

LEGAL BARRIERS THAT UNDERMINE THE RIGHTS OF VETERANS AND SERVICE MEMBERS

GOVERNMENT CONTRACTOR DEFENSE

While active service members (or their families if the service member is killed) can sue private corporations for product liability if they're injured or killed by a defective product, there are major limitations if military equipment used during military service is involved. Private military contractors are typically shielded from civil liability under the government contractor defense established in *Boyle v. United Technologies Corporation* (1988).¹ Under this defense, if a product is defective but made exactly according to government specifications for military use, victims have no recourse against the contractor. The company can only be liable if the product deviates from the specs or the contractor hides known dangers from the government.

The U.S. Supreme Court is now considering a case that could significantly expand immunity for military contractors. In *Hencely v. Fluor Corporation*, the issue is whether a private contractor working in a war-zone environment can be held accountable under state tort law despite federal laws shielding the government and the contractor from certain liability.² The suit arises from a 2016 suicide bombing at Afghanistan's Bagram Airfield where Fluor Corporation provided support services.³ Twenty-year-old Specialist Winston Hencely was severely injured when an Afghan national hired by a Fluor subcontractor used an explosive vest he constructed at the facility to carry out the attack, which killed six people (including the bomber) and hurt seventeen others. The projectiles in the bomb tore through Winston's skull, brain and chest, leaving him unable to fully use the left side of his body and to live a life of extreme pain, seizures, short-term memory loss and other serious afflictions. Winston pursued state negligence claims against Fluor, which the lower and appellate courts dismissed.

FERES DOCTRINE

When it comes to veterans with tort claims against the U.S. Department of Veteran Affairs (VA), such as medical malpractice at a VA hospital or other harm that may occur on VA property,⁴ vets have two options: They can seek new VA benefits⁵ or they may file a claim under the Federal Tort Claims Act (FTCA). The FTCA allows those hurt by the federal government to seek tort damages as well as access the courts.⁶ The FTCA has certain requirements that do not bind other victims seeking justice in the courts, like requiring them to first file an administrative claim and

other limitations.⁷ However, at least it's something. Before the FTCA became law in 1946, the government was completely immune from lawsuits, causing a grave injustice for many harmed individuals.⁸

When Congress passed the FTCA, it was not unlimited. In addition to establishing special procedures and restrictions, Congress enumerated 13 exceptions to this right to go to court. Among them: a prohibition on claims by service members arising out of wartime combat. That makes sense.

But in 1950, the U.S. Supreme Court broadened this “combat” exception to include non-combatant or “incident to service” injuries even though neither the FTCA language nor legislative history suggests that's what Congress intended.⁹ In other words, the decision, establishing what's known as the *Feres* doctrine, bars active-duty service members – which includes cadets who are in training and not yet commissioned officers – from suing the government for negligence, including sexual assault, gross medical malpractice, toxic poisoning or any other non-combat-related harm. It also closes the door on family member claims arising from the same wrongful acts. As a result, unlike civilians who have access to the civil justice system, the only recourse for injury for service members and their families is through internal military administrative systems, which lack transparency, fairness and adequate remedies.

Over the years, the Supreme Court has had multiple opportunities to overturn the *Feres* case but continues to reject appeals that challenge its judicially-fabricated doctrine, denying a petition as recently as February 24, 2025. This refusal prompted Justice Thomas to issue a strong dissent, writing in part, “As I have said before, we should fix the mess that we have made. ...*Feres* is indefensible as a matter of law, and senseless as a matter of policy.”¹⁰

It should be noted that when it comes to medical malpractice in military hospitals, growing criticism of the *Feres* doctrine eventually resulted in the enactment of the SFC Richard Stayskal Military Medical Accountability Act of 2019.¹¹ However, rather than simply allowing these claims to proceed under the FTCA, Congress created an administrative compensation system within the military that has proven to be completely unworkable.¹² Lawmakers and advocates say that “the Pentagon has not followed the spirit of the law, citing what they describe as an opaque process for deciding claims and a low approval rate.”¹³ And claimants have complained that they “were offered insufficient amounts or nothing” without the right to appeal to court.¹⁴

