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

May 21, 2019

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CRS REPORT
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Committees of Congress

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SUMMARY

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May 21, 2019

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

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, a person who negligently causes a vehicular collision may be 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) deterring people from injuring others and (2) compensating those who are injured.

Employees and officers of the federal government occasionally commit torts just like other members of the general public. For a substantial portion of this nation's history, however, plaintiffs injured by the tortious acts of a federal officer or employee were barred from filing lawsuits against the United States by "sovereign immunity"—a legal doctrine that ordinarily prohibits private citizens from haling a sovereign state into court 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, deeming this state of affairs unacceptable, enacted the Federal Tort Claims Act (FTCA), which authorizes plaintiffs to obtain compensation from the United States for the torts of its employees. However, subjecting the federal government to tort liability not only creates a financial cost to the United States, it also creates a risk that government officials may inappropriately base their decisions not on socially desirable policy objectives, but rather on the desire to reduce the government's exposure to monetary damages. 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 categories 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. In recent years, however, the Supreme Court has expressed reluctance to reconsider its long-standing FTCA precedents, thereby leaving the task of further developing the FTCA to Congress. Some Members of Congress have accordingly 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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Introduction

A plaintiff injured by a defendant's wrongful conduct may file a tort lawsuit to recover money from that defendant.[1] To name an especially 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."[2] 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."[3]

Employees and officers of the federal government occasionally commit torts just like other members of the general public.[4] 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.[5] 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.[6]

Congress, deeming this state of affairs unacceptable, ultimately enacted the Federal Tort Claims Act (FTCA) in 1946.[7] The FTCA allows plaintiffs to file and prosecute certain types of tort lawsuits against the United States and thereby potentially recover financial compensation from the federal government.[8] 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.[9] Other FTCA cases, however, involve grave allegations of government misfeasance. For example, after naval officers allegedly sexually assaulted several

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[1] *See, e.g.*, *Tort*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "tort" as "a civil wrong, other than breach of contract, for which a remedy may be obtained, usu[ally] in the form of [monetary] damages"). *See generally* CRS Legal Sidebar LSB10118, *Tort and Litigation Reform in the 115th Congress*, by Kevin M. Lewis (describing tort law, its purposes, and its relevance to Congress).

[2] Bryant Walker Smith, *Automated Driving and Product Liability*, 2017 MICH. ST. L. REV. 1, 66. *See also* Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better Than Third-Party ADR For Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331, 1332 (2000) (describing "an automobile accident" as a "paradigm" example of a tort).

[3] *E.g.*, Alberto Galasso & Hong Luo, *Tort Reform and Innovation*, 60 J.L. & ECON. 385, 386 (2017). *See also* John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 514–83 (2003) (discussing various scholarly accounts of the purposes of tort law).

[4] *See, e.g.*, Limone v. United States, 579 F.3d 79, 83 (1st Cir. 2009) (affirming district court's determination that several Federal Bureau of Investigation (FBI) agents committed various torts).

[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 also, 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).

women at the infamous Tailhook Convention in 1991, those women invoked the FTCA in an attempt to hold the United States liable for those officers' attacks.[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 over $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. However, 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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[10] Hallett v. United States, 877 F. Supp. 1423, 1425 (D. Nev. 1995). The court ultimately dismissed the plaintiffs' claims against the United States on a variety of grounds. *See id*. at 1427–32; Hallett v. United States, 850 F. Supp. 874, 877–83 (D. Nev. 1994).

[11] *See* Andrade v. Chojnacki, 65 F. Supp. 2d 431, 441, 446 (W.D. Tex. 1999). The United States ultimately prevailed at trial and on appeal. *See* Andrade v. Chojnacki, 338 F.3d 448, 453 (5th Cir. 2003).

[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*) ("The 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 2018, https://fiscal.treasury.gov/judgment-fund/annual-report-congress.html, lists all payments that the United States made to individual claimants under the FTCA and other compensatory statutes between October 1, 2017, and September 30, 2018. The sum of the "Confirmed Payment Amounts" for all reported "Litigative Payments" and "Administrative Payments" pursuant to the FTCA equaled a total of $318,912,807.83. 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/usao/page/file/1081801/download, reports that plaintiffs filed 2,971 tort cases against the United States during FY2017, and that an additional 4,128 tort cases against the federal government remained pending from the previous year. In addition, the report states that the Department of Justice received 3,019 new tort-related civil matters during FY2017.

[16] Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1309 (2002).

[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.[18] The FTCA also restricts the types and amount of monetary damages that a plaintiff may recover against the United States.[19] Additionally, the FTCA requires plaintiffs to comply with an array of procedural requirements before filing suit.[20]

This report provides an overview of the FTCA.[21] It first discusses the events and policy concerns that led Congress to enact the FTCA, including the background principle of sovereign immunity.[22] 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.[23] In doing so, the report describes categorical exceptions to the government's waiver of sovereign immunity,[24] statutory limitations on a plaintiff's ability to recover monetary damages under the FTCA,[25] and the procedures that govern tort claims against the United States.[26] The report concludes by discussing various legislative proposals to amend the FTCA.[27]

Background

A person injured by the tortious activity of a federal employee generally has two potential targets that he might name as a defendant in a tort lawsuit: (1) the federal employee who committed the tort and (2) the federal government itself.[28] In many cases, however, suing the employee is not a viable option.[29] 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.[30] Moreover, even if Congress had not decided to insulate federal employees from tort liability, suing an individual is typically an unattractive option for litigants, as individual defendants may lack the financial resources to satisfy an award of monetary damages.[31]

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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."

[28] *See* Harbury v. Hayden, 522 F.3d 413, 417 (D.C. Cir. 2008).

[29] *See id*.

[30] *See infra* "The Preclusion of Individual Employee Tort Liability Under the FTCA."

[31] *See, e.g.*, Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) ("[W]hen 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 substantial part)."); *Harbury*, 522 F.3d at 417 (describing "federal employee[s]" as "potentially judgment-proof").

For many litigants, the legal and practical unavailability of tort claims against federal employees makes suing the United States a more attractive option.[32] Whereas a private defendant may lack the financial resources to satisfy a judgment rendered against him, the United States possesses sufficient financial resources to pay virtually any judgment that a court might enter against it.[33]

A plaintiff suing the United States, however, may nonetheless encounter significant obstacles.[34] In accordance with a long-standing legal doctrine known as "sovereign immunity," a private plaintiff ordinarily may not file a lawsuit against a sovereign entity—including the federal government—unless that sovereign consents.[35] 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 initiating or prosecuting a lawsuit against the United States.[36] 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"[37] through "private bills."[38]

Some, however, criticized the public bill system.[39] Not only did private bills impose "a substantial burden on the time and attention of Congress,"[40] some members of the public became increasingly concerned "that the private bill system was unjust and wrought with political favoritism."[41] Thus, in 1946, Congress enacted the FTCA,[42] which effectuated "a limited waiver

[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. § 1304. *See also* James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 426–27 & nn.51–52 (describing the Judgment Fund and its history); Figley, *Ethical Intersections*, *supra* note 5, at 352–54 (same).

[34] *See Harbury*, 522 F.3d at 417.

[35] *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) ("The United States is immune from suit without its consent.").

[36] 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" against "citizens injured by the torts of federal employees").

[37] *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.").

[38] *See, e.g.*, Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983).

[39] Figley, *Ethical Intersections*, *supra* note 5, at 350 (claiming that "Members of Congress had long recognized that" private bills were "a poor way to resolve private claims against the government").

[40] *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").

[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).

of [the federal government's] sovereign immunity"[43] from certain common law[44] tort claims.[45] With certain exceptions and caveats discussed throughout this report, the FTCA authorizes plaintiffs to bring civil lawsuits

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[46] negligent or wrongful act or omission;
5. while acting within the scope of his 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.[47]

Thus, not only does the FTCA "free Congress from the burden of passing on petitions for private relief"[48] by "transfer[ring] responsibility for deciding disputed tort claims from Congress to the courts,"[49] it also creates a mechanism to compensate victims of governmental wrongdoing.[50] In addition to this compensatory purpose, the FTCA also aims to "deter tortious conduct by federal

[43] *E.g.*, Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017).

