

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, ET AL., Petitioners

v. MARCUS S. SMITH, ET AL.

CASE NO: 89-1646

PLACE: Washington, D.C.

DATE: November 7, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, ET AL., :

4 Petitioners :

5 v. : No. 89-1646

6 MARCUS S. SMITH, ET AL. :

7 - - - - - X

8 Washington, D.C.

9 Wednesday, November 7, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:55 a.m.

13 APPEARANCES:

14 DAVID L. SHAPIRO, ESQ., Deputy Solicitor General,
15 Department of Justice, Washington, D.C.; on behalf of
16 the Petitioners.

17 WALTER A. OLENIEWSKI, ESQ., Rockville, Maryland; on behalf
18 of the Respondents.

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P R O C E E D I N G S

(10:55 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1646, United States v. Marcus Smith.

Please proceed, Mr. Shapiro.

ORAL ARGUMENT OF DAVID L. SHAPIRO

ON BEHALF OF THE PETITIONERS

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

In this case the respondents brought an action against Dr. William Marshall, a U.S. Army physician, alleging malpractice occurring while Dr. Marshall was stationed overseas in Italy. The Government moved to substitute the United States as defendant, because Dr. Marshall was acting in the scope of his employment at the time of the acts complained of, and moved to dismiss the action because under an exception to the Tort Claims Act for claims arising in a foreign country, recovery could not be had against the United States.

The motions were granted by the district court, and on appeal, the court of appeals reversed, holding that the provision requiring substitution of the United States and precluding an action against the individual did not apply when an exception to the Tort Claims Act barred recovery against the United States. Because of a conflict

1 among the circuits, the case was brought here for review.

2 QUESTION: Well, now, Mr. Shapiro, the
3 Government did not bring here the question about the
4 Gonzalez Act, and --

5 MR. SHAPIRO: That is correct, Your Honor.

6 QUESTION: That strikes me as a little unusual.
7 It's very difficult to know how the statutory scheme fits
8 together if you don't know the meaning of the Gonzalez
9 Act.

10 MR. SHAPIRO: Well, the meaning of the Gonzalez
11 Act is very much part of the case, Your Honor. The
12 question -- we think the broad question whether this
13 action precluded -- is precluded by the Tort Reform Act of
14 1980 -- 1988 fairly does embrace the Gonzalez Act issue.
15 In any event, the respondents have relied entirely on the
16 Gonzalez Act as a basis for affirming the judgment below.
17 And we agree that --

18 QUESTION: So you think we do have to get into
19 it, and understand at least what the Gonzalez Act means?

20 MR. SHAPIRO: Yes, Your Honor.

21 QUESTION: Are you going to tell us what you
22 think it means?

23 MR. SHAPIRO: Well, I'm going to try --

24 QUESTION: Because it's a mystery to me.

25 MR. SHAPIRO: I'm going to try.

1 We do believe that the case presents two very
2 closely related questions. One is whether the Tort Reform
3 Act of 1988 in its own terms applies to require
4 substitution of the United States and precludes an action
5 against Dr. Marshall in the circumstances of this case.
6 We submit, in disagreement with the court below, that it
7 plainly does, both in the light of the language of the
8 statute, its clearly expressed purpose, and its history.

9 The second question in the case, which is the
10 question you, Justice O'Connor, referred to, is whether
11 the Gonzalez Act of 1976 precludes the application of the
12 reform act in this case. Our position is that it does
13 not. That there is no conflict between the provisions of
14 the Gonzalez Act and the broad protection afforded by the
15 Reform Act, and that in the event of any conflict the
16 provisions of the Reform Act are required to --

17 QUESTION: Does the Gonzalez Act grant any
18 affirmative right to sue the physician?

19 MR. SHAPIRO: No, it does not, Your Honor. And
20 I think that's a critical point of disagreement between us
21 and the respondents. The respondents attempt to suggest
22 throughout their brief a point which was not at all the
23 basis of the decision below, and that is that they are
24 pursuing a remedy under the Gonzalez Act. They are not.
25 That was evident from their complaint. The basis of their

1 assertion of Federal jurisdiction was diversity of
2 citizenship. They allege malpractice by the doctor under
3 Italian law, under California law, and under something
4 described as general American law, which perhaps was an
5 effort to resuscitate Swift against Tyson, but was clearly
6 not a reference to the Gonzalez Act.

7 What the Gonzalez Act does, we submit, is to
8 protect physicians in two ways. First and most
9 significantly, it protects physicians against suit by --
10 requiring the substitution of the United States as a
11 defendant. And indeed, the Fifth Circuit held a few years
12 ago that that preclusion, that protection, applied under
13 the circumstances of this case.

14 QUESTION: But that doesn't apply if the tort
15 occurs outside the United States?

16 MR. SHAPIRO: Your Honor, the Gonzalez Act
17 itself is less than completely clear on whether the
18 preclusion of that act applies in the circumstances of
19 this case. The court below held that it did not. We are
20 not objecting to that ruling here. A number of courts
21 have held that in contrast to the powers --

22 QUESTION: So we can assume that the Gonzalez
23 Act just doesn't apply if the tort occurs outside the
24 United States?

25 MR. SHAPIRO: The Gonzalez Act does not preclude

1 -- that is, we do not challenge the holding of the court
2 below that the Gonzalez Act does not preclude the action
3 against the doctor in this case, the Gonzalez Act itself.
4 The other --

5 QUESTION: But it doesn't give a cause of
6 action?

7 MR. SHAPIRO: That is correct. That is correct.
8 The other form of protection that was given to doctors and
9 related medical and dental personnel under the Gonzalez
10 Act was to authorize indemnification in situations where
11 the doctors might be held liable under some other law.
12 For example, if they were sued in a foreign country and
13 held liable under foreign law, and perhaps if they were
14 sued in other situations where the Tort Claims Act was not
15 available.

