CAPTIVE TO NEGLIGENCE: REFORMING THE *FERES* DOCTRINE

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> "[W]hy do we forgo all of the rights that we fight for? All the rights that I say I am defending, that you have asked me to instill in other countries, why do I lose those?"[1]

> "Such unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider Feres."[2]

I. INTRODUCTION

In January 2017, Green Beret Richard Stayskal underwent a computed tomography scan ("CT") of his lungs at Womack Army Medical Center so he could begin an underwater training course.[3] Despite being cleared to proceed with the training, Stayskal continued to have difficulty breathing and started coughing up blood.[4] It was not until June, when the Army permitted Stayskal to obtain a second opinion from a civilian doctor, that he learned his diagnosis—Stayskal had stage IIIA lung cancer.[5] The civilian doctor told him if he had been diagnosed in January during his initial CT scan, he would have had a 90% chance of survival, but now that the cancer had spread beyond his lungs to his liver, spleen, and lymph nodes, his diagnosis was terminal.[6] Stayskal's civilian doctor was shocked, and told him, "I am a doctor and I don't like the word *suing*, but you should be suing the crap out of somebody for this."[7]

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[1] Maximillian Potter, *The Feres Doctrine: The Fight to End a Systemic Miscarriage of Military Justice*, VANITY FAIR (Nov. 10, 2022), https://www.vanityfair.com/news/2022/11/the-feres-doctrine-the-fight-to-end-a-systemic-miscarriage-of-military-justice.

[2] Daniel v. United States, 139 S. Ct. 1713, 1714 (2019) (Thomas, J., dissenting from denial of certiorari).

[3] Potter, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*; James Laporta, *Dying of Cancer, a Green Beret Delivers an Emotional Statement to Congress on Medical Malpractice in the Military*, NEWSWEEK (May 2, 2019, 3:34 PM), https://www.newsweek.com/special-forces-soldier-feres-doctrine-congress-1412119.

[7] Potter, *supra* note 1.

In the civilian world, medical negligence this egregious would likely lead to a malpractice suit. However, due to precedent dating back to a 1950 Supreme Court decision, Stayskal's status as a service member prevents him from being able to sue the government under the Federal Tort Claims Act ("FTCA").[8] This precedent, known as the "*Feres* Doctrine" bars any claim by active duty service members, if the negligent conduct occurred "incident" to their military service.[9] Despite the widespread criticism that *Feres* has received, the Supreme Court has refused to overturn it.[10] After the Court denied certiorari in 2019 in the case of a young Navy Lieutenant who died after giving birth in a military hospital, Congress acted by creating a statutory carve-out to the *Feres* holding in the Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019 ("Stayskal Act").[11] The Stayskal Act required the Department of Defense ("DOD") to create and administer an internal medical malpractice claims process for service members.[12] Despite this positive step, the claims process currently lacks a mechanism for service members to appeal denied claims outside of the DOD, and so far most claims under the new process have been denied.[13]

This Comment proposes that the Supreme Court adopt a new two-part test for defining "incident to service" using one factor of the Ninth Circuit's current four-factor test, and an additional factor taken from a recent decision where the Ninth Circuit allowed a sexual assault case to proceed despite *Feres*, holding that sexual assault is not "incident to service."[14] This Comment also proposes revising the

[8] Feres v. United States, 340 U.S. 135, 146 (1950).
[9] *Id.* at 139.
[10] United States v. Johnson, 481 U.S. 681, 700 (Scalia, J., dissenting).
[11] 32 C.F.R. § 45.13 (2022); Sarah Jarvis, *Congress Lays Out Process for Military Med Mal Claims*, LAW360 (Dec. 10, 2019, 9:12 PM), https://www.law360.com/articles/1226987/congress-lays-out-process-for-military-med-mal-claims.
[12] 32 C.F.R. § 45.13(b).
[13] *Id.*; *see* Maggie BenZvi, *DOD Denies Most Stayskal Act Malpractice Claims*, COFFEE OR DIE MAGAZINE (Mar. 29, 2023), https://coffeeordie.com/stayskal-act-claims; Roxana Tiron, *Soldier Who Led Military Malpractice Fight Gets Claim Denied*, BLOOMBERG LAW (Mar. 28, 2023), https://news.bloomberglaw.com/us-law-week/pentagon-denies-claim-for-soldier-behind-new-malpractice-policy.
[14] Spletstoser v. Hyten, 44 F.4th 938, 958 (9th Cir. 2022).

DOD claims process created by the Stayskal Act to allow final claims to be reviewed by the U.S. Court of Appeals for Veterans Claims.

Part II of this Comment will detail the background of the Court's *Feres* jurisprudence, rationales for the doctrine, and attempts to overturn it. Part III will analyze the "*Feres* rationales," current circuit confusion over how to apply "incident to service," why *Feres* should not be overturned entirely, and the lack of accountability in the current DOD claims process. Part IV proposes a new two-part test to define the "incident to service" standard and outlines a proposed modification to the administrative claims process created by the Stayskal Act.

II. BACKGROUND

A. *The Federal Tort Claims Act and* Brooks

In 1946, Congress passed the FTCA.[15] The purpose of the FTCA was to waive sovereign immunity by allowing individuals to sue the government for tort claims in certain circumstances.[16] The FTCA "mark[ed] the culmination of a long effort to mitigate the unjust consequences of sovereign immunity from suit" that the government enjoys as part of the doctrine grounded in the historical concept that "the Crown is immune from any suit to which it has not consented . . . ."[17]

The FTCA contains several exceptions.[18] These exceptions include barring recovery for overseas activity and claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war."[19] Nothing in the FTCA explicitly prohibits service members from taking advantage of the right to sue the

[15] *See* Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 10 (2007).
[16] *Id.* at 13.
[17] *Feres*, 340 U.S. at 139.
[18] 28 U.S.C. § 2680.
[19] 28 U.S.C. § 2680(j).

government.[20] The majority of the FTCA's proposed drafts did contain a provision expressly denying recovery for service members, but the final version Congress enacted into law did not.[21]

In the 1949 case *Brooks v. United States*, the Supreme Court tested one side of the limits to service member recovery under the FTCA.[22] In *Brooks*, two off-duty service members and their father were driving on a rainy night in North Carolina when they were struck by a U.S. Army truck driven by a civilian contractor at an intersection.[23] The district court held that the service members' status as members of the military kept them from bringing an action against the United States, although the appeals court subsequently reversed this holding.[24]

