No. _____

In The

Supreme Court of the United States

GREGORY PAYNE DAVIDSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the holding of *Feres v. United States*, 340 U.S. 135, 146 (1950), "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" be overruled?

2. Does the immunity from suit for activities "incident to [military] service" established by *Feres v. United States*, 340 U.S. at 146, apply when:

   (a) the suit is not one brought under the Federal Tort Claims Act against the government, but is a suit against individuals;

   (b) the suit alleges that the injuries were intentionally and maliciously inflicted;

   (c) the parties involved are not members of the regular Armed Forces of the United States, but are National Guardsmen;

   (d) the injury arose from a complaint unrelated to military duty, but involving off-duty conduct;

   (e) a portion of the injury was inflicted after Petitioner had left the military service; and

   (f) at the time of filing of the suit, Petitioner was no longer a member of the National Guard?

3. What is the meaning of the term "incident to service" used in *Feres v. United States*, 340 U.S. at 146?

QUESTIONS PRESENTED – Continued

4. Does the holding in *Feres v. United States*, 340 U.S. at 146, that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," apply to suits against individual members of the National Guard for intentional and malicious injuries?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Gregory Payne Davidson, Petitioner;
2. United States of America, Respondent;
3. Michael Gray (prior Defendant); and
4. Dallas Cleveland (prior Defendant).

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The unpublished decision of the United States Court of Appeals for the Fifth Circuit is found at ___ F.3d ___, 2016 WL 1621985 (5th Cir. 2016), and is attached as Appendix 1-7. The published opinion of the United States District Court for the Northern District of Mississippi is attached as Appendix 8-12, and is found at 117 F.Supp.3d 876 (N.D. Miss. 2015). The unpublished Judgment of the United States District Court is attached as Appendix 13. The unpublished order of the United States Court of Appeals for the Fifth Circuit denying petition for rehearing is attached as Appendix 14.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on April 22, 2016, motion for rehearing denied on June 27, 2016, by writ of *certiorari* under 28 U.S.C. § 1254(1).

FEDERAL STATUTE CONSTRUED

The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), provides:

> Subject to the provisions of chapter 171 of this title, the district courts, . . . shall have exclusive jurisdiction of civil actions on claims

> against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> Under 28 U.S.C. § 2680, the
>
> . . . provisions of . . . section 1346(b) of this title shall not apply to: . . . **(h)** [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights:. . . . [or to] **(j)** [a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

28 U.S.C. § 2680.

STATEMENT OF THE CASE

Petitioner Gregory Payne Davidson (hereinafter "Petitioner"), a former Mississippi National Guard Sergeant, filed suit in the state court of Lee County, Mississippi, against two (2) of his former supervisors, his

former acting First Sergeant Dallas Cleveland (hereinafter "Cleveland"), and his former acting Company Commander Michael Gray (hereinafter "Gray"). Petitioner alleged that these two former supervisors had schemed to end his National Guard career in retaliation for an email which Petitioner had written to acting Company Commander Gray complaining about off-duty misconduct by acting First Sergeant Cleveland.

Rather than investigating Cleveland's off-duty misconduct, Gray and Cleveland retaliated against Petitioner for his complaint by ordering him to perform a physical fitness test during federal sequestration – a government-imposed furlough – which Petitioner could not lawfully be ordered to perform.

Notwithstanding Gray's and Cleveland's lack of authority to order such a fitness test, Petitioner performed the test as illegally ordered. Gray and Cleveland then falsified the results of the unauthorized physical fitness test, falsely claiming Petitioner had failed the test. This falsification resulted in Petitioner's being discharged from the Mississippi National Guard. After Petitioner's discharge, Gray and Cleveland then generated a "needs improvement" non-commissioned officer's ("NCO") evaluation report. The false "needs improvement" report caused Petitioner to be ineligible to reenlist in the Guard or any other military service, and ended his seventeen (17) year military career.

