IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-56180

KATHRYN SPLETSTOSER,

Plaintiff-Appellee,

v.

JOHN HYTEN, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

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STATEMENT OF JURISDICTION

Retired Army Colonel Kathryn Spletstoser filed this action against Air Force General John Hyten, current Vice Chairman of the Joint Chiefs of Staff, alleging various state-law torts and asserting subject-matter jurisdiction under 28 U.S.C. § 1332. *See* Compl. ¶ 6, Excerpts of Record (ER) 86. The district court substituted the United States for General Hyten pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(1), and the case proceeded against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674. The United States moved to dismiss based on *Feres v. United States*, 340 U.S. 135 (1950), but the district court denied that motion on October 22, 2020. *See* ER 3. The United States and General Hyten filed a timely notice of appeal on November 9, 2020. This Court has jurisdiction of an appeal of an order declining to dismiss based on the *Feres* doctrine under the collateral-order doctrine. S*ee Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1483-84 (9th Cir. 1991).

STATEMENT OF THE ISSUE

Colonel Spletstoser alleges that General Hyten sexually assaulted her in her hotel room while they were on temporary duty attending the Reagan National Defense Forum. General Hyten denies the allegation, and an extensive investigation conducted by the military found no basis to take action against General Hyten. The United States Senate also conducted an investigation before confirming General Hyten as Vice Chairman of the Joint Chiefs. The question presented is whether the *Feres* doctrine bars this suit because Colonel Spletstoser's own allegations and sworn statements (taken as

true, as they must be at this stage) demonstrate that her claim arose out of her military service. The Department of Defense takes very seriously allegations of sexual assault by members of the military and for that reason undertook an extensive investigation in this case. Under established precedent, that investigation cannot be second-guessed in a tort suit against the United States.

STATEMENT OF FACTS

A. Statutory Background

The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States and creates a cause of action for money damages for personal injury or property loss caused by the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," where "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Where the FTCA does not authorize suit, the case must be dismissed for lack of subject-matter jurisdiction. *See Jackson v. United States*, 110 F.3d 1484, 1486 (9th Cir. 1997) (dismissing suit based on *Feres*).

B. Factual Background

From November 3, 2016, through September 26, 2019, General Hyten served as the Commander of the United States Strategic Command (STRATCOM). First Amended Compl. (FAC) ¶ 10, ER 33.

Prior to General Hyten's appointment as STRATCOM Commander, Colonel Spletstoser had been assigned to STRATCOM as the Director of the Commander's Action Group (CAG). *See* FAC ¶¶ 18, 20, ER 34. Upon taking that position, General Hyten decided to retain Colonel Spletstoser as his CAG Director. *See id.* General Hyten was a member of the Air Force, and Colonel Spletstoser a member of the Army. *See id.* ¶¶ 21, 22, ER 34-35.

The original complaint alleged that on November 22, 2017, General Hyten directed another officer to initiate a Preliminary Inquiry into complaints from STRATCOM employees about Colonel Spletstoser's leadership style. *See* Compl. ¶¶ 53-57, ER 94. Based on the findings of the Preliminary Inquiry, General Hyten allegedly initiated a formal investigation against Colonel Spletstoser on January 20, 2018. *See id.* ¶ 58, ER 94. On February 26, 2018, based on findings of "toxic leadership," another Army officer (MG Karbler) relieved Colonel Spletstoser of her position as CAG Director, allegedly at General Hyten's request. *See id.* ¶¶ 73-74, ER 97-98. Colonel Spletstoser alleges that she retired from the military in March of 2018 as a result of being forced out by General Hyten, and that she rescinded her retirement two months later. *See id.* ¶¶ 75-77, ER 98.

On April 9, 2019, Colonel Spletstoser learned that General Hyten had been nominated to serve as Vice Chairman of the Joint Chiefs of Staff. *See* Compl. ¶ 80 ER 98. Three days later, she made allegations to the Air Force Office of Special Investigations (AFOSI), accusing General Hyten of sexual misconduct while they were

