



TORT TRIAL AND INSURANCE PRACTICE

Committee News

Winter 2003

Governmental Liability Committee

DEBATING THE *FERES* DOCTRINE

On October 8, 2002, the Committee on the Judiciary of the U.S. Senate convened a hearing entitled "The *Feres* Doctrine; an Examination of this Military Exception to the Federal Tort Claims Act."

The *Feres* doctrine stems from the U.S. Supreme Court case *Feres v. United States*, 340 U.S. 135 (1950), in which the Court held that active-duty military personnel and their estates could not recover damages under the FTCA for injuries that "arise out of or are in the course of activity incident to service." The *Feres* doctrine has been controversial since its inception. The military services maintain that the doctrine is necessary to prevent military members from using the tort system to undermine good order and discipline. Veterans' groups claim that it imposes an unfair legal disability on military members and veterans by depriving them of the right to obtain appropriate relief for injuries suffered as a result of government negligence. Critics have proposed

legislation to abolish the doctrine entirely or to allow military members to recover damages for medical malpractice.

Seven distinguished speakers addressed the Committee, including former Judge Advocates General of the military services and civilian attorneys experienced at representing military members and veterans.

In his opening remarks, Judiciary Committee Chair Patrick Leahy stated that "the burden should be on the Executive Branch to show why the *Feres* Doctrine should not be amended or abolished." Excerpts from the hearings follow. The full text of the hearings can be found at <http://www.senate.gov/judiciary/hearing.cfm?id=493>.

Excerpts from the testimony of The Honorable Paul Harris, Deputy Assistant Attorney General:

The holding of *Feres* has been broadly and persuasively applied

"The burden should be on the Executive Branch to show why the *Feres* Doctrine should not be amended or abolished."

by the courts and has now stood for 52 years without either legislative or judicial alteration.

The first of the three reasons or policy factors underlying the *Feres* doctrine is the availability of a viable alternative to damage suits in the form of a comprehensive statutory compensatory scheme. In *Feres*, the Supreme Court stressed

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... bringing together plaintiffs' attorneys, defense attorneys and insurance and corporate counsel for the exchange of information and ideas.

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MESSAGE FROM THE CHAIR



Welcome to the first edition of the Governmental Liability Committee Newsletter. I fervently hope that this

Newsletter becomes a valuable conduit of information among legal professionals in the area of government torts.

The Governmental Liability Committee underwent a series of leadership adjustments during the 2001-2002 bar year. With the resignation of our Chair, Robin Sembenini, I, then the Chair-Elect, assumed her duties for the 2001-2002 bar year. I am currently serving my term as Chair for the 2002-2003 bar year. Next year, your Chair will be Major Eugene H. Robinson, Jr., USMC. Eugene is a judge advocate stationed at Camp Pendleton, CA. I welcome his service to our Committee, and I'm sure he will successfully meet our many challenges during the 2003-2004 bar year. Speaking of challenges, we are still growing as a Committee. We need your help in recruiting new members.

We obtained approval from TIPS leadership for the appointment of the Committee's new Newsletter Editor, Kenneth Bullock, and the Web Coordinator, Michael Taber. Additionally, we recruited 13 new TIPS members as Vice-Chairs of the Governmental Liability Committee.

The new Governmental Liability members are predominantly young judge advocates. All are excited about working with TIPS, and I hope they will

provide leadership to the Governmental Liability Committee and to other TIPS entities.

We rewrote and sent to the Scope and Correlation Committee for approval of a new Governmental Liability scope statement, which is as follows:

Governmental Liability

Concentrates on tort liability issues facing governmental institutions in state, federal, municipal, military, and foreign settings. The focus is delineated between plaintiff and defense governmental tort liability matters that may affect government and civil practice (the emphasis being government practice), with a special focus on governmental liability preventive law. Issues stemming from environmental law to employee equal opportunity law, to even the Federal Torts Claims Act, are of topic to this Committee.

The philosophy here is inclusion across a wide array of government issues affecting the practice of law. This scope statement expands Governmental Liability's horizon to tackle particular issues that were previously not addressed in our specific forum.

Regarding membership: A huge debt of gratitude is owed to Alex Gonzales for assisting in granting one-year free TIPS memberships to certain Governmental Liability Committee members. Through the ABA's hardship dues practice and a one-year free TIPS membership, we have been able to easily recruit new leadership for TIPS. The

idea here was to give certain government attorneys an opportunity to shine and help move TIPS and the ABA. We're optimistic that many of the new Vice-Chair appointees will provide Governmental Liability critical leadership and management and will remain after their initial one-year "honeymoon" with TIPS.