Petitioner's suit was filed against Gray and Cleveland, in their individual capacities, for the Mississippi law tort of malicious interference with employment

and prospective employment. The United States of America (hereinafter "United States"), claiming that it, not Gray and Cleveland, was the appropriate defendant, subsequently substituted itself for Gray and Cleveland, and removed the case to the United States District Court for the Northern District of Mississippi. The United States then filed a motion to dismiss, which the United States District Court sustained. Appendix 8-12. The United States Court of Appeals for the Fifth Circuit affirmed. Appendix 1-7. The Fifth Circuit denied Petitioner's request for rehearing. Appendix 14. Petitioner timely files this Petition within the ninety (90) days after the Fifth Circuit's denial of the petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. The Court should grant the Writ to overrule *Feres v. United States*, 340 U.S. 135 (1950).

Feres v. United States, 340 U.S. 135, 138 (1950), considered the liability of the United States for damages to three (3) members of the military who "while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." This Court "conclude[d] that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. The Fifth Circuit, in the case at bar, expanded *Feres* to include immunity for suits by individual members of the

National Guard for malicious misconduct by their supervisors. According to the Fifth Circuit, it is " . . . apparent that the actions alleged in Davidson's complaint occurred 'in the course of activity incident to service' in the National Guard. *See Feres*, 340 U.S. at 146." *Davidson v. United States*, 2016 WL 1621985, at *2 (5th Cir. 2016); Appendix 5.

The Fifth Circuit found it of no significance that Petitioner's injuries occurred at a time of federal sequestration, stating:

> Davidson unconvincingly argues that *Feres* is inapplicable because he was not on active duty due to the federal sequestration in effect at the time of his failed physical fitness tests. However, "[t]he fact that an injured service member is not on active duty when the injury occurs does not preclude application of the *Feres* doctrine." *Miller*, 42 F.3d at 303."[1]

Davidson, 2016 WL 1621985, at *2; Appendix 6.

By applying *Feres* to claims for intentional injuries against individual defendants, the Fifth Circuit expanded the judicial immunity created by *Feres*. Before deciding whether such a broad interpretation of *Feres* is warranted, it is logical first to decide whether the *Feres* Doctrine itself is so unsound that it should be overruled.

In *United States v. Johnson*, 481 U.S. 681, 698-99 (1987), Justice Scalia, speaking for four (4) justices,

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[1] *Miller v. U.S.*, 42 F.3d 297 (5th Cir. 1995).

argued that *Feres* should be overruled since it created an immunity not authorized by Congress:

> It is strange that Congress' "obvious" intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of *Feres* suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed.

Justice Scalia's dissent was recently praised in *Ortiz v. U.S. ex rel. Evans Army Community Hosp.*, 786 F.3d 817, 823 (10th Cir. 2015), cert. granted, ___ U.S. ___, which observed that "the *Feres* doctrine has been criticized by countless courts and commentators across the jurisprudential spectrum."

In calling for reconsideration of *Feres*' immunity, Jennifer L. Zenar in *The Feres Doctrine: Don't Let This Be It. Fight!*, 46 J. Marshall L. Rev. 607, n. 41 (Nov. 2013), cites many authorities questioning the soundness of *Feres*, including:

> . . . *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J., dissenting) (arguing that the *Feres* Doctrine is unconstitutional as a violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments and also a violation of the separation of powers); *Sanchez v. United States*, 813 F.2d 593, 595 (2d Cir. 1987), modified, 839 F.2d 40

(2d Cir. 1988) (noting that the *Feres* Doctrine lacks a theoretical basis for its decision); *Taber v. Maine*, 67 F.3d 1029, 1032, 1038 (2d Cir. 1995) (finding that "the *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today," and noting that it is "an extremely confused and confusing area of law"); *Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985) (referring to the *Feres* Doctrine as a "blunt instrument"); *Hinkle v. United States*, 715 F.2d 96, 97 (3d Cir. 1983) (condemning the *Feres* Doctrine and the Supreme Court's inaction in that the court felt it was "forced once again to decide a case where 'we sense the injustice . . . of [the] result' but where nevertheless we have no legal authority, as an intermediate appellate court, to decide the case differently"); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (regretting its decision to bar the claim, the court "reluctantly" dismissed the claim and noted that it was not "blind to the tragedy . . . and . . . regrets the effects of our conclusion"); *Monaco v. United States*, 661 F.2d 129, 131-32 (9th Cir. 1981) (finding that the *Feres* Doctrine is the "subject of confusion" and stating that the court was not "fully convinced" of the doctrine's legal viability); see also *Purcell [v. U.S.]*, 656 F.3d [463] at 465 [2011] (stating that *Feres* is "viable," but "not without controversy"); *McConnell [v. U.S.]*, 478 F.3d [1092] at 1098 [2007] (finding that the Ninth Circuit's precedent relating to the *Feres* Doctrine creates an injustice and respectfully asking the

