No. 20-____

IN THE

# Supreme Court of the United States

JANE DOE,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

After years of deliberation, in 1946 Congress waived the United States' sovereign immunity from tort liability through the Federal Tort Claims Act ("FTCA"), including for injuries involving "members of the military or naval forces." 28 U.S.C. §§ 1346(b), 2671. Congress limited that waiver with enumerated exceptions, for instance preserving sovereign immunity against claims arising from "combatant activities . . . during time of war." *Id.* § 2680(k). Despite the plain text of the statute, just four years later this Court held that the FTCA broadly precludes claims for injuries "incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). For seventy years, *Feres* has deprived servicemembers of the statutory remedy Congress provided. Members of this Court have criticized this radical departure from statutory text, *see United States v. Johnson*, 481 U.S. 681, 702-03 (1987) (Scalia, J., dissenting) (*Feres* "ignor[ed] what Congress wrote and imagin[ed] what it should have written"), and voted to grant certiorari in cases seeking to correct this error. *See, e.g.*, *Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019) (Mem.) ("Justice Ginsburg would grant the petition for a writ of certiorari"); *id*. (Thomas, J., dissenting from denial of certiorari).

While a cadet at the United States Military Academy, Petitioner Jane Doe was subject to pervasive sexual harassment and raped by a fellow cadet. Later, she brought tort claims under the FTCA. The Second Circuit, applying *Feres*, held that her claims were "incident to service" and therefore barred. The questions presented are:

1. Was *Feres* wrongly decided and should it be overruled?

2. Alternatively, should *Feres* be limited so as not to bar tort claims brought by servicemembers injured by violations of military regulations, during recreational activities, or while attending a service academy?

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## INTRODUCTION

Petitioner Jane Doe grew up in a military family, and as a senior in high school she was thrilled to receive her offer of admission to the United States Military Academy at West Point ("West Point"). Ms. Doe entered West Point in 2008 and excelled as a cadet. However, West Point subjected her to pervasive sexual harassment. In her second year, Ms. Doe was raped on campus by a fellow cadet during a recreational walk late one evening. When she reported the assault, West Point failed to adhere to mandatory Department of Defense ("DOD") regulations governing sexual violence response. In 2010, Ms. Doe withdrew from the school. She later brought suit, including claims under the FTCA. The district court and court of appeals dismissed her FTCA claims on the pleadings, as *Feres* and its progeny have obliged courts to dismiss the claims of many other servicemembers.

In *Feres v. United States*, this Court dramatically curtailed Congress's waiver of sovereign immunity under the FTCA, holding that servicemembers cannot bring claims for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. This interpretation is incompatible with the plain text of the FTCA. "As written," the FTCA's broad waiver of sovereign immunity "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *Lanus v. United States*, 570 U.S. 932, 932 (2013) (Thomas, J., dissenting from denial of certiorari) (internal quotation marks omitted). And "when the meaning of the statute's terms is plain, [the Court's] job is at an end." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020). "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain

terms based on some extratextual consideration." *Id*. Nonetheless, since 1950, the *Feres* doctrine has nullified the FTCA's plain-text promise to servicemembers injured by tortious government conduct.

The national importance of *Feres* and its progeny cannot be overstated. In recent decades, civilians injured by government actions have gained greater access to recovery under the FTCA. Meanwhile, *Feres* and its progeny have denied servicemembers—and sometimes even their children—access to the very system of justice they have pledged to defend. *See, e.g.*, *Brown v. United States*, 739 F.2d 362, 368-69 (8th Cir. 1984) (rejecting as *Feres*-barred claims against the United States and superior officers for failing to prevent mock lynching of a Black servicemember, despite finding no relevant relationship between his injuries and military service); *Mondelli v. United States*, 711 F.2d 567, 568 (3d Cir. 1983) (rejecting as *Feres*-barred claims of a civilian child born with a genetically transferred form of cancer caused by her servicemember father's exposure to radiation). *Feres* has wrongfully deprived injured servicemembers of the remedies Congress established for them in the FTCA.

Unmoored from the text of the FTCA and lacking a coherent rationale, the *Feres* doctrine has also generated confusion among the lower courts. Circuit courts have come to conflicting conclusions about the scope of *Feres*'s "incident to service" bar, likely because some judges seek to avoid the injustice at the heart of the doctrine.

Over time, the *Feres* exception has swallowed the FTCA's rule. As members of this Court have concluded, "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *United States v. Johnson*, 481 U.S. 681,

700 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.). *Feres* has unjustly closed the courthouse doors to too many injured service-members and for too long has left tortious government conduct unchecked. The time to revisit *Feres* is now.

## OPINIONS BELOW

The court of appeals opinion is reported at 815 Fed. App'x. 592 (2d Cir. 2020). That opinion relied on and incorporated the *Feres* analysis from a prior published decision on the government's earlier interlocutory appeal. 870 F.3d 36 (2d Cir. 2017); *see also id.* at 50 (Chin, J., dissenting). The district court's opinion is reported at 98 F. Supp. 3d 672 (S.D.N.Y. 2015).

## JURISDICTION

The court of appeals entered its judgment on May 29, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves a judicially created exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346 *et seq*. The pertinent provisions of the FTCA are included at Pet.App.132a.

## STATEMENT

Since childhood, Jane Doe dreamed of following in the footsteps of her relatives by serving in the U.S. Armed Forces. Pet.App.104a. Ms. Doe was a conscientious and motivated student in high school, and after securing the necessary congressional nomination, she was thrilled to receive an offer of admission from West Point in 2008. *Id*. at 105a. Ms. Doe thrived at West Point, ranking high in her class and garnering praise from her professors. *Id*. at 106a-07a. One professor

described Ms. Doe as "one of the most professional and internally motivated" students at West Point, *id.* at 107a, a young woman who was likely to "excel as an Army officer" and whom he "would gladly recruit . . . to serve on [his] team, regardless of the mission." *Id*.

However, Ms. Doe achieved this success in spite of, not because of, the culture she found at West Point. During Ms. Doe's time at West Point, school administrators failed to take necessary steps to protect female cadets from a pervasive and well-known culture of sexual violence. West Point and its leaders fostered a sexually aggressive and misogynistic environment,[1] failed to punish rapists and other sexual assailants,[2]

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[1] For instance, during team-building exercises, male cadets would march and sing sexually violent cadences, e.g., "I wish that all the ladies / were statues of Venus/ and I was a sculptor / I'd break'em with my penis," and "I wish that all the ladies / were holes in the road / and I was a dump truck / I'd fill'em with my load" Pet.App.108a. This was done in full view of West Point officials, who did nothing to stop them. *Id.* West Point professors and staff openly joked with male cadets about sexual exploits, encouraged male cadets to seize any opportunity for sex, and claimed heavy drinking was an understandable response to the lack of sexual opportunities on campus. *Id.* at 109a.

[2] In 2010, during Ms. Doe's time of attendance, nearly 10% of female cadets indicated they had been subject to sexual assault at West Point that year. Defense Manpower Data Center, *2010 Service Academy Gender Relations Survey*, U.S. Dep't of Def. iv-v (2010), *available at* https://sapr.mil/public/docs/research/FINAL_SAGR_2010_Overview_Report.pdf [https://perma.cc/W5P4-BYW3]. More than half said they had been sexually harassed. *Id* at v. In academic year 2009-2010, West Point received eleven official reports of sexual assault. These reports were a small fraction of the assaults at West Point that year. Pet.App.110a. Of these eleven reports, five were "unrestricted" (informing the perpetrator's superiors and initiating an investigation) and six were "restricted" (meaning no action was to be taken). Only one perpetrator was dismissed from West Point. *Id.* at 110a-111a.

and failed to implement mandatory DOD directives and instructions to protect victims.[3]

Ms. Doe suffered the full consequences of West Point's blatant disregard of DOD policies on May 8, 2010, when she was raped by a fellow cadet. *Id*. at 115a-116a. Ms. Doe was attacked in an academic building, after-hours, during the course of a recreational nighttime walk. *Id*. She sought immediate medical care from West Point, which once again failed to comply with mandatory military directives or to provide appropriate medical and emotional support.[4] Three months later, she resigned and left the school. *Id*. at 118a. Ms. Doe's departure was a bitter loss to a young woman who had dreamed of serving her country. It was also a tragic loss to the nation of a promising future soldier.

After exhausting her administrative remedies, Ms. Doe filed an action in the Southern District of New York in 2013, pleading four causes of action: FTCA claims, a *Bivens* Fifth Amendment Due Process claim,

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[3] In 2011, West Point was not in compliance with DOD sexual harassment and assault policies and was employing a "deficient" prevention training program that failed to meet minimum standards. Pet.App.113a. DOD found that the quality of West Point's sexual harassment and assault prevention programs had declined since 2008. *Id.*

[4] West Point did not provide Ms. Doe with timely access to comprehensive medical and psychological treatment. In the two weeks following the rape, she received no counseling or support, aside from a single email. Pet.App.118a. Nor did she receive a forensic examination despite visiting a health clinic twice in the days after the rape. *Id.* at 116a-17a. These omissions directly contravened mandatory DOD regulations. Pet.App.62a; *see also* U.S. Dep't of Def., Directive 6495.01: Sexual Assault Prevention and Response Program, at 2, 13 (Nov. 7, 2008).

a *Bivens* Fifth Amendment equal protection claim, and a Little Tucker Act claim. *Id*. at 77a-78a. The district court (Hellerstein, J.) granted the defendants' motion to dismiss all claims with the exception of the *Bivens* equal protection claim. *Id*. at 101a.

The government filed an interlocutory appeal to the Second Circuit. Ms. Doe made a motion to transfer to the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(2), which a motions panel denied. *Id*. at 67a-68a. A divided Second Circuit merits panel then reversed the district court on Ms. Doe's equal protection claim, holding that "no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to service." *Id*. at 32a (internal quotation marks omitted). In dissent, Judge Chin noted that Jane Doe "was not in military combat or acting as a soldier or performing military service," but instead was merely a student, and "her injuries were incident only to her status as a student." *Id*. at 43a (Chin, J., dissenting). Ms. Doe subsequently appealed the dismissal of her statutory claims to the Federal Circuit, which transferred the case to the Second Circuit. *Id*. at 15a. Relying on and incorporating the *Feres* analysis from its prior equal protection decision, the Second Circuit affirmed, holding that "Doe's FTCA claims are incident to service, and are therefore barred under *Feres*." *Id*. at 5a-6a.

Jane Doe petitions for a writ of certiorari only as to the dismissal of her FTCA claims. At the time of the harassment, rape, and subsequent negligent handling of her rape by the West Point administration, Ms. Doe had incurred no active service obligation; she was "taking classes, participating in extracurricular activities, and learning to grow up and to be a self-sufficient and healthy individual." *Id*. at 59a (Chin, J., dissenting). "There was nothing characteristically military

about what she was doing." *Id*. (internal quotation marks omitted). Ms. Doe simply seeks to have her claims—and those of other injured servicemembers not subject to a *textual* limitation to the FTCA's waiver of sovereign immunity—heard on the merits.

## REASONS FOR GRANTING THE PETITION

### I. The *Feres* Doctrine's Departure from the Plain Text of the FTCA is a Recurring Issue of Great National Importance.

In *Feres v. United States*, this Court vitiated the ability of servicemembers to bring claims under the FTCA, barring tort claims against the government for injuries "incident to service." 340 U.S. at 146. This judicially created exception contravenes the plain text of the FTCA and dramatically restricts Congress's express waiver of sovereign immunity. The *Feres* doctrine wrongly deprives servicemembers of the remedies Congress created for them under the FTCA.

If the *Feres* doctrine ever was a defensible interpretation of Congress's intent, it has since outgrown every rationale. Rather than create "a workable, consistent and equitable whole," *Feres*, 340 U.S. at 139, for seventy years the "incident to service" bar has undermined Congress's statutory scheme, erroneously denied redress to servicemembers, and insulated tortious government conduct from liability. It has also led to "distortions" in other areas of law. *Daniel*, 139 S. Ct. at 1713-14 (Thomas, J., dissenting from denial of certiorari). This Court should grant certiorari to restore a faithful and just interpretation of the FTCA.

### A. Contrary to the Plain Text of the FTCA, *Feres* Closes the Courthouse Doors to Jane Doe and Countless Other Servicemembers.

When Congress gave the district courts jurisdiction to hear "any claim" of negligence against the United States, it did not mean "any claim but that of servicemen." *Brooks v. United States*, 337 U.S. 49, 51 (1949). The *Feres* doctrine is an indefensible interpretation of the plain text of the statute and a gross injustice to servicemembers denied remedy for injuries not precluded by the FTCA's enumerated exceptions.

#### 1. The *Feres* Doctrine Contravenes the Plain Text of the FTCA.

The FTCA's "terms are clear." *Brooks*, 337 U.S. at 51. The statute provides that the United States "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. The Act uses "neither intricate nor restrictive language in waiving . . . immunity." *United States v. Muniz*, 374 U.S. 150, 152 (1963). Critically, the FTCA expressly waives sovereign immunity for torts involving "members of the military or naval forces" and "the military departments." 28 U.S.C. § 2671. This broad waiver of sovereign immunity is qualified by several enumerated exceptions, at least three of which indicate Congress specifically considered and provided for the needs of the military. *Id.* § 2680(j) (excepting "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"); *id.* § 2680(k) (excepting "[a]ny claim arising in a foreign country"); *id*. § 2680(a) (excepting "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function."). But these limited

statutory exclusions do not encompass all claims incident to military service.

In the first years after its adoption, this Court recognized that servicemembers were eligible for recovery under the FTCA. In 1949, this Court allowed servicemembers to bring claims for the actions of a civilian Army employee who struck their car with an Army truck. *Brooks*, 337 U.S. at 51. The *Brooks* Court was persuaded by the plain language of the statute, its structure, and its legislative history. *Id.* Observing the FTCA's numerous exceptions are "lengthy, specific, and close to the present problem," the Court noted "such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim' [to describe the scope of government liability for servicemember claims]." *Id.* The *Brooks* Court thus read the FTCA to permit servicemember claims not barred by a statutory exclusion. And rightly so. As this Court has repeatedly emphasized: "In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 727 (1989).

Moreover, Congress considered—and rejected—a servicemember bar. *Lanus*, 570 U.S. at 932 (Thomas, J., dissenting from denial of certiorari) ("Congress contemplated such an exception . . . but codified language that is far more limited.") (citations omitted). Indeed, "[t]here were eighteen tort claims bills introduced in Congress between 1925 and 1935," and "[a]ll but two contained exceptions denying recovery to members of the armed forces." *Brooks*, 337 U.S. at 51. Yet, the final text of the FTCA contained no such exception. *Id*. at 51-52. Accordingly, as this Court

observed, "[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when [the FTCA] was passed." *Id.* at 51.

Yet, just one year after *Brooks*, and despite the plain language and legislative history of the FTCA, the *Feres* Court negated the FTCA's waiver of sovereign immunity for servicemembers, creating an additional broad exception barring claims for injuries incurred "incident to service[,]" 340 U.S. at 146—a phrase that appears nowhere in the statute. In so doing, the *Feres* Court neglected the definition of servicemember employment in Section 2671 and rendered superfluous the combatant activities exception, 28 U.S.C. § 2680(k).

"There is no support for [the incident to service bar] in the text of the statute . . . ." *Lanus*, 570 U.S. at 933 (Thomas, J. dissenting from denial of certiorari). As Judge Calabresi has likewise explained, the *Feres* Court's interpretation of the FTCA "flew directly in the face of a relatively recent statute's language," and "its willingness to ignore language, history, and the process of incremental law making . . . was . . . remarkable." *Taber v. Maine*, 67 F.3d 1029, 1038-39 (2d Cir. 1995). In fact, just seven years after *Feres*, this Court acknowledged—in a case not brought by a servicemember—that "[t]here is no justification . . . to read exemptions into the [FTCA] beyond those provided by Congress." *Rayonier v. United States*, 352 U.S. 315, 320 (1957). "If the Act is to be altered that is a function for the same body that adopted it." *Id.* Nonetheless, for seventy years the judicially created *Feres* doctrine has wrongfully closed the courthouse doors to injured servicemembers.

### 2. Courts Have Applied *Feres* to Preclude Suit in a Variety of Circumstances Not Intended by Congress.

The *Feres* doctrine "now 'encompasses, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military.'" *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)). This "has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government . . . ." *Lanus*, 570 U.S. at 932 (Thomas, J., dissenting from denial of certiorari); *see also Richards v. United States*, 180 F.3d 564, 564-65 (3d Cir. 1999) (Rendell, J., dissenting from denial of rehearing en banc) ("*Feres* . . . is being employed by many courts on a regular basis to deny a military employee's recovery, and to prevent the government's accountability, for injuries sustained in connection with essentially civilian activities wholly unrelated to military service.") (citations omitted).

Ms. Doe's case is but one of many examples that illustrate how *Feres* unjustly deprives injured servicemembers from any opportunity to be heard in court. Jane Doe, then a cadet studying at West Point, was raped by a fellow student during a social walk after hours. Had Ms. Doe chosen to attend a "private college receiving federal funding or another public educational institution," rather than choosing to serve her country, "she could seek recourse for her injuries." Pet.App.43a (Chin, J., dissenting). Moreover, if Ms. Doe was a *civilian* raped on the West Point campus by a cadet, she would be allowed to bring suit. *See Loritts v. United States*, 489 F. Supp. 1030, 1031 (D. Mass. 1980) (holding civilian may bring FTCA claims against

West Point for negligence when she was raped by cadet while visiting campus). As these cases demonstrate, *Feres*'s overbroad application has irrationally denied servicemembers a remedy for injuries for which "private individual[s] under like circumstances" would be liable. 28 U.S.C. § 2674.

It may seem anomalous that Ms. Doe's injury could be found "incident to service." But her case is not an outlier. The rape of an underage servicemember, plied with alcohol and assaulted at a party, was held "incident" to her military employment. *Gonzalez v. United States Air Force*, 88 F. App'x 371, 375 (10th Cir. 2004); *id.* at 379 (Lucero, J., concurring) ("Surely, no one should suggest that when young Americans sign up for military service, they can expect that potential sexual assaults upon them will be routinely considered 'incident' to that service. . . It is my hope that the expansive reach of *Feres* will be revisited."). The murder of a female naval officer, shot to death while watching a movie at home with a friend, was determined to be "incident to service" because the assailant, her ex-fiancé, was also a naval officer. *O'Neill v. United States*, 140 F.3d 564, 564-65 (3d Cir. 1998); *id.* at 565 (Becker, C.J., dissenting) ("[I]t is difficult . . . to imagine anything less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend.").When a drill sergeant ordered a recruit into a latrine and raped her—causing such extreme mental anguish to the recruit that she killed herself rather than face his continued abuse—the drill sergeant's conduct was also deemed "incident to service" because he threatened her with military discipline if she refused to submit to his advances. *Stubbs v. United States*, 744 F.2d 58, 59 (8th Cir. 1984).

Malicious religious discrimination and race discrimination within the military have no connection to military goals, yet here too, the *Feres* doctrine has immunized the United States from liability. For instance, a drill sergeant targeted a Muslim Marine Corps recruit on the basis of his faith, allegedly subjecting him to physical abuse so extraordinary that the recruit committed suicide. *Siddiqui v. United States*, 783 Fed. App'x. 484, 486 (6th Cir. 2019). The *Feres* doctrine barred his grieving parents' suit that claimed *inter alia* a pattern of religious discrimination against Muslims at their son's base. *Id.* at 488. In a similarly appalling circumstance, a group of servicemembers attempted to hang a Black servicemember in a mock lynching. *Brown*, 739 F.2d at 364. The court acknowledged the servicemember's assault took place at a "drinking party on a long holiday weekend" that was "not sponsored by the military base" nor was, in any way, "related to the military mission." *Id.* at 368. Yet, the court still held that his claim against the United States was barred by the *Feres* doctrine. *Id.* at 369. The servicemember later attempted suicide. *Id.* at 363.

The *Feres* doctrine's sweeping preclusive effect has barred FTCA claims of servicemembers for injuries wholly unrelated to any military duties. *See, e.g.*, *Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001) (holding the deaths of two off-duty servicemembers, who drowned during a civilian-led, off-base, recreational rafting trip were incident to service); *Bon v. United States*, 802 F.2d 1092, 1093 (9th Cir. 1986) (holding servicemember's injuries caused when a government-owned motorboat collided with her canoe were barred, although the accident occurred during the servicemember's off-duty recreational time); *Bozeman v. United States*, 780 F.2d 198, 201 (2d Cir. 1985) (rejecting as *Feres*-barred a widow's FTCA claims for

the death of her servicemember husband who was killed in a drunk-driving accident after the Army continued to serve the visibly inebriated driver at one of its clubs); *Hass v. United States*, 518 F.2d 1138, 1139 (4th Cir. 1975) (barring claims by servicemember injured while recreationally riding a horse rented from civilian employees of a government-owned stable).

The *Feres* doctrine has also wrongly precluded third-party claims that have their "genesis" in the servicemember's injury. For example, medical negligence caused a servicemember's child to be born with permanent brain injury and physical disfigurement. *See Ortiz v. United States*, 786 F.3d 817, 818 (10th Cir. 2015). Yet, the *Feres* doctrine left the family without any legal remedy, unable to recover costs to help with physicians, hospitalizations, medications, and other treatments necessary to support their child's life. *Id.* at 831; *see also Mondelli*, 711 F.2d at 568 (rejecting as *Feres*-barred claims of a civilian child born with a genetically transferred form of cancer, because her condition was a consequence of her servicemember father's exposure to radiation during nuclear device testing).

The legal claims of servicemembers victimized by conduct far removed from the scope of their military employment and duties have long crumpled against the steel wall of the *Feres* doctrine. Until this Court revisits *Feres*, servicemembers will continue to be injured without the possibility of legal redress provided by Congress and the plain text of the FTCA.

### B. Members of This and Other Courts Have Urged This Court to Revisit *Feres*.

Perhaps no other contemporary doctrine has provoked more lament, nor calls for reconsideration from

the bench, than *Feres*—including from members of this Court. *See, e.g.*, *Johnson*, 481 U.S. at 700-01 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received.") (citation omitted). In recent years, members of this Court have voted to grant certiorari in cases seeking to revisit *Feres*. *See, e.g.*, *Daniel*, 139 S. Ct. at 1713 (Mem.) ("Justice Ginsburg would grant the petition for a writ of certiorari"); *id*. (Thomas, J., dissenting from denial of certiorari); *Lanus*, 570 U.S. at 932 (Thomas, J., dissenting from denial of certiorari); *Jones v. United States*, 139 S. Ct. 2615, 2615 (2019) (Thomas, J., dissenting from denial of certiorari).

Lower courts, too, have frequently called for this Court to revisit *Feres*. *See, e.g.*, *Day v. Mass. Air. Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) (Boudin, J.) ("Possibly *Feres* . . . deserves reexamination by the Supreme Court."); *Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985) (Meskill, J.) ("The *Feres* doctrine is a blunt instrument; courts and commentators have often been critical of it."); *Taber*, 67 F.3d at 1044 n.11 (Calabresi, J.) ("The fact that the doctrine can be made workable does not suggest that the Supreme Court ought not abandon the doctrine completely for reasons akin to those given by Justice Scalia in his *Johnson* dissent."); *Richards*, 180 F.3d at 564-65 (Rendell, J., dissenting from denial of rehearing en banc) ("*Feres* represents more than a 'bad estimation[]' of what Congress intended to do (but did not do), in the [FTCA] . . . I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in *Feres*.") (citations omitted); *Matreale v. State Dep't of Military & VA*, 487 F.3d 150, 159 (3d Cir. 2007)

(Smith, J. concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundation upon which it stands . . . *Feres* and its progeny ought to be reexamined."); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (Thornberry, J.) ("[W]e are compelled, however reluctantly, to reverse the judgment of the district court and dismiss the claim as barred by *Feres*. We are not blind to the tragedy . . . and we regret the effects of our conclusion."); *Uhl v. Swanstrom*, 79 F.3d 751, 755 (8th Cir. 1996) (McMillian, J.) ("[W]e find ourselves equally reluctant, yet legally bound, to hold that plaintiff's claims in the present case are nonjusticiable under the *Feres* doctrine."); *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (McKeown, J.) ("[W]e apply the *Feres* doctrine here without relish . . . in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes.") (citations omitted); *Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1991) (Nelson, J.) ("It would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*."); *Ortiz*, 786 F.3d at 818 (Tymkovich, J.) ("[T]he facts here exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not ours to overrule."); *see also Bork v. Carroll*, 449 Fed. Appx. 719, 721 (10th Cir. 2015) (Gorsuch, J.) ("*Feres* proceeded to hold—despite the FTCA's language suggesting a waiver of immunity—that FTCA suits for injuries 'aris[ing] out of or . . . in the course of activity incident to service'" are barred).

It is time for this Court to revisit *Feres*.

### C. The *Feres* Doctrine Lacks a Single Coherent Rationale.

Over time, this Court has identified four purported justifications for *Feres*'s rewriting of the FTCA. Those rationales are: (1) a lack of "parallel [private] liability," *Feres*, 340 U.S. at 141-142; (2) the "distinctively federal in character" relationship between the Government and members of the armed forces, *id*. at 143; (3) the existence of an alternative compensation scheme, *id.* at 145; and (4) the importance of preserving military discipline. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977); *United States v. Brown*, 348 U.S. 110, 112 (1954). If ever these rationales were persuasive, the doctrine has far outlived them. This Court itself has abandoned the first three rationales—those originally articulated in *Feres*. *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955) (holding that the United States could be liable for negligently operating a lighthouse despite the lack of parallel private liability); *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985) (noting that the second, distinctively federal relationship, rationale and the third, alternative compensation, rationale no longer control). And for good reason.

This Court rejected *Feres*'s "parallel private liability" rationale a mere five years after *Feres*. *Indian Towing*, 350 U.S. at 66-69; *see also Rayonier*, 352 U.S. at 319. Dispensing with the "parallel private liability" rationale was appropriate, as several of the FTCA's exceptions would be rendered superfluous if uniquely governmental conduct did not fall within the FTCA's reach. For example, "private individuals typically do not . . . transmit postal matter, 28 U.S.C. § 2680(b), collect taxes or customs duties, § 2680(c), impose quarantines, § 2680(f), or regulate the monetary system,

§ 2680(i)." *Johnson*, 481 U.S. at 694-95 (Scalia, J., dissenting).

Next, in 1963, this Court set aside *Feres*'s "distinctively federal relationship" rationale in *United States v. Muniz*, 374 U.S. 150, 162 (1963), and later confirmed the rationale is no longer controlling. *Shearer*, 473 U.S. at 58 n.4. The *Feres* Court had reasoned that the relationship between the government and members of the armed forces necessitated uniform recovery for servicemembers. 340 U.S. at 143 ("It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.").[5] But in *Muniz*, the Court "abandoned this peculiar rule of solicitude" by "allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities." *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting). Moreover, "[t]he unfairness to servicemen

[5] In *Feres*, the "distinctively federal relationship" rationale rested on the notion that fairness to servicemembers required uniform recovery. In *Stencel Aero Engineering Corp. v. United States*, this Court suggested the rationale is directed toward uniformity for the Government. 431 U.S. at 672. But, "[t]o the extent that the rationale rests upon the military's need for uniformity, it is equally unpersuasive." *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting). Several FTCA exemptions "show that Congress considered the uniformity problem, *see, e.g.*, 28 U.S.C. §§ 2680(b), 2680(i), 2680(k), yet it chose to retain sovereign immunity for only some claims affecting the military. § 2680(j)." *Id.* Furthermore, as civilian claims against the military are not barred by the *Feres* doctrine, and servicemembers may recover for injuries not incident to service, the military desire for uniformity has been decidedly rejected by this Court. *Id.*

of geographically varied recovery is, to speak bluntly, an absurd justification, given that . . . nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery." *Id*. at 695-96; *see also Lanus*, 570 U.S. at 933 (Thomas, J., dissenting from denial of certiorari) (emphasizing that, contrary to the FTCA's text, *Feres* deprives servicemembers of *any* remedy for tortious government conduct.).

