No. 11-1351

In The Supreme Court of the United States

STEVEN ALAN LEVIN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF OF COURT-APPOINTED AMICUS CURIAE JAMES A. FELDMAN IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether suit may be brought against the United States for battery committed on a civilian by military medical personnel while acting within the scope of their employment.

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INTEREST OF THE AMICUS CURIAE

This brief is submitted in response to the Court's order inviting amicus curiae to brief this case in support of petitioner.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 663 F.3d 1059. The opinion of the U.S. District Court for the District of Guam dismissing this case for lack of subject matter jurisdiction (Pet. App. 14a-41a) is unreported, but it is available at 2009 WL 8690263. The district court's opinion granting summary judgment to the United States on petitioner's negligence claim is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2011. A petition for rehearing en banc was denied on February 15, 2012. Pet. App. 42a-43a. The petition for a writ of certiorari was filed on May 8, 2012, and granted on September 25, 2012. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set out in the appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

Petitioner's complaint alleges that, although he twice withdrew consent for an ophthalmic operation, a Navy doctor performed that operation anyway, in the process causing severe injury to petitioner's eyes. The question presented is whether the Gonzalez Act, 10 U.S.C. 1089, eliminates all potential remedies for petitioner (and those in his position) for this serious violation of an interest in bodily integrity that tort law has long protected.

1.a. The Federal Tort Claims Act (FTCA) was enacted in 1946 in order to (1) "mitigate [the] unjust consequences of sovereign immunity from suit" and (2) relieve Congress of the burden of considering a "steadily increas[ing]" number of private bills. *Feres v. United States*, 340 U.S. 135, 139-40 (1950). Its key provision "waives the Government's immunity from suit in sweeping language," *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)), for injuries

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674. The FTCA thus generally authorizes suit against the government for torts committed by government employees acting within the scope of their employment.

From the beginning, the FTCA's basic waiver of sovereign immunity was qualified by significant exceptions codified at 28 U.S.C. 2680, which provides that "[t]he provisions of [the FTCA] and section 1346(b) of [Title 28] shall not apply to" a variety of claims, including, for example, those "based upon the exercise or performance of . . . a discretionary function" or "arising in a foreign country." 28 U.S.C. 2680(a), (k). The exception at issue in this case is codified at 28 U.S.C. 2680(h). With an exclusion not relevant here for certain law enforcement personnel, it provides that the FTCA's waiver of sovereign immunity does not apply to

> [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. 2680(h). Although it is known as the "intentional tort" exception, see, *e.g.*, *Sheridan v. United States*, 487 U.S. 392, 394 (1988), it does not cover

some intentional torts (such as conversion or trespass), and it includes at least some torts that may be based on negligence, such as misrepresentation. See *Block v. Neal*, 460 U.S. 289, 296-97 (1983); *United States v. Neustadt*, 366 U.S. 696, 702 (1961). Most of the included torts are likely to be outside the scope of employment for most government employees. But if a government employee does commit one of the specified torts within the scope of employment, Section 2680(h) generally bars suit against the government for the wrong.

b. The FTCA as originally enacted did not generally preclude suits against individual government employees, including government medical personnel. See, *e.g.*, *Henderson v. Bluemink*, 511 F.2d 399, 404 (D.C. Cir. 1974); *Percivill v. United States*, 252 F. Supp. 157, 159 (W.D. Tex. 1966); *Myers v. United States*, 241 F. Supp. 515, 517-18 (N.D. Tex. 1965), rev'd on other grounds, 363 F.2d 615 (5th Cir. 1966); *Henning v. Ebersole*, 166 N.Y.S.2d 167, 169 (Sup. Ct. 1957). Rather, the Act simply provided for a remedy against the United States, which if undertaken would bar an additional suit against the employee for the same conduct. See 28 U.S.C. 2676. Plaintiffs, however, generally found the FTCA suit attractive when available. See, *e.g.*, H.R. Rep. No. 94-333, at 3 (1975) (suit against the United States rather than the employee "would normally accrue to the benefit of the plaintiff should he prevail, since there is no limit on the amount of damages that could be awarded by the court . . . and apparently no limit on the assets of the United States to satisfy a judgment").

In 1976, Congress enacted the Gonzalez Act, 10 U.S.C. 1089. The Act provides that

> [t]he remedy against the United States provided by [the FTCA] for damages for personal injury . . . caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel . . . of the armed forces, the National Guard while engaged in training or duty under [specified statutes], the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such [personnel] . . . whose act or omission gave rise to such action or proceeding.

10 U.S.C. 1089(a). The effect of that provision is to make "the remedy against the United States" under the FTCA preclusive of any suit against medical personnel of the armed forces or other specified agencies based on the performance of medical services within the scope of employment.

In the provision at issue in this case, the Gonzalez Act provides:

> For purposes of this section [*i.e.*, the Gonzalez Act], the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health

care functions (including clinical studies and investigations).

10 U.S.C. 1089(e). This case involves the application of that provision to a suit for medical battery against the United States.

2. Petitioner is a veteran of the armed forces. Mot. to Substitute United States 1, ECF No. 12. At some time prior to 2003, petitioner went to the Ophthalmology Department of the U.S. Naval Hospital on Guam for evaluation and treatment of a cataract in his right eye. Lieutenant Commander Frank M. Bishop, M.D., conducted the evaluation and recommended to petitioner a surgical procedure called "phakoemulsification with intraocular lens placement." Pet. App. 2a.

Petitioner gave his consent to the surgery. But the complaint alleges that, just prior to the operation, petitioner twice withdrew consent – first when he saw what appeared to be inadequate equipment in the operating room, and again after he had been anesthetized. Nevertheless, Dr. Bishop went ahead with the surgery. Pet. App. 15a-16a.

As a result of the surgery, petitioner suffered a condition known as "corneal clouding," which resulted in symptoms including "severe pain, some ptosis, disorientation, discomfort and problems with glare and depth of field vision as well as greatly diminished visual acuity." Petitioner requires ongoing medical treatment, and his prospects for future improvement are in doubt. Pet. App. 16a.

3. In 2005, petitioner filed a complaint in the United States District Court for the District of

Guam. The complaint named both Dr. Bishop and the United States as defendants. It alleged that Dr. Bishop had been negligent in his conduct of the operation and had committed a battery by proceeding with the operation despite petitioner's withdrawal of consent. The district court granted the government's unopposed motion to substitute itself for Dr. Bishop. Pet. App. 16a-17a.

The court granted summary judgment to the government on the negligence claim after petitioner failed to come forward with necessary expert testimony. The court declined, however, to grant summary judgment to the government on the medical battery claim, holding that a genuine issue of material fact existed as to whether petitioner had consented to the surgery. See Pet. App. 3a, 17a.

On the government's motion, the district court then dismissed the medical battery claim for lack of subject matter jurisdiction. The court held that Section 2680(h) excludes that claim from the FTCA's waiver of sovereign immunity. Pet. App. 24a-25a.[1]

4. The court of appeals affirmed. In the court's view, "the primary purpose of the Gonzalez Act is 'to protect military medical personnel from malpractice liability.'" Pet. App. 7a (quoting *Smith v. United States*, 499 U.S. 160, 172 (1991)). The court held

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[1] The district court also rejected petitioner's contention that his claim was authorized under 38 U.S.C. 7316(f), a statute worded similarly to Section 1089(e). Pet. App. 38a. The court of appeals affirmed the district court's holding, on the ground that Section 7316 is inapplicable to Navy doctors. Pet. App. 13a. The petition for certiorari does not challenge that holding.

that "to be consistent with this purpose," it must "read subsection (e) not as a *waiver of sovereign immunity* for battery claims brought against the United States, but as an *expression of personal immunity* from battery claims brought against military medical personnel." *Ibid.* The court held that the Section 2680(h) exception to the FTCA's broad waiver of sovereign immunity remains fully applicable and bars battery claims brought under the FTCA.

