THE 'SPARTAN ACADEMY' SHIELD: HOW COURTS PROTECT THE LEADER DEVELOPMENT EDUCATION MODEL AT MILITARY COLLEGES

Christopher M. Hartley*

* Assistant Professor, Department of Law, United States Military Academy, West Point. The author is an active duty Army Judge Advocate. The views expressed here are the author's personal views and do not necessarily reflect those of the Department of Defense, the United States Army, the United States Military Academy, or any other department or agency of the United States Government.

I. INTRODUCTION

"Spartan children were placed in a military-style education program. At the age of seven, Spartan boys were removed from their parents' homes and began the 'agoge,' a state-sponsored training regimen designed to mold them into skilled warriors and moral citizens."[1]

The design and operation of today's military colleges and academies[2] in the United States were shaped and influenced by the Spartan educational model.[3] While the practices of modern-day military schools have obviously evolved since the original Spartan prototype summarized above, they nonetheless retain a distinguishable character that sets them apart from their contemporary civilian institution counterparts. The allegiance to this method of instruction is based on the schools' conviction that these means will produce their desired ends.[4] In this regard, the institutional goal of molding students into skilled warriors and moral citizens has arguably changed little since the inception of the Spartan model. If any evolution has occurred in terms of these desired ends, it reflects the common theme in today's 'military schools' missions of producing leaders for the nation's military and civilian society, alike.

The methods these schools use to develop leaders require a significant amount of daily close-quarters, person-to-person contact that is at odds with

---

1 Evan Andrews, *8 Reasons It Wasn't Easy Being Spartan*, HIST. (Sep. 1, 2018), https://www.history.com/news/8-reasons-it-wasnt-easy-being-spartan.

2 This article routinely uses the terms 'military colleges' or 'military schools' generically to refer to any institution of higher education that implements a military structured environment. For purposes of this article, the subject military schools fall into one of two categories: 1) Federal Service Academies or 2) Senior Military Colleges (SMCs).

3 *See e.g.*, Samantha Henneberry, *Modern Leonidas: Spartan Military Culture in a Modern American Context,* UNIV. R.I. SENIOR HONORS PROJECTS, Paper 105, at 44-50 (2008) https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1108&context=srhonorsprog.

4 *See id.*

the requisite 'social distancing' protocols designed as prudent measures to combat a pandemic. It is therefore easy to conclude that military schools and their corresponding missions and goals were more profoundly impacted by the shutdown and slowdown induced by COVID-19 than their civilian school counterparts. As operations at our nation's institutions of higher education incrementally edge back to more normal operations, our military colleges have an added impetus to lead that charge. This presents a timely opportunity to explore the jurisprudence that provides these military schools the legal latitude to perpetuate their method of education.

As mentioned, the Spartan academy model is very distinctive. To that end, casual onlookers, and in some cases current and former students,[5] may question the legality of military school methods. A survey of the legal doctrines and buffers that provide the 'Spartan shield' that protects the military school *modus operandi* is the focus of this article. To be sure, Congress and the courts have regularly held military schools accountable for Constitutional transgressions. Amidst legal challenges, however, the courts have largely allowed these institutions to leave their methods of producing leaders intact. Exploring how and why the courts afford these institutions this latitude rounds out the focus of this article.

This introductory section continues with helpful background information and contemporaneous perspective, including a review of the types of military schools in the United States and their mission statements. Part I of this article illustrates how the contrast between the curriculum of schools that employ military-style regimen with those who do not was further enhanced during the pandemic-catalyzed departure from normal operations. This part further describes the various types of higher education schools that utilize structured military environments and the sources of their legal authority and support. Part II then reviews legal doctrines commonly relied upon in military school court challenges and relevant court cases. A common theme in these court opinions is that they often yield significant legal latitude for the subject school to retain their unique structure, techniques, and curricula. Part III draws from review of this jurisprudence to provide conclusions that translate to guidance for how military schools can best navigate the minefield of legal challenges to their military models as they continue the march towards normal operations.

---

[5] This article also routinely (and interchangeably) uses the terms 'students' and 'cadets' to describe students at 'military schools' discussed in footnote 2. The term 'cadets' is used generically as most, but not all students at military schools carry the official title of 'cadet.' One exception to this rule is the students of the United States Naval Academy who hold the title 'Midshipmen.'

A. "An Eviction Notice."[6]

Leaders of higher education institutions across the country dealt with the challenge of a fundamentally transformed educational process during the COVID-19 pandemic. Unlike K-12 schools, where most of the students live in their own homes and near their schools, colleges and universities faced a more complex challenge as they dealt with student bodies who were not always from the local area and who typically live on school campuses while classes are in session.[7] These institutions, at least temporarily, were forced into radical departures from both the in-person learning model, as well as the resident-student experience that is, during normal times, taken for granted as an integral part of U.S. higher education.[8]

B. "We can't telecommute to combat."[9] No virtual option for the 'Spartan' Academy?

Institutions of higher education that utilize structured military environments were not immune to the effects of the pandemic-induced shutdown. In fact, the structural and curricular modifications precipitated by the COVID-19 adjustments arguably affected military schools more profoundly than their non-military counterparts. Not only did the eviction notices force these schools to depart from their model of prescribed on-campus living arrangements, but in doing so, it also curtailed some of the fundamental military components of their programs, thereby complicating their ability to accomplish their institutional missions.[10]

---

6 *See* Anemona Hartocollis, *'An Eviction Notice': Chaos After Colleges Tell Students to Stay Away*, N.Y. TIMES (Mar. 11, 2020), https://www.nytimes.com/2020/03/11/us/colleges-cancel-classes-coronavirus.html. Section title adopted from cite article which also provides valuable contemporaneous perspective of the college and university closing dynamic.

7 *See id.*

8 *See, e.g.*, JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 7-11 (3d ed. 2019) (tracing the evolution of the "collegiate system" of simultaneous living and learning in a residential setting).

9 Transcript: Army Senior Leaders Update Reporters on U.S. Army Response to COVID-19, U.S. DEP'T OF DEF. (Apr. 30. 2020), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2173534/army-senior-leaders-update-reporters-on-us-army-response-to-covid-19/ (Gen. McConville said "Yes, we can't – we can't telecommute to combat and our troops need to be ready to go.").

10 *See e.g.*, Brandon O'Connor, *Cadets Return to Class With COVID-19 Changes in Place*, POINTER VIEW, Aug. 20, 2020, at 4, 6 (quoting United States Military Academy Brigade Tactical Officer Col. Kyle Marsh in categorizing each activity as "a must do, should do and like to do" when determining how West Point resumes operations). *See also Virginia Military Institute Operations Plan AY 2020-21 #1: Fall 2020 Return to Post & In-Person Classes*, VA. MIL. INST. 15, 30 (2020), https://www.vmi.edu/media/content-assets/documents/administration/Return-to-Post-OPLAN_2020.pdf (noting a "natural tension that exists in VMI's adversarial education model between the curricular, co-curricular, and extra-curricular aspects of that model will be exacerbated by the COVID-19 operating environment" and how "the adversarial system and Spartan barracks

Since these institutions employ palpably recognizable and distinct military regimens, the casual observer may logically conclude that there is a national security component in these schools' missions. For the service academies, the reflection of their congressional mandate to fulfill the military's need for leaders is apparent. For the non-service academy schools, there is still a distinct, albeit sometimes indirect, national security flavor in their mission statements. Yet, not all of the schools require their graduates to join the military.[11] Indeed, it is only at the federal service academies where students are automatically commissioned as officers.[12]

For the other military schools whose charters do not include a mandate of fulfilling the military's need for leaders, the law occasionally applies differently as will be explored later in this article. However, a common theme among these institutions' mission statements is a leadership development component.[13] That element ranges from developing leaders for the national security community or for molding tomorrow's leaders of society, in general.[14] A sampling of these mission statements reveals the uniqueness of these schools' institutional philosophies.

C. The Mission Statements of the American 'Spartan' Academies

> **United States Military Academy:** "To educate, train, and inspire the Corps of Cadets so that each graduate is a commissioned leader of character committed to the values of Duty, Honor, Country and prepared for a career of professional excellence and service to the Nation as an officer in the United States Army."[15]

> **Virginia Military Institute:** "[T]o produce educated, honorable cadets and graduates imbued with characteristics and traits long admired by our great Nation. We produce leaders of character who are prepared and ready to serve our communities, our states, and our Nation in times of peace and in times of war." or "VMI's mission is to produce citizen-soldiers, men and women educated for civilian life and also prepared to serve their country in the armed forces."[16]

---

environment are defining characteristics of VMI and must be preserved to the greatest extent possible despite the challenges posed by COVID-19").

11 *See* 10 U.S.C. § 2111a.

12 *See* 10 U.S.C. § 541(a).

13 *See* listing of a sample of military school mission statements, *infra* notes 15-19.

14 *See* listing of a sample of military school mission statements, *infra* notes 15-19.

15 U.S. MIL. ACAD. WEST POINT, https://www.westpoint.edu/ (last visited Feb. 28, 2021).

16 Col. William "Bill" Wyatt, *Statement on VMI's Place in America's Future*, VA. MIL. INST. (Sept. 12, 2017), https://www.vmi.edu/news/headlines/2017-2018/statement-on-vmis-place-in-americas-future.php; *About*, VA. MIL. INST., https://www.vmi.edu/about/.

> **The Military College of South Carolina:** "The Citadel's mission is to educate and prepare graduates to become principled leaders in all walks of life by instilling the core values of The Citadel in a challenging intellectual environment."[17]
>
> **Norwich University:** "To give our youth an education that shall be American in character—to enable them to act as well as to think—to execute as well as to conceive—'to tolerate all opinions when reason is left free to combat them'—to make moral, patriotic, efficient, and useful citizens, and to qualify them for all those high responsibilities resting upon a citizen of this free republic."[18]
>
> **Texas A&M Corps of Cadets:** "The Corps of Cadets develops well-educated leaders of character who embody the values of Honor, Courage, Integrity, Discipline and Selfless Service, are academically successful, highly sought-after, and prepared for the global leadership challenges of the future."[19]

It is a reasonable misunderstanding to assume that all students at the non-service academy military schools will join the military upon graduation; after all, the students pay tuition to endure such intense military lifestyles. However, even with this misunderstanding debunked, the percentage of their graduates who do join may be smaller than one would expect.[20] Still, the amount of these schools' graduates in the military ranks is noteworthy. Put simply, one is not surprised to run into graduates of Citadel, Norwich, or the ROTC programs at Texas A&M or Virginia Tech within the ranks because it is widely expected that supplying the military with a substantial number of officers is quite simply what these schools do. Further, because of those schools' military emphasis and traditions of excellence, there is also a frequent expectation that the graduates of these institutions are routinely of high caliber. Indeed, the common themes that pervade the foregoing mission statements foretell the pride these schools have in their graduates' superior quality. As an added endorsement and echoing these lofty expectations,

---

17 *The Citadel's Mission Statement*, CITADEL, https://www.citadel.edu/root/the-citadel-s-mission-statement#:~:text=The%20Citadel's%20mission%20is%20to,are%20of%20importance%20to%20society (last visited Feb. 28, 2021).

18 *Mission*, NORWICH, https://www.norwich.edu/about/1212-mission-statement (last visited Feb. 28, 2021).

19 *The Standard*, Tex.A&M 1, 6 (Aug. 14, 2015), https://student-rules.tamu.edu/wp-content/uploads/2018/02/The-Standard14-Aug-15.pdf.

20 *See, e.g.*, *Fast facts about the South Carolina Corps of Cadets Class of 2018*, CITADEL (May 2, 2018), https://today.citadel.edu/fast-facts-about-the-south-carolina-corps-of-cadets-class-of-2018/ (33 percent of Citadel's graduating 2018 class held military commissions).