*Feres*'s "alternative compensation" rationale was rejected by this Court before *Feres* was even decided. *Brooks*, 337 U.S. at 53 ("[N]othing in the [FTCA] or the veterans' laws . . . provides for exclusiveness of remedy."). And it was again rejected by this Court just four years after *Feres*. *Brown*, 348 U.S. at 113 (noting "Congress had given no indication that it made the right to compensation the veteran's exclusive remedy," and "the receipt of disability payments . . . did not preclude recovery under the [FTCA] but only reduced the amount of any judgment" thereunder). Moreover, *Feres* has been applied to bar recovery for injuries, like sexual assault, where no alternative compensation—from the Department of Veterans Affairs or elsewhere—exists. Gregory C. Sisk, *The Peculiar Obstacles to Justice Facing Federal Employees Who Survive Sexual Violence*, 2019 U. Ill. L. Rev. 269, 280-81 (2019) (explaining survivors of military sexual trauma receive "no benefit from the [Veterans Benefits Administration] unless they suffered a physical injury or have become psychologically disabled as a result"); *see also Webb v. Wilkie*, 32 Vet. App. 309, 313 (2020) (explaining entitlement to compensation under the veterans benefits scheme requires evidence of current disability). "In sum, 'the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable.'" *Johnson*,

481 U.S. at 698 (Scalia, J., dissenting) (quoting *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980)).

It was only "[s]everal years after *Feres* [that the Court] thought of a fourth rationale: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline." *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (citing *Brown*, 348 U.S. at 112). Over time, lower courts increasingly relied on this *post hoc* rationale. *See, e.g.*, *Taber*, 67 F.3d at 1043 ("Because the lower courts have found the rationales other than discipline extremely difficult to apply in a coherent manner . . . it is not surprising that *Johnson*—a decision that we are bound to follow—left both the doctrine and the lower courts more at loose ends than ever." (citation omitted)); *Elliott v. United States*, 13 F.3d 1555, 1559 (11th Cir. 1994) (stating that *Feres*'s other rationales "provide no help in determining when an injury occurs 'incident to service'"), *vacated for reh'g en banc*, 28 F.3d 1076 (11th Cir. 1994) (*en banc*), *affirming district court judgment by equally divided court*, 37 F.3d 617 (11th Cir. 1994); *see also Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) (noting application of the military discipline rationale to bar claims for civilian family of service-member "follows no legislative direction but instead enlarges a problematic court precedent").

But preserving military discipline cannot coherently justify the *Feres* doctrine's broad "incident to service" bar. In fact, precisely because military discipline serves as a *post hoc* rationale for *Feres*, courts have applied the doctrine to cases that have no military discipline implications whatsoever. *Hall v. United States*, 451 F.2d 353, 354 (1st Cir. 1971) ("Even though

there may have been no disciplinary element in this case . . . *Feres* required no nexus between discipline and injury."). Moreover, in Jane Doe's case, *Feres* was applied to shield not military order but rather violations of mandatory DOD directives and instructions. Broadly immunizing the government from suit for servicemembers' injuries—whether incident to service or not—undermines military discipline rather than preserves it.[6]

What is more, "[p]erhaps . . . Congress thought that *barring* recovery by servicemen might adversely affect military discipline." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). As the government itself recently told this Court, "[s]exual assault 'is one of the most destructive factors in building a mission-focused military.'"[7] Not only is intra-military sexual assault "difficult to uncover, but [also] devastating to the morale, discipline,

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[6] Empirical evidence also suggests military order and efficiency are undermined by prioritizing deference to hierarchy over accountability to one's comrades. Barry Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War*, 29 St. Louis U. L.J. 383, 408-09 (1985) ("Studies conducted during the Korean and Vietnam Wars confirmed the 'seeming irrelevance' of traditional concepts of discipline . . . [finding] that the basic drive to return home safely and the intimacy of the group were the primary motivations under fire. . . . Although blind obedience may have been necessary 'when armies had to be forced into open fire in mass infantry lines,' it is harmful in modern armies requiring individual responsibility.").

[7] Brief for Petitioner at 5, *United States v. Briggs*, *argued*, No. 19-108 (Oct. 13, 2020) (quoting Memorandum from James N. Mattis, Secretary of Defense, to All Members of the Department of Defense: S*exual Assault Prevention and Awareness* (Apr. 18, 2018), *available at* https://dod.defense.gov/portals/1/features/2018/0418_sapr/saap-osd004331-18-res.pdf [https://perma.cc/TGC4-VXWA]).

and effectiveness of our Armed Forces."[8] "And the destruction of 'morale, good order and discipline' is only exacerbated by a failure to bring assailants to justice."[9] Yet the *Feres* doctrine has been consistently applied to bar recovery for intra-military sexual assault. *See, e.g.*, *Smith v. United States*, 196 F.3d 774, 777 (7th Cir. 1999) (dismissing servicemember's FTCA claims that while off-duty, her drill sergeant repeatedly forced her into his private vehicle and took her off-post to rape her, because the assaults "were made possible by his status as her military superior" and thus "incident to service" under *Feres*).

Undermining the FTCA's deterrent effect is of particular concern in the military context. Taking sexual assault as an example, "[t]he Pentagon has identified military sexual trauma as a major deployment and readiness issue." Brief for Petitioner at 5, *United States v. Briggs*, *argued*, No. 19-108 (Oct. 13, 2020) (citing *UCMJ Sex Crimes Report* at 117 n.457). Which is why "the 'deterrence of sexual offenses in the military is especially critical.'" *Id.* (quoting *UCMJ Sex Crimes Report* at 117 n.456). Simply put, "[a]n effective fighting force cannot tolerate sexual assault within its ranks."[10] And yet, in 2010, the year Ms. Doe

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[8] *Id.* at 23.

[9] *Id*. at 7 (quoting U.S. Dep't of Defense, *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice* 2 ("*UCMJ Sex Crimes Report*") (Jan. 16, 2015), *available at* https://jpp.whs.mil/public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ.pdf [https://perma.cc/264Y-D7TA]).

[10] *Id.* (quoting Sexual Assault Prevention and Response Office, U.S. Dep't of Defense, *Department of Defense Fiscal Year 2009 Annual Report on Sexual Assault in the Military* 5 (2010), *available at* https://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf [https://perma.cc/C43R-HV98]).

resigned from West Point, DOD's own data revealed that staggering numbers of West Point students were subject to sexual assault and harassment on campus.[11] More recently, in 2018, DOD found that, despite its efforts, female servicemembers were experiencing increased rates of sexual assault and male servicemembers' rates of sexual assault had not improved at all.[12]

The *Feres* doctrine still further disrupts military discipline by limiting recoveries for servicemembers and their families: "After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). And to the extent that the potential effects of tort liability on military discipline is an appropriate consideration, Congress itself took account of this concern by preserving sovereign immunity against claims arising out of combatant activities during times of war, 28 U.S.C. § 2680(j), in foreign countries, *id*. § 2680(k), and as a result of discretionary actions. *Id*. § 2680(a). These statutory provisions have been sufficient to shield the military from liability when Congress intended. *See, e.g.*, *Mercado Del Valle v. United States*, 856 F.2d 406, 409 (1st Cir. 1988) (Breyer, J.) (holding discretionary

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[11] Defense Manpower Data Center, *supra* note 2, at 12, 64.

[12] Sexual Assault Prevention and Response Office, U.S. Dep't of Defense, *Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military* 3 (2020), *available at* https://www.sapr.mil/sites/default/files/1_Department_of_Defense_Fiscal_Year_2019_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [https://perma.cc/76UL-QK7W].

function exception bars FTCA claims arising from death of student in hazing incident related to Air Force ROTC program and declining to reach separate contention that *Feres* precluded suit).

The *Feres* rationales are now so disconnected from justifying the "incident to service" bar that some courts simply refuse to interpret the bar in light of those purported rationales. *Daniel v. United States*, 889 F.3d 978, 981 (9th Cir. 2018) ("Because of extensive criticism of the doctrine and its underlying justifications, we have 'shied away from attempts to apply these policy rationales.'") (quoting *Costo*, 248 F.3d at 867); *see also Daniel*, 139 S. Ct. at 1713-14 (Thomas, J., dissenting from denial of certiorari).

Moreover, absent a coherent rationale, the *Feres* doctrine has created pressure to offset the government's windfall by warping other areas of law in order to provide servicemembers some relief. *Id*. at 1714 ("[D]enial of relief to military personnel and distortions of other areas of law to compensate will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*."). These distortions mitigate the injustice of *Feres* in marginal cases but are unsustainable and insufficient substitutes for the statutory scheme Congress created in tort.[13] The Court

[13] In fact, there is evidence that reduced liability under *Feres* has encouraged collateral expansion of the government into essentially civilian activities, disconnected from any distinctively military mission. *See* 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, 4 (2003) (arguing reduced liability under *Feres* has encouraged collateral expansion of the military to displace private sector competitors, e.g., in recreation for servicemembers).

must step in to restore a reasoned approach to remedying servicemembers' injuries.

## II. The *Feres* Doctrine Generates Inconsistent Results Across the Circuit Courts.

In an apparent effort to avoid the manifest injustice of the doctrine, some courts have sought ways to evade the harsh preclusive effect of *Feres*. These efforts have largely failed given the sweeping scope of *Feres*, but to the extent they have succeeded, they have resulted in a series of circuit splits.

The circuits are divided over whether injuries incurred during recreational activities—such as the rape of Ms. Doe on an after-hours walk—are barred by *Feres*. *Compare Costo*, 248 F.3d at 864 (holding off-duty servicemember's injuries from recreational rafting trip were incident to service), *and Bon v. United States*, 802 F.2d 1092, 1093 (9th Cir. 1986) (same, concerning recreational canoe rented from naval facility), *and Hass*, 518 F.2d at 1139 (same, regarding recreational horseback riding on military base), *with Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 645-46 (5th Cir. 2008) (holding FTCA claim by servicemember injured on boat rented from civilian company licensed to operate at Army's facility was not incident to service, because connection to plaintiff's military status was "largely coincidental").

The Second Circuit held that Ms. Doe's injuries were *Feres*-barred because as a West Point cadet she was subject to military discipline "at all times" and review of her claims would implicate military decision-making. Pet.App.6a-7a. But in *Regan*, the Fifth Circuit explained that, according to that circuit's precedent, whether a servicemember "is at that time subject to military discipline . . . would be the wrong focus," and rather

"what is relevant . . . is where that status is on a continuum between performing the tasks of an assigned mission to being on extended leave from duty." 524 F.3d at 637. Like the injury in *Regan*, Ms. Doe's rape did not occur while she was performing a military mission, nor did it serve any military purpose. And insofar as civilians may bring claims against West Point under the FTCA arising from sexual assault on campus, *see Loritts*, 489 F. Supp. at 1031, Ms. Doe's status was similarly "coincidental to [her] injuries and not necessary to them." *Regan*, 524 F.3d at 643. But as the Ninth Circuit reasoned in *Costo*, "whatever the original scope of the *Feres* doctrine, it is clear that it has been interpreted throughout the lower courts—and, specifically, by [the Ninth Circuit]—to include[,]" injuries incurred during recreational activities at military-controlled facilities. 248 F.3d at 869.

Circuit courts have also come to conflicting conclusions as to whether tortious violations of DOD regulations—such as Ms. Doe's injuries—fall within the scope of the *Feres* bar. In *Johnson v. United States*, the Ninth Circuit explained that injuries incurred because of the government's "fail[ure] to follow established military rules and procedures" simply "do not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review." 704 F.2d 1431, 1440 (9th Cir. 1983); *see also* Pet.App.62a (Chin, J., dissenting) ("The concern identified in *Feres* and its progeny that courts not interfere with military discipline and structure carries little weight when the military is violating its own rules and regulations."). But in holding that Ms. Doe's claims were barred by the *Feres* doctrine, the Second Circuit came to the opposite conclusion. Pet.App.5a-6a; *see also Major v. United States*, 835 F.2d 641, 645 (6th Cir. 1987) (rejecting as *Feres*-barred claims arising

from the death a servicemember, and injury of another, struck by a drunk driver who consumed alcohol at an on-base party in violation of military regulations).

There is further division across the circuits as to whether FTCA claims by off-duty servicemembers involving conduct unrelated to military orders or training are barred. The Ninth Circuit has held that personal activities are not related to military function and discipline and allows these FTCA suits to proceed.[14] *Johnson*, 704 F.2d at 1440. This conduct is "subject to military discipline only in the very remotest sense . . . [and] purely personal." *Id*. The Fifth Circuit has reached a similar result. *See Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980) (holding that *Feres* did not bar suit by family of servicemember killed when hit by a military vehicle while driving on an Army-maintained road within Fort Hood because "a suit by one leaving the base to attend to his personal affairs, while under no military supervision, will not interfere with military discipline").

Other circuits, however, disagree and bar liability in cases involving off-duty servicemembers. The Tenth Circuit has rejected as *Feres*-barred claims by an off-duty servicemember against the United States for negligent operation of an officer's club that led to his beating by gang members in the parking lot. *Pringle*, 208 F.3d at 1222. Despite the nearly identical factual circumstances to *Johnson*, the *Pringle* court interpreted *Feres*' "incident to service" language to apply to "*all* injuries suffered by military personnel that are

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[14] The Ninth Circuit has applied this interpretation with some frequency. *See*, *e.g*., *Mills v. Tucker*, 499 F.2d 866, 867 (9th Cir. 1974) (*per curiam*); *Dreier v. United States*, 106 F.3d 844, 853 (9th Cir. 1996), *as amended* (Feb. 4, 1997); *Schoenfeld v. Quamme*, 492 F.3d 1016, 1017 (9th Cir. 2007).

even remotely related to the individual's status as a member of the military." 208 F.3d at 1223-24. Other circuits following this approach have barred recovery for horrific off-duty injuries unrelated to any plausible military objective or training. *See, e.g.*, *Brown*, 739 F.2d at 368-69 (barring claims arising from mock lynching of a Black servicemember, despite finding no relevant relationship between his injuries and military service); *Richards v. United States*, 176 F.3d 652, 656 (3d Cir. 1999), *reh'g denied* (barring recovery when servicemember was killed while driving home from work when his private vehicle was broadsided by military truck on a public highway that runs through Fort Knox Army Base); *O'Neill*, 140 F.3d at 564-565 (denying petition for rehearing en banc after concluding murder of servicemember watching a movie in her home, committed by a servicemember ex-fiancé, was incident to service).

The courts of appeals also disagree whether *Feres* applies to "dual status" technicians in the military, and if so, how. *Compare Jentoft v. United States*, 450 F.3d 1342, 1348-49 (Fed. Cir. 2006) (holding that "the plain language of [10 U.S.C.] § 10216(a) makes clear that" dual-status technicians are civilians) *with Zuress v. Donley*, 606 F.3d 1249, 1253 (9th Cir. 2010) (holding [10 U.S.C.] § 10216(a) has no bearing on the *Feres* analysis), *and Bowers v. Wynne*, 615 F.3d 455, 467 (6th Cir. 2010) (same), *and Williams v. Wynne*, 533 F.3d 360, 366-67 (5th Cir. 2008) (same).

Finally, the courts of appeals have diverged over whether *Feres* bars claims brought on behalf of servicemembers' civilian children, when the genesis of the injury involves negligent treatment of the servicemember parent. *Compare Brown v. United States*, 462 F.3d 609, 614 (6th Cir. 2006) (allowing father to bring suit under FTCA on behalf of his infant daughter who

was injured as a result of negligent prenatal care provided to her servicemember mother) *with Ortiz*, 786 F.3d at 818 (rejecting father's claims on behalf of his infant daughter who was injured as a result of negligent care provided to her servicemember mother preceding and during delivery). In some circuits, a servicemember mother cannot bring a claim due to *Feres* if she is injured by negligent prenatal care, but she "may recover consequential damages for non-physical injury [she] sustain[ed] as a result of injury" to her unborn civilian child. *Romero v. United States*, 954 F.2d 223, 227 (4th Cir. 1992) (holding FTCA claims not barred regarding civilian child injured in childbirth because hospital's negligent actions did not harm mother at all and thus had no genesis in mother's injury). *Cf. Mossow v. United States*, 987 F.2d 1365, 1369-70 (8th Cir. 1993) (holding FTCA claims not barred because hospital's negligent administration of medicine was intended to benefit only third-party child and not the mother).

Just as the *Feres* doctrine's evident error and injustice has led courts to distort other areas of the law, *see Daniel*, 139 S. Ct. at 1713-14 (Thomas, J., dissenting from denial of certiorari), so too has it prompted some courts to try to pry open the courthouse door for at least some injured servicemembers. These irreconcilable results across the circuits are the inevitable consequence. Though these circuit splits may be modest, the national stakes of their collective incoherence could not be higher. Servicemembers injured by tortious government conduct should be "entitled to rely on the law as written." *Bostock*, 140 S. Ct. at 1749. They likewise deserve consistency across the circuits. And only a reconsideration of *Feres* can make it so.

## III. This Case Presents an Appropriate Vehicle to Reconsider *Feres*.

While this Court need not overturn *Feres* to resolve this case in favor of the Petitioner,[15] Ms. Doe's case provides this Court an excellent opportunity to revisit the *Feres* doctrine.

This case squarely presents the *Feres* question. The Second Circuit held Ms. Doe's FTCA claims were "incident to service, and are therefore barred under *Feres*." Pet.App.6a. The allegations of Ms. Doe's complaint illuminate the tension between the FTCA's textual promise of a remedy and *Feres*'s bar to servicemembers' relief. Ms. Doe's injuries were not incurred abroad or in connection with combat activities. *See* 28 U.S.C. §§ 2680(j)-(k). She was injured on a college campus thousands of miles from any active battlefield. She was not attacked by an enemy combatant but a fellow cadet. She was raped not while performing military duties but after-hours on a recreational walk. That her injuries are deemed "incident to service" and

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[15] This Court could hold that, while *Feres* bars claims that "unduly interfere with military discipline," *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting), *Feres* is not controlling where military employees violate the military's own mandatory rules. In such cases, servicemembers would not fall within the scope of the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), and the Court would be in the position of reinforcing, rather than interfering with, military discipline. *See* Pet.App.62a (Chin, J,. dissenting) ("The concern identified in *Feres* and its progeny that courts not interfere with military discipline and structure carries little weight when the military is violating its own rules and regulations."). Additionally, or in the alternative, this Court could hold that *Feres* is not controlling where injuries arise during recreational activities or while attending a service academy. "[T]he special factors counseling hesitation . . . are simply not implicated" in such circumstances. *Id.* at 60a (Chin, J., dissenting) (internal quotation marks omitted).

therefore that her claims must be dismissed demonstrates just how far the *Feres* doctrine has departed from the plain text of the FTCA.

This Court does not lightly reconsider its past decisions, even ones as unjust and rightly condemned as *Feres*. Nevertheless, "[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . . and experience has pointed up the precedent's shortcomings." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2417 (2015) (Alito, J., dissenting) (citations and internal quotation marks omitted). *See also Johnson v. United States*, 576 U.S. 591 (2015) (Scalia, J., joined by Roberts, C.J. and Ginsburg, Breyer, Kagan, JJ.) ("Decisions . . . proved to be anything but evenhanded, predictable, or consistent . . . undermine, rather than promote, the goals that *stare decisis* is meant to serve."). While the Court has abandoned its three original justifications, *see, e.g.*, *Indian Towing Co.*, 350 U.S. at 66-69, and the fourth has been inconsistently applied and widely criticized in recent decades, *see, e.g., Johnson*, 481 U.S. at 700 (Scalia, J., dissenting), the doctrine has persisted in denying justice to countless servicemembers. Ms. Doe's case presents an opportunity for this Court to restore the balance.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 26, 2020

# APPENDIX

**APPENDIX A**

**Second Circuit Order**
**Affirming District Court Order**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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18-185

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JANE DOE,

*Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA,

*Defendant-Appellee*,

LIEUTENANT GENERAL FRANKLIN LEE HAGENBECK,
BRIGADIER GENERAL WILLIAM E. RAPP,

*Defendants*.[1]

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SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN

[1] The Clerk of Court is directed to amend the caption as set forth above.

ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of May, two thousand twenty.

PRESENT: RALPH K. WINTER,
RICHARD C. WESLEY,
RICHARD J. SULLIVAN,

*Circuit Judges.*

FOR PLAINTIFF-APPELLANT:

KATHRYN POGIN, JADE FORD (Chandini Jha, Kath Xu, Michael J. Wishnie, Shikha Garg, Abigail Olson, Samantha Schnell, *on the brief*), Veterans Legal Services Clinic, Jerome N. Frank Legal Services Organization, Yale Law School, New Haven, CT.

FOR DEFENDANT-APPELLEE:

CHRISTOPHER CONNOLLY (Benjamin H. Torrance, *on the brief*), Assistant United States Attorneys, *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff-Appellant "Jane Doe" appeals a decision of the district court (Hellerstein, *J.*) dismissing her claims under the Federal Tort Claims Act ("FTCA") and Little Tucker Act ("LTA") against the United States. Doe, a former cadet at the United States Military Academy ("West Point"), alleges that she was sexually assaulted by a fellow cadet in 2010. In 2013, Doe brought claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against two high-ranking military officials based on their roles in developing and overseeing West Point's allegedly inadequate sexual assault policies; FTCA claims against the United States based on those same allegedly inadequate policies; and a contract claim under the LTA on the theory that by implementing the allegedly inadequate sexual assault policies, the United States breached the "agreement" it entered into with Doe when she joined West Point as a cadet. The district court dismissed all claims except for Doe's *Bivens* equal protection claim. *Doe v. Hagenbeck*, 98 F. Supp. 3d 672 (S.D.N.Y. 2015). Lieutenant General Hagenbeck and Brigadier General Rapp filed a notice of interlocutory appeal regarding Doe's *Bivens* equal protection claim, and on appeal, a panel of this Court concluded that her *Bivens* claim was barred by the doctrine of intramilitary immunity established in *Feres v. United States*, 340 U.S. 135 (1950). *Doe v. Hagenbeck* ("*Doe I*"), 870 F.3d 36 (2d Cir. 2017). Accordingly, we remanded to the district court with instructions to dismiss that claim.

Now before the Court are Doe's FTCA and LTA claims. Principally, Doe argues that (1) her FTCA

claims are not barred by intramilitary immunity because her rape was not "incident to service;" and (2) the district court erred in dismissing her LTA claims, and a previous motions panel of this Court erred in concluding that those claims did not present a federal question. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, a detailed recitation of which is provided in *Doe I*, and refer to them only as necessary to explain our decision to affirm.

## I. Standard of Review

In considering a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1), we "review factual findings for clear error and legal conclusions *de novo*." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (internal quotation marks omitted). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.*

## II. Doe's FTCA Claims

Doe brings a number of claims under the FTCA, arguing that Defendants Hagenbeck, Rapp, and other West Point officials negligently trained and supervised West Point cadets and staff concerning sexual assault; implemented inadequate sexual assault policies; "created an unreasonable risk of causing [Doe] emotional distress" by creating and maintaining inadequate policies concerning sexual assault, failing to discipline assailants, and tolerating sexually aggressive conduct, J. App'x 62–63; and failed to investigate and punish instances of sexual assault in order "to conceal the true extent of the sexual violence at West Point," J. App'x 63. The government argues that these

claims are foreclosed by our decision in *Doe I*. We agree.

Under *Feres v. United States*, "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. *Feres* requires dismissal of a suit in which "commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct." *United States v. Shearer*, 473 U.S. 52, 58 (1985).

In *Doe I*, we concluded that Doe's *Bivens* claims were barred by the doctrine of intramilitary immunity because her injuries occurred "incident to service." 870 F.3d at 45. In doing so, we concluded that her allegations "center on the implementation and supervision of allegedly inadequate and harmful training and education programs relating to sexual assault and harassment;" "the alleged failure to provide properly . . . for the report and investigation of sexual assault claims, and for the support of cadets who are assaulted;" "the alleged lack of sufficient numbers of female faculty and administrators at West Point and on the failure to recruit female cadets;" "the allegedly inadequate punishment meted out not only to perpetrators of sexual violence but also to those who engage in misogynistic chants, slurs and comments;" and, "most broadly, on the assertedly culpable tolerance of a hostile culture toward women at West Point." *Id.* at 46. We determined that "[a]djudicating such a money damages claim would require a civilian court to engage in searching fact-finding about Lieutenant General

Hagenbeck and Brigadier General Rapp's 'basic choices about the discipline, supervision, and control' of the cadets that they were responsible for training as future officers." *Id.* (quoting *Shearer*, 473 U.S. at 58). Doe's FTCA claims involve the same purportedly wrongful conduct and the same injuries. Accordingly, Doe's FTCA claims are incident to service, and are therefore barred under *Feres*.

Doe's remaining arguments are similarly foreclosed by *Doe I*. For instance, Doe contends that, under *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995), her injuries were not within the scope of her military employment. But as the Court explained in *Doe I*, *Taber* did not create a new test for immunity, and *Feres* remains good law. *Doe I*, 870 F.3d at 47 n.9 (noting that "*Taber* could not be read to alter the reach of *Feres*, which was then and remains binding precedent"). And as we also noted in *Doe I*, "in the FTCA context, *Taber* itself noted . . . that the incident-to-service rule (regardless of workers' compensation considerations) is properly invoked when adjudicating the claim of a service member would require 'commanding officers . . . to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions.'" *Id.* at 48 (quoting *Taber*, 67 F.3d at 1049). "This is precisely the problem with Doe's claim here." *Id.*

Put simply, although Doe frames her suit as related to her role as a student and not her role as a soldier, the Court in *Doe I* has already concluded otherwise. *Id.* at 48 (finding Doe's argument that she "was not a soldier on the battlefield, but a student attending college" to be "both contrary to the case law and unsupported by the factual allegations in Doe's Amended Complaint"). As we noted previously, Doe was a member of the military, *id.* at 45, subject to military

command "'*at all times*,'" *id.* at 48 (quoting 10 U.S.C. § 7446(d)), who was at West Point "'for the purpose of military instruction,'" *id.* at 48–49 (quoting 10 U.S.C. § 7449(a)). Her education was "inextricably intertwined" with her "military pursuits." *Id.* at 49. We see no reason to depart from these findings now. Accordingly, we affirm the district court's dismissal of Doe's FTCA claims for lack of subject matter jurisdiction. *See Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996) ("[T]he proper vehicle for dismissing a *Feres*-barred FTCA claim is a dismissal for lack of subject-matter jurisdiction."). We therefore do not reach the question of whether the district court erred in dismissing her claims under the FTCA's discretionary function exception. *See Mitchell v. City of New York*, 841 F.3d 72, 77 (2d Cir. 2016) ("It is well-settled that this court may affirm on any grounds for which there is a record sufficient to permit conclusions of law, including grounds no[t] relied upon by the district court.") (internal quotation marks and alterations omitted)).

