruption of order and discipline would result if service members had access to Article III courts, the Court found the accident had nothing to do with military service and if the claim were barred, it would prevent innocent victims from being compensated.[45] This finding was predicated on the Court's view that the language of the FTCA did not exclude *all* claims by service members, particularly those not incident to service.[46] The Court also found that resolution of the fate of claims "incident to service" would have to wait for a "wholly different case."[47] That different case was presented the following year in *Feres v. United States.*

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40 *Id.* at 709.

41 *Id.* at 712.

42 Brooks v. United States, 337 U.S. 49, 50 (1949).

43 *Id.*

44 *Id.* at 50–51.

45 *Id.* at 51.

46 *Id.* at 49.

47 *Id.* at 52.

A. Feres v. United States

Feres v. United States consolidated three conflicting federal circuit court cases[48] and held that the FTCA barred the vast majority of service members from pursuing civil actions in tort in any Article III court for injuries incident to military service.[49]

Feres involved an active duty service member who died in a barracks fire.[50] An FTCA wrongful death action alleged that the fire was the result of the government's negligence in failing to maintain reasonably safe housing for troops. The question on which the Court focused, however, was not fire safety but rather whether the suit could go forward at all. Did the FTCA allow civil actions against the federal government in cases where an injury was in some way – in almost any way – incident to service? Despite the lack of clarity in the text[51] or in the legislative history,[52] the Court determined that in the cases before it, the FTCA waiver of immunity was not applicable to the alleged injuries (and thus the claims were barred) since each was somehow incident to service.[53] The opinion did not terminate the right to pursue a civil judgement in all such cases and left room for review of FTCA claims on a case-by-case basis.[54] However, the

48 Feres v. United States, 177 F.2d 535 (2d Cir. 1949); Griggs v. United States, 178 F.2d 1, 3 (10th Cir. 1949); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949).

49 *Id.* at 159 ("[T]he 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 the service.").

50 *Id.* at 137.

51 *Id.* at 156 ("These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears.").

52 *Id.* at 155 (describing the lack of "guiding materials" and highlighting that if the Court misinterprets the Act, "at least Congress possesses a ready remedy").

53 John Astley, *United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185 (1988) ("An analysis of the FTCA legislative history does not clearly indicate whether Congress intended to exclude military personnel from FTCA protection . . . it is reasonable to conclude that Congress intended service members to be covered.").

54 David E. Seidelson, *The* Feres *Exception to the Federal Tort Claims Act: New Insight Into an Old Problem*, 11 HOFSTRA L. REV. 629, 631 (1983).

stage was set for what was to follow. From *Feres* forward, the fate of service members injured incident to service was, in the vast majority of cases, sealed.[55]

While the *Feres* court made clear that the purpose of the FTCA was to hold the United States accountable in Article III courts for certain types of tortious misconduct,[56] it found there was no basis in the FTCA to extend that right to members of the armed forces injured incident to their service.[57] The Court emphasized that the relationship between those in the armed forces and the federal government is "distinctively federal in nature"[58] and that such harms were covered or compensable through other venues.[59] The Court reasoned that if Congress had intended to provide access to Article III courts[60] for intra-military civil tort claims, it would have done so explicitly.[61] Prior to *Feres,* in the event the internal systems within the military failed, service members could seek direct assistance from a member of Congress who could advocate

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55 Nicole Melvani, Comment, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members,* 46 CAL. W. L. REV. 395, 428–29 (2010); Kenneth R. Wiltberger, Note, *The Carmelo Rodriguez Military Medical Accountability Act of 2009: An Opportunity to Overturn the Feres Doctrine As It Applies to Military Medical Malpractice,* 8 AVE MARIA L. REV. 473, 497–98 (2010); Turley, *supra* note 34, at 10.

56 340 U.S. at 141.

57 *Id.* ("[P]laintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States.").

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

59 *Id.* at 144 ("This Court . . . cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services.").

60 Members of Congress have, on occasion, tried to undo *Feres* but have been unable to garner the votes needed. *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing before the Subcomm. on Commercial and Administrative Law*, 111th Cong. 7 (2009); *The Feres Doctrine; An Examination of This Military Exception to the Federal Torts Claim Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002), https://www.govinfo.gov/content/pkg/CHRG-107shrg88833/pdf/CHRG-107shrg88833.pdf; Melissa Feldmeier, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009,* 60 CATH. U. L. REV. 145, 153 (2010) (discussing legislation that could modify the harsh impact of *Feres*); Wiltberger, *supra* note 55 at *497–98*; Jennifer L. Carpenter, Comment, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine,* 26 U. HAW. L. REV. 35, 59–60 (2003).

61 340 U.S. at 144.

for a "private bill" that, if passed, redressed their grievances.[62] The lack of overwhelming numbers of such private bills (and the cumbersome and seemingly arbitrary nature of such relief) between 1946 and 1950 suggested to the Court that the intra-military compensation system was not just workable but should be the only mechanism for redress of grievances, not Article III courts and not private bills.[63]

Dicta in *Feres* reasoned that were intra-military civil tort claims common, it would be problematic at many levels.[64] However, the opinion is driven by a more basic set of issues – tort liability, the Court suggested, could undermine essential discipline and respect for and compliance with the chain-of-command, and would be a "radical departure" from established practices.[65]

B. Evolution of the *Feres* Doctrine

The prohibition against civil tort actions applicable to active duty (and even-post-discharge) service members in *Feres*[66] initially co-existed with the marginally permissive interpretations of the FTCA.[67] In *United States v. Brown,*[68] decided four years after *Feres*, a discharged veteran underwent knee surgery at the Veterans Administration Hospital[69] and

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62 James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic,* 85 N.Y.U. L. REV. 1862, 1863, 1877–82 (2010).

63 340 U.S. at 139.

64 *Id.* at 143 (concerns even included choice of law/conflict of laws problems: "That the geography of an injury should select the law to be applied to his tort claim makes no sense.").

65 *Id.* at 146.

66 *Id.* at 144 (noting that Congress was aware that it was barring common law tort claims incident to service: "[T]here was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service."); Lewis v. United States, 663 F.2d 889, 891 (9th Cir. 1981) (that Congress has not taken action to address the Court's "incident to service" interpretation of the FTCA supports the view that Congress is disinclined to change the incident to service bar to civil tort claims); Rhodes, *supra* note 26, at 24.

67 Brooks v. United States, 337 U.S. 49, 50 (1949).

68 348 U.S. 110 (1954).

69 *Id.* at 110.

sustained permanent harm to his leg. While the original injury was "incident to service,"[70] the negligence (medical malpractice) occurred after he had been discharged and would, the Court found, be "cognizable under local law, if the defendant were a private party."[71] The Court held that the claim should be allowed, suggesting that if an Article III court would be available to a civilian, it should also be available to post-discharged service members.

At that juncture, access to Article III courts became unpredictable, dependent on a series of factors including when and where the negligent act occurred, the duty status of the plaintiff, whether the service member was performing a military activity as opposed to taking advantage of a privilege or enjoying a benefit conferred as a result of military service, and whether the service member was subject to military discipline or control at the time of the injury.[72] While all important factors, no one was dispositive, and each could be viewed in light of the totality of the circumstances of a given case.[73]

Thirty-six years after *Feres,* these factors were reduced to a list in *Dreier v. United States*:[74] "(1) the place where the negligent act occurred; (2) the duty status of the plaintiff when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a service member; and (4) the nature of the plaintiff's activities at the time the negligent act occurred."[75] *Dreier* suggested that parties should be given the chance to make an assessment of "whether the suit requires the civilian court to second-guess military decisions, . . . and whether

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[70] *Id.* at 112.

[71] *Id.* at 111, 113.

[72] Paul Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor,* 44 TORT TRIAL INSUR. PRACT. LAW J. 1105, 1116–17 (2009).

[73] Stanley v. CIA, 639 F.2d 1146, 1151 (5th Cir. 1981).

[74] Dreier v. United States, 106 F.3d 844 (9th Cir. 1996)(a widow was not barred from recovering against the United States after her husband was fatally injured when he fell into a negligently-maintained wastewater drainage following an afternoon of drinking while off duty).

[75] Dreier v. United States, 106 F.3d 844 (9th Cir. 1996) (citing Bon v. United States, 802 F.2d 1092, 1094 (9th Cir.1986) (citing Johnson v. United States, 704 F.2d 1431, 1436–41 (9th Cir. 1983)); Jennifer Zyznar, *Feres Doctrine: "Don't Let This Be It. Fight!,"* 46 J. MARSHALL L. REV. 607, 623–24 (2013) (assessing the factors that may or may not lead to access to Article III courts).

the suit might impair essential military discipline," as well as, "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[76] No matter what factors a court applies, 77 the decision regarding whether an injury is incident to military service[78] resulted in "considerable confusion among the circuits."[79]

C. Expansive Application of "Incident to Service"

Following *Feres* and *Brown,* courts continued to broaden the definition of "incident to service,"[80] applying the prohibition to medical malpractice, exposure to toxic substances, murders or suicides, sexual assaults, and more – hardly activity that could or should be

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[76] *Dreier*, 106 F.3d at 853 (internal quotations omitted).

77 Professor Paul Figley suggests the following test: "whether the injury arose while a service member was on active duty; whether the injury arose on a military situs; whether the injury arose during a military activity; whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service when the injury arose; and whether the injury arose while the service member was subject to military discipline or control." Paul Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL INSUR. PRACT. LAW J. 1105, 1116 (2009).

[78] Kelly L. Dill, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 78 (2001).

[79] Taber v. Maine, 67 F.3d 1029, 1032, 1038 (2d Cir. 1995) ("[I]t is difficult to know precisely what the [*Feres*] doctrine means today. . . [it is] an extremely confused and confusing area of law"); Jennifer Zyznar, *Feres Doctrine: "Don't Let This Be It. Fight*!, 46 J. MARSHALL L. REV. 607, 614 (2013) (quoting Anne R. Riley, *United States v. Johnson: Expansion of the Feres Doctrine to Include Service Members' FTCA Suits Against Civilian Government Employees,* 42 VAND. L. REV. 233, 244 (1989).

[80] *See* United States v. Johnson, 481 U.S. 681 (1987) (barring a wrongful death action even though the harm was caused by the Federal Aviation Administration, a civilian agency, in large part because the decedent was a service member); *See also* Potts v. United States, 723 F.2d 20 (6th Cir. 1983) (per curiam) (denying recovery to a Navy corpsman for injuries sustained after being struck by a cable while on leave). *See, e.g.*, Major v. United States, 835 F.2d 641, 644–45 (6th Cir. 1987) (per curiam) (barring an action for recover from injuries sustained in an on-base motor vehicle accident,, which occurred due to an intoxicated, noncommissioned officer). The court stated that in years prior, "the Court ha[d] embarked on a course dedicated to broadening the *Feres* doctrine to encompass, 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." *Id.*

considered incident to or an essential part of military service.[81] A brief look at those harms follows.

(i) Post-*Feres* Medical Malpractice Cases

In *Henninger v. United States*, decided in 1973, the Ninth Circuit barred a medical malpractice claim involving negligent acts that resulted in the atrophy of the Navy serviceman's left testicle.[82] The malpractice began during a physical exam, one of the final steps that was to lead to plaintiff's discharge. When a "double hernia"[83] was found (generally referred to as a bilateral inguinal hernia), the plaintiff asked to have the condition treated in a non-military hospital after he became a civilian. The military doctor refused to sign the release authorizing civilian care and performed the operation, resulting in irreparable harm. The court found that these circumstances fit the definition of "incident to military service," barred recovery, and rationalized the decision based on the mandate in *Feres* and the availability of veteran's compensation benefits.[84] Just how this decision enhances military discipline or forwards any

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81 The courts have also extended the doctrine to apply to cadets at military academies. *See* Collins v. United States, 642 F.2d 217, 218 (7th Cir. 1981) (barring a cadet from bringing a medical malpractice claim for vision loss experienced while at the academy). See e.g. Chappell v. Wallace, 462 U.S. 296, 297-98, 305 (1983) (barring a claim based on racial discrimination); Doe v. Hageneck, 870 F.3d 36, 37 (2d Cir. 2017) (barring a sexual assault claim); Futrell v. United States 859 F.3d 403, 404-05 (7th Cir. 2017) (barring a claim for the military's failure to pay a retired member's salary and insurance for a year); Filer v. Donley, 690 F.3d 643, 645-49 (5th Cir. 2012) (barring a claim based on a hostile work environment in which a superior hung a noose around a grenade in his office with the number one on it and additionally, would tell the air reserve technicians to take a number to wait for the "complaint department"); Wetherill v. Geren, 616 F.3d 789, 790 (8th Cir. 2010) (barring a claim by a dual-status National Guard member). *But see* Jackson v. Tate, 648 F.3d 729, 730 (9th Cir. 2011) (allowing a discharged serviceman to bring a claim against a recruiter who forged the serviceman's signature on re-enlistment papers); Kelly Dill, *The Feres Bar: The Right Ruling for the Wrong Reason,* 24 CAMPBELL L. REV. 71, 78 (2001). Courts have even incorporated non-combat torts, reckless or knowing acts, and cases of alleged cover-up into what constitutes circumstances that are "incident to service." John W. Hamilton, *Contamination at U.S. Military Bases: Profiles and Responses,* 35 STAN. ENVTL. L.J. 223, 242-43 (2016).

82 *See* Henninger v. United States, 472 F.2d 814, 815 (9th Cir. 1973).

83 *Id.* at 815.

84 *Id.* at 815-16.

rational interest other than avoidance of accountability and limiting public exposure of wrongdoing is a mystery that would need to be resolved outside this particular judicial opinion.