[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, *Respondeat 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-Ruiz 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 189–194 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's 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. Cmdr. 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 also, 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").

[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 also, 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))).

personnel" by rendering the United States liable for the torts of its agents, thereby incentivizing the government to carefully supervise its employees.[51]

Significantly, however, the FTCA does not itself create a new *federal cause of action* against the United States; rather, the FTCA waives the United States's sovereign immunity from certain types of claims that exist under *state tort law*.[52] 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.[53] In this way, the FTCA largely "renders the Government liable in tort as a private individual would be under like circumstances."[54]

Critically, however, "although the FTCA's waiver of sovereign immunity is significant and extensive, it is not complete."[55] 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"[56] that are explained extensively below.[57] Moreover, to limit the fora in which a plaintiff may permissibly 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.[58] Furthermore, because Congress believed "that juries would have difficulty viewing the United States as a defendant

[51] Loumiet v. United States, 828 F.3d 935, 941 (D.C. Cir. 2016).

[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"), *cert. denied*, 137 S. Ct. 2274 (June 19, 2017); 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 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 employee of the Government . . . ."). A litigant aggrieved by a district or territorial court's judgment in an FTCA case generally has the right to appeal to a regional U.S. Court of Appeals. *See id.* § 1291 (providing that, with limited exceptions, "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . and the District Court of the Virgin Islands"). A litigant aggrieved by the U.S. Court of Appeals' ruling in an FTCA case may then request that the U.S. Supreme Court exercise its discretionary authority to review the case. *See id.* § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil . . . case . . . after rendition of judgment.").

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

Notably, the FTCA only authorizes tort lawsuits against the United States itself; it expressly shields individual federal employees from personal liability for torts[61] that they commit within the scope of their employment.[62] In other words, the FTCA "makes the remedy against the United States under the FTCA exclusive"[63] 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."[64] Congress 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."[65] Critically, the individual employee generally remains immune from tort liability for torts committed within the scope of his employment even if a provision of the FTCA forecloses the plaintiff from recovering monetary damages from the United States itself.[66]

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

[59] Matthew L. Zabel, *Advisory Juries and Their Use and Misuse in Federal Tort Claims Act Cases*, 2003 B.Y.U. L. REV. 185, 205 (citing 92 CONG. REC. 10,092 (1946) (statement of Rep. Scrivner)).

[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 also* 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"). *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] 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) ("Paragraph (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))).

[62] Levin v. United States, 568 U.S. 503, 509 (2013). *See also* 28 U.S.C. § 2679(b)(1) ("The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . .").

[63] *Levin*, 568 U.S. at 509.

[64] 28 U.S.C. § 2679(b)(1). This provision of the FTCA is "often called the Westfall Act." *Levin*, 568 U.S. at 509.

[65] Adams v. United States, 420 F.3d 1049, 1054 (9th Cir. 2005).

[66] *See, e.g.*, United States v. Smith, 499 U.S. 160, 165 (1991) (concluding that federal law "immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government").

the individual who committed the tort was in fact a federal employee,[67] and, if so, (2) whether that individual committed the tort within the scope of his office or employment.[68]

Employees and Independent Contractors

First, the FTCA only waives the United States's sovereign immunity as to torts committed by an "*employee* of the Government."[69] 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.[70] 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).[71]

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.[72]

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.[73] Thus, with certain caveats discussed below,[74] 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 the United States under the FTCA.[75]

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[67] *See infra* "Employees and Independent Contractors."

[68] *See infra* "Scope of Employment."

[69] 28 U.S.C. § 1346(b)(1) (emphasis added).

[70] *See, e.g.*, Kinebrew v. United States, No. 15-6855, 2016 WL 3014887, at *1 (E.D. Pa. May 26, 2016) ("The United States has not waived it sovereign immunity under the FTCA for claims based on the alleged negligence of non-employees . . . ."); Gonzalez v. United States, C.A. No. C-06-352, 2007 WL 2008675, at *3 (S.D. Tex. July 5, 2007) ("The FTCA does not impose liability on the government for the acts of non-employees . . . .").

[71] 28 U.S.C. § 2671.

[72] *See, e.g.*, U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Va., LLC, 899 F.3d 236, 248 (4th Cir. 2018) ("[A]n 'employee' for purposes of the [FTCA] need not have formal employee status.").

[73] *See, e.g.*, Creel v. United States, 598 F.3d 210, 211–15 (5th Cir. 2010) (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 against them and to substitute the United States as the defendant on the ground that the individual defendants were "not 'federal employees'").

[74] *See infra* "The *Boyle* Rule."

[75] *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

Notably, the United States commonly hires independent contractors to carry out its governmental objectives.[76] The FTCA, however, explicitly excludes independent contractors from the statutory definition of "employee."[77] As a result, "the government cannot be held liable" under the FTCA "for torts committed by its independent contractors";[78] the plaintiff must instead attempt to seek compensation from the contractor itself.[79]

Different courts consider different sets of factors when evaluating whether an alleged tortfeasor is an independent contractor as opposed to a government employee.[80] Most courts, however, hold that "the critical factor" when assessing whether a defendant is an employee or 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."[81] "[A] contractor can be said to be an employee or agent of the United States within the intendment of the [FTCA] only where the Government has the power under the contract to supervise a contractor's day-to-day

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defendant could proceed).

[76] *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] *See* 28 U.S.C. § 2671; *U.S. Tobacco*, 899 F.3d at 248 ("An 'employee' does not include an 'independent contractor' working for the government.") (citing 28 U.S.C. § 2671; United States v. Orleans, 425 U.S. 807, 814 (1976)).

[78] 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))).

[79] *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."

[80] *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))).

[81] *U.S. Tobacco*, 899 F.3d at 248. *See also, e.g.*, *Creel*, 598 F.3d at 213 (same); Bryant v. United States, No. CIV 98-1495 PCT RCB, 2000 WL 33201357, at *5 (D. Ariz. Jan. 11, 2000) (same).

operations and to control the detailed physical performance of the contractor."[82] Thus, to illustrate, courts have typically determined that certified registered nurse anesthetists (CRNAs) working for federal hospitals qualify as employees under the FTCA.[83] 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.[84] By contrast, 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."[85]

The *Boyle* Rule

Because the FTCA's prohibition against suits by individual 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.[86] Nevertheless, a plaintiff asserting a tort claim directly against a federal contractor may still encounter other obstacles to recovery. As the Supreme Court ruled in its 1988 decision in *Boyle v. United Technologies Corp.*, a plaintiff may not pursue state law tort

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[82] *U.S. Tobacco*, 899 F.3d at 248 (quoting Wood v. Standard Prods. Co., 671 F.2d 825, 829 (4th Cir. 1982)) (internal quotation marks omitted).

[83] *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").

[84] *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.").

[85] *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 the 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) ("[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).

[86] *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*, 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).

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."[87] 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.[88] Courts have been less willing to extend *Boyle* immunity to nonmilitary contractors, however.[89]

Scope of Employment

As noted above,[90] the FTCA applies only to torts that a federal employee commits "while acting within the scope of his office or employment."[91] Thus, "[i]f a government employee acts *outside* the scope of his employment when engaging in tortious conduct, an action against the United States under the FTCA will not lie."[92] Instead, the plaintiff may potentially "file a state-law tort action against the" employee who committed the tort, as the aforementioned protections from liability apply only when employees are acting within the scope of their employment.[93]

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[87] 487 U.S. 500, 507 (1988) (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

[88] *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]hether 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).

[89] *See, e.g.*, Cabalce v. Thomas E. Blanchard & Assocs., 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").

[90] *See supra* "Background"; "The Preclusion of Individual Employee Tort Liability Under the FTCA."

[91] 28 U.S.C. § 1346(b)(1).

[92] Folley v. Henderson, 175 F. Supp. 2d 1007, 1016 (S.D. Ohio 2001) (emphasis added). *See also, 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 employee's negligence.").

[93] *Folley*, 175 F. Supp. 2d at 1016. *See also, e.g.*, Dowdy v. Hercules, No. 07-CIV-2488(EVEN) (LB), 2010 WL 169624, 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 [wa]s not liable under the FTCA for his alleged negligent acts," and the doctor himself was "not immune from suit under the FTCA").

