

No Place in the Military: The Judiciary's Failure to Compensate Victims of Military Sexual Assault and a Suggested Path Forward Using Lessons from the Prison Context

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Introduction

Kori Cioca was serving the nation in the U.S. Coast Guard when she was raped by her military superior. The incident did not come out of the blue. Her commander began by sexually harassing and verbally abusing her. Cioca complained about her superior's abusive behavior and expressed her fear of him to military personnel in her chain of command, but this only led to an escalation of the superior's conduct. He began to drive past her home multiple times during the day and call her repeatedly, threatening her life. On several occasions, he broke into her room at night, and Cioca began sleeping with a knife under her pillow. One night the superior entered her room while he was drunk, and tried to rape her. When she defended herself, he struck her across the face so hard that she was thrown against a wall. Cioca has had to undergo major jaw surgery due to this incident. Although she reported the assault, her chain of command did nothing. Later that year, Cioca was told to retrieve keys from her superior. She tried to convince some of her fellow service members to go with her, but when no one could, she had to go on her own, and he raped her. As with the assault, Cioca reported the rape, but she was threatened with prosecution in a military court martial for lying. Her command directed Cioca to sign a statement stating that she had had an inappropriate relationship with her rapist. When Cioca objected that the statement falsely portrayed rape as consensual sex, the command told Cioca that she was being ordered to

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sign it and could not refuse to do so.¹

Ariana Klay was an active duty lieutenant in the U.S. Marine Corps when she was gang raped by her fellow soldiers one block from her residence on a military base. For months before the rapes, she was confronted with constant sexual harassment. When Klay reported the hostile environment to her superior, he refused to take any steps to stop the open and pervasive hostility towards Klay and other females at the Marine Barracks, and instead told Klay to “deal with it.” Klay reported the rapes, and the ensuing harassment and retaliation she endured from her command led to such severe distress that she attempted to commit suicide. The Marine Corps investigated the harassment, and held that Lt. Klay must have welcomed the severe and pervasive sexual harassment because she wore make up, regulation-length skirts (as part of her uniform) and exercised in running shorts and tank tops.²

Unfortunately, Kori Cioca and Ariana Klay’s stories are all too common in today’s military. One in three women leaving military service report experiencing some form of Military Sexual Trauma, and the problem is on the rise.³ The Pentagon estimates that 26,000 people in the armed forces were sexually assaulted in 2012, up from 19,000 in 2011.⁴ By the Pentagon’s own estimates, as few as 13.5% of sexual assaults in the military were reported in 2010.⁵ Additionally, while 40% of sexual assault allegations in the civilian world are prosecuted, this number is a staggeringly low 8% in the military.⁶ Sexual assault in the military is so pervasive that, as the Government Accountability Office reported, “many individuals do not come forward in the military out of fear of punishment because they have done something (e.g., drinking) that

¹ First Amended Complaint ¶¶ 7–28, *Cioca v. Rumsfeld*, No. 1:11-cv-151 (E.D. Va. Dec. 9, 2011), *aff’d* 720 F.3d 505 (4th Cir. 2013).

² Complaint ¶¶ 6–22, *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013), *aff’d*, 758 F.3d 369 (D.C. Cir. 2014).

³ Anne G. Sadler, Brenda M. Booth, Brian L. Cook & Bradley N. Doebbeling, *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 266 (2003) (“One-third . . . experienced one or more completed or attempted rapes.”).

⁴ Jennifer Steinhauer, *Sexual Assaults in Military Raise Alarm in Washington*, N.Y. TIMES, May 7, 2013.

⁵ DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2010, 97 (March 2011).

⁶ Nancy Gibbs, *Sexual Assaults on Female Soldiers: Don’t Ask, Don’t Tell*, TIME, Mar. 8, 2010, at 60.

they could also get in trouble for.”^{7,8} The same report stated that some service members believe that there is no point in reporting sexual assault if the perpetrator is of a higher rank or for fear of not being believed. Victims are reluctant to report attacks “for a variety of reasons, including the belief that nothing would be done or that reporting an incident would negatively impact their careers.”⁹ The *Washington Post* and *New York Times* report that the officers in charge of preventing and responding to sexual assault in the military are sometimes themselves perpetrators; for example, in 2013, the very officer in charge of sexual assault prevention programs for the Air Force was arrested and charged with sexual battery.¹⁰ Additionally, even once a case is reported, referred to a court martial, and a sexual assault conviction obtained, military commanders have the power to throw the conviction out. The nomination of Lt. Gen. Susan Helms for the position of vice commander of the Air Force’s Space Command, for example, was blocked in 2013 by Senator Claire McCaskill (D-MO) due to Helms’s decision to grant clemency to a convicted sex offender without any public explanation.¹¹ The *Washington Post* reported that “[i]n [a] five-page memo, dated Feb. 24, 2012, Helms wrote that she reviewed the court-martial transcript and trial exhibits. She said she came to the opposite conclusion of the jury and found Herrera to be a more credible witness than the lieutenant.”¹² Similarly, victims’ advocates called for Lt. Gen. Craig A. Franklin, commander of the Third Air Force in Europe, to be fired after he tossed out the sexual assault conviction of a star fighter pilot in February 2013.¹³

⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, DOD’S AND THE COAST GUARD’S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS FACE IMPLEMENTATION AND OVERSIGHT CHALLENGES 37 (2008).

⁸ Plaintiff Sarah Albertson of the *Cioca* lawsuit was charged with “Inappropriate Barracks Conduct” after reporting her rape because she had been drinking alcohol when it happened. Her rapist was charged with the same, rather than prosecuted. First Amended Complaint, *supra* note 1, at ¶ 58.

⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 6.

¹⁰ James Dao, *Assault-Prevention Officer in Air Force is Arrested*, N.Y. TIMES, May 6, 2013; Rachel Weiner, *Air Force Colonel Indicted on Assault Charge*, WASH. POST, August 19, 2013.

¹¹ Craig Whitlock, *General’s Promotion Blocked over Her Dismissal of Sex-Assault Verdict*, WASH. POST, May 6, 2013.

¹² *Id.*

¹³ *Id.*

While Congress has, in the last few years, made attempts to address this problem, its efforts have not been successful in effecting significant structural change. Members in the House and Senate have worked to strengthen protections for victims; for example, by including an evidentiary privilege in military courts for confidential communications between victims and victim advocates, requiring more robust reporting of sexual assault complaints for Veterans Administration benefits purposes, and ensuring expedited base transfer requests for victims of sexual assault.¹⁴ Members have included provisions in the National Defense Authorization Act that would evaluate commanders on the basis of how they deal with sexual assault complaints in their units, and removed a commander's ability to change or dismiss a sexual assault conviction by jury.¹⁵ Indeed, since these initiatives have become law and the press has increasingly covered this issue, the rate of sexual assault reports in the military has doubled.¹⁶ However, these efforts have still been criticized as mere window dressing. There remain strong incentives in the structure of the military justice system that perpetuate the epidemic of sexual assault. Advocates, former military attorneys and judges, and some Members of Congress have argued that it is critical to remove sexual assault prosecution decisions from the military chain of command entirely, because there are inherent conflicts of interest when a military commander, rather than a prosecutor or judge, is responsible for deciding whether or not to prosecute an accused service member in his or her unit. Senator Kristen Gillibrand (D-NY) introduced an amendment to remove this decision from commanders and give it to military prosecutors to be included in the 2014 National Defense Authorization Act, but the amendment failed by a Senate procedural mechanism.¹⁷ A similar bill, introduced by Representative Jackie Speier (D-CA), has not been

¹⁴ See Defense STRONG Act, S. 1018, 112th Cong. (2011). Parts of the Defense STRONG Act were codified at 10 U.S.C. § 2222.

¹⁵ See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672.

¹⁶ Sig Christenson, *Military sexual assault reports up 50%*, HOUSTON CHRON., Dec. 27, 2013.

¹⁷ Senator Gillibrand's Military Justice Improvement Act was not included in the 2014 National Defense Authorization Act. See Emily Crockett, *Defense Bill Will Not Include Gillibrand's Military Sexual Assault*

made into law.¹⁸ Indeed, even in some instances where Congress has made demands on the military, oftentimes the military has failed to comply. For example, the military has failed to establish and make available a database of sexual assault perpetrators, which was mandated by Congress several years ago.¹⁹

While civilian institutions are often checked by lawsuits alleging violations of individual rights, which in turn force those institutions to implement changes from within, this kind of check is doesn't exist in the military because of a long-standing, judicially created doctrine, beginning with *Feres v. United States*,²⁰ that bars such suits. Congress has on several occasions tried to overturn this doctrine, but to no avail. As the Honorable Judge Griffith of the D.C. Circuit pointed out during oral argument in *Klay v. Panetta*, "Congress has the power to create a cause of action . . . and they haven't done it."²¹

The staggering statistics on sexual assault in the military, the mishandling of sexual assault reports, and the lack of a meaningful response by Congress are what have led Cioca, Klay, and hundreds of other military sexual assault victims to file two separate class-action lawsuits against former Secretary of Defense Donald Rumsfeld and against former Secretary of Defense Leon Panetta,²² alleging violations of their individual constitutional rights and seeking monetary damages under *Bivens v. Six Unknown Federal Agents of Federal Bureau of Narcotics*²³ and *Davis v. Passman*.²⁴ In their complaints, the victims allege violations of their

Amendment, RHREALITYCHECK.COM (Dec.10, 2013), <http://rhrealitycheck.org/article/2013/12/10/defense-bill-will-not-include-gillibrands-military-sexual-assault-amendment/>.

¹⁸ See Sexual Assault Training Oversight and Prevention Act (STOP Act), H.R. 1593, 113th Cong. § 3(a) (2013), which would take the reporting, oversight, investigation, and victim care of sexual assaults out of the hands of the normal military chain of command and place jurisdiction in the newly created, autonomous Sexual Assault Oversight and Response Office comprising civilian and military experts.

¹⁹ Oral Argument at 7:51, *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014), <http://www.c-span.org/video/?317816-1/klay-v-panetta-oral-argument>.

²⁰ 340 U.S. 135 (1950).

²¹ Oral Argument, *supra* note 19, at 2:04.

²² See, e.g., *Klay*, 758 F.3d 369.

