

## LAW REVIEW 25018 <sup>1</sup>

May 2025

**Victory for federal employees seeking differential pay during military service; statutory interpretation wins the day. The Supreme Court interpretation of Section 5538 of Title 5, U.S. Code requires differential pay for federal civilian employee reservists ordered to active duty “under ... a provision of law referred to in” Sections 101(a)(13)(B) and Section 101(a)(13)(B) which defines “contingency operation” to include operations that result in the call to active duty of servicemembers under several enumerated statutes “or any other provision of law during a war or during a national emergency declared by the President or Congress.”**

**2.0—Paid leave for government employees who are Reserve Component service members.**

***Feliciano v. Department of Transpiration*, No. 23-861, decided April 30, 2025: A Case Study and Thomas G. Jarrard, USMCR (Ret.)<sup>2</sup>**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1600 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, 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 1400 of the articles.

<sup>2</sup> Thomas’s practice is focused on serving Veterans. He represents individuals and class actions in USERRA litigation and individuals and organizations in state and federal civil appeals. Thomas received his JD from Gonzaga University School of Law in 2007 and a MBA from the Columbia College School of Business in 2000. During law school he served as an associate editor for the Gonzaga Journal of International Law and as a Thomas More Scholar. Following law School, Thomas served in a two-year clerkship at the Washington State Court of Appeals Div. III. Thomas is admitted to practice in Washington State; the Federal District Courts of Washington, Colorado and Wisconsin; the 5th, 7th, 8th, 9th, 10th, 11th and the Federal Circuit Court of Appeals; the Merit System Protection Board; and the United States Supreme Court. Thomas currently serves on the steering committee, and as the E. Washington Director, for the Washington State Veterans Bar Association. He is an accredited attorney by the U.S. Department of Veterans Affairs and his law firm is certified by the Washington State DAV as a Veteran Owned

In your Law Review 24022 (March 2024), you wrote that in a prior case, *Flynn v. Department of State* case, that courts had determined that “military service under 10 U.S.C. § 12301(d) does not qualify for the reservist differential under 5 U.S.C. § 5538” because to receive differential pay, an employee “must have served pursuant to a call to active duty that meets the statutory definition of contingency operation [...] and for voluntary activation under 10 U.S.C. § 12301(d) to qualify as a contingency operation, “there must be a connection between the voluntary military service and the declared national emergency.” How does the *Feliciano v. Department of Transpiration* case effect those prior rulings?

**Answer, bottom line up front:** The Supreme Court’s holding in *Feliciano* effectively overturns those prior statutory interpretations.

### **Facts of the *Feliciano* case:**

Nick Feliciano worked as an air traffic controller with the Federal Aviation Administration, and simultaneously served as a Coast Guard reserve petty officer. In July 2012, the Coast Guard ordered him to active duty under 10 U. S. C. §12301(d). He remained on active duty until February 2017. His orders prescribed that he was called to active duty “in support of” several “contingency operation[s],” including

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Business. Thomas has a 10/10 “Superb” rating from the AVVO legal rating forum and is “AV” rated, a “Preeminent” rating from both peers and clients through Martindale-Hubbell.

Thomas retired following 25 years of service in the United States Marine Corps and Reserve, including two combat tours in Iraq. He is active in his state and local Veterans communities and a life member of both the Reserve Officers Association and Disabled American Veterans. He is the current chair of the Washington State Veterans Bar Association. His pro bono work consists of representing Veterans and survivors in benefits and appeal cases. Thomas resides in Spokane, WA with his wife and three children.

Operations Iraqi Freedom and Enduring Freedom. The FAA declined Feliciano's requests for differential pay pursuant to §12301(d). Feliciano filed a complaint to the Merit Systems Protection Board which also rejected his differential-pay claim, and he appealed to the Federal Circuit. Feliciano argued that two statutes entitled him to differential pay: 5 U. S. C. §5538(a) and 10 U. S. C. §101(a)(13)(B). Section 5538(a) requires differential pay for federal civilian employee reservists ordered to active duty "under . . . a provision of law referred to in" §101(a)(13)(B). Section 101(a)(13)(B) defines "contingency operation" to include operations that result in the call to active duty of servicemembers under several enumerated statutes "or any other provision of law during a war or during a national emergency declared by the President or Congress." Feliciano contended that under the statutes, that final phrase entitled him to differential pay because he was ordered to active duty under "any other provision of law" §12301(d) "during a national emergency." The Federal Circuit disagreed holding that when a reservist seeks differential pay for service "during a national emergency," he must show not only that he served during a national emergency, but also that there must also be a substantive connection to link that service to a particular national emergency.

**The Supreme Court's decision in the *Feliciano* case renders that interpretation obsolete.**

In his appeal to the Supreme Court, Feliciano made the same arguments that the Federal Circuit rejected below. The Supreme Court also took a very pragmatic approach to interpreting the statutes involved and held in Feliciano's favor that "federal civilian employee called to active duty pursuant to "any other provision of law . . . during

a national emergency” as described in §101(a)(13)(B) is entitled to differential pay if the reservist’s service temporally coincides with a declared national emergency without any showing that the service bears a substantive connection to a particular emergency.”

The Court made three important observations:

- (1) The Court analyzed the plain meaning of “during” within the context of the statute, and deferred specifically to the dictionary definition citing Black’s Law Dictionary 504 (6th ed. 1990) (defining “during” as “[t]hroughout the course of; throughout the continuance of; in the time of; after the commencement and before the expiration of”).
- (2) The Court disagreed with the Department of Transportation and pointed out that “the word “during” does not generally imply a substantive connection, and in particular, “[t]he plain everyday meaning of ‘during’ is ‘at the same time’ or ‘at a point in the course of.’ It does not normally mean ‘at the same time and in connection with.’”
- (3) The Court looked to other contextual clues, from the statutes and benefits schemes enacted by Congress, finding that when insisting on both a temporal and a substantive connection in other settings, Congress has commonly made its point more expressly than in the statute at issue. “When it comes to statutes governing the Armed Forces, Congress has used the phrase “during and because of” to describe leave both contemporaneous with and related to a reservist’s active-duty service.” Citing such examples the court held that lack of specificity illustrates, Congress can and does use different words in different provisions to insist on a

substantive connection. But the absence of any words hinting at a substantive connection in the statute before us supplies a telling clue that it operates differently and imposes a temporal condition alone. “

It is notable that the Court concludes its holding stating that:

Given all that, we think Mr. Feliciano’s reading more consistent with the statutory language before us. Just ask yourself how an ordinary American might approach the law’s terms. Would he have any reason to think that a reservist called up to active duty “during” a national emergency is entitled to differential pay if, and only if, he can prove his service has a “substantive connection” to a particular emergency? We doubt it.

This new guidance by the Supreme Court will certainly unwind many prior denials of differential pay by certain Agencies, and open the door to such pay for reservists going forward.

I invite the reader’s attention to LAW REVIEW 24022, March 2024 ROA Files an Amicus Curiae Brief in the Supreme Court in Support of a Broad Interpretation of Section 5538 of Title 5, U.S. Code. By Captain Samuel F. Wright, JAGC, USN (Ret.) As explained in Law Review, the ROA filed an amicus curiae {“friend of the court”) brief in the United States Supreme Court, urging the Court to grant certiorari (discretionary review) in the *Flynn v. Department of State* case and should reverse the decision of the United States Court of Appeals for the Federal Circuit. Ultimately the Supreme Court declined to hear the case, however, the ROA Amicus brief closely follows the Court’s holding above in *Feliciano*

*v. Department of Transportation.* We have placed a link to the ROA amicus brief at the end of this article.