in her STRATCOM office or on official trips. *See id.* ¶ 81, ER 98. AFOSI investigated the allegations, appointing military attorneys (Special Victims Counsel) to represent Colonel Spletstoser, and deploying a team of 53 military investigators. *See* Compl. ¶¶ 84, 89, 122, ER 99, 103. Those investigators interviewed 63 people in three countries and 14 states, including General Hyten's staff at Strategic Command, members of his staff when he was at Space Command, and his personal security team. The investigators also reviewed over 196,000 e-mails and 4000 pages of documents and scrutinized 152 travel records and phone records dating back to 2015. *See Hearing to Consider the Nomination of: General John E. Hyten, USAF for Reappointment to the Grade of General and to be the Vice Chairman of the Joint Chiefs of Staff Before the S. Comm. on Armed Servs.*, 116th Cong. 12 (2019) (Senate Hearing Comm. Tr.) at 12, *available at https://www.armed-services.senate.gov/imo/media/doc/19-65_07-30-19.pdf.* The investigation, which was overseen by the Air Force Inspector General and peer-reviewed, *see id.* at 11, resulted in a report of over 1400 pages, *see id.* at 12. After legal and command reviews, Air Force General James Holmes, the General Court-Martial Convening Authority, concluded that the evidence provided no basis for disciplinary action against General Hyten. *See* Compl. ¶¶118-19, ER 103.

Later, the United States Senate examined Colonel Spletstoser's allegations in evaluating General Hyten's nomination to his current post as Vice Chairman of the Joint Chiefs of Staff. The Senate received sworn testimony (including that of Colonel Spletstoser) in five executive sessions totaling more than 15 hours. *See* Senate Hearing

Comm. Tr. at 4, 7, 94. The Senate also studied over 1000 pages of investigative records and reviewed statements of more than 50 witnesses. *See id.* at 4. The Senate confirmed General Hyten's nomination by a vote of 75 to 22, see U.S. Senate, *Roll Call Vote for Nomination PN585* (Sept. 26, 2019), https://go.usa.gov/xsfRm, with several Senators publicly stating that General Hyten had been falsely accused and no Senator publicly disputing General Hyten's denial of the charges. *See* Senate Hearing Comm. Tr. at 27 (statement of Sen. McSally); *id.* at 47-48 (statement of Sen. Cotton); *id.* at 90 (statement of Sen. Kaine); *id.* at 103-04 (statement of Sen. Scott).

1. Original Complaint

Colonel Spletstoser filed her original complaint in federal district court on November 25, 2019, naming General Hyten in his individual capacity as the sole defendant. *See* Compl., ER 84. The complaint alleged that General Hyten, Colonel Spletstoser's "first-line supervisor," *id.*, ¶ 2, ER 85, sexually assaulted her on a number of occasions from approximately January through December 2017. *See id; see also id.* ¶ 29, ER 88 (asserting that Colonel Spletstoser "report[ed] directly to Gen. Hyten as his CAG Director").

Those allegations included details indicating that all the alleged sexual assaults grew out of Colonel Spletstoser's official military service. *See* Compl. ¶ 35, ER 89 (alleging that on a "temporary duty assignment" in Palo Alto, CA, General Hyten sexually assaulted Colonel Spletstoser after having asked her to remain in his hotel room after he held a "brief team closeout meeting" "to discuss the next day's talking points");

id. ¶ 38, ER 90 (alleging that General Hyten sexually assaulted Colonel Spletstoser in Monterey, CA, after texting her to come to his hotel room "to go over work issues"); *id.* ¶ 39, ER 90 (alleging that General Hyten sexually assaulted Colonel Spletstoser in Washington, D.C., after requesting her to visit his hotel room because "there was work to be done"); *id.* ¶ 40, ER 90-91 (alleging that General Hyten attempted to hug Colonel Spletstoser "while rehearsing for his upcoming press conference" during a Pacific Command trip in Seoul, South Korea); *id.* ¶ 41, ER 91 (alleging that General Hyten engaged in inappropriate behavior "in [Colonel Spletstoser's] STRATCOM office" on four occasions); *id.* ¶ 42, ER 91 (alleging that General Hyten grabbed Colonel Spletstoser's hand and asked her to stay a while in his hotel room "to discuss the day's meetings and events" in London, United Kingdom); *id.* ¶ 43, ER 91 (alleging that General Hyten kissed Colonel Spletstoser on the neck and head "in[] her office"); *id.* ¶ 44, ER 91 (alleging that General Hyten hugged Colonel Spletstoser in her hotel room before they left for the airport during a work-related trip to Halifax, Nova Scotia); *id.* ¶ 45, ER 91-92 (alleging that General Hyten sexually assaulted Colonel Spletstoser after coming to her hotel room "under the pretense of work-related purposes" while on official travel to Simi Valley, CA for the Reagan National Defense Forum).

The complaint also alleged that General Hyten took adverse personnel actions against Colonel Spletstoser in retaliation against her for rebuffing him, *see* Compl. ¶¶ 48-50, 52-59, 61-63, 69, 73-79, ER 92-98, and that the Department of Defense mishandled its investigation of her allegations and wrongly declined to impose any

disciplinary action against General Hyten, *see id.* ¶¶ 84-124, ER 99-104. The complaint asserted state common-law individual-capacity claims against General Hyten for sexual battery, assault, intentional infliction of emotional distress, and battery, as well as three other statutory tort claims under California law. *See id.*, ¶¶ 140-223, ER 106-115.

