

GONZALEZ V. UNITED STATES AIR FORCE: SHOULD COURTS CONSIDER RAPE TO BE INCIDENT TO MILITARY SERVICE?

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* Publications Editor, *American University Journal of Gender, Social Policy & the Law*, Volume 14; J.D. Candidate, *American University Washington College of Law*, 2006. Many thanks to Professor Amy Dillard for recommending this topic, Bill Renahan of the Prince Georges' County Public Defender's Office for his invaluable ideas and the members of the *Journal*, especially Cynthia, Liz and Mike for their countless edits and suggestions. Finally, I would like to thank my father, sister and Tony for their unwavering support, love and understanding.

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INTRODUCTION

Imagine that you are a member of the armed forces on active duty who happens to have a bit too much to drink during an on-base party. A fellow service member helps you to your barracks, returns later, and rapes you. You later find out that he has a prior felony assault conviction, which the military failed to discover during his enlistment. You sue the government for the military's negligence in hiring your attacker. However, you are unable to recover solely because you are an active duty service member.

These facts are similar to those of *Gonzalez v. United States Air Force*, an unpublished decision rendered by the Tenth Circuit.¹ The court dismissed the suit under the doctrine the Supreme Court announced in *Feres v. United States*, which states that the government is not liable under the Federal Tort Claims Act ("FTCA") for injuries incurred by military members on active duty providing that the injuries arose out of activities incident to service.² Courts bar virtually every tort claim through an expanded meaning of the *Feres* Doctrine, which finds that almost every injury that occurs to a service member arises directly out of his or her military service.³ According to judicial interpretations, service-related injuries include those that occur when a military member is on active duty, subject to military discipline, or while performing a recreational activity

1. See 88 Fed. Appx. 371, 372-73 (10th Cir. 2004) (stating that a service member, Kerry Nazario, raped the plaintiff, Nicolette Gonzalez, after helping her back to her barracks as she had been drinking at an on-base party).

2. See *id.* at 375 (dismissing the claim under the *Feres* Doctrine because the injury occurred while the plaintiff was on active duty and subject to military discipline); see also *Feres v. United States*, 340 U.S. 135, 146 (1950) (preventing active military members from bringing tort claims against the federal government for injuries that arose out of service).

3. See *United States v. Johnson*, 481 U.S. 681, 703 (1987) [hereinafter *Johnson I*] (Scalia, J., dissenting) (arguing that *Feres* was incorrect because it created "unfairness and irrationality" in later decisions); see also *Pringle v. United States*, 208 F.3d 1220, 1223-24 (10th Cir. 2000) (quoting *Persons v. United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991)) (noting that courts have broadened *Feres* to bar any claim even slightly related to a plaintiff's status as a military member, even if the claim does not appear to relate to military decisions).

that relates to military service.⁴

This Comment's analysis focuses on the facts that arose in *Gonzalez* and argues that a more appropriate holding would have provided the plaintiff with a remedy.⁵ Part I of this Comment provides a brief background of both the FTCA and the *Feres* Doctrine and introduces the plaintiff's claim in *Gonzalez* and the decision of the Tenth Circuit.⁶ Part II analyzes how civilian courts have expanded the meaning behind the *Feres* Doctrine dramatically, and argues that *Feres* should not have barred the plaintiff's claim in *Gonzalez*.⁷ Part II further discusses why the discretionary function and intentional tort exceptions to the FTCA should not bar the plaintiff's claim and explains why the Ninth Circuit's negligent hiring analysis would have been appropriate in *Gonzalez*.⁸ This Comment concludes that the Tenth Circuit could have decided *Gonzalez* differently and allowed the plaintiff the opportunity to argue the merits of her case had the court not dismissed the case on a jurisdictional technicality.⁹

I. BACKGROUND

A. *The Federal Tort Claims Act and its Exceptions*

One possible basis for civil redress for sexual assault claims that occur in the military is under the FTCA.¹⁰ At common law, the doctrine of sovereign immunity shielded the federal government from liability for torts committed by federal employees.¹¹ In response to the many private bills

4. See *Gonzalez*, 88 Fed. Appx. at 375-76 (explaining that *Feres* bars recovery for incidents occurring during social and recreational activities that service members engage in and also those injuries that occur when a service member is subject to military discipline, such as attending an on-base party).

5. See *id.* at 375 (dismissing the claim under *Feres* for lack of subject matter jurisdiction and leaving the plaintiff without a remedy in civilian courts, since the Federal Tort Claims Act ("FTCA") provides for plaintiffs to bring cases only in federal court); see also Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 751 (2002) (arguing that victims of sexual harassment usually are left without much of a remedy through the military justice process).

6. See *infra* Part I (explaining the relevant case law and statutes related to *Gonzalez* and the FTCA).

7. See *infra* Part II (arguing that the court was incorrect in its analysis as it focused on the moment of the injury and not on the negligence).

8. See *infra* Part II (arguing that the Supreme Court should grant certiorari to a negligent hiring case and decide the case in favor of the Ninth Circuit's interpretation of the FTCA).

9. See *infra* pp. 667-68 (concluding that the over-expanded application of *Feres* and the majority viewpoint of the intentional tort exception frustrate the purpose of the FTCA).

10. See 28 U.S.C. § 1346(b) (2005) (granting a limited waiver of sovereign immunity for claims by federal workers against the government for torts that arise while the employees are acting within the scope of their employment); see also *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953) (stating that one of the purposes of the FTCA is to provide a remedy to persons injured due to the actions of federal employees).

11. See William P. Kratzke, *Some Recommendations Concerning Tort Liability of*

that attempted to provide an avenue for redress for those injured by federal employees, Congress passed the FTCA.¹² The FTCA grants a limited waiver of the government's sovereign immunity and holds the government liable for torts committed by federal employees.¹³ However, the FTCA contains specific exceptions to this waiver, which include: (1) the discretionary function exception; (2) the intentional tort exception; and (3) the exception for claims that arise out of combat.¹⁴ These exceptions, among others, protect certain government activities from judicial questioning.¹⁵ In early cases, courts found that Congress intended for members of the armed forces to have the ability to sue the federal government for claims of negligence under the FTCA.¹⁶ The specificity within the language of the FTCA led courts to believe that Congress intended it to apply directly to those in active duty, as long as their claims did not fall under one of the exceptions to the FTCA.¹⁷

The Supreme Court first addressed the purpose behind the FTCA in *Brooks v. United States* and found that the statute allowed active duty service members to recover monetary damages from the federal government based upon its language and framework.¹⁸ The Court found that the plaintiffs could recover damages because their injuries did not occur incident to service, as they were not obeying military orders at the

Government and Its Employees for Torts and Constitutional Torts, 9 ADMIN. L.J. AM. U. 1105, 1107 (1996) (explaining that regardless of the merits of the claim, under the doctrine of sovereign immunity, no one could sue the government for torts committed by its employees).

12. *See id.* (stating that Congress passed the FTCA because it became too burdened by the numerous private bills).

13. *See* § 1346(b) (allowing plaintiffs to file suit against the government in federal court for a federal employee's negligence in circumstances where "the United States, if a private person, would be liable to the claimant"); 28 U.S.C. § 2671 (2005) (defining "employees" to include members of the military); *see also* *Coe v. United States*, 502 F. Supp. 881, 885 (D. Or. 1980) (stating that § 1346(b) of the FTCA waives sovereign immunity of the federal government only to the extent that a plaintiff could hold a private person liable).

14. *See* 28 U.S.C. § 2680(a)-(n) (2005) (excepting numerous other issues from the waiver of the government's sovereign immunity).

15. *See* Kratzke, *supra* note 11, at 1113-14 (explaining that the legislative history of the FTCA provides little explanation for having all these exceptions, beyond shielding the government from judicial critique).

16. *See, e.g.,* *Alansky v. Northwest Airlines*, 77 F. Supp. 556, 558 (D. Mont. 1948) (detailing a history of the government providing support for soldiers and, therefore, doubting that Congress would have changed that policy with the FTCA); *Samson v. United States*, 79 F. Supp. 406, 409 (S.D.N.Y. 1947) (finding that Congress's repeal of the Military Claims Act indicated its intent for soldiers to be able to seek redress under the FTCA).

17. *See Alansky*, 77 F. Supp. at 558 (finding that the explicit language within the FTCA specifically defines members of the military as "employees"); *see also* § 2680(a)-(n) (excepting certain claims from the waiver of sovereign immunity, such as when it is based on a discretionary function, is an intentional tort, is combat-related, or occurs in a foreign country).

18. *See* 337 U.S. 49, 50 (1949) (explaining that two servicemen and their father were riding in a vehicle on a public road when a military truck struck the vehicle, which was stopped at a stop sign, killing one and severely injuring the other two plaintiffs).

time of their injuries.¹⁹ The Court, however, failed to address how it would decide the case if the injury had arisen incident to service.²⁰

1. The Discretionary Function Exception Bars Claims that Allege Negligence in Decisions Made by Federal Employees

The FTCA's discretionary function exception bars claims based on the government's negligence in failing to perform a duty based on a discretionary function, which is a decision made using judgment.²¹ In *Dalehite v. United States*, the Supreme Court created a distinction between activities at a planning level and those at an operational level.²² Decisions at the planning level inherently involve discretion, as they are decisions that attempt to plan a course of action, and protect the government from liability.²³ Decisions at the operational level, however, are not discretionary, because they are merely decisions that put the plan into effect.²⁴

Recent Supreme Court jurisprudence has created a two-step process to determine whether the discretionary function exception applies.²⁵ The first prong questions whether the decision required any element of choice on the part of the employee.²⁶ If regulations bound the employee's course of action, thereby leaving the employee with no discretion in making his

19. *See id.* at 52 (finding that the plaintiff's military service alone was irrelevant to the car accident which caused the injuries).

20. *See id.* (indicating that the result might be different if the injury had occurred due to service-related activities, but specifically declining to answer that question).

21. *See* § 2680(a) (stating that the government is exempt from liability for any claim based upon a decision made by a federal employee, where the employee was using his own discretion).

22. *See* 346 U.S. at 35-36 (stating that persons make discretionary decisions at the planning level because such decisions are policy judgments that extend to the scheduling and initiation of activities, while decisions at the operational level are not discretionary and, therefore, subject the government to liability); *see also* *United States v. Varig Airlines*, 467 U.S. 797, 812-13 (1984) (noting that *Dalehite* still stands as a valid interpretation of the discretionary function exception despite analysis that may be to the contrary).

23. *See* *Bryson v. United States*, 463 F. Supp. 908, 911 (E.D. Pa. 1978) (providing an example of an action at the planning level as the creation of the standards used to judge military enlistees).

24. *See id.* at 912 (explaining that the decision to enlist a specific applicant into the military is a decision at the operational level, and thus makes the government liable).

25. *See* William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 12-23 (1993) (stating that the Supreme Court shaped the discretionary function test in a recent trilogy of decisions, *Varig Airlines*, *Berkovitz v. United States* and *United States v. Gaubert*).

26. *See* *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (explaining that the language of the exception mandates this prong because if an element of choice exists in the employee's decision-making, this inherently involves discretion and does not subject the government to liability); *see also* *United States v. Gaubert*, 499 U.S. 315, 324 (1991) (explaining that where a regulation proscribed certain conduct, and the employee followed this regulation, there is no liability because the employee did not use any discretion). However, if the employee performs contrary to its requirements, then the government is liable. *Id.*

decision, then the exception does not apply and the government is subject to potential liability.²⁷ The second prong questions whether the decision involved is the type of action that Congress intended to shield from liability.²⁸ This step determines whether the application of the exception protects against the questioning of certain types of decisions, such as those grounded in social, economic or political policy.²⁹

2. *The Intentional Tort Exception Prohibits Claims that Allege the Occurrence of an Assault or Battery*

Although the FTCA waives the sovereign immunity of the federal government in tort suits, it expressly prevents a plaintiff from bringing a suit alleging injury from assault and battery.³⁰ As a way to circumvent the intentional tort suit bar, plaintiffs in the past attempted to couch their assault claims as ones of negligence on the part of the government.³¹ In response, courts began to analyze the substance of the claim to determine whether it arose out of the government's negligence or out of an actual assault or battery.³² In *United States v. Shearer*, the Supreme Court held that the intentional tort exception barred not only those claims that alleged injury caused by an assault or battery directly, but also those claims that

27. See *Berkovitz*, 486 U.S. at 536 (stating that where there are regulations, the employee is bound to follow them and, therefore, the conduct of the employee is not based on choice).

