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You Catch More Flies With Honey: Reevaluating the Erroneous Premises of the Military Exception to Title VII

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YOU CATCH MORE FLIES WITH HONEY: REEVALUATING THE ERRONEOUS PREMISES OF THE MILITARY EXCEPTION TO TITLE VII

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Discrimination is a problem in the military. Though Title VII of the Civil Rights Act prohibits employment discrimination in the "military departments," courts have held that the statute does not apply to members of the military. The primary justification for this judge-made exception is that Title VII suits might have an adverse effect on military discipline. In their haste to condemn suits for military discrimination, however, courts tend to overlook the negative effects discrimination has on discipline, as well as the positive effects of diversity. This Note calls upon Congress to abrogate the military exception to Title VII; in the alternative, it argues that courts should reconsider the exception in light of discrimination's true effects.

In addition to its eroded policy foundations, the judicial exception to Title VII contradicts the ordinary language of the statute. The term "military departments" naturally includes servicepersons, who are employees, and there is no compelling reason to depart from the statute's ordinary meaning. The exception is also contrary to the statute's broad remedial purpose and much of the legislative history surrounding Title VII. The rationales the circuit courts use to conclude that members of the military cannot bring Title VII claims are inconsistent and contradictory, and the exception has resulted in confusion when applied to quasi-military personnel. As such, the military exception to Title VII should be abandoned—left in the past along with other vestiges of discrimination.

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin with respect to the terms, conditions, and privileges of employment.[1] In 1972, Congress expressly extended these protections to employees of the military departments.[2] Despite the seemingly plain language of Title VII, courts have barred servicepersons[3] from bringing claims for employment discrimination under Title VII and other statutes.[4] While various other statutes and internal regulations attempt to combat discrimination against servicepersons, discrimination within the military remains a problem.[5]

This Note recommends that Congress abrogate the military exception to Title VII. In the alternative, it suggests that courts reevaluate the exception. Part I describes the military's ongoing discrimination problem, the history of Title VII and the military exception to the statute, and the additional statutory protections that are offered to servicepersons. Part II.A then analyzes the ordinary meaning of the term "military departments" and the definition of "employee." Part II.B surveys the legislative history surrounding Title VII. Part II.C analyzes the policies upon which the judicial exception for the military is premised. Part II.D notes the confusion the exception has caused among courts. This Note concludes by calling upon the legislature and the judiciary to overturn the military exception to Title VII.

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e—2000e-17 (2018)). Other statutes prohibit discrimination on the basis of other untoward factors, including pregnancy, age, and disability. *See, e.g.*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. § 623 (2018)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101—12213 (2018)).

2. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16(a) (2018)).

3. This Note uses "servicepersons" to refer to uniformed personnel of the United States military, including officers, enlisted persons, and reservists.

4. *E.g.*, Johnson v. Alexander, 572 F.2d 1219, 1223-26 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978); Gonzalez v. Dep't of the Army, 718 F.2d 926, 928 (9th Cir. 1983).

5. *See infra* Part I.A.

II. BACKGROUND

A. The Military's Discrimination Problem

The United States military has a problem with discrimination. Over the course of the military's history, discrimination has come in various shapes and sizes, from segregating African-American troops,[6] to prohibiting women from serving in combat roles,[7] to the military's "Don't Ask, Don't Tell" policy,[8] to the Trump administration's recent attempts to ban transgender servicepersons from the military.[9] Because courts have largely held that Title VII does not apply to the military, discrimination which would clearly be unlawful in the rest of the public sector and in the private sector may be allowable in the case of military personnel.[10] While the military has made strides over the past half century in desegregating troops and implementing official policies prohibiting discrimination, in practice it continues to discriminate on the basis of protected attributes.[11]

The military's discrimination problem is clearly seen with regard to race. For hundreds of years, racial segregation in both society and the military was the norm.[12] After the Civil War, segregation remained entrenched in everyday life, the law, and

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6. James Burk & Evelyn Espinoza, *Race Relations Within the U.S. Military*, 38 ANN. REV. SOC. 401, 402 (2012).

7. Jill E. Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 104–08 (2008).

8. G. Dean Sinclair, *Homosexuality and the Military: A Review of the Literature*, 56 J. HOMOSEXUALITY 701, 708 (2009); *see also* Lindsay G. Stevenson, Note, *Military Discrimination on the Basis of Sexual Orientation: Don't Ask, Don't Tell and the Solomon Amendment*, 37 LOY. L.A. L. REV. 1331 (2004) (discussing the history of the military's Don't Ask, Don't Tell policy). The policy was repealed by the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516, (2010) (repeal codified at 10 U.S.C. § 654 (2018)).

9. Erik Larson, *Trump's Military Trans Ban Same as Before, Judge Says*, BLOOMBERG (Apr. 14, 2018), https://www.bloomberg.com/news/articles/2018-04-14/trump-s-updated-military-trans-ban-is-same-as-before-judge-says (summarizing these attempts).

10. *See, e.g.*, Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986; Gonzelez v. Dep't of the Army, 718 F.2d 926, 928 (1983). *But see* Hill v. Berkman, 635 F. Supp. 1228, 1236–37 (E.D.N.Y. 1986).

11. *See* Burk & Espinoza, *supra* note 6, at 402 (describing the history of improvements in race relations within the military).

12. Burk & Espinoza, *supra* note 6, at 402 (describing the history of improvements in race relations within the military).

the military.[13] World War II marked a turning point, however, and as African-American soldiers returned home, several well-published incidences of violence against African-American veterans,[14] along with political pressures of the burgeoning Cold War,[15] began to shift opinions within the Truman administration. In 1948, President Harry S. Truman signed an executive order mandating racial integration in the military.[16] The military's taste for discrimination was not to be eradicated so easily, however. Minorities, particularly African-Americans, were often assigned to low-skill, limiting roles in the infantry, or were required to wait upon white officers well into the 1960s.[17] Researchers have found that discrimination against minorities is still seen in the care given to wounded veterans, the administration of military justice, and officer promotion rates.[18] The discrepancies which characterize this last practice are statistically significant even when compared to the population of minorities in the military instead of the population at large.[19]

The military's taste for discrimination on the basis of sex is

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13. *See generally* Manning Marable, *The Military, Black People, and the Racist State: A History of Coercion*, 12 BLACK SCHOLAR 6 (1981); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

14. *Desegregation of the Armed Forces*, HARRY S. TRUMAN PRESIDENTIAL LIBR. & MUSEUM, https://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=bg (last visited Mar. 29, 2019).

15. Patrick Feng, *Executive Order 9981: Integration of the Armed Forces*, NAT'L MUSEUM OF THE U.S. ARMY (Jan. 28, 2015), https://armyhistory.org/executive-order-9981-integration-of-the-armed-forces/.

16. Exec. Order No. 9981, 3 C.F.R. § 722 (1948) ("there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin").

17. Mary C. Griffin, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082, 2084–85 (1987). This resistance to the order was motivated both by animosity towards the new policy and general reluctance in the face of change. *See Desegregation of the Armed Forces*, *supra* note 14.

18. Burk & Espinoza, *supra* note 6, at 414. The study found no evidence of discrimination in admission to the enlisted ranks or in the risk of death in combat, however. Burk & Espinoza, *supra* note 6, at 414.; *See generally* DON CHRISTENSEN & YELENA TSILKER, RACIAL DISPARITIES IN MILITARY JUSTICE: FINDINGS OF SUBSTANTIAL AND PERSISTENT RACIAL DISPARITIES WITHIN THE UNITED STATES MILITARY JUSTICE SYSTEM (May 5, 2017), https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf (supporting these findings).

19. Griffin, *supra* note 17, at 2084–85. These discrepancies are noteworthy given that there are more minorities serving in the military than there are in the population at large. Griffin, *supra* note 17, at 2084–85.

less covert. Women were not allowed to serve in the military prior to 1948, and they were barred from all combat roles until 1991.[20] Discrimination against servicewomen, though no longer officially sanctioned, is still commonplace. One expert describes a multitude of discriminatory sentiments harbored by officers and enlisted soldiers alike, including: women are not real soldiers; women who join the military are not ladylike; women servicepersons are lesbians or sexually promiscuous; and the military teaches men to be violent and so their violence towards servicewomen is excusable.[21] These attitudes within the military foster a nurturing environment for sexual harassers and an apathetic one for victims.[22]

While Don't Ask, Don't Tell has at least nominally been repealed with respect to LGBT servicepersons, transgender individuals are still subject to widespread discrimination in the military. Under the Obama administration, transgender persons were allowed to serve in the military, but they were more likely to experience adverse employment actions and harassment than their heterosexual counterparts.[23] In July 2017, President Trump unexpectedly tweeted a reversal of this Obama administration policy, citing "tremendous medical costs and disruption" and the erosion of "military readiness and unit cohesion."[24] The ban was enjoined by several federal courts.[25] The White House issued a more nuanced—though still

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20. *See* Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, §§210, 502, 62 Stat. 356; National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531(a)(1), (b)(1), 105 Stat. 1290, 1365 (1991); *see also* Hasday, *supra* note 7, at 104–08 (discussing the history of women and the military).

21. Michael I. Spak and Alice M. McCart, *Effect of Military Culture on Responding to Sexual Harassment: The Warrior Mystique*, 83 NEB. L. REV. 79, 80 (2004) (summarizing these and other problems).

22. *See id.* at 81–86; *see also Overview of the Annual Report on Sexual Harassment and Violence at the Military Service Academies: Hearing Before the Subcomm. on Military Personnel of the H. Comm. On Armed Services*, 115th Cong. 80–82 (2017) (official statement of Lieutenant General Robert L. Caslen, Jr.) (detailing attitudes and beliefs that reinforce the problem of sexual harassment at the military academies); H.R. REP. NO. 113-102, at 140–64 (2013) (describing incidences of sexual assault as well as proposed legislation).

23. Jack Harrison-Quintana & Jody L. Herman, *Still Serving in Silence: Transgender Service Members and Veterans in the National Transgender Discrimination Survey*, 3 LGBTQ POLICY J. 1, 4 (2013).

24. Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html.

25. *See, e.g.,* Karnoski v. Trump, 2017 WL 6311305 (W.D. Wash. 2017).

discriminatory—policy in March 2018, which was enjoined for similar reasons.[26] Several bills have been introduced to address this issue and are currently being considered by Congress.[27] This series of events shows that overt discrimination against transgender persons is widespread in the military, and less blatant discrimination against women and minorities is still pervasive.[28]

B. The History of Title VII

While Title VII was not specifically enacted to redress discrimination in the military, its historical context reveals its broad remedial purpose. The statute is cast against the United States' history of black slavery and the subordination of women.[29] After the Civil War, in which slavery in the American South was forcibly prohibited by the military, African-Americans in both the North and South were subject to prejudice and exploitation in employment, and many were worse off than they were before the Civil War.[30] The status of African-Americans improved only marginally under Jim Crow, and African-American employees and job-applicants were still frequently discriminated against during the 1950s and 1960s.[31]

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26. Sophie Tatum, *White House Announces Policy to Ban Most Transgender People from Serving in Military*, CNN (Mar. 24, 2018), https://www.cnn.com/2018/03/23/politics/transgender-white-house/index.html; Larson, *supra* note 9.

27. *See, e.g.*, H.R. 4041, 115th Cong. (2018); S. 1820, 115th Cong. (2018).

28. Discrimination on the basis of national origin, age, religion, disability, etc. are also problems in the military. *See, e.g.*, Fragante v. City of Honolulu, 699 F. Supp. 1429, 1432 (D. Haw. 1987) (national origin); Ora Fred Harris, Jr., *Protections Against Discrimination Afforded to Uniformed Military Personnel: Sources and Directions*, 46 MO. L. REV. 265, 286–87, 299, 306 (1981) (age; religion; and disability). The military's ineffective internal remedies are discussed *infra* Part I.D.

