No. 08-1529

In The
Supreme Court of the United States

ESTHER HUI, ET AL.,

Petitioners,

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

CONAL DOYLE
WILLOUGHBY DOYLE, LLP
1814 Franklin Street
Suite 800
Oakland, CA 94612
(510) 451-2777

ADELE P. KIMMEL
Counsel of Record
AMY RADON
PUBLIC JUSTICE, P.C.
1825 K Street, N.W.
Suite 200
Washington, DC 20006
(202) 797-8600

THOMAS M. DEMPSEY
LAW OFFICES OF THOMAS M. DEMPSEY
433 North Camden Drive
Suite 730
Beverly Hills, CA 90210
(310) 385-9600

ARTHUR H. BRYANT
LESLIE A. BRUECKNER
PUBLIC JUSTICE, P.C.
555 12th Street
Suite 1620
Oakland, CA 94607
(510) 622-8150

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does 42 U.S.C. § 233, which incorporates the Federal Torts Claims Act ("FTCA") and its exclusivity provision, 28 U.S.C. § 2679(b), bar a civil action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Public Health Service officials for violating the United States Constitution and causing the penile amputation and death of Francisco Castaneda, when the FTCA's exclusivity provision, by its terms, "does not extend or apply to a civil action against an employee of the Government . . . for a violation of the Constitution of the United States"?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

STATUTORY PROVISIONS

This case involves the immunity provisions in 42 U.S.C. § 233 of the Public Health Service Act ("PHS Act") and 28 U.S.C. § 2679(b) of the Federal Tort Claims Act ("FTCA"). These and other relevant statutes are reproduced in an appendix to this brief.

STATEMENT OF THE CASE

The issue in this case is whether two Public Health Service ("PHS") officials can be sued for violating the Constitution and causing the penile amputation and death of Francisco Castaneda through conduct that, in the district court's words, "transcends negligence by miles" and appears to be "one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered." Migliaccio App. to Pet. Cert. 74a, 80a n.16 ("Pet. App."). Petitioners contend that, even if they blatantly violated Castaneda's constitutional rights, they cannot be held personally accountable. They claim that Castaneda's surviving family members and estate are limited to a negligence lawsuit against the United States under the FTCA because 42 U.S.C. § 233(a) immunizes them from lawsuits for constitutional violations—*i.e.*, *Bivens* actions. However, the FTCA's exclusivity provision—which § 233(a) incorporates and which applies to all federal employees—expressly states that it "does not extend or apply to a civil action against an employee of the

Government . . . for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(1)-(2). This case will determine whether those words mean what they say.

A. Factual Background

Francisco Castaneda was an immigration detainee who had his penis amputated, and ultimately died of penile cancer at 36, because Petitioners refused to provide him with a simple skin biopsy they knew was necessary. J.A. 334-35, 338. Petitioners ignored increasingly-insistent recommendations from their own staff and outside physicians—and created false and misleading records about Castaneda's condition and treatment—while Castaneda had a growing, fungating penile lesion bleeding through his underwear. J.A. 110, 124-25, 136-37, 167-68, 172, 184, 345, 347-48, 355-56. Their "treatment" of Castaneda during his nearly eleven-month detention by Immigration and Customs Enforcement ("ICE") consisted primarily of ibuprofen, antihistamines, antibiotics, and an extra allotment of boxer shorts. J.A. 354-55, 358.

Castaneda entered the San Diego Correctional Facility ("SDCF") under ICE custody on March 27, 2006, after serving a four-month sentence with the California Department of Corrections. J.A. 343, 345. That day, he informed SDCF staff of a lesion on his penis that was painful, bleeding, and exuding discharge. J.A. 345. The next day, physician assistant

Lieutenant Anthony Walker examined Castaneda, noted a large "mushroomed" genital lesion and a family history of cancer, and recommended a urology consult and biopsy "ASAP." J.A. 109-12, 292, 345-46. Walker reported to and worked under the "close supervision" of Petitioner Hui. Ninth Circuit Supplemental Excerpts of Record ("SER") 358.[1]

Hui, a PHS civilian employee, was the treating physician responsible for Castaneda's medical care during his eight-month detention at SDCF. J.A. 239; SER 358, 366. Petitioner Gonsalves, a PHS officer, was SDCF's Health Services Administrator. J.A. 239. Both worked for the Division of Immigration Health Services ("DIHS"). SER 351.

When Hui first examined Castaneda, she believed that he had either cancer or an infection and knew that the standard of care required her to rule out penile cancer with a biopsy—the only definitive diagnostic test for doing so. SER 360-61, 363. Despite this knowledge, Hui never arranged for the test to be administered and declined an outside physician's offer to arrange for the biopsy. J.A. 125; SER 372, 379.

Walker's request for a urology consult and biopsy for Castaneda "ASAP" was not approved by DIHS for

[1] Petitioners' and the government's briefs omit the fact that Walker recommended a urology consult and biopsy "ASAP." *See* Gonsalves Br. 4; Hui Br. 4; U.S. Br. 3.

two months. J.A. 113-15, 292-94, 346; SER 368-69.[2] Even then, Castaneda never received a biopsy while in ICE custody. J.A. 363.

A week after DIHS approved the biopsy, Castaneda was sent to oncologist John Wilkinson, M.D. Wilkinson examined Castaneda and ordered urgent diagnosis and treatment, including a biopsy. J.A. 115-25, 294, 346-47. Wilkinson documented that Castaneda might have "penile cancer or a progressive viral based lesion" and noted:

> I strongly agree that it requires urgent urologic assessment of biopsy and definitive treatment. In this extremely delicate area and [sic] there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated.
>
> * * *
>
> I spoke with the physicians at the correctional facility. I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost

[2] DIHS approved a Treatment Authorization Request ("TAR") submitted by Walker. J.A. 111-15. DIHS "on-site" medical providers complete TARs when they believe off-site care is required, then send them to a "managed care coordinator" who decides, with a DIHS physician, whether to authorize treatment. J.A. 90-96. Detainees' TAR histories are available online to on-site providers, SER 366, so treating physicians like Hui can know their status at all times.

> effective. They understand the need for urgent diagnosis and treatment.

J.A. 116, 124. Wilkinson told Hui "in no uncertain terms" that Castaneda's penile lesion required a biopsy and offered to admit Castaneda for the test. J.A. 125; SER 373.[3] Nonetheless, Hui insisted that a biopsy was an "elective" out-patient procedure and she did not admit him to a hospital. J.A. 125.[4] According to Hui, any medical condition where death is not immediately imminent is "elective." SER 369-70.[5]

---

[3] Petitioner Gonsalves claims Wilkinson "made clear" that Castaneda should see a urologist first and only return to him if a biopsy showed cancer, and that "DIHS therefore sent Castaneda to Scripps Mercy where he could be examined by a urologist immediately." Gonsalves Br. 7 n.3. This ignores that Wilkinson offered to admit Castaneda for the consult and biopsy that same day and that Hui declined the offer because it was not "cost effective." J.A. 124. Moreover, five weeks elapsed before SDCF sent Castaneda to Scripps Mercy. J.A. 140-47, 351.

[4] When Hui declined Wilkinson's offer, she knew that DIHS was having difficulty locating a urologist to perform out-patient procedures on SDCF detainees due to "payment issues." SER 367-68, 374. Thus, she knew it would be difficult to get Castaneda an "out-patient" biopsy in the foreseeable future.

[5] Petitioners suggest that DIHS policy required Hui to arrange the biopsy on an out-patient basis. Gonsalves Br. 5; Hui Br. 5. This assertion is unsupported by the record. DIHS had already approved a biopsy without regard to whether it was performed in- or out-patient. J.A. 113-15, 292-94, 346. Moreover, Hui admitted that there was "no reason for [her] to refuse this procedure to go forward" and that, under DIHS policy, cancer should be treated "without any questions asked." SER 361, 368-69.

On June 30, while Hui knew that only a biopsy could determine whether Castaneda had cancer, DIHS medical records reported that Castaneda "DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory"—and that Castaneda "needs to be patient and wait." J.A. 133-34 (emphasis in original). They said his lesion had been "looking and acting a bit more angry" the past few months and there was "a severe deformed uncircumcised foreskin growth that could use attention." *Id*.

On July 13, both Wilkinson and an outside urologist, Dr. Masters, "strongly recommend[ed] admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant findings." J.A. 139. SDCF staff sought approval for Emergency Room ("ER") evaluation and treatment, documenting that Castaneda's penile lesion "now appears to be 'exploding' for lack of better words." J.A. 134-37, 139-40.

SDCF staff then took Castaneda to the Scripps ER. J.A. 140-47, 351. Dr. Juan Tovar examined Castaneda and recommended hospital admission to "rule out cancer, versus infectious etiology." J.A. 140-44. Daniel Hunting, M.D., a Scripps urologist, briefly examined Castaneda, did not obtain Castaneda's prior family history of cancer, and stated that his lesion was probably "condyloma" (*i.e.*, genital warts). J.A. 144-45, 351. Rather than treat Castaneda, Hunting referred him back to his "primary treating

urologist," despite his observation that his condition was so severe that his penis required "resection"—*i.e.*, partial surgical removal. J.A. 145, 148. Hui, meanwhile, still did not take any steps to ensure that Castaneda would get a biopsy. When Castaneda suffered from insomnia due to his condition, he was given an antihistamine and told to practice "stress reduction techniques." J.A. 164.

For five weeks after the ER visit, Castaneda still went untreated. At that point, Masters concluded that Castaneda needed a circumcision, to relieve the "ongoing medical side effects of the lesion including infection and bleeding" and provide a biopsy to "rule out malignant neoplasm" (*i.e.*, cancer). J.A. 156-60. Masters also offered to arrange for Castaneda's admission at a local hospital, but his offer was rejected. J.A. 159, 353-54. Instead, DIHS's records falsely characterized Masters as stating that the "elective procedures this patient may need in the future are cytoscopy and circumcision," J.A. 161, and failed to document either his conclusion that a biopsy was needed to rule out cancer or his offer to admit Castaneda for treatment.[6]

---

[6] Petitioner Gonsalves claims that Masters returned Castaneda to SDCF without providing "the authorized test and treatment." Gonsalves Br. 8-9. The reality is that DIHS did not accept Masters's offer to admit Castaneda to a local hospital for treatment and, instead, mischaracterized and omitted some of his recommendations in its records. Citing the same records, the district court noted below that Petitioners may have "lied about [outside doctors'] recommendations" and "purposefully

(Continued on following page)

A week after Masters's examination, Castaneda received a memo from Petitioner Gonsalves that said the "surgical intervention" recommended by the "off-site specialist" was "elective in nature"; "[a]n independent review by our medical team is in agreement with the specialist's assessment"; and the care Castaneda was receiving was "appropriate and in accordance with our policies." J.A. 167-68. Gonsalves's representation that the "off-site specialist" described the surgical intervention as "elective" was false and directly conflicts with the medical records of Wilkinson, Masters, and even Hunting (who recommended resection). J.A. 115-24, 139-40, 148, 156-60, 355.

Castaneda's condition continued to deteriorate. After an SDCF detention officer informed medical staff that Castaneda had blood on his boxer shorts, Walker sought authorization for Castaneda's surgery, but DIHS denied the request. J.A. 172, 173-77.[7] By November 15, Castaneda's lesion had grown, his boxer shorts were stained with blood and discharge, and he could no longer urinate while standing because the urine "spray[ed] everywhere." J.A. 179-80, 183-84. His weekly allotment of boxer shorts was increased. J.A. 183-84.

---

mischaracterized" Castaneda's medical conditions as "elective" to justify refusing him care. Pet. App. 78a-80a.

[7] DIHS denied the request, even though it acknowledged that Castaneda was a "mandatory hold" due to his immigration status and "may be with this facility for quite a while." J.A. 177.

Soon afterwards, ICE transferred Castaneda to San Pedro Service Processing Center, listing no current medical problems. J.A. 358-59. In early December, ACLU attorneys began advocating to get Castaneda the biopsy that had been recommended approximately eight months earlier. J.A. 359-60. As a result, urologist Lawrence Greenberg, M.D., examined Castaneda, describing his penis as "a mess" and stating that he required surgery. J.A. 360-61. Over a month later, urologist Asghar Askari, M.D., examined Castaneda and determined that Castaneda "most likely [had] penile cancer." J.A. 191-93, 362-63.

DIHS finally scheduled the biopsy that had been recommended nearly ten months earlier, but ICE abruptly released Castaneda on February 5, a few days before the biopsy was to occur. J.A. 363; SER 194-96. Castaneda went to the ER of Harbor-UCLA Hospital in Los Angeles on February 8, where he was diagnosed with squamous cell carcinoma of the penis. J.A. 363. His penis was amputated on February 14. *Id.* The amputation did not occur in time to save his life, as the cancer had spread and did not respond to numerous rounds of chemotherapy. J.A. 364. Castaneda died on February 16, 2008. *Id.*

B. Statutory Background

This case involves two federal statutes addressing the scope of immunity afforded to PHS personnel: 42 U.S.C. § 233 and 28 U.S.C. § 2679(b).

Congress enacted 42 U.S.C. § 233 as part of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868. The immunity provision in § 233(a) was a response to the Surgeon General's request that PHS personnel receive protection from ordinary malpractice liability. *See* 91 Cong. Rec. H42543 (daily ed. Dec. 18, 1970) (statement of Rep. Staggers, House sponsor of bill) (noting that the Surgeon General requested the amendment because PHS doctors "cannot afford to take out the customary liability insurance as most doctors do").

Congress addressed this issue by making an action against the United States under the FTCA—a statute designed to protect federal employees from common-law tort liability—the "exclusive" remedy for people injured by PHS officials' malpractice. Section 233(a) provides:

> DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE SUITS
>
> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 . . . for damage for personal injury, including death, resulting from the performance of medical . . . or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or

> proceeding by reason of the same subject-matter against the officer or employee . . . whose act or omission gave rise to the claim.

42 U.S.C. § 233(a).[8]

It was not until the following year that this Court decided *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971), a case charging federal agents with constitutional violations under the Fourth Amendment and permitting, for the first time, a constitutional damages claim against them. Prior to *Bivens*, no reported decision had allowed constitutional damages claims against federal officials.

Five years later, in 1976, this Court decided *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976), which recognized an Eighth Amendment claim against state officials under 42 U.S.C. § 1983, based on their deliberate indifference to a prisoner's serious medical needs. Prior to *Estelle*, this Court had not recognized an Eighth Amendment claim for a prisoner's inadequate medical care.

---

[8] Section 233(a) was modeled on the now-repealed Federal Drivers Act, adopted in 1961. *See* Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. § 2679(b) (1982)). Congress also adopted similar immunity statutes to protect other federal medical personnel, including the Gonzalez Act, 10 U.S.C. § 1089 (Army medical personnel), and 38 U.S.C. § 7316 (Veterans' Administration medical personnel).

In 1980—ten years after Congress enacted § 233(a)—*Carlson v. Green*, 446 U.S. 14, 18-19 (1980), held that such claims are actionable against federal officials under *Bivens*. In *Carlson*, the federal defendants were medical personnel employed by the federal Bureau of Prisons ("BOP") and the PHS.[9] This Court found the FTCA inadequate to remedy the Eighth Amendment violation at issue, which had resulted in the death of a federal prisoner, and found it "crystal clear" that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. at 20.

Eight years later, in 1988, Congress amended the FTCA in response to this Court's decision in *Westfall v. Erwin*, 484 U.S. 292, 299 (1988), which held that federal employees were not entitled to absolute immunity from common-law torts committed in the scope of their employment. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4653 (codified at 28 U.S.C. §§ 2671-80). As amended, the FTCA provides:

> (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 . . . of any employee

[9] Assistant Surgeon General Robert T. Brutshe, a PHS officer, was one of the defendants. *See* Resp. App. 69a, 73a-74a, Compl., *Carlson v. Green*, 446 U.S. 14 (1980) (No. 78-1261).