Regarding our CLE: We are exploring the idea of conducting regional CLE events. For example, ground plans were developed by, Vice-Chair, Patrick Jackson for a regional CLE in Shreveport, Louisiana, focusing on elected government officials (see below). Patrick gave our Committee a head start on this CLE by conceiving the program focus, arranging the site, and working on accommodations. Patrick Jackson is the City Attorney for Bossier City, LA. Here is his summary of the CLE focus:

"Recently, I represented a government official in her individual capacity from a vote she made when her City Attorney advised her she was acting within her discretion as an elected member. The entire body was sued officially and individually. The plaintiff was well funded, and the litigation extended over a period of three years. It was in federal court and involved Section 1983 first amendment issues. However, the biggest issue is that no one appears to look at individual exposure as it relates to official actions. Typically, governing bodies have general counsel to advise the body on liability issues for the entity itself. Rarely, how-

ever, does anyone say that if you vote this way or act in a certain regard, your own pockets are at stake. Examples - voting not to allow a sexually oriented business; operating or overseeing a prison or jail; terminating employees; arrests made by police officers; mismanagement of funds where federal grants are concerned and the elected or appointed official has oversight responsibility; etc. There is very little representation for public officials, elected or appointed, in this area until the action has occurred and the suit is filed. There are a number of excellent lawyers in this area. On the defense side, Ken Mascagni is an excellent choice, among many others. As to the plaintiff, Henry Walker could serve on both panels, and there are others that can be obtained if there is an interest in pursuing the issue."

Meetings: We conducted seven business meetings during the 2001-2002 bar year. At the Annual Meeting, we conducted a meeting; however, the turn-out was disappointing, probably because we were blocked for a Sunday morning. This will not happen again. Since the Chair and the Web Coordinator work in the same office, our ability to meet has been enhanced. In our meetings we have emphasized the newsletter, web coordination, CLE, and most importantly, membership. We contacted every Governmental Liability member by e-mail and provided Committee information for planning. This was accomplished through a *listserv* provided by the ABA. Eric Kapocius developed a *listserv* for Committee members and a *listserv* for the leadership. This medium has proven successful. As an example, Patrick Jackson responded to my e-mail and volunteered to serve as Vice-Chair and volunteered to lead the Governmental Liability's CLE program in Shreveport, LA. A tremen-

dous "thank you" goes to Erik Kapocius for his stalwart support to our Committee.

Future:

Membership: The goal is to have 350 members by the August 2003 Annual meeting. We hope all of the new members will prove their mettle and help move Governmental Liability into the future. We are confident that they will remain active with TIPS in the several years to follow.

Newsletter: The plan is to ensure that we publish our Newsletter three times a year.

CLE: We plan to have at least one regional CLE event per year.

I extend my heartfelt thanks to each of you for participating, and I look forward to hearing from you as we continue the 2002-2003 bar year. ⚖️

James M. Durant III
Chair

THE EDITOR

Thanks for taking the time to read the first edition of our newsletter. I plan to publish the Newsletter three times a year, but the key to keeping up that publication schedule is **receiving articles!** I need all Committee members to contribute. Contributions do not have to be long or studded with impressive footnotes. Book reviews, case notes, and brief informational articles are all valuable to our members, and we also welcome letters to the Editor commenting on previous features or matters of general interest to the Committee.

Send all contributions to me at kbullock@mindspring.com by May 1, 2003, for inclusion in the next edition. ⚖️

Kenneth Bullock

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NEW FEDERAL GOVERNMENT RENTAL CAR AGREEMENT

Effective October 1, 2002, a new Agreement took effect between the U.S. Government and rental car companies to set the terms for car rentals by federal employees on official business. The Agreement is titled "U.S. Government Car Rental Agreement Number 3." The full text of the agreement is at <http://mtmc.army.mil/content/6603/car3.pdf>.

The Agreement covers cars and minivans, but not sport-utility vehicles. Parties to the Agreement include rental car companies operating throughout the United States and overseas. The major new features of the Agreement include the following:

- A requirement that rental car companies provide full comprehensive and collision coverage with liability limits

of \$100,000 per person and \$300,000 per incident for the benefit of the traveler and the U.S. Government. The coverage may exclude intentional damage and damage resulting from abuses such as intoxicated driving, racing and unauthorized off-road driving;

- Claims by rental car companies against drivers for damages must first be submitted to the driver's agency, which will determine whether the damage occurred in the scope of employment. If not, the rental company can proceed directly against the driver;

- The rental company may charge a \$5.00 per day administrative fee; and

- Authorized drivers of rental vehicles include all properly-licensed employees in the scope of federal employment, even if not listed on the rental agreement.

