THE *FERES* DOCTRINE AND ACCOUNTABILITY

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"Judicial review of administrative action is a crucial aspect of this democratic project. If officials are not subject to the law, then democracy is a sham. We simply elect our dictators."[1]

PART I – INTRODUCTION

In the landmark decision *Feres v. United States*, the Supreme Court ruled that military personnel could not be held civilly liable for wrongs they commit against other military personnel.[2] The decision, handed down in 1950, was a judicial overhaul of the Federal Torts Claims Act (FTCA), a statute which makes government employees—and their agencies—liable for harm-producing behavior.[3] Military personnel, as government employees,[4] fall squarely within the FTCA's scope.[5] Nevertheless, the *Feres* court held the statute did not apply to them.[6]

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[1] Jerry Mashaw, *Judicial Review of Administrative Action: Reflections Balancing Political, Managerial and Legal Accountability*, REVISTA DIREITO GV 153, 167 (2005). Mashaw, 1

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

[3] The FTCA is codified at 28 U.S.C. § 2671 et seq. The Merriam Webster dictionary defines a "tort" as a "wrongful act other than a breach of contract for which relief may be obtained in the form of damages or an injunction." *Tort*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

[4] B. Guy Peters, *Accountability in Public Administration*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 211, 223, note 4, (2014) (hereinafter "OXFORD HANDBOOK") ("Although certainly different in many respects from others, the military are public employees and must be held to the same (or perhaps higher) standards of accountability.").

[5] While extending the FTCA to service members, Congress exempted "combatant activities" from that statute's scope. 28 U.S.C. § 2680(j) (2018). The limitation wisely protects military personnel from civil liability when engaged in combat.

[6] While not mentioned by the *Feres* court, later cases in the *Feres* jurisprudence have indicated that the rationale for the policy is the preservation of "military discipline." United States v. Johnson, 481 U.S. 681 (1987). According to this line of reasoning, if courts were able to review military managers' conduct in *any* way, military discipline would be

As a consequence, military personnel are the only category of government employee unable to sue when injured by a superior or colleague.[7] The absence of civil liability applies no matter how egregious or purposeful the bad behavior is.[8] Suits pertaining to sexual assault, medical malpractice, and even wrongful death are banned.[9] Expanded by lower courts over the years, the *Feres* doctrine now operates to prohibit virtually all civil suits filed by service members.[10] As the 9th Circuit has noted:

> [T]he *Feres* doctrine is applicable "whenever a legal action 'would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.'"[11]

While commentators have considered the harm being unable to sue causes individual service members,[12] no scholarship has

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compromised. Not surprisingly, military leaders not cited to empirical evidence in support of this proposition.

[7] All other government employees are subject to civil liability for intra-departmental harm they cause. This includes personnel in law enforcement agencies such as the F.B.I., U.S. Marshal Service, and state and local police departments. The military is the only agency where employees cannot sue for intra-agency harm.

[8] As long as the harm is considered "incident to service," it cannot serve as the basis of civil lawsuit. Persons v. United States, 925 F.2d. 292, 295 (9th Cir. 1991). This term has been defined to mean anything a service member does while a member of the military, whether on duty or off. Even murder does not provide grounds for a suit. *See* United States v. Shearer, 473 U.S. 52 (1985) (mother of an off-duty soldier murdered by a fellow soldier cannot sue the perpetrator or the Army itself).

[9] Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013) (dismissing a suit stemming from a sexual assault); Mollnow v. Carlton, 716 F.2d 627, 628 (9th Cir. 1983) (*Feres* doctrine applies to intentional torts as well as negligence); *see also* Dwight Stirling & Dallis Warshaw, *Closing the Courthouse Door to Servicemember Suits: Understanding the Feres Doctrine*. GP Solo, January/February 2018.

[10] Suits alleging violation of statutory protections now fall within the scope of the doctrine, including Title VII of the Civil Rights Act, the Age Discrimination Employment Act, and the Americans with Disability Act. Estes v. Monroe, 120 Cal.App.4th 1347, 1355-1356 (Cal. Ct. App. 2004). *See* also Bowen v. Oistead, 125 F.3d 800, 803-804 (9th Cir. 1997) (describing the doctrine's expansion).

[11] *Bowen*, 125 F.3d at 804 (quoting Hodge v. Dalton, 107 F.3d. 705, 710 (9th Cir. 1997)).

[12] Since its inception, the *Feres* doctrine has been sharply criticized by scholars and lower court judges alike. Melissa Feldmeir, *At War with the Feres Doctrine: the Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 Cath.U.LR. 145, 147, n.17 (2011). The most famous criticism was lodged by Justice Scalia in his dissenting opinion in U.S. v. Johnson. 481 U.S. at 692. As explained elsewhere, I find the criticism

been written examining the other side of the coin, the effect being immune from civil liability has on *military managers*. Under *Feres*, military managers do not face the possibility of answering to a court of law with regard to their personnel decisions. Adverse actions such as wrongful termination, whistleblower retaliation, and denial of due process are disallowed.[13] How does universal immunity impact the behavior of the hundreds of thousands of military officials in "civilian-like" positions? What influence does it have on the decision-making process of those working in financial services, logistics, medical services, public relations, information technology, and legal services?[14] It stands to reason that a policy that allows a colonel (superior) to fire a sergeant (subordinate) for reporting the colonel's fraud with no fear of civil liability affects the colonel's behavior.[15] The exact nature of the effect, however, has not been examined.

This article fills in the gap. Drawing on insight from social psychology, the literature on public accountability, legal scholarship, and my own 16-year military career, the article makes a startling finding. As a result of the *Feres* doctrine, military managers' day-to-day work environment is ideally suited for institutionalized lawlessness. When officials are forced to justify their actions to an independent third party, they tend to act deliberately, carefully, and thoughtfully.[16] Conversely, when officials are not answerable to an external forum, self-interest takes precedence over conforming to ethical and professional norms.[17] Insulated from the evaluative eye of the judicial branch, managers in the military establishment operate in a setting where

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well-placed. Dwight Stirling & Dallis Warshaw, *Rethinking the Military's Feres Doctrine*, ORANGE COUNTY REGISTER, June 15, 2017, https://www.ocregister.com/2017/06/15/rethinking-the-militarys-feres-doctrine/. It is indeed troubling that those who defend the country in uniform are the only Americans categorically barred from accessing the judicial system.

[13] *Hodge*, 107 F.3d. at 710 (9th Cir. 1997); Jackson v. Tate, 648 F.3d 729, 733 (9th Cir. 2011); *Bowen*, 125 F.3d at 803.

[14] The vast majority of uniformed military personnel are in non-combat-related positions. The so-called "combat support" and "combat service support" sectors comprise roughly 80% of the military's overall strength.

[15] The military is the only organization in American society, governmental, private, or otherwise, where employees cannot sue when injured by co-workers. Aberrational arrangements typically yield aberrational behavior.

[16] Mark Bovens, Thomas Schillemans & Robert E. Goodin, *Public Accountability*, *in* OXFORD HANDBOOK 1, 15.

[17] Jane Mansbridge, *A Contingency Theory of Accountability*, *in* OXFORD HANDBOOK 55, 64.

the potential for abuse of power and corruption is greater than in any other component of the executive branch.[18]

What makes the *Feres* doctrine so fascinating from a scholarship perspective is how out-of-step it is with the United States' founding philosophical principles. Fear of officials abusing their power underpins the American political order. The fear was so visceral at the nation's inception the Founders took the remarkable step of splitting governmental power three ways and pitting the parts against each other.[19] The Founders did this not because they believed public officials were innately untrustworthy. Rather, experience had shown them that "tyranny," the "arbitrary or unchecked exercise of power," is the invariable outcome whenever there are insufficient checks and balances.[20] James Madison called the consolidation of power in a single branch of government "the very definition of tyranny."[21] Montesquieu, Madison's ideological muse, went even further:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR.[22]

Astoundingly, under the judicially-created *Feres* doctrine, military managers' power is unchecked in the precise way the Founders tried to prevent. Relieved of judicial oversight, managers decide for themselves whether their personnel decisions are consistent with controlling legal mandates. The prospect of having to prove the legality of their decisions to a court of law has

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[18] I do not mean to suggest that *all* military managers abuse their power or are corrupt, a preposterous notion. My point, a theoretical one, is twofold: the corrupting influence of unchecked power is significant and the military's organizational structure affords protection to those inclined to engage in abuses.