Supreme Court of the United States to reconsider the rationales supporting the doctrine); *Kohn v. United States*, 680 F.2d 922, 925 (2d Cir. 1982) (recognizing that the *Feres* Doctrine is a controversial decision, but also that the court is obliged to follow precedent); *LaBash v. U.S. Dep't of the Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) (noting that "only the Supreme Court of the United States can overrule or modify *Feres*").

Because of the abundant authority questioning *Feres*, and because this Court has so recently indicated in *Ortiz* that the issue is worthy of review, this Court should grant the Writ.

II. *Feres* should not be expanded to provide immunity for intentional malicious acts in suits brought against individuals.

Assuming the continued validity of *Feres*, the Fifth Circuit should not have judicially-expanded *Feres* to encompass claims against individuals for malicious acts committed without any lawful authority. *Feres* involved claimants who while "on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." *Feres*, 340 U.S. at 138. On the other hand, the case at bar involves malicious and intentional actions by individual defendants undertaken during sequestration, a government-imposed furlough, when the individuals lacked lawful authority to spend any monies of the United States, or to order Petitioner

to perform any duties. The Writ should be granted because the Fifth Circuit refused to apply controlling authority from this Court.

In *Wilkes v. Dinsman*, 48 U.S. 89 (1849), the plaintiff was an active-duty Marine, who alleged that his naval commander had him flogged, arrested, and imprisoned for refusing to perform his regular duties. The plaintiff filed suit for assault and false imprisonment. This Court held there was a "presumption" that an officer had legitimately performed his duties in good faith, but that an action might be maintained if it were proved that he acted "beyond his jurisdiction . . . [taking actions] arising from ill-will, [from] a depraved disposition, or vindictive feeling,. . . ." *Wilkes*, 48 U.S. at 130.

In a subsequent appeal, *Wilkes* again set out the circumstances under which an officer of the United States might be held individually liable, stating:

> The case is one of much delicacy and importance as regards our naval service. For it is essential to its security and efficiency that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of justice, as well as on shipboard. And if it is not, the flag of the United States would soon be dishonored in every sea. *But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service*

> *to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.*

Dinsman v. Wilkes, 53 U.S. 390, 403 (1851) (emphasis added).

Wilkes was cited with approval in *Butz v. Economou*, 438 U.S. 478, 491-92 (1978), which stated:

> [I]n a case involving military discipline, the Court issued a similar ruling, exculpating the defendant officer because of the failure to prove that he had exceeded his jurisdiction or had exercised it in a malicious or willfully erroneous manner: "[I]t is not enough to show he committed an error of judgment, but it must have been a malicious and wilful error." *Wilkes v. Dinsman*, 7 How. 89, 131, 12 L.Ed. 618 (1849).

Butz also cites, with approval, *Little v. Barreme*, 2 Cranch 170, 2 L.Ed. 243 (1804), which established liability for the seizure of a vessel when "the seizure at issue was not among that class of seizures that the Executive had been authorized by statute to effect." *Butz*, 438 U.S. at 490. *Butz* stated:

> *Bates v. Clark*, 95 U.S. 204, 24 L.Ed. 471 (1877), was a similar case. The relevant statute directed seizures of alcoholic beverages in Indian country, but the seizure at issue, which was made upon the orders of a superior, was not made in Indian country. The "objection fatal to all this class of defenses is that in that

> locality [the seizing officers] were utterly without any authority in the premises" and hence were answerable in damages.

Butz, 438 U.S. at 490.

In the present case, as in the three (3) Supreme Court cases cited in *Butz*, Petitioner's supervisors not only acted with "malice or ill-will," but also "exceeded [their] jurisdiction." *Butz*, 438 U.S. at 492. This case fits within the *Dinsman/Butz* theory of liability, since the individual supervisory officers both acted maliciously and performed acts which were not "authorized by law" and which "exceeded [their] jurisdiction."

