The Federal Tort Claims Act (FTCA): A Legal Overview

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A plaintiff injured by a defendant’s wrongful act may file a tort lawsuit to recover money from that defendant. To name a particularly familiar example of a tort, a person who negligently causes a vehicular collision may be liable to the victim of that crash. By compelling people who wrongfully injure others to pay money to their victims, the tort system serves at least two functions: (1) deterring people from harming others and (2) compensating those who are injured.

For a substantial portion of this nation’s history, however, the doctrine of “sovereign immunity” barred people injured by the tortious acts of a federal officer or employee from filing lawsuits against the United States. Sovereign immunity is a legal doctrine that ordinarily prohibits private citizens from suing a sovereign state without its consent. Until the mid-20th century, a tort victim could obtain compensation from the United States only by persuading Congress to pass a private bill compensating him for his loss.

Congress enacted the Federal Tort Claims Act (FTCA), which authorizes plaintiffs to obtain compensation from the United States for the torts of its employees. Subjecting the federal government to tort liability creates a financial cost to the United States, and it also may incentivize government officials to base their decisions on the desire to reduce the government’s exposure to monetary damages, regardless of the perceived social benefit of an alternative. In an attempt to mitigate these potential negative effects of abrogating the government’s immunity from liability and litigation, the FTCA limits the circumstances in which a plaintiff may pursue a tort lawsuit against the United States. For example, the FTCA contains several exceptions that categorically bar plaintiffs from recovering tort damages in certain kinds of cases. Federal law also restricts the types and amount of damages a victorious plaintiff may recover in an FTCA suit. Additionally, a plaintiff may not initiate an FTCA lawsuit unless he has timely complied with a series of procedural requirements, such as providing the government an initial opportunity to evaluate the plaintiff’s claim and decide whether to settle it before the case proceeds to federal court.

Since Congress first enacted the FTCA, the federal courts have developed a robust body of judicial precedent interpreting the statute’s contours. The Supreme Court has expressed reluctance to reconsider its long-standing FTCA precedents, thereby leaving it to Congress to amend the FTCA if it disagrees with judicial interpretation of its application. Some Members of Congress have proposed legislation to modify the FTCA in various respects, such as by broadening the circumstances in which a plaintiff may hold the United States liable for torts committed by government employees.
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A plaintiff injured by a defendant’s wrongful conduct may file a “tort” lawsuit to recover money from that defendant. To name a familiar example of a tort, “a person who causes a crash by negligently driving a vehicle is generally liable to the victim of that crash.”

By forcing people who wrongfully injure others to pay money to their victims, the tort system serves at least two functions: (1) “deter[ring] people from injuring others” and (2) “compensat[ing] those who are injured.”

In ordinary circumstances, a tort victim may sue the employer of a tortfeasor under the theory of respondeat superior, where an employer bears responsibility for an employee’s actions. Until the mid-20th century, however, the principle of sovereign immunity—a legal doctrine that bars private citizens from suing a sovereign government without its consent—prohibited plaintiffs from suing the United States for the tortious actions of federal officers and employees. Thus, for a substantial portion of this nation’s history, persons injured by torts committed by the federal government’s agents were generally unable to obtain financial compensation through the judicial system.

Congress ultimately deemed this state of affairs unacceptable and enacted the Federal Tort Claims Act (FTCA) in 1946. The FTCA allows plaintiffs to file and prosecute certain types of tort lawsuits against the United States in federal court, with the potential of recovering financial compensation from the federal government. Some FTCA lawsuits are relatively mundane; for instance, a civilian may sue the United States to obtain compensation for injuries sustained as a result of minor accidents on federal property. Other FTCA cases, however, involve grave allegations of government misfeasance. For example, after naval officers allegedly sexually

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1 See, e.g., Tort, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “tort” as “a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of [monetary] damages”). See generally CRS In Focus IF11291, Introduction to Tort Law, by Kevin M. Lewis (describing tort law, its purposes, and its relevance to Congress). The author of this product is no longer at CRS. Any questions from congressional clients about this product should be directed to Michael Contino.


4 See, e.g., Thiele v. Bd. of Trs. of Ill. State Univ., 35 F.4th 1064, 1067 (7th Cir. 2022).

5 E.g., Paul Figley, Ethical Intersections & The Federal Tort Claims Act: An Approach for Government Attorneys, 8 U. ST. THOMAS L.J. 347, 348–49 (2011) [hereinafter Figley, Ethical Intersections] (explaining that “[f]or a century and a half... the United States’ sovereign immunity... protected it from suit[s]” filed by “citizens injured by the torts of federal employees”).

6 Axelrad, supra note 2, at 1332 (“Until the Federal Tort Claims Act was enacted in 1946, no general remedy existed for torts committed by federal agency employees.”). See also Figley, Ethical Intersections, supra note 5, at 348 (explaining that, until 1946, “the only practical recourse for citizens injured by the torts of federal employees was to ask Congress to enact private legislation affording them relief”).

7 28 U.S.C. §§ 1346(b), 2671–80. See, e.g., id. §§ 2401(b), 2402 (additional provisions of the U.S. Code that apply in FTCA cases). See also infra “Background” (describing the circumstances leading to the FTCA’s enactment in 1946).

8 See, e.g., 28 U.S.C. § 2674 (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.”).

9 See, e.g., Gibson v. United States, 809 F.3d 807, 809–10 (5th Cir. 2016) (lawsuit seeking compensation for injuries the plaintiff allegedly sustained as a result of falling off a stepladder while exiting a trailer owned by the Federal Emergency Management Agency).
assaulted several women at the Tailhook Convention in 1991, those women invoked the FTCA in an attempt to hold the United States liable for those officers’ conduct.\(^{10}\) Family members of persons killed in the 1993 fire at the Branch Davidian compound in Waco likewise sued the United States under the FTCA, asserting that federal law enforcement agents committed negligent acts that resulted in the deaths of their relatives.\(^{11}\) Additionally, the U.S. Court of Appeals for the First Circuit\(^ {12}\) affirmed an award of more than $100 million against the United States in an FTCA case alleging that the Federal Bureau of Investigation (FBI) committed “egregious government misconduct” resulting in the wrongful incarceration of several men who were falsely accused of participating in a grisly gangland slaying.\(^ {13}\)

Empowering plaintiffs to sue the United States can ensure that persons injured by federal employees receive compensation and justice. At the same time, waiving the government’s immunity from tort litigation comes at a significant cost. The U.S. Department of the Treasury’s Bureau of the Fiscal Service (Bureau) reports that the United States spends hundreds of millions of dollars annually to pay tort claims under the FTCA,\(^ {14}\) and the Department of Justice reports that it handles thousands of tort claims filed against the United States each year.\(^ {15}\) Moreover, exposing the United States to tort liability arguably creates a risk that government officials may inappropriately base their decisions “not on the relevant and applicable policy objectives that should be governing the execution of their authority,” but rather on a desire to reduce the government’s “possible exposure to substantial civil liability.”\(^ {16}\)

As explained in greater detail below, the FTCA attempts to balance these competing considerations by limiting the circumstances in which a plaintiff may successfully obtain a damages award against the United States.\(^ {17}\) For example, the FTCA categorically bars plaintiffs

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\(^{12}\) This report periodically references decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the First Circuit) refer to the U.S. Court of Appeals for that particular circuit.

\(^{13}\) See *Limone v. United States*, 579 F.3d 79, 83–84, 102, 108 (1st Cir. 2009). See also *Bravo v. United States*, 583 F.3d 1297, 1299 n.2 (11th Cir. 2009) (Carnes, J., concurring in the denial of rehearing en banc) (opining that ‘‘[t]he facts in the Limone case grew out of one of the darkest chapters in the history of the FBI, which involved rampant misconduct and corruption in the Boston office spanning a period of at least two decades’’).

\(^{14}\) The Bureau’s Annual Report to Congress for Fiscal Year 2022, https://fiscaldata.treasury.gov/datasets/judgment-fund-report-to-congress, lists all payments that the United States made to individual claimants under the FTCA and other compensatory statutes between October 1, 2021, and September 30, 2022. The sum of the “Confirmed Payment Amounts” for all reported “Litigative Payments” and “Administrative Payments” pursuant to the FTCA equaled a total of $525,353,470.44. This value includes only those payments that the Bureau explicitly coded as “Federal Tort Claims Act” payments.

\(^{15}\) Table 5 of the United States Attorneys’ Annual Statistical Report, https://www.justice.gov/omedia/1279221/dl?inline, reports that plaintiffs filed 3,030 tort cases against the United States during FY2022, and that an additional 5,016 tort cases against the federal government remained pending from the previous year. In addition, the report states that the Department of Justice received 3,056 new tort-related civil matters during FY2022.


\(^{17}\) See Gregory C. Sisk, Official Wrongdoing and the Civil Liability of the Federal Government and Officers, 8 U. ST. THOMAS L.J. 295, 322 (2011) (“The claim for individual justice in court to an aggrieved person or entity must be balanced against the common good advanced by effective collective measures of government and the preservation of democratic rule.”); David W. Fuller, Intentional Torts and Other Exceptions to the Federal Tort Claims Act, 8 U ST. THOMAS L.J. 375, 377 (2011) (“While a concern for fairness and equity in favor of aggrieved plaintiffs certainly
from pursuing certain types of tort lawsuits against the United States. The FTCA also restricts the types and amount of monetary damages that a plaintiff may recover against the United States. Additionally, the FTCA requires plaintiffs to comply with an array of procedural requirements before filing suit.

This report provides an overview of the FTCA. It first discusses the events and policy concerns that led Congress to enact the FTCA, including the background principle of sovereign immunity. The report then explains the effect, scope, and operation of the FTCA’s waiver of the United States’ immunity from certain types of tort claims. In doing so, the report describes categorical exceptions to the government’s waiver of sovereign immunity, statutory limitations on a plaintiff’s ability to recover monetary damages under the FTCA, and the procedures that govern tort claims against the United States. The report concludes by discussing various legislative proposals to amend the FTCA.

Background

A person injured by the tortious activity of a federal employee generally has two potential targets that may be named as a defendant in a tort lawsuit: (1) the federal employee who committed the tort and (2) the federal government itself. In many cases, however, suing the employee is not a viable option. For one, as explained in greater detail below, Congress has opted to shield federal officers and employees from personal liability for torts committed within the scope of their employment. Even if Congress had not decided to insulate federal employees from tort liability, suing an individual is often an unattractive option for litigants, as individual defendants may lack the financial resources to satisfy an award of monetary damages.

motivated legislators, that concern had to be balanced against others and was not the only impetus behind the FTCA.”); Niles, supra note 16, at 1296 (“The critical objective in providing for governmental exposure to tort liability is arriving at the proper balance between positive disincentives for negligent and unreasonable activity on the one hand and negative liability threats which distort the proper decision making process on the other.”).

18 See infra “Exceptions to the FTCA’s Waiver of Sovereign Immunity.”
19 See infra “Other Limitations on Damages.”
20 See infra “Procedural Requirements.”
21 This report is not intended to provide an exhaustive treatment of all topics related to the FTCA. Treatises that analyze the FTCA in greater depth include LESTER S. JAYSON & HON. ROBERT C. LONGSTRETH, HANDLING TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES (2005) and GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT: CASES AND MATERIALS (Foundation Press, 2d ed. 2008).
22 See infra “Background.”
23 See infra id.; “The Preclusion of Individual Employee Tort Liability Under the FTCA.”
24 See infra “Exceptions to the FTCA’s Waiver of Sovereign Immunity.”
25 See infra “Other Limitations on Damages.”
26 See infra “Procedural Requirements.”
27 See infra “Legislative Proposals to Amend the FTCA.”
29 See id.
30 See infra “The Preclusion of Individual Employee Tort Liability Under the FTCA.”
31 See, e.g., Andrew Kent, Are Damages Different?: Bivens and National Security, 87 S. CAL. L. REV. 1123, 1140 (2014) (summarizing the FTCA as “allowing suits directly against the federal government instead of officers (who might be judgment proof), and making the United States liable . . . .”); Stephen G. Gilles, The Judgment-Proof Society, 63 WASH. & LEE L. REV. 603, 606 (2006) (“When it comes to larger, litigable [tort] claims, many Americans are ‘judgment-proof’: They lack sufficient assets (or sufficient collectible assets) to pay the judgment in full (or even in
For many litigants, the legal and practical unavailability of tort claims against federal employees makes suing the United States a more attractive option. Whereas private defendants sometimes lack the financial resources to satisfy judgments rendered against them, the United States possesses sufficient financial resources to pay virtually any judgment that a court might enter against it.

A plaintiff suing the United States, however, may nonetheless encounter significant obstacles. In accordance with the legal doctrine of sovereign immunity, a private plaintiff ordinarily may not file a lawsuit against a sovereign entity— including the federal government—unless that sovereign consents. For a substantial portion of this nation’s history, the doctrine of sovereign immunity barred citizens injured by the torts of a federal officer or employee from pursuing a lawsuit against the United States. Until 1946, “the only practical recourse for citizens injured by the torts of federal employees was to ask Congress to enact private legislation affording them relief” through “private bills.”

Some, however, criticized the private bill system. Not only did private bills impose “a substantial burden on the time and attention of Congress,” but some members of the public also became increasingly concerned “that the private bill system was unjust and wrought with political

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32 See Harbury, 522 F.3d at 417.
33 See Figley, Ethical Intersections, supra note 5, at 361 (“From the perspective of a plaintiff . . . for whom the FTCA provides a remedy, the government is the very best sort of deep pocket defendant.”); Axelrad, supra note 2, at 1333 (describing the United States as “the ultimate ‘deep pocket’”); Richard H. Seamon, Causation and the Discretionary Function Exception to the Federal Tort Claims Act, 30 U.C. DAVIS L. REV. 691, 739 (1997) (“There is no defendant with a deeper pocket than the United States.”). To that end, Congress has created a standing appropriation from which successful claimants may collect FTCA judgments and settlements known as the Judgment Fund. 31 U.S.C. § 761.
34 E.g., Pornomo v. United States, 814 F.3d 681, 687 (4th Cir. 2016) (“The default position is that the federal government is immune to suit.”); Lipsey v. United States, 879 F.3d 249, 253 (7th Cir. 2018) (“The United States as sovereign is immune from suit unless it has consented to be sued.”); Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017), cert. denied, 139 S. Ct. 81 (2018) (“The United States is immune from suit without its consent.”); Veronica J. Finkelstein, A Distinction With a Difference: Understanding How the Federal Tort Claims Act Can Impact a Medical Malpractice Case, 93 P.A. B. ASS’N Q. 21, 25 (2022) (“As the sovereign is infallible, it can only be sued by consent.”).
35 Figley, Ethical Intersections, supra note 5, at 348–49 (explaining that, “for a century and a half, . . . the United States’ sovereign immunity . . . protected it from suit” by “citizens injured by the torts of federal employees”).
36 Id. at 348. See also Axelrad, supra note 2, at 1332 (“Until the [FTCA] was enacted in 1946, no general remedy existed for torts committed by federal agency employees.”).
37 Id. See also Helen Hershkoff, Early Warnings, Thirteenth Chimes: Dismissed Federal-Tort Suits, Public Accountability, and Congressional Oversight, 2015 Mich. St. L. Rev. 183, 187 (describing the significant burdens of “investigating the thousands of tort claims submitted to [Congress] each year for payment and enacting legislation for any claimant Congress chose to compensate”); Pfander & Aggarwal, supra note 33, at 424 n.39 (commenting that the 76th Congress (in 1939 and 1940) considered more than 1,700 private bills, more than 300 of which became law).
favoritism.” In 1946, Congress enacted the FTCA, which effectuated a “limited waiver of [the federal government’s] sovereign immunity” from certain common law tort claims. With certain exceptions and caveats discussed throughout this report, the FTCA authorizes plaintiffs to bring the following civil lawsuits exclusively in federal court if their claims are

1. against the United States;
2. for money damages;
3. for injury to or loss of property, or personal injury or death;
4. caused by a federal employee’s negligent or wrongful act or omission;
5. while acting within the scope of his or her office or employment;
6. under circumstances where the United States, if a private person, would be liable to the plaintiff in accordance with the law of the place where the act or omission occurred.

