SUICIDE IN THE MILITARY: THE *FERES* DOCTRINE'S BAR TO RECOVERY FOR THIRD-PARTY LIABILITY AND WHY CONGRESS SHOULD AMEND THE FTCA

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I. INTRODUCTION

When John Skees, an active-duty solider in the U.S. Army, was admitted to the Ireland Army Community Hospital in Fort Knox on March 20, 1992, he told them that he intended to kill himself.[1] He even told them he had already written a suicide note.[2] Regardless, hospital physicians discharged him shortly thereafter.[3] A few days later, Skees informed his Platoon Sergeant, Daniels, that he intended to commit suicide, and even showed him the weapon he planned to use.[4] Daniels neither confiscated the weapon nor took any other preventative measures.[5] Daniels' superior officers likewise took no action.[6] "When Skees informed Daniels for the third time that he intended to end his life, Daniels contacted Ireland Army Community Hospital, but the hospital said they could do nothing for Skees."[7] Skees committed suicide the following day.[8]

John Skees' story is heart-wrenching, but it is not unique. Suicide rates among active-duty military and veterans are the highest they have been since 2012, a year in which military suicides outnumbered combat fatalities.[9] In

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[1] Skees v. U.S. by & Through Dep't of the Army, 107 F.3d 421, 422 (6th Cir. 1997).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See* Bill Chappell, *U.S. Military's Suicide Rate Surpassed Combat Deaths in 2012*, NPR (Jan. 14, 2013, 6:38 PM), https://www.npr.org/sections/thetwo-way/2013/01/14/169364733/u-s-militarys-suicide-rate-surpassed-combat-deaths-in-2012 [https://perma.cc/U974-HC4P] (discussing that in 2012, 295 servicemen and women died fighting in Afghanistan while 349 died by suicide).

2018, the total was 325:[10] an active-duty member of the military died by suicide approximately once every twenty-seven hours.[11] And the number has continued to rise.[12] Since the outbreak of the novel coronavirus pandemic, reports show that military suicide rates have increased by as much as twenty percent over the 2019 totals.[13]

While the rising rates of suicide in the military are concerning, this Note specifically addresses active-duty military suicides like those of John Skees, whose suicide was at least partially the result of third-party negligence by his Sergeant and the Army hospital staff. If John Skees had been a civilian, his family would have been able to sue—and likely recover—for third-party negligence resulting in his suicide.[14] Because John Skees was in the military, however, the *Feres* doctrine, a judicially promulgated standard that precludes military personnel from recovering for injuries sustained "incident to service,"[15] completely barred recovery for his family.[16]

Part II of this Note explores the history of the Federal Tort Claims Act (FTCA), the Supreme Court's subsequent development of the *Feres* doctrine, and its application to military suicides, as well as the concurrent development of civilian suicide in tort law. Part III analyzes the rationales behind the *Feres* doctrine as applied to military suicides, then applies the factors for finding third-party liability in cases of civilian suicide to those of active-duty military personnel. Part IV proposes a legislative solution to the *Feres* doctrine's bar to recovery for military suicides, wherein Congress would amend the FTCA to include several categories of harms for which military personnel could recover. This Note builds on the current scholarship by including in this list "[a]cts of clear or gross negligence resulting in the suicide of an active-duty service member. In this context, clear or gross negligence would be that which violates a standard of care derived from the civilian suicide cases."[17]

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[10] UNDER SEC'Y OF DEF. FOR PERS. & READINESS, DEP'T OF DEF., ANNUAL SUICIDE REPORT 9 (2018), https://www.dspo.mil/Portals/113/2018%20DoD%20Annual%20Suicide%20Report_FINAL_25%20SEP%2019_508c.pdf [https://perma.cc/6DRG-YT7U] [hereinafter 2018 ANNUAL SUICIDE REPORT].

[11] *See id.* The author computed this number by averaging the number of deaths over a period of 365 days.

[12] *See* Nancy A. Youssef, *U.S. Army Saw Rise in Suicides as Covid-19 Pandemic Locked Down Nation*, WALL ST. J. (Oct. 1, 2020, 5:09 PM), https://www.wsj.com/articles/u-s-army-saw-rise-in-suicides-as-covid-19-pandemic-locked-down-nation-11601581910 [https://perma.cc/Q44T-2HVK] ("In all, there were 344 suicides among active-duty troops in 2019 . . . .").

[13] Lolita C. Baldor & Robert Burns, *Military Suicides Up as Much as 20% in COVID Era*, AP NEWS (Sept. 27, 2020), https://apnews.com/article/virus-outbreak-air-force-stress-archive-army-2be5e2d741c1798fad3f79ca2f2c14dd [https://perma.cc/KX7P-A2W2].

[14] *See infra* Part III.A.3 and note 54.

[15] Feres v. United States, 340 U.S. 135, 146 (1950).

[16] Skees v. U.S. by & Through Dep't of the Army, 107 F.3d 421, 425 (6th Cir. 1997).

[17] *Infra* Part III.A.1.

Thus, if a service member and third party had the requisite "special relationship," the suicide was foreseeable, and the suicide victim was in the custody and control of the third party, the third party could be held liable for the service member's suicide.[18]

II. BACKGROUND

A. The FTCA Analyzed

Until 1946, the United States government maintained sovereign immunity from lawsuits brought by its citizens.[19] Under the historic assumption that the "king could do no wrong,"[20] an individual could not bring the government into court for its tortious conduct unless it consented to the suit.[21] If the government did not consent, the individual's sole avenue for recourse was to petition Congress to pass a private bill either providing compensation for the government's wrongful acts or approving litigation.[22] These bills, primarily addressing tort claims, began to consume much of Congress's time, especially as the government rapidly expanded beginning in the 1920s.[23] For two decades, Congress considered ways to partially waive sovereign immunity.[24] A tragic helicopter accident in 1945 catalyzed Congress to finally pass its landmark legislation in the form of the Federal Tort Claims Act of 1946 (FTCA).[25]

The FTCA permits certain claims to be brought against the government for the negligent acts of its employees.[26] Specifically, the Act provides that "The 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[.]"[27] Enumerated in the Act, however,

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[18] *See infra* note 54.

[19] Andrew F. Popper, *Rethinking* Feres*: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1493 (2019).

[20] *Id.*

[21] KEVIN M. LEWIS, CONG. RESEARCH SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 4 (2019), https://crsreports.congress.gov/product/pdf/R/R45732/4 [https://perma.cc/VB9E-MDLA].

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See* LEWIS, *supra* note 21, at unnumbered page 2; *see also* Joe Richman, *The Day a Bomber Hit the Empire State Building*, NPR (Jul. 28, 2008, 11:23 AM), http://www.npr.org/templates/story.php?storyId=92987873 [https://perma.cc/R7KX-KML4] (stating that lawsuits initiated after the crash "resulted in landmark legislation" a year later in the form of the FTCA).

[26] 28 U.S.C. § 2674 (1948).

[27] *Id.*

are twelve exceptions, one of which is the basis for the *Feres* doctrine.[28] This exception states that the government does not waive sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[29] In 1950, the Supreme Court interpreted this provision as precluding recovery by military personnel for any tortious injury sustained "incident to service."[30] Over time, courts have come to interpret this language as barring practically all suits by active-duty military personnel.[31]

B. Mental Health and the Military

In 1946, the same year Congress passed the FTCA, it passed another important piece of legislation affecting members of the military—the National Mental Health Act (NMHA).[32] Among the strongest advocates for passing the NMHA were mental health professionals who had worked with WWII servicemen and veterans and studied the effects of war on the human psyche.[33] At a time when droves of men were returning home from combat, it became imperative to address the issue of mental health in the military.[34] Senator Claude Pepper, the bill's main sponsor in the Senate, reflected this idea in stating that:

> [T]he enormous pressures of the times, the catastrophic world war which ended in victory a few months ago, and the difficult period of reorientation and reconstruction, in which we have as yet achieved no victory, have resulted in an alarming increase in the incidence of mental disease and neuropsychiatric maladjustments among our people.[35]

With each successive war fought by the United States, mental health professionals broadened their understanding of war-related mental health issues.[36] The condition once termed "shell shock" and later "battle fatigue"

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[28] 28 U.S.C. § 2680 (1948).