In light of the Department of Defense's investigation, which found no basis for disciplinary action against General Hyten, and the Senate's investigation of Colonel Spletstoser's allegations, followed by his confirmation by the Senate, the Department of Justice certified that General Hyten was acting within the scope of his office or employment at the time of the incidents from which Colonel Spletstoser's claims arose. *See* ER 82. Accordingly, the Department notified the district court that, pursuant to the Westfall Act, the United States is properly substituted for General Hyten as the sole defendant in this action. *See* ER 77 (citing 28 U.S.C. § 2679(d)(1)).

The United States then moved to dismiss under the *Feres* doctrine, which bars suits by military personnel for injuries that arise from activities incident to military service.[1] Colonel Spletstoser opposed the motion, but submitted a sworn declaration that included allegations confirming the military purpose of each of the trips during which the alleged sexual misconduct occurred. *See* Decl. ¶ 22, ER 59 (Palo Alto, CA), ¶

[1] The United States also argued that dismissal was required under 28 U.S.C. § 2680(h), which bars certain enumerated torts including any that arise out of assault and battery. *See* Dkt. 22. The district court rejected that argument in denying defendants' motion to dismiss Colonel Spletstoser's amended complaint, *see* ER 29, and appellants do not challenge that ruling in this interlocutory appeal.

32, ER 61 (Monterey, CA), ¶ 38, ER 63 (Washington, D.C.), ¶ 43, ER 64 (Seoul, South Korea), ¶ 47, ER 65 (London, England), ¶ 52, ER 66 (Halifax, Nova Scotia), ¶ 57, ER 67 (Simi Valley, CA). Colonel Spletstoser's declaration noted, for example, that the purpose of the Simi Valley trip was to attend the Reagan National Defense Forum, *id.* ¶ 57, ER 68; that the Secretary of Defense determined the number of military personnel that were to attend the Forum, *id.* ¶ 60, ER 68; and that the official agenda for the Forum focused on core national defense topics, including "A View of Defense from Allies and Friends," "Space Wars; Are We Prepared for the Next Domain of Warfare?," and "Assessing the Rebuild: Will we have the Strategy and Resources to Rebuild the Military in FY 19 Pentagon," *id.* ¶ 66, ER 70-71. The declaration also asserted that although General Hyten was not her commanding officer "for disciplinary purposes," she did "serve[] with" him in her capacity as CAG Director. *Id.* ¶ 16, ER 58.

The district court substituted the United States for General Hyten under the Westfall Act, *see* ER 52; *Osborn v. Haley*, 549 U.S. 225, 247 (2007), and granted the motion to dismiss based on the *Feres* doctrine. The court concluded that this case is analogous to *Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988), where *Feres* barred a service member's claim that military superiors harassed him, both on- and off-base, during regular working hours and after hours. *See* ER 54; *Stauber*, 837 F.2d at 396. Colonel Spletstoser requested leave to amend her complaint, however, to omit certain allegations that she described as "background information" or "extraneous." *Id.* The court granted leave

because the court could not at that point conclude that an amendment, which Colonel Spletstoser had not yet submitted, would be futile. *See id.*

2. First Amended Complaint

Colonel Spletstoser then filed a First Amended Complaint (FAC). *See* ER 32. The amended complaint omitted all of the alleged incidents involving General Hyten asserted in her original complaint except for the alleged incident at the Reagan National Defense Forum in Simi Valley, California. *See* FAC, ¶¶ 30-75, ER 35-41. As to that incident, Colonel Spletstoser omitted her previous contention that General Hyten came to her hotel room "under the pretense of work-related purposes," Compl. ¶ 45, ER 85. The amended complaint also omitted Colonel Spletstoser's prior allegations that General Hyten was her "first-line supervisor," Compl. ¶ 2, ER 85; that General Hyten "retaliated against her and the government then failed to conduct a fair investigation into Gen. Hyten's conduct," *id.* ¶ 36, ER 90; *see also id.* ¶¶ 49, 52-60, 62, 64-71, 73-77, ER 92-98; and that the Air Force's investigation of her sexual misconduct claims was inadequate and the military's decision not to discipline General Hyten was biased and conflicted, *see id.* ¶¶ 84-92, 94-96, 101-08, 113-15, 117-19, 124, ER 98-104.

