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

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-1351, Levin v. United
5 States.

6 Mr. Feldman?

7 ORAL ARGUMENT OF JAMES A. FELDMAN

8 ON BEHALF OF THE PETITIONER

9 MR. FELDMAN: Mr. Chief Justice, and may it
10 please the Court:

11 As the language and structure of the
12 Gonzalez Act demonstrate, Congress did not completely
13 eliminate the long-recognized tort remedy that's
14 available to essentially everybody else in the country
15 when doctors perform surgery without a patient's
16 consent.

17 By abrogating the intentional tort exception
18 to the FTCA for the class of cases covered by the
19 Gonzalez Act, Congress both preserved a remedy for the
20 victims of that tort, and, by virtue of the Gonzalez
21 Act's exclusive remedy provision, they made certain that
22 the Federal employees themselves would not be sued.

23 As everyone understood at the time of the
24 enactment, that was the meaning of the terms of the
25 Gonzalez Act. The Act has two clauses, an operative

1 clause and an introductory clause.

2 The operative clause says, in simple
3 declarative terms, that the intentional tort exception
4 to the Federal Tort Claims Act shall not apply to any
5 cause of action arising out of a wrongful act or
6 omission in the performance of medical functions.

7 JUSTICE GINSBURG: Mr. Feldman, but it says,
8 first, "for purposes of this section." And, as I -- I
9 understand your argument, those words don't count. In
10 other words, you would be making -- you would interpret
11 the statute the same way if the sentence started with
12 "the provisions of Section 2680(h)."

13 MR. FELDMAN: No, Your Honor. That's not
14 right. We -- we -- that -- that -- the part after the
15 introductory clause says, "The provisions of the
16 intentional tort exception shall not apply to medical
17 malpractice cases." And that would make it apply across
18 the government to any government employee who is
19 performing those medical functions.

20 By saying, "for purposes of this section,"
21 Congress limited it in accordance with the case -- the
22 agency by agency approach that it had adopted in this
23 area and limited it to just the cases that are covered
24 by the Gonzalez Act; that is, by malpractice that's
25 committed by doctors of the Department of Defense, the

1 National Guard, the Armed Forces Retirement Home, and so
2 on.

3 And so the -- each clause serves quite an
4 important function. Congress had before the Gonzalez
5 Act -- they had already passed the statutes dealing, for
6 example, with the Public Health Service that's
7 essentially written in the same terms, with the Veterans
8 Administration -- although part of that was then added
9 later -- with the State Department doctors, and so on.

10 And so they were proceeding on an agency by
11 agency basis, and the way to accomplish that was to
12 first say, we -- we think that the intentional tort
13 exception should not apply to these cases because in
14 medical batteries of the sort that we -- as alleged in
15 this case, are so close to the kinds of medical
16 malpractice cases that are going to be brought against
17 the government anyhow.

18 But then, in each statute, they say, "for
19 purposes of this section," because it's only the
20 agencies, only the personnel covered by those sections,
21 and the torts covered by those sections.

22 JUSTICE GINSBURG: The Veterans
23 Administration, it doesn't say that, does it?

24 MR. FELDMAN: The Veterans --

25 JUSTICE GINSBURG: Yes.

1 MR. FELDMAN: The Veterans Administration,
2 originally -- the original Veterans Administration
3 statute, which was from about 1965, doesn't have this
4 1089(e) intentional tort exception at all in it.

5 But then they added it later, about 10 years
6 after this statute, and then they added a provision that
7 was slightly worded differently, but it achieves exactly
8 the same result. Instead of saying, "for purposes of
9 this section," it says, "by the personnel named in
10 Section A," which accomplishes exactly the same thing.

11 And, actually, if you look at the history of
12 that statute, the Senate report on that statute, quite
13 clearly, recites that Congress understood that 1089(e),
14 the statute here, has exactly the effect that I said.
15 And they said, we are modeling it on that provision.
16 And then they did tinker with the wording, and there's
17 actually no explanation for the specific change.

18 But it's not uncommon that, in statutes that
19 have been reviewed by different committees and passed 10
20 or 12 years apart, that Congress would have a -- they
21 would use slightly different language to achieve,
22 essentially, the same purpose.

23 JUSTICE BREYER: What would -- what do you
24 do, if anything, about those of us -- I hope more than
25 one -- who actually look at legislative history, and the

1 House and Senate Report -- the Senate Report says
2 Subsection (e) would nullify a provision of the Tort
3 Claims Act, which would otherwise exclude any action for
4 assault and battery, then the House says about the same
5 thing.

6 So, when I look at those two things, I think
7 the purpose of this Act was to do just exactly what the
8 other side says, it was to get rid of assault and
9 battery as an exception and said the government of the
10 United States will pay for unlawful assault and battery.

11 That's what the two reports say. That's why
12 they passed it.

13 MR. FELDMAN: Right. I believe, actually,
14 that's our -- that -- that's the way we read it, exactly
15 like that, which is the -- by nullifying the intentional
16 tort exception -- what the intentional tort exception
17 provides is -- actually, what it says, is, "The
18 provisions of the Federal Tort Claims Act shall not
19 apply to any case arising out of assault, battery," and
20 so on.

21 And, by eliminating that, the -- the
22 provisions of the Federal Tort Claims Act are otherwise
23 totally applicable to cases of medical battery, like
24 this, or other kinds of intentional tort.

25 And so, for cases, covered by the Gonzalez

1 Act -- that is, cases of medical malpractice committed
2 within the scope of employment by the doctors of the
3 certain specified agencies that Congress has named --
4 for those cases, there is no intentional tort exception,
5 and, therefore, you can bring an action against the
6 government.

7 CHIEF JUSTICE ROBERTS: I don't quite
8 understand your answer to Justice Ginsburg on the "for
9 purposes of this section."

10 What the section does is provide that the
11 remedy against the United States is exclusive. But what
12 the 1089(e) goes on to say is that the 26 -- the 2680(h)
13 provision doesn't apply. So I don't see how that -- I
14 mean, the -- the reference is to the exclusivity, not to
15 the waiver of the limitation on -- on intentional torts.

16 MR. FELDMAN: Well, I don't think that
17 that's right. I mean, I think, for purposes of this
18 section, you have to read it in context. And the fact
19 is that 2680 -- the term "2680(h) of Title 28" doesn't
20 appear elsewhere in the Gonzales Act.

21 The only work that that provision does in
22 the law, section -- the intentional tort exception,
23 2680(h) of Title 28, the only work that that does is to
24 make the -- is in the Federal Tort Claims Act, is to
25 make the -- the Act inapplicable to those kinds of

1 cases.

