

# Holding the Federal Government Accountable for Sexual Assault

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*ABSTRACT: The average American would be shocked to learn that the United States government holds itself absolutely immune from civil liability for most sexual assaults by its employees. Even the average lawyer might be surprised to discover that the federal employee who commits a sexual assault may also be shielded from individual tort liability by a special federal statute.*

*The Federal Tort Claims Act bars assault and battery claims against the sovereign United States, even if committed by an agent acting within the scope of most types of federal employment—that includes military recruiters, postal workers, and daycare employees. At the same time, the Westfall Act grants federal employees immunity from state tort claims for acts within the scope of employment. The scope of employment for both federal statutes is defined by state respondeat superior law, which over the decades has evolved to hold employers legally responsible under more circumstances for the intentional wrongdoing of employees. As a consequence of these statutes and evolving liability doctrines, both the federal government as an entity and the federal employee as an individual may well be immune from tort liability for assault and battery.*

*Absent legislative reform, the victim of a sexual assault at the hands of a federal employee may be left without any remedy against either the government or the individual in any venue, state or federal. In this article, the preclusion of a remedy for sexual assault by a federal agent and the avoidance of federal responsibility is highlighted, together with a proposed legislative resolution.*

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## I. INTRODUCTION

Over the past few decades, public attention has been increasingly directed to the scourge of sexual assault. Sexual violence has not only been rightly castigated as an egregious offense against human dignity but recognized as a discriminatory obstacle to full participation in the workplace, the military, and higher education. Rejecting retrograde attitudes about gender roles and refusing to regard degrading behavior as culturally acceptable or some kind of rite of passage for women seeking entry into male-dominated fields, government at all levels has mandated action to protect against and offer just relief to the victims of sexual misconduct.

The federal government has been at the forefront of legal initiatives to prevent and remedy sexual violence. In 1994, Congress enacted the Violence

Against Women Act (“VAWA”)<sup>1</sup> to address “the escalating problem of violence against women.”<sup>2</sup> The Supreme Court invalidated the provision creating a new federal civil rights remedy for victims of gender-based violence as exceeding congressional authority to regulate interstate commerce or remedy state infringement of equal protection.<sup>3</sup> Yet the VAWA had an impact in other ways by providing grant money to support state, local, and tribal law enforcement, rape prevention and education programs, and victim services.<sup>4</sup> The statute also created new federal crimes for interstate domestic violence.<sup>5</sup>

In Title IX of the Higher Education Amendments of 1972, Congress prohibited discrimination on the basis of sex within educational programs and activities.<sup>6</sup> The courts have read Title IX as providing a private right of action for damages when a person has been excluded from educational opportunity because an educational institution has been indifferent to sexual harassment or violence by employees or other students.<sup>7</sup> In 2013, Congress passed the Campus Sexual Violence Elimination Act, which requires colleges to disclose the campus security policy and campus crime statistics, report sexual violence incidents, publish procedures for disciplinary action, and provide training about sexual violence for school officials involved in the disciplinary process.<sup>8</sup> Holding colleges accountable for addressing sexual assault under the Title IX mandate, the United States Department of Education’s Office of Civil Rights has conducted more than 400 investigations of colleges for failing to properly investigate reports of sexual violence.<sup>9</sup>

It is intolerable that the federal government should hold itself and its agents exempt from legal responsibility for sexually-motivated or other assaults and batteries against its own people. Indeed, it would be the height of hypocrisy for the United States to enforce new laws and legal initiatives against sexual assault in other contexts, while refusing to be held accountable for its own misconduct. It is unthinkable that the survivor of sexual violence

1. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

2. S. REP. NO. 103-138, pt. 1, at 37 (1993).

3. *United States v. Morrison*, 529 U.S. 598, 607-27 (2000) (holding 42 U.S.C. § 13981 unconstitutional).

4. Violent Crime Control and Law Enforcement Act of 1994 § 1910A (formerly codified as 42 U.S.C. § 300w-10); *id.* § 2001 (now codified at 34 U.S.C. § 10441 (2017)); *id.* § 2102 (now codified at 34 U.S.C. § 10461); *id.* § 40241 (codified at 42 U.S.C. § 10409(a)); *id.* § 40131 (now codified at 34 U.S.C. § 12301).

5. *Id.* § 40221(a) (codified at 18 U.S.C. §§ 2261-62).

6. 20 U.S.C. § 1681 (2012).

7. *See Franklin v. Gwinnet Cty. Pub. Sch.*, 503 U.S. 60, 65-76 (1992); *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1295-97 (11th Cir. 2007); *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163, 168-74 (3d Cir. 2002).

8. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 11304, § 304, 127 Stat. 54, 89-92 (codified at 20 U.S.C. § 1092(f)).

9. *Title IX: Tracking Sexual Assault Investigations*, CHRON. OF HIGHER EDUC., <https://projects.chronicle.com/titleix> (last visited Oct. 27, 2018).

would be left without any remedy in any court against either the government itself or its individual employees.<sup>10</sup>

And yet the intolerable, the hypocritical, and the unthinkable describe the reality. Under decades-old federal statutes that have gone unrevised even while the legal and cultural landscape has changed, the sovereign United States is absolutely immune from liability in tort for any assault and battery—sexual or otherwise. And the federal employee who commits sexual violence may likewise obtain federal immunity from liability under state tort law.

Through an express exception to the Federal Tort Claims Act (“FTCA”), the United States enjoys complete sovereign immunity from most claims for assault and battery.<sup>11</sup> Most courts have interpreted the assault-and-battery exception to also preclude claims for negligent hiring or supervision of federal employees or, alternatively, have barred such claims under the statutory discretionary function exception.<sup>12</sup> And if a federal employee was acting within the scope of employment, as defined by state *respondeat superior* doctrine, the federal Westfall Act immunizes employees from liability under state tort law.<sup>13</sup> The individual employee retains that Westfall Act immunity even if the government as substituted defendant evades responsibility through limitations on the FTCA.<sup>14</sup> Nor are judicially-implied constitutional remedies likely to be availing, as the Supreme Court has largely halted the so-called *Bivens* remedy from being extended to any new contexts,<sup>15</sup> which may include sexual or others assaults by federal employees.

Litigation alleging sexual abuse by a federal employee arises more frequently out of certain federal government activities than others. For example, mail delivery by federal employees of the United States Postal Service (“USPS”) has regularly generated claims of sexual misconduct.<sup>16</sup> While parents today are more vigilant than in the past and more likely to

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10. Informed by the ongoing debate between concerned people of good faith about how to define sufficient consent between adults and what to adopt as appropriate disciplinary procedures for university students charged with sexual assault, some readers might worry that my use of the term “survivor” in this Article is a form of prejudgment. In the substantial majority of the cases cited throughout this Article, questions of credibility and disputes regarding the underlying facts are simply not present and, indeed, many of the sexual assailants are incarcerated by the time the civil case comes to judgment. Rather, the questions presented here are whether any remedy is available to those who survived what in most cases was an undisputed episode of sexual violence.

11. 28 U.S.C. § 2680(h) (2012); see *infra* Section II.A.1.

12. See *infra* Section II.A.4.

13. 28 U.S.C. § 2679(b)(1); see *infra* Section III.A.

14. *United States v. Smith*, 499 U.S. 160, 161–62 (1991); see *infra* Section III.A.1.

15. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–60 (2017); see *infra* Section III.B.

16. *LM ex rel. KM v. United States*, 344 F.3d 695, 697 (7th Cir. 2003); *Johnson ex rel. Johnson v. United States*, 788 F.2d 845, 847–55 (2d Cir. 1986); *Hughes ex rel. Hughes v. United States*, 662 F.2d 219, 219–20 (4th Cir. 1981); *West v. United States*, No. 15-01243-JLS, 2016 WL 1576382, at \*1 (C.D. Cal. Apr. 11, 2016); *Hamburg v. U.S. Postal Serv.*, No. H-10-2186, 2010 WL 4226461, at \*1 (S.D. Tex. Oct. 20, 2010).

notice a stranger wandering the streets next to their small children, the ubiquitous mail carrier does not seem out of place and his or her interaction with children in the neighborhood is welcomed—or at least not seen as suspicious. As the lawyer for the child victim in *LM ex rel. KM v. United States* explained during oral argument on appeal, “people in the neighborhood, they see their postal carrier everyday and that this is somebody who’s held in a position of trust and comfort in the community.”<sup>17</sup>

With his delivery route running through Park Forest, Illinois, 61-year-old Leslie Tucker was long employed as a mail carrier by the USPS.<sup>18</sup> Over the years, he had “c[o]me to be called ‘Lester the Molester’ by his co-workers because of his notorious sexual abuse of the children who lived along his routes.”<sup>19</sup> At one point, he had been removed from his previous route and reassigned to desk duty when the USPS learned that he was under investigation by the Richton Park, Illinois police for sexually molesting a two-year-old and a four-year-old girl.<sup>20</sup> “The case involving a 2-year-old was dropped for lack of evidence, and the mother of a girl who was 4 decided not to press charges because she feared her daughter would be traumatized.”<sup>21</sup> When no criminal charges were issued, Tucker was reassigned to a different postal route in Park Forest, during which the USPS received another report from a concerned person that he “was a known child molester.”<sup>22</sup>

Several years after Tucker had been reassigned, a man looking out of his window saw Tucker entice a seven-year-old neighbor girl on her bicycle over to his mail truck.<sup>23</sup> As the witness described it, Tucker exposed himself to the girl<sup>24</sup> and “repeatedly inserted his hands inside her pants, intermittently removing, smelling, and tasting his fingers, before proceeding again numerous times over a period of approximately eight minutes.”<sup>25</sup> The witness called the police, and Tucker was arrested.<sup>26</sup>

After further investigation, Tucker was accused of molesting nine young girls along his route,<sup>27</sup> “rang[ing] in age from 5 to 12.”<sup>28</sup> The accusations

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17. Transcript of Oral Argument, *LM ex rel. KM v. United States*, 344 F.3d 695, 697 (7th Cir. 2003) (No. 02-3583), 2003 WL 25880365 (7th Cir. Feb. 27, 2003).

18. Stanley Ziemba, *Mail Carrier in Abuse Case Has Bond Set at \$150,000; Crete Man Charged with Molesting Girl*, CHI. TRIBUNE, Aug. 15, 1998, at 5.

19. *LM ex rel. KM v. United States*, 344 F.3d 695, 697 (7th Cir. 2003).

20. *Id.*

21. Gary Wisby, *Mailman Allegedly Molested Girls*, CHI. SUN-TIMES, Aug. 20, 1998, at 25.

22. *LM ex rel. KM*, 344 F.3d at 695.

23. *Id.*; Ziemba, *supra* note 18.

24. Ziemba, *supra* note 18.

25. *LM ex rel. KM*, 344 F.3d at 695.

26. *Id.*

27. Wisby, *supra* note 21.

28. T. Shawn Taylor, *Mailman May Face More Charges of Sexual Abuse*, CHI. TRIB. (Aug. 21, 1998), [http://articles.chicagotribune.com/1998-08-21/news/9808210318\\_1\\_mail-truck-girls-parents-girls-mother](http://articles.chicagotribune.com/1998-08-21/news/9808210318_1_mail-truck-girls-parents-girls-mother).

included sexual touching and digital penetration.<sup>29</sup> In these cases, Tucker had lured the girls to his mail truck.<sup>30</sup> With the youngest girl, as Tucker later confessed, he had fondled her “as she played in a wading pool in” front of her house.<sup>31</sup> Because of the trauma from the abuse, the children underwent therapy and at least one attempted suicide.<sup>32</sup>

Tucker was charged with aggravated criminal sexual abuse for the episode involving the seven-year-old Park Forest girl.<sup>33</sup> He was subsequently indicted with the more serious crime of sexual assault of another five-year-old girl from Park Forest<sup>34</sup> and still later with the higher class felony of predatory criminal sexual assault.<sup>35</sup>

At the criminal trial, the now-eight-year-old girl from Park Forest identified Tucker from the witness stand as the man who had sexually assaulted her when she had stopped on her bicycle to talk with him next to his mail truck.<sup>36</sup> She testified that Tucker had told her not to tell anyone what had happened.<sup>37</sup> Saying he “couldn’t believe what [he] saw,” the neighbor testified that from his living room window he watched the sexual assault unfold as he called the police.<sup>38</sup>

After the bench trial, the judge found Tucker guilty on two counts of aggravated criminal sexual abuse but not guilty on the more serious charge of predatory sexual assault.<sup>39</sup> Afterward, Tucker pleaded guilty to charges of aggravated sexual abuse involving five other girls, in exchange for prosecutors dropping a charge of predatory sexual assault.<sup>40</sup> Tucker was sentenced to 14 years in prison.<sup>41</sup>

Parents of the children abused by mail carrier Tucker filed administrative claims with the USPS and then lawsuits against the United States under the

29. Wisby, *supra* note 21.

30. See Taylor, *supra* note 28.

31. William Presecky, *Ex-Mailman Pleads Guilty to 5 Charges of Sex Abuse*, CHI. TRIB. (July 21, 1999), [http://articles.chicagotribune.com/1999-07-21/news/9907210298\\_1\\_sexual-abuse-charges-of-sex-abuse-predatory](http://articles.chicagotribune.com/1999-07-21/news/9907210298_1_sexual-abuse-charges-of-sex-abuse-predatory).

32. Lola Smallwood, *Mailman Sentenced in Abuse of Girls*, CHI. TRIB. (Jan. 28, 2000), [http://articles.chicagotribune.com/2000-01-28/news/0001280218\\_1\\_sentenced-victims-family-pets](http://articles.chicagotribune.com/2000-01-28/news/0001280218_1_sentenced-victims-family-pets).

33. Ziemba, *supra* note 18.

34. Stanley Ziemba, *Mail Carrier is Indicted in 2nd Sex Case*, CHI. TRIBUNE (Metro Southwest), Aug. 28, 1998, at 1.

35. Stanley Ziemba, *Postal Carrier Faces More Sex Charges: Crete Man Accused of Molesting Girls*, CHI. TRIBUNE (Metro Southwest), Nov. 19, 1998, at 2.

36. Stanley Ziemba, *Girl Testified of Mail Route Attack; Crete Carrier Charged in Park Forest Incident*, CHI. TRIBUNE (Metro Southwest), Apr. 21, 1999, at 1.

37. *Id.*

38. Stanley Ziemba, *Postman Awaits Judge’s Verdict on Sex Charges; Carrier Accused of Attack on Girl*, CHI. TRIBUNE (Metro Southwest), Apr. 22, 1999, at 1.

39. Stanley Ziemba, *Ex-Mailman Found Guilty of Molesting Girl on Route; Crete Man Escapes Most Serious Charge*, CHI. TRIBUNE (Metro Southwest), May 12, 1999, at 1.

40. Presecky, *supra* note 31.

41. Smallwood, *supra* note 32.

Federal Tort Claims Act.<sup>42</sup> Sadly, but predictably, the claims ultimately were dismissed<sup>43</sup> as barred by the FTCA's exception from liability for "[a]ny claim arising out of assault [or] battery."<sup>44</sup> Even a negligent hiring and supervision claim was unavailing, as courts treat such claims as an attempted end-run around the assault-and-battery claim.<sup>45</sup> By the time one of these cases came up on appeal, the plaintiff had abandoned any claim of negligent hiring, supervision, or retention, which the Seventh Circuit characterized as simple recognition that such claims would impermissibly impose *respondeat superior* liability contrary to the assault-and-battery exception.<sup>46</sup> Ultimately, the Seventh Circuit held that state law did not support any claim of an affirmative, voluntarily-assumed duty by the government to protect children from the mail carrier.<sup>47</sup>

On appellate review of one the cases arising from Leslie Tucker's notorious reign of child molestation, the Seventh Circuit recited that "[n]o one can condone the sexual abuse of a young child."<sup>48</sup> Nonetheless, the Seventh Circuit affirmed dismissal of the FTCA action, thus taking the federal government off the hook for its responsibility in keeping the child-molesting mail carrier on this route.<sup>49</sup>

Expressing "great sympathy for the child and family involved," the Seventh Circuit insisted the question was not whether relief should be available for this "deplorable" episode but "whether someone other than the perpetrator him- or herself is responsible for the resulting injury."<sup>50</sup> But if this child victim through her parents had followed up the unsuccessful FTCA suit by seeking personal liability from Leslie Tucker under pertinent state law,<sup>51</sup> they might well have found that avenue closed as well.

Under the Westfall Act, a federal employee is immune from state tort liability for acts performed in the scope of employment.<sup>52</sup> States have

42. *LM ex rel. KM v. United States*, 344 F.3d 695 (7th Cir. 2003); *Ryan v. United States*, 156 F. Supp. 2d 900 (N.D. Ill. 2001).

43. *LM ex rel. KM*, 344 F.3d at 702; *Ryan*, 156 F. Supp. 2d at 908.

44. 28 U.S.C. § 2680(h) (2012); see *infra* Section II.A.1.

45. See *infra* Section II.A.4.

46. *LM ex rel. KM*, 344 F.3d at 697, 700; see also *Ryan*, 156 F. Supp. 2d at 902–07 (rejecting negligent hiring, supervision, and retention claim).

47. *LM ex rel. KM*, 344 F.3d at 700–02.

48. *Id.* at 696.

49. *Id.* at 702.

50. *Id.* at 696.

51. Given that Tucker languished in prison, a claim against him individually under state tort law, even if possible, might have simply produced an uncollectible damages judgement.

52. 28 U.S.C. § 2679(b)(1) (2012). In the District Court in *LM ex rel. KM*, the government argued that Leslie Tucker had not been acting within the scope of his employment when he assaulted the child. Defendant United States' Reply Memorandum in Support of Motion to Dismiss Complaint, *LM ex rel. KM v. United States*, (N.D. Ill. Feb. 11, 2002) (No. 01-C-8538), at \*3–4. The plaintiff responded that the complaint was not based on a *respondeat superior* theory of liability for Tucker's misconduct, but rather based on the failure of other government officials to



gradually expanded *respondeat superior* liability over the decades, making employers responsible under certain circumstances for even intentional wrongdoing by its employees.<sup>53</sup> Translating that state doctrine into the Westfall Act context means that a federal employee who commits an intentional tort, such as assault or battery, may be held within the scope of employment and able to invoke immunity under the Westfall Act from any state law liability.<sup>54</sup> And that individual immunity persists, even when the United States avoids collective liability through exceptions to the FTCA.<sup>55</sup> While the child's parents arguably could frame a claim against Tucker as an individual federal officer as a violation of a Fifth Amendment due process right to bodily integrity, the Supreme Court's increasingly skeptical attitude toward *Bivens* claims makes that litigation strategy dubious at best.<sup>56</sup>

And so we reach the repugnant result that no one may be answerable to this child victim—not the federal government whose own agent harmed her nor the individual federal employee who perpetrated the sexual assault and battery.

This astounding state of affairs comes about because of the unanticipated collision of federal statutes (largely designed to provide redress to those harmed by the federal government) with state scope of employment laws (likewise expanded to ensure greater accountability and remedies to tort victims).<sup>57</sup> Because the FTCA has not kept pace with changes in tort law and employment doctrine over the past 70 years, and because of the then-unanticipated extension of immunity to individual employees by the Westfall Act, a dreadful delinquency has overtaken the law.<sup>58</sup>

To be sure, a federal prisoner sexually assaulted by a correctional officer<sup>59</sup> or an arrestee molested by a federal law enforcement agent<sup>60</sup> may recover against the federal government under the FTCA because of a special Law Enforcement Proviso enacted in the mid-70s.<sup>61</sup> But that makes it all the more obscene to deny justice to the child sexually molested by a mail carrier on a postal route—even when the state *respondeat superior* law would make an employer vicariously liable for such an intentional act by an employee during

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prevent the molestation. Plaintiff's Response to United States' Motion to Dismiss, LM *ex rel.* KM v. United States, (N.D. Ill. Feb. 11, 2002) (No. 01-C-8538), at \*3.