28. See *Varig Airlines*, 467 U.S. at 813 (explaining that it is the nature of the actions taken by the employee that is the relevant focus, not the fact that the employee works for the government).

29. See *id.* at 813-14 (explaining that, under this exception, Congress intended to exempt from judicial scrutiny certain legislative and administrative decisions in order to protect the independence of the branches). The purpose of protecting against inquiry into certain types of decisions was to ensure that courts did not subject the government's decisions regulating the conduct of private persons to liability. *Id.*

30. See 28 U.S.C. § 2680(h) (2005) (barring intentional tort claims arising from "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights"); see also *Jablonski v. United States*, 712 F.2d 391, 395 (9th Cir. 1983) (articulating that the underlying policy behind the intentional tort exception is to "insulate the government from liability" for torts that it was "powerless to prevent").

31. See, e.g., *United States v. Shearer*, 473 U.S. 52, 53-55 (1985) (alleging that the military was negligent in its supervision of a serviceman who had committed manslaughter while on active duty, yet whom the military had transferred to another base upon his release from prison). After his transfer, the perpetrator kidnapped and murdered the plaintiff's son. *Id.* The plaintiff further alleged that the military had a duty to warn others of the perpetrator's predisposition to commit violence. *Id.*

32. See, e.g., *Bryson*, 463 F. Supp. at 912-13 (noting cases from the Third and Fifth Circuits where the courts refused to dismiss the negligence claim where the injuries arose from an employee's negligent actions despite the fact that the injuries originally stemmed from an assault and battery); see also *Coffey v. United States*, 387 F. Supp. 539, 540 (D. Conn. 1975) (explaining that the plaintiff's claim alleged that the Marine Guard who shot him was negligent in discharging his gun). The court held that the plaintiff's complaint fell under the intentional tort exception because he disguised his claim as one based on negligence, as it was clear from the substance of the claim that it focused on the assault, rather than on negligence. *Id.*

alleged an injury caused by negligence, despite the injury physically occurring from an assault or battery.³³

The Court felt that broad immunity better served the purpose behind the FTCA as Congress never intended for the government to be liable for intentional torts committed by its employees.³⁴ By finding that the intentional tort exception encompassed claims of negligence, even if the assault or battery was the basis of the claim, the Court expanded the notion of the intentional tort exception.³⁵ Even though it is only a plurality opinion, the *Shearer* holding has prevailed in the majority of circuits.³⁶

B. Negligent Hiring

An employer has a duty to exercise due care in the hiring of employees, and if the employer breaches this duty, a court may hold the employer liable for injuries caused by a negligently hired employee.³⁷ As the Supreme Court has not addressed this issue in relation to the military, the circuits lack guidance on whether they can analyze negligent hiring claims under the FTCA.³⁸ The majority of the circuits have held that the intentional tort exception bars most negligent hiring claims because but for the intentional tort, the claim itself never would have occurred.³⁹ However,

33. See 473 U.S. at 55-56 (explaining that the language “arising out of” encompasses negligence claims, as the FTCA protects the government from being liable for assaults and batteries committed by its employees). The Court further explained that the lack of supervision could not be the basis for the government’s liability. *Id.*

34. See *id.* at 55 (indicating that the legislative history of the FTCA made it clear that courts should not hold the government liable for intentional acts, because the government was not in a position to prevent the assaults and batteries of its employees).

35. See *id.* (prohibiting a negligent supervision claim under the language of § 2680(h) because the legislative history indicated that courts should read the statute broadly); see also *Franklin v. United States*, 992 F.2d 1492, 1498 (10th Cir. 1993) (finding that the intentional tort exception bars a claim that stems originally from an intentional tort, even if the claim is for negligence).

36. See, e.g., *Franklin*, 992 F.2d at 1498 (adopting the plurality reasoning in *Shearer* and finding that the exception barred any claim that arose from assault and battery, despite any negligence on the part of the government); *Guccione v. United States*, 847 F.2d 1031, 1034 (2d Cir. 1988) (noting that the Fourth, Fifth, Sixth and Tenth Circuits have adopted the broad view of *Shearer* and similarly have barred negligence claims that arose from intentional torts). *But see* *Bennett v. United States*, 803 F.2d 1502, 1503 (9th Cir. 1986) (refusing to recognize the *Shearer* analysis as binding because the discussion came from a plurality and, therefore, lacks precedential value). The court held that a claim based on an injury arising from an assault and battery did not excuse the government’s negligence. *Id.*

37. See, e.g., *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 910 n.4 (Minn. 1983) (listing some of the states that have recognized negligent hiring claims, including Alaska, California, District of Columbia, Florida, Georgia, Hawaii, Kansas, Louisiana, Michigan, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Texas and Tennessee).

38. Compare *Senger v. United States*, 103 F.3d 1437, 1441 (9th Cir. 1996) (refusing to adopt the *Shearer* reasoning regarding negligent hiring claims because it is only a plurality opinion with little precedential force), with *Guccione*, 847 F.2d at 1034 (adopting the reasoning in *Shearer* and stating that the language of the exception applies broadly enough to bar claims that stem from negligence but arise directly out of an intentional tort).

39. See, e.g., *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985) (arguing that a

the Ninth Circuit has allowed negligent hiring claims to be heard, basing its reasoning on the nature of the FTCA itself, and refusing to adopt the *Shearer* plurality opinion.⁴⁰ Instead, the Ninth Circuit has stated that claims alleging negligent hiring on the part of the government that are independent from the assault or battery, and in which the negligence is the proximate cause of the injury, could give rise to liability.⁴¹

C. Affirmative Duties

The intentional tort exception usually does not bar claims that allege that the government employer had an affirmative duty to the plaintiff and knew or should have known that an employee was likely to commit an injurious act.⁴² If the injury to the plaintiff was a foreseeable consequence of the government's negligence, courts do not consider the assault or battery a supervening act that nullifies the government's negligence.⁴³ In *Sheridan v. United States*, the Supreme Court held that there are situations where a negligent act by a government employee is enough to hold the government liable, provided that an affirmative duty existed on the part of the government prior to the negligence.⁴⁴ This liability exists even if an assault or battery caused the plaintiff's injury because the military had an affirmative duty to protect the plaintiff.⁴⁵ The Court found that the government has a duty to prevent a foreseeably dangerous person from injuring another, regardless of the perpetrator's military status or his intent

claim based on a negligent act arises from an assault, not from the negligence itself, and is therefore barred under the FTCA). *See generally Guccione*, 847 F.2d at 1034 (noting that many of the circuits, including the Fourth, Fifth, Sixth and Tenth, have interpreted *Shearer* to bar negligent hiring claims because of the claim's basis in an assault).

40. *See Senger*, 103 F.3d at 1441 (arguing that the purpose of the FTCA is to provide a forum for broad relief for negligent tort actions committed by government employees); *see also Bennett*, 803 F.2d at 1504 (finding that the purpose of the FTCA is not to grant broad immunity to the government, but is instead to allow for a wide range of federal employees to bring claims).

41. *See Senger*, 103 F.3d at 1441 (finding that the government could be held liable for negligently hiring and supervising a postal worker and for failing to warn others of the postal worker's dangerous tendencies, because the government knew or should have known of the postal worker's past actions). The court remanded this case for further consideration on the merits, finding that the district court failed to analyze the claim correctly. *Id.*

42. *See, e.g., Gibson v. United States*, 457 F.2d 1391, 1394 (3d Cir. 1972) (stating that if the government undertakes a duty to care for or instruct others, it assumes an affirmative duty to protect its employees from those who are violent).

43. *See id.* at 1395 (finding that courts could hold the government liable when it assumed a duty to care for and instruct others).

44. *See* 487 U.S. 392, 401 (1988) (holding the government liable for an intentional assault with a firearm by a drunken serviceman because the military had assumed an affirmative duty to care for its service members and neglected to uphold this duty). The Court found that the military had adopted regulations prohibiting firearms on-base and various service members failed to report the presence of a firearm or to care for the visibly drunk serviceman with the firearm. *Id.*

45. *See id.* at 403 (finding that liability exists regardless of the military status of the perpetrator, thereby declining to address negligent hiring).

to commit the assault.⁴⁶ Following *Sheridan*, courts began to adopt this rationale by stating that if the government had an affirmative duty to protect the plaintiff prior to the assault, the intentional tort exception does not bar the claim.⁴⁷

D. The Feres Doctrine

In *Feres v. United States*, the Supreme Court addressed the question it reserved in *Brooks*⁴⁸ and examined whether the FTCA was applicable to injuries that occurred incident to service.⁴⁹ The Court held that the government was not liable under the FTCA for injuries military members incurred while on active duty as long as they arose out of or occurred in the course of activity “incident to service.”⁵⁰ *Feres*, the Court found, was factually a different case than *Brooks*, because the *Brooks* plaintiff was not on active duty at the time of his injury and because the military had discharged him before he filed suit.⁵¹

The Court in *Feres* articulated three rationales for barring claims that arise in the course of activity incident to service: (1) the location where the plaintiff brings the tort claim should not govern the law that courts apply in the suit; (2) the relationship between the military and the United States Government is uniquely federal and, therefore, should be exempt from judicial inquiry; and (3) most military-related claims are covered by other statutory compensation systems.⁵² Using these rationales, the Court denied relief to the plaintiffs, further stating that the FTCA did not provide a new avenue of liability for military members, and that no current law existed

46. See *id.* at 400-03 (holding the government liable based on the service member’s negligence in allowing for the assault to occur). The Court found it irrelevant that the drunken serviceman’s actions resulted in an intentional assault. *Id.*

47. See, e.g., *Doe v. United States*, 838 F.2d 220, 222-23 (7th Cir. 1988) (explaining that if a duty existed prior to the assault, the assault is fully independent from any claim of negligence); see also *Loritts v. United States*, 489 F. Supp. 1030, 1031-32 (D. Mass. 1980) (finding the government negligent in failing to ensure the safety of females invited to West Point, despite the fact that it voluntarily had assumed this duty). This negligence led to the plaintiff’s rape. *Id.*

48. See *Brooks*, 337 U.S. at 52 (declining to consider the outcome of a situation where the injury arose out of combatant activities, as that was not the issue presented).

49. See *Feres*, 340 U.S. at 135 (consolidating three different cases that raised similar issues relating to the injuries of service members that occurred while on active duty).

50. See *id.* at 146 (explaining that injuries that occur “incident to service” are those that arise while performing a military duty, under military orders or on a military mission).

51. Compare *id.* at 136-37 (noting that the plaintiff was carrying out his orders by remaining in his barracks with an unsafe heating device), with *Brooks*, 337 U.S. at 50 (noting the plaintiff’s non-military status at the time of the suit, and indicating that he was driving along a public highway and under no compulsion or duty).

52. See *Feres*, 340 U.S. at 142-46 (justifying the reasons that military members cannot sue the government for injuries that arise incident to service). The Court further stated that it was unable to find any case law that allowed a private individual to sue for injuries similar to those in the case at bar. *Id.* at 141-42.

that allowed military members to sue their superiors for negligence.⁵³

In the years after *Feres*, courts began to focus their reasoning on the military status of the plaintiff at the time of the suit, rather than on his or her status when the injury originally occurred,⁵⁴ while continuing to affirm the use of the “incident to service” rationale.⁵⁵ The Ninth Circuit laid out four factors to use as guideposts, not definitively, to determine whether an injury occurred “incident to service”: (1) the location where the negligent act occurred; (2) whether the victim was on duty when the negligent act occurred; (3) whether the victim accrued any benefits as a service member at the time of injury; and (4) the nature of the victim’s activities at the time of the negligent act.⁵⁶ Further, courts have articulated that there must be a case-by-case analysis to determine whether precluding the claim would serve the purpose behind the *Feres* Doctrine.⁵⁷ However, the single prevailing concern that guides courts in their determination that *Feres* bars tort claims by service members is the fear that military order and discipline might be undermined if military personnel were permitted to sue for wrongful conduct.⁵⁸

53. See *id.* at 146 (barring the claim because Congress did not intend to create a new statutory scheme based on state law for service-related injuries when federal law has always governed these situations).

