

THREE WRONGS DO NOT MAKE A RIGHT: FEDERAL SOVEREIGN IMMUNITY, THE *FERES* DOCTRINE, AND THE DENIAL OF CLAIMS BROUGHT BY MILITARY MOTHERS AND THEIR CHILDREN FOR INJURIES SUSTAINED PRE-BIRTH

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The history of sovereign immunity in the United States is a history of mistakes.

—Susan Randall¹

*[W]e must confront—yet again—the *Feres* doctrine We conclude that this suit falls within the doctrine’s ever-expanding reach. We reach this conclusion only reluctantly, bound by circuit precedent to apply this doctrine to yet another case that seems far removed from its original purposes.*

—*Costo v. United States*²

INTRODUCTION

Through the application of the judicially created *Feres* doctrine, female service members who suffer injuries during pregnancy or the birthing process as a result of military medical malpractice are barred from seeking recovery under the Federal Tort Claims Act (FTCA) and, depending on the jurisdiction in which the negligent medical treatment

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1. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 2 (2002).

2. 248 F.3d 863, 864 (9th Cir. 2001).

occurs, their children may also be barred from seeking recovery for the injuries they sustain as the result of the negligent prenatal medical care. The *Feres* doctrine spawned from the United States government's passage of the FTCA in 1946, which was intended to be a broad waiver of the government's sovereign immunity.³ Pursuant to the FTCA, the government could be held liable for torts committed by its employees.⁴ The FTCA contains certain exceptions to this general waiver but never did, and currently does not, explicitly bar service members from bringing suit for injuries they sustain during their military service that do not fall within one of the enumerated exceptions.⁵

In 1950, however, the United States Supreme Court, in *Feres v. United States*,⁶ held that service members were barred from bringing claims pursuant to the FTCA if the injury to the service member occurred "incident to service."⁷ The "incident to service" test is not tied to any one of the enumerated exceptions in the FTCA and is, thus, an exception created by the Court. Federal courts have tried to apply this test and have struggled to determine when an injury occurs "incident to service," and injuries have been found to occur incident to service simply if the service member was on active duty at the time of the injury, regardless of whether the injury resulted from the service member's military duties.⁸

Thus, in cases involving claims brought by female service members for injuries suffered during their pregnancies or births as the result of military medical malpractice, courts have, with very little discussion or rationalization, held that the injuries occurred "incident to service" and are barred by the *Feres* doctrine.⁹ The child's claim may also be barred under the theory that it derived from the mother's injury and is barred because the mother's injury is barred.

3. See *infra* Part II.

4. See *infra* Part II.

5. See *infra* Part II.

6. 340 U.S. 135 (1950).

7. *Id.* at 146.

8. For example, the Seventh Circuit Court of Appeals has stated that "[t]he dispositive inquiry [is] whether the service-member stand[s] in the type of relationship to the military at the time of his or her injury that the occurrences causing the injury arose out of activity incident to military service." *Purcell v. United States*, 656 F.3d 463, 466 (7th Cir. 2011). Under this test, the Seventh Circuit has held that when a service member commits suicide on base during non-working hours, the injury arises out of an activity that was incident to service. *Id.* at 466-67.

9. See *infra* Part III.

In an earlier essay, I address the “incident to service” test as it applies to the pre-birth cases.¹⁰ After reviewing the history of women in the military and the unique treatment the military affords pregnant service members, in that essay I argue that pregnancy and any injuries sustained incident thereto cannot be considered occurring “incident to service” and should not be barred by the *Feres* doctrine.¹¹ In reviewing the pre-birth injury claims brought by female service members, I was surprised to find that their claims were being dismissed rather summarily, with very little, if any, discussion regarding how the claims undermined the rationales the Court outlined as underpinning the *Feres* doctrine.¹² If the woman was in the military when the injury occurred during pregnancy, her injury was barred, end of discussion.

In an effort to understand the force behind the perfunctory nature of the dismissals, my research led me to the doctrine of federal sovereign immunity. The *Feres* doctrine is, after all, grounded in the concept of sovereign immunity. The current application of the doctrine of federal sovereign immunity is that the government cannot be subject to suit unless it consents, regardless of whether the lawsuit implicates government policy decisions. In other words, immunity is available just because the government is a sovereign. The Supreme Court subscribes to this view. Whether the government should be able to claim unbridled immunity is, however, far from settled, but there are sound reasons for allowing the government to claim immunity for policy decisions that affect the public at large.¹³

In examining the pre-birth injury cases brought by female service members and the current application of the *Feres* doctrine, I have reached the conclusion that even though the Court outlined broad policy rationales supporting the existence of the doctrine, in application of the doctrine to pre-birth cases, the doctrine mirrors the current mistaken application of sovereign immunity in general and provides a virtual blanket form of immunity.¹⁴ Stated differently, in order to invoke the

10. Tara Willke, *Military Mothers and Claims Under the Federal Tort Claims Act for Injuries that Occur Pre-Birth*, 91 NOTRE DAME L. REV. ONLINE 160 (2016).

11. *Id.* at 165–68.

12. *Id.* at 167–68.

13. *E.g.*, Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1534–41 (1992); *see* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 522–25 (2008).

14. The cases that form the basis of this essay are only one example of instances where the doctrine has been applied without any meaningful review of whether the policy rationales underlying the *Feres* doctrine are actually implicated. A complete review of cases outside of the pre-birth context is beyond the scope of this essay, but it is an issue that is, nonetheless, ripe for review and discussion.

protection of the doctrine in FTCA cases brought by female service members for injuries sustained pre-birth, the government is not required to explain how any of the policy rationales enunciated by the Court for the doctrine are implicated by the female service member's claim. This is a mistake that is based on the mistaken belief that sovereign immunity has no boundaries or limits.

Thus, in Part I, I examine the doctrine of federal sovereign immunity and outline the competing theories regarding the existence of and purposes for the doctrine at the federal level. The federal government has operated under the assumption that unless it waives its immunity, it cannot be subject to suit. Part II provides a targeted overview of the FTCA and the *Feres* doctrine, focusing on the policy rationales enunciated by the Supreme Court for the creation of the doctrine. The pre-birth injury cases are just one example of how the expansive view of sovereign immunity has been applied to members of the military, and these cases are discussed in Part III.

