

IMMORAL WAIVER: JUDICIAL REVIEW OF INTRA-MILITARY
SEXUAL ASSAULT CLAIMS

by
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This Article critiques the application of the Feres doctrine and the policy of judicial deference to military affairs in the context of recent class actions against government and military officials for constitutional violations stemming from sexual assaults in the U.S. military. The Pentagon estimates that 19,000 military sexual assaults occur each year. Yet, in 2011, fewer than two hundred persons were convicted of crimes of sexual violence. In the face of such pervasive and longstanding constitutional violations, this Article argues that the balance of harms weighs heavily in favor of judicial intervention. The piece discusses why, from both legal and justice-based perspectives, the Feres principles are inapplicable to claims of intra-military sexual assault. Further, the Article argues that judicial decisions invalidating the “Don’t Ask, Don’t Tell” policy provide a roadmap for the judiciary in assessing both its proper role in respect of the contemporary armed forces and the institutional obligation to resolve the claims of exceptionally deserving plaintiffs.

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I. INTRODUCTION

"Ma'am, I am more afraid of my own soldiers than I am of the enemy."¹

In 2011, governmental officials estimate that approximately 19,000 sexual assaults took place in the United States military.² The vast majority of reported assaults were committed against enlisted personnel.³ Fewer than 200 persons were convicted of crimes of sexual violence, and only 122 were discharged upon conviction.⁴ Currently, two pending class

¹ Matthew Larotonda, *Panetta Introduces Initiatives to Fight Sexual Assault in the Military*, ABC NEWS BLOG (Apr. 16, 2012), <http://abcnews.go.com/blogs/politics/2012/04/panetta-introduces-initiatives-to-fight-sexual-assault-in-the-military/> (quoting a military nurse's comments to Congressperson Niki Tsongas, Co-Chair of the Sexual Assault Prevention Caucus).

² MSNBC.com Staff, *Panetta: Could Be 19,000 Military Sexual Assaults Each Year*, MSNBC.COM (January 18, 2012), http://usnews.nbcnews.com/_news/2012/01/18/10184222-panetta-could-be-19000-military-sex-assaults-each-year?lite. This amounts to 52 sexual assaults *per day*. The DoD uses the term "sexual assault" "to refer to a range of crimes, including rape, aggravated sexual assault, nonconsensual sodomy, aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses, as defined by the [Uniform Code of Military Justice]." U.S. DEP'T OF DEFENSE, SEXUAL ASSAULT PREVENTION & RESPONSE, DEP'T OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2011, at 27–28 (Dec. 2012), *available at* http://www.sapr.mil/media/pdf/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [hereinafter SEXUAL ASSAULT REPORT 2011]. The majority of reported sexual assaults (56%) were servicemember on servicemember. Nearly 70% of reported sexual assaults involved the serious crimes of rape, aggravated assault and/or non-consensual sodomy. *Id.* at 36–37. Reported incidents of unwanted sexual conduct also rose across the military academies during 2010–2011. U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM YEAR 2010–2011, at 55 (Dec. 2011), *available at* http://www.sapr.mil/media/pdf/reports/FINAL_APY_10-11_MSA_Report.pdf.

³ The Report notes that 63% of victims were grades E1–E4, which means that many of these individuals were either training or in their initial assignment. Forty-eight percent of perpetrators also were grades E1–E4. However, while few victims were officers, 25% of perpetrators were sergeant level or higher. SEXUAL ASSAULT REPORT 2011, *supra* note 2, at 54–55.

⁴ Of the 791 military subjects who had some disciplinary action initiated against them due to a sexual assault offense, 489 had court-martial charges preferred against them. Two hundred forty of the cases proceeded to trial. Eighty percent of these were convicted. SEXUAL ASSAULT REPORT 2011, *supra* note 2, at 43.

action lawsuits, *Cioca v. Rumsfeld*⁵ and *Klay v. Panetta*,⁶ seek to impose institutional accountability for sexual violence committed by servicemembers against fellow servicemembers. The lawsuits allege that, despite an official “zero tolerance” policy and repeated efforts to remedy the problem, sexual assault remains widespread across all branches of the military and military academies, fostered by a culture that rewards overt, ritualized displays of hyper-masculinity and severely penalizes victims for reporting incidents of sexual misconduct.⁷

The plaintiffs in *Cioca* and *Klay* face a Sisyphean battle due to two significant and interrelated obstacles. The most prominent are the *Feres*⁸ principles, which have been interpreted to bar actions by service personnel against military officials for torts committed “incident to service.” Since the 1950s, *Feres* has been expansively interpreted to bar justiciability of claims by military personnel against superior officers not only for negligence and intentional torts, but also for blatant violations of constitutional rights.⁹ Despite the strong disapproval of several Supreme Court justices and countless district and appellate courts, the Court has denied certiorari in recent cases challenging application of the doctrine, thus further entrenching it.¹⁰

The other substantial obstacle to these lawsuits is the normative but no less significant specter of “judicial activism” and its mirror, “military deference,” the reluctance of the judiciary to usurp Congressional responsibility for the conduct of military affairs. Signing up for the military has been interpreted by the courts to mean that plaintiffs can be administered psychotropic drugs,¹¹ exposed to toxic chemicals,¹² and sexually assaulted,¹³ all without their consent and devoid of meaningful remedy beyond recourse available via the Uniform Code of Military

⁵ Appellants’ Opening Brief, *Cioca v. Rumsfeld*, No. 12-1065 (4th Cir. Apr. 23, 2012) [hereinafter *Cioca Appeal*].

⁶ Complaint, *Klay v. Panetta*, 2013 WL 458318 (D.D.C. Feb. 7, 2013) (No. 1:12-cv-00350) [hereinafter *Klay Complaint*].

⁷ *Id.* ¶¶ 1–2; Amended Complaint ¶¶ 1–3, *Cioca v. Rumsfeld*, No. 1:11-cv-00151 (E.D. Va. Sept. 6, 2011) [hereinafter *Cioca Amended Complaint*]; see also *Cioca Appeal supra* note 5, at 7–8.

⁸ *Feres v. United States*, 340 U.S. 135 (1950).

⁹ See, e.g., *United States v. Stanley*, 483 U.S. 669, 683–84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 299 (1983).

¹⁰ The last time the Court directly addressed the *Feres* doctrine was in a five-to-four opinion. *United States v. Johnson*, 481 U.S. 681, 682, 692 (1987). Most recently, the Court declined an invitation to revisit *Feres* in *Witt ex rel. Estate of Witt v. United States*, 379 F. App’x 559 (9th Cir. 2010), cert. denied sub nom., *Witt v. United States*, 131 S. Ct. 3058 (2011).

¹¹ See, e.g., *Stanley*, 483 U.S. at 671, 683–84.

¹² See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1244 (E.D. N.Y. 1984).

¹³ See, e.g., *Gonzales v. U.S. Air Force*, 88 F. App’x 371, 373, 375–76 (10th Cir. 2004); *Smith v. United States*, 196 F.3d 774, 776–78 (7th Cir. 1999); *Day v. Mass. Air Nat’l Guard*, 167 F.3d 678, 680, 686 (1st Cir. 1999).

Justice (UCMJ)¹⁴ and the chain of command. No matter how profound the injustice or disenfranchised the plaintiff, in case after case, courts are reluctant to disregard what they believe to be established precedent barring judicial review of intra-military claims.

This hands-off position in regard to all things military is part and parcel of what other scholars have categorized as the Rehnquist and Roberts Courts' overarching "anti-litigation" stance.¹⁵ As Chief Justice Roberts tellingly observes of the Court: "It is not our job to protect the people from the consequences of their political choices."¹⁶ "[I]nactivist conduct" by the highest court has, in turn, led to a hands-off attitude in the appellate courts: "[J]udges are human, we might reasonably expect that some will take advantage of the increased opportunities to avoid decisions that they would prefer not to make."¹⁷

When it comes to constitutional claims stemming from intra-military sexual assaults, this minimalist approach results in profound injustice. The first of the class actions to be filed, *Cioca v. Rumsfeld*, was dismissed by the district court in December 2011¹⁸ and currently is on appeal to the U.S. Court of Appeals for the Fourth Circuit.¹⁹ The dismissal is premised on the commonly accepted ground that precedent leaves no place for the judiciary in the resolution of intra-military claims. Although the vast majority of courts share this interpretation of *Feres* as barring the plaintiffs' claims for constitutional torts, the blind application of outdated caselaw in these cases is legally and morally unsound.

Over the years, the Court has identified three core principles underlying *Feres*: (1) respect for supervisory decisions made in the context of intra-military supervision (the "incident to service" exception); (2) presence of an alternative compensation scheme that provides soldiers with a "generous" alternative to recovery in tort; and, (3) perhaps foremost, the belief that, were soldiers permitted to file lawsuits against superior officers in civilian courts, the military disciplinary structure

¹⁴ 10 U.S.C. § 836 (2006). The UCMJ is implemented through Executive Orders of the President of the United States pursuant to his authority under Article 36. *Id.* Those Executive Orders form a comprehensive volume of law known as the Manual for Courts-Martial (MCM). UNITED STATES, MANUAL FOR COURTS-MARTIAL I (2012).

¹⁵ Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 Geo. L.J. 121, 135–36 (2005); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1114 (2006). Scholars, for example, have critiqued recent decisions tightening pleading standards in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), as potentially limiting access to the courts and slowing deterrence of governmental misconduct. *See, e.g.*, Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 161–62 (2010).

¹⁶ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

¹⁷ Oldfather, *supra* note 15, at 135–36.

¹⁸ *Cioca v. Rumsfeld*, No. 1:11-cv-00151 (E.D. Va. Dec. 9, 2011) (order granting motion to dismiss).

¹⁹ *Cioca Appeal*, *supra* note 5.

would be undermined.²⁰ None of these justifications suffice to waive the judiciary's obligation to resolve the *Klay* and *Cioca* plaintiffs' constitutional claims.

Feres was decided just after World War II, a historical moment that differed dramatically from the one we now inhabit. Congress recently had enacted the Federal Tort Claims Act (FTCA), creating causes of action against federal officials for negligence.²¹ While Congress may not have intended to subject itself to tort claims from every soldier injured in the line of duty,²² when read against the current legal and political environment, the expansion of the doctrine to bar *all* claims by servicemembers against military officials does not make sense. Further, the judicial branch that advocated deference to military affairs in what have become seminal cases on constitutional separatism—*Rostker v. Goldberg*,²³ *Goldman v. Weinberger*,²⁴ *United States v. Shearer*²⁵—faced a vastly different world than the judiciary faces today.

This is not our grandparents' military, in which nearly 10% of the population volunteered or were drafted into service.²⁶ We inhabit the era

²⁰ See *United States v. Johnson*, 481 U.S. 681, 688–91 (1987); 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, 11–13 (2003). As the *Feres* doctrine has (d)evolved over several decades, courts increasingly have focused on the third rationale, maintenance of “military discipline,” in determining whether the *Feres* doctrine should bar tort claims. See, e.g., *United States v. Shearer*, 473 U.S. 52, 57 (1985); *Brown v. United States*, 739 F.2d 362, 368–69 (8th Cir. 1984). However, as will be discussed herein, both the rationale of parallel compensation and the “incident to service” exception maintain continued vitality in barring justiciability in the lower courts.

²¹ Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 2671–2680 (2006)). “The Federal Tort Claims Act (FTCA) creates a broad waiver of sovereign immunity for tort claims against the United States but also provides for a number of exceptions. . . . such as the so-called ‘intentional tort’ exception.” David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 375 (2011). The only explicitly military-related exception currently in the FTCA is section J, which exempts “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” 28 U.S.C. § 2680(j) (2006).

²² *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 681–82 (1st Cir. 1999).

²³ 453 U.S. 57 (1981).

²⁴ 475 U.S. 503 (1986).

²⁵ 473 U.S. 52 (1985).

²⁶ While 9% of the U.S. population served in the military during World War II, when measured at any point in time over the past decade, only 1% of the U.S. population actively is serving in today's armed forces. Sabrina Tavernise, *As Fewer Americans Serve, Growing Gap Is Found Between Civilians and Military*, N.Y. TIMES, Nov. 25, 2011, at A22, available at <http://www.nytimes.com/2011/11/25/us/civilian-military-gap-grows-as-fewer-americans-serve.html>. This is largely a result of the Laird Total Force Policy, referred to informally as the “Abrams Doctrine,” which was designed to gain popular support for military operations from the American public and to limit executive power by requiring, upon entrance into conflict, mobilization of National Guard units versus institution of another highly unpopular draft. For a

of the citizen-soldier. Forty percent of troops deployed to Iraq and Afghanistan are National Guard and Reserve volunteers.²⁷ Nearly half of these reservists suffer from issues such as post-traumatic stress disorder (PTSD), military sexual trauma (MST), or other psychological trauma and have difficulty accessing adequate treatment for these conditions.²⁸ The actions of “the troops” are not separate from those of civilians; the troops committing and suffering from sexual assaults *are* civilians. Unconvicted military perpetrators ultimately are released into the civilian population, are not subjected to sex offender registries, and are free to reoffend.²⁹ Perpetrators and victims return home to a system ill-equipped to offer redress for their grievances, contributing to concerning rates of divorce,³⁰ domestic violence,³¹ even suicide.³² Although soldiers comprise the heartland of America, military decisionmaking has been severed from civilian accountability.³³

The biggest hurdle to resolution of the *Cioca* and *Klay* plaintiffs’ claims is the idea that battle readiness depends on autonomy in military decisionmaking, that civilian intervention will weaken the institution of

discussion of the Abrams Doctrine, see BRIAN D. JONES, U.S. ARMY WAR COLLEGE, *THE ABRAMS DOCTRINE: TOTAL FORCE FOUNDATION OR ENDURING FALLACY?*, 1–2 (May 3, 2004), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA423689>.

²⁷ John F. Greden et al., *Buddy-to-Buddy, A Citizen Soldier Peer Support Program to Counteract Stigma, PTSD, Depression, and Suicide*, 1208 ANNALS N.Y. ACAD. SCI. 90, 90 (2010).

²⁸ See *id.* at 90–91. The authors note that while 42% of citizen-soldiers report mental health issues, many do not initiate treatment: only 54% referred through the Post Deployment Health Assessment follow through with a mental health visit, and only 30% with identified need reported receiving minimally adequate treatment. *Id.*

²⁹ See Katie Drummond, *Sexual Assault in the Military: Petition Pleads For Offender Registry*, FORBES (July 11, 2012), <http://www.forbes.com/sites/katiedrummond/2012/07/11/sexual-assault-military>.

³⁰ Michelle Miller, *Trouble on the Home Front? Military Divorces on the Rise*, CBS NEWS (July 18, 2012), http://www.cbsnews.com/8301-505263_162-57474778/trouble-on-the-home-front-military-divorces-on-the-rise/ (noting that, according to the Pentagon, the divorce rate among military personnel is the highest it has been in 10 years).

³¹ Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 POL. & SOC’Y 101, 112 (2009) (“Military domestic violence rates are two to five times higher than in civil society.”).

³² In July 2012, Secretary of Defense Leon Panetta referred to suicide among U.S. troops as an “epidemic.” Kathleen Miller, *Military Faces Suicide ‘Epidemic,’ Panetta Tells Congress*, BLOOMBERG, July 25, 2012, <http://www.bloomberg.com/news/2012-07-25/military-faces-suicide-epidemic-panetta-tells-u-s-lawmakers.html>. The rate of suicide in the military in 2012 thus far is 25% higher than the same period in 2010. David Zucchino, *Military Suicides Spike: Nearly 1 Per Day, Pentagon Reports*, L.A. TIMES (June 8, 2012), <http://articles.latimes.com/2012/jun/08/nation/la-na-nn-military-suicides-20120608>.

³³ Rachel Maddow aptly describes this distancing as “drift.” RACHEL MADDOW, *DRIFT: THE UNMOORING OF AMERICAN MILITARY POWER* (2012); see also DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 4 (2010).

the U.S. military. However, there is a much greater threat of erosion of the military command structure if sexual violence is permitted to continue unabated.³⁴ The DoD itself admits that the “costs and consequences [of sexual assault] for mission accomplishment are *unbearable*.”³⁵ As I discuss herein, the selfsame rhetoric of unit cohesion and combat readiness was deployed by the military to discourage judicial review of the discriminatory “Don’t Ask, Don’t Tell” (DADT)³⁶ policy. The result of judicial review in those cases? A stronger military.³⁷ In the case of serious, widespread, and unremedied constitutional violations, the biggest threat to democracy is not judicial intervention but judicial complacency.

Chief Justice Earl Warren famously cautioned that “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.”³⁸ However, this is precisely what is happening today in the case of victims of military sexual assault. As Jonathan Turley profoundly observes:

There remains a striking discontinuity in the duty of our servicemembers to defend liberties and rights with which they are only partially vested. . . . When servicemembers encounter . . . dangers, they do so as citizen-soldiers. It is the significance of the first part of the term citizen-soldier that demands greater attention from those of us who are the beneficiaries of the second part.³⁹

Turley observes, further, that the most essential time for civilians to step in and protect the rights of servicemembers is when they are “engaged in a new struggle against a hidden and dangerous enemy.”⁴⁰ The “hidden and dangerous” enemy to which Turley refers is international terrorism, but the same can be said of the domestic and endemic issue of sexual assault.

³⁴ See Hillman, *supra* note 31, at 119; see also Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today’s Army*, 30 HARV. J.L. & GENDER 151, 153, 201 (2007); Elizabeth A. Reidy, Comment, *Gonzalez v. United States Air Force: Should Courts Consider Rape to Be Incident to Military Service?*, 13 AM. U. J. GENDER SOC. POL’Y & L. 635, 657–58 (2005).

³⁵ SEXUAL ASSAULT REPORT 2011, *supra* note 2, at 67 (emphasis added).

³⁶ 10 U.S.C. § 654 (2006), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

³⁷ Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, admits that the military is a stronger institution without the ban on openly gay and lesbian servicemembers. Jim Michaels, *Adm. Michael Mullen: Military Stronger Without Ban on Gays*, USA TODAY, Sept. 21, 2011, <http://www.usatoday.com/news/washington/story/2011-09-20/gays-in-military-ban-repeal/50473438/1>. Defense Secretary Panetta similarly has concluded that the repeal of DADT has “not affected morale or readiness.” Pauline Jelinek, *Pentagon Holds Gay Pride Event*, ASSOCIATED PRESS (June 26, 2012), <http://bigstory.ap.org/pentagon-holds-gay-pride-event>.

³⁸ Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

³⁹ Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. REV. 1, 133 (2002).

⁴⁰ *Id.*

As I describe below, and as Turley and Diane Mazur elsewhere have argued, what has become a widely accepted “doctrine” of constitutional separatism is in fact no more than a flexible policy created by the Court as a reflection of changing political times.⁴¹ A close reading of precedent reveals that in assessing matters of constitutional concern, the caselaw does not mandate blanket non-intervention in military affairs but that the Court balance the harm of intervention against the injustice being perpetrated. *Feres*, which considered the narrow issue of military sovereign immunity from mere negligence claims, has been extended to the point of unrecognizability. The doctrine applied today is a policy of judicial deference that has been widely criticized as unjust by judge after judge, believing they are mandated to apply it.⁴²

In the field of history, scholars have identified what they label “conjunctures,” periods in which competing narratives are made visible and the time is particularly ripe for change.⁴³ In recent decisions in favor of plaintiffs challenging the discriminatory DADT policy, *Witt v. Department of the Air Force*⁴⁴ and *Log Cabin Republicans v. United States*,⁴⁵ the

⁴¹ *Id.* at 37, 47–48; MAZUR, *supra* note 33, at 56; *see also* Diane H. Mazur, *Rehnquist’s Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 784 (2002).

⁴² Appellate and district courts regularly express their ardent disapproval of the *Feres* doctrine in no uncertain terms. *See, e.g.*, *Ruggiero v. United States*, 162 F. App’x 140, 143 (3d Cir. 2006) (“We have no choice but to apply *Feres* to the instant case, despite the harshness of the result and our concern about the doctrine’s analytical foundations.”); *Richards v. United States*, 180 F.3d 564, 564–65 (3d Cir. 1999) (Rendell, J. dissenting) (describing expansion of *Feres* as a “travesty”); *Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990) (“We conclude that we are obligated to affirm this judgment. We reach this result with a pronounced lack of enthusiasm.”); *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir. 1973) (“If the matter were open to us we would be receptive to appellants’ argument that *Feres* should be reconsidered, and perhaps restricted to injuries occurring directly in the course of service. . . . Certainly the facts pleaded here, if true, cry out for a remedy.”); *Witt v. United States*, No. 2:08-CV-02024, 4–5 (E.D. Cal. Feb. 10, 2009) (order granting motion to dismiss) (“The alleged facts in the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff’s argument that this Court should allow this claim in spite of *Feres*. . . . The Court encourages the Ninth Circuit to consider the *Feres* Doctrine en banc. . . . The Court further joins [the] plea to the Supreme Court . . . that now is the time to revisit the *Feres* doctrine”); *see also* Charles G. Kels, *Military Medical Malpractice and “The Right to Sue,”* 30 CLINICS IN DERMATOLOGY 181, 186 (2012) (“Lower courts have often howled in protest as they applied the *Feres* doctrine, calling themselves ‘duty-bound’ to follow ‘wrong-headed’ precedent.”). *But see* *Shiver v. United States*, 34 F. Supp. 2d 321, 322 (D. Md. 1999) (“[T]o the extent that it could independently exercise its judgment on the issue, this Court would keep *Feres* intact and in place. . . . The resulting fear of litigation would paralyze decision-making in the one segment of our society that remains free of such paralysis, and that must remain free of it, if it is to fulfill its mission.”).

⁴³ FERNAND BRAUDEL, ON HISTORY 29 (Sarah Matthews trans., 1980); *see, e.g.*, ANANDA ABEYSEKARA, COLORS OF THE ROBE: RELIGION, IDENTITY, AND DIFFERENCE 13 (2002).

⁴⁴ 527 F.3d 806 (9th Cir. 2008).

federal courts in the Ninth Circuit showed themselves willing to fulfill their role as constitutional arbiter when individual rights are infringed as a result of inaction by the other two branches. Rather than interpreting precedent to mandate a hands-off approach to the military, the Ninth Circuit reinterpreted existing caselaw as a call for judicial intervention where constitutional rights were circumscribed. The courts determined in those cases that the egregiousness of discriminatory practices under DADT and the obvious attenuation between the policy and unit cohesion, outweighed potential negative effects of intercession in military affairs.⁴⁶ In light of the harm that can result from the glacial pace of legislative action, judicial decisionmaking proved itself a vital engine of social change.

According to the military's own statistics, thousands more servicemembers are sexually assaulted in one year than were discharged under the whole of the DADT policy.⁴⁷ Congress and the military have tried and failed for a quarter century to remedy the problem of intra-military sexual assault.⁴⁸ The only way to end intra-military rape is to radically alter the system of reporting, investigation, and prosecution of sexual assault claims.⁴⁹ The emphatic and relatively unanimous disapproval of the *Feres* doctrine by lower courts suggests that the question is not if the Court will revisit the doctrine, but when. With the filing of *Cioca* and *Klay*, the moment is ripe for the Supreme Court to revisit what has become an outdated and unworkable doctrine. Further, these cases provide an important opportunity for the Court to signal that it will not abdicate its responsibility to adjudicate worthy constitutional claims, particularly claims that otherwise are foreclosed.⁵⁰

⁴⁵ 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011), *rehearing denied*, Order Denying Petition for Rehearing, No. 10-56634 (9th Cir. Nov. 9, 2011).