Thus, not only does the FTCA “free Congress from the burden of passing on petitions for private relief” by “transfer[ring] responsibility for deciding disputed tort claims from Congress to the

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41 Stephen L. Nelson, The King’s Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act, 51 S. Tex. L. Rev. 259, 267 (2009). See also Axelrad, supra note 2, at 1332 (“Favoritism in Congress . . . could make or break the claimant’s ability to be made whole.”).
42 See, e.g., Nelson, supra note 41, at 268–71 (discussing the FTCA’s legislative history).
43 E.g., Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017), cert. denied, 139 S. Ct. 81 (2018).
44 Notably, however, “the United States . . . has not rendered itself liable under [the FTCA] for constitutional tort claims.” FDIC v. Meyer, 510 U.S. 471, 478 (1994) (emphasis added). See also Dianne Rosky, Respondent Inferior: Determining the United States’ Liability for the Intentional Torts of Federal Law Enforcement Officials, 36 U.C. Davis L. Rev. 895, 942 n.166 (2003) (“Repeated subsequent attempts to pass legislation creating federal liability for constitutional torts have failed.”). As a general matter, “federal constitutional claims for damages are cognizable only under” the Supreme Court’s decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), “which runs against individual governmental officers personally,” Loumiet v. United States, 828 F.3d 935, 945 (D.C. Cir. 2016), or under the Tucker Act, which waives the government’s immunity against certain types of constitutional claims under specified conditions. See, e.g., Paret-Ruíz v. United States, 827 F.3d 167, 176 (1st Cir. 2016) (citing 28 U.S.C. § 1491(a)(1)). Nevertheless—and as explained below—even though constitutional tort claims are not themselves actionable under the FTCA, whether a government employee transgressed constitutional bounds while performing his duties may nonetheless inform whether an exception to the FTCA’s general waiver of sovereign immunity bars a plaintiff’s nonconstitutional tort claim. See infra notes 191–196 and accompanying text.
45 In addition to the FTCA, other federal statutes may also allow persons to obtain compensation from the United States for injuries or property damage caused by an individual acting on the United States’ behalf. See, e.g., 10 U.S.C. § 2733(a) (allowing the armed forces to “settle[] and pay” certain “claim[s] against the United States for” property loss, personal injury, or death caused by an officer or employee of the armed forces); id. § 2734(a) (allowing the armed forces to “settle and pay” certain “claim[s] against the United States” brought by an “inhabitant of a foreign country” for property loss, personal injury, or death). See generally Lt. Cmrd. Clyde A. Haig, Discretionary Activities of Federal Agents Vis-A-Vis the Federal Tort Claims Act and the Military Claims Act: Are Discretionary Activities Protected at the Administrative Adjudication Level, and to What Extent Should They Be Protected?, 183 Mil. L. Rev. 110, 110–50 (2005) (comparing 10 U.S.C. § 2733(a) to the FTCA).
46 See infra “Employees and Independent Contractors.”
47 Meyer, 510 U.S. at 477 (quoting 28 U.S.C. § 1346(b)).
48 Pfander & Aggarwal, supra note 33, at 424. See, e.g., Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983) (noting that Congress enacted the FTCA “in the interest of providing a more efficient means of compensation” than “securing recompense by private bill”).
courts, it also creates a mechanism to compensate victims of governmental wrongdoing. In addition to this compensatory purpose, the FTCA also aims to deter tortious conduct by federal personnel by rendering the United States liable for the torts of its agents, thereby incentivizing the government to carefully supervise its employees.

The FTCA does not itself create a new federal cause of action against the United States; rather, the FTCA waives the United States’ sovereign immunity from certain types of claims that exist under state tort law. Thus, in most respects, “the substantive law of the state where the tort occurred determines the liability of the United States” in an FTCA case. In this way, the FTCA largely “renders the Government liable in tort as a private individual would be under like circumstances.”

Critically, however, the FTCA’s waiver of sovereign immunity is not complete. To address “concerns . . . about the integrity and solvency of the public fisc and the impact that extensive litigation might have on the ability of government officials to focus on and perform their other duties,” the FTCA affords the United States “important protections and benefits . . . not enjoyed by other tort defendants” that are explained below. Moreover, to limit the forums in which a plaintiff may permisibly litigate a tort suit against the United States, Congress vested the federal district courts (as well as a small number of territorial courts) with exclusive jurisdiction over FTCA cases. Furthermore, because Congress believed “that juries would have difficulty viewing

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49 Figley, Ethical Intersections, supra note 5, at 347. See also Hershkoff, supra note 40, at 196 (explaining that the FTCA “by design shifted responsibility for disputes about government negligence from Congress to the Article III courts”).

50 Pfander & Aggarwal, supra note 33, at 424. See, e.g., Sutton v. United States, 819 F.2d 1289, 1292 (5th Cir. 1987) (explaining that Congress enacted the FTCA “to afford easy and simple access to the federal courts for persons injured by the activities of government” (quoting Collins v. United States, 783 F.2d 1225, 1233 (5th Cir. 1986) (Brown, J., concurring))).


52 E.g., Pornomo v. United States, 814 F.3d 681, 687 (4th Cir. 2016) (“The FTCA does not create a new cause of action; rather, it permits the United States to be held liable in tort by providing a limited waiver of sovereign immunity.”); Raplee v. United States, 842 F.3d 328, 331 (4th Cir. 2016) (explaining that “the FTCA merely waives sovereign immunity to make the United States amenable to a state tort suit”); Hornbeck Offshore Transp., LLC v. United States, 569 F.3d 506, 508 (D.C. Cir. 2009) (“This statutory text does not create a cause of action against the United States; it allows the United States to be held liable if a private party would be liable under similar circumstances in the relevant jurisdiction.”).

53 Raplee, 842 F.3d at 331. See also, e.g., 28 U.S.C. § 1346(b)(1) (providing that the United States may be liable to the plaintiff in tort under the FTCA “if a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred”); Garling v. EPA, 849 F.3d 1289, 1294 (10th Cir. 2017) (“State substantive law applies to suits brought against the United States under the FTCA.” (quoting Hill v. SmithKline Beecham Corp., 393 F.3d 1111, 1117 (10th Cir. 2004))). Because “state law operates in the FTCA not of its own force, but by congressional incorporation[,] [s]everal commentators have cited the FTCA as a relatively unusual example of state law that operates in the federal system by congressional choice.” Rosky, supra note 44, at 957.

54 Richards v. United States, 369 U.S. 1, 6 (1962). See also, e.g., 28 U.S.C. § 2674 (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.”).

55 Niles, supra note 16, at 1300. See also Fuller, supra note 17, at 377 (“Congress never intended the FTCA as a comprehensive waiver of governmental immunity from tort liability.”).

56 Niles, supra note 16, at 1300.

57 See infra “Exceptions to the FTCA’s Waiver of Sovereign Immunity”; “Other Limitations on Damages”; “Procedural Requirements.”

58 28 U.S.C. § 1346(b)(1) (“Subject to the provisions of chapter 171 of this title, the district courts, together with . . . the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any
the United States as a defendant without being influenced by the fact that it has a deeper pocket than any other defendant,” 59 FTCA cases that proceed to trial are generally tried by the court without a jury. 60

The Preclusion of Individual Employee Tort Liability Under the FTCA

The FTCA only authorizes tort lawsuits against the United States itself; 61 it expressly shields individual federal employees from personal liability for torts that they commit within the scope of their employment. 62 Thus, under the FTCA the remedy against the United States “is exclusive of any other civil action or proceeding for money damages” that might otherwise be available “against the employee whose act or omission gave rise to the claim.” 63 Starting in the late 1980s, Congress has prohibited courts from holding federal employees personally liable for torts committed within the scope of their employment in order to avert what Congress perceived as “an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.” 64 The individual employee generally remains immune from tort liability for torts committed within the scope of employment, even if a provision of the FTCA forecloses the plaintiff from recovering monetary damages from the United States itself. 65


60 28 U.S.C. § 2402; Carlson v. Green, 446 U.S. 14, 22 (1980) (“A plaintiff cannot opt for a jury in an FTCA action.”). See Osborn v. Haley, 549 U.S. 225, 252 (2007) (explaining that the U.S. Constitution does not require a jury trial in FTCA cases because “the Seventh Amendment, which preserves the right to a jury trial . . . does not apply to proceedings against the sovereign”); Chestnut v. United States, 15 F.4th 436, 440 (6th Cir. 2021) (“Since a plaintiff does not have a jury right in an FTCA action . . . .”). But see Zabel, supra note 59, at 194 (noting that federal courts sometimes empanel “advisory juries” in FTCA cases to render nonbinding verdicts); Allgeier v. United States, 909 F.2d 869, 875 (6th Cir. 1990) (FTCA case in which a “trial before an advisory jury took place”).

61 See, e.g., Jude v. Comm’r of Soc. Sec., 908 F.3d 152, 157 n.4 (6th Cir. 2018) (“[T]he only proper defendant in an FTCA claim is the United States.”).

62 Levin v. United States, 568 U.S. 503, 509 (2013). That said, the FTCA shields federal employees from liability only for tort claims; it does not shield federal employees from personal liability for constitutional or statutory violations. See 28 U.S.C. § 2679(b)(2) (“Paraphrase (1) does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States, or . . . a violation of a statute of the United States . . . .”). See also Sisk, supra note 17, at 307 (“[F]ederal employees remain potentially liable for constitutional torts.” (quoting KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.3, at 227 (3d ed. 1994))).

63 28 U.S.C. § 2679(b)(1). See also Levin, 568 U.S. at 509. This provision of the FTCA is “often called the Westfall Act.” Id.

64 Does 1-10 v. Haaland, 973 F.3d 591, 597 (6th Cir. 2020) (“In 1988, Congress abandoned this piecemeal approach and passed broad legislation to expand the benefit of sovereign immunity to all federal employees.”); Adams v. United States, 420 F.3d 1049, 1054 (9th Cir. 2005).

As the following subsections of this report explain, determining whether the FTCA governs a particular tort case—and, thus, whether the FTCA shields the individual who committed the alleged tort from personal liability—requires the court to ask two threshold questions: (1) whether the individual who committed the tort was in fact a federal employee,\(^{66}\) and, if so, (2) whether that individual committed the tort within the scope of their office or employment.\(^{67}\)

### Employees and Independent Contractors

The FTCA only waives the United States’ sovereign immunity as to torts committed by an “employee of the Government.”\(^{68}\) Thus, if a plaintiff attempts to sue the United States for a tort committed by someone who is not a federal employee, the plaintiff’s claim against the government will necessarily fail.\(^{69}\) For the purposes of the FTCA, the term “employee of the government” includes

- officers or employees of any federal agency;
- members of the military or naval forces of the United States;
- members of the National Guard while engaged in training or duty under certain provisions of federal law;
- persons acting on behalf of a federal agency in an official capacity; and
- officers and employees of a federal public defender organization (except when such employees are performing professional services in the course of providing representation to clients).\(^{70}\)

As a result of this relatively broad definition of “employee,” the FTCA effectively waives the government’s immunity from torts committed by certain categories of persons who might not ordinarily be considered “employees” as a matter of common parlance.\(^{71}\)

Because the FTCA applies only to torts committed by federal “employees,” the FTCA provision shielding federal employees from personal tort liability does not protect nonemployees, or individuals who fall outside the statutory definition of employee.\(^{72}\) With certain caveats discussed below,\(^{73}\) a plaintiff injured by the tortious action of a nonemployee may potentially be able to sue...
that nonemployee individually under ordinary principles of state tort law, even though he could not sue either federal employees or the United States under the FTCA.\(^{74}\)

Whether an individual doing work on behalf of the federal government meets the statutory definition of employee is not always immediately clear. For instance, the United States commonly hires independent contractors to carry out its governmental objectives.\(^{75}\) The FTCA, however, explicitly excludes independent contractors from the statutory definition of “employee.”\(^{76}\) As a result, “the government cannot be held liable” under the FTCA “for torts committed by its independent contractors”;\(^{77}\) the plaintiff must instead attempt to seek compensation from the contractor itself.\(^{78}\)

Whether an alleged tortfeasor is an independent contractor as opposed to a government employee is often a question for courts to resolve. While different courts consider different sets of factors,\(^{79}\) most courts hold that “the critical factor” when assessing whether a defendant is an employee or

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\(^{74}\) See, e.g., Creel, 598 F.3d at 211–15 (remanding with instructions to deny nonemployee’s motion to dismiss and to grant United States’ motion to dismiss); Ezekiel v. Michel, 66 F.3d 894, 903–04 (7th Cir. 1995) (explaining that if individual defendant was “an independent contractor rather than a federal employee,” the plaintiff’s case against that defendant could proceed).

\(^{75}\) See, e.g., In re KBR, Inc., Burn Pit Litig., 744 F.3d 326, 331 (4th Cir. 2014) (“Since the United States began its military operations in Afghanistan and Iraq in 2001 and 2003, respectively, its use of private contractors to support its mission has risen to ‘unprecedented levels.’ At times, the number of contract employees has exceeded the number of military personnel alongside whom they work in these warzones.” (quoting Comm’n on Wartime Contracting in Iraq and Afghanistan, At What Risk? Correcting Over-Reliance on Contractors in Contingency Operations 1 (Feb. 24, 2011))).


\(^{77}\) Edison v. United States, 822 F.3d 510, 514 (9th Cir. 2016). Accord, e.g., Carroll v. United States, 661 F.3d 87, 93 (1st Cir. 2011) (“The FTCA expressly does not waive the government’s immunity for claims arising from the acts or omissions of independent contractors.”); Tsosie v. United States, 452 F.3d 1161, 1163 (10th Cir. 2006) (“Although ‘employees’ of the government include officers and employees of federal agencies, ‘independent contractors’ are not ‘employees.’ As such, ‘the FTCA does not authorize suits based on the acts of independent contractors or their employees.’” (quoting Curry v. United States, 97 F.3d 412, 414 (10th Cir. 1996))).

\(^{78}\) See, e.g., Creel, 598 F.3d at 211–15 (concluding that, because individual physician at Veterans Affairs Medical Center was an independent contractor rather than an employee of the federal government, plaintiff’s medical malpractice claim against that surgeon could proceed); Woodruff v. Covington, 389 F.3d 1117, 1125 (10th Cir. 2004) (affirming denial of individual defendants’ motion to dismiss the plaintiff’s tort claims and to substitute the United States as the defendant on the ground that the defendants were “not ‘federal employees’”); Ezekiel, 66 F.3d at 903–04 (concluding that if individual defendant was “an independent contractor rather than a federal employee,” the plaintiff’s case against the defendant could proceed). But see infra “The Boyle Rule.”

\(^{79}\) Compare, e.g., U.S. Tobacco, 899 F.3d at 248 n.4 (“Although none are dispositive of the question, factors that courts may consider in making the determination [of whether the tortfeasor is an independent contractor] include: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.”) (quoting Robb v. United States, 80 F.3d 884, 889 n.5 (4th Cir. 1996))), and Creel, 598 F.3d at 213–14 (listing similar factors), with, e.g., Woodruff, 389 F.3d at 1126 (“We have devised seven factors to guide this determination: (1) the intent of the parties; (2) whether the United States controls only the end result or may also control the manner and method of reaching the result; (3) whether the person uses his own equipment or that of the United States; (4) who provides liability insurance; (5) who pays social security tax; (6) whether federal regulations prohibit federal employees from performing such contracts; and (7) whether the individual has authority to subcontract to others.” (quoting Lilly v. Fieldstone, 876 F.2d 857, 859 (10th Cir. 1989))).
an independent contractor for the purposes of the FTCA is whether the federal government possesses the authority “to control the detailed physical performance of the contractor.”80 “[A] contractor can be said to be an employee or agent of the United States within the intention of the [FTCA] only where the Government has the power under the contract to supervise a contractor’s day-to-day operations and to control the detailed physical performance of the contractor.”81 For example, courts have typically determined that certified registered nurse anesthetists (CRNAs) working for federal hospitals qualify as employees under the FTCA.82 These courts have justified that conclusion on the ground that CRNAs do not ordinarily enjoy broad discretion to exercise their independent judgment when administering anesthesia, but instead operate pursuant to the direct supervision and control of an operating surgeon or anesthesiologist working for the federal government.83 That same analysis produces a different result when considering physicians. Courts have generally held that because physicians who provide medical services at facilities operated by the United States often operate relatively independently of the federal government’s control, such physicians ordinarily qualify as “independent contractors, and not employees of the government for FTCA purposes.”84

The Boyle Rule

Because the FTCA’s prohibition on tort suits against individual federal employees does not insulate independent contractors from liability, a plaintiff injured by the tortious action of an independent contractor working for the federal government may potentially be able to recover compensation directly from that contractor.85 Nevertheless, a plaintiff asserting a tort claim

80 Ohlsen v. United States, 998 F.3d 1143, 1157 (10th Cir. 2021); U.S. Tobacco, 899 F.3d at 248. See also, e.g., Creel, 598 F.3d at 213 (same).
82 See, e.g., Bird v. United States, 949 F.2d 1079, 1080 (10th Cir. 1991) (“[A]t the time in question the [certified registered nurse anesthetist] was not an independent contractor but was an employee of the government[.]”); Bryant, 2000 WL 33201357, at *11 (concluding that nurse anesthetist “was acting as an employee of the federal government within the meaning of the FTCA”).
83 See Bryant, 2000 WL 33201357, at *9 (“[T]he written policy and procedure of the Medical Center required either the chief anesthesiologist or the operating surgeon to exercise immediate clinical supervision of CRNAs . . . .”); id. at *9–10 (“[A] CRNA’s ability to exercise his or her professional judgment is limited . . . [S]o long as the directions of the surgeon comply with standards of safe anesthesia practice, a CRNA is obligated to follow those directions even if he or she disagrees.”); id. at *10 (“[T]he undisputed evidence of record demonstrates that CRNA Franc was subject to the supervision and control of operating surgeons when engaging in her activities as a nurse anesthetist. Unlike a physician, her actions in administering anesthesia were subject to the control of federal employees.”).
84 Robb, 80 F.3d at 890 (citing numerous cases). See also Creel, 598 F.3d at 212 (concluding that orthopedic surgeon who performed surgical procedure at Veterans Affairs Medical Center “was an independent contractor”). Cf. Woodruff, 389 F.3d at 1128 (holding that defendant physicians failed to prove they were federal employees for FTCA purposes).
That said, there is no per se rule “that a physician must always be deemed an independent contractor,” whether any particular physician hired by the government qualifies as an independent contractor depends on the facts of each case. Robb, 80 F.3d at 889. See also Ezekiel v. Michel, 66 F.3d 894, 903–04 (7th Cir. 1995) (concluding that “resident physician in training” was “an ‘employee of the Government’ for purposes of the FTCA”).
Moreover, Congress has provided that, under specified circumstances, certain types of medical contractors qualify as employees of the federal government for purposes of the FTCA. See Glenn v. Performance Anesthesia, P.A., No. 5:09-CV-00309-BR, 2010 WL 3420538, at *5 (E.D.N.C. Aug. 27, 2010), aff’d, Hancock v. Performance Anesthesia, P.A., 455 F. App’x 369 (4th Cir. 2011) (summary order) (“[P]ursuant to the Gonzalez Act, health care providers who serve under a personal services contract authorized by the U.S. Secretary of Defense are deemed to be employees of the government for the purpose of disposing of personal injury claims.”); 10 U.S.C. § 1089 (the Gonzalez Act).
85 See, e.g., Creel, 598 F.3d at 211–15 (concluding that, because individual physician at Veterans Affairs Medical Center was an independent contractor rather than an employee of the federal government, plaintiff’s medical
directly against a federal contractor may still encounter other obstacles to recovery. As the Supreme Court ruled in its 1988 decision, *Boyle v. United Technologies Corp.*, a plaintiff may not pursue state law tort claims against a government contractor if imposing such liability would either create “‘a significant conflict’” with “an identifiable ‘federal policy or interest’” or “‘frustrate specific objectives’ of federal legislation.”86 Several courts have therefore rejected tort claims against defense contractors on the ground that allowing such suits to proceed could undesirably interfere with military objectives.87 Courts have been less willing to extend *Boyle* immunity to nonmilitary contractors.88

Even in the military contractor context, government officials “must remain the agents of decision.”89 Accordingly, for *Boyle* to apply, the government must have mandated the contractor’s action that allegedly violated state law.90

**Scope of Employment**

As noted above,91 the FTCA applies only to torts that a federal employee commits “while acting within the scope of his office or employment.”92 This operates as a “threshold requirement” under the FTCA.93 Thus, “[i]f a government employee acts outside the scope of his employment when malpractice claim against that surgeon could proceed; *Woodruff*, 389 F.3d at 1125 (affirming denial of individual defendants’ motion to dismiss the plaintiff’s tort claims and to substitute the United States as the defendant on the ground that the defendants were “not ‘federal employees’”); *Ezekiel*, 66 F.3d at 903–04 (concluding that if individual defendant was “an independent contractor rather than a federal employee,” the plaintiff’s case against the defendant could proceed).