2 So when they say, in simple terms, that
3 shall not apply, all that could mean -- all that could
4 possibly mean is you eliminate that, and then you have
5 the Tort Claims Act how it is. And then what the four
6 purposes of this section does is say, but we're not
7 doing that across the board for every Federal employee
8 everywhere or even every malpractice case. We are just
9 doing it for the claims that are covered -- for the
10 cases that are covered in this section -- for purposes
11 of this section.

12 In this section, if you look at (a), then,
13 (a), which is the -- you know, basic exclusive remedy
14 provision that Your Honor mentioned, what (a) does is
15 deal specifically with -- intent with medical
16 malpractice committed by doctors and personnel.

17 JUSTICE SOTOMAYOR: Well, one of the
18 strongest arguments by your adversary has to do with the
19 incongruity between these claims and the Westfall ruling
20 by this Court. It's more a policy argument than a
21 language argument, but how do you address the fact that
22 we will be interpreting, essentially, two statutes that
23 are almost identical, but with different conclusions now, if
24 we were to adopt your view.

25 MR. FELDMAN: Right. I -- I think there

1 are -- there are a few reasons why the statutes have to
2 be construed differently. I mean, one is that, if you
3 look at the Court's decision in Smith, where it
4 construed that provision of the Westfall Act, it -- the
5 Court never suggested that the language -- the part of
6 the Westfall Act whose language is the same as this
7 supported its conclusion there. It was relying on other
8 provisions in the Westfall Act.

9 In particular, there was a provision that
10 said, "Once the government substitutes itself for the
11 defendant, the case shall proceed, subject to all the
12 exceptions and limitations in the Tort Claims Act." And
13 the Court said, well, yes, that -- that gives us a clear
14 understanding that, whether there's exceptions or not,
15 we want that case to proceed -- to proceed. That
16 provision isn't here in the Gonzalez Act.

17 And there was another provision in the
18 Westfall Act -- in the Smith case, in the Westfall Act,
19 that dealt with making a specific exception for Bivens
20 cases. And, again, that provision isn't here. And
21 that --

22 JUSTICE SCALIA: But why -- why would
23 Congress want to treat them differently?

24 MR. FELDMAN: Right. I think the reason is,
25 when they were dealing in this case with this area in

1 1976, they were dealing with a specific problem of
2 medical malpractice, and they were looking at that --
3 that problem, doctors, doctors had to get insurance,
4 what are we going to do about that for Federal
5 employees?

6 And they were -- when they focused on that
7 problem -- actually, as the Executive Branch itself said
8 in a letter that was sent to the Senate committee, it
9 said there's an urgent need, both, to assure adequate
10 remedies for tort victims and to protect Federal
11 employees.

12 And that's what they were trying to do here,
13 and I think you see it throughout the Gonzalez Act.
14 But --

15 JUSTICE SCALIA: But why -- why did they
16 feel the need here to assure adequate remedies for tort
17 victims, where they did not in -- in the Westfall Act?

18 MR. FELDMAN: Well --

19 JUSTICE SCALIA: I mean -- you know, injured
20 tort victims are injured tort victims. It does seem --
21 you know, rather odd that, in -- in one instance,
22 Congress would be concerned and, the other, not
23 concerned.

24 MR. FELDMAN: Right. I think the difference
25 is that, here, they were dealing specifically with the

1 problem of medical malpractice. 12 years later, when
2 they got around to the Westfall Act, they weren't
3 looking at medical malpractice.

4 They were looking, generally, at a whole --
5 the whole problem of government employees being sued
6 after this Court's decision in the Westfall case, a
7 problem that particularly affected, actually, lower
8 level government employees who were -- it's clear,
9 couldn't take advantage of the discretionary function
10 exception.

11 And, when they are looking at the broad
12 universe of employees, they took a different approach
13 and decided, well, we're just going to -- some people
14 are just going to be out of luck because this is the --
15 the determination that Congress made -- felt was
16 appropriate there.

17 But, when it was looking at the specific
18 problem of medical malpractice in the Gonzalez Act, it
19 definitely took the position, as everybody said at the
20 time and as the structure of the Act itself showed, that
21 they wanted to preserve remedies. And there are two
22 provisions in the Westfall Act that make that clear --

23 JUSTICE ALITO: Well, maybe we could address
24 this in slightly more concrete terms. You have two --
25 two situations. In one case, a Federal employee who's

1 driving a car deliberately runs somebody down. And, in
2 the second case, a government doctor grabs somebody who
3 doesn't want an operation and performs the operation
4 anyway.

5 Now, as -- under your reading, there
6 would -- there would be a claim against the government
7 in the second situation, but not in the first situation;
8 is that right?

9 MR. FELDMAN: That -- that's correct.

10 JUSTICE ALITO: Why would Congress want
11 that?

12 MR. FELDMAN: The reason they'd want it is
13 this: In the first situation, that -- that really
14 arose -- that -- that problem came with the Tort Claims
15 Act when it was first enacted in 1946. And, when
16 Congress was looking at the universe of Federal
17 employees, they felt -- and, especially, given the law
18 at that time and that continued really up to the
19 present, that, when a Federal employee or average
20 Federal employee, for the types of intentional torts
21 that they commit, especially a battery, it's
22 extraordinarily unlikely that that's going to be within
23 that scope of that employee's employment.

24 And Congress felt, well, we want to just
25 eliminate that altogether. It's not just to hold the

1 government responsible for that kind of a claim, when
2 some Federal clerk slugs someone or something like that,
3 and that was the determination they made.

4 When they got around to 1976, to dealing
5 with the particular problem of medical malpractice,
6 the -- it doesn't actually usually happen -- these kinds
7 of claims don't arise -- I'm not aware of anywhere a
8 doctor just grabs somebody and throws him, physically,
9 into the operating room. They happen when the doctor is
10 performing some procedure and performs a different
11 procedure or a procedure that was not authorized by the
12 patient.

13 And that -- that is very closely related to
14 core medical malpractice claims of exactly the sort that
15 they were dealing with here. It's very closely related
16 to informed consent claims, which I believe the
17 government -- I read the government to be conceding,
18 could be brought against the government.

19 And they thought there was no reason to
20 distinguish -- to distinguish one type of medical
21 malpractice from another. We want all of these claims,
22 we want to provide a remedy, and they all should be
23 brought against the government.

24 I would add one other --

25 JUSTICE KENNEDY: In law review commentaries

1 and maybe in lower courts' opinion, is there -- is it
2 fair to say that the weight of authority is to criticize
3 the battery-negligence distinction as being productive
4 of litigation and not really making a lot of sense?

5 MR. FELDMAN: I think that is fair to say,
6 and -- you know, States -- a lot of States have dealt
7 with this by dealing with -- in statutory -- in
8 statutes, not in common law development, so they
9 could kind of rationalize the system and say, look, this
10 is the kinds of claims you're going to have.