53. See *infra* Section III.A.2.

54. See *infra* Section III.A.3.

55. See *infra* Section III.A.1.

56. See *infra* Section III.B.

57. See *infra* Section III.A.3.

58. See *infra* Sections III.A.3 & IV.A.

59. See *Millbrook v. United States*, 569 U.S. 50, 51–52 (2013); *Bolton v. United States*, 347 F. Supp. 2d 1218, 1222–23 (N.D. Fla. 2004).

60. See *Anderson v. United States*, No. 8:12-3203-TMC-KDW, 2013 WL 8149332, at \*2–3, \*20–21 (D.S.C. Oct. 15, 2013), *adopted in part, rejected in part*, No. 8:12-3203-TMC-KDW, 2014 WL 1268589 (D.S.C. Mar. 26, 2014).

61. See 28 U.S.C. § 2680(h) (2012); see *infra* Section II.A.3.

the course of employment. Other than the accidents of history and momentary political attention to particular abuses by federal law enforcement 40 years ago, these contradictory results are inexplicable and morally unsustainable.<sup>62</sup>

The only comprehensive solution to this perverse situation is a legislative one. Congress may bring order to the muddle of statutes and judicial rulings by repealing the assault-and-battery exception to the FTCA. Congress thereby would complete a process begun with the Law Enforcement Proviso four decades ago and bring the FTCA up to date with changes in tort law since its initial and cautious enactment seven decades ago.<sup>63</sup> Rather than adding further confusion, and even more finely parsing federal exceptions to tort liability, the assault-and-battery exception should be repealed outright, for all intentional acts of violence, including but not limited to sexual assaults and batteries.<sup>64</sup>

In sum, what we need is enactment of a “Federal Sexual Assault Accountability Act.”<sup>65</sup> Only when the United States government assumes proper responsibility by compensatory statute for unjustified acts of violence and sexual exploitation perpetrated by federal agents can the federal government’s commitment to ending the scourge of sexual assault in our society be characterized as genuine.

## II. THE COLLECTIVE LIABILITY OF THE UNITED STATES GOVERNMENT: FEDERAL SOVEREIGN IMMUNITY AND SEXUAL ASSAULT

For the United States to be amenable to any suit on any theory of liability and for any specific type of remedy, an unambiguous waiver by statute must be shown.<sup>66</sup> The current mosaic of federal statutes, by both express legislative text and as construed by the courts, largely extinguishes remedies to those who suffer an assault or battery (sexual or otherwise) by a federal employee acting within the scope of employment. The Federal Tort Claims Act bars assault and battery claims,<sup>67</sup> outside of medical treatment<sup>68</sup> or unless committed by a federal law enforcement officer<sup>69</sup> (thus excluding assault and battery claims involving most military personnel, postal workers, federal daycare employees, etc.). Moreover, the trend in the courts is that a claim framed under the FTCA for negligent hiring, supervision, or training is also barred if the claim arises from an assault or battery by a federal employee.<sup>70</sup>

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62. See *infra* Section IV.A.

63. See *infra* Section IV.A.

64. See *infra* Section IV.C.

65. See *infra* Part IV and addendum.

66. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003).

67. See *infra* Section II.A.1.

68. See *infra* Section II.A.2.

69. See *infra* Section II.A.3.

70. See *infra* Section II.A.4.

Over the decades, the courts have regularly turned away claims alleging sexual assault by federal employees by invoking the assault-and-battery exception. Among the most common of episodes have been claims by girls and women who had been sexually molested by postal carriers<sup>71</sup> and potential recruits sexually assaulted by military recruiters.<sup>72</sup>

And whatever the continued validity of such claims against individual federal officers,<sup>73</sup> constitutional tort claims are not available against the United States itself.<sup>74</sup>

#### A. *THE ASSAULT-AND-BATTERY EXCEPTION TO THE FEDERAL TORT CLAIMS ACT*

Originally enacted in 1946,<sup>75</sup> the Federal Tort Claims Act (“FTCA”) simultaneously waives sovereign immunity for tort claims against the United States and confers exclusive jurisdiction over such claims to the United States District Courts.<sup>76</sup> The Supreme Court has described the FTCA as “the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work.”<sup>77</sup> The statute authorizes a claim (1) against the United States, (2) for money damages, (3) for personal injury, death, property harm, or property loss, (4) “caused by the negligent or wrongful act or omission of any employee of the [United States],” (5) “while acting within the scope of his office or employment,” (6) under circumstances where a private person would be liable under the law of the place where the act or omission occurred.<sup>78</sup>

The FTCA directs that “[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like

71. *LM ex rel. KM v. United States*, 344 F.3d 695, 697 (7th Cir. 2003); *Johnson v. United States*, 788 F.2d 845, 847 (2d Cir. 1986); *Hughes v. United States*, 662 F.2d 219, 220 (4th Cir. 1981); *West v. United States*, No. 15-01243-JLS, 2016 WL 1576382, at \*1 (C.D. Cal. Apr. 11, 2016); *Hamburg v. U.S. Postal Serv.*, No. H-10-2186, 2010 WL 4226461, at \*1 (S.D. Tex. Oct. 20, 2010).

72. *Olsen v. U.S. ex rel. Dep’t of the Army*, 144 F. App’x 727, 732 (10th Cir. 2005); *Leleux v. United States*, 178 F.3d 750, 756–57, 757 n.5 (5th Cir. 1999); *Garcia v. United States*, 776 F.2d 116, 117 (5th Cir. 1985); *Walling v. United States*, No. 1:13CV78, 2013 WL 6885274, at \*1 (E.D. Mo. Dec. 31, 2013); *Lilly v. United States*, 141 F. Supp. 2d 626, 627–30 (S.D. W. Va. 2001), *aff’d*, 22 F. App’x 293 (4th Cir. 2001); *Pottle v. United States*, 918 F. Supp. 843, 844–45 (D.N.J. 1996); *see also Stidham v. United States*, 252 F.3d 434, 434 (5th Cir. 2001) (affirming dismissal of FTCA claim by a young recruit forced to perform oral sex and sexually assaulted by multiple Army officials over several months).

73. *See infra* Section III.B.

74. *See infra* Section II.C.

75. Federal Tort Claims Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, 842. For a succinct history of the Federal Tort Claims Act legislation and congressional purpose, see Paul Figley, *Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 348–52 (2011).

76. 28 U.S.C. § 1346(b)(1) (2012). On the FTCA, see generally 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* (2018); GREGORY C. SISK, *LITIGATION WITH THE FEDERAL GOVERNMENT* §§ 3.2–.8 (2016).

77. *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

78. 28 U.S.C. § 1346(b)(1). On the basic elements of the FTCA, see SISK, *supra* note 76, § 3.5(a).

circumstances.”<sup>79</sup> In other words, the federal government is liable under the FTCA on the same basis and to the same extent as recovery would be allowed for a tort committed under like circumstances by a private person in that state.<sup>80</sup> The FTCA does not create any new causes of action nor does it formulate federal rules of substantive tort law. Instead, Congress determined “to build upon the legal relationships formulated and characterized by the States” with respect to principles of tort law.<sup>81</sup>

However, the FTCA sets out a number of specific exceptions to governmental liability, precluding certain types of claims and barring liability arising out of certain activities.<sup>82</sup> Not surprisingly, the applicability of an exception is often the central point of contention in FTCA litigation. In the case of sexual assaults at the hands of a federal employee, the assault-and-battery or intentional tort exception takes center stage.<sup>83</sup>

### 1. The Immunity of the United States Under the FTCA Against Claims for Assault and Battery

The biggest obstacle to justice in court for the victim of sexual violence by a federal employee stands in the unmistakable clarity of the explicit exclusion of all claims arising from assault and battery set out in the text of the Federal Tort Claims Act. Section 2680(h) of Title 28 of the United States Code excludes “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”<sup>84</sup> As Lester Jayson and Robert Longstreth put it in their treatise on the FTCA, “eleven familiar torts”—“a very considerable portion of the law of torts”—are removed altogether from the government’s consent to suit.<sup>85</sup>

Our focus here is on that part of the exception excluding “claim[s] arising out of assault [and] battery.”<sup>86</sup> Assault is defined as “the apprehension of immediate harmful or offensive contact with the plaintiff’s person, caused by acts intended to result in such contacts, or the apprehension of them,” while a battery is the “unpermitted, unprivileged contact[] with [the plaintiff’s] person, caused by acts intended to result in such contact[.]”<sup>87</sup>

79. 28 U.S.C. § 2674.

80. *United States v. Olson*, 546 U.S. 43, 44 (2005). On the state law liability standard for the FTCA, see *SISK*, *supra* note 76, § 3.5(b).

81. *Richards v. United States*, 369 U.S. 1, 7 (1962); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 114 (2001) (stating that federal tort statutes should be interpreted “against the backdrop of common law rules of tort law”).

82. 28 U.S.C. § 2680. On the exceptions to the FTCA, *see generally SISK*, *supra* note 76, § 3.6.

83. 28 U.S.C. § 2680(h). On the intentional tort exception to the FTCA, *see generally SISK*, *supra* note 76, § 3.6(d).

84. 28 U.S.C. § 2680(h).

85. 1 JAYSON & LONGSTRETH, *supra* note 76, § 13.06[1][a].

86. 28 U.S.C. § 2680(h).

87. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 9–10, at 43, 48 (1941).

Because the FTCA tends to be interpreted by the ordinary usage of terms from the common law,<sup>88</sup> these basic definitions have occasioned no controversy.

When it enacted the FTCA in 1946, Congress was concerned primarily with the most common types of injuries imposed by through “ordinary common-law torts.”<sup>89</sup> In particular, “negligence in the operation of vehicles”<sup>90</sup> was foremost in the legislative mind. In a brief colloquy between Assistant Attorney General Francis M. Shea and members of the House Judiciary Committee in 1942, they confirmed that if a government “automobile runs into a man and damages him,” that claim would be permitted as an injury caused by negligence, as contrasted with a “deliberate assault . . . where some agent of the Government gets in a fight with some fellow . . . [a]nd socks him.”<sup>91</sup>

Congress offered no direct explanation in the statutory text for the exclusion of several intentional torts, including assault and battery, and the pertinent legislative history is sparse. Congress’s apparent intent was to move forward cautiously, given that the waiver of sovereign immunity for any claim was then a novel initiative.<sup>92</sup> At a 1940 committee hearing, Alexander Holtzoff, a special assistant to the Attorney General and regarded by the Supreme Court as “one of the major figures in the” FTCA legislative history,<sup>93</sup> suggested to Congress that

[t]he theory of these exemptions is that, since this bill is a radical innovation, perhaps we had better take it step by step and exempt certain torts and certain actions which might give rise to tort claims

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88. See *Molzof v. United States*, 502 U.S. 301, 312 (1992) (“We conclude that [28 U.S.C.] § 2674 bars the recovery only of what are *legally* considered ‘punitive damages’ under traditional common-law principles.”); *United States v. Neustadt*, 366 U.S. 696, 706 (1961) (holding that the exception to the FTCA for “misrepresentation,” 28 U.S.C. § 2680(h), should be measured by the “commonly understood legal definition” of a negligent misrepresentation claim).

89. *Dalehite v. United States*, 346 U.S. 15, 28 (1953).

90. H.R. REP. NO. 76–2428, at 3 (1940); *Bills to Provide for the adjustment of Certain Tort Claims Against the United States: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 12 (1942) (statement of Rep. Shea, Member, H. Comm. on the Judiciary); *Tort Claims Against the United States: Hearing on H.R. 7236 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 76th Cong. 7, 16, 17 (1940); *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. Of the S. Comm. on the Judiciary*, 76th Cong. 9 (1940); 86 CONG. REC. 12024 (1940); see also *Dalehite*, 346 U.S. at 28 (referring to the legislative reports in observing that ordinary tort cases arising from car accidents were “[u]ppermost in the collective mind of Congress”).

91. *Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 33 (1942).

92. See William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1107 (1996); Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 547 n.84 (1947); see also *infra* Section IV.A.

93. *Kosak v. United States*, 465 U.S. 848, 856 (1984).

that would be difficult to defend, or in respect to which it would be unjust to make the Government liable.<sup>94</sup>

Congress may also have removed assault and battery claims against the government for the intentionally-wrongful actions of employees to roughly track the results under common-law tort doctrine that prevailed at the time. In an era of stricter rules for holding an employer accountable for the misconduct of employees,<sup>95</sup> the commission of an intentional tort might have been viewed as a superseding cause of the victim's harm.<sup>96</sup> Under the tort law of that era, the assault or battery by the employee thus might be seen as "an intervening force [that] prevents the [government's] antecedent negligence from being a legal cause in bringing about harm to another."<sup>97</sup>

Indeed, "since the individual tortfeasor plainly is the more culpable party," the victim of the attack could most readily seek compensation directly from the government employee who committed the assault or battery.<sup>98</sup>

Today, however, the combined effect of expanding *respondeat superior* rules in many states and Westfall Act immunity is to deprive survivors of sexual assault of any remedy in any court against any defendant.<sup>99</sup>

## 2. The Narrow "Exception to the Exception" for Batteries in the Course of Medical Treatment

Subsequent to the initial enactment of the FTCA in 1946, Congress acted to set aside the assault-and-battery exception for claims against certain federal medical providers arising from so-called medical batteries. Most prominently, the Medical Malpractice Immunity Act (commonly known as the Gonzalez Act) supersedes the FTCA's general bar on intentional tort claims to authorize a claim for medical battery against the United States.<sup>100</sup> The Gonzalez Act grants the "right to bring a claim of medical battery against the United States under the FTCA without encountering the intentional tort exception."<sup>101</sup>

Subsection 1089(e) of the Gonzalez Act provides:

For purposes of this section, the provisions of section 2680(h) of title 28 [the FTCA exception for claims of "battery"] shall not apply to any cause of action arising out of a negligent or wrongful act or

94. *Tort Claims Against the United States: Hearing on H.R. 7236 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 76th Cong. 22 (1940).

95. See *infra* Section III.A.2.

96. See RESTATEMENT (SECOND) OF TORTS § 448 (AM. LAW INST. 1965).

97. *Id.* § 441(2).

98. See *Sheridan v. United States*, 487 U.S. 392, 411 (1988) (O'Connor, J., dissenting) (discussing congressional intent in excluding claims for assault and battery from the FTCA in 1946).

99. See *infra* Section III.A.

100. 10 U.S.C. § 1089 (2012).

101. *Levin v. United States*, 568 U.S. 503, 506 (2013).

omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).<sup>102</sup>

The Act simultaneously grants immunity to the individual military medical personnel and substitutes the United States as the sole defendant to such a tort claim.<sup>103</sup> The Gonzalez Act thus is structured to offer reciprocal individual immunity and governmental liability: granting immunity to the individual medical practitioner for medical battery claims, while preserving a remedy against the government for battery claims involving the absence of consent to a medical procedure.

The Gonzalez Act applies to medical personnel in the armed forces, the National Guard when federalized for training or service, the Department of Defense, and the Central Intelligence Agency.<sup>104</sup> Parallel statutes provide the same FTCA remedy and individual immunity for medical personnel in the State Department,<sup>105</sup> the Veterans' Administration,<sup>106</sup> and the Public Health Service.<sup>107</sup>

The medical-practitioner "exception to the exception" for assault and battery under the FTCA, however, is an uncertain avenue for seeking recovery for sexual assault and battery or, for that matter, non-sexual attacks. The purpose of these statutes was to open the FTCA to what today would be a medical malpractice claim but that under archaic laws in some states had to be framed as a "battery." The Gonzalez Act was directed at that species of medical malpractice that could be pleaded as a battery, such as a lack of consent or of informed consent.<sup>108</sup> Under modern medical malpractice law, "informed consent" liability generally is subsumed under the negligence theory.<sup>109</sup>

For that reason, these medical-practitioner "provision[s]" would appear to authorize claims for *medical* battery—not battery generally.<sup>110</sup> Subsection 108g(e) of the Gonzalez Act confines the removal of the FTCA battery exception to claims arising out of "the performance of medical, dental, or related health care functions."<sup>111</sup> At least one court has permitted an FTCA

102. 10 U.S.C. § 1089(e).

103. *Id.* § 1089(c), (e).

104. *Id.* § 1089(a).

105. 22 U.S.C. § 2702.

106. 38 U.S.C. § 7316.

107. 42 U.S.C. § 233.

108. See 1 DAVID W. LOUISELL & HAROLD WILLIAMS, *MEDICAL MALPRACTICE* § 8.06[2] (2018) ("[M]ost courts today reserve the assault and battery theory for cases in which the patient has not consented to the procedure actually performed, while using negligence as the basis for claims that the provider obtained the patient's consent without making a proper disclosure.").

109. Barbara L. Atwell, *The Modern Age of Informed Consent*, 40 U. RICH. L. REV. 591, 595 (2006) ("Negligence as the basis of a complaint based on lack of informed consent more closely comports with the reality of medical practice.").

110. See SISK, *supra* note 76, § 3.6(d)(4).

111. 10 U.S.C. § 1089(e).

claim for sexual molestation by a medical technician to proceed under the Gonzalez Act.<sup>112</sup> But, on balance, “[t]he Gonzalez Act and similar statutes probably cannot be stretched to cover ordinary battery claims by government medical personnel, such as a violent attack or a sexual assault unrelated to medical treatment.”<sup>113</sup> A generous reading of “performance of medical, dental, or related health care functions”<sup>114</sup> to cover sexual advances by a health-care provider certainly cannot be assumed.<sup>115</sup>

### 3. The Broader “Exception to the Exception” for Assaults or Batteries by Law Enforcement Officers

While most plaintiffs injured by the deliberately wrongful conduct of federal employees are barred from recovery under the FTCA by the assault-and-battery exception, there is a rather significant “exception to the exception.” Almost 30 years after the enactment of the FTCA, Congress took the next major step in accountability by adopting a “Law Enforcement Proviso” that upsets the assault-and-battery exception in a truly substantial—but far from all-encompassing—manner.<sup>116</sup>

In 1974, Congress acted decisively to respond to reports of incidents of “abusive, illegal and unconstitutional ‘no-knock’ raids” by federal law enforcement agents.<sup>117</sup> In particular, the public was outraged by an episode in Illinois, in which federal narcotics agents acting without a warrant knocked down the door of a house, shouted obscenities, and threatened the residents with drawn weapons, only to discover they had the wrong address.<sup>118</sup> To “prevent the abuses of the past” by federal law enforcement and to compensate those who had suffered “physical damage,” and “pain, suffering and humiliation” incurred by wrongful use of force and improper searches

112. *Bembenista v. United States*, 676 F. Supp. 18, 22 (D.D.C. 1988), *aff’d in part, rev’d in part, and remanded on other grounds*, 866 F.2d 493, 494 (D.C. Cir. 1989); *see also* *Brignac v. United States*, 239 F. Supp. 3d 1367, 1377 (N.D. Ga. 2017) (treating an allegation of negligence by federally-funded health care center in failing to know of physician’s previous history of sexual assault as a “related function” to the provision of medical services and thus within the medical battery exception to the assault-and-battery exception).

113. *See* SISK, *supra* note 76, § 3.6(d)(3).

114. 10 U.S.C. § 1089(a).

115. *Cf. Doe v. United States*, 769 F.2d 174, 175 (4th Cir. 1985) (holding that the assault-and-battery exception barred FTCA claim and that the Gonzalez Act exception did not apply because the Air Force clinical social worker who engaged in deviant sexual conduct “was acting for his personal gratification rather than within the scope of his employment”).

116. On the Law Enforcement Proviso, *see* generally SISK, *supra* note 76, § 3.6(d)(4).

117. S. REP. NO. 93-588, at 2790 (1973). On the history behind the enactment of the Law Enforcement Proviso in 1974, *see* generally Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497 (1976).