54. See, e.g., *United States v. Brown*, 348 U.S. 110, 112 (1954) (reasoning that *Feres* did not bar the suit because his civilian status at the time of the suit exempted it from the “incident to service” analysis); see also *Watt v. United States*, 246 F. Supp. 386, 388 (E.D.N.Y. 1965) (finding that *Feres* did not bar the claim of a retired soldier injured in a military hospital because the injury did not occur while he was on active duty; thus, it was not incident to service). But see *Harten v. Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974) (stating that the relevant inquiry to determine whether an injury is incident to service is the plaintiff’s status at the time of injury).

55. See *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001) (indicating that the cases that interpret “incident to service” are irreconcilable); see also *Mariano v. United States*, 444 F. Supp. 316, 319-20 (E.D. Va. 1977) (finding “incident to service” to be a broad term, not restricted to the military context).

56. See *Dreier v. United States*, 106 F.3d 844, 848 (9th Cir. 1996) (explaining that it cannot reconcile prior *Feres* decisions and, therefore, courts should not use bright line rules to determine whether the Doctrine bars the claim). Furthermore, the court stated that the best way to determine whether *Feres* bars the claim is a comparison to prior decisions. *Id.* at 849.

57. See, e.g., *Stanley v. United States*, 786 F.2d 1490, 1499 (11th Cir. 1986) (indicating that the Eleventh Circuit’s interpretation of *Feres* and existing precedent does not bar an FTCA suit merely because the plaintiff’s injuries occurred while carrying out military-related orders).

58. See *Johnson I*, 481 U.S. at 691 (indicating that civilian court judgments would undermine a service member’s duty to the military because it would disrupt military discipline); see also *Moore v. Pa. Dep’t of Military & Veterans Affairs*, 216 F. Supp. 2d 446, 450 (E.D. Pa. 2002) (highlighting the “special status of the military,” thus exempting it from the civilian judicial system). But see *Mazur*, *supra* note 5, at 718 & n.101 (noting that Scalia’s dissent in *Johnson I* argued that the protection of military order and discipline was a “‘later-conceived-of’ rationale” that did not exist at the time the Court decided *Feres*).

E. Gonzalez v. United States Air Force

In 1999, a fellow Air Force member, Kerry Nazario, raped servicewoman Nicolette Gonzalez while she was sleeping in her barracks after an on-base party in Oklahoma.⁵⁹ The Air Force court-martialed her attacker, and Gonzalez brought suit against the United States Government, alleging numerous negligent acts on the part of the military.⁶⁰ The Tenth Circuit, admitting that the circumstances were tragic, affirmed the decision of the district court, which had dismissed her case for lack of subject matter jurisdiction.⁶¹ The court reasoned that because the plaintiff sustained her injuries incident to service, *Feres* barred her claims.⁶²

F. Negligence Claims under Oklahoma Law

In order for the plaintiff in *Gonzalez* to bring a negligence claim under the FTCA, she must demonstrate four elements under Oklahoma law: (1) that the military owed a duty to her; (2) that it breached this duty when it negligently hired Nazario; and (3) that the breach proximately caused (4) her injury.⁶³ To prove the chain of causation, there cannot be any supervening acts, which are acts that are: (1) independent of the original negligence; (2) able to bring about the injury itself; and (3) not foreseeable based on the original negligence.⁶⁴ Although a criminal act by a third party is generally considered a supervening event, there are two types of special relationships that create the duty to prevent the criminal actions of a third party and thus cause the original actor to be liable: (1) if the actor had a special duty to the person injured; or (2) where the actor's affirmative

59. See *Gonzalez*, 88 Fed. Appx. at 373 (indicating that her attacker helped her back to her barracks, noted the broken lock on her door, and returned later to rape her).

60. See *id.* (indicating that Gonzalez brought suit for monetary relief under the FTCA “for negligence, gross negligence, and violation of statutory duties,” along with a Title VII civil rights claim); see also *United States v. Nazario*, 56 M.J. 572, 573 (A.F. Ct. Crim. App. 2001) (affirming Nazario’s sentence of “dishonorable discharge, confinement for twenty months, forfeiture of all pay and allowances, and reduction” of grade level).

61. See *Gonzalez*, 88 Fed. Appx. at 376 (stating that to allow the claim would question military discipline because the injury occurred while she was at an on-base party).

62. See *id.* at 374-75 (holding that the framework of the Ninth Circuit in *Dreier* demonstrates that *Feres* bars claims for injuries that occur on-base and while the plaintiff was on active duty and “subject to military discipline and control”).

63. See generally RESTATEMENT (SECOND) OF TORTS § 328A (1965) (stating the elements of a negligence claim). The elements are:

(a)[F]acts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff; (b) failure of the defendant to conform to the standard of conduct; (c) that such failure is a legal cause of the harm suffered by the plaintiff; and (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.

Id.

64. See *Thompson v. Presbyterian Hosp., Inc.*, 652 P.2d 260, 264 (Okla. 1982) (stating that a supervening cause breaks the causal chain and protects the “original actor from liability”).

action has exposed the injured person to a high degree of risk.⁶⁵

Oklahoma law further recognizes that under the proximate cause analysis, the passage of time may qualify as a supervening event.⁶⁶ The Fifth Circuit has stated, “[i]t is sufficient for proximate cause purposes if the [actor], as a reasonably prudent person, could or should have foreseen that someone” might be injured by the actor’s negligence, despite a lapse in time.⁶⁷ In negligent hiring cases, as long as a court can determine that the proximate cause of the injury was the employer’s negligence in hiring, the passage of time between the injury and the hiring does not qualify as a supervening act.⁶⁸

II. ANALYSIS

A. *The Feres Doctrine Should Not Have Barred the Plaintiff’s Claim*

Courts should read the FTCA broadly to allow a wide range of plaintiffs an opportunity for redress in federal district courts.⁶⁹ As stated in *White v. United States*, courts must give the FTCA “liberal construction to ward off the obvious evil, which the Act was passed to prevent.”⁷⁰ Courts do not

65. See *Joyce v. M & M Gas Co.*, 672 P.2d 1172, 1173-74 (Okla. 1983) (detailing situations where an original actor should anticipate and protect against criminal conduct). See generally RESTATEMENT (SECOND) OF TORTS, § 448 (1965) (stating that the original actor is generally not liable for the criminal acts of a third party, unless the actor knew or should have known that his negligence created a situation where a third party had the opportunity to commit such a crime).

66. See *Leigh v. Wadsworth*, 361 P.2d 849, 854 (Okla. 1961) (finding that whether a lapse of time qualifies as an intervening cause is a question of fact and, therefore, could remove liability from the original actor). However, in this case, the passage of two-and-a-half years between the construction of a roof and its collapse was not sufficient to break the causal chain as the roof should have remained safe for a longer period of time. *Id.* at 854-55. See generally RESTATEMENT (SECOND) OF TORTS § 433 cmt. c (1965) (explaining that although lapse in time is a factor, if the original negligence is still a substantial factor in bringing about the harm, then no lapse in time prevents the original actor from being liable).

67. See *City of Brady v. Finklea*, 400 F.2d 352, 357 (5th Cir. 1968) (stating that the original actor did not need to foresee that twenty-eight years after the light’s construction, wires would fall and kill a specific person). It was enough that this type of accident was foreseeable to the original actor. *Id.*

68. See, e.g., *Mulloy v. United States*, 937 F. Supp. 1001, 1012-13 (D. Mass. 1996) (explaining that the rape and murder of the plaintiff’s wife was proximately caused by the Army’s negligent hiring of the perpetrator because without the hiring, the injury never could have occurred). The direct connection between the hiring and the injury satisfies proximate cause. *Id.*

69. See *Payton v. United States*, 636 F.2d 132, 138 (5th Cir. 1981) (indicating that courts should not interpret the exceptions to the FTCA so as to virtually deny federal employees recovery, as this is against the statute’s purpose, which is to provide recovery in a wide range of situations).

70. 317 F.2d 13, 16 (4th Cir. 1963) (quoting *Somerset Seafood Co. v. United States*, 193 F.2d 631, 635 (4th Cir. 1951)) (stating that one purpose of the FTCA is to prevent the unfairness of allowing the government to be immune from suits by federal employees in situations where private employees would have redress).

serve the purpose of the FTCA by narrowly construing its application.⁷¹ Both the incredible expansion of the reach of the *Feres* Doctrine over particular claims⁷² and the majority interpretation of the assault and battery exception frustrate the intended purpose of the FTCA.⁷³ Therefore, in order for the FTCA to serve Congress's intended purpose, courts should limit the application of the *Feres* Doctrine to claims that directly question military order and discipline.⁷⁴

As the Supreme Court initially created a distinction between injuries that occurred incident to service and injuries that did not, courts should continue to adhere to this distinction today.⁷⁵ Furthermore, *Feres* should not bar tort claims, such as the one in *Gonzalez*, because the negligence alleged did not arise out of the sexual assault but instead arose prior to the injury itself.⁷⁶ Instead, the application of the *Feres* Doctrine should extend only to injuries foreseeably arising out of service-related activities.⁷⁷ The *Feres* Doctrine bars injuries caused by medical malpractice, malfunctioning weapons, and even negligently driven vehicles, as these are all accidental

71. See 28 U.S.C. § 1346(b) (2005) (allowing for federal employees injured by other employees acting in the scope of their employment to seek relief against the federal government); see also *Dalehite*, 346 U.S. at 24-25 (explaining that a purpose of the FTCA was to provide relief for government employees who were injured in the course of their employment due to the negligence of another federal employee in situations where private employees would also have redress).

72. See *Pringle*, 208 F.3d at 1223-24 (citing *Persons*, 925 F.2d at 296 n.7) (explaining that courts have expanded *Feres* to bar almost every claim brought by an active duty service member); see also *Gonzalez*, 88 Fed. Appx. at 379 (Lucero, J., concurring) (arguing that the scope of the *Feres* Doctrine has reached beyond its original limitations).

73. See *Shearer*, 473 U.S. at 54-55 (barring FTCA claims that allege that the government was negligent in its hiring procedures because, although negligence was the proximate cause of the injury, the claims stem from an assault or battery).

74. See, e.g., *Johnson I*, 481 U.S. at 694, 698-99 (Scalia, J., dissenting) (arguing that the only prevailing rationale for barring claims for service-related injuries is that such claims would question military order and discipline); *Johnson v. United States*, 704 F.2d 1431, 1436 (9th Cir. 1983) [hereinafter *Johnson II*] (stating that the strongest argument for the *Feres* Doctrine is the need to protect military order and discipline from judicial intervention).

75. Compare *Brooks*, 337 U.S. at 52-53 (allowing the plaintiff's claim because the plaintiff's injuries, which did not stem from direct military orders, did not occur incident to service), with *Feres*, 340 U.S. at 146 (barring the plaintiff's claim and finding that when a plaintiff is on active duty and obeying military orders, then the injuries occur incident to service). The plain language of *Feres* evidences its distinction from *Brooks*, as the Supreme Court in *Feres* found that there should be an "allowance of claims arising from noncombat activities in peace," based on the language of the FTCA. *Id.* at 138. But see *Gonzalez*, 88 Fed. Appx. at 375-76 (finding the plaintiff's injuries incident to service where the plaintiff was injured while on-base and on duty, despite the fact that she was not obeying direct military orders or performing a military duty).

76. But see *Gonzalez*, 88 Fed. Appx. at 375-76 (finding the negligence alleged in the complaint irrelevant to the entire *Feres* analysis by focusing on the circumstances surrounding the rape, not on the government's negligence in hiring).

77. See *Feres*, 340 U.S. at 146 (barring claims for injuries that arose incident to service because they occurred while the plaintiff was under the compulsion of military orders).

injuries that are foreseeable consequences of military service.⁷⁸ Although rape does occur within the military, it should not be an injury that an enlistee should consider foreseeable for purposes of the *Feres* analysis, as it does not arise as a consequence of one's military service.⁷⁹ Furthermore, rape should not be considered an accident or a consequence of carrying out one's military commands or duties as it has no relation to other service-related activities.⁸⁰ Instead, rape is a severely punished crime within the military.⁸¹ A rape by a fellow service member should be unexpected based on the duty of care owed to fellow service members that entails a promise that a service member will not rape another, and instead, will do anything in his or her power to protect others.⁸²

Furthermore, the factual pattern of *Gonzalez* is more akin to that of *Brooks* rather than that of *Feres* because the plaintiff in *Gonzalez* was not obeying military orders when the sexual assault occurred.⁸³ In the present case, as in *Brooks*, there was no foreseeability that this rape could occur to

78. See *Brooks*, 337 U.S. at 52 (stating that examples of injuries that arise incident to service are those such as decisions made by officers in battle, a mistake by a military physician made during surgery, or a defective vehicle used in combat-related activities).