29. Cynthia Elaine Tompkins, *Title VII at 50: The Landmark Law Has Significantly Impacted Relationships in the Workplace and Society, But Title VII Has Not Reached Its True Potential*, 89 ST. JOHN'S L. REV. 693, 701 (2015) (describing how white men viewed blacks as property). Though Title VII included sex as a protected class, the statute's legislative history shows that remedying sex discrimination was probably not its principal purpose. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441–43 (1966). As such, this section focuses on the history of employment discrimination against African-Americans.

30. *See* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 262–63 (2011) (describing the years following the Civil War as the "nadir" of employment opportunities for African-Americans).

31. Scholars have observed that the employment discrimination that directly

The Civil Rights Act of 1964 was directly preceded by unprecedented racial and social turbulence. The Civil Rights Movement, including such notable figures as Rosa Parks in the Montgomery bus boycott and Dr. Martin Luther King, Jr. in the march on Washington, D.C., called the nation's attention to racial inequality generally, and President John F. Kennedy set his sights on employment discrimination in particular.[32] Literally hundreds of bills were rejected by the legislature before one was finally accepted.[33] The legislation that became the Civil Rights Act spent an extraordinary amount of time in committee, and was filibustered by Senate Democrats for sixty days.[34] After years of political strife—and centuries of societal discrimination—President Lyndon B. Johnson signed the Civil Rights Act into law in 1964.[35]

Title VII of the act prohibits discrimination on the basis of race, color, religion, sex, or national origin with respect to the terms, conditions, or privileges of employment.[36] The act also contains a private cause of action, which has essentially five elements: first, the employer must meet the statute's coverage requirements; second, the plaintiff must belong to a protected class; third, the plaintiff must be qualified for the position in question; fourth, an adverse employment decision must occur; and, fifth, the decision must have been due to race, color, religion, sex, or national origin.[37] The phrase "adverse employment action" includes any serious, material change in the terms or conditions of employment.[38] The phrase "because of"

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preceded the enactment of the Civil Rights Act was "not so much a problem of blatant exclusion, but of business practices that reinforced the effects of past exclusion" attributable to "complicated, deeply rooted, and structural" problems. *Id.* at 286 (internal quotation marks and citation omitted).

32. Tompkins, *supra* note 29, at 774–82. Several pieces of civil rights legislation were passed during this time period, but none had the scope or import of the Civil Rights Act of 1964. *See, e.g.*, Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86; Vaas, *supra* note 29, at 431 (characterizing these pieces of legislation as failures).

33. Vaas, *supra* note 29, at 431 n.2.

34. Tompkins, *supra* note 29, at 785–92.

35. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e—2000e-17 (2018)).

36. 42 U.S.C. § 2000e-2 (2018).

37. *See, e.g.*, Hishon v. King & Spaulding, 467 U.S. 69 (1984).

38. *See, e.g.*, Galabya v. N.Y.C. Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). Such a change might take the form of termination, demotion, or a decrease in wages or salary. *Id.*

covers disparate treatment, disparate impact, and harassment liability.[39]

The courts have also developed evidentiary standards alongside the substantive elements of a Title VII claim. A plaintiff must first make a prima facie case by proving the elements described above; the employer may then refute the plaintiff's case by articulating a "legitimate, nondiscriminatory reason" for the employment decision; and the plaintiff may then show that the proffered reason is merely pretextual and must persuade the factfinder of the reality of the unlawful discrimination.[40]

Conspicuously absent from the original act was any mention of government employees in general or members of the military in particular.[41] In 1972, Congress amended the Civil Rights Act, and inserted the following provision after the original text: "All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."[42] The added provision essentially mirrors the original statute, and

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39. Disparate treatment—intentional—discrimination is usually proven through direct evidence, such as statements made by a supervisor. *E.g.*, Slack v. Havens, 1973 WL 339, *5-6 (S.D. Cal. 1973). Disparate impact discrimination, on the other hand, may be shown through statistical or other indirect evidence and does not require proof of intent. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (while diploma and writing requirements are facially neutral, they may nonetheless be invalid because of their disparate effect on a protected class). In 1991, Congress passed an amendment to the Civil Rights Act which officially recognized disparate impact discrimination. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 105–106, 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k) (2018)). Perhaps the most common variety of discrimination prohibited by Title VII is harassment, which was first recognized by the Supreme Court in 1986. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 73 (1986). Hostile work environment claims are, in turn, the most common type of harassment and require evidence that the work environment is both objectively and subjectively perceived as hostile. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993). Same-sex harassment and "reasonably comparable evils" are also prohibited. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79-80 (1998). Lastly, Title VII prohibits employers from retaliating against employees who oppose discrimination or participate in investigations. 42 U.S.C. § 2000e-3(a) (2018).

40. McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802 (1973).

41. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e—2000e-17 (2018)). The original act exempts "the United States" from its coverage. This language has essentially been abrogated, but it remains in the codified statute. *See* 42 U.S.C. § 2000e(b) (2018).

42. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. § 2000e–16(a) (2018)).

federal civilian employment discrimination jurisprudence has developed along roughly the same track as private sector anti-discrimination law.[43] Courts have repeatedly held that Title VII is to be construed liberally in light of its historical context and broad remedial purpose.[44]

C. The Military's Exclusion from Title VII

Despite Title VII's plain language including the military departments within its scope, servicepersons have been judicially-excluded from coverage—either because they are not "employees," or because they are not members of the "military departments."[45] The Supreme Court has never taken up the question of whether Title VII applies to servicepersons, and so the two leading cases on the matter are from the Eighth and Ninth Circuits: *Johnson v. Alexander*[46] and *Gonzalez v. Department of the Army*,[47] respectively. In *Johnson*, a three-judge panel for the Eighth Circuit held that servicepersons are not employees.[48] In *Gonzalez*, the Ninth Circuit panel held that

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43. *See, e.g.*, Kristin Sommers Czubkowski, *Equal Opportunity: Federal Employees' Right to Sue on Title VII and Tort Claims*, 80 U. CHI. L. REV. 1841, 1844–46 (2013).

44. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979) ("Title VII . . . must therefore be read against the background of [the statute's legislative history and] historical context"); Quijano v. Univ. Fed. Credit Union, 617 F.2d 129, 131 (5th Cir. 1980) ("Title VII . . . is to be accorded a liberal construction"); Hart v. J.T. Baker Chem. Corp., 598 F.2d 829, 831 (3d Cir. 1979) ("broad remedial legislation such as Title VII is entitled to the benefit of liberal construction"); Craig v. Dep't of Health, Educ. & Welfare, 581 F.2d 189, 193 (8th Cir. 1978) ("the Equal Employment Opportunity Act [of 1972] is a remedial statute and should be liberally construed"); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977) ("Title VII is remedial in character and should be liberally construed to achieve its purposes"); Davis v. Valley Distrib. Co., 522 F.2d 827, 832 (9th Cir. 1975) ("The Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of victims of discrimination."), *cert. denied*, 429 U.S. 1090 (1977).

45. *See* Gonzalez v. Dep't of the Army, 718 F.2d 926 (9th Cir. 1983); Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986.

46. *Johnson*, 572 F.2d 1219. Because of the Supreme Court's decision to decline *certiorari*, the other circuits have largely aligned with *Johnson*. *See, e.g.*, Overton v. N.Y. State Div. of Military & Naval Affairs, 373 F.3d 83, 89 (2d Cir. 2004); Brown v. United States, 227 F.3d 295, 299 (5th Cir. 2000); Doe v. Garrett, 903 F.2d 1455, 1461–62 (11th Cir. 1990).

47. *Gonzalez*, 718 F.2d 926; *See also* 29 C.F.R. § 1614.103(d) (2018) (agreeing with *Johnson* and *Gonzalez*). The EEOC's regulations were only promulgated in response to these decisions, however. *See id.*

48. *Johnson*, 572 F.2d at 1223.

servicepersons are not members of the military departments.[49] Though the circuits' rationales conflict,[50] both courts appear to have been motivated by the disciplinary and national security concerns which underlie the *Feres* Doctrine, which is discussed later in this section and at length in Part II.C.[51]

In *Johnson*, the Eighth Circuit first excluded servicepersons from coverage under Title VII, reasoning that they were not "employees."[52] In that case, an African-American man attempted to enlist in the Army but was rejected.[53] The man alleged that his rejection was due to an Army policy that required applicants to disclose whether they had ever been arrested—regardless of whether they had ever actually been convicted of a crime.[54] The man asserted that this policy unlawfully discriminated against African-Americans.[55] The Eighth Circuit panel did not reach the merits of the case, however. Instead, it decided that soldiers should not be considered employees under Title VII because, first, servicepersons are not free to terminate their association with the military; second, the military is not free to terminate its association with servicepersons; and third, servicepersons are subject to military discipline and military law.[56] The court also conceded that the military departments "referred to in 5 U.S.C. § 102 *include . . . uniformed personnel*" as well as civilian employees.[57]

In *Gonzalez*, the Ninth Circuit also chose to limit Title VII's

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49. *Gonzalez*, 718 F.2d at 928.

50. The circuits not only use different reasoning to conclude that Title VII does not apply to members of the military, but the Eighth Circuit expressly contradicts the Ninth Circuit's holding that servicepersons are not members of the "military departments." *Id.* In turn, the Eighth Circuit's rationale that servicepersons are not employees has been cast into doubt by the Supreme Court. *See infra* Part II.D.1.

51. *See generally* Feres v. United States, 340 U.S. 135 (1950).

52. *Johnson*, 572 F.2d at 928. This idea appears to have originated with the military. *See* Johnson v. Hoffman, 424 F. Supp. 490, 493 (E.D.Mo. 1977).

53. *Johnson*, 572 F.2d at 1219–20.

54. *Id* at 1220.

55. *Id.*

56. *Id.* at 1223 n.4. The first two distinctions regarding free association in employment are not on point, since many workers are subject to similar restrictions such as non-compete agreements, economic pressures, or employers' internal policies. *See* Griffin, *supra* note 17, at 2091. The panel's final point about discipline seems to rely on the *Feres* Doctrine, which is discussed in greater detail within this section and in Part II.C. The panel's reasoning is contained within a single, short footnote that is unaccompanied by citations, and the decision itself is only six pages long. *See* Johnson, 572 F.2d at 1223 n.4.

57. *Id.* at 1224 (emphasis added).

coverage, reasoning that servicepersons were not part of the "military departments."[58] In *Gonzalez*, a Puerto Rican Army officer was denied a promotion and then terminated.[59] The Army eventually reinstated the officer and granted the promotion after administrative review, but the man continued his suit for national origin discrimination to seek backpay for the years in which he had been denied advancement.[60] The Ninth Circuit panel declined to reach the merits of the case,[61] though for reasons that are somewhat difficult to follow. The panel first contrasted the definition of military departments used by Title VII with a definition of "armed forces" found in an entirely separate statute.[62] In the court's opinion, "[t]he two differing definitions show that Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees, the latter of uniformed military personnel."[63] In support of this conclusion, the panel also cites to the legislative history of Title VII,[64] the titles of the chapters which contain the two definitions,[65] and the Eighth Circuit in

58. Gonzalez v. Dep't of the Army, 718 F.2d 926, 928 (9th Cir. 1983). This expressly contradicts the Eighth Circuit. *See infra* text accompanying note 50. The circuit courts' conflicting rationales are particularly problematic in the case of quasi-military personnel. *See infra* Part II.D.2 and Part II.D.3.

59. *Id.* at 927.

60. *Id.*

61. *See id*. at 928.