16 But the only function of the Gonzalez Act,
17 subsection (f), we submit, was to authorize
18 indemnification of doctors. It did not create a cause of
19 action against them. It did not authorize a cause of
20 action against them. And that is why, in our view, there
21 is --

22 QUESTION: But it is true, is it not, Mr.
23 Shapiro, that it would have permitted a cause of action
24 against the doctor on these very facts?

25 MR. SHAPIRO: It would not have precluded it.

1 QUESTION: It would not have precluded it. It
2 would -- there would have been no obstacle, and it would
3 have indemnified the doctor. So that what would have
4 happened, assuming the complaint is meritorious, that if
5 there had been no Reform Act, just under the Gonzalez Act
6 this plaintiff would have recovered and the Government
7 would have picked up the tab for the doctor.

8 MR. SHAPIRO: The Gonzalez Act itself did not
9 require indemnification. It authorizes it, but the
10 regulations --

11 QUESTION: But there had been a -- the Secretary
12 had taken the appropriate action --

13 MR. SHAPIRO: Yes, yes --

14 QUESTION: -- so that that is what would have
15 happened in this case if there had been no Reform Act.

16 MR. SHAPIRO: That is true, Your Honor.

17 QUESTION: So that if the Reform Act is read the
18 way you read it, this doctor now loses. And you are
19 saying that didn't change the statutory scheme?

20 MR. SHAPIRO: We're saying that there is no
21 repeal of any aspect of the Gonzalez Act. How -- the
22 Reform Act we do agree, indeed it's the basis of our
23 argument, changes the result in this case, yes, Your
24 Honor, but we don't regard that --

25 QUESTION: You don't regard that as an implied

1 repeal?

2 MR. SHAPIRO: No, Your Honor, we don't. And --

3 QUESTION: Does this mean this act isn't
4 applicable? Is that it?

5 MR. SHAPIRO: The Gonzalez Act provides that a
6 doctor may be indemnified in situations where under some
7 other law the doctor is held liable. We don't believe
8 that the Reform Act repeals the Gonzalez Act any more than
9 a decision by Italy or California to abolish the tort of
10 malpractice would repeal the Gonzalez Act.

11 QUESTION: No, but it limits its application to
12 providing protection in the case there might be recovery
13 under foreign law in a foreign jurisdiction.

14 MR. SHAPIRO: It limits its application.

15 QUESTION: That's all that's left of it.

16 MR. SHAPIRO: Well, there may be other
17 situations in which indemnification --

18 QUESTION: But not the principal ones of suits
19 against -- there were three in the original act, but now
20 we're down to part of one.

21 MR. SHAPIRO: Well, it may include another,
22 because there may be situations in which a doctor is lent
23 to a State or a private institution, and is sued in
24 situations where the case cannot be regarded as one within
25 the scope of his Federal employment, and therefore one

1 where the Tort Claims Act remedy is relevant.

2 To return, if I may for a minute, I would like
3 to return to this also, but to return for a minute to the
4 broader question in this case on which there is this
5 conflict among the circuits. We submit that the Reform
6 Act in its own terms clearly does require substitution of
7 the United States and precludes the action against the
8 individual. Indeed the respondents appear to have
9 conceded that point in their brief. They do not pursue
10 it. They rely only on the argument that the -- whatever
11 action was available under the Gonzalez Act is preferred
12 -- is preserved.

13 In our view that concession is correct. We
14 think there is no question under the text of the Reform
15 Act that substitution of the United States is required
16 here, and that the action against Dr. Marshall is
17 precluded.

18 To begin with the text of the Reform Act, it
19 starts in what is now subsection (b)(1) of section 2679,
20 by saying that the remedy against the United States
21 provided by 1346(b) is exclusive of any other civil action
22 --

23 QUESTION: Well, the problem with that is that
24 the Federal Tort Claims Act doesn't apply to torts
25 overseas. So it isn't all that clear on the face of it,

1 is it --

2 MR. SHAPIRO: Your Honor, we don't believe --

3 QUESTION: -- that the Reform Act affects this?
4 That's, I guess, one of the concerns of the Ninth Circuit.

5 MR. SHAPIRO: Well, the Ninth -- the Ninth
6 Circuit did certainly address that question squarely, but
7 we think it didn't read the act as a whole, or -- nor did
8 it focus on the legislative findings. That is, you start
9 with what is now 2679(b)(1). We concede that that section
10 standing alone is capable of two different readings,
11 although we contend the far more plausible reading is that
12 you have to take the Tort Claims Act remedy with its
13 exceptions and limitations. We believe that that reading
14 is confirmed beyond any doubt first by subsection (b)(4),
15 which is a part of the same statute, and which says that
16 upon certification that an employee was acting within the
17 scope of his employment. The action against the United
18 States shall proceed and shall be subject to the
19 limitations and exceptions applicable to those sections.

20 QUESTION: Well, but it says an action or
21 proceeding subject in paragraph 1, and if you read
22 paragraph 1 as not applying overseas, then how does that
23 help you?

24 MR. SHAPIRO: Well, Your Honor, we think -- we
25 think it's clear that paragraph (b)(1) itself -- we

1 concede that it is capable of two readings, but that
2 standing alone the far more plausible one is the one we
3 urge. And we, I'm sure, would be here today making the
4 same argument if (b)(4) were not there. But we think that
5 (b)(4) confirms the natural reading of (b)(1) that the
6 action can go forward, must go forward, subject to the
7 limitations and exceptions of the act itself, including
8 those in 2680.

