

## LAW REVIEW 16070<sup>1</sup>

July 2016

### ***Feres Doctrine Revisited***

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10.2—Other Supreme Court decisions

14.0—Tort claims involving service members and military families.

#### ***Feres v. United States, 340 U.S. 135 (1950).*<sup>3</sup>**

In its issue dated July 18, 2016, *Navy Times*<sup>4</sup> ran a cover story titled “Tragedy & Injustice” and an editorial calling for the elimination or limitation of the *Feres Doctrine*. The article included many compelling stories and photographs about tragedy and injustice brought about by death and serious complications caused by medical malpractice in medical care afforded to active duty service members at military medical treatment facilities, and by the fact that the *Feres Doctrine* precludes recovery for these deaths and complications.

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<sup>1</sup> I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

<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. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 34 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 VRRA 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 VRRA 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 at Tully Rinckey PLLC (TR), 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 (May 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> This is a 1950 decision of the United States Supreme Court. The citation means that you can find the decision in Volume 340 of *United States Reports*, starting on page 135.

<sup>4</sup> I am sure that the same article and editorial can be found in *Army Times*, *Air Force Times*, and *Marine Corps Times*.

I agree that it is unfair and anomalous that active duty service members and their surviving family members have no remedy for personal injury or wrongful death suffered as a result of medical malpractice at military treatment facilities, because of a Supreme Court decision decided one year before I was born, and I recently obtained my Medicare card. But I think that the article and editorial are somewhat misleading as to how we got here and what it will take to correct this injustice.

**The Federal Tort Claims Act waives sovereign immunity in tort, with important exceptions.**

Sovereign immunity or “the King can do no wrong” has been an important part of the common law in Great Britain and the United States for more than eight centuries. You cannot sue the sovereign (federal or state) without the sovereign’s consent. It has only been in the last century that federal and state sovereigns in our country have granted permission to sue, and there remain many exceptions to and conditions upon the waiver of sovereign immunity.

For most of our country’s history, there was no judicial remedy for a tort committed by a federal employee or service member, in the course and scope of his or her duties. If your child were injured or killed by the negligence of a Post Office driver, the only way that you could obtain compensation was by getting your United States Senator or Representative to introduce a private relief bill and hoping that the Senator or Representative had the interest and clout to push the bill through successfully. Your chance of being compensated depended more upon the interest and clout of your legislator than upon the merits of your claim. Consideration of these private relief bills distracted Senators and Representatives from urgent matters requiring congressional attention.

Congress finally provided a comprehensive remedy for torts committed by federal employees and service members on June 25, 1946, when it enacted the Federal Tort Claims Act (FTCA), as part of the Legislative Reorganization Act.<sup>5</sup> Congress set forth the general rule of liability as follows:

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,<sup>6</sup> *but shall not be liable for interest prior to judgment or for punitive damages.*<sup>7</sup>

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<sup>5</sup> 60 Stat. 812.

<sup>6</sup> The court hearing an FTCA case must look to the law of the state, district (District of Columbia), commonwealth (Puerto Rico), or territory (Guam, Virgin Islands, etc.) in determining whether and to what extent a private person would be held liable under like circumstances. 28 U.S.C. 1346(a).

<sup>7</sup> 28 U.S.C. 2674. The citation refers to title 28 of the United States Code, section 2674.

Section 2674 of title 28 makes clear that the United States is not liable for punitive damages or for prejudgment interest. Section 2680 contains 13 more express exceptions to the FTCA's waiver of sovereign immunity:

- a. Any claim arising out of the performance of a discretionary function, even if the discretion has been abused.<sup>8</sup>
- b. Any claim for the loss of letters or postal matter.<sup>9</sup>
- c. Any claim arising from the assessment of a tax or duty.<sup>10</sup>
- d. Any claim for which there is a remedy under the Suits in Admiralty Act.<sup>11</sup>
- e. Any claim arising out of the administration of the Selective Service System (draft).<sup>12</sup>
- f. Any claim arising out of the administration of a quarantine.<sup>13</sup>
- g. Any claim for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.<sup>14</sup>
- h. Any claim arising out of fiscal operations or operations of the monetary system.<sup>15</sup>
- i. Any claim arising out of the combatant activities of the military or naval forces or the Coast Guard in time of war.<sup>16</sup>
- j. Any claim arising in a foreign country.<sup>17</sup>
- k. Any claim arising out of the activities of the Tennessee Valley Authority.<sup>18</sup>
- l. Any claim arising out of the activities of the Panama Canal Company.<sup>19</sup>
- m. Any claim arising out of the activities of a Federal land bank, a Federal intermediate credit bank, or a bank of cooperatives.<sup>20</sup>

It should also be noted that FTCA lawsuits are tried to a judge alone. There is no right to a jury trial when suing the Federal Government in tort.<sup>21</sup>

### **The *Feres* case**

***Feres v. United States***

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<sup>8</sup> 28 U.S.C. 2680(a).