87 *See*, e.g., *Boyle*, 487 U.S. at 512 (“[S]tate law which holds Government contractors liable for design defects in military equipment does in some circumstances present a ‘significant conflict’ with federal policy and must be displaced.”); *Saleh v. Titan Corp.*, 580 F.3d 1, 8 (D.C. Cir. 2009) (“[W]ether the defendant is the military itself or its contractor, the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings is the same where, as here, contract employees are so inextricably embedded in the military structure. Such proceedings, no doubt, will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government’s wartime policies. Allowance of such suits will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations.”); *Koohi v. United States*, 976 F.2d 1328, 1336–37 (9th Cir. 1992) (concluding that federal law preempted claims against private companies involved in construction of air defense system). *But see* *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 481 (3d Cir. 2013) (allowing claim against defense contractor to proceed where “[t]he military did not retain command authority over” the contractor); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 995–96, 1000–01 (9th Cir. 2008) (concluding that federal statute governing liability for nuclear accidents precluded government contractor from asserting *Boyle* defense against claims arising out of nuclear incident).

88 *See*, e.g., *Cabalce v. Thomas E. Blanchard & Assoc.*, Inc., 797 F.3d 720, 731 (9th Cir. 2015) (“In the Ninth Circuit, however, the government contractor defense is only available to contractors who design and manufacture military equipment. This precedent renders the government contractor defense unavailable to VSE, a non-military contractor.”) (internal citations, quotation marks, and brackets omitted). *But cf.* *In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 459 n.3 (5th Cir. 2010) (declining to decide whether “*Boyle* is applicable only to military contractors”).

89 *Badilla v. Midwest Air Traffic Control Serv.*, Inc., 8 F.4th 105, 122 (2d Cir. 2021) (citing *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 630 (2d Cir. 1999)).

90 *Id.; see* *Helfrich v. Blue Cross and Blue Shield Ass’n*, 804 F.3d 1090, 1098 (10th Cir. 2015) (“In other words, in that circumstance—which state law was contrary to a contract term actually selected by an agency (a ‘discretionary’ decision)—there would be a ‘significant conflict between government policy and state tort liability of the contractor.’”).

91 *See supra* “Background”; “The Preclusion of Individual Employee Tort Liability Under the FTCA.”


93 *Magee v. United States*, 9 F.4th 675, 680 (8th Cir. 2022).
engaging in tortious conduct, an action against the United States under the FTCA will not lie. Instead, the plaintiff may potentially file a state-law tort action against the employee who committed the tort.

Courts usually determine whether a federal employee was acting within the scope of his employment at the time he committed an alleged tort by applying the law of the state in which the tort occurred. Although the legal principles that govern the scope of a tortfeasor’s employment vary from state to state, many states consider whether the employer hired the employee to perform the act in question and whether the employee undertook the allegedly tortious activity to promote the employer’s interests. The mere fact that the employee committed an illegal or wrongful act does not necessarily entail that the employee acted outside the scope of his employment.

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94 Folley v. Henderson, 175 F. Supp. 2d 1007, 1016 (S.D. Ohio 2001) (emphasis added). See, e.g., Zeranti v. United States, 167 F. Supp. 3d 465, 468–69 (W.D.N.Y. 2016) (“[I]f the federal employee was acting outside the scope of his or her employment, then the FTCA does not apply and the Court does not have jurisdiction over a vicarious liability claim asserted against the United States for its negligence.”).

95 Folley, 175 F. Supp. 2d at 1016. See, e.g., Dowdy v. Hercules, No. 07-CIV-2488(EVEN) (LB), 2010 WL 1669624, at *5 (E.D.N.Y. Jan. 15, 2010) (“As implied by the text of the FTCA, lawsuits against federal employees arising out of actions taken outside of the scope of their federal employment would face no sovereign immunity obstacles, because such claims are against those individuals, not the United States.”); Moreland v. Barrette, No. CR 05-480 TUC DCB, 2007 WL 2480235, at *3 (D. Ariz. Aug. 28, 2007) (concluding that because doctor employed by army hospital “did not act within the scope of his employment” at the time he allegedly committed a tort, “the Government was not liable under the FTCA for his alleged negligent acts,” and the doctor himself was “not immune from suit under the FTCA”).

96 See, e.g., M.D.C.G. v. United States, 956 F.3d 762, 769 (5th Cir. 2020) (“The issue of whether an employee is acting within the scope of his employment for purposes of the FTCA is governed by the law of the state in which the wrongful act occurred.”); Fountain v. Karim, 838 F.3d 129, 135 (2d Cir. 2016) (“We interpret the FTCA’s ‘scope of employment’ requirement in accordance with the . . . law of the jurisdiction where the tort occurred.”); Johnson v. United States, 534 F.3d 958, 963 (8th Cir. 2008) (“Scope of employment questions are governed by the law of the state where the alleged tortious acts took place.”). But see Doe v. Meron, 929 F.3d 153, 164 (4th Cir. 2019) (“When the allegedly tortious conduct occurs in a foreign country, rather than apply the law of the foreign country, courts have frequently applied District of Columbia law.”).

97 Compare, e.g., Johnson, 534 F.3d at 963 (“In determining whether an employee’s act is within the scope of employment under South Dakota law, a court considers a number of factors, including: (1) whether the act is commonly done in the course of business; (2) the time, place, and purpose of the act; (3) whether the act is within the enterprise of the master; the similarity of the act done to the act authorized; (4) whether the means of doing harm has been furnished by the master; and (5) the extent of departure from the normal method of accomplishing an authorized result.”), with, e.g., Rodriguez v. Sarabyn, 129 F.3d 760, 766 (5th Cir. 1997) (“Texas’s general rule . . . is that an employee acts within his scope of employment if the act is done (1) within the employee’s general authority, (2) in furtherance of the employer’s business, and (3) for the accomplishment of the objective for which the employee was employed.”). See also Paula Dalley, Destroying the Scope of Employment, 55 Washburn L.J. 637, 641 (2016) (“[T]he definition of ‘scope of employment’ varies from state to state.”).

98 See, e.g., Merlonghi v. United States, 620 F.3d 50, 55 (1st Cir. 2010) (“Massachusetts courts . . . determine whether an employee’s conduct is within the scope of his employment based on (1) ‘whether the conduct in question is of the kind the employee is hired to perform,’ (2) ‘whether it occurs within authorized time and space limits,’ and (3) ‘whether it is motivated, at least in part, by a purpose to serve the employer,’” (quoting Clickner v. City of Lowell, 663 N.E.2d 852, 855 (Mass. 1996))); Rodriguez, 129 F.3d at 766; Callaham ex rel. Foster v. United States, C/A No. 3:12-cv-579-JFA, 2012 WL 1835366, at *2 (D.S.C. May 21, 2012) (“In South Carolina, an act done for the purpose of benefitting the employer is considered within the scope of employment.”); Birke v. United States, No. 4:08CV1608MLM, 2009 WL 1605771, at *4 (E.D. Mo. June 8, 2009) (“Florida law provides [that] to establish employer liability based on its employee’s acting within the scope of his employment, a plaintiff must show that ‘(1) the conduct is of the kind the employee is hired to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master,’” (quoting Fernandez v. Fla. Nat’l Coll., Inc., 925 So.2d 1096, 1100 (Fla. Dist. Ct. App. 2006))).

99 See, e.g., Doe, 929 F.3d at 166 (“[E]ven intentional torts and illegal conduct may fall within employees’ scope of
Two cases involving vehicular mishaps illustrate how courts perform the scope of employment inquiry in practice. In *Barry v. Stevenson*, for instance, two soldiers—one driver and one passenger—were returning to their headquarters in a government-owned Humvee military truck after completing a work assignment on a military base. The truck hit a dip in the trail, injuring the passenger. Because the driver “was engaged in annual Army National Guard training” and “driving a government vehicle . . . on government property” at the time of the accident, the court concluded that the driver “was acting within the course of his employment” as a federal officer “when the injury occurred.”

In *Merlonghi v. United States*, by contrast, a special agent employed by the Office of Export Enforcement (OEE) collided with a motorcyclist while driving home from work in a government vehicle. The agent and the motorcyclist had engaged in a verbal altercation and “swerved their vehicles back and forth towards each other” immediately prior to the collision. After brandishing a firearm at the motorcyclist, the agent sharply careened his vehicle into the motorcycle, throwing the motorcyclist to the ground and severely injuring him. The court determined that the agent “was not acting within the scope of his employment” at the time of the collision even though “he was driving a government vehicle and was on call.” The court first observed that “engaging in a car chase while driving home from work [wa]s not the type of conduct that OEE hired [the agent] to perform.” The court also emphasized that the agent “was not at work, responding to an emergency, or driving to a work assignment” at the time of the collision. The court further noted that the agent’s actions were not “motivated . . . by a purpose to serve the employer,” as the agent’s “argument with [the motorcyclist] and the back-and-forth swerving leading to the altercation had nothing to do with an OEE assignment. His conduct related to personal travel and a personal confrontation.” Because the agent “was not acting within the scope of his employment when he crashed into” the motorcyclist, the court ruled that the district court had correctly dismissed the motorcyclist’s claims seeking compensation from the United States.

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101 Id. at 1223.
102 Id.
103 620 F.3d at 52.
104 Id.
105 Id.
106 Id. at 53.
107 Id. at 56.
108 Id.
109 Id.
110 Id. at 57.
111 Id. at 58.
Attorney General Certification

Occasionally a plaintiff will file a tort suit against an individual without realizing that the defendant is a federal employee. In such cases, the FTCA allows the Attorney General to certify that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose. If the Attorney General files such a certification, then

- the lawsuit is “deemed an action against the United States” under the FTCA;
- the employee is dismissed from the action, and the United States is substituted as defendant in the employee’s place; and
- the case proceeds against the government in federal court.

In such instances, the United States remain[s] the federal defendant in the action unless and until the district court determines that the employee . . . engaged in conduct beyond the scope of his employment. If a district court determines that an employee was acting beyond the scope of their duties, however, the court must deny the substitution motion and the action will continue against that employee in their personal capacity.

By creating a mechanism by which the United States may substitute itself as the defendant in the individual employee’s place, the FTCA effectively “immunize[s] covered federal employees not simply from liability, but from suit.” In this way, the FTCA “relieve[s] covered employees from the cost and effort of defending the lawsuit” and instead places “those burdens on the Government’s shoulders.”

In some cases, the Attorney General’s decision to substitute the United States in the officer’s place may adversely affect the plaintiff’s chances of prevailing on his claims. Generally speaking, once the Attorney General certifies that the federal employee was acting within the scope of his or her employment at the time of the allegedly tortious act, “the FTCA’s requirements, exceptions,

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112 Courts have disagreed regarding whether the Attorney General may certify a corporation, rather than a natural person, as a federal “employee” that is immune from liability under the FTCA. Compare Adams v. United States, 420 F.3d 1049, 1055 (9th Cir. 2005) (“Corporate entities . . . are not eligible for immunity certification as government employees under the FTCA.”), with B & A Marine Co. v. Am. Foreign Shipping Co., 23 F.3d 709, 715–16 (2d Cir. 1994) (affirming district court’s ruling that corporate entity was an “employee[] of the Government acting within the scope of [its] employment” for FTCA certification purposes).

113 See Hershkoff, supra note 40, at 200 (noting that injured persons will sometimes “file[] a garden-variety personal-injury suit” against an individual “in state court, not knowing that the tortfeasor is an agent or employee of the United States”).


115 Id.


117 Osborn, 549 U.S. at 230 (“Upon the Attorney General’s certification” in a case “commenced in state court, the case is to be removed to a federal district court, and the certification remains ‘conclusive . . . for purposes of removal.’” (quoting 28 U.S.C. § 2679(d)(2))); id. at 231 (“Once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court, and that court may not remand the suit to the state court.”); Hockenberry v. United States, 42 F.4th 1164, 1170 (10th Cir. 2022)

118 Osborn, 549 U.S. at 231.


120 Osborn, 549 U.S. at 238.

121 Id. at 252.
and defenses apply to the suit.”

Depending on the circumstances, those requirements, exceptions, and defenses can “absolutely bar [the] plaintiff’s case” against the United States, as explained below. Moreover, the individual federal employee remains immune from liability even when the FTCA “precludes recovery against the Government” itself. Thus, under certain circumstances, the FTCA will shield both the United States and its employees from liability for its tortious actions, thereby effectively “leav[ing] certain tort victims without any remedy.”

A plaintiff may sometimes prefer to litigate against the United States rather than against an individual government employee, especially if the employee does not have enough money to satisfy a judgment that the court might ultimately render in the plaintiff’s favor. Because government employees may be “under-insured or judgment proof,” they may lack sufficient assets to “satisfy judgments rendered against them” in tort cases. Thus, a plaintiff often does not object when the Attorney General certifies named defendants as acting within the scope of their employment at the time of the alleged tort. If a plaintiff does not challenge the Attorney General’s certification, the certification has conclusive effect.