79. See *Gonzalez*, 88 Fed. Appx. at 375 (failing to discuss the foreseeability of the occurrence of the plaintiff's rape in the military); see also DEP'T OF DEF., TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 58 (2004) (explaining that in a study of more than 3600 female veterans taken to a Veterans Administration facility between July 1994 and June 1995, twenty-three percent reported that they were sexually assaulted while in the military), available at <http://www.defenselink.mil/news/May2004/d20040513SATFReport.pdf> (last visited June 1, 2005). The Report further explains that due to differences in available studies and definitions, the comparison to civilian figures is unavailable. *Id.*; see also Amy Herdy & Miles Moffeit, *Betrayal in the Ranks*, DENVER POST, 2004, at 4 (explaining that a survey in recent years by the Department of Veterans Affairs reported that nearly "[thirty] percent of women reported a rape or attempted rape" in the military, while a 2000 federal study lists the civilian comparison as "nearly [eighteen] percent"), available at http://www.ici.kent.edu/newsbooks/tdp_betrayal.pdf (last visited June 1, 2005).

80. See *Gonzalez*, 88 Fed. Appx. at 379 (Lucero, J., concurring) (stating that no young person, when enlisting for military service, could expect that injuries "incident to service" potentially would include sexual assault). *But see id.* at 375 (finding that the sexual assault occurred incident to service, as it occurred on-base, while the plaintiff was on duty, and while she was receiving military benefits, despite there being no mention of military orders or commands).

81. See *Nazario*, 56 M.J. at 573 (approving the sentence of "dishonorable discharge, confinement for [twenty] months, forfeiture of all pay and allowances, and reduction to E-1 [grade level]" as a punishment for the crimes of rape, unlawful entry and fraudulent enlistment). See generally 10 U.S.C.S. § 920 (2004) (indicating that the specified punishments in the Uniform Code of Military Justice for the crime of rape range from death to a mere reduction in grade level and demonstrating that rape is not tolerated within the military).

82. See 10 U.S.C. § 934 (2004) (requiring all military members to perform their actions under a standard of "good order and discipline"); *United States v. Swift*, 53 M.J. 439, 448 (C.A.A.F. 2000) (stating specifically that rape is against military policy because it has a substantial impact on "good order" and "discipline").

83. *But see Gonzalez*, 88 Fed. Appx. at 376 (finding that *Feres* bars this sexual assault claim because the plaintiff's activities at the time of injury, drinking and impaired sleeping, were recreational and occurred based on military orders and discipline).

a person enlisted in the military, as one is supposed to feel safe while on duty.⁸⁴ In *Feres*, the injuries that occurred were a foreseeable result of being on active duty in the military.⁸⁵ *Gonzalez* demonstrates the expansion of the *Feres* Doctrine to a point never intended by early case law, since courts have virtually destroyed the judicially-created distinction between *Feres* and *Brooks*.⁸⁶

As the relevant focus in *Feres* cases is the moment of negligence and not the moment of the injury, the Tenth Circuit incorrectly analyzed *Gonzalez*.⁸⁷ The Tenth Circuit ignored that the moment of negligence in the plaintiff's case occurred at a different point in time than the plaintiff's injury.⁸⁸ The negligence itself (the enlistment of Nazario) and the injury (the rape) occurred at two distinct points in time.⁸⁹ Therefore, the Tenth Circuit should have analyzed the plaintiff's claim in *Gonzalez* by focusing on the time of the alleged negligence, as that is the relevant inquiry, and not on the point when the injury occurred.⁹⁰

84. See *Feres*, 340 U.S. at 146 (finding that there is a "vital distinction" between *Brooks* and *Feres* because the plaintiff in *Brooks* was "under compulsion of no orders or duty and on no military mission"). Arguably, as the plaintiff was not on active duty or under orders, this demonstrated that the injury that occurred was not foreseeable in nature. *Id.* But see *Brooks*, 337 U.S. at 52 (specifying that injuries that arise out of service are those that occur as a result of the poor judgment of a commander in battle, a defective Jeep or a surgeon's slip). A service member potentially could foresee these types of injuries. *Id.*

85. See *Feres*, 340 U.S. at 136-37 (deciding three consolidated cases: one case where the decedent perished in a fire in the barracks when the military should have known the heating elements to be unsafe and two medical malpractice cases alleging the negligence of military doctors during various operations). In the first case, the defendant was under the compulsion of direct military orders to remain quartered in his barracks when the fire occurred. *Id.* In the other two cases, it was foreseeable that injuries could arise in medical operations by physicians who lack the requisite training. *Id.*

86. Compare *id.* at 146 (finding that an injury arises incident to service when the plaintiff is on duty and obeying direct military orders), and *Brooks*, 337 U.S. at 52 (holding that the injuries the plaintiff received were not incident to service because they did not occur while he was under compulsion of military orders; they occurred while he was on furlough), with *Gonzalez*, 88 Fed. Appx. at 375 (holding that the plaintiff's rape was an injury incident to service simply because it occurred while she was on active duty and on-base).

87. See *Monaco v. United States*, 661 F.2d 129, 133 (9th Cir. 1981) (creating a distinction between the alleged negligence that occurred prior to the plaintiff's injuries and the moment of the actual injury). The court then based the *Feres* analysis on the moment of the negligence, rather than on the moment of the injury. *Id.*; see also *Kendrick v. United States*, 877 F.2d 1201, 1203 (4th Cir. 1989) (finding that the correct focus of *Feres* is not when the injury occurs but rather on the circumstances surrounding the negligent act); *Henning v. United States*, 446 F.2d 774, 777 (3d Cir. 1971) (arguing that courts should base the *Feres* analysis on the negligence alleged rather than on the moment of injury because of the Supreme Court's holding in *United States v. Brown*, which allowed a former service member to recover because the negligence occurred after his discharge).

88. See *Gonzalez*, 88 Fed. Appx. at 374 (failing to acknowledge the plaintiff's claim of negligence as the appropriate focus in *Feres* cases).

89. See *id.* at 372-73 (explaining that the rape took place in July 1999); *Nazario*, 56 M.J. at 577 (stating that Nazario began the enlistment process in Fall 1998).

90. See *Monaco*, 661 F.2d at 133 (arguing that the appropriate analysis in a *Feres* case should be based on the negligence alleged rather than on the injury that occurred). But see *Gonzalez*, 88 Fed. Appx. at 375 (analyzing the plaintiff's claim based on the injury she received rather than focusing on the negligence alleged in the claim).

In *Gonzalez*, the Tenth Circuit used the Ninth Circuit's four factors as guides to determine whether *Feres* barred the plaintiff's claim, thus demonstrating a respect for the Ninth Circuit's legal analysis in this area of case law.⁹¹ In addressing the four factors, the Court failed to take into account the actual negligence alleged by the plaintiff regarding the hiring of Nazario.⁹² The negligence alleged did not stem from the actual assault and battery, but occurred prior to the plaintiff's rape.⁹³ The analysis of the *Feres* portion of the plaintiff's case should have yielded a different outcome because the alleged negligence arose prior to the assault; therefore, the Tenth Circuit failed to analyze the claim properly.⁹⁴ The following five sections will elaborate on each factor of the four-part test and then discuss the prevailing concern behind the *Feres* Doctrine.⁹⁵

1. *The Location of the Negligent Act*

The Tenth Circuit erroneously interpreted the location of the injury to be the relevant inquiry in *Gonzalez* because the focus in *Feres* cases is on the negligence alleged, not the actual injury.⁹⁶ Therefore, as the negligent conduct in *Gonzalez* was the failure of the military to perform an adequate background check on Nazario, the location of the actual negligence is unknown because it may not have occurred on-base.⁹⁷ Nevertheless, the

91. See 88 Fed. Appx. at 374-75 (citing *Dreier*, 106 F.3d at 848) (stating that the Ninth Circuit's four factors determine whether the plaintiff's injury was incident to service through a balancing of the circumstances). The court further found that the injury was incident to service, because it occurred pursuant to the plaintiff's attendance at an on-base party and was a direct result of her military status. *Id.*

92. See *id.* at 375 (determining that the *Feres* Doctrine barred the plaintiff's claim based on the received injury and not the recruiter's negligence). The plaintiff alleged, among other things, that the military was negligent in its failure to perform an adequate background check on Nazario at the time of his hiring. *Id.* at 373; see also *Dreier*, 106 F.3d at 848 (stating the four factors that courts tend to focus on in a *Feres* case).

93. See *Gonzalez*, 88 Fed. Appx. at 375 (explaining that the plaintiff alleged that the military negligently enlisted Nazario). The court noted that the plaintiff's rape occurred in July 1999, which was, at most, nine months after Nazario's enlistment. *Id.* at 372-73; see also *Henning*, 446 F.2d at 777 (stating that the correct focus in a *Feres* analysis is on the moment of negligence, not the moment of injury, because the negligence is the basis of the claim).

94. See *Kendrick*, 877 F.2d at 1203 (noting that the relevant focus in the *Feres* analysis is the moment of negligence, not the moment of injury). *But see Gonzalez*, 88 Fed. Appx. at 375 (ignoring the relevant inquiry in the *Feres* analysis, the negligence alleged, and instead focusing erroneously on the injury that the plaintiff received).

95. See *infra* Parts II.A.1-II.B (analyzing the four-part test by focusing on the negligence alleged in the complaint, rather than on the plaintiff's injury and discussing the reasoning behind the need to protect military order and discipline).

96. See *Gonzalez*, 88 Fed. Appx. at 374-75 (failing to focus the guideposts from *Dreier* on the actual claim of the plaintiff and instead focusing the analysis on the moment of injury); see also *Monaco*, 661 F.3d at 133 (stating that courts should focus on the negligence alleged and not the moment of the injury).

97. See *Nazario*, 56 M.J. at 577 (failing to state where the enlistment of Nazario took place). The court noted that it was Nazario who initially contacted the recruiter about his enlistment. *Id.* *But see Gonzalez*, 88 Fed. Appx. at 374-75 (finding that the location of the

location alone is not dispositive and the court must consider it in conjunction with the other *Feres* factors.⁹⁸ In some cases, courts have allowed recovery where the negligence occurred on a military base and, in other cases, denied recovery when the negligence occurred off-base.⁹⁹ In either instance, however, this factor cannot weigh heavily in the overall analysis because of the unknown location of the negligent act and, therefore, the court must consider this factor relative to the other circumstances in this case.¹⁰⁰

2. *The Status of the Plaintiff at the Time of the Negligent Hiring*

The negligence that the plaintiff in *Gonzalez* alleged may have occurred prior to her entry into the military.¹⁰¹ However, as the relevant focus of the *Feres* inquiry is the moment of the negligence, the unknown status of the plaintiff at the time of the military's negligence cannot provide any guidance.¹⁰² If the plaintiff had not enlisted yet, none of her claims of negligence could involve military decisions.¹⁰³

Even if the plaintiff was on active duty at the time of the government's negligence, the status of the plaintiff is not highly relevant to the *Feres* analysis because it does not demonstrate any relationship between the

rape was on-base, and therefore, this was the relevant inquiry). The Tenth Circuit failed to state whether the enlistment of Nazario took place on a military site. *Id.*

98. See *Johnson II*, 704 F.2d at 1437 (stating that even when an injury occurs on-base, the court must analyze the actions that the active duty service member was performing at the time of the injury). The location of the incident, alone, does not decide the case. *Id.*; see also *Parker v. United States*, 611 F.2d 1007, 1014 (5th Cir. 1980) (stating that although *Brooks* permits recovery if the injury occurred off-base, the converse is not always true). If the injury to the plaintiff occurred on-base, the proper focus is to examine the nature of the service member's function in performing the activity at issue—whether the activity was an order or a duty. *Id.*

99. See *Whitley v. United States*, 170 F.3d 1061, 1072 n.24 (11th Cir. 1999) (explaining that various courts have allowed recovery regardless of where the location of the negligent act occurred because they have considered the location prong in combination with the service member's activity); see, e.g., *Elliot ex. rel. Elliot v. United States*, 877 F. Supp. 1569, 1576 (M.D. Ga. 1992) (permitting recovery in a case where on-base carbon monoxide poisoning occurred).

