

## ESSAY

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# MILITARY MOTHERS AND CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT FOR INJURIES THAT OCCUR PRE-BIRTH

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*Although she is a servicewoman, a mother cannot be confined to her  
military status.<sup>1</sup>*

### INTRODUCTION

Federal courts treat military mothers and their children differently from male military members and their children for claims sought under the Federal Tort Claims Act (“FTCA”) for a military doctor’s medical malpractice in the treatment and delivery of the child. For instance, most recently, in *Ortiz v. United States ex rel. Evans Army Community Hospital*, the Court of Appeals for the Tenth Circuit held that the FTCA barred the husband of a female Air Force officer from bringing a claim against the government when his child suffered brain trauma that resulted from a negligent delivery.<sup>2</sup> The *Feres* doctrine, a judicially created exception to the FTCA, bars members of the military from bringing claims under the FTCA if the injury was sustained “incident to service,”<sup>3</sup> and thus compelled the court to hold that the government was not liable under the FTCA in this case.<sup>4</sup> This arcane and overly broad doctrine has also been

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1 *Atkinson v. United States*, 825 F.2d 202, 207 (9th Cir. 1987) (Noonan, J., concurring).

2 786 F.3d 817, 818 (10th Cir. 2015).

3 *Id.* at 820 (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

4 *Id.* at 818.

applied to bar third party claims if the injury to the third party derived from an injury to the service member.

The *Ortiz* court was only compelled to reach this result because the child's mother was in the military. If the child's mother had not been a member of the military but was a spouse of a military member, the *Feres* doctrine would not have applied. The *Ortiz* decision is the most recent in a patchwork of decisions that outline the unfairness and inconsistency in the application of the *Feres* doctrine. A petition for certiorari has been filed, but the Court has denied review in earlier cases.<sup>5</sup>

In order to right a longstanding wrong perpetrated against military mothers and their children, the Court should grant review. Part I of this Essay provides a brief discussion of the FTCA and the *Feres* doctrine. Part II discusses the facts and holding in *Ortiz* and its rejection of the approaches taken in other circuits involving pregnant service members and pre-birth injuries, which has caused a clear split in the circuits. Part III argues that these types of claims are not subject to the *Feres* doctrine because pregnancy and injuries that occur incident thereto do not occur "incident to service."

#### I. THE FEDERAL TORT CLAIMS ACT AND THE *FERES* DOCTRINE

While the government is otherwise immune from civil lawsuits under the doctrine of sovereign immunity,<sup>6</sup> in 1946 Congress passed the FTCA,<sup>7</sup> which allows injured parties to recover when the government is at fault.<sup>8</sup> There are certain enumerated exceptions, but none of the exceptions unambiguously bars members of the military from bringing a claim under the FTCA.<sup>9</sup> Only three of those exceptions could be read as pertaining to members of the military. One exception concerns claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."<sup>10</sup> The other two exceptions that may be read as

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<sup>5</sup> See, e.g., *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.), *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).

<sup>6</sup> See, e.g., *Price v. United States*, 174 U.S. 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it." (citing *Schillinger v. United States*, 155 U.S. 163, 166 (1894))).

<sup>7</sup> Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended at scattered sections of 28 U.S.C.).

<sup>8</sup> See 28 U.S.C. § 1346(b) (2012).

<sup>9</sup> See *id.* § 2680.

<sup>10</sup> *Id.* § 2680(j).

applying to members of the military are those for claims arising in a foreign country and for the exercise of a discretionary function.<sup>11</sup>

Four years after the FTCA was passed, the Supreme Court decided *Feres v. United States*.<sup>12</sup> *Feres* addressed three cases that were factually similar: in each case a member of the military suffered injuries at the hands of government employees while on active duty, and two of the three cases concerned negligent medical care.<sup>13</sup> Even though none of the enumerated exceptions in the FTCA was implicated, because the plaintiffs were on active duty at the time of the injuries, the Court held 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.”<sup>14</sup>

Over the years, the Court’s justifications for the doctrine have become known as the *Feres* rationales.<sup>15</sup> These rationales have been heavily criticized as being irrational and unfair.<sup>16</sup> One rationale focuses on the relationship between the federal government and members of the military.<sup>17</sup> The theory is that because those in the military are federal employees, federal law, and not state tort law, should govern claims brought by these federal employees.<sup>18</sup> Another rationale focuses on the existing availability of benefits for those in the military.<sup>19</sup> If members of the military already have a system of benefits that provide them with recovery, then there is no need for them to bring claims under the FTCA.<sup>20</sup> The final rationale focuses on military discipline, under the theory that if members of the military are allowed to bring claims under the FTCA it will undermine the military discipline structure.<sup>21</sup> At one point, the Court seemed to emphasize and prioritize this rationale over the other two,<sup>22</sup> but it ultimately reiterated that the doctrine was underpinned by all three of the rationales.<sup>23</sup>

Other than articulating these three rationales, the Court has not provided any other guidance as to when an injury occurs “incident to

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11 *See id.* § 2680(a), (k).

