No. 01-1404

In the Supreme Court of the United States

SARA ELIZABETH LILLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under West Virginia law the government had a duty to prevent an Army recruiter from sexually assaulting a prospective recruit during non-duty hours and on non-military premises.

2. Whether a plaintiff can avoid the statutory bar under the Federal Tort Claims Act on recovery for claims arising out of assault and battery, 28 U.S.C. 2680(h), by pleading that the government was negligent in supervising the government employee who committed the assault or battery.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bennett v. *United States*, 803 F.2d 1502 (9th Cir. 1986)	9
Billingsley v. *United States*, 251 F.3d 696 (8th Cir. 2001)	9
Brock v. *United States*, 64 F.3d 1421 (9th Cir. 1995)	9
Doe v. *United States*, 838 F.2d 220 (7th Cir. 1988)	8
English v. *United States*, 122 S. Ct. 64 (2001)	4, 10
Franklin v. *United States*, 992 F.2d 1492 (10th Cir. 1993)	9
Foster v. *United States*, 532 U.S. 904 (2001)	4, 10
Grupo Mexicano de Desarrollo, S.A. v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)	7
Guccione v. *United States*, 847 F.2d 1031 (2d Cir. 1988), cert. denied, 493 U.S. 1020 (1990)	9
Leleux v. *United States*, 178 F.3d 750 (5th Cir. 1999)	9
Miller v. *Whitworth*, 455 S.E.2d 821 (W. Va. 1995)	7
Perkins v. *United States*, 55 F.3d 910 (4th Cir. 1995)	9
Senger v. *United States*, 103 F.3d 1437 (9th Cir. 1996)	9

Cases—Continued: Page

Sheridan v. *United States*, 487 U.S. 392 (1988) 2, 3, 4, 5, 6
United States v. *Shearer*, 473 U.S. 52 (1985) 4

Statute:

Federal Tort Claims Act:
28 U.S.C. 1346(b) (1994 & Supp. V 1999) 1
28 U.S.C. 1346(b)(1) (1994 & Supp. V 1999) 6
28 U.S.C. 2671 *et seq.* 1
28 U.S.C. 2679(a) 4
28 U.S.C. 2679(b)(1) 4
28 U.S.C. 2680(h) 2, 4

Miscellaneous:

Restatement (Second) of Torts (1965) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 22 Fed. Appx. 293 (Table). The opinion of the district court (Pet. App. 3-12) is reported at 141 F. Supp. 2d 626.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2001. The petition for a writ of certiorari was filed on March 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* (1994 & Supp. V 1999), alleging that the United States negligently failed

to prevent a sexual assault perpetrated on petitioner by an Army recruiter. Petitioner, who was 17 years of age at the time of the pertinent events, alleges that she contacted the Army recruiting office in South Charleston, West Virginia, about joining the Army. Sergeant Mark Clifford, an Army recruiter, arranged for petitioner to take the GED test, and drove petitioner to the exam site. When the two arrived, they found the building closed. Petitioner and Sgt. Clifford then had lunch together, saw a movie, and later went to a restaurant where Sgt. Clifford purchased several alcoholic drinks for petitioner. She became drunk and passed out. Sgt. Clifford then carried her out of the restaurant, drove her to a motel in a government vehicle, and had sexual intercourse with her. Pet. App. 3-4.[1]

2. Petitioner brought this suit against the United States under the FTCA, alleging that the Army negligently breached its duty to protect her from its recruiter. Pet. App. 20-23. The district court granted the government's motion to dismiss. *Id.* at 3-12. The court held that this action is barred by 28 U.S.C. 2680(h) because it "arises out of an assault [or] battery." Pet. App. 11. The court noted that *Sheridan* v. *United States*, 487 U.S. 392, 403 n.8 (1988), left open the question of whether claims that the government negligently hired, trained, or supervised one of its employees who committed a foreseeable assault or battery could ever be actionable under the FTCA. Pet. App. 8. But, the court recognized, the Fourth Circuit has held that such claims are barred under Section 2680(h) of the FTCA. *Ibid.*

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[1] Sgt. Clifford was subsequently indicted for second-degree sexual assault, a felony, under West Virginia law. C.A. App. 193-194.

The district court also rejected petitioner's claim that the government had undertaken and breached an affirmative duty to protect her. Pet. App. 9-11. Acknowledging that *Sheridan* had held that such claims are not necessarily barred by the assault and battery exception to the FTCA, the district court held that a plaintiff must establish that the government "breached its duty to the plaintiff through an act of negligence by a federal employee other than the intentional tortfeasor and such act was independent of the intentional tort." *Id.* at 9. Here, the district court stated, the only alleged breach of a duty "occurred when Clifford committed the intentional tort," and "[i]t is impossible to separate Clifford's intentional acts from any negligent acts of the United States." *Id.* at 10. Accordingly, the district court concluded, "[e]ven if the United States did assume an affirmative duty of care toward the plaintiff, the plaintiff cannot show that the United States breached that duty independent of Sergeant Clifford's intentional acts, and the United States is not liable for the intentional torts of its employees." *Id.* at 10-11.

