Flanking *Feres*: The Camp Lejeune Justice Act of 2022 and the Future of the Military's Sovereign Immunity*

Between the 1950s and the 1980s, experts estimate that toxic water at Camp Lejeune, a Marine Corps base located near Jacksonville, North Carolina, affected over one million people. The health effects of such contamination include the delivery of babies stillborn or with birth defects, acute illnesses affecting children and adults on base, and long-term instances of various serious and rare diseases like leukemia and male breast cancer. Despite clear evidence of the contamination and the resulting adverse health outcomes, both the military and the federal government have failed to provide adequate compensation to victims in the four decades since the problem's discovery. Entrenched sovereign immunity law in the form of the Feres *doctrine, as well as additional administrative and judicial barriers, have also operated to prevent exposed individuals from recovering. However, in August 2022—nearly forty years after evidence of the contamination surfaced—Congress passed the Honoring Our Promise to Address Comprehensive Toxics Act, which included the Camp Lejeune Justice Act. The law marked a huge victory for Camp Lejeune victims by granting those injured the ability to seek financial damages through an administrative process and, if denied, in federal court. The question remains: What does this development mean for the future of the military's sovereign immunity? This Comment examines the history of the water contamination at Camp Lejeune and the legal response over time, provides an overview of the Camp Lejeune Justice Act, and suggests how the law presents a strong framework for ensuring that veterans injured by toxic exposure and otherwise can access just compensation in the future.*

Author's Note: Implementation of the Camp Lejeune Justice Act of 2022 remains dynamic, and it may take years until all of the dust finally settles. This Comment seeks to offer commentary on the law as structured at the time of publication and what it means for the future of the military's sovereign immunity in that form.

INTRODUCTION

In 1982, the Marine Corps discovered contamination in the water supply at Camp Lejeune, a military base located near Jacksonville, North Carolina.[1] While the Marines shut down most of the polluted wells in 1985, experts estimate that contaminated water at Camp Lejeune exposed over one million veterans and civilian staff, as well as their families, to hazardous substances between the 1950s and the 1980s.[2] These victims include Catherine Daniels, who witnessed her three babies die at birth while she and her Marine husband lived at Camp Lejeune, as well as Jerry Ensminger, a Marine drill instructor

1. *Camp Lejeune, North Carolina*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, https://www.atsdr.cdc.gov/sites/lejeune/index.html [https://perma.cc/K3JY-FTLW] (last updated Sept. 25, 2019) [hereinafter ATSDR, *Camp Lejeune*].

2. *Id.*

who lost his nine-year-old daughter Janey to leukemia following in utero exposure on the base.[3]

In August of 2022, after nearly four decades of studies, legal battles, and legislative advocacy, Congress finally gave Daniels, Ensminger, and other victims the ability to seek financial remuneration for suffering caused by Camp Lejeune's toxic water.[4] On August 10, 2022, President Biden signed the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act ("PACT Act"),[5] which included the Camp Lejeune Justice Act of 2022 ("CLJA").[6] The package in theory represents a major victory for veterans exposed to burn pits in the Middle East, as well as those subjected to other forms of toxic pollution while in the military, who now suffer from rare cancers and other serious illnesses.[7]

In addition, the CLJA adds a new layer to sovereign immunity law in the United States. Before the enactment of the CLJA, the Supreme Court's *Feres* doctrine generally prevented injured servicemembers from seeking redress from the government in a tort lawsuit for damages under the Federal Tort Claims Act ("FTCA") where the claim arose "incident to service."[8] The CLJA circumvents these obstacles by explicitly outlining a cause of action in the United States District Court for the Eastern District of North Carolina for

3. Mike Magner, *Long Push for Camp Lejeune Toxic Water Lawsuits Clears Congress*, ROLL CALL (Aug. 2, 2022, 9:56 AM), https://rollcall.com/2022/08/02/long-push-for-camp-lejeune-toxic-water-lawsuits-now-hinges-on-senate/ [https://perma.cc/M8SR-JBJ5] [hereinafter Magner, *Long Push*]. Janey's mother, Etsuko Asako, only lived on base for two months of Janey's first trimester, as a Marine Corps assignment soon relocated the family to Parris Island, South Carolina. MIKE MAGNER, A TRUST BETRAYED: THE UNTOLD STORY OF CAMP LEJEUNE AND THE POISONING OF GENERATIONS OF MARINES AND THEIR FAMILIES 64–65 (2014) [hereinafter MAGNER, A TRUST BETRAYED].

4. *See* Magner, *Long Push*, *supra* note 3 (providing great overview of the history of water contamination and subsequent efforts seeking justice for those exposed).

5. Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (codified as amended in scattered sections of 38 U.S.C.); Chris Murphy, *PACT Act Passes After Jon Stewart Flames Republican Lawmakers*, VANITY FAIR (Aug. 3, 2022), https://www.vanityfair.com/hollywood/2022/08/pact-act-passes-after-jon-stewart-flames-republican-lawmakers [https://perma.cc/X567-HX3D (staff-uploaded, dark archive)]; *The PACT Act and Your VA Benefits*, DEP'T VETERANS AFFS., https://www.va.gov/resources/the-pact-act-and-your-va-benefits/ [https://perma.cc/MD3M-GL8Y] (last updated Oct. 1, 2023) [hereinafter DEP'T VETERANS AFFS., *PACT Act and Your VA Benefits*].

6. Magner, *Long Push*, *supra* note 3.

7. Murphy, *supra* note 5. According to the Department of Veterans Affairs ("VA"), the PACT Act might represent the largest servicemember benefit expansion in history. DEP'T VETERANS AFFS., *PACT Act and Your VA Benefits*, *supra* note 5. The PACT Act expands the list of presumptive conditions that the VA assumes result from exposure to toxic substances while in military service, making it easier for servicemembers to receive disability benefits through the VA. *See id.* As a result, veterans exposed to Agent Orange during the Vietnam War, as well as to burn pits and other toxic substances during the Gulf War and post-9/11, will have easier access to health care. *See id.*

8. Feres v. United States, 340 U.S. 135, 146 (1950).

veterans and family members exposed to toxic water at Camp Lejeune.[9] In allowing servicemembers and their families to initiate actions previously barred by *Feres*, the CLJA represents a critical legislative development that curtails the government's sovereign immunity in the military context.[10]

With the CLJA on the books, the question remains: How should lawmakers, courts, and other stakeholders consider the law in charting a course for the future of the military's sovereign immunity? Answering this question requires squaring the CLJA with two other recent developments in its field: (1) the *Feres* doctrine's continued entrenchment at the Supreme Court,[11] and (2) a partial carveout from *Feres* for medical malpractice claims enacted by Congress via the 2020 National Defense Authorization Act ("2020 NDAA").[12] Viewing the Supreme Court's latest actions, the 2020 NDAA, and the CLJA in tandem show that while Congress and the Court agree that *Feres* should remain in some form, Congress has chosen to depart from *Feres*, at least in part, in two instances: claims involving (1) medical malpractice and (2) toxic water exposure at Camp Lejeune. Still, these two differing legal regimes—the 2020 NDAA's administrative claims process and the CLJA's hybrid approach providing access to the courts—demonstrate that even Congress has yet to settle on the appropriate mechanism by which claimants may circumvent *Feres* to receive financial remuneration for injuries sustained during service.[13]

This Comment will explore why the CLJA presents the better of the two options, focusing on how the CLJA improves upon Congress's targeted carveout of the military's sovereign immunity via the administrative claims process for medical malpractice allegations created by the 2020 NDAA. In

9. Camp Lejeune Justice Act of 2022, Pub. L. No. 117-168, § 804(b), 136 Stat. 1759, 1802 (codified at 28 U.S.C. § 2671 note).

10. *See id.* (authorizing claims blocked by *Feres*). For instance, in *Clendening v. United States*, 19 F.4th 421 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 11 (2022), the Fourth Circuit rejected a Camp Lejeune toxic water claim in part based on *Feres*. *Id.* at 425. It follows that under the CLJA, Clendening may now receive compensation in the form of a court award. *See* Camp Lejeune Justice Act of 2022 § 804(b).

11. *See, e.g.*, *Clendening*, 143 S. Ct. at 12–13 (Thomas, J., dissenting from denial of cert.) (representing latest denial of certiorari in line of cases asking Supreme Court to overturn *Feres*). Despite the entrenchment of *Feres* at the Supreme Court, however, one twist has developed recently. *See* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 995 (2019) (holding that despite asbestos-free delivery of parts to military and subsequent addition of asbestos to parts by military, injured servicemembers could seek recourse from parts manufacturers on failure to warn basis as *Feres* barred claim against military). For further reading on the result reached in *DeVries*, see generally Holli B. Packer, Note, *Thank You for Your Service: The Supreme Court Fabricates New Standard for Maritime Product Liability in* Air & Liquid Systems Corp. v. DeVries, 44 TUL. MAR. L.J. 371 (2020).

12. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1457–60 (codified at 10 U.S.C. § 2733a).

13. In fact, the two approaches pose different mechanisms entirely—the 2020 NDAA creates a nonadversarial administrative claims process, and the CLJA enacts an administrative claims process checked by the opportunity to file a lawsuit. In this sense, the 2020 NDAA does not necessarily waive *Feres* in the medical malpractice context, as it merely authorizes a different mechanism entirely: the administrative claims process in lieu of a lawsuit.

particular, this Comment will examine how the CLJA expands on the 2020 NDAA's framework to offer an avenue for relief more analogous to that available under the FTCA, signaling Congress's willingness to soften the *Feres* doctrine in order to provide servicemembers and their families with the justice that they deserve on a case-by-case basis.

This Comment will proceed in three parts. Part I provides historical background on water contamination at Camp Lejeune and discusses the legal response to the adverse health effects it caused, including obstacles to a complete remedy for those injured. Part II outlines the mechanics of the CLJA by examining the statutory language and what unknowns remain. Part III considers how the CLJA fits into the broader framework of sovereign immunity, emphasizing why the landmark legislation should serve as a guide for future reform efforts.

I. LEGAL AND HISTORICAL BACKGROUND

A. *History of Water Contamination at Camp Lejeune*

The United States military established the Marine Corps base at Camp Lejeune in 1941.[14] Located near Jacksonville, North Carolina, the base sits within the Onslow Bight, a diverse coastal ecosystem containing pine and hardwood forests, saltwater marshes, and other wetlands.[15] Today, Camp Lejeune serves as a "home of expeditionary forces in readiness . . . a warfighting platform from which . . . Marines and Sailors train, operate, launch and recover while providing facilities, services and support that meet the needs of [these] warfighters and their families."[16] Indeed, the 156,000-acre base generates $3 billion in commerce annually; houses roughly 170,000 people, equivalent in size to North Carolina's seventh-largest city; and offers a variety of services, from childcare to education, recreation, and more.[17]

In addition to providing these amenities, the military also supplies a key necessity: water. As of 2013, eight water distribution systems furnish those

14. MAGNER, A TRUST BETRAYED, *supra* note 3, at 21; *see also About*, MARINES, https://www.lejeune.marines.mil/about.aspx [https://perma.cc/X4BZ-7HCD] [hereinafter MARINES, *About*].

15. MAGNER, A TRUST BETRAYED, *supra* note 3, at 19–20.

16. *Marine Corps Base Camp Lejeune*, MARINES, https://www.lejeune.marines.mil [https://perma.cc/SCG7-2JRX].

17. MARINES, *About*, *supra* note 14; State Demographer, *2021 Standard Population Estimates*, N.C. OFF. STATE BUDGET & MGMT., https://demography.osbm.nc.gov/explore/dataset/2021-standard-population-estimates/table/?disjunctive.county&disjunctive.muniname2&sort=population [https://perma.cc/9RVV-TKCA].

living and working on the base with water.[18] But during the second half of the twentieth century, water contamination plagued three of these facilities—Tarawa Terrace, Hadnot Point, and Holcomb Boulevard—which delivered drinking water to the majority of family housing units at Camp Lejeune.[19]

Warning signs first surfaced in 1980.[20] That year, in response to a new Environmental Protection Agency ("EPA") rulemaking, Camp Lejeune tested water for trihalomethanes, chemicals created during water treatment[21] and classified as possible carcinogens, with links to central nervous system depression and liver impairment.[22] On October 31, 1980, William Neal Jr., a military laboratory chief involved in water testing at Hadnot Point, cautioned that the "[w]ater is highly contaminated with low molecular weight halogenated hydrocarbons."[23] At least three more warnings followed.[24] In January of 1981, Neal documented "[h]eavy organic interference," and he requested his supervisors analyze the situation further.[25] The next month, he repeated this request: "[A]nalyze for chlorinated organics."[26] And the following month, he emphatically reiterated his point again: "Water is highly contaminated with other chlorinated hydrocarbons (solvents)!"[27] Yet the military discontinued investigation into Neal's claims, despite concerns that such substances caused liver cancer, kidney cancer, and central nervous system problems.[28] In fact, Colonel J.T. Marshall, the assistant chief of staff facilities, later questioned the accuracy of Neal's tests and recommended de-emphasizing the results in a report to the EPA.[29]

18. MORRIS L. MASLIA, RENÉ J. SUÁREZ-SOTO, JASON B. SAUTNER, BARBARA A. ANDERSON, L. ELLIOT JONES, ROBERT E. FAYE, MUSTAFA M. ARAL, JIABAO GUAN, WONYONG JANG, ILKER T. TELCI, WALTER M. GRAYMAN, FRANK J. BOVE, PERRI Z. RUCKART & SUSAN M. MOORE, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, ANALYSES AND HISTORICAL RECONSTRUCTION OF GROUNDWATER FLOW, CONTAMINANT FATE AND TRANSPORT, AND DISTRIBUTION OF DRINKING WATER WITHIN THE SERVICE AREAS OF THE HADNOT POINT AND HOLCOMB BOULEVARD WATER TREATMENT PLANTS AND VICINITIES, U.S. MARINE CORPS BASE CAMP LEJEUNE, NORTH CAROLINA, at A7 (2013), https://www.atsdr.cdc.gov/sites/lejeune/docs/chapter_A_hadnotpoint.pdf [https://perma.cc/FWZ7-S6PJ].

19. *Id.*

20. Barbara Barrett, *Warnings About Lejeune's Tainted Water Unheeded for Years*, MCCLATCHYDC, https://www.mcclatchydc.com/news/nation-world/national/article24579808.html [https://perma.cc/LFX9-P49U (staff-uploaded, dark archive)] (last updated June 24, 2010, 7:51 PM).

21. *Id.*

22. *Biomonitoring Summary: Disinfection By-Products (Trihalomethanes)*, CDC, https://www.cdc.gov/biomonitoring/THM-DBP_BiomonitoringSummary.html [https://perma.cc/3HRD-MFPD] (last updated Apr. 7, 2017).