²³ 403 U.S. 388, 397 (1971) (holding that a private citizen could obtain damages for injuries suffered due to a violation of the Fourth Amendment by federal officials). *Bivens* has since been used to provide monetary relief to citizens whose constitutional rights are violated by federal officials.

substantive and procedural due process rights (violation of bodily integrity, failure to implement federal regulations on sexual assault in the military), equal protection (creating a military environment hostile to women), and free speech (retaliation for reporting assaults).²⁵ The Fourth Circuit dismissed the *Cioca* suit, as was expected, based on the longstanding *Feres* doctrine, which provides both the military and individual military officers with immunity from suit.²⁶ The D.C. Circuit also dismissed *Klay*, similarly finding that the *Feres* doctrine barred creation of a *Bivens* remedy for soldiers whose injuries arose out of, or were in the course of activity incident to, their military service.²⁷ The principle that service members may not sue the military or military officials for monetary damages is ingrained in American case law. The only way these plaintiffs could obtain redress for their injuries is if the Supreme Court overturns or makes an exception to *Feres*.

The *Feres* doctrine developed out of a 1950 Supreme Court case that found a judicially created exception to the Federal Tort Claims Act (FTCA), a common mechanism by which individuals can sue the federal government for tort violations committed by federal employees. Two decades later, in *Bivens v. Six Unknown Federal Agents of the Federal Bureau of Narcotics*, the Supreme Court for the first time recognized an implied private cause of action for damages against federal officials who violated a plaintiff's Fourth Amendment rights.²⁸ *Bivens* was later extended to the Fifth Amendment Due Process Clause when the Court found in favor of a plaintiff congressional staff member who alleged sex discrimination against her employer in *Davis v. Passman*.²⁹ *Bivens* was again extended to the Eighth Amendment ban on cruel and unusual punishment when the Court found in favor of a federal prisoner who sued prison

²⁴ 442 U.S. 228 (1979) (holding that a congressional staff member could obtain monetary relief for the violation of her Fifth Amendment right to be free from sex discrimination when her congressman boss fired her on the basis of her sex).

²⁵ First Amended Complaint, *supra* note 1, at ¶¶ 319–56; Complaint, *supra* note 2, at ¶¶ 148–62.

²⁶ *Cioca*, 720 F.3d at 511.

²⁷ *Klay*, 758 F.3d at 377.

²⁸ 403 U.S. 388, 397 (1971).

²⁹ 442 U.S. 228 (1979).

officials for medical malpractice in *Carlson v. Green*.³⁰ These cases have made *Bivens* the primary mechanism by which individuals vindicate their constitutional rights against federal government officials. In recent years, the Supreme Court has provided a two-step approach for determining whether a *Bivens* remedy is available. First, a court should ask “whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages,”³¹ and second, “even in the absence of an alternative . . . the federal courts must . . . [pay] particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.”³² Although the Supreme Court has not extended *Bivens* to other constitutional amendments after *Greene*, circuit courts have allowed plaintiffs to obtain redress against federal officials in a variety of contexts, such as for violations of the right to free speech, free exercise, property, and procedural due process.³³

³⁰ 446 U.S. 14 (1980).

³¹ *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

³² *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

³³ Circuit courts have allowed *Bivens* First Amendment claims. The D.C. Circuit has long allowed *Bivens* actions for violations of the First Amendment rights of protesters. *Dellums v. Powell*, 566 F.2d 167, 196 (D.C. Cir. 1977); *Bloem v. Unknown Dep’t of the Interior Employees*, 920 F. Supp.2d 154, 161 (D.D.C. 2013); *Hartley v. Wilfert*, 918 F. Supp. 2d 45, 50 (D.D.C. 2013). Other circuits have come to the same conclusion. See *Panagacos v. Towery*, 501 Fed. App’x 620, 623 (9th Cir. 2012) (allowing *Bivens* free speech claim to proceed); *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 14 F.3d 457, 464 (9th Cir. 1994) (plaintiffs stated *Bivens* claim where complaint contained specific factual allegations that tended to show FBI agents intended to interfere with plaintiffs’ First Amendment rights to demonstrate and communicate their message about the environment); *Gibson v. United States*, 781 F.2d 1334, 1342 (9th Cir. 1986) (allegation that “FBI agents acted with impermissible motive of curbing plaintiff’s protected political speech . . . stated claim . . . cognizable through . . . *Bivens*-type action directly under First Amendment”); *Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (extending *Bivens* remedies “to violations of first amendment rights . . . [I]f [plaintiff] can prove that her first amendment rights were violated by a federal government employee, such evidence would support a cause of action for damages in the federal courts.”); *Jihaad v. Carlson*, 410 F.Supp. 1132, 1134 (E.D. Mich. 1976) (“the rationale of *Bivens* may, in a proper case, be applied to violations of the First as well as the Fourth Amendment”). Second Circuit courts assume that substantive due process claims can be brought under *Bivens*. *Roseboro v. Gillespie*, 791 F. Supp.2d 353, 380 (S.D.N.Y. 2011) (assuming that a pretrial detainee could bring a substantive due process *Bivens* claim for being placed in the SHU for 90 days but declining to find that his rights had been violated in that particular instance); *Petrucci v. Hasty*, 605 F. Supp.2d 410 (E.D.N.Y. 2009) (assuming that a pretrial detainee could bring a substantive due process *Bivens* claim for confinement in the SHU but declining to find that his rights had been violated in that instance). The Second Circuit also allows *Bivens* Fifth Amendment claims for deprivation of property. See, e.g., *Hallock v. Bonner*, 343 Fed. App’x. 633, 635 (2d Cir.2009) (“It is also a prerequisite for a due process violation, and hence for a *Bivens* action of this kind, that the defendants damage plaintiffs’ property with intentional conduct.”); *Polanco v. U.S. Drug Enforcement Admin.*, 158 F.3d 647, 650 (2d Cir.1998) (“*Bivens* provides a remedy only for intentional deprivations of property without due process of law.”). Circuit courts have allowed a *Bivens* cause of action for violations of Fifth

While the *Feres* doctrine was originally meant to prohibit FTCA claims against the military as an institution, its reasoning was later used to justify prohibiting military service members from bringing *Bivens* actions against individual military officials for violating service members' constitutional rights as well, under the "special factors counseling hesitation" prong of the two-part *Bivens* inquiry. This has created even greater immunity for the military than was originally intended by the Supreme Court in *Feres*. Commentators have long argued for Congress to make clear that the FTCA was never intended to make such an exception for service members by passing legislation explicitly rejecting the *Feres* doctrine.³⁴ Realizing the political hurdles to such a solution, others have argued that the Supreme Court should overturn the *Feres* doctrine altogether.³⁵ Less ambitious views on the matter advocate for courts to create an exception to *Feres* for constitutional violations, intentional torts, harms suffered once a service member is no longer in the military, and harms suffered by spouses and family of service members.³⁶

The major concern that courts have articulated to justify refusing to hear service members' claims against the military is the risk of harming military discipline and the problems with judicial interference in military affairs. This is a valid concern—if the judiciary were able to second-guess every military decision, there surely would be serious adverse effects on the military's ability to perform its critical role. However, these concerns do not justify the abdication of judicial duty in the face of egregious constitutional violations of service members'

Amendment procedural due process rights. *Engel v. Buchan*, 710 F.3d 698, 699 (7th Cir. 2013) (allowing *Bivens* cause of action for violation of *Brady*, a case that deals with suppression of evidence in violation of procedural due process of a defendant); *Tellier v. Fields*, 280 F.3d 69, 80–83 (2d Cir. 2000).

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 (2003).

³⁵ See, e.g., Brian P. Cain, *Military Medical Malpractice and the Feres Doctrine*, 20 GA. L. REV. 497 (1986); Jennifer L. Carpenter, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine*, 26 U. HAW. L. REV. 35 (2003); John B. Wells, *Providing Relief to the Victims of Military Medicine: A New Challenge to the Application of the Feres Doctrine in Military Medical Malpractice Cases*, 32 DUQ. L. REV. 109 (1993).

³⁶ David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L. J. 992 (1986).

rights. In fact, there is evidence that courts have adjudicated claims in a similar context without causing such problems. Prisons pose many of the same issues with judicial interference as does the military. But courts have found a way to adjudicate alleged constitutional violations that arise in this context, including rape, without causing problems in prison management. In the Eighth Amendment context, courts find violations where prison officials have acted with deliberate indifference to impending harm or with malicious and sadistic intent to do harm.³⁷ Under the framework articulated in *Turner v. Safley*,³⁸ courts only overturn prison regulations where a prison policy or action does not serve a legitimate penological objective. Indeed, the Supreme Court extended *Bivens* actions to the prison context in *Carlson v. Greene*.³⁹

In an ideal world, either Congress or the Supreme Court would overturn the *Feres* doctrine so that plaintiffs whose constitutional rights have been violated—victims of intentional torts, medical malpractice, and other harms—could obtain redress and so that the military’s actions could have some external check. The doctrine was never part of Congress’s intent in passing the FTCA, and the Court has expanded it to the point of absurdity. The doctrine’s expansion has allowed the military to go unchallenged for, and victims to go unprotected from, egregious violations of constitutional rights, like the sexual assault of service members by commanders and fellow soldiers with acquiescence. Courts have abdicated their duty to adjudicate service members’ claims in the face of these egregious violations by dismissing cases on *Feres* grounds for lack of subject matter jurisdiction.

Recognizing that such a solution is unlikely, however, this paper argues that courts should no longer dismiss cases brought by service members against the military for lack of subject matter jurisdiction. Rather, courts should use the existing mechanism for bringing constitutional claims against federal officials, *Bivens*, and hear these cases, while giving

³⁷ *Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Hudson v. McMillan*, 503 U.S. 1, 6 (1992).

³⁸ 482 U.S. 78, 89 (1987).

³⁹ 446 U.S. 14.

deference to the military using a three-part test that borrows from the prison context to provide monetary relief for constitutional violations. The refusal to allow *Bivens* actions against military officials in the instances in which *Bivens* actions were brought against them is a mistake. However, it is one that the Supreme Court can now fix by hearing the *Klay* or *Cioca* cases and extending *Bivens* to a new class of defendants, as both factors in the *Bivens* two-step inquiry are inapplicable in the military sexual assault context. Not only has Congress failed to provide a meaningful alternative channel to vindicate the rights of the numerous sexual assault victims who have been failed by the military justice system, but the fact that sexual assault has nothing to do with the military's mission makes the "special factors counseling hesitation" analysis inapplicable.

This paper provides a three-part test for dealing with *Bivens* actions against military officials, one that addresses many of the concerns inherent in the *Feres* doctrine and its extension to bar *Bivens* suits against military officials. The test would ask: (1) if the service member has suffered harm that is "sufficiently serious"; (2) if that harm was caused by the deliberate indifference of the service member's military superior or, in the alternative, by a malicious and sadistic act; and (3) whether the harm was rationally related to a valid military objective. Such a framework would ensure judicial noninterference in sensitive military affairs while also ensuring that the military does not violate constitutional rights with no external check.

