THE PECULIAR OBSTACLES TO JUSTICE FACING FEDERAL EMPLOYEES WHO SURVIVE SEXUAL VIOLENCE

Gregory C. Sisk[*]

The survivor of sexual violence in the federal workplace faces peculiar obstacles to remedial justice in court.

When any plaintiff brings a tort claim against the United States for intentional harm by a federal employee, the Federal Tort Claims Act ("FTCA") expressly excludes liability for "[a]ny claim arising out of assault [or] battery."[1] *That exception, however, is itself subject to exception and is of doubtful continuing legitimacy. For example, the United States remains liable under some circumstances for negligent failure to prevent an assault or battery. As another example, the FTCA expressly permits claims for assault or battery committed by a federal law enforcement officer. Moreover, the assault-and-battery exception has been partially and now should be wholly repealed. But even if the exception can be avoided for others, the federal employee still is left without tort relief.*

First, most federal courts have held that employment discrimination statutes provide the exclusive remedy for sexual misconduct occurring in the workplace, despite the absence of any support for that result in the text of the statutes. Second, the United States insists that the federal workers' compensation statute is the exclusive remedy, even for workplace injuries imposed by intentional coworker misconduct. Third, the young women and men of the armed services who survive sexual assault are locked out of the courthouse by the judicially implied Feres doctrine, which holds that a service member injured incident to service is barred from bringing an action against the United States under the FTCA.

While those who work for the federal government, like any private sector worker, are at risk for an accidental injury on the job, the employee who is sexually attacked by a coworker should not be treated as the inci-

* Laghi Distinguished Chair in Law, University of St. Thomas School of Law (Minnesota) (gcsisk@stthomas.edu). For generously reviewing earlier drafts, I thank Jeffrey Axelrad, Paul Figley, James Pfander, and Thomas Wall. I also benefited from and appreciated the generosity of participants in faculty workshops at the University of Iowa College of Law, the University of Minnesota Law School, the Antonin Scalia Law School at George Mason University, and the University of St. Thomas School of Law. I thank my research assistants, Lee Bennin, Maggie Owen, and Shana Tomenes for background research on the hundreds of reported cases on the assault-and-battery liability of the United States.

1. Federal Tort Claims Act, 28 U.S.C. § 2680(h) (2018).

dental victim of a work-related injury and subjected to routine compensation benefits that are not designed for the unique harm caused by sexual violence. To hold the federal government fully accountable for sexual assault, Congress should ensure that federal employees—both civilian and military—when sexually assaulted by a federal employee may seek appropriate judicial relief in the form of damages under the traditional law of torts.

TABLE OF CONTENTS

I. INTRODUCTION

No single federal government sector has generated more incidents of or more controversy about sexual violence than the armed services.[2] From the notorious Tailhook convention to ongoing controversies about sexual assault at the military academies, scandals about sexual predators in military uniforms have drawn considerable public and congressional attention.[3] For 2016, the Department of Defense reports that a staggering 4.3% of women serving in the military had been sexually assaulted—in that year alone.[4]

And yet, the young women and men of the armed services who have survived rape, groping, or sexual assault find the doors of the courthouse closed tightly and indeed securely locked against them. The name of that lock is the *Feres* doctrine, which holds that a service member injured incident to service is barred from bringing an action against the United States under the Federal Tort Claims Act ("FTCA").[5]

Consider the following hypothetical:[6] Private Angela Anderson, an eighteen-year-old who joined the Army right out of high school, began to receive unusual attention from her drill instructor, Sergeant Billy Brady, age thirty-five, beyond the grueling and in-your-face scrutiny ordinarily given to new recruits during basic training. He often kept her after training exercises and took her back to his office for what he called "personal remedial training." At one such session, when no one else was present, Sgt. Brady suddenly grabbed Pvt. Anderson and kissed her. Shocked, Pvt. Anderson sat quietly and did not respond. Sgt. Brady then started to undress her and, when she began to object, forced himself sexually on Pvt. Anderson.

Pvt. Anderson reported the episode to superior officers but heard nothing further. She subsequently learned from others on the base that Sgt. Brady had previously been disciplined by the Army for inappropriate and unduly familiar comments made to another female recruit and had been counseled that he should avoid being alone with female service members.

2. *See, e.g.*, Thomas Gibbons-Neff, *Reports of Sexual Assault in the Military Rise by 10 Percent, Pentagon Finds*, N.Y. TIMES (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/us/politics/sexual-assault-reports-military-increase.html (discussing increase in reports of sexual violence in the United States military).

3. U.S. COMM'N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 2 (2013).

4. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 9 (2016).

5. *See* Feres v. United States, 340 U.S. 135, 138–39 (1950).

6. Although this hypothetical is fictional, reported cases involving abusive episodes inside the military or involving military recruiters are legion. *See, e.g.*, Doe v. Hagenbeck, 870 F.3d 36, 38–40 (2d Cir. 2017); Gallardo v. United States, 755 F.3d 860, 862–63 (9th Cir. 2014); Olsen v. United States, 144 F. App'x 727, 728–29 (10th Cir. 2005); Leleux v. United States, 178 F.3d 750, 752–53 (5th Cir. 1999); Garcia v. United States, 776 F.2d 116, 116–17 (5th Cir. 1985); Walling v. United States, No. 1:13CV78 SNLJ, 2013 WL 6885274, at *1–2 (E.D. Mo. Dec. 31, 2013); Klay v. Panetta, 924 F. Supp. 2d 8, 10–11 (D.D.C. 2013), *aff'd*, 758 F.3d 369 (D.C. Cir. 2014); Pittman v. United States, No. 5:10-CV-517-BO, 2012 WL 113568, *1–2 (E.D.N.C. Jan. 13, 2012); Doe v. Hagee, 473 F. Supp. 2d 989, 992–93 (N.D. Cal. 2007); Bartley v. U.S. Dep't of the Army, 221 F. Supp. 2d 934, 937–38 (C.D. Ill. 2002); Lilly v. United States, 141 F. Supp. 2d 626, 627 (S.D.W. Va. 2001), *aff'd*, 22 F. App'x 293 (4th Cir. 2001); Shiver v. United States, 34 F. Supp. 2d 321, 322 (D. Md. 1999); Pottle v. United States, 918 F. Supp. 843, 845 (D.N.J. 1996).

Let's say that Pvt. Anderson timely filed an administrative claim[7] with the United States Army and then brought a FTCA suit in federal court against the United States. She alleged (1) the government was liable for a battery by its agent, and (2) the Army had negligently retained Sgt. Brady as a drill instructor and negligently failed to supervise him by allowing him to meet privately with female recruits. The United States moves to dismiss.

How will the court rule on Pvt. Anderson's case? Sadly, a favorable outcome is probably foreclosed under the current state of the law. First, the straightforward claim for assault and battery will be quickly tossed out under the FTCA's express exception from liability for "[a]ny claim arising out of assault [or] battery."[8] Second, following the case-law in most federal circuits, the negligent hiring and supervision claim likely will be dismissed as an attempted end-run around the assault-and-battery claim.[9]

The dismissal of such claims under the assault-and-battery exception to the FTCA is hardly unique to the military setting. The assault-and-battery exception and its broad application by the courts to related negligent hiring and supervision claims is a general bar to any claimant subjected to violence at the hands of federal agents.[10] As discussed in a companion article to this one,[11] this outdated statutory exclusion should be repealed.