Courts 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 the state in which the tort occurred.[94] Although the legal principles that govern the scope of a tortfeasor's employment vary from state to state,[95] 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.[96]

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.[97] The truck hit a dip in the trail, injuring the passenger.[98] 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."[99]

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.[100] The agent and the motorcyclist had engaged in a verbal altercation and "swerved their

[94] *See, e.g.*, 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.").

[95] *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.").

[96] *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 ("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."); 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))).

[97] 965 F. Supp. 1220, 1222–23 (E.D. Wis. 1997).

[98] *Id*. at 1223.

[99] *Id*.

[100] 620 F.3d at 52.

vehicles back and forth towards each other" immediately prior to the collision.[101] After brandishing a firearm at the motorcyclist,[102] the agent sharply careened his vehicle into the motorcycle, throwing the motorcyclist to the ground and severely injuring him.[103] 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."[104] 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."[105] 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.[106] 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."[107] 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.[108]

Attorney General Certification

Occasionally a plaintiff will file a tort suit against an individual[109] without realizing that he is a federal employee.[110] 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."[111] If the Attorney General files such a certification, then

- the lawsuit is "deemed an action against the United States" under the FTCA;[112]
- the employee is dismissed from the action, and the United States is substituted as defendant in the employee's place;[113] and
- the case proceeds against the government in federal court.[114]

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[101] *Id*. at 52.

[102] *Id*.

[103] *Id*. at 53.

[104] *Id*. at 56.

[105] *Id*.

[106] *Id*.

[107] *Id*. at 57.

[108] *Id*. at 58.

[109] 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).

[110] *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").

[111] 28 U.S.C. § 2679(d)(1)–(2).

[112] *Id*.

[113] Osborn v. Haley, 549 U.S. 225, 230 (2007). *See also* 28 U.S.C. § 2679(d)(1)–(2).

[114] *Osborn*, 549 U.S. at 230 ("Upon the Attorney General's certification" in a case "commenced in state court, the case

In such instances, the United States "remain[s] the federal defendant in the action unless and until the [d]istrict [c]ourt determines that the employee . . . engaged in conduct beyond the scope of his employment."[115] 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."[116] 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."[117]

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 employment when he committed the allegedly tortious act, "the FTCA's requirements, exceptions, and defenses apply to the suit."[118] Depending on the circumstances, those requirements, exceptions, and defenses can "absolutely bar [the] plaintiff's case" against the United States,[119] as explained in greater detail below.[120] Moreover, the individual federal employee remains immune from liability even when the FTCA "precludes recovery against the Government" itself.[121] 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."[122]

"In such cases, to try to preserve their lawsuits" against the federal employee, the plaintiff may attempt to "contest the Attorney General's scope-of-employment certification."[123] That is, the plaintiff may argue that the government employee defendant was *not* acting within the scope of his employment, such that the suit should therefore proceed against the government official in his personal capacity.[124] If the court agrees that the employee was acting within the scope of employment at the time of the alleged tort, then "the suit becomes an action against the United States that is governed by the FTCA."[125] If, however, the court disagrees with the Attorney General's determination, the suit may proceed against the government employee in his personal capacity.[126]

A plaintiff may, however, *prefer* to litigate against the United States rather than against an individual government employee, especially if the employee does not have enough money to

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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.").

[115] *Id*. at 231.

[116] *Id*. at 238.

[117] *Id*. at 252.

[118] Harbury v. Hayden, 522 F.3d 413, 416 (D.C. Cir. 2008) (citing 28 U.S.C. § 2679(d)(1)).

[119] *Id*. at 417.

[120] *See infra* "Exceptions to the FTCA's Waiver of Sovereign Immunity."

[121] United States v. Smith, 499 U.S. 160, 165 (1991). *See also* 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").

[122] B & A Marine Co. v. Am. Foreign Shipping Co., 23 F.3d 709, 715 (2d Cir. 1994).

[123] *Harbury*, 522 F.3d at 417. *Cf.* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420 (1995) (holding that the Attorney General's scope-of-employment certification under the FTCA is subject to judicial review).

[124] *Harbury*, 522 F.3d at 417.

[125] *Id*.

[126] *Id*.

satisfy a judgment that the court might ultimately render in the plaintiff's favor.[127] Because government employees may be "under-insured or judgment proof," they may lack sufficient assets to "satisfy judgments rendered against them" in tort cases.[128] Thus, oftentimes the plaintiff does not object when the Attorney General certifies that the named defendant was acting within the scope of his employment at the time of the alleged tort.[129]

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.[130] 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 his allegedly tortious action.[131] 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 his employment, that employee may at any time before trial petition a federal district court for certification that he was acting within the scope of his employment for the purposes of the FTCA.[132] If the court agrees that the employee was acting within the scope of his employment, then the case proceeds "against the Government, just as if the Attorney General had filed a certification."[133] If, however, 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 his personal capacity.[134]

Exceptions to the FTCA's Waiver of Sovereign Immunity

As mentioned above,[135] the FTCA imposes significant substantive limitations on the types of tort lawsuits a plaintiff may permissibly pursue against the United States.[136] The Congress that enacted the FTCA, concerned about "unwarranted judicial intrusion[s] into areas of governmental operations and policymaking,"[137] opted to explicitly preserve the United States' sovereign immunity from more than a dozen categories of claims.[138] Specifically, Section 2680 of the FTCA

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[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.

[129] Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 422 (1995) ("Ordinarily, scope-of-employment certifications occasion no contest.").

[130] *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.").

[131] *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").

[132] Fountain v. Karim, 838 F.3d 129, 133 n.3 (2d Cir. 2016) (citing 28 U.S.C. § 2679(d)(3)).

[133] Harbury v. Hayden, 522 F.3d 413, 416 n.1 (D.C. Cir. 2008) (citing 28 U.S.C. § 2679(d)(3)–(4)).

[134] *Id*.

[135] *See supra* "Background."

[136] *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").

[137] Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983).

[138] *See generally* 28 U.S.C. § 2680(a)–(f), (h)–(n). In addition to Section 2680, other provisions of the U.S. Code—as

establishes the following exceptions preventing private litigants from pursuing the following categories of claims against the United States:

- "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";[139]
- "Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter";[140]
- certain claims arising from the actions of law enforcement officers administering customs and excise laws;[141]
- certain admiralty[142] 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;[144]
- "Any claim for damages caused by the imposition or establishment of a quarantine by the United States";[145]
- certain claims predicated upon intentional torts committed by federal employees;[146]

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 381–32 ("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.").

[139] *See* 28 U.S.C. § 2680(a). *See also infra* "The Discretionary Function Exception."

[140] 28 U.S.C. § 2680(b). *See also, e.g.*, Dolan v. USPS, 546 U.S. 481, 483–92 (2006) (analyzing the scope of Section 2680(b)).

[141] *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)).

[142] "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).

[143] *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").

[144] 28 U.S.C. § 2680(e). Among other things, the Trading with the Enemy Act "affords the President broad powers to regulate, license, and prohibit trade with foreign nations." Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d 1268, 1275 (11th Cir. 2013). *See generally* 50 U.S.C. §§ 4301–41.

[145] 28 U.S.C. § 2680(f).

[146] *See id.* § 2680(h). *See also infra* "The Intentional Tort Exception."

- "Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system"[147];
- "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war";[148]
- "Any claim arising in a foreign country";[149]
- "Any claim arising from the activities of the Tennessee Valley Authority";[150]
- "Any claim arising from the activities of the Panama Canal Company";[151] or
- "Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."[152]

Some of these exceptions are more doctrinally significant than others.[153] The following sections of this report therefore discuss the most frequently litigated exceptions to the United States' waiver of immunity from tort claims.

The Discretionary Function Exception

First, Section 2680(a)[154]—which is "commonly called the discretionary function exception"[155]—"preserves the federal government's immunity . . . when an employee's acts involve the exercise of judgment or choice."[156] Along with being one of the most frequently litigated exceptions to the FTCA's waiver of sovereign immunity,[157] the discretionary function exception is, according to at least one commentator, "the broadest and most consequential."[158] For example, the United States

[147] 28 U.S.C. § 2680(i).