Other circuits uphold liability against individual military officers for intentional, unauthorized acts. *Jackson v. Tate*, 648 F.3d 729, 730 (9th Cir. 2011), held that officers may be sued individually when they commit an intentional wrongful act, such as "forging [plaintiff's] signature on re-enlistment papers." According to *Day v. Massachusetts Air Nat. Guard*, 167 F.3d 678, 681 (1st Cir. 1999), "[w]e conclude that *Feres* . . . does not bar state claims against individual servicemen for conduct outside the scope of their duties." Maliciously requiring Davidson to submit to an unlawful duty, off of a military post or property, falsifying the record of his performance of that duty, and giving him a concocted evaluation report after his discharge, is all conduct "outside the scope of their duties."

Feres distinguished earlier cases which had been "brought after the individual was discharged." *Feres*, 340 U.S. at 145. This present suit, also brought after

Petitioner was discharged, is against individuals for their malicious and intentional acts. Allowing a suit against those who have no lawful authority to take any military action and who generated a forged and falsified report after Petitioner was discharged does not give "judges . . . the task of running the Army" as disapproved in *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

The Petitioner was discharged on November 26, 2013. Since Gray's and Cleveland's forged and fabricated NCO evaluation was not created until December 7, 2013, after Davidson's discharge, at a time when Petitioner was a civilian, the Fifth Circuit should have followed the limitation on *Feres* established in *United States v. Brown*, 348 U.S. 110 (1954). In *Brown*, the plaintiff's injuries occurred in the Veteran's Administration Hospital after discharge. As in *Brown*, "the injury [here, the falsified NCO evaluation report that precluded re-enlistment and precluded any opportunity to become an officer] occurred after his discharge, while [Petitioner] enjoyed a civilian status." *Brown*, 348 U.S. at 112. Because of the near identity between the situation in *Brown* and the situation in the case at bar, Petitioner's injury should be determined not to be "incident to service" as contemplated by *Feres*. *Id.*

Indeed, this Court has held that even the Commander in Chief may be sued for intentional injuries inflicted before he took office. *Clinton v. Jones*, 520 U.S. 681, 693 (1997). By analogy, surely lower officers, such

as a National Guard sergeant, may be sued for intentional injuries inflicted on one who has left military service. "The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." *Clinton*, 520 U.S. at 692-93.

Feres is best explained by the "peculiar and special relationship of the solder to his superiors, the effects of the maintenance of such suits on discipline. . . ." *United States v. Muniz*, 374 U.S. 150, 162 (1963), quoting *United States v. Brown*, 348 U.S. 110, 112 (1954). Those considerations do not apply when a civilian files suit for damages against individuals who are no longer superior to him. It most certainly does not apply to injury inflicted *after* discharge. By extending *Feres* to establish immunity under the Constitution in circumstances far different from *Feres*, the Fifth Circuit has disregarded this Court's precedents. *Certiorari* should be granted for this reason also.

CONCLUSION

This case involves a far-reaching expansion of an immunity about which a dissenting opinion of this Court and many judges of the lower federal courts have expressed grave reservations. This is an important case for which the Writ should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-60567
Summary Calendar

GREGORY PAYNE DAVIDSON,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:14-CV-230

(Filed Apr. 22, 2016)

Before REAVLEY, SMITH, and HAYNES, Circuit Judges.

PER CURIAM:*

Gregory Payne Davidson appeals the district court's order dismissing Davidson's claims against his former

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

superiors at the National Guard due to lack of subject matter jurisdiction. We AFFIRM.

I. Background

In November of 2014, former Mississippi Army National Guard Staff Sergeant Gregory Payne Davidson filed suit in Mississippi state court against two of his former superior officers, acting Commander Michael Gray and acting First Sergeant Dallas Cleveland. According to Davidson, in response to an email he wrote to Gray complaining about Cleveland's conduct, Gray and Cleveland retaliated against him by causing him to fail two physical fitness tests and by fabricating Davidson's Noncommissioned Officer Evaluation Report to indicate that his physical fitness "need[ed] improvement." Davidson alleged that because of Gray and Cleveland's actions, he was unable to reenlist in the National Guard. He asserted state law claims against Gray and Cleveland for intentional interference with employment and intentional malicious interference with prospective economic gain.

