

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ESTHER HUI, ET AL., :

4 Petitioners :

5 v. : No. 08-1529

6 YANIRA CASTANEDA, AS PERSONAL :

7 REPRESENTATIVE OF THE ESTATE OF :

8 FRANCISCO CASTANEDA, ET AL. :

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10 Washington, D.C.

11 Tuesday, March 2, 2010

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:18 a.m.

16 APPEARANCES:

17 ELAINE J. GOLDENBERG, ESQ., Washington, D.C.; on behalf
18 of Petitioners.

19 PRATIK A. SHAH, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; for
21 United States, as amicus curiae, supporting
22 Petitioners.

23 CONAL DOYLE, ESQ., Oakland, California; on behalf of
24 Respondents.

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1 P R O C E E D I N G S

2 (11:18 a.m.)

3 CHIEF JUSTICE ROBERTS: Well, counsel, we're
4 still here.

5 (Laughter.)

6 MS. GOLDENBERG: I'm very glad, Your Honor.

7 CHIEF JUSTICE ROBERTS: And we'll hear
8 argument in Case 08-1529, Hui v. Castaneda.

9 Ms. Goldenberg.

10 ORAL ARGUMENT OF ELAINE J. GOLDENBERG

11 ON BEHALF OF THE PETITIONERS

12 MS. GOLDENBERG: Mr. Chief Justice, and may
13 it please the Court:

14 In section 233(a), Congress extended an
15 absolute immunity to officers and employees of the
16 Public Health Service. That provision, reflecting
17 Congress's policy judgment that the immunity was
18 necessary to revitalize the Public Health Service, makes
19 a claim against the United States under the Federal Tort
20 Claims Act the exclusive remedy for injury or death
21 resulting from the performance of medical or related
22 functions and precludes any other civil action or
23 proceeding against the individuals by reason of the same
24 subject matter.

25 Without grappling with the language of

1 section 233(a), Respondents have tried in a number of
2 different ways to imply a limitation into the test for
3 constitutional claims, but none of those arguments
4 creates any ambiguity in the statute, for three reasons.

5 First, the Bivens exception, found in the
6 Westfall Act itself, applies only to the immunity set
7 forth in the Westfall Act and says nothing about the
8 scope of the entirely separate and distinct immunity set
9 forth in section 233.

10 JUSTICE GINSBURG: What are the immunities
11 set forth in the Westfall Act? I thought that they
12 were -- they applied to all Federal employees?

13 MS. GOLDENBERG: Yes, Your Honor, that's
14 correct.

15 JUSTICE GINSBURG: Including the Public
16 Health Service.

17 MS. GOLDENBERG: Yes, that's correct.
18 Public Health Service employees can take advantage both
19 of the immunities set forth in the Westfall Act and also
20 of the separate, preexisting, more specific immunity that's
21 afforded to them by section 233(a).

22 And this Court's decision in Smith, I think,
23 made clear that those two immunities can coexist. There's
24 no conflict between them. And what this Court said in
25 Smith is that the Westfall Act immunity adds to the

1 prior immunity, and employees can take advantage of both
2 of them.

3 JUSTICE SOTOMAYOR: Counsel, our job is to
4 determine Congress's intent when it passed 233(a). What
5 we do know is that there was no Bivens immunity at the
6 time; the FTCA had only a limited application under
7 certain driver-related accidents. So we really don't
8 have anything to tell us, because they didn't even know
9 that there was a constitutional claim that could be
10 raised, what they would have intended or not intended.

11 And I thought that Justice Ginsburg's point
12 would be that the Westfall Act tells us what they
13 intended, because by its nature it applied to all
14 employees and didn't differentiate among them, and
15 copied 233's immunity, so that one can look at it and
16 say, ah, that speaks of Congress's intent.

17 MS. GOLDENBERG: Well, certainly it's true
18 that when Congress enacted the Westfall Act it could
19 have broadly said, for instance, notwithstanding any
20 other provision of law, no Federal employee shall assert
21 a statutory immunity to constitutional claims. But it
22 didn't do that. It did something much more narrow than
23 that, which is that what it said was in section
24 2679(b)(2), paragraph (1) -- the immunity for Federal
25 employees that was just set forth shall not apply to

1 constitutional claims. And that's --

2 JUSTICE SOTOMAYOR: Is there any other Act
3 besides 233(a) that is similar --

4 MS. GOLDENBERG: Yes.

5 JUSTICE SOTOMAYOR: -- that gives separate
6 immunity? Which are those?

7 MS. GOLDENBERG: There are a number of them,
8 Your Honor. Most of them apply to Federal medical
9 workers, although not all of them. There is 10 U.S.C.
10 section 1089, the Gonzalez Act, which is discussed in
11 our brief and in the government's brief, which applies
12 to Army doctors. There are statutes applying to NASA
13 doctors, to Veterans Administration doctors, to certain
14 medical volunteers.

15 So there are a number of these statutes
16 passed over a period of several decades. But in --

17 JUSTICE KENNEDY: But it seems to me that,
18 quite apart from the Westfall Act, there's a more --
19 more basic answer that you would make to Justice
20 Sotomayor's question. And that is, because the nature
21 of immunity clauses are to make the employees secure
22 against unforeseen causes of action as well as foreseen.
23 I think that's a principled answer you could make.

24 If I made that answer, do you have authority
25 I could cite for that proposition?

1 MS. GOLDENBERG: Well, I think that this
2 Court has, you know, broadly speaking, in talking about
3 judicially created immunities -- that immunity is for
4 hard cases as well as easy cases. And the Van de Kamp
5 decision that this Court recently issued with respect to
6 judicial immunity I think says --

7 JUSTICE KENNEDY: Okay.

8 MS. GOLDENBERG: -- something along those
9 lines.

10 But I think it's true, certainly, that --
11 it's true that Congress, when it passed section 233,
12 didn't know for sure that there was going to be a Bivens
13 cause of action that was going to be allowed. But it
14 spoke very broadly. It said "any other civil action or
15 proceeding." And when it did that, it surely meant
16 civil actions or proceedings that were created by the
17 courts at some later point in time as well as those that
18 existed at the time.

19 JUSTICE KENNEDY: If we limit it, then
20 Congress would have to reenact a statute every time
21 there was some new cause of action?

22 MS. GOLDENBERG: Exactly, Your Honor. And I
23 think the problem with the interpretation that makes the
24 interpretation of the statute depend on the timing of
25 the Bivens decision is pointed up by two different

1 statutory provisions and the odd results that you would
2 have.

3 One is that the Gonzalez Act, which I
4 referred to earlier -- it's 10 U.S.C. section 1089 --
5 was enacted in 1976, it has immunity-conferring language
6 that's extremely similar to the immunity-conferring
7 language of section 233(a). In fact, we know that when
8 Congress enacted the Gonzalez Act, it looked at and
9 thought about section 233(a), and yet if it mattered
10 whether Bivens had yet been decided, the Gonzalez Act
11 would bar Bivens claims, but 233(a) wouldn't, even though
12 you can't make that kind of distinction based on their text.