118. S. REP. NO. 93-469, at 30-32 (1973); *see* *Orsay v. U.S. Dep’t of Justice*, 289 F.3d 1125, 1132-36 (9th Cir. 2002) (abrogated by *Millbrook v. United States*, 569 U.S. 50 (2013)); Boger, Gitenstein & Verkuil, *supra* note 117, at 500-07.



and arrests,<sup>119</sup> Congress amended the FTCA to allow certain common-law intentional tort claims to be filed directly against the United States when arising from the actions of federal law enforcement officer.

The Law Enforcement Proviso, inserted into Subsection 2680(h), directs “[t]hat, with regard to acts or omissions of investigative or law enforcement officers of the United States Government,” the general waiver of sovereign immunity in the FTCA “appl[ies] to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.”<sup>120</sup> Congress did not otherwise vary from the FTCA approach, under which liability is determined by ordinary state tort law. The Supreme Court has confirmed that the plaintiff invoking the Law Enforcement Proviso still must state a cause of action arising under state tort law; FTCA liability may not be premised on a violation of a constitutional right.<sup>121</sup>

The Law Enforcement Proviso further states that, “[f]or 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.”<sup>122</sup> In *Millbrook v. United States*, a federal prisoner allegedly was sexually assaulted by prison guards.<sup>123</sup> The Supreme Court held unanimously that the proviso applies whenever a law enforcement officer was acting within the scope of federal employment, regardless of whether he or she was engaged at the time in a search, seizure of evidence, or an arrest.<sup>124</sup> The Court held that the proviso identifies “the status of persons whose conduct may be actionable, not the types of activities that may give rise to a tort claim against the United States.”<sup>125</sup>

The Law Enforcement Proviso marks the very first time Congress “waive[d] sovereign immunity for claims arising out of the intentional torts of law enforcement officers.”<sup>126</sup> Congress intended this provision to broadly “apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law.”<sup>127</sup>

In the law enforcement context, the United States has opened itself up for liability for a range of intentional wrongdoing by federal agents, notably including sexual assault when committed by a federal law enforcement officer within the scope of employment. The Supreme Court’s *Millbrook* decision is a case very much on point, for the Court there held that the Law Enforcement

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119. S. REP. NO. 93-469, at 30-37 (1973).

120. 28 U.S.C. § 2680(h) (2012).

121. *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994); *Carlson v. Green*, 446 U.S. 14, 23 (1980).

122. 28 U.S.C. § 2680(h).

123. *Millbrook v. United States*, 569 U.S. 50, 51 (2013) (emphasis omitted).

124. *Id.* at 57.

125. *Id.* at 56 (emphasis omitted).

126. *United States v. Shearer*, 473 U.S. 52, 56 (1985).

127. S. REP. NO. 93-588, at 2791 (1973).

Proviso reached allegations by a prisoner of sexual abuse by federal correctional officers.<sup>128</sup> Since 1974, actions under the FTCA alleging sexual misconduct by federal law enforcement officers have regularly been heard in the federal courts—shorn of the defense provided by the assault-and-battery exception.<sup>129</sup>

To be sure, if the law enforcement officer acts outside the scope of employment, an FTCA remedy is not available—but that is the case for any type of FTCA claim involving any tort theory and arising out of any governmental activity. Importantly, as discussed later,<sup>130</sup> changes in the state law of *respondeat superior* make it more likely that a federal agent engaged in intentional misconduct, including sexual assault, will be found to have acted within the scope of employment.

When the Law Enforcement Proviso was enacted, “the momentary public outrage” over the abusive federal narcotics raids “pragmatically channelled by congressional aides into a legislative amendment acceptable to an impatient Congress,” which produced an “idiosyncratic” remedy that was limited to the provocative context of federal law enforcement.<sup>131</sup> Nonetheless, observers at the time hoped the amendment would “provide the impetus for a thorough review of the entire field.”<sup>132</sup> During the course of the legislative process leading to the Law Enforcement Proviso, the Department of Justice had suggested removing assault-and-battery immunity for the tortious acts of all federal employees, not just law enforcement officers.<sup>133</sup>

Unfortunately, having taken this major next step in allowing access to traditional tort remedies against the United States by acknowledging intentional tort claims arising in federal law enforcement, Congress then fell silent and failed to follow through and grant the same ordinary tort remedies to those who are victimized by sexual or other violence by federal employees in other sectors of governmental activity. While those subject to arrest by federal law enforcement officers or incarcerated under the control of federal correctional officers may seek relief if sexually abused, innocent persons molested by military recruiters, ordinary postal employees, federal daycare

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128. *Millbrook*, 569 U.S. at 57.

129. *See, e.g.*, *St. John v. United States*, 240 F.3d 671, 675–78 (8th Cir. 2001) (remanding to consider a claim under the FTCA that a Bureau of Indian Affairs officer sexually assaulted his wife after threatening to arrest her); *Red Elk ex rel. Red Elk v. United States*, 62 F.3d 1102, 1104–07 (8th Cir. 1995) (affirming FTCA judgment for a minor girl raped by a tribal police officer); *Dickey v. United States*, 174 F. Supp. 3d 366, 373–74 (D.D.C. 2016) (addressing an FTCA claim by an arrestee alleging that a law enforcement officer sexually assaulted him by repeatedly manipulating his penis during a search).

130. *See infra* Section II.A.2.

131. *Boger, Gitenstein & Verkuil, supra* note 117, at 539.

132. *Id.*

133. *Id.* at 513.

workers, or even Transportation Safety Administration airport screeners<sup>134</sup> still find the courthouse doors closed against them.

#### 4. The Likely Unavailability of Claims for Negligent Hiring and Supervision of a Federal Employee Who Commits an Assault or Battery

Because the FTCA emphatically includes claims of negligence,<sup>135</sup> the assault-and-battery exception has not been read to preclude all claims of antecedent negligence that allegedly permitted or failed to prevent an attack. Nonetheless, most courts have drawn the line against a claim based on the government's failure to properly select or supervise an employee who engages in an attack. The majority of courts view negligent hiring and supervision claims as "disguised respondeat superior claims" contrary to the exclusion of assault and battery claims from the FTCA.<sup>136</sup> Moreover, the law generally does not impose a duty to prevent intentional wrongdoing by others, and even when such a duty is present, the plaintiff must establish not only the fact of an underlying assault or battery but also the independent carelessness of government employees in failing to prevent it. Though important in its own right, a claim for negligent hiring, training, or supervision, if available, is not the equivalent of a vicarious liability claim against an employer premised directly on an employee's wrongdoing while performing the job.

In *Sheridan v. United States*, a divided Supreme Court held that, while the FTCA plainly precludes a claim for assault and battery, the exception does not bar a claim for independent negligence when based on a duty to safeguard the public from an assault or battery.<sup>137</sup> Because the government employees at the Bethesda Naval Hospital allegedly had a duty under applicable state law

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134. Because TSA employees who conduct airport screenings are not authorized to arrest or detain a person, but only conduct consensual searches, most courts have held they are not within the definition of "law enforcement officers" for purposes of the FTCA proviso. See, e.g., *Pellegrino v. U.S. Transp. Sec. Admin.*, 896 F.3d 207, 216 (3d Cir. 2018) (concluding by a divided court that the law enforcement proviso applies "only to officers with criminal law enforcement powers" and thus does not include TSA agents), *reh'g en banc granted*, 904 F.3d 329 (3d Cir. 2018); *Walcott v. United States*, No. 13-CV-3303, 2013 WL 5708044, at \*2-3 (E.D.N.Y. Oct. 18, 2013); *Weinraub v. United States*, 927 F. Supp. 2d 258, 266 (E.D.N.C. 2012); *Welch v. Huntleigh USA Corp.*, No. 04-663 KI, 2005 WL 1864296, at \*4-5 (D. Or. Aug. 4, 2005); see also *Vanderklok v. United States*, 868 F.3d 189, 204 (3d Cir. 2017) (noting the district court's conclusion that a TSA agent "was not an investigative or law enforcement officer").

135. See 28 U.S.C. § 1346(b)(1) (2012) (making the United States liable for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment").

136. See *Doe v. United States*, 838 F.2d 220, 224 (7th Cir. 1988); see also *Lambertson v. United States*, 528 F.2d 441, 445 (2d Cir. 1976) ("[T]o permit plaintiff to recover by 'dressing up the substance' of battery in the 'garments' of negligence would be to 'judicially admit at the back door that which has been legislatively turned away at the front door.'" (quoting *Laird v. Nelms*, 406 U.S. 797, 802 (1972))).

137. *Sheridan v. United States*, 487 U.S. 392, 403 (1988).

to protect the public from dangers on the premises, the United States could be held liable for negligently allowing an off-duty, drunken serviceman to leave the hospital base with a loaded rifle and fire shots into a public street, injuring the plaintiffs in a passing car.<sup>138</sup> Hospital employees had seen the man with a prohibited rifle at the hospital and failed to take action to prevent the assault or warn others.<sup>139</sup> Thus, a claim for antecedent governmental negligence could proceed, notwithstanding an underlying episode of assault and battery.<sup>140</sup>

Importantly, such a negligence claim was made available in *Sheridan* only under circumstances where the government has a general duty to protect the public, unrelated to the employment-status of the assailant. Because “the assault and battery [had been] committed by the off-duty, inebriated enlisted man,” the *Sheridan* Court ruled that “the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of [the serviceman’s] employment status.”<sup>141</sup> Under *Sheridan*, an antecedent negligence claim may thus escape the strictures of the assault-and-battery exception only when tort law imposes a general duty to protect or control the behavior of others (federal employees and non-employees alike), such as may be imposed on the owner of property to which the public is invited or the custodian of a vulnerable person.<sup>142</sup>

By contrast, most courts have held that a negligence claim is not sufficiently independent of an assault-and-battery cause of action when the purported lack of care arises from the employment relationship, such as a failure to properly hire, train, or supervise employees. While the majority of the *Sheridan* Court chose not to address the question,<sup>143</sup> Justice Kennedy in his concurrence characterized a claim for negligent hiring or supervision of an employee as little more than a derivative or *de facto respondeat superior* claim for assault and battery.<sup>144</sup> Justice Kennedy stated:

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138. *Id.* at 401.

139. *Id.* at 395.

140. *Id.* at 398–403.

141. *Id.* at 401.

142. *See* *Stout v. United States*, 721 F. App’x 462, 470–72 (6th Cir. 2018) (ruling that a patient “ma[de] out a colorable claim for negligence independent of [the nurse’s] employment status” based on a failure by staff at veterans hospital to uphold the mandatory duty to report sexual assaults at the facility); *Bodin v. Vagshenian*, 462 F.3d 481, 485–90 (5th Cir. 2006) (ruling claims of negligent failure to prevent a psychiatrist’s sexual assault were based on the federal hospital’s duties under state law to exercise care to safeguard patients or invitees from known dangers, rather than on the psychiatrist’s status as a federal employee and thus were not barred by assault-and-battery exception).

143. *Sheridan*, 487 U.S. at 403 n.8 (declining to decide “whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee”).

144. *Id.* at 404–08 (Kennedy, J., concurring).

I would hold that where the plaintiff's tort claim is based on the mere fact of Government employment, a *respondeat superior* claim, or, a short step further, on the conduct of the employment relation between the intentional tortfeasor and the Government without more, a negligent supervision or negligent hiring claim, § 2680(h)'s exception applies and the United States is immune.<sup>145</sup>

The substantial majority of federal courts have followed Justice Kennedy's lead in precluding claims of negligence focused on the assailant's employment status, as contrasted with claims of negligent failure to protect against violence grounded on other factors, such as premises liability.<sup>146</sup> The line drawn by these courts between exclusion under the intentional tort exception and permissibility as a viable negligence claim under the FTCA reflects "the distinction between tort theories of liability that depend upon an employment relationship (e.g., negligent hiring or supervision) and those that do not (e.g., premises liability)."<sup>147</sup> When the alleged breach of duty by the federal government and the alleged "foreseeable consequences" of violence "ha[ve] everything to do with [the intentional tortfeasor's] employment status and job duties," the claim will be dismissed.<sup>148</sup>

In two cases arising from sexual molestation of children in a federal government context, the Seventh Circuit has illustrated what the majority of federal courts view as the crucial difference between permissible claims of antecedent negligence for a general failure to protect and impermissible claims of negligent hiring and supervision that are regarded as disguised assault-and-battery *respondeat superior* claims:

In *Doe v. United States*, a divided Seventh Circuit allowed a claim alleging breach of an affirmative protective duty to go forward.<sup>149</sup> Children in the care

145. *Id.* at 408.

146. *See, e.g., Stout*, 721 F. App'x at 467–72; *Estate of Smith v. United States*, 509 F. App'x 436, 442–43 (6th Cir. 2012); *CNA v. United States*, 535 F.3d 132, 148–49 (3d Cir. 2008); *Reed v. U.S. Postal Serv.*, 288 F. App'x 638, 638–40 (11th Cir. 2008); *Billingsley v. United States*, 251 F.3d 696, 698 (8th Cir. 2001); *Leleux v. United States*, 178 F.3d 750, 756–58 & n.5 (5th Cir. 1999); *Perkins v. United States*, 55 F.3d 910, 916–17 (4th Cir. 1995); *Franklin v. United States*, 992 F.2d 1492, 1499 n.6 (10th Cir. 1993); *Guccione v. United States*, 847 F.2d 1031, 1033–34 (2d Cir. 1988); *Hamburg v. U.S. Postal Serv.*, No. H-10-2186, 2010 WL 4226461, at \*3–4 (S.D. Tex. Oct. 20, 2010); *Martinez v. United States*, 311 F. Supp. 2d 1274, 1279 (D.N.M. 2004); *Borawski v. Henderson*, 265 F. Supp. 2d 475, 485 (D.N.J. 2003); *Ryan v. United States*, 156 F. Supp. 2d 900, 906–07 (N.D. Ill. 2001); *Lilly v. United States*, 141 F. Supp. 2d 626, 628–29 (S.D. W. Va. 2001), *aff'd*, 22 F. App'x 293 (4th Cir. 2001); *Pottle v. United States*, 918 F. Supp. 843, 847–48 (D.N.J. 1996).

147. *Verran v. United States*, 305 F. Supp. 2d 765, 776 (E.D. Mich. 2004); *see also Strange v. United States*, Nos. 96-1281, 96-1283, 1997 WL 295589, at \*3–4 (6th Cir. May 30, 1997) (remanding for trial of a claim of negligence under FTCA by postal patrons who were sexually assaulted by the postmaster because the government had a duty to protect invitees into the post office building and was aware of postmaster's misconduct).

148. *Vallo v. United States*, 298 F. Supp. 2d 1231, 1246–47 (D.N.M. 2003).

149. *Doe v. United States*, 838 F.2d 220, 223 (7th Cir. 1988).

of a military daycare center were apparently left unattended and then “were sexually molested by unknown parties.”<sup>150</sup> Accepting “the notion . . . that plaintiffs could not disguise *respondeat superior* claims as ‘negligent supervision’ claims, sneaking them in through the courthouse back door,” the court held that the plaintiffs in that case could still recover “because the claim arises from the relationship between the government and the *victim*, not the government and the tortfeasor.”<sup>151</sup> Having accepted a duty to care for the children at the daycare center, the government breached that duty when it “left the children alone, neglecting its voluntarily assumed duty to watch and protect them.”<sup>152</sup>

In its later decision of *LM ex rel. KM v. United States*, the background to which is described above, the Seventh Circuit clarified the state of the law.<sup>153</sup> Because it had not been established that federal employees were the abusers in that earlier *Doe* case, the *Doe* scenario presented the special circumstance of a claim of “harm . . . visited upon the children by an act of negligence independent of the employment relationship between the government and the day-care providers.”<sup>154</sup> By contrast, in the *LM ex rel. KM*, a federal mail carrier was known to be the abuser and, even though knowledge of his ongoing predation apparently was widespread in the post office, no affirmative duty of protection was found under pertinent state law to permit recovery to his victim.<sup>155</sup> By the time the case came up on appeal, the plaintiff had abandoned any claim of negligent hiring, supervision, or retention, which the Seventh Circuit characterized as simple recognition that such claims would impermissibly impose *respondeat superior* liability contrary to the assault-and-battery exception.<sup>156</sup> Ultimately, the Seventh Circuit held that state law did not support any claim of an affirmative, voluntarily-assumed duty by the government to protect children from the mail carrier.<sup>157</sup>

Among the federal Courts of Appeals, only the Ninth Circuit has taken a different path. In *Bennett v. United States*, the Ninth Circuit found the intentional tort exception inapplicable in the case of sexual abuse of children by a federal employee at a Bureau of Indian Affairs school.<sup>158</sup> The teacher had admitted on his employment application that he had been charged with public indecency, which if investigated would have revealed charges for child molestation.<sup>159</sup> A clearer case of negligence in hiring a teacher for a boarding school is difficult to imagine. In a subsequent decision, the Ninth Circuit

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150. *Id.* at 221.

151. *Id.* at 223.

152. *Id.*

153. *LM ex rel. KM v. United States*, 344 F.3d 695, 698 (7th Cir. 2003).

154. *Id.* at 699.

155. *Id.* at 700–02.

156. *Id.* at 697, 700.

157. *Id.* at 700–02.

158. *Bennett v. United States*, 803 F.2d 1502, 1504–05 (9th Cir. 1986).

159. *Id.* at 1502–03.

confirmed that the *Bennett* ruling meant “that the assault and battery exception does not immunize the Government from liability for negligently hiring and supervising an employee.”<sup>160</sup>

At the end of the day, however, the Ninth Circuit may end up close to the same place as other courts, even if by a different route. While the Ninth Circuit may not extend the FTCA’s assault-and-battery exception to cover episodes of careless employee management, that court has since regarded claims that challenge decisions by policy-makers on training and supervision as “fall[ing] squarely within the discretionary function exception” to the FTCA.<sup>161</sup> Thus, even in the single circuit that has recognized the distinction between a claim for negligence in hiring and supervision and direct vicarious liability for assault and battery, many such claims are doomed to failure.

The discretionary function exception to the FTCA immunizes the Government from liability based on an employee’s exercise or failure to exercise a “discretionary function or duty . . . whether or not the discretion

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160. *Brock v. United States*, 64 F.3d 1421, 1425 (9th Cir. 1995); *see also Senger v. United States*, 103 F.3d 1437, 1442 (9th Cir. 1996) (“In *Bennett*, the court held that the United States had waived immunity with respect to a claim alleging negligent hiring.”). In approval of the Ninth Circuit approach, Rebecca Andrews writes in a law student note that “[r]espondeat superior claims, which are based on vicarious liability and are barred by the assault and battery exception, are readily distinguishable from claims based on negligent hiring, retention and supervision,” as the latter require proof of the employer’s independent negligence. Rebecca L. Andrews, Note, *So the Army Hired an Ax-Murderer: The Assault and Battery Exception to the Federal Tort Claims Act Does Not Bar Suits for Negligent Hiring, Retention and Supervision*, 78 WASH. L. REV. 161, 193 (2003); *see also* Geri Ann Benedetto, Note, *TORTS—The Talismanic Language of Section 2680(h) of the Federal Tort Claims Act*, 60 TEMP. L.Q. 243, 244 (1987) (arguing that the majority rule “fails to recognize the existence of negligent supervision as a separate tort where such negligence leads to assault and battery,” thus “thwart[ing] the public policy of allowing recovery against the United States for the negligence of its employees”); Jack W. Massey, Note, *A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act*, 82 TEX. L. REV. 1621, 1633 (2004) (arguing that the Ninth Circuit ruling “reflects a general equitable concern to leave the fewest possible plaintiffs without means of redress” and further “re-establishes a proper interpretation of tort law and harmonizes the federal treatment of negligent supervision claims with that of the states”); David M. Zolensky, Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803, 806 (1981) (arguing the minority “approach is preferable because it recognizes that the essence of a plaintiff’s claim is negligence, not an assault and battery, and that allowing such claims to lie comports with the remedial purposes of the FTCA”). *But see* Jared M. Viders, Note, *Negligent Hiring, Supervision and Training—The Scope of the Assault and Battery Exception: Senger v. United States*, 39 B.C. L. REV. 452, 453, 461 (1998) (characterizing the Ninth Circuit result as “contrary to the plain language of the statute” because “Congress used the more sweeping language ‘arising out of’ to indicate that § 2680(h) did not distinguish between claims sounding in negligence and those sounding in respondeat superior” (quoting *Sheridan v. United States*, 487 U.S. 392, 409 (1998) (O’Connor, J., dissenting))).