That said, varying interpretations of the DFE in medical malpractice claims have allowed some cases to go forward in highly limited circumstances.[85] When courts assess such claims based on *Feres*, the "incident to military service"[86] bar was and is almost insurmountable. However, courts that moved beyond *Feres* have found that the DFE was created to "shield the government from liability for the exercise of governmental discretion, not to shield the government from claims of garden-variety medical malpractice."[87] That is not to say that victims of military medical malpractice have ready or predictable access to Article III courts under the FTCA; [88] it is the case that many health care cases involve discretionary judgements (and thus are off limits due to the DFE) – but this does not bar all medical malpractice cases.[89]

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85 Carpenter, *supra* note 60 at 50–52.

86 *Id.* (citing Romero v. United States, 954 F.2d 223 (4th Cir. 1992)) (declining to apply *Feres* to a claim for a child with cerebral palsy even though the negligent prenatal care that caused the injury was given to an active duty servicewoman); West v. United States, 729 F.2d 1120 (7th Cir. 1984) (declining to bar liability for the wrongful death of one twin and the birth defects of another). *But see* Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (deciding a servicewoman's injuries received during negligent prenatal care were incident to service); Scales v. United States, 685 F.2d 970 (5th Cir. 1982) (applying *Feres* to a suit brought by the parents of a boy who was born with mental and physical delays resulting from a rubella vaccination during his servicewoman-mother's pregnancy).

87 Sigman v. United States, 208 F.3d 760, 770 (9th Cir. 2000).

88 Patricia Kime, *Tragedy and Injustice: The Heartbreaking Truth About Military Medical Malpractice,* MILITARY TIMES (July 10, 2016), https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2016/07/10/tragedy-and-injustice-the-heartbreaking-truth-about-military-medical-malpractice/ (statement of Former Assistant Secretary of Defense for Health Affairs. Dr. Jonathan Woodson).

89 Feldmeier, *supra* note 60 at 176–77 (citing Collazo v. United States, 850 F.2d 1, 3 (1st Cir. 1988)) ("[W]here only professional, nongovernmental discretion is at issue, the 'discretionary function' exception does not apply."). *See also* Fang v. United States, 140 F.3d 1238, 1241–42 (9th Cir. 1998) (holding that the United States is not immune from claims related to the "actual administration of medical care by its employees," but is immune from claims related to discretionary policy decisions involving the allocation of medical personnel and resources); Martinez v. Maruszczak, 168 P.3d 720, 729 (Nev. 2007) (applying Nevada's FTCA-like waiver

In *Jackson v. United States,*[90] decided in 1997, a reservist at a weekend drill lacerated his hand. The military doctor treating Jackson did not inform him of the need to have surgery promptly[91] resulting in permanent damage to his hand. Again, when examining the application of *Feres*, the Ninth Circuit found that "the development of the doctrine . . . has broadened to such an extent that practically *any suit that implicates the military judgments* and decisions runs the risk of colliding with Feres."[92] The view of the expansiveness of the incident to service exception has not changed over the last two decades. In *Daniel v. United States*,93 decided in 2018, a Navy nurse died after delivery of her child due to postpartum hemorrhaging.94 The Ninth Circuit dismissed the claims of medical malpractice and wrongful death based on *Feres*.95

The concern expressed in *Jackson*, that any suit "that implicates" the military is barred, is even more troubling when it is extended to claims of civilian children of service members. In *Mondelli v. United States*,96 the child of a service member was born with retinal blastoma, a genetically transferred form of cancer.97 The cause of the child's condition was linked to a genetic anomaly that was a consequence of her father's exposure to radiation during nuclear device testing. The Third Circuit lamented that barring the claim would be an injustice—

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of sovereign immunity and finding that "while a physician's diagnostic and treatment decisions involve judgment and choice, thus satisfying the [*Gaubert*] test's first criterion, those decisions generally do not include policy considerations, as required by the test's second criterion").

90 110 F.3d 1484 (9th Cir. 1997).

91 *Id.* at 1486.

92 *Id.* at 1486–87 (emphasis added).

93 889 F.3d 978 (9th Cir. 2018).

94 *Id.* at 980.

95 *Id.* at 980, 982 (citing Atkinson v. United States, 825 F.2d 202, 203, 205-06 (9th Cir. 1987)) (relying on application of the *Feres* doctrine to bar the claimof a pregnant United States Army Specialist who had been sent home from the hospital multiple times before being diagnosed with preeclampsia and delivering a stillborn child).

96 711 F. 2d 567 (3rd Cir. 1983).

97 *Id.*

punishing a child for the harm the parents had sustained—but barred the claim nonetheless because her harm arose from the initial injury to her father that was incident to his service.[98]

The courts have, however, allowed recovery on behalf of a child injured in utero in some cases. In *United States v. Brown*, a doctor's negligent action in the course of routine treatment of a pregnancy allegedly resulted in the child being born with spina bifida.[99] The Sixth Circuit held that the *Feres* doctrine did not apply in such a situation because the FTCA, "does not preclude recovery for negligent prenatal injuries to the child of a military service person that are independent of any injury to the child's parent."[100]

However, in *Ritchie v. United States*,[101] a claim similar to *Brown*, a mother was ordered to continue military training while pregnant contrary to the admonitions of the mother's physician.[102] Stresses in training led to a premature birth and subsequent death of her infant.[103] In a wrongful death action for the loss of the child, the Ninth Circuit held that the "in utero" exception did not apply in this instance because the mother had suffered the injury to her child incident to service.[104]

(ii). Murder and Suicide

Civil tort actions following a murder or suicide have also been barred under the expansive interpretation of "incident to service" in *Feres*.[105] In *United States v. Shearer,* a service member was kidnapped and killed another while away from his base.[106] Previously, the

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98 Mondelli, 711 F.2d 567 (3d Cir. 1983). *But see*, Romero v. United States, 954 F.2d 223, 224-26 (4th Cir. 1992) (allowing recovery for a child born with cerebral palsy because of the mother's untreated incompetent cervix, reasoning that the treatment would have guaranteed the health of the child—a civilian—and therefore cannot be governed by *Feres*).

99 *See* Brown v. United States, 462 F.3d 609 (6th Cir. 2006).

100 *Id.* at 615.

101 733 F.3d 871 (9th Cir. 2013).

102 *Id.* at 873, 878 (allowing a child in utero to recover, but not the mother).

103 *Id.* at 873.

104 *Id.* at 878.

105 *Feres*, *supra* note 22 at 135.

106 United States v. Shearer, 473 U.S. 52 (1984).

assailant had been convicted of an unrelated manslaughter in Germany, 107 a fact know to the assailant's superiors who, nonetheless, allowed him to stay on the base.108 The deceased's parents alleged the Army had been negligent by failing to remove or identify the assailant, leading to the death of their son. Based on *Feres*, the Supreme Court barred the claim even though the murder occurred off the base on the premise that allowing the case to go forward would affect military discipline.109

Feres was made applicable to suicide in *Purcell v. United States,*110 a case involving the death of a twenty-one-year-old sailor. Although a phone call beforehand expressed concern that the sailor had a gun and planned on killing himself, Prucell's superiors took no action and the sailor subsequently took his life.111 The Seventh Circuit explained that even though the family had not received any benefits related to the suicide and thus would not recover twice112 (dual recovery is a common concern expressed in *Feres* cases), the court barred recovery, seemingly across the board, in cases involving homicide or suicide.113

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107 *Id.*

108 *Id.* at 53.

109 *Id.* at 58.

110 656 F.3d 463, 464 (7th Cir. 2011).

111 *Id.* at 465.

112 *See id.* at 467. *See also*, *Ritchie*, 733 F.3d 871, 875 (9th Cir. 2013) (citing Persons v. United States, 925 F.2d 292, 295-97 (9th Cir. 1991)) (holding that the family of a man who committed suicide as an off-duty member of the military, after the naval hospital released him, could not recover under the FTCA due to the *Feres* bar).

113 *See also,* Costo v. United States, 248 F.3d 863, 864–65, 867–68 (9th Cir. 2001) (holding that the family of a sailor who drowned during a Navy-led recreational rafting trip cannot recover under the FTCA because the totality of the circumstances test determined that certain unrelated military activities fall under *Feres*).

(iii). Sexual Assault and Other Egregious Misconduct

Sexual assault, currently at epidemic levels,[114] and violent hazing[115] have been deemed incident to service much like murder and suicide.[116] Accordingly, any deterrent effect the tort system would produce to lessen similar misconduct is lost. In *Klay v. Panetta*, the plaintiff had argued that "being victimized by a sexual assault cannot possibly be considered to be an 'activity' incident to military service...."[117] The court rejected plaintiff's claim,[118] explaining that the question was not whether being raped is an activity incident to military service, but rather, the connection to service came from the fact that the *assailant* was a service member.[119]

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114 *Mission: Ending the Epidemic of Military Rape,* Protect Our Defenders, https://www.protectourdefenders.com/about/; *Sexual Assault Reports in U.S. Military Reach Record High: Pentagon*, NBC NEWS (May 1, 2017), https://www.nbcnews.com/news/us-news/sexual-assault-reports-u-s-military-reach-record-high-pentagon-n753566; Samantha Kubek, *Over 70,000 military sexual assaults took place last year -- Congress must take action*, FOX NEWS (Nov. 16, 2017), https://www.foxnews.com/opinion/over-70000-military-sexual-assaults-took-place-last-year-congress-must-take-action.

115 Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991) (involving a brutal beating after having been included hung upside down by the ankles until the individual's bones separated).

116 *See, e.g.*, Klay v. Panetta, 758 F.3d 369 (D.C. Cir. 2014) (applying the *Feres* doctrine to bar plaintiff's relief sought for a sexual assault that occurred while serving in the military); Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991) (holding that a former service member was barred from bringing a FTCA claim against the government for an incident of hazing that led to post-traumatic stress disorder).

117 *Klay*, 758 F.3d at 375 (noting the claim flowed from the defendant's alleged mismanagement of the military).

118 *Id.* at 377 (acknowledging this was a civil rights/*Bivens* claim, and such claims are simply unavailable to members of the armed forces). *See* United States v. Stanley, 483 U.S. 669 (1987) ("*Bivens* suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement."); Erwin Chemerinski, FEDERAL JURISDICTION 621–22 (5th ed. 2007)). *See, e.g.* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

119 *Klay*, 758 F. 3d at 375-76 (reasoning that because the assailant was a service member subject to discipline in the military, a civil case focused on the same behavior would interfere with military judgements).

The absurdity of the reasoning in *Klay* needs no elaboration; sexual assault is not incident to military service.[120] It is a crime, prosecuted, albeit internally, in our armed forces.[121] Prosecution, however, does not equate with justice for a victim. Victims deserve their day in court.[122] With public focus on this issue by virtue of the "#me too"[123] and "time's up now"[124] movements, this is the right moment to break free of such preposterous reasoning, particularly in terms of our armed forces. Our military justifiably takes pride in teaching respect and decency, insisting on proper decorum, referring to civilians as "Sir" or "Ma'am," providing a model for those within and outside the armed forces.[125] That laudable vision of human interaction is patently incompatible with a jurisprudence that characterizes sexual assault as incident to military service.[126]

Beyond sexual assault, the FTCA has prevented individuals with traumatic brain injuries, post-traumatic stress disorder, and complications from chemical exposure from recovering in Article III tort cases even when such injuries are the result of nonconsenting experimentation, exposure to toxins,[127] or other actions that bear no meaningful relationship to acceptable military service.[128]

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120 Evan R. Seamone & David M. Traskey, Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates, 26.2 COLUM. J. GENDER & L. 343 (2014) (providing a useful guide for those who represent victims of sexual assault in the military).

121 Lisa Ferdinando, *DoD Releases Annual Report on Sexual Assault in Military*, DEP'T OF DEFENSE (May 1, 2018), https://dod.defense.gov/News/Article/Article/1508127/dod-releases-annual-report-on-sexual-assault-in-military/.

122 Naomi Himmelfarb et al., *Posttraumatic Stress Disorder in Female Veterans with Military and Civilian Sexual Trauma*, 19 J. TRAUMATIC STRESS, 837, 838 (2006) (stating that approximately 23% of females report being sexual assaulted in the military).

123 #ME TOO: YOU ARE NOT ALONE, https://metoomvmt.org/.

124 TIME'S UP, https://www.timesupnow.com/.

125 *Getting the Lowdown on Customs and Courtesies*, MILITARY.COM, https://www.military.com/join-armed-forces/getting-the-lowdown-on-customs-and-courtesies.html (last visited Jan. 18, 2019).

126 *Klay*, supra 116.

127 *See Stanley*, 483 U.S. at 671, 683–84; *Veloz-Gertrudis*, 768 F. Supp. at 39; *Sweet*, 687 F.2d 246; Campbell, *supra* note 2, at 138–40, 152–53.

128 *See* Helen D. O'Conor, *Federal Tort Claims Act is Available for OIF TBI Veterans, Despite Feres,* 11 DEPAUL J. HEALTH CARE L. 273, 274 (2008). It is estimated that twenty percent (20%)

In *Baker v. United States*,[129] in the course of a training exercise, a military police officer was injured when the role that officer played was misunderstood by others who, seemingly without provocation, reacted violently resulting in a life-altering traumatic brain injury. Making a conventional negligence case based on these facts was a simple matter – and yet, the officer was unable to recover in tort in an Article III court.[130]

A case with more complicated facts, *Katta v. United States*,[131] demonstrates the force of *Feres* in post-traumatic-stress-disorder (PTSD) cases. Ted Katta served in Vietnam in 1969, was discharged a year later, and returned home to recover from numerous injuries. After discharge and during the course of his recovery, he began to show signs of PTSD. The disorder persisted and intensified, and over time, he threatened family members, was hospitalized by the VA, released, had episodes of uncontrolled screaming, horrific night terrors, and finally, stepped in front of a train, taking his life. Katta's mother sued the VA alleging that the treatment received for his PTSD was wholly inappropriate. Her claim was rejected based on *Feres*, on the premise

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of troops deployed since 2001 have been affected by traumatic brain injury. Jesse Bogan, *Afghan War Vets, St. Louis Researchers Seek Answers on Head Injuries,* ST. LOUIS POST-DISPATCH (Jan. 27, 2014), http:// www.stltoday.com/news/local/metro/afghan-war-vets-st-louisresearchersseek-answers-on-head/article_daaa0082-4d39-5d0d-899a7e942109c103.html. *See* Gros v. United States, 232 Fed. Appx. 417, 417 (5th Cir. 2007) (denying recovery to service members who were exposed to toxic chemicals in the water on a United States military base); Baker v. United States, 2006 WL 1635634, at *1, 6 (E.D. Ky. June 8, 2006) (denying recovery to a military officer who experienced a traumatic brain injury while participating in a military role playing exercise); Katta v. United States, 774 F. Supp. 1134, 1136–37, 1141 (N.D. Ill. 1991) (denying recovery to a mother who alleged that her son received inadequate treatment for post-traumatic stress disorder subsequent to service); Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991) (denying recovery to a former service member who experienced post-traumatic stress disorder as a result of a hazing incident); *In re* Agent Orange Product Liability Litigation, 597 F. Supp. 740, 746, 753–54 (E.D.N.Y. 1984) (rejecting claims against the United States involving exposure to Agent Orange in Vietnam).