I. The Historical Development of the *Feres* Doctrine

Congress passed the Federal Tort Claims Act in 1948 to allow individuals to sue the federal government for tort violations committed by federal employees through a waiver of sovereign immunity.⁴⁰ Prior to this time, citizens injured by a government employee had to

⁴⁰ Thomas M. Gallagher, *Servicemembers' Rights under the Feres Doctrine: Rethinking Incident to Service Analysis*, 33 VILL. L. REV. 175 (1988).

petition Congress to pass a private bill for relief.⁴¹ As the federal government grew in size, federal agents inflicted more remediless wrongs upon individual citizens.⁴² The unwieldy system of petitioning Congress for relief eventually proved to be an inadequate method of handling tort claims against the government.⁴³

The FTCA's text makes an exception from liability for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."⁴⁴ This language clearly implies that the FTCA allows claims against the military for activities arising from *non-combatant* activities in peacetime. Additionally, between 1925 and 1935, Congress passed eighteen tort bills, all but two of which expressly denied any recovery to members of the Armed Forces.⁴⁵ The FTCA made no such exception, which indicates that around the time of its passage, Congress had been actively considering whether or not to include service members in its attempts to provide avenues for tort relief, and explicitly denied such relief in sixteen other instances. Its silence in the FTCA reflects not a lack of thought on the matter, but rather the intent to include service members in the class of individuals who should be able to sue the U.S. government for the torts of its federal employees.⁴⁶

The Supreme Court's initial interpretation of the FTCA was that it did not bar claims arising from non-combat activity. The Court's first opportunity to consider whether military service members could recover under the FTCA arose in the case of *Brooks v. United States*.⁴⁷ In *Brooks*, two service members on furlough from the Army were driving in a private car on a public highway when a civilian federal employee driving an Army truck negligently struck them.

⁴¹ *Id.*

⁴² *Feres v. United States*, 340 U.S. 135, 139–140 (1950).

⁴³ Gallagher, *supra* note 40, at 177.

⁴⁴ 28 U.S.C. § 2680(j).

⁴⁵ John Astley, *United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 195 (1988).

⁴⁶ Robert Cooley, *Method to This Madness: Acknowledging the Legitimate Rationale behind the Feres Doctrine*, 68 B.U. L. REV. 981, 984 (1988).

⁴⁷ *Brooks v. United States*, 337 U.S. 49 (1949).

The Court held that military status alone did not bar recovery and concluded that the plain language of the FTCA could not be read to exclude all military personnel tort claims. The Court concluded, therefore, that military personnel could recover under the FTCA for injuries, as they did in the *Brooks* case, because their injuries were not suffered “incident to service.”⁴⁸

Just one year later, the Court decided *Feres v. United States*, two medical malpractice actions and a negligence action on behalf of a service member who had died in a fire inside military barracks containing a faulty heating system. The Court dismissed all three suits and gave three reasons why service members should not be able to recover under the FTCA. First, soldiers did not choose where they were stationed, and because the FTCA adopted the tort law of the state in which the suit was brought, subjecting soldiers to the laws of fifty different states would be unfair since “a soldier on active duty . . . must serve any place or, under modern conditions, any number of places in quick succession.” Besides, the Court reasoned, “The relationship between the Government and members of its armed forces is distinctively federal in character,”⁴⁹ and there was no mechanism in state tort law by which service members could sue the government that the FTCA codified. Second, since service members already have their own compensation scheme in the Veterans Benefits Act and the Uniform Code of Military Justice (UCMJ),⁵⁰ allowing them to recover under the FTCA would be duplicative. As one commentator noted, this justification of the *Feres* doctrine “arguably reflects the belief of federal courts that military remedies have greater competence to resolve intramilitary tort questions.”⁵¹ Finally, the Court found that because no American law had ever “permitted a soldier to recover for

⁴⁸ Astley, *supra* note 45.

⁴⁹ *Feres*, 340 U.S. at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301 (1947)).

⁵⁰ “Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.” U.C.M.J. Article 138; 10 U.S.C. § 938.

⁵¹ Schwartz, *supra* note 36.

negligence, against either his superior officers or the Government he is serving,” Congress surely did not intend to create a new cause of action for military service members by passing the FTCA.⁵² The *Feres* decision represents the only judicially created exception to the FTCA.⁵³

The Supreme Court later held in *Chappell v. Wallace* that the *Feres* doctrine prohibited *Bivens* actions for constitutional torts.⁵⁴ In *Chappell*, African-American navy seamen brought a race discrimination claim against their military superiors as individuals. The plaintiffs alleged that their commanders gave them less lucrative duties and assignments than their white counterparts, and failed to promote them on the basis of their race. When the Court decided *Bivens*, a Supreme Court case that allowed citizens to sue federal government officials in their individual capacity for violating the Fourth Amendment, it cautioned that future courts should be hesitant to recognize constitutional violations against government actors where there were “special factors counseling hesitation.”⁵⁵ The Court cited its own reasoning in *Feres* as guiding its analysis in *Chappell*, stating that “the ‘special factors’ that bear on the propriety of respondents’ *Bivens* action also formed the basis of this Court’s decision in *Feres*.”⁵⁶ Using the reasoning of *Feres*, the Court found that the potentially disruptive effect that hearing the lawsuit would have on military decision making and military discipline was exactly one such factor.

Judicial decisions regarding whether a service member could sue under the FTCA or *Bivens* hinged, after this point, on whether the injury was suffered “incident to service,” as first articulated in *Brooks*. The Court repeatedly found that more and more injuries were within the “incident to service” umbrella. For example, the Court extended the military’s immunity in *United States v. Shearer*, where it held that an incident occurring off base and off duty was still a “decision of command” and therefore barred by the *Feres* doctrine. In *Shearer*, the mother of a

⁵² *Feres*, 340 U.S. at 141.

⁵³ Gallagher, *supra* note 40.

⁵⁴ *Chappell v. Wallace*, 462 U.S. 296, 298 (1983).

⁵⁵ *Bivens*, 403 U.S. at 396.

⁵⁶ *Wallace*, 462 U.S. at 298 (1983) (quoting *Bivens*, 403 U.S. at 396)).

service member sued the military for the negligent supervision of another service member, a convicted murderer, who kidnapped and killed her son. While such an action would have been sustained in a civilian court under a theory of *respondeat superior*, the Court held that “her allegations go directly to the management of the military, calling into question basic choices about the discipline, supervision, and control of a serviceman,” immunizing the military superiors in the case for their decision to enlist the perpetrator despite his violent history and their decision not to monitor him when he went off-base.⁵⁷

In *United States v. Stanley*, the Court refused to hear a *Bivens* claim brought by a soldier who had been secretly administered LSD by the military without his consent to test its effects on humans as part of a chemical warfare testing program.⁵⁸ The LSD caused the soldier to hallucinate, waking up in the middle of the night to violently beat his wife and children; incidents he failed to remember afterward. He was discharged from the Army and his marriage ended in divorce.⁵⁹ The Court held that the suit was barred because his injuries were suffered “incident to service,” even though the harmful conduct was not brought about as a result of a direct order by a military commander, as it was unclear who administered the drugs.⁶⁰ The reasoning the *Stanley* court gave for so vastly expanding the “incident to service” test was that allowing such a claim would “require judicial inquiry into, and hence intrusion upon, military matters,”⁶¹ thereby making that the central concern in *Feres* cases going forward. The court determined that the “incident to service” test would be the way courts should judge whether service members could bring *Bivens* actions against military officials.

This immunity was further expanded in *United States v. Johnson*, where the Court found that a navy pilot who crashed his plane, killing himself and his passengers due to faulty

⁵⁷ *United States v. Shearer*, 473 U.S. 52 (1985).

⁵⁸ *United States v. Stanley*, 483 U.S. 669 (1987).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 682.

instructions by the Federal Aviation Administration (FAA) tower monitoring his flight, could not bring an FTCA action against the FAA because he was on active duty.⁶² In doing so, the Court reaffirmed the holding of *Feres*. That the FAA was a civilian agency having nothing to do with military discipline or judicial interference in military matters was of no concern to the Court.

II. Criticisms of the *Feres* Doctrine

Most scholars now agree that the *Feres* decision was a mistake, as were the decisions that vastly expanded its reach. First, as commentators argue, the text of the FTCA clearly implies that Congress did not intend for the military exception to extend to non-combat activities.

Second, the reasons given for the *Feres* decision have been thoroughly debunked. The fifty-state rationale (the supposed unfairness of subjecting service members who cannot choose their assignments to the laws of fifty states) is unpersuasive given that civilians can sue the military for many of the harms that the *Feres* doctrine bars service members from suing for even though civilians also cannot choose the location of their assignment. Indeed, “*Feres* creates a massive gap between the legal worth of injuries incurred by service members and non-service members.”⁶³ As Justice Brennan pointed out in his dissenting opinion in *Stanley*, the judiciary can adjudicate cases where “a soldier sues for non-service connected injury, when a soldier sues civilian contractors with the Government for service-connected injury, and when a civilian is injured and sues a civilian contractor with the military or a military tortfeasor.”⁶⁴ There is no justification for the glaring inconsistency between the rights of service members and their civilian counterparts.

The rationale that service members already have their own compensation scheme has also been severely criticized. There are three mechanisms of service-member compensation that courts cite: (1) the UCMJ generally, which is supposed to deter wrongful conduct by providing

⁶² *United States v. Johnson*, 481 U.S. 681 (1987).

⁶³ Turley, *supra* note 34.

⁶⁴ *Stanley*, 483 U.S. at 702 (Brennan, J., dissenting) (citing *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting)).

criminal and non-judicial punishments to service members who violate it; (2) the Veterans Benefits Act (VBA), which provides service members compensation for service-connected injuries after they are discharged from the military; and (3) Article 138 of the UCMJ, which provides that service members can bring injuries to the attention of a commanding officer or his or her superior. All three of these mechanisms are severely flawed, however, and do not provide an equivalent to allowing recovery under the FTCA.