161. *Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000); *see also Doe v. Holy See*, 557 F.3d 1066, 1085–86 (9th Cir. 2009) (holding, as applied to a foreign sovereign, that hiring, training, and supervision of employees, as well as whether to warn of dangerousness, are discretionary acts).

involved be abused.”<sup>162</sup> This exception is designed “to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”<sup>163</sup> Unless a federal statute, rule, or policy specifically prescribes the course of action, thereby removing any discretion, federal agency choices that are susceptible to policy analysis are shielded from liability under the FTCA.<sup>164</sup>

Although some courts have held open the courthouse door to negligent employee management claims when a mandatory rule allegedly was not followed by government supervisors,<sup>165</sup> negligent, hiring, training, and supervision claims are regularly dismissed under the FTCA’s discretionary function exception.<sup>166</sup> For example, in *West v. United States*, the District Court dismissed a woman’s complaint that a mail carrier had repeatedly groped her breasts, exposed his penis, and attempted to kiss her.<sup>167</sup> Despite the Postal Service’s awareness of his behavior from multiple prior complaints about the mail carrier’s improper sexual conduct on his routes,<sup>168</sup> the court postulated that policy factors may have influenced the Postal Service’s employment management, bringing the claim within the discretionary function exception.<sup>169</sup>

In the unlikely event that a negligent hiring, training, or supervision claim remains viable under the FTCA—notwithstanding judicial application of either the assault-and-battery exception or the discretionary function exception—it is no substitute for a vicarious claim against the United States grounded firmly on the assault or battery. Even when the federal employee assailant was acting within the scope of employment as defined by state *respondeat superior* law—which would result in vicarious employer liability but for the assault-and-battery exception—the government may escape liability for the alternative negligent hiring and supervision claim by showing it had no prior reason to expect the employee’s misconduct. In a negligent hiring or supervision case, the focus shifts from the assault or battery committed by an

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162. 28 U.S.C. § 2680(a) (2012). On the discretionary function exception, see SISK, *supra* note 76, § 3.6(b).

163. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

164. See *United States v. Gaubert*, 499 U.S. 315, 323–25 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988).

165. See *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995); see also *infra* Section IV.D.

166. See *Snyder v. United States*, 590 F. App’x 505, 510 (6th Cir. 2014) (“This Circuit has consistently held that agency supervisory and hiring decisions fall within the discretionary function exception.”); *Suter v. United States*, 441 F.3d 306, 312 n.6 (4th Cir. 2006) (“Courts have repeatedly held that government employers’ hiring and supervisory decisions are discretionary functions.”); see also *Anderson v. United States*, No. 8:12-3203-TMC, 2016 WL 320076, at \*6–7 (D.S.C. Jan. 27, 2016) (involving a sexual assault case).

167. *West v. United States*, No. 15-01243-JLS, 2016 WL 1576382, at \*1–2 (C.D. Cal. Apr. 11, 2016).

168. *Id.* at \*1.

169. *Id.* at \*3–5.



agent that the government placed in a position to do harm to the separate question of whether the government affirmatively and negligently failed to anticipate the assault or battery.<sup>170</sup> As stated in an early case recognizing the theory, the negligent hiring and supervision claim “rests upon personal fault [of the employer] in exposing others to unreasonable risk of injury in violation of the master’s duty to exercise due care for their protection.”<sup>171</sup>

If not pretermitted by overzealous judicial application of FTCA exceptions, a negligence-based claim could serve an important purpose, especially in cases where *respondeat superior* law does not impose vicarious liability but the federal employer should have nonetheless known of the danger of sexual predation. And especially while the assault-and-battery exception lingers, a negligent hiring, training, and supervision claim has promise as an alternative, if not strangled by judicial extrapolation.

Nonetheless, uncertain availability of a claim of negligent failure to police misconduct by employees falls short of unequivocal governmental accountability for sexual and other violence by its employees acting within the scope of employment.

##### 5. The Clumsy and Confined Alternative Remedy of a Claim for Intentional Infliction of Emotional Distress

Although the phrase in which the assault-and-battery exception appears is often termed the “intentional tort” exception,<sup>172</sup> not every intentional tort recognized at common law is excluded from the FTCA. In particular, trespass, conversion, and intentional infliction of emotional distress are not listed in the statutory exception.<sup>173</sup>

Given the unique offense to human dignity inherent in sexual violence, a claim of intentional infliction of emotional distress, or IIED, is an obvious alternative to the excluded causes of action for assault and battery. In the end, while it can be a powerful remedy in the limited category of cases where emotional injury can be separated from an assault or battery, it is an awkward vehicle that seldom provides a robust alternative to a direct vicarious liability claim for assault and battery.

When raised under the FTCA in the context of an underlying assault or battery, a claim for IIED is of doubtful availability because it is not specifically

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170. See Andrews, *supra* note 160, at 166 (“[T]he tort of negligent hiring, retention and supervision requires an affirmative, negligent action on the part of the employer. This same action is not a requirement of respondeat superior.”).

171. Porter v. Grennan Bakeries, Inc., 16 N.W.2d 906, 910 (Minn. 1944). See generally Timothy P. Glynn, *The Limited Viability of Negligent Supervision, Retention, Hiring, and Infliction of Emotional Distress Claims in Employment Discrimination Cases in Minnesota*, 24 WM. MITCHELL L. REV. 581 (1998) (discussing the emergence and viability of parallel negligence claims, including negligent hiring, supervision, and retention, in employment discrimination cases).

172. See SISK, *supra* note 76, § 3.6(d)(1).

173. See 28 U.S.C. § 2680(h) (2012).

mentioned by the FTCA,<sup>174</sup> has been characterized as questionable by the Supreme Court in footnote dicta,<sup>175</sup> and often overlaps with such expressly excluded intentional tort claims as “assault, battery, false imprisonment, false arrest, malicious prosecution, . . . libel, [and] slander.”<sup>176</sup>

Nonetheless, most federal Courts of Appeals have recognized the IIED cause of action as proper under the FTCA because it is omitted from the list of other excluded intentional torts and can be given meaning independent of those excepted claims.<sup>177</sup> At the same time, the courts have struggled to ensure that an IIED claim does not become the alter ego of an excluded claim, such as assault and battery. Generally, “courts considering IIED claims brought under the FTCA widely recognize and apply th[e] rule” that (1) conduct that would constitute another excluded tort, such as assault or battery, is barred, even if it could alternatively be framed as constituting a non-barred tort, such as IIED, but that (2) any other aspect of the alleged conduct that would not in itself constitute a barred tort is not excluded.<sup>178</sup> Because drawing these lines can be difficult, “courts have seemingly reached widely divergent conclusions on whether IIED claims fall within one of the many FTCA exclusions.”<sup>179</sup>

The uneasy compromise between recognizing an IIED claim and honoring the exclusion of assault and battery is reflected in the Ninth Circuit’s divided decision in *Xue Lu v. Powell*.<sup>180</sup> In *Xue Lu*, an asylum officer in the Immigration and Naturalization Service insisted on meeting with Chinese women who had applied for asylum by visiting their homes, where he intimated that their applications would be granted if he were paid money or

174. But neither is the IIED cause of action expressly excluded from the FTCA, which should be sufficient to ensure its recognition, given the general waiver of sovereign immunity in the FTCA for not only negligence but a “wrongful act or omission” by a federal employee. See 28 U.S.C. § 1346(b)(1).

175. See *Christopher v. Harbury*, 536 U.S. 403, 420 n.19 (2002) (questioning whether an IIED claim could be sustained given the general exclusion of intentional torts from the FTCA).

176. See 28 U.S.C. § 2680(h).

177. See, e.g., *Limone v. United States*, 579 F.3d 79, 92–93 (1st Cir. 2009); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858–59 (10th Cir. 2005); *Raz v. United States*, 343 F.3d 945, 947–48 (8th Cir. 2003); *Truman v. United States*, 26 F.3d 592, 596–97 (5th Cir. 1994); *Kohn v. United States*, 680 F.2d 922, 926–27 (2d Cir. 1982); see also *Alexander v. United States*, 721 F.3d 418, 425 (7th Cir. 2013) (allowing a claim for intentional infliction of emotional distress under the FTCA without addressing the intentional tort exception).

178. David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 392–93 (2011); see also *Sheehan v. United States*, 896 F.2d 1168, 1171 (9th Cir. 1990) (asserting that an IIED claim would be barred if it constituted a traditionally defined assault); *Metz v. United States*, 788 F.2d 1528, 1534–35 (11th Cir. 1986) (barring an IIED claim that arises out of a FTCA-barred false arrest claim); *Stout v. United States*, 721 F. App’x 462, 472–73 (6th Cir. Jan. 12, 2018) (affirming dismissal of an IIED claim arising out of a sexual battery as also barred by the assault-and-battery exception).

179. Fuller, *supra* note 178, at 393.

180. *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010).

given sex.<sup>181</sup> He then sexually assaulted them, in one case by attempting to remove a woman's pants and in the other by offensive touching of private parts.<sup>182</sup> Recognizing that a direct assault and battery claim was plainly barred, the Ninth Circuit majority held that an IIED claim would be sufficiently distinct if focused not on the sexual assault but rather on the demand for "sexual gratification" "as a condition for exercising his discretion in favor of asylum."<sup>183</sup> The court acknowledged that "[t]he alleged touchings of the women were batteries and the sexual character of these offenses may not change their gravamen," thus likely leaving the United States immune.<sup>184</sup> However, the court held, "[t]he emotional distress suffered as a result of the demand for sexual favors is an injury distinct from the battery and may be proved by the plaintiffs."<sup>185</sup>

The Ninth Circuit's effort to thread the legal needle between the common law of tort and the statutory assault-and-battery exception was of continuing controversy in the *Xue Lu* case on remand and another appeal. After trial on remand, the District Court entered judgment for \$500,000 and \$700,000 to the two plaintiffs.<sup>186</sup> On the second appeal, the government contended that the District Court "fail[ed] to distinguish between injuries resulting from the assault and battery and injuries resulting from the solicitation" and insisted the plaintiffs had failed to show an emotional distress injury that was independent of the excluded assault and battery conduct.<sup>187</sup> The plaintiffs on appeal argued against any apportionment of damages, contending that the coercive effect of the sexual demand justified full recovery regardless of the additional factor of the assault and battery.<sup>188</sup> In any event, the plaintiffs suggested, "the relatively modest amount of damages"—comparing the judgment for \$500,000 and \$700,000 to awards in other sexual assault cases that exceeded \$1 million—"evidences the fact that the court did not include damages for the assault and battery."<sup>189</sup> In an unpublished decision, the Ninth Circuit affirmed, reading the District Court's opinion as awarding damages only for the demand for money or sexual favors to exercise authority to grant asylum and not for the distinct battery.<sup>190</sup>

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181. *Id.* at 946.

182. *Id.*

183. *Id.* at 950.

184. *Id.*

185. *Id.*

186. *Xue Lu v. United States*, No. 2:01-01758, 2013 WL 4007770, at \*7 (C.D. Cal. Aug. 5, 2013).

187. Brief for the Appellant at 13, 21, *Xue Lu v. United States*, 638 Fed. App'x 614 (9th Cir. 2016) (Nos. 13-56715, 14-55442, 14-55972).

188. Brief for the Appellee at 20–21, *Xue Lu v. United States*, 638 Fed. App'x 614 (9th Cir. 2016) (Nos. 13-56715, 14-55442, 14-55972).

189. *Id.* at 17, 25–26.

190. *Xue Lu v. United States*, 638 F. App'x 614, 616 (9th Cir. 2016).

For at least two reasons, both illustrated by *Xue Lu*, the IIED cause of action falls far short of a parallel remedy to a direct vicarious claim of assault and battery against the United States by a survivor of sexual assault. First, it is difficult and awkward to evaluate a claim for emotional distress for actions by the offending federal agent in a manner separate from an ensuing sexual assault or battery. Moreover, a confined-to-non-assault-and-battery-conduct approach risks leaving the primary consequences of sexual violence unremedied. In theory, a victim of sexual violence by a federal agent is placed in the odd position of asking the trial court to compensate her or him for the distress suffered by being solicited for sex, while strangely excluding any recovery for the indignity and humiliation caused by the sexual attack itself. No survivor of sexual violence should learn that the court will not give a full hearing to his or her story, but instead may only consider the emotional harm from federal agent misconduct that raised no apprehension of sexual violence, restricting any compensation to that lesser harm.

Second, the *Xue Lu* approach of segregating the victim's suffering of emotional distress between non-assaultive and non-battery elements of the incident can work only in the type of case where the plaintiff was initially solicited for sexual favors or subject to sexual insults in a manner that raised no apprehension of unwelcome physical contact.<sup>191</sup> In *Xue Lu*, the court viewed the asylum officer's initial demand for sexual favors (and money) in exchange for the exercise of a government authority as distinct from the officer's resort to groping in an attempt to directly obtain sexual gratification. Similarly, if a federal supervisor were to solicit sex from a federal employee by promising promotion or other employment benefits, even if the supervisor afterward turned to more forceful measures, an IIED claim might be premised that is separate from the sexual assault or battery.<sup>192</sup>

However, in the typical sexual violence case, any conduct or threat<sup>193</sup> by the predator that precedes offensive touching will already have moved the episode into an assault. Even before offensive touching occurs, the victim's

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191. See *Truman v. United States*, 26 F.3d 592, 595–96 (5th Cir. 1994) (allowing an IIED claim to go forward under the FTCA where the plaintiff alleged “numerous sexual insults, comments, and innuendos” but no “offensive contact directly or indirectly resulted” and the plaintiff was not placed “in imminent apprehension of harmful or offensive contact”).

192. See *Jense v. Runyon*, 990 F. Supp. 1320, 1330 (D. Utah 1998) (allowing IIED claim to proceed where plaintiff alleged a mail carrier “asked her invasive sexual questions, made unwanted sexual advances, and paid her unwelcome attention by visiting her on her mail route,” which the court held was “the core or substance of her claim,” even though later acts rose to the level of assault by a threat of violence and battery by offensive touching).

193. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 103 cmt. g (AM. LAW INST., Tentative Draft No. 3, Apr. 6, 2018) (“At one time, threats by ‘words alone’ could not form the basis for assault; an overt action was also required. The modern approach does not require an overt act along with words.”); see also *Holder v. D.C.*, 700 A.2d 738, 741 (D.C. 1997) (defining assault as “an intentional and unlawful attempt or threat, either by words or acts, to do physical harm to the plaintiff” (quoting *Etheredge v. D.C.*, 635 A.2d 908, 916 (D.C. 1993))).

“apprehension of immediate harmful or offensive contact”<sup>194</sup> by the actor’s intentional conduct or threats means that an assault is in progress.<sup>195</sup> And because any emotional distress connected to the assault itself is excluded under the FTCA, no distinct IIED claim can be sustained.<sup>196</sup> Thus, in cases where the offending federal employee groped, grabbed, or physically intimidated the victim, the plaintiff had already been “placed . . . in imminent apprehension of harmful contact (assault) and/or actual offensive contact (battery),” leading to dismissal of the IIED claim as arising directly out of conduct excluded from the FTCA.<sup>197</sup>

Once again, the assault-and-battery exception shuts the courtroom door to all but unusual cases and those with likely limited relief.

*B. SPECIAL GOVERNMENT SHIELDS AGAINST SEXUAL ASSAULT CLAIMS  
BY FEDERAL EMPLOYEES*

A federal employee who suffers sexual violence at the hands of another federal employee faces additional obstacles in obtaining justice in court.<sup>198</sup> Even if a federal employee who suffered sexual violence in the workplace could escape the exclusion of claims for assault and battery, most courts have read Title VII of the Civil Rights Act of 1964<sup>199</sup> to bar an FTCA claim by making exclusive those remedies for employment discrimination.<sup>200</sup>

194. PROSSER, *supra* note 87, § 10.

195. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 103 (AM. LAW INST., Tentative Draft No. 3, Apr. 6, 2018); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 4.11 (2d. ed. 2016) (“An assault is an act that is intended to and does place the plaintiff in apprehension of an immediate unconsented-to touching that would amount to a battery.”).

196. See *Stout v. United States*, 721 F. App’x 462, 472–73 (6th Cir. 2018) (affirming dismissal of FTCA claim because the emotional distress arose out of the sexual assault and thus were barred by the exception); *Cross v. United States*, 159 F. App’x 572, 576–77 (5th Cir. 2005) (affirming dismissal of FTCA suit because the plaintiff’s “emotional distress derives from imminent apprehension of harmful or offensive contact and, therefore, her claim derives from the underlying assault”); *Doe v. United States*, 618 F. Supp. 503, 506–07 (D.S.C. 1984) (dismissing FTCA suit because the claim of IIED arose from the assailant’s conduct in exposing himself and suggesting sexual acts and thus from an assault).

197. *Dardar v. Potter*, No. 02–3802, 2004 WL 422008, at \*8 (E.D. La. Mar. 4, 2004), *aff’d*, 108 F. App’x 931 (5th Cir. 2004); see also *Lewis v. Napolitano*, No. 11–2137, 2012 WL 274415, at \*1–3 (E.D. La. Jan. 31, 2012) (holding that plaintiff’s IIED claim was excludable under the FTCA because the underlying conduct involved offensive contact).

198. The special problems facing survivors of sexual assault in the federal civilian and military workplace are addressed in detail, along with proposal of specific legislation revisions to address that situation, in a companion article. Gregory C. Sisk, *The Peculiar Obstacles to Justice Facing Federal Employees Who Survive Sexual Assault*, 2019 U. ILL. L. REV. (forthcoming).

199. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

200. See, e.g., *Mathis v. Henderson*, 243 F.3d 446, 450–51 (8th Cir. 2001); *Pfau v. Reed*, 125 F.3d 927, 933 (5th Cir. 1997), *vacated and remanded on other grounds*, 525 U.S. 801 (1998).

Moreover, workplace assaults may fall within the exclusive coverage of the Federal Employees Compensation Act,<sup>201</sup> which some courts have extended to sexual violence.<sup>202</sup> To add to the obstacles, active service members in the armed forces are excluded from recovery for sexual and other assaults by the judicially-implied *Feres* doctrine,<sup>203</sup> which removes the FTCA remedy for those injured incident to military service.<sup>204</sup>

C. THE UNAVAILABILITY OF CONSTITUTIONAL TORT REMEDIES  
AGAINST THE UNITED STATES

A constitutional tort remedy against an individual federal officer under *Bivens v. Six Unknown Named Agents*<sup>205</sup> may be “on life support”<sup>206</sup> after recent Supreme Court decisions, as discussed later in this Article.<sup>207</sup> But the Supreme Court has already pulled the plug on any implied constitutional remedy in damages against the United States government itself.

In *FDIC v. Meyer*, the Supreme Court identified “[t]he ‘logic’ of *Bivens*” as deterring constitutional wrongs by the individual agents of the federal government.<sup>208</sup> For that reason, and because the Court feared “a potentially enormous financial burden for the Federal Government,” the Court unanimously declined to imply a direct damages claim against the United States for violations of constitutional rights.<sup>209</sup>

In sum, the government itself bears no financial liability for constitutional wrongs by its agents, however egregious. The United States has no vicarious or *respondeat superior* liability for the constitutional torts of its employees.<sup>210</sup>

At nearly every turn, the United States government refuses to hold itself accountable in damages for a sexual assault or battery committed by one of its own agents. When a federal agent commits sexual violence in a non-law enforcement scenario, the negative outcome is as starkly clear as it is morally intolerable.