FORCED ARBITRATION

Congress enacted two important statutes that allow service members experiencing specific types of illegal misconduct to seek legal redress in court when companies break the law: the Servicemembers Civil Relief Act (SCRA),¹⁵ protecting members from predatory lending and other financial abuses; and the Uniformed Services Employment and Reemployment Rights Act (USERRA),¹⁶ protecting their jobs when they're called to active duty. However, these rights – and Congress' intent – are being regularly undermined by the increasing use of forced arbitration clauses in financial and employment contracts. For example, nearly a decade ago, DOD found that “most predatory lenders require borrowers to waive their rights to go to court to resolve

disputes and instead submit borrowers to private adjudication through mandatory arbitration.”¹⁷ This problem has no doubt become even worse today.

Forced arbitration clauses require disputes to be resolved in private, secretive, rigged arbitration systems controlled by the company where there is virtually no right to appeal. For service members, this means that when they suffer financial abuse or employment violations after returning from active duty, they are barred from filing suit in court. Such clauses also typically include class action bans, preventing active-duty members – who have limited time and ability to pursue a case – from banding together with others to seek remedies through legal action. As Kevin Hollinger, Legislative Director of the Enlisted Association of the National Guard of the United States, explained in congressional testimony, “Forced Arbitration is a one-sided, non-transparent process in which Servicemembers have very little chance of achieving a favorable outcome when their rights and protections set forth under these federal laws are violated.”¹⁸ Forced arbitration also shields violators from public scrutiny and undermines the creation of public case law that clarifies and strengthens legal protections. And while numerous bills to ban forced arbitration clauses have been introduced in Congress, none of these bills has passed to date.¹⁹

NOTES

¹ 487 U.S. 500 (1988).

² Jimmy Hoover, “Supreme Court Seems Open to Tort Suits Against War Zone Contractors,” *National Law Journal*, November 3, 2025, <https://www.law.com/nationallawjournal/2025/11/03/supreme-court-seems-open-to-tort-suits-against-war-zone-contractors/>; Ronald Mann, “Court to consider protection of military contractors from certain suits,” *SCOTUSblog*, October 29, 2025, <https://www.scotusblog.com/2025/10/court-to-consider-protection-of-military-contractors-from-certain-suits>

³ *Hencely v. Fluor Corp.*, 120 F.4th 412 (4th Cir. 2024); *Hencely v. Fluor*, Case No. 6:19-cv-00489 (D.S.C) (complaint, February 20 2019).

⁴ We are not including discussion of legal options for VA benefit denials, which come with their own set of administrative and legal complications. See U.S. Department of Veterans Affairs, “VA decision reviews and appeals,” September 30, 2025, <https://www.va.gov/decision-reviews>

⁵ 38 U.S.C. § 1151.

⁶ 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.”

⁷ The FTCA includes “a ban on punitive damages, limitations on the right to a jury trial, caps on attorney’s fees, an exhaustion-of-the-administrative-remedies requirement” and other restrictions. Andrew F. Popper, “Rethinking *Feres*,” 60 *B. C. L. Rev.* 1491 (2019), <https://bclawreview.bc.edu/articles/304/files/63a55db9d05ac.pdf>. Specifically, the victim must first file an administrative claim with the federal agency that is to blame for the injury. The agency has six months to respond. If the agency denies the claim or does not respond in six months, the victim may file a lawsuit. See Justia, “Federal Tort Claims Act — Injury Lawsuits Against the Federal Government” (July 2025), <https://www.justia.com/injury/federal-tort-claims-act-ftca>

⁸ 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 (Spring 1970), <https://blogs.gonzaga.edu/gulawreview/files/2011/11/gonlr5.22.pdf>

⁹ *Feres v. United States*, 340 U.S. 135 (1950).

¹⁰ *Carter v. United States*, 145 S.Ct. 519 (2025) (Thomas, J., dissenting from denial of certiorari).

¹¹ Pub. L. No. 116-92 § 731 (2019).