100. See *Bon v. United States*, 802 F.2d 1092, 1095 n.3 (9th Cir. 1986) (finding that although the location of the act, if known, is important, it does not control the *Feres* analysis and, even if the location is definitely a military site, this does not automatically bar recovery under *Feres*); see also *Johnson II*, 704 F.2d at 1437 (stating that the location of the negligence is not dispositive in the *Feres* analysis because courts must balance all relevant factors).

101. See *Gonzalez*, 88 Fed. Appx. at 375 (stating that at the time of the injury, the plaintiff was an active duty service member, but failing to mention the status of the plaintiff at the time of the military's negligence in enlisting Nazario).

102. See *Kendrick*, 877 F.2d at 1203 (indicating that the proper focus should be on the time of the negligence, not the time of the injury, assuming that the negligence and the injury were not simultaneous). *But see Gonzalez*, 88 Fed. Appx. at 375 (failing to question what the military status of the plaintiff was at the time of Nazario's enlistment).

103. See *Monaco*, 661 F.2d at 132 (noting that if plaintiffs are not on active duty or enlisted in the military at the time of the negligence, then *Feres* cannot bar the claims because there is no need to protect military order and discipline).

negligence and the plaintiff's military service.¹⁰⁴ Furthermore, the Tenth Circuit should not have interpreted the plaintiff's claim to mean that but for her status as a military member, Nazario would never have raped her, because this is not the relevant inquiry.¹⁰⁵ Therefore, as the status of the plaintiff at the time of the negligence is unknown and unpersuasive, it cannot weigh heavily towards barring the plaintiff's claim.¹⁰⁶

3. *The Benefits the Plaintiff Received Due to Her Military Status*

The Tenth Circuit improperly analyzed the plaintiff's military service in the overall *Feres* analysis.¹⁰⁷ The negligent act of hiring Nazario occurred prior to the moment the plaintiff in *Gonzalez* sustained her injury.¹⁰⁸ Therefore, any benefits received by the plaintiff during her military service are irrelevant to the overall *Feres* analysis.¹⁰⁹ There is no relation between the time of the negligent hiring of Nazario, and the minimal benefits received by the plaintiff at the time of her injury.¹¹⁰

The Tenth Circuit found that the benefit the plaintiff received at the time of her injury was her ability to attend an on-base military party.¹¹¹ Courts have found that injuries that occur during recreational activities are incident to service because they relate to military order and discipline.¹¹² However, the plaintiff's ability to attend an on-base party is not a direct consequence of her military status, because other civilians could attend this party, and therefore, the factor cannot weigh heavily in the overall *Feres* analysis.¹¹³

104. See *Johnson II*, 704 F.2d at 1438 (stating that the plaintiff's military status was only relevant in the *Feres* analysis insofar as the status demonstrated any relationship between the government's negligent act or omission and the plaintiff's military service).

105. See *Parker*, 611 F.2d at 1011 (indicating that courts should not interpret "incident to service" to mean "but for the individual's military service, the injury would not have occurred," because courts must do an independent analysis of all the factors to determine whether *Feres* bars the claim).

106. See *Johnson II*, 704 F.2d at 1438 (explaining that this factor is only relevant insofar as it demonstrates a relation between the negligence and the plaintiff's military status).

107. See *Gonzalez*, 88 Fed. Appx. at 376 (using the fact that the plaintiff was at an on-base party to demonstrate that the benefits she received flowed directly from her military status and, therefore, barred the claim).

108. See *id.* at 372-73 (indicating that the rape occurred in July 1999); *Nazario*, 56 M.J. at 577 (stating that Nazario's enlistment process began several months prior to the rape, in Fall 1998).

109. See *Gonzalez*, 88 Fed. Appx. at 376 (implying that the benefit the plaintiff received was the ability to attend an on-base party with other civilians).

110. See *id.* at 375-76 (failing to explain the relevance between the plaintiff's benefit, the ability to attend the party, and the negligence on the part of the military in enlisting Nazario).

111. See *id.* at 376 (arguing that the ability to attend an on-base party was a direct consequence of the plaintiff's military service).

112. See *Costo*, 248 F.3d at 868-69 (indicating that most recreational activities that are military-sponsored fall under the *Feres* bar because these activities reinforce good morale, order and discipline within the military and, thus, serve a military purpose).

113. See *Johnson II*, 704 F.2d at 1438-39 (explaining that if the benefit received by the

Furthermore, because there is no articulable tie between the military's negligent hiring and the benefits received by the plaintiff as a result of being in the military, the focus on the status of the plaintiff at the time of the negligent act is irrelevant to the overall *Feres* analysis.¹¹⁴

4. *The Nature of the Plaintiff's Activities at the Time of the Negligent Act*

Although the nature of the plaintiff's activities at the time of the negligent act weighs heavily in the overall analysis,¹¹⁵ this final factor is unknown and, therefore, not determinative of whether *Feres* bars the plaintiff's claim.¹¹⁶ The plaintiff's activities at the time of injury indicate that she was not subject directly to military discipline, nor was she acting under orders or performing any duty.¹¹⁷ At the time of the actual assault, which should not be relevant to the court's analysis, the plaintiff's activity was not service-related because another service member raped her while she was "sleeping in an impaired state."¹¹⁸ The sexual activity at the moment of injury "served no military purpose," nor was it related to any military purpose.¹¹⁹

Furthermore, similar to the plaintiff in *Brooks*, the court should not have

plaintiff is indistinguishable from other benefits that a civilian could receive, then the benefit is not a direct consequence of being in the military). The Court found that that the plaintiff's part-time, after-hours employment in a military club was not distinguishable from any other part-time employment unrelated to military duties. *Id.* at 1439.

114. *See Holman v. United States*, No. 91-15012, 1992 U.S. App. LEXIS 13588, at *8, 11 (9th Cir. June 5, 1992) (mem.) (stating that the benefits the plaintiff received are only relevant to explain the plaintiff's presence at the military site and do not outweigh any other factor, such as participating in conduct regulated by the military, in the overall analysis). *But see Gonzalez*, 88 Fed. Appx. at 374-75 (focusing erroneously on the moment of injury and stating that the benefit received by the plaintiff was the ability to attend an on-base party that civilians also attended).

115. *See Johnson II*, 704 F.2d at 1439 (stating that the nature of the plaintiff's activities at the time of the negligent act is the most relevant factor in the overall *Feres* analysis to determine whether this claim would question military orders and discipline).

116. *See Gonzalez*, 88 Fed. Appx. at 372-73 (focusing incorrectly on the moment of the plaintiff's injury rather than the moment of negligence and, therefore, failing to explain the activities of the plaintiff at the time of Nazario's enlistment).

117. *Cf. Miller v. United States*, 643 F.2d 481, 486 (8th Cir. 1980) (arguing that although a court could consider virtually every part of a service member's life incident to service, there are situations where the plaintiff's injury does not relate to his military duties). *Compare Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) (finding that this factor weighed in the plaintiff's favor under *Feres*, as he was asleep at the time of his sexual assault), *with Gonzalez*, 88 Fed. Appx. at 376 (explaining that the plaintiff was under military orders and discipline, despite being asleep at the time of her injury).

118. *See Gonzalez*, 88 Fed. Appx. at 375-76 (arguing that although the plaintiff was not awake at the time of her injury, courts have found that the *Feres* Doctrine bars recreational activities, to which sleep can be analogized, despite the plaintiff being under no actual military control).

119. *See Stubbs v. United States*, 744 F.2d 58, 60 (8th Cir. 1984) (indicating that sexual harassment does not serve a specific military purpose). The court in *Stubbs* balanced this factor against two others, the duty status of the plaintiff at the moment of injury (obeying military orders to clean the latrines) and the location of the injury (on-base), and ultimately barred the plaintiff's claim under the *Feres* Doctrine. *Id.*

found that the plaintiff in *Gonzalez* was, at the time of her rape, obeying direct military orders or performing any activity related to her military career.¹²⁰ Instead, she was sleeping, “in an impaired state,” much the same as any person would after a party where he or she possibly had too much to drink.¹²¹ Sleep, regardless of whether someone is in an impaired state, is not an activity that someone performs under the compulsion of military orders.¹²² Therefore, the sleeping plaintiff in *Gonzalez* closely resembles the furloughed plaintiff in *Brooks*, who also was not subject to military orders at the time of his injury.¹²³

Although the plaintiff’s injuries occurred on-base while the plaintiff was on active duty and subject to military discipline, the negligent act did not occur at this same moment and, therefore, the court’s analysis is flawed because it should have focused on the moment of negligence, not the moment of injury.¹²⁴ Balancing the sexual assault, which has no military purpose, against the plaintiff’s activities, status, and location at the time of the negligent act, which were all unknown, demonstrates that *Feres* should not have barred the plaintiff’s claim.¹²⁵ Furthermore, allowing the plaintiff’s claim to proceed on the merits would only serve to support the disciplinary structure within the military, which is the very rationale behind the *Feres* Doctrine, as it likely would make the military more trustworthy

120. Compare *Brooks*, 337 U.S. at 52 (finding that the injury received by the plaintiff had nothing to do with his military career or military orders because he was on furlough and, therefore, was not incident to service), with *Gonzalez*, 88 Fed. Appx. at 375 (demonstrating that the plaintiff received her injury while she was on-base, however, she was drunk and sleeping at the time of her rape).

121. See *Gonzalez*, 88 Fed. Appx. at 376 (finding that although the plaintiff was not furthering a military objective when she slept, she still was subjected to military discipline at that time).

122. See *Day*, 167 F.3d at 683 (barring the plaintiff’s assault claim under *Feres*, however, specifically stating that the fact that the plaintiff was asleep, and therefore, not on duty, at the time of injury weighed in his favor). But see *Gonzalez*, 88 Fed. Appx. at 375-76 (disregarding the fact that the plaintiff actually was asleep on-base in her own barracks when the injury occurred, and instead finding that she was still subject to military orders and discipline when the rape occurred).

123. See *Feres*, 340 U.S. at 146 (finding that *Feres* differed from *Brooks*, as the plaintiff in the latter was on furlough at the time of his injury and was not under military orders at the time). But see *Gonzalez*, 88 Fed. Appx. at 376 (arguing that the military subjected the plaintiff to orders while she was both asleep and intoxicated).

124. Compare *Monaco*, 661 F.2d at 133 (indicating that as long as the negligence occurs at a time that the plaintiff is not in the military service, even if the injury does, the *Feres* Doctrine does not bar the plaintiff’s claim), with *Gonzalez*, 88 Fed. Appx. at 375 (barring the plaintiff’s claim under *Feres* because it analyzed the claim based on the moment of injury, which occurred during the plaintiff’s service, not on the negligence, which possibly occurred prior to her time in the service).

125. Compare *Dreier*, 106 F.3d at 852-53 (holding that the *Feres* Doctrine did not bar the plaintiff’s claim because, at the time of his death, the plaintiff was (1) indistinguishable from a civilian; (2) on-base; (3) not receiving any benefits that were military related; and (4) taking part in activities that were not military related), with *Gonzalez*, 88 Fed. Appx. at 375 (finding that the *Feres* Doctrine barred the plaintiff’s claim because, at the time of injury, the plaintiff was: (1) an active duty military member; (2) on-base; (3) receiving military benefits; and (4) taking part in military-related activities).

in the eyes of a service member because he or she would know that there is an outside check on the actions of those in the service.¹²⁶

B. *The Protection of Military Order and Discipline*

The prevailing judicial concern in allowing the *Feres* Doctrine to bar cases is the protection of military order and discipline.¹²⁷ Under the Uniform Code of Military Justice, any service member “who believes himself wronged” may bring to the attention of a commanding officer any injury that may have occurred.¹²⁸ If the commanding officer refuses to offer any redress, then the service member can complain to any superior officer.¹²⁹ However, this does not necessarily solve the problem in cases that allege serious accusations, such as sexual assault or sexual harassment.¹³⁰ For example, the superior could potentially be the aggressor in the situation, thereby leaving the plaintiff without anyone independent of the situation to hear her claim.¹³¹ In addition, the perpetrator could deny the accusations, or attempt to cover them up, rendering it a “he-said, she-said” argument, which further could destroy any order within the military.¹³²

If civilian courts were to address claims that alleged injuries based on sexual assault, this would only help to promote military order, rather than

126. See *Dreier*, 106 F.3d at 849 (stating that the most relevant question is whether adjudication of this type of claim would have negative effects on the disciplinary system within the military). See generally Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 78 n.527 (2003) (arguing that the protection of military order and discipline can only occur when civilian courts review military policies since rape, itself, is against discipline and order within the military).