Finally, in Part IV, I argue that Congress must reassert itself in this issue because, ultimately, whether the FTCA bars claims by female service members for injuries sustained pre-birth as the result of medical malpractice and the broader issue of whether the *Feres* doctrine should be used to bar similar claims is a policy determination that must be addressed by Congress. If Congress continues to allow the status quo to prevail, then courts addressing claims brought by service members under the FTCA should acknowledge that the concept of sovereign immunity embodied in the application of the *Feres* doctrine has been taken too far and conduct a meaningful review of the claims to determine if they undermine the rationales enunciated by the Court for the creation of the doctrine. In the cases involving injuries to service women and their children pre-birth, this will lead to the conclusion that these are not the types of claims that should be barred by the *Feres* doctrine.

I. SOVEREIGN IMMUNITY

The concept of sovereign immunity is commonly traced to the British monarchy, where the King was not to be called into court without his consent.¹⁵ Under the British theory of sovereign immunity, British subjects could only seek a petition of right to address claims

15. *United States v. Lee*, 106 U.S. 196, 205 (1882). See generally Randall, *supra* note 1, at 14–16; Marc L. Roark, *Retelling English Sovereignty*, 4 BRIT. J. AM. LEGAL STUD. 81, 83–84 (2015).

against the monarchy.¹⁶ Under its current application in this country, the doctrine of sovereign immunity provides the federal government with immunity from lawsuits unless the government consents to being sued. Even though there is almost widespread agreement that the Constitution does not explicitly grant the federal government immunity from lawsuits,¹⁷ there is disagreement regarding whether the doctrine should exist in a democratic republic.¹⁸ Proponents of the doctrine argue that it exists without an explicit grant in the Constitution.¹⁹ Opponents argue that the doctrine conflicts with democracy and has no role in a government where the people are the sovereign.²⁰ Others find that there are reasons for the doctrine's existence, but there is also acknowledgement that, as currently applied, the doctrine's application has been taken far beyond what is necessary to honor the doctrine's logical purposes.²¹

There is a valid argument that “[s]overeign immunity is a judge-made doctrine in its very origins.”²² In the Supreme Court's early jurisprudence regarding the existence of the doctrine in the new republic, as early as 1821, the Court acknowledged in dicta that the doctrine existed,²³ but it also acknowledged that “the principle has

16. *Lee*, 106 U.S. at 205.

17. *E.g.*, Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523 (2003); *see also* Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1943–50 (2012) (discussing the Guarantee Clause and its interplay with the doctrine of sovereign immunity). *But see* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1264–67 (2009) (discussing the Appropriations Clause as a source of immunity for claims for money damages).

18. *E.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435 (1987) (discussing who was to be the “ultimate unlimited sovereign” and finding that early Americans believed that “[t]rue sovereignty resided in the People themselves”).

19. *E.g.*, Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 488–89 (2001).

20. *E.g.*, Erwin Chermersky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–03 (2001).

21. *E.g.*, Jackson, *supra* note 17, at 522–27.

22. Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, “Accident,” and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 767 (2008); *see also* Sarah L. Britton, *Three-Dimensional Sovereign Immunity*, 54 SANTA CLARA L. REV. 237, 242 (2014).

23. *Cohens v. Virginia*, 19 U.S. (1 Wheat.) 264, 411–12 (1821) (“The universally received opinion is, that no suit can be commenced or prosecuted against the United States”); *accord United States v. M'LeMORE*, 45 U.S. (1 How.) 286, 288 (1846) (“[T]he government is not liable to be sued, except with its own consent,

never been discussed or the reasons for it given.”²⁴ More recently, in *Alden v. Maine*,²⁵ which involved state sovereign immunity, the Court reviewed the doctrine’s history, stating that “the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.”²⁶ According to the Court, ratification of the Constitution did not alter that understanding.²⁷ Thus, the doctrine was rooted in the belief that all governments were immune from suit and the only way for the sovereign to be subject to suit was if it consented thereto.²⁸

Others who support the existence of the doctrine have articulated theories other than the theory articulated by the Court to support the existence of the doctrine. One theory focuses on the government’s need to insulate itself from suit for the policy decisions that affect the public at large “because open-ended and unconstrained access to the courts by those who object to governmental policies or actions could undermine effective governance by the people through an electoral majority.”²⁹ Thus, the idea is that the policy decisions that the government makes for the public at large should not be reviewed in court.³⁰ Instead, the desirability of such decisions should be left to the electorate and the political process.³¹ Under this justification for sovereign immunity, there is a recognition that not all government actions are subject to immunity and government actions that are not tied to policy determinations should not be protected by the doctrine.³² Along those same lines, a test for determining when the government is able to invoke the protection of the doctrine has been proposed.³³ It has two criteria:

given by law.”). See generally Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443–44 (2005).

24. *United States v. Lee*, 106 U.S. 196, 207 (1882).

25. 527 U.S. 706 (1999).

26. *Id.* at 715–16.

27. See *id.* (“The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”).

28. Hill, *supra* note 19, at 489 (“[I]mmunity is an inherent attribute of sovereignty, without regard to the form of government prevailing within the borders of the particular sovereign.”).

29. Sisk, *supra* note 13, at 529–30; accord Krent, *supra* note 13, at 1532 (“The doctrine of sovereign immunity permits Congress to determine when to rely on the political process to safeguard majoritarian policy.”).

30. Sisk, *supra* note 13, at 529–30.

31. Krent, *supra* note 13, at 1532.

32. *Id.* at 1532–33; see also Sisk, *supra* note 13, at 529–30.

33. Corey Brettschneider & David McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*, 93 TEX. L. REV. 1229, 1235–36 (2015).

First, the state must act “for the people” within a framework that respects the rights of citizens and in which its powers are limited so as to meet this need. Second, the state must act “by the people” by deriving its power from the consent of the governed through their representatives.³⁴

Both criteria must be met for the government to claim it is immune from liability for its actions.³⁵

Other justifications for the doctrine’s existence are tied to the public treasury. One theory is that the doctrine protects the public treasury from excessive judgments.³⁶ Even under this theory, the government should not be allowed to claim that the doctrine automatically insulates it from liability.³⁷ Another similar theory focuses on the relationship between the branches of the government and the need for the courts to protect themselves from appearing weak.³⁸ The theory is that because the Constitution grants Congress the ability to make appropriations, even if a court enters a judgment against the United States, the court has no way to force the government to make the payment.³⁹ Thus, “[a]sserting the constitutional provenance of the sovereign immunity doctrine in a sense empowered the Court more fully to control what remedies it would make available.”⁴⁰ Professor Vicki Jackson, who has articulated this theory, writes, “[T]o the extent sovereign immunity can be understood as a form of early judicial efforts to protect and secure judicial independence . . . its scope should be reconsidered and narrowed (if the doctrine itself is not abolished).”⁴¹

Opponents of the doctrine argue that it does not exist in a form of government where sovereignty lies with the people.⁴² Thus, in a democratic republic, the concept of sovereign immunity is

34. *Id.* at 1235.