201. 5 U.S.C. §§ 8101–193; see *Caesar v. United States*, 258 F. Supp. 2d 1, 5 (D.D.C. 2003).

202. See *Mathirampuzha v. Potter*, 548 F.3d 70, 79 (2d Cir. 2008).

203. See, e.g., *Doe v. Hagenbeck*, 870 F.3d 36, 39–40, 50 (2d Cir. 2017); *Klay v. Panetta*, 924 F. Supp. 2d 8, 10–20 (D.D.C. 2013), *aff’d*, 758 F.3d 369 (D.C. Cir. 2014); *Bartley v. U.S. Dep’t of the Army*, 221 F. Supp. 2d 934, 937, 948–49 (C.D. Ill. 2002); *Shiver v. United States*, 34 F. Supp. 2d 321, 322 (D. Md. 1999).

204. See *Feres v. United States*, 340 U.S. 135, 138 (1950).

205. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

206. Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2006–07 CATO SUP. CT. REV. 23, 26.

207. See *infra* Section III.B.

208. *FDIC v. Meyer*, 510 U.S. 471, 484 (1994).

209. *Id.* at 486.

210. On the policy debate about whether the federal employee or the Government should bear liability for constitutional violations, see generally SISK, *supra* note 76, § 5.7(g)–(h).

To add insult to injury—or really to add injury to injury—the federal government casts its own cloak of immunity to broadly cover the individual federal employee as well, which is the subject of the next part of this Article.

### III. INDIVIDUAL LIABILITY OF THE FEDERAL EMPLOYEE: WESTFALL ACT IMMUNITY AND SEXUAL ASSAULT

At the same time that the United States avoids responsibility for assaults and batteries by its own agents, the Westfall Act holds federal employees absolutely immune from state tort claims for acts occurring within the scope of employment.<sup>211</sup> Scope of employment is defined by state *respondeat superior* law, which in turn has evolved in many states to treat even intentional torts as falling within the scope of employment.<sup>212</sup> The perverse result then can be that both the federal government as an entity and the federal employee as an individual are immune from liability for assault and battery.<sup>213</sup> Nor is a constitutional tort claim against the individual federal employee likely to be availing.<sup>214</sup>

#### A. *THE COLLISION BETWEEN WESTFALL ACT EMPLOYEE IMMUNITY AND CHANGES IN STATE RESPONDEAT SUPERIOR DOCTRINE IN THE CONTEXT OF SEXUAL ASSAULT*

##### 1. The Westfall Act and Immunity for Federal Employees from State Tort Liability

In the 1988 decision of *Westfall v. Erwin*, the Supreme Court significantly restricted the availability of qualified immunity to a federal officer when faced with a common-law tort suit.<sup>215</sup> While earlier decisions had more broadly covered federal officers with a blanket of immunity by a focus on the impact to government actors and thus to the government's business occasioned by the risk of litigation, the *Westfall* Court highlighted the individual's right to receive redress and not be "denied compensation simply because he had the misfortune to be injured by a federal official."<sup>216</sup> To obtain the protection of immunity, the Supreme Court insisted, the federal official must not merely have been acting in the line of duty but must have been engaged in some kind of discretionary or policy-making conduct.<sup>217</sup> Thereby, official immunity would "be determined on a case-by-case basis, according to whether 'the

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211. See *infra* Section III.A.1.

212. See *infra* Section III.A.2.

213. See *infra* Section III.A.3.

214. See *infra* Section III.B.

215. *Westfall v. Erwin*, 484 U.S. 292, 295–300 (1988).

216. *Id.* at 295.

217. See *id.* at 299.

contribution to effective government in particular contexts' from granting immunity 'outweighs the potential harm to individual citizens.'"<sup>218</sup>

The Supreme Court in *Westfall* invited Congress to provide guidance on the complex question of when immunity is appropriate for federal employees.<sup>219</sup> With notable alacrity, Congress accepted that invitation and, within mere months, broadly extended immunity to federal employees by statute. In 1988, Congress enacted the Federal Employee Liability Reform and Tort Compensation Act<sup>220</sup>—often referred to as the Westfall Act (given the Supreme Court decision that the statute legislatively supersedes).<sup>221</sup>

Under the Westfall Act, when a state tort action is brought against an individual federal employee, the United States may remove the lawsuit to federal court by certifying that the employee was acting within the scope of employment, after which the action proceeds against the United States as the sole defendant under the FTCA.<sup>222</sup> In this way, the statute confers tort immunity on the federal employee who was acting within the scope of employment. With the federal government substituted as defendant, the Westfall Act converts a state-law tort action for money damages against a federal employee into a suit under the FTCA against the United States.<sup>223</sup>

The Westfall Act immunizes the individual federal employee and substitutes the United States as a defendant only when an "employee of the Government" committed the alleged negligent or wrongful act or omission "while acting within the scope of his office or employment."<sup>224</sup> Under the statute, the Attorney General (or a delegate, usually a United States Attorney) is to certify whether "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose."<sup>225</sup> The Attorney General's certification of scope-of-employment is reviewable by the federal court for purposes of determining whether the

218. *United States v. Smith*, 499 U.S. 160, 163 (1991) (describing and quoting *Westfall*, 484 U.S. at 299).

219. *Westfall*, 484 U.S. at 300.

220. Pub. L. No. 100-694, §§ 5-6, 102 Stat. 4563, 4564-65 (1988) (codified at 28 U.S.C. § 2679(b), (d) (2012)).

221. On the Westfall Act, see SISK, *supra* note 76, § 5.6(b)-(c)(6).

222. 28 U.S.C. § 2679(d) (2012).

223. *Id.* The Suits in Admiralty Act similarly makes the remedy against the United States for admiralty injuries exclusive of any remedy that could be brought against the individual who caused the harm, 46 U.S.C. § 30904, and thus a claim under maritime law must be pursued only against the United States and not the individual federal employee, even if the remedy available against the government is limited. *See Ali v. Rogers*, 780 F.3d 1229, 1233-34 (9th Cir. 2015). Pertinent to this Article, however, the Suits in Admiralty Act contains no express exclusion of claims that could be characterized as assaults or batteries. *See B & F Trawlers, Inc. v. United States*, 841 F.2d 626, 628-29 (5th Cir. 1988) ("When Congress enacted the FTCA in 1948, it did not incorporate the numerous liability exceptions therein into the SIAA [Suits in Admiralty Act] and PVA [Public Vessels Act].").

224. 28 U.S.C. § 2679(b)(1).

225. *Id.* § 2679(d)(1).



United States is properly substituted as the sole defendant to the tort action.<sup>226</sup> If the Attorney General refuses to certify that the employee was acting within the scope of employment (leaving the suit pending against the individual employee), the Westfall Act allows the employee to petition the court to find that he or she was acting within the scope of employment.<sup>227</sup>

If the federal District Court finds that the employee was not acting within the scope of employment—that is, *respondeat superior* status for the United States is lacking—the putative FTCA action against the United States must be dismissed. If an FTCA action had been brought originally by the plaintiff in federal court, a scope-of-employment dismissal clears the way for the plaintiff to pursue a new claim against the individual in state court (presuming the statute of limitations has not been missed). If the FTCA action arrived in federal court by Westfall Act removal and substitution, a negative scope-of-employment determination by the court means that the action will resume as one against the individual employee under a state tort theory but remaining in federal court.<sup>228</sup>

As the Supreme Court has recognized in cases involving judicial review of the Westfall Act certification, the statute contemplates resumption of an ordinary tort claim against the employee when the government's scope-of-employment certification is abrogated.<sup>229</sup> When the employee is determined not to have been acting within the scope of federal employment, “then the transformation provisions do not apply and the suit remains one against the employee in his or her personal capacity under state law.”<sup>230</sup>

But if instead the federal court confirms that the individual federal employee was acting within the scope of employment, then the case converts into an FTCA action, and the individual employee is forever shielded from litigation. Not only has the United States been substituted as the sole defendant in the particular action, but the Westfall Act provides that “[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is

226. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 423–30 (1995).

227. 28 U.S.C. § 2679(d)(3).

228. *See, e.g., Wood v. United States*, 760 F. Supp. 952, 954–56 (D. Mass. 1991) (overturning Attorney General’s certification that an Army major was acting in the scope of employment when he allegedly sexually propositioned his secretary and grabbed and caressed her, thereby dismissing the substituted FTCA action against the United States and allowing the action to proceed against the major “in his private, individual capacity”). Because the Attorney General’s certification is conclusive for purposes of removal, 28 U.S.C. § 2679(d)(2), a restored action against the individual employee will remain in federal court; “Congress has barred a district court from passing the case back to state court [where it originated] based on the court’s disagreement with the Attorney General’s scope-of-employment determination.” *Osborn v. Haley*, 549 U.S. 225, 227 (2007).

229. *Osborn*, 549 U.S. at 235, 243–45; *see Gutierrez de Martinez*, 515 U.S. at 433–37.

230. James E. Pfander & David P. Baltmanis, Response, *W(h)ither Bivens?*, 161 U. PA. L. REV. ONLINE 231, 241 (2013).

precluded without regard to when the act or omission occurred.”<sup>231</sup> This “broader *preclusion* provision . . . was drafted to apply to all conceivable claims one might bring against a federal employee” for actions taken within the scope of duty.<sup>232</sup>

Importantly, “[t]he limitations and exceptions of the FTCA apply to an action after the United States substitutes itself for the individual defendants.”<sup>233</sup> If the United States is subsequently found to be immune from liability under the FTCA due to the limitations or exceptions of that statute, the substitution of the United States as the sole defendant is not thereby undone nor may the individual employee be brought back into the lawsuit.

In *United States v. Smith*, for example, the plaintiffs sued a military physician for medical malpractice in the delivery of their baby at an Army hospital in Italy.<sup>234</sup> Even though the United States was protected from liability under the FTCA by virtue of the exception for “[a]ny claim arising in a foreign country,”<sup>235</sup> the Supreme Court held that the Westfall Act nonetheless conferred immunity on the individual federal employee and thus barred the plaintiff from seeking damages against the physician.<sup>236</sup>

In other words, substitution of the federal government may sometimes prove fatal to the action, such as when the assault-and-battery exception applies.<sup>237</sup> As the Supreme Court explained in *Gutierrez de Martinez v. Lamagno*, although the Westfall Act substitutes the United States as the defendant, “[i]f . . . an exception to the FTCA shields the United States from suit, the plaintiff may be left without a tort action against any party.”<sup>238</sup>

For that reason, the survivor of sexual violence at the hands of a federal employee will be permitted to recover in tort for a direct claim of assault or battery only if the offending federal employee is held not to have acted within the scope of employment. If the assailant is held to be an agent of the United States under *respondeat superior*, that individual of is shielded from liability by the Westfall Act. The substituted United States defendant will then invoke sovereign immunity through the assault-and-battery exception to the FTCA.<sup>239</sup>

231. 28 U.S.C. § 2679(b)(1).

232. Pfander & Baltmanis, *supra* note 230, at 236–37.

233. *Roman v. Townsend*, 224 F.3d 24, 28 (1st Cir. 2000); *see also* *Singleton v. United States*, 277 F.3d 864, 872–73 (6th Cir. 2002) (concluding that the United States was properly substituted for the employee defendant under the Westfall Act and then the FTCA’s exception for defamation barred the claim), *overruled on other grounds*, *Hawver v. United States*, 808 F.3d 693 (6th Cir. 2015).

234. *United States v. Smith*, 499 U.S. 160, 162 (1991).

235. 28 U.S.C. § 2680(k).

236. *Smith*, 499 U.S. at 161–62.

237. *See, e.g.*, *Hicks v. Office of the Sergeant at Arms for the U.S. Senate*, 873 F. Supp. 2d 258, 270–71 (D.D.C. 2012); *Majano v. United States*, 545 F. Supp. 2d 136, 147 (D.D.C. 2008).

238. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995).

239. *See Majano*, 545 F. Supp. 2d at 147 (holding that a co-worker who assaulted and injured plaintiff during entry to workplace building was within the scope of employment and thus was

Everything hinges on the scope of employment determination,<sup>240</sup> and that determination is governed by evolving state *respondeat superior* law, which is discussed next.

## 2. The Evolution of State *Respondeat Superior* Doctrine for Intentional Torts Including Sexual Assault by Employees

For the purposes of determining both (1) whether an employee's conduct was within the scope of employment for a claim against the United States to be cognizable under the Federal Tort Claims Act<sup>241</sup> and (2) whether the individual federal employee is immune under the Westfall Act,<sup>242</sup> the point of legal reference is the *respondeat superior* law of the state in which the wrongful act occurred.<sup>243</sup> As one federal Court of Appeals has explained: "Federal law determines whether a person is a federal employee and defines the nature and contours of his official responsibilities; but the law of the state in which the tortious act allegedly occurred determines whether the employee was acting within the scope of those responsibilities."<sup>244</sup>

The traditional agency theory of *respondeat superior* demanded that the employee's conduct be motivated "at least in part, by a purpose to serve the" employer before an employer could be held vicariously liable for the employee's wrongdoing.<sup>245</sup> An assault on another generally would not be within the scope of employment, as the act ordinarily would reflect the personal animus or desires of the employee and offer no benefit to the employer. Thus, as one state court reasoned in rejecting a church's vicarious liability for a minister's sexual molestation of children, the employee "acted

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entitled to immunity and that plaintiff's exclusive FTCA remedy failed because of the assault-and-battery exception).

240. *Gutierrez de Martinez*, 515 U.S. at 426 ("Congress was notably concerned with the *significance* of the scope-of-employment inquiry—that is, it wanted the employee's personal immunity to turn on that question alone.").

241. See, e.g., *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1005 (9th Cir. 2014); *Palmer v. Flaggman*, 93 F.3d 196, 199 (5th Cir. 1996); *McHugh v. Univ. of Vt.*, 966 F.2d 67, 71 (2d Cir. 1992); see also *SISK*, *supra* note 76, § 3.5(e)(1) (discussing the scope of employment determination in FTCA cases); *supra* Section II.A.

242. See, e.g., *RMI Titanium Co. v. Westinghouse Elec. Co.*, 78 F.3d 1125, 1143 (6th Cir. 1996); *Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir. 1996); *Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994); see also *SISK*, *supra* note 76, § 5.6(c)(4) (discussing the scope of employment question); *supra* Section III.A.1.

243. See *Richards v. United States*, 369 U.S. 1, 9–10 (1962) (ruling that the FTCA "command[s] application of the law of the place where the negligence occurred"—*not* "the place where the negligence had its operative effect").

244. *Lyons v. Brown*, 158 F.3d 605, 609 (1st Cir. 1998).

245. See RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW. INST. 1958) ("Conduct of a servant is within the scope of employment if, but only if . . . it is actuated, at least in part, by a purpose to serve the master . . .").

for his own personal gratification rather than” in furtherance of the employer’s business when he “abused his position” to molest children.<sup>246</sup>

Over time, courts began to move beyond such assumptions. Today, courts increasingly recognize that an employer may rightly be vicariously liable when the work assignment, context, special relationships created with others, or other factors make even outrageous misconduct by an employee a reasonably foreseeable cost of doing business. In an early 1946 decision, Justice Roger Traynor of the California Supreme Court held for the court that the employer was liable when one employee assaulted another who had annoyed him: “Such injuries are one of the risks of the enterprise.”<sup>247</sup> When entering into employment, “[m]en do not discard their personal qualities,” but rather bring “the faults and derelictions of human beings as well as their virtues and obediences.”<sup>248</sup> Quoting Justice Benjamin Cardozo, Justice Traynor concluded that “[t]he risks of such associations and conditions were risks of the employment.”<sup>249</sup> From that start, California moved toward an understanding of *respondeat superior* grounded in foreseeability rather than on the unauthorized or atrocious nature of the employee’s wrongdoing.<sup>250</sup>

“[T]he central justification for *respondeat superior*” is that foreseeable harms in the conduct of a business “should be allocated to the enterprise as a cost of doing business.”<sup>251</sup> In this way, employers are encouraged to be vigilant in hiring employees and to take safety precautions; the injured are compensated; and the risk of loss is spread to those who can more readily anticipate and cover it.<sup>252</sup> Given opportunities for access to vulnerable populations created by certain work responsibilities and the employer’s superior position to supervise employees, even a sexual assault may come within the range of foreseeability.

In *Stropes v. Heritage House*, a case involving sexual abuse by a nurse’s aide of an intellectually disabled child, the Indiana Supreme Court addressed the scope of employment issue directly in the inflammatory context of sexual assault.<sup>253</sup> The court acknowledged that “[r]ape and sexual abuse constitute arguably the most egregious instances of wrongful acts which an employee could commit on the job and lend themselves to arguably the most instinctive conclusion that such acts could never be within the scope of one’s

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246. *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592, 599 (Okla. 1999).

247. *Carr v. Wm. C. Crowell Co.*, 171 P.2d 5, 7 (Cal. 1946).

248. *Id.* (quoting *Hartford Accident & Indem. Co. v. Cardillo* 112 F.2d 11, 15 (D.C. Cir. 1940)).

249. *Id.* (quoting *Leonbruno v. Champlain Silk Mills*, 128 N.E. 711, 711 (N.Y. 1920)).

250. *See* *Xue Lu v. Powell*, 621 F.3d 944, 948–57 (9th Cir. 2010) (detailing the evolution of *respondeat superior* law in California, including a contrasting description in the dissent).

251. *Farmers Ins. Grp. v. Cty. of Santa Clara*, 906 P.2d 440, 448 (Cal. 1995).

252. *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 907 P.2d 358, 366 (Cal. 1995).

253. *Stropes ex rel. Taylor v. Heritage House Childrens Ctr. of Shelbyville, Inc.*, 547 N.E.2d 244, 245–54 (Ind. 1989).

employment.”<sup>254</sup> But, the court insisted, “resolution of the question does not turn on the type of act committed or on the perpetrator’s emotional baggage accompanying the attack. Rather, . . . the focus must be on how the employment relates to the context in which the commission of the wrongful act arose.”<sup>255</sup> While leaving the ultimate answer to the jury, the court concluded that a jury could find that the nurse’s aide had at least initially “acted to an appreciable [degree] to further his master’s business,” even if he then deviated to an “act . . . predominantly motivated by an intention to benefit . . . himself.”<sup>256</sup>

In a subsequent decision, the Indiana Court of Appeals in *Southport Little League v. Vaughan* affirmed a jury verdict holding a youth baseball league liable under *respondeat superior* for sexual assaults on children by a volunteer.<sup>257</sup> The volunteer was clearly authorized to view children in a state of undress during the fitting of uniforms and was authorized to use the equipment shed where he committed the abuses.<sup>258</sup> Moreover, by being appointed as an official of the league, he was authorized “to exert his authority over youths who participated in” the baseball program.<sup>259</sup> Because the sexual assaults were committed in the context of various authorized duties, the employer was appropriately held responsible for the foreseeable deviation.<sup>260</sup>

At present, the states vary considerably on whether and when intentional misconduct by employees, including sexual assault against others, falls within the scope of employment. Given that the federal courts in evaluating FTCA claims and Westfall Act immunity must apply that same patchwork of differing state law on *respondeat superior*, they not surprisingly will reach contrasting results as well, even on similar facts.<sup>261</sup>

For example, in *Bodin v. Vagshenian*, the Fifth Circuit applied Texas law to find that a Veterans Administration psychiatrist who sexually molested patients “was solely motivated by his own personal gratification and not even in part by the Clinic’s purpose” and thus was not “acting within the scope of

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254. *Id.* at 249.

255. *Id.*

256. *Id.* at 247, 250.

257. *Southport Little League v. Vaughan*, 734 N.E.2d 261, 275–76 (Ind. Ct. App. 2000).

258. *Id.* at 266–67.

259. *Id.* at 272.