> of the Government . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee. . . . Any other civil action . . . arising out of or relating to the same subject matter against the employee . . . is precluded. . . .
>
> (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. . . .*

28 U.S.C. § 2679(b)(1)-(2) (emphasis added). As the italicized language shows, although the FTCA provides all federal employees with immunity from common-law torts, it simultaneously preserves personal liability for constitutional violations—*i.e.*, *Bivens* actions.

Section 233 depends on the FTCA for much of its effect. Section 233(a) explicitly refers to the "remedy against the United States provided by sections 1346(b) and 2672 of title 28"—*i.e.*, the FTCA remedy—and provides that, where PHS officials cause certain types of damage, the FTCA remedy against the United States is exclusive. 42 U.S.C. § 233(a). The "exclusive remedy" of § 233(a) is explicitly subject to § 1346(b), which, in turn, is "[s]ubject to the provisions of chapter 171" of title 28. 28 U.S.C. § 1346(b). Chapter 171 codifies the Westfall Act, 28 U.S.C. §§ 2671-80, and the Westfall Act, in turn, expressly preserves *Bivens* remedies in § 2679(b)

("The [exclusive] remedy against the United States provided by [the FTCA] . . . *does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States*") (emphasis added).

Petitioners' position is that § 233(a) affords them immunity from *Bivens* actions, notwithstanding that all other federal employees—including their BOP counterparts—are subject to *Bivens* liability.

C. Proceedings Below

Castaneda filed this action on November 2, 2007. Pet. App. 8a. He died three months later and his sister and personal representative, Yanira Castaneda, and his minor daughter and sole heir, Vanessa Castaneda, were substituted as Plaintiffs. *Id*. They assert FTCA claims against the United States; *Bivens* claims against federal officials alleging Fifth and Eighth Amendment violations for deliberate indifference to Castaneda's serious health needs; 42 U.S.C. § 1983 and common-law malpractice claims against state officials; and a malpractice claim against a private physician who examined Castaneda while he was in ICE custody. J.A. 377-404.

On January 14, 2008, Petitioners moved to dismiss the *Bivens* claims, arguing that, under 42 U.S.C. § 233(a), the FTCA provided the exclusive remedy, and certifying under 28 U.S.C. § 2679(d)(1) and 42 U.S.C. § 233(a) that Petitioners had acted

within the scope of their employment. Pet. App. 8a-9a; J.A. 34.

The district court denied the motion, concluding that § 233(a), through its reference to FTCA provisions, "incorporates the provision of the FTCA [28 U.S.C. § 2679 (b)(2)(A)] which *explicitly* preserves a plaintiff's right to bring a *Bivens* action." Pet. App. 59a-61a (emphasis in original).

The district court also observed that the evidence the Plaintiffs had "already produced at this early stage in the litigation is more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions." *Id*. at 75a. The court concluded its opinion by noting: "Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate." *Id.* at 80a n.16.

Petitioners filed an interlocutory appeal of the district court's immunity ruling. Soon thereafter, the government filed a Notice of Admission of Liability for Medical Negligence, admitting liability and causation on Respondents' medical negligence claim against the United States. J.A. 328-29.

The court of appeals affirmed the denial of *Bivens* immunity. Pet. App. 1a-40a. The court turned to *Carlson*, 446 U.S. 14, as "the starting point" for its analysis. Pet. App. 10a. It examined § 233(a) under *Carlson*'s two-factor test for *Bivens* preemption,

which places the burden on the party asserting preemption to demonstrate either (1) "special factors counselling hesitation in the absence of affirmative action by Congress" or (2) "that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* (quoting *Carlson*, 446 U.S. at 18-19) (emphasis in original).

Noting *Carlson*'s conclusion that Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief, the court found "no basis" for distinguishing *Carlson* here. Pet. App. 13a-14a. The court also concluded that § 233(a) does not contain any "explicit declaration" that Congress intended to provide PHS personnel immunity from *Bivens*. *Id.* at 19a. The court found support for this conclusion in § 233(a)'s text, *id.*; the text of the FTCA, as amended by the Westfall Act, *id.* at 25a; the historical context in which § 233(a) was enacted, *id*. at 20a-23a; and the legislative histories of § 233(a) and the Westfall Act, *id.* at 22a, 26a-28a.

Finally, the court concluded, in accordance with *Carlson*, that there are no "special factors" precluding a *Bivens* action. *Id.* at 37a-39a (quoting *Carlson*, 446 U.S. at 18).

SUMMARY OF ARGUMENT

Francisco Castaneda died after enduring eleven months of treatment at the hands of PHS officials for which, in the district court's words, "the moniker 'cruel' is inadequate." Pet. App. 80a. The question presented in this case is whether his family will be able to seek justice from the individuals who perpetrated that conduct—Petitioners here—or whether Petitioners are immunized from liability for constitutional violations by 42 U.S.C. § 233(a), a statute that was enacted the year *before* the right to sue for constitutional violations came into existence. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In light of the plain language of § 233(a); other provisions of the statute; numerous other indicia of congressional intent; the historical context in which § 233(a) was enacted; and this Court's own post-*Bivens* jurisprudence, the answer to this question is "no."

First and foremost, Petitioners' attempt to evade liability for one of the "most egregious Eighth Amendment violations the [district court] ha[d] ever encountered," Pet. App. 74a, is defeated by the plain language of § 233(a), which makes clear that Congress did not intend to provide PHS officials with immunity from *Bivens* actions. That provision is expressly subject to Section 1346(b) of the FTCA—which, in turn, is "[s]ubject to the provisions of chapter 171" of title 28. 28 U.S.C. § 1346(b). Chapter 171 codifies the Westfall Act, 28 U.S.C. §§ 2671-80, which expressly preserves *Bivens* actions: "*the remedy*

against the United States provided by [the FTCA] . . . does not extend or apply to a civil action against an employee of the government . . . which is bought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Because the immunity conferred by § 233(a) is expressly subject to the italicized language from the Westfall Act—language that indisputably excepts *Bivens* actions from the scope of immunity for all federal employees—Petitioners' immunity argument falters right from the start.

Other provisions of § 233 confirm this interpretation. First, § 233(c)—known as the "scope certification" provision—speaks volumes by what it does *not* include: a mechanism by which a federal employee's bid for immunity in a federal court action is triggered. A federal employee may not claim personal immunity under an "exclusive remedy" provision until the government or a district court certifies that an employee was acting within the scope of his employment when committing the tort from which the suit arose. 28 U.S.C. § 2679(d). Section 233(c), however, does not contain any procedure for a scope certification where a PHS officer faces a federal court action, which forces federal employees—including Petitioners here—to seek scope certification under a provision of the FTCA, 28 U.S.C. § 2679(d), that is itself subject to the FTCA's express preservation of *Bivens* actions against all federal employees. *Id.* The fact that § 233(c)—by virtue of its lack of an applicable scope certification provision—obligated Petitioners to use a certification provision

in the FTCA that itself is subject to the FTCA's *Bivens* exception defeats any argument that § 233(a) was intended to immunize PHS personnel from *Bivens* claims.

Section 233(f)'s "insure-or-indemnify" provision, which authorizes the government to indemnify or provide liability insurance for PHS personnel under certain circumstances, further confirms that § 233(a)'s exclusivity language permits *Bivens* actions. The inclusion of such a provision within § 233 is proof positive that Congress never intended to immunize PHS officials from *all* liability because, absent liability, there would be no need for indemnification or insurance.

Numerous other indicia of Congressional intent confirm that § 233(a) does not create any immunity from *Bivens* claims. For one, the title of § 233(a)—"Defense of Certain Malpractice and Negligence Suits"—unambiguously conveys that § 233(a) immunity extends to certain "malpractice" and "negligence" actions only, not actions asserting constitutional torts. Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868. Equally telling is the fact that § 233(a) was enacted before any constitutional tort action against federal employees had even been recognized by this Court. (*Bivens* was decided the year *after* § 233(a) was passed. *See* 403 U.S. at 389.) The legislative history of the Westfall Act—which includes an amendment to the FTCA that explicitly preserves the right to sue federal employees under *Bivens*—further confirms that Congress's sole

intent in enacting § 233(a) and similar immunity statutes was to provide federal employees immunity from common-law tort actions, not *Bivens* actions. Petitioners' contrary interpretation, which is at odds with every available indicia of Congressional intent, would mean that of all the federal employees in this country, only PHS employees are immune from *Bivens* liability—an anamolous result that Congress could not reasonably have intended.

Even if § 233(a) did not incorporate § 2679(b)'s express preservation of *Bivens* remedies (which it does), Petitioners' immunity argument would still fail because the immunity provision of the FTCA—28 U.S.C. § 2679(b)—applies on its face to all federal employees—including PHS personnel. Petitioners cannot escape the reach of this statute—and its express preservation of *Bivens* remedies—by arguing that it impliedly repeals § 233(a), because the two statutes are capable of coexistence, and thus, the Court must give effect to both. *See Things Remembered, Inc. v. Petraca*, 516 U.S. 124, 129 (1995).

Finally, this Court's jurisprudence—in particular, *Carlson v. Green*, 446 U.S. 14 (1980)—mandates a holding that § 233(a) does not immunize Petitioners from *Bivens* liability. *Carlson* held—in a case functionally equivalent to this one—that it is "crystal clear" that Congress does not intend the FTCA remedy to substitute for a *Bivens* remedy. 446 U.S. at 20. This case creates an even stronger basis for rejecting immunity than *Carlson*, which was decided before the Westfall Act explicitly preserved *Bivens*

actions against all federal employees. In addition, all of the various factors relied on by the *Carlson* Court to support its conclusion—including the absence of both an equally effective federal remedy and special factors counselling hesitation against the recognition of a *Bivens* remedy—are satisfied here in spades. If Petitioners are granted the immunity they seek, Castaneda's family will be relegated to damages that do nothing to compensate them for the unspeakable suffering Castaneda endured at the hands of PHS officials. This Court should not conclude this "Kafkaesque nightmare," Pet. App. 24a n.12, by depriving his family of their right to seek a full and effective remedy for their—and his—immeasurable losses.

ARGUMENT

I. SECTION 233 PRESERVES *BIVENS* CLAIMS AGAINST PHS OFFICIALS.

A. The Plain Language Of § 233(a), Which Incorporates The FTCA And Its Exclusivity Provision, Preserves *Bivens* Claims Against PHS Officials.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 233(a) starts with a cross-reference to the FTCA:

> *The remedy against the United States provided by sections 1346(b) and 2672 of title 28* [the FTCA] . . . for damage for personal injury, including death, resulting from the performance of medical . . . or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee . . . whose act or omission gave rise to the claim.

42 U.S.C. § 233(a) (emphasis added).[10]

The italicized language reveals that Congress did *not* intend to provide PHS officials with immunity from *Bivens* actions. The "exclusive remedy" of § 233(a) is expressly subject to § 1346(b), which, in turn, is "[s]ubject to the provisions of chapter 171" of title 28. 28 U.S.C. § 1346(b). Chapter 171 codifies the Westfall Act, 28 U.S.C. §§ 2671-80, which, in turn, preserves a *Bivens* remedy: "The [exclusive] remedy against the United States provided by [the FTCA] . . . *does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States.*" 28

[10] The italicized reference to "sections 1346(b) and 2672 of title 28" is the common convention for referring to the entire FTCA. *See, e.g.,* Gonsalves Br. 23; U.S. Br. 9; *United States v. Smith*, 499 U.S. 160, 165-66 (1991) (replacing similar immunity statute's reference to these section numbers with "[the FTCA]").

U.S.C. § 2679(b)(1)-(2)(A) (emphasis added). Because § 233(a) incorporates the FTCA provision that expressly preserves a *Bivens* remedy, this Court need look no further than the plain language of the statute to resolve the question presented in Respondents' favor.[11]

To avoid the inevitable result of following § 233(a)'s statutory trail, Petitioner Gonsalves and the United States argue that § 233(a) does not incorporate the FTCA's express preservation of *Bivens* remedies because § 233(a) refers to the FTCA only in describing the scope of the remedy against the

---

[11] This Court has long recognized the importance of examining statutory provisions incorporated by reference to ascertain the plain meaning of a statute. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 66 (2000) (interpreting the Age Discrimination in Employment Act ("ADEA") to apply to State employers because of later amendments to the Fair Labor Standards Act that were incorporated by reference in the ADEA); *U.S. Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495 (1994) (following "a somewhat convoluted path of statutory cross-references" to determine whether disclosures of employees' personal information under the Federal Service Labor-Management Relations Statute constitutes a "clearly unwarranted invasion" of the employees' privacy within the meaning of the Freedom of Information Act); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (noting that "cross-references [between different parts of the Social Security Act] illustrate Congress's intent that [those parts] operate together closely to provide uniform levels of support for children of equal need"); *County of Washington v. Gunther*, 452 U.S. 161 (1981) (interpreting the scope of Title VII, which proscribes employment discrimination, in light of the Equal Pay Act ("EPA"), after an amendment to Title VII cross-referenced the EPA).

United States—not the scope of immunity afforded to PHS personnel—and § 2679(b)(2)(A) is not part of that remedy. Gonsalves Br. 37-38; U.S. Br. 21-22. Setting aside the fact that § 233(a) incorporates the *entire* FTCA, this strained parsing of § 233(a)'s reference to the FTCA lacks merit.[12] As explained below, examining § 233 as a whole demonstrates that § 233(a) preserves *Bivens* claims.

B. Other Provisions Of § 233 Confirm That § 233(a) Preserves *Bivens* Claims.

Petitioners' reliance on one statutory phrase in § 233(a)—"exclusive of any other civil action"—shows a "regrettable penchant for construing words in isolation." *Deal v. United States*, 508 U.S. 129, 133 (1993). It is well-established that the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) (holding that

[12] Section 233(a) is subject to Chapter 171 of the FTCA in its entirety, including § 2679(b)'s *Bivens* exception, because of § 233(a)'s reference to § 1346(b). *See, e.g., Parrott v. United States*, 536 F.3d 629, 634 (7th Cir. 2008) ("Section 1346(b) is subject to chapter 171 in its entirety, not to [one subsection of the FTCA] specifically"). Indeed, much of the PHS Act's function depends on Chapter 171, which includes provisions on administrative adjustment of claims, exhaustion of administrative remedies, settlement, and exceptions to the FTCA's coverage. 28 U.S.C. §§ 2671-80.

the phrase "negligent transmission" in 28 U.S.C. § 2680(b) does not include "all" negligence occurring in the course of mail delivery); *see also United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (holding that a reference to "any" law enforcement officer cannot be construed broadly "without considering the rest of the statute"). Here, when § 233(a)'s exclusivity language is interpreted in the context of § 233 as a whole—particularly subsections (c) and (f)—it is clear that § 233(a) does not preclude *Bivens* actions, let alone *all* civil actions, as Petitioners claim.

1. Section 233(c)

Section 233(c) supports this interpretation of § 233(a) by virtue of what it does *not* contain. This subsection, commonly known as the "scope certification" provision, allows the United States to substitute as a defendant after certifying that an employee was acting within the scope of employment when committing the common-law tort from which the suit arose. 42 U.S.C. § 233(c). However, § 233(c) does *not* contain any procedure for a scope certification where a PHS official faces a *federal* court action. Instead, it is limited to actions filed in *state* court and permits removal to federal court upon certification. *Id*.

The absence of a scope certification provision in § 233(c) for federal court actions is proof positive that Congress did not intend § 233(a) to immunize PHS personnel from *Bivens* liability. A federal employee

may not claim personal immunity under an "exclusive remedy" provision—such as § 233(a) or § 2679(b)—until the government or a district court provides a scope certification. 28 U.S.C. § 2679(d). Because § 233 does not contain a scope certification provision for the types of claims asserted here, federal employees, including PHS personnel, must seek scope certification under 28 U.S.C. § 2679(d) of the FTCA—which, unlike § 233(c)—*does* provide a scope certification procedure for federal defendants who face federal court actions. 28 U.S.C. § 2679(d)(1).[13]

Because § 233(c) does not permit scope certification in federal cases, Petitioners here invoked 28 U.S.C. § 2679(d) as the basis for their immunity defense. J.A. 34. But Petitioners' reliance on § 2679(d) itself defeats their immunity argument—and their interpretation of § 233(a). This is because § 2679(d),

---

[13] Section 2679(d)(1) provides:

> 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.