The United States again moved to dismiss under *Feres*, but the district court this time denied the motion. *See* ER 3. The court first addressed the relevance of the allegations in the first complaint that were omitted from the amended complaint. The court acknowledged that it could properly "consider a plaintiff's previously-pled allegations in ruling on a motion to dismiss" where those allegations are relevant to the

claims asserted in an amended complaint. ER 15. The court concluded that the only such allegations from the original complaint were those that alleged that General Hyten came to Colonel Spletstoser's hotel room in Simi Valley "under the pretense of work-related purposes." ER 16 (quotation marks omitted). The court ruled that "[t]his information is relevant to adjudicating [p]laintiff's claims in the [amended complaint] because [p]laintiff seeks to recover for the alleged sexual assault that took place that night, and the omission of this allegation obscures information that is critical to this court's *Feres* doctrine analysis." *Id.* (emphasis omitted).

The court concluded, however, that all other allegations in the original complaint that were omitted from the amended complaint are not relevant to the remaining claim and thus should not be considered in applying *Feres*. Those allegations include Colonel Spletstoser's assertions of a year-long pattern of sexual assault and harassment at STRATCOM and on official trips; that General Hyten was Colonel Spletstoser's "first-line supervisor"; and that the military's investigation of Colonel Spletstoser's allegations was supposedly inadequate. The court concluded that these allegations do not bear on the *Feres* analysis because those allegations "do not relate to the alleged sexual assault at the [Simi Valley] hotel." ER 17. The court reasoned that a "pattern of tortious conduct . . . is plainly relevant to the *Feres* doctrine analysis where a plaintiff seeks to recover for the entire pattern of tortious conduct," but that Colonel Spletstoser now "seeks to recover for only one alleged instance of sexual assault." *Id.* (emphasis omitted). Accordingly, the court declined to consider those assertions, *see id.*, and analyzed "(1)

whether the [remaining] alleged acts occurred on- or off-base; (2) whether they occurred during working hours and were related to working conditions; (3) whether the defendant was superior in rank to the plaintiff and whether he was subject to military discipline for harassing the plaintiff; and (4) whether the actions could conceivably serve any military purpose." ER 25.

The court concluded that "[t]he first two factors are mixed, but ultimately militate against application of the *Feres* doctrine." ER 25. As to the third factor, the court ruled that General Hyten's superior rank militated in favor of applying the doctrine, because courts should hesitate in considering suits that would interfere with the relationship of service members and their superior officers. *See id.* As to the fourth factor, the court stated "the alleged sexual assault cannot conceivably serve any military purpose." *Id.*

SUMMARY OF ARGUMENT

The *Feres* doctrine bars FTCA claims by service members that arise out of service-related activity. *Feres* "has been broadly construed to immunize the United States and members of the military from any suit which may "'intrude in military affairs,' 'second-guess[] military decisions,' or 'impair[] military discipline.'" *Jackson v. Brigle*, 17 F.3d 280, 282 (9th Cir. 1994) (quoting *Stauber v. Cline*, 837 F.2d 395, 398 (9th Cir 1988)) (quotation simplified); *see also Bowen v. Oistead,* 125 F.3d 800, 803 (9th Cir. 1997). The Department of Defense views allegations of sexual harassment with the utmost seriousness, and, following Colonel Spletstoser's allegations, the Air Force conducted

an extensive investigation and concluded that there was no basis for disciplinary action. Colonel Spletstoser in effect asks the district court to conduct a parallel investigation that would second-guess the military's judgment. That is precisely the type of judicial intervention into military affairs that *Feres* is intended to preclude.

In applying *Feres,* the question is not whether a plaintiff's allegations describe conduct that is tortious in nature. The Air Force conducted an extensive investigation, and appointed two Special Victims Counsel to represent Colonel Spletstoser, precisely because of the nature of her allegations. Alleged tortious conduct may nevertheless be incident to service, and that is the case here. Even without reference to the allegations in the original complaint that the district court declined to consider, the remaining allegations and Colonel Spletstoser's sworn declaration make clear that General Hyten was her immediate military superior; that she was his Commander's Action Group Director; that she was on official travel for the Reagan National Defense Forum conference because of her assignment to STRATCOM; that she was on temporary duty (TDY) status for that trip; and that General Hyten came to her hotel room "under the pretense of work-related purposes."