62. *Id.* Title VII refers to 5 U.S.C. § 102, which defines the "military departments" as the Army, Navy, and Air Force. 5 U.S.C. § 102 (2018). The panel contrasted this definition with 10 U.S.C. § 101, which defines the "armed forces" as the Army, Navy, Air Force, Marine Corps, and Coast Guard. 10 U.S.C. § 101(4) (2018).

63. *Gonzalez*, 718 F.2d at 928. This conclusion does not follow logically. This is first because neither definition expressly mentions civilian employees. Second, Congress is not prohibited from using synonyms in different statutes. And third, the Marine Corps and Coast Guard also employ civilians—excluding civilian employees of only those branches would border on absurdity.

64. *Id.* As is shown in Part II.B, however, justifying the military's exclusion from Title VII through the statute's legislative history is unconvincing and, like many analyses that rely on legislative history, may be compared to looking over a crowd and picking out one's friends. *E.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

65. *Gonzalez*, 718 F.2d at 928 n.1. 5 U.S.C. § 102 (2018) is titled "Government Organization and Employees," while 10 U.S.C. § 101 (2018) is titled "Armed Forces." This is probably the most persuasive evidence proffered by the court, even though the titles of statutes are not typically given great weight by the Supreme Court. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 462 (1892) ("The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.").

Johnson.[66]

The main policy underlying these decisions is known as the *Feres* Doctrine,[67] or alternatively as the Separate Community Doctrine.[68] In general, the Federal Tort Claims Act (FTCA) abrogates the federal government's sovereign immunity for tort claims,[69] however, the *Feres* Doctrine provides an exception. In the absence of an express congressional command to the contrary, *Feres* bars soldiers' suits for service-related injuries because of concerns for military discipline.[70] The doctrine first developed within the context of the FTCA, but has since been expanded to include Title VII claims by military personnel.[71] Courts use it to assume away arguments that civil rights statutes, including Title VII, should apply to the military. The *Feres* Doctrine is shorthand for the idea that the military is too important to be burdened by rights that are otherwise viewed as fundamental. The doctrine emphasizes the importance of discipline in the military, the burden the military would bear if it were charged with safeguarding servicepersons' civil rights, and the primacy of national security concerns.[72] A secondary

66. *Gonzalez*, 718 F.2d at 928; *see generally Johnson*, 572 F.2d 1219. As of this writing, the only court to hold that Title VII does apply to members of the military did so over thirty years ago and denied relief on other grounds. Hill v. Berkman, 635 F. Supp. 1228, 1236–37 (E.D.N.Y. 1986).

67. Feres v. United States, 340 U.S. 135 (1950) (estate of an active-duty soldier who was killed because of the negligence of others denied relief under the FTCA); *see also*, E. Roy Hawkins, *The Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered in the Course of Military Service*, 125 MILT. L. REV. 99, 100 (1989).

68. The Separate Community Doctrine, which views the military as beyond the reach of most laws, is a direct relative of the *Feres* Doctrine. *See, e.g.*, Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953). This Note uses the phrase "*Feres* Doctrine" to refer to both.

69. *See* 28 U.S.C. § 2674 (2018).

70. Hawkins, *supra* note 67, at 100; *see also Feres*, 340 U.S. at 146.

71. *E.g.*, Walch v. Adjutant Gen. Dep't, 533 F.3d 289, 296 n.3 (5th Cir. 2008). Originally, the Supreme Court indicated that this doctrine applied only to injuries sustained during combat or times of war. *See Feres*, 340 U.S. at 138–39. The doctrine was then extended to cover injuries incidental to military service—including employment discrimination. *E.g.*, Stauber v. Cline, 837 F.2d 395, 397-98 (9th Cir. 1988); Holdiness v. Stroud, 808 F.2d 417, 423-24 (5th Cir. 1987); Bois v. Marsh, 801 F.2d 462, 469, 472 (D.C. Cir. 1986). Other courts have relied on the policies which underlie *Feres* without citing the case. *See, e.g., Johnson*, 572 F.2d at 1223 n.4.

72. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 299-300 (1983); United States v. Brown, 348 U.S. 110, 112 (1954). Another justification for excluding some members of the military from bringing Title VII claims is that, in some contexts, religion, sex, or national origin may represent a bona fide occupational qualification (BFOQ). *See*

policy justification employed by some courts is that, because military responsibilities are included in Congress's constitutionally enumerated powers, Title VII liability in military cases would raise separation of powers issues.[73]

In addition to excluding servicepersons' Title VII claims, courts have excluded claims brought under the various Civil War-era civil rights statutes, such as claims for unlawful abridgement of contract and conspiracy to interfere with civil rights.[74] In addition, courts have declined to recognize various discrimination-related Constitutional torts in the context of military employment.[75]

D. Unique Protections Offered to Members of the Military

Despite their exclusion from Title VII, members of the military are afforded a number of unique statutory protections. These include required reinstatement in the private sector, hiring preference in the public sector, lending protections, and internal administrative remedies for discrimination.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) prohibits discrimination and retaliation against servicepersons by private employers.[76] It requires reinstatement so long as servicepersons give private employers advance notice, serve in the military for less than five years while maintaining private employment, and return to work in a timely manner after the conclusion of each tour of duty.[77] USERRA requires that servicepersons be reinstated to equivalent positions with the same benefits they would have

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42 U.S.C. § 2000e-2(e) (2018). This occurs most often in the case of sex discrimination, though, as the military's increasing acceptance of servicewomen shows, the defense is not usually well-founded. *See* Hasday, *supra* note 7, at 104–08.

73. *See* U.S. CONST. art. I, § 8. *See also, e.g.*, *Chappell*, 462 U.S. at 299-301. The constitutional considerations of the *Feres* Doctrine are discussed in detail in Part II.C.3.

74. *E.g.*, 42 U.S.C. § 1981(a)-(b) (2018); 42 U.S.C. § 1985(3) (2018); Brown v. GSA, 425 U.S. 820 (1976).

75. *See, e.g.*, *Chappell*, 462 U.S. 296 (equal protection); Griffin, *supra* note 17, at 2082–83 n.4 (discussing courts' applications of the equal protection doctrine as it relates to employment discrimination).

76. 38 U.S.C. § 4311 (2018). *See generally*, Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. No. 103–353, 108 Stat. 3149 (codified at amended at 38 U.S.C. §§ 4301–4335 (2018)).

77. *See* 38 U.S.C. § 4312 (2018).

enjoyed absent military service.[78] USERRA also provides other protections, such as a prohibition against terminating a former serviceperson without cause for at least six months following that person's return.[79]

Qualified veterans also receive hiring preference in federal employment and may apply for positions that are not made available to other candidates.[80] According to their qualifications, veterans receive either ten-point, five-point, or zero-point preference in relation to other applicants.[81] To be eligible, veterans must provide documentation of their service and usually must have served during certain periods corresponding with various wars and military campaigns.[82] Some protections require that the veteran be separated from the military for at least three years, and others require the serviceperson to have sustained a disability or to have received a purple heart award.[83]

The Servicemembers Relief Act[84] provides various financial protections to members of the military and their families. Most notably, it entitles servicepersons to interest rates that are capped at six percent.[85] It also prevents lenders from foreclosing on or evicting servicepersons for up to nine months following the serviceperson's return from duty.[86]

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78. 38 U.S.C. § 4313 (2018). In the event such a position is unavailable, USERRA requires that the serviceperson be reemployed in a substantially similar position. *Id.*

79. 38 U.S.C. § 4316(c) (2018).

80. These preferences are provided by the Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (codified at scattered sections of 5 U.S.C., 29 U.S.C., and 38 U.S.C. (2018)) and the Veterans Employment Opportunities Act of 1998, Pub. L. No. 105–339, 112 Stat. 3182 (codified at scattered sections of 5 U.S.C. and 38 U.S.C. (2018)).

81. These point allocations anticipate that government agencies will use numerical or categorical ratings systems. *Veterans' Preference*, OFFICE OF PERS. MGMT., https://www.fedshirevets.gov/job-seekers/veterans-preference/ (last visited Mar. 31, 2019). Zero-point preference refers to a situation where a veteran and a non-veteran are equally qualified, in which case the position would be awarded to the veteran. *Id.*

82. 5 U.S.C. § 2108 (2018); *Veterans' Preference*, *supra* note 81.

83. 5 U.S.C. § 2108. There are a number of exceptions to these protections, such as for highly-skilled scientific positions or exempted service positions. *Id.*; 5 C.F.R. § 302.203 (2018); *Veterans' Preference*, *supra* note 81. The Department of Labor is responsible for administration of the statutes which provide veterans' preference, and the agency's decisions are appealable, first to the Merit Systems Protection Board and then judicially. 5 U.S.C. § 3330a–b (2018).

84. 50 U.S.C. §§ 3901—4043 (2018).

85. 50 U.S.C. § 3937(a)(1) (2018).

86. 50 U.S.C. § 3953 (2018) (foreclosures); 50 U.S.C. § 3951 (2018) (evictions). *See generally* Philip J. Bagley, *The Soldiers' and Sailors' Civil Relief Act: A Survey*, 45 MILT. L. REV 1 (1969). The Department of Justice may bring enforcement actions on

There are various other remedies for civil rights violations—available to servicepersons and ordinary citizens alike—scattered throughout the United States Code. Perhaps the most important of these is 42 U.S.C. § 1983, which creates a private right of action for violations of state, federal, and constitutional law.[87] Also notable are Title II and Title VIII of the Civil Rights Act, which prohibit certain kinds of discrimination in places of public accommodation and housing, respectively.[88]

There are also internal remedies available to servicepersons, but they are ineffective and show why a Title VII remedy for discrimination is needed. The military's two major anti-discrimination regimes are the Uniform Code of Military Justice (UCMJ) and the Department of Defense's Equal Opportunity Program.[89] Under the UCMJ, servicepersons are required to report allegations of discrimination to their commanding officers before proceeding up the chain of command.[90] This becomes problematic when the allegations are about a serviceperson's commanding officer, and such complaints tend to lead to suppression and retaliation.[91] While servicepersons are permitted to report discrimination to other officers afterwards, this option is little known and seldom utilized.[92] Moreover, commanding officers are free to retaliate against servicepersons in the meantime, without administrative review, by demoting them, suspending them, or docking their pay.[93] Because the UCMJ was designed to approximate the

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behalf of aggrieved servicepersons, and the act also creates a private right of action. 50 U.S.C. §§ 4041–4042 (2018).

87. 42 U.S.C. § 1983 (2018); Harris, *supra* note 28, at 294.

88. 42 U.S.C. §§ 2000a to 2000a-6 (2018) (public accommodations); 42 U.S.C. §§ 3601-3619 (2018) (housing); Harris, *supra* note 28, at 309.

89. 10 U.S.C. §§ 801-940 (2018) (UCMJ); 32 C.F.R. § 191 (2018) (Department of Defense's Equal Opportunity Program).

90. 10 U.S.C. § 938 (2018); *see also* Griffin, *supra* note 17, at 2087–89. At present, the Air Force is the only branch that allows servicepersons to bypass commanding officers to report discrimination. U.S. GOV'T ACCOUNTABILITY OFF., GAO-96-9, MILITARY EQUAL OPPORTUNITY: PROBLEMS WITH SERVICES' COMPLAINT SYSTEMS ARE BEING ADDRESSED BY DOD, 3 (1996).

91. Griffin, *supra* note 17, at 2087–89.

92. Rod Powers, *How to File an Article 138 Complaint Under the UCMJ*, BALANCE CAREERS (July 8, 2018), https://www.thebalancecareers.com/article-138-complaint-ucmj-3332814.