[29] *Id.* at § 2680(j).

[30] Feres v. United States, 340 U.S. 135, 146 (1950).

[31] Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991).

[32] National Mental Health Act, 42 U.S.C. § 232 (1946).

[33] ELLEN HERMAN, THE ROMANCE OF AMERICAN PSYCHOLOGY: POLITICAL CULTURE IN THE AGE OF EXPERTS 245 (U.C. Press 1995) (ebook), http://ark.cdlib.org/ark:/13030/ft696nb3n8/.

[34] *Id.*

[35] *Id.* (quoting National Neuropsychiatric Institute Act: Hearing Before the Subcomm. Health & Educ. of the S. Comm. on Educ. & Labor, 79th Cong. 1st sess. 5 (1946) (opening statement of Senator Claude Pepper)).

[36] MaryCatherine McDonald, Marisa Brandt, & Robyn Bluhm, *From Shell-shock to PTSD: A Century of Invisible War Trauma*, THE CONVERSATION (Apr. 3, 2017, 8:44 PM),

eventually became known as "posttraumatic stress disorder," or PTSD.[37] Unfortunately, despite greater understanding of the issues affecting military personnel, suicide rates among active-duty military and veterans are the highest they have been in seven years.[38] In 2018, an active-duty member of the military died by suicide approximately once every twenty-seven hours.[39] Though beyond the scope of this Note, the veteran suicide rates are far more alarming; studies show that currently between twenty and twenty-two veterans die by suicide *each day*.[40]

While these numbers are high, the rate of suicide among active-duty military is roughly the same as the civilian rate, when adjusted for age and other demographic factors.[41] However, given the resources the Department of Defense and the Department of Veterans Affairs have dedicated to this issue over the last decade,[42] the military suicide rate should be falling, not rising. Societal norms are shifting, with an emphasis on destigmatizing mental health issues.[43] However, the increase in military suicide rates suggests that these changes are not permeating military culture.[44] Continued efforts to support the mental health of military personnel will only achieve so much if the environment in which mental health issues manifest and are treated does not improve.

This Note posits that a major factor preventing profound changes in military culture is the courts' continued application of the *Feres* doctrine. As long as courts continue to apply *Feres*, military personnel will continue to be denied legal recourse for harms against them due to other military

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http://theconversation.com/from-shell-shock-to-ptsd-a-century-of-invisible-war-trauma-74911 [https://perma.cc/4G97-5M5W].

[37] Matthew J. Friedman, *PTSD History and Overview*, U.S. DEP'T OF VETERAN AFFS. NAT'L CTR. FOR PTSD, https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp [https://perma.cc/8TK7-5W4A].

[38] Patricia Kime, *Military Suicides Reach Highest Rate Since Record-Keeping Began After 9/11*, MILITARY.COM (Aug. 1, 2019), https://www.military.com/daily-news/2019/08/01/pentagon-reports-record-number-suicides.html [https://perma.cc/CZ59-3ETC].

[39] *Id.*

[40] *Id.*

[41] 2018 ANNUAL SUICIDE REPORT, *supra* note 10, at 15.

[42] *Suicide Prevention*, U.S. DEP'T OF VETERAN AFFS., https://www.mentalhealth.va.gov/suicide_prevention/resources.asp [https://perma.cc/5YEH-NHXC].

[43] *See generally* Reina Gattuso, *The Conversation on Mental Health Has Changed for the Better in the Last Decade*, TALKSPACE: THE TALKSPACE VOICE (Jan. 6, 2020), https://www.talkspace.com/blog/mental-health-stigma-through-decade/ [https://perma.cc/4FQN-NVPF]; *see also* Am. Psych. Ass'n, *Survey: Americans Becoming More Open About Mental Health*, APA.ORG (May 2019), https://www.apa.org/news/press/releases/2019/05/mental-health-survey [https://perma.cc/YCC9-Q4TD].

[44] The author came to this conclusion after reading about the DOD and VA's efforts to increase awareness of military suicides and the increase, regardless of those efforts, in suicide rates among both active-duty military and veterans.

personnel's negligent acts.[45] The tort system's aims are "to provide relief to injured parties for harms caused by others, to impose liability on parties responsible for the harm, and to deter others from committing harmful acts."[46] With *Feres* preventing injured parties from piercing the military veil, all relief granted, liability imposed, and deterrence must come from within the military itself. Military wrongdoers are subject to discipline under the Uniform Code of Military Justice,[47] but that does nothing in the way of financial relief for suicide victims' families. Because while families of suicide victims typically receive financial payouts upon the death of the service member,[48] that money is not linked in any way to a negligent third party's acts.[49] Thus, there may be a punishment and relief granted, though sometimes there is not.[50] But when the two are disconnected, there is no real deterrence.

If Congress were to amend the FTCA to create a special relationship between certain military personnel and allow for recovery in cases of third-party gross negligence resulting in the suicide of a service member, the tort system would connect the punishment to the relief. This Note suggests that this would act as greater deterrence against grossly negligent acts by military personnel. Section III of this Note explores how the evolution of third-party liability in cases of civilian suicides would apply to the military, ultimately helping to reduce the rate of military suicides.

C. Civilian Suicide and Third-Party Liability

Since the passage of the National Mental Health Act (NMHA) in 1946, mental health professionals have increased their understanding of mental health issues, including suicide.[51] The law, of course, takes time to catch up

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[45] *See infra* Part III.

[46] *Tort*, LEGAL INFO. INST. WEX LEGAL DICTIONARY & ENCYCLOPEDIA, https://www.law.cornell.edu/wex/tort [https://perma.cc/YVB7-KGZB].

[47] Uniform Code of Military Justice, 10 U.S.C. §§ 801–946a (2012).

[48] Nancy Montgomery, *Study: Survivors of Servicemembers Who Commit Suicide Should Get Full Benefits*, STARS AND STRIPES (Dec. 2, 2016), https://www.stripes.com/news/study-survivors-of-servicemembers-who-commit-suicide-should-get-full-benefits-1.442306 [https://perma.cc/9NXP-AKLN].

[49] DEP'T OF THE ARMY, LEGAL GUIDE FOR COMMANDERS 8-5 (1992), https://fas.org/irp/doddir/army/fm27-1.pdf [https://perma.cc/C6H6-DQJV] ("The Army claims system provides for payment . . . [o]f claims resulting from the negligent or wrongful conduct of soldiers, civilian employees, or other agents of the government.").

[50] Montgomery, *supra* note 48.

