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Unfair to the Unborn: a Look at Ortiz and the Injustice of the Feres Doctrine When Applied to Injuries Incurred to a Fetus While in the Womb of an Active Duty Service Woman

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UNFAIR TO THE UNBORN: A LOOK AT ORTIZ AND THE INJUSTICE OF THE FERES DOCTRINE WHEN APPLIED TO INJURIES INCURRED TO A FETUS WHILE IN THE WOMB OF AN ACTIVE DUTY SERVICE WOMAN

Tiffany-Ashley Disney*

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INTRODUCTION

Spring of 2009: Captain Heather Ortiz was admitted to Evans Army Community Hospital to deliver her baby.¹ When doctors carelessly administered drugs to Captain Ortiz, it prevented her baby, I.O.², from receiving enough oxygen while in the womb, resulting in brain trauma that caused cerebral palsy to I.O.³ Additionally, doctors failed to properly monitor I.O.’s heart monitor, adding to the severity of the injuries incurred.⁴ The Tenth Circuit denied compensation and a petition for Writ of Certiorari is pending with the Supreme Court.⁵

Under the 65 year long-standing *Feres Doctrine*, service members cannot sue the Government for injuries incurred incident to active duty service.⁶ The *Feres Doctrine* has created harsh results, perhaps results not even contemplated by the Supreme Court or even Congress and it has also received a large amount of criticism over the years.⁷ Some critics have proposed to revise the *Feres Doctrine*, while other critics have even proposed to eliminate the *Feres Doctrine*.⁸ Despite the criticism, most

¹ Ortiz v. U.S. ex rel. Evans Army Cmty. Hosp., 786 F.3d 817, 818 (10th Cir. 2015) petition for cert. filed October 19, 2015.

² The court used I.O. in the case to refer to Captain Ortiz’s child instead of the first name for privacy considerations.

³ *Id.* at 819.

⁴ *Id.*

⁵ Ortiz, 786 F.3d at 819.

⁶ See generally *Feres v. United States*, 340 U.S. 135 (1950) (denying tort claimants relief under the FTCA, thus, creating the “Feres Doctrine”). “Active Duty” is a very broad term and does not only refer to when military personnel have been deployed. While on active duty, military personnel serve the Country 24 hours a day, 7 days a week for the complete duration of their service commitment, unless on rest and relaxation “leave”. See *About the Army*, U.S. ARMY, <http://www.goarmy.com/about/serving-in-the-army/serve-your-way/active-duty.html> (last visited April 11, 2016).

⁷ *Id.*; see also Ortiz, 786 F.3d at 818 (recognizing the unfairness of the *Feres Doctrine*); *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (*Feres* was wrongly decided and heartily deserves the “widespread, almost universal criticism” it has received).

⁸ Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 Mil. L. Rev. 1, 60 (2007); see also Major Howard L. Donaldson, *Constitutional Torts and Military Effectiveness: A Proposed Alternative to the Feres Doctrine*, 23 A.F. L. Rev. 171, 205 (1983).

courts continue to expand the *Feres Doctrine* instead of limiting its application.

Part I of this note will examine the beginning of the *Feres Doctrine*, the original intent of the doctrine, and how the Court interpreted the FTCA in *Feres*. Part II of this note will examine how the *Feres Doctrine* has been applied to third parties and the parallel application to cases involving *in utero* tort claims. Part II of the note will also analyze the circuit split cases involving claims of the children of military women for injuries incurred *in utero*. Part III of this note will critique how the *Ortiz* court applied the *Feres Doctrine*. Part IV of this note will discuss reasons why the *Feres Doctrine* is unfair when claims are barred when the injury to the fetus or an infant of an active duty service woman was sustained *in utero*. Part IV will also recommend new changes to the *Feres Doctrine* that the military, Congress, and the Supreme Court should take into consideration.

I. THE BIRTH OF THE FERES DOCTRINE

A. Overview of the Federal Tort Claims Act

Prior to the Federal Tort Claims Act (FTCA) of 1945, suits against the Government were barred because the United States had sovereign immunity.⁹ Consequently, under the FTCA, congress provided a *limited* waiver of sovereign immunity for certain tort claims.¹⁰ The FTCA allows suits against the United States for personal injury or death caused by a government employee's negligence under circumstances in which a private person would be liable under the law of the state in which the negligent act or omission occurred.¹¹ The administrative-exhaustion requirement applicable to FTCA claims bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.¹² In order to establish governmental liability under the FTCA § 2671, a plaintiff must meet the private parallel liability test. Under this test, the plaintiff must prove that the injury was caused by the negligence of the government employee under circumstances where the United States, if it were a private person or entity, would be liable to the claimant in accordance with the law of the place where the act occurred.¹³ Section

⁹ See 28 U.S.C. § 2674 (2012).

¹⁰ 28 U.S.C. § 1346 (2012); *Carter-El v. District of Columbia Dept. of Corrections*, 893 F. Supp. 2d 243 (D.D.C. 2012).

¹¹ 28 U.S.C. §§ 1346(b)(1), 2674; see also *Estate of Sanders v. U.S.*, 736 F.3d 430 (5th Cir. 2013).

¹² 28 U.S.C. § 2675(a) (2012); *Barnes v. U.S.*, 776 F.3d 1134 (10th Cir. 2015).

¹³ 28 U.S.C. § 2671 (2012); *Gallardo v. U.S.*, 752 F.3d 865 (10th Cir. 2014).

2674 of the FTCA relieves the government of liability for punitive damages.¹⁴

B. Feres v. United States

The *Feres Doctrine* derived from three claims, which were against the United States Government under the FTCA, combined and heard before the Supreme Court.¹⁵ Two of the cases were active military tort claimants who were negligently treated by military medical personnel.¹⁶ The third claim was by a soldier killed in a fire in his barracks.¹⁷ Following *Feres*, the courts grappled with the *Feres Doctrine* by attempting to define its application and purpose.

In order to properly rule on the merits of the three consolidated claims, the Supreme Court in *Feres* needed to thoroughly analyze the FTCA. The Court began its dissection of the FTCA by noting that there were very little tools of statutory interpretation, as committee notes and floor debates are silent on the issue of whether active military can bring a tort claim against the Government.¹⁸ The Court quickly carved out one exception to the FTCA: tort claims *not* incidental to service.¹⁹ One purpose of the FTCA that the *Feres* Court recognized is to “mitigate unjust consequences of sovereign immunity” because tort claimants were prevented from bringing a claim against the government prior to the Act.²⁰

The FTCA gives federal courts jurisdiction for plaintiffs to bring claims against the United States for money damages, but this grant of jurisdiction does not necessarily mean that the courts must allow all claims to be brought.²¹ For the purposes of determining whether the courts should exercise their jurisdictional powers, the FTCA utilizes the following parallel liability test: “The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.”²²

¹⁴ 28 U.S.C. § 2674.

¹⁵ *Feres*, 340 U.S. at 137.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* But note, the Act does expressly state that recovery is not permitted during times of war. See Johnson, 481 U.S. at 693 (Scalia, J., dissenting). So, the question presented before the *Feres* Court was whether the Act permitted claims for injuries incurred while on active duty, but not during a time of war.

¹⁹ *Feres*, 340 U.S. at 139.

²⁰ *Id.*

²¹ *Id.* at 141.

²² *Id.*; 28 U.S.C. § 2674.