Congress unquestionably ascribes great importance to the non-service academy military schools and their contributions to the military.[21]

Regardless of these military schools' national or state mandates or the relative percentage of their graduates who enter military service, all of these schools are quite proud of their unique mission statements and the recognizable method of education they employ as a means to the end of accomplishing these missions. The close relation these schools draw between their adherence to military structure and the quality characteristics of their graduates prompted the lead-in quote of this section, "We can't telecommute to combat."[22] Here, the Chief of Staff of the Army is alluding to the notion that instituting a completely virtual environment would hinder the federal service academies from accomplishing their missions.[23] Non-service academy military schools would agree, in principle, with the chief of staff's statement. Thus, a pause in the military schools' operations would have the net effect of failing the country by facilitating a void of appropriately trained military and civilian leaders of tomorrow. The 'means and methods' of such military school curricula and how they are so profoundly affected by the switch to a virtual learning environment are worthy of discussion.

D. The 'Means and Methods' of the Spartan Academy Training Model

1. *They Might Leave Onlookers Agape or 'Agoge'*

Means and Methods of Warfare is a phrase used to describe the weapons and techniques used by soldiers, sailors, airmen, and marines engaged in combat.[24] These techniques that are designed to kill the enemy on the battlefield are obviously not employed against the students of our nations' military academies and senior military colleges in order to train them to become officers or leaders in society. To be sure, however, the means and methods of training cadets at these schools are different than those employed by their civilian counterparts and may, in comparison, appear austere and draconian. That said, military schools roundly do not prescribe or condone abusive treatment, tantamount to hazing, as a means to train and educate their future graduates.[25] To a casual outside observer, however, the strict

---

21 *See* 10 U.S.C. § 2111a(f); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 544(a)-(c), *infra* note 37.

22 *See* Transcript, *supra* note 9.

23 *See id.*

24 *See Methods and Means of Warfare*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/doc/war-and-law/conduct-hostilities/methods-means-warfare/overview-methods-and-means-of-warfare.htm.

25 *See, e.g.*, Col. Brett Ashworth, Vice President of The Citadel Office of Communication and Marketing, *A Statement on Hazing From The Citadel*, CITADEL (Feb. 21, 2015), https://www.citadel.edu/root/statement-hazing-2015.

requirements, exacting standards, consequence-based approach, and, in some cases, unique and non-negotiable requirements for graduation would appear unforgivingly stringent. Indeed, the daily programming at these institutions may raise eyebrows simply due to their stark departure from the comparatively relaxed lives of students at other colleges and universities.

The use of comparatively intense training and educational methods carries with it the perils of dancing closer to the line of what may be deemed abusive, cruel, and concomitantly illegal rather than what is widely deemed acceptable. Thus, it is not surprising that when faced with these means and methods, some students may take issue with the treatment they experience while attending one of these institutions and parlay those grievances to the legal realm. Examples of such claims may involve injuries incurred during training, treatment by a superior which may appear to have crossed the line from professional into abusive techniques, or whether constitutional rights were violated by an administrative decision including, but not limited to, expulsion from the school for an academic, military, physical, or honor deficiency.

2. *A Modern-Day Animal Farm; Foxes Guarding the Henhouse?*

An added wrinkle to the military school discussion is the amount of responsibility and, in some cases, autonomy the students of structured military school environments are given to manage and execute daily operations and train fellow cadets. These student 'chain-of command' models transform the student body closer to the official stature as 'leaders' of their respective institutions. This arrangement also represents a departure from the typical institutional model where students essentially exercise free will in their daily lives, save for the broad and often discretionary boundaries delineated by the 'adult' leaders of the institution. That students at military schools are imbued with official leadership capacity sometimes results in queries about the legal appropriateness of their actions, or about the propriety of their exalted status, in general.

E. A Timely Discussion: Resuming Normal Operations

Contemporaneous with this article's publication, educational institutions nationwide will still be wrestling with the challenge of resuming normal operations in the wake of the COVID-19 influenced adjustments. While military schools are not alone in facing these challenges, they are unique in that they were arguably the institutions whose core models of operations were most significantly altered due to the COVID-19 shutdowns and slowdowns. Therefore, due to the previously discussed causal relationship the institutional leaders avow between their methods and quality

of graduates, these schools are also the institutions with the most significant imperative to return to normal in order to fulfill their institutional missions.

In the midst of this transitional period where institutions of higher education are rediscovering and reimplementing their root practices, this article serves as a timely reminder of the jurisprudence that allows military schools the latitude to employ the means and methods they deem appropriate to train and educate their students. Further, it explores the rationale

for these legal protections and concludes that schools that employ means and methods commonly used in Spartan Academy curricula generally fare well when faced with legal challenges that might at least indirectly pose a challenge to those means and methods.

An important note at this juncture is that the court challenges reviewed in this article often do not directly assail the legitimacy of the military structure and system at these schools. To the contrary, the disputes usually involve suits for legal redress concerning ancillary issues, the review of which can help illustrate whether the judicial intervention either directs or inspires the schools to make fundamental changes to their structured military systems. Such ancillary issues include tort actions under the Federal Tort Claims Act, Fourteenth Amendment Equal Protection claims for alleged gender-based harassment, Establishment Clause challenges, Fourteenth Amendment Due Process cases in the context of honor violation sanctions, and the more straightforward tort claims based on agency law principles. The discussion about 42 U.S.C. § 1983 state action liability also includes a section reviewing its applicability in a non-military school setting, making this article relevant to the broader population of civilian school administrators, as well. In short, the journey of this article is not just to assess whether the law can 'reach' these institutions. Rather, it is to see whether successful legal challenges, or even arduously unsuccessful challenges, could have an appreciable impact on the perpetuation of the Spartan academic model.

Two more side notes about this review are in order. First, while some of these cases involve allegations of sensitive issues such as constitutional rights violations (gender-based harassment) or physical harms (hazing), neither the courts nor this article intend to be flippant about these cases' subject matter or make light about the fact that a military school may have avoided liability in any of these suits.[26] Rather, the intent of this article is to use these cases as vehicles to explore the legal theories involved and gauge how this jurisprudence provides the schools a 'Spartan Shield' that yields them the legal latitude to perpetuate their military models. Second, this article is not an exhaustive summary of legal doctrines or cases involving suits against military schools. It is simply intended as a broad survey that is

---

[26] As will be discussed later in this article, the legal theory relied upon by the losing claimant in these cases is often not their only available course of redress.

comprehensible to those who seek to learn the basics of the military school legal challenges as well as to school administrators and leadership as a helpful reference, should they face such challenges in the future.

II. THE SPARTAN ACADEMIC MODEL

A. Spartan Academic Armor: Uniquely Vulnerable to COVID-19?

The March 2020 reaction to the burgeoning COVID-19 concerns prompted colleges and universities nationwide to convert to an online format of education, sending their students away from their institutions' grounds to avoid the heightened health risks of the traditional, in-person format of instruction.[27] Military academies and senior military colleges were not immune to these health risks and governmental mandates that precipitated the closure of their higher education brethren. Without hesitation, they followed suit.[28]

The pandemic shutdown essentially leveled the playing field for military and non-military schools alike. Virtually all colleges and universities nationwide either sent their students away from campus or asked them to remain away for the rest of the academic year.[29] Regardless of how accustomed a school was to the online learning environment, they all were forced into this uncharted territory with minimal notice. That both military and non-military schools looked essentially the same at this juncture illustrates the reality which set the conditions for this article: the educational experience at military schools was far more fundamentally altered by the transition to virtual learning than their civilian counterparts.

To be sure, all institutions of higher education quickly discovered previously undiscovered benefits of the virtual classroom model. Indeed, some of the previously untested virtual learning techniques had attributes that make them attractive for future implementation during normal operations. However, even for non-military schools, there was early recognition that perpetual continuation of the all-virtual education model was far from optimal.[30] In fact, the realization that online learning was not the cure-all

---

27 *See* Hartocollis, *supra* note 6.

28 *See* Katie Lange, *A New Normal: Service Academies Cope With COVID-19*, U.S. DEP'T. OF DEF. (Apr. 23, 2020) https://www.defense.gov/Explore/Features/Story/Article/2162998/a-new-normal-service-academies-cope-with-covid-19/See. *But see* Rachel S. Cohen, *Coronavirus Returns to USAFA as School Year Begins*, A.F. MAG (Aug. 19, 2020), https://www.airforcemag.com/coronavirus-returns-to-usafa-as-school-year-begins/ (noting that the U.S. Air Force Academy just sent its underclassmen home during the pandemic shutdown).

29 *See* Hartocollis, *supra* note 6.

30 *See* Vijay Govindarajan and Anup Srivastava, *What the Shift to Virtual Learning Could Mean for the Future of Higher Ed*, HARV. BUS. REV. (Mar 31, 2020), https://hbr.org/2020/03/what-the-shift-to-virtual-learning-could-mean-for-the-future-of-higher-ed.

substitute for the traditional residential collegiate experience was precipitated by events at civilian institutions that predated the pandemic shutdown.[31]

The pandemic-induced residential education pause presented a unique challenge for military schools. This is due to the unique attributes of the military school educational model which encompasses an expansive array of everyday physical and military requirements, assessments, drills, rituals, and customs, virtually none of which can be trained or executed via the internet. Regardless of the varying intensity between these schools' military regimens, the online environment temporarily gutted a major portion of the educational experience which makes them unique. Such affected activities include daily formations, close-order marching drills, high-contact physical fitness activities and assessments, mandatory meals sitting shoulder-to-shoulder with fellow students, adherence to military customs and protocols, and, in general, the close, interpersonal interaction between cadets that is organic to daily counseling, mentorship, and training of officer candidates. It is not enough to say these activities are unique; rather, the military schools value them, if not swear by them, as being essential components for accomplishing their missions of leader development.

To be sure, however, these military schools are adjusting and improvising with the flexibility and 'mission accomplishment' attitude that one might expect of them. While they were forced to start categorizing the 'must dos,' 'should dos,' and 'like to dos' of their programs as they resumed operations, these institutions did not alter or abandon their stated missions.[32] In some cases, they had no choice as governmental expectations that help shaped the previously listed missions statements inject a component of non-negotiability into the process.[33] Realistically, however, the primacy of health and safety protocols, such as physical distancing procedures, presented the military schools enormous challenges in staying true to their stated missions and precipitated far from optimal training conditions. On the other hand, since a military school typically has more organic control over its students and can more naturally merge into a limited movement model as necessitated by the pandemic, the characteristically regimented nature of military schools arguably aided the establishment of the pandemic-protective 'bubbles' needed to more safely and expeditiously edge them towards normal operations.[34]

---

31 *See* Maria Konnikova, *Will MOOCs be Flukes?*, NEW YORKER (Nov. 7, 2014), https://www.newyorker.com/science/maria-konnikova/moocs-failure-solutions (exploring the initial popularity of the Massive Open Online Course (MOOC) concept and some of the unintended, undesired results such as low course completion and passage rates as well the dynamic that the courses were not always reaching the target population of those who had poor access to education).

32 *See* POINTER VIEW, *supra* note 10.

33 *See* 10 U.S.C. § 541(a).

34 *See* POINTER VIEW, *supra* note 10.

B. Types of Spartan Schools

The two basic types of military schools in United States higher education are the federal military service academies and the state supported senior military colleges. The service academies, such as the United States Military Academy at West Point and the United States Naval Academy in Annapolis, Maryland, are creations of Congress and are subject to the rules and regulations Congress establishes.[35] This includes the Uniform Code of Military Justice (UCMJ), a legal system by which the service academies essentially police their own; the cadets and midshipmen who attend the academies are contractually obligated to be subject to the rules and regulations established by the UCMJ.[36] That the service academies are 'self-policing'—they prosecute crimes of their students using their own justice system—is one aspect that distinguishes them from their cousin senior military colleges. This distinction helps buoy some of the legal doctrines that immunize federal service academies from certain aspects of legal liability.