[51] *See generally* Merike Sisask and Kairi Kõlves, *Towards a Greater Understanding of Suicidal Behaviour and its Prevention*, INT'L J. ENV'T RSCH. & PUB. HEALTH (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6121881/ [https://perma.cc/HGT5-CN9B].

to the rest of society. In the past, and in some jurisdictions still, suicide was a total bar to recovery for a third party's negligence.[52] In the eyes of the law, suicide is still largely seen as a superseding event which severs the chain of causation, thereby removing liability for a third-party's negligent acts committed before the suicide.[53] Others argue that a suicide victim, in taking his own life, is contributorily negligent to his own harms, often totally barring recovery.[54] And others argue that despite a person's suicidality, a duty of care for that person's safety should not attach to a third party at all.[55]

While different jurisdictions apply different negligence standards, many now recognize that under certain circumstances a third party can be held liable for a plaintiff's suicide.[56] Courts have primarily considered three factors in determining liability: the existence of a special relationship between the suicide victim and the third party; the third party's knowledge of the suicide victim's danger to himself; and the third party's custody or control over the suicide victim.[57] For example, liability has been found in cases where inmates died by suicide when the prison guards knew or had reason to know that the prisoners were suicidal.[58] Likewise, and most commonly, liability exists in the patient-psychiatrist relationship.[59] In contrast, all cases of active-duty military suicide alleging negligence against third parties in the military have been dismissed under *Feres*, regardless of the relationship, foreseeability, or degree of custody or control.[60]

D. From Brooks to Johnson: The Evolution of the Feres *Doctrine*

Between 1949 and 1987, the Supreme Court granted certiorari in several cases brought by military personnel (or their families) under the FTCA.[61] In all but one of those cases the Court narrowed the FTCA's military exception, barring recovery for an increasing array of claims by military personnel

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[52] Alex B. Long, *Abolishing the Suicide Rule*, 113 NW. U. L. REV. 767, 783 n.121 (2019).

[53] *Id.* at 771–72.

[54] Charles J. Williams, *Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim's Duty of Self-Care*, 76 NEB. L. REV. 301, 302 (1997).

[55] Long, *supra* note 52, at 771–72.

[56] *Id.* at 772.

[57] Williams, *supra* note 54, at 303, 309.

[58] Long, *supra* note 52, at 792 n.180.

[59] *Id.* at 793 n.183.

[60] *See infra* Part III.B.

[61] *See* Brooks v. United States, 337 U.S. 49 (1949). *See also* Feres v. United States, 340 U.S. 135 (1950); United States v. Brown, 348 U.S. 110 (1954); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977); Chappell v. Wallace, 462 U.S. 296 (1983); United States v. Shearer, 473 U.S. 52 (1985); United States v. Johnson, 481 U.S. 681 (1987).

against the government.[62] Precisely why this occurred is unclear. However, there was a telling shift in the Court's application of the legal rationales behind its holdings. While the Court stated three rationales for its holding in *Feres v. United States* in 1950,[63] by 1985 the Court emphasized only one: deference to military decision-making.[64] A number of factors could have contributed to this shift: societal changes in the perception of the military; changes in the composition of the Court, specifically an increasing respect for separation of powers; or decreased deference to congressional decision-making and to the statutory language of the FTCA.[65] Regardless of the reason, the change culminated in countless military service members, who were harmed by others' negligence, being unable to recover damages.

To understand *Feres* jurisprudence, we actually began in 1949, three years after Congress passed the FTCA, when the Supreme Court granted certiorari in *Brooks v. United States*.[66] *Brooks* was on appeal from the Fourth Circuit, which had held that the FTCA did not allow military personnel to bring suits against the government.[67] On appeal to the Supreme Court, the majority in *Brooks* limited its holding to recovery for injuries "not incident to . . . service."[68] Although the Court did not indicate the origins of that language, the Judge Advocate General's Department had previously defined "incident to service" to mean "while engaged in the actual performance of some official duty."[69]

The application of "incident to service" in *Brooks* was straightforward: the Brooks brothers were on leave, driving with their father, in their own private vehicle, and on a public highway.[70] They were not engaged in any activity related to their military careers.[71] The Brookses' car was struck by an Army truck, resulting in the death of one brother and injuries to the other brother and their father.[72] In language that presents a cruel irony when viewed in the light of later cases, the Court noted that the Brookses' injuries were "not caused by their service except in the sense that all human events depend

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[62] *See Brown*, 348 U.S. at 112 (finding that because military discipline and order was not implicated, Brown could recover for the injuries he sustained).

[63] Feres v. United States, 340 U.S. 135, 141–46 (1950).

[64] *See Shearer*, 473 U.S. at 58 n.4 (stating that the other *Feres* rationales, the federal relationship rationale, and the double recovery rationale were no longer controlling).

[65] The author suggests these as possible reasons for the Court's emphasis on military decision-making. However, any number of factors could affect this change.

[66] *Brooks*, 337 U.S. at 50.

[67] United States v. Brooks, 169 F.2d 840, 842 (4th Cir. 1948).

[68] *Brooks*, 337 U.S. at 50.

[69] *Military Personnel and the Federal Tort Claims Act*, 58 YALE L.J. 615, 621 n.28 (1949).

[70] *Brooks*, 337 U.S. at 50.

[71] *Id.* at 52.

[72] *Id.*

upon what has already transpired."[73] The Court declined to offer an opinion as to how an accident that was incident to service would be resolved, but it stated that "a wholly different case would be presented."[74] That "wholly different case" came the following year, when the Court decided *Feres v. United States*.[75]

In *Feres*, the Supreme Court purportedly applied only the "incident to service" standard from *Brooks* to three cases brought by active-duty military personnel.[76] In reality, however, the *Feres* court completely reinterpreted the FTCA and its application to military claims, holding that the plaintiffs could not recover for any injuries sustained "incident to service."[77] In support of its (re)analysis of the statute, the *Feres* court advanced three rationales.[78] The first was that claims by military personnel have no parallel cause of action for private civilians,[79] and the FCTA states that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual in like circumstances[.]"[80] The Court reasoned that "no private individual has power to conscript or to mobilize a private army with such authorities over persons as the Government vests in echelons of command."[81] Thus, despite several reasonable parallel civilian relationships, such as employer and employee or even landlord and tenant, the Court found no such similarity.[82]

The Court's second rationale was that "the relationship between the United States government and members of its armed forces is 'distinctly federal in character' . . . ," and so Congress could not have intended for the Act, which provides that the law of the state where the tort occurs governs, to apply to military personnel.[83] The third rationale addresses the issue of double recovery.[84] Because the military provides other forms of compensation, and because Congress did not specify a system for adjusting

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[73] *Id.*

[74] *Id.*

[75] Feres v. United States, 340 U.S. 135, 138 (1950) ("[T]his is the 'wholly different case' reserved from our decision in [*Brooks v. United States*][.]").

[76] Feres v. United States, 177 F.2d 535 (2d Cir. 1949); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949).

[77] *Feres*, 340 U.S. at 138–40.

[78] *Id.* at 141–46.

[79] *Id.* at 141.

[80] 28 U.S.C. § 2674 (1948).

[81] *Feres*, 340 U.S. at 141.

[82] *See id.* at 142.

[83] *Id.* at 142–43 (discussing that soldiers cannot choose where they are stationed, so imposing state-specific tort law would be unfair; also discussing the injustice of unequal tort remedies from state to state, wherein one serviceperson might recover for a harm in one state, where another in a different state could not); *see also infra*, Part III.A.2.