⁴⁶ *Witt*, 527 F.3d at 821; *Log Cabin Republicans*, 716 F. Supp. 2d at 927–28.

⁴⁷ Compare THE WILLIAMS INST., DISCHARGES UNDER THE DON'T ASK/DON'T TELL POLICY: WOMEN AND RACIAL/ETHNIC MINORITIES I (Sept. 2010), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Discharges2009-Military-Sept-2010.pdf> ("Since 1993, more than 13,000 individuals have been discharged for violating the DADT policy.") (analysis based on data from the DoD and U.S. Census Bureau), with SEXUAL ASSAULT REPORT 2011, *supra* note 2, at 28 (In 2010, according to the DoD, approximately 19,000 sexual assaults took place in the U.S. military.).

⁴⁸ In 1991, in response to the Tailhook incident, during which naval aviators harassed and assaulted 87 female aviators during an annual convention in Las Vegas, Congress engaged in hearings during which, among other things, they considered stripping the military services of their investigative functions in sexual molestation and other cases. Ultimately, the reforms that were engaged were not effective. See Melissa Healy, *Pentagon's Tailhook Report Expected to Detail Obstruction, Cover-Up: Scandal: Separate Inquiry Will Deal with Specific Charges in the Sexual Abuse of Women at an Aviators' Convention*, L.A. TIMES, Sept. 16, 1992, available at http://articles.latimes.com/1992-09-16/news/mn-939_1_sexual-harassment.

⁴⁹ See Rachel Natelson, *A Case for Federal Oversight of Military Sexual Harassment*, 43 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 277, 281 (2009).

⁵⁰ See, e.g., Reidy, *supra* note 34, at 657–58. See also *infra* Part IV.C.

Part Two of this Article discusses the issue of military-on-military sexual violence, focusing on the class actions currently pending, *Cioca v. Rumsfeld* and *Klay v. Panetta*. Part Three of the Article focuses on the policy of military deference and the *Feres* principles, examining the historical origins and continued expansion of these judge-made doctrines. Part Four of the Article makes three primary arguments in support of judicial resolution of constitutional claims resulting from intra-military sexual assault. First, I argue that the defense that intra-military rape is a hazard of service is unsupported, not only by Supreme Court caselaw but by the government's own admission. Military officials currently are permitted to take the paradoxical position of framing gender-based violence against civilians as a private crime and intra-military violence as incident to service. Second, I challenge the argument that the military provides adequate remedies in cases of sexual assault, particularly in regard to female servicemembers. Lastly, I argue that constitutional separatism is a creature of judicial policymaking that at long last is ripe for revision. I explore the DADT repeal cases as a roadmap for resolution of constitutional claims resulting from assault, and I conclude by outlining the normative reasons why the judiciary must take an active role in these cases in order to preserve confidence in not only the military, but the judiciary as well.

II. *KLAY* AND *CIOCA*: "ZERO TOLERANCE," MORAL WAIVERS, INSTITUTIONAL RESPONSIBILITY

Thirty-six plaintiffs in *Cioca v. Rumsfeld* and *Klay v. Panetta* seek recognition of the liability of military and executive officials for the constitutional harms they suffered as a result of being raped, assaulted, and harassed while serving in the military and the retaliation they experienced as a result of reporting the crimes.⁵¹ They allege that, not only were their Fifth Amendment rights to bodily integrity violated when they suffered sexual assaults, but officials impeded the plaintiffs' exercise of their due process rights and First Amendment rights by unfairly terminating and otherwise mistreating them because they had reported the violence. Further, the suits allege equal protection violations, as government officials "subjected [the] Plaintiffs to a pattern of . . . assault, and . . . harassment . . . on the basis of gender; and encouraged a culture of sexism and misogyny."⁵²

Kori Cioca chronicles a typical experience of escalating harassment, culminating in rape by a fellow servicemember.⁵³ Over the course of several months, Cioca's direct supervisor in the Coast Guard subjected her to numerous incidents of sexual harassment, culminating in his

⁵¹ See *Cioca Amended Complaint*, *supra* note 7, ¶¶ 1-3, 341-56; *Cioca Appeal*, *supra* note 5, at 2; *Klay Complaint*, *supra* note 6, at ¶ 2.

⁵² *Cioca Amended Complaint*, *supra* note 7, ¶ 352.

⁵³ *Id.* ¶¶ 7-20.

sneaking into Cioca's room and masturbating and forcing her to touch his penis and physically assaulting her when she refused. Despite the fact that Cioca and two other women who witnessed the harassment promptly reported the assault, military command did not respond on any official basis. However, a different superior officer took her to his church, where he and other officers "prayed for her safety."⁵⁴ Shortly after this incident, Cioca was dragged into a closet and raped by the supervisor who had been harassing her. Command eventually transferred Cioca; however, they told her if she continued to pursue allegations of rape, she would be court-martialed for lying.⁵⁵ She was ordered to sign a paper stating she had an inappropriate consensual relationship with her attacker. Despite a promise of confidentiality, commanders openly discussed the incident. She was harassed at her new post, and eventually discharged on the basis that she had a "history of inappropriate relationships."⁵⁶ Two months shy of completing her service obligation at the time of discharge, Cioca is unable to obtain benefits for a chronic injury sustained during the assault. Her attacker faced no sanction.⁵⁷

Ariana Klay tells a similar story of escalating incidents and retaliation for reporting. Klay alleges she was sexually harassed by numerous superior officers while serving at the Marine Barracks in Washington D.C., an extremely prestigious post situated just a mile from the Capitol. The complaint chronicles Klay's harassment by not one but numerous high ranking Marine officials, including a major, a captain, and a lieutenant colonel. The captain spread numerous rumors, including that Klay had been involved in a "gang bang." She regularly was referred to as "slut," "whore," and "WM," for "walking mattress." Upon reporting what she deemed "pervasive hostility," she was told to "deal with it." In 2010, a senior officer and his civilian friend entered her residence without permission, where both raped Lieutenant Klay.⁵⁸ When Klay reported the incident, she was told she must have welcomed the attack, because she wore regulation issue skirts and makeup and exercised in tank tops.⁵⁹ One of the rapists was court-martialed; however, he was convicted of the much lesser crimes of adultery and indecent language. Klay lost a promising career. At least one of her harassers was promoted.⁶⁰

These complaints chronicle not only individual harms but a "systemic failure to stop rape and sexual assault."⁶¹ The ways in which the

⁵⁴ *Id.* ¶ 19.

⁵⁵ *Id.* ¶¶ 22, 26.

⁵⁶ *Id.* ¶¶ 25–26.

⁵⁷ *Id.* ¶¶ 23, 28.

⁵⁸ Klay Complaint, *supra* note 6, ¶¶ 11–17.

⁵⁹ *Id.* ¶ 19.

⁶⁰ *Id.* ¶¶ 13, 20–21.

⁶¹ Cioca Amended Complaint, *supra* note 7, ¶ 302.

military tacitly⁶² and overtly promotes a culture of sexual assault begins with the recruitment process. Faced with a crisis in securing personnel in the face of impending wars, under Secretary of Defense Rumsfeld, the military instituted a policy of granting moral waivers, accepting recruits who had been arrested or convicted of offenses, including domestic assault, aggravated assault, and rape.⁶³ Between 2004 and 2007, over 125,000 recruits with criminal histories enlisted in the various branches.⁶⁴ In 2006, more than 10% of soldiers in the Army had criminal pasts.⁶⁵

A 2010 study of incoming recruits conducted on behalf of the Navy to evaluate the effectiveness of potential sexual assault prevention programs found that between 13% and 15% of new recruits self-reported perpetrating or attempting rape, more than three times the statistics estimated for the population in general.⁶⁶ The researchers who conducted the study caution that these numbers are likely low, as any

⁶² In other work, I have chronicled various ways in which “an aggressive masculine identity is constructed and reinforced among soldiers within the context of collective practices.” Francine Banner, “*It’s Not All Flowers and Daisies*”: Masculinity, Heteronormativity and the Obscuring of Lesbian Identity in the Repeal of “Don’t Ask, Don’t Tell,” 24 *YALE J.L. & FEMINISM* 61, 68 (2012). See also CYNTHIA ENLOE, *MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN’S LIVES* 218, 237 (2000) (discussing how war is legitimated as a “masculine activity” and volunteer soldiering is constructed as inherently masculine); JOSHUA S. GOLDSTEIN, *WAR AND GENDER: HOW GENDER SHAPES THE WAR SYSTEM AND VICE VERSA* 356 (2001) (observing the ways in which those higher up in military hierarchy are “coded” as masculine and those of lesser status as feminine); Valorie K. Vojdik, *The Invisibility of Gender in War*, 9 *DUKE J. GENDER L. & POL’Y* 261, 266 (2002) (noting that the military relies on “rites of institution” that “reinforc[e] solidarity among men as a group”).

⁶³ Michelle Singer, *Military Lowers Standards To Fill Ranks*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-18563_162-3115199.html. The provision of enlistment waivers for individuals with felony sexual offenses is explicitly prohibited by the National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. § 523 (2012) [hereinafter 2013 NDAA].

⁶⁴ HELEN BENEDICT, *THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ* 88 (2009).

⁶⁵ Lizette Alvarez, *Army Giving More Waivers in Recruiting*, N.Y. TIMES, Feb. 14, 2007, at A1, A24.

⁶⁶ See Terri J. Rau et al., *Evaluation of a Sexual Assault Education/Prevention Program for Male U.S. Navy Personnel*, 175 *MILITARY MED.* 429, 429–31 (2010). One in five participants in the study reported engaging in some “coercive behavior.” *Id.* at 231. This is not only true of the U.S. armed forces. In 2010, a study by DLA Piper commissioned by the Australian Defence Force (ADF) found that sexual predators likely specifically sought out service in the ADF. See 1 GARY A. RUMBLE ET AL., *REPORT OF THE REVIEW OF ALLEGATIONS OF SEXUAL AND OTHER ABUSE IN DEFENCE: FACING THE PROBLEMS OF THE PAST* 19–23 (2011), <http://www.defence.gov.au/CultureReviews/Docs/DLAPiper/DefenceDLAPiperReview-FullReport.pdf>. The risk factors for sexual abuse identified in the DLA Piper study—including the presence of minority groups, the lack of adverse consequences for abusive behavior, a strong mentality of group loyalty, the absence of positive support for people who report abuse, and a chain-of-command structure that creates fear of retribution—are presumably also present in the U.S. military. See *id.*

self-reporting study likely inspires respondents to under-report.⁶⁷ Commentators suggest that sexual predators are likely to be attracted to the armed forces in part because the service also recruits individuals who are particularly vulnerable to sexual assault.⁶⁸ “[A] startling number of women and men enlist in the military to escape abuse. Among army soldiers and marine recruits, half of the women and about one-sixth of the men report having been sexually abused as children, while half of both say they were physically abused[,]” much higher rates than among the civilian population.⁶⁹ The *Cioca* appeal chronicles repeated instances of former Secretaries of Defense Rumsfeld and Gates failing to comply with congressional mandates to remedy issues of sexual predation, assault, and harassment.⁷⁰ Under their watch, reported sexual assaults in the military increased by 25%, particularly in combat zones.⁷¹

Until very recently, the DoD response to rising rates of sexual assault has been to engage in “soft” approaches, such as advertising campaigns and lighthearted presentations, including “Sex Signals” and “Can I Kiss You?”⁷² Campaigns such as “Ask Her When She’s Sober,”⁷³ “What Rapists

⁶⁷ Rau et al., *supra* note 66, at 433.

⁶⁸ See, e.g., RUMBLE ET AL., *supra* note 66, at 24 (“The fact—well known for decades at least—that some people who wished to have sexual access to boys sought out positions in . . . institutions where they could have power over, and access to, children. There [is] no reason to think that such people would not have targeted relevant parts of the [armed forces].”).

⁶⁹ BENEDICT, *supra* note 64, at 24; see also Naomi Himmelfarb et al., *Posttraumatic Stress Disorder in Female Veterans With Military and Civilian Sexual Trauma*, 19 J. TRAUMATIC STRESS 837, 838 (2006) (“[F]emale Army soldiers have been shown to have higher rates of childhood sexual trauma than non-military women. Further, military women with early sexual trauma have been found to experience military rape more often than those without early trauma.” (citations omitted)).

⁷⁰ As the *Cioca* appeal notes, the 1998 National Defense Authorization Act required then-Secretary Rumsfeld “to establish a task force to investigate the manner in which the military was handling reports of sexual predation.” *Cioca* Appeal, *supra* note 5, at 7. For two years, no members were selected. When Robert Gates took over the Secretary of Defense post, he not only failed to implement these provisions, but he also failed to comply with the requirements of the 2009 National Defense Authorization Act to establish a centralized database with all reports of sexual predation in the military services. *Id.* at 6–8; see also Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 563, 122 Stat. 4356 (2008).

⁷¹ *Cioca* Amended Complaint, *supra* note 7, ¶ 339.

⁷² T. Anthony Bell, *Army Launches New SHARP Course for Trainees*, ARMY.MIL, Nov. 23, 2011, <http://www.army.mil/article/69787>; Amy Guckeen Tolson, *Everyone Shares Duty To Prevent Sexual Assault*, ARMY.MIL, Apr. 22, 2011, <http://www.army.mil/article/55388/everyone-shares-duty-to-prevent-sexual-assault/>.

⁷³ See Marty Kaplan, “Ask Her When She’s Sober,” HUFFINGTON POST, Mar. 26, 2012, http://www.huffingtonpost.com/marty-kaplan/ask-her-when-shes-sober_b_1378251.html. One poster for the campaign features a picture of a young man amidst the writing, “My strength is for defending, so when I saw she was drunk, I told my wingman ‘Ask her when she’s sober.’” Mike Lambert, *Hope You’re Not Offended: ASK HER WHEN SHE’S SOBER, I LIKE THE CUT OF HIS JIB* (Mar. 9, 2012, 5:15 AM), <http://navycaptain-therealnavy.blogspot.com/2012/03/hope-youre-not-offended.html>.

Look Like,”⁷⁴ and “Bystander Intervention”⁷⁵ perpetuate the perception that most sexual assaults occur in a “he said/she said” situation in which anyone could cross a line. “(Primarily male) troops are not encouraged to cease sexually pursuing (primarily female) co-workers but to become better at recognizing the ‘signals’ those co-workers are sending.”⁷⁶ As Helen Benedict notes, when confronted by the problem of sexual assault, many servicemembers respond that prostitution is not as widely available in Iraq and Afghanistan as it was in prior wars, characterizing rape as a crime of desire versus a crime of power and exploitation.⁷⁷ This portrayal of rape as a product of “pent-up lust,” encouraged by the Sexual Assault Prevention and Response Office (SAPRO) itself, plays into an “anyone can rape” myth that is both inaccurate and dangerous. It also ignores the vital fact that, as pointed out in one recent Navy study, “men who have previously engaged in sexual aggression are likely to do so again.”⁷⁸

The failure of recent institutional tactics to stem the tide of sexual assaults is evidenced by the fact that so few perpetrators in the military are convicted of crimes of sexual violence.⁷⁹ When one examines only reported offenses, fewer than 15% of those accused are prosecuted for rape or sexual assault versus 40% of the accused in the civilian community.⁸⁰ An attorney who has served in the Judge Advocate General’s corps and former military criminal investigators describe a culture in which accusers regularly are interrogated and threatened with charges for giving false statements and where rape cases routinely are given to male military police officers to investigate, as women are deemed “too sympathetic.”⁸¹

⁷⁴ U.S. DEPT. OF DEF., “*What Rapists Look Like*,” SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE (2007), <http://www.sapr.mil/index.php/contact-sapro/17-campaign>. According to audio clips on the DoD’s “What Rapists Look Like” campaign website, rapists “normally look like regular guys” and are “likely to be someone you know.” *Id.*

⁷⁵ U.S. DEPT. OF DEF., “*Bystander Intervention—Bar Scene*,” SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE (2007), <http://www.sapr.mil/index.php/contact-sapro/17-campaign> (“Man, we’d better go get [our friend] before he does something stupid.”).

⁷⁶ Banner, *supra* note 62, at 81.

⁷⁷ BENEDICT, *supra* note 64, at 167.

⁷⁸ Rau et al., *supra* note 66, at 429 (“[M]en who reported a premilitary history of rape perpetration, compared with those who did not, were nearly 10 times more likely to commit rape or attempted rape during their first year of military service.”).

⁷⁹ Of the 791 military subjects who had some disciplinary action initiated against them due to a sexual assault offense, 489 had court-martial charges preferred against them. Two hundred forty of the cases proceeded to trial. Eighty percent of these were convicted. SEXUAL ASSAULT REPORT 2011, *supra* note 2, at 43.

⁸⁰ *Id.* at 32. These statistics have improved from last year, showing some response by the military. See U.S. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE, DEP’T OF DEF. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2010 (Mar. 2011), available at http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

⁸¹ THE INVISIBLE WAR (Chain Camera Pictures 2011).

Rather than being court-martialed, offenders frequently are penalized under Article 15 of the UCMJ, which permits non-judicial penalties, or Article 134, adultery.⁸² Although SAPRO is in the process of implementing a centralized database to track incidents of sexual assault, to date, the military has been exceedingly lax in reporting such data.⁸³ Among plaintiffs, reports of incidents almost uniformly lead to derivation of opportunities for advancement, overt retaliation, or even death.⁸⁴ One-third of the 36 plaintiffs in the *Klay* and *Cioca* cases were officially reprimanded, sanctioned, or discharged in retaliation for making complaints.⁸⁵ Others resigned after having been ordered to continue to serve under direct command of alleged rapists or their friends and

⁸² *Cioca Amended Complaint*, *supra* note 7, ¶¶ 323, 325.

⁸³ *Id.* ¶ 337.

⁸⁴ In 2010, former Marine Corporal Cesar Laurean was found guilty of murdering his pregnant colleague, Lance Corporal Maria Lauterbach. Prior to the murder, Lauterbach allegedly had been stalked and raped by Laurean and was preparing to report the assault. Kevin Hayes, *Cesar Laurean Guilty of Murder of Pregnant Marine Maria Lauterbach*, CBS NEWS (Aug. 24, 2010), http://www.cbsnews.com/8301-504083_162-20014533-504083.html. A similar story is echoed in the case of Kerryn O'Neill, who was stalked and subsequently murdered by her ex-fiancé, and who was the topic of Senate hearings regarding the potential abolition of the *Feres* doctrine in 2002. Prior to the murder, the perpetrator had scored in the 99.99th percentile for aggressive destructive behavior in a Navy psychological test; however, officials had failed to pass the information on to command. See *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. 6 (2002) (statement of Christopher Weaver, Rear Admiral and Commandant, Naval District Washington D.C.) [hereinafter *Feres Hearing*]. The 2002 *Feres* Hearing was inspired by the Third Circuit's decision in *O'Neill v. United States*, 140 F.3d 564 (3d Cir. 1998). In *O'Neill*, the court concluded that the O'Neill family's wrongful death claim was barred by *Feres*. *Id.* at 565. Currently, in another tragic case, the family of Private First Class LaVena Johnson is pressing for further investigation of Ms. Johnson's death in Iraq, which was ruled a suicide but bears some evidence of the existence of a rape and subsequent cover up. David Zucchino, *Family Disputes Army's Suicide Finding in Daughter's Death*, L.A. TIMES (Mar. 8, 2009), <http://articles.latimes.com/2009/mar/08/nation/na-women-soldier-suicides8>.

⁸⁵ *Cioca Amended Complaint*, *supra* note 7, ¶¶ 26, 64–65, 74, 86, 92, 124–25, 162, 170, 178, 184, 205, 212, 298 (Kori Cioca: discharged due to “history of inappropriate relationships”; Sarah Albertson: officially reprimanded by Command after panic attack suffered when in same office with rapist, suspension of security clearance, downgrading of work assignments; Greg Jeloudov: discharged under DADT; Panayiota Bertzikis: denied rank due to “pending investigation”; Nicole Curdt: demoted, fined, confined to quarters, granted “Other Than Honorable” discharge; Stephanie B. Schroeder: disciplined for having male in room, ordered to perform menial labor; Amber Yeager: subjected to Article 15-6 “character” investigation; Blake Stephens: chaptered out due to anxiety; Valerie Desautel: discharged under DADT); *Klay Complaint*, *supra* note 6, ¶¶ 37, 70–72, 79, 93, 104 (Elle Helmer: subject to investigation and prosecution; Lamanda Cummings: pled guilty to charge of falsifying documents regarding the sexual assault; Rebecca Blumer: issued Administrative Discharge with Misconduct; Erica Dorn: assigned to less prestigious position; Mariel Marmol: position downgraded from aviation mechanic to store clerk).

protectors.⁸⁶ Many perpetrators were promoted, one was even featured in a Marine Corps calendar.⁸⁷

The experiences of Ariana Klay and Kori Cioca are not unique. In the past 30 years, numerous, similar cases have been brought in district courts around the United States, alleging a wide range of claims against military officials in connection with sexual assault and harassment.⁸⁸ Most have been dismissed based on the courts' application of the *Feres* principles. Last year, the District Court for the Eastern District of Virginia predictably dismissed Cioca's complaint on the grounds that, although the plaintiffs' complaints were "troubling," the "unique disciplinary structure of the military establishment" was a "special factor" that counseled against judicial intrusion.⁸⁹ Judge Liam O'Grady was apologetic in his dismissal.⁹⁰ Like his colleagues, he wanted to hear these cases, but believed precedent tied his hands.

In Part Three, I delve more deeply into the stated grounds for dismissal, arguing that the law is not as cut and dried as the courts believe. Contributing to Diane Mazur's and Jonathan Turley's recent work, I hope to lay a foundation for the judiciary to re-evaluate the adherence to military deference in the context of claims of sexual assault.

III. "TROUBLING," "EGREGIOUS," DISMISSED

*"The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office."*⁹¹

The ability of Cioca and Klay to bring their suits is located in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.⁹² *Bivens* involved an alleged Fourth Amendment violation, whereby several federal agents conducted a warrantless search of Bivens' apartment and subsequently

⁸⁶ Cioca Amended Complaint, *supra* note 7, ¶¶ 64–65, 310.

⁸⁷ After he was scheduled to be court-martialed, Airman Jessica Hinves' rapist received an award for "Airman of the Quarter," while Hinves was transferred to another base. The court-martial was dropped. Cioca Amended Complaint, *supra* note 7, ¶¶ 157–58. A Marine Captain, who, prior to Ariana Klay's rape, spread false rumors that she had participated in a "gang-bang" was promoted to one of the most prestigious positions in the Marines. Other harassers and her rapist were featured in a calendar. Klay Complaint, *supra* note 6, ¶ 13, 20.

⁸⁸ See, e.g., *Gonzales v. U.S. Air Force*, 88 F. App'x 371 (10th Cir. 2004); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678 (1st Cir. 1999); *Smith v. United States*, 196 F.3d 774 (7th Cir. 1999); *Mackey v. Milam*, 154 F.3d 648 (6th Cir. 1998); *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984).