12 340 U.S. 135 (1950).

13 *See id.* at 136–38.

14 *Id.* at 146.

15 *See United States v. Johnson*, 481 U.S. 681, 688–91 (1987) (outlining three rationales).

16 *See, e.g., id.* at 703 (Scalia, J., dissenting).

17 *See id.* at 689 (majority opinion).

18 *See id.*

19 *See id.* at 689–90.

20 *See id.*

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

22 *See United States v. Shearer*, 473 U.S. 52, 57 (1985) (citing *United States v. Muniz*, 374 U.S. 150, 162 (1963)).

23 *See Johnson*, 481 U.S. at 688–91.

service.” As a result, lower courts have had difficulty in making this determination.<sup>24</sup> Some have created factor-based tests to aid in the inquiry, and others have taken different approaches.<sup>25</sup> One court has noted that it has “reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable.”<sup>26</sup> Ultimately, in most cases, the *Feres* doctrine has been used to prevent military members from recovering for almost any injury caused by government personnel, no matter how tenuously connected to the person’s military service.

Regardless of the criticism the doctrine has received, it has been extended 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.<sup>27</sup> This has become known as the “genesis test.”<sup>28</sup> This test has taken on a life of its own and has been applied to a number of situations, like the claims at issue in *Ortiz*.

## II. *ORTIZ* AND THE PRE-BIRTH INJURY CASES

### A. *Ortiz’s Facts and Holding*

In *Ortiz*, Captain Heather Ortiz was scheduled for a routine Caesarean section at a military hospital.<sup>29</sup> In preparation for that procedure, hospital staff negligently provided her with a drug to which she was allergic.<sup>30</sup> To counteract the negative effects of that drug, she was given another, which caused her blood pressure to drop, causing hypotension, “an injury that occurs when blood flow is inadequate to perfuse the uterus and the placenta.”<sup>31</sup> As a result, her unborn child experienced “brain trauma that caused cerebral palsy.”<sup>32</sup>

*Ortiz’s* husband filed a claim on the child’s behalf under the FTCA.<sup>33</sup> The district court granted the government’s motion to dismiss the case under the *Feres* doctrine.<sup>34</sup> On review, the Tenth Circuit noted that courts have looked to different policy reasons and rationales or “special factors”

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24 See, e.g., *Taber v. Maine*, 67 F.3d 1029, 1043 (2d Cir. 1995).

25 Compare *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001) (outlining four factors), with *Purcell v. United States*, 656 F.3d 463, 466 (7th Cir. 2011) (applying a single, dispositive inquiry).

26 *Costo*, 248 F.3d at 867.

27 See *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673 (1977).

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

29 *Id.* at 818–19.

30 *Id.* at 819.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

to determine if the doctrine should apply,<sup>35</sup> but in the end it held that the primary inquiry was “whether the injury was ‘incident to service.’”<sup>36</sup> The court admitted that the language “incident-to-service” was “neither self-defining nor readily discernible” from prior Supreme Court precedent.<sup>37</sup> Nevertheless, it found that the test applies 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*.”<sup>38</sup>

Because a third party was bringing the claim, the court held the genesis test applied.<sup>39</sup> It found that in reviewing the pre-birth injury cases, some courts used the “treatment-focused” approach, holding that if the government’s conduct was focused on the child and not the mother, then the *Feres* doctrine did not apply.<sup>40</sup> It rejected this approach in favor of an “injury-focused” approach, which “asks first whether there was an incident-to-service injury to the service member.”<sup>41</sup> 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.”<sup>42</sup> In applying its test, the court found that the child’s injuries were caused by the allergic reaction and drop in blood pressure experienced by her mother prior to the child’s birth, so the *Feres* doctrine applied.<sup>43</sup>

The decision in *Ortiz* is the most recent example of the difficulty the courts have with determining whether the *Feres* doctrine should apply to these types of claims.

### B. *The Pre-Birth Injury Cases*

In the early cases involving injuries sustained by pregnant female service members, the service member herself sought recovery.<sup>44</sup> The *Feres* doctrine was, however, used to bar the claims brought by those female

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35 *See id.* at 821–22.

36 *Id.* at 822 (citing *Tootle v. USDB Commandant*, 390 F.3d 1280, 1282 (10th Cir. 2004)).

37 *Id.* at 820–21.

38 *Id.* at 821 (quoting *Pringle v. United States*, 208 F.3d 1220, 1223–24 (10th Cir. 2000) (per curiam)).

39 *See id.* at 824.