[19] Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Col.LR. 515, 570 (2015) (explaining that the separation of powers demonstrates "the constitutional commitment to limited rivalrous, and heterogenous government"). Michaels also notes: "For better or for worse, efficiency is not considered a preeminent constitutional value." *Id* at 572.

[20] *Tyranny*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2003). To the Founders, the notion that unchecked power leads to tyranny was as certain as a plate hitting the ground when pushed off a table.

[21] The Federalist No. 47 (James Madison) (Clinton Rossiter ed. 1961) (all subsequent references to this edition) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

[22] *Id.* (quoting Montesquieu) (emphasis in original).

been eliminated. The result is a dynamic of being "above the law," of operating outside of the reach of standard legal norms and standards. Such a dynamic has a corrosive effect on personal ethics, chipping away at one's integrity and sense of duty. Judicial review is in fact so interrelated with principled behavior, the American system of government is essentially unworkable without it: "If officials are not subject to the law, then democracy is a sham. We simply elect our dictators."[23]

The article proceeds in the following manner. Part II examines the impact being unaccountable has on behavior generally. Utilizing insights from social psychology, this section evaluates how not having to answer for one's decisions affects the decision-making process. According to social contingency theory, the "expectation that is one is to justify one's judgments, actions and decisions to others—that one is accountable—has a marked influence on those judgments, actions, and decisions."[24] Unsurprisingly, scholars have found that vindictive, self-serving conduct increases in the absence of a neutral, powerful "accountability forum," where the tendency is to give in to one's dictatorial, "un-angelic" impulses.[25] Part III assesses the role judicial review plays in the accountability framework. Courts of law, it turns out, are *the* most important accountability forums, their power to force public officials to explain themselves—and to issue punishment—unmatched in the American governmental system. Not only does judicial review preserve the rule of law, it also protects popular sovereignty by warning the public about when its agents have violated its trust.

Part IV takes stock of the damage the *Feres* doctrine does to the military's accountability framework. By freeing military managers from judicial oversight, the doctrine allows managers to make personnel decisions with impunity. The entirely predictable result is the abusive usage of reprimands, demotions, investigations, and similar measures to intimidate and punish subordinates perceived as threats or nuisances. None of the remaining mechanisms—vertical supervision, legislative oversight, the inspector general, media reporting—fill the hole created by *Feres*. Part V completes the analysis by taking stock of an example.

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[23] Mashaw, *supra* note 1 at 167. Mashaw also observed that "[d]emocratic governments would surely be incompletely accountable without effective judicial review."

[24] Bovens, *supra* note 16 at 15.

[25] "If men were angels, no government would be necessary," Madison famously noted. The Federalist No. 51 (James Madison).

PART II – HOW UNACCOUNTABILITY AFFECTS BEHAVIOR

I begin by exploring how a lack of accountability affects behavior in general. Social contingency studies which conditions tend to give rise to sound, ethical decisions.[26] The goal of social contingency theory, a subset of social psychology, is to identify the "ideal accountability forum," i.e., the forum that causes actors to behave in the most responsible, principled manner. The theory is premised on the idea that people's behavior is a product of their social environment, that behavior is "contingent" upon the reaction we receive from those around us.[27] If the social response is approving, the actor will deem the behavior appropriate, repeating it the next time around. If there is censure or condemnation, the actor will likely change course next time, choosing another option.

Researchers have found that social acceptance is the primary driver of behavior.[28] Social acceptance, in fact, has proven to be a more important influence on people's conduct than either doing the ethically correct thing or achieving the goal.[29] One scholar observed:

> As people seek approval, as choices are often based on the logic of appropriateness, they will adjust their actions and decisions to societal norms and expectations of appropriate conduct…[D]ecisions by decision-makers are often more influenced by the need for approval and support from important social constituencies than their desire to bring about specific results.[30]

Social contingency theory is relevant to the study of accountability in the governmental sector because public officials,

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[26] Bovens, *supra* note 16 at 14. The authors explain: "The theory generally assumes that the expectation that one is to justify one's judgments, actions, and decisions to others—that one is accountable—has a marked influence on those judgment, actions, and decisions. As people seek approval, as choices are often based on the logic of appropriateness, they will adjust their actions and decisions to societal norms and expectations of appropriate conduct." *Id.*

[27] P.E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model, Advances in Experimental Psychology*, Vol. 25, 335, 331-376 (1992) ("Expectations of accountability are an implicit or explicit constraint on virtually everything people do, 'If I do this, how will others react.' Failure to act in ways for which one can construct acceptable accounts leads to varying degrees of censure, depending on the gravity of the offense and the norms of the society.").

[28] *Id*. at 336.

[29] Johan P. Olsen, *Accountability and Ambiguity*, *in* OXFORD HANDBOOK 110, 106-123.

[30] Bovens, *supra* note 16 at 15.

as human beings, are driven by social acceptance in the same way anyone else is.[31] The acceptance striven for in the public setting is not from friends or acquaintances. Instead, it is from the relevant "accountability forum," be it superiors, the electorate, or external evaluators such as regulators and courts.[32] By showing how certain forums "enhance critical reflection" and "foster precision in judgments" while others lead to selfishness and laziness, the social contingency literature reveals the characteristics of the "ideal accountability forum."[33]

It turns out the ideal forum looks a lot like a judge engaging in judicial review. Scholars say people make the soundest decisions when the "the views of the audience are unknown or known to conflict, the audience is knowledgeable and powerful, and the audience possesses a legitimate right to inquire behind the opinions or decisions."[34] In such situations, one is forced to be careful and deliberate, ensuring his decisions are defensible from a variety of perspectives.[35] Blindly going with one's gut is not good enough, a fool's errand. To achieve the forum's approval, parties must maintain an internal dialogue, considering how each step can be justified if called upon to do so by the forum.[36] The ambiguity surrounding the forum's perspective requires parties to take "the most broadly defensible strategies possible, which in turn, leads to more systematic, even-handed, and integratively complex thinking."[37]

The process of constant reflection and self-checking is called "pre-emptive self-criticism."[38] This mode of thinking has been found to diminish selfishness, deepen circumspection, and increase compliance with accepted standards.[39] It has also been found to make parties more inclined to uphold the rules on which

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[31] P.E. Tetlock, *Social Functionalist Frameworks for Judgment and Choice: Intuitive Politicians, Theologians, and Prosecutors*, Psychological Review 109, p. 456, 451-471 (2002).
[32] Mansbridge, *supra* note 17 at 56.
[33] Bovens, *supra* note 16 at 15.
[34] Mansbridge, *supra* note 17 at 64.
[35] Mansbridge calls this "dynamic accountability." Mansbridge, *supra* note 17 at 63; *see also* Philip E. Tetlock and Jennifer S. Lerner, *Accounting for the Effects of Accountability*, 125 Psychological Bulletin 2, 257, 255-275 (1999).
[36] Tetlock, *supra* note 35 at 257.
[37] Shefali V. Patil, Process Versus Outcome Accountability, *in* OXFORD HANDBOOK 72, 69-89.
[38] Mansbridge, *supra* note 17 at 64.
[39] P.E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model, Advances in Experimental Psychology*, Vol. 25, 335, 331-376 (1992).

they expect to be held.[40] As judges are impartial, knowledgeable, and equipped with the ability "to inquire behind (parties') opinions or decisions," officials subject to judicial review are incentivized to perform pre-emptive self-criticism.[41] Officials who have violated legal norms are invariably exposed over the course of the intensive inquiry process, even the cleverest of crooks unable to escape the court's powerful horns. Judicial review, thusly, is the optimal accountability forum.[42]

Applying social contingency theory to the military's accountability framework, a bleak picture emerges. Relieved from judicial oversight, military managers do not have to be careful or deliberate. Nor do they have to meticulously evaluate their own behavior from a third-party perspective, making sure they can justify their actions broadly, considering "multiple perspectives on the issue and (trying) to anticipate the objections that reasonable others might rise to positions they take."[43] This is because, for managers, the beliefs and biases of the forums to whom they are answerable, their supervisors, are well-known. By rule, supervisors must regularly apprise their subordinates of their expectations and values, face-to-face meetings that are mandated by the military's annual evaluation process.[44]

Accordingly, to be successful, managers need merely conform to their bosses' expectations, shifting "their views in accordance with those of their evaluators."[45] Neither acting ethically nor following the rules is not important in this rubric. Instead, "giving the boss what he wants" becomes the path to organizational success, a mindset of buttering up.[46] As one scholar observed, "conformity confers political cover, regardless of whether the chosen processes yield negative or positive outcomes."[47] The focus is on formulating justifications they know their bosses will find acceptable as opposed to acting in a principled manner.[48]

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[40] Tetlock, *supra* note 35 at 257.
[41] *Id.*
[42] Bovens, *supra* note 16 at 15.
[43] Tetlock, *supra* note 35 at 257.
[44] Army Regulation 623-3, Evaluation Reporting System, Chapter 2.
[45] Patil, *supra* note 37 at 78.
[46] Tetlock, *supra* note 35 at 257 (observing that when the views of the forum are known, "[p]eople can simply adopt positions likely to gain the favor of those to whom they are accountable…")
[47] Patil, *supra* note 37 at 78.
[48] Mansbridge, *supra* note 17 at 64; *see also* Tetlock, *supra* note 35 at 257 ("When audience views are known prior to forming one's own opinion, conformity becomes the likely coping strategy.")