28 U.S.C. § 2679(d)(1). The FTCA also contains a scope certification provision applicable to state court actions, which provides for removal to federal court upon certification. 28 U.S.C. § 2679(d)(2).

like § 233(a), is subject to the FTCA's express preservation of a *Bivens* remedy for all federal employees. Section 2679(d)(4) states that scope certification "*shall be subject to the limitations and exceptions* applicable to" actions brought against the United States under the FTCA. 28 U.S.C. § 2679(d)(4) (emphasis added).[14] One such "*limitation[] and exception[]*" is § 2679(b), which is the express preservation of *Bivens* actions against all federal employees. *See Smith*, 499 U.S. at 166 (noting that the "limitations and exceptions" referenced in § 2679(d)(4) include the exceptions in § 2679(b)). Therefore, by virtue of the fact that Petitioners sought scope certification pursuant to § 2679(d), Petitioners are "subject to" the FTCA's express preservation of *Bivens* remedies in § 2679(b).

Petitioners, however, want to have their cake and eat it too. On the one hand, because § 233(a) does not contain a scope certification provision by which they could claim immunity, Petitioners invoked the FTCA's scope certification provision instead. Having availed themselves of that provision, however, Petitioners simultaneously contend that they are not subject to the FTCA's *Bivens* exception, even though that provision is incorporated by reference into

---

[14] Petitioners relied on § 2679(d)(4) as a basis for the motion to dismiss that led to this appeal. *See* Defs.' Notice of Mot. and Mot. to Dismiss for Lack of Jurisdiction; Mem. of P. & A. in Support Thereof at 10, *Castaneda v. United States*, 538 F. Supp. 2d 1279 (C.D. Cal. 2008) (No. CV 07-07241 DDP (JC)).

§ 2679(d). Petitioners' reliance on this sort of statutory gamesmanship as the basis for their immunity defense only underscores the weakness of their position.[15]

2. Section 233(f)

Section 233(f)'s "insure-or-indemnify" clause further confirms that § 233(a)'s exclusivity language does not bar all actions against PHS officials and, indeed, permits *Bivens* actions. Section 233(f) authorizes the government to indemnify or provide liability insurance for PHS personnel assigned to a

---

[15] Petitioners also try to escape the reach of the FTCA's *Bivens* exception by arguing that the FTCA's judgment-bar provision, 28 U.S.C. § 2676, shows that § 233(a) bars *Bivens* claims. Gonsalves Br. 26; *see also* U.S. Br. 11-12, 15 (same). This is an apples and oranges comparison. *See, e.g., Will v. Hallock*, 546 U.S. 345, 354 (2006) (noting that § 2676 is not analogous to an immunity statute, "but [rather] the defense of claim preclusion, or res judicata"). As the Seventh Circuit explained, because " 'Congress views FTCA and *Bivens* as parallel, complementary causes of action,' . . . [a] plaintiff may still bring both parallel claims as remedies to torts committed by law enforcement officers against the government and the individual officers, and the remedies complement each other. But the idea that a plaintiff may bring claims against both the government and the federal officer does not directly implicate whether one may pursue those claims to judgment." *Manning v. United States*, 546 F.3d 430, 434-45 (7th Cir. 2008), *cited in* Gonsalves Br. 26; *see also Serra v. Pichardo*, 786 F.2d 237, 241 (6th Cir. 1986), *cited in* Gonsalves Br. 26 (noting that the issue of whether "a *Bivens* remedy is available to a plaintiff even though plaintiff's allegations also could have supported [an FTCA claim]" has no bearing on "the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy").

foreign country or non-profit institution and in circumstances "likely to preclude the remedies of third persons against the United States [under the FTCA]." 42 U.S.C. § 233(f). Section 233(f) provides:

> The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical . . . or related functions . . . if such employee is assigned to a foreign country . . . or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in [the FTCA] for such damage or injury.

Id. This provision anticipates that, when an injured party does not have a remedy against the United States under the FTCA, he may sue a PHS official individually. The PHS official's protection in those circumstances is not immunity from suit; rather, it is indemnification or insurance, at the federal agency's discretion.

The fact that Congress included an indemnification and insurance provision in § 233(f) is powerful confirmation that it never intended to immunize PHS officers from all liability, as Petitioners claim. The reason is simple: absent liability, there would be no

need for indemnification or insurance. The legislative history of virtually identical immunity statutes confirms this. Congress explained that the purpose of the "insure-or-indemnify" clause of the Gonzalez Act, 10 U.S.C. § 1089, an immunity statute modeled on § 233, " . . . is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable." S. Rep. No. 94-1264 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4443, 4450-51; *see also* H.R. Rep. No. 93-368 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1688, 1710 (describing the purpose of the "insure-or-indemnify" clause in the virtually identical VA immunity statute, 38 U.S.C. § 7316, as extending "protection to cases where Federal Tort claims actions would not lie, but actions could still be brought against the VA employee personally for actions arising in the exercise of his duties").[16]

The fact that Congress saw fit to include an insurance and indemnification provision in § 233(f) is also conclusive evidence that § 233(a) does not apply to *Bivens* claims. This is because § 233(f) offers PHS officials protection in the form of indemnification and

[16] Petitioner Gonsalves and the United States note that the Gonzalez Act was modeled on § 233. Gonsalves Br. 33; U.S. Br. 16. The Gonzalez Act authorizes the government to indemnify or provide liability insurance for medical personnel when assigned to a foreign country and in circumstances "likely to preclude the remedies of third persons against the United States [under the FTCA]." 10 U.S.C. § 1089(f). The VA immunity statute likewise authorizes the same. 38 U.S.C. § 7316(e).

insurance when there is no remedy against the United States, and there has never been a remedy against the United States, or a U.S. agency, for *Bivens* actions. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 473 (1994) (holding that constitutional claims are not cognizable under the FTCA and declining to extend *Bivens* to a federal agency). Indeed, the FTCA makes clear that the United States' exclusive remedy provision extends only to common-law tort liability, not to *Bivens* actions. 28 U.S.C. § 2679(b)(1)-(2).

Although no court has interpreted the "insure-or-indemnify" clause in the context of a *Bivens* claim, four of the five appeals courts to construe the clause in the context of a common-law tort claim have held that, despite the exclusive remedy language in subsection (a), medical personnel could be sued for malpractice committed abroad because the FTCA precluded a remedy against the United States under 28 U.S.C. § 2680(k). *See, e.g.*, *Smith v. Marshall*, 885 F.2d 650, 651-55 (9th Cir. 1989), *rev'd in part on grounds not relevant here*, *Smith*, 499 U.S. 160 (holding that neither the Gonzalez Act nor the Westfall Act barred a malpractice claim against an Army doctor because there was no remedy under the FTCA, due to the foreign tort exception in § 2680(k)); *Newman v. Soballe*, 871 F.2d 969, 977 (11th Cir. 1989), *abrogated in part by Smith on grounds not relevant here*, 499 U.S. 160 (same); *Pelphry v. United States*, 674 F.2d 243, 246 (4th Cir. 1982) (holding that the Gonzalez Act did not bar a malpractice claim

against an Army doctor because there was no FTCA remedy under § 2680(k)*; Jackson v. Kelly*, 557 F.2d 735, 740-41 (10th Cir. 1977) (same); *but see Powers v. Schultz*, 821 F.2d 295, 297-98 (5th Cir. 1987) (interpreting 10 U.S.C. § 1089(f) and finding that Congress did not intend to expose military doctors abroad to liability for malpractice). Given that the majority of appeals courts found that the exclusivity language in pre-Westfall Act immunity statutes like § 233(a) did not even bar certain common-law malpractice claims, such language certainly could not bar *Bivens* claims.

The Westfall Act altered the "insure-or-indemnify" provisions in pre-Act immunity statutes like § 233. Since the Westfall Act, federal employees are protected from personal liability, even if there is no remedy against the United States under the FTCA, with two exceptions—one of which is the *Bivens* exception. 28 U.S.C. § 2679(b)(2). This was made clear in *United States v. Smith*, which held that the Westfall Act bars any malpractice action in state or federal court against a foreign-based military physician, even when there is no remedy available against the United States. 499 U.S. at 166. The Court reached this conclusion based, in part, on the express preservation of employee liability under § 2679(b), including the preservation of *Bivens* claims. *Id*. at 166-67. This Court noted that, after the Westfall Act, insurance or indemnification against malpractice suits in domestic courts "is no longer needed." *Id*. at 172 n.15.

Smith, however, expressly declined to reach the issue of whether the Gonzalez Act, 10 U.S.C. § 1089, would have barred the action against the physician. 499 U.S. at 165 n.6.[17] At oral argument, however, the United States conceded that the Gonzalez Act would have permitted a malpractice suit against the foreign-based military physician and that the government would have been authorized to indemnify him under § 1089(f). Tr. of Oral Argument, *United States v. Smith*, 499 U.S. 160 (1991) (No. 89-1646), 1990 WL 601363, at *7-8. When asked to explain the relationship between the seemingly broad exclusivity language in § 1089(a) and the "insure-or-indemnify" clause in § 1089(f), the United States responded by noting that it was " . . . one of the puzzlements of this case that led us ultimately not to pursue the argument that the Gonzalez Act itself precludes this action," *id*. at *37-38, and by admitting that "the general language about the remedy being exclusive [in § 1089(a)] is susceptible of different readings," particularly when read "in conjunction with subsection (f)," *id*. at * 39; *see also id*. at *16 (where the government admits that it is "not clear from either the text of the act itself [10 U.S.C. § 1089] or its history to what extent that preclusion [from suit] was total").

---

[17] Thus, *United States v. Smith* only overturned the lower court's ruling in *Smith v. Marshall*, 885 F.2d at 651-55, that the Gonzalez Act permitted a malpractice action otherwise barred by the Westfall Act. *United States v. Smith* abrogated part of *Newman's* holding, 871 F.2d at 977, on the same basis.

Despite its position in *Smith* that § 1089(a) would have permitted a malpractice suit against a miliary physician and that the statute is "susceptible of different readings," the United States argues here that the virtually identical exclusivity language in § 233(a) is "unambiguous and unqualified" and bars Respondents' *Bivens* actions. U.S. Br. 9. This inconsistency strips the United States' argument of any credibility. *See, e.g., Bates v. Dow Agrochemical*, 544 U.S. 431, 449 (2005) (rejecting the United States' argument, set forth in an *amicus* brief, that federal law preempts tort claims against a pesticide manufacturer; finding that the argument was "particularly dubious given that just five years ago the United States advocated the [opposite] interpretation"). Regardless, one thing is clear: § 233(f) shows that the immunity conferred by § 233(a) does not apply to *Bivens* claims.[18]

---

[18] Similarly, § 233(e) shows that § 233(a) does not provide PHS officials with immunity from all civil actions. Section 233(e) waives the government's sovereign immunity for assault and battery committed by PHS officials. 42 U.S.C. § 233(e). The majority of courts construing § 233 and similar statutes have held that subsection (e) provides medical personnel with immunity from assault and battery that they would not enjoy under subsection (a) alone. *See, e.g., Franklin v. United States*, 992 F.2d 1492, 1500 (10th Cir. 1993) (construing 38 U.S.C. § 4116(a) to permit intentional tort suits against VA medical personnel prior to an amendment to the statute that added an intentional tort provision similar to § 233(e)); *Lojuk v. Quandt*, 706 F.2d 1456, 1463 (7th Cir. 1983), *cert. denied*, 474 U.S. 1067 (1986) ("[I]n 10 U.S.C. § 1089, 42 U.S.C. § 233, and 42 U.S.C. § 2458a, it is the presence of subsection (e) waiving the

(Continued on following page)

C. All Other Indicia Of Congressional Intent Confirm That § 233(a) Does Not Preclude *Bivens* Actions Against PHS Officials.

Numerous other indicia of Congressional intent reveal that § 233(a) does not preclude *Bivens* actions against PHS personnel. As explained below, the title of § 233(a), the historical context in which Congress enacted § 233(a), and the Westfall Act's legislative history all confirm that PHS officials—like all other federal employees—are subject to *Bivens* actions.

1. Title of § 233(a)

Although a statute's title cannot create ambiguities in its text, *Cornell v. Coyne*, 192 U.S. 418, 430 (1904), a title should be considered when it confirms the plain language of a statute and enables the Court to discern congressional intent, *Immigration and Naturalization Serv. v. Nat'l Ctr. For Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991). Here, the title of § 233(a)—"Defense of Certain Malpractice and Negligence Suits"—confirms that the immunity

---

immunity of the United States for battery under Section 2680(h) that provides immunity for individual defendants in medical treatment cases"); *Leab v. Chambersburg Hosp.*, 230 F.R.D. 395, 396-97 (M.D. Pa. 2005) (adopting *Lojuk*'s reasoning that § 233(e) was not intended to immunize individual employees "from battery claims . . . unless a plaintiff had an alternative remedy against the United States under the FTCA"). Notably, *Lojuk* permitted the plaintiffs to proceed with a *Bivens* claim against a VA doctor. 706 F.2d at 1464, 1467-69.

conferred by § 233(a) extends to "malpractice" and "negligence" actions *only*, not actions sounding in constitutional tort.[19]

This Court has long recognized the distinction between constitutional torts on the one hand, and simple malpractice and negligence actions on the other. In *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), the Court explained that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Since *Estelle*, every U.S. Court of Appeals has issued equally clear statements demonstrating that "medical malpractice" alone can never rise to the level of a "deliberate indifference" constitutional claim. *See, e.g., Ruiz-Rosa v. Rullan*, 485 F.3d 150, 156 (1st Cir. 2009); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008); *Popoalii v. Corr. Med. Services*, 512 F.3d 488, 499 (8th Cir. 2008); *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006); *Self v. Crum*, 439 F.3d 1227, 1234 (10th Cir. 2006); *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004); *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004); *Bowman v. Corr. Corp. of Am.*, 350 F.3d 537, 544 (6th Cir. 2003); *Hinson v. Edmond*, 192

[19] This is the statute's title as it appears in the public law, and neither Petitioners nor the United States contest that this is the operative title. Gonsalves Br. 30; Hui Br. 38-39; U.S. Br. 12.

F.3d 1342, 1345 (11th Cir. 1999); *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996); *Miltier v. Beorn*, 896 F.2d 848, 852 (4th Cir. 1990); *Redwood v. Council of the Dist. of Columbia*, 679 F.2d 931, 933 (D.C. Cir. 1982). Thus, when Congress chose the words "malpractice" and "negligence" to describe the immunity provided in § 233(a), it plainly did not speak to constitutional torts.[20]

Moreover, the fact that Congress included the qualifier "certain" in § 233(a)'s title demonstrates that Congress intended to provide PHS personnel with immunity from some—but not all—malpractice and negligence suits. *See, e.g., El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 173 (1999) (noting that the "[i]nclusion of the word 'certain'" in a title "accurately indicated" a concern with "certain rules only, not with all rules") (citation omitted). Thus, Congress never even intended for § 233(a) to provide immunity from all types of common-law tort actions, let alone constitutional tort actions.

Petitioners' reliance on *Webster's Dictionary* in support of their contention that "malpractice" encompasses constitutional torts is singularly unpersuasive. Gonsalves Br. 19; Hui Br. 39-40; *see also* U.S. Br. 13. Aside from the fact that the common law is the proper

---

[20] Notably, Petitioners moved to dismiss this case on the ground that "Plaintiff's claims form the basis for a medical malpractice action (a non-constitutional tort claim) against the United States, and not a *Bivens* claim against each Public Health Service Defendant." *See* Defs.' Mot. to Dismiss at 8.

source for determining the meaning of an undefined term, *Scheidler v. Nat'l Org. For Women*, 537 U.S. 393, 402 (2003), if any dictionary is to be consulted, it should be *Black's Law Dictionary*. *Black's Law Dictionary* confirms that "malpractice" is "[a]n instance of negligence or incompetence on the part of a professional," in contrast to a "constitutional tort," which is "[a] violation of one's constitutional rights by a government officer, redressable by a civil action filed directly against the officer." *Black's Law Dictionary* (8th ed. 2004).[21]

In short, the title of § 233(a), which explains that the immunity afforded PHS personnel extends *only* to "certain malpractice and negligence suits," confirms that Congress never intended to preclude *Bivens* actions.

