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MILITARY LAW REVIEW

ARTICLES

ALTERNATIVES TO THE JUDICIALLY PROMULGATED *FERES* DOCTRINE
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A CRITIQUE OF THE ICRC'S CUSTOMARY RULES CONCERNING DISPLACED PERSONS: GENERAL ACCURACY, CONFLATION, AND A MISSED OPPORTUNITY
Lieutenant Jamieson L. Greer

BOOK REVIEWS

INDEX FOR VOLUMES 182-192

Department of Army Pamphlet 27-100-192

MILITARY LAW REVIEW

Volume 192 **Summer 2007**

CONTENTS

ARTICLES

Alternatives to the Judicially Promulgated *Feres* Doctrine
Major Deirdre G. Brou 1

Beyond Interrogations: An Analysis of the Protection under the Military Commissions Act of 2006 of Technical Classified Sources, Methods and Activities Employed in the Global War on Terror
Captain Nikiforos Mathews 81

A Critique of the ICRC's Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity
Lieutenant Jamieson L. Greer 116

BOOK REVIEWS

Scapegoats of the Empire, The True Story of Breaker Morant's Bushveldt Carbineers
Reviewed by *Lieutenant Commander David D. Furry* 127

A War Like No Other: How the Athenians and Spartans Fought the Peloponnesian War
Reviewed by *Major Eric Young* 134

INDEX FOR VOLUMES 182-192 150

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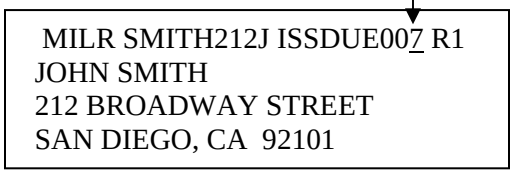

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MILITARY LAW REVIEW

Volume 192 **Summer 2007**

ALTERNATIVES TO THE JUDICIALLY PROMULGATED *FERES* DOCTRINE

MAJOR DEIRDRE G. BROU*

Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be legislator.[1]

I. Introduction

Army Specialist Sean Baker was a military police officer stationed at Guantanamo Bay, Cuba who "volunteered to play the part of an

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[1] THE FEDERALIST NO. 47 at 271 (James Madison) (Clinton Rossiter ed., 1961).

uncooperative detainee"[2] during a forced cell extraction training exercise on 24 January 2003 at Camp Delta, Guantanamo Bay.[3] Before the exercise began, First Lieutenant Shaw Locke, the officer in charge of Camp Delta's internal reaction force, instructed Specialist Baker to wear an orange jumpsuit, make noise in a cell, hide under a bed, and resist all verbal orders of the camp's internal reaction force team.[4] Lieutenant Locke further instructed Specialist Baker to comply with the team's orders once the team entered the cell and to say the codeword "red" if he felt threatened.[5]

After receiving his instructions from Lieutenant Locke, Specialist Baker donned an orange jumpsuit and squeezed under a bunk in a cell at the camp.[6] Once Specialist Baker heard the internal reaction force team approaching his cell, he began to yell.[7] As the internal reaction force team approached the cell door, the team's members began shouting verbal commands to Specialist Baker.[8] Specialist Baker ignored the commands.[9] The team entered the cell, grabbed Specialist Baker, and tried to physically restrain him.[10] Specialist Baker resisted and then muttered the codeword "red," signaling that the team was applying too much force.[11] The team ignored the code word, continued to physically restrain Specialist Baker, and beat him as he shouted "red" and "I am a U.S. [S]oldier!"[12] As a team member slammed Specialist Baker's head

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[2] Baker v. United States, 2006 U.S. Dist. LEXIS 38012, at *2 (E.D. Ky. 2006).

[3] *See id.* Specialist Baker was a member of the 438th Military Police Company, an Army National Guard unit from Kentucky. T. Bruce Simpson, Jr., The Beating of Specialist Baker in Guantanamo Bay, Cuba: a Report of Findings and a Request for Relief 1 (Dec. 2, 2004) (unpublished manuscript, on file with author).

[4] *See Baker*, 2006 U.S. Dist. LEXIS 38012, at *2. Lieutenant Locke was assigned to the 303d Military Police Company from Jackson, Michigan. Simpson, *supra* note 3, at 7.

[5] *See Baker*, 2006 U.S. Dist. LEXIS 38012, at *2. Prior to the internal reaction force team's forced cell extraction exercise, Lieutenant Locke allegedly told the team that Specialist Baker was "an unruly and uncooperative detainee" who had assaulted an Army sergeant. Lieutenant Locke also allegedly told the team that pepper spray had failed to subdue the "detainee." The evidence suggests that the internal reaction force team members "did not know this was a training exercise and they did not know that Sean Baker was a U.S. [S]oldier who was playing the role of a detainee dressed in an orange jumpsuit. They all believed this was a real-time mission." Simpson, *supra* note 3, at 24.

[6] *See Baker*, 2006 U.S. Dist. LEXIS 38012, at *2.

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.* at *3.

against the steel floor, one member of the team finally realized the "detainee" was a U.S. Soldier and the exercise ended.[13]

Shortly after the end of the exercise, Specialist Baker went to the Guantanamo Bay Naval Hospital and remained there for three days.[14] The military then medically evacuated Specialist Baker from Guantanamo Bay to the Portsmouth Naval Hospital for treatment of a traumatic brain injury he suffered during the cell extraction exercise.[15] Both the Walter Reed Army Medical Center and the Lexington, Kentucky Veterans Affairs Medical Center have also treated Specialist Baker.[16] The Army medically retired and honorably discharged him on 4 April 2004.[17] Because of the severity of his injuries, the Army awarded Specialist Baker one hundred percent service-connected disability pay.[18]

The U.S. Supreme Court, in *Feres v. United States*,[19] established the *Feres* doctrine to protect the Government from tort liability derived from military decisions, such as Lieutenant Locke's decisions related to the cell extraction exercise or the individual acts of the Soldiers involved in the exercise. The Court has often concluded that this function of the *Feres* doctrine—preserving military decision-making and discipline—is necessary for the effective and efficient functioning of the U.S. military.[20] Military decision-making entails balancing, among other things, the demands of the mission with the safety of the individual

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[13] *See id*. *See also* E-mail from T. Bruce Simpson, Jr., Legal Counsel for Sean D. Baker, Sr., Attorney at Law, McBrayer, McGinnis, Leslie & Kirkland, PLLC, Lexington, Kentucky (Feb. 27, 2007, 17:04 EST) (on file with author) ("The officers and enlisted men who were involved in the Sean Baker tragedy were never disciplined. No one was ever held accountable including the officers who covered it up.").

[14] *See* Simpson, *supra* note 3, at 16.

[15] *See Baker*, 2006 U.S. Dist. LEXIS 38012, at *3.

[16] *See id.*

[17] *See id.* at *3–*4.

[18] *See id.* at *4.

[19] 340 U.S. 135 (1950).

[20] *See* United States v. Johnson, 481 U.S. 681, 691 (1987) ("[A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission."); United States v. Stanley, 483 U.S. 669, 682–83 (1987) ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic.] would itself require judicial inquiry into, and hence intrusion upon, military matters."); United States v. Shearer, 473 U.S. 52, 57 (1985) ("[T]he situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, . . . and whether the suit might impair essential military discipline . . . .").

service member and the safety of the unit.[21] Arguably, military leaders at all levels cannot afford to cloud their decisions with issues of potential governmental or personal tort liability. The Court averred that military leaders must be free to make policies and decisions without the fear that they will face judicial scrutiny in civil court.[22]

The *Feres* doctrine, however, is too broad in scope and goes beyond protecting military decision making and discipline. The *Feres* doctrine extends protection to all government personnel who, while acting within the scope of their employment, negligently harm or kill a service member. It goes beyond protecting the leader who decides to put a Soldier on point during a combat patrol or who plans a training exercise that harms a service member. It also protects the military surgeon who negligently leaves a towel in a service member's abdomen after surgery;[23] the civilian government employee who negligently operates a military morale, recreation, and welfare program;[24] the civilian mechanic at the Post Exchange garage who negligently repairs a service member's

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[21] When small unit leaders receive missions, they must develop tentative mission plans based on the following factors: mission, enemy, terrain and weather, time available, troops available, and civilian activity in the mission area. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 4-01.45, TACTICAL CONVOY OPERATIONS ch. I (24 Mar. 2005) [hereinafter FM 4-01.45] (describing the convoy troop leading procedures small unit leaders must use to plan and execute a mission).

[22] *See Johnson*, 481 U.S. at 691 ("Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."); *Stanley*, 483 U.S. at 682–83 ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic.] would itself require judicial inquiry into, and hence intrusion upon, military matters.").

[23] *See* Jefferson v. United States, 178 F.2d 518, 519 (4th Cir. 1949), *aff'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950) (barring a Soldier's suit against the Government for negligently performed surgery).

[24] *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the wrongful death of a Sailor during a negligently-operated Navy Morale, Welfare, and Recreation (MWR) program's rafting trip); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (barring a Sailor's suit for injuries sustained while canoeing at a Navy MWR program's marina).

car;[25] and the government driver who, while negligently operating a government vehicle, kills a service member.[26]

When it promulgated the "incident to service" test in 1949, the U.S. Supreme Court had several tools at hand, in the form of the Federal Tort Claims Act's enumerated exceptions,[27] to prevent courts from intruding

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[25] *See* Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (barring a Marine's suit for damages arising out of a vehicle accident caused by the Base Exchange garage's negligent repair of his car).

[26] *See* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (barring suit for the wrongful death of a Soldier in an accident with a negligently-operated government vehicle).

[27] *See* 28 U.S.C. § 2680 (2000).

> The provisions of this chapter [28 U.S.C. §§ 2671–2680] and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall not apply to—
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law[.]
>
> (d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States.
> (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

upon military decision making and discipline. Rather than creating the "incident to service" exception, the Court should have applied the Act's existing enumerated exceptions to ensure that it protected military discipline and decision making and also preserved service members' rights under the Federal Tort Claims Act. This article analyzes the nature of the Court's decisions in *Brooks v. United States*[28] and *Feres v. United States*[29] and concludes that the promulgation of the *Feres* doctrine was an act of judicial legislation that violated the principles of separation of powers. This article also addresses the need to critically look at the *Feres* doctrine and determine whether the Federal Tort Claims Act itself and its thirteen enumerated exceptions shield the Government from liability for most military leaders' decisions.

Section II of this article describes the history of the gradual abrogation of the United States' sovereign immunity, and Section III

> (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
>
> . . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
>
> (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
>
> (k) Any claim arising in a foreign country.
>
> (l) Any claim arising from the activities of the Tennessee Valley Authority.
>
> (m) Any claim arising from the activities of the Panama Canal Company.
>
> (n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

Id.

[28] 337 U.S. 49 (1949).

[29] 340 U.S. 135 (1950).

discusses the Federal Tort Claims Act. Section IV outlines the development of the *Feres* doctrine. Sections V and VI critique the rationales for and against the *Feres* doctrine. Section VII proposes applying the Federal Tort Claims Act's enumerated exceptions as an alternative to the *Feres* doctrine. Section VII then returns to Specialist Baker's case and other cases to demonstrate how applying the Act's enumerated exceptions can protect military discipline and decision making while also ensuring service members enjoy rights more commensurate with those of civilians under the Act. Finally, Section VIII addresses the possible future of the *Feres* doctrine, given the recent changes in the composition of the Supreme Court.

II. The Gradual Abrogation of the United States' Sovereign Immunity

The American doctrine of sovereign immunity has its roots in English law.[30] The English doctrine of sovereign immunity prohibited suit against the King, absent his consent.[31] During the U.S. Supreme Court's early jurisprudence, the Court rejected this English doctrine of sovereign immunity in *Chisholm v. Georgia*.[32] In response to the Supreme Court's decision in *Chisholm*, Congress "unanimously proposed"[33] and adopted the Eleventh Amendment to the Constitution prohibiting suits against a state by "citizens of another State."[34] Although the Eleventh Amendment precludes suits against a state, the Constitution is silent as to the United States' immunity from suit.

In *Cohens v. Virginia*,[35] the U.S. Supreme Court remedied this issue by assuming that the doctrine of sovereign immunity applied to suits against the United States.[36] Thus, the Court set forth the rule that the United States was immune from suit unless Congress consented to suit. When interpreting statutes that waive sovereign immunity, the Supreme Court has held that Congress decides the breadth of the waiver and courts

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[30] *See* R. Matthew Molash, *Transition: If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin*, 1983 U. ILL. L. REV. 317, 319 (1983).
[31] Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963).
[32] 2 U.S. 419 (1793) (holding that an individual could sue a state).
[33] Hans v. Louisiana, 134 U.S. 1, 11 (1890).
[34] U.S. CONST. amend. XI.
[35] 19 U.S. 264 (1821).
[36] *See id.* at 411–12. *See* Jaffe, *supra* note 31, at 20.

must strictly interpret Congress's waiver of sovereign immunity;[37] therefore, courts cannot broaden a congressional grant of sovereign immunity.[38]

As a result of the United States' immunity from suit, "[i]ndividuals seeking redress for a wrongful act of the Federal Government, whether through contract or tort, could petition Congress to pass a private bill providing a special grant of relief."[39] "As the nation grew and the activities of the Government spread, inevitably the volume of claims against the Government rose sharply."[40] Therefore, the private relief bill burdened Congress. On 24 February 1855, Congress enacted the Court of Claims Act in an attempt to decrease this burden.[41] This Act initially granted the Court of Claims the power to prepare and submit bills to Congress[42] and the jurisdiction to hear "claims based on contract or federal law or regulation."[43]

Despite the Court of Claims Act, the number of private relief bills continued to burden Congress; this burden only increased with the

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[37] *See* Lane v. Pena, 518 U.S. 187 (1996) (holding that Congress must unequivocally waive sovereign immunity in a statute and courts cannot imply waivers of sovereign immunity); United States v. Kubrick, 444 U.S. 111, 118 (1979) (holding that in construing the Federal Tort Claims Act, the Court should not extend Congress's waiver of sovereign immunity); McMahon v. United States, 342 U.S. 25 (1951) (holding that courts must strictly construe, in favor of the sovereign, statutes that waive sovereign immunity); United States v. Sherwood, 312 U.S. 584 (1941) (holding that relinquishment of sovereign immunity is strictly interpreted); United States v. Shaw, 309 U.S. 495 (1940) (holding that courts cannot broaden a congressional waiver of sovereign immunity); Schillinger v. United States, 155 U.S. 163 (1894) (holding that courts cannot extend a congressional waiver of sovereign immunity).

[38] *See* Asher Bogin, *Rights of Servicemen Under the Federal Tort Claims Act*, 1 SYRACUSE L. REV. 87, 91 (1949). The Court, in fact, has refused to expand the Federal Tort Claims Act's exceptions. *See* United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."); United States v. Muniz, 374 U.S. 150 (1963) ("[w]e should not . . . narrow the remedies provided [in the Federal Tort Claims Act] by Congress."); Rayonier v. United States, 352 U.S. 315, 320 (1957) ("There is no justification for the United States Supreme Court to read exemptions into the Federal Tort Claims Act beyond those provided by Congress; if the act is to be altered, that is a function for the same body that adopted it.").

[39] Molash, *supra* note 30, at 319–20.

[40] LESTER S. JAYSON & ROBERT C. LONGSTRETH, ESQ., HANDLING FEDERAL TORT CLAIMS 2-6 (2006).

[41] *See* Act of Feb. 24, 1855, 10 Stat. 612.

[42] *See* United States v. Klein, 80 U.S. 128, 144 (1872).

[43] Dalehite v. United States, 346 U.S. 15, 25 n.10 (1953).

outbreak of the Civil War.[44] This increase prompted Congress in 1863 to empower the Court of Claims to enter final judgments and permit the U.S. Supreme Court to consider Court of Claims appeals.[45] The jurisdiction of the Court of Claims, however, remained limited to contractual issues because Congress had declined to broaden the court's jurisdiction.[46] During the 1880s, private relief bills continued to plague Congress.[47] In response, Congress passed the Tucker Act in 1887,[48] enlarging the court's jurisdiction "to include all cases for damages not sounding in tort."[49]

From the enactment of the Court of Claims Act until the passage of the Federal Tort Claims Act in 1946, Congress passed a series of statutes that provided limited tort relief and, thereby, gradually repudiated the United States' sovereign immunity in this respect.[50] Despite these statutes, the private relief bill continued to burden Congress, prompting Congress to try to enact a broader tort claims act.[51] Although the private relief bill burden remained steady between 1929 and 1942, Congress attempted but failed to enact a general tort claims act in an effort to relieve the private relief bill burden.[52]

The crash of a military aircraft into the Empire State Building on 28 July 1945 provided Congress with the impetus it needed to pass a broad tort claims act.[53] The crash killed fourteen people, injured several others, and caused approximately one million dollars in damage.[54] Victims of

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[44] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-10.
[45] *See Klein*, 80 U.S. at 144–45 n.22.
[46] *Id.* at 145.
[47] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-14 (stating that members of the House Committee on Claims estimated they had considered between 1000 and 2000 personal relief bills per session).
[48] Act of Mar. 3, 1887, 24 Stat. 505 (current version at 28 U.S.C. §§ 1346(a), 1491 (2000)).
[49] Dalehite v. United States, 346 U.S. 15, 25 n.10 (1953).
[50] Such statutes included the Military Claims Act (Act of July 3, 1943, 57 Stat. 372 (current version at 10 U.S.C. § 2376 (2000)) and the Small Tort Claims Act (42 Stat. 1066 (1922)). They also included statutes that permitted recovery for damage caused by naval vessels (Act of June 24, 1910, 36 Stat. 607), military operations (Act of Aug. 24, 1912, 37 Stat. 586), irrigation projects (Act of Mar. 3, 1915, 38 Stat. 859), aircraft (Act of July 11, 1919, 41 Stat. 109), and patent infringement (Act of June 25, 1910, 36 Stat. 851 (current version at 28 U.S.C. § 1498 (2004)).
[51] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-48 to 2-49.
[52] *See The Federal Tort Claims Act*, 56 YALE L. J. 534, 535 (1947).
[53] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-3.
[54] *See* Empire State Building Official Internet Site, http://www.esbnyc.com/tourism/tour

the crash and their families had no judicial recourse because Congress had not passed a tort claims act that broadly waived the United States' immunity from tort suits;[55] therefore, the private relief bill was the only relief available at the time to the victims and their families. On 2 August 1946, a year after the crash, Congress passed the Federal Tort Claims Act,[56] broadly waiving the United States' sovereign immunity for torts[57] and retroactively permitting the Empire State Building crash victims to file suit against the United States.[58]

III. The Federal Tort Claims Act

The Federal Tort Claims Act abrogated "the federal government's tort immunity in sweeping terms . . . ."[59] The current version of the Act provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."[60] The Act permits recovery for death, personal injury, and property damage caused by negligent government employees acting within the scope of their employment.[61]

Congress, however, restricted this recovery in several ways. Claimants must first submit an administrative claim to the appropriate governmental agency for adjudication before filing suit for damages.[62]

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ism_history_timeline.cfm (last visited Mar. 11, 2007).

[55] *See* JAYSON & LONGSTRETH, *supra* note 40, at 2-3.

[56] Federal Tort Claims Act, 60 Stat. 843 (1946) (current version at 28 U.S.C. §§ 1346(b), 2671–2680 (2000)).

[57] *See id.* § 410(a) ("Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances . . . .").

[58] *See id.* (granting the district courts jurisdiction over claims accruing on or after 1 Jan. 1945).

[59] Molash, *supra* note 30, at 320.

[60] 28 U.S.C. § 2674 (2000).

[61] *See id.* § 1346(b).

[62] *See id.* § 2675(a) ("An action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . . ."). *See also* Kornbluth v. Savannah, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975) ("The purpose of requiring preliminary administrative presentation of a claim is to permit a government agency to evaluate and settle the claim at an early stage, both for the possibility of financial economy and for the sake of relieving the judicial burden of [Federal Tort Claims Act] . . . suits."); Robinson v. United States Navy, 342 F. Supp.

This remedy is generally exclusive[63] and bars tort claims against the individual officer who acted negligently.[64] If the claimant is not satisfied with the outcome of the administrative proceeding, he can file suit in federal court.[65] A federal judge, not a jury, hears the case,[66] and the plaintiff may not recover punitive damages or prejudgment interest.[67] Similarly, the Federal Tort Claims Act limits the amount of fees a plaintiff's attorney may charge.[68] Venue is established in the district in which the plaintiff resides or in which the negligent act or omission occurred.[69] Additionally, the substantive tort law of the state in which the act or omission occurred governs issues of tort liability.[70]

Moreover, the Federal Tort Claims Act currently contains thirteen enumerated exceptions which significantly limit the United States' liability under the Act.[71] One of these exceptions prohibits recovery for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[72] The Federal Tort Claims Act's legislative history does not explain this exception's rationale or scope.[73] Despite this lack of legislative history, the Supreme

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381, 383 (E.D. Pa. 1972) ("The purpose of 28 U.S.C. § 2675(a) is to spare the Court the burden of trying cases when the administrative agency can settle the case without litigation.").

[63] *See* 28 U.S.C. § 2679(b)(1) ("The remedy against the United States . . . is exclusive. . . . Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded . . . .").

[64] *See id.* § 2676 ("The judgment in an action under section 1346(b) of this title . . . shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.").

[65] *See id.* § 2675(a).

[66] *See id.* § 2402 ("any action against the United States under section 1346 . . . shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) . . . shall, at the request of either party to such action, be tried by the court with a jury.").

[67] *See id.* § 2674.

[68] *See id.* § 2678 (limiting attorneys fees to twenty five percent of the judgment rendered).

[69] *See id.* § 1402(b) ("Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title . . . may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.").

[70] *See id.* § 1346(b).

[71] *See id.* § 2680. As it was passed in 1946, the Federal Tort Claims Act contained twelve enumerated exceptions. *See* Federal Tort Claims Act, 60 Stat. 843, § 421 (1946).

[72] 28 U.S.C. § 2680(j) (2004).

[73] Upon motion of Congressman A.S. Mike Monroney, the House inserted the word "combatant" into section 421(j) before the phrase "activities of the military or naval

Court extended this exception to prohibit service members' Federal Tort Claims Act claims for injuries incurred incident to service.[74] By creating what later became known as the *Feres* doctrine, the Court carved out a new Federal Tort Claims Act exception that barred service members' claims for injuries incurred incident to service.

IV. The Development of the *Feres* Doctrine

One can trace the *Feres* doctrine back to the U.S. Supreme Court's decision in *Brooks v. United States*.[75] In *Brooks*, a civilian Army employee, driving an Army truck while on duty, negligently struck two brothers who were both active duty Soldiers on ordinary leave from their duty station.[76] One brother died and the other brother sustained injuries from the accident.[77] The injured brother and the administrator of the dead brother's estate sued the United States under the Federal Tort Claims Act.[78] At trial, the Government moved to dismiss both brothers' claims;[79] it argued that the brothers could not sue for their injuries because they were in the military when the civilian employee harmed them.[80] The District Court for the Western District of North Carolina denied the Government's motion, found the civilian employee negligent, and allowed the brothers to recover.[81]

The Government appealed the decision, and the Court of Appeals for the Fourth Circuit reversed the district court's decision.[82] The Supreme Court granted certiorari and held that the Soldiers could recover because the accident was not "incident to the Brooks' service."[83] The Court stated:

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forces, or the Coast Guard, during time of war." 92 CONG. REC. 10,093 (1946). The amendment passed without discussion. *See id.*

[74] *See* Feres v. United States, 340 U.S. 135, 146 (1950) (barring service members' suits for injuries incurred incident to military service); Brooks v. United States, 337 U.S. 49, 52 (1949) (holding that service members could not recover for injuries sustained incident to military service).

[75] 337 U.S. 49 (1949).

[76] *See id.* at 50.

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.* at 51.

[83] *Id.* at 52.

> The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of the hand, a defective jeep which causes injury, all would ground tort actions against the United States. But, we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired.[84]

Thus, the Court set forth the rule that service members could recover under the Federal Tort Claims Act for injuries not sustained incident to military service.

Shortly after its *Brooks* decision, the U.S. Supreme Court applied the "incident to service" rule set forth in *Brooks* to deny relief in *Feres v. United States*.[85] *Feres* consisted of three cases consolidated on appeal to the U.S. Supreme Court.[86] The first case, *Feres v. United States*,[87] involved the death of an active duty Soldier in a barracks fire.[88] The decedent's executrix alleged that military officers negligently housed the deceased Soldier in barracks that it knew or should have known were unsafe because of a defective heating system.[89] The executrix also alleged negligence in failing to maintain an adequate fire watch.[90]

In *Jefferson v. United States*,[91] the second of the *Feres* cases, the plaintiff was an active duty Soldier who underwent abdominal surgery at an Army hospital.[92] Eight months after surgery, the plaintiff, no longer in the service, underwent another abdominal surgery;[93] doctors removed a towel thirty inches long and eighteen inches wide marked "Medical

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[84] *Id.*
[85] 340 U.S. 135 (1950).
[86] *See id.* at 136.
[87] 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135, 137 (1950).
[88] *See* 177 F.2d at 536.
[89] *Id.*
[90] *Id.*
[91] 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950).
[92] *See Jefferson*, 178 F.2d at 519.
[93] *See Feres*, 340 U.S. at 137.

Department of the U.S. Army" from his stomach.[94] The former Soldier sued the United States under the Federal Tort Claims Act.[95]

The third case considered in the *Feres* appeal, *Griggs v. United States*,[96] also involved negligently performed surgery.[97] In *Griggs*, an active duty Soldier died because of "the negligent, careless and unskillful acts of members of the Army Medical Corps, while acting in the scope of their office or employment."[98] The deceased Soldier's widow sued for damages under the Federal Tort Claims Act.[99]

In its decision, the Supreme Court held that the common fact underlying these three cases was that each claimant was on active duty, not furlough, when another service member negligently injured or killed him.[100] This rendered the injuries incidental to the claimants' military service, and, hence, not compensable under the Federal Tort Claims Act.[101] In adopting this Federal Tort Claims Act exception, the Court first recognized that "few guiding materials [exist] for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind."[102] When analyzing the Federal Tort Claims Act's applicability to service members, the Court concluded that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."[103]

Looking to the Act's legislative history, the Court acknowledged "the fact that eighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces, but the bill enacted as the present Tort Claims Act from its introduction made no exception."[104] The Court also recognized that the Act's military combatant activities exception

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[94] *Id.*
[95] *See Jefferson*, 178 F.2d at 518–19.
[96] 178 F.2d 1 (10th Cir. 1949), *rev'd sub nom.*, Feres v. United States, 340 U.S. 135 (1950).
[97] *See Griggs*, 178 F.2d at 1.
[98] *Id.*
[99] *Id.*
[100] *See Feres*, 340 U.S. at 138.
[101] *See id.* at 146.
[102] *Id.* at 138.
[103] *Id.* at 139.
[104] *Id.* at 140.

indicated that Congress intended to include service members.[105] The Court then recalled that *Brooks*, "in spite of its reservation of service-connected injuries, interprets the Act to cover claims not incidental to military service, and it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave."[106] The Court stated that "[t]hese considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears."[107]

The Court, however, did not cast such a task upon Congress.[108] Rather, the Court held that service members injured incident to service could not maintain Federal Tort Claims Act suits; the Court then enumerated and discussed three rationales underpinning its decision in *Feres*. The Supreme Court's first rationale for its ruling rested upon the theory of double recovery. The Court first noted that the Federal Tort Claims Act marked "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit."[109] It then asserted that the Government had already provided service members with veterans benefits to compensate them for injuries or their survivors for the service members' deaths.[110] The Court stated "[t]he primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to be unintentional."[111] Thus, the Court suggested that, because veterans benefits compensate service members for their losses, allowing them to

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[105] *See id.* at 138.
[106] *Id.* at 139.
[107] *Id.*
[108] The Court in *Rayonier Inc. v. United States*, however, proclaimed that "[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." Rayonier Inc. v. United States, 352 U.S. 315, 320 (1957) (citing United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949)). *See also* Aetna Cas. & Sur. Co., 338 U.S. at 383 ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."); United States v. Muniz, 374 U.S. 150 (1963) ("[w]e should not . . . narrow the remedies provided [in the Federal Tort Claims Act] by Congress.").
[109] *Feres*, 340 U.S. at 139.
[110] *Id.* at 140 ("Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.").
[111] *Id.*

recover under the Federal Tort Claims Act would allow an inequitable double recovery.

The Court based its second rationale on the provision in 28 U.S.C. § 2674 that provides that the United States shall be liable "in the same manner and to the same extent as a *private individual* (emphasis added) under like circumstances . . . ."[112] The Court stated that "[o]ne obvious shortcoming in these claims is that the plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States."[113] The Court reasoned that the United States could not be held liable for the military's negligence because "no private individual has the power to conscript or mobilize a private army with such authority over persons as the Government vests in echelons of command."[114]

The Court's final reason for denying service members' claims for injuries incurred incident to service was that "[t]he relationship between the Government and members of its armed forces is distinctively federal in character . . . ."[115] The Federal Tort Claims Act provides that the tort law of the state in which the injury occurred governs Federal Tort Claims Act suits.[116] Thus, the Court believed that allowing service members to sue under the Act for injuries sustained incident to service would impose state law upon the relationship between the Government and its military.[117] The Court was also concerned that sheer luck of assignment location or state in which the injury occurred would determine the amount, if any, recoverable.[118] The Court suggested that the resulting geographically inconsistent recovery would disrupt the uniformity necessary to the effective operation of the armed forces.[119]

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[112] *Id.* at 139.
[113] *Id.* at 141.
[114] *Id.* at 141–42.
[115] *Id.* at 143.
[116] *See* 28 U.S.C. § 1346(b) (2000).
[117] *See Feres*, 340 U.S. at 143.
[118] *See id.* ("That the geography of an injury should select the law to be applied to . . . [service members'] tort claims makes no sense.").
[119] *See id.* ("It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.").

After *Feres*, the federal courts continued to hear cases that required them to apply the incident to service test.[120] Just four years after *Feres*, in *United States v. Brown*, the Court clarified the incident to service test.[121] Brown, a discharged veteran, sued under the Federal Tort Claims Act for a Veterans Administration hospital's negligent treatment of his injured left knee.[122] Brown injured his knee while he was on active duty, and the military honorably discharged him because of the knee injury.[123] After his discharge, Brown sought treatment for his knee at Veterans Administration hospitals.[124] During surgery at a Veterans Administration hospital, a defective tourniquet used during the operation caused permanent nerve damage to Brown's left leg.[125] At trial, the district court concluded that Brown's "sole relief was under the Veterans Act and dismissed his complaint under the Tort Claims Act."[126] The Court of Appeals for the Second Circuit reversed the district court's decision, and the Supreme Court granted certiorari.[127]

In reaching its decision, the Supreme Court examined rationales similar to those discussed in *Feres*. The Court first considered the effect the suit would have on military discipline.[128] It concluded that Brown was not "on active duty or subject to military discipline."[129] Rather, the injury from the defective tourniquet occurred after Brown's honorable discharge from the service and "while he enjoyed a civilian status."[130] The Court then questioned whether the United States was "liable . . . in the same manner and to the same extent as a private individual under like

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120 *See, e.g.*, Archer v. United States, 217 F.2d 548 (9th Cir. 1954) (holding that a United States Military Academy cadet died incident to service in a military aircraft crash); O'Brien v. United States, 192 F.2d 948 (8th Cir. 1951) (holding that a United States Naval Reserve pilot died incident to service when his military jet crashed); Snyder v. United States, 118 F. Supp. 585 (D. Md. 1953) (holding that an off-duty service member did not die incident to service when a military plane crashed into his privately owned home and killed him); Brown v. United States, 99 F. Supp. 685 (S.D.W.V. 1951) (holding that a Sailor did not die incident to service when he drowned while on leave in a military pool).

121 348 U.S. 110 (1954).

122 *See id.* at 110.

123 *See id.*

124 *See id.*

125 *See id.* at 110–11.

126 *Id.* at 111.

127 *See id.*

128 *See id.* at 112.

129 *Id.*

130 *Id.*

circumstances."[131] The Court found that private hospitals are liable to their patients; therefore, government hospitals should be similarly liable to their patients.[132] Finally, the Court addressed veterans benefits and held that they were not an exclusive remedy.[133] Thus, the Court held that Brown could recover under the Federal Tort Claims Act for his injury because he did not incur the injury incident to his service.[134] As a result, the Court established that veterans could recover under the Federal Tort Claims Act for injuries incurred after their departure from military service.

In *Stencel Aero Engineering Corp. v. United States*, the Supreme Court again applied and defined the *Feres* doctrine's incident to service test.[135] In *Stencel*, a malfunctioning ejection system in an F-100 fighter aircraft injured Captain John Donham, a Missouri Air National Guard officer, during an in-flight emergency.[136] Stencel produced the ejection system using government specifications and certain government-provided components.[137] Although Captain Donham medically retired from the service and received a monthly lifetime pension of approximately $1,500 per month, he sued the United States and Stencel Aero Engineering Corporation, alleging "that the emergency eject system malfunctioned as a result of 'the negligence and carelessness of the defendants individually and jointly.'"[138] Stencel cross-claimed against the United States, seeking indemnity for any money it would have to pay Captain Donham.[139]

The district court held that *Feres* protected the United States from Donham's claim as well as the claim of a third party.[140] The Court of Appeals for the Eighth Circuit affirmed the district court's decision, and the Supreme Court granted certiorari.[141] The Supreme Court affirmed the district court's decision, holding "that the third-party indemnity

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131 *Id.*
132 *See id.*
133 *See id.* at 113.
134 *Id.*
135 431 U.S. 666 (1977).
136 *Id.* at 667.
137 *See id.* Stencel Aero Engineering Corporation contracted with the government prime contractor, North American Rockwell, to provide the F-100's pilot ejection system. *Id.* n.2.
138 *Id.* at 668.
139 *Id.*
140 *Id.* at 669.
141 *Id.*

action in this case is unavailable for essentially the same reasons that the direct action by Donham is barred by *Feres*."[142] The Court concluded that, regardless of who brought the suit, the suit would negatively affect military discipline.[143] Thus, the Supreme Court set forth the rule that *Feres* applied to third party indemnity actions.

Six years after holding that the *Feres* doctrine bars third party indemnity actions, the Supreme Court applied the *Feres* doctrine to bar alleged violations of service members' constitutional rights in *Chappell v. Wallace*.[144] In *Chappell*, the Court "granted certiorari to determine whether enlisted military personnel may maintain suits to recover damages from superior officers for injuries sustained as a result of violations of [c]onstitutional rights in the course of military service."[145] The respondents in *Chappell* were five enlisted men who alleged that their superior officers discriminated against them because of their race by subjecting them to severe penalties, poor evaluation reports, and undesirable duties.[146]

Although *Chappell* involved a *Bivens*[147] action seeking non-statutory damages, rather than a suit for damages under the Federal Tort Claims Act, the Supreme Court's analysis in *Feres* guided its analysis in *Chappell*.[148] The Court looked to the following *Feres* factors to determine whether the constitutional injuries occurred incident to service: the relationship between the Government and its military, the availability of veterans benefits, and the effects of suits on military discipline.[149] The Court focused on the negative effects the enlisted men's suit would have on military discipline and then barred their suit.[150] As a result, the Court held that the *Feres* doctrine's "policies . . . also bar suit by servicemen against other servicemen for [c]onstitutional torts."[151]

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[142] *Id.* at 673.
[143] *See id.* at 674.
[144] 462 U.S. 296 (1983).
[145] *Id.* at 297.
[146] *See id.*
[147] *See generally* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (finding a federal remedy exists when federal law enforcement agents conduct unlawful searches and arrests in violation of the Fourth Amendment).
[148] *See Chappell*, 462 U.S. at 299.
[149] *See id.*
[150] *See id.* at 304.
[151] F. McConnon, Jr. & Paul F. Figley, Torts Branch Monograph: The Feres doctrine 7 (1997) (unpublished monograph, on file with the U.S. Department of Justice, Civil Division).

A few years after its decision in *Chappell*, the Supreme Court decided a case that implicated the *Feres* doctrine and military decision making. In *United States v. Shearer*,[152] a German court convicted Army Private Andrew Heard, who was stationed in Germany, of manslaughter and sentenced him to four years confinement.[153] Upon Private Heard's release from German confinement, the Army transferred him to Fort Bliss, Texas.[154] At Fort Bliss, Private Heard kidnapped and murdered Private Vernon Shearer, who was off-duty and away from his duty station of Fort Bliss.[155] Private Shearer's mother filed a Federal Tort Claims Act suit. In her suit, Private Shearer's mother alleged that even though the Army knew that Private Heard posed a threat to others, the Army "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty."[156]

In its opinion in *Shearer*, the Supreme Court looked to the rationales cited in *Feres* and dismissed the following *Feres* rationales as no longer controlling: the prevention of double recovery and the intrusion of state law on the "Government's duty to supervise servicemen . . . ."[157] The Court rested its conclusion on what it believed to be the most important *Feres* rationale, preserving military discipline and preventing second-guessing of military decision making.[158] The Court concluded that the respondent's case "goes directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman."[159] The Court refused to reduce the *Feres* doctrine "to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."[160] Thus, the Court held that Shearer's claim was *Feres*-barred.

Approximately two years after its decision in *Shearer*, the United States Supreme Court again clarified and reaffirmed the *Feres* doctrine in

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[152] 473 U.S. 52 (1985).
[153] *See id.* at 54.
[154] *See id.*
[155] *See id.* at 53.
[156] *See id.* at 58.
[157] *Id.* at n.4.
[158] *Id.* at 57.
[159] *Id.* at 58.
[160] *Id.* at 57.

United States v. Johnson.[161] In *Johnson*, Lieutenant Commander Horton W. Johnson, a United States Coast Guard helicopter pilot, embarked on a mission to rescue a vessel in distress during inclement weather.[162] As weather conditions worsened, Johnson requested assistance from Federal Aviation Administration civilian air traffic controllers.[163] Shortly thereafter, a civilian Federal Aviation Administration air traffic controller assumed radar control over Johnson's helicopter.[164] The helicopter subsequently crashed into a mountain, killing Johnson and his crew.[165] Johnson's widow sued the United States for the air traffic controller's negligence.[166] The Court barred Johnson's widow's suit, holding that the *Feres* doctrine bars suits against the United States that are based upon service members' service-related injuries.[167] In spite of the clear negligence of federal civilian air traffic controllers, the Court declined "to modify the doctrine at this date."[168]

In reaching its decision in *Johnson*, the Court articulated the following three rationales that underlie the *Feres* doctrine: the intrusion of state law upon the relationship between the Government and its military, the availability of veterans benefits, and the possible effects of service members' tort suits on military discipline.[169] These rationales are similar, but not identical, to those the Court outlined in its *Feres* opinion. The first rationale the Court discussed was the relationship between the Government and its military.[170] The Court commented that "it would make little sense to have the Government's liability to members of the Armed Services dependent upon the fortuity of where the [S]oldier happened to be stationed at the time of the injury."[171] This first rationale echoed the *Feres* rationale that the relationship between the Government and its armed forces is distinctly federal in nature and that state law should not intrude upon this relationship.[172]

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161 481 U.S. 681 (1987).
162 *See id.* at 683.
163 *See id.*
164 *See id.*
165 *See id.*
166 *See id.*
167 *See id.* at 687.
168 *Id.* at 688.
169 *See id.* at 689–92.
170 *See id.* at 689.
171 *Id.* at 684 n.2.
172 *See* Feres v. United States, 340 U.S. 135, 143 (1950).