The court of appeals also believed that petitioner's construction of Section 1089(e) "runs counter to well-established guidelines for interpreting waivers of sovereign immunity," in accordance with which "limitations and conditions upon the waiver are to be strictly observed and exceptions thereto are not to be implied." Pet. App. 8a (internal quotation marks omitted). The court noted that petitioner's view of the Gonzalez Act was "plausible," but that it "cannot result in a waiver when nothing short of an unequivocal expression will do." Pet. App. 9a.

Finally, the court relied on this Court's holding in *Smith* that the statute at issue there – 28 U.S.C. 2679(b)(1) – "immunizes Government employees from suit *even when an FTCA exception precludes recovery against the Government*." Pet. App. 12a (quoting *Smith*, 499 U.S. at 166, and adding emphasis). In the court's view, *Smith* establishes that the same is true of the Gonzalez Act. Pet. App. 13a.

SUMMARY OF ARGUMENT

A traditional and long-accepted function of tort law is to provide protection against and redress for unauthorized intrusions into a person's bodily integrity. In this case, the court of appeals held that

Congress eliminated that protection for patients treated by medical personnel employed by the armed forces and certain other federal agencies when it included 10 U.S.C. 1089(e) in the Gonzalez Act. Because the text, structure, and history of the Act shows that Congress preserved a tort remedy, the court of appeals' decision should be reversed.

1. The text of Section 1089(e) includes an operative clause providing that the intentional tort exception to the FTCA "shall not apply" to tort actions arising from the conduct of medical personnel. The operative clause, by itself, would have eliminated the intentional tort exception for all medical malpractice claims. The introductory clause ("[f]or purposes of this section") limits the effect of the operative clause to just the claims covered by the Gonzalez Act against personnel of the specified agencies, since Congress decided to proceed in this area on an agency-by-agency basis. By eliminating the intentional tort exception for that set of claims, Congress made the government itself liable for them under the FTCA. As the government repeatedly explained in its briefs in *Smith*, the Gonzalez Act "will serve an important function: authorizing the pursuit of 'intentional' malpractice claims against the United States." 89-1646 U.S. Br. 34.

The court of appeals' conclusion that the introductory clause eliminates all tort remedies for medical battery is mistaken. It would read the text of Section 1089(e) as a counterfactual directive, requiring courts to pretend that the intentional tort exception does not apply when in fact it continues to bar suits for victims of medical battery by medical

personnel of the specified agencies. When Congress wants to direct such a counterfactual, however, it instead uses different terms, such as "shall be considered" or "deemed." Indeed, Congress used the term "deemed" to direct a counterfactual in another provision of the Gonzalez Act itself. By using the simple declarative ("shall not apply") in Section 1089(e) instead, Congress created a provision that has the real-world effect of abrogating the intentional tort exception and rendering the government liable for those torts. Moreover, the court of appeals' reason for adopting its construction – that its reading was required by the purposes of Section 1089(e) – is mistaken. There is no basis to conclude that Section 1089(e) must be read with the single-minded aim of achieving one and only one purpose. In any event, the court of appeals failed to grasp the dual purposes of the Gonzalez Act to protect federal medical personnel while still permitting redress for tort victims.

2. The structure of Section 1089(e) confirms that the Gonzalez Act does not eliminate all remedies for victims of medical battery. Three provisions of the Gonzalez Act establish that the Act's scheme is to channel tort remedies into two paths – (1) suit against the government under the FTCA or, (2) where such suit is unavailable, suit against the individual employee combined with federal indemnification or insurance. In Section 1089(f), the Act provides for such indemnification for suits against individual employees involving conduct in a foreign country or within other FTCA exceptions. Similarly, Section 1089(c) provides a removal mechanism to ensure that tort suits do not proceed against the em-

ployee where an FTCA suit is available; where an FTCA suit is unavailable, remand is required. The exclusive remedy provision in Section 1089(a) also operates to preclude remedies against individual employees only if an alternative remedy against the government is available. Within that structure, Section 1089(e) similarly protects employees while leaving a remedy open. By permitting suit against the government for medical battery, it treats victims of medical battery like all other malpractice victims. It requires them to obtain relief exclusively through suit against the government, thereby protecting individual employees from suit.

3. The history of the Gonzalez Act demonstrates that Congress and the Executive Branch understood and intended that the Act would "nullify a provision of the Federal Tort Claims Act which would otherwise exclude any action for assault and battery" from the FTCA's coverage. S. Rep. No. 94-1264, at 9 (1976). Not a word in that history suggests that Congress wanted to deprive tort victims of all redress.

4. The court of appeals' holding that, among all victims of medical malpractice, victims of medical battery alone should be barred from any recovery would entangle courts in confusion and lead to arbitrary results Congress did not intend. The States have adopted widely varying rules on how medical battery claims must be pleaded. Under the court of appeals' holding, however, malpractice victims will have their remedy allowed or eliminated based on the niceties and fine distinctions of state pleading requirements – even though all States would in the

end recognize a right to relief for victims of medical battery. Moreover, while most malpractice victims would have a remedy, those whose claims were determined to sound in battery, which may involve particularly serious injuries, would be left in the cold. The excluded victims likely consist of veterans and family members of those who serve in the armed forces and whom Congress would not have wanted to disadvantage.

5. Petitioner's reading of Section 1089(e) comports with this Court's teachings on sovereign immunity. This Court's cases on FTCA exceptions establish that no strict rule requiring "unequivocal waiver" applies. Instead, Section 1089(e), like other provisions affecting FTCA exceptions, should be construed in accordance with all the usual tools of statutory interpretation. In any event, petitioner's reading of Section 1089(e) would satisfy any applicable strict construction rule, because the traditional tools of statutory construction make its meaning clearly discernable.

6. Petitioner's reading is also consistent with this Court's decision in *Smith*, which involved a different statute, with different provisions, structure, history, and purposes. The statute at issue in Smith contains no analogue to Section 1089(e), and the Court expressly rested its decision in *Smith* on two provisions that have no analogue in the Gonzalez Act.

ARGUMENT

Tort law has long protected the basic interest in bodily integrity. In particular, victims of medical malpractice, including both negligence-based and battery-based malpractice, may recover for their in-

juries. After enactment of the FTCA, a civilian victim of malpractice committed by an armed forces doctor (or other medical employee) could take advantage of these traditional remedies. If the claim sounded in negligence, the victim had the choice either to sue the government under the FTCA or to sue the doctor directly. If the claim sounded in battery, the victim could sue only the doctor, because the intentional-tort exception excluded battery suits against the government. In either case, however, the victim had a remedy.

The Gonzalez Act altered this scheme by requiring victims to invoke an available FTCA remedy against the government instead of suit against the employee. But it carefully preserved a remedy against the employee in cases in which the FTCA remedy is not available. The question presented in this case is whether the Gonzalez Act, while preserving the right of a tort victim to obtain some remedy in all other cases, entirely eliminated all remedies for the traditional tort of medical battery. The text, structure, history, and purpose of the Gonzalez Act establish that it did not.

I. THE TEXT OF SECTION 1089(e) ELIMINATES THE INTENTIONAL TORT EXCEPTION FOR CASES WITHIN THE SCOPE OF THE GONZALEZ ACT

The text of Section 1089(e) abrogates the intentional-tort exception for cases within the scope of the Gonzalez Act. The court of appeals misread that text by applying a counterfactual reading that does not accord with the simple declarative terms Congress chose and by requiring that Section 1089(e) be con-

strued in accordance with a mistaken idea of its purpose.

A. The Text of Section 1089(e) Limits the Abrogation of the FTCA's Intentional Tort Exception to Torts of Medical Personnel in the Armed Forces and Other Specified Agencies

1. Section 1089(e) has two parts. The introductory clause is "[f]or purposes of this section." The operative clause provides that "the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions." If taken alone, the operative clause would have only one reasonable reading: It would abrogate the intentional tort exception to the FTCA (Section 2680(h)) for torts committed by *all* government medical personnel.