Gray and Cleveland jointly removed the action to federal district court. Upon certifying that Gray and Cleveland were federal employees acting within the scope of their federal employment at the time of the alleged actions, the United States of America substituted itself for Gray and Cleveland. The United States then filed a motion to dismiss Davidson's complaint based on, among other things, lack of subject matter

jurisdiction under the *Feres*[1] doctrine. The district court granted the Federal Rule of Civil Procedure 12(b)(1) motion to dismiss, and Davidson timely appealed.

II. Discussion

We review de novo a district court's granting of a motion to dismiss under Rule 12(b)(1). *Willoughby v. U.S. ex rel. U.S. Dep't of the Army*, 730 F.3d 476, 479 (5th Cir. 2013). In reviewing a Rule 12(b)(1) disposition, a district court may consider "(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the that [sic] court's resolution of disputed facts." *Walch v. Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 293 (5th Cir. 2008) (citation omitted); *see also Smith v. Reg'l Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014) ("In considering a challenge to subject matter jurisdiction, the district court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case." (citation omitted))

The *Feres* doctrine bars claims asserted by military service members against their superiors "where the injuries arise out of or are in the course of activity incident to service." *Feres v. United* States, 340 U.S. 135, 146 (1950); *see also United States v. Stanley*, 483 U.S. 669, 679 (1987) ("[T]he unique disciplinary structure of the Military Establishment and Congress'

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

activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a [federal] remedy against their superior officers." (citation omitted)); *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983) ("[W]e must be concerned with the disruption of the peculiar and special relationship of the soldier to his superiors that might result if the soldier were allowed to hale his superiors into court. . . ." (alteration in original) (citation omitted)); *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034, 1035 (5th Cir. 1986) ("[C]ivilian courts may not sit in plenary review over intraservice military disputes.").

The *Feres* doctrine applies to National Guardsmen. *Schoemer v. United States*, 59 F.3d 26, 29 (5th Cir. 1995); *Walch*, 533 F.3d at 296-97. The *Feres* doctrine also applies to state claw claims because "[j]udicial review of a claim for damages asserted on the basis of state law would constitute no less an unwarranted intrusion into the military personnel structure than the entertainment of [federal claims]." *Holdiness v. Stroud*, 808 F.2d 417, 419-20, 426 (5th Cir. 1987) (dismissing a discharged National Guardsmen's state law claim brought against his former superiors for discriminatorily denying him a promotion and giving him an arbitrarily low job evaluation report).

In determining whether Davidson's claimed injuries occurred in the course of activity incident to service and are thus barred under *Feres*, we examine the

totality of the circumstances.[2] *See Schoemer*, 59 F.3d at 28. The "incident to service" test has been broadly construed to immunize the United States and members of the military from any suit that might intrude upon military affairs, second-guess military decisions, or impair military discipline. *See Miller v. United States*, 42 F.3d 297, 302 (5th Cir. 1995).

It is readily apparent that the actions alleged in Davidson's complaint occurred "in the course of activity incident to service" in the National Guard. *See Feres*, 340 U.S. at 146. The complaint notes that Davidson was a member of the National Guard, with Gray serving as his acting Commander and Cleveland as his acting First Sergeant. Attached to the complaint is an email, sent to Gray's National Guard email address, in which Davidson expresses misgivings about Cleveland's conduct. Davidson's complaint further disagrees with the manner in which Cleveland and Gray conducted two physical fitness tests that Davidson failed. Finally, Davidson's complaint also attaches his noncommissioned officer's evaluation report – allegedly falsified by Gray and Cleveland – that states that Davidson "need[ed] improvement" in certain categories, including physical fitness.[3] In sum, it is clear that

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[2] "In particular, we consider: (1) the serviceman's duty status; (2) the site of his injury; and (3) the activity he was performing." *Schoemer*, 59 F.3d at 28.

