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Has Congress Repealed the *Feres* Doctrine?

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
About Sam Wright

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14.0—Tort claims involving service members and military families.

Q: I am a retired Army Reserve Colonel and a life member of the Reserve Organization of America.[3] For many years, I have read with interest your "Law Review" articles about

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1700 of the articles.

[2] 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 (VRRA—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 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, 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.

[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost

military-legal topics. I am particularly interested in Law Review 16070 (July 2016), about the "*Feres Doctrine.*"

Last year, my 23-year-old son enlisted in the Army. While at Officer Candidate School (OCS), my son was seriously injured in a training accident. He was taken to an Army hospital, but his treatment was delayed because there was not a qualified physician at the hospital at the time. When treatment was begun, the treating physician made several judgment errors, and a treating nurse gave my son the wrong medicine by injection.

I hired a civilian physician to review my son's medical records. She told me that treating physicians and nurses made a series of errors that amount to medical malpractice, and that but for the malpractice my son most likely would have survived his injuries. My son's death left a wife with no husband and a young child with no father.

I contacted several lawyers to sue the Army for malpractice. Each lawyer told me that because of a Supreme Court case decided in 1950 such a lawsuit would be summarily dismissed without consideration of the merits, just as you wrote in Law Review 16070. Therefore, my son's widow and I did not pursue legal action against the Army for the death of my son.

I have heard that just recently Congress repealed the *Feres* Doctrine. Is that true?

A: It is not correct to say that Congress repealed the *Feres* Doctrine, but Congress did make some inroads against this doctrine.

On 12/20/2019, President Trump signed into law the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020.[4] Each year, Congress passes an NDAA, authorizing the activities of the Department of Defense (DOD) and the services and the national defense activities of the Department of Energy.[5] Each year, Congress uses the NDAA to amend provisions of many titles of the United States Code.

Section 731 of the NDAA for FY 2020 amended title 10 of the United States Code by adding a new section 2733a. You can find the entire text of this new section at the end of this article.

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equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

[4] Fiscal Year 2020 began on 10/1/2019, and it will end on 9/30/2020.

[5] The Department of Energy is responsible for nuclear weapons and nuclear power for Navy submarines and aircraft carriers.

In 1946, Congress enacted the Federal Tort Claims Act (FTCA). With certain enumerated exceptions, and with explicit conditions, the FTCA waived the sovereign immunity of the Federal Government with respect to claims of wrongful death, personal injury, and property damage caused by the negligent act or omission of a Federal employee (including a member of the armed forces). Under the FTCA, the Federal Government is liable if and to the extent that a private person or corporation could be held liable, under the law of the state where the alleged tort occurred.

As enacted in 1946, the FTCA did not contain a provision expressly authorizing suits against the Federal Government for wrongful death or personal injury suffered by service members incident to their service, but neither did the FTCA contain a provision expressly precluding such lawsuits. In the next four years, there were three Court of Appeals (one step below the Supreme Court) decisions on this issue. Two Courts of Appeals held that there was no cause of action under the FTCA for wrongful death or personal injury of a service member incident to his or her service, while the other Court of Appeals held that the FTCA did provide for such a cause of action. Because of this conflict among the circuits, the Supreme Court granted certiorari (discretionary review) to establish a single nationwide rule on this important topic.

The Supreme Court consolidated the three Court of Appeals cases for one Supreme Court review. Two of the cases involved alleged medical malpractice, while the other case involved a barracks fire that resulted in the death of Lieutenant Feres.

In *Feres v. United States,*[6] the Supreme Court held that the FTCA did not waive sovereign immunity for a claim involving wrongful death or personal injury or wrongful death of an active duty service member, incident to his or her service. A claim is considered to be incident to service if the service member's injury or death occurred while performing military duty or if the service member was receiving a benefit (like medical care) to which he or she was entitled because of his or her service. The *Feres* Doctrine precludes suits against the Federal Government for medical malpractice involving active duty service members, and it precludes other kinds of claims as well. The concept of "incident to service" is broad.

In *Feres,* the Supreme Court expressed doubt about its conclusion, because neither the text of the FTCA nor the legislative history offered any helpful guidance as to the intent of Congress on this question. The Court indicated that Congress had a "ready remedy" if it disagreed with the Court's conclusion. In the intervening period of almost 70 years, Congress has amended the FTCA several times, but until now it has not tinkered with the *Feres* Doctrine.

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[6] 340 U.S. 135 (1950). The citation means that you can find this decision in Volume 340 of *United States Reports,* starting on page 135. Please see Law Review 16070 for a detailed discussion of the *Feres* case.

The new section 2733a of title 10 (quoted in its entirety at the end of this article) permits a person like you or your son's widow to file an administrative claim with the Service Secretary concerned.[7] If the Service Secretary finds the claim to have merit, he or she can authorize payment in an amount that the Secretary deems appropriate. The new section does not authorize a suit against the Federal Government in federal court. If the Service Secretary denies the claim or approves it in an amount that the claimant considers insufficient, there is no judicial review of the Service Secretary's decision.