Congress, however, decided to proceed in this area on an agency-by-agency basis. The Gonzalez Act therefore does not seek to address medical malpractice by all government medical personnel. Instead, it addresses only claims against medical personnel in the armed forces, the National Guard during training, the Department of Defense, the Armed Forces Retirement Home, and the CIA. 10 U.S.C. 1089(a).[2]

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[2] As originally enacted, the Gonzalez Act did not include National Guard medical personnel in Section 1089, but instead included a separate section codified at 32 U.S.C. 334 (1976), which provided for indemnification for National Guard medical personnel but did not include them in the FTCA system. In 1981, Congress repealed that provision and amended Section 1089(a) to include National Guard medical personnel. See Pub. L. No. 97-124, §§ 2, 3, 95 Stat. 1666 (1981). The predecessor of

Congress addressed medical malpractice claims against personnel of other agencies in other statutes enacted both before and after the Gonzales Act. See pp. 28-29, 32-33, *infra*.

The function of the introductory "[f]or purposes of this section" clause is therefore straightforward. It limits the abrogation of the intentional tort exception to just the claims covered by "this section," *i.e.*, claims based on malpractice – including, in particular, medical battery – committed by medical personnel employed by the armed forces and the other specified agencies. By abrogating the intentional tort exception for that set of claims, Section 1089(e) has the effect of making the United States liable for them under the FTCA. At the same time, because the Gonzalez Act makes the FTCA the exclusive remedy for those claims, 10 U.S.C. 1089(a), it immunizes medical personnel from liability for such claims.

2. The government has previously expressed precisely that understanding of the meaning of the Gonzalez Act. In its brief in *Smith*, the government explained that

> in providing that the FTCA exception for intentional torts does not apply to medical malpractice claims, the [Gonzalez] Act has the effect of permitting FTCA actions against the United States based upon allegations that a doctor has performed medical procedures to which the plaintiff did not consent. 10 U.S.C. 1089(e).

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the Armed Forces Retirement Home was also added to the Gonzalez Act later. See Pub. L. No. 98-94, § 934(a), 97 Stat. 614, 651 (1983).

Smith, U.S. Br. at 32-33. In its briefing in *Smith*, the government repeated that explanation twice more with respect to Section 1089(e) and an additional time in discussing a similar statute addressing VA medical personnel.[3] That is petitioner's position in this case.

B. The Court of Appeals Erred in Construing "[f]or purposes of this section" To Require a Counterfactual Inquiry

1. The court of appeals found the above interpretation of Section 1089(e) "plausible," Pet. App. 6a, 9a, and "a viable reading at first blush," Pet. App. 6a. It concluded, however, that the introductory "[f]or purposes of this section" clause mandated a far

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[3] See *Smith*, U.S. Br. 34 ("[T]he Reform Act also has no effect on the Gonzalez Act's waiver of sovereign immunity as to malpractice claims sounding in intentional tort. Thus even after the Reform Act, the Gonzalez Act (and other statutes containing similar provisions . . .) will serve an important function: *authorizing the pursuit of 'intentional' malpractice claims against the United States under the FTCA*.") (emphasis added) (citation omitted); U.S. Reply Br. 12 ("[T]he provision of the Gonzalez Act waiving sovereign immunity as to medical malpractice claims sounding in intentional tort, 10 U.S.C. 1089(e), *will enable plaintiffs to pursue those claims against the United States*.") (emphasis added); see also U.S. Reply Br. 12-13 ("[T]here is no inconsistency between our position and the enactment, in the same year as the Reform Act [the statute at issue in *Smith*], of a waiver of sovereign immunity for malpractice claims sounding in intentional tort against medical personnel of the Veterans Administration, 38 U.S.C. 4116(f). . . . Had that amendment not been passed, the effect of applying the Reform Act to VA physicians would have been to bar such 'intentional' malpractice claims altogether. *By virtue of its enactment, plaintiffs may now pursue those claims against the United States*.") (emphasis added) (citation omitted).

less natural reading. According to the court, the introductory clause of Section 1089(e) requires a court to *pretend* that the intentional tort exception does not apply and suit may be brought against the government; the purpose is said to be to invoke the exclusive remedy provision in Section 1089(a) and thereby insulate medical personnel from liability. Pet. App. 7a-8a. But under the court of appeals' interpretation, that pretense would be counterfactual. The intentional tort exception would actually continue to bar medical battery and other intentional tort suits against the government.

The court of appeals was driven to its counterfactual reading by its view that the "[f]or purposes of this section" language requires an interpretation that carries out the purpose of the Gonzalez Act. The court viewed that purpose as "to protect military medical personnel from malpractice liability" and nothing else. Pet. App. 7a (quoting *Smith*, 499 U.S. at 172).

2. The court of appeals' analysis is flawed for two reasons. First, if Congress had intended the court of appeals' interpretation, it would have achieved it through statutory text, not by sending courts on an elusive search for the Gonzalez Act's purpose. Second, the court's interpretation rests on an incomplete understanding of the statute's dual purposes; a full understanding of those purposes supports petitioner's interpretation, not that of the court of appeals.

a. Had Congress intended to achieve the goal the court of appeals posited, it could have easily done so. The most direct way would have been simply to pro-

vide that suits for assault, battery, etc. – the torts covered in Section 2680(h) – may not be brought against government medical personnel of the specified agencies for conduct within the scope of their employment. Alternatively, if Congress had wanted to proceed by way of a counterfactual assumption, it would have used terms such as "deemed" or "considered" to accomplish that end, as it does in other statutes where it wants courts to adopt such assumptions.[4] For example, it could have provided

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[4] The examples are numerous. See, *e.g.*, 7 U.S.C. 7283(b) ("For purposes of this section, raw cane sugar, refined beet sugar, and in-process sugar eligible for a loan under section 7272 of this title s*hall not be considered* an agricultural commodity." (emphasis added)); 15 U.S.C. 78o-11(e)(3)(B) ("For purposes of this subsection, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal home loan banks s*hall not be considered* an agency of the United States." (emphasis added)); 26 U.S.C. 857(c)(1) ("For purposes of section 243 (relating to deductions for dividends received by corporations), a dividend received from a real estate investment trust which meets the requirements of this part *shall not be considered* a dividend." (emphasis added)); 42 U.S.C. 422(c)(2) ("For purposes of sections 416(i) and 423 of this title, any services rendered by an individual during a period of trial work *shall be deemed* not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." (emphasis added)); 42 U.S.C. 416(b) ("For purposes of subparagraph (C) of section 402(b)(1) of this title, a divorced wife *shall be deemed* not to be married throughout the month in which she becomes divorced." (emphasis added)); 42 U.S.C. 6305(f) ("For purposes of this section, if a manufacturer or private labeler complied in good faith with a rule under this part, then he *shall not be deemed* to have violated any provision of this part by reason of the alleged invalidity of such rule." (emphasis added)); see also 29 U.S.C. 1144(b)(2)(B) (ERISA "deemer" clause); *FMC Corp. v. Holliday*,

that "[f]or purposes of this section, 28 U.S.C. 2680(h) shall be deemed not to apply." That is precisely how the government paraphrases what it claims is the meaning here. See BIO 8 (Gonzalez Act operates "[b]y *deeming* Section 2680(h) inapplicable '[f]or purposes of this section'" (emphasis added)). Indeed, in the Gonzalez Act's removal provision, where Congress *did* intend a counterfactual meaning, Congress used just this kind of "deemed" construction to direct that in certain circumstances an action shall be "deemed a tort action brought against the United States" notwithstanding that it was in fact brought against an employee. 10 U.S.C. 1089(c); see pp. 23-24, *infra*.