PART III – JUDICIAL REVIEW AS AN ACCOUNTABILITY MECHANISM

Mindful of how a lack of accountability affects behavior, we turn now to the role judicial review plays in the public accountability framework.[49] As mentioned above, it turns out that judicial review virtually embodies the ideal accountability forum. Through it, courts of law scrutinize the actions of the two other branches of government, the executive and legislative, for compliance with the Constitution, statutes, and judicial precedent.[50] Actions deemed inconsistent with law are invalidated. Most commentators view judicial review as the Constitution's most potent structural check on public officials, particularly executive officials.[51]

Judicial review derives its value from three factors:(1) its role as an accountability mechanism, (2) the support it provides the rule of law, and (3) how it strengthens popular sovereignty. Each are discussed in turn.

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[49] Public accountability scholars have designed a mode of analysis which asks: "who is accountable to whom, for what, by which standards, and why?" The components include the "accountable actor," the party who must render an account. Another part is the "accountability forum," the person or entity to whom the account must be given. The other factors are the nature of the conduct which must be accounted for, the evaluation standards, and the nature of the obligation, that is, why the actor feels compelled to give an account in the first place. Bovens, *supra* note 16 at 10-12.

[50] "Judicial review by independent courts has long been understood as one mechanism for keeping the government within the limits of its power." David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 Georgetown L.J. 735, 723-801 (2009). Early critics of the Constitution in fact worried the power to overturn void actions of the executive branch made the judiciary too strong, superior in force to either congress or the president. Some modern scholars agree. Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 3–6, at 302–11 (3d ed. 2000). The concern centers around judges' protection from the electoral process as well as their lifetime tenure. Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 935–42 (2001).

[51] Law, *supra* note 50 at 735 (noting the importance of judicial review in "keeping the government within the limits of its power."); *see also* Carol Harlow, *Accountability and Constitutional Law*, *in* OXFORD HANDBOOK 199-201, 195-210.

A. Judicial Review Is an Essential Accountability Mechanism

To Madison, the biggest challenge in designing a democratic republic was finding a way to "oblige (the government) to control itself."[52] The danger lay in the darker aspects of human nature, the tendency of people to act like tyrants if given the chance.[53] Elections, while essential, were not enough—"experience has taught mankind the necessity of auxiliary precautions."[54] What Madison called "auxiliary precautions," contemporary scholars refer to as "accountability mechanisms."[55] Defined as a "relation or arrangement in which an agent can be held to account by another agent or institution," accountability mechanisms are the structural measures that keep public officials within the limitations of their delegated authority.[56]

Accountability mechanisms have three essential elements. Forums must have the ability to (1) make parties appear before them, (2) inquire as to "the adequacy of the explanation or the legitimacy of the conduct" of the parties, and (3) impose punishments.[57] Courts of law fulfill all three dimensions, virtually embodying each component. Parties' attendance is ensured through coercive instruments, including bench warrants, subpoenas, and sanctions. The resistant find themselves picked up by law enforcement personnel and sitting in a jail cell. Reluctance tends to soften when one's liberty is at stake, an effective method of obtaining compliance. Courts' ability to make parties answer questions about their behavior is likewise without peer. Opposing attorneys can press their claims during depositions and cross-examination, proceedings conducted under the penalty of perjury. The open and exhaustive inquisitorial process discourages deceit. Documents and other incriminating materials must also be turned over to the opposing side. A form of compelled transparency, the discovery process levels the

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[52] The Federalist No. 51 (James Madison).

[53] John Adams famously wrote that "all men would be Tyrants if they could." Scholars have observed that Adams, whose shadow is cast across the Constitution, "remained convinced that human nature was inherently selfish and self-serving." Darren Stoloff, HAMILTON, ADAMS, JEFFERSON: THE POLITICS OF ENLIGHTENMENT AND THE AMERICAN FOUNDING 141 (2005).

[54] The Federalist No. 51 (James Madison).

[55] Mark N. Franklin, Stuart Soroka & Christopher Wlezien, *Accountability and Democracy*, *in* OXFORD HANDBOOK 389, 389-404.

[56] Bovens, *supra* note 16 at 8 (Social contingency theory "generally assumes that the expectation that is one is to justify one's judgments, actions and decisions to others—that one is accountable—has a marked influence on those judgments, actions, and decisions.").

[57] *Id.* at 9.

playing field, enabling the politically weak to stand face-to-face with powerful players. As to penalties, courts hand down money judgments, injunctions, and contempt-of-court orders. Because the risks are so severe, giving in to its demands becomes practically inevitable. Those failing to do so usually pay a heavy price.

Assessing the role judicial review plays as an accountability mechanism, one scholar observed: "No functioning democracy worthy of its name has found the primary alternative accountability mechanisms [to judicial review], political or managerial control, adequate to the task of sustaining democratic accountability.[58] Another said:

> [Judicial review's] importance to democracy is that (it) establishes the accountability of the state for publicly knowable laws, while empowering citizens to use law to hold agents of the state accountable. This is why the standing that citizens have to sue agents of the state for harm or failures to uphold laws is a key indicator of the extent and depth of democratic accountability.[59]

B. Judicial Review Protects the Rule of Law

Judicial review also supports the rule of law. "The most basic tenet of a strong 'rule of law' regime," observed a commentator, "is that the exercise of all power within the system is, in principle, limited by law."[60] Power can only be "limited by law," though, if there is an independent party assessing whether a violation has occurred in the first place.[61] Since *Marbury v. Madison*, this responsibility has been assigned to the judicial branch, the final arbiter of what the law *is*.[62] By keeping officials within the limits of their delegated authority, courts ensure the executive and legislative branches stay true to the Founders' vision, a "government of laws, not of men."[63] Without judicial

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[58] Mashaw, *supra* note 1 at 167.
[59] Mark E. Warren, *Accountability and Democracy*, *in* OXFORD HANDBOOK 47, 39-54.
[60] Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 Yale Law and Policy Review, 361, 382 (1993).
[61] William W. Gwyn, THE MEANING OF THE SEPARATION OF POWERS 128 (1965).
[62] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[63] John Adams memorialized this expression in the Massachusetts Constitution.

review, the delicate arrangement falls apart.[64] "For this reason," a scholar remarked, "'democracy' and 'rule of law' have become inextricably linked, with judicial review the keystone of the legal accountability system."[65]

The process is elegant in both its simplicity and efficacy. Congress crafts the rules that administrative officials must follow while judges determine compliance:

> Congress prescribes the procedural and substantive requirements for administrative agencies, appropriates or withholds funds, confirms or rejects presidential appointees, and exercises oversight via hearing and investigations. *And, of course, the judiciary determines agency compliance with constitutional and statutory requirements*.[66]

If courts did not perform judicial review, there would be no way to objectively evaluate whether a rule has been broken. The result would be a situation where "the King is law," as Thomas Paine observed in *Common Sense*.[67] Lacking a binding quality, laws would change from rules punishable by state-administered penalties to mere suggestions,[68] In this way, judicial review gives the rule of law its punch. As Erwin Chemerinsky observed, "Without judicial review, there is no way to ensure that Constitution and federal laws are supreme."[69]

C. Judicial Review Strengthens Popular Sovereignty

Finally, judicial review helps preserve democratic control over the executive branch.[70] Democratic governance, at its foundation, involves a delegation of power to agents, the reposing of the use

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[64] John Uhr, *Accountable Civil Servants*, *in* THE OXFORD HANDBOOK 230, 226-241 (explaining that "legal accountability" is "one expression of public accountability typically put in place by the legislature to promote officials' adherence to the rule of law.").