13 JUSTICE SCALIA: Of course, I don't look to
14 see what Congress intended. I look to see what the
15 statute says. I don't know that we -- we -- we
16 psychoanalyze the text of a statute on the basis of what
17 the Congress at that time knew. The text says what it
18 says.

19 MS. GOLDENBERG: Yes, Your Honor, I agree.
20 And the text here is very broad and very clear that it's
21 any other civil action or proceeding that --

22 JUSTICE SCALIA: That's what it says.

23 MS. GOLDENBERG: -- that results from the same
24 subject matter. And I think one thing that's important
25 is that "subject matter" here clearly means the same set

1 of facts or the same set of circumstances.

2 So that, it -- it's not the case that you
3 only get immunity where your cause of action is somehow
4 similar to the cause of action you have under the FTCA.
5 If you -- you get immunity if you have any claim against
6 the individuals that comes out of the -- the same set of
7 facts, even if it were true that there was some
8 requirement of an FTCA remedy, which we don't believe
9 there is.

10 And what's absolutely clear here as well is
11 that Respondents do have an FTCA remedy against the
12 United States. They have brought an FTCA claim against
13 the United States. The United States has admitted
14 liability on that claim. That's found at page 328 of
15 the Joint Appendix. And so the question now is, what
16 damages will the Respondents recover from the United
17 States? And -- and in that setting, most certainly the
18 claim against the individuals is barred by section
19 233(a).

20 JUSTICE STEVENS: Would you comment on --

21 JUSTICE GINSBURG: And that's a -- there's
22 a ceiling, because the Tort Claims Act refers to the law
23 of the place where the act or omission occurred. In
24 this case it's California?

25 MS. GOLDENBERG: Well, Your Honor,

1 California law is what's been discussed in the briefs.
2 I understand that it's possible that Respondents might
3 argue that some of the acts or omissions here took place
4 in the District of Columbia, because that's the place
5 where some of the decisions were made about the
6 treatment authorization requests. But California law is
7 what has been asserted so far in the case. That's true.

8 JUSTICE GINSBURG: Which would put a lid
9 on the damages, since this is a death case, of 250,000?

10 MS. GOLDENBERG: Not exactly, Your Honor.
11 There is no limit whatsoever on the economic damages in
12 a case arising out of professional negligence. There is,
13 under California law, a \$250,000 cap on noneconomic
14 damages. As we have said in our briefs, we think that
15 in this case, where Respondents have argued intentional
16 wrongdoing by the United States, for which they can
17 recover under the FTCA, if they can prove that something
18 more than negligence was at issue, then it's possible
19 under California law, although California law is not
20 entirely clear, that they could actually exceed that
21 \$250,000 cap for noneconomic damages.

22 JUSTICE STEVENS: May I ask you to comment
23 on the fact that, in the Carlson case, apparently the
24 assistant surgeon general was, in fact, a defendant, and
25 the government failed to make this defense?

1 MS. GOLDENBERG: Your Honor, I'm not certain
2 why the defense wasn't raised in the case.

3 JUSTICE STEVENS: But if you're right,
4 they should have.

5 MS. GOLDENBERG: Well, not necessarily,
6 because there may be factual issues that -- that we're
7 not now aware of. In other words, it may be that the
8 government concluded that, despite what was alleged in
9 the complaint, that when that particular individual took
10 the acts complained of, he wasn't somehow wearing his
11 PHS hat, he was operating in some other capacity. So --
12 but that's obviously just speculation.

13 And it's -- it is not clear why that defense
14 wasn't raised. What is clear is that it was not raised
15 and, not only that, but in the court of appeals and in
16 this Court, there is no reference made to the fact that he's
17 in the Public Health Service.

18 JUSTICE STEVENS: Now, that's kind of
19 interesting that apparently the government was not
20 aware of the breadth of the position they're --
21 you're now taking.

22 MS. GOLDENBERG: Well, I'm not sure that's
23 necessarily the conclusion I would draw. As I say,
24 there may be factual reasons why it wasn't raised.
25 There may be strategic reasons why it wasn't raised.

1 It's hard to speculate on that so long after the --
2 after the fact.

3 But what is clear from Carlson is that the
4 way that section 233(a) did arise in that case is that
5 the Court used it as a specific example to contrast with
6 the FTCA itself, and said that section 233 was a place
7 where Congress had made known explicitly its intent that
8 the FTCA be the exclusive remedy and that other remedies
9 be precluded.

10 That's the way that 233(a) was argued in
11 the briefs in that case, and that's how the Court used
12 it. And that's obviously extremely supportive of the
13 Petitioners' plea for immunity here.

14 This Court has already essentially
15 recognized in Carlson, in reasoning in support of its
16 holding, that that is the role that 233(a) plays, and the
17 Court must have been talking about barring Bivens claims
18 because that's what Carlson was about. So that's the
19 significance of 233(a) in that case.

20 The Respondents also -- on a subject we
21 haven't touched on yet, I think, look at the title of
22 section 233(a) and some of its other subsections, and
23 there I think it's clear that the title can't vary the
24 clear statutory text in any way. Even if the title were
25 relevant here, it talks about negligence and

1 malpractice. And we've cited in our reply brief, at pages
2 18 to 19, the authorities showing that when the statute
3 was enacted in 1970, malpractice was thought to sweep
4 very broadly to cover any bad acts, any malpractice, and
5 so it doesn't operate -- the title here can't operate as
6 a limitation on the scope of this provision.

7 With respect to the history, the one
8 other thing that I wanted to point out that I didn't get
9 to in my answer before is another odd result that you
10 would have, if you looked at when Bivens was decided and
11 made that your deciding factor, is that the FTCA's
12 judgment bar, at 28 U.S.C. section 2676, which was enacted
13 in 1948, which says that when you take a claim against
14 the United States under the FTCA all the way to judgment,
15 you are barred from raising any other civil action or
16 proceeding by reason of the same subject matter. So
17 very similar language to what we have here. That
18 wouldn't bar Bivens claims, even though every court of
19 appeals to have looked at the issue has said that it
20 does cover Bivens claims in a different sense.

21 JUSTICE KENNEDY: Well, that would bar a
22 later Bivens claim. I assume you could bring a Bivens
23 action first, and the bar provision would not apply,
24 assuming you can bring the Bivens claim.

25 MS. GOLDENBERG: Yes, I think that's right.

1 But the -- all I'm trying to say is that it's the "any
2 other civil action or --

3 JUSTICE KENNEDY: Yes.

4 MS. GOLDENBERG: -- proceedings" language in
5 the judgment bar. If you looked at whether Bivens had
6 been decided yet, it wouldn't cover Bivens because the
7 statute was enacted prior to the time that Bivens was
8 decided. It was enacted in 1948.