The assault-and-battery exception, however, is not the only barrier to justice for a federal employee who experiences a sexual assault or battery at the hands of another federal employee. The survivor of sexual violence in the federal workplace—military or civilian—faces peculiar obstacles unique to the federal employment context. Even if the FTCA's assault-and-battery exception were to be eliminated by statute, and even today when the exception can otherwise be avoided in certain cases,[12] the federal employee is still left without any tort relief.[13]

7. *See* 28 U.S.C. §§ 2401(b), 2675 (2018) (setting forth requirement of an administrative claim). *See generally* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 3.3(a) (2016).

8. Federal Tort Claims Act, 28 U.S.C. § 2680(h) (2018).

9. *See, e.g.*, Stout v. United States, 721 F. App'x 462, 467 (6th Cir. Jan. 12, 2018); CNA v. United States, 535 F.3d 132, 148–49 (3d Cir. 2008); Reed v. U.S. Postal Serv., 288 F. App'x 638, 639–40 (11th Cir. 2008); Billingsley v. United States, 251 F.3d 696, 698 (8th Cir. 2001); 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, 1031–34 (2d Cir. 1988).

10. *See* Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 103 IOWA L. REV. 6 (forthcoming 2018).

11. *See id.*

12. For example, the assault-and-battery exception is itself subject to an exception when the assailant is a law enforcement officer. Federal Tort Claims Act, 28 U.S.C. § 2680(h). *See infra* Section II.A. Moreover, the assault-and-battery exception does not bar a claim that the government had a general duty to protect or control the behavior of others (federal employees and nonemployees alike), such as may be imposed on the owner of property to which the public is invited or the custodian of a vulnerable person. *See* Sheridan v. United States, 487 U.S. 392, 401 (1988); Bodin v. Vagshenian, 462 F.3d 481, 495–97 (5th Cir. 2006).

13. *See infra* Section II.A.

First, because the incident occurred while Pvt. Anderson was in military employment,[14] her claims may be vulnerable to dismissal under precedents holding that employment discrimination statutes provide the exclusive remedy for sexual misconduct occurring in the workplace.[15]

Second, active service members in the armed forces are excluded from recovery for sexual and other assaults by the judicially implied *Feres* doctrine,[16] which removes the FTCA remedy for those injured incident to military service.[17] Justified as protecting military discipline from being undermined by litigation, the *Feres* doctrine leaves service members without any judicial recourse in tort when they are harmed by either the negligent or intentional wrongdoing of government actors while the service member is subject to military orders, on base, or acting on a military mission.[18]

If Pvt. Anderson followed up an unsuccessful FTCA suit by seeking personal liability from Sgt. Brady under pertinent state law, she might find that avenue closed as well. Under the Westfall Act,[19] a federal employee is immune from state tort liability for acts performed in the scope of employment. States have gradually expanded *respondeat superior* liability over the decades, making employers responsible under certain circumstances for even intentional wrongdoing by its employees. 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 thus able to invoke immunity under the Westfall Act from any state law liability. And that individual immunity persists, even when the United States avoids collective liability through exceptions to the FTCA. While Anderson might frame a claim against Sgt. Brady 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.

And so, we reach the repugnant result that no one is answerable to Pvt. Anderson—not the federal government whose own agent harmed her, nor the individual federal officer who perpetrated the sexual assault and battery.

14. *See infra* Section II.C. For uniformed personnel in the military, the central Title VII federal employment discrimination statute does not directly apply. Brown v. United States, 227 F.3d 295, 298–99 (5th Cir. 2000); Randall v. United States, 95 F.3d 339, 343 (4th Cir. 1996); Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978). Instead, a Military Discrimination Complaint System, established by Department of Defense regulation, articulates a prohibition on "discrimination based on race, color, religion, sex, national origin, mental or physical disability, or age," 32 C.F.R. § 191.4(e) (2017), which defines "sexual harassment" as a "form of sex discrimination," *id.* 191.3. Unlike Title VII, the military equal employment rules do not permit suit in court. Bartley v. U.S. Dep't of the Army, 221 F. Supp. 2d 934, 941 (C.D. Ill. 2002). In any event, the same arguments that justify Title VII preemption of related tort claims in the civilian context would presumably apply in the military context. *See infra* Section II.C.

15. *See, e.g.*, Mathis v. Henderson, 243 F.3d 446, 450–51 (8th Cir. 2001); Pfau v. Reed, 125 F.3d 927, 932–33 (5th Cir. 1997), *vacated*, 525 U.S. 801 (1998).

16. *See, e.g.*, Doe v. Hagenbeck, 870 F.3d 36, 44 (2d Cir. 2017); Klay v. Panetta, 924 F. Supp. 2d 8, 12–20 (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, 948–49 (C.D. Ill. 2002); Shiver v. United States, 34 F. Supp. 2d 321, 322 (D. Md. 1999).

17. *See* Feres v. United States, 340 U.S. 135, 146 (1950).

18. *See generally* SISK, *supra* note 7, at § 3.8(c).

19. 28 U.S.C. § 2679(b)(1) (2018).

The only solution to this perverse situation is a legislative one. Congress may start to bring order to the muddle of statutes and judicial rulings by repealing the assault-and-battery exception to the FTCA, as proposed in a companion article.[20] But for those who work for the federal government, removal of the assault-and-battery immunity for the government would only be a first step. Confusing judicially devised limitations on remedies for sexual assault in the federal employment and military contexts should be clarified in favor of a full tort remedy through the FTCA for assault and battery.[21]

II. THE OBSTACLES TO JUSTICE FOR FEDERAL EMPLOYEES SUFFERING SEXUAL VIOLENCE IN THE FEDERAL WORKPLACE

A. The General Obstacle of the Assault-and-Battery Exception and the Additional Peculiar Obstacles to Federal Employees Sexually Assaulted by Another Federal Employee

The FTCA bars assault and battery claims against the sovereign United States,[22] even if committed by an agent acting within the scope of most types of federal employment—that includes military recruiters, postal workers, and day-care 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.

As bad as this state of affairs is, and as urgent as a general legislative reform may be, it is even worse for a federal employee unfortunate enough to be the victim of sexual violence at the hands of another federal employee. Even if the assault-and-battery obstacle is overcome, other peculiar obstacles lay in the path to justice for a federal employee.

To begin with, the assault-and-battery exception does not always bar a claim, even one in which an act of violence by a federal agent is the gravamen of the harm.[23] Congress has carved out some claims of assault or battery, sexual or otherwise, as deserving of relief under the FTCA.[24] In addition, some forms of antecedent negligence—that is, negligence that allowed a violent episode to unfold—have been held to fall outside of the assault-and-battery exception.[25]

First, the Law Enforcement Proviso, inserted as an exception to the assault-and-battery exception, directs that, "with regard to acts or omissions of

20. *Id.* at 12.
21. *See infra* Sections III.B & C.
22. 28 U.S.C. § 2680(h) (2018).
23. *Id.* at 24.
24. *Id.* at 72.
25. *Id.* at 25.

investigative or law enforcement officers of the United States Government," the general waiver of sovereign immunity in the FTCA applies "to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."[26]

In *Millbrook v. United States*,[27] in which a federal prisoner alleged sexual assault by prison guards, 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.[28] 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."[29]

Second, an antecedent negligence claim may escape the strictures of the assault-and-battery exception when tort law imposes a general duty to protect or control the behavior of others (federal employees and nonemployees alike), such as may be imposed on the owner of property to which the public is invited or the custodian of a vulnerable person.[30] In *Sheridan v. United States*,[31] the 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.[32] Because the government employees at the Bethesda Naval Hospital allegedly had a duty under applicable state law to protect the public from dangers on the premises, the United States could be held liable for negligently allowing an off-duty, drunken service man to leave the hospital base with a loaded rifle and fire shots into a public street, injuring the plaintiffs in a passing car.[33] Thus, a claim for antecedent governmental negligence could proceed, notwithstanding an underlying episode of assault and battery.[34]

But neither of these paths around the assault-and-battery exception are available to the federal employee who is attacked in the federal workplace. Even if a federal employee who suffered sexual violence in the workplace could escape the FTCA exclusion of claims for assault and battery, most courts

26. 28 U.S.C. § 2680(h) (2018).