23. Barrett, *supra* note 20.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *See id.*; DEP'T VETERANS AFFS., *PACT Act and Your VA Benefits*, *supra* note 5.

29. Barrett, *supra* note 20.

The problems continued, however. In 1982, the military discovered volatile organic compounds ("VOCs") in the water coming from Tarawa Terrace and Hadnot Point,[30] exposure to which can cause a variety of adverse health outcomes, from irritation and difficulty breathing to organ damage and cancer.[31] At Hadnot Point, the military detected the VOC trichloroethylene ("TCE") at a concentration of 1,400 parts per billion ("ppb") in May of 1982, exponentially higher than the current limit for TCE in drinking water: 5 ppb.[32] In addition to TCE, officials found VOC contamination in the form of tetrachloroethylene ("PCE"), among other compounds, stemming primarily from leaking underground storage tanks and waste disposal sites nearby.[33] At Tarawa Terrace, analysis showed PCE at a concentration of 215 ppb in February 1985, again significantly higher than the current limit of 5 ppb.[34] The contamination originated from ABC One-Hour Cleaners, a dry cleaning company located off-base.[35] Only after these findings did the military shut down the contaminated wells at Hadnot Point and Tarawa Terrace, with most closures occurring by February 1985.[36]

In addition, the water pollution at Hadnot Point posed problems for the Holcomb Boulevard system. While Holcomb Boulevard wells generally did not contain contamination, problems arose in instances where toxic water from Hadnot Point flowed through the Boulevard system.[37] For twelve days in early 1985, water from Hadnot Point supplied the Holcomb Boulevard plant during

30. *Camp Lejeune, North Carolina: Background*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, https://www.atsdr.cdc.gov/sites/lejeune/background.html [https://perma.cc/5DP8-QHLA] (last updated Jan. 16, 2014). VOCs present as a gas or dissolved in water. Water Res. Mission Area, *Volatile Organic Compounds (VOCs)*, U.S. GEOLOGICAL SURV. (Feb. 27, 2019), https://www.usgs.gov/mission-areas/water-resources/science/volatile-organic-compounds-vocs [https://perma.cc/4B2G-C2UG]. VOCs also exist nearly everywhere, with thousands of these chemicals used in a variety of applications, including in gasoline production, dry cleaning, and bleach. *Id.* While VOCs in surface water evaporate, VOCs in groundwater persist and can migrate into drinking water supply. *Id.*

31. *Volatile Organic Compounds*, AM. LUNG ASS'N, https://www.lung.org/clean-air/at-home/indoor-air-pollutants/volatile-organic-compounds [https://perma.cc/46GZ-QBZY] (last updated Nov. 2, 2023). Exposure to VOCs via water comes in three forms—inhalation, skin contact, and ingestion. COMM. ON CONTAMINATED DRINKING WATER AT CAMP LEJEUNE, NAT'L RSCH. COUNCIL, CONTAMINATED WATER SUPPLIES AT CAMP LEJEUNE: ASSESSING POTENTIAL HEALTH EFFECTS 68 (2009), https://www.ncbi.nlm.nih.gov/books/NBK215298/pdf/Bookshelf_NBK215298.pdf [https://perma.cc/8BNL-7Z2H]. Thus, in addition to drinking the water, base residents and employees also came into contact with the VOCs via daily activities such as hand washing and bathing. *Id.* at 68–69.

32. *Summary of the Water Contamination Situation at Camp Lejeune*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, https://www.atsdr.cdc.gov/sites/lejeune/watermodeling_summary.html [https://perma.cc/U53N-JQWP] (last updated Apr. 18, 2017).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

a shutdown.[38] And at various other times between 1972 and 1985, water from Hadnot Point supplemented the Holcomb Boulevard supply when dry conditions prevented the facility from keeping up with demand.[39]

These occurrences, in conjunction with the decades of contamination at Hadnot Point and Tarawa Terrace, had horrific impacts on human health that extended well beyond the stories of Catherine Daniels and Janey Ensminger.[40] Dr. Mike Gros, an ob-gyn who lived on base for three years in the early 1980s and experienced an "especially high exposure level" to water coming from Hadnot Point, later developed T-cell chronic leukemia.[41] The three daughters of Joan and Eddie Lewis, who resided at Camp Lejeune as young children in the 1960s, each had their own serious health problems later in life—the first developed a "baseball-sized" uterine tumor; the second had over twelve noncancerous tumors removed from her uterus; and the third lost half of a lung due to a rare disease.[42] Mike Partain, who also spent time on the base as a youngster, later received a rare male breast cancer diagnosis, a condition that gained national attention in the late 2000s after Partain and others discovered a cluster of over twenty men with both breast cancer and ties to Camp Lejeune.[43]

The water contamination did not spare infants and children either.[44] Indeed, residents of Jacksonville and Camp Lejeune called one section of the local cemetery "Baby Heaven" given the large number of infants buried there.[45] One family's story remains particularly harrowing. Louella and John Holliday moved to Camp Lejeune in 1973 with two healthy children.[46] The couple conceived a third child while on base, but Louella delivered the baby in Mississippi during a visit to her parents while her husband deployed.[47] Shortly after delivery, the doctor informed Louella that her newborn son, John Samuel Holliday Jr., had died.[48] Louella could not believe it, so the doctor left the room to take another look.[49] When the physician returned, he grimly told Louella that

38. *Id.*

39. *Id.*

40. *See supra* note 3 and accompanying text.

41. MAGNER, A TRUST BETRAYED, *supra* note 3, at 113–17.

42. *Id.* at 117–18.

43. *See id.* at 171–82.

44. *See id.* at 35–44 (detailing numerous gruesome stories about stillborn babies, babies born with birth defects, and children with adverse health outcomes at Camp Lejeune).

45. *Id.* at 39.

46. *Id.* at 39–40. The Holliday children experienced bizarre health effects once they arrived on base. *See id.* at 40. Louella later described how, before her daughter Angela even turned one, she "had such severe nosebleeds that blood came out of her eyes." *Id.* In addition, her four-year-old son William's face swelled up so badly at one point that the couple took him to the doctor. *Id.*

47. *Id.* at 39.

48. *Id.*

49. *See id.*

"the baby is alive, but you'd better pray for him to die because he's going to be a vegetable if he lives."[50] John Samuel Holliday Jr. died fifteen hours later.[51] Ultimately, in addition to the Daniels, Ensminger, Gros, Lewis, Partain, and Holliday families, experts estimate that the Camp Lejeune contamination could have exposed over one million people to toxic water.[52]

B. *The Legal Response to the Camp Lejeune Contamination and the History of the Military's Sovereign Immunity*

1. Initial Response and Notification

The Marine Corps responded slowly to the Camp Lejeune water contamination.[53] When the private contractor that conducted the 1982 tests informed the base about this contamination, the base chemist chose not to notify her superiors.[54] In a 1983 report to the EPA, officials at Camp Lejeune claimed no areas of the base "pose[d] an immediate threat to human health," and in one internal memo, the base chemist suggested that the testing presented anomalous results, though the testing contractor repeatedly warned of poisonous substances in the water.[55] In late 1983 and early 1984, the base even reduced the frequency with which it conducted water testing.[56] Perhaps the lack of other problem indicators, like the taste or the smell of the water, contributed to the military's indifference.[57] Only after another contractor discovered the prominent carcinogen benzene in mid-1984 did the military begin the process of shutting down Camp Lejeune's contaminated wells.[58]

Although the Marines shut down most of the contaminated wells at Camp Lejeune in 1985, military officials did not conduct further research or notify those affected until much later.[59] In fact, base officials initially characterized the shutdowns as "precautionary measures" and indicated that no direct human exposure to toxic chemicals occurred.[60] In the decades that followed, military

50. *Id.*
51. *Id.* at 40.
52. ATSDR, *Camp Lejeune*, *supra* note 1.
53. *See* Barrett, *supra* note 20.
54. *Id.*
55. *Id.*
56. *Id.*
57. *See* MAGNER, A TRUST BETRAYED, *supra* note 3, at 114 (offering anecdotal perspective that water contamination lacked physical indicators such as smell or taste abnormalities).
58. Barrett, *supra* note 20.
59. *See* MAGNER, A TRUST BETRAYED, *supra* note 3, at 97–215 (providing thorough treatment of the decades of back and forth between victims, military, Congress, and various other government agencies in response to the Camp Lejeune contamination).
60. Brief of Ensminger et al. as Amici Curiae Supporting Respondents at 14, CTS Corp. v. Waldburger, 573 U.S. 1 (2014) (No. 13-339) (quoting Jerry Allegood, *Civilians, Military Investigating Waste Dumps at Camp Lejeune*, NEWS & OBSERVER, Sept. 15, 1985, at 29A).

leadership also resisted requests for information and assistance in conducting studies examining the impacts of the contamination.[61] The resistance started to crumble in 2006, when Congress took action in response to mounting evidence of adverse impacts on human health by requiring the Marines to notify individuals of their possible exposure to toxic water at Camp Lejeune.[62] Congress built on these requirements in the 2008 National Defense Authorization Act, providing more specific notification procedures for those exposed to toxic water from the Hadnot Point and Tarawa Terrace systems.[63]

2. 2012 Law Providing Medical Benefits to Injured Individuals and the Pursuit of Department of Veterans Affairs Disability Claims

Another major step forward for those injured by Camp Lejeune's toxic water came in 2012, when President Barack Obama signed the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 ("2012 law").[64] Prior to the law's passage, veterans could seek basic medical coverage, including for preventative, inpatient, and emergency services, through the Department of Veterans Affairs ("VA") as a benefit provided for their previous service.[65] But for victims like Dr. Mike Gros, who suffered from T-cell chronic leukemia after working for three years as an ob-gyn at Camp Lejeune, such benefits did not cover the entire cost of health care.[66] Moreover, family members of servicemembers stationed on Camp Lejeune did not qualify for benefits.[67]

As a result, the 2012 law, also known as the Janey Ensminger Act, marked the first significant legislative victory for those seeking remuneration for

61. *See id.* at 14–15.

62. *See id.*; John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 318(b), 120 Stat. 2083, 2144 (2006).

63. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 315, 122 Stat. 3, 56–57 (2008).

64. Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 102, 126 Stat. 1165, 1167–69 (codified as amended in scattered sections of 38 U.S.C.).

65. *About VA Health Benefits*, DEP'T VETERANS AFFS., https://www.va.gov/health-care/about-va-health-benefits/ [https://perma.cc/8BEN-R9DW] (last updated Aug. 29, 2023).

66. MAGNER, A TRUST BETRAYED, *supra* note 3, at 231–32 ("Most of Gros's medical bills were covered by the VA and later Medicare, but some of his estimated $12 million in health-care costs—which mounted as Gros faced complications from a bone-marrow transplant that included 'graft versus host' disease and numerous side effects from treatments—had come out of his own pocket. Not to mention the losses he sustained after being unable to continue his practice as an Ob/Gyn in Texas."). Indeed, most victims that filed claims sought "to recover millions of dollars in health-care costs, lost wages, and damages for pain and suffering." *Id.* at 233.

67. *See id.* at 244–46 (discussing concern that providing medical benefits to veterans' family members exposed to Camp Lejeune's toxic water could add one million people to VA system).

adverse health effects caused by Camp Lejeune's water contamination.[68] Specifically, the law provided veterans stationed on Camp Lejeune and exposed to toxic water for at least thirty days between 1957 and 1987 with enhanced medical benefits through the VA if they presented with any of fifteen enumerated illnesses.[69] In addition, the law extended the VA medical benefits coverage to family members of veterans that resided on Camp Lejeune for at least thirty days during the same period, including those in utero.[70] Still, the legislation did not cover all affected individuals; the thirty-day exposure requirement prevented some potential victims from receiving compensation entirely, like children born with birth defects years after their parent(s) moved off base.[71]

Moreover, while the law provided servicemembers and their families with medical benefits, it did not provide an avenue for financial compensation, leaving veterans to seek full remuneration via the VA disability claims process.[72] At first glance, the VA disability compensation system would seem to give veterans with Camp Lejeune claims an advantage in the form of a more lenient causation requirement compared to the "preponderance of the evidence" standard plaintiffs must ordinarily meet in civil court.[73] Under the VA standard, veterans "have the burden of proving that their disability is 'at least as likely as not' related to military service," with the VA describing "the standard as equal to or greater than 50%, a more favorable standard than Social Security disability

68. Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 § 101; Magner, *Long Push*, *supra* note 3. Jerry Ensminger lost his daughter to leukemia and connected her death to Camp Lejeune's toxic water after seeing a television report in 1997. Magner, *Long Push*, *supra* note 3. He subsequently played, and continues to play, a key role in the advocacy efforts that resulted in the passage of the 2012 benefits legislation and the CLJA. *See id.*

69. Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 § 102; *see also Additional VA Health Benefits Programs*, DEP'T VETERANS AFFS., https://www.va.gov/healthbenefits/resources/publications/hbco/hbco_additional_health_programs.asp [https://perma.cc/YC5Z-W52D] (last updated Apr. 2, 2018) [hereinafter DEP'T VETERANS AFFS., *Additional VA Health Benefits Programs*]. The conditions outlined in the statute include: esophageal, lung, breast, bladder, and kidney cancers; leukemia; multiple myeloma; myelodysplastic syndromes; renal toxicity; hepatic steatosis; female infertility; miscarriage; scleroderma; neurobehavioral effects; and Non-Hodgkin's lymphoma. Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 § 102.

70. Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 § 102.

71. John W. Hamilton, Note, *Contamination at U.S. Military Bases: Profiles and Responses*, 35 STAN. ENV'T L.J. 223, 245–46 (2016). The enactment of the thirty-day eligibility period represented a compromise between Senator Richard Burr (R-NC) and the VA over the estimated cost of providing benefits to Camp Lejeune victims, with the VA concerned a blanket provision would result in $4 billion of spending over ten years. MAGNER, A TRUST BETRAYED, *supra* note 3, at 245–46.

