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How the Feres Doctrine Prevents Cadets and Midshipmen of Military-Service Academies from Achieving Justice for Sexual Assault

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HOW THE *FERES* DOCTRINE PREVENTS CADETS AND MIDSHIPMEN OF MILITARY-SERVICE ACADEMIES FROM ACHIEVING JUSTICE FOR SEXUAL ASSAULT

*Katherine Shin**

Sixty-seven years ago, Feres v. United States foreclosed service members from pursuing claims under the Federal Tort Claims Act (FTCA) for “injuries incident to their service.” The progeny of case law that has since developed, the basis for what is known as the Feres doctrine, expanded the scope of what the Feres Court originally articulated as an injury incident to service. Now, cadets and midshipmen of military-service academies who allege that the government (i.e., the administration of military-service academies) was negligent in handling their sexual assaults are precluded from bringing an FTCA claim because their injuries are classified as “incident to their service” under Feres.

Cadets and midshipmen occupy an ambiguous status as both service members and students of military-service academies. Although cadets and midshipmen are considered service members under the law, they are also students of military-service academies where they will graduate with a bachelor’s degree and incur an active-duty obligation to serve in the officer corps of the U.S. Armed Forces after they graduate.

This Note focuses on the ambiguous status of cadets and midshipmen and argues that they are more akin to students of civilian colleges than active-duty service members. Unlike cadets and midshipmen, civilian students can raise Title IX claims against their universities for student-on-student sexual harassment or assault. By comparing how claims fare for cadets and midshipmen under Feres to the same claims by civilian students under Title IX, this Note argues that cadets and midshipmen do not have the same opportunity to achieve justice as civilian students in like circumstances.

This Note additionally examines the legal and policy arguments against extending the Feres doctrine to cadets and midshipmen. Considering the evidence that suggests when superiors allow sexual harassment it may lead to higher instances of sexual harassment and assault in the military ranks,

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this Note urges Congress to reexamine the FTCA to limit the scope of the judicially made Feres doctrine to exclude cadets and midshipmen from bringing FTCA claims for the negligent mismanagement of their sexual assaults by academy administration.

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INTRODUCTION

The word is out! If you are a rapist, go into the military where you will be protected after you rape someone.

—Annie Kendzior, former Midshipman at the U.S. Naval Academy¹

Around 1:00 a.m. on May 9, 2010,² Jane Doe,³ a college student, agreed to go out for a walk with a fellow student and friend, Robert Smith.⁴ On the surface, Doe’s night seems no different than what any young person might encounter as part of the typical U.S. college experience.

Jane Doe was a cadet at the United States Military Academy—commonly known as West Point.⁵ Doe had graduated at the top of her high school class and was nominated by one of her senators as the “top candidate in her state.”⁶ Doe applied to West Point in the hopes of attending a prestigious four-year college that produced women of “leadership, honor, and dignity.”⁷ Unlike graduates of civilian colleges, however, West Point cadets incur a military-

1. *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) [hereinafter *MSA Sexual Violence Hearing*] (statement of Annie Kendzior).

2. The facts set forth in this Introduction are based entirely upon the plaintiff’s amended complaint. In reviewing the district court’s decision in the dismissal stage, the Second Circuit took these allegations as true and construed them in the most favorable light to the plaintiff. *See Doe v. Hagenbeck*, 870 F.3d 36, 38–40, 50–51 (2d Cir. 2017).

3. Judge Alvin K. Hellerstein of the Southern District of New York granted Jane Doe’s motion to use a pseudonym for her court proceedings. The defendants did not object. *Doe v. Hagenbeck*, 98 F. Supp. 3d 672, 676 n.1 (S.D.N.Y. 2015).

4. The use of this pseudonym was also granted. *Hagenbeck*, 870 F.3d at 40 n.2.

5. *Id.*

6. Second Amended Complaint at 2, *Doe v. Hagenbeck*, 98 F. Supp. 3d 672 (S.D.N.Y. 2015) (No. 13 Civ. 2802 (AKH)), ECF No. 40. To apply for admission to West Point or any other military-service academy, a candidate must fulfill basic age, marital, medical, and physical requirements. The applicant must also receive a congressional nomination from either their representatives, one of their senators, or the Vice President of the United States. *Steps to Admissions: The West Point Application Process*, W. POINT, <https://www.usma.edu/admissions/SitePages/Steps.aspx> [https://perma.cc/JAZ3-TSFQ] (last visited Oct. 4, 2018).

7. Second Amended Complaint, *supra* note 6, at 2.

service obligation as commissioned officers of the U.S. Army upon graduation.⁸

At first, Doe excelled in everything West Point had to offer. She joined extracurricular activities and achieved high grades in her courses.⁹ One faculty member noted that Doe was “one of the most professional and internally motivated cadets I’ve worked with” and that he “would gladly recruit her to serve on my team, regardless of the mission.”¹⁰ However, over time, Doe began to feel increasingly isolated.¹¹ Doe was one of approximately two hundred women that made up 15 percent of her college class.¹² West Point’s hypermasculine culture, condoned and implicitly encouraged by school administrators and the policies they enacted, entailed constant gender-based harassment and degradation.¹³ For example, cadets participating in team-building activities would shout crude, sexually charged chants such as: “I wish that all the ladies / were holes in the road / and I was a dump truck / I’d fill ’em with my load . . . I wish that all the ladies / were statues of Venus / and I was a sculptor / I’d break ’em with my penis.”¹⁴ Faculty did not intervene to mitigate this hostile environment and sometimes encouraged it by sympathizing with heterosexual male cadets about the difficulty of getting sex at West Point.¹⁵ Some school policies echoed surprisingly archaic and discriminatory gender-based practices, for instance, requiring only female cadets to test for sexually transmitted diseases.¹⁶ West Point’s administrators not only implemented these policies, they also failed to protect female cadets who reported unwanted sexual contact from male supervisors.¹⁷ It comes as no surprise that, in the midst of this environment, Doe sought medical attention and was prescribed a mild sedative for anxiety.¹⁸

On this particular day, Doe took her anxiety medication before the early morning walk with Robert Smith.¹⁹ Unbeknownst to her, the medication began to interact with alcohol Smith provided, and Doe slipped into unconsciousness.²⁰ When she awoke, Doe found herself covered in dirt and bruises, with blood between her legs.²¹ The physical evidence indicated that Smith had raped her when she lost consciousness.²²

8. *Your Career After West Point*, W. POINT, <https://www.usma.edu/admissions/SitePages/Careers.aspx> [<https://perma.cc/M84X-WX3T>] (last visited Oct. 4, 2018).

9. Second Amended Complaint, *supra* note 6, at 4.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 5.

14. *Id.*

15. *Id.* at 6.

16. *Id.* at 8–9.

17. *Id.* at 7.

18. *Id.* at 10–11.

19. *Id.* at 11–12.

20. *Id.* at 12.

21. *Id.*

22. *Id.*

The West Point administrators' post-sexual-assault intervention only prolonged Doe's trauma. The school nurse failed to preserve any evidence of the sexual assault²³ and Doe met with West Point's designated sexual assault response counselor only once, who explained that Doe had the choice of filing either an unrestricted or a restricted report.²⁴ Doe decided to file a restricted report which did not call for official action and did not name the perpetrator.²⁵ Doe, like many other survivors of sexual assault at military-service academies, feared retaliation and tarnishing her reputation at West Point.²⁶ She did not want to be labeled as a "troublemaker" for breaking rules, being out past curfew, and for drinking alcohol with Smith.²⁷ Even though Doe had filed a report, she received only one email two weeks later from another counselor who had apparently been referred Doe's case from her original counselor.²⁸ West Point failed to extend Doe the support she needed.²⁹ Ultimately, Jane Doe chose to resign from West Point, and in August 2010, she was honorably discharged from the Army.³⁰

Sadly, Doe's story is not uncommon, even today. According to an annual report on sexual harassment and assault at military-service academies (MSAs), a total of eighty-six reports of sexual assault were made at the three MSAs from 2015 to 2016.³¹ Out of this total, twenty-six reports were filed at West Point.³² Compared to when Doe had attended West Point, the total number of reports made at West Point has *increased* by sixteen.³³ In addition, the total reported sexual assaults at all MSAs has increased by nine reports since Doe's attendance.³⁴ Although the Department of Defense (DoD) has hypothesized that the increased reporting may have been the result of more people willing to report assaults, the fact remains that sexual assault

23. *Id.*

24. Unlike unrestricted reports, restricted reports do not initiate official action and do not disclose the name of the perpetrator. *See Doe v. Hagenbeck*, 870 F.3d 36, 40 (2d Cir. 2017).

25. Second Amended Complaint, *supra* note 6, at 13.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 14.

30. *Id.*

31. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES, ACADEMIC PROGRAM YEAR 2015–2016, at 5–6 (2016), http://sapr.mil/public/docs/reports/MSA/APY_15-16/APY_15_16_MSA_Report_v2 [<https://perma.cc/7X4P-UYG7>]. The five federal military-service academies are: U.S. Military Academy, U.S. Naval Academy, U.S. Air Force Academy, U.S. Coast Guard Academy, and U.S. Merchant Marine Academy. This Note will specifically focus on the first three military-service academies because their graduates are commissioned into the traditional U.S. Armed Forces and, more importantly, because they are the oldest and most prestigious military institutions, viewed by the public as comparable to the most elite U.S. civilian colleges. *See infra* Part II.

32. U.S. DEP'T OF DEF., *supra* note 31, at 8.

33. *Id.*

34. *Id.*

is a persistent issue not only at MSAs, but in the U.S. Armed Forces generally.³⁵

Moreover, cadets and midshipmen (i.e., cadets at the U.S. Naval Academy; “midshipwomen” is never used) are limited in their abilities to pursue justice for sexual assault.³⁶ Due to their status as service members while attending their respective academies, cadets and midshipmen are denied the due process civilian college students would receive in similar situations.³⁷ This unequal treatment is puzzling when one considers that the three highly prestigious MSAs present themselves as equals to elite civilian colleges and in fact compete with them for blue-chip applicants.³⁸ Given the social salience and current controversy regarding sexual harassment and assault,³⁹ it is worth reexamining the basis of this differential treatment and reassessing whether it should continue as a matter of law.

This Note will examine the two common claims that military sexual assault victims pursue: (1) Federal Tort Claims Act (FTCA) claims against the United States for negligent supervision of federal employees, and (2) *Bivens*⁴⁰ claims against individual defendants for violations of the constitutionally protected right of equal protection stemming from gender discrimination. This Note will focus primarily on the *Feres*⁴¹ doctrine governing the underlying reasons for prohibiting military service members—including cadets and midshipmen at the MSAs—from pursuing these two categories of claims. Part I.A describes *Feres* and subsequent cases that have come to form the *Feres* doctrine. Part I.B surveys how subsequent U.S. Supreme Court decisions have shaped the *Feres* doctrine and how it is applied in lower courts.

Part II provides an overview of Title IX and discusses how other higher-education institutions approach sexual harassment and assault claims under Title IX. Part III evaluates how a hypothetical claim brought by a cadet under Title IX would play out and compares those results to how courts currently resolve such claims under the *Feres* doctrine.

By comparing MSAs and other higher-education institutions in light of Title IX and the *Feres* doctrine, Part IV argues that *Feres* raises legal and policy concerns when applied to cadets and midshipmen with sexual assault

35. See Lolita C. Baldor, *Sexual Assault Reports Up at Navy, Army Academies*, PBS NEWS HOUR (Mar. 15, 2017, 1:58 PM), <https://www.pbs.org/newshour/nation/sexual-assault-reports-navy-army-academies> [<https://perma.cc/Q85W-7CVY>]; Aria Bendix, *U.S. Naval and Military Academies See Rise in Sexual Assault*, ATLANTIC (Mar. 16, 2017), <https://www.theatlantic.com/education/archive/2017/03/us-naval-and-military-academies-see-rise-in-sexual-assault/519912/> [<https://perma.cc/98FD-5ZCN>]; Helene Cooper, *Reports of Sexual Assault Increase at Two Military Academies*, N.Y. TIMES (Mar. 15, 2017), <https://nyti.ms/2mKUqTi> [<https://perma.cc/YD5S-BKWW>].