In Section 1089(e), Congress did not directly provide that suits against medical personnel for intentional torts are barred, and it used the simple declarative "shall not apply" in Section 1089(e) *without* using the "deemed" construction or any other indication that it intended courts to assume a state of affairs that is directly contrary to fact. Congress thereby provided that its command in Section 1089(e) should have real-world, not counterfactual, effect. Section 1089(e) does not ask a court to imagine that the intentional tort exception does not exist, when in fact it actually does. Instead, it abrogates the intentional tort exception for medical torts committed by medical personnel of the specified agencies.

b. The court's view that the introductory "[f]or

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498 U.S. 52, 61-63 (1990) (interpreting ERISA "deemer" clause).

purposes of this section" clause sends a court on a quest for the statute's principal purposes is especially unlikely. As this Court has explained, statutes are frequently enacted for multifarious reasons, and determining the purpose of a statute can be an indeterminate and disputed process. See, *e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). In contrast to the court of appeals' approach, petitioner's interpretation of the introductory clause – that it limits the abrogation of the intentional tort exception to claims covered by the Gonzalez Act – is straightforward and grounded in the text of the statute.

c. The court of appeals' interpretation also rests on a misunderstanding concerning the principal purposes of the Gonzales Act. "[N]o legislation pursues its purposes at all costs," *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012), and "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means," *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). As explained below, the Gonzales Act had two goals. It was intended not only to immunize medical personnel from liability, but also to shift responsibility for medical malpractice to the United States. See pp. 21-27, *infra*. Petitioner's reading accomplishes both purposes. In contrast, the court of appeals' interpretation accomplishes only one, leaving victims of medical battery without any remedy.

II. THE STRUCTURE OF SECTION 1089 CONFIRMS THAT CONGRESS INTENDED TO MAKE THE GOVERNMENT RESPONSIBLE FOR TORT DAMAGES, NOT TO ELIMINATE THE ABILITY OF TORT VICTIMS TO OBTAIN REDRESS

The structure of the Gonzalez Act confirms that the Gonzalez Act did not entirely eliminate traditional tort remedies for victims of wrongs committed by government medical personnel. Instead, the Gonzalez Act channels such remedies into two categories: (a) remedies against the government and (b) remedies against the employee with authorization for government indemnification and insurance. Three provisions of the Gonzalez Act confirm the intent to channel remedies into those two paths: the indemnification provision in Section 1089(f), the removal provision in Section 1089(c), and the exclusive remedy provision in Section 1089(a).

A. The Gonzalez Act Permits Actions Against Individual Employees if an Alternative FTCA Suit Against the Government Is Unavailable

1. Before the Gonzalez Act, a victim of malpractice by a government doctor acting within the scope of employment generally could sue the government under the FTCA. But because the FTCA includes a number of exceptions, such as the exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), some tort victims could not sue the government. Their only remedy was a state-law suit against the individual employee. The Gonzalez Act addressed such suits in several ways.

2. The Gonzalez Act includes a provision author-

izing indemnification and insurance for medical personnel who are subject to state-court suits for torts committed within the scope of their employment. It provides:

> [T]he head of the agency concerned may . . . hold harmless or provide liability insurance for any person described in subsection [1089](a) for damages for personal injury . . . caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions . . . while acting within the scope of such person's duties if [1] such person is assigned to a foreign country or [2] detailed for service with other than a Federal department, agency, or instrumentality or [3] if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

10 U.S.C. 1089(f)(1).

Under this provision, there are three categories of cases in which an agency head may authorize indemnification, the first and third of which are relevant for present purposes because they specifically include cases arising within the FTCA exceptions. The first category consists of cases in which the employee "is assigned to a foreign country." Because the FTCA expressly excludes "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), this category consists of cases in which no FTCA remedy is available. The other, catch-all category – where "the circumstances . . . preclude the remedies of third persons against the United States" under the FTCA –

by its terms also consists of cases in which no FTCA remedy is available. Because the entire indemnification provision applies only to torts arising "within the scope of [the employee's] duties," most or all cases in this third category are those falling within the other FTCA exclusions in Section 2680.

The indemnification provision is thus Congress's solution to the problem of state-law suits against covered medical personnel based on claims that fall within an FTCA exclusion. And the solution Congress chose in such situations was not simply to leave victims without a remedy. Instead, Congress chose to indemnify or insure federal employees to protect them from the financial costs of suits, while preserving a remedy for victims of malpractice.[5] There is no other possible meaning of Section 1089(f)(1). Cf. *Hui v. Castaneda*, 130 S. Ct. 1845, 1854 (2010) (considering but not passing on similar construction of analogous statute, 42 U.S.C. 233(f)).

3. The removal provision of the Gonzalez Act, 10 U.S.C. 1089(c), similarly shows that the Act was intended to preserve remedies for medical malpractice committed by covered medical personnel. Section 1089(c) provides that upon certification by the Attorney General

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[5] This is the virtually uniform view of the courts that have examined the issue. See, *e.g.*, *Newman v. Soballe*, 871 F.2d 969, 972-973 (11th Cir. 1989); *Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir. 1982); *Jackson v. Kelley*, 557 F.2d 735, 740-741 (10th Cir. 1977); *Burchfield v. Regents of Univ. of Colo.*, 516 F. Supp. 1301 1304 (D. Colo. 1981); *Anderson v. O'Donoghue*, 677 P.2d 648, 651-652 (Okl. 1983); but see *Powers v. Schultz*, 821 F.2d 295, 298 (5th Cir. 1987).

> that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed . . . to the district court of the United States . . . and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto.

10 U.S.C. 1089(c). By this means, Congress converted state-court suits against individual employees into FTCA suits in federal court against the government.

That is not the end of the story, however. A motion to remand may be filed, and, if the district court "determine[s] . . . that the case so removed *is one in which a remedy by suit within the meaning of [Section 1089(a)] is not available* against the United States, the case shall be remanded to the state court." 10 U.S.C. 1089(c) (emphasis added). If the FTCA remedy "is not available," therefore, Congress's direction is to remand the case to state court, where it can continue to be litigated against the employee. Section 1089(c), like the indemnification provision in Section 1089(f)(1), is thus premised on the proposition that the suit can go forward against the employee if no FTCA remedy is available against the government. Channeling suits into FTCA actions against the government where such actions are available, while preserving a continued right to bring suit against the employee where not, was the

basic structural mechanism of the Gonzalez Act.[6]

4. Finally, the Gonzalez Act's exclusive remedy provision, 10 U.S.C. 1089(a), also manifests Congress's intent to afford some remedy for medical malpractice by the medical personnel it covers. That provision specifies that "[t]he remedy against the United States provided by [the FTCA] for damages for personal injury . . . caused by the negligent or wrongful act or omission" of medical personnel of the armed forces or other specified agencies "while acting within the scope of [their] duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such" government medical personnel. 10 U.S.C. 1089(a). Particularly when read in light of the Act's indemnification and removal provisions, the meaning of the exclusive remedy provision is clear. Under Section 1089(a), "[t]he remedy against the United States" under the FTCA precludes any action against the individual employee. Conversely, when there is no "remedy against the United States," there is no preclusion, and the suit against

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[6] An additional provision of the Gonzalez Act, 10 U.S.C. 1089(d), specifically empowers the Attorney General to settle claims in suits against individual employees, and it thus also demonstrates Congress's intent that such suits can proceed when suit against the government is unavailable. See *Burchfield*, 516 F. Supp. at 1304 (observing that suit against a military medical professional for conduct within the scope of employment "may be a proper case for compromise or settlement pursuant to § 1089(d) or for indemnification under 10 U.S.C. § 1089(f)").

the employee may go forward.[7]

5. The structure of the Gonzalez Act thus shows solicitude for government employees. It provides for the government either to bear the brunt of tort lawsuits or to provide indemnity and insurance to the employee where no suit against the government is available, and it provides for a procedural mechanism – removal– to protect employees from state-law suits in appropriate cases. But, contrary to the court of appeals' position, see Pet. App. 5a, 7a, solicitude for government employees is not the only factor at work. The Act's structure also shows solicitude for tort victims, who retain a remedy for tortious conduct. Nowhere in the structure of the Act is there any indication that Congress intended to protect government medical personnel by simply eliminating the ability of victims of long-recognized torts to obtain any redress.

