10-1984

United States v. Shearer

Lewis F. Powell Jr.

CFR with view to grant on conflict

Risk removed. Still Grant

Resp., mother of a service man, sued U.S. under Tort Claims Act to recover damages for the death ~~by~~ (murder) of her son. The son was off-duty at the time he was murdered by another service man. The murderer had previously been convicted of a murder in Germany but had not been discharged from the Army.

CA3 (2-1), reversed DC, and held Resp. was entitled to sue.

PRELIMINARY MEMORANDUM

September 24, 1984 Conference
Summer List 23, Sheet 3

CA3 rejected application of Feres (bars suit for damages by service personnel, and of the "intentional tort" exception to FTCA.

No. 84-194-CFX

UNITED STATES	Cert to CA3 (Higginbotham; dissenting)		(Gibbons, Garth,
v.			
SHEARER (mother of deceased serviceman), etc.	Federal/Civil		Timely

Dissent by J. Garth is correct.

1. SUMMARY: Petr contends that both the Feres doctrine and the intentional tort exception bar recovery under the Federal Tort Claims Act by a mother whose son was murdered by a fellow serviceman.

2. FACTS AND PROCEEDINGS BELOW: While off-base on authorized

CFR I am a little less certain than the memowriter that the Feres holding is wrong, but the "intentional tort" holding certainly seems incorrect. Both are important questions. —Dan

leave, resp's son, Private Shearer, was kidnapped and murdered by a fellow serviceman, one Heard, who was subsequently convicted of the murder in New Mexico state court. Three years earlier, while stationed in Germany, Heard had been convicted of the allegedly gruesome murder of a German woman, for which he served only three years of a four-year sentence. Heard had returned to the United States upon his release from the German jail just four months before he killed Shearer. At the time of the murder, the Army had initiated proceedings to discharge him, as at least three of his superiors had recommended.

Resp brought this action seeking damages against the United States under the Federal Tort Claims Act, 28 U.S.C. §1346(b), 2671 et seq. She claimed that the Army was responsible for Shearer's death because of its negligent failure to control Heard, to prevent him from endangering others, to warn others that he was at large, and to remove him from active duty, all despite its knowledge of his dangerous and murderous propensities.

The DC (Hannum, E.D. Pa.) granted the government summary judgment on the ground that the doctrine of Feres v. United States, 340 U.S. 135 (1950), barred the suit. The court reasoned that while the injury had not occurred during activity incident to military service, the allegedly negligent conduct related "directly to decisions of military personnel made in the course of the performance of their military duty." The court did not address the government's contention that the intentional tort exception to the FTCA also precluded suit.

A divided panel of CA3 reversed. Because the crucial

question under Feres is whether the serviceman sustained the injury in the course of or incident to his military service, the court found that generally an off-duty seviceman who is off-base and not engaged in military activity at the time of the injury may recover under FTCA. The court relied on Brooks v. United States, 337 U.S. 49 (1949), in which this Court allowed an off-duty serviceman hit by a military vehicle while engaged in personal business to recover under the FTCA. It criticized the DC's "singular focus on the status and activity of the allegedly negligent parties ... without considering the status and activity of the injured party." The court also rejected as erroneous the DC's reliance on two cases, including Henning v. United States, 446 F.2d 774 (CA3 1971), in which the Feres doctrine had barred recovery by servicemen alleging medical malpractice in an army hospital. According to CA3, they had not utilized a "tortfeasor status-activity analysis," but rather recognized that malpractice by military physicians was incident to military service. By contrast, the court observed, "certainly being kidnapped off base at gun point can never be perceived as one of the activities or anticipated free benefits of being in the armed services."

CA3 also found no bar in the intentional tort exception, which precludes recovery on "[a]ny claim arising out of assault [and] battery ... ." 28 U.S.C. §2680(h). The court found that FTCA does not bar recovery for injury caused by an assault and battery so long as the intentional tort "ha[s] its roots in government negligence." Gibson v. United States, 457 F.2d 1391, 1395-97 (CA3 1972). It relied heavily on Gibson, in which the

court had allowed a Job Corps instructor to recover for injuries sustained when one of his trainees, a juvenile delinquent and narcotics addict, attacked the instructor with a screwdriver during a class. The Gibson court held the attack "a foreseeable consequence of the government's failure to exercise due care." CA3 below also distinguished several cases in which courts had rejected attempts to sue government superiors for negligent supervision of employees who had intentionally injured the plaintiffs or their decedents, including Hughes v. Sullivan, 514 F. Supp. 667 (E.D. Va.), aff'd sub nom., Hughes v. United States, 662 F.2d 219 (CA4 1981); Naisbitt v. United States, 611 F.2d 1350 (CA10 1980); and United States v. Shively, 345 F.2d 294 (CA5 1965). The court stated that in each the alleged negligence had been but a remote cause of injury or the plaintiffs had, "through artful pleadings with conclusionary allegations, attempt[ed] to create a negligence issue."