36. See *infra* Part III.A.

37. See *infra* Part III.A.

38. See *infra* Part II.

39. See *infra* Part IV.B.1.

40. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

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

and discrimination claims. In particular, this Part explores how military superiors who allow sexual harassment contribute to an increased likelihood of sexual harassment or assaults and how this impacts cadets and midshipmen. Accordingly, Part V proposes a model statute Congress could enact to carve such issues arising at MSAs out from *Feres* doctrine coverage.

I. THE MILITARY: *FERES* DOCTRINE AND *BIVENS* CLAIMS

To understand how courts consider MSA sexual assault claims under the FTCA, it is important to understand the *Feres* doctrine and *Bivens* claim jurisprudence. Part I.A discusses the Federal Tort Claims Act and the Supreme Court decisions that substantially narrowed its application in *Feres* and its progeny. Part I.B then describes *Bivens*, which recognized an implied cause of action for damages on the part of individuals whose constitutional rights were violated, as well as subsequent *Bivens* case law.

A. The *Feres* Doctrine: FTCA Claims and *Bivens* Claims

The *Feres* doctrine first developed as a judicially made doctrine to address tort claims brought by service members against the government. In its infancy, the *Feres* doctrine recognized that service members may be injured by other federal employees, outside the scope of their activities as soldiers, and that their status as soldiers did not grant the government blanket immunity from service members' tort claims.⁴² However, as Parts I.A.1 and I.A.2 show, the Supreme Court, with each subsequent iteration, developed and expanded the *Feres* doctrine to consider more factors in its analysis of whether the service member could recover damages against the government, which in effect, narrowed the likelihood of recovery for service members who brought claims under the FTCA.

1. Laying the Foundation: *Brooks* and *Feres*

Congress enacted the Federal Tort Claims Act⁴³ to allow tort claims against the United States for injuries caused by federal employees⁴⁴ acting in

42. See *Brooks v. United States*, 337 U.S. 49, 50–52 (1949).

43. 28 U.S.C. §§ 2671–80 (2012). Federal courts have original jurisdiction for FTCA claims:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (2012); see also 28 U.S.C. § 2674 (establishing the scope of liability of the United States).

44. Under the FTCA, federal employees include “officers or employees of any federal agency, members of the military or naval forces of the United States, [and] members of the National Guard while engaged in training or duty” 28 U.S.C. § 2671.

their official capacity.⁴⁵ Within the military context, the Supreme Court held in *Brooks v. United States*⁴⁶ that members of the United States Armed Forces could pursue remedies under the FTCA and allowed military service members to recover against the government for injuries they sustained “not incident to their service.”⁴⁷

A year later, the Supreme Court defined what “incident to service” meant in *Feres v. United States*.⁴⁸ *Feres* was actually three separate cases⁴⁹ consolidated into one, each raising the question of whether an active-duty service member who sustained an injury due to the negligence of other military personnel and under other circumstances suffered an actionable wrong, can recover under the FTCA.⁵⁰ The Supreme Court gave a negative answer in all three cases, effectively rendering a vanishingly narrow interpretation of *Brooks*’s “not incident to service” rider, much to the dismay of present and future service member claimants.

The *Feres* Court’s reasoning behind its “incident to service” rule can be broken down into three parts. First, the Court considered whether recognizing the service members’ claims under the FTCA would create new causes of action that Congress did not intend. Second, the Court discussed how service members’ and the federal government’s relationship is defined by federal laws and how this relationship conflicts with the FTCA’s construction of state tort law to govern liability. Third, the Court discussed other statutory provisions that already provide remedies for service members’ injuries and used them as a reason to construe their ability to obtain FTCA remedies narrowly.

The *Feres* Court recognized that the FTCA was the “culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit.”⁵¹ These unjust consequences stemmed from the fact that, but for the happenstance that wrongs had been committed by a federal employee, the injured would have had an opportunity to seek legal recourse in court.⁵² Even though Congress enacted the FTCA to provide relief for the government employees’ tortious actions, Congress explicitly included a “private liabilities” test to make clear that the claims actionable under the FTCA were

45. Under the FTCA, military personnel acting in an official capacity means “acting in [the] line of duty.” *Id.*

46. 337 U.S. 49 (1949).

47. *See id.* at 50.

48. 340 U.S. 135, 144 (1950). To determine whether a service member’s claim is precluded under the *Feres* doctrine, courts analyze whether the service member’s injury was incident to service. *See, e.g.,* *United States v. Johnson*, 481 U.S. 681, 682 (1987). This Note will refer to this line of analysis as the “incident-to-service” test.

49. The three claimants were (1) the executrix of service member Feres recovering for his death due to a fire in his barracks at Pine Camp, New York; (2) plaintiff service member Jefferson who brought a medical malpractice suit after he was found to have a towel marked “Medical Department U.S. Army” in his stomach during a surgical procedure; and (3) the executrix of service member Griggs who died from alleged negligent medical treatment by army surgeons. *See Feres*, 340 U.S. at 136–37.

50. *Id.* at 138.

51. *Id.* at 139.

52. *See id.* at 139–40.

those that might also be brought against a private tortfeasor.⁵³ Put another way, Congress did not want to expose the government to “novel and unprecedented liabilities.”⁵⁴ Applying this principle—that Congress enacted the FTCA in part to limit the government’s liability to existing causes of action—the Court held in *Feres* that there were no laws on the books or doctrine in common law permitting military personnel to recover monetary damages from their superior officers or from the government, and therefore it could not validate the plaintiffs’ FTCA claims.⁵⁵

On the other hand, the Court did acknowledge that but for the status of the claimant as a service member and the government as a sovereign, private liability would exist for injuries arising from the negligence of federal employees.⁵⁶ However, the Court noted that “the liability assumed by the Government here is that created by ‘all the circumstances,’ not that which a few of the circumstances might create.”⁵⁷ Or, in simpler terms, the Court recognized that the claimant’s status as a service member and the government’s status as a sovereign could not be separated from the cause of action.

Further, the FTCA explicitly designates “the law of the place where the act or omission occurred” to determine the substantive law governing a tort claim.⁵⁸ The Court reasoned that since the military designates the location and the duration of a service member’s service, hinging the scope of liability for injuries incident to service on the location of where the injury occurred would not be rational due to the fact that each states’ limitation on liability differs drastically.⁵⁹ Moreover, as the Court articulated in *United States v. Standard Oil Co.*,⁶⁰ the service members’ relationship with the government is “distinctively federal in character” and ultimately controlled by federal, not state, authority.⁶¹

Lastly, the Court discussed the federal compensation systems in place that already provide remedies for discharged service members, widows, or surviving family members.⁶² The Court noted that two of the plaintiffs had received adequate payments from the government for the injuries the service members sustained.⁶³

53. *See id.* at 141. “The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674 (2012).

54. *See Feres*, 340 U.S. at 142.

55. *See id.*

56. *See id.* (recognizing that a civilian doctor would be subject to malpractice liability under similar circumstances).

57. *Id.*

58. *See id.* at 143 (quoting the FTCA).

59. *Id.*

60. 332 U.S. 301 (1947).

61. *See Feres*, 340 U.S. at 143–44 (quoting *Standard Oil Co.*, 332 U.S. at 305–06).

62. *Id.* at 145.

63. *See id.*

2. Three Broad Rationales: *Stencel Aero* and *Johnson*

The *Feres* Court's initial articulation of the incident-to-service rule did not last long. Over time, the Supreme Court clarified its initial incident-to-service rule with "three broad rationales." The Supreme Court first articulated the rationales in 1977 in *Stencel Aero Engineering Corp. v. United States*,⁶⁴ and relied on them for rulings ten years later in *United States v. Johnson*.⁶⁵ In *Stencel Aero*, the Supreme Court defined *Feres*'s three broad rationales as: (1) the federal relationship between the government and service members; (2) an alternative compensation scheme, such as the Veterans' Benefits Act (VBA) that provides for injuries sustained by service members; and (3)

[t]he 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 Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.⁶⁶

To summarize and for ease of reference, this Note will refer to the three rationales as: (1) the uniquely federal nature of military service; (2) the presence of alternative compensation schemes; and (3) the deleterious effect of superiors' legal liability on military good order and discipline.

Feres had articulated the first two rationales, but the scope was expanded in *Johnson*. The *Johnson* Court extended the *Feres* doctrine to injuries not only caused by other military personnel, but also injuries caused by federal civilian employees.⁶⁷ The Court explained that the military-or-not status of the alleged tortfeasor was irrelevant to the *Feres* analysis, which had been confined to alleged liability of other service members.⁶⁸ What was dispositive under *Feres*, rather, was the claimant's status as a member of the military.⁶⁹

The second rationale also mentioned in *Feres*—the existence of an alternative compensation system for service members—was expanded further under *Stencel Aero* and affirmed in *Johnson*. The *Johnson* Court noted that Congress most likely did not intend for service members to recover under the FTCA for injuries incident to service when the VBA already provided for such injuries.⁷⁰ Moreover, the *Johnson* Court rearticulated their finding in *Stencel Aero* that VBA compensation was the "upper limit of liability" the government was responsible for regarding injuries incident to service.⁷¹

64. 431 U.S. 666, 671–72 (1977).

65. 481 U.S. 681, 688–91 (1987).

66. *Stencel Aero*, 431 U.S. at 671–72 (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

67. *See Johnson*, 481 U.S. at 686–88.

68. *See id.*

69. *See id.* at 689.

70. *See id.* at 689–90.

71. *See id.* at 690.

Out of all the rationales articulated by the *Johnson* Court, the third rationale, new to the relevant jurisprudence, has become the most persuasive for federal courts applying the *Feres* doctrine.⁷² Unlike other occupations, the *Johnson* Court reasoned, the military requires the “obedience, unity, commitment, and esprit de corps” of its members to protect and serve the country.⁷³ Given this “specialized society,” the Court concluded that the judiciary should not interfere in the military’s mission by allowing tort claims by service members against their superiors that might undermine the need for good order and discipline in the military.⁷⁴

To summarize, in *Johnson*, the Supreme Court, while purporting to clarify *Feres*, effectively expanded its reach by foreclosing service members’ claims for injuries caused by civilian employees and simultaneously signaled to future claimants that the Court was unwilling to “undermine the commitment essential to effective service” and thereby “disrupt” military good order and discipline.⁷⁵

B. *Bivens* Claims and the *Feres* Doctrine

By the time *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁷⁶ was decided, the *Feres* doctrine had effectively closed off legal recourse in civilian courts under the FTCA for service members who sustained injuries “incident to their service,” broadly defined.⁷⁷ Given the background presumption of federal sovereign immunity that the FTCA waived, this meant that service members had no plausible option for seeking remedies in court for service-related injuries. *Bivens*, however, suggested a new route for military personnel to raise *constitutional* claims for money damages. But as the Court grafted *Feres* onto *Bivens* and narrowed *Bivens* itself, the promise revealed itself to be a false hope.

1. *Bivens*: A New Path to Recovery?

Bivens did not concern a tort claim between a service member and the government, but rather a constitutional claim brought by a private citizen against the government.⁷⁸ Webster Bivens alleged that agents of the Federal Bureau of Narcotics, acting in their official capacity, entered and searched

72. Even though the *Johnson* Court referred to three broad rationales, the first two rationales had already been found to be “no longer controlling” by the time *Johnson* was decided. See *Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 635 (5th Cir. 2008) (quoting *Shearer v. United States*, 473 U.S. 52, 58 n.4 (1985)).

73. *Johnson*, 481 U.S. at 691 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

74. See *id.* at 690–91 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

75. See *id.* at 691.

76. 403 U.S. 388 (1971).

77. *Bivens* was decided before the Supreme Court articulated the three broad rationales in *Stencel Aero* and *Johnson*. See Jonathan P. Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93, 96–98 (1990) (discussing the outcomes of *Feres* and *Johnson*).

78. 403 U.S. at 389.

his residence without a warrant, threatened to arrest his family, and subsequently arrested him without probable cause.⁷⁹ He claimed to have suffered injuries as a result of the agents' violations of his constitutional rights under the Fourth Amendment and sued for \$15,000 in damages from each agent.⁸⁰

The *Bivens* Court recognized that, even though the Fourth Amendment did not explicitly provide for recovery of damages,⁸¹ an award of money damages was an appropriate form of remedy given that *Bivens* had no other real options for redress for this constitutional violation.⁸² The Court specifically pointed out that recognizing an implied cause of action in the case was fitting because there were no "special factors counselling hesitation in the absence of affirmative action by Congress."⁸³ Furthermore, since Congress had not explicitly prohibited individuals from seeking damages for injuries arising from a violation of their Fourth Amendment rights, the Court found that it was within its power to find an implied cause of action.⁸⁴ *Bivens* thus promised an avenue for service members to bring claims for constitutional violations against the government, despite the absence of authorization by congressional statute (i.e., the FTCA, as construed by *Feres* and its progeny).

