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Reconsidering *Feres*: A New Framework for Military Sexual Assault

Sarah Ann Purtill *

Since the Supreme Court's 1950 decision in Feres v. United States*, military servicemembers have been largely unable to recover for their injuries under the Federal Tort Claims Act. This Note proposes that courts read an exception to* Feres *where the Department of Defense has violated its own mandatory rules and regulations. This reading is consistent with the Court's precedents; resolves several enduring doctrinal ambiguities; and creates a pathway to justice for victims of military sexual assault.*

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INTRODUCTION

> We can think of no other judicially-created doctrine which has been criticized so stridently, by so many jurists, for so long . . . . Yet, unless and until Congress or the Supreme Court choose to confine the unfairness and irrationality that [*Feres*] has bred, we are bound.[1]

For seventy years, military servicemembers have been largely unable to recover for their injuries under the Federal Tort Claims Act (FTCA). From the outset, FTCA liability was limited in cases involving discretionary functions of government,[2] and for injuries sustained at war[3] and abroad.[4] During these early years, servicemembers successfully recovered for injuries outside the scope of their military duties.[5] In 1950, however, the Supreme Court in *Feres v. United States* created a broad exception to liability under the FTCA for injuries sustained "incident to [military] service."[6] This

1. Ritchie v. United States, 733 F.3d 871, 878 (9th Cir. 2013).
2. *See* 28 U.S.C. § 2680(a); Freeman v. United States, 556 F.3d 326, 334 (5th Cir. 2009).
3. *See* 28 U.S.C. § 2680(j).
4. *See id.* § 2680(k).
5. *See, e.g.*, Brooks v. United States, 337 U.S. 49 (1949) (allowing recovery when servicemember plaintiff was struck by an Army truck while off-duty).
6. 340 U.S. 135, 146 (1950).

atextual carveout was later rationalized as necessary to military discipline,[7] but has been used to bar claims stemming from recreational activities,[8] medical malpractice,[9] and even some claims brought by civilian third parties.[10] Much has been said about the injustice wrought by *Feres.*[11] Servicemembers have experienced "uniform nonrecovery"[12] under the FTCA under conditions increasingly removed from military service. Most recently, scholarly attention has turned to *Feres*-barred claims of military sexual harassment and sexual assault.[13]

There is an epidemic of sexual violence in the military. Approximately 38% of female and 4% of male military personnel and veterans have experienced military sexual trauma (MST), defined as sexual assault or sexual harassment occurring during military service.[14] Approximately 80% of survivors have opted not to report the crime in recent years.[15] In light of

7. *See* United States v. Brown, 348 U.S. 110, 112 (1954).

8. *See, e.g.*, McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007) (barring servicemember's claim for an injury sustained while using a government owned motorboat).

9. *See, e.g.*, Ortiz v. United States, 786 F.3d 817, 818 (10th Cir. 2015) (barring claim that medical malpractice caused a servicemember's child to be born with permanent brain injury).

10. *See id.* at 831; *see also* Mondelli v. United States 711 F.2d 567, 568 (3d Cir. 1983) (rejecting claims of a civilian child born with cancer linked to servicemember parent's exposure to radiation).

11. *See generally* Andrew F. Popper, *Rethinking* Feres*: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1497 n.28 (2019) (compiling sources).

12. United States v. Johnson, 481 U.S. 681, 694-96 (1987) (Scalia, J., dissenting).

13. *See, e.g.*, Jeffrey Critchlow, Note, *Propping Open the Courthouse Door: Why Service Members Should Be Able to Bring Sexual Harassment Suits Under the* Feres *Doctrine*, 104 IOWA L. REV. 855 (2019); Popper, *supra* note 11, at 1510; Katherine Shin, Note, *How the* Feres *Doctrine Prevents Cadets and Midshipmen of Military-Service Academies from Achieving Justice for Sexual Assault*, 87 FORDHAM L. REV. 767 (2018)

14. *Facts on United States Military Sexual Violence*, PROTECT OUR DEFENDERS (2018), https://www.protectourdefenders.com/wp-content/uploads/2019/01/1.-MSA-Fact-Sheet-180628.pdf [https://perma.cc/UCP7-JC3G].

15. *Id.*

the well-documented failures of military justice,[16] some survivors have sought relief under the FTCA to hold military leadership accountable. However, their claims have been uniformly precluded by *Feres* as "incident to service,"[17] to the dismay of both the survivors and the courts dismissing their claims. As one judge lamented, "[s]urely, no one should suggest that when young Americans sign up for military service, they can expect that potential sexual assaults upon them will be routinely considered 'incident' to that service. . . . It is my hope that the expansive reach of *Feres* will be revisited."[18] Indeed, scholars and practitioners alike have called on Congress and the Supreme Court to overturn *Feres*—to no avail.[19]

Given the current legal landscape, this Note seeks to identify an alternate possibility for legal recourse and deterrence of sexual harassment and sexual assault in the military. It argues for the first time that courts should read an exception to the *Feres* doctrine where the Department of Defense (DoD)[20] has violated its own mandatory rules and regulations. This reading is consistent with the letter of the FTCA, *Feres*, and its controlling progeny. It restores the appropriate functions of the executive and judicial branches vis-à-vis each other, with special deference to military decision making. And it resolves persistent ambiguities in the doctrine. Some lower courts read *Feres* to bar claims stemming from officers' failure to enforce

16. *See generally* Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy*, 11 OHIO ST. J. CRIM. L. 579 (2014) (discussing failures of the military justice system to redress sexual misconduct and proposing reforms).

17. *See, e.g.*, Gonzalez v. United States Air Force, 88 F. App'x 371 (10th Cir. 2004); O'Neill v. United States, 140 F.3d 564 (3d Cir. 1998); Stubbs v. United States, 744 F.2d 58 (8th Cir. 1984).

18. *Gonzalez*, 88 F. App'x at 379 (Lucero, J., concurring).

19. Following decades of advocacy against *Feres*, the National Defense Authorization Act for 2020 created a very limited exception to *Feres* for some medical malpractice cases. *See* Patricia Kime, *A Dent to Feres: Troops to Be Able to File Claims — But Not Sue — for Medical Malpractice*, MILITARY TIMES, Dec. 11, 2019 (summarizing the legislative change). In the last several years, the Supreme Court has denied certiorari in cases requesting reconsideration of *Feres*. *See, e.g.*, Daniel v. United States, 139 S. Ct. 1713 (2019); Jones v. United States, 139 S. Ct. 2615 (2019); Lanus v. United States, 570 U.S. 932 (2013).