129 2006 WL 1635634, at *1 (E.D. Ky. June 8, 2006).

130 *Id.* at *1, 6.

131 Katta v. United States, 774 F. Supp. 1134, 1136–37, 1141 (N.D. Ill. 1991) (appealing a claim denied by the Veterans' Administration).

that PTSD was incident to his service, even though the condition first manifested after Katta entered civilian life.[132]

Like *Katta*, the fate of Alexis Veloz-Gertrudis is deeply troubling. To say that Seaman Veloz-Gertrudis was the victim of a hazing incident really does not capture what happened.[133] While assigned to the U.S.S. Forrestal, Veloz-Gertrudis alleged that "[s]enior crewmen tied him up with rope and suspended him upside down from an air pressure valve. He was stripped to the waist and grease was smeared over his stomach. Crew members then took turns slapping him on the stomach and chest."[134] At one point, "a crew member yanked on the rope by which plaintiff was hanging, forcing his ankles over the top of the valve. Veloz-Gertrudis heard his ankle "pop" and began screaming with pain. . . ."[135] In response to the screaming, the crew members "continued to strike him, one delivering a series of particularly hard blows. . . ." When he threatened to report what had happened, he was punched in the head and neck and, at some point, a crew member jumped up and down on his back.[136] These events scarred him physically and, not surprisingly, resulted in PTSD. Yet when he sought recovery for alleged horrific harms he suffered, he was barred, because, *inter alia*, "pursuit of plaintiffs' claim would intrude on military discipline."[137]

It does not take a great leap of logic or a scintilla of disrespect for our armed forces (and none is intended) to conclude that the circumstances alleged by Veloz-Gertrudis reflect a failure of military discipline.[138] The very fact that a civil action in tort was unavailable – and thus

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132 While the outcome in Katta is the norm, there are a few cases, e.g., Wojton v. United States, 199 F. Supp. 2d 722, 727, 732–33 (S.D. Ohio 2002) which states that liability is possible for misdiagnosis of post-traumatic stress disorder coupled with the provision of improper medication.

133 Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991).

134 *Id.*

135 *Id.*

136 *Id.* at 39–40.

137 *Id.* at 41.

138 *Id.* at 39.

undeterred[139] – contributes to an environment where this type of misconduct can take place with seeming impunity.

The cases of egregious conduct just described would be actionable if the recommendations in this article are implemented. Even so, many simple negligence and even certain intentional tort cases (e.g., emotional distress comes to mind) that would be actionable outside the military would still be blocked and compensation limited to the intra-service administrative system. An example of what that might look like is *Gros v. United States,* where the plaintiff alleged significant harm as a consequence of exposure to contaminated water[140] on a military base.[141] The Fifth Circuit found that exposure to contaminated water in the plaintiff's home (on a military base) was activity "incident to service."[142] While exposure to contaminated water was the consequence of a breach of a reasonable duty of care to maintain an essential service and probably actionable in the private sector, plaintiff's harm was purely a consequence of life on a military base and thus genuinely incident to service. *Gros* would not be actionable were the recommendations in this article accepted – a simple maintenance failure is not within one of the seven proposed exceptions to the FTCA.

Gros is simply different than cases involving rape, violent beatings, clear or gross malpractice, or nonconsenting exposure to toxins.[143] The FTCA was written to allow for accountability when accountability was essential and would not disrupt the ability of our

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139 *See supra*, note 13 and accompanying text.

140 John W. Hamilton, *Contamination at U.S. Military Bases: Profiles and Responses,* 35 STAN. ENVTL. L.J. 223, 242-43 (2016) (suggesting removal of the bar on cases for for non-combat torts, reckless or knowing acts, and cases of alleged cover-up.).

141 *See* Gros v. United States, 232 Fed. Appx. 417, 419 (5th Cir. 2007) (barring claims brought against the government by service members who were exposed to toxic chemicals in the water on a United States military base); *In re* Agent Orange Product Liability Litigation, 597 F. Supp. 740, 746, 753–54 (E.D.N.Y. 1984) (applying *Feres* to bar claims against the United States involving exposure to Agent Orange in Vietnam).

142 Gros, 2007 WL 1454486, at *1 (noting that Gros was on active duty when the harm, and as such "the *Feres* doctrine bars suit when the injuries ar[i]se on base while plaintiffs were off-duty and attending to personal activities").

143 *See* Jonathan D. Moreno, UNDUE RISK: SECRET STATE EXPERIMENTS ON HUMANS 13-52 (2001).

government to exercise discretion. It is inconceivable that the discretion Congress had in mind was the capacity to subject service members to torture, sexual crimes, or toxins.

In *United States v. Stanley,*[144] the Supreme Court held that the *Feres* doctrine barred a claim against the government for long-term effects of lysergic acid diethylamide (LSD) administered to the plaintiff after he consented to participate in a study to test the effectiveness of *protective gear* against chemical warfare.[145] The Court found it immaterial that Stanley was deceived and that he was not acting under direct orders of his superiors in taking the LSD, invoking chain-of-command concerns.[146] Barring cases where nonconsenting and unknowing service members have been used as human subjects for experiments hardly seems to advance discipline or any other interest used to defend *Feres* (or central to the DFE) other than avoidance of accountability.147

(iv). Avoiding *Feres*: A Few Exceptions to the Bar

While success rates are low and options few, there are certain instances where *Feres* may not apply. For example, the *Feres* doctrine does not explicitly bar claims for injunctive (as opposed to monetary) relief, although a cursory look at the case law suggests that it is unlikely that most courts would issue such injunctions.148 A second possibility stems from a few cases

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[144] 483 U.S. 669 (1987).

[145] *Id.* at 671–72.

[146] *Id.* at 680 (stating the officer-subordinate relationship is not crucial under *Feres*, and noting that the court, instead, applied an "incident to service" test). *See also* Sweet v. United States, 528 F. Supp. 1068 (D.S.D. 1981), *aff'd*, 687 F.2d 246 (8th Cir. 1982) (barring a former serviceman from bringing a claim from injuries that arose when that the government forced him to take LSD as part of an experiment and failed to provide him with the necessary follow-up treatment and care). The court in *Sweet* noted that the injuries sustained were "inseparably entwined and directly related to the injury he allegedly sustained while in the service." *Id.* at 1070, 1075.

147 See Jonathan D. Moreno, UNDUE RISK: SECRET STATE EXPERIMENTS ON HUM

ANS 13-52 (2001).

148 *Compare* Speigner v. Alexander, 248 F.3d 1292, 1296 (11th Cir. 2001) (holdng that the doctrine of nonjusticiability extends to cases for injunctive relief, with a few unspecified exceptions), *with* Wigginton v. Centracchio, 205 F.3d 504, 512 (1st Cir. 2000) (holding intra-military suits alleging constitutional violations, but not seeking damages, are justiciable).

involving misconduct by independent contractors retained by the armed forces,[149] where a former service member was harmed by actions of the contractor including, in one instance, a claim based on a post-discharge failure to warn.[150] Service members may also be able to sue states governments, as opposed to the federal government, although such cases have little or nothing to do with accountability under the FTCA.[151]

In *Lutz v. Secretary of the Air Force*,[152] three service members broke into the office of Maj. Marsha Lutz and stole documents that disclosed the sexual orientation of Maj. Lutz.[153] Maj. Lutz filed suit alleging that the theft was tortious, designed to harm her reputation, and not incident to service in any way. The Ninth Circuit agreed, recognizing that, "even *Feres* concatenations must come to an end."[154] The court reasoned that an act by one service member toward another with "no conceivable military purpose and . . . not perpetrated during the course

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149 Gomez v. Campbell-Ewald Co., No. CV 10-02007 DMG (CWx), 2013 WL 655237, at *6 (C.D. Cal. Feb. 22, 2013), *vacated*, 768 F.3d 871 (9th Cir. 2014), *aff'd in part*, 136 S. Ct. 663, 672 (2016) (acknowledging that both sovereign immunity and the government contractor defense make it difficult to pursue claims against a government contractor, but when on to hold that "when a contractor violates both federal law and the Government's explicit instruction . . . no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation"). *See,* Boyle v. United Technologies Corp., 487 U.S. 500, 510–12 (1988) (neglecting to directly adopt the *Feres* doctrine for independent contractors, but holding nonetheless holding that there could be a significant conflict between federal interests and state tort laws); Lessin v. Kellogg Brown & Root, 2006 WL 3940556, at *1 (S.D. Tex. June 12, 2006) (refusing to dismiss a claim against an independent contractor for negligence in inspecting, maintaining, and repairing a truck that injured him, causing a traumatic brain injury, while providing a military escort).

150 Perez v. United States, 2010 WL 11505508, at *1 (S.D. Fla. June 15, 2010) (holding the *Feres* doctrine did not bar a claim under the FTCA for negligence in post-discharge failure to warn about toxic chemicals in the drinking water consumer while stationed that caused non-Hodgkin's lymphoma).

151 Trankel v. Montana, 938 P.2d 614, 619 (Mont. 1997) (holding that a former service member could bring a claim for negligence related to military service because the claim was against the state of Montana, and not the U.S. Government).

152 944 F.2d 1477 (9th Cir. 1991).

153 *Id.* At 1470.

154 *Id.* at 1487 (internal citations omitted).

of a military activity surely are past the reach of *Feres*."[155] The court found that service members should not be able to avoid responsibility simply because they wore a military uniform at the time they committed an unquestionably wrongful act.[156] This case is part of a very, very limited "private acts" exception recognized in *Durant v. Neneman*: "[O]ur evolving jurisprudence has created a zone of protection for military actors, immunizing [them from] civilian courts. It is our conclusion, however, that this zone [created by *Feres*] 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. . . ." 157 *Durant* states the obvious: "When a soldier commits an act that would, in civilian life, make him liable to another, he should not be allowed to escape responsibility . . . because those involved were wearing military uniforms . . . .[M]ilitary personnel . . . engaged in distinctly nonmilitary acts . . . should be subject to civil authority."158 Of course the problem is that almost all the actions described in this article involve misconduct which could be seen as incident to service when that term is defined as being virtually anything in any way related to our armed forces.

In *Adams v. United States*,[159] the Fifth Circuit reversed a summary judgment dismissing the claim of the family of a service member who had a fatal heart attack following a circumcision.[160] That plaintiff had not received payments from the military, was on indefinite leave, and awaiting separation paperwork to be completed, persuaded the Fifth Circuit to reverse the summary judgment.[161] *Adams* suggests that a victim of military medical malpractice may circumvent *Feres* when the plaintiff was not returning to military service.[162] Again, while it is tempting to classify this as an exception, it's not. For example, almost all PTSD claims involve

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[155] *Id.*

[156] *Id.*

157 884 F.2d 1350, 1353, 1354 (10th Cir. 1989)

158 *Id.*

[159] 728 F.2d 736 (5th Cir. 1984).

[160] *Id.* at 737–38.

[161] *Id.* at 737, 739–40.

[162] Adams v. United States, 728 F.2d 736, 741 (5th Cir. 1984).

veterans who do not intend to return to military service – and almost all are kept out of Article III courts.[163]

In *Hall v. United States*,[164] a widow sued the federal government for the wrongful death of her husband (a petty officer), his two children, and his two step-children,[165] all of whom died from carbon monoxide poisoning in their home on a naval base after the Navy failed to replace gas appliances. The government moved to dismiss based on *Feres* but lost when the court found that the harm was not incident to the officer's military service since the officer was off-duty and asleep, factors prompting the court to consider whether this was personal activity and not incident to service.[166] This decision does not square with many of the cases already discussed including *Gros v. United States* involving harm caused by contaminated water (used for drinking and bathing) in a home on a base.[167] Frankly, while "personal activity" does seem a legitimate way to describe behavior not "incident to military service," there is little to suggest it is a reliable distinction.[168]

(v) Reluctance to Follow *Feres*

That *Feres* is problematic is hardly debatable – but is the case an incorrect reading of the FTCA? Justice Antonin Scalia's dissent in *United States v. Johnson* ,[169] left little doubt of his point of view; the case, he wrote, is "wrongly decided."[170] In a dissenting opinion denying a grant of certiorari, Justice Clarence Thomas observed that the FTCA simply does not mandate blocking claims across-the-board of service members: "There is no support for this conclusion in

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163 Amitis Darabnia, *To Care for Him Who Shall Have Borne the Battle: Government's Response to PTSD,* 25 FED. CIR. B.J. 453, 480 n. 224 (2016).

[164] 130 F. Supp. 2d 825 (S.D. Miss. 2000).

[165] *Id.* at 826.

[166] *Id.* at 829.

