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Legal Sidebar

The *Feres* Doctrine: Congress, the Courts, and Military Servicemember Lawsuits Against the United States

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The Supreme Court's 1950 decision in *Feres v. United States* generally bars individuals from pursuing tort lawsuits against the United States for injuries arising from active-duty military service, establishing what is known as the *Feres* doctrine. The *Feres* doctrine's soundness has been a topic of sustained debate among lawmakers, judges, and scholars since its inception. The Supreme Court has on several occasions, however, declined requests to abrogate or modify the doctrine. This Sidebar analyzes the *Feres* doctrine, recent limitations placed on the doctrine by Congress and the courts, and select considerations for Congress.

The Federal Tort Claims Act and the *Feres* Doctrine

Under ordinary circumstances, a plaintiff injured by a defendant's wrongful conduct may file a tort lawsuit to attempt to recover money from that defendant. For instance, if a driver causes a car crash by negligently operating his vehicle, that driver may owe compensatory damages to other persons injured in the crash. Conventional tort law principles do not necessarily apply when the person who commits the tort is a federal officer or employee. The legal principle of sovereign immunity ordinarily bars private citizens from suing the United States without its consent, although Congress may waive the United States' sovereign immunity in circumstances it deems appropriate. For instance, Congress enacted the Federal Tort Claims Act (FTCA), which allows private parties to pursue tort lawsuits against the United States under certain conditions.

Although the FTCA waives the federal government's immunity from a variety of tort lawsuits, the Act preserves the United States' immunity from certain types of lawsuits. Section 2680 of the FTCA lists the types of claims that plaintiffs may not pursue against the federal government, notwithstanding the FTCA's general waiver of sovereign immunity. For example, the "discretionary function exception," codified at Section 2680(a), insulates the United States from liability for injuries resulting from a federal employee's policy judgments or choices. Another provision, Section 2680(h), prevents plaintiffs from suing the United States for certain categories of intentional torts committed by federal employees.

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Additionally—and of particular relevance here—Section 2680(j) shields the United States from any tort claim "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." Generally, if a lawsuit falls within any of the FTCA's exceptions, the plaintiff may neither recover compensation from the United States nor recover from the employee who committed the tort in question.

In addition to the exceptions explicitly set forth in Section 2680, the Supreme Court recognized an additional implicit exception to the FTCA's waiver of sovereign immunity in the 1950 case of *Feres v. United States*. In that case, which consolidated a number of lawsuits, several active-duty servicemembers (or their executors) attempted to assert tort claims against the United States. In one suit, the executor of a servicemember who died in a fire at a military facility claimed that the United States negligently caused the servicemember's death by "quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant" and by "failing to maintain an adequate fire watch." A second plaintiff claimed that an Army surgeon negligently left a 30- by 18-inch towel in his stomach during an abdominal operation. A third servicemember's executor alleged that Army surgeons administered "negligent and unskillful medical treatment" that resulted in the servicemember's death. The Supreme Court ultimately dismissed all three claims, announcing "that the Government is not liable" under the FTCA for injuries to active-duty servicemembers "where the injuries arise out of or are in the course of activity incident to service."

The Supreme Court based its ruling on inferences from legislative purpose, reasoning that if Congress intended to waive sovereign immunity for injuries sustained in the course of military service through the FTCA, it would have said so expressly. The Supreme Court articulated several justifications for the *Feres* doctrine. For example, requiring federal courts to adjudicate "suits brought by service members against the Government for injuries incurred incident to service" would, in the Court's view, undesirably embroil "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." The Supreme Court also supported the *Feres* doctrine with the fact that the government already implements a uniform system for compensating and providing services to servicemembers harmed in the course of their duties. In the Court's view, Congress would have adjusted these benefits if it intended the FTCA to "permit recovery for injuries incident to military service."

The Supreme Court's holding in *Feres* ordinarily bars military personnel from asserting tort claims against the United States so long as those claims arise out of active-duty military service. Notably, the *Feres* doctrine is significantly more expansive than Section 2680(j)—which, as noted above, shields the federal government from liability "arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*." As compared to Section 2680(j), *Feres* "applies broadly" to shield the United States from virtually "all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military." For instance, courts have generally concluded that *Feres* bars active-duty servicemembers from suing the government for injuries resulting from allegedly negligent medical care rendered at military medical facilities, even though such injuries do not arise out of wartime combatant activities.

Limitations on the *Feres* Doctrine

The Supreme Court has stated that Congress may abrogate or modify *Feres* by amending the FTCA if it so chooses. Congress has not yet opted to do so. Both Congress and lower courts have nonetheless limited the *Feres* doctrine to some extent. Congress, for its part, did so in 2022 through the Camp Lejeune Justice Act. Any individual, including a veteran, who was exposed for 30 days or more between August 1, 1953, and December 31, 1987, to water at Marine Corps Base Camp Lejeune in North Carolina can sue the United States "to obtain appropriate relief for harm that was caused by exposure to the water." The claimant must first raise their claim before the appropriate federal agency before filing it in federal court.

