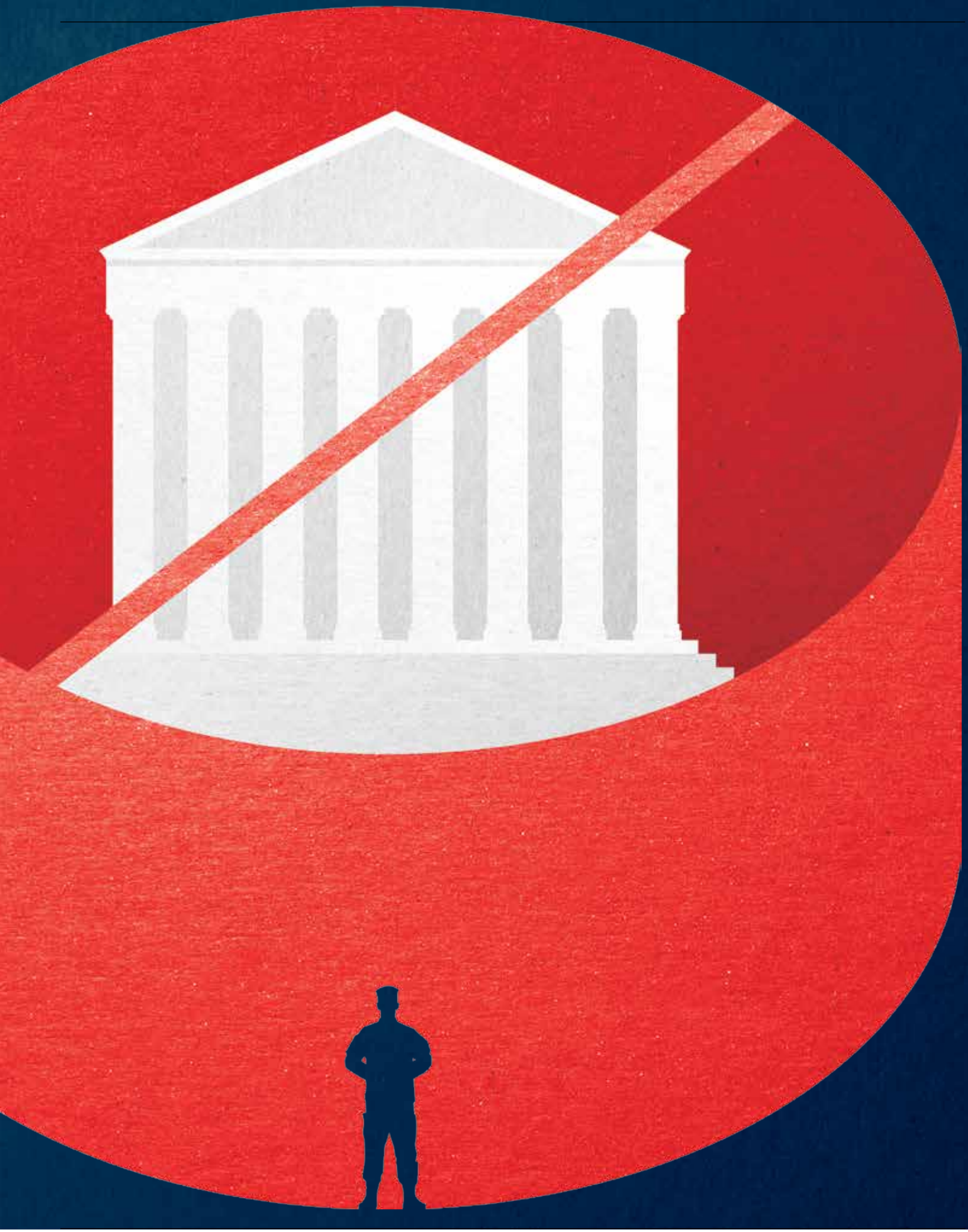
THE IRRATIONAL RATIONALE:

