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A Federal Court Rules that Military Members are not Necessarily Barred by the *Feres* Doctrine for Sexual Assault Claims.

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Sovereign Immunity and the *Feres* Doctrine

Sovereign immunity is an old doctrine that dates back to the common law in Great Britain. Under the doctrine, you cannot sue the sovereign (the United States, or any individual state government), without the sovereign's consent.

In 1946, Congress enacted the Federal Tort Claims Act (FTCA) which waives sovereign immunity but has specific exceptions, with explicit conditions, to the waiver of sovereign immunity. What that means is that unless one of these exceptions is met, you can bring a suit against the United States without its consent, because the FTCA grants such consent. The relevant section of the FTCA has been amended multiple times since, most recently in 2006. The current statutory text is included below:

> The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] shall not apply to—
> (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

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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 [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] 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—

(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.[.]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 [46 USCS §§ 30901 et seq. or 31101 et seq.] 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]
(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 [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], 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.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(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 co-operatives.

In 1950, a case called *Feres v. United States* was heard before the United States Supreme Court.[3] The Supreme Court held that the FTCA does not waive sovereign immunity with respect to claims by members of the military, meaning that the United States is not liable for injuries to service members "arising out of or in the course of activity incident to service."[4] Examples of incidents that meet that definition include an active duty soldier who was killed in a barracks fire or was injured in the line of duty.[5] Importantly, the *Feres* Doctrine does not prevent a military spouse or dependent (child) from bringing a suit for his or her own injuries or wrongful death. For more details about *Feres v. United States* and the FTCA, see Law Review 16070.

Recent Case of *Spletstoser v. Hyten*, 2022 U.S. App. LEXIS 22259; ___ F.4th ___.

This case arises out of an alleged sexual assault by a man who was the Vice Chairman of the Joint Chiefs of Staff mat the time the suit was filed. General John Hyten alleged assaulted his subordinate, Colonel Kathryn Spletstoser.[6] At the time of the alleged assault, General Hyten was the Commander of United States Strategic Command (STRATCOM).[7] Colonel Spletstoser was assigned to STRATCOM as the Director of the Commander's Action Group (CAG).[8] A year after Hyten took command, STRATCOM leaders attended the Reagan National Defense Forum hosted by the Reagan Presidential Library, a civilian organization that is sponsored primarily by the private sector; the Forum took place in California.[9]

Hyten and Spletstoser stayed at a hotel that was open to both military and civilians during the Forum.[10] After the Forum was over, on December 2, 2017, Hyten allegedly knocked on

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[3] *Feres v. United States*, 340 U.S. 135 (1950).
[4] *Id*. at 145.
[5] *Id*.
[6] *Spletstoser v. Hyten*, No. 20-56180, 2022 U.S. Appl. LEXIS 22259 at *1.
[7] *Id*. at *4.
[8] *Id*.
[9] *Id*. at *6.
[10] *Id.*

Spletstoser's door "late in the evening".[11] According to Spletstoser, Hyten "restrained [Spletstoser], grabbed her buttocks, kissed her against her will[,] and rubbed his penis against her until he ejaculated," while declaring that he "want[ed] to make love to [Spletstoser]."[12]

Spletstoser asserted seven California state law claims against Hyten including sexual battery, assault, and intentional infliction of emotional distress.[13] Hyten moved to dismiss the claims, arguing that the suit was barred by the *Feres* doctrine.[14] The district court in California denied Hyten's motion to dismiss, and the United States Court of Appeals for the Ninth Circuit affirmed that decision.[15] What those court decisions mean is that Spletstoser can now bring a suit against Hyten for alleged sexual assault without the *Feres* Doctrine providing protection for him.

