IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD WILL, ET AL., :

Petitioners :

v. : No. 04-1332

SUSAN HALLOCK, ET AL. :

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Washington, D.C.

Monday, November 28, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

ALLISON M. ZIEVE, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first in Will v. Hallock.

Mr. Hallward-Driemeier.

ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

ON BEHALF OF THE PETITIONERS

MR. HALLWARD-DRIEMEIER: Mr. Chief Justice, and may it please the Court:

In enacting the Federal Tort Claims Act, Congress recognized that suits against Federal employees, based upon their official conduct, constituted a very real attack upon the morale of the Civil Service. Congress addressed that concern in two ways. First, it allowed plaintiffs to sue the United States directly, but secondly and importantly, it provided that a plaintiff who took up that opportunity, the judgment in the suit against the United States would constitute a complete bar to any action against the employee.

CHIEF JUSTICE ROBERTS: And in enacting section 1291, Congress specified that only final decisions would be appealable.

MR. HALLWARD-DRIEMEIER: That's right, Your Honor, and this Court has adopted a practical rather

than technical construction of that statute. And the Court has recognized in -- in numerous cases that claims of official immunity are -- warrant immediate appellate review because they can only be effectively vindicated by review at the motion to dismiss stage.

And -- and that is the kind of protection that section 2676 provides. It establishes that the judgment in the suit against the United States shall be a complete bar against any action against the employee. So it's the action itself that is precluded, and it is precluded completely. And that --

JUSTICE SOUTER: Well, you can -- you can say the same thing of -- of res judicata, that there is a complete bar. I guess my concern here is that this seems to be, with respect to the employee, something much closer to a res judicata case than to an immunity per se case.

MR. HALLWARD-DRIEMEIER: Well, Your Honor, the -- the Court recognized in the Digital Equipment case that even a claim of res judicata could correctly be characterized as a right to be free from suit, but it said that that wasn't enough. One had to look at the importance of the -- of the value protected, and the --

JUSTICE SOUTER: Digital I remember.

MR. HALLWARD-DRIEMEIER: And -- and the Court --

JUSTICE SCALIA: So do I.

(Laughter.)

MR. HALLWARD-DRIEMEIER: I'm sure you do.

And the Court has recognized in any number of cases that claims of official immunity are the kind that present sufficiently important public interests to warrant an exception to the -- the otherwise rule that appeals can only be had at the final judgment.

JUSTICE O'CONNOR: But in Digital Equipment, I think that we said that the collateral order doctrine is narrow, it should stay that way, and that we should give it -- we should be very reluctant to expand the practical construction of section 1291. And this certainly would be an expansion, would it not?

MR. HALLWARD-DRIEMEIER: Well, I don't think so, Your Honor, because this is like the other claims of immunity that the Court has recognized warrant collateral appeal in Mitchell v. Forsyth or Nixon v. Fitzgerald. It's a kind of official --

JUSTICE SCALIA: It's certainly broader -- it's certainly broader than res judicata anyway, isn't it? Because if the Government -- suit against the Government is dismissed on jurisdictional grounds, what

would be res judicata is only the jurisdictional question, and -- and this doesn't -- this goes beyond that, doesn't it?

MR. HALLWARD-DRIEMEIER: That's right, Your Honor. We point out any number of ways in which section 2676 confers an immunity on employees that is broader than the traditional common law rule of res judicata. For example, res judicata would not bar a suit against another party that could not have been joined in the first suit, but by its plain terms, section 2676 would bar such a claim.

Likewise, common law res judicata would not bar a second suit to -- to recover a kind of damages that were unavailable in the first, but whereas punitive damages are unavailable in a suit against the United States, section 2676 would plainly bar a second suit against the employee to cover punitive damages.

JUSTICE SOUTER: Well, I'm -- I'm assuming that it's not res judicata in -- in the narrow sense of the doctrine, but it's -- it's still a bar that depends upon a -- a prior judgment. And in that respect, it's sort of res judicata-like. Conversely, there is -- there is no immunity in the first instance conferred directly on the employee as such. And so that's -- that's why I -- it seems to me that there's an argument

that this is a lot closer to res judicata than it is to classic immunity.

MR. HALLWARD-DRIEMEIER: Well, certainly there is no categorical rule that claims in the nature of claim preclusion are not eligible for immediate appeal under collateral order. In Abney v. United States, for example, the Court upheld immediate appeal of the denial of a -- of a double jeopardy claim, which likewise depends upon the existence of a prior action.

JUSTICE SOUTER: But a double jeopardy claim is -- is a claim in which there is an -- a -- an immunity textually conferred by the -- the Constitution, or at least, we -- we have thought it -- the guarantee does not make an awful lot of practical sense, unless you read it that way. You don't have that -- that situation here.

MR. HALLWARD-DRIEMEIER: Well, the Constitution does not use the word immunity, nor does the Westfall Act use the word immunity.

JUSTICE GINSBURG: And there is -- in fact, there's no immunity. That's what makes this different.

Suppose the Bivens action had been brought first. The officers would not have been immune from suit. It's not like an officer who has qualified immunity and doesn't depend upon the suit order. Here,

there would have been no immunity at all if you'd sued the officers directly and not brought that Federal Tort Claims Act suit first.

MR. HALLWARD-DRIEMEIER: That's right. Like the claim of double jeopardy in Abney, the claim of immunity here depends upon the existence of a prior litigation, but as in Abney, the -- the interests that it protects are the interests to be free from the -- the cost burdens distraction of litigation.

JUSTICE KENNEDY: Well, I -- I take it Justice Ginsburg's point -- and it's my concern as well -- is that if the Bivens action is brought first, there's no protection of the Government against multiple actions. So -- so the policy that you're arguing for just is dependent on which suit happens to be brought first.

MR. HALLWARD-DRIEMEIER: Well, I'm not sure that --

JUSTICE KENNEDY: And that's not -- that's not a very strong policy interest to vindicate by expanding the collateral order doctrine.