A senior military college (SMC) is defined as a college offering a reserve officer training corps (ROTC) program under 10 U.S.C. § 2111a(f).[37] As opposed to the numerous other schools offering ROTC, SMC's legal authority categorizes them into one of the three types of college ROTC programs.[38] This status prescribes certain parameters and provides various federal benefits and recognition. SMC's have a robust ROTC program and generally require all students to wear uniforms and live under a rigid military regimen.[39] Some senior military colleges can be identified by the schools, in their entirety, such as The Citadel and Virginia Military Institute, even though not all students at those schools participate in ROTC.[40] SMC status is

---

35 *See* 10 U.S.C. § 541(a).

36 *See Admissions Catalog*, U.S. MIL. ACAD. 1, at 43, https://www.westpoint.edu/sites/default/files/pdfs/ABOUT/Student%20Consumer%20Info/wp_admissions-catalog_2013-14.pdf (last visited Jan. 30, 2021) ("Oath of Allegiance").

37 *See* 10 U.S.C. § 2111a(f) (2013); National Defense Authorization Act for Fiscal Year 1998, PUB. L. NO. 105-85, § 544(a)-(c). Section 544 of Public Law 105-85 is titled Continuation of Support to Senior Military Colleges. It contains a list of institutions categorized as senior military colleges (SMCs) and outlines its rationale for continued federal support of the institutions. *Id.* at § 544. In particular, the following remarks reflect the importance Congress ascribes to SMC in the broader national security context: "as they have in the past, the senior military colleges can and will continue to accommodate to changing military requirements to ensure that future graduates entering military service continue to be officers of superb quality who are quickly assimilated by the Armed Forces and fully prepared to make significant contributions to the Armed Forces through extended military careers." *Id.* at § 544(c). *See* 10 U.S.C. § 2111a(d) which further prohibits Department of Defense reduction of the ROTC programs at SMCs ("Termination or Reduction of Program Prohibited.—The Secretary of Defense and the Secretaries of the military departments may not take or authorize any action to terminate or reduce a unit of the Senior Reserve Officers' Training Corps at a senior military college unless the termination or reduction is specifically requested by the college.").

38 *See* 10. U.S.C. § 2111a; National Defense Authorization Act, Pub. L. No. 105-85, § 544(a)-(c).

39 *See* National Defense Authorization Act, Pub. L. No. 105-85, § 544.

40 *See* 10. U.S.C. § 2111a.

also ascribed to the large ROTC programs at other schools not typically thought of as 'military schools' such as the Virginia Polytechnic University (Virginia Tech) and Texas A&M. Rounding out the list of SMCs are North Georgia College and Norwich University.[41] In terms of government support, a common SMC model finds the schools operations funded by a state, however, there is usually a private component whereby students must pay a room and board fee.[42] To that end, Norwich is the exceptional SMC in that it is a completely private university.[43] Federal support for SMCs is not in the form of direct funding, but in assigning active duty military personnel as school administrators and providing the requisite federal recognition and protection that enables these schools to contribute high-quality officers for the military.[44] Another relevant detail to this article's discussion is that SMC students, even those in the ROTC program, are not subject to the Uniform Code of Military Justice (UCMJ).[45]

III. THE DOCTRINES AND CASES: THE UNPIERCED SPARTAN ACADEMY VEIL?

A. Doctrines Affecting the Service Academies

Most discussions about legal claims against the military, in general, and service academies, specifically, are centered on one or more of three legal creeds: the doctrine of military deference, the *Feres* doctrine, and *Bivens* actions. Much scholarship has been written about these doctrines; indeed, some of the scholarship is critical of them, if, for nothing else than the specter that application of the doctrines denies servicemembers the opportunity to sue the government regarding harms incurred in the course of their service when it seems as though they should have the right to do so. In the context of service academies, such matters involve issues of such significant constitutional import that the court's dismissal of the action often leaves the reader with a bit of whiplash. That is, one might be at a loss for how the court could be so indifferent about such important rights, even when the facts are often stipulated. However, a quick survey of these doctrines helps illustrate how the courts' rationale for such accommodations to the military is tied to

---

41 *See id.*

42 *See, e.g.*, Mellen v. Bunting, 327 F.3d 355, 361 (4th Cir. 2003) (detailing how the Virginia Military Institute, while a state supported school, requires students to pay a room and board fee).

43 *See, e.g., About Norwich University*, NORWICH, https://www.norwich.edu/about (last visited Feb. 28, 2021).

44 *See* U.S.C. § 2111a(f). *See also* National Defense Authorization Act for Fiscal Year 1998, PUB. L. NO. 105-85, § 544(a)-(c).

45 *See* Woodrick v. Divich, 24 M.J. 147, 150 n.2 (C.M.A. 1987) ("Article 2(a)(2), Uniform Code of Military Justice, 10 U.S.C. § 802(a)(2), which includes '[c]adets, aviation cadets, and midshipmen,' applies to cadets at the service academies, but it does not encompass AFROTC cadets.").

the interest of availing the institutions the requisite flexibility to satisfy their national security-related mandates.

1. *The Doctrine of Military Deference*

The general doctrine of military deference is a deeply rooted concept within U.S. jurisprudence. Among the legal scholarship addressing the topic, John F. O'Connor authored a *tour de force* in *The Origins and Application of the Military Deference Doctrine*.[46] This comprehensive resource also includes discussions of the *Feres* and *Bivens* doctrines.[47] Military deference, itself, is a concept that pervades most court challenges of military decision making; its influence and trappings are often present in cases dealing with *Feres* and *Bivens* issues as well. As Mr. O'Connor artfully describes, judicial deference to the military is a doctrine in which courts considering military issues "perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context" requiring "the Court to perform a deferential substantive review when considering constitutional challenges to military procedures."[48] Perhaps the most basic historical underpinning of the military deference doctrine is the concept that the control of the military is encompassed in the enumerated duties of Congress and the President in Articles I and II, and not within the Article III purview of the courts.[49] The subject matter of court claims affected by the military deference doctrine run the gamut. Some examples include claims of fundamental right violations via the Establishment Clause and others involve actions at tort as reviewed by the following *Feres* doctrine discussion.

2. *The* Feres *Wheel Goes Round and Round*

An often-heard phrase when discussing potential legal action against the military is the Feres doctrine. This doctrine, born out of the Feres v. U.S. case, was a judicial interpretation of the 1946 Federal Tort Claims Act's (FTCA) applicability to the military.[50] The FTCA created a limited exception to the sovereign immunity doctrine, which immunized the state against lawsuits brought by private citizens.[51] In the landmark Feres case, however, the court reasoned that servicemembers could not prevail against the

---

46 *See* John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

47 *See id.* at 278-83.

48 *Id.* at 161, 165-66.

49 *See id.* at 166.

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

51 *See* Wake v. United States, 89 F.3d 53, 57 (2d Cir. 1996).

government "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[52] In doing so, it claimed that the "relationship of military personnel to the Government has been governed exclusively by federal law" meaning that the sum total of federal control of the military via Congressional regulations and the UCMJ was tantamount to plenary control with no room or reason to allow the infiltration of claims emanating from local law.[53] The Wake v. United States case provided a threefold summarization for the necessity of *Feres*:

> Three rationales underlie the Feres doctrine: (1) the "distinctly federal" relationship between the Government and members of its armed forces; (2) the existence of a uniform system of "generous statutory disability and death benefits" for members of the military; and (3) the need to preserve the military disciplinary structure and prevent judicial involvement in sensitive military matters.[54]

Other practical reasons for perpetuation of the *Feres* doctrine emanate from *Wake's* third prong mentioned above. That is, the unique and dangerous nature of service in the military militate away from a system in which servicemembers can sue the United States for damages or injuries that have a higher incidence of occurring when engaged in military missions or operating amidst military equipment or in military zones.[55] The mere specter of the military having to defend itself against any and all allegations of negligence with respect to an accident or incident in which a servicemember has been harmed portends an unending parade of lawsuits that would cripple the military's ability to accomplish its national security mission.

Also related to Wake's third prong above is the notion that there is not only a need to preserve the military disciplinary structure, but that such judicial involvement would be duplicitous of other avenues provided to seek justiciable remedy for grievances. In fact, such a functioning grievance apparatus already exists in many forms, the most germane of which is the Uniform Code of Military Justice (UCMJ).[56] Other avenues of redress for servicemembers include access to the Inspector General, the option to file an Article 138 complaint, and, in line with Congress' Article I power, the right to enlist the support of a servicemember's congressman to help resolve a

---

52 *Feres*, 340 U.S. 135, at 146.

53 *See id.*

54 *Wake*, 89 F.3d at 57 (citing United States v. Johnson, 481 U.S. 681, 688-91(1987)); *see also* United States v. Stanley, 483 U.S. 669, 682-83 (1987).

55 *See* David E. Seidelso, *From Feres v. United States to Boyle v. United Technologies Corp.: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219, 239 (1994).

56 10 U.S.C. Chapter 47 - Uniform Code of Military Justice.

situation in which the servicemember feels he/she was wronged.[57] Aside from the UCMJ and other resources having the blessing of Congress, it is contended that they are better equipped to handle the nuances of grievances arising from the inherently dangerous nature of military service.[58]

3. *Avoiding the* Feres *Wheel:* Bivens *Actions*

Similar to the FTCA, *Bivens* actions also provide a judicial bypass for military claimants facing the ever so impermeable sovereign immunity.[59] The action is named after the *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* case in which the court awarded damages in a suit against federal officials for infringements on the plaintiffs' constitutional rights.[60] The net result of the case was not an overturn of the sovereign immunity doctrine; rather, it allowed for exceptions to the doctrine in a very limited set of circumstances.[61] When *Bivens* relief was sought in a military setting, however, the *Chappell v. Wallace* court reiterated that the *Bivens* court excepted out such situations which "counseled special hesitation" to be ineligible for *Bivens* damages and declared military claims that traditionally beckon deference from the courts are indeed such a circumstances that counsel hesitation.[62] In *United States v. Stanley*, the court further aligned the standards for *Bivens* applicability to the military with the *Feres* 'incident to service' test.[63]

Lauded for the latitude it provides the military for accomplishing its national security mission, the military application of *Bivens* as articulated in *Chappell* and refined in *Stanley* is not without its critics. The obvious complaint is the extremely limited relief available to servicemembers whenever their grievances are incident to military service.[64] As discussed above, the focus of this article is not to pass judgment on the court's application of *Feres* and *Bivens* to the military, especially when their substantive results may shock the conscience of casual onlookers. Rather, this article surveys cases that illustrate how these doctrines procedurally affect the military schools' flexibility to train their students as they see fit.

---

57 *See* 10 U.S.C. § 938 - Art. 138. Complaints of wrongs. *See also* Lt. Col. Craig A. Meredith, *The Inspector General System,* 2003-AUG. ARMY LAW. 20 (2003). *See also* Darrell Baughn, *Divorce & Deployment,* 28 FAM. ADVOC. 8, 11 (2005) (explaining the both the inspector general complaint and congressional inquiry options available to soldiers).

58 *See* Seidelso, *supra* note 55.

59 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

60 *See id.*

61 *See id.* at 397.

62 *See* Chappell v. Wallace, 462 U.S. 296, 304 (1983).

63 *See Stanley*, 483 U.S. at 680-81.

64 *See* Kevin Quirk, *United States v. Stanley: Military Personnel and the Bivens Action*, 67 N.C.L. REV. 233, 254-55 (1988).