9 So it's not -- it doesn't make sense to make
10 your statutory interpretation, your interpretation of
11 those words, hinge on the fact that Bivens had or hadn't
12 been decided yet.

13 If there are no further questions, I'd
14 like to reserve my remaining time for rebuttal.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. Shah.

17 ORAL ARGUMENT OF PRATIK A. SHAH

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING PETITIONERS

20 MR. SHAH: Mr. Chief Justice, and may it
21 please the Court:

22 By its plain terms, section 233(a) precludes
23 any civil action against officers and employees of the
24 Public Health Service arising out of performance of
25 their medical duties. Instead, it makes an action

1 against the United States under the Federal Tort Claims
2 Act the exclusive remedy for injury arising out of
3 PHS-provided care. Unlike the Westfall Act, section 233
4 contains no carve-out for constitutional claims, nor is
5 there any textual basis for which to imply one.

6 Accordingly, this Court should reverse the
7 Ninth Circuit's decision allowing Respondents' Bivens
8 claims against the individual Petitioners on top of
9 their FTCA claims against the United States.

10 Now, even assuming Congress did not
11 specifically have Bivens claims in mind at the time that
12 they enacted this statute, that's no reason to limit the
13 plain terms of section 233(a). First, Justice Kennedy,
14 going to your question about whether there's authority
15 for that proposition that when Congress doesn't
16 specifically anticipate a certain set of facts yet the
17 plain terms control, that that is the correct result,
18 this Court has stated both in the RICO context as well
19 as in other contexts that the fact that Congress doesn't
20 specifically contemplate application of the statute to
21 particular circumstances simply demonstrates the breadth
22 of the statute and not any ambiguity. Those statements
23 are set forth on page 15 of our brief, Sedima, Yeskey,
24 and others.

25 The second point I would make is the best

1 indication of Congress's broad intent is simply the
2 plain terms of the statute. Congress could have enacted
3 a statute that only provided immunity for, say,
4 negligent performance of medical duties. It included no
5 such limitation in 233(a). It could have made the FTCA
6 remedy exclusive of, say, only common law causes of
7 action or State law causes of action, or even existing
8 causes of action. It did not do that. It said it is
9 the exclusive remedy for any other civil action by
10 reason of the same subject matter. Congress could --

11 JUSTICE GINSBURG: Mr. Shah, is that -- is
12 that the same -- in all the statutes that Carlson cites
13 on page 20, when they say that Congress follows the
14 practice of explicitly stating what it means to make the
15 FTCA an exclusive remedy, there's this -- the Gonzalez
16 Act and there's 233(a), and then there is the swine flu.

17 Are they all -- are all those
18 provisions, provisions like 233(a), that say "any civil
19 action"?

20 MR. SHAH: Yes, Your Honor, in terms of that
21 latter phrasing "exclusive of any other civil action or
22 proceeding." For example, the Gonzalez Act, which is
23 reproduced in the gray brief on page 1a of our -- of the
24 government's appendix, it uses very similar language.
25 It says: The FTCA remedy shall be exclusive of any

1 other civil action or proceeding by reason of the same
2 subject matter. That's identical language to that used
3 in 233(a).

4 Now, there is a way in which 233(a) is even
5 broader than any of those other statutes in its
6 description of what type of performance of medical
7 duties is covered. There, there is no modifier of
8 negligence or wrongful act or omission. It simply says:
9 Any performance of medical duties is covered.

10 In the Gonzalez Act, which we would submit
11 has as quite broad language and should have the same
12 effect, they at least have a qualifier of negligent or
13 wrongful act or omission. Not that that should create a
14 change in result, but it just goes to show the
15 incredibly broad language that Congress used to show --
16 that Congress used in 233(a).

17 And I think on the Gonzalez Act point -- and
18 Justice Sotomayor, I think this goes to your question
19 about whether there are other statutes -- even though
20 that Congress may not have contemplated Bivens at the
21 time, the Gonzalez Act was passed in 1976, 5 years after
22 Bivens had decided, and yet Congress used the identical
23 language or nearly identical language as present in
24 233(a) in enacting the Gonzalez Act. Presumably,
25 Congress was aware of the potential for Bivens liability

1 at the time, yet they chose to use the same categorical
2 text.

3 And in the legislative history of the
4 Gonzalez Act, they say they used that text for the
5 specific purpose of ensuring total financial immunity --
6 immunity from total financial liability for DOD and
7 armed forces medical personnel.

8 JUSTICE SOTOMAYOR: Can you tell me how many
9 PHS personnel work in settings outside custodial
10 settings?

11 MR. SHAH: Outside which?

12 JUSTICE SOTOMAYOR: Custodial settings.

13 MR. SHAH: Well, Your Honor, there's 6,000
14 -- approximately 6,000 commissioned officers. Of those,
15 slightly more than 1,000 of the commissioned PHS
16 officers work in either the Bureau of Prisons or in ICE
17 detention facilities.

18 So the remaining 5,000 of the commissioned
19 officers may not work in what you would call a strictly
20 custodial context. A bulk -- the majority of them work
21 for the Indian Health Service, and that's true for both
22 employees and the --

23 JUSTICE SOTOMAYOR: I'm sorry. For the
24 Indian --

25 MR. SHAH: For the Indian Health Service.

1 JUSTICE SOTOMAYOR: And is there a reason
2 Congress would want to immunize PHS personnel against
3 Bivens claims in a custodial setting, but not immunize
4 Bureau of Prison personnel?

5 MR. SHAH: Well, Your Honor, I think they
6 would want to immunize Bureau of Prison personnel. And,
7 in fact, that's where a majority of these types of
8 claims come up. That, of course, is another custodial
9 setting, and -- and I think Congress would have been
10 aware --

11 JUSTICE SOTOMAYOR: But not every doctor --
12 if they come under the FTCA, they -- their --
13 constitutional claims are not immunized against them --

14 MR. SHAH: Oh, I see.

15 JUSTICE SOTOMAYOR: -- unless they are PHS
16 personnel.

17 MR. SHAH: Right. Right. You're right.
18 If they were -- if they were a BOP employee --

19 JUSTICE SOTOMAYOR: Right.

20 MR. SHAH: -- as opposed to PHS personnel,
21 then you're right, they would fall under the Westfall
22 Act, and there would be the carve-out for constitutional
23 claim.

24 Now, what we do know is that Congress
25 enacted this special protection for Public Health

1 Service personnel and singled them out at the Surgeon
2 General's request in 1970. And I think it's important
3 to remember, in 1970 -- this is pre-Westfall Act -- it was
4 not at all clear that Federal medical personnel were
5 immune even from common law negligence, for example.

6 And so even from that point, putting Bivens
7 liability aside, Congress chose to accord special
8 protection to PHS personnel above and beyond that
9 entitled to those who they were working with side by
10 side, say in the Bureau of Prisons or in detention --

11 JUSTICE ALITO: Are they paid less than
12 other -- than other Federal employees who perform
13 similar functions? And what do -- what do physicians
14 who are not -- were not employees of the Public Health
15 Service do about liability for Bivens actions? Are
16 they responsible for getting their own malpractice
17 insurance?