B. Section 1089(e) Comports with the Gonzalez Act's Structure

Section 1089(e) comports with the Gonzales Act's structure by protecting medical personnel from suit

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[7] The government reads Section 1089(a) instead as precluding a remedy against the individual employee even for cases in which, due to an FTCA exclusion, no remedy is available against the United States. See BIO 7, 11 n.7. As the government concedes, if Section 1089(a) were read in that way, Section 1089(e) would serve no function at all, because Section 1089(a) alone would have achieved the same result without it. See *ibid*. (Section 1089(e) ("Section 1089(e) is arguably superfluous."). In any event, the government's reading makes no sense in light of the Gonzalez Act's indemnification and removal provisions, which clearly provide for suits against employees and their consequences.

while preserving the ability of tort victims to obtain redress. Claims in which the issue is whether medical personnel had adequate consent to perform a procedure, are historically, practically, and conceptually closely tied to, and very difficult to distinguish from, other medical malpractice actions. Indeed, such medical battery cases can be among the most compelling medical malpractice cases, and the least likely ones in which Congress would have intended to foreclose remedies altogether. See pp. 37-38, *infra*. Accordingly, rather than continuing to permit medical battery cases to be brought against individual employees, Congress chose to channel medical battery cases into FTCA suits against the government, with the consequence that suits against the employee would be barred. The important point, however, is that the structural mechanism of the Gonzalez Act remained entirely intact. Medical personnel of the specified agencies are protected from suit, while victims of tortious conduct retain a remedy against the government.

By contrast, the court of appeals' result would create an inexplicable anomaly. The Gonzalez Act generally preserves a remedy for victims of malpractice committed by employees of the specified agencies, and the government and its medical personnel thus have an undoubtedly beneficial incentive to exercise proper care. But, under the court of appeals' interpretation, the Act would leave victims of medical battery, unlike other malpractice victims, with no opportunity to obtain redress for often serious injuries, and an important incentive for the government and its medical personnel to conduct themselves properly would be eliminated. That result is incon-

sistent with how the rest of the Gonzalez Act works, and it should be rejected.

III. CONGRESS UNDERSTOOD THAT SECTION 1089 PERMITS FTCA SUITS FOR MEDICAL BATTERY AND OTHER INTENTIONAL TORTS

The Gonzalez Act went through a number of iterations before it was enacted in 1976. At each stage, Congress indicated its intent to treat medical battery like other forms of medical malpractice, substituting FTCA liability for individual employee liability. At no point is there any suggestion that Congress intended to protect government employees by entirely eliminating remedies for some tort victims.

A. Pre-Gonzalez Act Statutes

The Drivers' Liability Act (DLA) was passed in 1961 to address suits against federal employees for damages arising from the operation of motor vehicles within the scope of their employment. Pub. L. No. 87-258, 75 Stat. 539 (1961). Under the DLA, a "remedy by suit against the United States" under the FTCA was an exclusive remedy, barring any other action. 28 U.S.C. 2679(b) (1964).[8] In 1965, Congress adapted the same scheme to address suits against Veterans Administration medical personnel in a statute now codified at 38 U.S.C. 7316. See Pub. L. No. 89-311, 79 Stat. 1156 (1965).

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[8] See S. Rep. No. 87-736 at 13 (1961) (letter from William P. Rogers, Deputy Attorney General) (noting that the exclusive remedy provision of the DLA was "confin[ed] to . . . circumstances where suit could be brought against the United States under the [FTCA]").

Neither the DLA nor Section 7316 as first enacted included a provision analogous to Section 1089(e). The first of the DLA-inspired immunity statutes to include a provision analogous to Section 1089(e) is now codified at 42 U.S.C. 233. Pub. L. No. 91-623, 84 Stat 1868 (1970). In terms similar to Section 1089(e), that statute made the intentional tort exception inapplicable "to assault or battery arising out of negligence" in the provision of medical services by Public Health Service employees. 42 U.S.C. 233(e).

B. The Gonzalez Act

1. In 1971, a bill was introduced that would have included provisions analogous to those in the Gonzalez Act (though applying only to the armed forces and not the other specified agencies), but without Section 1089(e). Instead, the bill would have directly amended Section 2680(h) itself by adding language eliminating from that exception medical torts by employees of the armed forces "arising out of assault or battery." S. 1078, 92nd Cong. (1971). The bill was introduced by Senator Griffin, who explained that "the Federal Tort Claims Act does not subject the United States to liability for an assault and battery committed by a Government employee. Malpractice suits, arising out of medical treatment, sometimes are based on 'lack of consent' and brought on a theory of assault and battery." 117 Cong. Rec. 4518 (1971). The proposed bill would "*permit malpractice actions based on assault and battery to be brought against the United States* . . . [and] assure that a plaintiff's existing right of action for alleged acts of malpractice is not limited." *Ibid.* (emphasis added).

2. In 1975, Representative Gonzalez proposed H.R. 3954, the bill that ultimately became the Gonzalez Act.[9] In introducing it, he stated that the Act would "make medical malpractice claims applicable against the United States rather than the individual." 121 Cong. Rec. 4578 (1975). The House Committee on Armed Services considered the effects of Section 2680(h) in medical malpractice suits when it held hearings on the bill. During those hearings, Representative Hogan noted that Section 2680(h) "does not allow a claim or a law suit arising out of assault and battery." *Full Committee Consideration of H.R. 3954, Hearings Before the H. Comm. on Armed Servs.*, 94th Cong. 4 (1975). He then stated that "[w]hat [proposed Section 1089(e)] does in a malpractice suit *is allow a claim arising out of assault and battery, or a law suit under the Federal Tort Claims Act arising out of assault and battery* in the limited malpractice area." *Ibid.* (emphasis added).

The subsequent House Report indicated that Section 1089(e) "use[d] [] the words 'assault and battery arising out of negligence' *in defining a circumstance where coverage for malpractice could be allowed un-*

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[9] Section 1089(e) in H.R. 3954 provided: "For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to assault and battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations." H.R. 3954, 94th Cong. (1975). The provision was virtually identical to Section 1089(e) as enacted, except that it applied only to assault and battery and not to other intentional torts, and it applied only to conduct arising out of negligence, rather than "negligence or a wrongful act or omission," as in the final bill.

der the provisions of the Federal Tort Claims Act." H.R. Rep. No. 94-333, at 4 (1975) (emphasis added).

3. The Senate Committee amended the bill to bring it into its final form. The changes broadened, but did not otherwise affect, Section 1089(e). See note 9, *supra*. As the Senate Report explained, "[s]ubsection (e) would *nullify a provision of the Federal Tort Claims Act which would otherwise exclude any action for assault and battery from the coverage of the Federal Tort Claims Act*." S. Rep. No. 94-1264, at 9 (emphasis added). The report went on:

> In some jurisdictions it might be possible for a claimant to characterize negligence or a wrongful act as a tort of assault and battery. In this way, the claimant could sue the medical personnel in his individual capacity . . . simply as a result of how he pleaded his case. In short, subsection (e) makes the [FTCA] the exclusive remedy for *any action, including assault and battery, that could be characterized as malpractice*.

Id. at 9-10 (emphasis added).[10]

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[10] The court of appeals (Pet. App. 7a-8a) and the government (BIO 7 n.6) correctly rely on this passage to contend that Congress was concerned that, without Section 1089(e), fine points of pleading, rather than substantive differences in conduct, could make the difference between a permitted medical negligence claim and a prohibited medical battery claim under the FTCA. The solution embodied in Section 1089(e), however, was not to give dispositive weight to those fine points of pleading, leaving some victims of malpractice with no remedy against anyone. Instead, the solution adopted in Section 1089(e) was to permit malpractice claims, however pleaded, to be brought against the government under the FTCA, thereby excluding such actions against individual medical employees.