[84] *Feres*, 340 U.S. at 144–46.

recovery based on other forms of compensation, the Court again reasoned that Congress could not have meant for the Act to "permit recovery for injuries incident to military service."[85]

The Court addressed the argument that the above rationales could have been applied in *Brooks* to deny recovery but distinguished the facts of *Feres* under the "incident to service" standard.[86] Its distinction included the fact that the Brookses were "under compulsion of no orders or duty and on no military mission" when they were injured.[87] And the Brooks brothers were allowed to recover because their military status at the time of the incident "was not analogous to that of a soldier injured while performing duties under orders."[88] Thus, the Court's rationales ultimately supported the "incident to service" standard as the key element separating recovery from nonrecovery.[89]

The military decision-making rationale, which has come to dominate *Feres* jurisprudence, was actually introduced in *United States v. Brown*.[90] In determining whether *Brooks* or *Feres* governed based on the facts, the Court looked to Brown's relationship to the military when the tortious act occurred.[91] Brown sustained his original injury while he was on active duty, and the injury for which he brought suit was a surgery performed by the Veterans Health Administration (VA) hospital.[92] However, by the time he brought suit he was a Veteran who had been retired for seven years.[93] Thus, the Court looked to the effects on military discipline as the primary factor separating recovery from nonrecovery:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.[94]

Between 1950 and 1987, the Supreme Court expanded *Feres* to preclude almost all claims by military personnel against the government.[95] And as the

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[85] *Id.* at 144.
[86] *Id.* at 146.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *See* United States v. Brown, 348 U.S. 110, 112 (1954).
[91] *Id.*
[92] *Id.*
[93] *Id.* at 110.
[94] *Id.* (quoting *Feres*, 340 U.S. at 143).
[95] *See* Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991).

Supreme Court expanded *Feres*, so too did the lower courts: over time, "incident to service" came to include sexual assault and rape, negligent auto repairs, murder, medical malpractice, and suicide.[96] In 1987, the Court heard *United States v. Johnson*, where it expanded *Feres* to bar recovery for a serviceman who died due to negligence of civilian FAA employees.[97] The majority's explanation demonstrated incredible deference to military decision-making. It finished its analysis with the following:

> Even if military negligence is not specifically alleged in tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are intricately intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and one's country. 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*.[98]

In a dissent nearly twice as long as the majority opinion, Justice Antonin Scalia unleashed a scathing diatribe against nearly four decades of the Court's *Feres* jurisprudence.[99] He attacked each of the underlying rationales of *Feres* in turn, finding that not only were they not supported by the text of the Act, but the Court had applied them inconsistently.[100] "In sum," he wrote, "neither the three original *Feres* reasons nor the post hoc rationalization of 'military discipline' justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[101] Justice Scalia's criticisms of the *Feres* rationales are revisited in more detail in Part III below.

E. Congress' Attempts to Resolve Feres

Members of Congress have also repeatedly spoken out against *Feres*, and have tried to pass legislation addressing some of the doctrine's most glaring

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[96] *See generally* Stubbs v. United States, 744 F.2d 58 (8th Cir. 1984) (sexual harassment); Sanchez v. United States, 813 F.2d 593 (2nd Cir. 1987) (negligent auto repairs); Ortiz v. United States, 786 F.3d 817 (10th Cir. 2015) (medical malpractice); Purcell v. United States, 656 F.3d 463 (7th Cir. 2011) (suicide).

[97] *See* United States v. Johnson, 481 U.S. 681 (1987).

[98] *Id.* at 691 (emphasis added).

[99] *Id.* at 692–703 (Scalia, J., dissenting).

[100] *Id.* at 697–98.

[101] *Id.* at 700.

injustices, especially those stemming from medical malpractice.[102] And although Congress has considered *Feres* legislation twice in the last decade alone, no bill has yet passed in both houses.[103] While *Feres* is almost universally disliked by legislators, as yet they have not rectified the issue by amending the FTCA.[104] In December 2019, however, Congress did pass a bill that, while it did not overturn *Feres*, takes steps towards remedying some of its most egregious injustices.[105] The National Defense Authorization Act for Fiscal Year 2020 ("NDAA") "authorize[d] appropriations for fiscal year 2020 for military activities of the Department of Defense (DOD) . . . ."[106] For the first time, Congress authorized claims by members of the military against the United States for personal injury or death caused by medical malpractice.[107]

However, it places several limitations on what claims are compensable,[108] ultimately casting serious doubt as to whether this provision could benefit suicide victims' surviving beneficiaries. For example, claims can only be brought if they are: "for personal injury or death caused by the negligent or wrongful act or omission of a [DOD] health care provider in the performance of medical, dental, or related health care functions while such provider was acting within the scope of employment";[109] "the act or omission constituting medical malpractice occurred in a covered military medical treatment facility"[110]; "the claim is not allowed to be settled and paid under any other provision of the law";[111] and the claim is adequately substantiated according to Secretary of Defense guidelines.[112] Crucial to instances of military suicide is the provision limiting DOD liability to "only the portion of compensable injury, loss, or damages attributable to the medical malpractice of the DOD health care provider."[113] While the NDAA states that, for liability purposes, it will use the tort law adopted by the majority of states,[114] to date only a plurality of states has adopted the same liability

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[102] Melissa Feldmeier, Comment, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. U. L. REV. 145, 162–65 (2010).

[103] *Id.* at 163.

[104] *See infra* Part IV.

[105] National Defense Authorization Act for Fiscal Year 2020, 10 U.S.C. § 2733a (2020).

[106] *Id.*

[107] *Id.*

[108] *Id.* at § 2733a(b)(1)–(6).

[109] *Id.* at § 2733a(b)(2).

[110] *Id.* at § 2733a(b)(3).

[111] *Id.* at § 2733a(b)(5).

[112] *Id.* at § 2733a(b)(6).

[113] *Id.* at § 2733a(c).

[114] *Id.* at § 2733a(f)(2)(B).

apportionment model.[115] Thus, it is unclear which model would be used for claims brought under the NDAA. If the plurality approach is adopted, then a suicide victim's survivors could recover only if the victim was found to be fifty percent at fault or less for his or her own death; if the victim is found to be 51% or more at fault, then recovery would be barred.[116] Even then, a jury would have to attribute at least half of the liability for a suicide victim's death to a third-party military medical provider in order for the victim's family to recover damages.[117] Finally, the DOD could possibly escape liability entirely by framing the fault as that of a supervisor or commanding officer, who is not subject to liability under this act, rather than the DOD medical provider.[118]

III. ANALYSIS

As applied, the *Feres* doctrine generally bars recovery for harms to active-duty military personnel resulting from other service members' negligence. This includes all cases of active-duty military suicides. Though emphasis on different rationales has shifted over the years, three general reasons remain for barring recovery in such suits: (1) deference to military decision-making; (2) the distinctly federal nature of the relationship between military personnel and the government; and (3) the issue of double recovery.[119] In civilian suicide cases, however, courts have found third-party liability for suicide victims' deaths when there was a special relationship between the victim and the third party, the suicide was foreseeable, and the victim was under the third party's custody and control.[120] This section analyzes the three current *Feres* rationales as applied to cases of active-duty military suicide. It then applies the civilian suicide liability factors to those same cases, demonstrating the potential for recovery if the cases had not been barred by *Feres*.

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[115] *Comparative Negligence, Contributory Negligence and Determining Fault*, ENJURIS, https://www.enjuris.com/personal-injury-law/shared-fault-rules.html [https://perma.cc/7BHK-MAC9] (last visited Mar. 15, 2021).

[116] *Id.*

[117] *Id.*

[118] *See* 10 U.S.C. § 2733a(a) (stating that the NDAA allows claims "caused by the medical malpractice of a Department of Defense health care provider").

[119] *See* United States v. Johnson, 481 U.S. 681, 688–91 (1987).

[120] Williams, *supra* note 54, at 309.

A. The Feres *Rationales Applied to Military Suicides*

1. The Military Decision-Making Rationale

Although the military decision-making rationale was not cited by the Supreme Court until after *Feres v. United States*,[121] it became the rationale most heavily relied upon in subsequent *Feres* jurisprudence.[122] Understandably, courts generally do not want to interfere in the operations of the military; they fear involvement would lead to a collapse of military order and discipline.[123] However, in cases involving military suicides, the decision-making implicated has not been "military" in the typical understanding of the word, except that the actors involved are members of the armed forces.