4. *Service Academy Case:* Doe v. Hagenbeck

A relatively recent court case that illustrates how all three of these doctrines apply to our federal service academies in a contemporary setting is *Doe v. Hagenbeck*.[65] In this case, a former West Point cadet brought a *Bivens* claims against academy leadership alleging due process and equal protection violations.[66] The plaintiff also pursued a FTCA claim "alleging negligent supervision, negligent training, negligence, negligent infliction of emotional distress, and abuse of process."[67] Her allegations were that academy leadership fostered a "male" and "misogynistic culture" at the academy amidst her claims of being sexually assaulted, the aftermath of which resulted in her resignation from the academy.[68] In disposing of the *Bivens* claims, the court looked to the *Stanley* court alignment of *Bivens* relief with the *Feres* 'incident to service' standard and found that the harms alleged in this case were indeed incident to service.[69] The court also found that the facts and allegations of the case coupled with their occurrence in a military training environment were the type of facts that that the *Bivens* court implored to counsel hesitation, in the absence of independent congressional action authorizing such damages.[70]

In arriving at its findings, the court made clear it was not minimizing the gravity or seriousness of Doe's sexual harassment claims.[71] However, it found that the procedural circumstances of this case were akin to *Chappell* in which the military "has established a comprehensive internal system of justice to regulate military life" and "has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers."[72] It was in this context and not as a passing of judgment to the merits or seriousness of appellant's allegations that *Bivens* relief was ruled unavailable.

Further, in finding that the facts in *Doe v. Hagenbeck* satisfy the incident to service standard per *Feres* and *Bivens*, the court disagreed with the dissent's assertion that appellant's alleged sexual assault occurred in the context of a "college campus," rather than a military training environment and that Doe, "while at West Point was not a soldier on the battlefield, but a student attending college."[73] The court found that the military and education experience at the West Point were "inextricably intertwined" and quoted

---

65 Doe v. Hagenbeck, 870 F.3d 36 (2nd Cir. 2017).
66 *See id.* at 39.
67 *See id.* at 40-41.
68 *See id.* at 39-40.
69 *See id.* at 44.
70 *See Doe* 870 F.3d at 46.
71 *See id.* at 50.
72 *See id.* at 47 (quoting *Chappell*, 462 U.S. at 302-04).
73 *See id.* at 48.

Chappell in noting that, "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields," and "conduct in combat inevitably reflects the training that precedes combat."[74]

While refusing to denigrate the severity of the appellant's claims or disparage the very constitutional rights they invoked, the *Doe v. Hagenbeck* court reiterated what has been consistent application of *Feres* and *Bivens* to claims by military servicemembers. That is, the military is subject to the control of Congress and their governing regulations, including the UCMJ. The *Hagenbeck* court further pointed out that Congress has not been shy about its interest and oversight of sexual harassment in the military and has many initiatives to address the issue in addition to the previously discussed avenues of redress.[75] Servicemembers therefore have ample resources for addressing their concerns be they a result of alleged sexual assault or other injury incurred within the military. However, as clarified by the *Doe v. Hagenbeck* decision, civilian court judicial intervention is not one of those routes.[76]

The key takeaway gleaned from this *Doe v. Hagenbeck* review is not that the doctrines of judicial deference, *Feres*, and *Bivens* cavalierly restrict service academy cadets from holding their institutions accountable for alleged constitutional infringements. Rather, the significance of this case is twofold. First, it illustrates how these doctrines impede the judicial branch from legally 'reaching' these institutions, thus providing them with the legal latitude to structure and control their military environments as they see fit, subject to congressional oversight.

Second, the *Doe v. Hagenbeck* review provides a more in-depth answer to the question, why? Why do such shields for Spartan-style academies exist? Within that question, the answer is threefold. First, in a separation of powers context, Congress promulgates the military rules and regulations, as summarized by *Chappell:*

> Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field.[77]

Second, consistent with *Doe* and *Chappell's* reference to Congress' authority over the military, the *Hagenbeck* case alludes to the resources

---

74 *See id.* at 49 (quoting *Chappell*, 462 U.S. at 300).
75 *See Doe*, 870 F.3d at 50.
76 *See id.*
77 *Chappell*, 462 U.S. at 304.

Congress has provided the military that obviate the need for judicial intervention such as a well-developed and functioning Uniform Code of Military Justice (UCMJ) to handle servicemember discipline issues and alleged infringements of constitutional rights. The military additionally provides other routes of seeking redress for such issues via UCMJ Article 138 process, Inspector General access, and the prerogative to contact members of Congress. Most notably, however, is that none of these alternative processes require civilian court intervention.

Finally, the *Doe v. Hagenbeck* court considers both of the above rationale amidst the backdrop of judicial deference.

> This result, the Fourth Circuit said, implies no tolerance for the misconduct alleged in plaintiff's pleading, but rather reflects "the judicial deference to Congress and the Executive Branch in matters of military oversight required by the Constitution and our fidelity to the Supreme Court's consistent refusal to create new implied causes of action in this context."[78]

Here, quoting the *Cioca v. Rumsfeld* case, the *Hagenbeck* court explained why judicial deference dictates that new, implied causes of action outside of the previously mentioned avenues of redress should not be entertained.

B. Doctrine relevant to Senior Military Colleges (SMCs)

1. *General SMC Legal Foundations*

While similar in their basic institutional missions and military regimens, Senior Military Colleges are functionally and legally different from their brethren federal service academies. First, they do not automatically commission every graduate as an officer in the United States military, resulting in different treatment in other federal educational contexts. Second, while they do follow some general parameters of federal law, they are not directly supported by federal funds.[79] Further distinguishing SMCs from the service academies and thus sharpening the legal contrast therein is the fact that SMC cadets are not subject to the UCMJ. Finally, other than the baseline federal parameters, the schools themselves are not subject to extensive federal regulations.[80] Thus, in addition to *Feres* applicability to ROTC students at all colleges, other federal routes for bringing suit against SMCs appear to be foreclosed.

---

78 *See Doe*, 870 F.3d at 46 (quoting Cioca v. Rumsfeld, 720 F.3d 505, 512 (4th Cir. 2013)).
79 *See* 10 U.S.C. § 2111a(f).
80 *See Woodrick*, 24 M.J. 147.

However, courts have entertained suits seeking legal redress against SMCs using other avenues. Ironically, the first two of such legal challenges this article discusses are of the federal law variety, even though most of these schools are state supported. The first of these theories of legal liability is to bring a federal action for alleged constitutional rights violations via 42 U.S.C. § 1983, a creation of the Civil Rights Act of 1871.[81] Section 1983 provides a route to take SMCs to federal court.[82] This procedural avenue is also used to allege the practices of these institutions violated fundamental rights pursuant to, among others, the Establishment Clause of the 1st Amendment or the Equal Protection Clause of the Fourteenth Amendment.[83] Still another method is to bring a tort claim against the school or its officials in state court.[84] In reviewing example court challenges using these theories, it appears that the SMC shields against legal challenges are not quite as watertight as those of federal service academies.

Also evident from the following case survey is that even though a few of the legal challenges against SMCs have been successful, the courts have largely left their core, institutional military 'means and methods' undisturbed. One could conclude that lack of direct federal control might avail SMCs more latitude to sidestep legal challenges as well as avoid federal changes to their operating rules as Congress can do with service academies. However, after reviewing the following legal challenges against SMCs, one could also conclude that lack of the federal oversight coupled with the absence of shielding doctrines such as military deference, *Feres*, and *Bivens* in fact leaves SMCs more vulnerable to legal challenges in general. More legal challenges would logically lead to a higher likelihood that some of those challenges would be successful, even if the relative percentage of success is rather small.

2. *The Civil Rights Route: 42 USC § 1983*

Section 1983 allows private citizens to bring a claim under federal law for allegations that their constitutional rights were violated by someone who was acting "under color of" local law.[85] That is, the citizen is not bringing the legal action directly against the government (federal or state) nor the educational institution, itself. Rather, the suit is brought against another individual who acted within the direction of the government. In these cases,

---

81 42 U.S.C. § 1983.

82 Darcy L. Proctor, *Civil Rights Liability in the Public Schools – A 19th Century Law Wrestles with 21st Century Problems: Section 1983 School Litigation – Bullying, Harassment and Beyond*, NAT'L SCH. BD. ASS'N COUNCIL OF SCH. ATT'Y., https://cdn-files.nsba.org/s3fs-public/09-Proctor-Foskett-Civil-Rights-Liability-in-the-Public-Schools-Paper.pdf (2016).

83 *See generally* Mentavlos v. Anderson, 249 F.3d 301 (4th Cir. 2001)*; Mellen*, 327 F.3d 355.

84 *See generally* Alton v. Texas A&M Univ., 168 F.3d 196 (5th Cir.1999).

85 42 U.S.C. § 1983.

the lawsuit is brought against individuals associated with the institutions of higher education, thus implicating the government-supported school in the harm for which relief is claimed. In part, § 1983 provides:

> every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[86]

Section 1983 is an old law, indeed part of civil rights legislation of the late 1800s. Within the context of higher education, it is most often used as a route to seek redress against schools and school leadership.[87] While courts have generally held that public school systems do not incur legal obligations from harms caused by private actors, several exceptions have been carved out in related jurisprudence.[88] Thus, while it may seem private institutions of higher education might be able to steer clear of § 1983 claims, this theory of liability has been used by students (and former students) in presenting claims against private universities when there is some indicia of public support or control. Further, the statute's "under color of any statute…of any State," language indicates that liability could be incurred by staff and faculty of even private universities, in this context.[89] Finally, liability could also potentially attach to any student whose actions are determined to be under the color of state law.[90]

3. *Citadel Case:* Mentavlos v. Anderson

An illustrative section 1983 case against a SMC arises out of the Military College of South Carolina, also known as the Citadel. Resembling the *Doe v. Hagenbeck* case involving the United States Military Academy, the *Mentavlos v. Anderson* case involves allegations by a former Citadel student that institution-condoned, gender-based harassment ultimately led to the student's resignation.[91] Even though Mentavlos' complaint implicates students of a state-supported military college against other students, a "conduit" to federal jurisdiction is established via the federal statute.[92] The

---

86 *Id.*

87 *See* Proctor, *supra* note 82.

88 *See* John P. Fougerousse, *Citadel Cadets Dodge the State Action Bullet: A Critical Analysis of Mentavlos v. Anderson*, 53 S.C. L. REV. 737, at 748 (2002).

89 42 U.S.C. § 1983.

90 *See generally Alton*, 168 F.3d 196.

91 *Mentavlos*, 249 F.3d 301.

92 *See* Proctor, *supra* note 82.

statute essentially enables suits against personnel affiliated with private or semi-private institutions acting in their capacity of state law.[93] The defendants initially named in Mentavlos' complaint consisted of both students and faculty members.[94] However, after a settlement was reached, only two students remained among the named defendants.[95] Therefore, the case is a somewhat limited example of the applicability of § 1983 in the sense that it only involves students, rather than the staff, faculty, or institution itself.

Similar to service academies and other SMCs, The Citadel is structured in a way that its students, most of whom are assigned leadership positions, take a much more active role than their fellow students at non-military schools.[96] These roles include partial responsibility for training subordinate cadets as well as the day-to-day operations of life outside the classroom.[97] It is in this context that SMC students often find their most significant challenges involve satisfying the demands of fellow students from higher class years (or, 'upper-class' cadets) in their capacity as student leaders. These challenges and demands are generally perpetual. That is, they are imposed whenever the cadets are outside the classroom and exist everywhere in the cadet living areas.[98]

As such, the environment endured by SMC cadets are a world apart from the experience of their peers at civilian institutions where there are far fewer conformity requirements within the sanctity of the living areas and dormitories, save for the occasional edicts of a resident assistant. Since a large part of the ground-level, day-to-day responsibility for militarily training junior cadets is delegated to the student leaders of these schools, these student-leaders possess the aura of being officially in charge, at least in the eyes of the junior cadets they manage. Certainly, decisions involving direr consequences such as the expulsion of a student are still the within the purview of school administrators, or, the proverbial 'adults in the room.' However, the institutional leaders at SMCs do rely upon the feedback from their student leaders when making such decisions.