MR. HALLWARD-DRIEMEIER: Well, it -- it's -- it's not entirely clear that the United States would be subject to a second suit. It -- the -- the susceptibility of the United States to a further suit

would be governed by collateral --

JUSTICE KENNEDY: Well, it depends on -- it depends on -- on how the case was resolved.

MR. HALLWARD-DRIEMEIER: That's -- that's right.

But -- but what's important here is that the interest protected is the interest of the employee against the -- the distraction -- against the attack on morale. That was the language that the Assistant Attorney General used.

JUSTICE GINSBURG: It's hard to accept that argument given that if the lawyer had sued in the reverse order, there would be the same morale. All the rest would follow.

So here it's -- it's a question of the lawyer brought the wrong lawsuit first, and the attack on the morale -- there's no difference if a Bivens action had been brought and no other action. Is there any -- why is this morale changed by the Government having gotten the first case dismissed for lack of subject matter jurisdiction with no consideration of the merits at all?

MR. HALLWARD-DRIEMEIER: Well, Your Honor, the -- the statute protects against the -- the cost of repetitive litigation, the harassment of the employee

of multiple suits. These are the exact same types of interest that the Court has recognized --

JUSTICE GINSBURG: What was the harassment that this employee experienced in the -- in the FTCA claim that was dismissed?

MR. HALLWARD-DRIEMEIER: It -- well, in this particular FTCA claim, there -- there was no discovery. But as we point out in -- in our brief, FTCA cases, even those dismissed on the basis of the 2680 exceptions, are often resolved only after years of litigation, including often trial. So -- so the harassment is -- is the same.

On -- on respondents' view, the judgment bar would not kick in. For example, in a case like Varig Airlines, where this Court upheld the Government's assertion of the -- the discretionary function exception only after 8 years of litigation when the case had been -- gone to the Ninth Circuit two times where there had been a trial and final judgment and --

JUSTICE GINSBURG: Did that -- did that involve the employee or it was just legal argument involving lawyers representing the United States?

MR. HALLWARD-DRIEMEIER: It would certainly involve the employee. Any trial would -- would inevitably involve the employee in discovery, in -- in

appearing at trial as a witness.

The -- the Government also is protected by section 2676, as the Assistant Attorney General said. The -- the burden on the Government, because the Government is often called upon to defend employees against suit -- and -- and the Government, having litigated once and obtained a judgment in the first FTCA suit, should not be forced to expend all those resources again in a second suit, this time styled as one against the employee.

JUSTICE STEVENS: Counsel, can I ask you sort of a basic question that I don't really think is adequately addressed in the briefs? You contend, as I understand it, that the exception in 2680(c) covers this case.

MR. HALLWARD-DRIEMEIER: Yes.

JUSTICE STEVENS: And 2680 -- the introductory language of 2680 is the provisions of this chapter shall not apply to such cases. And is it not true that 2676 is in this chapter, and does it not, therefore, follow that 2676 does not apply to this case?

MR. HALLWARD-DRIEMEIER: 2676 makes the -- the scope of its application turn on whether there has been a judgment and an action under section 1346(b).

JUSTICE STEVENS: But my first question is how does 2676 apply if it's in the chapter that 2680 says shall not apply to -- to things in the exception?

MR. HALLWARD-DRIEMEIER: Well, Your Honor, the -- that view of the language, shall not apply, would be inconsistent with this Court's decisions both in United States v. Smith and in FDIC v. Meyer.

In United States v. Smith, for example, the plaintiffs had made exactly that argument with respect to shall not apply. They said that -- that 1346 shall not apply to an action that arises in a foreign country. Therefore, section 1346 cannot provide the remedy to which we are supposed to be limited. And the Court rejected precisely that argument.

JUSTICE STEVENS: But they held that the -- the action simply didn't apply in -- in that case. There was no -- there was no recovery under the -- basically it held the foreign -- foreign country exception precluded the statute from applying --

MR. HALLWARD-DRIEMEIER: Well, what they --

JUSTICE STEVENS: -- which is what also happens here.

MR. HALLWARD-DRIEMEIER: Well, take another example why -- why you couldn't read the -- the shall not apply language in that way. The first exclusivity

provision of section 2679(a) with respect to sue and be sued agencies -- if you said that 1346(b) shall not apply to a suit against the Postal Service because the suits against the Postal Service regarding miscarriage of letters is excluded from 1346(b) by that same language, shall not apply, well, that would render the Postal Service exception meaningless and you would sue the -- the Postal Service pursuant to its sue and be sued authority instead of suing the United States under 1346(b).

JUSTICE SCALIA: Go -- go through that again, would you?

MR. HALLWARD-DRIEMEIER: The -- the -- 2679(a) says that the authority of an agency to sue and be sued in its own name shall not extend to claims cognizable under section 1346(b). The argument might be made, with respect to a suit against the Postal Service for miscarriage of the mail, that -- that claim is not cognizable under section 1346(b) because section 2680(b) says that 1346(b) shall not apply to claims relating to the miscarriage of mail. So by the same reading of shall not apply, one would come to the conclusion that -- that the claim relating to the miscarriage of mail is not cognizable under 1346(b), and therefore you sue the -- the Postal Service.

JUSTICE STEVENS: No. It only says it shall not apply if it comes within the exception.

MR. HALLWARD-DRIEMEIER: And -- and a -- a claim with respect to the miscarriage of mail is one that comes within the exception. And so that reading of shall not apply has been rejected by the Court in Smith v. United States, likewise is inconsistent with the Court's decision, FDIC v. Meyer, and would render it simply ridiculous with respect to claims against the Postal Service.

JUSTICE BREYER: I guess it's true, is it -- I'm testing my own understanding of this -- that if, in fact, shall not apply meant anything in that chapter, if you had a State and that State gave a State law remedy for, say, detaining property or for loss of mail or something, then that State law remedy would continue in existence because the thing in the law that sets aside that State court remedy is a different part of the same chapter --

MR. HALLWARD-DRIEMEIER: That's right.