Q: What is the effective date of this new provision? Does it apply to my son's death in 2019?

A: The effective date of the new provision is 1/1/2020. The final subsection of the new section 2733a is as follows: "Any claim filed in calendar year 2020 shall be deemed to be filed within the time period specified in section 2733a(b)(4) of such title, as so added, if it is filed within three years after it accrues." Thus, you and your son's widow need to file your claim not later than 12/31/2020.

Q: I think that the individual Army physicians and nurses whose malpractice caused my son's death should have to pay substantial damages out of their own pocket. We call this "accountability." Is there any way to impose personal financial liability on individual physicians and nurses?

A: No. The pertinent provision of the FTCA is as follows:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.[8]

The clear purpose and effect of this provision is to make individual federal employees, including service members, immune from being sued in federal or state court for alleged malpractice or any other tort arising out of their actions in the scope of their federal employment. This provision most often is applied to vehicle accident claims, but it is not limited to vehicle accidents and alleged medical malpractice. There is simply no way for you to get money

[7] The Secretary of the Army would be the Secretary concerned for your claim involving the death of your son.
[8] 28 U.S.C. 2679(b)(1).

damages against an individual service member or federal employee for your son's death. Of course, if an individual military physician or nurse is found to have committed malpractice that resulted in death or serious medical complications, that will not be career-enhancing for the individual officer.

In 1977-80 and again in 1982, I served on active duty, as a junior officer and judge advocate, in the Claims Division of the Office of the Judge Advocate General of the Navy. I recall, during my 1982 assignment, a serious medical malpractice claim involving injuries to the mother and the baby during childbirth at a U.S. Navy hospital in Italy.

The FTCA does not apply outside the United States. The Military Claims Act (MCA) provides that the Service Secretary may approve a payment to a claimant for certain kinds of tort claims arising out of United States military operations outside our country, but the MCA does not permit a suit against the United States in court.

One of my colleagues in the Claims Division, Office of the Judge Advocate General of the Navy, reviewed the case and found that there were egregious errors that caused serious complications for both the mother and the child, and she (my colleague) recommended a substantial payment. Because of the amount of the proposed payment, it was necessary for the Secretary of the Navy personally to review and sign off on the payment. At the time, the Secretary of the Navy was John F. Lehman.

Secretary Lehman reviewed the report and agreed to the substantial payment. It just so happened that Secretary Lehman also had on his desk, at the same time, the selection board report for promotions to
O-7 (then called Commodore) in the Navy Medical Corps. The Commanding Officer of the specific Navy hospital (an O-6) was on the list for promotion to O-7. Secretary Lehman struck the name of that Commanding Officer and approved the list as so amended. Yes, there was accountability.

Please join or support ROA

This article is one of 1900-plus "Law Review" articles available at www.roa.org/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 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

Here (below) is the entire text of the new section 2733a of title 10 of the United States Code:

'§ 2733a. Medical malpractice claims by members of the uniformed services
''(a) IN GENERAL.—Consistent with this section and under such regulations as the Secretary of Defense shall prescribe under subsection (f), **the Secretary may allow, settle, and pay a claim against the United States for personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider.**
''(b) REQUIREMENT FOR CLAIMS.—A claim may be allowed, settled, and paid under subsection (a) only if—
''(1) the claim is filed by the member of the uniformed services who is the subject of the medical malpractice claimed, or by an authorized representative on behalf of such member who is deceased or otherwise unable to file the claim due to incapacitation;

‘‘(2) the claim is for personal injury or death caused by the negligent or wrongful act or omission of a Department of Defense health care provider in the performance of medical, dental, or related health care functions while such provider was acting within the scope of employment;
‘‘(3) the act or omission constituting medical malpractice occurred in a covered military medical treatment facility;
‘‘(4) the claim is presented to the Department in writing within two years after the claim accrues;
‘‘(5) the claim is not allowed to be settled and paid under any other provision of law; and
‘‘(6) the claim is substantiated as prescribed in regulations prescribed by the Secretary of Defense under subsection (f).
‘‘(c) LIABILITY.—(1) The Department of Defense is liable for only the portion of compensable injury, loss, or damages attributable to the medical malpractice of a Department of Defense health care provider.
‘‘(2) The Department of Defense shall not be liable for the attorney fees of a claimant under this section.
‘‘(d) PAYMENT OF CLAIMS.—
(1) If the Secretary of Defense determines, pursuant to regulations prescribed by the Secretary under subsection (f), that a claim under this section in excess of $100,000 is meritorious, and the claim is otherwise payable under this section, the Secretary may pay the claimant $100,000 and report any meritorious amount in excess of $100,000 to the Secretary of the Treasury for payment under section 1304 of title 31.
‘‘(2) Except as provided in paragraph (1), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.
‘‘(e) REPORTING MEDICAL MALPRACTICE.—
Not later than 30 days after a determination of medical malpractice or the payment of all or part of a claim under this section, the Secretary of Defense shall submit to the Director of the Defense Health Agency a report documenting such determination or payment to be used by the Director for all necessary and appropriate purposes, including medical quality assurance.
‘‘(f) REGULATIONS.—
(1) The Secretary of Defense shall prescribe regulations to implement this section.
‘‘(2) Regulations prescribed by the Secretary under paragraph (1) shall include the following:
‘‘(A) Policies and procedures to ensure the timely, efficient, and effective processing and administration of claims under this section, including—
‘‘(i) the filing, receipt, investigation, and evaluation of a claim;
‘‘(ii) the negotiation, settlement, and payment of a claim;
‘‘(iii) such other matters relating to the processing and administration of a claim, including an administrative appeals process, as the Secretary considers appropriate.
‘‘(B) Uniform standards consistent with generally accepted standards used in a majority of States in adjudicating claims under chapter 171 of title 28 (commonly known as the ‘Federal Tort Claims Act’) to be applied to the evaluation, settlement, and payment of claims under this