2. *Chappell v. Wallace*: "Caution, Red Light Ahead"

Although, in theory, service members might bring *Bivens* actions for service-related injuries implicating constitutionally protected rights, the Supreme Court eventually invoked Justice William Brennan's "special factors counselling hesitation" language in *Bivens* to foreclose that possibility.⁸⁵ In 1983, the Court, channeling *Feres*, held in *Chappell v. Wallace*⁸⁶ that service members could not bring an action for injuries incident to service, whether framed as constitutional or FTCA claims.⁸⁷

In *Chappell*, five enlisted members of the Navy brought an action seeking damages and other remedies against the officers who commanded the vessel on which they served.⁸⁸ They sued for damages under *Bivens*, alleging that their superior officers engaged in racial discrimination in violation of their Fifth Amendment rights.⁸⁹ The District Court for the Southern District of

79. *Id.*

80. *See id.* at 390.

81. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

82. *See Bivens*, 403 U.S. at 396 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

83. *Id.*

84. *See id.* at 397.

85. *Id.* at 396.

86. 462 U.S. 296 (1983).

87. *See id.* at 305.

88. *Id.* at 297.

89. *Id.* In the original suit, respondents brought a Fifth Amendment equal protection claim and a claim of conspiracy to deprive them of their civil rights under 42 U.S.C. § 1985(3)

California dismissed their claims because, among other reasons,⁹⁰ the decisions of the U.S. Navy were nonreviewable.⁹¹ On appeal, the Ninth Circuit reversed and found that *Bivens* authorized the sailors' claims and articulated factors for the lower courts to utilize when assessing *Bivens* claims.⁹²

The Supreme Court reversed, finding that it was inappropriate to extend *Bivens* due to the "special factors counselling hesitation" within the context of the military.⁹³ The Court reasoned that the "peculiar and special relationship of the soldier to his superiors,"⁹⁴ as well as the "need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice"⁹⁵ requires the judiciary to exercise caution before allowing a *Bivens* claim to proceed. The Court was elaborating, essentially, on the third rationale it would ratify five years later in *Johnson*: the special need for good order and discipline in the military and the deleterious effect that superiors' liability might have on it.⁹⁶ The *Chappell* Court reasoned that the nature of the military institution required freedom to discipline soldiers and sailors through the internal chain of command without undue interference from the courts.⁹⁷

Not only did the *Chappell* Court emphasize the judiciary's need to respect military good order and discipline, it also emphasized the Constitution's explicit delegation of regulation of the armed forces to Congress.⁹⁸ Due to the legislative and executive branches' constitutional powers over the armed forces, the *Chappell* Court invoked the separation-of-powers principle as an underlying reason for concluding that courts need to exercise great caution when recognizing an implied cause of action for service members absent explicit guidance from Congress.⁹⁹

(1976). *Id.* The Fifth Amendment constitutional claim is the only relevant claim for the purposes of this Note. The Supreme Court in *Davis v. Passman*, 442 U.S. 228 (1979), allowed Fifth Amendment due process claims to be brought under *Bivens*. See *Wallace v. Chappell*, 661 F.2d 729, 730 n.1 (9th Cir. 1981), *rev'd*, 462 U.S. 296 (1983).

90. The district court also reasoned that the service members had not exhausted available administrative remedies. See *Chappell*, 462 U.S. at 298.

91. See *id.*

92. See *id.*

93. *Id.*

94. *Id.* at 299 (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

95. *Id.* at 300.

96. Although the Supreme Court initially identified this factor in *Brown*, the Court did not specifically identify the military relationship and discipline as a *Feres* rationale until *Stencel Aero* and *Johnson*. See *supra* Part I.A.2.

97. See *Chappell*, 462 U.S. at 300.

98. See *id.* at 301. The Constitution grants plenary power to Congress "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cls. 12–14.

99. See *Chappell*, 462 U.S. at 302–04.

3. *United States v. Stanley*: “Do Not Enter”

The Supreme Court subsequently refocused its lens and narrowed *Bivens* claims even further in *United States v. Stanley*.¹⁰⁰ *Stanley* may be the apex of the *Feres* doctrine because its facts involved not just mere negligence but gross misconduct by the military against one of its members. The claimant in *Stanley* was a former service member who had unknowingly volunteered for a program where the army secretly administered him the hallucinogenic drug LSD to study its effects.¹⁰¹ Due to the LSD, the claimant began to suffer from hallucinations, memory loss, and severe personality changes that eventually led to his discharge from the military and dissolution of his marriage.¹⁰² Five years after his discharge, the claimant was finally notified that he had been secretly administered LSD and subsequently sought, but was unsuccessful in acquiring, administrative relief.¹⁰³

The claimant eventually resorted to civilian courts and filed a claim under the FTCA against the government. The District Court for the Southern District of Florida granted summary judgment for the government, finding that the claimant's injuries were incident to service and therefore not actionable under the FTCA.¹⁰⁴ The Fifth Circuit affirmed the dismissal of the FTCA claim, but allowed the claimant to raise a *Bivens* claim against the individual military officials and civilians of the drug program by pleading a violation of his Fifth Amendment right against deprivation of life and liberty without due process.¹⁰⁵

Although the district court granted partial summary judgment for the government due to the fact that the claimant could not identify the proper military officials to sue, the court of appeals gave the claimant an opportunity to amend his claim to name at least one defendant.¹⁰⁶ During the proceedings on the claimant's second amended complaint, the *Chappell* decision was released and the district court reaffirmed its previously vacated order.¹⁰⁷ Despite the fact that the *Chappell* and *Bivens* remedy was not available to service members because of the deleterious effect on military good order and discipline, the district court allowed the claimant's *Bivens* claim to proceed because it found that the special factors only applied to service members who brought a claim against a superior officer for “direct orders in the performance of military duty and the discipline and order necessary thereto.”¹⁰⁸ Moreover, the district court supported its decision by noting that there were no congressionally prescribed remedies in place for the type of

100. 483 U.S. 669 (1987).

101. *See id.* at 671.

102. *Id.*

103. *Id.* at 672.

104. *See id.*

105. *See id.*

106. *See id.* at 673–74. Stanley eventually named ten civilian defendants and “unknown individual federal and state agents and officers.” *Id.* at 674 n.2.

107. *See id.* at 675.

108. *See id.* (quoting *Stanley v. United States*, 574 F. Supp. 474, 479 (S.D. Fla. 1983)).

egregious injuries the claimant suffered.¹⁰⁹ The defendants sought interlocutory appeal which the Eleventh Circuit granted.¹¹⁰ The court of appeals affirmed and allowed the *Bivens* claim to proceed.¹¹¹

The Supreme Court granted certiorari and reversed.¹¹² The *Stanley* Court applied *Feres*'s incident-to-service bar to the claimant's constitutional claims for service-related injuries.¹¹³ In the majority opinion, Justice Antonin Scalia noted that "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters."¹¹⁴ The *Stanley* Court also found the lack of an alternative remedy for the claimant irrelevant in determining whether the courts should intrude upon military affairs.¹¹⁵ Thus, the "special factors counselling hesitation" became less of a cautionary measure and more of a secondary line of analysis. Due to the special factors, the Court held that both *Bivens* and FTCA claims should undergo the same *Feres* incident-to-service analysis.¹¹⁶

Although all justices unanimously agreed that Stanley was not entitled to recover under the FTCA due to the fact that his injuries were sustained incident to service,¹¹⁷ Justice Sandra Day O'Connor and Justice Brennan strongly dissented¹¹⁸ to the Court's decision to dismiss Stanley's constitutional claims to recover damages for the government subjecting Stanley to secret, nonconsensual human experimentation while he was serving in the U.S. Army.

Justice O'Connor emphasized that the government's conduct went beyond mere negligence, or even deliberate indifference, to conduct that was "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."¹¹⁹ She particularly admonished the Court for using *Chappell*'s "judicially crafted" rule to "insulate defendants from liability for deliberate and calculated exposure of otherwise healthy military personnel to medical experimentation without their consent . . . for no other reason than to gather information on the effect of [LSD] on human beings."¹²⁰

109. *See id.*

110. *Id.* While this case was pending, the Fifth Circuit was divided into the Fifth Circuit and Eleventh Circuit. *See Stanley v. United States*, 786 F.2d 1490, 1492–93 (11th Cir. 1986).

111. *See Stanley*, 483 U.S. at 675.

112. *Id.* at 676.

113. *See id.* at 681.

114. *Id.* at 682.

115. *See id.* at 683.

116. *See id.* at 683–84.

117. *See id.* at 670.

118. Justice O'Connor wrote an opinion concurring in part and dissenting in part. *Id.* at 708 (O'Connor, J., concurring in part and dissenting in part). Justice Brennan wrote a dissent which Justice Marshall joined in full and which Justice Stevens joined in part. *Id.* at 686 (Brennan, J., dissenting).

119. *Id.* at 709 (O'Connor, J., concurring in part and dissenting in part).

120. *Id.*

Further denouncing the Court's decision regarding Stanley's constitutional claim, Justice Brennan reproached the Court for "disregard[ing] the commands of our Constitution, and bow[ing] instead to the purported requirements of a different master, *military discipline*."¹²¹ Justice Brennan further highlighted the apparent hypocrisy in the United States military's actions, as it had criminally prosecuted Nazi officials for experimenting on human subjects only a few years earlier.¹²²

Stanley finally achieved some recourse in 1994 when Congress passed private legislation,¹²³ which established an arbitration panel to determine whether Stanley was entitled to damages and, if so, to determine the award amount (up to \$400,577).¹²⁴ The arbitration panel voted two to one for Stanley and awarded him the maximum amount of recovery allowed.¹²⁵ Therefore, although Stanley achieved legal recourse after nearly twenty years of legal battles, this was only possible due to Congress's own efforts and it can be assumed that remedy through private legislation is not a viable option for most service members who cannot recover under *Bivens*.

4. The *Feres* Doctrine in the Courts of Appeals: A Fork in the Road

Although the Supreme Court held that service members who sustained injuries incident to service are not entitled to recovery under the FTCA or *Bivens*, the Supreme Court did not clarify how to ascertain whether an injury arose incident to service.¹²⁶ Recall that the *Johnson* Court laid down three broad rationales to guide a court's *Feres* inquiry, but these rationales have proved too broad and thus difficult to apply.¹²⁷ As a result, federal courts over time have applied a case-by-case inquiry, which has led to inconsistent applications of the *Feres* doctrine across various circuits.¹²⁸ To sample *Feres*'s inconsistencies throughout the circuit courts, this section compares two approaches to the doctrine.

As the Fifth Circuit retraced the evolution of the *Feres* doctrine in *Parker v. United States*,¹²⁹ it noted the increasing murkiness of when an injury is incident to service.¹³⁰ To clarify the fact-based inquiry of the *Feres*

121. *Id.* at 686 (Brennan, J., dissenting).

122. *Id.* at 687–88.

123. Private laws only apply to a specific individual or group of people. *Public and Private Laws*, GOVINFO, <https://www.govinfo.gov/help/plaw> [<https://perma.cc/YD2H-ZTMF>] (last updated Jan. 22, 2018).

124. Bob Erlandson, *Ex-Sergeant Compensated for LSD Experiments Tests by Army, CIA Done at Edgewood*, BALT. SUN (Mar. 7, 1996), http://articles.baltimoresun.com/1996-03-07/news/1996067079_1_stanley-lsd-fort-knox [<https://perma.cc/P3QQ-UDG2>].

125. *Id.*

126. See Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 25–26 (2007).

127. See, e.g., *Taber v. Maine*, 67 F.3d 1029, 1038–43 (2d Cir. 1995) (recounting the inconsistencies of the *Feres* doctrine throughout its history and noting the difficulties of applying the doctrine).

128. See *id.*

129. 611 F.2d 1007 (5th Cir. 1980).