If a plaintiff successfully obtains a judgment against the United States based on the tortious conduct of a federal employee, the government may not subsequently sue the culpable employee to recover the amount of money the government paid to the plaintiff. Consequently, if the government successfully substitutes itself for an individual defendant in an FTCA case, that substitution may effectively relieve the individual employee from all civil liability for any allegedly tortious action. Because this aspect of the FTCA is particularly favorable for government employees, if the Attorney General refuses to certify that an employee was acting within the scope of employment, that employee may at any time before trial petition the district court for such a certification. If the court agrees that the employee was acting within the scope of employment, then the case proceeds “against the Government, just as if the Attorney General

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123 Id. at 417.
124 See infra “Exceptions to the FTCA’s Waiver of Sovereign Immunity.” See Hockenberry, 42 F.4th at 1170 (reflecting that where a claim fails within an exception to the FTCA’s waiver of sovereign immunity, substitution bars an action, and sovereign immunity does not allow a plaintiff to bring the original federal employee defendant back into the action).
125 United States v. Smith, 499 U.S. 160, 165 (1991). See Hershkoff, supra note 40, at 201 (explaining that the FTCA “bars relief against individual employees for torts committed in the course of employment even if the FTCA precludes relief against the government”).
127 See id. (“From the plaintiff’s perspective, [the federal government substituting itself as the sole defendant] can produce a net positive: Although the plaintiff must now litigate against the Federal Government, the original defendant—a potentially judgment-proof federal employee—has been replaced by the seemingly bottomless U.S. Treasury.”).
128 Pfander & Aggarwal, supra note 33, at 443 n.133.
130 E.g., Doe, 929 F.3d at 160.
131 See Collins v. United States, 564 F.3d 833, 836 (7th Cir. 2009) (“[T]he government, when it is held liable under the [FTCA], has no right of indemnity from its negligent employee.”).
132 See Osborn v. Haley, 549 U.S. 225, 229 (2007) (explaining that the FTCA “accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties”).
133 Fountain v. Karim, 838 F.3d 129, 133 n.3 (2d Cir. 2016) (citing 28 U.S.C. § 2679(d)(3)).
had filed a certification.\footnote{Harbury v. Hayden, 522 F.3d 413, 416 n.1 (D.C. Cir. 2008) (citing 28 U.S.C. § 2679(d)(3)–(4)).} If the court instead finds that the government employee was not acting within the scope of employment, then the lawsuit may proceed against the government employee in their personal capacity.\footnote{Id.}

## Exceptions to the FTCA’s Waiver of Sovereign Immunity

As mentioned above,\footnote{See supra “Background.”} the FTCA imposes significant substantive limitations on the types of tort lawsuits a plaintiff may permissibly pursue against the United States.\footnote{See, e.g., Calderon v. United States, 123 F.3d 947, 948 (7th Cir. 1997) (noting that the FTCA’s “waiver of immunity is far from absolute,” as “many important classes of tort claims are excepted from the Act’s coverage”).} In enacting the FTCA, Congress was concerned about “unwarranted judicial intrusion[s] into areas of governmental operations and policymaking.”\footnote{Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983).} Congress therefore opted to explicitly preserve the United States’ sovereign immunity from more than a dozen categories of claims,\footnote{See generally 28 U.S.C. § 2680(a)–(f), (h)–(n). In addition to Section 2680, other provisions of the U.S. Code—as well as certain judicially created doctrines—also preserve the United States’ immunity from various types of tort suits. See, e.g., id. § 1346(b)(2) (providing that, notwithstanding the FTCA’s general waiver of sovereign immunity, “no person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act”); Laird v. Nelms, 406 U.S. 797, 802–03 (1972) (holding that the FTCA does “not authorize suit against the Government on claims based on strict liability for ultrahazardous activity”); United States v. Demko, 385 U.S. 149, 149–54 (1966) (holding that 18 U.S.C. § 4126, which entitles injured inmates to compensation under specified circumstances, barred injured prisoner from recovering additional damages under the FTCA); Williamson v. United States, 862 F.3d 577, 578–79 (6th Cir. 2017) (holding that Federal Employees’ Compensation Act precluded plaintiff from obtaining damages under the FTCA). See generally Fuller, supra note 17, at 381–82 (“Numerous other federal statutes either prohibit or provide their own single mechanism for potential recovery against the government and thus indirectly prevent claims that would otherwise be cognizable under the FTCA.”)).} which are set out in Section 2680 of the FTCA:

- “Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty”;\footnote{See 28 U.S.C. § 2680(a). See also infra “The Discretionary Function Exception.”}
- “Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter”;\footnote{28 U.S.C. § 2680(b). See, e.g., Dolan v. USPS, 546 U.S. 481, 483–92 (2006) (analyzing the scope of Section 2680(b)).}
- certain claims arising from the actions of law enforcement officers administering customs and excise laws;\footnote{See 28 U.S.C. § 2680(c) (providing that, with four specified exceptions, the FTCA does not authorize claims “arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer”). See also, e.g., Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 215–28 (2008) (interpreting Section 2680(c)); DaVinci Aircraft, Inc.}
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- certain admiralty claims against the United States for which federal law provides an alternative remedy; 143
- claims “arising out of an act or omission of any employee of the Government in administering” certain provisions of the Trading with the Enemy Act of 1917; 145
- “Any claim for damages caused by the imposition or establishment of a quarantine by the United States”; 146
- certain claims predicated upon intentional torts committed by federal employees; 147
- “Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system”; 148
- “Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war”; 149
- “Any claim arising in a foreign country”; 150
- “Any claim arising from the activities of the Tennessee Valley Authority”; 151
- “Any claim arising from the activities of the Panama Canal Company”; 152 or
- “Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.” 153

If a tort claim against the United States falls within any of these exceptions, the district court lacks jurisdiction to adjudicate it. 154

Some of the exceptions listed above are more doctrinally significant than others. 155 The following sections discuss the most frequently litigated exceptions to the United States’ waiver of immunity from tort claims.

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143 “Admiralty” is defined as “the rules governing contract, tort, and workers’-compensation claims arising out of commerce on or over navigable water.” *Admiralty, Black’s Law Dictionary* (10th ed. 2014).

144 See 28 U.S.C. § 2680(d) (providing that the FTCA does not apply to “[a]ny claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States”).


147 See id. § 2680(h). *See also infra “The Intentional Tort Exception.”*


149 Id. § 2680(j). *See infra “The Combatant Activities Exception.”*


154 See, e.g., DaVinci Aircraft, Inc. v. United States, 926 F.3d 1117, 1123 (9th Cir.), cert. denied, 2019 WL 5301048 (Oct. 21, 2019).

155 See, e.g., Matthews v. United States, Civil No. 07-00030, 2011 WL 3471140, at *2 (D. Guam Aug. 5, 2011), aff’d, 586 F. App’x 366 (9th Cir. 2014) (describing “the discretionary function exception” as “the most frequently litigated"
The Discretionary Function Exception

Section 2680(a)—also known as the discretionary function exception—“preserves the federal government’s immunity . . . when an employee’s acts involve the exercise of judgment or choice.” Along with being one of the most frequently litigated exceptions to the FTCA’s waiver of sovereign immunity, the discretionary function exception is, according to at least one commentator, “the broadest and most consequential.” For example, the United States has successfully invoked the discretionary function exception to avoid tort liability in cases involving exposures to radiation, asbestos, Agent Orange, and the human immunodeficiency virus (HIV).

The discretionary function exception serves at least two purposes. First, the exception “prevent[s] judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” According to one commentator, the Congress that enacted the FTCA viewed such second guessing to be “inappropriate” because (1) “such judgments are more appropriately left to the political branches of our governmental system”; and (2) “courts, which specialize in the resolution of discrete factual and legal disputes,” may not be “equipped to make broad policy judgments.” Second, the discretionary function exception is intended to “protect the Government from liability that would seriously handicap efficient government operations.” By insulating the government from


156 See 28 U.S.C. § 2680(a) (stating that the FTCA’s waiver of sovereign immunity “shall not apply to . . . [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance of a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused”).


158 E.g., Tsolmon v. United States, 841 F.3d 378, 380 (5th Cir. 2016). For another CRS product analyzing the discretionary function exception, see CRS Legal Sidebar LSB10355, Can Mass Shooting Victims Sue the United States?, by Kevin M. Lewis.

159 See, e.g., Hon. Robert C. Longstreth, Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?, 8 U. ST. THOMAS L.J. 398, 403 (2011) (describing the discretionary function exception as “heavily litigated”); Nelson, supra note 41, at 262 (“The discretionary function exception is the most criticized and litigated exception to the FTCA.”).

160 Niles, supra note 16, at 1300. See Sisk, supra note 17, at 301 (“The most important [exception] (in terms of frequency of assertion by the government, successfully more often than not) is the discretionary function exception.”); Seamon, supra note 33, at 700–01 (describing the discretionary function exception as “broad,” and as “the most important exception” to the FTCA’s waiver of sovereign immunity).

161 Seamon, supra note 33, at 694–95. See Clendening v. United States, 19 F.4th 421, 435 (4th Cir. 2021) (“Courts have frequently found that ‘the [G]overnment’s decision whether to warn about the presence of toxins, carcinogens, or poisons falls under the discretionary function exception.’”) (quoting Sánchez ex rel. D.R. Niles CLF, supra note 16, at 1307 (“Two basic reasons have been offered to justify the different judicial treatment of claims challenging discretionary acts, and claims focused on merely ministerial functions.”).


163 Niles, supra note 16, at 1308. See Seamon, supra note 33, at 703 (explaining that the discretionary function exception reflects “(1) separation-of-powers concerns and, relatedly, (2) the incompetence of courts, compared to executive-branch officials, to decide matters of public policy.”).

164 See Nieves Martinez v. United States, 997 F.3d 867, 876 (9th Cir. 2021) (“Thus, the exception ‘protects only governmental actions and decisions based on considerations of public policy.’”)

165 Varig Airlines, 467 U.S. at 814 (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)).
liability for the discretionary actions of its employees, the discretionary function exception arguably decreases the likelihood that federal employees will shy away from making sound policy decisions based on a fear of increasing the government’s exposure to tort liability.\footnote{See Niles, supra note 16, at 1309 (noting the possibility “that the threat of liability will induce government officials to make decisions based not on the relevant and applicable policy objectives that should be governing the execution of their authority, but based rather on” avoiding “possible exposure to substantial civil liability”).} Relatedly, exposing the United States to liability for discretionary acts could cause government officials to “spend an inordinate amount of their tax-payer compensated time responding to lawsuits” rather than serving the “greater good of the community.”\footnote{Id. at 1310.} The discretionary function exception thus “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.”\footnote{Varig Airlines, 467 U.S. at 808.}

As explained in greater detail below,\footnote{See infra “Whether the Challenged Conduct Is Discretionary”; “Whether Policy Considerations Influence the Exercise of the Employee’s Discretion.”} to determine whether the discretionary function exception bars a particular plaintiff’s suit under the FTCA, courts examine whether the federal employee was engaged in conduct that was (1) discretionary and (2) policy-driven.\footnote{E.g., Gordo-Gonzalez v. United States, 873 F.3d 32, 36 (1st Cir. 2017).} “If the challenged conduct is both discretionary and policy-driven,” then the FTCA does not waive the government’s sovereign immunity with respect to that conduct, and the plaintiff’s FTCA claim must therefore fail.\footnote{Id. See, e.g., Garling v. EPA, 849 F.3d 1289, 1295 (10th Cir. 2017) (“If both elements are met, the governmental conduct is protected . . . and sovereign immunity bars a claim that involves such conduct.”).} If, by contrast, an official’s action either (1) “does not involve any discretion” or (2) “involves discretion,” but “does not involve the kind of discretion—consideration of public policy—that the exception was designed to protect,” then the discretionary function exception does not bar the plaintiff’s claim.\footnote{Seamon, supra note 33, at 706–07; Foster Logging, Inc. v. United States, 973 F.3d 1152, 1157 (11th Cir. 2020).}

**Whether the Challenged Conduct Is Discretionary**

When first evaluating whether “the conduct that is alleged to have caused the harm” to the plaintiff “can fairly be described as discretionary,”\footnote{E.g., Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017), cert. denied, 139 S. Ct. 81 (2018) (quoting Fothergill v. United States, 566 F.3d 248, 252 (1st Cir. 2009)).} a court must assess “whether the conduct at issue involves ‘an element of judgment or choice’ by the employee.”\footnote{E.g., Pornomo v. United States, 814 F.3d 681, 687 (4th Cir. 2016) (quoting Berkovitz ex rel. Berkovitz v. United States, 486 U.S. 531, 536 (1988)).} “The conduct of federal employees is generally held to be discretionary unless ‘a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.’”\footnote{“State law will not suffice” to render the discretionary function exception inapplicable; “only federal statutes, regulations, or policies will suffice to . . . divest the federal government of its sovereign immunity.” Evans, 876 F.3d at 381 (emphasis added).} If “the employee has no rightful option but to adhere to the directive” established by a federal statute, regulation, or

\footnote{Id. (quoting Berkovitz, 486 U.S. at 536). See, e.g., Compart’s Boar Store, Inc. v. United States, 829 F.3d 600, 605 (8th Cir. 2016) (“Government employees act with discretion unless they are following a regulation or policy that is ‘mandatory and . . . clearly and specifically define[s] what the employees are supposed to do.’” (quoting C.R.S. ex rel. D.B.S. v. United States, 11 F.3d 791, 799 (8th Cir. 1993))).}
policy, “then there is no discretion in the conduct for the discretionary function exception to protect.”\textsuperscript{177} Put another way, the discretionary function exception does not insulate the United States from liability when its employees “act in violation of a statute or policy that specifically directs them to act otherwise.”\textsuperscript{178}

Even where a federal statute, regulation, or policy pertaining to the challenged action exists, the action may nonetheless qualify as discretionary if the law in question “predominately uses permissive rather than mandatory language.”\textsuperscript{179} In other words, where “a government agent’s performance of an obligation requires that agent to make judgment calls, the discretionary function exception” may bar the plaintiff’s claim under the FTCA.\textsuperscript{180} Notably, “[t]he presence of a few, isolated provisions cast in mandatory language” in a federal statute, regulation, or policy “does not transform an otherwise suggestive set of guidelines into binding” law that will defeat the discretionary function exception.\textsuperscript{181} “Even when some provisions of a policy are mandatory, governmental action remains discretionary if all of the challenged decisions involved ‘an element of judgment or choice.’”\textsuperscript{182}

The Fourth Circuit’s decision in Rich v. United States\textsuperscript{183} exemplifies how courts evaluate whether a federal employee has engaged in discretionary conduct. The plaintiff in Rich—a federal inmate stabbed by members of a prison gang—attempted to file an FTCA suit alleging that the Bureau of Prisons (BOP) should have housed him separately from the gang members.\textsuperscript{184} Federal law permitted—but did not affirmatively require—BOP “to separate certain inmates from others based on their past behavior.”\textsuperscript{185} Because federal law empowered prison officials to “consider several factors and exercise independent judgment in determining whether inmates may require separation,” the Rich court held that BOP’s decision whether or not to separate an inmate from others was discretionary in nature and therefore outside the scope of the FTCA.\textsuperscript{186}

\textsuperscript{177} Berkovitz, 486 U.S. at 536.
\textsuperscript{178} Tsalmon v. United States, 841 F.3d 378, 384 (5th Cir. 2016). \textit{See, e.g.}, Sanders v. United States, 937 F.3d 316, 330 (4th Cir. 2019) (holding that discretionary function exception did not apply where agency employee allegedly “failed to comply with the mandatory directives in” the agency’s standard operating procedures); Collins v. United States, 564 F.3d 833, 840 (7th Cir. 2009) (“If a statute or regulation or other directive intended to be binding forbids the specific act contended to have been negligent, the employee who committed the act was not exercising authorized discretion.”).
\textsuperscript{179} Compurt’s Boar Store, 829 F.3d at 605 (quoting Herden v. United States, 726 F.3d 1042, 1047 (8th Cir. 2013)).
\textsuperscript{180} Gonzalez v. United States, 814 F.3d 1022, 1029 (9th Cir. 2016) (citing Conrad v. United States, 447 F.3d 760, 765–66 (9th Cir. 2006); Ocran v. United States, 117 F.3d 495, 500-01 (11th Cir. 1997); and Kelly v. United States, 924 F.2d 355, 358, 360–61 (1st Cir. 1991)).
\textsuperscript{181} Gonzalez, 814 F.3d at 1030 (quoting Sabow v. United States, 93 F.3d 1445, 1453 (9th Cir. 1996)). \textit{See Lam v. United States}, 979 F.3d 665, 677 (9th Cir. 2020) (“This decision teaches the importance of analyzing policies that contain mandatory words in their overall context.”).
\textsuperscript{182} Compurt’s Boar Store, 829 F.3d at 605 (quoting Hart v. United States, 630 F.3d 1085, 1086 (8th Cir. 2011)).
\textsuperscript{183} 811 F.3d 140 (4th Cir. 2015).
\textsuperscript{184} See id. at 141–42.
\textsuperscript{185} See id. at 145 (analyzing 28 C.F.R. § 524.72).
\textsuperscript{186} Id. \textit{See also} Rinaldi v. United States, 904 F.3d 257, 273 (3d Cir. 2018) (“[H]ousing and cellmate assignments unquestionably involve an ‘element of judgment or choice.’” (quoting United States v. Gaubert, 499 U.S. 315, 322 (1991))); Cohen v. United States, 151 F.3d 1338, 1343 (11th Cir. 1998) (“Congress intended to give the BOP discretion in making its classification decisions and determinations about placement of prisoners.”); Calderon v. United States, 123 F.3d 947, 950 (7th Cir. 1997) (holding that BOP’s “decision not to separate” two inmates “is properly classified as a discretionary act”). \textit{But see} Parrott v. United States, 536 F.3d 629, 638 (7th Cir. 2008) (concluding that once “a valid separation order” separating two inmates “is in effect, there is no discretion left” for the discretionary function exception to protect).
By contrast, in the Supreme Court case of Berkovitz ex rel. Berkovitz v. United States, the discretionary function exception did not shield the United States from liability. The plaintiff in Berkovitz alleged that the federal government issued a license to a vaccine manufacturer “without first receiving data that the manufacturer must submit showing how the product . . . matched up against regulatory safety standards,” as required by federal law. After the plaintiff allegedly contracted polio from a vaccine produced by that manufacturer, the plaintiff sued the United States under the FTCA. Because “a specific statutory and regulatory directive” divested the United States of any “discretion to issue a license without first receiving the required test data,” the Court held that “the discretionary function exception impose[d] no bar” to the plaintiff’s claim.

Courts have disagreed on whether the discretionary function exception shields tortious conduct that allegedly violates the U.S. Constitution, as contrasted with a federal statute, regulation, or policy. Most courts have held that “the discretionary-function exception . . . does not shield decisions that exceed constitutional bounds, even if such decisions are imbued with policy considerations.” These courts reason that “[t]he government has no discretion to violate the Federal Constitution; its dictates are absolute and imperative.” By contrast, a minority of courts

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188 Id. at 542.
189 Id. at 533.
190 Id. at 532, 542–43.
191 See, e.g., Loumiet v. United States, 828 F.3d 935, 939 (D.C. Cir. 2016) (“We conclude, in line with the majority of our sister circuits to have considered the question, that the discretionary-function exception does not categorically bar FTCA tort claims where the challenged exercise of discretion allegedly exceeded the government’s constitutional authority to act.”) (emphasis added).
192 Id. at 944. See, e.g., Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009) (“[T]he discretionary function exception does not . . . shield conduct that transgresses the Constitution.”); Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003) (concluding that government’s actions “[f]or all intents and purposes, divest the government of its discretion to issue licenses without the required test data.”); Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001) (“[F]ederal officials do not possess discretion to violate constitutional rights . . . .” (quoting U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988))); Nurse v. United States, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (“The Constitution can limit the discretion of federal officials such that the FTCA’s discretionary function exception will not apply.”).