JUSTICE BREYER: -- in 2679(b)?

MR. HALLWARD-DRIEMEIER: Right. And -- and --

JUSTICE BREYER: But the whole point of the Westfall Act is to get rid of those State causes of

action.

MR. HALLWARD-DRIEMEIER: Exactly, and in that sense, that reading of shall not apply is simply inconsistent with the Court's holding in United States v. Smith.

JUSTICE BREYER: But the language does seem to say it.

MR. HALLWARD-DRIEMEIER: Well, I think what it -- what it means is that -- what it -- what it has been understood to mean is that the United States' waiver of sovereign immunity. It -- the United States has not subjected itself to liability on claims of the nature of those exceptions. And that's how the Court has described it in any number of cases, that the exceptions in 2680 mark the limits of the extent to which the United States --

JUSTICE BREYER: All right. Well, then -- then to get to the main point here, if we are going to get to that, the question that I would have for you is -- is the following. If we accept your interpretation, it's pretty anomalous. I mean, someone who brings his Bivens action first, of course, can sue the individual employee, and you agree to that. But if he brings his Bivens action second, because he made a mistake and went into the wrong court or he brought the wrong

action or it was a borderline case, frankly, and he didn't know how it would end up, that person is out of luck.

Now, there's nothing in this statute that says that the Government -- that the Congress wanted to achieve that result. What order you bring the suit in shouldn't really make any difference here. The Bivens action is totally different from all the other tort actions in that respect, and it's listed separately in 2679 to make clear that it isn't -- it is different.

So why? I mean, why read it your way? The burden that reading it their way would impose on the Government is minuscule. The number of such suits is tiny, I would imagine.

All right. Now, what is wrong with my question?

MR. HALLWARD-DRIEMEIER: Well, there --

JUSTICE BREYER: A lot of things.

MR. HALLWARD-DRIEMEIER: -- there are any number of things wrong in our view.

First, Congress has, as Your Honor recognized, created an express exception for Bivens claims in 2679(b), but it has created no similar exception to -- to 2676 even though prior to passage of the Westfall Act, any number of courts of appeals had

construed 2676 to apply to Bivens claims.

Further, as respondents recognize, 2676's application at this point is virtually limited because of the Westfall Act to a second case that raises a Bivens claim. So their --

JUSTICE GINSBURG: Could the two claims have been brought together? This is -- if an employee is in an uncertain situation, doesn't know if the FTCA act applies, it certainly doesn't want to be without any defendant for conduct of the kind that -- that this complaint charges. Could such an employee say I want to bring my Tort Claims Act against the United States, but I'd like to have in that same lawsuit, in case the court says it comes under an exception, my Bivens claim? Would it be possible to bring those suits together?

MR. HALLWARD-DRIEMEIER: Well, Your Honor, obviously that -- that issue is not presented here because here we have two separate litigation --

JUSTICE GINSBURG: I'm -- I'm asking --

MR. HALLWARD-DRIEMEIER: But --

JUSTICE GINSBURG: -- does the Government have a position on that, whether you can combine a suit against the United States under the Tort Claims Act with a suit against the individual officers under

Bivens.

MR. HALLWARD-DRIEMEIER: Well, the -- the consistent view of the courts of appeals and district courts over 50 years has been that the judgment bar does have some application even when the claims are litigated simultaneously. For example, it's the universal rule among those courts of appeals that have decided the issue that if the plaintiff obtains a judgment against the United States, that that judgment immediately --

JUSTICE GINSBURG: But I want you to go back before we get to a judgment. Can such a suit be brought?

MR. HALLWARD-DRIEMEIER: Can it be brought? It can be brought.

JUSTICE GINSBURG: Could this lawyer have brought the FTCA act complaint and pled in the alternative the Bivens claim?

MR. HALLWARD-DRIEMEIER: It -- it can certainly be brought because the judgment bar only comes into effect when there's been a judgment. So it could be brought.

But as I was saying, the -- the courts are unanimous in holding that if both of those claims were to proceed through litigation and to trial and there

were to be a judgment in the action under the FTCA against the United States, that that would immediately bar any recovery against the employee. And that's been the view, again, for some 50 years now. So --

CHIEF JUSTICE ROBERTS: Counsel, what if the first case against the Government were dismissed because of a finding that the employee was acting beyond the scope of his authority? Should that really bar a subsequent action against the employee in an individual capacity?

MR. HALLWARD-DRIEMEIER: Well, in -- in a footnote --

CHIEF JUSTICE ROBERTS: I read your --

MR. HALLWARD-DRIEMEIER: -- in our brief we suggest it might not --

CHIEF JUSTICE ROBERTS: I read footnote 5. You said it didn't. But I don't see how that's consistent with the language of the statute.

MR. HALLWARD-DRIEMEIER: And -- and in fact, in -- in re-reading FDIC v. Meyer in preparation for oral argument, footnote 7 of that decision suggests that that would be a judgment in an action under 1346(b). FDIC v. Meyer was saying that it would, nonetheless, be cognizable under 1346(b) because the allegation was that they were acting within the scope.

So -- so perhaps we should not have conceded that.

But it could still be that the -- the judgment bar wouldn't apply. It would be an action in -- under -- a judgment in an action under 1346(b), but the judgment bar protects an employee of the Government. And -- and that's a defined term and it's defined in the way that suggests the person acting within the scope of their employment, advancing the purposes of the agency. So there -- there might be a reason why the judgment bar itself would not apply to a claim where the determination was that the person was not acting within the scope of employment.

JUSTICE GINSBURG: Your theory would cover the case where the FTCA claim drops out because the employee didn't file the administrative claim within the -- what is it? 6 months?

MR. HALLWARD-DRIEMEIER: It -- Your Honor, it would not, I think, cover a claim that -- where the dismissal was curable, where the person could go and exhaust their claim. But the test of whether --

JUSTICE GINSBURG: But don't they have a short span where they have to bring that administrative claim?

