Tort Remedies in Military Prisons and Brigs

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INTRODUCTION

Consider the following case.[1] A servicemember is convicted at a general court-martial of two counts of attempted sexual abuse of a child who never existed, sentenced to a dishonorable discharge, reduction in grade to E-1, and nearly two years in military prison. According to the young man, one of the prison guards took to groping him on a regular basis. It was inevitable, brazen—at mealtimes, the young man said, the guard would pull him out of line every day to "search" him using invasive, prolonged cupping of his genital areas. He wasn't the only one, either. Other inmates reported the same types of abuse. The young man raised the issue in his CCA appeal, but the court dismissed it in a footnote.

After the serviceman got out, a psychologist diagnosed him with PTSD, and the guard propositioned him via direct message on Snapchat. Had the young man been incarcerated in a state or federal prison, he could have brought a Section 1983 or *Bivens* action against the institution and its employees to seek compensation for his mistreatment and the damage it caused. While such claims would have faced a high bar, clearing it would have offered him a meaningful opportunity to obtain just and adequate relief.

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[1] These facts are adapted from an interview conducted by one of the authors of an anonymous airman in February 2021.

That opportunity does not exist for incarcerated servicemembers. Under the doctrine of *Feres v. United States*, most suits for relief by servicemembers for service-connected injuries are barred;[2] for military prisoners, this includes any injuries incident to their incarceration.[3] While Congress has recently provided a detour around the doctrine for malpractice actions against military medical services,[4] *Feres* continues to bar most suits by servicemembers against the military for injuries they receive incident to their service.

Although the *Feres* doctrine leaves many incarcerated servicemembers without a viable remedy for violations of their constitutional rights, the reach of *Feres* in military prisons has garnered little attention. Incarcerated servicemembers are not only the products of a military justice system the operates mostly out of public view, but also fail—like so many other "discrete and insular minorities"—to attract the kind of political sympathy enjoyed by other subjects of the *Feres* doctrine, such as the victims of medical malpractice.[5] Reform is therefore extremely unlikely.

This article begins the task of examining how the *Feres* doctrine affects military prisoners. Part I provides an overview of the doctrine's history, emphasizing the shifting and amorphous rationales that have served to justify this judicially created bar to otherwise viable suits. Part II describes how the doctrine operates in the context of military prisoners' claims. Part III situates *Feres* in the context of the several forms of relief that an incarcerated or formerly incarcerated

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

[3] *Ricks v. Nickels*, 295 F.3d 1124 (10th Cir. 2002).

[4] *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1457-60 (2019) (codified at 10 U.S.C. § 2733a).

[5] United States v. Carolene Products Company, 304 U.S. 144 n.4 (1938). This is not to say that prisoners constitute a suspect class for Equal Protection analysis, but merely that the justifications for the judicial protection of rights for this group is similar to that of actual suspect classes. Prisoners and criminal defendants are politically powerless. See, e.g., Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269, 1329 (1998); Susan R. Klein, The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles, 1997 U. Ill. L. Rev. 453, 488 (1997).

military prisoner might seek for violations of his or her constitutional rights, explaining how *Feres* works together with other doctrines to leave no viable route for military prisoners to obtain meaningful relief. Finally, the Conclusion sketches a way forward for the Court or Congress to address the access-to-justice disparity between civilian and military prisoners wrought by *Feres* and related doctrines.

I. ORIGINS AND EVOLUTION

The *Feres* doctrine originated in 1950, when the Supreme Court created a judicial exception to the broad waiver of sovereign immunity in the Federal Tort Claims Act (FTCA), unanimously holding that the federal government cannot be liable under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity *incident to service*."[6] In so holding, the *Feres* Court distinguished an earlier case, *Brooks v. United States*, in which the Court rejected a military *status*-based exception to the FTCA.[7]

Since then, the Supreme Court has significantly broadened *Feres*, for instance, by applying the doctrine to damage actions under *Bivens* in the 1983 case of *Chappell v. Wallace*.[8] Despite the doctrine's longevity, several Supreme Court Justices have argued that the case was wrongly decided and should be limited or overturned.[9] Although *Feres* remains good law, the doctrine has

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[6] *Feres*, 340 U.S. at 146 (emphasis added). Justice Douglas concurred only in the result, but did not write an opinion. *Id.*

[7] *Id.* at 138 (citing Brooks v. United States, 337 U.S. 49, 52 (1949)). Brooks involved two brothers who were negligently struck by an Army truck while driving a private car off duty. *Brooks*, 337 U.S. at 50. In *Feres*, by contrast, the plaintiffs in all three of the consolidated cases sustained injuries incident to their military service. *Feres*, 340 U.S. at 146.