⁸⁹ *Cioca v. Rumsfeld*, No. 1:11-cv-151, 1–2 (E.D. Va. Dec. 9, 2011) (order granting motion to dismiss) (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)).

⁹⁰ In the dismissal of the *Cioca* plaintiffs' complaint, Judge Liam O'Grady acknowledged the plaintiffs' claims as both "troubling" and "egregious." *Id.* at 1–2.

⁹¹ *United States v. Stanley*, 483 U.S. 669, 699 (1987) (Brennan, J., concurring in part and dissenting in part) (quoting *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 123 (1849) (internal quotation marks omitted)).

⁹² 403 U.S. 388 (1971).

subjected him to a strip search. The Court held that, even if no specific statute provided it, a violation of the Constitution by a federal employee could provide a cause of action against that employee for money damages.⁹³ *Bivens* has been interpreted to provide causes of action for employment discrimination under the Fourteenth Amendment Due Process Clause and the Eighth Amendment's prohibition on cruel and unusual punishment.⁹⁴ In *Bivens*, the Court "recognized the tremendous capacity for causing harm that one possesses when acting under the authority of the United States government."⁹⁵

In the context of suits by and against military personnel the ability of plaintiffs to obtain money damages under *Bivens* has been severely limited by the separate but interrelated principles propounded by the Court in *Feres v. United States*.⁹⁶ *Feres* involved three cases in which executors of estates of active duty military personnel sued military officials for damages based on negligence under the FTCA.⁹⁷ The Court held that, although the FTCA provided some causes of action against the military, the Act was not meant to create new causes of action but only to right "remediless wrongs—wronges which would have been actionable if inflicted by an individual or a corporation but [are] remediless solely because their perpetrator was an officer or employee of the Government."⁹⁸ In the *Feres* plaintiffs' cases, because each harm was suffered in the course of active duty and there was no liability "under like circumstances" for private claims, the Court unanimously held that the suits were not justiciable.⁹⁹ *Feres* created an opportunity for Congress to clarify application of the FTCA and articulate the scope of its application

⁹³ *Id.* at 389, 397.

⁹⁴ Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 822 (2010) (citing *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 46 U.S. 14 (1980)).

⁹⁵ Kevin J. Mahoney, Comment, *United States v. Stanley: Has the Feres Doctrine Become a Grant of Absolute Immunity?*, 23 NEW ENG. L. REV. 767, 780–81 (1989). Beyond the scope of this Article but important to consider is the argument that the Court's declining to limit the *Feres* doctrine is simply part and parcel of the Court's resistance to *Bivens* claims more generally. See Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens after Minneci*, 90 WASH. U. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042175.

⁹⁶ 340 U.S. 135 (1950).

⁹⁷ *Id.* at 137. One decedent perished in a barracks fire and the other two were allegedly victims of Army doctors' errors. *Id.* See also 28 U.S.C. § 1346(b)(1) (2006).

⁹⁸ *Feres*, 340 U.S. at 138–40 ("[The FTCA] does contemplate that the Government will sometimes respond for negligence of military personnel, for it defines 'employee of the Government' to include 'members of the military or naval forces of the United States,' and provides that "acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.") (quoting 28 U.S.C. § 2671 (2006)).

⁹⁹ *Id.* at 141–42; see also 28 U.S.C. § 2674 (2006).

to service personnel.¹⁰⁰ However, Congress has not taken the opportunity to amend the statute.

Since *Feres*, the Court has identified three key rationales why military plaintiffs deserve less access to *Bivens* remedies than their civilian counterparts. First, the relationship of service personnel to military superiors is not the typical employer-employee relationship: “The relationship between the Government and members of its armed forces is ‘distinctively federal in character.’”¹⁰¹

This . . . relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service. Performance of the military function in diverse parts of the country and the world entails a “[s]ignificant risk of accidents and injuries.” Where a service member is injured incident to service—that is, because of his military relationship with the Government—it “makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman.”¹⁰²

Second, the Court assumes there already exist “generous statutory disability and death benefits . . . for service-related injuries.”¹⁰³ When last considering the issue, the Court saw no reason why military plaintiffs should be entitled to a windfall over and above that received by civilians suffering negligence in similar circumstances. And third, suits by servicemembers for injuries incurred incident to service are the “claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.”¹⁰⁴ “In every respect the military is, as this Court has recognized, ‘a specialized society.’”¹⁰⁵ “[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.”¹⁰⁶ The Court has noted that, even where a servicemember’s suit is not based in tort,

a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one’s service and to one’s country. Suits brought by service members against the Government for service-related

¹⁰⁰ See Gregory Spicer & Alan Gantzhorn, Note, *United States v. Stanley: Salt in a Serviceman’s Wounds*, 39 MERCER L. REV. 1013, 1016 (1987–1988).

¹⁰¹ *United States v. Johnson*, 481 U.S. 681, 689 (1987) (quoting *Feres*, 340 U.S. at 143) (internal quotation marks omitted).

¹⁰² *Id.* (citation omitted) (quoting *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 672 (1977)).

¹⁰³ *Id.* at 689.

¹⁰⁴ *Id.* at 690 (quoting *United States v. Shearer*, 473 U.S. 52, 59 (1985)).

¹⁰⁵ *Id.* at 690–91 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

¹⁰⁶ *Id.* at 691 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (internal quotation marks omitted)).

injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.¹⁰⁷

One can see the dramatic evolution of this doctrine of military deference over the course of the four cases cited in the *Cioca* dismissal: *Orloff v. Willoughby*,¹⁰⁸ *Gilligan v. Morgan*,¹⁰⁹ *Chappell v. Wallace*,¹¹⁰ and *United States v. Stanley*.¹¹¹ I provide a brief overview of these cases as they clearly highlight the increasing drift of the judiciary away from review of military affairs.

A. *Orloff to Stanley: Court as Pragmatist to Court as Policymaker*

The oldest case cited by the district court in its dismissal of the *Cioca* complaint, *Orloff v. Willoughby*, highlights the first of the *Feres* rationales—that the military chain of command should be the first and last resort for grievances regarding the assignment of servicemembers’ duties.¹¹² *Orloff* involved the Fifth Amendment claim of a doctor, who was lawfully inducted into the Army but, based on suspicions of “subversive” activities, was not provided the rank and assignment he allegedly was offered at his induction.¹¹³ In response to the allegation that the Army had deprived the doctor of the privilege against self-incrimination, a non-unanimous majority observed:

[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters.¹¹⁴

The Court cautioned that it was “obvious” that the appointment of military physicians was under the President’s discretion.¹¹⁵

The next case cited in the *Cioca* dismissal, *Gilligan v. Morgan*, involved a negligence suit against government officials for their actions in deploying the National Guard at Kent State in the early 1970s.¹¹⁶ The *Morgan* Court relied on a textual separation of powers argument to hold that, since Congress was granted “the responsibility for organizing, arming, and disciplining the Militia” under Article I, and had “authorized

¹⁰⁷ *Id.* at 691 (footnote omitted).

¹⁰⁸ 345 U.S. 83 (1953).

¹⁰⁹ 413 U.S. 1 (1973).

¹¹⁰ 462 U.S. 296 (1983).

¹¹¹ 483 U.S. 669 (1987).

¹¹² *Orloff*, 345 U.S. at 94.

¹¹³ *Id.* at 84, 89.

¹¹⁴ *Id.* at 93–94.

¹¹⁵ *Id.* at 90.

¹¹⁶ *Gilligan v. Morgan*, 413 U.S. 1, 3 (1973).

the President—as the Commander in Chief of the Armed Forces—to prescribe regulations governing organization and discipline of the National Guard[.]”¹¹⁷ the “relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, would . . . embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.”¹¹⁸

Diane Mazur observes that these cases, which seem to be relatively unproblematic acknowledgements of actions squarely within the congressional grant of power, “formed the basis for fundamental change in the constitutional law of civilian-military relations” by “plant[ing] a seed, in the most general terms, that might later grow to discourage judicial review of military discretion under a much broader range of circumstances.”¹¹⁹ The *Morgan* decision is particularly notable for what the Court did not say. It is understandable that the judicial branch would not desire to micro-manage the weapons-training schemes undertaken by the armed forces; however, the Court did not limit its holding to an affirmation of legislative responsibility for setting training methods. Rather, the Court “fail[ed] to note . . . that military judgments are not beyond judicial review just because they are military judgments.”¹²⁰ *Morgan* declined to recognize that military decisions “become judicial questions when they carry collateral consequences for civilians.”¹²¹

The final cases cited by Judge O’Grady, *Chappell v. Wallace*¹²² and *United States v. Stanley*,¹²³ further extended and at the same time entrenched the *Feres* doctrine, stretching the application of judicial deference to situations way beyond the supervisory relationship. In *Chappell v. Wallace*, five African American sailors sued commanders and superiors under the Civil Rights Act,¹²⁴ alleging a violation of Equal Protection when they were overlooked for desirable duties, threatened by superiors, and given penalties of unusual severity due to their race.¹²⁵ *United States v. Stanley* involved a due process claim by a serviceman who volunteered for what was ostensibly a chemical warfare testing program,

¹¹⁷ *Id.* at 6–7. Article I delegates to Congress responsibility for military affairs, and Article III does nothing to abridge this delegation. *See* U.S. CONST. art. I, § 8, cl. 16, art. III.

¹¹⁸ *Morgan*, 413 U.S. at 7.

¹¹⁹ Mazur, *supra* note 41, at 735, 739. Diane Mazur observes that, whereas Justice Jackson’s opinion in *Orloff* made a “relatively simple” textual observation regarding the separation of powers, Justice Rehnquist “misrepresented . . . the language of that opinion in order to substantiate a presumption of judicial deference to all exercises of military discretion.” *Id.* at 743.

¹²⁰ *Id.* at 740.

¹²¹ *Id.*

¹²² 462 U.S. 296 (1983).

¹²³ 483 U.S. 669 (1987).

¹²⁴ 42 U.S.C. § 1985 (2006).

¹²⁵ *Chappell*, 462 U.S. at 297.

but instead was secretly administered lysergic acid diethylamide (LSD) pursuant to an Army plan to test the effects of the drug on human subjects.¹²⁶ As a result, Stanley suffered severe personality changes that caused him to violently beat his spouse.¹²⁷ These cases are notable because they took the core principles of *Feres* and extended their application beyond everyday torts to constitutional harms.¹²⁸

In dismissing the plaintiffs' claims, the *Chappell* Court coined the oft-quoted language that *Bivens* remedies are not "available when 'special factors counselling hesitation' are present."¹²⁹ In characterizing what these "special factors" might be, the Court severed the rationale in *Feres* from principles of tort and recovery, reasoning instead that *Feres* "seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline.'"¹³⁰ Although the discrimination alleged in *Chappell* occurred during peacetime, the Court justified its holding in combat: "The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."¹³¹

In *Stanley*, the primary issue as characterized by the courts was not one of separation of powers but rather whether the subjection of the plaintiff to Tuskegee-like experimentation without his knowledge or consent could be considered "incident to service."¹³² The district court had ruled in Stanley's favor, interpreting *Chappell* only to bar *Bivens* actions when "a member of the military brings a suit against a superior officer for wrongs which involve direct orders in the performance of military duty and the discipline and order necessary thereto," factors that were not present in Stanley's claim.¹³³ The defendants in Stanley's case

¹²⁶ *Stanley*, 483 U.S. at 671.

¹²⁷ *Id.*

¹²⁸ Jonathan P. Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93, 105–06 (1990).

¹²⁹ *Chappell*, 462 U.S. at 298 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

¹³⁰ *Id.* at 299 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)); *see also id.* at 300 ("[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.") (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

¹³¹ *Id.* at 300.

¹³² *See United States v. Stanley*, 483 U.S. 669, 679–80 (1987). Commentators observe that the Court granted certiorari in Stanley's case in order to clarify the widespread confusion in the wake of *Chappell v. Wallace* regarding whether *Feres* was or was not a complete bar to servicemembers' constitutional claims. Spicer & Gantzhorn, *supra* note 100, at 1019.

¹³³ *Stanley v. United States*, 574 F. Supp. 474, 479 (S.D. Fla. 1983). After discussing a series of cases addressing the viability of various claims, the district court eventually held that *Chappell* did not bar Stanley's claims against officials for torts committed against him during his service: "This court strongly believes that the

were not his direct superiors, and may have been civilians. The Court of Appeals for the Eleventh Circuit affirmed, stating that, “[t]he inescapable demands of military discipline and obedience to orders’ are not implicated by the facts of this case.”¹³⁴ The Supreme Court, however, found these arguments unpersuasive, returning to the “factors counseling hesitation” implicit in “[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice.”¹³⁵ The Court observed once again that “Congress . . . exercised [its] authority to ‘establis[h] a comprehensive internal system of justice to regulate military life.’”¹³⁶ The Court also importantly characterized the “incident to service” requirement of *Feres* as much broader than the officer-subordinate relationship: “Stanley . . . may well be correct that *Chappell* implicated military chain-of-command concerns more directly than do the facts alleged here; . . . one must assume that . . . [Stanley] was not acting under orders from superior officers when he was administered LSD.”¹³⁷ These two cases in combination effected a multi-dimensional expansion of *Feres*, extending the case’s application beyond mere negligence claims and into nearly every realm of servicemembers’ activities.¹³⁸

Post-*Chappell*, during the Vietnam War era, the Court heard a number of facial constitutional challenges to military policies. The Court’s approach was to find that such cases were justiciable but to subject military justifications for infringement on constitutional rights to

Chappell decision has no effect whatsoever on the plaintiff’s ability to maintain a cause of action arising from the facts of the instant case. . . . [T]he Supreme Court’s blanket statement stripping military personnel of their right to maintain an action against superior officers bars only those actions in which the same ‘special factors’ are present, i.e., a case in which a member of the military brings a suit against a superior officer for wrongs which involve direct orders in the performance of military duty and the discipline and order necessary thereto.” *Id.*

¹³⁴ *Stanley v. United States*, 789 F.2d 1490, 1496 (11th Cir. 1986) (quoting *Chappell*, 462 U.S. at 304).

¹³⁵ *Stanley*, 483 U.S. at 679 (quoting *Chappell*, 462 U.S. at 300).

¹³⁶ *Id.* at 679 (quoting *Chappell*, 462 U.S. at 302).

¹³⁷ *Id.* at 680; see also Mahoney, *supra* note 95, at 789 (characterizing *Stanley* less as “delimit[ing] the scope of *Chappell*” than as “expand[ing] the protections afforded by the bright line ‘incident to service’ standard”).

¹³⁸ The Court has shown itself to be unfriendly to cases that re-frame what are intentional tort claims into other causes of action to avoid the bar imposed by the FTCA. See, e.g., *United States v. Shearer*, 473 U.S. 52, 59 (1985); see also Natasha Tidwell, Note, *Soldiers of Misfortune: The Justiciability of Injunctive Relief Actions in the Federal Courts and the U.S. Military’s Mandatory Anthrax Inoculation Program*, 37 NEW ENG. L. REV. 429, 464 (2002–2003) (“The *Stanley* Court distinguished the type of cases where a plaintiff seeks to thwart an ongoing constitutional violation from [cases] where the plaintiff [seeks] redress for a past injury.”). However, Cioca and Klay primarily seek the implementation of widespread policy changes. Further, the crime of rape and, as importantly, retaliation for reporting, encompass serious and tangible violations of the plaintiffs’ rights under the First, Fifth and Fourteenth Amendments.

a lesser standard of review.¹³⁹ Although *Feres* was not explicitly cited, the narrative in these cases was exceedingly protective of military autonomy. Diane Mazur outlines how, during the Rehnquist era, a hard division was erected between the judicial and military realms, “chang[ing] the constitutional relationship between the military and the judiciary, granting Congress much greater latitude to use military necessity as a means of shaping the nature of civilian society.”¹⁴⁰ She chronicles subsequent cases, such as *Parker v. Levy*,¹⁴¹ *Goldman v. Weinberger*,¹⁴² and *Rostker v. Goldberg*,¹⁴³ all of which served to advance the position that the military was a “separate society” whose actions were properly insulated from Article III review.¹⁴⁴ Although the Court under Chief Justice Roberts has only had the opportunity to tangentially address these issues, the cases that recently have been before the Court suggest a similar deference to concerns of military effectiveness.¹⁴⁵

¹³⁹ See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting) (accusing the Court in its review of military decisions of “eschew[ing] its constitutionally mandated role” and subjecting review of military decisionmaking to a “subrational-basis standard”).

¹⁴⁰ Mazur, *supra* note 41, at 740.

¹⁴¹ In *Parker*, a military doctor who had been convicted under Articles 90, 133, and 134 of the UCMJ after making public statements against the Vietnam War sought habeas corpus relief in the federal courts, challenging his conviction on the grounds that the Articles were void for vagueness under the Fifth Amendment Due Process Clause and overbroad in violation of the First Amendment. 417 U.S. 733, 736, 740–42 (1974). Justice Rehnquist, writing for the majority, reversed a unanimous judgment of the Court of Appeals and upheld the doctor’s conviction, reasoning that a lesser standard of review applied to challenges to the UCMJ than to those of civilian criminal statutes.

¹⁴² In *Goldman*, Justice Rehnquist again wrote for the majority, the Court held that the defendant’s First Amendment right to the free exercise of religion was not violated by an Air Force regulation prohibiting his wearing of a yarmulke. 475 U.S. 503, 504, 510 (1986). Although the Court assumed that the regulation of headgear was “in the interest of the military’s perceived need for uniformity,” *id.* at 510, Congress shortly thereafter enacted a statute permitting the wearing of religious apparel by servicemembers. 10 U.S.C. § 774(a) (2006).

¹⁴³ *Rostker*, another Rehnquist opinion, held that the Equal Protection Clause was not violated by a congressional statute subjecting only men to the draft. 453 U.S. 57, 83 (1981).

¹⁴⁴ Mazur observes that *Rostker* marked the apex of judicial deference to the military, as basis for the exclusion of women from the draft was not premised on military concerns, but on the distinctly civilian concern that women were needed as wives and mothers. Mazur, *supra* note 41, at 759, 761–62.

¹⁴⁵ In *Winter v. Natural Resources Defense Council, Inc.*, for example, the Court considered whether to affirm the Court of Appeals for the Ninth Circuit’s upholding of the grant of a preliminary injunction imposing restrictions on the Navy’s sonar training. 129 S. Ct. 365 (2008). In reversing the Ninth Circuit, the Court cited the “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force” which are “essentially professional military judgments.” *Id.* at 377 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). Notably, however, the *Winter* Court did not blindly defer to military expertise, as there was evidence proffered by Naval senior officers as to the threat posed by enemy forces

As I discuss in the following section, since the seminal decisions regarding the constitutionality of military policies in the 1980s, lower courts addressing the justiciability of military claims often merge the rationales underlying judicial deference in regard to tort and constitutional claims, with the result that justifications such as morale and combat-readiness suffice to bar the full range of potential claims brought by military personnel against superiors. However, I describe in the following sub-section how a closer review of the Court's jurisprudence in this area reveals that, cloaked in the doctrine of judicial restraint, there are layer upon layer of justifications for judicial activism, as Diane Mazur describes them, "platitudes as reasons to ratify military choice."¹⁴⁶ The result is a resoundingly undemocratic process in which the claims of those most worthy are those that are denied.

B. In Supplanting Judgment, Seeds of Hope

*"[M]ilitary interests do not always trump other considerations, and we have not held that they do."*¹⁴⁷

Despite the unsympathetic outcome in *Chappell* and *Stanley*, within these cases lies some potential for the justiciability of sexual assault claims against military officials. *Feres* did not hold that all claims by servicemembers against the government even for service-related injuries were barred, but that such suits "could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."¹⁴⁸ Similarly, in *Chappell*, the majority cautioned that the case should not be read as an absolute bar to judicial intervention, but rather, that judges were in the unique position of weighing the desirability of entering into the fray of intra-military litigation. The *Chappell* Court did not state that judicial deference to intra-military claims is mandatory but that "[c]ivilian 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; that relationship is at the heart of the necessarily unique structure of the Military Establishment."¹⁴⁹

and the need for sonar training exercises. The Court weighed these views against the potential harms to wildlife prior to rendering its decision and importantly noted that "military interests do not always trump other considerations, and we have not held that they do." *Id.* at 378; see also Joel R. Reynolds et al., *No Whale of A Tale: Legal Implications of Winter v. NRDC*, 36 *ECOLOGY L.Q.* 753, 772 (2009).

¹⁴⁶ Mazur, *supra* note 41, at 748.

¹⁴⁷ Opinion by Chief Justice Roberts in *Winter*, 129 S. Ct. at 378.

¹⁴⁸ *United States v. Johnson*, 481 U.S. 681, 691 (1987) (emphasis added) (interpreting *Feres* in regard to suits alleging negligence by civilian employees of the federal government).

¹⁴⁹ *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (emphasis added).

While it is his dissent in *United States v. Johnson*¹⁵⁰ that is most often cited in support of revisiting the *Feres* doctrine, Justice Scalia's opinion in *Stanley* offers a revealing discussion regarding the Court's approach to the resolution of intra-military claims. In *Stanley*, Justice Scalia, writing on behalf of the majority, recognized that the Court was situated at the fulcrum of the civilian-military balance. Conceding that the Court was interpreting the "incident to service" language broadly, Justice Scalia engaged in a discussion of the various directions open to the Court in interpreting its role in military affairs:

[T]here are varying levels of generality at which one may apply 'special factors' analysis. Most narrowly, one might require reason to believe that in the particular case the disciplinary structure of the military would be affected—thus not even excluding *all* officer-subordinate suits, but allowing, for example, suits for officer conduct so egregious that no responsible officer would feel exposed to suit in the performance of his duties. Somewhat more broadly, one might disallow *Bivens* actions whenever an officer-subordinate relationship underlies the suit. More broadly still, one might disallow them in the officer-subordinate situation and also beyond that situation when it affirmatively appears that military discipline would be affected. . . . Fourth, as we think appropriate, one might disallow *Bivens* actions whenever the injury arises out of activity 'incident to service.' And finally, one might conceivably disallow them by servicemen entirely.¹⁵¹

He continues by saying that what test the court applies is not set in stone, but where "one locates the rule along this spectrum depends upon how prophylactic one thinks the prohibition should be (*i.e.*, how much *occasional, unintended* impairment of military discipline one is willing to tolerate), which in turn depends upon how harmful and inappropriate judicial intrusion upon military discipline is thought to be."¹⁵²

The majority opinion clearly concedes that its interpretation of the phrase "incident to service" in *Stanley*'s case was the result of the Court's weighing of harms (impairments of military discipline v. judicial intervention) at a particular historical time and place, concluding:

This is essentially a policy judgment, and there is no scientific or analytic demonstration of the right answer. Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits, where we adopted an 'incident to service' rule.¹⁵³

Rather than providing precedent to foreclose judicial review of the allegations in *Klay* and *Cioca*, a close reading of *Stanley* suggests that,

¹⁵⁰ 481 U.S. 681 (Scalia, J., dissenting).

¹⁵¹ *United States v. Stanley*, 483 U.S. 669, 681 (1987).

¹⁵² *Id.* (emphasis added).

