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P R O C E E D I N G S

(11:18 a.m.)

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

(Laughter.)

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

CHIEF JUSTICE ROBERTS: And we will hear argument in Case 08-1529, Hui v. Castaneda.

Ms. Goldenberg.

ORAL ARGUMENT OF ELAINE J. GOLDENBERG

ON BEHALF OF THE PETITIONERS

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

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

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
21 is 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
24 is 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 says 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.

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 is 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 something along those
7 lines.

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

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

20 MS. GOLDENBERG: Exactly, Your Honor. And I
21 think the problem with the interpretation that makes the
22 interpretation of the statute depend on the timing of
23 the Bivens decision is pointed up by two different
24 statutory provisions and the odd results that you would
25 have.

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

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

17 MS. GOLDENBERG: Yes, Your Honor, I agree.
18 And the text here is very broad and very clear that it's
19 any other civil action or proceeding that -- that
20 results from the same subject matter. And I think one
21 thing that's important is that "subject matter" here
22 clearly means the same set of facts or the same set of
23 circumstances.

24 So that, it -- it's not the case that you
25 only get immunity where your cause of action is somehow

1 similar to the cause of action you have under the FTCA.
2 You get immunity if you have any claim against the
3 individual that comes out of the -- the same set of
4 facts, even if it were true that there was some
5 requirement of an FTCA remedy, which we don't believe
6 there is.

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

17 JUSTICE GINSBURG: And that's a -- there is
18 a ceiling, because the Tort Claims Act refers to the law
19 of the place where the act or omission occurred. In
20 this case it's California?

21 MS. GOLDENBERG: Well, Your Honor,
22 California law is what's been discussed in the briefs.
23 I understand that it's possible that Respondents might
24 argue that some of the acts or omissions here took place
25 in the District of Columbia, because that's the place

1 where some of the decisions were made about the
2 treatment authorization requests. But California law is
3 what has been asserted so far in the case, that's true.

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

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

18 JUSTICE STEVENS: May I ask you to comment
19 on the fact that in the Carlson case apparently the
20 assistant surgeon general was, in fact, a defendant and
21 the government failed to make this defense?

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

24 JUSTICE STEVENS: Because if you are right,
25 they should have.

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

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

14 JUSTICE STEVENS: It is kind of interesting
15 that apparently the government was not aware of the
16 breadth of the position you are now -- you are now
17 taking.

18 MS. GOLDENBERG: Well, I'm not sure that is
19 necessarily the conclusion I would draw. As I say,
20 there may be factual reasons why it wasn't raised.
21 There may be strategic reasons why it wasn't raised.
22 It's hard to speculate on that so long after the --
23 after the fact.

24 But what is clear from Carlson is that the
25 way that section 233(a) did arise in that case is that

1 the Court used it as a specific example to contrast with
2 the FTCA itself, and said that section 233 was a place
3 where Congress had made known explicitly its intent that
4 the FTCA be the exclusive remedy and that other remedies
5 be precluded.

6 That's the way that 233(a) was argued in
7 the briefs in that case and that's how the Court used
8 it. And that is obviously extremely supportive of the
9 Petitioner's plea for immunity here.

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

16 The Respondents also -- in a subject we
17 haven't touched on yet, I think, look at the title of
18 section 233(a) and some of its other subsections, and
19 there I think it's clear that the title can't vary the
20 clear statutory text in any way. Even if the title were
21 relevant here, it talks about negligence and
22 malpractice, and we've cited in our reply brief at pages
23 18 to 19 the authorities showing that when the statute
24 was enacted in 1970 malpractice was thought to sweep
25 very broadly to cover any bad acts, any malpractice, and

1 so it doesn't operate -- the title here can't operate as
2 a limitation on the scope of this provision.

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

17 JUSTICE KENNEDY: Well, that would bar a
18 later Bivens claim. I assume you could bring a Bivens
19 action first and the bar provision would not apply,
20 assuming you can bring the Bivens claim.

21 MS. GOLDENBERG: Yes, I think that's right.
22 But the -- all I'm trying to say is that it's the "any
23 other civil action or proceedings" language in the
24 judgment bar. If you looked at whether Bivens had been
25 decided yet, it wouldn't cover Bivens because the

1 statute was enacted prior to the time that Bivens was
2 decided. It was enacted in 1948.

3 So it's not -- it doesn't make sense to make
4 your statutory interpretation, your interpretation of
5 those words, hinge on the fact that Bivens had or hadn't
6 been decided yet.

7 If there are no further questions, I would
8 like to reserve my remaining time for rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Shah.

11 ORAL ARGUMENT OF PRATIK A. SHAH

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING PETITIONERS

14 MR. SHAH: Mr. Chief Justice, and may it
15 please the Court:

16 By its plain terms, section 233(a) precludes
17 any civil action against officers and employees of the
18 Public Health Service arising out of performance of
19 their medical duties. Instead, it makes an action
20 against the United States under the Federal Tort Claims
21 Act the exclusive remedy for injury arising out of
22 PHS-provided care. Unlike the Westfall Act, section 233
23 contains no carve-out for constitutional claims, nor is
24 there any textual basis for which to apply one.

