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Civil Procedure - Intra-Military Immunity Doctrine Applies to Dual Status Technicians - Zuess v. Donley, 606 F.3D 1249 (9th Cir. 2010)

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**CIVIL PROCEDURE—INTRA-MILITARY
IMMUNITY DOCTRINE APPLIES TO DUAL
STATUS TECHNICIANS—ZURESS V. DONLEY, 606
F.3D 1249 (9TH CIR. 2010)**

Due to the sensitive nature of military activities, the intra-military immunity doctrine has long prevented members of the military from bringing actions against the government or military personnel.¹ In recent years, courts have considered whether the intra-military immunity doctrine will apply with the same force to dual status technicians (“DSTs”) as members of the military who do not hold a civilian position, following the enactment of the National Defense Authorization Act for Fiscal Year 1998 (“1997 Amendments”).² In *Zuress v. Donley*,³ the Court of Appeals for the Ninth Circuit considered whether the 1997 Amendments granted DSTs standing to bring Title VII claims against the government and other military personnel.⁴ The Ninth Circuit held that the 1997 Amendments did not change the application of the intra-military immunity doctrine as applied to DSTs when the challenged personnel actions are “integrally related” to the unique structure of the military.⁵

Lisa M. Zuress served as a dual status Air Force Reserve

¹ See *Feres v. United States*, 340 U.S. 135, 146 (1950) (granting government immunity under Federal Torts Claim Act (“FTCA”) if injury is incident to service); see also *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997) (stating members of armed forces barred from bringing suit against government). See generally Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 6 (2003) (discussing Court’s creation of protection for military from criminal prosecution and civil litigation). Following the Civil War, the American military expanded from a small operation with limited duties into a much larger and separate military society. *Id.* The Court believed that military separateness was a necessity to military readiness. *Id.* Therefore, the Court provided the military with a number of protections and exemptions in its governing system. *Id.* See also *infra* note 15 and accompanying text (providing further discussion of intra-military immunity doctrine).

² See *Mier v. Owens*, 57 F.3d 747, 749 (9th Cir. 1995) (examining whether DSTs may file Title VII suit); see also William E. Brown, *Dual Status National Guard Technicians Should Be Barred from Bringing Civil Suits Under Title VII*, 199 MIL. L. REV. 89, 90 (2009) (explaining Title VII protection as applied to DSTs left up to courts). The National Guard Military Discrimination Complaint System (“NGMDCS”) provides an avenue for injured service members to file discrimination claims when their claims are barred in federal courts. See Brown, *supra*, at 90.

³ 606 F.3d 1249 (9th Cir. 2010).

⁴ *Id.* at 1250.

⁵ *Id.* at 1254-55 (declining to adopt standard set forth by federal circuit).

Technician at Luke Air Force Base in Glendale, Arizona.⁶ As a DST, Zuress held two positions while being employed at Luke Air Force Base, one position in a civilian capacity and another position in a military capacity.⁷ In 2003, Zuress sent a letter to Defense Department officials alleging inappropriate sexual behavior by other members of her group.⁸ After sending the letter and agreeing to serve as a character witness, Zuress's superiors began to treat her unfairly.⁹ Following two "average" performance reports, Zuress realized that she would not be promoted and was therefore forced into retirement.¹⁰

After retiring, Zuress claimed that the Air Force violated her rights under Title VII of the Civil Rights Act of 1964 ("Title VII").¹¹ The United States District Court of Arizona dismissed her complaint for lack of subject matter jurisdiction.¹² On appeal, the Ninth Circuit affirmed, finding that the 1997 Amendments were not the "clear statement . . . required from Congress to override [the] settled judicial doctrine of intra-military immunity."¹³

In *Feres v. United States*,¹⁴ the Court held members of the Armed

⁶ *Id.* at 1252 (explaining Zuress held position from July 2000 to June 2005).

⁷ *Id.* (detailing Zuress's employment positions). Zuress's civilian position was as a GS-12 Operations Staff Specialist for the 944th Operations Group, and her military position was as an Air Force Reserve Captain in the 944th Operations Group. *Id.* Zuress held both positions to fulfill the requirement that all Air Force or Army technicians must maintain membership in the Air Force or Army Reserve. *Id.* at 1251.