2. Historical Context

It is well-established that, to determine the meaning of a statute, this Court examines the historical context in which the statute was enacted.

---

[21] Petitioner Gonsalves argues that "[w]hile every instance of malpractice does not rise to the level of deliberate indifference under the Constitution, acts of deliberate indifference by medical personnel do constitute malpractice." Gonsalves Br. 29. This is like equating manslaughter with murder. There is a dead body in both cases, but the "intent" makes all the difference in the character of the wrongdoing. Just as manslaughter is a lesser included offense of murder, malpractice is a "lesser included offense" of deliberate indifference.

Branch v. Smith, 538 U.S. 254, 268-69 (2003); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.,* 534 U.S. 124, 134 (2001). Placing § 233(a) in its historical context further confirms that Congress never intended to immunize PHS personnel from *Bivens* actions.

When Congress passed § 233(a) on December 31, 1970, *see* Pub. L. No. 91-623, victims of constitutional torts had *no authority* to bring suits against federal employees for constitutional violations. As explained above, the remedy for constitutional violations by federal employees did not even exist until June 21, 1971, when this Court decided *Bivens* and *created* a remedy for those injured by federal employees' unconstitutional conduct. *Bivens*, 403 U.S. at 389. Moreover, § 233(a) was enacted before *Estelle* recognized an Eighth Amendment claim based on the deliberate indifference to a prisoner's serious medical needs and before *Carlson* held that these claims apply to federal officials. Congress plainly could not have intended § 233(a) to preclude claims that would not be cognizable until years later, after the claim was fully developed by the Court's *Bivens* jurisprudence, especially given all other indicia of congressional intent confirming that § 233(a) covered "malpractice and negligence" actions only.

The first time Congress spoke to the issue of *Bivens* was in 1988, when it amended the FTCA to explicitly *preserve Bivens* actions against all federal employees. 28 U.S.C. § 2679(b)(2). Because the "remedy" against PHS personnel in § 233(a) is only

"exclusive" to the extent provided by the FTCA, Congress did not need to take any further action to amend § 233(a): the preservation of *Bivens* actions was effectuated by the amendments to the FTCA's remedy provisions, which are incorporated into § 233(a) by the first sentence of that statute. Against this backdrop, the only plausible interpretation of § 233(a) is that it incorporates § 2679's express preservation of *Bivens* remedies.

The United States' argument that "Congress may well have been aware of the concept of a constitutional tort when it enacted Section 233(a) in December 1970" does not withstand scrutiny. U.S. Br. 16 (citing *Bell v. Hood*, 327 U.S. 678, 684-85 (1946)). *Bell* declined to rule on the appropriateness of a remedy against federal employees for Fourth Amendment violations, and the district court on remand held that no such cause of action existed. *See* 71 F. Supp. 813, 817 (S.D. Cal. 1947). Between *Bell* and *Bivens*, no reported decision had held that a claim against federal officials existed for constitutional violations. Congress therefore could not "have been aware" of the concept of a constitutional tort claim when it enacted § 233(a). Instead, as its title confirms, the statute was merely intended to accomplish one simple goal: to immunize PHS personnel from some (and not even all) common-law tort claims.

3. Legislative History

Any remaining doubts concerning whether the express preservation of *Bivens* remedies in the Westfall Act applies to PHS personnel is resolved by looking at the Westfall Act's legislative history, which confirms that Congress viewed § 233(a) as providing immunity for common-law tort actions only, not *Bivens* actions.

Congress viewed the Westfall Act as restoring the *status quo* to before the Court's decision in *Westfall v. Erwin*, 484 U.S. 292, 299 (1988), which held that federal employees were not entitled to absolute immunity for common-law torts committed in the scope of their employment. The substance of *Westfall* is not pertinent here, but the decision warrants attention because it prompted Congress to clarify, for the first time since *Bivens*, the circumstances under which federal employees are immune from liability for common-law torts. The House Judiciary Committee stated that the Westfall Act "*would not affect* the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights") (emphasis added). H.R. Rep. No. 100-700, at 6 (1998), *reprinted in* 1988 U.S.C.C.A.N. 5945; *see also* 134 Cong. Rec. 29933 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley) (noting that "this bill does not have any effect on the so-called Bivens cases or Constitutional tort claims, . . . *which can continue to be brought against individual Government officials*") (emphasis added); *Legislation to Amend the Federal Tort Claims*

Act: Hearing Before the Subcomm. on Administrative Law and Government Relations of the H. Comm. on the Judiciary, 100th Cong. 78-79 (1988) ("House Hearings") (statement of Robert Willmore, Deputy Assistant Attorney General) (noting that "[t]here is no change, however, in [the government's] long-standing belief that persons whose constitutional rights have been violated by scope-of-employment federal conduct should also be required to sue the United States, not the employee. . . . *[L]itigating Bivens cases will not much change as a result of Westfall, which changed the law only as it concerns common law torts*.") (emphasis added). In Congress's view, then, the Westfall Act merely extended to all federal employees the immunity that PHS personnel, among others, had enjoyed all along: immunity from common-law torts only.

In urging passage of the Westfall Act, Congress discussed other pre-Westfall Act immunity statutes—including § 233(a)—to show that a general grant of immunity to all federal employees was desirable. Each time Congress mentioned these pre-Westfall Act immunity statutes, it described them as providing immunity from common-law torts only—not all actions, and certainly not *Bivens* actions. *See, e.g.,* H.R. Rep No. 100-700, at 2 ("[T]he general rule applicable to Federal employees was that they were absolutely immune from personal liability in State common law tort actions for harm that resulted from activities within the scope of their employment."); House Hearings 75-76 (statement of Willmore)

("[M]ost federally employed physicians have only been protected from personal liability for claims alleging medical malpractice . . . and the United States has been able to develop a consistent and uniform approach to medical malpractice and automobile tort litigation—two of the most common types of common law torts."). In fact, the House Judiciary Committee specifically cited § 233(a) as an example of an earlier immunity statute that made the FTCA "the exclusive remedy for medical or dental malpractice" on the part of medical personnel. H.R. Rep. No. 100-700, at 4.

In short, the Westfall Act did "not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action; nor [did] it either expand or diminish rights established under other Federal statutes." *Id.* at 7. Prior to the Westfall Act, no court had held that § 233(a)—or any other similar immunity statute—provides federal medical personnel with immunity from *Bivens* actions, and the legislative history confirms that Congress too did not view § 233(a) as providing such expansive immunity to PHS personnel.

II. THE FTCA'S EXPRESS PRESERVATION OF *BIVENS* ACTIONS IN § 2679(b) IS DISPOSITIVE, REGARDLESS OF WHETHER § 233(a) INCORPORATES THAT PROVISION BY REFERENCE.

Petitioners' immunity argument would fail even if § 233(a) did not incorporate § 2679 by reference. The reason is simple: Congress's express preservation of *Bivens* remedies in § 2679(b)(2) applies on its terms to all federal employees—including PHS personnel. As *Smith* observed: "The [Westfall] Act's plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not." 499 U.S. at 173. Thus, Petitioners can be held liable under *Bivens* regardless of § 233(a)'s incorporation of the FTCA.

That § 233(a) and the FTCA confer overlapping immunities on PHS personnel does not alter this result. This Court "has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *Pioneer,* 534 U.S. at 144. Here, § 233 and the FTCA overlap, but they do, in fact, reach "distinct cases." The FTCA is a comprehensive statute that applies to *all* federal employees, including PHS personnel, and expressly preserves *Bivens* actions. Section 233, while applicable only to PHS personnel and silent with respect to *Bivens* actions, continues to reach "distinct cases" by providing PHS personnel with important protections they would not otherwise have under the

FTCA. These protections include the government's waiver of sovereign immunity in § 233(e) for assault and battery committed by PHS personnel; indemnification and insurance under § 233(f) for PHS personnel facing malpractice actions in foreign courts; and immunity from common-law torts under § 233(a) for private contractors, volunteers, and other entities "deemed" PHS employees by the Secretary of HHS. *See* § 233(g) (operators of health centers receiving federal funds); § 233(j) (officers, employees, or contractors of health center operators); § 233(m) (managed care plans that enter into contracts with health centers); § 233(o) (health professionals who volunteer at free clinics); § 233(p) (professionals who carry out smallpox countermeasures in the event of emergency).[22]

The FTCA and § 233 therefore can comfortably coexist and "do not pose an either-or proposition." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Things Remembered*, 516 U.S. at 129 (when statutes can "comfortably coexist," the Court must

[22] Petitioner Hui argues that the language of 42 U.S.C. § 238q, the Good Samaritan statute that provides immunity for the use of defibrillators, makes a "distinction" between the immunity conferred by § 233 and the FTCA, and infers that the distinction must be that § 233 provides *Bivens* immunity, while § 2679 does not. Hui Br. 31-32. A far more plausible reading of this statute is that Congress wanted to ensure that § 238q did not waive *any* other immunity provided by *any* other statute applicable to health care professionals; as explained above, § 233 reaches a distinct set of cases that § 2679 does not. *See* § 233(g), (j), (m), (o), and (p).

"give effect to both"). It is of no consequence that § 233(a)'s exclusive remedy provision results in some redundancy when read with § 2679(b) because "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, . . . a court must give effect to both." *Germain*, 503 U.S. at 253 (citations omitted).

For example, the scope certification provision in § 2679(d)(2) made the scope certification provision in § 233(c) redundant by changing the certification process for state court actions. Likewise, the Westfall Act rendered part of § 233(f) superfluous, given this Court's observation about the virtually identical provision in § 1089(f) of the Gonzalez Act. *Smith*, 499 U.S. at 172 n.15 (noting that, after the Westfall Act, "insurance or indemnification against malpractice suits in *domestic* courts is no longer needed, but § 1089(f) still serves to protect foreign-based military personnel against malpractice suits in *foreign* courts") (emphasis in original). The redundancy resulting from the Westfall Act's impact on § 233(a) is of no more concern than the redundancy resulting from the Westfall Act's impact on § 1089(f), as both statutes continue to serve important functions.

Thus, construing § 233 and § 2679(b) together involves the "classic judicial task of reconciling . . . laws enacted over time, and getting them to 'make sense' in combination." *United States v. Fausto*, 484 U.S. 439, 453 (1988). This "necessarily assumes that the implications of a statute may be altered by the

implications of a later statute." *Id*. Just as *Fausto* found that the statute at issue remained "an operative part of the integrated statutory scheme set up by Congress to protect civil servants," *id*., § 233 remains an "operative part" of the scheme Congress set up to protect federal employees from common-law tort suits.

This construction of § 233 and § 2679(b) does not create an "implied repeal" of § 233(a), as Petitioner Gonsalves and the United States contend. Gonsalves Br. 38; U.S. Br. 24. An implied repeal "will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch*, 538 U.S. at 273 (citations omitted); *see also Pioneer,* 534 U.S. at 142 ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.") (citation omitted). For all of the reasons stated above, there is plainly no "irreconcilable conflict" here, and therefore no implied repeal.

Even if this Court were to find an "irreconcilable conflict" between § 233(a) and the Westfall Act, the Westfall Act's express preservation of *Bivens* actions prevails. This is because the Westfall Act is a comprehensive statute that speaks specifically to the issue presented, while § 233(a) is silent. *See, e.g., United States v. Estate of Romani*, 523 U.S. 517, 532

(1998) (holding that the Federal Tax Lien Act governed over the federal priority statute because "the Tax Lien Act is the *later statute, the more specific statute, and its provisions are comprehensive*") (emphasis added); *see generally FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand"). As such, Congress simply made explicit in the Westfall Act what had been implicit when it adopted § 233—that federal employees do not enjoy immunity from *Bivens* actions.[23] Accordingly, the Westfall Act controls.

---

[23] Petitioners and the government argue that, because the FTCA expressly preserves *Bivens* actions, but § 233 does not, this Court should not interpret § 233(a) as including a *Bivens* exception. Gonsalves Br. 35; Hui Br. 31; U.S. Br. 23. This argument fails for several reasons. First, by its terms, the FTCA's *Bivens* exception applies to *all* federal employees. Petitioners' and the government's position would require this Court to read into § 2679(b)(2)(A) an "exception" for PHS employees that conflicts with the plain terms of that provision. Second, given the comprehensiveness of the FTCA, there was simply no reason for Congress to amend § 233 to include an express *Bivens* exception. Third, given § 233(a)'s explicit reference to the FTCA, there was no reason for Congress to add a *Bivens* exception. Finally, as explained above, Congress never intended to provide *any* federal employee with immunity from constitutional torts.

III. THIS COURT'S *BIVENS* JURISPRUDENCE FURTHER CONFIRMS THAT § 233(a) DOES NOT IMMUNIZE PETITIONERS FROM LIABILITY.

This Court's *Bivens* jurisprudence—in particular, *Carlson v. Green*, 446 U.S. 14—also mandates a finding that § 233(a) does not immunize Petitioners from *Bivens* liability. As explained below, this case is functionally equivalent to *Carlson*, but factually and legally it provides an even more powerful case for rejecting Petitioners' claim of immunity.

A. This Case Is Functionally Equivalent To *Carlson*, But With A More Compelling Factual and Legal Basis.

Carlson upheld the availability of a *Bivens* remedy against BOP and PHS medical personnel who were deliberately indifferent to a federal prisoner's serious medical needs.[24] As in this case, the federal employees' deliberate indifference caused a man to die, and this Court found the FTCA inadequate to remedy the constitutional violation at issue: cruel and unusual punishment resulting in the deprivation of life.

---

[24] *See* Resp. App. 69a, 74a (Compl., *Carlson v. Green*, 446 U.S. 14 (1980) (No. 78-1261), listing Assistant Surgeon General Robert T. Brutshe as a defendant and noting that he is a PHS employee).

In *Carlson*, the Court held that it was "crystal clear" that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. at 20. In so holding, the Court concluded that Congress did not view the FTCA as providing "an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id*. at 18-19 (emphasis in original). *Carlson* further found that the FTCA did not preclude *Bivens* actions because "no special factors counsell[ed] hesitation" against permitting a deliberate indifference claim against officials that included a PHS employee. *Id*. at 19.

This case provides an even more powerful basis than *Carlson* for rejecting Petitioners' bid for immunity from *Bivens*. Like *Carlson*, this is a wrongful death and survival action based on the deliberate indifference of prison medical personnel and officials. But this case is more factually compelling than *Carlson*. There, the decedent's treatment for an asthma attack was delayed for eight hours, then he was given contra-indicated medication and died soon afterwards. 446 U.S. at 16 n.1. Castaneda, in contrast, was denied treatment for *eleven months* while blood and pus oozed from fungating lesions on his penis. J.A. 60-62, 172, 184. In order to avoid a trial on the merits of these claims, the government has already admitted causing Castaneda's penile amputation and death; the only remaining liability issue is whether the individual federal officers were deliberately indifferent in doing so. The district court

found that the Plaintiffs have "already produced [evidence] . . . more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions." Pet. App. 75a.

This case also has a much stronger legal basis than *Carlson* because, eight years after *Carlson*, Congress passed the Westfall Act, clarifying that the FTCA's "exclusive remedy" extends only to common-law torts and does not preclude *Bivens* actions. 28 U.S.C. § 2679(b). This express *Bivens* exception demonstrates that Congress does not view the FTCA as an adequate substitute for *Bivens*. So here, unlike in *Carlson*, this Court need not strive to infer whether Congress intended to preserve *Bivens* claims—the Westfall Act answers the question with resounding certainty.