[148] *Id.* § 2680(j). *See also infra* "The Combatant Activities Exception."

[149] 28 U.S.C. § 2680(k). *See also infra* "The Foreign Country Exception."

[150] 28 U.S.C. § 2680(*l*). *See also* Thacker v. Tenn. Valley Auth., --- S. Ct. ---, 2019 WL 1886028, at *4 (Apr. 29, 2019) ("Congress made a considered decision not to apply the FTCA to the [Tennessee Valley Authority].") (emphasis omitted).

[151] 28 U.S.C. § 2680(m). The Panama Canal Treaty of 1977 replaced the Panama Canal Company with the Panama Canal Commission. *E.g.*, Black v. Office of Pers. Mgmt., 641 F. App'x 1007, 1008 (Fed. Cir. 2016).

[152] 28 U.S.C. § 2680(n).

[153] *See, e.g.*, Matthews v. United States, Civil No. 07-00030, 2011 WL 3471140, at *2 (D. Guam Aug. 5, 2011) (describing "the discretionary function exception" as "the most frequently litigated" statutory exception to the FTCA); James R. Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (similar).

[154] *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 or the failure to exercise or perform 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").

[155] *E.g.*, Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017).

[156] *E.g.*, Tsolmon v. United States, 841 F.3d 378, 380 (5th Cir. 2016).

[157] *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 DFE is the most criticized and litigated exception to the FTCA.").

[158] Niles, *supra* note 16, at 1300. *See also* 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).

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).[159]

The discretionary function exception serves at least two purposes.[160] 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."[161] 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."[162] Second, the discretionary function exception is intended to "protect the Government from liability that would seriously handicap efficient government operations."[163] By insulating the government from 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.[164] 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."[165] 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."[166]

As explained in greater detail in the following subsections,[167] 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.[168] "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.[169] 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

[159] Seamon, *supra* note 33, at 694–95.

[160] *See* Niles, *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.").

[161] Berkovitz *ex rel.* Berkovitz v. United States, 486 U.S. 531, 536–37 (1988) (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)) (internal quotation marks omitted).

[162] Niles, *supra* note 16, at 1308. *See also* 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").

[163] *Varig Airlines*, 467 U.S. at 814 (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)).

[164] *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").

[165] *Id*. at 1310.

[166] *Varig Airlines*, 467 U.S. at 808.

[167] *See infra* "Whether the Challenged Conduct Is Discretionary"; "Whether Policy Considerations Influence the Exercise of the Employee's Discretion."

[168] *E.g.*, Gordo-Gonzalez v. United States, 873 F.3d 32, 36 (1st Cir. 2017).

[169] *Id*. *See also, 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.").

discretion—consideration of public policy—that the exception was designed to protect," then the discretionary function exception does not bar the plaintiff's claim.[170]

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,"[171] a court must assess "whether the conduct at issue involves 'an element of judgment or choice' by the employee."[172] "The conduct of federal employees is generally held to be discretionary unless 'a federal[173] statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'"[174] If "the employee has no rightful option but to adhere to the directive" established by a federal statute, regulation, or policy, "then there is no discretion in the conduct for the discretionary function exception to protect."[175] 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."[176]

Even where a federal statute, regulation, or policy pertaining to the challenged action exists, however, the action may nonetheless qualify as discretionary if the law in question "predominately uses permissive rather than mandatory language."[177] 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.[178] 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.[179] "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.'"[180]

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[170] Seamon, *supra* note 33, at 706–07.

[171] *E.g.*, Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017) (quoting Fothergill v. United States, 566 F.3d 248, 252 (1st Cir. 2009)).

[172] *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)).

[173] "*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).

[174] *Id*. (quoting *Berkovitz*, 486 U.S. at 536). *See also, 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))).

[175] *Berkovitz*, 486 U.S. at 536.

[176] Tsolmon v. United States, 841 F.3d 378, 384 (5th Cir. 2016). *See also, e.g.*, 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.").

[177] *Compart's Boar Store*, 829 F.3d at 605 (quoting Herden v. United States, 726 F.3d 1042, 1047 (8th Cir. 2013)).

[178] 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); Ochran v. United States, 117 F.3d 495, 500-01 (11th Cir. 1997); Kelly v. United States, 924 F.2d 355, 358, 360–61 (1st Cir. 1991)).

[179] *Id*. at 1030 (quoting Sabow v. United States, 93 F.3d 1445, 1453 (9th Cir. 1996)).

[180] *Compart's Boar Store*, 829 F.3d at 605 (quoting Hart v. United States, 630 F.3d 1085, 1086 (8th Cir. 2011)).

The Fourth Circuit's decision in *Rich v. United States*[181] exemplifies how courts evaluate whether a federal employee has engaged in discretionary conduct. The plaintiff in *Rich*—a federal inmate who was 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.[182] Federal law permitted—but did not affirmatively require—BOP "to separate certain inmates from others based on their past behavior."[183] 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.[184]

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.[185] 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.[186] After the plaintiff allegedly contracted polio from a vaccine produced by that manufacturer, the plaintiff sued the United States under the FTCA.[187] 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.[188]

Courts have disagreed regarding 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[189] have held that "the discretionary-function exception . . . does not shield decisions that exceed constitutional bounds, even if such decisions are imbued with policy considerations."[190] These courts reason that "[t]he government 'has no "discretion" to

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[181] 811 F.3d 140 (4th Cir. 2015).

[182] *See id*. at 141–42.

[183] *See id*. at 145 (analyzing 28 C.F.R. § 524.72).

[184] *Id*. *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"). *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).

[185] *See* 486 U.S. 531, 542–43 (1988).

[186] *Id*. at 542.

[187] *Id*. at 533.

[188] *Id*. at 532, 542–43.

[189] *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).

[190] *Id*. at 944. *See also, 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 (8th Cir. 2003) (concluding that government's actions "f[e]ll outside the FTCA's discretionary-function exception because [the plaintiff] alleged they were conducted in violation of [the Constitution]"); 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.

violate the Federal Constitution; its dictates are absolute and imperative.'"[191] By contrast, a minority of courts have instead concluded that the discretionary function exception shields actions "based upon [the] exercise of discretion" even if they are "constitutionally repugnant."[192] These courts base that conclusion on the fact that the text of 28 U.S.C. § 2680(a) purports to shield discretionary judgments even when a government employee abuses his discretion.[193] Still other courts have declined to take a side on this issue.[194]

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 evaluate "whether the exercise or non-exercise of the granted discretion is actually or potentially influenced by policy considerations"[195]—that is, whether the challenged action "implicate[s]

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, however, 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 ("[W]e 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).

[191] *Loumiet*, 828 F.3d at 944 (quoting Owen v. City of Indep., Mo., 445 U.S. 622, 649 (1980)). *See also, e.g.*, *Medina*, 259 F.3d at 225 ("[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))); *U.S. Fid. & Guar. Co.*, 837 F.2d at 120 ("[C]onduct cannot be discretionary if it violates the Constitution.").

[192] *See* Kiiskila v. United States, 466 F.2d 626, 627–28 (7th Cir. 1972). *See also* Linder v. McPherson, Case No. 14-cv-2714, 2015 WL 739633, at *13 (N.D. Ill. Jan. 29, 2015) ("In spite of th[e] recent trend of courts holding that it is outside of the discretion of federal employees to engage in behavior that violates the Constitution, the only Seventh Circuit case the Court has located squarely held just the opposite.").

[193] *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").

[194] *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).

[195] *E.g.*, Evans v. United States, 876 F.3d 375, 380 (1st Cir. 2017) (quoting Fothergill v. United States, 566 F.3d 248, 252 (1st Cir. 2009)).

social, economic, [or] policy judgments."[196] As the Supreme Court has recognized, the discretionary function exception "protects . . . only governmental actions and decisions based on considerations of public policy."[197] For instance, if a given decision requires a federal employee to "balance competing interests"[198]—such as weighing the benefits of a particular public safety measure against that measure's financial costs[199]—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.[200] Courts therefore "do not examine . . . 'whether policy considerations were actually contemplated in making the decision'"[201]—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."[202] Indeed, the discretionary function exception "applies 'even if the discretion has been exercised erroneously' and is deemed to have frustrated the relevant policy purpose."[203] For that reason, whether the employee committed negligence in exercising his discretion "is irrelevant to the applicability of the discretionary function exception."[204] Nor does it matter whether the allegedly tortious action was undertaken "by low-level government officials [or] by high-level policymakers."[205] 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.[206] 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.[207]

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

[197] Berkovitz *ex rel.* Berkovitz v. United States, 486 U.S. 531, 537 (1988).