<sup>9</sup> 28 U.S.C. 2680(b).

<sup>10</sup> 28 U.S.C. 2680(c).

<sup>11</sup> 28 U.S.C. 2680(d).

<sup>12</sup> 28 U.S.C. 2680(e).

<sup>13</sup> 28 U.S.C. 2680(f).

<sup>14</sup> 28 U.S.C. 2680(h).

<sup>15</sup> 28 U.S.C. 2680(i).

<sup>16</sup> 28 U.S.C. 2680(j).

<sup>17</sup> 28 U.S.C. 2680(j).

<sup>18</sup> 28 U.S.C. 2680(l).

<sup>19</sup> 28 U.S.C. 2680(m).

<sup>20</sup> 28 U.S.C. 2680(n).

<sup>21</sup> 28 U.S.C. 1346(b).

Feres was an active duty Army soldier serving at Pine Camp, New York when he was killed in a barracks fire. The executrix of his estate brought suit against the Federal Government, under the FTCA, contending that the fire was caused by a defective heating system and that the Government was negligent in failing to detect and correct the defect and in failing to maintain a proper fire watch. The District Court dismissed the case before trial, holding that the FTCA did not provide for liability against the United States for incidents of this kind. The executrix appealed to the United States Court of Appeals for the 2d Circuit,<sup>22</sup> and the 2d Circuit affirmed the dismissal.

#### ***Jefferson v. United States***

Jefferson was on active duty in the Army when he had an abdominal operation at an Army hospital. Eight months later, and after he was honorably discharged, he had a second abdominal operation, this time at a civilian hospital. During the second operation, the surgeon found a 30 inch by 18 inch towel, and on the towel “Medical Department, U.S. Army” was printed.

Jefferson sued the Federal Government under the FTCA. The District Judge conducted a hearing and concluded, as a factual matter, that leaving the towel in Jefferson’s abdomen during surgery constituted negligence and that the negligence had caused medical complications for Jefferson, but the District Judge also found that, as a matter of law, the Federal Government was not liable under the FTCA under these circumstances. Jefferson appealed to the United States Court of Appeals for the 4<sup>th</sup> Circuit,<sup>23</sup> which affirmed.

#### ***Griggs v. United States***

Griggs was on active duty in the Army when he received medical treatment, and he died shortly thereafter. The executrix of his estate sued the Federal Government, alleging that the medical treatment constituted medical malpractice and that the malpractice resulted in Griggs’ death. The district court dismissed the action, holding that the FTCA did not provide for liability under these circumstances.

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<sup>22</sup> The 2d Circuit is the federal appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont.

<sup>23</sup> The 4<sup>th</sup> Circuit is the federal appellate court that sits in Richmond and hears appeals from district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

The executrix appealed to the United States Court of Appeals for the 10<sup>th</sup> Circuit.<sup>24</sup> The 10<sup>th</sup> Circuit disagreed with the 2d Circuit and the 4<sup>th</sup> Circuit. The 10<sup>th</sup> Circuit held that the FTCA does provide for liability under these circumstances and ordered that the case be returned to the district court for trial.

**The Supreme Court granted review in all three cases and consolidated them for appeal.**

Because there was a conflict among the circuits on an important legal issue, the Supreme Court granted *certiorari* (discretionary review) in each of the cases and consolidated them for consideration. In an essentially unanimous decision, 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.<sup>25</sup>

The Court's decision was written by Justice Robert H. Jackson, and seven of his colleagues joined. Justice William O. Douglas concurred in the result without writing an opinion.

