Tort Claims against the Federal Government (2021)
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# Introduction

Historically, the states had sovereign immunity, which was the common law concept that no one could sue the king (government). The Constitution created two exceptions to sovereign immunity for the states and the federal government. They must honor their contracts and pay for takings. Congress limited state sovereign immunity with the Civil Rights Acts passed after the Civil War. The most used is 42 USC 1983, which allows state officers to be sued in federal court for constitutional torts. This review deals with ordinary tort claims, which are subject to sovereign immunity.

Sovereign immunity for the federal government is rooted in the Appropriations Clause: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9. The Courts held that this meant you could not execute a judgement against the government. Someone injured through a tort had to petition Congress to introduce a private bill to appropriate money to pay the claim. Congress also had to pass bills to pay for contract and takings claims. In 1855, Congress established the Court of Claims to adjudicate the constitutionally allowed claims. See: [History of the United States Court of Federal Claims](https://biotech.law.lsu.edu/blog/USCFC-Court-History-Brochure_1_0.pdf).

The Court of Federal Claims is an Article I court, which means that the judges are appointed for terms of office and are removable for good cause. This is the same structure as the Bankruptcy Courts. The decisions of the CFC are appealed to the Federal Circuit through a petition for reviewed authorized by 42 U.S. Code § 300aa–12. The CFC deals with financial claims against the federal government that arise from statutes, regulation, and taking claims.

# Federal Tort Claims Acts (FTCA)

States and the federal government are immune from tort claims unless they waive sovereign immunity through the statutes or through their state constitution. (Louisiana abolished state sovereign immunity when it revised its constitution in 1974.) These laws are usually called Tort Claims Acts and allow claims for the torts that are listed in the statute, subject to other limitations in the statute.

The FTCA was passed in 1946. The FTCA allows recovery "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Since the FTCA is passed in derogation of immunity – it provides a limited waiver of immunity - the courts strictly construe claims of government waiver of immunity in favor of the government. If a claim is not clearly authorized by the statute or if the claimant has not followed the statutory procedure, the claim will be dismissed. (The results are different in Louisiana, as discussed later.)

The Westfall Act was passed in 1988 to clarify the procedure for substituting the government as defendant in FTCA claims filed against individual government employees and officers. (This section quotes and adapts language from *Osborn v. Haley*, 549 U.S. 225 (2007)). The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. See 28 U. S. C. §2679(b)(1). When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." §2679(d)(1), (2). Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the Federal Tort Claims Act (FTCA), 60 Stat. 842. If the action commenced in state court, the case is to be removed to a federal district court, and the certification remains "conclusiv[e] ... for purposes of removal." §2679(d)(2).

In *Gutierrez de Martinez v. Lamagno*, 515 U. S. 417, 420 (1995), [the court] held that the Attorney General's Westfall Act scope-of-employment certification is subject to judicial review. Substitution of the United States is not improper simply because the Attorney General's certification rests on an understanding of the facts that differs from the plaintiff's allegations. The United States must remain the federal defendant in the action unless and until the District Court determines that the employee, in fact, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of his employment. On the jurisdictional issues, the Attorney General's certification is conclusive for purposes of removal, i.e., 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. §1447(d)'s bar on appellate review of remand orders does not displace §2679(d)(2), which shields from remand an action removed pursuant to the Attorney General's certification.

Once the government is substituted as the defendant, any damages awarded to the plaintiff would be paid by the federal government, not by the federal official. Therefore, the official will not be held accountable personally for damages awarded to the plaintiff, nor must the individual pay for the defense of the case.

# The Administrative Claims Process

The FTCA sets up an administrative compensation system with an appeal to the federal courts. The claim must give the governmental agency enough notice of its nature and basis so that it can begin its own investigation and evaluation, and it must demand payment for a "sum certain." Since the appeal to courts is to evaluate the claim as ruled on by the agency, issues that are not raised in the filing with the agency cannot raised later in the court filings. The factual basis of the claim is the most important for the agency. While the FTCA does not provide for discovery, the claimant can get records through FOIA and the Privacy Act, as well as any agency specific avenues.

The administrative claim must be filed within two years of the injury. 28 U.S.C. § 2401(b). A plaintiff’s failure to first file an administrative claim will result in the claim being dismissed from the court for lack of subject matter jurisdiction. (No exhaustion of remedies.) Because subject matter jurisdiction cannot be waived, the requirement to first file with the appropriate agency cannot be waived, *Richman v. U.S.*, 709 F.2d 122 (1st Cir. 1983); nor can jurisdiction be stipulated. *Bush v. U.S.*, 703 F.2d 491 (11th Cir. 1983).