⁸ *Zuress*, 606 F.3d at 1252 (explaining circumstances surrounding letter). After Zuress sent the letter to the Defense Department, she also agreed to appear as a character witness in a coworker's discrimination suit. *Id.* As a result, Zuress claimed that the inappropriate sexual behavior intensified. *Id.*

⁹ *Id.* at 1252 (discussing breadth of unfair treatment Zuress received). For example, Zuress's former military commander failed to return her salutes after she sent the letter. *Id.* Similarly, her supervisors blocked any chance of promotion by giving her two "average" performance reviews. *Id.*

¹⁰ *Id.* (describing military's promotion procedures). The military forces any officer who on two occasions fails to receive a promotion into retirement. *See id.* Furthermore, though Zuress also held a civilian position, her retirement from the military would result in her losing the civilian position as well. *Id.*

¹¹ *Id.* (discussing nature of complaint filed in federal district court). In her complaint, Zuress named Michael B. Donley, Secretary of the Air Force, as the only defendant. *Id.* at 1249. Zuress claimed that her superiors violated her rights when they failed to promote her, temporarily detailed her to a lower-grade position, failed to extend her military retirement date, and forced her into retirement. *Id.* at 1252.

¹² *Id.* (explaining basis for district court dismissal). Zuress conceded that the challenged personnel actions were "integrally related to the military's unique structure," but argued that the 1997 Amendments supported her claim. *See id.* at 1254.

¹³ *See Zuress*, 606 F.3d at 1254-55.

¹⁴ 340 U.S. 135 (1950).

Forces could not sue the government for injuries arising from their military duty.¹⁵ Courts have routinely denied suits against government and military personnel that would force the judiciary to examine the “established relationship between enlisted military personnel and their superior officers.”¹⁶ This result is true despite some harsh and unfair results because lower courts are bound by the Court’s precedent.¹⁷ Both the sensitive

¹⁵ See *id.* at 146 (stating holding of case). *Feres* consolidated three cases involving suits by members of the military against the United States for claims under the FTCA. See *id.* at 136-37. All three plaintiffs’ alleged negligence by members of their respective military branches. *Id.* The Court held that the FTCA did not extend to members of the military for wrongs incident to their military service. *Id.* at 146; see also Turley, *supra* note 1, at 7 (noting intra-military immunity developed as a judicially created doctrine). As far back as the Civil War, ranks of the military and members of the Supreme Court viewed military separateness as an integral part of military readiness. Turley, *supra* note 1, at 6. In one of its first expansions of military immunity, the Court included combat injuries and noncombat injuries as “incident to service.” *Id.* at 8-9. This expansion set the stage for the judicial system’s muddled attempt to define what injuries are “incident to service.” *Id.* at 9.

¹⁶ *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (extending doctrine barring claim brought by enlisted Navy personnel for racial discrimination); see *United States v. Johnson*, 481 U.S. 681, 691-92 (1987) (extending doctrine barring claim brought by widow of pilot against civilian employees of federal government); *Gonzalez v. Dep’t of the Army*, 718 F.2d 926, 930-31 (9th Cir. 1983) (reaffirming doctrine extends to bar claims brought for specific alleged constitutional violations); see also Robert Cooley, Note, *Method to This Madness: Acknowledging the Legitimate Rationale Behind the Feres Doctrine*, 68 B.U. L. REV. 981, 990 (1988) (stating military discipline main rationale remains from *Feres* doctrine). Strict discipline and regulation within the military continues to be indispensable for the effective operation of our armed forces. Cooley, *supra*, at 990. In *Chappell*, the Court stated, “[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.” 462 U.S. at 300; Edwin F. Hornbrook & Eugene J. Kirschbaum, *The Feres Doctrine: Here Today—Gone Tomorrow?*, 33 A.F. L. REV. 1, 10-11 (1990) (stating concerns regarding military effectiveness). The issue of military effectiveness includes numerous concerns:

[T]he crucial importance of military effectiveness to national security; the risk to military effectiveness posed by judicial interference; the potential danger to military discipline posed by the litigation process; the difficulty of measuring when and how much military discipline is deteriorating; and the difficulty of designing a bright line rule to protect the interests of both national security and individual soldiers.