Petitioners attempt to distinguish *Carlson* by arguing that Respondents' *Bivens* claims are against a new category of defendants, Hui Br. 20, and that *Carlson* did not involve § 233(a) immunity, Gonsalves Br. 53.[25] In so arguing, Petitioners fail to recognize that one of the *Carlson* defendants was a PHS officer: the Assistant Surgeon General of the United States. Moreover, when evaluating immunity, "this Court has

[25] Contrary to Petitioner Hui's contention, Castaneda's status as a civil ICE detainee is immaterial because civil detainees' constitutional rights are at least as great as convicts'. *City of Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239, 244-45 (1983) (noting that the due process rights of a civil detainee are at least as great as the Eighth Amendment protections for a convicted prisoner).

long favored a 'functional' inquiry—immunity attaches to particular official functions, not to particular offices." *Westfall*, 484 U.S. at 296 n.3. *Carlson* and this case involve claims against officials performing the same function: providing medical care to detainees. There is no principled basis for distinguishing among medical personnel employed by the BOP, PHS, DIHS, or any other federal agency.[26] As for Petitioners' claim that *Carlson* is irrelevant because it did not involve § 233(a) immunity, § 233(a) does not apply to *Bivens* actions and is, therefore, no more relevant here than it was in *Carlson*.

In short, Petitioners' attempts to distinguish *Carlson* are unavailing. *Carlson* is on all fours with this case, but this case provides an even more compelling basis on which to conclude that § 233(a) does not immunize petitioners from *Bivens* liablity.

B. A *Bivens* Remedy Is Essential Here For The Same Reasons The Court Articulated In *Carlson*.

Carlson's holding that the FTCA is not an effective substitute for *Bivens* is squarely applicable

[26] To illustrate, at least one quarter of the medical personnel employed by the BOP are members of the PHS. Federal Bureau of Prisons, Central Office—Health Services Division, http://www.bop.gov/about/co/health_services.jsp (last visited Dec. 18, 2009). Therefore, BOP and PHS personnel work side-by-side every day in detention facilities throughout the country.

here. This is because the four factors identified in *Carlson* as demonstrating why a *Bivens* remedy is more effective than an FTCA remedy apply with equal or greater force in this case: (1) the FTCA is no more a deterrent today than it was when this Court decided *Carlson*, as FTCA damages remain recoverable only against the United States; (2) punitive damages remain unavailable under the FTCA, 28 U.S.C. § 2674; (3) the FTCA still does not provide a jury trial, 28 U.S.C. § 2402; and (4) the FTCA remedy continues to depend on the "law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1).

Indeed, this case illustrates why deterrence and a uniform remedy, in particular, are at least as important as they were thirty years ago. Since *Carlson*, this Court has continued to confirm the importance of individual deterrence. *Meyer*, 510 U.S. at 485 (refusing to extend *Bivens* claims to federal agencies because "the deterrent effects of the *Bivens* remedy would be lost"); *Corr. Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (refusing to extend *Bivens* to private entities because it would not advance *Bivens*' core purpose of deterring individual officers from engaging in unconstitutional wrongdoing).[27] Deterrence remains essential today because

[27] This Court's ultimate rejection of *Bivens* claims in *Malesko* and *Meyer* is inapposite here because the plaintiffs in those cases attempted to extend *Bivens* to a new set of defendants—a private entity and federal agency. As explained above, Respondents here seek no such extension and instead have raised *Bivens* claims cognizable under *Carlson*.

federal medical personnel have the unique ability to impose a death sentence, without judge or jury, by purposefully failing to treat a life-threatening disease, as Petitioners did here. Protecting physicians from ordinary malpractice claims is a reasonable, practical endeavor. "Protecting individuals who intentionally inflict cruel and unusual punishment just because they happen to work for the Public Health Service is not." Pet. App. 72a n.13. This case presents the quintessential example of conduct that the *Bivens* remedy was intended to deter.[28]

Similarly, this case illustrates the continued importance of a uniform federal remedy for constitutional violations resulting in death. Under the FTCA, the Castaneda family's remedies are constrained by state law. California law prohibits survivors from recovering pre-death pain and suffering damages and caps non-economic damages at $250,000 for wrongful death. Cal. Civ. Code § 377.34 (2004); Cal. Civ. Code § 3333.2 (1997) ("MICRA"). Under *Bivens*, in contrast, damages are not capped and the federal survival rule allows for pre-death pain and suffering. 446 U.S. at 24-25 (noting that the liability of federal agents for constitutional claims should not depend on where the

[28] The government argues that adverse personnel action can be an effective deterrent. U.S. Br. 18. However, despite Hui's mistreatment of Castaneda and others, *see, e.g.*, *Hernandez-Banderas v. Hui*, No. CV-08-06594 (C.D. Cal. filed Oct. 7, 2008), she continues to work for the government, treating our country's veterans at a VA Hospital. SER 351.

violation occurred); *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1190 (7th Cir. 1985) (holding that the federal survival rule applies to civil rights claims and permits pre-death pain and suffering).

The facts of this case vividly illustrate why $250,000 is a woefully inadequate remedy. As this Court noted in *Estelle*: "in the worst cases [a failure to provide medical care] may actually produce physical torture or lingering death." 429 U.S. at 103. "Physical torture" and "lingering death" is exactly what Castaneda endured. He suffered in agony for eleven months, while blood and pus oozed from fungating lesions on his penis. Anxiety over his condition and lack of treatment prevented him from sleeping without medication. According to the district court, the care afforded Castaneda "can be characterized by one word: nothing." Pet. App. 75a. After Castaneda was released from ICE custody, his penis was amputated, and he died slowly over the next year. It is doubtful that few—if any—prisoners in our nation's history endured a more torturous and lingering death at the hands of a government medical provider. Even more than in *Carlson*, the FTCA is an inadequate substitute for a *Bivens* remedy here.[29]

---

[29] Petitioners rely on *Perry v. Shaw*, 106 Cal. Rptr. 2d 70 (Cal. Ct. App. 2001), to argue that Respondents may avoid the MICRA cap. Gonsalves Br. 56 n.17. That reliance is misplaced, as *Perry* involved battery for unauthorized breast augmentation surgery, and Respondents have not asserted a battery claim.

C. Petitioners Cannot Satisfy *Carlson*'s Two-Pronged "Explicit Declaration" Test For *Bivens* Preemption.

Petitioners also cannot satisfy *Carlson*'s "explicit declaration" test for *Bivens* immunity. *Carlson* held that one of the two ways in which a federal defendant may defeat a *Bivens* action is by "show[ing] that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18-19 (emphasis in original). Neither prong could possibly be satisfied here.[30]

First, Congress explicitly preserved *Bivens* actions in § 2679(b)(2), which is dispositive. Moreover, as explained above, § 233 is not an "explicit declaration" precluding *Bivens* actions because it does not even bar all suits alleging *common-law* torts, much less suits alleging constitutional torts. Even if this Court determines that § 233(a) is ambiguous based on the overall structure of § 233, it cannot bar Respondents' *Bivens* claims because an ambiguous declaration is not an "explicit" one.

---

[30] Petitioner Gonsalves characterizes this test as "stray dictum." Gonsalves Br. 44, 48. However, Petitioners' entire argument is based on the "explicit declaration" prong of this "dictum." Regardless of whether the test was "dictum" in *Carlson*, this Court acknowledged that it "became holding" in 1983. *See United States v. Stanley*, 483 U.S. 699, 678-79 (1987). Most recently, in *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007), this Court cited the language of *Bivens* and *Carlson* requiring that Congress view the alternative remedy as "equally effective."

Second, Petitioners cannot demonstrate that Congress viewed the FTCA and *Bivens* remedies as "equally effective" because: (1) Congress never even *considered* whether the FTCA and *Bivens* were equally effective remedies when enacting § 233; (2) the FTCA is not, for the reasons discussed above, an equally effective substitute; and (3) Congress confirmed *Carlson*'s holding that the two remedies are not "equally effective" when it amended the FTCA (and, by incorporation, § 233) to preserve *Bivens* actions explicitly. Considering that *Bivens* (1971), *Estelle* (1976), and *Carlson* (1980) had not been decided when Congress enacted § 233 in 1970, Congress could not have viewed the FTCA and *Bivens* as providing "equally effective" remedies for deliberate indifference to a serious medical need. When Congress did consider this issue for the first time in 1988, however, it made its views clear by explicitly preserving *Bivens* actions.[31]

Petitioners' claim that dicta in *Carlson* describes § 233(a) as a "paragon of a statute that forecloses *Bivens* relief" is without merit. Gonsalves Br. 45-46. *Carlson* cites § 233(a) as an example of an "explicit

---

[31] *Carlson* stated that post-*Bivens* congressional action is relevant to determine whether a pre-*Bivens* statute satisfies the "explicit declaration" test. 446 U.S. at 19-20 (Congress's 1974 amendments to the FTCA, waiving sovereign immunity for certain intentional torts, "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action"); *id*. (noting that "congressional decision[s] should be given effect by the courts").

declaration" revealing Congress's view that the FTCA is the exclusive remedy for "malpractice," not constitutional violations. 446 U.S. at 20. Moreover, as explained above, Petitioners' argument is belied by the fact that one of the principal defendants in *Carlson* was a PHS officer: the Assistant Surgeon General. If the Court truly thought § 233(a) barred *Bivens* actions, it would not have qualified its description of § 233(a) as providing immunity from "malpractice actions," nor would it have permitted a *Bivens* claim against the Assistant Surgeon General.

In short, Petitioners cannot satisfy *Carlson*'s "explicit declaration-equally effective" test.

D. Petitioners Cannot Satisfy *Carlson*'s "Special Factors" Test Because Congress Has Taken "Affirmative Action" To Preserve a *Bivens* Remedy And, In Any Event, No "Special Factors" Apply Here.

Nor can Petitioners evade *Bivens* liability by showing "special factors counselling hesitation in the absence of affirmative action from Congress." *Carlson*, 446 at 18 (citations omitted).

As a threshold matter, the "special factors" test is inapplicable where, as here, Congress *has* taken "affirmative action" by explicitly preserving *Bivens* actions in the remedial scheme claimed to be a "substitute" for a *Bivens* remedy. Given that Congress took "affirmative action" in this case by explicitly

preserving Bivens remedies in the FTCA itself, the "special factors" test does not apply. Entertaining Petitioners' "special factors" arguments here would require this Court not only to disregard Congress's unambiguous command in the FTCA, but would overrule *Carlson*'s holding that no "special factors" counsel against the recognition of a *Bivens* remedy in a custodial case involving federal officials' deliberate indifference.

Regardless, Petitioners' and their *amici*'s various "special factors" arguments fail on their own terms. First, the argument that permitting Respondents' *Bivens* claims here will open a "floodgate" of litigation is baseless. U.S. Br. 18-19; *see also* Hui Br. 44-46. The United States admits that only 75 members of the PHS currently face *Bivens* actions, U.S. Br. 2, 18-19, which accounts for less than one-half of one percent of the 20,000-member PHS workforce. This minuscule figure is unsurprising, given that only 17% of PHS commissioned officers work in a custodial setting where they could be subject to the types of *Bivens* claims asserted here. Br. in Opp. 35-36 n.19 (hereinafter "BIO").

Second, the argument that this case could somehow affect deployment of PHS personnel in times of war and national emergency is likewise unfounded. U.S. Br. 30, n.15; Commissioned Officers Ass'n ("C.O.A.") Br. 4-5, 10. Neither Petitioners nor their *amici* explain how a PHS officer could be subject

to a "deliberate indifference" claim when responding to a national emergency or during war.[32]

Finally, the argument that permitting Respondents' *Bivens* claims to proceed in this case could impact recruitment, hiring, and retention in the PHS fails on numerous levels. Gonsalves Br. 53; Hui Br. 43-45; U.S. Br. 14; C.O.A. Br. 6. As a threshold matter, Petitioners' position would create a double standard that undermines uniformity by leaving BOP personnel liable under *Bivens*, while PHS personnel who work alongside their BOP counterparts, performing functionally equivalent duties, would be immune. *See generally* BIO 33-39.[33] This result is

---

[32] The United States attempts to analogize this case to the Court's decisions in *Chappell v. Wallace*, 462 U.S. 296 (1983) and *Stanley*, 483 U.S. 669. U.S. Br. 30-31 n.15. These decisions are inapposite because the *Bivens* claims here do not involve the PHS deployed in war or emergency. Should that context arise in the future, this Court could then conduct a "special factors" inquiry to determine whether to extend *Bivens* to such a context. Moreover, *Chappell* and *Stanley* involved the unique disciplinary structure of the military and the *Feres* doctrine, which focuses on the status of the *plaintiff* as a member of the armed services. Neither of these factors is present here.

[33] The United States urged review of this case on the grounds that the circuit split frustrated national uniformity, "cause[d] significant administrative problems," and hindered recruiting efforts. U.S. *Amicus* Br. in Support of Cert. 9. However, the United States offers no explanation for why a rule immunizing PHS—but not BOP—personnel would not cause administrative and recruitment difficulties in the BOP and other agencies, or how its position promotes national uniformity across government agencies.

untenable, and clearly not what Congress intended when it sought to extend the same scope of immunity to *all* federal employees in the Westfall Act.

Moreover, the notion that *Bivens* claims will somehow impair recruitment and retention because of the burdens of litigation and the "threat of ruinous liability" is more theoretical than actual. U.S. Br. 18; C.O.A. Br. 7. For one, the government defends all claims against the PHS, *see* § 233(b), and "virtually without exception" provides indemnification.[34] BIO 37. Additionally, the defense of qualified immunity means that the PHS will have protections from individual discovery. *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982). However, where, as here, constitutional and common-law torts are brought together, the employee will have to provide a deposition and testify in the FTCA action in any event.

The related argument that "allegations of government misconduct are 'easy to allege and hard to disprove,'" U.S. Br. 18, does not hold true with respect to medical claims. *See, e.g.,* Richard Shandell

---

[34] The C.O.A. incorrectly asserts that liability insurance for *Bivens* claims "would necessarily be more expensive than 'standard coverage.'" C.O.A. Br. 7. For $270.00 per year, Federal Employee Defense Services ("FEDS") will provide $1,000,000 in insurance coverage for *Bivens* claims. *See, e.g.,* Fed. Employee Def. Services, Member Benefits, http://www.fedsprotection.com/services.asp?page=2 (last visited Jan. 8, 2010). Congress's stated reason for enacting § 233(a) (unaffordable malpractice premiums) plainly does not apply to *Bivens* insurance, which is affordable.

and Patricia Smith, *The Preparation and Trial of Medical Malpractice Cases* § 2.03 (2007 ed.) ("A jury will usually believe a physician over a plaintiff, unless there is a record to the contrary. Beware the case which relies on the client's word and not on medical records."). This fact becomes even more pronounced when the plaintiff is a detainee and the defendant a government doctor.

The well-defined way in which medical cases must be proven distinguishes this case from *Wilkie*, where the plaintiff suffered "death by a thousand cuts." 551 U.S. at 555. The *Wilkie* Court declined to extend *Bivens* to a property rights retaliation claim because of difficulty in defining the cause of action and the attendant invitation to bring "claims in every sphere of legitimate governmental action affecting property interests." *Id*. at 561. However, this Court qualified its holding by noting that "there is a world of difference between [death by a thousand cuts] and a popular *Bivens* remedy for a well-defined violation." *Id.* This case, unlike *Wilkie*, presents a well-defined cause of action within the heartland of cognizable *Bivens* actions.

Petitioners' reliance on *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), is similarly misplaced. Gonsalves Br. 46-47; Hui Br. 13, 35, 47. In *Bush*, 462 U.S. at 388-39, this Court held that the comprehensive remedial scheme there could substitute for *Bivens* because it adequately addressed the constitutional deprivations that arose out of an adverse employment action,

primarily by providing retroactive seniority, reinstatement, and back pay. In *Chilicky*, the Court found that the complex remedial scheme to redress denial of social security disability benefits was "more elaborate than the civil service system" in *Bush*. 487 U.S. at 425.

Bush and *Chilicky* are inapposite here because, first, the alternative remedial schemes in those cases contained no express right to bring a *Bivens* action, as the FTCA does in this case. More important, however, the constitutional violation at issue here is the deprivation of *human life*—not a property or employment interest—which makes this case unlike any other the Court has considered since *Carlson*. There is no adequate alternative to *Bivens* that could remedy a constitutional violation of this nature. Restoration of benefits, back pay, seniority, or reinstatement will do nothing to compensate the Castaneda estate for the horrific suffering that Castaneda endured or to compensate Vanessa Castaneda for the loss of her father. Here, it is damages or nothing for the Castaneda family.