Other assertions in the original complaint, which were omitted from the amended complaint, confirm that *Feres* bars this action. Among other things, those allegations include assertions that General Hyten was Colonel Spletstoser's "first-line supervisor;" that she "reported directly" to him; that they traveled together for work purposes; and that when on travel prior to the alleged misconduct at the Reagan

National Defense Forum conference, General Hyten had conducted work with Colonel Spletstoser and other service members in hotel rooms. In filing her amended complaint, Colonel Spletstoser described these allegations as "background." That may be correct insofar as Colonel Spletstoser no longer seeks to recover for those alleged incidents. But the background remains entirely relevant to the military relationship that is crucial to the *Feres* inquiry. The allegations describe a series of service-related events, and the allegations regarding the Reagan National Defense Forum incident did not materially differ in kind from the allegations now omitted that formed the background to the asserted acts in question.

Perhaps most tellingly, the amended complaint omitted Colonel Spletstoser's allegations that the military's investigation was inadequate and unfair. *See* Compl. ¶¶ 90-124, ER 99-104 (asserting, e.g., that the investigation was "inadequate and conflicted"). The *Feres* doctrine bars any claim arising out of such allegations, *see*, *e.g.*, *United States v. Shearer*, 473 U.S. 52 (1985), and Colonel Spletstoser's omission of those assertions does not change the fact that to rule in her favor, the district court would have to undertake its own review of allegations investigated by the military and reject the results of the military's investigation. The Supreme Court and this Court have made clear that the FTCA does not provide a basis for review of this kind.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews *de novo* the denial of a motion to dismiss for lack of subject-matter jurisdiction, *see Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1484 (9th Cir. 1991), accepting as true, for purposes of appeal, all well-pleaded facts alleged in the complaint, *see id.* at 1479 n.2.

ARGUMENT

The *Feres* Doctrine Bars this Suit.

Colonel Spletstoser has alleged that General Hyten sexually assaulted and harassed her. The Department of Defense takes all such allegations seriously. Sexual assault and harassment never serve the interests of the military, and are directly counter to the good order and discipline of the military unit. Consistent with that view, here, the Department conducted an extensive investigation and found no basis to discipline General Hyten or to conclude that he had engaged in the alleged misconduct. In connection with his confirmation, the Senate engaged in a similar investigation of Colonel Spletstoser's allegations before confirming him to his position. This suit calls on another branch of government to second-guess the results of the military's investigation. If allowed to proceed, the suit would function as a collateral attack on the military's own investigation and disciplinary determination. That is precisely the type of action the *Feres* doctrine prohibits. The district court erred in refusing to dismiss this case under *Feres*.

A. *Feres* Precludes FTCA Suits That Ask A Court to Examine or Intrude Into Matters of Military Discipline and Judgment.

In *Feres* v. *United States*, 340 U.S. 135 (1950), the Supreme Court held that a service member may not bring an FTCA suit for injuries that arise from activities that are incident to military service. *See id.* at 146.[2]

In applying the *Feres* doctrine, the Supreme Court and lower courts have identified three underlying rationales. First, because "the relationship between the Government and members of its Armed Forces is 'distinctively federal in character,' it would make little sense to have the Government's liability to members of the Armed Services depend on the fortuity of where the soldier happened to be stationed at the time of injury" by subjecting the Government to liability under state tort law. *Stencel Aero Eng. Corp. v. United States*, 431 U.S. 666, 671 (1977); *Atkinson v. United States*, 825 F.2d 202, 204 (9th Cir. 1987). Second, "alternative compensation systems" are available to injured service members as a substitute for tort liability. *Stencel Aero Eng. Corp.*, 431 U.S. at 671-672; *Atkinson*, 825 F.2d at 204. Third—and most critical here—the *Feres* doctrine protects the integrity of "the military disciplinary structure," *Atkinson*, 825 F.2d

[2] The Supreme Court also has applied *Feres* and the "incident to service" test to *Bivens* claims, *see Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987), and this Court has held that the *Feres* rule and test in addition governs state-law tort claims brought by one service member against another, *see Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1480-82 (9th Cir. 1991) (citing, *e.g.*, *Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988)); *see also Bowen v. Oistead*, 125 F.3d 800, 803 (9th Cir. 1997).

at 204, by preventing civilian courts from "second-guess[ing] military decisions" and "impair[ing] essential military discipline," *United States v. Shearer*, 473 U.S. 52, 57 (1985).

This Court has repeatedly explained that *Feres* "'has been interpreted broadly,' so that '[p]ractically any suit that implicates military judgments and decisions . . . runs the risk of colliding with *Feres*.'" *Bowen*, 125 F.3d at 803. "The *Feres* doctrine is applicable whenever a legal action 'would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.'" *Id.*; *see also Zaputil v. Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) (citing *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997) (citing *McGowan v. Scoggins*, 890 F.2d 128, 132 (9th Cir. 1989)). This Court has applied *Feres* "to immunize the United States and members of the military from any suit which may 'intrude in military affairs,' 'second-guess[] military decisions,' or 'impair[] military discipline.'" *Jackson v. Brigle*, 17 F.3d 280, 282 (9th Cir. 1994) (quoting *Stauber,* 837 F.2d at 398); *see also Bowen,* 125 F.3d at 803.