Under this test, the FTCA is not creating a new cause of action, but the “acceptance of liability under circumstances that would bring private liability into existence.”²³ The crux of the *Feres* Court’s analysis is that it failed to see a situation where an individual would have a claim against a private individual in a similar situation.²⁴ The Court continued to explain how a situation could arise where private individuals would be liable in a similar situation, but turned away from this theory because liability must be present in *all* situations.²⁵ The Court gave some examples of where there would and would not be liability if an analogous claim was brought against a private individual.²⁶ One example the Court gave that does not rise to the level of private liability is when an employee who is injured on the job does not have a claim against the employer because the employee’s claim has been replaced by worker’s compensation—an out of court remedy.²⁷ Therefore, parallel liability does not exist under an employee/employer situation for injuries sustained on the job, eliminating the argument that the service members should be allowed to bring the claims because the Government is an “employer” of active duty service members.²⁸ Thus, the Court determined that the claims in *Feres* did not meet the parallel liability test.²⁹

Furthermore, the Court noted that the Government’s relationship to military personnel, unlike private citizens, is “distinctively federal in character.”³⁰ The *Feres* Court then concluded by emphatically denying the ability for the three tort claimants to bring their law suits under the FTCA because the relationship between military personnel and the Government is not governed by private law but by Federal law.³¹

C. *Rationalizing the Feres Doctrine*

The next case in the series of landmark cases refining the *Feres Doctrine* is *United States v. Johnson*.³² In *Johnson*, the plaintiff died in a helicopter crash that resulted from the negligence of a civilian who was employed by a government agency, the Federal Aviation Administration.³³ The Supreme Court declined to overrule the *Feres*

²³ *Feres*, 340 U.S. at 141.

²⁴ *Id.*

²⁵ *Id.* at 145.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Feres*, 340 U.S. at 145.

³⁰ *Id.* at 143.

³¹ *Id.* at 146.

³² *Johnson*, 481 U.S. 681 (1987).

³³ *Id.* at 682.

Doctrine, rationalizing that the *Feres Doctrine* has never been about the person responsible for causing the presumably negligent injuries. The focus has always been on whether military personnel incurred an injury that “arose out of [service] or [was] in the course of activity incident to service.”³⁴ Thus, the Court extended the *Feres Doctrine* and emphasized that the *Feres Doctrine* bars all suits brought on behalf of service members against the Government for all service-related injuries, regardless of whether the injury incurred from a civilian or another military personnel.³⁵

The Court then clarified the *Feres Doctrine* by explaining the three rationales for the *Feres Doctrine*.³⁶ The first rationale is that the relationship between military service members and the Government is “distinctively federal in nature.”³⁷ A military person on active duty is required to perform a diverse set of orders some of which may pose a significant risk of accident or injury.³⁸ When an active duty service member is injured “incident to service,” the Government provides a variety of federal statutory remedies, none of which include a lawsuit.³⁹ By applying the provided federal remedy, it provides “simple, certain, and uniform compensation for injuries or death of those in armed services.”⁴⁰

Because “generous” statutory remedies are afforded to injured military personnel for death or disability, the pre-determined method of recovery is a second, independent rationale for the *Feres Doctrine*.⁴¹ Since the primary purpose of the FTCA was to provide a remedy to those who are without a remedy, the purpose of the FTCA is disregarded if service members are allowed to bring a lawsuit since the service members are already being generously compensated by statutory remedies that do not require litigation in court.⁴² Congressional intent supports this rationale because Congress did not provide for an offsetting of the statutory remedies and lawsuit under the FTCA; there is no mention in the FTCA of interplay between these two types of remedies.⁴³ Thus, the Court reasoned that the statutory remedies, such as the Veterans’ Benefit Act, give the upper limit of liability of the Government

³⁴ *Id.* at 683-84, 687-89 (quoting *Feres*, 340 U.S. at 159).

³⁵ *Id.* at 683-84, 687-89.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Johnson*, 481 U.S. at 683-84, 687-88.

³⁹ *Id.*

⁴⁰ *Johnson*, 481 U.S. at 689 (quoting *Feres*, 340 U.S. at 144).

⁴¹ *Id.*

⁴² *Id.* at 690.

⁴³ *Id.*

and are intended to be the sole remedy for service-related injuries.⁴⁴ These statutory benefits for service-related injuries operate much like workman's compensation.⁴⁵

The third and final rationale for the *Feres Doctrine* is that courts should not meddle with military affairs, because they could affect military discipline and the effectiveness of the military in general.⁴⁶ Under this rationale, the Court noted that allowing service members to bring claims could not only affect the sensitive military hierarchy of discipline, but could also undermine the "duty and loyalty to one's service and one's country."⁴⁷

The *Johnson* court gave instructions for when an analysis into the *Feres Doctrine* would be necessary.⁴⁸ When a typical case exists, such as an active duty service member suing the Government for negligent injury caused by another active duty service member, the focus is on whether those injuries were sustained "incident to service."⁴⁹ In the typical cases, an analysis into the three rationales is not needed.⁵⁰ However, when the atypical case does not exist, such as a non-military Government employee or another civilian caused the injuries to an active duty service member, an analysis into the three *Feres* rationales is required.⁵¹ The Court also noted that none of the three rationales significantly depended on whether the tortfeasor was civilian or military personnel.⁵²

In *Johnson*, the court thoroughly analyzed the three rationales, but hastily concluded its opinion without an adequate application⁵³ of the three rationales to the facts of the case. The Court simply stated that there was no dispute that Johnson's injuries arose out of events incident to his military service, that his wife was receiving statutory benefits after his death, and that Johnson was acting pursuant to military orders.⁵⁴

The dissent in *Johnson*, written by Justice Scalia and joined by Justice Brennan, Justice Marshall and Justice Stevens, harshly criticized the *Feres Doctrine* and the unjust result the Doctrine brings to injured military personnel.⁵⁵ The *Johnson* dissent began by arguing that instead

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Johnson*, 481 U.S. at 690.

⁴⁷ *Id.* at 691.

⁴⁸ *Id.* at 684.

⁴⁹ *Id.*

⁵⁰ *Id.* at 684.

⁵¹ *Id.*

⁵² *Johnson*, 481 U.S. at 689.

⁵³ Considering that the bulk of the opinion is spent discussing the three rationales, the application to these rationales is very limited. *See generally Id.*

⁵⁴ *Johnson*, 481 U.S. at 691.

⁵⁵ *Id.* at 693 (Scalia, J., dissenting).

of three rationales for the *Feres Doctrine*, there are actually four rationales for the *Feres Doctrine*.⁵⁶ The following are the four rationales the dissent identified: (1) parallel private liability required under the FTCA is absent; (2) Congress did not intend to have local tort govern the distinctively federal relationship between active service members and the Government; (3) Congress did not intend to make claims available under the FTCA for service personnel who were already receiving veteran's benefits for injuries sustained "incident to service" and; (4) Congress did not intend to permit suits for service-related injuries because those type of claims would interfere with the military discipline.⁵⁷ The dissent in *Johnson* reasoned that the last three rationales are merely speculating Congress's intent and only the first rationale is in fact supported by the plain text of the statute. Because of the lack of support for all four of the rationales, the dissent emphatically stated that no reason justified the result of the *Feres Doctrine* or the failure to apply the plain text of the FTCA.⁵⁸

The first of the merely speculative rationales the *Johnson* dissent recognized is Congress did not intend local tort law to govern a distinctively federal relationship because of the unfairness of the active military service member in making a recovery based on where the injury was sustained, something outside of the service member's control.⁵⁹ However, the dissent criticized this as a weak rationale based on poor policy and principal in order support the *Feres Doctrine*. The dissent even went as far as calling this justification "absurd," stating that non-uniform recovery is better than no recovery at all.⁶⁰ The dissent also noted that uniform recovery is illusory because recovery in local tort law is permitted to service members for injuries not related to service and to civilians for injuries sustained from military negligence.⁶¹

Second, the rationale that Congress intended to make the Veterans' Benefit Act the sole remedy is no longer controlling law.⁶² Thus, the dissent rejected the idea that the FTCA intended the Veterans' Benefit Act to be the sole means of recovery and the Government's upper limit of accepting liability.⁶³ The dissent gave two examples, both before and after *Feres* was decided, where the Supreme Court permitted recovery under the Veterans' Benefit Act and allowed claims to be brought under

⁵⁶ *Id.* at 694.