72. Hamilton, *supra* note 71, at 245.

73. Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 285–86 (2019).

or workers' compensation cases."[74] In addition, like civil personal injury judgments, the VA delivers disability compensation to veterans tax free.[75]

Despite this pro-veteran structure, however, pursuit of relief via the VA disability compensation system largely proved futile for veterans.[76] By February of 2015, the VA adjudicated 9,636 claims related to contaminated water exposure at Camp Lejeune, denying over 92% of the requests.[77] The low success rate stemmed in part from the heavy burden veterans and family members faced in proving their cases before the VA; varied amounts of exposure and long latency periods made it difficult for individuals to provide the medical evidence required to win VA approval of their claims, even with the more favorable causation standard available.[78]

In response, the VA promulgated regulations in March of 2017 that established a presumptive service connection for eight conditions associated with the water contamination.[79] Presumptions represent one way that the VA's Veterans Benefits Administration ("VBA") attempts to ease the process for veterans to obtain disability compensation.[80] Where a "presumptive" service connection exists, the VA "presumes that certain disabilities were caused by military service . . . because of the unique circumstances of a specific Veteran's military service."[81] However, veterans must still get over some hurdles to avail themselves of a presumptive service connection. In the Camp Lejeune context, 38 C.F.R. § 3.307(a)(7) outlines some minimum requirements, such as the thirty-day exposure period on the base also outlined in the 2012 law.[82] Meanwhile, section 3.307(d) provides the military with an opportunity to file affirmative rebuttal evidence.[83]

74. *Id.* For an example of this in practice, see 38 C.F.R. § 3.317(d)(2) (2022), which delineates the "at least as likely as not" standard in the context of disability compensation for Gulf War veterans.

75. *Compensation*, DEP'T VETERANS AFFS., https://benefits.va.gov/compensation/ [https://perma.cc/68S3-DNLX] (last updated May 31, 2022).

76. *See infra* Section I.B.3.

77. *See Updated VA Claims Information and Stats*, CIVILIAN EXPOSURE, https://www.civilianexposure.org/updated-va-claims-information-and-stats/ [https://perma.cc/WGU3-XAF2] (last updated Apr. 2015).

78. Hamilton, *supra* note 71, at 245.

79. OFF. OF INSPECTOR GEN., DEP'T OF VETERANS AFFS., REPORT NO. 21-03061-209, IMPROVED PROCESSING NEEDED FOR VETERANS' CLAIMS OF CONTAMINATED WATER EXPOSURE AT CAMP LEJEUNE 1–2 (2022), https://www.va.gov/oig/pubs/VAOIG-21-03061-209.pdf [https://perma.cc/5934-M77D]. The conditions included adult leukemia, aplastic anemia and other myelodysplastic syndromes, bladder cancer, kidney cancer, liver cancer, multiple myeloma, non-Hodgkin lymphoma, and Parkinson's disease. *Id.* at 1. For the regulatory provisions, see 38 C.F.R. §§ 3.307–3.309.

80. *See* VETERANS BENEFIT ADMIN., DEP'T OF VETERANS AFFS., PRESUMPTIVE DISABILITY BENEFITS, https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/presumption.pdf [https://perma.cc/LP5L-47B7 (staff-uploaded archive)] (last updated Oct. 2022).

81. *Id.*

82. 38 C.F.R. § 3.307(a)(7)(i)–(iv).

83. *Id.* § 3.307(d)(2).

Even with the regulatory presumption in place, however, servicemembers' prospects for receiving disability compensation remained low. Between the enactment of the presumption in 2017 and March 31, 2021, the VBA adjudicated roughly 57,500 Camp Lejeune-based water contamination claims for both presumptive and nonpresumptive conditions.[84] The VBA denied over 70% of these claims, with nearly 90% of the denials issued in response to claims centered around nonpresumptive conditions.[85] The VA also estimated in August of 2022 that the VBA incorrectly adjudicated nearly 21,000 claims (37% of the total), including prematurely denying roughly 17,200 submissions before even sending required letters to veterans detailing the evidence needed to process their claims.[86] Overall, the VA Office of the Inspector General ("VA OIG") estimates that these errors resulted in at least $13.8 million in underpayments to servicemembers, with the actual figure potentially much higher given that the VA OIG did not include the monetary impact of premature claim denials in its calculations.[87]

3. Pursuit of a Remedy in Court

With the imperfect coverage provided by the 2012 law and the difficulties faced in obtaining compensation from the VA, aggrieved individuals tried their luck in court.[88] But until the passage of the CLJA, these individuals found little success. Indeed, the bulk of the attention—and frustration—surrounding the Camp Lejeune water contamination in the legal context concerned the inability of injured veterans, their family members, and base staff to receive financial compensation for the harm caused.[89] This subsection proceeds in three parts. First, it will outline a key obstacle preventing plaintiffs from accessing the justice system: the military's sovereign immunity as preserved by the Federal Tort Claims Act and the *Feres* doctrine. Second, it will discuss the Supreme Court's decision in *CTS Corp. v. Waldburger*,[90] which, until passage of the CLJA, posed another barrier in the context of Camp Lejeune water contamination claims.[91] Third, it will outline the administrative claims process for medical malpractice allegations that Congress enacted via the 2020 NDAA. In tackling these issues and the recent developments pushing back on the current sovereign immunity doctrine embodied by the FTCA and *Feres*, this section will set the stage for broader consideration of the CLJA and what it means for the future of the military's sovereign immunity from civil lawsuits.

84. OFF. OF INSPECTOR GEN., DEP'T OF VETERANS AFFS., *supra* note 79, at 2.
85. *Id.*
86. *Id.* at 7.
87. *See id.* at 11 & n.36.
88. Magner, *Long Push*, *supra* note 3.
89. *See id.*
90. 573 U.S. 1 (2014).
91. *Id.* at 1, 3–4.

a. Obstacle I: The Military's Sovereign Immunity

The military's sovereign immunity from civil lawsuits represents the most significant barrier to Camp Lejeune plaintiffs.[92] For most of America's history, the English common law rule of "the king can do no wrong" precluded citizens from seeking legal redress against the State in a court of law.[93] In other words, the State retained sovereign immunity.[94] Instead, to obtain damages from the federal government, an individual had to petition Congress for "private" legislation.[95] This system posed significant hardships for citizens, including the sheer effort required to elicit individualized congressional action.[96]

But in 1946, Congress enacted a major reform in the sovereign immunity space via the Federal Tort Claims Act.[97] The FTCA allows individuals to sue the United States

> for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[98]

Although the FTCA allows citizens to sue the federal government, the lawsuits it authorizes look markedly different from those filed by ordinary private citizens against other private parties.[99] First, plaintiffs in an FTCA lawsuit generally cannot receive a jury trial.[100] Second, the statute expressly exempts the government from liability for interest prior to judgment and punitive damages.[101] Third, the law caps attorneys' fees at 25% of any judgment rendered.[102] Fourth, the government stands in the shoes of its employees and

92. *See* Feres v. United States, 340 U.S. 135, 146 (1950) (barring claims arising "incident to service").

93. Edwin M. Borchard, *Governmental Responsibility in Tort* (pt. 6), 36 YALE L.J. 1, 17 (1926).

94. *Id.* at 38.

95. MICHAEL D. CONTINO & ANDREAS KUERSTEN, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 4 (2023), https://crsreports.congress.gov/product/pdf/R/R45732 [https://perma.cc/R55W-7XZ6 (staff-uploaded archive)].

96. *See id.* at 4–5 (discussing problems with private bill system).

97. *Id.*; Federal Tort Claims Act, ch. 753, §§ 401–424, 60 Stat. 812, 842–47 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671–2680).

98. 28 U.S.C. § 1346(b)(1).

99. *See* MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 248–50 (11th ed. 2021) (outlining key provisions of statute, many of which differ from private tort suits).

100. 28 U.S.C. § 2402 (providing narrow exception for actions to recover taxes "erroneously or illegally assessed or collected" and similar claims).

101. *Id.* § 2674.

102. *Id.* § 2678.

officials—the FTCA provides a remedy against the government, not individuals working for the government.[103] Lastly, the FTCA remains fraught with exceptions and only provides a limited waiver of immunity.[104]

One such limit deals explicitly with the military: the combatant activities exception.[105] Specifically, this exemption bars claims "arising out of the combatant activities of the military . . . during time of war,"[106] operating to "preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit."[107] Courts thus apply the combatant activities exception to bar claims resulting from activities involving "physical violence" or activities "both necessary to and in direct connection with actual hostilities."[108] For example, the Ninth Circuit distinguished between direct and indirect aid to combat in determining where to draw the line.[109] In *Johnson v. United States* (1948),[110] the Ninth Circuit held that ships discharging "oils, sewage, and other noxious matter" into water while awaiting assignment in port following World War II did not constitute a combatant activity, in contrast to "supplying ammunition to fighting vessels in a combat area during war," which did.[111]

In addition to this statutory carveout, the Supreme Court's decision in *Feres v. United States*[112] significantly expanded the scope of the military's immunity from civil lawsuits beyond those implicating combatant activities.[113]

While *Feres* serves as the seminal case in this area, development of the Court's modern military sovereign immunity doctrine began one year prior in *Brooks v. United States*.[114] In *Brooks*, a truck driven by an Army employee struck a car containing the Brooks brothers—active duty servicemembers—and their

103. *Id.* § 2679(b).

104. CONTINO & KUERSTEN, *supra* note 95, at 16–17; *see also* 28 U.S.C. § 2680 (listing exceptions). In the military context, relevant exceptions include the discretionary function exception, which prohibits claims based on actions taken by government officials while "exercising due care, in the execution of a statute or regulation," 28 U.S.C. § 2680(a), and the combatant activities exception, *id.* § 2680(j). Of these, this section will focus on the combatant activities exception, as it more directly implicates Camp Lejeune contaminated water claims.

105. CONTINO & KUERSTEN, *supra* note 95, at 28–29.

106. 28 U.S.C. § 2680(j).

107. Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009).

108. Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948). Section II.B *infra* discusses the likely nonapplicability of the combatant activities exception in the Camp Lejeune claims context. *See infra* notes 190–93 and accompanying text.

109. *Johnson*, 170 F.2d at 768–70.

110. 170 F.2d 767 (9th Cir. 1948).

111. *Id.* at 768–70.

112. 340 U.S. 135 (1950).

113. *Id.* at 146; CONTINO & KUERSTEN, *supra* note 95, at 30–32.

114. 337 U.S. 49 (1949); *see also Feres*, 340 U.S. at 138 (referring to the question of whether servicemembers could sue for injuries incident to service, left open by the *Brooks* decision).

father.[115] The accident occurred while the trio traversed a public highway on leave away from their duty station, inflicting death and serious injury.[116] The Court allowed the Brooks' claims to proceed, as the accident "had nothing to do with the Brooks' army careers."[117] However, the Court noted that should a claim involve an accident "incident to the Brooks' service," it would present "a wholly different case."[118]

Presented with this question in *Feres*, the Court distinguished *Brooks* and held that servicemembers could not sue the federal government for injuries sustained "in the course of activity incident to service."[119] Specifically, the Court employed this broad holding to bar three claims from proceeding: two claims for medical malpractice against Army personnel for care provided during the servicemember's service, and one wrongful death claim against the Army alleging negligence in failing to ensure the safety of barracks that later burned down, resulting in the death of the plaintiff Feres.[120] The Court provided three overarching reasons for this distinction.[121] First, the Court noted that prior to the FTCA, no common law rule allowed soldiers to recover for the military's negligence.[122] Because no private individual could recover under like circumstances, the servicemembers could not state claims here.[123] Second, the Court added that servicemembers already enjoyed access to a "favorable" compensation system, a structure the Court emphasized given the "peculiar disadvantage" servicemembers face in litigation due to a variety of factors, including limited time and money.[124] Third, the Court rejected the notion that Congress intended the FTCA to allow such claims because of the fact that federal law governed the relationship between servicemembers and the government.[125] If such claims proceeded, state tort law would control instead.[126]

Subsequent decisions in the *Feres* line introduced a new reasoning for the incident to service exception to the FTCA: the military discipline rationale.[127]

115. *Brooks*, 337 U.S. at 50.

116. *See id.*

117. *Id.* at 52.

118. *Id.*

119. *Feres*, 340 U.S. at 146.

120. *Id.* at 136–37.

121. Robert A. Diehl, Student Article, Feres *Lives: How the Military Medical Malpractice Administrative Claims Process Denies Servicemembers Adequate Compensation*, 60 DUQ. L. REV. 172, 177–79 (2022).

122. *Feres*, 340 U.S. at 141.

123. *Id.* at 141–42. This first rationale follows directly from the text of the FTCA, which provides that "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," the lawsuit could proceed. Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1).

124. *Feres*, 340 U.S. at 145.

125. *Id.* at 146.

126. *Id.*

127. *See* Diehl, *supra* note 121, at 180–83.

In *United States v. Brown*,[128] the Court rearticulated the *Feres* rationale as based on "[t]he peculiar and special relationship of the soldier to his superiors, *the effects of the maintenance of such suits on discipline*, and *the extreme results that might obtain if suits* [could proceed] *for negligent orders given or negligent acts committed in the course of military duty*."[129] Such justification would continue to arise in later cases decided under *Feres*.[130] Still, in *United States v. Johnson* (1987),[131] the last case to address a serious challenge to *Feres*,[132] the Court returned to the *Feres* Court's three-part rationale: (1) no common law rule authorized recovery, (2) servicemembers could otherwise obtain compensation, and (3) federal law needed to control the relationship between servicemembers and the government.[133] The Court again barred a claim along these lines, cementing the broad applicability of the *Feres* doctrine in modern jurisprudence.[134]

In the Camp Lejeune context, the *Feres* doctrine precluded servicemembers and family members from pursuing judicial remedies for damages before the passage of the CLJA.[135] One recent Fourth Circuit opinion, *Clendening v. United States*,[136] illustrates federal courts' use of *Feres* to dismiss Camp Lejeune claims.[137] There, the widow of a former Judge Advocate General in the Marine Corps brought a wrongful death lawsuit alleging her husband's death stemmed from drinking contaminated water while the couple lived in the Hadnot Point area of Camp Lejeune for a year and a half in the early 1970s.[138] The plaintiff, Carol Clendening, specifically claimed that her husband's exposure caused the onset of leukemia, Waldenstrom macroglobulinemia, and chronic lymphoblastic lymphoma, conditions that later resulted in his death.[139] Though the court acknowledged sympathy for the plaintiff, it barred the claim on *Feres* grounds, explaining that Clendening's claim, like that in *Feres*, involved an assertion of injuries due to unsafe living conditions on a military base.[140] Moreover, the *Clendening* court emphasized that *Feres* will bind federal courts

128. 348 U.S. 110 (1954).

129. *Id.* at 112 (emphasis added).

130. *See* Diehl, *supra* note 121, at 181.

131. 481 U.S. 681 (1987).

132. *See* Diehl, *supra* note 121, at 182.

133. *Johnson*, 481 U.S. at 689–90.

134. *Id.* at 691–92.

135. *See, e.g.*, *In re* Camp Lejeune N.C. Water Contamination Litig., 263 F. Supp. 3d 1318, 1342 (N.D. Ga. 2016) (rejecting consolidated claims in part based on *Feres*), *aff'd*, 774 F. App'x 564 (11th Cir. 2019); Clendening v. United States, 19 F.4th 421, 431 (4th Cir. 2021) (rejecting claim in part based on *Feres*), *cert. denied*, 143 S. Ct. 11 (2022); Swanson v. United States, 845 F. App'x 690, 691 (9th Cir. 2021) (rejecting claim based on *Feres*); Gros v. United States, 232 F. App'x 417, 419 (5th Cir. 2007) (rejecting claim based on *Feres*).