27. 569 U.S. 50 (2013).

28. *Id.* at 51, 57.

29. *Id.* at 56.

30. *See also* Stout v. United States, 721 F. App'x 462, 472 (6th Cir. 2018) (ruling that a patient made out "a colorable claim for negligent 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, 489 (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).

31. 487 U.S. 392 (1988).

32. *Id.* at 403.

33. *Id.* at 401.

34. *Id*. at 398–403.

have read Title VII of the Civil Rights Act of 1964[35] to bar an FTCA claim by making exclusive those remedies for employment discrimination.[36]

Moreover, workplace assaults may fall within the exclusive coverage of the Federal Employees Compensation Act,[37] which some courts have extended to sexual violence.[38]

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,[39] which removes the FTCA remedy for those injured incident to military service.[40]

B. Peculiar Obstacle 1: Treating Sexual Violence Claims as Falling Within the Exclusive Coverage of the Federal Employees Compensation Act

The Federal Employees Compensation Act ("FECA")[41] is the federal version of workers compensation for civilian employees of the United States and its departments and agencies. As the Supreme Court explained in *Lockheed Aircraft Corp. v. United States*,[42] the "FECA's exclusive-liability provision" embodies "the principal compromise—the '*quid pro quo*'—commonly found in workers' compensation legislation: Employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for legislation, but in return they lose the right to sue the Government."[43]

When it applies to a workplace injury, FECA unambiguously displaces the FTCA, by providing that the liability of the United States under FECA "with respect to the injury or death of an employee is exclusive."[44] Thus, if an assault or battery falls within the coverage of FECA—and the government insists that workplace violence does—FECA provides the only remedies against the federal government.[45] That the harm may have resulted from intentional wrongdoing rather than negligence or that a workers compensation schedule of payments may not adequately compensate the dignity harm caused by sexual violence still will not permit the injured party to resort to the FTCA.[46] As the Tenth Circuit held in *Tarver v. United States*,[47] "[i]f the Secretary determines

35. 42 U.S.C. §§ 2000e–2000e-17 (2018).

36. *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).

37. 5 U.S.C. §§ 8101–93 (2018).

38. *See* Mathirampuzha v. Potter, 548 F.3d 70, 73, 81 (2d Cir. 2008); Caesar v. United States, 258 F. Supp. 2d 1, 5 (D.D.C. 2003).

39. *See, e.g.*, Doe v. Hagenbeck, 870 F.3d 36, 44 (2d Cir. 2017); Klay v. Panetta, 924 F. Supp. 2d 8, 12–20 (D.D.C. 2013), *aff'd*, 758 F.3d 369 (D.C. Cir. 2014); Bartley v. U.S. Dep't of Army, 221 F. Supp. 2d 934, 937, 948–49 (C.D. Ill. 2002); Shriver v. United States, 34 F. Supp. 2d 321, 322 (D. Md. 1999).

40. *See* Feres v. United States, 340 U.S. 135, 138–39 (1950).

41. 5 U.S.C. §§ 8101-93 (2018). On FECA, see generally SISK, *supra* note 7, at 311–17.

42. 460 U.S. 190 (1983).

43. *Id.* at 193–94.

44. 5 U.S.C. § 8116(c) (2018).

45. *See* Mathirampuzha v. Potter, 548 F.3d 70, 72 (2d Cir. 2008).

46. *See* Saltsman v. United States, 104 F.3d 787, 789–91 (6th Cir. 1997).

47. 25 F.3d 900 (10th Cir. 1994).

the employee was injured in the performance of duty, the Secretary's decision is binding on the court, regardless of whether compensation is actually awarded, and the [FTCA] action must be dismissed."[48]

The United States has taken the position in court that, even aside from the assault-and-battery exception to the FTCA, employee-on-employee workplace torts are covered by FECA, which in turn precludes an FTCA action.[49] And the courts have agreed.[50] Thus, the survivor of sexual violence in the federal employment context may have a remedy in FECA, but not one designed to address the singular character and far-reaching consequences of sexual violence.

Because FECA as a workers compensation statute is poorly positioned to address the distinct harm of sexual violence, FECA exclusivity undermines full accountability to the victims of sexual assault or battery in the federal civilian workforce.[51] As Professor Jane Korn writes, "[w]hile all workers must accept some risks, the risk of being treated as a sexual object rather than as a worker is not one that we should have to accept."[52]

C. Peculiar Obstacle 2: Interpreting the Federal Employee Version of Title VII as Barring Alternative Sex Discrimination Claims Including FTCA Claims for Sexual Violence

There is no single federal employment discrimination statute, but rather "a patchwork of prohibitions and protections" found in several statutory schemes.[53] Title VII of the Civil Rights Act of 1964—which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin[54]—is the original, most comprehensive, and most litigated of these statutes.

When originally enacted in 1964, Title VII provided no judicial remedy for employment discrimination by the United States; indeed, the federal government is expressly excluded from the definition of employer covered by the nondiscrimination provisions.[55] In 1972, Congress expressly waived the sovereign immunity of the federal government for employment discrimination

48. *Id.* at 903. On the interaction between FECA and the FTCA, see generally Gregory C. Sisk, *Judicial Review of Personal Injury Claims by Federal Civilian Employees: Navigating Between the Shoals of FECA and the Crest of the FTCA*, 51 TORT TRIAL & INS. PRAC. L.J. 893 (2016).

49. *See* Brief for the United States at 3, 21, Millbrook v. United States, 569 U.S. 50 (2013) (No. 11–10362) (arguing that a broad construction of law enforcement officer for the Law Enforcement Proviso would not result in disparate treatment of employee violence when the co-employee was a law enforcement officer because such a workplace tort likely would be exclusively covered under FECA).

50. *See Mathirampuzha*, 548 F.3d at 85; Caesar v. United States, 258 F. Supp. 2d 1, 5 (D.D.C. 2003).

51. *See infra* Subsection III.B.1.

52. Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1418 (1993).

53. *See* MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 15 (7th ed., 2013).

54. 42 U.S.C. § 2000e-2 (2018).

55. 42 U.S.C. § 2000e(b) (2018) ("The term 'employer' . . . does not include . . . the United States [or] a corporation wholly owned by the Government of the United States . . . .").

claims falling under Title VII, but accomplished that purpose by adding a new and separate section of the statute, Section 717.[56]

In 1976, the Supreme Court held in *Brown v. General Services Administration*[57] that Congress intended through Section 717 "to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination."[58] For that reason, alternative remedies for federal civilian employment discrimination, under other statutes or procedures, did not survive the enactment of Section 717.[59] Because Congress believed that the enactment of the 1972 amendment would provide the only effective judicial remedy for government employees alleging employment discrimination, federal employees would not be permitted to make an end-run around the Title VII administrative claim process by invoking other possible remedies that permit plaintiffs to file a direct action in court.[60]

As Kristin Czubkowski rightly points out in an insightful student law review article, *Brown* did not consider the availability of tort remedies for distinct injuries, but rather sought to emphasize that a single remedy was now in place for employment discrimination.[61] Nonetheless, many federal Courts of Appeals have extrapolated *Brown* to exclude any tort remedy when the incident alleged by the plaintiff could also be stated as an employment discrimination claim.[62]

Both the Fifth and Eighth Circuits have ruled that "[w]hen the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim."[63] Although these cases involved sexual harassment, the rationale would appear to extend to sexual assault and battery as well.[64] For example, a "single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability."[65] By the reasoning of the Fifth and Eighth Circuits, then, because the "same set of facts" of

56. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111 (codified at 42 U.S.C. § 2000e-16) (2018).

