# CLOSING THE COURTHOUSE DOOR TO SERVICEMEMBER SUITS

## Understanding the *Feres* Doctrine

**By Dwight D. Stirling and Dallis Warshaw**

Suppose a prospective client enters your office, a sexual assault survivor inquiring about legal representation in a tort case. Meeting with her, you hear a shocking narrative of violence, depravity, and institutional liability. As result of the discussion and follow-up research, you conclude she has a meritorious case and file a civil suit against both the individual perpetrator and the employer. When the defendants respond with motions to dismiss, you are not concerned, considering the motions more of an irritation than a real threat, the complaint alleging more than enough evidence of wrongfulness and damages to establish a factual dispute. Shockingly, however, the court grants the defendants' motions, dismissing the suit *with prejudice*. In his ruling, the judge says that while he finds dismissal to be unfair and unfortunate, throwing the case out is nevertheless mandated by Supreme Court precedent.

Such a ruling would be the outcome if your client was a servicemember in the U.S. Armed Forces at the time the sexual assault occurred. Under the so-called *Feres* doctrine, a judicial policy stemming from *Feres v. United States*, 340 U.S. 135 (1950), both the military as an institution and individual military servicemembers have absolute immunity from civil liability for harm incurred "incident to service." The military's immunity from liability exists regardless of the nature of the harm or the degree of wrongfulness. While one would expect injuries stemming from combat to be outside the reach of the courts, a rule that places *all* harm—including civilian-type harm—outside the reach of the judicial system is harder to justify. Under the *Feres* doctrine, a suit where a servicemember falls into a coma because a military dentist used too much novocaine is automatically dismissed, as are cases ranging from negligence in the context of a softball game to undisclosed drug experimentation, sexual assault, and even murder. The military establishment's across-the-board immunity from civil liability leaves men and women in uniform with less access to the courthouse for the everyday harm they suffer than those in prison (*Farmer v. Brennan*, 511 U.S. 825 (1994), holding that a prison inmate can win a civil suit for sexual assault if "deliberate indifference" is proven).

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## THE FEDERAL TORT CLAIMS ACT

The *Feres* doctrine has its roots in the Federal Tort Claims Act (FTCA), the statutory scheme that makes the federal government liable for the harm caused by its agents. While the FTCA expressly exempts war-related situations from civil liability, it gave servicemembers the right to sue for all other types of tort damages (e.g., medical malpractice, assault, barracks fires, etc.). Remarkably, it was the Supreme Court that subsequently decided to broaden the military's immunity. By placing garden-variety, day-to-day tortious conduct beyond the reach of judicial review, the Court contorted the combatant activities exception beyond recognition, engaging in an astonishing example of "judicial legislation." How and why the Court interjected itself into the delicate apportionment of rights between management and labor in the military sector—a matter Congress had carefully worked out through the political process—is as fascinating as it is controversial.

Passage of the FTCA was a dramatic defeat for the notion of sovereign immunity, a legal concept inherited from the British that took root in America's early national identity. Applied to tort liability, sovereign immunity means that the "sovereign" (i.e., the federal government) cannot be deemed liable for its agents' misconduct unless it consents (*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821)). Another way of saying this is, "you cannot sue the king." Sovereign immunity held sway in the United States for nearly 150 years, a rule that barred civil suits seeking money damages against federal officials under any legal theory, negligence or intentional misconduct. Instead of seeking redress in court, injured parties were forced to lobby members of Congress for passage of private compensation bills, a laborious procedure that took years and often failed (Alexander Holtzoff, "The Handling of Tort Claims Against the Federal Government," *Law & Contemporary Problems*, Spring 1942 (9:2) at 311, 314, 321–22).

Over time, the United States' blanket assertion of sovereign immunity became unworkable. As the size of the country's administrative apparatus grew, so did the number of people injured by government malfeasance. Legislators buckled under the burden of reviewing and approving compensation bills individually, an increasingly monumental task. The injured parties likewise grew weary of waiting for legislative remedies (Ugo Colella and Adam Bain, "Revisiting Equitable Tolling and the Federal Torts Claims Act: Putting the Legislative History in Proper Perspective," *Seton Hall Law Review*, 2000 (31:1) at 174–228.). Frustration also formed around the arrogance displayed by governmental officials, the disregard for the average person's well-being that tends to occur when civil servants are unaccountable to the public. When a series of high-profile federal accidents unfolded in the mid-1940s, including a military pilot who crashed a B-25 bomber into the Empire State Building, the outrage reached a crescendo. Facing intense pressure, Congress passed the FTCA in 1946 (28 U.S.C. §1346).