MR. HALLWARD-DRIEMEIER: They have -- they have 2 years to bring the administrative claim. They

have 6 months to bring the suit in court after the administrative claim has been resolved. And the -- the reason --

JUSTICE GINSBURG: And the suit is tossed out because one of those deadlines was met. It would follow, I think, under your reasoning that there could be no subsequent Bivens claim.

MR. HALLWARD-DRIEMEIER: That's right. The -- the statute makes the test whether there has been a judgment in an action under 1346(b), and plainly, under any reading of that language, it means where there is a judgment that finally resolves the liability of the United States under section 1346(b), there has been a judgment in an action under 1346(b). And I don't think that the language is susceptible to any other reading. So if the claim, as Your Honor suggested, finally resolves whether the United States could be liable under section 1346(b), then the judgment bar applies.

Unless there are no further questions --

JUSTICE STEVENS: I'd like to pursue the question I asked you earlier because I really didn't fully understand your answer. It seems to me, as I read 2680, it simply says that if one of the exceptions applies, there's no waiver of sovereign immunity, basically. That's what -- what the scope of it is.

And therefore, none of the other provisions of -- of this chapter apply, and if none of the provisions of this chapter apply, clearly the judgment bar provision is one of those.

MR. HALLWARD-DRIEMEIER: I -- I think I'm going to borrow Justice Breyer's response because it's -- it's a little clearer than the -- than the point I was trying to make. And that -- by that same logic, that would mean that the provisions of 2679(b) would not apply to the claim, and that is --

JUSTICE STEVENS: That's correct.

MR. HALLWARD-DRIEMEIER: -- precisely the question that was addressed in -- in United States v. Smith, and the Court said that -- that it did apply.

JUSTICE STEVENS: It follows that 2679(b) does not apply, but you're just have -- working on a blank slate with no provision of the Federal Tort Claims Act affecting a waiver of sovereign immunity or imposing any kind of judgment bar.

MR. HALLWARD-DRIEMEIER: But if 2679(b) did not apply, there would be no basis for substituting the United States and having the claim dismissed. And that was precisely the issue that was addressed in -- in United States v. Smith. So -- so plainly you cannot read it to mean that -- that all of the provisions of

the FTCA are simply a nullity or nugatory with respect to such a claim. That -- that -- rather, as Your Honor suggested, what it means is that the United States has not waived its sovereign immunity.

JUSTICE STEVENS: Correct.

MR. HALLWARD-DRIEMEIER: But in FDIC v. Meyer, the Court was very clear that the FTCA is the kind of case which defines jurisdiction by the scope of the waiver of immunity and to -- the claims to which the United States has rendered itself liable. So -- so all of those issues are interrelated, and -- and it reflects the substantive nature of those exclusions. It could not be --

JUSTICE BREYER: But you left out one word that I think is important there. To test it to see if I'm right about this is I thought 2679(b) was focusing in large part upon State tort suits. Is that right?

MR. HALLWARD-DRIEMEIER: It is true that --

JUSTICE BREYER: They wanted to get rid of the State tort suits --

MR. HALLWARD-DRIEMEIER: The -- the --

JUSTICE BREYER: -- in part. Am I right about that or not?

MR. HALLWARD-DRIEMEIER: 2679(b) applies only to -- to State law causes of action.

JUSTICE BREYER: All right. So, therefore, if in fact we had words mean what they seem to mean, Congress would have both removed the State lawsuits in 2679(b) and reinstated them or set them in the exceptions. But that would have the statute defeat itself, and therefore, that case that you're citing came to a correct result.

MR. HALLWARD-DRIEMEIER: That's right.

JUSTICE BREYER: That's right?

MR. HALLWARD-DRIEMEIER: I --

JUSTICE BREYER: Okay. Don't tell me it's right if it's not right is all I want --

MR. HALLWARD-DRIEMEIER: Well, certainly --

JUSTICE BREYER: Okay.

MR. HALLWARD-DRIEMEIER: -- we -- we believe that United States v. Smith was right, and that shall not apply cannot have the meaning that Justice Stevens was trying to attribute to it for that reason.

If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Zieve.

ORAL ARGUMENT OF ALLISON M. ZIEVE

ON BEHALF OF THE RESPONDENTS

MS. ZIEVE: Mr. Chief Justice, and may it

please the Court:

To begin with, the court of appeals did not have jurisdiction under the final judgment rule to review the district court's order.

Petitioners do not contest that they could have been sued under Bivens initially or that the Hallocks could have filed simultaneous FTCA claims and Bivens claims. Petitioners' argument is that they cannot now be sued only because the Hallocks first filed a different suit against the United States. That situation, which hinges on the sequence of lawsuits, does not describe an immunity or a right not to stand trial.

Petitioners try hard to paint the purpose of the judgment bar as the same as the purpose of qualified immunity, avoiding distraction and inhibition of Federal employees from their work. But --

JUSTICE KENNEDY: But what -- what significance do you give to the word to complete, as to whether it's a complete bar? Doesn't that indicate that the -- the statute is -- is a bar to all -- all further actions after a judgment?

MS. ZIEVE: I don't think complete bar means anything more than bar. Res judicata is a complete bar and a statute of limitations is a complete bar. And I

-- I think the statute would mean the same thing without that word. And there's --

JUSTICE GINSBURG: Well, not -- there -- there are exceptions to the statute of limitations. You could have tolling, and there are exceptions to a preclusion doctrine. So those doctrines aren't complete in the sense that they are without exceptions.

MS. ZIEVE: That's right, but when -- when the bar applies, it's -- it's an absolute bar. I don't -- I agree that if the bar has been triggered, it is a -- it completely precludes any further action on any claims, but I don't think the word complete gives us much guidance about when the bar is triggered.

And the purpose behind the bar generally is not the same as the purpose of qualified immunity because although the FTCA, in general, and the legislative history of the FTCA indicates that the act as a whole was intended to protect employee morale and distraction from employment, that's not the purpose behind the judgment bar. And the judgment bar would be a poor vehicle for accomplishing that purpose since it allows not only a Bivens suit as an initial matter and, when it was enacted, allowed -- still allowed employees to be sued for State torts, but also would allow two suits, as long as the Bivens suit were litigated

before.