Federal agencies that authorize employees to rent vehicles while on official travel should use the Agreement whenever possible. Ensure that the rental agreement signed by the official traveler makes reference to U.S. Government Car Rental Agreement Number 3. If federal employees rent vehicles outside the Agreement and damages occur to the rental vehicles or third parties in the scope of employment, the agency may be directly liable to the rental car company and any tort victims for the full amount of damages.



Save the Date!

The Women and Minority Involvement Committee of the Tort Trial and Insurance Practice Section, co-sponsoring with the TIPS' Law Student Division and the Task Force on Plaintiffs Involvement, proudly presents a phenomenal CLE program entitled, "Equal Access to Justice: Time to End Lip Service to Diversity" and will feature incoming ABA President Dennis Archer as a keynote speaker. Mr. Archer's inspiring and motivational message will prelude presentations by a panel of nationally recognized members of the legal profession. A reception will follow immediately.

Don't miss this exciting event during the ABA's Annual Meeting!

August 9, 2003, 2:00-5:00 p.m.; CLE Center, San Francisco, California.



GET PUBLISHED

(An Added TIPS Member Benefit)

TIPS' Newsletter Editors are looking for articles, case notes, etc., to publish in their General Committees' newsletter and on the Section's website. Below is a list of the 37 Committees and their Editors. Pick a Committee within your area of interest, contact the Editor via e-mail with your article, and GET PUBLISHED.

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FERES. . .

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that the Federal Tort Claims Act “should be construed to fit . . . into the entire statutory system of remedies against the government [and thereby create] a workable, consistent and equitable whole,” 340 U.S. at 139, and that it was thus highly relevant that Congress had already provided, “systems of simple, certain, and uniform compensation for the injuries or death of those in the Armed Services.” 340 U.S. at 144.

The present statutory compensation scheme has three discrete components. First, members of the uniformed services serving on active duty receive free medical care when injured or ill. They also receive unlimited sick leave with full pay and allowances until well or released from active duty. Survivors of service members are entitled to death gratuity benefits, as well as subsidized life insurance.

Second, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. Moreover, should a service member leave the service without seeking disability retirement, he or she may later request it.

Third, the Veterans Benefits Act provides yet another system of medical care, disability and death benefits for the service-disabled veteran and his or her family. (A veteran eligible for both veterans disability benefits and military disability retirement benefits must choose which he or she will receive.)

The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way.

The second consideration that has led to the broad application of the *Feres* doctrine by the courts through the years can be understood as an aspect of the traditional reluctance of American courts to intervene in military affairs, and the reluctance of the Congress to force such intervention.

The third policy consideration, the federal nature of the relationship and the absence of analogous private liability, led the Supreme Court in *Feres* to conclude that a service member’s suit failed to state a claim under the Federal Tort Claims Act language, which provides, “The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances” On this point, the Supreme Court, in *Feres* stated:

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.

340 U.S. at 146.

While it sometimes is argued that the *Feres* doctrine is unfair to service members who are the victims of medical malpractice, as we have seen, the *Feres* doctrine is an adjunct to a military disability compensation package available to service members which, on the whole, is far more generous, even-handed, and fair than compensation

available to private citizens under analogous state workers’ compensation schemes. This is because service members, unlike their civilian counterparts who suffer serious adverse consequences from medical care, generally are eligible for compensation whether or not those consequences are, or can be proven to be, the result of substandard medical care. While, in certain cases, the compensation may be somewhat less than what might be available to a successful plaintiff who endures a medical malpractice lawsuit (just as workers’ compensation systems generally provide lower benefits for work-related injuries than what may be available through tort litigation), the fact is that all of these service members are eligible for such compensation rather than only a small handful who can show a causal link between their condition and substandard medical care. The arbitrariness and uncertainty associated with tort litigation is eliminated. Accordingly, from the perspective of all service members who suffer adverse consequences from medical care, the existing system of compensation is in many ways superior to what they would receive if they were private citizens.

It is the view of the Department of Justice that the *Feres* doctrine continues to be a sound and necessary limit on the FTCA’s waiver of sovereign immunity, essential to the accomplishment of the military’s mission and the safety of the Nation.