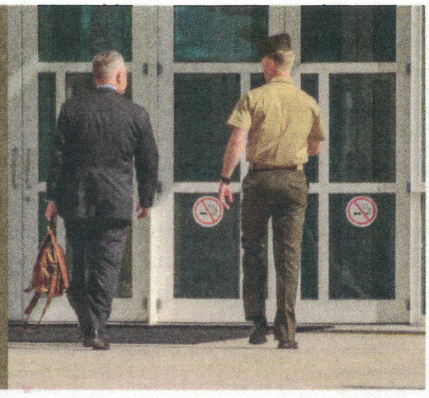
Under the FTCA, the federal government consented to be held liable for torts caused by its employees in most situations. Specifically, financial liability was extended to conduct by civil servants where private parties could be held liable for the same behavior. The FTCA did not constitute a complete waiver of sovereign immunity, however. Thirteen categories of conduct were exempted from its scope, behavior by federal employees where immunity still applied. One such category was the harm servicemembers sustained during "combatant activities . . . during time of war," that is, the harm soldiers sustained on the battlefield. Narrow in scope, the combatant activities exemption reflects a deliberate Congressional decision to place a narrow, discrete band of military activities outside the reach of civil suits.

## THE SUPREME COURT'S "JUDICIAL LEGISLATION"

It is from this backdrop that the Supreme Court considered *Feres v. United States*

in 1950. A consolidation of three lawsuits filed by servicemembers and their families, each of the suits involved situations where military officials were indisputably at fault in non-combat situations. The lead suit, for instance, involved First Lieutenant Feres, a junior Army officer killed in a barracks fire caused by a faulty heating system. Whether the Army had been negligent in the installation of the electrical wiring was not in dispute. The only issue was whether a soldier harmed by faulty wiring in a barracks had standing under the FTCA to sue; that is, whether the federal government could be held liable for this kind of malfeasance.

**The civilian judiciary has concluded that sexual assault is merely "incident to service" for those in uniform.**



Surprisingly, the Court said no. It ruled that *all* injuries sustained by servicemembers "incident to service" were nonjusticiable, unable to serve as the basis for a civil lawsuit. The relationship between the harm and combatant activities did not matter, the Court said. Nor was the nature of the harm inflicted or the degree of the military officials' wrongfulness of consequence. If the harm was sustained by a servicemember "incident to service," then the harm could not serve as the basis for a civil lawsuit. In this way, the Court placed all conduct by military personnel—combat commanders, doctors, and human resource personnel alike—beyond the reach of the court system and judicial review.

The Court's primary rationale for imposing a blanket ban on all tort injuries incurred "incident to service" was the preservation of military discipline. The Court said that judicial review would upset the delicate relationship between military leaders and subordinates, a sacrosanct relationship. Military leaders should not be worried about judges second-guessing their decisions, the Court said, as fear of civil liability would erode the quality and decisiveness of command decision making. Categorical immunity was needed owing to the "the peculiar and special relationship of the soldier to his superiors, the effects of maintenance of [civil] suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders or negligent acts committed. . ." (*United States v. Johnson*, 481 U.S. 681, 692 (1987)). Envisioning offended privates using the threat of legal action to subvert the authority of captains and sergeants, the Court overruled Congress by re-extending sovereign immunity to the entire military establishment.

The response to the Court's ruling was as polarized as it was predictable. While the military leadership was pleased, nearly every other stakeholder looked on in stunned disbelief. For generals, admirals, and other members of the leadership structure, the Court's ruling was a welcome surprise. Their exposure to civil liability for non-combat misconduct and negligence was a thing of the past, a welcome relief. No longer did doctors, managers, and others accused of falling below the standard of care need to worry about depositions, cross-examination, adverse money judgments, and the other intrusive aspects of civil litigation. Gone was the fear of being hauled into court when a service woman died after childbirth owing to the doctor's failure to properly clamp her uterus, when an 18-year-old recruit was raped by her drill instructors during boot camp, or when a deserving officer was passed over for promotion as a result of his race or religion. Under *Feres,* harm of this type was "incident to service" and therefore nonjusticiable.

For all other stakeholders, the response to the Supreme Court's decision was deeply critical. The responses fell into three categories. Legal scholars questioned the Court's constitutional authority to unilaterally expand the combatant activities exemption (Deirdre G. Brou, "Alternatives to the Judicially Promulgated *Feres* Doctrine," *Military Law Review,* Summer 2007 (192) at 1–80). Instead of adhering to the language of the FTCA, the Court improperly expanded the FTCA beyond recognition, an expansion they called "judicial legislation." Second, scholarship from the military community predicted that insulating military officials from liability would lead to more recklessness and abuse of power (Melissa Feldmeier, "At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009," *Catholic University Law Review,* Fall 2010 (60:1) at 145–182). These scholars pointed out the correlative relationship between accountability and carefulness, the positive effect being answerable to an independent body has on people's behavior. They worried that blanket immunity would mainly affect the "labor" aspect of the military sector, the rank-and-file servicemembers most susceptible to sexual violence and unscrupulous supervisors. Finally, academics noted the lack of empirical evidence for the Court's contention about military discipline (Jennifer Zyznar, "Feres Doctrine: 'Don't Let This Be It. Fight!'," *John Marshall Law Review,* Winter 2013 (46:2) at 607–630). With nothing in the judicial record corroborating this point, the Court's suggestion that civil liability would undermine discipline appeared to be based on a hunch.