93. *See* 10 U.S.C § 815(b) (allowing commanding officers to reduce certain officers' pay by 50% over two months, to deduct up to seven days' pay from ordinary servicepersons, and to demote individuals serving beneath them to the next lower paygrade—all without administrative review).

criminal law rather than employment law,[94] it is ill-equipped to resolve disputes over adverse employment actions.

The military's Equal Opportunity Program is equally ineffective. Under the Equal Opportunity Program, servicepersons may file discrimination complaints, but the complaints are then reported to servicepersons' commanding officers.[95] In addition, Congress has found that Equal Opportunity Program specialists are generally overworked and insufficiently trained, and that they are often lax in following procedures and documenting complaints.[96] The Equal Opportunity Program focuses on providing guidance rather than adjudicating individual disputes, and so it is not well-positioned to provide individual remedies for military discrimination.

Neither the UCMJ nor the Equal Opportunity Program provide guidelines for investigating complaints, and the legal standards that do exist are often ambiguous and inconsistent.[97] Neither program designates an official to lead investigations, and neither examines complaints thoroughly.[98] Each program can be rightly described as a "runaround" designed to ensure discipline rather than to promote justice.[99] Most importantly, neither program awards damages to servicepersons who suffer from unlawful discrimination.[100] Because of this, servicepersons have almost no incentive to report discrimination—particularly discrimination that is effectuated by their commanding officers. The *Feres* Doctrine precludes review by Article III courts, and so servicepersons are usually left without remedy.[101] Justice Douglas once wrote that "it is the function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not

94. *See The Uniform Code of Military Justice (UMCJ)*, MILITARY.COM, https://www.military.com/join-armed-forces/the-uniform-code-of-military-justice-ucmj.html (last visited June 4, 2019); *see generally* 10 U.S.C. §§ 801 et. seq.

95. GAO, *supra* note 90, at 3-4; Rod Powers, *Air Force Military Equal Opportunity (MEO) and Sexual Harassment*, BALANCE CAREERS (Mar. 21, 2019), https://www.thebalancecareers.com/air-force-military-equal-opportunity-sexual-harassment-3331702.

96. GAO, *supra* note 90, at 2-3, 7-10.

97. Robert D. Smither & Mary Ruth Houston, *Racial Discrimination and Forms of Redress in the Military*, 15 INT'L J. INTERCULTURAL REL. 459, 463 (1991); Griffin, *supra* note 17, at 2087–89.

98. Smither & Houston, *supra* note 97, at 463.

99. Griffin, *supra* note 17, at 2087–89.

100. *See* 10 U.S.C. §§ 801-940 (2018); 32 C.F.R. § 191 (2018).

101. Griffin, *supra* note 17, at 2088–89; Smither & Houston, *supra* note 97, at 463.

turn on the charity of a military commander."[102] In this, courts have failed.[103]

III. DISCUSSION

In the late 1970s and early 1980s, courts barred members of the military from seeking remedies under Title VII. These decisions used different, faulty analyses to arrive at unjust conclusions. First, the plain language of the statute indicates that the military falls within the scope of Title VII. Second, the broad remedial purpose of the statute indicates that the legislature did not intend to exclude the military from coverage. Third, policy considerations for discipline and separateness in the military are outdated and are secondary to the policies espoused by the Civil Rights Act. Finally, the judicial exclusion of the military from Title VII has created confusion and ambiguity in the lower courts. As such, Congress should act to abrogate judicial decisions which are contrary to the nation's established policies. In the alternative, federal courts should choose to distinguish earlier decisions barring members of the military from exercising their statutory rights under Title VII.

A. "Military Departments" and "Employees"

Title VII provides, in pertinent part, that "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."[104] 5 U.S.C. § 102 in turn reads: "The military departments are: The Department of the Army. The Department of the Navy. The Department of the Air

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102. Winters v. United States, 89 S. Ct. 57, 59–60, (1968).

103. Though this Note calls upon the judiciary and the legislature to address the military's discrimination problem, another potential solution would be to improve the administrative remedies available to servicepersons. This could be done by amending the UCMJ or the Department of Defense's Equal Opportunity Program. These regimes could, for instance, be modified to provide for damages. They could also implement alternate, anonymous reporting procedures that allow servicepersons to circumvent the chain of command. Or they could limit the potential for retaliation by commanding officers. These are just a few of the many potential improvements that are available.

104. 42 U.S.C. § 2000e-16(a) (2018).

Force."[105]

1. Plain Language of the Statute

The first step in statutory interpretation is to find the ordinary meaning of the statute's language.[106] The plain language of Title VII indicates that members of the military, who are employees,[107] shall not be subject to discrimination based on race, color, religion, sex, or national origin. An ordinary, common sense reading of the phrase "military departments" suggests that it includes each department's members.[108] A military department itself cannot exist without individual constituents; it, like a department in any private company, must be composed of managerial, supervisory, and other employees.

The statute does not leave "military departments" undefined, however. Instead, it specifically refers to the definition found in Title 5 of the United States Code, which indicates that these departments are the Army, Navy, and Air Force. The ordinary meanings of "Army," "Navy," and "Air Force" include the enlisted members of each branch.[109] Enlisted

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105. 5 U.S.C. § 102 (2018).

106. *E.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); W. Va. Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 98–99 (1991); Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 552 (1990), *superseded by statute on other grounds, as recognized in* Johnson v. Home State Bank, 501 U.S. 78 (1991); Caminetti v. United States, 242 U.S. 470, 485 (1917).

107. *See infra* Part II.A.3.

108. The Oxford English Online Dictionary defines "military" as "[r]elating to or characteristic of soldiers or armed forces." *Military*, OXFORD ENGLISH ONLINE DICTIONARY (2018), https://en.oxforddictionaries.com/definition/us/military (last visited Oct. 26, 2018). It defines "department" as "[a] division of a large organization such as a government, university, or business, dealing with a specific subject, commodity, or area of activity." *Department*, OXFORD ENGLISH ONLINE DICTIONARY (2018), https://en.oxforddictionaries.com/definition/us/department (last visited Oct. 26, 2018). *See generally*, Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560 (2012) (consulting dictionaries to aid in statutory construction).

109. The Oxford English Online Dictionary defines "the Army" as "[t]he branch of a nation's armed services that conducts military operations on land." *Army*, OXFORD ENGLISH ONLINE DICTIONARY (2018), https://en.oxforddictionaries.com/definition/us/army (last visited Oct. 26, 2018 PM). It defines "the Navy" as "[t]he branch of a nation's armed services that conducts military operations at sea." *Navy*, OXFORD ENGLISH ONLINE DICTIONARY (2018), https://en.oxforddictionaries.com/definition/us/navy (last visited Oct. 26, 2018). It defines "the Air Force" as "[t]he branch of a nation's armed services that conducts military operations in the air." *Air Force* Oxford English Online Dictionary (2018),

soldiers, sailors, and airmen are the first individuals who come to mind when one thinks of the members of the Army, Navy, and Air Force. In addition, non-civilians make up the large majority of military department personnel.[110]

It would be an abnormal reading, not an ordinary one, to suggest that phrase "military departments" includes only the civilian employees of those departments. There is nothing in the text of the statute that suggests such a limitation. The statute does not read, for instance, "civilians in military departments shall be made free from discrimination." The words "all" and "affecting" that precede "military departments" serve to broaden the phrase. *All* personnel actions affecting military employees and applicants are included, not just some. Personnel actions which merely *affect* employees and applicants are covered, not just actions that are substantial or that pertain to the employee or applicant directly.

When other statutes refer only to civilian employees of military departments, they tend to do so expressly.[111] The simple occurrence of the word "departments" is insufficient to contravene the ordinary meaning of "military departments" and restrict the phrase to only civilian employees.[112]

2. Consistent Usage and Meaningful Variation

The second step in statutory interpretation is to determine whether a well-established cannon of construction dictates a

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https://en.oxforddictionaries.com/definition/us/air_force (last visited Oct. 26, 2018). Certainly uniformed soldiers, sailors, and airmen are necessary to conduct military operations on land, at sea, and in the air.

110. Non-civilian members of the military constitute 67.6% of all Department of Defense employees. *See* DEP'T OF DEFENSE, DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY iii (2016), http://download.militaryonesource.mil/12038/MOS/Reports/2016-Demographics-Report.pdf.

111. *See, e.g.*, 29 U.S.C. § 203(e)(2)(A) (2018) ("employee" means "any individual employed by the Government of the United States. . . *as a civilian in the military departments*" under the Fair Labor Standards Act) (emphasis added); 10 U.S.C. § 2737(a) (2018) (servicepersons and civilians each listed individually with regard to liability under the FTCA); 10 U.S.C. § 1030(a)(2) (2018) (servicepersons and civilians each listed individually with regard to bonus eligibility); *see also* Griffin, *supra* note 17, at 2089–95.

112. As noted in Part I.C, the Eighth Circuit conceded that the military departments "referred to in 5 U.S.C. § 102 include . . . uniformed personnel" in its decision excluding servicepersons from the scope of Title VII. Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978).

meaning other than the ordinary one.[113] One such cannon is the presumption that language within a statute or within a code is used consistently, and that variations are thus meaningful.[114]

One of the most persuasive pieces of evidence that "military departments" includes uniformed members of the armed forces is that the rest of the Civil Rights Act does *not* exclude servicepersons.[115] It would be odd to disallow discrimination in places of public accommodation or in housing but exempt military installations from these requirements.[116] While it is true that Title VII may be distinguished from Title II and Title VIII since it relates to employment discrimination, the Civil Rights Act as a whole prohibits discrimination without regard to an individual's status as a member of the military. The military exception that occurs only in Title VII thus borders on the absurd.[117]

The *Gonzalez* court viewed the term "military departments" as it is used in Title VII and as defined in 5 U.S.C. § 102 as distinct from the term "armed forces," which does not appear in Title VII and is defined in 10 U.S.C. § 101.[118] The best evidence for this proposition is that the section's title, "Armed Forces" seems to refer specifically to enlisted servicepersons, since those individuals are, at least presumptively, "armed."[119] Evidence found in a statute's title is afforded only a light amount of evidentiary weight by courts, however,[120] and there is no cannon of construction that prohibits Congress from using synonyms in entirely separate statutes.

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113. *E.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

114. *See, e.g.*, Sullivan v. Stroop, 496 U.S. 478, 484–85 (1990); United Sav. Ass'n v. Timbers of Inwood Forest Associates., 484 U.S. 365, 371 (1988). This presumption is stronger when statutes contain similar subject matter. *See, e.g.*, Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986).

115. *See, e.g.*, 42 U.S.C. §§ 2000a (2018) (public accommodations); 42 U.S.C. §§ 3601-3619 (2018) (Fair Housing Act); Harris, *supra* note 28, at 308–09.

116. Admittedly, this is in part because the policy considerations discussed in Part II.C below may not attach in such situations.

117. *See infra* Part II.B for an analysis of congressional intent.

118. Gonzalez v. Dep't of the Army, 718 F.2d 926, 928 n.1 (9th Cir. 1983). Title 10 defines the armed forces as "the Army, Navy, Air Force, Marine Corps, and Coast Guard." 10 U.S.C. § 101(a)(4) (2018).

119. *Compare* 5 U.S.C. §§101-105 (2018) ("Organization) *with* 10 U.S.C. §§101 et. seq. (2018) ("Armed Forces").

120. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19, 20 n.14 (1981) ("It has long been established that the title of an Act cannot enlarge or confer powers.") (internal quotation marks and citations omitted).

