



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 active-duty servicemembers from pursuing tort lawsuits against the United States for injuries that arise out of military service. Although some Members of Congress, judges, and scholars have criticized *Feres*, the Supreme Court has on multiple occasions declined requests to abrogate or modify the doctrine. Most recently, on May 20, 2019, the Supreme Court declined to take up the case of *Daniel v. United States*, in which the petitioner asked the Court to partially overrule *Feres* and thereby allow him to pursue a medical malpractice lawsuit against the federal government. This Sidebar analyzes *Feres*, the legal issues surrounding the doctrine, and what the Court's most recent decision not to revisit the doctrine may mean 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 accident by negligently operating his vehicle, that driver may owe compensatory damages to other persons injured in the crash. However, ordinary tort law principles do not necessarily apply when the person who commits the tort is a federal officer or employee, as the legal principle of sovereign immunity ordinarily bars private citizens from suing the United States without its consent. That said, Congress may waive the United States's sovereign immunity in circumstances it deems appropriate. In this vein, Congress has enacted the Federal Tort Claims Act (FTCA), which allows private parties to pursue tort lawsuits against the United States under certain conditions. (For more on the FTCA, see this CRS report.)

Although the FTCA waives the federal government's immunity from a variety of tort lawsuits, the Congress that enacted the FTCA opted to preserve the United States's immunity from certain types of lawsuits. Section 2680 of the FTCA accordingly lists various 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

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of [intentional torts](#) committed by federal employees. 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 speaking, 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 had 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 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 *Feres* Court based its ruling on [inferences from legislative purpose](#), reasoning that if the Congress that enacted the FTCA intended to waive sovereign immunity for injuries sustained in the course of military service, it would have said so expressly. The Court cited [several justifications](#) for the *Feres* doctrine. For one, 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](#).” According to the Court, it would also be [unnecessary](#) to empower active-duty servicemembers to seek monetary damages awards from the United States, as injured servicemembers are already potentially entitled to [medical, disability, and death benefits](#) under federal law.

The Court’s holding in *Feres* thus 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.

Legal 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 the court attempt to divine Congress’s [purpose](#) in enacting the statute in question, or should the court instead restrict itself to interpreting the statutory [text](#) that Congress enacted? The Court’s opinion in *Feres* exemplifies the former, [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 Scalia's dissent in *United States v. Johnson*—a case in which a majority of the Supreme Court reaffirmed its prior decision in *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. Generally speaking, the Court 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. Most 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 thus attempted to pursue medical malpractice and wrongful death claims against the United States under the FTCA. The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) concluded that the *Feres* doctrine barred the plaintiff's tort claims because they arose out of his wife's military service. The Ninth Circuit expressed that 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.” Accordingly, 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 Thomas, relying on Justice Scalia's aforementioned dissent in *Johnson*, dissented from the denial of *certiorari*, opining that “*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.” Justice Ginsburg also voted in favor of granting *certiorari*, but did not join Justice Thomas's dissent or otherwise explain the reasoning underlying her vote.

The Supreme Court's continued unwillingness to reconsider *Feres* signals that if Congress wants to allow active-duty servicemembers to pursue tort lawsuits against the United States for service-related injuries, it would likely need to take legislative action. To that end, some Members of the 116th Congress have introduced legislation to allow active-duty servicemembers to bring certain lawsuits that *Feres* might otherwise prohibit. For instance, subject to certain conditions and limitations, the SFC Richard Stayskal Military Medical Accountability Act of 2019 (H.R. 2422) would authorize “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. Legislation proposing to narrow the scope of the *Feres* doctrine may implicate various public policy considerations discussed in other CRS products.

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