## III. Doe's LTA Claim

Doe next contends that the district court erred in dismissing her LTA claim, and that that we should reconsider our prior ruling regarding our jurisdiction over this claim. We disagree. The LTA vests district courts with concurrent jurisdiction for "civil action[s] or claim[s] against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States . . . in cases not sounding in tort." 28 U.S.C. § 1346(a)(2). Section 1295(a)(2) grants "exclusive jurisdiction" to the Federal Circuit over nontax appeals from decisions of the district courts when "the jurisdiction of that court was based, in whole or in part," on the LTA. *United States v. Hohri*, 482 U.S. 64, 68–69, 75–76 (1987) (quoting 28

U.S.C. § 1295(a)(2)). However, 28 U.S.C. § 1346 "is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). As such, a plaintiff bringing a claim under the LTA must identify some statute, regulation, or contractual provision that provides for payment of money damages in the event of a breach. *See id.*

Before we decided *Doe I*, Doe moved to transfer the government's appeal to the Federal Circuit, arguing that it had exclusive jurisdiction because the district court's jurisdiction was based in part on the LTA. A motions panel of this Court denied that motion, finding that "the district court's jurisdiction was not based on the [LTA], since [Doe's] contract claim failed to present a substantial federal question." J. App'x 98 (the "Motions Panel's Order"). After the district court's final judgment following *Doe I*, Doe appealed to the Federal Circuit, which granted the government's subsequent motion to transfer the appeal to the Second Circuit. The Federal Circuit concluded that the Motions Panel's jurisdictional determination was "law of the case," and that the Federal Circuit lacked jurisdiction to hear the appeal "[b]ecause the district court's jurisdiction was not based in whole or in part on the [LTA]." J. App'x 168–71. Doe now asks us to overturn the Motions Panel's Order denying her motion to transfer the government's appeal and to send her appeal back to the Federal Circuit. We decline to do so.

The "law of the case" doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus.*

*Operating Corp.*, 486 U.S. 800, 815–16 (1988) (internal quotation marks omitted). While a court has the "power to revisit prior decisions of its own or of a coordinate court in any circumstance, . . . as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). The doctrine of the law of the case is, of course, "even less binding in the context of interlocutory orders," as "a motions panel's decision is based on an abbreviated record and made without the benefit of full briefing by the parties, which may result in a less than thorough exploration of the issues." *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999). Nonetheless, "[t]he major grounds justifying reconsideration" remain "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Doe v. N.Y.C. Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983) (internal quotation marks omitted).

Although the record here was in a sense "abbreviated" given the interlocutory nature of the appeal, *Rezzonico*, 182 F.3d at 149, the motion was nonetheless fully briefed and argued by two sophisticated parties. Moreover, this is not a case in which the Motions Panel "silently address[ed] the jurisdictional question" or where a *pro se* litigant failed to brief a complex jurisdictional issue. *See Lora v. O'Heaney*, 602 F.3d 106, 109 (2d Cir. 2010). And, as explained below, we do not question our jurisdiction over this appeal. In sum, as Doe points to no factual or legal development that the Motions Panel failed to consider, and does not otherwise point to a "clear error" or "manifest injustice" warranting reconsideration, we decline to revisit

the Motions Panel's Order, deny Doe's implicit request to transfer this appeal back to the Federal Circuit, and proceed to consider the district court's dismissal of Doe's claim on the merits.

In substance, Doe contends that the "Oath of Allegiance" that she signed when she agreed to attend West Point carried an "implied covenant of good faith and fair dealing" that the United States breached by failing to address the hostile culture toward women that existed at the institution. But the Oath of Allegiance did not create a binding contract with the United States for the purposes of the LTA. West Point cadets are appointed, *see* 10 U.S.C. §§ 7441a, 7442, 7446, and the Supreme Court has emphasized that an appointment does not create a "contract" for the purposes of LTA jurisdiction, *see Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 735–38 (1982); *see also United States v. Hopkins*, 427 U.S. 123, 128 (1976) ("[A]bsent specific command of statute or authorized regulation, an appointed employee subjected to unwarranted personnel action does not have a cause of action against the United States."); *Chu v. United States*, 773 F.2d 1226, 1229 (Fed. Cir. 1985). Accordingly, Doe's claim simply "sound[s] in tort," and therefore did not give rise to a claim under the LTA. 28 U.S.C. § 1346(a)(2); *Bembenista v. United States*, 866 F.2d 493, 496 (D.C. Cir. 1989). We therefore affirm the dismissal of Doe's LTA claim.

We have reviewed the remainder of Doe's arguments and find them to be without merit. For the foregoing reasons, the order of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

**APPENDIX B**

**Second Circuit Order Denying Respondents' Motion for Summary Affirmance**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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18-185
S.D.N.Y.-N.Y.C. 13-cv-2802
Hellerstein, J.

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JANE DOE,

*Plaintiff-Appellant*,

v.

LIEUTENANT GENERAL FRANKLIN LEE HAGENBECK, et al.,

*Defendants-Appellees.*

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of June, two thousand nineteen.

Present:

John M. Walker, Jr.,
Richard J. Sullivan,
*Circuit Judges,*

William H. Pauley, III,[*]
*District Judge.*

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[*] Judge William H. Pauley, III, of the United States District Court for the Southern District of New York, sitting by designation.

Appellees move for summary affirmance of the district court's judgment dismissing Appellant's complaint. Upon due consideration, it is hereby ORDERED that the motion is DENIED because the Appellees have not demonstrated that the appeal "is truly frivolous." *United States v. Davis*, 598 F.3d 10, 13 (2d Cir. 2010). The appeal shall proceed in the ordinary course.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed January 18, 2018]

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2018-1246

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JANE DOE,

*Plaintiff-Appellant*

v.

FRANKLIN LEE HAGENBECK, WILLIAM E. RAPP,
UNITED STATES,

*Defendants-Appellees*

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Appeal from the United States District Court
for the Southern District of New York in
No. 1:13-cv-02802-AKH, Judge Alvin K. Hellerstein.

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ON MOTION

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ORDER

Before REYNA, LINN, and HUGHES, *Circuit Judges*. LINN, *Circuit Judge*.

Franklin Lee Hagenbeck, William E. Rapp, and the United States ("appellees") move to transfer this appeal to the United States Court of Appeals for the Second Circuit. Jane Doe opposes the motion.

Jane Doe sued the appellees,[*] alleging hostility toward and discrimination against women at the

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[*] Lieutenant General Franklin Lee Hagenbeck was the Superintendent of the United States Military Academy at West Point

United States Military Academy at West Point. Ms. Doe's complaint alleged Fifth Amendment due process and equal protection claims, as well as claims under the Federal Tort Claims Act and the Little Tucker Act (28 U.S.C. § 1346(a)(2)). The United States District Court for the Southern District of New York granted in part the appellees' motion to dismiss, dismissing Ms. Doe's due process, Federal Tort Claims Act, and Little Tucker Act claims. The appellees appealed the district court's denial of their motion to dismiss with respect to the equal protection claim to the United States Court of Appeals for the Second Circuit.

Before the Second Circuit, Ms. Doe filed a motion to transfer the appeal to this court on the grounds that the Second Circuit lacked jurisdiction over an appeal when the district court's jurisdiction was based at least in part on the Little Tucker Act. The Second Circuit denied the motion to transfer "because the district court's jurisdiction was not based on the Little Tucker Act, since [Ms. Doe]'s contract claim failed to present a substantial federal question." *Doe v. Hagenbeck*, No. 15-1890-cv, ECF No. 65 at 1.

The Second Circuit then reversed the district court's denial of the appellees' motion to dismiss the equal protection claim. Based on that ruling, the district court then dismissed all of Ms. Doe's claims with prejudice. Ms. Doe filed an appeal to this court.

This is a court of limited jurisdiction. 28 U.S.C. § 1295. That jurisdiction includes claims in which the district court had jurisdiction based in whole or in part on the Little Tucker Act. *See* 28 U.S.C. § 1295(a)(2). Here, however, the Second Circuit held that the

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and Brigadier General William E. Rapp was the Commandant of Cadets when the facts underlying Ms. Doe's appeal took place.

district court's jurisdiction over Ms. Doe's complaint was not based on the Little Tucker Act. That determination is now law of the case. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (explaining that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case)" (internal quotation marks and citation omitted)). And, "as a rule, courts should be loathe" to "revisit prior decisions of its own or of a coordinate court in any circumstance" "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* at 817 (citation omitted). Such extraordinary circumstances do not exist here.

Because the district court's jurisdiction was not based in whole or in part on the Little Tucker Act, this court lacks jurisdiction to hear Ms. Doe's appeal. Pursuant to 28 U.S.C. § 1631, this court may transfer a case to another "court in which the action or appeal could have been brought at the time it was filed," in this case the Second Circuit.

Accordingly,

IT IS ORDERED THAT:

The motion is granted. This appeal and all filings are transferred pursuant to 28 U.S.C. § 1631 to the United States Court of Appeals for the Second Circuit.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s25

ISSUED AS A MANDATE: January 18, 2018

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2015

(Argued: June 16, 2016 Decided: August 30, 2017)

No. 15-1890-cv

JANE DOE,

*Plaintiff-Appellee*,

v.

LT. GEN. FRANKLIN LEE HAGENBECK,
BRIG. GEN. WILLIAM E. RAPP,

*Defendants-Appellants,*

UNITED STATES OF AMERICA,

*Defendant*.

Before: WESLEY, LIVINGSTON, and CHIN, *Circuit Judges*.

Appeal from an April 13, 2015 order of the United States District Court for the Southern District of New York (Hellerstein, *J.*), granting in part and denying in part Defendants' motion to dismiss. Plaintiff-Appellee Jane Doe — a former West Point cadet who alleges that she was sexually assaulted by another cadet — brought a *Bivens* action against two superior officers at West Point, Defendants-Appellants Lieutenant General Franklin Lee Hagenbeck and Brigadier General William E. Rapp, in their personal capacities, for alleged violation of her Fifth Amendment right to equal protection. Because adjudicating Doe's claim

would require judicial interference into a wide range of military functions (including the training, supervision, discipline, education, and command of service personnel at West Point), triggering the incident-to-service rule, we conclude that there is no *Bivens* remedy available in this context. Accordingly, the order of the district court is REVERSED, and the case is REMANDED with instructions to dismiss.

JUDGE CHIN dissents in a separate opinion.

FOR PLAINTIFF-APPELLEE:

REBECCA OJSERKIS, JONAS WANG, Erin Baldwin, Kathryn Wynbrandt, Bethany Li, Michael J. Wishnie, Veteran Legal Services Clinic, Jerome M. Frank Legal Services Organization, Yale Law School, New Haven, CT, *for Jane Doe*.

FOR DEFENDANTS-APPELLANTS:

CHRISTOPHER CONNOLLY, Benjamin H. Torrance, Assistant United States Attorneys, New York, NY, for Joon H. Kim, Acting United States Attorney for the Southern District of New York, *for Lt. Gen. Franklin Lee Hagenbeck and Brig. Gen. William E. Rapp*.

AMICI CURIAE:

Caitlin J. Halligan, Joel M. Cohen, Casey K. Lee, Kathryn M. Cherry, Gibson, Dunn & Crutcher LLP, New York, NY, *for Amici Curiae* Federal Courts and Constitutional Law Professors, *in support of Jane Doe*.

Paul W. Hughes, Travis Crum, Mayer Brown LLP, Washington, D.C., *for Amici*

*Curiae University Administrators, in support of Jane Doe.*

Penelope A. Preovolos, Ben Patterson, Morrison & Foerster LLP, San Francisco, CA, *for Amici Curiae* Former Military Officers, *in support of Jane Doe*.

John D. Niles, James Anglin Flynn, Covington & Burling LLP, Washington, D.C., *for Amici Curiae* National Veterans Legal Services Program, Protect Our Defenders, Service Women's Action Network, *in support of Jane Doe*.

Sandra S. Park, Steven Watt, Lenora M. Lapidus, American Civil Liberties Union Foundation, New York, NY, *for Amici Curiae* American Civil Liberties Union, American Association of University Women, Human Rights and Gender Justice Clinic at the City University of New York School of Law, Human Rights Watch, National Alliance to End Sexual Violence, National Center on Domestic and Sexual Violence, National Women's Law Center, *in support of Jane Doe*.

DEBRA ANN LIVINGSTON, *Circuit Judge*:

Jane Doe is a former United States Military Academy ("West Point") cadet who alleges that during her second year at West Point, she was sexually assaulted by a fellow cadet. She filed this lawsuit not against the cadet, but against two superior officers, Lieutenant General Franklin Lee Hagenbeck and Brigadier General William E. Rapp, in their personal capacities. Lieutenant General Hagenbeck was Superintendent of West Point from approximately

July 2006 to July 2010, and in that role he chaired the Sexual Assault Review Board, which is the "primary means of oversight" of the sexual assault prevention and response program at West Point. Joint App'x 12. Brigadier General Rapp was Commandant of Cadets at West Point from 2009 to 2011 and was in charge of the administration and training of cadets. Doe alleges, in substance, that Lieutenant General Hagenbeck and Brigadier General Rapp "perpetrat[ed] a sexually aggressive culture" at West Point that "discriminated against female cadets," "put female cadets at risk of violent harm," and resulted, *inter alia*, in her sexual assault. *Id.* at 29.

In 2013, Doe filed suit against the United States, Lieutenant General Hagenbeck, and Brigadier General Rapp. She pleaded four causes of action, but the district court dismissed all but one: a claim against Lieutenant General Hagenbeck and Brigadier General Rapp brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on the basis of their alleged violation of equal protection rights protected by the Fifth Amendment. For the reasons stated below, we conclude that the district court erred in permitting this *Bivens* claim to proceed. We therefore REVERSE the order of the district court as to this claim and REMAND the case to the district court with instructions to dismiss it.

## BACKGROUND

### I. Factual Allegations[1]

Doe, who graduated from high school in 2008, received an offer of admission to West Point during her senior year, which she accepted. As a West Point cadet, Doe was a member of the Army. 10 U.S.C. § 3075(b)(2). The expectation upon enrollment was that, following her military training and education at West Point — which, together with room and board, Doe received without charge — she would serve at least five years of active duty. The West Point curriculum, as Doe alleges in her Amended Complaint, "is designed to train 'officer-leaders of character to serve the Army and the Nation.'" Joint App'x 13.

Upon arrival at West Point, Doe, who was one of about 200 women among the approximately 1,300 cadets in her class, alleges that she encountered what she describes as a "male" and "misogynistic culture." *Id.* at 14, 15. Cadets, for example, sang sexually explicit and offensive chants while marching on campus, "in view and earshot of faculty and administrators." *Id.* at 16. Doe contends that she "observed her cadet classmates making misogynistic and sexually aggressive comments on a regular basis," while "[t]he West Point administration frequently ignored and sometimes condoned these comments." *Id.* at 15. Doe does not allege that Lieutenant General Hagenbeck or Brigadier General Rapp engaged in any such conduct, but she does contend that they "created" the culture

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[1] The factual background presented here is derived from the allegations in Doe's Amended Complaint, which we accept as true and view in the light most favorable to her in reviewing the district court's decision on the motion to dismiss. *See Starr Int'l Co. v. Fed. Reserve Bank*, 742 F.3d 37, 40 (2d Cir. 2014).

there, which "marginalized" Doe and other female cadets and "caused them to be subjected to routine harassment, [to] suffer emotional distress and other harms, and [to] be pressured to conform to male norms." *Id.* Doe also maintains that West Point's training on sexual assault and harassment was inadequate "and did little to combat the overwhelmingly misogynistic culture of the school." *Id.* at 17.

In the early morning of May 9, 2010, during her second year at West Point, Doe alleges that she was raped by a fellow cadet with whom she had gone walking after hours. In particular, Doe asserts that after taking a prescribed sedative as she was preparing for bed, she agreed at about 1:00 a.m. to leave her dormitory with this cadet (identified by Doe in her Amended Complaint only as "Mr. Smith" ("Smith")) in violation of West Point rules. Doe alleges that she accepted only a few sips of alcohol from Smith but that, as a result of the combined effects of the sedative and the alcohol, she "began to lose awareness of her surroundings and consciousness of what she was doing." *Id.* at 22. Doe contends that Smith "was aware that [she] had lost consciousness and took advantage," attacking her and having "forcible, non-consensual intercourse with her." *Id.* She also maintains that she does not remember the details of the attack.

Doe sought care from West Point's cadet health clinic the next day, which provided her with emergency contraception and, on a subsequent visit on or about May 11, tested her for sexually-transmitted diseases. Although the treating nurse allegedly informed Doe that she had signs of vaginal tearing, and the medical record indicates Doe reported that she "was sexually assaulted by a friend," Doe states that the clinic "did not perform any forensic collection or

preservation of evidence of the sexual assault." *Id.* at 23. During a regular appointment with her psychiatrist that day (a psychiatrist Doe began consulting, she alleges, because of the significant stress she suffered due to West Point's oppressive atmosphere), Doe reported "nonconsensual sexual relations with a friend," and was referred to West Point's Sexual Assault Response Counselor, Major Maria Burger. *Id.*

Doe met only once with Major Burger. During that meeting, the major explained to Doe that she could file either an "unrestricted" or a "restricted" report about the incident. *Id*. An unrestricted report would have included both Doe's and her alleged assailant's names and would have been given to commanders for potential disciplinary action. A restricted report would preserve their anonymity, but would not result in a referral. Doe filed a restricted report. She alleges in her Amended Complaint that she feared reputational harm or even retaliation from other cadets if she filed an unrestricted report. She also worried that she would be punished for having been out after hours and for consuming alcohol with her alleged assailant, and that an unrestricted report would damage her career prospects because "[i]t was common knowledge among the cadets that successful women in the military did not report incidents of sexual assault." *Id.*

Doe contends that in the aftermath of the sexual assault, her anxiety grew intolerable. Doe informed West Point that she would resign, and on August 13, 2010, she was honorably discharged. Doe thereafter enrolled in a civilian college from which she earned a degree.

## II. Procedural History

On April 26, 2013, Doe filed a complaint in the United States District Court for the Southern District of New York (Hellerstein, *J.*).[2] On September 4, 2013, she filed an Amended Complaint. Therein, Doe pleaded four independent causes of action: (1) a *Bivens* claim based on an alleged Fifth Amendment due process violation against Lieutenant General Hagenbeck and Brigadier General Rapp; (2) a *Bivens* claim premised on an alleged Fifth Amendment equal protection violation against Lieutenant General Hagenbeck and Brigadier General Rapp; (3) a claim for breach of

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[2] A redacted version of the Complaint was docketed, and an unredacted version was filed under seal. The district court ordered the parties to show cause why the Complaint should remain under seal, and Doe then filed a motion to seal the case. At a hearing, the district court granted the motion in part, and denied it in part. It granted Doe permission to proceed under a pseudonym, and it also ruled that she could continue to redact from public filings the name of "Mr. Smith," the man she alleged had assaulted her. The district court decided that the names of the individual defendants and the facts and circumstances of the alleged assault, however, should be disclosed. No challenge has been presented on appeal to this manner of proceeding and we are without the benefit of briefing on the question. We assume, *arguendo*, that the district court did not abuse its discretion in determining to proceed in this manner and do not address the matter further. *But see, e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 275 (4th Cir. 2014) (holding that the district court's sealing order "violated the public's right of access under the First Amendment and that the [district] court abused its discretion in allowing Company Doe to proceed under a pseudonym"); *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (indicating that "'[t]he people have a right to know who is using their courts,'" and describing "the relevant inquiry as a balancing test that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure" (quoting *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997))).

the covenant of good faith and fair dealing under 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act") against the United States; and (4) a Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671– 2680, claim against the United States alleging negligent supervision, negligent training, negligence, negligent infliction of emotional distress, and abuse of process.

On September 20, 2013, defendants filed a motion to dismiss the Amended Complaint, which Doe opposed. On April 13, 2015, the district court issued an opinion and order granting in part and denying in part defendants' motion. The district court granted defendants' motion as to the two claims against the United States: the Little Tucker Act claim and the FTCA claim. The district court also dismissed Doe's *Bivens* claim asserting a violation of her due process rights. These claims are not at issue in this interlocutory appeal.

The district court denied the motion to dismiss as to the *Bivens* claim in which Doe asserted that Lieutenant General Hagenbeck and Brigadier General Rapp violated her equal protection rights. The district court acknowledged that a *Bivens* remedy is not available "when 'special factors counselling hesitation' are present," *Chappell v. Wallace*, 462 U.S. 296, 298 (1983) (quoting *Bivens*, 403 U.S. at 396). It recognized that absent Congressional authorization for a money damages claim, "[t]he need to insulate the military's disciplinary structure from judicial inquiry" constitutes a special factor. *Doe v. Hagenbeck*, 98 F. Supp. 3d 672, 684 (S.D.N.Y. 2015). Further, the court acknowledged the Supreme Court's instruction, in *United States v. Stanley*, that in the military context, the special factors requiring abstention "extend [even] beyond the situation in which an officer-subordinate

relationship exists, and require abstention in the inferring of *Bivens* actions as extensive as the exception to the FTCA" established in *Feres v. United States*, 340 U.S. 135 (1950), *Stanley,* 483 U.S. 669, 683–84 (1987). In the district court's view, however, "the primary reason for exercising judicial restraint with cases concerning the military is 'the need to preserve the military disciplinary structure and prevent judicial involvement in sensitive military matters.'" *Doe*, 98 F. Supp. 3d at 688 (quoting *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996)). The district court concluded that Doe's claim, at least at the motion to dismiss stage, did not implicate such concerns.

Following the district court's opinion, Lieutenant General Hagenbeck and Brigadier General Rapp filed a notice of interlocutory appeal and moved for a stay pending the appeal. In response, Doe argued that any appeal should be pursued in the Federal Circuit instead of in the Second Circuit. The district court granted the stay until August 7, 2015, "and such further period as the U.S. Court of Appeals shall determine." Joint App'x 9. The district court also "note[d] Plaintiff's position that any appeal should be pursued in the Federal Circuit[] instead of the Second Circuit" and "le[ft] that determination for the appellate courts." *Id.* A panel of this Court thereafter granted defendants' motion to stay the proceedings before the district court and denied Doe's motion to transfer venue.

## DISCUSSION

Doe's equal protection claim is based on the proposition that Lieutenant General Hagenbeck and Brigadier General Rapp, her superior officers at the time, "knowingly and intentionally created and enforced a policy and practice" at West Point that

"discriminated against female cadets," "tolerated attacks against [them] and discouraged reporting," and promoted a "sexually aggressive culture" there that caused Doe to suffer, *inter alia*, a sexual assault. Joint App'x 29. The district court denied defendants' motion to dismiss this claim, concluding it should be permitted to proceed "unless it is evident from the complaint, or shown by an answer and subsequent proofs, that military discipline or its command structure is compromised." *Doe*, 98 F. Supp. 3d at 689. We review the district court's determination *de novo*. *Warney v. Monroe Cty.*, 587 F.3d 113, 120 (2d Cir. 2009).

In reviewing the denial of a motion to dismiss, we assume that the allegations in Doe's Amended Complaint are true and draw all reasonable inferences from those allegations in her favor. *Starr Int'l Co. v. Fed. Reserve Bank*, 742 F.3d 37, 40 (2d Cir. 2014). Assuming their truth, Doe's allegations of harassment and abuse are no credit to West Point, an institution founded, as Doe alleges, "to train 'officer-leaders of character to serve the Army and the Nation.'" Joint App'x 13. But this neither does nor should end the judicial inquiry into whether Doe's *Bivens* claim may proceed.

Doe seeks to hold her superior officers personally liable for money damages in connection with their decisions regarding the training, supervision, discipline, education, and command of service personnel at West Point, an officer training school and military base. But Congress, "the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy" for the constitutional claim that Doe asserts. *Chappell*, 462 U.S. at 304. The Supreme Court, citing the "inescapable

demands of military discipline . . . [that] cannot be taught on battlefields," *id.* at 300, has held, unanimously, that absent Congressional authorization, "it would be inappropriate [for courts] to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Id.* at 304; *see also id.* at 305 (holding that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations"). We conclude that *Chappell* and its progeny are dispositive of Doe's *Bivens* claim and, accordingly, that the district court erred in determining that Doe's *Bivens* claim may proceed.

I

We start with *Bivens* itself. In *Bivens*, the Supreme Court permitted the plaintiff, who alleged that he had been subjected to an unlawful, warrantless search of his home and to an unlawful arrest, to proceed with a Fourth Amendment damages claim against allegedly errant federal law enforcement agents, despite the fact that Congress had not provided for such a remedy. 403 U.S. at 389, 395–97. Although the *Bivens* Court permitted this damages claim to proceed, it signaled, as the Court has repeatedly cautioned since, that "such a remedy will not be available when 'special factors counselling hesitation' are present."[3] *Chappell*,

[3] The Court has in recent years prescribed a two-step process for determining whether a *Bivens* remedy is available in which we consider, first, whether an alternative remedial scheme exists. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In *Stanley*, the Court suggested that traditional forms of redress, "designed to halt or prevent" a constitutional violation "rather than [for] the award of money damages," might sometimes be available in the military context. 483 U.S. at 683. We nonetheless assume *arguendo* that there is no alternative remedy here and address our analysis to the Supreme Court's admonition that "even in the

462 U.S. at 298 (quoting *Bivens*, 403 U.S. at 396). The Court has since made clear that it is "reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). In the forty-six years since *Bivens* was decided, the Supreme Court has extended the precedent's reach only twice,[4] and it has otherwise consistently declined to broaden *Bivens* to permit new claims.[5] *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (observing that "the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity," and collecting cases in which the Supreme Court has refused to do so (quoting *Iqbal*, 556 U.S. at 675)). Indeed, noting that "it is a significant step under separation-of-powers principles for a court

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absence of an alternative," *Wilkie*, 551 U.S. at 550, courts must pay "particular heed" to "special factors counselling hesitation before authorizing a new kind of federal litigation," *id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)); *see also Stanley*, 483 U.S. at 683 (noting that availability of alternative remedy is "irrelevant" to special factors analysis).

[4] *See Carlson v. Green*, 446 U.S. 14, 18–23 (1980) (finding an implied private cause of action for a prisoner's Eighth Amendment claim); *Davis v. Passman*, 442 U.S. 228, 230–34 (1979) (finding an implied private cause of action for a congressional employee's employment discrimination claim under the Fifth Amendment).

[5] *See Minneci v. Pollard*, 565 U.S. 118, 124–25 (2012) (collecting cases); *see also, e.g.*, *Malesko*, 534 U.S. at 70–73 (no *Bivens* action for prisoner's Eighth Amendment-based suit against a private corporation that managed a federal prison); *Schweiker v. Chilicky*, 487 U.S. 412, 414, 425–27 (1988) (no *Bivens* action for claim by recipients of Social Security disability benefits that benefits had been denied in violation of the Fifth Amendment); *Bush*, 462 U.S. at 386–90 (no *Bivens* action for claim that federal employer demoted federal employee in violation of the First Amendment).

to determine that it has the authority," in effect, "to create and enforce a cause of action for [money] damages against federal officials," the Court only recently observed that "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Id.* at 1856.