The UCMJ system, for example, is rife with conflicts of interest. Cases are not brought against a service member by a neutral body such as a prosecutor or judge; rather, they can only be brought by the service member's own commanding officer. Commanders under pressure to perform therefore have a strong incentive to be lenient with soldiers who do well at their duties, even if those soldiers commit crimes. Commanders who have preexisting opinions about their soldiers are inevitably influenced by these opinions in their decisions on whether or not to bring a case forward in the military justice system. While commanders have attorneys to advise them on legal issues, they have the right to ignore the advice of these attorneys. As a result, the UCMJ as a compensation system fails where commanders can choose not to bring cases when they are alerted to an incident of harm, which often happens in sexual assault cases, and where commanders pardon convictions that have been rendered by military juries. This is one of the reasons Members of Congress have recently called for taking the power to bring sexual assault prosecutions away from military commanders.⁶⁵

The Veterans Benefits system is hardly an alternative to the type of recovery that could be obtained through the FTCA. The checks-and-balances-type benefits of having the judiciary adjudicate FTCA claims is simply not present where an executive branch agency with its own financial constraints, budgetary pressures and reputational concerns is determining what injuries

⁶⁵ Sean Sullivan, *Feinstein: Review Military Sexual Assault Cases Outside Command Chain*, WASH. POST, May 12, 2013.

to provide compensation for. To this day, for example, the military establishment refuses to acknowledge that it did anything to harm the so-called Atomic Veterans, service members who were exposed to radiation from the military's nuclear testing experiments of 1945–1962.⁶⁶ Some of the shortcomings of the UCMJ also translate into the shortcomings of the VBA. For example, service members who apply for veterans benefits after a sexual assault suffered during their service often cannot recover because the assault was never documented by their commanding officer and put in their files, a requirement for receiving veterans' benefits for sexual-assault related injuries such as Post-Traumatic Stress Disorder. In contrast, suing under the FTCA would allow those service members to use evidence other than what their commanding officer documented to prove that a sexual assault occurred and that the service member suffered harm. Indeed, "the level of compensation given to seriously injured service members makes a mockery of the notion of interchangeable or redundant compensation systems."⁶⁷ The VBA does not compensate for everything that one could obtain compensation for if allowed to bring an FTCA claim. Congress, for example, has repeatedly acknowledged that current veterans benefits do not cover all injuries, or provide for sufficient compensation, by passing such laws as the Radiation-Exposed Veterans' Compensation Act,⁶⁸ and the Radiation Exposure Compensation Act.⁶⁹ These statutes provide veterans with monetary compensation for contracting cancer and other diseases as a direct result of their exposure to atmospheric nuclear testing undertaken by the United States during the Cold War, or their exposure to high levels of radon while doing uranium mining.

The provision of the UCMJ that allows service members to report injuries to their commanding officers or higher ups also has its shortcomings. Service members often do not report injuries to their superior officers if the perpetrator *is* their superior officer, considering that

⁶⁶ Schwartz, *supra* note 36, at 999 n.34 ("From the 1950s to the present, the military's response to the Atomic Veterans has been to cover up rather than to remedy their problems.").

⁶⁷ Turley, *supra* note 34.

⁶⁸ Pub. L. No. 100-321, 102 Stat. 485 (1988) (codified as amended at 38 U.S.C. § 1112(c)).

⁶⁹ Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified as amended at 42 U.S.C. § 2210 (1990)).

superior officers have a tremendous amount of power and influence in the military hierarchy. High-ranking officers in the military can sometimes exert control over investigations into their own misconduct. Service members also do not report injuries if they fear not being believed, if doing so would open an investigation of the injury and make them the “talk of the base,” if it could harm their reputation, and for a host of other concerns. All of these shortcomings have led one commentator to conclude,

“In practice . . . institutional pressures cause the military remedial system to break down in precisely the cases where deterrence and compensation are most needed. As instruments of military policy, the remedial system cannot be relied upon to play a watchdog role, where that may cause embarrassment to the military; instead, the remedial system may be more likely to cover up military wrongdoing. The military justice system is probably competent to punish and deter isolated misconduct of lower level officers that sharply departs from the military’s own norms of behavior. But it may be less competent to deter conduct that is part of a widespread problem.”⁷⁰

Third, the parallel private liability argument (that there was no “parallel private liability” for suits by service members against the government in state tort law that was codified by the FTCA) was quickly recognized as weak and rejected by the Supreme Court in *Rayonier, Inc. v. United States*, where the Court held that an injured party could not be deprived of his rights simply due to an alleged distinction between the government’s actions in its proprietary capacity versus its uniquely governmental capacity.⁷¹ This is increasingly true today with the growing use of military contractors.

⁷⁰ Schwartz, *supra* note 36, at 999.

⁷¹ 352 U.S. 315, 319 (1957); *see also Indian Towing Co. v. United States*, 350 U.S. 61, 66–69 (1955).

Even under an “incident to service” analysis, the types of claims barred by the FTCA today cannot possibly be considered the kinds of experiences that a service member can expect (or that society should tolerate) just because they enter the military and give up certain freedoms. Courts interpret “incident to service” to mean that, but for a person’s military status, he or she would not have suffered the injury. It was only because, as a service member, with access to military medical treatment, courts reasoned, that the service member suffered injury from the malpractice of a military physician. Therefore the patient’s injury was deemed incident to service. It was only because, as a service member with access to the living quarters of an Army base, that the service member experienced rape there. Therefore her injury was deemed incident to service. In *Gonzalez v. Air Force*, for example, the Tenth Circuit found that the benefit a plaintiff received at the time of her injury (rape) was her ability to attend an on-base military party. Courts have subsequently found that injuries occurring during recreational activities are incident to service because they relate to military order and discipline.⁷² The absurdity of this idea is easy to uncover, as the *Gonzalez* plaintiff’s ability to attend the on-base military party where she was raped could not have possibly had anything to do with her military service. If such a situation should be considered incident to service, so should one where a commander directs a service member to rape another as punishment for abdicating a military duty. Clearly this cannot be the case.

Schwartz, for example, argues, “Since 1950 the *Feres* doctrine has grown into something quite different from the original rule. A list of the various claims barred today by the *Feres* doctrine illustrates: black servicemen claiming discriminatory punishments and duty assignments by a superior officer;⁷³ a servicewoman claiming to have been sexually assaulted;⁷⁴ an army intelligence agent found dead after allegedly being confined and interrogated for nine days by

⁷² *Costo v. United States*, 248 F.3d 863, 868–69 (9th Cir. 2001).

⁷³ *Chappell v. Wallace*, 462 U.S. 296 (1983).

⁷⁴ *Stubbs v. United States*, 744 F.2d 58 (11th Cir. 1984).

Army and CIA agents who had learned of his intention to write his memoirs;⁷⁵ soldiers subjected to experimental injections of LSD;⁷⁶ thousands of soldiers ordered to participate in atomic radiation experiments.⁷⁷ These are not the kinds of things we expect soldiers to undergo simply because they have signed up for or been conscripted into the military. As Justice O'Connor stated in her *Stanley* dissent, "In my view, conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."⁷⁸ And as Brennan echoed in his, "The court holds that the Constitution provides him with no remedy, solely because his injuries were inflicted while he performed his duties in the Nation's Armed Forces. If our Constitution required this result, the Court's decision, though legally necessary, would expose a tragic flaw in that document."⁷⁹

III. A Fourth Rationale: Judicial Non-Interference

As courts began to acknowledge the problems with the rationales provided for keeping *Feres* and the decisions interpreting it, a dominant rationale for maintaining the doctrine emerged. In *Shearer* the court provided a two-part test to determine whether an injury was suffered "incident to service": (1) whether the suit requires a civilian court to second-guess military decisions . . . and (2) whether the suit might impair essential military discipline. As one commentator noted, "the trend among federal courts after the Supreme Court's decision in *Shearer* has been to confine 'incident to service' analysis to primarily a 'military discipline' analysis."⁸⁰ In *United States v. Brown*, the court noted that Congress did not intend to allow suits for injuries incident to military service because of the potential undue interference with military discipline, stating that *Feres* seems best explained by the "peculiar and special relationship of the

⁷⁵ *Sigler v. Le Van*, 485 F. Supp. 185 (D. Md. 1980).

⁷⁶ *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981).

⁷⁷ *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1980) (en banc), cert. denied, 457 U.S. 1133 (1982).

⁷⁸ *Stanley*, 483 U.S. at 709.

⁷⁹ *Id.*

⁸⁰ Gallagher, *supra* note 40, at 196.

soldier to his superiors [and] the effects of the maintenance of such suits on discipline.”⁸¹ If service members could bring suits against each other, military discipline would be undermined and civilian courts would be able to second-guess military decision making. Therefore, “civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers.”⁸²

Courts have increasingly begun to justify decisions dismissed on *Feres* grounds under the banner of judicial noninterference in military affairs, reinforcing the notion that the military is separate from the civilian system. As the Court stated in *Chappell*, the first case to hold that service members cannot bring *Bivens* actions against military officials, “military necessity makes demands on its personnel ‘without counterpart in civilian life,’”⁸³ pointing out the “hierarchical structure of discipline and obedience to command . . . unique in its application to the military establishment and wholly different from civilian patterns,”⁸⁴ and concluding that “it is difficult to conceive of an area of governmental activity in which the courts have less competence.”⁸⁵ As the court added in *Orloff*, because “the military constitutes a specialized community governed by a separate discipline from that of the civilian . . . orderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters”⁸⁶ “The special status of the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel.”⁸⁷

⁸¹ *United States v. Brown*, 348 U.S. 110, 112 (1954).

⁸² *Chappell*, 462 U.S. at 300.

⁸³ *Id.* (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

⁸⁴ *Id.*

⁸⁵ *Id.* at 302 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

⁸⁶ *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

⁸⁷ *Chappell*, 462 U.S. at 303–04 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

When courts have expressed concern over judicial intrusion into military discipline, they have referred to one of three things. First, courts express concern that they may cause disruption through factual inquiries. Requiring members of the Armed Forces to testify as to one another's decisions and actions can threaten the military's reputation, for example. Second, they express concern that courts may chill swift and bold military decision making by constantly holding the potential for damage remedies over the heads of commanders. Third, courts worry that they may promote the disobedience of soldiers; soldiers would be more likely to defy orders if they knew they could sue later.

All three of these rationales have also been thoroughly criticized. First, commentators argue that reputational concerns aren't persuasive given that "civilian plaintiffs are not barred from bringing suit for injuries caused by the tortious conduct of the military."⁸⁸ These suits also require that service members testify about their actions and the inner workings of the military. Additionally, as a general matter, allowing service members to testify about each others' actions ensures that the public has information about how the military functions and ensures effective civilian oversight over military affairs, a longstanding principle in American law. The concern regarding chilling swift decision making is also unpersuasive when one considers that the decisions that are being protected by the current *Feres* doctrine framework are to suppress whistleblowers, ignore sexual assault, engage in racial discrimination, conduct chemical experiments on soldiers, and the like—not the kind that need protection, such as decisions made in combat. Finally, blind obedience to military commands is not a virtue that should be promoted, given that military law imposes an obligation on soldiers to refuse to obey unlawful orders,⁸⁹ and given that military service members do retain their constitutional rights.