35. *Id.* at 1235–36.

36. Sisk, *supra* note 13, at 543.

37. *Id.* at 562 (“It is quite another thing to allow the canon of strict construction to devolve into a methodology by which the government wins automatically whenever plausible arguments can be made for alternative interpretations of a statutory provision that sets forth standards, limitations, exceptions, or procedural rules for claims against the government already authorized by an express waiver.”).

38. *See* Jackson, *supra* note 17, at 574–75.

39. *Id.* at 574.

40. *Id.* at 604–05.

41. *Id.* at 607.

42. Amar, *supra* note 18, at 1466 (no immunity for constitutional violations); Chermersky, *supra* note 20, at 1203 (the doctrine “conflicts with too many basic constitutional principles to survive”); Randall, *supra* note 1, at 3 (“[T]he federal government . . . enjoys no constitutional immunity in Article III cases.”).

“inconsistent” with the Constitution because it places the government above the people.⁴³ Professor Susan Randall argues that this “mistake has thwarted the administration of justice in this country over the course of more than two centuries, depriving many claimants against the United States . . . protection of our law.”⁴⁴ Examining similar evidence used by the Court to find that the doctrine of sovereign immunity survived ratification, Professor Randall agrees with the Court that prior to ratification of the Constitution there was a general understanding regarding the concept of sovereign immunity and the ability of a sovereign to be immune from suit unless it consented, but she argues that “the Founders understood ratification of the Constitution to provide that consent.”⁴⁵

Thus, the exact reaches of federal sovereign immunity, if it exists at all, are far from settled, and there are a number of reasonable, sound arguments questioning the existence and reach of the doctrine. The Court has, however, taken the position that the federal government cannot be subject to suit unless it consents, and this is the assumption under which Congress has operated. The next section addresses one of the government’s particular waivers of its immunity—the Federal Tort Claims Act—and the Court’s determination that this waiver was not intended to apply to members of the military for injuries they sustained “incident to service.”

II. THE FEDERAL TORT CLAIMS ACT AND THE *FERES* DOCTRINE

Because of the doctrine of sovereign immunity, the United States government was not subject to liability for torts caused by its employees until the passage of the Federal Tort Claims Act (FTCA)⁴⁶ in 1946. The FTCA was Title IV of the Legislative Reorganization Act.⁴⁷ The purpose for the Legislative Reorganization Act was “[t]o provide for increased efficiency in the legislative branch of the Government.”⁴⁸

43. Randall, *supra* note 1, at 15.

44. *Id.* at 6.

45. *Id.* at 30.

46. 28 U.S.C. § 1346 (2012).

47. Legislative Reorganization Act of 1946, Pub. L. No. 601, 60 Stat. 812, 842.

48. *Id.* The passage of the FTCA was, according to some accounts, spurred by a B-24 bomber crash into the Empire State Building. Joe Richman, *The Day a Bomber Hit the Empire State Building*, NPR (July 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=92987873>. The Texas City Disaster of 1947, where it was estimated that it was possible that up to six hundred people died after a French ship carrying ammonium nitrate exploded, may have also helped trigger the passage of the FTCA. Edward G. Bahdi, *A Look at the Feres Doctrine as It Applies to Medical*

Prior to the passage of the FTCA, in order for a private citizen to seek relief for a tort caused by a government employee, the citizen had to find a congressional sponsor to shepherd the claim through both houses of Congress for ultimate approval by the President.⁴⁹ Even though the actual procedure was well established by the time the FTCA was passed, the process was “remarkably inefficient” and time consuming.⁵⁰

The FTCA was considered a broad waiver of the United States’ sovereign immunity.⁵¹ Pursuant to the FTCA, the United States became liable “in the same manner and to the same extent as a private individual under like circumstances”⁵² “for money damages”⁵³ for damages to property and personal injury caused by “any employee of the government.”⁵⁴ When the FTCA was passed, it contained twelve exceptions.⁵⁵ None of those twelve exceptions unambiguously barred members of the military from bringing claims under the FTCA. There are currently thirteen enumerated exceptions, including one for “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”⁵⁶ The other two

Malpractice Lawsuits: Challenging the Notion That Suing the Government Will Result in a Breakdown of Military Discipline, ARMY LAW., Nov. 2010, at 56, 57.

49. See generally Walter Gellhorn & Louis Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1 (1955).

50. PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT 6–7 (2012).

51. E.g., *Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001).

52. 28 U.S.C. § 2674 (2012).

53. *Id.* § 1346(b)(1).

54. *Id.*

55. Legislative Reorganization Act of 1946, Pub. L. No. 601, § 421, 60 Stat. 812, 845–46.

56. 28 U.S.C. § 2680(j) (2012). The other enumerated exceptions are:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

exceptions that may be read as applying to members of the military are those for claims arising in a foreign country and for the exercise of a discretionary function.⁵⁷ As noted by one court shortly after the passage of the FTCA, the legislative history regarding the enumerated exceptions was “singularly barren” regarding the purpose behind each one of the listed exceptions.⁵⁸

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- (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
 - (2) the interest of the claimant was not forfeited;
 - (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
 - (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..[sic]
- (d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.
 - (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.
 - (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
 - [(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.]
 - (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
 - (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
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 - (k) Any claim arising in a foreign country.
 - (l) Any claim arising from the activities of the Tennessee Valley Authority.
 - (m) Any claim arising from the activities of the Panama Canal Company.
 - (n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Id. § 2680(a)–(i), (k)–(n).

57. *Id.* § 2680(a), (k).

58. *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948).