18 MR. SHAH: Well -- well, Your Honor, in
19 terms of the -- in terms of the ordinary claims, the
20 common law claims, of course, that would be covered by
21 the Westfall Act. In terms of Bivens, in terms of
22 insurance against Bivens claims in particular, my
23 understanding -- and this is anecdotal -- is that most --
24 most of the medical personnel in the Bureau of Prisons
25 do not have any other protection beyond that that's

1 provided by the Westfall Act. That is, they don't have
2 separate policies.

3 There is -- at least according to the
4 citation in Respondents' brief about a Web site that
5 shows that you can get Bivens insurance. It's not clear
6 to me whether that's available to Federal -- Federal
7 medical personnel, at least in the amounts of insurance
8 that might be necessary to adequately protect them --

9 JUSTICE SCALIA: Of course, we're -- you
10 know, we're talking here as though Congress is a
11 perpetual unchanging institution. Why would it have
12 done this for Public Health Service employees and not
13 have done this for Bureau? It wasn't the same Congress
14 that passed those two Acts. The one may have been a
15 stingier Congress than the other, or there -- there may
16 have been more lobbying by one of the other groups in
17 one case.

18 I don't see any reason why we have to
19 philosophically reconcile the -- the granting of -- of
20 greater immunity to Public Health Service employees.

21 MR. SHAH: Justice Scalia, I completely
22 agree. I think it's correct that the important fact is
23 the fact that Congress accorded them special protection.
24 Again, this was -- this was at the request, the specific
25 request of the Surgeon General, and they did this to

1 help revitalize the Public Health Service.

2 Now, I don't think that it's -- that the
3 Public Health Service -- it's anomalous that they get
4 this protection. I think they're in many ways similarly
5 situated to medical personnel who have served for DOD in
6 the armed forces. Like DOD medical personnel, PHS
7 officers can be assigned to very difficult situations
8 and settings, sometimes in armed conflict, other custodial
9 settings, and they can be ordered to perform certain
10 medical conditions.

11 In the Gonzalez Act legislative history,
12 Congress says that that was a reason -- an additional
13 reason as to why they wanted to accord immunity. And I
14 think PHS personnel are similarly situated. If this
15 Court were looking for a reason, the fact is they were
16 accorded the same immunity, and that's the dispositive
17 factor.

18 JUSTICE SCALIA: Just as a matter of
19 curiosity, do all of these immunity provisions come out
20 of the same committee? Or can one assume that the
21 Public Health Service may have come out of one committee
22 of Congress, the Bureau of Prisons may have come out of
23 another committee of Congress, the DOD may have come out
24 of a third committee of Congress?

25 MR. SHAH: Right. I don't know if they all

1 came out of the same committee, but these certainly span
2 a wide spectrum of years, all the way from the 1960s
3 to -- to the late 1970s, in terms of when these various
4 immunity provisions were enacted. Some of them happened
5 at the same time, like, I believe, the provision for NASA
6 personnel was added at the same time the Gonzalez Act
7 was passed.

8 JUSTICE ALITO: If section 2679(b)(2),
9 instead of saying paragraph (1) does not extend nor
10 apply, had said the remedy against the United States
11 provided by sections 1346(b), et cetera, and repeated
12 that language from (b)(1), and then said: "Is not the
13 exclusive remedy in any civil action against an employee
14 of the government," and continued with subsection (2),
15 then the result here would be different, wouldn't it?

16 MR. SHAH: Your Honor, it may be a closer
17 case but I don't think that the result would be
18 different, and here's why: If you look at the text of
19 233(a) -- and this is on the very last page of the -- of
20 the government's brief -- it does refer to the FTCA in
21 terms of the remedy that a -- that a plaintiff should
22 seek, but it's not -- it does not look to the FTCA to
23 make that remedy exclusive.

24 Instead, it provides independent language,
25 independent of the FTCA, to make the remedy exclusive.

1 It says, "The remedy against the United States" under the
2 FTCA -- that's what it references -- "for damage for
3 personal injury including death resulting from" medical
4 performance -- and then it has its own language -- "shall be
5 exclusive of any other civil action or proceeding by
6 reason of the same subject matter." It does not
7 reference the FTCA in that latter clause, and it's that
8 latter clause that makes the remedy exclusive.

9 So, regardless of the language of the
10 Westfall Act, I think -- I don't think it would make a
11 difference to the result if Congress had used the
12 wording that you suggest, Justice Alito.

13 The one -- the one final point I'd like
14 to make is I think it bears emphasizing that this is not
15 a case where there is no other relief than a Bivens
16 remedy available. The FTCA remedy is not only available
17 generally, but the United States has already admitted
18 liability on Respondents' medical negligence claim in
19 this case. The only difference from Respondents'
20 amount -- from Respondents' perspective now is the
21 amount of damages that are recoverable, and we would
22 submit --

23 JUSTICE GINSBURG: Could the -- could the
24 plaintiff contest the certification that this was within the
25 scope -- and say it was so egregious, it was outside the

1 scope, and, therefore, it doesn't come -- come within
2 233(a) or anything else, and so we have a straight claim
3 against the defendants?

4 MR. SHAH: To my knowledge, plaintiffs have
5 not made that argument in this case, that they were not
6 acting within the scope.

7 JUSTICE GINSBURG: Or they would lose their
8 argument against the -- I mean, they would lose their
9 claim against the government if they were taking that
10 position?

11 MR. SHAH: They would lose their FTCA claim
12 against the government, then, Your Honor.

13 If there are no further questions. Thank
14 you.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr. Shah.
16 Mr. Doyle.

17 ORAL ARGUMENT OF CONAL DOYLE

18 ON BEHALF OF THE RESPONDENTS

19 MR. DOYLE: Mr. Chief Justice, and may it
20 please the Court:

21 Section 233 does not bar Bivens claims here
22 for two principal reasons. First, 233 does not abrogate
23 a constitutional cause of action because it cannot
24 satisfy Carlson's explicit declaration test, which is a
25 type of clear statement rule.

1 JUSTICE GINSBURG: Now, that's quite a surprising
2 statement for you to make, when the very first statute
3 that Carlson mentions is 233(a).