136. 19 F.4th 421 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 11 (2022).

137. *See id.* at 428, 431.

138. *Id.* at 425.

139. *Id.*

140. *Id.* at 428, 431.

until the Supreme Court says otherwise.[141] The Supreme Court then denied certiorari.[142]

But despite the Supreme Court's entrenched position, the *Feres* doctrine faces extensive criticism. In his dissent in *Johnson* (1987), Justice Scalia, joined by Justices Brennan, Marshall, and Stevens,[143] labeled *Feres* as "wrongly decided," deserving of the "widespread, almost universal criticism" it receives, and resulting in "unfairness and irrationality."[144] For instance, lawsuits against private entities whose negligent maintenance of heating facilities leads to fire and death (similar to what occurred in *Feres*) can certainly proceed.[145] And in the medical malpractice context, citizens routinely file successful lawsuits against private health care providers.[146] Indeed, it seems unfair and irrational that servicemembers suffering these same injuries remain unable to sue simply because the claims accrued while they wore the uniform.

Since Justice Scalia's pronouncement in *Johnson* (1987), Justice Thomas echoed the call for reform on four occasions in dissenting from denials of certiorari in cases involving claims barred by the *Feres* doctrine.[147] In his dissent in *Daniel v. United States*,[148] Justice Thomas emphasized perceived distortions in law caused by the *Feres* doctrine, highlighting the Court's decision in *Air & Liquid Systems Corp. v. DeVries*.[149] In *DeVries*, the Supreme Court held that veterans suffering from asbestos-related cancer could sue the original manufacturer of the parts later installed on Navy ships that exposed the servicemembers to asbestos, despite the fact that the manufacturer delivered the parts to the Navy without asbestos and that the Navy added the asbestos to the parts.[150] According to Justice Thomas, the decision in *DeVries* "twisted

141. *Id.* at 431.

142. Clendening v. United States, 143 S. Ct. 11, 11 (2022) (denying certiorari).

143. *See* United States v. Johnson, 481 U.S. 681, 692–703 (1987) (Scalia, J., dissenting). The *Johnson* decision represented a peculiar 5-4 split—three liberal justices joined the conservative stalwart Scalia in lambasting the *Feres* doctrine, showing how criticism of the *Feres* doctrine transcends partisanship.

144. *Id.* at 700–01, 703 (internal quotations omitted) (quoting *In re* Agent Orange Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)).

145. *See* Cooper T. Fyfe, Comment, *The Detrimental Pitfall of the FTCA: Overturning* Feres *& Endorsing the Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019*, 52 TEX. TECH L. REV. 877, 904 (2020).

146. *See id.*

147. Lanus v. United States, 570 U.S. 932, 932–33 (2013) (Thomas, J., dissenting); Daniel v. United States, 139 S. Ct. 1713, 1713–14 (2019) (Thomas, J., dissenting); Doe v. United States, 141 S. Ct. 1498, 1498–500 (2021) (Thomas, J., dissenting); *Clendening*, 143 S. Ct. at 11–14 (Thomas, J., dissenting). In *Daniel*, Justice Ginsburg also supported granting the plaintiff's petition for certiorari. *Daniel*, 139 S. Ct. at 1713.

148. 139 S. Ct. 1713 (2019).

149. 139 S. Ct. 986 (2019); *Daniel*, 139 S. Ct. at 1713–14.

150. *See DeVries*, 139 S. Ct. at 991.

traditional tort principles to afford [servicemembers] the possibility of relief."[151] More recently, in *Doe v. United States*,[152] a case barred by *Feres* involving an alleged rape at the United States Military Academy at West Point, Justice Thomas again stressed the incongruous outcomes in *Feres*-related cases, stating that "[a]t a minimum, we should take up this case to clarify the scope of the immunity we have created."[153] Still, despite Justice Thomas's spirited effort, the *Feres* doctrine remains the law of the land.[154]

b. Obstacle II: CTS Corp. v. Waldburger

In addition to the FTCA and the *Feres* doctrine, the Supreme Court's decision in *CTS Corp. v. Waldburger*[155] posed a unique barrier in the Camp Lejeune claims context.[156] In particular, the *Waldburger* holding ultimately prevented nonservicemember plaintiffs, including family members, from seeking relief in court.[157] The case arose from CTS Corporation's operation of an electronics manufacturing plant in Asheville, North Carolina, from 1959 to 1985.[158] Part of the manufacturing process involved storing TCE and 1,2-dichloroethane ("DCE"), chemicals also associated with the Camp Lejeune water contamination.[159] After the plant closed, individual property owners bought the surrounding land, later learning from the EPA in 2009 that TCE and DCE polluted their well water.[160] As a result, the landowners sued CTS in 2011, twenty-four years after the company sold the property.[161] CTS moved for dismissal, pointing to North Carolina's statute of repose law, which bars tort suits brought more than ten years after the defendant's last culpable act.[162] The landowners countered that the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") preempted

151. *Daniel*, 139 S. Ct. at 1714. For further reading on the absurd result reached in *DeVries*, see generally Packer, *supra* note 11.

152. 141 S. Ct. 1498 (2021).

153. *Id.* at 1499.

154. *See* Clendening v. United States, 143 S. Ct. 11, 12–13 (2022).

155. 573 U.S. 1 (2014).

156. *Id.* at 18 (holding North Carolina's statute of repose barred Camp Lejeune claims). In a coincidence, the *Waldburger* decision also arises from a case originating in North Carolina. *Id.* at 5. However, the *Waldburger* decision no longer poses a problem in the Camp Lejeune context, as the CLJA expressly allows a route around this obstacle, discussed in more detail in Part II *infra*.

157. *See In re* Camp Lejeune N.C. Water Contamination Litig., 263 F. Supp. 3d 1318, 1340–41 (N.D. Ga. 2016) (rejecting consolidated claims of nonservicemembers in part based on *Waldburger*), *aff'd*, 774 F. App'x 564 (11th Cir. 2019). The Northern District of Georgia also barred nonservicemember claims based on the FTCA's discretionary function exception. *Id.* at 1343–47. However, as discussed *infra* in Section II.B, the CLJA, in addition to abrogating plaintiffs' *Waldburger* problem, prevents the government from asserting its discretionary function defense under the FTCA.

158. *Waldburger*, 573 U.S. at 5.

159. *Id.*

160. *Id.* at 5–6.

161. *Id.* at 6.

162. *Id.*

the North Carolina statute of repose.[163] The Supreme Court then issued a blow to the landowners and other plaintiffs, like those with Camp Lejeune claims, holding that CERCLA does not preempt state statute of repose laws.[164]

Following the *Waldburger* ruling, the North Carolina General Assembly amended North Carolina's statute of repose law to exempt tort claims based on groundwater contamination, noting that the change would apply to cases currently pending.[165] But the Eleventh Circuit soon ruled in *Bryant v. United States*[166] that the law could only apply prospectively.[167] As a result, the government could assert the *Waldburger* holding as a defense to claims involving injury from exposure to contaminated water, provided that the plaintiff filed the claim more than ten years after the defendant's last culpable act. On remand, the United States District Court for the Northern District of Georgia then concluded that the statute of repose indeed barred plaintiffs' claims along on this ground.[168]

c. The 2020 National Defense Authorization Act

While the Supreme Court continues to affirm *Feres*, Congress recently carved out a minor exception in the area of medical malpractice. Specifically, in the 2020 National Defense Authorization Act ("2020 NDAA"), Congress authorized servicemembers to pursue military medical malpractice claims via an administrative process.[169] In this form, the 2020 NDAA medical malpractice

163. *See id.* at 3–7. CERCLA provides a mechanism to clean up hazardous waste sites, with a cause of action to recover cleanup costs. *Id.* at 4. The law does not provide a cause of action for personal injury caused by such contamination. *Id.* However, when Congress enacted CERCLA in 1980, the law mandated preparation of a report examining whether existing legal doctrine provided an adequate means of redress for those injured by hazardous waste contamination. *Id.* at 4–5. The report recommended that states repeal both statutes of limitation and statutes of repose laws that operated to bar claims before the plaintiff even knew they suffered an injury, which could pose a problem in the hazardous waste claims context given long latency periods before discovery of harm. *Id.* at 5. In response, Congress amended CERCLA to preempt state statutes of limitation where the commencement period for hazardous waste injury claims began earlier than when the plaintiff discovered or reasonably should have discovered the injury. *See id.*; 42 U.S.C. § 9658(a)(1), (b)(4)(A). But the amendment remained silent as to whether CERCLA also preempted state statutes of repose, giving rise to the *Waldburger* case, as the North Carolina statute of repose would operate to preclude the plaintiffs' claims unless a court found the CERCLA provision applied to state statutes of repose as it did to state statutes of limitation. *See Waldburger*, 573 U.S. at 5.

164. *Waldburger*, 573 U.S. at 18–19.

165. Bryant v. United States, 768 F.3d 1378, 1380–82 (11th Cir. 2014).

166. 768 F.3d 1378 (11th Cir. 2014).

167. *Id.* at 1385. The *Bryant* case constituted a multidistrict litigation in which the United States District Court for the Northern District of Georgia ultimately heard plaintiffs' Camp Lejeune claims as one, making the Eleventh Circuit the appropriate appeals court despite the issue concerning North Carolina law. *See id.* at 1379–81.

168. *In re* Camp Lejeune N.C. Water Contamination Litig., 263 F. Supp. 3d 1318, 1362 (N.D. Ga. 2016).

169. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1457–60 (codified at 10 U.S.C. § 2733a).

provision does not get around the *Feres* doctrine by allowing lawsuits—it authorizes administrative claims only.[170] In fact, by allowing medical malpractice claims via an administrative process, Congress dialed back the underlying legislative provision, which would have waived *Feres* in the medical malpractice context.[171] Indeed, key policymakers opposed the enactment of a statutory exception to *Feres*, stating publicly that claims in the military context remain of a different character because of the availability of comprehensive benefits via the VA system,[172] a policy point highlighted throughout the Department of Defense's ("DoD") regulations implementing the eventual carveout.[173] For instance, in its regulations, DoD explicitly noted that the medical malpractice claims process stands apart from other "comprehensive" benefits available to servicemembers.[174] However, DoD cautioned that this option in the medical malpractice context operates as a substitute to other available compensation mechanisms like VA disability claims, with the regulations mandating an offset to prevent duplicitous awards.[175]

The administrative process also differs from a tort lawsuit in several other key respects. First, the regulations do not authorize payment of attorneys' fees by the government, as the DoD classifies the procedure as nonadversarial, with no prevailing party.[176] Second, some military providers may remain insulated from claims, as the FTCA's "discretionary function" exception, among others, applies.[177] Third, the regulations bar third-party claims, such as those of injured

170. Diehl, *supra* note 121, at 183–84.

171. *Id.* The original policy proposal, known as the Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019, would have expressly abrogated *Feres* in regard to claims of medical malpractice against the military by creating a statutory cause of action. SFC Richard Stayskal Military Medical Accountability Act of 2019, S. 2451, 116th Cong.

172. *Bill That Would Give Soldiers Right To Sue Government for Medical Malpractice Stalls in Senate*, QUEEN CITY NEWS (Oct. 15, 2019, 12:06 AM), https://www.qcnews.com/news/bill-that-would-give-soldiers-right-to-sue-government-for-medical-malpractice-stalls-in-senate/ [https://perma.cc/4PNZ-M4PK]. In addition to vocal opposition, the Military Medical Accountability Act of 2019 never received much support, garnering only two cosponsors in the Senate and only sixteen in the House. *S.2451 – SFC Richard Stayskal Military Medical Accountability Act of 2019: Cosponsors*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/2451/cosponsors, [https://perma.cc/B3JF-5348 (staff-uploaded archive)]; *H.R.2422 – SFC Richard Stayskal Military Medical Accountability Act of 2019: Cosponsors*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/2422/cosponsors [https://perma.cc/5DKQ-FNJ4 (staff-uploaded archive)].

173. *See* 32 C.F.R. §§ 45.1(b), 45.11 (2022).

174. *Id.* § 45.1(b).

175. *Id.*

176. *Id.* § 45.2(d).

177. *Id.* § 45.2(f)(1)(i)–(iii). The FTCA retains sovereign immunity where the governmental actor's decision-making derives from broader social, political, or economic considerations, preventing courts from second-guessing officials as they attempt to navigate these factors. *See* Cope v. Scott, 45 F.3d 445, 447–48 (D.C. Cir. 1995). The discretionary function exception applies in the medical malpractice administrative claims context; however, it will likely only rarely come into play, if at all.

family members.[178] Fourth, the regulations impose special damages calculation methods, including use of the VA Schedule for Rating Disabilities[179] and, as discussed above, deducting expenses paid through other compensation.[180] Fifth, the administrative process provides a final resolution, as claimants cannot seek judicial review of DoD decisions,[181] though the regulations do establish an administrative appeals process.[182]

Thus, *Feres* remains intact as a seemingly insurmountable obstacle for civil claims filed against the military, including for those seeking remuneration from exposure to toxic water at Camp Lejeune. At the same time, however, both judges (e.g., the Supreme Court in *DeVries*) and legislators (e.g., Congress via the 2020 NDAA) have recognized that, in some circumstances, servicemembers should have an avenue for relief, though no consensus exists for how to best provide it.

II. THE CAMP LEJEUNE JUSTICE ACT OF 2022

The Camp Lejeune Justice Act of 2022 builds on previous legislative accomplishments in the Camp Lejeune water contamination and military medical malpractice context while circumventing the obstacles posed by the *Feres* doctrine and *Waldburger*. This part proceeds in three sections. First, it briefly outlines the events leading to the CLJA's passage. Second, it unpacks the mechanics of the CLJA and identifies areas of uncertainty. Third, it discusses the status of the CLJA litigation as of the publication of this Comment, including how stakeholders, the Navy, and the United States District Court for the Eastern District of North Carolina have handled the law's complexities to date.

A. *Enactment*

The congressional effort to enact the CLJA took nearly three years. Representative Matt Cartwright (D-PA) and Senator Thom Tillis (R-NC) first introduced House and Senate versions of the CLJA in 2020.[183] But only after the bill's third introduction in the House in early 2022 did the chamber pass the legislation, doing so as part of the broader VA disability compensation

See, e.g., Sigman v. United States, 217 F.3d 785, 795 (9th Cir. 2000) (referencing "well-established principle" that the discretionary function exception does not apply to "claims of garden-variety medical malpractice").

178. 32 C.F.R. § 45.3(b).

179. *Id.* § 45.8(a).

180. *Id.* §§ 45.9, 45.11.