57. 425 U.S. 820 (1976).

58. *Id.* at 828–29.

59. *See id.* at 825–29.

60. *Id.* at 832–33.

61. Kristin Sommers Czubkowski, Comment, *Equal Opportunity: Federal Employees' Right to Sue on Title VII and Tort Claims*, 80 U. CHI. L. REV. 1841, 1853, 1869 (2013).

62. 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); *see also* Mobley v. Donahoe, 498 F. App'x 793, 797 (10th Cir. 2012) (adopting the *Mathis* approach to preclude an FTCA claim in an employment discrimination context).

63. *Mathis,* 243 F.3d at 451; *Pfau,* 125 F.3d at 933. For further description of *Mathis* and *Pfau*, see Evan Feinauer, *Distinct Claims for Distinct Wrongs: The Preemption Treatment of "Highly Personal" Wrongs*, 2014 U. CHI. LEGAL F. 633, 645–48 (2014).

64. *See* Bergbauer v. Mabus, 810 F. Supp. 2d 251, 254, 260 (D.D.C. 2011) (citing *Mathis* and *Pfau* in holding that Title VII preempted an intentional infliction of emotional distress tort claim based on a supervisor's conduct in pushing his foot between plaintiff's legs under the table and kissing her on the mouth and forcing his tongue into her mouth).

65. Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 136 (2d Cir. 2001).

a rape would support both a Title VII and FTCA claim, the Title VII claim would supplant the FTCA claim.[66]

By contrast, the Ninth Circuit recognized that egregious sexual violence imposes "a wrong that was not just distinct from, but *more harmful* than discrimination."[67] In *Brock v. United States*,[68] the Ninth Circuit held that Title VII did not preempt an FTCA suit against the United States arising from a rape of a Forest Service employee by her supervisor during overnight field outings, which the court said amounted to a "highly personal violation" beyond the ordinary meaning of workplace discrimination.[69]

But even the Ninth Circuit has not kept the door open to FTCA tort remedies for all forms of sexual violence arising in the federal civilian workplace. In *Sommatino v. United States*,[70] the Ninth Circuit (over a dissent) held that a federal employee's allegations of "intentional touching" of her breasts and "sexually suggestive and vulgar remarks" by a coworker were "typical of the offensive workplace behavior giving rise to an action [under Title VII] to remedy a hostile work environment."[71] The court majority held that this offensive conduct was "not of the order of magnitude of the personal violation of rape in *Brock*" or "forced sexual assaults" such as kissing and fondling.[72]

Thus, sexually-motivated and unconsented touching accompanied by sexual threats—which plainly amounts to at least an assault and likely crosses the line into a battery under the law of torts[73]—are not always accepted as the premise for an FTCA action, even in the Ninth Circuit.

D. Peculiar Obstacle 3: Special Government Shield Against Sexual Assault Claims by Military Service Members

In one of its earliest FTCA decisions after enactment of the statute, the Supreme Court held unanimously in *Feres v. United States*[74] that claims raised

66. *See* Bartley v. U.S. Dep't of Army, 221 F. Supp. 2d 934, 939–40 (C.D. Ill. 2002) (holding Title VII provided the exclusive remedy and dismissing negligent failure to train and supervise claims by employees of an Army facility who alleged sexual violence including rape, sodomy, unwelcome touching, and threats of physical harm).

67. Czubkowski, *supra* note 61, at 1857.

68. 64 F.3d 1421 (9th Cir. 1995).

69. *Id.* at 1423–24; *see also* Jones v. Needham, 856 F.3d 1284, 1292 (10th Cir. 2017) (approvingly discussing *Brock*'s "highly personal" standard for allowing action on a tort claim separate from Title VII, but finding it inapplicable to the facts of the case). *Cf.* Kibbe v. Potter, 196 F. Supp. 2d 48, 69 (D. Mass. 2000) (holding that "highly personal causes of action . . . are not foreclosed by Title VII's exclusivity principle" in allowing a federal employee to bring an action against a coworker or other nonemployer defendant). *See generally* Robert M. Mahoney, Note, *Don't Discriminate Against Distinct or Highly Personal Harms: An Analysis of Section 717 of Title VII Pertaining to Preemption of Alternative Theories of Recovery by Federal Employees*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 310, 342–43 (2014) (approving of the Ninth Circuit's "highly personal harm" approach as allowing "remedies addressing the true nature of harm experienced by employees").

70. 255 F.3d 704 (9th Cir. 2001).

71. *Id.* at 712.

72. *Id.*

73. *See Sommantino,* 255 F.3d at 712; *see also Brock*, 64 F.3d at 1423–24.

74. 340 U.S. 135 (1950).

by military personnel for injuries sustained incident to service would be excluded altogether from tort remedies against the United States.[75] Nothing in the text of the FTCA removes military service members outside of its protection, although explicit exceptions, such as the combatant activities exception,[76] would preclude certain types of claims arising from distinctly military activity. Nonetheless, the Court in *Feres* and later in *United States v. Johnson*[77] reasoned that "the existence of . . . generous statutory disability and death benefits," which "'compare extremely favorably with those provided by most workmen's compensation statutes,'"[78] displaces tort remedies under the FTCA. The Court further opined that "[s]uits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."[79]

Precisely because the *Feres* bar to FTCA remedies was judicially implied, the exclusion of injured service members has been controversial from inception and its rationale continues to be debated in both the courts and among commentators.[80] Moreover, the meaning of "incident to military service"—which defines the scope of the exclusion—is frequently disputed, with the federal courts all over the map on the right analysis.[81]

The surviving rationales for the continuing vitality of the *Feres* doctrine are the compensation afforded to injured service members through the Veterans Benefits Act ("VBA")[82] and the concern that allowing suits involving conduct in a military context would undermine military discipline. Whatever the force of those arguments in other contexts, they are especially unpersuasive when applied to claims of sexual violence. Survivors of sexual violence in the mili-

75. *Id.* at 141–46.

76. 28 U.S.C. § 2680(j) (2018) (excluding "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war").

77. 481 U.S. 681 (1987).

78. *Id.* at 689–90 (quoting *Feres*, 340 U.S. at 159).

79. *Johnson*, 481 U.S. at 688–92. *But see id.* at 698 (Scalia, J., dissenting) (disputing the "later-conceived-of 'military discipline' rationale" as justifying judicial implication of an exclusion from the FTCA for military service members).

80. *Compare* 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, 89 (2003) (arguing that "[t]he *Feres* doctrine stands as one of the most extreme examples of judicial activism in the history of the Supreme Court") *with* Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 465 (2010) (challenging the characterization of *Feres* as "judicially created" and arguing that it correctly interpreted congressional intent for the FTCA). For a critique of the *Feres* doctrine, see generally SISK, *supra* note 7.