Hornbrook & Kirschbaum, *supra*, at 11. But see *United States v. Brown*, 348 U.S. 110, 113 (1954) (distinguishing between injuries arising outside course of military duty and those within military duty). In *Brown*, the plaintiff suffered bodily injuries causing him to be honorably discharged from the Armed Services. *Id.* at 110. However, he suffered the injuries at issue several years following his discharge as the result of a negligently conducted operation by the Veterans Administration. *Id.* at 110-11. The Court drew a line in its holding between “injuries that [do] and injuries that [do] not arise out of or in the course of military duty,” the latter being the type of injury that when reviewed, does not impede military effectiveness. *Id.* at 113.

¹⁷ See *Hinkie v. United States*, 715 F.2d 96, 98 (3d Cir. 1983) (admitting harsh result of case). The court noted that children of service members should not have to suffer, but that

nature of military personnel relationships and the unique structure of the military require courts to uphold this time-honored doctrine.¹⁸ Additionally, courts have pointed to alternative remedies available to plaintiffs provided by Congress and within the structure of the military itself.¹⁹

In *O'Brien v. United States*,²⁰ the Court of Appeals for the Eighth

nonetheless, the court is handcuffed by the decisions of the Supreme Court. *Id.* at 99; see *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982) (explaining intra-military immunity applies to cases brought by dependents of service members); see also John Astley, Note, *United States v. Johnson: Feres Doctrine Gets New Life and Continues to Grow*, 38 AM. U. L. REV. 185, 185 (1988) (noting injustice of intra-military immunity doctrine).

¹⁸ See *Brown*, 348 U.S. at 112 (articulating relationship between soldiers and superiors provides necessity for barring some FTCA suits); see also *United States v. Shearer*, 473 U.S. 52, 57-59 (1985) (noting case would require judicial review of sensitive military affairs); *Chappell*, 462 U.S. at 300 (cautioning against examination of hierarchical relationships within military); *Stauber v. Cline*, 837 F.2d 395, 400 (9th Cir. 1988) (explaining claims would require judiciary to examine "sensitive military affairs"); *Mattos v. United States*, 412 F.2d 793, 794 (9th Cir. 1969) ("It is judicial intrusion into the area of military performance that is sought to be avoided."). The examination of military discipline requires special regulations. See *Chappell*, 462 U.S. at 300. Without strict discipline and special regulations affecting judicial review, the military would lack the ability to function at the necessary capacity. *Id.* But see *Turley*, *supra* note 1, at 17-18 (highlighting military discipline rationale lacks evidentiary support for broad application of intra-military immunity). Although military discipline is the most self-evident rationale, it is too broad and could hypothetically encompass any aspect of military life. *Id.* at 17. Furthermore, courts have never found any empirical evidence that allowing challenges would hinder military effectiveness. *Id.* at 17-18.

¹⁹ See *Feres*, 340 U.S. at 145 (showing compensation received by soldiers comparable to most workers' compensation statutes); see also *Gonzalez*, 718 F.2d at 929-30 (noting plaintiff exhausted internal military remedies and court reluctant to review). After termination from the military, the military reinstated and retroactively promoted the plaintiff to the rank of major. *Gonzalez*, 718 F.2d at 930. The plaintiff had sought an earlier retroactive date, but the court denied review of the military's internal decision. *Id.*; see also *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977) (explaining claim allowance would frustrate essential element of Veterans' Benefits Act). The Court noted that one of the essential elements of the military compensation scheme includes an upper limit for service-connected injuries. *Stencel Aero Eng'g Corp.*, 431 U.S. at 673. The Court then went on to state that, "[t]o permit (petitioner) to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door." *Id.* (quoting *Laird v. Nelms*, 406 U.S. 797, 802 (1972)); see also *Brown*, *supra* note 2, at 108 (outlining adequacy of NGMDCS in providing complainants with compensation absent Title VII action). When the NGMDCS approves a discrimination complaint, the commanding officers must take action to remedy the unlawful acts of discrimination. See *Brown*, *supra* note 2, at 113-14. The procedure for a complaint filed with the NGMDCS is very similar to a claim filed in a civilian court system. *Id.* The complainant may appeal a claim to a hierarchy of supervisors if he/she is not satisfied with the initial result, much like the appeals procedure in the civilian court system. *Id.* The National Guard Bureau issues the final decision in the appeals process and thus protects complainants' due process rights. *Id.* at 114; see also *Astley*, *supra* note 17, at 208 (noting alternative compensation schemes available for service members).