260. *Id.* at 269–70; see also *L.M. ex rel. S.M. v. Karlson*, 646 N.W.2d 537, 539–40 (Minn. Ct. App. 2002) (finding a genuine issue of material fact that prevents summary judgment “as to whether sexual abuse is a foreseeable risk of the day-care industry”); *Fearing v. Bucher*, 977 P.2d 1163, 1167 (Or. 1999) (holding that “a jury could [reasonably] infer that the sexual assaults [by a priest who was a youth pastor] were the culmination of a progressive series of actions that began with and continued to involve [the priest’s] performance of the ordinary and authorized duties of a priest”).

261. On the variation of state *respondeat superior* law and the consequential divergence of federal court rulings on FTCA and Westfall Act matters, see generally SISK, *supra* note 76, § 5.6(c) (4).

his employment.”<sup>262</sup> Accordingly, the FTCA action against the United States was dismissed, while at the same time, the victim could still bring action against the employee in his individual capacity.<sup>263</sup>

Another federal court, in *McIntosh v. United States*, applied Kansas law in holding that a plaintiff patient had presented plausible evidence that a physician’s assistant at a veteran’s center was within the scope of employment when he committed a sexual assault.<sup>264</sup> The examination of the patient did further the government’s interest, even though performed “in excess,” and the “tortious conduct was not far removed in time, distance, or purpose from [the physician assistant’s] normal duties,” arguably meaning that he “combin[ed] his own personal interest with the VA’s business interests.”<sup>265</sup>

Indeed, one federal Court of Appeals applied a single state’s law to reach somewhat contrasting results in two FTCA cases, with the outcome turning on how the law was applied to debatable differences in the underlying facts. In *Red Elk ex rel. Red Elk v. United States*, the Eighth Circuit affirmed an FTCA judgment for a minor girl raped by a tribal police officer, applying South Dakota *respondeat superior* law to conclude it was foreseeable that a police officer with authority to pick up teenage girls for violation of curfew might commit sexual misconduct.<sup>266</sup> In *Primeaux v. United States*, the en banc Eighth Circuit, over a strong dissent, affirmed dismissal of a motorist’s claim that she had been raped by a tribal police officer from whom she had accepted a ride after her car was stuck in the snow.<sup>267</sup> The majority held that the tribal police officer “was on a frolic of his own and not acting in the course or scope of his employment,”<sup>268</sup> distinguishing *Red Elk* because the officer “was unarmed, out of uniform, and off duty, insofar as his law enforcement responsibilities were concerned” and was also “outside his jurisdiction” as the incident occurred off the reservation.<sup>269</sup> The dissent reached the opposite conclusion, finding *Red Elk* on point regarding the foreseeability that a police officer “would stop

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262. *Bodin v. Vagshenian*, 462 F.3d 481, 486–87 (5th Cir. 2006); *see also* *Flechsigg v. United States*, No. 92-5189, 1993 WL 47200, at \*1–2 (6th Cir. 1993) (holding that federal correctional officer transporting a prisoner for medical treatment was not acting within the scope of employment when he took her to his apartment and sexually assaulted her); *Cho v. Oquendo*, No. 16-CV-4811, 2017 WL 3316098, at \*6 (E.D.N.Y. Aug. 2, 2017) (holding that Transportation Safety Administration screening officer was not within scope of employment because sexual assault did not further employer’s business and did not occur anywhere near the security checkpoint).

263. *See supra* Section III.A.1.

264. *McIntosh v. United States*, No. 16-2218, 2017 WL 607294, at \*4 (D. Kan. Feb. 15, 2017).

265. *Id.*

266. *Red Elk ex rel. Red Elk v. United States*, 62 F.3d 1102, 1107 (8th Cir. 1995).

267. *See Primeaux v. United States*, 181 F.3d 876, 877–78, 882 (8th Cir. 1999) (en banc).

268. *See id.* at 882 (quoting the district court below).

269. *See id.* at 882.

and offer assistance to a stranded motorist”<sup>270</sup> and observing that the officer approached the motorist “in a police car *with its red lights flashing*.”<sup>271</sup>

The crucial point is not whether a growing number of states have reached the right conclusion in bringing certain episodes of sexual violence by an employee within the *respondeat superior* liability of an employer—the crucial point is that they have already done so. And because both FTCA liability and Westfall Act immunity hinge on state *respondeat superior* law, the consequences may be profound for victims of sexual violence at the hand of federal employees.

### 3. The Westfall Act and State Law Changes May Combine to Confer Immunity on Federal Employees Committing Sexual Assault

The Westfall Act generally makes the immunity of a federal employee parallel to the liability of the United States under the FTCA—both being triggered by whether the employee was acting within the scope of employment. That mutuality breaks all the way down, however, when an exception to the FTCA restores sovereign immunity to the United States, while the employee holds fast to individual immunity.<sup>272</sup> As described immediately above, over the past few decades, state *respondeant superior* “rules have tended to broaden the scope of employment concept so as to expand employer accountability to others for the misdeeds of employees.”<sup>273</sup> However, through the Westfall Act, the broadening of state *respondeat superior* law that was designed to expand employer accountability may have the paradoxical effect of narrowing tort liability by conferring immunity on both the federal employer and the federal employee.<sup>274</sup>

Thus, Congress’s withdrawal of state-law remedies against federal employees acting within the scope of employment may leave a victim of wrongdoing without any remedy, in any venue, against any defendant, whether the federal government collectively or the federal employee individually. Especially when that wrong involved a deliberate attack on the plaintiff’s person, and even more so when the act was a degrading one of sexual violence, this is morally indefensible. And yet here we are.

In a scholarly dialogue about governmental accountability for constitutional violations, Professors Carlos Vázquez and Stephen Vladeck<sup>275</sup> and Professor James Pfander and David Baltmanis<sup>276</sup> contend that, if the

270. *Id.* at 888 (Lay, J., dissenting).

271. *Id.* at 883.

272. *See supra* Section III.A.1.

273. SISK, *supra* note 76, § 5.6(c)(4).

274. *Id.* (“Ironically—or some might say, perversely—application of these state law expectations to the peculiar Westfall Act context may have precisely the opposite effect . . .”).

275. Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509 (2013).

276. Pfander & Baltmanis, *supra* note 230.

Westfall Act is read to entirely displace common-law claims arising from constitutionally-protected rights, the courts must replace the preempted state-law remedies with federal remedies to avoid constitutional concerns.<sup>277</sup> Especially given that a constitutional tort remedy is on increasingly thin ice before the Supreme Court,<sup>278</sup> Congress arguably has a constitutional as well as a moral duty to ensure federal government accountability for constitutionally-sensitive claims that are suppressed by the Westfall Act. Violation of a person's body by a government agent plainly implicates such constitutional concerns.<sup>279</sup>

*B. THE QUESTIONABLE AVAILABILITY OF A BIVENS CONSTITUTIONAL  
TORT FOR SEXUAL ASSAULT*

If any act by a governmental agent flagrantly crosses a constitutional line, surely the sexual violation of another counts as that intolerable offense.<sup>280</sup> Sexual violence can never be justified as an instrument of government or serve any legitimate purpose. In the law enforcement and prison contexts, sexual violence implicates, respectively, the Fourth Amendment right to be free of unreasonable search and seizure<sup>281</sup> and the Eighth Amendment prohibition on cruel and unusual punishment.<sup>282</sup> For those suffering sexual misconduct by other federal employees, the Fifth Amendment due process clause<sup>283</sup> should provide constitutional protection for bodily integrity,<sup>284</sup> and the Fifth Amendment's equal protection component extends to sexual violence that manifests gender discrimination.<sup>285</sup>

While the FTCA prevents a direct claim against the United States based on assault and battery by most categories of federal employees<sup>286</sup> and the

277. *Id.* at 232, 247; Vázquez & Vladeck, *supra* note 275, at 575–80.

278. *See infra* Section III.B.

279. *See infra* Section III.B.

280. *See Doe ex rel. Knackert v. Estes*, 926 F. Supp. 979, 984 (D. Nev. 1996) (“Sexual assault upon a student by a teacher is an unconstitutional intrusion into the child’s bodily integrity, somewhat akin in nature to corporal punishment.”).

281. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

282. U.S. CONST. amend. VIII (stating “nor cruel and unusual punishments inflicted”).

283. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

284. *See Alexander v. DeAngelo*, 329 F.3d 912, 916 (7th Cir. 2003) (holding that “a rape committed under color of state law is” a civil rights violation “as a deprivation of liberty without due process of law” under the Fourteenth Amendment); *see also* *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (saying that “the Fifth Amendment . . . withdraws from Government the power to degrade or demean”).

285. *See Windsor*, 133 S. Ct. at 2695 (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”); *Davis v. Passman*, 442 U.S. 228, 243–44 (1979) (recognizing a Fifth Amendment right against gender discrimination by the Federal Government).

286. *See supra* Section II.A.1.



federal government is not subject to a constitutional tort action,<sup>287</sup> Westfall Act immunity does not extend to a civil action “which is brought for a violation of the Constitution of the United States.”<sup>288</sup> Thus, federal employees who transgress constitutional norms take themselves outside Westfall Act immunity and are subject to suit for so-called constitutional torts—at least in theory.<sup>289</sup>

In *Bivens v. Six Unknown Named Agents*, the Supreme Court held that a damages action would lie against federal law enforcement agents, acting under color of federal authority, for their alleged violation of a plaintiff’s Fourth Amendment right to be free from an unreasonable search and seizure.<sup>290</sup> The Court grounded such claims in the basic proposition that there must be legal remedies for legal wrongs.<sup>291</sup>

*Bivens* claims have been analogized to claims under 42 U.S.C. § 1983,<sup>292</sup> which authorizes civil rights claims against state officials acting under color of law.<sup>293</sup> Therein, of course, lies the controversy. While constitutional tort claims against state officials have been expressly authorized in the United States Code since shortly after the Civil War, Congress has never expressly granted jurisdiction to the federal courts to hear constitutional claims against federal officers.

With its 1971 decision in *Bivens*, the Supreme Court began a half-century experiment into judicial implication of constitutional tort remedies. In its 2017 decision of *Ziglar v. Abbasi*, the Court appeared to bring that experiment close to an end.<sup>294</sup>

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287. See *supra* Section II.C.

288. 28 U.S.C. § 2679(b)(2)(A) (2012). On the exceptions to the Westfall Act, see also SISK, *supra* note 76, § 5.6(c)(6).

289. *Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (noting “[t]he Westfall Act’s explicit exception for *Bivens* claims”).

290. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

291. See *id.* at 396–97.

292. 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

293. See, e.g., James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121–25, 137 (2009); David Zaring, *Three Models of Constitutional Torts*, 2 J. TORT L. ii, 1–3 (2008).

294. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017); see Steve Vladeck, *On Justice Kennedy’s Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SECURITY (June 19, 2017), <https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/> (“*Abbasi* could be a huge nail in the coffin of *Bivens* . . .”); see also *infra* notes 308–21 and accompanying text.

With the judicially-framed *Bivens* remedy increasingly doubtful in any context,<sup>295</sup> especially in a new context like sexual assault,<sup>296</sup> and always limited to a remedy against the individual federal employee, the need for a legislative solution becomes all the clearer. Reform of the FTCA would put claims against the government itself for sexual and other violence on a more secure footing and do so in the simpler format of an ordinary common-law tort action.<sup>297</sup>

# 1. The Decline (If Not Yet Fall) of the *Bivens* Constitutional Tort Claim

In its landmark *Bivens* decision, the Supreme Court recognized a cause of action against federal narcotics agents who allegedly violated the plaintiff's Fourth Amendment rights by arresting him for narcotics violations and searching the apartment without probable cause or a warrant.<sup>298</sup> Although acknowledging that the Fourth Amendment does not provide for its enforcement by an award of damages "in so many words," the majority concluded that damages was the ordinary remedy for invasion of personal liberty interests.<sup>299</sup>

Despite its promising beginning as a civil rights analogy for federal officers to § 1983 for such claims against state officers, the *Bivens* remedy soon began to fall into disfavor in the Supreme Court. During its first decade, the *Bivens* remedy was lauded as "a powerful new string to a victim's bow."<sup>300</sup> After a second decade, observers were lamenting that the promise of remediation for constitutional violations had been eroded and that "there is little left of the *Bivens* principle."<sup>301</sup> The Supreme Court became more and more stingy in implying a *Bivens* remedy,<sup>302</sup> with two members of the Court characterizing *Bivens* as "a relic of the heady days in which this Court assumed common-law powers to create causes of action."<sup>303</sup> Classic *Bivens*-type claims, such as prison condition suits under the Eighth Amendment and suits alleging an unlawful search and seizure in violation of the Fourth Amendment, continue to be

295. See *infra* Section III.B.1.

296. See *infra* Section III.B.2; see also *Klay v. Panetta*, 758 F.3d 369, 376 (D.C. Cir. 2014) (refusing to imply a *Bivens* remedy for sexual assault problems in the military).

297. See *infra* Section III.B.3.

298. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–90 (1971). For the story of *Bivens*, see James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in *FEDERAL COURTS STORIES* (Vicki C. Jackson & Judith Resnik eds., 2010).

299. *Bivens*, 403 U.S. at 396.

300. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 42 (1983).

301. Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293–94 (1995).

302. See *Wilkie v. Robbins*, 551 U.S. 537, 554–62 (2007); *Schweiker v. Chilicky*, 487 U.S. 412, 421–29 (1988); *Bush v. Lucas*, 462 U.S. 367, 368–80 (1983); SISK, *supra* note 76, § 5.7(b)(4)–(c)(5).

303. *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

fairly successful, at least to the same extent as other kinds of challenges to government misconduct.<sup>304</sup> Nonetheless, the conventional wisdom has taken hold that “the *Bivens* doctrine . . . is on life support with little prospect of recovery.”<sup>305</sup>

From the beginning, *Bivens* was subject to a crucial limitation, which has loomed ever larger in the ensuing decades. In *Bivens*, the Court reasoned that an implied claim for damages for violation of the plaintiff’s Fourth Amendment rights could proceed in part because such a claim “involve[d] no special factors counselling hesitation in the absence of affirmative action by Congress.”<sup>306</sup> The Court now appears inclined to see “special factors counselling hesitation” emerging in every case.<sup>307</sup>

In *Ziglar v. Abbasi*, a four-justice majority (of six justices participating) declared “that expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity[,]” and suggested the Court will rarely if ever recognize a *Bivens* remedy in a new context.<sup>308</sup> The Supreme Court, while not overturning *Bivens* and its early progeny in their specific contexts, is now more likely to defer to legislative action—or inaction—on whether a private damages remedy should be created for recompense against alleged official constitutional wrongdoing. Indeed, Professor Stephen Vladeck predicts that “*Abbasi* will likely prove to be a nail in the coffin of *Bivens*.”<sup>309</sup>

## 2. The Now Dubious Proposition That the *Bivens* Claim May be Extended to the New Context of Sexual Assault

While a direct constitutional tort claim by a sexual violence survivor against the individual federal employee assailant may be available in theory, it is a theory being rapidly drained by the Supreme Court of operative power. In *Abbasi*, the Court held that “a case presents a new *Bivens* context”<sup>310</sup>—subject then to the negative presumption that a new remedy would be “‘disfavored’ judicial activity”<sup>311</sup>—“[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court.”<sup>312</sup> Without offering “an exhaustive list of differences that are meaningful enough to make a given context a new one,”<sup>313</sup> the Court provided several examples:

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304. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 n.15 (2010).

305. Tribe, *supra* note 206, at 26.

306. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* 403 U.S. 388, 396 (1971).

307. SISK, *supra* note 76, § 5.7(c) (discussing the “special factors” and other limitations by the Supreme Court on the *Bivens* remedy).

308. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

309. Stephen I. Vladeck, *Taking the Federal Government to Court: A Remedial Overview* (forthcoming) (manuscript at 27) (on file with author).

310. See *Abbasi*, 137 S. Ct. at 1859.

311. *Id.* at 1857.

312. *Id.* at 1859.

313. *Id.* at 1859–60.

the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.<sup>314</sup>

Some of these examples or factors appear to weigh against extension of the *Bivens* right to a sexual assault or battery by a federal employee. Most importantly, “the constitutional right . . . at issue” may be new in nature or new in application, which by itself could be sufficient to defeat an extension.<sup>315</sup> The Supreme Court has recognized a *Bivens* remedy under the Fifth Amendment against gender discrimination in federal employment.<sup>316</sup> But the Court has not approved a constitutional tort remedy for an equal protection violation in a non-federal-employment context and most particularly not in a claim for damages based on alleged sexual violence by a federal employee. Moreover, when equal protection is not the gravamen of an assault—which would be true when sexual violence does not arise from a pattern of discriminatory treatment—the claim would rest on a more general Fifth Amendment due process protection. And the Supreme Court has never held more generally that a victim of governmental violence contrary to the Fifth Amendment may invoke a damages remedy under *Bivens*.

A factor that does support recognition of a *Bivens* remedy is that, in a specific case of sexual violence, it truly “is damages or nothing.”<sup>317</sup> Nonetheless, during the same term that *Abbasi* was decided, the Supreme Court deflected a case that raised the most horrifying episode imaginable in which damages were the only remedy available: A law enforcement officer allegedly murdered an innocent child at the border by shooting him in the head.<sup>318</sup>

Invoking *Abbasi*’s judicial skepticism, the Court returned the case to the Court of Appeals to evaluate whether special factors counselled against extension of the *Bivens* remedy to this new context.<sup>319</sup> The closing lines of the *Abbasi* majority opinion offer little hope that egregious wrongdoing by a

314. *Id.* at 1860.

315. *Id.* at 1859, 1864 (stating that “a modest extension is still an extension”).

316. *Davis v. Passman*, 442 U.S. 228, 243–44 (1979).

317. *See Abbasi*, 137 S. Ct. at 1862 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (Harlan, J., concurring)) (explaining that availability of a remedy other than damages “is of central importance” and acknowledging that instances of individual episodes “due to their very nature are difficult to address except by way of damages actions after the fact”).

318. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2004–05 (2017).

319. *Id.* at 2006–07.

governmental officer will tip the weighing of factors in a positive direction.<sup>320</sup> The Court emphasized that the question was not whether the government agents acted “proper[ly], nor whether it gave decent respect to [the plaintiffs’] dignity and well-being,” but only whether an action for damages should be allowed without prior congressional approval.<sup>321</sup>

### 3. Recovering the Past by Legislative Reform

With the *Bivens* action stumbling in the courts, those concerned about sexual violence committed by federal employees must look to Congress to put claims for such intentional wrongdoing on a more secure footing—and do so in the simpler format of an ordinary common-law tort action.<sup>322</sup>

As Professor James Pfander has documented, long before *Bivens*, the courts regularly entertained simple common-law trespass claims against federal officers for unlawful conduct that exceeded constitutional warrant and infringed individual rights.<sup>323</sup> During the early Republic and throughout the nineteenth century, courts recognized a “sturdy common-law trespass action [that] provided individuals with an assured right to bring federal government officials to account.”<sup>324</sup> These courts “evaluate[d] the simple legality of the” governmental conduct, imposed compensatory damages against the individual officer who transgressed statutory or constitutional limits, and left the officer to seek indemnity from Congress.<sup>325</sup> Through this common-law precursor to *Bivens*, the courts effectively protected individual rights and articulated the fundamental limitations on justifiable government action.

An enhanced Federal Tort Claims Act (“FTCA”) that provides a remedy for intentional torts would achieve the same clarity in legal framework for governmental action that long prevailed in American courts. By holding the federal government accountable for “ordinary common-law torts,”<sup>326</sup> the FTCA more closely resembles the nineteenth century common-law trespass remedy<sup>327</sup> than does the twentieth century judicially-devised *Bivens*

320. *Abbasi*, 137 S. Ct. at 1869.

321. *Id.*

322. Portions of this subpart are adapted from a post in a blog symposium on Professor James Pfander’s book on constitutional torts. See Gregory Sisk, *Federal Official Liability for Intentional Wrongdoing: Recovering the Past*, BALKINIZATION (May 21, 2017, 1:41 PM), <https://balkin.blogspot.com/2017/05/federal-official-liability-for.html>.