25 Accordingly, this Court should reverse the

1 Ninth Circuit's decision allowing Respondent's Bivens
2 claims against the individual Petitioners on top of
3 their FTCA claims against the United States.

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

19 The second point I would make is the best
20 indication of Congress's broad intent is simply the
21 plain terms of the statute. Congress could have enacted
22 a statute that only provided immunity for, say,
23 negligent performance of medical duties. It included no
24 such limitation in 233(a). It could have made the FTCA
25 remedy exclusive of, say, only common law causes of

1 action or State law causes of action, or even existing
2 causes of action. It did not do that. It said it is
3 the exclusive remedy for any other civil action by
4 reason of the same subject matter. Congress --

5 JUSTICE GINSBURG: Mr. Shah, is that -- is
6 that the same -- in all the statutes that Carlson cites
7 on page 20, when they say that Congress follows the
8 practice of explicitly stating what it means to make the
9 FTCA an exclusive remedy, there's this -- the Gonzales
10 Act and 233(a), and then there is the swine flu.

11 Do -- are they all -- are all those
12 provisions, provisions like 233(a), that say "any civil
13 action"?

14 MR. SHAH: Yes, Your Honor, in terms of that
15 latter phrasing "exclusive of any other civil action or
16 proceeding." For example, the Gonzales Act, which is
17 reproduced in the gray brief on page 1a of our -- of the
18 government's appendix, it uses very similar language.
19 It says: The FTCA remedy shall be exclusive of any
20 other civil action or proceeding by reason of the same
21 subject matter. That is identical language to that used
22 in 233(a).

23 Now, there is a way in which 233(a) is even
24 broader than any of those other statutes in its
25 description of what type of performance of medical

1 duties is covered. There, there is no modifier of
2 negligence or wrongful act or omission. It simply says:
3 Any performance of medical duties is covered.

4 In the Gonzales Act, which we would submit
5 has as quite broad language and should have the same
6 effect, they at least have a qualifier of negligent or
7 wrongful act or omission. Not that that should create a
8 change in result, but it just goes to show the
9 incredibly broad language that Congress used to show --
10 that Congress used in 233(a).

11 And I think on the Gonzales Act point -- and
12 Justice Sotomayor, I think this goes to your question
13 about whether there are other statutes -- even though
14 that Congress may not have contemplated Bivens at the
15 time, the Gonzales Act was passed in 1976, 5 years after
16 Bivens had decided, and yet Congress used the identical
17 language or nearly identical language as present in
18 233(a) in enacting the Gonzales Act. Presumably,
19 Congress was aware of the potential for Bivens liability
20 at the time, yet they chose to use the same categorical
21 text.

22 And in the legislative history of the
23 Gonzales Act they say they used that text for the
24 specific purpose of ensuring total financial immunity,
25 immunity from total financial liability for DOD and

1 armed forces medical personnel.

2 JUSTICE SOTOMAYOR: Can you tell me how many
3 PHS personnel work in settings outside custodial
4 settings?

5 MR. SHAH: Outside which?

6 JUSTICE SOTOMAYOR: Custodial settings.

7 MR. SHAH: Well, Your Honor, there's 6,000,
8 approximately 6,000 commissioned officers. Of those,
9 slightly more than 1,000 of the commissioned PHS
10 officers work in either the Bureau of Prisons or in ICE
11 detention facilities.

12 So the remaining 5,000 of the commissioned
13 officers may not work in what you would call a strictly
14 custodial context. A bulk -- the majority of them work
15 for the Indian Health Service, and that is true for both
16 employees and the --

17 JUSTICE SOTOMAYOR: I'm sorry? For the
18 Indian --

19 MR. SHAH: For the Indian Health Service.

20 JUSTICE SOTOMAYOR: And is there a reason
21 Congress would want to immunize PHS personnel against
22 Bivens claims in a custodial setting, but not immunize
23 Bureau of Prison personnel?

24 MR. SHAH: Well, Your Honor, I think they
25 would want to immunize Bureau of Prison personnel. And

1 in fact, that's where a majority of these types of
2 claims come up. That, of course, is another custodial
3 setting, and -- and I think Congress would have been
4 aware --

5 JUSTICE SOTOMAYOR: But not every doctor --
6 if they come under the FTCA, they -- their --
7 constitutional claims are not immunized against them --

8 MR. SHAH: Oh, I see.

9 JUSTICE SOTOMAYOR: -- unless they are PHS
10 personnel.

11 MR. SHAH: Right. Right. You are right.
12 If they were a BOP employee as opposed to PHS personnel,
13 then you are right, they would fall under the Westfall
14 Act and there would be the carve -out for constitutional
15 claim.