181. *Id.* § 45.14(a).

182. *Id.* § 45.13.

183. Camp Lejeune Justice Act of 2020, H.R. 6204, 116th Cong.; Camp Lejeune Justice Act of 2020, S. 4716, 116th Cong. The pair reintroduced similar versions of the bill in 2021. Camp Lejeune Justice Act of 2021, H.R. 2192, 117th Cong; Camp Lejeune Justice Act of 2021, S. 3176, 117th Cong.

reform effort found in the PACT Act.[184] Despite this positive momentum, however, procedural complexity and partisan wrangling slowed the legislation in the Senate, with final passage not occurring until later in the summer.[185] President Biden then signed the package into law on August 10, 2022.[186]

184. Camp Lejeune Justice Act of 2022, H.R. 6482, 117th Cong. (2022); Honoring Our PACT Act of 2022, H.R. 3967, 117th Cong. § 804 (as passed by Senate, June 16, 2022). On February 22, 2022, the House Committee on Veterans' Affairs reported—and the House Committee on Armed Services discharged—separate legislation, the Honoring Our Promise to Address Comprehensive Toxics Act of 2022. Honoring Our PACT Act of 2021, H.R. 3967, 117th Cong. (as reported by H.R. Comm. on Veterans' Affs., Feb. 22, 2022). At this time, the PACT Act did not contain the CLJA's text. *Id.* However, when the House Committee on Rules submitted the PACT Act to the full House of Representatives on February 28, 2022, the Committee added the CLJA to the bill. *H.R. 3967 – Honoring Our PACT Act of 2022: Actions*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/3967/all-actions [https://perma.cc/GVC2-K6Q3 (staff-uploaded archive)] [hereinafter CONGRESS.GOV, *House PACT Act: Actions*]; STAFF OF H.R. COMM. ON RULES, 117TH CONG., TEXT OF H.R. 3967, THE HONORING OUR PACT ACT (Comm. Print 2022); *Comparative Print: Bill to Bill Differences*, H.R. COMM. ON RULES (Feb. 23, 2022, 11:22 AM), https://rules.house.gov/sites/democrats.rules.house.gov/files/CP-117HR3967RH-RCP117-33.pdf [https://perma.cc/8NFT-FTVV (staff-uploaded archive)]. The inclusion of the CLJA in the PACT Act likely stems from coordinated advocacy efforts on the bill's behalf, bolstered by the fact that Representative Deborah Ross (D-NC) sat on the House Committee on Rules, an important position. Press Release, Chairman McGovern Welcomes Members to the House Rules Committee for the 117th Congress (Jan. 8, 2021), https://rules.house.gov/press-releases/chairman-mcgovern-welcomes-members-house-rules-committee-117th-congress [https://perma.cc/YU5A-XMKG]. Indeed, during the Committee's consideration of the PACT Act, Rep. Ross spoke out in direct support of the legislation, noting that it now included the CLJA. *Rules Committee Meeting on H.R. 3967*, H.R. COMM. ON RULES (Feb. 28, 2022), https://rules.house.gov/video/rules-committee-meeting-hr-3967 [https://perma.cc/6TA6-KEDL] (beginning around timestamp 1:09:00). While the PACT Act title notes a date of 2022, the 2022 version of the bill represents the version introduced on June 17, 2021. CONGRESS.GOV, *House PACT Act: Actions*, *supra*.

185. The Senate did not pass the House text of the PACT Act until June 16, 2022, by a vote of 84 to 14. 168 CONG. REC. S2991 (daily ed. June 16, 2022) (cataloging roll call vote). Interestingly, Senators Thom Tillis (R-NC) and Richard Burr (R-NC), Senate sponsors of the CLJA, voted against the PACT Act in the Senate. *Id.* But this version did not go to President Biden's desk. Honoring Our PACT Act of 2022, H.R. 3967, 117th Cong. (as passed by Senate, June 16, 2022). Instead, the House reconsidered the PACT Act as the text of S. 3373, passing it again—with the CLJA language—on July 13, 2022, by a vote of 342 to 88. *See* S. 3373, 117th Cong. (as passed by House, July 13, 2022); 168 CONG. REC. H6289 (daily ed. July 13, 2022) (cataloging voting record). The Senate took up the PACT Act for the second time on July 27, 2022, but the chamber failed to invoke cloture, with only 55 senators (of the 60 needed) voting to end debate. 168 CONG. REC. S3731 (daily ed. July 27, 2022) (cataloging cloture vote). The next week, however, the Senate tried again and managed to pass the PACT Act, thanks in part to intense advocacy from comedian Jon Stewart. Murphy, *supra* note 5. The PACT Act passed the Senate the second time by an 86 to 11 vote, and though Sen. Burr supported it this time around, Sen. Tillis again did not. 168 CONG. REC. S3851–52 (daily ed. Aug. 2, 2022) (cataloging voting record).

186. *S. 3373 – Honoring Our PACT Act of 2022*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/3373/actions [https://perma.cc/V9E8-ZPWF (staff-uploaded archive)].

B. *Mechanics: What Does the Language Say?*

The CLJA constitutes the first statutorily enacted exception to the military's sovereign immunity from civil lawsuits.[187] Specifically, section 804(f) of the CLJA waives the government's sovereign immunity from damages claims brought under the law in certain contexts, including the use of the discretionary function exception to the FTCA.[188] With this waiver in place, the CLJA effectively circumvents the FTCA and *Feres* doctrine obstacles plaguing past attempts at restitution for those exposed to contaminated water at Camp Lejeune. In addition, section 804(j)(3) expressly eliminates the barrier posed by the Supreme Court's *Waldburger* holding, as the CLJA clarifies that "[a]ny applicable statute of repose or statute of limitations, other than [those laid out in this section], shall not apply to a claim under [the CLJA]."[189]

However, while section 804(f) prevents the government from using the discretionary function provision of the FTCA to circumvent immunity,[190] section 804(i) retains the FTCA's combatant activities exception, which could operate to bar claims.[191] Still, a historical reading of the "combatant activities" exception as discussed in Part I reveals that this exception will likely apply to few, if any, claims under the CLJA. In this case, the Camp Lejeune water contamination would seem more akin to the situation in *Johnson* (1948), where the Ninth Circuit held that the combatant activities exception did not bar recovery for injuries caused by pollution discharged from ships while anchored in port before their next combat assignment.[192] Here, individuals stationed on Camp Lejeune and drinking water there remained at least one step removed from combat, just like the ships in *Johnson* (1948) awaited their next mission. Indeed, recent caselaw from the Fourth Circuit confirms that the combatant activities exception operates to "'foreclose state regulation of the military's battlefield conduct and decisions.'"[193] Failing to respond to water contamination

187. *Compare* Camp Lejeune Justice Act of 2022, Pub. L. No. 117-168, § 804(b), 136 Stat. 1759, 1802 (codified at 28 U.S.C. § 2671 note) (allowing suit in the Eastern District of North Carolina), *with* 28 U.S.C. §§ 2671–2680 (2020) (containing no similar provisions).

188. *See* Camp Lejeune Justice Act of 2022 § 804(f) (waiving certain FTCA immunity provisions, which include discretionary function exception). The discretionary function applies to bar claims arising out of actions taken by government officials while exercising due care in response to a statutory or regulatory directive. 28 U.S.C. § 2680 (2022).

189. Camp Lejeune Justice Act of 2022 § 804(j)(3).

190. *Id.*

191. *Id.* § 804(i); 28 U.S.C. § 2680(j). Of note, § 2680(j) contains additional language qualifying the "combatant activities" exception "during time of war." 28 U.S.C. § 2680(j). The CLJA does not use the "during time of war" language. Camp Lejeune Justice Act of 2022 § 804(i). It remains unclear whether this distinction matters.

192. Johnson v. United States, 170 F.2d 767, 768, 770 (9th Cir. 1948).

193. *In re* KBR, Inc., Burn Pit Litig., 744 F.3d 326, 351 (4th Cir. 2014) (quoting Harris v. Kellogg Brown & Root Servs., Inc., 724 F.3d 458, 480 (3d Cir. 2013)) (concluding waste management and water treatment functions performed by contractor for military in combat area constituted combatant activity).

at Camp Lejeune does not appear to represent "battlefield conduct and decisions" because the base itself—a training and staging ground—does not constitute a battlefield.

Where the FTCA does not bar a Camp Lejeune claim from proceeding, section 804(b) of the CLJA provides broad coverage for injured servicemembers, their families, and base staff by allowing individuals "who resided, worked, or [were] otherwise exposed (including in utero exposure) for not less than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987, to water at Camp Lejeune, North Carolina" to bring an action for damages in federal court.[194] However, like the 2012 VA benefits law, the CLJA's thirty-day direct exposure requirement could bar some claims, like those of individuals born with birth defects years after their parents moved off base.[195] In addition, victims can only bring claims for injuries diagnosed or treated before August 10, 2022.[196]

In terms of venue where individuals may bring an action, section 804(d) of the CLJA vests the United States District Court for the Eastern District of North Carolina with exclusive jurisdiction.[197] Assigning jurisdiction to the Eastern District of North Carolina makes sense given Camp Lejeune's location, but forcing a single court to handle the deluge of claims has created complexities discussed further in Section II.C *infra*.

But before filing a claim in the Eastern District, section 804(h) of the CLJA requires that a claimant first comply with the administrative remedy exhaustion requirements of the FTCA.[198] Codified at 28 U.S.C. § 2675, the FTCA's exhaustion provision places two important limitations on claimants.[199] First, Section 2675(a) provides that

> [a]n action shall not be instituted upon a claim against the United States for money damages for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency* in writing and sent by certified or registered mail.[200]

Second, Section 2675(b) adds that "[a]ction under this section shall not be instituted for any sum in excess of the amount of the claim presented to the

194. *See id.*; Camp Lejeune Justice Act of 2022 § 804(b).

195. See *supra* note 71 and accompanying text, which highlights how the direct exposure requirement limits the universe of claims.

196. Camp Lejeune Justice Act of 2022 § 804(j)(1).

197. *Id.* § 804(d).

198. *Id.* § 804(h).

199. 28 U.S.C. § 2675.

200. *Id.* § 2675(a) (emphasis added).

federal agency."[201] Thus, claimants will need to take care in first submitting their required administrative claims, and in doing so, filing these claims for the proper amount of damages.

To comply with 28 U.S.C. § 2675 in the Camp Lejeune claim context, a plaintiff must first submit a claim to the Navy's Tort Claims Unit ("TCU") for adjudication.[202] As discussed in Section II.C.2 *infra*, the Navy's handling of these claims remains a key sticking point in the litigation, and the TCU has yet to establish a streamlined process for reviewing all claims. But regardless of the approach taken by the TCU, the agency does not have much time to act before claimants can file in court.[203] In addition, the CLJA litigation will arrive quickly, as section 804(j) provides that claimants must file their claims in court "after the later of" two years after enactment or 180 days after the TCU denies their claim.[204]

Once in court, section 804(c) outlines the CLJA's procedures for proving one's case. First, section 804(c)(1) places the burden of proof on the claimant to show "one or more relationships between the water at Camp Lejeune and the harm."[205] Second, section 804(c)(2) clarifies that the claimant meets this burden when showing a relationship between exposure to Camp Lejeune's water and harm either (A) "sufficient to conclude that a causal relationship exists," or (B) "sufficient to conclude that a causal relationship is at least as likely as not."[206] This standard thus remains similar to the more veteran-friendly approach taken by the VA to a claimant's burden of proof, as discussed in Part I, *supra*, rather than the preponderance of the evidence standard typically required in civil lawsuits.[207] Still, as also discussed in Part I, *supra*, this similarly favorable standard has yet to pay dividends for veterans in the Camp Lejeune disability claims context.[208] Perhaps plaintiffs will have better luck with factfinders in the Eastern District of North Carolina, provided the claims make it that far.[209]

201. *Id.* § 2675(b) (excepting where higher amount "based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon the allegation and proof of intervening facts").

202. *See Camp Lejeune Justice Act Claims*, U.S. NAVY JUDGE ADVOC. GEN.'S CORPS, https://www.jag.navy.mil/legal-services/code-15/camp-lejeune/ [https://perma.cc/H83R-AWMB].

203. 28 U.S.C. § 2675(a) further constrains the TCU, as "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section." 28 U.S.C. § 2675(a).

204. Camp Lejeune Justice Act of 2022, Pub. L. No. 117-168, § 804(j)(2)(A)–(B), 136 Stat. 1759, 1803–04 (codified at 28 U.S.C. § 2671 note); 32 C.F.R. § 750.30 (2022).

205. Camp Lejeune Justice Act of 2022 § 804(c)(1).

206. *Id.* § 804(c)(2)(A)–(B).

207. *See supra* notes 73–74 and accompanying text.

208. *See supra* notes 76–87 and accompanying text.

209. The government and the plaintiff's leadership counsel continue to work toward settlement of claims. *See generally* Status Report on Resolution Discussions Between Plaintiffs' Leadership &

Should a plaintiff succeed in court, however, the CLJA places several limitations on damages. First, section 804(e) bars claimants from bringing more than one claim for the harm suffered.[210] Second, consistent with 28 U.S.C. § 2674, the liability provision of the FTCA, section 804(g) provides that CLJA claimants cannot receive an award for punitive damages.[211] Third, the final version of the law generated confusion as to the total award a servicemember might receive. Section 804(e)(2) provides that existing disability awards, payments, or benefits provided to a claimant under the VA, Medicare, or Medicaid, or provided "in connection with health care or a disability relating to exposure to the water at Camp Lejeune," will offset the amount of any court award.[212] This offset provision could play a role in how injured claimants pursue relief,[213] though the VA has yet to issue regulations on the matter.[214] Fourth, and finally, the CLJA as enacted contains no limitation on contingency fees payable to the lawyers assisting servicemembers and their families with claims.[215] With plaintiffs' attorneys blanketing the airwaves to solicit clients, lawmakers requested legislative reform to cap contingency fees and ensure that servicemembers ultimately receive a bigger piece of the damages pie.[216]

Defendant, *In re* Camp Lejeune Water Litig., No. 23-CV-00897 (E.D.N.C. Oct. 26, 2023), Doc. 33 (providing overview of settlement negotiation status). A successful settlement could preclude some or all trials.

210. Camp Lejeune Justice Act of 2022 § 804(e)(1).

211. *Id.* § 804(g); 28 U.S.C. § 2674 ("The United States . . . shall not be liable . . . for punitive damages.").

212. Camp Lejeune Justice Act of 2022 § 804(e)(2)(A)–(B). This offset provision bears conceptual similarity to the collateral source rule in civil suits seeking compensation for personal injury, where entities that already paid money to the plaintiff, like health insurance companies, obtain liens on any judgment rendered.