127. See *Johnson I*, 481 U.S. at 691-92 (stating that if the litigation of certain claims would disturb the order and disciplinary structure within the military, courts should not hear the specific claim under the *Feres* Doctrine).

128. See 10 U.S.C. § 938 art. 138 (2004) (protecting service members with the right of review within the military in order to avoid any arbitrary or harmful decisions).

129. See *id.* (indicating that once the service members complain to any superior officer, it is the superior officer’s duty to forward the complaint to the officer in charge of court-martials, who, in turn, will evaluate the claim and take the proper measures).

130. See, e.g., *Shiver v. United States*, 34 F. Supp. 2d 321, 322 (D. Md. 1999) (finding that the plaintiff’s drill sergeant was the one who allegedly raped her); *Corey v. United States*, No. 96-6409, 1997 U.S. App. LEXIS 22258, at *3-5 (10th Cir. Aug. 20, 1997) (stating that after the plaintiff’s Colonel repeatedly sexually harassed her, she filed a complaint within the military). However, this incident was covered up, threats were made to potential witnesses, and the Air Force did not take disciplinary action against the harasser. *Id.*; *Stubbs*, 744 F.2d at 59 (indicating that after the sergeant sexually harassed the plaintiff, the plaintiff told her sister that if she complained to her superior officer as directed by the Uniform Code of Military Justice, “the Army would turn on her as a troublemaker”).

131. See, e.g., *Shiver*, 34 F. Supp. 2d at 322 (explaining that the perpetrator was an officer with a position of authority); *Stubbs*, 744 F.2d at 59 (demonstrating that the aggressor was the plaintiff’s superior officer).

132. See, e.g., *Corey*, 1997 U.S. App. LEXIS 22258, at *3-5 (indicating that other officers attempted to cover up the situation, leaving the plaintiff to defend herself, and leaving her claim without any other support).

interfere with it.¹³³ A situation that leaves a plaintiff in the military without a remedy or the ability to bring suit against her aggressor who is also in the service will serve to erode military order.¹³⁴ It is unlikely that an individual would want to work to benefit a system that refuses to help her or turns a blind eye to her situation.¹³⁵ The harm that could result from judicial interference is far less costly than the harm and morale drain that could result from the failure to address the injury at all.¹³⁶ The ability of the judicial branch to question the military in these situations allows military members, particularly women, to feel secure in their positions by knowing that if a rape occurred, they could have a remedy in civilian courts.¹³⁷ The advancement of military order and discipline is enhanced by allowing potential plaintiffs the knowledge that independent judicial systems will properly address and potentially remedy their injuries.¹³⁸ The military cannot afford to allow a situation to occur where there is so much distrust and secrecy as to cause a commanding officer to lack respect or

133. See Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335, 359-60 (1999) (arguing that the internal investigations of the instances of sexual harassment and assault at both Tailhook and Aberdeen Proving Ground interfered so much with military order and discipline that litigating sexual assault and harassment cases only could help the situation within the military, not harm it). *But see* Chappell v. Wallace, 462 U.S. 296, 303-04 (1983) (explaining that the “special status” of the military requires a justice system specifically for the military, separate from the civilian court system).

134. See Turley, *supra* note 126, at 78 n.527 (explaining that the protection of discipline does not take place where a court does not review military policies because allowing sexual assault to occur without any questioning is actually contrary to discipline and order). *But see* Chappell, 462 U.S. at 304 (finding that the special relationship between a soldier and his superiors would not allow a lower ranked soldier to question or to hold his superior liable, because this questioning potentially would destroy military order and discipline).

135. See *Stubbs*, 744 F.2d at 60-61 (explaining that the reason the victim committed suicide was because she felt as if the military would do nothing to support her claim of sexual harassment against her commanding officer, but rejecting the plaintiff’s claim that the military “created the atmosphere which ultimately led to [the plaintiff’s] suicide”).

136. See *Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999) (indicating that the tolerance of rape and sexual harassment within the military “results in a warping of military discipline, a lack of military readiness, and a weakening of national security”). *But see* Chappell, 462 U.S. at 303-04 (emphasizing that judicial interference in the military would undermine the hierarchy that the military has established, thus destroying any discipline that the military has created).

137. *But see* Mazur, *supra* note 5, at 718 n.103 (indicating that the purpose of barring sexual harassment and assault claims under *Feres* is because litigation is not effective discipline for those within the military). However, the military justice system apparently does not provide effective discipline either, based on the high number of rapes and potential rapes that women face. Herdy & Moffeit, *supra* note 79, at 4.

138. See Spak & Tomes, *supra* note 133, at 363 n.153 (indicating that although *Feres* bars judicial intrusion in claims against the military in an attempt to promote military discipline, this premise does not likely hold true in claims that allege sexual assault). Questioning the decisions of those who commit sexual assault cannot undermine control, as the perpetrators likely would not have any control or authority left to question. *Id.* *But see* Chappell, 462 U.S. at 303-04 (indicating that the military is not democratic and, therefore, does not allow for civilian interference with the disciplinary structure of the military).

credibility.¹³⁹ Although the Supreme Court designed *Feres* to protect the military from judicial intervention,¹⁴⁰ the Court also judicially created the Doctrine to prevent the chaos that might ensue from a situation where service members question the orders and commands of superior officers.¹⁴¹ The refusal of courts to hear such claims only fosters the very situations that the Supreme Court intended *Feres* to prevent, because without judicial questioning, obedience and loyalty within the military could result in distrust and insubordination.¹⁴²

*C. The Discretionary Function Exception Should not Bar
the Plaintiff's Claim Because the Negligence was not
at the Planning Level*

The discretionary function exception should not have barred the plaintiff's claim in *Gonzalez*, because the decision made by the recruiter was not one of a discretionary nature.¹⁴³ Decisions at the planning level focus on the type of person to admit into the military, while decisions at the operational level focus on the decision to admit a specific person into the military.¹⁴⁴ The actual enlistment of a person into the military occurs at the operational level; therefore, the discretionary function exception does not apply.¹⁴⁵ Therefore, since a military regulation bound the recruiter in *Gonzalez* to perform a background check accurately and the recruiter failed in this duty, the decision to enlist Nazario occurred at the operational

139. See, e.g., *Stubbs*, 744 F.2d at 60-61 (demonstrating that where a commanding officer sexually harassed a subordinate, the victim committed suicide because she felt that other officers would not believe that he assaulted her).

140. See *Johnson I*, 481 U.S. at 690-91 (finding that the protection against judicial intervention into military decisions was a reason behind the *Feres* Doctrine). Courts attempt to protect these decisions, since they closely relate to the ability to complete military missions. *Id.*

141. See *Feres*, 340 U.S. at 143-44 (protecting the unique relationship between the soldier and the soldier's superiors).

142. See *Saum v. Widnall*, 912 F. Supp. 1384, 1396 (D. Colo. 1996) (stating that courts can grant review when the plaintiff's claim is relatively serious and the potential injury to the plaintiff greatly outweighs any interference that judicial questioning might have with military decisions). *But see Johnson I*, 481 U.S. at 691 (arguing that obedience and loyalty within the military are promoted by not allowing courts to question military decisions).

143. See 28 U.S.C. § 2680(a) (2005) (indicating that the government cannot be liable for claims based on the discretion of federal employees at the planning level); see also *Bryson*, 463 F. Supp. at 911-12 (clarifying how acts, such as the ones in *Gonzalez*, occurred not at the planning level but at the operational level, and thus the discretionary function presumptively does not apply).

144. See *Bryson*, 463 F. Supp. at 911-12 (explaining that the standards to judge whether an applicant is qualified for the military are developed at a planning level, thus exempting the government from liability as to the content of those standards). However, the actual application of the standards takes place at the operational level, permitting courts to hold the government liable. *Id.*

145. See *id.* at 912 (finding that the operational level consists of any action on the part of a federal employee that takes and applies the plans and judgments to individual cases).

level.¹⁴⁶ The recruiter's actions were not at the planning level because he was not making any overall policy judgments, so the discretionary function exception does not apply.¹⁴⁷

As Congress's intended purpose of this exception was to prevent judicial interference in military decision-making, this exception is not applicable in the case at hand because the decision by the recruiter was not discretionary; rather, it was a failure to follow prescribed regulations.¹⁴⁸ Congress effectively would be endorsing a policy of admitting convicted felons into the military if it did not allow judicial questioning of decisions made by recruiters while violating prescribed regulations.¹⁴⁹ The decision to admit one person into the military who happens to be a prior convicted felon is not the type of decision Congress intended to shield from judicial scrutiny under the discretionary function exception.¹⁵⁰ Judicial interference in a situation similar to *Gonzalez* would protect the safety and security of the military because these factors cannot exist if enlistees are prior convicted felons.¹⁵¹ More importantly, the military cannot function properly if it exists conditioned upon a system of mistrust and fear.

*D. The Tenth Circuit Should Adopt the Ninth Circuit's
Position on Negligent Hiring Because Doing So Would
Better Serve the Purpose Behind the FTCA*

The appropriate analysis of negligent hiring claims is the framework used by the Ninth Circuit in *Senger* as opposed to that of the *Shearer*

146. See *Nazario*, 56 M.J. at 577 (demonstrating that the recruiter failed to determine what was enclosed within Nazario's sealed records); see also 32 C.F.R. § 96.1 (2005) (requiring that the military perform a background check on all military applicants, and noting that a felony charge bars enlistment).

147. See *Bryson*, 463 F. Supp. at 911-12 (stating that the enlistment of a specific individual into the military is at the operational level because it entails putting policy into effect and does not require the use of judgment on the part of the recruiter; instead, the planning level requires the use of judgment); see also *Berkovitz*, 486 U.S. at 536 (finding that the relevant inquiry that guides the analysis is the nature of the employee's conduct, not the status of the employee). The Court further stated that if there were a statute, regulation or policy that mandated the actions of the employee, it would not be discretionary because there would not be the element of choice involved. *Id.*

148. See *Nazario*, 56 M.J. at 577 (stating that the recruiter attempted to determine the truthfulness of Nazario's statements as regulations bound him to do so); see also *Varig Airlines*, 467 U.S. at 814 (indicating that the purpose of the exception is to prevent judicial questioning in certain types of decisions that Congress intended to shield from liability).

149. See *Bryson*, 463 F. Supp. at 911-12 (subjecting the government to liability where a recruiter does not follow the prescribed instructions regarding the enlistment of a specific person into the military, since planning level decisions are not those that Congress intended to shield from liability).

150. See *United States v. Muniz*, 374 U.S. 150, 163 (1963) (finding that the purpose of the discretionary function exception is to protect against suits that would prevent efficiency in governmental operations).

151. *But see id.* (stating that governmental agencies, such as the military, must be able to run efficiently without judicial interference and questioning).

plurality.¹⁵² The framework the Tenth Circuit used, that of the *Shearer* plurality, is erroneous because it does not follow the procedure dictated by the FTCA.¹⁵³ Since the meaning behind the FTCA is to allow a broad class of persons the ability to seek redress against the federal government for negligence, courts should not grant broad immunity.¹⁵⁴ Instead, the Supreme Court should grant certiorari to a similar case in order to resolve the discrepancies among circuits, and should adopt the Ninth Circuit's position on negligent hiring because doing so would better serve the purpose behind the FTCA.¹⁵⁵

While *Shearer* and *Gonzalez* have some similarities, the circumstances surrounding the injury in *Shearer* are quite different from those of *Gonzalez*.¹⁵⁶ On the other hand, the facts of *Senger* and *Gonzalez* are quite similar, as both cases demonstrate negligence on the part of the government regarding its hiring and retention procedures.¹⁵⁷ The plaintiff's complaint in *Gonzalez* should have focused on the failure of the military to complete its duty of ensuring that prior convicted felons do not enlist in the military, and this should have been the specific focus of the Tenth Circuit's analysis.¹⁵⁸ The facts surrounding *Gonzalez* demonstrate that it is truly a case of negligence arising prior to military service, similar to *Senger*, in

152. Compare *Senger*, 103 F.3d at 1442 (arguing that the intentional tort exception does not bar negligent hiring claims when the claims themselves do not arise directly from the assault and battery, and instead arise out of the government's negligence in hiring), with *Shearer*, 473 U.S. at 54 (deciding that the intentional tort exception bars any claim that would not exist without the prior occurrence of an assault and battery and, therefore, barring negligent hiring claims).