11 But the key thing is that everybody in the
12 country, I think, under every State's law, if a doctor
13 performs an operation that you didn't consent to, you
14 have an action in tort. And that protects both you and
15 provides an incentive -- an important incentive, to
16 doctors and medical personnel, to be sure that they are
17 only doing what they are authorized to do.

18 There is not a hint that, when Congress was
19 dealing with the Westfall Act -- I keep saying, "the
20 Westfall Act" -- when Congress was dealing with the
21 Gonzalez Act, there is not a hint that they were trying
22 there to say, well, we want to save money or something
23 by eliminating those kind of very, very traditional tort
24 claims from those victims, and we don't want those
25 people to have compensation.

1 JUSTICE GINSBURG: Mr. Feldman, do I
2 understand the mechanics of this right, that, if the
3 injured person sued the United States directly, that
4 suit would fail because the battery exclusion would
5 apply, but it's only by suing the officer -- the doctor
6 and then getting the United States substituted that the
7 battery exception is abrogated; is that right?

8 MR. FELDMAN: No, I don't -- I don't believe
9 that that's correct. There is nothing in this Act that
10 says it should make any difference. There is nothing,
11 certainly, in Subsection (e) or anywhere else in the Act
12 that says it should make any difference, whether you are
13 suing the government or suing the -- or suing the -- or
14 suing the doctor. If you sue the government, the
15 government says, well, we have a defense that the
16 intentional tort exception applies.

17 You would say, no, it says here, for
18 purposes of this section, the intentional tort exception
19 does not apply. And what that means, "for the purposes
20 of this section," is for claims that are covered by this
21 Act, which is claims that are medical tort claims
22 brought against personnel of the affected agencies who
23 are acting within the scope of their authority.

24 JUSTICE SOTOMAYOR: Are there any -- I'm
25 sorry.

1 Are there any other tort claims besides the
2 lack of consent battery claim at issue here that could
3 be encompassed by the Intentional Tort Act, as it
4 relates to medical malpractice?

5 Let's assume that it's not an operation, but
6 sexual behavior with a patient in their hospital room,
7 something of that nature.

8 Is that covered under the Gonzalez Act, as a
9 claim against the United States?

10 MR. FELDMAN: If it would be an assault or
11 battery that was committed by -- within the scope of the
12 professional's employment, then it would be. But it's
13 always the question of whether it's within the scope of
14 employment.

15 And I think, usually, the -- the case law --
16 I mean, I think, usually, the cases are that a doctor
17 who commits a sexual assault on a patient or something
18 is not acting within -- in the kind of circumstances you
19 are talking about, is not acting within the scope of
20 employment.

21 But that would be a case-by-case
22 determination. There might be some kind of case
23 where -- you know, it would depend on the facts of the
24 case.

25 JUSTICE SOTOMAYOR: This exception you're --

1 you're talking about is regularly applied in the lower
2 courts?

3 MR. FELDMAN: What -- I beg your pardon?

4 JUSTICE SOTOMAYOR: In the lower courts,
5 this determination is regularly made?

6 MR. FELDMAN: The -- the scope of employment
7 determination is made every day because that is made --
8 that is applicable throughout, in any kind of respondeat
9 superior situation, whenever the employer of the medical
10 professional is sued and that kind of thing -- or -- or
11 nonmedical professional, for that matter. That --

12 JUSTICE SCALIA: Of course, when the
13 government removes the case, it concedes that point,
14 doesn't it, normally? Where a case is removed from
15 State court, the government -- the Attorney General must
16 certify that it was within the scope of employment, no?

17 MR. FELDMAN: That's correct. That's
18 correct. And that is actually one of the two -- one of
19 two of the key provisions of the Act, that kind of
20 establish -- that could make it very clear that what
21 Congress was trying to do was preserve remedies because,
22 in that very provision, after it talks about removing
23 when the Attorney General has certified that it's within
24 the scope of employment, it says, "The case can be
25 remanded if the removed case is one such that" there --

1 "that no remedy against the United States is available."

2 And what that shows is that Congress knew
3 that there would be actions that would continue to be
4 brought against doctors. And they actually wanted to
5 provide for that, right there, and say it should be --
6 those should be remanded to State court, and then they
7 will proceed against the doctor in State court.

8 Then there is -- so that there would be --

9 JUSTICE SCALIA: What was that case, where
10 no action against the United States is available?

11 MR. FELDMAN: That would be a case, for
12 example --

13 JUSTICE SCALIA: Not -- not by reason of
14 the -- of the battery?

15 MR. FELDMAN: No, it wouldn't be -- if
16 Congress didn't have this provision in the statute --

17 JUSTICE SCALIA: I understand.

18 MR. FELDMAN: -- it would have been by
19 reason -- that would have been.

20 JUSTICE SCALIA: Yes, yes.

21 MR. FELDMAN: Another one would be a foreign
22 tort, which is also another exception under the Tort
23 Claims Act --

24 JUSTICE SCALIA: I see.

25 MR. FELDMAN: -- a discretionary function

1 case, and there are some in the medical context.

2 JUSTICE SCALIA: I got you.

3 MR. FELDMAN: Or one of the other
4 exceptions. All of those exception cases, they go on.
5 They go on, and Congress -- Congress could have closed
6 all of them down.

7 And, in fact, if Congress was worried that
8 there would be -- really, if their sole purpose here was
9 to say, we don't want any actions to be brought against
10 Federal employees, they should -- they could have just
11 said, we don't want any actions to be brought against
12 Federal employees. But, instead, they are providing for
13 what happens and for the continuation of the action
14 against the doctor.

15 JUSTICE ALITO: Now, the government has an
16 alternative interpretation, and I know you think it's
17 wrong. But would you go further and say that it's not a
18 plausible interpretation?

19 MR. FELDMAN: I would. I think that
20 because, as the court -- when the courts used -- you
21 know, a number of different formulations to -- to talk
22 about that -- I think you are referring to a kind of
23 strict construction rule that -- that applies to waivers
24 of sovereign immunity, which we don't think is
25 applicable here.

1 But, even where that rule does apply,
2 really, the question is, is it a reasonable degree of
3 clarity that Congress intended to waive immunity? Is it
4 -- as the Court has said, is it clearly discernible from
5 a fair reading of the statute that they intended to
6 waive?

7 And it has to be clear, and I think it is
8 clear here. And that was what everybody at the time of
9 the statute thought. It's what the government itself
10 thought up through the time of the -- of the Smith case,
11 15 --

12 JUSTICE ALITO: But was the
13 interpretation adopted by the district court and by the
14 Ninth Circuit, but you still say is implausible.

15 MR. FELDMAN: I think so. I would add
16 that -- I am not here to defend the Ninth Circuit's
17 judgment, but I would add that they had a pro se
18 litigant before them, and I don't think they had access
19 to the full degree of presentation that they might have
20 had, if -- if it had been more fully developed.