Like *Carlson*, the force of this case and the need for a *Bivens* remedy derives from the severity of the constitutional violation. Recognizing the gravity of this deprivation, the district court found that the Petitioners' actions were "beyond cruel and unusual":

> Plaintiff has submitted powerful evidence that Defendants knew Castaneda needed a biopsy to rule out cancer, falsely stated that

> his doctors called the biopsy "elective," and let him suffer in extreme pain for almost one year while telling him to be "patient" and treating him with Ibuprofen, antihistamines, and extra pairs of boxer shorts. . . . Everyone knows that if you deny someone the opportunity for an early diagnosis and treatment, you may be – literally – killing the person. Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker "cruel" is inadequate.

Pet. App. 80a n.16. Given the abject cruelty of Petitioners' conduct—conduct that, in the district court's words, "transcend[ed] negligence by miles"—it is hard to overstate the importance of a *Bivens* remedy in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

CONAL DOYLE
WILLOUGHBY DOYLE, LLP
1814 Franklin Street
Suite 800
Oakland, CA 94612
(510) 451-2777

ADELE P. KIMMEL
Counsel of Record
AMY RADON
PUBLIC JUSTICE, P.C.
1825 K Street, N.W.
Suite 200
Washington, DC 20006
(202) 797-8600

THOMAS M. DEMPSEY
LAW OFFICES OF THOMAS M. DEMPSEY
433 North Camden Drive
Suite 730
Beverly Hills, CA 90210
(310) 385-9600

ARTHUR H. BRYANT
LESLIE A. BRUECKNER
PUBLIC JUSTICE, P.C.
555 12th Street
Suite 1620
Oakland, CA 94607
(510) 622-8150

January 15, 2010

10 U.S.C. § 1089

§ 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 Armed Forces Retirement Home Board, in the case of an employee of the Armed Forces Retirement Home; and

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

28 U.S.C. § 1346

§ 1346. United States as defendant

* * *

(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.

* * *

United States Code, Title 28, Chapter 171
Tort Claims Procedure

28 U.S.C. § 2671

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National

Guard as defined in section 101(3) of title 32, means acting in line of duty.

---

28 U.S.C. § 2672

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency 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: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against

the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and

conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

---

28 U.S.C. § 2673

§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

---

28 U.S.C. § 2674

§ 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.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or

compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

---

28 U.S.C. § 2675

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. § 2676

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

---

28 U.S.C. § 2677

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

---

28 U.S.C. § 2678

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this

section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

---

28 U.S.C. § 2679

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(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.

---

28 U.S.C. § 2680

§ 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. [FN1]

(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.

38 U.S.C. § 7316

§ 7316. Malpractice and negligence suits: defense by United States

(a)(1) The remedy –

(A) against the United States provided by sections 1346(b) and 2672 of title 28, or

(B) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under section 1346(b) or 2672 of title 28,

for damages for personal injury, including death, allegedly arising from malpractice or negligence of a health care employee of the Administration in furnishing health care or treatment while in the exercise of that employee's duties in or for the Administration shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim.

(2) For purposes of paragraph (1), the term "health care employee of the Administration" means a physician, dentist, podiatrist, chiropractor, optometrist, nurse, physician assistant, expanded-function dental auxiliary, pharmacist, or paramedical (such as medical and dental technicians, nursing assistants, and therapists), or other supporting personnel.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) (or such person's estate) for any such damage or 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 Secretary 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 proceeding is brought, to the Attorney General, and to the Secretary.

(c) Upon a certification by the Attorney General that the defendant was acting in the scope of such person's employment in or for the Administration 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. After removal the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States. Should a

United States district court determine on a hearing on a motion to remand held before a trial on the merits that the employee whose act or omission gave rise to the suit was not acting within the scope of such person's office or employment, 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) The Secretary may, to the extent the Secretary considers appropriate, hold harmless or provide liability insurance for any person to whom the immunity provisions of this section apply (as described in subsection (a)), for damage for personal injury or death, or for property damage, negligently caused by such person while furnishing medical care or treatment (including the conduct of clinical studies or investigations) in the exercise of such person's duties in or for the Administration, if such person is assigned to a foreign country, detailed to State or political division thereof, or is acting under any other circumstances which would preclude the remedies of an injured third person against the United States, provided by sections 1346(b) and 2672 of title 28, for such damage or injury.

(f) The exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission of any person described in subsection (a) in furnishing medical care

or treatment (including medical care or treatment furnished in the course of a clinical study or investigation) while in the exercise of such person's duties in or for the Administration.

42 U.S.C. § 233

§ 233. Civil actions or proceedings against commissioned officers or employees

(a) Exclusiveness of remedy

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

(b) Attorney General to defend action or proceeding; delivery of process to designated official; furnishing of copies of pleading and process to United States attorney, Attorney General, and Secretary

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 his estate) for any such damage or 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 him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary 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 proceeding is brought, to the Attorney General, and to the Secretary.

(c) Removal to United States district court; procedure; proceeding upon removal deemed a tort action against United States; hearing on motion to remand to determine availability of remedy against United States; remand to State court or dismissal

Upon a certification by the Attorney General that the defendant was acting in the scope of his 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 merit 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: Provided, That

where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

(d) Compromise or settlement of claim by Attorney General

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) Assault or battery

For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

(f) Authority of Secretary or designee to hold harmless or provide liability insurance for assigned or detailed employees

The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the

Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to a State or political subdivision thereof or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury.

(g) Exclusivity of remedy against United States for entities deemed Public Health Service employees; coverage for services furnished to individuals other than center patients; application process; subrogation of medical malpractice claims; applicable period; entity and contractor defined

(1)(A) For purposes of this section and subject to the approval by the Secretary of an application under subparagraph (D), an entity described in paragraph (4), and any officer, governing board member, or employee of such an entity, and any contractor of such an entity who is a physician or other licensed or certified health care practitioner (subject to paragraph (5)), shall be deemed to be an employee of the Public Health Service for a calendar year that begins during a fiscal year for which a transfer was made under subsection (k)(3) of this section (subject to paragraph (3)). The remedy against the United States for an

entity described in paragraph (4) and any officer, governing board member, employee, or contractor (subject to paragraph (5)) of such an entity who is deemed to be an employee of the Public Health Service pursuant to this paragraph shall be exclusive of any other civil action or proceeding to the same extent as the remedy against the United States is exclusive pursuant to subsection (a) of this section.

(B) The deeming of any entity or officer, governing board member, employee, or contractor of the entity to be an employee of the Public Health Service for purposes of this section shall apply with respect to services provided –

(i) to all patients of the entity, and

(ii) subject to subparagraph (C), to individuals who are not patients of the entity.

(C) Subparagraph (B)(ii) applies to services provided to individuals who are not patients of an entity if the Secretary determines, after reviewing an application submitted under subparagraph (D), that the provision of the services to such individuals –

(i) benefits patients of the entity and general populations that could be served by the entity through community-wide intervention efforts within the communities served by such entity;

(ii) facilitates the provision of services to patients of the entity; or

(iii) are otherwise required under an employment contract (or similar arrangement) between the entity and an officer, governing board member, employee, or contractor of the entity.

(D) The Secretary may not under subparagraph (A) deem an entity or an officer, governing board member, employee, or contractor of the entity to be an employee of the Public Health Service for purposes of this section, and may not apply such deeming to services described in subparagraph (B)(ii), unless the entity has submitted an application for such deeming to the Secretary in such form and such manner as the Secretary shall prescribe. The application shall contain detailed information, along with supporting documentation, to verify that the entity, and the officer, governing board member, employee, or contractor of the entity, as the case may be, meets the requirements of subparagraphs (B) and (C) of this paragraph and that the entity meets the requirements of paragraphs (1) through (4) of subsection (h) of this section.

(E) The Secretary shall make a determination of whether an entity or an officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section within 30 days after the receipt of an application under subparagraph (D). The determination of the Secretary that an entity or an officer,

governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section shall apply for the period specified by the Secretary under subparagraph (A).

(F) Once the Secretary makes a determination that an entity or an officer, governing board member, employee, or contractor of an entity is deemed to be an employee of the Public Health Service for purposes of this section, the determination shall be final and binding upon the Secretary and the Attorney General and other parties to any civil action or proceeding. Except as provided in subsection (i) of this section, the Secretary and the Attorney General may not determine that the provision of services which are the subject of such a determination are not covered under this section.

(G) In the case of an entity described in paragraph (4) that has not submitted an application under subparagraph (D):

(i) The Secretary may not consider the entity in making estimates under subsection (k)(1) of this section.

(ii) This section does not affect any authority of the entity to purchase medical malpractice liability insurance coverage with Federal funds provided to the entity under section 254b, 254b, or 256a of this title.

(H) In the case of an entity described in paragraph (4) for which an application under subparagraph (D) is in effect, the entity may, through notifying the Secretary in writing, elect to terminate the applicability of this subsection to the entity. With respect to such election by the entity:

(i) The election is effective upon the expiration of the 30-day period beginning on the date on which the entity submits such notification.

(ii) Upon taking effect, the election terminates the applicability of this subsection to the entity and each officer, governing board member, employee, and contractor of the entity.

(iii) Upon the effective date for the election, clauses (i) and (ii) of subparagraph (G) apply to the entity to the same extent and in the same manner as such clauses apply to an entity that has not submitted an application under subparagraph (D).

(iv) If after making the election the entity submits an application under subparagraph (D), the election does not preclude the Secretary from approving the application and thereby restoring the applicability of this subsection to the entity and each officer, governing board member, employee, and contractor of the entity, subject to the provisions of this

subsection and the subsequent provisions of this section.

(2) If, with respect to an entity or person deemed to be an employee for purposes of paragraph (1), a cause of action is instituted against the United States pursuant to this section, any claim of the entity or person for benefits under an insurance policy with respect to medical malpractice relating to such cause of action shall be subrogated to the United States.

(3) This subsection shall apply with respect to a cause of action arising from an act or omission which occurs on or after January 1, 1993.

(4) An entity described in this paragraph is a public or non-profit private entity receiving Federal funds under section 254b of this title.

(5) For purposes of paragraph (1), an individual may be considered a contractor of an entity described in paragraph (4) only if –

(A) the individual normally performs on average at least 32½ hours of service per week for the entity for the period of the contract; or

(B) in the case of an individual who normally performs an average of less than 32½ hours of services per week for the entity for the period of the contract, the individual is a licensed or certified provider of services in the fields of family practice, general internal medicine, general pediatrics, or obstetrics and gynecology.

(h) Qualifications for designation as Public Health Service employee

The Secretary may not approve an application under subsection (g)(1)(D) of this section unless the Secretary determines that the entity –

(1) has implemented appropriate policies and procedures to reduce the risk of malpractice and the risk of lawsuits arising out of any health or health-related functions performed by the entity;

(2) has reviewed and verified the professional credentials, references, claims history, fitness, professional review organization findings, and license status of its physicians and other licensed or certified health care practitioners, and, where necessary, has obtained the permission from these individuals to gain access to this information;

(3) has no history of claims having been filed against the United States as a result of the application of this section to the entity or its officers, employees, or contractors as provided for under this section, or, if such a history exists, has fully cooperated with the Attorney General in defending against any such claims and either has taken, or will take, any necessary corrective steps to assure against such claims in the future; and

(4) will fully cooperate with the Attorney General in providing information relating to an estimate described under subsection (k) of this section.

(i) Authority of Attorney General to exclude health care professionals from coverage

(1) Notwithstanding subsection (g)(1) of this section, the Attorney General, in consultation with the Secretary, may on the record determine, after notice and opportunity for a full and fair hearing, that an individual physician or other licensed or certified health care practitioner who is an officer, employee, or contractor of an entity described in subsection (g)(4) of this section shall not be deemed to be an employee of the Public Health Service for purposes of this section, if treating such individual as such an employee would expose the Government to an unreasonably high degree of risk of loss because such individual –

(A) does not comply with the policies and procedures that the entity has implemented pursuant to subsection (h)(1) of this section;

(B) has a history of claims filed against him or her as provided for under this section that is outside the norm for licensed or certified health care practitioners within the same specialty;

(C) refused to reasonably cooperate with the Attorney General in defending against any such claim;

(D) provided false information relevant to the individual's performance of his or her duties to the Secretary, the Attorney General, or an applicant for or recipient of funds under this chapter; or

(E) was the subject of disciplinary action taken by a State medical licensing authority or a State or national professional society.

(2) A final determination by the Attorney General under this subsection that an individual physician or other licensed or certified health care professional shall not be deemed to be an employee of the Public Health Service shall be effective upon receipt by the entity employing such individual of notice of such determination, and shall apply only to acts or omissions occurring after the date such notice is received.

(j) Remedy for denial of hospital admitting privileges to certain health care providers

In the case of a health care provider who is an officer, employee, or contractor of an entity described in subsection (g)(4) of this section, section 254h(e) of this title shall apply with respect to the provider to the same extent and in the same manner as such section applies to any member of the National Health Service Corps.

(k) Estimate of annual claims by Attorney General; criteria; establishment of fund; transfer of funds to Treasury accounts

(1)(A) For each fiscal year, the Attorney General, in consultation with the Secretary, shall estimate by the beginning of the year the amount of all claims which are expected to arise under this section (together with related fees and expenses of witnesses) for which payment is expected to be made in accordance with section

1346 and chapter 171 of Title 28 from the acts or omissions, during the calendar year that begins during that fiscal year, of entities described in subsection (g)(4) of this section and of officers, employees, or contractors (subject to subsection (g)(5) of this section) of such entities.

(B) The estimate under subparagraph (A) shall take into account –

(i) the value and frequency of all claims for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions by entities described in subsection (g)(4) of this section or by officers, employees, or contractors (subject to subsection (g)(5) of this section) of such entities who are deemed to be employees of the Public Health Service under subsection (g)(1) of this section that, during the preceding 5-year period, are filed under this section or, with respect to years occurring before this subsection takes effect, are filed against persons other than the United States,

(ii) the amounts paid during that 5-year period on all claims described in clause (i), regardless of when such claims were filed, adjusted to reflect payments which would not be permitted under section 1346 and chapter 171 of Title 28, and

(iii) amounts in the fund established under paragraph (2) but unspent from prior fiscal years.

(2) Subject to appropriations, for each fiscal year, the Secretary shall establish a fund of an amount equal to the amount estimated under paragraph (1) that is attributable to entities receiving funds under each of the grant programs described in paragraph (4) of subsection (g) of this section, but not to exceed a total of $10,000,000 for each such fiscal year. Appropriations for purposes of this paragraph shall be made separate from appropriations made for purposes of sections 254b, 254b, and 256a of this title.

(3) In order for payments to be made for judgments against the United States (together with related fees and expenses of witnesses) pursuant to this section arising from the acts or omissions of entities described in subsection (g)(4) of this section and of officers, governing board member, employees, or contractors (subject to subsection (g)(5) of this section) of such entities, the total amount contained within the fund established by the Secretary under paragraph (2) for a fiscal year shall be transferred not later than the December 31 that occurs during the fiscal year to the appropriate accounts in the Treasury.

(l) Timely response to filing of action or proceeding

(1) If a civil action or proceeding is filed in a State court against any entity described in subsection (g)(4) of this section or any officer,

governing board member, employee, or any contractor of such an entity for damages described in subsection (a) of this section, the Attorney General, within 15 days after being notified of such filing, shall make an appearance in such court and advise such court as to whether the Secretary has determined under subsections (g) and (h) of this section, that such entity, officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding. Such advice shall be deemed to satisfy the provisions of subsection (c) of this section that the Attorney General certify that an entity, officer, governing board member, employee, or contractor of the entity was acting within the scope of their employment or responsibility.