The second *Johnson* rationale was that veterans benefits served as "a substitute for tort liability, a statutory 'no-fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government."[173] The Court stated that the "existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries."[174] This rationale paralleled the *Feres* rationale that allowing service members to sue the United States under the Federal Tort Claims Act would allow for double recovery.[175]

The third rationale the Court enunciated, that of military discipline, was not raised directly in *Feres*.[176] The Court in *Johnson* barred service members' claims for injuries incurred incident to service because of "the peculiar and special relationship of the [S]oldier 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 . . . ."[177] The *Feres* Court implicitly addressed this concern when it discussed the lack of comparable private individual liability and the authority over service members the Government vests in military leaders.[178] In *Johnson*, the Court elaborated on this concept and concluded that allowing service members to sue the United States would adversely affect the authority the Government vests in military leaders at all levels and, thereby, disrupt discipline.[179]

After addressing the three rationales underlying its decision, the Court concluded that "[t]here is no dispute that Johnson's injury arose directly out of the rescue mission, or that the mission was an activity

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[173] *Johnson*, 481 U.S. at 684 n.2.
[174] *Id.* at 689.
[175] *See Feres*, 340 U.S. at 140.
[176] The Court in *Shearer*, *Stencel*, and *Brown*, however, did address the effects service member's Federal Tort Claims Act suits would have upon military discipline. *See* United States v. Shearer, 473 U.S. 52, 57 (1985); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 674 (1977); United States v. Brown, 348 U.S. 110, 112 (1954).
[177] *Johnson*, 481 U.S. at 689 (citing *Stencel Aero Eng'g Corp.*, 431 U.S. at 671–72).
[178] *See Feres*, 340 U.S. at 141–42.
[179] *See Johnson*, 481 U.S. at 690 ("*Feres* and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'") (citing *Shearer*, 473 U.S. at 55) (emphasis in original).

incident to his military service. Johnson went on the rescue mission specifically because of his military service."[180] Therefore, the Court concluded that Johnson died incident to his military service, and his survivors could not maintain a Federal Tort Claims Act suit.[181]

A little more than a month after its decision in *Johnson*, the Supreme Court applied the *Feres* doctrine to a service member's *Bivens*[182] claim in *United States v. Stanley*.[183] In February 1958, Master Sergeant James B. Stanley volunteered for a "program ostensibly designed to test the effectiveness of protective clothing and equipment as defenses against chemical warfare."[184] Rather than testing protective clothing and equipment, the Army administered doses of lysergic acid diethylamine (LSD) to Stanley four times during February 1958 as part of a secret plan to study the effects of drugs on humans.[185] Because of his exposure to LSD, Stanley suffered hallucinations and periods of incoherence and memory loss.[186] The LSD exposure also caused him to occasionally wake from sleep at night, beat his wife and children, and then later be unable to recall the violence.[187] As a result, Stanley's ability to perform his military duties decreased, and the Army discharged him from military service in 1969.[188] He divorced one year later because of the LSD-induced personality problems.[189]

On 10 December 1975, Stanley received a letter from the Army asking him to assist with a study of LSD's long term effects on the 1958 tests' voluntary participants.[190] This was the first time the Army informed Stanley of the true nature of the 1958 tests.[191] This notice prompted Stanley to file an administrative claim for compensation.[192]

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[180] *Johnson*, 481 U.S. at 691.
[181] *Id.* at 692. If, however, any civilians died in the helicopter crash, their survivors could likely maintain a Federal Tort Claims Act suit against the United States based upon the air traffic controller's negligence.
[182] *See generally* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (finding a federal remedy exists when federal law enforcement agents conduct unlawful searches and arrests in violation of the Fourth Amendment).
[183] 483 U.S. 669 (1987).
[184] *Id.* at 671.
[185] *See id.*
[186] *See id.*
[187] *See id.*
[188] *See id.*
[189] *See id.*
[190] *See id.*
[191] *See id.* at 672.
[192] *See id.*

After the Government denied his claim, Stanley filed suit under the Federal Tort Claims Act and alleged that the Government negligently administered and monitored the drug testing program.[193] Stanley later amended his complaint, adding claims that several unknown federal officers violated his constitutional rights.[194]

Although Stanley's action was a *Bivens* claim, the Court affirmed its decision in *Chappell* and found that the analysis is the same "in the *Bivens* and *Feres* contexts."[195] The Court then stated that

> Stanley underestimates the degree of disruption that would be caused by the rule he proposes. A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking [sic] would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking [sic]), the mere process of arriving at correct conclusions would disrupt the military regime. The 'incident to service' test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.[196]

Therefore, the Supreme Court barred Stanley's claim. The holding in *Stanley* "is significant because it sanctioned a straightforward application of the incident to service test, without resort to the rationales enunciated in *Feres*."[197]

In creating the *Feres* doctrine, the Supreme Court has created a new exception to the Federal Tort Claims Act that bars service members' claims for injuries incurred incident to service. The Court's rationale for

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193 *See id.*
194 *See id.*
195 *Id.* at 677.
196 *Id.* 682–83.
197 McConnon & Figley, *supra* note 151, at 11.

this policy has remained fairly consistent. It has repeatedly asserted that permitting service members to sue under the Act would impose state law upon the relationship between the Government and its armed forces and would award service members double recovery. The third *Feres* rationale, that no private individual has the Government's power to organize a military, shifted to the *Johnson* rationale that allowing such suits would upset military discipline and decision making. Regardless of the rationales the Court has used to support the *Feres* doctrine, its overall effect is clear: it bars most service members' claims, even though a civilian in the same position would have a valid Federal Tort Claims Act claim.[198]

V. Discussion of the Rationales Against the *Feres* Doctrine

A. Ambiguous Standard

Despite the Supreme Court's suggestion in *Stanley* that the "incident to service" test is relatively straightforward,[199] federal courts have inconsistently applied the test.[200] The "incident to service" test focuses

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[198] *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the wrongful death of a Sailor who drowned during a Navy MWR program's rafting trip); Molnar v. United States, 200 U.S. App. Lexis 6417 (6th Cir. 2000) (barring a Sailor's suit for military physicians' medical malpractice); Richards v. United States, 176 U.S. 652 (3d Cir. 1999) (barring suit for the death of a Soldier in an accident caused by a negligently driven government vehicle); Jones v. United States, 112 F.3d 299 (7th Cir. 1997) (barring a Soldier's suit for military physicians' medical malpractice); Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996) (barring a service member's suit for military physicians' failure to timely diagnose her cancer); Wake v. United States, 1996 U.S. App. LEXIS 35578 (2d Cir. 1996) (barring a Naval Reserve Officers Training Corps (NROTC) cadet from recovering from injuries sustained in the crash of a negligently-driven NROTC van); Walls v. United States, 832 F.2d 93 (7th Cir. 1987) (barring a service member's suit for injuries he sustained as a passenger in a military post's aero club plane when it crashed); Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (barring a wrongful death suit for a service member killed in a military aircraft accident while on ordinary leave); Haas v. United States, 518 F.2d 1138 (4th Cir. 1975) (barring a Marine's suit for injuries he sustained at the base's horseback riding stables); United States v. Lee, 400 F.2d 558 (9th Cir. 1968) (barring suit for the death of a Marine who was a passenger in a military aircraft when it crashed).

[199] *See Stanley*, 483 U.S. at 683 ("The 'incident to service' test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.").

[200] *See* United States v. Johnson, 481 U.S. 681, 685 (1987) (granting certiorari to resolve the disparity among Federal Circuits' interpretations of the *Feres* doctrine). *Compare* Collins v. United States, 642 F.2d 217 (7th Cir. 1981) (barring an Air Force Academy

on the actions and status of the victim. This victim-based test provides an unclear and irregular standard to determine whether a service member has a valid Federal Tort Claims Act claim.[201] Additionally, no clear definition exists for the phrase "incident to service."[202] Because of the lack of a precise and straightforward definition, federal courts and practitioners in the tort law field have wrestled with how to determine whether a service member sustained an injury incident to his service.[203] As a result, federal courts have developed several different methods to determine if the *Feres* doctrine bars a service member's suit.

Some federal courts look to the *Feres* rationales to determine whether a service member's injury occurred incident to service.[204]

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cadet's suit for military physicians' medical malpractice), *with* Fischer v. United States, 451 F. Supp. 918 (E.D. N.Y. 1978) (permitting an Air Force Academy cadet's suit for military physicians' medical malpractice). *Compare* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting a claim for the wrongful death of a service member in an accident with a negligently-operated government vehicle), *with* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (denying a claim for the wrongful death of a service member in an accident with a negligently-operated government vehicle). *Compare* Flowers v. United States, 179 Fed. Appx. 986 (9th Cir. 2006) (holding that *Feres* barred a service member's Right to Financial Privacy Act claims against the United States), *with* Cummings v. Dep't of the Navy, 279 F.3d 1051 (D.C. Cir. 2002) (permitting a service member's Privacy Act claims against the United States).

[201] *See supra* note 200.

[202] The military does not use this phrase to classify the circumstances of a service member's injuries. Rather, when determining whether a service member is entitled to receive veterans benefits, the military looks to whether the service member's injuries were incurred in the line of duty. If a service member incurs an injury or disease while on active duty, the military presumes the service member incurred the injury or disease in the line of duty, unless substantial evidence demonstrates that the service member's own willful misconduct or drug or alcohol abuse caused the injury or disease. The military conducts line of duty investigations to determine whether a service member is entitled to disability retirement, severance pay, medical or dental care, or other veterans benefits. *See* 38 U.S.C. § 105(a) (2000); U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS paras. 2-2 and 2-6b (15 Apr. 2004) [hereinafter AR 600-8-4].

[203] *See The Feres Doctrine and Military Medical Malpractice: Hearing on S. 489 and H.R. 3174 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 63–64 (1986) [hereinafter *The Feres Doctrine and Military Medical Malpractice*] (statement of Michael E. Noone, Jr., Associate Dean, Columbus School of Law, Catholic University of America) ("The problem that we in the tort claims business have faced for the last 36 years is what does 'incident to the service' mean.").

[204] *See* United States v. Shearer, 473 U.S. 52 (1985) (barring a Soldier's claim because it raised issues of military decision making and discipline); *Flowers*, 179 Fed. Appx. 986 (barring a service member's Right to Financial Privacy Act suit against the United States because his claims implicated the *Feres* rationales); Shaw v. United States, 854 F.2d 360 (10th Cir. 1988) (barring a service member's claim because the service member would

Courts have commonly barred a service member's claims if the service member was eligible for veterans benefits, if the case involved military decision making and discipline, or if the case intruded upon the distinctly federal relationship between the Government and its military.[205] When applying the *Feres* rationales method of analysis, courts generally determine whether at least one of the *Feres* rationales applies to the case under consideration. If a court finds that a case implicates at least one of the *Feres* rationales, then the court will typically hold that the case is *Feres*-barred.[206]

Other federal courts recognize that applying the *Feres* rationales analysis provides little insight into whether a service member incurred an injury incident to service.[207] Thus, other federal courts have developed a totality of the circumstances method of analysis to determine whether a service member's claim may go forward under the Federal Tort Claims Act. In conducting a totality of the circumstances analysis, courts have looked to the victim's activities and duty status at the time of injury as

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receive veterans benefits and the case implicated military decision making); Major v. United States, 835 F.2d 641 (6th Cir. 1987) (barring two service members' claims because they raised issues of military decision making); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (applying the *Feres* rationales to bar a service member's own claim for negligent provision of prenatal care).

[205] *See Shearer*, 473 U.S. 52 (barring a Soldier's claim because it raised issues of military decision making and discipline); Brown v. United States, 462 F.3d 609 (6th Cir. 2006) (applying the *Feres* rationales to permit a child's claim of negligent provision of prenatal care to his service member mother); *Flowers*, 179 Fed. Appx. 986 (barring a Soldier's Right to Financial Privacy Act suit against the United States because his claims implicated the *Feres* rationales); Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (permitting a service member's child's suit because the suit did not implicate the *Feres* rationales); *Shaw*, 854 F.2d 360 (barring a service member's claim because the service member would receive veterans benefits and the case implicated military decision making); *Major*, 835 F.2d 641 (barring two service members' claims because they raised issues of military decision making); *Del Rio*, 833 F.2d 282 (applying the *Feres* rationales to bar a service member's own claim for negligent provision of prenatal care).

[206] *See Shearer*, 473 U.S. 52 (barring a Soldier's claim because it raised issues of military decision making and discipline); *Shaw*, 854 F.2d 360 (barring a service member's claim because the service member would receive veterans benefits and the case implicated military decision making); *Major*, 835 F.2d 641 (barring two service members' claims because they raised issues of military decision making); *Del Rio*, 833 F.2d 282 (applying the *Feres* rationales to bar a service member's own claim for negligent provision of prenatal care).

[207] For example, a court that applied the *Feres* rationales method of analysis would have likely barred the Soldiers' suits in *Brooks* because the Soldiers were entitled to veterans benefits. However, even though the Soldiers in *Brooks* received veterans benefits, the Court permitted their suits under the Federal Tort Claims Act. Brooks v. United States, 337 U.S. 49, 54 (1949).

well as the location of the negligent act to determine whether a service member incurred an injury incident to service.[208]

When determining the nature of the service member's activity at the time of injury, courts consider whether the activity was related to the service member's military service or duties.[209] The further attenuated the activity is from the military, the more likely courts will find that the activity was not related to the service member's military duties.[210] When

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[208] *See* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (looking to the nature of a Soldier's activity at the time of his death and the location of the negligent act); Adams v. United States, 728 F.2d 736 (5th Cir. 1984) (analyzing the injured service member's duty status and activity as well as the location of the negligent act); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (looking to the service member's duty status, nature of his activities at the time of his death, and location of the negligent act); Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (looking to the service member's duty status, nature of his activities at the time of his injury, and location of the negligent act); Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (analyzing the service member's duty status, nature of her activities at the time of injury, location of the negligent act, and the benefits accruing to the service member).

[209] Courts also look to whether a service member was enjoying a benefit of his military service, such as undergoing medical treatment at a military hospital or participating in a military recreational program such as river rafting or horseback riding. If the activity was related to the service member's military service, courts tend to bar the service member's claim. *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the drowning death of a Sailor in a Navy MWR program's rafting trip); Pringle v. United States, 208 F.3d 1220 (10th Cir. 2000) (barring a Soldier's suit for injuries he incurred in a fight in the parking lot of a military bar); *Richards*, 176 F.3d 652 (barring suit for the death of a Soldier in an accident with a negligently-operated government vehicle); Kitowski v. United States, 931 F.2d 1526 (11th Cir. 1991) (barring suit for the death of a service member during sea rescue training); Persons v. United States, 925 F.2d 292 (9th Cir. 1991) (barring suit for the death of a Sailor who killed himself after trying to obtain mental health counseling at a military hospital); Morey v. United States, 903 F.2d 880 (1st Cir. 1990) (barring a service member's claim for the military's failure to send him to a rehabilitation program for substance abuse); Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (barring a Soldier's claim for military medical malpractice); *Bon*, 802 F.2d 1092 (barring a Sailor's claim for injuries suffered while canoeing in a Navy MWR program's marina); *Parker*, 611 F.2d 1007 (permitting suit for the death of a service member who died while on leave in an automobile accident with a government vehicle); Layne v. United States, 295 F.2d 433 (7th Cir. 1961) (barring suit for the death of a service member in a military jet crash); Pearcy v. United States, 2005 U.S. Dist. LEXIS 36671 (W.D. La. 2005) (barring a service member's wrongful death claim for the death of her baby caused by negligent prenatal care).

[210] *See Pierce*, 813 F.2d 349 (permitting a service member's suit against the Government for injuries sustained while off-duty in a motor vehicle accident with an on-duty Navy recruiter); *Adams*, 728 F.2d 736 (permitting suit for a service member who died as a result of medical malpractice in a Public Health Services hospital); Cooper v. Perkiomen Airways Ltd., 609 F. Supp. 969 (E.D. Pa. 1985) (permitting suit against the Government

considering the service member's duty status at the time of injury, some courts look to whether the injured service member was on leave or pass at the time of injury,[211] while other courts look to whether the service member was subject to military discipline when injured.[212] Because service members are subject to the Uniform Code of Military Justice at all times while on active duty,[213] this "subject to military discipline" analysis of duty status amounts to a complete bar.[214] Finally, when conducting a totality of the circumstances analysis, courts look to the place where the negligent act occurred.[215] On a case-by-case basis, courts assign importance to each of the three totality of the circumstances factors and then determine whether a service member's injuries occurred incident to service.[216]

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for the death of a service member killed in a civilian aircraft crash caused by negligent Federal Aviation Administration air traffic controllers).

[211] *See* Cortez v. United States, 854 F.2d 723 (5th Cir. 1988) (permitting a wrongful death suit for a Soldier who died while on the Temporary Disability Retired List); Walls v. United States, 832 F.2d 93 (7th Cir. 1987) (barring the suit of a service member injured while on pass in a military aero club airplane crash); *Parker*, 611 F.2d 1007 (permitting the wrongful death suit of a service member who was departing work and starting leave when he died in a crash with a government vehicle).

[212] *See Walls*, 832 F.2d 93 (barring a service member's suit because, among other things, he was subject to military jurisdiction when he was injured in a military aero club airplane crash); Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979) (barring a wrongful death claim because the service member was subject to military discipline when he died in a military aircraft crash); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979) (barring a wrongful death suit because, among other things, the service member was subject to military discipline when he died in a military aero club airplane crash); Haas v. United States, 518 F.2d 1138 (4th Cir. 1975) (barring a service member's suit for injuries sustained at a military horseback riding facility because, among other things, military patrons of the facility were subject to military discipline).

[213] UCMJ art. 2 (2005).

[214] *See supra* note 212.

[215] *See* Thomason v. Sanchez, 539 F.2d 955 (3d Cir. 1976) (barring a service member's Federal Tort Claims Act suit because the service member was injured on a military base and while on active duty); Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (looking to the location of the negligent act, among other things, to determine if a Soldier died incident to service); Smith v. Morton Thiokol, Inc., 712 F. Supp. 893 (M.D. Fla. 1988) (looking to the service-member/victim's duty status and activity at the time of death and the location of the negligent act).

[216] *See* Elliott v. United States, 13 F.3d 1555 (11th Cir. 1994) (rejecting the location of the negligent act as controlling and permitting a service member's suit because, at the time of his injury, he was on leave and not engaged in an activity related to his military service); Flowers v. United States, 764 F.2d 759 (11th Cir. 1985) (rejecting the location of the negligent act as controlling and barring a service member's suit because his activity at the time of injury was related to his military service); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting a service member's suit even though the negligent act occurred on a military installation).

Even courts that apply the same analysis often reach disparate outcomes with similarly-situated plaintiffs.[217] Perhaps the best example of such disparity can be found in the decision the Court of Appeals for the Eleventh Circuit reached in *Del Rio v. United States*.[218] During an initial prenatal care visit to the Naval Aerospace and Regional Medical Center in Pensacola, Florida, Hospital Corpsman Second Class Laura Del Rio, an active duty Sailor, informed medical personnel that her medical history increased her risk of complications during pregnancy.[219] A month after her initial visit, Del Rio experienced severe nausea, cramping, and bleeding and sought treatment at the Naval Aerospace and Regional Medical Center.[220] Approximately four months later, Del Rio was admitted to the Naval Aerospace and Regional Medical Center and, two days later, "was transferred to Keesler Air Force Base for intensive prenatal care."[221] At Keesler, Del Rio delivered two boys, Frederick Wayne Del Rio and Michael Norman John Del Rio.[222] Frederick suffered permanent injuries, and Michael died five days after his birth.[223] Del Rio sued under the Federal Tort Claims Act for her physical injuries, Frederick's injuries, and Michael's death.[224] She alleged that the medical center staff in Pensacola ignored her medical history and failed to

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[217] *Compare* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting a wrongful death suit for a service member who was departing work and starting leave when he died in an accident with a government vehicle on a military installation), *and* Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (permitting an off-duty service member's suit for injuries sustained in a motor vehicle accident with an on-duty Navy recruiter), *with* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (denying a wrongful death suit for an off-duty service member who left work early and, while on his way home, died in a motor vehicle accident with a government vehicle).

[218] 833 F.2d 282 (11th Cir. 1987)

[219] *Id.* at 284 n.2. Specifically, Del Rio told medical personnel of her history of miscarriages and infertility, of her family's history of multiple births, and of her exposure to diethylstilbestrol (DES). *See id.* DES is a synthetic nonsteroidal estrogen that was given to women to prevent miscarriage and pregnancy complications between 1938 and 1971 in the United States. *See* Sarina Schrager & Beth E. Potter, *Diethylstilbestrol Exposure*, 69 AM. FAM. PHYSICIAN 2395, 2395 (2004). In 1971, the U.S. Food and Drug Administration warned about the use of DES during pregnancy after a relationship between exposure to DES and vaginal and cervical cancer was found in women whose mothers had taken DES during their pregnancies. *See id.* Women who were exposed in utero to DES also have pregnancy complications, infertility problems, and reproductive tract anomolies. *See id.* at 2398–99.

[220] *Del Rio*, 833 F.2d at 284.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

properly treat her in July 1983 when she first reported her pregnancy complications.[225]

In its opinion, the Court of Appeals for the Eleventh Circuit individually addressed each claimant's injury. First, the court addressed Hospital Corpsman Second Class Del Rio's own claim. The court held that "[t]he rationales underlying the *Feres* doctrine preclude appellant's suit against the United States on the alleged prenatal treatment she received while on active duty in the [N]avy."[226] In reaching this conclusion, the court stated that Del Rio's own suit implicated the *Feres* factor of the relationship between the Government and its military to the greatest degree because Del Rio's "active military status permitted her to seek prenatal care at the military hospital."[227] The court also stated that Del Rio would continue to receive medical care for any injury sustained incident to her service; therefore, her case implicated the *Feres* double recovery factor.[228] Finally, the court concluded that Del Rio's suit would implicate the third *Feres* factor, that of avoiding involving the "judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[229] As a result, Del Rio's claim for her own injuries failed.

After determining that the *Feres* doctrine barred Del Rio's own claim, the court addressed the twin sons' claims. Del Rio claimed that both of her sons' claims did not derive from her claim and were not, thus, barred.[230] The court agreed with Del Rio and held that "[t]he three [*Feres*] rationales clearly are not present in a suit by a child of a service person for the negligence of military medical staff."[231] With Fredrick's claim, the court concluded that he had no distinctly federal relationship with the Government and that he enjoyed no statutory benefits as a dependent of a service member.[232] The court stated that although Frederick's suit requires "the same type of inquiry into the physician's decisions as a suit by Ms. Del Rio, military discipline is not implicated to the same degree."[233] The court further declared that a civilian child's suit "for the negligent administration of prenatal care need not impair the

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225 *Id.*
226 *Id.* at 286.
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.* at 287.
232 *Id.*
233 *Id.*

esprit de corps necessary for effective military service, nor will it require the court to second-guess a decision by military personnel unique to the accomplishment of a military mission."[234] Thus, the court permitted Frederick to recover for his injuries.

After permitting Frederick's claim, the court addressed Del Rio's claim for the wrongful death of her other son, Michael. The court began its analysis of Michael's claim by looking to the Florida Wrongful Death Act.[235] It characterized the Florida Wrongful Death Act as creating "in the statutory beneficiaries an independent cause of action."[236] Therefore, the court concluded that Del Rio's claim for Michael's wrongful death provided her "as a surviving parent, with some relief from the death of her minor child. The effect of the Florida statute is to award damages to Ms. Del Rio, an active member of the armed forces, for an injury personal to her.[237] Thus, the court barred Del Rio's claim for the death of her son, Michael.

The results in *Del Rio* demonstrate the disparity in results that the *Feres* "incident to service" test has wrought. Del Rio's three suits arose out of the same medical malpractice. As Frederick's and Michael's mother, Del Rio pursued the suits for them and questioned the quality of military prenatal care provided to her and her unborn sons. Yet, the court permitted Frederick's suit because it did not threaten military discipline and decision making while, in the same opinion, it barred Del Rio's recovery because her own suit based upon the same negligent act required judicial inquiry that would threaten military discipline and decision making. The court's opinion in *Del Rio*, therefore, contradicts itself and demonstrates how the *Feres* victim-based test produces incongruous results.

Although the Supreme Court thought the Federal Tort Claims Act's "geographically varied recovery"[238] was unfair to service members, its incident to service test has resulted in recovery that varies.[239] Because no

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[234] *Id.*
[235] *Id.* at 288 (citation omitted).
[236] *Id.*
[237] *Id.*
[238] United States v. Johnson, 481 U.S. 681, 695 (1987).
[239] *Compare* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting a wrongful death suit for a service member who was departing work and starting leave when he died in an accident with a government vehicle on a military installation), *and* Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (permitting an off-duty service

clear definition for the phrase incident to service exists, federal courts have developed different tests to determine whether an injury occurred incident to service. As a result of the different types of analysis and the nebulous phrase incident to service, courts have reached inconsistent outcomes on similarly-situated plaintiffs, such as the plaintiffs in *Del Rio*.[240]

B. The Preventative Function of Tort Law

Although the Federal Tort Claims Act's function is compensatory in nature, it can serve a secondary tort law function of promoting institutional reform. "A recognized need for compensation is . . . a powerful factor influencing tort law."[241] Thus, compensation is, perhaps, the primary function of tort law. However, "[t]he prophylactic factor of preventing future harm has been quite important in the field of torts."[242] Therefore, tort law is concerned with compensating the victim and demonstrating to potential defendants that they may be liable for their own torts. In *Feres*, the Court focused on the compensation veterans benefits provide injured service members, thereby ignoring the preventative function tort law serves.[243]

Because Federal Tort Claims Act suits can focus judicial and public attention on an organization's shortcomings, government organizations facing suit for negligence under the Federal Tort Claims Act may be more inclined to take measures to prevent recurrences of such negligence. This could improve the efficient and safe operation of the agency. However, the *Feres* doctrine destroys this incentive to prevent future acts of negligence by allowing the Government to evade liability for injuries a negligent government employee inflicts upon a service member.

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member's suit for injuries sustained in a motor vehicle accident with an on-duty Navy recruiter), *with* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (denying a wrongful death suit for an off-duty service member who left work early and, while on his way home, died in a motor vehicle accident with a government vehicle).

[240] *See Richards*, 176 F.3d at 657 ("It is because Feres too often produces such curious results that members of this court repeatedly have expressed misgivings about it.").

[241] W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 20 (5th ed. 1984).

[242] *Id.* at 25.

[243] *See* Feres v. United States, 340 U.S. 135, 140 (1950).

C. Violation of Separation of Powers

The Constitution provides that Congress has the power to pass all laws necessary and proper for executing its powers, to include paying the United States' debts.[244] The Constitution grants courts the power to interpret the laws that Congress enacts.[245] When interpreting legislation, the Supreme Court has held that courts must refuse to appraise the legislation's wisdom.[246] Yet, in determining the applicability of the Federal Tort Claims Act to service members' claims, the Supreme Court has consistently appraised the wisdom of the statute.[247] In promulgating the *Feres* doctrine, the Court overstepped its authority, acted as a legislative body, carved out a judicial exception to the Act, and violated the principles of separation of powers.

When interpreting congressional waivers of sovereign immunity, the Supreme Court has held that courts must strictly interpret waivers of sovereign immunity and must not broaden such waivers.[248] When

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[244] *See* U.S. CONST. art. I, § 8.

[245] *See id.* art III, § 2.

[246] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194–95 (1978) ("Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . . [Courts] . . . do not sit as . . . committee[s] of review, nor are . . . [they] vested with the power of veto.").

[247] *See* United States v. Johnson, 481 U.S. 681, 689 (1987) (stating that permitting the situs of the negligence to affect the Government's liability makes no sense) (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977); *Stencel Aero Eng'g Corp.*, 431 U.S. at 672 ("it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the solider happened to be stationed at the time of the injury"); *Feres*, 340 U.S. at 143 ("That the geography of an injury should select the law to be applied to his tort claims makes no sense.").

[248] Even though the Court has consistently recognized that it must strictly construe congressional waivers of sovereign immunity, the Court has not applied this rule of strict construction "where the language of the statute itself is broad, as it is in the Tort Claims Act." *See* Bogin, *supra* note 38, at 91. The Court, in fact, has refused to expand the Federal Tort Claims Act's exceptions. *See* United States v. Muniz, 374 U.S. 150, 165–66 (1963) ("[w]e should not . . . narrow the remedies provided [in the Federal Tort Claims Act] by Congress."); Rayonier v. United States, 352 U.S. 315, 320 (1957) ("There is no justification for the United States Supreme Court to read exemptions into the Federal Tort Claims Act beyond those provided by Congress; if the act is to be altered, that is a function for the same body that adopted it."); United States v. Aetna Cas. and Sur. Co., 338 U.S. 366, 383 (1949) ("The exemptions of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction to narrow the remedies provided [in the Federal Tort Claims Act] by Congress."). *See also* Lane v. Pena, 518 U.S. 187 (1996) (holding that Congress must unequivocally waive sovereign immunity in a statute and courts cannot imply waivers of sovereign immunity); United States v. Kubrick, 444 U.S. 111, 118 (1979) (holding that in

interpreting statutes, to include statutes that waive sovereign immunity, a strong presumption exists that the plain language of the statute expresses Congress's intent.[249] Only "rare and exceptional"[250] circumstances permit rebuttal of a statute's plain language.[251] Therefore, when interpreting a statute, courts first look to the statute's plain language; if the plain language is ambiguous, courts then consider the statute's legislative history to discern congressional intent.

In creating the incident to service test, the Supreme Court ignored the plain meaning of the Federal Tort Claims Act and created an additional exception to the Act. Apart from its anomalous line of *Feres* doctrine cases, the Court has found that the Act broadly waives sovereign immunity, and has repeatedly rejected judicial expansions of the Act's

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construing the Federal Tort Claims Act, the Court should not extend Congress's waiver of sovereign immunity); McMahon v. United States, 342 U.S. 25 (1951) (holding that legislation benefiting a certain group of people is construed liberally in their favor; however, courts must strictly construe, in favor of the sovereign, statutes that waive sovereign immunity); United States v. Sherwood, 312 U.S. 584 (1941) (holding that relinquishment of sovereign immunity is strictly interpreted); United States v. Shaw, 309 U.S. 495 (1940) (holding that courts cannot broaden a congressional waiver of sovereign immunity); Schillinger v. United States, 155 U.S. 163 (1894) (holding that courts cannot extend a congressional waiver of sovereign immunity).

[249] *See* Ardestani v. Immigration and Naturalization Serv., 502 U.S. 129, 135–36 (1991) (citing Rubin v. United States, 449 U.S. 424, 430 (1981)) ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances.'"); Rubin v. United States, 449 U.S. 424, 430 (1981) (citing *Tennessee Valley Auth.*, 437 U.S. at 187 n.3) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'"); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statue itself. Absent a clearly expressed intention to the contrary, that language must ordinarily be regarded as conclusive."); *Tennessee Valley Auth.*, 437 U.S. at 187 ("the plain language of the statute, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable'"); Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 223 (1945) ("we think congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation."); Crook v. Harrelson, 437 U.S. 55, 60 (1930) (holding that courts should override a statute's literal terms only in rare and exceptional circumstances).

[250] *Crook*, 437 U.S. at 60.

[251] *See Ardestani*, 502 U.S. at 135–36 ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances.'") (citing *Rubin*, 449 U.S. at 430); *Rubin*, 449 U.S. at 430 ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'") (citing *Tennessee Valley Auth.*, 437 U.S. at 187 n.3); *Crook*, 437 U.S. at 60 (holding that courts should override a statute's literal terms only in rare and exceptional circumstances).

exceptions.[252] Only a few months after its decision in *Brooks* and a year prior to promulgating the *Feres* doctrine, the Court, in *United States v. Aetna Casualty & Surety Co.*,[253] stated that

> the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.* . . . "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."[254]

In *Rayonier Inc. v. United States*,[255] the Court affirmed its decision in *Aetna* and declared that it had "no justification . . . to read exemptions into the [Federal Tort Claims] Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."[256] Finally, in *Muniz v. United States*, the Court reaffirmed its holding in *Aetna* and stated that "[w]e should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress."[257] Although the Court in *Aetna*, *Rayonier*, and *Muniz* concluded that only Congress could expand the Federal Tort Claims Act's exceptions, the Court in *Feres* ignored the Act's plain language and expanded its exceptions.

Even the Supreme Court in *Brooks* was "not persuaded that 'any claim' [under the Federal Tort Claims Act] meant 'any claim but that of servicemen.'"[258] Rather, the Act's plain language unequivocally waives the United States' sovereign immunity and permits "*any* (emphasis in original) claim founded on negligence brought against the United

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[252] *See generally Muniz*, 374 U.S. 150; *Rayonier Inc.*, 352 U.S. 315; *Aetna Cas. & Sur. Co.*, 338 U.S. 366.

[253] 338 U.S. 366.

[254] *Id.* at 383 (quoting Justice Cardozo, Anderson v. Hayes Constr. Co., 153 N.E. 28, 30 (N.Y. 1926)). In *Aetna*, the Court held that an insurance company may bring suit in its own name against the Government for a claim that the company subrogated by paying an insured who had a valid Federal Tort Claims Act claim. *Aetna Cas. & Sur. Co.*, 338 U.S. at 368, 383.

[255] 352 U.S. 315 (1957).

[256] *Id.* at 320.

[257] *Muniz*, 374 U.S. at 165–66 (refusing to expand the Federal Tort Claims Act's exceptions to bar federal prisoners' suits under the Act).

[258] Brooks v. United States, 337 U.S. 49, 51 (1949) ("It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed.").

States."[259] The Act contains limiting language; however, the language does not limit jurisdiction to any claim but that of service members harmed incident to service. Therefore, the Act's language allows service members' claims, regardless of service connection, and the Court should have refused to expand the Act's exceptions, as it refused to do in *Aetna*, *Rayonier*, and *Muniz*.

Assuming, as the Supreme Court did in *Feres*,[260] that the Federal Tort Claims Act's language does not unequivocally waive sovereign immunity, the legislative history indicates that Congress intended to permit service members' claims under the Act, regardless of whether their claims arose incident to their military service. Between 1942 and the passage of the Federal Tort Claims Act in 1946, Congress considered eighteen tort claims bills.[261] Of those bills, sixteen barred service members from recovery for injuries incurred in the line of duty.[262] The Federal Tort Claims Act as enacted, however, contained no such bar. The omission of such a bar, when one was considered and rejected in sixteen previous tort bills, clearly indicates that Congress did not intend to limit service members' ability to sue under the Federal Tort Claims Act.

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[259] *Id.*

[260] Feres v. United States, 340 U.S. 135, 139 (1950) ("These considerations [of the uncertainty concerning the extent of the Federal Tort Claims Act's waiver of sovereign immunity], it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears.").

[261] *See* H.R. 12178, 68th Cong. (2d Sess. 1925); H.R. 12179, 68th Cong. (2d Sess. 1925); S. 1912, 69th Cong. (1st Sess. 1925); H.R. 6716, 69th Cong. (1st Sess. 1926); H.R. 8914, 69th Cong. (1st Sess. 1926); H.R. 9285, 70th Cong. (1st Sess. 1928); S. 4377, 71st Cong. (2d Sess. 1930); H.R. 15428, 71st Cong. (3d Sess. 1930); H.R. 16429, 71st Cong. (3d Sess. 1931); H.R. 17168, 71st Cong. (3d Sess. 1931); H.R. 5065, 72d Cong. (1st Sess. 1931); S. 211, 72d Cong. (1st Sess. 1931); S. 4567, 72d Cong. (1st Sess. 1932); S. 1833, 73d Cong. (1st Sess. 1933); H.R. 129, 73d Cong. (1st Sess. 1933); H.R. 8561, 73d Cong. (2d Sess. 1934); H.R. 2028, 74th Cong. (1st Sess. 1935); S. 1043, 74th Cong. (1st Sess. 1935). *See also* Brooks v. United States, 337 U.S. 49, 51 (1949).

[262] *See* H.R. 12179, 68th Cong. (2d Sess. 1925); S. 1912, 69th Cong. (1st Sess. 1925); H.R. 6716, 69th Cong. (1st Sess. 1926); H.R. 8914, 69th Cong. (1st Sess. 1926); H.R. 9285, 70th Cong. (1st Sess. 1928); S. 4377, 71st Cong. (2d Sess. 1930); H.R. 15428, 71st Cong. (3d Sess. 1930); H.R. 16429, 71st Cong. (3d Sess. 1931); H.R. 17168, 71st Cong. (3d Sess. 1931); H.R. 5065, 72d Cong. (1st Sess. 1931); S. 211, 72d Cong. (1st Sess. 1931); S. 4567, 72d Cong. (1st Sess. 1932); S. 1833, 73d Cong. (1st Sess. 1933); H.R. 129, 73d Cong. (1st Sess. 1933); H.R. 2028, 74th Cong. (1st Sess. 1935); S. 1043, 74th Cong. (1st Sess. 1935).

Additionally, the bill that later became the Federal Tort Claims Act originally contained thirteen exceptions.[263] The Act as passed, however, contained twelve enumerated exceptions;[264] the omitted exception prohibited "any claim for which compensation is provided by the . . . World War Veterans' Act of 1924, as amended."[265] This omission is significant because it indicates that Congress intended to permit service members' claims under the Federal Tort Claims Act regardless of whether the injuries occurred incident to military service.

Similarly, "[t]he Federal Tort Claims Act expressly repealed the Military Personnel Claims Act of July 3, 1943, which authorized the Secretary of War to adjust claims of servicemen up to $1,000 when the claims were not incident to service."[266] This suggests that "Congress, when it deprived the servicemen of this limited remedy for torts committed by the Government, did so with the expectation and intent that this remedy be superseded by the rights granted by the . . . [Federal Tort Claims Act]."[267] Therefore, the Federal Tort Claims Act's repeal of the Military Personnel Claims Act demonstrates that Congress intended to permit service members unqualified recovery under the Federal Tort Claims Act.

The congressional discussions concerning the Federal Tort Claims Act also indicate that Congress was aware of the possibility that service members would file claims under the Federal Tort Claims Act. As members of Congress discussed the bill that later became the Federal Tort Claims Act, they also discussed the troubles disabled veterans faced at the time.[268] Shortly after the discussion, Congressman A.S. Monroney moved to insert the word "combatant" before the word "activities" in the exception that barred "[a]ny claim arising out of the activities of the military or naval forces, or the Coast Guard, during time of war."[269] The motion passed without discussion.[270] Some legal scholars have theorized that the term combatant "may have been inserted in view of the uncertain

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[263] *See* Bogin, *supra* note 38, at 91 n.29.
[264] *See* Federal Tort Claims Act, 60 Stat. 843, § 421 (1946) (current version at 28 U.S.C. § 2680 (2000)).
[265] *See* Bogin, *supra* note 38, at 91 n.29.
[266] *Id.* at 93.
[267] *Id*.
[268] *See* 92 CONG. REC. 10,091–92 (July 25, 1946) (statement of Rep. Rogers).
[269] 92 CONG. REC. 10,093 (July 25, 1946) (statement of Rep. Monroney).
[270] *See* 92 CONG. REC. 10,093 (July 25, 1946) ("The amendment was agreed to.").

meaning of the companion phrase 'during the time of war.'"[271] Regardless of why Congress inserted the term combatant into the military activities exception, this exception's presence in the Act demonstrates that Congress was aware of the potential for military claims and chose to exclude only certain military claims from the Act.

The Federal Tort Claims Act's plain language, buttressed by its legislative history, indicates that Congress intended to permit service members to recover under the Act, regardless of the "incident to service" test. Clearly, "Congress was cognizant of potential military claims when drafting the . . . [Federal Tort Claims Act] and, had it chosen to do so, could have explicitly excluded them."[272] However, it did not. Rather, the plain language of the Federal Tort Claims Act permits all claims against the United States, subject to the enumerated exceptions.[273] The omission of the exception that barred World War veterans from recovering under the Act, the Federal Tort Claims Act's repeal of the Military Claims Act, and the insertion of the word combatant into the military activities exception all demonstrate that Congress intended to permit service members to enjoy the same standing as civilians when suing under the Federal Tort Claims Act. Despite this, the Supreme

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[271] *The Federal Tort Claims Act*, *supra* note 52, at 548 n.99.