One *Feres* scholar, Professor Andrew Popper of American University's Washington College of Law, has proposed a designation of decisions as either "an *essential component to military service* (and therefore not actionable) and those that do not involve an *essential component of military service* (and are potentially actionable claims)."[124] To clarify, he lists seven specific behaviors which should be actionable in tort precisely because they do not implicate essential military decision-making that would threaten military discipline and chain-of-command.

Professor Popper's solution targets seven specific categories of harms, relief for which is currently barred by *Feres*. They are:

1. Sexual assault.
2. Rape.
3. Extreme physical violence or acts that fall within the definition of torture, domestic violence, and child abuse.
4. Acts of clear or gross medical malpractice.[125]
5. Exposure of service members to pharmaceuticals, narcotics, or toxins without informed and voluntary consent.
6. While in military service, acts of driving under the influence of drugs or narcotics on more than one occasion.
7. Acts or patterns of invidious discrimination on the basis of race,

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[121] *See* United States v. Brown, 348 U.S. 110, 112 (1954).

[122] *See* United States v. Shearer, 473 U.S. 52, 58 n.4 (1985) (stating that the other *Feres* rationales, the federal relationship rationale and the double recovery rationale, were no longer controlling).

[123] Popper, *supra* note 19, at 1541.

[124] *Id.*

[125] *Id.* at 1542. Popper's article was published shortly before the NDAA was passed. Still, Popper notably does not propose the same limitations on recovery for medical malpractice that the NDAA does. *Id.*

religion, ethnicity, or gender. [126]

As he explains, the goal is to avoid allowing causes of action that involve an essential component of military service and thus implicate military decision-making, chain-of-command issues, and military discipline.[127]

This Note proposes adding a category to Popper's list of exceptions: acts of clear or gross negligence resulting in the suicide of an active-duty service member. In this context, clear or gross negligence would be that conduct which violates a standard of care derived from civilian suicide cases. Thus, if a service member's suicide was both foreseeable and that person was in the custody and control of the third party, the third party could be held liable for the service member's suicide. As with Popper's proposed list of actionable tort claims, claims based on suicide resulting from "undeniable misconduct seem[] unlikely to prompt insubordination or a collapse of order and discipline. Instead, it is far more likely that . . . amending the FTCA will give justice to victims of wrongdoing and deter future misconduct."[128]

The goal in allowing these claims would not be to undermine military discipline, but to ultimately strengthen it. If those harmed can use the tort system to hold other military personnel liable for certain acts, it will generate a level of deterrence for those acts that does not seem to currently exist in the military culture. For example, in the military suicide cases explored below, decisions by both superior officers and medical personnel are called into question. *Feres* jurisprudence suggests that trials in such cases would "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."[129] Likewise, the Court has found that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment."[130]

However, shielding individuals who commit certain tortious acts does not protect the military establishment; it instead allows it to rot from the inside. It is arguably better to expose the bad actors to tort liability and subsequent military discipline than allow the military to cover up certain behaviors and hope it can fix the problem from within. The continued rise in military suicide rates suggests that whatever the military is doing to change

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[126] *Id.* at 1543.

[127] *Id.* at 1541.

[128] *Id.*

[129] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977).

[130] Chappell v. Wallace, 462 U.S. 296, 300 (1983).

attitudes about mental health and deter suicides is not working.[131] When one examines the cases below, it is no wonder. Without real deterrence from the tort system, stories like those below will continue to occur, weakening the military as service members realize that certain acts by superior officers and medical personnel will not be adequately punished.

For example, in *Stubbs v. United States*, the Eighth Circuit concluded that sexual assault by a superior officer was incident to Dawn Stubbs' military service, and that allowing recovery would impermissibly implicate military decision-making.[132] So, when her sister brought a claim for negligence after Dawn committed suicide, *Feres* barred recovery.[133] It did not matter that Stubbs' drill sergeant ordered her into the latrine, propositioned her, and groped her.[134] It did not matter that he threatened to make things difficult for her if she would not have sex with him.[135] And it did not matter that Dawn could not face returning to the military and being subjected to further sexual harassment, and so she shot herself two weeks after the incident, on the day she was to report back to base after the Christmas holiday.[136]

The court's analysis consisted of two parts: (1) whether there was a relevant relationship between Stubbs' activity and the military service, and (2) whether military discipline would be impeded if the challenged conduct were to be litigated.[137] Stubbs' active-duty status and presence on base at the time of her assault, in addition to being under orders by a superior officer, satisfied the first element.[138] There was no question that the second element was satisfied as well:

> The claim thus appears to be that the United States created the atmosphere which ultimately led to Stubbs'[s] suicide. This claim would directly question the disciplinary decisions of superior officers in failing to prevent the incident and in creating a situation where enlisted personnel are discouraged from making complaints. All of these inquiries go to the heart of military decision[-]making and discipline, and thus are barred by *Feres*.[139]

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[131] *See Suicide Prevention, supra* note 42.
[132] Stubbs v. United States, 744 F.2d 58, 60 (8th Cir. 1984).
[133] *Id.* at 61.
[134] *Id.* at 59.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 60.
[138] *Id.*
[139] *Id.* at 61.

But in this case, why would it be considered a bad thing for a court to rule on the negligence of military personnel? Stubbs' case does not implicate the type of military decision-making that the court was initially hesitant to make. And holding a man accountable for his part in the suicide of a woman he sexually assaulted should not threaten military order, but rather enhance it by deterring such behavior and assuring victims of sexual assault that it will not be tolerated among the ranks.

In several other cases involving alleged third-party negligence resulting in active-duty military suicides, the decision-making implicated was not even that of the victims' superior officers, but of military health care professionals.[140] In *Becton v. United States*, a Massachusetts district court dismissed a father's claim for military personnel's negligence resulting in his son's suicide.[141] Addison Becton Jr. had enlisted in the Navy on August 10, 1972.[142] Three days later he was admitted to the medical dispensary for exhibiting suicidal tendencies, including cutting his arms and climbing to the top of a building, presumably to jump.[143] Medical personnel treated his arm wounds and released him to a different unit for a psychological evaluation.[144] Two days later, while assigned to the Medical Survey Unit while awaiting discharge, Becton climbed to the top of a building and jumped.[145] He died a month later, having never regained consciousness.[146]

In his claim for negligence, Becton's father asserted that the military personnel who treated Becton knew or should have known that he posed a real danger to himself.[147] Although the court dismissed the claim, its opinion noted that regardless, *Feres* would bar recovery: "Relevant case law instructs that because Becton's activities, at the time of defendant's alleged negligence, were so enmeshed with the armed services, he should be treated as if he were *a member thereof* at all times" (emphasis added).[148] The court did not explain how Becton's suicide was incident to his military service or how it implicated military decision-making; it essentially held that *Feres* would apply simply because Becton was a member of the military when he died.[149]

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[140] *See, e.g.*, Becton v. United States, 489 F. Supp. 134, 135 (D. Mass. 1980); Persons v. United States, 925 F.2d 292, 293 (9th Cir. 1991).

[141] *Becton*, 489 F. Supp. at 135.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 135–36.

[146] *Id.*

[147] *Id.* at 136.

[148] *Id.* at 138.

[149] *Id.*; *compare id.* at 136 *with* Stubbs v. United States, 744 F.2d 58, 60–61 (8th Cir. 1984).