The two-year statute of limitations governing FTCA cases applies regardless of state law. Therefore, the suit may be barred under the FTCA even if the action would have been timely under the state law. The FTCA’s two- year statute of limitations will also apply to allow a claim which would be time- barred under state law. For example, a claim was allowed against the federal government even though the claim had expired under Maryland’s one-year statute of limitations. *Maryland v. United States*, 165 F.2d 869 (4th Cir. 1947). Since the action is based on the tort law of the state where the injury occurred, the plaintiff will need to plead the state law in the complaint to the court. The plaintiff will also have to comply with any special pleading requirements imposed by state law. The most common of these is requiring an affidavit from a medical expert supporting claims of medical malpractice.

After the administrative claim is filed, the agency must deny it in writing before a suit against the United States can be filed in district court. If the agency does not act upon the claim within six months, the claim is deemed denied and the plaintiff can then file in federal district court. 28 U.S.C. § 2675(a). If the administrative claim is denied outright by the agency or denial is presumed because of agency inaction for six months, the litigant hassix months to file a tort claim in federal district court.28 U.S.C. § 2401(b). Thus, if a claimant files on the last day of the two-year period and the agency ignores the claim, the claimant cannot go to court until the end of the six months. There is nothing in the statute that sets a limit for how long you can wait to file after the 6 months. Since this is a judicial review of any agency action, and not a *de novo* tort case, there is no right to a jury trial under the FTCA. 28 U.S.C. § 2402.

# Recoverable Damages

Compensatory damages are the only remedy recoverable under the FTCA. *Fitch v. U.S.*, 513 F.2d 1013 (6th Cir. 1975). The FTCA does not allow courts to issue injunctions against the federal government. *Moon v. Takisaki*, 501 F.2d 389 (9th Cir. 1974). Punitive damages are expressly forbidden, even if they are allowed under state law. 28 U.S.C. § 2674.

Sovereign immunity bars an award of attorney fees against the federal government unless expressly authorized by statute. Since the FTCA does not expressly authorize attorney fees, they are not recoverable against the federal government under the FTCA. *Joe v. U.S.*, 772 F.2d 1535 (11th Cir. 1985). The FTCA limits the amount which may be claimed by counsel from the compensatory damages award. No attorney may receive more than 25% of any compensatory damages or settlement. 28 U.S.C. § 2678.

The FTCA itself does not place a cap on the amount of damages recoverable against the federal government. However, the government’s liability is limited in the same way that a private party would be limited under the relevant state law. Therefore, the United States is able to take advantage of any state damage caps on awards for medical malpractice. *Carter v. U.S.*, 982 F.2d 1141 (7th Cir. 1992).

# Exceptions to the FTCA

The FTCA does not waive immunity for all torts: major exceptions are carved out in [28 U.S.C. § 2680](http://biotech.law.lsu.edu/cases/immunity/ftca_exceptions.htm). These exceptions stipulate that the federal government will not be held liable for the claims against its employees arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Also not allowed are damages from a quarantine imposed by the federal government. Claims based on intentional actions that are excluded from the FTCA may be brought as *Bivens* actions, if they rise to the level of constitutional violations (constitutional torts).

Perhaps most significantly, § 2680(a) precludes recovery from the government for:

"[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."

This is the discretionary-function exception, and is discussed more fully below.

# Discretionary Function Defense

The FTCA (and most state tort claims acts) preserve immunity from tort liability for the discretionary acts of government employees. This discretionary function exception is perhaps the most notable and complex exception to FTCA liability.

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A discretionary function is an act involving an exercise of personal judgment. The basis for the discretionary function exception to the FTCA is the legislative branch's desire to prevent judicial second-guessing through tort actions of legislative and administrative decisions grounded in social, economic, and political policy. The federal government retains immunity from tort liability for itself and its employees for the performance or nonperformance of discretionary functions. This immunity is granted when the act in question requires the exercise of judgment in carrying out official duties. Discretionary immunity applies unless a plaintiff can show that a reasonable person in the official's position would have known that the action was illegal or beyond the scope of that official's legal authority. [*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)](http://biotech.law.lsu.edu/cases/immunity/harlow.htm). We will take a more in depth look at the discretionary function immunity test when we look at the FTCA cases.

There is no discretion for ministerial tasks – actions mandated by law or regulation. These acts are not discretionary in nature, but ministerial. Ministerial tasks are those that do not require an official's discretion because they either follow a predetermined plan and cannot be changed, such as following a health department checklist regulation, or they do not involve any special expertise, such as driving a car. If a law or a regulation dictates a government employee’s course of action, that employee will be subject to liability for failure to comply.

# Intentional Torts under FTCA

The FTCA does only allows limited recovery for intentional torts. It does not allow recovery for:

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. 28 U.S.C. § 2680(h).

The section allowing certain intentional torts against federal law enforcement officers was passed after the *Bivens* case in 1971 created a constitutional tort action against federal officers. The court treat it as the exclusive remedy, so that if the claim is covered by the FTCA, you cannot file it as a *Bivens* action. (Nor would you want to, the defenses are much stronger for *Bivens* actions.)