[272] Costo v. United States, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J., dissenting). Critics of this line of thought have pointed to the fact that, even though more than fifty years have lapsed since the *Feres* decision, Congress has not passed legislation abrogating the *Feres* doctrine. *See The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act, Hearing Before the S. Committee on the Judiciary*, 107th Cong. 2d Sess. 24 (2002) [hereinafter *The Feres Doctrine*] (statement of Major General (MG) John Altenburg). Congress's failure to abrogate the *Feres* doctrine, however, does not change the fact that the Supreme Court overstepped its authority in *Feres* and created an additional exception to the Federal Tort Claims Act. "To say that because Congress hasn't done something that Congress agrees with [*Feres*] is really as much a non sequitur as the holding in *Feres* is from the case." *Id.* (statement of Senator Arlen Specter). Throughout the 1980s, Congress attempted several times to pass bills permitting service members to sue under the Federal Tort Claims Act for medical malpractice. *See* 134 CONG. REC. S929, 929 (Feb. 18, 1988) (statement of Sen. Sasser); 134 CONG. REC. H354, 356 (Feb. 17, 1988) (statement of Rep. Frank). One of the bills passed the House with a vote of 917–90; however, it failed to make it out of the Senate. *See* 134 CONG. REC. H354, 356 (Feb. 17, 1988) (statement of Rep. Frank). The bill never made it "out of the [Senate] Judiciary Committee because of the strong opposition of Senator Strom Thurmond, Republican of South Carolina, the committee's chairman." Linda Greenhouse, *Washington Talk; On Allowing Soldiers to Sue*, N.Y. TIMES, Dec. 16, 1986,http://query.nytimes.com/gst/fullpage.html?sechealth&res=9A0DE3DB123EF935A25751C1A960948260.

[273] *See* 28 U.S.C. §§ 1346(b), 2674, 2680 (2000).

Court elected to create the *Feres* doctrine, an additional exception to the Federal Tort Claims Act.

The *Feres* doctrine, therefore, is "a judicial re-writing of an unambiguous and constitutional statute. Even to the courts that have considered it, the [*Feres*] decision stands not for an interpretation of statute but rather a 'judicially created exception' to the [Federal Tort Claims Act] . . . ."[274] The *Feres* doctrine has amounted to an almost total bar to service members' claims, and it has become an additional exception to the Federal Tort Claims Act. Thus, when it promulgated the *Feres* doctrine, the Court assumed the role of the legislature, modified the Federal Tort Claims Act, and created a new exception to the Act. This act of judicial legislation runs counter to "our basic separation of powers principles . . . ."[275]

VI. Analysis of the Rationales in Support of the *Feres* Doctrine

A. The Relationship Between the Government and Its Armed Forces

The U.S. Supreme Court denied claims under the "incident to service" test because it considered the relationship between the Government and its armed forces to be distinctly federal in nature. Under the Federal Tort Claims Act, the tort law of the state in which an act or omission occurred governs both the United States' substantive tort liability and the amount of damages recoverable.[276] Therefore, the Court believed that allowing service members to sue under the Federal Tort Claims Act for injuries sustained incident to service would cause state law to intrude upon the relationship between the Government and its armed forces.[277]

State law, however, intrudes upon the relationship between the Government and its armed forces when civilians sue under the Federal Tort Claims Act for injuries inflicted by military employees and service members. State law governs civilians' ability to recover under the Act by providing the substantive tort law to establish the United States'

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[274] *Costo*, 248 F.3d at 871 (Ferguson, J., dissenting). *See* Schoemer v. United States, 59 F.3d 26, 28 (5th Cir. 1995); Pringle v. United States, 208 F.3d 1220, 1223 (10th Cir. 2000); Romero *ex rel.* Romero v. United States, 954 F.2d 223, 224 (4th Cir. 1992)).

[275] *Costo*, 248 F.3d at 871 (Ferguson, J., dissenting).

[276] *See* 28 U.S.C. § 1346.

[277] *See* Feres v. United States, 340 U.S. 135, 143 (1950).

liability for its employees' actions.[278] State law also governs the amount recoverable.[279] Civilians sue under the Federal Tort Claims Act and, as a result, government employees and service members face tort liability.[280] Because tort law varies from state to state, this can lead to varying tort standards for government employees and service members.

In *Feres*, the Court believed that this choice of law provision was "fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury."[281] The Court, however, felt that service members had no such choice because the Government could assign them anywhere in the world.[282] Therefore, the Court concluded "[t]hat the geography of an injury should select the law to be applied to . . . [a service member's] tort claims makes no sense."[283]

Justice Scalia, in his dissent to the Court's opinion in *Johnson*, wrote that "[t]he unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than [what *Feres* provides] uniform nonrecovery."[284] Federal prisoners, just like service members, have no control over their location.[285] Yet, in *United States v. Muniz*,[286] the Court held that federal prisoners could sue under the Federal Tort Claims Act. Despite a similar lack of control of

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[278] *See* 28 U.S.C. § 1346.

[279] *See id. See also* Richards v. United States, 369 U.S. 1 (1962) (holding that the entire law of the state applies).

[280] *See* Brown v. United States, 348 U.S. 110 (1954) (permitting a discharged veteran's claim for medical malpractice at a Veterans Affairs hospital); Brown v. United States, 462 F.3d 609 (6th Cir. 2006) (permitting a child's suit for negligent provision of prenatal care to the service member mother); Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (holding that a service member's child could maintain a suit for medical and legal malpractice); Adams v. United States, 728 F.2d 736 (5th Cir. 1984) (permitting a Soldier's suit for a Public Health Services hospital's medical malpractice that occurred while the Soldier was on excess leave and after he had received a notice of separation); Smith v. Saref, 148 F. Supp. 2d 504 (D. N.J. 2001) (permitting a service member's child's suit for medical malpractice); Graham v. United States, 753 F. Supp. 994 (D. Me. 1990) (permitting a child's suit for negligent provision of prenatal care to the service-member mother).

[281] *Feres*, 340 U.S. at 142–43.

[282] *See id.* at 143.

[283] *Id.*

[284] United States v. Johnson, 481 U.S. 681, 695–96 (1987) (Scalia, J. dissenting).

[285] *Id.*

[286] United States v. Muniz, 374 U.S. 150 (1963).

location, the Court narrowed service members' Federal Tort Claims Act remedies while it refused, in the context of federal prisoners, to "narrow the remedies provided by Congress."[287]

Just as the service member has little freedom to "limit the jurisdiction in which"[288] federal entities may injure him, also limited is the service member's family. Service members and their families move frequently to meet the needs of the military and enjoy little choice in assignment location. Even though service members' families have little choice of assignment when they accompany the service member sponsor to duty stations, the federal courts have permitted military family members to recover under the Federal Tort Claims Act.[289]

Because tort law varies from state to state, the amount a military family member recovers can vary depending upon where the family member sustained the injury. The military family member's injuries and the recovery gained under the Federal Tort Claims Act likely affect the service member's financial and familial situation. The variation from state to state in recovery, however, has not barred military family members from recovering for injuries caused by the Government's negligence.[290] Despite this variation in recovery, the federal courts have permitted such suits and do not appear concerned about state law's intrusion on the relationship between the Government and its armed forces, nor has there been any indication such an intrusion has occurred.

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[287] *Id.* at 165–66 (refusing to expand the Federal Tort Claims Act's exceptions to bar federal prisoners' suits under the Act). *See generally Johnson*, 481 U.S. at 695–96 (Scalia, J. dissenting) (citing *Muniz*, 374 U.S. at 162).

[288] *Feres*, 340 U.S. at 142–43.

[289] *See* Brown v. United States, 462 F.3d 609 (6th Cir. 2006) (permitting a child's suit for negligent provision of prenatal care to the service-member mother); Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (holding that a service member's child could maintain a suit for medical and legal malpractice); Smith v. Saref, 148 F. Supp. 2d 504 (D.N.J. 2001) (permitting a service member's child's suit for medical malpractice); Graham v. United States, 753 F. Supp. 994 (D. Me. 1990) (permitting a child's suit for negligent provision of prenatal care to the service-member mother); Burke v. United States, 605 F. Supp. 981 (D. Md. 1985) (permitting suit for a military doctor's failure to timely diagnose a service member's dependent wife's cancer).

[290] *See supra* note 289 and accompanying text.

B. Lack of Comparable Private Liability

The Federal Tort Claims Act provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a *private individual* under like circumstances . . . ."[291] The Court in *Feres* asserted that service members suing the Government for injuries incurred incident to service could point to no private individual's liability remotely similar to that of the U.S. military.[292] Therefore, the Court reasoned that the United States could not be liable for injuries service members incur incident to service because "no private individual has the power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command."[293]

The military, however, performs functions that private individuals also perform, such as providing medical, legal, retail, transportation, and recreational services.[294] Private individuals provide such services and are liable for negligent provision of such services.[295] Applying the Court's

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[291] 28 U.S.C. § 2674 (2000) (emphasis added).

[292] *See Feres*, 340 U.S. at 141.

[293] *Id.*

[294] *See* UCMJ arts. 27a,27b (2005); U.S. DEP'T OF DEFENSE, DIR. 1015.2, MORALE, WELFARE, AND RECREATION (MWR) (14 June 1995) [hereinafter DOD DIR. 1015.2]; U.S. DEP'T OF DEFENSE, INSTR. 1015.10, PROGRAMS FOR MORALE, WELFARE, AND RECREATION (MWR) (14 June 1995) (incorporating C1, 31 Oct. 1996) [hereinafter DODI 1015.10]; U.S. DEP'T OF THE ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES (24 Oct. 2006) [hereinafter AR 215-1]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (16 Nov. 2005) [hereinafter AR 27-10]; U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996) [hereinafter AR 27-3]; U.S. DEP'T OF ARMY, REG. 40-1, COMPOSITION, MISSION, AND FUNCTION OF THE ARMY MEDICAL DEPARTMENT (1 July 1983) [hereinafter AR 40-1]; U.S. DEP'T OF ARMY, REG. 60-10, ARMY AND AIR FORCE EXCHANGE SERVICE (17 June 1988) [hereinafter AR 60-10]; Defense Commissaries Agency Home Page, http://www.commissaries.com/about_us.cfm [hereinafter DECA website] (last visited Mar. 15, 2007).

[295] *See* Dunbar v. Jackson Hole Mt. Resort Corp., 392 F.3d 1145, 1148 (10th Cir. 2004) (holding that private recreation companies can be liable for negligence if the harm is not a result of an inherent risk of the sport or recreational activity); Wien Alaska Airlines v. Simmonds, 241 F.2d 57 (9th Cir. 1957) (permitting suit against an airline for a death that occurred in an aircraft crash); Lloyd Noland Hosp. v. Durham, 905 So.2d 157 (Ala. 2005) (permitting a suit against a private hospital for medical malpractice); Richmond v. Nodland, 501 N.W.2d 759, 761 (N.D. 1993) ("The elements of a legal malpractice action against an attorney for professional negligence are the existence of an attorney-client relationship, a duty by the attorney to the client, a breach of that duty by the attorney, and damages to the client proximately caused by the breach of that duty."); Johnson v. Wagner Provision Co., 49 N.E.2d 925 (Ohio 1943) (permitting suit against owners of a

logic, because private entities can be held liable for negligent provision of medical, legal, retail, transportation, and recreational services, the United States could, similarly, be liable for the negligent provision of such services. In fact, civilians and military retirees have pursued Federal Tort Claims Act suits for negligent provision of such services.[296] Yet, active duty service members injured under the same or similar circumstances as civilians or retirees have no such cause of action.[297]

Additionally, the Supreme Court in *Johnson* did not directly address the issue of lack of comparable private liability raised in *Feres*. Instead, the Court's focus seemed to shift from lack of comparable private liability to the authority the Government vests in the chain-of-command and the need to preserve this authority in order to maintain the military's good order and discipline.[298] This shift in *Johnson* suggests that the issue of lack of comparable private liability is no longer a valid rationale.

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retail store); JCPenney Co. v. Robison, 193 N.E. 401 (Ohio 1934) (permitting suit against owners of a retail store); Halpern v. Wheeldon, 890 P.2d 562 (Wyo. 1995) (permitting suit against a company that provided horseback riding tours).

[296] *See* United States v. Brown, 348 U.S. 110 (1954) (holding that a discharged veteran could recover for negligent medical treatment at a Veterans Affairs hospital); Brown v. United States, 462 F.3d 609 (6th Cir. 2006) (holding that a service member's child could recover under the Federal Tort Claims Act for injuries caused by negligent prenatal care); Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) (holding that dependent children of active duty service members may have their own claims for medical and legal malpractice); Bryant v. United States, 565 F.2d 650 (10th Cir. 1977) (permitting suit for negligent supervision of children in a government boarding school); Piggott v. United States, 480 F.2d 138 (4th Cir. 1973) (permitting a mother's suit against the United States for the drowning deaths of her two children at the Jamestown National Historical Park).

[297] *See* United States v. Johnson, 481 U.S. 681, 703 (1987) (barring suit for a Coast Guard pilot's death in the crash of his helicopter); Costo v. United States, 248 F.3d 863 (9th Cir.) (barring suit for the wrongful death of a Sailor during a Navy MWR program's rafting trip); Richards v, United States, 176 F.3d 652 (3d Cir. 1999) (barring suit for the death of a Soldier killed in an accident with a negligently-operated government vehicle); Jones v. United States, 112 F.3d 299 (7th Cir. 1997) (barring a service member's suit for military medical malpractice); Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996) (barring a service member's suit for military medical malpractice); Rayner v. United States, 760 F.2d 1217 (11th Cir. 1985) (barring suit for a service member's death caused by military medical malpractice); Uptegrove v. U.S., 600 F.2d 1248 (9th Cir. 1979) (barring suit for the death of a Navy officer killed while on leave and flying space-available on a military aircraft that crashed). *But see* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting suit for a Soldier's death in an accident with a negligently-operated military vehicle).

[298] *Johnson*, 481 U.S. at 692.

C. Prevention of Double Recovery

In *Feres*, the Supreme Court concluded that veterans benefits provide service members with a litigation-free remedy for injuries they incur incident to service and that veterans benefits compare satisfactorily to workers' compensation benefits.[299] The Court has continued to adhere to the *Feres* doctrine because it believes that veterans benefits compensate service members for their injuries.[300] Thus, the Court has concluded that allowing service members to sue the United States under the Federal Tort Claims Act for their injuries could lead to double recovery. This concern about double recovery, however, does not justify the broad, almost total bar to suit the *Feres* doctrine presents.

In its opinion in *Feres*, the Court characterized the veterans compensation system as one that "normally requires no litigation, is not negligible or niggardly . . . ."[301] The Court's emphasis on the fact that the veterans compensation system normally requires no litigation is misplaced. Perhaps at the time the Court decided *Feres*, the veterans compensation system swiftly and accurately awarded benefits. Today's service members pending medical retirement or discharge, however, are "stranded in administrative limbo. They are at the mercy of a medical evaluation system that's agonizingly slow, grossly understaffed and saddled with a growing backlog of cases."[302] Once a service member

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[299] Feres v. United States, 340 U.S. 135, 145 (1950).

[300] *See Johnson*, 481 U.S. at 689 ("[T]he existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries."); *Feres*, 340 U.S. at 140 ("Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.").

[301] *Feres*, 340 U.S. at 145. *See Johnson*, 481 U.S. at 689; Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977) ("[the Veterans Benefits Act] . . . provides a swift, efficient remedy for the injured serviceman . . . .").

[302] Kelly Kennedy, *Wounded and Waiting*, ARMY TIMES, Feb. 18, 2007, http://www.armytimes.com/news/2007/02/tnsmedboards070217/. *See Walter Reed Army Medical Center Outpatient Care: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Aff., H. Comm. on Oversight and Gov't Reform*,,110th Cong. 9, 11 (2007) [hereinafter *Hearings on the Walter Reed Army Medical Center Outpatient Care*] (statement of Lieutenant General Kelvin C. Kiley, the Army Surgeon General), *available at* http://oversight.house.gov/Documents/2007030512.0611-72972.pdf (last visited Mar. 14, 2007) ("the total time from permanent profile to final disability rating is currently 208 days"); RICHARD BUDDIN & KANIKA KAPUR, AN ANALYSIS OF MILITARY DISABILITY COMPENSATION 88 (2005) (prepared for the Office of the Secretary of Defense by the National Defense Research Institute) ("In our view, the military disability system has become unduly complex. . . . These complexities mean that it is difficult to assess why a member has received a given disability rating and harder still to assess how this disability

leaves active duty, he will face the veterans compensation system, a large bureaucracy that slowly and inefficiently processes service members' claims.[303] The Veterans Benefits Administration's disability claims

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rating translates into some incremental monthly income."); *Army Surgeon General Puts in for Retirement*, NAVY TIMES, Mar. 13, 2007, http://www.navytimes.com/news/2007/03/TNSkiley070312/ ("'Our disability system has become a maze: overly bureaucratic, sometimes unresponsive, and needlessly complex,' . . . [acting Secretary of the Army] Geren said. 'A [S]oldier who fights the battle should not have to come home and fight the battle of bureaucracy.'"); Kelly Kennedy, *Who's Fit for Duty?*, ARMY TIMES, June 19, 2006, http://armytimes.com/legacy/new/0-ARMYPAPER-1827366.php ("From 2001 through 2004, the number of active-duty and reserve claims made with the Army Medical Evaluation and Physical Evaluation boards nearly doubled from 7,218 in 2001 to 13,748 in 2005."); Dana Priest & Anne Hall, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/0217/AR2007/021701172.html (describing a mother's struggles for fifteen months as she helped her injured son through the Army's medical evaluation process).

[303] *See* S.W. MELIDOSIAN ET AL., THE VETERAN: VA'S CUSTOMER: WHO CLAIMS BENEFITS AND WHY? 158 (1996) ("The [Veterans Claims Adjudication] Commission concluded that the problems with the existing [veterans claims] system are so many and so varied that it cannot be fine tuned into a system that will consistently produce timely and high-quality adjudicative products."). *See also* GENERAL ACCOUNTING OFFICE, DESPITE RECENT IMPROVEMENTS, MEETING CLAIMS PROCESSING GOALS WILL BE CHALLENGING 3 (2002) (testimony of Cynthia A. Bascetta, Director, Health Care—Veterans Health and Benefits Issues before the Subcommittee on Benefits, Committee on Veterans' Affairs, House of Representatives) ("VBA continues to experience problems processing veterans' disability compensation and pension claims. These include large backlogs of claims and lengthy processing times. As acknowledged by VBA, excessive claims inventories have resulted in long waits for veterans to receive decisions on their claims and appeals."); GENERAL ACCOUNTING OFFICE, CLAIMS PROCESSING TIMELINES PERFORMANCE MEASURES COULD BE IMPROVED 5 (2002) (report to the Chairman and Ranking Minority Member, Committee on Veterans' Affairs, U.S. Senate) (stating that in fiscal year 2002, the Veterans Administration took an average of 241 days to complete a disability compensation claim, 126 days to make a pension decision, and 172 days to complete a dependency and indemnification compensation claim); GENERAL ACCOUNTING OFFICE, PROBLEMS AND CHALLENGES FACING DISABILITY CLAIMS PROCESSING 2 (2000) (testimony of Cynthia A. Bascetta, Associate Director Veterans' Affairs and Military Health Issues, Health, Education, and Human Services Division before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives) ("For a number of years, VBA's regional offices have experienced problems processing compensation claims. These have included large backlogs of pending claims, lengthy processing times for initial claims, high error rates in claims processing, and questions about the consistency of regional office decisions."); BLUE RIBBON PANEL ON CLAIMS PROCESSING, PROPOSALS TO IMPROVE DISABILITY CLAIMS PROCESSING IN THE VETERANS BENEFITS ADMINISTRATION 3 (1993), *available at* http://www.vetscommission.org/displayContents.asp?id=4 [hereinafter BLUE RIBBON PANEL ON CLAIMS PROCESSING] ("While VA believes that veterans are now receiving better decisions, VA is acutely aware that the growing backlog has created additional and unacceptable delays for its clients.").

process is not easy.[304] Service members often require veterans' advocates to assist in filing claims for disability benefits.[305] Veterans filing claims for benefits must often provide "extensive proof and substantiation and, if connections between injuries and service are not appropriately made, benefits will be denied."[306]

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[304] *See* MELIDOSIAN ET AL., *supra* note 303, at 158 ("At the [veterans benefits] claims intake point, the application is lengthy, unfocused, and, in many instances, asks for information that is extraneous to the benefit sought."); *id.* at 192 (characterizing the Veterans Administration's adjudication and appeals process as procedurally complex); BLUE RIBBON PANEL ON CLAIMS PROCESSING, *supra* note 303, at 321 ("Survey respondents generally confirmed the Blue Ribbon Panel's conclusion that VA Form 21-526, used to apply for disability compensation and pension, is inadequate."); Marty Katz, *Representing Veterans in the Battle for Benefits*, TRIAL, Sept. 2006, at 30 (interview with Ronald B. Abrams, Joint Executive Director of National Veterans Legal Services Program) ("Each year, increasing numbers of veterans file claims for disability benefits from the Department of Veterans Affairs (VA). But the process is not easy . . . .").

[305] *See* Connolly v. Derwinski, 1 Vet. App. 566, 569 (1991) ("VA's duty to assist arises out of its long tradition of *ex parte* proceedings and paternalism toward the veteran."); MELIDOSIAN ET AL., *supra* note 303, at 158 ("The [Veterans' Claims Adjudication] Commission believes that VA's traditional paternalism is the source of much of its present difficulties. . . . A paternalistic system requires that claimants not be informed regarding such fundamental matters as the specific requirements for presenting and proving their claims."); Katz, *supra* note 304, at 31 ("After the veteran files a claim, the VA has a strange and almost Kafkaesque adjudication process.").

[306] Katz, *supra* note 304, at 30. *See* GENERAL ACCOUNTING OFFICE, HUMAN EXPERIMENTATION: AN OVERVIEW ON COLD WAR ERA PROGRAMS 2 (1994) (testimony of Frank C. Conahan, Assistant Comptroller General, National Security and International Affairs Division before the Legislation and National Security Subcommittee, Committee on Government Operations, House of Representatives) ("it has proven difficult for participants in government tests and experiments between 1940 and 1974 to pursue claims because little centralized information is available to prove participation or determine whether adverse effects resulted from the testing."); GENERAL ACCOUNTING OFFICE, VETERANS DISABILITY INFORMATION FROM MILITARY MAY HELP VA ASSESS CLAIMS RELATED TO SECRET TESTS 1 (1994) (report to the Chairman, Committee on Veterans Affairs, U.S. Senate) ("because there is only limited information available on [the military's secret chemical] test participants, VA will continue to have difficulty deciding whether veterans' claims are [service connected and therefore,] valid."); U.S. DEP'T OF VETERANS AFFAIRS, ANALYSIS OF PRESUMPTIONS OF SERVICE CONNECTION (1993) (discussing various medical conditions and the Veterans Affairs requirements to prove service connection); ECONOMIC SYSTEMS INC., VA DISABILITY COMPENSATION PROGRAM LEGISLATIVE HISTORY 19 (2004) [hereinafter ECONOMIC SYSTEMS INC.] (review prepared for the Veterans Administration Office of Policy, Planning, and Preparedness) ("[T]he issues of presumptions [of service-connection]—both for disease as well as Prisoner of War Effects—has become increasingly complex."); Patricia O. Jungreis, Comment*: Pushing the Feres Doctrine a Generation Too Far: Recovery for Genetic Damage to the Children of Servicemembers*, 32 AM. U.L. REV. 1039, 1040–41 (1983) ("Thousands of veterans have filed claims with the Veterans' Administration (VA) seeking compensation for their injuries [from exposure to hazardous materials]. The VA,

Moreover, veterans benefits are not as generous as the Court believed them to be.[307] A service member injured incident to service and medically retired from the military may receive his retirement pay.[308] Service members' benefits also include tax-free disability compensation[309] as well as free or subsidized medical care[310] and prescriptions.[311] Despite these and many other benefits, service members injured on active duty and their families often struggle financially.[312]

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however, has been generally unresponsive to these claims and reluctant to recognize that the injuries from exposure to hazardous materials are service related.").

[307] The Court in *Johnson* characterized veterans benefits as "generous." United States v. Johnson, 481 U.S. 681, 689 (1987). Military disability benefits, however, are not compensatory. Rather, they "supplement earnings on the assumption that those earnings are depressed as a result of disability." BUDDIN & KAPUR, *supra* note 302, at xx.

[308] A service member injured in the military and found not fit for duty will receive a disability rating. Kennedy, *supra* note 302. If the disability rating is lower than thirty percent, the service member will get a one time severance payment. *Id.* If the rating is thirty percent or more, the service member may receive lifelong medical benefits as well as the same percentage of his base pay. *Id.*

[309] U.S. DEP'T. OF VETERANS AFF., FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS 17 (2006).

[310] *Id.* at ch. 1.

[311] *Id.* at 13–14.

[312] For example, Jerry Meagher was a twenty-two year old active duty service member who checked into Balboa Naval Hospital in 1974 to have a cyst removed from his left arm. As a result of Meagher's surgery, he became a severely brain-damaged quadriplegic who required twenty four hour a day care. Meagher's "mother testified before . . . [Representative Glickman's congressional] subcommittee that it takes all of the VA compensation that Jerry receives, plus $600 to $800 a month to take care of Jerry." *See The Feres Doctrine and Military Medical Malpractice*, *supra* note 203, at 17 (prepared statement of Dan Glickman, U.S. Representative from the State of Kansas). The Veterans Benefits Administration (VBA) rating schedules are slow to incorporate advances in medicine, which can result in under compensating some veterans while over compensating other veterans. Typically the VBA only updates rating schedules when veterans' service organizations or congressional staff raise the issue. Between 1978 and 1988, the VBA partially updated only four of the fourteen sections of the rating schedule. ECONOMIC SYSTEMS INC., *supra* note 306, at 58. *See* GOVERNMENT ACCOUNTABILITY OFFICE, DOD AND VA HEALTH CARE CHALLENGES ENCOUNTERED BY INJURED SERVICEMEMBERS DURING THEIR RECOVERY PROCESS (2007) (statement of Cynthia A. Bascetta, Director, Health Care before the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, House of Representatives) ("Our work has shown that servicemembers injured in combat face an array of significant medical and financial challenges as they begin their recovery process in the DOD and VA health care systems."); Kelly Kennedy, *Officers Get More, Higher Disability Ratings*, ARMY TIMES, Mar. 8, 2007, *available at* http://www.armytimes.com /news/2007/03/TNSreedstats070308 ("VA benefits are much less [than military disability retirement benefits] and end with the death of the veteran if [the disability] isn't service-connected. There's no lifetime medical insurance for the spouse and for the children."); Simpson, *supra* note 3, at 15 ("When [Specialist Sean Baker] . . . arrived home in

The biggest distinction between civilian awards and military entitlements is that civilian awards take into account economic damages while military benefits do not. In personal injury cases, a civilian typically may recover for "lost earning capacity as substantiated by acceptable medical proof."[313] A service member who medically retires from the military will likely receive his retirement pay.[314] Nowhere in a service member's benefits is a calculation that accounts for an increased earning potential as he ages; rather, the retirement pay is calculated using the service member's pay rate when he was discharged from the service.[315] As a result, a service member's pay stagnates at the rank at which he departed the military[316] and only increases with cost of living adjustments.[317]

Civilians injured through the Government's negligence can also claim non-economic damages. These include past and future conscious pain and suffering, emotional distress, physical disfigurement, and loss of consortium.[318] A civilian decedent's survivors may recover for loss of monetary support, loss of ascertainable contributions, and loss of services.[319] The survivors may also recover for the civilian decedent's pre-death conscious pain and suffering; loss of companionship, comfort, society, protection, and consortium; loss of training, guidance, education and nurturing; and emotional distress.[320]

Veterans benefits provide no such compensation for non-economic damages. In situations involving the wrongful death of a service member, a military decedent's survivors and estate are limited to receiving the veteran's survivors benefits (see Appendix). One of the

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Georgetown, Kentucky, . . . despite the finding of the Physical Evaluation Board *seven months earlier that he was disabled*, there was no disability compensation awaiting Sean Baker. He was, at that time, unemployed, broke, on nine different prescription medications, and suffering from seizures and other traumatic brain injury maladies . . . .") (emphasis in original).

313 *See* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 3-5b2d. (31 Dec. 1997) [hereinafter AR 27-20]. *See also* BUDDIN & KAPUR, *supra* note 302, at xx ("[Military disability benefits] supplement earnings on the assumption that those earnings are depressed as a result of disability.").

314 *See* 10 U.S.C. § 1201 (2000).

315 *See id.* § 1401.

316 *See id.*

317 *See* 38 U.S.C. § 1104 (2000).

318 *See* AR 27-20, *supra* note 313, para. 3-5b3.

319 *See id.* para. 3-5c2.

320 *See id.* para. 3-5c3.

first benefits the survivors receive is the military decedent's Servicemembers' Group Life Insurance. Servicemembers' Group Life Insurance provides $400,000 coverage of the service member, $100,000 coverage of the service member's spouse, and $10,000 coverage of each dependent child.[321] While this insurance is often considered a benefit, it is actually a contractual agreement between the Government and its service members. Service members automatically qualify for Servicemembers' Group Life Insurance coverage and must opt out if they do not want the coverage.[322] If a service member elects the coverage or fails to opt out of the coverage, the Government deducts a premium from the service member's base pay.[323]

Depending on the service member's rank at death, the service member's surviving spouse could receive dependency and indemnification compensation between $1033 and $2404 per month.[324] Each child under eighteen years of age is entitled to $257 per month; the surviving spouse is entitled to an additional $250 in dependency and indemnification compensation per month until the youngest child attains the age of eighteen.[325] Children may retain the dependency and indemnification compensation until age twenty-three if they are enrolled at an approved educational institution.[326]

Veterans' surviving spouses also face the possibility of losing their survivor benefits. "Prior to 1971, a veteran's surviving spouse who remarried was permanently barred from receiving benefits unless the remarriage was void or had been annulled."[327] Congress rescinded this bar in 1970[328] and then reinstated the bar in 1990.[329] In 2002, Congress

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[321] *See* 38 U.S.C. § 1967; *see also* E-mail from Doug Davis, Veterans Affairs Benefits Specialist, Armed Forces Services Corporation, to Major Deirdre G. Brou, student, 55th Judge Advocate Graduate Course, the Judge Advocate General's Legal Center and School (Mar. 12, 2007, 12:07 EST) (on file with author).

[322] *See id.*

[323] *See id.* § 1969.

[324] *See id.* § 1311(a).

[325] *See id.* § 1311(f).

[326] *See id.* § 1314(c).

[327] Turner v. Gober, 1997 U.S. App. LEXIS 17384, at *3 (Fed. Cir. 1997). *See also* Owings v. Brown, 1996 U.S. App. LEXIS 11368 (Fed. Cir. 1996) (holding that a remarried spouse was not entitled to reinstatement of dependency and indemnity compensation upon the termination of her remarriage); Carter v. Cleland, 207 U.S. App. D.C. 6 (D.C. Cir. 1980) (holding that wives who separated from their abusive military husbands but never divorced them were not entitled to receive their deceased husbands' veterans benefits because the estranged wives had children by other men).

[328] *Turner*, 1997 U.S. App. LEXIS at *3–*4.

again permitted remarried spouses to resume drawing benefits upon the termination of the remarriage by divorce or death.[330] A civilian's spouse faces no such potential loss of a Federal Tort Claims Act award upon remarriage; the award remains the property of the civilian's spouse, regardless of remarriage.

In addition to the Court's double recovery concern, the *Feres* Court also claimed that veterans benefits compared "extremely favorably with those provided by workmen's compensation statutes."[331] This logic mistakenly assumes that the *Feres* doctrine only bars the type of suits that would be barred under a typical workers' compensation scheme. Workers' compensation laws vary by state; typically, such laws provide workers' compensation as the exclusive remedy available to employees injured in accidents that arise out of and in the course of employment.[332] Generally, workers' compensation laws bar employees from suing for negligent treatment of a work-related injury.[333] Many of the injuries for which service members sue under the Federal Tort Claims Act involve

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[329] *Id.* at *4.

[330] Act of Dec. 6, 2002, Pub. L. No. 107-330, tit. I, § 101(b), 116 Stat. 2821 (current version at 38 U.S.C.S. § 103 (LEXIS 2007).

[331] United States v. Feres, 340 U.S. 135, 145 (1950).

[332] *See* GA. CODE ANN. § 34-9-1 (2007) ("'Injury' or 'personal injury' means only injury by accident arising out of and in the course of the employment and shall not, except as provided in this chapter, include a disease in any form except where it results naturally and unavoidably from the accident."); NEB. REV. STAT. § 48-101 (LEXIS 2007) ("When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his . . . employment, such employee shall receive compensation therefor from his . . . employer if the employee was not willfully negligent at the time of receiving such injury."); N.J. STAT. ANN. § 34:15-1 (LEXIS 2007) ("When personal injury is caused to an employee by accident arising out of and in the course of his employment, . . . he shall receive compensation therefor from his employer, provided the employee was himself not willfully negligent at the time of receiving such injury, ..."); OR. REV. STAT. § 656.005 (2006) ("A 'compensable injury' is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death.").

[333] *See* Wright v. United States, 717 F.2d 254 (6th Cir. 1983) (permitting a federal employee's suit under the Federal Tort Claims Act for negligent medical treatment of a tubal pregnancy that ruptured at work); Crisp Reg. Hosp., Inc. v. Oliver, 275 Ga. App. 578 (Ga. Ct. App. 2005) (holding that Georgia's workers' compensation laws provide benefits for a work-related injury that later becomes exacerbated or aggravated, therefore an injured employee could not bring an independent tort action against his employer for damages for worsening of the injury); Crosson v. Jamaica Med. Ctr., 14 A.D.3d 587 (N.Y. App. Div. 2005) (holding a hospital worker injured at work could not recover for the hospital-employer's negligent treatment of the work-related injury); Budd v. Punyanitya, 69 Va. Cir. 148 (Va. Cir. 2005) (holding that a hospital employee injured at work could not recover for the hospital-employer's negligent treatment of the compensable injury).

claims that would usually fall outside the realm of workers' compensation. This is primarily because the military provides medical treatment to service members for both work and non-work related injuries and conditions.[334]

Many service members' injuries also fall outside the realm of workers' compensation because the military performs many functions that can harm civilian and military personnel alike. As previously mentioned, the military provides comprehensive health care as well as legal, retail, and recreational services to military personnel.[335] It also operates fleets of vehicles and aircraft. Service members have been harmed in accidents caused by a base exchange garage's negligent repairs to vehicles;[336] off-duty service members have been injured while enjoying military-sponsored rafting trips,[337] canoeing trips,[338] and horseback rides;[339] off-duty service members have also died when military aircraft have crashed into their homes or government vehicles have crashed into their cars.[340] Workers' compensation would not cover

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[334] *See* Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996) (holding that a Soldier could not recover for the military doctors' failure to timely diagnose her non-Hodgkins lymphoma); Schoemer v. United States, 59 F.3d 26 (5th Cir. 1995) (barring a service member's military medical malpractice suit for failure to diagnose him as having an abnormality of the pituitary gland); Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (holding that a service member could not recover for negligent treatment of venous thrombosis); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (holding that a service member could not recover for negligent prenatal care); Rayner v. United States, 760 F.2d 1217 (11th Cir. 1985) (holding that a service member's widow could not recover for negligent treatment of the service member's back pain that resulted in death).

[335] *See supra* note 294.

[336] *See* Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (barring a Marine's suit for damages sustained when his car wrecked because the base exchange garage had negligently repaired his car).

[337] *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (holding a Sailor's family could not recover for his drowning death during a Navy MWR program's rafting trip).

[338] *See* Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (holding that a Sailor could not recover for injuries sustained as a result of a negligently-operated Naval MWR program's boating and canoeing center).

[339] *See* Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) (holding that a Marine could not recover for injuries sustained while riding a horse he rented from the Marine base's stables).

[340] *See* Richards v. United States, 176 F.3d 652 (3d Cir. 1999) (barring suit for the death of an active duty Soldier in an accident with a negligently-operated government vehicle); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (permitting suit for the death of an active duty Soldier in an accident with a negligently-operated government vehicle); Orken v. United States, 239 F.2d 850 (6th Cir. 1956) (barring suit for the death of a military doctor killed when a military aircraft crashed into his on-base home in Guam).

any of the injuries in these scenarios because the injuries did not arise out of, or occur in, the course of employment.

Both the risk of double recovery and the belief that veterans benefits compare favorably to workers' compensation benefits do not justify the broad, almost total, bar to suit that the *Feres* doctrine imposes. Several options exist to prevent service members from receiving duplicate recovery. The Government can avoid double recovery by establishing the amount of damages through the administrative or judicial process. The Government can then off-set the amount of damages by the value of the veterans benefits the service member or his estate will receive. Another approach could permit the federal judge trying the case to factor veterans benefits into the damages calculations. Taking such steps to ensure the service member does not recover twice will ensure the service member is fairly and adequately compensated.

D. Effects on the Good Order and Discipline of the Military

The United States Supreme Court in *Johnson* emphasized its fear that allowing service members to sue the United States for a government employee's negligence would open the floodgates to challenges of all military decisions and policies.[341] Major General John D. Altenburg, formerly the U.S. Army's Assistant Judge Advocate General, echoed and expounded upon the Court's concerns when he spoke in support of the *Feres* doctrine before the U.S. Senate Committee on the Judiciary.[342] During his testimony, he specifically addressed the effect service members' Federal Tort Claims Act suits could have upon military order, discipline, and effectiveness.[343] In his testimony, Major General Altenburg posited that if the *Feres* doctrine was not in effect, two Soldiers from the same unit injured in a military vehicle accident could sue the United States, thus embroiling their unit "in discovery disputes concerning training and licensing procedures, maintenance records, [and] disposition of unit mechanics . . . ."[344]

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[341] United States v. Johnson, 481 U.S. 681, 690–91 (1987).

[342] *The Feres Doctrine*, *supra* note 272, at 11 (statement of MG John D. Altenburg, former Assistant Judge Advocate General, U.S. Army, Washington, D.C.).

[343] *Id.*

[344] *Id.* at 50 (prepared statement of MG John D. Altenburg, former Assistant Judge Advocate General, U.S. Army, Washington, D.C.).