81. *Compare* Regan v. Starcraft Marine, LLC, 524 F.3d 627, 637 (5th Cir. 2008) (describing a "three-factor analysis for whether a service member's injury was incident to military service: (1) duty status, (2) site of injury, and activity being performed") *and* Purcell v. United States, 656 F.3d 463, 466 (7th Cir. 2011) (applying such traditional factors as occurrence in an "on-base residential building" while service member was "on active duty" and implicating military regulations and discipline) *with* Dreier v. United States, 106 F.3d 844, 852–53 (9th Cir. 1997) (articulating a case-by-case analysis under which "the most relevant line of inquiry is whether or not the service member's activities at the time of injury are of the sort that could harm the disciplinary system if litigated in a civil action"). On the meaning of "incident to service" for the *Feres* doctrine, see generally SISK, *supra* note 7.

82. *See generally* 38 U.S.C. §§ 101–4335 (2018).

tary will receive little or no benefit from the VBA unless they suffered a physical injury or have become psychologically disabled as a result.[83] As with workers' compensation generally,[84] the VBA is not designed to address this unique violation to personal dignity. And the excuse that military discipline will be unsettled by a claim of sexual violence is hard to accept because the military command *should* be unsettled when one of its own has been subjected to sexual degradation by another within that same community.

Nonetheless, the *Feres* doctrine has indeed precluded claims arising from sexual violence in the military. The *Feres* doctrine has operated as a bar to FTCA and constitutional tort claims by a growing list of complaint allegations, including women working at an Army base who suffered rape, sodomy, offensive touching, and threats of violence;[85] a service woman who had been raped by her drill sergeant;[86] a West Point cadet who was raped by a fellow student;[87] women serving in the Navy and Marines who had been raped and sexually assaulted by other service members;[88] and an Air Force service woman who was groped by an officer at a base party.[89] Although the *Feres* doctrine cannot plausibly be stretched to cover potential recruits who have not yet enlisted and certainly does not cover military dependents,[90] the bar on FTCA claims has been extended to students in the Reserve Officers Training Corps.[91]

Nor is a constitutional tort claim likely to be availing here. Now it surely cannot be disputed that sexual violation of another by a government agent crosses the constitutional line.[92] For those suffering sexual misconduct by other federal employees, the Fifth Amendment due process clause[93] should provide constitutional protection for bodily integrity,[94] and the Fifth Amendment's equal protection component extends to sexual violence that manifests gender

83. *Id.*

84. *See supra* Section II.B. and *infra* Subsection III.B.1.

85. Bartley v. U.S. Dep't of Army, 221 F. Supp. 2d 934, 937, 948–49 (C.D. Ill. 2002).

86. Shiver v. United States, 34 F. Supp. 2d 321, 322 (D. Md. 1999).

87. Doe v. Hagenbeck, 870 F.3d 36, 39–40, 44 (2d Cir. 2017). *But see id.* at 51 (Chin, J., dissenting) (arguing that, because the cadet was "not in military combat or acting as a soldier or performing military service," but was "simply a student," the injuries were not "incident to military service").

88. Klay v. Panetta, 924 F. Supp. 2d 8, 12–20 (D.D.C. 2013), *aff'd*, 758 F.3d 369 (D.C. Cir. 2014).

89. Corey v. United States, No. 96-6409, 1997 WL 474521, at *1, 3–5 (10th Cir. Aug. 20, 1997).

90. *See* Zimmerman *ex rel.* Zimmerman v. United States, 171 F. Supp. 2d 281, 289 (S.D.N.Y. 2001) (holding that the *Feres* doctrine barred individual claims by a military officer arising out of sexual assault of the officer's daughter by fellow officer, but did not bar claims on behalf of the daughter).

91. *See* Lovely v. United States, 570 F.3d 778, 783–84 (6th Cir. 2009); Brown v. United States, 151 F.3d 800, 805 (8th Cir. 1998); Wake v. United States, 89 F.3d 53, 58–59 (2d Cir. 1996).

92. *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.").

93. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

94. *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, 570 U.S. 744, 774 (2013) (saying that the Fifth Amendment "withdraws from Government the power to degrade or demean").

discrimination.[95] Nonetheless, the Supreme Court has largely closed off the constitutional tort avenue.[96]

With its 1971 decision in *Bivens v. Six Unknown Named Agents*,[97] the Supreme Court began a half-century experiment into judicial implication of constitutional tort remedies.[98] But in its 2017 decision of *Ziglar v. Abassi*,[99] the Court appeared to bring that experiment close to an end.[100] In *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.[101]

The extension of the *Bivens* cause of action to remedy a sexual assault or battery by a federal employee is especially doubtful in the military context, which has proven impervious to constitutional tort claims.[102] The courts have never recognized a *Bivens* remedy arising out of military activities.[103]

And this refusal has extended to claims arising from an epidemic of sexual violence within the military, which typically have been framed as a failure by military commanders to establish preventive policies and impose proper discipline.[104] In *Klay v. Panetta*, the District of Columbia Circuit assumed that the military service members who had survived rape by their fellow service members had no alternative remedy[105] and acknowledged that sexual violence obviously does not advance any military mission.[106] Nonetheless, the court declined to imply a *Bivens* remedy because "Congress is extensively engaged with the problem of sexual assault in the military but has chosen not to create such a cause of action."[107]

95. *See Windsor*, 570 U.S. at 774 ("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).

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

97. 403 U.S. 388 (1971).

98. *Id.* at 390–92.

99. 137 S. Ct. 1843 (2017).

100. *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*. . . .").

101. *Abassi*, 137 S. Ct. at 1857.

102. *See* United States v. Stanley, 483 U.S. 669, 684 (1987); Chappell v. Wallace, 462 U.S. 296, 304 (1983). *See generally* SISK, *supra* note 7, § 5.7(c)(6).

103. Cioca v. Rumsfeld, 720 F.3d 505, 510 (4th Cir. 2013).

104. *See* Klay v. Panetta, 758 F.3d 369, 376 (D.C. Cir. 2015); *Cioca*, 720 F.3d at 516; *see also* Doe v. Hagenbeck, 870 F.3d 36, 39–40, 44–49 (2d Cir. 2017) (reversing the district court's recognition of a *Bivens* claim for an equal protection violation by a military cadet who alleged a rape by another cadet and discriminatory policies regarding sexual assaults and prevention programs affecting equal education in the military academy).

105. 758 F.3d at 373.

106. *Id.* at 374–75.

107. *Id.* at 376.

III. PROPOSED "FEDERAL SEXUAL ASSAULT RESPONSIBILITY ACT"

A. Repeal of the Federal Tort Claims Act's Assault-and-Battery Exception

Congress should complete a process that began 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. 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, and whether the victim is a federal employee or not.

As addressed in detail in the companion article,[108] a greater appreciation that responsible employers must be held accountable for employment-related misconduct by their own employees, together with the social justice need to hold someone accountable to the victim for a sexual assault, mandate legislative change.

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): "Any claim arising out of ~~assault, battery,~~ false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[109]

For federal employees—civilian or military—a repeal of the assault-and-battery exception is only the start of a necessary reform process. The peculiar obstacles facing those who encounter sexual violence in the federal workplace need specific attention, as discussed further below.

B. Clarification That FECA and Title VII Do Not Preempt Tort Liability for Sexual Assault

"Rape is not a risk inherent or necessary to the workplace environment."[110]

FECA[111] was designed to address workplace accidents, not to compensate for sexual violence.[112] Rape, sexual contact, and sexual assault by a supervisor or co-employee are hardly accidental and are not adequately compensated by the schedule of payments for ordinary physical injuries.[113]

108. *See generally* Sisk, *supra* note 10.

109. 28 U.S.C. § 2680(h) (2018) (strikethrough alteration added).