The Supreme Court's separation-of-powers concern with implied causes of action under the Constitution, present in all cases in which plaintiffs have sought to extend *Bivens*'s reach, is particularly acute in the military context. In *Chappell*, the Supreme Court held that special factors counselled against permitting the plaintiffs — enlisted Navy sailors who alleged that superior officers had discriminated against them on the basis of race — to maintain *Bivens* money damage claims. 462 U.S. at 297, 304. Referencing the "centuries of experience" reflected in the military's "hierarchical structure of discipline and obedience to command," a structure "wholly different from civilian patterns," *id.* at 300, the Court concluded that civilian courts, not responsible for the lives of soldiers and "ill-equipped to determine the impact upon discipline" of their intrusions, *id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962)), must "hesitate long" before entertaining suits which ask courts to "tamper with the established relationship between enlisted military personnel and their superior officers," *id.* at 300. Congress, the Court unanimously said, has "plenary control over rights, duties, and responsibilities in the framework of the [m]ilitary [e]stablishment, including regulations, procedures and remedies related to military discipline." *Id.* at 301. In the absence of Congressional action, the Court concluded, "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." *Id.* at 305.

The Supreme Court was, if anything, even more emphatic in *Stanley*. The Court ruled there that the plaintiff — a former soldier alleging that the Army had secretly given him doses of LSD to study the drug's effects — could not maintain a *Bivens* action, even though at least some of the defendants in the case were not Stanley's superior military officers (thus not directly implicating *Chappell*'s chain-of-command concerns) and "may well have been civilian personnel." 483 U.S. at 679; *see id.* at 671, 680–84. Citing by way of analogy to its decision in *Feres*, which established that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," 340 U.S. at 146, the *Stanley* Court explained that there is no "reason why [its] judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits, where [it] adopted [the] 'incident to service' rule," 483 U.S. at 681. The Court thus concluded — in sweeping language — that in the military context, even where *no* "officer-subordinate relationship exists," the reach of the special factors counselling "abstention in the inferring of *Bivens* actions" is "as extensive as the exception to the FTCA established by *Feres*." *Id.* at 683–84. Accordingly, pursuant to the incident-to-service rule, "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'" *Id.* at 684 (quoting *Feres*, 340 U.S. at 146).

## II

This Supreme Court precedent frames our inquiry and leads ineluctably to the conclusion that Doe cannot maintain her *Bivens* claim. Doe was a member of the military at the time the events giving rise to her

claim occurred, and the claim concerns superior officers. Further, her claim calls into question "basic choices about the discipline, supervision, and control" of service personnel and would "require[ ] the civilian court to second-guess military decisions," thus triggering the incident-to-service rule.[6] *United States v. Shearer*, 473 U.S. 52, 57–58 (1985) (noting that allegations "go[ing] directly to the 'management' of the military" that "might impair essential military discipline" lie at the "core" of rule's concerns). In such circumstances, her *Bivens* claim must be dismissed.

At the start, by statute, a West Point cadet is a member of the military. "The Regular Army is [a] component of the Army" and "includes . . . cadets of the United States Military Academy," 10 U.S.C. § 3075, who swear an oath to "at all times obey the legal orders of [their] superior officers, and the Uniform Code of Military Justice," *id.* § 4346(d). For this reason, in the context of the FTCA, courts citing *Feres* have reliably applied the doctrine of intramilitary immunity to bar suits brought by service academy cadets whenever such suits implicate the incident-to-service rule. *See,*

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[6] Given that the *Chappell* Court squarely held that "military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (although the question presented in that case concerned violations "in the course of military service"), 462 U.S. at 297, 305, and the *Stanley* Court only broadened *Chappell*'s holding, *see* 483 U.S. at 683 (explaining that *Chappell*'s reasoning "extend[s] beyond the situation in which an officer-subordinate relationship exists"), resolution of this case may not require an incident-to-service inquiry at all. Nonetheless, consistent with the approach of our sister circuits, *see Klay v. Panetta*, 758 F.3d 369, 374 (D.C. Cir. 2014); *Cioca v. Rumsfeld*, 720 F.3d 505, 512–14 (4th Cir. 2013), we apply the incident-to-service rule here and reach the same result we would have reached under *Chappell* alone.

*e.g.*, *Miller v. United States*, 42 F.3d 297, 301, 308 (5th Cir. 1995); *Collins v. United States*, 642 F.2d 217, 218 (7th Cir. 1981). This Circuit, moreover, has recognized that the rule also applies in the context of suits brought by students who are part of the Reserve Officer Training Corps at *nonmilitary* schools. *See Wake*, 89 F.3d at 55, 58–59, 62.

Next, Doe's alleged injuries clearly are covered by the Supreme Court's holding in *Stanley* that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'" 483 U.S. at 684 (quoting *Feres*, 340 U.S. at 146). As the Supreme Court recognized in *Shearer* when applying the incident-to-service rule, when a claim on its face "requires the civilian court to second-guess military decisions," and when the complaint, fairly read, calls into question "the 'management' of the military" — that is, "basic choices about the discipline, supervision, and control" of service personnel — we are "at the core" of the rule's concerns. 473 U.S. at 57–58. In such circumstances, we do not inquire into "the extent to which particular suits would call into question military discipline and decisionmaking." *Stanley*, 483 U.S. at 682. Instead, such cases "require abstention," *id.* at 683, so as to avoid interference with "the necessarily unique structure of the military establishment" and to defer to the Framers who, "well aware of the differences between [military] and civilian life" and cognizant of the issues that might in future arise, granted "plenary authority to *Congress* . . . '[t]o make Rules for the Government and Regulation of the land and naval Forces,'" *Chappell*, 462 U.S. at 300–01 (emphasis added) (quoting U.S. Const. art. 1, § 8, cl. 14).

Here, in considering whether Doe's injuries occurred "incident to service," we examine the specific factual

allegations that underlie her equal protection claim.[7] *See Klay v. Panetta*, 758 F.3d 369, 375 (D.C. Cir. 2014) (noting that the incident-to-service rule bars *Bivens* claims when litigating "the plaintiff's theory of the case" would, in effect, "require military leaders to defend their professional management choices"). The allegations in Doe's Amended Complaint do not merely invite, but require a most wide-ranging inquiry into the commands of Lieutenant General Hagenbeck and Brigadier General Rapp. Specifically, as they relate to these defendants' conduct, Doe's allegations center on the implementation and supervision of allegedly inadequate and harmful training and education programs relating to sexual assault and harassment; on the alleged failure to provide properly both for the report and investigation of sexual assault claims, and for the support of cadets who are assaulted; on the

[7] We have suggested that in some circumstances — for instance, where an issue exists for FTCA purposes as to whether a given automobile accident occurred "within a distinctly military sphere of activity," *see Wake*, 89 F.3d at 58 — the incident-to-service inquiry may require the analysis of potentially relevant factors, such as the relationship of the activity at issue to membership in the service or the location of the conduct giving rise to the tort claim. *Id*. No such close analysis is necessary here, however, given the clear relationship between Doe's *Bivens* claim and management and discipline at West Point. In any event, we note that the balance of the relevant factors we identified in *Wake* are clearly present here. Doe was a member of the Army; her tuition-free presence at West Point (and access to the facilities therein) was a benefit conferred as a result of that membership; and her constitutional claim arises from her treatment at West Point, where she resided and was training to become an officer. *See id*. at 57 (identifying "status as a member of the military," "the location of the conduct giving rise to the underlying tort claim," and "whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service" as among relevant factors).

alleged lack of sufficient numbers of female faculty and administrators at West Point and on the failure to recruit female cadets; on the allegedly inadequate punishment meted out not only to perpetrators of sexual violence but also to those who engage in misogynistic chants, slurs and comments; and, most broadly, on the assertedly culpable tolerance of a hostile culture toward women at West Point. Adjudicating such a money damages claim would require a civilian court to engage in searching fact-finding about Lieutenant General Hagenbeck and Brigadier General Rapp's "basic choices about the discipline, supervision, and control" of the cadets that they were responsible for training as future officers. *Shearer*, 473 U.S. at 58. In such circumstances, we conclude that *Chappell* and *Stanley* squarely foreclose Doe's *Bivens* claim.

This conclusion, we note, is consistent with the recent decisions of at least two other circuits. The D.C. Circuit rejected as "patently deficient" a *Bivens* claim pressed by current and former sailors and Marines who alleged they were the victims of sexual assault or harassment resulting from a military culture attributable to their superiors: "If adjudicating the case would require military leaders to defend their professional management choices — 'to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions' — then the claim is barred by the 'incident to service' test." *Klay*, 758 F.3d at 370, 375 (citation omitted) (quoting *Shearer*, 473 U.S. at 58). The Fourth Circuit, addressing a similar claim, was equally clear: "*Bivens* suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement." *Cioca v. Rumsfeld*, 720 F.3d 505, 512 (4th Cir. 2013) (quoting Erwin Chemerinsky, Federal Jurisdiction 621–22 (5th ed. 2007)). This result, the Fourth

Circuit said, implies no tolerance for the misconduct alleged in a plaintiff's pleading, but rather reflects "the judicial deference to Congress and the Executive Branch in matters of military oversight required by the Constitution and our fidelity to the Supreme Court's consistent refusal to create new implied causes of action in this context." *Id.* at 518; *see also id.* at 514 (noting that "the *Chappell*, *Stanley*, *Feres* and *Shearer* precedents mandate that courts not permit a *Bivens* action that challenges military decisionmaking").

Doe argues, relying principally on *United States v. Virginia* (*VMI*), 518 U.S. 515 (1996), that the failure to afford her a *Bivens* claim against Lieutenant General Hagenbeck and Brigadier General Rapp "contradict[s] *VMI*," Doe's Br. at 15, specifically the Supreme Court's merits determination therein that the State of Virginia could not preclude women from attending the Virginia Military Institute, a public college that styles itself as providing a military education.[8] *VMI*, 518 U.S. at 519. But this argument misses the point. Lieutenant General Hagenbeck and Brigadier General Rapp do not seek dismissal based on the scope of equal protection guarantees — a subject to which *VMI* could be pertinent. Instead, they invoke binding Supreme Court precedent standing for the proposition that whatever the scope of the particular constitutional *rights* at issue, the *remedy* of money damages is unavailable to members of the armed services for

[8] The Institute is not affiliated with the U.S. armed forces, nor are its students, by virtue of their enrollment there, members of the United States military. *Cf. id.* at 520–22 (describing the Institute as a state military college both financially supported by, and subject to control by, the Virginia General Assembly, and noting that it differs from federal service academies because it prepares students for both military and civilian life).

violations of those rights where Congress has not acted and the incident-to-service rule is satisfied.

*Chappell* itself involved an equal protection claim by African American enlisted personnel who alleged that their superior officers "failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity," all on account of their race. 462 U.S. at 297; *see Wallace v. Chappell*, 661 F.2d 729, 730 (9th Cir. 1981). Despite the gravity of these allegations, and with no disparagement of the right at stake, the Court, noting that Congress "has established a comprehensive internal system of justice to regulate military life" and "has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers," determined that a *Bivens* remedy was unavailable. *Id*. at 302–04. As the Court unanimously recognized, "[j]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates." *Id.* at 301 (second alteration in original) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)). *VMI* is simply not germane to the remedial inquiry mandated by *Chappell*, *Stanley*, and other *Bivens* cases.

Doe next contends, and the dissent agrees, that pursuant to this Court's decision in *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995), her injuries did not arise incident to military service. This is also incorrect. *Taber* involved an FTCA claim brought by an off-duty Navy Seabee who was injured in an automobile accident by another off-duty Navy serviceman. *Id.* at 1032. This Court concluded in *Taber* that the question

whether *Feres* barred the plaintiff's FTCA claim turned, *in the circumstances of that case*, on whether a person in Taber's position would be entitled to workers' compensation benefits on the theory that when injured he was engaged in activities that "fell within the scope of [his] military employment." *Id.* at 1050. Whatever *Taber*'s significance to this Circuit's FTCA case law, the *Taber* panel had no occasion to address either *Chappell* or *Stanley*, or the scope of "abstention in the inferring of *Bivens* actions" more generally.[9] *Stanley*, 483 U.S. at 683. Moreover, even in the FTCA context, *Taber* itself noted, citing Supreme Court precedent, that the incident-to-service rule (regardless of workers' compensation considerations) is properly invoked when adjudicating the claim of a service member would require "'commanding officers . . . to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary

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[9] As a matter of this Circuit's FTCA precedent, moreover, it is noteworthy that only some nine months after the amended decision in *Taber*, this Court in *Wake* suggested that to the extent the appellant there argued that *Taber* had created a new "scope of employment" test for determining the applicability of the *Feres* doctrine, *Taber* could not be read to alter the reach of *Feres*, which was then and remains binding precedent. 89 F.3d at 61. This Circuit has not relied on *Taber*'s holding in the intervening twenty-plus years, and at least one other circuit has declined to employ its approach. *See Skees v. United States*, 107 F.3d 421, 425 n.3 (6th Cir. 1997) (declining to adopt *Taber*). In such circumstances, *Taber* is a thin reed, indeed, to support the dissent's position that we may properly entertain a *Bivens* claim here, despite the broad inquiry that Doe's allegations demand into the discipline, supervision, and control of cadets at West Point, on the theory that Doe, when allegedly assaulted while out after hours, was not "'engaged in activities that fell within the scope of [her] military employment,'" Dissenting Op. at 21 (citing *Taber*, 67 F.3d at 1050).

decisions.'" 67 F.3d at 1049 (quoting *Shearer*, 473 U.S. at 58). This is precisely the problem with Doe's claim here.

Doe attempts to avoid this conclusion by arguing that her damages claim "does not interfere with military discipline or management . . . because she only questions *school* management" — the decisions of Lieutenant General Hagenbeck and Brigadier General Rapp "made in their roles as school administrators — not as military officials." Doe's Br. at 36. The dissent, too, takes this tack.[10] Observing, dismissively, that West Point serves a military purpose "*to some extent*," Dissenting Op. at 23 (emphasis added), the dissent claims that the "incident to service" rule does not apply because at the time that Doe was allegedly assaulted, she was "out for an evening walk on a college campus," *id.* at 22, and because, more broadly, Doe while at West Point was not a soldier on the battlefield, but a student attending college. *Id.* at 22–23. "West Point

[10] The dissent in addition urges that defendants allegedly violated military regulations in connection with Doe's tenure at West Point and that "[j]udicial review of . . . allegations that the individual defendants failed to follow mandatory military . . . regulations would not unduly interfere" with the military's proper operation. Dissenting Op. at 27. Suffice it to say that the dissent cites no case law supporting the proposition that the availability of a *Bivens* damages suit turns on this contingency, and unsurprisingly, since such an approach would be inconsistent with courts' traditional reluctance "to intrude upon the authority of the Executive in military and national security affairs' unless 'Congress specifically has provided otherwise.'" *Ziglar*, 137 S. Ct. at 1861 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)); *see also id.* at 1858 (citing *Chappell* and *Stanley* in suggesting that Congress's exercise of regulatory authority "in a guarded way" constitutes a special factor counselling against recognition of a *Bivens* claim on the ground that it is "less likely that Congress would want the Judiciary to interfere").

functions principally as a school," the dissent urges, and "Doe was primarily a student." *Id.* at 24.

With respect, this analysis is both contrary to the case law and unsupported by the factual allegations in Doe's Amended Complaint. As Doe has acknowledged, the United States Military Academy at West Point has a single, unitary mission: to "train 'officer-leaders of character to serve the Army and the Nation.'" Joint App'x 13. Its cadets swear an oath to "*at all times* obey the legal orders of . . . superior officers, and the Uniform Code of Military Justice," 10 U.S.C. § 4346(d) (emphasis added), and are subject to military discipline pursuant to the Code, *id.* § 802(a)(2). Cadets are divided into companies, each commanded by an Army officer, "for the purpose of military instruction," *id.* § 4349(a), and are "trained in the duties of members of the Army," *id.* § 4349(e), and even paid as members of the Army, 37 U.S.C. § 203(c). Doe's contention that this Court might disaggregate those aspects of cadets' lives that concern "education" from those involving their training to be future officers — a contention entirely unsupported by allegations in the Amended Complaint — is thus fanciful, at best, because academic and military pursuits are inextricably intertwined at the United States Military Academy, which exists for "the instruction and preparation for military service" of Army members.[11] 10 U.S.C. § 4331(a).

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[11] Moreover, even assuming such disaggregation could be done, it is directly contrary to *Stanley*'s admonition against inquiring whether "particular suits," examined case by case, "would call into question military discipline and decisionmaking." 483 U.S. at 682–83. Such inquiries, the *Stanley* Court concluded, "raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands," would themselves "disrupt the military regime." *Id.*

As *Chappell* recognized, "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields," and "conduct in combat inevitably reflects the training that precedes combat." 462 U.S. at 300. Doe was not "a soldier on a battlefield" at the time of the events challenged here, as the dissent points out. Dissenting Op. at 23. This observation, however, is beside the point. As a member of the Army, Doe was training at West Point to lead battlefield soldiers. Adjudicating the claim she brings against her superior officers, moreover, which charges them with "creat[ing] a dangerous and sexually hostile environment," Joint App'x 28, and challenges matters ranging from the alleged "underrepresentation of women in the school administration" and among the cadet classes, *id.* at 14, to the alleged tolerance of "sexually aggressive language and conduct by faculty, officials and male cadets," *id.* at 28, would require a civilian court to examine a host of military decisions regarding aspects of West Point's culture, as well as the supervision of West Point cadets, their training and education, and their discipline by superior officers. Doe's claim thus "strikes at the core" of the concerns implicated by the incident-to-service rule: that civilian courts are ill-equipped "to second-guess military decisions" regarding "basic choices about the discipline, supervision, and control" of service members, *Shearer*, 473 U.S. at 57–58, that doing so could impair "military discipline and effectiveness" in unintended and unforeseen ways, *id.* at 59, and that the "explicit constitutional authorization for *Congress* '[t]o make Rules for the Government and Regulation of the land and naval Forces,'" counsels hesitation as to the wisdom of money damages litigation, where Congress has not authorized it, *Stanley*, 483 U.S. at 681–82 (quoting U.S. Const. art. I, § 8, cl. 14).

In sum, West Point is part of the Department of the Army. Its cadets are service members. Lieutenant General Hagenbeck was the commanding officer of a military base during his time at West Point, and Brigadier General Rapp commanded the cadets. The future officers who study and train at West Point, like the enlisted men and women they are trained to command, may not invoke *Bivens* to recover damages for injuries that "arise out of or are in the course of activity incident to service." *Stanley*, 483 U.S. at 684. Doe's *Bivens* claim against her superior officers, implicating Army training, supervision, discipline, education, and command, triggers the incident-to-service rule and cannot proceed.

## CONCLUSION

We note, as did the D.C. Circuit, that Congress "has been 'no idle bystander to th[e] debate' about sexual assault in the military." *Klay*, 758 F.3d at 376 (alteration in original) (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 551 (4th Cir. 2012)). In reversing the district court's determination as to the viability of Doe's *Bivens* claim, we do not discount the seriousness of her allegations, nor their potential significance to West Point's administration. As the Supreme Court has made clear, however, it is for Congress to determine whether affording a money damages remedy is appropriate for a claim of the sort that Doe asserts. We therefore join the D.C. Circuit and the Fourth Circuit in concluding that no *Bivens* remedy is available here. We accordingly need not reach the question whether Lieutenant General Hagenbeck and Brigadier General Rapp are entitled to qualified immunity.

For the foregoing reasons, we REVERSE the order of the district court, and REMAND to the district court with instructions to dismiss Doe's equal protection claim.

DENNY CHIN, *Circuit Judge:*

I respectfully dissent.

Assuming, as we must at this juncture of the case, that the allegations of the amended complaint are true, plaintiff-appellee Jane Doe was subjected to pervasive and serious sexual harassment, including rape, at the United States Military Academy at West Point ("West Point"). The harassment resulted from practices and policies that the individual defendants permitted to proliferate and, indeed, implemented or encouraged, depriving Doe of an equal education because of her gender. The amended complaint alleges that the individual defendants created, promoted, and tolerated a misogynistic culture, including by, for example, setting separate curriculum requirements for women and men (self-defense for first-year female cadets and boxing for first-year male cadets), requiring sexually transmitted disease testing for female but not male cadets, warning female cadets that it was their burden to spurn sexual advances from male cadets while openly speaking to male cadets about sexual exploits and encouraging them to take advantage of any opportunity to have sex, imposing inadequate punishment for offenders, and permitting sexually explicit, violent, and degrading group chants during team building exercises, with verses such as the following:

> I wish that all the ladies / were bricks in a pile / and I was a mason/ I'd lay them all in style. . . .
>
> I wish that all the ladies / were holes in the road / and I was a dump truck / I'd fill 'em with my load. . . .

> I wish that all the ladies / were statues of Venus / and I was a sculptor / I'd break 'em with my penis.

App'x 15.

If West Point were a private college receiving federal funding or another public educational institution and allegations such as these were proven, there clearly would be a violation of Doe's rights and she could seek recourse for her injuries. The Government argues, however, that the individual defendants are immune from suit because they are military officers. And while it acknowledges that "[s]exual assault in the military and at service academies cannot be tolerated," it argues that Doe is a service member and that "service members may not sue their superiors for injuries that arise incident to military service," Appellants' Br. at 2, relying on the concept of intramilitary immunity as set forth in *Feres v. United States*, 340 U.S. 135 (1950), and its progeny. The majority accepts the argument.

I do not agree that the *Feres* doctrine applies, for in my view Doe's injuries did not arise "incident to military service." When she was subjected to a pattern of discrimination, and when she was raped, she was not in military combat or acting as a soldier or performing military service. Rather, she was simply a student, and her injuries were incident only to her status as a student. When she was raped, she was taking a walk on a college campus with another student, someone she thought was a friend. The actions and decisions she now challenges had nothing to do with military discipline and command; instead, she seeks recourse for injuries caused by purported failures on the part of school administrators acting in an academic capacity overseeing a learning environment for students.

While West Point is indeed a military facility, it is quintessentially an educational institution. As its website proclaims, it is "one of the nation's top-ranked colleges," and it provides its "students with a top-notch education."[1] In my view, the *Feres* doctrine does not bar Doe's equal protection claims. For these and other reasons discussed below, I would affirm the district court's decision denying the individual defendants' motion to dismiss the equal protection claim. Accordingly, I dissent.

## I.

As alleged in the amended complaint, the facts are summarized as follows:

Doe is a former cadet who resigned from West Point in 2010 after completing two years. She grew up in a military family and graduated near the top of her class in high school. At West Point she "thrived academically, participated in extracurricular activities, and ranked high in her class." App'x 14. Because she left West Point before the start of her third year, she never assumed active status and had no obligation to enlist as a soldier. *See* 32 C.F.R. § 217.6(f)(6)(ii)(A).[2] Her

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[1] Letter from Col. Deborah J. McDonald, West Point Director of Admissions, to High School Seniors, http://www.usma.edu/admissions/Shared%20Documents/COL-web-letter.pdf; *see also* United States Military Academy, http://www.westpoint.edu/ (last visited Aug. 29, 2017) ("The Academy provides a superb four-year education, which focuses on the leader development of cadets in the academic, military, and physical domains, all underwritten by adherence to a code of honor.").

[2] "Fourth and Third Classmen (First and Second Years). A fourth or third classman disenrolled will retain their MSO [Military Service obligation] in accordance with 10 U.S.C. chapter 47 and DoD Instruction 1304.25 *but have no active duty service obligation* (ADSO)." 32 C.F.R. § 217.6(f)(6)(ii)(A) (emphasis

obligations to the military did not vest, and she was not contractually required to repay the cost of her education.

West Point has an enrollment of approximately 4,600 cadets and a faculty of some 600 individuals, of whom three-quarters are military personnel and one-quarter are civilian employees. Cadets live on-campus in dormitories all four years and eat in dining halls. The curriculum ″is designed to train 'officer- leaders of character to serve the Army and the Nation,'" App'x 3, and thirty-six majors are offered, including Politics, Art, Philosophy and Literature, Engineering, History, Physics and Sociology.[3] West Point is accredited by the Middle States Commission on Higher Education, the accreditation unit for the Middle States Association of Colleges and Schools.[4] Cadets may participate in numerous extracurricular activities, including athletics, honor societies, academic competitions, and musical groups. West Point fields athletic teams in twenty-four NCAA Division I sports and twenty-one club sports. Upon graduation, West Point cadets earn a

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added). *See also* 32 C.F.R. § 217.4(d) ("Cadets and midshipmen disenrolling or those disenrolled *after the beginning of the third academic year* from a Service academy normally will be called to active duty in enlisted status, if fit for service.") (emphasis added).

[3] West Point Curriculum, http://www.usma.edu/curriculum/SitePages/Home.aspx.

[4] The Middle States Commission on Higher Education conducts accreditation activities for institutions of higher education in states in the mid-Atlantic region, including New York. Middle States Commission on Higher Education, http://www.msche.org/ (last visited Aug. 29, 2017). West Point is one of many institutions accredited by the organization. *See* Institution Directory, Middle States Commission on Higher Education, http://www.msche.org/institutions_directory.asp (last visited Aug. 29, 2017).

Bachelor of Science degree and become commissioned as second lieutenants in the U.S. Army.

Approximately 200 of the 1,300 cadets in Doe's entering class were women. Doe was often the only woman in a squad of approximately ten cadets. During her time at West Point, she was subjected to pervasive sexual harassment and a culture of sexual violence. Her classmates regularly made misogynistic and sexually aggressive comments, which were frequently ignored and sometimes condoned by West Point administrators. During team-building exercises, cadets would march and sing "sexual, misogynistic chants," such as the one quoted above, in view and earshot of faculty and administrators. App'x 16. Male cadets often used derogatory terms to describe women and frequently made contemptuous comments about the physical appearance of women. West Point officials ignored or endorsed these comments, and openly joked with male cadets about sexual exploits. Male faculty members routinely expressed sympathy with male cadets over the lack of opportunities to have sex, and suggested that they seize any chance they could to do so.

There were other disparities in the treatment of male and female cadets. West Point officials required mandatory annual sexually transmitted disease ("STD") testing for female cadets, but not male cadets, explaining that STDs were more harmful to women than to men and therefore it was the responsibility of women to prevent the spread of these diseases. In the Physical Education program in the first year at West Point, male cadets were required to take boxing while female cadets were required to take self-defense.

While West Point provided training for the prevention of sexual assault and harassment, the training

was inadequate. West Point officials provided only limited training on the concepts of respect and consent, while sending the message to female cadets that it was "a woman's responsibility" to prevent sexual assault and that "it was their job to say 'no,' when faced with inevitable advances from their male colleagues." App'x 18. West Point officials failed to punish cadets who perpetrated sexual assaults and created an environment in which male cadets understood that they could sexually assault female colleagues with "near impunity," while female cadets understood "that they risked their own reputations and military careers" by reporting sexual assaults against them. App'x 18. The vast majority of faculty members and administrators were male.