Major General Altenburg also voiced the concern that while courts often focus on shielding the chain of command and superior officers from litigation, "the real divisiveness would come because of all the junior leaders that could eventually be involved in civilian litigation in instances like this."[345] He hypothesized that if a Soldier assigned to an infantry platoon was injured or killed during a platoon live fire ground assault exercise "potential defendants would include two team leaders probably between the ages of 19 and 22 years old, three squad leaders, and a platoon sergeant, and that is before we even get to officers."[346] Major General Altenburg summed up his concerns by stating that military

> [t]raining is rigorous and inherently dangerous. It's done in every kind of weather, every kind of geography, with heavy equipment, massive vehicles, live ammunition, and explosives. The military accepts young, inexperienced individuals, trains them in warfighting skills—difficult, demanding skills—and builds cohesive teams capable of accomplishing whatever missions the country deems critical to our national interests so that the rest of us remain secure. The training mission must approximate combat as closely as possible to ensure a ready, trained military that will achieve decisive victory wherever the country sends them. Examples of military training—simply guiding a 70 ton tank to its pad in the motor pool at Fort Knox, or working on the flight deck of an aircraft carrier during night flight operations off the Virginia coast, or refueling and rearming a jet aircraft at Langley Air Force Base, or merely driving a 5 ton truck at [m]idnight in blackout conditions through the forest at a training base in North Carolina—highlight that military training is inherently dangerous. Military drivers don't simply hop in their semi-trailer and drive the interstate highway—as do their civilian counterparts. They must organize in convoys and coordinate driving at a certain speed and at a certain interval from each other—while driving the

[345] *Id.* at 12 (statement of MG John D. Altenburg, former Assistant Judge Advocate General, U.S. Army, Washington, D.C.).
[346] *Id.*

> same interstate highway. Discipline and teamwork are always foremost considerations.[347]

Major General Altenburg clearly articulated and described the concern that lies at the heart of the issue of whether service members should be permitted to sue the United States for injuries incurred incident to military service. Military decision making often requires leaders to make decisions based on a limited amount of information and time;[348] timely decisions can save lives and ensure mission accomplishment. Allowing service members to question the decisions of their leaders and their fellow service members in civil court could cause leaders to second-guess their decisions before making them. It could also, theoretically, encourage insubordination and diminish unit cohesion. Carried to its logical conclusion, allowing such suits could diminish the legitimacy of a leader's orders during battle, training, or daily operations and encourage service members to believe they can choose which orders to follow. This could also affect military decision and policy making, which is what the *Feres* doctrine is designed to avoid.

Not all activities the military undertakes, however, implicate the concerns Major General Altenburg voiced. As previously mentioned, the military provides retail,[349] recreational,[350] and legal services[351] to service

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[347] *Id.* at 51 (prepared statement of MG John D. Altenburg, former Assistant Judge Advocate General, U.S. Army, Washington, D.C.).

[348] *See* FM 4-01.45, *supra* note 21, at ch. I (describing how to use the troop leading procedures to plan tactical convoys); U.S. DEP'T. OF ARMY, FIELD MANUAL 7-8, INFANTRY RIFLE PLATOON AND SQUAD para. 2-2 (1 Mar. 2001) [hereinafter FM 7-8] (describing the troop leading procedures).

[349] *See* AR 60-10, *supra* note 294; DECA website, *supra* note 294.

[350] Military morale, welfare, and recreation services include gymnasiums, pools, parks, riding stables, bowling centers, commercial travel, child and youth services, and high adventure activity trips. *See* Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Chambers v. United States, 357 F.2d 224 (8th Cir. 1966); DOD DIR. 1015.2, *supra* note 294; AR 215-1, *supra* note 294, at fig. 3-1. Although military garrison commanders and senior military leaders are generally responsible for the administration of MWR programs, civilian employees manage and oversee the programs. *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001); AR 215-1, *supra* note 294, at ch. 2.

[351] The United States is liable under the Federal Tort Claims Act for a government attorney's legal malpractice. The military provides legal services to military retirees, dependents of service members, and service members. Civilian clients harmed by a military attorney's legal malpractice have sued the United States under the Federal Tort Claims Act. Although there are no cases on point, the *Feres* doctrine would likely bar service members from recovering under the Federal Tort Claims Act for a military attorney's legal malpractice. *See* 10 U.S.C. § 1054(a) (2004); AR 27-10, *supra* note 294, at ch. 6; AR 27-3, *supra* note 294. *See also* Mossow v. United States, 987 F.2d 1365 (8th

members, their families, and military retirees. The provision of medical services is perhaps the best example of an activity the military undertakes that does not implicate the concerns Major General Altenburg voiced. Allowing service members to sue under the Federal Tort Claims Act for injuries or death due to a military doctor's medical malpractice does not harm military discipline or decision making. This is because military physicians rarely, if ever, serve as commanders or leaders.

Army Medical Corps officers typically serve two roles: staff officers who advise the command and health care professionals who provide medical services. An Army physician's professional duties relate to the physician's role as medical care provider[352] while the staff duties are "advisory [or] technical in supervision of all medical units of the command."[353] Army physicians' staff duties include advising the commander and his staff officers on medical matters affecting the command and assisting in planning military operations.[354] Army physicians serving as staff officers may recommend policies and programs;[355] however, the leadership decides whether and how to implement the recommended policies and programs.[356]

In rare cases, a Medical, Dental, or Veterinary Corps officer may serve as a commander.[357] Army Regulation 40-1, *Composition, Mission, and Function of the Army Medical Department*, states that "[a]dministrative directions of small outpatient health clinics may be vested in any qualified health care officer . . . . In certain Army health clinics, the senior position is designated as commander. These commanders will provide for disciplinary control over personnel assigned to these clinics."[358] One can easily draw a line between a Medical Corps officer's actions as a professional health care provider and those as a staff officer or commander; a doctor's breach of a

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Cir. 1993) (holding that a service member's dependent child could sue for legal malpractice under the Federal Tort Claims Act); Knisley v. United States, 817 F. Supp. 680 (S.D. Ohio 1993) (holding that the United States was not liable for an Army attorney's alleged legal malpractice because the malpractice occurred in Belgium; also holding that the discretionary function exception barred the claimant's suit against the United States).

[352] AR 40-1, *supra* note 294, para. 2-2b1.

[353] *Id.* para. 2-2b.

[354] *Id.*

[355] *Id.*

[356] *Id.*

[357] *Id.* para. 1-9.

[358] *Id.*

professional duty to a civilian patient exposes the United States to liability under the Federal Tort Claims Act. Likewise, it should expose the United States to liability if the patient is a service member.

Additionally, federal courts have, in fact, resolved suits that implicate the concerns Major General Altenburg voiced. Although federal courts have been reluctant to intrude upon military decision making,[359] they have reviewed *habeas corpus* suits alleging the military has violated its own regulations or challenging the constitutionality of military statutes, regulations, or executive orders.[360] Service members have filed *habeas corpus* suits to prevent involuntary enlistment into the military,[361] to stop the discharge of service members from the military,[362] to halt a Department of Defense (DOD) mandatory inoculation program,[363] and to review the military's denial of service members'

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[359] Federal courts have generally declined to entertain *habeas corpus* suits that involve military matters such as duty assignments. *See* Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

[360] *See* Frontiero v. Sec'y of Defense, 411 U.S. 677 (1973) (holding that statutes that require a servicewoman to prove her spouse's dependency in order to obtain medical and housing benefits violated the Due Process Clause of the Fifth Amendment because the same statutes placed no such burden on a serviceman); Patton v. Dole, 806 F.2d 24 (2d Cir. 1986) (enjoining the Navy from involuntarily enlisting a Merchant Marine Academy midshipman who failed to successfully graduate from the Academy); Mindes v. Seaman, 453 F.2d 197, 200 (5th Cir. 1971) ("[Judicial] review is available where military officials have violated their own regulations . . . .") ("Judicial review has been held to extend to the constitutionality of military statutes, executive orders, and regulations . . . .").

[361] *See Patton*, 806 F.2d 24 (enjoining the Navy from involuntarily enlisting a Merchant Marine Academy midshipman who failed to successfully graduate from the Academy).

[362] *See* Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991) (denying an injunction to stop the Army from separating a Soldier for cocaine use); Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985) (vacating a lower court's preliminary injunction halting the separation of a captain from the Air Force). *See also* Harmon v. Brucker, 355 U.S. 579 (1958) (finding the District Court for the District of Columbia had jurisdiction to review whether an Army commander erroneously considered the petitioners' pre-induction misconduct when deciding to characterize the petitioner Soldiers' service as other than honorable on their discharge certificates).

[363] *See* John Doe v. Rumsfeld, 341 F. Supp. 2d 1, 19 (D. D.C. 2004) (enjoining a mandatory DOD anthrax vaccination program)

> Congress has prohibited the administration of investigational drugs to service members without their consent. This Court will not permit the government to circumvent this requirement. The men and women of our armed forces deserve the assurance that the vaccines our government compels them to take into their bodies have been tested by the greatest scrutiny of all—public scrutiny.

requests for conscientious objector status.[364] Because such suits stop the military or a military leader from acting, they necessarily challenge the authority of the military and threaten discipline.[365] Yet, federal courts have reviewed such cases and, in some instances, enjoined the Department of Defense and individual commanders from acting.[366]

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[364] *See* Parisi v. Davidson, 405 U.S. 34, 54 (1972) ("In holding that the pendency of court-martial proceedings must not delay a federal district court's prompt determination of the conscientious objector claim of a serviceman who has exhausted all administrative remedies, we no more than recognize the historic respect in this Nation for valid conscientious objection to military service."); Hopkins v. Schlesinger, 515 F.2d 1224, (5th Cir. 1975) ("The Army's determination that a serviceman does not meet its test of a conscientious objector is final if there is a basis in fact for it."); Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971) (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); Pitcher v. Laird, 421 F.2d 1272 (5th Cir. 1970) (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); Jashinski v. Holcomb, 2006 U.S. Dist. LEXIS 45061 (W.D. Tex. 2006) (finding that a basis of fact existed to support the Army's decision to deny a Soldier's request for discharge based on conscientious objector status); Bailey v. Sec'y of the Army, 1987 U.S. Dist. LEXIS 10804 (N.D. Al. 1987) (concluding that a basis of fact supported the Army's decision to deny a conscientious objector request).

[365] For example, a service member seeking conscientious objector status may remain at his home station during the pendency of his *habeas* suit while his unit deploys overseas. *See* Alhassan v. Hagee, 424 F.3d 518 (7th Cir. 2005) (finding the Marine Corps had a basis in fact to support its denial of Lance Corporal Alhassan's request for conscientious objector status); Andy Krevetz, *Marine's Appeal Denied—Reservist Had Applied for Conscientious Objector Status*, PEORIA J. STAR, Sept. 11, 2005, at B2 ("Capt. John Douglass of the Peoria County reserve unit said Alhassan, who did not go on either of the unit's deployments, is still a member of 'Charlie Company.'"). *See also* Jashinski v. Holcomb, 2006 U.S. Dist. LEXIS 45061 (W.D. Tex. 2006) ("On or about March 7, 2005, Specialist Jashinski's unit was deployed to Afghanistan, but she was allowed to remain at Fort Sam Houston because her CO application was still pending."). The service member who fails to deploy with his unit because of his request for conscientious objector status will likely harm the morale and readiness of his unit in several ways. First, the service member's failure to deploy will likely affect his unit's readiness because it has one less person to contribute to the unit's mission. Additionally, other service members in the unit likely know why the service member did not deploy. This could harm the other service members' morale and encourage other service members to file frivolous claims of conscientious objection in an attempt to evade deployment.

[366] *See Patton*, 806 F.2d 24 (enjoining the Navy from involuntarily enlisting a Merchant Marine Academy midshipman who failed to successfully graduate from the Academy); *Helwick*, 438 F.2d 959 (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); *Pitcher*, 421 F.2d 1272 (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); *John Doe*, 341 F. Supp. 2d 1 (enjoining a mandatory DOD anthrax vaccination program). *But see* Parrish v. Brownlee, 335 F. Supp. 2d 661

Thus, federal courts have granted relief to prevent potential harm to a service member under the same circumstances,[367] but, when considering negligent tort allegations, have applied the *Feres* doctrine to deny relief for actual harm the Government has caused its service members.[368]

As MG Altenburg suggested during his testimony, eliminating the *Feres* doctrine could permit questioning of military decisions. Such questioning may encourage insubordination and harm unit cohesion, thereby upsetting the good order and discipline that the *Feres* doctrine is designed to preserve. Even though the *Feres* doctrine protects this important interest, it is too broad. Applying the Federal Tort Claims Act's plain language and enumerated exceptions, such as the discretionary function exception, can preserve the military's decision and policy-making authority while affording service members rights commensurate with those of civilians under the Federal Tort Claims Act.

(E.D.N.C. 2004) (denying a preliminary injunction preventing the Army from calling a reserve officer to active duty).

[367] *See* Frontiero v. Sec'y of Defense, 411 U.S. 677 (1973) (holding that statutes that required a servicewoman to prove her spouse's dependency in order to obtain medical and housing benefits violated the due process clause of the Fifth Amendment because the same statutes placed no such burden on a serviceman); *Parisi*, 405 U.S. at 54 ("In holding that the pendency of court-martial proceedings must not delay a federal district court's prompt determination of the conscientious objector claim of a serviceman who has exhausted all administrative remedies, we no more than recognize the historic respect in this Nation for valid conscientious objection to military service."); *Harmon*, 355 U.S. 579 (finding the District Court for the District of Columbia had jurisdiction to review whether an Army commander erroneously considered the petitioners' pre-induction misconduct when deciding to characterize the petitioner Soldiers' service as other than honorable on their discharge certificates); *Patton*, 806 F.2d 24 (enjoining the Navy from involuntarily enlisting a Merchant Marine Academy midshipman who failed to successfully graduate from the Academy); *Helwick*, 438 F.2d 959 (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); *Pitcher*, 421 F.2d 1272 (reversing the district court's denial of a Soldier's request for *habeas corpus* and directing that the Soldier's request for conscientious objector status be granted); *John Doe*, 341 F. Supp. 2d 1 (enjoining a mandatory DOD anthrax vaccination program).

[368] *See* United States v. Stanley, 483 U.S. 669 (1987); United States v. Johnson, 481 U.S. 52 (1985); Feres v. United States, 340 U.S. 135 (1950); Costo v. United States, 248 F.3d 863 (9th Cir. 2001); Richards v. United States, 176 F.3d 652 (3d Cir. 1999); Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987); Millang v. United States, 817 F.2d 533 (9th Cir. 1987); Knoch v. United States, 316 F.2d 532 (9th Cir. 1963).

VII. Alternatives to the *Feres* Doctrine

When the Supreme Court promulgated the *Feres* doctrine it had several tools at hand, in the form of the Federal Tort Claims Act's enumerated exceptions, to prevent courts from intruding upon military decision making and discipline. When Congress enacted the Federal Tort Claims Act in 1946, the Act included twelve enumerated exceptions; the exceptions barred recovery for claims arising out of the exercise of a discretionary function, claims arising in a foreign country, claims arising from intentional torts, and claims arising out of the combatant activities of the military during a time of war.[369] Of the enumerated exceptions, these latter four exceptions most directly apply to the military, and they would likely bar most Federal Tort Claims Act suits that implicate military decision making and discipline.

The Federal Tort Claims Act exception barring claims arising in a foreign country would bar service members' claims for injuries incurred overseas in places such as Germany, Iraq, Korea, Cuba, and Afghanistan.[370] Likewise, the combatant activities exception removes the threat of service members suing the United States for acts that occurred during combatant activities in a declared war.[371] Additionally, the assault and battery exception would likely shield the United States from liability for intentional torts its employees commit against service members.[372]

For purposes of addressing alternatives to the *Feres* doctrine, the most significant exception is the discretionary function exception. The discretionary function exception provides that the FTCA waiver of immunity shall not apply to

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise

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[369] The Federal Tort Claims Act, § 421, 60 Stat. 843 (current version at 28 U.S.C. § 2680 (2000)).

[370] *See* 28 U.S.C. § 2680(k) (2000).

[371] This exception may not preclude service members from suing for injuries that occurred during combatant activities when war is not declared; however, the claims arising in a foreign country exception would prohibit such a claim if the claim arose overseas. *See id.* § 2680(j).

[372] *See id.* § 2680(k).

> or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[373]

The U.S. Supreme Court has interpreted and applied this exception to bar Federal Tort Claims suits that question the discretionary acts of government employees.

One of the U.S. Supreme Court's initial cases addressing the discretionary function exception was *Dalehite v. United States*.[374] This case examined the nature and scope of the discretionary function exception. In *Dalehite*, the Court consolidated on appeal numerous claims for damages against the United States arising out of an explosion of ammonium nitrate fertilizer in the port of Texas City, Texas.[375] The United States directed production and distribution of this fertilizer for export to areas the United States and its Allies occupied in Europe and Asia following World War II.[376] The claimants contended numerous governmental acts and decisions were negligent.[377] Among these were the executive-level decision to institute the fertilizer program, the failure to adequately test the fertilizer to determine the likelihood of explosion, the manufacturing plan for the fertilizer, and the lack of government supervision of the fertilizer storage, transport, and loading.[378]

The U.S. Supreme Court concluded that the discretionary function exception protected the decision to implement the fertilizer export program as well as the subsequent acts taken to execute the program.[379] The Court barred the claims because the discretionary function exception protected "the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law."[380] The discretionary function exception protected not only the executive decision to initiate programs and activities; it also protected "the acts of subordinates in carrying out

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[373] *Id.* § 2680(a).
[374] 346 U.S. 15 (1953).
[375] *See id.* at 17.
[376] *See id.* at 19.
[377] *See id.* at 23.
[378] *See id.* at 23–24.
[379] *See id.* at 42.
[380] *Id.* at 34.

the operations of government in accordance with official directions . . . ."[381] *Dalehite*, however, "did not provide an easy test for distinguishing discretionary from nondiscretionary acts; its test sought to distinguish between immune actions at the 'planning level' and non-immune actions at the 'operational level.'"[382]

A few years after its *Dalehite* decision, the Court again addressed the discretionary function exception in *Indian Towing Co. v. United States*.[383] *Indian Towing* involved a claim for cargo damaged when a tugboat and its barge ran aground, allegedly due to the failure of the light in a Coast Guard light house.[384] The claimants alleged that the Coast Guard negligently inspected, maintained, and repaired the light.[385] The Supreme Court ruled that the Coast Guard did not have to undertake the lighthouse service.[386] However, once it decided to operate a light on the island, it "engendered reliance on the guidance afforded by the light . . . ."[387] As a result, it "was obligated to use due care to make certain the light was kept in good working order, and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning."[388]

In *United States v. Varig Airlines*,[389] the U.S. Supreme Court rejected the *Dalehite* "'operational/planning' level distinction"[390] for a test that focused on the nature of the conduct in question.[391] In *Varig Airlines*, the Court consolidated on appeal two separate cases involving airplane crashes.[392] Both claimants contended that the Federal Aviation Administration negligently formulated and implemented a spot-check program for airplane development, production, and operational

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[381] *Id.* at 36.
[382] ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 241, THE FEDERAL TORT CLAIMS ACT V-2 (Apr. 1999) [hereinafter JA 241].
[383] 350 U.S. 61 (1955).
[384] *Id.* at 62.
[385] *Id.*
[386] *Id.* at 69.
[387] *Id.*
[388] *Id.*
[389] 467 U.S. 797 (1984).
[390] JA 241, *supra* note 382, at V-3.
[391] *Id.*
[392] *Varig Airlines*, 467 U.S. at 800.

inspection.[393] As a result, the claimants asserted that the Federal Aviation Administration negligently certified the aircraft for commercial use, which led to the aircraft crashes.[394]

The U.S. Supreme Court enunciated and employed a two-step analysis to determine whether the discretionary function exception barred the claims.[395] In its analysis, the Court first looked to the nature of the conduct, to determine whether the actor had discretion to act.[396] The Court then conducted a public policy inquiry and addressed "whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."[397] The Court barred the claims and concluded that the discretionary function exception was "intended to encompass the discretionary acts of the Government acting in its role as a regulator of the private conduct of private individuals."[398]

In *United States v. Berkovitz*,[399] the U.S. Supreme Court applied the two-part test it set forth in *Varig Airlines* to determine whether the discretionary function exception barred suit against the United States. The Supreme Court granted certiorari "to resolve a conflict in the Circuits regarding the effect of the discretionary function exception on claims arising from the Government's regulation of polio vaccines."[400] In addressing the claims, the Court first looked to the challenged conduct's nature to determine "whether the action is a matter of choice for the acting employee."[401] The Court remarked that the discretionary function exception does not shield the Government from liability if a regulation, statute, or policy requires a specific course of action.[402] If the conduct, however, "involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield."[403] The Court found that Congress crafted the discretionary function exception to shield "the Government from liability if the action challenged in the case involves

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393 *See id.* at 819.
394 *See id.* at 799.
395 *See id.* at 816.
396 *See id.* at 813.
397 *Id.*
398 *Id.* at 813–14.
399 486 U.S. 531 (1988).
400 *Id.* at 534.
401 *Id.* at 536.
402 *See id.*
403 *Id.*

the permissible exercise of policy judgment."[404] The Court concluded that federal officials who violate statutes or regulations have no discretion to act; therefore, the discretionary function exception does not shield the United States from liability for such actions.[405]

In *United States v. Gaubert*,[406] the Supreme Court again applied the two part test it set forth in *Varig Airlines* to determine whether the discretionary function exception shielded the United States from liability for decisions made by federal banking regulators. In *Gaubert*, federal banking regulators facilitated the merger of Thomas M. Gaubert's Texas-chartered and federally insured savings and loan association with "a failing Texas thrift."[407] Gaubert's financial situation concerned the federal regulators; therefore, Gaubert resigned from management of the savings and loan and posted a $25 million interest in real property to personally guarantee the savings and loan's net worth.[408] Approximately two years after the merger, the savings and loan's board of directors and management resigned at the behest of the federal regulators.[409] The federal regulators recommended the individuals who later replaced the directors and managers.[410] Soon after taking over, the new directors disclosed that the savings and loan had a negative net worth, prompting Gaubert to file an administrative claim for his losses.[411] Upon denial of his administrative claim, Gaubert filed suit seeking "damages for the alleged negligence of federal officials in selecting new officers and directors and in participating in the day-to-day management of [Gaubert's savings and loan] . . . ."[412]

The Supreme Court granted certiorari and applied the two part *Varig Airlines* test. In reaching its decision, the Court first looked to "whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations."[413] The Court concluded that the federal banking regulators "were not bound to act in a particular way; the exercise of their authority involved a great 'element of

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404 *Id.* at 537.
405 *See id.* at 547–48.
406 499 U.S. 315 (1991).
407 *Id.* at 319.
408 *See id.*
409 *See id.*
410 *See id.* at 320.
411 *Id.*
412 *Id.*
413 *Id.* at 328.

judgment or choice.'"[414] The Court then looked to the regulators' actions to determine if they were the type of actions that Congress intended to protect with the discretionary function exception.[415] The Court acknowledged that

> [t]he federal regulators here had two discrete purposes in mind as they commenced day-to-day operations at . . . [Gaubert's savings and loan]. First, they sought to protect the solvency of the savings an loan industry at large, and maintain the public's confidence in that industry. Second, they sought to preserve the assets of . . . [Gaubert's savings and loan] for the benefit of depositors and shareholders, of which Gaubert was one.

Consequently, the Court barred Gaubert's claim, holding that the federal banking regulators' challenged actions "involved the exercise of discretion in furtherance of public policy goals . . . ."[416]

Through its cases interpreting the Federal Tort Claims Act's discretionary function exception, the Supreme Court has established a two-part test to determine whether the Federal Tort Claims Act's discretionary function exception shields the United States from suit for its employees' negligence. Part one of the test requires a court to determine whether statutes, regulations, or policies require certain action. If a statute, regulation or policy requires certain action, government employees have no discretion to act; therefore, when a government employee violates such a law, regulation, or policy, the United States is generally liable for the employee's action.[417] If an employee had the discretion to act, part two of the test requires a court determine whether Congress intended to protect the conduct or the conduct is based upon or susceptible to public policy considerations.[418] If Congress intended to protect the conduct or if the conduct involved policy considerations, the

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[414] *Id.*
[415] *See id.* at 332.
[416] *Id.* at 334.
[417] *See Gaubert*, 499 U.S. 315 (holding that the discretionary function exception protects policy-making decisions and daily operational decisions); Berkovitz v. United States, 486 U.S. 531 (1980) (holding that the discretionary function exception does not shield the Government from liability when a federal agency does not comply with mandatory rules.); *see also* JA 241, *supra* note 382, at V-5.
[418] United States v. Varig Airlines, 467 U.S. 797, 813 (1984).

discretionary function exception generally bars recovery under the Federal Tort Claims Act.[419]

Courts can apply this two-part discretionary function test to protect the military's decision making process and its discipline. Although hierarchical in nature, the military delegates authority from its most senior leaders to that level where decision making must take place immediately. This often empowers low ranking service members with the authority and discretion to make decisions on the spot. The Army's leadership method of "mission command"[420] demonstrates the concept of how the military, as a whole, makes and implements decisions.

> Under mission command, commanders provide subordinates with a mission, their commander's intent and concept of operations, and resources adequate to accomplish the mission. Higher commanders empower subordinates to make decisions within the commander's intent. They leave details of execution to their subordinates and require them to use initiative and judgment to accomplish the mission.[421]

This method "allows Army forces to adapt and succeed despite the chaos of combat."[422] This delegation of authority leadership concept permeates all areas of the military, not just combat operations. Military commanders at all levels possess great authority and discretion to train units,[423] mete out military justice,[424] and manage people.[425] If applied to

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[419] *See id.*

[420] U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY para. 3-33 (14 June 2005) [hereinafter FM 1].

[421] *Id.*

[422] *See id.*

[423] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 7-0, TRAINING THE FORCE para. 6-1 (22 Oct. 2002) [hereinafter FM 7-0] ("Assessment is the commander's responsibility. It is the commander's judgment of the organization's ability to accomplish its wartime operational mission. Assessment is a continuous process that includes evaluating training, conducting an organizational assessment, and preparing a training assessment."); U.S. DEP'T OF ARMY, FIELD MANUAL 25-4, HOW TO CONDUCT TRAINING EXERCISES 6 (10 Sept. 1984) [hereinafter FM 25-4] ("During the planning phase of training management, commanders at each echelon determine the need for training exercises and identify the types they will use."); U.S. DEP'T OF ARMY, FIELD MANUAL 7-1, BATTLE FOCUSED TRAINING para. 1-4 (15 Sept. 2003) [hereinafter FM 7-1] ("While senior leaders determine the direction and goals of training, it is the officers and [noncommissioned officers] who ensure that every training activity is well planned and rigorously executed."); *id.* para. 2-1 ("Using the Army Training Management Cycle, the commander

the military context, the Federal Tort Claims Act's enumerated exceptions, particularly the discretionary function exception, can protect this leadership concept from judicial second-guessing while also preserving service members' rights under the Act.

Consider the following scenarios: an active duty Sailor drowns during a negligently operated Navy Morale, Welfare, and Recreation Program's white water rafting trip;[426] a U.S. Military Academy cadet returning to the Academy on official travel orders sustains serious injuries when a fellow cadet wrecks the car in which they are traveling;[427] an Army surgeon negligently leaves a towel in a Soldier's stomach during surgery.[428] Courts have held that the *Feres* doctrine bars all of these service members' suits under the Federal Tort Claims Act.[429] If a court were to apply the Act's enumerated exceptions, however, these service members may be able to recover under the Act.

Applying the enumerated exceptions to these situations, a court would first determine whether any of the alleged negligence occurred overseas or in combat. If the negligence occurred overseas or in combat, a court would likely conclude that the service members could not recover under the Federal Tort Claims Act. If however, a court determines the alleged negligence occurred in the United States and not during combat,

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continuously plans, prepares, executes, and assesses the state of training in the unit. This cycle provides the framework for commanders to develop their unit's METL [mission essential task list], establish training priorities, and allocate resources.").

424 *See* AR 27-10, *supra* note 294, para. 3-4 (stating that a commander must personally exercise discretion during the nonjudicial punishment process by evaluating the case to determine what proceedings are appropriate, determining whether the Soldier committed the offenses, and determining the amount and nature of the punishment); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para. 2-12 (12 Oct. 2006) [hereinafter FM 6-22] ("In Army organizations, commanders set the standards and policies for achieving and rewarding superior performance, as well as for punishing misconduct. In fact, military commanders can enforce their orders by force of criminal law.").

425 *See* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (15 May 2006) [hereinafter AR 623-3] (prohibiting certain comments and narratives on military evaluation reports and permitting raters and senior raters broad discretion to assess each rated Soldier's performance and potential); U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) [hereinafter AR 635-200] (affording Army commanders broad discretion to determine whether to administratively separate Soldiers).

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

427 *See* Tobin v. United States, 170 F. Supp. 2d 472, 474–75 (D. N.J. 2001).

428 *See* Feres v. United States, 340 U.S. 135, 137 (1950).

429 *See generally Feres*, 340 U.S. 135; *Costo*, 248 F.3d 863; *Tobin*, 170 F. Supp. 472.

the court could then look to whether the discretionary function exception barred suit.

When determining whether the discretionary function exception would bar suit for the Sailor's drowning death, a court would first look to the nature of the alleged negligent act. Assume the deceased Sailor's family alleges that a civilian employee had reconnoitered the rafting route, identified a hazardous condition, and yet failed to take measures to mitigate the hazard. The court would first determine whether the civilian employee violated any statutes, regulations, or policies that required certain action. If such a violation occurred, the court would likely find that the employee lacked the discretion to act and the service member's suit could go forward under the Federal Tort Claims Act.

If, on the other hand, a court finds that the civilian employee had the discretion to act, the court would then analyze the questionable conduct and determine whether Congress intended to protect the conduct or whether the conduct is susceptible to policy considerations. This analysis would permit the court to determine whether the employee's negligence implicated sensitive areas of military affairs while also preserving the deceased Sailor's family's rights under the Federal Tort Claims Act.

Looking at the cadet injured as a passenger in an automobile accident en route to the Military Academy, a court would first address the actions of the cadet driving the automobile. Assume that, prior to embarking on their return trip to the Military Academy, both cadets received safety briefings from their Army leaders instructing them to drive safely, comply with all motor vehicle laws, and stop if they get tired.[430] If the driver fell asleep while driving, a court would likely determine that the driver did not have the discretion to act. Therefore, a court would likely permit suit by the injured cadet who was a passenger in the vehicle.

Finally, when determining whether the discretionary function exception would bar suit for the Soldier harmed during surgery, a court would first look to the nature of the conduct in question. If a court finds that the allegedly negligent Army surgeon had the discretion to act, the court would then consider whether Congress intended to shield the conduct or whether the conduct is susceptible to policy considerations. Civilians are permitted to pursue Federal Tort Claims Act suits based

[430] *See Tobin*, 170 F. Supp. 2d at 475.

upon military physicians' medical malpractice; this suggests that Congress did not intend to shield the Government from liability for such malpractice and such suits do not implicate policy concerns. Therefore, the Soldier could likely maintain his Federal Tort Claims Act suit based upon the surgeon's negligence.

Turning to the case presented at the outset of this article, the District Court for the Eastern District of Kentucky held that the *Feres* doctrine barred Specialist Baker's claims alleging negligent planning and execution of the cell extraction exercise.[431] The court could have reached the same outcome if it had applied the Federal Tort Claims Act's enumerated exceptions. First, a court could look to the situs of the alleged negligent acts—Guantanamo Bay, Cuba. Because the acts took place outside the United States, the enumerated exception barring claims arising in a foreign country[432] would likely bar Specialist Baker's suit. Even if the negligent acts occurred in the United States, Specialist Baker's suit would likely fail under the Federal Tort Claims Act. If Specialist Baker based his suit on the actions of the Soldiers who beat him, the enumerated exception barring suits arising out of an assault or battery[433] would likely bar Specialist Baker's suit.

If, however, Specialist Baker alleged that Lieutenant Locke negligently planned and executed the exercise, a court could apply the discretionary function exception[434] to bar Specialist Baker's suit. The court would first look to the nature of Lieutenant Locke's conduct. As previously discussed,[435] the Government affords military leaders vast authority and wide discretion to plan and execute training. Therefore, Lieutenant Locke, as the officer in charge of the internal reaction force team, likely possessed wide discretion to train the team. Because Lieutenant Locke had the discretion to act, a court would then look to the nature of his conduct and determine whether Congress intended to shield the Government from liability for his negligence or whether his acts implicated policy concerns. Judicial questioning of military leaders' training decisions likely intrudes upon the management of the military, thus implicating policy concerns. As a result, a court would likely hold that the discretionary function exception bars Specialist Baker's suit that

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431 *See* Baker v. United States, 2006 U.S. Dist. LEXIS 38012, at *10-*11 (E.D. Ky. 2006).
432 *See* 28 U.S.C. § 2680k (2000).
433 *See id.* § 2680h.
434 *See id.* § 2680a.
435 *See supra* notes 430–35 and accompanying text.

alleges Lieutenant Locke negligently planned and executed the training exercise.

Since the promulgation of the *Feres* doctrine, federal courts have applied the "incident to service" test to deny Federal Tort Claims Act recovery to service members who, but for their military status, could likely have recovered under the Act.[436] The Supreme Court's decision in *Boyle v. United Technologies Corp*[437] demonstrates that this doctrine is unnecessary because courts can apply the discretionary function exception's two part test to preclude judicial second guessing of military

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[436] *See* Costo v. United States, 248 F.3d 863 (9th Cir. 2001) (barring suit for the drowning death of a Sailor while on a Navy MWR program's rafting trip); Cutshall v. United States, 75 F.3d 426 (8th Cir. 1996) (barring a service member's suit for military medical malpractice); Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (barring suit for a service member who died as a result of military medical malpractice); Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989) (barring a serviceman's suit for the Base Exchange garage's negligent repairs of his car that caused an automobile accident); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (barring a servicewoman's suit for negligent provision of prenatal care); Bailey v. DeQuevedo, 375 F.2d 72 (3d Cir. 1967) (barring a service member's suit for military medical malpractice); Orken v. United States, 239 F.2d 850 (6th Cir. 1956) (barring suit for the wrongful death of a military doctor who died when a military aircraft crashed into his home).

[437] 487 U.S. 500 (1988). Other federal courts have also applied the discretionary function exception to bar civilians' Federal Tort Claims Act suits that allege military negligence. *See* Hawes v. United States, 409 F.3d 213 (4th Cir. 2005) ("we find that the district court did not err in finding that the decisions in question [Staff Sergeant Raventos' maintenance decisions concerning a military obstacle course] were protected by the discretionary function exception.") (barring a civilian's suit for damages for injuries sustained on a military obstacle course); Nieves-Rodriguez v. United States, 1997 U.S. App. LEXIS 28640 (1st Cir. 1997) (applying the discretionary function exception to bar a civilian's Federal Tort Claims Act suit that challenged a decision to erect a steel pole barrier in front of an air base and challenged the air base's failure to warn of the steel pole's presence); Angle v. United States, 1996 U.S. App. LEXIS 16085 (6th Cir. 1996) ("failure to remove lead-based paint from military housing or to warn residents of the dangers of such paint came within the discretionary function exception."); Goldstar v. United States, 967 F.2d 965 (4th Cir. 1992) (finding the discretionary function exception barred suit for damages arising out of the looting and rioting that followed the United States' invasion of Panama); Creek Nation Indian Hous. Auth. v. United States, 905 F.2d 312 (10th Cir. 1990) (applying the discretionary function exception to bar civilians' suits for damages caused by the allegedly negligent design of bombs); Medina v. United States, 709 F.2d 104 (1st Cir. 1983) (upholding a commander's decision to revoke a civilian's permit to enter a naval station because the decision was discretionary: "A base commander has wide discretion as to whom he may exclude from the base . . . ."); Knisley v. United States, 817 F. Supp. 680 (S.D. Oh. 1993) (applying the discretionary function exception to bar a service member's wife's Federal Tort Claims Act suit for legal malpractice because the suit questioned the manner in which the Army trained its attorneys).

decision making.[438] In *Boyle*, the Court considered whether service members could sue government contractors for injuries sustained because of military equipment design defects.[439] David A. Boyle, a United States Marine helicopter pilot, died when his Marine helicopter crashed off the coast of Virginia.[440] Although Boyle survived the crash, he drowned because he could not escape from the helicopter.[441] Boyle's father sued the Sikorsky Division of United Technologies Corporation and alleged that the company had defectively repaired the helicopter and, thus, caused the crash.[442] Boyle's father also claimed "that Sikorsky had defectively designed the copilot's emergency escape system: the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch was obstructed by other equipment."[443]

On appeal to the Supreme Court, the Court applied the Federal Tort Claims Act's discretionary function exception to bar Boyle's father's suit, even though the suit was a suit against the government contractor rather than a Federal Tort Claims Act suit against the Government. The Court then held that "the selection of the appropriate design for military equipment to be used for our Armed Forces is assuredly a discretionary function within the meaning of [the discretionary function exception] . . . ."[444] Designing military equipment requires not only "engineering analysis, but judgment as to the balancing of many technical, military, and even social considerations, including the trade-off between greater safety and greater combat effectiveness."[445] The Court felt that judicial second-guessing of these judgments would financially burden defense contractors who would, in turn, pass the financial burden to their customer, the U.S. Government.[446] The Court, therefore, barred the claim and concluded "that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and

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[438] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988) ("[T]he selection of the appropriate design for military equipment to be used for our Armed Forces is assuredly a discretionary function within the meaning of [the discretionary function exception] . . . .").
[439] *See id.* at 503.
[440] *See id.* at 502.
[441] *See id.* at 503.
[442] *See id.*
[443] *Id.*
[444] *See id.* at 511.
[445] *See id.*
[446] *See id.* at 511–12.

must be displaced."[447] The holding in *Boyle* demonstrates how courts can apply the discretionary function exception to preclude judicial second-guessing of military decisions while also preserving service members' rights under the Federal Tort Claims Act.

Because of the military's leadership emphasis on delegation of authority, the discretionary acts of military leaders must be shielded from judicial second-guessing in order to ensure the proper functioning of the military. The *Feres* doctrine protects military decision making and discipline from such judicial second-guessing at the expense of service members' rights under Federal Tort Claims Act. This doctrine is too broad in scope and should be supplanted by the Federal Tort Claims Act's enumerated exceptions. If applied to the military context, the Federal Tort Claims Act's enumerated exceptions—and particularly the discretionary function exception—can protect the military's decision making and discipline while also preserving service members' rights under the Federal Tort Claims Act. Therefore, the Act's enumerated exceptions can serve as reasonable alternatives to the overly-broad *Feres* doctrine.

VIII. The Future of the *Feres* Doctrine

Since the Supreme Court's decisions in *Brooks*[448] and *Feres*,[449] federal courts have broadened the incident to service test, creating an almost total bar to service members' Federal Tort Claims Act suits.[450] Courts have even gone so far as to extend the *Feres* doctrine's

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[447] *Id.* at 512. The Court held that

> [l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of equipment that were known to the supplier but not to the United States. *Id.*

[448] Brooks v. United States, 337 U.S. 49 (1949).

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

[450] *See, e.g.*, Major v. United States, 835 F.2d 641, 644–45 (6th Cir. 1987) ("[I]n recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military . . . .").

application to privacy statutes.[451] Despite the expansion of the incident to service test, members of the federal judiciary at all levels have questioned the *Feres* doctrine and called for its abrogation.[452] Most notably, Supreme Court Justice Scalia, in his dissent in *United States v. Johnson*,[453] described the *Feres* decision as "clearly wrong" and the source of "unfairness and irrationality."[454] Former Supreme Court Justices Brennan and Marshall and current Justice Stevens joined Justice Scalia in his dissent. Since that 1987 decision, the Court has changed significantly. Justice Stevens and Justice Scalia are the only Justices from the *Johnson* Court who remain on the Supreme Court. With the appointment of a new Chief Justice in 2005 and Associate Justice in 2006, the Court could abrogate its precedent in *Feres*. However, given the judicial temperament of Chief Justice John Roberts and that of Justice Samuel Alito, the Court will likely affirm its decision in *Feres*.

Chief Justice Roberts and Justice Alito hold similar positions on what constitutes statutory ambiguity and how courts should clarify statutory ambiguity. In his confirmation hearings before the Senate Committee on the Judiciary, Chief Justice Roberts stated,

> [y]ou don't look to legislative history to create ambiguity. In other words, if the text is clear, that is what you follow, and that's binding. And you don't look beyond it to say, well, if you look here, though, maybe this clear word should be interpreted in a different way.[455]

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[451] *See* Flowers v. United States, 289 F. Supp. 2d 1213 (D. Haw. 2003) (holding that the *Feres* doctrine barred a service member's claims against the United States under the Right to Financial Privacy Act when an Army trial counsel requested financial records from the service member's bank for use at an Article 32, Uniform Code of Military Justice hearing and the bank released the records without complying with the Right to Financial Privacy Act); *but see* Cummings v. United States, 279 F.3d 1051 (D.C. Cir. 2002) (reversing a district court's holding extending the *Feres* doctrine to bar service members' Privacy Act lawsuits).