167 Gros v. United States, 232 Fed. Appx. 417, 417 (5th Cir. 2007) (denying recovery to service members who were exposed to toxic chemicals in the water on a United States military base

[168] *See* Warner v. United States, 720 F.2d 837, 839 (5th Cir.1983) (noting that activities such as shopping might be incident to service if they occur during brief off-duty periods).

169 United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting).

170 *Id.* at 700 (quoting *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y.)).

the text of the statute, and it has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees. I tend to agree with Justice Scalia that '*Feres* was wrongly decided' . . . ."[171]

Assuming Justices Scalia and Thomas are right, the case is nonetheless controlling precedent, prompting courts to search, often in vain, for exceptions. For example, in *Daniel v. United States*,[172] after the court barred the claim based on the *Feres* doctrine, it stated that the plaintiff, a dedicated lieutenant, was "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."[173] Yet, the current understanding of "incident to service" precluded the Ninth Circuit from allowing an otherwise legitimate claim (from the standpoint of substantive tort law) to go forward.[174]

While Congress did not resolve the matter of tort claims "incident to service," *Feres* left little room for other interpretations: "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."[175] Given the enormity of this declaration, it is worth exploring whether the justifications on which the Court predicated its opinions are convincing.[176]

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171 Lanus v. United States, 570 U.S. 932, 933 (2013).

172 889 F.3d 978, 982 (9th Cir. 2018).

173 *Id* at 982.

174 *See* Hinkie v. United States, 715 F.2d 96, 97 (3d Cir. 1983); *see also* Jennifer Zyznar, *Feres Doctrine: Don't Let This Be It. Fight!*, 46 J. MARSHALL L. REV. 607, 623 n. 125 (2013) (citing *Matraele v. N.J. Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (discussing the *Feres* doctrines ripeness for reconsideration)).

175 340 U.S. at 146.

176 Tara Wilke, *Three Wrongs Do Not Make a Right: Federal Sovereign Immunity, the Feres Doctrine, and the Denial of Claims Brought by Military Mothers and their Children for Injuries Sustained Pre-Birth*, 263 WIS. L. REV. 263, 276 (2016) (quoting 481 U.S. 681, 692–703 (1987) (Scalia, J. dissenting)).

III. THE *FERES* RATIONALES

While the *Feres* Court found that the FTCA, explicitly, was designed to hold the government liable, "in the same manner and to the same extent as a private individual under like circumstances. . .", 177 the Court also found compelling reasons to bar liability when an injury was incident to military service. These include the following: (1) "[t]he relationship between the Government and members of its armed forces is distinctly federal in character,"178 (2) an accessible compensation process for illness and injury, and (3) an understandable concern that the presence of many and varied civil tort claims would undermine discipline, chain-of-command, the willingness to follow lawful orders unquestioningly, and more.[179] In addition, the Court was concerned that expansive civil liability would lead to unequal treatment of service members. These and other rationales bear scrutiny.

A. Unique Relationship

That there is a unique relationship between members of the armed forces and the federal government is not debatable.180 However, it does not follow automatically that the existence of that relationship must mean denial of access to justice in Article III courts.

It has been suggested that evidence of the unsuitability of civil tort litigation to this unique relationship can be derived from looking at the small number of cases and scant case law generated between the adoption of the FTCA in 1946 and before the 1950 *Feres* decision.181 That there is limited precedent in this time period is in no way surprising or indicative of much of anything for two reasons: first, the government fought aggressively every case that was

177 340 U.S. at 141.

178 *Id.* at 143.

[179] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977); Feres v. United States, 340 U.S. 135, 141, 143-44 (1950).

180 *See* Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 434 (2010) (articulating that no private citizen has ever had a relationship comparable to the power the Government has over its armed forces).

181 *Id.*

brought,[182] and second, there was no time for the doctrine to evolve and thus no chance to work through various quirks unique to intra-military litigation. In 1949, in *Brooks v. United States,*[183] the government argued unsuccessfully that all cases in any way incident to service should be barred. A year later, in *Feres,* the argument succeeded, notwithstanding the fact that, as Justice Thomas later noted, the FTCA says nothing of the kind.[184]

If any conclusion is to be drawn from the limited litigation history prior to 1950 and the almost nonexistent precedent thereafter, it is that in the absence of the potent deterrent effect of tort law,[185] there has been an epidemic of sexual assault,[186] significant unchecked acts of

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182 Brooks v. United States, 337 U.S. 49, 50 (1949), Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948), and the lower court decision in *Feres* are good examples of this. The Government's argument in each of these cases was not that that the Governmental actors behavior conformed with due care, but rather that the Government was immune.

183 *See, e.g., Brooks*, 337 U.S. at 50.

184 Lanus v. United States, 570 U.S. 932, 933 (2013).

185 *Supra*, note 114.

186 Cioca v. Rumsfeld, 720 F.3d 505, 512 (4th Cir. 2013) (denying relief sought by a victim of sexual assault in the military, occurring on the military premise, because civil liability would affect adversely military discipline); Klay v. Panetta, 758 F.3d 369, 376-77 (D.C. Cir. 2014)(in affirming the district court's dismissal, thus rejecting a sexual assault victim's claims, the court stated: "[W]e do not take lightly the severity of plaintiffs' suffering or the harm done by sexual assault and retaliation in our military. But the existence of grievous wrongs does not free the judiciary to authorize any and all suits that might seem just."). *See Sexual Assault in the Military: Hearing Before the Subcomm. on Pers. of the S. Comm. On Armed Servs.*, 113th Cong. (2013) (statement of Rebekah Havrilla, Former Sergeant, U.S. Army) (sworn congressional testimony setting forth a harrowing narrative of rape and sexual abuse in the military); Kelsey L. Campbell, Note, *Protecting Our Defenders: The Need to Ensure Due Process for Women in the Military Before Amending the Selective Service Act,* 45 HASTINGS CONST. L.Q. 115 (2017); Alexandra Lohman, *Silence of the Lambs: Giving Voice to the Problem of Rape And Sexual Assault in the United States Armed Forces,* 10 NW. J. L. & SOC. POL'Y 230 (2015); Stella Cernak, Note, Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Line, 22 Mich. J. Gender & L. 207 n. 9 (2015) (citing Amy Goodman & Denis Moynihan, *Addressing the* Epidemic *of* Military Sexual *Assault,* DEMOCRACY NOW (May 9, 2013), http://www.democracynow.org/blog/2013/5/9/addressing_the_epidemic_of_military_sexual_asault); Molly O'Toole, Military Sexual *Assault* Epidemic *Continues to Claim Victims as Defense Department Fails Females*, HUFFINGTON POST (Oct. 6, 2012), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense- department n 1834196.html.

medical malpractice,[187] and impermissible physical abuse.[188] It is no wonder that even judicial conservatives (Justices Scalia and Thomas) took the position that *Feres* was a mistake from the outset.[189]

The nature of the unique relationship that service members have with the country they serve is potent, suffused with mandates of command and order, discipline and responsibility, a commitment to country, a respect for rules, regulations, statutes, and, of course, the UCMJ. A lack of accountability for overt wrongdoing is nowhere in that set of critical obligations and values.

B. Sufficient Alternative Remedies

A second rationale for *Feres* is the availability of remedies within the system of military justice.[190] Service members, the Court noted, were "already well-provided for" under the Veteran's Benefit Act, a compensation scheme providing funds to those who are injured incident to military service regardless of fault.[191] The argument is that service members are better off because (1) there is no obligation to prove fault, (2) any needed medical care is free, and (3) there are generous insurance, retirement, and other general benefits "outside of the tort area."[192]

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187 Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members,* 46 CAL. W. L. REV. 395, 398 (2010) (arguing that Feres has rendered service members "second-class citizens, whose rights fall below even those of the nation's criminals . . . . [The] *Feres* bar undermines the quality of healthcare provided to the nation's military forces by preventing accountability for egregious mistakes and shortcomings in medical treatment."); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. WASH. L. REV. 1, 43 (2003) ("Military medical malpractice has long been a subject of intense criticism. This record may reflect the absence of malpractice as a deterrent in the military medical system due to the application of the Feres doctrine. While early cases did allow recovery for injuries to family members of service members, the courts have largely cut off even that element of deterrence by extending Feres to cover such cases.").

188 *Katta, supra,* note 106 at 1136–37, 1141.

189 Lanus v. United States, 570 U.S. 932, 933 (2013).

190 Feres v. United States, 340 U.S. 135, 140 (1950).

191 *See* Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671–72 (1977).

192 Leo Shane III, *The Argument for Keeping the Feres Doctrine,* STARS AND STRIPES (Apr. 2, 2012); Figley, *supra* note 211 at 427.

Arguably, allowing those with such benefits to recover in an Article III court could be seen as dual recovery or unjust enrichment and create an "uneven system for compensating troops."[193] Moreover, the "simple, certain, and uniform" compensation system results in "recoveries [that] compare extremely favorably with those provided" by other federal compensation schemes, such as workers' compensation.[194]

Detractors of the current system assert that it is neither sufficient in amount nor reliable enough to cover the harms service members and their families experience and certainly insufficient to produce a deterrent to future violations.[195] Particularly in post-discharge compensation cases, veterans face significant barriers.[196] In fact, there is simply no basis to argue and no record to support the proposition that the compensation system available within the military is comparable to the civil justice system in terms of the amount of individual judgements, deterrent effect, and fairness. The question is whether adding the potential for

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193 Shane III, *supra* note 173.

194 *Feres*, 340 U.S. at 143–45. *See* Froelich, *Closing the Equitable Loophole: Assessing the Supreme Court's Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs,* 35 SETON HALL L. REV. 699, 716 (2005) (emphasizing that the President has exclusive authority over military rights, duties, responsibilities, regulations and procedures). Circuit courts have expressed concern that "judicial meddling in such instances would violate the separation of powers" and further that "civilian courts are inherently unsuitable and incompetent to oversee such matters. *Id.* at 728 (citing Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989)).

[195] Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine,* 192 MIL. L. REV. 1, 45–47 (2007) (arguing that the veteran's compensation system may require litigation, and further, it is inefficient, slow, not always accurate, and not as generous as the *Feres* court might have believed); Helen D. O'Conor, *Federal Tort Claims Act is Available for OIF TBI Veterans, Despite Feres*, 11 DEPAUL J. HEALTH CARE L. 273, 274 (2008) (arguing that the benefits available through veteran statutes do not adequately cover life-long impairments).

196 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, DOD HEALTH: ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS 12 (May 2017), https://www.gao.gov/assets/690/684608.pdf; *Clinic Files Class Action on Behalf of Marine Corps Vets with PTSD,* YALE LAW SCH. (Mar. 2, 2018), https://law.yale.edu/yls-today/news/clinic-files-class-action-behalf-marine-corps-vets-ptsd (describing the filing of a class action law suit on behalf of thousands of Navy and Marine Corps veterans of Iraq and Afghanistan who developed post-traumatic stress disorder and other mental health conditions during military service but were separated with less-than-honorable discharge).

access to Article III courts in highly limited and well-defined circumstances would do more harm than good.

To be sure, mechanisms for discipline, strict adherence to lawful orders, and respect for the chain-of-command are essential. That those critical components of our armed forces are undermined by making the government civilly accountable in select cases involving unquestionably wrongful conduct simply does not ring true and is not justified by an imperfect administrative and internal system of compensation.[197]

The premise of this particular rationale is that an administrative compensation system within our armed forces (broadly defined) would be frustrated or cannot co-exist when a small number of victims of overt wrongdoing have access, in limited circumstances, to civil justice in Article III courts. First, there is literally no empirical evidence to support this justification. Second, the idea that a victim would be unjustly enriched wrongfully presupposes that courts would permit a person to be awarded twice for the same costs and that the damages one would seek and receive in an Article III court are the same one would receive in an administrative tribunal. Presumably, an administrative award for costs or damages could be off-set against a judgment for those same costs and damages. Alternatively, it is possible to avoid the unjust enrichment problem by providing a service member an opt-out option from the military administrative compensation system to pursue a civil tort claim as is done with intentional torts

197 *Compensation for Victims of Military Malpractice: Hearing Before the Military Pers. and Comp. Subcomm. of the H. Comm. on Armed Servs.*, 100th Cong. 1 (1987) (statement of H. Lawrence Garrett III, General Counsel, Department of Defense) ("The Department believes that amendment of the Military Claims Act . . . may very well provide . . . a solution.").

in certain workers compensation systems198 and a number of other administrative compensation programs.199

C. Chain-of-Command and Military Discipline

Respect for and adherence to rules, discipline, tradition, training/conditioning regimes, and the chain-of-command is vitally important to the effective and efficient operation of our armed forces. The limitations in *Feres* are driven, in meaningful part, by the concern that exposure to liability would undermine those vital aspects of military life.200 The argument is that civil tort litigation, "if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."201 The discipline and the very nature of the command structure would, "get bogged down in lengthy and possibly frivolous lawsuits [that may] substantially disrupt the military mission, by requiring officers … to testify

198 Grammatico v. Indus. Comm'n, 90 P.3d 211, 213 (Ariz. Ct. App. 2004) (on opting out of Workers' Compensation and pursuing remedies in tort, based on ARIZ. REV. STAT. § 23-906.A). Several cases provide examples of allowing a worker to opt out of workers' compensation when they are victims of an intentional tort. *See* Parret v. UNICCO Serv. Co., 127 P.3d 572 (Okla. 2005); Suarez v. Dickmont Plastics Corp., 698 A.2d 838 (Conn. 1997); Woodson v. Rowland, 407 S.E.2d 222 (N.C. 1991); Millison v. E.I. du Pont de Nemours & Co., 501 A.2d 505 (N.J. 1985); VerBouwens v. Hamm Woods Prods., 334 N.W.2d 874 (S.D. 1983); Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981).