20. This Note uses DoD as shorthand to refer to the departments charged with coordinating and supervising functions of its military employees. As a formal matter, the Coast Guard is within the Department of Homeland Security (DHS), not the DoD. Wherever this Note refers to DoD, the reader can assume an analogy to DHS with respect to its Coast Guard employees.

sexual assault prevention and response policy, seemingly out of fear that this failure is "discretionary" or else requires a "direct inquiry into military judgments."[21] This Note, however, argues that such a failure is more likely to disrupt than facilitate military discipline. In the interest of military discipline, the courts should be inclined against a default exception to FTCA liability in such cases.

My proposal to limit the scope of the *Feres* doctrine proceeds in five parts. Part I provides an overview of *Feres* and its progeny, distilling principles that have informed its overbroad application among the lower courts. Part II highlights three ambiguities in the current formulation of the *Feres* doctrine: the treatment of military service academy cadets and dual-status technicians; the treatment of injuries sustained "off-duty"; and the scope of protected military decisionmaking. While these ambiguities feature in a range of cases, they are particularly relevant in the context of MST claims. Part III proposes a new account of the *Feres* doctrine. It argues that *Feres* does not encompass injuries that occur when the military violates its own mandatory rules and regulations, and that such a reading restores the appropriate functions of the military and the courts. Part IV highlights the account's ability to resolve the ambiguities discussed in Part II. Finally, Part V situates this account within the statutory scheme and suggests additional reforms to address gaps and overlaps in access to justice for military servicemembers.

I. THE CURRENT DOCTRINE

This Part provides an overview of the *Feres* doctrine and its progeny cases. It lays the groundwork for evaluating ambiguities in the application of *Feres* to MST cases, and for evaluating this Note's new framework for applying *Feres.* Section I.A situates the *Feres* doctrine in historical context with a brief discussion of its creation and the evolution of its military discipline rationale. Section I.B analyzes the current doctrine as applied among the lower courts.

21. *See* United States v. Johnson, 481 U.S. 681, 691 n.11 (1987) (establishing this standard under *Feres*).

A. Background on Feres

In 1946, Congress waived its sovereign immunity from suit with the passage of the FTCA.[22] This statute created liability "in the same manner and to the same extent as a private individual under like circumstances,"[23] including for torts involving "members of the military or naval forces" and "the military departments."[24] This broad grant was cabined by several enumerated exceptions, including claims "arising out of the combatant activities . . . during time of war";[25] "arising in a foreign country";[26] or based upon the "exercise . . . or the failure to exercise . . . a discretionary function."[27] These limited statutory exclusions did not encompass all claims related to military service.

For the first four years after its adoption, the Court allowed servicemembers to bring claims under the FTCA for injuries not "incident to service," including for injuries sustained by a servicemember struck by an Army truck while off-duty and off-base.[28] In 1950, however, the Court consolidated three cases involving servicemember claims against the military in *Feres v. United States*. In the first of these cases, the executrix of Rudolph Feres sought to recover for his death in a barracks fire. Mr. Feres was allegedly quartered in barracks with a defective heating plant and inadequate fire watch. The second plaintiff, Arthur Jefferson, sought to recover after an army surgeon left a towel in his stomach during abdominal surgery. In the third case, the executrix of Dudley Griggs sought to recover for his death in connection with medical malpractice by army surgeons. The Court denied relief to all three plaintiffs, concluding that the government is not liable for injuries that "arise out of or are in the course of activity incident to service."[29]

22. KEVIN LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT: A LEGAL OVERVIEW 1 (2019), https://fas.org/sgp/crs/misc/R45732.pdf (summarizing exhaustion provision and cases) [https://perma.cc/94TM-CH5D].

23. 28 U.S.C. § 2674.

24. *Id.* § 2671.

25. *Id.* § 2680(j).

26. *Id.* § 2680(k).

27. *Id.* § 2680(a).

28. *See* Brooks v. United States, 337 U.S. 49, 53 (1949).

29. Feres v. United States, 340 U.S. 135, 136-38, 146 (1950). In *Feres*, an off-duty service member died in a fire at the barracks cause by a defective heating

The Court cited three justifications for its "incident to service" prohibition on servicemember recovery. First, it was concerned that there was no "parallel [private] liability" for uniquely governmental functions.[30] Second, it was dissatisfied that state law would govern the federal government's liability to servicemembers when servicemembers have no control over their geographic location.[31] Finally, the Court noted that servicemembers had access to alternative compensation under the Veterans Benefits Administration.[32]

None of these rationales were enduring. The Court abandoned the first in 1955;[33] the second as early as 1963;[34] and the third by 1954.[35] Yet the *Feres* doctrine endured anyway, rationalized *post hoc* in *United States v. Brown* as preventing suits that would unduly interfere with military discipline and the "peculiar and special relationship of the soldier to his superiors."[36] The Court was rightfully concerned that tort liability would

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plant. *Id*. at 137. The other two cases involved medical malpractice. *See* Jefferson v. United States, 178 F.2d 518, 519 (4th Cir. 1949); Griggs v. United States, 178 F.2d 1, 2 (10th Cir. 1950).

30. *Feres*, 340 U.S. at 141-42.

31. *Id.* at 143-44.

32. *Id.* at 145.

33. Indian Towing Co. v. United States, 350 U.S. 61, 66-69 (1955). The Court was troubled that the government would be liable for the negligent operation of a lighthouse if it "were to permit the operation of private lighthouses," but would not be liable for the same conduct if it did not permit parallel private operations. It thought that the Court "would be attributing bizarre motives to Congress were we to hold that it was predicating liability on . . . the presence or absence of identical private activity." *Id.* at 66-67.

34. United States v. Muniz, 374 U.S. 150, 162 (1963). Although variations in state law might theoretically impede uniform administration of the military, the Court will not assume any disruption "[w]ithout more definite indication of the risks of harm from diversity." *Id.* at 162; *see also* United States v. Shearer, 473 U.S. 52, 58 n.4 (1985) (noting that the second, "distinctively federal" rationale is no longer controlling).

35. United States v. Brown, 348 U.S. 110, 113 (1954) ("Congress could, of course, make the [disability] compensation system the exclusive remedy. . . . [But] Congress [gave] no indication that it made the right to compensation the veteran's exclusive remedy . . . . [T]he receipt of disability payments . . . did not preclude recovery under the [FTCA] but only reduced the amount of any judgment . . . .").

36. *Id.* at 112.

create incentives to behavior that are not in the best interest of national security.[37] Military command would "get bogged down in lengthy and possibly frivolous lawsuits [that may] substantially disrupt the military mission."[38] Moreover, the courts are ill-equipped to second-guess military decisions, which often involve sensitive issues and technical information.[39] In subsequent *Feres* cases, the Court reaffirmed the military discipline rationale, but otherwise provided little concrete guidance to courts applying the "incident to service" test. The scope of the doctrine thus expanded in ways that surprised and disheartened advocates.