⁸⁸ Schwartz, *supra* note 36, at 1005.

⁸⁹ *Id.* at 1006–1007.

The military discipline rationale is peculiar given that many of the cases that have been struck down on *Feres* grounds have had little to do with discipline at all. When courts of appeals have attempted to use the “incident to service” test in a more meaningful way, the Supreme Court has struck them down. In *Atkinson v. United States*, the Ninth Circuit allowed a medical malpractice case to go forward because a female service member was suing a military doctor for the misdiagnosis of her pre-eclampsia, finding that whether or not she could sue would have no bearing on military discipline.⁹⁰ The case was later modified and withdrawn in light of the Supreme Court’s ruling in *United States v. Johnson*,⁹¹ where the Court prevented a military service member from suing even a civilian agency on *Feres* grounds. Additionally, in *Daberkow v. United States*, a German pilot who was killed while training in an American-made aircraft under German command was unable to recover.⁹² These cases indicate that military discipline “appear[s] to be little more than a pretense to prevent service members from seeking damages under the FTCA and maintain a bright-line rule,”⁹³ and that *Feres* has been applied as broadly as possible to shield the military from liability. Cases like these have led commentators and dissenting judges to conclude that the judiciary has abdicated its duty to adjudicate difficult but important claims when it comes to military service members.⁹⁴

⁹⁰ *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987).

⁹¹ *United States v. Johnson*, 481 U.S. 681 (1987) (barring case on *Feres* grounds even though civilian air traffic controller, an employee of civilian federal agency, caused injury.).

⁹² *Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978).

⁹³ Turley, *supra* note 34, at 27.

⁹⁴ See, e.g., Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 725–26 (2013); Jonathan Tomes, *Feres to Chappell to Stanley: Three Strikes and Service Members Are Out*, 25 U. RICH. L. REV. 93, 113 n.97 (1990); *Goldman v. Weinberger*, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting) (“The Court, however, evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel.”); *United States v. Stanley*, 483 U.S. at 709–710 (O’Connor, J., dissenting) (“No judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case.”); *Stanley*, 483 U.S. at 710 (Brennan, J., dissenting (“The [majority] holds that the Constitution provides [Stanley] with no remedy, solely because his injuries were inflicted while he performed his duties in the Nation’s Armed Forces. If our Constitution required this result, the Court’s decision, though legally necessary, would expose a tragic flaw in that document . . . [i]n reality, the [majority] disregards the commands of our Constitution, and bows instead to the purported requirements of a different master, *military discipline* . . .”).

The idea that the judiciary has too little expertise in military affairs to contribute anything meaningful when service members try to sue the military is simply false. It is precisely the judiciary's role to adjudicate claims between parties and determine what is fair. Leaving this job to the military or some other executive branch agency when the military itself is the perpetrator of the wrong does not make sense. Fostering a separate system of justice for the military goes against the principle of checks and balances and is not what the Framers intended. Additionally, the military's growing size makes this a growing problem.

IV. *Feres* Is Here to Stay

Commentators have for years been arguing that the *Feres* doctrine should be overturned; however, this is unlikely to happen because neither Congress nor the Supreme Court is likely to do so.

In the almost twenty-five years since this Court reaffirmed *Feres* in *Johnson v. FAA*, Congress has rejected numerous bills that would have limited *Feres*, including by rendering it inapplicable to medical malpractice claims.⁹⁵ Congress held extensive hearings on several of those bills.⁹⁶ None, however, have resulted in a floor vote that has been successful at overturning the rule.

The Supreme Court is also unlikely to overturn *Feres*, given that the Court has only expanded its reach over time. Additionally, *stare decisis* would strongly militate against the

⁹⁵ See H.R. 1478, 111th Cong. (2009); S. 1374, 111th Cong. (2009); H.R. 6093, 110th Cong. (2008); H.R. 4603, 109th Cong. (2005) (proposed addition of Section 2161(c)(1)(E) to the Public Health Service Act, 42 U.S.C. 300aa-1 *et seq.*); H.R. 2684, 107th Cong. (2001); H.R. 3407, 102d Cong. (1991); H.R. 536, 101st Cong. (1989); S. 2490, 100th Cong. (1988); S. 347, 100th Cong. (1987); H.R. 1341, 100th Cong. (1987); H.R. 1054, 100th Cong. (1987).

⁹⁶ See *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. (2009); *The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002); *Claims for Negligent Medical Care Provided Members of the Armed Forces: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 102nd Cong. (1991); *Medical Malpractice Suits for Armed Services Personnel: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 100th Cong. (1988); *Compensation for Victims of Military Malpractice: Hearing Before the Military Personnel and Compensation Comm. of the H. Comm. on Armed Services*, 100th Cong. (1987); *Military Medical Malpractice and Liability for Injuries Resulting From the Atomic Weapons Testing Program: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. (1987).

Court overturning this precedent. The Supreme Court has had the chance to overturn *Feres* in *Johnson v. United States*, and it did not, which would suggest that it is unlikely to do so now.

The argument that *Feres* should be overturned is likely going nowhere. The best that we can hope for is that the Court limits *Feres*'s reach.

V. Learning from a Similar Context: Prisons

The concern that courts lack the competence to deal with issues in a highly specialized setting is not unique to the military. Courts have expressed similar concerns with judicial interference in at least one other context: prisons. A comparison between the military and prison is indeed jarring at first. Prisoners have committed crimes and been locked away to pay the price for doing so and to maintain the safety of the public. Military service members, in contrast, put their lives on the line for their country. The comparison I make, however, is not between service members and prisoners. It is as *institutions* that prisons and the military have relevant similarities, particularly when it comes to how courts should adjudicate disputes that occur within them.

As an initial matter, both service members and prisoners give up some, but not all, of their constitutional rights when they enter those institutions. "Military authorities are empowered to impose a high risk of serious physical harm on troops by ordering them into combat. The discipline underlying effective military force is thought to require restrictions on soldiers' personal freedom and acceptance of a certain degree of physical harshness and brutality in their living environment."⁹⁷ This is also true in the prison context, where, as the Court articulated in *Farmer v. Brennan*, "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions;' it outlaws cruel and unusual 'punishments.'"⁹⁸ Prisoners' freedoms are severely curtailed and they are often put into very uncomfortable conditions. This is in part the very purpose of

⁹⁷ Schwartz, *supra* note 36, at 997.

⁹⁸ *Farmer*, 511 U.S. at 837.

incarceration. Needless to say, both soldiers and prisoners do not enjoy the same kind of freedoms as ordinary citizens. This forces courts, as a result, to work hard to strike the right balance between upholding the prisoner or service member's rights while also considering that some rights are incompatible with their environments, because both sets of individuals have made choices that require them to give up or diminish their ability to exercise their rights to the fullest extent, compared to ordinary citizens.

First Amendment rights provide a good example of how this plays out in both contexts. While both service members and prisoners enjoy First Amendment protection, their rights are significantly curtailed due to the governmental interests involved. Prisons, for example, have a great deal of authority to limit what prisoners can read,⁹⁹ who they can talk to outside of the prison¹⁰⁰ and what they can say.¹⁰¹ Similarly, the military also limits how service members can express themselves.¹⁰² Individuals in both institutions do not completely give up their constitutional rights, however. For example, in *Turner v. Safley*, the Supreme Court held that a prison regulation requiring the warden to approve all prisoner marriages was unconstitutional because it violated prisoners' substantive due process rights by impinging on their fundamental interest in marriage.¹⁰³ In *Witt v. Air Force*¹⁰⁴ and *Log Cabin Republicans*,¹⁰⁵ the Ninth Circuit

⁹⁹ *Beard v. Banks*, 548 U.S. 521 (2006).

¹⁰⁰ *Turner v. Safley*, 482 U.S. 78 (1987) (upholding prison regulation prohibiting inmates from corresponding through letters with inmates in other prisons); *Shaw v. Murphy*, 532 U.S. 223 (2001) (upholding prison regulation prohibiting inmate from giving another inmate legal advice); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (allowing prison warden broad discretion in which publications prisoners cannot receive from the outside world); *Pell v. Procunier*, 417 U.S. 817 (1974) (upholding prison restriction on press access to prisoners for purposes of interviewing them).

¹⁰¹ *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008).

¹⁰² *Weinberger*, 475 U.S. at 503 (upholding a military policy disallowing military rabbi from wearing his yarmulke on Air Force base).

¹⁰³ *Turner*, 482 U.S. at 78.

¹⁰⁴ *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008).

¹⁰⁵ *Log Cabin Republicans v. U.S.*, 658 F.3d 1162 (9th Cir. 2011).

found that the military's Don't Ask, Don't Tell (DADT) policy violated the substantive due process rights and First Amendment rights of service members.¹⁰⁶

Additionally, both the military and prisons are highly valued institutions in society because they protect the security of the public. The military protects the country against external threats; prisons protect local communities from the risk that criminals pose. The country relies on both of these functions to thrive and grow. As a result, the public tends to be willing to accept the separate nature of both institutions from the rest of society and to allow for a significant amount of self-policing. The military has its own criminal justice system, for example (the UCMJ). Prisons promulgate regulations that lay out rules for prisoners and prison staff as well as the punishments for violations of such rules.

Both institutions' members tend to lack strong political power, but for different reasons. Politicians often care little about the plight of prisoners—prisoners tend to be from predominantly poor communities where political participation is minimal,¹⁰⁷ and depending on their convictions, prisoners often give up their voting rights. Service members also tend to be economically less well-off than the civilian population.¹⁰⁸ Additionally, the military strongly discourages political speech and encourages soldiers not to dissent.¹⁰⁹ While the defense establishment wields a tremendous amount of power in Congress, and the notion that the

¹⁰⁶ In both cases, the court found that the military policy created adverse consequences for revealing a service member's sexual orientation and thereby violated his First Amendment rights.

¹⁰⁷ U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 164620, PROFILE OF JAIL INMATES 1996 (1998).

¹⁰⁸ Nearly three quarters of those killed in Iraq came from towns where the per capita income was below the national average. *Small Towns Absorb the Toll of War*, NAT'L PUB. RADIO (Feb. 20, 2007), <http://www.npr.org/templates/story/story.php?storyId=7492231>. "The greatest indicator of the likelihood of military service is whether young men of modest ability come from disadvantaged circumstances, experience minimal connectedness to others, and report a history of adolescent fighting." Glen H. Elder, Jr., et al., *Pathways to the All-Volunteer Military*, 91(2) SOC. SCI. Q. 455 (2010). Military recruiters have been criticized for disproportionately targeting low-income youth and students of color. *Soldiers of Misfortune: Abusive U.S. Military Recruitment and Failure to Protect Child Soldiers*, ACLU (May 13, 2008), <https://www.aclu.org/human-rights/soldiers-misfortune-abusive-us-military-recruitment-and-failure-protect-child-soldiers>.