JUSTICE BREYER: Yes, but that -- that -- see, that's what's -- I'm not at all certain about this, whether they have an appeal, whether they don't have an appeal. I'm testing it out.

But it seems to me if we take your position, we're going to make things awfully complicated. That is, the -- the basic idea here is in the vast mine run of employee suits, go sue the Government, and you can't sue the employee at all. That's true of the State actions. That's true of ordinary tort actions. And so ordinarily, if you sued the -- the employee, whether you sued him first, second, or third, you're not supposed to and he ought to have an appeal right away to get you out of court.

Now, there is an exception there with the Bivens because you can bring your suit first and then there's no problem. But if we make an exception in the appealability rule for that, people are going to get mixed up. It's a kind of curlicue, and even in the Bivens case, it has a basic objective of trying to prevent people from harassing the employee because the instances in which you bring a Bivens suit first, as a practical matter, are probably small.

Now, what's the response to that? I'm just

nervous about making these collateral rules so complicated as to whether -- you'd have to do it whether it's a Bivens suit or some other kind of suit under this, and nobody is going to understand it.

MS. ZIEVE: Well --

JUSTICE BREYER: So put in --

MS. ZIEVE: I don't --

JUSTICE BREYER: -- put them in the whole bag. Say give the employee his appeal because most of the time it's totally to help him from being harassed.

Now, what's the answer to that? And I'm not -- I'm putting it because I want to get your answer.

MS. ZIEVE: Well, a couple things. First of all, the -- the bar to State law tort suits is in 2679(b), which was passed in 1988, 42 years after the judgment bar and the -- and the bulk of FTCA. It was passed as an express effort to overturn this Court's decision in Westfall, which held that employees did not have immunity from State law -- certain State law torts. And in the findings that are incorporated into section 2 of the statute, Congress specifically called 2679(b) an immunity provision, and this Court has since recognized that, for instance, in Gutierrez de Martinez. There is no comparable legislative history indicating immunity for -- for -- under 2676.

So I -- I don't think it's that complicated to figure out now whether someone is proceeding -- whether the claim arises -- whether the claim to appealability, whether the defense arises under 2679(b) or under the judgment bar because they just really get at very different things. And the courts haven't shown -- there's not a lot of case law in either direction, but the -- the courts haven't exhibited much confusion about that.

The other thing is that when you're -- when you're construing the scope of the judgment bar, it's important to remember that this was passed in 1946, and it was intended -- at that time some 25 years -- 35 years before Bivens, what the -- what Congress was getting at was State law suits against the employees versus State law suits against the United States. And the effort was to shift the liability to the United States. That effort to shift liability, yes, was for morale, to protect employees from being distracted, but that -- that was, again, the purpose of the shift of liability, the waiver of sovereign immunity in general.

The only real explanation of the judgment bar appears in the background of where the drafters explained that the bar is intended to -- as a bar to -- bar to further suit not only against the Government, as

would have been true under the prior bill. This is around page 14 of my brief, the quote from -- from the 1945 report. Not -- a bar to liability not only against the Government, as would have been true under the prior version, but also against the employee. And there was no bar to suit in the prior version of the bill. So the drafters' explanation could only have been referring to the normal operation of res judicata. And this Court has used res judicata in Digital as sort of the quintessential example of a defense that is not subject to immediate appeal.

JUSTICE BREYER: Your rule would be this. It's such a complicated area. I'm sorry. But if a plaintiff brings a lawsuit, tort suit, against a Government employee and the Westfall Act bars the lawsuit, period, you can't sue him at all because of -- of (b). He gets an immediate appeal if the district court doesn't agree.

MS. ZIEVE: That's --

JUSTICE BREYER: But if under the Westfall Act you could sue him, depending on the order, he doesn't get an appeal.

MS. ZIEVE: That's right because defense is based on the order of suits. Those are preclusion defenses, and preclusion defenses are not immediately

appealable. And, you know, I think this follows from the Court's decision in -- in Irwin that -- that certain defenses that are available to private parties in litigation should also be available, treated the same way, have the same rules when the Government is being sued like a private party.

CHIEF JUSTICE ROBERTS: What -- what's wrong with the Government's distinction of Digital that here you have a policy embodied in a statute as opposed to a private settlement agreement?

MS. ZIEVE: The -- Digital explains that if you have a right not to stand trial that is set forth in a statute or constitutional provision, that the court isn't going to second-guess the importance of that right. It's -- it's unclear whether the importance prong of the collateral order test should be part of -- part of that effective reviewability or whether it's part of the second prong about separate from the merits of the case.

But in any event, what Digital doesn't say is just because something is in a statute -- a right is in a statute -- it's -- it -- it is correct to characterize it as a right not to stand trial. To the contrary, Digital cautions that anything -- so many defenses could be called rights not to stand trial, and

so the court will look -- will apply the test very stringently.

Statute of limitations, for instance, are in statutes and when the statute has expired, you could say that is a statutory bar to a right to stand trial. But statute of limitations, like the res judicata defense, are just not appealable under the collateral order doctrine.

JUSTICE O'CONNOR: Well, I suppose if there was no appellate court jurisdiction, we're not going to resolve the merits of that question.

MS. ZIEVE: That's right. If there's no appellate court jurisdiction, the Court doesn't have to go on to construe the scope of the judgment bar. But --

JUSTICE GINSBURG: Well, you would at the end of the road. If -- if you go to the Bivens claim and if the plaintiffs prevail, you could still appeal from that and say that that suit was barred. It should never have gone forward.

MS. ZIEVE: That's right, Justice Ginsburg, and that's exactly why this defense is effectively reviewable after final judgment as opposed to now.

JUSTICE GINSBURG: There's no question that it would be -- it doesn't die if you don't have an

interlocutory review. It's there but you've wasted a lot of time going through the whole trial to find out the answer.