In any case, whatever "meaningful" variation exists in the definitions found in title 5 and title 10 disappears upon examining the terms used within each definition. Both definitions include the Army, Navy, and Air Force, and the title 10 definition adds the Marine Corps and Coast Guard.[121] Given the dictionary definitions of each of these terms, servicepersons would seem to be covered—the additions of the Marine Corps and the Coast Guard do not change the definitions of the other three terms.[122] What is more, title 10 defines each military department as specifically including the United States Army, Navy, Air Force, etc., as well as enlisted individuals and those involved in combat.[123] The simple use of "armed forces"—which has a definition substantially the same as "military departments"—in another statute does not contradict the plain meaning of Title VII.[124]

3. Definition of "Employee"

Servicepersons receive pay in exchange for labor and are not independent contractors; as such they are rightly considered employees. The Eighth Circuit in *Johnson* held that servicepersons are not employees,[125] but this conclusion is contradicted by Title VII's own definition of employee, other definitions of the word, and common sense.

According to Title VII, an employee is "an individual

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121. *See* 5 U.S.C. §102; 10 U.S.C. §101.

122. See *infra* note 63 and accompanying text.

123. 10 U.S.C. § 3062(b). "In general, the Army, within the Department of the Army, includes land combat and service forces . . . . It is responsible for the preparation of land forces . . . . The Army consists of (1) the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States and the Army Reserve; and (2) all persons appointed or enlisted in, or conscripted into, the Army without component." *Id.*; *see also* 10 U.S.C. § 5061-62 (2018) (Navy); 10 U.S.C. § 8062(b) (2018) (Air Force); 10 U.S.C. § 5063(a) (2018) (Marine Corps); Griffin, *supra* note 17, at 2089–90 n.47.

124. While Congress could have referred to title 10 instead of title 5 to define military departments, inferring legislative intent from Congress's choice *not* to do something is wrongfooted. *E.g.*, Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 11 (1942) (describing the attempt to find meaning in legislative inaction as "the pursuit of a mirage"). *But see* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988) (arguing that there is some coherence to finding meaning in legislative inaction). The similarity of the definitions negates whatever significance this Congressional choice might hold.

125. *See* Johnson v. Alexander, 572 F.2d 1219, 1223 (8th Cir. 1978), *cert. denied*, 439 U.S. 986.

employed by an employer."[126] This definition is circular, and the EEOC has not elaborated on it.[127] Therefore, it is helpful to consult a dictionary.[128] The English Oxford Dictionary defines "employee" as "[a] person employed for wages or salary, especially at nonexecutive level;"[129] it defines "employer" as "[a] person or organization that employs people;"[130] and it defines "employ" as to "[g]ive work to (someone) and pay them for it."[131] These definitions make clear that wages, salary, and the receipt of work are the key elements of employment. Servicepersons are each individuals, they receive money in exchange for their work, and the federal government is a covered employer.[132] Therefore, an ordinary reading of Title VII's definition of employee leads to the conclusion that servicepersons should be considered employees. The Supreme Court has confirmed this reading by stating in dicta that the "relationship of the Government to members of the military . . . . is . . . that of employer to employee."[133]

Other definitions of the term "employee" lead to the same conclusion. Courts, the Department of Labor, the Internal Revenue Service, and other agencies weigh several factors to determine whether a worker is an employee.[134] First, they

126. 42 U.S.C. § 2000e(f) (2018).

127. *See* 29 C.F.R. § 1614.702 (2018).

128. *See* 110 CONG. REC. 7216 (1964) (memorandum of Sen. Clark to Sen. Dirksen stating the word "employer" was "intended to have its common dictionary meaning, except as qualified by the Act"); *see also, e.g.*, Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560 (2012) (consulting dictionaries to aid in statutory construction).

129. Employee, OXFORD ENGLISH ONLINE DICTIONARY (2018), https://en.oxforddictionaries.com/definition/us/employee (last visited Oct. 27, 2018).

130. Employer, OXFORD ENGLISH ONLINE DICTIONARY (2018), https://en.oxforddictionaries.com/definition/us/employer (last visited Oct. 27, 2018).

131. Employ, OXFORD ENGLISH ONLINE DICTIONARY (2018), https://en.oxforddictionaries.com/definition/us/employ (last visited Oct. 27, 2018).

132. Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees," but it originally excluded the federal government. 42 U.S.C. § 2000e(b) (1971). The 1972 amendments changed this by including "governments, governmental agencies [and] political subdivisions" within the definition of "persons." *Compare* 42 U.S.C. § 2000e(a) (2018) *with* 42 U.S.C. § 2000e(b) (2018); *see also* 42 U.S.C. § 2000e–16(a) (2018) (federal government is a covered employer); Brown v. GSA, 425 U.S. 820, 831 (1976) (same).

133. Parker v. Levy, 417 U.S. 733, 751 (1974).

134. Though there is no hard and fast definition for what constitutes an "employee," the factors that follow can be adduced from judicial and administrative decisions. *See, e.g.*, United States v. Silk, 331 U.S. 704, 716 (1947); Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376, 1382 (3d Cir. 1985), *cert. denied*, 474 U.S. 919 (1985); Patricia Davidson, *The Definition of Employee under Title VII: Distinguishing*

consider the degree of control exercised by the alleged employer, as evidenced by employer-provided training, supervision, quotas, and requirements.[135] Second, they consider the continuity of the employment relationship, including its relative permanence and whether the worker receives regular hours or pay.[136] Third, courts and agencies consider the worker's relative independence, including whether the worker makes provisions for his or her own licensing, advertising, customers, tools, equipment, records, and taxes.[137] Independence is also evidenced by a worker's own opportunities for profit and loss.[138] Last, courts and agencies evaluate whether the worker's contributions are integral to the employer's operations and whether the alleged employee may work for competitors.[139]

Each of these factors mitigates in favor of finding that servicepersons are employees. First, the military exercises rigid control over servicepersons' schedules, work locations, living quarters, dress, and grooming; it provides servicepersons with intensive supervision and training; and commanding officers issue orders that cannot be altered or questioned.[140] Second, while the serviceperson-military relationship is not necessarily permanent, neither party may terminate it at will, and servicepersons are usually given set hours and regular pay.[141]

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between Employees and Independent Contractors, 53 U. CIN. L. REV. 203 (1984); Alexandre Zucco, *Independent Contractors and the Internal Revenue Service's Twenty Factor Test: Perspective on the Problems of Today and the Solutions for Tomorrow*, 57 WAYNE L. REV. 599, 602–06 (2011). The Eighth Circuit seemed to believe that servicepersons are similar to independent contractors because they are not at will employees. *See* Johnson v. Alexander, 572 F.2d 1219, 1223 n.4 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978) ("An enlisted man in the Army . . . is not free to quit his 'job,' nor is the Army free to fire him from his employment.").

135. Zucco, *supra* note 134, at 602-06.

136. Zucco, *supra* note 134, at 602-06.

137. Zucco, *supra* note 134, at 602-06.

138. Zucco, *supra* note 134, at 605.

139. Zucco, *supra* note 134, at 602-06.

140. *See, e.g.*, Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 559 (1994) (describing these aspects of military service).

141. *See, e.g.*, 37 U.S.C. § 1014 (2018) (military pay is ordinarily distributed at least monthly); U.S. DEP'T OF DEF., DD Form 4/1, Enlistment/Reenlistment Document Armed Forces of the United States (Oct. 2007), https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0004.pdf (enlisted servicepersons cannot resign their employment and can only be discharged under certain circumstances); *see also* 37 U.S.C. § 1005 (2018) (members of the Army and Air Force must be paid regularly).

Third, servicepersons lack independence because they do not invest in their own tools or equipment and do not engage in other profit-driven activities. Lastly, servicepersons' individual contributions are integral to the military's success and they are barred from working for "competitors"—which would usually be deemed treason in this context.[142] It is also worth noting that most servicepersons are completely reliant on the military for employment,[143] and they perform many of the same technical, clerical, and administrative duties that civilian employees do.[144] Servicepersons also meet the common law agency test for whether an individual is an employee because the military benefits from the work they perform, rigidly controls their conduct, and assents to the formation of the relationship.[145] The military benefits from servicepersons' efforts in fulfilling its national security objectives — indeed servicepersons' contributions are essential. The military tells servicepersons how to dress, when to arise and retire, where to live, and generally controls the minute details of their lives. The parties' assent to the agency relationship when an applicant enlists in the military and the military accepts his or her enlistment. Servicepersons are thus employees under the common law's traditional definition of employee.

The ordinary meaning of employee, the Supreme Court's interpretation of the word, and its definition in various other contexts show that servicepersons should be considered employees.

B. Congressional Intent

In examining congressional intent, it is important to remember that legislative history is not the law.[146] The textual

142. *See generally*, *e.g.,* United States v. Provoo, 215 F.2d 531 (2d Cir. 1954); United States v. Monti, 100 F. Supp. 209 (E.D.N.Y. 1951).

143. This is one reason why Congress has enacted statutes like USERRA and the Veterans' Preference Act to help former-servicepersons transition to employment in the private sector. *See infra* Part I.D.

144. Griffin, *supra* note 17, at 2098.

145. *E.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992) (summarizing , the application of the common law test of agency where Congress has not defined a key term, relating to employment status). *See generally*, Ronald C. Wyse, *A Framework of Analysis for the Law of Agency*, 40 MONT. L. REV. 31, 33–35 (1979).

146. *See, e.g.*, In the Matter of Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989).

analysis conducted in Part II.A takes precedence over anything gleaned from committee reports, hearings, bills, and other legislative documents. Legislative history may supplement the text, but where the text is clear, as in Title VII's application to members of the military, congressional intent is only of secondary concern.[147]

1. The Broad Remedial Purpose of Title VII

The text nonetheless evinces Congress's intent for expansive Title VII coverage. Congress defined "employee" circularly as "an individual employed by an employer" and left "discrimination" undefined.[148] The broad definition of employee indicates inclusivity rather than exclusivity, and the term "discrimination" is likewise free of either general or specific limitations. In addition, Title VII was amended to cover federal employees in 1972.[149] This amendment indicates that Congress intended to expand rather than contract the act's coverage.

The historical context surrounding Title VII reveals that the principal evil which Congress sought to remedy was discrimination.[150] The United States' history of slavery, Jim Crow, the repression of women, and the Civil Rights Movement gives context to the Civil Rights Act's broader purposes.[151] The inclusion of attributes besides race and color in Title VII's protections shows that Congress intended the act to eliminate untoward discrimination in all its forms.[152]

Nowhere in Title VII is the military specifically omitted from coverage, and Congress might not have felt the need to address intra-military discrimination given President Truman's 1948 executive order desegregating the military.[153] Even if Congress did not specifically include uniformed members of the military within Title VII's coverage, the act's broad remedial

147. *See, e.g.*, Carr v. United States, 560 U.S. 438, 458 (2010).

148. 42 U.S.C. § 2000e(f) (2018).

149. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16 (2018)).

150. The Supreme Court frequently exaines historical context when interpreting statutes. *See, e.g.*, Leo Sheep Co. v. United States, 440 U.S. 668 (1979).

151. *See infra* Part I.B.

152. *See* 42 U.S.C. § 2000e-2(a) (2018); 42 U.S.C. § 2000e-16(a) (2018).

153. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948). *See generally*, Burk & Espinoza, *supra* note 6, at 402.

purpose includes eliminating discrimination within the military.[154]

2. Legislative History of the Civil Rights Act of 1964

The legislative history of the Civil Rights Act of 1964 is inconclusive. This is in part because the legislative history is largely recorded in debates between members of Congress, statements of the act's opponents and proponents, and hundreds of accepted and rejected amendments, rather than in authoritative committee reports.[155] As such, the legislative history of Title VII is often difficult to parse and unfamiliar to courts.[156] It may still provide some insights, however.