In 1949, the United States Supreme Court, in *Brooks v. United States*,⁵⁹ first addressed whether recovery under the FTCA was available for members of the military for instances not covered by the exceptions in the statute—although the plain language of the FTCA appeared to allow such claims unless one of the enumerated exceptions applied. In *Brooks*, two brothers, who also happened to be members of the military, were hit by a vehicle driven by a government employee while the brothers were on furlough.⁶⁰ One of the brothers died, and the other was injured.⁶¹ When claims by the surviving brother and the estate of the deceased brother were brought under the FTCA, the government sought to have them dismissed because the brothers were on active duty at the time of the accident.⁶² The district court denied the motion, but the appeals court reversed.⁶³

In a relatively short opinion, the Court affirmed, finding that the statute provided district courts with jurisdiction over “any claim” and stated that “it would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed.”⁶⁴ The Court then discussed the versions of the tort claims bills that were introduced before the FTCA was passed, and it found that of the eighteen introduced between 1925 and 1935, sixteen contained exceptions for claims brought by members of the military.⁶⁵ When the version that ultimately became the law was introduced, the exception for claims brought by members of the military had been omitted.⁶⁶ Because the accident at issue had “nothing to do with the [brothers’] army careers,” their claims were viable under the FTCA.⁶⁷ The Court did, however, state that “[w]ere the accident incident to the [brothers’] service, a wholly different case would [have been] presented.”⁶⁸

In 1950, the Supreme Court had the opportunity to decide that “wholly different case” in *Feres v. United States*.⁶⁹ *Feres* addressed

59. 337 U.S. 49 (1949).

60. *Id.* at 50. “Leave” or “furlough” are the military terms used to describe approved vacation or “leave” time. The fact that the brothers were on furlough means that they were not just off duty, but that they were also on approved leave.

61. *Id.*

62. *Id.*

63. *Id.* at 50–51.

64. *Id.* at 51. The Court further stated, regarding the fact that Congress had servicemen in mind, that “[t]he overseas and combatant activities exceptions make this plain.” *Id.*

65. *Id.*

66. *Id.* at 51–52.

67. *Id.* at 52.

68. *Id.*

69. 340 U.S. 135 (1950).

three cases that were factually similar: in each of the cases a member of the armed forces suffered injuries by government employees while on active duty and not while on leave, and two of the three cases concerned negligent medical care.⁷⁰ The Court found that the fact that the plaintiffs in *Feres* were on active duty and not leave at the time of the injuries was a “vital distinction” because in *Brooks* the plaintiffs were on leave and not under “orders or duty and on no military mission.”⁷¹ Pursuant to the Court’s holding in *Feres*, the FTCA was not a viable remedy “for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”⁷²

The Court found unpersuasive that the statute already contained enumerated exceptions (none of which were applicable to the facts before it) and the final version of the FTCA did not contain an exception for members of the service not injured during war, as did sixteen of the prior versions.⁷³ The Court found that members of the military already had a “comprehensive system of relief” and that “[t]he primary purpose of the Act was to extend a remedy to those who had been without,” so the statute could not be read as creating yet another avenue for members of the service to recover for their injuries.⁷⁴ Furthermore, reasoned the Court, members of the military had never been allowed to sue the government, and allowing such lawsuits would create causes of action Congress had not contemplated.⁷⁵ In considering the broad language used in the Act, which suggested that there was not a limit to the types of claims allowed if certain exceptions did not apply, the Court found that the section in which the language was found was merely jurisdictional and it remained for the courts to determine which claims would be allowed.⁷⁶ Additionally, the Court held that there existed a “distinctly federal” relationship between the government and those in the armed forces, such that the relationship was governed by federal, not state, law.⁷⁷

70. *Id.* at 137–38.

71. *Id.* at 146.

72. *Id.*

73. *Id.* at 138–39.

74. *Id.* at 140. The Court’s finding was seemingly consistent with other courts’ interpretations of other statutes waiving the federal government’s immunity. *See generally* Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 446 (2010).

75. *Feres*, 340 U.S. at 141–42.

76. *Id.* at 140–41 (discussing 28 U.S.C. § 1346(b)(1) (Supp. III 1950)).

77. *Id.* at 143–44 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947)).

Three of the reasons justifying the Court's holding in *Feres* became known as the "*Feres* rationales."⁷⁸ One rationale focused on the relationship between the federal government and members of the military.⁷⁹ The reasoning behind this rationale was that because those in the military are federal employees, federal law, and not state tort law, should govern claims brought by these federal employees.⁸⁰ Another rationale focused on the existing availability of benefits for those in the military.⁸¹ If members of the military already had a system of benefits that provided them with recovery, then there was no need for them to bring claims under the FTCA. The final rationale articulated by the Court in *Feres* focused on the fact that members of the military were not allowed to sue the government prior to the enactment of the FTCA, so Congress did not envision creating a new cause of action for members of the military when it passed the FTCA.⁸²

Four years after the Court's enunciation of the rationales used to support the decision in *Feres*, the Court seemingly introduced another rationale: one grounded in "military discipline."⁸³ The Court provided little elaboration regarding the basis for this rationale, but it stated that the rationale was grounded in "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty."⁸⁴ The "military discipline" rationale led to the rejection of the earlier rationale that was announced in *Feres*: the belief that the FTCA did not create causes of action for members of the military.⁸⁵ Pursuant to the new "military discipline" rationale, courts were to ask whether the "suit require[d] the civilian court to second-guess military decisions."⁸⁶ At one point, the Supreme Court seemed to emphasize and prioritize this rationale over the other

78. *United States v. Johnson*, 481 U.S. 681, 688–91 (1987).

79. *Id.* at 689.

80. *Id.*

81. *Id.* at 689–90.

82. *Feres*, 340 U.S. at 141–42.

83. *United States v. Brown*, 348 U.S. 110, 112 (1954).

84. *Id.*

85. *Johnson*, 481 U.S. at 694–95 (Scalia, J. dissenting) ("In any event, [the Court] subsequently recognized [its] error [in formulating this earlier rationale] and rejected [it as a justification].").