199 Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1673 (2015) (discussing the Vaccine Act opt-out option found at 42 U.S.C. § 300aa--11(a)(2)(A)(i), 300aa-21(b) pertaining to retention of vaccine claimants retention of the right to pursue civil tort options). *See* COMCAST CABLE ARBITRATION OPT OUT AGREEMENT (2007), http://comcast.com/arbitrationoptout/default.ashx (an opt-out program where the option was limited funds from settlement versus independent litigation); SEPTEMBER 11TH VICTIM'S COMPENSATION FUND, https://www.vcf.gov/ (creating a fund to pay victims of the 9/11 terrorist disaster in which victims have the option to take the settlement distribution or opt out and litigate independently).

200 340 U.S. at 146

201 Regan v. Starcraft Marine LLC, 524 F.3d 627, 634.(5th Cir. 2008). *See* Dawson, *supra* note 18 at 488 (claiming that the "often maligned military discipline rationale, standing alone, is sufficient to support the *Feres* doctrine").

in court as to their decisions and actions. . . .[taking] scarce resources away from compelling military needs' to avoid legal actions." 202

Notwithstanding the important concerns expressed above, there is no concrete data, no studies, not even any documented history to support the proposition that providing access to justice in Article III courts to address egregious misconduct means undoing the UCMJ, rules related to discipline, training regimens, or, for that matter, any rules and regulations regarding service members. Nothing in that structure need change.

Access to justice means only that there would be a remedy in a court of law for isolated, undeniably unacceptable misconduct clearly not essential to military operations, order, or discipline. Undoing *Feres* is not an invitation for a free-for-all, for chaos, for the end of tradition, or anything of the sort. Being accountable for discernible wrongdoing does not equate with the behavioral Armageddon and mayhem *Feres* devotees fear. The converse seems more realistic: systemic avoidance of liability for clearly actionable behavior shields wrongdoers, fosters distrust and resentment, enshrines unequal treatment, and nurtures a culture of secrecy.

On the more pointed question of chain-of-command, in the absence of *Feres*, would service members regularly question the judgment of their superiors? If so, the doctrine should not change.[203] However, there is no demonstrated reason to believe that long-standing military practices, including unquestioned compliance with all lawful orders, would vanish simply because a very small number of people who engage in overtly unacceptable misconduct are held accountable for their actions. Making the recommendation to amend the FTCA and end the *Feres* bar is accompanied by the deeply held belief204 in the essential nature of the kind of training and discipline that has characterized our military since its very beginning.205

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202 Leo Shane III, *The Argument for Keeping the Feres Doctrine*, STARS AND STRIPES 216 (Apr. 2, 2012) (referring, *inter alia*, to comments of the Solicitor General).

[203] *Stencel Aero Eng'g Corp.*, 431 U.S. at 671–72; *Feres*, 340 U.S. at 141, 143–44.

204 The conclusions in this section draw more heavily on the author's personal experiences noted briefly at the outset of the article.

205 This is not a debatable point, but it is one that is discussed regularly. Jon Mixon, USAF (ret.), *Why is the Military So Strict and Tough?*, MILITARY1 (2018), https://www.military1.com/army/article/538486-why-is-the-military-so-strict-and-tough/; Adam

The discipline/command arguments are not complicated: (1) holding wrongdoers accountable does not undermine discipline; (2) holding wrongdoers accountable does not cause the collapse of the chain-of-command or otherwise invite insubordination; (3) findings of civil liability in tort make it *less* likely that unlawful, unreasonable, and indefensible risks to human welfare will take place in the future;[206] (4) if *Feres* did not bar recovery, the frequency of isolated controversial or injurious practices might be curtailed; [207] (5) given the exposure and fiscal potential of tort liability, lifting the *Feres* bar would make it more likely the federal government would acknowledge wrongdoing rather than fight tooth and nail the very existence of responsibility for actions that cause harm;[208] (6) subjecting the federal government to the light of day for systemic misconduct including invidious discrimination should have a powerful

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Taylor, (coder, ret.), *Why Is Discipline Important in a Military?*, QUORA (2017), https://www.quora.com/Why-is-discipline-important-in-a-military.

206 Jonathan D. Moreno, UNDUE RISK: SECRET STATE EXPERIMENTS ON HUMANS (2001)

207 *Hinkie v. United States* 715 F.2d 96, 97 (3d Cir. 1983) (barring civil liability in a radiation exposure case where not only was there service member a victim, but his spouse and child as well); *Jaffee v. United States*, 1980 U.S. App. LEXIS 20332 (3rd Cir. 1980) (blocking service members' claims based on *Feres* despite a commanding officer's awareness of risk from exposure to deadly radiation); Hall v. United States, 130 F. Supp. 2d 825 (S.D. Miss. 2000) (holding that widow of a petty officer could recover for her husband's death and death of their children from carbon monoxide poisoning in their home at a naval base)

208 The federal government fought successfully all claims involving exposure to dioxin (Agent Orange) in Vietnam, as well as chemicals in the water on military basis, among other claims. *See Gros*, 232 Fed. Appx. 417, 417 (5th Cir. 2007); *In re* Agent Orange Product Liability Litigation, 597 F. Supp. 740, 746, 753–54 (E.D.N.Y. 1984); Kelly L. Dill, *The Feres Bar: The Right Ruling for the Wrong Reason,* 24 CAMPBELL L. REV. 71, 80 (2001) (explaining how courts have barred claims where exposure to chemicals or radiation has led to birth deformities); see also Molly Kokesh, *Applying the Feres Doctrine to Prenatal Injury Cases After Oriz v. United States,* 93 DENVER L. REV. ONLINE 1, 1 (2016) (citing Ortiz v. United States Evans Army Cmty. Hosp., No. 12-CV-01731-PAB-KMT, 2013 WL 5446057, at *7 (D. Colo, Sept. 30, 2013) (discussing the genesis test for the "in utero" exception)).

corrective effect,[209] and (7) when there are no consequences for tortious misconduct, there is no meaningful deterrence for repetition of that same act. [210]

It is simply illogical to assume that discipline and respect for authority are optimized in a setting where accountability is circumscribed. It is more logical to assume that the presence of unchecked egregious misconduct advancing no service related goal is the consequence of insufficient accountability and deterrence.

D. The "*Feres* is a Fair Interpretation of the FTCA" Rationale

The FTCA, like most statutes, has gaps – but the Court in *Feres* was not engaged in judicial "gap filling" of an ambiguous statute.[211] The Court was legislating. It's one thing for the Court to give clarity to a statute. It's quite another to craft a massive exception to liability in a statute designed to create accountability, blocking countless claims, when the statute on which those claims would be based, the FTCA, does not do so.[212] The idea that Congress was unaware of the importance of specifying exceptions to the FTCA when it opened the door to tort liability is indefensible. Exemptions or exceptions, e.g., the DFE, were discussed, and the matter of service members considered – e.g., the addition of the word "combatant"[213] in House debates. A blanket bar of liability would have been a political decision of great moment – but it did not happen.

When Congress passed the FTCA and waived sovereign immunity, had Congress been inclined to block the vast majority of civil tort claims emanating from the single largest branch of

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209 David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine,* 95 YALE L.J. 992, 1015-1016 (1986) ([C]ases involving particularly egregious or widespread military misconduct are more appropriately resolved by civilian courts. . . .")

210 Andrew F. Popper, *In Defense of Deterrence,* 75 ALB. L. REV. 181 (2012).

211 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

212 John Astley, *United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow,* 38 AM. U. L. REV. 185 (1988) ("An analysis of the FTCA legislative history does not clearly indicate whether Congress intended to exclude military personnel from FTCA protection . . . it is reasonable to conclude that Congress intended service members to be covered.").

213 *Id.*

government, the Defense Department,[214] it easily could have done so – but it did not. Seen in that light, *Feres* is not just overly broad,[215] it is an incorrect interpretation of the FTCA and thus wrongly decided.[216]

To be fair, there is thoughtful and compelling scholarship defending the Court's decision as consistent with the FTCA.[217] There is also the fact that the Court crafted limitations on civil actions in *Feres* as the best way to solve what it perceived as the problem of maintaining discipline and the chain-of-command, both understandable and undeniably valid goals. Regardless of the motivation when the case was decided, the immunity *Feres* spawned has played a role in the aforementioned epidemic of sexual assault, [218] inexcusable negligence,[219] and more. Quite obviously, these actions have not been deterred – and they are not "incident to

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214 THE WHITE HOUSE, THE EXECUTIVE BRANCH (last accessed Jan. 17, 2019), https://obamawhitehouse.archives.gov/1600/executive-branch ("The Department of Defense is the largest government agency, with more than 1.3 million men and women on active duty, nearly 700,000 civilian personnel, and 1.1 million citizens who serve in the National Guard and Reserve forces.").

[215] *See* 28 U.S.C. § 2680 (2018); Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 60–72 (2007).

[216] *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting).

[217] Figley, *supra* note 179, at 443 (explaining Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671–72 (1977) and reiterating the reasoning behind the *Feres* doctrine); *Feres*, 340 U.S. at 143–44 (describing the alternative methods of recovery as one of the rationales behind the adoption of its nonjusticiability doctrine).

218 *Mission: Ending the Epidemic of Military Rape,* PROTECT OUR DEFENDERS (last accessed Jan. 17. 2019), https://www.protectourdefenders.com/about/; *Sexual Assault Reports in U.S. Military Reach Record High: Pentagon*, NBC NEWS (May 1, 2017), https://www.nbcnews.com/news/us-news/sexual-assault-reports-u-s-military-reach-record-high-pentagon-n753566; Samantha Kubek, *Over 70,000 military sexual assaults took place last year -- Congress must take action,* FOX NEWS (NOV. 16, 2017), https://www.foxnews.com/opinion/over-70000-military-sexual-assaults-took-place-last-year-congress-must-take-action.

219 *See* United States v. Stanley, 483 U.S. 669, 671, 683–84 (1987); Veloz-Gertrudis v. United States, 768 F. Supp. 38, 39 (E.D.N.Y. 1991); Sweet v. United States, 528 F. Supp. 1068, 1070 (D.S.D. 1981), *aff'd*, 687 F.2d 246 (8th Cir. 1982); Campbell, *supra* note 2, at 138–40, 152–53.

service."[220] Without a Congressional imperative in the FTCA on service related harms, the Court, for legitimate reasons, took a shot at setting public policy engaging in the kind of "judicial law making" often condemned221 violating one of the most basic notions of separation of powers.222 Over time, *Feres* has left countless victims without full remediation, wrongdoers without accountability, and foreseeable injurious misconduct unchecked.

E. The Unequal Treatment Rationale

Another rationale underlying *Feres* was the concern that access to Article III courts in select and unpredictable cases would result in unequal treatment of service members.223 While it is important for similarly situated service members to be treated equally and while equal

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[220] *Klay*, 924 F. Supp. 8, 13 (D.C.D.C. 2013) ("[B]eing victimized by a sexual assault cannot possibly be considered to be an 'activity' incident to military service.").

221 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in part and dissenting in part) ("The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life tenured [judges] . . . with the somewhat more modest role envisioned for these lawyers by the Founders."); Turley, *supra* note 34, at 89; Greg Jones, *Proper Judicial Activism,* 14 REGENT U. L. REV. 141, 143 (2002) ("Judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation."); REPRESENTATIVE TRENT FRANKS,UNITED STATES HOUSE OF REPRESENTATIVES, FRANKS DENOUNCES NINTH CIRCUIT RULING AGAINST PARENTAL RIGHTS (Nov. 4, 2005) http://www.house.gov/apps/list/press/az02_franks/I10405_ParentalRights.html ("This is just the latest outrage to come from the Ninth Circuit, which has become the poster child for judicial activism.").

222 Erwin Chemerinsky, *Supreme Court - October Terms 2009 Foreword: Conservative Judicial Activism,* 44 LOY. L.A. L. REV. 863, 866-67 (2011) ("Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public"); David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era,* 36 HASTINGS CONST. L.Q. 217, 250-51 (2009) ("The basic vice of judicial activism … is that it violates the fundamental American constitutional principle of separation of powers. . . ."); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 581 (2007) ("[J]udicial activism [is at odds with basic notions of] separation of powers principles because the Constitution renders such authority to Congress rather than the federal judiciary. . . .").

223 *See* Shane III, *supra* note 173 (arguing that not only would such claims affect the concept of equality of treatment for all troops in the armed services, but that without imposition of limits, "the armed forces would get bogged down in lengthy and possibly frivolous lawsuits").

treatment is the promise of the entire justice system,224 fear of unequal treatment is just that – a fear. Again, there is nothing in the Court's opinion that demonstrates just how access to justice is discriminatory – because it is not. That an injured person seeks a remedy in a court of law hardly seems a basis to cry foul.

There is one other aspect to equal treatment. Military justice pursuant to the UCMJ is remarkably efficient and fair. Yet in any military process of any kind, rank and regard for the command structure are appropriately of consequence. While rank does not make one above the law under the UCMJ, rank matters in the way parties are addressed and treated. This is not in any way a criticism – the system of military justice is a stunning example of how, in a very unique setting, an enviable quantum of justice can take place. With multiple and potent interests in play, the system strikes an almost miraculous balance between disciplined efficiency and fairness. That said, it is simply be untrue to say that this system is no different than that which takes place in an Article III court.

In civil, non-military courts, rank does not dictate credibility assumptions, respect, or deference. The judge is not an officer in the same branch of the service as the parties before the court.225 There is no convening authority (often a commanding officer) with special authority to activate the proceeding or review the outcome of a case. Civil courts, by design and tradition, prize equal justice under law, a level playing field, justice, and compassion. Those notions, particularly equal justice under law, are the dominant hallmarks of the entire system of

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224 Discussing the possibility of unequal treatment and litigation by prisoners, the Court rejected the contention outright: "[W]e conclude that the prison system will not be disrupted by the application of Connecticut law in one case and Indiana law in another to decide whether the Government should be liable to a prisoner for the negligence of its employees." United States v. Muniz, 374 U.S. 150, 162 (1963).