A 2010 Department of Defense ("DoD") survey found that fifty-one percent of female cadets and nine percent of male cadets reported that they had experienced sexual harassment at West Point.[5] The survey found that more than nine percent of the female cadets at West Point experienced unwanted sexual contact in 2010, and some eighty-six percent of these women did not report the incident[6] Of the female cadets who did not report unwanted sexual contact, seventy-one percent feared "people gossiping about them" and seventy percent "felt uncomfortable" making a report.[7] In

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[5] *See* Paul J. Cook & Rachel N. Lipari, Defense Manpower Data Center, *2010 Service Academy Gender Relations Survey*, at iv-v (2010), http://www.sapr.mil/public/docs/research/FINAL_SAGR_2010_Overview_Report.pdf.

[6] *Id.* at iv-v.

[7] *Id.* at v. Underreporting of sexual violence on college campuses is a significant issue. *See* Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 Geo. J. Gender & L. 563, 566 (2014).

2011, DoD found that West Point was only "partially in compliance" with sexual harassment and assault policies, and that West Point's prevention training was "deficient," did not meet the minimum standard of annual training for cadets, lacked an institutionalized comprehensive sexual assault prevention and response curriculum, and failed to comply with DoD directives intended to reduce rape and sexual assault.[8]

Defendants-appellants Lieutenant General Franklin Lee Hagenbeck, the Superintendent of West Point from July 2006 to July 2010, and Brigadier General William E. Rapp, Commander of Cadets at West Point from 2009 to 2011, were responsible for administering the sexual assault prevention and response program and the training of cadets on campus during the relevant time period. According to the amended complaint, however, instead of implementing programs and policies to educate and protect students, defendants created, promulgated, implemented, and administered the policies, practices, and customs at issue. The 2009-2010 DoD Annual Report on Sexual Harass-

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[8] The statistics at West Point are representative of a large-scale epidemic of sexual assault and harassment of women on college campuses around the country. A 2006 study concluded that "[o]ne in five women is sexually assaulted while in college." *See* White House Task Force To Protect Students from Sexual Assault, *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault* 6 (2014), https://www.justice.gov/ovw/page/file/905942/download. A 2015 survey of 27 U.S. universities by the Association of American Universities found that approximately one-third of female undergraduates reported experiencing non-consensual sexual contact at least once. David Cantor et al., Westat, *Report on the Association of American Universities Campus Climate Survey on Sexual Assault and Sexual Misconduct*, at xi (2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

ment and Violence at Military Service Academies found that trends of unwanted sexual contact experienced by female cadets increased during the time Hagenbeck and Rapp were, respectively, Superintendent and Commander of Cadets.

On May 8, 2010, around 1 a.m., a male cadet stopped by Doe's dormitory room and invited her for a walk. It was after curfew, and Doe had earlier taken a sedative prescribed to help her sleep because she had been suffering from anxiety and stress. Nonetheless, she agreed to go with him. They eventually walked into an administrative building and the male cadet began drinking alcohol, offering Doe a few sips. She took them, and then lost consciousness as the alcohol mixed with her medication. The male cadet then took advantage, attacking Doe and having "forcible, nonconsensual intercourse with her," on the concrete floor of a boiler room. App'x 22. She woke up in her own bed a few hours later, with dirt on her clothes and hair, bruises on her lower back, and blood between her legs. Three days later, when she went for a vaginal examination at West Point's health clinic, there were signs of vaginal tearing. She eventually left West Point, enrolling at a four-year college from which she earned a degree.

Doe brought this action below against the United States under the Federal Tort Claims Act (the "FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), as well as against Hagenbeck and Rapp in their individual capacities under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for due process and equal protection violations. The district court dismissed the claims against the United States as well as the due process claim, and

permitted Doe to pursue only her equal protection claim against the individual defendants. The district court held that the *Feres* doctrine did not bar the equal protection claim and that the individual defendants were not entitled to qualified immunity. Only the district court's denial of defendants' motion to dismiss the equal protection claim is before us on this interlocutory appeal.[9]

## II.

### A. Equal Protection

Since 1971, the Supreme Court "has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996) ("*VMI*") (citing, *inter alia*, *Reed v. Reed*, 404 U.S. 71 (1971)). In *VMI*, the Court held that Virginia's policy of excluding women from enrolling in its historically single-sex military college violated the Equal Protection Clause of the Fourteenth Amendment. 518 U.S. at 534. Similarly, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 733 (1982), the Court held that a state university's policy of admitting only women to its nursing programs violated the Equal Protection Clause.

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[9] Because the majority holds that Doe's equal protection claims are barred by the *Feres* doctrine, it does not reach the Government's alternative argument that the individual defendants are entitled to qualified immunity. Accordingly, I do not discuss the qualified immunity issue, but simply note that I believe the district court correctly rejected the defense at the motion-to-dismiss stage.

These principles apply not just to gender discrimination in admissions to educational institutions but to the continued treatment of students after they have been admitted. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (holding plaintiffs could pursue claims against school system and superintendent for "unconstitutional gender discrimination in schools" under § 1983, where defendants purportedly failed to address sexually harassing conduct by another student). Courts have thus recognized equal protection claims where gender discrimination created a hostile educational environment. *See, e.g.*, *Hayut v. State Univ. of New York*, 352 F.3d 733, 743-46 (2d Cir. 2003) (allowing § 1983 equal protection claim by student against professor for hostile educational environment created by "derogatory and sexually-charged comments"). Moreover, the Supreme Court has recognized a *Bivens* claim for gender discrimination, holding that the Equal Protection Clause of the Fifth Amendment confers "a federal constitutional right to be free from gender discrimination." *Davis v. Passman*, 442 U.S. 228, 235 (1979) (holding that former congressional staff member could sue U.S. Congressman for damages under Fifth Amendment for discriminating against her on basis of sex).

Equal protection and other constitutional principles have been applied to the military and military institutions. In *Frontiero v. Richardson*, the Court held that a statutory scheme for housing allowances and spousal medical and dental benefits that applied different standards for male and female active service members was "constitutionally invalid." 411 U.S. 677, 688 (1973). *See also Fitzgerald*, 555 U.S. at 257 (observing that students at "military service schools and traditionally single-sex public colleges," which are

exempt from Title IX of Educational Amendments of 1972, 20 U.S.C. § 1681(a), could bring § 1983 claims for violation of equal protection clause); *VMI*, 518 U.S. at 535-36, 547-54; *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (rejecting, but reaching merits, of claim challenging different discharge policies for male and female officers, based on then-existing exclusion of women from combat roles). In *Crawford v. Cushman*, we observed that "a succession of cases in this circuit and others had reiterated the proposition that the military is subject to the Bill of Rights and its constitutional implications." 531 F.2d 1114, 1120 (2d Cir. 1976); *see also Dibble v. Fenimore*, 339 F.3d 120, 128 (2d Cir. 2003) ("We decline to adopt a categorical rule on the justiciability of intramilitary suits.").

The military has itself adopted regulations to address the issue of gender discrimination and sexual harassment. Army regulations unambiguously prohibit sexual harassment, and commanders and supervisors are obliged to ensure that sexual harassment is not tolerated.[10] All military academies (including West

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[10] *See, e.g.*, U.S. Army Reg. 600-20, Ch. 7-3(a) (Mar. 18, 2008) ("The policy of the Army is that sexual harassment is unacceptable conduct and will not be tolerated."); *id.* Ch. 7-3(b) ("The POSH [Prevention of Sexual Harassment] is the responsibility of every Soldier. . . . Leaders set the standard for Soldiers . . . to follow."); *id.* Ch. 7-2(a) ("Commanders and supervisors will . . . [e]nsure that assigned personnel . . . are familiar with the Army policy on sexual harassment."); *id.* Ch. 7-2(d) ("Commanders and supervisors will . . . [s]et the standard."); *id.* Ch. 7-4(a) (defining "sexual harassment" to include physical or verbal conduct); *id.* Ch. 7-6(b) ("A hostile environment occurs when Soldiers or civilians are subjected to offensive, unwanted and unsolicited comments, or behaviors of a sexual nature [including] for example, the use of derogatory gender-biased terms, comments about body parts, suggestive pictures, explicit jokes, and unwanted touching.").

Point) must comply with regulations promulgated by DoD as part of its Sexual Assault Prevention and Response Program.[11]

Hence, Doe was entitled, under the Fifth Amendment and the Army's own regulations, to an environment free from gender discrimination and sexual harassment.

B. The *Feres* Doctrine

In 1950, the Supreme Court held in *Feres v. United States* that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. *Feres* involved three cases, brought by or on behalf of servicemen against the United States for personal injuries, sustained ″while on active duty and not on furlough," purportedly caused by the "negligence of others in the armed forces." *Id.* at 137-38. In two of the cases, death resulted. *Id.* at 137. The Court held that Congress did not intend to subject the Government to tort claims "by a member of the armed services." *Chappell v. Wallace*, 462 U.S. 296, 299 (1963) (interpreting *Feres*).

The Court later extended the concept of intramilitary immunity to *Bivens* claims. A *Bivens* remedy is not available when "special factors counseling hesitation" are present. *Bivens*, 403 U.S. at 396; *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) ("The Court's precedents now make clear that a *Bivens* remedy will not be available if there are 'special factors counseling

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Army regulations expressly acknowledge that "[s]exual harassment is a form of gender discrimination." *Id.* Ch. 7-4.

[11] *See* 32 C.F.R. § 103.5; U.S. Dep't of Def. Dir. 6495.01 (Jan. 23, 2012), https://www.hsdl.org/?abstract&did=761622.

hesitation in the absence of affirmative action by Congress.'" (citation omitted)). In *Chappell*, the Court recognized that "the unique disciplinary structure of the military establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell*, 462 U.S. at 304; *see also United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (recognizing that rationales for intramilitary immunity as explained in *Feres* are "special factors" counseling against *Bivens* relief, and "holding that no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to service'") (quoting *Feres*, 340 U.S. at 146).

At the same time, however, "our citizens in uniform may not be stripped of basic civil rights simply because they have doffed their civilian clothes." Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962) (quoted in *Chappell*, 462 U.S. at 304). As the Court noted in *Chappell*: "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 462 U.S. at 304-05. Indeed, members of the military have been permitted, after *Feres*, to bring constitutional challenges against the Government with respect to matters relating to the military. *See Frontiero*, 411 U.S. at 688; *accord Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 640-41 (5th Cir. 2008) (*Feres* did not bar suit brought by service member "engaged in purely recreational activity" "not related to any tactical or field training," even where recreational facility was provided "to improve the morale and welfare" of service members); *Crawford*, 531 F.2d at 1125-27 (holding, where servicewoman was dis-

charged from Marines because she was pregnant, that her rights to equal protection and due process were violated, and ordering award of damages). *See also Schlesinger*, 419 U.S. at 508-10; *Parker v. Levy*, 417 U.S. 733, 758-60 (1974) (rejecting, but reaching merits of, First Amendment challenge brought by Army captain convicted by general court-martial of violations of Uniform Code of Military Justice, and observing that "the members of the military are not excluded from the protection granted by the First Amendment").

In cases decided after *Feres*, the Court has explained the ″broad rationales″ underlying its determination that soldiers may not maintain tort suits against the Government or members of the military for injuries arising incident to military service. *United States v. Johnson*, 481 U.S. 681, 688 (1987). First, there is a "unique relationship between the Government and military personnel,″ *Chappell*, 462 U.S. at 299, that is "'distinctively federal in character.'" *Johnson*, 481 U.S. at 689 (quoting *Feres*, 340 U.S. at 143). The military function is performed " in diverse parts of the country and the world," and when a service member is injured "incident to service — that is, because of his military relationship with the Government" — a uniform federal remedy should be available, and "the fortuity of the situs of the alleged negligence" should not dictate whether the Government is liable. *Id*.

Second, Congress has established alternative, statutory means of compensation for military personnel injured incident to service. As the Court observed in *Johnson*, "the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Id*. It is not likely, the Court has concluded,

that Congress would have created "'systems of simple, certain, and uniform compensation for injuries or death of those in the armed services'" while intending at the same time to permit lawsuits for service-related injuries under the FTCA. *Chappell*, 462 U.S. at 299 (quoting *Feres*, 340 U.S. at 144).[12]

Third, suits based upon service-related activity "'would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Johnson*, 481 U.S. at 691 (quoting *Shearer*, 473 U.S. at 57). Courts should not intrude in military matters, the Court has explained, because "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *Johnson*, 481 U.S. at 691; *see United States v. Shearer*, 473 U.S. 52, 59 (1985) ("*Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits . . . were allowed for negligent orders given or negligent acts committed in the course of military duty.") (internal quotation marks omitted).

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[12] In subsequent cases, the courts have recognized that "the presence of a compensation system, persuasive in *Feres*, does not of necessity preclude a suit for negligence." *United States v. Muniz*, 374 U.S. 150, 160 (1963) (citing *United States v. Brown*, 348 U.S. 110 (1954)); *see also Taber v. Maine*, 67 F.3d 1029, 1039 (2d Cir. 1995) ("Indeed, the Supreme Court and several circuit courts (without reproof from the Supreme Court) have subsequently . . . allowed FTCA claims in a significant number of cases in which the injured plaintiffs were fully covered by the government's compensation scheme.").

In *Taber v. Maine*, after reviewing the Supreme Court case law, we summarized the various considerations and held that:

> an appropriate test for applying the *Feres* doctrine must respect: (1) the Supreme Court's stated concern for keeping courts away from delicate questions involving military discipline; (2) *Feres*'s clear intention to replace the contingencies of local tort law with a uniform federal scheme; and (3) *Feres*'s original desire that this uniformity is to be achieved through exclusive recourse to the federal system of military death and disability benefits.

67 F.3d 1029, 1049 (2d Cir. 1995).

In *Taber*, the plaintiff Taber was a Navy "Seabee" — a construction worker — who was injured in Guam when his car was struck by a car driven by another Navy serviceman, Maine. *Id.* Both were on active duty but on liberty, and the accident occurred on a public road. *Id.* Taber had spent the day with his companion and they were driving back to her home for the weekend when the accident occurred. *Id.* He sued the United States and Maine for his injuries, which he alleged were caused by Maine's negligent driving. *Id.* The Government defended in part by relying on the *Feres* doctrine, and the district court agreed, dismissing the claims. *Id.* at 1033.

On appeal, the Second Circuit reversed, holding that "the link between Taber's activity when he was injured and his military status is too frail to support a *Feres* bar." *Id.* at 1050. The Court explained that "[t]here is nothing characteristically military about an employee who, after working-hours are done, goes off to spend a

romantic weekend with a companion. . . . The accident that followed, on the open road and on the way to [the companion]'s house[,] had 'nothing to do with' Taber's military career and was 'not caused by service except in the sense that all human events depend upon what has already transpired.'" *Id.* at 1051 (quoting *Brooks v. United States*, 337 U.S. 49, 52, 69 (1949)).

*Taber* teaches us that military status does not automatically trigger *Feres* immunity. Rather, we apply the incident to service test by asking whether, at the time the plaintiff was injured, she was "engaged in activities that fell within the scope of [her] military employment." 67 F.3d at 1050. In *Wake v. United States*, we reiterated that we must look at "the totality of the germane facts," and noted that "[i]n examining whether a service member's injuries were incurred 'incident to service,' the courts consider various factors, with no single factor being dispositive." 89 F.3d at 57-58. In addition to "[t]he individual's status as a member of the military at the time of the incident," those factors include: "the relationship of the activity to the individual's membership in the service"; "the location of the conduct giving rise to the underlying tort claim"; "whether the activity is limited to military personnel and whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service." *Id.* at 58.[13]

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[13] In *Wake*, we applied *Feres* to bar claims brought by a student in the Reserve Officers Training Corps at a nonmilitary college. 89 F.3d at 55. The student was an enlisted inactive member of the Navy Reserves who was assigned to "temporary duty" to travel to a military clinic for a physical examination required to qualify as a flight navigator. *Id.* at 56. On the way back, while traveling in a military vehicle driven by a Marine Corps sergeant, she was injured. *Id.* at 55-56. We concluded, not surprisingly, that

C. Application of the *Feres* Doctrine to this Case

In my view, the *Feres* doctrine does not bar Doe's *Bivens* claim that she was denied her constitutional right to equal access to education, for her injuries did not arise "incident to service." First, as to the activities immediately preceding Doe's rape, her ultimate injury, she was engaged in purely recreational activity: she was out for an evening walk on a college campus, after curfew, with another student who was a friend. Second, as to her broader activities at West Point, she was a student attending college: she was taking classes, participating in extracurricular activities, and learning to grow up and to be a self-sufficient and healthy individual. She was not a soldier on a battlefield or military base. She was not traveling in a military car or boat or plane or pursuant to military orders. She was not being treated by military doctors. She was not on duty or in active service or on active status, and she was not yet obliged to enter into military service. There was "nothing characteristically military" about what she was doing, and her injuries did not arise out of military employment.

To be sure, West Point serves, to some extent, a military purpose, and its cadets are indeed being trained to be soldiers and officers. As the Government and the majority note, West Point cadets are considered members of the military. Appellants' Br. at 14;

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the student's injuries were sustained incident to service. *See id.* at 58-61. While Wake was indeed a student, she was on a "temporary duty" assignment and was traveling in a military vehicle driven by an active service member. Moreover, she received military benefits for her injury — she "was assigned a 100% disability rating from the [Veterans Administration] on January 5, 1993, resulting in monthly VA service-connected compensation benefits of approximately $2,000 per month." *Id.* at 62.

Maj. Op. at 18-19 (citing 10 U.S.C. § 3075(a)- (b)(2) (including "cadets of the United States Military Academy" in the "Regular Army," "a component of the Army")). But Doe's status as a member of the military is not, by itself, dispositive. *See Wake*, 89 F.3d at 58-61 (declining to attribute dispositive weight to plaintiff's status as a cadet but looking at all germane circumstances); *Taber*, 67 F.3d at 1053 (holding that *Feres* was not a bar where "[o]ther than the naked fact that Taber was in the Navy at the time of his injury, there is no government/plaintiff relationship of any significance in this case"). Rather, West Point functions principally as a school and Doe was primarily a student; the concerns underlying the Supreme Court's decision in *Feres* and the "special factors counseling hesitation" in the intramilitary immunity cases simply are not implicated here.

First, Doe's claims do not implicate "delicate questions involving military discipline." *Taber*, 67 F.3d at 1049. Her claims do not call into question "the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *Johnson*, 481 U.S. at 691. The actions and decisions of the individual defendants being challenged here do not implicate, except perhaps in the most abstract sense, military discipline or military judgment or military preparation.[14] Instead, Doe's claims challenge

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[14] The Government argues that Doe's claims "call[] into question the management of the military," "specifically their decisions concerning the discipline, supervision, and control of West Point cadets." Appellants' Br. at 10. I suppose that may be so to a degree, but our observation in *Taber* applies here: "Arguably, there is some government/tortfeasor relationship that might entail minimal disciplinary concerns even in this case, but these are both qualitatively and quantitatively different from those that concerned us in [other cases implicating *Feres*], let alone

academic decisions and policies, and the individual defendants were acting as educators and school administrators, tasked with providing their students with a positive learning environment, one free from sexual discrimination and harassment. *See VMI*, 518 U.S. at 532 (recognizing right to equal protection in education, including at a military educational institution); *Hagopian v. Knowlton*, 470 F.2d 201, 210 (2d Cir. 1972) (comparing West Point's responsibility for instilling discipline in cadets "to the responsibilities of public school teachers to educate their students").

Second, the "federal system of military death and disability benefits" established by Congress for injuries sustained by military personnel incident to service, *Taber*, 67 F.3d at 1049, apparently is not available to Doe. Indeed, now that her claims against the United States have been dismissed, it appears that her *Bivens* claim is her only means of seeking relief for her injuries. The Government has not suggested that Doe is eligible for any benefits akin to workers' com-

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those that troubled the Supreme Court in *Shearer*." 67 F.3d at 1053. Moreover, as amici point out, many graduates of military academies use their degrees to pursue other professional, non-military endeavors immediately after meeting minimum service requirements. *See* Amicus Br. of Former Military Officers at 10 (citing Government Accountability Office study reporting that 32% and 38% of academy graduate officers in, respectively, 2001 and 2005 left in their fifth year, the first year officers were eligible to leave military). While a four-year college degree is required to be commissioned as an Army officer, admission to West Point is not; in fact, in Fiscal Year 2011, only 14.6% of Army officers were commissioned by attending West Point. *See* Amicus Br. of Former Military Officers at 11 (citing Table B-31: Active Component Commissioned Officer Corps, FY 11, http://prhome.defense.gov/Portals/52/Documents/POPREP/poprep2011/appendixb/b_31.html (last visited Aug. 29, 2017).

pensation benefits for injuries arising out of activities within the scope of her military duties.

Third, the district court's decision to permit Doe to proceed with her federal constitutional claim does not implicate the Court's concern that a "uniform federal scheme" not be displaced by "the contingencies of local tort law." *Taber*, 67 F.3d at 1049. Federal constitutional rights are at stake, and "the fortuity of the situs of the alleged [wrongdoing]" will not dictate whether the individual defendants will be liable. *Johnson*, 481 U.S. at 688. Rather, Doe's equal protection claim is a federal claim, based on federal constitutional law: the Equal Protection Clause of the Fifth Amendment.

Moreover, there are federal regulations that also apply here, and Doe alleges that defendants failed to abide by them. The concern identified in *Feres* and its progeny that courts not interfere with military discipline and structure carries little weight when the military is violating its own rules and regulations. *See Crawford*, 531 F.2d at 1120 (noting that "[a] line of cases in our court holds that actions by the armed services that are violative of their own regulations are within the reach of the courts") (collecting cases); *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968) (permitting review of petition for writ of habeas corpus where naval reservist claimed he was denied discharge by Navy in violation of its own regulations). Judicial review of Doe's allegations that the individual defendants failed to follow mandatory military directives and regulations would not unduly interfere with "the proper and efficient operation of our military forces." *Smith v. Resor*, 406 F.2d 141, 146 (2d Cir. 1969).

The Government cites three cases that have applied the *Feres* doctrine to dismiss claims brought by service

academy cadets. *See* Appellants' Br. at 14 (citing *Miller v. United States*, 42 F.3d 297, 301 (5th Cir. 1995); *Collins v. United States*, 642 F.2d 217, 218 (7th Cir. 1981); *Archer v. United States*, 217 F.2d 548, 552 (9th Cir. 1954)). These out-of-circuit cases, of course, are not controlling, and they are in any event distinguishable. In *Miller*, a freshman midshipman at the Naval Academy was hit in the head by the boom of a sailboat while training to learn, *inter alia*, seamanship and the handling of a small vessel. 42 F.3d at 299. In *Collins*, an Air Force cadet alleged that he was injured by medical malpractice on the part of Air Force medical personnel. 642 F.2d at 218. In *Archer*, a West Point cadet was aboard a United States Army plane returning to West Point from a leave. He was being transported as "a soldier in military service in line of duty" and was killed when the plane crashed. His parents brought a wrongful death action against the United States, alleging negligence in the operation of the plane. 217 F.2d at 549, 551.

These factual scenarios are significantly different from the circumstances before us now. Injuries resulting from training aboard a Navy boat or flying on an Army plane or being treated by military doctors clearly are injuries incident to service. None of the cases involved a claim for the violation of constitutional rights, *see Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (damages suits "may offer the only realistic avenue for vindication of constitutional guarantees"), and none involved a claim for the deprivation of the opportunity for an equal education, or a claim of an injury sustained while socializing with a classmate. Moreover, in all three cases, the armed forces provided disability or death benefits or other compensation. *Miller*, 42 F.3d at 299-300, 306, 307; *Collins*, 642 F.2d at 221; *Archer*, 217 F.2d at 550.

Finally, the majority and the Government rely on two recent decisions of other Circuits rejecting *Bivens* claims brought by current and former service members alleging they had been raped and sexually assaulted by other service members. The plaintiffs in these cases contended that the actions and omissions of current and former Secretaries of Defense had created a military culture of tolerance for sexual assault and misconduct. *See Klay v. Panetta*, 758 F.3d 369, 371-72 (D.C. Cir. 2014); *Cioca v. Rumsfeld*, 720 F.3d 505, 513-14 (4th Cir. 2013). The cases, however, are distinguishable, for they involved active duty service members who brought broad challenges to policies of high-ranking government officials, raising questions as to military discipline and command for those in active duty. The cases did not involve students or an educational institution or the deprivation of meaningful access to an education because of discriminatory academic policies or school administrators tasked with running an educational institution. The *Feres* concerns — particularly the question of interfering with military command and discipline — play out very differently in this scenario.[15] As Justice Brennan wrote in *Stanley*:

> In *Chappell*, the Court did not create an inflexible rule, requiring a blind application of *Feres* in soldiers' cases raising constitutional claims. Given the significant interests protected by *Bivens* actions, the Court must consider a constitutional claim in light of the

[15] *Klay* and *Cioca* are also distinguishable because they do not employ the fact-specific, totality-of-circumstances approach our Circuit applied in *Taber* and *Wake*. Instead, they rely primarily on one consideration: military discipline and decision-making. *See Klay*, 758 F.3d at 374-75; *Cioca*, 720 F.3d at 512-15.

> concerns underlying *Feres*. If those concerns are not implicated by a soldier's constitutional claim, *Feres* should not thoughtlessly be imposed to prevent redress of an intentional constitutional violation.

483 U.S. at 705 (Brennan, J., concurring in part and dissenting in part, with Marshall, J., joining, and Stevens, J., joining in relevant part).

III.

The *Feres* doctrine has been criticized wide and far, and many have called for the Supreme Court to reconsider it.[16] While we do not, of course, have the authority to overrule *Feres*, we should not be extending the doctrine. *See Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J.,

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[16] *See, e.g., Lanus v. United States*, 133 S. Ct. 2731, 2732 (Thomas, J., dissenting from denial of certiorari) ("I would grant the petition to reconsider *Feres* . . . ."); *Ortiz v. United States*, 786 F.3d 817, 818 (10th Cir. 2015) ("[T]he facts here exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not ours to overrule."); *France v. United States*, 225 F.3d 658, (6th Cir. 2000) (per curiam) ("[M]any courts and commentators have strongly criticized the *Feres* decision."); *Day v. Mass. Air. Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) ("Possibly *Feres* . . . deserves reexamination by the Supreme Court."); *Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985) ("The *Feres* doctrine is a blunt instrument; courts and commentators have often been critical of it."); *Taber,* 67 F.3d at 1044 n.11 ("The fact that the doctrine can be made workable does not suggest that the Supreme Court ought not abandon the doctrine completely for reasons akin to those given by Justice Scalia in his *Johnson* dissent."); 14 Charles Alan Wright et al., *Federal Practice & Procedure* § 3658 (4th ed. 2015) ("The *Feres* doctrine has been called 'much-criticized' and 'controversial.'"); Erwin Chemerinsky, *Federal Courts Jurisdiction* 674 (6th ed. 2012) (noting that many commentators and courts have "sharply criticized" the *Feres* doctrine for causing "manifest injustice").

concurring in part and dissenting in part) ("While lower courts are bound by the Supreme Court's decision in *Feres*, they are hardly obliged to extend the limitation . . . ."). By holding that Doe's injuries sustained as a cadet incident to being a student are barred as injuries incident to military service, the majority does precisely that.

I would affirm the district court's determination that the *Feres* doctrine does not bar Doe's equal protection claim. Accordingly, I dissent.

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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15-1890

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of September, two thousand fifteen.