86. *United States v. Shearer*, 473 U.S. 52, 57 (1985).

remaining two,⁸⁷ but it ultimately reiterated that the doctrine was underpinned by all three of the rationales.⁸⁸

Other than articulating the three rationales, the Court has not provided any other guidance as to when an injury occurs “incident to service.” The late Justice Scalia took all three of these rationales to task in his dissent in *United States v. Johnson*.⁸⁹ He argued that none of the stated rationales “justifie[d the Court’s] failure to apply the FTCA as written” and that “*Feres* was wrongly decided and heartily deserve[d] the ‘widespread, almost universal criticism’ it has received.”⁹⁰

Given the criticism of the rationales and the difficulty in applying them, circuit courts began creating their own factors to consider when determining whether the *Feres* doctrine applied to bar suits.⁹¹ For instance, the Ninth Circuit Court of Appeals considers “1) where the negligent act occurred[,] 2) the duty status of the plaintiff when the negligent act occurred[,] 3) the benefits accruing to the plaintiff because of his status as a service member[,] and 4) the nature of the plaintiff’s activities at the time the negligent act occurred.”⁹² None of the factors is dispositive, and the court will consider “the totality of the circumstances.”⁹³ The Ninth Circuit noted that it has “reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable,” so when determining whether the doctrine applies, it looks to cases with analogous fact patterns to determine if the doctrine should be applied.⁹⁴

The Court has extended application of the doctrine to claims brought by third parties when the third party’s claim derived from an injury that a member of the military sustained incident to service.⁹⁵ This

87. *Id.* (“[T]he situs of the [tort] is not nearly as important as whether the suit requires the civilian court to second-guess military decisions . . .”).

88. *Johnson*, 481 U.S. at 688–91.

89. 481 U.S. 681 (1987); *id.* at 692–703 (Scalia, J., dissenting).

90. *Id.* at 700 (Scalia, J., dissenting) (quoting *In re “Agent Orange” Product Liability Litigation*, 580 Fed. Supp. 1242, 1246 (E.D.N.Y. 1984)).

91. *E.g.*, *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001); *accord Taber v. Maine*, 67 F.3d 1029, 1043 (2d Cir. 1995) (“[T]he lower courts have found the rationales other than discipline extremely difficult to apply in a coherent manner . . .”).

92. *Costo*, 248 F.3d at 867 (citations omitted); *accord Wake v. United States*, 89 F.3d 53, 58 (2d Cir. 1996); *Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980) (considering the military member’s duty status, where the injury occurred, and what the service member was doing at the time the injury occurred); *see also Pierce v. United States*, 813 F.2d 349, 353 (11th Cir. 1987) (adopting the three-part *Parker* test).

93. *Costo*, 248 F.3d at 867 (citations omitted).

94. *Id.*

95. *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 674 (1977).

has become known as the “genesis” test.⁹⁶ Pursuant to this test, the inquiry is whether the claim originated in an injury that occurred to a member of the military incident to that member’s service.⁹⁷ This test has taken on a life of its own and has been applied to a number of situations outside of the “garden-variety indemnification suit” from which it originated.⁹⁸ For instance, it has been applied to bar claims brought by the children and spouses of members of the military for birth defects the children allegedly suffered as the result of inoculations their fathers received during the Persian Gulf War.⁹⁹ Additionally, as is discussed in more detail below, it has been applied to claims brought by the children of service women.

III. THE PRE-BIRTH INJURY CASES

Until the 1970s, women who were in the United States military and who chose to have children could be subject to discharge based on their status as mothers.¹⁰⁰ Today, however, women who choose the military as a career path are no longer automatically subject to discharge because they are also mothers.¹⁰¹ In the early cases involving injuries sustained by pregnant female service members and their children, the service member herself sought recovery.¹⁰² The *Feres* doctrine was, however, used to bar the claims brought by those female service members, and courts did so primarily based on an application of the three *Feres* rationales. For instance, in *Atkinson v. United States*,¹⁰³ a female service member brought a claim under the FTCA, arguing that the military’s failure to adequately diagnose and treat her symptoms,

96. *Ortiz v. United States ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 824 (10th Cir. 2015).

97. *Id.*

98. *Id.* at 823–24.

99. *Minns v. United States*, 155 F.3d 445, 446, 451 (4th Cir. 1998). *See generally Ortiz*, 786 F.3d at 824 n.5 (citing other circuit courts that have applied the genesis test outside of the indemnity context).

100. In 1951, President Truman signed Executive Order 10240, which essentially allowed female service members to be discharged for having children or assuming motherly duties. Exec. Order No. 10240, 3 C.F.R. 749 (1949–53).

101. The policy allowing for the discharge of pregnant women was challenged, and some branches of the service started to abandon the policy by granting pregnant soldiers waivers, but the official pronouncement on the policy’s constitutionality was not until 1976 by the Second Circuit Court of Appeals in *Crawford v. Cushman*, 531 F.2d 1114, 1116 (2d Cir. 1976).

102. *Irvin v. United States*, 845 F.2d 126, 127 (6th Cir. 1988); *Del Rio v. United States*, 833 F.2d 282, 284 (11th Cir. 1987); *Atkinson v. United States*, 825 F.2d 202, 203 (9th Cir. 1987).

103. 825 F.2d 202 (9th Cir. 1987).

which were consistent with pre-eclampsia, resulted in the death of her child, who was stillborn.¹⁰⁴ The government settled the claims for the child's injuries,¹⁰⁵ but the female service member sought damages for the physical and emotional injuries she allegedly suffered due to the government's negligent care.¹⁰⁶

On appeal to the Ninth Circuit, the court initially reversed the district court's dismissal of the suit under the *Feres* doctrine.¹⁰⁷ In so doing, the court relied on the application of the third *Feres* rationale and ultimately found that "[t]he care provided a pregnant woman hardly can be considered to be distinctively military in character" and that the service woman's "injuries ha[d] nothing to do with her army career 'except in the sense that all human events depend upon what has already transpired.'"¹⁰⁸ The Ninth Circuit then withdrew that opinion, however, due to the United States Supreme Court's decision in *United States v. Johnson*, which clarified that all three of the *Feres* rationales must be considered to determine if the doctrine bars the suit. The Ninth Circuit ultimately held that the third *Feres* rationale did not support dismissal of the female service member's claim, but it held, without elaboration, that application of the other two rationales supported dismissal.¹⁰⁹

In *Irvin v. United States*,¹¹⁰ the Sixth Circuit Court of Appeals dismissed a claim by a female service member and her child for negligent prenatal care after her child died shortly after it was born.¹¹¹ The mother claimed that the military was negligent in "prescribing her contraindicated medication," failing to correctly diagnose and treat her pregnancy condition, and providing less than the acceptable standards of care.¹¹² As was alleged in the complaint, these negligent acts led to the baby's death four days after she was born.¹¹³ The court quickly

104. *Id.* at 203.