[198] *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)).

[199] *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.").

[200] *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 weighed social, economic, and political policy considerations before acting." (quoting Ochran v. United States, 117 F.3d 495, 500 (11th Cir. 1997))).

[201] *E.g.*, Seaside Farm, Inc. v. United States, 842 F.3d 853, 858 (4th Cir. 2016).

[202] *Gonzalez*, 814 F.3d at 1028 (quoting GATX/Airlog Co. v. United States, 286 F.3d 1168, 1174 (9th Cir. 2002)). *See also, 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))).

[203] 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").

[204] Evans v. United States, 876 F.3d 375, 381 (1st Cir. 2017). *See also, 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).

[205] 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.").

[206] United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813 (1984).

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

If the first element of the discretionary function exception is satisfied, then courts will generally presume that the second element is satisfied as well.[208] 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."[209] Nevertheless, a plaintiff may 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.[210]

Courts assessing the applicability of the discretionary function exception utilize a "case-by-case approach."[211] 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."[212] Nevertheless, examples from the case law help illustrate which sorts of governmental actions are susceptible to policy analysis. For instance, in the *Rich* case discussed above,[213] 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.'"[214] 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.'"[215] 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.[216]

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.[217] 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,[218] as a mere decision to act carelessly or slothfully "involves no element of choice or judgment grounded in policy considerations."[219] Courts have

[208] *Gaubert*, 499 U.S. at 324.

[209] *Id*.

[210] *Id*. at 324–25.

[211] *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)).

[212] *Id*. at 151.

[213] *See supra* "Whether the Challenged Conduct Is Discretionary."

[214] 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)).

[215] *Id*. at 146 (quoting Dykstra v. U.S. Bureau of Prisons, 140 F.3d 791, 796 (8th Cir. 1998)).

[216] *Id*. *See also* 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.").

[217] Coulthurst v. United States, 214 F.3d 106, 111 (2d Cir. 2000) (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)).

[218] *Id*. at 110–11 (citing United States v. Gaubert, 499 U.S. 315, 323 (1991)).

[219] Palay v. United States, 349 F.3d 418, 432 (7th Cir. 2003).

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.[220]

The Intentional Tort Exception

Another important exception to the FTCA's waiver of sovereign immunity is known as the "intentional tort exception."[221] An "intentional tort," as the name suggests, occurs "when the defendant acted with the intent to injure the plaintiff or with substantial certainty that his action would injure the plaintiff."[222] A familiar example of an intentional tort is battery—that is, purposeful harmful or offensive physical contact with another person.[223] Subject to a significant proviso discussed below,[224] the intentional tort exception generally[225] preserves the United States's 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.[226]

As the Supreme Court has observed, however, this list "does not remove from the FTCA's waiver all intentional torts;" moreover, the list includes "certain torts . . . that may arise out of negligent"—and therefore unintentional—"conduct."[227] Thus, while the phrase "intentional tort

[220] *See* Whisnant v. United States, 400 F.3d 1177, 1179, 1183 (9th Cir. 2005).

[221] *See, e.g.*, Levin v. United States, 568 U.S. 503, 507 (2013) ("We have referred to [28 U.S.C.] § 2680(h) as the 'intentional tort exception.'" (quoting United States v. Shearer, 473 U.S. 52, 54 (1985))).

[222] Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 447 (1990). *See also* Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1587 (2012) (noting the "distinction between the intentional torts, such as battery, assault, and false imprisonment, and the non-intentional torts, such as the negligent infliction of physical or emotional harm and strict liability for defective products and abnormally dangerous activities").

[223] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 13.

[224] *See infra* "The Exception to the Intentional Tort Exception: The Law Enforcement Proviso."

[225] *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).

[226] 28 U.S.C. § 2680(h).

[227] *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,

exception" provides a suitable "shorthand description" of the exception's scope, that moniker is, according to the High Court, "not entirely accurate."[228]

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.[229] However, at least some Members of the Congress that first enacted the FTCA appeared to believe (1) that "it would be 'unjust' to make the government liable" for the intentional torts of its employees;[230] and (2) that "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."[231]

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,[232] 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."[233] 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.[234]

The Exception to the Intentional Tort Exception:[235] The Law Enforcement Proviso

Critically, however, the intentional tort exception contains a carve-out known as the "law enforcement proviso"[236] that renders the United States liable for certain intentional tort claims committed by "investigative or law enforcement officers of the United States Government."[237] Congress added this proviso "in 1974 in response to widespread publicity over abuse of powers by federal law enforcement officers."[238] Thus, although "private citizens are barred from bringing suit against federal employees for many intentional torts, they may nonetheless bring suit" against the United States for a subset of these torts "if the alleged act was committed by an 'investigative or law enforcement officer.'"[239] Only the following torts fall within the law enforcement proviso's ambit:

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conversion, invasion of privacy, and intentional infliction of emotional distress are not listed).").

[228] *Levin*, 568 U.S. at 507 n.1.

[229] Fuller, *supra* note 17, at 383–84.

[230] *Id*. at 384.

[231] *Id*.

[232] *See supra* "Introduction."

[233] Hallett v. U.S. Dep't of Navy, 850 F. Supp. 874, 878 (D. Nev. 1994).

[234] *Id*. at 877–78.

[235] *See* Fuller, *supra* note 17, at 385; Pellegrino v. TSA, 896 F.3d 207, 214 (3d Cir. 2018) (same).

[236] *See, e.g.*, Millbrook v. United States, 569 U.S. 50, 52 (2013) (using the phrase).

[237] 28 U.S.C. § 2680(h).

[238] 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).

[239] *Pellegrino*, 896 F.3d at 214 (quoting 28 U.S.C. § 2680(h)).

- assault;
- battery;
- false imprisonment;
- false arrest;
- abuse of process; and
- malicious prosecution.[240]

The list of intentional torts that potentially qualify for the law enforcement proviso therefore contains "only half" of "the torts listed in the intentional tort exception."[241] The proviso thereby only "waives immunity for the types of tort claims typically asserted against criminal law enforcement officers, while preserving immunity for other tort claims that are asserted more broadly against federal employees."[242]

To determine whether the proviso applies in any given case, the court must first assess whether the alleged tortfeasor qualifies as an "investigative or law enforcement officer[]."[243] 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."[244] Some courts have therefore concluded that the law enforcement proviso waives the United States's immunity only against claims for intentional torts committed by "criminal law enforcement officers," as contrasted with "federal employees who conduct only administrative searches" like Transportation Security Administration (TSA) screeners.[245] Thus, as a general matter, the United States remains largely immune to claims arising from intentional torts committed by federal employees who are not criminal law enforcement officers.[246]

It is important to note that the law enforcement proviso waives the United States's immunity only for acts or omissions committed "while the officer is 'acting within the scope of his office or employment.'"[247] The underlying tort need not arise while the officer is executing searches, seizing evidence, or making arrests; so long as the officer is "act[ing] within the scope of his or her employment" at the time the tort arises, "the waiver of sovereign immunity holds."[248] In other words, the waiver of sovereign immunity "effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity" at the

[240] 28 U.S.C. § 2680(h).

[241] *Pellegrino*, 896 F.3d at 218.

[242] *Id.*

[243] 28 U.S.C. § 2680(h).

[244] *Id.*

[245] *Pellegrino*, 896 F.3d at 225 (emphasis omitted).

[246] *See, e.g.*, *id.* at 229–30 ("[TSA screeners,] like meat inspectors, OSHA workers, and other personnel who are permitted to perform only administrative searches . . . do not qualify as 'investigative or law enforcement officers' under the law enforcement proviso of the FTCA. Because the proviso does not apply, Pellegrino's intentional tort claims are barred by § 2680(h)'s intentional tort exception, and the District Court correctly dismissed those claims based on the United States' sovereign immunity.").