The Supreme Court was unpersuaded "that 'any claim' means 'any claim but that of servicemen.'"[25] The Court highlighted that the FTCA already contained several explicit exceptions, including one for "claims arising out of combatant activities in the military . . . during time of war."[26] The Court concluded that "such exceptions make it clear" that Congress understood what it was doing in writing the statute and that it would be "absurd" to believe Congress did not consider service members in writing the FTCA, especially since the "overseas and combatant activities exceptions make this plain."[27] Most importantly, however, the Court in *Brooks* set the table for its subsequent holding in *Feres*, distinguishing the accident from "an army surgeon's slip of the hand" or "a defective jeep which causes injury."[28] Specifically, the Court noted that the accident "had nothing

[20] *See id.* (specifically dictating that a claim arising out of military or naval activities is not precluded by the chapter, but § 2680 does not explicitly prohibit service members from being able to sue).
[21] Brooks v. United States, 337 U.S. 49, 51-52 (1949).
[22] *Id.* at 49.
[23] *Id.* at 50.
[24] *Id.* at 50-51.
[25] *Id.* at 51.
[26] *Id.*
[27] *Brooks*, 337 U.S. at 51.
[28] *Id.* at 52.

to do with the Brooks' army careers" and their injuries were "not caused by their service."[29]

B. The Feres *Doctrine*

Just one year later, the Supreme Court took up three tort claims jointly brought in *Feres v. United States*.[30] *Feres* involved two medical malpractice claims and one wrongful death claim against the United States.[31] The family of the eponymous Feres brought the wrongful death suit after a fire caused by a defective heating plant located in his barracks killed him.[32] The Court emphasized that this situation was entirely different from the facts of *Brooks* and that the only question at issue was whether the FTCA extended to situations where the injury was sustained "incident to [the plaintiffs'] service."[33] The Court relied on an analysis of Congress's purpose in passing the FTCA and recognized the "distinctively federal" relationship between the Government and members of the armed forces holding that because of this connection, there was no federal law that recognized the type of recovery claimants sought.[34]

Finally, the Court held that Congress, in enacting the FTCA, had not intended to create a system where claimants could enjoy multiple types of recovery and that since service members have access to recovery through the Veteran's Benefit Act ("VBA"), that Congress must not have intended to include them in the FTCA.[35] The Court did not believe that Congress intended to allow for a "dual recovery" system where service members could receive benefits through the VBA and seek civil recovery in the courts.[36]

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[29] *Id.* at 52.
[30] *Feres*, 340 U.S. at 137.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 138.
[34] *Id.* at 143.
[35] *See id.* at 145; *see also* Kaitlan Price, Comment, *Feres: The "Double-Edged Sword*," 125 DICK. L. REV. 745, 753 (2021) (explaining the VBA compensation scheme).
[36] *See* Price, *supra* note 35, at 753.

C. Post Feres *Legal Regime*

Over time, the Court added to its original rationales for denying recovery in *Feres*. In *United States v. Brown*, the Court held that a veteran could sue the government for negligent medical care received at a Veterans Administration Hospital since the negligent act in question was not incident to his service.[37] Importantly, the *Brown* Court held that, contrary to the reasoning in *Feres*, the ability of a service member to recover under the FTCA was not impacted by similar recovery under the VBA.[38] The Court also expounded on *Feres* to offer an additional rationale for the doctrine—that service members should not be permitted to sue the government for fear of disturbing the

> peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Torts Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . .[39]

This has become known as the "military decision making" or "military discipline" rationale for *Feres* immunity.[40]

In 1987, the Supreme Court reaffirmed the principle holding of *Feres*, in *United States v. Johnson*.[41] Notably, the Court in *Johnson* took the *Feres* regime even further by holding the *Feres* doctrine covered negligent incidents caused by civilian employees of the federal government.[42] In *Johnson*, a Coast Guard officer was killed while operating a helicopter on a rescue mission in which employees of the Federal Aviation Administration ("FAA") caused the crash.[43] The Eleventh Circuit had previously overturned the district court's dismissal of the case because of the civilian contractors' involvement, finding the effect of a suit on "military discipline" to be the primary

[37] *See* United States v. Brown, 348 U.S. 110, 112 (1954).
[38] *Id.* at 111.
[39] *Id.* at 112.
[40] Price, *supra* note 35, at 755.
[41] United States v. Johnson, 481 U.S. 681, 682 (1987).
[42] *Id.* at 683.
[43] *Id.*

justification for *Feres*.[44] In the majority decision, the Supreme Court disagreed with the circuit court's reasoning, finding that the contractor's presence in the equation was not meaningful to the application of *Feres*.[45]

But Justice Scalia, along with Justice Brennan, Justice Marshall, and Justice Stevens in the dissent, strongly criticized the decision in *Johnson*––and *Feres*––as wrongly decided, writing that "the Court today provides several reasons why Congress might have been wise to exempt from the [FTCA] certain claims brought by servicemen. The problem . . . is that Congress not only failed to provide such an exemption, but quite plainly excluded it."[46] Justice Scalia emphasized the lack of textual support for the Court's interpretation of the FTCA in *Feres*, and highlighted the evidence that Congress considered and rejected excluding service members in drafting the FTCA.[47] He also attacked the majority's military decision making rationale by pointing out that if a civilian was killed when Johnson's helicopter crashed, that civilian could sue the military, raising the question of why military decision making is uniquely undermined when service members bring these suits.[48] Justice Scalia further questioned the dual compensation concerns raised in *Feres*, noting that the Court had permitted dual recovery under the VBA and FTCA in the past.[49]

The *Feres* doctrine significantly impacts injured service members and their families by preventing suits over claims with a tenuous connection to military life—like negligent care for a vacation-related stingray injury.[50] The doctrine barred recovery in cases where negligent conduct led to a towel that read "Medical Department U.S. Army" being left in a man's stomach, a service member losing a leg due to flesh-eating bacteria, the rape of a young cadet at West Point,

[44] *Id.* at 684.
[45] *Id.* at 686.
[46] *Johnson*, 481 U.S. at 692 (Scalia, J., dissenting).
[47] *Id.* at 693.
[48] *Id.* at 700, 703.
[49] *Id.* at 697.
[50] Glaude v. United States, 381 F. Supp. 2d 1328, 1328-31 (N.D. Fla. 2005).

and countless other deaths and injuries.[51] The doctrine also frustrates lower courts that apply it "without relish" while creating an increasingly tangled system for its application.[52]