B. The Status of Feres

The expansion of the *Feres* doctrine to the present reflects the dual influences of *stare decisis*[40] and "an increasing sense of awe for things military."[41] The current controlling law, restated in *Johnson*, is that "a suit based upon service-related activity necessarily implicates the military['s] judgments and decisions" and is thus *Feres*-barred.[42] Though ostensibly driven by a concern for military discipline, the Court found the *Feres* doctrine to preclude both *Bivens* actions brought by servicemembers,[43] and actions that do not involve an officer-subordinate relationship.[44] As the Ninth Circuit observed, "practically any suit that 'implicates . . . military judgments and decisions' runs the risk of colliding with *Feres*" after *Johnson.*[45] As a result, over the last thirty years, the lower courts have

37. Popper, *supra* note 11, at 1522-23.

38. *Id.* at 1523 (quoting Leo Shane III, *The Argument for Keeping the Feres Doctrine*, STARS & STRIPES (Apr. 2, 2012), https://www.stripes.com/news/the-argument-for-keeping-the-feres-doctrine-1.173370 [http://perma.cc/58RP-5PLY]).

39. *Id.*; *see also* United States v. Johnson, 481 U.S. 681, 690-92 (1987) (discussing that *Feres* barred some types of claims because they involve the judiciary in sensitive military affairs and mentioning the military as a specialized society).

40. *See Johnson*, 481 U.S. at 703 (Scalia, J., dissenting).

41. Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991).

42. *Johnson*, 481 U.S. at 691.

43. Chappell v. Wallace, 462 U.S. 296, 297-98 (1983).

44. United States v. Stanley, 483 U.S. 669, 683-84 (1987).

45. *Persons,* 925 F.2d at 295 (citation omitted) (quoting *Johnson*, 481 U.S. at 691).

interpreted the *Feres* doctrine to prevent recovery in an ever-expanding range of cases.

In its broadest application, the *Feres* doctrine functions as a status-based bar to recovery for military servicemembers and their families—without exception. The Tenth Circuit, for example, interprets the doctrine to bar "*all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military,"[46] including injuries sustained by an off-duty servicemember who was beaten by gang members in the parking lot of an officers' club,[47] and injuries sustained by a third-party child born disabled due to medical malpractice at a military clinic.[48] The Sixth Circuit similarly held servicemember claims barred "without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the . . . purpose of the military activity from which it arose."[49] Applying this standard, the court dismissed claims relating to the physical abuse of a Muslim recruit who was targeted by a fellow servicemember because of his religion,[50] as well as the claims of a servicemember struck by a drunk driver who consumed alcohol at an unsanctioned party attended by other military servicemembers.[51]

Other courts have interpreted *Feres* as a status-based bar to servicemember recovery, but recognize exceptions when a servicemember is not on duty. The Fifth Circuit explained that "what is relevant . . . is where [the claimant's] status is on a continuum between performing the tasks of an assigned mission to being on extended leave from duty."[52] By this standard, it dismissed the claims of a child injured by a vaccine negligently administered to his servicemember mother while she was pregnant.[53] The court dismissed his claim because his injury had its genesis in treatment related to his mother's military duty status. In another case, however, it allowed a servicemember to sue when she was injured on a recreational

46. Pringle v. United States, 208 F.3d 1220, 1223-24 (10th Cir. 2000) (quoting *Persons,* 925 F.2d at 296).

47. *Id.* at 1222.

48. Ortiz v. United States, 786 F.3d 817, 818, 832 n.18 (10th Cir. 2015).

49. Major v. United States, 835 F.2d 641, 644-45 (6th Cir. 1987) (footnote omitted).

50. Siddiqui v. United States, 783 F. App'x. 484, 486 (6th Cir. 2019).

51. *Major*, 835 F.2d. at 645.

52. Regan v. Starcraft Marine, LLC, 524 F.3d 627, 637 (5th Cir. 2008).

53. Scales v. United States, 685 F.2d 970, 970, 974 (5th Cir. 1982).

boat ride with a civilian company licensed to operate at the Army's facility.[54] The court determined that the injury's connection to her military status was "largely coincidental."[55]

The most permissive applications of the *Feres* doctrine acknowledge that military status is relevant to a *Feres* inquiry but consider several factors that determine whether an injury is "incident to service." In the Second Circuit, "military status does not automatically trigger *Feres* immunity."[56] Instead, "[i]n examining whether a service member's injuries were incurred 'incident to service,'" that Circuit "consider[s] various factors, with no single factor being dispositive."[57] Similarly, the Ninth Circuit considers four factors: "(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."[58]

As illustrated above, there is "considerable confusion among the circuits"[59] in applying *Feres*, and a great deal of uncertainty no matter what factors a court applies.[60] Though the lower courts are split in their interpretation of *Feres*, many have "shied away from attempts to apply [its] policy rationales," including its military discipline rationale.[61] Instead, concerns for military discipline and deference to military authority serve as background norms that have encouraged ever-broadening patchwork applications of the "incident to service" test among the lower courts.[62]

54. *Regan*, 524 F.3d at 645-46.

55. *Id.*

56. Doe v. Hagenbeck, 870 F.3d 36, 58 (2d Cir. 2017) (Chin, J., dissenting); Taber v. Maine, 67 F.3d 1029, 1050 (2d Cir. 1995).

57. Wake v. United States, 89 F.3d 53, 57-58 (2d Cir. 1996).

58. Dreier v. United States, 106 F.3d 844, 848 (9th Cir. 1996) (citing Bon v. United States, 802 F.2d 1092, 1094 (9th Cir. 1986)).

59. Jennifer L. Zyznar, Comment, *The* Feres *Doctrine: "Don't Let This Be It. Fight!,"* 46 J. MARSHALL L. REV. 607, 614 n.53 (2013) (citing Anne R. Riley, Note, United States v. Johnson*: Expansion of the* Feres *Doctrine to Include Servicemembers' FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233, 244 (1989)).

60. Popper, *supra* note 11, at 1505.

61. Daniel v. United States, 889 F.3d 978, 981 (9th Cir. 2018) (quoting Costco v. United States, 248 F.3d 863, 867 (9th Cir. 2001)).

62. *See* Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991) (asserting "awe for things military" as a cause of *Feres*'s expansion).

II. PROBLEMS OF APPLICATION

The legal landscape discussed in Part I leaves unresolved several issues regarding the substantive scope of the *Feres* doctrine. Three of these unresolved issues are relevant in the MST context and will be discussed in this Part. First, Section II.A considers the status of military academy cadets and military technicians, who share some—but not all—of the characteristics of military servicemembers. Second, Section II.B examines the ambiguous definition of "off-duty," a status or circumstance that sometimes enables servicemember claims to proceed. Finally, Section III.C explores the indeterminate scope of military "decision making," a zone within which *Feres* is supposed to apply. The "incident to service" test does not offer clear guidance to the lower courts in any of these three cases.