21 But I do think that, when the Court is
22 making that determination of what's clearly discernible
23 from a fair reading of the statute, the Court has also
24 made it clear, though, that what you don't do is take
25 each word in the statute and say, we're going to take

1 the most pro-government meaning of this word, and then
2 you add them altogether.

3 What you do is you look at the statute as a
4 whole, you look at the context of the statute, you look
5 at the structure of the statute, and then you say what
6 is plausible, what is clearly discernible from a fair
7 reading.

8 JUSTICE GINSBURG: Mr. Feldman, when the
9 Westfall Act, which doesn't abrogate the intentional
10 tort provision, when that was passed, why -- was there
11 any reason why Congress kept these five or six separate
12 acts, like the Gonzalez Act, instead of saying, well, we
13 did this piecemeal for particular agencies, and, now, we
14 we're dealing with Federal employees across the board, so
15 there is no reason why we should have these five or six
16 that go another way?

17 MR. FELDMAN: Well, I can give you the
18 answer that the government gave in its brief in Smith,
19 which is the Gonzalez Act and the other four or five
20 statutes continue to serve two -- at least two vital
21 functions, and one is specifically this: That they
22 eliminate the -- the intentional tort exception and,
23 therefore, allow relief for victims of intentional tort
24 in this medical malpractice context, just like victims
25 of other kinds of malpractice.

1 The other thing is there are some cases, for
2 instance, foreign torts, where there is another
3 provision of the Gonzalez Act, 1089(f), that provides
4 for indemnifying or holding harmless doctors, when
5 judgments are against them in certain -- when there's a
6 foreign tort, when the doctor has been detailed to a
7 non-Federal agency, or if the circumstances are such as
8 are likely to preclude a remedy under the Tort Claims
9 Act.

10 So, again, Congress in that -- that
11 provision remains important because there could be a
12 foreign judgment against the doctor or something, even
13 after the Westfall Act, and that would -- that gives the
14 authority to reimburse the doctor, if the agency
15 determines that -- that that's appropriate.

16 But that provision also shows that Congress
17 intended that to preserve remedies here because it would
18 have made no sense for Congress to say, we want to
19 provide for the indemnification or reimbursement of the
20 doctor, if what they really were trying to do was
21 eliminate all the cases against doctors.

22 JUSTICE KAGAN: Mr. Feldman, is --

23 JUSTICE SCALIA: It -- it --

24 CHIEF JUSTICE ROBERTS: Justice --

25 JUSTICE SCALIA: It's right on the same

1 thing, so I -- that provision ends -- and I am
2 strengthening you -- your last point -- that provision
3 ends, "if the circumstances are such as are likely to
4 preclude the remedies of third persons against the
5 United States described in Section 1346(b) of Title 28."

6 That clearly envisions that, in the ordinary
7 case, those remedies against the United States would not
8 be precluded.

9 MR. FELDMAN: That's right. And the -- and
10 the choice that Congress had -- had here, really, was
11 between taking intentional tort cases and allowing them
12 to be continued to be brought against doctors and then
13 subject to this kind of reimbursement provision, which
14 they had provided for, or saying, no, we want these to
15 just be brought against the government and to protect
16 the Federal employees much more fully. And so that was
17 the purpose of 1089(e).

18 They said, we want to steer this into the
19 same channel that all the other malpractice actions are
20 going into.

21 JUSTICE KAGAN: Mr. Feldman, as I understand
22 your argument and -- and the differences that you have
23 with the government, you have one set of differences
24 about the meaning of 1089(e), but then another set about
25 this question of, if it were true that the government

1 was immune from suit, could you bring a tort suit
2 against the doctors?

3 And the government said -- says no. And you
4 say, yes, you might be able to do that. But do you have
5 to answer that question, at all, in order to say that
6 you're correct on 1089(e)?

7 MR. FELDMAN: No. I mean, that's -- that
8 question isn't at issue in this case. That would really
9 only be directly at issue if somebody brought a suit
10 against the doctor. But --

11 JUSTICE KAGAN: So there is a lot of going
12 back and forth about this question of what would happen
13 if the government were immune, would the individual
14 doctor be immune? But that is, essentially, irrelevant
15 to the question before us; is that correct?

16 MR. FELDMAN: I -- I just wouldn't say it's
17 irrelevant because what the -- the provisions that I
18 have been talking about show is that Congress --
19 Congress was not trying, in this Act, unlike in the
20 Westfall Act, which doesn't have either of these two
21 provisions, the reimbursement and remand provision that
22 I've talked about -- unlike in the Westfall Act,
23 Congress wasn't trying to save money or other -- do
24 something else by just eliminating remedies for victims.

25 It was trying to -- as the Executive Branch

1 said, as I said, to assure remedies for all tort victims
2 and to protect doctors in a variety of different ways.
3 And given that that's what they were trying to do in the
4 Gonzalez Act, which is clear from the structure, that
5 also helps clarify what 1080 -- or makes more clear what
6 1089(e) means.

7 JUSTICE KAGAN: Saying it a different way, I
8 don't have to accept your broader argument; I can remain
9 ambivalent about your broader argument and still accept
10 your narrower argument.

11 MR. FELDMAN: Yes.

12 JUSTICE KAGAN: Is that correct?

13 MR. FELDMAN: Yes. That is correct.

14 I would add that, with respect to the strict
15 construction standard, I don't think it does apply in --
16 in this context. The Court has never applied it in the
17 Federal Tort Claims Act context. In the Gonzalez Act,
18 1089(e), specifically, refers to the Federal Tort Claims
19 Act. It says, "Section 2680(h) of Title 28."

20 Each of the other provisions of the Gonzalez
21 Act, for their operation, also depend on the Federal
22 Tort Claims Act. The exclusive remedy provision talks
23 about the Tort Claims Act. The reimbursement provision,
24 the remand version, each of them -- the whole statute is
25 really part of the Federal Tort Claims Act machinery.

1 And, when Congress invoked that machinery
2 here, I think it knew and I think it was consistent with
3 this Court's precedents that the Court applied the same
4 rule that it applied in the Dolan case, which is
5 construing the words in accordance with their reason and
6 normal tools of statutory construction, without a strict
7 construction rule.

8 Although, as I said, I do think that it is
9 clear what the meaning of -- of the provision is, if
10 they do -- you do apply the rule.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Feldman.

14 Mr. Shah?

15 ORAL ARGUMENT OF PRATIK A. SHAH

16 ON BEHALF OF THE RESPONDENTS

17 MR. SHAH: Mr. Chief Justice, and may it
18 please the Court:

19 Subsection (e) of the Gonzalez Act states,
20 in pertinent part, that, "For purposes of this section,"
21 which refers to the Gonzales Act, "the FTCA's
22 intentional tort exception shall not apply."