This suit raises those core *Feres* concerns, as the district court could provide recovery here only by rejecting the determination of military officials, after they conducted an extensive investigation. For that reason, and because Colonel Spletstoser's claims otherwise arise out of activity related to her military service, the *Feres* doctrine bars this action.

B. This Suit Asks A Civilian Court to Examine Events Investigated by the Air Force to Determine Whether Any Form of Discipline was Appropriate.

In contrast to many *Feres* cases where the relation to military discipline must be inferred, the suit here takes direct issue with an extensive internal military investigation and disciplinary judgment. Colonel Spletstoser reported allegations to the Air Force Office of Special Investigations accusing General Hyten of sexual misconduct while they were in her STRATCOM office or on official trips. *See* Compl. ¶ 81, ER 98. The Office of Special Investigations appointed military attorneys to represent Colonel Spletstoser. *See id.* ¶¶ 84, 89, 122, ER 99, 103. A team of 53 military investigators interviewed 63 people in three countries and 14 states, including General Hyten's staff at Strategic Command, members of his staff when he was at Space Command, and his personal security team. They also reviewed over 196,000 e-mails and 4000 pages of documents as well as 152 travel records and phone records dating back to 2015. *See Hearing to Consider the Nomination of: General John E. Hyten, USAF for Reappointment to the Grade of General and to be the Vice Chairman of the Joint Chiefs of Staff Before the S. Comm. on Armed Servs.*, 116th Cong. 12 (2019) (Senate Hearing Comm. Tr.) at 12, *available at* *https://www.armed-services.senate.gov/imo/media/doc/19-65_07-30-19.pdf*.

The investigation, which was overseen by the Air Force Inspector General and peer-reviewed, *see* Senate Hearing Comm. Tr. at 11, produced a report of over 1400 pages, *see id.* at 12. Following legal and command reviews, Air Force General James Holmes, the General Court-Martial Convening Authority, concluded that the evidence

provided no basis for disciplinary action against General Hyten. *See* Compl. ¶¶118-19, ER 103. As discussed above, the United States Senate separately examined Colonel Spletstoser's allegations in evaluating General Hyten's nomination prior to confirming him to be Vice Chairman of the Joint Chiefs of Staff.

This case thus involves second-guessing of military disciplinary judgments in the most direct way because the complaint asks the district court to undertake the same factual inquiry that the Department of Defense already undertook—for the express purpose of reaching a different conclusion. Such a collateral attack on the military's own investigation is the type of inquiry that *Feres* forecloses. Indeed, the Supreme Court has gone further, admonishing that tort suits that call military discipline into question are foreclosed regardless of how intrusive the suit would be. In the context of holding that the considerations that animate *Feres* also foreclose inferring a *Bivens* remedy in this context, the Court explained that "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters," stressing that such inquiries would raise "the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands," and that "the mere process of arriving at correct conclusions would disrupt the military regime." *United States v. Stanley*, 483 U.S. 669, 682-683 (1987); *see also United States v. Shearer*, 473 U.S. 52, 55 (1985) (*Feres* barred suit alleging negligent supervision and oversight with respect to the kidnap and murder of an Army private by a fellow service

member, explaining that "[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions").

C. *Feres* Applies Here Notwithstanding the Serious Allegations of Harassment and Assault.

That this suit involves allegations of harassment and assault does not alter the *Feres* analysis here. The Air Force properly recognized the gravity of the charges asserted by Colonel Spletstoser with regard to the conduct of her supervising officer, and conducted a correspondingly intensive investigation. The seriousness of the allegations is not a warrant to replicate and dismiss the results of the Air Force inquiry.