The Executive Branch read the bill the same way. In a letter to the Senate Committee, a Department of Defense representative explained that, under Section 1089(e), "[t]he exception in section 2680(h) of title 28 for claims arising out of assault or battery would not bar a claim otherwise covered by the new [Gonzalez Act]." S. Rep. No. 94-1264, at 13. Permitting such claims would advance the dual purposes of the Gonzalez Act that he articulated:

> [T]here is now an urgent need *both* to assure an adequate remedy in all cases against the United States for injury caused by malpractice or negligence by persons in the medical and related specialties in the armed forces, within the scope of their duties, *and* to make that remedy the exclusive remedy for that malpractice.

Ibid. (emphasis added). The Gonzalez Act would "insure[] the availability of adequate compensation for legitimate malpractice claims *and* insulate[] medical practitioners from frivolous lawsuits." *Ibid.* (emphasis added).

C. Post-Gonzalez Act Statutes

Congress passed a series of contemporaneous and later statutes replicating the same scheme for the benefit of other government medical personnel. See 51 U.S.C. 20137 (NASA; originally enacted as 42 U.S.C. 307 in 1976); 22 U.S.C. 2702 (State Department; originally enacted as 10 U.S.C. 1091 in 1976); see also 38 U.S.C. 7316 (VA statute amended in 1987 to include provision analogous to Section 1089(e)). In addition, Congress enacted two other statutes addressing the same problem in the same way for non-medical professionals. See 10 U.S.C. 1054 (Depart-

ment of Defense legal personnel; originally enacted in 1986); 5 U.S.C. 8477 (Thrift Investment Board fiduciaries; originally enacted in 1986).[11] Each of the statutes retained a structure similar or identical to the Gonzalez Act, and each included a provision like Section 1089(e) making Section 2680(h) inapplicable to alleged malpractice committed within the scope of government employment.

IV. CONGRESS HAD GOOD REASONS TO TREAT MEDICAL BATTERY THE SAME AS OTHER MEDICAL MALPRACTICE CLAIMS IN THE GONZALEZ ACT

Given the exceptionally close relationship between medical battery and other medical malpractice actions, Congress's decision in the Gonzalez Act to permit medical battery claims to be brought against the government and therefore treated like

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[11] Just as medical battery is very closely related to other forms of medical malpractice, see pp. 34-36, *infra*, "misrepresentation" – another tort included in Section 2680(h) – is very closely related to many instances of legal malpractice. Thus, just as Congress enacted Section 1089(e) and the analogous medical statutes to transfer all forms of medical malpractice liability, including liability for medical battery, from the employee to the government, Congress enacted Section 1054(e) to transfer all liability for legal malpractice from the employee to the government. See *Mossow ex rel. Mossow v. United States*, 987 F.2d 1365, 1370-1371 (8th Cir. 1993) (rejecting government argument that plaintiffs' legal malpractice claim is precluded by 28 U.S.C. 2680(h) exclusion for "misrepresentation," on ground that Section 1054(e) makes Section 2680(h) inapplicable); *Devlin v. United States*, 352 F.3d 525, 536 (2d Cir. 2003). The same conclusion applies to fiduciary liability that is covered by 5 U.S.C. 8477, which similarly may involve a claim of misrepresentation that, without Section 8477(e), would be barred by Section 2680(h).

other medical malpractice claims made sense. The alternative adopted by the court of appeals, which would require courts to distinguish between medical negligence claims (which can be brought under the FTCA against the government) and medical battery claims (which are barred altogether), would entangle courts in confusion and entirely deprive victims of remedies based on fine differences in pleading rules in the different States. In the end, it would eliminate remedies for many of the victims who appeared to be most deserving.

A. State Laws Impose Widely Varying Rules on Consent-Based Medical Tort Claims

Most states recognize three types of consent-based claims that can be brought against doctors and other medical personnel – informed consent, revoked consent, and no consent. Informed consent claims address situations where, although the patient consented to the procedure, the doctor did not convey adequate information to the patient to make the patient's consent an "informed" one. See*, e.g.*, *Willis v. Bender*, 596 F.3d 1244, 1254 (10th Cir. 2010). Claims of revoked consent occur where the patient tries to revoke prior consent to a procedure but the doctor performs the procedure anyway. See*, e.g.*, *Mims v. Boland*, 138 S.E.2d 902, 907 (Ga. Ct. App. 1964) (describing circumstances under which a doctor could be liable for continuing a procedure after consent has been revoked). Lack of consent claims commonly address situations where the doctor did not obtain any consent at all for the procedure that he or she performed. See, *e.g.*, *Willis*, 596 F.3d at 1254.

Originally, all medical consent claims were treated as battery claims, on the theory that touching of the body without the patient's consent is a technical battery. *See* Jennifer A. Stiller, Health Law Practice Guide § 1:13 (2012). Most States have since moved towards treating informed consent claims as negligence-based, on the theory that the doctor has behaved negligently in failing to disclose sufficient information to the patient at the time the patient consented to the operation. *See, e.g., Curran v. Buser*, 711 N.W.2d 562, 568 (Neb. 2006). Two States, however, appear to permit plaintiffs to bring informed consent claims either as negligence-based or battery-based claims, see *Brown v. Wood*, 202 So. 2d 125, 130 (Fla. Dist. Ct. App. 1967); *Congrove v. Holmes*, 308 N.E.2d 765, 770-71 (Ohio Ct. Com. Pl. 1973), and at least two States still require *all* informed consent claims to be brought as battery claims, see *Fitzpatrick v. Natter*, 961 A.2d 1229, 1241 n.13 (Pa. 2008); *Cary v. Arrowsmith*, 777 S.W.2d 8, 21 (Tenn. Ct. App. 1989); see also *Foster v. Traul*, 175 P.3d 186, 192 (Idaho 2007); *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742, 748 (Pa. 2002).

Revoked consent claims are comparatively rarer. Of the jurisdictions that have addressed them, at least nine have classified them as battery-based.[12] Wisconsin, however, treats them as negligence-based, identically to informed-consent claims. See *Schreiber v. Physicians Ins. Co. of Wis.*, 588 N.W.2d

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[12] See *Pallacovitch v. Waterbury Hosp.*, No. CV126013332, 2012 WL 3667310, at *3 (Conn. Super. Ct. Aug. 3, 2012) (identifying seven other jurisdictions in addition to Connecticut); *Meyers v. Epstein*, 232 F. Supp. 2d 192, 198 (S.D.N.Y. 2002) (discussing New York law).

26, 33 (Wis. 1999). South Carolina requires all medical consent-based claims, including revoked consent claims, to be brought under the State's negligence-based medical malpractice framework. *Linog v. Yampolsky*, 656 S.E.2d 355, 358 (S.C. 2008).

Lack of consent claims in most States are medical battery claims. See, *e.g., Howard v. Univ. of Med. and Dentistry of N.J.*, 800 A.2d 73, 80 (N.J. 2002). Nevertheless, at least two States do not recognize medical battery claims as intentional torts at all, and thus require that they be brought as negligence-based claims. See *Lugenbuhl v. Dowling*, 701 So. 2d 447, 453 (La. 1997) (rejecting "battery-based liability in lack of informed consent cases (which include no-consent cases)"); *Linog*, 656 S.E.2d at 358. Some other States treat medical battery the same as common-law battery. See, *e.g.*, *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 438 (Ariz. 2003) (en banc); *In re A.C.*, 573 A.2d 1235, 1243 (D.C. 1990); *In re Gardner*, 534 A.2d 947, 951 (Me. 1987). Some states differentiate between medical battery (an intentional tort) and medical malpractice, which they view as including all negligence-based medical claims. See*, e.g. Yoder v. Cotton*, 758 N.W.2d 630, 635 (Neb. 2008) (noting that "[b]attery committed by a physician has been distinguished from claims of medical malpractice").