105. As noted by the concurrence, "[t]hat the government did not invoke this rule against Baby Atkinson [was] a tribute to its humanity but [did] little to mitigate the harshness of the general rule." *Id.* at 207 (Noonan, J., concurring).

106. *Id.* at 203 n.1.

107. *Atkinson v. United States*, 804 F.2d 561, 561 (9th Cir. 1986), *withdrawn*, 825 F.2d 202, 203 (9th Cir. 1987).

108. *Id.* at 565 (quoting *Brooks v. United States*, 337 U.S. 49, 52 (1949)).

109. *Atkinson*, 825 F.2d at 206.

110. 845 F.2d 126 (6th Cir. 1988).

111. *Id.* at 130-31.

112. *Id.* at 127.

113. *Id.*

found that the mother's claim was barred under the *Feres* doctrine because she was on active duty at the time she suffered the injuries.¹¹⁴

In *Del Rio v. United States*,¹¹⁵ a female service member argued that her pregnancy and the treatment that she received as a result was not incident to her service in the military.¹¹⁶ Without providing any meaningful discussion, the court disagreed: because the mother's "active duty military status" allowed her to receive medical care at the base medical facility, that "medical treatment . . . was incident to her military service."¹¹⁷ It was able to quickly dispense with the second factor as well, finding that she was entitled to care under the military's no-fault compensation system.¹¹⁸ Finally, regarding the third rationale, the court found that because the mother's job in the Navy was as a hospital corpsman, it "place[d] the discipline, supervision and control of her working group at issue."¹¹⁹ No meaningful, in-depth review was conducted, and that is the approach that continues today.

For example, in the most recent case involving a child's claim under the FTCA for pre-birth injuries, the Tenth Circuit Court of Appeals reiterated that in determining whether the *Feres* doctrine applied, the primary inquiry was "whether the injury was 'incident to service.'"¹²⁰ The court admitted that the language "incident-to-service" was "neither self-defining nor readily discernible from the language of *Feres* or *Johnson*."¹²¹ Nevertheless, it found that the test applies very broadly and "encompasses, at a minimum, *all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military*" and that "[p]ractically any suit that implicates the military's judgments and decisions runs the risk of colliding with *Feres*."¹²² Thus, the court found that the three *Feres* rationales "effectively merged . . . with the incident to service test," and it would apply that test as it was first articulated in *Feres*.¹²³

114. *Id.* at 130.

115. 833 F.2d 282 (11th Cir. 1987).

116. *Id.* at 286.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Ortiz v. United States ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 821–22 (10th Cir. 2015).

121. *Id.* at 820–21.

122. *Id.* at 821 (quoting *Pringle v. United States*, 208 F.3d 1220, 1223–24 (10th Cir. 2003)).

123. *Id.* at 822–23 (quoting *Ricks v. Nickels*, 295 F.3d 1124, 1130 (10th Cir. 2002)).

As a result of the courts' unwillingness to fully consider whether the claim should be barred, at the end of the 1980s it was clear that a female service member's claims for injuries she sustained during pregnancy were going to be barred by the *Feres* doctrine. Whether her child would be able to state a claim was (and still is) wholly dependent on where the injury occurred and the approach taken by the federal court in that jurisdiction. Regarding the claims brought by the service women's children, three approaches have been taken. The first approach involves an application of the *Feres* rationales, and in the first cases addressing this issue, courts turned to those rationales to determine if the child's claim should be barred under an application of the rationales, which led the courts to reach inconsistent results.¹²⁴ The Fourth and Sixth Circuits use what has been termed the "treatment-focused" approach, which focuses on whether the treatment was directed at the child or the mother.¹²⁵ If the "sole purpose" of the treatment was to benefit the child, the *Feres* doctrine is found to not be applicable and will not bar the child's claim.¹²⁶

In *Ortiz v. United States ex rel. Evans Army Community Hospital*,¹²⁷ the Tenth Circuit rejected the "treatment-focused" approach and applied the "injury-focused" approach and held that a child's claim for injuries sustained pre-birth was barred under the FTCA because her mother, a captain in the Air Force, suffered an injury during the

124. *Compare Scales v. United States*, 685 F.2d 970, 973-74 (5th Cir. 1982), and *Irvin v. United States*, 845 F.2d 126, 130-31 (6th Cir. 1988) (applying the *Feres* rationales and finding that the children's claims were barred), with *Del Rio*, 833 F.2d at 287-88 (applying the *Feres* rationales and finding that the child's claim was not barred).

125. *Brown v. United States*, 462 F.3d 609, 616 (6th Cir. 2006); *Romero v. United States*, 954 F.2d 223, 226 (4th Cir. 1992). In order to reconcile its holding with its earlier, seemingly contrary holding in *Irvin*, in *Brown* the Sixth Circuit held that it was "not convinced that the end result of [the] analysis require[d] slavish adherence to *Irvin*," because the facts were distinguishable and because the opinion in *Irvin* "rest[ed] on shaky ground." *Brown*, 462 F.3d at 614. According to the court in *Brown*, *Irvin* rested on "shaky ground" because the language it relied on was, allegedly, dictum from the Fifth Circuit's decision in *Scales*. *Id.* at 614 (citations omitted).

126. *E.g.*, *Romero*, 954 F.2d at 225. Other approaches have been proposed. For instance, in a case where the child's injuries were allegedly caused by the military's failure to follow the pregnant service member's pregnancy plan, one judge suggested that the *Feres* doctrine should not be applied in situations where the military failed to follow its own policies and regulations. *Ritchie v. United States*, 733 F.3d 871, 879 (9th Cir. 2013) (Nelson, J., concurring), *cert. denied*, 134 S. Ct. 2135 (2014). Another judicial approach that has been suggested is to focus on the military's conduct toward the service member, and if that conduct toward the service member would be barred by the *Feres* doctrine, so too would the claim brought by the third party. *Ortiz*, 786 F.3d at 834 (Ebel, J., concurring).