Most importantly, the enacting Senate included a proviso in the definition of employer which established the federal government's policy of non-discrimination in employment.[157] This explicit statement of policy shows that Title VII was originally intended to extend to the federal government, and thus the broad remedial purpose of the original act applies to the federal government's component parts, including the military. In addition, the 1964 Congress considered a number of bills which specifically addressed discrimination in both the public and private sectors, indicating that the legislature was cognizant of the federal government's discrimination problem and intended for Title VII to address it.[158]

On the other hand, of course, these bills were not enacted,[159]

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154. "[S]tatutory provisions often go beyond the principal evil to cover reasonably comparable evils." Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79 (1998); *see also supra* note 44 and accompanying citations. *But see, generally,* Harry C. Beans, *Sex Discrimination in the Military*, 67 MIL. L. REV. 19, 42 (1975) (asserting that Congress did not intend to include uniformed military personnel in the 1972 amendments to Title VII); Chuck Henson, *Title VII Works - That's Why We Don't Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41 (2012) (arguing that Title VII's purpose was to prohibit the most obvious and harmful forms of discrimination while preserving employers' rights to discriminate in less harmful ways).

155. Vaas, *supra* note 29, at 457–58.

156. *See* Vaas, *supra* note 29.

157. This proviso stated, "it shall be the policy of the United States to insure [sic] equal employment opportunities for Federal employees without discrimination." Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 254 (now codified with slightly different wording at 5 U.S.C. § 7201(b) (2018)). This policy statement is not legislative history, as such, but it is probably less authoritative than the text.

158. Vaas, *supra* note 29, at 431.

159. Vaas, *supra* note 29, at 431.

which may just as easily evince Congress's intent to exclude federal employees, which would presumably include members of the military. Moreover, Congress did not enact federal employment protections as part of the of 1964 act, and the statute specifically exempted the United States from coverage.[160]

3. Legislative History of the 1972 Amendments

The legislative history of the 1972 amendments to Title VII is likewise inconclusive. The legislature did not directly address whether the term "military departments" was intended to include servicepersons or merely civilian employees of the military departments, and committee reports and statements from hearings are ambiguous. In one hearing, for instance, the United States Civil Service Commission submitted a document which stated that "the military departments have adopted new equal employment opportunity plans of action."[161] The commission did not specify what departments it was referring to, however, and it did not address whether the plans applied to servicepersons.[162] In another instance, the amendments' sponsor, Senator Alan Cranston, stated that the legislation would, "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases."[163] But the senator did not define what he meant by "federal employees" or "federal government."[164]

There is evidence that the 1972 Congress intended an expansive reading of Title VII. One Senate report stated that the "principal purpose" of the statute "is to amend title VII of the Civil Rights Act of 1964 to provide the Equal Employment Opportunity Commission with a method for enforcing the rights

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160. "The term 'employer' . . . does not include . . . the United States." Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 253 (codified at 42 U.S.C. § 7201 (2018)). While this exemption is still a part of the United States Code, its meaning was abrogated by the 1972 amendments to Title VII. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-16 (2018)).

161. *A Bill to Further Promote Equal Employment Opportunities for American Workers: Hearing on H.R. 1746 Before the General Subcomm. on Labor of the H. Comm. on Education and Labor*, 92d Cong. 373 (1971).

162. *See id.*

163. Equal Employment Opportunities Enforcement Act of 1971, S. 2515, 92d Cong., *in* 118 CONG. REC. 4929 (1972).

164. *See id.*

of those workers who have been subjected to unlawful employment practices."[165] Members of the military were—and still are—subjected to unlawful employment discrimination on the basis of race, color, religion, sex, and national origin, and so the amendments appear to apply to them. In another instance, one senator declared, "[t]here is no reason why a Federal employee should not have the same private right of action enjoyed by individuals in the private sector."[166] The policy of equality this statement is premised on is reasonably applicable to members of the military.

Another purpose contemplated by the legislature was the federal government's role as a bellwether and an example. The federal government's "policies, actions, and programs strongly influence the activities of all other enterprises, organizations and groups. In no area is government action more important than in . . . civil rights."[167] This desire to set an example is likewise applicable to prohibiting employment discrimination in the military.

On the other hand, there is also evidence that Congress either did not contemplate Title VII's application to members of the military when it enacted the 1972 amendments or that it specifically intended to exclude servicepersons from the act's coverage. The legislative record focuses on the effects of systemic discrimination against minorities and women in federal civilian positions, not in the military.[168] Congress also referred to the fact that "the federal government employs 2.6 million persons," and the district court in *Johnson* believed that because the membership of the armed forces decreased from 2.6 million to 2.2 million in 1972, Congress could not have been referring to the military.[169]

The congressional record is inconclusive. While it is clear that "military" was understood the same way in 1972 as it is today,[170] and that Congress was aware that employment discrimination in the military was a problem,[171] there is no

165. S. REP. NO. 92-415, at 1 (1971).

166. 118 CONG. REC. 4922 (1972) (statement of Sen. Harrison A. Williams).

167. S. REP. NO. 92-415, at 12 (1971); *see also* Czubkowski, *supra* note 43, at 1847.

168. Czubkowski, *supra* note 43, at 1848–49.

169. *See* Johnson v. Hoffman, 424 F. Supp. 490, 493 (E.D.Mo. 1977).

170. *See, e.g.*, H.R. REP. NO. 89-718, at 8 (1965) ("military service").

171. *A Bill to Further Promote Equal Employment Opportunities for American Workers: Hearing on H.R. 1746 Before the General Subcomm. on Labor of the H.*

direct evidence on how Congress understood the terms "military departments," "Army," "Navy," "Air Force," or "employee." Ancillary legislative evidence indicates both that Congress did intend to include the military within Title VII's scope and that it did not. Using the legislative history to arrive at any definitive conclusion would thus be like looking over a crowd and picking out one's friends.[172] Analyses of the act's text and underlying policies are more likely to prove useful in evaluating Title VII's application to the military.

C. Policies Underlying the Feres Doctrine

The *Feres* Doctrine is employed by courts to bar servicepersons' Title VII claims.[173] The reasoning behind the doctrine is, first, that the military is constrained by "certain overriding demands of discipline and duty" which outweigh the rights of individuals;[174] and, second, that the Constitution allocates responsibility for military affairs to Congress.[175] The doctrine is usually used to assume away serviceperson's claims rather than analyze them.[176] As shown in Part II.A and II.B, the doctrine conflicts with both the text of Title VII and the statute's broad remedial purpose. The policies which give rise to the *Feres*

Comm. on Education and Labor, 92d Cong. 373 (1971) (indicating that the military was required to receive approval from the Civil Service Commission to use tests in making employment decisions).

172. *E.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

173. *See, e.g.*, Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978). *See also* Orloff v. Willoughby, 345 U.S. 83, 93-95 (1953); Feres, v. United States, 340 U.S. 135 (1950). Again, this Note uses "*Feres* Doctrine" to refer to both *Feres* and the broader Separate Community Doctrine.

174. Middendorf v. Henry, 425 U.S. 25, 43 (1976) (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)); *see also* Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("it is the primary business of armies and navies to fight or be ready to fight wars") (quoting U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)); Parker v. Levy, 417 U.S. 733, 744 (1974) ("the military constitutes a specialized community governed by a separate discipline from that of the civilian") (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

175. *See, e.g.*, *Johnson*, 572 F.2d 1219 (citing separation of powers concerns); *see also* Griffin, *supra* note 17, at 2095 n.76. These constitutional considerations are discussed at length *infra* Part II.C.3.

176. As one scholar has observed, "a judicial posture that defers almost entirely to the decisions and actions of the military establishment leaves little room for consideration of any competing individual rights." Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 224 (2006). The *Feres* Doctrine has been expanded over time, leaving even less room for individual rights. *Id.* at 136–38.

Doctrine should thus be able to withstand close scrutiny to justify abrogating both the letter of the law and the will of the legislature.[177]

1. The Historical Context of the Feres Doctrine

The *Feres* Doctrine was first formulated during the 1950s.[178] Since then, the policy considerations which may have once mitigated in its favor have either faded or been contradicted.[179] In the mid-1950s, the battlefields of World War I and World War II were recent memories, military operations in Korea had only just been suspended, and the United States was embroiled in the Cold War.[180] Employment discrimination was still legal, and segregation was widely practiced.[181] Courts had numerous political and social reasons to prioritize military discipline at the expense of protecting servicepersons from discrimination. Today, however, physical deployment to a foreign front is relatively rare.[182] Increasingly, military service involves technical and clerical work—work that resembles that performed in the private sector—as the military transitions to fight terrorism and other complex domestic and international threats.[183] Title VII has been the law of the land for over fifty years,[184] and segregation is widely regarded as a blot on the nation's history.[185]

Feres was decided in 1950, and thus was not written with Title VII in mind.[186] Instead, the doctrine first arose within the

177. *See, e.g.*, King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991) (statutes which benefit members of the military should be broadly construed); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (remedial statutes should be broadly construed).

178. *See Feres*, 340 U.S. 135; *see also Orloff*, 345 U.S. 83.

179. *See infra* Part II.C.2.

180. *See* Burk & Espinoza, *supra* note 6, at 402.

181. *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 487-88 (1954).

182. *See* Neale D. Guthrie, *The Impact of Technological Change on Military Manpower in the 21st Century* 51 (June 1990) (unpublished MA. thesis, Naval Postgraduate School), http://www.dtic.mil/dtic/tr/fulltext/u2/a232472.pdf.

183. *Id.* at 48–49.

184. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (2018)).

185. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 592–93 (1983) (describing segregation as a "pall" on the nation's past).

186. *See* Feres, v. United States, 340 U.S. 135 (1950); s*ee also* Orloff v. Willoughby, 345 U.S. 83 (1953). *Orloff* arose in the employment context, but it was likewise decided some time before Title VII was enacted.

context of federal liability for physical injuries sustained by soldiers during active-duty military service.[187] Most physical injuries inflicted by an employer or its agent are the result of negligence rather than intentional misconduct; employment discrimination, however, is usually the result of animus. Even employment discrimination that is not intentional is not quite as innocent as the garden-variety negligence contemplated by *Feres*. Instead, it is "invidious" and is often the product of past discriminatory animus.

The principal of *stare decisis* has played a large part in the survival of the *Feres* Doctrine.[188] Departing from the doctrine, though, would not rob the Supreme Court of its capital or destabilize its jurisprudence. While the Court has upheld *Feres* in various contexts, it has not directly addressed whether the doctrine precludes servicepersons' Title VII claims.[189] Decisions which do cite to *Feres* tend to do so without much in the way of analysis.[190] Letting a decision stand for its own sake may protect certain reliance interests, but that is not a good reason for clinging to an anachronistic policy.[191] *Feres* is outdated, and courts should depart from it.

2. Discrimination's Effects on Discipline

The main reason courts give for prohibiting servicepersons from seeking remedies under Title VII is that it will negatively affect military discipline, and that discipline is necessary to maintain national security.[192] The second part of this statement

187. *See Feres*, 340 U.S. at 146. These injuries might be inflicted by an adversary or by fellow-servicepersons. *See id.*

188. *See, e.g.*, Johnson v. Alexander, 572 F.2d 1219, 1223 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978).

189. *Id.*

190. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 298-99 (1983) (mentioning but not analyzing disciplinary considerations); Martelon v. Temple, 747 F.2d 1348, 1351 (10th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) (1983 action touching upon concerns for discipline).

191. United States v. Reliable Transfer, Co. 421 U.S. 397, 403 (1975) (overturning precedent may be appropriate when subsequent history and experience have eroded a rule's foundations); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1090–94 (2013).

192. Courts frequently state this maxim in their rulings, but they generally decline to support it with analysis, statistics, or even anecdotal evidence. *See, e.g.*, Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("the military constitutes a specialized community governed by a separate discipline from that of the civilian"); Burns v.

may be valid, but discriminatory employment practices actually undermine military discipline.