[65] Mashaw, *supra* note 1 at 153

[66] Michaels, supra note 19 at 533 (emphasis added).

[67] Thomas Paine, COMMON SENSE (1776).

[68] Emphasizing the act of a "lawful judgment," the Magna Carta envisioned an independent judicial system: "The No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land. Article 39, Magna Carta (1215).

[69] Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stanford L. Rev. 1201, 1211 (2001).

[70] A commentator said: "(Judicial review's) importance to democracy is that (it) establishes the accountability of the state for publicly knowable laws, while empowering citizens to use law to hold agents of the state accountable. This is why the standing that citizens have to sue agents of the state for harm or failures to uphold laws is a key indicator of the extent and depth of democratic accountability." Warren, *supra* note 59 at 47.

of force in a select set of individuals that establish collective standards.[71] The delegation is based on the belief the grant of authority will be a net positive, increasing the order, safety, and prosperity in day-to-day life.[72] Government is only necessary because people cannot live in peace without it.[73]

The challenge is to keep agents within the confines of their delegated power. Quickly and reliably identifying misbehavior is critical.[74] If people know about agents' misconduct, they can take steps to address it, such as voting the rogue parties out of office or establishing stronger institutional controls.[75] "[T]here may be no better way for the people to prevent government tyranny and abuse than to threaten a tyrannical and abusive government with loss of power," Professor Law noted.[76] It is when people *do not know* about their agents' misdeeds that they are susceptible to serious harm. Neither elections nor constitutional amendments are useful in controlling corrupt officials if the public does not know the officials are corrupt in the first place.[77]

Judicial review solves this information problem. When courts scrutinize the propriety of public officials' behavior, they provide the public with timely, accurate, low-cost information about their agents' conduct.[78] A judicial determination that an official has

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[71] *Id.* at 40.

[72] Thomas Hobbes described the alternative to government as the "state of nature," a circumstance he called "solitary, poore, nasty, brutish, and short." Professor David Law describes it as "a chaotic state in which people employ violence against one another without any kind of organized external restraint, in a perpetual war of all against all." Law, *supra* note 50 at 734.

[73] Most political scientists and social psychologists accept that a certain darkness lurks within human nature, an incurable inclination toward violence and oppression. Our Founders certainly did. "If men were angels," Madison wrote, "no government would be necessary." The Federalist No. 51 (James Madison). "All men would be Tyrants if they could," observed Adams. STOLOFF, *supra* note 53, at 141.

[74] Arthur Lupia & Mathew D. McCubbins, *Representation or Abdication? How Citizens Use Institutions To Help Delegation Succeed*, 37 EUR. J. POL. RES. 291, 298–99 (2000) (identifying the conditions that must be satisfied in order for a principal to delegate successfully to an agent).

[75] Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 168, 171–76 (1984).

[76] Law, *supra* note 50 at 765.

[77] Professor Law noted that relying on officials to report their own misbehavior is not realistic: "[T]he people of any given country would be unwise to rely upon self-reporting by the government, for the simple reason that the government has an incentive to conceal bad behavior and will be an unreliable source of information about its own misconduct." Law, *supra* note 50 at 746.

[78] Arthur Lupia & Matthew D. McCubbins, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 81 (1998).

violated societal standards has a "fire alarm" effect, warning the public that danger is afoot.[79] Courts' independence, expertise, and credibility make them particularly effective at performing this role. As Professor Law noted, "Here and in other countries, courts tend to enjoy higher levels of public confidence than either the media or the national government. Such confidence is crucial if a given institution is to function effectively as a fire alarm: people are more likely to heed the message if they trust the messenger."[80]

The Federal Tort Claims Act ("FTCA") bolsters the alarm feature of judicial review. By exposing public officials to civil liability for misconduct, those who are harmed by public officials are incentivized to report the misbehavior. "The creation of a legal system in which it is in the interests of a party that believes it has not been treated [lawfully] to seek recourse to the courts in an effective means for dealing with [the] problem" of monitoring officials' conduct."[81] Contingent fee arrangements minimize out-of-pocket costs.[82] By exposing civil servants to tort liability, the FTCA eliminates the need for law enforcement personnel to "patrol the halls of government for acts of misconduct," an inherently costly and inefficient oversight tactic.[83] In the event a lawsuit turns up serious breaches, media outlets broadcast the information to a large swath of the public, amplifying the siren effect.[84]

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[79] Significantly, without judicial assistance the media is not well-positioned to ferret out misconduct. Professor Law observed: "In particular, the media and other private monitoring institutions are vulnerable to government manipulation in ways courts are not. For information about the government, the press must rely to a significant extent upon what the government itself chooses to disclose. The government can be expected to provide the media with a selective and self-serving account of its own activities, to reward sympathetic journalists with preferential access to information, and perhaps even to suppress or censor unfavorable coverage." Law, *supra* note 50 at 753.

[80] *Id.*

[81] Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, *in* IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173, 198 (Judith Goldstein & Robert O. Keohane eds., 1993).

[82] A contingent fee is an attorney-client arrangement where the client does not pay an hourly fee. Instead, if there is a financial recovery, the attorney takes a percentage of it, usually 33%, in way of attorneys fees.

[83] Law, *supra* note 50 at 748 (remarking that the "police-patrol approach is inherently resource-intensive, if not wasteful").

[84] Law, *supra* note 50 at 752 ("[C]ourts provide grist for the media by hearing disputes and rendering decisions that are of potential interest to the public…the efforts of the media and the courts combine to offer the best of both police-patrol and fire-alarm oversight: the media act as a police patrol that generates judicial fire alarms.").

Government employees are equally incentivized to sue when wronged by their superiors.[85] The information emanating from intra-governmental lawsuits provides the public a reliable method of learning about retaliation, abuse of power, or other transgressions transpiring within the public sector. Most servants are not overly beholden to their bosses, sufficiently autonomous to challenge a retaliatory demotion or other abusive action when necessary.[86] As one scholar noted, "Civil servants' loyalties generally lie with their professional communities (as trained biologists, lawyers, engineers, etc.), the programs they advance, and the organizations they serve."[87] The FTCA's effect is to deputize public employees as government watchdogs, giving rise to a dynamic where rank and file staff members are encouraged to bring judicial attention to their superiors' violations of law.[88] The result is a structure where administrative agencies largely police themselves.

PART IV – THE MILITARY'S ACCOUNTABILITY FRAMEWORK

Having taken stock of the role judicial review plays in the standard accountability framework, our examination shifts to the military's accountability framework—one which does not contain judicial review. The objective is to determine whether the remaining mechanisms in the framework hold military officials to answer in a meaningful way. If so, the absence of judicial oversight is not overly concerning. If not, there is a problem. Mindful of the significant role judicial oversight plays in the civilian governmental setting, our inquiry assesses whether there is something unique about the military that allows it to weather the loss of judicial review in a less harmful manner. Said differently, is there something special about the military that prevents its managers from becoming "dictators" when not held to the rule of law by the civilian judiciary? The answer turns out to be no.

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[85] Michaels, *supra* note 19 at 543 (observing that "the independent and much relied-upon civil service has institutional, cultural, and legal incentives to insist that agency leaders follow the law").
[86] Donald P. Moynihan & Sanjay K. Pandey, *The Role of Organizations in Fostering Public Service Motivation*, 67 Pub. Admin. Rev. 40 (2007).
[87] Michaels, *supra* note 19 at 544.
[88] Daniel Carpenter, THE FORGING OF BUREAUCRATIC AUTONOMY 26-33 (2001). Judicial review also performs a "coordinating function" by enabling the public to a reach a consensus of the steps which must be taken to keep control of the government. Court decisions facilitate widespread, unified action by affecting the beliefs people have about how their agents' trustworthiness and fidelity. Law, *supra* note 50 at 768.