130. See *id.* at 1008–11.

doctrine's incident-to-service analysis, the *Parker* court articulated three factors to determine whether the service member's FTCA claim may proceed: (1) the duty status of the service member, (2) the place of injury, and (3) what activity the service member was engaged in at the time of the injury.¹³¹ This test—known as the *Parker* test—has become the standard inquiry for applying the *Feres* doctrine within the Fifth Circuit.¹³²

However, variations of the *Parker* test also exist depending on the factual circumstances of the service member's claim. For example, in service members' medical malpractice suits, the first factor, which inquires into the service member's duty status, "subsumes" the third factor, which inquires into the service member's activity.¹³³ The third factor then is replaced with an inquiry into whether the service member's medical treatment "was intended to return him to military service."¹³⁴ Thus, although the Fifth Circuit generally considers duty status the most critical factor of the *Parker* test, the third factor is the most important factor in determining whether the service member was injured incident to service in medical malpractice suits.¹³⁵

Unlike the Fifth Circuit, the Sixth Circuit takes a broader approach to the *Feres* doctrine by only relying upon the three broad rationales articulated in *Johnson*.¹³⁶ The Sixth Circuit noted in *Major v. United States*¹³⁷ that *Feres* had expanded

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, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.¹³⁸

Even in subsequent cases, the Sixth Circuit has not articulated a multiple-factor test, as the Fifth Circuit has, and instead bases its decisions on other circuit cases with similar factual inquiries to the case under consideration.¹³⁹

In sum, depending on where the service member raises his or her claim, the results might differ due to the differences in each circuit's *Feres* analysis. While some circuits may consider the duty status of the service member as the most pertinent factor in its analysis, other circuits choose to analyze the claim in a broader context. With circuit courts differing in application of the

131. *Id.* at 1013.

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

133. *Snell v. Simpson*, No. 09-992-BAJ-SCR, 2011 WL 13202679, at *4 (M.D. La. Sept. 2, 2011) (quoting *Schoemer v. United States*, 59 F.3d 26, 28–29 (5th Cir. 1995)).

134. *See id.* at *4 (quoting *Schoemer*, 59 F.3d at 28–29).

135. *See id.* at *5.

136. *See supra* Part I.A.2.

137. 835 F.2d 641 (6th Cir. 1987).

138. *Id.* at 644–45.

139. *See, e.g.,* *Lovely v. United States*, 570 F.3d 778, 783 (6th Cir. 2009); *Mackey v. United States*, 226 F.3d 773, 776 (6th Cir. 2000); *Skees v. United States*, 107 F.3d 421, 423–24 (6th Cir. 1997); *Wright v. United States*, No. 91-2404, 1992 WL 279314, at *3–4 (6th Cir. Oct. 9, 1992) (per curiam).

Feres doctrine, it is difficult to pinpoint the exact scope of the doctrine and to which specific circumstances the doctrine extends.

5. *Klay* and *Cioca*: Dead End

Although various circuit courts have been inconsistent with regards to their application of the *Feres* doctrine, they have achieved some consensus regarding the unavailability of *Bivens* claims for service members.

During 2013 and 2014, the Fourth Circuit and D.C. Circuit heard similar *Bivens* actions brought by former and current service members of various branches of the U.S. Armed Forces who had been sexually assaulted by their peers. Both cases, *Cioca v. Rumsfeld*¹⁴⁰ and *Klay v. Panetta*,¹⁴¹ alleged that the former Secretaries of Defense, Secretaries of the Navy, and the Commandants of the Marines¹⁴² violated the service members' constitutional rights, namely their First Amendment rights of free speech, Fifth Amendment rights of equal protection and due process, and Seventh Amendment rights to a jury trial.¹⁴³ Both cases had similar allegations: the plaintiffs suffered undue harm from the mismanagement of their sexual assaults by the military and government.¹⁴⁴

Although both courts noted the plaintiffs' suffering, both also recognized that no *Bivens* remedies were available for service members whose injuries were incident to service.¹⁴⁵ Both courts concluded that the incident-to-service test was colored by the fact that it was inappropriate for courts to "pass judgment on the merits of the Defendants' military decisions, which Supreme Court precedent has concluded is not within . . . judicial branch function."¹⁴⁶ In other words, the courts did not wish to recognize an implied cause of action and overstep separation-of-powers principles absent explicit congressional authorization.¹⁴⁷ The Fourth Circuit panel opined that "*Bivens* suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement."¹⁴⁸

Bivens actions are no longer an available route for service members to seek legal recourse for sexual assault during their military careers. However, unlike *Bivens* actions, which rest upon an implied cause of action, the FTCA explicitly allows service members to recover for injuries sustained *not*

140. 720 F.3d 505 (4th Cir. 2013).

141. 758 F.3d 369 (D.C. Cir. 2014).

142. Only *Klay* alleged claims against the former secretaries of the navy and commandants of the Marine Corps. *See id.* at 371.

143. Both *Cioca* and *Klay* alleged violation of Fifth Amendment rights to equal protection and due process, but only *Klay* alleged violation of the right to bodily integrity. *Compare Cioca*, 720 F.3d at 507, with *Klay*, 758 F.3d at 372.

144. *See Cioca*, 720 F.3d at 507; *see also Klay*, 758 F.3d at 371–72.

145. *See Cioca*, 720 F.3d at 517–18; *see also Klay*, 758 F.3d at 377.

146. *Cioca*, 720 F.3d at 516; *see also Klay*, 758 F.3d at 375.

147. *See Cioca*, 720 F.3d at 516; *see also Klay*, 758 F.3d at 375–76.

148. *Cioca*, 720 F.3d at 512 (quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION 621–22 (5th ed. 2007)).

incident to their service. Thus, in theory, despite *Feres*, a service member might yet prevail on a sexual assault FTCA claim so long as he or she can establish that the injuries were not incident to service.

II. MILITARY-SERVICE ACADEMIES: WHAT DO WE DO WITH THEM?

Under § 3075(b)(2),¹⁴⁹ cadets and professors of West Point are part of the United States Army.¹⁵⁰ Similar statutes cover professors, cadets, and midshipmen enrolled at the U.S. Naval Academy (USNA) in Annapolis, Maryland, and the U.S. Air Force Academy (USAFA) in Colorado Springs, Colorado. Since cadets and midshipmen are members of the U.S. Armed Forces, courts do not distinguish between the military in general and MSAs in their analysis of FTCA claims brought by cadets or midshipmen of MSAs, including in their application of the *Feres* doctrine.

Before proceeding with how MSAs are analyzed under *Feres*, it is important to lay out the basic characteristics of MSAs. MSAs are quintessentially different than the active-duty branches of the military and in certain ways are more akin to civilian colleges than the military at large. For example, all three MSAs are accredited universities¹⁵¹ that grant cadets and midshipmen bachelor's degrees upon graduation.¹⁵² All three MSAs offer similar academic programs, with more than twenty majors ranging from science and engineering to humanities.¹⁵³ Similar to other institutions of higher learning, the MSAs also offer various extracurricular activities such as clubs and athletic teams for cadets and midshipmen to participate in during their four years at the academies.¹⁵⁴ And, as a practical matter, the three

149. 10 U.S.C. § 3075(b)(2) (2012).

150. 6 C.J.S. *Armed Services* § 28 (2018).

151. West Point and the Naval Academy are accredited by the Middle States Commission on Higher Education while the Air Force Academy is accredited by the Higher Learning Commission. See *Accreditation*, U.S. NAVAL ACAD., <https://www.usna.edu/Academics/Accreditation-Dean/Accreditation.php> [<https://perma.cc/TE3V-YFRM>] (last visited Oct. 4, 2018); *Graduating from the Academy: Curriculum*, U.S.A.F. ACAD., <https://www.usafa.edu/academics/registrar/curriculum/> [<https://perma.cc/Z6V4-MZPL>] (last visited Oct. 4, 2018); *Welcome to the Office of the Dean*, U.S. MIL. ACAD., <https://www.usma.edu/academics/SitePages/Home.aspx> [<https://perma.cc/5HH4-WXXG>] (last visited Oct. 4, 2018).

152. See *About USNA*, U.S. NAVAL ACAD., <https://www.usna.edu/About/index.php> [<https://perma.cc/W2X5-7FEF>] (last visited Oct. 4, 2018); *About West Point*, U.S. MIL. ACAD., <https://www.westpoint.edu/About/SitePages/Home.aspx> [<https://perma.cc/J5KB-RR8F>] (last visited Oct. 4, 2018); *Graduating from the Academy: Curriculum*, *supra* note 151.

153. See *Academics*, U.S. NAVAL ACAD., <https://www.usna.edu/Academics/Majors-and-Courses/index.php> [<https://perma.cc/X6JK-TG2G>] (last visited Oct. 4, 2018); *Academics at a Different Altitude*, U.S.A.F. ACAD., <https://www.usafa.edu/academics/> [<https://perma.cc/6U4D-UAVU>] (last visited Oct. 4, 2018); *Curriculum*, U.S. MIL. ACAD., <https://www.westpoint.edu/curriculum/SitePages/Home.aspx> [<https://perma.cc/8Y8G-UFG5>] (last visited Oct. 4, 2018).

154. See *Midshipman Interests*, U.S. NAVAL ACAD., <https://www.usna.edu/MidActivities/> [<https://perma.cc/8JUT-V6E8>] (last visited Oct. 4, 2018); *Welcome to the Directorate of Cadet Activities*, U.S. MIL. ACAD., <https://www.westpoint.edu/dca/SitePages/Home.aspx> [<https://perma.cc/72G9-F2UC>] (last visited Oct. 4, 2018); *What Life Is Like at the Academy's Altitude*, U.S.A.F. ACAD., <https://www.usafa.edu/cadet-life/> [<https://perma.cc/SY2F-TU6D>] (last visited Oct. 4, 2018).

traditional MSAs compete for blue-chip students with elite civilian colleges, and they in fact advertise themselves as a reasonable, free option for a high-quality college education comparable to the civilian institutions.¹⁵⁵

However, MSAs differ from civilian institutions of higher learning in certain respects.¹⁵⁶ Unlike students at civilian universities, cadets and midshipmen are required by law to serve for at least five years as active-duty commissioned officers of the military upon graduation.¹⁵⁷ However, the service obligation does not vest until after the second year of studies at an MSA is completed.¹⁵⁸ To prepare the cadets and midshipmen for their roles as officers of the U.S. Armed Forces, all MSAs incorporate military and physical training into their curricula alongside their academic programs.¹⁵⁹ Hence, unlike civilian university students, cadets and midshipmen follow a strict daily schedule that requires all cadets and midshipmen to wake up, eat, learn, and train during the same regimented hours.¹⁶⁰ In addition to the strict military and physical training regimens during the academic year, cadets and midshipmen are required to participate in military training for a few weeks during the summer between each academic year.¹⁶¹ Thus, MSAs not only purport to offer top-quality university education for their cadets and midshipmen, but their required military training and education component differentiates them from other civilian institutions and resembles the active-duty branches of the military. In effect, the cadets and midshipmen of MSAs occupy a gray area: they are simultaneously fledgling active-duty officers of

155. *USMA Admissions—the Corps Starts Here!*, U.S. MIL. ACAD., <https://www.westpoint.edu/admissions/SitePages/Home.aspx> [https://perma.cc/THN2-R5FX] (last visited Oct. 4, 2018).

156. This denotes other state-run military higher-education institutions such as senior military colleges (e.g., Virginia Military Institute) that are civilian colleges that require all its students to enroll in a Reserve Officer Training Corps (ROTC) program. See *Military Colleges and Academies*, USA.GOV, <https://www.usa.gov/military-colleges> [https://perma.cc/S3B7-THQB] (last updated Mar. 13, 2018); *Service Academies & Senior Military Colleges*, TODAY'S MIL., <https://todaysmilitary.com/training/service-academies-and-military-colleges> [https://perma.cc/AFB6-8HY3] (last visited Oct. 4, 2018).

157. See 10 U.S.C. §§ 4348(a)(2)(A)–(B), 6959(a)(2)(A)–(B), 9348(a)(2)(A)–(B) (2012).

158. *Doe v. Hagenbeck*, 870 F.3d 36, 51 (2d Cir. 2017) (Chin, J., dissenting).

159. See *Academics*, *supra* note 153; *Applying to College Is a Big Step*, U.S. MIL. ACAD., https://www.westpoint.edu/admissions/SitePages/Pros_Cadets.aspx [https://perma.cc/NJD3-AYFX] (last visited Oct. 4, 2018); *Military Education*, U.S.A.F. ACAD., <https://www.usafa.edu/cadet-life/military/military-education/> [https://perma.cc/54LY-BEDU] (last visited Oct. 4, 2018).