[3] Davidson does not dispute that he has yet to pursue administrative remedies for his claims with the Army Board for Correction of Military Records. In any event, even assuming Gray and Cleveland acted maliciously, Davidson's claim that *Feres* is inapplicable to common law intentional torts is incorrect. *See*

the alleged actions within the complaint occurred "in the course of activity incident to service" in the National Guard.[4] *Id.*

Davidson unconvincingly argues that *Feres* is inapplicable because he was not on active duty due to the federal sequestration in effect at the time of his failed physical fitness tests. However, "[t]he fact that an injured service member is not on active duty when the injury occurs does not preclude application of the *Feres* doctrine." *Miller*, 42 F.3d at 303. A prime rationale for the *Feres* doctrine is that military training decisions – such as how to conduct physical fitness tests and evaluate military personnel – are professional military judgments best left to the legislative and executive branches and not to civilian courts. *See id.* at 303-04; *see also Walch*, 533 F.3d at 301 ("[A] court may not reconsider what a claimant's superiors did in the

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Holdiness, 808 F.2d at 419, 426 & n.51 (dismissing a state law claim based on the allegedly discriminatory denial of a promotion, and citing *Trerice v. Pederson*, 769 F.2d 1398, 1404 (9th Cir. 1985) (noting that *Feres* has been extended to cover "actions for injuries arising out of intentional tortious conduct")).

[4] Davidson also attempts to argue that his injuries did not occur incident to his service in the National Guard because, according to his complaint, his evaluation report was not provided to him until after his discharge. This argument is specious at best. The injury Davidson complains of is the discharge *itself*. For the allegedly false evaluation report to have contributed to his injury, it inevitably would have had to influence the decision to discharge Davidson *before* the discharge actually occurred. The mere fact that Davidson did not *receive* the evaluation report until after his discharge is irrelevant.

name of personnel management – demotions, determining performance level, reassignments to different jobs – because such decisions are integral to the military structure."). The *Feres* doctrine applies here, and the district court did not err in determining that it lacked subject matter jurisdiction.

We AFFIRM.[5]

[5] Due to the lack of jurisdiction, Davidson's request that we re-substitute the initial individual defendants is dismissed as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

GREGORY PAYNE DAVIDSON PLAINTIFF

v. CAUSE NO. 1:14CV230-LG-DAS

UNITED STATES OF AMERICA DEFENDANT

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS

BEFORE THE COURT is the Motion to Dismiss [4] filed by the Defendant, the United States of America. The Motion has been fully briefed by the parties. After due consideration of the submissions and the relevant law, the Court finds that it lacks subject matter jurisdiction of this case. Accordingly, the Motion will be granted and Plaintiff's claims dismissed.

BACKGROUND

Plaintiff Davidson filed this lawsuit in the Circuit Court of Lee County, Mississippi, against two individuals – Michael Gray and Dallas Cleveland; Gray was the acting Commander and Cleveland was the acting First Sergeant of Davidson's National Guard unit in Tupelo, Mississippi. Davidson alleged that Gray and Cleveland schemed to end Davidson's military career in retaliation for an email Davidson wrote to Gray complaining about Cleveland. Specifically, Gray and Cleveland failed Davidson on the fitness test required for re-enlistment, and fabricated an NCO Evaluation

Report to include ratings of "needs improvement." As a result, Davidson could not reenlist in the military. Davidson brought state law claims against Gray and Cleveland for intentional interference with employment and intentional malicious interference with prospective economic gain.

The United States of America was substituted for Gray and Cleveland upon certifications that they were statutorily deemed to be federal employees acting within the scope of their federal employment at the time of the alleged actions. (Notice of Substitution Ex. A, ECF No. 3-1). The United States removed the case to this Court and has filed a motion to dismiss Davidson's Complaint based on the *Feres* doctrine.[1] A motion to dismiss pursuant to the *Feres* doctrine is properly treated as a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *Presley v. Jackson Mun. Airport Auth.*, 94 F. Supp. 2d 755, 764 (S.D. Miss. 2000) (quoting *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996)).

DISCUSSION

Under the *Feres* doctrine, it is well established that military service members cannot assert claims against the military, their superiors or other service members "where the injuries arise out of or are in the course of activity incident to service." *Feres v. United*

[1] The United States asserted additional grounds for dismissal, but as the Court finds it lacks subject matter jurisdiction of the case, these additional grounds are not addressed.