Excerpts from the testimony of Major General Nolan Sklute, USAF (Retired), Judge Advocate General of the U.S. Air Force, 1993-1996:

This issue, boiled down to its basics, is whether persons should be allowed to sue the United States for

injuries sustained by military members serving on active duty, when such injuries result from the negligence of another military member or Federal Government employee.

Commanders make decisions and issue orders each and every day that affect the personal lives of their subordinates. They relate to matters such as daily duties, assignments, travel, disciplinary matters, medical requirements, and a wide array of matters essential to the mission and the welfare of the unit and its members. Many also directly impact the lives of the families of such members.

It is not difficult to imagine the adverse impact on unit cohesiveness which would result from subjecting these decisions to judicial scrutiny. Commanders and other military members would, in many instances, be deposed and summoned into court to justify their decisions. It may also engender the belief among the force that no order or decision is final until the courts have issued a ruling. Trust, one of the essential ingredients for unit cohesiveness would be undermined--trust not only among individual service members, but also between the members and their organization. To allow service members to sue their government for damages related to

military service implies that the military has failed its own and that only by taking the "boss" to court can justice be attained. Fostering such an attitude within a community that demands uncompromising trust and teamwork has dire implications.

Excerpts from testimony of Mr. Eugene Fidell, Counsel, Feldesman, Tucker, Leifer, Fidell, & Bank, LLP, Washington, DC:

I would like to address the notion that adjustment or relaxation of the rule would compromise proper military interests by subjecting commanders and others in leadership positions to a welter of intrusive and distracting investigations. I have no doubt that this argument has been put forward in good faith, but there is little merit in it. It rests on a totally outdated notion of how commanders spend their time. Today's military—every branch—is a highly sophisticated post-industrial effort in which inquiries and investigations play a regular and entirely necessary role in ensuring accountability, efficiency, fairness, and—above all—the achievement of operational objectives.

[T]here is nothing at all novel in the proposition that there are times

when public policy requires military and naval officers to make time to cooperate with legal proceedings and inquiries, including those filed by military subordinates. While some who believe their time might be better spent on other matters may resent having to make room for them, officers in this day and age must be able to "multi-task," and I personally have no reason to believe that the demands associated with an adjustment of the *Feres* Doctrine would be intolerable or could not be accommodated by the Armed Forces in terms of the need to reconcile competing demands on limited time. Plainly, operational demands will always have priority, and the danger of excessive intrusion can be addressed by framing any *Feres* adjustment wisely.

I should also mention that these comments proceed on the assumption that commanders will continue to enjoy the broad personal immunity the law has long afforded them from civil actions brought by subordinates. *Chappell v. Wallace*, 462 U.S. 296 (1983). In other words, there is no reason to fear that adjustment of the *Feres* Doctrine will have any effect on the personal liability of any individual. ⚖️

NOMINATIONS SOUGHT FOR 2003 EDMUND MUSKIE PRO BONO SERVICE AWARD

Nominations are open for the 2003 Edmund Muskie Pro Bono Service Award conferred annually by the American Bar Association Tort Trial and Insurance Practice Section (TIPS) to recognize section members who exemplify the attributes of Senator Edmund Muskie: his dedication to justice for all citizens, his public service, and his role as a lawyer and distinguished leader of TIPS.

Nominations should be submitted to: The Edmund Muskie Award, TIPS Law in Public Service Committee, Section of Tort Trial and Insurance Practice, 750 N. Lake Shore Drive, Chicago, IL 60611-4497. The deadline is February 15, 2003.

2003 TIPS CALENDAR

March

13-15 **Property Insurance Law
Committee Spring** **New Orleans, LA**

20-21 **Emerging Issues in
Motor Vehicle Product** **Phoenix, AZ**

21-22 **Toxic Torts and Environmental
Law Committee** **Phoenix, AZ**

24-25 **Vision 20/20 Institute** **Hartford, CT**

April

12-16 **TIPS National Trial Academy** **Reno, NV**

17-18 **Transportation MegaConference VI** **New Orleans, LA**

May

1-4 **TIPS Spring Meeting** **Austin, TX**

7-10 **FSLC Spring Meeting** **Chicago, IL**

13-14 **Staff Counsel Meeting** **New York, NY**

August

7-13 **ABA Annual Meeting** **San Francisco, CA**

October

TBA **Aviation Litigation Meeting** **Washington, DC**

TBA **FSLC Fall Meeting** **TBD**

22-27 **TIPS Fall Meeting** **Savannah, GA**