

## Servicemembers Precluded from Tort Recovery for Personal Injury or Death Incident to Service

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

10.2—Other Supreme Court Cases

11.0—Veterans' Claims

### ***Feres v. United States*, 340 U.S. 135 (1950).**

CBS News recently ran a compelling story about a Marine who died of malignant melanoma. A Navy physician noticed an unusual wart but failed to follow up in a timely manner, it was alleged. By the time the Marine received appropriate medical treatment, it was too late to save his life. Every day, or at least every week, there are successful medical malpractice cases involving this scenario: negligent failure to diagnose results in delayed treatment and death. But this dead patient was an active duty Marine, so the “*Feres Doctrine*” precludes recovery for medical malpractice. Several ROA members have asked me to explain.

---

<sup>1</sup>I invite the reader's attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

“The King can do no wrong” is the common law rule in Great Britain and the United States. This means that you cannot sue the sovereign without the sovereign’s consent. Until recent decades, the sovereign (federal and state) generally withheld such consent.

Until 1946, when Congress enacted the Federal Tort Claims Act (FTCA), it was not possible to sue the United States in tort. If your child were run over by a Post Office truck, your only way to get financial compensation from the federal government was to get your congressman to introduce a private relief bill, and the Congress was flooded with such bills. Payment of such claims was arbitrary and capricious. Your chance of being compensated depended more upon the interest and influence of your congressman than upon the merits of your case.

Congress enacted the FTCA in an attempt to get out of the private relief bill business and to provide for a fair adjudication of tort claims arising out of federal activities. The FTCA generally provides that the federal government shall be liable (with certain enumerated exceptions) for property damage, personal injury, or death caused by the negligent act of a federal employee (including a member of the armed forces) acting in the course and scope of his or her employment, if and to the same extent that a private person or corporation would be liable for the negligent act of an employee, in accordance with the law of the state where the allegedly negligent act occurred. The FTCA is a broad but not unlimited waiver of sovereign immunity; certain kinds of claims, including claims arising out of discretionary functions of the federal government and combat operations, are excluded from the waiver of sovereign immunity.

In 1950, four years after Congress enacted the FTCA, the Supreme Court faced the question of whether the FTCA permitted the imposition of tort liability on the United States for personal injury or wrongful death suffered by a member of the armed forces incident to his or her service. The Court agreed to hear three cases from three different Courts of Appeals. Two Courts of Appeals had held that the federal government was not liable for the personal injury or wrongful death of a member of the armed forces, but the third Court of Appeals held that the federal government could be held liable. One case (*Feres v. United States*) involved a barracks fire on an Army base, resulting in the death of LT Rudolph J. Feres. The other two cases were medical malpractice cases, one involving death of the patient, and the other involving serious complications short of death.

The Supreme Court held, “We conclude that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the government has been governed exclusively by federal law. We do not think that Congress, in drafting this act, created a new cause of action dependent on local law for service- connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.” *Feres*, 340 U.S. at 146.

The Court’s unanimous decision also acknowledged uncertainty in ascertaining the intent of Congress on this question: “There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute [FTCA]

was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the act, at least Congress possesses a ready remedy.” *Feres*, 340 U.S. at 138.

The “ready remedy” to which the Supreme Court referred was to amend the FTCA. If Congress wants to permit servicemembers to recover for personal injury or wrongful death incident to their service, Congress can amend the statute to permit such recovery. In the 58 years since the Supreme Court decided *Feres*, scores of bills to repeal the *Feres* Doctrine have been introduced, but no such law has been enacted. At various times, such bills have passed the House of Representatives or the Senate, but no such bill has passed both the House and Senate in the same Congress.

In the CBS News report, attorney Eugene Fidell stated that filing a *Feres*-barred medical malpractice case is a “waste of time.” Eugene Fidell is an expert in military law and is the co-author of Law Review 123 (May 2004). I certainly agree with his assessment.

### **Please join or support ROA**

This article is one of 1800-plus “Law Review” articles available at [www.roa.org/page/lawcenter](http://www.roa.org/page/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association  
1 Constitution Ave. NE  
Washington, DC 20002