9 Indeed that's confirmed by the legislative
10 history. The House Committee report said, and I quote,
11 "Any claim against the Government that is precluded by the
12 exceptions in 2680 is also precluded against an employee,
13 or his or her estate." We also believe that that reading
14 is consistent with the legislative findings that were made
15 in the Reform Act, that were incorporated in the act in
16 section 2. Those findings start by suggesting that this
17 Court's decision in Westfall against Erwin, which had --
18 just previously been announced, seriously eroded the
19 common law immunity previously available to -- Federal
20 employees.

21 In the view of Congress, the erosion of that
22 immunity had created an immediate crisis, and I am reading
23 again from the findings "involving the prospect of
24 liability and the threat of protracted litigation." So,
25 Justice Stevens, to return to an earlier question of

1 yours, Congress was concerned not only with the threat of
2 liability, but with the threat of protracted personal tort
3 litigation for the entire Federal work force. And
4 Congress does not suggest in doing that that the employees
5 whose conduct falls within the exceptions of section 2680
6 are in any sense different from Federal employees whose
7 conduct is subject to, not only to suit under the Tort
8 Claims Act, but to recovery as well. And the findings go
9 on to say that granting broad protection to individual
10 employees is necessary to the morale and well-being of the
11 Federal work force.

12 I should emphasize, if I may, that the
13 respondents at the end of their brief have seriously
14 overstated the consequences of the position that the
15 Government is urging here. They suggest that the effect
16 is to -- really is to leave the respondents without any
17 remedy whatever. It is true that our position is that
18 respondents cannot recover either under Federal or State
19 law in court for the wrongs they allege.

20 But they do have a remedy, they did at the time,
21 and they still do, under the Military Claims Act, 10
22 U.S.C. Section 2733. Millions of dollars are paid every
23 year under that statute on the basis of claims of
24 malpractice in situations where the recovery is not
25 available under the Federal Tort Claims Act. It is also

1 true that under a program called the Civilian Health and
2 Military Medical Program of the Uniformed Services, a
3 substantial percentage of the child's care, costs of
4 medical care, are covered until the child is 21, and if
5 the child is severely handicapped, then for the rest of
6 their life.

7 QUESTION: Mr. Shapiro, those were all in effect
8 at the time the Gonzalez Act was applied, weren't they?
9 Adopted?

10 MR. SHAPIRO: Yes, Your Honor. I'm not quite
11 sure of the timing, but I think that they were. The
12 Gonzalez Act, Your Honor, was not intended to protect or
13 to provide a remedy for individuals. That was --

14 QUESTION: No, it's pretended to protect the
15 doctors --

16 MR. SHAPIRO: Yes.

17 QUESTION: -- is what it was doing. It provided
18 complete protection to the doctors, but it preserved the
19 remedy. Whereas this other statute provides complete
20 protection to the employee by taking away some remedies.

21 MR. SHAPIRO: This returns, and I think it's
22 more than a matter of semantics, Justice Stevens. It
23 returns to what I think is a critical distinction between
24 preserving a remedy, authorizing a remedy, or creating a
25 remedy. And --

1 QUESTION: Well, it's critical for your reading
2 of the savings clause about no violation of the statute.
3 That's -- I understand, I understand your argument there.

4 MR. SHAPIRO: Yes, yes.

5 QUESTION: And literally you perhaps have the
6 better of it, but one can assume that perhaps there is
7 some legislative history suggesting Congress did not
8 intend to take away, except for those created by the
9 Westfall case, what had thought to be other Tort Claim Act
10 -- other statutory remedies.

11 MR. SHAPIRO: There is an indication --

12 QUESTION: And let me ask you one other thing,
13 because you might want to address them both together. Is
14 it correct that there is an absence in the legislative
15 history of the Reform Act of any specific consideration of
16 medical malpractice claims?

17 MR. SHAPIRO: The only references, I believe, in
18 the legislative history to medical malpractice are
19 references to the Gonzalez Act as an example of situations
20 in which actions are precluded, and a reference to the
21 Powers case, which is very much like this case, in which
22 the Fifth Circuit held that an action of this type was
23 precluded by the Gonzalez Act itself. But no general
24 discussion of malpractice.

25 I think it's fair to say that Congress was

1 concerned about all potential tort liability of all
2 Federal employees, and of course, there is no question at
3 all that a great many malpractice claims are within the
4 scope of the Reform Act. And it's our contention that all
5 malpractice claims are.

6 With respect to the focus of the Gonzalez Act,
7 we do believe, as I think you agree, that the purpose of
8 the Gonzalez Act was to protect physicians, that the --
9 and related medical personnel. That the primary means for
10 affording that protection was to preclude suit against
11 them as individuals and to require suit against the United
12 States. It is not clear from either the text of the act
13 itself or its history to what extent that preclusion was
14 total. And every court that faced that question of the
15 Gonzalez Act recognized that it was a difficult question.
16 We do believe, in view of subsection (f) and the
17 legislative history, that it's not appropriate to contest
18 --

19 QUESTION: Well, it is clear. I mean this much
20 at least is clear, is if there's no remedy under the
21 Federal Tort Claims Act, then the case would be remanded
22 to a state court, a provision that's not in the Reform
23 Act. And therefore they clearly contemplated, in the case
24 of a foreign suit, it would go forward.

25 MR. SHAPIRO: Your Honor, the provision --

1 QUESTION: That's clear, isn't it?

2 MR. SHAPIRO: I don't believe so.

3 QUESTION: Oh, I'm sorry.

4 MR. SHAPIRO: There's a provision of the old
5 Drivers Act, which was very similar to the remand
6 provision of this act, which was interpreted by the courts
7 to apply only when it was determined that the employee was
8 not acting within the scope of his employment. That is,
9 the remand provision --

10 QUESTION: Yes, but this remand provision refers
11 to the absence of a remedy. That's what it -- that's not
12 the scope of employment.