16 Now, what we do know is that Congress
17 enacted this special protection for Public Health
18 Service personnel and singled them out at the Surgeon
19 General's request in 1970. And I think it's important
20 to remember in 1970 this is pre-Westfall Act. It was
21 not at all clear that Federal medical personnel were
22 immune even from common law negligence, for example.

23 And so even from that point, putting Bivens
24 liability aside, Congress chose to accord special
25 protection to PHS personnel above and beyond that

1 entitled to those who they were working with side by
2 side, say in the Bureau of Prisons or in the --

3 JUSTICE ALITO: Are they paid less than
4 other -- than other Federal employees who perform
5 similar functions? And what do -- what do physicians
6 who are not -- were not employees of the Public Health
7 Service, do about liability for Bivens actions? Are
8 they responsible for getting their own malpractice
9 insurance?

10 MR. SHAH: Well -- well, Your Honor, in
11 terms of the -- in terms of the ordinary claims, the
12 common law claims, of course, that would be covered by
13 the Westfall Act. In terms of Bivens, in terms of
14 insurance against Bivens claims in particular, my
15 understanding, and this is anecdotal, is that most --
16 most of the medical personnel in the Bureau of Prisons
17 do not have any other protection beyond that, that is
18 provided by the Westfall Act. That is, they don't have
19 separate policies.

20 There is -- at least according to the
21 citation in Respondent's brief about a web site that
22 shows that you can get Bivens insurance. It's not clear
23 to me whether that's available to Federal -- Federal
24 medical personnel, at least in the amounts of insurance
25 that might be necessary to adequately protect them.

1 JUSTICE SCALIA: Of course we're -- you
2 know, we are talking here as though Congress is a
3 perpetual unchanging institution. Why would it have
4 done this for Public Health Service employees and not
5 have done this for Bureau? It wasn't the same Congress
6 that passed those two acts. The one may have been a
7 stingier Congress than the other, or there -- there may
8 have been more lobbying by one of the other groups in
9 one case.

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

13 MR. SHAH: Justice Scalia, I completely
14 agree. I think it's correct that the important fact is
15 the fact that Congress accorded them special protection.
16 Again, this was -- this was at the request, the specific
17 request of the Surgeon General, and they did this to
18 help revitalize the Public Health Service. Now I don't
19 think that -- that the Public Health Service is
20 anomalous that they get this protection. I think they
21 are in many ways similarly situated to medical personnel
22 who have served for DOD in the armed forces. Like DOD
23 medical personnel, PHS officers can be assigned to very
24 difficult situations and settings, sometimes in armed
25 conflict, other custodial settings, and they can be

1 ordered to perform certain medical conditions.

2 In the Gonzalez Act legislative history,
3 Congress says that that was a reason -- an additional
4 reason as to why they wanted to accord immunity. And I
5 think PHS personnel are similarly situated. If this
6 Court were looking for a reason, the fact is they were
7 accorded the same immunity and that is the dispositive
8 fact.

9 JUSTICE SCALIA: Just as a matter of
10 curiosity, do all of these immunity provisions come out
11 of the same committee? Or can one assume that the
12 Public Health Service may have come out of one committee
13 of Congress, the Bureau of Prisons may have come out of
14 another committee of Congress, the DOD may have come out
15 of a third committee of Congress?

16 MR. SHAH: Right. I don't know if they all
17 came out of the same committee, but these certainly span
18 a wide spectrum of years, all the way from the 1960s
19 to -- to the late 1970s, in terms of when these various
20 immunity provisions were enacted. Some of them happened
21 at the same time, like I believe the provision for NASA
22 personnel was added at the same time the Gonzalez Act
23 was passed.

24 JUSTICE ALITO: If section 2679(b)(2),
25 instead of saying paragraph (1) does not extend nor

1 apply, had said the remedy against the United States
2 provided by sections 1346(b), et cetera, and repeated
3 that language from (b)(1), and then said: "Is not the
4 exclusive remedy in any civil action against an employee
5 of the government," and continued with subsection (2),
6 then the result here would be different, wouldn't it?

7 MR. SHAH: Your Honor, it may be a closer
8 case but I don't think that the result would be
9 different, and here's why. If you look at the text of
10 233(a), and this is on the very last page of the -- of
11 the government's brief, it does refer to the FTCA in
12 terms of the remedy that a -- that a plaintiff should
13 seek; but it's not -- it does not look to the FTCA to
14 make that remedy exclusive.

15 Instead it provides independent language,
16 independent of the FTCA, to make the remedy exclusive.
17 It says the remedy against the United States under the
18 FTCA -- that's what it references -- for damage for
19 personal injury including death resulting from medical
20 performance, and then it has its own language, "shall be
21 exclusive of any other civil action or proceeding by
22 reason of the same subject matter." It does not
23 reference the FTCA in that latter clause, and it's that
24 latter clause that makes the remedy exclusive.