Feres has also indirectly impacted other areas of tort law. In his dissent from the denial of certiorari in a case called *Daniel v. United States*, Justice Thomas pointed out the practical problems *Feres* creates.[53] Earlier in the same term, the Court decided *Air & Liquid Systems Corp. v. Devries* which involved the case of two veterans exposed to asbestos in insulation on Navy ships.[54] The asbestos was added to the insulation by the military, but the Court allowed the veterans to sue the manufacturer to create a way for them to recover because they could not sue the Navy.[55] Thomas noted that "[s]uch unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider Feres."[56]

D. Attempts to Eliminate Feres

Given the widespread acknowledgment by courts and scholars of the defects of *Feres*, Congress tried several times to change the doctrine.[57] In 2009, the House introduced the Carmelo Rodriguez Military Medical Accountability Act of 2009, which would have allowed for suits under the FTCA for injury or death of service members brought about by the "negligent or wrongful act or omission in the performance of medical, dental, or related health care

[51] *Feres*, 340 U.S. at 137; Potter, *supra* note 1; Doe v. Hagenbeck, 870 F.3d 36, 39, 50 (2d Cir. 2017).
[52] Costo v. United States, 248 F.3d 863, 867 (9th Cir. 2001) ("[T]he cases applying the *Feres* doctrine are irreconcilable.").
[53] *Daniel*, 139 S. Ct. at 1713-14 (2019) (Thomas, J. dissenting from denial of certiorari)..
[54] *Id.*
[55] *Id.* at 1714.
[56] *Id.*
[57] *See* Melissa Feldmeier, Note, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. UNIV. L. REV. 145, 162-63 (2010) (listing legislative attempts to fix the doctrine).

functions . . . ."[58] But, like other attempts before it, the Act died in Congress.[59]

In 2018, the husband of a Navy officer brought suit against the United States in the Ninth Circuit under the FTCA after allegedly negligent medical treatment was administered at a Naval hospital, leading to his wife's death following childbirth.[60] In deciding the case, the Ninth Circuit conceded that cases "applying the *Feres* doctrine are irreconcilable," but nevertheless held that they had to abide by precedent.[61] In an extremely pointed conclusion, the court stated, "[i]f ever there were a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so."[62]

The Plaintiff in *Daniel* appealed to the Supreme Court, but the Court denied certiorari.[63] Both Justice Thomas and Justice Ginsburg would have granted the petition for writ of certiorari, and Justice Thomas wrote a detailed explanation of his dissent, reiterating his belief that *Feres* should be overturned.[64]

The Court's decision to deny certiorari in *Daniel* and leave *Feres* unchanged made it clear that opponents of the doctrine could not rely on the Court for a solution.[65] In April 2019, the Stayskal Act was introduced in the House.[66] After some difficulty in the Senate, Congress eventually hammered out a compromise that was

[58] H.R. 1478, 111th Cong. § 2681 (2009).
[59] *See* Kristina Fiore, *Green Beret Fights to Sue Military Doctors*, MEDPAGE TODAY (Dec. 18, 2019), https://www.medpagetoday.com/special-reports/exclusives/82079.
[60] Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1713 (2019).
[61] *Id.* at 982 (quoting *Costo*, 248 F.3d at 867).
[62] *Id.*
[63] *Daniel*, 139 S. Ct. at 1713 (2019) (Thomas, J. dissenting from denial of certiorari)..
[64] *See id.* at 1713-14.
[65] *See* James Laporta, *Supreme Court Refuses to Hear Case on Doctrine Preventing Military Medical Malpractice Lawsuits*, NEWSWEEK (May 20, 2019, 4:34 PM), https://www.newsweek.com/supreme-court-feres-doctrine-congress-1430664 ("[The *Daniel*] decision is a major blow to opponents of the Feres doctrine, who believe the Supreme Court precedent is excessively broad and is misinterpreted and outdated when examining today's Military Health System.").
[66] *See id.*

incorporated into the 2019 National Defense Authorization Act for Fiscal Year 2020.[67]

This compromise created a claims process that allows service members to file a claim with the DOD to receive compensation for "personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider."[68] Claimants must file within two years of the incident, provided that the malpractice occurred in a "covered military medical treatment facility" and that the claim is not paid under any other compensation system.[69] Under the Stayskal Act, the DOD is authorized to pay out claims only up to $100,000, with any claim in excess referred to the Secretary of the Treasury for further evaluation.[70] As part of the new law, the Secretary of Defense was instructed to develop regulations to implement the claims system.[71] The DOD must also report to Congress yearly regarding the claims paid.[72]

In June 2021, the DOD published an interim final rule and accepted comments over the next several months.[73] In August 2022, the DOD released the final rule that detailed how the claims system functions.[74] Under the final rule, any appeal is reviewed by an appeals

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[67] *See* Y. Peter Kang, *Law360's Tort Report: Personal Injury and Med Mal News*, LAW360 (Oct. 28, 2019), https://www.law360.com/articles/1212905/law360-s-tort-report-personal-injury-med-mal-news-in-brief; *see also* Patricia Kime, *A Dent to Feres: Troops to be Able to File Claims—But Not Sue—for Medical Malpractice*, MIL. TIMES (Dec. 11, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/12/11/a-dent-to-feres-troops-to-be-able-to-file-claims-but-not-sue-for-medical-malpractice.

[68] 10 U.S.C. § 2733a(a).

[69] 10 U.S.C. § 2733a(b)(3)-(4); *see also* Robert A. Diehl, Note, *Feres Lives: How the Military Medical Malpractice Administrative Claims Process Denies Servicemembers Adequate Compensation*, 60 DUQ. L. REV. 172, 188 (Winter 2022) (explaining the implications of the military medical treatment facility provision).

[70] 10 U.S.C. § 2733a(d).

[71] 10 U.S.C. § 2733a(f).

[72] 10 U.S.C. § 2733a(h).

[73] Medical Malpractice Claims by Members of the Uniformed Services, 87 Fed. Reg. 52446-01, 52446-47 (Aug. 26, 2022).