213. Leo Shane III, *Don't Expect Quick Payouts from Camp Lejeune Toxic Water Lawsuits*, MARINE CORPS TIMES (Aug. 18, 2022), https://www.marinecorpstimes.com/news/pentagon-congress/2022/08/18/dont-expect-quick-payouts-from-camp-lejeune-water-lawsuits/ [https://perma.cc/QB2Q-J7XD].

214. *VFW, BMBFC Law Collaborate To Assist with Camp Lejeune Claims*, VETERANS FOREIGN WARS (Nov. 16, 2022), https://www.vfw.org/media-and-events/latest-releases/archives/2022/11/vfw-bmbfc-law-collaborate-to-assist-with-camp-lejeune-claims [https://perma.cc/MMG5-M5LL]. For instance, Shane Liermann of Disabled American Veterans, a veterans' advocacy group, noted that "'[a] lawsuit as a first step makes sense for some of these family members and relatives who aren't getting any benefits now, because they have nothing to lose' . . . '[b]ut for veterans who already get some help, there could be a dollar-for-dollar offset.'" Shane, *supra* note 213.

215. *See* Camp Lejeune Justice Act of 2022 § 804 (containing no provision limiting contingency fees).

216. Protect Camp Lejeune VETS Act, H.R. 925, 118th Cong. § 2 (2023); Protect Camp Lejeune VETS Act, S. 378, 118th Cong. § 2 (2023) (capping fees at 12% for administrative awards and 17% for damages awards, as well as prohibiting payment of ancillary fees and costs); Protect Access to Justice for Veterans Act, H.R. 1204, 118th Cong. § 2 (2023) (capping fees at 20% for administrative awards and 33% for damages awards). The political feasibility of such an effort remains unclear, however, as lawmakers already blocked the addition of a contingency fee cap during final CLJA deliberations. Press Release, Off. of Sen. Dan Sullivan, Sullivan Demands Congress Protect Sick Marines from Predatory Trial Lawyers (Nov. 17, 2022), https://www.sullivan.senate.gov/newsroom/press-releases

Thus, the CLJA represents a significant win for critics of the FTCA and the *Feres* doctrine, but as discussed in this section, the law still contains important limitations that dictate how those injured by toxic water at Camp Lejeune may recover damages. As such, only time will tell how large of a victory the legislation truly represents.

C. *Status: Where Does Implementation of the Law Stand?*

Indeed, it took until one year after the CLJA's enactment for the law's practical structure to begin to come into focus. This section proceeds in two subsections, each articulating the law's status as of November 2023. First, it discusses the Eastern District of North Carolina's approach to the litigation. Second, it outlines the Navy's procedure in adjudicating claims. Both areas remain volatile and subject to uncertainty.

1. The Eastern District of North Carolina's Strategy

The United States District Court for the Eastern District of North Carolina has taken an active role in shaping the CLJA litigation, with the court's strategy evolving to meet the realities of the CLJA docket in terms of managing both the volume of and differences between claims. When CLJA-authorized lawsuits first entered the court's docket, an early Eastern District order denied plaintiffs' motions to consolidate, suggesting claims would proceed individually.[217] However, by the end of the first quarter of 2023, the sheer number of claims—and lawsuits filed—required the court to change course. At the court's first status conference to discuss the litigation, Judge James C. Dever III indicated that should the court handle each CLJA claim as it would a typical lawsuit, then the court might need a period of time "as long as the Roman

/sullivan-demands-congress-protect-sick-marines-from-predatory-trial-lawyers [https://perma.cc/T4KB-2JC5]. This reality remains especially interesting as the FTCA, and even the more recent 2020 NDAA administrative claims process, both explicitly provide for attorneys' fees caps. 28 U.S.C. § 2678; 10 U.S.C. § 2733a(c)(2). But with both Republicans (the 12% and 17% caps) and Democrats (the 20% and 33% caps) proposing reform, a bipartisan solution could materialize. Moreover, as the CLJA litigation has developed, the government has taken a stronger position in advocating for attorneys' fees caps in line with the limits provided under the FTCA. *See generally* United States' Statement of Interest Regarding Attorneys' Fees, *In re* Camp Lejeune Water Litig., No. 23-CV-00897 (E.D.N.C. Oct. 27, 2023), Doc. 34 (arguing the nature of the government's sovereign immunity, as well as the CLJA and its legislative history, mandate capping attorneys' fees at 25%).

217. Order on Motions to Consolidate at 2, Akers v. United States, No. 22-CV-00154 (E.D.N.C. Oct. 5, 2022). The claims brought in *Akers* and in other similar suits involved instances where plaintiffs submitted administrative claims and received denials prior to the passage of the CLJA. Order of Dismissal of Plaintiff's Memorandum of Law on Administrative Exhaustion at 2–4, Akers v. United States, No. 22-CV-00154 (E.D.N.C. Feb. 14, 2023).

Empire" to resolve all cases.[218] As a result, the court established a master docket for CLJA claims, *In re Camp Lejeune Water Litigation*, and appointed a plaintiff's leadership counsel to drive the litigation.[219] Ultimately, the court has worked—and will continue to work—with both the plaintiff's leadership counsel and the government to develop (1) a master complaint and a master answer; and (2) a procedure for consolidating discovery, phased discovery, coordinating expert-related motions, adjudicating dispositive motions, bellwether selection, trials, and settlement negotiations.[220]

In addition, the court has indicated its desire to pursue a case management structure similar to that employed in the wake of the September 11, 2001 terror attacks, as well as following the BP Deepwater Horizon oil spill, to efficiently control the litigation.[221] This approach, known as the Hellerstein model, involves creating a database to facilitate a quick resolution to claims.[222] But the Hellerstein model may involve adjusting the CLJA's preference for modified tort lawsuits, though the court, experts, and the plaintiff's bar appear to support this system.[223] For example, according to Kenneth Feinberg, the special master who oversaw the 9/11 litigation, the model sacrifices the "'traditional' approach to tort resolution" for a "practical" result: "[The Hellerstein model] prioritizes administrative efficiency, it prioritizes limited cost, it prioritizes certainty of result . . . [b]ut you don't have the appeals process; the rules of evidence don't apply. There is a little bit less due process in favor of streamlined efficiency."[224] Still, while the 9/11 and BP dockets involved no trials, lawyers working on the CLJA litigation believe that some CLJA claims will go to trial, indicating the

218. Cullen Browder, *Camp Lejeune Toxic Water Claims Get First Day in Court*, WRAL NEWS, https://www.wral.com/story/camp-lejeune-toxic-water-claims-get-first-day-in-court/20798299/ [https://perma.cc/AQ2N-QN23] (last updated Apr. 5, 2023, 6:52 PM); Chris Villani, *9/11 Cases Provide a Playbook for Camp Lejeune Water Suits*, LAW360 (June 7, 2023, 11:22 AM), https://www.law360.com/articles/1677499/9-11-cases-provide-a-playbook-for-camp-lejeune-water-suits [https://perma.cc/7FAH-MA8U (staff-uploaded, dark archive)].

219. Order Establishing Master Docket at 1, *In re* Camp Lejeune Water Litig., No. 23-CV-00897 (E.D.N.C. Apr. 25, 2023), Doc. 1; Order Appointing Plaintiff's Leadership Counsel at 1, *In re* Camp Lejeune Water Litig., No. 23-CV-00897 (E.D.N.C. July 19, 2023), Doc. 10.

220. Order Establishing Master Docket, *supra* note 219, at 1. The plaintiffs filed the Master Complaint on October 6, 2023. Plaintiffs' Master Complaint at 1, *In re* Camp Lejeune Water Litig., No. 23-CV-00897 (E.D.N.C. Oct. 6, 2023), Doc. 25. The litigation will proceed in "tracks," organized by health conditions claimed. Case Management Order No. 2 at 8–12, *In re* Camp Lejeune Water Litig., No. 23-CV-00897 (E.D.N.C. Sept. 26, 2023), Doc. 23.

221. *See* Order Establishing Master Docket, *supra* note 219, at 1; Villani, *supra* note 218; Jay Price, *Four Judges Take On Possibly Tens of Thousands of Lawsuits over Camp Lejeune Water*, NPR (June 7, 2023, 4:25 PM), https://www.npr.org/2023/06/07/1180840816/four-judges-take-on-possibly-tens-of-thousands-of-lawsuits-over-camp-lejeune-wat [https://perma.cc/B8S9-6HHM].

222. Villani, *supra* note 218.

223. *Id.*; Price, *supra* note 221.

224. Villani, *supra* note 218.

court may put the CLJA's statutory process to the test after all.[225] Indeed, the Eastern District expects to hold the first slate of trials in 2024.[226]

Thus, all signs point to the Eastern District of North Carolina "steer[ing] the case with a firm hand," a practice called "managerial judging" and geared toward bringing an efficient conclusion to the litigation.[227]

2. The Navy's Status in Adjudicating Claims

But while the Eastern District has a strategy, the Navy's approach to CLJA claim resolution remains mired in controversy. On December 20, 2022, the Eastern District held that section 804(h) of the CLJA requires that even plaintiffs who have already had Camp Lejeune claims denied by the Navy before enactment of the CLJA must resubmit administrative claims to the TCU before bringing CLJA actions in court.[228] Still, beyond this singular court ruling, uncertainty as to when and how the TCU will proceed in adjudicating claims pervades, though the TCU's ultimate strategy will influence the outcome of CLJA litigation.

Two overarching questions persist. First, how will the TCU scale its operations to handle the flood of claims it receives? Second, what "policies" will the TCU adopt in handling claims—for instance, when will it aggressively pursue settlements, when will it approve claims at the requested amount, and when will it summarily deny claims to allow resolution by the Eastern District?

To the first question, though the Navy has yet to indicate how it will adjudicate claims, the Eastern District has made clear it wants the TCU to resolve claims before they reach the court.[229] But despite the court's preference, the Navy continues to struggle with operationalizing its CLJA response strategy. As of September 2023, the Navy still lacks the financial resources and staff to review CLJA claims in a timely manner.[230] With this reality in mind, the TCU hopes to eventually hire 100 new employees to run a new division dedicated to CLJA claims, the Camp Lejeune Claims Task Force,[231] a decision made in part to relieve existing staff of "working 'an unsustainable amount of

225. *Id.*

226. Case Management Order No. 2, *supra* note 220, at 11.

227. Price, *supra* note 221.

228. Fancher v. United States, No. 22-CV-315, 2022 WL 17842896, at *9 (E.D.N.C. Dec. 20, 2022).

229. Price, *supra* note 221.

230. Kaustuv Basu, *Navy Lawyer Blames Lejeune Delays on Funding, Staff Shortages*, BLOOMBERG L. (May 25, 2023, 5:10 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/product-liability-and-toxics-law/X390BQ98000000 [https://perma.cc/QY5D-ECD9 (staff-uploaded, dark archive)] [hereinafter Basu, *Navy Lawyer*].

231. Letter from Carlos Del Toro, Sec'y of the Navy, to Ted Budd, Sen. (June 30, 2023) [hereinafter Del Toro Letter] (on file with the North Carolina Law Review).

overtime.'"[232] Moreover, the TCU continues to scale information technology solutions to assist it with handling claims.[233] All the while, the number of claims before the Navy increases, with over 117,000 claims, representing over $3.3 trillion in compensation sought, filed as of October 27, 2023.[234]

But even if the TCU had the resources to process CLJA claims, other barriers exist as well. According to the Navy, the complexity of cases requires a multistep process that includes sending out requests for documentation that may necessitate going back over forty years to obtain the proper information.[235] Moreover, the National Archives and Records Administration, which maintains employment records relevant to the litigation, cannot process the volume of requests for information received related to the CLJA during the time provided for filing CLJA claims.[236]

In addition, scrutiny from the Eastern District, stakeholders, and Congress compounds the problem. In the court's first hearing on the CLJA litigation, Judge Dever remarked that "[t]he Navy needs to step up its game."[237] Jerry Ensminger put it more bluntly: "I don't understand what the hell they're doing. . . . I don't think they do."[238] And North Carolina Senator Ted Budd has led the congressional charge.[239] If the Navy's efforts continue to flounder, then perhaps Congress will step in again.

To the second question, it remains unclear to what extent existing Navy regulations will govern claims adjudications.[240] The lack of clarity stems in part from the operation of the CLJA, which, in tandem with 28 U.S.C. § 2675(a), allows claimants to file lawsuits in the Eastern District if the Navy does not issue a final decision on their claim within six months of filing.[241] Because the Navy has indicated that it cannot possibly adjudicate all claims within six

232. *Id.*; Basu, *Navy Lawyer*, *supra* note 230.

233. Del Toro Letter, *supra* note 231.

234. United States' Statement of Interest Regarding Attorneys' Fees, *supra* note 216, at 15.

235. Kaustuv Basu, *Veterans on Borrowed Time Fume Over Delays on Toxic Water Claims*, BLOOMBERG L. (May 8, 2023, 5:05 AM), https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/XD9VQP8000000 [https://perma.cc/NF78-C5NT (staff-uploaded, dark archive)].

236. *Id.*

237. *Id.*

238. Browder, *supra* note 218.

239. Letter from Ted Budd, et al., to Carlos Del Toro, Sec'y of the Navy & Merrick B. Garland, Att'y Gen., U.S. Dep't of Just. (May 17, 2023), https://www.budd.senate.gov/wp-content/uploads/2023/05/Budd-Letter-to-SecNavy-and-AG-Garland-RE-Camp-Lejeune-Claim-Delays.pdf [https://perma.cc/D3QL-PZJ2]; *see also* Victor Skinner, *North Carolina Senator Demands Action for Veterans Impacted at Camp Lejeune*, CTR. SQUARE (July 21, 2023), https://www.thecentersquare.com/north_carolina/article_4edf2cd4-27f0-11ee-9820-13e9e760d890.html [https://perma.cc/5VDD-PC3G].

240. *See generally* 32 C.F.R. § 750 (2022) (outlining the Navy's general claims regulations).

241. *See* Camp Lejeune Justice Act of 2022, Pub. L. No. 117-168, § 804(h), 136 Stat. 1759, 1803 (codified at 28 U.S.C. § 2671 note); 28 U.S.C. § 2675(a); *Camp Lejeune Justice Act Claims*, U.S. NAVY, https://www.navy.mil/clja/ [https://perma.cc/3PHZ-GWAE].

months of filing,[242] the feasibility of this existing structure poses an open question.