⁵⁷ *Id.*

⁵⁸ *Id.* at 700 (Scalia, J., dissenting).

⁵⁹ *Id.* at 695.

⁶⁰ *Johnson*, 481 U.S. at 695 (Scalia, J., dissenting).

⁶¹ *Id.* at 696 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 66–69 (1955)).

⁶² *Id.* at 697 (citing *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985)).

⁶³ *Id.*

the FTCA.⁶⁴ Both of these cases, the dissent pointed out, have never been “expressly disapproved,” and both cases hold that nothing in either the FTCA or the Veterans’ Benefit Act provide for exclusiveness of one remedy over the other.⁶⁵ The dissent ended its criticism for this rationale by stating “the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres Doctrine*; it only makes the effect of the doctrine more palatable.”⁶⁶

Third, the dissent criticized the rationale that allowing service members to bring suit under the FTCA has any impact on effecting military discipline.⁶⁷ The reality is, no matter how much courts try to avoid it, courts need to evaluate military discipline in the form of adjudicating cases, especially when there is a civilian involved.⁶⁸ However, the dissent noted that the FTCA does give specific examples of when courts should not question military commands: claims based on combat decisions, claims based on performance of discretionary functions, claims arising in foreign countries, intentional torts, and claims based upon the execution of a statute or regulation.⁶⁹ Then, the dissent presented the ground-breaking idea that perhaps the reason why Congress did not expressly bar suits from being brought by service members is because “Congress thought that barring recovery by service members might adversely affect military discipline.”⁷⁰ Justice Scalia concluded the opinion with a caution not to extend *Feres* any further than it already has been extended.⁷¹

D. Drawing the Line – Does *Feres* Apply to All Victims?

The Supreme Court in *United States v. Brown*, for the first time since *Feres* was decided, recognized an exception to the *Feres Doctrine*.⁷² Although the exception to the *Feres Doctrine* in *Brown* was decided in

⁶⁴ The two examples were *Brown* and *Brooks*. Johnson, 481 U.S. at 697-98 (Scalia, J., dissenting). See *Brooks v. United States*, 337 U.S. 49, 53 (U.S. 1949); see also *U.S. v. Brown*, 348 U.S. at 111.

⁶⁵ Johnson, 481 U.S. at 697-98 (Scalia, J., dissenting) (citing *Brooks*, 337 U.S. at 53; *U.S. v. Brown*, 348 U.S. at 111).

⁶⁶ *Id.* at 698 (quoting *Hunt v. United States*, 204 U.S. App. D.C. 308, 326 (1980)).

⁶⁷ *Id.* at 699.

⁶⁸ *Id.* at 700 (giving the example that if the helicopter had been crashed into a house, the homeowners would have a claim with the Government, and thus, the courts would have questioned military decision making).

⁶⁹ *Id.* at 699-700 (citations omitted) (quotations omitted).

⁷⁰ *Id.* at 700 (emphasis not added).

⁷¹ Johnson, 481 U.S. at 703.

⁷² *United States v. Brown*, 348 U.S. 110 (1954).

dicta because *Brown's* ruling was based on *Brooks v. United States*,⁷³ the argument and foundation built for the exception is not without merit.⁷⁴

In *Brown*, the court allowed a military veteran who was seeking recovery from a negligent injury caused by military hospital staff while receiving treatment at a veteran's hospital.⁷⁵ The plaintiff was a civilian—even though he was being treated for injuries sustained while he was considered on active duty.⁷⁶ The Court distinguished between claims that “arose out of [service] or [was] in the course of activity incident to service” (and subsequently would be barred under the *Feres Doctrine*) and claims that did not arise out of service or were not in the course of military duty.⁷⁷

The Supreme Court in *Brown* analyzed that the FTCA was created so the Government could waive sovereign immunity from recognized causes of action, but not to open up the Government to new and novel liability.⁷⁸ However, the Court recognized that the FTCA does not preclude claims that might be recognized under state law by a private party.⁷⁹ The Court gave two examples of situations in which liability is well-established: the responsibility of hospitals to their patients and the liability of car owners.⁸⁰ Thus, the Court ruled that the veteran could sustain his claim under the FTCA because the damage did not arise out of or in the course of his military service, but the negligence occurred after his military service, while he was a veteran.⁸¹

II. GROWING PAINS: APPLYING THE *FERES DOCTRINE* TO THIRD PARTIES

Following *Feres*, numerous cases have decided whether third party claimants are barred from bringing claims under the *Feres Doctrine*. Even though the *Feres Doctrine* is a well-established doctrine, courts are nonetheless still grappling with how to handle third party claimants, specifically, when a service member's child suffers an injury in the

⁷³ In *Brooks*, it was determined that military personnel on leave, and not on active duty, could recover under the FTCA. 337 U.S. 49, 54 (U.S. 1949). *Feres* did not overturn *Brooks*, but merely distinguished it, so *Brooks* is still controlling law. *Brown*, 348 U.S. at 112. This exception ruled in *dicta* was even recognized by Justice Scalia in the dissent of *Johnson*.

⁷⁴ See generally U.S. v. *Brown*, 348 U.S. 110.

⁷⁵ *Id.* at 112.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 112-13.

⁷⁹ *Id.* at 113.

⁸⁰ U.S. v. *Brown*, 348 U.S. at 113.

⁸¹ *Id.* at 110.

mother's womb. The Supreme Court has never directly addressed the issue as to whether recovery under the FTCA is allowed under *Feres* when the injury was sustained *in utero*. The Supreme Court has addressed the issue of whether claims by a civilian should be allowed under the FTCA for injuries sustained by active military personnel and permitted civilians to bring these type of claims. However, the Supreme Court has dismissed indemnification suits by third parties who injured an active service member.⁸²

A. *The Supreme Court – Third Party Claimants*

The Supreme Court first addressed the issue of whether third parties had a claim under the FTCA in *Stencel Aero Engineering Corporation v. United States*.⁸³ Captain John Donham suffered permanent injuries when the ejection seat to his aircraft malfunctioned.⁸⁴ Even though Donham was compensated under statutory remedies, Donham brought a claim against the United States and Stencel Aero Engineering Corporation, the manufacturers of the aircraft.⁸⁵ Stencel Aero then cross-claimed against the United States for indemnity and The United States moved to dismiss both of the claims because of lack of subject matter jurisdiction under the *Feres Doctrine*.⁸⁶

The *Stencel Aero* Court then analyzed the three rationales for the *Feres Doctrine*.⁸⁷ First, the Court easily came to the conclusion that the relationship between the suppliers and the Government, like the relationship between an active duty service member and the Government, is distinctively federal in character.⁸⁸ The Court did not want to depart from prior case law and create a cause of action based on local law for service-related injuries or death due to negligence.⁸⁹ As to the second factor, the Court had some difficulty applying this rationale because it seemed unfair to allow Donham to recover from Stencel Aero, while Stencel Aero would not be afforded relief from the Government.⁹⁰ Yet, the Government was bound by the predetermined statutory maximum amount of acceptance of liability for Donham's injuries.⁹¹ But in the end, the Court determined that the indemnification claim was an attempt by

⁸² *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977).