(2) If the Attorney General fails to appear in State court within the time period prescribed under paragraph (1), upon petition of any entity or officer, governing board member, employee, or contractor of the entity named, the civil action or proceeding shall be removed to the appropriate United States district court. The civil action or proceeding shall be stayed in such court until such court conducts a hearing, and makes a determination, as to the appropriate forum or procedure for the assertion of the claim for damages described in subsection (a) of this section and issues an order consistent with such determination.

(m) Application of coverage to managed care plans

(1) An entity or officer, governing board member, employee, or contractor of an entity described in subsection (g)(1) of this section shall, for purposes of this section, be deemed to be an employee of the Public Health Service with respect to services provided to individuals who are enrollees of a managed care plan if the entity contracts with such managed care plan for the provision of services.

(2) Each managed care plan which enters into a contract with an entity described in subsection (g)(4) of this section shall deem the entity and any officer, governing board member, employee, or contractor of the entity as meeting whatever malpractice coverage requirements such plan may require of contracting providers for a calendar year if such entity or officer, governing board member, employee, or contractor of the entity has been deemed to be an employee of the Public Health Service for purposes of this section for such calendar year. Any plan which is found by the Secretary on the record, after notice and an opportunity for a full and fair hearing, to have violated this subsection shall upon such finding cease, for a period to be determined by the Secretary, to receive and to be eligible to receive any Federal funds under titles XVIII or XIX of the Social Security Act [42 U.S.C.A. § 1395 et seq. or 1396 et seq.].

(3) For purposes of this subsection, the term "managed care plan" shall mean health maintenance organizations and similar entities that

contract at-risk with payors for the provision of health services or plan enrollees and which contract with providers (such as entities described in subsection (g)(4) of this section) for the delivery of such services to plan enrollees.

(n) Report on risk exposure of covered entities

(1) Not later than one year after December 26, 1995, the Comptroller General of the United States shall submit to the Congress a report on the following:

(A) The medical malpractice liability claims experience of entities that have been deemed to be employees for purposes of this section.

(B) The risk exposure of such entities.

(C) The value of private sector risk-management services, and the value of risk-management services and procedures required as a condition of receiving a grant under section 254b, 254b, or 256a of this title.

(D) A comparison of the costs and the benefits to taxpayers of maintaining medical malpractice liability coverage for such entities pursuant to this section, taking into account –

(i) a comparison of the costs of premiums paid by such entities for private medical malpractice liability insurance with the cost of coverage pursuant to this section; and

(ii) an analysis of whether the cost of premiums for private medical malpractice liability insurance coverage is consistent with the liability claims experience of such entities.

(2) the report under paragraph (1) shall include the following:

(A) A comparison of –

(i) an estimate of the aggregate amounts that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) would have directly or indirectly paid in premiums to obtain medical malpractice liability insurance coverage if this section were not in effect; with

(ii) the aggregate amounts by which the grants received by such entities under this chapter were reduced pursuant to subsection (k)(2) of this section.

(B) A comparison of –

(i) an estimate of the amount of privately offered such insurance that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) purchased during the three-year period beginning on January 1, 1993; with

(ii) an estimate of the amount of such insurance that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) will purchase after December 26, 1995.

(C) An estimate of the medical malpractice liability loss history of such entities for the 10-year period preceding October 1, 1996, including but not limited to the following:

(i) Claims that have been paid and that are estimated to be paid, and legal expenses to handle such claims that have been paid and that are estimated to be paid, by the Federal Government pursuant to deeming entities as employees for purposes of this section.

(ii) Claims that have been paid and that are estimated to be paid, and legal expenses to handle such claims that have been paid and that are estimated to be paid, by private medical malpractice liability insurance.

(D) An analysis of whether the cost of premiums for private medical malpractice liability insurance coverage is consistent with the liability claims experience of entities that have been deemed as employees for purposes of this section.

(3) In preparing the report under paragraph (1), the Comptroller General of the United States

shall consult with public and private entities with expertise on the matters with which the report is concerned.

(o) Volunteer services provided by health professionals at free clinics

(1) For purposes of this section, a free clinic health professional shall in providing a qualifying health service to an individual be deemed to be an employee of the Public Health Service for a calendar year that begins during a fiscal year for which a transfer was made under paragraph (6)(D). The preceding sentence is subject to the provisions of this subsection.

(2) In providing a health service to an individual, a health care practitioner shall for purposes of this subsection be considered to be a free clinic health professional if the following conditions are met:

(A) The service is provided to the individual at a free clinic, or through offsite programs or events carried out by the free clinic.

(B) The free clinic is sponsoring the health care practitioner pursuant to paragraph (5)(C).

(C) The service is a qualifying health service (as defined in paragraph (4)).

(D) Neither the health care practitioner nor the free clinic receives any compensation for the service from the individual or from any third-party payor (including reimbursement under any insurance policy or health plan, or

under any Federal or State health benefits program). With respect to compliance with such condition:

(i) The health care practitioner may receive repayment from the free clinic for reasonable expenses incurred by the health care practitioner in the provision of the service to the individual.

(ii) The free clinic may accept voluntary donations for the provision of the service by the health care practitioner to the individual.

(E) Before the service is provided, the health care practitioner or the free clinic provides written notice to the individual of the extent to which the legal liability of the health care practitioner is limited pursuant to this subsection (or in the case of an emergency, the written notice is provided to the individual as soon after the emergency as is practicable). If the individual is a minor or is otherwise legally incompetent, the condition under this subparagraph is that the written notice be provided to a legal guardian or other person with legal responsibility for the care of the individual.

(F) At the time the service is provided, the health care practitioner is licensed or certified in accordance with applicable law regarding the provision of the service.

(3)(A) For purposes of this subsection, the term "free clinic" means a health care facility operated

by a nonprofit private entity meeting the following requirements:

(i) The entity does not, in providing health services through the facility, accept reimbursement from any third-party payor (including reimbursement under any insurance policy or health plan, or under any Federal or State health benefits program).

(ii) The entity, in providing health services through the facility, either does not impose charges on the individuals to whom the services are provided, or imposes a charge according to the ability of the individual involved to pay the charge.

(iii) The entity is licensed or certified in accordance with applicable law regarding the provision of health services.

(B) With respect to compliance with the conditions under subparagraph (A), the entity involved may accept voluntary donations for the provision of services.

(4) For purposes of this subsection, the term "qualifying health service" means any medical assistance required or authorized to be provided in the program under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], without regard to whether the medical assistance is included in the plan submitted under such program by the State in which the health care practitioner involved provides the medical

assistance. References in the preceding sentence to such program shall as applicable be considered to be references to any successor to such program.

(5) Subsection (g) of this section (other than paragraphs (3) through (5)) and subsections (h), (i), and (l) of this section apply to a health care practitioner for purposes of this subsection to the same extent and in the same manner as such subsections apply to an officer, governing board member, employee, or contractor of an entity described in subsection (g)(4) of this section, subject to paragraph (6) and subject to the following:

(A) The first sentence of paragraph (1) applies in lieu of the first sentence of subsection (g)(1)(A) of this section.

(B) This subsection may not be construed as deeming any free clinic to be an employee of the Public Health Service for purposes of this section.

(C) With respect to a free clinic, a health care practitioner is not a free clinic health professional unless the free clinic sponsors the health care practitioner. For purposes of this subsection, the free clinic shall be considered to be sponsoring the health care practitioner if –

(i) with respect to the health care practitioner, the free clinic submits to the Secretary an application meeting the

requirements of subsection (g)(1)(D) of this section; and

(ii) the Secretary, pursuant to subsection (g)(1)(E) of this section, determines that the health care practitioner is deemed to be an employee of the Public Health Service.

(D) In the case of a health care practitioner who is determined by the Secretary pursuant to subsection (g)(1)(E) of this section to be a free clinic health professional, this subsection applies to the health care practitioner (with respect to the free clinic sponsoring the health care practitioner pursuant to subparagraph (C)) for any cause of action arising from an act or omission of the health care practitioner occurring on or after the date on which the Secretary makes such determination.

(E) Subsection (g)(1)(F) of this section applies to a health care practitioner for purposes of this subsection only to the extent that, in providing health services to an individual, each of the conditions specified in paragraph (2) is met.

(6)(A) For purposes of making payments for judgments against the United States (together with related fees and expenses of witnesses) pursuant to this section arising from the acts or omissions of free clinic health professionals, there is authorized to be appropriated $10,000,000 for each fiscal year.

(B) The Secretary shall establish a fund for purposes of this subsection. Each fiscal year amounts appropriated under subparagraph (A) shall be deposited in such fund.

(C) Not later than May 1 of each fiscal year, the Attorney General, in consultation with the Secretary, shall submit to the Congress a report providing an estimate of the amount of claims (together with related fees and expenses of witnesses) that, by reason of the acts or omissions of free clinic health professionals, will be paid pursuant to this section during the calendar year that begins in the following fiscal year. Subsection (k)(1)(B) of this section applies to the estimate under the preceding sentence regarding free clinic health professionals to the same extent and in the same manner as such subsection applies to the estimate under such subsection regarding officers, governing board members, employees, and contractors of entities described in subsection (g)(4) of this section.

(D) Not later than December 31 of each fiscal year, the Secretary shall transfer from the fund under subparagraph (B) to the appropriate accounts in the Treasury an amount equal to the estimate made under subparagraph (C) for the calendar year beginning in such fiscal year, subject to the extent of amounts in the fund.

(7)(A) This subsection takes effect on the date of the enactment of the first appropriations Act that

makes an appropriation under paragraph (6)(A), except as provided in subparagraph (B)(i).

(B)(i) Effective on August 21, 1996 –

(I) the Secretary may issue regulations for carrying out this subsection, and the Secretary may accept and consider applications submitted pursuant to paragraph (5)(C); and

(II) reports under paragraph (6)(C) may be submitted to the Congress.

(ii) For the first fiscal year for which an appropriation is made under subparagraph (A) of paragraph (6), if an estimate under subparagraph (C) of such paragraph has not been made for the calendar year beginning in such fiscal year, the transfer under subparagraph (D) of such paragraph shall be made notwithstanding the lack of the estimate, and the transfer shall be made in an amount equal to the amount of such appropriation.

(p) Administration of smallpox countermeasures by health professionals

(1) In general

For purposes of this section, and subject to other provisions of this subsection, a covered person shall be deemed to be an employee of the Public Health Service with respect to liability arising out of

administration of a covered countermeasure against smallpox to an individual during the effective period of a declaration by the Secretary under paragraph (2)(A).

(2) Declaration by Secretary concerning countermeasure against smallpox

(A) Authority to issue declaration

(i) In general

The Secretary may issue a declaration, pursuant to this paragraph, concluding that an actual or potential bioterrorist incident or other actual or potential public health emergency makes advisable the administration of a covered countermeasure to a category or categories of individuals.

(ii) Covered countermeasure

The Secretary shall specify in such declaration the substance or substances that shall be considered covered countermeasures (as defined in paragraph (7)(A)) for purposes of administration to individuals during the effective period of the declaration.

(iii) Effective period

The Secretary shall specify in such declaration the beginning and ending dates of the effective period of the declaration, and may subsequently amend such declaration to shorten or extend such effective period, provided that the new closing date is after the date when the declaration is amended.

(iv) Publication

The Secretary shall promptly publish each such declaration and amendment in the Federal Register.

(B) Liability of United States only for administrations within scope of declaration

Except as provided in paragraph (5)(B)(ii), the United States shall be liable under this subsection with respect to a claim arising out of the administration of a covered countermeasure to an individual only if –

(i) the countermeasure was administered by a qualified person, for a purpose stated in paragraph (7)(A)(i), and during the effective period of a declaration by the Secretary under subparagraph (A) with respect to such countermeasure; and

(ii)(I) the individual was within a category of individuals covered by the declaration; or

(II) the qualified person administering the countermeasure had reasonable grounds to believe that such individual was within such category.

(C) Presumption of administration within scope of declaration in case of accidental vaccinia inoculation

(i) In general

If vaccinia vaccine is a covered countermeasure specified in a declaration under subparagraph (A),

and an individual to whom the vaccinia vaccine is not administered contracts vaccinia, then, under the circumstances specified in clause (ii), the individual –

(I) shall be rebuttably presumed to have contracted vaccinia from an individual to whom such vaccine was administered as provided by clauses (i) and (ii) of subparagraph (B); and

(II) shall (unless such presumption is rebutted) be deemed for purposes of this subsection to be an individual to whom a covered countermeasure was administered by a qualified person in accordance with the terms of such declaration and as described by subparagraph (B).

(ii) Circumstances in which presumption applies

The presumption and deeming stated in clause (i) shall apply if –

(I) the individual contracts vaccinia during the effective period of a declaration under subparagraph (A) or by the date 30 days after the close of such period; or

(II) the individual has resided with, or has had contact with, an individual to whom such vaccine was administered as provided by clauses (i) and (ii) of subparagraph

(B) and contracts vaccinia after such date.

(D) Acts and omissions deemed to be within scope of employment

(i) In general

In the case of a claim arising out of alleged transmission of vaccinia from an individual described in clause (ii), acts or omissions by such individual shall be deemed to have been taken within the scope of such individual's office or employment for purposes of –

(I) subsection (a) of this section; and

(II) section 1346(b) and chapter 171 of Title 28.

(ii) Individuals to whom deeming applies

An individual is described by this clause if –

(I) vaccinia vaccine was administered to such individual as provided by subparagraph (B); and

(II) such individual was within a category of individuals covered by a declaration under subparagraph (A)(i).

(3) Exhaustion; exclusivity; offset

(A) Exhaustion

(i) In general

A person may not bring a claim under this subsection unless such person has exhausted such remedies as

are available under part C of this subchapter, except that if the Secretary fails to make a final determination on a request for benefits or compensation filed in accordance with the requirements of such part within 240 days after such request was filed, the individual may seek any remedy that may be available under this section.

(ii) Tolling of statute of limitations

The time limit for filing a claim under this subsection, or for filing an action based on such claim, shall be tolled during the pendency of a request for benefits or compensation under part C of this subchapter.

(iii) Construction

This subsection shall not be construed as superseding or otherwise affecting the application of a requirement, under chapter 171 of Title 28, to exhaust administrative remedies.

(B) Exclusivity

The remedy provided by subsection (a) of this section shall be exclusive of any other civil action or proceeding for any claim or suit this subsection encompasses, except for a proceeding under part C of this subchapter.

(C) Offset

The value of all compensation and benefits provided under part C of this subchapter for an incident or series of incidents shall be offset against the amount

of an award, compromise, or settlement of money damages in a claim or suit under this subsection based on the same incident or series of incidents.

(4) Certification of action by Attorney General

Subsection (c) of this section applies to actions under this subsection, subject to the following provisions:

(A) Nature of certification

The certification by the Attorney General that is the basis for deeming an action or proceeding to be against the United States, and for removing an action or proceeding from a State court, is a certification that the action or proceeding is against a covered person and is based upon a claim alleging personal injury or death arising out of the administration of a covered countermeasure.

(B) Certification of Attorney General conclusive

The certification of the Attorney General of the facts specified in subparagraph (A) shall conclusively establish such facts for purposes of jurisdiction pursuant to this subsection.

(5) Covered person to cooperate with United States

(A) In general

A covered person shall cooperate with the United States in the processing and defense of a claim or action under this subsection based upon alleged acts or omissions of such person.

(B) Consequences of failure to cooperate

Upon the motion of the United States or any other party and upon finding that such person has failed to so cooperate –

(i) the court shall substitute such person as the party defendant in place of the United States and, upon motion, shall remand any such suit to the court in which it was instituted if it appears that the court lacks subject matter jurisdiction;

(ii) the United States shall not be liable based on the acts or omissions of such person; and

(iii) the Attorney General shall not be obligated to defend such action.

(6) Recourse against covered person in case of gross misconduct or contract violation

(A) In general

Should payment be made by the United States to any claimant bringing a claim under this subsection, either by way of administrative determination, settlement, or court judgment, the United States shall have, notwithstanding any provision of State law, the right to recover for that portion of the damages so awarded or paid, as well as interest and any costs of litigation, resulting from the failure of any covered person to carry out any obligation or responsibility assumed by such person under a contract with the United States or from any grossly negligent, reckless,

or illegal conduct or willful misconduct on the part of such person.