Before the court, the claimant must sufficiently prove a causal relationship between exposure to the water and the harm suffered. Relief awarded under this law is offset by any support an individual receives from programs administered by the Department of Veterans Affairs, Medicare, Medicaid, or any other benefit provided for health care or a disability relating to exposure to water at Camp Lejeune. No punitive damages are allowed. The U.S. District Court for the Eastern District of North Carolina has exclusive jurisdiction over these cases. Claims under this law cannot be commenced after the later of the following: (1) "the date that is two years after the date of enactment of this Act" (it was enacted on August 10, 2022); or (2) "the date that is 180 days after the date on which the claim is denied" by the appropriate federal agency "under [28 U.S.C. 2675]."

Also in 2022, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) ruled in *Spletstoser v. Hyten* that the *Feres* doctrine did not bar a former servicemember from suing the United States and a former officer for damages resulting from an alleged sexual assault that took place while the servicemember was on active duty. The Ninth Circuit stated that "we 'cannot fathom' how the alleged sexual assault in this case could ever be considered an activity 'incident to [military] service.'"

Considerations for Congress

Commentators have long debated *Feres*'s desirability and defensibility. Apart from the policy questions of whether active-duty servicemembers should enjoy the right to sue the United States under the FTCA, *Feres* also implicates several significant legal questions. For one, *Feres* reflects a broader judicial debate over how judges should interpret statutes: should courts attempt to divine Congress's *purpose* in enacting statutes or should courts restrict themselves to interpreting the statutory *text* that Congress enacted? The Court's opinion in *Feres* exemplifies the purposivist approach: even though the FTCA contains no explicit text barring suits by active-duty servicemembers, the Court inferred that Congress would not have wanted to subject the United States to potentially wide-ranging liability for torts arising from military activities "in the absence of [an] express congressional command."

By contrast, Justice Antonin Scalia's dissent in *United States v. Johnson*—a case in which a Supreme Court majority reaffirmed *Feres*—illustrates the competing (and increasingly influential) textualist approach to statutory interpretation. In Justice Scalia's view, the *Feres* Court should not have recognized an exception barring servicemembers from bringing FTCA suits because Congress did not expressly enact one. According to Justice Scalia, the *Feres* Court had "no justification . . . to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered, that is a function for the same body that adopted it." Pointing to Section 2680(j)'s combatant activities exception described above, Justice Scalia reasoned "that Congress specifically considered, and provided what it thought needful for, the special requirements of the military," such that "[t]here was no proper basis for" the *Feres* Court "to supplement—i.e., revise—that congressional disposition."

Separate from the question of whether the *Feres* decision is sound as a matter of statutory interpretation is the question of whether, and under what circumstances, the Supreme Court could overrule it. The Court generally follows the rule of *stare decisis*—that is, the Supreme Court will typically follow its prior precedents unless strong grounds to overturn them exist. The Court has repeatedly stated that "considerations of *stare decisis* have added force" in cases interpreting federal statutes because, if the Court's interpretation is incorrect, Congress may override the Court's decision "by amending the statute."

Perhaps for that reason, the Court has repeatedly declined to reconsider the Feres Court's interpretation of the FTCA. Recently, the Court declined to grant certiorari in the case of *Daniel v. United States*, in which the plaintiff alleged that his wife—a Navy Lieutenant on active-duty status—died during childbirth as a result of negligent medical care rendered at a Navy hospital. The plaintiff attempted to pursue medical malpractice and wrongful death claims against the United States under the FTCA. The Ninth Circuit concluded that the *Feres* doctrine barred the plaintiff's tort claims because they arose out of his wife's military service. The court stated it reached this decision "regretfully," opining that "[i]f ever there were a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so." The plaintiff asked the Supreme Court to overrule *Feres* "for medical malpractice claims brought under the [FTCA]," at least with respect to cases that do "not involve any military exigencies, decisions, or considerations, and where the service member was not engaged in military duty or a military mission at the time of injury or death." The Supreme Court denied the plaintiff's petition on May 20, 2019, without comment. Justice Clarence Thomas, relying on Justice Scalia's dissent in *Johnson*, dissented from the denial of certiorari, stating that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." Justice Ruth Bader Ginsburg also voted in favor of granting certiorari, but did not join Justice Thomas's dissent or otherwise explain the reasoning for her vote.

The Supreme Court's determinations signal that legislative action may be the most likely avenue for potentially addressing individuals' ability to pursue tort lawsuits against the United States for injuries sustained incident to active-duty military service. To that end, legislation amending the FTCA to allow active-duty servicemembers to bring certain lawsuits that *Feres* might otherwise prohibit has been introduced in the past. For instance, subject to certain conditions and limitations, the SFC Richard Stayskal Military Medical Accountability Act of 2019 (H.R. 2422) would have authorized "member[s] of the Armed Forces of the United States" to pursue claims "against the United States . . . for damages . . . arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions" rendered at specified types of military medical treatment facilities. (This Act, in its enacted form, ultimately established a regulatory regime by which servicemembers can seek compensation from the Department of Defense for injuries suffered while on active duty that resulted from medical malpractice by military medical providers.) However, legislation proposing to narrow the scope of the *Feres* doctrine may implicate various public policy considerations discussed in other CRS products.

In addition to modifying the FTCA, Congress also has the authority to enact private legislation to compensate individuals who are barred from obtaining relief from the United States under the FTCA. As some commentators have noted, "Congress has often provided compensation in situations where the courts have found that the FTCA waiver of immunity provides no relief."

(Former Legislative Attorney Kevin M. Lewis was the original author of this Legal Sidebar. Future inquiries from congressional clients on this issue may be submitted to Andreas Kuersten, the author of this updated version.)

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