



Can Mass Shooting Victims Sue the United States?

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Several weeks after the police [arrested](#) Dylann Roof for unlawfully possessing a controlled substance, Roof tried to buy a [semiautomatic handgun](#). Under existing law, this previous arrest [should have disqualified Roof](#) from obtaining that weapon. However, the FBI—[by its own admission](#)—committed oversights while performing Roof’s background check. As a result, Roof successfully purchased the firearm despite his prior arrest. Roof then [killed nine people](#) with that handgun in a racially motivated attack on a South Carolina church.

Several of Roof’s victims (or their estates) [sued the United States](#), seeking to hold the federal government liable for failing to prevent Roof from purchasing the firearm he used in the shooting. In its August 30, 2019 opinion in *Sanders v. United States*, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) [rejected](#) the United States’s request to dismiss the victims’ case. *Sanders* may be significant to Congress not only due to the [national attention](#) surrounding Roof’s case, but also because the litigation implicates [broader debates](#) over when—and subject to what conditions—a private party may sue the federal government. This Sidebar describes the statutes and legal principles governing when a plaintiff may pursue tort litigation against the United States, explains how the *Sanders* court applied those laws and doctrines, and identifies potential considerations for Congress.

Sovereign Immunity and the Federal Tort Claims Act

The doctrine of [sovereign immunity](#) ordinarily bars private parties from suing the United States without the government’s consent. To enable persons injured by the federal government to obtain recourse, however, Congress has [waived](#) the United States’s immunity from certain lawsuits. For example, the [Federal Tort Claims Act](#) (FTCA) [enables](#) plaintiffs to pursue certain state law [tort claims](#) against the federal government. For instance, a plaintiff injured by a federal employee’s negligence can potentially sue the United States to obtain compensation.

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However, the FTCA’s waiver of sovereign immunity is subject to numerous [conditions](#) and [limitations](#). Of particular relevance here, Congress decided to preserve the United States’s immunity from certain categories of tort lawsuits that, in Congress’s view, would inappropriately require judges to engage in “[second-guessing](#)” of legislative and administrative decisions grounded in social, economic, and political policy.” To that end, [28 U.S.C. § 2680\(a\)](#)—also known as the “[discretionary function exception](#)”—bars any FTCA claim based on either (1) “an act or omission of an employee of the Government” undertaken “in the execution of a statute or regulation” or (2) “the exercise or performance” of a “discretionary function or duty” (including “the failure to exercise or perform” such a function or duty). According to the Supreme Court, the discretionary function exception thereby “protect[s] the Government from liability that would seriously [handicap efficient government operations](#).”

Section 2680(a) [does not define](#) the term “discretionary function or duty.” Courts have developed a [two-part inquiry](#) for determining whether the discretionary function exception forecloses a particular FTCA suit. **First**, the court must assess whether the case involves [discretionary](#) conduct—that is, whether the government employee who allegedly injured the plaintiff engaged in conduct that involved “an element of [judgment or choice](#).” Courts usually presume that a federal employee’s conduct qualifies as discretionary unless a federal law or policy specifically [prescribes a course of action](#) the employee must follow. **Second**, courts evaluate whether the employee’s conduct was [policy-driven](#)—that is, whether the plaintiff seeks to hold the United States liable for a legislative or administrative decision rooted in [social, economic, or political](#) considerations. If the answer to both questions is yes, then the case [cannot proceed](#).

Sanders v. United States

The *Sanders* plaintiffs, invoking the [FTCA’s waiver of sovereign immunity](#), sued the United States under [South Carolina tort law](#) for allegedly failing “to prevent Roof from purchasing the [firearm he used in the shooting](#).” The plaintiffs claimed that if the FBI had [properly performed its background check](#) on Roof, he would not have obtained the handgun he used to commit his crimes. They specifically alleged that the background check was deficient in [three respects](#):

1. The employee who performed the background check did not [contact the police department](#) that arrested Roof to request documentation regarding his arrest;
2. The FBI failed to give its employees access to a [law enforcement database](#) that contained information that would have disqualified Roof from buying the weapon; and
3. The government failed to [maintain the integrity](#) of certain data in its information systems.

Although the United States [argued](#) that the discretionary function exception categorically barred the lawsuit, the Fourth Circuit [disagreed](#). The court reasoned that the government [could not satisfy](#) the first prong of the exception’s two-part test because a federal policy commanded FBI employees to undertake a specific course of action when conducting background checks. Specifically, the Fourth Circuit observed that the FBI’s [Standard Operating Procedures \(SOPs\)](#) [directed](#) the FBI employee handling Roof’s background check to contact the police department that arrested him to obtain additional information. The court construed that requirement as a [mandatory directive](#) that left no room for individual discretion. Because an FBI employee allegedly ignored that non-discretionary requirement, the court concluded that the discretionary function exception [did not bar](#) the plaintiffs from pursuing a tort claim based on the FBI’s alleged failure to abide by the SOPs.