A. The Status of Cadets and Technicians

The servicemember status of claimants is dispositive—or, at the very least, influential—in *Feres* inquiries.[63] However, it is unclear whether and when military-service academy cadets[64] and military technicians have servicemember status for purposes of a *Feres* inquiry. Cadets "occupy a gray area: they are simultaneously fledgling active-duty officers of the U.S. Armed Forces and also students at accredited universities pursuing college degrees."[65] They incur a five-year military service obligation after they complete two years of their baccalaureate education at a service academy[66] and are required to participate in military training throughout their schooling. "Dual status" military technicians also occupy a gray area. They

63. *See supra* Section I.B (summarizing disparate treatment of servicemember status across circuits).

64. United States Naval Academy attendees are "midshipmen," while other academy attendees are "cadets." Unless otherwise specified, "cadets" will be used as shorthand to refer to cadets and midshipmen. *See Life at the Academy*, https://www.usna.edu/BlueAndGoldBook/life.php [https://perma.cc/LFD9-X9NX] *(last visited Mar. 13, 2022)*; *U.S. Military Academy at West Point*, GOARMY.COM, https://www.goarmy.com/careers-and-jobs/find-your-path/army-officers/military-academy.html [https://perma.cc/RMA2-RPU5].

65. Shin, *supra* note 13, at 786-87.

66. *See* 10 U.S.C. §§ 4348(a)(2)(A)-(B), 6959(a)(2)(A)-(B), 9348(a)(2)(A)-(B); 32 C.F.R. § 217.6(f)(6)(ii)(A).

are civilian employees who are required to maintain military status as a condition of their employment with the federal government.[67]

Jurists are divided over whether *Feres* applies to cadets and technicians. Judge Denny Chin forcefully argued that injuries stemming from a campus sexual assault "were incident only to [the plaintiff's] status as a student," not as a servicemember, and should not be *Feres*-barred.[68] Others have argued that *Feres* prevents recovery for any injuries "that occurred while [the plaintiff] was a ROTC cadet."[69] As to dual-status military technicians, some courts have found that "the plain language of [10 U.S.C.] § 10216(a) makes clear" that dual-status technicians are civilian employees,[70] while others have found exactly the opposite.[71]

Servicemember status has huge consequences for the survivors of MST, who lack robust protection under other civil rights laws. Military service academies are not subject to Title IX, legislation which has been critical in holding civilian school administrators accountable for campus sexual harassment and assault.[72] Dual-status military technicians, meanwhile, do not have a definite path to recourse under Title VII, which protects most public and private employees from sexual harassment and assault at work. Though the Fifth Circuit allowed a technician's Title VII claims to proceed, the Supreme Court denied certiorari on appeal from the respondents.[73] As such, cadets' and technicians' ability to recover for MST injuries is at best uncertain, and at worst wholly foreclosed.

67. *See* 10 U.S.C. § 10216(a).

68. Doe v. Hagenbeck, 870 F.3d 36, 51 (2d Cir. 2017) (Chin, J., dissenting) (arguing to affirm the lower court decision).

69. Wake v. United States, 89 F.3d 53, 59 (2d Cir. 1996). *See also* Collins v. United States, 642 F.2d 217, 220-21 (7th Cir. 1981) (*Feres* doctrine applies to cadets at service academies); Archer v. United States, 217 F.2d 548, 551 (9th Cir. 1954) (barring claim when cadet was injured on military plane while on leave).

70. Jentoft v. United States, 450 F.3d 1342, 1348-49 (Fed. Cir. 2006).

71. *See* Zuress v. Donley, 606 F.3d 1249, 1253 (9th Cir. 2010) (holding § 10216(a) has no bearing on the *Feres* analysis); Bowers v. Wynne, 615 F.3d 455, 467 (6th Cir. 2010) (same); Williams v. Wynne, 533 F.3d 360, 366-67 (5th Cir. 2008) (same).

72. *See generally* Shin, *supra* note 13.

73. *See* Neville v. Dhillon, 140 S. Ct. 2840 (2020).

B. The Definition of "Off-Duty"

In some courts, a servicemember injured "off-duty" may recover for their injuries. It is unclear, however, when a servicemember is "off-duty" and how off-duty status affects a *Feres* analysis. Courts have used "off-duty" as shorthand to refer to several different situations. It may refer to activities that occur on-base, while the servicemember is not performing assigned tasks—for example, when an active-duty service member has retired to his barracks.[74] The phrase may also encompass sanctioned or unsanctioned activities that occur off-base during short leaves—for example, when an active-duty servicemember attends a weekend party with his fellow soldiers,[75] or when a reservist is engaged in recreational activities on non-duty days. Finally, "off-duty" may refer to conditions of extended leave off-base, including Family and Medical Leave Act leave, approved leave without pay, or separation from the military.

The circuits are split on whether and when injuries sustained in the course of "off-duty" activity are precluded from recovery under *Feres*. The most permissive applications of the *Feres* doctrine have allowed recovery when military status is "coincidental to [plaintiff's] injuries and not necessary to them,"[76] and when the harm stemmed from "personal activity" conducted off-duty.[77] This includes injuries sustained off-duty and on-base, as when a servicemember is injured in a recreational boating accident on campus.[78] Other courts unequivocally prohibit recovery for injuries incurred during recreational activities at military-controlled facilities.[79] Even more restrictively, some courts have interpreted *Feres* to preclude even claims arising in the course of off-duty and off-base "activities such as shopping . . . if they occur during brief off-duty periods."[80]

It matters greatly whether and when "off-duty" injuries are actionable because sexual harassment and sexual assault frequently occur off-duty, both on- and off-base. In 2006, approximately 25% of the women survivors of MST reported that their injury occurred off-base, and 55% indicated that

74. *See* Feres v. United States, 340 U.S. 135, 137 (1950).

75. *See* Major v. United States, 835 F.2d 641, 645 (6th Cir. 1987).

76. Regan v. Starcraft Marine, LLC, 524 F.3d 627, 643 (5th Cir. 2008).

77. Hall v. United States, 130 F. Supp. 2d 825, 826-29 (S.D. Miss. 2000).

78. *Regan*, 524 F.3d at 643.

79. Costo v. United States, 248 F.3d 863, 868-69 (9th Cir. 2001).

80. Popper, *supra* note 11, at 1517 n.162 (summarizing Warner v. United States, 720 F.2d 837, 839 (5th Cir. 1983)).

their injury occurred during off-duty hours.[81] In 2018, approximately 38% of these injuries occurred off-base, and 74% during off-duty hours.[82] These percentages represent thousands of claims annually that may or may not be precluded by *Feres*, depending on the treatment of off-duty status.