160. See *A Day in the Life*, U.S.A.F. ACAD., <https://www.usafa.edu/cadet-life/day-in-the-life/> [https://perma.cc/7H5D-N5KS] (last visited Oct. 4, 2018); *Cadet Life*, ARMY W. POINT, http://goarmywestpoint.com/sports/2015/7/14/gameday_0714153634.aspx?prl=635724706363055257 [https://perma.cc/NEB5-8J2S] (last visited Oct. 4, 2018); *Daily Schedule*, U.S. NAVAL ACAD., <https://www.usna.edu/Admissions/Student-Life/Daily-Schedule.php> [https://perma.cc/AJF9-Z5HG] (last visited Oct. 4, 2018).

161. See *Cadet Schedule*, U.S.A.F. ACAD., <http://usafa.smartcatalogiq.com/en/2015-2016/Catalog/Cadet-Life/Cadet-Schedule> [https://perma.cc/M2FU-GY6F] (last visited Oct. 4, 2018); *Cadet Summer Training (CST)*, U.S. MIL. ACAD., [https://www.westpoint.edu/dmi/SitePages/Cadet%20Summer%20Training%20\(CST\).aspx](https://www.westpoint.edu/dmi/SitePages/Cadet%20Summer%20Training%20(CST).aspx) [https://perma.cc/M89G-S8MJ] (last visited Oct. 4, 2018); *Summer at USNA*, U.S. NAVAL ACAD., <https://www.usna.edu/Admissions/Academics/Summer-At-USNA.php> [https://perma.cc/HQS7-4V8V] (last visited Oct. 4, 2018).

the U.S. Armed Forces and also students at accredited universities pursuing college degrees.

Because these institutions operate both as educational and military establishments, it is important to understand how both types of establishments are regulated. First, Part II.A discusses how educational institutions are evaluated under Title IX for issues relating to gender discrimination and sexual assault. Part II.B then discusses how a hypothetical claim would be resolved if MSAs were subject to Title IX.

A. Educational Institutions and Title IX

For educational institutions receiving federal funding, Title IX of the Education Amendments of 1972¹⁶² (“Title IX”) prohibits gender discrimination in the institutions’ programs and activities.¹⁶³ Title IX provides exceptions ranging from educational institutions of religious organizations to social fraternities and sororities in institutions of higher learning.¹⁶⁴ In § 1681(a)(4), Title IX specifically excludes all institutions whose primary purpose is to train individuals for U.S. military service.¹⁶⁵ Hence, even though MSAs are federally funded institutions of higher learning, these institutions can discriminate based upon gender under Title IX, and cadets and midshipmen cannot pursue claims under Title IX for injuries sustained from gender discrimination at the MSAs.

B. Title IX Basics

To understand how civilian students’ remedies for sexual assault under Title IX differ from the remedies cadets and midshipmen of MSAs can pursue under the FTCA, it is first important to understand how Title IX operates and what factors are considered in order to hold schools liable for gender discrimination under this statute. Parts II.B.1 and II.B.2 examine how, under Title IX, schools may be held liable for damages for school-employee-on-student harassment, while Parts II.B.3 and II.B.4 discuss how Title IX may be applied to hold schools, including higher-education institutions, liable for student-on-student harassment that occurred on school grounds.

162. 20 U.S.C. § 1681 (2012). Section 1681(a) states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Section 1681(c) defines educational institutions as

any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

163. *Id.* § 1681; *see also* 14 C.J.S. *Civil Rights* § 165 (2018).

164. For more exceptions contained in Title IX, *see* 20 U.S.C. § 1681(a)(1)–(9).

165. *Id.* § 1681(a)(4).

1. *Cannon v. University of Chicago*: Implied Causes of Action

Although MSAs are not covered under Title IX, it is important to understand how other similar educational institutions are analyzed under Title IX for claims brought by students for sexual assault.

Soon after Title IX was enacted, the Supreme Court in *Cannon v. University of Chicago*¹⁶⁶ faced the issue of whether individuals had a private cause of action against universities under Title IX, even though the statute did not explicitly provide for one.¹⁶⁷ To determine whether Congress intended an implied cause of action under Title IX, the Court focused on a similarly worded statute, Title VI of the Civil Rights Act of 1964.¹⁶⁸ By finding that Title VI provided an implied cause of action for individuals who had been discriminated against based upon race, color, or national origin, the Court found that Congress likely intended the same under Title IX for gender discrimination.¹⁶⁹ Moreover, since the statutes utilized identical language focusing on the benefitted class rather than language prohibiting racial or gender discrimination in federally assisted programs, the Court inferred that Congress also intended to provide a cause of action for the benefitted class under Title IX.¹⁷⁰

It is important to note two factors the Court considered in addition to the language indicating an implied cause of action. First, the Court inferred that Congress did not intend to endorse the use of public funds to financially support educational institutions engaged in discriminatory practices.¹⁷¹ Second, the Court noted that recognizing a private cause of action under Title IX would not overburden universities.¹⁷² Specifically, the Court pointed out that Title VI had not produced litigation “so costly or voluminous that either the academic community or the courts have been unduly burdened.”¹⁷³ Furthermore, the Court found that recognizing Title IX actions would not result in university administrators being “so concerned about the risk of litigation” so as to “fail to discharge their important responsibilities in . . . [a] professional manner.”¹⁷⁴ In sum, the Court found not only that the implied cause of action under Title IX provided a necessary remedy for individuals who were injured by gender discrimination, but also noted that university administrations were fully capable of handling any Title IX litigation.

166. 441 U.S. 677 (1979).

167. *Id.* at 683.

168. *See id.* at 694–98. Title VI states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2012).

169. *See Cannon*, 441 U.S. at 690.

170. *See id.* at 690–93.

171. *See id.* at 692–93, 704.

172. *See id.* at 709–10.

173. *Id.* at 709.

174. *Id.* at 710.

2. *Franklin v. Gwinnett County Public Schools*:
Awarding Damages Under Title IX

Following *Cannon*'s recognition of an implied cause of action under Title IX, the Supreme Court in *Franklin v. Gwinnett County Public Schools*¹⁷⁵ held that damages were an available remedy under Title IX.¹⁷⁶ The Court reasoned that since Congress had not expressly stated that monetary damages were unavailable under Title IX, the Court retained the power to allow for any appropriate relief.¹⁷⁷

The claimant in *Franklin* was a student who was repeatedly sexually harassed and assaulted by the school's sports coach.¹⁷⁸ When the student notified the school's administrators and asked them to address the situation, the school did not pursue any actions against the coach and attempted to discourage the student from pressing charges against him.¹⁷⁹ Along with its holding that damages were available under Title IX, the Court also confirmed that the school district had a duty under Title IX to ensure that its staff did not discriminate based on sex.¹⁸⁰ Namely, the school district had a duty to ensure that its staff were not engaging in sexual harassment—a type of gender discrimination.¹⁸¹

Similar to the separation-of-powers concerns discussed in *Feres* and *Bivens*, the Court was once again faced with the question whether allowing damages as a remedy for Title IX would result in an undue expansion of judicial power.¹⁸² The Court answered this inquiry in the negative, focusing on the difference between finding a cause of action and its power to determine appropriate remedies.¹⁸³ In particular, the Court argued that refusing to allow for damages would render any causes of action authorized (explicitly or implicitly) by Congress useless and result in greater harm to separation-of-power principles than “selective abdication” of the Court's judicial authority.¹⁸⁴ In particular, the Court emphasized, “From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court”¹⁸⁵

175. 503 U.S. 60 (1992).

176. *Id.* at 76.

177. *See id.* at 70–71.

178. *See id.* at 63.

179. *See id.* at 64.

180. *See id.* at 75.

181. *See id.* (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

182. *See id.* at 73.

183. *See id.* at 73–74.

184. *See id.* at 74.

185. *Id.* at 66.

3. *Gebser* and *Davis*: Deliberate Indifference and School Duties Regarding Student-on-Student Sexual Harassment

Since the Supreme Court allowed individuals to recover damages against school administrations under Title IX, the Court had to further define to what extent the administration could be held liable. In *Gebser v. Lago Vista Independent School District*,¹⁸⁶ the Court set the standard of care required for school administrators under Title IX by holding that schools can be held liable if the school, with knowledge of the acts of sexual harassment by its staff, had acted with “deliberate[] indifferen[ce].”¹⁸⁷

The Supreme Court further clarified *Gebser*’s “deliberate indifference” language in the context of student-on-student sexual harassment in *Davis v. Monroe County Board of Education*.¹⁸⁸ The *Davis* Court laid out a framework to be satisfied in order to find schools liable for student-on-student harassment.¹⁸⁹ Within this framework, the Court held that a federally funded school is liable only when (1) the alleged harassment was “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit,” and (2) with knowledge of this harassment, the school acted with deliberate indifference.¹⁹⁰

The *Davis* Court further explained that the “deliberate indifference” must have at least caused or exposed the student to the alleged sexual harassment.¹⁹¹ Moreover, in the context of student-on-student harassment, schools satisfy the “deliberate indifference” requirement when their response “or lack thereof is clearly unreasonable in light of the known circumstances.”¹⁹² The *Davis* Court also limited a school’s scope of liability to situations where the school had considerable control, not only over the student-harasser, but also the context in which the harassment occurred.¹⁹³ Thus, the *Davis* Court ensured that schools that acted reasonably in response to the alleged harassment would not be held liable for student-on-student harassment, at least to the extent over which the school had control.

4. *Williams v. Board of Regents of the University System of Georgia*: Applying Title IX to Sexual Harassment at Universities

The Supreme Court articulated the “deliberate indifference” standard of liability for teacher-on-student harassment in *Gebser* and adopted the same standard in *Davis* for student-on-student harassment. Later, in 2007, the Eleventh Circuit applied this Title IX analysis in *Williams v. Board of*

186. 524 U.S. 274 (1998).

187. *See id.* at 277.

188. 526 U.S. 629 (1999).

189. *See id.* at 633.

190. *Id.*

191. *See id.* at 644–45.

192. *See id.* at 648.

193. *See id.* at 645.

*Regents of the University System of Georgia*¹⁹⁴ to alleged sexual assault in the university context.

The plaintiff, Tiffany Williams, was a student at the University of Georgia (“UGA”) who was sexually assaulted by three student-athletes.¹⁹⁵ Although the plaintiff agreed to consensual sex with the first perpetrator, Tony Cole, she was not aware that Cole allowed his friend, Brandon Williams, to wait in the closet to rape the plaintiff after Cole.¹⁹⁶ While Brandon Williams was assaulting the plaintiff, Cole called another friend, Steven Thomas, telling him they were “running a train” on the plaintiff.¹⁹⁷ Cole invited Thomas to his room and Thomas proceeded to rape the plaintiff after Brandon Williams.¹⁹⁸ The three perpetrators were charged criminally and under the university’s judiciary panel. Yet, all three were either acquitted or not disciplined.¹⁹⁹

The plaintiff eventually brought Title IX claims against UGA, the Board of Regents of UGA, and the University of Georgia Athletic Association (UGAA).²⁰⁰ The district court ultimately dismissed all claims and the plaintiff appealed.²⁰¹

In evaluating whether UGA and UGAA were in violation of Title IX and liable for student-on-student harassment, the Eleventh Circuit outlined four elements discussed in *Gebser* and *Davis*. The court concluded that the plaintiff must establish that: (1) the institutional defendants are federal-funding recipients; (2) the defendants had actual knowledge of the alleged harassment; (3) the defendants acted with “deliberate indifference” that “subjected” the plaintiff to discrimination; and (4) the discrimination was “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”²⁰²

The facts of the case eventually showed that the plaintiff’s Title IX claims should not have been dismissed. After the first element was established, the Eleventh Circuit found that UGA and UGAA had actual knowledge of the harassment.²⁰³ Not only had UGA and UGAA recruited Cole into their athletic department knowing that he had sexually assaulted other women at the University of Rhode Island and had been charged with sexual misconduct

194. 477 F.3d 1282 (11th Cir. 2007).

195. *See id.* at 1288.

196. *See id.*

197. *See id.*

198. *See id.*

199. *See id.* at 1289.

200. The plaintiff brought four claims against the individual rapists, UGA and its board of regents, and the UGAA. For the purposes of this Note, only the Title IX claim against UGA and UGAA are relevant and will be discussed. *Id.* at 1290.