A. *The Civil-Military Gap*

The harm caused by a lack of liability in fact turns out to be more severe in the military context than in the civilian sector. The damage is amplified due to the "civil-military gap," the civilian population's limited understanding of the military's structure, activities, and culture.[89] Less than eight percent of the population having served in the military in any form, with less than 1% serving in uniform at any one time.[90] Lamentably, the gap is particularly wide amongst the societal elite, the well-to-do, well-educated segment of the population occupying most positions of power.[91]

A well-worn adage holds that one cannot monitor what one does not understand. The civil-military gap is a textbook example of this principle. "Whatever the putative reasons behind the nonservice of privileged Americans, our concern is that the gap between the opinion-makers—the cultural, professional, and business elites—and the military is harming us as a country now and may harm us to a greater extent in the future."[92] Unable to draw upon first-hand experience and having "few ways…to gain much direct exposure and knowledge about the military," civilian leaders lack a clear conception of what "right" looks like.[93] The magnitude of the disconnect has grown to the point one scholar observed the military establishment is largely a country unto itself, serving in the armed forces "something other people do."[94]

The civil-military gap causes civilian leaders in watchdog positions and the civilian intelligentsia to pull their punches. When assessing an allegation of misconduct within the military establishment, the military's version of events is largely taken at face value, including the assignment of blame and whether the

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[89] Linn K. Desaulniers, *The Gap that Will Not Close: Civil-Military Relations and the All-Volunteer Force*, 1, Masters Thesis, United States Marine Corps Command and Staff College, May 4, 2009.
[90] Mona Chalabi, *What Percentage of Americans Have Served in the Military?*, Five Thirty Eight, March 19, 2015: https://fivethirtyeight.com/features/what-percentage-of-americans-have-served-in-the-military/. 0.4% of the population is active military personnel. The number rises to about 1% when accounting for reservists. *Id.*
[91] Kathy Roth-Douquet and Frank Schaeffer, AWOL: THE UNEXCUSED ABSENCE OF AMERICA'S UPPER CLASSES FROM MILITARY SERVICE – AND HOW IT HURTS OUR COUNTRY 9 (2009); *see also* Andrew Bracevich, BREACH OF TRUST: HOW AMERICANS FAILED THEIR SOLDIERS AND THEIR COUNTRY 1-41 (2013) (discussing the causes and negative fallout of the civil-military gap).
[92] Roth-Douquet, *supra* note 91 at 7.
[93] Desaulniers, *supra* note 89 at 11.
[94] *Id.* at 19

conduct was legal.[95] Part of this is due to the reverence exhibited generally toward service members.[96] Part is also due to the opaqueness of the military establishment: it constitutes an enigma to most civilians.[97] As a result, when the military says "there is nothing to see here," those in the oversight system are inclined to comply.[98] The passive response is exacerbated when a bona fide military star is the messenger, such as a general in medal-covered uniform. There, the likelihood a thorough inquisitorial process will transpire decreases further, politically ambitious civilians loathe to appear unpatriotic or insufficiently respectful.[99]

B. *External Accountability Mechanisms*

The military's accountability framework consists of a series of external measures: legislature oversight, media coverage, political accountability, and criminal liability (both internal and external). Each will be examined in turn.

1. *Legislative Oversight*

Each of these dimensions is observable in the context of legislative oversight, the monitoring of the military by Congress.[100] Scholars generally view legislative oversight as a weak accountability mechanism, explaining how, with the growth of the administrative bureaucracy, elected officials are simply unable to keep up with the "sheer complexity and diversity of federal responsibilities in modern times."[101] The ineffectiveness of legislative oversight is amplified in the military context. Not having served themselves, members of Congress feel little connection with the armed forces.[102] "The elected representatives of the people no longer act as a tie between the military and the people, feeling no corporateness and allowing the sense that it is the 'other' who serves to build cynically," one scholar noted.[103] The military is mystifying to civilian lawmakers, "a society apart

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[95] Peter D. Feaver and Richard H. Kohn, SOLDIER AND CIVILIANS: THE CIVIL MILITARY GAP AND AMERICAN NATIONAL SECURITY, 8 (2001).
[96] Desaulniers, *supra* note 89 at 17 (observing that 81% of Americans hold the military in either "very great prestige" or "great prestige" according to a Harris poll).
[97] *Id.* at 14 (noting that the "political itself has lost touch with the military world").
[98] Roth-Douquet, *supra* note 91 at 35.
[99] *Id.* at 47.
[100] In the case of state National Guards, the monitoring is performed by state legislatures.
[101] Michaels, *supra* note 19 at 533; *see also* David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION, 554-135 (1995).
[102] Desaulniers, *supra* note 89 at 5.
[103] *Id.* at 7.

from civilian society."[104] Legislators tend to see the military as an entity to be funded and equipped as opposed to scrutinized or questioned.

Elected officials' "hand-off attitude" is visible when a service member asks his member of Congress to conduct a "Congressional inquiry" into a complaint of abuse, misconduct, or corruption.[105] There, the legislator often does little more than send a form letter to the Department of Defense's public relations department asking for an explanation.[106] Upon receipt, the legislator typically forwards the military's response to the service member, which almost always consisting of a blanket denial of the alleged misbehavior. No independent investigation or analysis is performed. Obtaining a formal response to the complaint is deemed a job well done, evidence of the legislator's diligence and concern for the constituent's issue. The inquiry is normally closed once the military's formal response (the blanket denial) is forwarded to the service member, the process having yielded little to no material assistance.[107]

At times, legislators display a willingness to confront military officials about alleged misconduct, a feistiness seen most often in the wake of a heavily publicized scandal.[108] There, legislators attempt to impose accountability by conducting hearings, using the sessions to question senior defense officials about the details of the scandal. The process frequently takes on a futile, "yelling-at-the-ocean" quality. Congress has no authority to remove specific military officials from office or impose individualized punishment.[109] The only meaningful arrows it has in its Constitutional quiver are to reduce the Department of Defense's budget and to add or modify a regulatory statute.[110] Typically, these steps are politically unrealistic. As a result, congressional investigations are more political theatre than serious fact-finding activities.

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[104] Parker v. Levy, 417 U.S. 733, 743 (1974).
[105] Congressional Inquiries, DoD Open Government, http://open.defense.gov/Transparency/Congressional-Inquiries/.
[106] During my military career and while operating as Chief Executive Officer of Veterans Legal Institute, I have observed hundreds of Congressional inquiries.
[107] Ironically, the closing letter frequently includes a line thanking the constituent for his service.
[108] Martin Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, 24, Congressional Research Service (1995).
[109] Roger A. Bruns, CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY 34 (2011).
[110] Alissa M. Dolan, *Congressional Oversight Manual*, Congressional Research Service, 86 (2014).

Consider a 2017 exchange between Senator Gillibrand and General Neller, the Commandant of the Marine Corps. The following dialogue occurred during a congressional inquiry into the Marine Corps' nude photo scandal:

> Senator Gillibrand: So, I have to say when you say to us "it's got to be different," that rings hollow. I don't know what you mean when you say that. Why does it have to be different? Because you all of a sudden feel that it has to be different? Who has been held accountable? I very much align myself with — with Senator Fischer's comments. Who has been held responsible? Have you actually investigated and found guilty anybody? If we can't crack Facebook, how are you, we supposed to be able to confront Russian aggression and cyber hacking throughout our military? It is a serious problem when we have members of our military denigrating female Marines who will give their life to this country in the way they have with no response.
>
> General Neller: I'm still in the — I mean, I don't have a good answer for you. I'm not going to sit here and duck around this thing, I'm not. I'm responsible, I'm the commandant, I own this and we are going to have to you know, you've heard it before, but we're going to have to change how we see ourselves and how we treat each other. That's, that's a lame answer, but ma'am, that's all — that's the best I can tell you right now. We've got to change, and that's on me.[111]

While the Senator's outrage is obvious, equally obvious is her awareness that, as a member of Congress, she lacks the tools to hold the Commandant, the Marine Corps, or the specifics service members who engaged in the misconduct to account in any meaningful way. After a few days of hearings, the congressional inquiry ended quietly, with no action taken.[112] In this way, misconduct that could have been easily handled by the judiciary through a civil litigation went unresolved by Congress. Whereas a court of law could have determined which military personnel sent the photos and the extent of each service members' liability, meting out sanctions with precision and fairness, the episode

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[111] http://miami.cbslocal.com/2017/03/14/angry-senatords-grill-commandant-over-marine-photo-scandal/

[112] Dolan, *supra* note 110 at 86. The process in called a "resolution of inquiry."

thoroughly befuddled Congress. The well-meaning few who took the matter seriously were ultimately incapable of holding anyone accountable for anything.