²⁰ 192 F.2d 948 (8th Cir. 1951).

Circuit held that the doctrine of intra-military immunity applies to members of the military reserves (“reservists”).²¹ However, courts have established outer limits to the doctrine, emphasizing that the tortious conduct at issue must be incident to military service; when this is not the case, the claim should move forward.²² The key question courts ask when deciding whether to apply the doctrine of intra-military immunity is if the judiciary would have to second-guess military decisions?²³

²¹ See *id.* at 950-51 (applying intra-military immunity doctrine to member of United States Naval Reserve).

²² See *Lutz v. Sec’y of the Air Force*, 944 F.2d 1477, 1488 (9th Cir. 1991) (limiting application of doctrine when conduct not incident to service). In *Lutz*, the injured plaintiff claimed defamation after her subordinates broke into her office, stole personal property, and distributed it. *Id.* at 1479. The material implicated the plaintiff’s involvement in a lesbian relationship. *Id.* Despite the fact that all individuals involved were active members of the military, entrenched in the sensitive hierarchical structure of the military, the Ninth Circuit held the doctrine did not apply because the conduct was “not incident to service.” *Id.* at 1488; see also *Bledsoe v. Webb*, 839 F.2d 1357, 1361 (9th Cir. 1988) (refusing to apply doctrine to civilian plaintiff employed by military department). In *Bledsoe*, the military denied its civilian employee entry onto the naval ship on which she was required to perform electrical technician services. *Bledsoe*, 839 F.2d at 1358. The court concluded that the military officer’s decision to deny the plaintiff access to the boat was not “inherently military.” *Id.* at 1360; see also *Astley, supra* note 17, at 216-17 (explaining post-*Feres* decisions focus on whether suit threatens unique and sensitive structure of military). *Astley* demonstrates that courts have begun to recognize situations in which an FTCA claim by military personnel should proceed when the suit has no bearing on military effectiveness. *Astley, supra* note 17, at 186-87. Any court denying a claim brought by a service member must show that military discipline or decision making would be threatened by allowing the claim to proceed. *Id.* at 217. For a court to properly conduct this analysis it must acknowledge all the facts and circumstances surrounding the alleged violation. *Id.*

²³ See *Shearer*, 473 U.S. at 57 (explaining cases must be examined on case-by-case basis applying *Feres* and its progeny). The Court stated:

The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions and whether the suit might impair essential military discipline.

Id. (citations omitted). The Court pointed out that allowing this suit would require officers of the military to testify about management and disciplinary decisions. *Id.* at 58-59; see also *Brown, supra* note 2, at 98-101 (outlining judiciary’s continued hesitation in examining relationship between military personnel). Hesitation persists when examination of the alleged conduct would result in a disruption to the order and discipline of the military. *Brown, supra* note 2, at 101. Allowing the court to entertain such suits and interfere with the relationships of service members and their superiors would be a substantial blow to the unique structure of the military establishment. *Id.*; see also *Astley, supra* note 17, at 187 (advocating claims by military personnel if second-guessing of military decisions not required by judiciary).