Discrimination itself does not increase military discipline over either the short-run or the long-run. When an individual experiences or observes discrimination, antipathy and hostility are natural responses.[193] These human responses sow discord and disunity among the ranks. The negative effects of discrimination are recognized by the branches of the armed forces, and each prohibits discrimination on the basis of race, color, religion, sex, or national origin.[194] Department of Defense regulations state that discrimination "is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment."[195] Therefore, if officers or supervisory personnel do engage in unlawful discrimination, they are themselves contravening established policy and disregarding military discipline.[196]

Wilson, 346 U.S. 137, 140 (1953) (members of the military are subject to "certain overriding demands of discipline and duty"). While the exigencies of war may create extenuating circumstances, history shows that war seldom justifies depriving individuals of important rights. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018). Scholars have been more explicit in explaining the virtues of military discipline, which are essentially twofold. First, discipline acts as a necessary counterweight to human nature, which ordinarily urges servicepersons *not* to put their own lives in jeopardy and *not* to kill others. Second, discipline acts to prevent the armed forces from devolving into a mere mob. *E.g.*, Col. Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123, 160–61 (2017). These considerations are largely inapplicable to employment discrimination, however. This is primarily because allowing Title VII suits will not diminish a serviceperson's responsibility to follow orders *at the time they are given*.

193. *See, e.g.*, Neslie A. Etheridge, *Effects of Discrimination in the Workplace*, U.S. ARMY (Feb. 12, 2015),
https://www.army.mil/article/142799/effects_of_discrimination_in_the_workplace;
Cassandra A. Okechukwu et al., *Discrimination, Harassment, Abuse, and Bullying in the Workplace: Contribution of Workplace Injustice to Occupational Health Disparities*, 57 AM. J. INDUS. MED. 573, 577 (2014).

194. *E.g.*, *Equal Opportunity Branch (EO)*, U.S. ARMY,
http://www.armyg1.army.mil/eo/default.asp (last visited Mar. 29, 2019); *Navy Sexual Harassment Prevention and Response and Equal Opportunity*, U.S. NAVY, https://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/default.aspx (last visited Feb. 19, 2019); *Equal Opportunity*, U.S. AIR FORCE, https://www.af.mil/Equal-Opportunity/ (last visited Feb. 19, 2019).

195. DEP'T OF DEF. Directive 1350.2, The Department of Defense Military Equal Opportunity (MEO) Program (2015),
https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/135002p.pdf

196. While it may be necessary for commanding officers to exercise their discretion

The adverse effects of discrimination are well-documented.[197] Discrimination increases incidences of employee stress, anxiety, depression, and suicide.[198] It promotes fear, anger, and resentment among employees.[199] It can lead to alcohol and tobacco use and numerous related health effects.[200] It can independently affect blood pressure, heart-rate, etc.[201] Discrimination results in increased absenteeism, lower quality work product, missed deadlines, needless turnover, and less-qualified individuals receiving trainings, promotions, and leadership opportunities.[202] Discrimination affects employees' confidence in the fairness of workplace decisions and generally increases hostility in the work environment.[203]

The benefits of workplace diversity and inclusion are equally well-documented. Anti-discrimination policies directly increase discipline by improving morale and motivation.[204] Increased diversity and inclusion create economies-of-scale, where diverse talents, skills, experiences, perspectives, and languages increase creativity and innovation and improve public

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in an emergency situation, it is difficult to imagine a scenario in which *unlawful* employment discrimination would ever be necessary—either during normal operations, combat, or emergencies.

197. *See, e.g.*, Etheridge, *supra* note 193 (describing these effects); Okechukwu et al., *supra* note 193 (same); Elizabeth A. Deitch et al., *Subtle Yet Significant: The Existence and Impact of Everyday Racial Discrimination in the Workplace*, 56 HUM. REL. 1299 (2003) (same). These effects have long been recognized by military leaders, too. For example, General Douglas MacArthur once said that morale "will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice on the part of their government, or of ignorance, personal ambition, or ineptitude on the part of their military leaders." *See* Griffin, *supra* note 17, at 2109 (quoting Annual Report of the Chieft of Staff, U.S. Army, for the Fiscal Year ending June 30, 1933).

198. Etheridge, *supra* note 193.

199. *See* Okechukwu et al., *supra* note 193.

200. Etheridge, *supra* note 193.

201. *See* William A. Darity, Jr., *Employment Discrimination, Segregation, and Health*, 93 AM. J. PUB. HEALTH 226 (2003) (describing discrimination's effects on health).

202. *See, e.g.*, Crosby Burns, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, CTR. FOR AM. PROGRESS 1, 2–3 (2012).

203. *Id.* at 1.

204. *See, e.g.*, M.V. LEE BADGETT ET AL., *THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES* (2013), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf; Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715 (2011); Swinton W. Hudson, Jr., *Diversity in the Workforce*, 3 J. EDUC. & HUM. DEV. 73 (2014).

perception.[205] Prioritizing such beneficial policies could thus offset any negative effects on discipline. In other words, the military might find, as the private sector has, that it catches more flies with honey than it does with vinegar.

Suits for employment discrimination under Title VII could be marginally disruptive to the military's day-to-day operations.[206] It is unlikely that such suits would be more disruptive than they are in the private sector or in federal civilian employment,[207] but their consequences could be more severe. It does not follow, however, that discipline would necessarily decrease if servicepersons were afforded a Title VII remedy for discrimination. Just because a serviceperson has been discriminated against, or has initiated a claim, does not mean that serviceperson is then free to disobey orders—either while the claim is pending or after it has been adjudicated. Likewise, the mere existence of a claim would not be overly distracting to commanding officers or enlisted servicepersons since Title VII prohibits retaliation.[208] Incidences of discrimination would likely diminish over time, and any negative effects on discipline would diminish with them. Prioritizing anti-discrimination policies and allowing a Title VII remedy for discrimination would thus likely have the net effect of increasing military discipline.

3. Constitutional Considerations

A secondary justification cited by most courts applying the *Feres* Doctrine is that military affairs are constitutionally allocated to Congress, and so judicial review of servicepersons' claims is precluded by the Constitution's separation of powers.[209] This is simply policy dressed up as legal analysis. While it is

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205. *See, e.g.*, Brooke & Tyler, *supra* note 204, at 726-29; Hudson, *supra* note 204, at 73-75; Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473, 474 (1998).

206. *E.g.*, Orloff v. Willoughby, 345 U.S. 83, 93-95 (1953). This line of argument often seems to assume that most discrimination suits are baseless, which is not necessarily true, but the point may be valid nonetheless.

207. "Application of Title VII has not wrought havoc upon police or fire departments, hospitals, or other institutions that demand discipline from their employees." Griffin, *supra* note 17, at 2105.

208. *See* 42 U.S.C. § 2000e–3(a) (2018).

209. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 299 (1983).

true that the Constitution commands Congress to raise, support, and regulate the armed forces, it is emphatically—and inescapably—the province of the judiciary to say what the law is and to whom it applies.[210] The judiciary has few qualms about reviewing decisions Congress makes pursuant to the commerce power, the taxing power, the spending power, or its other enumerated powers, and so refusing to review servicepersons' employment claims on constitutional grounds is somewhat disingenuous.[211] The Constitution designates the president as Commander in Chief over the armed forces, and so authority over the military is not solely allocated to the legislative branch.[212] Allowing only administrative review of servicepersons' discrimination claims is ineffective and raises its own independent separation of powers issues.[213] It is close to a dereliction of duty for the judiciary to deny review of servicepersons' claims simply because of their military status.

Denying servicepersons remedies under Title VII of the Civil Rights Act also raises Fifth Amendment concerns. The Fifth Amendment proscribes the federal government from denying individuals the equal protection of federal laws.[214] Servicepersons do not lose these protections simply because of their membership in the military.[215] It would be incongruous to deprive members of the military of recourse for takings, constitutional torts, Fair Housing Act violations, and so on, and it is equally incongruous to deprive them of protections under Title VII.[216]

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210. Marbury v. Madison, 5 U.S. 137, 177 (1803).

211. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

212. *Compare* U.S. CONST. art. I, § 8 *with* U.S. CONST. art. II, § 2.

213. *See infra* Part I.C.

214. U.S. CONST. amend. V. While the Fifth Amendment does not expressly provide for equal protection, the Supreme Court has held that equal protection is a component of due process in Bolling v. Sharpe, 347 U.S. 497, 498 (1954) (discussing equal protection in the context of the Fourteenth Amendment's Due Process clause).

215. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (invalidating a statute that differentiated between men and women for military allowance purposes). *But see* Rostker v. Goldberg, 453 U.S. 57, 82-83 (1981) (upholding Congress's allocation of funds to draft men but not women).

216. Similarly, the Fifth Amendment's due process clause protects citizens' constitutional rights to life, liberty, and property. U.S. CONST. amend. V. Servicepersons are deprived of due process when they receive only administrative review of constitutional claims brought under 42 U.S.C. § 1981 or 42 U.S.C. § 1985. Courts justify this by again citing to their unconvincing concerns over separation of powers. *E.g.*, Northern Pipeline v. Marathon Pipe Line, 458 U.S. 50, 66 (1982) ("the two powers are entirely independent").

The constitutional half of the *Feres* Doctrine's rationale is feeble. Given the changed circumstances since the doctrine's inception and discrimination's negative effects on morale and discipline, its policy justifications are equally tenuous. The foundations of *Feres* have thus been significantly eroded, and it is time for Congress and the courts to depart from the doctrine within the context of employment discrimination.

D. Inconsistencies in the Lower Courts

The tensions between the ordinary meaning of Title VII and the policy considerations that allegedly support the *Feres* Doctrine have produced confusion and inconsistency in the federal courts. Though the Eighth Circuit and the Ninth Circuit arrive at the same conclusion regarding Title VII's application to servicepersons, their rationales conflict. The *Feres* Doctrine's blanket ban on servicepersons' claims leads to uncertain application with regard to certain members of the National Guard, as well as with regard to members of the Public Health Service Commissioned Corps. This is an additional reason that courts and Congress should depart from *Feres*.

1. Inconsistent Rationales

Because the rationale employed by the Eighth Circuit conflicts with the Ninth Circuit's reasoning, their consensus is largely illusory.[217] In *Johnson*, the Eighth Circuit held that servicepersons are not employees, and so Title VII does not apply to them.[218] The court reasoned that servicepersons do not enjoy the same mobility that private sector employees do, and they are subject to military discipline and military law.[219] The court's rationale is deficient for several reasons: first, while servicepersons may not enjoy employment at will, their relationship with the military is relatively permanent, which mitigates in favor of finding an employment relationship;[220]

217. Griffin, *supra* note 17, at 2093.

218. Johnson v. Alexander, 572 F.2d 1219, 1223 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (19780).

219. *Id.* at 1223 n.4.

220. *See, e.g.*, United States v. Silk, 331 U.S. 704, 716 (1947) (among other factors, courts determine whether a worker is an employee by weighing the "permanency of [the] relation[ship]").

second, servicepersons receive pay in exchange for their labor, which also indicates that they are employees;[221] and third, the *Feres* Doctrine's concerns for discipline are outdated, unsupported, and largely erroneous.[222]

In *Gonzalez*, the Ninth Circuit held that servicepersons are not members of the "military departments," and so Title VII does not apply to them.[223] The court drew a tenuous distinction between the term "military departments" as it is used in Title VII and the term "armed forces," which appears elsewhere in the United States Code, and found confirmation for this distinction in both the legislative history of Title VII and the Eighth Circuit's holding in *Johnson*.[224] This analysis is not only contrary to the ordinary meaning of the statute,[225] it was also directly contradicted by the Eighth Circuit when it stated that the military departments "referred to in 5 U.S.C. § 102 include . . . uniformed personnel."[226]

While the virtues of *stare decisis* may weigh in favor of overlooking these inconsistencies, the text of Title VII directly contradicts the judiciary's current interpretation of the statute. The *Feres* Doctrine's policy assumptions are no longer sufficient to justify this anomalous reading, and so *Johnson* and *Gonzalez* should not be relied upon by future courts.