40 *Id.* at 828.

41 *Id.* at 825 (citing *Feres v. United States*, 340 U.S. 135, 144 (1950)).

42 *Id.* (citing *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673–74 (1977)).

43 *See id.* at 831–32.

44 *See 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).

service members.<sup>45</sup> The courts failed to provide any discussion as to how pregnancy and injuries sustained thereto relate to one's responsibilities as members of the military.<sup>46</sup> Regardless, at the end of the 1980s, it was clear that a female service member's claims for injuries she sustained during pregnancy would be barred by the *Feres* doctrine, and women stopped seeking claims on their own behalf.

When addressing claims brought on the behalf of service members' children, courts have used or proposed approaches other than the one used by the court in *Ortiz*. This has caused a clear circuit split. Early cases applied the rationales outlined in *Feres* to the child's claim to determine if the claim should be barred and reached inconsistent results applying those rationales.<sup>47</sup> In the early 1990s, the Fourth Circuit used the "treatment-focused" approach, which was rejected by the court in *Ortiz*, to determine if the claim should be barred.<sup>48</sup> Pursuant to this approach, if the "sole purpose" of the treatment that the mother received was for the child's benefit only, the *Feres* doctrine does not apply.<sup>49</sup> Courts are forced to engage in this analysis and chose one of these approaches because the child's mother is in the military.

### III. INJURIES SUSTAINED DURING PREGNANCY DO NOT OCCUR "INCIDENT TO SERVICE"

In the pre-birth injury cases, application of the *Feres* doctrine hinges on the mother's military status, regardless of whether the claim is brought by the female service member or for her child. Even though the Supreme Court has stated that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules,"<sup>50</sup> that is exactly what has happened. In the pre-birth cases, it has been reduced to one bright-line rule: if the woman is in the military, her claim is barred, and her child's may be too, depending on the approach used by the court. The controversy surrounds the meaning of the phrase "incident to service." In finding that the injury has occurred "incident to service," courts have blindly assumed that injuries sustained during pregnancy occur "incident to service," as that phrase was used in *Feres*. Even though we cannot be certain regarding the exact driving force behind the Court's holding in *Feres*, it is possible that the Court only

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45 See *Irvin*, 845 F.2d at 130; *Del Rio*, 833 F.2d at 286; *Atkinson*, 825 F.2d at 206.

46 See, e.g., *Irvin*, 845 F.2d at 130 (relying only on a statement that the service member's "individual claim is barred under a straightforward reading of *Feres*").

47 Compare *Scales v. United States*, 685 F.2d 970, 973-74 (5th Cir. 1982) (barring suit initiated by child under *Feres*), and *Irvin*, 845 F.2d at 130-31 (same), with *Del Rio*, 833 F.2d at 287-88 (allowing maintenance of claim on child's behalf).

48 See *Romero v. United States*, 954 F.2d 223, 225 (4th Cir. 1992).

49 *Id.*

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

intended to bar claims that would have been covered by the typical worker's compensation laws—claims that were, in some way, related to the service member's duties in support of the "military enterprise."<sup>51</sup> A closer review of the history of women in the military demonstrates that pregnancy was not part of the military enterprise at the time of the *Feres* decision and has never been.

Prior to World War II, if a nurse serving in the Army Nurse Corps became pregnant and was not married, she was dishonorably discharged.<sup>52</sup> The military's treatment of pregnancy was not altered significantly with the passage of the Women's Armed Services Integration Act, which provided for the integration of women into the armed forces, but which also provided that women could be discharged for reasons that were different from the reasons men could be discharged.<sup>53</sup> Thus, at the time *Feres* was decided, women were subject to discharge for almost any reason,<sup>54</sup> and in 1951, with President Truman's signing of Executive Order 10,240, it was clear that pregnancy and duties consistent with motherhood were grounds for discharge.<sup>55</sup> The policy allowing for the discharge of pregnant women was not officially deemed unconstitutional until 1976, long after the *Feres* doctrine was in place.<sup>56</sup>

Today, pregnancy has been and continues to be something that is treated as outside the realm of regular military service. If a woman becomes pregnant on active duty, she may seek a voluntary separation because of the pregnancy.<sup>57</sup> 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.<sup>58</sup> Likewise, pregnant service members may have their regular work duties altered during their pregnancy.<sup>59</sup> Thus, courts should not blindly assume that just because a female service member is pregnant, any

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51 *Taber v. Maine*, 67 F.3d 1029, 1044 (2d Cir. 1995).

52 See JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 71 (rev. ed. 1992).

53 Pub. L. No. 80-625, § 104(h), 62 Stat. 356, 359–60 (1948) (codified as amended at scattered sections of 10 U.S.C.); see also HOLM, *supra* note 52, at 124–26 (describing unprecedented discharge authority for women but not men who could only be involuntarily discharged for "moral dereliction, professional dereliction, or because his retention was not clearly consistent with the interests of national security").