[74] *Id.* at 52446.

board consisting of three to five DOD officials "experienced in adjudicating medical malpractice claims."[75]

III. ANALYSIS

A. *The Military Decision-Making Test is the Only Viable Rationale for* Feres

Of the three original "*Feres* rationales" the only one that remains viable is the need to preserve military decision-making from court interference. While the Supreme Court and lower appellate courts articulated various reasons for *Feres* over the last few decades, the three core rationales for the doctrine are (1) the "distinctly federal" relationship between service members and the military, (2) the existence of an alternative compensation system in the form of the VBA, and (3) a desire to preserve military decision making and discipline.[76]

The first of these rationales can cause confusion as the Supreme Court has explained it differently in different cases. However, Justice Scalia summed up the rationale in his *Johnson* dissent as an objection to potential unfairness in a lack of uniformity of recovery based on geography.[77] He also called this rationale "absurd" because the lack of uniformity in recovery can hardly be worse than barring recovery altogether, and because the Court allows federal prisoners to recover despite their lack of geographical uniformity.[78]

The second rationale is that service members should not be permitted to sue because they already receive compensation under the VBA if they are injured or killed in the course of their service.[79] However, there are several problems with this reasoning, including the fact, as Justice Scalia again pointed out, that the Court allowed dual

[75] *Id.* at 52453.
[76] Andrew Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1518 (2019).
[77] *Johnson*, 481 U.S. at 695.
[78] *Id.*
[79] *Id.* at 697.

recovery in the *Brooks* case.[80] Additionally, the VBA contains no exclusivity provision.[81]

The process to receive VBA benefits is also often quite difficult and leads to insufficient recovery and compensation.[82] For instance, VBA loss of earnings benefits are less generous than those obtained through civil litigation, and the VBA provides no compensation at all for non-economic damages.[83] As a result, injured service members and their families "often struggle financially" despite receiving benefits.[84]

The final rationale—military decision-making—also poses problems. The most significant criticism is that the text of the FTCA does not support this rationale.[85] Congress included an explicit carve out for combatant activities, but no other bar on service member suits arising out of connection to service.[86] Congress also passed a version of the Act that did not bar service members from seeking recovery despite many previous drafts including such an exception.[87] Additionally, military decision-making can be questioned with impunity in suits brought by civilians, making the application of this doctrine only to service members appear unfair—at least superficially.[88]

Despite these objections, good arguments exist for retaining the military decision-making rationale. Service in the military is fundamentally different from civilian life and involves much more danger for service members, even if they are stationed inside the United States or outside of an active war zone.[89] Training in particular can expose service members to very dangerous situations that are nevertheless necessary for the readiness and functionality of the

[80] *Id.*
[81] *Id.*
[82] *See* Brou, *supra* note 15 at 45-47.
[83] *Id.* at 48-49.
[84] *Id.* at 48.
[85] *See Johnson*, 481 U.S. at 692-93 (Scalia, J., dissenting).
[86] *Id.* at 693.
[87] *See Brooks*, 337 U.S. at 51-52.
[88] *See generally Johnson*, 481 U.S. at 700 (Scalia, J., dissenting).
[89] *See* Brou, *supra* note 15, at 54.

military.[90] Allowing suits that challenge orders made during military exercises and activities could "diminish the legitimacy of a leader's orders during battle, training, or daily operations and encourage service members to believe they can choose which orders to follow."[91] While there are valid reasons to believe the military decision-making rationale for *Feres* may not be as easily found in the text as the Court has claimed, the rationale itself remains sound.

B. Lack of Guidance from the Supreme Court has Created Confusion Among the Circuits

There is no definitive Supreme Court standard for what qualifies as "incident to service."[92] Several circuits use multi-factor balancing tests, while others take a broader approach and consider a plaintiff's relationship to the military or the use of a military hospital as sufficient to bar recovery under *Feres*.[93] Some of the factors that are

[90] *Id.*
[91] *Id.* at 55.
[92] *See* Doe v. United States, 141 S. Ct. 1498, 1499 (2021) (Thomas, J., dissenting).
[93] The First Circuit uses a four-factor test examining whether (1) the tort occurred on a military facility (2) whether it arose out of military life (3) whether the perpetrator was acting in cooperation with the military and (4) whether the plaintiff was in the military at the time of the incident. Diaz-Romero v. Mukasey, 514 F.3d 115, 119 (1st Cir. 2008). The Third Circuit considers the claimant's military service alone as sufficient to bar recovery. Loughney v. United States, 839 F.2d 186, 188 (3d Cir. 1998). The Fourth Circuit considers factors such as "[(1)] the duty status of the service member, [(2)] whether the injury took place on base, and [(3)] what activities the service member was engaged in at the time" of the incident, although these factors are "not always determinative." Clendening v. United States, 19 F.4th 421, 428 (4th Cir. 2021). The Fifth Circuit uses a test that examines "(1) duty status, (2) site of injury, and (3) activity being performed." Regan v. Starcraft Marine, LLC, 524 F.3d 627, 637 (5th Cir. 2008). The Seventh Circuit does not have a factor test, but simply considers the plaintiff's "relationship to the military" at the time of the injury. Purcell v. United States, 656 F.3d 463, 466 (7th Cir. 2011). The Eighth Circuit has taken a similar tack and has no formal factor test, but instead considers whether a harm "ar[ises] out of [the plaintiff's] service activities[.]" Brown v. United States, 151 F.3d 800, 807 (8th Cir. 1998). The Ninth Circuit uses a four-factor test that considers "(1) the place where the negligent act occurred (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred." McConnell v. United States, 478 F.3d 1092, 1095 (9th Cir. 2007). The Tenth Circuit has acknowledged that incident to service is not readily discernible from Supreme Court precedent but

used in the various tests include: if the tort occurred on a military facility; arose from military life; resulted from a perpetrator acting in cooperation with the military; occurred while the plaintiff was on active duty; involved activities that at the time of the incident had a nexus to the military; or involved benefits that accrued to a plaintiff as a result of their status as a service member.[94] Understandably, the lack of conformity among circuits has led to confusion among lower courts about how to apply the doctrine.

The Ninth Circuit test is one of the most comprehensive approaches to *Feres* and incorporates many of the factors used by the other circuits—making it an ideal case study for reforming *Feres*.[95] Its application demonstrates how broadly current *Feres* case law has been extended. The case that originally introduced the circuit's four-factor test, *Johnson v. United States*, involved a non-commissioned officer who negligently operated an on-base bar while off duty from his military service.[96] The court evaluated the facts by considering (1) the place where the alleged negligent act occurred, (2) the duty status of the plaintiff, (3) the benefits accruing to the plaintiff because of his status as a service member, and (4) the nature of the plaintiff's activities at the time the negligence occurred.[97] After applying this test, the Court concluded that a lawsuit was not barred because the defendant's activity did not "involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review. [This was not] a case where the government's negligence occurred because of a decision requiring military expertise or judgment."[98]

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considers "*all* injuries" servicemembers suffer that relates even "remotely" to their military service to be barred by *Feres*. Pringle v. United States, 208 F.3d 1220, 1223-24 (10th Cir. 2000). The Eleventh Circuit uses a factor test very similar to the Ninth Circuit's test that examines (1) the duty status of the service member, (2) the location of the injury, and (3) the service member's activity at the time of the injury. Pierce v. United States, 813 F.2d 349, 353 (11th Cir. 1987).