¹⁰⁹ Michael Noone, *Political Dissent in the U.S. Military*, ABC NEWS (Feb. 7, 2007), <http://abcnews.go.com/Politics/story?id=2857017>.

government has a duty to provide for veterans is a popular one, individual service members tend to wield little political power because they are discouraged from airing their grievances.

Judicial interference in prison management raises many of the same concerns articulated in the context of judicial interference in military affairs. Courts express the concern that judges in prison cases should not “become the primary arbiters of what constitutes the best solution to every administrative problem,”¹¹⁰ and that “prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations.”¹¹¹ Courts argue that prison officials have expertise that courts lack on how best to achieve penological objectives such as prison security and rehabilitation.

The difference between the two contexts, however, is that despite the concerns that courts express over inserting themselves into prison management decisions, courts do not completely dismiss prisoners’ rights cases for lack of subject matter jurisdiction, as they do in the case of military service members. Unlike with the military, courts have not created in prisons a world unto itself, where they are expected to self-police without an effective external check. Courts hold prisons accountable to the Constitution. Prisoners may sue prison officials for violating their Eighth Amendment right to be free from cruel and unusual punishment through § 1983 actions against states¹¹² and *Bivens* actions against the federal government.¹¹³ For constitutional violations outside the Eighth Amendment, courts allow prisoners to challenge prison policies and regulations under a deferential standard articulated in *Turner v. Safley*, if those policies violate a prisoner’s constitutional rights to free speech, exercise of their religion, freedom from unreasonable search and seizure, equal protection, etc.

¹¹⁰ *Turner*, 482 U.S. at 89.

¹¹¹ *Id.* at 88 (quoting *Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119, 128 (1977)).

¹¹² *Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (“*Bivens* actions against federal prison officials (and their 42 U.S.C. § 1983 counterparts against state officials) are civil in character . . .”).

¹¹³ *Carlson v. Green*, 446 U.S. 14, 25 (1980) (extending *Bivens* actions to Eighth Amendment claims against federal prison officials).

This involvement has not caused a disruption in prison security, as commentators fear would be caused in the case of military discipline. It has not meant the substitution of judges' opinions for the expert opinions of prison officials on matters of incarceration. If anything, commentators have held that judges are *too* deferential even in the prison context.¹¹⁴ This begs the question of whether the judicial treatment of prisoners' rights can lend some wisdom on how courts can be involved, yet still deferential, in the military context.

Additionally, it is worth noting that courts are not unwilling to force the military to behave constitutionally. Courts are willing to provide injunctive relief to service members who sue claiming violations of their constitutional rights, as discussed above in the case of *Witt v. Air Force*. This would suggest that courts should be consistent between the military and prison contexts by allowing service members to pursue both injunctive as well as monetary relief. The reasons that both types of relief exist explain why this is the case: not all harms can be solved by changing a practice or policy. Sometimes the harm has already been done, and the only way to deter similar harm in the future and to compensate victims is by forcing the perpetrator to pay. As explained by the Court in *Davis v. Passman*, a case in which a female congressional staffer sued her congressman boss for firing her on the basis of her sex, equitable relief in the form of reinstatement would be unavailing, and only a damages remedy would be appropriate if the former congressional staff member were to prevail on the merits of her claim that her constitutional rights were violated when she was discharged.¹¹⁵ Monetary relief of this kind is allowed in the prison context as a way to punish rogue prison officials and regulate prison conditions from the outside. At the very least, the same should be true of the military.

Rather than dismissing all service member cases for monetary relief on *Feres* grounds, courts can learn from cases in the prison context and allow them in certain circumstances. Courts

¹¹⁴ James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 99–101, 119 (2006).

¹¹⁵ 442 U.S. 228, 245 (1979).

can adopt tests developed in case law, under the Eighth Amendment and under *Turner v. Safley*, to determine when gross violations of constitutional rights have occurred in the military context, and can then allow service members who have suffered them to recover. This will protect service members and address the most shocking violations while still giving courts the ability to provide deference to military judgment.

VI. Prisoners' Rights: How Courts Determine What They Are and Whether They Have Been Infringed

Prisoners can assert their constitutional rights in two main ways. When challenging a prison policy or regulation, courts use a test articulated in *Turner v. Safley*. In using the test, plaintiffs make a *prima facie* case that a constitutional analysis has been triggered by the prison's regulation or policy, and courts make a factual finding that there has been such a trigger. Once courts determine that the Constitution has been triggered, they engage in a deferential analysis. Courts then use a four-part test to determine if the policy or regulation is constitutional. The four parts are:

1. "There must be a valid, rational connection between the regulation and a legitimate and neutral governmental interest put forward to justify it, which connection cannot be so remote so as to render the regulation arbitrary or irrational;
2. Whether there are alternative means of exercising the asserted constitutional right that remain open to inmates, which alternatives, if they exist, will require a measure of judicial deference to the corrections officials' expertise;
3. Whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of

- limited prison resources, which impact, if substantial, will require particular deference to corrections officials; and
4. Whether the regulation represents an “exaggerated response” to prison concerns, the existence of a ready alternative that fully accommodates the prisoner’s rights at de minimis costs to valid penological interests being evidence of unreasonableness.”¹¹⁶

Courts tend to review constitutionally challenged military policies and regulations on a more sub-rational basis. For example, in *Goldman v. Weinberger*, the court found that a military regulation prohibiting individuals on base from wearing religious headgear passed constitutional scrutiny.¹¹⁷ In *Rotsker v. Goldberg* the Court found that a military regulation excluding women from the draft passed constitutional scrutiny because the prohibition on women serving in combat positions justified the policy.¹¹⁸ Although the policy was made for administrative convenience, a justification not permitted in Equal Protection cases,¹¹⁹ the court allowed it in the military context.

When prisoners sue for individual instances of harm, they do so under the Eighth Amendment. Courts find Eighth Amendment violations against state prison officials through § 1983 causes of action. Courts also allow prisoners to sue federal prison officials through *Bivens*

¹¹⁶ *Turner*, 482 U.S. at 78–79.

¹¹⁷ *Weinberger*, 475 U.S. at 503.

¹¹⁸ 453 U.S. 57, 78–79 (1981).

¹¹⁹ See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (It may be that there is empirical support for the proposition that men are more likely to be the principal supporters of their spouses and families . . . but the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative convenience.”); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment”); *Frontiero v. Richardson*, 411 U.S. 677, 689–90 (1973) (“[O]ur prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and efficiency . . . administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality.”).

causes of action.¹²⁰ In *Carlson v. Green*, the Court found that a prisoner's decedent could bring a *Bivens* cause of action to recover monetary damages against a prison official for failing to provide him with medical treatment when he needed it and thereby violating his Eighth Amendment right to be free from cruel and unusual punishment.¹²¹ The court reasoned that "[n]either of the situations in which a cause of action under *Bivens* may be defeated" were present in *Carlson* because the cases involved "no special factors counseling hesitation" and there was "no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover damages from the officers."¹²²

This differs from the *Turner* context in that it is not a prison policy that is being challenged; rather, what is challenged is a prison official's discrete and individual infliction of harm. In these instances, the prison usually admits that the officer's conduct was wrong, unlike in *Turner* cases where the prison defends the constitutionality and penological necessity of the policy. Additionally, the most egregious violations of constitutional rights in prison are brought up in Eighth Amendment cruel and unusual punishment cases, such as prison rape, lack of adequate medical treatment, inhumane or filthy conditions, assault by prison guards, etc.

There are a few contexts in which Eighth Amendment claims are brought. In the context of excessive force claims against prison officials, such as the intentional infliction of force to quell a prisoner riot, courts ask whether the injury caused by the prison official was imposed "maliciously and sadistically for the very purpose of causing harm" or "applied in a good-faith effort to maintain or restore discipline."¹²³ Courts find that when prison guards rape inmates,

¹²⁰ *Carlson v. Green*, 446 U.S. 14, 19 (1980) (noting that federal prisoners can also bring FTCA causes of action against the United States for the intentional torts of prison officials, and this does not preclude them from bringing *Bivens* actions against individual prison officials.).

¹²¹ *Id.*

¹²² *Id.* at 15.

¹²³ *Hudson v. McMillan*, 503 U.S. 1, 6 (1992); see also *Whitley v. Albers*, 475 U.S. 312, 320 (1986) ("[W]e think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.").

they do so with malicious and sadistic intent to do harm and therefore violate their Eighth Amendment rights, as rape cannot possibly be seen as necessary to maintain prison security.

In cases where the harm caused is not intentional, such as the failure to provide adequate medical care,¹²⁴ or the failure to protect a prisoner from attack at the hands of another prisoner, courts ask whether the prison official acted with deliberate indifference to imminent harm.¹²⁵ Courts use a two-part test articulated in *Farmer v. Brennan*. This test is composed of a subjective and objective component. The subjective component asks whether the prison guard in charge of supervising or monitoring the inmate had knowledge of impending harm and did nothing about it. The objective portion asks whether the harm suffered was sufficiently serious. Intense fear of imminent harm can qualify for the objective portion of the test even if physical harm does not actually occur.¹²⁶ In *Farmer*, the Court found that a prison guard was deliberately indifferent to the risk that a transsexual prisoner may be raped by other prisoners in the unit. The prisoner had told the guard he was afraid for his safety and that he had received threats from the other prisoners. The transsexual prisoner was ultimately gang raped. The Court found that even though the prison official was not the one to rape the prisoner, by allowing the prisoner to be raped by others, the official had violated the prisoner's Eighth Amendment rights.¹²⁷ The court reasoned that enduring rape, or constant fear of rape, is not part of a prisoner's incarceration just because all prisoners face such a risk.¹²⁸ The court reasoned that "gratuitously allowing the beating or

¹²⁴ *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) (finding cause of action under Eighth Amendment for deliberate indifference to medical needs of prisoner).

¹²⁵ *Farmer*, 511 U.S. at 834 (finding Eighth Amendment violation based on deliberate indifference where prison official placed transsexual in general population with other inmates despite official's awareness that he faced a serious risk of violence, resulting in transsexual being beaten and raped by other inmates).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 833–34.

rape of one prisoner by another serves no ‘legitimate penological objectiv[e]’¹²⁹ and rejected “the theory that sexual or other assaults are a legitimate part of a prisoner’s punishment.”¹³⁰

This observation is very telling and extremely common sense. Like prisoners, for whom rape is not a legitimate part of incarceration, no matter how likely it may be to occur in prison, rape should not be considered a part of military service, also no matter how likely it may be to occur on base or in the theatre of war. Rape in the ranks simply is not and should not be accepted as “incident to service.”