13 MR. SHAPIRO: So did the old provision of the
14 Drivers Act.

15 QUESTION: Oh, I'm sorry, I didn't --

16 MR. SHAPIRO: That is, the question what the --
17 phrase absence of a remedy means was much debated in the
18 lower courts. We think it's been resolved by the new
19 provisions of the Reform Act. But under the old
20 provisions, it was held under the Drivers Act by several
21 courts that the phrase the absence of a remedy referred to
22 the availability under 1346 of a suit against the United
23 States and not to the possibility that there might be
24 internal exceptions within the act itself. So that the
25 only situation which a remedy was absent in the view of

1 those courts was where the employee was not acting within
2 the scope of his employment. statutory construction, the
3 doctrine If I may return to a point which I think was is.
4 implicit in your earlier question, the issue whether the
5 broad scope of the Reform Act is in any way limited by the
6 Gonzalez Act, we think is illuminated by the fact that the
7 Reform Act itself contains two very specific exceptions in
8 subsection (b)(2): an action may be brought against an
9 individual for a violation of the Constitution, a Bivens
10 action which, of course, is not this case, or may be
11 brought against an individual for a violation of the
12 statute of the United States. indemnification. It does not,
13 In our view I don't want to rehearse my earlier effort to
14 answer Justice O'Connor, but we do think it's clear that
15 this action against Dr. Marshall is not an action for a
16 violation of the statute of the United States. The
17 complaint that was filed in the case clearly did not
18 regard it as such. like the case of Gordon against the New
19 York Stock Now this Court has said in Andrews against the
20 Glover and a number of other cases that when there is a
21 specific enumerated exception in an act, this Court should
22 be very reluctant to apply an additional exception in the
23 absence of very clear legislative intent. We submit that
24 there is no such legislative intent, either clear or
25 cloudy in this case. severely undermined if the Gonzalez

1 Now, the respondents try to answer that by
2 invoking another doctrine of statutory construction, the
3 doctrine involving a presumption against implied repeals.
4 We have attempted, I think, already to explain why in our
5 view there is no implied repeal in this case. Not only is
6 there still room for the Gonzalez Act itself to operate,
7 but the Gonzalez Act itself simply authorized
8 indemnification of a physician when in fact a physician
9 was held liable under the provisions of some other law.
10 So that if the other law under which a doctor might be
11 held liable prevents the suit against the doctor, that
12 simply reduces the need for indemnification. It does not,
13 in our view, in any way repeal the statute.

14 We do, however, go on in our brief, and I would
15 like to underscore that to the extent this Court believes
16 there is any tension or conflict between that provision of
17 the Gonzalez Act and the broad scope of the Reform Act,
18 that this case, like the case of Gordon against the New
19 York Stock Exchange and other cases, is a case where the
20 later statute must be given precedence if it's to be given
21 its full scope. There is no doubt, we believe, that
22 Congress intended to protect Federal employees not only
23 from liability but from the threat of protracted
24 litigation. That's made very specific in the finding.
25 That purpose would be severely undermined if the Gonzalez

1 Act, however it might be read, were to undercut the
2 language of the -- the language and purpose of the Reform
3 Act in this case.

4 If I may, I would like to reserve the rest of my
5 time for rebuttal.

6 QUESTION: Very well, Mr. Shapiro.

7 Mr. Oleniewski, we'll hear from you.

8 ORAL ARGUMENT OF WALTER A. OLENIEWSKI

9 ON BEHALF OF THE RESPONDENTS

10 MR. OLENIEWSKI: Mr. Chief Justice, and may it
11 please the Court:

12 We believe that the concessions made by the
13 Government in this case are critical to the resolution of
14 this case, and primarily those concessions deal with the
15 Gonzalez Act. Basically, what the Ninth Circuit Court of
16 Appeals did is they addressed two questions. The first
17 question was, one, whether a military doctor who is
18 working in a foreign country is immune under the Gonzalez
19 Act from suits for medical malpractice. And the court in
20 that situation said that the doctor was not so immune and
21 could be sued, regardless where the suit was brought.

22 QUESTION: Are you defending the rationale of
23 the court of appeals?

24 MR. OLENIEWSKI: Yes, Your Honor.

25 QUESTION: Well, they didn't need to get to the

1 Gonzalez Act at all. They just said that the Reform Act
2 by its own terms just doesn't apply to this case.

3 MR. OLENIEWSKI: Which is true, Your Honor.

4 QUESTION: Well, that isn't -- the Government
5 says it isn't.

6 MR. OLENIEWSKI: But the first issue that the
7 Ninth Circuit addressed in its opinion was the Gonzalez
8 Act. Once they addressed that issue and found that there
9 was a remedy under the Gonzalez Act, they then turned to
10 an analysis of the, what is called Reform Act, to
11 determine whether or not Dr. Marshall was immune under the
12 Reform Act.

13 QUESTION: Um-hum.

14 MR. OLENIEWSKI: And --

15 QUESTION: Do you defend their, the Ninth
16 Circuit's reasoning about the Reform Act?

17 MR. OLENIEWSKI: Well, I am not sure, Your
18 Honor, how clear --

19 QUESTION: You're not sure what it was?

20 MR. OLENIEWSKI: Well, I think the court went
21 part way. They did indeed, as counsel for the Government
22 has said, they did make a statement in the course of the
23 opinion that because there was no remedy under the Federal
24 Tort Claims Act, that Dr. Marshall was not immune. You
25 have to also understand that as they concluded their

1 opinion, the very last sentence before the conclusion was
2 that we hold, as did the Eleventh Circuit in Newman v.
3 Soballe, that the doctor is not immune from a lawsuit.
4 Now --

5 QUESTION: To win here, you don't have to defend
6 every sentence in the Ninth Circuit's opinion. Do you
7 agree with the statement that because the -- there was no
8 cause of action against the United States because it was
9 in a foreign question -- foreign country, therefore the
10 Reform Act didn't apply?