C. The Scope of "Decision Making"

The *Feres* doctrine also leaves unresolved the scope of military "decision making," a zone within which *Feres* is supposed to apply. As the dissent in *Johnson* notes, the Court's holding in that case suggests that *Feres* applies when a claim "will require civilian courts to examine military decisionmaking and thus influence military discipline."[83] Put differently, in addition to the actions that would be dismissed as discretionary functions, which are excepted by 28 U.S.C. § 2680(a), there are perhaps additional military decisions that require deference because they are "inextricably intertwined with the conduct of the military mission."[84] It is critical to the military's mission that decisions are not influenced by tort incentives; some decisions will "of necessity . . . result in a risk of great harm" and must nevertheless be executed.[85]

The zone of military decision making certainly involves "'management' of the military," including "basic choices about the discipline, supervision, and control of a serviceman."[86] But jurists disagree about whether unlawful decisions and decisions that do not traverse the chain-of-command are protected. Courts in the Ninth Circuit have concluded that the courts "cannot review the lawfulness of an allegedly unlawful military order" in the

81. SEXUAL ASSAULT PREVENTION AND RESPONSE OFF., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2018 11 (2019). Men are somewhat more likely than women to report that their injuries occurred on-base and during on-duty hours, but also report high rates of off-base and off-duty MST.

82. *Id.*

83. United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting).

84. *Id.* at 691.

85. Popper, *supra* note 11, at 1499. *See also* Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 907 (2010) (arguing that "judges are not well-equipped to decide those controversies that are best framed as political or moral questions").

86. United States v. Shearer, 473 U.S. 52, 58 (1985).

course of a *Feres* analysis.[87] Others believe that courts may circumvent *Feres* in cases involving violations of federal regulations.[88] Some circuits have applied *Feres* when a servicemember is injured by another servicemember of the same rank.[89] Others have declined to apply *Feres* in such cases.[90]

A number of military rules and regulations concerning MST have been codified in the last ten years.[91] Military sexual harassment and sexual assault are indisputably unlawful, as are the omissions of responsibilities to survivors codified at law. Nevertheless, at issue is whether *Feres* insulates decisions to violate these rules, either by perpetrating MST,[92] or by omitting a responsibility to implement sexual assault response and prevention policies.[93] Such "decisions" would seem not to serve any cognizable military purpose,[94] but may only be justiciable within the military-justice system and not Article III courts.

* * *

The analysis of the *Feres* doctrine in this Part has raised three unresolved issues of application to MST cases. The "incident to service" test does not obviously apply to injured cadets and dual-status technicians; to injuries sustained through a range of "off-duty" activities; or to injuries resulting from unlawful "decisions," or decisions that do not travel vertically through the chain-of-command. The courts have begun to wrestle with

87. Haramalis v. Baldwin, No. 2:17-cv-498-JAM-CKD, 2018 U.S. Dist. LEXIS 42974 (E.D. Cal. Mar. 14, 2018); *see also* Zaputil v. Cowgill, 335 F.3d 885 (9th Cir. 2003) (refusing to assess the lawfulness of a military order before dismissing claims under *Feres*).

88. Doe v. Hagenbeck, 870 F.3d 36, 62 (2d Cir. 2017) (Chin, J., dissenting).

89. *See, e.g.*, Morris v. Thompson, 852 F.3d 416, 418 (5th Cir. 2017).

90. *See, e.g.*, Morse v. West, No. 97–1386, 1999 WL 11287, at *4 (10th Cir. Jan. 13, 1999) (holding that *Feres* barred plaintiff's claims against a fellow student because "[t]he alleged 'tort' in the instant case clearly occurred in 'activity incident to service'" (citations omitted)).

91. *See, e.g.*, 32 C.F.R. § 103.4 (establishing sexual assault response and prevention procedures).

92. In a notable and egregious case, a drill sergeant ordered the plaintiff recruit into a latrine to rape her, threatening military discipline if she did not comply. Stubbs v. United States, 744 F.2d 58, 59 (8th Cir. 1984).

93. The plaintiff in *Doe* alleges that officers "condoned and . . . encouraged . . . gender-based harassment and degradation." Shin, *supra* note 13, at 770. Their conduct is an apparent violation of federal regulations.

94. *See generally* Popper, *supra* note 11, at 1522-25 (criticizing *Feres*'s application in such cases).

these issues, generating splits among and within the circuits. For servicemember survivors and their advocates, *Feres* has created a legal landscape that is, at best, unpredictable and, at worst, inaccessible.

The existing literature has mostly advocated overturning *Feres* at the Supreme Court or through legislative reform.[95] There are strategic advantages to pursuing reform through these channels. The Supreme Court has the ability both to pare back the doctrine and to establish a more administrable test for its application in the lower courts. At present, jurists are unsure whether and how *Feres* attaches to a military status or other circumstances of servicemember injury, and they would benefit from additional guidance.[96] Congress, on the other hand, could use its decades of experience with the FTCA to craft amended exceptions to tort liability that balance the needs of the military and the cost of litigation with the concerns of injured servicemembers.[97] And Congress, unlike the Court, is not bound by the existing text or concerns for *stare decisis*.

However, both the Court and Congress have proved mostly unable or unwilling to overturn *Feres.*[98] In light of their inaction, this Note proposes an alternative route to recovery: a reading of the *Feres* doctrine that would limit its application in cases where the government has violated its own mandatory rules and regulations.

III. A NEW FRAMEWORK

This Part advocates for an interpretation of the *Feres* doctrine that would open the courthouse doors to MST survivors. Section III.A outlines this account and reconciles it with controlling precedent. Section III.B argues that this framework preserves military discipline. Finally, Section III.C discusses the reimagined role of the courts and their relationship to the military under this framework.

A. "Its Own Rules and Regulations"

The *Feres* doctrine can be read to exclude injuries stemming from the DoD's violation of its own mandatory rules and regulations. In many

95. *See supra* note 13 and accompanying text.

96. *See supra* Section II.B.

97. *See, e.g.*, Popper, *supra* note 11, at 1542-43 (discussing competing concerns for tort reform and proposing a particular legislative reform).

98. *See supra* note 19 and accompanying text.

instances, Congress has legislated unqualified, rule-like directives to the DoD, its Secretary, or other officers in the chain of command. For example, the Superintendent of West Point "shall ensure that any cadet . . . who is a victim of an alleged sexual assault . . . is informed of the right to request a transfer"[99] and shall "take action on a request for transfer . . . not later than 72 hours after receiving the formal request from the cadet."[100] In other instances, Congress allows the DoD some standard-like discretion to implement its directives. For example, the Superintendent shall "approve such a request for transfer unless there are exceptional circumstances that require denial of the request."[101]

Likewise, there are directives that originate within the DoD and are compelled down the chain-of-command. For example, the Secretary of Defense has mandated that a "unit commander who receives an Unrestricted Report of a sexual assault shall immediately refer the matter to the appropriate [investigatory body] . . . [and] shall not . . . delay immediately contacting the [investigatory body] while attempting to assess the credibility of the report."[102] Other directives give subordinates some discretion regarding enforcement. For example, commanders "shall have discretion to defer action on alleged collateral misconduct [like underage drinking] . . . until final disposition of the sexual assault case."[103] In the case of both DoD and Congressional directives, the *Feres* doctrine should not apply to alleged violations of *mandatory* (unqualified, rule-like, and non-discretionary) directives.