States, 340 U.S. 135, 146 (1950); *United States v. Stanley*, 483 U.S. 669, 683-84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983). This bar has been interpreted broadly. "[P]ractically any suit that 'implicates the military judgments and decisions' . . . runs the risk of colliding with *Feres*." *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991) (quoting *United States v. Johnson*, 481 U.S. 681, 691 (1987)). *Feres* bars intentional tort and negligence claims, regardless of whether they are asserted under federal or state law. *Holdiness v. Stroud*, 808 F.2d 417, 426 (5th Cir. 1987); *Matreale v. N.J. Dep't. of Military & Veterans Affairs*, 487 F.3d 150, 156 (3d Cir. 2007); *Bowen v. Oistead*, 125 F.3d 800, 804 (9th Cir. 1997).

It is clear from Davidson's allegations that his alleged harm arose from, or in the course of activity incident to, his military service in the Mississippi Army National Guard, since his damages allegedly resulted from the conduct and actions of his superior officers. Although his allegations would seem to place his case squarely within *Feres*, Davidson argues that his status as a state, rather than federal, military employee exempts his claim from the *Feres* bar. However, the case law does not support this contention. There is no apparent distinction between members of the various National Guard units and other members of the United States military. *See Schoemer v. United States*, 59 F.3d 26, 29 (5th Cir. 1995) *(Feres* applies both to reservists and National Guardsmen); *Uhl v. Swanstrom*, 79 F.3d 751 (8th Cir. 1996) (applying *Feres* bar to suit by National Guardsman against his commanding state

officer, the Adjutant General of the Iowa Air National Guard, and the Iowa Air National Guard); *Stauber v. Cline*, 837 F.2d 395, 399 (9th Cir. 1988) ("It is beyond question that the *Feres* doctrine generally applies to claims brought by National Guard members."); *Townsend v. Seurer*, 791 F. Supp. 227, 229 (D. Minn. 1992) ("[R]egardless of whether the suit is brought against the state National Guard and individual Guard personnel or against the United States and individual Guard personnel, the *Feres* doctrine will bar the action.").

Finally, even if, as Davidson argues, he could not have been on active duty with the National Guard because of the federal sequestration in effect at the time of his fitness testing, that fact does not make *Feres* inapplicable. *See, e.g.*, *Miller v. United States*, 42 F.3d 297, 303 (5th Cir. 1995) ("incident to service" does not equate to active duty or actively pursuing military duties); *Quintana v. United States*, 997 F.2d 711, 712 (10th Cir. 1993) ("[A]ctive duty status is not necessary for the *Feres* 'incident to service' test to apply."); *Velez v. United States ex rel. Dep't. of Army*, 891 F. Supp. 61, 63 (D.P.R. 1995) ("The distinction between an 'active' and 'inactive' National Guard serviceman relative to the *Feres* doctrine is irrelevant.").

A liberal interpretation of the facts plead in Davidson's complaint raises only allegations about the manner in way his superiors evaluated his fitness for continued military employment. Pursuant to *Feres*, matters and decisions which are incident to military service may not be reconsidered by the Court. *See*

Walch v. Adjutant General's Dep't. of Tex., 533 F.3d 289, 301 (5th Cir. 2008) (court may not reconsider what a claimant's superiors did in the name of personnel management or determining performance level because such decisions are integral to the military structure). The Court therefore lacks subject matter jurisdiction of this case.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion to Dismiss [4] filed by the Defendant, the United States of America, is **GRANTED**. This case is dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

SO ORDERED AND ADJUDGED this the 29th day of July, 2015.

s/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
CHIEF U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

GREGORY PAYNE DAVIDSON PLAINTIFF

v. CAUSE NO. 1:14CV230-LG-DAS

UNITED STATES OF AMERICA DEFENDANT

JUDGMENT

This matter having come on to be heard on the Defendant's Motion to Dismiss, the Court, after a full review and consideration of the Motion, finds that in accord with the Order entered herewith,

IT IS ORDERED AND ADJUDGED that this cause is **DISMISSED** pursuant to FED. R. CIV. P. 12(b)(1).

SO ORDERED AND ADJUDGED this the 29th day of July, 2015.

s/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
CHIEF U.S. DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60567

GREGORY PAYNE DAVIDSON,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING

(Filed Jun. 27, 2016)

Before REAVLEY, SMITH, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES
CIRCUIT JUDGE