HOW THE MILITARY HIDES BEHIND THE *FERES* DOCTRINE TO DENY JUSTICE TO SERVICE MEMBERS

by DALLIS N. WARSHAW

In a letter to Congress, Alexis Witt, widow of Army Staff Sergeant Dean Patrick Witt, reflected on her husband. Athletic, good-humored, and professional, he was a patriot who had been awarded numerous honors during his military career. After Dean died at the age of 25, Alexis suffered crippling anxiety attacks that worsened when she thought of her young children, now fatherless.[1] What haunted Alexis most was the fact that Dean's death didn't occur on a battlefield or while performing a dangerous training exercise. Rather, his death was completely avoidable, caused by inexcusable mistakes made during a routine appendectomy at Travis Air Force Base.



Following the procedure, a nurse prematurely removed his airway, and then botched the ventilation and intubation process by using pediatric equipment and forcing air into his stomach rather than into his lungs.[2] Failing to call a "code blue," a required step that would have alerted all on-duty medical staff, she chose to handle the situation herself, depriving Dean of oxygen for seven to ten minutes. He lapsed into a coma and died three months later. Despite an expert's declaration that the nurse had been grossly negligent,[3] the ensuing medical malpractice lawsuit against the Air Force was dismissed at the pleading stage, with the judge concluding that the result was "unfair and irrational."[4] Amazingly, this ruling was an entirely correct application of law to fact.

ON TOPIC
As a result of the *Feres* doctrine, service members are provided less legal protection than criminals in federal prison . . .

A little known Supreme Court policy—the *Feres* doctrine—bars civil suits filed by service members for damages incurred in uniform.[5] Under the *Feres* doctrine, government and military officials are immune from civil liability, regardless of the type of harm they cause or the nature of their improper behavior, whether negligent or intentional. Lawsuits seeking damages for sexual assault, the undisclosed administration of psychotropic drugs, and negligent medical care have all been dismissed pursuant to the *Feres* doctrine. Ironically, had the plaintiffs been civilians or military spouses at the time of their injuries—rather than active duty service members—they would have had standing to sue. As a result of the *Feres* doctrine, service members are provided less legal protection than criminals in federal prison,[6] unprotected by the very laws they risk their lives to protect.

History of the *Feres* Doctrine

In 1946, Congress passed the Federal Torts Claims Act (the FTCA), a partial waiver of sovereign immunity that permitted citizens to sue the federal government for torts committed by those acting on behalf of the United States. For good reason, however, the FTCA included certain exceptions to this waiver, such as any claims "arising out of the *combatant activities* of the military ... *during time of war*."[7]

In *Brooks v. United States*, the first Supreme Court case to review the FTCA, two service members on furlough were riding in an automobile on a public highway when a vehicle owned and operated by the Army negligently struck them. One of the service members was killed, and the other was badly injured. The Supreme Court held that they could recover under the FTCA because their injuries were not "caused by their service." The Court, however, expressly refused to state whether a service member injured "incident to service" could recover, stating "a wholly different case would be presented" in that situation.[8]

One year later, however, the Supreme Court was presented with that situation in *Feres v. United States*.[9] The Court consolidated three different lawsuits in its *Feres* decision. In *Feres*, a service member died in a fire while sleeping in barracks allegedly known to be unsafe due to a negligently maintained heating system. In *Griggs*, a service member died due to the alleged negligence of Army surgeons. Lastly, in *Jefferson*, an Army surgeon negligently left a large towel marked "Medical Department U.S. Army" in a service member's abdomen, which was discovered during a second procedure eighteen months later. The Court held that the claimants were all barred from recovery under the FTCA because their injuries or deaths were sustained "incident to service."