[94] *See Diaz-Romero*, 514 F.3d at 119; *Clendening*, 19 F.4th at 428; *Regan*, 524 F.3d at 637.

[95] Johnson v. United States, 704 F.2d 1431, 1440 (9th Cir. 1983).

[96] *Id.*

[97] *Id.* at 1440.

[98] *Id.* at 1439-40.

This rationale appropriately tethered the circuit's test to the most valid rationale for *Feres*, but the first three factors in the test bear little relationship to insulating decisions relating to military readiness and training from judicial review.[99] By applying this four-factor test, the Ninth Circuit determined that an accident between two off-duty service members operating a canoe and a motorboat, a drowning during a Navy-led recreational rafting trip, and a waterskiing accident involving off-duty service members using a boat rented from an on-base facility were all barred from recovery under *Feres*.[100] But using the same test, the Court allowed suits involving an accidental fall into a drainage channel and a vehicle accident due to an unrepaired guardrail on base to proceed.[101] The application of factors one, two, and three often lead to nonsensical results that bear little relationship to protecting military decision-making.

Factor three—the benefits accruing to a plaintiff because of their status as a service member—is arguably the most problematic factor because it means that a plaintiff using any military-provided benefit or medical care can be barred from suing. For example, in the canoe–motorboat accident case, the Court determined that a suit was barred because both boats were rented from an on-base Special Services Center that the plaintiff could access for rentals only because of her status as a service member.[102] On the other hand, in a case involving a car accident due to an unrepaired guardrail, the court permitted the suit to move forward because anyone could use the road the plaintiff was driving on, in contrast to the rented kayak that was a benefit only available to service members.[103]

This is a line of reasoning that has no relationship at all to military discipline or decision-making. If anything, in the unrepaired guardrail case, a decision was likely made by a military member not to repair the guardrail, whereas no affirmative chain of command

[99] *Id.*
[100] Bon v. United States, 802 F.2d 1092, 1093-96 (9th Cir. 1986); *Costo*, 248 F.3d at; *McConnell*, 478 F.3d at 1093.
[101] Dreier v. United States, 106 F.3d 844, 845-46 (9th Cir. 1996); Schoenfeld v. Quamme, 492 F.3d 1016, 1017 (9th Cir. 2007).
[102] *Bon*, 802 F.2d at 1095.
[103] *Schoenfeld*, 492 F.3d at 1024.

decision was made to rent a kayak to an individual service member. Another reason this factor proves illogical is that many service member benefits can also be used by spouses or children who are permitted to sue for negligence. The third element of the test is illogical and leads to absurd results. For instance, a military spouse who has access to a military hospital solely by virtue of the spousal relationship could sue for a negligently performed operation, while their service member spouse could not.

Factors one and two, where the tortious activity occurred and the duty status of the plaintiff at the time of its occurrence are similarly problematic. For instance, in *Bon*, the canoe-motorboat accident case, the court determined that the first two factors weighed in favor of *Feres* immunity because the accident occurred near a military facility.[104] While both participants in the accident were off duty at the time of its occurrence, they were still on "active duty."[105] Service members engaging in day-to-day activities on base—where a civilian also might be engaging in those exact same activities—or simply being "active duty" at the time of an incident does not have a strong connection to chain of command style military decisions. This creates a regime where a car accident caused by an off-duty service member driving on base that kills both a civilian and service member could lead to liability for the former but not the latter.

Confusion among circuit courts about what qualifies as "incident to service," in addition to producing varying tests, has also led to different outcomes in similar types of cases in different circuits. One example is whether children born with birth defects due to negligent military medical care given to their mothers during their pregnancy should be allowed to sue.[106] Some circuits have analyzed these cases under the "treatment-focused" test, which asks whether the doctors were primarily treating the military mother or her child, while others have used an "injury-focused" test which asks whether the servicemember suffered an injury that was incident to her service.[107]

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[104] *Bon*, 802 F.2d at 1093-95.
[105] *Id.*
[106] Tara Willke, *Military Mothers and Claims Under the Federal Tort Claims Act for Injuries that Occur Pre-Birth*, 91 NOTRE DAME L. REV. ONLINE 160, 163, 165 (2016).
[107] *Id.* at 164-165.

These different approaches led to disparate outcomes in different circuits, and the Supreme Court has not clarified which approach correctly interprets "incident to service."[108]

Another example of this problem is how *Feres* interacts with sexual assault claims. In 2021, the Supreme Court denied certiorari in a Second Circuit case that held the rape of a West Point cadet was incident to her service.[109] Justice Thomas again wrote a dissent to the denial of certiorari, pointing out that circuit courts struggle to discern what qualifies as incident to service.[110] In August 2022, in a case called *Spletstoser v. Hyten*, the Ninth Circuit held that a sexual assault claim was not incident to service because sexual assault could not "conceivably serve any military purpose."[111] This "unprecedented move" created a circuit split over whether or not *Feres* should bar all sexual assault claims.[112]

While *Feres* is legally problematic and leads to grossly unjust results for injured service members, repealing the doctrine entirely at this juncture is inadvisable. Not only has the Court held to the doctrine over the course of a seventy-year period but repealing it entirely could lead to a chaotic situation where courts question decisions that truly are important to the operation of the military.[113]

The problem with simply overturning *Feres* lies largely with the text of the FTCA itself. The FTCA provides an exception for torts "arising out of the combatant activities of the military or naval forces, or the Coast Guard *during time of war*," but so much of the distinctive

[108] *Compare* Brown v. United States, 462 F.3d 609, 610, 616 (6th Cir. 2006), and Del Rio v. United States, 833 F.2d 282, 287-288 (11th Cir. 1987) (permitting suit on behalf of the injured child), *with* Ortiz v. United States ex rel. Evans Army Cmty. Hosp. 786 F.3d 817, 818 (10th Cir. 2015) (barring suit by injured child).
[109] *Doe*, 141 S. Ct. at 1498.
[110] *Id.* at 1499.
[111] *Spletstoser*, 44 F.4th at 942 (affirming the district court's decision concluding that an "alleged sexual assault [could] not conceivably serve any military purpose").
[112] Mariel Padilla, *The 19th Explains: How a Recent Court Opinion Could Clear the Way for Military Sexual Assault Survivors to Find Justice*, THE 19TH (Aug. 24, 2022), https://19thnews.org/2022/08/military-sexual-assault-survivors-justice.
[113] *See* Brou, *supra* note 15 at 54-55.