B. The Court of Appeals' Conclusion Would Require Courts To Enforce Arbitrary Distinctions and Disserve Congress's Intent

Under the scheme of Section 1089(e), the niceties of state law and the fine distinctions discussed above have little effect on the basic question whether some

remedy is available for consent-based malpractice claims. Consent-based malpractice claims are treated the same as other traditional malpractice claims; a remedy against the government – and not the doctor – is available for all of them. Moreover, within the category of consent-based malpractice claims, courts need not wrestle with outcome-determinative inquiries into the fine points of classification adopted under various state laws; the FTCA remedy is available for all such claims, just as it is for other malpractice claims.

1. The court of appeals' construction of Section 1089(e) would undo those beneficial effects. Despite the fact that the conduct itself would be tortious in *every* State, the question whether the victim of a medical battery by an armed forces doctor has a remedy at all would turn on precisely how claims were pleaded, on the application of often indeterminate rules of state law distinguishing between various types of consent-based claims, and on the accident of which State's law governs the case in question. See 28 U.S.C. 1346(b)(1) ("law of the place where the act or omission occurred").

2. The court of appeals' result would preclude *all* remedies for a class of tort victims that Congress could not have intended to disfavor. "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." *Shloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.). Consent-based medical torts may involve serious in-

cursions on bodily integrity, as occurred in this case. See, *e.g.*, *Guin v. Sison*, 552 So. 2d 60, 61-62 (La. Ct. App. 1989) (consent given only for abdominal exploration and possible colectomy, but doctor also removed ovary and Fallopian tube he believed to be contributing to patient's condition); *Bazaz-Sehgal*, 798 A.2d at 745 (unwanted implantation of prosthesis during surgery); *Blanchard v. Kellum*, 975 S.W.2d 522, 523 (Tenn. 1998) (attempted extraction of all teeth without consent to full extraction). They may also involve failures by medical professionals to provide crucial information that would enable patients to make informed decisions about their own medical treatment; in some jurisdictions, such cases must be pleaded as batteries. See, *e.g.*, *Fitzpatrick*, 961 A.2d at 1241 n.13; *Friter v. Iolab Corp.*, 607 A.2d 1111, 1111-1112 (Pa. Super. Ct. 1992) (patient not told lens implanted in eye was experimental); *Shadrick v. Coker*, 963 S.W.2d 726, 729 (Tenn. 1998) (doctor failed to inform patient that screws being inserted into spine were experimental). In medical consent cases, tort remedies have long provided remedies for victims and incentives for medical professionals to observe appropriate standards. Under the court of appeals' decision, patients of doctors employed by the armed forces and the other specified agencies would be left entirely without those protections.

3. Moreover, while state law generally provides some protection for victims of the whole range of consent-based medical torts, victims of consent-based medical torts committed by government medical personnel of the specified agencies would find remedies distributed arbitrarily. For example, in

Pennsylvania and Tennessee, where *all* consent-based medical torts must be pleaded as batteries, victims of all consent-based medical torts would presumably be left entirely without redress. In other States, in which some consent-based torts can (or must) be pleaded as negligence, the availability of a remedy would depend on the court correctly sorting out the proper categorization. Victims of perhaps the most severe consent-based torts – a doctor's intentional performance of a procedure to which the patient has given no consent, as in *Guin*, *supra* – would in most States be left entirely without redress.

4. There is no reason why Congress would have wanted to distinguish this one class of medical malpractice victims and leave them entirely without a remedy for what could be very serious wrongs. Indeed, under the Gonzalez Act, this class of victims likely includes veterans like petitioner and families of those serving in the armed forces whom this Court has recognized are uniquely the subject of congressional solicitude for their service to our country. See, *e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) ("[P]rovisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946) (legislation affecting veterans "is to be liberally construed for the benefit of those who left private life to serve their country"). The court of appeals' conclusion that Congress intended to leave this class of victims without the remedies ordinarily available to every other victim in our society is particularly misguided, and it should be rejected.

V. PETITIONER'S READING OF SECTION 1089(e) COMPORTS WITH THIS COURT'S TEACHINGS ON WAIVERS OF SOVEREIGN IMMUNITY

In concluding that petitioner's "plausible" reading of Section 1089(e) had to be rejected, Pet. App. 6a, the court of appeals relied heavily on its view that petitioner's reading requires "an unequivocal waiver of [sovereign] immunity." Pet. App. 9a. This Court has explained, however, that no such "unequivocal waiver" is necessary when, as here, the issue is the scope of an exception to the FTCA. Moreover, even if a strict construction rule applied, the evidence that Section 1089(a) abrogates the intentional tort exception for acts specified in the Gonzalez Act would satisfy it.

A. The Court of Appeals Erred in Applying a Rule of "Unequivocal Waiver"

1. The Federal Tort Claims Act waives the Government's immunity from suit in clear, "sweeping" language. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491-92 (2006) (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)); see also *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Accordingly, the construction of the scope of exceptions to that "broad waiver of sovereign immunity," *Kosak v. United States*, 465 U.S. 848, 852 (1984), does not "implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Dolan*, 546 U.S. at 491-92 (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). That is because "unduly generous interpretations of the exceptions

run the risk of defeating the central purpose of the statute." *Id.* at 492 (quoting *Kosak*, 465 U.S. at 853 n.9). Instead, "the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception' – no less and no more.'" *Ibid.* (quoting *Kosak*, 465 U.S. at 853 (quoting *Dalehite v. United States*, 346 U.S. 15, 31 (1953))). The Court has applied that approach in numerous cases construing both the scope of Section 2680 exceptions and other aspects of the FTCA.

For example, in *Dolan*, the Court considered whether a claim for injuries incurred when the plaintiff tripped over some mail left on her porch was barred by 28 U.S.C. 2680(b), the FTCA exception for "[a]ny claim arising out of the . . . negligent transmission of letters or postal matter." The Court noted that the words of Section 2680(b), taken by themselves, could extend to a claim like the plaintiff's, 546 U.S. at 486, and could therefore bar her suit. Under the court of appeals' "unequivocal waiver" standard, that would have been sufficient to resolve the case. Instead, however, this Court employed ordinary tools of statutory construction – "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis," *ibid.* – to conclude that a "narrower reading" of the postal exception was appropriate, under which "negligent transmission" did *not* extend to the plaintiff's claim. *Ibid.*

Regardless of whether the Court held for the

plaintiff or the United States, each of the other cases in which the Court has addressed an FTCA exception has similarly applied the ordinary tools of statutory construction to determine the scope of the exception, without applying or in most cases even referring to any special "unequivocal waiver" rule. See, *e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 217-28 (2008) (Section 2680(c) customs exception); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700-12 (2004) (Section 2680(k) "foreign country" exception); *Smith v. United States*, 507 U.S. 197, 203 (1993) (same); *Kosak*, 465 U.S. at 851-855 (Section 2680(c) customs exception); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808-12 (1984) (Section 2680(a) discretionary function exception).

2. Even aside from FTCA exceptions, the Court has construed the FTCA without applying an "unequivocal waiver" requirement. As the Court explained in *United States v. Kubrick*, which involved the FTCA statute of limitations, "we should not take it upon ourselves to extend the waiver beyond that which Congress intended," but "[n]either . . . should we assume the authority to narrow the waiver that Congress intended." 444 U.S. 111, 117-118 (1979). See, *e.g.*, *United States v. Olson*, 546 U.S. 43 (2005) (construing FTCA requirement that government be held liable only in situations where state law would make a private person liable in tort); *Molzof v. United States*, 502 U.S. 301 (1992) (defining the scope of the FTCA's prohibition on the award of "punitive damages"); *United States v. Muniz*, 374 U.S. 150 (1963) (holding that the FTCA extends to applicable claims by federal prisoners, based on the text, legis-

lative history, and purpose of the statute).