section without regard to the place of occurrence of the medical malpractice giving rise to the claim or the military department or service of the member of the uniformed services, and without regard to foreign law in the case of claims arising in foreign countries, including uniform standards to be applied to determinations with respect to—
‘‘(i) whether an act or omission by a Department of Defense health care provider in the context of performing medical, dental, or related health care functions was negligent or wrongful, considering the specific facts and circumstances;
‘‘(ii) whether the personal injury or death of the member was caused by a negligent or wrongful act or omission of a Department of Defense health care provider in the context of performing medical, dental, or related health care functions, considering the specific facts and circumstances;
‘‘(iii) requirements relating to proof of duty, breach of duty, and causation resulting in compensable injury or loss, subject to such exclusions as may be established by the Secretary of Defense; and
‘‘(iv) calculation of damages.
‘‘(C) Such other matters as the Secretary considers appropriate.
‘‘(3) In order to implement expeditiously the provisions of this section, the Secretary may prescribe the regulations under this subsection—
‘‘(A) by prescribing an interim final rule; and
‘‘(B) not later than one year after prescribing such interim final rule and considering public comments with respect to such interim final rule, by prescribing a final rule.
‘‘(g) LIMITATION ON ATTORNEY FEES.—(1) No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 20 percent of any claim paid pursuant to this section.
‘‘(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with a claim under this section any amount in excess of the amount allowed under paragraph
(1), if recovery be had, shall be fined not more than $2,000, imprisoned not more than one year, or both.
‘‘(h) ANNUAL REPORT.—Not less frequently than annually until 2025, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report—
‘‘(1) indicating the number of claims processed under this section;
‘‘(2) indicating the resolution of each such claim; and
‘‘(3) describing any other information that may enhance the effectiveness of the claims process under this section.
‘‘(i) DEFINITIONS.—In this section:
‘‘(1) COVERED MILITARY MEDICAL TREATMENT FACILITY.—
The term ‘covered military medical treatment facility’ means a facility described in subsection (b), (c), or (d) of section 1073d of this title.
‘‘(2) DEPARTMENT OF DEFENSE HEALTH CARE PROVIDER.—
The term ‘Department of Defense health care provider’ means a member of the uniformed

services, civilian employee of the Department of Defense, or personal services contractor of the Department (under section 1091 of this title) authorized by the Department to provide health care services and acting within the scope of employment of such individual.
''(3) MEMBER OF THE UNIFORMED SERVICES.—
The term 'member of the uniformed services' includes a member of a reserve component of the armed forces if the claim by the member under this section is in connection with personal injury or death that occurred while the member was in Federal status.''.
(2) CLERICAL AMENDMENT.—
The table of sections at the beginning of chapter 163 of such title is amended by inserting after the item relating to section 2733 the following new item: later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall provide to the Committees on Armed Services of the Senate and the House of Representatives a briefing on the development of regulations under section 2733a(f) of title 10, United States Code, as added by subsection (a)(1).
(c) CONFORMING AMENDMENTS.—
(1) Section 2735 of such title is amended by striking ''2733,'' and inserting ''2733, 2733a,''.
(2) Section 1304(a)(3)(D) of title 31, United States Code, is amended by striking ''2733,'' and inserting ''2733, 2733a,''.
(d) EFFECTIVE DATE AND TRANSITION PROVISION.—
(1) EFFECTIVE DATE.—
The amendments made by this section shall apply to any claim filed under section 2733a of such title, as added by subsection (a)(1), on or after January 1, 2020.
(2) TRANSITION.—*Any claim filed in calendar year 2020 shall be deemed to be filed within the time period specified in section 2733a(b)(4) of such title, as so added, if it is filed within three years after it accrues.*

Emphasis supplied.