⁸³ *Id.*

⁸⁴ *Id.* at 667.

⁸⁵ *Id.* at 668.

⁸⁶ *Id.* at 668-69.

⁸⁷ *See generally* *Stencel Aero*, 431 U.S. 666 (1977).

⁸⁸ *Id.* at 672.

⁸⁹ *Id.* at 671.

⁹⁰ *Id.* at 672.

⁹¹ *Id.*

Donham that merely circumvented the cap the Government had implemented for allowable recovery.⁹² For the third factor, the Court reasoned that when a case involves an injury sustained by a soldier on duty, regardless of whether the tortfeasor was the Government or a third party, the trial would require an inquiry that would involve “second-guessing military orders.”⁹³ Thus, the Supreme Court rejected the third-party suit to be brought because of the three rationales of the *Feres Doctrine*.⁹⁴

The dissent in *Stencel Aero* disagreed with extending the *Feres Doctrine*, reasoning that the extension was unjustified and was no different than a corporation suing the Government under other permitted provisions of the FTCA.⁹⁵ The dissent pointed out that the Veterans’ Benefit Act does not explicitly include a provision on whether the Veterans’ Benefit Act is meant to be the exclusive remedy and upper limit of liability for the Government.⁹⁶ Yet, the private liability equivalent, worker’s compensation, which the statutes due expressly include a provision that worker’s compensation is the exclusive remedy, does not affect the right of third party indemnity suits, which courts have allowed.⁹⁷

Additionally, the dissent argued that concerns of military personnel bringing lawsuits against their superiors does not arise when a non-military third party is the one bringing the claim.⁹⁸ Had the situation been that the airplane seat ejected and landed on the rooftop of somebody’s house, the homeowner, unlike an active duty service member, undoubtedly would have a cause of action against the Government under the FTCA.⁹⁹ The trial in that scenario might even include testimony from military personnel about their orders given, decision, and subsequent actions, but neither the *Feres Doctrine* nor the FTCA would bar such suit.¹⁰⁰ Thus, the dissent concluded that the reasoning in *Stencel Aero* is flawed when the analysis is applied to other similar fact patterns.¹⁰¹

⁹² *Id.* at 673.

⁹³ *Stencel Aero*, 431 U.S. at 673.

⁹⁴ *Id.*

⁹⁵ *Id.* at 674 (Marshall, J., dissenting).

⁹⁶ *Id.* at 675.

⁹⁷ *See Id.* at 675-76.

⁹⁸ *Id.* at 676.

⁹⁹ *Id.*

¹⁰⁰ *Stencel Aero*, 431 U.S. at 676-77 (Marshall, J., dissenting).

¹⁰¹ *Id.* at 677.

B. *The Supreme Court—Civilian Claimants*

In *Indian Towing Co. v. United States*, the plaintiffs brought a claim under the FTCA against the Government for damages sustained due to the alleged negligence of the United States Coast Guard in operating a lighthouse.¹⁰² The Government argued that the FTCA provides for recourse only if private liability would be imposed in the same circumstances.¹⁰³ Furthermore, the Government claimed that there cannot be any liability based on the negligent performance of an activity in of itself, in other words, the “end objective” of the activity.¹⁰⁴ The Court rejected this argument because all activities conducted by the Government could be characterized as “uniquely governmental,” and thus liability on the Government would never be imposed on the basis that there is not a parallel private activity.¹⁰⁵ The Court also reasoned that such minor details were not intended for the courts to interpret and that FTCA drafters were careful in ensuring substantive and procedural safeguards.¹⁰⁶ Once the Government decided to operate the lighthouse, the Government owed a duty of due care to ensure the lighthouse remained operational, and was consequently liable for any damages for failing to maintain the lighthouse.¹⁰⁷ The intentions of the FTCA are clear: once the Government undergoes an activity, a duty of due care is owed to ensure that activity is not negligently conducted, and the Government is liable for any damages.¹⁰⁸

C. *The Circuit Split*

Five circuits have addressed whether liability should be imposed on the Government under the FTCA for damages sustained *in utero* to the child of an active military woman. The Fifth and Sixth Circuits have held that the *Feres Doctrine* bars recovery.¹⁰⁹ However, the Sixth Circuit has since held that the *Feres Doctrine* may not bar recovery in certain circumstances.¹¹⁰ The Eleventh, Fourth, and Eighth Circuits have all held

¹⁰² *Indian Towing Co. v. United States*, 350 U.S. 61, 61-62 (1955).

¹⁰³ *Id.* at 64.

¹⁰⁴ *Id.* at 66.

¹⁰⁵ *Id.* at 67.

¹⁰⁶ *Id.* at 61.

¹⁰⁷ *Id.* at 69.

¹⁰⁸ *Indian Towing*, 350 U.S. at 69.

¹⁰⁹ See *Scales v. United States*, 685 F.2d 970, 971 (5th Cir. 1982); see also *Irvin v. United States*, 845 F.2d 126, 127 (6th Cir. 1988).

¹¹⁰ *Brown v. United States*, 462 F.3d 609, 615-16 (6th Cir. 2006).

that the *Feres Doctrine* does not bar recovery.¹¹¹ The early cases applied the *Feres Doctrine* and barred claims of children of military women for injuries that occurred *in utero*.¹¹² However, as the circuits continued to evaluate the issue, there was a shift from barring the claims to allowing the claims because the *Feres* rationales are not present during these types of claims. Furthermore, when an injury occurs in the womb, there is an express denial in the later cases of the application of the genesis test, which forbids claims deriving from a military mother's injuries. In the later circuit cases, there is a move in the right direction to cure the injustice of the *Feres Doctrine* as it relates to claims brought by children for injuries sustained *in utero*.

1. The Circuit Split: The *Feres Doctrine* Bars Recovery For Infants—Or Does It?

In *Scales v. United States*, the Fifth Circuit barred an infant,¹¹³ through his mother, from bringing a claim under the FTCA because of the *Feres Doctrine*.¹¹⁴ The *Scales* court briefly highlighted the first of the two rationales for the *Feres Doctrine*, the distinctively federal relationship and the special remedy for service personnel under the Veterans' Benefit Act.¹¹⁵ However, the court placed an emphasis on what the court thought was the most important rationale: the need to preserve military discipline.¹¹⁶

The court relied on the reasoning in *Stencel Aero*, interpreting *Stencel Aero* as barring claims to non-military personnel if the claim would involve an inquiry into military affairs.¹¹⁷ Additionally, the court reasoned that because *Feres* directly discussed two medical malpractice claims brought by non-military personnel, the *Feres* Court intended to bar all claims involving medical malpractice that would require questioning military discipline.¹¹⁸ The court concluded that allowing the child's claim would hypothetically have the same result as if his mother

¹¹¹ *Del Rio v. United States*, 833 F.2d 282, 284 (11th Cir. 1987); *Mossow v. United States*, 987 F.2d 1365, 1369 (8th Cir. 1993); *Romero v. United States*, 954 F.2d 223, 225 (4th Cir. 1992).

¹¹² See *Scales*, 685 F.2d 970; see also *Irvin*, 845 F.2d 126.

¹¹³ The infant was injured as a result of negligent medical treatment in the womb of his active duty military mother. The military mother received a rubella vaccine while she was pregnant, which caused her infant to be born with congenital rubella syndrome.