One might expect an "incident to service" test to examine whether the injury was sustained during some form of combat, since that is the language found in the FTCA. On the contrary, courts have applied much broader criteria, such as whether the injury occurred at a military facility or arose out of military life, and whether the injured party was in some manner on military service at the time of the incident.[10] Many courts and commentators have described the "incident to service test" as akin to "but for" causation—"but for" being in the military, the service member wouldn't have been in that exact place to experience the injury, therefore barring their claim.[11]

To be clear, the "incident to service" language can be found nowhere in the FTCA. As written, the FTCA makes the United States liable to all persons, including service members, injured by the wrongful acts of government employees. Other than the exception for "combatant activities . . . during time of war," there is no express limitation on the claims of service members that can be brought against the government. *Feres* is, unquestionably, a judge-made doctrine, in which the Supreme Court displaced the policy decisions of Congress for that of its own.

The Expansion of the *Feres* Doctrine

Stemming from the FTCA's limited waiver of sovereign immunity, the *Feres* doctrine originally only barred *tort* suits brought by service members against the *government*. Over the years, however, courts have expanded *Feres* to bar almost all lawsuits brought by service members, including non-tort suits against commanding officers and those against other service members.

In *United States v. Stanley*, the Supreme Court expanded the *Feres* doctrine to bar lawsuits against *individuals* for *constitutional violations*.[12] James Stanley, an Army Master Sergeant, volunteered to participate in a military program purportedly designed to test the effectiveness of protective clothing and equipment. During the testing, however, he was secretly administered doses of lysergic acid diethylamide (LSD). As a result, Stanley would "without reason, violently beat his wife and children, later being unable to recall the entire incident." Stanley first learned the truth about the program years later, when he received a letter from the military asking for his continued cooperation in the "voluntary" study. Stanley filed a non-statutory *Bivens* action,[13] seeking to hold the military personnel who violated his constitutional rights personally accountable. Borrowing the *Feres* test, the Court held that a *Bivens* action is barred when the service member's injury arises out of activity "incident to service." Since then, courts have used *Stanley* and *Feres* to bar lawsuits by service members for violations of Section 1983 of the Civil Rights Act.[14]

Shockingly, some lower courts have further extended the *Feres* doctrine to bar even suits filed in *state court* against *other service members*. In *Stauber v. Cline*,[15] Stauber filed suit against other service members for IIED and libel, alleging that the defendants continuously harassed him

on and off base. The court determined that the harassing activity was "incident to service" because the parties were at all times under the command of military officers. Stauber's claims, the court said, "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.'"[16]

Feres' Irrational Rationale

Over the years, the *Feres* doctrine has been used to immunize the United States and individual members of the military from *any* lawsuit that might in any way "intrude in military affairs" or "second-guess[] military decisions."[17] In *United States v. Johnson*,[18] the Supreme Court dismissed a lawsuit brought by the widow of a Coast Guard helicopter pilot who had been killed on a rescue mission, alleging that the crash occurred due to the negligence of *civilian* air traffic controllers who directed his aircraft into the side of a mountain. The Supreme Court stated that, "even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates [] military judgments and decisions." The Court concluded that allowing lawsuits brought by service members on the basis of *any* government employee's negligence seriously undermines "duty and loyalty to one's service and to one's country."

This "military decisions" justification, however, is weak at best, seeing that many of these claims would not even remotely involve inquiry into military decision-making. For instance, a case like *Johnson* would involve inquiry into the procedures of a civilian government agency, and medical malpractice suits would involve questioning solely medical, not military, judgments. In *United States v. Brown*,[19] when a defective tourniquet used in a military hospital permanently damaged a veteran's leg, the Supreme Court determined that the *veteran's* lawsuit was *not* barred by the *Feres* doctrine because he was suing for injuries "not incurred while [he] was on active duty or subject to military discipline." It is simply nonsensical to bar medical malpractice suits by active duty service members when the judicial inquiry into a veteran's medical malpractice suit would be identical to that of an active duty service member, yet the latter is barred by the *Feres* doctrine purportedly in an effort to maintain military discipline and prevent inquiry into military decision-making.