In *Mier v. Owens*,²⁴ the Ninth Circuit held that military promotion is a personnel action which is “integrally related” to the military’s unique structure and, therefore, the doctrine applies, barring suit.²⁵ In 1997, Congress amended the National Defense Authorization Act to clarify the previous definition of DSTs.²⁶ Although most courts have held that the 1997 Amendments did not change the application of the intra-military immunity doctrine to DSTs, the Federal Circuit in *Jentoft v. United States*²⁷ interpreted the amendments to grant DSTs standing to bring *any* action against the government as civilian employees.²⁸ The key issue facing the courts in interpreting the 1997 Amendments is whether it was the “unmistakable terms” necessary from Congress to grant DSTs standing as federal civilian employees for “any other provision of law,” including those times when serving in their military capacity.²⁹

In *Zuress*, the Ninth Circuit faced the question of whether the 1997 Amendments superseded the doctrine of intra-military immunity and granted DSTs unequivocal civilian status to bring suits against the government.³⁰ The *Zuress* court examined the statutory provisions giving consideration to the pre-existing intra-military immunity precedent.³¹ The Ninth Circuit highlighted the long history of protecting the intra-military

²⁴ 57 F.3d 747 (9th Cir. 1995).

²⁵ See *id.* at 751. In *Mier*, the plaintiff experienced repeated discrimination, was subsequently suspended from his civilian job, and in turn did not receive a promotion. *Id.* The court stated that promotional decisions within the military are central to the military’s hierarchy and not amenable to review by a civilian court. *Id.*

²⁶ 10 U.S.C.A. § 10216 Military Technicians (dual status) (West 1997), amended by Ike Skeleton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137. The statute provides that, “[f]or purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee.” *Id.*

²⁷ 450 F.3d 1342 (Fed. Cir. 2006).

²⁸ See *Jentoft*, 450 F.3d at 1348-49. Compare *Wetherill v. Geren*, 616 F.3d 789, 796 (8th Cir. 2010) (holding DSTs do not have standing when conduct at issue incident to military service position), and *Williams v. Wynne*, 533 F.3d 360, 367-68 (5th Cir. 2008) (holding status of military technicians as civilian employees not changed by 1997 Amendments), and *Walch v. Adjutant Gens. Dep’t*, 533 F.3d 289, 300 (5th Cir. 2008) (holding military technicians were considered civilian employees since 1968 and amendments did not change this), with *Jentoft*, 450 F.3d at 1348-49 (holding DSTs have unconditional civilian status to bring claims against military and military personnel).

²⁹ See *Wetherill*, 616 F.3d at 795 (noting Congress would have been more direct if intended “doctrinal revolution”); *Williams*, 533 F.3d at 367 (noting ambiguity in 1997 Amendments). In *Williams*, the court noted the inconsistency between the language stating that DSTs are federal civilian employees for “any other provision of law,” but requiring DSTs serve as reservists. *Williams*, 533 F.3d at 366. But see *Jentoft*, 450 F.3d at 1348-49 (holding no language in 1997 Amendments limited when DSTs regarded as federal civilian employees).

³⁰ *Zuress v. Donley*, 606 F.3d 1249, 1250 (9th Cir. 2010) (stating issue on appeal).

³¹ *Id.* at 1253.

immunity doctrine from statutory and common law challenges.³² Next, the court explained that under the “unmistakable terms” test, ““if Congress had intended for [Title VII] to apply to the uniformed personnel of the various armed services, it would have said so in unmistakable terms.””³³

The Ninth Circuit next considered whether the phrase “any other provision of law” demonstrated “clear Congressional intent” for DSTs to be regarded as civilian employees when filing *any* claim against the military.³⁴ The court reasoned that nothing had changed about the DST position after the 1997 Amendments, explaining DSTs still held hybrid positions.³⁵ The Ninth Circuit relied heavily on the legislative history of the 1997 Amendments to show that Congress intended that the amendments only clarify the inconsistencies used to refer to DSTs, not to affect settled case law.³⁶ The Ninth Circuit held that the 1997 Amendments

³² See *id.*; see also *supra* notes 15-17 and accompanying text (outlining expansion of doctrine through history).