¹¹⁴ *Scales*, 685 F.2d at 971.

¹¹⁵ *Id.* at 972

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

brought the suit for personal injuries she sustained during delivery: the courts questioning military decisions.¹¹⁹ Thus, the child was not allowed to bring the claim, even though he was never an active duty service member at any point in his life and maintained an independent cause of action.¹²⁰

In the Sixth Circuit case *Irvin v. United States*, a former service member mother and her husband brought a suit against the Government for failing to give adequate prenatal care, which resulted in the death of their child.¹²¹ The court examined the three *Feres* rationales, stating that it is obvious that any suit of this type would involve “second guessing” military affairs, and thus, effectively has the same result as if any active duty service member brought the suit for personal injuries.¹²² The court, relying on *Stencel Aero*, adopted the genesis test, which forbids any claims that derive from an active military personnel’s injury, expanding the *Feres Doctrine*. Under the expansive approach of genesis test, not only is an indirect “derivative claim” of an active service member’s injury prevented, such as a loss of companionship claim, but the test also prevents claims that are “derivative injury” from of an active service member’s injury.¹²³

A few years later in *Brown v. United States*, although the Sixth Circuit did not expressly overrule *Irvin*, the court did limit its harsh reasoning and provided factual scenarios where the *Feres Doctrine* did not apply, even when the injury occurred *in utero*.¹²⁴ The court permitted recovery in *Brown* because no injury was sustained by the military mother and injuries were sustained only by the infant.¹²⁵ The court rejected the Fifth Circuit’s claim that a fetus could never maintain an independent cause of action.¹²⁶ The court also reasoned that a negligence claim for medical malpractice during prenatal care or during labor and delivery is a claim the courts can entertain, and do so on a routine basis, without any judicial intervention in “sensitive military affairs.”¹²⁷

¹¹⁹ *Id.* at 974.

¹²⁰ Scales, 685 F.2d at 973.

¹²¹ *Irvin*, 845 F.2d at 127.

¹²² *Id.* at 129.

¹²³ *Id.* at 130.

¹²⁴ *Brown v. U.S.*, 462 F.3d at 615-16.

¹²⁵ *Id.* at 615-16.

¹²⁶ *Id.* at 614 (quoting Scales, 685 F.2d at 973).

¹²⁷ *Id.* at 615.

2. The Circuit Split: The Feres Doctrine Allows Recovery For Infants

The Eleventh Circuit in *Del Rio v. United States*, a military mother was forbidden from bringing an action against the United States under the FTCA for negligent prenatal care administered by active duty military, resulting in personal injuries and the wrongful death of her son.¹²⁸ The court ruled that the mother could not bring the action for the damages for her personal injuries because of the *Feres Doctrine*.¹²⁹ However, the court ruled that the action for damages sustained by the child withstands the application of the *Feres Doctrine* because that claim will not “circumvent the purposes of the FTCA.”¹³⁰ The court reasoned that the three rationales for the *Feres Doctrine* “clearly are not present in a suit by the child of a service person for the negligence of military medical staff.”¹³¹ First, the “distinctive federal” relationship between a child and the Government is not the same as a soldier who is on active duty.¹³² Second, there are not any statutory benefits available to the children.¹³³ And third, while adjudicating this claim does require a possible inquiry into military discipline, it does not reduce the effectiveness of the military service, nor will the inquiry “require the court to second-guess a decision by military personnel unique to the accomplishment of a military mission.”¹³⁴

The Fourth Circuit in *Romero v. United States*, denied application of the genesis test as it related to prenatal or labor and delivery medical care.¹³⁵ The court reasoned that the genesis test was meant for injuries to civilians that derived from a service-related injury, but was not meant to be used to determine whether the injury to a civilian occurred during active duty service.¹³⁶ The court explained that a classic example of the proper application of the genesis test is birth defects from a service member’s exposure to radiation, which looks at a past injury that caused a future injury.¹³⁷ However, the court reasoned that the genesis test was not meant to bar claims of an infant for acts of military negligence when treatment directed towards both the fetus and the active duty service woman may overlap, which sometimes may involve simultaneous

¹²⁸ *Del Rio*, 833 F.2d at 284 (11th Cir. 1987).

¹²⁹ *Id.* at 287.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Del Rio*, 833 F.2d at 287.

¹³⁵ *Romero*, 954 F.2d at 226.

¹³⁶ *Id.*

¹³⁷ *Id.*

injuries to the mother and fetus or infant.¹³⁸ The court further explained that in order to properly administer care to an unborn child and ensure the health of a civilian, sometimes it will involve the mother's body, but that does not mean the care is directed towards the active duty mother.¹³⁹ The *Romero* court also recognized that the Government owes an affirmative duty of care directly to the civilian child.¹⁴⁰

The Eighth Circuit in *Mossow by Mossow v. United States* adopted almost verbatim the reasoning in *Romero*.¹⁴¹ In *Mossow*, the plaintiff suffered from cerebral palsy as a result of injuries caused by military negligence during the time of his birth.¹⁴² The court emphasized that claims are not barred by *Feres* when the claimant is a civilian or civilian dependent who has sustained a direct injury from military personnel.¹⁴³ The court rejected the application of the genesis test because the plaintiff sustained his own individual injuries that were not derivative of a service woman's injuries; thus, the plaintiff maintained his own independent cause of action as a civilian.¹⁴⁴ Furthermore, the court ruled that the claim would not disrupt military discipline because the claim would not involve questioning military orders given to military personnel or involve actions taken to complete a military mission.¹⁴⁵

III. THE FLAWED REASONING OF THE ORTIZ COURT

In the 10th Circuit Case, *Ortiz v. United States ex rel. Evans Army Community Hospital, I.O.*, the child of Captain Ortiz, sustained injuries in the womb as a result of negligent treatment during labor and delivery at a military hospital.¹⁴⁶ The *Ortiz* court ruled that I.O.'s injuries were "incident to service" because the injuries sustained by I.O. occurred while she was in the womb of Captain Ortiz, an active duty service member.¹⁴⁷ The court also applied the genesis test, as adopted in *Irvin*: but for Captain Ortiz's injuries, I.O. would not have been injured.¹⁴⁸ Furthermore, the court ruled that I.O.'s injuries derived from Captain Ortiz's injuries, comparing how I.O.'s claim was similar to third party

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Mossow*, 987 F.2d at 1369.

¹⁴² *Id.* at 1367.

¹⁴³ *Id.* at 1368.

¹⁴⁴ *Id.* at 1369-70.

¹⁴⁵ *Id.* at 1370.

¹⁴⁶ *Ortiz*, 786 F.3d at 818-19.

¹⁴⁷ *Id.* at 822.

¹⁴⁸ *Id.* at 827 (citing *Irvin*, 845 F.2d).

loss of consortium claims.¹⁴⁹ Because it was determined that I.O.'s injuries derived from Captain Ortiz, under the genesis test, I.O.'s claims were barred since they were considered incident to the service of Captain Ortiz.¹⁵⁰

Even though the *Ortiz* court thought they were adhering to precedent, the *Ortiz* court wrongly decided this case. The court chose an incorrect starting point for the application of the injury under the genesis test.¹⁵¹ I.O. sustained independent injuries that did not derive from Captain Ortiz and therefore I.O.'s injuries should not have been considered a derivative injury of her mother's under the genesis test.¹⁵² By applying the genesis test, the court disregarded the original intent of the *Feres Doctrine*. Moreover, the court could have distinguished from precedent without the risk of not following precedent. The court tried to squeeze their ruling into doctrine intended to prevent claims that would otherwise not be entertained by a private citizen, and prevented a claim that had Captain Ortiz been treated by a private citizen, I.O. could have sought recovery. Merely because Captain Ortiz was on active duty should not have prevented the claims brought by I.O. for injuries incurred *in utero*.