110. 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, 97 (2000); *see also* Korn, *supra* note 52, at 1388 (explaining that sexual violence "must be recognized as an injury different kind from those contemplated by workers' compensation statutes").

111. *See supra* Subsection II.B.1.

112. *See* Korn, *supra* note 52, at 1418.

113. *See supra* Subsection II.B.1.

Title VII as applied to federal workers[114] falls short of a fully compensatory regime for sexual violence. Even with augmented remedies, which apply more fully in the private sector, Title VII is principally a remedy for the employment-related consequences of gender discrimination.[115] Especially in the case of the federal government, Title VII does not admit to the full range of damages that would be available in a private sector action to remedy such an outrage as sexual violence in the workplace.[116]

Only by a tort remedy may the dignitary harm, psychological harms and reactions, emotional distress, pain and suffering, loss of enjoyment of life, and other harms from sexual violence, both disabling and nondisabling be fully compensated.

1. Revising FECA's Exclusivity Provision to Permit Tort Claims Arising Out of Sexual Assault and Battery

Traditionally and still in many jurisdictions today, sex-based misconduct—including sexual violence—in the private workplace has been covered under state workers compensation statutes, depending on whether the assault is regarded as sufficiently arising from the employment.[117] In such cases, the schedule of workers compensation payments becomes the exclusive remedy, precluding a tort suit against the employer.[118] In holding a tort claim by a rape survivor against her former employer to be "barred by the exclusivity provision of the workers' compensation act," one court expressly rejected the argument that sexual assault is different because it is "not a 'normal risk' of employment."[119] Instead, the court said, we should look to "the nature of the claim," that is, whether the injury arose out of and in the course of employment, "not the source of the injuries."[120] Under this view, as said by another court, "a rape

114. *See supra* Section II.C.

115. *See supra* Section II.C.

116. *See supra* Section II.C.

117. Martha S. Davis, Note, *Rape in the Workplace,* 41 S.D. L. REV. 411, 426–27 (1996) ("A majority of state and federal courts hold that rape or other sexual assault on the job is covered by worker's compensation, and thus the doctrine of exclusivity prohibits tort recovery for the raped worker."); *see, e.g.*, Truman Arnold Cos. v. Miller Cty. Cir. Ct., 513 S.W.3d 838, 839, 842 (Ark. 2017) (holding the workers' compensation remedy is exclusive and dismissing a negligent hiring, supervision, and retention claim against the employer by an employee who was sexually assaulted by the manager of the convenience store); Tolbert v. Martin Marietta, 759 P.2d 17, 25–26 (Colo. 1988) (holding workers compensation was the exclusive remedy for an employee raped by a coworker in the cafeteria); Rathbun v. Starr Commonwealth for Boys, 377 N.W.2d 872, 874, 876 (Mich. Ct. App. 1985) (dismissing a claim against the employer for negligently hiring a worker with a criminal sex offender record who raped her at work and holding the exclusive remedy was workers compensation).

118. Korn, *supra* note 52, at 1369 ("The argument that workers' compensation is the exclusive remedy prevails about half the time, resulting in dismissal of the plaintiff's tort claim."); Giampetro-Meyer, Browne & Maloy, *supra* note 110, at 75 (explaining that rape victims frequently are prevented from bringing a tort suit because of workers compensation exclusivity doctrine).

119. Doe v. Purity Supreme, Inc., 664 N.E.2d 815, 818–19 (Mass. 1996) (quoting with disapproval Korn, *supra* note 52, at 1384–89).

120. *Id.* at 819.

victim stands in precisely the same posture as a robbery victim in the establishment of a causal connection between her employment and the injury."[121]

Increasingly, however, both scholars and courts are appreciating that when "rape occurs in the workplace," the law should not "respond to such trauma as if it is just another slip and fall case in slightly different garb."[122]

While any sexual assault or battery is an instance of violence, Martha Davis thoughtfully asks in a student law review note "whether that violence creates physical injury in the worker's compensation sense."[123] In contrast with other injuries occurring in the workplace, rape, sexual battery, and sexual assault are not "accidents" arising out of employment.[124] Moreover, in terms of remedy, the workers compensation scheme focuses primarily on medical expenses and loss of earning power.[125] It is not designed to fully compensate for the "invisible injuries" of rape victims, which include emotional distress, depression, anxiety, social withdrawal, cognitive impairment, and disruptive behavior.[126] Professors Andrea Giampetro-Meyer, M. Neil Browne, and Kathleen Maloy rightly conclude that "the long-term physical, physiological, and life-altering consequences of rape" demand damages, such as through "the option of tort remedy."[127]

Likewise, some courts are "refus[ing] to say that the risk of . . . physical abuse of a sexual nature"[128] is connected to the workplace and are beginning to appreciate that sexual violence is not "susceptible to a neat compensatory formula"[129] under the workers compensation regime. At least one state has amended its workers compensation statute to add an express exception to exclusivity for claims related to sexual assault.[130] As the Florida Supreme Court said in holding that the workers compensation exclusivity rule did not bar tort claims against the employer by female employees who suffered repeated sexual

121. Shutters v. Domino Pizza, Inc., 795 S.W.2d 800, 803 (Tex. App. 1990) (citing Commercial Standard Ins. v. Marin, 488 S.W.2d 861, 868–69 (Tex. App. 1972)).

122. Giampetro-Meyer, Browne & Maloy, *supra* note 110, at 69.

123. Davis, *supra* note 117, at 424.

124. Korn, *supra* note 52, at 1393–1406.

125. *See id.* at 1368–69.

126. Giampetro-Meyer, Browne & Maloy, *supra* note 110, at 72, 89. On the effects of a rape as "very different from the effects of a more common workplace injury," see generally *id.* at 87–94.

127. *Id.* at 95.

128. Kennedy v. Pineland State Bank, 439 S.E.2d 106, 107 (Ga. Ct. App. 1993) (holding workers compensation was not exclusive remedy for bank employee sexually assaulted by a company director in the bank vault).

129. Kerans v. Porter Paint Co., 575 N.E.2d 428, 430–31 (Ohio 1991) (holding workers compensation was not the exclusive remedy where a store manager "touched [employee's] breasts without her consent, put his hand up her dress against her will, forced her to touch his genitalia, exposed himself to her in a back room, and finally appeared naked before her and requested that she watch him masturbate.").

130. HAW. REV. STAT. § 386-5 (2017).

> The rights and remedies herein granted to an employee . . . on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee . . . , except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought.

Id.

touching by male co-employees, these batteries did not involve "wage loss or workplace injury, but an unlawful intrusion upon personal rights."[131]

In line with the trend recognizing that "[t]here is a distinct difference between rape [and sexual assault and battery] and other workplace injuries,"[132] FECA should be revised to clarify that the particular harm of sexual violence may more appropriately and completely be addressed through a tort claim under the FTCA. Section 8116 of Title 5, United States Code, would be 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." This language would allow both a direct assault and battery claim when the assailant was acting within the scope of employment and a negligent hiring, training, or supervision claim when the federal employer failed to act with reasonable care to prevent the sexual assault or battery.

2. Revising Title VII to Confirm NonDisplacement of Tort Claims Arising Out of Sexual Assault and Battery

While Title VII has evolved to provide a more robust remedy for the dignitary and emotional harm from sexual violence,[133] it remains an employment-related provision designed specifically to address discrimination in the conditions of employment. In the private sector, a plaintiff may seek both employment discrimination remedies (including punitive damages when suffering intentional discrimination) and damages under common-law tort actions.[134] Both of those options may be foreclosed to a federal government employee who survives sexual violence, absent clarification in the statute.