225 That cases involving the armed forces can end up in non-military courts is not a novel concept. Schlesinger v. Councilman, 420 U.S. 738 (1975) (anticipating cases originating in the armed forces but finding an exhaustion requirement for such cases); Parker v. Levy, 417 U.S. 733 (1974) (habeas corpus review of court martial); Parisi v. Davidson, 405 U.S. 34 (1972); O'Callahan v. Parker, 395 U.S. 258 (1969).

justice.[226] It cannot be that the possibility of a fair and open trial where all stand on equal footing is to be avoided because it reveals undue advantage and unequal treatment.

The *Feres* Court rationalized its decision based on legitimate fears. Over the next 68 years, those fears did not manifest. Instead, the wrongs described in this paper have. Harkening back to undocumented fears without evidence that they will ever occur is not an acceptable rationale to justify the deprivation of rights explicit in *Feres*.[227]

IV. ANALOGIES TO OTHER FEDERAL PROGRAMS

To see if *Feres* was the norm for federal employees, it is worth looking at a few other federal agency programs. Several large programs involving government employees and others have somewhat similar limits on access to Article III courts. However, none of those programs have seen widespread unchecked discrimination or the same levels of sexual assault or multiple instances of egregious malpractice. Moreover, while limiting injured government employees or others to administrative relief is not unusual, as it turns out, based on *Feres,* our service members, the best among us, get the least protection from tortious misconduct.

A. Federal Employees outside the Armed Forces: FECA

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226 SUPREME COURT OF THE UNITED STATES, THE COURT AND CONSTITUTIONAL INTERPRETATION, https://www.supremecourt.gov/about/constitutional.aspx (last accessed Jan. 17, 2019).

227 Author's note: Fear of what might happen should not be the basis for denying our service members so fundamental a set of rights – or any set of rights. For example, we condemn legislation that constitutes a prior restraint on speech even knowing that some speech may, in the end, be horrific and injurious, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (prior restraints on speech that restrict news and commentaries are inherently unconstitutional). We cherish the notion of a presumption of innocence in criminal cases even knowing that we run the risk of acquitting those who have committed crimes. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995) (deconstructing innocence and its place in American jurisprudence). We do so, predicated on our belief in the strength of our system of justice, not on fear that the system might fail. A fear driven legal system is an open-ended invitation to totalitarianism.

There is a limitation on access to Article III courts for federal employees via the Federal Employees' Compensation Act (FECA). 228 Their claims, more often than not, are pursued administratively229 (much like workers compensation claims in the private sector230). "Federal employees' injuries that are compensable under FECA cannot be compensated under other federal remedial statutes, including the Federal Tort Claims Act."231

The difficulties federal employees face bringing civil actions in tort based on the FTCA 232 surfaced in *Ezekiel v. Michael*.233 There, a federal employee sued a resident VA physician after an injection with a contaminated hypodermic needle.234 Because the physician was a federal employee acting in the scope of his employment, the plaintiff's remedies were limited to FECA.235

FECA provides for wage loss compensation, medical care, rehabilitation, attendant's allowance, and survivors' benefits.236 As with workers compensation and cases barred by *Feres*, FECA is, 237 for the most part, an exclusive remedy.238 In making FECA the sole

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228 5 U.S.C. § 8101 *et seq.;* 20 C.F.R. §§ 10, 20 (2018).

229 5 U.S.C. §§ 8103-8193.

230 U.S. DEPARTMENT OF LABOR, WORKERS' COMPENSATION, https://www.dol.gov/general/topic/workcomp (last accessed Jan. 18, 2019).

231 Wallace v. United States, 669 F.2d 947, 951 (4th Cir. 1982) (citing United States v. Demko, 385 U.S. 149, 151 n.1 (1966)).

232 *See generally*, *Wallace*, 669 F.2d 947 (1982).

233 Ezekiel v. Michel, 66 F.3d 894 (7th Cir. 1995).

234 *Ezekiel*, 66 F.3d at 895.

235 *Id.*

236 Howard L. Graham, FED. EMPLOYEES COMP. ACT PRAC. GUIDE § 1:1 (2d ed.) (2017).

237 5 U.S.C. § 8116(c); Lockheed Aircraft Corp. v. U.S., 460 U.S. 190, 193–94 (1983).

238 Williamson v. United States, 862 F.3d 577, 583 (6th Cir. 2017) (citing Spinelli v. Goss, 446 F.3d 159, 161 (D.C. Cir. 2006)); Elman v. United States, 173 F.3d 486, 492 (3d Cir. 1999); Votteler v. United States, 904 F.2d 128, 130–31 (2d Cir. 1990); Wilder v. United States, 873 F.2d 285, 288–89 (11th Cir. 1989) (per curiam); Vilanova v. United States, 851 F.2d 1, 7 n.24 (1st Cir. 1988); *see also* Lance v. United States, 70 F.3d 1093, 1095 (9th Cir. 1995) (per curiam) (proposing that FECA is an exclusive remedy).

remedy, Congress intended to "limit the government's liability to a low enough level so that all injured employees c[ould] be paid some reasonable level of compensation for a wide range of job-related injuries, regardless of fault."[239] Federal employees have "the right to receive immediate, fixed benefits, regardless of fault and without need for litigation from their federal employer, but in return they lose their right to sue the government."[240] However, claims of discrimination by federal employees including sexual harassment, unlike similar claims in the armed forces, may be heard in an Article III court.[241] In addition, FECA claims can be judicially reviewed in an Article III courts when there is a (1) cognizable constitutional claim, and (2) when there is an explicit statutory violation.[242] No such exceptions exist for service members.

b. Federal Inmates

In *United States v. Muniz*, the Supreme Court addressed the question of whether a prisoner could recover under the FTCA for injuries sustained while in the prison.[243] While such claims *might* affect prison discipline, the Court found the parties presented no evidence that tort recovery would affect discipline.[244] *Muniz*, however, did not result in anything remotely resembling regular access to Article III courts. Instead, Congress passed the Inmate Accident

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239 Tredway v. District of Columbia, 403 A.2d 732, 734 (D.C. Ct. App. 1979).

240 Patnaude v. Gonzales, 478 F. Supp. 643, 650 (D. Del. 2007) (citing 5 U.S.C. § 8116(c) (limits the rights of service members as well as civilians doing business with the military to pursue claims for injuries in Article III courts)).

241 Kristin Sommers Czubkowsk, Comment, *Equal Opportunity: Federal Employees' Right to Sue on Title VII and Tort Claims,* 80 U. CHI. L. REV. 1841 (2013).

242 Staacke v. United States Secretary of Labor, 841 F.2d 278, 281 (9th Cir. 1988); Rodrigues v. Donovan, 769 F.2d 1344, 1348 (9th Cir. 1985) (for constitutional challenges); and Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 238-39 (1968); Leedom v. Kyne, 358 U.S. 184, 188-89 (1958) (for claims involving a statutory violation).

[243] United States v. Muniz, 374 U.S. 150, 150 (1963).

[244] *Muniz*, 374 U.S. at 163 ("It is also possible that litigation will damage prison discipline, as the Government most vigorously argues. However, we have been shown no evidence that these possibilities have become actualities in the many States allowing suits against jailers, or the smaller number allowing recovery directly against the States themselves."); Melvani, *supra* note 16, at 429–430 (citing United States v. Muniz, 374 U.S. 150, 162-62 (1963)).

Compensation Act (IACA)[245] establishing an administrative compensation system for federal inmates or their dependents for work-related injuries occurring during incarceration.[246] Pursuant to IACA, the Federal Prison Industries Board maintains the Prison Industries Fund as the sole means of compensation for inmates,[247] effectively barring inmates from maintaining an FTCA suit.[248] In deciding the exclusivity of the IACA, the Supreme Court echoed the reasoning related to FECA (and *Feres*): "[W]here there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group."[249] Parenthetically, the claims of federal prison *employees*, as opposed to inmates, were discussed in *Wilson v. United States,*[250] and found to be outside IACA and limited to the FECA.

Looking at basic civil rights, members of the armed forces, unlike other federal employees or even convicted felons, do not have the option to bring a 1983[251] civil rights action[252] or *Bivens* claim.[253] *Wilson* found that prisoners, on the other hand, have those options: "[T]he statutory scheme lack[s] procedural safeguards for the prisoner's constitutional rights, the statute possesse[s] very little deterrent value, and there [is] no explicit indication from

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245 18 U.S.C. § 4126 (2012).

246 Michael B. Mushlin, 2 RIGHTS OF PRISONERS § 8:22 (5th ed., 2017).

247 18 U.S.C. § 4126.

248 U.S. v. Demko, 385 U.S. 149 (1966); *see also* Campbell, *supra* at §2[a]; Mushlin, *supra* note 239, at § 8:22.

249 *Demko*, 385 U.S. at 151–52 (citing Patterson v. U.S., 395 U.S. 495 (1959); *Johansen,* 343 U.S. 427 (1952)).

250 Wilson v. United States, 959 F.2d 12 (2d Cir. 1992).

251 42 U.S.C. § 1983.

252 Koprowski v. Baker, 822 F.3d 248 (6th Cir. 2016); Smith v. U.S., 561 F.3d 1090 (10th Cir. 2009); Bagola v. Kindt, 131 F.3d 632 (7th Cir. 1997); Scott v. Reno, 902 F. Supp. 1190 (C.D. Cal. 1995).

253 Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (involving a civil rights claim against what was then the Federal Bureau of Narcotics for a violation of plaintiff's Fourth Amendment rights to be free from unreasonable search).

Congress [barring] *Bivens* action[s]."[254] The same statutory deficiencies are applicable to service members – and yet, Dean Irwin Chemerinski's summation of their civil rights options, or lack thereof, is telling. Unlike federal employees or prisoners, "*Bivens* suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement."[255] This distinction is of consequence when considering the range of alleged (unchecked and thus undeterred) acts[256] of invidious discrimination.[257] Finally, unlike service members, an inmate can seek judicial review of an IACA decision predicated on a violation of procedural safeguards or abuse of discretion.[258]

C. Longshoremen and Harbor Workers

The last of the alternate programs assessed is the Longshoremen and Harbor Workers' Compensation Act (LHWCA),[259] which provides governmental and non-governmental employees disability and death compensation for harms sustained on navigable waterways. The statute originally covered "employees in traditional maritime occupations such as longshore

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254 *Smith*, 561 F.3d at 1102 (citing *Bagola*, 131 F.3d at 644–45).

255 Erwin Chemerinski, FEDERAL JURISDICTION 621–22 (5th ed. 2007).

256 Overt discrimination resulting in disparate treatment, normally within Title VII (42 U.S.C. § 2000e-2 (1982)) does not apply directly to the military. McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). While recent cases, e.g., Ortiz v. Werner Enter., Inc., 834 F.3d 760 (7th Cir. 2016), have expanded and clarified the reach of Title VII, applicability to the military via a civil rights case brought in an Article III court is not part of that change.

257 J. Stephen Clark, *But-For Sex: Equal Protection and the Individual Right to Marry a Specific Person Without Regard to Sex,* 60 S.D. L. REV. 389, 398 (2015) (on the history of discrimination in the military); Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 Yale L.J. 2082, 2084-86 (1987) (detailing the history of discrimination); *Overview of the Annual Report on Sexual Harassment and Violence at the Military Service Academies*, Hearing Before the Subcomm. on Military Personnel of the H. Comm. On Armed Servs., 115th Cong. 64 (2017).

258 "[A]n inmate may seek judicial review of a final IACA decision under the Administrative Procedures Act. . . ." Johnson v. United States, 2018 U.S. Dist. LEXIS 195074 (D. Ore. 2018); Peguero v. Unicor Indus., 2014 U.S. Dist. LEXIS 59900, at 5 (D.N.J. 2014) (an inmate can seek review of an IACA decision based on, "procedural safeguards and assessment for abuse of discretion . . . ." (citing Thompson v. Federal Prison Industries, 492 F.2d 1082 (5th Cir. 1974))).

259 33 U.S.C. §§ 901 et seq. (2012).

workers, ship-repairers, shipbuilders or ship-breakers, and harbor construction workers," but coverage expanded substantially with the enactment of the Defense Base Act (DBA)[260] which included those who "work for private employers on U.S. military bases or . . . lands used by the U.S. for military purposes outside of the United States," among others.[261] When the LHWCA applies, it is an exclusive remedy barring civil tort actions in Article III courts pursuant to the FTCA.[262] However, similar to FECA, if the federal court believes there is a "substantial question" regarding whether LHWCA applies to the employee's claim, it will generally hold the case in abeyance.[263] The LHWCA is similar to FECA in that a "third party . . . subject to liability for injuries covered under LHWCA may maintain an indemnity action against the United States. . . ."[264] (something service members cannot do), The LHWCA does not bar discrimination claims (again, something that is barred for service members), and LHWCA cases are appealable in federal court (not so for service members).[265]

Each of these programs reflects the values and trade-off in what has been called the "grand bargain" underlying workers compensation:[266] In exchange for foregoing the right to bring a civil action in tort, a person gains access to a more simplified administrative no-fault

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260 42 U.S.C. §§ 1651–54 (2012).

261 DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION, U.S. DEPARTMENT OF LABOR, LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT FREQUENTLY ASKED QUESTIONS (last visited Sept. 22, 2018) https://www.dol.gov/owcp/dlhwc/FAQ/lsfaqs.htm.

262 1 CIV. ACTIONS AGAINST THE U.S. § 2:10 (2018) (because LHWCA disputes are between two private parties, the question of whether LHWCA bars constitutional claims is generally not at issue).

263 *Id.* (citing Wilder v. U.S., 873 F.2d 285 (11th Cir. 1989)). Unless an administrative decision is made on the applicability of the LHWCA, an employee's acceptance of a voluntary LHWCA award is not conclusive in barring the employee's ability to sue under the FTCA.