¹⁵³ *Id.*

when *Bivens* claims are brought by members of the armed forces, courts step into the shoes of policymakers and weigh the actual harm of judicial intervention in light of the particular type of claim that is raised at the historical moment, asking how great are the relative harms “today.” Rather than engaging in this evaluation, however, courts instead address these issues generally—and mistakenly—interpreting *Chappell* and *Stanley* as having slammed the door on servicemembers’ claims of constitutional violations.¹⁵⁴ The judiciary has placed itself in the position of gatekeeper in the case of military affairs. There is compelling evidence that the courts’ approach to these cases is contrary to that intended by the legislature.

C. *Speaking Through Silence? The Legislative Intent of the FTCA*

As Maia Goodell observes, while the “*Feres* doctrine is often dubbed nonjusticiab[le],” this is “a dubious moniker given the doctrine’s origins in statutory construction.”¹⁵⁵ Recent courts have been critiqued for conservatism; however, it is unclear whether the judiciary is in fact being deferential to Congress in applying *Feres* as a bar to intra-military claims. Just prior to *Feres*, the Court closely examined the legislative history of the FTCA in *Brooks v. United States*.¹⁵⁶ There, the Court considered whether the father of an off-duty serviceman killed in a collision with an Army truck could recover for negligence under the FTCA.¹⁵⁷ The Government argued that because Brooks was in the armed forces at the time of the accident, the family’s wrongful death claims were

¹⁵⁴ A very few courts do seem to weigh the harms in applying *Feres*. In *C.R.S. v. United States*, 761 F. Supp. 665 (D. Minn. 1991), for example, the plaintiff brought a § 1983 claim against government officials, alleging that his constitutional rights were violated when he received a blood transfusion at a military hospital that infected him with AIDS, which he subsequently passed on to his wife and infant daughter. In holding that the plaintiff’s claim survived a motion to dismiss, the court observed that the traditional rationales of *Feres* did not suffice to bar the plaintiff’s claims, as such claims: “[had] very little ‘potential . . . [to] implicate military discipline’” and would not “imperil national security and the military mission.” *Id.* at 668 (quoting *United States v. Johnson*, 481 U.S. 681, 692 (1987)). (“Furthermore, *some* inquiry into military activities and decision making is not a sufficient rationale for barring all suits. . . . Finally, these claims do not present the threat of a soldier haling his superior into court.”) See also *Hansen v. United States*, 3 Fed. App’x 592 (C.A. Wash. 2001), ruling that “the *Feres* doctrine should not be applied prematurely, and . . . that it was willing to entertain ideas that [at least some activities by servicemembers] may not be ‘incident to service’ because the military relationship could be too tenuous.” *Hansen*, cited in Kelly Dill, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 79 (2001).

¹⁵⁵ Maia Goodell, *Physical-Strength Rationales for De Jure Exclusion of Women from Military Combat Positions*, 34 SEATTLE U. L. REV. 17, 25 (2010).

¹⁵⁶ 337 U.S. 49 (1949).

¹⁵⁷ *Id.* at 50.

barred.¹⁵⁸ The Court believed that the terms of the FTCA were clear on its face:

They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that “any claim” means “any claim but that of servicemen.” The statute does contain twelve exceptions. None exclude petitioners’ claims. . . . [S]uch exceptions make it clear to us that Congress knew what it was about when it used the term “any claim.” It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed.¹⁵⁹

The Court further considered and dismissed the idea that granting Brooks’ claims would interfere with military discipline, noting, “[W]e are dealing with an accident which had nothing to do with the Brooks’ army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired.”¹⁶⁰ Today, *Brooks* remains good law and is followed in some jurisdictions, which apply a “totality of the circumstances” test to determine whether particular injuries are “incident to service.”¹⁶¹ However, *Brooks*’ viability has been severely circumscribed as the “incident to service” language in *Feres* has

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 51 (citing 28 U.S.C. § 2680 (2006)). “There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped.” *Id.* at 51–52 (footnotes omitted). See also Christopher G. Froelich, *Closing the Equitable Loophole: Assessing the Supreme Court’s Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs*, 35 SETON HALL L. REV. 699, 710–11 (2005) (“Although Congress considered many provisions significantly limiting governmental exposure to liability in situations involving military personnel, it ultimately chose to preclude only ‘claim[s] arising out of the combatant activities of the military or naval forces . . . during time of war.’” (quoting 28 U.S.C. § 2860(j) (2006))).

¹⁶⁰ *Brooks*, 337 U.S. at 52. Elizabeth Reidy, another commentator to closely analyze the legislative history of the FTCA, offers a strong argument that the *Brooks* Court’s reading is correct, arguing that “[b]oth the incredible expansion of the reach of the *Feres* Doctrine over particular claims and the majority interpretation of the assault and battery exception frustrate the intended purpose of the FTCA.” Reidy, *supra* note 34, at 647–48 (footnote omitted).

¹⁶¹ See, e.g., *Dreier v. United States*, 106 F.3d 844, 852 (9th Cir. 1996); *Kelly v. Pan. Canal Comm’n*, 26 F.3d 597, 600 (5th Cir. 1994) (citing *Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980)); *Millang v. United States*, 817 F.2d 533, 535 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Johnson v. United States*, 704 F.2d 1431, 1437 (9th Cir. 1983); *Hall v. United States*, 130 F. Supp. 2d 825, 828 (S.D. Miss. 2000). The majority of courts simply hold the claims barred by the *Feres* doctrine. See, e.g., *Ruggiero v. United States*, 162 F. App’x 140, 143 (3d Cir. 2006) (“We have no choice but to apply *Feres* to the instant case, despite the harshness of the result and our concern about the doctrine’s analytical foundations.”); *Major v. United States*, 835 F.2d 641, 644–45 (6th Cir. 1987) (“[I]n recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual’s status as a member of the military. . . . [W]e are bound to observe the Court’s clear directive on this issue.”), *cert. denied*, 487 U.S. 1218 (1988).

been more and more expansively interpreted. Kelly Dill observes that those courts taking the totality of the circumstances approach employ a tortured analysis to “get around” the *Feres* bar.¹⁶²

The Court has had occasion to scrutinize the legislative history of the FTCA outside of the military context, for example, in considering whether simple negligence claims by prisoners are barred by the FTCA. In *United States v. Muniz*, the Court unanimously held that such claims were clearly not barred, and that this outcome was a simple matter of statutory interpretation:

Whether [prisoners] are entitled to maintain these suits requires us to determine what Congress intended when it passed the Federal Tort Claims Act in 1946. This question would not appear at first glance to pose serious difficulty. Congress used neither intricate nor restrictive language in waiving the Government’s sovereign immunity. . . . [but] [s]o far as it appears from the face of the Act, Congress has clearly consented to suits such as those involved in the case at bar.¹⁶³

Importantly, the Court granted certiorari in *Muniz* because so many lower courts had assumed, if servicemembers’ claims were barred, prisoners’ claims would likewise be barred based on *Feres*; however, the Court was emphatic that “[a]n examination of the legislative history of the [FTCA] reinforces our conclusion that Congress intended to permit [prisoners’] suits.”¹⁶⁴ The Court dismissed arguments that permitting

¹⁶² Dill, *supra* note 154, at 77–78. In addition to applying the “totality test,” discussed *supra* note 161, some courts also have argued that *Feres* bars “as applied” versus facial challenges, or that *Feres* bars all but equitable relief, positions critiqued by other legal scholars. See Froelich, *supra* note 159, at 736; Tidwell, *supra* note 138, at 464; David Hartnagel, *Civilian Jurisdiction for Military Injury and the Feres Doctrine*, 72 GEO. WASH. L. REV. 1113, 1117–21 (2004); Turley, *supra* note 20, at 23. Jonathan Turley noted nearly 10 years ago that the “contradiction and confusion” spawned by *Feres* was “unrivalled in the Court’s history,” as “[s]ome courts have applied the doctrine to bar virtually any claims by service members while others have adopted narrower approaches. . . . These cases appear to be the natural result of applying a doctrine that has become increasingly untethered from any compelling policy rationale.” Turley, *supra* note 20, at 33–34.

¹⁶³ *United States v. Muniz*, 374 U.S. 150, 152–53 (1963) (citing 28 U.S.C. § 1346(b)(1) (2006)) (“None of the exceptions precludes suit against the Government by federal prisoners for injuries sustained in prison.”).

¹⁶⁴ *Id.* at 153. “[T]he want of an exception for prisoners’ claims reflects a deliberate choice, rather than an inadvertent omission.” *Id.* at 156. The similarities between military and prisoner plaintiffs seeking relief from governmental officials for constitutional claims resulting from sexual assault cannot be overlooked. Both military and incarcerated plaintiffs are subject to highly hierarchical institutional structures dependent on ideals of hegemonic masculinity. Both populations, also, are subject to civil disability as a consequence of status. A vital difference ripe for exploration is the significance of “voluntary” surrendering of rights and privileges attendant to military service versus involuntary status as a consequence of criminal conviction.

such suits would “impair the administration of our prisons” because it seemed “more a matter of conjecture than of reality.”¹⁶⁵ The Court was

given few concrete examples of how variations in personal injury law would impair the prison system. . . . Without more definite indication of the risks of harm from diversity, we conclude that the prison system will not be disrupted by the application of [various state law] . . . to decide whether the Government should be liable to a prisoner for the negligence of its employees. Finally, though the Government expresses some concern that the nonuniform right to recover will prejudice prisoners, it nonetheless seems clear that no recovery would prejudice them even more.¹⁶⁶

Today, *Muniz* continues to be viable, with the bizarre result that prisoners have much broader access to recovery in the courts than do U.S. servicemembers.¹⁶⁷

In the same term as *Stanley*, the Court heard the last case in which they would explicitly consider the *Feres* doctrine. In *United States v. Johnson*, the majority barred the widow of a Navy helicopter pilot from recovering in tort after her husband’s death in a training related accident.¹⁶⁸ Justice Scalia observed that the Court’s policymaking in judicial-military affairs in connection with the FTCA was wholly unsupported by legislative intent:

I cannot deny the possibility that some suits brought by servicemen will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us.

It is strange that Congress’ “obvious” intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court nor by the Congress that enacted the

¹⁶⁵ *Id.* at 159, 161.

¹⁶⁶ *Id.* at 161–62.

¹⁶⁷ See Will A. Smith, Comment, *Civil Liability for Sexual Assault in Prison: A Challenge to the “Deliberate Indifference” Standard*, 34 CUMB. L. REV. 289, 289–90 (2003–2004) (discussing the relatively onerous “deliberate indifference” standard required for prison rape victims to bring actions seeking civil damages under 42 U.S.C. § 1983 and the Eighth Amendment). Although the “deliberate indifference” standard is not an easy one to meet, prisoners have been able to state claims against officials for constitutional harms resulting from sexual assault and hazing in a number of recent cases. Colorable claims also include claims for constitutional violations stemming from retaliation for reporting such assaults. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 828–29 (1994); *Bridges v. Gilbert*, 557 F.3d 541, 551–53 (7th Cir. 2009); *Johnson v. Warner*, 200 F. App’x 270, 271–73 (4th Cir. 2006); *Hardy v. District of Columbia*, 601 F. Supp. 2d 182, 187 (D.D.C. 2009); *State ex rel. Cravens v. Nixon*, 234 S.W.3d 442, 448 (Mo. Ct. App. 2007); *Garrett v. Borden*, 202 S.W.3d 463, 464–65 (Tex. App. 2006).

¹⁶⁸ *United States v. Johnson*, 481 U.S. 681, 691–92 (1987).

FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of *Feres* suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed.¹⁶⁹

Justice Scalia then outlined the extent to which he feared the Court was supplanting its own opinion over that of the legislature regarding the effect of judicial intervention on military decisionmaking:

[M]ost fascinating of all to contemplate [is that] Congress thought that *barring* recovery by servicemen might adversely affect military discipline. After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.¹⁷⁰

Justice Scalia's characterization of judicial deference as potentially *harming* military discipline and readiness reflects that, even if there is an "underlying good reason to privilege all things military, . . . that . . . reason may not hold up regarding every particular instance of special treatment."¹⁷¹ The Bar Association of the District of Columbia recommended a Resolution from the American Bar Association urging Congress to counteract the Court's usurpation of this legislative role, arguing that the Court "wrote into the FTCA an additional exception that Congress could have added but deliberately did not," violating servicemembers' rights to access to the courts.¹⁷² Several members of Congress have also advocated the amendment of a doctrine that has produced "anomalous results which reflect neither the will of the Congress nor basic common sense."¹⁷³

The purpose of the FTCA is described in *Feres* itself: "[The Act] was not an isolated and spontaneous flash of congressional generosity. It

¹⁶⁹ *Id.* at 699 (Scalia, J., dissenting) (citing Barry Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U. L.J. 383, 407-11 (1985)).

¹⁷⁰ *Id.* at 700 (Scalia, J., dissenting). For a thorough, although potentially incorrect, critique of the *Johnson* dissent by a Justice Department prosecutor at the time, see Joan M. Bernott, *United States v. Johnson: The Dissent's Flawed Attack on Feres v. United States*, 21 CREIGHTON L. REV. 109 (1987-1988).

¹⁷¹ Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER, L. & JUST. 369, 372 (2005).

¹⁷² BAR ASS'N OF D.C., REPORT TO THE HOUSE OF DELEGATES 12 (2008). Nicole Melvani refers to *Feres* as the "fourteenth exception" to the FTCA, "[g]iven the blatant disregard for the plain language of the statute and Congress' original intent" exhibited by the Court. Nicole Melvani, Comment, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 412 (2010). The American Bar Association has formally reported on the proposed judicial amendment of the FTCA in the context of relief for military plaintiffs. See Memorandum regarding the 2008 Annual Meeting of the American Bar Association and Meeting of the House of Delegates 11 (Sept. 9, 2008), available at http://www.abanet.org/leadership/2008/annual/docs/select_committee_report.doc.

¹⁷³ See *Feres* Hearing, *supra* note 84, at 88 (statement of Sen. Arlen Specter).

mark[ed] the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit.”¹⁷⁴ Today, however, the claims of servicemembers are drastically limited compared to those of civilians in like circumstances. In *Sheridan v. United States*, the Court considered whether civilian plaintiffs, who had been shot by a troubled, off-duty navy corpsman as they happened to be driving past Bethesda Naval Hospital, were barred from bringing a claim that the government was negligent in failing to restrain the corpsman.¹⁷⁵ The Court held that the suit could proceed because “in a case in which the employment status of the assailant has nothing to do with the basis for imposing liability on the Government, it would seem *perverse* to exonerate the Government because of the happenstance that [the employee] was on a federal payroll.”¹⁷⁶

In contrast, in the intra-military context, claims of negligence for failure to supervise or restrain employees are deemed clearly to be rooted in assault and battery and, thus, barred by the *Feres* doctrine.¹⁷⁷ The import is that a civilian visitor and a member of the National Guard who, for example, happen to be victims of the same accident on a military base, face wholly different avenues for recovery simply based on their employment status. In the seminal case to address the issue, *United States v. Shearer*, a mother brought a suit alleging that the Army had “negligently and carelessly failed to exert a reasonably sufficient control over” another servicemember, who murdered her son.¹⁷⁸ The Court held that recovery under the FTCA was barred based on the “special relationship of the soldier to his superiors, the effects of the maintenance of such suits [under the Act] on discipline, and the extreme results that

¹⁷⁴ *Feres v. United States*, 340 U.S. 135, 139 (1950).

¹⁷⁵ *Sheridan v. United States*, 487 U.S. 392, 393–94 (1988). The government argued that the suit was barred by the intentional tort exception of the FTCA, 28 U.S.C. § 2680(h), since at the heart of plaintiffs’ claims were the intentional torts of assault and battery. *Id.* at 400.

¹⁷⁶ *Id.* at 402 (emphasis added). The Court further noted that whether the plaintiffs’ claims were barred should not turn on the distinction between negligence and intentional tort: “If the Government has a duty to prevent a foreseeably dangerous individual from wandering about unattended, it would be odd to assume that Congress intended a breach of that duty to give rise to liability when the dangerous human instrument was merely negligent but not when he or she was malicious.” *Id.* at 403. The lower courts have since split on this issue of whether the government should be accountable for harm to civilians stemming from the negligent hiring and supervision of wayward governmental employees. Compare *Mulloy v. United States*, 884 F. Supp. 622, 631 (D. Mass. 1995) (attaching liability when the government owes and breaches an independent duty to the victim to act or refrain from acting), with *Bajkowski v. United States*, 787 F. Supp. 539, 541–42 (E.D. N.C. 1991) (attaching liability when the government would be liable if the assailant were not a government employee).

¹⁷⁷ See *United States v. Shearer*, 473 U.S. 52, 55 (1985).

¹⁷⁸ *Id.* at 54.

might obtain if suits . . . were allowed for negligent orders given or negligent acts committed in the course of military duty.”¹⁷⁹

That the FTCA provides no evidence that Congress sought to immunize the government from constitutional claims of servicemembers places *Feres* squarely in the province of federal common law, an example not of judicial restraint but of legislating from the bench in an egregious way. Jonathan Turley observes that the position of the judiciary in regard to military decisionmaking is

brehtaking in its departure from the text and purpose of the Constitution. . . . [T]he military is given the protection of a fifty-first state, while it is also relieved of many of the requirements imposed on the states under a variety of constitutional provisions and doctrines. . . . This unique position is not based in the text of the Constitution, but is based on the preference of the Court.¹⁸⁰

Whatever one’s opinion about judges as policymakers, there also is an even more central issue of basic justice at stake in cases of intra-military rape and sexual assault. In her dissent in *Stanley*, Justice O’Connor expressed dismay that the non-consensual administration of psychotropic drugs could in any way be considered “incident to service,” remarking that the action was “so far beyond the bounds of human decency that as a matter of law it simply [could not] be considered a part of the military mission.”¹⁸¹ In the same case, Justice Brennan outlined the historical rationale for permitting intentional tort claims against military superiors, citing a nineteenth century case, *Wilkes v. Dinsman*,¹⁸² for the proposition that, while an agent of the government should be “protected under mere errors of judgment in the discharge of his duties, . . . he is not to be shielded from responsibility if he . . . inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.”¹⁸³ Over the past 60 years, the courts radically have departed from the fundamental principles underlying exempting military personnel from certain civilian suits:

Feres itself was concerned primarily with the *unfairness to the soldier* of making his recovery turn upon where he was injured, a matter outside of his control. Subsequent cases, however, have stressed the *military’s need for uniformity* in its governing standards. Regardless of

¹⁷⁹ *Id.* at 57 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)). In the Court’s view, it was irrelevant that the victim was off base when murdered: “[T]he situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline.” *Id.* (citation omitted).

¹⁸⁰ Turley, *supra* note 39, at 45–46. Turley calls the military a “pocket republic,” treated by the courts as a separate state entitled to nearly absolute autonomy in its decisionmaking. *Id.* at 47.

¹⁸¹ *United States v. Stanley*, 483 U.S. 669, 709 (1987) (O’Connor, J., dissenting).

¹⁸² *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89 (1849).

¹⁸³ *Stanley*, 483 U.S. at 699 (Brennan, J., dissenting) (quoting *Wilkes*, 48 U.S. (7 How.) at 123).

how it is understood, this second rationale is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA.¹⁸⁴

Justice Scalia's words highlight a significant shift in the balance from the legislative intent of Congress in passing the FTCA, passed to protect the little guy, to heavily weighing the interest of the military employer. In the context of sexual assault, the consequences of this power imbalance are appalling. As I argue below, when one weighs the harms of intervention versus the gravity of the crimes being perpetrated, the balance clearly weighs in favor of judicial recognition of the constitutional obligations of military officials to protect servicemembers from sexual assault.

IV. "THIS IS OUR WAR TOO":¹⁸⁵ MAKING THE CASE FOR JUDICIAL INTERVENTION

*"Sometimes it takes a different kind of action to cause change to come."*¹⁸⁶

The persistent refusal of the judiciary to address the issue of intra-military sexual assault threatens not only the institutional competence of the military, but the institutional competence of the judiciary as well. As discussed above, rather than blindly accepting the adage that national security will be threatened by civilian oversight of rape allegations, the judiciary is constitutionally required at least to require some justification that providing remedies to victims of sexual assaults will harm military affairs. In the following sub-sections I discuss how, when the harm of

¹⁸⁴ *United States v. Johnson*, 481 U.S. 681, 695 (1987) (Scalia, J., dissenting) (citations omitted). Justice Scalia is a strange bedfellow with other advocates for abolition of the *Feres* doctrine, most of whom call for limitation to the doctrine based on participatory democratic or justice-based principles. See, e.g., MAZUR, *supra* note 33, at 25–26, 54–55; Mahoney, *supra* note 95, at 796–804; Turley, *supra* note 39, at 132–33. An opponent of purposivism, Justice Scalia roots his criticisms of *Feres* in congressional intent, chastising the Court's misreading of *Feres* while upholding the doctrine's principles as a matter of a policy of judicial restraint. Compare *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting), with *Stanley*, 483 U.S. 669, 684. Interestingly, in *Goldman v. Sec'y of Def.*, then-Judge Scalia joined a dissent from the D.C. Appeals Court's denial to hear Goldman's case en banc, urging that the panel had an obligation to "measure the command suddenly and lately championed by the military against the restraint imposed [on the military] by the Free Exercise Clause." 739 F.2d 657, 660 (D.C. Cir. 1984) (Ginsburg, J., dissenting), *aff'd sub nom. Goldman v. Weinberger*, 475 U.S. 503 (1986). Had Justice Scalia been appointed to the Court just a few years earlier, the outcome of *Goldman v. Weinberger*, a five-to-four opinion, may have been different, thus changing the course of the military deference doctrine. See Dwight H. Sullivan, *The Congressional Response to Goldman v. Weinberger*, 121 MIL. L. REV. 125, 134 (1988).

¹⁸⁵ Adapted from a slogan from a Women's Army Corps recruitment poster during World War II. Poster: This Is My War Too! (U.S. Army Women's Army Auxiliary Corps 1943).

¹⁸⁶ THE INVISIBLE WAR, *supra* note 81 (statement of Brigadier General Wilma L. Vaught regarding *Cioca v. Rumsfeld*).

intervention is weighed against that of abdication, it is abundantly clear that none of the core principles of *Feres* are served in barring the claims of servicemembers who have experienced rape or sexual assault by colleagues while defending our country. Rather, just as the discriminatory DADT policy had a “direct and deleterious effect” on the armed forces,¹⁸⁷ allowing rape and harassment to continue unabated harms recruiting and leads to the discharge of competent servicemembers. I discuss each *Feres* principle in turn below.

A. *Rape as an Occupational Hazard: Unjust Application of the “Incident to Service” Exception*

Fox News commentator Liz Trotta recently drew fire by suggesting that rape was an occupational hazard for women in the U.S. military;¹⁸⁸ however, the widespread criticism of these comments belies that this is the very defense the government presents in suit after suit alleging sexual assault and harassment. It borders on absurd that rape would be considered “incident” to military service; however, uniformly courts have interpreted precedent to stand for this very proposition.¹⁸⁹ The phrase “incident to service” has been interpreted by most lower courts to signal application of a test akin to “but for” causation,¹⁹⁰ with courts characterizing any and all events occurring after a person joins the service as incident to his or her enlisted status.¹⁹¹ The harsh impact of the application of a “but for” rather than proximate cause test for what constitutes injuries “incident to service” is clear in those cases addressing sexual assault.