This Court's decision in *Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988), is instructive. In that case, the plaintiff brought suit against three mechanics who, like the plaintiff in that case, worked as "dual-status employees" of the National Guard. (As the Court noted, civilian National Guard mechanic-technicians must also be members of the National Guard as a condition of their civilian employment.) The plaintiff "alleged that the three defendants, over a five-year period, continuously harassed him, both on- and off-base, during regular work-duty hours and after hours." *Id.* at 396.[3]

[3] The complaint in *Stauber* alleged:

> harassment and intimidation in the use of sirens and horns and other noisemaking devices, all directed at plaintiff; forcing plaintiff to leave his work area door open so as not to be able to shut the noise out while others were allowed to close their doors; allowing everyone in the work area except

This Court held that *Feres* required dismissal. The Court reached that conclusion even while recognizing that the defendants' conduct served no military purpose. *See* 837 F.2d at 400 n.10. The Court held that *Feres* precluded the suit even though the plaintiff and defendants were dual-status employees and even though some of the alleged conduct occurred off-base and outside of working hours. The Court explained that "the off-base, after-hours harassment was merely an extension of on-base events to which intramilitary immunity properly applies," and further noted that to "examine the relationship between on- and off-base events in this case, beyond determining that the conduct involved was incident to service, would result in an impermissible intrusion upon military matters." *Id.* at 401.

> plaintiff to use ear protectors; forbidding plaintiff from working outside; following plaintiff in his automobile with sirens and horns directed at plaintiff; physically pushing plaintiff; threatening to make negative reports about plaintiff to plaintiff's superiors; maliciously and intentionally disrupting, disorganizing, and sabotaging plaintiff's work area; hiding and rearranging parts and tools and jamming plaintiff's toolbox closed; excluding only plaintiff from use and possession of keys to the common work area; driving back and forth in front of plaintiff's [off-base] home; and representing to plaintiff that eventually defendants would succeed in getting plaintiff fired from his position as a civilian technician.

Id. at 397 n.2.

It should follow a fortiori from the Court's holding and analysis that the allegations of misconduct in this case likewise fall within the scope of *Feres*. General Hyten and Colonel Spletstoser were far more clearly subject to military discipline than the dual-status mechanics in *Stauber,* and their relative positions in the military command structure were even more significant than in *Stauber,* where the Court found it relevant that all three defendants were superior in rank to the plaintiff although only one had direct authority over him. Moreover, whereas the off-base harassment in *Stauber,* such as following plaintiff's car with blaring sirens and driving repeatedly in front of his home, had no connection to work, General Hyten and Colonel Spletstoser traveled together as part of their military service and many of their interactions necessarily took place off base and in hotel rooms while they traveled.

These facts are plain from those allegations considered by the district court and from Colonel Spletstoser's declaration. The amended complaint and the declaration state that General Hyten was Colonel Spletstoser's military superior. *See* FAC ¶ 23, ER 35; Spletstoser Decl., ¶¶ 6, 9, ER 57. Colonel Spletstoser's declaration also explains that General Hyten "retained [her] as his [Commander's Action Group] Director" when he became STRATCOM Commander. Decl. ¶ 9, ER 57, and General Hyten was thus her commanding officer at STRATCOM. The amended complaint also alleges that General Hyten sexually assaulted Colonel Spletstoser when STRATCOM was invited to attend the Reagan National Defense Forum in Simi Valley, California, *see* FAC ¶ 30, ER 35, and the district court recognized that Colonel Spletstoser was invited to that event

because of her assignment to STRATCOM, *see* ER 26. Colonel Spletstoser's declaration notes that all the trips discussed in her declaration—including the Simi Valley trip—involved temporary duty assignments, *see* Decl. ¶ 19, ER 59.

In addition, an allegation in the original complaint (correctly considered by the district court) further stated that General Hyten had come to Colonel Spletstoser's hotel room while they were representing STRATCOM at the Reagan National Defense Forum "under the pretense of work-related purposes." Compl. ¶ 45, ER 92. This assertion, which the district court properly considered in assessing the amended complaint, *see* ER 16, 18, still further supports applying *Feres* here.

The district court nevertheless mistakenly concluded that this case—once plaintiff omitted her "background" allegations—was controlled by *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991). In *Lutz*, an Air Force Major brought *Bivens* and common-law claims against three military subordinates who entered her office on several occasions, removed personal property, made copies of a personal letter and notes, and showed those materials to others in an attempt to harm her reputation and career. *See id.* at 1479. *Lutz* distinguished *Stauber* on the grounds that "the defendants in *Stauber* were all superior in rank to the plaintiff and one was his direct supervisor," *id.* at 1486; the alleged harassment in *Stauber* "largely took place during working hours and in the process of work," *id.*; and "many of the harassing acts were related to working conditions." *Id.* Each of these grounds distinguishes the present case from *Lutz* as well, and confirms that this action is governed by the principles correctly applied in *Stauber*.

Even more significant, allowing this suit to proceed not only would involve the type of discovery and trial against which the Supreme Court has admonished, but would ask the court to retrace the path already taken by the military in its intensive review of the allegations at issue and ultimately to set aside its conclusion. *Lutz* presented no similar concerns, and *Feres* and subsequent decisions make clear that the FTCA is not a means to obtain this type of review.[4]

D. Other Original-Complaint Allegations Omitted from the Amended Complaint, Which the District Court Wrongly Failed to Consider, Confirm *Feres*'s Applicability Here.