[452] *See* Boyle v. United Techs Corp., 487 U.S. 500 (1988); United States v. Johnson, 481 U.S. 681 (1987) (Scalia, J, dissenting); Costo v. United States, 248 F.3d 863 (9th Cir. 2001); Day v. Massachusetts Air Nat'l Guard, 167 F.3d 678 (1st Cir. 1999); O'Neill v. United States, 140 F.3d 564 (3d Cir. 1998) (Becker, C.J., dissenting) (denying petition for rehearing); Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995); Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987); Lee v. United States, 261 F. Supp. 252 (C.D. Cal. 1966).

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

[454] *Id.* at 703 (Scalia, J., dissenting).

[455] *See Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary*, 98th Cong. 319 (2005)

Similarly, during his confirmation hearings before the Senate Committee on the Judiciary, Justice Alito stated, "[w]hen I interpret statutes . . . where I start and often where I end is with the text of the statute. And if you do that, I think you eliminate a lot of problems involving legislative history and also with signing statements."[456] Therefore, both Justices believe that the Court should look to legislative history only when a statute is ambiguous on its face. Both Justices also believe, however, that the Supreme Court's constitutional decisions are more important than its decisions involving statutory interpretation. This is primarily because Congress can correct inaccurate statutory interpretations;[457] according to Chief Justice Roberts, "short of amendment, only the Court can fix the constitutional precedents."[458]

Given both Justices' belief that judges should not read ambiguity into a statute where none exists, both Justices may likely disagree with the Court's decision in *Brooks* and *Feres*. The Federal Tort Claims Act contained a clear waiver of sovereign immunity, allowing tort recovery to those injured by the Government. Congress qualified the waiver with several enumerated exceptions;[459] Congress also limited the Government's liability to "the same manner and to the same extent as a private individual under like circumstances."[460] Yet, in *Brooks* and *Feres*, the Supreme Court expanded the exceptions to the Act.[461] Regardless of whether Chief Justice Roberts and Justice Alito believe *Brooks* and *Feres* were correctly or incorrectly decided, the "incident to

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[hereinafter *Chief Justice Roberts's Confirmation Hearings*] (statement of John G. Roberts, Jr., nominee, Chief Justice of the United States).

[456] *Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 350 (2006) [hereinafter *Justice Alito's Confirmation Hearings*] (statement of Samuel A. Alito, Jr., nominee, Associate Justice of the Supreme Court of the United States).

[457] *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 164 ("[t]he Court has frequently explained that stare decisis is strongest when you're dealing with a statutory decision. The theory is a very straightforward one that if the Court gets it wrong, Congress can fix it. And the Constitution, the Court has explained, is different."); *Justice Alito's Confirmation Hearings*, *supra* note 456, at 343 ("a constitutional decision of the Supreme Court has a permanency that a decision on an issue of statutory interpretation doesn't have.").

[458] *Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 164.

[459] *See* Federal Tort Claims Act, 60 Stat. 843, § 421 (1946) (current version at 28 U.S.C. § 2674 (2000)).

[460] *Id.* § 410.

[461] *See generally* Feres v. United States, 340 U.S. 135 (1950); Brooks v. United States, 337 U.S. 49 (1949).

service" test has become precedent that will likely guide both Justices' decisions on the Supreme Court.

Both Chief Justice Roberts and Justice Alito share similar philosophies on stare decisis. Both Justices believe that the doctrine of stare decisis is important because it ensures "evenhandedness, predictability, [and] stability"[462] in the judicial system. That is, stare decisis engenders reliance and preserves settled expectations in the judicial system.[463] Chief Justice Roberts and Justice Alito agree that, if a prior precedent exists in a case, a judge should first look to the prior precedent in reaching a decision.[464] They both believe that a judge cannot overturn precedent simply because he feels it is flawed;[465] rather a judge must consider the following factors when deciding to revisit a precedent: whether the particular precedent has become "unworkable,"[466] whether subsequent developments have eroded the decision's doctrinal basis,[467] the initial vote on the case that set the precedent,[468] the length of time the precedent has been in place,[469] whether other cases have reaffirmed the case on stare decisis grounds,[470] and the nature and extent of reliance on the precedent.[471]

If the Court considers a case that implicates the *Feres* doctrine, both Justices will likely adhere to the principle of stare decisis. The Court has applied the incident to service test ever since its *Brooks* decision in 1949 and held that, generally, service members cannot recover under the Federal Tort Claims Act for service-related injuries. As a result, the *Feres* doctrine has become an established part of the law and has been reaffirmed countless times; it is a doctrine that both government and

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462 *See Chief Justice Robertss' Confirmation Hearings*, *supra* note 455, at 144.
463 *See id.* at 142; *Justice Alito's Confirmation Hearings*, *supra note* 456, at 318.
464 *See Justice Alito's Confirmation Hearings*, *supra* note 456, at 319.
465 *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 144; *Justice Alito's Confirmation Hearings*, *supra* note 456, at 435 and 601 ("in general, courts follow precedents. They need a special—the Supreme Court needs a special justification for overruling a prior case.").
466 *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 142; *Justice Alito's Confirmation Hearings*, *supra* note 456, at 399.
467 *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 142*; Justice Alito's Confirmation Hearings*, *supra* note 456, at 400 ("Sometimes changes in the situation in the real world can call for the overruling of a precedent.").
468 *See Justice Alito's Confirmation Hearings*, *supra* note 456, at 399.
469 *See id.*
470 *See id.*
471 *See id.*

plaintiffs' attorneys rely upon when advising clients and deciding how to dispose of cases. The *Feres* doctrine has not proven "unworkable;" rather, it has provided a fairly bright line rule to determine whether a service member's case can go forward under the Federal Tort Claims Act.

Lower courts' varying definitions of "incident to service" have led to some inconsistency in recovery; however, courts commonly accept that they must look to the duty status and activities of the victim when determining whether an injury occurred incident to service. Given the length of time the *Feres* doctrine has been in force and the reliance the legal community has placed upon it, the *Feres* doctrine has become a strong precedent. Additionally, given Chief Justice Roberts's and Justice Alito's belief that Congress can correct an inaccurate interpretation of a statute, both Justices will likely continue to apply the *Feres* doctrine and only seek to clarify the doctrine in future cases, as the Court did in *Stanley* and *Johnson*.

Finally, both Justices' judicial record suggests that neither will advocate for the abrogation of the *Feres* doctrine. Chief Justice Roberts served as a judge on the Court of Appeals for the District of Columbia from June 2003 until his confirmation hearings for Chief Justice of the United States in September 2005.[472] During that short period of time, two cases implicating the *Feres* doctrine came before the court. In the first case, *James v. United States*,[473] a service member appealed the district court's holding that the *Feres* doctrine barred his claim. On January 14, 2004, the Court of Appeals for the District of Columbia denied the request for rehearing and affirmed the holding of the District Court for the District of Columbia.[474] On 7 April 2004, after the service member filed another request for rehearing and a motion for appointment of an attorney, the court of appeals again denied the service member's petition.[475] Chief Justice Roberts was one of the judges who heard both petitions.

Chief Justice Roberts did not hear the second *Feres* case that came before the Court of Appeals for the District of Columbia. In *Schnitzer v.*

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[472] *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 58 (employment record, question 7, questionnaire of John G. Roberts, Jr., nominee, Chief Justice of the United States).

[473] James v. United States, 85 Fed. Appx. 777 (D.C. Cir. 2004) (rehearing denied).

[474] *Id.*

[475] James v. United States, 2004 U.S. App. LEXIS 7002, *1 (D.C. Cir. 2004) (rehearing denied).

Harvey,[476] the Court of Appeals for the District of Columbia affirmed the district court's dismissal of a military prisoner's Federal Tort Claims Act claim. The prisoner filed a Federal Tort Claims Act suit after a portion of the ceiling at the United States Disciplinary Barracks fell on him, causing him permanent injuries.[477] The District Court for the District Columbia held that it lacked subject matter jurisdiction over the prisoner's case because the *Feres* doctrine barred the claim.[478] After hearing arguments, the Court of Appeals for the District of Columbia considered the following three factors to determine whether the prisoner sustained his injuries incident to his military service: the prisoner's duty status when injured, where the injury occurred, and the nature of the prisoner's activity at the time of injury.[479] The Court of Appeals for the District of Columbia concluded the prisoner sustained his injuries incident to his military service and affirmed the district court's decision.[480]

Justice Alito possesses a more developed record as a judge than Chief Justice Roberts. Justice Alito served as a judge on the Court of Appeals for the Third Circuit from June 1990 until his confirmation hearings in January 2006.[481] During his tenure as an appellate court judge, Justice Alito heard two cases that directly addressed the *Feres* doctrine. In the first case, *O'Neill v. United States*,[482] the mother of a Navy ensign murdered by another Navy ensign sued the Government under the Federal Tort Claims Act for her daughter's wrongful death.[483] The murdered ensign's mother alleged the Navy negligently failed to follow up on personality tests it administered to the murderer prior to the murder.[484] The court denied the mother's request for a rehearing, affirming the lower court's dismissal of the mother's cause of action.[485] One judge, Judge Becker, dissented from the court's denial of a rehearing and stated his objections to the *Feres* doctrine.[486] Justice Alito did not join in the dissent.[487]

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476 Schnitzer v. Harvey, 389 F.3d 200 (D.C. Cir. 2004).
477 *See id.* at 201.
478 *See id.*
479 *See id.* at 203.
480 *See id.* at 205–06.
481 *See Justice Alito's Confirmation Hearings*, *supra* note 456, at 59.
482 140 F.3d 564 (3d Cir. 1998) (petition for rehearing denied).
483 *See id.* at 565.
484 *See id.*
485 *See id.* at 564.
486 *See id.* at 564–66.
487 *See id.*

Richards v. United States[488] was the second *Feres* case the Court of Appeals for the Third Circuit heard during Justice Alito's tenure. In *Richards*, the negligent driver of a government vehicle killed a Soldier on his way home from work at the end of the duty day.[489] The Soldier's widow sued under the Federal Tort Claims Act, alleging the driver's negligence caused her husband's death.[490] The lower court dismissed the widow's claim for lack of subject matter jurisdiction after applying the *Feres* doctrine.[491] On appeal to the Court of Appeals for the Third Circuit, Judges Roth, Lewis, and Garth heard and denied the widow's initial request for rehearing.[492] Richards' widow petitioned the court again for rehearing, en banc.[493] Justice Alito, Chief Judge Becker, and Judges Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Roth, Lewis, McKee, Rendell, and Garth heard the second request.[494] The court denied the second request because the claim arose incident to the deceased Soldier's service;[495] again, only Chief Judge Becker dissented and urged "the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in Feres."[496]

In addition to hearing two *Feres* doctrine cases, Justice Alito wrote the Third Circuit Court of Appeal's opinion in *Bolden v. Southeastern Pennsylvania Transportation Authority*.[497] Bolden, an employee of the Southeastern Pennsylvania Transportation Authority, tested positive for marijuana use during a mandatory employment-related drug test.[498] As a result, the Southeastern Transportation Pennsylvania Authority terminated Bolden's employment.[499] Bolden filed suit against the Southeastern Pennsylvania Transportation Authority in federal district court, alleging the Southeastern Pennsylvania Transportation Authority "violated his Constitutional rights by subjecting him to an unreasonable search and seizure and by discharging him without a prior hearing."[500] In

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[488] 176 F.3d 652 (3d Cir. 1999), *reh'g denied*, 180 F.3d 564 (3d Cir. 1999).
[489] *See id.* at 653–54.
[490] *See id.* at 653.
[491] *See id.*
[492] *See id.*
[493] *See id.* at 564.
[494] *See id.*
[495] *See id.*
[496] *Id.* at 565.
[497] 953 F.2d 807 (3d Cir. 1991).
[498] *See id.* at 810–11.
[499] *See id.* at 811.
[500] *Id.*

his written opinion, Justice Alito characterized the Southeastern Pennsylvania Transportation Authority as a hybrid governmental entity.[501] As such, he concluded that it enjoyed immunity from the punitive damages Bolden sought.[502] In his written opinion, Justice Alito cited to *Feres* to support his proposition that both state governments and the federal government enjoy absolute sovereign immunity absent a waiver of the immunity.[503] Justice Alito's use of *Feres* to support his proposition suggests that he views *Feres* as valid law.

Both Chief Justice Roberts' and Justice Alito's decisions while serving as appellate court judges suggest that they consider the *Feres* doctrine to be valid law today. This indication, coupled with their shared belief that stare decisis is a fundamental principle of the U.S. judicial system, suggests that neither Justice favors abrogating the *Feres* doctrine. As both Justices stated in their confirmation hearings, Congress can always enact legislation to correct the Court's inaccurate interpretation of a statute;[504] therefore, Congress, not the judiciary, will dismantle the *Feres* doctrine, if it is to be eliminated.

IX. Conclusion

At the time the Supreme Court enunciated the *Feres* doctrine, it had at its disposal the enumerated exceptions to the Federal Tort Claims Act. It could have applied several of the enumerated exceptions to bar service members' suits under the Federal Tort Claims Act. Most significantly, the Court could have applied the discretionary function exception to bar service members' claims that questioned the lawful discretionary decisions their leaders made. Had the Court applied the discretionary function exception to *Feres v. United States*[505] and its progeny, it could have precluded the judicial second guessing of military decisions it

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501 *See id.* at 830.
502 *See id.*
503 *See id.*
504 *See Chief Justice Roberts's Confirmation Hearings*, *supra* note 455, at 164 ("The Court has frequently explained that stare decisis is strongest when you're dealing with a statutory decision. The theory is a very straightforward one that if the Court gets it wrong, Congress can fix it. And the Constitution, the Court has explained, is different."); *Justice Alito's Confirmation Hearings*, *supra* note 456, at 343 ("[I]f a case is decided on statutory grounds, there's a possibility of Congress amending the statute to correct the decision if it's perceived that the decision is incorrect or it's producing undesirable results.").
505 Feres v. United States, 340 U.S. 135 (1950).

sought to avoid. Yet, contrary to its refusal in *Muniz* and *Rayonier* to broaden the Federal Tort Claims Act's exceptions, the Court carved out a new exception to the Act and barred virtually all service members from recovering for injuries incurred incident to service.

The *Feres* doctrine serves the important function of preserving military decision making and preventing legal liability considerations from tainting the military decision making process. This is arguably vital to the discipline and effective functioning of the U.S. military. But, this broad-sweeping protection also prohibits service members from recovering under circumstances where a civilian could recover. Applying the enumerated exceptions to the Federal Tort Claims Act, including the discretionary function exception, can preserve the chain-of-command's military decision-making and policy-making authority while affording service members rights more commensurate with those of civilians under the Federal Tort Claims Act. Therefore, the enumerated exceptions, especially the discretionary function exception, provide a reasonable balance between the need to protect military decision making and the need to protect service members' interests in receiving full and fair compensation for their service-related injuries.

BEYOND INTERROGATIONS: AN ANALYSIS OF THE PROTECTION UNDER THE MILITARY COMMISSIONS ACT OF 2006 OF TECHNICAL CLASSIFIED SOURCES, METHODS AND ACTIVITIES EMPLOYED IN THE GLOBAL WAR ON TERROR

CAPTAIN NIKIFOROS MATHEWS*

"The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated . . . ."

- Letter from George Washington to Colonel Elias Dayton, July 26, 1777[1]

The conduct of war, in the most classic sense, is the engagement in armed conflict either between states or within states.[2] In such a context, there is typically a recognized hierarchy of enemy actors, a recognized objective of the combatants, and a recognized beginning and end to the hostilities. In contrast, the Global War on Terror (GWOT) is an ongoing conflict involving non-state actors operating in the shadows across national borders. Therefore, "victory" in the classic sense is not attainable, as there is no enemy authority to accept the terms of surrender

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[1] 8 WRITINGS OF GEORGE WASHINGTON 478–79 (J. Patrick ed., 1933).

[2] While "war" itself is used to describe virtually any struggle—including those pitched on the fields of athletic endeavor—it is most commonly understood to be the state of international or internal armed conflict. *See, e.g.*, JOINT FORCES STAFF COLLEGE, PUB. 1, THE JOINT STAFF OFFICER'S GUIDE 1997 app. O (1997) (defining war as "[a] state of undeclared or declared armed hostile action characterized by the sustained use of armed force between nations or organized groups within a nation involving regular and irregular forces in a series of connected military operations or campaigns to achieve vital national objectives").

and act on behalf of the defeated.[3] The present conflict is so rooted in religious fanaticism, and so characterized by decentralized actions, that even if Osama bin Laden himself were to be captured and openly declare a cessation of hostilities, al Qaeda splinter groups, their associates, and their philosophical sympathizers undoubtedly would continue their efforts, perhaps with increased zeal and recklessness fostered by the evaporation of even limited command and control.[4] What this means for GWOT-related prosecutions is that, unlike the post-World War II trials at Nuremburg and more recent war crimes tribunals, there will not be an end to the hostilities before the relevant legal proceedings commence. In fact, these proceedings have already begun and there is no end to the hostilities in sight.[5]

The ongoing nature of the current conflict presents unique challenges in establishing a workable framework under which to prosecute GWOT detainees, particularly when it comes to determining the use and protection of sensitive information in legal proceedings. The prosecution of GWOT detainees has and will continue to require the use of sensitive

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[3] Consider, for example, the definitive end of World War II with Emperor Hirohito's signature on the U.S.S. *Missouri* on 27 September 1945, or the symbolic and—for all practical purposes—military end of the U.S. Civil War with General Robert E. Lee's surrender at the Appomattox courthouse on 9 April 1865.

[4] As the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) noted:

> The problem is that al Qaeda represents an ideological movement, not a finite group of people. It initiates and inspires, even if it no longer directs. In this way it has transformed itself into a decentralized force. Bin Ladin may be limited in his ability to organize major attacks from his hideouts. Yet killing or capturing him, while extremely important, would not end terror. His message of inspiration to a new generation of terrorists would continue.

FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 16 (2004) [hereinafter 9/11 COMMISSION REPORT].

[5] The words of President George W. Bush in the wake of the September 11th attacks regarding the scope and expected duration of this conflict have held true:

> Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. . . . Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen.

President's Address to a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001).

information as evidence. More relevant to this article, however, is that much of the prosecution's evidence will have been *obtained* from sensitive sources, methods, and activities employed by the Government, whether human or technical in nature.[6] Against the backdrop of an ongoing conflict, these sensitive sources, methods and activities—i.e., the means of obtaining evidence—used by the counterterrorism[7] community likely will not be stale at the time of a detainee's prosecution and, therefore, the disclosure of such means would compromise their future utility.[8]

This point has not been lost on those responsible for drafting procedural rules for GWOT prosecutions. The most recent effort in this regard is the Military Commissions Act of 2006 (the MCA).[9] The MCA's general approach to the protection of sensitive information is largely consistent with the approaches found in the Classified Information Procedures Act (CIPA)[10] and in Military Rule of Evidence (MRE) 505,[11] the federal statute and military evidentiary rule upon which much of the MCA's relevant provisions are based. However, the MCA

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[6] The Department of Defense (DOD) has defined intelligence sources to include "people, documents, equipment, or technical sensors." U.S. DEP'T OF DEFENSE, JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 269 (12 Apr. 2001, *as amended through* 12 July 2007) [hereinafter DOD DICTIONARY].

[7] According to the DOD Dictionary, counterterrorism is defined as "[o]perations that include the offensive measures taken to prevent, deter, preempt, and respond to terrorism." *Id.* at 130. As used in this article, "counterterrorism" has the meaning ascribed to it in the DOD Dictionary.

[8] As one commentator has noted, "[t]his is an unusual situation given that almost all war crimes and war-related offenses are prosecuted after the end of hostilities, when the need to protect national security information and safeguard participants in the trial is greatly reduced." Frederic L. Borch III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to* Military Commissions: Trying American Justice, ARMY LAW., Nov. 2003, at 10 (responding to Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1).

[9] Military Commissions Act (MCA) of 2006, 10 U.S.C.S. § 948a - 950w (LEXIS 2007) [hereinafter MCA]. The first conviction before a military commission convened under the MCA was that of David Hicks, an Australian trained by al Qaeda who pleaded guilty on 26 March 2007 to providing material support to a terrorist organization. *See* William Glaberson, *Plea of Guilty from Detainee in Guantánamo*, N.Y. TIMES, Mar. 27, 2007, at A1.

[10] 18 U.S.C. app. III (2000).

[11] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 505 (2005) [hereinafter MCM].

also specifically protects from disclosure classified[12] sources, methods and activities through which admissible evidence was obtained.[13] The protection of sensitive counterintelligence means is not specified in either CIPA or MRE 505. As a result, the language of the MCA that provides this protection has come under attack as an instrument the prosecution may use to deny an accused his due process rights, particularly by restricting his ability to object to the admissibility of evidence obtained through questionable interrogation tactics.[14] Yet this myopic focus on interrogation methods has overshadowed what has become truly important to the counterintelligence community in this conflict and what was undoubtedly on the minds of the drafters of the MCA: the protection of *technical* means used to gather intelligence by penetrating terrorist communications and, especially, their finances.

This article tracks the development and content of the MCA as it relates to sensitive information, and examines whether the MCA's protection of technical counterintelligence means would withstand judicial scrutiny. Section I of this article provides background on how the MCA came to be and how it ultimately deals with the use and protection of sensitive information in military commission proceedings. Using the al Qaeda financial network as a vehicle, section II discusses the types of technical sources, methods and activities employed in the

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[12] The drafters of the MCA decided to limit its protection of sensitive information to information that is actually classified, as discussed in greater detail below. *See infra* notes 27–31 and accompanying text.

[13] *See* 10 U.S.C.S. § 949d(f)(2)(B).

[14] *See, e.g.*, HUMAN RIGHTS WATCH, Q AND A: MILITARY COMMISSIONS ACT OF 2006, at 4 (2006), http://hrw.org/backgrounder/usa/qna1006/usqna1006web.pdf [hereinafter HUMAN RIGHTS WATCH Q & A] (stating that the protection of classified sources and methods of interrogations, in particular, will make it "extremely difficult for defendants to establish that evidence was obtained through torture or other coercive interrogation methods"); HUMAN RIGHTS FIRST, ANALYSIS OF PROPOSED RULES FOR MILITARY COMMISSIONS TRIALS 2 (2007), http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf ("[T]he administration has claimed that the so-called 'alternative interrogation techniques' used on 14 former CIA detainees now held at Guantanamo are classified. . . . The Government could seek to include hearsay testimony derived from these interrogations, claim that the techniques used are classified, and defense lawyers would have a hard time showing that evidence should be excluded because it was obtained through torture."); Amnesty International, *Military Commissions Act of 2006—Turning Bad Policy Into Bad Law*, Sept. 29, 2006, http://web.amnesty.org/library/Index/ENGAMR511542006 (stating that an accused's inability "effectively to challenge the 'sources, methods or activities' by which the Government acquired the evidence . . . is of particular concern in light of the high level of secrecy and resort to national security arguments employed by the administration in the 'war on terror'").

GWOT against terrorist networks that the MCA intends in large part to protect. This section further highlights the importance of preventing the disclosure of such means. Finally, section III argues that, assuming proper vigilance by the military judge, the protection afforded under the MCA to technical counterintelligence means used to obtain incriminating evidence should not negatively impact the accused's defense. As such, these protections should withstand judicial scrutiny.

I. The Development of the Military Commissions Act of 2006 and Its Approach to Sensitive Information

Shortly after the attacks of September 11th, the President issued a military order establishing military commissions to prosecute suspected GWOT terrorists for law of war violations and directing the Secretary of Defense to issue the necessary orders and regulations for these commissions.[15] In March 2002, the Pentagon responded to this directive by issuing procedural rules for the commissions.[16] Thereafter, the General Counsel of the Department of Defense issued Military Commission Instructions specifying the crimes and elements of offenses to be prosecuted and providing administrative guidelines for the conduct of proceedings.[17] When it came to sensitive information, these rules and instructions broadly delineated what was to be safeguarded in proceedings, creating the concept of "protected information,"[18] and provided sweeping rules to prevent the disclosure of such information.[19]

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[15] Military Order of November 13, 2001, 3 C.F.R. 918 (2002) [hereinafter Military Order].

[16] *See* U.S. Dep't of Defense, Military Commission Order No. 1 (21 Mar. 2002), 32 C.F.R. §§ 9.1–9.12 (2005) [hereinafter DOD MCO No. 1]. For instance, DOD MCO No. 1 set forth the number of military officers required for a panel, the powers vested in the presiding officer of the panel, and certain procedural safeguards afforded to the accused. *Id.* §§ 9.4(A)(2)–(A)(5), 9.5.

[17] *See* 32 C.F.R. §§ 10–18 (2005).

[18] DOD MCO No. 1 defined "protected information" to include:

> (A) information classified or classifiable pursuant to [Executive Order 12,958, now Executive Order 13,292]; (B) information protected by law or rule from unauthorized disclosure; (C) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (D) information concerning intelligence and law enforcement sources, methods, or activities; or (E) information concerning other national security interests.

In 2006, the United States Supreme Court held in *Hamdan vs. Rumsfeld*[20] that military commissions, as then constituted, were not valid.[21] However, the Court left open the door for the President to obtain express authorization from Congress to employ the proposed military

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DOD MCO No. 1, *supra* note 16, § 9.6(d)(5)(i).

[19] *See id.* §§ 9.6(d)(2)(iv), 9.6(d)(5)(ii) – (iv).

[20] 548 U.S. __, 126 S. Ct. 2749 (2006). Salim Ahmed Hamdan, a Yemeni national, allegedly worked as Osama bin Laden's bodyguard and chauffer. He was captured in Afghanistan in 2001 and was brought to Guantánamo Bay, Cuba, in 2002.

[21] *Id.* at 2778. Specifically, the Court concluded that the commissions lacked requisite Congressional authorization; that Common Article 3 of the Geneva Conventions applies to detainees; and that the military commissions procedures deviated substantially from those applicable under the Geneva Conventions and courts-martial. *See id.* at 2749. With respect to the lack of congressional authorization, the Court held that the power to create military commissions, if it exists, is among the "powers granted jointly to the President and Congress in time of war." *Id.* at 2773. It further held that Congress' authorization to use "all necessary and appropriate force against all nations, organizations, or persons" involved in the September 11th attacks which was granted under the Authorization for Use of Military Force, Pub. L. No. 1107-40, 115 Stat. 224, § 2(a) (2001), did not amount to a congressional authorization of military commissions. *Hamdan*, 126 S. Ct. at 2775. Specifically, the Court stated:

> [W]hile we assume that the AUMF [Authorization for Use of Military Force] activated the President's war powers, . . . and that those powers include authority to convene military commissions in appropriate circumstances, . . . there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ [Uniform Code of Military Justice] . . . . Together, the UCMJ, the AUMF, and the DTA [Detainee Treatment Act of 2005] at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is . . . to decide whether Hamdan's military commission is so justified.

Id. Note that congressional sanction of the use of military commissions to try offenders of the law of war, as a general matter, was not at issue in *Hamdan*, as the Supreme Court had already determined that Congress had sanctioned the use of military commissions. *Ex parte* Quirin, 317 U.S. 1, 28 (1942) (pointing to UCMJ article 15, now UCMJ article 21, which states: "The jurisdiction [of] courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by law of war may be tried by such . . . commissions."). Rather, what was at issue was whether the President was justified in convening the military commissions under the laws of war absent a specific congressional authorization.

commissions and for the President and Congress to address the Court's concerns over the rules governing these proceedings.[22]

In response to the Court's invitation in *Hamdan* to salvage the use of military commissions to try GWOT detainees, the President engaged Congress in an intense discourse intended to specifically authorize the President to create these commissions and to establish new procedural rules governing their proceedings. Following several key compromises, the Senate passed the bill that ultimately became the MCA on 28 September 2006.[23] Among the hotly-debated points on which the President and Congress reached compromise was the treatment of sensitive information in legal proceedings.[24] The primary reason for

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[22] *See Hamdan*, 126 S. Ct. at 2799 (Breyer, J. concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary.").

[23] 152 CONG. REC. S10,420 (daily ed. Sept. 28, 2006); *see also* Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, WASH POST., Sept. 29, 2006, at A01. The House of Representatives passed the bill the following day, and the MCA was signed into law by the President on 17 October 2006. Upon signing the bill, the President noted:

> In the months after 9/11, I authorized a system of military commissions to try foreign terrorists accused of war crimes. . . . Yet the legality of the system I established was challenged in the court, and the Supreme Court ruled that the military commissions needed to be explicitly authorized by the United States Congress. And so I asked Congress for that authority, and they have provided it.

President Bush Signs Military Commissions Act of 2006, Oct. 17, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.

[24] *See, e.g.*, *Agreement Is Reached on Detainee Bill*, N.Y. TIMES, Sept. 21, 2006, at A-1; R. Jeffrey Smith & Charles Babington, *Senators Near Pact on Interrogation Rules*, WASH. POST, Sept. 22, 2006, at A01. Finding middle ground with the President over how to deal with sensitive information in military commission proceedings was a concern for many Senators. For instance, Senator John McCain listed his priorities in the wake of *Hamdan* as follows:

> Ever since the Supreme Court announced its decision in the case of Hamdan v. Rumsfeld, I have made clear that my three primary goals for legislation authorizing military tribunals were: (1) Adjudicating the cases of detained terrorists in proceedings that are consistent with our values of justice, (2) *protecting classified information*, and (3) ensuring that our military and intelligence officers have clear standards for what is, and is not, permissible during detention and interrogation operations.

152 CONG. REC. S10,275 (daily ed. Sept. 27, 2006) (statement of Sen. McCain) (emphasis added).

such heavy negotiation on this topic was the harsh criticism of the expansive protection afforded to sensitive information under the Pentagon's procedural rules.[25] In particular, the legislators recognized the importance of allowing the accused to see the evidence brought against him in a manner that would withstand future Supreme Court scrutiny. Among other things, this would necessitate eliminating the Pentagon's procedural rules requiring the exclusion of the accused (and his civilian defense counsel) from portions of the proceedings that dealt with protected information.[26] At the same time, however, they struggled to devise a process that would enable the prosecution to admit evidence without exposing the sensitive sources, methods, or activities used to obtain that evidence to suspected terrorists, commission members, or the

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[25] Those procedural rules were almost universally criticized by commentators both within and outside of the Judge Advocate community. *See, e.g.*, Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1; Philip Allen Lacovara, *Trials and Error*, WASH. POST, Nov. 12, 2003, at A23 ("Further undermining the legitimacy of the process is the fact that the Defense Department's instructions for the military commissions grant broad discretion to the President and Secretary of Defense to close the entire proceeding, acting on undefined 'national security interests.'"); HUMAN RIGHTS FIRST, TRIALS UNDER MILITARY ORDER (2006), http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf.

[26] *See* DOD MCO No. 1, *supra* note 16, § 9.6(d)(5)(ii). Unlike those rules, the MCA does not allow for the exclusion of the accused from portions of his trial and does not permit the introduction of evidence before the commission without it being disclosed to the accused. Rather, it allows for the exclusion of the accused only for disruptive or dangerous conduct. *See* 10 U.S.C.S. § 949d(e) (LEXIS 2007). In drafting the rules for exclusion of the accused, legislators appear to have paid particular attention to the *Hamdan* Court's statement that "at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him." *Hamdan*, 126 S. Ct. at 2798. Legislators also apparently took to heart the concerns of senior Judge Advocates from the various armed services in this regard. *See, e.g.*, *Standards of Military Tribunals: Hearing Before the H. Comm. on Armed. Servs.*, 109th Cong. (2006) (statements of Major General Scott Black, United States Army, Judge Advocate General ("I can't imagine any military judge believing that an accused has had a full and fair hearing if all the Government's evidence that was introduced was all classified and the accused was not able to see any of it.") and Brigadier General James C. Walker, Staff Judge Advocate to the Commandant U.S. Marine Corps ("I concur with my colleagues that if we get to a point where the sole evidence against an accused is classified, he must be able to see that evidence. That's just essentially one of those elements of a full and fair trial."). In an editorial, *The New York Times*, a vociferous critic of the military commission procedures proposed under both the MCA and the Pentagon rules, noted the significance of the compromises that led to "Mr. Bush's agreement to drop his insistence on allowing prosecutors of suspected terrorists to introduce classified evidence kept secret from the defendant." N.Y. TIMES, Sept. 22, 2006, at A-20.

public at large, if such disclosure would be detrimental to national security.[27]

To begin with, the drafters of the MCA spurned the Pentagon procedural rules' concept of "protected information," deciding instead to limit protection to "classified information."[28] This greatly simplified the universe of information that could benefit from protection. The current Government information classification system was established in March of 2003 under Executive Order 13,292 (EO 13,292)[29] and sets forth the process through which information is to be classified and handled.[30] Among other things, it requires that information be classified according to its "sensitivity," or the degree to which the public disclosure of that

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[27] Safeguarding counterintelligence means was clearly on the Senators' minds in the weeks leading up to the passage of the MCA. Weeks before it was passed, Senator William H. Frist noted that the bill which became the MCA "protects classified information—our critical sources and methods—from terrorists who could exploit it to plan another terrorist attack." 152 CONG. REC. S10,243 (daily ed. Sept. 27, 2006) (statement of Sen. Frist). Senator Levin added, "the bill does not permit the use of secret evidence that is not revealed to the defendant. Instead, the bill clarifies that information about sources, methods, or activities by which the United States obtained evidence may be redacted before the evidence is provided to the defendant and introduced at trial." 152 CONG. REC. S10,244 (daily ed. Sept. 27, 2006) (statement of Sen. Levin). Senator Lindsey Graham, a member of the Senate Armed Services Committee, remarked: "We're going to protect our classified information, and we're going to protect our methods and sources." James Rosen, *Graham Says Tribunal Bill Goes Too Far; Senator Upset By Clause to Withhold Relevant Evidence*, MYRTLE BEACH SUN-NEWS, Sept. 9, 2006, at A1.

[28] Classified information has been defined under the Classified Information Procedures Act (CIPA) as "any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." 18 U.S.C. app. III, § 1(a) (2000). CIPA defines "national security" as "the national defense and foreign relations of the United States." *Id*.

[29] Exec. Order No. 13,292, 3 C.F.R. 196 (2004).

[30] The stated purpose of the order is to establish "a uniform system for classifying, safeguarding and declassifying national security information, including information relating to defense against transnational terrorism." *Id.* With limited exception, the ability to classify information originally may be exercised only by the "original classification authorities," namely, the President, the Vice President (in the performance of executive duties) and agency heads and officials designated by the President in the *Federal Register*. *Id*. at 197. These original classification authorities must receive training on Executive Order No. 13,292 and its implementation directives (including possible criminal, civil and administrative sanctions in connection with unauthorized disclosures of the information) and may delegate their classification authority in writing to subordinate officials who have a "demonstrable and continuing" need to exercise it. *Id*. at 197-98.

information would damage national security.[31] By embracing the objective and recognized standard of classified information, the MCA provided a clear scope of information that would be afforded protection.

In addition to clarifying that only classified information is eligible for protection, the MCA established specific procedures for protecting classified information in military commission legal proceedings. As noted above, the MCA's provisions regarding the treatment of classified information were largely modeled after CIPA and MRE 505, a military evidentiary rule which itself is modeled after CIPA. The provisions of CIPA and MRE 505 do not apply to the MCA, as they apply to federal court proceedings and military law proceedings, respectively.[32]

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[31] *See id*. at 215. Three classification sensitivity levels apply in the United States: (i) Top Secret, for information that, if publicly disclosed, reasonably could be expected to cause "exceptionally grave damage" to the national security; (ii) Secret, for information that, if publicly disclosed, reasonably could be expected to cause "serious damage" to the national security; and (iii) Confidential, for information that, if publicly disclosed, reasonably could be expected to cause "damage" to the national security if disclosed to the public. Note that it is impermissible to classify information in order to cover up illegal activities or merely because it would be embarrassing to state actors or others; information may only be classified to protect national security objectives. *See id*. at 200 (setting forth restrictions on reasons for classification).

[32] The availability of the federal courts and courts-martial as legal avenues that recognize and protect classified information has led some to assert that detainee prosecutions should take place in those systems. An examination of whether suspected terrorists should be tried either under these or other legal regimes instead of by military commissions is beyond the scope of this article. Nevertheless, with respect to the use of federal courts, the prosecution of Zacharias Moussaoui serves as a cautionary tale as far as disclosure of sensitive information is concerned. To the dismay of many, Moussaoui was prosecuted in federal court. *See, e.g.*, *Fox News Sunday* (Fox television broadcast Dec. 16, 2001) (statement of Sen. Joseph Lieberman) ("If [Moussaoui] is not a candidate for a military tribunal, who is?"); *Treatment and Trial of Certain Non-citizens in the War Against Terrorism, Hearing on Military Order on Detention Before the S. Armed Servs. Comm.*, 107th Cong. (2001) (statement of Sen. Carl Levin) ("The glove fits so perfectly here [for prosecution before a military commission]."); *see also* Editorial, *The Moussaoui Experiment*, WASH. POST, Jan. 27, 2003, at A18 (suggesting that Moussaoui's trial be moved to military court). Once Moussaoui was brought to the civilian courts, he benefited from the full range of rights afforded to criminal defendants who are American citizens, which he is not (he is a French citizen). For certain technical reasons, his case was not a CIPA case. Regardless, the prosecution had great difficulty restricting Moussaoui's access to sensitive information, and especially to sensitive sources. *See, e.g.*, United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2004); A. John Rasdan, *The Moussaoui Case: The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417 (2005) (discussing the challenges in prosecuting Moussaoui in the civil criminal courts). Trying Guantánamo detainees and other suspected terrorists in the federal court system would involve similar complications.

Nevertheless, before turning to the MCA itself, a brief overview of CIPA and MRE 505 procedures is helpful in understanding the relevant framework of laws existing at the time the drafters of the MCA established its military commission procedures.

According to the legislative history, CIPA was enacted primarily to deal with the issue of "graymail," a word-play on "blackmail" that essentially describes a situation where a criminal defendant attempts to force the Government to drop or reduce charges by threatening to disclose classified information.[33] However, CIPA ultimately dealt with the disclosure of classified information in federal proceedings in a more expansive way, addressing not only a defendant's threatened disclosures at trial,[34] but also providing a process for dealing with a defendant's discovery requests.[35] Specifically, when it comes to discovery, the court may authorize the Government to delete or substitute classified information contained in documents made available to a defendant.[36]

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[33] *See* S. REP. NO. 96-823, at 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4295. The impetus for CIPA's passage was primarily to facilitate the criminal prosecution of Cold War-era spies. *See generally* Katherine L. Herbig & Martin F. Wiskoff, Defense Personnel Security Research Center, ESPIONAGE AGAINST THE UNITED STATES BY AMERICAN CITIZENS 1947-2001 (2002), *available at* http://www.fas.org/sgp/library/spies.pdf.

[34] *See* 18 U.S.C. app. III, § 5.

[35] *See id*. § 4 (allowing for the deletion, substitution or summarizing of classified information during discovery). "Congress intended section 4 to clarify the court's powers under Fed. R. Crim. P. 16(d)(1) to deny or restrict discovery in order to protect national security." United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988) (citing S. REP. NO. 823, at 6, *reprinted in* 1980 U.S.C.C.A.N. 4299-4300); *see also* United States v. Yunis, 867 F.2d 617, 621 (D.C. Cir. 1989) (stating that § 4 of CIPA "contemplates an application of the general law of discovery in criminal cases to the classified information area with limitations imposed based on the sensitive nature of classified information").