In his opinion, Justice Jackson acknowledged the difficulty of the decision and uncertainty about discerning the intent of Congress on this specific question:

There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or even that it was in mind. Under these circumstances, no conclusion can be above challenge, but if misinterpret the Act, at least Congress possesses a ready remedy.<sup>26</sup>

In his opinion, Justice Jackson offered several rationales for the holding that the FTCA precludes recovery by an active duty service member or survivor or estate of an active duty service member who suffers personal injury or death as a result of medical malpractice or another tort, if the service member suffered from the tort in the scope of his or her military duties while on active duty. In my opinion, the strongest rationale is as follows:

This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole. The Tort Claims Act was not a spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust

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<sup>24</sup> The 10<sup>th</sup> Circuit is the federal appellate court that sits in Denver and hears appeals from district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

<sup>25</sup> *Feres*, 340 U.S. at 146. Thus, the Court affirmed the 2d Circuit decision in *Feres* and the 4<sup>th</sup> Circuit decision in *Jefferson* and reversed the 10<sup>th</sup> Circuit decision in *Griggs*.

<sup>26</sup> *Feres*, 340 U.S. at 138.

consequences of sovereign immunity from suit. While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown. As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or corporation but remediless solely because their perpetrator was an officer or employee of the Government. Relief was often sought and sometimes granted through private bills in Congress, the number of which steadily increased as Government activity increased. The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results led to a strong demand that claims for tort wrongs be submitted to adjudication. Congress already waived immunity and made the Government answerable for breaches of its contracts and certain other types of claims. At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.<sup>27</sup>

**In my opinion, *Feres* was wrongly decided.**

I believe that *Feres* was wrongly decided and that the Court should have applied the *expressio unius est exclusio alterius* canon of statutory construction. That is Latin for “to express one is to exclude all the others.”

As I have explained above, Congress included more than 20 express exceptions to the general rule that the Federal Government is liable if and to the same extent that a private person or corporation would be liable under like circumstances. Including these express exceptions in the text of the FTCA should have precluded the Court from finding other implied exceptions, like the *Feres* Doctrine.

In his opinion, Justice Jackson noted that 18 tort claim bills were introduced in Congress between 1925 and 1935, and all but two of them expressly denied recovery to members of the armed forces, but the statute as enacted in 1946 neither expressly permitted nor expressly

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<sup>27</sup> *Feres*, 340 U.S. at 139-40.

precluded recovery for service members.<sup>28</sup> If Congress wanted to exclude service members from recovery, it knew how to draft an explicit provision to that effect. I think that the Court erred in finding an implied exception—the *Feres* Doctrine.

**Although the Supreme Court wrongly decided *Feres* in 1950, Congress has implicitly ratified this interpretation, and it is most unlikely that the Supreme Court will overrule *Feres*.**

As Justice Jackson noted in his opinion, Congress has a “ready remedy” if it believes or comes to believe that *Feres* was wrongly decided.<sup>29</sup> Justice Jackson was referring to the fact that Congress can, at any time, amend the FTCA by adding a provision that explicitly permits service members and their survivors to recover for injury or death suffered in torts that occurred incident to their service. Congress has had 66 years to enact such an amendment, but has not done so. Many bills to that effect have been introduced, but none have been enacted. Congress has tinkered with the FTCA many times over the last 66 years, enacting amendments, but none of those amendments addressed the *Feres* Doctrine. The Supreme Court will likely conclude that Congress has ratified this doctrine, and in my opinion it is most unlikely that the Supreme Court will reconsider and overrule *Feres*.

If the *Feres* Doctrine is to be overruled with respect to medical malpractice in medical care provided to active duty service members, this will probably have to happen by action by Congress, not the Supreme Court. I am not optimistic that such congressional action will happen any time soon. The 114<sup>th</sup> Congress is almost over, and in the few remaining legislative days Congress will be focused almost exclusively on appropriations bills and other “must pass” items that must be enacted just to keep the Federal Government in operation.

Even in the 115<sup>th</sup> Congress, which starts in January 2017, it is most unlikely that Congress will cut back on the *Feres* Doctrine legislatively, because doing so would cost a lot of money. Let us discuss the fiscal “facts of life.”

The national debt, as of April 2016, is in excess of \$19 Trillion. It has increased from \$10.626 Trillion in January 2009.<sup>30</sup> Regardless of which party controls the White House and Congress next year, enacting new legislation that imposes significant costs on the Federal Treasury will be most difficult. Under the “pay go” rules that Congress has enacted, the Congressional Budget

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<sup>28</sup> *Feres*, 340 U.S. at 139.

<sup>29</sup> *Feres*, 340 U.S. at 138.