127. 786 F.3d 817 (10th Cir. 2015).

delivery, even though the mother was not bringing a claim for any injury she herself sustained.¹²⁸ The “injury-focused” approach “asks first whether there was an incident-to-service injury to the service member.”¹²⁹ If that question is answered in the affirmative, then the inquiry focuses on “whether the injury to the third party was derivative of that injury.”¹³⁰ Both questions have to be answered in the affirmative for the *Feres* doctrine to apply.¹³¹ The plaintiffs in *Ortiz* are currently seeking review by the Supreme Court,¹³² but prior to the Tenth Circuit’s opinion in *Ortiz*, the Supreme Court had been asked to address the issue regarding the application of the *Feres* doctrine to cases involving pregnant service members and their children on four occasions and denied certiorari each time.¹³³

IV. RIGHTING THE WRONGS

Even though the Supreme Court has stated that “[t]he *Feres* doctrine cannot be reduced to a few bright-line rules,”¹³⁴ that is exactly what has happened to claims brought by service women for injuries sustained during their pregnancies.¹³⁵ Thus, under the mistaken perception that sovereign immunity has no limits, tethers, or boundaries, the *Feres* doctrine has been applied to bar the claims brought by female service members injured as a result of military medical malpractice without any meaningful inquiry as to whether the rationales underpinning the existence of the doctrine are implicated by the lawsuit.

As a result, potentially viable claims, like the claim at issue in *Atkinson*, have been dismissed, and the courts have engaged in

128. *Id.* at 828.

129. *Id.* at 825. The court found that the “treatment-focused” approach could lead to strange results because it could be difficult to ascertain whether the treatment was to benefit the mother, the child, or both. *Id.* at 830.

130. *Id.* at 825.

131. *Id.*

132. *Ortiz*, 786 F.3d 817, appeal docketed, No. 15-488 (U.S. Oct. 13, 2015).

133. *Ritchie v. United States*, 733 F.3d 871 (9th Cir. 2013), cert. denied, 134 S. Ct. 2135 (2014); *Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988), cert. denied, 488 U.S. 975 (1988); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988); *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983).

134. *Shearer v. United States*, 473 U.S. 52, 57 (1985).

135. As noted by Judge Ferguson in *Costo v. United States*, “the ‘incident to service’ test appears to have given way to an ‘incidental to service’ inquiry, further distorting Congress’s original language in the FTCA.” 248 F.3d 863, 870 n.1 (9th Cir. 2001) (Ferguson, J., dissenting).

numerous forms of legal gymnastics to determine if a child's claim for injuries sustained pre-birth should be barred just because the child's mother happens to be a member of the military. As discussed above, this has led to unfairness and inconsistency in the way the doctrine has been applied to the claims brought by the children of service women. It has, however, also led to unfairness between other military constituents. For example, as the *Feres* doctrine is currently applied in the pre-birth cases, only a female service woman's claim is barred. Put more simply, a male service member whose wife is not in the military may bring a claim under the FTCA for damages sustained if his wife or their child is injured during the pregnancy and, likewise, so may his wife and child.¹³⁶

On a broader scale, it has led to unfairness between civilians and members of the military because "[t]he doctrine effectively declares that members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans."¹³⁷ For example, even though the same rationales underpinning the doctrine may be implicated in claims for medical malpractice by civilians, civilians are allowed to bring those claims. Thus, the unbridled application of sovereign immunity through the *Feres* doctrine raises constitutional arguments that are beyond the scope of this essay but that are nevertheless present and cannot be ignored.

The *Feres* doctrine applies to a wider variety of cases than just those involving claims for injuries that occur during pregnancy, and whether members of the military should be barred from bringing claims under the FTCA is a far-reaching policy determination that should be left for Congress. Congress is aware of the unfairness that is currently caused by the application of the *Feres* doctrine, particularly in the area of medical malpractice. In the 1980s and early 1990s, it attempted to rectify the unfairness caused by the doctrine's application in cases involving medical malpractice, but all attempts failed.¹³⁸

136. *Reilly v. United States*, 665 F. Supp. 976, 978-79 (D.R.I. 1987) (involving a claim under the FTCA brought by a male member of the service, his wife, who was not in the service, and their infant daughter, who suffered extreme injuries prior to her birth), *aff'd in part*, 863 F.2d 149 (1st Cir. 1988).

137. *Costo*, 248 F.3d at 870 (Ferguson, J., dissenting).

138. H.R. 3407, 102d Cong. (1991-92) (introduced and reported to the Committee on the Judiciary); H.R. 1054, 100th Cong. (1987-88) (passed the House with a vote of 312 to 61); H.R. 3174, 99th Cong. (1985-86) (passed the House with a vote of 317 to 90); H.R. 1943, 98th Cong. (1983-84).

In 2009, another attempt was made: the Carmelo Rodriguez Military Medical Accountability Act.¹³⁹ The proposed legislation was triggered by a tragedy in which the diagnosis of a young service member's malignant melanoma was never fully explained to him or treated by military doctors, which ultimately caused his very untimely death.¹⁴⁰ The legislation would have allowed a service member to bring a claim "arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions."¹⁴¹ Despite the bill's good intentions, it did not survive contact with its many enemies. It received a favorable recommendation from the House Committee on the Judiciary, but opponents of the bill were concerned that it would "not make any significant contribution towards improving the quality of military medicine and [would] undermine military morale and effectiveness."¹⁴² As a result, nothing was done. Congress should, however, reassert itself in this area. Its failure to do so has led to a regime where the courts have been left to implement a policy that has never been articulated by Congress and has led to unfairness between members of the military and between members of the military and the general public. That cannot be what Congress intended when passing the FTCA.

In the event that Congress maintains the status quo—which is, unfortunately, a likely scenario—courts should acknowledge that the current application of the *Feres* doctrine parrots the Court's jurisprudence regarding the vast reach of federal sovereign immunity: that the federal government is immune from suit regardless of whether the lawsuit implicates government policy decisions. In acknowledging this fact, courts should conduct a meaningful inquiry regarding whether the lawsuit actually runs afoul of any of the policy rationales relied on to invoke the protection of the *Feres* doctrine.¹⁴³ In cases involving

139. H.R. 1478, 111th Cong. § 2681(a) (2009); S. 1347, 111th Cong. § 2681(a) (2009).

140. See generally Melissa Feldmeier, Comment, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. U. L. REV. 145, 164–65 n.141 (2010); Kenneth R. Wiltberger, Note, *The Carmelo Rodriguez Military Medical Accountability Act of 2009: An Opportunity to Overturn the Feres Doctrine as It Applies to Military Medical Malpractice*, 8 AVE MARIA L. REV. 473, 473–74 (2010).