(B) Venue

The United States may maintain an action under this paragraph against such person in the district court of the United States in which such person resides or has its principal place of business.

(7) Definitions

As used in this subsection, terms have the following meanings:

(A) Covered countermeasure

The term "covered countermeasure" or "covered countermeasure against smallpox", means a substance that is –

(i)(I) used to prevent or treat smallpox (including the vaccinia or another vaccine); or

(II) used to control or treat the adverse effects of vaccinia inoculation or of administration of another covered countermeasure; and

(ii) specified in a declaration under paragraph (2).

(B) Covered person

The term "covered person", when used with respect to the administration of a covered countermeasure, means a person who is –

(i) a manufacturer or distributor of such countermeasure;

(ii) a health care entity under whose auspices –

(I) such countermeasure was administered;

(II) a determination was made as to whether, or under what circumstances, an individual should receive a covered countermeasure;

(III) the immediate site of administration on the body of a covered countermeasure was monitored, managed, or cared for; or

(IV) an evaluation was made of whether the administration of a countermeasure was effective;

(iii) a qualified person who administered such countermeasure;

(iv) a State, a political subdivision of a State, or an agency or official of a State or of such a political subdivision, if such State, subdivision, agency, or official has established requirements, provided policy guidance, supplied technical or scientific advice or assistance, or otherwise supervised or administered a program with respect to administration of such countermeasures;

(v) in the case of a claim arising out of alleged transmission of vaccinia from an individual –

(I) the individual who allegedly transmitted the vaccinia, if vaccinia vaccine was administered to such individual as provided by paragraph (2)(B) and such individual was within a category of individuals covered by a declaration under paragraph (2)(A)(i); or

(II) an entity that employs an individual described by clause (I) or where such individual has privileges or is otherwise authorized to provide health care;

(vi) an official, agent, or employee of a person described in clause (i), (ii), (iii), or (iv);

(vii) a contractor of, or a volunteer working for, a person described in clause (i), (ii), or (iv), if the contractor or volunteer performs a function for which a person described in clause (i), (ii), or (iv) is a covered person; or

(viii) an individual who has privileges or is otherwise authorized to provide health care under the auspices of an entity described in clause (ii) or (v)(II).

(C) Qualified person

The term "qualified person", when used with respect to the administration of a covered countermeasure, means a licensed health professional or other individual who –

(i) is authorized to administer such countermeasure under the law of the State in which the countermeasure was administered; or

(ii) is otherwise authorized by the Secretary to administer such countermeasure.

(D) Arising out of administration of a covered countermeasure

The term "arising out of administration of a covered countermeasure", when used with respect to a claim or liability, includes a claim or liability arising out of –

(i) determining whether, or under what conditions, an individual should receive a covered countermeasure;

(ii) obtaining informed consent of an individual to the administration of a covered countermeasure;

(iii) monitoring, management, or care of an immediate site of administration on the body of a covered countermeasure, or evaluation of whether the administration of the countermeasure has been effective; or

(iv) transmission of vaccinia virus by an individual to whom vaccinia vaccine was administered as provided by paragraph (2)(B).

Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 42 U.S.C. § 2679 (1982))

AN ACT

To amend title 28, entitled "Judiciary and Judicial Procedure", of the United States Code to provide for the defense of suits against Federal employees arising out of their operation of motor vehicles in the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2679 of title 28, United States Code, is amended (1) by inserting the subsection symbol "(a)" at the beginning thereof and (2) by adding immediately following such subsection (a) as hereby so designated, four new subsections as follows:

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(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) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his 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 for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title 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 (b) of this section is not available against the United States, the case shall be remanded to the State court.

"(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."

SEC. 2. The amendments made by this Act shall be deemed to be in effect six months after the enactment hereof but any rights or liabilities then existing shall not be affected.

Approved September 21, 1961.

DATE	FILINGS-PROCEEDINGS
10/27/78	Entered order GRANTING appellant's motion of 10/26/78. The time within which the appellant must file her answer to the appellee's petition for rehearing in [sic] banc is extended up to 11/7/78.
11/24/78	Entered order denying appellee's petition for rehearing.
12/1/78	Filed o&3c application for stay of mandate pending filing of petition for cert, svc.
12/7/78	Entered order granting motion of 12/1/78 and the mandate of this court is Stayed up to 1/5/79 pending the filing of a petition for writ of cert. to Supreme Court of the U.S.
[Illegible]	Filed O&3c of appellee's second application for stay of mandate pending filing of petition for certiorari; svc.
[Illegible]	Entered order Granting application for stay of mandate only to the extent that the mandate of this court be Stayed up to 2/12/79.
2/20/79	Filed notice of filing petition for cert on 2/13/79; Supreme Court No. 78-1261.
2/26/79	Filed notice of filing petition for cert. on 2/13/79; Supreme Court No. 78-1261.
6/22/79	Entered Supreme Court order dated 6/18/79, GRANTING petition for cert.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administrator of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS) and next of kin of JOSEPH JONES, JR., PLAINTIFF

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons; C. L. BENSON, Warden, Terre Haute Penitentiary; ROBERT L. BRUTSHE, M.D., Assistant Surgeon General; JOINT COMMISSION ON ACCREDITATION OF HOSPITALS; DR. BENJAMIN B. DEGARCIA, Chief Medical Officer; Medical Training Assistant WILLIAM WALTERS; Staff Officer EMMETT BARRY, DEFENDANTS

COMPLAINT

INTRODUCTION

From January 6 through August 14, 1975, four black prisoners at the Federal Prison in Terre Haute died because of medical care so inappropriate as to evidence intentional maltreatment. The fact that all four inmates who died were black is not a mere coincidence, since it is the non-white prisoners who are the last to receive what little medical attention is available and are the last to be admitted to the prison hospital.

The prisoners at Terre Haute have tried all peaceful means available to bring to the attention of

the authorities the blatant inappropriate medical care, which threatens the lives of all of them.

Despite letters of protest to prison officials and several Congressmen and a peaceful work stoppage joined by 900 prisoners, Defendants WARDEN BENSON, DIRECTOR CARLSON and their agents did nothing to change the blatant inadequate medical conditions at Terre Haute.

The instant Complaint is a classic case of medical care which is so clearly inadequate as to amount to a refusal to provide essential care, so inappropriate as to evidence intentional maltreatment causing death. Prisoners clearly do not surrender all their constitutional rights when they enter the prison gates. Decent medical care is a basic human right which must be afforded all people, whether or not imprisoned.

JURISDICTION

1. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1331(a) and under the substantive rights created by the Constitution of the United States. Plaintiff, MRS. MARIE GREEN, next of kin and administrator of the estate of her son JOSEPH JONES (a/k/a ROSCOE SIMMONS), is suing for monetary damages for the death of her son.

PARTIES

2. Plaintiff MARIE GREEN is the next of kin and administrator of the estate of her son, JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS), who died at Terre Haute Prison from willful, wanton and criminally negligent medical care of such a degree to constitute intentional maltreatment.

3. Defendant NORMAN CARLSON is the Director of the Bureau of Prisons and is responsible for the care and management of federal prisons; sued individually and in his official capacity as Director of Bureau of Prisons.

4. Defendant C. L. BENSON is the Warden of Terre Haute Prison and is responsible for the care and management of the prisoners confined in his institution; sued individually and in his official capacity as Warden.

5. Defendant ROBERT T. BRUTSHE is the Assistant Surgeon General of the United States and is responsible for monitoring the medical services at Terre Haute Prison; sued individually and in his official capacity as Assistant Surgeon General.

6. Defendant JOINT COMMISSION ON ACCREDITATION OF HOSPITALS is in charge of inspecting hospital facilities and supplying them with accreditation if they meet set standards. This Commission accredited the hospital at Terre Haute Penitentiary.

7. Defendant DR. BENJAMIN B. DeGARCIA was Chief Medical Officer at the time of the death of JOSEPH JONES, JR., and was directly responsible for the functioning of the prison medical services; sued individually and in his official capacity as Chief Medical Officer.

8. Defendant WILLIAM WALTERS was a Medical Training Assistant employed at Terre Haute Prison as a doctor's aide and on duty and in charge of the medical facilities on the day of JOSEPH JONES' death; sued individually and in his capacity as a Medical Training Assistant.

9. Defendant Staff Officer EMMETT BARRY, custodial guard at Terre Haute Penitentiary and on duty in the hospital on the day of JOSEPH JONES' death; sued individually and in his official capacity as Staff Officer.

COUNT I

1. The deceased JOSEPH JONES, JR. was convicted of bank robbery under the name of ROSCOE SIMMONS in 1972 and placed in the custody of the Attorney General of the United States at the Federal Bureau of Prisons under a sentence of ten years.

2. The deceased, JOSEPH JONES, JR., had a history of asthma and was diagnosed as a chronic asthmatic upon his entry into the Federal Prison System.

3. In 1973 JOSEPH JONES, JR. was given steroids for the treatment of an acute asthmatic episode, and he was treated with oral steroids intermittently over the next two years.

4. After being incarcertated [sic] in McNeil Island Penitentiary in Washington, and Leavenworth Penitentiary in Kansas, JOSEPH JONES, JR. was transferred to Terre Haute Prison in July of 1974.

5. In July of 1975, JOSEPH JONES' asthmatic condition deteriorated and he required hospitalization outside the penitentiary. For eight days he was hospitalized at St. Anthony's Hospital in Terre Haute, Indiana.

6. Upon his release from the hospital on August 6, 1975, the treating physician recommended that JONES not be sent back to Terre Haute Penitentiary, but instead that he be transferred to another climate. The doctor made two specific recommendations: Lexington, which has a good management program for chronic diseases; and Sandstone, which has a drier climate.

7. The recommendation was ignored by the Defendants and their agents. JOSEPH JONES was placed back in Terre Haute Prison, where he died eight days later.

8. On his return to the prison hospital, the deceased was not given proper medication as directed by the local hospital, nor was the treatment of steroids

continued, as ordered by the physician at the local hospital.

9. On August 14, JOSEPH JONES complained of an asthma attack and was admitted to the hospital at about 3:00 p.m. From that time on, the Defendants were responsible for a course of conduct which was willful, wanton and criminally negligent and so blatantly inappropriate as to evidence intentional maltreatment, and was directly responsible for the death of JOSEPH JONES, JR.

10. Although JONES was in serious condition for eight hours before he died, no doctor was on duty, nor was any doctor called to treat him. There was a deliberate indifference to the deceased's repeated cries for essential treatment.

11. Defendant DR. BENJAMIN DeGARCIA was not present at the prison hospital on weekends, nor did he provide a procedure to check in in case of emergencies. Defendant DeGARCIA allowed a prison hospital to function with totally inadequate staff, improperly trained, and without proper equipment and procedures.

12. Medical Training Assistant WALTERS, a non-licensed nurse, was left in charge of the hospital. Although JONES was becoming more agitated and having more and more difficulty breathing, WALTERS left JONES alone with inmate nurses while he went around to the floors dispensing medications.

13. When WALTERS returned, he brought the respirator with him. WALTERS had been put on notice two weeks prior that the respirator was broken, yet he still tried to go through the motions of administering the respirator. JONES pulled away from WALTERS, telling him that the respirator was making his breathing worse, and in fact the respirator was not functioning properly.

14. WALTERS then administered two shots of Thorazine (intervenously and intermuscularly) to JONES, who was having great difficulty breathing. The use of Thorazine is directly contradictory to the treatment necessary for someone suffering from an asthma attack.

15. About one-half hour after the second shot of Thorazine was administered, JOSEPH JONES had a respiratory arrest. Defendant Staff Officer BARRY and Medical Training Assistant WALTERS brought an emergency cart to administer an electric jolt to the deceased, but neither WALTERS nor BARRY knew how to operate this machine. JONES was pronounced dead at St. Francis Hospital in Terre Haute.

16. The death of inmate JONES was the fourth inmate death at Terre Haute resulting from inadequate medical care in a seven-month period.

17. Defendants CARLSON, BENSON and BRUTSCHE [sic] were all put on notice prior to the instant case that the medical treatment and facilities in the Terre Haute prison hospital were grossly inadequate. Letters were written to Director CARLSON

and Warden BENSON complaining of the lack of proper medical care. In addition, prisoners at Terre Haute staged a work stoppage and peaceful protest to bring the serious problem of inadequate medical care to the attention of the prison authorities.

18. Despite the repeated requests for basic changes in the procedures, facilities and personnel at the Terre Haute prison hospital, Defendants CARLSON, BENSON and BRUTSHE did nothing to adequately alter the grossly inadequate medical care being administered at Terre Haute. They ignored the requests for change despite three prior inmate deaths and allowed the prison hospital to operate in a manner which perpetuated grossly inappropriate medical care.

19. Defendant Assistant Surgeon General ROBERT L. BRUTSHE is employed by the United States Public Health Service and visited Terre Haute twice in the last year to review specific cases, as well as to inspect the total medical program at Terre Haute. He gave the medical facilities his approval and failed to recommend needed changes in equipment, procedures and availability of trained medical staff.

20. THE JOINT COMMISSION ON ACCREDITATION OF HOSPITALS gave accreditation to the prison hospital despite its serious deficiencies in equipment, procedures, and availability of doctors and trained medical staff.

21. The above alleged acts of the Defendants and their agents, coupled with the complete failure of the Defendants to provide any positive medical treatment for JOSEPH JONES, JR., constitutes a course of medical care so clearly inadequate as to amount to the refusal to provide essential care. Such acts were so blatantly inappropriate as to evidence intentional maltreatment resulting in the deprivation of JOSEPH JONES, JR.'s life, in violation of the due process clause of the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages, plus costs of this action, including attorneys fees; and such other relief as this Court deems just, proper and equitable.

COUNT II

22-42. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 22 through 43 [sic] of this Count II, as if fully set forth herein.

43. The above alleged acts of the Defendants and their agents and the complete failure to provide any positive medical treatment for JOSEPH JONES, JR., as he suffered from a severe asthma attack which resulted in the loss of his life, constituted cruel and unusual punishment, violative of the Eigth [sic] Amendment to the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages, plus the costs of this action, plus such other relief as this Court deems just and proper.

COUNT III

44-64. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 44 through 64 of this Count III, as if fully set forth herein.

65. The above alleged acts of Defendants and the absolute failure to provide a positive course of essential medical treatment was caused in part by the fact that the deceased was black, and he was denied basic humane medical treatment, which resulted in his death, on the basis of race, in violation of the equal protection component of the Fifth Amendment of the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages plus the costs of this action, including attorneys fees, and such other relief as this Court deems just and proper.

COUNT IV

66-86. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 66 through 86 of this Count IV, as if fully set forth herein.

87. The above alleged actions of the Defendants were of a malicious and intentional nature and manifest a deliberate indifference of requests for essential treatment.

WHEREFORE, Plaintiff demands judgment against the Defendants jointly and severally, for $500,000 in punitive damages, plus costs and any relief which this Court deems appropriate.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL FOUR COUNTS.

Respectfully submitted,

/s/ _____

MICHAEL DEUTSCH
DENNIS CUNNINGHAM
CHARLES HOFFMAN

Attorneys for Plaintiff
110 South Dearborn, Room 707
Chicago, Illinois 60603
312/236-3504

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administratrix of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS) and next of kin of JOSEPH JONES, JR., PLAINTIFF

– vs. –

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS

ANSWER TO REQUEST FOR PRODUCTION

Plaintiff, Mrs. Marie Green, by her attorneys, answers the request of the Defendant, Joint Commission on Accreditation of Hospitals, for the production of documents, by the production of the attached documents, to wit:

1. A copy of the Petition for Letters of Administration filed in the Circuit Court of Cook County, Illinois, in the Estate of Joseph A. Jones, Jr., Deceased, No. 76 P 3693.

2. A copy of the Order Appointing Legal Representative Of Decedent's Estate entered by the Court in the above mentioned matter.

3. A copy of the Letters of Administration issued in the above mentioned matter.

/s/ Charles Hoffman
CHARLES HOFFMAN
One of the Attorneys
for Plaintiff