[8] 462 U.S. 296, 305 (1983).

[9] *See, e.g.*, United States v. Johnson, 481 U.S. 681, 692-703 (1987) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); Lanus v. United States, 570 U.S. 932, 932 (2013) (Thomas, J., dissenting from denial of certiorari) ("There is no support for [*Feres*'s] conclusion in the text of the statute, and it has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees.").

been criticized by nearly every circuit court of appeals, and many parts of it have been eroded to the point of incoherence.[10]

While the exception finds no support in the text of the FCTA, the *Feres* majority justified its decision with four policy rationales: (1) the lack at common law of any private liability similar to that asserted by the servicemembers; (2) the potential unfairness related to variations in state law governing servicemembers' tort claims; (3) the distinctively federal character of the relationship between the government and military personnel coupled with the absence of a federal law permitting damages against the military in these circumstances; and (4) the existence of the Veterans Benefit Act, which provides a system of "simple, certain, and uniform compensation" for injuries or death of armed services personnel.[11]

As the scope of the doctrine has grown, these rationales have morphed without explanation. In *United States v. Johnson*, the Court stated three rationales quite distinct from *Feres*'s original four: (1) the distinctively federal nature of the relationship between the military and the government; (2) the existence of generous statutory death and disability benefits for servicemembers; and (3) the interest of maintaining military discipline.[12] In the seven decades since *Feres* was decided, debates around the applicability of these rationales to various types of claims has generated a large and idiosyncratic body of law.

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[10] *See, e.g.*, Daniel v. United States, 889 F.3d 978, 982 (9th Cir. 2018) ("We . . . have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable."); McMahon v. Pres. Airways, Inc., 502 F.3d 1331, 1341 (11th Cir. 2007) ("The *Feres* doctrine has been controversial"); Tootle v. USDB Commandant, 390 F.3d 1280, 1283 (10th Cir. 2004) ("[The servicemember plaintiff] may well have a point—jurists and commentators have indicated that the *Feres* doctrine is not compatible with principles of equal protection."); Scales v. United States, 685 F.2d 970 (5th Cir. 1982) ("[W]e are compelled, however reluctantly, to … dismiss the claim as barred by *Feres*.").

[11] *See Feres*, 340 U.S. at 141-44.

[12] 481 U.S. at 688-91.

II. INCARCERATION IN A MILITARY PRISON AS A "SERVICE-CONNECTED ACTIVITY"

That body of law fully extends to military prison litigation. Every federal court of appeals to consider whether the *Feres* doctrine applies to incarcerated servicemembers' claims has answered in the affirmative.[13] The leading case, *Ricks v. Nickels*,[14] is particularly important because the U.S Disciplinary Barracks (USDB) is located within the Tenth Circuit at Fort Leavenworth, Kansas. Joined by several other inmate plaintiffs, Ricks filed a complaint under *Bivens*, alleging, inter alia, that in 1997 and 1998 USDB guards sexually assaulted him during frisk searches and that USDB administrators retaliated against him and others for exercising their rights to petition and access the courts. Ricks and his co-plaintiffs sought injunctive, mandamus, and monetary relief and administrative sentence credit, alleging First, Fifth, and Eighth Amendment violations. The district court eventually dismissed all of Ricks's claims. On appeal, the Tenth Circuit affirmed, holding that notwithstanding the dishonorable discharge that was part of Ricks's sentence, he remained subject to the UCMJ under 10 U.S.C. § 802(a)(7) and therefore his incarceration "stemmed from his military relationship such that [it was] incident to his military service."[15]

In cases like Ricks', applying *Feres* is at least somewhat perverse.[16] Since Ricks was never going to return to active duty, and since the main deterrent for other offenders is the sentence and the dishonorable discharge, the effect of the *Feres* bar on military discipline seems insignificant.