323. See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871–76 (2010); see also Vladeck, *supra* note 309, at 24 (“From the Founding into the 1960’s, there was actually a robust regime of damages against federal officers for constitutional violations in the form of judge-made civil remedies . . .”).

324. JAMES E. PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR* xxii (2017).

325. *Id.* at 7–8.

326. *Dalehite v. United States*, 346 U.S. 15, 28 (1953).

327. See *Little v. Barreme*, 6 U.S. 170, 179 (1804).

constitutional tort cause of action. Given federal sovereign immunity, the federal government could not be held vicariously liable during this earlier period, but the equivalent was achieved by judicial imposition of damages against individual federal officers and congressional awards of indemnity to the officers.<sup>328</sup> In the end, “Congress accepted financial responsibility for government wrongdoing.”<sup>329</sup> The FTCA accomplishes that same purpose more forthrightly by shifting liability from the officer to the United States, thus holding the government directly accountable.<sup>330</sup>

The traditional tort remedy is especially well-suited for addressing individual acts of sexual violence. Some *Bivens* claims—such as those brought under the Fourth Amendment—seek relief for harms that have a constitutional dimension that is not readily translated into garden-variety torts. In *Bivens*, the Court contended that the harm occasioned by an abuse of law enforcement power by federal officials was different in nature and greater in consequence than that involved in the ordinary trespass or assault case and thus demanded a different measure of damages.<sup>331</sup> Moreover, some constitutional rights—such as due process or equal protection—are not readily analogized to common-law torts.<sup>332</sup> By contrast, placing sexual violence claims into a constitutional framework may be awkward and offers no independent benefits. The common-law torts of assault and battery generally provide meaningful redress for sexual violence.

Relegating a survivor of sexual assault to an uncertain and awkward constitutional claim, rather than being allowed to bring a forthright and ordinary tort claim for assault and battery, cannot be justified. Even if a constitutional tort claim against a federal employee by the survivor of sexual violence were to rise above judicial skepticism, recovery is uncertain. When a survivor of sexual violence fails to hold the United States accountable, the offending employee may well have taken up a prison residence,<sup>333</sup> which makes recovery of compensation less than promising. While the government may choose to indemnify a federal employee found liable under *Bivens*,<sup>334</sup> the government has discretion to refuse reimbursement when not “in the interest of the United States.”<sup>335</sup> This may well encourage the United States to distance itself from the employee sued for sexual misconduct.

328. PFANDER, *supra* note 324, at 3.

329. *Id.*

330. See 28 U.S.C. § 2679(b) (2012).

331. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392–93 (1971).

332. See Vladeck, *supra* note 309.

333. See, e.g., *LM ex rel. KM v. United States*, 344 F.3d 695, 697 (7th Cir. 2003); *West v. United States*, No. 15-01243-JLS, 2016 WL 1576382, at \*2 (C.D. Cal. Apr. 11, 2016).

334. See SISK, *supra* note 76, § 5.7(e).

335. 28 C.F.R. § 50.15(c)(1) (2001); John E. Nordin II, *The Constitutional Liability of Federal Employees: Bivens Claims*, 41 FED. BAR NEWS & J. 342, 343 n.25 (1994).

The survivor of a sexual assault by a federal employee acting within the scope of employment is affirmatively denied a remedy against that assailant—even when the federal government itself escapes liability through exceptions to the FTCA and other limitations on litigation remedies against the United States. As a dubious and awkward alternative, the availability of a constitutional tort remedy for the victim of a sexual assault by a federal employee is anything but certain. A survivor of sexual assault should be able to bring a forthright and ordinary claim for assault and battery against those responsible, including an employer when the pertinent state law holds the employer accountable for creating the opportunity for the malfeasance.

#### IV. PROPOSED “FEDERAL SEXUAL ASSAULT RESPONSIBILITY ACT”

Although it took three decades after initial enactment of the Federal Tort Claims Act, the next big step in justice reform came in 1974 when Congress adopted the Law Enforcement Proviso and accepted compensatory accountability for various intentional torts—including assault and battery—by federal law enforcement officers.<sup>336</sup> Having then made the major policy decision to accept liability for intentional torts by federal officers in the most complex setting of law enforcement, Congress should now complete the task and bring the FTCA up to date by repealing the assault-and-battery exception as a whole.

Allowing a federal prisoner to sue for recovery for sexual assault by a federal correctional officer, while turning away the child molested by a postal worker, is an offensive dereliction of responsibility by the United States. To pour salt in the wound, Congress subsequently has granted immunity to federal employees who engage in negligence or other wrongful acts—including intentional torts—while acting in the scope of employment.<sup>337</sup> For a survivor of sexual violence at the hands of a federal employee, it is a claim against the United States or nothing. For too long, “nothing” has been the answer.

##### A. ALLOWING CLAIMS UNDER THE FTCA FOR ASSAULT AND BATTERY

The three historical reasons in 1946 for excluding assault and battery claims from the FTCA—being cautious and incremental in waiving sovereign immunity from liability, being consistent with then-current tort doctrine that seldom imposed liability on an employer for intentional wrongdoing by an employee, and the ready availability of claims directly against the individual assailant—have fallen away, been overtaken by changes in tort doctrine, and been contradicted by the federal grant of immunity to federal employees. Moreover, a greater appreciation that responsible employers must be held accountable for employment-related misconduct by their employees, together

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336. See *supra* Section II.A.3.

337. See *supra* Section III.A.1.

with the social justice need to hold someone accountable to the victim for a sexual assault, mandate legislative change.

The assault-and-battery exemption in the FTCA reflected a cautious step-by-step approach to the then-innovative step of waiving federal sovereign immunity for tort liability.<sup>338</sup> As the Supreme Court explained only a decade after its enactment, “the very purpose of the Tort Claims Act was to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.”<sup>339</sup>

Today, Congress has adopted statutory waivers of sovereign immunity that sweep across the landscape of government activities and make the United States amenable to suit for most areas of substantive law.<sup>340</sup> These congressional actions “have woven a broad tapestry of authorized judicial actions against the federal government.”<sup>341</sup>

Holding the courthouse doors open to compensate those injured by wrongful government conduct is no longer novel and innovative. Skepticism about waiving sovereign immunity to allow judgments against the United States has been rebutted by decades of successful experience with regular submission of claims for injuries in tort to established court procedures. Illustrative of the caution that prevailed in 1946 and the accompanying hesitation to include claims for assault and battery was the apparent fear that allegations of intentional wrongdoing could be inflammatory in nature, “easily exaggerated,” and lead to inflated judgments for excessive damages against the United States.<sup>342</sup> The rebuttal lies in the decades of assault and battery claims heard in the often highly contested factual context of law enforcement powers without judicial looting of the federal treasury. Importantly, FTCA suits are tried to the bench,<sup>343</sup> not to a potentially over-sympathetic jury.

In any event, as an early scholarly observer wrote immediately after enactment of the FTCA, such fears could not justify the “sweeping exception”

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338. See *supra* Section II.A.1 (examining why Congress adopted the assault-and-battery exemption in the FTCA).

339. *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957).

340. See *SISK*, *supra* note 76, § 2.4 (explaining that statutory waivers of federal sovereign immunity today cover most situations in which an injured party would seek relief—ranging beyond tort claims to include claims sounding in contract, employment discrimination, environmental law, government benefits, constitutional law, and attorney’s fees).

341. Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 603 (2003).

342. See *Tort Claims Against the United States: Hearing on S. 2690 Before a Subcomm. of the Sen. Comm. on the Judiciary*, 76th Cong. 39 (1940). A Department of Justice witness explained FTCA exceptions as excluding torts that “would be difficult to make a defense against, and which are easily exaggerated.” *Id.*; see also Andrews, *supra* note 160, at 169; *The Federal Tort Claims Act*, *supra* note 92, at 547 (explaining reasoning for assault and battery exception included in FTCA due to “the difficulty of defending such suits and the probability of judgments against the Government in amounts out of proportion to the damages actually suffered by claimants”).

343. See 28 U.S.C. § 2402 (2012).



of intentional torts, which “imposes a hardship upon claimants.”<sup>344</sup> “It is bad law to leave a raped child without a forum and without redress when the only reasons to do so are empty.”<sup>345</sup>

In addition, the disclaimer of responsibility for sexual violence by its agents inherent in the refusal of the United States to accept liability for assault and battery under the FTCA was at least understandable in an era of limited *respondeat superior* liability and when a direct claim against the individual assailant was readily available. Neither of those premises remain in place. As discussed previously, many states have expanded the scope of employer responsibility to encompass intentional wrongdoing by employees—including sexual assault and battery—under certain circumstances.<sup>346</sup> Most egregiously, the Westfall Act blankets the individual federal employees who acted within the scope of employment with immunity, thereby withdrawing the alternative of a tort suit against the individual employee who commits an act of violence—sexual or otherwise.<sup>347</sup>

Fortunately, the heavy-lifting on the policy question of whether to make the sovereign federal government amenable to liability for a federal employee’s assault or battery was already undertaken some 40 years ago when such claims were authorized in the law enforcement context.<sup>348</sup> The Law Enforcement Proviso of 1974<sup>349</sup> was “a major amendment” to the FTCA “that had the effect of broadly reappraising government responsibility for the torts of its officials.”<sup>350</sup> The big step in that direction has already been taken;<sup>351</sup> one commentator suggests “the door is already three-quarters open.”<sup>352</sup> Indeed, observers and participants at the time optimistically anticipated that the 1974 amendment “may provide the impetus for a thorough review of the entire field.”<sup>353</sup> Four decades later, such a “thorough review” is long overdue.

If any area of direct governmental interaction with the people is fraught with complexity and controversy, surely it must be the field of law enforcement. Law enforcement officers are some of the only federal civilian employees authorized to exercise physical force against fellow citizens that would plainly constitute assault and battery but for legal justifications.

344. *The Federal Tort Claims Act*, *supra* note 92, at 547.

345. Massey, *supra* note 160, at 1652.

346. *See supra* Section III.A.2.

347. *See supra* Sections III.A.1 & III.A.3.

348. *See supra* Section II.A.3.

349. 28 U.S.C. § 2680(h) (“*Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, [the FTCA] shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.”).

350. Boger, Gitenstein & Verkuil, *supra* note 117, at 498.

351. *See* Fuller, *supra* note 178, at 385 (saying that, with the Law Enforcement Proviso, “[t]o some extent the proposed ‘step-by-step’ approach [taken in the original enactment of the FTCA] came to fruition”).

352. Massey, *supra* note 160, at 1636.

353. Boger, Gitenstein & Verkuil, *supra* note 117, at 539.

Complex factual and legal questions about precarious encounters of law enforcement with citizens suspected of crimes, contentious debates about the validity of a particular search, heated disputes about the appropriate amount of force properly exercised by armed police officers in conducting a specific arrest—all these have been subjected to evaluation through tort actions in the federal courts under the Law Enforcement Proviso over the past 40 years.<sup>354</sup> To now hold the government to account for the predatory behavior of a mail carrier or for sexual molestation of a child by a federal daycare worker present rather straightforward cases, implicating no difficult questions of public policy or appropriate governmental exercise of force.

The words of the Senate Committee on Government Operations in 1973 when reporting the Law Enforcement Proviso to grant relief in tort against the United States to the victims of abusive conduct by law enforcement have even greater resonance today when advocating for just relief for other victims of violence, including sexual violence, by government employees. The Senate committee observed that there was “no effective legal remedy against the Federal Government for the actual physical damage, much less the pain, suffering and humiliation to which” the families mistakenly targeted by federal narcotic agents had been subjected.<sup>355</sup> Even worse today, the survivors of sexual assault by a federal employee not only have “no effective legal remedy against the Federal Government” for the suffered harm because of the assault-and-battery exception to the FTCA, but now may have “no effective legal remedy” against the individual assailant either, who may be sheltered behind the Westfall Act.

The Senate committee sharply criticized the provision of the FTCA that “protects the Federal Government from liability where its agents commit intentional torts such as assault and battery.”<sup>356</sup> The committee concluded that

[t]he injustice of this provision should be manifest—for under the Federal Tort Claims Act a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal ‘no-knock’ raid.<sup>357</sup>

The injustice today is that “a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal

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354. See, e.g., *Tekle v. United States*, 511 F.3d 839, 854–55 (9th Cir. 2007); *Washington v. DEA*, 183 F.3d 868, 874 (8th Cir. 1999); *Dickey v. United States*, 174 F. Supp. 3d 366, 369–74 (D.D.C. 2016); *Moher v. United States*, 875 F. Supp. 2d 739, 756–60 (W.D. Mich. 2012); *Hanson v. United States*, 712 F. Supp. 2d 321, 330–31 (D.N.J. 2010).

355. S. REP. NO. 93-588, at 2 (1973).

356. *Id.* at 3.

357. *Id.*

Government is held harmless” if that same mail truck driver molests a child while on his postal route.<sup>358</sup>

*B. FEDERAL GOVERNMENT LIABILITY FOR SEXUAL VIOLENCE, AND THE  
TRADITIONAL PURPOSES AND PROCESS OF TORT LAW*

The two leading rationales for tort liability remain compensation for the injured and deterrence of the tortfeasor.<sup>359</sup> Extending federal government liability for intentional torts including sexual assault and battery readily satisfies the compensation rationale, while deterrence of government actors admittedly is muted when any judgment is satisfied from the public treasury. However, a public tort remedy, especially when accomplished through a public judicial forum, could have a meaningful deterrent effect. For related reasons, creating an alternative administrative process for tort claims involving federal agents would not be appropriate for episodes involving sexual violence or other intentional wrongdoing.

1. Compensating the Victims of Sexual Violence Perpetrated  
by Federal Agents

Whether conceived of as corrective justice to right individual wrongs or as part of distributive justice to promote general social well-being,<sup>360</sup> compensation of the injured has always been a primary purpose of tort law.<sup>361</sup> When the federal government is the source of the injury, the “dual personality”<sup>362</sup> of the compensation rationale is comfortably accommodated. The harmed person is made whole (or as whole as money damages allow). And the cost is distributed to the public generally (by being paid from the public treasury).

Ensuring that the federal government is accountable for a larger range of tortious harms also properly adjusts for the larger scope of federal government activities today. As government grows and the number of public employees increases, so the occasions expand for misconduct by federal agents to impact on individual members of the populace.<sup>363</sup> When

358. *Id.*

359. See DOBBS, HAYDEN & BUBLICK, *supra* note 195, § 2.2–.5; MARSHALL S. SHAPO, TORT LAW AND CULTURE 142–49 (2003).

360. See DOBBS, HAYDEN & BUBLICK, *supra* note 195, § 2.2; SHAPO, *supra* note 359, at 142–43.

361. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 22–23 (1983) (explaining that “[w]e value compensation,” not only because it deters or even provides corrective justice, but also that it “distribut[es] the costs of official misconduct from the unfortunate victim to a larger group”).

362. SHAPO, *supra* note 359, at 143.

363. Jonathan Turley, Pax Militaris: *The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 4 (2003) (highlighting “the expansion of the military into collateral areas of governance such as medicine, entertainment, and transportation,” in which the military often “openly competes with private businesses for both military and civilian customers”); see also Deirdre G. Brou, *Alternatives to the Judicially Promulgated*

government becomes more omnipresent in modern society, immunizing the government from liability for its tortious misconduct leaves more and more Americans unable to receive compensation for their injuries.

## 2. Deterring Sexual Violence by Federal Agents

In the private sector, tort liability is also believed to influence behavior, a goal often given the “shorthand” reference of “deterrence.”<sup>364</sup> By imposing the costs of misfeasance or malfeasance on the persons and entities responsible, future risky or wrongful conduct will presumably be discouraged.

In a strictly economic sense, deterrence is significantly muted in the federal government context. Any judgment under the FTCA is paid from a general appropriation and is not levied against the individual federal employees or even the specific agencies at fault.<sup>365</sup> Of course, this truncation of deterrence when compensation is paid from the public treasury applies to all tort claims against the federal government under the FTCA and not only to the intentional torts at issue in this Article.<sup>366</sup>

Adopting a special provision that a damages award for intentional wrongdoing will be exacted directly from the responsible agency’s appropriations might marginally increase an economic deterrent effect.<sup>367</sup> In general, judgments in FTCA actions (as well as most other lawsuits) against

Feres *Doctrine*, 192 MIL. L. REV. 1, 4–5, 43–44 (2007) (arguing that the military today performs many functions that private individuals perform, well beyond military decision making).

364. SHAPO, *supra* note 359, at 143.

365. See SISK, *supra* note 76, § 1.10 (describing the Judgment Fund as a permanent appropriation separate from agency appropriations); see also *infra* note 368.

366. A broader critique of the social justice and economic efficiency dimensions of ordinary tort liability against a government entity is well beyond the scope of this Article. For a general discussion of governmental liability and deterrence, see SCHUCK, *supra* note 361, at 102–06. For differing views on whether litigation liability deters local government from constitutional wrongs, see Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 849, 880 (2001) (arguing “that constitutional tort damage remedies levied against municipalities do, in fact, alter the behavior of government policymakers in desirable ways” by “important informational and fault-fixing functions of . . . claims”); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347–48 (2000) (arguing, in context of constitutional torts, that because “government does *not* respond to costs and benefits in the same way as a private firm,” then “government cannot be expected to respond to forced financial outflows in any socially desirable, or even predictable, way”); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1150 (2016) (concluding that “[t]he sparse evidence . . . suggests that at least some law enforcement officials in such agencies are motivated by liability costs to reduce risk”).

367. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1681 (2003) (“[T]he evidence clearly shows that, in general, government agencies seek to avoid fines, which are extremely disruptive to the normal operation of any bureaucracy—especially if the money must be diverted from other, already budgeted, priorities.”). But see Schwartz, *supra* note 366, at 1149 (reporting that “[s]everal [local law enforcement] agencies that pay settlements and judgments from their budgets do not appear to suffer any economic consequences of these pay[ments]” given the political budgeting process).

the federal government are paid from a continuing appropriation by Congress called the Judgment Fund.<sup>368</sup> However, Congress could provide otherwise in intentional tort cases, by directing that a judgment be imposed directly against the funds appropriated to the agency that employed the federal officer who committed an assault or battery.<sup>369</sup>

There is precedent for such a special directive. Under the Equal Access to Justice Act (“EAJA”), Congress has subjected the United States to liability for attorney’s fees both “to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award”<sup>370</sup> and, more broadly, in any non-tort civil action against the federal government, “unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”<sup>371</sup> As one court colorfully put it, by “discourag[ing] the federal government from using its superior litigating resources unreasonably,” the EAJA is “an ‘anti-bully’ law.”<sup>372</sup>

To enhance the deterrent effect of this fee-shifting statute, Congress directed that any fee award based on “a finding that the United States acted in bad faith”<sup>373</sup> or acted without substantial justification<sup>374</sup> shall be paid by the agency and from agency funds.<sup>375</sup> By levying fee awards against the individual agencies, rather than distributing the liability generally to the public treasury through the Judgment Fund, Congress intended to “provide agencies a strong disincentive against taking unreasonable positions.”<sup>376</sup>

Similarly, Congress could ratchet up the deterrent effect by directing that any FTCA judgment arising from such underlying intentional wrongdoing as an assault or battery be charged against agency funds. In this way, an agency would know that its own funds are at risk if one of its employees commits a wrongful act of violence, sexual or otherwise, while acting within the scope of federal employment. If a damage award is large enough, the judgment would

368. 31 U.S.C. § 1304 (2012); 28 U.S.C. § 2414. On the Judgment Fund, see Paul F. Figley, *The Judgment Fund: America’s Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145, 147 (2015); SISK, *supra* note 76, § 1.10.

369. See SCHUCK, *supra* note 361, at 108 (arguing that greater deterrent effect could be imposed by requiring federal agencies to pay FTCA liability costs, along with transmission of those “costs downward to the budgets of the smallest subunits capable of deterring the conduct in question”).

370. 28 U.S.C. § 2412(b). On the Equal Access to Justice Act, see also SISK, *supra* note 76, at § 7.11.