153. See *Shearer*, 473 U.S. at 54 (holding, in a plurality opinion, that the intentional tort exception of the FTCA bars claims alleging that the government was negligent in failing to prevent the assault or battery of an active duty service member); *Franklin*, 992 F.2d at 1498 (finding that the Tenth Circuit adopted the *Shearer* plurality opinion and, therefore, the intentional tort exception bars negligence claims because the claims stemmed from an assault or battery).

154. See *Senger*, 103 F.3d at 1441 (explaining that the purpose of the FTCA is to provide broad redress for plaintiffs).

155. See *id.* at 1441-42 (holding that the intentional tort exception should not bar negligent hiring claims because one purpose of the FTCA is to provide an avenue of redress for federal employees in situations where private employees have the ability to gain relief).

156. Compare *Shearer*, 473 U.S. at 52 (addressing a complaint that alleged that the military was negligent in its supervision of the perpetrator because he committed his assault subsequent to his enlistment), with *Gonzalez*, 88 Fed. Appx. at 373 (explaining that Nazario had committed his crime prior to his enlistment into the military, thereby fraudulently enlisting).

157. Compare *Senger*, 103 F.3d at 1444 (explaining that the post office may have failed in its duty to third parties because the plaintiff's assault should have been foreseeable to the perpetrator's employer as it knew of his long history of violence and instability), with *Gonzalez*, 88 Fed. Appx. at 373 (indicating that the plaintiff did not focus her complaint directly on the negligence in the hiring of Nazario but, instead, had numerous negligence claims against the military).

158. But see *Gonzalez*, 88 Fed. Appx. at 373 (explaining that the plaintiff's claim alleged various FTCA arguments, without specifically focusing on one major claim, and then barring the claim under *Feres* without addressing any of the plaintiff's arguments).

which the post office had knowledge of the prior instabilities in the perpetrator's life, rather than just a case of a mere failure to supervise.¹⁵⁹

Furthermore, the failure to supervise in *Shearer* occurred at the same moment as the injury, while the negligence in *Gonzalez* occurred prior to the injury, at the time of Nazario's enlistment.¹⁶⁰ Unlike *Shearer*, where the military did not have the ability to know of the perpetrator's dangerous tendencies upon his enlistment, in *Senger*, the postal service knew of the perpetrator's violent history.¹⁶¹ The military, in *Gonzalez*, should have known of Nazario's prior assault conviction due to its enlistment regulations and, therefore, demonstrated negligence in its failure to follow its own procedures.¹⁶² The military could have prevented Nazario's actions by rejecting his application prior to his enlistment, just as the post office could have prevented Senger's assault had it taken the recommended action to remove the perpetrator from his job.¹⁶³

Although a majority of circuits, including the Tenth Circuit, have adopted the concept that the assault and battery exception bars claims focusing on negligence in hiring, courts should not adopt the majority viewpoint in cases like *Gonzalez*.¹⁶⁴ The Supreme Court still has not

159. See *Nazario*, 56 M.J. at 577 (demonstrating that Nazario fraudulently enlisted into the military, thereby showing that the negligence on the part of the military occurred prior to Nazario's actual enlistment).

160. Compare *Shearer*, 473 U.S. at 54 (stating that the plaintiff alleged that the military failed to supervise the perpetrator, by enabling him to commit such a violent crime), with *Senger*, 103 F.3d at 1440 (explaining that the post office had knowledge of the perpetrator's previous criminal acts, dangerous tendencies, and violent past, and even proposed that it remove him from his job many years prior to the actual assault), and *Nazario*, 56 M.J. at 577 (demonstrating that the military failed in its duty to protect other service members by incorrectly following the military regulations regarding criminal background checks).

161. Compare *Shearer*, 473 U.S. at 54 (stating that the prior manslaughter conviction occurred at another Army base, and failing to mention whether the perpetrator had committed any violent felonies prior to his enlistment), with *Senger*, 103 F.3d at 1442 (explaining that the perpetrator's employer had knowledge of his criminal history and stated that one of his criminal acts took place while he was working with the post office).

162. See 10 U.S.C. § 504 (1968) (forbidding any person who has a felony on his record to enlist in the military); *Nazario*, 56 M.J. at 577 (stating that the recruiter had the ability to run an accurate background check on Nazario, rather than merely make one phone call without any follow-up).

163. See *Nazario*, 56 M.J. at 577 (stating that the recruiter failed to complete the background check on Nazario and uncover the felony assault and, therefore, failed to determine the accuracy of Nazario's statements regarding his criminal history); see also *Senger*, 103 F.3d at 1444 (stating that the court should hear the plaintiff's claim on its merits because summary judgment was inappropriate where the injury to the plaintiff may have been foreseeable based on the knowledge the post office had at the time).

164. Compare *Thigpen v. United States*, 800 F.2d 393, 394 (4th Cir. 1986) (holding that § 2680(h) bars all claims that rely on an existing assault or battery), and *Hoot v. United States*, 790 F.2d 836, 839 (10th Cir. 1986) (holding that the intentional tort exception barred the plaintiff's claims for negligence because the claims arose from an assault or battery), with *Senger*, 103 F.3d at 1440-41 (stating that there is federal subject matter jurisdiction when a claim arises from negligence in the hiring or supervision of employees because the intentional tort exception does not bar such claims since the negligence, as opposed to the injuries, does not arise directly out of the assault or battery).

directly refuted the position of the Ninth Circuit, so it still stands as valid law, and the Tenth Circuit should adopt the minority viewpoint as a way to analyze negligent hiring claims.¹⁶⁵ The viewpoint of the Ninth Circuit regarding negligent hiring better satisfies the legislative purpose behind the FTCA.¹⁶⁶ In *Gonzalez*, the lack of an adequate background check was a negligent omission on the part of the military that the court should not have ignored.¹⁶⁷ Although the military does have in place regulations to determine which candidates for enlistment have the proclivity to commit violent crimes,¹⁶⁸ this system has not always proven reliable.¹⁶⁹

E. The Military Has an Affirmative Duty to Protect Service Members from Potentially Dangerous Individuals

The military, just like any other employer, owes a duty to its employees to hire only those persons who will not cause injury to other employees.¹⁷⁰ Military regulations ensure that no foreseeably dangerous individuals have

165. See *Senger*, 103 F.3d at 1441 (providing a framework used for analyzing negligent hiring claims that is more consistent with the purpose of the FTCA in that it allows courts to hear a broad range of negligence claims against the federal government); see also Jack W. Massey, *A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act*, 82 TEX. L. REV. 1621, 1622 (2004) (stating that the minority viewpoint is actually the better viewpoint to handle negligent hiring claims because it furthers the purpose of the FTCA).

166. See *Senger*, 103 F.3d at 1441 (stating that the purpose of the FTCA is to provide plaintiffs broad redress, if private citizens are also able to bring claims in similar situations).

167. See, e.g., *Gonzalez*, 88 Fed. Appx. at 374 (leaving the victim without a remedy by dismissing her claim in federal court under the *Feres* Doctrine).

168. See 10 U.S.C. § 504 (indicating that among those persons not qualified to serve in the armed forces are those with prior felony convictions, as these persons have the inclination to commit criminal acts); 32 C.F.R. § 96.1 (2005) (authorizing the military to acquire the criminal histories of those applying to enlist to determine whether they have committed felonies in the past); see also UNITED STATES AIR FORCE, RECRUITING PROCEDURES FOR THE AIR FORCE, AETC INSTRUCTION 36-2002 77-82 (Apr. 18, 2000) (enumerating the offenses, such as assault, that may bar enlistment into the military, based on the reasoning that those who have previously committed criminal acts have the ability to do so again in the future), available at <http://www.aetc.randolph.af.mil/im/pub/afpd/publications/aetcpubs/aetcins/aetc36-2002.pdf> (last visited June 1, 2005).

169. See, e.g., *Nazario*, 56 M.J. at 577 (demonstrating that the recruiter failed to determine the accuracy of Nazario's statements and uncover the felony assault on his record). As the recruiter enlisted Nazario into the military, he breached his duty to protect the other enlisted members from foreseeably dangerous individuals. *Id.*; see also Richard A. Oppel, Jr. & Ariel Hart, *Contractor Indicted in Afghan Detainee's Beating*, N.Y. TIMES, June 18, 2004, at A1 (explaining that a court recently indicted a civilian contractor, who police had arrested fourteen years prior on felony assault charges, for "kicking and beating" a detainee in Iraq). Despite his previous assault charges, the military had placed him at Fort Bragg, North Carolina, as a member of the Special Forces in the Army. *Id.*

170. See *Sheridan*, 487 U.S. at 403 (holding that the military has a duty to prevent a foreseeably dangerous individual from doing anything unattended); *King v. United States*, 756 F. Supp. 1357, 1360 (E.D. Cal. 1990) (indicating that in negligence claims, the first thing that a plaintiff must demonstrate is a pre-existing duty to protect a group of people from harm). See generally RESTATEMENT SECOND OF TORTS § 314B(2) (1965) (indicating that an employer owes a duty to protect its employees who foreseeably may be injured while acting within the scope of their employment).

the ability to enlist.¹⁷¹ The mere existence of such procedures further demonstrates the military's acknowledgement of its duty to protect those who have enlisted in the armed forces.¹⁷² Therefore, the Air Force owed a duty to Gonzalez, among others, to protect her from harm, and should have rejected Nazario prior to his enlistment because he had a prior felony assault conviction.¹⁷³

As regulations bound the recruiter to complete an accurate background check on all potential enlistees, the military failed in its duty to protect those enlisted in the military in the present case.¹⁷⁴ Although Nazario stated that he had a juvenile charge for fighting, this was false, and the recruiter should have taken the time to determine that Nazario actually had a felony assault charge on his record.¹⁷⁵ Therefore, the failure to fulfill this duty gave rise to the plaintiff's negligence claim against the military.¹⁷⁶

The foreseeability of an injurious act is a prerequisite to holding the government liable under the proximate cause requirement of a negligence claim.¹⁷⁷ The Air Force knew that an injury (yet not specifically rape) might be possible if it enlisted a person with a criminal record.¹⁷⁸ In fact, the military has regulations in place to prevent this potentially dangerous situation from occurring.¹⁷⁹ Although the Air Force could not be certain

171. See 10 U.S.C. § 504 (stating that no person who has previously committed a felony is qualified to enlist in the military); 32 C.F.R. § 96.1 (requiring the military to complete criminal history background checks to ensure the moral quality of all applicants and to bar those with criminal records from enlisting).

172. See *Mulloy v. United States*, 937 F. Supp. 1001, 1008-09 (D. Mass. 1996) (stating that the military had a duty not to enlist a prior convicted felon, as it should have known of his dangerous propensities and because the military had a duty to protect service members and their families from harm). See generally 32 C.F.R. § 96.4 (2004) (indicating that regulations require the military to complete accurate background checks on potential enlistees).

173. See *Mulloy*, 937 F. Supp. at 1008-09 (finding that the military should not enlist foreseeably dangerous persons because it has a duty to protect those within the military from harm); see also 10 U.S.C. § 504 (denying enlistment to those with prior felonies on their records unless they are specifically waived).

174. See *Loritts*, 489 F. Supp. at 1031-32 (finding that if the military assumes a duty, this duty binds the military to act with appropriate care so as to ensure the safety of the individuals it is protecting).

175. See *Nazario*, 56 M.J. at 577 (indicating that although Nazario disclosed to the recruiter that he had a juvenile conviction for fighting, the recruiter failed to determine the accuracy of these statements because he did not investigate the contents of the sealed record).

176. See *Loritts*, 489 F. Supp. at 1031-32 (finding that because the military failed to provide escorts guaranteed to females visiting the West Point Campus, the military was liable for its negligence because its breach directly caused the injury to the plaintiffs).

177. See *King*, 756 F. Supp. at 1360 (arguing that if the military could foresee the danger of its actions, yet still took these actions, and an injury occurred, then the behavior is a tort, and a court potentially could hold the military liable for its actions).