It is with this backdrop that Jeanie Mentavlos alleges that the cadets responsible for her training violated her constitutional rights because of gender-based harassment she alleges they subjected her to.[99] Further, since the upper-class cadets involved were appointed their leadership positions and

---

93 *See id.*
94 *Mentavlos*, 249 F.3d at 305-06.
95 *See id.*
96 *See, e.g., Mentavlos*, 249 F.3d at 307-08.
97 *See id.*
98 *See id.*
99 *See Mentavlos,* 249 F.3d at 305-06.

ostensibly trained for those positions by school leadership, her allegations were that they were acting under color of state law for § 1983 purposes.[100]

The *Mentavlos* court first laid out some basics about such claims. First, it quoted *American Mfrs. Mut. Ins. Co. v. Sullivan*, in likening the 'under color of state law' requirement to the state action doctrine of the Fourteenth Amendment.[101] It further articulated a two-part test establishing the elements for establishing a § 1983 claim: (1) that Anderson and Saleeby [the accused cadets in this case] "deprived her of a right secured by the Constitution and laws of the United States;" and (2) that they "deprived her of this constitutional right under color of State statute, ordinance, regulation, custom, or usage."[102] Noting that most constitutional violations are committed by governments, the court hinted that there is a presumption against the validity of finding constitutional right violations committed by purely private entities unless there is such "close nexus between the State and the challenged action."[103] However, the court quoted *Jackson v. Metropolitan Edison Co*. in conceding that, in certain circumstances, actions by private individuals "may be fairly treated as that of the State itself." In citing the precedent which most reflects the situation for The Citadel's Mentavlos issues, the court turns to *Blum v. Yaretsky* in asserting that "the required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"[104] Definitionally, the Mentavlos court locks into the "fairly attributable to the state" language of the *Arlosoloff v. NCAA* case in evaluating the facts in Mentavlos.[105]

Mentavlos submits that her alleged cadet assailants should be liable under 42 U.S.C. § 1983 because:

> (1) training civilians for the military in a rigorous military environment is a traditional governmental function, and (2) the cadets were acting pursuant to the disciplinary authority bestowed upon them by the rules, regulations, and customs of The Citadel, which receives substantial assistance, primarily financial in nature, from the State of South Carolina.[106]

Mentavlos' claimed that the Citadel had delegated to her alleged assailants powers that equate to a 'traditional government function' of training, akin to the missions of the nation's service academies.[107] She further

---

100 *See id*.
101 *See id.* at 310.
102 *Id*. (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).
103 *Mentavlos,* 249 F.3d. at 310 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).
104 *Id*.
105 *Id*. at 313 (quoting Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984)).
106 *Id*. at 312.
107 *See id.* at 314.

reasoned that since the cadets' and midshipmen's active military status at the service academies triggers *Feres* doctrine immunity at those institutions, then the Citadel's cadets should likewise be considered 'in the military' for purposes of acting under color of state law, thus enabling a § 1983 claim.[108] In rejecting this theory, the court distinguished the mission of the service academies from that of the senior military colleges in finding the mere existence of a military training regimen at those institutions does not automatically confer upon them the delegation of the sovereign responsibility for training civilians for military service.[109] Put simply, the federal service academies have that role via congressional edict whereas the SMCs do not, even though they share the same basic structured military model.

The court also rejected Mentavlos' theory that since the Citadel receives resources from the state of South Carolina and that their students are trained and regulated by the state-supported institution, the cadets' actions would logically have to be classified as under color of state law.[110] After asserting that mere receipt of state funds does not attribute an institution's employees or students' actions to the state via the color of state law context, the court also pointed out some key details from Mentavlos' claims that would further distance the actions of her upper-class cadets' actions from state responsibility.[111] First, the court downplayed the amount of control upper-class cadets at the Citadel actually have over fourth-class cadets by pointing out how disciplinary sanctions are ultimately meted out by school leadership and not the cadets, themselves.[112] It further noted that the Citadel's regulations governing cadet conduct, while indeed allowing them to exercise some dominion and control over junior cadets, do not endorse or condone abuses of this system such as sexual harassment.[113] Consequently, if cadets operate outside of regulatory guidance, the court theorized that their actions could not be attributed to the state for purposes of invoking § 1983.[114]

The *Mentavlos* case does not stand for the proposition that SMCs or their associated cadets are immune from accountability when it comes to allegations of offenses such as sexual harassment. To the contrary, it illustrates how these institutions' condemnation of such abuses and structure and processes for holding perpetrators accountable as they did in punishing Mentavlos' alleged assailants can shelter the cadets (and the institutions) from § 1983 liability. To be sure, the cadets may be subject to discipline via institutional regulations and liability via state criminal code as necessary.

---

108 *See Mentavlos*, 249 F.3d at 314.
109 *See id.* at 314-16.
110 *See id.* at 317-18.
111 *See id.* at 319-20.
112 *See id.* at 320.
113 *See Mentavlos*, 249 F.3d at 320.
114 *See id.*

However, they are not subject to a second round of punishment via a federal finding that their actions, attributable to their institution, violated fellow cadets' constitutional rights.

In summary, the *Mentavlos* case illustrates a situation in which the courts were not willing to attribute the actions of cadets to the state, at least for purposes of 42 U.S.C. § 1983 liability. In doing so, the court stopped short of passing judgment on Citadel's military structure and operations or ruling those procedures failed to pass constitutional muster. Based on the Citadel's experience, one might hasten to conclude military schools are immune to § 1983 liability. However, the fact that the Citadel and one of its staff members reached a pre-trial settlement with the plaintiff counsels caution against such a rash assumption. Our review of *Powe v. Miles* and *Alton v. Texas A&M* at least leaves the door open to the possibility of school and school administrator liability § 1983. However, if a student or cadets' actions are not found to be under color of state law, that door would then close.

C. Religion and Honor: Cracks in the Spartan Armor? The VMI Cases.

1. *Losing my Religion?* Mellen v. Bunting

The Virginia Military Institute (VMI) has also been on the receiving end of legal actions through the years. Noteworthy in our exploration of the court's treatment of VMI's means and methods are the *Mellen v. Bunting*, *Pack v. VMI*, and *Smith v. VMI* cases. *Mellen v. Bunting* involved an Establishment Clause challenge to VMI's supper prayer tradition while *Pack v. VMI* and *Smith v. VMI* were based on procedural and substantive challenges to the school's honor system.[115] VMI prevails in the latter two actions but loses in the former. Regardless of the court outcomes, all of these cases reveal a significant degree of judicial deference to the military means and methods employed at VMI.

The *Mellen v. Bunting* opinion provides a *stare decisis* compendium that outlines the history of Establishment Clause challenges of religious practices at all levels of state-supported educational institutions.[116] The court comprehensively reviews the somewhat erratic but trend-revealing,

---

[115] *Mellen*, 327 F.3d 355; Pack v. Va. Military Inst., No. 89-2012, 1989 U.S. App. LEXIS 21409 (4th Cir. July 24, 1989); Smith v. Va. Mil. Inst., No. 6:09-CV-00053, 2010 WL 2132240 (W.D. Va. May 27, 2010).

[116] *See generally, Mellen* 327 F.3d at 355 (reviewing a long and somewhat erratic line of cases dealing with Establishment Clause challenges at all levels of education). One trend that could be deduced is that the courts are much more amenable to government sponsored prayer practices at higher education institutions as opposed to K-12 schools due to the heightened coercive nature of K-12 schools. *Id.* However, the *Mellen* court ruled that the coercive, military nature of VMI made its students more susceptible to government sponsorship than at civilian schools, where other circuits had ruled in favor of university sponsored prayer. *Id.*

education-related Establishment Clause jurisprudence in an attempt to discern how it should apply to an institution of VMI's uniqueness. While the challenge of the school's supper prayer was of the Establishment Clause variety and not a direct affront to VMI's military means and methods, VMI's leadership maintained that the tradition was indeed an integral component of VMI's program.[117] The court ultimately concluded that VMI's supper prayer tradition ran afoul of the Establishment Clause.[118]

An interesting component of the *Mellen v. Bunting* decision was its thorough, matter-of-fact review of VMI's structured military environment, otherwise known as the 'adversative' method. The court embarks on a thorough illustration of VMI's "adversative method of training," a descendant practice of old English military instruction philosophy.[119] Among other things, the court notes that the VMI training method "features physical rigor, mental stress, equality of treatment, little privacy, minute regulation of personal behavior, and inculcation of certain values" and refers to it as a "rigorous and punishing system of indoctrination."[120] The court quotes the *U.S. v. Virginia* Supreme Court case's recognition of the system's goals of developing "mental and physical discipline."[121] The court notes that "submission and conformity" components of VMI's adversative method reflect "central tenets of VMI's educational philosophy."[122]

The court's exhaustive account of VMI's means and methods is as thorough as it is intriguing. Intriguing because it reviews a style of instruction that outsiders might view as unforgiving, if not borderline tortious. The court opinion unabashedly uses descriptors such as "rigorous and punishing system" and "hazardous course" to refer to the VMI regimen and "duress and stress" and "spartan barracks" to portray what VMI cadets must endure without questioning the legality or humaneness of the methods.[123] While it is true that the controversy before the court in this case is not whether such methods are legally assailable, the fact that the court casually accepts the practices as matters of fact reflects a tone of judicial deference towards the military schools. Indeed, it was the coercive nature of military-style schools that served as the lynchpin for the court to conclude that VMI's supper prayer did violate the Establishment Clause, despite opposite results at sister circuits when evaluating the constitutionality of prayer events at other universities and colleges.[124]

---

117 *See Mellen*, 327 F.3d at 373.
118 *See id.* at 376-77.
119 *Id.* at 361.
120 *Id.*
121 *Id.*
122 *Mellen*, 327 F.3d at 361.
123 *Id.*
124 *See id.* at 371.

The court's ultimate ruling that the supper prayer tradition was unconstitutional was a loss for VMI. However, the 'Spartan' academic institution's *modus operandi* detailed in the court opinion was relatively untouched. It is true that General Bunting argued that the supper prayer tradition was reinstituted "to build solidarity and bring the Corps together as a family" and served as "a precious link to our heritage and an admirable practice for a school of our provenience and culture."[125] By the tenor of General Bunting's characterization of his position, one could easily conclude that he probably felt removing the tradition after the court loss amounted to an excision of a vital component in the VMI leader development model. However, since the other means and methods referred to in the *Mellen v. Bunting* opinion remained unscathed, the loss VMI suffered was a relatively minor court intrusion into their internal business rules.

Another noteworthy aspect of the *Mellen v. Bunting* decision is that it did not hold General Bunting personally and pecuniarily liable to the plaintiffs for his supervisory role even though the court ultimately concluded there was a violation of the plaintiff-cadets' Establishment Clause protections under his watch. Rather, the court relied on "qualified immunity" jurisprudence to hold that the General's opinion that VMI's supper prayer did not violate the Establishment Clause was reasonable.[126] The court quoted *Harlow v. Fitzgerald* in pointing out that where "a constitutional violation has been alleged, our second inquiry is whether the defendant violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[127] The court then analyzed prong one of the qualified immunity analysis to find whether a constitutional violation occurred; as discussed, the court ruled in the affirmative.[128] It then pointed out the lack of Supreme Court precedent on the issue of school-sponsored prayer in institutions of *higher education* as well as a lack of precedent as to how this might apply to military schools as rationale for concluding that General Bunting's assumption that the VMI supper prayer was constitutional was indeed reasonable.[129]

In the wake of *Mellen v. Bunting*, three key observations can be made. First, SMCs are not immune from court intrusions regarding Bill of Rights individual liberties. However, the relative ease with which the court pierced the military school veil in terms of an Establishment Clause issue may be

---

125 *Id*. at 363.

126 *See id.* at 376.

