



CENTER FOR JUSTICE & DEMOCRACY
185 WEST BROADWAY
NEW YORK, NY 10013
TEL: 212.431.2882
centerjd@centerjd.org
<http://centerjd.org>

FAQ: THE FERES DOCTRINE

What is the Feres Doctrine?

The Feres Doctrine bars active duty servicemembers from suing the government for negligence. The doctrine was created by the U.S. Supreme Court in a misguided 1950 decision that expanded governmental immunity in ways that Congress never intended.¹ As Supreme Court Justice Antonin Scalia wrote in 1987, “*Feres* was wrongly decided and heartily deserves the ‘widespread, almost universal criticism’ it has received.”²

Specifically, Congress passed the Federal Tort Claims Act (FTCA) in 1946.³ Until then, the government was completely immune from lawsuits, causing a grave injustice for many harmed individuals.⁴ The right to sue under the FTCA was not unlimited, however. In addition to establishing special procedures and restrictions,⁵ Congress enumerated 13 exceptions to this right. One of those exceptions prohibits claims by servicemembers arising out of wartime combat. That makes sense. But in 1950, the Supreme Court broadened this exception to include non-combatant, or “incident to service” injuries even though neither the FTCA language nor legislative history suggests that is what Congress intended.

Since then, active duty servicemembers who are the victims of sexual assault, toxic poisoning, gross medical negligence, or any other non-combat related harm, have been blocked from any legal resource in court. The Supreme Court left it to Congress to fix the law.

Has Congress tried to fix the law?

Yes, a number of bills have been introduced over the years. While Congress likely would have public support for completely overturning the Feres Doctrine, Congress has taken a step-by-step approach, focusing first on medical malpractice.⁶

Why do military medical negligence victims and their families need help?

It shocks the conscience that the Feres Doctrine would extinguish the legal rights of those who serve in war and survive, only to return home but become seriously injured or killed as a result of

gross medical malpractice by negligent military personnel. Yet that is the law right now. In fact, these servicemembers and their families have fewer rights to sue and obtain compensation than do inmates harmed by prison health care.⁷

This is all the more shocking because medical negligence is rampant within the military medical system.⁸ Establishing at least some legal accountability would likely reduce risky behavior, expose problems and drive the government to improve its standard of medical care.⁹

And while the Feres Doctrine does not limit the rights of veterans, active duty service members may also receive care within the Department of Veterans Affairs (VA) hospital system, one of the largest and continuously dysfunctional health care systems in the nation.¹⁰ Patient safety can only improve by increasing VA hospitals' accountability to patients.

(Thanks to New York Law School students Rachel Tarzia and Barbara Wheatle for their research assistance.)

NOTES

¹ *Feres v. United States*, 340 U.S. 135 (1950). See, e.g., Andrew F. Popper, "Rethinking Feres," *Boston College Law Review*, January 25, 2019, <https://ssrn.com/abstract=3322838>

² *United States v. Johnson*, 481 U.S. 681, 700 (1987)(Scalia dissenting)("The *Feres* Court claimed its decision was necessary to make 'the entire statutory system of remedies against the Government...a workable, consistent and equitable whole.' I am unable to find such beauty in what we have wrought.")

³ The FTCA, 28 U.S.C. §1346(b), permits claims against the United States for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where, the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

⁴ Presidents from Lincoln to FDR had complained about this injustice. See, e.g., Smithmoore P. Myers, "Limitations And Exceptions Under The Federal Tort Claims Act," 5 *Gonz. L. Rev.* 175 (1970).

⁵ The FTCA includes "a ban on punitive damages, limitations on the right to a jury trial, caps on attorney's fees, an exhaustion of administrative remedies requirement" among other limits. Andrew F. Popper, "Rethinking Feres," *Boston College Law Review*, January 25, 2019, <https://ssrn.com/abstract=3322838>

⁶ Since at least the 1990s, bills had been introduced with the express purpose of allowing medical malpractice claims against the government for military personnel. See, e.g., H.R. 1054, 100th Cong. (1987); S. 347, 100th Cong. (1987); H.R. 3407, 102nd Cong. (1991); H.R. 2684, 107th Cong. (2001), H.R. 6093, 110th Cong. (2008), and S. 1347, H.R. 1478, the Carmelo Rodriguez Act of 2009, 111th Congress (2009).

⁷ See, e.g., Center for Justice & Democracy, "FAQ – Civil Justice And Prison Health Care: All Locked Up and Behind Bars," July 8, 2015, <https://centerjd.org/content/faq-civil-justice-and-prison-health-care>

⁸ See, e.g., Sharon LaFraniere and Andrew W. Lehren, "In Military Care, a Pattern of Errors but Not Scrutiny," *New York Times*, June 28, 2014, <https://www.nytimes.com/2014/06/29/us/in-military-care-a-pattern-of-errors-but-not-scrutiny.html>

⁹ James Clark, "'It's a Scandal' – Inside The Fight To Hold the Military Accountable For Medical Malpractice," *Task and Purpose*, November 16, 2018, <https://taskandpurpose.com/feres-doctrine-military-medical-malpractice/>; Nick Schwellenbach, "House Committee Moves to Allow Suits for Military Medical Malpractice," *Center for Public Integrity*, May 19, 2014, <https://publicintegrity.org/national-security/house-committee-moves-to-allow-suits-for-military-medical-malpractice/>

¹⁰ See, e.g., Center for Justice & Democracy, *Briefing Book, Medical Malpractice By the Numbers* (December 2018) at 148 *et seq.*, <https://centerjd.org/content/briefing-book-medical-malpractice-numbers>