That is not to say that these courts permit FTCA claims against the United States predicated solely on violations of federal constitutional law. The Supreme Court has squarely held that “the United States . . . has not rendered itself liable under [the FTCA] for constitutional tort claims.” FDIC v. Meyer, 510 U.S. 471, 478 (1994). Rather, the above-cited cases hold that the discretionary function exception will not bar a state law tort claim against the United States when a government employee also violates the U.S. Constitution in the course of committing that tort. See Loumiet, 828 F.3d at 945–46 (“A plaintiff who identifies constitutional defects in the conduct underlying her FTCA tort claim . . . may affect the availability of the discretionary-function defense, but she does not thereby convert an FTCA claim into a constitutional damages claim against the government; state law is necessarily still the source of the substantive standard of FTCA liability.”); Limone, 579 F.3d at 102 n.13 (“We do not view the FBI’s constitutional transgressions as corresponding to the plaintiffs’ causes of action—after all, the plaintiffs’ claims are not Bivens claims [against individual federal officers alleging violations of the Constitution]—but rather, as negating the discretionary function defense.”). That said, some judges have doubted whether there is a coherent distinction between (1) a federal constitutional tort claim and (2) a claim that a federal employee violated the U.S. Constitution in the course of committing a state law tort. See Castro v. United States, 560 F.3d 381, 394 (5th Cir.) (Smith, J., dissenting) (“It is difficult to conceive of a violation of a constitutional right that does not also give rise to a state [law] cause of action . . . . Under the majority’s framework, by a plaintiff’s artful pleading, the United States can be liable whenever the Constitution is violated even though, under Meyer, the sovereign is not subject to liability for constitutional torts.”), rev’d en banc, 608 F.3d 266 (5th Cir. 2010).
193 Loumiet, 828 F.3d at 944 (internal quotations omitted); U.S. Fid. & Guar. Co., 837 F.2d at 120 (“[C]onduct cannot be discretionary if it violates the Constitution.”).
have instead concluded that the discretionary function exception shields actions “based upon [the] exercise of discretion” even if they are “constitutionally repugnant.” These courts base their conclusion on the text of 28 U.S.C. § 2680(a), which purports to shield discretionary judgments even when a government employee abuses his discretion. Still other courts have declined to take a side on this issue.

**Whether Policy Considerations Influence the Exercise of the Employee’s Discretion**

If the allegedly tortious conduct that injured the plaintiff was discretionary, the court must then proceed to the second prong of its analysis, evaluating “whether the exercise or non-exercise of the granted discretion is actually or potentially influenced by policy considerations”—that is, whether the challenged action “implicate[s] social, economic, [or] policy judgments.” As the Supreme Court has recognized, the discretionary function exception “protects . . . only governmental actions and decisions based on considerations of public policy.” For instance, if a given decision requires a federal employee to “balance competing interests”—such as weighing the benefits of a particular public safety measure against that measure’s financial costs—then that decision is likely susceptible to policy analysis within the meaning of the discretionary function exception.

When applying the second prong of the discretionary function exception, courts employ an objective rather than a subjective standard. Courts therefore “do not examine . . . whether

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194 See Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021) (“Congress could have adopted language that carved out certain behavior from this exception—for example, grossly negligent behavior, intentional behavior, or behavior that rises to the level of a constitutional violation. But Congress did not do so.”); Kiiskila v. United States, 466 F.2d 626, 627–28 (7th Cir. 1972). See also Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019) (“[T]he theme that ‘no one has discretion to violate the Constitution’ has nothing to do with the [FTCA], which does not apply to constitutional violations.”).

195 See Kiiskila, 466 F.2d at 628 (“28 U.S.C. § 2680(a) precludes action for abuse of discretionary authority whether through negligence or wrongfulness.”). See also 28 U.S.C. § 2680(a) (stating that the discretionary function exception applies “whether or not the discretion involved be abused”).

196 See Doe v. United States, 831 F.3d 309, 319–20 (5th Cir. 2016) (“Whether a properly pled constitutional violation allows a plaintiff to circumvent the discretionary function exception is an open question in this circuit. Because we conclude the plaintiffs did not sufficiently plead [a constitutional violation], we need not settle the issue of whether a constitutional violation removes the applicability of the discretionary function exception.”); Doe KS v. United States, Case No. 17–2306, 2017 WL 6039536, at *4 (D. Kan. Dec. 5, 2017) (“Assuming—without holding—that the majority of appellate courts are correct about FTCA liability for exceeding constitutional authority . . . .”) (emphasis added).

197 E.g., Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017), cert. denied, 139 S. Ct. 81 (2018) (quoting Fothergill v. United States, 566 F.3d 248, 252 (1st Cir. 2009)).

198 E.g., Gonzalez v. United States, 814 F.3d 1022, 1033 (9th Cir. 2016).


200 E.g., Compart’s Boar Store, Inc. v. United States, 829 F.3d 600, 605 (8th Cir. 2016) (quoting Herden v. United States, 726 F.3d 1042, 1050 (8th Cir. 2013)).

201 See Morales v. United States, 895 F.3d 708, 716 (9th Cir. 2018) (“We reject the suggestion that the government cannot invoke the discretionary function exception whenever a decision involves considerations of public safety . . . . In case after case, we have considered the government’s balancing of public safety with a multitude of other factors.”).

202 See, e.g., Croyle ex rel. Croyle v. United States, 908 F.3d 377, 382 (8th Cir. 2018) (“Balancing safety, reputational interests, and confidentiality is the kind of determination ‘the discretionary function exception was designed to shield.’”) (quoting Berkovitz, 486 U.S. at 536).

203 See, e.g., Gonzalez, 814 F.3d at 1032 (“In determining if the conduct involves policy judgment, we do not look to an agent’s subjective weighing of policy considerations.”); Cohen v. United States, 151 F.3d 1338, 1341 (11th Cir. 1998) (“[W]e do not focus on the subjective intent of the government employee or inquire whether the employee actually
policy considerations were actually contemplated in making the decision”—that is, “[t]he decision need not actually be grounded in policy considerations so long as it is, by its nature, susceptible to a policy analysis.” The discretionary function exception “applies ‘even if the discretion has been exercised erroneously and is deemed to have frustrated the relevant policy purpose.” Whether the employee committed negligence in exercising his discretion “is irrelevant to the applicability of the discretionary function exception.” Nor does it matter whether the allegedly tortious action was undertaken “by low-level government officials [or] by high-level policymakers.” The critical question is whether a decision at issue is “susceptible to policy analysis.” The nature of the conduct challenged by the plaintiff—as opposed to the status of the actor—governs whether the discretionary function exception applies in a given case. As long as the challenged conduct involves the exercise of discretion in furtherance of some policy goal, the discretionary function exception forecloses claims under the FTCA. Conversely, where a subjectively discretionary act does not flow from plausible policy objectives, that act does not fall within the discretionary function exception.

If the first element of the discretionary function exception is satisfied, then courts will generally presume that the second element is satisfied as well. The Supreme Court has held that when an “established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.” Nevertheless, a plaintiff may weighed social, economic, and political policy considerations before acting.” (quoting Ochran v. United States, 117 F.3d 495, 500 (11th Cir. 1997))).

204 Seaside Farm, Inc. v. United States, 842 F.3d 853, 858 (4th Cir. 2016). See also, e.g., Buckler v. United States, 919 F.3d 1038, 1045 (8th Cir. 2019) (“[A]s long as a discretionary decision is susceptible to policy analysis, the [discretionary function] exception applies whether or not [the] defendant in fact engaged in conscious policy-balancing.”) (internal citations and quotation marks omitted); Jude v. Comm’r of Soc. Sec., 908 F.3d 152, 159 (6th Cir. 2018) (“Such ‘social, economic, or political’ policy analysis need not have actually occurred in the disputed instance, but rather the decision need only have been theoretically susceptible to policy analysis.”).

205 Gonzalez, 814 F.3d at 1028 (quoting GATX/Airlog Co. v. United States, 286 F.3d 1168, 1174 (9th Cir. 2002)). See, e.g., Gibson v. United States, 809 F.3d 807, 813 (5th Cir. 2016) (“Our inquiry is ‘not whether the decision maker in fact engaged in a policy analysis when reaching his decision but instead whether his decision was susceptible to policy analysis.’” (quoting In re FEMA Trailer Formaldehyde Prods. Liab. Litig., 713 F.3d 807, 810 (5th Cir. 2013))).

206 Pornomo v. United States, 814 F.3d 681, 687–88 (4th Cir. 2016) (quoting Holbrook v. United States, 673 F.3d 341, 350 (4th Cir. 2012)). See also 28 U.S.C. § 2680(a) (providing that the applicability of the discretionary function exception does not hinge on “whether or not the discretion involved be abused”).

207 Evans v. United States, 876 F.3d 375, 381 (1st Cir. 2017), cert. denied, 139 S. Ct. 81 (2018). See, e.g., Wood v. United States, 845 F.3d 123, 128 (4th Cir. 2017) (explaining that the discretionary function exception “shield[s] decisions of a government entity made within the scope of any regulatory policy expressed in statute, regulation, or policy guidance, even when made negligently”) (emphasis added).

208 Chadd v. United States, 794 F.3d 1104, 1111 (9th Cir. 2015). See also, e.g., Wood, 845 F.3d at 128 (“The analysis also does not depend on whether the conduct was that of a high-level agency official making policy or a low-level employee implementing policy.”).


211 Evans, 876 F.3d at 380 (quoting United States v. Gaubert, 499 U.S. 315, 334 (1991)).

212 See Armstrong v. Reynolds, 22 F.4th 1058, 1083 (9th Cir. 2022) (“The narrow decision to copy [an employer] on a letter acknowledging the withdrawal of Armstrong’s claim, by contrast, was made after her first complaint was closed and before her last complaint was filed or any investigation was conducted, and did not involve such [policy] considerations.”).

213 Gaubert, 499 U.S. at 324.

214 Id.
rebut that presumption if “the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime” at issue in the case.215

Courts assessing the applicability of the discretionary function exception utilize a case-by-case approach.216 Given the fact-intensive nature of the discretionary function inquiry, “deciding whether a government agent’s action is susceptible to policy analysis is often challenging.”217 Nevertheless, examples from the caselaw help illustrate which sorts of governmental actions are susceptible to policy analysis.218 For instance, in the Rich case discussed above,219 the court held that “prisoner placement and the handling of threats posed by inmates against one another are ‘part and parcel of the inherently policy-laden endeavor of maintaining order and preserving security within our nation’s prisons.’”220 The court explained that “factors such as available resources, proper classification of inmates, and appropriate security levels are ‘inherently grounded in social, political, and economic policy.’”221 Accordingly, the court held that BOP’s decision to house the plaintiff with inmates who ultimately attacked him was susceptible to policy analysis, such that the discretionary function exception shielded the United States from liability.222

By contrast, courts have held that decisions motivated solely by laziness or careless inattention “do not reflect the kind of considered judgment ‘grounded in social, economic, and political policy’” that the discretionary function exception is intended to shield from judicial second-guessing.223 For example, the discretionary function exception does not shield “[a]n inspector’s decision (motivated simply by laziness) to take a smoke break rather than inspect” a machine that malfunctions and injures the plaintiff.224 Courts have similarly held that allowing toxic mold to grow on food served at the commissary on a naval base is not a decision influenced by social, economic, or political policy, and that, as a result, the discretionary function exception does not bar a plaintiff sickened by that mold from suing the United States.225

215 Id. at 324–25.
216 E.g., Hajdusek v. United States, 895 F.3d 146, 150 (1st Cir. 2018) (quoting Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999)).
217 Id. at 151.
218 See, e.g., Croyle ex rel. Croyle v. United States, 908 F.3d 377, 381–82 (8th Cir. 2018) (“‘[T]he decision to warn is, at its core, a policy decision.’ Likewise, supervising employees typically involves policy considerations.”) (internal citations omitted).
219 See supra “Whether the Challenged Conduct Is Discretionary.”
220 Rich v. United States, 811 F.3d 140, 145 (4th Cir. 2015) (quoting Cohen v. United States, 151 F.3d 1338, 1344 (11th Cir. 1998)).
221 Id. at 146 (quoting Dykstra v. U.S. Bureau of Prisons, 140 F.3d 791, 796 (8th Cir. 1998)).
222 Id. See Rinaldi v. United States, 904 F.3d 257, 274 (3d Cir. 2018) (“[T]he District Court correctly concluded that housing and cellmate assignments are ‘of the kind that the discretionary function exception was designed to shield.’” (quoting Mitchell v. United States, 225 F.3d 361, 363 (3d Cir. 2000)); Cohen, 151 F.3d at 1345 (concluding that federal law “does not render the discretionary function exception inapplicable to cases . . . in which a prisoner attacks another prisoner”); Calderon v. United States, 123 F.3d 947, 951 (7th Cir. 1997) (“[B]alancing the need to provide inmate security with the rights of the inmates to circulate and socialize within the prison involves considerations based upon public policy.”).
224 Id. at 110–11 (citing United States v. Gaubert, 499 U.S. 315, 323 (1991)). See also Palay v. United States, 349 F.3d 418, 432 (7th Cir. 2003).
225 See Whisnant v. United States, 400 F.3d 1177, 1179, 1183 (9th Cir. 2005).
The Intentional Tort Exception

Another exception to the FTCA’s waiver of sovereign immunity is known as the “intentional tort exception.” An intentional tort occurs “when the defendant acted with the intent to injure the plaintiff or with substantial certainty that his action would injure the plaintiff.” A familiar example of an intentional tort is battery—that is, purposeful harmful or offensive physical contact with another person. Subject to a significant proviso discussed below, the intentional tort exception generally preserves the United States’ immunity against claims arising out of

- assault;
- battery;
- false imprisonment;
- false arrest;
- malicious prosecution;
- abuse of process;
- libel;
- slander;
- misrepresentation;
- deceit; or
- interference with contract rights.

The Supreme Court has observed that this list “does not remove from the FTCA’s waiver all intentional torts” and that the list includes “certain torts . . . that may arise out of negligent—and therefore unintentional—conduct.” Thus, while the phrase “intentional tort exception” provides a suitable “shorthand description” of the exception’s scope, that moniker is, according to the Supreme Court, “not entirely accurate.”

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228 See, e.g., RESTATEMENT (SECOND) OF TORTS § 12.

229 See infra “The Exception to the Intentional Tort Exception: The Law Enforcement Proviso.”

230 But see Levin, 568 U.S. at 518 (holding that another federal statute, 10 U.S.C. § 1089(e), “abrogates the FTCA’s intentional tort exception” with respect to torts committed by specified classes of government employees).


232 Levin, 568 U.S. at 507 n.1. See also Fuller, supra note 17, at 379–80 (observing “that the label ‘intentional tort exception’ is something of a misnomer” because § 2680(h) not only (1) “excludes some torts that courts have held need not always be intentional;” but also (2) “fails to include all intentional torts in the list of excluded causes of action”); Sisk, supra note 17, at 304 (“This exception . . . includes most intentional torts (but perhaps not all, as trespass, conversion, invasion of privacy, and intentional infliction of emotional distress are not listed”).

233 Levin, 568 U.S. at 507 n.1.
The FTCA’s “legislative history contains scant commentary” discussing Congress’s rationale for exempting these categories of torts from the FTCA’s waiver of sovereign immunity. At least some Members of the Congress that first enacted the FTCA appeared to believe that (1) “it would be ‘unjust’ to make the government liable” for the intentional torts of its employees, and (2) “exposing the public fisc to potential liability for assault, battery, and other listed torts would be ‘dangerous,’ based on the notion that these torts are both easy for plaintiffs to exaggerate and difficult to defend against. The intentional tort exception has shielded the United States from liability for serious acts of misconduct allegedly committed by federal officers. In a particularly high-profile example, a group of women who were allegedly sexually assaulted by naval officers at the 1991 Tailhook Convention sued the United States under the FTCA “for the sexual assaults and batteries allegedly perpetrated by Naval officers at the Convention social events.” The court ultimately ruled that the intentional tort exception defeated the plaintiffs’ claims against the United States, as the alleged sexual assaults constituted intentionally tortious acts.

The Exception to the Intentional Tort Exception: The Law Enforcement Proviso

The intentional tort exception contains a carveout known as the “law enforcement proviso” that renders the United States potentially liable for certain intentional torts committed by federal investigative or law enforcement officers. Congress added this proviso in 1974 “in response to widespread publicity over abuse of powers by federal law enforcement officers.” Only the following torts fall within the law enforcement proviso’s ambit:

- assault;
- battery;
- false imprisonment;
- false arrest;
- abuse of process; and
- malicious prosecution.