³³ See *Zuress*, 606 F.3d at 1253 (alteration in original) (quoting *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978)) (approving Eighth Circuit’s observation that Congress must clearly intend Title VII apply to DSTs); see also *Mier v. Owens*, 57 F.3d 747, 749 (9th Cir. 1995) (applying “unmistakable terms” test to determine whether National Guard Technicians Act applies to DSTs); *Gonzalez v. Dep’t of the Army*, 718 F.2d 926, 928 (9th Cir. 1983) (explaining Congress must clearly state intention for Title VII to apply to military personnel).

³⁴ See *Zuress*, 606 F.3d at 1254.

³⁵ *Id.*; see *Williams v. Wynne*, 533 F.3d 360, 366-67 (5th Cir. 2008) (explaining requirement of DSTs to maintain service in military reserves). The Fifth Circuit pointed to the fact that DSTs must still hold a position in the military reserves. *Williams*, 533 F.3d at 367. Allowing civilian status for Title VII suits would require courts to intrude on the exact military personnel decisions which the doctrine of intra-military immunity protects. *Id.*; see also *Walch v. Adjutant Gens. Dep’t of Tex.*, 533 F.3d 289, 300 (5th Cir. 2008) (articulating DSTs have been classified as federal civilian employees since 1968 National Guard Technicians Act). The Fifth Circuit explained that DSTs have always been considered federal civilian employees and that the 1997 Amendments did nothing to change this fact. *Id.* The Fifth Circuit explained that the *Feres*’ principles still applied and prevented DSTs from bringing Title VII claims when the conduct at issue was “integrally related to the military’s unique structure.” *Id.* at 299 (quoting *Brown v. United States*, 227 F.3d 295, 299 n.5 (5th Cir. 2000)).

³⁶ *Zuress*, 606 F.3d at 1255. A House Report for the 1997 Amendments explained:

The National Defense Appropriations Act for Fiscal Year 1996 and the National Defense Authorization Act for Fiscal Year 1996 enacted provisions defining the term “military technician” which were not completely consistent with one another. This section would remove the inconsistencies by defining a military technician (dual status) as a federal civilian employee who is hired . . . and who, as a condition of federal civilian employment, must maintain military membership in the selected reserve, and who also must be assigned to a position as a technician in the administration and training of the selected reserve, or to a position in the maintenance and repair of supplies or equipment issued to the selective reserve or armed forces. The section would also require that, unless exempted by law, all military technicians . . . would be required to maintain military membership in the selected reserve unit by

did not require a reexamination of prior precedent and Zuess was therefore barred from bringing the action against the military.³⁷

The Ninth Circuit correctly determined that the plain meaning of the statute was ambiguous and therefore required further analysis.³⁸ Due to the ambiguity of the text contained in the 1997 Amendments, the statute must be examined in light of prior case law and its legislative history.³⁹ The Ninth Circuit gave immense weight to the long history of courts protecting the intra-military immunity doctrine.⁴⁰ Supporting its decision to bar Zuess's suit, the Ninth Circuit went on to note that numerous cases have expanded upon the doctrine since its judicial inception in *Feres*.⁴¹

The Ninth Circuit focused mainly on cases that have expanded on the doctrine, but the court did not abandon precedent in which the conduct at issue was not incident to the injured service member's military service.⁴² While many of the lawsuits barred by the doctrine appear to lead to harsh and unjust results, the Ninth Circuit reinforced that these results are necessary to preserve the most efficient and effective military.⁴³ Furthermore, there are many remedies for injured service members within the military system itself that lead to very similar outcomes or may even exceed those remedies which are available in the civilian court system.⁴⁴

which they are employed as a military technician

H.R. REP. NO. 105-132, at 358 (1997) (citations omitted).

³⁷ *Zuess*, 606 F.3d at 1255.