Present: Gerard E. Lynch,
Raymond J. Lohier, Jr.,
*Circuit Judges*.[*]

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JANE DOE,

*Plaintiff-Appellee*,

v.

LT. GEN. FRANKLIN LEE HAGENBECK,
BRIG. GEN. WILLIAM E. RAPP,

*Defendants-Appellants*,

UNITED STATES OF AMERICA,

*Defendants*.[**]

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[*] The Honorable Susan L. Carney, who was originally a member of the panel, recused herself. The appeal is being decided by the remaining two members of the panel, who are in agreement. *See* Local Rule § 0.14.

[**] The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above. *See* Fed. R. App. P. 43(c)(2).

Appellants, through counsel, move pursuant to Federal Rule of Appellate Procedure 8(a) for a stay of district court proceedings pending disposition of their appeal of the district court's order denying qualified immunity. Appellee moves to transfer the case to the Federal Circuit on the grounds that this Court lacks jurisdiction over an appeal when the district court's jurisdiction was based at least in part on the Little Tucker Act. Upon due consideration, it is hereby ORDERED that Appellee's motion is DENIED because the district court's jurisdiction was not based on the Little Tucker Act, since Appellee's contract claim failed to present a substantial federal question. *See* 28 U.S.C. §§ 1295(a)(2), 1346(a)(2). It is further ORDERED that the Appellants' stay motion is GRANTED. *See In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 169-71 (2d Cir. 2007). The Appellants are directed to file a scheduling notification within 14 days of the date of entry of this order pursuant to Second Circuit Local Rule 31.2.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]
/s/ Catherine O'Hagan Wolfe

**APPENDIX F**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed April 13, 2015]

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13 Civ. 2802 (AKH)

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JANE DOE,

*Plaintiff*,

-against-

LT. GEN. FRANKLIN LEE HAGENBECK, BRIG. GEN. WILLIAM E. RAPP, and the UNITED STATES OF AMERICA,

*Defendants*.

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ORDER AND OPINION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COMPLAINT

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ALVIN K. HELLERSTEIN, U.S.D.J.:

This case presents a novel legal question: whether the federal judiciary must refrain from issuing remedial relief and damages for the constitutional deprivation of a woman's equal protection right to a West Point education free of discrimination and hostility, on the ground that doing so would interfere with the right and power of the Executive Branch to command, and the Legislature's right and power to legislate, with respect to the nation's military forces.

Plaintiff Jane Doe[1] ("Plaintiff") alleges in her complaint that rampant sexual hostility at the United States Military Academy at West Point ("West Point") forced her to resign as a cadet and be honorably discharged in August 2010, before entering her third year. She sues the Superintendent of West Point, Lieutenant General Franklin Lee Hagenbeck ("Hagenbeck"), and the Commandant of Cadets at West Point, Brigadier General William E. Rapp ("Rapp") (collectively, the "Individual Defendants"), the two officers in command of West Point at the time of the violations alleged in her complaint, for violating her constitutional rights. She also sues the United States on contract and tort claims.

Defendants Hagenbeck, Rapp, and the United States of America (the "United States") (collectively, "Defendants") move, pursuant to Fed. Rs. Civ. P. 12(b)(1) & (6), to dismiss Plaintiff's claims for lack of subject-matter jurisdiction and for failure to state legally sufficient claims for relief.

I hold in this opinion that Plaintiff has sufficiently alleged rampant hostility toward, and discrimination against, women at West Point; that the Individual Defendants knowingly allowed such practices to continue in violation of statutory obligations requiring them to put them to an end; that judicially-ordered remedies would not compromise the legislative or executive functions of government, including the disciplinary role of the Executive Branch over the nation's military; and that it would be inappropriate at this stage of the case for this Court to refrain from

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[1] By order dated August 15, 2013, I granted Plaintiffs motion, without objection, to proceed under the fictitious name Jane Doe. *See* Dkt. No. 13.

hearing and considering the merits with respect to Plaintiffs equal protection claim. For the reasons discussed in this opinion, I sustain the complaint against Hagenbeck and Rapp on Plaintiffs equal protection claim. However, I find that Plaintiffs due process claim does not sufficiently plead causality to survive a motion to dismiss. I dismiss also the counts against the United States under the Federal Tort Claims Act and the Little Tucker Act.

## I. The Allegations of the Complaint

### A. *The Alleged Facts*

Hagenbeck was West Point's Superintendent between July 2006 and July 2010, and served as Chair of its Sexual Assault Review Board (the "Board"). The Board served as the primary oversight of West Point's sexual assault prevention program. As West Point's Commandant of Cadets, Rapp was in charge of the administration and training of cadets from 2009 to 2011. Doe alleges that Hagenbeck and Rapp furthered the pervasive culture of sexual violence and gender discrimination at West Point.

Doe alleges that Hagenbeck and Rapp disregarded statutory commands to eliminate sexual violence and gender discrimination. 10 U.S.C. § 4361 provides that the Secretary of Defense and the Superintendent of West Point are to "prescribe a policy on sexual harassment and sexual violence applicable to the cadets and other personnel of the Academy", and provide "required training on the policy for all cadets and other Academy personnel". Further, the Superintendent of West Point is given a statutory responsibility to conduct yearly assessments of the effectiveness of policies, training, and procedures intended to reduce sexual harassment and sexual violence. 10 U.S.C. § 4361(c). The Super-

intendent of West Point is also required to conduct an annual evaluation of the number of sexual assaults, rapes, and other offenses involving cadets or West Point faculty and report these statistics to the Department of Defense ("DOD"). 10 U.S.C. § 4361(d).

Doe alleges that Hagenbeck and Rapp failed to carry out their statutory responsibilities. Doe alleges numerous examples of sexual assaults, sexual harassments, and failures to punish perpetrators. In one instance, despite repeated complaints by female cadets that male supervisors inappropriately touched them and made unsolicited offensive and sexual comments, Hagenbeck and Rapp simply relieved the supervisors of supervisory duties over the particular female cadets making the complaints, without punishing the offending officers. In another example, a guest speaker on the subject of military ethics concluded his speech by hugging a woman and commenting that he liked hugging women because he liked their "bumps". Despite multiple complaints, West Point failed to respond to correct such offensive conduct.

The West Point administration and faculty openly joked with male cadets about having sex with female cadets, lamenting the lack of "sexual opportunities" at West Point, and advising male cadets to "seize any chance to have sex". Cadets marched through campus shouting offensive lyrics in earshot of faculty and administration who were aware that male cadets sang these songs during "team building" exercises. One example of this aggressive, violent language is excerpted below:

> I wish that all the ladies / were bricks in a pile / and I was a mason / I'd lay them all in style.

> I wish that all the ladies were holes in the road / and I was a dump truck / I'd fill 'em with my load.
>
> I wish that all the ladies / were statues of Venus / and I was a sculptor / I'd break 'em with my penis.

Many West Point policies and practices pertaining to sexual health, prevention of assault, and reporting of incidents facially discriminated against women. Female cadets, but not male cadets, were required to submit to annual testing for sexually transmitted diseases ("STDs"). In response to complaints about the policy, West Point's health administrators explained that "it was the Army's opinion that STDs were more harmful to women than men and it was the responsibility of women to prevent their spread". The sexual assault prevention programs taught that the prevention of sexual assault was "a woman's responsibility" and it was the women's job to say "no" when faced with inevitable advances from their male colleagues. Female cadets were informally advised either by other cadets or by West Point personnel that their military careers would suffer if they reported sexual assaults, and they were made to understand that male cadets would not face similarly adverse consequences. During Doe's first year at West Point, male cadets were required to take boxing, and as the only difference in curriculum, female cadets were required to take self-defense classes.

Doe alleges that the annual reports required by 10 U.S.C. § 4361(d) show that the instances of sexual assault and rape—including rapes by multiple offenders—were actually increasing during the Individual Defendants' tenures, and that Hagenbeck and Rapp failed to implement policies and practices to

decrease—or at minimum halt the increase of—sexual assault. A 2010 DOD survey stated that 51 percent of female cadets (more than 100 women) and 9 percent of male cadets had been sexually assaulted that year. Yet, only 11 official reports of sexual assault had been filed and only one cadet had been dismissed. The survey stated that approximately 90 percent of sexual assaults at West Point were not reported, and that 61 percent of female cadets chose not to report assaults, believing that doing so would hurt their reputation and expose them to retaliation.

The 2011 DOD Report (the "Report") stated that West Point was only "partially in compliance" with DOD regulations mandating sexual assault training and prevention. The Report concluded that West Point's sexual assault prevention training was "deficient" and failed to meet the minimum standard of annual training for cadets. The Report stated that West Point lacked an institutionalized comprehensive Sexual Assault Prevention Response ("SAPR") curriculum as required by statute, and failed to comply with DOD directives intended to reduce rapes and sexual assaults. Doe alleges that Hagenbeck and Rapp had personal knowledge of these deficiencies, as under the statute it was their responsibility to compile the information for, and compose the substance of, these reports. Despite this knowledge of pervasive sexual violence and harassment, Hagenbeck and Rapp failed to take the appropriate actions to implement their statutory obligations.

Doe alleges she suffered from the culture of sexual harassment and sexual assault while at West Point, including from male cadets who pressured her to go on dates with them. As a first-year cadet, Doe was allowed only very limited opportunities to leave campus,

and thus could not escape the discriminatory atmosphere she alleges pervaded West Point. As a result of this environment, Doe developed stress and saw a psychiatrist who prescribed a sedative, which had undisclosed side effects of impaired awareness and reactions, as well as memory loss. Doe alleges that due to the sexually hostile environment she began to consider transferring out of West Point in approximately April 2009, less than a year after she signed the Oath of Allegiance, but her commitment to the military and a desire to pursue a career in the Army motivated her to attempt to complete her studies at West Point.

Doe further alleges her own experience of rape and inadequate administrative response. She alleges that during the end-of-term examination period, on or about May 8, 2010, she took a prescribed sedative to help her sleep. A male cadet friend tapped on the window to Doe's room, after midnight, and invited her to come outside and walk with him. In violation of curfew, they went for a walk, entered an unoccupied academic building, and sipped from a bottle of liquor that Doe's friend had brought with him. Doe lost consciousness, but remembers "lying on the concrete floor of a boiler room, not understanding what was going on, and waking in her bed with dirt on her clothes and in her hair, bruises on her lower back, and blood between her legs". Doe alleges that her friend "had forcible, non-consensual intercourse" with her. Doe visited the health clinic the same day, and was given emergency contraception. The next day, Doe confronted her friend, who admitted that they had intercourse, stated that he thought it was consensual, but apologized "that he had no control over his actions because of the alcohol".

Doe returned to the clinic the next day to seek medical treatment for her injuries. The nurse performed a vaginal examination, informed her that she had signs of vaginal tearing, noted a possible sexual assault on Doe's medical records, but did not conduct a forensic examination to collect evidence (as is required by DOD regulations).

West Point had two types of sexual assault reporting: A "restricted" report does not lead to disciplinary action; an "unrestricted" report identifies the perpetrator and the victim, informs the perpetrator's superiors, and initiates an investigation. Doe filed a "restricted" report, fearing that an unrestricted report would damage her career prospects, place her reputation in jeopardy, and cause her to be punished for violations of curfew and drinking regulations. Doe alleges that the 2010 DOD survey found that a majority of female West Point cadets who declined to file unrestricted reports of sexual assault declined because of fears consistent with those held by Doe.

Doe alleges that she could not endure the emotional effect and isolation produced by her experience and the absence of consequences to her rapist, and that she could not risk continuing at West Point into her third year because of the financial consequence of a later resignation.[2] On August 10, 2010, she resigned. And, on August 13, 2010, she was honorably discharged. Doe then enrolled and graduated from a civilian college, but hopes to enroll in Army Corps Officer Candidate School.

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[2] West Point classifies its cadets in reverse chronological order, so that a "fourth year cadet" is a cadet in his first year of schooling. In the interest of common understanding, this opinion refers to a cadet in his first year of schooling as a "first year cadet."

Doe alleges that she signed an Oath of Allegiance upon her enrollment at West Point, equivalent to an educational services contract. By this contract, she alleges, she had a reasonable expectation of receiving a West Point education free of tuition, room, and board from West Point in exchange for her commitment to enter military service upon graduation as a commissioned officer.

B. *The Alleged Claims*

Doe's complaint alleges four claims for relief. First, Doe alleges that the Individual Defendants are liable for violation of her Fifth Amendment Due Process right as proximate causes of her rape by a fellow cadet. Doe alleges that Hagenbeck and Rapp created and maintained a dangerous environment at West Point, culminating in her rape and resignation from West Point.

Second, Doe alleges that the Individual Defendants are liable to her for violation of her Fifth Amendment Equal Protection right. Doe alleges that the sexually hostile environment created and perpetuated by the Individual Defendants at West Point placed her at high risk of harm because of her gender, and denied her the right to be free of gender-based discrimination.

Third, Doe alleges that the United States is liable to her pursuant to 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act")[3] for breach of the covenant of good faith

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[3] District Courts have concurrent jurisdiction with the United States Court of Federal Claims to hear claims for less than $10,000 against the United States under the Tucker Act of 1887. *See* 28 U.S.C. § 1346(a)(2). This is known as the "Little Tucker Act". The United States Court of Federal Claims has exclusive jurisdiction for claims in excess of $10,000 against the United States under the Tucker Act of 1887. *See* 28 U.S.C. § 1491.

and fair dealing. Upon acceptance to West Point, Doe signed an Oath of Allegiance, which she alleges is an educational contract and service agreement. Doe alleges that the United States acted in bad faith by engaging in conduct that was designed to oppress women at West Point, after inducing them to enter into contractual obligations, and that she was therefore deprived of her reasonable expectation of contractual education benefits.

Last, Doe alleges that the United States is liable to her under the Federal Tort Claims Act ("FTCA") for negligent supervision of male cadets and staff members, negligent training of male cadets and staff members, the negligence of the Individual Defendants and other staff members, negligent infliction of emotional distress, and abuse of process.

II. Discussion

A. *The Standards Governing Motions to Dismiss*

When considering a motion to dismiss, I accept all well-pled factual allegations in the complaint as true, and draw all reasonable inferences in plaintiff's favor. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). If, however, the complaint does not plead facts that "plausibly give rise to an entitlement for relief', I must dismiss it. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

B. *The Right to Equal Protection of the Laws*

In 1996, the Supreme Court held that state policies denying women admission to military colleges violated their right to equal protection of the laws, in violation

of the federal Constitution. U.S. Const., Amend. V; *United States v. Virginia*, 518 U.S. 515 (1996). Virginia Military Institute ("VMI") was a public state institution intending to produce "citizen-soldiers", but offered admission only to men. The Supreme Court ruled that the categorical exclusion of women denied them equal protection of the laws, and that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Id.* at 532.

The Equal Protection Clause of the Fifth and. Fourteenth Amendments of the United States Constitution confers a "federal constitutional right to be free from gender discrimination". *Davis v. Passman*, 442 U.S. 228 (1979). Doe sues based on this fundamental and clear constitutional protection. *See also Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009); *United States v. Virginia*, 518 U.S. 515 (1996). "When—as alleged here—sexual harassment includes conduct evidently calculated to drive someone out of the workplace, the harassment is tantamount to sex discrimination." *Annis v. Westchester*, 36 F.3d 251, 254 (2d Cir. 1994); *cf. Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993) ("Sexual harassment of women constitutes disparate treatment because of gender, and is actionable under Section 1983."); *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003); *Gierlinger v. New York State Police*, 15 F.3d 32 (2d Cir. 1994).

Doe claims in this case that at West Point one law exists for men and another law exists for women. Doe's allegations, if proven, clearly demonstrate that the

policies and procedures at West Point violate the Equal Protection Clause. The United States Constitution is not an aspirational document called upon only when convenient to implement; it is the highest law of the land and it commands obedience.

Doe's claim echoes the concerns so forcefully identified in *VMI*. In *VMI*, women were denied admission into a state-financed university preparing individuals for military service, simply because they were women. Just as state-financed schools preparing applicants for the military have a constitutional obligation to treat gender alike, a federally-financed academic institution like West Point cannot have one law for men and another law for women, or, as Doe alleges, policies that favor men while subjecting women to hostile and discriminatory treatment.

### C. *Implied Rights of Action for Constitutional Violations*

Private citizens may sue individual tortfeasors for money damages if, under color of law, they violate a plaintiff's constitutional rights, even in the absence of specific statutory authorization. "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). *See also Butz v. Economou*, 438 U.S. 478, 504 (1978) ("[T]he decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official.").

In 1979, the Supreme Court extended *Bivens* claims to cover the equal protection component of the Fifth Amendment's due process clause, allowing private citizens to sue under *Bivens* for gender discrimination. *Davis v. Passman*, 442 U.S. 228 (1979). In *Davis v. Passman*, a former congressional staffer sued a United States Congressman for gender discrimination. Davis was hired by then-Congressman Otto E. Passman as a deputy administrative assistant. After a short five-month tenure, Passman terminated Davis via a written letter. The letter explained that while Davis was clearly "able, energetic, and a very hard worker," she could not perform the job any longer because "it was essential that the understudy to my Administrative Assistant be a man". *Id* at 230. Davis sued Passman, alleging that terminating her because of her gender violated the Fifth Amendment equal protection component.

The Supreme Court agreed with Davis, holding that "a cause of action and a damages remedy can also be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated". *Id.* The Court found that "first . . . petitioner asserts a constitutionally protected right; second, that petitioner has stated a cause of action which asserts this right; and third, that relief in damages constitutes an appropriate form of remedy." *Id.* at 234. *Davis*, therefore, provides the *Bivens-type* remedy for gender discrimination under which Doe brings her claim. A *Bivens* claim is brought, not against the government, but against individuals who, under color of law, violate a plaintiff's constitutional rights.

Doe alleges that Hagenbeck and Rapp were responsible for failing to implement the sexual assault prevention policies that DOD mandated for West

Point. She alleges that as part of this responsibility, they compiled the DOD reports which documented pervasive gender discrimination and disturbingly high levels of sexual assaults and violence. Doe has provided concrete examples of such gender discrimination, including, *inter alia*, the pervasive frequent sexual assaults and rapes; mandatory annual STD testing for female cadets but not for male cadets because women are "responsible" for stopping the spread of STDs; the fact that male cadets regularly march through the campus shouting their desire to break women with their penises; and the comprehensive reports showing that *over half of* female cadets at West Point were sexually assaulted, and that West Point's sexual assault prevention programs and reporting mechanisms were "deficient," with no—or inadequate—steps being taken to repair the deficiency.

Doe has also sufficiently shown Hagenbeck and Rapp's personal responsibility for the discriminatory policies and practices. Doe's pleading satisfies *Ashcroft v. Iqbal*, which held that plaintiff in a *Bivens* or § 1983 action must plead that each defendant purposefully violated the constitution through his own individual actions. 556 U.S. 662, 666-67 (2009). To satisfy *Iqbal* in this circuit, "[t]he personal involvement of a supervisory defendant may be shown by evidence that . . . the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom." *Scott v. Fischer*, 616 F.3d 100, 109-10 (2d Cir. 2010); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). *See also Alli v. City of New York*, 2012 WL 4887745, at *5 (S.D.N.Y. Oct. 12, 2012); *Bellamy v. Mount Vernon Hosp.,* 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009). Doe's complaint sufficiently shows personal responsibility on the part of Hagenbeck and Rapp. *Iqbal*, 556 U.S.

662 (2009). A claim is facially plausible when the factual allegations, not the legal conclusions, "allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The "plausibility standard is not akin to a probability requirement but it asks for more than a sheer possibility that a defendant has acted unlawfully". *Id.* Doe's complaint meets this standard.

C. *Defendants are not Entitled to Qualified Immunity*

Hagenbeck and Rapp are not entitled to qualified immunity. A public official is entitled to qualified immunity if his actions do not violate clearly established rights of which a reasonable person, at the time, would have known, or if it was objectively reasonable for the public official to believe that his actions were lawful. *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006).

A right is clearly established at the time of infringement if the Second Circuit and Supreme Court cases have held that the right exists, and have defined it with reasonable specificity. *Scott v. Fischer*, 616 F.3d 100, 105 (2d. Cir. 2010), The right to be free from gender discrimination under the Equal Protection Clause of the United States Constitution clearly was established at the time, and both the Supreme Court and Second Circuit had said as much. *See, e.g., Davis v. Passman*, 442 U.S. 228 (1979); *United States v. Virginia*, 518 U.S. 515 (1996); *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009). The government argues that Hagenbeck and Rapp should have qualified immunity because their implementation of constitutional and statutory commands to end gender discriminated reflected discretionary conduct, and

they are entitled to qualified immunity for discretionary conduct.

The government's argument fails. Although some discretionary actions are protected by qualified immunity, this protection does not extend to excuse discretionary acts that violate the federal Constitution. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Hagenbeck and Rapp cannot argue that (i) equal treatment of men and women was not a clearly established constitutional right; (ii) they did not know of that right, or (iii) they were not obliged to confer such equal treatment. At this stage, in opposition to a motion to dismiss, "the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense". *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). Flagenbeck and Rapp's motion to dismiss, based on their allegedly having exercised discretion, must be denied.

D. *Exceptions to Rights of Action When Injuries Are Incurred Incident to Military Service*

U.S. courts have developed a strong policy against judicial involvement in military matters, even where constitutional rights have been compromised. *See, e.g., Feres v. United States*, 340 U.S. 135 (1950); *Chappell v. Wallace*, 462 U.S. 296 (1983). The cases generally are in the context of suits against the Government under the FTCA, but the doctrine is applied also to actions against superior officers for violations of the Constitution and statutes of the United States under

color of law. *See, e.g., Chappell*, 462 U.S. at 303-04. This section discusses whether, in light of this policy, the facts that Doe alleges in her complaint may be reviewed by this Court.

1. *The* Feres *Doctrine*

In *Feres v. United States*, 340 U.S. 135 (1950), the United States Supreme Court reviewed three cases where enlisted service men on active duty suffered deaths or injuries from the negligence of others in the military, and they or their next of kin sued the Government under the FTCA to recover money damages. In two cases, there had been medical malpractice by U.S. Army surgeons; in the third case, a soldier died when an army barracks caught fire from a defective heating plant. The "common fact underlying the three cases [was] that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces". *Id.* at 137. The Supreme Court held that "service-connected injuries" could not be made the basis of lawsuits under the FTCA. *Id.* at 139.

In *Chappell v. Wallace*, the U.S. Supreme Court extended *Feres* to "*Bivens-type* claims". 462 U.S. 296, 304 (1983). In *Chappell*, five enlisted men serving on a combat ship sued their officers alleging that they were assigned to undesirable duties and were given low performance evaluations because of their race, in violation of the Constitution and laws of the United States. *Bivens*, the Supreme Court held, should not be applied if there were "special factors counseling hesitation". *Chappell*, 426 U.S. at 298, quoting *Bush v. Lucas,* 103 S. Ct. 2404, 2411 (1983). The Supreme Court ruled that it understood *Feres* as denying a right to sue based on the "peculiar and special relationship of the solider to his superior, [and] the effects on the

maintenance of such suits on discipline . . .". *Chappell*, 462 U.S. at 299, quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963). As the Court stated, "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." *Chappell*, 462 U.S. at 300. The need to insulate the military's disciplinary structure from judicial inquiry constituted a "special factor counseling hesitation" against affording a *Bivens* remedy to plaintiffs. *Chappell*, 462 U.S. at 304.

In *United States v. Stanley*, 483 U.S. 669 (1987), an Army sergeant on active duty, having volunteered to join a test of the effectiveness of protective clothing and equipment against chemical warfare, was also subjected to a test of the effects of LSD (lysergic acid diethylamide) on military personnel. Without Sergeant Stanley's consent or knowledge, the Army gave him four doses of LSD in the course of a month, and then asked him for consent. Stanley refused, and began to suffer hallucinations, incoherence, and memory loss from the LSD administered to him. The drug caused him to awaken at night and, without knowing it, violently to beat his wife and children. The Army discharged Stanley, and his marriage dissolved. He sued to recover damages, under both the FTCA and *Bivens.*

The U.S. Supreme Court, reversing the court of appeals, dismissed the lawsuit and both of Stanley's claims. The Supreme Court reasoned that the Constitution had given Congress "plenary control over rights, duties, and responsibilities in the framework

of the Military Establishment". Thus, the "unique disciplinary structure" of the military and the "comprehensive internal system of justice to regulate military life" that Congress had established were "special factors counseling hesitation" before implying a right to bring a *Bivens* action. *Id.* at 679, quoting *Chappell*, 462 U.S. at 301-02, 304. Under *Feres*, that "hesitation" applies, not only to instances where the plaintiff may have been following the orders of a military superior, but whenever the injury complained of was "incident to service". *Id.* at 681-82.

The Supreme Court acknowledged that its rule of "special factors counseling hesitation" reflected "a policy judgment" that was "protective of military concerns", and that there was no clear "right answer" in balancing the special status of the military and the rights of persons in the military. *Stanley*, 483 U.S. at 681. The Court expressed concern about fashioning a less protective rule that might permit suits calling "military discipline and decisionmaking" into question, or intruding upon "military matters"—for example, "compelled depositions and trial testimony by military officers concerning the details of their military commands"—and favored "a line that is relatively clear and that can be discerned with less extensive inquiry into military matters". *Id.* at 682-83. The Supreme Court held that Stanley's suit could not proceed, neither under the FTCA, nor under *Bivens.*

In *Wake v. United States*, 89 F.3d 53 (2d Cir. 1996), the plaintiff was in her third year of schooling at Norwich University.[4] The plaintiff had served in

[4] Norwich University is a private college designated by Title 10 as "a senior military college" whose cadets *may* be ordered to active duty upon graduation. *See* 10 U.S.C. § 2111(a).

the Navy before admission and was "enlisted as an inactive member" in the Navy Reserves and in the Navy Reserve Officers Training Corp ("NROTC"), subject to reactivation in the event that she withdrew from the NROTC. She sustained permanent injuries in a car accident while riding in a vehicle owned by the NROTC, en route to a pre-commissioning physical examination required by the NROTC. She sued the United States and various military personnel under the FTCA and *Bivens* for, among other things, violations of her Fifth Amendment right to due process, the car driver's negligence, and negligence in advising her how to pursue compensation for her injuries. *Id.* at 56.

The Second Circuit affirmed the dismissal of Wake's claims because it determined that, as an enlisted service member, her injuries were "incident to service" and thus barred by *Feres*. *Id.* at 62. In *Wake*, the court stated that to determine whether an injury occurs "incident to service", "the courts consider various factors, with no single factor being dispositive". *Id.* at 58. Such factors include, but are not limited to: the individual's status and relationship to the military at the time of the injury; the relationship of the activity which created the injury to the individual's service in the military; the location in which the injury occurred; whether the activity is limited to military personnel; and whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service. *Id.* at 57-58.

In applying the factors to the plaintiff, the Second Circuit focused on her membership in NROTC and that she was an enlisted member of the Naval Reserves. *Id.* The Second Circuit noted that "numerous circuits have found that individuals on reserve status fall within the *Feres* bar". *Id.* at 59. *See also*

*Collins v. United States*, 642 F.2d 217, 220 (7th Cir. 1981) (FTCA suit by cadet at Air Force Academy for medical malpractice dismissed because under *Feres* injuries occurred "incident to service"); *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013) (suits for sexual assault incurred while on active duty in the military dismissed); *Klay v. Panetta*, 785 F.3d 369 (D.C. Cir. 2014) (same); *Marquet v. Gates*, No. 12 Civ. 3117, (S.D.N.Y. Sept. 11, 2013) (suit by fourth year cadet that West Point's indifference to rape by upper classman dismissed).