178. See *Mulloy*, 937 F. Supp. at 1010-11 (explaining that it is foreseeable when enlisting a person with a criminal record into the military that this person potentially could harm those with whom he comes into contact).

179. See 32 C.F.R. § 96.1 (2005) (requiring the military to perform background checks

that the past commission of a crime is dispositive of the propensity to commit future crimes, the regulations act in a preemptive manner to attempt to preclude the occurrence of any preventable injury with the goal of ensuring the safety of others in the military.¹⁸⁰ The military does not have to foresee the actual rape, just that there is the chance that a similar injury may occur if it enlists a person with dangerous propensities.¹⁸¹ The injury the plaintiff in *Gonzalez* suffered was a potentially foreseeable result of the hiring of a person who had a felony assault on his record.¹⁸²

Since there must be an unbroken chain of causation between the negligence alleged and the injury for the government to be liable, it is necessary to demonstrate that neither Nazario's criminal act nor the lapse in time qualify as supervening acts that break this chain.¹⁸³ In *Gonzalez*, the plaintiff's rape likely would not have occurred but for the government's original negligence in the hiring of Nazario.¹⁸⁴ Although the rape itself caused the plaintiff's injury, this act was foreseeable based on the government's original negligence under the third prong of the test, and therefore does not qualify as a supervening event.¹⁸⁵ In addition, there was

on potential enlistees in order to prevent the enlistment of those with a felony on their record).

180. See Dep't of Defense, Directive 1304.26: Qualification Standards for Enlistment, Appointment, and Induction, at 8 (Dec. 21, 1993) [hereinafter Directive 1304.26] (stating that the purposes of these regulations are to minimize the enlistment of those who will disrupt "good order, morale, and discipline," and to ensure that the military does not place those already enlisted in close contact with persons who have committed serious crimes in order to protect their safety), available at http://www.dtic.mil/whs/directives/corres/pdf/d130426wch1_122193/d130426p.pdf (last visited June 1, 2005).

181. See *King*, 756 F. Supp. at 1360 (quoting *Ballard v. Uribe*, 715 P.2d 624, 629 (Cal. 1986)) (stating that the military had no duty to foresee that the plaintiff's husband would commit suicide after the plaintiff's arrest; however, the military should have foreseen that the possibility existed for the plaintiff to harm herself). The court stated that its task was to decide whether the plaintiff's injury was a foreseeable harm from the negligence that occurred. *Id.* at 1360 n.3.

182. See *Mulloy*, 937 F. Supp. 1009-10 (stating that the military has procedures meant to ensure that it does not place prior convicted felons into positions of trust, as it is foreseeable that these persons will harm those with whom they come into contact). See generally 10 U.S.C. § 504 (1968) (barring the enlistment of all persons who have a prior felony on their record).

183. See *Thompson*, 652 P.2d at 263-64 (explaining that in order to successfully bring a negligence claim, the plaintiff must prove that the negligence was the proximate cause of the harm, and stating that the intervention of new forces that were not reasonably foreseeable breaks the causal connection).

184. See *Gonzalez*, 88 Fed. Appx. at 372-73 (indicating that although Nazario directly caused the plaintiff's rape, this injury never would have occurred had the military accurately performed its duty and not enlisted Nazario).

185. See *Thompson*, 652 P.2d at 264 (stating that under the third prong of the test, if the injury to the plaintiff was not a foreseeable result of the original negligence, then the act qualifies as a supervening event); see also Directive 1304.26, *supra* note 180, at 7-8 (explaining that the purpose of the regulations barring the enlistment of those with a prior felony conviction is to prevent injury from occurring to those in the military due to the enlistment of felons). Cf. *Mulloy*, 937 F. Supp. at 1012 (finding that both the rape and murder of the service member's wife were a foreseeable result of the military negligently

a special relationship between the military and the plaintiff because the government had a specific responsibility to protect the plaintiff, and others in her position, from preventable harm.¹⁸⁶ The government's affirmative act, its negligence in hiring, was the action that exposed the plaintiff to risk and, therefore, the government is liable regardless of Nazario's criminal action.¹⁸⁷ The rape was, therefore, an intervening force that was a foreseeable consequence of the government's negligence in its hiring of Nazario and does not break the chain of causation.¹⁸⁸

In *Gonzalez*, the negligent hiring, although separated significantly in time from the moment of the actual injury, does not create a chain of causation too attenuated to support a negligence claim.¹⁸⁹ There was no occurrence during the nine-month period between negligence and injury that would cause a break in the chain except for the passage of time.¹⁹⁰ There is no indication that a person who has committed only one felony several years ago is no longer foreseeably dangerous after a certain amount of time has passed.¹⁹¹ If anything, the presumption within the military falls the other way because regulations bar those even with merely one juvenile

hiring a prior convicted felon).

186. See Directive 1304.26, *supra* note 180, at 8 (indicating that the military has a responsibility, which inherently amounts to a special relationship, to prevent enlistees with prior felonies on their records from harming others within the military); see also *Joyce*, 672 P.2d at 1173-74 (stating that if a special relationship exists between the original actor and the potentially injured party, the original actor has a duty to protect those persons from the intentional criminal actions of third parties).

187. See *Nazario*, 56 M.J. at 577 (indicating that the military failed in its duty to perform accurate background checks on all its enlistees since Nazario had a prior felony on his record); see also *Joyce*, 672 P.2d at 1174 (explaining that if the affirmative action taken by the original actor put the plaintiff in the position for a third party to injure the plaintiff, then the original actor is liable regardless of the third party's criminal act).

188. See *Mulloy*, 937 F. Supp. at 1012-13 (stating that rape is a foreseeable consequence when the military negligently hires a prior convicted felon); see also *Thompson*, 652 P.2d at 263-64 (indicating that an intervening force does not break the causal chain and subject the original actor to liability if the intervening force was one that was sufficiently foreseeable based on the original act).

189. See *Brady*, 400 F.2d at 357 (explaining that the plaintiff's claim satisfies proximate cause even if there was a significant lapse in time, if the original actor should have foreseen that, based on the negligence, an injury could occur, provided that there are no other supervening actions). Cf. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting) (explaining that a court cannot significantly separate the injury in time from the negligence because, if it does, there is no proximate cause). However, if there is a continuous chain of events between the moment of negligence and the injury, there is no remoteness in time. *Id.*

190. See *Nazario*, 56 M.J. at 577 (indicating that Nazario approached the military "in the fall of 1998" to begin the enlistment process); see also *Leigh*, 361 P.2d at 854 (explaining that because the stability of the roof should have lasted for up to ten years, the mere passage of time, absent another force, does not qualify as a supervening act that breaks the chain of causation between negligence and injury).

191. See *Deerings W. Nursing Ctr., Div. of Hillhaven Corp. v. Scott*, 787 S.W.2d 494, 496 (Tex. App. 1990) (inferring that if a person has demonstrated violent tendencies in the past, it is likely that he might commit violent acts in the future).

felony from enlisting.¹⁹² Nor is there an indication that Nazario's behavior changed after nine months of enlistment in order to erase his past proclivity towards violent behavior.¹⁹³ As the military knew or should have known of the potential for injury if it enlisted a person who has a propensity for violence, this satisfies proximate cause.¹⁹⁴ Therefore, in *Gonzalez*, the military is liable because it breached its affirmative duty to complete an accurate background check on Nazario in order to ensure the safety of its enlisted members, and this breach was the reasonably foreseeable cause of the plaintiff's rape.¹⁹⁵

CONCLUSION

The purpose of the FTCA is to provide federal employees an avenue of redress against the United States Government in instances where private employees would be able to bring a negligence suit against their private employers.¹⁹⁶ However, the *Feres* Doctrine limits this access and has prevented the majority of cases from ever reaching an appropriate, let alone desirable remedy, because courts tend to dismiss the claims of active duty service members on a jurisdictional technicality without ever reaching the merits of the cases.¹⁹⁷ Congress or the judicial branch needs to confine the *Feres* Doctrine to its originally intended limits in order to provide a more acceptable remedy to plaintiffs, such as the plaintiff in *Gonzalez*.¹⁹⁸ Furthermore, courts should not hide the military's negligence in enlisting a potentially dangerous member of the armed forces behind a doctrine that

192. See 32 C.F.R. § 96.3 (2005) (stating that criminal history checks apply to all enlistees' convictions or citations, both juvenile and adult).

193. See *Nazario*, 56 M.J. at 577 (failing to state if there was anything that occurred during the nine-month period between enlistment and rape that would indicate that he no longer had the ability to commit violent acts).

194. See *Mulloy*, 937 F. Supp. at 1012 (explaining that the perpetrator's enlistment proximately caused the rape and death of the plaintiff's wife because, had the military not allowed him to enlist, he would not have been able to attack the service member's wife). Therefore, there was a causal connection between the military's negligent hiring and the wife's injury. *Id.*; see also *Brady*, 400 F.2d at 357 (finding that when the original actor should have foreseen the potential for injury to the plaintiff at the time of the negligence, absent another supervening force, proximate cause is satisfied).

195. See *Mulloy*, 937 F. Supp. at 1014 (stating that when the military owes a duty to a member of the military community, the military breaches this duty when it negligently enlists a prior convicted felon). Furthermore, when that person injures another, and this injury is foreseeable, a court can hold the military liable. *Id.*

196. See *Senger*, 103 F.3d at 1441 (explaining that a purpose for and rationale behind the FTCA is to allow plaintiffs to have broad redress in federal district courts).

197. See, e.g., *Gonzalez*, 88 Fed. Appx. at 375 (dismissing the plaintiff's claim for lack of subject matter jurisdiction under the *Feres* Doctrine without addressing the actual merits of the claim).

198. See *supra* notes 152-169 and accompanying text (arguing that the Ninth Circuit's interpretation of the assault and battery exception would better allow plaintiffs to find relief in the court system because it focuses on the negligence alleged, not on the negligence that resulted in an assault and battery).

courts never intended to be so broad.¹⁹⁹

The majority's interpretation of the assault and battery exception frustrates the purpose behind the FTCA because courts apply it so broadly as to envelop within the exception even those assault and battery cases that truly stem from a prior negligent act.²⁰⁰ Given the appropriate opportunity, the Supreme Court should resolve the discrepancies between the circuits regarding negligent hiring claims in favor of the Ninth Circuit's minority position in order to provide potential plaintiffs with a fair remedy.²⁰¹

As the Third Circuit has stated, "the facts pleaded here, if true, cry out for a remedy."²⁰² A service member should feel unthreatened by fellow service members while serving in the military and safe from violent crimes, such as rape.²⁰³ Rape should not be occurring as frequently as it is within the military.²⁰⁴ The strongest way to prevent this is to allow courts to adjudicate these claims, because that is at least one true way to protect order within the military.

199. See *Persons*, 925 F.2d at 296 n.7 (explaining that courts have broadened the *Feres* Doctrine to encompass every claim even slightly related to military service).

200. See *Shearer*, 473 U.S. at 54-55 (barring not only claims that arise directly from an assault or battery, but also negligence claims that have their roots in an assault or battery).

201. Compare *id.* (granting broad immunity to the government by barring any claim that stems from an assault or battery), with *Senger*, 103 F.3d at 1441-42 (allowing plaintiffs to bring claims arising out of an assault or battery if the basis of the claim was a negligent act or omission on the part of a government employee).

202. *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir. 1973) (stating that the decision in *Feres* binds the court, and precedent demonstrates that the Supreme Court is unlikely to overturn *Feres* because the Court continues to refuse to grant certiorari to cases involving this doctrine).

203. See generally 10 U.S.C. § 504 (1968) (indicating that there are regulations that prohibit the enlistment of persons with a felony on their criminal record).

204. See *Gonzalez*, 88 Fed. Appx. at 371 (demonstrating that a fellow service member raped the plaintiff, yet barring her claim because she was on active duty at the time of the injury); see also *Shiver*, 34 F. Supp. 2d at 322-23 (demonstrating that the plaintiff's drill sergeant raped her, yet leaving her without redress within the civilian courts); *Corey*, 1997 U.S. App. LEXIS 22258, at *3-5 (showing that the plaintiff's Colonel raped her); *Stubbs*, 744 F.2d at 59 (stating that the plaintiff's sergeant sexually harassed her, and left the plaintiff so distraught over her lack of remedy that it caused her suicide). See generally *supra* note 79 (indicating the numerous occurrences of sexual assault and harassment within the military).