23 The question in this case is whether those
24 words unequivocally waive sovereign immunity for medical
25 battery claims like Petitioner's. The answer is --

1 CHIEF JUSTICE ROBERTS: Well, the
2 "unequivocally" -- we have a lot of cases that say you
3 don't get -- you certainly get the benefit of the
4 "unequivocally" standard, when you are talking about a
5 waiver of sovereign immunity in the first instance, but
6 you don't keep getting the benefit over and over again
7 when you are talking about, as in this case, an
8 exception to an exception to an exception.

9 MR. SHAH: Well, Your Honor, I think the --
10 the canon actually applies most strongly in this set of
11 circumstances. And let me talk about Dolan and the line
12 of cases which recognizes a very narrow exception to the
13 normal presumption against waivers of sovereign
14 immunity.

15 Dolan and the -- and its predecessor cases
16 recognize that the narrow exception to the canon, when
17 construing the scope of exceptions that were enacted
18 alongside the broad waiver of sovereign immunity in the
19 FTCA itself. And the purpose of drawing that exception
20 to the canon was it didn't want -- the Court didn't want
21 to defeat Congress's purpose as manifest in the broad
22 waiver itself.

23 Those exceptions were cutting back on the
24 contemporaneous waiver of sovereign immunity. The Court
25 said, we don't want to cut back, given the uniquely

1 broad waiver that the FTCA enacts. It's a narrow rule
2 exception limited to those circumstances that hasn't
3 been applied outside those circumstances.

4 Unlike those cases, this case is not
5 construing the scope of an exception that was enacted
6 alongside the FTCA that was trying to cut back on the
7 waiver of sovereign immunity.

8 To put it more concretely, on the day before
9 the Gonzalez Act was enacted, there was no question that
10 sovereign immunity barred the type of claim at issue;
11 that is, no one had any dispute that the FTCA's baseline
12 of sovereign immunity applied and would have blocked
13 this claim.

14 The question is whether --

15 CHIEF JUSTICE ROBERTS: Well, but that was
16 because, at that point, there was an exception to the
17 exception of sovereign immunity.

18 MR. SHAH: Correct.

19 CHIEF JUSTICE ROBERTS: And you're going
20 even a step further, to say you get the benefit of the
21 unequivocal test that you've set forth at even the next
22 stage.

23 MR. SHAH: Here's --

24 CHIEF JUSTICE ROBERTS: No, you've already --
25 you've already used up your benefit of an unequivocal

1 requirement when you've got the interpretation of the
2 FTCA itself, which is the waiver of sovereign immunity.

3 MR. SHAH: Well, Your Honor, we haven't used
4 it up because of the scope of interpreting Section
5 2680(h). You wouldn't apply the waiver because of the
6 exception that was enacted in Dolan. That's Dolan
7 itself. If we were just talking about construing the
8 scope of Section 2680(h) itself, I would agree
9 completely with you.

10 What we have here is, some years later, we
11 have a baseline of sovereign immunity. Everyone agrees
12 that the FTCA and its exceptions have struck the
13 appropriate balance.

14 CHIEF JUSTICE ROBERTS: Wait a minute. You
15 agree with me that you don't get the benefit of your
16 higher standard of interpretation with respect to
17 2680(h)?

18 MR. SHAH: With respect to the terms of
19 2680(h) as enacted at that time. The difference --

20 CHIEF JUSTICE ROBERTS: But then the -- then
21 the heightened standard of use sort of resurrects again,
22 when you get to considering an exception to 2680(h).

23 MR. SHAH: The reason, Your Honor, is that
24 you have a baseline of sovereign immunity. What 26 --
25 in order for -- for the other side to prevail, Section

1 1089(e) has to waive sovereign immunity.

2 It has to -- it has to enact a new waiver of
3 sovereign immunity that, undisputedly, applied the day
4 before the Gonzalez Act. That is when the canon should
5 apply most strongly, when -- when the other side is
6 saying that Congress --

7 JUSTICE SOTOMAYOR: What do you need more
8 clear than "(h) doesn't apply"?

9 MR. SHAH: Well, Your Honor --

10 JUSTICE SOTOMAYOR: I mean, I don't know how
11 much clearer Congress has to get than to say it's
12 nullified.

13 MR. SHAH: Sure.

14 JUSTICE SOTOMAYOR: What more does it have
15 to say; the exception doesn't apply, and then what's
16 left?

17 MR. SHAH: Your Honor, if all it said is
18 that the intentional tort exception does not apply, I
19 would agree with you, that that would be enough. And
20 that's exactly what Congress said in the 1988 --

21 JUSTICE SCALIA: But it didn't -- it didn't
22 want to say it shall not apply for everything. It
23 didn't want to eliminate the intentional tort exception
24 for everybody, right? It only wanted to eliminate it
25 for the people covered by -- by the Gonzalez Act.

1 MR. SHAH: That -- that may well be true,
2 and Congress, when it enacted the 1988 VA Act, did it in
3 the most direct way. It said, "The intentional tort
4 exception shall not apply with respect to personnel
5 employed by the VA." But it --

6 JUSTICE SCALIA: It might have said that,
7 but, if it wanted to be more parsimonious in its
8 language, it could simply say for purposes of this
9 section.

10 MR. SHAH: Well --

11 JUSTICE SCALIA: Which section applies only
12 to these particular individuals.

13 MR. SHAH: Justice Scalia, I think it might
14 be helpful to take a step back. We have four statutes
15 starting in 1965, then 1976. The Gonzalez Act was part
16 of that chain. All four statutes in this relevant
17 subsection, the analogue, the Subsection (e) here, said,
18 "For purposes of this section, the intentional tort
19 exception shall not apply."

20 Then we get to 1988, the last one in the
21 line, which is the VA amendment. It changes that
22 language. It eliminates that opening proviso for
23 purposes of this section. The legislative history
24 accompanying it says, look, we want to allow intentional
25 tort remedies for veterans.

1 It does so -- the only reason I can conceive
2 of that Congress would have done it is because it didn't
3 think that the prior four model statutes did it clearly
4 enough. And I think that is the reason. And -- and if
5 we were in a normal statutory --

6 JUSTICE SCALIA: It was a -- it was a
7 different Congress. They don't always use the same
8 language. Come on.

9 MR. SHAH: Well, Your Honor, they used the
10 identical language --

11 JUSTICE SCALIA: You're -- you're lucky they
12 even remember the earlier statutes.

13 (Laughter.)

14 MR. SHAH: Well, Your Honor, they use the
15 identical language in every other provision of that
16 statute. They made an affirmative decision to change
17 the language of Subsection (e). Now, if this were an
18 ordinary --

19 JUSTICE SOTOMAYOR: Now, what do you do with
20 Justice Breyer's point -- or with your adversary's
21 point? I know you'll tell us don't look at the
22 Congressional Record because it suits you right now,
23 because when it doesn't, you point to it extensively.