The Second Circuit found that the facts in the record, viewed in light of the rationales underlying the *Feres* doctrine, showed that Wake's injuries occurred "incident to service". The court noted that Wake was travelling in a Navy-owned vehicle at the time of her injuries; the driver of the vehicle was a non-commissioned officer acting within the scope of his employment; Wake was with other ROTC cadets at the time of her injuries, being transported back to Norwich University from a flight physical examination conducted at a Navy base; the purpose of the trip was for a military physical examination; and Wake was issued a travel order assigning her to temporary duty and authorizing her travel. *Id.*

Importantly, the Second Circuit further emphasized that courts should consider the three broad rationales underlying *Feres* when determining whether an injury occurred "incident to service": "(1) the 'distinctly federal' relationship between the Government and members of its armed forces; (2) the existence of a uniform system of 'generous statutory disability and death benefits' for members of the military; and (3) the need to preserve the military disciplinary structure and prevent judicial involvement in sensitive military

matters." *Id.* at 57, 61-62. With respect to the first rationale, the court held that due to the federal nature of the relationship, Wake should be barred from pursuing state tort law claims. Secondly, the court found that Wake had already received generous benefits from her 100% disability rating from the Department of Veteran Affairs. Finally, the court found the third rationale also weighed in favor of invoking the *Feres* doctrine, "to avoid civilian court scrutiny of military discipline and policies such as those necessarily implicated by an accident in a military vehicle driven by a military officer" and "to avoid disruption of military order". *Id.* at 62.

1. *The Status of Plaintiff Jane Doe*

Doe brings two claims against Hagenbeck and Rapp under *Bivens:* for violation of her due process rights, and for violation of her right to equal protection of the laws.

A. *Due Process Claim*

Doe's due process claim alleges that the actions of the Individual Defendants, in failing properly to train, supervise, and punish cadets concerning sexual assaults, were a proximate cause of her rape by a fellow cadet. I hold, however, that these allegations fail to show a plausible and sufficient factual nexus to show proximate cause for the relief she seeks, and that this portion of her complaint should be dismissed. *See Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009).

An action to vindicate a constitutional right, such as a *Bivens* claim, employs the tort principle of proximate causation. *Higazy v. Templeton*, 505 F.3d 161, 175 (2d Cir. 2007). "Proximate or legal cause is defined as that 'which in a natural sequence, unbroken by any new cause, produces that event and without which that

event would not have occurred." *Caraballo v. U.S.*, 830 F.2d 19, 22 (2d Cir. 1987) (quoting *Rider v. Syracuse Rapid Transit Ry. Co.*, 171 N.Y. 139, 147 (1902)). In order for Doe's complaint to survive a motion to dismiss her *Bivens* claim against Hagenbeck and Rapp for violation of her due process rights, she must adequately plead that their acts proximately caused her rape.

Doe's complaint on its face shows that the actions taken by Hagenbeck and Rapp were too attenuated from Doe's rape to be a proximate cause of her injuries. Doe alleges that the Individual Defendants fostered an environment of sexual hostility and toleration of violence against women by creating a culture of blaming the victim, discouraging female cadets from reporting sexual assault, ineffectively punishing cadets who perpetrated sexual assault, providing inadequate resources for sexual assault victims, and marginalizing women by failing to recruit female cadets and faculty. Doe further alleges that the Individual Defendants turned a blind eye to the inappropriately high number of sexual assault statistics which had repeatedly been brought to their attention, reflecting a deliberate indifference to Doe's due process rights.

However, the nexus between the acts, or failures to act, that Doe alleges and her rape are too tangential. The complaint does not show that without the policies implemented by Hagenbeck and Rapp, Smith (Doe's fellow cadet) would not have taken the actions he did on the night of May 8, 2010, or that she would not willingly have accompanied him. Doe alleges that Smith came to her room after hours, invited her to take a walk with him in violation of curfew, took her to an academic building, drank alcohol, and then had

sex with her, without her consent, when she was unconscious due to drinking alcohol after taking a prescribed sedative. As the complaint fails adequately to plead that actions of Hagenbeck and Rapp proximately caused the events of that night, this count of Doe's *Bivens* claim fails.

B. *Equal Protection Claim*

Doe's equal protection claim is different. The cognizable injury in Doe's equal protection claim is that she was denied her constitutionally-protected right to an "equal opportunity to aspire, achieve, participate in and contribute to society based on [her] individual talents and capacities". *VMI*, 518 U.S. at 532. As the line of cases descending from *Feres* demonstrate, the primary reason for exercising judicial restraint with cases concerning the military is "the need to preserve the military disciplinary structure and prevent judicial involvement in sensitive military matters". *Wake*, 89 F.3d at 57. As the Supreme Court stated in *United States v. Shearer*, "*Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty.'" 473 U.S. 52, 57 (1985) (quoting *U.S. v. Muniz*, 374 U.S. 150, 162 (1963) (quoting *U.S. v. Brown*, 348 U.S. 110, 112 (1954))). It is "the unique disciplinary structure of the Military Establishment and Congress' activity in the field [which] constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens-type* remedy against their superior officers." *Stanley*, 483 U.S. at 679 (quoting *Chappell*, 462 U.S. at 304).

However, Doe's complaint does not take issue with the "military disciplining structure". *Wake*, 89 F.3d at 57. She asks for no special rule for, or review of, her status as a West Point cadet. *Cf., Chappell*, 462 U.S. at 303. She asks for no dispensation regarding her duties and responsibilities. *Cf., Stanley*, 483 U.S. at 679-680. All she asks for is the dignity of equality – that there be no special rules, or practices, at West Point that favor male cadets over female cadets, or vice-versa, or that tend to degrade one sex as a means to raise or motivate another.

Doe's complaint alleges rampant hostility manifested against females in numerous aspects of life at West Point, depriving women of equal opportunity to receive and benefit from a West Point education. Only female cadets were required to be tested for STDs, and were told that it was their responsibility to prevent the spread of STDs. Women were taught self-defense and discouraged from reporting rapes, as if it was they who were responsible for male transgressions, and to bear such events as mild mishaps if they were not successful in warding them off. The marching chants of cadets degraded women while they amused or motivated men. And, as the complaint alleges, defendants Hagenbeck and Rapp were indifferent to their constitutional and statutory obligations to foster equal conditions and equal protection between male and female cadets.

Doe's complaint accuses the Individual Defendants of fostering policies and practices perpetuating the nation's "long and unfortunate history of sex discrimination". *VMI*, 518 U.S. at 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). The complaint alleges that defendants Hagenbeck and Rapp, even while knowing that DoD found West Point to be

only 'partially in compliance' with sexual assault and harassment policies, and that West Point's prevention training was 'deficient', and that West Point failed to comply with numerous DoD directives to reduce rape and sexual assaults, failed to act to ensure that female cadets had equal protection of the laws. "[G]ender classifications are invalid," the Supreme Court held, and a reviewing court must strike them down unless a "proffered justification is 'exceedingly persuasive.'" *VMI*, 518 U.S. at 532-33. Unless the government shows that a challenged classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives,'" the classifications violate the constitutional guarantee of equal protection of the laws. *Id.* at 533 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)). Defendants have not yet made that showing; perhaps, after this aspect of their "12(b)(6) motion" is denied, their answer and proofs may rectify this deficiency. But, without such a showing, Defendants' motion to dismiss Plaintiffs equal protection claim should not be granted.

In *VMI*, the Supreme Court was faced with a policy that facially excluded women — a policy of clear gender discrimination. Women were not excluded from West Point, but the burdens foisted upon them were almost as insidious, with direct effects to their morale, mental and physical stability, and ability to persevere. The "factors counseling hesitation" stated in *Stanley*, 483 U.S. at 681, cannot become factors commanding paralysis without doing violence to *VMI*, and the right of female cadets to Equal Protection of the laws. Federal courts not only have the jurisdiction, but the obligation, to uphold constitutional rights, at least until a showing is made that good order and discipline

in the military are likely to be compromised. If women constitutionally must be admitted to military colleges, and courts have jurisdiction to enforce such rights of entry, the courts may not abstain from jurisdiction if women thereafter are deprived of their constitutional rights. The law demanding a woman's entry through the schoolhouse gates must not abandon its protection beyond the gates if a woman's right to equal protection continues to be violated. Hagenbeck and Rapp cannot rely on *Feres* if, as alleged, their conduct caused gender discrimination against women, unless it is evident from the complaint, or shown by an answer and subsequent proofs, that military discipline or its command structure is compromised.

At this point in the litigation, Doe's equal protection claim of her complaint against Hagenbeck and Rapp has sufficient legal basis to withstand Defendants' motion to dismiss.[5]

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[5] Not every complaint by a female service person against her commander gives rise to an equal protection argument to invoke the jurisdiction of the district courts. In the instant case, Plaintiff was a second-year cadet at a military college. A cadet may resign from West Point during her first two years without incurring financial obligations to the United States. 10 U.S.C. § 4348. If, however, a cadet resigns during her third or fourth year, she may be required either to enlist as a soldier in the armed forces, and/or to reimburse the military "in an amount that bears the same ratio to the total cost of advanced education provided [the cadet] as the unserved portion of active duty." *See* Cadet Oath, 10 U.S.C. § 4348. Since Doe resigned before entering her third year at West Point, she had no obligation to enlist as a soldier or enter into any military status, or to pay any money. She was a student, entitled as much to equal protection of the laws as the plaintiff who was denied entrance into VMI. *See United States v. Virginia*, 518 U.S. 515 (1996). Plaintiff has adequately pled plausible facts showing discriminatory treatment to females as a class, and that the allegations will not affect the command structure of the military or

### B. *Doe's Claims against the United States Under The Federal Tort Claims Act*

Doe sues the United States under the FTCA for the existence of the sexually hostile environment at West Point, which she alleges led to her rape. Specifically, Doe sues the United States for negligent supervision of male cadets and staff members, negligent training of male cadets and staff members, the negligence of the Individual Defendants and other staff members, negligent infliction of emotional distress, and abuse of process for failure to investigate and punish incidents of sexual assault.

Under the FTCA, the United States waives sovereign immunity and authorizes claimants to sue for money damages in the federal district courts for injuries caused by its employees' negligence or wrongful acts or omissions. The FTCA gives federal district courts jurisdiction over:

> civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). There are several statutory exceptions, including:

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the disciplinary authority of commanding officers. *Cf. with Stanley*, 483 U.S. at 681.

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such regulation may be valid, or based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). Defendants' motion to dismiss argues that Doe's claim for recovery under the FTCA is legally insufficient because Hagenbeck and Rapp were employees of the government performing discretionary functions.

Hagenbeck and Rapp had the responsibility under applicable statutes and regulations to implement policies and practices to reduce and eliminate discrimination based on gender. How they did it, and the extent to which they did it, were discretionary functions, barring an FTCA claim against the United States.

The exception to FTCA liability, based upon the performance of discretionary duties, covers acts that "involve an element of judgment or choice". *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal quotations and citations omitted). An action is considered discretionary for purposes of the exception when implementation of a statute or regulation allows for, or requires, that the official balance competing needs and make choices based on public policy considerations. *See generally Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 535-40 (1988); *Coulthurst v. United States*, 214 F.3d 106, 108-10 (2d Cir. 2000).

Doe claims that Hagenbeck and Rapp were responsible for policies and practices creating pervasive gender discrimination and violence to women, including the rape of Doe, and that failure to punish the perpetrator or remedy the policies and practices demonstrated their tolerance of sexual assaults of female cadets. However, Hagenbeck's and Rapp's policies and practices implemented 10 U.S.C. § 4361 and 32 C.F.R. § 103.5. Pursuant to 32 C.F.R. § 103.5(f)(1), the Secretaries of the Military Departments are required to "[e]stablish departmental policies and procedures to implement the SAPR [Sexual Assault Prevention and Response] Program" consistent with the provisions of this part and DoDI [United States Department of Defense Instructions] 6495.02", which is the SAPR Program Procedures ("DOD Directive 6495.02"). The regulation directed the Secretary to do things like, "influenc[e] policy; chang[e] organizational practices; foste[r] coalitions and networks, educat[e] providers, promot[e] community education, and strengthen] individual knowledge and skills". 32 C.F.R. § 103.5(f)(5). DOD Directive 6495.02 ordered each commander to "implement a SAPR prevention program" that, among other things: (1) "[e]stablishes a command climate of sexual assault prevention predicated on mutual respect and trust, recognizes and embraces diversity, and values the contributions of all its Service members"; (2)"[e]mphasizes DOD and Military Service policies on sexual assault and on the potential legal consequences for those who commit such crimes"; and (3) that "[i]dentifies and remedies environmental factors specific to the location that may facilitate the commission of sexual assaults". (*See* DOD Directive 6495.02, at pp. 43-44, *available at* http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf.)

Defendants correctly argue that the implementation of the sexual assault and harassment prevention programs and the institution of reporting mechanisms for sexual assault involved a large amount of discretion by Hagenbeck and Rapp. *Gaubert*, 499 U.S. at 322. The directives at issue here identified large, amorphous objectives and goals and did not provide concrete clear ministerial orders. Furthermore, there is no doubt that the issue of sexual assault in the military, and at West Point, is a public policy issue that requires Hagenbeck and Rapp to balance competing needs and make choices based on public policy considerations.[6]

Doe's FTCA claims criticize these discretionary actions and decisions and base her claims on the way the Individual Defendants performed their responsibilities. However, in implementing the policies and procedures at issue in this case, Hagenbeck and Rapp exercised a large amount of discretion which they used to balance and weigh issues of public importance. These claims are therefore excepted from

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[6] The issue of sexual assault in the military was spotlighted in United States Congressional hearings after a 2013 Pentagon Report estimated that 26,000 sexual assaults took place in the armed services in 2012. President Obama spoke on the issue, expressing his disapproval and affirming the need to end discrimiantion. *See* Lusita Lopez Torregrosa, "Women in Congress Confront the Military on Sexual Assault," N.Y. Times, May 28, 2013, *available at* http://rendezvous.blogs.nytimes.com/2013/05/28/women-in-congress-confront-the-military-on-sexual-assault/?_phprtrue&_type=blogs&_r=0. There was a public outcry and debate, bills were drafted, and legislation ultimately passed. *See* Jonathan Weisman and Jennifer Steinhauer, "Negotiators Reach Compromise on Defense Bill," N.Y. Times. Dec. 9, 2013, *available at* http://www.nytimes.com/2013/12/10/us/politics/house-and-senate-reach-compromise-on-pentagon-bíll.html.

the FTCA's reach and not available to Doe in this lawsuit and, accordingly, are dismissed.

C. *Doe's Breach of Contract Claim against the United States*

Lastly, Doe sues the United States for a breach of contract. She claims that her enrollment at West Point created an educational services contract with the United States.

The U.S. District Courts and the Court of Claims have coordinate jurisdiction over any "civil action or claim against the United States, not exceeding $10,000 in amount . . . upon any express or implied contract with the United States." *See* 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act"). This permission to sue the United States waives sovereign immunity.

Doe alleges that when she signed an Oath of Allegiance on June 30, 2008, she and the United States effectively entered into an educational services contract. She alleges that she promised to serve in the Army for eight years, including five in active duty, and the United States promised to give her a free four-year education at West Point, and room and board.

"[A]ny agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government." *Massie v. U.S.*, 166 F.3d 1184, 1188 (Fed. Cir. 1988) (quoting *Trauma Serv. Group v. U.S.*, 104 F.3d 1321, 1326 (Fed. Cir. 1997)). An educational services contract can be the basis of such a claim. The United States, itself, has sued prior cadets successfully when they failed to reimburse the United States

in accordance with the contract's terms. *See, e.g., United States v. China*, 2007 WL 775615 (D.S.C. Mar. 8, 2007); *United States v. Chrzanowski*, 358 F. Supp. 2d 693 (N.D. Ill. 2005); *O'Rourke v. Dep't of Air Force*, 2005 WL 3088611 (N.D. Ohio Nov. 16, 2005).

However, Doe's contract claim fails because the United States performed the services it agreed to perform. If Doe is correct and is able to prove that the pervasive sexual violence and gender discrimination at West Point constituted a failure to provide her equal protection of the laws, she may be entitled to recovery under *Bivens*, but not recovery for breach of contract. The government did not stop providing Doe with an education, room, and board. The government is not suing Doe for an alleged failure to reimburse it. Doe's claim of constitutional violations is a claim sounding in tort, and the Little Tucker Act specifically excludes from jurisdiction cases "sounding in tort." 28 U.S.C. § 1346(a)(2).

III. Conclusion

Doe's claim, that the policies and procedures created and implemented by Hagenbeck and Rapp violated her constitutional right to equal protection of the laws, is legally sufficient to proceed at this stage of the proceedings. Defendants' motion to dismiss Doe's *Bivens* claims is GRANTED with respect to Doe's Due Process claim (Count one), and DENIED as to Doe's Equal Protection claim (Count two). Defendants' motion to dismiss Doe's claims under the FTCA and the Little Tucker Act are GRANTED (Counts three and four).

Accordingly, Counts one, three and four of the Amended Complaint are dismissed. Defendant the United States of America is also dismissed from the case.

Plaintiff shall amend the caption and the allegations of her complaint to conform to this decision by Monday, May 11, 2015. The individual defendants shall have until Monday, June 8, 2015, to answer. I shall meet with the parties, through counsel, on Friday, July 10, 2015, at 10:00 a.m. to agree to a case management plan.

SO ORDERED.

Dated: April 13, 2015
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

**APPENDIX G**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Civil No.: 13 CIV. 2802 (AKH)

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JANE DOE,

*Plaintiff*,

v.

LT. GEN. FRANKLIN LEE HAGENBECK,
BRIG. GEN. WILLIAM E. RAPP, and the
UNITED STATES OF AMERICA,

*Defendants*.

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August 30, 2013

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AMENDED COMPLAINT

Plaintiff Jane Doe, through counsel, alleges the following upon information and belief:

1. The leaders of the United States Military Academy ("West Point") have failed to take necessary steps to protect women cadets from a pervasive and well-known culture of sexual violence. Jane Doe, a cadet at West Point, suffered the consequence of these senseless policies when she was raped by a fellow cadet. She brings this suit seeking declaratory relief and monetary damages, and hopes that this action will deter Defendants and their successors from perpetuating the practices that caused her suffering, protect future female cadets, and better ensure that West Point realizes the noble ideals it represents.

## JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331. This action arises under the U.S. Constitution; the Little Tucker Act, 28 U.S.C. § 1491; Federal Torts Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 etseq.; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

3. Venue lies in this district pursuant to 28 U.S.C. § 1391(b) in that all events complained of and giving rise to Plaintiff's claims arose in this district.

## PARTIES

4. Plaintiff Jane Doe (a pseudonym) is a former West Point cadet.

5. Defendant Lt. Gen. Franklin Lee Hagenbeck is sued in his personal capacity. He was Superintendent of West Point from approximately July 2006 to July 2010, and among other duties, he chaired the Sexual Assault Review Board, which is the "primary means of oversight" of the sexual assault prevention and response program at West Point.

6. Defendant Brigadier General William E. Rapp is sued in his personal capacity. He was Commandant of Cadets at West Point from 2009 to 2011 and was in charge of the administration and training of cadets.

7. Defendant United States of America is sued under the FTCA for the tortious acts of its agents or employees and under the Little Tucker Act for breach of contractual obligations.

## FACTS AND PROCEEDINGS

8. Ms. Doe grew up in a military family. During high school, she received a West Point mailing displaying women in uniform demonstrating leadership,

honor, and dignity. She began to imagine studying at West Point. In her senior year, Ms. Doe applied to West Point. After years of balancing studies, extracurricular activities, and jobs to help support her family, she hoped to take advantage of West Point's offerings without incurring the debt that attendance at another college would have imposed.

9. Ms. Doe was convinced that West Point would provide the academic, physical, and mental rigor that she desired. She also viewed West Point as an honorable and meritocratic institution where she would have an opportunity to excel based on her abilities and hard work.

10. Ms. Doe was nominated by her U.S. Representative. One of her Senators identified her as the top candidate in her state. Ms. Doe was thrilled when she learned that she had been offered admission to West Point.

11. Ms. Doe graduated from high school in June 2008, near the top of her class. She accepted West Point's offer of admission and on June 30, 2008 signed an Oath of Allegiance, an educational services contract with the United States, which committed Ms. Doe to serving in the Army for eight years, including five on active duty. In consideration for this promise of service, Ms. Doe was to receive her tuition, room, and board from West Point without charge.

12. The oath explained that if Ms. Doe failed to complete her contractual military service, she would be required to "reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided me as the unserved portion of active duty bears to the total period of active duty I have agreed to serve."

13. Ms. Doe's contract with the Army allowed her to take advantage of the numerous educational opportunities available at West Point's campus, located on approximately 16,000 acres on the Hudson River. At the time she enrolled, there were approximately 4,600 cadets and 600 faculty members at West Point. Approximately three-quarters of the faculty were military personnel and one-quarter were civilian employees.

14. Cadets live in on-campus dormitories ("barracks") for all four years, eat in the dining hall ("mess hall"), and receive a monthly stipend.

15. The curriculum at West Point is designed to train "officer-leaders of character to serve the Army and the Nation." Cadets may choose from thirty-six majors. Cadets also participate in the Physical Education Program, which includes military movement, swimming, combatives, and boxing.

16. West Point offers a number of extracurricular activities, including athletics, Cadet Honor Societies, academic competitions. West Point's athletic program includes twenty-four National Collegiate Athletic Association Division I teams and twenty-one club sports. Musical activities include the West Point Band, Concert Band, Jazz Knights, Marching Band, and Hellcats (comprised of buglers and drummers). Cadets may also apply for merit-based scholarships, including grants for two years of foreign language graduate study or other educational experiences in foreign countries. Upon graduation, West Point graduates earn a Bachelor of Science and become commissioned as second lieutenants in the U.S. Army.

17. At West Point, Ms. Doe flourished. She thrived academically, participated in extracurricular activities, and ranked high in her class. A representative

faculty evaluation stated, "CDT [Doe] has what it takes . . . she is one of the most professional and internally motivated cadets I've worked with . . . I am confident that she will excel as an Army officer. I would gladly recruit her to serve on my team, regardless of the mission."

18. About 200 of the approximately 1,300 cadets in Ms. Doe's entering class were women. Ms. Doe was often the only woman in her squad of approximately ten cadets, and frequently felt isolated as a result.

19. Upon information and belief, West Point has been unwilling to increase the number of female cadets in each entering class, despite having enough qualified candidates to do so. Through this policy and practice, West Point leaders seek to preserve the male culture of West Point and the military leadership for future generations.

20. There has never been a female Superintendent or Commandant of Cadets at West Point. The faculty is overwhelmingly male. The underrepresentation of women in the school administration causes female cadets to feel even more marginalized.

21. In their 2009-2010 Plan for Sexual Assault and Harassment Prevention, Defendants state that one of their priorities is the "continued effort to increase the recruitment of military women for positions within the Staff and Faculty at USMA, to include positions with both the Office of the Dean and USCC Staff." Defendants have failed to achieve this goal, despite acknowledging its importance in abating the culture of sexual violence at West Point.

22. As set forth herein, Defendants Hagenbeck and Rapp created a misogynistic culture at West Point that marginalized Ms. Doe and other female cadets, caused

them to be subjected to routine harassment, suffer emotional distress and other harms, and be pressured to conform to male norms.

23. The male cadets, teachers, and supervisors constantly made Ms. Doe aware of her gender at West Point. Ms. Doe and other female cadets felt immense pressure to match the men's physical capabilities and to align themselves with their male colleagues socially and psychologically. Women who associated themselves with men received top leadership positions and respect; cadets perceived women who were allied with other women as weak.

24. Ms. Doe observed her cadet classmates making misogynistic and sexually aggressive comments on a regular basis. The West Point administration frequently ignored and sometimes condoned these comments.

25. During team-building exercises, for instance, cadets would march and sing a song that began, "I wish that all the ladies / were bricks in a pile / and I was a mason / I'd lay them all in style." Later verses stated, "I wish that all the ladies / were holes in the road / and I was a dump truck / I'd fill'em with my load" and "I wish that all the ladies / were statues of Venus/ and I was a sculptor / I'd break'em with my penis."

26. Another popular song warned listeners to avoid a steamroller. Male cadets created versions of this song such as "I'm a cream puff, baby, and I'm going to cream all over you," or "I'm a skeet shooter, and I'm going to skeet all over you," referencing male ejaculation.

27. West Point officials knew about the sexual, misogynistic chants and did not stop them. The cadets

sang these chants as they marched around campus, in view and earshot of faculty and administrators.

28. Cadets often used derogatory terms to describe women. Cadets turned the word "trou," a term based on the unflattering pants that Defendants required female cadets to wear, into a slur for an unattractive or worthless female cadet. For example, cadets referred to pints of Ben & Jerry's ice cream as "trou buckets" and disparaged exercise bikes as "trou chariots."

29. Male cadets frequently made contemptuous comments about female civilians' appearance and weight. Cadets used the term "whale-watching" to describe collectively making fun of a fat woman.

30. In addition to ignoring or endorsing the cadets' misogynistic and sexually aggressive comments, West Point officials openly joked with male cadets about sexual exploits. Male cadets believed opportunities to have sex with women at West Point were rare because of the gender imbalance among cadets. Many faculty members and officers, the vast majority of whom are male, are also West Point alumni, from a time when there were few or no women at the school. Male faculty routinely expressed sympathy with male cadets over the lack of sexual opportunities, and communicated that they should seize any chance to have sex they could.

31. Some faculty members communicated to male cadets that heavy drinking was an understandable response to the lack of sexual opportunities. Cadets often engaged in irresponsible drinking as a means of exploring other social outlets. Male cadets joked about getting female cadets or other women drunk enough that they would have sex.

32. The administration endorsed inappropriate or sexually aggressive comments even in some formal West Point events. During Ms. Doe's second year, a guest speaker for West Point's professional military ethics program concluded his speech by hugging a civilian woman and observing that he liked hugging women because "they have bumps." When Ms. Doe reported the speaker's comments, school administrators ignored her complaints.

33. West Point's training on sexual assault and harassment was inadequate and did little to combat the overwhelmingly misogynistic culture of the school.

34. During the 2009-2010 academic year, the highest-ranking officers in the West Point sexual harassment program were Defendants Hagenbeck and Rapp. Superintendent Hagenbeck implemented new sexual assault policies.

35. Under Defendants Hagenbeck and Rapp's policies, West Point officials failed to punish cadet perpetrators of sexual assault and approved egregiously inadequate punishments.

36. A 2010 Department of Defense ("DoD") survey found that cadets did not report approximately ninety percent of sexual assaults. Fifty-one percent of female cadets and nine percent of male cadets reported that they had experienced sexual assault.

37. In academic year 2009-2010, West Point received eleven official reports of sexual assault. These reports were a small fraction of the assaults at West Point that year. Of these eleven reports, five were "unrestricted" (informing the perpetrator's superiors and initiating an investigation) and six were "restricted" (meaning no action was to be taken). Defendants Hagenbeck and Rapp approved the dismissal of only one perpetrator

from West Point, after a court-martial convicted him of rape.