In *Persons v. United States*, the Ninth Circuit reluctantly affirmed the dismissal of a similar claim, brought by Robin Persons and her four-year old son, for the wrongful death of Petty Officer Kelly Persons and the failure to warn of his attempted suicide.[150] In this case, Kelly Persons had gone to the Balboa Naval Hospital's Emergency Room seeking help after he attempted suicide by cutting his wrists.[151] The hospital never admitted him for observation, but merely treated his wounds. Three months later, Persons committed suicide.[152] This court, which had taken issue with *Feres* on several prior occasions, was forced to apply factors that inexorably led it to deny recovery.[153] Persons was at a Naval hospital because he was a serviceman, and he was treated by military doctors who were subject to military orders.[154] The court expressed unease with the expansion of *Feres*: "From *Brooks* . . . to *Johnson*, jurisprudence has been guided by an awe of all things military.[155] As a result, practically any suit that 'implicates . . . military judgments and decisions,' runs the risk of colliding with *Feres*."[156]

The Ninth Circuit's comments demonstrate the extent of the deference to the military that has developed over time, and the difficulty of applying the military decision-making rationale to suicide cases. Neither Addison Becton Jr. nor Kelly Persons was in a combat zone.[157] They were not in field hospitals. The decisions of the personnel who treated them were entirely medical, not military, yet *Feres* completely barred recovery.[158] If the negligent actors in *Becton* and *Persons* could be hauled into court for their decisions, it would act as deterrent for future similar conduct, possibly saving the lives of future military personnel seeking help for suicidal thoughts and actions. While the NDAA might offer some relief to similar victims' families in the future, that act does not apply to cases predating 2017.[159] Further, it is unclear how the NDAA would practically apply, if at all, in cases of military suicide, especially in cases where the victims' deaths occurred one and three months, respectively, after the alleged medical malpractice.

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[150] Persons v. United States, 925 F.2d 292, 293 (9th Cir. 1991).

[151] *Id.* at 294.

[152] *Id.*

[153] *Id.* at 295.

[154] *Id.* at 296.

[155] *Id.*

[156] *Id.* at 295.

[157] *See supra* notes 140–156.

[158] *Id.*

[159] Richard E. Custin, *Congress Grants Military Members Partial Victory, but* Feres *Doctrine Survives*, THE HILL (Dec. 20, 2019, 1:00 PM), https://thehill.com/opinion/national-security/475024-congress-grants-military-members-partial-victory-but-feres-doctrine [https://perma.cc/DP2Z-G47L].

2. The Federal Relationship Rationale

The Supreme Court's second rationale used in *Feres v. United States* came from its interpretation of the Federal Tort Claims Act.[160] The FTCA provides that the law of the state where the tort occurs applies.[161] The Court found that the relationship between military personnel and the United States is "distinctly federal in character," and therefore Congress could not have intended for the FTCA to apply to active-duty military personnel.[162] There are several arguments in support of this rationale. First, military personnel do not typically choose where they are stationed, so it would be unfair to subject them to the tort laws of a state where they have not chosen to reside.[163] Second, because state tort laws vary, recovery for the same tort could be wildly different for active-duty military stationed in different states.[164] And third, the FTCA bars recovery for torts occurring overseas, so even if a member of the military could recover for a tort that occurred in the United States, there would still be no recovery for similarly situated personnel stationed overseas.[165]

Perhaps the strongest argument against this rationale comes from Justice Antonin Scalia's dissent in *United States v. Johnson*.[166] He explained that the rationale as applied in *Feres* was aimed at eliminating the unfairness to soldiers who could not choose where they were stationed, and thus the law that governed when a tort occurred.[167] Over time, however, the rationale became concerned with preserving uniformity for the military in its governing standards.[168] "The 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."[169]

Justice Scalia's point is made clear when the federal relationship rationale is applied to the military suicide cases: in every state where an

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[160] Feres v. United States, 340 U.S. 135, 142–43 (1950).

[161] 28 U.S.C. § 1346(b)(1).

[162] *Feres*, 340 U.S. at 143–44.

[163] *Id.* at 142–43 (discussing that soldiers cannot choose where they are stationed, so imposing state-specific tort law would be unfair; also discussing the injustice of unequal tort remedies from state to state, wherein one serviceperson might recover for a harm in one state, where another in a different state could not).

[164] *Id.*

[165] *Id.*

[166] United States v. Johnson, 481 U.S. 681, 695 (Scalia, J., dissenting).

[167] *Id.*

[168] *Id.*

[169] *Id.* at 695–96.

active-duty member of the military has died by suicide, courts have either found liability in cases of third-party negligence resulting in a death by suicide—allowing recovery for the families of the victims—or left the matter to a jury as a question of fact.[170] In the military suicide cases, however, *Feres* completely barred recovery.[171]

3. The Double Recovery Rationale

The third rationale cited by the *Feres* court in barring recovery for negligent harms to active-duty military personnel is the issue of double recovery.[172] The Court reasoned that because the military provides compensation for harms caused to its personnel, it should not provide additional compensation in the form of damages.[173] However, when a service member dies, the insurance amount paid out by the military to the surviving beneficiaries is typically the same regardless of how the person died.[174] If a member of the military dies, due in part to the negligence of another service member, the beneficiaries will receive the same amount as a person who died in any other manner not due to third-party negligence.[175] If a civilian dies due to third-party negligence (and certain factors are present), on the other hand, the surviving beneficiaries would have a cause of action against the negligent third party, and would be able to seek damages in addition to whatever other insurance payouts were received.[176] It is this cause of action that courts have taken away from service members.

Additionally, while the military typically pays out the same amount regardless of how a service member dies, some cases of suicide are deemed "misconduct," in which case the surviving family is "denied significant benefits, including a survivor benefit retirement payout to spouses of a lifetime annuity that can total hundreds of thousands of dollars, along with a

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[170] *See* Gries v. Long Island Home, Ltd., 274 A.D. 938 (App. Div. 2nd Dept. 1948); Bramlette v. Charter Med.-Columbia, 393 S.E.2d 914 (S.C. 1990); Vistica v. Presbyterian Hosp. & Med. Ctr., Inc., 432 P.2d 193 (Cal. 1967); Stallman v. Robinson, 260 S.W.2d 743 (Mo. 1953); Sudderth v. White, 621 S.W.2d 33 (Ky. Ct. App. 1981); Darling v. Augusta Mental Health Inst., 535 A.2d 421 (Me. 1987).

[171] *See* Becton v. United States, 489 F.Supp. 134 (D. Mass. 1980); Skees v. U.S. by & Through Dep't of the Army, 107 F.3d 421 (6th Cir. 1997); Liek v. United States, 2017 U.S. Dist. LEXIS 80344 (D. Mass. 2017); Persons v. United States, 925 F.2d 292 (9th Cir. 1991); Purcell v. United States, 656 F.3d 463 (7th Cir. 2011); Siddiqui v. United States, 2019 U.S. App. LEXIS 23442 (6th Cir. 2019); Stubbs v. United States, 744 F.2d 58 (8th Cir. 1984).

[172] Feres v. United States, 340 U.S. 135, 144–46 (1950).

[173] *Id.*

[174] Montgomery, *supra* note 48.

[175] *See id.*

[176] *See supra* Part II.C.

monthly tax-free stipend from the Veterans Affairs Department."[177] In order to make this determination, the military performs a Line of Duty Investigation to ascertain whether the deceased was of sound or unsound mind.[178] If the former, the act of suicide is deemed misconduct.[179] Thus, those conducting Line of Duty Investigations, who incidentally have no medical or mental health training, are forced to either find that their fellow service members were of unsound mind (which can be difficult if there is no medical history of mental health issues), or find that the deceased was of sound mind, knowing that the result will be to deny the surviving family members significant benefits.[180] As such, these investigations have become increasingly problematic both in process and results.[181] While most suicides are ultimately not deemed misconduct, approximately ten percent are, meaning that those families are denied most of the benefits that they otherwise would have received if their family member had been "of unsound mind."[182]

The double recovery rationale is therefore problematic when applied to active-duty military suicide. Yes, often families are allowed to recover upon the death by suicide of the family service member. Other times, however, they are not. When the suicide is partially the result of third-party negligence, the question becomes even more complex. But allowing these families to have their day in court would not require allowing them to recover twice. An easy solution to the double recovery issue is to reduce the amount of damages awarded by the amount received by the military. That way, beneficiaries can still receive damages for the harms to their loved ones, while preserving the second goal of the tort system: deterrence of similar future acts.