264 *Id.* (citing Eagle-Picher Industries, Inc. v. U.S., 937 F.2d 625 (D.C. Cir. 1991)).

265 Warner v. Contract Claims Servs., Inc., 2017 LEXIS 182567 (E.D.N.C. 2017).

266 Hendrix v. Alcoa, Inc., 506 S.W.3d 230 (Ark. 2016); Cross v. Slayter Trucking Cos., 206 So. 3d 1124, 1130-31 (La. App. 2016); Collins v. COP Wyo., LLC, 366 P.3d 521, 527 (Wyo. 2016); Vasquez v. Dillard's, Inc., 381 P.3d 768, 786, (Okla. 2016); Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 676-77 (Iowa 2015); Whedbee v. N.D. Workforce Safety & Ins. Fund, 845 N.W.2d 632, 637 (N.D. 2014).

system to address the costs of an injury.[267] However, all of the programs, except the military compensation scheme, allow for discrimination claims in federal court. All of the programs, except the military compensation scheme, rely on federal courts to determine if the various compensation programs are applicable. While there are undoubtedly other distinctions, e.g., most of these programs exclude intentional torts,[268] one thing is clear: while the idea of limiting access to civil tort actions in certain situations is not unique to the armed forces, the incidence of unchecked and undeterred misconduct in the military described in this article powerfully suggest the need for change. In the closed universe of military justice and administrative compensation, something is amiss. It stands to reason that the *Feres* bar has played a central role by greatly limiting the deterrent impact of civil judgements, allowing gross misconduct to occur without consequences.

V. THE CURRENT *FERES* ENVIRONMENT

The *Feres* doctrine, like the scope of the DFE,[269] has been the topic of endless discussions and the target of frequent criticism.[270] While there is no general agreement on the

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267 Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017,* 69 RUTGERS U. L. REV. 891 (2017); *but see* Price V. Fishback, *Long-Term Trends Related to the Grand Bargain of Workers' Compensation*, 69 RUTGERS L. REV. 1185 (2017) (commenting on and disagreeing in part with Emily Speiler's article).

268 Matthew K. Brown, Note, *How Exclusive Is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret,* 65 OKLA. L. REV. 75 (2012); *see* Okla. Stat. § 302 (2011) (access to court is barred "except in the case of an intentional tort, or where the employer has failed to secure the payment of compensation for the injured employee...").

269 Jonathan A.Bruna, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Torts Claims Act*, 49 HARV. J. ON LEGIS. 412 (2012); Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exemption to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259 (2009); Lawrence Kaminski, Comment, *Torts – Application of Discretionary Function Exception of Federal Tort Claims Act,* 36 MARQ. L. REV. 88 (1952) (noting the confusion generated by the discretionary function exception).

270 Jennifer L. Zyznar, Comment, *The Feres Doctrine: "Don't Let This Be It. Fight!,* 46 J. MARSHALL L. REV. 607, 626 (2013); Melvani, *supra* note 16, at 428-29; Kenneth R. Wiltberger, Note, *The Carmelo Rodriguez Military Medical Accountability Act of 2009: An Opportunity to Overturn the Feres Doctrine As It Applies to Military Medical Malpractice,* 8 AVE MARIA L.

best next step in a post-*Feres* legal universe, a real change, and not just juridical side-stepping, is needed. Isolated examples of "work-arounds" where *Feres* did not block a claim, e.g., the *Agent Orange* decision,271 or the compensation provided for exposure injuries and open pit burns,272 are hardly an answer. Most cases end up with limited or no recourse.273 For example, the attempt to address water toxicity at Camp Lejeune provided for notification and only limited benefits – and then only to those stationed at the camp.274 There was also a proposal to create a separate compensation system for military victims of sexual assault and harassment.275 None of these examples, however, would open the courthouse doors to claims by service members.

REV. 473, 497-98 (2010); Turley, *supra* note 34, at 10; David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992, 996-97 (1986); Feldmeier, *supra* note 49, at 150; Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 15 (2007); Jennifer L. Carpenter, Comment, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine*, 26 U. HAW. L. REV. 35, 59-60 (2003); Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091, 1109-10; Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?* 47 CLEV. ST. L. REV. 335, 345 (1999).

271 Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, § 3 (2006); 38 C.F.R. § 3.307, 3.309 (2018).

272 Dignified Burial and Other Veterans' Benefits Improvement Act of 2012, Pub. L. No. 112-260, § 201(a)(1), 126 Stat. 2417, 2422 (2013).

273 Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439 (2005) (reviewing various routes through and around the discretionary function exception); Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93 (1985) (arguing that too many intra-military actions are barred).

274 *See, e.g.*, S. 277, 112th Cong. (2011) (providing hospital care, medical services, and nursing home care for any illness acquired by veterans and family members who were stationed at Camp Lejeune); Janey Ensminger Act, H.R. 4555, 111th Cong. (2010) (directing the Secretary of Veterans Affairs to furnish hospital care, medical services, and nursing home care to veterans who were stationed at Camp Lejeune).

275 Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and Harassment,* 222 MIL. L. REV. 211, 240-59 (2014).

The last major legislative proposal, the Carmelo Rodriguez Malpractice and Injustice Act,[276] was presented to Congress in 2009.[277] The bill[278] sought to amend the FTCA to "allow claims for damages to be brought against the United States for personal injury or death . . . arising out of . . . medical, dental, or related [malpractice]."[279] The bill was to honor Sgt. Carmelo Rodriguez who died after a military doctor misdiagnosed a deadly malignant melanoma.[280] Even after hearings[281] which made clear that service members, "would not be allowed to bring suits 'arising out of . . . armed conflicts,'"[282] negotiations broke down and the bill died when differences could not be resolved between those who wanted to enhance the intra-military compensation system and those seeking to undo *Feres*.[283]

The last time the Supreme Court granted *cert* in a *Feres* case where major change seemed quite possible was *United States v. Johnson* in 1987.[284] In *Johnson*, plaintiff died in a rescue mission while on board a HH-52 Seaguard.[285] The crash was attributed to the negligence of civilian FAA air traffic controllers.[286] The decedent's estate argued that *Feres* should not apply

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276 Feldmeier, *supra* note 49 (broad discussion of the Carmelo Rodriguez Military Accountability Act).

[277] Byron Pitts, *Case Sheds Light on Military Law*, CBS NEWS (Oct. 12, 2008, 7:20 PM), https://www.cbsnews.com/news/case-sheds-light-on-military-law/.

[278] U.S. CONGRESS, ACTIONS OVERVIEW: H.R. 1478 — 111TH CONGRESS (2009-2010).

279 U.S. CONGRESS, SUMMARY: H.R. 1478 — 111TH CONGRESS (2009-2010).

[280] Byron Pitts, *Military Can't Be Sued For Malpractice*, CBS NEWS (Mar. 24, 2009, 6:43 PM), https://www.cbsnews.com/news/military-cant-be-sued-for-malpractice/.

[281] *See generally, Carmelo Rodriguez Military Medical Accountability Act of 2009*, Hearing before the Subcomm. on Comm. and Admin. Law, 111th Cong. 7 (2009).

[282] *Id.* at 2.

[283] U.S. CONGRESS, *supra* note 277; U.S. CONGRESS, ACTIONS OVERVIEW: S. 1347 — 111TH CONGRESS (2009-2010).

[284] Patricia Kine, *Tragedy and Injustice: The Heartbreaking Truth About Military Medical Malpractice*, MILITARY TIMES (Jul. 10, 2016), https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2016/07/10/tragedy-and-injustice-the-heartbreaking-truth-about-military-medical-malpractice/.

[285] United States v. Johnson, 481 U.S. 681, 682 (1987).

[286] *Id.*

because (1) the FAA is a civilian agency, and (2) the actions leading to the crash were not incident to service. The Court, however, rejected both arguments[287] and left little room for doubt regarding *Feres*: "This Court has never deviated from this characterization of the *Feres* bar. . . in the close to 40 years since it was articulated. . . ." [288] Passing the buck somewhat, the Court noted that Congress has the power to alter the rule if it determines that *Feres* was a misinterpretation of the FTCA.289 As noted earlier in this article, it is in the *Johnson* dissent that Justice Scalia and others concluded that "*Feres* was wrongly decided. . . ."[290] At different points, Justices Ginsburg and Thomas also imply that the *Feres* doctrine, at a minimum, deserves a second look,[291] but despite having a number of opportunities to do so, the Court has left *Feres* unchanged.[292]

Frustration with the expansive interpretation of "incident to service," (and without expressing whether Congress or the Court should act) Professor Richard Custin wrote, "the ruling should be addressed because it unfairly discriminates against military personnel, essentially stripping them. . . of a civil right. . . . [B]abies? Birth injuries? That's not incident to service. [Malpractice causing] your appendix [to] rupture. . . .That's not incident to service."[293]

Notwithstanding the concerns and criticisms noted in this article, there remains clear and understandable opposition to change. Within the ranks, Dr. Jonathan Woodson, former Assistant Secretary of Defense for Health Affairs, warned that "chaos" would result if troops were allowed

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[287] *See generally id.*

[288] *Id.* at 686.

289 *Id.*

[290] *Johnson*, 481 U.S. at 700–701 (Scalia, J., dissenting) (quoting *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)).

[291] Kine, *supra* note 283.

[292] *See generally* Ortiz v. United States, 137 S.Ct. 1431 (2017); Ritchie v. United States, 134 S.Ct. 2135 (Mem.) (2014); Read v. United States, 571 U.S. 1095 (2013); Witt v. United States, 564 U.S. 1037 (2011); and Hafterson v. United States, 558 U.S. 948 (2009).

[293] Patricia Kine, *Tragedy and injustice: The heartbreaking truth about military medical malpractice*, MILITARY TIMES (July 10, 2016), https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2016/07/10/tragedy-and-injustice-the-heartbreaking-truth-about-military-medical-malpractice/.

to sue for injuries.[294] Maj. Gen. John Altenburg, Jr. (Ret.), would instead prefer to improve the current benefits system.[295] In academia, there is also meaningful and solid scholarship[296] supporting *Feres* including Professor Paul Figley's eloquent defense of the doctrine (along with a suggestion of how the doctrine could be clarified).[297] Professor Figley's analysis is consistent with the reasoning in *Feres* and *Stencel Aero Engineering. v. United States.*[298]

Stencel applies *Feres* to a broad range of claims that could be brought *by* various third parties and government contractors against the federal government. It relies on the same reasoning as *Feres*: the necessity of preserving the chain-of-command, the unique nature of the military, and the importance of allowing discretionary and command judgements to remain in the military and not second-guessed by federal courts.[299] The *Feres-Stencel* doctrine has also barred claims initiated by injured service members *against* third parties and government contractors, rendering those contractors practically immune from civil tort litigation in fields as diverse as product liability and medical services.[300]

Notwithstanding the stubbornly unchanging position of the Court, in the ranks, and in some corners of the legal professoriate, the tone of a number of circuit courts is wistful, unenthusiastic, decrying the unsoundness, harsh impact, or basic unfairness of *Feres,* while

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[294] Pitts, *supra* notes 276, 279.

295 An up-to-date comprehensive summary of many benefits are available in: MILITARY COMPENSATION BACKGROUND PAPERS (8th ed. 2018), https://www.loc.gov/rr/frd/mil-comp.html.

296 Dawson, *supra* note 15, at 498.

297 Paul Figley, *supra* note 179; Joan M. Bernott, *Fairness and Feres: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51 (1987).

298 Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977).

299 Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 237 (1963) (arguing that courts are not the proper forum to "determine whether complex government decisions are 'reasonable.'").

300 McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983) (Feres-Stencel provides de facto immunity for tort claims), *cert. denied* 464 U.S. 1043 (1984).

recognizing the case as binding precedent.[301] Consider *Daniel v. United States*,302 a wrongful death/malpractice case. After childbirth in a military hospital, Lt. Daniel began hemorrhaging. Those entrusted with her care failed to take the appropriate steps to stop the bleeding and she died in a few hours.[303] The District Court found it had no option but to dismiss the claim based on *Feres* "unless and until Congress or the Supreme Court choose to confine the unfairness and irrationality that *Feres* has bred. . . ."[304] The Ninth Circuit agreed,[305] acknowledging that "[i]f ever there were a case to carve out an exception to the *Feres* doctrine, this . . . is it," but noted that "only the Supreme Court has the tools to do so."[306] A petition for certiorari is currently pending.[307]

Similarly, in *Ortiz v. United States*,[308] a malpractice case where errors made during a caesarian section led to significant deficits in a child,[309] the Tenth Circuit declared that "the facts . . . exemplify the over breadth (and unfairness) of the doctrine, but *Feres* is not ours to

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[301] *See generally* Daniel v. United States 889 F.3d 978 (9th Cir. 2018); Ortiz v. United States, 786 F.3d 817 (10th Cir. 2015); Read v. United States, 536 Fed. Appx. 470 (5th Cir. 2013); Ritchie v. United States, 733 F.3d 871 (9th Cir. 2013); Witt v. United States, 379 Fed. Appx. 559 (9th Cir. 2010); Hafterson v. United States, 2008 WL 4826097, No. 3:08-cv-533-J-16MCR (M.D. Fl. 2008).

302 *Daniel*, 889 F.3d at 980.

[303] *Id.*

[304] Daniel v. United States, 2016 U.S. Dist. LEXIS 7443 (W.D. Wash. 2016).

[305] *See generally Daniel*, 889 F.3d at 978.

[306] *Daniel*, 889 F.3d at 982.

[307] Rehearing, en banc, denied by Daniel v. United States, 2018 U.S. App. LEXIS 19540 (9th Cir. Wash. 2018), Petition for certiorari filed at, 10/11/2018; JoNel Aleccia, *Widower Takes Ban on Military Injury Claims to Supreme Court,* MILITARY.COM (Oct. 14, 2018), https://www.military.com/daily-news/2018/10/14/widower-takes-ban-military-injury-claims-supreme-court.html.