The court incorrectly applied the genesis test because the claim was not a derivative claim based on the mother's injuries; it was an independent cause of action. Surely if the Unborn Victims of Violence Act recognizes a child *in utero* as an independent person, so too should the *Ortiz* court have when it applied the *Feres Doctrine*.¹⁵³ The focus of the *Ortiz* court should not have been whether the injury first occurred to the mother, and thus whether I.O.'s injuries were "derivative" on the mother's right to bring a claim, instead the focus should have been on I.O. who is an independent, non-military person.

Furthermore, this is not a situation where an injury sustained by an active duty service member in the past caused a future injury to a fetus, but this is a situation where injuries occurred simultaneously to both the fetus and the mother. Under the expansive approach of the Fourth Circuit, which only uses the genesis test for injuries to civilians that were derived from a service related injury, most actions taken during labor and delivery could be construed to ensure the health of a civilian and therefore are not a service related injury. Merely because the treatment of care towards Captain Ortiz's and I.O.'s well-being might have overlapped should overshadow the fact that I.O. is a civilian who was

¹⁴⁹ *Ortiz*, 786 F.3d at 825.

¹⁵⁰ *Id.* at 831.

¹⁵¹ *Id.* at 831-32.

¹⁵² *Id.*

¹⁵³ 10 U.S.C. § 919a (2012) (commonly referred to as the "Unborn Victims of Violence Act of 2004").

injured because of military negligence. The analysis should have begun with the fetus, an independent person, not with the mother, even though those actions involve the body of an active duty service woman, and possible simultaneous injuries.

Notwithstanding the fact that I.O. is an independent person with an independent cause of action under the FTCA, the *Ortiz* court should have relied on the Sixth Circuit in *Brown v. United States* and at least permitted the claim for failing to properly monitor I.O.'s heart monitor, a benefit solely to the fetus. The inadequate monitoring did not affect Captain Ortiz's health in anyway just like failing to adequately give prenatal treatment did not affect the mother's health in *Brown*.¹⁵⁴

The court in *Ortiz* wrongly veered from the original intent of the *Feres Doctrine* when the court prevented I.O. from bringing a claim against the Government for the negligence of the doctors during labor and delivery. This was not a service-related injury arising out of Captain Ortiz's services, but an event that occurred independent of Captain Ortiz's service. Furthermore, I.O. was a private citizen, a mere infant, not a service member who had contracted to serve in the military. I.O. did not voluntarily forfeit her claims by enlisting in the military, contrary to military personnel. In *Indian Towing*, the plaintiffs were allowed to recover because they were injured as a result of the Coast Guard's negligence.¹⁵⁵ I.O. deserved recovery as much as the plaintiffs did in *Indian Towing*, since she too sustained injuries from military negligence.

Moreover, had Captain Ortiz gone to a private hospital, I.O. would not have any of the obstacles to overcome in bringing the negligence claim. Since I.O. would have had a cause of action if Captain Ortiz gave birth in a private hospital, the parallel private liability test, one of the requirements under the FTCA, is met in *Ortiz*.¹⁵⁶ As the Supreme Court in *Brown* so eloquently pointed out, medical malpractice is indeed a well-established liability of a breach of duty that hospitals owe to their patients.¹⁵⁷ That duty was breached to I.O., a private citizen, and I.O. deserved adequate compensation for the injuries that occurred from negligent treatment. If the purpose of the FTCA was to truly bar claims, which otherwise would not have been able to be brought against the government simply because the government is not a "private citizen," then that purpose has not been upheld by the *Ortiz* court.¹⁵⁸

The *Ortiz* court stated that it was not at liberty to go against the Supreme Court. But this case could have a different outcome and still

¹⁵⁴ *Brown v. U.S.*, 462 F.3d at 615.

¹⁵⁵ *Indian Towing*, 350 U.S. 61.

¹⁵⁶ *Id.*

¹⁵⁷ *U.S. v. Brown*, 348 U.S. at 113.

¹⁵⁸ See 28 U.S.C. § 2671 (2012).

have followed Supreme Court precedent by merely declining to extend the Supreme Court's ruling or by distinguishing the Supreme Court's ruling in *Feres*.¹⁵⁹ The *Ortiz* court should have declined to extend *Feres* any further, as the dissent in *Johnson* cautioned.¹⁶⁰ The purpose of the FTCA was to extend a remedy to those who had been without a remedy, rather than to make additional provision for those already provided for under the statute.¹⁶¹ When the *Ortiz* court barred I.O. from bringing her claim, the court deviated from the purpose of the FTCA because I.O. would be left without a remedy since there are not any statutory provisions that would provide for her. In fact, the *Ortiz* court could have ruled based off of *Brown*'s rationale that once the government undertakes an operation, it owes a duty of care.¹⁶² Under that rationale, the *Ortiz* court would not have been straying away from any Supreme Court decision but would have been wholly in line with Supreme Court precedent. Instead, the *Ortiz* court wrongfully and regretfully¹⁶³ chose to expand the *Feres Doctrine* and took the doctrine farther than Supreme Court ever intended for the doctrine to go because the purpose of the doctrine was not to bar citizen's claims, but only active duty service member's claims.

Thus, because I.O. is an independent person with an independent cause of action, like the plaintiffs in *Johnson* or *Indian Towing*, I.O. should be allowed to bring her claim under the FTCA, notwithstanding the *Feres Doctrine*. Military personnel did not cause injuries to an active duty service member; however, military personnel did cause injuries to I.O., a private citizen. Like the factual scenario described in the dissent of *Johnson*, where a homeowner would have been able to recover from military negligence, so should I.O.'s claim been expressly permitted under the FTCA because I.O. is a private citizen.¹⁶⁴ Mere proximity in relationship to military personnel should not prevent non-military claimants from recovery for the military's negligence.

In *Brown*, the veteran sustained injuries from the hospital's staff negligent treatment for an injury that occurred while he was on active duty. The beginning of Brown's original injury occurred while he was on

¹⁵⁹ Stare decisis binds prior decisions only if the legal point on which the case was decided on is the same or substantially the same in both cases. See e.g. *District of Columbia v. Gould*, 852 A.2d 50 (D.C. 2004); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007).

¹⁶⁰ *Johnson*, 481 U.S. at 703.

¹⁶¹ *Feres*, 340 U.S. at 141.

¹⁶² *Indian Towing*, 350 U.S. at 69.

¹⁶³ When the court ruled they were going to apply the *Feres Doctrine*, the court said, "[w]e wish, frankly, that were not the case." *Ortiz*, 786 F.3d at 832.

¹⁶⁴ See *Johnson*, 481 U.S. at 700.

active duty, but the negligence occurred during follow up treatment when he was no longer active military. In *Ortiz* the beginning of the injury incurred while Captain Ortiz was on active duty, but it ended with an injury to a private citizen. I.O. never even served in the military, her mother was on active duty, whereas a retired veteran was active duty at one time. If the veteran in *Brown* could recover for injuries as a result of negligence by military personnel during his status as a veteran, relief should have been afforded to I.O., who never had status as a service member. In other words, if a military veteran can recover for damages, so should an unborn child, who has a status that is far more removed than a veteran.