25 So regardless of the language of the

1 Westfall Act, I think -- I don't think it would make a
2 difference to the result if Congress had used the
3 wording that you suggest, Justice -- Justice Alito.

4 The one -- the one final point I would like
5 to make is I think it bears emphasizing that this is not
6 a case where there is no other relief than a Bivens
7 remedy available. The FTCA remedy is not only available
8 generally, but the United States has already admitted
9 liability under Respondents' medical negligence claim in
10 this case. The only difference from Respondents'
11 amount -- from Respondents' perspective now is the
12 amount of damages that are recoverable, and we would
13 submit --

14 JUSTICE GINSBURG: Does the plaintiff
15 contest the certification that this was within the
16 scope -- and say it was so egregious it was outside the
17 scope, and therefore it doesn't come with -- come within
18 233(a) or anything else, and so we have a straight claim
19 against the defendant?

20 MR. SHAH: To my knowledge, plaintiffs have
21 not made that argument in this case, that they were not
22 acting within the scope.

23 JUSTICE GINSBURG: So they would lose their
24 argument against the -- I mean, they would lose their
25 claim against the government if they were taking that

1 position?

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

4 If there are no further questions. Thank
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr. Shah.
7 Mr. Doyle.

8 ORAL ARGUMENT OF CONAL DOYLE

9 ON BEHALF OF THE RESPONDENTS

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

12 Section 233 does not bar Bivens claims here
13 for two principal reasons. First, 233 does not abrogate
14 a constitutional cause of action because it cannot
15 satisfy Carlson's explicit declaration test, which is a
16 type of clear statement rule.

17 JUSTICE GINSBURG: That's quite a surprising
18 statement for you to make, when the very first statute
19 that Carlson mentions is 233(a).

20 MR. DOYLE: Your Honor, I believe you were
21 referring to the dicta in Carlson on page 20?

22 JUSTICE GINSBURG: Yes.

23 MR. DOYLE: And it's interesting to note how
24 that issue was raised. In the briefs it wasn't raised
25 arguing that 233(a) barred Bivens claims; the government

1 didn't make that argument. And in fact it was raised in
2 Respondents' cert petition or brief in opposition for
3 the proposition that -- that the language of that
4 statute actually allowed a Bivens claim because it
5 didn't preclude it. And in -- in response the
6 government actually argued that because Bivens hadn't
7 been decided in -- in 1970 that it could not have
8 possibly preserved Bivens claims. So actually the
9 opposite issue that was -- that was addressed in
10 Carlson --

11 JUSTICE GINSBURG: Well, it certainly
12 doesn't get that out of the way. It's put on page 20,
13 because one of the reasons why Carlson enabled -- allows
14 the Bivens Act is that it doesn't contain language and
15 the -- it -- it seems to me that this -- that this
16 paragraph is contrasting statutes with Carlson, because
17 in Carlson there is no -- there is no other statute.

18 MR. DOYLE: Justice Ginsburg, if I may
19 reply, I believe that that's not the proper way to read
20 that dicta for two reasons. First, I think Justice
21 Stevens mentioned the Assistant Surgeon General of the
22 United States was actually a defendant in the case, and
23 so although this 233(a) immunity wasn't -- was not
24 decided in Carlson, certainly the Court was aware that a
25 -- that a Public Health Service defendant was in the

1 case, and they wouldn't have permitted an action to move
2 forward against that defendant had they believed that
3 233 barred Bivens.

4 And second, it -- it specially characterizes
5 the explicit declaration as applying to malpractice, not
6 Bivens claims. And other -- for example, another
7 statute in the category there was the Federal Drivers
8 Act, and certainly it's hard to imagine how a Federal
9 driver could be liable under -- under Bivens.

10 And so I think a better reading of that
11 dicta is that the Court is just saying, here's an
12 example, these statutes show that when Congress makes an
13 explicit declaration but the issue is explicit as to
14 what. And it's clear I think from reading that dicta
15 based on the existence of the Surgeon General in the
16 case and the fact that the dicta was qualified, that it
17 didn't apply to Bivens.

18 But moving back to the Carlson test, 233
19 can't satisfy the test because Carlson never even -- or
20 Congress never considered whether the FTCA was a
21 substitute for Bivens in 1970. And this point is
22 underscored by the fact that the statute was enacted
23 before Bivens and that the cause of action at issue here
24 wasn't recognized until ten years later in Carlson.

25 And second, when Congress did finally

1 consider for the first time whether the FTCA was an
2 adequate substitute for Bivens in 1988, it expressly
3 preserved rather than barred Bivens' claims in the
4 Westfall Act.

5 And the Westfall Act was a comprehensive
6 statute that was intended to provide an overhaul of
7 personal immunity at the request of this Court in
8 Westfall v. Irwin, and it applied to all Federal
9 employees, including members of the Public Health
10 Service. And that was the holding of this Court in
11 Smith.