MS. ZIEVE: That's true to this -- just as is true with defenses based on statute of limitations or res judicata or, you know, a whole host of defenses --

JUSTICE O'CONNOR: Could the district court have certified the question?

MS. ZIEVE: The district court could have certified it and -- and --

JUSTICE O'CONNOR: And was there a request made to do that or --

MS. ZIEVE: Yes. The district court denied that.

JUSTICE KENNEDY: Yes, but the petitioners requested it. Did -- did you oppose that request below?

MS. ZIEVE: I don't know. I don't remember.

JUSTICE GINSBURG: The district judge said I'm not going to give you 1292(b) certification, but -- but there's Cohen against Beneficial out there. Why don't you try that route? It was the district judge who -- who mentioned that possibility, wasn't it?

MS. ZIEVE: Well, actually the petitioners filed a notice of appeal before the 1292(b) motion had

been decided and then sought a 1292(b) certification. I think they were trying to protect themselves by doing it both ways --

JUSTICE GINSBURG: But I think the district -- the district judge was aware of Cohen against Beneficial, and I think referred to it. Maybe I'm -- I don't remember correctly.

JUSTICE KENNEDY: Yes. I -- I thought -- I thought the district court said I'm going to deny the motion to certify because the issue is clear in my view, but if you think you have a collateral order doctrine, then go ahead and take your appeal.

MS. ZIEVE: Well, I don't think he expressed any view about whether the case satisfied the Cohen doctrine.

JUSTICE GINSBURG: No, but he mentioned that there was -- he mentioned Cohen.

MS. ZIEVE: Yes, but he -- he didn't think the issue warranted an immediate appeal. He made that clear by denying the 1292(b) motion. And -- and I think that would have been the -- the appropriate way to appeal would have been 1292(b), and having been denied that route, petitioners should wait till the end of the case because, as you say, this issue will be effectively reviewable at the conclusion of the

litigation.

CHIEF JUSTICE ROBERTS: Is it -- is it -- maybe this is an incorrect way to look at it, but there is a relationship between the merits and the interlocutory review decision. I would suppose if we agreed on the merits with the Government -- in other words, adopted a fairly clear and categorical rule -- the need for an interlocutory appeal would diminish because the district courts would almost always get it right.

But if we adopt a standard for the application of this bar that, you know, depends on a lot of different things, then the appellate court is going to disagree with the district court in a greater number of circumstances, and maybe we should allow an interlocutory review of that.

MS. ZIEVE: The Court's cases allowing and disallowing collateral order appeals don't turn on the -- the litigation efficiencies that will be obtained if the court goes forward, but rather on whether the issue or the defense that -- that the petitioner is seeking to appeal actually fits the stringent requirements of the Cohen doctrine. And the Court has, in its more recent cases, cautioned against broadening collateral order appeals and indicated that 1292(b) and the rule's

enabling act provisions 2092 that allows a court to identify categories of cases that are appropriate for interlocutory appeal as a categorical matter, but those are the preferred ways to go rather than stretching the final judgment rule really beyond the bounds of its language.

JUSTICE GINSBURG: Perhaps you should go on now to the question, assuming that it is immediately appealable.

MS. ZIEVE: If the Court reaches the second question, the res judicata foundation of the bar shows as well why the Second Circuit's decision on the substantive question should be affirmed.

The -- the text -- the language of the text uses classic res judicata terminology, judgment and bar, and the historical context of the statute makes that reading by far the most reasonable.

The -- when the act was passed in -- in 1946, until then, Federal employees had been sued for State law torts, the biggest category of cases involving auto accidents with postal workers. And Congress set about trying to waive sovereign immunity so that the Government could step in to defend the suits and be sued in their place, which it thought was fair and would help morale. And so that plaintiffs would no

longer have to seek private bills in Congress, which was considered a -- a burden.

When the -- when the -- the FTCA allows the United States to stand in the shoes of the employee for purposes of a State law tort suit. And then the judgment bar extends to the employee the preclusion benefit of that suit so that the employee gets the same res judicata effect that he would have had absent the shift of -- of the defense to the Government.

The -- again, the -- the one clear explanation in the background for why the judgment -- what the judgment bar does is that it -- it applies to the employee the same bar that would have applied to the Government under -- under prior bills which, again, was only the bar of res judicata. Because res --

CHIEF JUSTICE ROBERTS: Did you -- did you make the argument or the point that Justice Stevens articulated earlier about the -- the provisions of this chapter not applying and that including 2676?

MS. ZIEVE: No, we didn't make it, and --

CHIEF JUSTICE ROBERTS: Does it sound good or bad to you now?

(Laughter.)

MS. ZIEVE: We did make a similar argument that 2680 states that 1346(b) shall not apply and

because the judgment bar only applies to actions under 1346(b), it's something of a contradiction to say that an action that -- to which 1346(b) shall not apply at the same time an action under 1346(b).

As for Justice Stevens' broader argument that -- that chapter -- chapter 171, which is the rest of the FTCA, other than -- than 1346(b), shall not -- shall not apply to claims arising from the exceptions, I don't think that Smith, which I think was Mr. Hallward-Driemeier's response -- Smith doesn't really provide a full answer to why that argument might be wrong because Smith really -- Smith did say that an action that -- an action to which the chapter does not apply at the same time can be one to which the exclusive remedy provision has been applied.

But one difference is the -- the order in which those things happened. First, you would get the 2679(b) exclusive remedy provision invoked before the question of whether 2680 applied would arise.

And the other point is that Smith, which construed the exclusive remedy provision to apply even if the exceptions would then preclude a suit entirely, was based on the purpose of the exclusive remedy provision. The legislative history's relatively clear statements that it was intended to provide an immunity

from State law tort suits for Federal employees acting within the scope of their employment and looks to two other provisions of 2679, neither of which would come -- have any role here or were even adopted or enacted until 42 years after the judgment bar was enacted.