1. *Test as “Talisman”*: Military Sexual Assault as “Incident to Service”

In *Gonzalez v. U.S. Air Force*, the Tenth Circuit considered a plaintiff’s negligence claim against the Air Force in connection with an incident in which she was raped by a fellow servicemember while asleep in her room

¹⁸⁷ *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 916 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011).

¹⁸⁸ Trotta stated of Pentagon statistics regarding sexual assault, “Now, what did they expect? These people are in close contact.” *Fox News’ Liz Trotta On Women Raped In Military: “What Did They Expect? These People Are In Close Contact,”* HUFFINGTON POST (Feb. 13, 2012), http://www.huffingtonpost.com/2012/02/13/fox-news-liz-trotta-rape_n_1274018.html.

¹⁸⁹ *See, e.g.,* *Gonzales v. U.S. Air Force*, 88 F. App’x 371, 375 (10th Cir. 2004); *Day v. Mass. Air Nat’l Guard*, 167 F.3d 678, 682–83 (1st Cir. 1999); *Smith v. United States*, 196 F.3d 774, 776–78 (7th Cir. 1999); *Mackey v. Milam*, 154 F.3d 648, 652 (6th Cir. 1998); *Stubbs v. United States*, 744 F.2d 58, 60–61 (8th Cir. 1984).

¹⁹⁰ Robert L. Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24, 30 (1976).

¹⁹¹ *See, e.g.,* *Herreman v. United States*, 476 F.2d 234, 236–37 (7th Cir. 1973); *Shults v. United States*, 421 F.2d 170, 171–72 (5th Cir. 1969); *Chambers v. United States*, 357 F.2d 224, 229 (8th Cir. 1966).

after an on-base party.¹⁹² The plaintiff was underage, she had been served alcoholic beverages, and her attacker was able to enter her room because the lock to her floor was broken and her door was propped open because the air conditioning in the building was not functioning.¹⁹³ The court held that even plaintiff's sleeping was incident to her military service: "In general, the applicable test for whether an activity is incident to service . . . encompass[es] most recreational and social opportunities afforded to service members by the military. . . . [I]mposition of liability here . . . would serve to second-guess military policy concerning military discipline and training."¹⁹⁴

In *Day v. Massachusetts Air National Guard*, the First Circuit held that, even though some events had occurred off base, the § 1983 claim of an airman who sought to recover for injuries in what the court characterized as "despicable" hazing incidents at a national guard base was barred.¹⁹⁵ Among other incidents, the guardsman was awakened in the middle of the night by at least nine other enlistees, stripped, and carried outside, where the guardsmen forcibly inserted a traffic cone between his buttocks and photographed him.¹⁹⁶ The plaintiff complained that, prior to being assaulted himself, he had witnessed other new recruits undergo similar incidents.¹⁹⁷ The court reluctantly held that the claims could not go forward:

The incident to service test itself has become a talisman, although perhaps not so intended. Courts have sought to determine whether an injury was incident to service by asking whether it occurred on a military facility, whether it arose out of military activities or at least military life, whether the alleged perpetrators were superiors or at least acting in cooperation with the military, and—often stressed as particularly important—whether the injured party was himself in some fashion on military service at the time of the incident. . . . Judged mechanically by such criteria, Day's claims against the United States are barred.¹⁹⁸

Ironically, the court noted that the more pervasive the misconduct, the less likely the plaintiff would be to recover: "Indeed, if the government

¹⁹² *Gonzales*, 88 F. App'x at 373–74. The Court of Appeals for the Tenth Circuit had previously considered claims by an Air Force guardswoman for sexual assault and battery and conspiracy to deprive her of equal protection of the law in *Corey v. United States* No. 96-6409, 1997 WL 474521, at *5 (10th Cir. Aug. 20, 1997) (unpublished opinion). In *Corey*, the court stated, "The *Feres* doctrine 'encompass[es], at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military.'" *Id.* (quoting *Persons v. United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991)).

¹⁹³ *Gonzales*, 88 F. App'x at 373.

¹⁹⁴ *Id.* at 375–76.

¹⁹⁵ 167 F.3d 678, 680 (1st Cir. 1999).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 682 (citations omitted).

here had shown that Day's hazing was part of a military toughening-up policy, *all* claims against the individuals would be barred [even those under state law] . . . no matter how unattractive the policy might be."¹⁹⁹

In *Smith v. United States*, the Seventh Circuit considered tort claims by a plaintiff raped by a supervisor at Aberdeen Proving Ground, an Army facility in Maryland.²⁰⁰ In what has come to be known as the Aberdeen Scandal, six women brought charges against twelve commissioned and non-commissioned male officers alleging sexual assault on female trainees under their command.²⁰¹ Smith sued the Army under the FTCA for failing to supervise a drill sergeant who numerous times allegedly "entered her barracks room unannounced[,] . . . forced her into his privately-owned vehicle, drove her to an off-post hotel, and then forced her to have non-consensual intercourse."²⁰² During each event, Smith had been off duty.²⁰³ Smith presented her claim via Army channels, but received no response.²⁰⁴ The Seventh Circuit Court of Appeals held that Smith's claims were barred by *Feres* because

[t]he wrongs allegedly perpetrated . . . upon then-Private First Class Smith were made possible by [the perpetrator's] status as her military superior. Similarly, the claims that other officers failed to report Robinson's conduct implicate serious questions about the proper conduct and readiness of military units. . . . Congress has made it clear that an FTCA action, in which the service member seeks damages from the United States and necessarily calls into question the management decisions of those who exercise military leadership, is not the appropriate avenue for a wronged service member seeking redress. . . . It is not our role . . . to pass judgment on the adequacy of that Congressional response.²⁰⁵

The perpetrators at Aberdeen were tried pursuant to the UCMJ, with the most egregious offender sentenced to 25 years in military prison.²⁰⁶ The

¹⁹⁹ *Id.* at 685.

²⁰⁰ *Smith v. United States*, 196 F.3d 774, 775–76 (7th Cir. 1999).

²⁰¹ *Army Sex Scandal Verdict*, PBS ONLINE NEWS HOUR (Apr. 29, 1997), http://www.pbs.org/newshour/bb/military/april97/sex_scandal_4-29.html (transcript).

²⁰² *Smith*, 196 F.3d at 776.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 777–78 (citations omitted). The court compared the facts in *Smith* to those in *Mackey v. Milam*, 154 F.3d 648 (6th Cir. 1998). In *Mackey*, the court held that officers were acting within the scope of their employment when they harassed a captain because they had supervisory power over her granted by their mutual employer, the Air Force. *Id.* at 651.

²⁰⁶ The Staff Sergeant who received the most severe punishment was sentenced to 25 years in military prison and released after serving 14 years. During the trial, he admitted to having sex with 11 different persons under his command. Sig Christenson & Karisa King, *Critics Say Walker's Sentence Too Short*, MY SAN ANTONIO (July 29, 2012), http://www.mysanantonio.com/news/local_news/article/Critics-say-Walker-s-sentence-too-short-3743863.php; Scott Wilson, *Aberdeen Sergeant Gets 25 Years: Jury's Decision Fails to End Debate on Race, Sex, Power in Military*, BALTIMORE SUN, May 7,

handling of the cases drew fire from some who alleged that the assailants, all African American men, might have been wrongfully accused.²⁰⁷ Notably, however, the *Feres* doctrine is equally unjust to accusers and alleged perpetrators; should a perpetrator be wrongfully accused of sexual violence, he or she also is without remedy. The *Feres* doctrine is interpreted to bar suits for intentional infliction of emotional distress for those wrongfully accused of sexual assault.²⁰⁸

In case after case, neither the legislative intent in passing the FTCA nor the intuitively, morally correct idea expressed by the Court in *Wilkes* that the little guy should be protected from immoral conduct,²⁰⁹ is being realized. As Jonathan Turley observes, a system has been established wherein servicemembers “hold a type of dual citizenship: citizens of both the national republic . . . and a pocket republic that supplants many of [our key, national] principles with an endogenous system of rules and traditions.”²¹⁰ As the petition for certiorari in the Aberdeen case notes, “It could just as easily have been a civilian woman in [the plaintiff’s] place and, if it had, the *Feres* doctrine would not even have been raised by the Government.”²¹¹

The idea that holding individuals accountable for misconduct will somehow threaten military affairs is undercut by the military’s own response to incidents of sexual violence committed by active-duty troops against civilians, which is to characterize such incidents as the product of individual psychosis rather than institutional design. The military repeatedly disavows responsibility for violence in connection with the actions of so-called “renegade” servicemembers.²¹² When it comes to victimizers, officials ardently refuse to acknowledge any connection between bad behavior and military supervision or training.²¹³ State-sponsored rituals inculcating “macho” attitudes and gendered hierarchies are cleanly severed from a servicemember’s commission of violence.²¹⁴ However, when these selfsame individuals attack other

1997, available at http://articles.baltimoresun.com/1997-05-07/news/1997127064_1_simpson-aberdeen-sentence.

²⁰⁷ Wilson, *supra* note 206.

²⁰⁸ See *Lovely v. United States*, 570 F.3d 778, 785 (6th Cir. 2009) (upholding dismissal of claim for intentional infliction of emotional distress under the *Feres* doctrine).

²⁰⁹ *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 123 (1849).

²¹⁰ Turley, *supra* note 39, at 3.

²¹¹ Petition for Writ of Certiorari, *Smith v. United States* at 12, 196 F.3d 774 (7th Cir. 1999) (No. 99-1394).

²¹² See, e.g., Bruce Tucker & Sia Triantafyllos, *Lynndie England, Abu Ghraib, and the New Imperialism*, 38 CANADIAN REV. OF AM. STUD. 83, 84–86 (2008).

²¹³ *Id.* at 85–86.

²¹⁴ For a thorough discussion of potential connections between militarized rituals of masculinity and the commission of gendered violence, see Joane Nagel, *Masculinity and Nationalism: Gender and Sexuality in the Making of Nations*, 21 ETHNIC & RACIAL STUD. 242, 257–58 (1998) (describing three ways in which the military is masculinized, including the “sexualized nature of warfare,” the “depiction of the

military personnel, the institution is quick to label such attacks “incident” to military service.²¹⁵ Sacrificing bodily autonomy simply is a cost of joining up.

2. *Just a “Couple of Knuckleheads”: Gender-Based Violence and the Culture of Scapegoating*

Despite widespread efforts to downplay crimes of sexual violence, military officials, the legislature, and the executive recently have been confronted by troops committing gang-rape, sexual humiliation, and torture at home and abroad. Among the most high profile of these incidents have been the Abu Ghraib Prison scandal, the gang-rape and murder of Abeer Janabi and her family in 2006, and the 2012 Secret Service “sex romp” debacle. Catherine MacKinnon observes that, despite rhetoric acknowledging rape as a crime of power, seldom is sexual violence—even mass sexual violence—treated as the product of institutional forces and pressures.²¹⁶ Rather, sexual violence is characterized as a private crime.²¹⁷ Particularly in times of stress, rape is dismissed as “a lesser evil in the hierarchy of wartime horrors, . . . a crime that the world can dismiss as collateral damage, or as cultural, or inevitable.”²¹⁸

Numerous scholars have chronicled the responses of the Bush—and now Obama—administrations to incidents of sexual violence committed by active-duty troops against civilians. Tucker and Triantafyllos, for example, describe the “scapegoating” endemic to the Abu Ghraib scandal:

[T]he spectacle of the same set of photographs being shown repeatedly kept the focus on individual perpetrators and the morality of their behaviour, and so created a narrative limited to the actions of a few individuals. . . . In the end the metanarrative exempted Americans from confronting race and the racialized

‘enemy’ in conflicts,” and the “use of the masculine imagery of rape, penetration and sexual conquest to depict military weaponry and offensives.”); see also ENLOE, *supra* note 62, at 238; Banner, *supra* note 62, at 67; Vojdik, *supra* note 62, at 266.

²¹⁵ HUFFINGTON POST, *supra* note 188.

²¹⁶ Catherine A. MacKinnon, *Rape, Genocide, and Women’s Human Rights*, 17 HARV. WOMEN’S L.J. 5, 14–15 (1994).

²¹⁷ *Id.*

²¹⁸ UN Sees Wartime Rape as Big Challenge, DECCAN HERALD, Aug. 7, 2010, <http://www.deccanherald.com/content/86748/un-sees-wartime-rape-big.html>. The Human Rights Watch characterizes the failure of the world community to “condemn[] [rape] like any other abuse” as resulting from a persistent “willingness to tolerate sexual abuse against women.” HUMAN RIGHTS WATCH–WOMEN’S RIGHTS PROJECT, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS 7 (1995), available at <http://www.hrw.org/reports/1995/08/01/human-rights-watch-global-report-womens-human-rights>.

violence that structures both the discourse and practice of the so called “war on terror.”²¹⁹

The authors emphasize that this characterization of the rampant sexual abuse and humiliation of prisoners as the work of a few wayward soldiers was fostered by

[o]fficial reactions to the news from Abu Ghraib [which] sought to contain the story by suggesting that the behaviour depicted in the photographs was exceptional. Both American President George W. Bush and Secretary of Defense Donald Rumsfeld emphasized their regret that a few soldiers had brought the overall integrity of the American military into question. The White House declared that President George W. Bush was “shocked and disgusted” by the photographs, distancing him and the military command structure from any explanation and taking no official responsibility.²²⁰

The enlisted personnel involved in the scandal received comparatively light punishments. No officers were tried.²²¹

A similar distancing of official responsibility from servicemembers’ actions is evident in the official response to the trial of former Private First Class Steven Green, who was involved in a 1996 crime in Iraq in which five soldiers colluded to participate in the rape and murder of 14-

²¹⁹ Tucker & Triantafyllos, *supra* note 212, at 85, 97; see also RYAN ASHLEY CALDWELL, *FALLGIRLS: GENDER AND THE FRAMING OF TORTURE AT ABU GHRAIB* 45, 145, 167 (2012); Lindsey Feitz & Joane Nagel, *The Militarization of Gender and Sexuality in the Iraq War*, in *WOMEN IN THE MILITARY AND IN ARMED CONFLICT* 201, 211–13, 217 (Helena Carreiras & Gerhard Kümmel eds., 2008); John W. Howard III & Laura C. Privera, *The Fallen Woman Archetype: Media Representations of Lynndie England, Gender and the (Ab)uses of U.S. Female Soldiers*, 31 *WOMEN’S STUD. IN COMM.* 287, 305 (2008).

²²⁰ Tucker & Triantafyllos, *supra* note 212, at 85–86 (“Both Bush and Rumsfeld took the position that the degradation of Iraqi soldiers at Abu Ghraib was exceptional, the result of renegade soldiers operating outside the official chain of command.”); see also Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 *MICH. J. INT’L L.* 251, 252 n.4 (2009) (“The Bush [A]dministration has condemned the abuses as the work of a ‘few bad apples,’ while working diligently to get the story off the front pages and out of the presidential campaign.” (quoting Phillip Carter, *The Road to Abu Ghraib: The Biggest Scandal of the Bush Administration Began at the Top*, *WASH. MONTHLY*, Nov. 2004, available at <http://www.washingtonmonthly.com/features/2004/0411.carter.html>)).

²²¹ Private Lynndie England was dishonorably discharged from the service and served 521 days prior to being paroled. Laura Rozen, *Abu Ghraib Guard Lynndie England Says of Iraqi Prisoners She Was Convicted of Abusing: ‘They Got the Better End of the Deal.’* *YAHOO NEWS* (Mar. 20, 2012), <http://news.yahoo.com/blogs/envoy/abu-ghraib-guard-lynnie-england-says-iraqi-prisoners-214645632.html>. Her supervisor, Charles Graner, was sentenced to ten years. *Graner Sentenced to 10 Years For Abuse*, *ASSOCIATED PRESS* (Jan. 16, 2005), <http://www.nbcnews.com/id/6795956/#.UTKMy1fud8>. Four guards and two low-level military intelligence officers made plea deals in the case. *Judge Throws Out Abu Ghraib Guilty Plea*, *NBC NEWS* (May 4, 2005), http://www.nbcnews.com/id/7734657/ns/world_news-mideast_n_africa/t/judge-throws-out-abu-ghraib-guilty-plea/#.UXR1ZrWG3h8.

year-old Abeer al-Janabi and her family.²²² When one scrutinizes the facts of that case, it is clear that the soldiers' treated the event as akin to a military mission. Leaving one man on lookout duty, four of the soldiers donned their uniforms and jogged in formation to the al-Janabi residence, where Green herded Mr. and Mrs. al-Janabi and their five-year-old daughter into a back bedroom and executed them.²²³ The three others corralled Abeer into the living room and attempted to assault her. The highest-ranked individual present touched Abeer first, as a matter of right.²²⁴ Green emerged from the bedroom, raped Abeer, then shot her. The designated lookout lent someone his lighter; they burned her body to destroy the evidence.²²⁵

Despite a pact to keep events secret, the attack on the al-Janabi family became known among a number of those stationed in Mamudiyah.²²⁶ Rather than taking action against the perpetrators, in the spirit of brotherhood, a supervisor assisted the perpetrators in attempting to cover up the crime.²²⁷ He then arranged an honorable discharge for Green on the grounds of "anti-social personality disorder."²²⁸ Another soldier in the unit eventually came forward. He was transferred to another unit because he feared "payback" for his actions.²²⁹

There was strong evidence that Green was not fit for military service and that the unit had been under incredible amounts of stress.²³⁰ Despite strong indications that military officials were negligent in hiring and retaining Green, in not providing adequate psychiatric care to the

²²² JIM FREDERICK, *BLACK HEARTS: ONE PLATOON'S DESCENT INTO MADNESS IN IRAQ'S TRIANGLE OF DEATH* 259–60 (2010).

²²³ *Id.* at 260, 264–66.

²²⁴ *Id.* at 266–67.

²²⁵ *Id.*

²²⁶ *Id.* at 268–70. In the close quarters shared by combat troops, it is not uncommon for horrific incidents to be well-known among colleagues. For example, investigators into the recent "trophy hunting" of civilian body parts by numerous infantrymen in Afghanistan discovered that, although the "kill team" was characterized by officials as operating in secret, in fact "pretty much the whole platoon" knew about them. Mark Boal, *The Kill Team*, *ROLLING STONE*, Apr. 14, 2011, at 60.

²²⁷ Gail McGowan Mellor, *Sentencing of Steve Green in Abeer Death, Command Structure in Iraq*, *HUFFINGTON POST* (May 22, 2009), http://www.huffingtonpost.com/gail-mcgowan-mellor/the-death-of-abeer-in-ira_b_206793.html.

²²⁸ *Officials: Soldier was Discharged for 'Antisocial Personality,'* CNN (July 5, 2006), <http://web.archive.org/web/20060718151434/http://www.cnn.com/2006/LAW/07/05/iraq.charge.ap/index.html>.

²²⁹ When the "whistleblower" soldier notified his father, an Army veteran, that he planned to reveal his knowledge about the incident, the father told him that to "give[] up a brother" the incident would have to be "heinous." Gregg Zoroya, *Soldier Describes Anguish in Revealing Murder Allegations*, *USA TODAY* (Sept. 13, 2006), http://www.usatoday.com/news/nation/2006-09-12-soldier-anguish_x.htm.

²³⁰ Andrew Tilghman, *"I Came Over Here Because I Wanted to Kill People,"* *WASH. POST* (July 30, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/28/AR2006072801492.html>.

soldiers in Bravo Company, and, certainly, in covering up the incident after it was discovered, the governmental response to the soldiers' actions was to focus on Green as the "ringleader" and to paint the soldiers' actions as outside the pale. The President noted:

What concerns me is not only the action and, you know, if this is true, the despicable crime, if true. But what I don't want to have happen is for people to then say, well, the U.S. military is full of these kind of people. That is not the case. Our military is fabulous.²³¹

Green, with a history of several violent misdemeanors prior to entering the service, had been admitted into the Army under the Rumsfeld "moral waiver" policy.²³²

The same hands-off policy regarding institutional accountability is also evident in the recent Secret Service scandal, which involves numerous complaints of misconduct, including sexual assaults, against at least a dozen secret service personnel.²³³ Unsurprisingly, the agents involved are challenging dismissal on grounds of scapegoating, saying they didn't break the rules but that inappropriate sexual behavior by agents abroad was the cultural norm.²³⁴ They argue that engagement in prostitution and sexual exploitation were officially sanctioned practices, evidenced by the nickname "Secret Circus" used by employees "to describe what ensues when large numbers of agents and officers arrive in a city."²³⁵ Although the allegations involved were serious, President Obama elected not to address them in a press conference but rather appeared on a popular evening talk show to chat casually about the scandal.²³⁶ Again, the behavior of governmental personnel was dismissed

²³¹ Joseph Giordano, *U.S. Pledges Justice in Alleged Rape, Killings at Mahmudiyah*, STARS & STRIPES (July 8, 2006), <http://www.stripes.com/news/u-s-pledges-justice-in-alleged-rape-killings-at-mahmudiyah-1.51325> (quoting President Bush in an interview with CNN).

²³² BENEDICT, *supra* note 64, at 88–89. Jeremy Morlock, one of the alleged ringleaders of the trophy hunting squad in Afghanistan also had committed several misdemeanors prior to entering the service, including a disorderly conduct charge for burning his wife with a cigarette. Boal, *supra* note 226, at 66.

²³³ See Lolita C. Baldor, *Secret Service Prostitution Scandal: Up to a Dozen Service Members Brought Women to Colombia Hotel*, HUFFINGTON POST (Aug. 3, 2012), http://www.huffingtonpost.com/2012/08/03/secret-service-prostitution-scandal_n_1738712.html; Carol D. Leonnig & David Nakamura, *Secret Service Sex Scandal: Several Say They Didn't Break the Rules*, WASH. POST, May 22, 2012, http://www.washingtonpost.com/politics/secret-service-sex-scandal-several-say-they-didnt-break-the-rules/2012/05/22/gIQAXrX8iU_story.html.

²³⁴ Leonnig & Nakamura, *supra* note 233.

²³⁵ *Id.* For a historical overview of the military's promotion of prostitution in locations where military bases are situated, see CYNTHIA ENLOE, *BANANAS, BEACHES AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS* 81–91 (1990).

²³⁶ Courtney Garcia, *Obama Slow Jams with Fallon, Talks About Secret Service "Knuckleheads"*, NBC NEWS (Feb. 24, 2013), http://entertainment.nbcnews.com/_news/2012/04/24/11376497-obama-slow-jams-with-fallon-talks-about-secret-service-

as exceptional. The President praised the 99.9% of the Secret Service who were doing a good job and referred to those engaging in sexual misconduct as “knuckleheads.”²³⁷ The official investigation report of the incidents concluded that the misconduct was not due to “leadership problems” and that the military “did not create or foster an atmosphere of tolerance for prostitution or marital infidelity.”²³⁸

From the perspective of diplomacy, government officials’ reluctance to attribute misconduct to chain-of-command failures is unsurprising. When sexual violence and gender-based crimes ultimately come to light, if soldiers have committed attacks against civilians, we expect the uniform official response will be to label bad actors as “rogues” and to distance military culture and supervisory structure from violent actions. When one servicemember attacks another, however, the government illogically is allowed to discount the attack as “incident to service” and to proffer that, somehow, civilian investigation into the matter will threaten the core of military discipline. Violence against civilians is shocking. Violence against fellow soldiers, mundane.