[247] 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"). *See also supra* "Scope of Employment."

[248] Bunch v. United States, 880 F.3d 938, 941 (7th Cir. 2018) (citing *Millbrook*, 569 U.S. at 55).

time they commit the allegedly tortious act.[249] 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."[250] Assuming that the correctional officers qualified as law enforcement officers within the meaning of the FTCA[251] 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.[252]

The Foreign Country Exception

As the name suggests, the "foreign country exception"[253] to the FTCA preserves the United States' sovereign immunity against "any claim arising in a foreign country."[254] 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*."[255] The exception therefore "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.[256]

The recent case of *S.H. ex rel. Holt v. United States* illustrates how courts apply the foreign country exception in practice.[257] 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.[258] When the mother ultimately gave birth prematurely in Spain,[259] her daughter was injured during birth.[260] After the family returned to the United States, American doctors diagnosed the daughter with cerebral palsy resulting from her premature birth.[261] The court concluded that, because the daughter's "cerebral palsy resulted from the brain injury she sustained 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.[262] To support its conclusion, the court reasoned that, for the purposes of the foreign

[249] *Millbrook*, 569 U.S. at 57.

[250] *See id.* at 51.

[251] 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.

[252] *See id.* at 51–57.

[253] *See*, *e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (using the phrase "foreign country exception").

[254] 28 U.S.C. § 2680(k).

[255] *Sosa*, 542 U.S. at 712 (emphasis added).

[256] *E.g.*, Nurse v. United States, 226 F.3d 996, 1003 (9th Cir. 2000).

[257] 853 F.3d 1056, 1057-63 (9th Cir. 2017).

[258] *Id*. at 1058.

[259] *Id*.

[260] *Id*.

[261] *Id*. at 1059.

[262] *Id*. at 1063.

country exception, "an injury is suffered where the harm first 'impinge[s]' upon the body, even if it is later diagnosed elsewhere."[263]

The Military Exceptions

Finally, two exceptions—one created by Congress, one created by the Supreme Court—preserve the federal government's immunity as to certain torts arising from the United States' military activities.

The Combatant Activities Exception

The first such 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 Guard, during time of war."[264] Although the FTCA's legislative history casts little light on the purpose and intended scope of the combatant activities exception,[265] 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."[266]

The 1996 case of *Clark v. United States* illustrates how the combatant activities exception operates in practice.[267] 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.[268] 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.[269] 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.[270]

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.[271] That doctrine derives its name from the 1950 case

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[263] *Id*. at 1058 (quoting RESTATEMENT (FIRST) CONFLICT OF LAWS § 377, n.1 (1934)).

[264] 28 U.S.C. § 2680(j).

[265] *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))).

[266] *Saleh*, 580 F.3d at 7. *See also, 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.").

[267] *See* 974 F. Supp. 895 (E.D. Tex. 1996).

[268] *Id*. at 896.

[269] *Id*.

[270] *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."

[271] *See* Feres v. United States, 340 U.S. 135, 146 (1950). *See also, e.g.*, United States v. Johnson, 481 U.S. 681, 692 (1987) (reaffirming *Feres*).

Feres v. United States, in which several active duty servicemembers (or their executors) attempted to assert a variety of tort claims against the United States.[272] The executor for one of the servicemembers who died in a fire at a military facility, for instance, claimed that the United States had negligently caused the servicemember'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."[273] The second plaintiff claimed that an Army surgeon negligently left a 30-by-18-inch towel in his stomach during an abdominal operation.[274] The executor of a third servicemember alleged that army surgeons administered "negligent and unskillful medical treatment" that resulted in the servicemember's death.[275] 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."[276]

The *Feres* doctrine thus "applies broadly"[277] 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."[278] For instance, courts have frequently barred active duty servicemembers from suing the United States for medical malpractice allegedly committed by military doctors.[279]

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[272] *See Feres*, 340 U.S. at 136-37.

[273] *Id*.

[274] *Id*. at 137.

[275] *Id*.

[276] *Id*. at 146.

[277] 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)), *cert. dismissed*, 137 S. Ct. 1431 (2017). *See also, 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.").

[278] *Ortiz*, 786 F.3d at 821 (quoting *Pringle*, 208 F.3d at 1223–24). *See also, 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").

[279] *See, e.g.*, Daniel v. United States, 889 F.3d 978, 981 (9th Cir. 2018) ("[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 . . . ."), *petition for cert. docketed*, No. 18-460 (U.S. Oct. 11, 2018); 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 (and, given her age, could not be) 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 Pre-Birth*, 2016 WIS. L. REV. 263, 263 ("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 military 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).

Notably, the *Feres* doctrine is not explicitly codified in the FTCA.[280] 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."[281] 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."[282] 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."[283]

As discussed in greater detail below,[284] the *Feres* doctrine has been the subject of significant debate.[285] Nonetheless, the Supreme Court has reaffirmed[286] or expanded[287] *Feres* on several occasions despite opportunities and invitations to overturn[288] or confine[289] its holding. Most recently, on May 20, 2019, the Court denied a petition asking the court to overrule *Feres* with

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[280] *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) ("[T]he FTCA does not contain 'incident to service' language."); Maj. Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. 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, as discussed above, *see supra* "The Combatant Activities Exception," the FTCA does contain a provision preserving the government's immunity "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 . . . .").

[281] *Ortiz*, 786 F.3d at 821. *See also, 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)).

[282] United States v. Shearer, 473 U.S. 52, 58 (1985) (alteration in original) (quoting *Chappell*, 462 U.S. at 302).

[283] United States v. Johnson, 481 U.S. 681, 690 (1987) (quoting *Shearer*, 473 U.S. at 59).

[284] *See infra* "Proposals to Abrogate *or* Modify *Feres*."

[285] *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 stridently, by so many jurists, for so long [as the *Feres* doctrine].").

[286] *See Johnson*, 481 U.S. at 686, 688 ("This Court has never deviated from . . . the *Feres* bar . . . We decline to modify the doctrine at this late date."). *See also Shearer*, 473 U.S. at 57–59 (concluding that *Feres* barred plaintiff's FTCA claim).

[287] *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977) ("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 *Feres*.").

[288] *See, e.g.*, *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." (quoting *Agent Orange*, 580 F. Supp. at 1246)).

[289] *See, e.g.*, *id*. at 692 ("I can perceive no reason to accept petitioner's invitation to extend [*Feres*] as the Court does today."); *Stencel Aero*, 431 U.S. at 674 (Marshall, J., dissenting) ("I do not agree that [*Feres's*] extension to cover this case is justified.").

respect to certain types of medical malpractice claims.[290] Although the Supreme Court has stated that Congress may abrogate or modify *Feres* by amending the FTCA if it so chooses, Congress has not yet opted to do so.[291]

Other Limitations on Damages Under the FTCA

Apart from the exceptions to the United States' waiver of sovereign immunity discussed above,[292] 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,[293] the FTCA imposes several restrictions on the types and amount of damages that a litigant may recover.[294] With few exceptions,[295] plaintiffs may not recover punitive damages or prejudgment interest against the United States.[296] The FTCA likewise bars most awards of attorney's fees against the government.[297]

Furthermore, with limited exceptions, an FTCA plaintiff may not recover any damages that exceed the amount he initially requested when he submitted his claim to the applicable agency to

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[290] *See* Petition for Writ of Certiorari, Daniel v. United States, 587 U.S. ___ (No. 18-460), at i ("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, 587 U.S. ___, No. 18-460, slip op. at 1 (2019) ("The petition for a writ of certiorari is denied.").

[291] *See Johnson*, 481 U.S. at 686 (majority opinion) ("Nor has Congress changed [*Feres*] in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." (quoting Feres v. United States, 340 U.S. 135, 138 (1950))).

[292] *See supra* "Exceptions to the FTCA's Waiver of Sovereign Immunity."