JUSTICE BREYER: I don't -- I don't understand. If we were to take that, wouldn't we have to overturn Smith? You think not. You just said not.

But as I -- then as I understand Smith, we look to (b) and (b) says, plaintiff, you cannot bring an action under anything. Okay? You can't bring a State tort law action. You can't bring an action under Federal law against the employee, with certain exceptions where you can like Bivens and where there's a specific statute.

Then we have over here the exceptions section. And over here in the exceptions section, it says there is no Federal action for, among other things, the case in front of us and, among other things, actions in a foreign country. And so the court says, one, this is in a foreign country, so you can't bring it under Federal Tort Claims Act, and now we'll go look to see whether this bar that you can't bring it, period, applies. They say it does apply.

Now, Justice Stevens dissented, but he didn't

dissent on that ground.

And -- and so -- so I don't see how we could reach the result with this other exception without overturning Smith because Smith said (b) does apply. And so if the fact that it falls within an exception means the whole thing doesn't apply, then they would have held (b) doesn't apply. But they said (b) does apply. So how do we get there given Smith?

MS. ZIEVE: Well, like application of the judgment bar, one distinction would be that it turns on the order in which things occur, and in --

JUSTICE BREYER: I mean, that -- that would be to overturn the reasoning of Smith. It would say --

MS. ZIEVE: But the reasoning --

JUSTICE BREYER: Yes.

MS. ZIEVE: Well, the reasoning of Smith is not based on the language of 2680. The reasoning of Smith is based on the statement of legislative purpose, the background under which 2679(b) was enacted, and based on 2679(b)(2), which has -- stating exceptions, and 2679(d)(4), which has procedures for the United States to certify and step into the shoes of the United States. So --

JUSTICE BREYER: So, in effect, they didn't -- the Court didn't consider this argument in Smith.

MS. ZIEVE: Right. What the Court did in Smith -- and I think this applies to much of the Court's jurisprudence to construing the --

JUSTICE STEVENS: The main holding in Smith was that the foreign country exception applied. That's all they held in Smith, wasn't it?

MS. ZIEVE: Right. Smith held the foreign country exception applied even though the employee would -- the -- the plaintiff would have no remedy.

JUSTICE STEVENS: And the -- and the -- I don't see how that is at all inconsistent with what I'm suggesting here. I really don't.

MS. ZIEVE: Well, I don't think it's inconsistent. I think one thing that's important is that the Court -- both in that case and in Meyer and in Gutierrez de Martinez, the Court looked at provisions of the FTCA that are not models of clarity and attempted to give a sensible reading, given the -- the purposes that Congress was trying to achieve and the context and structure of the specific provisions.

JUSTICE STEVENS: Well, looking at it very broadly, it doesn't seem to me that if the United States did not waive sovereign immunity for a particular category of tort case, that a dismissal of such a tort case should bar an -- an action by an

individual against an individual defendant, just looking at it in -- in a global sense. And that's what the plain language of the statute also says. So I don't really see any tension. I -- maybe I'm missing something obvious here.

MS. ZIEVE: I agree entirely. As the Court said in Meyer, the jurisdiction under the FTCA is defined by the scope of the waiver of sovereign immunity, and without question --

JUSTICE GINSBURG: But we -- this case is about the interpretation of 2676, as we took it. And before your time runs out, if we can get to the nub of your difference, your reading and the Government's, you say judgment in 2676 means judgment on the merits, and the Government says it means any judgment. So to buy your interpretation, we would have to put a caret mark after judgment and put on the merits. But the statute doesn't say on the merits.

MS. ZIEVE: No, the statute doesn't say what it means by judgment. And I -- and I don't think judgment has a clear meaning, and that's why it's appropriate to look to the context of the provision, what Congress was trying to achieve in the provision to interpret the scope of the bar and the meaning of -- of that word and all the words together.

The -- the purpose of the statute is to shift suits from the employees to the Government, and the background of this specific provision, little as it is, and the comparison in a couple places to this provision discussing a parallel way to the administrative settlement provision -- we think the most sensible reading is that Congress was trying to extend the preclusion effect of the suit against the Government so that although the employee would no longer be sued and would get that benefit in the first instance, if the plaintiff chose to go against the Government first, the employee wouldn't have -- there would be no second suit against the employee for those same State law torts because in -- in 1946, the only torts Congress was considering were State law torts. Am I going to sue the Government for negligence or my mail carrier for negligence?

And to -- both for efficiency reasons, to protect the Government, which was concerned about -- about the burden on it of having to go -- to litigate twice, the preclusion effect would be carried to the employee, so that once there was a resolution of the State law torts against the Government, that would be the end of the matter. I think the end of the matter is actually a phrase that the Assistant Attorney

General uses in the legislative history.

CHIEF JUSTICE ROBERTS: What is the -- as a practical matter, though, what is the great burden on the plaintiffs in requiring them to sue the individual defendants first if they're concerned about the judgment bar?

MS. ZIEVE: In -- in many cases, if not most cases, an -- a plaintiff won't have both remedies available. So it's only a -- a small universe of cases anyway in which a plaintiff would want to sue in Bivens and sue under the FTCA. But at the beginning of the case, before discovery, when all you've done is file your administrative claim to which, in many cases as in this one, the Government has never even responded, the plaintiffs and the lawyers may have no idea that they actually have a Bivens claim. In this case, when they thought they had one, they filed it.

Also, the Government's view in -- in other cases is not that your -- it doesn't help the plaintiffs to sue simultaneously because the Government's position in other cases has been -- and courts have largely agreed -- that once the judgment in the -- on the FTCA claim comes down, the Bivens suit is then precluded, in some cases even if the judgment in the Bivens suit has preceded the judgment in the FTCA

suit. So bringing them simultaneously, while in some cases might -- might be feasible and seem like a good idea, is not necessarily going to protect the plaintiffs, given the scope of the Government's arguments.

CHIEF JUSTICE ROBERTS: Well, you don't -- you don't have to bring them simultaneously. You can bring the individual action first, separately.