If civilian justice is out of reach for military plaintiffs, at the very least, one would think that the characterization of sexual violence as an occupational hazard should afford victims work-related compensation. However, as I discuss below, both psychic and substantive remedies are elusive.

B. Double Jeopardy: The Pervasive Lack of Remedies for Victims of Military Sexual Assault and Trauma

The second component of *Feres* is the assumption that there exist sufficient avenues for recovery for military personnel outside of recovery in tort. However, the challenges faced by the soldier-plaintiffs in *Feres* and its companion cases were not those confronted by men and women in uniform today. Paul Figley, in his recent defense of the *Feres* decision, notes, “At the time the FTCA became law, a wide range of remedies were available to service members, veterans, and their families.”²³⁹ “In an age of

knuckleheads?lite. The President noted: “The Secret Service, these guys are incredible. . . . A couple of knuckleheads shouldn’t detract from that they do. What they were thinking, I don’t know. That’s why they’re not there anymore.” *Id.*

²³⁷ *Id.*

²³⁸ Baldor, *supra* note 233 (quoting the report on the military investigation the Associated Press).

²³⁹ Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 404 (2010) (detailing the extensive benefits available to servicemembers at the time *Feres* was decided); *see also* Joan M. Bernott, *Fairness and Feres: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51, 62–63 (1987) (observing that critics of *Feres* misconstrue the doctrine’s “draconian harshness”; debunking the myth that “servicemembers have less access to relief . . . than nonservicemembers similarly situated” because “the military scheme provides benefits for substantially *all* . . . injuries sustained . . . during a servicemember’s federal service”; and noting that the process for recovery via military channels is much easier than in a civilian context). While Figley

modest tort judgments, the loss of a tort claim was balanced by the assurance of free medical care and veteran's benefits for an injured soldier.²⁴⁰ Today, however, compensation for servicemembers is often dramatically lower than that available in similar civilian contexts.²⁴¹ As I discuss below, for contemporary victims of sexual assault and post-traumatic stress disorder, remedies are particularly elusive.

A 2006 study by the Department of Veterans' Affairs (VA) estimated that one in three military women were sexually assaulted during service.²⁴² Although the percentage of males experiencing actual assault may be lower, because men comprise 85% of servicemembers, it is likely that more military men than women are victims of sexual assault.²⁴³ Although service personnel who served in Iraq are entitled to five years of veteran's benefits after honorable discharge, obtaining such benefits is an exercise in bureaucracy requiring filling out of more than 20

critiques legal scholars who have criticized the *Feres* doctrine, he does not discuss the process by which benefits are in fact made available to servicemembers today, a process far more onerous than that for returning veterans in the 1940s and 1950s. Further, Figley conflates scholars' criticisms of the expansion of the *Feres* doctrine with criticism of the *Feres* case, which even some ardent advocates for judicial review of intra-military claims concede was rightly decided. See, e.g., MAZUR, *supra* note 33, at 54 ("[T]he *Feres* doctrine has a reasonable justification in most circumstances.").

²⁴⁰ Day v. Mass. Air Nat'l Guard, 167 F.3d 678, 682 (1st Cir. 1999) (citing *Feres* v. United States, 340 U.S. 135, 144–45 (1950)).

²⁴¹ The benefits received by veterans who experience botched operations may amount to millions of dollars less than those received by civilian counterparts. See Turley, *supra* note 20, at 13 ("*Feres* creates a massive gap between the legal worth of injuries incurred by service members and non-service members."). Compare Chris Vaughn, *Airman Who Lost Both Legs in Botched Surgery Fights for Compensation*, FORT WORTH STAR-TELEGRAM (Aug. 28, 2011), <http://www.star-telegram.com/2011/08/27/3318619/airman-who-lost-both-legs-in-botched.html> (describing the lawsuit of Retired Airman Colton Read, who lost his legs after a botched gallbladder surgery, who sought \$54 million and received nothing due to the *Feres* bar), with Travis J. Tritten, *U.S. Government Pays \$7.5 Million to Medical Malpractice Victim*, STARS & STRIPES (Aug. 4, 2011), <http://www.stripes.com/news/air-force/u-s-government-pays-7-5-million-to-medical-malpractice-victim-1.151155> (discussing the Air Force's payment of \$7.5 million to a civilian when medical staff at an Andersen Air Force Base clinic failed to diagnose a spinal disc problem).

²⁴² Himmelfarb et al., *supra* note 69, at 841. Forty-one percent of nearly 200 participants in the VA study reported as having been the victim of Military Sexual Trauma. *Id.*

²⁴³ See Margret E. Bell & Annemarie Reardon, *Working With Survivors of Sexual Harassment and Sexual Assault in the Military*, in ADVANCES IN SOCIAL WORK PRACTICE WITH THE MILITARY 72, 74 (Joan Beder ed., 2012) (estimating that 27% of men were severely and repeatedly sexually harassed during military service); Patrizia Riccardi, *Male Rape: The Silent Victim and the Gender of the Listener*, 12 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY (2010) (letter to the editor) (noting a lack of studies regarding the prevalence of male rape in the military and describing the deep shame inherent in reporting the crime); Jesse Ellison, *The Military's Secret Shame*, NEWSWEEK, Apr. 11, 2011, at 42, available at <http://www.thedailybeast.com/newsweek/2011/04/03/the-military-s-secret-shame.html> (citing a VA study that, in 2010, nearly 50,000 male veterans in the VA system screened positive for experiences of sexual assault).

documents in different systems.²⁴⁴ If a servicemember is physically injured in an assault, she will face several obstacles to recovery that she would not face if, for example, she were injured during a training exercise. If a sexual assault is not prosecuted, or if the victim is discharged less than honorably, it will be even more challenging for her to prove that an injury was “service-related” in order to qualify for benefits.²⁴⁵

If the harms suffered go beyond the physical, the scheme of recovery is even more challenging. Levels of PTSD among victims of sexual assault are higher than among men who have served in combat.²⁴⁶ Sexual predation and violence are so pervasive that a special term, “Military Sexual Trauma” (MST) has been coined to classify those seeking assistance after suffering such attacks.²⁴⁷ Under the current scheme, obtaining compensation for PTSD as a result of experiencing sexual violence is more onerous than obtaining compensation for PTSD experienced as a result of combat.²⁴⁸ While combat exposure is accepted from veterans’ testimony, victims of MST seeking compensation must present corroboration that their mental difficulties are causally connected to the violence experienced.²⁴⁹ Not only is this a time-consuming and fact-intensive inquiry, the standard enables the government to point to numerous other factors, such as pre-military sexual abuse, to bar claims that PTSD is service-related.²⁵⁰ Further,

²⁴⁴ BENEDICT, *supra* note 64, at 202–03; *see also* Melvani, *supra* note 172, at 419–20 (“[W]hile the list of [veterans’] benefits appears good on paper, this does not always translate so readily into practical application.”).

²⁴⁵ Kori Cioca’s story is illustrative. Having been drummed out of the Coast Guard after reporting her assault, she discovered that the incident left her with permanent nerve damage to her face. Because she was dishonorably discharged two months shy of fulfilling her two year service obligation, her injuries do not meet the VA definition of “service-related” injuries; however, the government defended against her suit for constitutional harms resulting from the assault on the grounds the event was “incident to service.” For an introduction to Cioca’s story, see *THE INVISIBLE WAR*, *supra* note 81.

²⁴⁶ *See* Victoria A. Osborne et al., *Psychosocial Effects of Trauma on Military Women Serving in the National Guard and Reserves*, 13 *ADVANCES IN SOC. WORK* 166, 169 (2012).

²⁴⁷ The definition of MST includes “psychological trauma, which in the judgment of a mental health professional employed by the Department, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty or active duty for training.” 38 U.S.C. § 1720(D)(a)(1) (2006).

²⁴⁸ *See* Ben Kappelman, Note, *When Rape Isn’t Like Combat: The Disparity Between Benefits for Post-Traumatic Stress Disorder for Combat Veterans and Benefits for Victims of Military Sexual Assault*, 44 *SUFFOLK U. L. REV.* 545, 546 (2011) (noting that the evidentiary burden on veterans seeking compensation for victims of PTSD related to sexual assault “generally requires corroboration from outside sources”).

²⁴⁹ *Id.*

²⁵⁰ *See* Rick Maze, *Ex-officer: Sex Assault Victims Struggle for VA Benefits*, *USA TODAY* (July 19, 2012), <http://www.usatoday.com/news/military/story/2012-07-19/military-victims-claims/56330892/1?csp=34news> (“[O]ne in three claims for post-traumatic stress related to military sexual trauma are approved by the Veterans Affairs Department, compared with half of all other PTSD claims.”).

although women can obtain help at any VA office, only 22 offer clinics employing personnel specifically trained to deal with women's experiences of violence, a lack of services Helen Benedict categorizes as "disastrous."²⁵¹ Those who do obtain services report a lower standard of care and higher rate of dissatisfaction than women obtaining similar services in a civilian context.²⁵² When women do obtain compensation for PTSD, they receive on average lower payments than men.²⁵³

The trauma suffered by victims of sexual violence is compounded by the fact that they are citizen-soldiers who may be serving longer and more intensive tours than they expected when signing up for the military. With the advent of the all-volunteer force, servicemembers increasingly are drawn from economically depressed areas, with nearly half of recruits characterized as "lower-middle-class to poor."²⁵⁴ More than 20% of those who served in Iraq have been diagnosed with PTSD.²⁵⁵ Numerous analysts suggest that the extent of psychological issues suffered by these troops reflect a confluence of the number of reservists serving and the brief period between multiple deployments of such troops.²⁵⁶ Rates of divorce,²⁵⁷ domestic violence,²⁵⁸ and suicide²⁵⁹ all are matters of pressing concern to military brass.

In addition to facing administrative hurdles to recovery, victims of MST frequently observe that they are twice violated, once by the actual assault and again by the response of peers and supervisors to their coming forward. By military officials' own admission, sexual violence in the military is severely underreported and under-prosecuted.²⁶⁰ A

²⁵¹ BENEDICT, *supra* note 64, at 203.

²⁵² Irina Sadovich Gillett et al., *Female Veterans and Military Sexual Trauma*, 3 J. OF DIVERSE SOC. WORK 47, 48 (2012); *see also* Osborne et al., *supra* note 246, at 169, 175 (observing that women in the military have a more difficult time reporting incidents of sexual assault; obtaining medical attention; and gaining access to legal resources than do civilians; and noting that female veterans reported a lack of "gender specific sensitivity and competence" within the VA healthcare system).

²⁵³ Gillett et al., *supra* note 252, at 48.

²⁵⁴ In 2004, almost two-thirds of recruits to the Army were drawn from counties where the household income was below the median income in the United States. Ann Scott Tyson, *Youths in Rural U.S. are Drawn to Military: Recruits' Job Worries Outweigh War Fears*, WASH. POST, Nov. 4, 2005, at A1.

²⁵⁵ Michael R. Duke et al., *PTSD Treatment-Seeking Among Rural Latino Combat Veterans: A Review of the Literature*, 26 J. OF RURAL SOC. SCI. 157, 158 (2011).

²⁵⁶ *See id.* at 157-80.

²⁵⁷ Miller, *supra* note 30.

²⁵⁸ "Military domestic violence rates are two to five times higher than in civil society." Hillman, *supra* note 31, at 112.

²⁵⁹ Greden et al., *supra* note 27, at 94; Miller, *supra* note 32; Zucchini, *supra* note 32.

²⁶⁰ One hundred fourteen offenders were convicted of unspecified other charges. Fifty-two were discharged instead of trial. Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfalls*, McCLATCHY WASHINGTON BUREAU (Nov. 28, 2011), <http://www.mcclatchydc.com/2011/11/28/131523/militarys-newly-aggressive-rape.html>.

miniscule number of assailants are convicted of crimes of sexual violence, and more than a third of those convicted of sexual assaults are allowed to continue to serve after conviction.²⁶¹ As chronicled in the *Cioca* and *Klay* complaints, victims of intra-military sexual assault not infrequently are discharged themselves or leave the service willingly after suffering retaliation for reporting attacks.²⁶² Even if victims do come forward and officials are successful in prosecuting offenders, the cost of receiving benefits can be having to continue to serve side-by-side with their attackers.²⁶³ The fact that perpetrators not infrequently outrank victims means that they assert “considerable control over the victims in the work environment.”²⁶⁴ As Amy Sepinwall has observed, “a commander’s failure to punish an atrocity of his troops . . . comes to constitute part of the [victim’s] injury.”²⁶⁵ By failing to punish—or to adequately punish—perpetrators of sexual assault, a commander “underwrites the dignitary harm” caused by the assault and “[i]ndeed, because of his position of superior authority, . . . lends even more credence to the estimation of the worth of the victim[] expressed by the soldiers’ act.”²⁶⁶

That the military is known for “closing rank” and “protecting its own” is evidenced by the extent of SAPRO training efforts directed toward encouraging troops to speak out about assault and to support others who come forward.²⁶⁷ In the 2010 survey conducted by the military regarding sexual assault, 71% of women and 85% of men who admitted experiencing some type of unwanted sexual conduct stated that they did not report the incident. The most frequent reasons of active-duty women for not reporting included:

not wanting anyone to know (67 percent), feeling uncomfortable making a report (65 percent), thinking their report would not be kept confidential (60 percent), being afraid of retaliation or reprisals from the perpetrator or his or her friends (54 percent), fear of being labeled a troublemaker (52

²⁶¹ Press Release, Serv. Women’s Action Network, Pentagon Report Shows Slight Increase in Reported Sexual Assaults in 2011; 36% of Convicted Sex Offenders Still Allowed to Serve (Apr. 16, 2012), available at <http://servicewomen.org/wp-content/uploads/2012/04/SAPRO2011responsepresser.pdf>.

²⁶² See *Klay Complaint*, *supra* note 6, ¶ 2; *Cioca Amended Complaint*, *supra* note 7, ¶ 3.

²⁶³ See Osborne et al., *supra* note 246, at 169 (observing that victims’ being required to report to duty alongside perpetrators each day is a situation not unusual in the military but uncommon among the civilian population).

²⁶⁴ *Id.* at 169–70 (noting that this situation affects the reporting structure, encourages harassment and retaliation, and encourages a lack of dissemination of information about how to report crimes).

²⁶⁵ Sepinwall, *supra* note 220, at 255.

²⁶⁶ *Id.* at 294.

²⁶⁷ See, e.g., DEP’T OF DEF., Sexual Assault Prevention and Response, *Department of Defense Social Marketing Campaign Facilitator’s Guide* (2009), http://www.sapr.mil/media/pdf/saam/facilitators_guide-lets_call_the_sarc.pdf (Poster theme: “Let’s Report It!”).

percent), hearing about the negative experiences of other victims (47 percent), and thinking that nothing would be done about their report (47 percent).²⁶⁸

These responses point to a system that is profoundly flawed. As Hillman notes, “The material difficulty of prosecuting in remote theaters of military operations, the reluctance of servicemembers to place vindication of a rape victim above their sense of loyalty to a valued comrade-in-arms, and commanding officers’ tendency to underestimate the significance of a sex crime often stall the investigative process.”²⁶⁹

A recent study indicates that the suicide rates for female soldiers triple when they go to war.²⁷⁰ Related press reports imply that this may be due to women suffering greater anxieties in male-dominated war zones, ignoring the potential effects of assault and harassment on many women’s military experiences.²⁷¹ While some dismiss MST as symptomatic of women’s inherent sensitivity, this ignores that, along with the act of rape frequently come threats of death or, at least, bodily injury.²⁷² Victims not only have to cope with a violation, but also with a very real fear they will be killed. They also are placed in “double jeopardy” by the distinct but very real harm of not being believed. Although potential connections between experiences of sexual assault and harassment in the military and rising rates of suicide have not been deeply explored, a recent study of victims found a statistically significant connection between servicemembers’ experience of both physical and sexual assault and suicide risk.²⁷³

Fueled by the dearth of adequate compensation for many military victims, vociferous advocates for abolition of the *Feres* doctrine have emerged in the context of Title VII,²⁷⁴ informed consent,²⁷⁵ and medical

²⁶⁸ SEXUAL ASSAULT REPORT 2010, *supra* note 80, at 19.

²⁶⁹ Hillman, *supra* note 31, at 111.

²⁷⁰ See Gregg Zoroya, *Female Soldiers’ Suicide Rate Triples When at War*, USA TODAY (Mar. 18, 2011), http://www.usatoday.com/news/military/2011-03-18-1Asuicides18_ST_N.htm.

²⁷¹ *Id.* But see Jeffrey S. Dietz, *Breaking the Ground Barrier: Equal Protection Analysis of the U.S. Military’s Direct Ground Combat Exclusion of Women*, 207 MIL. L. REV. 86, 104 (2011) (citing Catherine Pearson, *Women Handle Combat Stress As Well As Men, Study Shows*, HUFFINGTON POST, June 8, 2011, http://www.huffingtonpost.com/2011/06/08/women-combat-stress_n_873381.html).

²⁷² See BENEDICT, *supra* note 64, at 6.

²⁷³ See Craig J. Bryan et al., *The Associations of Physical and Sexual Assault with Suicide Risk in Nonclinical Military and Undergraduate Samples*, 43 SUICIDE & LIFE-THREATENING BEHAV. 223, 232–33 (Apr. 2013).

²⁷⁴ In the Title VII context, “a consensus has emerged among federal appellate courts that the law does not apply to uniformed members of the armed services.” Natelson, *supra* note 49, at 279. For a summary of cases addressing the issue, see *id.* The arguments in favor of justiciability of intra-military claims in the sexual harassment context are similar to those in the case of sexual assault.

²⁷⁵ A particularly profound attack on the *Feres* doctrine currently is being waged in a class action brought by numerous veterans who allege that the government exposed nearly 8,000 recruits at Edgewood Arsenal to chemical and biological agents

malpractice claims.²⁷⁶ Supporters of providing military plaintiffs access to the courts in the latter context note that *Feres* is particularly pernicious in those cases, as “[o]utside the battlefield scenario, medical malpractice suits by members of the armed services ‘do not call into question military commands, orders, or policies.’”²⁷⁷ The justice-based rationales for revisiting the *Feres* doctrine in these other contexts apply as or more strongly to claims for sexual assault and harassment. It is difficult to imagine a scenario more personal and further removed from the values essential to efficient battlefield operations than a sexual assault or rape. Further, the sexual assault of each individual servicemember not only harms an individual body but injures the national body as well. When the Court discussed the idea of remedies in 1950, it was unlikely Justice Jackson imagined a civilian tort system with the extent of punitive damages available today. It is also unlikely he would imagine a military in which 52 servicemembers per day suffered sexual assaults.

Although the fiscal rationale for the *Feres* doctrine is not the most cited by the courts, the existence of veterans’ benefits is a popular justification among legal commentators for the retention of *Feres*.²⁷⁸ Kelly Dill, for example, notes:

without their consent. Complaint at ¶¶ 2, 4, *Vietnam Veterans of America v. Cent. Intelligence Agency* (N.D. Cal.) (No. 09-0037) (Jan. 7, 2009).

²⁷⁶ The recent suit by the family of Staff Sergeant Dean Witt is illustrative. Witt was admitted to an Air Force hospital for a routine appendectomy and was left in a vegetative state after doctors made repeated mistakes during the operation. After the dismissal of Witt’s spouse’s claim, she petitioned the Supreme Court for certiorari, urging the Court to revisit *Feres*. Witt *ex rel.* Estate of Witt v. United States, 379 F. App’x 559 (9th Cir. 2010), *petition for cert. filed*, 2011 WL 6355 (Jan. 7, 2011) (No. 10-885). Certiorari was denied without comment. Witt *ex rel.* Estate of Witt v. United States, 131 S. Ct. 3058, 3058 (2011); *see also* Leo Shane III, *Supreme Court Deals Devastating Blow to Feres Doctrine Opponents*, STARS & STRIPES (June 27, 2011), <http://www.stripes.com/news/supreme-court-deals-devastating-blow-to-feres-doctrine-opponents-1.147604>. In 2009, the Carmelo Rodriguez Military Medical Accountability Act of 2009 was introduced to the House of Representatives. The bill, which would have allowed service members injured or killed as a result of military medical malpractice in non-combat situations to bring suit under the FTCA, was not enacted into law. *See* H.R. 1478, 111th Cong. (2009); *see also* Kels, *supra* note 42, at 185.

²⁷⁷ Charles G. Kels, *Military Medical Malpractice and “The Right to Sue,”* 30 CLINICS IN DERMATOLOGY 181, 184 (2012) (quoting Kenneth R. Wiltberger, Note, *The Carmelo Rodriguez Military Medical Accountability Act of 2009: An Opportunity to Overturn the Feres Doctrine as it Applies to Military Medical Malpractice*, 8 AVE MARIA L. REV. 473, 495 (2010)). As Jonathan Turley points out, civilian tort cases may lead to improvements in the standard of care. Because of the lack of accountability, “[w]e see cases in the military involving conduct that would be viewed as perfectly medieval in the civilian world.” Bill Sizemore, *Service Members Have Little Recourse Against Malpractice*, THE VIRGINIAN-PILOT (May 17, 2009), <http://hamptonroads.com/2009/05/service-members-have-little-recourse-against-malpractice> (quoting Jonathan Turley).

²⁷⁸ Dill, *supra* note 154, at 71 (observing that, while limitations on servicemembers’ recovery of monetary damages was at the heart of the FTCA, today, “[t]his fiscal function rationale for the *Feres* doctrine has been cast aside and courts . . . rely on the military discipline rationale”); *see also* Figley, *supra* note 239, at 470–71.

If courts focus[ed] more on the financial reasons for the doctrine it would become evident that both the interests of service members as well as taxpayers are adequately being served by the *Feres* doctrine in place. The *Feres* bar provides a significant fiscal function by capping the amount of recovery for service members similar to private organizations' efforts to limit liability through workers' compensation schemes.²⁷⁹

Figley agrees that the idea that it is not fair to deny servicemembers the same opportunities for recovery as civilians

glosses over the workers' compensation-like trade of accepting assured, administrative, no-fault compensation in exchange for forgoing the opportunity to bring suit in tort and recover more damages. The real consequence of *Feres* is that, for purposes of suing their employer in tort, the government's military employees are treated in roughly the same fashion as employees of other employers. This is hardly unfair.²⁸⁰

In reality, however, the actual VA benefits scheme is not the one that is promised on paper. For victims of military sexual assault and trauma, the result is often retribution rather than recompense.²⁸¹ As Ann Scales noted, in the fiscal rationale for *Feres*, we see "juggernauts converge. At the same time that executive power over all matters military has been cementing, 'tort reform' has reached a frenzied level. Who can doubt that it would be more 'efficient' for industry if the universal rule were that a plaintiff can never prevail?"²⁸² Efficiency, however, should not eclipse justice for deserving plaintiffs.²⁸³

²⁷⁹ Dill, *supra* note 154, at 72. "[S]ervice members waive many of their rights and are treated differently in several aspects because they receive special benefits that eliminate the need for additional compensation under the FTCA." *Id.* at 86.

²⁸⁰ Figley, *supra* note 239, at 470–71 (footnotes omitted).