12 And Petitioner's reading here would actually
13 require this Court to write in an implied exception to
14 the Westfall Act that doesn't exist, that would exempt
15 out Public Health Service personnel from the explicit
16 carve-out of Bivens. Moreover, the Petitioner's reading
17 here --

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

20 MR. DOYLE: No, Your Honor, there is no
21 implicit repeal here, although we can --

22 JUSTICE SCALIA: Well, that provision says
23 that it's exclusive, and you are saying the Westfall Act
24 says it is not exclusive.

25 MR. DOYLE: Your Honor, there is no implicit

1 repeal here for the -- because 233(a) still has
2 independent work to do. But we do concede that under
3 our reading there would be no -- it wouldn't really do
4 any more work for Public Health Service employees,
5 because they have a broader protection under the
6 Westfall Act, as applied to any wrongful act or
7 omission.

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

11 MR. DOYLE: The provision --

12 JUSTICE SCALIA: Implicitly, because it's
13 not specifically referred to.

14 MR. DOYLE: Well, there would no -- there
15 would be no repeal, because there are a number of other
16 provisions within section 233 itself that it's relevant
17 to. And so the Public Health Service Act --

18 JUSTICE GINSBURG: That's just (a). We are
19 just talking about (a).

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

22 JUSTICE BREYER: I don't understand your
23 Westfall Act argument. I must be missing something. My
24 understanding is, many years ago, Congress passes a
25 statute that says: Give salute immunity from Bivens

1 actions through the government. Don't sue the employee.
2 It says that, basically. A long time ago.

3 Then, sometime after, Congress passes
4 another statute, and in paragraph (a) of that statute,
5 it says: An even larger group of people, just sue the
6 government. And then it says: As to this larger group
7 of people, paragraph 1 of this statute doesn't apply to
8 Bivens actions.

9 So what does that got to do with this
10 earlier statute? Does it refer to it? In other words,
11 if I understand -- I understand your Carlson argument.
12 I got that one, but I don't understand this argument if
13 I have the statutes right.

14 MR. DOYLE: Well, Your Honor, I think that
15 -- and I don't mean to repeat myself, but to answer that
16 question --

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

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

24 JUSTICE BREYER: That's your Carlson
25 argument. I got that. I understand that. The one I

1 don't understand is: What's the relation of the
2 Westfall Act to this argument?

3 MR. DOYLE: There is -- there is two
4 relationships between the Westfall Act and the Public
5 Health Service Act. First, the Westfall Act simply
6 applies on its face to all government employees. And
7 this Court has held that, and so --

8 JUSTICE BREYER: Yes, right. They give the
9 government employees the same kind of immunity that -- a
10 little more limited, and that's in paragraph 1. And
11 then paragraph 2 says: Paragraph 1 doesn't apply to
12 Bivens actions.

13 It doesn't say anything about the earlier
14 statute. It applies to a different group of people. It
15 has all kinds of requirements, nothing involved with
16 233. Okay, so what is it to do with this case?

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

21 MR. DOYLE: Justice Breyer, if I could
22 answer. This Court, in Smith, held that the immunity
23 conferred by section 1 applies to all Federal employees.
24 You have to read 1 and 2 together. I mean, you can't
25 divorce them, because section 1 grants immunity, but

1 subsection 2 affects it and -- and helps define it by
2 saying that --

3 JUSTICE BREYER: You are talking about the
4 Westfall Act. Absolutely right. I just said: What
5 does the act have to do with this older act?

6 MR. DOYLE: Well, it isn't -- the older act
7 refers to the Federal court claim that is providing
8 exclusive remedy in this case. And the FTCA is the only
9 remedial scheme in the case. So in other words, 233
10 doesn't set forth within it different remedies that
11 prospective plaintiffs can get against the Public Health
12 Services. It decided to define it by referring to the
13 FTCA. And when you go to the --

14 JUSTICE BREYER: Westfall -- Westfall Act is
15 not -- is not the FTCA, is it?

16 MR. DOYLE: It is.

17 JUSTICE BREYER: Oh, it is the -- in other
18 words, you think -- I thought the FTCA Act was an act
19 that gives you action against the government.

20 MR. DOYLE: The Westfall Act is just simply
21 an amendment to the FTCA.

22 JUSTICE BREYER: So it says: This act is
23 the exclusive remedy -- the FTCA is an exclusive remedy
24 for all employees, but this provision which gives us an
25 exception does not give you the exception, does not make

1 it exclusive for Bivens actions.

2 Okay. You go ahead. You explain it to me.
3 I don't want to keep repeating my skepticism on this.

4 MR. DOYLE: Okay. Well, the first clauses
5 of section 233(a) states that -- that the remedy against
6 the United States provided by 1346(b) is remedy
7 available. And so you go to 1346(b) and Congress
8 defined the 1346(b), I believe it's on page 5A of our
9 appendix. It says that -- that the remedy is subject to
10 the entire provisions of the FTCA. So you have to look
11 to the entire provisions of the FTCA to determine what
12 the remedy is, because --

13 JUSTICE GINSBURG: What -- what says "entire
14 subject" -- 233(a), where does that say anything other
15 than -- I mean, it reads like it's immunity from any
16 civil action. That's -- those are the words I think
17 that you have to overcome. It says: Plaintiff has a
18 substitute remedy against the United States under the
19 Federal Tort Claims Act, and the employee is immune from
20 any civil action. And then you say, but any civil
21 action doesn't include Bivens actions. And you must be
22 saying that the later act shrinks the former act.