B. The Civilian Suicide Liability Factors Applied to Military Suicide Cases

Active-duty military suicides implicate the two main factors courts have considered in holding third parties liable for civilian suicide victims' deaths: foreseeability of the suicide and whether the suicide victim was in the custody and control of the third party.[183] As military suicide rates have risen to record highs over the past decade,[184] it should be increasingly foreseeable that

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[177] *See supra* Part II.C.

[178] Aaron L. Lancaster, *Line of Duty Investigations: Battered, Broken and in Need of Reform*, 225 MIL. L. REV. 597, 610 (2017).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *See supra* Part II.C.

[184] Kime, *supra* note 38.

service members, both individually and collectively, are at a risk for suicide. Additionally, military personnel undergo regular psychological examinations,[185] so identifying individuals at risk for suicide is possible to a greater degree than with civilians.

Active-duty military are also under the "custody or control" of those responsible for them in ways unique to the military. Active-duty service members must request leave, cannot travel a certain distance from base unless on leave, and are required to inform their supervisors when they depart for and return from leave.[186] Not only is much of their time scheduled, but relatively minor deviations from that schedule can result in a service member being declared Absent Without Leave (AWOL).[187] Further, for at least the first few years of service, enlisted service members who are unmarried are required to live on base in barracks or dormitories.[188] The custody and control the military exerts over its personnel is, therefore, arguably closer to that of institutionalized patients than that of outpatients. And in cases of civilian suicides, both institutions and individual mental health professionals have been found liable.[189] This Note proposes that similar liability should be applied, in certain cases, to non-medical military personnel as well. The civilian suicide liability factors are particularly applicable to the military and should be used to allow surviving beneficiaries to recover damages for third-party negligence of any other service member that results in an active-duty suicide.

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[185] Mil. Health Sys., *Periodic Health Assessment*, HEALTH.MIL, https://health.mil/Military-Health-Topics/Health-Readiness/Reserve-Health-Readiness-Program/Our-Services/PHA [https://perma.cc/R24Z-7LPG] (stating that the Periodic Health Assessment, which includes a "[b]ehavioral health screen," is completed annually).

[186] *Military Leave: What it is and How it Works*, U.S. DEP'T OF DEF. MILITARY ONESOURCE (May 6, 2020, 8:59 PM), https://www.militaryonesource.mil/military-life-cycle/new-to-the-military/getting-settled/military-leave-and-how-it-works [https://perma.cc/2343-FYYT].

[187] *See* Rod Powers, *AWOL and Desertion: Maximum Punishments*, THE BALANCE CAREERS (updated Nov. 29, 2018), https://www.thebalancecareers.com/awol-and-desertion-3354177 [https://perma.cc/2FGW-A4HM] (providing a list of punishments for going AWOL under Article 86 of the Uniform Code of Military Justice).

[188] Rod Powers, *US Military Housing, Barracks, and Housing Allowance*, THE BALANCE CAREERS (last updated Sept. 12, 2019), https://www.thebalancecareers.com/what-the-recruiter-never-told-you-3332705 [https://perma.cc/CF2K-YVAW] (explaining that single enlisted service members in each branch of the military typically spend the first few years of service residing on-base in the dormitory, or barracks).

[189] Williams, *supra* note 54, at 302.

1. Foreseeability

The element of foreseeability requires that the third party either knew or should have known that the patient was suicidal as judged by a reasonable person standard.[190] One court stated that "the foreseeability of a decedent's suicide is legally sufficient . . . if the deceased had a history of suicidal proclivities, manifested such proclivities in the presence of defendant, or was admitted to the defendant's facility because of a suicide attempt."[191]

The previous section describes the circumstances under which Kelly Persons and Addison Becton Jr. committed suicide: Persons sought help from the Balboa Naval Hospital after he attempted suicide by cutting his wrists. The hospital treated his wounds, but never even admitted him for observation. Three months later, Persons committed suicide.[192] Addison Becton Jr. was admitted to the medical dispensary for exhibiting suicidal tendencies three days after he enlisted.[193] Medical personnel treated his arm wounds and released him to a different unit for a psychological evaluation.[194] Two days later, Becton climbed to the top of a building and jumped. He died a month later, having never regained consciousness.[195]

Recall again the facts of *Skees v. United States by & Through Department of the Army*,[196] which are especially disheartening: John Skees was admitted to the Ireland Army Community Hospital. Skees told them that he intended to kill himself and had already written a suicide note. Hospital physicians diagnosed him with "Adjustment Disorder with Mixed Emotional Features and Passive Aggressive Traits" and discharged him shortly thereafter.[197] A few days later, Skees informed his Platoon Sergeant, Daniels, that he intended to commit suicide, and even showed him the weapon he planned to use.[198] Daniels neither confiscated the weapon nor took any other preventative measures. Neither did Daniels' superior officers.[199] "When Skees informed Daniels for the third time that he intended to end his life, Daniels contacted Ireland Army Community Hospital, but the hospital said

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[190] Patricia C. Kussmann, Annotation, *Liability of Doctor, Psychiatrist, or Psychologist for Failure to Take Steps to Prevent Patient's Suicide*, 81 A.L.R.5th 167, *4.

[191] Foster v. Charter Med. Corp., 601 So.2d 435, 440 (Ala. 1992).

[192] Persons v. United States, 925 F.2d 292, 294 (9th Cir. 1991).

[193] Becton v. United States, 489 F. Supp. 134, 135–36 (D. Mass. 1980).

[194] *Id.*

[195] *Id.*

[196] *See supra* Part I.

[197] *See supra* Part I.

[198] *See supra* Part I.

[199] Skees v. U.S. by & Through Dep't of the Army , 107 F.3d 421, 422 (6th Cir. 1997).

they could do nothing for Skees."[200] Skees committed suicide the following day.[201]

There is no argument that the suicides of Kelly Persons, Addison Becton Jr., and John Skees were not only foreseeable, but that other military personnel had actual knowledge that the servicemen were at a high risk for suicide. If those men had been civilians, their suicides would have certainly satisfied the foreseeability factor.

2. Custody and Control

The other key factor courts often use in determining whether a third party may be liable for a person's suicide is whether the deceased was in the third party's custody or control.[202]

> Custody of the suicide victim, whether actual or constructive, constitutes evidence of the defendant's voluntary assumption of care of the suicidal person. Further, custody means that the suicidal person has lost some of his freedom to take steps to care for himself. Thus, it follows that in situations where the defendant has effectively taken custody of, or exercises control over, a suicidal person, then the defendant has assumed that person's duty of self-care.[203]

In the case of active-duty military suicides, the suicide victim is always in the custody and control of the military to some degree. After all, active-duty military personnel are required to be certain places at certain times, are not allowed to take leave without permission, and generally live under a far greater degree of custody and control than someone not in the military.[204] Realistically, military personnel exist in a state somewhere between the degree of custody or control exerted over prison inmates or hospital inpatients and that of the average citizen.