[36] 18 U.S.C. app. III § 4; *see also* Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 291 n.73 (1986); Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1962-63 (2005); United States v. Libby, 429 F. Supp. 2d 46, 48 (D.D.C. 2006). An authorization by the court to so delete or substitute requires a "sufficient showing" by the Government. Although "sufficient showing" is not defined in CIPA, as discussed in greater detail below, courts have fashioned standards and tests to determine whether defendants should prevail on CIPA discovery requests for classified information. *See infra* notes 84-97 and accompanying text.

Although beyond the scope of this article, note that CIPA also requires that a defendant file a notice describing the classified information he "reasonably expects to disclose or cause the disclosures of" at trial. 18 U.S.C. app. III, § 5(a). Hence, if classified information is disclosed to (or otherwise possessed by) a defendant who intends to use it in the proceedings, the Government may request a hearing to determine the "use, relevance or admissibility" of the information. *Id*. § 6(a). If the court then rules that the

In the military context, MRE 505 generally protects classified information from disclosure during criminal proceedings if the head of the executive or military department or Government agency concerned with the information asserts privilege over it by finding that the information itself is properly classified and that its disclosure "would be detrimental to national security."[37] When it comes to discovery, like CIPA, MRE 505 allows the Government to delete or substitute classified information in response to requests from an accused.[38] In relevant part, MRE 505 permits the military judge to authorize the deletion or substitution of classified information at the discovery stage, "unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial."[39]

Much like MRE 505, the MCA deploys a shield over classified information sought by an accused, establishing a process through which a "national security" privilege may be asserted.[40] This shield is deployed

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classified information is admissible, the Government may move to substitute or summarize the information. *Id*. § 6 (c)(1). In fact, the court is *required* to grant the Government's motion for an alternative to outright disclosure if that alternative will provide the defendant "with substantially the same ability to make his defense as would disclosure of the specified classified information." *Id*.

[37] MCM, *supra* note 11, MIL. R. EVID. 505(c).

[38] *See id.* MIL. R. EVID. 505(g)(2). This evidentiary rule provides:

> Limited disclosure. The military judge, upon motion of the Government, shall authorize (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

Id.

[39] *Id*. Similar to § 6(a) of CIPA, MRE 505 allows the Government to make a motion for an in camera proceeding to determine whether, and in what form, classified information may be disclosed and used during the court-martial trial proceeding. *Id.* MIL. R. EVID. 505(i)(4). Classified information may only be disclosed if it is "relevant and necessary to an element of the offense or a legally cognizable defense." *Id.* MIL. R. EVID. 505(i)(4)(B); *see also* United States v. Lonetree, 31 M.J. 849, 856 (N.M.C.M.R. 1990), *aff'd* 35 M.J. 396 (C.M.A. 1992), *cert. denied,* 507 U.S. 1017 (1993).

[40] Specifically, § 949d(f)(1) of the MCA states:

during all stages of the proceedings, and hinges upon a finding by the head (or his designee) of the executive or military department or Government agency concerned that (i) the information is properly classified, and (ii) its disclosure would be detrimental to national security.[41] Once privilege is asserted, the accused may not disclose (or compel the disclosure of) the subject information.[42] The MCA also permits the military judge to authorize the prosecution to introduce either redacted documents or summary information to protect classified information from disclosure at trial.[43]

> (f) Protection of Classified Information-
>
> (1) NATIONAL SECURITY PRIVILEGE- (A) Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the preceding sentence applies to all stages of the proceedings of military commissions under this chapter.
>
> (B) The privilege referred to in subparagraph (A) may be claimed by the head of the executive or military department or Government agency concerned based on a finding by the head of that department or agency that--
>
> (i) the information is properly classified; and
>
> (ii) disclosure of the information would be detrimental to the national security.

Note that the military judge may not assess the validity of the national security privilege. Rather, it appears that Congress intended to defer exclusively to the department or agency head on the substance of the privilege assertion, as determined in accordance with § 949d(f)(1)(B), and that the military judge's review consists merely of ensuring that the relevant department or agency head has made the required *finding* as to (i) the proper classification of the information at issue, and (ii) the potential impact of its disclosure.

[41] 10 U.S.C.S. § 949d(f)(1) (LEXIS 2007). In the words of Senator John McCain, "[W]hile ensuring a full and fair process, the legislation [that became the MCA] also recognizes the important role that classified information is likely to play in these trials. The legislation expressly provides the Government with a privilege to protect classified information." 152 CONG. REC. at S10,275 (daily ed. Sept. 7, 2006) (statement of Sen. McCain).

[42] Note that even after discovery, during an examination of a witness, trial counsel may object to admission into evidence of any classified information and the military judge (who may choose to review trial counsel's claim of privilege in camera and on an ex parte basis) must thereafter safeguard the information. 10 U.S.C.S. § 949d(f)(2)(C) (stating, in relevant part: "During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information."). A parallel to this is found in CIPA, which requires that the court take protective action when the defense's questioning of a witness may require the disclosure of classified information. 18 U.S.C. app. III § 8(c) (2000).

[43] Section 949d(f)(2)(A) of the MCA states as follows:

However, unlike CIPA and MRE 505, the MCA specifically provides a mechanism for the protection of classified sources, methods or activities. In relevant part, § 949d(f)(2)(B) of the MCA states:

> (2) INTRODUCTION OF CLASSIFIED INFORMATION-
>
> * * *
>
> (B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES- The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.[44]

In short, if the military judge determines that certain evidence is reliable and otherwise admissible, and permits the introduction of that evidence, he must protect the classified sources, methods or activities used to obtain that evidence, although he may require a summary of those counterintelligence means. Therefore, although the MCA brings the use and protection of sensitive information in military commission proceedings more in line with federal and military procedural law and closer to the expectations of the legal community, it goes out of its way to explicitly protect counterintelligence means from disclosure.[45]

> (A) ALTERNATIVES TO DISCLOSURE.—To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—(i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission; (ii) the substitution of a portion or summary of the information for such classified documents; or (iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

Id.

[44] *Id.* § 949d(f)(2)(B).

[45] This explicit protection of counterintelligence means was obviously intentional. In the words of Senator Lindsey Graham,

II. Technical Sources, Methods and Activities Employed in the GWOT

As previously discussed, the protection afforded to classified information under the MCA is largely consistent with that afforded under CIPA and MRE 505, with the notable exception of the explicit protection afforded under § 949d(f)(2)(B) of the MCA to sources, methods and activities used to obtain admissible evidence. But why is this the case? What prompted the drafters to take such an interest in—and such specific precautions concerning—the protection of GWOT counterintelligence means? The answer lies in the counterintelligence community's wide-ranging response to the September 11th attacks, and particularly on its heavy reliance upon technical counterintelligence means.

The Government has traditionally placed great emphasis on protecting its classified sources, methods and activities from disclosure, whether to the media through leaks or to the public at large through legal proceedings.[46] Its efforts in the GWOT are no exception. Of the

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> We struck a great balance. . . . We need to be very clear that, in prosecuting the terrorists during a time of war, we do not have to reveal our sources and methods to protect us, our classified procedures. . . . But if the Government decides to provide information to the jury that would result in a conviction, sending someone to jail for a long period of time, or to the death chamber, an American trial must allow that person to know what the jury found them guilty of so they can confront the evidence.

Byron York, *The Detainee Deal: The White House Won—and So Did McCain*, NAT'L REV. ONLINE, Sept. 22, 2006, *available at* http://article.nationalreview.com/?q=YWYONTjhOGVjMGRkNTBkZGY1NTZkYTg4MGViY2I1ZTE=.

[46] The Government's protectiveness over such information in legal proceedings is not limited to restricting disclosure in U.S. courts; rather, it also has gone to great pains to protect its classified sources and methods in the context of international criminal justice. *See, e.g.*, Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 YALE J. INT'L L. 477 (2006). For instance, the U.S. Government allowed its former officials to testify before the ICTY at Slobodan Milošević's trial only in a closed session with two Government officials present and with permission to delete any testimony from the record that it believed compromised U.S. national security. *Id*. at 484. The reason given for these conditions to testimony was as follows: "It is a matter of intelligence collection and a fear that sources and methods of obtaining information could be jeopardized if [the former officials] have to testify in open court." *Id*.; *see also* Ian Black, *Wesley Clark Testifies in Secret at Milosevic Trial*, GUARDIAN, Dec. 16, 2003, at 11; *Closed Session Ordered for Envoy's War Crimes Testimony*, AUSTRALIAN, June 14, 2002, at 9; Elaine Sciolino, *Clark Testifies Against Milosevic at Hague Tribunal*, N.Y. TIMES, Dec. 16, 2003, at A3.

counterintelligence means that have come to the public light, interrogation methods have dominated the headlines.[47] This public fascination with intelligence gathered through interrogations is understandable; it is a manifestation of our concern for the humane treatment of detainees and, as such, touches upon our core societal values. And yet, in the context of what has been—and will continue to be—truly important in the daily prosecution of the GWOT, it is a mistake to focus solely on interrogation tactics.[48] A wide array of other

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[47] An examination of the validity or morality of detainee interrogation techniques employed by any DOD or governmental agency program is beyond the scope of this article. Nevertheless, it cannot be disputed that interrogations of suspected high-ranking terrorists have, at times, proved modestly effective in yielding useful intelligence. The CIA's High Value Terrorist Detainee Program has been particularly effective in this regard, reporting success in using interrogation methods that have led to the capture of al Qaeda operations chief Khalid Shaykh Mohammad, better known as the mastermind of the September 11 attacks, and Ramzi bin al-Shibh, another September 11 plotter. *See* OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, SUMMARY OF THE HIGH VALUE TERRORIST DETAINEE PROGRAM (2006), http://www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf. Once captured, Khalid Shaykh Mohammad himself appears to have provided a plethora of information about other terrorists and planned operations. *See id*. Information from interrogations has also played an important part in averting additional terrorist plots, including one involving the destruction of commercial airliners from London in the summer of 2006. *See* Mark Mazzetti, *The Reach of War; New Generation of Qaeda Chiefs Is Seen on Rise*, N.Y. TIMES, Apr. 2, 2007, at A-1.

[48] As noted above, some critics have focused exclusively on potential invocation of privilege over counterintelligence sources, methods and activities to conceal in commission proceedings abusive and/or illegal interrogation techniques that may either embarrass the Government or permit coerced statements. *See supra* note 14. As one commentator states bluntly:

> The bill [that became the MCA] includes a number of provisions that protect classified "sources, methods, or activities" against being revealed. The likely impact of such provisions is to bar any inquiry into the CIA's abusive interrogation practices. (For sources, substitute "disappeared" detainees; for methods, substitute torture, and for activities, substitute water-boarding, stress positions, and days without sleep.)

Joanne Mariner, *The Military Commissions Act of 2006: A Short Primer*, Oct. 9, 2006, http://writ.news.findlaw.com/mariner/20061009.html; *see also* HUMAN RIGHTS WATCH Q & A, *supra* note 14, at 4 ("Unless military commission judges are extremely vigilant [in the application of protection over classified sources, methods and activities], the prohibition on evidence obtained through torture could be become virtually meaningless.").

While beyond the scope of this article, the admission of potentially "coerced" evidence is quite limited under the MCA. A statement obtained prior to the enactment of the Detainee Treatment Act of 2005 (42 U.S.C.S. § 2000dd (LEXIS 2007) [hereinafter DTA 2005]) where the degree of coercion is disputed, may be admitted *only* if the military judge

means have been employed with modest success and warrant protection from disclosure. Infiltration efforts and classic techniques involving human intelligence certainly are being used with increased vigor.[49] Most significant, however, and the central focus of this article, are those activities and methods that gather intelligence through technical means.

Technical means have been employed to monitor both terrorist communications and financial activity. On the communications front, one program that has been the subject of intense public scrutiny involves monitoring by the National Security Agency of communications where one party is located outside of the United States.[50] This program, known as the Terrorist Surveillance Program (TSP),[51] and similar "wire-tapping"

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concludes that (i) the statement is reliable and possesses sufficient probative value, and (ii) that the interests of justice would be best served by admitting the statement; for statement obtained after enactment of DTA 2005, the military judge also must conclude that the interrogation methods used were not cruel, inhuman, or degrading. 10 U.S.C.S. § 948r.

[49] Improving human intelligence has been a common theme in administrative and congressional reviews since the September 11th attacks. *See, e.g.*, H. SUBCOMM. ON TERRORISM & HOMELAND SEC., H. PERM. SELECT COMM. ON INTELLIGENCE, REPORT ON COUNTERTERRORISM INTELLIGENCE CAPABILITIES AND PERFORMANCE PRIOR TO 9-11, 107th Cong. 2 (2002), *available at* http://fl1.findlaw.com/newsfindlaw.com/cnn/docs/terrorism/hsint1.71702thsrpt.pdf [hereinafter COUNTERTERRORISM CAPABILITIES REPORT] (recommending that CIA leadership "penetrate terrorist cells, disrupt terrorist operations and capture and render terrorists to law enforcement. . . . More core collectors need to be put on the streets."). The lack of human intelligence in Afghanistan and Iraq prior to the September 11th attacks is viewed as a major intelligence community failure. In fact, former National Security Advisor Samuel Berger testified before Congress that the United States maintained no significant intelligence assets in Afghanistan after 1989. *Joint Investigation into September 11th: Second Public Hearing Before the Joint H. & S. Intelligence Comms*., 107th Cong. (2002), *available at* http://www.fas.org/irp/congress/2002_hr/091902berger.pdf (statement by Samuel Berger); *see also* COUNTERTERRORISM CAPABILITIES REPORT, *supra*, at 2 ("CIA did not sufficiently penetrate the al-Qa'ida organization before September 11th. Because of the perceived reduction in the threat environment . . . and the concomitant reduction in resources for basic human intelligence collection, there were fewer operations, officers, fewer stations, fewer agents, and fewer intelligence reports produced.").

[50] According to a Department of Justice publication, this program is narrowly focused on international calls for which there is a reasonable basis to believe that one party to the communication is affiliated with al Qaeda. U.S. DEP'T OF JUSTICE, THE NSA PROGRAM TO DETECT AND PREVENT TERRORIST ATTACKS: MYTH V. REALITY 2 (2006), http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf.

[51] Although not aimed at intercepting an enemy nation's signals, the TSP nevertheless falls within classic signals intelligence. According to the DOD Definitions, signals intelligence is defined as "communications intelligence, electronic intelligence, and foreign instrumentation signals intelligence, however transmitted." DOD DICTIONARY, *supra* note 6, at 492. The use of signals intelligence to track and capture non-state figures through their communications is not new. One noted case where it has been used is that

programs intended to monitor potential terrorist communications, have been the focus of the media and the public because of the privacy concerns they engender.[52] Nevertheless, the more novel and, quite possibly, more effective use of technical means has been to access and monitor *financial* activity and records to establish links between and among actors of interest and their funds. Using al Qaeda's financial network as a vehicle, the following subsection examines the financial networks (i.e., the "cycle" of their funds—generation, investment, and movement) of modern terrorist organizations and explores how certain technical counterintelligence means are being employed in the GWOT to exploit these financial networks.

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of Kurdistan Workers' Party leader Abdullah Oçalan, who led a bloody war in the 1990s against Turkish forces for an independent Kurdish state. (There are approximately twenty-five million Kurds, primarily in Iraq, Iran, Syria and southeast Turkey, making them the largest ethnic population without a state in the world.) Oçalan was captured in 1999 in Kenya after being expelled some years earlier from Syria and subsequently being freed from house arrest in Italy. The exact circumstances of how he was located and apprehended are not clear, although *The New York Times* published a report citing unnamed U.S. sources claiming that U.S., British and Israeli intelligence agents tracked his mobile phone activity and passed on information about his whereabouts to Turkey. Tim Weiner, *U.S. Helped Turkey Find and Capture Kurd Rebel*, N. Y. TIMES, Feb. 20, 1999, at 1. The United States officially maintains it did not participate in the capture of Oçalan.

[52] The TSP was disclosed to the public in December 2005. *See, e.g.*, James Risen & Eric Lichtabu, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A-1. In a recent suit brought by the American Civil Liberties Union (ACLU) and certain journalists, academics and lawyers, a U.S. district court judge in Michigan held that the program's warrantless monitoring violated the Separation of Powers doctrine, the Administrative Procedures Act, the First and Fourth Amendments to the United States Constitution, and statutory law. *See* ACLU vs. NSA, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006). The Sixth Circuit, however, vacated the district court's order and remanded the case with instructions that it be dismissed for lack of jurisdiction based on the plaintiffs' inability to establish standing for any of their asserted claims. *See* ACLU v. NSA, Nos. 06-2095/2140, at 35 (6th Cir. July 6, 2007). The Government had argued that the President had the "inherent" authority under the Constitution to engage in signals intelligence as Commander-in-Chief, that the AUMF implicitly authorized the activity and that the telephone conversations were intercepted only where the Government "has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, White House Press Briefing, Dec. 19, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

A. Understanding Terrorist Organization Financial Networks

Relatively little money is required to implement any one terror operation. In fact, according to the 9/11 Commission, the attacks of September 11th, which were the most expensive operation ever undertaken by al Qaeda, cost "somewhere between $400,000 and $500,000 to plan and conduct."[53] Nevertheless, weapons, training, preparation for operations, and the day-to-day subsistence of operatives all require the generation, management and movement of funds. As a result, "follow the money" has been a lynchpin in the counterterrorism community's plan to locate al Qaeda associates and frustrate the organization's operational capabilities.[54] Indeed, President Bush emphasized the importance of crippling terrorist financial networks in an executive order issued soon after the September 11th attacks.[55]

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[53] 9/11 COMMISSION REPORT, *supra* note 4, at 169. The operatives spent more than $270,000 in the United States and incurred "additional expenses includ[ing] travel to obtain passports and visas, travel to the United States, expenses incurred by the plot leader and facilitators outside the United States, and expenses incurred by the people selected to be hijackers who ultimately did not participate." *Id*. at 499 n.131.

[54] As the future co-Chairman of the 9/11 Commission, Lee H. Hamilton, noted:

> [T]racking al Qaeda financing is an effective way to locate terrorist operatives and supporters and to disrupt terrorist plots. . . . Following the money to identify terrorist operatives and sympathizers provides a particularly powerful tool in the fight against terrorist groups. Use of this tool almost always remains invisible to the general public, but it is a critical part of the overall campaign against al Qaeda.

National Commission on Terrorist Attacks Upon the United States, Statement Before the S. Comm. on Banking, Housing & Urban Affairs, 108th Cong. (2004) (statement of former Vice Chair Lee H. Hamilton and Commissioner Slade Gorton), *available at* http://banking.senate.gov/_files/joint_st.pdf.

[55] This executive order states, in relevant part:

> [B]ecause of the pervasiveness and expansiveness of the financial foundations of foreign terrorists, [this] Order authorizes the U.S. Government to block the assets of individuals and entities that provide support, services, or assistance to, or otherwise associate with, terrorists and terrorist organizations designated under [this] Order, as well as their subsidiaries, front organizations, agents, and associates. . . . I also find that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists. I also find that a need exists for further consultation and cooperation with, and sharing of information by, United States and foreign financial

Considering the depth and sophistication of the al Qaeda financial network, leveraging technical means to accomplish the ends envisioned by this executive order was clearly born of necessity.

It is now well-known that al Qaeda has generated millions of dollars from multiple sources, actively managed its financial investments and operated small businesses throughout the world.[56] In fact, the organization has its own finance and business committee charged with the management and transfer of its funds around four continents.[57] Financial training and acumen is viewed as a critical aspect of al Qaeda's operational capability, as evidenced by the detailed instructions provided in its military training manual, *Declaration of Jihad Against the Country's Tyrants*.[58] The organization's financial network has truly proven resilient, primarily because of the limited information disclosed to the web of players involved and the diversification of its activities in the generation, management, and movement of funds.

Al Qaeda and its associates have been extremely successful in generating income from public and private donations, as well as crime. Donations have come from wealthy individuals, but appear mostly to derive from legitimate government and private Islamic benevolent organizations and charities.[59] In Saudi Arabia, in particular, government

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> institutions as an additional tool to enable the United States to combat the financing of terrorism.

Exec. Order No. 13,224, 3 C.F.R. 786 (2002). Through this executive order, President Bush froze the assets of twenty-seven organizations and individuals having suspected links to terrorists. Thirty-nine names were added within the next month.

[56] As the 9/11 Commission noted, "al Qaeda had many sources of funding and a pre-September 11th annual budget estimated at $30 million." 9/11 COMMISSION REPORT, *supra* note 4, at 170.

[57] ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 81 (2003). It also uses regional financial officers to further manage its funds. *Id*.

[58] *Id*. at 83-84. Among other things, this document instructs the reader how to counterfeit currency and credit cards and forge official documents. *Id*. Interestingly, it articulates several financial security principles, including the following: (i) funds should be either invested for financial return or set aside (and scattered) for use in operations; (ii) very few members should know the location of funds at any one time; and (iii) monies should be left with non-members of the organization. *Id*. at 84.

[59] As the 9/11 Commission pointed out, "Al Qaeda and its friends took advantage of Islam's strong calls for charitable giving, *zakat*. These financial facilitators also appeared to rely heavily on certain imams at mosques who were willing to divert *zakat* donations to al Qaeda's cause." 9/11 COMMISSION REPORT, *supra* note 4, at 170. Some of these donations have been generated from unwitting philanthropic organizations. *See, e.g.*, William E. Wechsler, *Strangling the Hydra: Targeting al Qaeda's Finances*, *in* HOW

officials have failed to effectively curb the open support provided to groups suspected of supporting terrorist organizations.[60] And yet, al Qaeda does not subsist on donations alone. Another primary source of income generation for the organization is crime. In fact, intelligence sources estimate that al Qaeda's European network raises approximately $1 million per month through credit card fraud alone.[61]

Once terrorist organizations generate and accumulate funds, they must deposit, manage and, at times, invest them until such time as they are needed for operational purposes.[62] Al Qaeda's investments have been exceptionally diverse, both geographically and substantively. For instance, it has invested in fishing, hospital equipment, the dairy industry and paper mills.[63] Although definitive proof is lacking, al Qaeda funds have also been tied to the illegal diamond trade.[64]

Effecting operational plans necessarily requires the movement of funds. Criminals throughout history have devised creative ways to move funds. Islamic terrorist networks, in particular, appear to use three primary methods: the formal banking system, cash couriers, and *hawala*, a traditional and unregulated arrangement for capital transfer

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DID THIS HAPPEN? TERRORISM AND THE NEW WAR 137 (James F. Hodge, Jr. & Gideon Rose eds., 2001).

[60] Indeed, it appears "al Qaeda found fertile fund-raising ground in Saudi Arabia, where extreme religious views are common and charitable giving was both essential to the culture and subject to very limited oversight." 9/11 COMMISSION REPORT, *supra* note 4, at 171.

[61] GUNARATNA, *supra* note 57, at 87.

[62] Note that "operational purposes" may mean expenditures directly related to terrorist acts, such as the rental of a Ryder® truck by convicted terrorist Muhammad Salameh and his co-bombers in connection with the 1993 World Trade Center bombing. However, it may also mean day-to-day expenditures, such as rent payments for sleeper cells and training facility necessities.

[63] GUNARATNA, *supra* note 57, at 90.

[64] *See generally* DOUGLAS FARAH, BLOOD FROM STONES (2004). *See also* Douglas Farah, *Al Qaeda Cash Tied to Diamond Trade: Sale of Gems From Sierra Leone Rebels Raised Millions, Sources Say*, WASH. POST, Nov. 2, 2001, at A01 (reporting that one European investigator opined: "I now believe that to cut off al Qaeda funds and laundering activities you have to cut off the diamond pipeline. . . . We are talking about millions and maybe tens of millions of dollars in profits and laundering."); *Al Qaeda Bought Diamonds Before 9/11*, USA TODAY, Aug. 7, 2004 (reporting witness accounts that six senior al Qaeda associates dealt directly with then-Liberian President Charles Taylor and other warlords beginning in 1999). Nevertheless, the 9/11 Commission concluded: "we have seen no persuasive evidence that al-Qaeda funded itself by trading in African conflict diamonds." 9/11 COMMISSION REPORT, *supra* note 4, at 171.

based on trust.[65] Current intelligence indicates that al Qaeda increasingly relies on transferring funds through *hawala* and simple cash couriers.[66]

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[65] Several forms of *hawala* exist, mostly in South Asia and in the Middle East. In its simplest form, it consists of a broker located in one location taking a fee to transfer money to a recipient in a different location through a trusted contact of the broker. The steps of a typical *hawala* transaction are as follows: (i) the sender gives the broker the amount to be transferred, plus his fee (typically about one percent of the transaction), (ii) the broker notifies a personal contact in proximity of the recipient of the intended transfer through e-mail, instant message, phone, or fax, (ii) the contact approaches the recipient, who often must provide a pre-designated password or detail to complete the transaction, (iii) the contact extends the money to the recipient, and (iv) the broker and his contact keep detailed ledgers and either cancel existing debt or physically settle the transaction by falsifying invoices for phantom goods and services or by providing goods (including commodities such as gold and diamonds) or services of equivalent value as an alternative to cash. The system relies on a high level of trust between the broker and his contact, as their bilateral settlement is not secured.

Large-scale use of *hawala* appears to have begun in the 1940s when, for a variety of reasons, an enormous number of people migrated from South Asian rural areas to cities throughout the world, transferring what wealth they could through trusted friends and extended family. Michelle Cottle, *Hawalah v. The War on Terrorism*, NEW REPUBLIC, Oct. 15, 2001, at 1-2. *Hawala* exploded in the 1960s and 1970s, as migrants of Asian and Middle Eastern expatriates arranged to send earnings to family members in their country of origin without paying the high banking and exchange rates required of such transfers in the official banking system. *Id*.

> Hawala remains a significant method for large numbers of businesses of all sizes and individuals to repatriate funds and purchase gold . . . . It is favoured because it usually costs less than moving funds through the banking system, it operates 24 hours per day and every day of the year, it is virtually completely reliable, and there is minimal paperwork required."

ORG. FOR ECON. CO-OPERATION AND DEV. (OECD) FIN. ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES 1999–2000 (2000), http://www.fatf-gafi.org/dataoecd/29/37/34038120.pdf.

[66] In fact, the Department of the Treasury Under Secretary for Terrorism and Financial Intelligence noted in 2004:

> As the formal and informal financial sectors become increasingly inhospitable to financiers of terrorism, we have witnessed an increasing reliance by al-Qaida and terrorist groups on cash couriers. The movement of money via cash couriers is now one of the principle methods that terrorists use to move funds.

Legislative Proposals to Implement the Recommendations of the 9/11 Commission: Hearing Before the H. Comm. on Fin. Servs., 108th Cong. 35 (2004) (Prepared testimony of Stuart A. Levey, Undersecretary for Terrorism and Financial Intelligence, U.S. Department of the Treasury) [hereinafter Levey FSC Testimony]). Charitable organizations also may be used by terrorist organizations to move funds.

Although the transfer of money using cash couriers is inherently invisible to technical monitoring, this is not the case for transfers effected through the formal banking system and, to a lesser extent, *hawala*, which itself often makes use of the formal banking system.

With respect to with *hawala*, it is important to note that its link to terrorist financing is not theoretical. In fact, the 9/11 Commission concluded that al Qaeda frequently moved money through *hawala* prior to the September 11th attacks.[67] The vast scope of *hawala* in areas of al Qaeda influence is also telling.[68] At first blush, *hawala* transactions may appear impossible to uncover or monitor. Yet there are components of *hawala* that utilize the formal banking system, most significantly the ultimate settlement between the broker and his contact, which may be effected through traditional money transfers or deposits.

Despite a heavy reliance on *hawala*, terrorist organizations such as al Qaeda also move funds directly through the formal banking system, relying on the low level of scrutiny over money transfers where the amount transferred does not raise suspicion.[69] As the 9/11 Commission

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[67] 9/11 COMMISSION REPORT, *supra* note 4, at 171. One notable such case is that of Dihab Shill, a Somali-based *hawaladar* (broker) that was identified as the financier of the 1998 attacks on the American embassies in Kenya and Tanzania. One terrorist involved in the attack, Mohamed Al-Owhali, apparently had no money or identity papers, but was nevertheless able to receive funds from Dihab Shill because the al Qaeda contact who sent him cash from Yemen had written a note on the transfer which, according to the Dihab Shill owner in Nairobi, Kenya, said: "This person doesn't have any proper documents . . . please give him without documents." John Willman, *Trail of Terrorist Dollars That Spans the World*, FIN. TIMES, Nov. 29, 2001, at https://specials.ft.com/attack onterrorism/FT3RNR3XMUC.html. Note, however, that the 9/11 Commission found no evidence of *hawala* being used in connection with the September 11 attacks. 9/11 COMMISSION REPORT, *supra* note 4, at 499 n.131.

[68] For instance, according to the estimates of Shaukut Aziz, Pakistan's Minister of Finance and a former executive vice president of Citibank in New York, as of 2001, Pakistani *hawala* networks accounted for transfers of between two and five billion U.S. dollars per year; on the higher end, this is many multiples greater than the amount of foreign transfers made annually through the official Pakistani banking system. *See* Douglas Frantz, *A Nation Challenged: Ancient Secret System Moves Money Globally*, N.Y. TIMES, Oct. 3, 2001, at 2.

[69] *See* U.S. Dep't of Treasury Secretary John W. Snow, Letter to the Editor, N.Y. TIMES, June 29, 2006 [hereinafter Secretary Snow Letter] (stating "[w]hile terrorists are relying more heavily than before on cumbersome methods to move money, such as cash couriers, we have continued to see them using the formal financial system . . ."). It stands to reason that the lower the amount involved, the less the ability of the bank to flag and scrutinize a cash transaction due to the sheer volume of daily transactions. The Bank Secrecy Act of 1970, which was amended by the USA PATRIOT Act of 2001,

concluded, "[t]he conspiracy made extensive use of banks in the United States. The hijackers opened accounts in their own names, using passports and other identification documents. Their transactions were unremarkable and essentially invisible amid the billions of dollars flowing around the world every day."[70] Nevertheless, despite terrorist financial networks' efforts to fly under the wire of financial scrutiny, the fact remains that whether as a component of *hawala* or otherwise, they have used and, to some extent, must continue to use, the formal banking system to subsist and to effect their operations.

B. Counterintelligence Means for Financial Monitoring Used in the GWOT

As the preceding subsection highlights, terrorist organizations such as al Qaeda must generate, manage and move funds for operational purposes, much like a legitimate enterprise. In taking each of these steps, they often leave behind banking or other financial tracks that the counterintelligence community could uncover and exploit. A sophisticated surveillance program may be able to sift through mounds of financial data and capture critical information.

Based on this potential, intelligence, law enforcement, and other agencies scrambled to arm themselves with enhanced financial monitoring abilities in the wake of September 11th, often enlisting the help of private sector companies.[71] Among other efforts, programs were established to monitor the formal money transfer, credit card charge and banking system—i.e., the banking footprints—of terrorists. Tracking the formal banking system has provided concrete leads on terrorists and their intended operations.[72] One early tracking effort was a Department of

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established an arbitrary threshold of $10,000 for daily cash transactions, above which U.S. banks must file a report known as a "Currency Transaction Report." 31 U.S.C. §§ 5313, 5316(a) (2000). Note, however, that U.S. banks must also file a "Suspicious Activity Report" where the bank "knows, suspects or has reason to suspect" that questionable cash transactions are being effected. *Id.* § 5318(g).

[70] 9/11 COMMISSION REPORT, *supra* note 4, at 14 (Executive Summary).

[71] *See id.* at 382 (noting that the world financial community has provided strong cooperation in supplying relevant information for investigations).

[72] According to Treasury Department Undersecretary Levey:

> [W]hile terrorist supporters may use code names on the phone, when they send or receive money through the banking system, they often provide information that yields the kind of concrete leads that can

Defense collaboration with a company named First Data, which at the time owned the money-transfer company, Western Union.[73] But a more prominent program that has recently come to light is not operated by the intelligence agencies or traditional law enforcement. Rather, it is run by the Treasury Department and is named the Terrorist Finance Tracking Program (TFTP).[74] A critical aspect of this program is the ability to make queries into the vast database of international wire transactions managed by a Belgian firm named SWIFT (Society for Worldwide Interbank Financial Telecommunication). SWIFT is an industry-owned cooperative managing much of the world's financial-message traffic, processing millions of electronic messages daily from banks, brokerages, and investment managers in connection with international transactions.[75]

> advance an investigation. For these reasons, counter-terrorism officials place a heavy premium on financial intelligence. . . . Despite attempts at secrecy, terrorist facilitators have continued to use the international banking system to send money to one another, even after September 11th.

The Terror Finance Tracking Program: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs., 108th Cong. 44 (2006) (Prepared testimony of Stuart A. Levey) [hereinafter Levey HFSSOI Testimony].

[73] First Data, which operates globally, processes massive volumes of credit charge charges and, as such, has access to who purchases what and where they live. *See* RON SUSKIND, THE ONE PERCENT DOCTRINE 38 (2006). According to its web site, a sender may send money through Western Union to 245,000 agent locations in over 200 countries. WesternUnion, http://www.westernunion.com/info/selectCountry.asp?origination=global (last visited Oct. 4, 2007).

[74] The first public admission of the existence of the program was made on 22 June 2006. *See* Glen R. Simpson, *U.S. Is Moving on Several Fronts to Police Financial Transactions*, WALL ST. J., June 24, 2006, at A4; *see also* Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A-1; Barton Gellman, et al., *Bank Records Secretly Tapped*, WASH. POST, June 23, 2006, at A-1; Josh Meyer & Greg Miller, *U.S. Secretly Tracks Global Bank Data*, L.A. TIMES, June 23, 2006, at A-1.

[75] According to its web site, SWIFT was founded in 1973 with the mission of "creating a shared worldwide data processing and communications link and a common language for international financial transactions." SWIFT, About SWIFT, http://www.swift.com/index.cfm?item_id=1243 (last visited Oct. 4, 2007). SWIFT's web site indicates exactly how expansive its reach is, reporting that it currently provides messaging services and interface software to nearly 8,100 financial institutions in 206 countries. SWIFT, About SWIFT, http://www.swift.com/index.cfm?item_id=62272 (last visited Oct. 4, 2007). Once the TFTP was publicly acknowledged by a U.S. Government official, SWIFT issued the following statement to help allay fear in the financial markets of abuse:

> In the aftermath of the September 11th attacks, SWIFT responded to compulsory subpoenas for limited sets of data from the Office of Foreign Assets Control of the United States Department of the

SWIFT does not handle funds per se, but does handle over 2.5 billion sets of transfer instructions and transaction confirmations each year.[76]

According to Treasury officials, the TFTP has been highly successful, leading not only to the apprehension of suspected terrorists, but also to the disruption of existing terrorist cells and pending operations.[77] The program's successes are believed to include information leading to arrests in connection with the 2002 Bali bombings and the arrest of a key player in Iraqi terrorism, as well as useful information related to the 2005 London bombings.[78]

The importance of these and similar (whether not yet publicly disclosed or not yet developed or implemented) governmental efforts warrants their protection from unnecessary disclosure. Disclosures from media leaks have already damaged programs employing technical counterintelligence means in the GWOT. The TFTP is one such example. In a letter to the editors of The New York Times, Treasury Secretary John W. Snow underscored the damage to intelligence efforts caused by the program's disclosure, stating that the newspaper had "undermined a highly successful counter-terrorism program and alerted terrorists to the methods and sources used to track their money trails."[79]

> Treasury. Our fundamental principle has been to preserve the confidentiality of our users' data while complying with the lawful obligations in countries where we operate.

Press Release, Statement on Compliance by SWIFT, June 23, 2006, *available at* http://www.swift.com/index.cfm?item_id=59904.

[76] Glen R. Simpson, *Treasury Tracks Financial Data in Secret Program*, WALL ST. J., June 23, 2006, at A1.

[77] In the words of then-Treasury Secretary John W. Snow: "I am particularly proud of our Terrorist Finance Tracking Program which, based on intelligence leads, carefully targets financial transactions of suspected foreign terrorists." U.S. Department of the Treasury Press Release, John W. Snow, Secretary of the Treasury (June 22, 2006), *available at* http://www.treas.gov/press/releases/js4332.htm.

[78] *See* Levey HFSSOI Testimony, *supra* note 72 (noting that the program "played an important role in the investigation that eventually culminated in the capture of Hambali, Jemaah Islamiyya's Operations Chief, who masterminded the 2002 Bali bombings" and uncovered "a key piece of evidence that confirmed the identity of a major Iraqi terrorist facilitator and financier").

[79] In relevant part, Secretary Snow's letter stated:

> The decision by The New York Times to disclose the Terrorist Finance Tracking Program, a robust and classified effort to map terrorist networks through the use of financial data, was irresponsible and harmful to the security of Americans and freedom-loving people

Unnecessarily disclosing the existence and workings of classified sources, methods and activities such as the TFTP in military commission proceedings would exacerbate damage which has already been inflicted by media leaks, and would substantially impair—or, in some cases, render worthless—those means. Disclosing similar programs (whether tracking finances, physical movement, communications, internet use, etc.) would have the same practical effect on intelligence gathering as executing scores of trusted agents and informants. This is something the counterintelligence community could ill afford.

III. An Analysis of the MCA's Protection of Technical Sources, Methods and Activities under CIPA

The preceding sections have established that technical classified sources, methods and activities employed in the GWOT—particularly those monitoring terrorist financial networks—are a critical component of the overall counterintelligence effort. Furthermore, these technical classified means often will not be stale at the time of the relevant legal proceedings, and the drafters of the MCA recognized that their disclosure may cause significant damage to ongoing counterintelligence programs. The remaining question is whether the specific protections afforded to these means under § 949d(f)(2)(B) of the MCA would withstand judicial scrutiny.[80] This section argues that they should.

The courts have recognized the Government's strong interest in protecting classified counterintelligence means in the context of terrorism cases.[81] In fact, when it comes to counterintelligence means,

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> worldwide. In choosing to [expose this program], The Times undermined a highly successful counter-terrorism program and alerted terrorists to the methods and sources used to track their money trails.

Secretary Snow Letter, *supra* note 69. Following the disclosure of the program, Treasury Undersecretary Levey testified: "The Terrorist Finance Tracking Program was . . . an invisible tool. Its exposure represents a grave loss to our overall efforts to combat al Qaida and other terrorist groups." Levey HFSSOI Testimony, *supra* note 72.

[80] *See* 10 U.S.C.S. § 949d(f)(2)(B) (LEXIS 2007).

[81] *See, e.g.*, United States v. Walker-Lindh, 198 F. Supp. 2d 739, 742 (E.D. Va. 2002); United States v. Bin Laden, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999). As one court stated in an attempt to disclose surveillance information under the Foreign Intelligence Surveillance Act, "[i]n the area of foreign intelligence gathering, the need for extreme

judicial concern with the protection of sources and methods in connection with terrorism cases, particularly where investigations are ongoing, predates the September 11th attacks[82] and extends even to interrogation techniques.[83] As the *Hamdan* Court noted, the Government "has a compelling interest in denying [the accused] access to certain sensitive information."[84] Outside of the terrorism context, the Supreme Court clearly stated in a case dealing with the threatened disclosure of intelligence sources and methods that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation. . . . Measures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests."[85] Nevertheless, judicial trends and sweeping dicta merely provide us with an interesting historical backdrop; they cannot accurately predict how the courts would deal with a challenge to the MCA's protection under § 949d(f)(2)(B) of classified counterintelligence means, particularly as they apply to technical means. Rather, support for the position that the MCA should withstand judicial scrutiny is found by comparing the MCA's protection

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caution and sometimes even secrecy may not be overemphasized." United States v. Ott, 637 F. Supp. 62, 65 (E.D. Ca. 1986), *aff'd*, 827 F.2d 473, 475 (9th Cir. 1987).

