

Supreme Court Declines Request to Revisit Precedent Barring Military Cadet's Sexual Assault Claim Against United States

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With various exceptions, the [Federal Tort Claims Act \(FTCA\)](#) enables plaintiffs to sue the United States when a federal employee commits a wrongful or negligent act that causes personal injury or death. However, in *Feres v. United States*, the [Supreme Court held](#) that the FTCA generally [does not authorize](#) military personnel to sue the United States for injuries arising out of military service. Although some Members of Congress, [judges](#), and scholars have criticized *Feres*, the Court has consistently [declined](#) to reconsider the decision. Most recently, the Court denied certiorari in *Doe v. United States*, in which a West Point cadet asked the Court to [narrow or overrule Feres](#) to let her sue the United States for allegedly failing to implement adequate policies to prevent, investigate, and punish sexual assault at West Point. This Sidebar analyzes *Feres*, *Doe*, and their potential significance to Congress.

The Federal Tort Claims Act

A person injured by a private party's wrongful conduct may potentially file a [tort lawsuit](#) against that defendant for monetary damages. However, when a *federal officer or employee* allegedly commits a tort, the doctrine of [sovereign immunity](#)—which forbids private citizens from suing the government without its consent—constrains plaintiffs from suing the United States. Congress may, however, [waive](#) the United States' sovereign immunity with respect to specified claims. Accordingly, the [FTCA](#) waives the federal government's immunity from certain state law tort claims based on negligent or wrongful acts that federal officers and employees commit within the scope of their employment. However, [Section 2680](#) of the FTCA [preserves the United States' immunity](#) from certain tort claims. For example:

- [Section 2680\(j\)](#) shields the United States from tort claims arising out of the military's [wartime combatant activities](#);
- [Section 2680\(h\)](#) bars plaintiffs from suing the United States for certain [intentional torts](#) committed by federal employees; and

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- [Section 2680\(a\)](#), known as the “[discretionary function exception](#),” protects the United States from liability for torts its employees commit while performing certain [discretionary, policy-based activities](#).

Feres v. United States

Besides the exceptions explicitly codified in [Section 2680](#), the Supreme Court recognized in *Feres v. United States* another implicit exception to the FTCA’s waiver of sovereign immunity. In *Feres*, several military servicemembers (or their executors) asserted various tort claims against the United States. For instance, one Army servicemember claimed that a military surgeon negligently [left a towel in his stomach](#) during an operation. Another servicemember’s executor alleged that army surgeons’ [negligent medical treatment](#) caused the servicemember’s death. A third servicemember’s executor [claimed](#) that the military negligently quartered the servicemember in an unsafe barracks without an adequate fire watch, causing the servicemember to die when the barracks caught fire. The Court dismissed the plaintiffs’ claims, [holding](#) “that the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” Courts refer to this rule as the “[intramilitary immunity](#)” doctrine, or simply the “*Feres doctrine*.”

The Court has offered [several rationales](#) for *Feres*’s holding. According to the Court, adjudicating tort claims based on service-related injuries would undesirably “involve the judiciary in [sensitive military affairs](#) at the expense of military discipline and effectiveness.” Observing that Congress provided [statutory benefits](#) to servicemembers who suffer service-related injuries or death, the Court has also [inferred](#) that Congress would not have “provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA.” Finally, given the “[distinctly federal](#)” relationship “between the Government and members of its armed forces,” the Court has opined that it would be inappropriate to subject the United States to liability based on state tort law for its military activities.

Doe v. United States

The Court has [reaffirmed](#) or [declined to reconsider](#) *Feres* [on multiple occasions](#). Most recently, in *Doe v. United States*, a West Point cadet alleged that another cadet sexually assaulted her on campus. She sued the United States under the FTCA, alleging that military officials failed to implement adequate policies to prevent, investigate, and punish sexual assault at West Point. Noting that adjudicating the plaintiff’s claims would require a civilian court to scrutinize military officials’ decisions regarding the discipline, supervision, and control of military cadets, the U.S. Court of Appeals for the Second Circuit held that the plaintiff’s claims were service-related and thus barred by *Feres*. Reasoning that the plaintiff’s educational activities were “inextricably intertwined” with her military service, the Second Circuit rejected the plaintiff’s arguments that her claims were “related to her role as a student and not her role as a soldier.”