127 *Mellen*, 327 F. 3d at 376 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

128 *See id.*

129 *See id.* Precedent generally existed for K-12 schools on the school prayer issue. However, the precedent that does exist regarding institutions of higher education is at the circuit court level and lacks consistency of conclusions, overall. *See generally,* Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972); Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997); Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997).

seen as an outlier, when juxtaposed against the significant deference afforded to the military in the other Bill of Rights' contexts, such as First Amendment speech.[130] Nonetheless, the court does not hesitate to pierce the veil of VMI's religious practice when jurisprudence and logic lead them to conclude the practice is unconstitutional.[131] Second, even if the court concludes that a SMC practice violates the Constitution, General Bunting's qualified immunity ruling portends good news for military school leadership who hope to avoid personal monetary liability for their schools' disputed polices.[132] Finally, even if the SMC (or service academy) practice is found to violate the Constitution, it appears from this case that the courts intrusion on the military school practice will be surgical. That is, it will narrow the scope of its excision to remove only the constitutional component, leaving the bulk of the school's means and methods unadulterated.

2. *On my Honor:*[133] *Let's Go Back to § 1983!*

A common thread that links federal service academies and SMCs is the existence of revered and reputationally austere institutional honor codes. The honor codes are implemented via the procedures of school honor systems; the implementing venues such as honor boards or honor courts determine whether an accused student, in fact, violated the institution's venerated honor code.[134] The codes are famous, or perhaps, infamous for their historical

---

130 *See, e.g.*, O'Connor, *supra* note 46, at 231.

131 *See* Anderson v. Laird, 466 F.2d 283, 296 (1972) (finding all three of the U.S. Armed Services Academies' chapel services attendance requirement to violate the First Amendment's Free Exercise clause). Anderson v. Laird was a successful Establishment Clause challenge to the federal service academy Sunday chapel attendance requirement three decades before Mellen v. Bunting. *Id.* The case serves as a possible harbinger of future treatment of Establishment Clause challenges at military school and perhaps represents a trend of less military deference afforded to religious issues than other bill of rights liberties. *Id.*

132 *See Mellen*, 327 F.3d at 376 (finding a reasonable officer could have believed the prayer to be constitutional, affirming qualified immunity to Bunting).

133 The phrase, 'On my Honor' was adopted from the University of Virginia pledge. *See* Anne E. Bromley, *Rite of Passage: First-Year Students Join the Community of Trust* (Aug. 25, 2014), https://news.virginia.edu/content/rite-passage-first-year-students-join-community-trust (describing how the pledge is signed by newly matriculating students). Copy of pledge is available during the online application process as supplemental questions to the commonapp.org application systems. Various University of Virginia courses require this pledge on individual assignments: "On my honor, I pledge that I have neither given nor received help on this assignment." (available at https://engineering.virginia.edu/online/the-honor-system). More complete information about the University of Virginia Honor System is available at the Honor System website. *Honor Committee,* U. VA., https://honor.virginia.edu/ (last visited Jan. 31, 2021).

134 *See* U.S. CORPS OF CADETS, THE CADET HONOR CODE, SYSTEM, AND COMMITTEE PROCEDURES, DEP'T OF THE ARMY (2018) (documenting the rules and process for the United States Military Academy Honor System). *See also* HONOR COMMITTEE BY-LAWS, U. VA. HONOR COMMITTEE (2020), https://honor.virginia.edu/sites/honor.virginia.edu/files/Honor%20Committee%20By-laws%20February%2024%202020.pdf (documenting the rules and process for the University of Virginia Honor System).

austerity. In terms of penalties for violations, many of the codes were structured as single-sanction; that is, the only punishment for being found to have violated the honor code is expulsion from the school.[135] The original honor systems were often extrajudicial in their application; little to no oversight from school administrators influenced or impeded on the decisions rendered by the often student-run process.[136] With such autonomy, potential for abuses of process, and high stakes outcomes, it was only a matter of time before students looked to the courts to challenge honor code sanctions. This trend of using legal resources to fight honor sanctions began relatively recently.[137] Previous iterations of stringent, student-led school honor systems were so exclusively run by the students and often under the cloak of watertight secrecy that they flew under the judicial radar for many years.[138]

The Virginia Military Institute is a school that has stayed true to its original honor code moorings in that it still maintains a single sanction of expulsion for a found violation.[139] However, the simplistic, binary nature of VMI's honor system does not translate to court challenge immunity for its honor court proceeding. In fact, the austerity of the single-sanction system coupled with its high-stakes results makes it an especially attractive target for which an aggrieved cadet (or ex-cadet) can seek judicial intervention. Nonetheless, two VMI honor code cases indicate the tendency of judicial deference to pervade the honor code arena.

Smith v. VMI and *Pack v. VMI* both involve 42 U.S.C. § 1983 actions initiated by cadets who had been found to have violated VMI's honor code and subsequently expelled from the institute.[140] The alleged violations were based on claims that the honor process violated their Fourteenth Amendment due process rights (procedural and substantive).[141] In both cases and consistent with the general theme of judicial deference applied to all educational institutions honor systems (both military and non-military), the courts engaged in a cursory review to ensure the minimal standards of notice and hearing were present.[142] In finding sufficient procedural due process had been afforded, the courts substantive due process inquiries were largely constrained to ensuring the resultant sanction was not arbitrary and

---

135 *See Honor* System, VA. MIL. INST., https://www.vmi.edu/cadet-life/cadet-leadership-and-development/honor-system/ (last visited Sep. 15, 2020).

136 *See* LEWIS SORLEY, HONOR BRIGHT: HISTORY AND ORIGINS OF THE WEST POINT HONOR CODE AND SYSTEM , 143 (McGraw-Hill Learning Solutions, 2008).

137 *See* LANCE BETROS, CARVED FROM GRANITE: WEST POINT SINCE 1902, 297 (Tex. A&M U. Press, 2012).

138 *See id.*

139 *See Honor System,* VA. MIL. INST., *supra* note 133.

140 *See Smith*, 2010 WL 2132240, at *1; *Pack*, 1989 U.S. App. LEXIS 21409, at *1.

141 *See Smith*, 2010 WL 2132240, at *1; *Pack*, 1989 U.S. App. LEXIS 21409, at *1.

142 *See generally, Smith*, 2010 WL 2132240, at *2; *see also Pack*, U.S. App. LEXIS 21409, at *1 (discussing procedures used by the Virginia Military Institute in both cases to ensure defendants' rights under Due Process of law were sufficiently met).

capricious.[143] The *Pack* court went further by questioning whether the grounds upon which the alleged substantive due process violation was based were even viable.[144] The court relied on precedent in opining that substantive due process claims are usually only entertained when they involve alleged violations of core, fundamental rights.[145] In this case, the plaintiff's complaint that the honor sanction amounted to a breach of contract between him and VMI was viewed as very shaky ground for seeking a substantive due process judicial intervention.[146]

The review of these two VMI honor code cases reflect a common theme in which military schools enjoy significant judicial deference when faced with challenges to their honor systems. To be sure, the preliminary impediment to judicial intervention in institutional honor cases is the deference afforded to educational processes, generally, and honor process, specifically, at *both* military and non-military schools.[147] For Fifth and Fourteenth Amendment purposes, the requisite process is therefore minimal, and the substantive inquiry is likewise cursory. In that regard, court decisions regarding honor systems have not moved the needle significantly when it comes to precipitating changes to a military school's overall means and methods. To be sure, however, many of these schools have, on their own accord, evolved their honor processes away from the single-sanction systems and other austere trappings of yesteryear's honor codes.[148] However, these changes have largely not been at the hand of judicial directive or influence.

---

143 *See Smith*, 2010 WL 2132240, at *4; *see also Pack*, U.S. App. LEXIS 21409, at *2 (finding neither of the plaintiffs' substantive due process rights to have been violated).

144 *See Pack*, U.S. App. LEXIS 21409, at *3 (noting Pack's lack of cited authority to support substantive due process violations).

145 *See id*. at *2.

146 *See id.* (affirming the district court's finding that plaintiff failed to sufficiently plead an infringement of a fundamental right under the Fourteenth Amendment's Due Process clause).

147 *See* Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FL. COASTAL L.J. 243, at 282 (citing Board of Curators of U. of Mo. v. Horowitz 435 U.S. 78 (1978)); *see also, e.g.,* Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) (asserting that "a school disciplinary proceeding is not a criminal trial, nor is a student accused of cheating entitled to all the procedural safeguards afforded criminal defendants)" (citing Jenkins v. La. St. Board of Educ., 506 F.2d 992, 1000 (5th Cir. 1975)); Betts v. Board of Educ., 466 F.2d 629, 633 (7th Cir. 1972); Esteban v. Cent. Mo. St. College, 415 F.2d, 1077, 1089-90 (8th Cir. 1969); *see also,* Jackson v. Dorrier, 424 F.2d 213, 217 (6th Cir. 1970) ("[T]o hold that the relationship between parents, pupils and school officials must be conducted in an adversary atmosphere and accordingly the procedural rules to which we are accustomed in a court of law would hardly best serve the interests of any of those involved.").

148 *See The Informed Retraction*, U. OF VA. HONOR COMM., https://honor.virginia.edu/informed-retraction (last visited Feb. 26, 2021) (laying out the University of Virginia's policy for an informed retraction, a new adjustment to their honor system).

D. 42 U.S.C. § 1983 Applicability to Non-military Schools: *Powe v. Miles*

As an aside from the military school focus of this article, one might realize that the § 1983 claims entertained against SMC's due to their state-supported status could also be a route to file claims against non-military, state-supported schools, as well. The *Powe v. Miles* case essentially probes whether the indirect public support of a private university could render it vulnerable to § 1983 liability.[149]

This detour into a non-military institution is not without its military parallels. For as was the case in the late 1960s, the controversy at stake related to an on-campus protest of an ROTC ceremony and parade in the wake of the Vietnam War.[150] Seven student protestors alleged Alfred University violated their First Amendment freedom of speech/expression rights by suspending them for their actions in impeding the ceremony and parade and subsequent refusal to cease and desist at the direction of university officials.[151] They invoked 42 U.S.C. § 1983 as their jurisdictional hook, which was an invocation of the Civil Rights Act statute towards a non-discrimination issue (free speech).[152] The case involved the students of Alfred University's Liberal Arts College, who were more squarely part of the private Alfred University, and the student protestors who were enrolled in the university's College of Ceramics.[153] New York State College of Ceramics at Alfred University, to be more precise, was at one point independent but later brought under the tutelage of Alfred University.[154] It existed administratively on Alfred's campus but still answered to New York state university trustees.[155]

One of the two central issues in this case could prove insightful for private military and non-military colleges, alike. That is because the court had to wrestle with the question of whether Alfred University, a 'private' university, could still be subjected to 42 U.S.C. § 1983 liability for the actions of its staff and faculty. The legal theory was that indirect public support, including the fact the University was initially chartered by the state, involved enough of a state government imprimatur to allow for§ 1983 claims based on the theory of acting under color of state law.[156]

---

149 Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (A landmark case in this arena, the 1968 *Powe v. Miles* case was set at Alfred University, ironically a private institution in New York).

150 *See id.* at 77-79.

151 *See id.* at 79.

152 *See id*.

153 *See id.* at 82-83

154 *Powe*, 407 F.2d at 82-83.

155 *See id.* at 83.

156 *See id.* at 80.