2. *Media Coverage*

The civil-military gap similarly hamstrings the second external mechanism, media coverage. There, the issue is one of access. Journalists usually find themselves on the outside of a closed system looking in. Statements released through formal public relations channels are usually devoid of revealing details, pro-military messages carefully sculpted to contain little substantive content.[113] Efforts to perform conventional newsgathering techniques are stymied by a lack of familiarity with military terminology, processes, and culture. Structural barriers such as security classifications place key documents out of reach.[114] Useful investigative journalism is usually dependent on the assistance of a whistleblower, a service member willing to share inside information about wrongdoing.[115] Service members, however, are not normally inclined to talk with reporters, abiding by admonishments to refer all media inquiries to the public affairs office. Unlike their civilian counterparts, military whistleblowers are not legally protected from reprisal, unable to sue should they be reprimanded, terminated, or court-martialed as a result of their communications.[116] The lack of protection makes whistleblowing in the military setting a rare occurrence, undercutting media coverage's potency.[117]

From a scholarly perspective, media coverage does not meet any of the definitional components of an accountability mechanism. Journalists cannot obligate military personnel to appear before them, compel answers to their questions, or impose sanctions for bad behavior. Bad publicity and public disapproval

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[113] John Adache, THE MILITARY AND PUBLIC RELATIONS – ISSUES, CHALLENGES, AND STRATEGIES 15 (2014).

[114] Some commentators have argued military officials deliberately "overclassify" harmful documents to remove them from public circulation. David Shapiro, *Reducing Overclassification through Accountability*, 14, Brennen Center for Justice at New York University Law School, 2001.

[115] Elizabeth Goitein, Bradley Manning Didn't Break the Secrecy System, Salon, December 13, 2011: https://www.salon.com/2011/12/13/bradley_manning_didnt_break_the_secrecy_system/.

[116] Elizabeth Goitein, To Fix Leaks, Fix Culture of Secrecy, CNN Online, August 8, 2012: http://www.cnn.com/2012/08/06/opinion/goitein-secrecy/index.html.

[117] David Shapiro, *Reducing Overclassification through Accountability*, 6, Brennen Center for Justice at New York University Law School (2001).

are the major outcomes that can brought to bear.[118] In a well-functioning accountability system, bad publicity can have positive ramifications, leading to legislative reforms, replacement of elected officials, and compensation to victims.[119] Bad press, though, is less impactful in the military context, where officials can easily withstand negative news cycles and political tongue-lashing, shielded by the civil-military gap and the fact that there is no obvious manner for civilian officials to act upon the anger.[120] The wait-it-out approach can be seen in the Marine Corps' response to the photo scandal. After a few days of front page stories, the reporting tapered off, its energy sapped by the absence of additional scoops and the Commandant's flaccid apology. Without civil litigation to cover, reporters ran out of material to write about.[121]

3. *Electoral Accountability*

The third mechanism is electoral accountability, the ability of the public (the principal) to remove elected officials (the agents) by voting.[122] Scholars observe that "[d]emocratic accountability in representative government is the accountability of decision-makers to the electorate," a system that "relies on the existence of a direct line upward from 'we the people' to the government and downward from government to society."[123] Voting is a sensitive accountability mechanism, however. Its efficacy is reliant on the availability of information.[124] The public cannot "throw the crooks out" if they do not know about the crooks' bad behavior. As civil litigation and vigorous media coverage are absent, the public is largely in the dark about the behavior of military officials.[125] To the extent the public does become aware of

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[118] Pippa Norris, *Watchdog Journalism*, *in* OXFORD HANDBOOK 530, 525-541.
[119] *Id.* at 534.
[120] Mark H. Moore, *Accountability, Legitimacy, and the Court of Public Opinion*, *in* OXFORD HANDBOOK 633, 632-646.
[121] Uultimately, a few marines received internal administrative punishment, an indication the media coverage was not a complete failure. http://www.businessinsider.com/marine-sentenced-in-connection-with-marines-united-photo-scandal-2017-7.
[122] Mark N. Franklin, *Elections*, *in* OXFORD HANDBOOK 398, 389-404; *see also* Erik Hans Klijn, *Accountable Networks*, *in* OXFORD HANDBOOK 243, 242-257 ("Elected politicians are responsible for setting policy and can be held accountable by voters in elections.").
[123] Yannis Papadopoulos, *Accountability and Multi-Level Governance*, *in* OXFORD HANDBOOK 274, 273-288.
[124] Warren, *supra* note 59 at 43-44.
[125] Dwight Stirling & Dallis Warshaw, *Rethinking the Military's Feres Doctrine*, ORANGE COUNTY REGISTER, June 15, 2017, https://www.ocregister.com/2017/06/15/rethinking-the-militarys-feres-doctrine/.

internal misconduct such as the photo scandal, the information rarely gives rise to electoral action. To most civilians, the military is the "other," an insular body with which they have little connection or personal stake.[126] Reasoning the generals will figure it out, voters rarely consider problems within the military system as "voting issues" casting ballots. Elections' role in holding military officials to account is negligible as a result.

4. *Criminal Liability in the Civilian Justice System*

Criminal liability in the civilian justice system is the final external mechanism. Civilian prosecutors can indict and try military personnel for criminal conduct the same way they can civilians.[127] District attorneys and U.S. attorneys do not normally take an interest in military crime, however. Instead, they allow the military to police itself through the courts-martial system.[128] Civilian charges are usually reserved to situations where the misconduct occurs in a civilian setting or when civilians are victimized.[129] Civil authorities have scant interest in military personnel actions, matters considered employment-like in nature, managerial decisions falling outside the sphere of prosecutorial scrutiny.[130] Prosecutors are well-positioned to hold a service member to account driving drunk in town, but they are not well-positioned to hold a military manager to account for destroying a subordinate's career with an improperly-issued letter of reprimand.[131] As a consequence, criminal liability in the abuse of power setting is ineffective.

C. *Internal Accountability Mechanisms*

We now examine the military internal accountability mechanisms, assessing whether these measures make up for the absence of judicial review. Does the military regulate itself in the abuse of power context, holding those engaging in illegal or retaliatory conduct to account? The Founders did not believe a

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[126] Desaulniers, *supra* note 89 at 7. Voting is of limited value in the military context, where the relationship between principal and wrongdoer is indirect and attenuated. There are at least three degrees of separation between the public and any offending military official: *public*—president—secretary of defense—service secretary— *offending military official*.

[127] For example, see Charles Piller, *Convicted of Unlawful Sex with Girl, 17, Recruiter Was Kept for Years in National Guard*, Sacramento Bee, August 22, 2011: http://www.sacbee.com/news/investigations/article2573397.html.

[128] Lawrence J. Morris, MILITARY JUSTICE: A GUIDE TO THE ISSUES, 12, 2010.

[129] *Id*.

[130] *Id*.

[131] Gregory Maggs, MODERN MILITARY JUSTICE: CASES AND MATERIALS, 2d., 24 (2015).

governmental entity could internally check itself.[132] Had a president's personal sense of duty and honor, for instance, been deemed sufficient to keep him within the four corners of the law, judicial review of the executive would have been superfluous. That said, has the military establishment cracked the code of the classic dilemma, engineering an internal process of keeping managers from oppressing subordinates? No, it has not.

1. *Command Control*

To see why the answer is no, it is helpful to understand the operational dynamic in the military, including how power is distributed. Organizational power is held by "commanders":

> Commanders are responsible for everything their command does or fails to do…Commanders delegate sufficient authority to Soldiers in the chain of command to accomplish their assigned duties, and commanders may hold these Soldiers responsible for their actions. Commanders who assign responsibility and authority to their subordinates still retain the overall responsibility for the actions of their commands.[133]

As the passage makes clear, commanders make all executive decisions, supervise all primary staff members, and write or approve of all senior-level performance evaluations.[134] Failing to follow a commander's orders or to display sufficient respect exposes service members to severe internal criminal and administrative liability.[135] While individual staff members oversee functional areas such as human resources, finances, operations, and legal services, they answer to the unit commander. Their importance, influence, and power are an outshoot of his.[136] Further, only those receiving a commander's "top block" evaluation will have the ability to move up significantly in the organizational hierarchy, a prize given 10% of a unit's managerial team.[137] Rewarding those they like and censuring those they do not, even mild-mannered commanders cast long shadows,

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[132] The Federalist No. 47 (James Madison).