³⁸ *See Zuess*, 606 F.3d at 1254-55 (requiring court to proceed with statutory analysis looking at case law and legislative history). The Ninth Circuit explains that there is a long history of protecting the doctrine of intra-military immunity. *Id.* at 1253. The court goes on to conclude that if Congress intended to change this provision as applied to DSTs, they would have done so in unmistakable terms. *Id.*

³⁹ *See, e.g., Mier v. Owens*, 57 F.3d 747, 749 (9th Cir. 1995) (acknowledging necessity of unmistakable terms from Congress); *Gonzalez v. Dep't of the Army*, 718 F.2d 926, 928 (9th Cir. 1983) (announcing Eighth Circuit's first reference to unmistakable terms test); *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978) (introducing unmistakable terms test regarding whether Congress intended service members to bring suit).

⁴⁰ *Zuess*, 606 F.3d at 1253 (listing cases that guarded intra-military immunity doctrine); *see also* *United States v. Johnson*, 481 U.S. 681, 692 (1987) (barring suit brought by widow); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (barring racial discrimination suit); *Stauber v. Cline*, 837 F.2d 395, 400-01 (9th Cir. 1988) (barring suit for harassment under incident to service rationale); *Gonzalez*, 718 F.2d at 930-31 (barring suit brought for constitutional violation).

⁴¹ *Zuess*, 606 F.3d at 1253 (citing various suits barred by doctrine); *see also supra* note 16 and accompanying text (showing breadth of cases barred by doctrine and supporting rationale).

⁴² *See Zuess*, 606 F.3d at 1253; *see also supra* note 22 and accompanying text (highlighting cases in which wrongful conduct not incident to military service).

⁴³ *See Zuess*, 606 F.3d at 1253; *see also supra* note 17 and accompanying text (explaining harsh and unjust results stem from Court's binding authority).

⁴⁴ *See supra* note 19 and accompanying text (showing adequate remedies usually received by

Judges are given a wealth of responsibility and power in the American court system, but within this power should not be the ability to examine and second-guess decisions made by our military leaders.⁴⁵

The Ninth Circuit was correct when it refused to follow the conclusion reached by its sister circuit in *Jentoft*, which determined that the 1997 Amendments were unambiguous and DSTs were unconditionally federal civilian employees.⁴⁶ The notion that an erroneous result was reached in *Jentoft* is further supported by the fact that other courts have also refused to follow the result reached in *Jentoft* since the filing of *Zuress*.⁴⁷ Offering support for the Ninth Circuit's holding, the House Report for the 1997 Amendments states "[t]his section would remove the inconsistencies" in the handful of different names used to refer to DSTs.⁴⁸

In *Zuress v. Donley*, the Ninth Circuit considered whether the 1997 Amendments to the Department of Defense Appropriations Act granted DSTs standing as civilians, notwithstanding their service as reservists. Following the determination that the language of the statute was ambiguous, the Ninth Circuit relied on a long history of case law and the legislative intent behind the 1997 Amendments in correctly affirming the District Court of Arizona's decision. The Ninth Circuit properly determined what Congress intended in enacting the 1997 Amendments. The court correctly upheld the application of the intra-military immunity doctrine as applied to Dual Status Technicians to prevent judicial review of military decision making.

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plaintiffs).

⁴⁵ See *supra* note 18 and accompanying text (showing necessity of not second-guessing military decisions by judiciary); see also Turley, *supra* note 1, at 6 (explaining consistent Court support for rationale of military separateness from civilian justice system).

⁴⁶ See *Zuress v. Donley*, 606 F.3d 1249, 1254 (disagreeing with *Jentoft* court that 1997 Amendments effected substantive change by Congress); see also *supra* note 35 and accompanying text (explaining nothing changed about DSTs after 1997 Amendments). When the conduct at issue is incident to military service, courts are determining that the same rationale for applying the intra-military immunity doctrine holds firm even after the 1997 Amendments. See also *supra* note 35 and accompanying text.

⁴⁷ See *Wetherill v. Geren*, 616 F.3d 789, 795 (8th Cir. 2010) (declining to follow *Jentoft* while agreeing with rationale of *Zuress*, *Williams*, and *Walch*).

⁴⁸ See *Zuress*, 606 F.3d at 1254-55; see also *supra* note 36 and accompanying text (quoting House Report on 1997 Amendments).