Neither was the *Ortiz* court bound by *Stencel Aero* because I.O.'s case is a factually distinctive scenario. I.O. is not trying to circumvent the statutory remedies by bringing an indemnification claim but I.O. has an independent cause of action and is not provided statutory remedies. In *Stencel Aero*, the Supreme Court ruled that Stencel Aero Incorporation's indemnification claims against the government were barred under the *Feres Doctrine* because the claim would have the same effect as if a service member brought the claim, thus undermining the purpose of the *Feres Doctrine*.¹⁶⁵ I.O. is not seeking recovery because of injuries sustained *during* active duty service but is seeking recovery because of an injury sustained *from* an active duty service member—a one-word difference that should have permitted I.O. to seek relief from the Government under the FTCA.

The *Ortiz* Court claimed that it should follow *Stencel Aero* because other Circuit Courts have applied *Stencel Aero* to third party claims even when they were not indemnity claims.¹⁶⁶ But the *Ortiz* court was not bound by the Circuit Courts' decision to expand *Stencel Aero*. The court should have rejected the Sixth Circuits expansion of *Stencel Aero* because the reasoning of *Stencel Aero* was not to prevent all derivative injuries, but derivative claims that attempted to circumvent the upper-level amount of acceptance of liability of the Government.¹⁶⁷ By this reasoning, the homeowner potential plaintiff in *Stencel Aero* would not have received any recovery because it derived from the chain of events of the Government's negligence. Additionally, unlike the plaintiff in *Stencel Aero*, I.O. is not attempting to circumvent the upper-level liability of the Government under the Veterans' Benefit Act.¹⁶⁸ In fact,

¹⁶⁵ *Stencel Aero*, 431 U.S. at 673.

¹⁶⁶ *Ortiz*, 786 F.3d at 824.

¹⁶⁷ *Stencel Aero*, 431 U.S. at 673.

¹⁶⁸ *Id.*

there is no other recovery available to I.O. unless this claim is allowed to be brought before the court.

Despite the court's insistence that allowing the claim to be brought by I.O. will disrupt the "military discipline," the *Ortiz* court did not offer a rationale on precisely how military discipline will be disrupted any more intrusively than other civilian claims that are brought because of military negligence under the FTCA. I.O. is a child who was injured by military negligence while in a military hospital, not a service member who could possibly disrupt military discipline. Furthermore, Captain Ortiz was not acting pursuant to military orders like the plaintiff in *Johnson*. Both the Fifth Circuit and the Eleventh Circuit have held that claims brought for military negligence during prenatal care or labor and delivery require little, if any, inquiry into either possible "sensitive military affairs," or "military mission[s]." ¹⁶⁹ Thus, the third rationale, not wanting to inquire about military orders, is not present in this case.

IV. SECOND CHANCES: RECONSIDERING THE FERES DOCTRINE

A. *An Uneven and Unfair Application of the Feres Doctrine*

The *Feres Doctrine* creates unequitable results when it prevents civilian children of military personnel from recovering for an injury that occurred while receiving treatment in a military hospital. For one, the military benefit insurance will generally only provide coverage for care received in a military hospital.¹⁷⁰ Thus, a military service woman is essentially required to deliver her child in a military hospital, and subsequently is barred from bringing a potential negligence suit in civil court. It creates a double edged sword with no recourse for injuries sustained to a third party civilian, unlike active military personnel who at least have some remedies available under the Veterans' Benefit Act.

Additionally, the *Feres Doctrine* was meant to provide even application of recovery and to "mitigate unjust consequences of sovereign immunity."¹⁷¹ However, if the facts are changed slightly to a civilian wife of a military service man gives birth in the military hospital, and the child is injured because of negligence, the genesis test is eliminated because the mother is not in the active military. Under this scenario, presumably since the FTCA does not prevent recovery by military dependents, recovery under the Act would be permitted. Even

¹⁶⁹ Scales, 685 F.2d at 974; Del Rio, 833 F.2d at 287.

¹⁷⁰ *The TRICARE Prime Program*, MILITARY.COM, <http://www.military.com/benefits/tricare/prime/tricare-prime-overview.html> (last visited 1/25/2016).

¹⁷¹ *Feres*, 340 U.S. at 139.

though the FTCA is a gender-neutral law on its face, the unfairness of the application of the *Feres Doctrine* and the unjust consequences of sovereign immunity are demonstrated above when the active duty military service member is not the mother but is switched to a father whose non-military wife is giving birth. Not only is the *Feres Doctrine* unfair but it has the effect of discriminating towards pregnant women in the military because there is no recovery to potential damages of their non-military child who sustained injuries *in utero*. Thus, women in the military are being unfairly discriminated against and the *Feres Doctrine* is not providing an even application of recovery.

The *Feres Doctrine* should not bar claims brought by children of an active duty military woman merely because the child is in the womb. Under the Seventh Amendment,¹⁷² a child has a constitutional right to equal access to the courts.¹⁷³ Under this rationale, there not only is an exception the *Feres Doctrine* but also an additional round-about way of avoiding the *Feres Doctrine*.

To hold otherwise is a violation under the Equal Protection Clause.¹⁷⁴ In *Romer v. Evans*, even though homosexuals were not members of a protected class, the Court ruled that it was unconstitutional for the state to make any laws that prohibited any legislative, judicial, or executive action designed to protect homosexuals.¹⁷⁵ The Court reasoned that "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."¹⁷⁶ Similarly, even though the *Feres Doctrine* is a gender-neutral law, the doctrine is preventing children of military women from bringing their claims in Court and leaving these children without any aid from the government. Although the *Feres Doctrine* is not expressly singling out children of military women, the *Feres Doctrine* as it stands today has the effect of singling out children of military women from bringing claims under the FTCA.

¹⁷² U.S. Const. amend. VII.

¹⁷³ Laurie Higginbotham & Jamal Alsaffar, *Fighting for Military Mothers' Newborns When A Servicewoman Receives Negligent Prenatal Care, Can Her Civilian Child Be Compensated for Birth Injuries? The Federal Circuits Disagree, but Lawyers Can Glean Strategies from the Courts that Allow These Claims*, Trial, December 2004, at 44, 46. This argument has not been presented to the court in any circuit cases.

¹⁷⁴ Under the doctrine of Reverse Incorporation, the Fifth Amendment Due Process Clause is read to incorporate the Fourteenth Amendment Equal Protection Clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁷⁵ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁷⁶ *Id.* at 633.

B. Three Rationales for Feres Are Not Present When Dealing with Third-Parties Civilians

There are three main rationales for the *Feres Doctrine*. The first is that the relationship between members of the armed forces and the Government is distinctively federal in nature. When a civilian is the recipient of negligent misconduct by a military member, the very premise of the first rationale fails because there is no longer the distinctive federal relationship that needs to be protected. There is no longer a bilateral contract where the military personnel consented to being in the military and under the Government's control. Instead, the civilian is at the mercy of the military medical doctors to administer proper care. However, once the Government decided to start accepting civilians in its hospital, like the operation of the lighthouse in *Indian Towing*, the Government owes a duty of due care to the civilian patient.¹⁷⁷

Second, there is no recourse given to military dependents under the Veterans' Benefit Act except for a widow receiving death benefits. There are no statutory provisions providing recourse for a military dependents being treated by military personnel. Until statutory provisions exist that provide remedies for children of military personal, local tort law will have to suffice to govern the claims brought under the FTCA.