¹² See, e.g., Joce Sterman and Daniela Molina, “Military leader speaks about malpractice investigations after months of requests,” *InvestigateTV*, June 30, 2024, <https://www.kctv5.com/2024/07/01/military-leader-speaks-about-malpractice-investigations-after-months-requests>; Patricia Kime, “Military Services Approving Roughly 3% of Malpractice Claims from Service Members,” *Military.com*, June 7, 2024, <https://www.military.com/daily-news/2024/06/07/military-services-approving-roughly-3-of-malpractice-claims-service-members.html>; Office of U.S. Senator Markwayne Mullin, “Mullin Calls for Justice and Accountability for Victims of DOD Medical Malpractice,” March 30, 2023, <https://www.mullin.senate.gov/newsroom/press-releases/mullin-calls-for-justice-and-accountability-for-victims-of-dod-medical-malpractice/>

¹³ Under the Act, non-economic (pain and suffering) compensation was capped at \$600,000. In October 2023, the Pentagon raised the cap to \$750,000. Manuel Vega, a Marine Corps veteran and founder of Save Our Servicemembers, a nonprofit that advocates for military malpractice reforms, “pointed out that the 2020 National Defense Authorization Act authorized \$400 million over 10 years for the Pentagon to pay military medical malpractice claims made after January 2017. But, in reality, very few have been approved. . . . Even Master Sgt. Richard Stayskal, for whom the law that allowed the claims is named, had his claim denied”; he developed terminal lung cancer after military doctors missed a large tumor, misdiagnosing his condition numerous times. See Thomas Novelty and Rebecca Kheel, “Pentagon Raises Cap on Service Members’ Medical Malpractice Claims,” *Military.com*, October 20, 2023, <https://www.military.com/daily-news/2023/10/20/pentagon-raises-cap-service-members-medical-malpractice-claims.html>

¹⁴ Brian K. Findley, *New Law Allows Medical Malpractice Claims by Military: A Progress Report*, American Bar Association, September 29, 2023, https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/tortsource/2023/summer/new-law-allows-medical-malpractice-claims-military

¹⁵ 50 U.S.C. §§ 3901-4043.

¹⁶ 38 U.S.C. §§ 4301-4335.

¹⁷ U.S. Department of Defense, *Report on Predatory Lending Practices Directed at Members of the Armed Forces and their Dependents*, August 9, 2006, <https://apps.dtic.mil/sti/pdfs/ADA521462.pdf>

¹⁸ Testimony of Kevin Hollinger, Legislative Director, Enlisted Association of the National Guard of the United States, before the U.S. House Subcommittee on Economic Opportunity of the Committee on Veterans’ Affairs, hearing on “Examining the Future of Workforce Protections for Servicemembers,” March 9, 2023, <https://www.congress.gov/118/meeting/house/115444/witnesses/HHRG-118-VR10-Wstate-HollingerK-20230309.pdf>

¹⁹ See, e.g., H.R.5350 – Fair Act of 2025 (introduced September 15, 2025), <https://www.congress.gov/bill/119th-congress/house-bill/5350/text>; S.2799 – the Forced Arbitration Injustice Repeal (FAIR) Act (introduced September 15, 2025), <https://www.congress.gov/bill/119th-congress/senate-bill/2799/text>; H.R.5516 – To amend title 38, United States Code, to clarify the employment and reemployment rights of members of the uniformed services to other law (introduced September 19, 2023), <https://www.congress.gov/bill/118th-congress/house-bill/5516/text>; H.R.5125 – End Servicemember Forced Arbitration Act (introduced August 1, 2023), <https://www.congress.gov/bill/118th-congress/house-bill/5125/text>; H.R.2196 – Justice for Servicemembers Act (introduced March 26, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/2196/text>. In addition, Congress has repeatedly ignored DOL’s push to end mandatory arbitration clauses in service member employment contracts. See, e.g., U.S. Department of Labor, Veterans’ Employment and Training Service, *USERRA: FY 2022 Annual Report to Congress* (September 2023), <https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Annual-FY2022.pdf>; U.S. House Subcommittee on Economic Opportunity of the Committee on Veterans’ Affairs, Hearing on “Examining the Future of Workforce Protections for Servicemembers,” March 9, 2023, <https://www.congress.gov/118/meeting/house/115444/documents/HHRG-118-VR10-Transcript-20230309.pdf>