141. H.R. 1478; S. 1347.

142. H.R. Rep. No. 111-466, at 20 (2010).

143. A number of scholars have called for the demise of the *Feres* doctrine and a number of alternatives have been suggested in cases not specifically involving injuries that involve pregnant women and their children. E.g., Patrick J. Austin, *Incident to Service: Analysis of the Feres Doctrine and Its Overly Broad Application to Service Members Injured by Negligent Acts Beyond the Battlefield*, 14 APPALACHIAN J.L. 1, 18

pre-birth injuries, the four-part test used in some jurisdictions does not go far enough in ensuring that the doctrine is applied fairly.

Instead, in these types of cases, courts should find that injuries suffered by service women pre-birth cannot be determined to occur “incident to service.” As discussed in my earlier essay, at the time the Court formulated the “incident to service” test, women were subject to discharge for any reason, and pregnancy has never been considered part of the military’s mission.¹⁴⁴ To the contrary, the concept of motherhood has always been recognized by the military as something specific to women. If a woman becomes pregnant on active duty, she may seek a voluntary separation because of the pregnancy.¹⁴⁵ Upon confirmation of pregnancy, the military may impose restrictions on a pregnant service member’s ability to change her duty station during the duration of the pregnancy and for a short time thereafter.¹⁴⁶ Likewise, pregnant service

(2014); Bahdi, *supra* note 48, at 67; Peggy L. Miller, *An Ounce of Immunity Prevents a Pound of Lawsuits: Medical Malpractice and Military Mothers*, 70 U. DET. MERCY L. REV. 327, 328 (1993) (arguing that in determining whether immunity exists, one should focus on the actor, not the victim); Thomas M. Gallagher, Note, *Servicemembers’ Rights Under the Feres Doctrine: Rethinking ‘Incident to Service’ Analysis*, 33 VILL. L. REV. 175, 199–203 (1988) (arguing that, in determining whether an injury occurred “incident to service,” courts should focus on whether military decisions will be questioned in the lawsuit and whether the lawsuit will have a negative impact on military discipline); Geoffrey G. Leder, Note, *The Feres Doctrine, Negligent Prenatal Care, and Injuries to the Children of Pregnant Military Servicewomen: Brown v. United States*, 76. U. CIN. L. REV. 1043, 1065–66 (2008) (arguing that, in determining whether the child’s claims are barred, the courts should focus only on the *Feres* rationales and not ask whether the injury derived from an injury to the service woman).

144. Willke, *supra* note 10, at 166.

145. *E.g.*, U.S. DEP’T OF AIR FORCE, AIR FORCE INSTRUCTION 36-3208 para. 3.17 (2004) (“Women may find pregnancy and the expectation of motherhood incompatible with continued military service [and,] [i]f so, they may ask for separation.”).

146. *E.g.*, U.S. DEP’T OF AIR FORCE, AIR FORCE INSTRUCTION 36-2110 para. 2.39 (2009); *see* U.S. DEP’T OF ARMY, ARMY REGULATION 614-30 para. 5-3 (2015). Commanders have also had to take seemingly drastic measures regarding pregnancy to ensure unit readiness. For instance, on November 4, 2009, the commanding officer in Iraq instituted a policy that provided for the court martial of soldiers, both male and female, if a female soldier became pregnant while serving under his command. *See Sarah Netter & Louis Martinez, Senators Demand General Rescind Order on Pregnant Soldiers*, ABC NEWS (Dec. 22, 2009), <http://abcnews.go.com/WN/general-backs-off-threat-court-martial-pregnant-soldiers/story?id=9399604>. Major General Cucolo, the officer who instituted the policy, stated that the reason he instituted the policy was because the loss of the female soldiers, who would have to return stateside after becoming pregnant, would leave the unit weaker. *See General: No Court Martial for Pregnant Soldiers*, NBCNEWS.COM (Dec. 22, 2009), http://www.nbcnews.com/id/34524436/ns/us_news-military/t/general-no-court-martial-pregnant-soldiers/. He also stated that while some soldiers had been reprimanded for violating the policy, none had

members may have their regular work duties altered during their pregnancy.¹⁴⁷

Furthermore, courts are well equipped to address this issue when a similar suit is brought by a civilian, so it should not be automatically presupposed that just because a plaintiff is a member of the armed forces, the court will have to delve into sensitive military matters based on that fact alone.¹⁴⁸ In short, an acknowledgement that the reaches of federal sovereign immunity have been stretched to unreasonable limits will help the courts addressing these cases reach the conclusion that pregnancy and any injuries incident thereto do not occur “incident to service” and are not barred by the *Feres* doctrine. If the mother’s claim is not barred, then her child’s claim will not be barred, so the issue regarding whether the child has a claim will be addressed through a finding that the mother’s claim is not barred.

CONCLUSION

The mistaken belief that federal sovereign immunity provides the government with blanket immunity from suit unless it consents has crept into the application of the *Feres* doctrine, at least as that doctrine has been applied to the claims brought by service women for injuries sustained pre-birth. This has created a far-reaching policy under which these service members may be barred from bringing claims under the FTCA if the injury occurred when they were in the military, regardless of the tenuous connection between the injury and the service member’s military duties. The pre-birth injury cases also illustrate how far this policy has been taken and its harsh ramifications. Congress simply could not have intended to create this kind of unfairness when it passed the FTCA, and it should address the matter and clearly specify its intent. Alternatively, it is time for courts to acknowledge that the

been court martialled and he did not foresee any being court martialled for violating the policy. *Id.*

147. *E.g.*, U.S. DEP’T OF AIR FORCE, AIR FORCE INSTRUCTION 10-203 para. 3.5 (2014); U.S. DEP’T OF ARMY, ARMY REGULATION 40-501 para. 7-9 (2011).

148. Krent, *supra* note 13, at 1532-33 (“Government actions that are situation-specific, such as physician malpractice, rarely stem from previously set policy” and “[i]mmunizing such acts from tort suits may not force the government to internalize the costs of its actions, which, in turn, may lead to inefficient governance in the future.”); Sisk, *supra* note 13, at 562 (“It is quite another thing to allow the canon of strict construction to devolve into a methodology by which the government wins automatically whenever plausible arguments can be made for alternative interpretations of a statutory provision that sets forth standards, limitations, exceptions, or procedural rules for claims against the government already authorized by an express waiver.”).

doctrine of sovereign immunity, as it is applied today, rests on very unsettled ground and that there are solid reasons for reining it back in.