²⁸¹ As a practical matter, the *Feres* doctrine has been interpreted as an all or nothing proposition; since benefits are available for military personnel, they should not receive a windfall. However, this need not be the case. Congress could simply act as the *Brooks* Court recommended in 1949 and reduce recovery for military personnel under the FTCA by amount of benefits already received. *See Brooks v. United States*, 337 U.S. 49, 53–54 (1949). Where insufficient benefits are awarded under the VA compensation scheme, as is true in the vast majority of sexual assault cases, fiscal considerations would indicate that the suits should proceed. As Dill notes, if courts shift focus from "paper" benefits to "military entitlements the service member [actually] will receive, courts may conclude that . . . the service member will be compensated in some form." Dill, *supra* note 154, at 84. In addition, the "windfall" argument against justiciability does not provide adequate rationale for barring suits for equitable relief.

²⁸² Scales, *supra* note 171, at 384–85.

²⁸³ David Fuller, who has scrutinized the history of the FTCA, provides an insightful discussion of the adoption of the intentional tort exception to the FTCA. He argues that Congress's decision to permit suits against the government for negligence but not intentional torts, which represent "more egregious conduct," stems from the fact that intentional torts "would be difficult to make a defense against, and [potentially] are easily exaggerated." Fuller, *supra* note 21, at 383–84

Even if the incident to service and remedial aspects of *Feres* are deemed inapplicable to these constitutional claims, there remains the overarching and significant ideal of judicial deference. In the final section, I discuss why the adherence to a principle of judicial deference is misguided in these cases, and I highlight the ways in which recent jurisprudence in the DADT repeal cases may provide a roadmap to overcoming judicial inaction in regard to military affairs.

C. Defense Isn't So Different: The "Don't Ask" Cases as a Path to Revisiting the Feres Doctrine

The most pervasive, and most amorphous, justification for courts' declining to hear claims of intra-military sexual assault is the idea that the judiciary is not competent to dictate military affairs. The policy of judicial deference to the military in part is textual. The most oft-repeated justification, however, is ideological. Courts are not in a position, the argument goes, "to manage the infinite number of individualized decisions necessary to govern and regulate military personnel."²⁸⁴ "To permit [suits by military personnel against other military personnel] would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions"²⁸⁵ Allowing even one person to challenge a dubious, or even overtly discriminatory, order from a supervisor is to cast in question the entire regime of military discipline. This has been the rationale behind cases barring suits for racial discrimination and upholding DADT. It is also the driving force behind courts' sidestepping adjudication of suits based on harms stemming from intra-military sexual assault.

As discussed above, while *Feres* addressed the ability of military personnel to bring negligence claims, the bar is not as solid when it comes to judicial intervention in matters of constitutional concern.²⁸⁶ In *Orloff*, where the Court considered the doctor's Fifth Amendment claim to his post, the Court made no reference to *Feres*. Although the case was decided just three years after *Feres* and the majority opinion written by the same Justice, Justice Jackson characterized Orloff's constitutional

(quoting *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Comm. on the Judiciary*, 76th Cong. 13 (3d Sess. 1940) (statement of Alexander Holtzoff, special assistant to the Att'y. Gen. of the United States)). Fuller observes, however, that in crafting the intentional tort exception, Congress did not intend to foreclose liability for such claims on a permanent basis but took a "wait and see" or "step by step" approach to the scope of liability under the FTCA. *Id.* at 384.

²⁸⁴ Mazur, *supra* note 41, at 715.

²⁸⁵ *United States v. Shearer*, 473 U.S. 52, 58 (1985).

²⁸⁶ The Court has reviewed the actions of the military in recent cases seeking equitable relief, although such cases involved the impact of military decisionmaking on civilian affairs and not intra-military claims. *See* *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 51–52 (2006).

claim as “novel.”²⁸⁷ In *United States v. Stanley*, the last case to explicitly address the *Feres* doctrine, the Court concluded not that the judiciary abstain from hearing intra-military claims, but that the Court weigh the harm of intervention against the harm of abstention.²⁸⁸ And although the Court applied a “sub-rational basis” test in *Stanley*, in subsequent cases adhering to constitutional separatism, including *Rostker* and *Goldman*, it did decide the plaintiff’s constitutional claims on the merits.²⁸⁹

The Court’s 30-year silence with regard to issues of intra-military affairs has led to the development of a mythological idea that the military is wholly and properly removed from civilian oversight. Charles Kels characterizes the practice of abstention as

a judicial shortcut. It has served as a convenient way to establish a clear-cut prohibition on service members’ suits, rather than engaging in the painstaking, case-by-case analysis required to apply the literal FTCA provisions This rote application of a bright-line rule has produced a streamlined, largely consistent process for denying service members’ claims, arguably to the detriment of justice and fairness.²⁹⁰

Recently, however, there are indications that military sovereignty is not limitless.²⁹¹ In 2010, the Court of Appeals for the Ninth Circuit decided *Witt v. Dep’t of the Air Force*,²⁹² signaling that the time had come for the judiciary to step forward and end an unjust and untenable policy that was threatening military preparedness. *Witt* paved the way for Judge Virginia Phillips to declare DADT unconstitutional and to enjoin the military from enforcing the discriminatory policy.²⁹³ I argue below that these decisions were not the result of substantive changes in law, but

²⁸⁷ *Orloff v. Willoughby*, 345 U.S. 83, 84 (1953).

²⁸⁸ 483 U.S. 669, 682–83 (1987).

²⁸⁹ *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986); *id.* at 515 (Brennan, J., dissenting); *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

²⁹⁰ Kels, *supra* note 42, at 186.

²⁹¹ Many scholars spotted a potential judicial shift toward a more “activist” approach in cases reviewing the actions of the Bush administration in the context of terrorism. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 728 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 636–37 (2006) (Kennedy, J., concurring in part); *see also* Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 46 (2006); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers after Hamdan*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 933, 934 (2007). However, if in 2006–2008 the Court was making a statement regarding the proper limits of executive power, that statement is placed in question by the Court recently declining to hear cases that could ensure the spirit of the Guantanamo cases is affected. *See* *Latif v. Obama*, 666 F.3d 746, 747–48 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012); *see also* David Cole, *Gitmo: 10 Years & Counting*, THE NATION, (Jan. 23, 2012) (The D.C. Circuit has “come close to echoing the South’s resistance to the 1954 *Brown v. Board of Education* ruling [and] . . . rendered [judicial review] virtually meaningless.”).

²⁹² *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

²⁹³ *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010).

signaled a sea change in the judiciary's perception of its duty *vis-a-vis* military plaintiffs. The injustices in those cases cried out for the courts to act. Today, gays and lesbians are out in the armed forces in no small part thanks to the courts' intervention. Recent jurisprudence in connection with DADT reveals much about the current military-civilian landscape and may provide a model for the judiciary to reevaluate its inaction in regard to intra-military sexual assault.

1. *The DADT Cases as Judicial and Moral Roadmap*

Since the policy was enacted in 1993, DADT was subjected to numerous legal challenges on the grounds that the policy violated the First and Fourteenth Amendments.²⁹⁴ Even before DADT, Plaintiffs made constitutional challenges to military policies regarding homosexuality.²⁹⁵ In the vast majority of cases to address these issues, courts upheld the policy.²⁹⁶ Despite the high level of scrutiny generally applied to First Amendment claims, courts applied a lower level of scrutiny when considering DADT for the same reasons as they did when considering other constitutional claims by servicemembers against the service: "The military always has been accorded broad deference in how it chooses to run the armed forces."²⁹⁷ Legal scholars noted in the early stages of litigation in the 1990s that "courts only may intervene [in military affairs] if they discern defective political process. Where Congress or its delegate in the executive branch has evaluated the problem only in the most extraordinary case may the decision be disturbed."²⁹⁸

The Second Circuit found that the practice of judicial deference was particularly apt in the context of a statute governing expression of sexuality, as the "essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'"²⁹⁹ The

²⁹⁴ The most common allegations were that the policy chilled protected speech by discouraging proclamations of homosexuality among the military personnel. *See, e.g.,* *Cook v. Gates*, 528 F.3d 42, 47 (1st Cir. 2008); *Witt*, 527 F.3d at 809, 827.

²⁹⁵ *See Ben-Shalom v. Marsh*, 881 F.2d 454, 457 (7th Cir. 1989), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004, 1004 (1990) (Ben Shalom II).

²⁹⁶ *See, e.g.,* *Cook*, 528 F.3d at 65; *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1425–26, 1432 (9th Cir. 1997); *Ben-Shalom*, 881 F.2d at 466; *Beller v. Middendorf*, 632 F.2d 788, 805–12 (9th Cir. 1980); *see also* Shannon Gilreath, *Sexually Speaking: "Don't Ask, Don't Tell" and the First Amendment After Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL'Y 953, 954 (2007) ("[P]rior to *Witt*, the courts rejected the idea that First Amendment heightened scrutiny should apply to 'Don't Ask, Don't Tell.'"). For a legal analysis of the various constitutional challenges that have been brought against DADT, *see* JODY FEDER, CONG. RESEARCH SERV., R40795, "DON'T ASK, DON'T TELL": A LEGAL ANALYSIS (2010).

²⁹⁷ Joseph E. Broadus & William B. Rubenstein, *Don't Ask, Don't Tell: Is the Military's New Policy for Admitting Gays and Lesbians Constitutional?*, 79 A.B.A. J. 54, 54 (Oct. 1993).

²⁹⁸ *Id.*

²⁹⁹ *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)); *see also Ben-Shalom*, 881 F.2d at 461 ("The

Seventh Circuit in *Ben Shalom* explained the effect of judicial deference on servicemembers' First Amendment claims:

[T]he branches of the military have great leeway in determining what policies will foster the military mission, and courts will rarely second-guess those decisions. This deference means . . . that policies that might not pass constitutional muster if imposed upon a civilian population will be upheld in the military setting. . . . “Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. . . . [since] to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.”³⁰⁰

Michael McConnell observed of these early cases, “[E]ven when fundamental [First Amendment] freedoms are involved, the military enjoys wide discretion to limit conduct that it deems injurious to morale or otherwise inconsistent with the military mission.”³⁰¹

In 2004, the Court decided *Lawrence v. Texas*, recognizing a Fourteenth Amendment right to sexual autonomy.³⁰² The military court acknowledged the *Lawrence* decision as having some precedential value in the armed forces in *United States v. Marcum*.³⁰³ In *Cook v. Gates*, the Court of Appeals for the Second Circuit considered whether *Lawrence* impacted the practice of judicial deference to military decisionmaking and decided it did not, since with DADT:

[A]s in *Rostker*, there is a detailed legislative record concerning Congress' reasons for passing the Act. This record makes plain that Congress concluded, after considered deliberation, that the Act was necessary to preserve the military's effectiveness as a fighting force, and thus, to ensure national security. This is an exceedingly weighty interest and one that unquestionably surpasses the government interest that was at stake in *Lawrence*.³⁰⁴

With *Witt*, however, the tide turned. The Ninth Circuit considered the same issue as the Second Circuit and came to a different conclusion. The court recognized in that decision that “judicial deference to . . . congressional exercise of authority is at its apogee when legislative action

essence of military service ‘is the subordination of the desires and interests of the individual to the needs of the service.’” (quoting *Goldman*, 475 U.S. at 507)).

³⁰⁰ *Ben-Shalom*, 881 F.2d at 461 (quoting *Goldman*, 475 U.S. at 507).

³⁰¹ Michael W. McConnell, *What Would It Mean to Have a “First Amendment” for Sexual Orientation?*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 234, 241 (Saul M. Olyan & Martha C. Nussbaum eds., 1998).

³⁰² 539 U.S. 558, 578 (2003).

³⁰³ 60 M.J. 198, 206–07 (C.A.A.F. 2004). Notably, there are “factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest[.]” *Id.* at 207. For example, in *Marcum*, the defendant's conviction was upheld because the relationship in question was between a superior and subordinate officer, and thus was inherently coercive. See Gilreath, *supra* note 296, at 966–67.

³⁰⁴ *Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008) (citation omitted).

under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”³⁰⁵ However, the court interpreted *Rostker* to stand for the proposition that “deference does not mean abdication.”³⁰⁶ “Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs.”³⁰⁷ Subsequent to *Witt*, an as applied challenge, in *Log Cabin Republicans v. United States*, the United States District Court for the Central District of California held that DADT was unconstitutional on its face, violating both the First and Fifth Amendments.³⁰⁸ Against the advice of governmental officials, Judge Phillips ordered the government to suspend and discontinue all pending discharge proceedings and investigations under DADT, pushing Congress and the executive to speed up reconsideration of the discriminatory policy.³⁰⁹ In issuing the injunction, Judge Phillips looked behind the legislative rhetoric regarding DADT and found that copious empirical research demonstrated no connection between the DADT policy and the “task cohesion” essential to military readiness.³¹⁰ In fact, she determined that, rather than promoting military readiness, factors such as the negative effect of DADT on military recruiting, actually served “not to advance the Government’s interests of military readiness and unit cohesion, much less to do so significantly, but to harm that interest.”³¹¹

The Ninth Circuit’s decisions in these cases rang the death knell for the DADT policy, forcing politicians who wished to continue supporting the policy to realize there was going to “be an increasingly high price to pay politically for enforcing a law which 70 percent of the American people oppose[d] and a core Democratic constituency abhor[red].”³¹² As Audrey Hagedorn notes, “*Witt* and *Log Cabin Republicans* generated the congressional, presidential, military, and public discourse that ultimately lead to the legislative repeal of DADT in late 2010.”³¹³ Michael Kirby refers to judicial decisionmaking on gay, lesbian, bisexual and transgender (GLBT) rights as “a move of a piece on the chessboard that

³⁰⁵ *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

³⁰⁶ *See id.* at 821 (quoting *Rostker*, 453 U.S. at 70).

³⁰⁷ *Id.* (quoting *Weiss v. United States*, 510 U.S. 163, 176 (1994)).

³⁰⁸ 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010).

³⁰⁹ *See* Kevin Dolak, *California Court Won’t Suspend ‘Don’t Ask Don’t Tell’ Case*, ABC NEWS (Jan. 29, 2011), <http://abcnews.go.com/Politics/court-put-dont-case-hold/story?id=12794417#.UBs0oqOWguI>; Julie Watson, “Don’t Ask, Don’t Tell” Enforcement Must Be Halted, *Federal Judge Rules*, HUFFINGTON POST (Oct. 12, 2010), http://www.huffingtonpost.com/2010/10/12/dont-ask-dont-tell-judge_n_759960.html.

³¹⁰ *Log Cabin Republicans*, 716 F. Supp. 2d at 912–13.

³¹¹ *Id.* at 919.

³¹² John Schwartz, *U.S. Judge Halts ‘Don’t Ask’ Law for the Military*, N.Y. TIMES, Oct. 13, 2010, at A17 (quoting Richard Socarides, former advisor to President Bill Clinton).

³¹³ Audrey K. Hagedorn, Note, “Don’t Ask, Don’t Tell,” the Supreme Court, and Lawrence the “Laggard,” 87 IND. L.J. 795, 796–97 (2012).

itself stimulate[s] other judicial, executive, and legislative moves. . . . all part of a series of steps. They weren't pre-ordained, and nobody knew the sequence in which they would happen. But each one affected the next."³¹⁴ The repeal of DADT was accomplished not via legislative change or executive mandate or judicial decisionmaking, but by the action of the three concomitant powers, each in concert with the other.

Despite the *Witt* court's rhetoric about the effects of *Lawrence*, the sea change from the cases of the early 1990s to *Witt* and *Log Cabin Republicans* was not inspired by any significant change in law, but of a shift in judicial interpretation of existing precedent.³¹⁵ As Hagedorn points out, "the issues raised and the questions asked [in *Witt*] . . . were no different from those raised and asked in *Cook v. Gates* in 2009."³¹⁶ The real difference is that, rather than interpreting *Rostker* to foreclose judicial oversight of military affairs, the Ninth Circuit applied the decision to stand for the principle that the judiciary must not abdicate its obligation to resolve constitutional issues. Kenji Yoshino observes:

[A 1973] plurality rejected the argument that it should stay its hand because the nation was then debating the Equal Rights Amendment. It recognized that this debate did not absolve the court of the obligation to say what the law was at the time a particular case came over the transom.

Moreover, even the *Rostker* opinion, rightly viewed as the high-water mark of judicial deference to the military, never stated that military issues were unreviewable by the courts.³¹⁷

In the DADT repeal cases, the courts properly "hesitate[d],"³¹⁸ then decided that, on balance, the injustice resulting from faulty military

³¹⁴ Michael Kirby & Ruthann Robson, *Judicial Review, Judicial Activism, Queer Rights, and Literature: A Conversation Between the Honorable Michael Kirby and Professor Ruthann Robson*, 43 SUFFOLK U. L. REV. 89, 96 (2009).

³¹⁵ The *Witt* court characterized *Lawrence* as subjecting the right to sexual autonomy to "heightened scrutiny." See *Witt v. Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). However, interpretations of numerous other courts and legal commentators indicate that the *Lawrence* decision was by no means as clear as the *Witt* court suggested. See, e.g., Hagedorn, *supra* note 313, at 797; Order Denying Petition for Rehearing, *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1265 (9th Cir. 2008) (O'Scannlain, Smith, and Smith, dissenting) ("*Witt* contravenes Supreme Court precedent, including *Lawrence*, in the area of substantive due process, creates a circuit split, and stretches the judicial power beyond its constitutional mandate.").

³¹⁶ Hagedorn, *supra* note 313, at 797.

³¹⁷ Kenji Yoshino, *The Military in the Constitution*, N.Y. TIMES (June 28, 2011), <http://www.nytimes.com/roomfordebate/2010/10/13/the-future-of-dont-ask-dont-tell/the-military-in-the-constitution>; see also Goodell, *supra* note 155, at 28 (observing that the military deference doctrine is not an "absolute bar" to judicial resolution of constitutional claims). But see Gustavo Oliveira, Note, *Cook v. Gates and Witt v. Department of the Air Force: Judicial Deference and the Future of Don't Ask Don't Tell*, 64 U. MIAMI L. REV. 397, 407-10 (2009) ("[T]here is no reason to believe that the current Supreme Court is ready to change course on the issue of judicial deference in the military context.").

³¹⁸ *Witt*, 527 F.3d at 818; see *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

policy far outweighed the harm of judicial intervention in military decisionmaking. In ruling in Margaret Witt's favor, the Ninth Circuit acknowledged that what Shannon Gilreath calls the "defense is different"³¹⁹ policy is not limitless. When the military was forced to offer evidence that DADT improved military readiness, there was nothing to "buttress the pernicious legal regime . . . targeting gay and lesbian service members."³²⁰

The DADT repeal cases are portentous for *Klay* and *Cioca*, because they signal that judicial intervention is warranted where the jurisdiction of the "pocket republic" has bled too far. As Diane Mazur argues, "[J]udges . . . have more discretion than they typically exercise to think honestly about what judicial deference should mean when applied to military cases. . . . Courts should be deferring, if at all, to hard-earned experience and lessons learned, not bare assertions or opinions."³²¹ There are areas in which the military will have more expertise; however, this is no reason why the courts should be deferring to Congress on matters of constitutional rights.³²² The judicial branch today conflates the rationales behind *Feres*' doctrine of "non-interference" and the doctrine of "military deference" crafted by the court in the constitutional cases of the 1970s; however, in reality, "[t]he current military deference doctrine requires the Court to perform a deferential substantive review when considering constitutional challenges to military procedures."³²³ "As contrasted with the Court's doctrine of noninterference [in negligence claims], the military deference doctrine affords an aggrieved servicemember his day in court."³²⁴ Chief Justice Roberts himself recently acknowledged that the Court's

deference in matters of policy cannot . . . become abdication in matters of law. . . . Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar

³¹⁹ Gilreath, *supra* note 296, at 962–63.

³²⁰ *Id.* at 965; see also Bailey W. Brown, III, *Don't Ask, Do Tell: The Implications of 2008 Circuit Court Decisions for the Standard of Constitutional Review Applicable to the Military Homosexual Conduct Policy*, 201 MIL. L. REV. 184, 219–20 (2009).

³²¹ MAZUR, *supra* note 33, at 191.

³²² See *id.* at 192; see also Eugene R. Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters*, 43 U.C. DAVIS L. REV. 999, 1018 (2010) ("[J]ustices . . . without active military experience may be (or may *feel*, which can amount to the same thing) at a disadvantage when dealing with cases that involve military matters, even though they seem utterly lacking in fear when it comes to tackling equally (or more) arcane or inaccessible areas of the law.").

³²³ John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 165–66, 311 (2000) (expressing optimism that if "the political branches became unconcerned with protecting the legitimate liberty interests of military personnel, the existence of a doctrine that involves a substantive review of the challenged regulations might result in an occasional legal victory for the individual litigant").

³²⁴ *Id.* at 311.

circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.”³²⁵

Importantly, in the DADT cases, review by the judiciary was warranted because, when the judiciary looked behind usual justifications, they found a vital nexus was lacking between “military effectiveness and the conduct proscribed” under the statute, an argument also applicable in cases of intra-military rape.³²⁶ Bailey Brown writes of the DADT repeal cases:

In order to rest on naked deference regarding DADT, the Court would have [had] to explain why separation of servicemembers based upon private sexual conduct [was] a military matter rather than a legal one. This would require a connection between private sexual activity and military effectiveness—a connection which, if manifested in form of sexual assault or harassment, would likely violate a number of uncontroversial criminal statutes addressing sexual misconduct.³²⁷

Like the DADT cases, the *Cioca* and *Klay* complaints chronicle a pernicious regime in which the legislative process is undermined by silencing those directly affected by the policy from participation in the public forum.³²⁸ As discussed above, victims of rape in the military clearly are silenced by a pervasive and oppressive policy that discourages reporting and too often penalizes victims rather than perpetrators.³²⁹ By most characterizations, the willingness of the courts to decide *Witt* and *Log Cabin Republicans* on the merits and the subsequent repeal of the policy in fact *strengthened* the military, with the armed forces’ highest ranking official noting that the new law fostered “a more tolerant joint force, a force of more character and more honor, *more in keeping with [military] values.*”³³⁰ It is difficult to see how the imposition of a more just approach to rape and sexual assault would not have the same effect on unit cohesion and, if there is a strong argument in that regard, the government should be required to make it.³³¹

³²⁵ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (quoting John Marshall, *Marshall’s “A Friend of the Constitution” Essays* (1819), reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 155, 190–91 (Gerald Gunther ed., 1969)).

³²⁶ Brown, *supra* note 320, at 221.

³²⁷ *Id.* at 221.

³²⁸ As I have elsewhere discussed, the DADT policy fostered sexual assaults by enabling servicemembers to hold the threat of discharge over unwilling sexual partners who happened to be gay or lesbian. See Banner, *supra* note 62, at 63. In fact, two of the *Cioca* plaintiffs were discharged under DADT after reporting their assaults. See *Cioca Amended Complaint*, *supra* note 7, ¶¶ 74, 298.

³²⁹ See *supra* Parts IV.A.2, IV.B.

³³⁰ Michaels, *supra* note 37 (emphasis added) (quoting Adm. Michael Mullen, Chairman of the Joint Chiefs of Staff). Military leaders have concluded that repeal has “not affected morale or readiness.” Jelinek, *supra* note 37.