4 MR. DOYLE: Your Honor, I believe you're
5 referring to the dicta in Carlson on page 20.

6 JUSTICE GINSBURG: Yes.

7 MR. DOYLE: And it's interesting
8 to note how that issue was raised. In the briefs, it wasn't
9 raised arguing that 233(a) bars Bivens claims; the government
10 didn't make that argument. And, in fact, it was raised in
11 the Respondents' cert petition or brief in opposition for
12 the proposition that -- that the language of that
13 statute actually allowed a Bivens claim because it
14 didn't preclude it. And in -- in response the
15 government actually argued that because Bivens hadn't
16 been decided in -- in 1970, that it could not have
17 possibly preserved Bivens claims. So it was actually
18 the opposite issue that was -- that was addressed in
19 Carlson --

20 JUSTICE GINSBURG: Well, it certainly
21 doesn't get that out of the way. It's put on page 20,
22 because one of the reasons why Carlson enables - allows the Bivens Act
23 is that it doesn't contain language and the -- and it --
24 it seems to me that this -- that this paragraph is
25 contrasting statutes with Carlson, because in Carlson

1 there is no -- there is no other statute.

2 MR. DOYLE: Justice Ginsburg, if I may
3 reply, I believe that that's not the proper way to read
4 that dicta for two reasons. First, I think Justice
5 Stevens mentioned the Assistant Surgeon General of the
6 United States was actually a defendant in the case, and
7 so although this 233(a) immunity wasn't -- wasn't
8 decided in Carlson, certainly the Court was aware that a
9 -- that a Public Health Service defendant was in the
10 case, and they wouldn't have permitted an action to move
11 forward against that defendant had they believed that
12 233 barred Bivens.

13 And, second, it -- it specially characterizes
14 the explicit declaration as applying to malpractice, not
15 Bivens claims. And other -- for example, another
16 statute in the category there was the Federal Drivers
17 Act, and certainly it's hard to imagine how a Federal
18 driver could be liable under -- under Bivens.

19 And so I think a better reading of that
20 dicta is that the Court is just saying: Here's an
21 example; these statutes show that when Congress makes an
22 explicit declaration, but the issue is explicit as to
23 what? And it's clear I think from reading that dicta
24 based on the existence of the Surgeon General in the
25 case and the fact that the dicta was qualified, that it

1 didn't apply to Bivens.

2 But moving back to the Carlson test, 233
3 can't satisfy the test because Carlson never even -- or
4 Congress never considered whether the FTCA was a
5 substitute for Bivens in 1970. And this point is
6 underscored by the fact that the statute was enacted
7 before Bivens and that the cause of action at issue here
8 wasn't recognized until 10 years later in Carlson.

9 And, second, when Congress did finally
10 consider for the first time whether the FTCA was an
11 adequate substitute for Bivens in 1988, it expressly
12 preserved, rather than barred, Bivens claims in the
13 Westfall Act.

14 And the Westfall Act was a comprehensive
15 statute that was intended to provide an overhaul of
16 personal immunity at the request of this Court in
17 Westfall v. Erwin, and it applied to all Federal
18 employees, including members of the Public Health
19 Service. And that was the holding of this Court in
20 Smith.

21 And Petitioners' reading here would actually
22 require this Court to write in an implied exception to
23 the Westfall Act that doesn't exist, that would exempt
24 out Public Health Service personnel from the explicit
25 carve-out of Bivens. Moreover, the Petitioners' reading

1 here --

2 JUSTICE SCALIA: You claim the Westfall Act
3 implicitly repealed 233(a)? Is that what you say?

4 MR. DOYLE: No, Your Honor, there's no
5 implicit repeal here, although we can --

6 JUSTICE SCALIA: Well, that provision says
7 that it's exclusive, and you're saying the Westfall Act
8 says it's not exclusive.

9 MR. DOYLE: Your Honor, there's no implicit
10 repeal here for the -- because 233(a) still has
11 independent work to do. But we do concede that under
12 our reading, there would be no -- it wouldn't really do
13 any more work for Public Health Service employees,
14 because they have a broader protection under the
15 Westfall Act, because it applies to any wrongful act or
16 omission.

17 JUSTICE SCALIA: But it isn't just made
18 superfluous. It is repealed. The provision of it that
19 says "it shall be exclusive" is repealed.

20 MR. DOYLE: The provision --

21 JUSTICE SCALIA: Implicitly, because it's
22 not specifically referred to.

23 MR. DOYLE: Well, there were no -- there
24 would be no repeal because there are a number of other
25 provisions within section 233 itself that it's relevant

1 to. And so the Public Health Service Act --

2 JUSTICE GINSBURG: That's just (a). We're
3 just talking about (a).

4 MR. DOYLE: Yes, but these other provisions
5 refer back to (a). And if I could --

6 JUSTICE BREYER: I don't understand your
7 Westfall Act argument. I must be missing something. My
8 understanding is, many years ago, Congress passes a
9 statute and says: Give absolute immunity from Bivens
10 actions. Sue the government; don't sue the employee.
11 It says that, basically. A long time ago.

12 Then, sometime after, Congress passes
13 another statute, and in paragraph (a) of that statute,
14 it says: An even larger group of people, just sue the
15 government. And then it says: As to this larger group
16 of people, paragraph (1) of this statute doesn't apply to
17 Bivens actions.

18 So, what does that got to do with this
19 earlier statute? Doesn't it refer to it. I don't --
20 in other words, I understand your Carlson argument.
21 I got that one, but I don't understand this argument if
22 I have the statutes right.

23 MR. DOYLE: Well, Your Honor, I think that
24 -- and I don't mean to repeat myself, but to answer that
25 question --

1 JUSTICE BREYER: Well, is there an answer to
2 the question? Because that would be important.

3 MR. DOYLE: I believe there is. But I think
4 that the fundamental issue you have to look at, Your
5 Honor, is whether, in 1970, Congress intended to abrogate
6 a constitutional cause of action. And in this Court's
7 line of clear statements --

8 JUSTICE BREYER: That's your Carlson
9 argument. I got that one.

10 MR. DOYLE: Okay.

11 JUSTICE BREYER: I understand that one.
12 The one I don't understand is what's the relation of the
13 Westfall Act to this argument?

14 MR. DOYLE: There's -- there's two
15 relationships between the Westfall Act and the Public
16 Health Service Act. First, the Westfall Act simply
17 applies on its face to all government employees. This
18 Court has held that, and so --

19 JUSTICE BREYER: Yes, right. They give the
20 government employees the same kind of immunity that -- a
21 little more limited, and that's in paragraph (1). And
22 then paragraph (2) says: Paragraph (1) doesn't apply to
23 Bivens actions.

24 It doesn't say anything about the earlier
25 statute. It applies to a different group of people. It

1 has all kinds of requirements, nothing involved with
2 233. Okay. So, what is it to do with this case?

3 Now, what I'm thinking now from your
4 hesitation is it has nothing to do with the case; it's
5 the Carlson thing that is the important thing. Now, you
6 tell me why I'm wrong.