[133] Army Regulation 600-20, Army Command Policy, Section 2-1(b).

[134] Army Regulation 623-3, Evaluation Reporting System, Section 2.

[135] Morris, *supra* note 128 at 12.

[136] Tellingly, documents by principal staff members are frequently along a phrase such as "by power of the commander," a warning to the recipient to give the matter his full attention.

[137] Gary Sheftick, *Army to Change Officer Evaluation Reports*, U.S. Army Online, Sept. 20, 2012: https://www.army.mil/article/87652/army_to_change_officer_evaluation_reports.

exerting immense leverage over subordinates' current circumstances and future opportunities.

Due to their supreme authority, both units and individual service members tend to take on their commanders' personality as a result, assuming his traits, value system, and idiosyncrasies.[138] This tendency occurs in the ethical realm as well. Principled commanders create atmospheres where staff, managers, and junior personnel are motivated to behave in a virtuous, selfless manner. Unscrupulous commanders, by contrast, bring out the worst instincts in their underlings, giving rise to a dog-eat-dog, anything-goes environment. "Winning" and advancing personal interests takes precedence over doing the right thing in these units.[139]

2. *Supervisor Accountability*

Supervisorial accountability is of limited practical value in holding managers to answer for illegal personnel actions. If senior leaders actively try to root out misconduct and corruption within their ranks, some level of accountability can occur. But in a strict chain-of-command system, there is little structural protection against situations where the fox is guarding the henhouse, that is, where the leader is complicit in the abusive behavior, either directly or indirectly. Whereas courts stand in dynamic tension with executive branch officials such as military personnel, incentivized to right wrongs by constitutional mandate and historical origins, superior officers are not institutionally adverse to the personnel they oversee.

Instead, the interests of personnel within the same supervisorial chain tend to merge, a subordinate's achievements or failures reflecting on the "fitness" of the superior, signs of his effectiveness or incompetence as a leader.[140] While courts of law are singularly focused on distributing equitable results, unit commanders are focused instead on "mission success," their

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[138] I have seen this phenomenon happen time and time again over the course of my military career.

[139] Another factor is the intense top-down pressure for units to maintain "readiness," a state where all positions are filled with personnel possessing the correct qualifications. An unqualified service member sitting on a unit's books brings negative attention to the commander. Under these conditions, abiding by regulatory niceties can yield to expediency in executing personnel actions, a sacrifice made in the name of "accomplishing the mission."

[140] Kaifeng Yang, *Qualitative Analysis, in* OXFORD HANDBOOK 164, 157-176. The unity of interest cuts against bringing outward attention to misconduct, many managers either not wanting to know, not caring, or in the worst case, punishing the party reporting the information.

commitment to equity and fair play decidedly less reliable as a result.[141]

Thus, while vertical supervision projects the appearance of constituting a potent accountability mechanism, it in fact is not. Checking all three boxes of the formal definition—it is able to obligate underlings to give account, answer questions, and submit to sanctions—it is nonetheless a weak instrument. Effective forums are structurally independent from the accountable actor, possess significant inquisitorial and sanctioning powers, and include guarantees of due process.[142] Few things a manager does vis-à-vis a subordinate are impartial or independent, including how he responds to a complaint of abuse of power. The response is processed through the lens of the manager's own interests.

If a whistleblower has been silenced via retaliation, for instance, he faces a conflict of interest, a divergence between the ethically proper course of action (reporting the complaint to the commander for initiation of investigation) and the one most advantageous him personally (doing nothing). There, due process and other procedural protections become nuisances. While some managers can chart principled courses of action in such a situation, structural flaws of this type underscore the weakness of supervisorial accountability as a stand-in for judicial review.

3. *Internal Auditing Measures*

Nor do internal auditing measures fill the void. These measures consist of inquiries and actions by inspectors general, equal opportunity officials, and remedial agencies such as boards of corrections. Military inspectors general are responsible for examining allegations of fraud, waste, and abuse.[143] Although investigations are often detailed, inspectors general, rarely lawyers, have neither subpoena power nor the ability to impose punishment.[144] Unlike civilian judges, they have no special training in evaluating credibility, performing analytical reasoning, or understanding complex concepts such as fundamental fairness.[145] Further, an inspector general's findings and recommendations are advisory in nature, confidential, inter-

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[141] Senior military personnel are evaluated primarily on how much of their stated mission they accomplish. They are rarely if even evaluated on how they respond to complaints of illegal conduct made by subordinates. The system is structured where officials are strongly incentivized to focus exclusively on evaluated behavior to largely ignore other subjects.

[142] Bovens, *supra* note 16 at 9.

[143] Army Regulation 20-1, Inspector General Activities and Procedures.

[144] Army Regulation 20-1, Inspector General Activities and Procedures.

[145] Military inspector generals are normally officers from other functional areas such as logistics or civil affairs who perform 2-3 year "tours," returning to their normal position afterwards.

agency reports forwarded to the commanders for whom they work, who are free to ignore them.[146] The process contains neither the impartiality, objectivity, nor quality of judicial review.

Correction boards are designed to modify military records deemed to be issued in error, including documents containing evidence of illegal personnel actions.[147] Conducting secretive, nonadversarial hearings, these boards review paper petitions and issue nonprecedential decisions.[148] They also lack the authority to sanction wrongdoers, focused only on "remedying" mistakes contained in service members' records.[149] While more objective and professional than inspectors general or equal opportunity officials, correction boards do not approximate the inquiry process of courts of law.

4. *Criminal and Administrative Liability in the Military System*

The final internal mechanism is criminal and administrative liability in the military system. Criminal liability is handed down through courts-martial, deliberative bodies officiated by military judges that mete out confinement and other punishment for serious breaches of the Uniform Code of Military Justice.[150] Adverse administrative action takes the form of terminating, demoting, or reprimanding service members for misbehavior of a more minor nature, the military's version of negative employment action.[151]

Neither mechanism is a serious check on abuse of power and corruption, however. The reason is that both processes are run by commanders:

> The most distinctive procedural feature of the military justice system is that decisions on what to charge, whether to prosecute, and at what level to prosecute are made exclusively by commanders. This reflects the concept that runs throughout the system—that

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[146] Army Regulation 20-1, Inspector General Activities and Procedures, Section 4-6.
[147] Department of Defense Directive 1332.41, *Boards for Correction of Military Records and Discharge Review Boards*.
[148] Army Regulation 15-185, Army Board of Corrections of Military Records, Section 2-11 ("Applicants do not have the right to a hearing before the board.")
[149] Army Regulation 15-185, Army Board of Corrections of Military Records, Section 2-2 ("In appropriate cases, it directs or recommends correction of military records to remove an error or injustice.")
[150] MANUAL FOR COURTS-MARTIAL, Chapter V, *Court-Martial Composition and Personnel; Convening Courts-Martial*.
[151] Morris, *supra* note 128 at 10.

> commanders are in charge, not lawyers other disciplinary officials…commanders enjoy tremendous discretion and near plenary authority to bring charges, pick juries, approve (or disapprove) findings and sentences, and grant clemency.[152]

Controlling the court-martial process and administrative discipline, commanders usually have a conflict of interest when a complaint of retaliation is made. This is because in most occurrences of retaliation, the commander's participation is required. A service member cannot be terminated, demoted, reprimanded, or investigated, for instance, without command approval. While managers can recommend negative actions, commanders are the "action officers." This means that, on many occasions, disciplining the offender would require a commander to discipline himself. Even commencing an investigation is usually not in a commander's best interest, creating a cloud of suspicion which extends to the commander himself, creating questions about his leadership. Riddled with conflicts of interest and ill-designed incentive structures, internal disciplinary measures are not effective at curbing abuses of power.