[293] *E.g.*, Malmberg v. United States, 816 F.3d 185 (2d Cir. 2016) ("Damages in FTCA actions are determined by the law of the state in which the tort occurred."); Lockhart v. United States, 834 F.3d 952, 955 (8th Cir. 2016) (similar); 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 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.").

[294] *See, e.g.*, 28 U.S.C. § 2674.

[295] *But see id*. ("If, however, if 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 . . . .").

[296] *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.").

[297] *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).

satisfy the FTCA's exhaustion requirement,[298] which this report discusses below.[299] "[T]he underlying purpose of" requiring the plaintiff to specify the maximum amount of damages he seeks "is to put the government on notice of its maximum potential exposure to liability"[300] and thereby "make intelligent settlement decisions."[301] Critically, however, a plaintiff can potentially recover damages in excess of the amount he 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.[302]

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.[303]

For one, with certain exceptions,[304] 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 responsible for the plaintiff's alleged injury, and (2) that agency has "finally denied" the plaintiff's claim.[305] These administrative exhaustion requirements afford federal agencies an opportunity to settle disputes before engaging in formal litigation in the federal courts.[306] "[E]ncouraging settlement of tort claims within administrative agencies" in this manner arguably "reduce[s] court congestion and avoid[s] unnecessary litigation."[307] Because

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[298] 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, or upon allegation and proof of intervening facts, relating to the amount of the claim.").

[299] *See infra* "Procedural Requirements."

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

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

[302] 28 U.S.C. § 2675(b). *See also*, *e.g.*, *Zurba*, 318 F.3d at 738–44 (analyzing when an FTCA plaintiff may recover damages in excess than 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).

[303] *E.g.*, 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, 406 (1998) ("The FTCA's statute of limitations, § 2401(b), imposes two limitations periods on claimants.").

[304] *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").

[305] *Id*. *See also* Read, *supra* note 302, at 794–95 (outlining the process for filing an administrative claim under the FTCA).

[306] 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 also Michels*, 31 F.3d at 688 ("In 1966, to encourage more administrative settlements, Congress amended the FTCA to require administrative claims in all cases.").

[307] Colella, *supra* note 303, at 401. *See also* Read, *supra* note 302, 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

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."[308]

A claimant ordinarily has two years from the date of his injury[309] to present a written notification of his FTCA claim "to the Federal agency whose activities gave rise to the claim."[310] This written notification must "sufficiently describ[e] the injury to enable the agency to begin its own investigation."[311] Once the agency receives such notice, it may either settle the claim or deny it.[312]

With limited exceptions,[313] if the claimant fails to submit an administrative claim within the two-year time limit, then "his 'tort claim against the United States shall be forever barred.'"[314] 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.[315]

Government in its attempts to settle meritorious cases").

[308] Colella, *supra* note 303, at 401–02. *See also* Read, *supra* note 302, 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.").

[309] 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.").

[310] 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.").

[311] *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 also* 28 C.F.R. § 14.4 (specifying various types of information that a claimant "may be required to submit").

[312] Figley, *Ethical Intersections*, *supra* note 5, at 359. *See also* 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).

[313] *See, e.g.*, Tunac v. United States, 897 F.3d 1197, 1207 (9th Cir. 2018) (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).

[314] Zappone v. United States, 870 F.3d 551, 555 (6th Cir. 2017) (quoting 28 U.S.C. § 2401(b)). *See also, e.g.*, Douglas v. United States, 814 F.3d 1268, 1279 (11th Cir. 2016) (affirming dismissal of FTCA claims that plaintiff had "failed to fully exhaust").

[315] *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.

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.[316] Statistics suggest that "[t]he majority of FTCA . . . claims are resolved on the administrative level and do not go to litigation."[317] 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.[318] If no administrative settlement occurs, a claimant's right to a judicial determination "is preserved and the claimant may file suit in federal court."[319] 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[320] if he so chooses.[321] With limited exceptions,[322] if the plaintiff does not file suit before this six-month deadline, his claim against the United States will be "forever barred."[323]

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.[324] 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

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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).

[316] *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.").

[317] 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.").

[318] 28 U.S.C. § 2401(b).

[319] Axelrad, *supra* note 2, at 1344.

[320] *See* 28 U.S.C. § 1346(b)(1) (providing that specified federal district courts "shall have exclusive jurisdiction" over FTCA cases).

[321] *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."), *cert. denied*, 137 S. Ct. 2274 (June 19, 2017).

[322] *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").

[323] 28 U.S.C. § 2401(b). *See also, e.g.*, Sconiers v. United States, 896 F.3d 595, 596 (3d Cir. 2018) (affirming dismissal of FTCA case where plaintiff "failed to" file suit "within six months of [the] agency's written denial").

[324] *See* 28 U.S.C. § 2675(a). *See also* Colella, *supra* note 303, 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.").

requirement.[325] Thus, under these limited circumstances, Section 2675(a) authorizes a plaintiff to file an FTCA suit against the United States even before the agency has formally denied his administrative claim.[326]

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.[327] In recent decades, however, the Supreme Court has rejected several invitations by litigants to modify its long-standing doctrines governing the FTCA's application.[328] In doing so, the Court has expressed reluctance to revisit settled FTCA precedents in the absence of congressional action.[329] Thus, if Congress disapproves of some or all of the legal principles that currently govern FTCA cases, legislative action may be necessary to change the governing standards.[330]

Some observers have advocated a variety of modifications to the FTCA.[331] 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 does not apply;[332]

[325] *Id*.

[326] *See generally* Colella, *supra* note 303, at 406–56 (discussing the FTCA's deemed denial provision and its effects on the FTCA's statutes of limitation).

[327] *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).

[328] *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 "modif[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).

[329] *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 *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." (quoting *Feres*, 340 U.S. at 138 (1950))). *Cf.* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (noting that "*stare decisis* in respect to statutory interpretation has 'special force'" because "Congress remains free to alter" the Court's interpretation, especially where "Congress has long acquiesced in" that interpretation) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989))).

[330] *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").

[331] *See, e.g.*, Rosky, *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, *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").

[332] For instance, the 116th Congress recently 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. Pub. L. No. 116-9 § 9002(b)(2)(C) (2019) (codified at 43 U.S.C. § 1742a(b)(2)(C)).

- expanding or narrowing the FTCA's definition of "employee"[333]—which, as discussed above, is presently relatively broad, but does not include independent contractors;[334] 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, or eliminate existing exceptions.[335]

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,[336] but could concomitantly increase the total amount of money the United States must pay to tort claimants each year[337] 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."[338] Conversely, narrowing the FTCA's immunity waiver could result in a larger number of private individuals bearing the costs of government employee misfeasance,[339] but could result in a cost savings to the United States[340] and decrease the potential for judicial interference with federal operations.[341]

[333] For example, the 116th Congress recently enacted a Consolidated Appropriations Act for 2019, which provides 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].").

Other bills pending in the 116th Congress likewise propose to expand the scope of entities that qualify as federal employees for purposes of the FTCA. *See, e.g.*, No Federal Funding to Benefit Sanctuary Cities Act, H.R. 1885, 116th Cong. § 2(b) (1st Sess. 2019) (proposing to classify certain state and municipal officers, employees, and agents as "employee[s] of the Federal Government" for the purposes of the FTCA under specified conditions).

[334] *See supra* "Employees and Independent Contractors."

[335] *See, e.g.*, ACCESS Act, H.R. 1326, 116th Cong. § 604(a) (1st Sess. 2019) (providing that, for the purposes of the FTCA, "any action by an agent or employee of the United States to manage or allow the use of Federal land for purposes of target practice or marksmanship training by a member of the public shall be considered to be the exercise or performance of a discretionary function").

[336] *Cf.* Pfander & Aggarwal, *supra* note 33, at 424 (noting that Congress enacted the FTCA "to provide compensation to victims of government wrongdoing").

[337] *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.").

[338] *See* Niles, *supra* note 16, at 1300.

[339] *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").

[340] *See id*. at 1300 (noting potential "concerns . . . about the integrity and solvency of the public fisc").

[341] *See, e.g.*, United States v. Johnson, 481 U.S. 681, 690 (1987) (opining that the *Feres* doctrine limits judicial interference "in sensitive military affairs at the expense of military discipline and effectiveness" (quoting United States v. Shearer, 473 U.S. 52, 59 (1985))).