11 MR. OLENIEWSKI: In the limited circumstances of
12 this case, I would, Your Honor. And the reason being,
13 this case involved a claim that arose in a foreign
14 country, and because it was different than all the other
15 exceptions contained under 2680. As Justice O'Connor
16 pointed out earlier, and as the legislative history has
17 pointed out in the Gonzalez Act, Congress recognized that
18 they could not legislate and they could not impose their
19 laws on the sovereign of another country. That is why the
20 Federal Tort Claims Act does not apply in a foreign
21 country.

22 QUESTION: But even if -- even if you thought
23 the court of appeals was wrong in that specific statement,
24 you -- you wouldn't lose.

25 MR. OLENIEWSKI: That's correct, Your Honor.

1 QUESTION: That's what you're arguing?

2 MR. OLENIEWSKI: That's correct.

3 QUESTION: That's right.

4 MR. OLENIEWSKI: And their holding, as they said
5 in their last sentence of their opinion before the
6 conclusion, was the same as the holding in Newman v.
7 Soballe. Now, Newman v. Soballe clearly stated, and again
8 it gets back now to the concessions of what the Government
9 has conceded. Newman v. Soballe said that a military
10 doctor is protected by the Gonzalez Act and is therefore
11 not among those Federal employees affected by the Westfall
12 decision or the Reform Act.

13 QUESTION: Well, do you think that the Gonzalez
14 Act conveys a cause of action on a plaintiff who has been
15 allegedly injured by a Federal doctor?

16 MR. OLENIEWSKI: I prefer to refer to it as a
17 remedy, Your Honor, but I would also agree that a cause of
18 action would be an acceptable synonym. And indeed,
19 although the Government is arguing here today that the
20 Gonzalez Act does not provide a remedy, in their petition
21 for certiorari, at page 5 of their petition they say that
22 the Gonzalez Act regulates the remedies available for
23 malpractice by military physicians. And on the very next
24 page of that opinion, of that petition, they say that the
25 Eleventh Circuit in Newman v. Soballe clearly held that

1 Congress intended for the Gonzalez Act to permit suits
2 against a military doctor when the Federal Tort Claims Act
3 excepted -- when the Federal Tort Claims Act exceptions
4 foreclosed suit against the United States. And they then
5 said --

6 QUESTION: Excuse me, I --

7 MR. OLENIEWSKI: -- they wouldn't appeal from
8 that.

9 QUESTION: That could mean to permit suits where
10 suits are otherwise available, but not to create a cause
11 of action. What, what language do you rely upon in the
12 Gonzalez Act as conferring a cause of action?

13 MR. OLENIEWSKI: Well, first of all, the
14 Gonzalez Act in 1089(a) does talk about a cause of action
15 under the Federal Tort Claims Act. In 1089(f) --

16 QUESTION: Well, wait a minute. What does it
17 say about that? It says that that -- that remedy under
18 the Tort Claims Act --

19 MR. OLENIEWSKI: Is exclusive.

20 QUESTION: -- shall be exclusive. Now that
21 doesn't confer any cause of action, does it?

22 MR. OLENIEWSKI: That -- other than what might
23 be available through the Federal Tort Claims Act, Your
24 Honor.

25 QUESTION: Well, that's right. It certainly

1 confers no new cause of action. It says the Tort Claims
2 Act remedy shall be exclusive. What other language in the
3 Gonzalez Act?

4 MR. OLENIEWSKI: Then we go to 1089(f), which
5 indicates that the Secretary may hold the doctor harmless
6 or indemnify him in situations where he may be detailed to
7 a foreign country --

8 QUESTION: Right.

9 MR. OLENIEWSKI: -- or a Federal institution, or
10 under some other circumstances --

11 QUESTION: That doesn't create a cause of action
12 either. It just says if he is held liable, you can
13 identify -- indemnify.

14 MR. OLENIEWSKI: Well, that's why I prefer to
15 refer to it as a remedy, Your Honor, because as the
16 Government has taken the position -- for example, prior to
17 the Westfall legislation, when we only had the Gonzalez
18 Act -- the Gonzalez Act was enacted in 1976, and since
19 1976 until 1989 the Government made the argument that the
20 Gonzalez Act provided an exclusive remedy only through the
21 United States under the Federal Tort Claims Act. They
22 refused, until the Newman decision in 1989, to acknowledge
23 that suit can be permitted against an individual doctor.

24 QUESTION: Did they say that it provided an
25 exclusive remedy under the Tort Claims Act, or did, do

1 they say that it provided that the remedy under the Tort
2 Claims Act is exclusive?

3 MR. OLENIEWSKI: The latter, Your Honor.

4 QUESTION: The latter. I don't see that it
5 creates any remedy at all. It just speaks to exclusivity
6 of other remedies, and to indemnification for payment that
7 is made under causes of action that elsewhere exist.

8 MR. OLENIEWSKI: Well, Your Honor, the
9 Government has already conceded that they had no
10 disagreement and they were not appealing from the
11 rationale of either Newman or Smith with regard to the
12 fact that a doctor can be sued in his individual capacity,
13 and the Government would then indemnify him.