23 MR. DOYLE: The later act amended the former
24 act; that's correct, Your Honor.

25 JUSTICE GINSBURG: It amended 233(a) without

1 mentioning it?

2 MR. DOYLE: It did, in effect, because it's
3 incorporated by reference through the act. So 1346(b),
4 the first sentence says: Subject to the provisions of
5 chapter 171, which is the entire FTCA. And within that
6 chapter, there's a provision entitled "exclusiveness of
7 remedy." And that defines -- and that really addresses
8 the precise issue before the Court, whether the FTCA is
9 the exclusive remedy here for a Bivens action. And it
10 specifically says in that section that Bivens actions
11 are excluded.

12 And so if you want to find out what remedy
13 is available to a prospective plaintiff, you have to
14 look at how Congress defined the remedy, and it
15 specifically defined it by limiting it under its
16 Exclusiveness Clause to common law torts, not Bivens
17 claims.

18 But I think one of the key principles here
19 that we have to acknowledge is that you deferred -- the
20 Court defers to Congress in policy considerations like
21 this because presumably Congress is in a better position
22 than the Court to -- to weigh policy decisions like
23 providing immunity to certain government employees. But
24 the deference there is only appropriate where Congress
25 has actually faced the issue and balanced the policy

1 considerations. And it could not have done so in 1970,
2 because Bivens hadn't been decided, Estelle v. Gamble
3 hadn't been decided until 1976, which just -- which
4 established the deliberate indifference standard, and
5 then Carlson wasn't decided until 1980. And when
6 Congress, for the first time, actually looked at the
7 issue --

8 JUSTICE SCALIA: Well, you say any -- any
9 other civil action that -- that did not exist prior to
10 the enactment of 233(a) would not be covered by its
11 exclusion because Congress couldn't have known that this
12 civil action existed, so that it only covered those
13 causes of action that existed at the time the statute
14 was passed?

15 MR. DOYLE: Only -- only as the
16 constitutional causes of action, Justice Scalia. I
17 think --

18 JUSTICE SCALIA: Why? Why? I mean, if your
19 theory is it doesn't preclude anything they didn't know
20 about, if they didn't know about something, whether it's
21 constitutional or not, what -- what reason is there to
22 say it's precluded?

23 MR. DOYLE: Well, I think that the issue
24 here is, is that when Congress was going to -- was going
25 to abrogate a constitutional right or recognize a

1 constitutional remedy, it has to do so in a clear way.
2 And for example, Webster v. Doe, on effect, the
3 Latchford case, has very similar language. It's all
4 civil actions, and that's all in the context of whether
5 Indians can bring an action against the State under the
6 Eleventh Amendment. In that case, the Court held that
7 all civil actions did not include the right to bring an
8 action against the Eleventh Amendment, or State under
9 the Eleventh Amendment, because you are dealing with a
10 constitutional issue.

11 And in this case -- I think it goes to
12 Justice Kennedy's point -- we are not saying that any
13 cause of action, perhaps, was created after 1970
14 wouldn't be barred, but when you are talking about a
15 constitutional cause of action there is a difference.
16 And you -- Congress has to at least consider the issue,
17 balance the policy considerations, and make an informed
18 decision in order for this Court to abrogate a
19 constitutional right.

20 JUSTICE KENNEDY: And Carlson is your best
21 authority for that? Even though I don't think Carlson
22 is directly on point, Carlson is still your best
23 authority?

24 MR. DOYLE: Well, Carlson sets forth the
25 clear statement rule here, the explicit declaration

1 test, and then --

2 JUSTICE KENNEDY: In a different context,
3 but that -- but Carlson's still your best authority for
4 that proposition?

5 MR. DOYLE: I think Webster v. Doe is
6 another example of a case where this Court would not
7 abrogate a constitutional right based on fairly clear
8 language that said the director of the CIA had
9 discretion to terminate anybody. And in that case, he
10 terminated a CIA employee because he was homosexual and
11 he brought a variety of different constitutional causes
12 of action. And then, you know, the Court held that to
13 abrogate a constitutional cause of action, there has to
14 be -- there has to be a clear statement. So we don't
15 believe there has been that clear statement, but --

16 JUSTICE STEVENS: I think your clear
17 statement argument would apply even if Carlson had been
18 decided before the statute was met?