7 MR. DOYLE: Justice Breyer, if I could
8 answer. This Court, in Smith, held that the immunity
9 conferred by section (1) applies to all Federal employees.
10 And you have to read (1) and (2) together. I mean, you can't
11 divorce them, because section (1) grants immunity, but
12 subsection (2) affects it and -- and helps define it by
13 saying that --

14 JUSTICE BREYER: You're talking about the
15 Westfall Act. Absolutely right.

16 MR. DOYLE: Yes. And that said --

17 JUSTICE BREYER: I just say, what does the
18 Act have to do with this older Act?

19 MR. DOYLE: Well, it isn't -- the older Act
20 refers to the Federal Tort Claims Act as providing the
21 exclusive remedy in this case. And the FTCA is the only
22 remedial scheme in the case. So, in other words, 233
23 doesn't set forth within it different remedies that
24 prospective plaintiffs can get against the Public Health
25 Services. It decided to define it by referring to the

1 FTCA. And when you go to the --

2 JUSTICE BREYER: Westfall -- Westfall Act is
3 not -- is not the FTCA, is it?

4 MR. DOYLE: It is. Right.

5 JUSTICE BREYER: Oh, it is the -- in other
6 words, you think -- I thought the FTCA Act is an Act
7 that gives you action against the government.

8 MR. DOYLE: The Westfall Act is just simply
9 an amendment to the FTCA.

10 JUSTICE BREYER: So it says: This Act is
11 the exclusive remedy -- the FTCA is an exclusive remedy
12 for all employees, but this provision which gives us an
13 exception does not give you the exception, does not make
14 it exclusive for Bivens actions.

15 Okay. You go ahead. You explain it to me.
16 I don't want to keep repeating my skepticism, I want to listen.

17 (Laughter.)

18 MR. DOYLE: Okay. Well, the first clause
19 of section 233(a) states that -- that the remedy against
20 the United States provided by 1346(b) is remedy
21 available. And so you go to 1346(b), and Congress
22 defined the 1346(b) -- I believe it's on page 5a of the --
23 of our appendix -- and says that -- that the remedy is
24 subject to the entire provisions of the FTCA. And so you
25 have to look to the entire provisions of the FTCA

1 to determine what the remedy is, because --

2 JUSTICE GINSBURG: What -- what says "entire
3 subject" -- 233(a), where does that say anything other
4 than -- I mean, it reads like it's immunity from any
5 civil action. That's -- those are the words I think
6 that you have to overcome. It says: Plaintiff has a
7 substitute remedy against the United States under the
8 Federal Tort Claims Act, and the employee is immune from
9 any civil action. And then you say, but any civil
10 action doesn't include Bivens actions. And you must be
11 saying that the later Act shrinks the former Act.

12 MR. DOYLE: The later Act amended the former
13 Act; that's correct, Your Honor.

14 JUSTICE GINSBURG: It amended 233(a) --

15 MR. DOYLE: It -- it did, in --

16 JUSTICE GINSBURG: -- without mentioning it?

17 MR. DOYLE: -- effect, because it's
18 incorporated by reference through the Act. So 1346(b),
19 the first sentence says "subject to the provisions of
20 chapter 171," which is the entire FTCA. And within that
21 chapter, there's a provision entitled "Exclusiveness of
22 Remedy." And that defines -- and that really addresses
23 the precise issue before the Court, whether the FTCA is
24 the exclusive remedy here for a Bivens action. And it
25 specifically says in that section that Bivens actions

1 are excluded.

2 And so if you want to find out what remedy
3 is available to a prospective plaintiff, you have to
4 look at how Congress defined the remedy, and it
5 specifically defined it by limiting it under its
6 Exclusiveness Clause to common law torts, not Bivens
7 claims.

8 But I think one of the key principles here
9 that we have to acknowledge is that you defer -- the
10 Court defers to Congress in policy considerations like
11 this because presumably Congress is in a better position
12 than the Court to -- to weigh policy decisions like
13 providing immunity to certain government employees. But
14 the deference there is only appropriate where Congress
15 has actually faced the issue and balanced the policy
16 considerations. And it could not have done so in 1970,
17 because Bivens hadn't been decided; Estelle v. Gamble
18 hadn't been decided until 1976, which -- which
19 established the deliberate indifference standard; and
20 then Carlson wasn't decided until 1980. And when
21 Congress, for the first time, actually looked at the
22 issue --

23 JUSTICE SCALIA: Well, you say any -- any
24 other civil action that -- that did not exist prior to
25 the enactment of 233(a) would not be covered by its

1 exclusion because Congress couldn't have known that this
2 civil action existed, so that it only covered those
3 causes of action that existed at the time the statute
4 was passed?

5 MR. DOYLE: Only -- only as to
6 constitutional causes of action, Justice Scalia.
7 And I think --

8 JUSTICE SCALIA: Why? Why? I mean, if your
9 theory is it doesn't preclude anything they didn't know
10 about, if they didn't know about something, whether it's
11 constitutional or not, what -- what reason is there to
12 say it's precluded?

13 MR. DOYLE: Well, I think that the issue
14 here is, is that when Congress is going to -- was going
15 to abrogate a constitutional right or recognize a
16 constitutional remedy, it has to do so in a clear way.
17 And in, for example, Webster v. Doe or, in effect, the
18 Blatchfield -- Blatchford case, has very similar language.
19 It's all civil actions, and that's in a context of whether
20 Indians can bring an action against the State under the
21 Eleventh Amendment. In that case, the Court held that
22 all civil actions did not include the right to bring an
23 action against the Eleventh Amendment -- a State under
24 the Eleventh Amendment, because you're dealing with a
25 constitutional issue.

1 And in this case -- I think that goes to
2 Justice Kennedy's point -- we're not saying that, you know,
3 any cause of action that perhaps was created after 1970
4 wouldn't be barred, but when you're talking about a
5 constitutional cause of action, there is a difference.
6 And you -- Congress has to at least consider the issue,
7 balance the policy considerations, and make an informed
8 decision in order for this Court to abrogate a
9 constitutional right.

10 JUSTICE KENNEDY: And Carlson is your best
11 authority for that? Even though I don't think Carlson
12 is directly on point, Carlson is still your best
13 authority?

14 MR. DOYLE: Well, Carlson sets forth the
15 clear statement rule here, the explicit declaration
16 test, and then --

17 JUSTICE KENNEDY: In a different context,
18 but that -- but Carlson is still your best authority for
19 that proposition?

20 MR. DOYLE: I think Webster v. Doe is
21 another example of a case where this Court would not
22 abrogate a constitutional right based on fairly clear
23 language that said the director of the CIA had
24 discretion to terminate anybody. And in that case, he
25 terminated a CIA employee because he was homosexual, and

1 he brought a variety of different constitutional causes
2 of action. And then, you know, the Court held that to
3 abrogate a constitutional cause of action, there has to
4 be -- there has to be a clear statement. And so we don't
5 believe there has been that clear statement, but --

6 JUSTICE STEVENS: Do think your clear
7 statement argument would apply even if Carlson had been
8 decided before the statute was enacted?

9 MR. DOYLE: Well, that's true, Your Honor.

10 JUSTICE STEVENS: Okay.

11 MR. DOYLE: And so, it's not --

12 CHIEF JUSTICE ROBERTS: Well, I would have
13 thought it wouldn't apply as strongly because they would
14 have been saying any action at a time when they knew that
15 particular action existed.