A judge can draw on familiar principles of statutory interpretation to determine whether a directive is mandatory or discretionary. Ordinarily, a directive that an officer "shall," "will," or "must" act is mandatory, while a directive that an officer "should" or "may" act is discretionary.[104] The

99. 10 U.S.C. § 7461(e)(2)(A).

100. *Id.* § 7461(e)(2)(B)(i).

101. *Id.* § 7461(e)(2)(B)(ii).

102. 32 C.F.R § 105.9(c)(8)(i)

103. *Id.* at § 105.9(h)(1).

104. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY (5th ed. 2014); LARRY M. EIG, CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 10 (Sept. 24, 2014), https://sgp.fas.org/crs/misc/97-589.pdf [https://perma.cc/G8FR-QRM3]. *See, e.g.*, Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969,

meaning of these words is informed by their broader statutory context.[105] The use of mandatory and permissive verbs in the same statutory provision can underscore their different meanings.[106] Sometimes the context of a statute will contravene the ordinary meaning of its mandatory or permissive terms.[107]

Whether a directive is mandatory or discretionary, per the analysis above, is a surface-level matter of statutory interpretation that does not require judicial inquiry into military decision making. As a result, this account is consistent with *Feres* and its progeny. As Part II explained, the Court cannot review any claim that "implicates the military['s] judgments and decisions,"[108] since "[t]o permit this kind of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions" to the detriment of military command structures.[109] In cases where a subordinate servicemember has violated a mandatory directive from above, the courts would not be forced to "second-guess military decisions."[110] Rather, the courts would assume the wisdom of the mandatory rule or regulation at issue, as well as the inviolability of the chain-of-command, in their *Feres* inquiry. They would judge only whether the directive was violated as a matter of fact—a limited inquiry in the context of unqualified, rule-like directives.

B. Military Discipline

As discussed in Section II.A, *Feres* is motivated by a legitimate concern for the integrity of military discipline. The military "constitutes a specialized

1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' . . . normally creates an obligation impervious to . . . discretion.").

105. Eig, *supra* note 104.

106. *Id.*

107. *Id.*

108. United States v. Johnson, 481 U.S. 681, 691 (1987).

109. United States v. Shearer, 473 U.S. 52, 52 (1985).

110. *See id.* at 57 (arguing that courts are not in a position to "second-guess military decisions").

community governed by a separate discipline from that of the civilian."[111] In order to function, this community requires "instinctive obedience, unity, commitment, and esprit de corps."[112] A civil tort scheme must not undermine these values or distort incentives to act in furtherance of the military mission. Notwithstanding these well-founded concerns, there is no evidence that delimited Article III justiciability would undermine military discipline and the military-justice system at large.[113] Quite the opposite.

Empirical evidence suggests that military order is undermined when "blind obedience" to hierarchy is prioritized over individual accountability for wrongdoing.[114] Indeed, "systemic avoidance of liability for clearly actionable behavior shields wrongdoers, fosters distrust and resentment, enshrines unequal treatment, and nurtures a culture of secrecy."[115] In particular, "[s]exual assault 'is one of the most destructive factors in building a mission-focused military.'"[116] Sexual assault is "devastating to the morale, discipline, and effectiveness of our Armed Forces,"[117] and "the destruction of 'morale, good order and discipline' is only exacerbated by a failure to bring assailants to justice."[118] Unfortunately, *Feres* has been

111. Parker v. Levy, 417 U.S. 733, 744 (1974) (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

112. Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

113. Popper, *supra* note 11, at 1523.

114. Bennett, *The Feres Doctrine, Discipline, and the Weapons of War,* 29 ST. LOUIS U. L.J. 383, 408-09 (1985) ("Studies conducted during the Korean and Vietnam Wars confirmed the 'seeming irrelevance' of traditional concepts of discipline . . . . Although blind obedience may have been necessary 'when armies had to be forced into open fire in mass infantry lines,' it is harmful in modern armies requiring individual responsibility.")

115. Popper, *supra* note 11, at 1523.

116. Brief for Petitioner at 5, United States v. Briggs, argued, No. 19-108 (Oct. 13, 2020) (quoting Memorandum from James N. Mattis, Secretary of Defense, to All Members of the Department of Defense: Sexual Assault Prevention and Awareness (Apr. 18, 2018), https://dod.defense.gov/portals/1/features/2018/0418_SAPR/SAAP-OSD004331-18-RES.PDF [https://perma.cc/3AB3-99N9]).

117. *Id.* at 23.

118. *Id.* at 7 (quoting U.S. DEP'T OF DEF., SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 2 (UCMJ Sex Crimes Report)).

applied by the lower courts to bar recovery in even the most egregious cases of MST.[119]

On this Note's account of *Feres*, however, there would be civil liability for MST[120] and for failure to comply with mandatory sexual assault prevention and response policies.[121] In these cases, we may be confident that holding wrongdoers accountable does not undermine discipline or disrupt the military chain-of-command. Servicemembers would still be required to exhaust their administrative remedies within the DoD before accessing the Article III courts,[122] and the military courts would retain primary jurisdiction over military offenses.[123] It is only when military justice fails to punish wrongdoing—in the limited instances where the wrongdoer has tortiously violated a mandatory directive from above—that the civilian justice system would be employed. In such cases, the Article III court would be in the position of reinforcing military discipline and the chain-of-command.

C. Judicial Reinforcement

Article I military courts retain primary jurisdiction over military sex crimes, and for good reasons.[124] On this account of *Feres,* the military courts' discretion to prosecute and punish individual servicemembers would be unchanged. Rather than punishing *individual* wrongdoers over the objections of the military-justice apparatus, Article III courts would be reinforcing the *collective* values that individual wrongdoings threaten.

119. *See supra* note 92 and accompanying text; *see also* Smith v. United States, 196 F.3d 774, 777-78 (7th Cir. 1999) (dismissing claims of servicemember who was repeatedly forced into her drill sergeant's vehicle and raped).

120. *See* 10 U.S.C. § 920 (defining sexual offenses and specifying that such offenses "shall be punished" by court martial).

121. Refer to *supra* Section III.A for an operationalized definition and example of "mandatory" policies on this account.

122. *See* 28 U.S.C. § 2401(b) (requiring administrative exhaustion); *see* LEWIS, *supra* note 22 at 33-35.