3. The court of appeals affirmed in an unpublished opinion based "on the reasoning of the district court." Pet. App. 2.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court. Except for the Ninth Circuit, every court of appeals that has considered the issue since *Sheridan* v. *United States*, 487 U.S. 392 (1988), has held that a plaintiff cannot avoid the FTCA's bar on recovery for claims arising out of assault or battery by pleading that the government negligently supervised the alleged assailant. Although the Ninth Circuit has disagreed

with the other circuits, the unpublished decision below does not deepen the conflict. Moreover, this case is not an appropriate vehicle to resolve the conflict because there is an adequate state-law ground supporting the judgment. In addition, this Court has recently declined review in other cases presenting the same negligent-supervision issue. *English* v. *United States*, 122 S. Ct. 64 (2001); *Foster* v. *United States*, 532 U.S. 904 (2001). There is no reason for a different result here.

1. The FTCA provides the exclusive remedy for tort actions against the United States, but only to the limited extent that the FTCA clearly and explicitly waives sovereign immunity. 28 U.S.C. 2679(a) and (b)(1). In providing this remedy, Congress expressly barred recovery for a number of intentional torts, including "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h).

This Court considered the scope of the intentional tort exception in *Sheridan* v. *United States*, 487 U.S. 392 (1988).[2] The Court held that claims based on a duty

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[2] Prior to *Sheridan*, the four Justices who reached the issue in *United States* v. *Shearer*, 473 U.S. 52 (1985), concluded that negligent-supervision claims are barred under the FTCA. Those Justices reasoned that a plaintiff

> cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.

473 U.S. at 55. Three Justices concurred in the judgment and the remainder of the opinion, but did not join this part of the opinion. Justice Marshall concurred in the judgment only. Justice Powell took no part in the decision.

that is independent of the assailant's employment status, such as a duty to protect a victim or a good-samaritan duty, are not barred by the assault and battery exception where the assailant (1) is not a federal employee or (2) is a federal employee but is acting outside the scope of his employment. *Id.* at 400-401. In such circumstances, "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 assailant's] employment status." *Id.* at 401 (emphasis added). The Court remanded in *Sheridan* for a determination of whether the government had breached a duty owed to the plaintiffs under state law by having adopted regulations prohibiting firearms on the naval base or by "voluntarily undertaking to provide care to [the assailant] who was visibly drunk and visibly armed." *Ibid.*

The Court in *Sheridan* expressly declined to consider whether claims based on an employment relationship (negligent hiring, supervision, or training) are barred by the assault and battery exception. 487 U.S. at 403 n.8. In a concurring opinion, Justice Kennedy stated that he would have reached that issue and would have held that a plaintiff may not maintain a claim based only on the employment relationship between the intentional tortfeasor and the government. *Id.* at 408 (Kennedy J., concurring). "Otherwise," Justice Kennedy explained, "litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors." *Id.* at 407. The dissenting Justices also would have held that negligent-supervision claims are

barred. *Id.* at 411 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J.).

2. The courts below correctly held that petitioner did not allege a claim that would allow recovery under the FTCA. Apart from general allegations that the Army negligently supervised Sgt. Clifford (see Pet. App. 21-23), in the district court petitioner did not identify any government employee other than Sgt. Clifford who breached a duty owed to her. See *ibid.*; *id.* at 10-11. In this Court, too, petitioner argues that the government created a "special relationship" with her "when Clifford picked up [petitioner], a minor, took her to the GED exam, * * * and promised to deliver her back to her mother once the test was completed." Pet. 11. As the district court correctly recognized (Pet. App. 10-11), however, because those allegations were tied only to the conduct of the alleged intentional tortfeasor, they cannot provide a basis for government liability under *Sheridan*.

In this Court, petitioner seeks to satisfy the *Sheridan* standard by alleging that Sgt. Clifford's commanding officer knew of his previous "behavioral problems" and described him as "quirky"; Sgt. Clifford had previously made sexual advances to another female recruit; and other recruiting sergeants were present at the restaurant when petitioner became drunk. Pet. 17. Whether any of those actions could constitute a negligent breach of a duty owed to petitioner is an issue of West Virginia law (see 28 U.S.C. 1346(b)(1) (1994 & Supp. V 1999)), and this Court ordinarily does not examine such fact-specific, state-law issues in the first instance. See *Sheridan*, 487 U.S. at 401. Moreover, petitioner did not raise those arguments in district court. Accordingly, the arguments were not properly before the court of appeals, and are not properly before this Court. See

Grupo Mexicano de Desarrollo, S.A. v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999).