16 MR. DOYLE: It wouldn't -- it wouldn't apply
17 as -- as strongly, but I -- I don't think that the
18 sequence of enactment is dispositive, I think is the
19 point.

20 CHIEF JUSTICE ROBERTS: Oh, so you're
21 saying -- your response to Justice Stevens follows
22 because you say they -- unless they say a Bivens action
23 is excluded, it's not.

24 MR. DOYLE: Or constitutional, but it has to
25 be clear that Congress addressed the issue and

1 considered abrogating a constitutional claim. I mean,
2 that's what the cases are clear about. And so --

3 JUSTICE GINSBURG: So the Gonzalez Act is
4 after Bivens.

5 MR. DOYLE: It is.

6 JUSTICE GINSBURG: But you say the same
7 thing -- even though Bivens was before Congress -- and
8 even though the Gonzalez Act doesn't have an exception for
9 Bivens claims, you read one into the Gonzalez Act?

10 MR. DOYLE: Your Honor, I -- I would say the
11 Gonzalez Act also wouldn't bar Bivens claims, because
12 it's just the sequence of enactment -- but I mean, if
13 it was -- if it had shown in some way that Congress
14 considered the constitutional issue -- and the legislative
15 history of the Gonzalez Act shows that it did not at
16 that time -- if there was some indication in the
17 language of the statute or anywhere that a
18 constitutional --

19 JUSTICE SCALIA: Legislative history will
20 do, so -- so we don't require this clear statement,
21 right?

22 MR. DOYLE: I'm sorry, Justice Scalia, I
23 didn't hear your question.

24 JUSTICE SCALIA: Legislative history will do
25 the job, so you're abandoning the -- the proposition

1 that there has to be a clear statement by Congress.

2 MR. DOYLE: No, Your Honor. And if I -- if
3 I meant to imply that, I misspoke.

4 JUSTICE SCALIA: That's what you said. I
5 thought you said if -- if it was clear from the
6 legislative history that Congress considered Bivens
7 actions and nonetheless enacted language similar to
8 233(a), that wouldn't be enough.

9 MR. DOYLE: It -- it -- I think that in the
10 statute, in the -- in the text of the statute itself,
11 there has to be some evidence from Congress that it
12 considered it. I think that you can look at other
13 factors to try to figure out what -- what Congress was
14 thinking, of course. However, in this case, I think the
15 point is clear that whether you look at the legislative
16 history, whether you look at the alternative remedial
17 scheme --

18 JUSTICE SCALIA: Now you're confusing me
19 again.

20 (Laughter.)

21 JUSTICE SCALIA: Is -- is -- is important
22 what Congress was thinking or what Congress said? I
23 thought your proposition was, unless the statute says
24 that it bans constitutional actions, it doesn't. Is
25 that your proposition?

1 MR. DOYLE: That -- that's correct. You have
2 to start with the text.

3 JUSTICE SCALIA: Then it doesn't matter what
4 Congress was thinking, does it? Unless Congress says
5 that, your -- your position is --

6 MR. DOYLE: Well, obviously if -- if the statute
7 unambiguously bars constitutional claims by mentioning
8 the Constitution, I don't think you look at the
9 legislative history. That's correct, Your Honor.

10 JUSTICE SCALIA: But, ah, but if it doesn't
11 unambiguously bar it, you can then look to legislative
12 history and say although it didn't bar it, the
13 legislative history shows that it was intended to bar
14 it.

15 MR. DOYLE: I think that if -- if -- if any
16 statute is ambiguous --

17 JUSTICE SCALIA: You are abandoning Carlson
18 then.

19 MR. DOYLE: -- you can look to the legislative
20 history.

21 JUSTICE SCALIA: I thought Carlson was your
22 big case.

23 MR. DOYLE: Well, I believe it is, Your Honor.
24 And -- and -- and the Carlson test --

25 JUSTICE SCALIA: You just abandoned its

1 proposition that there has to be a statement in the
2 statute.

3 MR. DOYLE: Your Honor, all I'm saying
4 is that --

5 CHIEF JUSTICE ROBERTS: You're not
6 abandoning it; you're taking it further. You're
7 taking Carlson further. It doesn't have to be -- no?

8 MR. DOYLE: All I'm saying is, I believe, is
9 that -- is that in this case, if you look at the actual
10 statute that's at issue, no matter what test you use,
11 whether you -- whether you -- whether you like
12 legislative history, whether you -- whether you only
13 look at plain text, or whether you want to look at
14 what's the alternative remedy, is it equivalent to a
15 constitutional claim, this statute doesn't pass muster.
16 It is clear that Congress never considered whether or
17 not to abrogate a constitutional cause of action in
18 1970.

19 JUSTICE BREYER: I think his point is it doesn't
20 matter whether they did or didn't consider it; the
21 question is the statute was decided by Justice Brennan
22 as an example of a statute where Congress did explicitly
23 say whatever it thought that this particular remedy was
24 a remedy exclusive, an exclusive remedy, and that
25 satisfied the second requirement of Carlson. That was

1 Justice Ginsburg's first question. And -- and there --
2 that's, I think, the problem for you in this case.

3 MR. DOYLE: Your Honor, again, I don't want
4 to repeat my answer to that question, but just to
5 emphasize that -- that the Court in Carlson did not
6 specifically say that Bivens claims were barred by
7 reference to 233. It mentioned malpractice. And
8 there is a distinct difference between malpractice and
9 deliberate indifference in 1980, because Estelle had
10 been decided 4 years earlier.

11 So, one of the other anomalies here is that
12 looking at -- at -- at the practical effect, going to
13 your implied repeal question, Justice Scalia, the only
14 work that -- that 233(a) would have left to do under the
15 Petitioners' reading is -- is to bar Bivens claims. And
16 when Congress enacted the statute in 1970, Bivens didn't
17 even exist.

18 And so, the protection that -- the -- the
19 position that we are advocating protects doctors because
20 the Westfall Act extends much broader immunity to common
21 law torts, to any wrongful act or omission, not just
22 actions performing medical functions. And so, this is
23 completely consistent with Congress's intent in 1970
24 when constitutional claims didn't even exist.

25 And so, when Congress looked at the issue,

1 examined it and decided whether -- whether there's a
2 difference between Bivens and the common law and whether
3 the FTCA was adequate to substitute for Bivens, it made
4 a decision to expressly preserve Bivens actions in this
5 case. And even if, Your Honors, you believe that
6 233 bars Bivens claims here, you have to reconcile it
7 with the Westfall Act, because the Westfall Act
8 expressly preserves Bivens claims.

9 And it is a comprehensive statute; it is
10 a later passed statute; and it is specific to the issue before
11 the Court, which is can -- can a Bivens claim be brought
12 against a Public Health Service doctor?