MS. ZIEVE: Bring the individual -- bring suit -- the Bivens suit first? If the -- if the statute of limitations work out, you could bring the Bivens suit first, but again, you'd have to --

JUSTICE GINSBURG: A Bivens suit is pretty hard to prove, a lot harder than proving a case of negligence.

MS. ZIEVE: Yes. And since, either way, you're only going to get one satisfaction for your claim, it seems odd to adopt a construction that encourages plaintiffs to go first after the employees when the purpose of the FTCA was try to encourage plaintiffs to go after the Government instead.

JUSTICE STEVENS: And plaintiffs, generally, like to sue -- sue solvent defendants too I think.

(Laughter.)

MS. ZIEVE: Yes. And -- and if the

Government had responded in this case to the administrative claim in -- in a timely manner or at all, the plaintiffs would have had a better sense of where they stood on the FTCA claim before they filed suit.

I'd like to mention, although the Government has sort of retracted it, that footnote 5 of their reply brief concedes that claims wholly outside the purview of the FTCA, to use their phrase -- that judgments based on claims wholly outside the purview of the FTCA do not trigger the judgment bar. Claims based on -- claims that arise under the exceptions of 2680 are surely outside the purview of the FTA -- FTCA. The -- the 1945 committee report, which is the last one before the statute was enacted, actually describes the FTCA 2680 exceptions as excepting certain classes of torts from the grant of the right to sue. Not only does that make clear that they're outside the purview of the FTCA, but that they are matters of subject matter jurisdiction. As this Court has explained in cases like Scarborough and last month in Everhart, subject matter jurisdiction refers to classes of cases that the court has authority to adjudicate. The court -- the district court did not have authority to adjudicate the FTCA claim filed by the Hallocks because

it fell within an exception. For that reason, res judicata would not apply.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Hallward-Driemeier, you have 5-and-a-half minutes left.

REBUTTAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER
ON BEHALF OF THE PETITIONERS

MR. HALLWARD-DRIEMEIER: Thank you, Your Honor.

First, I think it's important to note that respondents concede that the Westfall Act confers a form of official immunity. That statute, like 2676, does not use the word immunity. Rather, it uses the word, any action related to the same subject matter is precluded. And that is virtually indistinguishable from the language of 2676 that -- that establishes a complete bar to any action by reason of the same subject matter.

So there is no requirement that Congress invoked particular language to create an immunity. The question is what are the underlying concerns that are protected? And the respondents have admitted that 2676, like the Westfall Act, was intended to protect employee morale against the threat of personal

liability when they were acting for the Government, as well as the distraction and cost of defending against suit.

This Court, in fact, in Gilman --

JUSTICE SCALIA: The thing you haven't answered that I think is troubling everybody is why is -- why is that -- I mean, if you could come up with some explanation of why that concern for morale only arises after there has been a -- a judgment in the suit against the Government. Why -- if that were the concern and if the Government wanted total immunity, why wouldn't they have extended it to a -- a 1983 suit brought before the FTCA suit?

MR. HALLWARD-DRIEMEIER: Well, Your Honor, I -- I admit that Congress --

JUSTICE SCALIA: Give me a good reason for that.

MR. HALLWARD-DRIEMEIER: -- Congress addressed the -- only part of -- of the problem. But as Justice Stevens recognized, plaintiffs would want to sue the solvent defendant, and that's why the -- making the Government itself subject to suit was part of the deal. And -- and Congress understood that plaintiffs were going to take up that option. And that's why, up until the -- this Court's adoption of Bivens, there

were virtually no decisions about 2676 because plaintiffs just didn't try.

This Court in Gilman, an early case relating to 2676, recognizes that -- that the statutory provision was intended to address precisely these types of concerns, morale of employees, the same concerns that have led this Court and Congress in other contexts to recognize other forms of -- of official immunity. And this one is equally subject to immediate review.

Respondents suggest, considering for a moment, what Congress would have expected in 1946 when it initially enacted this, and -- and I think that that is helpful. There is -- it is quite clear 2676 is explicit, that Congress did not expect the end of the litigation against the United States under the FTCA to mark the beginning of the litigation against the employee in his personal suit.

And -- and respondents offer the example of the postal carrier as one of those quintessential cases that Congress meant to address. But, of course, the postal exception to the FTCA, another exception in 2680, 2680(b), would bar many claims against the United States relating to a postal carrier's misdirection of the mail. Now, respondents would have the Court believe that if that suit was brought against the

United States and the United States was found not to be liable because of that exception, that the plaintiffs were free -- and Congress intended that the plaintiff be free -- to then go sue the poor mail carrier himself personally.

JUSTICE GINSBURG: What about 2679(b)(2) of the Westfall Act which says the Government doesn't get substituted for the employee in a Bivens claim? Westfall -- the Congress was -- was quite concerned, it seems, with preserving an action brought for violation of the Constitution of the United States.

MR. HALLWARD-DRIEMEIER: With respect to section 2676, Bivens claims today, after the enactment of the Westfall Act, stand in the same footing as common law claims stood prior to the enactment of the Westfall Act. In other words, prior to Westfall, you could bring a common law claim against an employee, but if you brought a suit against the United States, the judgment in that suit would bar the common law claim against the employee. In other words, the plaintiff had to make a choice.

Likewise, when Congress enacted Westfall and said you no longer have a choice with respect to common law claims, those have to be brought against the United States, it left the plaintiffs with a choice with

respect to constitutional claims. They could choose to pursue a Bivens remedy, but if they sue the United States on those claims, the judgment and the action under 1346 would be a complete bar to any action against the employee.

CHIEF JUSTICE ROBERTS: And if -- if they decided to pursue a Bivens claims -- a Bivens claim, doesn't the -- the Government often undertake the representation of the Government employees in those cases?

MR. HALLWARD-DRIEMEIER: That's right. And an additional concern of Congress was that the Government would be forced to defend against the suit twice. In effect, the cost of litigation might be borne by the Government in both cases.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)