[308] Ortiz v. United States, 2013 WL 5446057, No. 12-cv-01731-PAB-KMT, 1 (2013); Patricia Kine, *Military Family Pushes Supreme Court to Consider Malpractice Claim*, MILITARY TIMES (Dec. 21, 2015), https://www.militarytimes.com/news/your-military/2015/12/21/military-family-pushes-supreme-court-to-consider-malpractice-claim/.

[309] *Ortiz*, 2013 WL 5446057, at 1-2.

overrule."[310] Quoting *Costo v. United States* the court, "join[ed] 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."[311]

Similar sentiments were voiced in *Ritchie v. United States*,[312] a wrongful death action filed after malpractice during pregnancy led to the death of plaintiff's infant son.[313] The District Court acknowledged that "a child's premature birth and subsequent death would be devastating to any parent," but dismissed the claim "[b]ecause the *Feres* doctrine applies. . . ."[314] The Ninth Circuit affirmed: "In light of Supreme Court and our own precedent, we *regretfully* conclude that [*Feres* bars the claim]."[315][emphasis added]

In *Witt v. United States*,[316] surgical malpractice left plaintiff in a permanent vegetative state. The District Court dismissed, noting that "the alleged facts [were] so egregious and the liability of the Defendant [seemed] so clear," the court "did give serious consideration to Plaintiff's argument that this Court should allow [the] claim in spite of *Feres*. . . "[317] On appeal the court found it was "bound by precedent of the Supreme Court . . . to affirm the . . .

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[310] *See generally Ortiz*, 2013 WL 5446057 at 7; *see generally* Ortiz v. United States, 786 F.3d 817, 818 (10th Cir. 2015).

[311] *Id.* at 823 (quoting Costo v. United States, 248 F.3d 863, 869 (9th Cir. 2001)).

[312] *Claims Against the Military*, MILITARY LAW CENTER (last accessed Oct. 14, 2018, 7:33 PM), https://militarylawcenter.com/practice-area/claims-government/ (exploring the possibilities and process a service member might use without any change to *Feres* to initiate a civil tort claim in an Article III court.).

[313] Ritchie v. United States, 733 F.3d 871 (9th Cir. 2013), *cert. denied* 2014 U.S. LEXIS 3142 (U.S. 2014).

[314] Ritchie v. United States, 2011 U.S. Dist. LEXIS 45057 (D. Haw. 2011).

[315] *Ritchie*, 733 F.3d at 873.

[316] Witt v. United States, 2009 WL 10690924, No. 2:08-CV-02024, 1 (E.D.C.A. 2009).

[317] Witt v. United States, 2009 U.S. Dist. LEXIS 9451 at 5.

dismissal."[318] In *Hafterson v. United States*, another malpractice/wrongful death case,[319] the court found that "[d]espite Plaintiffs' well-reasoned opposition to [the] application of the *Feres* doctrine, it is clear that this case cannot escape the doctrine's broad reach."[320]

In *Colton Read v. United States*, a military surgeon sliced into the plaintiff's aorta in the course of routine gallbladder surgery.[321] The court held as follows: "Irrespective of criticism of the *Feres* doctrine . . .the government remains immune [because] Colton Read's injuries were 'incident to service' and not actionable under the FTCA."[322]

As the above cases suggest, while there are expressions of regret regarding the doctrine, there is also nearly uniform adherence to *Feres*. Those who have studied the doctrine,[323] urge "comprehensive change,"[324] to "permit the adjudication of personal injury and death claims. . . ."[325] Others urge an "impact on military discipline" test to "define 'incident to service,'" to

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[318] Witt v. United States, 379 Fed. Appx. 559, 560 (9th Cir. 2010); Witt v. United States, 2010 U.S. App. LEXIS 9953 (9th Cir. Cal. 2010).

[319] Hafterson v. United States, 2008 WL 4826097, No. 3:08-cv-533-J-16MCR, 1 (M.D.F.L. 2008); Hafterson v. United States, 2008 U.S. Dist. LEXIS 91811 at 6.

[320] *Id.* at 2.

[321] Read v. United States, 2012 WL 5914215, No. SA-12-CV-910-XR, 1 (W.D.T.X. 2012).

[322] Read v. United States, 536 Fed. Appx. 470, 472-73 (5th Cir. 2013).

[323] *See generally* Melvani, *supra* note 16, at 398 (*Feres* has rendered service members "second-class citizens, whose rights fall below even those of the nation's criminals. . . . [The] *Feres* bar undermines the quality of healthcare provided to the nation's military forces by preventing accountability for egregious mistakes and shortcomings in medical treatment."); Turley, *supra* note 34, 43 ("Military medical malpractice has long been a subject of intense criticism. This record may reflect the absence of malpractice as a deterrent in the military medical system due to the application of the Feres doctrine." [footnotes omitted]); Feldmeier, *supra* note 49; Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992).

[324] Feldmeier, *supra* note 49, at 178 (citing Maj. Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine,* THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 102–103 (2007)).

[325] Feldmeier, *supra* note 49, at 180 (citing *The Feres Doctrine and Military Med. Malpractice: Hearing on S. 489 and H.R. 3174*, Before the Subcomm. on Admin. Prac. and Proc. of the Senate Comm. on the Judiciary," 99th Cong. 64, 77 (1986) (statement of Michael F. Noone)).

"cure the ills of this doctrine and protect the rights of our nation's service members."[326] If one assumes there are currently injuries and related claims that are in no way incident to anything remotely resembling military service (sexual assault and clear or gross malpractice come to mind), what options exist to provide access to justice in Article III courts? The Court and Congress unquestionably have the capacity to undo *Feres*,– but then what?

VI. RECOMMENDATIONS AND CONCLUSION

There are, at a minimum, three options:

(1) Leave *Feres* and the FTCA as is;

(2) By congressional or judicial action, overrule *Feres* and do nothing further, in which case, service related civil tort claims against the government would have to be based on the FTCA, limited unpredictably by the DFE, mimicking the uncertain civil tort environment between 1946 and 1950;

(3) Overrule *Feres*, amend the FTCA, and specify those behaviors, events, practices, or actions that are not incident to or essential for service and therefore potentially actionable.[327]

Option three is the best course.

To start, option one is out – as is suggested throughout this article, *Feres* has run its course, spawned an epidemic of undeterred misconduct, and left countless thousands of innocent victims without remedy, without justice, and without their day in court.

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[326] Thomas M. Gallagher, *Servicemembers' Rights under the Feres Doctrine: Rethinking Incident to Service Analysis*, 33 VIL. L. REV. 175, 202-203 (1988).

[327] If this set of options sounds familiar, perhaps it is because they boil down to the same options facing Congress as it debates healthcare – leave the ACA as is, repeal, or repeal and replace. Sean Sullivan, *Republicans abandon the fight to repeal and replace Obama's health care law*, WASHINGTON POST (Nov. 7, 2018), https://www.washingtonpost.com/powerpost/republicans-abandon-the-fight-to-repeal-and-replace-obamas-health-care-law/2018/11/07/157d052c-e2d8-11e8-ab2c-b31dcd53ca6b_story.html?utm_term=.b32a0712d191; *ACA Repeal/Replace,* https://www.afp.org/media-center/kits/aca-repeal-replace.html

Option two is also inadvisable. Were *Feres* overruled without further clarification, there would be unpredictable and discordant exposure to tort liability under the FTCA as well as a continuation of irrational limitations on liability due to the multiple exceptions in the FTCA including, of course, the expansive DFE.[328] The DFE has expanded beyond any fair interpretation of the text of the statute and precludes meritorious claims while securing "nothing of value except perhaps a modest savings in litigation costs."[329] Without amendments, the FTCA alone would leave victims in the Neverland of the DFE, the "broadest and most criticized" of the thirteen enumerated exceptions to that Act.[330]

That more of a change is needed seems obvious – hence, option three. The goal would be to help courts determine what actions are an *essential component of military service* (and therefore not actionable) and those that do not involve an *essential component of military service* (and are potentially actionable claims).

While this solution, at least initially, cannot resolve with certainty the question of the effect of civil liability on military discipline and chain-of-command, it would leave untouched the existing array of potent sanctions for misconduct, failure to follow lawful orders, or failure to comply with a host of regulations currently in place. These powerful mechanisms should be sufficient to prevent the chaos defenders of *Feres* fear. A limited number of civil tort cases focused on undeniable misconduct seem unlikely to prompt insubordination or a collapse of order and discipline. Instead, it is far more likely that overruling *Feres* and amending the FTCA will give justice to victims of wrongdoing and deter future misconduct.

On that point, it is fair to wonder whether the incidence of sexual assault, domestic violence, clear or gross medical malpractice, physical abuse, and similar wrongs would decline in the presence of the potential for governmental tort liability. Does the potential for money

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328 *Id.* at 59–60 ("the [DFE] has more flexibility than the *Feres* doctrine because the DFE allows [for] a case-by-case analysis. . . .").

329 Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. LEGIS. 411, 414–15 (2012).

330 Feldmeier, *supra* note 49.

damages in a civil court deter future misconduct if the actors in question do not pay but the federal government does?[331]

First, at a personal level, litigation forces victims and alleged wrongdoers to re-live some of the worst moments of their lives. Cases of this type are painful and jarring. No one with even a passing understanding of our legal system would look forward to the essential rigors of civil litigation. That alone is a deterrent force. Second, a finding of fault in civil courts may have a real and direct effect on those accused of wrongdoing. It takes no imagination to anticipate that a finding of liability in an Article III court predicated on a determination of misconduct could activate an inquiry and may be the opening shot for the initiation of disciplinary proceedings within the military justice system. Third, at a governmental level, it would be fanciful to assume there would be no deterrent effect from civil tort litigation. Like any entity anywhere, our military services will do what they can to make sure they are not hauled into court. There is, then, much to be gained (and unfortunately much to be deterred) from the imposition of liability.

Whether there will be beneficial consequences from opening the courthouse doors is a question more easily answered than the extent to which civil liability will affect the command structure on which the military must depend. The necessity of following lawful orders without question is vital to all missions our military undertakes. Similarly, unlike many walks of public and private life, there is a physicality to the military training experience that is both essential and, on occasion, painful and harsh.[332] Training is not just athletic conditioning. Troops training for combat must be pushed to the limits of their endurance, both physically and psychologically. To create individuals and units that act with a common purpose, a willingness to risk one's life for one's comrades, the starting point is often stripping recruits of practices, habits, and ideas they bring with them to the service and replacing those beliefs with the values of mission, task, country, command, service, and more.

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331 Figley, *supra* note 286, at 464 ("if Feres did not exist, the Department of Defense would be no more responsive to financial deterrence than it is with Feres.").

332 Jon Mixon, U.S.A.F. (Ret.), *Why is the Military So Strict and Tough?* MILITARY1 (2018), https://www.military1.com/army/article/538486-why-is-the-military-so-strict-and-tough/.

The kind of training and service just described involves actions, outside of the military, that could be seen as tortious but in fact are vitally important. Such actions cannot be the basis of civil tort liability.[333] Like injuries sustained in combat or armed conflict, these would be harms sustained in actions not just incident to but essential to military service and for such harms, there is no place for civilian courts to be reassessing essential military judgements.

Accordingly, the best approach is not an open-ended civil tort universe where any potentially actionable behavior in the military could become the subject of litigation. Instead, this recommendation identifies only seven specific behaviors that are actionable. The following actions or behaviors should be excluded from the rights limiting regime spawned by the DFE and *Feres*:

1. Sexual assault (is not essential to military service).

2. Rape (is not essential to military service).

3. Extreme physical violence or acts that fall within the definition of torture, domestic violence, and child abuse (are not essential to military service).

4. Acts of clear or gross medical malpractice (are not essential to military service).[334]

5. Exposure of service members to pharmaceuticals, narcotics, or toxins *without informed and voluntary consent* (is not essential to military service).[335]

6. While in military service, acts of driving under the influence of drugs or narcotics on more than one occasion (is not essential to military service).

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333 Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("Civilian courts must . . . hesitate long before entertaining a suit which asks 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.").

334 There are many definitions of "gross" but the term is used here to connote actions that are, by clear measure, undeniably malpractice. W. PAGE W. KEETON, ET. AL, PROSSER AND KEETON ON TORTS § 34, at 211, 212 (5th ed. 1984). *See e.g.*, NMP Corp. v. Parametric Tech. Corp., 958 F. Supp. 1536, 1546 (N.D. Okla. 1997); Kenneth W. Simmons, *Rethinking Mental States*, 72 B.U.L. REV. 463 (1992) (discussing the many and varied meanings of the term "gross").

335 Jonathan D. Moreno, UNDUE RISK: SECRET STATE EXPERIMENTS ON HUMANS 13-52 (2001).

7. Acts or patterns of invidious discrimination on the basis of race, religion, ethnicity, or gender (are not essential to military service).

The above actions are as intolerable in military life as in civilian life. Those who have been victims of such acts should be able to pursue their claims in Article III courts, the system of justice they pledged to defend. In this model, the UCMJ is unchanged and unaffected. The approved intense, demanding, painful, and harsh physical and psychological demands of training are not lessened. Discipline, chain-of-command, tradition, efficiency, following unquestioningly all lawful orders, all paramount considerations, are not disrupted.

When those who engage in misconduct are held accountable, when government is obligated to remedy those wrongs, respect for order, discipline, and all standards will increase. When uniformly condemned actions are subjected to public scrutiny in Article III courts, the probability of future similar misconduct will decline.

Assuming this recommendation is followed, it would only make sense for Congress to revisit the impact of the amendment to the FTCA within a few years and assess whether limited exposure to tort liability impedes, improves, or has no discernible effect on the capacity of our armed forces to carry out all essential functions.[336] In the meantime, as the courthouse doors open partially, those who engage in the unquestionable misconduct described throughout this article will be subject to legal sanctions, and those victimized will finally have their day in court.

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