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

20 JUSTICE STEVENS: Okay.

21 MR. DOYLE: So, it's not --

22 CHIEF JUSTICE ROBERTS: I would have thought
23 it wouldn't apply as strongly because they would have
24 been saying any action at a time when they knew that
25 particular action existed.

1 MR. DOYLE: It wouldn't -- it wouldn't apply
2 as -- as strongly, but I -- I don't think that the
3 sequence of enactment is dispositive, I think is the
4 point.

5 CHIEF JUSTICE ROBERTS: Oh, so you are
6 saying -- your response to Justice Stevens follows
7 because you say they -- unless they say a Bivens action
8 is excluded, it's not?

9 MR. DOYLE: Or constitutional, but it has to
10 be clear that Congress addressed the issue and
11 considered abrogating a constitutional claim. I mean,
12 that's what the cases are clear about. And so --

13 JUSTICE GINSBURG: So the Gonzalez Act is
14 after Bivens?

15 MR. DOYLE: It is.

16 JUSTICE GINSBURG: But you say the same
17 thing even though Bivens was before Congress and even
18 though the Gonzalez Act doesn't have an exception for
19 Bivens claims, you read one into the Gonzalez Act?

20 MR. DOYLE: Your Honor, I -- I would say the
21 Gonzalez Act also wouldn't bar Bivens claims, because it
22 wasn't just the sequence of enactment -- but I mean, if
23 it was -- but if it had shown in some way that Congress
24 considered the constitutional issue, and the legislative
25 history of the Gonzalez Act shows that it did not at

1 that time, there was some indication in the -- in the
2 language of the statute or anywhere that a
3 constitutional --

4 JUSTICE SCALIA: Legislative history will
5 do, so -- so we don't require this clear statement,
6 right?

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

9 JUSTICE SCALIA: Legislative history will do
10 the job, so you are abandoning the -- the proposition
11 that there has to be a clear statement by Congress?

12 MR. DOYLE: No, Your Honor. And if I -- if
13 I meant to imply, I misspoke.

14 JUSTICE SCALIA: That's what you said. I
15 thought you said if -- if it was clear from the
16 legislative history that Congress considered Bivens
17 actions and nonetheless enacted language similar to
18 233(a), that wouldn't be enough.

19 MR. DOYLE: It -- it -- I think that in the
20 statute, in the -- in the text of the statute itself,
21 there has to be some evidence from Congress that it
22 considered it. I think that you can look at other
23 factors to try to figure out what -- what Congress was
24 thinking, of course. However, in this case, I think the
25 point is clear that whether you look at the legislative

1 history, whether you look at the alternative remedial
2 scheme --

3 JUSTICE SCALIA: Now you are confusing me
4 again.

5 (Laughter.)

6 JUSTICE SCALIA: Is -- is -- is important
7 what Congress was thinking or what Congress said? I
8 thought your proposition was, unless the statute says
9 that it bans constitutional actions, it doesn't. Is
10 that your proposition?

11 MR. DOYLE: That -- that's correct --

12 JUSTICE SCALIA: Then it doesn't matter what
13 Congress was thinking, does it? Unless Congress says
14 that, your -- your position is?

15 MR. DOYLE: Obviously if -- if a statute
16 unambiguously bars constitutional claims by mentioning
17 the Constitution, I don't think you look at the
18 legislative history. That's correct, Your Honor.

19 JUSTICE SCALIA: But, ah, but if it doesn't
20 unambiguously bar it, you can then look to legislative
21 history and say although it didn't bar it, the
22 legislative history shows that it was intended to bar
23 it.

24 MR. DOYLE: I think that if -- if -- if any
25 statute is ambiguous --

1 JUSTICE SCALIA: You are abandoning Carlson
2 then. I thought Carlson was your big case?

3 MR. DOYLE: I believe it is, Your Honor.
4 And -- and -- and that Carlson says --

5 JUSTICE SCALIA: Why don't you abandon its
6 proposition that there has to be a statement in the
7 statute?

8 MR. DOYLE: Your Honor, all I'm saying --

9 CHIEF JUSTICE ROBERTS: You are not
10 abandoning it, you are taking it further. You are
11 taking Carlson further. It doesn't have to be -- no?

12 MR. DOYLE: All I'm saying is, I believe, is
13 that -- is that in this case, if you look at the actual
14 statute that's at issue, no matter what test you use,
15 whether you -- whether you -- whether you like
16 legislative history, whether you -- whether you only
17 look at plain text, or whether you want to look at
18 what's the alternative remedy, is it equivalent to a
19 constitutional claim, this statute doesn't pass muster.
20 It is clear that Congress never considered whether or
21 not to abrogate a constitutional cause of action in
22 1970.

23 JUSTICE BREYER: His point is it doesn't
24 matter whether they did or didn't consider it, the
25 question is the statute was decided by Justice Brennan

1 as an example of a statute where Congress did explicitly
2 say whatever it thought that this particular remedy was
3 a remedy exclusive, an exclusive remedy, and that
4 satisfied the second requirement of Carlson. That was
5 Justice Ginsburg's first question. And -- and there --
6 that's, I think, the problem for you in this case.