The reality is that courts already have the ability to question military decision-making when either a civilian or a service member's dependent sues under the FTCA, since these cases are not barred by the *Feres* doctrine. In *Johnson*, Justice Scalia wrote a strongly worded dissent, stating that *Feres* was "wrongly decided and heartily deserves the widespread, almost universal criticism it has received," specifically taking issue with the "military decisions" justification and the unjustified discrepancies it creates. To demonstrate his point, Justice Scalia provided this alternate scenario: "If Johnson's helicopter had crashed into a civilian's home, the homeowner could have [successfully] brought an FTCA suit that would have invaded the sanctity of military decision-making no less than [Johnson's]."[20]

> Lawsuits seeking damages for sexual assault, the undisclosed administration of psychotropic drugs, and negligent medical care have all been dismissed pursuant to the *Feres* doctrine.

Ultimately, as a society, we have heard and dismissed the "military decisions" argument before. For years, the military carried out overtly discriminatory practices against gay and lesbian service members purportedly to promote unit cohesion and combat readiness. The military was unable to provide evidence for these policies, leading to the eventual repeal of "Don't Ask, Don't Tell," with former Defense Secretary Leon Panetta recently concluding that the repeal has "not affected morale or readiness."[21] In the end, *Feres* and the rationale behind it only serve to shield physicians, military officials, and the government from lawsuits that would otherwise hold them accountable for their wrongdoings.

Applying *Feres* to Sexual Assault

Imagine you are nineteen years old and the only female service member on base, receiving threatening calls from a male supervisor at night and finding him asleep in your bed during the day. You report his behavior, but his superiors are his "drinking buddies" who refuse to take you seriously. One evening, he exposes himself to you and attempts to force you to touch him, and then dislocates your jaw when you resist. Weeks later, still forced to work with your attacker, he forces you into a room and rapes you. He is punished with a minor loss in pay, while you are discharged for having an "inappropriate relationship." This was real life for Kori Cioca, as told, alongside numerous other strikingly similar stories, in the recent documentary *The Invisible War*.[22]

For Fiscal Year 2016, even though the Department of Defense estimates that approximately 15,000 service members were sexually assaulted, only 143 cases resulted in a conviction for a sexual assault related offense.[23] In a comparable civilian context, an employer would be held liable in federal court if it knew or should have known about sexual harassment and failed to take actions to prevent it.[24] However, when sexually assaulted or harassed, service members' claims are barred by the *Feres* doctrine because the violent act of rape is seen as merely "incident to service."

In *Cioca v. Rumsfield*,[25] a *Bivens* action was brought by service members who detailed the retaliation they experienced for reporting their sexual assaults and their unsuccessful attempts to prosecute their attackers. Since the plaintiffs alleged that mismanagement of the military was ultimately the cause of their injury, the suit was dismissed under *Feres* without any further consideration. Similarly, in *Gonzalez v. U.S. Air Force*,[26] the court dismissed a claim against the Air Force, brought after the plaintiff was raped while asleep in her room, concluding that her act of sleeping was "incident to service" since it occurred on base while she was on active duty.

As with other *Feres* cases, the justification

for dismissing sexual assault claims brought by service members is that battle readiness would be threatened if military decision-making were at all questioned. However, given that this argument has failed before and that the problem of sexual assault continues unabated,[27] it is time to begin questioning certain aspects of military decision-making and demanding accountability through the threat of civil suit.

Conclusion

For nearly seventy years, countless courts and commentators have criticized the *Feres* doctrine. Nevertheless, neither Congress nor the Supreme Court has reversed course. It goes without saying that a military service member should not face the threat of a lawsuit for decisions made on the battlefield or for matters related to training or preparation for battle. But does it follow that the military establishment should be completely outside the province of civilian judicial inquiry, even in cases of sexual assault and medical malpractice? The military's leadership purports to take care of its own, but then conveniently hides behind the *Feres* doctrine when faced with a suit by a rape victim. It is time to rethink accountability in the military, replacing blanket immunity with a more nuanced policy, one that preserves combat readiness while simultaneously honoring the victims of egregious misconduct and inexcusable negligence.

ON POINT
Service members' claims are barred by the Feres doctrine because the violent act of rape is seen as merely "incident to service."

