OPINION

Rethinking the military's Feres doctrine

AP Photo/John Bazemore

U.S. Army Capt. Kristen Griest, left, of Orange, Conn., stands in formation during an Army Ranger School graduation ceremony, Friday, Aug. 21, 2015, at Fort Benning, Ga.

By **DWIGHT STIRLING** and **DALLIS WARSHAW** |
June 15, 2017 at 12:03 am

0 COMMENTS

Suppose your daughter is a freshman in college. One night you get a call from her, the call every parent fears — she has been sexually assaulted by an older student. She is crying and distraught, traumatized by what just transpired. You find out that the perpetrator has a history of assaulting freshman women on campus, and that the university staff had knowledge of the perpetrator's history.

Such a situation is a horrific, worst-case scenario. As the victim of an intentional tort, however, your daughter has a number of legal options available to her. Her recourse includes a lawsuit against the perpetrator as well as a lawsuit against the university for its organizational liability, such as occurred in the Penn State/Sandusky suits.

Now, let's change the fact pattern slightly: Your daughter is in the military instead of college. The result is starkly different. Due to a little-known policy called the *Feres* doctrine, which arose from the Supreme Court case of *Feres v. United States* in 1950, your daughter would be prevented from suing for both the emotional and physical harm she sustained in the assault. Should she file a suit against either her assailant or the military establishment, regardless of its institutionalized knowledge, the court would immediately dismiss it, the judge all the while acknowledging the results were "unfair."

Under the *Feres* doctrine, service members are categorically banned from filing suits for harm incurred while on duty. Period, end of story. There are no exceptions, it is absolute.

Since its creation, courts and commentators have vehemently condemned the *Feres* doctrine. One of its most ardent critics was Antonin Scalia, the legendary conservative Supreme Court justice. In United States v. Johnson, Justice Scalia wrote that "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." Yet, the *Feres* doctrine persists as national policy.

The given justification for the *Feres* doctrine is the protection of good order and discipline within the military. Without a doubt, commanding officers shouldn't face the threat of a lawsuit for decisions made in combat or in preparing troops for battle. The *Feres* doctrine, though, goes too far by banning all suits "incident to service."

Good order and discipline simply would not be harmed by the suit of a soldier burned due to known faulty wiring in his barracks, or a sexual assault victim, or a soldier who was secretly administered LSD to test its effects, or a Marine who had a towel left in his stomach during a routine procedure. Yet, the *Feres* doctrine summarily bans each of these suits.

By immunizing the military from civil liability, the *Feres* doctrine increases abuse of power and corruption by military officials. It is common sense that when officials are not held accountable for their misconduct, they tend to abuse their authority. That is why the Founders split the government's power into three branches and allowed the courts to review the conduct of the other two branches. Judicial review is a cornerstone of our democracy.

Protected from lawsuits, however, military officials are freed from this constitutional accountability framework. Lawsuits not only allow victims of misconduct to be made whole, they inform the public of governmental wrongdoing. This information flow is critical in a representative democracy, where voters cannot change what they do not know.

It is time to review the scope of the *Feres* doctrine. Chaining shut the courthouse doors to prevent service member access is unconscionable.

Dwight Stirling is CEO of the Veterans Legal Institute. Dallis Warshaw is policy analyst at the Veteran Legal Institute.

Tags: **Guest Commentary**

Dwight Stirling

Dallis Warshaw

Join the Conversation

We invite you to use our commenting platform to engage in insightful conversations about issues in our community. Although we do not pre-screen comments, we reserve the right at all times to remove any information or materials that are unlawful, threatening, abusive, libelous, defamatory, obscene, vulgar, pornographic, profane, indecent or otherwise objectionable to us, and to disclose any information necessary to satisfy the law, regulation, or government request. We might permanently block any user who abuses these conditions.

If you see comments that you find offensive, please use the “Flag as Inappropriate” feature by hovering over the right side of the post, and pulling down on the arrow that appears. Or, contact our editors by emailing moderator@scng.com.