VII. Applying Eighth Amendment Rights to the Military Context

The Eighth Amendment right to be free from cruel and unusual punishment is obviously applicable only in the prison context, as it is a right that can only be exercised by incarcerated inmates. This begs the question of how any Eighth Amendment analysis or test could be useful for courts when hearing cases brought by military service members.

Courts have spoken precisely to this issue, finding that the principles underlying an inmate’s Eighth Amendment rights are the same as a citizen’s substantive due process rights, as found in the Fourteenth Amendment and Fifth Amendment Due Process Clauses.¹³¹ As one commentator points out, “Despite the Supreme Court’s insistence that the Due Process Clause, and not the Eighth Amendment, protects pretrial detainees from deplorable and harmful conditions of confinement, most federal circuits now assess pretrial detainees’ claims under Eighth Amendment standards.”¹³² Hence, in *Smith v. Knox* the court held that “the Due Process clause of the Fourteenth Amendment offers pre-trial detainees the same protection against

¹²⁹ *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 527, 548 (1984)).

¹³⁰ *Farmer*, 511 U.S. at 833–34.

¹³¹ The Fifth Amendment to the United States Constitution provides: “No person shall be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V. The Fourteenth Amendment provides: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

¹³² David C. Gorlin, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees’ Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, MICH. L. REV. 108, 417 (2009).

deliberate indifference as the Eighth Amendment guarantees to the convicted.”¹³³ Some courts conclude that pretrial detainees and convicted prisoners have the “same” rights,¹³⁴ or that the Due Process Clause and Eighth Amendment are “coextensive”¹³⁵ or used “interchangeably.”¹³⁶ In *Schwartz v. Lassen County*, the court applied the Eighth Amendment’s “deliberate indifference” standard to § 1983 claims for failure to provide medical care to pretrial detainees under the Fourteenth and Fifth Amendments, finding a violation of their substantive due process rights.¹³⁷ A pretrial detainee’s right to be free from deliberate indifference to harm is rooted in his interests in liberty, dignity, and security of person, analogous to the Eighth Amendment’s protection of the same interests of the convicted.

But courts have applied analysis from the Eighth Amendment not just in cases involving pretrial detainees, but also in other types of cases where Fourteenth or Fifth Amendment substantive due process violations have been alleged, as well. For example, courts have recognized the right to substantive due process as the proper method by which to impose constitutional liability on a public school teacher for improper punishment of a school child.¹³⁸ “A decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child’s Fifth Amendment liberty interest in his personal security and a violation of substantive due process prohibited by the Fourteenth

¹³³ 666 F.3d 1037 (7th Cir. 2012) (citing *Williams v. Rodriguez*, 509 F.3d 392, 401 (7th Cir. 2007)); see also *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979) (noting pretrial detainees are entitled to be free of cruel and unusual punishment under the Due Process Clause of the Fourteenth Amendment).

¹³⁴ *Daniel v. U.S. Marshall Serv.*, 188 F. App’x 954, 961–62 (11th Cir. 2006) (per curiam); *Daniels v. Woodside*, 396 F.3d 730, 735 (6th Cir. 2005).

¹³⁵ *Suprenant v. Rivas*, 424 F.3d 5, 18 (1st Cir. 2005).

¹³⁶ *Marsh v. Butler County*, 268 F.3d 1014, 1024 n.5 (11th Cir. 2001).

¹³⁷ 666 F. Supp. 2d 1045 (E.D. Cal. 2012) (citing *Estelle v. Gramble*, 429 U.S. 97, 104 (1976) for the proposition that a jailer’s failure to promptly and reasonably procure competent medical aid when a pretrial detainee suffers serious illness or injury while confined violates a prisoner’s Eighth Amendment rights).

¹³⁸ *Thrasher v. Gen. Gas. Co. of Wis.*, 732 F. Supp. 966, 970 (W.D. Wis. 1990). See also Jerry R. Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence That Is Literally Shocking to the Conscience*, 39 S. D. L. REV. 276, 287–88 (1994).

Amendment.”¹³⁹ The due process concerns implicated by harm to bodily integrity are what drive the Eighth Amendment’s prohibition on cruel and unusual punishment as well.

Similar to a prison official exhibiting deliberate indifference to harm, courts have found state officials to violate the Fourteenth Amendment substantive due process rights of minors in state custody when the state’s failure to act presents a substantial likelihood that injury to minors in their custody will occur in the future.¹⁴⁰ In *A. v. Nutter*, the court found that the Philadelphia Department of Human Service’s (DHS) failure to properly investigate reports of child abuse in foster homes and conduct proper safety assessments made the state constitutionally liable for the substantive due process violations of those children based on the sexual abuses they suffered in those homes.¹⁴¹ The court reasoned that “[w]hen the state by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, such as food, clothing, shelter, medical care, and *reasonable safety*, it transgresses the substantive limits on state action set by the Due Process Clause.”¹⁴² Similarly, in *Wood v. Ostrander*, the Ninth Circuit found a substantive due process violation where a police officer left a plaintiff alone at night in a high-crime area after her boyfriend, in whose car she had been riding, was arrested for drunk driving.¹⁴³ The plaintiff was raped by a stranger in the area while attempting to get home. The court reasoned that the state had created the danger to which she was exposed, and by leaving her alone on the side of the road with no means of transportation, were “deliberately indifferent” to her safety.¹⁴⁴

This is presumably why inmates, whose liberty is curtailed by their incarceration, are able to sue prison officials for failing to protect them from harm under deliberate indifference. For

¹³⁹ *Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988).

¹⁴⁰ *A v. Nutter*, 737 F. Supp. 2d 341, 353 (E.D. Pa. 2010).

¹⁴¹ *Id.* at 357.

¹⁴² *Id.* at 365 (quoting *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 200 (1989) (emphasis added) (internal quotation marks omitted)).

¹⁴³ 879 F.2d 583, 587 (9th Cir. 1989).

¹⁴⁴ *Id.* at 588.

children in foster homes whose liberty is curtailed by their placement, and for inmates who cannot leave the prison in which they are housed, the state assumes the duty of protecting their safety and meeting their very basic human needs, as these individuals are not free enough to provide for their own.

Courts think about the liberty, security, and dignity interests protected by the Eighth Amendment's prohibition on cruel and unusual punishment in much the same way as the Fourteenth and Fifth Amendments' guarantees of substantive due process. Hence, the Eighth Amendment tests are very transferrable to those other contexts. Just as the Eighth Amendment prohibits prison officials from "maliciously and sadistically" causing intentional harm, courts have applied the same standard to teachers who inflict corporal punishment on students, to determine if the student's substantive due process rights have been violated.¹⁴⁵ Courts also apply a similar standard for allegations of police brutality, asking "whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."¹⁴⁶

This paper argues that similarities exist between the military and prisons when it comes to judicial involvement in adjudicating conflict; it does not purport to analogize between military service members and children in state custody, students in public schools, or victims of police brutality. However, the reasoning from these cases sheds light on the way courts have dealt with the substantive due process rights of individuals whose liberty has already been significantly curtailed by the state. Courts can borrow the reasoning of the child custody, corporal punishment, and police brutality cases to determine *what* constitutes malicious sadism or deliberate indifference to serious bodily harm to a military service member. Soldiers who report

¹⁴⁵ *Wise v. Pea Ridge School District*, 855 F.2d 560, 564 (8th Cir. 1988).

¹⁴⁶ *Thrasher v. Gen. Cas. Co. of Wisconsin*, 732 F. Supp. 966, 970 (W.D. Wis. 1990) (citing *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir.1980)).

harm or fear of harm but who are ignored don't have the array of choices that ordinary citizens have to protect themselves—they cannot leave their base or station, and must continue serving alongside the source of their impending harm. It makes sense, therefore, that the military should assume the duty of protecting the substantive due process rights of soldiers just like prisons and welfare offices for prisoners and for children. Courts can therefore apply the deliberate indifference standard from the Eighth Amendment to the Fourteenth Amendment substantive due process rights of military service members.

VIII. Applying Deliberate Indifference, Malicious Intent, and *Turner* to Suits Against the Military

There is one important way that the military is different from the prison context. When an individual signs up for military service, he or she signs up to be put in harm's way. He agrees to allow his superior to command him into situations that may cost him his life. This is not something we require of prisoners. Prisoners are incarcerated mainly to remove the risk that they pose to society. Even though one purpose of incarceration is punishment, and therefore some measure of discomfort goes with the territory, being put in harm's way certainly does not.

This would suggest that it does not make sense for courts to find that soldiers' substantive due process rights have been violated through the deliberate indifference of their superiors, warranting monetary damages. If soldiers entering the military put their very lives and bodily integrity at risk, they should not be able to claim that military officials have, in turn, violated their bodily integrity. The unique relationship between the soldier and his superior, as articulated in *Chappell*, precludes soldiers from asserting no more than that their superiors have caused them to suffer harm.¹⁴⁷

¹⁴⁷ *Chappell*, 462 U.S. at 296 (holding that enlisted service members could not maintain a suit for monetary damages against their superior officers for alleged constitutional violations).

However, it is simply not the case that soldiers have *no* substantive due process protection against any and all kinds of physical harm. Courts have consistently held that soldiers do not give up their constitutional rights when they enter the military.¹⁴⁸ Staking out the position that soldiers by virtue of their military status cannot be wrongfully harmed assumes that the military never abuses its authority and power. The *Stanley* line of cases, and now the *Cioca* and *Klay* lawsuits very clearly demonstrate that the military can sometimes do horrible things to its own. The question is where to draw the line between harms that are appropriate for soldiers to take on and those that are not, and whether soldiers should be able to recover in damages for harms already suffered (monetary relief) or only have the benefit of relief for harms that might occur in the future (injunctive relief).

In fact, the role of courts is, in part, to ensure that the government doesn't abuse its citizens. Military service members are citizens susceptible to the same risks of government abuse as civilians. By refusing to allow service members to sue for violations of those rights, the court abdicates its duty to safeguard the individual rights of an entire class of people. If courts are not willing to allow service members to be compensated for violations of all of their constitutional rights, which it held in *Chappell*, at the very least, they can protect the most basic rights of service members and punish the most egregious violations of constitutional rights—those that safeguard the bodily integrity and dignity of the individual and that are not an ordinary component or risk of military service. This would ensure that courts still defer to the military, but provide justice for the worst harms that occur there.