At the same time, however, the court also ruled that the discretionary function exception [barred](#) the plaintiffs’ second claim that the FBI should have granted its employees [access to the database](#) that [contained disqualifying information](#) about Roof’s arrest. The court [reasoned](#) that agency decisions regarding which databases to provide to employees “involve[] ‘an element of judgment’” and are therefore the sorts of decisions “that the discretionary function exception was designed to shield.” The

court [similarly concluded](#) that the plaintiffs could not pursue their third claim that the United States failed to maintain the integrity of data in its systems.

Judge G. Steven Agee filed a dissenting opinion [disputing](#) the majority's conclusion that the SOPs left the investigating employee no discretion regarding whether to [perform additional research](#) into the factual circumstances surrounding Roof's arrest. Judge Agee also expressed concern that the majority's ruling to the contrary would "effectively subject the Government to [per se liability](#) for every act of negligence by a Government actor." According to Judge Agee, "the question of whether an examiner should keep pursuing an investigation . . . is fundamentally grounded in the question of how to most effectively utilize [limited agency resources](#)"—a [policy-laden decision](#) that Congress intended the discretionary function exception to protect. Thus, argued Judge Agee, "imposing liability here could [hamstring the proper delivery](#) of a Government service in a key area of public safety."

The *Sanders* opinion does not guarantee that the plaintiffs will ultimately recover compensation from the federal government. Given the procedural posture of the appeal, the Fourth Circuit only resolved whether the government was categorically immune from the plaintiffs' claims; it [did not consider](#) whether those claims had legal merit. For example, the court did not address the [government's argument](#) that South Carolina tort law imposes no legal duty to protect others from violent crimes committed by third parties. Instead, the Fourth Circuit [remanded](#) the case to the district court, where the parties will continue to litigate whether the plaintiffs are entitled to monetary damages.

Considerations for Congress

The dueling majority and dissenting opinions in *Sanders* reflect that evaluating whether the discretionary function exception forecloses a given FTCA claim is not always straightforward, and that judges sometimes disagree over whether the exception applies. Notably, the Supreme Court has opined that it is "[impossible](#) to define with precision every contour of the discretionary function exception," and other courts have remarked that it is difficult to "[chart\[\] a clear path through the weaving lines of precedent](#) regarding what decisions are susceptible to social, economic, or political policy analysis." While the task of articulating the exception's boundaries has primarily [fallen to the courts](#), Congress could clarify the exception's scope and applicability to reduce judicial disagreement and produce more predictable results. That said, legislative intervention might also reduce the judiciary's flexibility to adapt the discretionary function doctrine to unforeseen factual circumstances.

Some Members of [recent Congresses](#) have introduced legislation proposing to supplement or modify the FTCA's definition of "discretionary function." A section of the [ACCESS Act](#) (H.R. 1326, 116th Cong.), for example, would specify that "[f]or purposes of [the FTCA], any action by an agent or employee of the United States to manage or allow the use of Federal land for purposes of target practice or marksmanship training by a member of the public shall be considered to be the exercise or performance of a discretionary function." This provision, along with [28 U.S.C. § 2680\(a\)](#), would thereby immunize the federal government from tort claims arising from such training activities. The [No Exemptions for EPA Act of 2015](#) (H.R. 3531, 114th Cong.), by contrast, would have expanded the government's potential liability by rendering the discretionary function exception inapplicable to FTCA cases involving actions taken "in connection with a response under the Comprehensive Environmental Response, Compensation, and Liability Act."

Sanders also implicates questions regarding the proper mechanism for compensating victims of mass tragedies. The [FTCA](#)—at least when the government is in some way responsible for the victims' injuries—contemplates that victims' claims will be resolved through [formal litigation](#) (subject to a requirement that those victims first afford the United States an opportunity to [settle the claim before a lawsuit begins](#)). While litigation in federal court has advantages, such as oversight by an [impartial judicial officer](#) and the opportunity for [appellate review](#) of erroneous rulings, it can also be [time-consuming and expensive](#) for the victims and the United States alike.

In other contexts, by contrast, Congress has provided that victims of mass tragedies may receive compensation through a fund without the expense and inconvenience of pursuing a formal lawsuit. For instance, Congress established the [September 11th Victim Compensation Fund \(VCF\)](#) to compensate persons injured or killed in the September 11th attacks. Obtaining compensation from the VCF may be [less onerous](#) than litigating an adversarial lawsuit. However, a Special Master rather than a life-tenured federal judge makes VCF award determinations, which are “[final](#) and not subject to judicial review.” Thus, whenever Congress makes money available to persons injured or killed under tragic circumstances, it may consider whether to require those persons to obtain the money through full-fledged litigation—or, alternatively, through less formal procedures.