For the reasons discussed, reversal and dismissal are required even without regard to the allegations in the original complaint the district court declined to consider. Were this Court to reach the question, however, the district court erred in concluding that the allegations could not properly be considered as part of its *Feres* analysis.

As the district court recognized, a party "cannot selectively delete allegations from a prior complaint to avoid dismissal of an amended complaint." ER 14 (citation omitted). "When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously

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[4] Other circuits have uniformly applied the *Feres* doctrine to bar sexual assault claims notwithstanding the gravity of the allegations under facts similar to those alleged here. *See Gonzalez v. U.S. Air Force*, 88 F. App'x 371 (10th Cir. 2004); *Smith v. United States*, 196 F.3d 774 (7th Cir. 1999); *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678 (1st Cir. 1999); *Mackey v. Milam*, 154 F.3d 648 (6th Cir. 1998); *Corey v. United States*, No. 96-6409, 1997 WL 474521 (10th Cir. Aug. 20, 1997); *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984) (per curiam).

made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extrajudicial admission made by a party or his agent." *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) (quotation marks omitted). The district court's refusal to consider the allegations is particularly anomalous because Colonel Spletstoser does not state that she no longer stands behind her statements, only that that she now regards them as "background" or "irrelevant."

The original complaint confirms Colonel Spletstoser's relationship to General Hyten in the military hierarchy, stating that General Hyten was Colonel Spletstoser's "first-line supervisor," Compl. ¶ 2, ER 85, and that she "report[ed] directly" to him, *id.* ¶ 29, ER 88. That is plainly relevant to the *Feres* inquiry. *See Stauber*, 837 F.2d at 396 (noting that one of the alleged military harassers "had direct authority over" the plaintiff). The allegations omitted from the amended complaint (taken as true only for present purposes) also demonstrate that the alleged conduct on the trip to the Reagan National Defense Forum conference was part of an alleged pattern of sexual harassment and unwanted advances at STRATCOM and on official military trips preceding that conference. *See* Compl., ¶¶ 35-44, ER 89-91; *Stauber*, 837 F.2d at 396 (noting plaintiff's allegations that he was "continuously harassed . . . both on- and off-base" supported applying *Feres*); *see also Lutz*, 944 F.2d at 1486 (noting this aspect of *Stauber*).

Those omitted assertions echo Colonel Spletstoser's sworn declaration, which includes sexual-abuse allegations with respect to each of the official work trips mentioned in her original complaint and confirms each trip's official military purpose. *See* Decl. ¶¶ 20-56, ER 59-67. Because Colonel Spletstoser has never withdrawn or recanted those allegations, her omission of those allegations from the amended complaint does not render them irrelevant here.

The original complaint also asserted that on several official work trips prior to the Reagan National Defense Forum conference, General Hyten came to Colonel Spletstoser's hotel room, or requested that she stay in his room after the conclusion of work-related meetings conducted there, for additional work-related purposes. *See* Compl. ¶¶ 35, 38, 39, 40, 42-43, 44, ER 89-91. Those allegations, taken as true, suggest that it was not unusual for General Hyten's team to conduct business in hotel rooms while on temporary duty assignments, and that the alleged misconduct thus effectively took place in the workplace (if it occurred at all). Colonel Spletstoser's declaration similarly states that she and General Hyten were on temporary duty assignments during the official work trips in question. *See supra* p. 22.

The district court did not explain why it refused to consider the original complaint's assertions that General Hyten was Colonel Spletstoser's "first-line supervisor," Compl. ¶ 2, ER 85, and that she "report[ed] directly" to General Hyten, *id.* Those statements are relevant to *Feres* for reasons already explained, and the court erred by not considering them. The district court also erred in regarding as irrelevant the

allegations in the original complaint that the military's investigation of her allegations was inadequate and unfair. *See* ER 16-17. That allegation makes explicit what is, in any event, apparent from the amended complaint: this damages suit is a direct challenge to the military's investigation and disciplinary determinations. The withdrawal of the statement from the amended complaint does not alter the application of *Feres*.

CONCLUSION

The Court should reverse the ruling below and direct the district court to dismiss this case for lack of subject-matter jurisdiction.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel are aware of no related cases within the meaning of Ninth Circuit Rule 28-2.6.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6655 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Lowell V. Sturgill Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2021, I electronically filed the foregoing Brief for Appellants with the Clerk of the Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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