## EXPANSION OF THE "INCIDENT TO SERVICE" TEST

Over the past nearly 70 years, the *Feres* doctrine has been continually expanded

beyond the combatant activities exception to exclude almost all types of lawsuits brought by servicemembers. In *United States v. Stanley*, 483 U.S. 669 (1987), an Army master sergeant volunteered to participate in a military program purportedly designed to test the effectiveness of protective clothing and equipment. During the testing, however, he was secretly administered doses of LSD, and, as a result, would "without reason, violently beat his wife and children, later being unable to recall the entire incident." Upholding the dismissal of his *Bivens* action, the Supreme Court said the surreptitious testing was "incident to service."

Similarly, courts have held that a suit cannot be supported for harm incurred during everyday civilian-type activities, such as being injured swimming in a pool (*Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966)), riding a horse (*Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975)), playing in a softball game (*Keisel v. Buckeye Donkey Ball, Inc.*, 311 F.Supp. 370 (E.D.Va. 1970)), and even sleeping in one's bed (*Gonzales v. United States Air Force*, 88 Fed. Appx. 371 (10th Cir. 2004)). Courts also have used *Feres* to bar suits for violations of Section 1983 of the Civil Rights Act (*Day v. Mass. Air Nat'l Guard*, 167 F.3d 678 (1st Cir. 1999)) and medical malpractice claims where the negligence shown was both fatal and incontrovertible (*Witt v. United States*, 2009 LEXIS 9451 (U.S. Dist. Feb. 10, 2009)).

Recently, in this era of *Feres* expansion, courts have been presented with multiple accounts of violent, systemic sexual assault and harassment in the military. Most cases follow a common narrative, typified by Kori Cioca, a veteran whose story is featured in the award-winning documentary *The Invisible War* (Chain Camera Pictures, 2012). At age 19, Cioca was a new member of the service who began receiving threatening phone calls and unwanted advances from a male superior. She reported the harassment to her supervisors, but they were his "drinking buddies" and refused to take her complaints seriously. One evening he exposed himself to her and dislocated her jaw when she resisted. Weeks later he forced her into a room and raped her. He was punished with a minor loss in pay, while she was involuntarily discharged for having an "inappropriate relationship."

In 2016, only 143 cases resulted in a conviction through the court-martial process for a sexual assault–related offense, even though the Department of Defense estimated that approximately 15,000 servicemembers were sexually assaulted (tinyurl.com/k2zsbjt). When sexual assault occurs repeatedly within a civilian organization, the employer can be held civilly liable on the basis it knew or should have known of the dangerous situation and failed to take steps to prevent its recurrence. By contrast, when sexual violence occurs in the military, those responsible are given a pass while survivors are prohibited from suing because the civilian judiciary has concluded that sexual assault is merely "incident to service" for our men and women in uniform (see, e.g., *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013); *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014)).

**Courts have used *Feres* to bar medical malpractice claims where the negligence was both fatal and incontrovertible.**

## CONCLUSION

Notwithstanding *Feres*' bar on civil liability for in-service tort injuries, there are a variety of steps attorneys can take to protect the rights of servicemembers. First, it is important to understand the precise scope of the doctrine. While *Feres* does bar suits brought by active-duty servicemembers for harm sustained during service, it does not apply to military veterans for harm incurred after service (*United States v. Brown*, 348 U.S. 110 (1954)) or to injuries incurred by servicemembers' family members (see, e.g., *Ritchie v. United States*, 733 F.3d 871 (9th Cir. 2013)). Further, former servicemembers (i.e., veterans) can seek disability compensation from the Department of Veterans Affairs (VA) for injuries incurred during military service, an administrative process with which attorneys can assist. Attorneys can also help veterans navigate the VA's bureaucratic maze to obtain the housing, education, and medical benefits to which they are entitled. Finally, attorneys can help veterans with "bad paper" (i.e., a negative characterization of service) by filing a petition for a "discharge upgrade." If successful, the improved status can unlock veterans' access to the Post-9/11 G.I. Bill and other critical benefits. ■

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