In the private sector, the Supreme Court has long agreed that Title VII is not an exclusive remedy but rather is intended to "supplement rather than supplant" other available remedies.[135] Moreover, Title VII has been revised to strengthen remedies for "unlawful intentional discrimination" by providing for recovery of both compensatory damages and punitive damages if the employer engaged in a discriminatory practice "with malice or reckless indifference" to

131. Byrd v. Richardson-Greenshields Sec., Inc., 552 So.2d 1099, 1104–05, 1104 n.8 (Fla. 1989); *see also* King v. Consol. Freightways Corp., 763 F. Supp. 1014, 1017 (W.D. Ark. 1991) (citing *Byrd* and concluding Arkansas would follow Florida approach); Estate of Underwood v. Nat'l Credit Union Admin., 665 A.2d 621, 635 (D.C. 1995) (quoting *Byrd* and agreeing that an employee's claim for emotional distress based on sexual advances by a coworker that included angry yelling and humiliation is not barred); Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1005 (N.M. 1999) (citing *Byrd* and concluding that sexual harassment is not an "accident" within exclusive coverage of workers compensation).

132. Giampetro-Meyer, Browne & Maloy, *supra* note 110, at 88.

133. *See* Czubkowski, *supra* note 61, at 1879 (referring to "[t]he relatively late recognition that Title VII remedied psychological as well as economic harms from discrimination, particularly in the form of sexual harassment claims"); Davis, *supra* note 117, at 444 (noting "the enactment of the Civil Rights Act of 1991 and its provision for compensatory and punitive damages for individual discrimination.").

134. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974).

135. *Id.*; *see also* Czubkowski, *supra* note 61, at 1851–52.

the plaintiff's rights.[136] By allowing actions against both the employer for gender discrimination under Title VII *and* against an offending coworker for common-law assault and battery, and further allowing enhanced remedies like punitive damages, private sector employees may obtain more comprehensive relief for sexual violence in the workplace.

Federal civilian employees, however, are restricted by many courts to Title VII as the exclusive remedy whenever the same facts would support both a claim of discrimination and a common-law tort.[137] And the statutory provision for punitive damages for malicious or reckless indifference contains an exception for "a government, government agency or political subdivision."[138] Thus, two of the most powerful remedies available to survivors of workplace sexual violence are denied to those who have the misfortune of serving the federal government.

To address this sad state of affairs, Title VII should be revised to expressly recognize that employment discrimination and sexual violence, while arising from the same facts, are distinct in the nature of the harm caused. As the Ninth Circuit said in *Brock v. United States*,[139] "[r]ape *can be* a form of sexual discrimination, but we cannot say to its victims that it is nothing more."[140] Likewise, another court observed that "[a]ssault, for example, is actionable apart from Title VII because it is beyond the meaning of discrimination."[141] In *Brown v. General Services Administration*,[142] the Supreme Court established Title VII as the exclusive remedy for employment discrimination suffered by federal employees.[143] But as a district court recognized shortly after *Brown*, a plaintiff experiencing outrageous sexually-motivated conduct on the job should be able to seek remedies for "two distinct and independent rights: her right to be free from discriminatory treatment at her jobsite and her right to be free from bodily or emotional injury caused by another person."[144]

The Ninth Circuit in *Brock* was on the right track in appreciating that the distinct and "highly personal" harm of rape cannot be captured comprehensively in a Title VII employment discrimination claim.[145] The subjective "highly

136. 42 U.S.C. § 1981a(a)(1), (b)(1) (2018).

137. *See supra* Section II.C.

138. 42 U.S.C. § 1981a(b)(1). Admittedly, even if a federal employee could make resort to the Federal Tort Claims Act, punitive damages are unavailable as well under that statutory waiver of the sovereign immunity of the United States. *See* 28 U.S.C. § 2674 (2018) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."). On the exclusion of punitive damages from the FTCA, see generally SISK, *supra* note 7, § 3.7(c). That exclusion, however, is mitigated in part by the compensatory purpose of the FTCA in supplying a robust remedy for injuries under the common law of tort.

139. 64 F.3d 1421 (9th Cir. 1995).

140. *Id.* at 1423.

141. Boyd v. O'Neill, 273 F. Supp. 2d 92, 96 (D.D.C. 2003).

142. 425 U.S. 820, 828–33 (1976).

143. *Id.* at 834–35.

144. Stewart v. Thomas, 538 F. Supp. 891, 895 (D.D.C. 1982); *see also* Czubkowski, *supra* note 61, at 1855.

145. *Brock*, 64 F.3d at 1423–24.

personal" rubric, however, has proven uneven at best in addressing the problem of sexual assault,[146] as even the Ninth Circuit has treated sexually-motivated touching as sometimes ineligible for tort remedies beyond Title VII.[147] To design a more objective standard and put the matter on more solid legal grounding, the question of the reach of Title VII should be defined in terms of the appropriate common-law remedy for sexual violence.[148]

Accordingly, to be both clear and modest in proposal, Title VII, as applicable to federal employees, should be clarified as nonexclusive in the precise context of sexual assault and sexual battery. Thus, whether or not a Title VII employment discrimination claim is also raised, a federal employee who experiences a sexual assault or battery at the workplace would be free to present a direct assault and battery claim (assuming the assailant acted within the scope of employment) or a claim of negligent hiring, training, and supervision under the FTCA.

To accomplish this purpose, Section 2000e-16 of Title 42, United States Code, should be 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."

Importantly, sexual harassment that creates a discriminatory hostile work environment, but does not rise to the level of a common-law assault and battery cognizable under the FTCA would still be subsumed within Title VII. As Kristin Czubkowski writes, Title VII should be exclusive for claims of employment discrimination by federal employees, including those claims however framed that are "the functional equivalent of an employment discrimination or sexual harassment claim."[149] A claim based solely on harassing words in the workplace that does not create an apprehension of an unwelcome touching (that is, a sexual assault) is not likely to be actionable under the common law of tort that applies under the FTCA in any event. As Czubkowski observes, "[s]exual harassment is not a separate tort, so the employer's liability would derive exclusively from Title VII rather than tort law."[150]

Of course, going back again to the first and foremost obstacle, revision of Title VII and FECA to avoid supplanting a common-law tort remedy for federal employees surviving sexual assault or battery will take us nowhere if Congress

146. *See* Feinauer, *supra* note 63, at 650 ("One key concern with the vagueness of the 'highly personal' standard is that even competent judges intent on policing the boundaries of federal preemption doctrine will struggle to develop a consistent and principled approach.").

147. *See* Sommatino v. United States, 255 F.3d 704, 712 (9th Cir. 2001).

148. *See id.* at 713 (Reinhardt, J., concurring in part and dissenting in part) (arguing that a more "principled line" would be to evaluate whether a claim meets the standard for an assault under common law); Feinauer, *supra* note 63, at 656 ("A legal standard that clarifies when there are two wrongs—and thus, when two claims should be allowed—would be both more predictable and more administrable.").

149. Czubkowski, *supra* note 61, at 1881.

150. *Id.*

does not also remove the obstacle of the assault-and-battery exception in the FTCA.[151]

C. Clarification That the Feres *Doctrine Does Not Preclude a Claim Arising from Sexual Assault or Battery*

Advancing the proposition that sexual violence survivors in the military deserve full compensation should not become bogged down in morass of the *Feres* doctrine. Providing a tort remedy for this distinct harm does not force us to join either side of the ongoing debate about whether the judicially implied exclusion of military service members from the Federal Tort Claims Act is justified as a matter of proper statutory interpretation or moral and prudent public policy.[152] Whatever the justifiability of the *Feres* doctrine in application to regular military chain-of-command matters, the United States government and military commanders should not be heard to suggest that suffering rape or sexual assault is a mere incident of military service. The brave men and women serving their country in our armed forces should never endure sexual degradation or be told that full compensation for that wrongdoing must be denied to protect military discipline.