24 But what do you do with the Veterans Act
25 record that says, we are modeling ourselves after the

1 Gonzalez Act, including its nullification of the
2 intentional tort?

3 MR. SHAH: Well -- well, Your Honor, it said
4 the first part. It did not say the second part. There
5 is nothing in that legislative history that says it
6 is -- it thought 1089(e) nullified the intentional tort
7 exception. It says it's patterned after the Gonzalez
8 Act, and then it changed the main language, the opening
9 proviso of that provision.

10 Now, if this were an ordinary case of
11 statutory interpretation, this Court would have to
12 figure out whether, by changing that language, did
13 Congress just want to tinker with the language to
14 clarify its intent? Did it intend to have a dispositive
15 change by making that change in language?

16 But this is not an ordinary case of
17 statutory interpretation.

18 JUSTICE SCALIA: Well, listen, I -- you
19 know, I don't -- I don't much care about legislative
20 history, but -- but, if I did --

21 (Laughter.)

22 JUSTICE SCALIA: -- I wouldn't think that --
23 that you would say it is patterned after another Act,
24 where you change a very basic provision, whether suit
25 can be brought against the United States or not.

1 MR. SHAH: Well, Your Honor, it is
2 patterned --

3 JUSTICE SCALIA: I mean, that's sort of
4 rudimentary and fundamental to it. It doesn't seem to
5 me they would say it's patterned after it. But -- you
6 know, I -- I don't care.

7 (Laughter.)

8 MR. SHAH: Well, Your Honor, it is patterned
9 in the sense it does use the operative language. It
10 takes out the key opening proviso, which is the entire
11 dispute in this case.

12 But legislative history, while it might be
13 important if this were a normal statutory interpretation
14 case, this Court has said, time and time again, you
15 cannot look to the legislative history to supply an
16 unequivocal waiver that is not present in the text
17 itself.

18 JUSTICE KAGAN: Well, let's go back to the
19 text then, Mr. Shah. As I understand your argument, it
20 goes something like this: This provision is there to --
21 to prevent people from drawing a mistaken inference.
22 And the inference would be that the doctors were liable
23 because the government was not. Now, there are a
24 thousand ways to do that pretty clearly.

25 You could just say, irrespective of whether

1 the government is liable, the doctors are not -- or some
2 such thing.

3 MR. SHAH: Sure.

4 JUSTICE KAGAN: But, instead, what Congress
5 did was it enacted a kind of "let's pretend" provision,
6 right? Let's pretend that the government is liable, so
7 then the inference won't arise. Now, that has to be not
8 just not the best way of achieving Congress's objective;
9 it has to be the worst, right, because, then, you're
10 raising the inference that in fact the government is
11 liable.

12 Why would Congress have wanted to do that?

13 MR. SHAH: Well, Your Honor, I agree with
14 you, Congress could have written this provision in a
15 different way and more clear ways, but I think it's
16 helpful --

17 JUSTICE KAGAN: I'm saying something more
18 than that.

19 MR. SHAH: Sure.

20 JUSTICE KAGAN: It could not have written it
21 in a worse way.

22 (Laughter.)

23 MR. SHAH: Well, I would disagree with that.
24 But let me -- let me take a step back here, on sort of
25 the landscape in which Subsection (e) was enacted.

1 Both sides agree that, without Subsection
2 (e), covered medical personnel would have faced the risk
3 of personal liability for medical battery claims. Both
4 sides also agree that Subsection (e) was enacted to
5 obviate that risk and, in fact, successfully does so
6 under either side's construction. Everyone agrees on
7 that.

8 The dispute here is whether Congress
9 accomplished that objective by, A, assuming the
10 existence of an available tort remedy for purposes of
11 the Gonzalez Act's conferral of immunity, as the text of
12 the provision suggests; or, instead, whether it takes
13 the substantial further step of actually amending the
14 FTCA, which is a separate -- an entirely separate
15 statute and, thereby, provide a remedy against the
16 United States.

17 The latter construction, I don't think is
18 unmistakably correct, it's not unavoidable. And -- and,
19 because of that, the unequivocal waiver requirement
20 favors the government --

21 JUSTICE BREYER: You're -- you're -- I'm
22 picking up from -- I find Justice Scalia's hypothetical
23 interpretations of legislative history very useful.
24 So the -- the -- and I --

25 (Laughter.)

1 JUSTICE SCALIA: Thank you. Thank you, dear
2 colleague. I appreciate that.

3 (Laughter.)

4 JUSTICE BREYER: The -- the thing where we
5 are in this -- it' -- we have a -- we have a statute,
6 1089, basically, and it says you can sue the government
7 for the tort of an employee -- I'm oversimplifying, I'm
8 oversimplifying so. And we should interpret that narrowly,
9 okay? We should interpret that -- absolutely has to be
10 definite, and it is pretty definite.

11 Now, what we have is an exception to that.
12 And the exception is an exception for battery, but not
13 battery. Can't sue the United States for battery. And
14 we're supposed to interpret that, I guess, as broadly as
15 possible. If you have a plausible argument that it
16 could be broader, you get it, as long as it's plausible.

17 Then what we have -- because, after all,
18 after these two things, you can still sue the person who
19 hit you over the head, you can go sue him in a State
20 court, can't you? Now, oh, now, we bring a new Act
21 there. And this new Act says, we are going to have a
22 little exception to the exception. Right? And we are
23 supposed to interpret that one, I guess, as narrowly as
24 possible.

25 You see -- so, now, what we are -- because

1 that's an exception to something which should be
2 interpreted as broadly as possible, which is an
3 exception to something that should be interpreted as
4 narrowly as possible.

5 So I think I get it like Costello used to, I
6 don't know what I'm talking about.

7 (Laughter.)

8 JUSTICE BREYER: Because there are a lot of
9 words in these things. And -- and so given all these
10 words and -- this is where the Chief Justice started --
11 I mean, can't we at least look at legislative history,
12 to try to figure out what Congress was doing by the time
13 we get to the exception to the exception to the
14 exception?

15 MR. SHAH: No -- no, Your Honor. This Court
16 has made quite clear you cannot look at the
17 legislative history. And the fact that, if you find
18 this confusing --

19 JUSTICE BREYER: Yes.

20 MR. SHAH: -- Justice Breyer, if you find
21 it's not --

22 JUSTICE BREYER: Well, then you win, as long
23 as I find it confusing.

24 (Laughter.)

25 MR. SHAH: -- unequivocally clear, we win,

1 and you don't look to the legislative history for
2 clarity. That's the point of what --

3 JUSTICE BREYER: Well, I don't find it all
4 that confusing. What it says is that this battery
5 exception, which is in (h), is not supposed to apply
6 when we look at the military doctors. That's what it
7 says.