38. Defendants' punishment of perpetrators of sexual harassment was also grossly inadequate. In one instance, multiple female cadets complained that a male supervisor subjected them to unwanted and unsolicited comments that were offensive and sexual in nature. The victims alleged that he touched them in a manner that made them feel uncomfortable and created a sexually hostile work environment. Defendants Hagenbeck and Rapp did not punish or dismiss the supervisor, but simply relieved him of his duties.

39. By failing to adequately punish perpetrators of sexual violence, Defendants Hagenbeck and Rapp sent the message to male cadets that they would tolerate sexual violence at West Point. They created a system in which male cadets understood that they could sexually assault their female colleagues with near impunity, while at the same time teaching female cadets that they risked their own reputations and military careers by reporting assault and that little or no action would be taken against their assailants.

40. In addition, Defendants Hagenbeck and Rapp implemented harmful training and education on sexual assault and harassment, which further engrained a "blame the victim" mentality in the cadet student body.

41. At West Point, sexual assault and harassment training is part of Defendants' "Respect Program." Respect program officers simply informed cadets of the definitions of sexual harassment and assault, the reporting options, and points of contact for reporting. Fourth Class (freshman) and Third Class (sophomore) cadets received approximately four hours of Respect

training in the 2009-10 academic year, only some of which pertained directly to sexual assault.

42. West Point officials offered Sex Signals, a training program on the meaning of consent, only to Second Class (junior) cadets.

43. The trainings that cadets did receive communicated the message that sexual assault prevention was a woman's responsibility. The Respect program officers explicitly told Ms. Doe and her fellow female cadets that it was their job to say "no," when faced with inevitable advances from their male colleagues.

44. West Point officials also required mandatory annual sexually transmitted disease (STD) testing for female cadets, but not for male cadets. During Ms. Doe's second year, West Point officials and health administrators from Mologne Cadet Health Clinic convened a briefing for the female cadets. There, they admitted that the policy was unfair, but expressed that it was the Army's opinion that STDs were more harmful to women than men and that it was the responsibility of women to prevent their spread.

45. The school's Physical Education Program reinforced the message that men should develop their natural aggression, while women should focus on protecting themselves. During Ms. Doe's plebe (first) year at West Point, Defendants required male cadets to take boxing. They required female cadets to take self-defense classes instead. Apart from this single distinction, first-year cadets otherwise followed the same curriculum.

46. Defendants Hagenbeck and Rapp knew or should have known that their policies were inadequate to protect women and discourage sexual violence on campus. In 2011, DoD found that West Point was only

"partially in compliance" with sexual harassment and assault policies. DoD's report found that West Point's prevention training was "deficient," did not meet the minimum standard of annual training for all cadets, and lacked an institutionalized comprehensive Sexual Assault Prevention and Response (SAPR) curriculum.

47. The 2011 Report also found that West Point failed to comply with DoD directives intended to reduce rape and sexual assault, including but not limited to DoD Directives 6495.01 (Nov. 7, 2008), 6495.02 (Nov. 13, 2008), 1350.2 (Nov. 21, 2003) and 1020.02 (Feb. 5, 2009).

48. The DoD 2009-2010 Annual Report on Sexual Harassment and Violence at Military Service Academies found that some alarming trends at West Point grew worse during the time that Defendant Hagenbeck served as Superintendent and Defendant Rapp as Commandant of Cadets. These trends included increasing unwanted sexual contact experienced by female cadets. The 2009-2010 Annual Report found that the number of incidents involving multiple offenders had more than doubled since 2008, almost half of all women surveyed indicated that alcohol or drugs were involved in episodes of unwanted sexual contact, and such episodes had increased in number.

49. Total reports of sexual assault at West Point have also increased since 2007.

50. Defendants Hagenbeck and Rapp received all of these annual reports from DoD. They knew of the pervasive threats facing the female cadets at West Point and that their policies exacerbated these dangers. Nevertheless, they failed to act or acted with deliberate indifference to the evidence of pervasive sexual assault and harassment.

51. Defendant Hagenbeck recommended a successor, Lt. Gen. David H. Huntoon, who has also refused to take sexual assault and gender relations seriously. The Pentagon's Inspector General recently censured Lt. Gen. Huntoon for misconduct, including an alleged improper relationship with a civilian female employee.

52. Throughout her time at West Point, Ms. Doe experienced the effects of Defendants' policies firsthand. She coped with regular harassment from male cadets who pressured her to go on dates with them. Due to the cadet gender ratio, male cadets perceived female cadets who were not dating or in relationships as abnormal.

53. It was impossible for Ms. Doe to escape from these male cadets' harassment due to strict rules requiring cadets to stay on campus at nearly all times. To go further than the nearest town—to which West Point officials permitted visits only on weekends—cadets had to obtain a pass several days in advance. First-year cadets were entitled to only a few weekend passes per year, and even more senior cadets could only obtain a limited number of passes.

54. The atmosphere at West Point created significant stress for Ms. Doe. In 2010, these stresses led Ms. Doe to seek treatment for anxiety. Her psychiatrist at West Point prescribed a sedative to help her sleep. The psychiatrist did not warn Ms. Doe of the sedative's dangerous side effects, including impaired awareness and reactions, as well as memory loss. Ms. Doe was unaware of the drug's risks until one evening when she tried to study after taking the sedative. Her vision became blurred and she was unable to concentrate.

55. On or about April 2009, Ms. Doe began to consider transferring out of West Point. Nonetheless,

Ms. Doe's commitment to the military and her desire to pursue a career in the Army motivated her to try to complete her studies at West Point.

56. On or about the evening of May 8, 2010, Ms. Doe took a prescribed sedative as she was preparing for bed. Around 1:00 a.m. that night, a cadet referred to by the pseudonym "Robert Smith" came to her bedroom and asked if she wanted to go for a walk.

57. Mr. Smith was a combat veteran who had enrolled at West Point after serving in the Army. He was a classmate, but having already completed a tour of duty, he was older and more seasoned than most other second-year cadets.

58. Mr. Smith had previously told Ms. Doe that he suffered from nightmares and violent flashbacks, symptoms consistent with Post-Traumatic Stress Disorder, but that he was not seeing a psychiatrist at West Point. Instead, he said he was self-medicating with alcohol.

59. While alcohol was technically prohibited, West Point officials and upperclassmen widely tolerated its consumption by combat veterans.

60. Ms. Doe considered Mr. Smith a friend. She knew that he was dating another cadet and believed that there was nothing romantic about their own friendship. Ms. Doe accepted Mr. Smith's request that they go for a walk, even though it was a violation of West Point rules to be out of the dorm after Taps.

61. Ms. Doe and Mr. Smith entered an academic building. Mr. Smith began drinking liquor that he had brought with him. He offered Ms. Doe a few sips, which she accepted. As the alcohol mixed with her sedative, Ms. Doe began to lose awareness of her

surroundings and consciousness of what she was doing.

62. Mr. Smith was aware that Ms. Doe had lost consciousness and took advantage. He attacked Ms. Doe and had forcible, non-consensual intercourse with her. Ms. Doe remembers lying on the concrete floor of a boiler room, not understanding what was going on. She does not remember the details of the attack.

63. Ms. Doe woke up a few hours later in her bed, on or about the morning of May 9, 2010, with dirt on her clothes and hair, bruises on her lower back, and blood between her legs. Ms. Doe was confused and alarmed. She confided in a friend, who advised her to obtain emergency contraception.

64. The next day, on or about May 10, 2010, Ms. Doe confronted Mr. Smith. With a happy, satisfied look on his face, he said that they had slept together. Mr. Smith said he believed it was consensual, but Ms. Doe felt horrified and violated. She told Mr. Smith that he had taken advantage of her. Mr. Smith apologized and said that he was a "creep." He said that he had had no control of his actions because of the alcohol.

65. After this conversation, Ms. Doe went to the Mologne Cadet Health Clinic and Center for Personal Development. She requested and received emergency contraception.

66. On or about May 11, 2010, Ms. Doe returned to the Mologne Clinic to seek medical treatment for her injuries and for the possible consequences of unprotected sex. She requested and received tests for HIV, syphilis, chlamydia, and gonorrhea.

67. At the health clinic, the nurse treating Ms. Doe performed a vaginal exam and informed her that she

had signs of vaginal tearing. The clinic did not perform any forensic collection or preservation of evidence of the sexual assault.

68. The medical record from this visit notes that Ms. Doe "was drinking this weekend when she was sexually assaulted by a friend. She does not remember most of it. She has glimpses of it because of pain. She is still sore."

69. That same day, Ms. Doe also went to a regular appointment with Dr. Joshua Hain, her psychiatrist. Dr. Hain's notes state that Ms. Doe "reported today that over the weekend, she had nonconsensual sexual relations with a friend." Dr. Hain referred Ms. Doe to West Point's Sexual Assault Response Counselor, Maj. Maria Burger.

70. During their only meeting, Maj. Burger explained to Ms. Doe that under West Point rules that Defendants Hagenbeck and Rapp established and implemented, Ms. Doe had the option of filing either a "restricted" or "unrestricted" report. Unlike a restricted report, an unrestricted report would include both Ms. Doe and Mr. Smith's names and would be given to commanders for potential disciplinary action.

71. Ms. Doe felt that she had no option but to file a restricted report. In part, she believed that her reputation would be in jeopardy if she filed an unrestricted report, and that other cadets would retaliate against and ostracize her. Furthermore, because her commanding officer would receive a copy of any unrestricted report, Ms. Doe feared that she would be punished for having been out after Taps and for consuming a small amount of alcohol.

72. Ms. Doe also felt that filing an unrestricted report would have a damaging effect on her career

prospects. It was common knowledge among the cadets that successful women in the military did not report incidents of sexual assault. Ms. Doe felt that if she made an unrestricted report, West Point officials and fellow cadets would label her a troublemaker and faker, which would irreparably hurt her chances for advancement in the military.

73. Ms. Doe was not the only female cadet who feared the consequences of reporting sexual assault. According to DoD's 2010 Service Academy Gender Relations Survey, seventy percent of female West Point cadets who declined to report unwanted sexual conduct "did not want people gossiping about them" and "felt uncomfortable making a report." Sixty-one percent of female West Point cadets who declined to report unwanted sexual conduct "thought it would hurt [their] reputation and standing," and forty-four percent feared some form of retaliation.

74. Approximately two weeks after the rape, Ms. Doe received a single e-mail from another counselor, apparently a referral from Maj. Burger.

75. Ms. Doe felt isolated and did not know where to turn for emotional support following the rape. She began to have sensations of feeling separated from her body.

76. Her anxiety after the sexual assault became intolerable. Ms. Doe knew that if she left West Point after the start of her third year, she would be contractually required to repay the cost of her education. This was a financial risk that Ms. Doe was unable to take. On or about August 10, 2010, Ms. Doe informed West Point that she would be resigning from the Academy. On August 13, 2010, she was honorably discharged.

77. Ms. Doe enrolled in a civilian college after leaving West Point. Although she earned a degree, she struggled emotionally as she continued to process the experience of having been sexually assaulted at West Point.

78. Ms. Doe remains committed to military service. She is drawn to the constant pursuit of bettering oneself physically and mentally and to the leadership development opportunities that military service affords. Ms. Doe hopes to enroll in Army Corps Officer Candidate School this fall.

## LEGAL CLAIMS

### FIRST CLAIM FOR RELIEF
Fifth Amendment Due Process
(*Bivens*: Defendants Hagenbeck and Rapp)

79. Ms. Doe repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

80. Defendants Hagenbeck and Rapp are liable in their individual capacities as the supervisors of Mr. Smith for his violations of Ms. Doe's due process rights.

81. Defendants Hagenbeck and Rapp were personally involved in and actually caused the aforementioned violations of Ms. Doe's due process rights by knowingly and intentionally creating, implementing, enforcing, encouraging, sanctioning, and/or acquiescing in a policy, practice, and/or custom in which Mr. Smith violated Ms. Doe's due process rights.

82. Defendant Hagenbeck, as Superintendent of West Point and chair of the monthly meetings of the Sexual Assault Review Board, and Defendant Rapp, as West Point Commandant of Cadets, were responsible

for creating, promulgating, implementing, and administering the policies, practices and/or customs of the West Point sexual harassment program.

83. Defendants Hagenbeck and Rapp were personally involved in and proximately caused the violations of Ms. Doe's rights by creating, promulgating, implementing, and administering policies, practices, and/or customs that (1) taught female cadets that it was their responsibility to ward off the advances of male cadets, thus creating a culture of blaming the victim; (2) discouraged female cadets from reporting sexual assault by causing them to fear retaliation and harm to their career; (3) rarely punished cadet perpetrators of sexual assault or punished them only mildly, thereby fostering an environment of sexual hostility and toleration of violence against women; (4) provided female cadets with inadequate, if any, support services after their attacks; (5) tolerated a culture of hostility towards women, including failing to punish male cadets for the regular use of misogynistic chants and slurs and ignoring sexist comments by West Point faculty and speakers; and (6) fostered the marginalization of women at West Point by failing to hire female faculty and administrators and failing to recruit female cadets.

84. Furthermore, Defendants Hagenbeck and Rapp knew or should have known of the high rate of sexual assault and sexual harassment against female cadets. In its 2009-2010 report, the DoD found that fifty-six percent of female cadets at military service academies experienced sexual harassment and 12.9 percent experienced unwanted sexual contact. This report, others by the DoD and Government Accountability Office, and other journalistic or public accounts, notified Defendants that female cadets at West Point

faced unacceptably high levels of risk of sexual harassment and assault.

85. Despite this knowledge, Defendants failed to act to remedy the situation, thus acquiescing in the widespread constitutional violations of which Ms. Doe's injuries were a part. Instead, Defendants Hagenbeck and Rapp created a policy, practice, and/or custom under which widespread due process violations continued and were exacerbated.

86. Defendants Hagenbeck and Rapp were personally involved in and proximately caused the violations of Ms. Doe's rights through their deliberate indifference to and actual knowledge, prior to the violation of Ms. Doe's constitutional rights, of the widespread rape and sexual assault of female cadets.

87. Since the constitutional violations against female cadets were so widespread, they became a custom of constitutional violations in the face of which Defendants Hagenbeck and Rapp deliberately refused to act, despite official and unofficial reports notifying them of this pervasive problem. Their refusal to act, despite notice and actual knowledge, amounts to acquiescence to violations of Ms. Doe's constitutional rights for which they are personally liable.

88. Defendants Hagenbeck and Rapp were personally involved in and proximately caused the violations of Ms. Doe's rights through their deliberate indifference to her constitutional rights. Defendants Hagenbeck and Rapp (1) knew to a moral certainty that sexual assault and harassment occurred frequently at West Point and that female cadets faced a unrelentingly sexually aggressive culture; (2) knew that effective punishment of sexual assault perpetrators, refusal to tolerate sexually aggressive language and conduct by

West Point faculty, officials, and male cadets, and a less misogynistic sexual education training would have made the male cadets less likely to violate constitutional rights; and (3) knew that under the current disciplinary system and education program, the male cadets at West Point were inadequately trained, were committing widespread due process violations by continuously assaulting the female cadets, and would continue to do so without proper discipline and training geared towards changing the pervasive culture of violence against women at West Point.

89. The inadequacy of the discipline and training program and the tolerance of sexually aggressive language and conduct by faculty, officials and male cadets was obvious and had been reported to Defendants Hagenbeck and Rapp by internal investigations by the DoD and the Government Accountability Office and external criticisms by investigative journalists. Despite this knowledge, Defendants Hagenbeck and Rapp failed to create or implement an adequate training program or meaningfully to discipline cadets who sexually assaulted other cadets, failed to act to end the use and endorsement of sexually aggressive language and conduct by faculty, officials and male cadets, and were deliberately indifferent to Ms. Doe's rights.

90. Defendants Hagenbeck and Rapp were personally involved in and proximately caused the aforementioned violations of Ms. Doe's constitutional rights and were deliberately indifferent to the rights of Ms. Doe in failing to adequately supervise subordinate Mr. Smith, who proximately caused the violations of Ms. Doe's Fifth Amendment rights.

91. Despite the obvious need for close supervision of male cadets due to the well-known problems of sexual assault and sexually aggressive culture at West Point,

Defendants Hagenbeck and Rapp egregiously failed to supervise the actions of male cadets and other agents to ensure that due process violations did not occur, evidencing gross negligence in supervising subordinate male cadets and deliberate indifference to the rights of Ms. Doe.

92. By failing to punish perpetrators of sexual assault, failing to properly train male cadets, failing to adequately protect female cadets from sexual assaults, and tolerating sexually aggressive language and conduct by faculty, officials and male cadets, Defendants Hagenbeck and Rapp communicated to male cadets that they could commit sexual assaults against female cadets with impunity. By communicating this message, Defendants created a dangerous and sexually hostile environment for Ms. Doe and the other women of West Point.

93. As a result of Defendants Hagenbeck and Rapp's acts and/or omissions, Ms. Doe suffered damages, including but not limited to violations of her constitutional rights, physical injury, and emotional distress.

94. When Ms. Doe was raped, she was not engaged in activities that fell within the scope of military employment. Ms. Doe was a student of West Point and not an employee. Her injuries from being raped arose outside the scope of any employment, and she would not be eligible to receive workers' compensation under federal or New York law.

95. Ms. Doe fears that she will again be subjected to such unlawful and unconstitutional actions and seeks a judicial declaration that Defendants' conduct has deprived her of her rights under the constitution and laws of the United States.

SECOND CLAIM FOR RELIEF
Fifth Amendment Equal Protection
(*Bivens*: Defendants Hagenbeck and Rapp)

96. The Plaintiff repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

97. Defendants Hagenbeck and Rapp created and enforced a policy that put female cadets at risk of violent harm. They knowingly and intentionally created and enforced a policy and practice that tolerated attacks against female cadets and discouraged reporting of such attacks, perpetrating a sexually aggressive culture at West Point.

98. In designing and implementing a policy and practice that discriminated against female cadets, Defendants violated the equal protection component of the Due Process Clause of the Fifth Amendment of the United States Constitution.

99. The above-named Defendants deprived Ms. Doe of basic due process protections by creating and enforcing a policy and practice that placed her at a high risk of harm based on her gender in violation of her right to equal protection under the Fifth Amendment.

100. As a result of above-named Defendants' actions, Ms. Doe suffered damages, including but not limited to, physical injury and emotional distress.

THIRD CLAIM FOR RELIEF
Little Tucker Act: Breach of the Covenant of
Good Faith and Fair Dealing
(Defendant: United States)

101. The Plaintiff repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

102. In signing her Oath of Allegiance, Ms. Doe entered into a valid educational contract and service agreement with Defendant United States. She entered into this contract with a reasonable expectation of receiving educational benefits, tuition, room, and board from West Point in exchange for her promise of military service.

103. The contract provided that if she failed to satisfy her obligation to serve on active duty under the contract, the United States would have an enforceable right to recoup the full costs of her education. This recoupment clause confirmed the contractual nature of Ms. Doe's agreement with the Defendant United States.

104. The United States has filed suit to enforce educational contracts substantially similar to that executed by Ms. Doe. In one such action, the United States characterized the failure of a former West Point cadet to complete his course of study as a "breach of his service agreement." The United States has characterized the West Point Oath of Allegiance as, variously, a "service contract," a "cadet contract" and the equivalent of a "military education contract."

105. The educational contract between Ms. Doe and the United States contained an implied covenant of good faith and fair dealing.

106. By creating and enforcing policies and practices that fostered a sexually hostile environment and toleration of violence against women, failing to adequately punish perpetrators of sexual assault, failing to adequately train cadets, faculty and administrators, and endorsing a misogynistic culture, Defendant United States deprived Ms. Doe of her contractual right to receive this education.

107. Defendant United States acted in bad faith by engaging in conduct that was designed to oppress women at West Point, after inducing them to enter into contractual obligations. By depriving Ms. Doe of her reasonable expectation of contractual education benefits and acting in bad faith, Defendant United States breached the covenant of good faith and fair dealing.

108. Ms. Doe seeks damages of less than $10,000 on her breach of contract claim. Accordingly, jurisdiction over her Little Tucker Act claim is proper in this Court.

FOURTH CLAIM FOR RELIEF
Federal Tort Claims Act
(Defendant United States)

109. The Plaintiff repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

*Negligent Supervision*

110. Defendants Hagenbeck and Rapp and other West Point officials negligently failed to supervise male cadets, including Mr. Smith. Defendants Hagenbeck and Rapp and other West Point officials were fully aware that cadets had committed numerous acts of sexual violence in the past. Defendants Hagenbeck and Rapp and other West Point officials failed to investigate these incidents, failed to punish the cadets for acts of sexual violence, and failed to condemn and end the prevalence of sexually aggressive language and conduct by faculty, officials, and male cadets. Defendants Hagenbeck and Rapp and other West Point officials were fully aware of these circumstances from the DoD, Government Accountability Office,

congressional hearings, internal investigations, and various news reports.

111. Defendants Hagenbeck and Rapp and other West Point officials also knew that there was a culture condoning sexual harassment, sexual assault, and rape among the cadets at West Point. Had Defendants Hagenbeck and Rapp and other West Point officials adequately supervised the cadets, the United States could have avoided the harm to Ms. Doe.

112. Defendants Hagenbeck and Rapp and other West Point officials also negligently failed to supervise West Point staff members, including Maj. Burger, in properly handling Ms. Doe's sexual assault report. Defendants Hagenbeck and Rapp and West Point officials were fully aware that rape and sexual assault were prevalent at West Point, that reporting and training policies were inadequate, that punishment of those who committed rape or sexual assault was rare, and that there existed a culture condoning sexual harassment, sexual assault, and rape.

113. Defendants Hagenbeck and Rapp and other West Point officials were fully aware that staff members had inadequately handled sexual assault complaints in the past. Had Defendants Hagenbeck and Rapp and other West Point officials properly supervised West Point staff members, the United States could have avoided the harm to Ms. Doe.

*Negligent Training*

114. Defendants Hagenbeck and Rapp and other West Point officials also failed to adequately train West Point cadets, including Mr. Smith, in preventing sexual assaults against female cadets. The United States was fully aware that rape and sexual assault were prevalent at West Point and that the sexual

assault trainings created a culture condoning sexual harassment, sexual assault, and rape.

115. Even when Defendants Hagenbeck, Rapp, and other West Point officials learned of previous instances of sexual assault among cadets, they failed to change the ineffective cadet training. Had Defendants Hagenbeck and Rapp and other West Point officials corrected the inadequate training, the United States could have avoided the harm to Ms. Doe.

116. Defendants Hagenbeck and Rapp and other West Point officials also failed to train West Point staff members to properly respond to sexual assaults reports by cadets.

117. The United States was fully aware that rape and sexual assault were prevalent at West Point, that reporting and training policies were inadequate, that punishment of rapists and those who committed sexual assaults were rare, and that there existed a culture allowing and condoning sexual harassment, sexual assault, and rape.

118. Even when Defendants Hagenbeck and Rapp and other West Point officials learned of previous instances where West Point staff inadequately responded to sexual assault reports, they failed to change the defective trainings and policies. Had Defendants Hagenbeck and Rapp and other West Point officials corrected the inadequate training, the United States could have avoided the harm to Ms. Doe.

*Negligence*

119. Defendants Hagenbeck and Rapp and other West Point officials negligently established, promulgated, and implemented the inadequate policies and practices that caused Ms. Doe to be sexually assaulted.

Defendants Hagenbeck and Rapp and other West Point officials negligently created, condoned, and failed to amend a culture that allowed sexual harassment, sexual assault, and rape.

*Negligent Infliction of Emotional Distress*

120. Robert Smith created an unreasonable risk of causing Ms. Doe emotional distress. Mr. Smith's rape of Ms. Doe unreasonably endangered Ms. Doe's physical safety, and it was clearly foreseeable that his act would cause Ms. Doe emotional distress. Mr. Smith's conduct caused Ms. Doe's emotional distress, and his conduct was severe enough that it resulted in Ms. Doe's emotional injury and bodily harm.

121. Defendants Hagenbeck and Rapp and other West Point officials created an unreasonable risk of causing Ms. Doe emotional distress. Their creation and maintenance of inadequate sexual assault prevention and reporting policies, as well as their failure to discipline assailants and their tolerance of sexually aggressive language and conduct by faculty, officials and male cadets, unreasonably endangered Ms. Doe's physical safety. It was clearly foreseeable that these acts would cause Ms. Doe's emotional distress. Defendants Hagenbeck and Rapp and other West Point officials caused Ms. Doe's emotional distress, and their conduct was severe enough that it resulted in Ms. Doe's emotional injury and bodily harm.

*Abuse of process*

122. Defendants Hagenbeck and Rapp and other West Point officials abused legal process in their actions. Defendants refused to properly investigate and punish incidents of sexual assault. Defendants also established and operated a system that discouraged and prevented Ms. Doe from pursuing an unrestricted

report and/or criminal charges against Mr. Smith without fear of retaliation.

123. On information and belief, Defendants Hagenbeck and Rapp and other West Point officials deliberately abused the investigation and reporting process for the improper purpose of discouraging reports so as to conceal the true extent of the sexual violence at West Point, avoiding further investigation or review of their constitutionally deficient sexual assault policies, practices, and customs, and attempting to maintain a favorable public image of West Point.

124. Defendants Hagenbeck and Rapp and other West Point officials are, by their military rank, empowered to make arrests and are thus law enforcement officers for the purposes of the FTCA, 28 U.S.C. § 2680(c).

125. The United States is liable pursuant to the FTCA for the tortious acts of its employees in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

126. Defendants Hagenbeck and Rapp, as well as other West Point officials, were acting within the course and scope of their employment as agents of the United States, and on behalf of the United States, when they committed the tortious and unlawful acts complained of here, including negligent supervision, negligent training, negligent infliction of emotional distress, negligence, and abuse of process.

127. In these circumstances, if the United States were a private person, liability would be imposed in accordance with the law of New York. When Ms. Doe was raped, she was not engaged in activities that fell within the scope of military employment. She was a

student of West Point and not an employee, and her injuries were in no way work-related. She would thus be ineligible to receive workers' compensation under federal or New York law.

128. Ms. Doe has administratively exhausted her claims under the FTCA. Ms. Doe timely filed an FTCA administrative claim with DoD on or about May 3, 2012. As of August 30, 2013, DoD has not issued a decision on her claim.

PRAYER FOR RELIEF

WHEREFORE, Ms. Doe respectfully requests that this Court:

(1) Enter a declaratory judgment that the actions of Defendants Hagenbeck and Rapp violated the United States Constitution;

(2) Award Ms. Doe compensatory damages in an amount to be proven at trial;

(3) Hold Defendants jointly and severally liable for compensatory damages; and

(4) Grant such other relief as the Court deems just and equitable.

Dated: August 30, 2013
New Haven, Connecticut

Respectfully Submitted,

By: /s/ Michael J. Wishnie

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# APPENDIX H

STATUTORY PROVISIONS INVOLVED

**28 U.S.C. § 1346:**

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

**28 U.S.C. § 2671:**

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of

title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

* * *

**28 U.S.C. § 2674:**

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which

otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

* * *

**28 U.S.C. § 2680:**

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law

enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution,

abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.