14 QUESTION: Well, they said they are not
15 appealing from it, but to the extent that you make an
16 argument based upon the Gonzalez Act that relates to the
17 interpretation of the Reform Act, I don't understand them
18 to have waived their position.

19 MR. OLENIEWSKI: Well, with regard to the Reform
20 Act, because it did not carry a provision similar to
21 what's contained in 1089(f), and because of the
22 legislative history which cites the Gonzalez Act with some
23 approval, we believe that Congress intended for 1089(f) to
24 remain viable so that an individual doctor would still be
25 protected from individual liability for, among other

1 things, suits that occur either in a foreign country or in
2 the United States if the claim arose in a foreign country.

3 As a matter of fact, in the same year that the
4 Reform Act was enacted, Congress amended the Veterans
5 Administration statute, 38 U.S.C. 4116. It also contains
6 a similar provision to what is contained in 1089(f),
7 providing for indemnification of Veterans Administration
8 doctors. They passed that in the same year that they
9 passed the Reform Act. They obviously intended words such
10 as the indemnification in 1089(f) to have effect.

11 The Government has conceded that as an
12 alternative basis for affirming that the rationale that
13 was interpreted by the courts below interpreting Gonzalez
14 could be a separate basis for affirming.

15 With regard to the --

16 QUESTION: Well, I thought they just said that
17 maybe we ought to, we ought to remand to have the Gonzalez
18 Act further considered. But I thought the Government says
19 we ought to decide it here, and that Gonzalez -- that the
20 Gonzalez Act can't be an alternative ground for
21 affirmance.

22 MR. OLENIEWSKI: Well, in their petition at page
23 20 --

24 QUESTION: I'm talking about their brief on the
25 merits.

1 MR. OLENIEWSKI: Your Honor, with regard to the
2 brief on the merits, what they are arguing in there is
3 that the Gonzalez Act continues to have viability, but the
4 viability is now limited to (1) a suit against the doctor
5 in a foreign country and (2) to an intentional tort, such
6 an assault and battery.

7 QUESTION: Well, they say it's of no utility in
8 this case.

9 MR. OLENIEWSKI: Well, I'm not sure how they
10 arrive at that, Your Honor.

11 QUESTION: Well, but that's what they urge.

12 MR. OLENIEWSKI: I understand.

13 QUESTION: Yes.

14 QUESTION: May I say a word to you, Mr.
15 Oleniewski? We granted certiorari in this case, of
16 course, to resolve the question presented in the question
17 -- in the petition for certiorari. And your, naturally
18 you have concern as to what the ultimate outcome of the
19 case is for your client about remanding and so forth. But
20 we're here to decide as best we can the question presented
21 in the petition.

22 MR. OLENIEWSKI: I think, Your Honor, that the
23 question presented in the petition wasn't necessarily the
24 decision that was reached by the Ninth Circuit. The Ninth
25 Circuit did, as you pointed out earlier, did mention in

1 passing that there was no remedy available under the
2 Federal Tort Claims Act, and that's why Dr. Marshall is
3 not immune. But I also indicate that because this is an
4 incident that occurred in a foreign country, and because
5 the Federal Tort Claims Act and Congress recognize that
6 does not extent to a foreign country, that is why in this
7 situation the Reform Act does not apply.

8 With regard to the Reform Act, there seems again
9 to be some discussion about what the respondents' position
10 is with regard to 28 U.S.C. 2679(b)(2). That is the
11 provision that has the two exceptions within the Reform
12 Act, the two exceptions being to bring a suit against a
13 Federal employee in his individual capacity either for a
14 violation of the Constitution of the United States or,
15 two, for a violation of a statute of the United States
16 under which such action against the individual is
17 otherwise authorized.

18 Now, although Government seems to think we don't
19 rely upon that statute, we do. Obviously we did not rely
20 upon that statute when the lawsuit was filed, because the
21 lawsuit was filed more than a year before the statute was
22 enacted, and obviously we could not have. The statute was
23 not enacted until this matter had already gone through the
24 district court and was in the court of appeals.

25 But it's clear that the statutes that Congress

1 contemplated had to include, among others, the Gonzalez
2 Act. The only legislative history that we have from
3 Congress on that talks in terms of preserving legal
4 remedies that existed before, not changing any legal
5 remedies that existed before. And so as they were passing
6 this legislation to protect what they perceived was a
7 change in the law caused by this Court's decision in
8 Westfall v. Erwin, they did not change any of the other
9 statutes that already existed, among them the Gonzalez
10 Act.

11 Now, the use of the term "violation," I am not
12 sure why Congress used that word. There is no mention in
13 the legislative history why they used that word. It's a
14 shorthand term. Certainly with regard to the Constitution
15 you can't bring an action against someone for violating
16 the Constitution. You bring an action against someone for
17 violating the rights that another person has under the
18 Constitution. And for the same logic, the law --
19 violation of a statute of the United States would also say
20 that you can sue an individual where there has been a
21 violation of a statute where this Federal statute
22 permitted a remedy against the individual doctor. Again,
23 the Gonzalez Act, 1089(f).

24 There's been some discussion also about whether
25 or not a remedy has been created. Clearly before the

1 Westfall legislation was enacted, the Gonzalez Act did
2 permit, under 1089(f), a doctor to be indemnified, which
3 obviously meant, according to the Ninth Circuit and the
4 Eleventh Circuit, that he could be sued in his individual
5 capacity.

6 But before the Newman decision, the Government
7 relied upon cases like Powers v. Schultz, and in those
8 cases they were making the same argument that they're
9 making now. And the argument there was that there was
10 only a remedy if you could be sued in a foreign country.
11 That was rejected by Newman, that was rejected by Smith,
12 and the Westfall legislation doesn't in any way indicate
13 that those interpretations should be changed.