234 Fuller, supra note 17, at 383–84.
235 Id. at 384.
236 Id.
237 See supra “.”
239 Id. at 877–88.
240 See Fuller, supra note 17, at 385.
243 Gregory C. Sisk, Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity, 92 N.C. L. REV. 1245, 1305 (2014). See also Nguyen v. United States, 556 F.3d 1244, 1255–56 (11th Cir. 2009) (discussing the law enforcement proviso’s purpose and legislative history); Caban v. United States, 671 F.2d 1230, 1234 (2d Cir. 1982) (noting that the enactment of the law enforcement proviso “was triggered by the abusive tactics of federal narcotics agents who engaged in illegal, unconstitutional ‘no-knock’ raids”); Rosky, supra note 44, at 939–43 (outlining the proviso’s legislative history).
244 28 U.S.C. § 2680(h).
To determine whether the proviso applies, a court must assess whether the alleged tortfeasor qualifies as an “investigative or law enforcement officer[].”\(^{245}\) The FTCA defines that term to include “any officer of the United States who is empowered by law to” (1) “execute searches,” (2) “seize evidence,” or (3) “make arrests for violations of Federal law.”\(^ {246}\) A court may also employ definitions of an “officer” in place at the time of the 1974 amendments to the FTCA.\(^ {247}\) Thus, to illustrate, Customs and Border Patrol officers who perform these sorts of law enforcement duties qualify as investigative or law enforcement officers under the proviso,\(^ {248}\) but employees of the Department of Treasury’s Federal Law Enforcement Training Center who perform primarily supervisory duties do not.\(^ {249}\) At the margins, however, courts sometimes disagree over whether any particular federal official falls within the proviso’s definition. One appellate court, for instance, has ruled that Transportation Security Officers (TSOs) employed by the Transportation Security Administration qualify as “investigative or law enforcement officers” because federal law empowers TSOs to search luggage and passengers for items prohibited on commercial aircraft.\(^ {250}\) However, a different court, emphasizing that TSOs lack the authority to carry firearms, make arrests, or seek and execute warrants, has reached the opposite conclusion.\(^ {251}\)

The law enforcement proviso waives the United States’ immunity only for acts or omissions committed “while the officer is ‘acting within the scope of his office or employment.’”\(^ {252}\) The underlying tort need not arise while the officer is executing searches, seizing evidence, or making arrests, however. So long as the officer is acting within the scope of his or her employment at the time the tort arises, the waiver of sovereign immunity applies.\(^ {253}\) To illustrate, the Supreme Court has held that the intentional tort exception will not necessarily bar a federal prisoner’s claim “that correctional officers sexually assaulted . . . him while he was in their custody,”\(^ {254}\) Assuming that the correctional officers qualified as law enforcement officers within the meaning of the FTCA and were acting within the scope of their employment at the time of the alleged assault, the Court concluded that the law enforcement proviso rendered the intentional tort exception inapplicable even if the correctional officers were not specifically engaged in investigative or law enforcement activity during the assault itself.\(^ {255}\)

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\(^ {245}\) See id.

\(^ {246}\) Id.


\(^ {248}\) See Campos v. United States, 888 F.3d 724, 737 (5th Cir. 2018), cert. denied, 139 S. Ct. 1317 (2019).

\(^ {249}\) See Metz v. United States, 788 F.2d 1528, 1532 (11th Cir. 1986).

\(^ {250}\) See Pellegrino, 937 F.3d at 167-81. For a CRS product analyzing the Pellegrino case in greater detail, see CRS Legal Sidebar LSB10363, Is a TSA Screener a “Law Enforcement Officer”? Court Allows Lawsuit Against United States to Proceed, by Kevin M. Lewis.

\(^ {251}\) See Corbett v. Transp. Sec. Admin., 568 F. App’x 690, 701 (11th Cir. 2014).

\(^ {252}\) Millbrook v. United States, 569 U.S. 50, 55 (2013) (quoting 28 U.S.C. § 1346(b)(1)). See also Rosky, supra note 44, at 910 n.49 (noting that the law enforcement proviso “mak[es] federal law enforcement officers the only federal employees whose intentional torts may give rise to government liability”); supra “Scope of Employment.”

\(^ {253}\) Bunch v. United States, 880 F.3d 938, 941 (7th Cir. 2018) (citing Millbrook, 569 U.S. at 55).

\(^ {254}\) See Millbrook, 569 U.S. at 51.

\(^ {255}\) The Supreme Court expressed no opinion on whether the correctional officers in Millbrook “qualif[ied] as ‘investigative or law enforcement officers’ within the meaning of the FTCA.” See id. at 55 n.3.

\(^ {256}\) See id. at 51–57.
The Foreign Country Exception

As the name suggests, the “foreign country exception”257 to the FTCA preserves the United States’ sovereign immunity against “any claim arising in a foreign country.”258 The Supreme Court has interpreted this exception to “bar[] all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”259 For instance, courts “routinely” hold that conduct occurring on an American military base in a foreign country falls within the exception.260 The exception “ensure[s] that the United States is not exposed to excessive liability under the laws of a foreign country over which it has no control,” as could potentially occur if the United States made itself liable to the same extent as any private citizen who commits a tort in that country.261

The 2017 case of S.H. ex rel. Holt v. United States illustrates how courts apply the foreign country exception in practice.262 In that case, a family attempted to sue the United States pursuant to the FTCA, alleging that U.S. Air Force (USAF) officials in California “negligently approved the family’s request for command-sponsored travel to a [USAF] base in Spain” with substandard medical facilities.263 When the mother ultimately gave birth prematurely in Spain,264 her daughter was injured during birth.265 After the family returned to the United States, American doctors diagnosed the daughter with cerebral palsy resulting from her premature birth.266 The court concluded that, because the daughter’s birth injury arose in Spain, the foreign country exception barred the family’s FTCA claim even though doctors did not diagnose the daughter with cerebral palsy until after the family returned the United States.267 To support its conclusion, the court reasoned that, for the purposes of the foreign country exception, “an injury is suffered where the harm first ‘impinge[s]’ upon the body, even if it is later diagnosed elsewhere.”268

The Military Exceptions

Two exceptions preserve the federal government’s immunity as to certain torts arising from the United States’ military activities. Congress created one exception, the combatant activities exception, in the FTCA’s text. The Supreme Court created the other exception by way of the Feres doctrine.

The Combatant Activities Exception

The first exception, codified at 28 U.S.C. § 2680(j), preserves the United States’ immunity from “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast

259 Sosa, 542 U.S. at 712 (emphasis added).
260 See Doe v. Meron, 929 F.3d 153, 167 (4th Cir. 2019) (collecting cases).
261 E.g., Nurse v. United States, 226 F.3d 996, 1003 (9th Cir. 2000).
262 853 F.3d 1056, 1057–63 (9th Cir. 2017).
263 Id. at 1058.
264 Id.
265 Id.
266 Id. at 1059.
267 Id. at 1063.
268 Id. at 1058 (quoting RESTATEMENT (FIRST) CONFLICT OF LAWS § 377, n.1 (1934)).
Guard, during time of war.»

Although the FTCA’s legislative history casts little light on the purpose and intended scope of the combatant activities exception, courts have generally inferred that “the policy embodied by the combatant activities exception is . . . to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit.”

The 1996 case of Clark v. United States illustrates how the combatant activities exception operates in practice. The plaintiff in Clark—a U.S. Army sergeant who served in Saudi Arabia during Operation Desert Storm—conceived a child with his wife after he returned home to the United States. After the child manifested serious birth defects, the sergeant sued the United States, claiming that his “exposure to the toxins he encountered while serving in Saudi Arabia” during Operation Desert Storm “combined with the medications and shots he received from the U.S. Army” caused his child to be born with significant injuries. The court concluded that, because a state of war existed during Operation Desert Storm, the sergeant’s claims arose “out of wartime activities by the military” and were therefore barred by the combatant activities exception.

The 2021 case Badilla v. Midwest Air Traffic Control Service, Inc. further clarifies enforcement of this exception. That case concerned a lawsuit against a military subcontractor providing air traffic control services at Kabul Afghanistan International Airport. The plaintiffs, the estates of the pilots and crew of a civilian flight that crashed into a nearby mountain, alleged that the subcontractor negligently provided the flight with instructions that put it on a collision course with the mountain. The court held that the combatant activities exception does not preempt state-law claims against military contractors unless the claim arises out of the contractor’s involvement in the military’s combatant activities, and the military specifically authorized or directed the action that generated the lawsuit. Under that standard, the exception did not apply to the defendant in Badilla because the military did not authorize the air traffic controller’s decision to cancel the civilian flight’s clearance to land.

269 28 U.S.C. § 2680(j); see Moore v. Elec. Boat Corp., 25 F.4th 30, 38 (1st Cir. 2022) (determining that a company that built and maintained submarines used by the Navy during wartime had presented at least a colorable argument for the applicability of the combatant activities exception).

270 See, e.g., Harris v. Kellogg Brown & Root Servs., Inc., 724 F.3d 458, 479 (3d Cir. 2013) (“The [FTCA] does not explicitly state the purpose of the [combatant activities] exception, nor does legislative history exist to shed light on it.”); Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009) (“The legislative history of the combatant activities exception is ‘singularly barren.’” (quoting Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948))).

271 Saleh, 580 F.3d at 7. See, e.g., Harris, 724 F.3d at 480 (“The purpose underlying § 2680(j) therefore is to foreclose state regulation of the military’s battlefield conduct and decisions.”).


273 Id. at 896.

274 Id.

275 Id. at 898. In the alternative, the court also determined that the Feres doctrine barred the sergeant’s claims. See id. at 897. See also infra “The Feres Doctrine.”

276 8 F.4th 105 (2d Cir. 2021).

277 Id. at 111-20.

278 Id.

279 Id. at 128.

280 Id. at 129-30.
The Feres Doctrine

In addition to the exceptions to liability explicitly enumerated in Section 2680, the Supreme Court has also articulated an additional exception to the United States’ waiver of sovereign immunity known as the Feres doctrine. This doctrine derives its name from the 1950 case Feres v. United States, in which several active duty servicemen (or their executors) attempted to assert a variety of tort claims against the United States. The executor for one of the servicemen who died in a fire at a military facility, for instance, claimed that the United States had negligently caused the serviceman’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.” The second plaintiff claimed that an Army surgeon negligently left a 30-by-18-inch towel in his stomach during an abdominal operation. The executor of a third serviceman alleged that army surgeons administered “negligent and unskillful medical treatment” that resulted in the serviceman’s death. The Supreme Court dismissed all three claims, holding “that the Government is not liable under the [FTCA] for injuries to [military] servicemen where the injuries arise out of or are in the course of activity incident to [military] service.”

The Feres doctrine thus “applies broadly” to render the United States immune from tort liability resulting 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 frequently barred active duty servicemen from suing the United States for medical malpractice allegedly committed by military doctors.

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282 Feres, 340 U.S. at 136-37.

283 Id. at 137.

284 Id. at 136.

285 Id. at 146.

286 Ortiz v. United States ex rel. Evans Army Cmty. Hosp., 786 F.3d 817, 821 (10th Cir. 2015) (quoting Pringle v. United States, 208 F.3d 1220, 1223–24 (10th Cir. 2000)). See, e.g., Purcell v. United States, 656 F.3d 463, 465 (7th Cir. 2011) (opining that the Feres doctrine “has been interpreted increasingly broadly over time”); Dreier v. United States, 106 F.3d 844, 848 (9th Cir. 1996) (“[C]ourts applying the Feres doctrine have given a broad reach to Feres’ ‘incident to service’ test.”).

287 Ortiz, 786 F.3d at 821 (quoting Pringle, 208 F.3d at 1223–24). See, e.g., Dreier, 106 F.3d at 848 (noting that Feres may bar recovery even “for injuries that at first blush may not have appeared to be closely related to [the plaintiff’s] military service or status”).

288 See, e.g., Daniel v. United States, 889 F.3d 978, 981 (9th Cir. 2018), cert. denied, 139 S. Ct. 1713 (2019) (“[O]ur cases have consistently applied the Feres doctrine to bar medical malpractice claims predicated on treatment provided at military hospitals to active duty service members . . . .”); Cutshall v. United States, 75 F.3d 426, 427 (8th Cir. 1996) (concluding that Feres barred corporal’s claim that Navy doctors failed to promptly detect corporal’s cancer).

Significantly, some courts have interpreted the Feres doctrine to also bar certain medical malpractice claims by non-servicemember third parties. See, e.g., Ortiz, 786 F.3d at 824 (holding that if an injury to a civilian “has its origin in an incident-to-service injury to a service member. . . . then Feres applies as a bar to the third-party claim, just as it would to a claim by the service member for his or her injuries”). For example, some courts have held that, under certain circumstances, the Feres doctrine renders the United States “immune from damages for injuries its agents caused to an active-duty servicewoman’s baby during childbirth,” even though that baby was not a member of the military. E.g., id. at 818. See generally Tara Willke, Commentary, Three Wrongs Do Not Make a Right: Federal Sovereign Immunity, The Feres Doctrine, and the Denial of Claims Brought by Military Mothers and Their Children for Injuries Sustained.
The *Feres* doctrine is not expressly codified in the FTCA.\(^{290}\) Instead, courts have justified *Feres* on the ground that subjecting the United States to liability for tort claims arising out of military service could “disrupt the unique hierarchical and disciplinary structure of the military.”\(^{291}\) According to the Supreme Court, “complex, subtle, and professional decisions as to the composition, training, and . . . control of a military force are essentially professional military judgments.”\(^{292}\) In the Supreme Court’s view, requiring federal courts to adjudicate “suits brought by service members against the Government for injuries incurred incident to service” would thereby embroil “the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.”\(^{293}\) The Supreme Court also substantiated the *Feres* doctrine with the fact that the government already implements a uniform system for compensating and providing services to servicemembers harmed in the course of their duties.\(^{294}\) In the Supreme Court’s view, Congress would have adjusted the aforementioned benefits if it had intended the FTCA to “permit recovery for injuries incident to military service.”\(^{295}\)

As discussed in greater detail below,\(^{296}\) the *Feres* doctrine has been the subject of significant debate.\(^{297}\) Despite opportunities and invitations to overturn or confine its holding in *Feres*,\(^{298}\) the

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**Pre-Birth, 2016 Wis. L. Rev. 263, 263 (2016)** (“Through the application of the judicially created *Feres* doctrine, female service members who suffer injuries during pregnancy or the birthing process as a result of medical malpractice are barred from seeking recovery under the [FTCA] and, depending on the jurisdiction in which the negligent medical treatment occurs, their children may also be barred from seeking recovery for the injuries they sustain as the result of the negligent prenatal medical care.”). But see Brown v. United States, 462 F.3d 609, 614 (6th Cir. 2006) (concluding that *Feres* is “inapplicable to suits for negligent prenatal care affecting only the health of the fetus” and not the health of the servicemember mother).

\(^{290}\) See, e.g., United States v. Johnson, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting) (“Read as it is written, [the FTCA’s] language renders the United States liable to all persons, including servicemen, injured by the negligence of Government employees. Other provisions of the Act set forth a number of exceptions, but none generally precludes FTCA suits brought by servicemen.”); Patrick J. Austin, *Incident to Service: Analysis of the Feres Doctrine and its Overly Broad Application to Service Members Injured by Negligent Acts Beyond the Battlefield, 14 APPALACHIAN J. L. 1, 3 (2014) (“[The FTCA does not contain ‘incident to service’ language.”)); Maj. Thomas R. Folk, *The Administrative Procedure Act and the Military Departments, 108 Mt. L. Rev. 135, 154 (1985) (“The Supreme Court has repeatedly recognized [the *Feres*] exception to the FTCA . . . despite the FTCA’s failure to mention such an exception with other explicit exceptions applicable to activities by the armed forces.”).

Although the FTCA does contain a provision preserving the government’s immunity from “any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” see 28 U.S.C. § 2680(j), that exception is not coextensive with the *Feres* doctrine as articulated by the Supreme Court. See, e.g., Matthew v. United States, 452 F. Supp. 2d 433, 444 (S.D.N.Y. 2006) (“The statutory exemption in 28 U.S.C. § 2680(j) applies to a much narrower set of circumstances than the *Feres* doctrine . . . .”)

\(^{291}\) *Ortiz*, 786 F.3d at 821. See, e.g., Wetherill v. Geren, 616 F.3d 789, 793 (8th Cir. 2010) (“Underlying *Feres* was a recognition of ‘the peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of [FTCA] suits on discipline.’”) (quoting Chappell v. Wallace, 462 U.S. 296, 299 (1983)).


\(^{295}\) Id.

\(^{296}\) See infra “Proposals to Abrogate or Modify *Feres*.”

\(^{297}\) See, e.g., *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (arguing that “*Feres* was wrongly decided and heartily deserves the ‘widespread, almost universal criticism’ it has received” (quoting *In re Agent Orange Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984))); *Ortiz*, 786 F.3d at 818 (stating that, “[i]n the many decades since its inception, criticism of the so-called *Feres* doctrine has become endemic”); Ritchie v. United States, 733 F.3d 871, 878 (9th Cir. 2013) (“We can think of no other judicially-created doctrine which has been criticized so sturdily, by so many jurists, for so long [as the *Feres* doctrine].”).