With that in mind, a modest revision of 28 U.S.C. § 2680(h) should clarify that "a sexual assault or sexual battery on a military service member shall not be regarded as incurred incident to service."

This proposal would neither overturn *Feres* in other contexts nor interfere with permissible discretionary decisions within the military chain of command. With the removal of the assault-and-battery exception, and clarification that suffering a sexual assault or battery is not incident to service, service members suffering sexual violence would be able to sue the United States directly for assault and battery under the FTCA when the assailant was acting within the scope of military employment. And, yes, the victimized service member would also be permitted to assert negligence by military officials in failing to take reasonable steps to prevent sexual violence.

To the extent that questions of military recruitment, supervision, and discipline raised in such case would implicate military policy, judicial examination of those actions would still be precluded by application of the discretionary function exception to the FTCA, which remains untouched by this proposal. 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 involved be

151. *See* Griego v. United States, No. EP-99-CA-164-DB, 2000 WL 33348763, at *2–7 (W.D. Tex. June 2, 2000) (ruling that a federal employee's FTCA claim that a coworker fondled her breasts (1) was not covered by FECA because she alleged mental anguish and emotional distress rather than physical injury, and (2) was not barred by Title VII exclusivity because the plaintiff raised no Title VII violation, but (3) had to be dismissed because of the assault-and-battery exception to the FTCA).

152. *See supra* Section II.C.

abused."[153] 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."[154]

While the discretionary function exception would impact many, perhaps most, claims for negligent hiring, training, and supervision, the government cannot invoke that exception when the decision or action challenged as a failure of due care was not an exercise of discretion. As the Supreme Court has held, the "discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[155]

Importantly, this specific-prescription limitation on assertions of unreviewable discretion by the military would provide a crucial means of enforcing congressional mandates on the problem of sexual assault in the military, which many contend are regularly ignored or grudgingly and incompletely obeyed by military commanders.[156] Professor and military expert Victor Hansen contends there remains a "leadership culture" which discourages "fully investigating and clearly identifying the command failings which may have contributed to the under-detection of these sexual assault crimes."[157] The Government Accountability Office reports that sexual assault prevention efforts are ineffective because they receive "limited support from commanders."[158]

As an important example of clear congressional direction, the 2014 National Defense Authorization Act[159] included several reforms to address the problem of sexual violence in the military,[160] many of which impose nondiscretionary duties. Commanders are forbidden to overturn guilty verdicts for serious offenses or reduce a verdict to a lesser sentence.[161] A commanding officer must immediately refer a reported sexual assault to the appropriate investigative service.[162] If a commander declines to refer charges in a sexual assault case, the case must be reviewed by a superior.[163] Commanders must conduct

153. 28 U.S.C. § 2680(a) (2018). On the discretionary function exception, see generally SISK, *supra* note 7, § 3.6(b).

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

155. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

156. Statement of Victor Hansen, Professor, New England School of Law, quoted in U.S. Commission on Civil Rights, Sexual Assault in the Military 15 (Sept. 2013).

157. *Id.*

158. U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: DOD'S AND THE COAST GUARD'S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS NEED TO BE FURTHER STRENGTHENED 2 (2010), http://www.gao.gov/products/GAO-10-405T.

159. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

160. *See* Ed O'Keefe, *Congress Approves Reforms to Address Sexual Assault, Rape in Military*, WASH. POST (Dec. 19, 2013), https://www.washingtonpost.com/politics/congress-poised-to-approve-reforms-to-address-sexual-assault-rape-in-military/2013/12/19/bbd34afa-68c9-11e3-a0b9-249bbb34602c_story.html?noredirect=on&utm_term=.a087dd7e9da3.

161. National Defense Authorization Act § 1702(a)(1).

162. *Id.* § 1742.

163. *Id.* § 1744.

climate assessments, which must be tracked.[164] Retaliation against anyone who reports a sexual assault is expressly prohibited.[165] And the military may not enlist anyone who is a convicted sex offender.[166]

If a plaintiff bringing a claim under the FTCA arising out of a sexual assault or battery in the armed forces were to demonstrate that these legislative mandates were not followed, the government would lose the protection of the discretionary function exception.[167] And, in this valuable way, the specific directive of statutes passed by Congress to arrest the scourge of sexual assault in the military would be given sharper teeth.

D. The Proposed Exceptions to Exclusivity of FECA and Title VII and to the Feres *Bar as Defined for Sexual Assault and Battery*

As stated above[168] and described further in the companion article,[169] the best approach to providing just compensation in general 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).[170] In this way, the general repeal would maintain traditional tort definitions of the assault or battery causes of action, without newly defined civil claims for an assault or battery that is "sexual" in nature. Thus, in contexts outside of federal employment, all claims arising from a federal employee's assault or battery, as defined by the pertinent state's law and whether sexual in nature or not, could be maintained against the United States under the FTCA.

In light of that general proposal and its generality of terms, the proposals above to carve out a narrower and new category of "sexual" assault and battery in clarifying the scope of FECA and Title VII for federal civilian employees and excepting the *Feres* doctrine for military service members may appear inconsistent. To be truthful, it is indeed inconsistent, but it is an inconsistency justified by the particular nature and design of these statutory schemes along with a deliberate attempt to be modest in suggesting legislative revisions. In other words, more narrowly defeating the exclusivity of these statutes and doctrines for claims raising "sexual" violence is suggested as a limited proposal for reform and as tailored to these specific contexts.

For example, in the Title VII context, given that the employment discrimination statute specifically covers sex-based discrimination, an exception for "sexual" assault and battery fits the nature of the statute. Indeed, an assault or battery that had no sexual character or motive would not be an act of gender

164. *Id.* § 1721.

165. *Id.* § 1709.

166. *Id.* § 1711.

167. *See* Mulloy v. United States, 884 F. Supp. 622, 626–34 (D. Mass. 1995) (ruling that the military by negligently enlisting a man with an extensive criminal record including rape had created the likelihood that he would be a danger to others if placed in a residential military base).

168. *See supra* Section III.A.

169. Sisk, *supra* note 10.

170. 28 U.S.C. § 2680(h) (2018).

discrimination, and thus would fall entirely outside the scope of Title VII. As another example, in the military context, removing the *Feres* bar more generally for assault and battery might allow a service member to pursue claims for injuries arising from hand-to-hand combat training, which would intrude directly into military readiness. By contrast, lifting the *Feres* bar for an assault or battery that is sexual in nature could not interfere with any genuine military training or operation, as sexual misconduct has no legitimate place in military conconduct.

Notwithstanding these explanations, a reasonable argument persists for extending the more general permission for claims of "assault" and "battery" to the federal workplace context as well. If Congress agrees, that broader federal accountability for any violence by its agents may be laudatory here as well.

IV. CONCLUSION

Even if it ever made any sense, allowing a federal prisoner to sue for recovery for sexual assault by a federal correctional officer, while turning away the federal employee who is raped on the job 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. 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.

For those who work for the federal government, removal of the general assault-and-battery immunity for the government would only be a first step. Confusing judicially created limitations on remedies for sexual assault in the federal employment and military contexts need to be clarified in favor of a full tort remedy through the FTCA for assault and battery.

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.

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."