14 In the case of Powers v. Schultz, when the
15 Government won that decision, the plaintiff was dismissed
16 from court and there was no remedy for that plaintiff.
17 Under Newman and under Smith, because the doctor was
18 allowed to be sued in his individual capacity, it allowed
19 a suit to proceed against the doctor and for a potential
20 remedy against the doctor.

21 We believe that there is sufficient rationale in
22 the holding of the Smith case, and particularly as it
23 applies to adopting the holding in Newman v. Soballe, that
24 the Gonzalez Act is still a viable statute, and as a
25 viable statute, a remedy is available against the doctor

1 individually, regardless of where the suit is filed.

2 QUESTION: May I ask you a question? Earlier I
3 think you said the statute -- the Reform Act did not
4 expressly amend any other statute, something like that.
5 Did it expressly repeal or supersede the Motor Vehicle
6 Act?

7 MR. OLENIEWSKI: Yes. And that's a good point,
8 Justice Stevens, because in your inquiry of Government
9 counsel you had asked about a comparison of the provisions
10 in the Drivers Act and in the Gonzalez Act. In the
11 Gonzalez Act, the remand provision under 1089(c) is a
12 remand of a case to State court where there is no remedy.
13 The Drivers Act, as it existed, did not have similar
14 language. The Drivers Act language was limited to remand
15 when the driver was found to be outside the scope of his
16 employment, not whether or not a remedy was available to
17 him. But it's clear that the Drivers Act was assimilated
18 into, and has now been to an extent broadened to become
19 the Reform Act.

20 QUESTION: May I ask you another -- I may make
21 you a little far afield, but I am curious. Under the
22 Drivers Act, or under the Reform Act since then, has it
23 been decided whether an intentional tort may be sued upon?

24 MR. OLENIEWSKI: I'm not --

25 QUESTION: Say a driver, you know, some wild

1 allegation he intentionally insulted someone. Would that
2 be covered by --

3 MR. OLENIEWSKI: Other than the Gonzalez Act and
4 the VA statute and a couple of the other piecemeal
5 statutes providing for medical doctors' immunization,
6 which has subsections providing for intentional torts, I
7 am not aware of any provision that would permit a suit for
8 an intentional tort under either the Drivers Act or the
9 Reform Act. So, --

10 QUESTION: I suppose if we, if we accept the
11 Government's position here, a suit against the doctor for
12 an intentional tort would also be barred, if the Gonzalez
13 Act is superseded by the Reform Act?

14 MR. OLENIEWSKI: I would think, to carry their
15 logic, it would have to be.

16 QUESTION: Yeah.

17 MR. OLENIEWSKI: Because they are picking and
18 choosing those provisions of the Gonzalez Act that they
19 believe have been repealed.

20 QUESTION: Well, they're saying that whatever is
21 outside the scope of the Reform Act remains. That's what
22 they say. But if the -- but if the tort, basic tort act
23 precludes recovery for intentional torts -- I guess that
24 is one of the exemptions, isn't it?

25 MR. OLENIEWSKI: That's correct.

1 QUESTION: Well, then -- and if the statute
2 applies to bar any action except under the Reform Act,
3 that would mean an intentional tort action would be
4 barred, I would think --

5 MR. OLENIEWSKI: Yes. I think there could be an
6 argument made that a doctor could no longer -- or that
7 1089(e), which provides for an intentional tort to be
8 brought against the United States, that an argument can be
9 made that that is no longer in existence. I don't think
10 that's the case, because I think it's clear from the
11 legislative history and the way that Congress cited the
12 Gonzalez Act that they were satisfied with the Gonzalez
13 Act.

14 QUESTION: What is your response here to Mr.
15 Shapiro's argument based on 2679(d)(4) to the effect that,
16 in the provision there, that once there has been a scope
17 certification and a substitution of the United States, the
18 action proceeds subject to the limitations and exceptions
19 applicable to those actions? His argument is that there
20 would be no utility in that reference to subject to
21 limitations and exceptions if remedy were to be -- were to
22 be limited to cases in which recovery is possible.

23 MR. OLENIEWSKI: Justice Souter, prior to
24 enactment of the Reform Act, the Gonzalez Act essentially
25 carried those same provisions. But because the Gonzalez

1 Act also carried subsection (f), it really didn't apply in
2 certain specified situations for military doctors. It's
3 our contention that Gonzalez Act is still viable, and that
4 that all-encompassing language of (d)(4) doesn't really
5 apply to Dr. Marshall.

6 QUESTION: If we don't accept your position on
7 the Gonzalez Act, does this argument defeat you under the
8 Reform Act?

9 MR. OLENIEWSKI: No, because in this particular
10 case -- again, it is an incident that occurred in a
11 foreign country, and Congress doesn't really extend to a
12 foreign country. That's why we don't believe --

13 QUESTION: Well, isn't that one of the
14 limitations and exceptions to which (d)(4) refers?

15 MR. OLENIEWSKI: Well, if you look at the
16 introductory language to 2680, the language specifically
17 says that this section and this chapter shall not apply to
18 any of the following, which includes a foreign country.
19 The Reform Act happens to be located in that chapter,
20 Chapter 171 of the Federal Tort Claims Act. So by its own
21 terms would not apply.

22 QUESTION: What, what then do we make of (d)(4)?
23 What is its utility?

24 MR. OLENIEWSKI: Basically, in any type of a
25 common law tort situation it would be available as an

1 exclusive remedy.