Judge Garth dissented. He expressed his disagreement with the majority's Feres holding, noting that the CA3's own decision in Henning taught that an allegation of negligence required an inquiry into the time and place of the negligence. But he primarily addressed the intentional tort exception, adopting the reasoning of Collins v. United States, 259 F. Supp. 363 (E.D. Pa. 1966) (emphasis in original):

> Congress could easily have excepted claims for assault. It did not; it used the broader language excepting claims arising out of assault. It is plain that the claim arose only because of the assault and battery, and equally plain that it is a claim arising out of the assault and battery.

The dissent would have found Naisbitt, Hughes, and Shively

controlling. In Naisbitt, two off-duty members of the Air Force entered a privately owned store and assaulted, raped, and murdered several persons. Plaintiffs founded their cause of action on the negligent failure of the United States to supervise and restrain the airmen. CA10 affirmed the district court's dismissal of the suit after finding that it arose from assaults and batteries. In Hughes, a mailman on his route lured two young girls into his truck and took indecent sexual liberties with them. Their mother brought suit, contending that postal authorities had acted negligently in failing to relieve the mailman of his duties after a virtually identical incident some years before. CA4 affirmed the district court's dismissal of the suit on the ground that it arose from assaults and batteries. In Shively, an officer negligently issued a pistol to one Sergeant Lancaster, who was off-duty and in civilian clothes. Lancaster used the pistol to shoot his recently divorced wife and kill himself. CA5 held that the ex-wife's claim arose out of assault and was thus barred.

Judge Garth distinguished Gibson on the ground that the court there had found that by placing a group of trainees with drug and behavioral problems in a controlled, rehabilitative environment, the government had accepted a duty to care for them, control them, and prevent them from harming others. Here, by contrast, the government had never accepted any special obligation to exercise reasonable care to prevent Heard from harming Shearer or anyone.

CA3 voted six to four to deny the petition for rehearing en banc, Judges Garth, Adams, Hunter, and Weis voting to grant. Judge Garth reiterated his disagreement with the panel

disposition, emphasizing that the panel had relied on a case, Shively, which had come to a directly contrary result. Judge Adams also issued a statement, arguing that the conflict between the panel's decision and those of other circuits on the intentional tort exception, as well as the importance of the panel's decision on the Feres doctrine, counselled en banc consideration.

3. CONTENTIONS: Petr contends that CA3's holding conflicts with those of every other court of appeals to decide the issue, including CA10 in Naismith, recently reaffirmed in Wine v. United States, 705 F.2d 366 (CA10 1983), CA4 in Hughes, and CA5 in Shively. CA3's attempted distinction of these cases cannot stand, as Naismith, Wine, and Hughes terminated with dismissals, and Shively reversed a judgment in favor of plaintiff, CA5 expressly noting its agreement that the government was negligent. Moreover, the decision below is inconsistent with the "arising out of" language of the statute, the plain meaning of which would bar this suit. Further, since Congress indisputably intended section 2680(h) to exempt the government from liability for the intentional torts of its employees acting within the scope of their duties, it could not possibly have intended to allow recovery for intentional torts by employees acting outside the scope of their duties and thus even further beyond the government's supervision and control. Indeed, CA3's decision imposes on the government a novel form of liability unknown at common law, which does not recognize a duty on the part of the employer to exercise reasonable care to prevent its employees from

doing harm to others even when the employer knows of its employee's dangerous inclinations and has the ability to control the employee's off-duty activities. This is particularly inappropriate in light of the purpose of the intentional tort exception to exempt the government even from some well-established forms of liability.