2. Dual Status National Guard Technicians

When the military exception to Title VII is applied to certain members of the National Guard, it returns confusing results.[227] Many members of the National Guard work as technicians in support of the organization's operations.[228] These

221. *See infra* Part II.A.3.

222. *See infra* Part II.C.2.

223. Gonzalez v. Dep't of the Army, 718 F.2d 926, 928–29 (9th Cir. 1983).

224. *Id.* at 927–28.

225. *See infra* Part II.A.

226. Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978).

227. Much of this analysis also applies to reservists. *But see* Roper v. Dep't of Army, 832 F.2d 247, 248 (2d Cir. 1987) (barring reservists from bringing Title VII claims).

228. There were approximately 52,000 technicians employed by the National Guard in 2010. *See* Army Staff Sgt. Jim Greenhill, *Dual-status Technicians Critical to Guard Missions*, NAT'L GUARD BUREAU (Apr. 15, 2010), http://www.nationalguard.mil/News/Article-View/Article/577016/dual-status-technicians-critical-to-guard-missions/.

individuals are employed directly by the federal government as civilians, but they are also required to enlist in the National Guard.[229] Therefore, they are both members of the military and civilian employees.[230] 10 U.S.C. § 10216(a) states that "[f]or purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee."[231] Even though this section appears to include dual status technicians as civilian employees of the federal government, courts have nonetheless waivered on whether Title VII applies to them.

The Federal Circuit has held that, because of their status as civilians, these members of the National Guard may state a claim under Title VII.[232] In *Jentoft*, the Federal Circuit reasoned that the ordinary language of 10 U.S.C. § 10216(a) removes dual status technicians from the scope of *any* other provision of law, including the judge-made *Feres* Doctrine.[233] The court found it significant that "there is no language in § 10216(a) limiting the circumstances in which a dual status technician can be considered a federal civilian employee."[234] The court held that "the broad and unambiguous language" of the enacted laws of Congress must preempt judge-made doctrines like *Feres*.[235] Thus at least one circuit court has held that the Title VII claims of dual status employees are valid.[236]

Several circuit courts have indicated that Title VII only applies to guardmembers if the unlawful behavior arises out of the serviceperson's civilian employment. The Eighth Circuit has

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229. 32 U.S.C. § 709(e)) (2018).

230. These positions are referred to as "dual status" positions. *See, e.g.*, 10 U.S.C. § 10216 (2018).

231. 10 U.S.C. § 10216(a).

232. *Cf.* Jentoft v. United States, 450 F.3d 1342, 1350 (Fed. Cir. 2006) (holding that a military reservist could pursue civilian remedies under the Equal Pay Act because of "dual status" under 10 U.S.C. § 10216(a)).

233. *See id.* at 1348; *see also* Daniel Lam, *Wetherill v. Geren: The Eighth Circuit Erred by Applying the Feres Doctrine to Bar Dual Status Military Technicians from Bringing Civil Actions under Title VII*, 46 CREIGHTON L. REV. 433, 455–57 (2012) (arguing that because the statute does not qualify its use of "any" it means "all").

234. *Jentoft,* 450 F.3d at 1348.

235. *Id.* at 1349 (citing Chappell v. Wallace, 462 U.S. 296, 304 (1983) (Congress is authorized to regulate military justice)).

236. The Federal Circuit also stated that dual status employees could not pursue claims that were essentially military in nature; for instance, claims "that relate to enlistment, transfer, promotion, suspension and discharge or that otherwise involve the military hierarchy" are not cognizable. *Id.* at 1345.

held that a claim challenging internal National Guard personnel decisions is invalid if it "involves an assessment of a [technician's] *military* qualifications."[237] The Fifth Circuit has also suggested that actions which arise out of the scope of a guardmember's civilian employment may state a claim under Title VII.[238]

Despite these indications, the Eighth Circuit and the Fifth Circuit have not really followed the dicta of their precedents, and the Federal Circuit's decision in *Jentoft* is at odds with most of the other circuit courts. In 2008, the Fifth Circuit held that guardmembers' claims are barred by the *Feres* Doctrine because the same disciplinary concerns that apply to other soldiers apply to dual status technicians.[239] The Sixth Circuit has also held that the dual status technician position is one that is "irreducibly military in nature," and thus that technicians' Title VII claims are barred by *Feres*.[240] The Ninth Circuit has found confirmation for these sentiments in legislative history.[241] Thus, the *Feres* Doctrine's application to dual status National Guard technicians has divided the circuits.

3. Public Health Service Commissioned Corps

Courts have also divided on Title VII's application to members of the Public Health Service Commissioned Corps (PHSCC). The PHSCC is one of seven uniformed services of the

237. Hupp v. Dep't of the Army, 144 F.3d 1144, 1146 (8th Cir. 1998) (emphasis added).

238. *See* Brown v. U.S., 227 F.3d 295, 299 (5th Cir. 2000) ("While these actions had a civilian component, in that [the guardmember's] discharge made him ineligible for his civilian position, they nonetheless were actions taken within the military sphere.") (finding for the defendant); *see also* Hunter v. Stetson, 444 F. Supp. 238, 240 (E.D.N.Y. 1977) (military demotion for actions taken as a civilian may implicate Title VII).

239. Walch v. Adjutant Gen. Dep't of Tex., 533 F.3d 289, 296–97 (5th Cir. 2008); *see also* Martelon v. Temple, 747 F.2d 1348, 1351-52 (10th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) (extending this analysis to 1983 actions); Hawkins, *supra* note 67, at 125–27 (arguing that the same disciplinary concerns that apply to the military apply to the National Guard).

240. Leistiko v. Stone, 134 F.3d 817, 820–21 (6th Cir. 1998).

241. Zuress v. Donley, 606 F.3d 1249, 1253 (9th Cir. 2010) (using legislative history to contradict the plain language of 10 U.S.C. § 10216); *see also* Wetherill v. Geren, 616 F.3d 789, 792-94 (8th Cir. 2010) (weighing several circuit court decisions against *Jentoff*).

United States military.[242] Its members wear Navy uniforms and often work alongside active-duty servicepersons to provide healthcare, prevent disease, and ensure food and drug safety during disasters.[243] The PHSCC is a division of the Department of Health and Human Services, though,[244] and courts differ on whether it is a military organization.

The District of Columbia Circuit has held that PHSCC officers are distinct from members of the military.[245] The court reasoned that: the PHSCC is an agency of the Department of Health and Human Services; the PHSCC is not included within the definition of "armed forces" found in 10 U.S.C. § 101; both the agency and its employees are free to terminate their employment relationship at any time; and the PHSCC is not a military service, and is not subject to the UCMJ unless the executive-in-chief declares otherwise.[246] As such, the court allowed PHSCC officers to bring Title VII claims for discrimination.[247]

On the other hand, the Tenth Circuit has held that PHSCC officers are sufficiently similar to members of the military to subject them to the *Feres* Doctrine.[248] The court reasoned that: the titles, ranks, pay systems, and benefits of PHSCC officers and military officers are substantially the same; service in the PHSCC *can* be designated as military service by the president if he or she chooses; and the PHSCC "is consistently included with the armed forces in statutory definitions of 'uniformed

242. Middlebrooks v. Leavitt, 525 F.3d 341, 343 (4th Cir. 2008). The others are the Army, Navy, Air Force, Marine Corps, Coast Guard and commissioned corps of the National Oceanic and Atmospheric Administration. *Id.*; *see also* 10 U.S.C. § 101(a)(4)–(5) (2018).

243. COMMISSIONED CORPS OF THE U.S. PUB. HEALTH SERV., *About Us*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.usphs.gov/aboutus/ (last visited June 5, 2019). The PHSCC also sometimes assigns its officers to serve with military personnel during times of war. John Parascandola, *Militarization of the PHS Commissioned Corps* (Sept. 2001), https://lhncbc.nlm.nih.gov/system/files/pub2001060.pdf.

244. *See* COMMISSIONED CORPS OF THE U.S. PUB. HEALTH SERV., *Leadership*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.usphs.gov/aboutus/ (last visited June 5, 2019).

245. Milbert v. Koop, 830 F.2d 354, 359 (D.C. Cir. 1987). The court decided this issue without addressing whether members of the military were barred from bringing Title VII claims. *See id.*

246. *Id.* at 358–59.

247. *Id.* at 359.

248. Salazar v. Heckler, 787 F.2d 527, 533 (10th Cir. 1986).

services.'"[249] The Tenth Circuit also turned to legislative history to reinforce its conclusion that Congress intended to bar PHSCC officers from bringing Title VII claims.[250]

The Fourth Circuit has also held that PHSCC officers are not able to state a claim under Title VII by relying on congressional intent.[251] In 1998, Congress enacted the Health Professions Education Partnerships Act, which provides that the "[a]ctive service of commissioned officers of the [PHSCC] shall be deemed to be active military service in the Armed Forces of the United States for purposes of all laws related to discrimination."[252] Rather than evaluate the *Feres* Doctrine's application to PHSCC officers specifically, the Fourth Circuit chose to view this enactment as evidence of Congress's intent to preclude the Title VII claims of *all* PHSCC officers—not just those engaged in active-duty military service.[253]

As the courts' piecemeal application of Title VII to members of the PHSCC and the National Guard shows, the *Feres* Doctrine has not been uniformly applied to all servicepersons. The doctrine conflicts with the plain language of Title VII and creates confusion. Many courts seem to sense this tension—though most overlook it in favor of preserving the judiciary's own capital. The analyses of the two leading decisions in the field differ, making their apparent consensus illusory. *Feres* leads to confusion and inconsistency when Title VII is applied to quasi-military personnel. As such, the doctrine should be abandoned.

IV. CONCLUSION

Title VII was enacted to combat discrimination in all its forms. It was amended to include employees of the military departments, which plainly includes servicepersons. The judicial branch has largely ignored the laws of Congress, however, in favor of a judge-made doctrine that is outdated and flawed. When *Feres* was decided, World War II had only just concluded,

249. *Id.* at 530. *But see Milbert*, 830 F.2d at 358 (PHSCC not included within definition of "armed forces" found at 10 U.S.C. § 101 and elsewhere).

250. *Salazar*, 787 F.2d at 531–33.

251. Middlebrooks v. Leavitt, 525 F.3d 341, 346–47 (4th Cir. 2008).

252. Health Professions Education Partnerships Act of 1998, Pub. L. No. 105-392, 112 Stat. 3524, 3588 (codified at 42 U.S.C. § 213(f) (2018)).

253. *Middlebrooks*, 525 F.3d at 347; *see also* Hedin v. Thompson, 355 F.3d 746, 748, 750–51 (4th Cir. 2004).

and Title VII and the 1972 amendments to the Civil Rights Act were unenacted. Today, Title VII has been the law for over fifty years; it has expressly included the military departments for over forty. *Feres* is premised on the idea that discrimination on the basis of race, color, religion, sex, national origin, or other unlawful factors is desirable because it increases military discipline. History and experience have shown that this is not the case. In fact, discrimination *decreases* military discipline. The foundations of the *Feres* Doctrine are anachronistic and decaying. It is time for Congress and the courts to depart from *Feres* and allow a Title VII remedy for those who serve and protect this nation.