The Court of Appeals affirmed the decision in Spletstoser's favor because the "asserted tortious act (sexual assault) did not involve a close military judgment call, did not further any conceivable military purpose, and could not be considered incident to military service"[16]

In making that decision, the Court of Appels looked at four factors developed in *Johnson v. United States* that are used to determine whether the *Feres* Doctrine applies.[17] The four Johnson factors are: 1) where the tortious act occurred; 2) the duty status when the tortious act occurred; 3) the benefits accrued due to status as a service member (i.e. does the service member have access to the place where the tort occurred solely because of their military status); and 4) the nature of the activities when the tortious act occurred.

Looking at these factors, the court found it relevant that the alleged sexual assault occurred in a location that was open to both military and non-military members, it occurred during personal time, and that Spletstoser could not possibly be under orders to submit to Hyten's sexual advances.[18] This analysis ultimately led the court to determine that Hyten was not protected by the *Feres* Doctrine.

It is important to note that these Johnson factors are applied by the 9th Circuit Court of Appeals, which covers Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. Other circuit courts in other areas of the United States might apply slightly different tests since the Supreme Court did not create a standard test to be applied.[19]

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[11] *Id*.
[12] *Id*. at *7.
[13] *Id*.
[14] *Id*. at *1.
[15] *Id*.
[16] *Spletstoser*, 2022 U.S. App. LEXIS 22259 at *3.
[17] *Johnson v. United States*, 704 F.2d 1431, 1436-39 (9th Cir. 1983).
[18] *Spletstoser*, 2022 U.S. App. LEXIS 22259 at *2.
[19] Keep an eye out for a future article on how different circuits determine the applicability of the *Feres* Doctrine.

This decision is a noteworthy step towards reining in the *Feres* Doctrine and protecting military members from wrongs committed against them by the government or other service members during their military service. While we can debate all day whether *Feres* was wrongly decided in the first place, it is what it is for now. Congress knows the state of the law, and if they choose to amend it, they have the power to do so. Nonetheless, this case is a strong in-road for some military members to seek a remedy when they have been sexually assaulted.

Distinguishing *Doe v. Hagenbeck*, 870 F.3d 36 (2d Cir. 2017).

Spletstoser v. Hyten does not mean that every military member will be able to bring their sexual assault claim against the United States government or an official. In 2017, the United States Court of Appeals for the Second Circuit heard a case arising out of an alleged rape of a female cadet, by a male cadet, at the United States Military Academy. The female cadet, known by the pseudonym "Jane Doe," brought suit against Lieutenant General Hagenbeck, the USMA Superintendent at the time, and Brigadier General Rapp, the USMA Commandant of Cadets at the time. She sued these men in their individual capacities, meaning that they could personally be responsible for any money damages awarded to her in court. However, in this case, the court held that Doe's FTCA claim, for "negligent supervision, negligent training, negligent infliction of emotional distress, and abuse of process" was clearly barred by the *Feres* Doctrine.[20] For more details about this case, see Law Review 17091.

At first glance, the outcomes of *Doe* and *Spletstoser* seem to be in conflict with each other. However, when you think about it, they are factually very different cases. Spletstoser brought suit against Hyten because *he* was the one who allegedly sexually assaulted her. Conversely, Doe brought suit against Hagenbeck for "creating a dangerous and sexually hostile environment," not for personally committing a sexual assault.[21] Doe's claim required the civilian court to second-guess military decisions regarding the management of service personnel.[22] For these reasons, the *Feres* Doctrine bars Doe's suit but permits Spletstoser's.

Where Does the *Feres* Doctrine Stand Now?

It is likely that other circuits will follow the 9th Circuit's ruling in *Spletstoser* when it comes to sexual assault cases. This means that military sexual assault survivors should be able to sue their assailants for damages. While other courts in other parts of the country are not required to follow the precedent created by the 9th Circuit, if another Circuit were to rule differently on the same issue, it is likely the Supreme Court would have to step in to remedy the split amongst the circuits.

[20] *Doe v. Hagenbeck*, 870 U.S. F.3d 36, 41 (2d Cir. 2017).
[21] *Id*. at 49.
[22] *Id*. at 45.

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