123. *See* 10 U.S.C. § 818 (defining jurisdiction of courts-martial).

124. *See* Schenck, *supra* note 16, at 582-83. ("These critics [of the military justice system] fail to understand the crucial role of convening authorities in the maintenance of good order and discipline, the allocation of resources in the prosecution of cases, and the important prosecutorial element that military cases have legitimacy with military juries, which includes the chain of command's support.").

For example, in a prototypical case of military sexual assault, the unit commander may decline to prosecute the accused assailant in the interests of the military or of justice.[125] On the account of *Feres* proposed here, the victim could not challenge the decision not to prosecute in an Article III court because her commander was given discretion by statute. She could, however, recover in tort for the injuries she sustained as a result of the sexual assault. If she were successful, her remedy would not enjoin the military from its decision not to prosecute. It would, nevertheless, include declaratory relief or damages that increase the cost of military sexual assault for the DoD.[126] As a result, civil liability would "have a powerful corrective effect" on sexual misconduct and tolerance thereof over time[127] without changing the outcomes of individual cases in the military-justice system. Critically, this "corrective effect" would be limited to those behaviors that Congress and the DoD have already proscribed in no uncertain terms through mandatory directives.

* * *

"Surely, no one should suggest that when young Americans sign up for military service, they can expect that potential sexual assaults upon them will be . . . considered 'incident' to that service."[128] This Part has argued for an interpretation of *Feres* wherein violations of mandatory military directives can be reviewed by Article III courts. This reading can be reconciled with precedent that bars the courts from reviewing cases that require "direct inquiry into military judgments."[129] When the courts provide

125. As in civil cases, the decision not to prosecute may reflect the interest of the victims or justice. It may also be in the interest of the military mission. However, the decision not to prosecute is subject to oversight. If the chief prosecutor requests review of a commanders' decision not to prosecute, the Secretary of Defense must review that decision. *See* CONG. RSCH. SERV., MILITARY SEXUAL ASSAULT: A FRAMEWORK FOR CONGRESSIONAL OVERSIGHT 53 (2017), https://crsreports.congress.gov/product/pdf/R/R44944/4 [https://perma.cc/4NRU-7DSD].

126. The government bears the legal costs of its employees' misconduct. *See, e.g.*, Collins v. United States, 564 F.3d 833, 836 (7th Cir. 2009) ("[T]he government, when it is held liable under the Federal Tort Claims Act, has no right of indemnity from its negligent employee.").

127. *See* Popper, *supra* note 11, at 1524-25 (explaining the relationship between financial incentives in tort and behavior).

128. Gonzalez v. United States Air Force, 88 F. App'x 371, 379 (10th Cir. 2004) (Lucero, J. concurring).

129. *See* United States v. Johnson, 481 U.S. 681, 691 n.11 (1987).

remedy for violations of mandatory directives, they are not forced to "second-guess" military decisions or disrupt military discipline; they take for granted the wisdom of these directives and the integrity of the chain-of-command. In fact, unchecked violations of mandatory directives are more likely to disrupt than to facilitate military discipline. In the interest of "good order and military discipline,"[130] the courts should be inclined against an overbroad reading of *Feres.* The framework described here appropriately limits *Feres*'s application and, as the next Part will argue, resolves substantial doctrinal ambiguities.

IV. REVISITING APPLICATIONS

Having presented a new framework for applying *Feres*, this Part considers its implications for a range of FTCA claims. It returns to the doctrinal ambiguities discussed in Part II and shows how these would be resolved within this new framework, to the benefit of MST survivors. First, Section IV.A resolves the status of service academy cadets and military technicians. Second, Section IV.B considers the treatment of "off-duty" injuries. Finally, Section IV.C clarifies the scope of protected military decision making.

A. Resolving The Status of Cadets and Technicians

On the account this Note proposes, cadets and technicians would be treated like other servicemembers for the purposes of a *Feres* inquiry. A claim would be *Feres*-barred if it alleged an injury stemming from violation of a *discretionary* military directive. Their claims may proceed if they are alleging injury from a violation of a *mandatory* military directive or a non-military rule or regulation. Whether the claim can proceed is an issue of statutory interpretation independent of their cadet or technician status. A directive might be mandatory if it states that an officer "shall" perform the assigned duty, and there are no statutory exceptions. A directive is almost certainly a "military" rule or regulation if it is codified under Title 10 of the U.S. Code, or if it is issued by a superior officer to a subordinate in the DoD pursuant to their constitutional or statutory authority.

In practice, cadet MST survivors would almost always be alleging violations of mandatory military directives issued under Title 10, where sex assault policies for military service academies are codified. The determinative issue in a *Feres* analysis is not whether a cadet has

130. *Id.* at 690.

servicemember status "at all times,"[131] including the time of the offense, but rather the nature of the alleged offense. The same analysis applies to dual-status technicians; however, they may have a wider range of non-military injuries. A military technician, for example, might allege a tortious dereliction of duty arising under Title VII.[132] In any case, the courts do not need to analyze whether the technician has civilian or military status to conduct a *Feres* inquiry. They need only analyze whether the alleged conduct concerns a civilian or military rule or regulation—a much simpler analysis, and one that provides MST survivors some access to the courts.

B. Resolving The Definition of "Off-Duty"

The *Feres* framework proposed here also creates a readily administrable test for injuries that arise "off-duty." No matter where injuries arise "on a continuum between performing the tasks of an assigned mission to being on extended leave from duty,"[133] they will be assessed according to whether the injury is related to a transgression of mandatory military rules and regulations. In many instances of sexual misconduct, there is a close connection between duty rules and regulations and conduct that occurs off-campus and off-duty. Sexual assault prevention and response policies apply with equal force to intra-military MST that occurs off-campus and off-duty.[134]

Admittedly, more survivors would have access to the Article III courts if there were a blanket exception to *Feres* for injuries sustained off-duty. However, such a rule seems in tension with existing precedent and would likely open up the military to a broad range of litigation outside the MST context, taking "scarce resources away from compelling military needs to

131. Doe v. Hagenbeck, 870 F.3d 36, 48 (2d Cir. 2017) (holding claim *Feres*-barred because of servicemember status).

132. *See generally* Craig Westergard, *You Catch More Flies with Honey: Reevaluating the Erroneous Premises of the Military Exception to Title VII*, 20 MARQ. BENEFITS & SOC. WELFARE L. REV. 215 (2019) (arguing that Title VII applies to military employees and citing cases).