PART V – AN EXAMPLE

We now observe how the lack of judicial review plays out in a hypothetical situation, one where a military manager must decide how to respond to a complaint by a subordinate.[153] In the scenario, Lieutenant Colonel (LTC) Matthews, the manager of a base's Information Technology (IT) office, has received a complaint from Sergeant (SGT) Peterson, a computer specialist in the office. (The civilian analog is a departmental chief and a junior staff member.) SGT Peterson's complaint pertains to how the IT office responded to a security breach, a response Peterson believes has lackadaisical, leaving the network at serious risk of future attack. LTC Matthews is afraid Peterson will go directly to the base commander, General Jones. Should this happen, it could damage his reputation and decrease his chances of promotion as General Jones is also Matthews' first-line supervisor and evaluator.

In this situation, LTC Matthews has two options. His could order a full-scale reassessment of the IT office's response to the security breach, implementing stricter measures if necessary. The remedial process would be costly, highly visible, and raise uncomfortable questions about his professional competence.

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[152] *Id*. at 4.

[153] The hypothetical scenario is a composite of many similar situations I have observed in my 16-year-military career as an Army JAG officer.

Alternatively, he could retaliate against SGT Peterson, taking steps to undermine the sergeant's credibility. As the threat is to the relationship with General Jones, his accountability forum, damaging the sergeant in the general's eyes would be helpful.

According to social contingency theory, LTC Matthews' decision will be made based on three factors: what he knows about General Jones' views, whether General Jones is knowledgeable and powerful, and how strenuously General Jones will inquire into LTC Matthews' conduct.[154] In our fictional scenario, drawn from experience, LTC Matthews has a close relationship with General Jones, a mentor-protégé dynamic, the two regularly eating together at the officer club. The general feels a debt of gratitude to Matthews, a technology whizz who spent significant off-duty time jimmy-rigging the general's laptop, tablet, smartphone and other computing assets, enabling them to operate seamlessly together, a minor miracle in the military context. The assistance has given the general, a one star, a competitive edge over his peers, increasing the likelihood he will be awarded a second star. Over the years, LTC Matthews has gained a thorough understanding of the general's beliefs and values, including his zero-tolerance policy on romantic relationships in the workplace, a situation called "fraternization." Matthews also knows the general will inclined to take his word at face value, biased toward officers like he, hand-selected for their positions.[155]

On these facts, social contingency theory holds that LTC Matthews will retaliate against the SGT Peterson. Scholars explain how "expectations of accountability" operate as a "constraint" on behavior:

> Expectations of accountability are an implicit or explicit *constraint* on virtually everything people do, "If I do this, how will others react?" Failure to act in ways for which one can construct acceptable accounts leads to varying degrees of censure, depending of the gravity of the offense and the norms of society.[156]

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[154] Mansbridge, *supra* note 17 at 64.

[155] From my experience, is not at all unusual for military subordinates to have an intimate understanding of their boss' views, attitudes, and idiosyncrasies. Subordinates carefully cultivate information of this type as a kind of insurance policy, able to be drawn upon when needed. Deliberately performing favors in order to create a sense of gratitude and dependence is likewise not unusual.

[156] Bovens, *supra* note 16 at 4.

Here, LTC Matthews is essentially operating in a "constraint-free" environment. His primary accountability forum, the general (vertical supervision), can easily be manipulated. Whereas the risk of being caught is supposed to discourage reprisal and dishonesty in the public sector, here there is little risk. As explained above, commanders *are* the law within the units they govern, controlling every level of the disciplinary system. Having the base commander in his debt will insulate LTC Matthews from a serious inquisitorial process should an accusation be made. Moreover, familiarity with the general's views will allow him to tailor the retaliation, crafting a scenario that "conforms" to the general's biases, beliefs, and values, knowledge that further marginalizes the potency of vertical supervision as an accountability instrument.

Consider the likely outcome should LTC Matthews ground his retaliatory action on a claim of fraternization, alleging he witnessed SGT Peterson holding hands with a female private during office hours. The claim would tap into General Jones' pre-existing disdain for fraternization, increasing the odds of a heavy-handed response. The "he said/she said" nature of the allegation would also align with the general's inclination to believe direct reports. Regardless of whether adverse action such as a demotion or reprimand is taken, Matthews would have achieved his objective—damaging the sergeant's credibility in General Jones' eyes. Any future complaint Peterson were to make about Matthews would likely be seen as a deliberate attempt to even the score.

Also consider the outcome should Matthews file a federal whistleblower suit alleging retaliation. The U.S. Attorney would immediately step in to defend LTC Matthews and the Army, filing a motion to dismiss the suit pursuant to the *Feres* doctrine. The judge would respond by granting the motion, having no alternative as *Feres* is controlling Supreme Court precedent. The case would then be gone, the entire process from filing to dismissal taking about two months. The protection *Feres* provides administrators like LTC Matthews is ironclad, an impenetrable wall.

Note how differently the situation would play out if military officials were subject to judicial review. In that event, social contingency theory suggests LTC Matthews would not retaliate, cowered by the thought of having to justify his actions to a jurist trained in ferreting out subterfuge. The prospect of turning over emails, phone records, and other incriminating materials would be worrisome, as would answering pointed questions under oath. Further, unlike General Jones, the judge's views would not only

be unknown, the judge would not have any reason to pull punches. Facing the prospect of objective scrutiny, negative publicity, and civil penalties, Matthews would be forced to engage in a careful, deliberate decision-making process. In the end, he would probably decide the benefits of retaliating were outstripped by the risk, opting instead to reevaluate his office's response to the security breach.

The upshot is that the absence of judicial review degrades managers' behavior in the exact manner one would expect it to. In this way, military officials are susceptible to the normal, conventional impact being unaccountable has on behavior, choosing the course of conduct most beneficial to them personally instead of the legal or ethical one. The rule of law is debilitated in the precise way the Founders warned about. While the magnitude of the problem will need to be fleshed out in future papers, it is certainly not a minor issue. As shown in the LTC Matthews' scenarios, vindictive, unscrupulous behavior is managers' *most rational* course of action in routine situations. Any public accountability framework where corruption and abuse of power are officials' most attractive option is confronting a problem of the first order.

Providing a window into the prevailing managerial dynamic of the *Feres* era, the LTC Matthews example illustrates how public officials inevitably behave when not answerable to the judiciary. Senior personnel do whatever they want, whenever they want, unfazed by the entreaties of the unfortunate souls caught in their trap. Process is ignored and rule of law is defiled. The axiom "power corrupts, absolute power corrupts absolutely" comes to mind, as do images of authoritarianism. Many of the article's themes can be observed in the example—the fecklessness of the remaining accountability mechanisms, the untouchability of managers who hide beneath a commander's wing, how retaliating can be the most rational choice. Rather than serving as instruments of responsible governance, lawsuits are little more than leaves scattered on a driveway, minor nuisances casually swept away, their fear-generating, behavior-modifying qualities gone completely.

PART VI – CONCLUSION

We are left in the end with a moral question. It is hardly surprising that public officials act badly when freed from external checks. Indeed, according to social psychology, doing so is human nature. While not absolving military managers who abuse their power of blame, the inevitability of abuses in a constraint-free environment points to a larger, structural problem. In the same way building a road in mountainous terrain without

guardrails implicates the engineers who designed it, implementing a system where military officials are unaccountable to the law implicates those who designed the system. Responsibility ultimately lies with the elected officials who allow the nearly 70-year-old policy to persist.

In this way, the *Feres* doctrine is the quintessential metaphor for the civil-military gap. While members of Congress could easily modify the policy, they have little interest in how service members are treated by their superiors because, by and large, neither they nor their kids have served. When querying the military leadership about what to do, the answer is as predictable as it is overheated: if managers are exposed civil liability the military will no longer be an effective fighting force.[157] While no evidence is cited, the response invariably carries the day and matter is closed.

But of course, which manager—civilian, military, or otherwise—would not choose to be exempt from judicial review if given the option? As such, while Congress would quickly dismiss a request by the F.B.I., U.S. Marshal Service, or any civilian law enforcement agency to be immunized from the courts, it reflexively allows lawyers, logisticians, doctors and other "civilian-like" officials in the military establishment to operate in such a manner. An irrational distinction, the double standard—and the damage it does to those in uniform—is a searing indictment of our national values.

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[157] For illustrative purposes, military leaders made a series of statements of this type during the Senate Judiciary Committee's 2002 hearing on the Feres Doctrine. *The Feres Doctrine: An Examination of This Military Exception to the Federal Torts Claims Act*, HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE (2002).