Third, the Court's reasoning about upsetting military discipline is flawed. Even if this reasoning was sound, this policy should not withstand the injustice it brings to children who sustained injuries before they were even born because of military negligence. Curiously, neither *Stencel Aero* nor *Johnson*, two cases in which the Court emphasized the need to protect military discipline, required an inquiry into military affairs.¹⁷⁸ Perhaps Justice Scalia was correct when he suggested that the Court's refusal to question military orders is doing more harm than good.¹⁷⁹ Because of the concern to protect citizens, maybe the courts do need to inquire into military affairs to adequately adjudicate claims in negligence. When a civilian is involved in receiving medical care, there is not a chain of military command present. As Major Brou pointed out, this rationale is not present when military personnel are receiving medical treatment.¹⁸⁰ In fact, the chain of command could be reversed if a lower-command military service member is treating a higher-command

¹⁷⁷ See *Indian Towing*, 350 U.S. at 61.

¹⁷⁸ See generally *Stencel Aero*, 431 U.S. 666 (1977); see also *Johnson*, 481 U.S. 681 (1987).

¹⁷⁹ See Bruce D. Beach, *The Death of Wilkes v. Dinsman: 'Special Factors Counseling Hesitation' in Abandoning A Common Law Doctrine*, 41 Baylor L. Rev. 179, 201 (1989).

¹⁸⁰ Brou, *supra* note 8, at 56.

military service member.¹⁸¹ Furthermore, this case is unlike *Johnson*, where the service member died in a helicopter crash while carrying out a military mission. During labor and delivery, a service woman is not carrying out an activity in furtherance of a military mission.

C. *Mitigating the Pain: Solutions to the Feres Doctrine*

Below are a few novel solutions that either Congress could enact as law, the armed services could implement a policy, or the court could rule in order to bring justice to unborn children of military women who suffer an injury while the mother is on active duty.

1. Congressional Action

Congress should implement laws to prevent the injustice that the *Feres Doctrine* has created towards unborn children of military women. It has been proposed before that the Military Veteran Benefits Act create a program for the benefit of military infants and children. The creation of a new program would create many logistical issues, such as what is types of injuries are covered and the extent of coverage. Another issue with this program is that there may not be adequate funding to properly provide coverage, and again, the issue of adequate compensation resurfaces.

If the last and only legitimate concern about the *Feres Doctrine* is upsetting military discipline, perhaps Congress should consider creating an Article 1 Court, where the claims are either adjudicated in civil court or Judge Advocate General (JAG). This would require the cooperation of the military to change their own policies. If the claims are not adjudicated in JAG, the civil courts cannot issue final orders, only recommendations and findings of facts, but the JAG court would issue the final order.¹⁸² This system would operate much like the bankruptcy courts operate when hearing a *Sterns* claim: the bankruptcy courts issue recommendations and findings of fact and the district courts issue the final orders.¹⁸³ This new system would strike balance between protecting the lives of the infants of military women yet still preserving the need to protect the military discipline. This system for adjudicating claims would only apply when a civilian's tortfeasor was military personnel. Under this system, the original intent of the of the *Feres Doctrine* is still upheld,

¹⁸¹ Brou, *supra* note 8, at 56.

¹⁸² See *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (holding that the Bankruptcy court lacked authority under Article III to enter final judgment on state-law counterclaim but could issue proposed findings of fact).

¹⁸³ *Id.*

but yet the Seventh Amendment¹⁸⁴ concerns are eliminated. This is not a catch-all solution, and many questions would still be left unanswered.

2. Military Policy

One solution would be to give the mothers an option to take additional military leave allotted specifically for being treated for prenatal care at a military hospital. Of course, this would be burdensome because of the procedures required for taking leave. Unless, the military implemented a policy that service women are automatically on pre-approved leave during prenatal visits or during labor and delivery at military hospitals. Thus, the prenatal care or labor and delivery procedures would undoubtedly not be “incident to service” because the mother is now on leave and thus not on active duty.

3. Court Rulings

There is, however, a much simpler solution: creating an exception to the *Feres Doctrine*. In light of the injustice the *Feres Doctrine* creates, it is time for the Supreme Court to stop expanding the *Feres Doctrine* and start limiting the application of it. The first of these limitations could be that the *Feres Doctrine* does not apply to injuries incurred to active military service members’ infants while in the womb because of medical malpractice of another service member. This would eliminate the convoluted genesis test. The courts would no longer have to determine if the injury occurred to an unborn infant and if it was “derivative” of an injury “incident to military service.” It eliminates splitting hairs to determine whether the medical care was given for the primary benefit of the mother or the unborn child—a test that will often result in inconsistent or overlapping results.

This would also eliminate any concerns about over-diminishing the *Feres Doctrine* because this exception would not apply to injuries sustained due to medical malpractice to military personnel. This exception is not liberally applied to all third party injuries, so any concerns about third party suits being brought for negligent infliction of emotional distress, loss of companionship, and loss of consortium are also eliminated. This exception would not circumvent the current FTCA, and would continue to exempt any claims during times of war.

The important distinction to this exception is that there must have been an act or a failure to act by military personnel during the course of medical treatment to a fetus or infant of an active duty service woman. This exception fits squarely with the original intent of the *Feres Doctrine*

¹⁸⁴ U.S. Const. amend. VII.

because it meets the parallel liability test since it does not create new liability for the Government under the FTCA and an infant would be able to recover under private action.

Although it has been suggested¹⁸⁵ that an exception should be applied to all medical malpractice cases, that exception is too broad and does indeed go against the Supreme Court's original intent, especially since *Feres* directly dealt with two cases entailing medical malpractice in the consolidated suit.¹⁸⁶ There is one main difference between military personnel and an infant—unborn or born: military personnel consented to being in the military whereas the infant did not. The Supreme Court in *Feres* wanted the *Feres Doctrine* to expressly to apply to medical malpractice cases involving military since two of the claims before the Supreme Court in *Feres* involved medical malpractice. The Supreme Court has made other exceptions for non-active duty military personnel, such as veterans.¹⁸⁷ Any court, but especially the Supreme Court, can rule that the *Feres Doctrine* should not apply to injuries incurred to fetuses or infants receiving medical treatment from military personnel and *Feres* would not need to be overturned. With this narrow exception, the reasons for *Feres* would still be preserved yet the proper recourse would be provided to an infant, whether born or still in the womb. Thus, the Supreme Court should provide clarity to the existing Circuit split and the ambiguity should be resolved in the infant's favor for reasons founded in fairness and equity.

V. CONCLUSION

In conclusion, when the *Feres Doctrine* is applied to negligence claims brought against the Government for medical malpractice under the FTCA for injuries that incurred *in utero* of an active servicewoman, grave injustice occurs. The original reasoning of the *Feres Doctrine* is not kept and the three rationales for the *Feres Doctrine* are not present. In order to prevent the injustice that occurs, courts should not apply the *Feres Doctrine* and instead should treat the claim as an independent cause of action brought by a civilian. As Justice Ruth Bader Ginsburg says "Justices continue to think and can change . . . I am ever hopeful

¹⁸⁵ See Jennifer L. Carpenter, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine*, 26 U. Haw. L. Rev. 35 (2003); see also Brou, *supra* note 8, at 53.

¹⁸⁶ *Feres*, 340 U.S. at 137.

¹⁸⁷ See generally *U.S. v. Brown*, 348 U.S. 110.

that if the Court has a blind spot today, its eyes will be open tomorrow.”¹⁸⁸

¹⁸⁸ Sean Sullivan, *Justice Ruth Bader Ginsburg Says Male Justices Have a ‘Blind Spot’ on Women’s Issues*, WASH. POST (July 31, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/07/31/justice-ruth-bader-ginsburg-says-male-justices-have-a-blind-spot-on-womens-issues/>.