133. Regan v. Starcraft Marine, LLC, 524 F.3d 627, 637 (5th Cir. 2008).

134. *See* 10 U.S.C. § 1561 (requiring response to any "complaint alleging sexual harassment by a member of the armed forces or a civilian employee of the Department of Defense").

avoid legal actions," as proponents of *Feres* fear.[135] Moreover, even where courts have allowed claims to proceed because the servicemember was injured "off-duty," this exception has been realized inconsistently.[136] Servicemembers and the military alike would benefit from an unambiguous and principled doctrinal framework. The one proposed here predictably opens the courthouse doors to MST survivors no matter where their injuries occur.

C. Resolving The Scope of "Decision Making"

Finally, this account of *Feres* creates a definite scope of protected military decision making. Injuries arising from discretionary conduct are never justiciable,[137] but violations of mandatory directives are. In effect, the government is liable when, and only when, a subordinate servicemember violates a mandatory directive from higher up in the chain-of-command. Military decision making is protected until, and only until, a rule or regulation has traveled down the military hierarchy to a level where servicemembers no longer have discretion to implement that rule or regulation.

There are two corollaries to this finding. First, unlawful orders or actions are not shielded by *Feres*. By definition, an unlawful action is one that the servicemember did not have the discretion to perform. Second, there is liability when a servicemember is injured by an assailant of the same rank, provided the assailant did not have the discretion to act as he did. These findings have significant implications for survivors of MST. Intra-military sexual assault and sexual harassment will always be justiciable in Article III courts because they are proscribed at every level of the military by 10 U.S.C. § 920. Many deficiencies in response to sexual assault will also be actionable.[138] Additionally, recovery will be available regardless of rank; except that if an assailant is of a higher rank than a victim, there may be

135. Leo Shane III, *The Argument for Keeping the Feres Doctrine*, STARS & STRIPES (Apr. 2, 2012), https://www.stripes.com/news/theargument-for-keeping-the-feres-doctrine-1.173370 [https://perma.cc/FQM7-W9U9].

136. *See supra* Section II.B.

137. On this account, there is some discretionary conduct that is *Feres*-barred and may not fall under the discretionary function exception (DFE), 28 U.S.C. § 2680(a), to the FTCA.

138. *See, e.g.*, *supra* note 99 and accompanying text.

additional liability.[139] These are significant advances from the current regime.

* * *

The *Feres* "incident to service" test has generated a great deal of confusion among and within the circuits.[140] The *Feres* framework proposed in Part III is not only defensible, but desirable, because its administrable test resolves several doctrinal ambiguities. It clarifies the treatment of dual-status servicemembers, of injuries arising "off-duty," and of decisions made at every level of the military chain-of-command. Moreover, this Part has shown that this new framework would give MST survivors unprecedented access to the Article III courts.

V. REFORMS

The account of *Feres* advocated here will have collateral consequences for other regimes. This Part briefly addresses how these regimes might react and adapt to changes in tort after the "distortions" wrought by *Feres* are corrected.[141] Section V.A suggests that Congress titrate its lawmaking to the newly important distinction between mandatory and discretionary rules. Section V.B argues that the VA benefits scheme should not adjust its aid calculation in consideration of damages awarded at tort.

A. Congressional Action

This new account of *Feres* relies heavily on a distinction between mandatory and discretionary rules. As a result, unartfully drafted statutes that foreclose military discretion, or that allow discretion where none is merited, will have serious consequences at tort. It is plausible that, all else being equal, the DoD might try to limit its exposure to liability by extending any discretion from Congress down the chain-of-command.[142] In

139. For one, officers have a duty to report sexual assault to their unit commander, a duty which is presumably omitted in the case of an officer assailant—and which gives rise to additional liability.

140. *See supra* Part II.

141. Daniel v. United States, 139 S. Ct. 1713, 1713-14 (2019) (Mem.) (Thomas, J., dissenting from denial of certiorari) ("[D]enial of relief to military personnel and distortions of other areas of law to compensate . . . will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*.").

142. Of course, the DoD will always have competing incentives to limit discretion on some matters.

anticipation of this response, Congress should issue mandatory directives that circumscribe conduct that serves no military purpose, including gross medical malpractice, domestic violence, and policies that insulate such conduct. It should also be as specific as possible in mandating sexual assault prevention and response regulations. And Congress should be careful to write discretion into statutes where it believes a directive could conceivably compromise military objectives. Thoughtful legislation will go a long way to creating a military that is well-ordered, efficient, and disciplined.

B. Compensation Regimes

The availability of a remedy at tort may renew calls to limit VA disability payouts.[143] The victims of MST are now eligible to receive monthly disability payments if their results in post-traumatic stress disorder or another diagnosed disability. These benefits are prorated based on the severity of the disability and are not means-tested.[144] As a result, an award from a civil judgment will not affect a servicemembers' monthly benefits calculations, even if their disability is related to the injury they allege at tort. This status quo should remain unchanged, despite the cost to the federal government, because civil judgements and disability payments serve different and important objectives.

The damages awarded in a civil suit are not intended to merely meet subsistence needs; they also punish misconduct, express condemnation for the wrong act, and deter repetition of that same act in the future.[145] Disability payments, on the other hand, are entitlements to eligible veterans that dignify their sacrifice. The payments can help to meet the subsistence needs of veterans, but they are also intended to compensate veterans for the ongoing effects of service-connected disability, disease, and injury.[146] Thus, while civil judgements focus on military misconduct and serve the interests of a broader military community, disability payments focus on the particularized harm effected by misconduct and serve the interests of an

143. *See* Richard Buddin & Kanika Kapur, *An Analysis of Military Disability Compensation,* RAND CORPORATION (Oct. 11, 2016), https://militarypay.defense.gov/Portals/3/Documents/Reports/RAND_MG369.pdf?ver=2016-10-11-165728-880 [https://perma.cc/F9E4-NV43] (summarizing critiques of the military benefits scheme).

144. CONG. BUDGET OFF., VETERANS' DISABILITY COMPENSATION: TRENDS AND POLICY OPTIONS 1 (Aug. 7, 2014).

145. *See* Popper, *supra* note 11, at 1524-25.

146. Buddin & Kapur, *supra* note 143.

individual servicemember. Both types of relief are indispensable to a military regime that respects and protects its servicemembers.

CONCLUSION

The *Feres* doctrine has been used to close the courthouse doors to countless servicemembers who were injured by government negligence. This injustice is brought into focus by the epidemic of military sexual harassment and sexual assault, which could be ameliorated by incentives in tort to enact and enforce protections for survivors. Although Congress and the Supreme Court have been called upon to revisit the *Feres* doctrine in recent years, this Note suggests an alternative that does not require their action. It advocates reading that the *Feres* doctrine does not apply where the DoD has violated its own rules and regulations. This reading is consistent with the FTCA, *Feres*, and its controlling progeny; restores the appropriate functions of the military and the courts vis-à-vis each other; and resolves serious ambiguities in the doctrine in favor of the survivors of MST. The *Feres* doctrine is a creature of the courts and can still be tamed by judicial intervention.