Despite this uncertainty, the Navy—alongside the Department of Justice ("DoJ")—established a process for some claims in September of 2023.[243] Specifically, the Navy and DoJ created an "Elective Option" meant to provide quicker administrative review for qualifying claimants.[244] To access the Elective Option, claimants must present with a "Qualifying Injury," or a condition which the Agency for Toxic Substances and Disease Registry has causally linked to the Camp Lejeune contamination.[245] If a claimant has a Qualifying Injury and otherwise meets the requirements outlined in the Navy-DoJ guidance, then the claimant may elect to settle their claim for between $100,000 and $550,000, with the final settlement amount dependent on other factors such as length of exposure.[246]

Certainly, the Elective Option presents an attractive choice for qualifying claimants given its compensation guarantee, compounded further by the fact that, unlike compensation awarded via the administrative claims process or by the Eastern District, money paid through the Elective Option does not come with an offset in the amount of VA compensation and benefits.[247] In addition, the Elective Option could benefit the sickest—and oldest—victims, who may have less time to wait for the Navy and Eastern District to resolve claims.[248] Still, it remains unclear how many of the over 117,000 claimants can make use of the Elective Option, as well as how many will ultimately accept any settlement offer made pursuant to it. Thus, the Navy continues to struggle with rolling out the CLJA, though pressure from all angles may soon force the Navy into action, as it appears to have already done in the context of Elective Option claims.

242. *Camp Lejeune Justice Act Claims*, *supra* note 241.

243. *See generally* U.S. NAVY, PUBLIC GUIDANCE ON ELECTIVE OPTION FOR CAMP LEJEUNE JUSTICE ACT CLAIMS (2023), https://www.navy.mil/clja/ [https://perma.cc/2UCR-XD4M] (click "Public Guidance on Elective Option") (outlining an alternative settlement policy adopted by the Department of Navy and the Department of Justice for certain CLJA claims).

244. *Id.* at 1.

245. *Id.* at 2. These conditions include kidney cancer, liver cancer, non-Hodgkin lymphoma, leukemia, bladder cancer, multiple myeloma, Parkinson's Disease, kidney disease and end stage renal disease, and systemic sclerosis and systemic scleroderma. *Id.* at 3. However, the Elective Option excludes "Cardiac Birth Defects" due to the fact-intensive nature of any investigation into these conditions. *Id.*

246. *Id.* at 2–7.

247. *Id.* at 7.

248. *See* Brianna Keilar & Margaret Given, *Camp Lejeune Water Contamination Cases Increasingly Becoming Wrongful Death Claims as Lawsuits Proceed at a Crawl*, CNN, https://www.cnn.com/2023/08/13/politics/camp-lejeune-water-contamination-pact-act/index.html [https://perma.cc/9EJA-3VCQ] (last updated Aug. 29, 2023, 5:05 PM).

III. THE MILITARY'S SOVEREIGN IMMUNITY POST-CLJA

While CLJA implementation faces roadblocks, the law's implications for the future of the military's sovereign immunity have already started to come into focus. But any hope that the CLJA might represent the beginning of the end for the *Feres* doctrine wore off quickly, as the Supreme Court reaffirmed the broad holding of *Feres* only three months after the CLJA's enactment when it denied certiorari in *Clendening*.[249] With *Feres* firmly entrenched, the question remains: How does the CLJA fit into sovereign immunity doctrine in the military context?

A. *The CLJA's Relationship with the FTCA and the* Feres *Doctrine*

Justice Thomas's dissent from the denial of certiorari in *Clendening* and subsequent court filings in unrelated matters show how the CLJA relates to the FTCA and *Feres*. According to Justice Thomas, the "Camp Lejeune Justice Act of 2022 . . . does not alter the availability of recovery under the FTCA. Rather, the Act provides an alternative remedy to the FTCA that presupposes multiple routes to recovery."[250] In making this assertion, Justice Thomas cites to CLJA section 804(e)(1),[251] which provides in relevant part: "[a]n individual . . . who brings an action under this section for a harm [resulting from exposure to contaminated water at Camp Lejeune], including a latent disease, *may not thereafter bring a tort action against the United States for such harm pursuant to any other law*."[252] Indeed, taking this language at face value suggests that Congress contemplated the possibility of additional judicial recourse for those injured by Camp Lejeune's toxic water via the FTCA[253]—for instance, in the event that the Supreme Court reversed *Feres* during the CLJA's window for bringing claims.

The United States agreed with Justice Thomas's analysis in one court document filed in other Camp Lejeune-related litigation. In its brief responding to the United States District Court for the Western District of North Carolina's request for briefing on how the CLJA impacts a Camp Lejeune-related claim brought before the CLJA's enactment, the government posited that "[the CLJA] may not preclude a pre-existing tort action such as Plaintiff's present action under the FTCA."[254] However, the brief also noted that FTCA claims remain contingent on other jurisdictional limitations that the CLJA

249. *See* Clendening v. United States, 143 S. Ct. 11, 11 (2022).

250. *See id.* at 12 n.2 (Thomas, J., dissenting).

251. *Id.*

252. Camp Lejeune Justice Act of 2022, Pub. L. No. 117-168, § 804(e)(1), 136 Stat. 1759, 1803 (codified at 28 U.S.C. § 2671 note) (emphasis added).

253. *See id.*

254. United States' Responsive Memorandum on the Camp Lejeune Justice Act of 2022 at 3, Pride v. U.S. Dep't of the Navy, No. 19-CV-363 (W.D.N.C. July 26, 2019), Doc. 64.

circumvents, including the *Waldburger* defense and the *Feres* doctrine.[255] Such limits would suggest that while plaintiffs may file claims under the FTCA in the Camp Lejeune context, existing judicial doctrine does not allow recovery. Indeed, the government recognized that the CLJA represents Congress's response to court decisions barring Camp Lejeune claims based on the FTCA.[256]

The government has since echoed its standpoint in a briefing filed in separate litigation brought after the passage of the CLJA: as the CLJA allows claims by veterans, "Congress did not likely intend for the *Feres* doctrine (which would generally preclude such claims) to apply."[257] In this light, it appears the CLJA operates similarly to the 2020 NDAA in providing a targeted carveout for a specific set of claims—those relating to water contamination at Camp Lejeune. Ultimately, then, the government's position underscores the modern reality of military sovereign immunity doctrine: unless the Supreme Court overrules *Feres*, enabling recovery under the FTCA, Congress retains the ability to circumvent this barrier through legislation like the CLJA.

B. *The CLJA as a Policy Option Moving Forward*

1. The CLJA vs. the FTCA and the 2020 NDAA: Pros of the CLJA Approach

While Congress maintains discretion to bypass *Feres*, the small sample size of its actions in this area—the 2020 NDAA and the CLJA—reveal that it has not yet settled on the appropriate mechanism by which to do so. However, because the CLJA remains more analogous to the remedy available via the FTCA, in particular, due to its authorization to pursue a remedy in court, Congress should start with the CLJA as a framework when considering future legislation in this arena.

At first glance, it seems apparent that the avenue for relief provided by the CLJA falls somewhere in between the recovery offered by the FTCA and the 2020 NDAA.[258] In fact, Justice Thomas asserted that the CLJA presents a solution "much narrower in scope than the FTCA."[259] And in some respects, Justice Thomas stands correct. First, the CLJA limits recovery to compensation for injuries caused by toxic water at Camp Lejeune, and only for those exposed

255. *Id.*

256. *Id.* at 2.

257. United States' Responsive Memorandum on Administrative Exhaustion at 3, Akers v. United States, No. 22-CV-00154 (E.D.N.C. Aug. 25, 2022), Doc. 15.

258. *See* Camp Lejeune Justice Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (codified at 28 U.S.C. § 2671 note); Clendening v. United States, 143 S. Ct. 11, 12 n.2 (2022) (Thomas, J., dissenting); National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1457–60 (codified at 10 U.S.C. § 2733a).

259. *Clendening*, 143 S. Ct. 11, 12 n.2 (Thomas, J., dissenting).

for at least thirty days between August 1, 1953, and December 31, 1987.[260] The FTCA applies more broadly to all civil claims against the United States.[261] Second, the CLJA vests jurisdiction exclusively with the United States District Court for the Eastern District of North Carolina.[262] The FTCA provides jurisdiction in all district courts.[263] Third, though both the CLJA and the FTCA prohibit recovery for punitive damages,[264] as well as provide an exclusive remedy,[265] the FTCA makes the government liable "in the same manner and to the same extent as a private individual under like circumstances,"[266] while the CLJA offsets any damages award by the amount of existing compensation available through the VA, Medicare, Medicaid, and other sources.[267] Moreover, claimants under the CLJA may receive even less financial remuneration, as the CLJA contains no provision capping awards of attorneys' fees like that found in the FTCA.[268]

Still, flexibilities and potential advantages for plaintiffs exist in the CLJA structure as compared to the FTCA. First, the CLJA outlines a more lenient causation standard of "at least as likely as not,"[269] while civil claims under the FTCA proceed with the traditional "more likely than not" approach used in private civil suits.[270] Second, though the FTCA mandates courts try claims without a jury,[271] the CLJA provides in section 804(d) that "[n]othing in this subsection shall impair the right of any party to a trial by jury."[272] Third, while the combatant activities exception applies to both the FTCA and the CLJA,[273] the CLJA bars the government from asserting the discretionary function defense,[274] which had previously prevented Camp Lejeune claims at least in part.[275]

260. Camp Lejeune Justice Act of 2022 § 804(b).

261. *See* 28 U.S.C. § 1346.

262. Camp Lejeune Justice Act of 2022 § 804(d).

263. 28 U.S.C. § 1346.

264. Camp Lejeune Justice Act of 2022 § 804(g); 28 U.S.C. § 2674.

265. Camp Lejeune Justice Act of 2022 § 804(e)(1); 28 U.S.C. § 2676.

266. 28 U.S.C. § 2674.

267. Camp Lejeune Justice Act of 2022 § 804(e)(2). Note, however, that similar offsets may too occur in the civil lawsuit context—insurance liens, for example.

268. *See id.* (containing no attorneys' fees provision); 28 U.S.C. § 2678. However, as noted previously, stakeholders continue to push for attorneys' fees reform. *See supra* note 216 and accompanying text.

269. Camp Lejeune Justice Act of 2022 § 804(c); *see also supra* Part II.

270. *See* 28 U.S.C. § 2674.

271. *Id.* § 2402.

272. Camp Lejeune Justice Act of 2022 § 804(d).

273. *Id.* § 804(i); 28 U.S.C. § 2680(j).

274. Camp Lejeune Justice Act of 2022 § 804(f).

275. *See* Clendening v. United States, 19 F.4th 421, 431 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 11 (2022).

In addition to these positive differences, the two laws do have some similarities. First, in terms of statute of limitations, the CLJA mandates that all claims must have accrued before its enactment and that plaintiffs bring their claims within two years of enactment or 180 days after final administrative denial by the Navy.[276] The relevant FTCA provision requires a plaintiff to bring their claim within two years of it having accrued or 180 days after final administrative denial.[277] Second, both laws require administrative disposition of a claim prior to filing in court, with the CLJA explicitly adopting the FTCA procedure found in 28 U.S.C. § 2675.[278] Finally, like the FTCA, the CLJA allows plaintiffs to pursue a remedy in court. In this way, the CLJA remains consistent with the purpose of the FTCA in opening the government to civil lawsuits where justice requires. The CLJA thus, though not completely identical to the FTCA, marks a major step forward, especially when considering that some of its provisions may even qualify as more favorable to plaintiffs.

Moreover, the fact that the CLJA enables plaintiffs to seek relief in court makes the law a broader solution than that found in the 2020 NDAA, which relies solely on an administrative process, marking a key difference in the two laws and one critical to the CLJA's potential success.[279] Several other distinctions between the two approaches bear relevance as well. First, the CLJA allows claims by all exposed, qualified by its thirty day threshold, while the 2020 NDAA narrowly authorizes claims by injured servicemembers, or if deceased, their legal representative—it does not provide for claims by family members, nor does it permit the full gamut of civil claims.[280] Second, the CLJA's causation standard remains more favorable to plaintiffs than the preponderance of the evidence approach taken by the 2020 NDAA medical malpractice regime.[281] The medical malpractice claims regulations also prohibit the use of discovery,[282] a process available for CLJA claimants in court. Third, the government may technically assert the discretionary function defense to medical malpractice claims,[283] but the CLJA precludes its use. Finally, the 2020 NDAA caps attorneys' fees recovery at 20% of a claim award (though attorneys cannot recover fees from the government), with the CLJA remaining silent on this

276. Camp Lejeune Justice Act of 2022 § 804(j).

277. 28 U.S.C. § 2401(b).

278. *Id.* § 2675; Camp Lejeune Justice Act of 2022 § 804(h).

279. *See* 32 C.F.R. § 45.14(a) (2022).

280. 10 U.S.C. § 2733a(a)–(b); 32 C.F.R. § 45.2(f)(5).

281. Camp Lejeune Justice Act of 2022 § 804(c); 32 C.F.R. §§ 45.4(d), 45.6(a). However, while the 2020 NDAA regime uses the preponderance of the evidence standard, the CLJA's causation approach does follow another administrative scheme: that of the VA disability compensation system, as discussed in Part I *supra*.

282. 32 C.F.R. § 45.4(e).

283. *Id.* § 45.2(f)(1). As discussed in note 177 *supra*, the discretionary function exception likely does not apply to typical medical malpractice claims.

front.[284] Besides the attorneys' fees policy, which may see reform regardless,[285] the CLJA's approach in these areas—which puts plaintiffs on a stronger footing—stands more analogous with the FTCA in giving plaintiffs the chance to bring lawsuits more like those available to private citizens against other private citizens.

But the CLJA and the 2020 NDAA scheme have similarities as well. First, the CLJA's offset provision borrows from a similar policy in the medical malpractice claims regulations.[286] Second, the CLJA also follows from the 2020 NDAA in that it provides a remedy in a hyperspecific context: those injured by toxic water at Camp Lejeune versus those injured by the medical malpractice of military health care providers.[287] Third, the two processes remain parallel in terms of (1) offering an exclusive remedy;[288] (2) disallowing punitive damages;[289] and (3) their statute of limitations, with the NDAA provision also requiring that a plaintiff bring a claim within two years of accrual.[290] Despite these similarities, however, the fact that the CLJA enables plaintiffs to seek recourse in court shows how it marks a fundamental shift from the recovery mechanism provided by the 2020 NDAA for medical malpractice claims, making the CLJA more akin to the avenue for relief provided by the FTCA. Ultimately, this key difference between the CLJA and the 2020 NDAA makes the CLJA the better of the two options for the future because it more closely aligns with the FTCA's civil suit approach.

2. Potential Drawbacks to the CLJA Approach

Despite the CLJA's benefits when it comes to providing an avenue of recovery for injured veterans in the face of *Feres*, the specificity of its application cautions as to the feasibility of its adoption in other contexts. For instance, stakeholders could read the CLJA as a unique response to the military's and the VA's chronic inability to provide adequate relief, as evidenced by the sheer volume of claims denials, including on improper grounds, in the CLJA context;[291] the fact that the VA only processed 57,500 claims in five years,

284. 10 U.S.C. § 2733a(c)(2); *see* Camp Lejeune Justice Act of 2022 § 804 (containing no provisions about attorneys' fees). Still, this provision may see reform, and the government also continues to push attorneys' fees caps in the litigation. *See supra* note 216 and accompanying text.