[82] *See Bin Laden*, 58 F. Supp. 2d at 121 (In considering whether to require security clearances for defense counsel, the court stated that concern over the disclosure of classified information is "heightened in this case because the Government's investigation is ongoing, which increases the possibility that unauthorized disclosures might place additional lives in danger.").

[83] For instance, in the prosecution of John Walker-Lindh in 2002, a federal district court acknowledged that "given the nature of al Qaeda and its activities, and the ongoing federal law enforcement investigation into al Qaeda, the identities of the [interviewed] detainees, as well as the questions asked and the techniques employed by law enforcement agents in the interviews are highly sensitive and confidential." *Walker-Lindh*, 198 F. Supp. 2d at 742.

[84] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006). Sources of intelligence information have been protected across the federal legal landscape, and not just in connection with terrorism trials. For example, in *CIA v. Sims*, 471 U.S. 159, 175 (1985), the Supreme Court recognized the broad authority of the director of Central Intelligence to withhold intelligence sources from Freedom of Information Act disclosure requests, reiterating its position in *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam), that "the [g]overnment has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."

[85] Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964), a case where the public disclosure of the CIA station chief in Athens, Greece, was quickly followed by his assassination).

of such means with CIPA's well-established and recognized procedures.[86]

Consider the simple example of a classified counterintelligence program that tracks global money transfers, much like the TFTP. Let us assume that this hypothetical program uncovers the existence of a wire transfer confirmation, demonstrating that an accused received funds from a bank account held by a charitable organization with purported ties to al Qaeda. Let us further assume that the prosecution intends to admit the wire confirmation into evidence at trial, and that the confirmation is otherwise discoverable and admissible.

Before embarking on our analysis, it is helpful to frame the circumstances under which the identity of the hypothetical financial monitoring program could be disclosed in the proceedings, so as to isolate which provisions of CIPA and the MCA are relevant to the analysis. Classified information may be disclosed during legal proceedings by either the accused or the prosecution. With respect to the prosecution, such disclosure may be intentional, as part of the prosecution's case or in response to a discovery request. It is highly unlikely that an accused would know of the existence of the financial monitoring program that led to the collection of evidence against him; as such, the accused himself would not be in a position to disclose the existence of the program.[87] Also, for obvious reasons, the Government would want to maintain the program's anonymity and would not disclose it as part of its case if the court did not require it to do so. Hence, a disclosure of the program during legal proceedings is most likely to occur only if the prosecution's response to the accused's discovery request identifies the source of the wire confirmation. This section contends that CIPA and the MCA would prevent such a disclosure in similar ways.

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[86] As the original statute addressing the procedures for disclosure of classified information in legal proceedings, CIPA has more developed case law than MRE 505. Hence, this analysis focuses solely on CIPA. CIPA itself has withstood the test of time and its provisions have repeatedly been found constitutional. *See, e.g.*, United States v. Pringle, 751 F.2d 419, 427-28 (1st Cir. 1984); United States v. Wilson, 750 F.2d 7 (2d Cir. 1984); *see also* Timothy J. Shea, Note, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657 (1990).

[87] Note further that § 5 of CIPA and § 949d(f)(1) of the MCA would prevent the accused from disclosing such information unless and until vetted by the court.

A. Analysis of the Discovery Request Under CIPA

As Congress and the courts have made clear, CIPA was not intended to create new rules of relevance and admissibility.[88] Rather, "CIPA's fundamental purpose is to protect and restrict the discovery of classified information in a way that does not impair the defendant's right to a fair trial. It is essentially a procedural tool . . . ."[89] Under CIPA discovery procedures, the Government may petition the court to delete or substitute information contained in documents to be made available to a defendant.[90] To this end, the prosecution may submit documents—which the court may review in camera and ex parte—to make the "sufficient showing" required in support of its motion.[91] Upon such a petition, the Court essentially must determine how important the requested information is to the defendant's case. The standard for making this

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[88] *See* S. REP. NO. 96-823, at 8 (1980); H.R. NO. 96-1436, at 12 (1980) (Conf. Rep.); United States v. Johnson, 139 F.3d 1359, 1365 (11th Cir. 1998) ("CIPA has no substantive impact on the admissibility or relevance of probative evidence.") (citations omitted).

[89] United States v. Dumeisi, 424 F.3d 566, 578 (7th Cir. 2005) (citations and quotations omitted); *see also* United States v. Smith, 780 F.2d 1102, 1106 (4th Cir. 1985) (en banc) (stating that "[t]he circuits that have considered the matter agree with the legislative history . . . that ordinary rules of evidence determine admissibility under CIPA") (citations omitted).

[90] 18 U.S.C. app. III, § 4; *see also Pringle*, 751 F.2d at 427; United States v. Libby, 429 F. Supp. 2d 46, 47 (D.D.C. 2006). Irrespective of the CIPA discovery procedures, the Government's obligation to disclose any evidence in its possession that is exculpatory to a defendant in accordance with *Brady v. Maryland*, 373 U.S. 83, 87 (1963), remains. Although the Supreme Court has stated that "[t]here is no general constitutional right to discovery in a criminal case and *Brady* did not create one," *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), the Government would withhold such evidence at its own risk. *See* United States v. Ramirez, 54 F. Supp. 2d 25, 33 (D.D.C. 1999). To properly comply with its *Brady* obligations, the Government would need to assess whether the evidence in its possession was arguably exculpatory and, if so, should submit the evidence to the court for an in camera and ex parte review to secure judicial approval for withholding it from the defense. *See* United States v. Felt, 491 F. Supp. 179, 184 (D.D.C. 1979).

[91] *See* 18 U.S.C. app. III, § 4; *see also* H.R. REP. NO. 96-831, at 27 n.22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4307 (stating that an adversarial proceeding at this stage "would defeat the very purpose" of the Government's request to withhold discovery of the classified materials at issue); United States v. Clegg, 740 F.2d 16, 17 (6th Cir. 1984) (noting that the district court allowed the Government to submit classified and unclassified documents for in camera ex parte review to establish their materiality to the defense); *Libby*, 429 F. Supp. 2d at 48 (stating that the court can envision making determinations regarding the materiality of classified information in the preparation of the defense ex parte "if the Government is of the view that simply disclosing the nature or mere existence of certain classified information would alone pose significant harm to national security").

determination is that a defendant should have "substantially the same ability to make his defense" whether or not disclosure occurs.[92] The requested information must be more than theoretically relevant to the defense; rather, it must be material and helpful to the defendant's preparation of his case.[93] In practical terms, a defendant first must demonstrate that the requested information is "relevant" to his case.[94] Once a defendant has met this low threshold, the Government may assert a "colorable" claim of privilege over the information.[95] Upon doing so, the defendant must then demonstrate that the information would be helpful to his defense.[96]

Applying the above standards and steps to our hypothetical wire transfer confirmation, let us examine how a court would apply CIPA to deal with a Government petition to remove references to the classified counterintelligence program in materials it is to make available to a defendant. A defendant certainly should be able to demonstrate that the methods used by the Government to acquire the confirmation are relevant to his case. Similarly, the Government should be able demonstrate a colorable claim of privilege over its classified financial monitoring program, as disclosure of its mere existence could have disastrous consequences on its continued utility. Hence, it would be left to the court to determine whether the identity (and, perhaps, certain details) of the program at issue is material and helpful to the defense and, therefore, warrant disclosure.

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[92] Note that this standard is explicitly set forth for determinations regarding substitutions for classified information *at trial*, and not for responses to discovery requests. 18 U.S.C. app. III, § 6(c). Nevertheless, courts have applied this same standard for substitution determinations at the discovery stage, as doing so is in line with the underlying purpose of the Act.

[93] *See* United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) (stating that classified information must be at least helpful to the defense, and not just theoretically relevant); *Smith*, 780 F.2d at 1110 (stating that courts should order the disclosure of classified information only if it is "at least essential to [the] defense, necessary to the defense, and neither merely cumulative nor corroborative") (internal citation and quotation marks omitted); *see also* United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998); *Libby*, 429 F. Supp. 2d at 48.

[94] *See Yunis*, 867 F.2d at 623.

[95] *Id*.

[96] *Id*. In connection with its determinations, some circuit courts have adopted balancing tests to weigh the defendant's right to prepare his defense against the public's interest in preventing disclosure of classified information. *See, e.g.*, United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988); *Smith*, 780 F.2d at 1110.

Such disclosure is highly unlikely to be material or helpful to the defense. An insightful parallel may be drawn here with *U.S. v. Pringle*, where the defendants sought discovery under Federal Rule of Criminal Procedure 16 of "materials related in any conceivable way to the surveillance, boarding and seizure" of their vessel by the U.S. Coast Guard.[97] The Government moved for protection of its classified information under, *inter alia*, CIPA §§ 3 and 4.[98] The district court concluded, following an ex parte, in camera review of the materials at issue, that when it came to surveillance information, it "was neither relevant nor helpful to the defense of the accused, nor otherwise essential to the fair adjudication of the case and, hence, not discoverable under [Rule 16]."[99] The circuit court agreed, noting that such information was not relevant to the guilt or innocence of the defendants.[100]

Technical classified means, such as the surveillance methods used by the U.S. Coast Guard in *Pringle*, are by their very nature unlikely to be exculpatory or even helpful to the defense. In our hypothetical case, the defendant likely would focus his defense on avenues such as his lack of personal involvement in the transfer, a legitimate business purpose for accepting funds from the organization's account, or his lack of knowledge as to the organization's illicit activities, and not on attacking the program that discovered the wire transfer communication. Scenarios certainly could be envisioned where the reliability or accuracy of the program is compromised.[101] And yet, by and large, technical means such

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[97] United States v. Pringle, 751 F.2d 419, 425 (1st Cir. 1984). In relevant part, Rule 16(d)(1) provides as follows:

> (1) *Protective and Modifying Orders*. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone.

FED. R. CRIM. P. 16.

[98] *Pringle*, 751 F.2d at 425.

[99] *Id*. As the court pointed out, the legislative history makes clear that §§ 3 and 4 of CIPA "were intended to make explicitly the . . . limitation of discovery of classified information pursuant to [Rule 16]." *Id*. at 427.

[100] *Id*. at 427-28 (stating "[w]e have reviewed the classified information and agree with the district court that 'it was not relevant to the determination of the guilt or innocence of the defendants, was not helpful to the defense and was not essential to a fair determination of the cause.'") (quoting Brady v. Maryland, 373 U.S. 83 (1963)).

[101] For instance, in the course of examining the evidence identifying the financial monitoring program under CIPA's procedures, the court itself could determine that the

as the hypothetical financial monitoring program, are by their very nature disinterested and unemotional. As such, little can be gained by revealing and probing them.[102]

Hence, applying the CIPA procedures, a judge most likely would conclude that disclosure of the identity and details of the counterintelligence program that uncovered the confirmation were not material to the defense. At most, the judge may allow for a summary or statement concerning the means through which the confirmation was acquired.

B. Analysis of the Discovery Request Under the MCA

It could be argued that § 949d(f)(2)(B)—the section of the MCA explicitly protecting sources, methods and activities from disclosure[103]—is superfluous, as counterintelligence means would benefit from similar protection under § 949d(f)(1)[104] of the MCA. As discussed in section II above, § 949d(f)(1) of the MCA generally protects classified information from disclosure at *all* stages of military commission proceedings, if the head of the relevant department or agency finds that such disclosure would be detrimental to the national security.[105] In accordance with EO 13,292, counterintelligence means themselves may constitute classified information, separate and apart from the substantive evidence they produce. Specifically, the executive order states that information may be considered for classification if it concerns "*intelligence activities, intelligence sources or methods*, or scientific, technological, or economic matters relating to the national security, including defense against

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reliability and/or accuracy of the program warrants adversarial probing. And yet, a court likely would proceed down this road with great caution. In short, where "the Government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules." *Sarkissian*, 841 F.2d at 965 (quotation and citation omitted).

[102] The same cannot be said for human sources of intelligence, whether Government agents, informants or interrogated persons. This is especially true where information is obtained through the interrogation of either the defendant himself or another detainee and the military judge must determine whether the resulting evidence is reliable. For example, evidence may be obtained through an informant with malicious motives or through the testimony of another detainee during an interrogation involving questionable tactics. *See supra* note 48. The MCA specifically deals with coerced testimony. *See* 10 U.S.C.S. § 948r (2007).

[103] *See supra* note 44 and accompanying text.

[104] *See supra* note 40.

[105] 10 U.S.C.S. § 949d(f)(1).

transnational terrorism."[106] Applying the language of the executive order to our example, the counterintelligence program that intercepted the wire transfer confirmation should be protected from disclosure under § 949d(f)(1) of the MCA, even absent § 949d(f)(2)(B), so long as the appropriate official finds that the program is properly classified and that its disclosure would be detrimental to national security.

Nevertheless, for the reasons articulated in section I above, legislators wanted to specifically protect classified sources, methods, and activities used to obtain admissible evidence.[107] In accordance with § 949d(f)(2)(B) of the MCA, the Government would be allowed to admit the wire transfer confirmation into evidence without disclosing the existence or details of the classified program, so long as the military judge concluded that the confirmation itself is otherwise admissible and reliable.[108] It follows from the unambiguous and mandatory language of § 949d(f)(2)(B), bolstered by the clear intent of § 949d(f)(1), that an accused's discovery request for disclosure of the means used to discover the confirmation would prove fruitless. At the time of admission of the evidence, the judge at most may permit an unclassified summary of the sources, methods or activities used to obtain the confirmation "to the extent practicable and consistent with national security,"[109] thereby providing the accused some context for the admitted evidence. If the military judge makes appropriately-supported reliability determinations (inter alia, to ensure that counterintelligence operators do not themselves manipulate technical means to manufacture or enhance evidence), and applies the requirement that alternative disclosures be practicable and consistent with national security in such a manner as to allow for an unclassified summary, then (for the same reasons as those articulated above in the context of CIPA) the defense should not suffer. In short, the defense gains little by discovering the identity and details of the hypothetical financial monitoring program.

In summary, the MCA should protect technical counterintelligence means, such as the hypothetical financial monitoring program in the example above, from disclosure during discovery in a similar manner, and with similar alternatives to outright disclosure, as CIPA. Assuming the military judge's vigilance, such protection should not negatively

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[106] Exec. Order No. 13,292, 3 C.F.R. 196, 198 (2004) (emphasis added).
[107] *See supra* note 27 and accompanying text.
[108] *See* 10 U.S.C.S. § 949d(f)(2)(B).
[109] *See id*.

impact the accused's defense, as there is little to be gained by an accused's probing the existence and details of such a program. Consequently, a challenge to the MCA's explicit protection from disclosure of technical sources through which evidence is obtained is likely to fail, resulting in the admission of the evidence—assuming that it is otherwise reliable, as the MCA requires.[110]

IV. Conclusion

The employment of classified sources, methods and activities by the counterintelligence community is a vital component of our national security effort in the GWOT. The disjointed nature of the terrorist organizations involved and the disparate ethnic, racial and cultural composition of its members and sympathizers has necessitated significant reliance on technical means to gather intelligence. Such means have increasingly been used to monitor communications, especially financial transactions, in search of golden nuggets of information. The MCA properly recognizes that these means are critical to counterintelligence efforts and should be protected, while allowing for a summary to be provided to the accused as an alternative to outright disclosure. Provided that the military judge is vigilant in determining reliability and liberally allows for such summaries, the MCA will protect technical classified sources, methods and activities employed by the Government in the GWOT in a manner consistent with CIPA and without negatively impacting the accused's ability to mount an adequate defense. Thus, the protections afforded to such technical counterintelligence means under the MCA should withstand judicial scrutiny.

[110] *See supra* notes 44–45 and accompanying text.

A CRITIQUE OF THE ICRC'S CUSTOMARY RULES CONCERNING DISPLACED PERSONS: GENERAL ACCURACY, CONFLATION, AND A MISSED OPPORTUNITY†

LIEUTENANT JAMIESON L. GREER°

I. Introduction

The International Committee of the Red Cross (ICRC), in its recent compilation of customary international humanitarian law, distills five customary Rules governing the treatment of displaced persons. These Rules indicate that customary law (1) prohibits parties to a conflict from forcibly transferring civilian populations (allowing an exception for military necessity), (2) prohibits states from transferring portions of their own population to a territory they occupy, (3) insists that displaced persons must receive basic access to the necessities of life and enjoy family unification, (4) asserts a right of voluntary return for displaced persons upon the cessation of the causes of displacement, and (5) insists that the property rights of displaced persons must be respected.[1] Generally, these rules are representative of customary international law; however, there are a few flaws that strip these rules of some of their value. In addition, two broad problems with the ICRC's analysis are (1) the conflation of separate legal groups—refugees, internally displaced persons, and other migrants—into one, affecting the scope of duties to these groups under the law of war, and (2) the curious absence of a rule addressing *nonrefoulement* obligations during armed conflict. This brief critique will review the general accuracy and possible flaws in the Rules, the conflation of separate legal classifications, and the surprising omission of a *nonrefoulement* rule. While the rules on displaced persons have normative or aspirational value, they do not reflect the state of customary law and thus have limited practicality in current law of war issues.

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[1] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I: RULES 457–74 (2005).

II. The Rules in Particular

In general, the Rules are accurate restatements of customary international law. Some portions of the Rules are, however, aspirational. For example, Rule 129(B) asserts that parties to a non-international armed conflict may not displace the civilian population for reasons related to the conflict unless for the security of the citizens or out of military necessity.[2] This Rule implies that parties to a conflict feel bound by customary international law during wartime in their decisions concerning the placement of their civilian population, an idea challenged by competing notions of sovereignty. The rule is saved, temporarily, by the "military necessity" loophole, which would conceivably allow almost any displacement of civilians during wartime. The military necessity exception would allow forced displacement measures such as moving a group of civilians to work in armaments factories, using their homes for quartering troops, or evacuating an area in the slight chance that it may become a battlefield. The military necessity exception, coupled with the national security exception, is more accurate than an absolute prohibition, but it renders Rule 129(B) largely unhelpful. It is difficult to conceive of a situation that would prevent a party to a non-international conflict from displacing a domestic civilian population.

The ICRC, however, makes a good case for promulgating the Rule. The ICRC cites significant treaty law as evidence, including Additional Protocol II (AP II) to the Geneva Conventions and provisions from the International Criminal Court (ICC), International Criminal Tribunal for the Former Yugoslavia (ICTY), and International Criminal Tribunal for Rwanda (ICTR) Statutes criminalizing civilian displacement.[3] Furthermore, the ICRC looks to bilateral agreements between parties in internal armed conflicts in Bosnia and Herzegovina and the Philippines which have similar provisions.[4] Additional Protocol II is less widely accepted than other international humanitarian law treaties,[5] and is not

[2] *Id*. at 457.
[3] *Id*. at 459.
[4] *Id*.
[5] 158 states are party to Additional Protocol (AP) II, as opposed to 192 states party to the Geneva Conventions and 162 states party to AP I to the Geneva Conventions, which the United States has indicated is partially representative of customary international law. *See* States Party to the Main Treaties, http://www.icrc.org/eng/party-ccw (last visited Oct. 19, 2007) [hereinafter Parties to Treaties].

generally considered customary law,[6] but it is evidence of state intent. The ICC has similar customary weight.[7] The ICRC cites Article 5(d) of the ICTY statute, which broadly grants the Tribunal power to prosecute those responsible for deporting any civilian population during internal or international armed conflict.[8] Of course, the Statute is limited in its geographic and temporal jurisdiction to the territory of the former Yugoslavia since 1991[9] and was designed to address the unique circumstances of that conflict. Furthermore, conflicts in the former Yugoslavia were not only internal in nature but also international at times. The later ICTR Statute has a similar provision prohibiting deportation, but rejects the broad scope of the ICTY provision and limits the prohibition on deportation only to those carried out "as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[10] This narrow prohibition is probably more representative than the ICTY provision or the AP II provision, and is more indicative of the exact purpose of the Rule.

A more accurate rule pertaining to non-international armed conflict would read: "Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds." The ICRC references to state practice in the former Yugoslavia and Rwanda both occurred in contexts of discriminatory treatment of civilians. Discrimination was also the central problem in Germany's deportations during World War II, which prompted criminal deportation laws in international conflicts.[11] The state practice cited by the ICRC occurs purely in the context of ethnic or social "cleansing," and the rule should reflect that narrow application. The ICRC construction tends to hide this

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[6] BARRY E. CARTER ET AL., INTERNATIONAL LAW 1108 (2003). *But see* Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 244 (1996) (citing the *Tadic* decision as evidence of the development of customary law governing internal armed conflicts and the influence of AP II).

[7] Only ninety-seven states are party to the Rome Statute establishing the ICC. *See* Parties to Treaties, *supra* note 5.

[8] Statute of the International Criminal Tribunal (Former Yugoslavia) art. 5(d), May 25, 2993, 32 I.L.M. 1159 [hereinafter ICTY Statute].

[9] *Id*. art. 8.

[10] Statute of the International Criminal Tribunal (Rwanda) art. 3(d), Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute].

[11] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 49, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

main purpose of the Rule by simply restating human rights law applicable domestically and then cutting most of those rights away with the military necessity clause.[12] Although the ICRC rule may hedge against unforeseen circumstances, customary law is not forward-looking in nature, but dependent on historic state practice and *opinio juris*. The alternative construction offered above better reflects state practice and sense of obligation with regard to internal displacement: displacement for discriminatory reasons is unlawful.

Rule 130, prohibiting transfer of citizens into occupied territory, is an accurate statement of customary international law. The most prominent outlier in the international community as to Rule 130 is Israel, which has transferred citizens to occupied territories in Gaza and the West Bank. Officially, Israel does not create settlements on the basis that there is no customary international law preventing population transfers, but rather relies on the murky definition of "occupation" to challenge the application of international humanitarian law. In a de facto sense, however, Israel is settling its population in occupied territories. The ICRC does not directly address Israel's non-compliance, but only refers obliquely to the situation when listing Security Council resolutions bearing on population transfer.[13] The commentary would be more complete with a frank discussion of practice in Israel, but the Rule is accurate nonetheless.

It is difficult to refute Rule 130 despite Israel's state practice. The ICRC presents compelling evidence of the acceptance of this rule, notably the international condemnation of German efforts in WW II to "Germanize" occupied territories and similar events in the former Yugoslavia, which culminated in both instances with criminalization of this activity by treaty.[14] Specifically, Article 49 of the 1949 Geneva Conventions and the Nuremburg Trial decisions, which both have customary law status, stand as a direct response to population transfer

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[12] The International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR] states that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." *Id*. art. 12(1). Furthermore, the ICCPR allows an exception from the rule for national security and permits derogation in times of national emergency. *Id.* arts. 4(1), 12(3). Significantly, the ICCPR does not allow derogation from the obligation to not discriminate on the grounds of race, color, sex, language, religion, or social origin. *Id.* art. 4(1).

[13] HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 463.

[14] *Id*.

experiences in World War II. Although Israel may be seen as an important de facto objector to the customary principle, state practice and *opinio juris* support the Rule articulated by the ICRC.

Rules 131, 132, and 133 all suffer from a common vagueness problem: none of the rules indicates who bears the obligations for following the Rule. Rule 131 mandates that displaced civilians must receive adequate "shelter, hygiene, health, safety, and nutrition" and requires that "members of the same family are not separated."[15] The ICRC clarifies Rule 131 somewhat in the commentary following the rule with respect to non-international armed conflicts. The commentary indicates that "the government concerned" has the primary responsibility for caring for internally displaced persons (IDPs), but that in some instances a government's duty only extends to facilitating passage of international humanitarian organizations assisting the IDPs.[16] The Rule and the commentary do not explain whether the "government concerned" is the national government of the territory, a national government in absentia working through neutral parties, an occupying government, or a puppet government established by a foreign party. Given this ambiguity, it is difficult to actually distill a precise "rule," and the ICRC's commentary is much more helpful as a description of the current state of affairs than the "rule" is as a representation of customary law.

Rule 132 is also vague because it grants a "right" to displaced persons to return to their homes upon cessation of the causes of their displacement, but it does not indicate to whom the displaced may appeal for redress. The ICRC, in citing evidence for this Rule, implies that states are responsible for facilitating return of the displaced, which is correct.[17] The ICRC gives plenty of evidence supporting this idea from actual state practice, statements, and policy.[18] The ICRC also relies on authority from United Nations (UN) General Assembly resolutions and publications as evidence of this Rule, inferring that the UN has some kind of protective role concerning those displaced in non-international conflicts. The UN does in fact fulfill this role to a degree; however, thus

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[15] *Id.* at 463.
[16] *Id.* at 467.
[17] There may be limitations on this "right of return" for national security reasons or even by waiver. *See* Lewis Saideman, *Do Palestinian Refugees Have a Right of Return to Israel? An Examination of the Scope of and Limitations on the Right of Return*, 44 VA. J. INT'L L. 829 (2004) (discussing possible narrow limitations on the customary right of return).
[18] HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 468–72.

far it is not a *legal* obligation but an assumed one.[19] It seems as if the ICRC is attempting to carve out a niche for the UN in assisting IDPs. The Rule would be more descriptive of the current state of the law and more practical for application by affirmatively declaring that states or parties controlling territory have a duty to facilitate the right of return of the displaced, rather than leaving the internally displaced with a right in the abstract.

Rule 133 is similar to Rules 131 and 132 in that it places a duty on an unknown party. This contrasts with positive treaty law contained, for example, in Geneva Convention IV, Article 53, which takes care to specify that the occupying power bears the duty to respect civilian property. Displaced persons are civilians and therefore covered under the Geneva Conventions, which have the status of customary law. The ICRC's customary rule may be phrased in the terms of rights for displaced persons rather than duties of states in order to expand the law beyond the Geneva Convention standard and require all people and parties to respect this right during wartime. The evidence offered by the ICRC all bears on state responsibility for ensuring property rights, but does highlight international commissions designed to settle property disputes in the former Yugoslavia as support for its broader construction of the Rule.[20] Although these ad hoc commissions may represent the future direction of the Rule, the ICRC could be clearer and more accurate by ascribing the duty of protecting property rights to the state, and discussing the aspirational regime in the commentary.

The vagueness in these Rules is largely excusable: customary law is inherently vague because it is not the product of deliberate processes but rather is the sum of many parts. Constructing customary law in a clearer and more accurate form, however, would lend more credibility to the ICRC's Rules. By leaving duties and obligations in the abstract in order to give the appearance of a broader legal sweep, the ICRC undermines the usefulness of the Rules beyond the academic sphere. The ICRC does conceive of the Rules "primarily as a work of scholarship," but it also

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[19] The UN Secretary-General appointed a Special Representative of the Secretary-General on Internally Displaced Persons at the request the UN Commission on Human Rights, not at the direction of the Security Council or even the General Assembly. Office of the High Commissioner for Human Rights, *Mandate and Activities of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng*, http://193.194.138.190/html/menu/2/7/b/midpintro.
htm (2003).

[20] HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 473.

hoped that it would assist in the "implementation, clarification, and development of international humanitarian law."[21] The ICRC's Rules concerning displaced populations are a welcome contribution to legal literature, but the inclusion of aspirational evidence brings with it unnecessary vagueness, reducing the practical value of the Rules.

III. Conflation, and a Missed Opportunity

The customary rules distilled by the ICRC do not adequately reflect the different duties owed to different types of displaced persons. There are several categories of displaced persons who, judging by international instruments and state practice, are due differing levels of protection. These categories include (1) internally displaced persons, (2) refugees as defined by the 1951 Geneva Convention, (3) "refugees" that are civilians fleeing real danger but who do not quite fall under the 1951 Convention, and (4) "refugees" that face no danger in their home state but are merely migrants for economic or other reasons. At the beginning of Chapter 38 on displacement and displaced persons, the ICRC declares that Rules 129 to 133 apply to both refugees and internally displaced persons, and never makes any further distinction between these groups.[22] Refugees under the 1951 Convention are persons fleeing their home state due to a well-founded fear of persecution based on social factors such as race, religion, or politics,[23] and internally displaced persons are those who, for reasons of violence, human rights violations, or natural disaster, have been forced to leave their homes.[24]

Lumping these groups together under international humanitarian law is appropriate as a baseline, since that regime protects civilians in wartime generally and all of these groups of displaced persons fall under that protective structure during armed conflict. A great host of positive and customary law has grown up around refugees, however, and very little around IDPs. Consequently, refugees enjoy more specific legal

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[21] *Id*. at xi.
[22] *Id.* at 457.
[23] Geneva Convention Relating to the Status of Refugees art. 1(A), July 28, 1951, 189 U.N.T.S. 2545 [hereinafter 1951 Convention].
[24] UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT, *available at* http://www.relieftweb.int/ocha_ol/pub/idp_gp/idp.html [hereinafter UN HUMANITARIAN AFFAIRS GUIDING PRINCIPLES] (last visited Oct. 19, 2007).

protections than IDPs.[25] The invocation of human rights norms on behalf of IDPs is the most effective form of legal protection for them, in peace and war, while refugees benefit from human rights law and refugee law.[26]

The ICRC's primary evidence for customary protections for IDPs is reference to the Guiding Principles on Internal Displacement, a document produced by Francis Deng, the Representative of the Secretary General of the UN on Internally Displaced Persons. The ICRC, in Chapter 38 relating to displaced persons, refers to the Guiding Principles twelve times over 112 footnotes, or over ten percent of the citations. The UN, however, has affirmed that these principles are unbinding and serve only as guidelines, as the title suggests. While the UN asserts that these guidelines "are based upon existing international humanitarian law and human rights instruments," it simultaneously recognizes that they are given for "practical application in the field" and to "clarify grey areas and fill in the gaps" in IDP protection.[27] Most scholars lament the absence of a protective legal regime for IDPs, rather than relying on the Guiding Principles as evidence of a developing regime.[28] The ICRC's attempt to bring the Guiding Principles into the fold of customary law is aspirational at best, and does not greatly support the ICRC's equalization of IDP rights and refugee rights.

Rules 131 and 133 are areas where refugees, as understood by the 1951 Geneva Convention, enjoy greater protection than displaced persons in general. Rule 131 sets a minimum standard for "satisfactory conditions of shelter, hygiene, health, safety and nutrition" and family unity for displaced persons. Rule 133 requires others to respect displaced persons' property rights. These Rules are accurate as to internal migrants and non-refugee international migrants, but those with refugee status benefit from more robust protections. In addition to these basic protections, the 1951 Convention requires states to give refugees

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[25] *See* Patrick L. Schmidt, *The Process and Prospects for the UN Guiding Principles on Internal Displacement to Become Customary International Law: a Preliminary Assessment*, 35 GEO. J. INT'L L. 483, 489 (2004).

[26] *Id*. at 491–92; Francois Bugnion, *Refugees, Internally Displaced Persons, and International Humanitarian Law*, 28 FORDHAM INT'L L.J. 1397, 1408–09 (2005).

[27] UN HUMANITARIAN AFFAIRS GUIDING PRINCIPLES, *supra* note 24; *Foreword to the Guiding Principles by Under-Secretary-General for Humanitarian Affairs Mr. Sergio Vieira de Mello*, http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html (1998).

[28] *See generally* Schmidt, *supra* note 25 (assuming that the Guiding Principles are not yet customary law and, at best, soft law).

employment rights equal to that of legal immigrants,[29] to protect refugees' tangible and intangible property rights,[30] and to extend social welfare benefits of housing, health care, and food equal to that of legal immigrants.[31] The 1951 Convention constitutes customary international law, and is a treaty obligation states and their agent military forces are bound to respect.[32] By mixing duties to and rights of refugees with those of a less-protected legal status, the ICRC diluted the Rules pertaining to displaced persons.

The conflation of legal groups is not only an inaccurate portrayal of the current state of customary law, but it is a missed opportunity for the ICRC. In an attempt to equalize protections for IDPs and other migrants with Convention-style refugee protections, the ICRC failed to put forth a customary rule of international humanitarian law mandating parties to the conflict to respect *nonrefoulement* rights of Convention refugees. *Nonrefoulement* is the most basic protection for a refugee, ensuring that a person fleeing to another state because of a well-founded fear of persecution in his or her home state for religious, political, racial, or other reason, will not be returned to the home state by the receiving country.[33] This principle, codified in the 1951 Convention, is by birth a creature of refugee law rather than human rights law or international humanitarian law. Perhaps, recognizing this doctrinal distinction, the ICRC omitted discussion of *nonrefoulement* in this volume on customary international humanitarian law. This cannot be the case, however, because the ICRC looks to other non-law of war treaties, some less accepted than the Refugee Convention, as support for its rules concerning displaced populations.[34] The omission of a *nonrefoulement* Rule seems startling considering that international humanitarian law is the first line of protection for refugees.

Nonrefoulement prevents a state or its agents from returning Convention refugees to a country where they have a well-founded fear of danger from persecution based on race, religion, nationality, political opinion, or other social characteristic, unless the refugee is a threat to

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[29] 1951 Convention, *supra* note 23, art. 17.
[30] *Id*. arts. 13, 14.
[31] *Id*. arts. 20, 21, 23.
[32] Bugnion, *supra* note 26, at 1404.
[33] 1951 Convention, *supra* note 23, art. 1(A)(2).
[34] *See, e.g.*, HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 466 n.61 (relying on the Convention on the Rights of the Child as evidence of customary international humanitarian law).

national security.[35] This is a robust and largely uncontested duty established by treaty law and has developed into customary international law, and some even contend that it represents a *jus cogens* principle.[36] This implies that states cannot derogate from *nonrefoulement* duties, even in war. At the very least, state practice indicates that *nonrefoulement* during international armed conflict is a customary rule. For example, the U.S. Department of Defense incorporated into its instructions a directive ordering the military to abide by the *nonrefoulement* principle and follow a regulation designed to receive asylum claims and channel them to the proper authorities within the U.S. government.[37] Furthermore, the principle of *nonrefoulement* was alluded to in Geneva Convention IV, Article 45, which prevented a Party from transferring a civilian "to a country where he or she may have reason to fear persecution for his or her political opinions or beliefs."

In contrast, there is no comparable absolute duty to protect IDPs. Much customary international humanitarian law applies to IDPs, including Geneva and Hague Convention protections for civilians, customary law protecting civilians, and nonderogable human rights. Attempts to label IDPs as a special group in international humanitarian law is largely unnecessary because of these protections; it is otherwise imprudent because no legal regime has developed to give IDPs any special status. Inclusion of IDPs in a *nonrefoulement* rule would dilute the rule by placing a duty on states inconsistent with sovereignty rights and thus unworkable in international politics—a duty not to *refouler* an IDP to an area or region within their state where they would be subject to persecution based on religion, politics, or other social factors.

The ICRC should have differentiated between refugees and other displaced groups[38] and should have included a rule of customary international humanitarian law specific to refugees, simply adapting the principle from the 1951 Convention: that a party to a conflict may not return a civilian to a state he has fled where his life or freedom would be

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[35] 1951 Convention, *supra* note 23, art. 33.

[36] *See, e.g.*, Cartagena Declaration on Refugees, Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93 (1984–85); Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on* Refoulement *and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, 30 (1994).

[37] U.S. DEP'T OF DEFENSE, DIR. 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (3 Mar. 1972) (amended 17 May 1973)).

[38] Bugnion, *supra* note 26, at 1410–11 (explaining that refugees and internally displaced persons have different needs for protection).

threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. This rule applies only to a specific type of refugee, consistent with the 1951 Convention definition, and excludes protections for other displaced populations. This does not lessen the protections for other displaced groups, which are still protected by basic principles of international humanitarian law, but it does affirm the robust *nonrefoulement* duty parties to a conflict owe to refugees. This proposed rule is not only a realistic reflection of customary law, but a valuable tool for refugee protection at a time when many refugees flee as a result of armed conflict resulting in discriminatory violence.

IV. Conclusion

Military forces are often the first entity that displaced persons can rely on for legal protection, so international humanitarian law on the topic is vital to minimize the effects of war on civilians. The ICRC Rules generally describe the state of customary international humanitarian law with respect to displaced persons, with the exception of vague allocations of duties and an overbroad Rule on internal displacement. The Rules are valuable in that they address IDPs, which have become a great humanitarian concern in recent years, but conflating the separate legal classifications of IDPs, refugees, and other groups unfortunately dilutes some of the Rules, resulting in a complete omission of a Rule on *nonrefoulement*. This last error is truly unfortunate; this is a missed opportunity to affirm the robust rights of refugees in the context of conflict. The aspirational nature of the ICRC Rules concerning displaced persons and the covert attempt to expand IDP protections at refugee expense ensures that the Rules will remain purely of academic interest rather than contributing substantively to the development of customary law.

SCAPEGOATS OF THE EMPIRE, THE TRUE STORY OF BREAKER MORANT'S BUSHVELDT CARBINEERS[1]

REVIEWED BY LIEUTENANT COMMANDER DAVID D. FURRY[2]

Lieutenant George Witton of the Bushveldt Carbineers (BVC) was found guilty of murdering Boer prisoners of war and sentenced to death by a British court-martial in 1902.[3] Witton, however, did not face the pointy end of a British firing squad; his sentence was commuted by Lord Kitchener, the British commander-in-chief, "to one of penal servitude for life."[4] Witton's co-defendants, Lieutenants Harry "Breaker" Morant and Peter Handcock, were not so spared. Morant and Handcock's execution on 27 February 1902[5] launched them to near-mythical proportions and controversy that lingers today.[6] *Scapegoats* is Witton's fascinating account of his service, court-martial, imprisonment, and release in 1904 from an English prison. Witton makes a compelling case that he and his co-accused were indeed "scapegoats of the empire," although later evidence, primarily from Witton himself, undermines many of his claims. Nonetheless, *Scapegoats* is replete with many thought-provoking issues that resonate 100 years later in the Global War on Terror.

"[The Boer War] was the culmination of two and a half centuries of Afrikaner expansion and conflict with Africans and British."[7] Although the proffered justification for the war was to secure the political rights of British settlers who had rushed to the gold fields of the Boer-controlled Transvaal in the 1880s, others saw it as an attempt by "empire builders" Cecil Rhodes and Alfred Beit to secure these gold fields for the British empire.[8] The British Colonial Secretary, Joseph Chamberlain, "regretted

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[1] GEORGE WITTON, SCAPEGOATS OF THE EMPIRE, THE TRUE STORY OF BREAKER MORANT'S BUSHVELDT CARBINEERS (Clock & Rose Press 2003) (1907).

[2] U.S. Navy. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U. S. Army, Charlottesville, Virginia.

[3] WITTON, *supra* note 1, at 160.

[4] *Id.*

[5] *Id.* at 154–55.

[6] For an excellent big-screen interpretation of these events, *see* BREAKER MORANT (South Australian Film Corp. 1980). "A good, solid Australian film . . . though the drama is unsurprising, it unfolds so earnestly, so logically and so intelligently, one cannot help being affected." Vincent Canby, *For the Once-a-Year Moviegoer Here's the Essential Guide*, N.Y. TIMES, Dec. 21, 1980.

[7] THOMAS PAKENHAM, THE BOER WAR xiii (1979).

[8] *Id.* at xiv.

that there was 'too much of 'money-bags' about the whole business.'"[9] One commentator of that era noted, "[i]f there was a good case for the Boer War . . . it was indifferently put, and I doubt if a single nation understood it."[10]

The Boers declared war in October 1899, and by June 1900 the British occupied the capital, Pretoria.[11] Lord Roberts, the British commander-in-chief, announced that the war was all but over and returned to England.[12] However, Boer commandos kept up the fight using guerrilla tactics for which the British, and Lord Kitchener, Roberts' relief, were unprepared.[13] "[The British Army's] regulations had not contemplated—to any practical purpose, at least—an enemy who was a combatant one day and a civilian the next."[14] Kitchener responded with a scorched-earth policy: he confined Boer women and children to concentration camps, and crisscrossed the countryside with barbed wire to corral Boer commandos.[15] And he created an "irregular" unit, the BVC, to prosecute a guerrilla war for which his regular army units were not trained.[16]

Into this imperial, guerrilla war stepped Australian George Witton. His patriotism is inspiring. Reflecting a turn of the century style that pervades throughout, he opens *Scapegoats* by stating:

> When war was declared between the British and the Boers, I, like many of my fellow-countrymen, became imbued with a warlike spirit, and when reverses had occurred among the British troops, and volunteers for the front were called for in Australia, I could not rest content until I had offered the assistance one man could give to our beloved Queen and the great nation to which I belong.[17]

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[9] WILLIAM MANCHESTER, THE LAST LION, WINSTON SPENCER CHURCHILL, VISIONS OF GLORY: 1874–1932, at 294 (1983).
[10] *Id.* at 296.
[11] F. M. CUTLACK, BREAKER MORANT, A HORSEMAN WHO MADE HISTORY 44 (1962).
[12] *Id.*
[13] *Id.* at 48.
[14] *Id.*
[15] *Id.* at 45.
[16] *Id.* at 49.
[17] WITTON, *supra* note 1, at 1.