work the military engages in does not occur during war time.[114] One example would be the deployment of the Army National Guard, a reserve part of the armed forces that state governors can activate to respond to domestic crises that do not involve foreign wars.[115] A similar problem is presented by the work of the Coast Guard, much of which occurs during peacetime and includes law enforcement, response, and maritime prevention missions in addition to traditional military functions.[116]

But it is not just these unique situations that raise concerns under a strict textualist reading of the FTCA absent *Feres*—military training and orders often involve inherently risky elements that are necessary to create an effective fighting force but may appear tortious to civilian adjudicators.[117] Lawmakers recognized this important distinction by including an exception related to activities occurring during wartime.[118] Still, this original exception is underinclusive of military decisions made outside of the theater of war. The problem with the current application of *Feres* is that the way the Court has defined the doctrine consistently captures the type of tort that has no connection to uniquely military activities.

While the current confusion over what qualifies as "incident to service" has caused divergent results in different courts, adopting any of the existing tests would only perpetuate the problems with *Feres*. In a recent article, one author advocated that the Supreme Court adopt the Eleventh Circuit's three-factor test to standardize the approach to incident to service without completely overturning the doctrine.[119] This would be inadvisable. While adopting one of the current circuit court tests would at least clear up confusion and standardize the approach of lower courts, it would not fix the underlying problem with *Feres*—that its application under any of the

[114] 28 U.S.C. § 2680(j) (emphasis added).
[115] *Army Guard Mission*, ARMY NAT'L GUARD, https://www.army.nationalguard.mil/About-Us/Army-Guard-Mission/ (last visited Jan. 8, 2023).
[116] *Missions*, U. S. COAST GUARD, https://www.uscg.mil/About/Missions/ (last visited Jan. 8, 2023).
[117] *See* Popper, *supra* note 76, at 1541-42.
[118] 28 U.S.C. § 2680(j).
[119] Price, *supra* note 35, at 765.

current tests is over-inclusive of the only rationale for the doctrine that makes any sense—the need to protect truly military decisions from being questioned by courts.

C. Lack of Accountability has Led to Worse Standards of Care in Military Medicine

While the intent of *Feres* was to protect the military, by insulating the institution from liability, *Feres* as it currently exists harms not just individual service members, but also the institution by failing to incentivize change, undermining service member trust in the military, and creating lasting reputational damage. The current system of insulating the military––even from suits that have nothing to do with military decision-making––provides no economic incentive to counter negligence. Tort law generally serves as a vehicle not just to compensate victims, but also to deter potential injurers.[120] Under a law and economics lens, tort rules are optimal when they incentivize individuals to take "all reasonable (cost-justified) steps to minimize overall accident costs."[121]

None of these economic incentives exist inside the closed system of military medical care. Service members are captive to the system and are not permitted to obtain outside care without special permission.[122] Members who question the quality of their care or advocate for themselves can even risk official sanctions.[123] This limitation is even more concerning since military hospitals have a history of providing substandard care compared to their civilian counterparts.[124] A 2014 report on the quality of military medical care

[120] *See* Brou, *supra* note 15, at 33.
[121] THOMAS J. MICELI, THE ECONOMIC APPROACH TO LAW 39 (3rd ed. 2017).
[122] Sharon LaFraniere, *Service Members Are Left in Dark on Health Errors*, N.Y. TIMES (Apr. 19, 2015), https://www.nytimes.com/2015/04/20/us/service-members-are-left-in-dark-on-health-errors.html.
[123] *Id.* In 2007, one patient at Langley Air Force Base who pushed for care for her breast pain was met with a threat by the PA she saw to "place a note in her file that could have damaged her career if she came back again." *Id.* After subsequently being diagnosed with breast cancer, the patient reported the incident, but the hospital ignored her complaints and promoted the PA. *Id.*
[124] Sharon LaFraniere & Andrew W. Lehren, *Smaller Military Hospitals Said to Put Patients at Risk*, N.Y. TIMES (Sept. 1, 2014),

found that infants and mothers are more likely to suffer injuries during childbirth at a military hospital than at a civilian one.[125]

In the context of sexual assault cases, the failure to allow for civil recovery leaves victims with an internal system that has often been biased, inadequate, or impossible to navigate without threat to the victim's career.[126] Ironically, the perception that little accountability exists for perpetrators can attract sexual predators into the service. As one former Midshipman at the U.S. Naval Academy put it, "[t]he word is out! If you are a rapist, go into the military where you will be protected after you rape someone."[127]

Some have questioned whether the litigation risk would improve institutional accountability given that the military itself, instead of individual injurers, would be liable if service members were permitted to sue.[128] But the military is more sensitive to bad publicity and public opprobrium than other similar institutions, like local police forces, given that it constantly needs new recruits.[129] This sensitivity to a type of market pressure would create an incentive to improve care

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http://www.nytimes.com/2014/09/02/us/smaller-military-hospitals-said-to-put-patients-at-risk.html. Patient-safety expert, Dr. Lucian L. Leape, found the standard of care differences so disturbing that he "thinks [military hospitals] should be outlawed." *Id.*

[125] Sharon LaFraniere & Andrew W. Lehren, *U.S. Military Hospitals Are Ordered to Improve Care, Access and Safety*, N.Y. TIMES (Oct. 1, 2014), https://www.nytimes.com/2014/10/02/us/military-hospitals-veterans-affairs-chuck-hagel.html.

[126] *See* Katherine Shin, Note, *How the Feres Doctrine Prevents Cadets and Midshipmen of Military-Service Academies from Achieving Justice for Sexual Assault*, 87 FORDHAM L. REV. 767, 800-02 (2018).

[127] *Id.* at 769 (quoting *Overview of the Annual Report on Sexual Harassment and Violence at the Military Service Academies: Hearing Before the Subcomm. On Military Personnel of the H. Comm. on Armed Servs.*, 115th Cong. 64 (2017) (statement of Annie Kendzior)).

[128] *See* Joan M. Bernott, *Fairness and Feres: A Critique of the Presumption of Injustice*, 44 WASH & LEE L. REV. 51, 68 (1987).

[129] *See generally* Heather Mongilio, *Tough Recruiting Environment is About More than Low Unemployment Experts Say*, USNI NEWS (Dec. 2, 2022, 3:01 PM), https://news.usni.org/2022/12/01/tough-military-recruiting-environment-is-about-much-more-than-low-unemployment-experts-say.

if a lawsuit was possible to avoid, not only monetary, but also reputational fallout.