\(^{298}\) See, e.g., *Johnson*, 481 U.S. at 692 (Scalia, J., dissenting) (“I can perceive no reason to accept petitioners’ invitation to extend [*Feres*] as the Court does today.”); Stencel Aero Eng’g Corp. v. United States, 431 U.S. 666, 674 (1977)
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Supreme Court has reaffirmed\textsuperscript{299} or expanded\textsuperscript{300} the doctrine on several occasions. Most recently, on May 20, 2019, the Court denied a petition asking the Court to overrule \textit{Feres} with respect to certain types of medical malpractice claims.\textsuperscript{301} Although the Supreme Court has stated that Congress may abrogate or modify \textit{Feres} by amending the FTCA if it so chooses, Congress has not yet opted to do so.\textsuperscript{302}

Both Congress and lower courts have nonetheless limited the \textit{Feres} doctrine to certain degrees. Congress, for its part, did so through the Camp Lejeune Justice Act in 2022.\textsuperscript{303} Under this act, any individual, including a veteran, who was exposed to water at Marine Corp Base Camp Lejeune in North Carolina for 30 days or more between August 1, 1953, and December 31, 1987, can sue the United States “to obtain appropriate relief for harm that was caused by exposure to the water.”\textsuperscript{304}

Certain guidelines and restrictions apply, however.\textsuperscript{305}

In addition, also in 2022, the Ninth Circuit ruled that the \textit{Feres} doctrine did not bar a former servicemember from suing the United States and a former officer for damages resulting from an alleged sexual assault that took place while the servicemember was on active duty.\textsuperscript{306} The Ninth Circuit stated that “we ‘cannot fathom’ how the alleged sexual assault in this case could ever be considered an activity ‘incident to [military] service.’”\textsuperscript{307}

Other Limitations on Damages Under the FTCA

Apart from the exceptions to the United States’ waiver of sovereign immunity discussed above,\textsuperscript{308} the FTCA may also limit a plaintiff’s ability to obtain compensation from the federal government in other ways. Although, as a general matter, the damages that a plaintiff may recover in an FTCA suit are typically determined by the law of the state in which the tort occurred,\textsuperscript{309} the FTCA

\hspace{1cm}(Marshall, J., dissenting) (“I do not agree that [\textit{Feres'}] extension to cover this case is justified.”).

\textsuperscript{299} See \textit{Johnson}, 481 U.S. at 686, 688 (“This Court has never deviated from . . . the \textit{Feres} bar . . . . We decline to modify the doctrine at this late date.”). \textit{See also Shearer}, 473 U.S. at 57–59 (concluding that \textit{Feres} barred plaintiff’s FTCA claim).

\textsuperscript{300} See \textit{Stencel Aero}, 431 U.S. at 673 (“We conclude . . . that the third-party indemnity action in this case is unavailable for essentially the same reasons that the direct action by Donham is barred by \textit{Feres}.”).

\textsuperscript{301} See \textit{Petition for Writ of Certiorari}, Daniel v. United States, 139 S. Ct. 1713 (2019) (No. 18–460), at i (“\textit{Should Feres} be overruled for medical malpractice claims brought under the Federal Tort Claims Act where the medical treatment did 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 the injury or death?”); Daniel v. United States, 139 S. Ct. 1713, 1713 (2019) (“The petition for a writ of certiorari is denied.”).

\textsuperscript{302} See \textit{Johnson}, 481 U.S. at 686 (majority opinion) (“Nor has Congress changed \textit{Feres} in the close to 40 years since it was articulated, even though, as the Court noted in \textit{Feres}, Congress ‘possesses a ready remedy’ to alter a misinterpretation of its intent.” (quoting \textit{Feres} v. United States, 340 U.S. 135, 138 (1950))).


\textsuperscript{304} \textit{Id.} at § 804(b).

\textsuperscript{305} \textit{E.g., id.} at §§ 804(c), 804(d), 804(e), 804(g), 804(h), and 804(j)(2).

\textsuperscript{306} \textit{Spletstoser v. Hyten}, 44 F.4th 938, 958–59 (9th Cir. 2022).

\textsuperscript{307} \textit{Id.} (quoting \textit{Lutz v. Secretary of Air Force}, 944 F.2d 1477, 1486 (9th Cir. 1991)) (brackets in original).

\textsuperscript{308} \textit{See supra} “Exceptions to the FTCA’s Waiver of Sovereign Immunity.”

\textsuperscript{309} \textit{E.g., Malmberg v. United States}, 816 F.3d 185, 193 (2d Cir. 2016) (“Damages in FTCA actions are determined by the law of the state in which the tort occurred.”); \textit{Lockhart v. United States}, 834 F.3d 952, 955 (8th Cir. 2016) (similar); \textit{Reilly v. United States}, 863 F.2d 149, 161 (1st Cir. 1988) (similar). Thus, if the state in which the tort occurred has enacted statutes that cap the amount of damages a plaintiff may recover in a state law tort case, those statutory caps
imposes several restrictions on the types and amount of damages that a litigant may recover. With few exceptions, plaintiffs may not recover punitive damages or prejudgment interest against the United States. The FTCA likewise bars most awards of attorney’s fees against the government.

With limited exceptions, an FTCA plaintiff may not recover any damages that exceed the amount initially requested when the plaintiff submitted the claim to the applicable agency to satisfy the FTCA’s exhaustion requirement, discussed below. The underlying purpose of requiring the plaintiff to specify the maximum amount of damages sought “is to put the government on notice of its maximum potential exposure to liability” and thereby facilitate “intelligent settlement decisions.” However, a plaintiff can potentially recover damages in excess of the amount initially requested if the plaintiff can demonstrate “intervening facts” or “newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency” that warrant a larger award.

may likewise limit the damages a plaintiff may recover from the United States in an FTCA case. E.g., Clemons v. United States, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494, at *2 (S.D. Miss. June 13, 2013) (“[S]tate law damages caps apply in FTCA cases.”); Bowling v. United States, 740 F. Supp. 2d 1240, 1267 (D. Kan. 2010) (“With respect to compensatory damages, under the FTCA, damages are determined by the law of the state where the tortious act was committed, and presumes the application of any relevant damage caps that might be applied in the case of a private individual under like circumstances.”).


But see id. (“If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death . . . .”).

See id. (“The United States . . . shall not be liable for interest prior to judgment or for punitive damages.”); Carlson v. Green, 446 U.S. 14, 22 (1980) (“Punitive damages in an FTCA suit are statutorily prohibited.”).

E.g., Anderson v. United States, 127 F.3d 1190, 1191–92 (9th Cir. 1997) (“Congress has not waived the government’s sovereign immunity for attorneys’ fees and expenses under the FTCA.”); Bergman v. United States, 844 F.2d 353, 355 (6th Cir. 1988) (“It is clear that the FTCA does not waive the United States’ immunity from attorneys’ fees.”); Joe v. United States, 772 F.2d 1535, 1537 (11th Cir. 1985) (“The FTCA does not contain the express waiver of sovereign immunity necessary to permit a court to award attorneys’ fees against the United States directly under that act.”). But see Tri-State Hosp. Supply Corp. v. United States, 341 F.3d 571, 573, 577 (D.C. Cir. 2003) (holding that plaintiff could potentially recover attorneys’ fees in FTCA action because plaintiff was “not seeking the attorney’s fees it incurred in bringing its FTCA action,” but was instead seeking “to recover the . . . attorney’s fees it had incurred defending itself against” an allegedly malicious prosecution).

See 28 U.S.C. § 2675(b) (“Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, upon allegation and proof of intervening facts, relating to the amount of the claim.”).

See infra “Procedural Requirements.”

Zurba v. United States, 318 F.3d 736, 743 (7th Cir. 2003).

Allgeier v. United States, 909 F.2d 869, 875 (6th Cir. 1990) (internal citation omitted).

28 U.S.C. § 2675(b). See, e.g., Zurba, 318 F.3d at 738-44 (analyzing when an FTCA plaintiff may recover damages in excess of the amount requested in his initial administrative claim); Lebron v. United States, 279 F.3d 321, 325–31 (5th Cir. 2002) (same); Michels v. United States, 31 F.3d 686, 687–89 (8th Cir. 1994) (same); Allgeier, 909 F.2d at 877–79 (same). See generally Daniel Shane Read, The Courts’ Difficult Balancing Act To Be Fair To Both Plaintiff and Government Under the FTCA’s Administrative Claims Process, 57 BAYLOR L. REV. 785 (2005) (discussing when courts have allowed plaintiffs to recover damages that exceed their administrative claims and opining when courts should allow plaintiffs to do so as a matter of policy).
Procedural Requirements

In addition to the aforementioned substantive limitations on a plaintiff’s ability to pursue a tort lawsuit against the United States, Congress has also established an array of procedural requirements a plaintiff must satisfy in order to validly invoke the FTCA. Most significantly, the FTCA contains statute-of-limitations and exhaustion provisions that limit when a plaintiff may permissibly file a tort lawsuit against the United States.319

For one, with certain exceptions,320 a plaintiff may not institute an FTCA action against the United States unless (1) the plaintiff has first “presented the claim to the appropriate Federal agency” whose employees are allegedly responsible for the plaintiff’s injury, and (2) that agency has “finally denied” the plaintiff’s claim.321 These administrative exhaustion requirements afford federal agencies an opportunity to settle disputes before engaging in formal litigation in the federal courts.322 “[E]ncouraging settlement of tort claims within administrative agencies” in this manner arguably “reduce[s] court congestion and avoid[s] unnecessary litigation.”323 Because litigation can be costly and time-consuming, the settlement of claims within administrative agencies arguably not only “benefits FTCA claimants by permitting them to forego the expense of full-blown litigation,” but also “frees up limited [governmental] resources for more pressing matters.”324

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319 E.g., Redlin v. United States, 921 F.3d 1133, 1136 (9th Cir. 2019) (“[28 U.S.C. §] 2401(b) has been interpreted as including two separate timeliness requirements. A claim is timely only if it has been: (1) submitted to the appropriate federal agency within two years of accrual and (2) filed in federal court within six months of the agency’s final denial.”). Federal law rather than state law governs the applicable limitations period. See, e.g., Booth v. United States, 914 F.3d 1199, 1204 n.4 (9th Cir. 2019) (“A court must look to state law for the purpose of defining the actionable wrong for which the United States shall be liable, but to federal law for the limitations of time within which the action must be brought.”) (quoting Poindexter v. United States, 647 F.2d 34, 36 (9th Cir. 1981)).

320 See 28 U.S.C. § 2675(a) (“The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim . . . .”); id. (stating that Section 2675’s exhaustion requirements do “not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim”).

321 Id. See Read, supra note 318, at 794–95 (outlining the process for filing an administrative claim under the FTCA).

322 Lopez v. United States, 823 F.3d 970, 976 (10th Cir. 2016) (quoting Smoke Shop, LLC v. United States, 761 F.3d 779, 786 (7th Cir. 2014)). See Michels, 31 F.3d at 688 (“In 1966, to encourage more administrative settlements, Congress amended the FTCA to require administrative claims in all cases.”).

323 Ugo Colella, The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought Pursuant to the Federal Tort Claims Act, 35 San Diego L. Rev. 391, 401 (1998). See Read, supra note 318, at 791 (explaining that the “two goals” of the administrative claim requirement are “to ease court congestion and provide fairness to plaintiffs by aiding the Government in its attempts to settle meritorious cases”).

324 Colella, supra note 323, at 401–02. See Read, supra note 318, at 792 (“By stating that a goal was to aid the efficient settlement of meritorious claims, it is clear that Congress intended to help attorneys on both sides resolve disputes by creating a process at the administrative level that would lead to less work for all involved. Congress related that the then current situation unnecessarily consumed the time of United States Attorneys and subjected deserving plaintiffs to needless delays and attorneys’ fees in processing their claims through the federal courts.”); Axelrad, supra note 2, at 1343 (“Administrative claims allow parties to reach the benefits of settlement without the expense of filing, much less litigating a suit.”).
A claimant ordinarily has two years from the date of his injury to present a written notification of his FTCA claim “to the Federal agency whose activities gave rise to the claim.” This written notification must “sufficiently describ[e] the injury to enable the agency to begin its own investigation.” Once the agency receives such notice, it may either settle the claim or deny it. With limited exceptions, a tort claim against the United States will be time-barred if the claimant fails to submit an administrative claim within the two-year time limit. As a general rule, a plaintiff must “exhaust his administrative remedies prior to filing suit.” A plaintiff usually cannot file an FTCA lawsuit and then cure his failure to comply with the exhaustion requirement by belatedly submitting an administrative claim.

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325 See 28 U.S.C. § 2401(b) (“A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues.”); Morales-Melecio v. United States, 890 F.3d 361, 368 (1st Cir. 2018) (“In general, a tort claim under the FTCA accrues when a plaintiff is injured.”).

326 28 C.F.R. § 14.2. The United States has promulgated a standard form which the claimant may (but need not) use for this purpose. See id. § 14.2(a) (“[A] claim shall be deemed to have been presented when a Federal agency receives . . . an executed Standard Form 95 or other written notification of an incident.”). Many courts require the plaintiff to prove that the agency actually received his claim. See Cooke v. United States, 918 F.3d 77, 81–82 (2d Cir.), cert. denied, 139 S. Ct. 2748 (2019) (discussing the competing majority and minority positions on this issue). Courts adopting this interpretation of the FTCA’s claim presentment requirement reason that it is insufficient for the plaintiff to merely prove that he placed the claim in the mail. See, e.g., id. at 81–82 (“[T]he mere mailing of a notice of claim does not satisfy the FTCA’s presentment requirement.”).

327 E.g., Lopez, 823 F.3d at 976 (quoting Estate of Trentadue ex rel. Aguilar v. United States, 397 F.3d 840, 852 (10th Cir. 2005)). See 28 C.F.R. § 14.4 (specifying various types of information that a claimant “may be required to submit”); Chronis v. United States, 932 F.3d 544, 547 (7th Cir. 2019) (explaining that the FTCA’s “presentment requirement has four elements: (1) notification of the incident; (2) demand for a sum certain; (3) title or capacity of the person signing; and (4) evidence of the person’s authority to represent the claimant”).

328 Figley, Ethical Intersections, supra note 5, at 359. See Axelrad, supra note 2, at 1336 (“When an agency receives an administrative claim it is empowered to consider whether to grant the claim in full, resolve the claim by negotiating a compromise settlement, deny the claim, or take no action on the claim.”); 28 U.S.C. § 2672 (governing the administrative settlement of FTCA claims).

329 See, e.g., Tunac v. United States, 897 F.3d 1197, 1207 (9th Cir. 2018), cert. denied, 139 S. Ct. 817 (2019) (explaining that a court may toll the two-year time limit, but only if the plaintiff shows, “among other things, that ‘fraudulent conduct by the defendant result[ed] in concealment of the operative facts’” (alteration in original) (quoting Fed. Election Comm’n v. Williams, 104 F.3d 237, 240–41 (9th Cir. 1996))). Additionally, sometimes a plaintiff cannot fairly be expected to file an administrative claim within two years of his injury, especially when “the fact or cause of an injury is unknown to (and perhaps unknowable by) a plaintiff for some time after the injury occurs.” E.g., Dominguez v. United States, 799 F.3d 151, 153 (1st Cir. 2015) (quoting Rakes v. United States, 442 F.3d 7, 19 (1st Cir. 2006)). In such instances, “the statute of limitations clock does not begin to run until the putative plaintiff knows of the factual basis of both his injury and its cause.” Morales-Melecio, 890 F.3d at 368. See also, e.g., Tunac, 897 F.3d at 1206–07 (applying this rule in the medical malpractice context). This rule “protects plaintiffs who are either experiencing the latent effects of a previously unknown injury or struggling to uncover the underlying cause of their injuries from having their claims time-barred before they could reasonably be expected to bring suit.” A.Q.C. ex rel. Castillo v. United States, 656 F.3d 135, 140 (2d Cir. 2011).


331 See McNeil v. United States, 508 U.S. 106, 107–13 (1993) (emphasis added). See also, e.g., Douglas, 814 F.3d at 1279 (affirming dismissal of FTCA claims that plaintiff had “failed to fully exhaust”). But see D.L. ex rel. Junio v. Vassilev, 858 F.3d 1242, 1246 (9th Cir. 2017) (holding “that the FTCA’s exhaustion requirement does not prevent a plaintiff from amending a previously filed federal complaint over which there is jurisdiction to add an FTCA claim once he has exhausted his administrative remedies”) (emphasis in original).
If, after the claimant submits his claim to the relevant administrative agency, the claimant and the agency agree on a mutually acceptable settlement, no further litigation occurs. Statistics suggest that most FTCA claims are resolved administratively. If the agency does not agree to settle the claim, however, the agency may deny the claim by “mailing, by certified or registered mail, . . . notice of final denial of the claim” to the claimant. If no administrative settlement occurs, a claimant’s right to a judicial determination “is preserved and the claimant may file suit in federal court.” The claimant typically has six months from the date the agency mails its denial to initiate an FTCA lawsuit against the United States in federal court if he so chooses. With limited exceptions, if the plaintiff does not file suit before this six-month deadline, his claim against the United States will be “forever barred.”

If a federal agency does not promptly decide whether to settle or deny claims that claimants have presented to them, the FTCA establishes a mechanism for constructive exhaustion to prevent claims from being consigned to administrative limbo while the claimant awaits the agency’s decision. Pursuant to Section 2675(a) of the FTCA, “[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of the FTCA’s exhaustion requirement. Thus, under these limited circumstances, Section 2675(a) authorizes a plaintiff to

332 See 28 U.S.C. § 2672 (“The acceptance by the claimant of any . . . award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States . . . [A]ny such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government.”).

333 Figley, Ethical Intersections, supra note 5, at 359. Cf. Axelrad, supra note 2, at 1334 (“[D]uring fiscal year 1998, the Postal Service reported that it received approximately 15,000 tort claims and paid approximately 11,000 of those claims through the administrative process.”).


335 Axelrad, supra note 2, at 1344.

336 See 28 U.S.C. § 1346(b)(1) (providing that specified federal district courts “shall have exclusive jurisdiction” over FTCA cases).