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.[342] As discussed above,[343] 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."[344] Opponents of *Feres* argue that the doctrine inappropriately bars servicemembers from obtaining recourse for their injuries.[345] Critics maintain that *Feres*'s bar on FTCA suits creates especially unjust results with respect to servicemembers who suffer injuries in military hospitals[346] and servicemembers who are victims of sexual abuse,[347] as those types of tortious actions are far removed from the core functions of the military.[348] Some Members of Congress,[349] judges,[350] and legal commentators[351] have therefore advocated eliminating or narrowing the *Feres* doctrine to allow servicemembers to pursue certain tort claims against the United States under the FTCA.

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[342] *See, e.g.*, Feres *Doctrine—A Policy in Need of Reform?: Hearing Before the H. Subcomm. on Military Personnel*, 116th Cong. (2019) [hereinafter *2019* Feres *Hearing*]; *The* Feres *Doctrine: An Examination of This Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 1–133 (2002) [hereinafter *2002* Feres *Hearing*]; *The* Feres *Doctrine and Military Medical Malpractice: Hearing Before the Subcomm. on Admin. Prac. & Proc. of the S. Comm. on the Judiciary*, 99th Cong. 9 (1986) [hereinafter *1986* Feres *Hearing*] (statement of Sen. Edward M. Kennedy) ("Over the period of the past years we have had seven hearings on the *Feres* doctrine.").

[343] *See supra* "The *Feres* Doctrine."

[344] Feres v. United States, 340 U.S. 135, 146 (1950). *See also, e.g.*, *Johnson*, 481 U.S. at 692 (reaffirming *Feres*).

[345] *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 characterize as "the patent inequity of the *Feres* doctrine"); Willke, *supra* note 279, at 282 (arguing that *Feres* "has led to unfairness between civilians and members of the military"); Brou, *supra* note 330, at 4 (maintaining that "[t]he *Feres* doctrine . . . is too broad in scope and goes beyond protecting military decision making and discipline").

[346] *See, e.g.*, Willke, *supra* note 279, at 263–64 ("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 military 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.").

[347] *See, e.g.*, Hershkoff, *supra* note 40, at 219 (maintaining that "[t]he combined effect of the exception for assault and battery with the *Feres* Doctrine creates a toxic brew for claimants . . . who allege claims of sexual abuse or rape"); Ann-Marie Woods, *A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. REV. 1329, 1331 (2014) (arguing that "[f]or countless victims of military sexual assault, the *Feres* doctrine has closed the doors of civilian courthouses").

[348] *See, e.g.*, Turley, *supra* note 331, at 57 (describing the military's medical operations as "collateral to the core functions of the military"); *id*. at 30-31 (2003) (arguing that "intentional torts like assault and battery" are "by definition unrelated to any legitimate military function").

[349] *See, e.g.*, *2002* Feres *Hearing* 1 (statement of Sen. Arlen Specter) (opining that *Feres* "has produced anomalous results which reflect neither the will of the Congress nor common sense").

[350] *See, e.g.*, Daniel v. United States, 587 U.S. ___, No. 18-460, slip op. at 1 (2019) (Thomas, J., dissenting from the denial of certiorari) (opining that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received" (quoting Lanus v. United States, 570 U.S. 932, 933 (2013) (Thomas, J., dissenting from denial of certiorari))); Ortiz v. United States *ex rel.* Evans Army Cmty. Hosp., 786 F.3d 817, 818 (10th Cir. 2015) ("In the many decades since its inception, criticism of the so-called *Feres* doctrine has become endemic."), *cert. dismissed*, 137 S. Ct. 1431 (2017); 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 stridently, by so many jurists, for so long [as the *Feres* doctrine].").

[351] *See, e.g.*, Brou, *supra* note 330, at 72 (arguing that the *Feres* doctrine "is too broad in scope"); Turley, *supra* note 331, at 4, 82 (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").

Supporters of *Feres*, by contrast, have instead urged Congress to retain the *Feres* doctrine in its current form.[352] These commentators contend "that the abolition of the *Feres* doctrine would lead to intra-military lawsuits that would have a very adverse effect on military order, discipline and effectiveness."[353] Supporters further maintain that entertaining tort suits by servicemembers against the United States would increase the government's exposure to monetary liability.[354] Some who support the *Feres* doctrine argue that even though *Feres* bars servicemembers from suing the United States under the FTCA for injuries they sustain incident to military service, *Feres* does not necessarily leave servicemembers without any remedy whatsoever; depending on the circumstances, injured servicemembers may be entitled to certain benefits under other federal statutes.[355]

Congress has periodically held hearings to assess whether to retain, abrogate, or modify the *Feres* doctrine.[356] The House Armed Services Committee's Subcommittee on Military Personnel conducted the most recent of those hearings on April 30, 2019.[357]

If Congress desires to authorize servicemembers to prosecute tort lawsuits against the United States, it has several options. 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.[358] Alternatively, instead of abrogating *Feres* entirely, Congress could allow servicemembers to sue the United States for only certain injuries arising from military service, such as injuries resulting from medical malpractice.[359] As an alternative to authorizing full-fledged litigation against the United States in

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[352] *See, e.g.*, *2002* Feres *Hearing* 3 (statement of Paul Harris, Deputy Assoc. Att'y Gen., Dep't of Justice) (maintaining that "the *Feres* doctrine continues to be a sound and necessary limit on the FTCA's waiver of sovereign immunity, essential to the accomplishment of the military's mission and to the safety of the Nation"); Paul Figley, *In Defense of* Feres: *An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 395 (2010) [hereinafter Figley, *Unfairly Maligned*] (arguing that "the Supreme Court correctly decided the *Feres* case in 1950").

[353] *1986* Feres *Hearing* 20 (statement of Robert L. Willmore, Deputy Assistant Att'y Gen.). *See also 2002* Feres *Hearing* 4 (statement of Rear Admiral Christopher E. Weaver) (contending that "allowing service members to bring suits" against the United States under the FTCA would "interfere with mission accomplishment and adversely affect [the military's] operational readiness").

[354] *1986* Feres *Hearing* 21 (statement of Robert L. Willmore, Deputy Assistant Att'y Gen.).

[355] *See* Figley, *Unfairly Maligned*, *supra* note 352, 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.

[356] *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.").

[357] *See generally 2019* Feres *Hearing*.

[358] *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).

[359] *See, e.g.*, *1986* Feres *Hearing* 11 (statement of Sen. Edward M. Kennedy) ("The bill would only allow suits for medical malpractice in peacetime, for non-combat related medical damages . . . ."); Melvani, *supra* note 358, at 434

federal court, Congress could also 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 alternative compensation scheme Congress established for persons injured by vaccines.[360]

To that end, Congress has periodically introduced bills proposing to modify the *Feres* doctrine.[361] Most recently, several Members of the 116th Congress cosponsored the Sfc. Richard Stayskal Military Medical Accountability Act of 2019 (H.R. 2422), which would authorize "member[s] of the Armed Forces of the United States" to bring claims "against the United States under [the FTCA] for damages . . . arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions" rendered at certain military medical treatment facilities under specified conditions.[362]

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. Although, as explained above, Congress enacted the FTCA in part to eliminate the need to pass private bills in order to compensate persons injured by the federal government,[363] Congress still retains some authority to pass private bills if it so desires.[364] 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.[365] 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."[366]

("If Congress is unprepared to completely abolish the *Feres* doctrine, it should at the very least rescind the doctrine for medical malpractice claims.").

[360] *See* 42 U.S.C. §§ 300aa-1-300aa6.

[361] *See generally* Melissa Feldmeier, *At War With the* Feres *Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. U. L. REV. 145, 148–49, 162–66 (2010) (surveying bills that Congress introduced between 1985 and 2009).

[362] H.R. 2422, 116th Cong. § 2(a) (1st Sess. 2019).

[363] *See supra* "Background."

[364] *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.").

[365] *See* Hershkoff, *supra* note 40, at 243 ("I suggest reinvigorating 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.").

[366] Longstreth, *supra* note 157, at 400 n.11 (listing examples).

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