8 MR. SHAH: Your Honor --

9 JUSTICE BREYER: And if -- and you say, ah,
10 but it says, "for purposes of this section." Okay. I
11 look at "for purposes of this section," and the purposes
12 of this section -- the very first whole sentence has to
13 do with 1089. It has to do with the scope. It has to
14 do with the general waiver.

15 MR. SHAH: Well, the "for purposes of this
16 section" language, I think, is the key phrase, and this
17 section refers to the Gonzalez Act. What the Gonzalez
18 Act primarily does -- what Sections (a) through (c) are
19 all about, are about conferring personal immunity. So I
20 think --

21 JUSTICE SCALIA: I don't think those are the
22 key words. I think the key words are "shall not apply."
23 "Shall not apply."

24 MR. SHAH: Well, Your Honor --

25 JUSTICE SCALIA: It isn't shall be deemed

1 inapplicable.

2 MR. SHAH: Your Honor, I think, when we are
3 reading it --

4 JUSTICE SCALIA: It is not a hypothetical.
5 It says, "They shall not apply to any cause of action,"
6 etc.

7 MR. SHAH: I think, when we are reading it
8 against the canon -- the sovereign immunity canon, I
9 think we would expect Congress to speak more clearly.
10 And Congress gave us two examples of how it spoke more
11 clearly in this very context.

12 One is, in 1974, the sole -- the only time
13 it amended Section 2680(h), it amended it within the --
14 the provision itself; that is, it amended the language
15 of 2680(h) to add a law enforcement proviso that said,
16 "This exception applies except with respect to law
17 enforcement in certain circumstances."

18 That's one way --

19 JUSTICE BREYER: Okay. But why? Why would
20 they have wanted to do that? That is to say, look, if
21 you cut the exception to the exception to the exception,
22 the presumption, da, da, da, out of it, what we've got
23 on your interpretation is that a person who's hurt by a
24 battery committed by a government official, given your
25 interpretation, has no remedy at all. I mean,

1 previously, he could have at least sued in State court.

2 MR. SHAH: Well --

3 JUSTICE BREYER: Now, what you're saying is
4 Congress tried to do with this language is say, hey, you
5 can't sue in State court; and, by the way, when you try
6 to sue the Federal government, we are not going to give
7 you your suit, either. Why do that?

8 MR. SHAH: Well, Your Honor, I don't
9 think -- I don't think that's true. I think before --
10 before the Gonzalez Act came along, there was a split in
11 the circuits. That's why the Gonzalez Act came along.
12 There were -- there were circuits that did not allow a
13 claim to proceed personally against the physician.

14 There were circuits that recognized absolute
15 immunity against a personal suit, even while it was
16 undisputed that battery claim could not proceed against
17 the government.

18 That -- and what -- what Congress said, if
19 you want to look at legislative history, what the Senate
20 Report says is, in light of this D.C. Circuit decision
21 that went the other way, Congress enacted the Gonzalez
22 Act because it was primarily concerned about conferring
23 personal immunity.

24 Every time the Senate Report talks about the
25 purpose of the bill -- it's on page 1, heading, "Purpose

1 of the Bill" -- it says conferring personal immunity,
2 nothing about expanding the government's tort liability.

3 JUSTICE GINSBURG: Mr. Shah, this is not
4 always the government's position. In fact, in a brief
5 to this Court, in the Smith case, the government took
6 the position that Mr. Feldman is presenting to us.

7 What occurred to turn on the light for the
8 government, to see that it was wrong in the Smith case
9 and come up with this -- the interpretation you are now
10 advancing?

11 MR. SHAH: Sure, Justice Ginsburg. Well,
12 the first thing I would say is that Section 1089(e) was
13 not directly at issue in Smith, and the issue had really
14 been litigated quite sparsely, both before and after
15 Smith.

16 Once this case presented itself, the
17 government revisited its position. I think there were
18 two --

19 JUSTICE KAGAN: But this is not a side
20 issue, Mr. Shah. In fact, you used your understanding
21 of 1089(e) as an argument to produce that the result this
22 Court reached in Smith, so it was -- it was not a very
23 large issue, but it was -- it was an argument.

24 You said -- you know, we should reach the
25 result that we -- that you wanted in Smith because

1 1089(e) would continue to have this effect.

2 MR. SHAH: Well, Your Honor, I don't agree
3 with that characterization. The government's argument
4 would have been identical, with or without 1089(e). But
5 I don't want to quibble about --

6 JUSTICE KAGAN: It was a supportive
7 argument. I am not saying that it was the but-for
8 argument, but it was clearly a supportive argument in
9 your brief.

10 MR. SHAH: Your Honor, if you want to read
11 it that way, I think that's fine. I think --

12 JUSTICE SCALIA: Why -- why else was it
13 there? Just for fun?

14 (Laughter.)

15 MR. SHAH: No, I agree. It was in order
16 to --

17 JUSTICE SCALIA: It was obviously there to
18 support your position. Now, your position would have
19 been the same. Now, that's true. Your position would
20 have been identical, but the only purpose of that
21 argument was to support that position.

22 MR. SHAH: Your Honor, I agree. It -- it
23 supported that position --

24 CHIEF JUSTICE ROBERTS: And that was
25 successful. The Court relied on that argument several

1 times in its opinion.

2 MR. SHAH: I don't believe so, Your Honor.
3 I don't believe the Court --

4 CHIEF JUSTICE ROBERTS: We certainly -- we
5 certainly cited Smith.

6 MR. SHAH: Yes, but the Court did not
7 interpret 1089(e). I think Smith -- what Smith
8 hopefully said, Your Honor -- and this is one of the
9 reasons why the government revisited its position --
10 what the Court said in the Smith decision -- you don't
11 have to take my word of what the legislative history
12 says.

13 What the -- what the Court in Smith itself
14 said is that the sole purpose of the Gonzalez Act -- not
15 the primary purpose, not a purpose, not a chief
16 purpose -- the sole purpose of the Gonzalez Act -- and
17 it's talking about the Gonzalez Act as a whole -- was to
18 confer personal immunity and not to create malpractice
19 rights in favor of plaintiffs.

20 What Justice Ginsburg --

21 CHIEF JUSTICE ROBERTS: Your friend -- your
22 friend says that, in Smith -- I'm sorry for the
23 confusion -- the Court addressed your argument on the
24 meaning of the Gonzalez Act several times.

25 MR. SHAH: Your Honor, it did not address

1 1089(e) at all, and -- and I think that's plain as day
2 from -- from the opinion. What the Court said in Smith
3 is that the purpose of the Gonzalez Act -- the sole
4 purpose of the Gonzalez Act is to confer personal
5 immunity. And what it also said is the Gonzalez Act
6 does not create malpractice rights in favor of
7 plaintiff.