With regard to the liberal arts students who were more squarely part of the private university, the court was unimpressed with this argument.[157] Regarding the fact that the school was originally chartered by the state, the court noted "[b]ut this is also true of every corporation chartered under a special or even a general incorporation statute, and not even those taking the most extreme view of the concept have ever asserted that state action goes that far."[158] Regarding the students' arguments that the university nonetheless performs a "public function," by receiving state aid and operating in accordance with state regulations, the court highlighted a distinction between state actions and private actions.[159] That is, an action taken by a university such as enforcing their protest policy as Alfred did in this case is a private (university) action.[160] Whereas if the protest policy had been promulgated by New York government to schools statewide, that would equate to state action such that the Alfred University officials enforcing those rules would be acting under color of state law.[161] Since this was a case of the former rather than the latter, Alfred University was held not to be subject to § 1983 liability.[162]

However, the court found that liability did attach with respect to the suspended protestors who were College of Ceramics students.[163] They ruled as such "for the seemingly simple but entirely sufficient reason that the State has willed it that way" because, amongst other reasons, the college was perpetuated on Alfred University's campus, but "under the jurisdiction and control of the state university trustees" and that "[t]he very name of the college identifies it as a state institution."[164] Having reached the substantive complaint that the University's policy that resulted in the protesting students' suspensions, the court found, "[t]he Policy as it stands is an appropriate response to the legitimate need for effective regulation of on-campus conduct."[165]

Though a diversion from our military school focus mission of this article, *Powe v. Miles* can be instructive to both military and non-military private colleges and even those with both public and private components. First, it shows that a private institution will likely not be subject to 42 U.S.C. § 1983 liability simply because of its rather attenuated relations to the state

---

157 *See id.* at 79-80.

158 *Id*. at 80.

159 *See Powe*, 407 F.2d. at 81.

160 *See id.* (explaining how the existence of general state regulation of the institution does not automatically qualify the activity is question as a state function).

161 *See id.* (discussing how Alfred University's discipline policy could be considered state action had it been a state policy applicable to all schools).

162 *Id*. at 85.

163 *Id*. at 82.

164 *Powe*, 407 F.2d, at 82.

165 *See id.* at 85.

in terms of nominal state aid and adherence to state education dictates. Second, even though a non-military college such as Alfred University does not employ the means and methods of the structured military environments central to this article, like any school, it does have its own means and methods in the form of rules, regulations, and operating procedures such as the student protest regulations at issue in the *Powe v. Miles* case. To that end, this case represents a good prism for a civilian college to look through to determine its degree of vulnerability to § 1983 claims. Third, in the wake of our preceding review that courts will at least entertain § 1983 claims against our public SMCs, this case provides insight as to the likelihood of liability against a purely private SMC.

E. Tort and Agency liability: The 'Command Responsibility' for Spartan Student Actions

> Two maxims are inculcated into naval culture. The first is that if a ship runs aground, it is the captain's responsibility. The second is that the captain is always responsible, even if he or she isn't…In the Army, there is an old saying that the commander is responsible for everything the unit does or fails to do. But are they accountable?[166]

The above quote represents the military philosophy of command responsibility.[167] Given the custom of command responsibility, the general theories of tort liability in agency law such as *respondeat superior* and vicarious liability should therefore not be foreign concepts to military leaders using military methods to train future leaders. The responsibility component of the quote above deals more with a leader's credit towards an overall mission success or failure.[168] The accountability component goes more towards whether the leader can be held liable for any and all of their subordinates' actions, even if they involve tortious or criminal activity that the leader had little or no knowledge of.[169] The answers to that question vectors us to a discussion of agency law principles. How those principles are applied in the context of the liability of military school leadership helps scope the review of our remaining court cases.

---

166 Joe Doty, & Chuck Doty, *Command Responsibility and Accountability*, MILITARY REVIEW (Jan.-Feb. 2012), https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/MilitaryReview_20120229_art009.pdf.

167 *See id*. at 37 (discussing how a military commander, while responsible for everything their unit's do or fail to do, certainly cannot directly control every action of their units). The article goes on to discuss the "knew or should have known" concept with respect to how commanders could potentially be held accountable for their subordinates' actions when the commander might not have been in direct control of them. *Id.*

168 *See id.* at 38.

169 *See id.* at 37.

1. *The Norwich University cases*

In the wake of our discussion of the private Alfred University and what the *Powe v. Miles* decision portends for private SMCs, two illustrative cases involving legal challenges at SMCs emerge out of Norwich University, a private military college in Northfield, Vermont.[170] The *Wake v. United States* case allows us to revisit the *Feres* doctrine outside of the context of the federal service academy.[171] The case also helps draw a distinction in a SMC's potential liability when dealing with students who are ROTC members as opposed to those who are not. In *Brueckner v. Norwich*, general agency principles are at play in a case involving a tort action against an SMC.[172]

In *Wake v. United States*, a Norwich University ROTC cadet was seriously injured in an automobile accident while *en route* to a military clinic for a physical examination.[173] In addition to the medical care and compensation as part of the Veterans' Affairs benefit scheme, Wake sought additional damages from the United States government via the FTCA, alleging negligence on the part of the vehicle's driver.[174] The plaintiff, who was a Navy reservist, argued that her status as an 'inactive' reservist while an ROTC cadet at Norwich did not preclude her from FTCA eligibility.[175] The court ultimately ruled that the cadet was barred from such recovery based on the *Feres* doctrine under the theory that her riding in the vehicle to a military physical exam was an activity that is sufficiently incident to service, irrespective of her inactive status as a reservist.[176]

There are a few noteworthy aspects to this case. First, regarding Wake's FTCA claim (she also pressed separate state law claims against the University and staff), this was a claim against the United States for which Norwich, as a University itself, was immune from liability regardless of the FTCA outcome. Second, it illustrates a scenario outside of the federal service academy sphere where the *Feres* doctrine is held to be applicable when dealing with a college or university's ROTC cadet. To that end, it reveals a split of treatment between ROTC and non-ROTC cadets. That is, ROTC

---

170 *About Norwich University*, NORWICH U., https://www.norwich.edu/about (last visited Feb. 28, 2021).

171 *Wake*, 89 F.3d 53.

172 Brueckner v. Norwich Univ., 730 A.2d 1086 (Vt. 1999).

173 *See Wake*, 89 F.3d at 55-56.

174 *See id.* at 56.

175 *See id.* at 58 (discussing the legal parameters considered to determine whether a service member's injury is incident to military service and thereby precludes FTCA eligibility. In this case, Wake claims, among other things, that her status as an ROTC cadet and not being on active duty at the time would characterize her injury as being not incident to service).

176 *See id.* at 59-60 (rejecting Wake's argument that her injury was not incident to service because, among other things, the military relationship with her travel (i.e., she would not have the privilege of being on military travel orders but for her status in the military) overcomes her argument that her injury was not incident to service).

cadets are precluded from FTCA eligibility in situations that are deemed incident to service whereas non-ROTC cadets are not foreclosed from such FTCA claims because they are not in the military and thus, their actions could not logically be found to be incident to service. Further, this case shows that as long as the student's claim is against the United States, as opposed to the university itself, the private military college would be shielded from direct liability in any FTCA claim. Norwich also has the added benefit of being a purely private SMC which would also immunize it from § 1983 liability if a constitutional rights violation were asserted. Finally, despite the fact that the case did not involve the means or methods by which Norwich trains its students and ROTC cadets, it illustrates how the *Feres* doctrine could, in certain circumstances, be invoked to immunize a private military college's means and methods from judicial intervention.

However, one does not have to have a vivid imagination to see how the limited scope of the *Wake v. United States* case (federal law claim by a servicemember) reveals significant areas of vulnerability for a private military college facing tort claims. This vulnerability exists if the route chosen for recovery is not via an incident to service theory of liability or is not otherwise *Feres*-barred due to the civilian status of the student. *Brueckner v. Norwich University* is another case emanating from the same campus that illustrates the legal vulnerability created by such gaps. The *Brueckner* case presents a closer call as to whether the means and methods of military schools--the core issue of this article--are vulnerable to legal challenge.

William Brueckner entered Norwich University as a freshman ('rook') on a four year Naval ROTC scholarship.[177] He remained at Norwich for only sixteen days, citing his departure was "a result of his subjection to, and observation of, numerous incidents of hazing."[178] In those sixteen days, "plaintiff withstood a regular barrage of obscene, offensive and harassing language."[179] He ultimately prevailed in Vermont Supreme Court which found Norwich liable for his injuries based on *respondeat superior* and negligent supervision theories.[180] Norwich argued the hazing action of the cadets involved were not condoned activity and were thus outside the scope of employment for agency tort liability purposes.[181] Citing the Second Restatement of Agency, the court noted that "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master."[182] Thus, while Norwich's policy forbids such

---

177 *See Brueckner*, 730 A.2d at 1089.
178 *Id.*
179 *Id.*
180 *See id.* at 1093.
181 *See id.* at 1091.
182 *Brueckner*, 730 A.2d 1086, at 1091.

hazing, the court found that the actions of the cadets could "fairly be seen [by the jury] as qualitatively similar to the indoctrination and orientation with which the cadre members were charged."[183]

As a result of the court's finding of liability and in light of the fact that Brueckner performed satisfactorily during his short stay at the university, the court ordered Norwich to pay Brueckner lost earnings as determined by an expert economist who took into account what he would have earned as a college graduate.[184] Though losing on the tort liability and compensatory damages issue, Norwich prevailed in challenging the lower court's award of punitive damages.[185] While the court deemed Norwich's actions as wrongful, they failed to agree that the malice required for a punitive damage award was appropriate in this situation, since Norwich did not condone such behavior and included education and training in an attempt to prevent it.[186]

In summary, the *Brueckner* case is, perhaps, a military school's worst nightmare. That is, Norwich is a school 1) that relies on a demanding, military regimen as a vital component in developing its aspiring military and civilian leaders; 2) that knows there is a fine line between the proper execution of such means and methods and abusive conduct; 3) that, because of this, goes to extra lengths to train its students how to act within the bounds of acceptable conduct in training fellow students; 4) that indeed punishes those students who violate these guidelines and engage in abusive behavior or hazing; and 5) that nonetheless is found liable for such departures in conduct and is saddled with significant monetary penalty. While the court did not find Norwich's military system structure to be unconstitutional or ask the university to cease and desist its institutional practices, it would not be farfetched to assume such a monetary penalty might coax an institution to significantly change its system so as to avoid such sanctions in the future, irrespective of the fact punitive damages were not ordered. Put simply, potential tort liability under agency principles does not directly require an institution to change its means and methods, but the monetary pain and associated reputational costs certainly can have the indirect effect of coaxing a school gradually reforming its operational practices. Finally, it is noteworthy that when facing similar allegations of abusive practice by upper-class cadets, state-supported Citadel was able to escape liability in a § 1983 action, yet private Norwich was completely exposed via tort and agency theories of liability.

In summary, there is no discernible evidence that Norwich radically changed its system or structure following the *Brueckner* case, although it is

---

183 *Id.*

184 *See id.* at 1094 (considering, among other things, a comparison of average wages of high school graduates against those of college graduates in determining compensatory damages).

185 *See id.* at 1095-96.

186 *See id.* at 1096-97.

logical to assume they tightened up their anti-hazing training and accountability procedures in the aftermath. Following *Brueckner*, Norwich still stands, but the case indeed represents a theory of legal liability that could have an indirect effect of piercing the veil of military schools' methods of instruction.

2. Section 1983 Liability of Spartan Academy Leaders: Comparisons and Contrasts of the Alton v. Texas A&M *case*

In 1999, an interesting case emerged out of Texas A&M that draws some insightful comparisons and contrasts to several of our previously reviewed cases. Since the result in *Alton v. Texas A&M* might not have been as most would have predicted, the case inspires a more critical read. The distinguishing and diverse factors of *Alton* make it very instructive and a natural place to wrap up this article's case review. *Alton* involves allegations of hazing that ultimately result in school administrative action against the offending cadets as well as criminal liability.[187] *Alton,* however, is brought against school administrators under a § 1983 action via the theory that they were vicariously liable for the tortious actions of their students.[188]

First, the tort and agency principles central to the *Alton* case immediately make the reader think of the same theories of liability relied upon in *Brueckner v. Norwich*. Notably different than the present *Alton* case, other than the outcome, is that the *Brueckner* case involved a suit against a private university, whereas Texas A&M is a state-supported school. That difference helps explain the differences in legal authorities pursued in each case. *Alton* involved a § 1983 claim under a theory of state action, whereas *Brueckner* did not, ostensibly because Norwich is a private university. An argument could be made that purely private universities do enjoy at least some degree of state support, but one might also conclude that such a state connection to the private actor would be impermissibly attenuated for § 1983 purposes. Regardless, *Brueckner* was a claim based purely on tort and agency principles. However, *Brueckner* is comparable to the *Alton* case in that *Alton's* final decision turned on basic agency jurisprudential applicability to § 1983 claims.