³³¹ A similar argument recently has been made by Hillary Hansen in support of using evidence regarding effects on morale and unit cohesion akin to that in the *Log*

Additionally supporting the argument in favor of judicial review is that these claims implicate such a broad range of constitutional violations, and that the violations have been permitted to continue so long without remedy.³³² While the equal protection aspect *Cioca's* and *Klay's* claims is not a focus of this essay, they also must not be ignored as providing compelling justice-based reasons for the courts to find these claims justiciable. Whether it is men or women who are victims, sexual assault is not a genderless problem.³³³ Historically, sexual assault of military males has been part and parcel of hazing rituals, and sexual harassment and assault of military women strategically has been deployed to impede advancement of women into higher paying positions.³³⁴ Rapes of men and women are founded in a culture that is permissive of violence and intent on preserving the "masculine" rituals of the U.S. armed forces by "feminizing" non-conforming persons.³³⁵ Today, high-ranking officials

Cabin Republicans case to support repeal of the military abortion ban. See Hillary Hansen, Note, *Fundamental Rights for Women: Applying Log Cabin Republicans to the Military Abortion Ban*, 23 HASTINGS WOMEN'S L.J. 127, 154 (2012). During the Congressional hearing after the case of Kerryn O'Neill, discussed *supra* note 84, Admiral Christopher E. Weaver, Naval Commandant, observed that allowing her family to recover would "create inequities in other parts of the system." Feres Hearing, *supra* note 84, at 6 (statement of Christopher E. Weaver). When pressed by Senator Specter as to what these inequities might be, the Admiral could not provide an example of a situation in which there would be any unfairness in allowing a suit for wrongful death occurring in a non-combat situation to proceed. *Id.* ("Sir, I cannot provide an answer to that at this moment. I will provide that to you, if I could.")

³³² In summer 2012, 38 alleged victims came forward regarding sexual assaults by at least 15 superiors occurring at Lackland Air Force Base in San Antonio, Texas. Twenty-one years after the Tailhook scandal, the aviator who first revealed her experiences in the "gauntlet" is once again speaking out, calling for a Congressional hearing on the assaults at Lackland. Jennifer Hlad, *Tailhook Whistle-Blower Wants Congressional Hearing on Lackland*, STARS AND STRIPES (Aug. 1, 2012), <http://www.stripes.com/news/navy/tailhook-whistle-blower-wants-congressional-hearing-on-lackland-1.184595>. "I was absolutely distraught to think that in 20 years, the situation and the work environment for women in the military is less safe and less professional." (quoting Paula Coughlin-Puopolo, a victim of sexual assault in the military). "Time and again, we have seen a pattern over the past 25 years where we have a flare-up in the press and public consciousness . . . then the response is kept out of the public eye . . . There's never a systematic policy solution." *Id.* (quoting Nancy Parrish, president of Protect Our Defenders).

³³³ Belkin discusses the ways in which male-on-male rape in the military enforces a "coercive form[] of military masculinity through a range of actions, including punishment, the enforcement of the pecking order, and the expression of homophobia." Aaron Belkin, *Spam Filter: Gay Rights and the Normalization of Male-Male Rape in the U.S. Military*, 100 RADICAL HIST. REV. 180, 181 (2008).

³³⁴ See, e.g., DONNA M. McALEER, PORCELAIN ON STEEL: WOMEN OF WEST POINT'S LONG GRAY LINE 62-63 (2010) (discussing sexual harassment tactics employed by male West Point cadets as a strategy to rid the academy of female cadets); *Cioca Appeal*, *supra* note 5, at 3 (Kori Cioca's attacker repeatedly told her that she was a "stupid f***** female who didn't belong in the military.")

³³⁵ The battle for gay men to gain access to the front lines was fought for much less time than for women in combat, but gay men gained the right to serve much

are speaking out about the ways in which the military culture itself is inherently connected to rising rates of sexual assault.³³⁶ Retired Colonel Dr. Elspeth Cameron Ritchie, formerly the top advocate for mental health inside of the Office of the Army Surgeon General, for example, describes a “*Lord of the Flies*” atmosphere and “a clear pattern of non-commissioned officers . . . in superior positions preying on naïve Soldiers and female Airmen.”³³⁷

Retired Major Lil Pfluke stated that the unrelenting sexual harassment she encountered in the service affected her ability to advance:

[W]e [women] were regularly called bitch, whore, and worse; . . . we were accused of sexual promiscuity or lesbianism; . . . we were subjected to . . . “pranks” [such] as shaving cream filled condoms in our bed or semen in our underwear drawer. What most people don’t realize is the toll that juvenile and hateful treatments take on a person after a while. The constant barrage of . . . inequities made even the strongest among us harbor self-doubts.³³⁸

sooner than women. I have argued elsewhere that this relatively rapid success of the campaign to grant gay men the dubious right of access to the front lines is due in large part to their ability to conform to the traditional stereotype of the “macho” soldier. Banner, *supra* note 62, at 67.

³³⁵ Despite marginal steps toward gender integration, upwards of 150,000 positions in the military remain closed to women. There are few women at the top of the military field. In 2009, the Army celebrated the ascent of Teresa King, nicknamed “No Slack” as first female commandant of the Army drill sergeant school. It was the highest promotion of a female officer in any branch of the armed forces to date. In late 2011, King was removed from her post. Although reinstated, King has filed an official complaint against the Army, alleging that her direct supervisors engaged in racism and sexism. James Dao, *Once Hailed as Army Pioneer, Now Battling to Stay on the Job*, N.Y. TIMES, May 11, 2012, at A18, A22.

³³⁶ Retired Army Major General Dennis Laich characterizes sexual violence in the military as “a cultural issue.” Leigh Munsil, *Jeanne Shaheen: Expand Military Abortion Rights*, POLITICO, July 18, 2012, http://www.politico.com/news/stories/0712/78683_Page2.html; see also Elspeth Cameron Ritchie, *Yet Another Military Sex Scandal*, TIME MAGAZINE–BATTLELAND (July 3, 2012), <http://nation.time.com/2012/07/03/yet-another-military-sex-scandal/#ixzz21CXV5XzV>; Zucchini, *supra* note 84 (describing Retired Army Colonel Ann Wright’s accusation that the military is withholding evidence of sexual assault in connection with suicides by female servicemembers).

³³⁷ Ritchie, *supra* note 336 (“Recruits . . . had to get permission from the same drill sergeants who were abusing them to get to a chaplain or someone else that they could report the abuse. The equal opportunity officer, that they could have reported the rapes to, was part of the network of abusers.”) (discussing the situation at Edgewood Arsenal, a recruit training site near Aberdeen Proving Grounds).

³³⁸ MCALEER, *supra* note 334, at 62–63. Sociologist Helen Benedict offers similar comments by Sergeant First Class Eli Painted Crow, who, after being victimized by several sexual assaults and attempted assaults herself, was put in charge of a female barracks at Fort Bliss, Texas. Painted Crow relates to Benedict the story of a female recruit who complained to the Sergeant that she had been threatened with anal rape.

Former Marine Corps Lance Corporal Nicole McCoy, who has garnered nearly 100,000 signatures on a petition to require the military to establish a sex offender registry, observes, “It felt like it was just a normal thing, to be raped, if you were a woman in the military.”³³⁹

Andrew Siegel describes the impact that the judicial minimalism of the Rehnquist and Roberts Courts has had on particularly vulnerable parties, categorizing the willingness to “play a limited and secondary role in the maintenance of the American polity” as anti-democratic.³⁴⁰ This is particularly true of the *Feres* doctrine, which insulates the nation’s largest federal employer from the claims of the most vulnerable. In dismissing nearly identical claims of widespread sexual misconduct at Aberdeen Proving Grounds nearly 15 years ago, the Seventh Circuit acknowledged:

[E]mployer tolerance of sexual assault and sexual harassment in the workplace . . . renders the workplace less productive and stifles the initiative and creative capacity of the organization. When the organizations involved are the Armed Forces of the United States, the victim . . . is deprived of the very special satisfaction that military service to the Country should bring. Tolerance of such behavior also results in a warping of military discipline, a lack of military readiness, and a weakening of national security. Democratic support for military institutions is eroded when citizens do not believe that their children, and those of their neighbors, will be treated with dignity and respect during their period of service.³⁴¹

The military is based on trust, integrity, and honor, values directly undermined by these types of claims.³⁴² Denying deserving servicemembers access to the courts threatens the core of our democracy.³⁴³

The combination of persistent advocacy for changes in legislation and publicity brought by the recent lawsuits has ushered in improvements for military plaintiffs. With the passage of provisions such as the Shaheen Amendment as part of the 2013 National Defense Authorization Act (NDAA),³⁴⁴ potentially significant changes are being

The supervisor’s response was that the recruit should “walk with her back against the wall.” BENEDICT, *supra* note 64, at 89.

³³⁹ Drummond, *supra* note 29.

³⁴⁰ Andrew M. Siegel, *Notes Towards an Alternate Vision of the Judicial Role*, 32 SEATTLE U. L. REV. 511, 512 (2009) (“[J]udges are not to be proactive, but rather are to sit back and wait to see if Congress, in its infinite wisdom, has chosen to break the glass and call on their expertise.”).

³⁴¹ *Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999).

³⁴² See *Hollywood*, *supra* note 34, at 153; *Reidy*, *supra* note 34, at 657–58 (“The harm that could result from judicial interference is far less costly than the harm and morale drain that could result from the failure to address the injury at all.”).

³⁴³ See *Turley*, *supra* note 39, at 132–33.

³⁴⁴ 2013 NDAA, *supra* note 63, §§ 570–579; 158 CONG. REC. S7285 (daily ed. Nov. 30, 2012) (statement of Sen. Jeanne Shaheen).

effected for victims of intra-military sexual assault. The 2013 NDAA provides for the establishment of special victims units and independent reviews of sexual assault cases³⁴⁵ and, for the first time since 1981, permits the use of federal funds for abortion in case of rape or incest.³⁴⁶ The Military Personnel Subcommittee of the House Armed Services Committee has committed to holding hearings on these issues in 2013.³⁴⁷ The Air Force has pledged to assign specially trained counsel to victims of assault.³⁴⁸ However, with institutional commitment to change come questions regarding efficacy and enforcement. The transition to a new Secretary of Defense, for example, bears the potential to devalue issues of concern to women servicemembers. Further, keeping pace with new initiatives to stem sexual assault across the branches are reports of increasing misconduct at the military academies³⁴⁹ and in combat zones.³⁵⁰ The Sexual Assault Training Oversight and Protection Act, which would create an independent office of civilians and military personnel to oversee investigation and prosecution of sexual assault claims, has been stalled since its introduction 2011.³⁵¹ That the U.S. Commission on Civil Rights has made military sexual assault the topic of its 2013 Enforcement Report highlights the importance of holding the legislative feet to the fire in regard to effecting these changes.³⁵²

Brooks and Muniz, as well as dissents in *Rosker*, *Stanley*, and other cases strongly suggest that what has been marketed over the past sixty years as a doctrine of judicial restraint is in fact an example judicial activism at its most profound.³⁵³ In *Chappell*, *Stanley*, and the other cases establishing

³⁴⁵ 2013 NDAA, *supra* note 63, §§ 573, 576.

³⁴⁶ *Id.* § 704.

³⁴⁷ Jim Forsyth, *Congress to Hold Hearing on Sexual Abuse in Military*, REUTERS (Jan. 8, 2013), <http://www.reuters.com/article/2013/01/08/us-usa-military-sex-idUSBRE9070TI20130108>.

³⁴⁸ Jennifer Hlad, *Air Force to Assign Counsel for Victims of Sexual Assault*, STARS AND STRIPES (Jan. 9, 2013), <http://www.stripes.com/news/air-force-to-assign-counsel-for-victims-of-sex-assault-1.203281>.

³⁴⁹ The academic year 2011–2012 saw a 23% increase of assaults compared to 2010–2011. The number of reported assaults has increased each year since 2008. Eric Katz, *Reported Sexual Assaults at Military Academies Continue to Rise*, GOVERNMENT EXECUTIVE (Dec. 27, 2012), <http://www.govexec.com/defense/2012/12/reported-sexual-assaults-military-academies-continue-rise/60361/>.

³⁵⁰ In a study of 1,100 women deployed to Iraq and Afghanistan, one-fourth of respondents reported having been sexually assaulted. Melissa Jeltsen, *Military Sexual Assaults in Combat Zones Happen Frequently: Study*, HUFFINGTON POST (Dec. 27, 2012), http://www.huffingtonpost.com/2012/12/27/military-sexual-assaults_n_2370099.html.

³⁵¹ Jennifer Hlad, *Military Sexual Assault Victims Share Heartbreak as Lawmakers Renew Push*, STARS AND STRIPES (Apr. 18, 2013), <http://www.stripes.com/news/military-sexual-assault-victims-share-heartbreak-as-lawmakers-renew-push-1.217176>.

³⁵² Press Release, U.S. Comm'n on Civil Rights, U.S. Comm'n on Civil Rights Announces 2013 Statutory Enforcement Report and Briefing on Sexual Assault in the Military (Oct. 23, 2012), http://www.usccr.gov/press/2012/PR_10-23-12_EnforcementReportFinal.pdf.

³⁵³ *See Mazur*, *supra* note 41, at 726.

and extending the *Feres* doctrine, the Court substituted its own policy judgments for those of a silent Congress, choosing to circumscribe relief for admittedly deserving plaintiffs. The judiciary has put itself in the position of affecting military tort reform. The continued application of *Feres* may be deemed unjust in the case of modern-day medical malpractice, where the opportunities for recovery by civilian plaintiffs dwarf those of their military counterparts. It is egregious, however, in the case of constitutional torts, in which the harm radiates far beyond the relationship between co-worker and co-worker, or soldier and superior officer. The consistency with which the courts have left individuals, whose rights have been infringed, without viable remedies violates “both natural justice and of our legal system’s founding commitments.”³⁵⁴ “[T]he parsimonious interpretation of remedial statutes, and the expansion of doctrines . . . that categorically exclude some transgressors from monetary liability, thwart the exercise of democratic citizenship.”³⁵⁵

The DADT repeal cases make it clear that the door to judicial intervention need not be closed by the lower courts. Where unconstitutional behavior persists, and where plaintiffs are otherwise without remedy, it is the duty of the courts to lead by example and to defend counter-majoritarian principles.³⁵⁶ Lower courts express hesitation to act in narrowing the *Feres* doctrine, as “the Supreme Court has increasingly reminded [them] that departures from prior Supreme Court precedent should not normally be pioneered by circuit or district judges.”³⁵⁷ However, where issues of social justice affecting civilians are concerned, the DADT cases provide a model of justice resulting from a judicial decision to fulfill its role as protector of essential civil rights. As Chief Judge Becker of the Court of Appeals for the Third Circuit recently observed of *Feres*:

In the last decade . . . [the] voices of courts and commentators have died down. Everyone seems to have given up. But the harshness of the doctrine remains. . . . Bolstered by the oft-quoted words of Justice Frankfurter: “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”³⁵⁸

When human rights are at stake, sometimes the tail must wag the dog.

³⁵⁴ Siegel, *supra* note 340, at 520. Eugene Fidell suggests that, rather than adoption of a court-closing stance, the Court’s reluctance to engage in decisionmaking in the military context may be a result of collective inexperience with the armed forces. *See* Fidell, *supra* note 322, at 1018–19.

³⁵⁵ Siegel, *supra* note 340, at 523.

³⁵⁶ *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

³⁵⁷ *Day v. Mass. Air Nat’l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) (citing *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996), *rev’d on other grounds*. *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997)).

³⁵⁸ *O’Neill v. United States*, 140 F.3d 564, 566 (3d Cir. 1998) (Becker, C.J., statement *sur denial*) (quoting *Henslee v. Union Planters Nat’l Bank*, 335 U.S. 595, 600 (1949)).

V. CONCLUSION

*"I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very freedom that I provide, and then questions the manner in which I provide it. I would rather you just said thank you and went on your way. Otherwise, I suggest you pick up a weapon and stand a post."*³⁵⁹

Numerous, interrelated factors might be blamed for the entrenchment of the doctrine of military deference in today's society—judicial activism, judicial restraint, fiscal conservatism, elitism, apathy. The biggest driver of the *Feres* doctrine, however, is fear. The military has been able to re-frame anti-militarism as a value of "elites" and to conflate critiques of the institution with criticism of those who serve.³⁶⁰ A similar framing has occurred in the context of *Feres*, with practitioners and servicemembers accusing "liberal" academics of blindly criticizing the doctrine while ignoring its obvious utility.³⁶¹ For nearly twenty years, the military carried out overtly discriminatory practices without sanction under the guise that purposeful discrimination against gay and lesbian personnel, and particularly lesbian personnel,³⁶² promoted unit cohesion and combat readiness. When the military was, at last, forced to provide evidence for these claims, the policy collapsed like a house of cards. Courts must require the military to provide evidence that, on balance, the harm being perpetuated via sexual assaults is less than the harm that would result from judicial intervention.

Today's typical troops are not career soldiers. Nor are they so-called "weekend warriors." They are young, economically disadvantaged, and poorly-educated volunteers who serve multiple, extended tours of duty in conflict situations. Our longstanding failure to protect these volunteers from military sexual assault is an issue that literally cuts to our nation's heartland. In case after case to address the *Feres* doctrine, courts highlight the injustices resulting from the policy of judicial non-intervention in military affairs. However, the justifications for sidestepping this political question—threat to good order, alternative systems of recovery, combat readiness—do not in any way support blatant inaction in the face of injustice. Further, there is no evidence that lawsuits brought challenging

³⁵⁹ A FEW GOOD MEN (Columbia Pictures & Castle Rock Entertainment 1992).

³⁶⁰ See *supra* Part III.A.2; Stephen D. Reese, *Militarized Journalism: Framing Dissent in the Gulf Wars*, in REPORTING WAR: JOURNALISM IN WARTIME 247, 259 (Stuart Allan & Barbie Zelizer eds. 2004).

³⁶¹ For critiques of academia's *Feres* criticism written by former U.S. Department of Justice litigators, see Bernott, *supra* note 239; Figley, *supra* note 239.

³⁶² Although the debate surrounding the DADT repeal focused on combat readiness, "[t]hroughout the DADT era, women comprised just fourteen percent of enlisted personnel but thirty percent of discharges pursuant to the DADT policy. In 2009, a striking thirty-nine percent of those discharged under DADT were female." Banner, *supra* note 62, at 63 (footnotes omitted) (citing THE WILLIAMS INST., *supra* note 47, at 2).

the *Feres* doctrine or alleging constitutional violations have harmed military discipline.³⁶³ The government's own admissions about the costs of sexual assault mandate a directly contrary conclusion.³⁶⁴ The judicial "activism" that forced Congress's hand in repealing DADT provides evidence that positive outcomes can result when the court fulfills its role as constitutional decisionmaker. Even the harshest critics of the DADT repeal now observe that the repeal has been a success.

Advocates of judicial restraint will argue that the legislature is currently considering and has implemented numerous solutions to the pervasive problem of rape in the military, including creating special victims units, revamping the sexual assault reporting structure, and creating centralized databases of offenders.³⁶⁵ They may point to recent, highly-publicized prosecutions taking place after accusations of widespread sexual abuse on military bases as signaling change.³⁶⁶ Rather than labeling the new wave of prosecutions and policy changes as panacea, however, we must situate these changes in historical context. Tailhook '91, Aberdeen '96, Airforce Academy '03, Lackland '12. Each event resulted in emergency measures to stem the tide of sexual violence. None of these policy changes resulted in fewer sexual assaults. The fact that such incidents continue is evidence that, in the most pernicious cases, legislative action alone may be insufficient to protect constitutional interests. Forty years ago, in his concurrence in *Frontiero v. Richardson*,³⁶⁷ Justice Powell retreated from applying a higher level of scrutiny to gender-based equal protection claims, arguing that Congress was the appropriate branch to reckon with and would soon settle the issue via passage of the Equal Rights Amendment.³⁶⁸ Justice Powell relied on a mistaken assumption that issues of justice would be settled by popular response and, of course, the Amendment did not pass. Since that time, the pace of women's advancement in the civilian workplace has been glacial compared to women's presence in the workforce.

³⁶³ See Turley, *supra* note 20, at 17 ("[A] strong argument can be made that the primary elements of cohesion and discipline in the military have virtually nothing to do with potential civil liability."); see also Tomes, *supra* note 128, at 109–10.

³⁶⁴ The DoD observes that sexual assault "is an affront to the basic American values we defend, and may degrade military readiness, subvert strategic goodwill, and forever change the lives of victims and their families." SEXUAL ASSAULT REPORT 2011, *supra* note 2, at 1.

³⁶⁵ For a description of policies recently implemented by the Pentagon to address the issue of intra-military sexual assault, see Leon E. Panetta, U.S. Sec'y of Def., Remarks on Capitol Hill, U.S. DEP'T OF DEF. (Apr. 17, 2012), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013>.

³⁶⁶ Jim Forsyth, *Woman in Air Force Says Trainer Intimidated Her Into Having Sex*, CHICAGO TRIBUNE, July 17, 2012, available at http://articles.chicagotribune.com/2012-07-17/news/sns-rt-us-usa-military-sexbre86h02s-20120717_1-basic-training-sexual-assault-sexual-activity.

³⁶⁷ 411 U.S. 677 (1973).

³⁶⁸ *Id.* at 691–92 (Powell, J., concurring).

We are at a juncture in which the appropriate role of the judiciary in respect to the other branches is open to definition. The debate about judicial activism prompted by the verdict regarding the Affordable Healthcare Act,³⁶⁹ the recent chess game in effecting the repeal of DADT, and the sheer magnitude of constitutional violations in these cases render the timing ideal for the Court to reassess the viability of the *Feres* doctrine. To dismiss the claims of Kori Cioca and Ariana Klay would signal not a continuation of the status quo but an abdication of the judiciary in a matter that strikes at the heart of Constitutional rights, a tragic failure to protect those whom we entrust to protect us.

³⁶⁹ The extent of debates to arise regarding interpretation of the Court's recent decision in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), characterized by some as emblematic of a policy choice to preserve institutional legitimacy at the expense of protecting the Constitution and others as a victory for placing new limits on federal power, demonstrates that we are at an important juncture in determining the role of the courts. Compare CAUSE OF ACTION, *Why Chief Justice Roberts's Opinion in NFIB v. Sebelius May Ultimately Advance Economic Freedom and Promote Limited-Government and Federalism Values*, CAUSE OF ACTION BLOG (July 3, 2012 3:43 PM), <http://causeofaction.org/2012/07/03/why-chief-justice-robertss-opinion-in-nfib-v-sebelius-may-ultimately-advance-economic-freedom-and-promote-limited-government-and-federalism-values/> (arguing that Chief Justice Roberts placed limitations on the commerce clause in *Sebelius*, which "reaffirmed and strengthened important limits on the scope of federal power"), with Ilya Somin, *The Impact of the Individual Mandate Decision on the Supreme Court's Legitimacy*, THE VOLOKH CONSPIRACY (July 13, 2012), <http://www.volokh.com/2012/07/13/the-impact-of-the-individual-mandate-decision-on-the-supreme-courts-legitimacy/> ("If future generations endorse the liberal view that judicial enforcement of constitutional limits on federal power is always or almost always inappropriate, then Roberts will come out looking prescient.").