285. *See, e.g.*, Camp Lejeune Veterans and Families Protection Act, H.R. 9430, 117th Cong. (2022) (amending the Honoring Our PACT Act of 2022 to establish a maximum amount of attorney fees for suits against the United States relating to water at Camp Lejeune); United States' Statement of Interest Regarding Attorneys' Fees, *supra* note 216, at 1–15 (arguing for establishing attorneys' fees caps based on FTCA in CLJA context).

286. *See* 32 C.F.R. § 45.1(b).

287. *See* Camp Lejeune Justice Act of 2022 § 804(b); 10 U.S.C. § 2733a(a).

288. Camp Lejeune Justice Act of 2022 § 804(e)(1); 32 C.F.R. § 45.14(a).

289. Camp Lejeune Justice Act of 2022 § 804(g); 32 C.F.R. § 45.2(f)(4).

290. *See* Camp Lejeune Justice Act of 2022 § 804(j); 10 U.S.C. § 2733a(b)(4).

291. OFF. OF INSPECTOR GEN., DEP'T OF VETERANS AFFS., *supra* note 79, at 7.

despite an estimated one million potential victims;[292] the significant shortcomings in the 2020 NDAA malpractice claims process provision in terms of both scope and structure;[293] and the longer-term problems facing the VA.[294] Indeed, the current frustration with the law's rollout among claimants, Congress, and judges alike cautions that the law could end in failure.

Moreover, as supporters of *Feres* argue, the doctrine does have its advantages.[295] For instance, the *Feres* doctrine prevents excessive damages awards given that the existing military compensation system provides benefits.[296] The *Feres* Court noted that, when Congress enacted the FTCA, it faced no onslaught of private bills in the military context because of the "comprehensive" structure already in place.[297] At least in 1950, when the Supreme Court announced *Feres*, the remedies available via the administrative claims system could prove more lucrative than what an injured servicemember could obtain in court.[298] And this rationale continues to find support today. During the debate over the 2020 NDAA, Senator Lindsey Graham (R-SC) commented that "[i]f you are hurt in a medical facility as a member you have medical retirement," emphasizing further that opening the military up to lawsuits would have an adverse impact on combat readiness in the future.[299]

Beyond the obstacle posed by support for *Feres* in the literature, within Congress, and at the Supreme Court, a legislative remedy like the CLJA also presents the problems typically associated with the legislative process. Indeed, it took nearly four decades of studies and legislative advocacy, as well as at least two attempts at relief in the 2012 law and the 2017 VA regulations, for Congress to enact the CLJA. When President Biden finally signed the PACT Act, and with it, the CLJA, into law, the product represented a compromise, including provisions such as the compensation offset and a temporary, two-year window

292. *Id.* at i-ii; ATSDR, *Camp Lejeune*, *supra* note 1.

293. *See* Diehl, *supra* note 121, at 187–93.

294. *See, e.g.*, Jaden Urbi, *The VA's History of Setbacks and Missteps*, CNBC, https://www.cnbc.com/2018/05/28/va-veterans-affairs-history-setbacks-missteps.html/ [https://perma.cc/2T7V-2WVW] (last updated May 28, 2018, 3:16 PM) (discussing spending, quality of care, claims backlog, and other issues faced by the VA).

295. *See, e.g.*, Kelly L. Dill, Comment, *The* Feres *Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 84, 87–91 (2001) (arguing that the strong military compensation system in place prevents need to overrule *Feres*, an action that could lead to double recovery).

296. *See id.* at 87.

297. Feres v. United States, 340 U.S. 135, 140 (1950).

298. *See id.* at 145.

299. Roxana Tiron & Travis J. Tritten, *Trump Ally Graham Opposes Troops' Bid To Sue on Botched Care*, BLOOMBERG GOV'T (Sept. 18, 2019, 3:51 PM), https://about.bgov.com/news/trump-ally-graham-opposes-troops-bid-to-sue-on-botched-care/ [https://perma.cc/SEA5-MBA6 (dark archive)]. Senator Graham voted for the PACT Act, but senators can vote on legislation for any number of reasons. *Roll Call Vote 117th Congress – 2nd Session*, U.S. SENATE (Aug. 2, 2022), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00280.htm/ [https://perma.cc/52JE-Z8NZ].

for filing suit. Even the CLJA in its current form may not represent a final solution, with renewed debate over whether to reform the law to establish attorneys' fees caps.[300]

3. The CLJA: A Strong Policy Option for the Present and Future

Despite these drawbacks, indicators in both the CLJA's structure and implementation to date suggest it will successfully afford relief to those injured by toxic water at Camp Lejeune in the absence of the Supreme Court overruling *Feres*. First, the dual administrative-judicial scheme in the CLJA, as closely analogous to the FTCA, underscores an intent for victims to receive just compensation one way or the other—if not through the administrative system, then through the courts. The CLJA thus operates to provide a judicial check on the military's and the executive branch's existing claims structures, incentivizing these systems to provide more adequate and better relief in the future. In the short run, at least, this framework suggests that Camp Lejeune victims will finally obtain the remuneration that many have fought for decades to secure.

Second, the fact that plaintiffs' lawyers have bet big on the CLJA underscores its potential to succeed. In 2022, attorneys spent over $145 million advertising their services to Camp Lejeune claimants, more than double the amount spent on asbestos and mesothelioma mass tort marketing.[301] Congress too has geared up to support payouts, appropriating over $6 billion to cover awards under the law.[302] Together, these investments indicate that the CLJA provides a winning formula for veterans (and by extension, the plaintiffs' bar). When the dust settles, the end result could represent the largest military-related liability payout in the country's history.[303]

Looking ahead, the CLJA could serve as a warning to the military and the VA that Congress will step in when the existing compensation system fails to support servicemembers and their families suffering from grievous injuries. If the historic benefits expansion enacted by the other provisions in the PACT Act[304] fail to materialize, for example, then Congress could again turn toward a

300. Camp Lejeune Veterans and Families Protection Act, H.R. 9430, 117th Cong. (2022); United States' Statement of Interest Regarding Attorneys' Fees, *supra* note 216, at 1–15 (arguing for establishing attorneys' fees caps based on FTCA in CLJA context).

301. Roy Strom, *Camp Lejeune Ads Surge Amid 'Wild West' of Legal Finance, Tech*, BLOOMBERG L. (Jan. 30, 2023, 5:02 PM), https://news.bloomberglaw.com/business-and-practice/camp-lejeune-ads-surge-amid-wild-west-of-legal-finance-tech/ [https://perma.cc/SX6S-YC4B (staff-uploaded, dark archive)].

302. *Id.*

303. *See id.*

304. *Fact Sheet: PACT Act Delivers on President Biden's Promise to America's Veterans*, WHITE HOUSE (Aug. 2, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/02/fact-sheet-pact-act-delivers-on-president-bidens-promise-to-americas-veterans/ [https://perma.cc/ZH8M-VFYH].

CLJA-esque solution to give servicemembers injured by toxic exposure leverage via the courts. A CLJA-esque solution could also inform policymaking in other areas of military justice contextualized by uncertainty as to whether *Feres* will bar a plaintiff's claim, namely cases involving sexual assault.[305] Thus, while Congress might have enacted the CLJA in response to a specific problem, this reality does not preclude Congress from using the CLJA approach to solve other existing and future issues in this space.

In fact, a bipartisan group in Congress introduced CLJA-esque legislation in July of 2023 to add teeth to the 2020 NDAA medical malpractice claims process.[306] The proposal came on the heels of Congressional outrage after reports that the DoD denied 140 of the 155 malpractice claims submitted administratively since the 2020 NDAA's passage,[307] including that of Richard Stayskal—the Green Beret whose experience prompted the 2020 NDAA's reform in the first place.[308] The bill, the Healthcare Equality and Rights for Our Heroes Act ("HERO Act"), allows for claims "against the United States . . . for damages for personal injury or death of a member of the Armed Forces arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions . . . that is provided at a covered military medical treatment facility."[309]

In addition to allowing injured servicemembers to seek damages in federal court, the HERO Act borrows from the CLJA in other respects: (1) it provides an exclusive remedy,[310] (2) it contains a statute of limitations,[311] and (3) claimants must still comply with the administrative claims process before seeking relief in court.[312] But the HERO Act differs from the CLJA in other regards, though none represent large-scale departures from the CLJA's

305. *See* Spletstoser v. Hyten, 44 F.4th 938, 958–59 (9th Cir. 2022) (holding *Feres* did not bar sexual assault claim). *But see* Doe v. United States, 815 F. App'x 592, 594–95 (2d Cir. 2020) (barring sexual assault claim in part based on *Feres*), *cert. denied*, 141 S. Ct. 1498 (2021).

306. Press Release, Off. of Congressman Richard Hudson, Hudson Introduces HERO Act To Enhance Legal Protection, Compensation for Military Medical Malpractice (July 13, 2023), https://hudson.house.gov/press-releases/hudson-introduces-hero-act-to-enhance-legal-protection-compensation-for-military/ [https://perma.cc/6VUZ-7VUX].

307. NTD News, *Sen. Mullin, Rep. Hudson Discuss the Military Medical Accountability Act*, YOUTUBE (Mar. 29, 2023), https://youtu.be/BYeH00CQLk4 [https://perma.cc/HH9E-NFHC] (beginning around timestamp 3:45).

308. Ian Shapira, *A Green Beret's Cancer Changed Military Malpractice Law. His Claim Still Got Denied.*, WASH. POST (Mar. 29, 2023, 7:00 AM), https://www.washingtonpost.com/dc-md-va/2023/03/29/army-malpractice-richard-stayskal-claim-denied/ [https://perma.cc/7KTT-Q9YW (dark archive)]. The military later offered Stayskal a settlement of $600,000—far less than the $40 million he initially claimed. *Id.*

309. Healthcare Equality and Rights for Our Heroes Act, H.R. 4334, 118th Cong. § 2(b) (2023).

310. *Id.*; Camp Lejeune Justice Act of 2022, Pub. L. No. 117-168, § 804(e)(1), 136 Stat. 1759, 1803 (codified at 28 U.S.C. § 2671 note).

311. H.R. 4334 § 2(b); Camp Lejeune Justice Act of 2022 § 804(j).

312. H.R. 4334 § 2(b); Camp Lejeune Justice Act of 2022 § 804(h).

structure. First, the government does not reduce an award of compensation under the HERO Act by a claimant's Servicemembers' Group Life Insurance benefit.[313] And second, the combatant activities exception to the FTCA does not apply in actions under the HERO Act.[314] Thus, while future legislation in this arena may differ in terms of minor details, the HERO Act's introduction suggests Congress intends to keep the CLJA's structure when implementing future reforms.

Indeed, the passage of the CLJA further shows that Congress has taken ownership over when to dial back the harshness of *Feres*. With Congress having taken two actions recently (the 2020 NDAA and the CLJA) after decades of advocacy, Congress stands well positioned to take additional action as necessary. Moreover, as the CLJA both builds off of the 2020 NDAA medical malpractice claims system and operates as more closely analogous to the remedy provided under the FTCA, it signals a congressional willingness to partially abandon the traditional military claims system in order to subject the military and the VA to judicial oversight. Such an approach remains especially important given the modern difficulties the VA faces in providing adequate compensation to veterans,[315] an ability that the *Feres* Court explicitly relied on in justifying its decision.[316] Perhaps the advantages of *Feres* do not hold water in today's military compensation landscape. As a result, though the CLJA approach has potential drawbacks, the sum of its advantages, as well as context in which its disadvantages exist, reveal that the CLJA's framework remains both a strong—and viable—solution for the future.

CONCLUSION

When viewing the CLJA in this level of detail, one can easily lose sight of the remarkable achievement it represents, even if imperfect. The fact remains that individuals and families like Catherine Daniels, Jerry Ensminger, Dr. Mike Gros, the Lewises, Mike Partain, and the Hollidays that suffered grievous injury due to the water contamination at Camp Lejeune can now successfully petition the government for financial damages in a court of law, a victory that comes after nearly forty years of battling against some of the most powerful institutions in the country—the military, the Supreme Court, and Congress, among others. The passage of the CLJA, along with the effort expended by many to obtain it, thus deserves commendation.

Considering the law more holistically, the CLJA stands at the crux of a new era for the military's sovereign immunity from civil lawsuits, governed for

313. H.R. 4334 § 2(b); Camp Lejeune Justice Act of 2022 § 804(e)(2).
314. H.R. 4334 § 2(b); Camp Lejeune Justice Act of 2022 § 804(i).
315. *See supra* note 294 and accompanying text.
316. *See* Feres v. United States, 340 U.S. 135, 145 (1950).

almost seventy-five years by the stringency, and steadiness, of the *Feres* doctrine. Following on the heels of congressional authorization in the 2020 NDAA of administrative claims for medical malpractice against the military, the CLJA again signals a willingness to depart from *Feres* in specific circumstances in order to provide injured servicemembers with justice. Moreover, in its current form, the CLJA builds on the process established by the 2020 NDAA and provides an avenue for relief much more analogous to that found under the FTCA, giving veterans an opportunity for remuneration previously barred by *Feres*. The CLJA thus not only marks a hard-fought step forward in curtailing the military's sovereign immunity but also holds promise as a mechanism by which to get around the harshness of *Feres* in the future. Hopefully, when the time comes to reflect on the CLJA seventy-five years from now, this same sentiment will continue to ring true.

WILLIAM RHYNE**

** I have many to thank. I would like to acknowledge the hard work and dedication of Anna Fraser, Elizabeth Poole, Sonam Shah, Jess Errico, Aidan Kelley, Alex Goodin, Connor Fraley, Ken Chu, Matthew Adams, Rebecca Blinzler, Kathryn Turk, Deven Upadhyay, Nicole Gibson, Alia Basar, John Choi, Mia Thillet, Will White, Olivia Hilt, Jack Salt, Alex Slawson, Halie Mariano, Kat Robinson, and the other editorial board members and staff of the *North Carolina Law Review* Vols. 101 and 102 for their thorough editing and attention to detail. I would also like to acknowledge Professors Richard Saver, Maria Savasta-Kennedy, John Brooker, and Don Hornstein for their thoughtful feedback and advice in developing, researching, and writing about this topic. And I would like to acknowledge Professor Meghan Brooks and Tyler McIntyre for their insight as well. While this Comment bears my name, it reflects the contributions of many, and I remain grateful for their support. Finally, I would like to thank those in our Armed Forces whose sacrifices give us the freedom to engage in discussions of this magnitude.