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[13] *See* Schnitzer v. Harvey, 389 F.3d 200, 203 (D.C. Cir. 2004) (that *Feres* applies "without modification to military prisoners"); Ricks v. Nickels, 295 F.3d 1124 (10th Cir. 2002); Dexheimer v. United States, 608 F.2d 765 (9th Cir. 1979) (applying *Feres* to claims of a military prisoner); Shaw v. United States, 448 F.2d 1240 (4th Cir. 1971) (finding "no meaningful distinction" between military prisoners and other service members under *Feres*).

[14] *Ricks*, 295 F.3d 1124; *see also* Tootle v. USDB Commandant, 390 F.3d 1280 (10th Cir. 2004); Paalan v. Nickels, 17 F. App'x 930 (10th Cir. 2001) (unpublished).

[15] *Id.* at 1132.

[16] See 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, 36-38 (2003).

Additionally, the extension of *Feres* to the military prison contexts cuts off the most important source of pressure for reform, particularly if equitable relief is unavailable.[17] As a discrete and insular minority, private causes of action are a particularly important means for military prisoners to obtain relief. Finally, given that there is not much of a practical difference between a military prisoner and his or her civilian counterpart, the *Feres* doctrine in the prison context operates much like the status-based bar that the Court rejected in *Brooks*. While these considerations suggest that that a court might be cautious or reluctant to apply the doctrine to military prisoners' claims for equitable relief on Eighth Amendment grounds, equitable relief is not of much use to military prisoners.

III. THE MIRAGE OF EQUITABLE RELIEF

Although *Feres* and related doctrines do not operate as a complete bar to relief, the types of relief that the doctrine does allow tend to be less useful for incarcerated servicemembers' claims. While the circuits are in accord that *Feres* bars claims for monetary relief, they are split as to whether and to what degree *Feres* applies to claims for equitable relief. At one extreme, the Eleventh Circuit has implied that the *Feres* doctrine bars all service-related claims for equitable relief, though it acknowledges the continuing availability of equitable relief in cases involving broad constitutional challenges to military policy.[18] On the other end of the spectrum, the Ninth and Tenth Circuits have explicitly stated that *Feres* applies only to damages claims, and the Third

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[17] *See* Part III, *infra*.

[18] Speigner v. Alexander, 248 F.3d 1292 (11th Cir. 2001) ("[C]ases brought by enlisted personnel against the military for injuries incident to service are nonjusticiable, whether the claims request monetary damages or injunctive relief."). *But see* Brannum v. Lake, 311 F.3d 1127, 1130 (D.C. Cir. 2002) ("To the extent that [*Speigner*] invoked [a facial/as-applied] distinction in denying jurisdiction over a separated National Guard officer's suit for reinstatement, we respectfully disagree.").

and First Circuits also appear to follow this rule.[19] These interpretations follow from a passage in *Chappell v. Wallace*, in which the Supreme Court extended *Feres* to *Bivens* claims, that clarified: "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."[20] Citing this passage, the D.C. Circuit held, in the context of a jurisdictional claim for injunctive relief, that *Feres* doctrine allows "at least some equitable claims relating to military service," but declined to "ascertain *Feres*'s exact bounds."[21]

The Second, Fifth, Seventh, Eighth, D.C., and Federal Circuits have charted a middle course, reasoning that the *Feres* doctrine does not bar equitable relief where the plaintiff seeks to challenge the "facial validity of military regulations,"[22] but may bar challenges in which the equitable relief sought is against certain "discrete individualized actions,"[23] such as personnel decisions.[24]

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[19] See, *e.g.*, Wilkins v. United States, 279 F.3d 782, 787 (9th Cir. 2002) ("*Feres* applies only to money damages. To conclude otherwise would leave military personnel without judicial recourse to challenge unconstitutional policies."); Walden v. Bartlett, 840 F.2d 771, 774-75 (10th Cir. 1988) ("[T]he rationales supporting *Feres* are not implicated by an action for injunctive and declaratory relief."). *See also* Wigginton v. Centracchio, 205 F.3d 504 (1st Cir. 2000) (entertaining equitable claim that was not a facial challenge to the constitutionality of a military regulation); Jorden v. Nat'l Guard Bureau, 799 F.2d 99 (3d Cir. 1986) (same). Arguably, despite its broad language, *Wilkins* did not definitively resolve the Ninth Circuit's position on the circuit split. *See, e.g.*, Lawrence v. Haw. Air Nat'l Guard, 126 F. App'x 835, 838 (9th Cir. 2005) (unpublished) (distinguishing *Wilkins* and disallowing injunctive relief under *Feres*).