The plaintiff [asked the Supreme Court](#) to grant certiorari to either overrule *Feres* or limit the doctrine “so as not to bar tort claims brought by servicemembers injured by violations of military regulations, during recreational activities, or while attending a service academy.” The Court [denied](#) the plaintiff’s petition without comment.

Opining that “*Feres* was [wrongly decided](#),” Justice Thomas [dissented](#) from the denial of certiorari. He noted that [nothing in the FTCA’s text](#) imposes an across-the-board bar against military servicemembers’ tort claims, as *Feres* holds. Rather, noted Justice Thomas, [Section 2680\(j\)](#) only bars FTCA claims based on [wartime combatant activities](#), which were [not at issue](#) in *Doe*. Justice Thomas thus [urged the Court](#) to overrule *Feres*, or at least grant certiorari to consider which injuries qualify as “incident to military service.”

Considerations for Congress

Policymakers, judges, and commentators have debated the *Feres* doctrine's desirability and legal justifications. Some maintain that authorizing lawsuits against the United States would disrupt military operations. Supporters also note that *Feres* does not leave injured servicemembers wholly without a remedy, because injured and deceased servicemembers are potentially eligible for statutory benefits. Critics maintain that *Feres* unjustly precludes injured or deceased servicemembers from obtaining complete recourse through the judicial system.

The Supreme Court's past disinclination to reconsider *Feres* suggests that it is unlikely that the Court will revisit the doctrine in the near future. Because Congress may amend a statute if it believes the judiciary has interpreted it incorrectly, the Court seldom overrules its own precedents interpreting federal statutes like the FTCA. Thus, if Congress disapproves of *Feres*, it may consider abrogating or modifying the doctrine legislatively.

Legislative proposals to override *Feres* implicate several legal questions. The first concerns the proposal's scope. For instance, Congress could abrogate the *Feres* doctrine entirely, or it could legislate more narrowly to make the doctrine inapplicable to specified categories of claims only, such as claims arising from sexual assault, or claims by military cadets.

If Congress ultimately decides to modify *Feres*, it may consider whether to also amend FTCA provisions that may impose other barriers to servicemember lawsuits. For example, with limited exceptions, Section 2680(h) of the FTCA forbids plaintiffs from suing the United States for certain intentional torts, including battery and assault. Depending on the circumstances, this exception may bar military personnel from suing the federal government for a sexual assault committed by another servicemember, irrespective of whether the *Feres* doctrine would independently defeat the plaintiff's claim. Similarly, in *Doe*, the United States argued that the discretionary function exception supplied an independent basis to dismiss the plaintiff's FTCA claim, because the development and implementation of sexual assault policies at a service academy implicated military officials' policy-driven judgments and choices. (The Second Circuit did not consider the discretionary function issue because its ruling on the *Feres* doctrine sufficed to resolve the case.) Thus, if Congress wishes to remove barriers to servicemembers suing the federal government for injuries arising from sexual assaults, it might consider amending Section 2680 as well.

As an alternative to letting servicemembers sue the United States, Congress could consider compensating injured servicemembers through internal military procedures. For instance, while the House version of the National Defense Authorization Act for Fiscal Year 2020 (NDAA) proposed to modify *Feres* to authorize servicemembers to sue the United States for military healthcare providers' torts, the NDAA as enacted instead creates an administrative procedure by which such servicemembers may request compensation from the Secretary of Defense. Congress likewise could consider establishing similar administrative mechanisms to compensate servicemembers for other types of claims. For instance, a provision of the I Am Vanessa Guillén Act of 2021 (H.R. 3224, S. 1611, 117th Cong.) would authorize the Secretary of Defense to pay certain claims for personal injury or death arising from sex-related offenses committed by members of the armed forces or Department of Defense employees, or from the negligent failure to prevent or investigate such an offense.

Besides creating new compensatory remedies for survivors of military sexual assault, there may be other actions Congress or the Executive could take to address sexual assault in the military. At President Biden's direction, the Secretary of Defense has established an Independent Review Commission to study and make recommendations regarding responses to military sexual assault and harassment. A separate CRS product analyzes potential policy responses to military sexual assault in greater depth.

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