371. 28 U.S.C. § 2412(d)(1)(A).

372. *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1101 (D.C. Cir. 1986), *vacated*, 487 U.S. 1229 (1988).

373. 28 U.S.C. § 2412(c)(2).

374. *Id.* § 2412(d)(4).

375. *Id.* On payment of attorneys’ fees out of the Judgment Fund or agency funds, see Figley, *supra* note 368, at 171–75.

376. *Id.* at 173.

“create a new claim on the agency’s budget and thereby command the attention of the agency’s top officials, plus its political overseers.”<sup>377</sup>

Deterrence through tort liability may also take on a “strong, or moralizing, form.”<sup>378</sup> An additional deterrent effect may come into play when such claims are litigated in the public forum of a federal court, especially in the context of sexual violence. “With exposure comes publicity.”<sup>379</sup> Ordinary negligence claims against the federal government under the FTCA get little attention, even when leading to a judgment in favor of an injured plaintiff. But a court ruling that the federal government is liable for sexual violence committed by one of its agents is more likely to draw media and other public attention. And the prospect of reputational damage to an agency (or its leading officers) for failing to take appropriate measures to prevent sexual violence may undermine the agency’s political agenda or provoke negative responses by law or reduced appropriations from Congress.<sup>380</sup>

The opposite is also true. In the public sector, excessively broad immunity from accountability in tort imposes a social cost by undermining the message of fairness and the rule of law.<sup>381</sup> When the public learns that the federal government refuses to accept responsibility in tort for sexual violence by its agents, that refusal contributes to insecurity and distrust. When the very public institutions charged with public safety, social security, and upholding the law are exempted from tort liability for sexual violence by their appointed agents, the public unavoidably will feel less safe in general and especially when interacting with federal employees. And when the federal government urges greater attention to and stronger measures against sexual violence in the private sector, but holds itself above similar controls, the message about the intolerance of sexual violence is contradicted and cynicism is promoted.

### 3. Maintaining a Public Judicial Forum, Rather Than Administrative Remedies, for Tort Claims Involving Intentional Torts

Although the Federal Tort Claims Act is initiated by an administrative claim, an unsatisfied plaintiff maintains the right to pursue an action through

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377. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 738 (2018) (discussing deterrent effect on a federal agency of civil or criminal contempt fines).

378. SHAPO, *supra* note 359, at 143.

379. Gilles, *supra* note 366, at 860; *see also* Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1229–30 (2014) (observing that even unsuccessful litigation against the government may provoke public debate and encourage reform).

380. *See* Schlanger, *supra* note 367, at 1681 (explaining that inmate litigation about abusive prison or jail conditions “can trigger embarrassing political inquiry and even firings, resignations, or election losses”).

381. *See* SCHUCK, *supra* note 300, at 23 (explaining that when legal immunity leaves governmental “victims without remedy, the integrity and universality of” moral norms and “public values are called into serious question”).

the traditional tort forum of a public court proceeding.<sup>382</sup> Creation of a new and exclusive administrative remedy for government torts is especially inappropriate in the context of sexual violence. Ensuring appropriate compensation for the victims of federal sexual violence and imposing some level of deterrence is best achieved by availability of a right to action in federal court.

As a prerequisite to filing a lawsuit, a potential FTCA plaintiff must present an administrative claim to the appropriate agency.<sup>383</sup> This mandatory administrative claim process offers the possibility of settlement “without the need for filing suit and possible expensive and time-consuming litigation.”<sup>384</sup> While this process has been remarkably successful as an alternative dispute resolution tool,<sup>385</sup> the plaintiff who does not obtain an acceptable settlement has the right to bring an action in federal District Court,<sup>386</sup> thus preserving the traditional litigation process for resolution of tort claims against the United States.

Whatever the merits of replacing the longstanding FTCA judicial remedy with an exclusive administrative claim process might be, sexual assault and battery claims would be an odd and strikingly inappropriate context in which to begin such an experiment. Such an administrative scheme is unlikely to either provide full compensation for this type of harm or to ensure proper detection and deterrence of sexual violence.

In terms of just compensation, claims of sexual violence are particularly ill-suited to an administrative scheme such as the typical workers’ compensation system which is designed to provide a routine and regularized schedule of benefits.<sup>387</sup> Rape, sexual contact, and sexual assault are hardly accidental and are not adequately compensated by the schedule of payments for ordinary physical injuries.<sup>388</sup> In the workers’ compensation context, both scholars and courts are increasingly arriving at the recognition that when “rape occurs in the workplace,” the law should not “respond to such trauma as if it is just a slip and fall case in slightly different garb.”<sup>389</sup> Moreover, an

382. SISK, *supra* note 76, §§ 3.3(a), 3.4(a) (describing the FTCA prerequisite of an administrative claim and the subsequent commencement of court proceedings).

383. 28 U.S.C. §§ 2401(b), 2675 (2012). On the administrative claim requirement for the FTCA, see SISK, *supra* note 76, § 3.3(a).

384. S. REP. NO. 89-1327, at 3 (1966).

385. Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better Than Third-Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331, 1343-44 (2000).

386. See 28 U.S.C. § 2401(b) (authorizing filing an FTCA lawsuit within six months after notice of final denial of an administrative claim).

387. For further discussion of the inadequacy of workers compensation schedules for sexual violence cases in the federal workplace, see Sisk, *supra* note 198.

388. Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1393-406 (1993).

389. Andrea Giampetro-Meyer, M. Neil Browne & Kathleen Maloy, *Raped at Work: Just Another Slip, Twist, and Fall Case?*, 11 UCLA WOMEN’S L.J. 67, 69 (2000).

administrative compensation scheme is likely to focus primarily on medical expenses and loss of earning power, while neglecting or failing to fully address the “invisible injuries” of rape victims, which include emotional distress, depression, anxiety, social withdrawal, cognitive impairment, and disruptive behavior.<sup>390</sup> Professors Andrea Giampetro-Meyer, M. Neil Browne, and Kathleen Maloy rightly conclude that “the long-term physical, psychological, and life-altering consequences of rape” demand damages, such as through “the option of tort remedy.”<sup>391</sup>

Finally, far from providing at least the minimal deterring signal that comes from a judicial decree,<sup>392</sup> an internal administrative process is less likely to be fully transparent and attract public attention. Indeed, the long and sordid history of sexual violence complaints being neglected, excused, and under-enforced in various employment settings and university administrative systems provides ample reason to be dubious about relying on such systems for alleged sexual misconduct by federal agents. If any area of potential misconduct in society should be subject to careful public scrutiny and be tested by the traditional and exacting process of litigation, it would be the public sector.

### C. DELETING THE GENERAL ASSAULT-AND-BATTERY EXCEPTION OUTRIGHT

The most expedient and unmistakable means of removing the obstacle to just compensation in cases of sexual and other violence by federal agents is to strike the words “assault” and “battery” from the exception phrase in the first sentence of Subsection 2680(h).<sup>393</sup> Along with the removal of these two words, it may seem sensible to strike the same words from the Law Enforcement Proviso in the same subsection. However, the better course of discretion action may be to avoid any tinkering with the Law Enforcement Proviso, and thereby forestall any suggestion that the removal of “assault” and “battery” might mean a retreat from the 1974 extension of liability in the law enforcement context.

Given that the pressing problem addressed in this Article is the unjustifiable exclusion of claims for sexual assault and battery from the FTCA, the logical answer might appear to be language creating a special category of and treatment for assaults and batteries that are sexual in nature. By this approach, rather than deleting “assault” and “battery” from § 2680(h), a “Sexual Assault and Battery Proviso” could be added, stating that the exception does not apply to “sexual assaults and sexual batteries.” But in

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390. *Id.* at 72, 89. On “the effects of a rape [being] very different from the effects of a more common workplace injury,” see *id.* at 90–94.

391. *Id.* at 95.

392. See *supra* Section IV.B.2.

393. 28 U.S.C. § 2680(h) (2012) (providing an exception for “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights”).



addition to simplicity (which is a virtue in itself), removing the general exception for “assault and battery” outright is preferable for three reasons:

First, with the prior Law Enforcement Proviso that removes all assaults and batteries (sexual or otherwise) from the exception when allegedly committed by law enforcement officers,<sup>394</sup> a large share of claims of assault and battery against the federal government may already be asserted under the FTCA.<sup>395</sup> If we continued with a piece-meal erosion of the assault-and-battery exception, such as by now excising only *sexual* assaults and batteries, fewer and fewer intentional torts would remain inside the shrinking exception. Preserving the exception in a few thinly-sliced circumstances would appear capricious.

Consider this example: At present, an air traveler who suffers an assault or battery of any kind at the airport by a federal law enforcement officer may recover under the FTCA. If a version of this present proposal were adopted, but limited to sexual assaults and batteries, then an air traveler who is sexually assaulted or battered by a non-law enforcement Transportation Safety Administration (“TSA”) agent could also recover under the FTCA. But what about the air traveler who is the victim of a non-sexual assault or battery by a TSA agent? How do we justify excluding any relief because the assault or battery is not sexual in nature or the particular TSA agent is not a law enforcement officer?<sup>396</sup> At some point, if we are not there already, the arbitrary picking and choosing of which plaintiffs may recover under the FTCA for violence by a federal agent offends principles of equal protection under the law.

In sum, while the argument for removal of the assault-and-battery exception for victims of sexual violence is most poignant and powerful, the same arguments regarding evolution of the law and just accountability apply with considerable force to all victims of unjustified federal government violence.

Second, if a plaintiff who complains of being threatened or attacked by a non-law enforcement federal agent knows that he or she may obtain recovery under the FTCA if the attack was *sexual*—but not otherwise—(and, indeed, may also be denied recovery even against the individual attacker under the Westfall Act) plaintiff’s lawyers will seek to frame such claims as sexual in nature whenever possible. Not only would this encourage artful pleading but would introduce another factual dispute into the litigation, complicating recovery and imposing more burdens on both litigators and courts. In addition, by encouraging litigators to stretch the facts to characterize an assault or battery as sexual in nature, the effect could be to depreciate or even trivialize genuine episodes of sexual violence.

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394. See *supra* Section II.A.3.

395. See *supra* Section IV.A.

396. On TSA agents not being law enforcement officers within the proviso, see *supra* note 134.

Third, while tort law has long recognized and carefully defined “assault” and “battery,” there is no clear definition for such new legal terms as “sexual assault” or “sexual battery” in the civil context, even if there may be parallels in criminal law.<sup>397</sup> Given that the FTCA deliberately relies on principles of state tort law and generally does not impose novel new terms of federal tort law, creating a specially-termed sexual assault and battery proviso would depart from basic principles of the FTCA. Avoiding such uncertainties would be achieved by a more general repeal of the assault and battery components of the FTCA exception.

*D. CONTINUING QUESTIONS ABOUT SCOPE OF EMPLOYMENT AND  
NEGLIGENT HIRING AND SUPERVISION AFTER REPEAL OF THE  
ASSAULT-AND-BATTERY EXCEPTION*

The repeal of the assault-and-battery exception would leave unaffected the independent requirement that a directly vicarious claim against the United States under the FTCA be based on the actions of a federal employee acting within the scope of employment. If a federal employee who commits a violent act is found to have engaged in the so-called “frolic” of his or her own, as defined by the law of *respondeat superior* in the pertinent state, the United States has no vicarious liability under the FTCA. The repeal proposed in this Article updates the FTCA to be consistent with modern tort liability law, not to impose new responsibilities divorced from the employment relationship.

Importantly, when an assailant was not acting within the scope of federal employment, the victim encounters no legal obstacles in seeking a remedy directly against that individual. If the FTCA is not available because an employer has no *respondeat superior* responsibility under state law, neither is Westfall Act immunity conferred on the employee, because he or she falls outside of the scope of employment. In the non-scope-of-employment case, the collision between the FTCA and the Westfall Act is avoided.

However, when a government employee commits an assault or battery outside the scope of employment but while on the job and in a position of opportunity afforded by federal employment, an alternative claim for negligent hiring or supervision then would appropriately be raised.<sup>398</sup> With the removal of the assault-and-battery preclusion, the objection that alleged carelessness in hiring, training, or supervising an employee is an end-run

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397. As discussed in the companion article on government liability for sexual violence between federal employees, a limitation to “sexual” assault or battery may be necessary to avoid expanding the FTCA in a manner that intrudes on other statutory schemes, such as employment discrimination or federal workers compensation. See Sisk, *supra* note 198.

398. See *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.* 474 A.2d 436, 439 (R.I. 1984) (explaining that the negligent hiring action “provides a remedy to [those] who would otherwise be foreclosed from recovery . . . since the wrongful acts of employees in these cases are likely to be outside the scope of employment or not in furtherance of the master’s business”).

around the exception would fall away. As discussed earlier,<sup>399</sup> a claim of negligent hiring or supervision (1) would remain vulnerable to other limitations in the FTCA, including the discretionary function exception,<sup>400</sup> and (2) would demand proof of affirmative negligence by the federal employer.

First, when rules and practices about hiring, training, and supervision of employees implicate policy, the discretionary function exception remains in place as a potential hurdle to a successful FTCA claim.<sup>401</sup> Suggesting a modest and targeted reform, nothing in the legislative solution proposed in this Article alters the text or meaning of the discretionary function exception. Given how regularly negligent hiring, training, and supervision claims under the FTCA are dismissed under the discretionary function exception,<sup>402</sup> successful attempts to hold the federal government liable outside of situations where the employee clearly acted within the scope of employment are likely to be few.

Nonetheless, the discretionary function exception is not an insuperable obstacle when government supervisors fail to follow the rules. In *Berkovitz v. United States*, the Supreme Court established a crucial new prong for application of the discretionary function exception by taking it off the table altogether when the government actor had no permissible choice<sup>403</sup>:

[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.<sup>404</sup>

With this in mind, the negligent management theory has the greatest promise in cases where the government failed to properly conduct a mandatory background check on a prospective federal employee, failed to conduct obligatory supervisory actions,<sup>405</sup> or neglected to report prior misconduct as required by a mandatory statute or rule (such as those requiring reporting of child abuse). In the most egregious of cases—such as when the Bureau of Indian Affairs failed to conduct a background check

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399. See *supra* Section II.A.4.

400. See 28 U.S.C. § 2680(a) (2012).

401. See *supra* Section II.A.4.

402. See *supra* Section II.A.4.

403. *Berkovitz v. United States*, 486 U.S. 531 (1988).

404. *Id.* at 536.

405. See *McIntosh v. United States*, No. 16-2218, 2017 WL 607294, at \*6 (D. Kan. Feb. 15, 2017) (rejecting application of the discretionary function exception to allegations that a supervisor had failed to make required weekly contacts and random reviews of patient encounters by a Veterans Administration physician's assistant who was sexually assaulting patients).

before hiring a new teacher for a boarding school who was facing charges for sexual molestation of children<sup>406</sup>—the discretionary function exception should be no obstacle.

Second, when a federal employee was not acting within the scope of employment, the federal government would not be liable absent an independent showing that it had been indifferent to warnings of the risk of violence. A claim for negligent hiring, training, and supervision could be pursued only with affirmative evidence that the government supervisors had prior knowledge of the employee's predatory behavior or had failed to conduct a background check to ensure the employee's suitability for the position. But this is important in itself, as the negligence theory "is premised upon the idea of improper employment," including the recognition that "the employer is in the best position to know the characteristics and risks associated with the job" and therefore has a "duty to hire with care."<sup>407</sup>

In this way, too, the FTCA would be brought into closer parallel with the same tort law standards that apply in the private sector, where claims of negligent hiring and supervision are recognized and commonplace.<sup>408</sup> Without the premise of a direct exception to federal liability for assault and battery, the rulings of a majority of federal courts that negligent hiring, training, and supervision claims are nothing more than disguised evasions of the exception could not stand.

For example, if the United States Postal Service employs a mail carrier known to have a history of driving while intoxicated, and if a plaintiff is injured when struck by a postal vehicle driven on the route by that mail carrier while intoxicated, the plaintiff plainly has a claim for the negligence in causing the accident and likely "for the negligence of [the mail carrier]'s superiors when it was foreseeable that he would again drive while intoxicated."<sup>409</sup> But if the Postal Service has previous knowledge of the mail carrier's proclivity to molest children and that employee "while driving on his mail route, stops to lure two children into his mail truck and rapes them," the government would "escape[] liability" in most federal courts today because

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406. *Bennett v. United States*, 803 F.2d 1502, 1502–03 (9th Cir. 1986); *see also* *Stout v. United States*, 721 F. App'x 462, 470 (6th Cir. 2018) (holding that the discretionary function exception did not bar a veterans hospital plaintiff's claim that other employees witnessed a sexual assault by a nurse because agency directives and state law imposed a mandatory "duty not open to the discretion attendant to policy decisions").

407. Jamie Lake, Note, *Screening School Grandparents: Ensuring Continued Safety and Success of School Volunteer Programs*, 8 ELDER L.J. 423, 452 (2000); *see also* *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 913–14 (Minn. 1983) (recognizing that the employer making the hire must consider the job description, whether the employee will have access to home or office, or whether the employee may establish a relationship with a person).

408. *See* *Midwest Knitting Mills, Inc. v. United States*, 950 F.2d 1295, 1298 (7th Cir. 1991) ("The tort of negligent supervision of employees enjoys a secure position in the mainstream of American common law.").

409. Benedetto, *supra* note 160, at 264 n.164.

that negligent hiring or supervision claim would be held barred by the assault-and-battery exception.<sup>410</sup> Repeal of the assault-and-battery exception would overturn that anomalous and unjust result.

## V. CONCLUSION

President Abraham Lincoln argued that “[i]t is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.”<sup>411</sup> Through a muddle of anachronistic federal statutes and congressional inattention to changes in tort law doctrine over several decades, we have arrived at the disgraceful state of legal affairs under which employees of the federal government committing the most egregious acts of personal invasion against others may be held immune from liability, while the sovereign United States also holds itself unanswerable.

The federal government has played a leading role in confronting sexual exploitation in the marketplace and in education, as well as encouraging unabridged remedies for the victims of sexual assault. But the sovereign United States declares itself exempt from liability in tort for sexual assault and battery by its own agents. And by perverse operation of federal employee immunity statutes in unanticipated intersection with changes in state law on employer responsibility, the individual federal worker who engages in a sexual attack while on the job is protected by the federal government from any personal responsibility to compensate the victim.

Only Congress can now bridge this chasm in accountability for sexual assaults by agents of the United States. By revising the Federal Tort Claims Act to repeal the exclusion of claims for assault and battery and by clarifying the reach of other statutes that were not designed to exclusively and fully address harm from physical sexual misconduct, the federal government will hold itself accountable as well in the battle against sexual violence.

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<sup>410.</sup> *Id.*

<sup>411.</sup> CONG. GLOBE, 37th Cong., 2d Sess., App. 2 (1862).

## ADDENDUM:

## TEXT OF PROPOSED “FEDERAL SEXUAL ASSAULT ACCOUNTABILITY ACT”

An Act entitled the Federal Sexual Assault Accountability Act,

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That—*

SEC. 1. Section 2680(h) of title 28, United States Code, is amended by striking out the words “assault, battery,” in the first sentence, and inserting at the end of the section the following: “Further provided, That, a sexual assault or sexual battery on a military servicemember shall not be regarded as incurred incident to service.”

SEC. 2. Section 2000e-16 of title 42, United States Code, is amended by inserting at the end of subsection (c) the following: “The remedy for personal injury arising from a sexual assault or sexual battery or negligent failure to prevent a sexual assault or sexual battery that is cognizable under chapter 171 of Title 28 is not preempted by other remedies available by law under this subchapter.”

SEC. 3. Section 8116 of title 5, United States Code, is amended by inserting at the end of subsection (c) the following: “The remedy for personal injury arising from a sexual assault or sexual battery or negligent failure to prevent a sexual assault or sexual battery that is cognizable under chapter 171 of Title 28 is not preempted by other remedies available by law under this subchapter.”