54 See HOLM, *supra* note 52, at 124–26.

55 Exec. Order No. 10,240, 3 C.F.R. § 749 (1949–1953).

56 See *Crawford v. Cushman*, 531 F.2d 1114, 1126 (2d Cir. 1976).

57 See, e.g., U.S. DEP'T OF AIR FORCE, INSTRUCTION 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN para. 3.17 (2004).

58 See, e.g., U.S. DEP'T OF AIR FORCE, INSTRUCTION 36-2110, ASSIGNMENTS para. 2.39 (2009).

59 See, e.g., U.S. DEP'T OF AIR FORCE, INSTRUCTION 10-203, DUTY LIMITING CONDITIONS para. 3.5 (2013).

injuries she or her child sustains during the pregnancy occur “incident to service” when every indication is that the military treats pregnancy as something that is outside the realm of ordinary service.

Furthermore, an application of the *Feres* doctrine to these types of cases reveals the absurdity it causes.<sup>60</sup> If a spouse of someone in the military becomes pregnant and the spouse is not serving on active duty, any injuries she or her unborn child sustains are not barred by the *Feres* doctrine because she is not a member of the military, even though she may have had the same military doctor, used the same military facilities as a pregnant female service member, and may have suffered the same types of injuries. 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.<sup>61</sup>

There is no sound basis to allow men to recover for injuries sustained by their pregnant wives just because the wife is not in the military: the primary concerns that underlie the application of the *Feres* doctrine to a female service member also exist if a male service member brings suit. In examining the rationales for the doctrine, male members of the military have the same “distinctively federal” relationship with the government as female members of the military, and a lawsuit brought by a male member of the military for injuries sustained by his wife or child during pregnancy will involve the same sort of inquiry into military decision-making that the courts are trying to avoid, especially if it involves the same doctor, hospital, or procedure.

The only current rationale that could possibly justify the application of the doctrine to a female service member and not a male service member is the availability of the no-fault compensation scheme provided under the Veterans’ Benefits Act.<sup>62</sup> It is, however, unclear whether the types of damages claimed by the female service women are the type that would be covered by that Act. For instance, women have not always sought damages for their own injuries: female service members have sought damages for

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60 “It is true, of course, that statutes are to receive a reasonable construction and that, in determining the legislative intent, exceptions are to be read into their language to avoid injustice, oppression or absurd consequences.” *United States v. Brooks*, 169 F.2d 840, 850 (4th Cir. 1948) (Parker, C.J., dissenting) (first citing *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 483 (1868); then citing *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892); and then citing *Sorrells v. United States*, 287 U.S. 435, 446–48 (1932)), *rev’d*, 337 U.S. 49 (1949).

61 See *Reilly v. United States*, 665 F. Supp. 976, 1014–16 (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).

62 38 U.S.C. § 1131 (2012).



the costs of taking care of the injured child.<sup>63</sup> Without some proof that the female service member is seeking the types of damages covered by the Veterans' Benefits Act, that rationale alone should not be used to categorically bar her claim. Thus, as applied to these cases, the *Feres* doctrine raises equal protection issues that could be alleviated if pregnancy and injuries incident thereto are finally acknowledged as something that do not occur "incident to service."

Regarding the child's claim, if injuries that occur during pregnancy are not considered as occurring "incident to service," then the courts do not have to engage in a round of legal gymnastics to determine whether the *Feres* rationales apply to bar the child's claim, whether the treatment was to benefit the mother or the child, or whether the child's injury had its genesis in an injury to the child's military mother. In short, the child will not be prejudiced from bringing a claim just because the child's mother is in the military.

#### CONCLUSION

Application of the *Feres* doctrine to claims brought by pregnant female service members and their children pre-birth is only triggered if the woman is a member of the military; the Tenth Circuit's decision in *Ortiz* highlights the legal wrangling the courts have been forced to engage in solely because of this fact. Even if the *Feres* doctrine itself stands on solid ground, its application in these types of cases does not. Pregnancy is not something that has ever been part of the military enterprise and will occur regardless of the military's mission; as such, any injuries related thereto do not occur "incident to service." As noted by Judge Nelson in *Ritchie v. United States*, "To hold that these kinds of tortious acts against a pregnant servicewoman are per se judicially unreviewable because they are part of the military mission is to practice willful blindness at the expense of a woman's livelihood and the life of her unborn child."<sup>64</sup>

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63 See, e.g., *Romero v. United States*, 954 F.2d 223, 224 (4th Cir. 1992).

64 *Ritchie v. United States*, 733 F.3d 871, 881 (9th Cir. 2013) (Nelson, J., concurring).