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

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10.2 -- Other Supreme Court Cases

***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.

"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, i 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.