201. *See id.* at 1290–91. The Eleventh Circuit found that the Title IX claim against the board of regents was properly dismissed. *Id.* at 1293–94.

202. *See id.* at 1293 (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

203. *See id.* at 1294. As discussed previously, sexual harassment is considered a form of gender discrimination. *See supra* Part II.A.2.

at Wabash Valley College,²⁰⁴ but they were also aware of the rape of the plaintiff by the three defendants.²⁰⁵

Moreover, the Eleventh Circuit found that the plaintiff had satisfied both the third and fourth elements. Although the UGA police had provided a preliminary report within forty-eight hours of the incident and a full report within three months of the incident, UGA acted with “deliberate indifference” when it waited eight months to bring any disciplinary hearings against the defendants.²⁰⁶ Furthermore, UGA and UGAA, with full knowledge of Cole’s record, did not adequately ensure that the student-athletes were informed of the sexual harassment policy, and their failure to “supervise its student-athletes subjected Williams to this further harassment and caused Williams to be the victim of a conspiracy between Cole, Brandon Williams, and Thomas to sexually assault and rape her.”²⁰⁷

Due to UGA and UGAA’s “deliberate indifference,” the court reasoned, the university’s discriminatory actions effectively barred her from continuing her education at UGA.²⁰⁸ Although the plaintiff withdrew from UGA after the incident, UGA failed to take any actions against the three defendants that would have prevented them from attacking the plaintiff if she had chosen to return to continue her education at UGA.²⁰⁹

While the *Davis* Court recognized that discrimination must “be more widespread than a single instance of one-on-one peer harassment,” the Eleventh Circuit found that the plaintiff had satisfied this element.²¹⁰ Given the allegations that the defendants conspired a serial group rape of the plaintiff spanning two hours, the Court found that the severity of this series of events was objectively offensive.

In sum, the Eleventh Circuit found that UGA and UGAA were liable because they had knowledge of the fact that Cole was a known predator and, with this knowledge, failed to supervise him. For the other two student-athletes, the administrators also failed to provide adequate education of the athletic program’s sexual harassment policy. In light of these factors, the Eleventh Circuit held UGA and UGAA liable for the student-athletes’ rape of the plaintiff and awarded her Title IX damages.

III. HOW MSA CONDUCT WOULD FARE UNDER A DIFFERENT STANDARD

Title IX effectively provides relief for individuals seeking to bring actions against educational institutions receiving federal funding. It is clear that MSAs are exempt under Title IX. But should they be allowed this leeway? As discussed previously, when a cadet or midshipman brings a tort or

204. *See id.* at 1290.

205. *See id.* at 1294.

206. *See id.* at 1296–97.

207. *Id.* at 1296.

208. *See id.* at 1298.

209. *See id.*

210. *See id.* at 1297–98 (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 652–53 (1999)).

constitutional claim against the United States, the *Feres* doctrine will apply and courts will determine whether the injury that arose was “incident to service.” However, Title IX seems to provide a fairer and more just result for students who choose to pursue claims against school administrations regarding student-on-student sexual assault. Amending Title IX to allow cadets or midshipmen to recover would pave the way for achieving justice for individuals facing these issues at MSAs.

By considering the facts of *Doe v. Hagenbeck*,²¹¹ summarized in the Introduction to this Note, this Part first delves into the Southern District of New York’s *Feres* analysis of Jane Doe’s claim and the outcome of Doe’s claim on appeal in the Second Circuit. This Part then analyzes the facts of *Doe* under Title IX to see how Doe’s claim may have fared if she were a student in a federally funded civilian higher-education institution, instead of West Point.

A. *The Application of Feres to Military-Service Academies*

In April 2013, Jane Doe filed a complaint in the District Court for the Southern District of New York against the United States, Lieutenant General Franklin Lee Hagenbeck (then the superintendent of West Point and chair of West Point’s Sexual Assault Review Board), and Brigadier General William E. Rapp (then the commandant of cadets and in charge of cadet training and administration at West Point). Doe brought four causes of action: (1) a *Bivens* claim against individual defendants for due process violations under the Fifth Amendment; (2) a *Bivens* claim against individual defendants for equal protection violations under the Fifth Amendment; (3) a claim against the United States for breach of the covenant of good faith and fair dealing under the “Little Tucker Act”;²¹² and (4) an FTCA claim against the United States for negligence, negligent supervision and training, negligent infliction of emotional distress, and abuse of process.²¹³ Judge Alvin K. Hellerstein dismissed all but the second equal protection *Bivens* claim,²¹⁴ permitting it to proceed on the ground that Doe’s complaint did not “take issue with the ‘military disciplining structure’”²¹⁵ and therefore did not implicate the two main judicial concerns for prohibiting *Bivens* claims: “the need to preserve the military disciplinary structure and prevent judicial involvement in sensitive military matters.”²¹⁶ Or, as Judge Hellerstein put it, “All she asks

211. 98 F. Supp. 3d 672 (S.D.N.Y. 2015), *rev’d in part*, 870 F.3d 36 (2d Cir. 2017).

212. 28 U.S.C. § 1346(a)(2) (2012).

213. *See Doe v. Hagenbeck*, 870 F.3d 36, 40–41 (2d Cir. 2017).

214. That Judge Hellerstein’s dismissal of Jane Doe’s FTCA claim was based on an exception provided for in § 2680(a) goes beyond the scope of this Note. Other circuit courts who have decided FTCA claims brought by cadets and midshipmen have used the *Feres* doctrine to dismiss FTCA claims. *See generally, e.g.,* Ruggiero v. United States, 162 F. App’x 140 (3d Cir. 2006); Cummings v. Dep’t of Navy, 279 F.3d 1051 (D.C. Cir. 2002); Wake v. United States, 89 F.3d 53 (2d Cir. 1996); Collins v. United States, 642 F.2d 217 (7th Cir. 1981); Morse v. West, 975 F. Supp. 1379 (D. Colo. 1997).

215. *Hagenbeck*, 98 F. Supp. 3d at 688 (quoting *Wake*, 89 F.3d at 57).

216. *Id.* (quoting *Wake*, 89 F.3d at 57).

for is the dignity of equality—that there be no special rules, or practices, at West Point that favor male cadets over female cadets, or vice-versa, or that tend to degrade one sex as a means to raise or motivate another.”²¹⁷ Thus, Judge Hellerstein found that Jane Doe’s *Bivens* claim was not barred under the *Feres* doctrine.²¹⁸ The defendants filed for an interlocutory appeal, and the Second Circuit granted defendants’ motion.²¹⁹

Nevertheless, a three-judge panel of the Second Circuit ultimately reversed Judge Hellerstein’s order by two to one, holding that Doe was a cadet at West Point and therefore a service member of the Army, which implicates the *Feres* doctrine and “special factors counseling hesitation.”²²⁰ Judge Debra Ann Livingston concluded that “[a]djudicating the claim she brings against her superior officers . . . would require a civilian court to examine a host of military decisions regarding aspects of West Point’s culture, . . . the supervision of West Point cadets, their training and education, and their discipline by superior officers.”²²¹ In the view of the majority, West Point’s primary mission, to train future officers of the U.S. Armed Forces, signified that the college component of the MSA was inseverable from the military-training component of the institution.²²² Therefore, Doe’s claim against the West Point administrators for discrimination she, and other women, faced on campus implicated military good order and discipline.²²³ As in *Cioca* and *Klay*, the Second Circuit barred *Bivens* claims by cadets who sought to recover damages against MSA administrators and the government for sexual assault.²²⁴

On the other hand, Judge Denny Chin dissented and argued that Doe’s rape was not an injury incident to service, rather, her “injuries were incident only to her status as a student.”²²⁵ Judge Chin highlighted the fact that Doe’s *Bivens* claim is not that of a service member, which might implicate military good order and discipline, but that of a student who “seeks recourse for injuries caused by purported failures on the part of school administrators acting in academic capacity overseeing a learning environment for students.”²²⁶ Furthermore, Judge Chin contended that although other cases such as *Klay* and *Cioca* had effectively closed off remedies for service members for sexual assault, Doe’s case was markedly different since her claim did not intrude upon the policies of high-ranking military officials.²²⁷ Rather, the heart of Doe’s claim was whether she was “depriv[ed] of meaningful access to an education because of discriminatory academic policies or school administrators tasked with running an educational

217. *Id.*

218. *Id.* at 689.

219. *See Doe v. Hagenbeck*, 870 F.3d 36, 41 (2d Cir. 2017).

220. *See id.* at 49.

221. *Id.* (citations omitted).

222. *See id.* at 48–49.

223. *See id.* at 49.

224. *See id.*

225. *Id.* at 51 (Chin, J., dissenting).

226. *Id.*

227. *Id.* at 61.

institution.”²²⁸ In other words, Judge Chin’s dissent focused on the fact that Doe’s injuries were sustained “incident to being a student,” while the majority’s analysis was more akin to *Klay* and *Cioca* as Doe’s injuries were found to be incident to service.²²⁹

B. If Military-Service Academies Were Under Title IX

As discussed in Part II and in Judge Chin’s *Hagenbeck* dissent,²³⁰ cadets and midshipmen occupy a gray area in the law due to the fact that they are considered both university students and service members. This section examines how a court may analyze a potential claim against MSAs, if the cadets and midshipmen were alternatively categorized as students under Title IX. For this line of analysis, *Hagenbeck*’s facts will be used to determine whether she would have had an actionable claim under Title IX.

As stated previously, to determine whether a federally funded educational institution is liable for student-on-student harassment under Title IX, the Supreme Court mainly focuses on two factors in its test.²³¹ *Williams* extended this analysis to higher-education institutions for sexual assault claims under Title IX.²³²

After establishing that the institution is federally funded, the first factor of the Supreme Court’s Title IX analysis requires that the harassment was severe enough to bar a student from an educational benefit.²³³ In Jane Doe’s case, articulated above,²³⁴ Smith’s sexual assault and the subsequent actions, or inaction, by the West Point administration may qualify as discrimination severe enough to have barred Doe from continuing her education at West Point.²³⁵ Even if the sexual assault was considered a one-time incident, a court may also find that persistent sexual harassment and gender discrimination from the sexually explicit taunts, degrading comments about sex by superiors, and humiliating and discriminatory treatment by both superiors and fellow cadets, are “severe” and persistent enough to bar Doe from an educational benefit.

Assuming that there is a fair likelihood that the first factor could be satisfied, Jane Doe would also likely satisfy the second factor of the Supreme Court’s Title IX analysis: deliberate indifference.²³⁶ West Point had full

228. *Id.*

229. Compare *id.* at 62, with *id.* at 49 (majority opinion).

230. See *supra* Part II.B.

231. The first factor refers to the harassment itself: the discrimination, which includes the harassment and the subsequent events that occurred in relation to the incident, must be “so severe” as to bar the student from an educational benefit; it cannot be trivial. The second factor focused on the actions of the school: whether the school had knowledge of the harassment and whether, with the knowledge of such actions, it acted “clearly unreasonabl[y]” or with “deliberate indifference” in response to the situation at hand. See *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 447 F.3d 1282, 1297–98 (11th Cir. 2007).

232. See *supra* Part II.B.4.

233. See *supra* Part II.C.

234. See *supra* Part III.A.

235. See *supra* Part II.D.

236. See *supra* Part II.C.

knowledge of Doe's rape since Doe received treatment at West Point's medical facility and also filed a restricted report with the school. Although it may be disputed whether West Point acted "clearly unreasonabl[y]" in response to the rape, the nurse's failure to collect evidence and West Point's sexual assault counselor's lack of communication might present judges with substantial facts to find in her favor.

Even if Doe's post-sexual-assault treatment fails to satisfy the "deliberate indifference" requirement, West Point's consecutive failure to address the rampant sexual harassment and discrimination in its policies and practices may satisfy the requirement. West Point administrators were not only aware of the multiple complaints female cadets had made about inappropriate treatment by their peers, but some of its own faculty participated in such harassment. To this extent, Doe would possibly be able to hold West Point administrators liable not only for student-on-student harassment,²³⁷ but also under traditional Title IX provisions of school employee-on-student harassment.²³⁸ Since the standards for evaluating direct harassment by school employees are less stringent than student-on-student liability, Doe may have an opportunity to succeed through this route.

However, more important than whether or not Jane Doe would succeed in holding West Point liable under Title IX, she would certainly have had sufficient evidence to proceed past the dismissal stage under Title IX. By comparing Jane Doe's potential Title IX claim and the actual results of her claims under the *Feres* doctrine, it is clear that cadets and midshipmen at MSAs are not given the same opportunity for legal recourse as similarly situated students at civilian universities.