Assault and Battery

This exception to the FTCA was applied in a case where the plaintiff alleged deviant sexual conduct by an Air Force clinical social worker who was treating the plaintiff for "blackouts". The court dismissed the claim by determining that the sexual misconduct constituted assault and sovereign immunity was therefore not waived. *Doe v. U.S.*, 769 F.2d 174 (4th Cir. 1985).

In a Fifth Circuit case, a Naval recruit who alleged that she had contracted a venereal disease from consensual intercourse with an enlisted Naval petty officer sued under the FTCA, alleging fraudulent concealment of the infection by the officer and negligence on the part of the Navy. The court held that the fraudulent concealment of infection claim made the officer’s actions a battery, and therefore fell within the intentional tort exception to the FTCA's waiver of sovereign immunity. Additionally, the claims of the Navy’s negligence were not sufficiently distinct from the battery claim against the officer, and therefore were also not admissible under the FTCA.[[*Leleux v. United States*, 178 F.3d 750 (5th Cir. 1999)](http://biotech.law.lsu.edu/cases/STDs/Leleux.htm)]

In contrast, the assault and battery exception did not apply when there was no intentional wrongful act on the part of a government surgeon in cutting into the plaintiff's right knee when the left knee was supposed to be the one operated on. The court in *Lane v. United States*, 225 F. Supp. 850 (D.C. Va. 1964) concluded that § 2680(h) was inapplicable because under general tort law, assault must contain an element of intent. Furthermore, the surgeon was negligent, and this negligence should not lose its identity simply because the ultimate injury was the combined result of the negligence and the assault. The plaintiff was allowed to recover damages from the government.

Importantly, the assault or battery must have been committed by the government employee, not by a third party. For example, where an Air Force psychiatrist negligently failed to transmit to a second psychiatrist the history of a mentally ill airman who, as a result, was released and killed his wife, the court said the assault and battery exception was not applicable. The court noted that the assault and battery exception applied only to assault by government agents, not to assault by third parties which the government negligently failed to prevent. *Underwood v. U.S.*, 356 F.2d 92 (5th Cir. 1966).

Defamation

There is an express exception in the FTCA for libel and slander. Congress thus intended to retain sovereign immunity with respect to defamation allegations against federal employees. Government officials, including public health officials, often use publicity, which might include defamation, to change or influence policy. For example, if a health inspector informs the press about a restaurant’s violations, the bad publicity generated might have more impact than any other enforcement measure. The health inspector will generally not be held liable to the restaurant for damages, even if the statements are false.

# Torts Claims by Military Personnel

In a military context, the federal government still retains immunity from liability from suits by servicemen. The lead case is [*Feres v. U.S.,* 340 U.S. 135 (1950)](http://biotech.law.lsu.edu/cases/immunity/feres_v_us.htm), in which the Supreme Court held that the United States was not liable in tort for the death of a serviceman by fire in the barracks while on active duty, or for the injury or death of servicemen resulting from negligence in medical treatment by Army surgeons. This case established that the FTCA does not waive immunity for injuries to servicemen arising out of, or in the course of, activity incident to military service. Significantly, the *Feres* bar on recovery does not hinge on the military status of the tortfeasor. Rather, the *Feres* doctrine bars all suits on behalf of service members against the federal government based upon service- related injuries. *U.S. v. Johnson*, 481 U.S. 681 (1987).

The government can be liable under the FTCA when the injury does not arise out of conduct incident to military service. This “incident to service requirement” is examined on a factual, case-by-case basis and will not be reduced to a bright-line test. *U.S. v. Shearer*, 473 U.S. 52 (1985). Still, it is applied broadly by the courts to bar government tort liability. For example, the *Feres* doctrine barred an active duty serviceman's claim for an injury incurred despite that the serviceman was off duty playing basketball, some of those who treated his injury were civilians, and his alternative legal remedies may have been inadequate. *Borden v. Veterans Admin*., 41 F.3d 763 (1st Cir. 1994).

Importantly, the *Feres* doctrine only applies to active military personnel. Therefore, claims brought by civilians or civilian dependents of service members are not barred by *Feres*. *Mossow By Mossow v. U.S.*, 987 F.2d 1365 (8th Cir. 1993). Retired military personnel are also not barred from bringing an FTCA claim by *Feres.* *McGowan v. Scoggins*, 881 F.2d 615 (9th Cir. 1989). This case presented an FTCA claim brought by a retired Army officer, seeking damages for harm suffered while entering an Air Force Base. The court held that the *Feres* doctrine is inapplicable to a claim filed by someone who is not a member of the armed forces for an injury that was not incident to current military service, or who is not subject to supervision of military personnel.

Members of state National Guard units not in the active federal service are considered employees of the individual state, not of the Federal Government. Therefore, the United States is not held liable under the FTCA for the negligence of nonactivated members of the guard.*Williams v. United States*, 189 F.2d 607 (10th Cir. 1951).