<sup>30</sup> [http://useconomy.about.com/od/usdebtanddeficit/p/National-Debt-Under-Obama.htm?utm\\_term=chart%20of%20national%20debt%20by%20year&utm\\_content=p1-main-1-title&utm\\_medium=sem&utm\\_source=msn\\_s&utm\\_campaign=adid-bb54c966-d1c7-4406-b996-18fe79311cb5-0-ab\\_msb\\_ocode-29571&ad=semD&an=msn\\_s&am=broad&q=chart%20of%20national%20debt%20by%20year&o=29571&qsrc=999&l=sem&askid=bb54c966-d1c7-4406-b996-18fe79311cb5-0-ab\\_msb](http://useconomy.about.com/od/usdebtanddeficit/p/National-Debt-Under-Obama.htm?utm_term=chart%20of%20national%20debt%20by%20year&utm_content=p1-main-1-title&utm_medium=sem&utm_source=msn_s&utm_campaign=adid-bb54c966-d1c7-4406-b996-18fe79311cb5-0-ab_msb_ocode-29571&ad=semD&an=msn_s&am=broad&q=chart%20of%20national%20debt%20by%20year&o=29571&qsrc=999&l=sem&askid=bb54c966-d1c7-4406-b996-18fe79311cb5-0-ab_msb)

Office (CBO) will estimate the cost to the Treasury of a bill that would limit the *Feres* Doctrine. *In the same bill*, there will need to be a “pay for” provision. That is, the bill would need to propose a tax increase or a cut in some other item of federal spending, equal to or greater than the cost of the *Feres* repeal, as estimated by the CBO.

**What kinds of claims does the *Feres* Doctrine preclude? And what kinds of claims does it permit?**

The *Feres* Doctrine precludes a claim for medical malpractice or other tort if the claimant suffered from the malpractice or other tort while on active duty and if the alleged tort occurred incident to the service member’s service. The *Feres* Doctrine does not preclude a claim by a military retiree or veteran alleging medical malpractice or another tort while receiving medical care at a military or Department of Veterans Affairs (VA) medical treatment facility.

The *Feres* Doctrine does not preclude a claim by a military spouse or dependent (child) *for his or her own injuries or wrongful death*. A claim for loss of consortium or loss of future financial support because of the death or injury suffered by the active duty service member is precluded by the doctrine.

Reporter Patricia Kime correctly reported in the *Navy Times* article dated July 16, 2016 that there is an ambiguity as to the application of the *Feres* Doctrine in a scenario that is increasingly common as women come to account for an increasing percentage of the active duty force.

Let us say that Mary Smith is an active duty soldier and is pregnant. She receives medical treatment at a military medical treatment facility while on active duty. As a result of medical malpractice in the treatment of Mary, Joe is born alive but with significant birth defects, like brain damage caused by deprivation of oxygen to the fetus during childbirth. Is Joe’s medical malpractice claim barred by the *Feres* Doctrine? There is no clear answer to that question, and there is a conflict among court decisions that have addressed it.

I think that it is likely that in the not-too-distant future the Supreme Court will grant *certiorari* in a case of that nature. When that happens, it is likely that the Court will hold that *Feres* does not bar a claim of this nature. This is a wrinkle on *Feres* that the Court did not anticipate in 1950. But I think that it is most unlikely that the Court will overrule the application of *Feres* to cases like *Jefferson* and *Griggs*.

**Will repealing or overruling the *Feres* Doctrine, as applied to medical malpractice claims make military medical providers individually accountable in medical malpractice lawsuits? No.**

In her *Navy Times* article of July 16, 2016, reporter Patricia Kime implied that repealing or overruling *Feres* as applied to medical malpractice claims would make military medical providers individually accountable for malpractice. I beg to differ.

As I will explain in detail in Law Review 16071, the very next article in this “Law Review” series, the FTCA is the *exclusive remedy* for an alleged tort committed by a service member or federal civilian employee in the course and scope of his or her duty or employment. A lawsuit against the individual service member or federal employee is absolutely precluded in this circumstance.<sup>31</sup> This individual immunity applies to medical malpractice claims, and to vehicle accident claims, and to all other kinds of tort claims.

With regard to medical malpractice, this individual immunity is absolutely essential. Without such immunity, the services would not be able to recruit and retain military medical professionals. In high-risk specialties like obstetrics-gynecology, the annual medical malpractice premium greatly exceeds the annual salary of the military physician in grade O-5 or O-6, even if the medical “proficiency pay” is included.<sup>32</sup>

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<sup>31</sup> 28 U.S.C. 2679.

<sup>32</sup> Please see Law Review 147 (November 2004), by Colonel John S. Odom, Jr., USAFR (now retired) and myself.