Finally, there is the objection that increased accountability might create a tradeoff with military excellence.[130] If *Feres* were repealed entirely, there might be reason to be concerned that safety might create tradeoffs with mission effectiveness. However, this argument is unpersuasive if liability only extends to suits for unsafe barracks, negligent driving, medical malpractice, or similar situations. Indeed, in the case of medical malpractice, increased accountability through potential litigation can only make the military more effective. The problem of military doctors providing a low standard of care to service members would be even worse if those same doctors were working in a war zone. The threat of litigation could help deter injuries while also making the military more effective.

The Court wanted to protect the relationship between service members and the military through *Feres*, but the doctrine undermines this relationship instead of preserving it. As Justice Scalia pointed out in his dissent in *Johnson*, nothing could be more calculated to undermine morale than service members realizing that their survivors can recover only a fraction in compensation for their death compared to civilian compensation schemes.[131]

The military already faces a serious recruiting crisis, and evidence indicates that scandals and lack of trust have made veterans less likely to recommend a military career to family members.[132] The example of Dez Del Barba, whose family legacy of service inspired him to pursue Army ROTC, is a powerful one.[133] Del Barba contracted a flesh-eating bacterial infection while at boot camp after he was refused treatment for the strep throat that causes the disease (medical staff told Del Barba to "[g]o the fuck away" despite his positive strep test).[134] Del Barba's mother, who herself served 23 years in the national guard, "never thought the Army would do to our son what they did to our

[130] Bernott, *supra* note 128, at 68.
[131] *Johnson*, 481 U.S. at 700, 703.
[132] Mongilio, *supra* note 129.
[133] Potter, *supra* note 1.
[134] *Id.*

son."[135] Del Barba lost half his leg due to the infection with a lawsuit barred by *Feres*.[136] A history of these types of preventable injuries to service members, and the impact on their friends, colleagues, and family, does not instill trust in the military or improve morale.

D. The Current Administrative Claims Process Lacks Accountability

The new claims process established by the Stayskal Act puts the DOD in charge of formulating the rules governing the adjudication of service member claims.[137] The final agency rule provides that an appeal panel will review the rejection of claims inside of the DOD.[138] This is concerning since this structure lacks the outside accountability necessary to prompt change.[139] The risk of reputational oversight that comes from outside scrutiny can be a powerful motivator for improved performance.[140] The impetus for the Stayskal Act itself was the negligent care that service members often receive at the hands of the military, and like any large institution, the DOD's primary incentive is to protect itself. Ironically, the Stayskal Act's requirement that the DOD provide a yearly report to Congress on the number of claims it pays may create a perverse incentive to approve fewer claims so that numbers remain low.[141] Indeed, preliminary results seem to indicate that this is occurring. Since the final rule's implementation, the majority of claims under the Stayskal Act have been denied.[142] Incredibly, in March of 2023, Stayskal's own claim was denied which one co-sponsor of the Stayskal Act called "a slap in the face."[143]

During the notice and comment process, the DOD received a comment proposing that final decisions be reviewed by the U.S. Court

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[135] *Id.*
[136] *Id.*
[137] *See* 10 U.S.C. § 2733a(f).
[138] Medical Malpractice Claims by Members of the Uniformed Services, 32 C.F.R. § 45.13 (2022).
[139] *See supra* Section III.C.
[140] *See supra* Section III.C.
[141] *See* 10 U.S.C. § 2733a(h).
[142] *See* Tiron, *supra* note 13; BenZvi *supra* note 13.
[143] Tiron, *supra* note 13.

of Appeals for Veterans Claims.[144] The agency rejected this proposal, reasoning that Congress had included no provision for third-party review and that it was trying to establish a "non-adversarial" process for resolving claims.[145] While a non-adversarial process may be desirable during the claims process itself, the lack of an outside appeal creates a process without meaningful accountability.

IV. PROPOSAL

A. The Supreme Court Should Adopt the "Nature of Plaintiff's Activity" Factor from the Ninth Circuit's Four Factor Test Along with the "Any Military Purpose" Test from Spletstoser v. Hyten *to Guide Future Interpretations of "Incident to Service"*

The Court should adopt the "nature of plaintiff's activity" factor from the four-factor test that the Ninth Circuit uses in evaluating *Feres* cases combined with the "any military purpose" test that the Ninth Circuit cited in its August decision in *Spletstoser v. Hyten*.[146] This change would effectively overturn much of the Court's prior precedent, but it would solve the inequities of the doctrine while better upholding the original intent of Congress and still technically leaving the doctrine of *Feres*—if not the case itself—intact.

Adopting the "nature of plaintiff's activity" factor in the Ninth Circuit test would bar suits involving legitimate chain of command concerns while allowing them to proceed where the plaintiff was engaging in activities that they would still be engaging in if they were a civilian. The Ninth Circuit interpreted the nature of activity factor as examining whether a service member was under the "compulsion of military orders or performing any sort of military mission" at the time of the incident.[147] This rationale has sometimes been stretched too far, for instance, in the boating accident case where the court concluded that the plaintiff was "subject to military orders and

[144] Medical Malpractice Claims by Members of the Uniformed Services, 87 Fed. Reg. 52446, 52447 (Aug. 26, 2022).
[145] *Id.*
[146] *Spletstoser*, 44 F.4th at 942.
[147] *Johnson*, 704 F.2d at 1439.

regulations" for the boat rental.[148] The Court, in adopting this factor, should tie its interpretation to "the sort of close military judgment call that the *Feres* doctrine was designed to insulate from judicial review" by drawing a bright line between military-related activity and activity that a civilian would also engage in like renting a boat.[149]

The Court has shown reluctance to reduce *Feres* decisions to a "bright-line rule," but in practice, a bright-line rule already exists in many circuits—if an injury has even the most tenuous of relationships to a plaintiff's military service, then recovery is barred.[150] This factor would require fact intensive analysis of each individual case, but it would result in decisions that are both more fair and more logical.

The second piece of the two-factor test that the Supreme Court should endorse in defining incident to service is the rationale that the Ninth Circuit affirmed in *Spletstoser v. Hyten*. The court held that the case could proceed since sexual assault could not "serve any military purpose."[151] Adopting this factor and rationale would also resolve the current confusion over handling sexual assault claims because it would make clear that sexual assault coverups, along with other similar criminal behavior, never serve a legitimate military purpose.