[20] 462 U.S. 296, 304 (1983).

[21] *Brannum*, 311 F.3d at 1130; *see also* Piersall v. Winter, 435 F.3d 319, 323 (D.C. Cir. 2006) ("That the *Feres* doctrine does not bar an equitable suit challenging military jurisdiction does not imply that it does bar other challenges related to the administration of military justice.").

[22] Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034, 1036 (5th Cir. 1986); *see also* Goldman v. Weinberger, 475 U.S. 503 (1986) (as-applied Free Exercise challenge to Air Force's prohibition against wearing yarmulke while in uniform). *Crawford* appears to misread *Goldman* as a facial challenge.

[23] *See* Dibble v. Fenimore, 339 F.3d 120, 126 (2d Cir. 2003) (collecting cases).

[24] *See, e.g.*, Jones v. N.Y. State Div. of Military & Naval Affairs, 166 F.3d 45, 52 (2d Cir.1999) (upholding *Feres*-based dismissal of damages claims, but allowing claim for injunctive relief where "the military has failed to follow its own mandatory regulations in a manner substantially prejudicing a service member"); Adkins v. United States, 68 F.3d 1317, 1323 (Fed. Cir. 1995) (allowing challenge for failure to follow own procedures), *abrogated on other grounds by* Fisher v. United States, 402 F.3d 1167 (Fed. Cir. 2005) (en banc); Knutson v. Wisc. Air Nat'l Guard, 995 F.2d 765, 771 (7th Cir. 1993) (holding that challenges by servicemembers to military personnel decisions are

The Third Circuit provides perhaps the clearest justification for a rule that allows at least some forms of injunctive relief:

> One of the concerns underlying *Chappell* [and *Feres*] is the need for military officers' uninhibited decisionmaking, and the threat to such decisionmaking if officers fear personal liability. The threat of personal liability for damages poses a unique deterrent to vigorous decisionmaking. On the other hand, the possibility that an officer may be compelled by a court to cease applying a particular regulation in an arbitrary manner, or to reinstate an improperly discharged soldier, poses much less of a threat to vigorous decisionmaking.[25]

Tellingly, the Third Circuit's opinion does not give serious consideration to the fact that the "threat of personal liability" is significantly lessened by the fact that the officer would almost certainly be indemnified by the institution.

Additionally, even if injunctive relief is available, it is not particularly useful in the prison context, where demands for equitable relief may be mooted due to changed circumstances, such as the prisoner's release and discharge from the armed services.[26] In most cases brought by an individual plaintiff, the injury-causing conduct will not persist beyond the filing of a lawsuit, making damages the only kind of relief that can adequately remedy the injury.[27] As Justice Brennan wrote in *United States v. Stanley*,

> Serious violations of the constitutional rights of soldiers must be exposed and punished. . . . [A]ny constitutional violation, may be enjoined if and when discovered. An injunction,

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ordinarily nonjusticiable, unless they involve facial challenges to the constitutionality of statutes or military regulations); Watson v. Ark. Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989) (rejecting a challenge to a "discrete personnel decision"); Emory v. Sec'y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987) (rejecting claim that equal protection challenge to promotion system was nonjusticiable).

[25] Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 109 (3d Cir. 1986).

[26] Under contemporary Supreme Court standing doctrine, "past wrongs do not in themselves amount to th[e] real and immediate threat of injury necessary to" support a claim for injunctive or declaratory relief. City of Los Angeles v. Lyons, 461 U.S. 95, 103 (1983) (citing Rizzo v. Goode, 423 U.S. 362, 372 (1976)). "The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *Id.* at 111.