Courts should not completely close off service members' ability to sue for monetary damages. Courts should instead allow it, but impose a high standard on what service members

¹⁴⁸ *Id.* at 304 (Chief Justice Burger, writing for a unanimous court, stated: “[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.”); *see also Weinberger*, 475 U.S. at 509–10 (holding service members have First Amendment rights, although the military can legitimately place greater restrictions on those rights than would be proper in a civilian setting).

can recover for. This is achievable if the court adopts the Eighth Amendment tests of malicious harm and deliberate indifference, to allow service members to sue in the military context, but ask a third question to avoid the problem that service members have implicitly chosen to put themselves in harm's way. Like in *Turner*, where, to determine the constitutionality of a prison policy or regulation, courts ask whether the policy is rationally related to a valid penological objective, courts should ask the same question in the military context: is the harm inflicted rationally related to a valid military objective?

This leaves us with a three-part test for courts to use when determining whether service members should be able to recover when military actors violate their substantive due process rights.

First, as in the objective portion of the *Farmer* test: did the service member suffer harm that was sufficiently serious?

Second, was the military official maliciously and sadistically acting to cause that harm, or if not acting intentionally, using the subjective portion of the *Farmer* test, was the official deliberately indifferent to the imminent risk of harm?

And finally, as contemplated by the first prong of the *Turner* test, was the harm inflicted rationally related to a valid *military* (rather than penological) objective?

Notice that if we were asking whether the commander acted maliciously and sadistically to cause harm, we almost never need to ask the third question: whether the harm inflicted was rationally related to a military objective. Presumably it is never rational or part of a military objective for a commander to sadistically cause one of his soldiers harm; rather, whatever harm soldiers may incur is only acceptable if it is related to the bigger goal of fostering an effective and strong military.

Using this three-part test, we can see that the kinds of things we would want soldiers to be able to recover for (sexual assault by another soldier) would fail the test, while the kinds of things that we would not want soldiers to be able to recover for (a physically demanding combat training program) would pass. Take sexual assault, for example. In the case of service members who are sexually assaulted by their superiors, a service member could sue for monetary damages under the theory that the commander violated her Fifth Amendment substantive due process rights by “maliciously and sadistically” causing her harm rather than to restore or maintain military discipline. Oftentimes service members who have been sexually assaulted by someone of a higher rank must continue take orders and face punishment from that individual. Finding that a deprivation of individual liberty creates a duty to protect on the part of the state would be applicable here.

In the case of service members who are sexually assaulted by *other* service members, plaintiffs could sue under a theory of deliberate indifference. This is provided, of course, that there were indicators that the victim had expressed fear to his or her commander before the assault (as was the case in *Farmer*), or provided that the plaintiff could show that the unit culture was hostile to women and conducive to sexual assault (like plaintiff Cioca, who expressed to military officials in her chain of command that she was being sexually harassed before her rape took place). These are methods that have been utilized by plaintiffs in deliberate indifference lawsuits in the prison context. The harm of sexual assault is more than sufficiently serious; it violates bodily integrity, liberty, and dignity. Sexual assault under color of law is a violation of the constitutional guarantee of due process.

If the harm is not sufficiently serious, or if the military official can prove that he or she did not act with deliberate indifference but rather had little to do with a service member’s injury, recovery under this test would be appropriately difficult. Additionally, under this test, service

members would not be able to sue for monetary damages alleging violations of other constitutional rights. Service members could not get monetary relief for violations of their First Amendment rights to free speech and religious exercise; service members could not obtain monetary relief for the exclusion of women from combat positions under an Equal Protection theory, etc. These claims would not be entirely precluded because service members could still sue for injunctive relief, and courts would provide the deference that they have under *Goldman* and *Rotsker*. But for the worst of harms—harms to bodily integrity and dignity that have absolutely nothing to do with military service, harms that have been done and for which the only recovery is backward-looking, service members would be able to sue for monetary relief using the test articulated above.

If, on the other hand, a service member were to sue for physical injuries suffered from a physically demanding combat training program, this same test would allow courts to deny monetary relief to service members who sued their superiors. The court might find that the soldier suffered serious harm (depending on how serious: broken limbs and the need for medical treatment could qualify as harm that is “sufficiently serious”; other types of harm, such as getting the flu, would not). The court would by and large find that the commander administering the program did not act maliciously unless it could be shown that he or she purposefully forced the soldiers to suffer for his or her own sadistic pleasure. On the other hand, the court could probably find that the commander acted with deliberate indifference to the harm that was caused to the soldiers in the program because he knew that the physically demanding nature of the exercises would likely cause some physical harm.¹⁴⁹ In the prison or civilian context, these two things in combination would be enough to find a substantive due process violation. But the third prong of

¹⁴⁹ There is often a high attrition rate in these programs specifically because of how physically demanding they can be. See U. CHRISTEAN KUBISIAK ET AL., UNITED STATES ARMY RESEARCH INSTITUTE FOR THE BEHAVIORAL AND SOCIAL SCIENCES, REVIEW OF INTERVENTIONS FOR REDUCING ENLISTED ATTRITION IN THE U.S. MILITARY: AN UPDATE at 32 (2009).

my test, articulated above, would ensure that courts could give the program a pass. The military training program would most definitely be rationally related to a valid military objective. The military has an interest in training its soldiers for physically tough situations, such as combat. Running physically demanding training programs do just that. Soldiers are trained in this manner to become ready for battle. Ignoring or perpetuating sexual assault, on the other hand, does nothing for battle-readiness. It only harms and degrades soldiers and detracts from military effectiveness. Sexual assault has absolutely no relation to military objectives. It has no place in the military.

This test, as articulated above, would work in cases where commanders have exhibited deliberate indifference prior to the occurrence of a sexual assault. But what about cases in which a sexual assault has already occurred, the service member reports it to her commander, and he either does nothing about it or retaliates against her for speaking out? How would a court find that the actions of a military official caused harm that was sufficiently serious? Experience from Eighth Amendment prison cases and due process cases can lend some guidance. In *Skinner v. Lampert*, the court found that the failure to adequately investigate dangerous conditions in a state penitentiary or to implement an effective internal review process for reporting the institutional deficiencies that contributed to inmate assaults violated the Eighth Amendment.¹⁵⁰ Similarly, in *Nutter*, the court found a violation of substantive due process, because government officials failed to properly investigate reports of child abuse,¹⁵¹ as it also did in *Clark K. v. Guinn*, where this failure presented a substantial likelihood that the injury to children would occur in the future.¹⁵² Part of the court's reasoning in these cases was that the state-imposed curtailment of liberty on the children placed on the state a duty to protect them. By failing to investigate reports

¹⁵⁰ 457 F. Supp. 2d 1269 (D. Wyo. 2006).

¹⁵¹ *Nutter*, 737 F. Supp. 2d at 341.

¹⁵² *Clark K. v. Guinn*, 2007 WL 1435428 (D. Nev. May 14, 2007).

of abuse, the state put those children under the risk that they would be harmed again and, therefore, violated their substantive due process rights.

The failure to investigate harm is quite literally what deliberate indifference is; it is used by courts in the prison context to detect violations of prisoners' Eighth Amendment rights and should be used in the military context to detect violations of service members' substantive due process rights, as well. This is particularly important because, despite congressional efforts to the contrary, service members who report a sexual assault have no right to a unit or base transfer, and are forced to live and work alongside their perpetrator.¹⁵³ The captive nature of a military base and the hierarchical structure of the military ensures that service members who are victims of sexual assault face continuous danger and unique traumatization following sexual trauma. This is exactly what happened to Marine Lance Corporal Maria Lauterbach, who accused her assailant of rape and spent the next eight months exposed to the accused rapist, who later murdered her and buried her with the body of her unborn son.¹⁵⁴

Courts have also found substantive due process violations in other situations that might be helpful in a military context, particularly in proving deliberate indifference. Currently, plaintiffs can establish liability against a municipality under § 1983 by showing that a policymaker is responsible for a *custom* that causes harm to citizens in its custody.¹⁵⁵ Plaintiffs who are victims of sexual assault in the military could use this framework to show that commanders have created and condoned a culture that is hostile to women by committing and fostering sexual harassment and by actively mocking sexual assault prevention trainings. The

¹⁵³ The Defense STRONG Act, which was incorporated in large part into the 2011 NDAA and signed into law by President Obama, requires the military to *expedite* the base transfer *requests* of sexual assault victims. It does not guarantee that victims will be granted such a request, however. Additionally, victims must officially report that they have been sexually assaulted in order to be granted such a transfer, something victims in the military are very reluctant to do. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2011) (codified at 10 U.S.C. § 2222) (emphasis added).

¹⁵⁴ *Turner*, 482 U.S. 78.

¹⁵⁵ See *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978) (holding that local governments can be held liable where a constitutional violation arises from a custom or policy).

Cioca complaint provides a number of examples that demonstrate how this is the case. These could all be seen as contributors to a custom that helps to create a culture of sexual assault, one that is fostered by the commander or other military officials.

Conclusion

If the Supreme Court is unwilling to overturn the *Feres* doctrine and allow service members to obtain monetary relief for violations of their constitutional rights, the least the Court can do is to ensure that service members have some meaningful redress, outside of the military's own criminal justice system, for the most egregious violations of their constitutional rights and the worst and most degrading of their injuries. Using the test articulated above, courts will be able to grant relief to service members in limited situations for unjustified violations of their constitutional rights while ensuring that service members are not able to sue for harms that are part of military service. It also addresses the major concern that courts have expressed when deciding cases in which service members have sued the military: that courts should defer to military judgment and that the judiciary should not interfere in sensitive, day-to-day military affairs. This test allows courts to do just that, without completely abdicating their duty to check the military's abuse of power.

The problem of sexual assault in the military has gone on for too long and grown too much. The military has long urged Congress to let it take care of the problem on its own, and while Congress has finally started to pay attention to this issue, it has still failed to act in any meaningful way. Additionally, for too long, courts have been reluctant to get involved in these cases for fear of stepping into a realm in which they lack competence. But they must rise to the occasion and accept the challenge. This is exactly the kind of case that necessitates and justifies a *Bivens* remedy. Service members give their lives every day for the benefit of our country, and increasingly these very service members are subjected to sexual abuse. Even where Congress has

made demands on the military, the military has oftentimes failed to comply. Where Congress is unable or unwilling to protect the rights of individuals, the courts must step in. This is precisely what the courts are for and what *Bivens* was intended to do: protect the constitutional rights of individuals unable to obtain relief via other channels. Sexual assault has no place in our military. The Court should ensure this is so.