The Feres holding was also error. This Court has explained that the doctrine emanates from the relationship of serviceman to military superior and is concerned to avoid judicial second-guessing of decisions necessarily entrusted to military discretion. The alleged negligence arises directly from basic decisions about the discipline, control, and discharge of Heard; CA3 has therefore undermined the basis of the Feres doctrine. The location of the murder and the off-duty status of the victim make no difference, because they do not affect the source of the alleged negligence. Brooks is inapposite. Because the duty breached by the driver there was one owed to plaintiff not as serviceman but as member of the public at large, the suit entailed no review of military decisions.

4. DISCUSSION: This seems a grant. CA's reasoning is unpersuasive on both counts. The conflict on the scope of the intentional tort exception is genuine, and the dissent's distinction of Gibson is considerably more coherent than the majority's distinction of Naisbitt, Hughes, and Shively. CA3's focus on off-duty status and off-base location undermines Feres, a course this Court has shown little inclination to endorse.

5. RECOMMENDATION: I recommend CFR with an eye toward

granting.

Response waived.

September 4, 1984	Donovan	Opns in petn

Argued ....., 19... *Assigned* ....., 19... No. 84-194

Submitted ....., 19... *Announced* ....., 19...

UNITED STATES

vs.

SHEARER

Fewer should control this

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

May 13, 1985

84-194 United States v. Shearer

Dear Chief:

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 13, 1985

No. 84-194 United States v. Shearer

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 14, 1985

Re: No. 84-194 United States v. Shearer

Dear Chief,

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 15, 1985

84-194 - United States v. Shearer

Dear Chief,

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

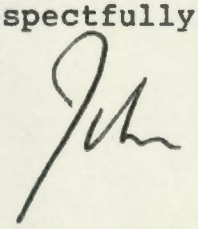
May 15, 1985

Re: 84-194 - United States v. Shearer

Dear Chief:

It seems to me that your discussion of Feres in Part II-B of your opinion is sufficient to support the disposition, and therefore that the discussion in Part II-A is not necessary. If there is any possibility that you could omit Part II-A, I would be happy to join your opinion.

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 16, 1985

No. 84-194

United States v. Shearer

Dear Chief,

I agree with John that the decision in this case should turn on Ferres without addressing the Federal Tort Claims Act question. Like him, if you could omit Part II-A, I too would be happy to join your opinion.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 17, 1985

Re: No. 84-194, United States v. Shearer

Dear Chief:

On reflection, I am persuaded that the proper approach to the resolution of this case is on the Feres doctrine, rather than on §2680(h). Thus, like John and Bill Brennan, I could go along, perferably, only with Parts I and IIB of your opinion. I think I see problems down the road with the other approach.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 24, 1985

No. 84-194

United States v. Shearer

Dear Chief,

I attach a brief statement that I'll file in the above case.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

Attachment

No. 84-194 -- United States v. Shearer

JUSTICE BRENNAN, concurring in part and concurring in the judgment.

I do not join Part II-A of the Court's opinion. I do, however, join Part II-B and therefore concur in the judgment.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 24, 1985

Re: No. 84-194, United States v. Shearer

Dear Chief:

I join Parts I and IIB of your opinion, but not Part IIA.

Sincerely,

HAB

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 25, 1985

Re: 84-194 - United States v. Shearer

Dear Bill:

Would you please join me in your separate statement. I will withdraw mine so that we don't have too many one-liners.

Respectfully,

John

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1985

Re: No. 84-194, United States v. Shearer

Dear Bill:

Would you please add my name to your brief statement concurring in part and concurring in the judgment.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1985

Re: No. 84-194, United States v. Shearer

Dear Chief:

Inasmuch as Bill Brennan and Thurgood are filing separate statements, it is perhaps easier if I join Bill Brennan rather than to have you note me separately at the beginning of your opinion.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

84-194 United States v. Shearer (Lynda)

LFP Out - letter 5/3/85
CJ for the Court 3/4/85
1st draft 5/13/85
Joined by SOC 5/13/85
WHR 5/14/85
BRW 5/15/85
HAB joins Parts I and IIB 6/24/85
JPS concurring in part and concurring in the judgment
1st draft 6/24/85
WJB concurring in part and concurring in the judgment
Typed draft 6/24/85
1st draft 6/24/85
Joined by HAB 6/25/85
JPS 6/25/85 - withdrawing separate statement
TM concurring in the judgment
1st draft 6/25/85