As this hypothetical MSA-Title IX analysis demonstrates, other options exist to more effectively address the needs of cadets and midshipmen. Part IV discusses legal arguments and policy considerations that the *Feres* doctrine presents in real-life situations.

IV. ARGUMENTS AGAINST THE *FERES* DOCTRINE

The *Feres* doctrine has not been without controversy over the nearly seventy years since the Supreme Court created it. Most notable, perhaps, is Justice Scalia's scathing dissent in *Johnson*, where he claimed, "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."²³⁹ Justice Scalia is not alone in his criticism. The Third Circuit once commented, "It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."²⁴⁰ The Ninth Circuit raised similar concerns: "We reach this conclusion only reluctantly, bound by circuit precedent to apply

237. See *supra* Part II.B.3.

238. See *supra* Part II.B.2.

239. *United States v. Johnson*, 481 U.S. 681, 700–01 (1987) (Scalia, J., dissenting) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)).

240. *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999).

this doctrine to yet another case that seems far removed from its original purposes.”²⁴¹ One judge has even argued that the *Feres* doctrine is a violation of service members’ equal protection rights and constitutional separation-of-powers principles.²⁴² These are but a few of the numerous criticisms the *Feres* doctrine has amassed over the years.²⁴³

Part IV.A discusses legal arguments posited by judges contesting the applicability of the *Feres* doctrine. Part IV.B reviews the policy arguments that call for reconsideration of the *Feres* doctrine and analyzes the real-life impact the doctrine has in today’s society.

A. Legal Arguments Against the *Feres* Doctrine

Johnson solidified the three broad rationales in the *Feres* doctrine and further expanded the scope of *Feres*.²⁴⁴ However, the *Johnson* decision was split five to four, with Justice Scalia composing the dissent for Justices Brennan, Thurgood Marshall, and John Paul Stevens. In his dissent, Justice Scalia attacked the three broad rationales of *Feres*, claiming that the judicially made doctrine had “outlived [its] textual support, and the *Feres* rule is now sustained only by three disembodied estimations of what Congress *must* (despite what it enacted) have intended.”²⁴⁵

Justice Scalia first addressed the three factors which formed the basis of *Feres*. The first reason for the Supreme Court’s holding in *Feres* was that parallel private liability for service members to bring suit against the government did not exist as required in the text of the FTCA.²⁴⁶ However, if Congress intended this factor to preclude a service member from bringing FTCA claims, then several of the exceptions under the FTCA, such as those articulated in 28 U.S.C. § 2680(b), § 2680(c), § 2680(f), and § 2680(i), were “superfluous” since the exceptions do not also have parallel private liability.²⁴⁷ In particular, Justice Scalia noted that “private individuals typically do not, for example, transmit postal matter, collect taxes or custom duties, impose quarantines, or regulate the monetary system.”²⁴⁸ Since these specific exceptions did not also have parallel private liability, Justice Scalia reasoned that such applications of the *Feres* doctrine were not intended by Congress.

Moreover, Justice Scalia found *Feres*’s second rationale of “federal relationship” lacking as well. *Feres* originally concluded that Congress did not intend for state tort law to govern a “‘distinctively federal’ relationship”

241. *Costo v. United States*, 248 F.3d 863, 864 (9th Cir. 2001).

242. *See id.* at 869–76 (Ferguson, J., dissenting).

243. For more examples of such criticisms of the *Feres* doctrine, see generally Brou, *supra* note 126; Tomes, *supra* note 77; and Dallis N. Warshaw, *The Irrational Rationale: How the Military Hides Behind the Feres Doctrine to Deny Justice to Service Members*, 59 ORANGE COUNTY LAW., July 2017, at 28.

244. *See supra* Part I.A.2.

245. *United States v. Johnson*, 481 U.S. 681, 695 (1987) (Scalia, J., dissenting).

246. *See id.* at 694.

247. *See id.* at 694–95.

248. *See id.* at 694 (citations omitted).

between a service member and the government.²⁴⁹ If Congress had not intended for state tort law to govern recovery under the FTCA due to the unfairness of applying a law to a service member who does not have a choice in his geographic location, this reasoning was defeated when the Court allowed federal prisoners, who are under similar geographic circumstances, to recover damages against prison authorities under the FTCA.²⁵⁰ In other words, if unfairness is the key underlying factor, then it is more unfair to disallow claims due to “nonuniform recovery” than to allow “uniform nonrecovery.”²⁵¹

Further, the *Feres* Court reasoned that the military requires uniform recovery.²⁵² However, this rationale also falls short. On the one hand, the Court has allowed service members to recover for injuries *not* incident to their service and, on the other hand, has allowed civilians to recover for negligence by service members. In other words, the Court’s own holdings have effectively rendered the uniformity reasoning defunct.²⁵³

Lastly, the *Feres* Court reasoned that Congress had not intended for service members to receive double recovery under both the FTCA and Veteran Benefits Act for injuries or death incident to service.²⁵⁴ However, in *Brooks* and *United States v. Brown*²⁵⁵—both cases which have not been overruled by the Supreme Court—the Court found that the VBA was not an “exclusive” remedy.²⁵⁶ Furthermore, Justice Scalia found that recovery under the FTCA is actually not comparable to the VBA. Although the *Feres* Court found that the VBA was comparable to state workers compensation statutes, Justice Scalia noted it was easier to recover and terminate recovery under the VBA than state workers compensation schemes and the VBA did not exclude injuries “incident to service,” unlike the FTCA.²⁵⁷

However, since the Supreme Court later held that the rationales contemplated in *Feres* and discussed above were “no longer controlling,”²⁵⁸ the most pertinent rationale was the judiciary’s interference in military good order and discipline and decision-making. In response to this rationale, Justice Scalia commented that it was “outlandish to consider that result ‘outlandish,’ since in fact it occurs frequently, even under the *Feres* dispensation.”²⁵⁹ According to Justice Scalia, service members who sustained an injury from another service member’s negligence compared to civilians who sustained the same injury at the hand of the same service member, under the same set of circumstances, require the same type of

249. *See id.* (quoting *Feres v. United States*, 340 U.S. 135, 143 (1950)).

250. *See id.* at 696 (discussing *United States v. Muniz*, 374 U.S. 150, 162 (1963)).

251. *See id.* at 695–96.

252. *See id.* at 689.

253. *See id.* at 696.

254. *See supra* Part I.A.1.

255. 348 U.S. 110 (1954).

256. *See Johnson*, 481 U.S. at 698 (Scalia, J., dissenting).

257. *See id.*

258. *See supra* note 72 and accompanying text.

259. *See Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (citation omitted) (quoting *Brooks v. United States*, 337 U.S. 49, 53 (1949)).

inquiries and interference with military decision-making.²⁶⁰ However, in this particular circumstance, only the service member's recovery would be barred under the *Feres* doctrine while the courts will still "interfere" in military policies and decision-making for the civilian's FTCA claim. Thus, the most critical rationale, interference in military decision-making, does not actually carry out its purpose, and, as Justice Scalia plainly stated, "neither the three original *Feres* reasons nor the *post hoc* rationalization of 'military discipline' justifies [the Court's] failure to apply the FTCA as written."²⁶¹ Accordingly, Justice Scalia's analysis highlights the logical inconsistencies of the *Feres* doctrine and suggests that the judicially created *Feres* doctrine at least requires thorough reconsideration.

B. Policy Arguments Against the *Feres* Doctrine

Several policy considerations also call for caution in expanding the *Feres* doctrine to apply to MSAs, specifically in cases brought by cadets and midshipmen for administrative mismanagement of sexual assault.

One of the primary stated goals of MSAs is to produce outstanding and capable future leaders of the military.²⁶² In addition to producing leaders, the MSAs are top-ranking educational institutions²⁶³ that attract many young men and women who aspire not only to serve their country, but also to pursue a high-quality education. Yet, the real-life negative consequences of the *Feres* doctrine diminish the effectiveness of MSAs in producing capable future leaders of the military and in recruiting the very best applicants who might be considering other elite civilian colleges. This Part addresses the issues surrounding how MSAs currently address sexual assault and how the *Feres* doctrine exacerbates the mismanagement that occurs when MSAs handle sexual assaults under current doctrine.

1. Retaliation and Military-Service Academies

According to the Department of Defense's annual report on MSAs, around 50 percent of female cadets and midshipmen who filed sexual assault reports described experiencing retaliation in the form of ostracism and

260. *See id.*

261. *See id.*

262. *See About USNA, supra* note 152 ("As the undergraduate college of our country's naval service, the Naval Academy prepares young men and women to become professional officers of competence, character, and compassion in the U.S. Navy and Marine Corps."); *About West Point, supra* note 152 ("West Point's purpose is to produce leaders of character who are prepared to provide selfless service to our Army and the nation."); *Preparing Leaders of Character in Service to Our Country*, U.S.A.F. ACAD., <https://www.usafa.edu/character/> [<https://perma.cc/PTP9-KMB4>] (last visited Oct. 4, 2018) ("The Academy's mission is 'to educate, train and inspire men and women to become officers of character motivated to lead the United States Air Force in service to our Nation.'").

263. Among national liberal arts colleges, the U.S. News ranked West Point eighteenth, the U.S. Naval Academy twenty-second, and the U.S. Air Force Academy thirtieth. *See National Liberal Arts Colleges*, U.S. NEWS, <https://www.usnews.com/best-colleges/rankings/national-liberal-arts-colleges> (last visited Oct. 4, 2018).

maltreatment.²⁶⁴ Moreover, around 13 percent of these women reported experiencing some form of professional reprisal.²⁶⁵ Interestingly, much of the retaliation these cadets and midshipmen experienced is not considered retaliation under military policy and military law.²⁶⁶ Even though MSAs have been implementing policies to prohibit retaliation against victims who report their assaults, each school, astonishingly, only received one retaliation allegation from 2015 through 2016.²⁶⁷

The statistics provided by this annual report paint a general picture of the hostile climate the cadets and midshipmen potentially face for reporting their sexual assaults. However, the annual report falls short in portraying the jarring experiences of retaliation that many victims have faced and have recently come forward with in the media. On December 11, 2017, *CBS This Morning* released its findings of a six-month investigation into sexual assault at the Air Force Academy.²⁶⁸ Two former cadets disclosed their experiences of retaliation and maltreatment after reporting their sexual assaults. *CBS This Morning* also interviewed with two current cadets who spoke under anonymity due to the retaliation they had already faced and in fear of future retaliation on their military careers.²⁶⁹

One former cadet, Melissa Hildremyr, was mistreated by the Air Force Office of Special Investigations, which blamed Hildremyr for her own sexual assault and questioned the veracity of her statement.²⁷⁰ At the end of the harrowing process with the USAFA, Hildremyr ultimately left the Air Force Academy, while her rapist graduated.²⁷¹ Similarly, Annie Kendzior, a former midshipman of the USNA, testified in front of the House Subcommittee on Military Personnel about her distressing experiences with the administration after being sexually assaulted.²⁷² In her testimony, Kendzior commented on the biased procedure of the Academic Review Board and how she was “repeatedly encouraged to resign by USNA officials.”²⁷³ Similar to Hildremyr, Kendzior left the Naval Academy,

264. See U.S. DEP'T OF DEF., *supra* note 31, at 22. The report defines “ostracism” as a form of social exclusion, while “maltreatment” is defined as an act by an individual “who can legally give orders to that reporter [who] commits such acts.” *Id.*

265. See *id.* The report defines “reprisal” as actions that negatively affect “professional opportunities and can involve a range of unjustified personnel actions.” *Id.*

266. Only about 1 percent of cadets and midshipmen who faced ostracism or maltreatment qualify as experiencing retaliation under military policy and law while only around 5 percent of cadets and midshipmen who faced professional reprisal qualify under military policy and law. See *id.*

267. See *id.* at 23–24.

268. *Current and Former Cadets Speak Out on Sexual Assault at Air Force Academy*, CBS NEWS (Dec. 12, 2017, 2:52 PM), <https://www.cbsnews.com/news/air-force-academy-sexual-harassment-retaliation-allegations/?ftag=MSF0951a18> [<https://perma.cc/8632-7V5D>].

269. See *id.*

270. See *id.*

271. See *id.*

272. *MSA Sexual Violence Hearing*, *supra* note 1, at 9–11 (statement of Annie Kendzior).