Connoisseurs of formal, late-Victorian English will enjoy this manner of writing. Other modern readers may find this style wordy and unwieldy, with some passages requiring more than one reading just to follow the narrative.

Witton was well-suited for duty with the BVC. A big man at six foot two inches, he was "born in the bush, could ride almost as soon as [he] could walk, and had learned to shoot almost as soon as [he] learned anything."[18] Writing chronologically, Witton first describes his deployment from the Australian bush to the African veldt. Readers anxious for details of the Morant case will have to wade through the stories of his training and deployment to Africa, written in his antiquated style. Although these passages provide insights into the life of a soldier 100 years ago, they pale in interest to the details of this fascinating case.

Winston Churchill once described Russia as "a riddle, wrapped in a mystery, inside an enigma."[19] Churchill[20] could very well have been describing the case of the officers of the BVC. The case is shrouded in half-truths and controversy and remains as perplexing today as it was then.[21]

The facts of the case are complex enough in plain language, and become more difficult to discern in Witton's terse writing style. Witton joined his unit of the BVC on 4 August 1901.[22] The next day, Captain Hunt, the officer in charge, was killed, and Morant assumed command.[23] The BVC troopers discovered Hunt's mutilated body several days later, and found a Boer prisoner, named Visser, in possession of Hunt's khaki

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[18] *Id.* at 2.
[19] Quotationspage.com, http://www.quotationspage.com/quotes/Sir_Winston_Churchill/ 31 (last visited Oct. 23, 2007).
[20] Twenty-five year old Winston Churchill first rose to national prominence in England for his daring escape from a Boer prisoner of war camp in 1899. MANCHESTER, *supra* note 10, at 301–14. As a member of Parliament, Churchill would later advocate for Witton's release from prison. WITTON, *supra* note 1, at 236.
[21] One recent commentator stated, "[o]ne hundred years after the courts martial, Australia remains divided on the guilt of Morant and Handcock. The pendulum has swung backwards and forwards as articles, books, academic papers, a play and a film have made this one of the most enduring controversies in Australia's short history." NICK BLESZYNSKI, SHOOT STRAIGHT, YOU BASTARDS! THE TRUTH BEHIND THE KILLING OF "BREAKER" MORANT 441 (2002).
[22] WITTON, *supra* note 1, at 51.
[23] *Id.* at 52.

trousers.[24] Morant ordered Visser shot.[25] Several weeks later, eight Boer soldiers were taken prisoner, and Morant also ordered their execution.[26] Finally, a German missionary named Hesse was found murdered in the district.[27] Witton, Morant and Handcock were charged with the murder of Visser and the eight prisoners. Morant and Handcock were also charged with the murder of Hesse.

The main theory for the defense was that these soldiers were following orders to take no prisoners and to shoot any Boer found wearing British khaki. This issue is the heart of the story, and Witton makes a compelling argument that these were indeed the orders for troopers of the BVC. Morant told Witton that Hunt informed the unit he had direct orders from headquarters in Pretoria not to take prisoners.[28] Hunt's order was confirmed by several witnesses at the court-martial.[29] Witton also states that items appeared in the Australian press in November 1901 indicating that Kitchener issued orders to shoot any Boer wearing British khaki.[30]

At the court-martial, Colonel Hamilton, a member of Kitchener's staff, denied the existence of an order to take no prisoners.[31] Witton's extensive quotes from the arguments at court, including the judge advocate's instructions, are some of the most fascinating passages in *Scapegoats*. The judge advocate's charge to the members included this instruction: "[an officer is] responsible for the carrying out of obviously illegal and improper commands from superiors."[32] Witton, Morant, and Handcock were found guilty of murdering Visser and the eight Boers.[33] Morant and Handcock were found not guilty of the murder of Hesse.[34]

Questions linger and *Scapegoats* only provides partial answers. Did Kitchener issue an illegal order? Were Morant, Handcock, and Witton merely following orders? Or were they carrying out an illegal order they had a duty to disobey? Others will have to determine the ultimate answers

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[24] *Id.* at 55, 57.
[25] *Id.* at 58.
[26] *Id.* at 62.
[27] *Id.* at 64.
[28] *Id.* at 55.
[29] *Id.* at 116.
[30] *Id.*
[31] *Id.* at 93.
[32] *Id.* at 101.
[33] *Id.* at 157–58.
[34] *Id.* at 144.

to these questions. Perhaps the most lasting lesson from the court-martial can be summed up in the argument from the defense counsel, Major Thomas. His point applies with equal force today:

> We cannot judge such matters fairly unless we place ourselves amidst the same surroundings, and with the same provocations as obtained with the men whose actions are to be tried. What are our irregular troops for? To ride down, harry, and shoot the enemy . . . [t]hese irregular combatants of the army are really charged now with the bulk of the fighting, and if they are to be restrained and tied down by strict rules, such as might obtain were they fighting French or German soldiers instead of guerillas, then the sooner they are recalled from the field the better, or, at any rate, let definite instructions be issued for their guidance. Do not let them have indefinite, hazy instructions as to what they may do.[35]

Whatever the truth of these matters, Witton is very persuasive in demonstrating how the court-martial proceedings weighed against the accused. Witton was held in solitary confinement for over three months pending trial.[36] He requested counsel and witnesses, but was told by an officer that he had "nothing to fear or trouble about" and therefore made no further efforts for his defense.[37] Major Thomas was originally hired by a co-accused, and only came to represent all of the accused upon his petition to the court on the opening day of trial on 16 January 1902.[38] Thomas had no time to prepare an adequate defense, and met with Witton "for a few minutes only" before the trial convened.[39] Also, the British command disbanded the BVC just before the court-martial commenced.[40] As a result, key defense witnesses were unavailable for trial. Government witnesses, however, were provided a stipend so they could remain in the area to testify.[41] Significantly, there was a Colonel Hall, the garrison commandant, who would have presumably known of an order not to take prisoners. Hall was unavailable for trial; just before

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[35] *Id.* at 121.
[36] *Id.* at 79.
[37] *Id.* at 80.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 80.
[41] *Id.*

the court-martial he was transferred to India.[42] These procedural machinations lend credence to Witton's argument that the deck was unfairly stacked against the BVC accused.

Further, Witton describes how Kitchener refused to consider matters in clemency. The court-martial recommended mercy for the accused, noting the provocation they felt for the maltreatment of Captain Hunt's body, their ignorance of military law and procedure, their good service throughout the war, and in the case of Handcock and Witton, the fact that they were following orders from Morant.[43] Morant and Handcock both wrote to Kitchener, and Thomas attempted to meet with him, but the commander-in-chief was away on trek and not available to consider their petitions.[44] Thomas further requested an appeal to the King, but was informed that the matters had already been approved by authorities in England.[45] This was improperly denied, as a contemporary scholar noted that the procedures in place at the time afforded an accused the right to appeal to the confirming or reviewing authorities.[46]

Finally, Witton argues that Kitchener misrepresented certain facts of the court-martial in a telegram describing the case to Australian authorities.[47] Despite the court's recommendation of mercy because of the mistreatment of Hunt's body, Kitchener telegraphed that "no such ill-treatment [of Hunt] was proved" and that there were "no extenuating circumstances."[48] This clearly prejudiced opinion against the accused suggests that Kitchener intended to shade the facts against them.

Despite these troubling aspects of the government's handling of the case, later events and more recent scholarship have cast doubt on the legitimacy of some of Witton's claims. The most damaging comes from Witton himself. In 1929, he wrote a letter to Thomas, who was preparing a book on the affair.[49] Witton wrote, "the shooting of Hesse was a premeditated and most cold-blooded affair. Handcock with his own lips described it to me . . . Morant and Handcock being acquitted my lips

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[42] *Id.* at 51.
[43] *Id.* at 160.
[44] *Id.* at 151.
[45] *Id.*
[46] BLESZYNSKI, *supra* note 21, at 603.
[47] WITTON, *supra* note 1, at 155.
[48] *Id.* at 155.
[49] BLESZYNSKI, *supra* note 21, at 490.

were sealed."[50] A letter from Handcock was also discovered that suggests Handcock admitted to killing Hesse.[51] If credible, these documents seriously undercut Witton's claims that he, Morant, and Handcock were "scapegoats of the empire." This riddle, wrapped in a mystery, inside an enigma, may never be solved.

Scapegoats comes up short in answering whether Witton, Morant and Handcock were in fact scapegoats of the empire, as later evidence casts doubt on Witton's assertions of his innocence. Nonetheless, *Scapegoats* is a must-read for serious students of the Morant case. Despite its limitations, *Scapegoats* is an invaluable first-person account of this complex and intriguing case. Newcomers to the story of Breaker Morant will discover a revealing behind-the-scenes look at British military justice at the turn of the century, notably the irregularities in court-martial proceedings that cast doubt on the fairness of the convictions. *Scapegoats* also provides cautionary lessons about fighting a guerilla war that apply with equal force to today's Global War on Terror.

[50] *Id.* at 491.
[51] *Id.* at 495.

A WAR LIKE NO OTHER: HOW THE ATHENIANS AND SPARTANS FOUGHT THE PELOPONNESIAN WAR[1]

REVIEWED BY MAJOR ERIC YOUNG[2]

There is a commonality to war, it being entirely human, that transcends time and space.[3]

Over 2,000 years ago, the sight of massed Greek phalanxes likely inspired fear in their enemies in the same manner massed tank armies do today. What are phalanxes and how did they operate as such an effective and fearful battlefield formation? While various news networks and the Internet provide the modern world up-to-the minute pictures and visualizations of warfare and its toll on society, ancient warfare was not documented in the same vivid manner. Here is where *A War Like No Other: How the Athenians and Spartans Fought the Peloponnesian War* provides twenty-first century readers an inside look at Greek life and some of the best available "pictures" of the Peloponnesian War.

A War Like No Other is a contemporary perspective of the war between Athens and Sparta that occurred between 431 and 404 B.C. Victor Davis Hanson[4] provides a richly depicted history of a war that "is now 2,436 years in the past."[5] Hanson's extensive research and analysis of ancient Greek culture, society, and military capabilities ultimately provides a two-fold insight: first, that this ancient war resulted in a tragedy of then-previously unheard of human and economic destruction;

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[1] VICTOR DAVIS HANSON, A WAR LIKE NO OTHER: HOW THE ATHENIANS AND SPARTANS FOUGHT THE PELOPONNESIAN WAR (2005).

[2] U.S. Army. Chief of Civil and Administrative Law, 101st Airborne Division (AASLT), Fort Campbell, Kentucky. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] *See* HANSON, *supra* note 1, at XVI.

[4] Victor Davis Hanson is a Senior Fellow at the Hoover Institution located at Stanford University, a Professor Emeritus at California University in Fresno, California, and a nationally syndicated columnist for Tribune Media Services. He "is the author of hundreds of articles, book reviews, scholarly papers, and newspaper editorials on matters ranging from Greek, agrarian and military history to foreign affairs, domestic politics, and contemporary culture" and has written or edited sixteen books, many of which concern ancient Greek military and agrarian matters. VDH's Private Papers, http://www.victorhanson.com/Author/index.html (last visited Oct. 23, 2007).

[5] HANSON, *supra* note 1, at 3.

second, that war's impact on society was as devastating then as it is today.

Early on, Hanson asks why "this rather obscure ancient war between miniscule Athens and Sparta [is] still so alive, and used and abused in ways that other ancient conflicts, such as the Persian Wars (490[B.C.], 480–79[B.C.]) and Alexander the Great's conquests (334–323[B.C.]), are not . . . ."[6] Hanson points out that the Peloponnesian War was the "first great instance" where what he terms "Western powers"—the city-states of Athens and Sparta—"squared off in mutual destruction."[7]

> So Athens versus Sparta serves as a warning . . . of what can happen when the Western way of war is unleashed upon its own. In modern terms, the Peloponnesian War was more like World War I, rather than the Second World War—the issues that divided the two sides likewise more complex, the warring parties themselves not so easily identifiable as good or evil, and the shock of thousands killed similarly grotesquely novel and marking a complete break with past experience.[8]

While he discusses the nature of Greek warfare before the Peloponnesian War, Hanson does so only to illustrate that it was a ritualized, seasonal event[9] lacking the barbarism and terror that became the Peloponnesian War's norm. Hanson's primary focus is explaining how both Athens and Sparta were required to change their tactics and operational goals in order to wage protracted, total warfare. For example, whereas wealthy citizens, as well-armed and armored infantry, had previously defended their city-states, twenty-seven years of warfare quickly eroded this practice.[10] Both Athens and Sparta came to rely on light cavalry, siege warfare, and even mercenaries to overcome heavy-laden and outdated infantry battles on open terrain.[11]

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[6] *Id.* at 5.
[7] *Id.* at 12.
[8] *Id.*
[9] *See id*. at 19. The normal conditions of warfare existing before 431 B.C. consisted of "brutal battles of an hour or so defining war between reluctant farmers with harvest responsibilities at home." *Id*.
[10] *See id.* at 143 ("In general, like everything in the Peloponnesian War, twenty-seven years of fighting finally eroded the strict correlation between status and military service.").
[11] *See id.* at 134.

While Hanson is a noted historian who has written extensively of late about the U.S. military and political involvement in Iraq,[12] he discusses only generally the political reasons for the Peloponnesian War. Instead, he states that his real aim is to "flesh out this three-decade fight of some twenty-four hundred years past as something very human and thus to allow the war to become more than a far off struggle of a distant age."[13] The challenge for Hanson is explaining the horrors of the Peloponnesian War in a manner that people can relate to in the same way photography and video capture the horrors of modern conflicts. Hanson generally succeeds in this endeavor by relating the nature of ancient Greek combat to modern readers through numerous examples from recent conflicts.[14] The result is that Hanson clearly conveys that the war's participants, and victims, were not so different from people living today.[15]

Although he raises the question as to why the Peloponnesian War is still studied more than most other conflicts, Hanson unfortunately provides only cursory explanations. He discusses, with limited analysis, how such a long struggle destroyed "entire families across generations"[16] and how the war ultimately began at the height of Greece's "Golden Age"[17] and ended in its demise. While Hanson mentions that the war was "assumed to be the final arbitrator of the contrasting values"[18] of Athens and Sparta, he only references the economic, social, and political aspects of each city state to set the conditions for what he is really trying to convey: that the prolonged war eroded each city's ideology and changed the nature of Greek warfare itself.

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[12] *See, e.g.*, Victor Davis Hanson, *Battles Change, Wars Don't: From Ancient Greece to Modern Iraq, History Shows Us That Fear, Honor, and Self-Interest Drive Hostilities Between the States*, L.A. TIMES, Oct. 23, 2005, *available at* http://www.victorhanson.com/articles/hanson/102305.html.

[13] HANSON, *supra* note 1, at 3–4.

[14] *See id.* at 60 (comparing the moral quandary of fighting not between armies but rather soldiers against civilian property to both Sherman's burning estates and ruining property during the American Civil War and also to the allied fire-bombing of Japan in World War II).

[15] William Grimes, *The Brutal War That Broke a Democratic Superpower*, N.Y. TIMES, Oct. 11, 2005, *available at* http://www.nytimes.com/2005/10/11/books/11grim.html?_r=1&n=Top/Features/Books/Book%20Reviews&oref=slogin ("In [Hanson's] capable hands, the past, more often than not, seems almost painfully present.").

[16] HANSON, *supra* note 1, at 5.

[17] *Id*.

[18] *Id*. at 6.

Hanson explains that his intent is not to address or answer the strategic reasons for the war's campaigns,[19] which often challenges the reader's ability to place the lessons of *A War Like No Other* in context. Instead, Hanson provides extensive details when explaining the intricacies of Greek warfare. Readers wanting to know how, rather than why, this brutal conflict was waged will feel right at home with *A War Like No Other*'s intimate insight into the human toll the war exacted, its impact on Greek society, and its relationship to more recent conflicts such as World War I, the Vietnam War, and even the current Global War on Terror.[20]

Hanson's primary source for *A War Like No Other* is Thucydides, who Hanson describes as "not just an abstract theorist but a chief player in the war he wrote about."[21] Although Hanson references works from other Greek authors such as Xenophon,[22] he terms Thucydides "our chief source of knowledge about the Peloponnesian War, . . . [who] offers up exemplary snapshots that ground his entire narrative in the human experience of killing."[23] Thucydides' personal experiences as an Athenian general and observations of participants from both sides of the war led him to document the conflict between the years 431 B.C. to 411 B.C.[24] in his narrative *The History of the Peloponnesian War*.[25] Without Thucydides, Hanson would have been challenged to find another source that would give him the same insight into, and understanding of, ancient Greek warfare. As a result, *A War Like No Other* reads like a contemporary re-telling of Thucydides' narrative with numerous injections and explanations relating his observations and experiences to modern audiences.

As Hanson analyzes Thucydides' own involvement in the war, he attempts to provide some objectivity to Thucydides' observations and relate how Thucydides tried to understand the conflict from each belligerent's perspective. For example, while accounting for how Thucydides spent his years in exile following his battlefield loss at

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[19] *See id.* at xiv.
[20] *See id.* at 3–4.
[21] *Id.* at 7.
[22] *See id.* at 30, 322. Hanson notes that Xenophon's *Hellinica* continues Thucydides' narrative where it left off in 411 B.C. to the end of the war in 404–403 B.C.
[23] *Id.* at xv.
[24] *See id.* at 30.
[25] THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR (Rex Warner trans., Penguin Group, rev. ed. 1972) (411 B.C.). There are several translations of Thucydides' narrative dating back to 1505 A.D.; one of the most commonly referenced is cited here.

Amphipolis, the author explains that Thucydides was an "embedded reporter of sorts"[26] who interviewed soldiers from both sides of the conflict in order to provide a "balanced treatment" [27] in his history of the conflict. Hanson, however, admits that although Thucydides is "our chief source of knowledge about the Peloponnesian War,"[28] there is limited documentation from other observers or participants remaining to counter Thucydides' wartime observations and analyses. Without other historical sources to confirm or counter Thucydides' writings, one may ask whether Thucydides was really as balanced as Hanson leads readers to believe. However, Hanson does grant that Thucydides is a "brilliant philosopher who tried to impart to the often obscure events of the war a value that transcended his age."[29] By comparing Thucydides' description of the horrors of the Peloponnesian War to more contemporary conflicts, such as World War I, Vietnam, or Operation Iraqi Freedom, Hanson shows how Thucydides' writing transcends the ancient conflict in which he observed and participated. Hanson ultimately applies Thucydides' lessons to other conflicts, resulting in a detailed understanding of the Peloponnesian War's brutality from either the Spartan or Athenian side.

Hanson's descriptive writing style brings the sights, smells, and sounds of ancient warfare alive for modern readers accustomed to colorful mass-media images. Vivid descriptions of close-order Greek infantry formations (hoplite phalanxes) and combat, early unconventional warfare, use of light cavalry, siege warfare, sea engagements, and even disease provide readers fairly clear pictures of the war. He discusses early Greek military transformation from one fighting method (phalanxes of hoplites) to another ("combined arms" warfare that could "win theaters of conflict on the basis of military efficacy rather than traditional protocol"),[30] and even describes in detail how the fighting ships (triremes) were built and functioned. Modern Soldiers will easily relate to Hanson's descriptions of how personal body armor, while necessary, was heavy and cumbersome.[31] Hanson also describes in detail the role and importance of early cavalry, and the key role of terrain and obstacles in determining the outcome of battles—lessons that remain essential to battlefield success even today. The highlight is Hanson's ability to relate his descriptions to modern conflicts and technology, ultimately translating

[26] *See* HANSON, *supra* note 1, at 7.
[27] *Id.*
[28] *Id*. at xvi.
[29] *Id.* at 7.
[30] *Id.* at 141.
[31] *Id*. at 136–37.

ancient Greek means and methods of warfare into twenty-first century understanding.

Modern military lawyers will easily understand Hanson's examples of early rules of engagement, then-accepted laws of war, and violations of those laws on both land and sea.[32] Hanson describes the "morality of waging exhaustive war,"[33] as it developed after Sparta's initial invasion in 431 B.C., as a "new and unsettling enterprise for Athens and Sparta, as both sides lacked accessible hard targets and thus soon sought to prevail through ruining civilian resources and attacking third parties."[34] As Hanson puts it, the Peloponnesian War resulted in "fighting [becoming] far more deadly, amorphous, and concerned with the ends rather than the ethical means."[35]

The law of war lessons in *A War Like No Other* regarding war crimes, fratricide, and treatment of those wounded and killed in battle could easily be compared with recent experiences in Afghanistan and Iraq. Hanson provides a valuable example for today's military lawyers to review: even in victory, Greek commanders were not excused from following the then-understood rules for war. Hanson explains that "[d]rowning was considered the most nightmarish of deaths in Greek popular religion. It was the angst over that dreaded end of hundreds of their comrades that led the Athenians to put their own generals on trial after the victory at Arginusae in 406" when those generals did not act to save the drowning sailors.[36] As America's current conflicts are well into their fifth year, *A War Like No Other* reminds modern military attorneys that legal and moral issues in war are not limited to recent conflicts. The lessons of the Peloponnesian War remain relevant for study today.[37]

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[32] *See id.* at 299–301 (specifically discussing in detail the laws and accepted protocols of combat existing at the time the war started and how they changed over the course of the conflict).
[33] *Id.* at 61.
[34] *Id.*
[35] *Id.* at 301. Hanson cites to one of his earlier works as well as other authors for "an enormous bibliography of the earlier 'rules of war' and their violation during the Peloponnesian War"; however, he does not discuss these rules in any significant detail in *A War Like No Other*. *Id.* at 378.
[36] *Id.* at 247.
[37] *See id.* at 377. For example, in endnote 14 to Chapter 10, Hanson states that "[i]t is a general law that an escalation of violence and an erosion of restraint are in direct proportion to the length of a struggle."

A War Like No Other provides all readers, especially military readers intent on professional development, a rich opportunity to "learn about the distant past by evoking subsequent wars in which soldiers were often confronted with the same fears and motivations, their officers struggling likewise with age-old dilemmas of strategy, logistics, and tactics."[38] Although the war occurred long ago, Hanson articulates well that "how" the war was fought should continue to be studied; the lessons learned from it are valuable resources for today's Soldiers and leaders.

Hanson asks early on, as the nature of Greek warfare changed from massed formations on open fields to unconventional warfare, which side is the "most resourceful in an asymmetrical war when both sides either cannot or will not face each other in conventional battle . . . ."[39] While similar questions are currently being raised and studied with regard to the on-going conflicts in Afghanistan and Iraq, Hanson only relates Thucydides' position, rather than expanding upon his own position: that human nature remains unchanging and questions such as this will continue for as long as there is warfare.[40] Readers will quickly understand that as the war persisted, tactics and strategy changed as resources, both personnel and materiel, became scarce. As a result, *A War Like No Other* provides an early glimpse of the same challenges nations and armies face today.[41]

In order to relate ancient battlefields to readers who will likely never visit them, Hanson does not simply rely on a 2,000 year-old description of the terrain to explain his points. Rather, he takes the time (and personal effort) to describe in detail several of the battlefields as they are today. This provides insight into places significant in the course of history that might otherwise only appear now as overgrown lots, hills, and valleys.[42] He also provides quality detail of the terrain as viewed by

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[38] *Id*. at xvi.
[39] *Id.* at 6.
[40] *See id.* at 20. Hanson notes that "thousands were to die on both sides because their leaders took them to war without a real plan of how to defeat the enemy on the battlefield and destroy its power." *Id*. Although Hanson leaves this comment untouched, today's military readers will recognize the significance of warfare waged by unprepared armies and leaders lacking clear military and political objectives costing lives on the battlefield.
[41] *See, e.g.*, Hanson, *supra* note 12. Here, Hanson notes that while current conflicts in Afghanistan and Iraq have been deemed to include "asymmetrical warfare," such a term is misplaced as terrorism, roadside executions, kidnappings, fear of disease, and biological attack were also prevalent during the Peloponnesian War. *Id*.
[42] *See* HANSON, *supra* note 1, at 154. Describing the battlefield at Mantinea, Hanson notes that few tourists visit it today and that it basically is comprised of a few country

the Greeks themselves: flat fields for fighting, hills for flank defense, strategic routes and roads, and choke points.[43] However, despite all of his detailed descriptions and travel, the maps used throughout this book are overly simple. For example, by not providing detailed maps of unit placements when describing land and naval battles as they occurred during the war, Hanson leaves readers to imagine rather than clearly visualize what he is trying to explain, albeit descriptively. Adding several additional diagrams and more detailed maps would enhance the overall "picture" that Hanson endeavors to create in the first place.

In perhaps a most unique perspective of the Greek landscape, Hanson relies on his own experience as a farmer while trying to convey the challenges and hardships faced by the opposing armies. This is especially true when he explains how the Greek practice of ravaging the land and burning crops was not always successful. Hanson notes that the nature of the crops likely found throughout the region—olive trees, fruit trees, grape vines, dry brush, and wheat fields—did not lend themselves to easy destruction. "[A] few years ago I tried to chop down several old walnut trees on my farm . . . [e]ven when the ax did not break, it sometimes took me hours to fell an individual tree."[44] Hanson's account of his own struggles to cut down a tree helps reiterate that this ancient war, and the people who fought it, were just like people of today.

Hanson has written a superb book on the war's brutality and how it was fought. Nevertheless, other shortcomings, while not detracting significantly from the book's quality, can challenge the reader's understanding. First, it is not always easy to comprehend the sheer number of Greek and non-Greek participants, and who fought on which side at any given time. Although Hanson provides numerous regional names and various alliances formed during the war, he does not always clearly identify who, other than the main antagonists, are on each side. As Hanson uses the larger strategic picture to develop his theme throughout the book of how the war was fought, he appears to have overlooked that readers need to easily understand which historical figures fought for either side in order to best understand the points he is trying to make.

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homes, an eccentric church, and "the traces of a vast lost city . . . peek[ing] out amid the weeds and wheat fields." *Id.*

[43] *Id.*

[44] *Id.* at 36.

Second, the book's organization creates confusion as the author revisits the same battles and events. By breaking down the chapters into various descriptive aspects of the war (such as "Fear," "Fire," "Disease," "Terror," and "Armor"), Hanson admits that he has "less opportunity for chronological continuity . . . ."[45] While he does provide a rudimentary timeline of events,[46] a chapter dedicated to the main strategic goals and significant events occurring during the war would provide readers a useful frame of reference to better understand the valuable points he makes throughout this book.

Overall, *A War Like No Other* provides an outlet for today's readers to visualize, and relate to, warfare from long ago. Victor Davis Hanson delivers a vividly written book with numerous ties to modern events and conflicts, and in doing so reminds modern readers that the face of war has changed little over time. Hanson remains true to his stated intent of providing readers an in-depth understanding of how the Peloponnesian War was fought. Above all, he ultimately succeeds in developing an intimate and detailed glimpse of the complexity and brutality of warfare from long ago that, as current conflicts remind us, continue to this day.

[45] *Id*. at xvi.
[46] *See id*. at 31–34.

CUMULATIVE INDEX, VOLS. 182-192

I. AUTHOR INDEX

Baldrate, Captain Brian C., *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for* Hamdan v. Rumsfeld, Vol. 186, at 1.

Best, Major Robert Wm., *Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off*, Vol. 183, at 1.

Brailliar, Lieutenant Commander (Sel) Rachel B., USCG, *Protecting U.S. Ports with Layered Security Measures for Container Ships*, Vol. 185, at 1.

Brou, Major Deirdre G., *Alternatives to the Judicially Promulgated* Feres *Doctrine*, Vol. 192, at 1.

Chase, Major Dana J., *Competitive Quotes on FSS Buys: Hold the Pickle, Hold the Mayo—Can You Have It Your Way and Still Have Competition?*, Vol. 184, at 129.

Chu, Dr. David S.C., *The Twenty-Fourth Charles L. Decker Lecture in Administrative and Civil Law*, Vol. 184, at 186.

Cronauer, Adrian, *The Twenty-Third Charles L. Decker Lecture in Administrative and Civil Law*, Vol. 183, at 176.

Cullen, Anthony, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, Vol. 183, at 66.

DiMeglio, Major Richard P., *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, Vol. 186, at 116.

Dunham, Frank W., Jr., *The Thirty-Second Kenneth J. Hodson Lecture on Criminal Law*, Vol. 183, at 151.

Dunlap, Major Jerrett W., *The Economic Efficiency of the Army's Maneuver Damage Claims Program: Coase, but No Cigar*, Vols. 190/191, at 1.

Greer, Lieutenant Jamieson L., *A Critique of the ICRC's Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity*, Vol. 192, at 131.

Haig, Lieutenant Commander Clyde A., *Discretionary Activities of Federal Agents Vis-à-Vis the Federal Tort Claims Act and the Military Claims Act: Are Discretionary Activities Protected at the Administrative Adjudication Level, and to What Extent Should They Be Protected?*, Vol. 183, at 110.

Hayes, Major Timothy P., Jr., *Post-Traumatic Stress Disorder on Trial*, Vols. 190/191, at 67.

Jackson, Major Russell K., *Lawlessness Within a Foreign State as a Legal Basis for United States Military Intervention to Restore the Rule of Law*, Vol. 187, at 1.

Johnson, Major John C., *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, Vols. 190/191, at 111.

Jurden, Major John P., *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, Vol. 184, at 1.

Kercher, Major Keven Jay, *Time for Another Haircut: A Re-Look at the Use of Hair Sample Testing for Drug Use in the Military*, Vol. 188, at 38.

Lancaster, Major Nicholas F., *Occupational Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Be Considered Customary International Law?*, Vol. 189, at 51.

Lieberman, Michael, *Salvaging the Remains: The Khmer Rouge Tribunal on Trial*, Vol. 186, at 164.

Liegl-Paul, Major Charlotte M., *Civilian Prisoners of War: A Proposed Citizen Code of Conduct*, Vol. 182, at 106.

Lippert, Major Jeffery D., *Automatic Appeal Under UCMJ Article 66: Time for a Change*, Vol. 182, at 1.

McCormack, Professor Wayne, *Emergency Powers and Terrorism*, Vol. 185, at 69.

Long, Major Julie, *What Remedy for Abused Iraqi Detainees?*, Vol. 187, at 43.

Mathews, Captain Nikiforos, *Beyond Interrogations: An Analysis of the Protection under the Military Commissions Act of 2006 of Technical Classified Sources, Methods and Activities Employed in the Global War on Terror*, Vol. 192, at 96.

Marsh, John O., Jr., *The Tenth Hugh J. Clausen Lecture on Leadership*, Vol. 188, at 86.

Ramsey, Lieutenant Colonel Matthew D., *A Nuts and Bolts Approach to Litigating the Shaken Baby or Shaken Impact Syndrome*, Vol. 188, at 1.

Schimpf, Major Paul M., USMC, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, Vol. 185, at 149.

Sexton, Lieutenant Colonel Jeffrey P., *Home Schooling Away from Home: Improving Military Policy Toward Home Education*, Vol. 182, at 50.

Simon, Captain Douglas L., *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, Vol. 184, at 66.

Smawley, Lieutenant Colonel George R., *The Past as Prologue: Major General George S. Prugh, Jr. (Ret.) (1942-1975)—Witness to Insurgent War, the Law of War, and the Expanded Role of Judge Advocates in Military Operations*, Vol. 187, at 96.

Solis, Lieutenant Colonel (Ret.) Gary, USMC, *First George S. Prugh Lecture in Military Legal History: Judge Advocates, Courts-Martial, and Operational Law Advisors*, Vols. 190/191, at 153.

Stigall, Captain Dan E., *The Rule of Law: A Primer and a Proposal*, Vol. 189, at 92.

Sullivan, Colonel Dwight H., USMCR, *Killing Time: Two Decades of Military Capital Litigation*, Vol. 189, at 1.

Taft, William H., IV, *The Eighteenth Waldemar A. Solf Lecture in International Law*, Vol. 184, at 174.

II. SUBJECT INDEX

-A-

ARTICLE 66

Automatic Appeal Under UCMJ Article 66: Time for a Change, Major Jeffery D. Lippert, Vol. 182, at 1.

-C-

CAPITAL LITIGATION

Killing Time: Two Decades of Military Capital Litigation, Colonel Dwight H. Sullivan, USMCR, Vol. 189, at 1.

CLAIMS

Discretionary Activities of Federal Agents Vis-à-Vis the Federal Tort Claims Act and the Military Claims Act: Are Discretionary Activities Protected at the Administrative Adjudication Level, and to What Extent Should They Be Protected?, Lieutenant Commander Clyde A. Haig, Vol. 183, at 110.

The Economic Efficiency of the Army's Maneuver Damage Claims Program: Coase, but No Cigar, Major Jerrett W. Dunlap, Vols. 190/191, at 1.

CONTRACT & FISCAL LAW

Competitive Quotes on FSS Buys: Hold the Pickle, Hold the Mayo—Can You Have It Your Way and Still Have Competition?, Major Dana J. Chase, Vol. 184, at 129.

COURTS-MARTIAL

Automatic Appeal Under UCMJ Article 66: Time for a Change, Major Jeffery D. Lippert, Vol. 182, at 1.

A Nuts and Bolts Approach to Litigating the Shaken Baby or Shaken Impact Syndrome, Lieutenant Colonel Matthew D. Ramsey, Vol. 188, at 1.

Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off, Major Robert Wm. Best, Vol. 183, at 1.

Post-Traumatic Stress Disorder on Trial, Major Timothy P. Hayes, Jr., Vols. 190/191, at 67.

Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards, Major John P. Jurden, Vol. 184, at 1.

CRIMINAL LAW

Automatic Appeal Under UCMJ Article 66: Time for a Change, Major Jeffery D. Lippert, Vol. 182, at 1.

A Nuts and Bolts Approach to Litigating the Shaken Baby or Shaken Impact Syndrome, Lieutenant Colonel Matthew D. Ramsey, Vol. 188, at 1.

Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law, Captain Douglas L. Simon, Vol. 184, at 66.

Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off, Major Robert Wm. Best, Vol. 183, at 1.

Post-Traumatic Stress Disorder on Trial, Major Timothy P. Hayes, Jr., Vols. 190/191, at 67.

Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards, Major John P. Jurden, Vol. 184, at 1.

Time for Another Haircut: A Re-Look at the Use of Hair Sample Testing for Drug Use in the Military, Major Keven Jay Kercher, Vol. 188, at 38.

-E-

EIGHTH AMENDMENT

Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law, Captain Douglas L. Simon, Vol. 184, at 66.

EVIDENCE

A Nuts and Bolts Approach to Litigating the Shaken Baby or Shaken Impact Syndrome, Lieutenant Colonel Matthew D. Ramsey, Vol. 188, at 1.
Time for Another Haircut: A Re-Look at the Use of Hair Sample Testing for Drug Use in the Military, Major Keven Jay Kercher, Vol. 188, at 38.

-F-

***FERES* DOCTRINE**

Alternatives to the Judicially Promulgated Feres *Doctrine*, Major Deirdre G. Brou, Vol. 192, at 1.

-H-

HOME SCHOOLING

Home Schooling Away from Home: Improving Military Policy Toward Home Education, Lieutenant Colonel Jeffrey P. Sexton, Vol. 182, at 50.

-I-

INTERNATIONAL AND OPERATIONAL LAW

Beyond Interrogations: An Analysis of the Protection under the Military Commissions Act of 2006 of Technical Classified Sources, Methods and Activities Employed in the Global War on Terror, Captain Nikiforos Mathews, Vol. 192, at 96.

Civilian Prisoners of War: A Proposed Citizen Code of Conduct, Major Charlotte M. Liegl-Paul, Vol. 182, at 106.

A Critique of the ICRC's Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity, Lieutenant Jamieson L. Greer, Vol. 192, at 131.

Emergency Powers and Terrorism, Professor Wayne McCormack, Vol. 185, at 69.

The Evolution of the Just War Tradition: Defining Jus Post Bellum, Major Richard P. DiMeglio, Vol. 186, at 116.

Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law, Anthony Cullen, Vol. 183, at 66.

Lawlessness Within a Foreign State as a Legal Basis for United States Military Intervention to Restore the Rule of Law, Major Russell K. Jackson, Vol. 187, at 1.

Occupational Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Be Considered Customary International Law?, Major Nicholas F. Lancaster, Vol. 189, at 51.

Protecting U.S. Ports with Layered Security Measures for Container Ships, Lieutenant Commander (Sel) Rachel B. Brailliar, USCG, Vol. 185, at 1.

The Rule of Law: A Primer and a Proposal, Captain Dan E. Stigall, Vol. 189, at 92.

Salvaging the Remains: The Khmer Rouge Tribunal on Trial, Michael Lieberman, Vol. 186, at 164.

The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamdan v. Rumsfeld, Captain Brian C. Baldrate, Vol. 186, at 1.

Under New Management: The Obligation to Protect Cultural Property During Military Occupation, Major John C. Johnson, Vols. 190/191, at 111.

What Remedy for Abused Iraqi Detainees?, Major Julie Long, Vol. 187, at 43.

-L-

LECTURES

The Eighteenth Waldemar A. Solf Lecture in International Law, William H. Taft, IV, Vol. 184, at 174.

First George S. Prugh Lecture in Military Legal History: Judge Advocates, Courts-Martial, and Operational Law Advisors, Lieutenant Colonel (Ret.) Gary Solis, USMC, Vols. 190/191, at 153.

The Tenth Hugh J. Clausen Lecture on Leadership, John O. Marsh, Jr., Vol. 188, at 86.

The Thirty-Second Kenneth J. Hodson Lecture on Criminal Law, Frank W. Dunham, Jr., Vol. 183, at 151.

The Twenty-Third Charles L. Decker Lecture in Administrative and Civil Law, Adrian Cronauer, Vol. 183, at 176.

The Twenty-Fourth Charles L. Decker Lecture in Administrative and Civil Law, Dr. David S.C. Chu, Vol. 184, at 186.

-M-

MILITARY JUSTICE

Time for Another Haircut: A Re-Look at the Use of Hair Sample Testing for Drug Use in the Military, Major Keven Jay Kercher, Vol. 188, at 38.

-O-

ORAL HISTORIES

The Past as Prologue: Major General George S. Prugh, Jr. (Ret.) (1942-1975)—Witness to Insurgent War, the Law of War, and the

Expanded Role of Judge Advocates in Military Operations, Lieutenant Colonel George R. Smawley, Vol. 187, at 96.

-P-

POST-TRAUMATIC STRESS DISORDER

Post-Traumatic Stress Disorder on Trial, Major Timothy P. Hayes, Jr., Vols. 190/191, at 67.

-V-

VICTIM & VICTIM-ADVOCATE

Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military, Major Paul M. Schimpf, USMC, Vol. 185, at 149.

By Order of the Secretary of the Army:

GEORGE W. CASEY, JR.
General, United States Army
Chief of Staff

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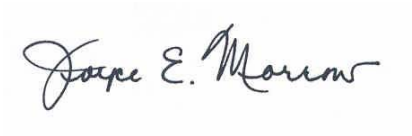

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