ENDNOTES

(1) Letter from Alexis Witt to Congressmen John Conyers & Steve Cohen, U.S. Congress, House of Representatives, House Committee on the Judiciary, *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearings on H.R. 1478 before the Subcommittee on Commercial and Administrative Law*, 111th Cong., 1st sess., 2009, 85-87.

(2) Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 Cal. W. L. Rev. 395, 396 (2009).

(3) Motion to Strike Declaration of Loretta Manuel, *Witt v. United States*, 2009 U.S. Dist. LEXIS 9451 (No. 2:08-CV-02024 JAM-KJM), 2009 U.S. Dist. Ct. Motions LEXIS 13908, 4 (E. Dist. Cal. Jan. 7, 2009).

(4) *Witt v. United States*, No. 2:08-CV-02024 JAM-KJM, 2009 LEXIS 9451, at *7 (U.S. Dist. Feb. 10, 2009).

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

(6) *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that a prison inmate can win a civil suit for sexual assault if "deliberate indifference" is proven).

(7) Federal Tort Claims Act, 28 U.S.C. §2680(j) (2006) (emphasis added).

(8) *Brooks v. United States*, 337 U.S. 49, 52 (1949).

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

(10) *United States v. Shearer*, 473 U.S. 52, 57 (1985).

(11) *See* Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 Lewis & Clark L. Rev. 724, 756 (2013).

(12) *United States v. Stanley*, 483 U.S. 669, 686 (1987).

(13) *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

(14) *See Day v. Mass. Air Nat'l Guard*, 167 F.3d 678 (1st Cir. 1999) (Day was photographed during a hazing ritual in which other service members dragged him outside, poured a liquid between his butt cheeks, and then forcibly shoved a traffic cone between them; the court determined that the *Feres* doctrine barred a 1983 action because the activity was part of military life).

(15) *Stauber v. Cline*, 837 F.2d 395, 398 (9th Cir. 1988), *cert. denied*, 488 U.S. 817 (1988).

(16) *Id.* at 400; *But see Lutz v. Sec'y of the Air Force*, 944 F.2d 1477 (9th Cir. 1991).

(17) *Stauber*, 837 F.2d at 398.

(18) *United States v. Johnson*, 481 U.S. 681 (1987).

(19) *United States v. Brown*, 348 U.S. 110 (1954).

(20) *United States v. Johnson*, 481 U.S. 681, 700 (1987).

(21) Pauline Jelinek, *Pentagon to Recognize Gay Troops*, Huffington Post (Aug. 14, 2012), http://www.huffingtonpost.com/2012/06/14/pentagon-gay-troops-event_n_1597453.html.

(22) *The Invisible War* (Chain Camera Pictures 2012). *See also* Nancy Ramsey, *'Invisible War': New Documentary Exposes Rape in the Military*, ABC News (June 27, 2012), http://abcnews.go.com/Politics/rape-military-invisible-war-documentary-exposes-assaults/story?id=16632490; *U.S. veterans sue Pentagon after they were raped and sexually abused by comrades*, Daily Mail (Feb. 15, 2011), http://www.dailymail.co.uk/news/article-1357230/US-veterans-sue-Pentagon-rape-sexual-abuse-comrades.html.

(23) *See* 2016 Dep't of Def. Ann. Rep. on Sexual Assault in the Military, Appendix B: Stat. Data on Sexual Assault 10, 26 (2017), http://sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf

(24) *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

(25) *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013); *see also Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014). *But see Doe v. Hagenbeck*, 98 F. Supp. 3d 672 (S.D.N.Y. 2015) (court allowed *Bivens* suit claiming "rampant sexual hostility" at West Point because military discipline not negatively affected by Equal Protection claim).

(26) *Gonzalez v. United States Air Force*, 88 Fed. Appx. 371 (10th Cir. 2004).

(27) In response to the release of *The Invisible War* documentary in 2012, limited legislative progress has been made; however, military sexual assault continues to occur at staggering levels. For information about recent legislation, see Protect Our Defenders http://www.protectourdefenders.com/invisiblewar/.

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