3. Because the issue in this case is closely analogous to the issues in the above cases, no rule of "unequivocal waiver" applies. As in those cases, the broad FTCA waiver of immunity in 28 U.S.C. 1346 and 2674 is in place, and its interpretation is not in question. As in many of those cases, this case turns on the application of an exception to the FTCA – here, the Section 2680(h) intentional tort exception, as modified by Section 1089(e) for a particular class of cases (those involving medical personnel of the specified agencies). The question whether, as applied to claims covered by the Gonzalez Act, that exception leaves the victims of medical battery remediless is one that should be answered, as this Court's cases have instructed, by identifying the "words and reason" of the statutes involved – no less and no more.

B. In Any Event, Construing Section 1089(e) to Permit FTCA Suits in these Circumstances Satisfies Any Strict Construction Rule that Would Be Applied

Even if a rule of strict construction applied, Section 1089(e) would permit FTCA suits for medical battery and other intentional torts. While such a strict construction rule requires more certainty before concluding that Congress waived sovereign immunity, it does not prohibit the use of the ordinary tools of statutory construction to determine if Congress's intent was clear. For example, in a case construing the waiver of sovereign immunity in the Privacy Act, the Court discussed the use of strict construction. The Court explained that, "[a]lthough this

canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. [The Court has] never required that Congress use magic words." *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). "To the contrary, [the Court has] observed that the sovereign immunity canon 'is a tool for interpreting the law' and that it does not 'displac[e] the other traditional tools of statutory construction.'" *Ibid.* (quoting *Richlin Sec. Serv. Co. v. Chertoff,* 553 U.S. 571, 589 (2008)). When strictly construing a waiver, "[w]hat [the Court] thus require[s] is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, *then* [the Court] take[s] the interpretation most favorable to the Government." *Ibid.* (emphasis added).

For the reasons given above, it is "clearly discernable" from the text, as well as the other traditional tools of statutory construction, that Section 1089(e) eliminates the FTCA exception for medical battery (and other intentional torts) committed by covered medical personnel, based on Congress's determination that it made sense to treat such cases the same as other medical malpractice cases. To require an even more explicit expression of Congress's intent, in the face of the text of Section 1089(e) and all of the other evidence above, would be to disregard Congress's intent in order to achieve an exceptionally harsh result that serves no sound purpose.

VI. THIS COURT'S DECISION IN *SMITH* DOES NOT SUPPORT THE COURT OF APPEALS' CONCLUSION

As explained above, the Gonzalez Act is based on the premise that victims of traditional torts will have remedies, either against the government under the FTCA or against the tortfeasor-employees. The court of appeals, supported by the government, erred in finding that this Court "expressly rejected an identical argument in [*United States v.*] *Smith*, [499 U.S. 160 (1991)]." Pet. App. 12a; see BIO 11. *Smith* involved a different statute with different provisions, a different structure, a different history, and different purposes. Nothing in *Smith* casts doubt on the conclusion that the Gonzalez Act preserves a remedy for victims of medical battery, as for victims of other forms of medical malpractice.

1. *Smith* arose from a claim against an army doctor for malpractice that occurred in a foreign country. The plaintiff did not sue the government, because the FTCA exception for suits arising in foreign countries, 26 U.S.C. 2680(k), precluded it. Although the government had originally relied on the Gonzalez Act in arguing that the doctor could not be sued, the government thought better of that argument and abandoned it in the court of appeals. See *Smith*, 499 U.S. at 164 n.6; see also pp. 15-16, *supra*. As the case came to this Court, it involved a post-Gonzalez Act federal statute, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act), 28 U.S.C. 2679(b)(1). That Act generally provides that FTCA suits against the government are the exclusive remedy for torts committed by government employees within the scope of their

employment, and the case presented the question whether the Liability Reform Act precluded the suit against the doctor, notwithstanding the unavailability of an FTCA suit. The Court held that it did.

2. The Liability Reform Act differs substantially from the Gonzalez Act. The Liability Reform Act contains no analogue to Section 1089(e), or to the Gonzalez Act's indemnification or removal provisions. To the contrary, while those provisions demonstrate that Congress intended the Gonzalez Act *not* to preclude suits against the employee when the FTCA remedy is unavailable, the absence of those provisions permitted an alternative reading of the Liability Reform Act in *Smith*.

Equally important, the Court in *Smith* expressly and exclusively based its decision on two provisions in the Liability Reform Act that have no analogue in the Gonzalez Act. 499 U.S. at 166. One of them provides that suits in which the United States is substituted as a defendant under the Liability Reform Act "shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA] *and shall be subject to the limitations and exceptions applicable to those actions*." 28 U.S.C. 2679(d)(4) (emphasis added). The Court found that the "limitations and exceptions" clause – which is not present in the Gonzalez Act – demonstrates Congress's intent that plaintiffs within the scope of the Section 2680 exclusions would be left without a remedy. *Smith*, 499 U.S. at 166.

The "second basis of [the Court's] interpretation" in *Smith* was an "express preservation[] of employee liability" for *Bivens* actions or actions under other

federal statutes that authorize suit against a government employee. 499 U.S. at 166; see *id.* at 167 (citing 28 U.S.C. 2679(b)(1) and (2)). The Court reasoned that "Congress' express creation of these two exceptions convinces us that [the court of appeals] erred in inferring a third exception that would preserve tort liability for Government employees when a suit is barred under the FTCA." *Ibid.* Again, there is no analogue in the Gonzalez Act to the *Bivens* and other-statute exceptions in the Liability Reform Act.

3. Far from casting any doubt on reading the Gonzalez Act to preserve *some* remedy for traditional tort violations, the Court in *Smith* stated that it "need not question the lower court's determination that the Gonzalez Act would *not* immunize [the doctor] from a malpractice action brought under state or foreign law" *i.e.*, a case that would be barred against the government under an FTCA exception. 499 U.S. at 172 (emphasis added).[13] *Smith* accordingly has no bearing on the interpretation of the Gonzalez Act in general, or on Section 1089(e) – a provision not at issue in *Smith* – in particular.

4. Finally, the court of appeals attempted to find support in this Court's comment in *Smith* that the Gonzalez Act "functions *solely* to protect military medical personnel from malpractice liability." Pet. App. 5a (quoting *Smith*, 499 U.S. at 172, and adding emphasis); see also BIO 8. The Court made that comment in rejecting a contention that the Gonzalez

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[13] See also *Hui v. Castaneda*, 130 S. Ct. 1845, 1854 & n.10 (2010) (similarly reserving question whether "an injured party without a remedy under the FTCA may sue a PHS official directly" under a statute analogous to the Gonzalez Act).

Act itself *created* a remedy against the employee in *Smith* – a claim that is not made here, where the issue is whether Section 1089(e) removes an exception to a remedy created by the FTCA elsewhere. The Court in *Smith* did not purport to consider other purposes of the Gonzalez Act, such as providing under Section 1089(f) for instances in which an FTCA remedy is unavailable and the individual employee is sued – or providing under Section 1089(e) for eliminating medical battery suits against employees by eliminating an FTCA exception that would otherwise bar such suits. Accordingly, nothing in *Smith* detracts from the conclusion that the Gonzalez Act abrogates the intentional tort exception for claims covered by it, thereby permitting the victims of those torts their remedy under the FTCA.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 10 U.S.C. 1089 provides:

§ 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against

any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f)(1) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term "head of the agency concerned" means --

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Chief Operating Officer of the Armed Forces Retirement Home, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

2. 28 U.S.C. 1346(b) provides:

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United

States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

3. 28 U.S.C. 2674 provides in pertinent part:

§ 2674. Liability of United States

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.

* * * * *

4. 28 U.S.C. 2679 provides in pertinent part:

§ 2679. Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of

this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is

filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

5. 28 U.S.C. 2680 provides:

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to --

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if --

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[**(g)** Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious

prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

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

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.