273. *Id.* at 64.

largely because of her stressful experience with Naval Academy officials, while both of her rapists graduated.²⁷⁴

It is clear that reporting sexual assault comes at a great cost to a cadet or midshipman's future academic career and his or her career in the military. Moreover, once the cadet or midshipman reports their sexual assault, they also risk MSAs mismanaging their cases. In a system where superior officers handle a cadet's or midshipman's sexual assault case in a biased manner, what remedies are available to hold MSA administrators accountable? The only remedy may be to seek recourse in civilian courts. However, the *Feres* doctrine has foreclosed this option for the cadets and midshipmen who wish to bring a tort or constitutional claim against the MSAs for such mismanagement. As a result, they are left bereft of any judicial remedy at all.²⁷⁵

2. Consequences of Mismanagement of Sexual Assault Cases in Military-Service Academies

Throughout the various statements of cadets and midshipmen who experienced sexual assault at MSAs, there exists an underlying connection: all of those cadets and midshipmen were enthusiastic to attend MSAs and serve their country in the U.S. Armed Forces. However, many left MSAs due to the treatment they received after their sexual assault.²⁷⁶ There are dire consequences for allowing mismanagement of sexual assault cases to continue not only in MSAs, but in the military as a whole. In particular, the loss of qualified candidates can negatively affect the diversity of military leadership.

Diversity is essential in the military. In *Grutter v. Bollinger*,²⁷⁷ high-ranking military officers submitted an amicus brief asserting that racially diverse officers were essential to national security.²⁷⁸ Officers of the military also submitted an amicus brief in *United States v. Virginia*²⁷⁹ to argue that women were crucial to military success by recounting important contributions of women in service.²⁸⁰ In that case, Justice Ginsburg cited an

274. *See id.*

275. *See supra* Part III.A.

276. *See supra* notes 268, 273 and accompanying text; *see also* Brandy Zadrozny & James LaPorta, *Cadet Run Out of West Point After Accusing Army's Star Quarterback of Rape*, DAILY BEAST (Dec. 8, 2017, 7:02 PM), <https://www.thedailybeast.com/cadet-run-out-of-west-point-after-accusing-armys-star-quarterback-of-rape> [https://perma.cc/4Q2B-3F55] (reporting the story of Madeline Lewis, a former cadet who was sexually assaulted at West Point and whose long-term dream was to follow in her grandfather's footsteps and attend West Point).

277. 539 U.S. 306 (2003).

278. *See id.* at 308; *see, e.g.*, Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516), 2003 WL 1787554, at *5.

279. 518 U.S. 515 (1996).

280. *Id.* at 544.

amicus brief submitted by active and retired female service members²⁸¹ which noted the successes of women at MSAs and the “vital contributions and courageous performance of women in the military”²⁸² to support the Court’s holding that the Virginia Military Institute cannot prohibit women from attending the institution because of fears that women are not capable of becoming “citizen-soldiers.”²⁸³ Both cases presented the MSAs as universities that train future leaders of the military. In *Grutter* especially, the amicus brief was influential in establishing that civilian universities that also directly shape the leaders of tomorrow need diversity just like the military.²⁸⁴

More importantly, the military has made its stance clear.²⁸⁵ Diversity is necessary to the military, and the benefits of diversity, whether from racial or gender diversity, have advanced the military establishment as a whole.²⁸⁶ Nonetheless, the MSA administrations’ reaction to sexual assault paints a different picture. Allowing biased treatment of sexual assault victims, largely female cadets and midshipmen, has already caused many qualified future leaders of the military to drop out of school. Moreover, MSAs, who compete with other top-ranked universities for blue-chip applicants, stand to lose capable future leaders of the military if such practices persist.

3. Direct Impact of Sexual Assault on Leadership in the Military

Compared to civilian universities whose graduates pursue an occupation of their choice, graduates of MSAs are required by law to become officers of the military.²⁸⁷ Professor Thomas H. Lee commented on the unique nature of MSAs:

Nor, for that matter, can civilian undergraduate colleges, or indeed, any civilian institution of higher learning, assert the sort of robust causal claim that the military academies can The military service academies and officer training programs are unique gate-keeping institutions insofar as they are a sufficient condition for direct entry into leadership of an important public institution—the officer corps of the nation’s armed forces.²⁸⁸

Due to MSA graduates’ direct induction into military leadership, cadets and midshipmen play an important role in shaping how the military operates and potentially have a significant impact on how their subordinates behave within the military system as well.

The direct impact officers have in preventing sexual assault within their ranks has been corroborated by research. One study conducted on 506 female

281. Brief of Amicus Curiae Lieutenant Colonel Rhonda Cornum et al., *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941), 1995 WL 703393.

282. *United States v. Virginia*, 518 U.S. at 544–45 nn.13–15.

283. *See id.* at 544–45.

284. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

285. *Id.*

286. *See id.*

287. *See supra* Part III.

288. Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 *FORDHAM L. REV.* 2301, 2317 (2004) (footnote omitted).

veterans who served in all branches of the military from 1961 through 1997 found that 79 percent of the participants had experienced sexual harassment during their service and around one-third of the participants had been raped.²⁸⁹ Not surprisingly, the majority of the women who had been raped had also experienced sexual harassment as well.²⁹⁰

More importantly, the results of this particular study showed that an officer permitting or engaging in sexual harassment and other types of similar behavior was “associated with a three to four-fold increase in odds of rape.”²⁹¹ The study also showed that even subtle forms of sexual harassment could significantly increase the risk of sexual assault.²⁹² In sum, behavior exhibited by the leadership plays a critical factor in the likelihood of sexual harassment and sexual assault occurring within military ranks.²⁹³ However, as seen with Hildremy’s and Kendzior’s experiences, many of the perpetrators graduate and are placed in leadership positions, thereby increasing the risk of continuing a destructive cycle of sexual assault within the military.

It is therefore crucial that MSAs not only provide an environment in which cadets and midshipmen are not afraid to speak out, but also ensure that perpetrators within the MSAs do not enter the military. Considering the risk of sexual assault at MSAs, the mismanagement of sexual assault by school administration, and the lack of legal recourse against the MSAs for this mismanagement, the MSAs stand to lose many qualified, usually female, candidates who desire to serve in the military.

V. PROPOSED MODEL STATUTE: ADDITIONAL EXCEPTION FOR MSAS

If the *Feres* doctrine is not legally sound and has dire policy consequences, then what is a possible remedy to legal precedent that has been cemented in the American legal system for the past sixty-seven years? The only plausible solution lies within Congress’s powers to legislate an additional exception to the FTCA.

The Federal Tort Claims Act provides for thirteen exceptions setting forth non-eligible claims. Within these exceptions, 28 U.S.C. § 2680(j) is the only one that specifically addresses military service members. The statute states: “The provisions of this chapter and section 1346(b)²⁹⁴ of this title shall not

289. See Bryan R. Blackmore, *Sexual Assault Prevention: Reframing the Coast Guard Perspective to Address the Lowest Level of the Sexual Violence Continuum—Sexual Harassment*, 221 MIL. L. REV. 75, 96–97 (2014) (citing research from Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 263–71 (2003)).

290. See *id.* at 98.

291. See *id.*

292. See *id.*

293. See *id.*

294. 28 U.S.C. § 1346(b) grants exclusive jurisdiction to district courts for claims arising under the FTCA.

apply to . . . (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war”²⁹⁵

According to the text of this exception, it is clear that Congress intended some FTCA claims to be unavailable to service members. For example, under this exception, a service member would not be able to bring an FTCA claim against the United States for sending that service member into a war zone where she was injured. This example clearly is in line with what the *Feres* doctrine has considered an injury “incident to service,” and it is obvious why such decisions may interfere with military good order and discipline.²⁹⁶ However, for other cases that are not related to combat, the decision of where to draw the line for an injury “incident to service” is unclear.²⁹⁷ What is clear is that such inconsistencies have resulted in the *Feres* doctrine expanding beyond what may have been originally intended by Congress and what the *Feres* Court first articulated.²⁹⁸

With no indication that the current Supreme Court intends to overrule *Feres*, it cannot be dismantled by judges alone. Nor does this Note urge that it be wholly abandoned or abandoned anywhere other than the specific context of sexual assault and discrimination at the MSAs. Therefore, the only possible avenue to specifically and cohesively address the rights of cadets and midshipmen under the FTCA and *Feres* doctrine is through legislation. *Feres*, after all, is a judicially made doctrine that is not required by the Constitution. The legislative enactment of another exception would balance not only the main concern of the *Feres* doctrine—the judicial interference with military decision-making—but also the need for legal recourse for cadets who have been sexually assaulted within the MSAs.

A potential model statute for this exception is provided here:

The provisions of this chapter and section 1346(b) of this title shall not apply to . . .

(o) Any claim arising out of the United States federal service academies in relation to military activities, discipline, and decision-making. Provided, that, with regard to administrative acts or omissions, in relation to operation of the United States federal service academies as educational institutions, the provisions of this chapter and section 1346(b) of this title shall apply to any claims, brought by cadets or midshipmen, arising out of gross negligence of faculty and administrators of the United States federal service academies, including any civilians or officers employed by the United States federal service academies. For the purposes of this subsection, “cadets or midshipmen” means any student currently attending, or who had attended at the time when the events of the claims arose, any of the United States federal service academies.

295. 28 U.S.C. § 2680(j) (2012).

296. See *supra* Part I.A.2.

297. See *supra* Part I.A.4 (discussing the difficulty of analyzing whether an injury was sustained incident to service).

298. See *supra* Part IV.A.

This model statute is based upon another FTCA exception, 28 U.S.C. § 2680(h), which disallows claims such as battery, assault, and false imprisonment against federal employees, except against law enforcement officers of the federal government. If Congress can craft such an exception to an exception, it is also capable of contemplating one for MSA cadets and midshipmen as well. The model statute refers only to cadets and midshipmen because they occupy a gray area between full active-duty service members and students of higher-education institutions.²⁹⁹ Interference with military good order and discipline is implicated at a higher degree for claims brought by active-duty military personnel, as they are first and foremost employees of the government. On the other hand, cadets and midshipmen are first and foremost students pursuing a college education who will eventually acquire an active-duty obligation upon graduation.³⁰⁰ Further, they are primarily interacting with MSA administrations not as service members, but as students of an academic institution.³⁰¹ Therefore, Congress should enact the statute provided or one of a similar nature. The model statute offers Congress the ability to address the persistent sexual assault issues within MSAs without overturning the *Feres* doctrine for the rest of active-duty military personnel.

CONCLUSION

Over the nearly seventy years of its existence, the *Feres* doctrine has foreclosed many options for service members seeking damages for injuries sustained while in service of the U.S. Armed Forces. Although the *Feres* doctrine has its merits, the injustices resulting from its unforgiving application has left cadets and midshipmen of military-service academies without legal recourse for claims regarding the school's mismanagement of their sexual assault cases. With harsh repercussions, such as social and professional retaliation for reporting sexual assault, the *Feres* doctrine also places undue burden upon cadets and midshipmen who wish to hold military-service academies' administrations accountable for the dire mismanagement of sexual harassment and assault that occurred on MSA grounds. The current social and political climate also calls for reconsideration of the *Feres* doctrine for cadets and midshipmen of military-service academies. With social movements such as #MeToo³⁰² and proliferation of news coverage of rampant sexual assault in a wide variety of industries,³⁰³ victims of sexual

299. See *supra* Part IV.

300. See *supra* Part III.A.

301. See *supra* Part III.A.

302. See Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/> [https://perma.cc/KJC3-SC6R] (last visited Oct. 4, 2018).

303. Rachel Gillett, *Sexual Harassment Isn't a Hollywood, Tech, or Media Issue—It Affects Everyone*, BUS. INSIDER (NOV. 30, 2017, 10:49 AM), <http://www.businessinsider.com/sexual-harassment-affects-nearly-everyone-2017-11> [https://perma.cc/JH2J-D7J6]. For an updated timeline on the #MeToo movement, see Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (Sept. 19, 2018, 4:15 PM), <http://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htlstory.html> [https://perma.cc/3TBY-5V8P].

assault are calling for more accountability and action. In this new era of awareness, Congress can no longer sit idly by as the conspicuous issue of sexual assault continues unabated. The lack of remedies for sexual assault victims in military-service academies must be addressed, and Congress must be the one to do it.