[27] The story set forth in the Introduction, *supra*, is an example of such a claim.

however, comes too late for those already injured; for these victims, "it is damages or nothing."[28]

Finally, where the offensive conduct is ongoing at the time that a lawsuit may be brought, incarcerated servicemembers may still be poorly positioned to clear the hurdles for obtaining injunctive relief. According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test.[29] Thus, for Constitutional challenges under *Bivens*, plaintiffs must not only contend with the *Feres* bar, but must also satisfy the requirement of some "likelihood of substantial and immediate irreparable injury"[30] necessary to justify relief. Indeed, in the few cases where prisoners have brought claims for both injunctive and monetary relief, they have not succeeded in obtaining either.[31]

CONCLUSION: A PATH FORWARD FOR INCARCERATED SERVICEMEMBERS

Unsurprisingly, there are no reported cases since *Feres* in which an incarcerated servicemember has successfully brought a *Bivens* claim against a military prison or its employees.[32] Given the apparent impossibility of sustaining these claims in the current environment, legislative or doctrinal changes would be necessary to make them practically relevant. Although recent legislative activity has modestly altered the landscape for claims relating to

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[28] 483 U.S. 669, 690 (1987) (Brennan, J., concurring) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

[29] That test requires (1) that the plaintiff has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

[30] *Lyons*, 461 U.S. at 111 (quoting O'Shea v. Littleton, 414 U.S. 488, 679 (1974)).

[31] *See, e.g.*, Marrie v. Nickels, 70 F. Supp. 2d 1252, 1259 (D. Kan. 1999) (holding that prisoners' claims for monetary relief were barred by *Feres* and requests for injunctive relief were mooted by prisoners' transfer to a different facility); Order at 10-12, Ricks v. Nickels, No. 5:97-cv-03280-JTM (D. Kan. Sept. 30, 1999), ECF No. 59 (denying the plaintiffs' claims for injunctive and mandamus relief as moot because they were transferred). *See also* Walden v. Bartlett, 840 F.2d 771, 774-75 (10th Cir. 1988) (determining that military prisoners at U.S. Disciplinary Barracks, Fort Leavenworth may file suit in U.S. District Court seeking injunctive and declaratory relief for oppressive prison conditions, and that such requests are not specifically barred by *Feres*).

[32] See note 14, *supra*, for some examples of unsuccessful claims by military prisoners.

malpractice, there has been no proposed legislation that would enable prisoners' claims to bypass the doctrine.[33] Since Congress has struggled to even consider criminal justice reforms that enjoy much broader support,[34] it seems doubtful that any *Feres* legislation will pass unless an enterprising member of Congress slips it into the annual National Defense Authorization Act. This seems at least plausible.

Another prospect for reform lies in the courts. While the Supreme Court has traditionally treated statutory rulings like *Feres* as super-strong precedents, several Justices have expressed serious misgivings about the doctrine over the years. Most significantly, in *United States v. Johnson*, four dissenting Justices called *Feres* a "clearly wrong decision," and strongly suggested that the doctrine should be overruled.[35] That said, if *Feres* were repudiated, it is unclear what test—if any—could or should replace it, though some scholars have proposed creative suggestions.[36] Furthermore, on the current Court, only Justice Thomas has repeatedly and passionately urged the Court to repudiate *Feres*.[37] While no other Justice has joined Justice Thomas's repeated calls for an end to *Feres*, it is at least conceivable that they would do so in a particularly egregious case. At least for the moment, that possibility may be incarcerated servicemembers' best hope.

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[33] *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1457-60 (2019) (codified at 10 U.S.C. § 2733a).

[34] *See, e.g.*, Catie Edmondson, *Bipartisan Police Overhaul Talks are Officially Dead on Capitol Hill*., N.Y TIMES (September 22, 2021), https://www.nytimes.com/2021/09/22/us/politics/police-reform-booker-scott.html.

[35] United States v. Johnson, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting).

[36] *See, e.g.*, James M. Brennan, *Incident to Service: The* Feres *Doctrine and the Uniform Code of Military Justice*, 81 A.F.L. REV. 240 (2020) (proposing a refinement to the "*Feres* 'incident to service' test by looking to . . . Uniform Code of Military Justice Article 2(a)(10)).

[37] *See, e.g.*, Doe v. United States, 141 S. Ct. 1498, 1498-1500 (2021) (Thomas, J., dissenting from the denial of certiorari); Daniel v. United States, 139 S. Ct. 1713, 1713-14 (2019) (same); Lanus v. United States, 570 U.S. 932, 932-33 (2013) (same).