In any event, these alleged acts would not provide a basis for tort liability under West Virginia law. That State follows the doctrine that, "[g]enerally, a person does not have a duty to protect others from the deliberate criminal conduct of third parties." *Miller* v. *Whitworth*, 455 S.E.2d 821, 825 (W. Va. 1995) (citing Restatement (Second) of Torts § 302B, cmt. d (1965)). *Miller* held that this general principle would not apply "(1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or (2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct." *Ibid.* (citing Restatement (Second) of Torts §§ 302B, cmt. e & 315).

Petitioner argues that the government had an affirmative duty to protect her because of her status as a prospective recruit and because the government "took charge" of her. Pet. 7-12, 17-18. There is no basis, however, for imposing such an affirmative duty in this case. The brief, unspecific remarks of Sgt. Clifford's commanding officer that he was "quirky" and had had "behavioral problems" do not indicate that the commander should have foreseen Sgt. Clifford's criminal act. Moreover, any duty arising from the commander's knowledge of Sgt. Clifford would be related to his employment status and thus not the kind of independent duty required under *Sheridan*. Similarly, the statement by another prospective recruit that Sgt. Clifford had made unwanted sexual advances toward her also provides no basis for government liability. Indeed, that prospective recruit specifically stated that she did not report this incident to the Army. Pet. App. 132.

Finally, the government cannot be held liable based upon the actions of the other sergeants. They were not acting within the scope of their employment when they were at the restaurant that Sgt. Clifford and petitioner visited that night. See Pet. App. 63, 135, 138. The undisputed facts also show that the other sergeants arrived separately from Sgt. Clifford and petitioner, were in a different section of the crowded restaurant, and did not know petitioner or that she was a potential recruit. *Id.* at 63-65, 136-139. Thus, these sergeants did not take charge of petitioner, create a special relationship with her, or expose her to a high risk of Sgt. Clifford's intentional misconduct, so as to render them liable under West Virginia law.

The facts of this case contrast markedly with those in the cases on which petitioner relies (Pet. 14-16), where the courts found an independent duty on the part of the government to protect the victim of a battery. For example, *Doe* v. *United States*, 838 F.2d 220 (7th Cir. 1988), held that the government had a duty to protect children in an Air Force daycare center from sexual abuse by an unknown assailant. As discussed above, there is no comparable basis in this case for holding that the government assumed a duty to protect petitioner from Sgt. Clifford's criminal act.

3. The holding of the unpublished decision below that a plaintiff cannot evade the intentional tort exception by alleging that the government negligently hired, supervised, or trained the assailant also does not warrant review. With the exception of the Ninth Circuit, every court of appeals that has considered the issue since *Sheridan* has held, consistent with the decision of the Fourth Circuit below, that the statutory bar on recovery for claims arising out of assaults and batteries cannot be circumvented by pleading that the

assault or battery that injured the plaintiff was caused by the government's negligent supervision. See, *e.g.*, *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (barring claim of negligent supervision of a Job Corps enrollee if the battery he committed occurred within the scope of his employment and government did not breach a duty unrelated to employment relationship); *Leleux* v. *United States*, 178 F.3d 750, 757 (5th Cir. 1999) (barring claim of negligence against United States in seduction of recruit by Navy serviceman because negligence did not arise out of "an independent, antecedent duty unrelated to the employment relationship between the tortfeasor and the United States"); *Perkins* v. *United States*, 55 F.3d 910, 916-917 (4th Cir. 1995) (rejecting "negligent supervision" and "negligent retention" claims); *Franklin* v. *United States*, 992 F.2d 1492, 1498-1499 (10th Cir. 1993) (barring claim of negligence against United States in case of medical battery by VA hospital employee because claim was contingent on employment relationship); see also *Guccione* v. *United States*, 847 F.2d 1031, 1034 (2d Cir. 1988) (barring claim that United States was negligent in failing to supervise undercover agent because claim was not independent of employment relationship), cert. denied, 493 U.S. 1020 (1990).[3]

In any event, this case is not an appropriate vehicle for the Court to resolve the one-sided conflict between the Ninth Circuit and the other courts of appeals that

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[3] The Ninth Circuit has held that the statutory bar on recovery for claims arising out of assaults and batteries can be avoided by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision or hiring. See *Senger* v. *United States*, 103 F.3d 1437, 1442 (9th Cir. 1996); *Brock* v. *United States*, 64 F.3d 1421, 1425 (9th Cir. 1995); see also *Bennett* v. *United States*, 803 F.2d 1502, 1503-1504 (9th Cir. 1986).

have considered the question. The unpublished opinion below does not contribute to the disagreement, and it is supported by an adequate state-law ground. As discussed above, the undisputed facts show no special circumstance to take this case outside West Virginia's general rule that a person is not liable for another person's deliberate criminal act. In addition, this Court has declined review in recent cases presenting the negligent-supervision issue. See *English* v. *United States*, 122 S. Ct. 64 (2001); *Foster* v. *United States*, 532 U.S. 904. (2001). This case calls for the same result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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