2 QUESTION: Um-hum.

3 MR. OLENIEWSKI: As the legislative history
4 clearly points out at page 3 of the House Report, the
5 examples of the kinds of claims that may be brought
6 against Federal employees includes suits for clerical
7 negligence in typing or filing documents, errors in
8 benefit determination, suits against park rangers. Those
9 were the things that Congress had in mind when they were
10 enacting the Reform Act or the Westfall legislation.

11 QUESTION: So it would basically, in most cases
12 it would refer, then, to limitations and so on under the
13 local law?

14 MR. OLENIEWSKI: Yes.

15 QUESTION: Yeah, okay.

16 MR. OLENIEWSKI: Thank you.

17 QUESTION: Thank you, Mr. Oleniewski.

18 Mr. Shapiro, do you have rebuttal?

19 REBUTTAL ARGUMENT OF DAVID L. SHAPIRO

20 ON BEHALF OF THE PETITIONERS

21 MR. SHAPIRO: Thank you, Mr. Chief Justice.

22 Just two points, one to correct the record on one point.
23 The remand provisions of the old Drivers Act were word for
24 word the same as the remand provisions of the Gonzalez
25 Act. Reading from the old Drivers Act, it says "Should a

1 United States district court determine that the case so
2 removed is one in which a remedy by suit within the
3 meaning of subsection (b) is not available against the
4 United States, the case shall be remanded to the State
5 court." And as I suggested earlier, that was interpreted
6 to mean that the case shall be remanded when it was
7 determined that the employee was not acting within the
8 scope of his employment.

9 One other --

10 QUESTION: Mr. Shapiro --

11 MR. SHAPIRO: I'm sorry.

12 QUESTION: Mr. Shapiro, while you're on the
13 Gonzalez Act-type things, could you explain to me the
14 purpose of the last part of subsection (f) of the Gonzalez
15 Act? If the exclusiveness of remedy recited in the
16 Gonzalez Act, which language is very much like the
17 exclusiveness recitation in the Reform Act, if that
18 exclusiveness prevents an action against the employee,
19 even where there would be no action available against the
20 United States, what is the purpose of that provision which
21 allows the head of the agency to get liability insurance,
22 if the circumstances are such as are likely to preclude
23 the remedies of third persons against the United States?
24 I -- you know, I read that as embodying the assumption
25 that if the circumstances are such as are likely to

1 preclude remedies against the United States, there is a
2 remedy against the employee, and therefore he's going to
3 need insurance. Isn't that assumption sort of implicit in
4 that?

5 MR. SHAPIRO: Yes, I think it is, Your Honor. I
6 mean, that's one of the puzzlements of this case that led
7 us ultimately not to pursue the argument that the Gonzalez
8 Act itself precludes this action.

9 QUESTION: Yes, but the point is that the first
10 part of the Gonzalez Act uses language that's very similar
11 to the language you're relying on in the Reform Act.

12 MR. SHAPIRO: That's true.

13 QUESTION: And if -- if in the Gonzalez Act they
14 didn't think that that language precluded the suit against
15 the individual, why would they in the Reform Act?

16 MR. SHAPIRO: The Gonzalez Act is simply cloudy
17 on this point, and the other two parts of subsection (f)
18 may well embrace points that are consistent with a broader
19 reading of subsection (a) of the Gonzalez Act. That
20 clause, as a general catch-all clause, seems to give what
21 we regard as the less plausible reading of the general
22 provision of Gonzalez. But when you turn to the Reform
23 Act, every bit of evidence available, the text of
24 subsection (4), the legislative findings, the legislative
25 history, lead in precisely the opposite direction.

1 And we believe, as the courts that have
2 construed the Gonzalez Act believe, that the general
3 language about the remedy being exclusive is susceptible
4 of different readings. Those courts have agreed that our
5 reading is the more plausible one. But reading it in
6 conjunction with subsection (f), they have felt
7 constrained to conclude that the Gonzalez Act itself did
8 not preclude the remedy. That factor simply is not
9 present under the Reform Act, and the broad purpose of the
10 Reform Act to give this kind of protection, we believe is
11 evident both from the language from the statute and its
12 history. But you're quite right that that part of
13 subsection (f) is simply there, and it's puzzling.

14 Yes, Justice Stevens?

15 QUESTION: Mr. Shapiro, I'm just curious. Other
16 than the Gonzalez Act and the Motor Vehicle statute, are
17 there other statutes where there was specific problems
18 within the general area of coverage of the Federal Tort
19 Claims Act were addressed by special legislation?

20 MR. SHAPIRO: There are other statutes similar
21 to the Gonzalez Act. Counsel referred to the Veterans
22 Act, the Public Health Service Act, the State Department
23 Act, all of which have provisions which are somewhat
24 similar. But I should mention in that connection that the
25 1988 amendment to the Veterans Act that is referred to

1 simply incorporates into it the allowance of actions for
2 intentional torts, or at least the revision, and a
3 effective revision of the intentional tort exception to
4 the Tort Claims Act, so that a malpractice action may be
5 brought against a physician that sounds in battery. That
6 that was the purpose of the 1988 amendment. There are
7 such statutes, other such statutes.

8 If there are no further questions, we would
9 submit the case.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Shapiro.

12 The case is submitted.

13 (Whereupon, at 11:50 a.m., the case in the
14 above-entitled matter was submitted.)
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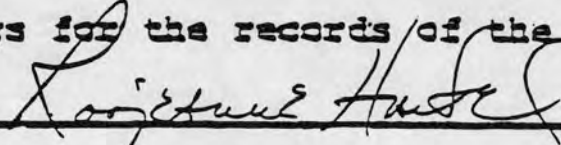
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#89-1646 - UNITED STATES, ET AL., Petitioners v. MARCUS S. SMITH, ET AL.

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