In several cases of military suicides, however, the victim was undisputedly being held in the custody of military personnel, as in the case of Addison Becton Jr., who committed suicide while being held in the Medical Survey Unit while awaiting his discharge.[205] Likewise, John Skees

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[200] *Id.*

[201] *Id.*

[202] Williams, *supra* note 54, at 309.

[203] *Id.* at 310.

[204] *See Military Leave*, *supra* note 186.

[205] Becton v. United States, 489 F.Supp. 134, 135–36 (D. Mass. 1980).

had been in the custody of the Army hospital, but hospital staff released him despite him telling them outright that he was suicidal.[206]

In *Purcell v. United States*, Michael Purcell was not in the custody of military medical personnel, but rather that of DOD police officers.[207] Someone had informed the base that Purcell had a gun and was threatening suicide.[208] When DOD police officers went to his residence, they found evidence of a gun, but not the gun itself.[209] The officers handcuffed Purcell to take him into custody.[210] However, when he asked to use the bathroom, one of the officers uncuffed his hands.[211] The officers had one of Purcell's friends accompany him to the bathroom, at which point Purcell pulled a gun from his waistband and shot himself in the chest.[212]

Courts in several jurisdictions have found liability in cases of civilian suicides when a suicide was foreseeable, and the victim was in the custody and control of a third party.[213] Sometimes, these factors are indisputable; sometimes they present a triable question of fact for a jury.[214] But the families of the victims at least have the opportunity to seek damages for the negligence that resulted in their loved ones' deaths. Under *Feres*, no degree of foreseeability or custody and control will ever lead a court to find a third party liable for a military serviceperson's suicide. The following section explores various solutions to this injustice.

IV. RESOLUTION

The unpopularity of the *Feres* doctrine has generated countless conversations about how best to address the problems it has created. Some argue for amending the FTCA, while others insist that *Feres v. United States* must be overturned by the Supreme Court.[215] However, as recently as May 2019, the Court denied the petition for a writ of certiorari in *Daniel v. United States*, a *Feres* case involving a Navy lieutenant who died due to medical malpractice while giving birth at a naval hospital.[216] Only Justices Ginsberg

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206 Skees v. U.S. by & Through Dep't of the Army, 107 F.3d 421, 422 (6th Cir. 1997).
207 Purcell v. United States, 656 F.3d 463, 464–65 (7th Cir. 2011).
208 *Id.*
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.* at 466.
213 *See supra* Part II.C.
214 *Id.*
215 Popper, *supra* note 19, at 1540.
216 Daniel v. United States, 139 S. Ct. 1713 (2019).

and Thomas dissented from the denial.[217] This refusal to hear a *Feres* case makes it appear extremely unlikely that the Court will overturn *Feres* any time soon.

In addition to the judicial solution, much of the existing *Feres* scholarship calls for Congress to amend the FTCA in order to clarify its intent regarding military tort claims.[218] This Note likewise advocates for this solution but adds a specific call for the civilian factors regarding third-party liabilities in suicide to be applied to the military, generating a heightened standard of care for third parties in cases of active-duty military suicides.

Thus, it is left to Congress to fix the *Feres* doctrine by amending the FTCA. Unfortunately, Congress has attempted several times to amend the FTCA, always without success.[219] The SFC Richard Stayskal Military Medical Accountability Act of 2019 is currently being considered in the Senate, with a companion bill in the House.[220] However, the current bill is almost identical to a bill from ten years ago, the Carmelo Rodriguez Military Medical Accountability Act of 2009, which failed to pass both houses.[221] As the titles of the bills suggest, the aim is increasing military medical accountability by specifically allowing military personnel to file claims for medical malpractice against the military under the FTCA.[222] As stated above in Part II.E., the NDAA now authorizes service members to recover for certain acts of medical malpractice.[223] However, the limitations to recovery are considerable and would likely not provide adequate recovery in instances of suicide.[224]

Additionally, in terms of military suicides, these bills do not go far enough. While active-duty military suicides are often the result of medical malpractice, there are also situations where non-medical military personnel are negligent, resulting in a serviceperson's suicide.[225] There are also cases

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[217] *Id.* at 1713–14.

[218] *See, e.g.*, Popper, *supra* note 19, at 1540–43; Feldmeier, *supra* note 102, at 178–80; Katherine Shin, *How the Feres Doctrine Prevents Cadets and Midshipmen of Military-Service Academies from Achieving Justice for Sexual Assault*, 87 FORDHAM L. REV. 767, 803–05 (2018); Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 431–35 (2010).

[219] Feldmeier, *supra* note 102.

[220] S.2451, 116th Cong. (2019); H.R.2422, 116th Cong. (2019). At the time of this Note's publication, the most recent activity among either bill was in September 2019. *See* Bill Record of S.2451, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/2451/ [https://perma.cc/BT58-YMP7].

[221] H.R.1478, 111th Cong. (2009).

[222] *Id.*; S.2451, 116th Cong. (2019); H.R.2422, 116th Cong. (2019).

[223] *See supra* Part II.E.

[224] *See supra* Part II.E.

[225] *See* Purcell v. United States, 656 F.3d 463, 465–66 (7th Cir. 2011); Stubbs v. United States, 744

where the negligence of a superior officer is arguably greater than that of military medical personnel.[226] In those cases, the ability to sue for medical malpractice would be of little to no use.[227] Instead, this Note proposes that Congress amend the military exception to the FTCA in a more comprehensive manner, looking at all of the ways in which courts have interpreted the FTCA to bar suits by military personnel. Part III of this Note introduced Professor Andrew Popper's solution targeting seven specific categories of harms, relief for which is currently barred by *Feres*.[228] To recap, his exceptions are:

1. Sexual assault.
2. Rape.
3. Extreme physical violence or acts that fall within the definition of torture, domestic violence, and child abuse.
4. Acts of clear or gross medical malpractice.
5. Exposure of service members to pharmaceuticals, narcotics, or toxins *without informed and voluntary consent.*
6. While in military service, acts of driving under the influence of drugs or narcotics on more than one occasion.
7. Acts or patterns of invidious discrimination on the basis of race, religion, ethnicity, or gender.[229]

This list is limited to those causes of action which "do not involve an essential component of military service (and [so] are potentially actionable claims)."[230] As Popper explains, the goal is to avoid allowing causes of action that do involve an essential component of military service and thus implicate military decision-making, chain-of-command issues, and military discipline.[231]

This Note proposes adding a category to Popper's list of exceptions: acts of clear or gross negligence resulting in the suicide of an active-duty service member. In this context, clear or gross negligence would be that conduct which violates a standard of care derived from the civilian suicide cases. If a service member and the third party had the requisite "special relationship," the suicide was foreseeable, and the suicide victim was in the custody and

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F.2d 58, 60 (8th Cir. 1984).

[226] *Stubbs*, 744 F.2d at 59; Skees v. U.S. by & Through Dep't of the Army, 107 F.3d 421, 422 (6th Cir. 1997).

[227] *See supra* Part II.E.

[228] Popper, *supra* note 19, at 1542–43.

[229] *Id.*

[230] *Id.*

[231] *Id.* at 1541.

control of the third party, the third party could be held liable for the service member's suicide. Allowing suits for claims based on suicide resulting from "undeniable misconduct seem[] unlikely to prompt insubordination or a collapse of order and discipline. Instead, it is far more likely that . . . amending the FTCA will give justice to victims of wrongdoing and deter future misconduct."[232]

V. CONCLUSION

For almost seventy years, the *Feres* doctrine has been the source of countless injustices against military service members and their families. Among these injustices is the inability of surviving beneficiaries to recover for third parties' negligent actions resulting in their loved ones' suicides. It is time for Congress to act and to sound the death knell for *Feres* once and for all.

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[232] *Id.*