Alton is also comparable to the *Mentavlos* case out of the Citadel in that the similar allegations of hazing/harassment result in § 1983 claims via the 'under color of state law' theory. However, the two cases distinguish themselves in that the post-settlement claims in the *Mentavlos* case were solely directed against two cadets. In the *Alton* case, however, due to the

---

187 *See Alton*, 168 F.3d 196, 198-99.

188 *See id.* at 200.

disciplinary action and criminal procedures pending the offending Texas A&M cadets, the claims only targeted the school administrators.

Finally, the *Alton* case has some parallels with the previously discussed Virginia Military Institute's *Mellen v. Bunting* in the sense that both cases dealt with the qualified immunity of the school administrators. In both situations, the administrators were found to be shielded by the qualified immunity doctrine, albeit via slightly different reasons. The VMI superintendent was shielded from personal liability via qualified immunity because General Bunting was not found to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known" even though an Establishment Clause violation was found.[189] In *Alton*, Texas A&M leadership was found to be entitled to qualified immunity because statutorily and jurisprudentially, § 1983 liability only attaches to principle government officials based on their *direct* acts or omissions.[190]

In terms of analysis, the *Alton* court refers to a common theme among military schools. That is, the military training structure vests upper-class cadets with such significant authority, so much so that the court assumed for sake of argument without rendering a decision on the point, that "the student cadet leaders in this particular situation were arguably acting under color of state law."[191] This is noteworthy because it appears the *Alton* court finds more vested authority in the cadet leaders of the Texas A&M Corps of Cadets than the *Mentavlos* case did for the Citadel cadets. If one were to assume a negligible difference in the qualitative variable of how much authority these two schools actually delegate to their student leaders, the *Alton* finding reveals a significantly different legal conclusion (that the cadets' actions are under color of state law) than the *Mentavlos* court (that concluded the cadets' actions were not under color of state law).

When the *Alton* court turns its § 1983 analysis to the question of whether the cadets' actions can be attributed to Texas A&M school leaders, the court's analysis diverges from the similar analysis in *Brueckner*. That is, the *Alton* court looked to precedent to find that "[o]nly the direct acts or omissions of government officials, not the acts of subordinates, will give rise to individual liability under § 1983."[192] This led the court to apply a "deliberated indifference test" and restate a three-part test offered up in *Doe v. Dallas Indep. Sch. Dist.*:

---

189 *Mellen*, 327 F.3d at 376 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

190 *See Alton*, 168 F.3d at 200 (emphasis added) (explaining how only the direct actions of government officials, not their subordinates, impute liability under 1983).

191 *Id.*

192 *Id.* (quoting Coleman v. Houston Indep. Sch. Dist., 113 F.3d 528, 534 (5th Cir. 1997)).

1. The officials learned of facts or a pattern of inappropriate hazing behavior by a subordinate pointing plainly toward the conclusion that the subordinate was abusing the student;

2. The officials demonstrated deliberate indifference toward the constitutional rights of Alton by failing to take action that was obviously necessary to prevent or stop the abuse; and

3. The officials' failure caused a constitutional injury to Alton.[193]

If one were to reasonably assume that the deliberate indifference test presents a fairly high bar, that assumption would be validated by the court's conclusion. That is, even if it could be inferred that Texas A&M administrative leadership knew about incidents of abuses by upper-class cadets, they were still not deliberately indifferent to those abuses, in part because they did not condone the conduct and further, they "acted to prevent hazing and to punish hazing activities."[194]

In summary, the *Alton* court draws interesting comparisons and contrasts. As noted, it concluded (*arguendo*)[195] that actions of a military school's cadet leaders do fall under color of state law whereas the *Mentavlos* court was unable to do so even as it probed a myriad of potential theories as outlined above. Perhaps the *Alton* court's finding in this regard was somewhat skewed by its paucity of analysis. The court did not officially rule on this matter because of its ruling on the merits with respect to the state actor school administrators.[196] The school administrators were the only appellees in this case, as the § 1983 claims against the students ostensibly were subsumed by their expulsion from Texas A&M and their pending criminal proceedings. However the court concluded, for sake of argument, that the students were acting under of color of state law by noting that "[t]he student cadet leaders of the Corps are vested with authority over the less senior cadets and serve as a link in the chain of command between a freshman, like Alton, and the officials who oversee the Corps.[197] Considering this authority and the unique paramilitary structure of the A&M Corps of Cadets, the student cadet leaders in this particular situation were arguably acting under color of state law."[198] Thus, the court articulates a legal conclusion at odds with the *Mentavlos* case by more readily tying the actions of military school upper-class cadets to their institutional leaders.

---

193 *Id.* (restating the Doe v. Dallas test and incorporating the present facts in Alton).
194 *Id.*
195 *Alton*, 168 F. 3d at 200.
196 *Id.*
197 *Id.*
198 *Id.*

Having established a connection that could potentially hold a military educational institution's leaders liable for the conduct of their students, the *Alton* court then retreated to a much softer application of vicarious liability than that applied in the Norwich *Brueckner* case. The *Brueckner* court quite easily concluded that the actions of the cadets, despite being contrary to school regulations, could be imputed to the school leadership.[199] The *Alton* court applied a much more stringent deliberate indifference standard in finding otherwise. Perhaps the difference here is the legal underpinnings of the tort liability relied upon. The *Brueckner* case, set at a private university, did not invoke § 1983 liability and relied on basic tort principles of Restatement (Second) of Agency § 229(l).[200] *Alton*, on the other hand turned to § 1983 case precedent which counseled caution in ascribing responsibility for student's actions to their institutional leaders.

Simply using the *Alton* versus *Brueckner* comparison as a barometer, it appears that institutional leaders facing § 1983 claims are much less likely to incur liability for its students' actions than those who are being taken to court on basic tort theories of liability. Indeed, the *Alton* court injected a bit of judicial deference in its conclusion by finding that when it comes to "the fine and murky line between the permissible and the impermissible actions, we ought not repudiate an official who conducted a careful investigation into questioned conduct."[201] It also cannot be overlooked that Texas A&M immediately took action against the nine cadets.

IV. CONCLUSIONS

Speaking of fine and murky lines, formulating coherent conclusions after this review of military school jurisprudence proves difficult. However, considering the importance of these institutions' missions, the schools' pride in accomplishing those missions, and the school's belief that perpetuating their means and methods is necessary to achieve their missions, drawing some semblance of concluding thoughts is in order. Consistent with this article's title, the central question posed is, "what type of legal latitude do

---

199 *See Brueckner*, 730 A.2d at 1091 (finding that a reasonable jury could find the cadre members to be acting within the scope of their employments at the time of the alleged hazing).

200 *Id*. at 1091.

201 *See Alton*, 168 F.3d at 201. A note of context about the court's contemporaneous statement: "military hazing itself may appear abusive to those unfamiliar with its objectives." *Id.* Contextually, it appears the court is using the term 'hazing,' which the court, based on its previous uses of the term, recognizes as representative of improper cadet conduct, to describe the more general concept of military training means and methods that do not constitute inappropriate hazing but still may be viewed as excessively harsh to onlookers. The *Mellen* court similarly uses the word hazing without commenting on the propriety of such conduct. *See Mellen*, 327 F.3d 355. These casual uses of the term 'hazing' when the term is otherwise widely used to describe what is expressly forbidden by these institutions indicates there is a colloquial, secondary use of the term to more generally describe permissible training procedures that do not rise to the level of abusive conduct.

these schools have to perpetuate their structured military means and methods?" Within that construct, this article has explored legal challenges against the institutions that do not always directly relate to a challenge of their systems. However, in looking through the prisms of these cases, we can draw some conclusions about how susceptible these schools are to the legal 'reach' of the courts. Therefore, it would not be a stretch to assume that if a court yielded any degree of deference regarding an individual incident at the school without casting judgment on the entirety of the school's means and methods, then they logically would allow the same latitude in ruling on a challenge to the school's military processes, writ large. Framing the argument in this manner, several concluding observations emerge.

First, there is generally significant legal latitude that allows these institutions to sustain their models of leader development. Whether it is through general judicial deference to the military and/or educational institutions, the impermeability precipitated by application of the *Feres* and *Bivens* doctrines, or the relatively difficult route to sustaining a 42 U.S.C. § 1983 claim, many of these court cases reveal that the hesitance of courts to legally 'reach' these institutions translates to a significant amount of autonomy in how to conduct their business.

That is not to say the institutions who enjoy such Spartan shields via the prevalent legal regimes are not otherwise subjected to pressures that might affect their real or perceived autonomy. For example, the congressional control over federal service academies that provides this legal doctrinal top-cover can, on the other hand, make life very difficult for the institution when a congressional inquiry results in an investigation of that school's processes.

Nor is it to say that all schools or issues that are challenged enjoy the same legal protection. As a private institution, Norwich's experience of absorbing liability for the tortious actions of its students is much different than the Citadel's sidestepping liability for the *Mentavlos* allegations. While the *Brueckner* court in Norwich did not rule any of Norwich's means or methods unconstitutional or direct they cease and desist any practices, such painful court results could easily make a military school gun-shy about its practices, for lack of a better term. In this vein, the answer to the question of whether a school would likely lose a challenge in court often amounts to the proverbial, 'it all depends.' That is, it depends on the legal doctrine used, the specific facts of the case, and the judicial temperament of the court. This third variable was especially evident when contrasting the courts' agency law application in *Alton* and *Brueckner*. To be sure, there were other variables involved in the two cases such as the different legal doctrines relied upon (tort action versus § 1983 constitutional rights claim). Nevertheless, the divergent conclusions of the Vermont Supreme Court and Fifth Circuit Court of Appeals decisions fail to provide us a helpful barometer of whether a

student's abusive actions at a military school will easily be attributed to the school's leadership.

Further, if one were to conclude that the core rituals and practices that these schools' pride have been largely untouched by the judicial arm, General Bunting of the Virginia Military Institute may be inclined to disagree. For it is General Bunting who argued that the supper prayer tradition VMI in *Mellen* was an integrally important component of the VMI leader development process. In losing that case, VMI and other similar schools may very well view that decision more as the first of many to come that could potentially erode their core practices rather than a one-off anomaly.

Second, leaders of both service academies and SMCs should not forget that Congress' ascribes immense importance to their missions and their contributions to the nation's national security and citizenry. In that vein, these educational leaders should not be gun-shy in perpetuating their structured military methods, as they have the implicit endorsement of Congress. That said, these leaders can minimize the risk of their institutions, students, and themselves from falling victim to legal action if they stay true to their rules and regulations that are designed to keep the schools within constitutional boundaries. That is, their student leaders who are delegated much authority, autonomy, and ownership in the military training process—as well they should be—should be well trained and educated about how to appropriately execute those responsibilities. They should also be held accountable for transgressions including, but not limited to, activities that amount to hazing. Further, those accountability measures and their consequences should be sufficient to deter student leaders for acting outside their prescribed boundaries.

On the other hand, excessive micromanagement of student leaders at military schools can have the understandable but undesired effect of making the students gun-shy. That is, the concern that it is easy to cross the fine line between what they are duty bound to do in order to lead and train fellow students and what is expressly prohibited could paralyze them with the fear that they are always dancing on a tightrope above dire consequences. Indeed, this presents a significant management challenge for the leaders at these military institutions of higher education. However, it is a challenge that must be reconciled because their missions of producing leaders for the military and society are too important to allow their means and methods of leader development to retrograde. A clear conclusion from this review is that the institutional leaders can help themselves capitalize on the normally afforded judicial deference and accomplish their missions if their students are properly trained and held accountable.