13 JUSTICE GINSBURG: The Westfall Act could be
14 read to say we're now covering all these people who did
15 not have, who were not sheltered by immunity before, but
16 this amendment saves out Bivens claims. One could read
17 that as self-contained and not touching other statutes
18 that existed independently before.

19 MR. DOYLE: Your Honor, I -- I -- I don't
20 think that's a reasonable reading, because at the time
21 of the Westfall Act's passage in 1988, no court had held
22 that Bivens claims were barred by section 233 or any
23 other pre-Act immunity statute like the Gonzalez Act or
24 and the VA Act.

25 And the legislative history of the Westfall

1 Act shows that, in 1988, Congress believed that the
2 Westfall Act would simply extend the protections
3 available to -- to government employees before Westfall
4 v. Erwin, and that -- and that people would still be
5 able to bring constitutional claims against members of
6 the Federal government.

7 And so, Congress had no reason in 1988 to
8 go back and amend the -- the earlier passed 233,
9 because there was no indication -- judicial construction
10 or the legislative history -- that 233 ever barred Bivens
11 claims in the first place.

12 And so, adopting the Petitioners' position
13 in this case would -- would subvert congressional
14 intent, because it would say that, you know, when
15 Congress finally weighed all of the considerations in
16 the case, decided whether Bivens and the FTCA were
17 adequate, it decided to -- it decided to preserve Bivens
18 claims rather than bar them.

19 And -- and -- and so, accepting the
20 Petitioners' position would just subvert
21 that intent based on an Act that was passed prior to
22 Bivens existing, prior to a constitutional cause of
23 action being accepted for this type of action, and it --
24 and it would just be completely inconsistent with what
25 Congress has -- has done to protect Federal employees.

1 JUSTICE STEVENS: May I just be sure I
2 understand your argument? Is the Westfall Act -- would
3 it have covered every immunity that the Public Health
4 Act previously provided? So, is it correct that the --
5 the prior statute is now totally unnecessary and does
6 nothing except preserve the Bivens -- preserve the
7 immunity for Bivens actions?

8 MR. DOYLE: No, Your Honor, I don't think I
9 got to finish that answer before. But if you look at --
10 at the appendix to our -- our brief from page 28
11 to 62, there's two pages in there, page 29 and page 55,
12 that show that section (a) still has meaning, because
13 there's a host of non-Federal employees, people that --
14 that are government contractors that provide services to
15 free health clinics and the like that can be deemed
16 employees of the Public Health Service and then take
17 advantage of their immunity. But otherwise, they
18 wouldn't be able to take advantage of the immunity
19 under FTCA, because they aren't Federal employees.

20 So 233(a) still has work to do, even under
21 our construction. And so, surely, it would not protect
22 Public Health Service employees any more because they
23 have greater protections in the Westfall Act, and, again,
24 the Petitioners' reading here would -- the only work it
25 would have left to do would be to bar Bivens claims, but

1 Bivens didn't even exist in 1970, when -- that the Act
2 was passed. That doesn't -- that doesn't make much
3 common sense.

4 And before I -- I conclude, I just want to
5 speak for a moment about, you know, the importance of
6 this case under the -- the Bivens jurisprudence. I
7 mean, the purpose of Bivens -- this Court has acknowledged
8 recently in Meyer and Malesko is to provide deterrence
9 to -- to Federal officers. And this is exactly the type
10 of case that -- that -- where deterrence is important,
11 because government employees should not feel that they
12 can -- they can --

13 JUSTICE BREYER: Can't they sue the Federal
14 Government and collect money?

15 MR. DOYLE: Not for the -- not for a Bivens
16 claim, and --

17 JUSTICE BREYER: No, I mean, can't your
18 clients -- anybody who has a case like yours -- can't they
19 sue the Federal Government and collect damages for their
20 claim?

21 MR. DOYLE: It depends. Sometimes they can't.

22 JUSTICE BREYER: Did your clients sue the
23 Federal Government?

24 MR. DOYLE: Yes.

25 JUSTICE BREYER: Did they collect money?

1 MR. DOYLE: No, they haven't collected money
2 yet.

3 JUSTICE BREYER: No. But if they win, will
4 they?

5 MR. DOYLE: On one claim, but one of our
6 claims, the most important claim here, is -- is -- will
7 be extinguished under California law, which highlights
8 why, you know, Congress would not want to -- why this
9 Court in Carlson, first of all, said that the FTCA is not
10 an effective substitute for Bivens, and Congress
11 ratified that decision 8 years later in the Westfall
12 Act by finding the same thing, that -- that Bivens
13 claims and the FTCA are complementary and parallel
14 causes of action, because for the very reason that, under
15 California law in this case, a survival claim for
16 pre-death pain and suffering for -- for Mr. Castaneda,
17 who endured an incredible ordeal for 2 years at the hands
18 of a government medical provider, that that -- that claim
19 would be barred.

20 And so I would urge this Court to follow its
21 -- its precedent in Carlson and recognize that Congress,
22 8 years later in the Westfall Act, actually ratified
23 that holding that said that the FTCA is not an adequate
24 substitute for a Bivens action for the reasons I've set
25 forth. Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 Ms. Goldenberg, you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF ELAINE J. GOLDENBERG

4 ON BEHALF OF THE PETITIONERS

5 MS. GOLDENBERG: Just two quick points, if
6 I may. One is that I think you can't read this Court's
7 Bivens jurisprudence to set forth any kind of clear
8 statement rule in this context. In many cases after
9 Carlson was decided, this Court has looked for
10 indications that Congress thought the judiciary should
11 stay its hands, and it has found those indications in
12 the mere existence of some kind of statutory scheme,
13 even where Congress has said nothing express about
14 whether that scheme should be exclusive or not.

15 If it can be the case that, simply by setting
16 forth an elaborate scheme, Congress can indicate its
17 intent that this particular implied cause of action
18 shouldn't go forward, then it must be true also that
19 where Congress expressly says that it shouldn't go
20 forward, that that can be given effect.

21 And I point out that there is not a cutting off
22 of a constitutional right here. It's just that there is
23 a specific cause of action that isn't going to be
24 allowed to go forward because it's one that this Court
25 would imply.

1 Secondly, just to go back to my answer to
2 Justice Kennedy's question before, the case that I meant
3 to cite to you was Van de Kamp v. Goldstein, 129 Supreme
4 Court 855, and that talked about absolute immunity
5 reflecting a balance of evils. Here, I think Congress
6 has done that balancing. Congress has decided that it
7 would rather protect the PHS, make sure that causes of
8 action and liability aren't hanging over the heads of
9 PHS officers, even if that means that some individuals
10 don't get recovery against certain specific PHS
11 personnel on their claims, when they can of course
12 recover from the United States.

13 If there are no further questions, we'd
14 ask that the decision of the Ninth Circuit be reversed.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Counsel.

17 The case is submitted.

18 (Whereupon, at 12:10 p.m., the case in the
19 above-entitled matter was submitted.)

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