While this Comment does not advocate for overturning the concept of the *Feres* doctrine, applying this test would contradict the Court's holding in *Feres* itself since the original case barred recovery for two medical malpractice and one wrongful death claim due to a barracks fire.[152] However, it is possible for the Court to abrogate *Feres* itself, while still retaining the doctrine of barring certain types of service member claims. Indeed, the Court has shown a recent

[148] *Bon*, 802 F.2d at 1096.
[149] *Johnson*, 704 F.2d at 1440.
[150] United States v. Shearer, 473 U.S. 52, 57 (1985).
[151] *Spletstoser*, 44 F.4th at 942.
[152] *See Feres*, 340 U.S. at 137.

willingness to revise past precedents to create what it considers to be improved tests, and it should do so here.[153]

The two parts of this test would work together to narrow down the types of claims that would be barred by the *Feres* "incident to service" test. The "nature of plaintiff's activity" element would allow suits to proceed where a plaintiff is engaging in activity that they would also engage in as a civilian—for example undergoing medical care. The second part of the test would further narrow *Feres* immunity in situations where a plaintiff was engaged in a clearly military activity at the time of the incident, but there could be no legitimate military purpose to consider the action as incident to service—for instance, a sexual assault occurring while the plaintiff was on duty.

To be sure, this test would not eliminate the *Feres* doctrine entirely, and its application would likely lead to the same outcome in several cases where the doctrine attracted the most criticism, like *United States v. Johnson*. Applying this test of incident to service, the plaintiff's estate in *Johnson* would still be barred from suit under the first factor since the decedent was on an official Coast Guard rescue mission at the time of the incident.[154] The second factor—legitimate military purpose—would demand a more fact-intensive examination since the alleged negligence, in that case, involved the conduct of civilian FAA workers.[155]

Another example of a historic case that would still likely be barred from suit under this test is *Stencel Aerospace Engineering Corp. v. United States*, where a pilot was injured due to a malfunction of his aircraft, which he argued was partly due to the negligent specifications of the military.[156] Operating under the two-factor test, the first factor would weigh in favor of barring suit since the plaintiff was in the course of a military mission at the time of the incident—something that a civilian would not be engaged in. Under the second factor,

[153] *See e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); West Virginia v. EPA, 142 S. Ct. 2587 (2022).
[154] *See Johnson*, 481 U.S. at 683.
[155] *See id.*
[156] *See* Stencel Aerospace Eng'g Corp. v. United States, 431 U.S. 666, 667-68 (1977).

immunity would still apply if the military had a plausible claim that there was a legitimate military need for the specifications. To be sure, this test would still involve courts enquiring at least to a minimal degree into a military justification for a particular course of action, but as Justice Scalia pointed out in *Johnson*, this already occurs whenever a civilian files suit against the military.[157] The goal should be to protect mission-critical decisions, not for courts to blindly accept all statements of the military as gospel truth.

Likewise, in *United States v. Shearer*, the Court barred a case brought by the family of an army private killed by another service member while both were off-duty.[158] The suit alleged that the military failed to adequately supervise a servicemember who was known to be dangerous and that the military failed to "'exert a reasonably sufficient control over him . . . [or] warn other persons that he was at large.'"[159] The Court applied the *Feres* doctrine here because the alleged negligence had to do with "management of the military" and "basic choices about the discipline, supervision, and control of a serviceman" involving whether to "overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct."[160]

But while some plaintiffs would still be barred from relief under this test of incident to service, many others would be able to move forward with their lawsuits, particularly in cases that have stirred the most condemnation, such as medical malpractice, off-duty recreational injuries, negligent driving, and similar claims that are not unique to military life and have no strong connection to military decision making. In most cases, this test would also permit sexual assault claims to move forward.

[157] *See Johnson*, 481 U.S. at 700 (Scalia, J. dissenting).
[158] *See Shearer*, 473 U.S. at 53.
[159] *Id.* at 54.
[160] *Id.* at 58.

B. Congress Should Revise the DOD Claims Process to Allow for Review by the U.S. Court of Appeals for Veterans Claims

While this Comment advocates for the Supreme Court's adoption of the above two-factor test, the Court's longstanding reluctance to hear *Feres* cases makes it likely that the DOD administrative claims process will be the only way for service members to recover in the near future. Congress should modify the existing statute outlining the DOD claims process to include a review of final decisions by the U.S. Court of Appeals for Veterans Claims. The DOD is correct to point out that the statute does not currently speak to third-party review, so Congress's action is appropriate.[161]

Allowing a final appeal to an outside reviewing court once the internal DOD decision is issued would preserve the non-adversarial approach during the claims process itself while ensuring an outside review of the decision of whether to grant claims. This would mirror the current model for veteran's claims which are non-adversarial during the administrative claims process but turn into an adversarial process at the appeals level.[162] Revising the claims process to provide a reviewing court that is outside of the DOD would increase accountability so that the DOD does not continue to frustrate the purpose of the Stayskal Act by denying the "vast majority" of claims without any outside review or accountability.[163] Indeed, the idea of modifying the Stayskal Act to provide third party review has already gained at least some Congressional support.[164]

V. CONCLUSION

Feres jurisprudence has become increasingly unmoored from its only persuasive rationale—protecting military decisions from review by civil courts. Adopting the two-part test proposed in this Comment would refocus the meaning of incident to service on the

[161] Medical Malpractice Claims by Members of the Uniformed Services, 87 Fed. Reg. 52446, 52447 (Aug. 26, 2022).
[162] *See* Evans v. Shinseki, 25 Vet. App. 7, 14 (2011); 38 U.S.C. § 7252(a).
[163] BenZvi, *supra* note 13.
[164] *Id.* (Senator Markwayne Mullin, co-sponsor of the Stayskal Act, expressed support for revising the Act to include third party review).

most logical of the *Feres* rationales, while providing guidance for lower courts to follow. Making this change would not only streamline and clarify the Court's current *Feres* jurisprudence but would also go a long way toward addressing the systemic injustice the doctrine has caused. Additionally, Congress should modify the administrative claims process created by the Stayskal Act to provide service members with a reviewing court outside the DOD to ensure fairness and accountability in administering claims. While the Court is unlikely to hear a *Feres* case soon, Congress can and should act now to ensure that the "fox is [no longer] guarding the henhouse" and that no service member is forced to forego the rights guaranteed to other Americans.[165]

[165] *Id.;* Potter, *supra* note 1 ("[W]hy do we forgo all of the rights that we fight for? All the rights that I say I am defending, that you have asked me to instill in other countries, why do I lose those?").