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

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

22 And, so, the protection that -- the -- the
23 position that we are advocating protects doctors because
24 the Westfall Act extends much broader immunity to common
25 law tort to any wrongful act or omission, not just

1 actions performing medical functions. And, so, this is
2 completely consistent with Congress's intent in 1970
3 when constitutional claims didn't even exist.

4 And, so, when Congress looked at the issue,
5 examined it and decided whether -- whether there is a
6 difference between Bivens and the common law and whether
7 the FTCA was adequate to substitute for Bivens, it made
8 a decision to expressly preserve Bivens actions in this
9 case. And even if, Your Honors, you believe that
10 233 bars Bivens claims here, you have to reconcile it
11 with the Westfall Act, because the Westfall Act
12 expressly preserved Bivens claims.

13 And it was a comprehensive statute, is later
14 passed statute and it is specific to the issue before
15 the Court, which is can -- can a Bivens claim be brought
16 against the Public Health Service doctors.

17 JUSTICE GINSBURG: The Westfall Act could be
18 read to say we are now covering all these people who did
19 not have, who were not sheltered by immunity before, but
20 this amendment saved that Bivens claims, once you read
21 that as self-contained and not touching other statutes
22 that existed independently before.

23 MR. DOYLE: Your Honor, I -- I -- I don't
24 think that's a reasonable reading, because at the time
25 of the Westfall Act's passage in 1988, no court had held

1 that Bivens claims were barred by Section 233 or any
2 other pre-act immunity stature like the Gonzalez Act or
3 and the VA Act.

4 And the legislative history of the Westfall
5 Act shows that in 1988 Congress believed that the
6 Westfall Act would simply extend the protections
7 available to -- to government employees before Westfall
8 v. Erwin, and that -- and that people would still be
9 able to bring constitutional claims against members of
10 the Federal government.

11 And, so, Congress had no reason in 1988 to
12 go back and amend the -- the earlier passage of 233,
13 because there was no indication to judicial construction
14 or the legislative history that 233 ever barred Bivens
15 claims in the first place.

16 And, so, adopting the Petitioner's position
17 in this case would -- would subvert congressional
18 intent, because it would say that, you know, when
19 Congress finally weighed all of the considerations in
20 the case, decided whether Bivens and the FTCA were
21 adequate, it decided to -- it decided to preserve Bivens
22 claims rather than bar them. And -- and -- and, so,
23 accepting the Petitioner's position, which would subvert
24 that intent based on an act that was passed prior to
25 Bivens existing, prior to a constitutional cause of

1 action being accepted for this type of action, and it --
2 and it would just be completely inconsistent with what
3 Congress has -- has done to protect Federal employees.

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

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

24 So 233(a) still has work to do, even under
25 our construction. And, so, surely it would not protect

1 Public Health Service employees anymore because they
2 have greater protections in the Westfall Act, and again,
3 the Petitioner's reading here would -- the only work it
4 would have left to do would be to bar Bivens claims, but
5 Bivens didn't even exist in 1970 when -- that the Act
6 was passed. That doesn't -- that doesn't make much
7 common sense.

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

17 JUSTICE BREYER: Can't they sue the Federal
18 Government and collect money.

19 MR. DOYLE: Not for the -- not for a Bivens
20 claim.

21 JUSTICE BREYER: No, I mean, can't your
22 clients -- anybody who has a case like yours, can't they
23 sue the Federal Government and collect damages for their
24 claims?

25 MR. DOYLE: It depends. Some --

1 JUSTICE BREYER: Did your clients sue the
2 Federal Government?

3 MR. DOYLE: Yes.

4 JUSTICE BREYER: Did they collect money?

5 MR. DOYLE: No, they haven't collected money
6 yet.

7 JUSTICE BREYER: No. But if they win, will
8 they?

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

24 And so I would urge this Court to follow it
25 -- its precedent in Carlson and recognize that Congress

1 eight years later in the Westfall Act actually ratified
2 that holding that said that the FTCA is not an adequate
3 substitute for a Bivens action for the reasons I set
4 forth. Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Ms. Goldenberg, you have three minutes
7 remaining.

8 REBUTTAL ARGUMENT OF ELAINE J. GOLDENBERG

9 ON BEHALF OF THE PETITIONERS

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

20 If it can be the case that simply by setting
21 forth an elaborated scheme Congress can indicate its
22 intent that this particular implied cause of action
23 shouldn't go forward, then it must be true also that
24 where Congress expressly says that it shouldn't go
25 forward, that that can be given effect.

1 And I point out there is not a cutting off
2 of a constitutional right here. It's just that there is
3 a specific cause of action that isn't going to be
4 allowed to go forward because it's one that this Court
5 would imply.

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

18 If there are no further questions, we would
19 ask that the decision of the Ninth Circuit be reversed.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

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

24

25

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