337 See id. § 2401(b) (“A tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.”). See also, e.g., Raplee v. United States, 842 F.3d 328, 333 (4th Cir. 2016) (“[28 U.S.C.] § 2401(b) requires a plaintiff to bring a federal civil action within six months after a federal agency mails its notice of final denial of his claim.”). But see 28 C.F.R. § 14.9(b) (providing that, under certain conditions, a claimant may seek reconsideration of the agency’s final denial, which tolls the six-month statute of limitations).

338 See United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1638 (2015) (holding that the FTCA’s statutes of limitation may be extended under certain conditions); Ortiz-Rivera v. United States, 891 F.3d 20, 25 (1st Cir. 2018) (“The FTCA’s time bar may be . . . tolled when a party has pursued its rights diligently but some extraordinary circumstance prevents it from meeting a deadline.”) (internal citation, quotation marks, and brackets omitted). See also 28 U.S.C. § 2679(d)(5) (providing that “[w]henever an action or proceeding in which the United States is substituted as the party defendant . . . is dismissed for failure first to present a claim” to the appropriate federal agency, “such a claim shall be deemed to be timely presented” if (1) “the claim would have been timely had it been filed on the date the underlying civil action was commenced;” and (2) “the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action”).


340 See 28 U.S.C. § 2675(a). See also Colella, supra note 323, at 395 (“[A]n estimated one-third of administrative claims are deemed denied by the filing of a lawsuit.”); Axelrad, supra note 2, at 1336 (“When an agency receives an administrative claim it is empowered to . . . take no action on the claim.”).

file an FTCA suit against the United States even before the agency has formally denied his administrative claim.\footnote{See generally Colella, supra note 323, at 406–56 (discussing the FTCA’s deemed denial provision and its effects on the FTCA’s statutes of limitation).}

Operating alongside the FTCA is the judgment bar statute.\footnote{28 U.S.C. § 2676.} That statute sets forth that a judgment in an FTCA action “shall constitute a complete bar to any action by the claimant, by reason of the same subject matter,” against a government employee whose act or omission gave rise to the FTCA claim.\footnote{Id.} Put differently, an FTCA judgment precludes a future cause of action under a different statute.

In 2021, the Supreme Court clarified the scope of the judgment bar statute in Brownback v. King.\footnote{141 S. Ct. 740 (2021).} In Brownback, a plaintiff sued the United States after FBI agents tackled, choked, and punched him while mistaking him for a fugitive.\footnote{Id. at 746.} The plaintiff raised causes of action under the FTCA and Bivens v. Six Unknown Federal Narcotics Agents,\footnote{483 U.S. 388 (1971).} which allows individuals to sue federal officials in limited circumstances for violating their constitutional rights despite the absence of a statutory cause of action.\footnote{Brownback, 141 S. Ct. at 746.} The district court dismissed the FTCA claims for lack of subject-matter jurisdiction and granted the government’s motion for summary judgment as to Bivens.\footnote{Id. at 746–48.}

The plaintiff wished to pursue only the Bivens claim on appeal. The Sixth Circuit held that the dismissal of the FTCA claim did not trigger the judgment bar statute.\footnote{Id. at 745.} A unanimous Supreme Court reversed, holding that “a ruling that the court lacks subject matter jurisdiction may simultaneously be a judgment on the merits that triggers the judgment bar.”\footnote{Id. at 749–50.}

### Legislative Proposals to Amend the FTCA

Since Congress first enacted the FTCA in 1946, the federal courts have developed a robust body of judicial precedent interpreting the statute.\footnote{See, e.g., United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1638 (2015); United States v. Gaubert, 499 U.S. 315, 324 (1991); Feres v. United States, 340 U.S. 135, 146 (1950).} In recent decades, the Supreme Court has rejected several invitations by litigants to modify long-standing doctrines governing the FTCA’s application.\footnote{See Petition for Writ of Certiorari at i, Evans v. United States, No. 17-1516 (U.S. May 4, 2018) (asking the Court, among other things, to ‘modify[y]’ its ‘prior precedent applying the discretionary-function exception to the [FTCA] to government employees acting on the operational level’); Order Denying Writ of Certiorari, Evans, No. 17-1516 (Oct. 1, 2018) (rejecting this invitation to modify the Court’s precedent). See also United States v. Johnson, 481 U.S. 681, 692 (1987) (reaffirming the Feres doctrine’s continued validity).} In doing so, the Court has expressed reluctance to revisit settled FTCA precedents in the absence of congressional action.\footnote{See, e.g., Johnson, 481 U.S. at 686 (“This Court has never deviated from this characterization of the Feres bar. Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in}
principles that currently govern FTCA cases, legislative action may be necessary to change the governing standards.\footnote{355} Some observers have advocated a variety of modifications to the FTCA.\footnote{356} Recent legislative proposals to alter the FTCA have included, among other things,

- carving out certain categories of claims, cases, or plaintiffs to which the FTCA would not apply,\footnote{357}
- expanding or narrowing the FTCA’s definition of “employee”\footnote{358}—which, as discussed above, is presently relatively broad, but does not include independent contractors;\footnote{359} and
- amending 28 U.S.C. § 2680 to create new exceptions to the federal government’s waiver of sovereign immunity—or, alternatively, to broaden, narrow, modify, or eliminate existing exceptions.\footnote{360}


\footnote{355} See, e.g., Maj. Deirdre G. Brou, Alternatives to the Judicially Promulgated Feres Doctrine, 192 MIL. L. REV. 1, 79 (2007) (predicting that “Congress, not the judiciary, will dismantle the Feres doctrine, if it is to be eliminated”). \footnote{356} See, e.g., Rosky, \textit{supra} note 44, at 962 (arguing that, in order to promote uniform and fair results in FTCA cases, Congress should add “a new, separate provision” to the FTCA “establishing that claims arising from the intentional torts of law enforcement officers are governed by a federal scope of employment rule, rather than by the law of any particular state”); Jonathan Turley, \textit{Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance}, 71 GEO. WASH. L. REV. 1, 4, 82 (2003) (arguing that “the Feres doctrine was fundamentally flawed from its inception on both a constitutional and statutory basis,” and suggesting that Congress amend “the FTCA to reaffirm that only combat-related injuries are exempted from the Act”). \textit{Cf.} Booth v. United States, 914 F.3d 1199, 1205 (9th Cir. 2019) (suggesting that Congress could legislate to toll the FTCA’s statute of limitations for plaintiffs under the age of 18 until they reach the age of majority).

\footnote{357} For instance, the 116th Congress enacted the John D. Dingell, Jr. Conservation, Management, and Recreation Act, which provides in relevant part that the FTCA “shall not apply to [specified] organization[s] or individual[s] carrying out a privately requested good Samaritan search-and-recovery mission” pursuant to the act. P.L. 116-9 § 9002(b)(2)(C) (2019) (codified at 43 U.S.C. § 1742a(b)(2)(C)). \footnote{358} For example, the 116th Congress enacted the Consolidated Appropriations Act for 2019, which provides in relevant part that “an eligible individual who is employed in any project funded under title V of the Older Americans Act of 1965 . . . and administered by the Forest Service shall be considered to be a Federal employee for purposes of [the FTCA].” See P.L. 116-6, 133 Stat. 13, 247 (2019).


\footnote{359} \textit{See supra “Employees and Independent Contractors.”} \footnote{360} \textit{See, e.g.,} Tribal Law and Order Reauthorization and Amendments Act of 2019, S. 210, 116th Cong. § 104 (1st Sess. 2019) (“While acting under the authority granted by the Secretary through an Indian Self-Determination and Education Assistance Act . . . contract or compact, a tribal law enforcement officer shall be deemed to be a Federal law
The 117th Congress saw one FTCA-related provision become law. Section 104 of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, amended the Workforce Innovation and Opportunity Act to set forth that acceptance of a payment under the act constituted a release of all claims against the United States under the FTCA.361

Proposals to change the FTCA’s substantive standards implicate policy questions that Congress may wish to consider. On one hand, broadening the FTCA’s waiver of sovereign immunity could enable a larger number of victims of government wrongdoing to obtain recourse through the federal courts,362 but could concomitantly increase the total amount of money the United States must pay to tort claimants each year363 and exacerbate “concerns . . . about . . . the impact that extensive litigation might have on the ability of government officials to focus on and perform their other duties.”364 Conversely, narrowing the FTCA’s immunity waiver could result in a larger number of private individuals bearing the costs of government employee misfeasance,365 but could result in a cost savings to the United States366 and decrease the potential for judicial intervention in federal operations.367

**Proposals to Abrogate or Modify Feres**

One particular proposal to amend the FTCA that has captured a relatively substantial amount of congressional attention is abrogating or narrowing the Feres doctrine.368 As discussed above,369 the Feres doctrine shields the federal government from liability “for injuries to servicemen where the injuries arise out of or are in the course of activity incident to [military] service.”370 Opponents of Feres argue that the doctrine inappropriately bars servicemembers from obtaining recourse for their injuries.371 Critics maintain that Feres’s denial of certain FTCA suits creates

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362 Cf. Pfander & Aggarwal, supra note 33, at 424 (noting that Congress enacted the FTCA “to provide compensation to victims of government wrongdoing”).
363 See Rosky, supra note 44, at 909 n.48 (“This broad and basic federal interest in determining the sweep of the waiver encompasses a more specific interest—the government’s fiscal interest in the outcome of claims . . . Payment of judgments . . . comes from the United States’ purse.”).
364 See Niles, supra note 16, at 1300.
365 See id. at 1295 (arguing that the “government is a more appropriate candidate to bear the costs incurred by its negligent acts than the private citizen who sustains an injury through no ‘fault’ of her own”).
366 See id. at 1300 (noting potential “concerns . . . about the integrity and solvency of the public fisc”).
369 See supra “The Feres Doctrine.”
371 See, e.g., Richard E. Custin et al., Is it Time to Revisit the Feres Doctrine? The Disparate Treatment of Active Duty Military Personnel Under the Federal Tort Claims Act, 22 J.L. BUS. & ETH. 1, 2 (2016) (criticizing what the authors
especially unjust results with respect to servicemembers who suffer injuries in military hospitals\textsuperscript{372} and who are victims of sexual abuse,\textsuperscript{373} as those types of tortious actions are far removed from the core functions of the military.\textsuperscript{374} Some Members of Congress\textsuperscript{375} and legal commentators\textsuperscript{376} have advocated eliminating or narrowing the \textit{Feres} doctrine to allow servicemembers to pursue certain tort claims against the United States under the FTCA.

Supporters of \textit{Feres} have instead urged Congress to retain the \textit{Feres} doctrine in its current form.\textsuperscript{377} These commentators contend “that the abolition of the \textit{Feres} doctrine would lead to intra-military lawsuits that would have a very adverse effect on military order, discipline and effectiveness.”\textsuperscript{378} Some who support the \textit{Feres} doctrine argue that, even though \textit{Feres} bars servicemembers from suing the United States under the FTCA for injuries they sustain incident to military service, \textit{Feres} does not necessarily leave servicemembers without any remedy. Depending on the characterizations of the events, servicemembers may be able to pursue claims against their alleged tortfeasors or against the United States if they fall within the scope of the FTCA’s waiver of sovereign immunity.

\textit{Feres} has been subject to criticism from lower courts, the Supreme Court, and Members of Congress.\textsuperscript{379} The American Medical Association and other medical organizations have advocated eliminating or narrowing the \textit{Feres} doctrine to allow servicemembers to pursue certain tort claims against the United States.\textsuperscript{380} They argue that \textit{Feres} allows the government to obtain a competitive advantage by not having to pay for damages that result from negligent medical treatment.\textsuperscript{381} However, other commentators argue that \textit{Feres} is necessary to protect the military’s chain of command and discipline.\textsuperscript{382} The American Bar Association and the American Bar Association’s Committee on Civil Rights have recommended that Congress amend the FTCA to reaffirm servicemembers’ right to sue the United States for injuries sustained incident to military service.\textsuperscript{383} Some Members of Congress have introduced legislation to amend the FTCA to allow servicemembers to sue the United States for injuries sustained incident to military service.\textsuperscript{384} The legislative history of the FTCA, which was enacted in 1946, demonstrates that Congress intended to grant servicemembers the same tort remedies as civil servants.\textsuperscript{385}

\textit{Feres} was decided in 1950, when the United States was engaged in a war in Korea. The Supreme Court’s decision has been widely criticized by Members of Congress, military leaders, and others.\textsuperscript{386} They argue that \textit{Feres} is too broad in scope and goes beyond protecting military decision making and discipline.\textsuperscript{387} Some who support the \textit{Feres} doctrine argue that, even though \textit{Feres} bars servicemembers from suing the United States under the FTCA for injuries they sustain incident to military service, \textit{Feres} does not necessarily leave servicemembers without any remedy. Depending on the
circumstances, injured servicemembers may be entitled to certain benefits under other federal statutes.\textsuperscript{381}

Congress has periodically held hearings to assess whether to retain, abrogate, or modify the Feres doctrine.\textsuperscript{382} For example, the House Armed Services Committee’s Subcommittee on Military Personnel conducted hearings on April 30, 2019, titled “Feres Doctrine—A Policy in Need of Reform?.”\textsuperscript{383}

Congress has several options if it desires to authorize servicemembers to pursue tort lawsuits against the United States in circumstances not permitted under current law. For example, Congress could abolish Feres in its entirety and allow servicemembers to file tort suits against the United States subject to the same exceptions and prerequisites that govern FTCA lawsuits initiated by nonservicemembers.\textsuperscript{384} Congress could also, instead of abrogating Feres entirely, allow servicemembers to only sue the United States for certain injuries arising from military service or under certain conditions, as it does, for example, with regard to medical malpractice by Department of Defense medical practitioners.\textsuperscript{385} In addition, rather than authorizing full-fledged litigation against the United States in federal court, Congress could create alternative compensation mechanisms intended to provide relief to injured servicemembers whose claims would otherwise be barred by Feres. Such alternative compensation procedures could, for example, resemble the compensation scheme Congress established for persons injured by vaccines.\textsuperscript{386}

**Private Bills**

In addition to proposals to modify the FTCA itself, Congress retains the authority to enact private legislation to compensate individual tort victims who would otherwise be barred from obtaining recourse from the United States under the FTCA in its current form.\textsuperscript{387} Congress enacted the

\textsuperscript{381} See Figley, *Unfairly Maligned*, supra note 378, at 453 (arguing that servicemembers have access to a “full panoply of service members’ and veterans’ benefits”); 2002 Feres Hearing 3 (statement of Paul Harris, Deputy Assoc. Att’y Gen., Dep’t of Justice) (“[T]he military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such injuries or death through the creation of an efficient and comprehensive compensation system.”); Joan M. Bernott, *Fairness and Fares [sic]: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51, 69–70 (1987) (“Servicemen already enjoy greater access to federal relief for most injury [sic] than do all other federal employees; equity does not compel exacerbating this disparity by revoking or limiting Feres.”). For an analysis of the statutory benefits to which injured servicemembers may be entitled, see CRS In Focus IF11102, *Military Medical Malpractice and the Feres Doctrine*, by Bryce H. P. Mendez and Kevin M. Lewis.

\textsuperscript{382} See, e.g., 2002 Feres Hearing 1–133; 1986 Feres Hearing 9 (statement of Sen. Edward M. Kennedy) (“Over the period of the past years we have had seven hearings on the Feres doctrine.”).

\textsuperscript{383} See generally 2019 Feres Hearing.

\textsuperscript{384} See, e.g., Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 433 (2010) (“Congress should . . . clarify that the exceptions specifically enumerated in the [FTCA] are the only limitations on active duty service members’ ability to bring suit for injuries sustained from the negligence of government employees.”). Notably, those exceptions would include Section 2680(j), which, as discussed above, see supra “The Combatant Activities Exception,” preserves the United States’ sovereign immunity against “any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” 28 U.S.C. § 2680(j).

\textsuperscript{385} See, e.g., James M. Brennan, *Incident to Service: The Feres Doctrine and the Uniform Code of Military Justice*, 81 A.F.L. REV. 240 (2020) (advocating modifying the Feres doctrine such that servicemember tort suits against the government are only barred “when a civilian injured under similar circumstances could have been subject to military justice” under Article 2(a) of the Uniform Code of Military Justice).

\textsuperscript{386} See 42 U.S.C. §§ 300aa-1-300aa6.

\textsuperscript{387} See Private Bills, supra note 38.
The Federal Tort Claims Act (FTCA): A Legal Overview

FTCA in part to eliminate the need to pass private bills to compensate persons injured by the federal government, but Congress still retains some authority to pass private bills if it so desires. Thus, rather than amend the FTCA to expand the universe of circumstances in which the United States will be liable to tort claimants, some have suggested that Congress should pass individual private bills to compensate particular injured persons or groups of persons who might otherwise lack recourse under the FTCA. To that end, Congress has occasionally "provided compensation [to plaintiffs] in situations where the courts have found that the FTCA waiver of immunity provides no relief."

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388 See supra “Background.”
389 See Fuller, supra note 17, at 378–79 (“[P]rivate bills today are far from dead . . . . While by no means easy or commonplace, it remains possible to obtain private legislative relief today—a possibility that should not be forgotten in discussions of the FTCA and its scope.”).
390 See Hershkoff, supra note 40, at 243 (“I suggest rejuvenating a claimant’s right to petition for a private bill whenever a claim is not cognizable under the FTCA—a result that is not foreclosed by the current statute but the practice is virtually dormant.”).
391 Longstreth, supra note 159, at 400 n.11 (listing examples).