8 That was one of the things that the
9 government looked at in reformulating its position and
10 adopting its current position, was the decision in
11 Smith, which came after our brief. The other thing we
12 looked at --

13 JUSTICE KENNEDY: Well, you did -- you did
14 say, in the reply brief, that the point of the Gonzalez
15 Act, it says, "would enable plaintiffs to pursue those
16 claims against the United States."

17 MR. SHAH: You are correct.

18 JUSTICE KENNEDY: I know you would have been
19 disappointed if we didn't ask you about this.

20 MR. SHAH: Yes, you are correct. We said
21 it. This is a change of position. We revisited it.
22 There were a couple things we looked at in coming to
23 our --

24 JUSTICE KENNEDY: And I -- but it -- and
25 Justice Kagan indicated, this wasn't just an aside.

1 This was rather a central theory for your interpretation
2 of the Act; maybe not the only theory, but a central
3 theory.

4 MR. SHAH: I -- again, I -- I disagree,
5 fundamentally, with that characterization. It's two
6 sentences in our brief. It's at the back end of the
7 brief. It was not fundamental to the position in Smith.
8 The Court did not rely on it at all in Smith.

9 But, even if all that were true, I think the
10 important thing is why we changed our position. The one
11 is -- the first and foremost is the statements in the
12 Court's decision in Smith itself, which, obviously,
13 post-dated our brief --

14 JUSTICE SCALIA: I don't find that
15 inconsistent with the position argued. There -- you are
16 talking about the statement that the sole purpose was --
17 was to --

18 MR. SHAH: The two statements, the sole
19 purpose of the Gonzalez Act is to confer immunity,
20 not --

21 JUSTICE SCALIA: I don't think it is the
22 sole purpose, even if you -- you accept your friend's
23 interpretation.

24 MR. SHAH: But, no --

25 JUSTICE SCALIA: No, no. The sole purpose

1 is to assure immunity to these doctors. Now, in
2 assuring immunity to these doctors, we -- we are not
3 going to leave these people without any remedy, and so
4 we allowed them a remedy against the United States.

5 That's subsidiary to the sole purpose of the
6 Act. Sure, the sole purpose is to -- is to -- is to
7 help these doctors. But, in order to do it and be fair
8 at the same time, you have to allow suit against the
9 United States. I think you could still say the sole
10 purpose was to help the doctors.

11 MR. SHAH: Well, Your Honor, I would
12 disagree with that. The other side's brief says, all
13 along, the sole purpose of this Act was not just to
14 confer personal immunity, but it had a dual purpose.

15 The dual purpose was to confer personal
16 immunity -- and this is, time and time again, in the
17 other side's brief -- to -- to confer personal immunity
18 and also to provide adequate remedies to tort
19 plaintiffs. That was not, we submit, a purpose, let
20 alone a primary purpose, of the Gonzalez Act.

21 JUSTICE GINSBURG: Why would -- why would
22 Congress -- I mean, the Veterans Administration Act came
23 after the four or five others, and Congress thought it
24 was patterning that Act after the Gonzalez Act.

25 Why would Congress want to provide this

1 battery remedy if a Veterans Administration medical
2 person messed up, but not if it was an armed service
3 doctor?

4 MR. SHAH: Of course, Congress doesn't say.
5 I think there are two potential reasons, Justice
6 Ginsburg. One might be the -- as -- as this Court has
7 recognized, the special solicitude that Congress pays
8 veterans, and it may have wanted to open up remedies to
9 veterans that were unavailable to others.

10 I think the second potential reason is the
11 defense side reasons. The defendants in Veterans Act
12 cases are civilian Veterans Administration employees.
13 In a Gonzalez Act case, by and large, the defendants are
14 going to be active military personnel. Congress is
15 often hesitant to create -- expand judicial remedies
16 against active military personnel because of the risk it
17 poses to interfering with military function and order.

18 So I think those are two reasons why
19 Congress may have decided to -- to change course in the
20 Veterans Act in 1988, after it had four provisions that
21 said exactly the same thing, using the four purposes of
22 this Act provision, it changed it, and it must have
23 changed it for a reason.

24 Two potential reasons are to change the
25 result, which, of course, under which the government

1 would win; or because it think -- it thought it needed
2 to speak more clearly, in order to waive sovereign
3 immunity. And, under the presumption against sovereign
4 immunity waivers, the government would also prevail.

5 JUSTICE KAGAN: Mr. Shah, your basic theory
6 of the case, which is that, in order to make absolutely
7 certain that everyone gets the benefit of the
8 intentional tort exception, both the government and
9 individual doctors, in order to make that absolutely
10 clear, Congress writes a provision saying that the
11 intentional tort exception shall not apply.

12 Now -- I mean, the -- the position, I have
13 to say, seems to refute itself. If Congress wanted to
14 make absolutely clear that the intentional tort
15 exception would apply, it wouldn't have written a
16 provision saying that it doesn't apply.

17 MR. SHAH: Well, the provision that you
18 describe, Justice Kagan, is not this provision. It's
19 the 1988 Veterans Act amendment, which says the
20 intentional tort exception shall not apply. This
21 provision says, "for purposes of this section," that is,
22 for purposes of the Gonzalez Act's conferral of immunity
23 in Subsection (a), that the -- the intentional tort
24 exception shall not apply.

25 Now, sometimes, when Congress uses the four

1 purposes of this section's formulation, sometimes, it
2 uses words like "assume that" or "consider that," as
3 it -- as cited in the other side's brief, in footnote 4,
4 on page 18. However, other times, when it uses "for
5 purposes of this section," even though it intends
6 somewhat of a counterfactual inquiry, it eliminates
7 those words.

8 In Title 10 itself, Section 10 USC 335 says,
9 "for purposes of this section" -- the exact language is,
10 "For purposes of this chapter, the term 'State' includes
11 Guam and the Virgin Islands."

12 Now, there's no dispute that Congress was
13 not trying to add Guam and the Virgin Islands as the
14 51st and 52nd States of the Union. What it meant is,
15 when applying the provisions of this section, treat Guam
16 and Virgin Islands as if they are States. So --

17 JUSTICE BREYER: Would you -- are you
18 finished there?

19 MR. SHAH: Yes, sir.

20 JUSTICE BREYER: Would -- would you go back
21 for a minute and think, before this Act was passed --
22 the Gonzalez Act -- and think of the millions of
23 government employees, and they're in different parts of
24 the country, and some of them commit batteries.

25 Now, you told me before that, where an

1 injured person -- a plaintiff sues a government
2 employee, and they sue under State tort law, and they
3 say, this government employee committed a battery, okay,
4 in the course of duty, you say there was an immunity
5 there.

6 Where did the immunity come from?

7 MR. SHAH: It was -- it was a common law
8 absolute immunity.

9 JUSTICE BREYER: From what?

10 MR. SHAH: One -- one case is the
11 Martinez --

12 JUSTICE BREYER: I mean, what was the theory
13 of it? I mean, here it's just -- it's a person, he's at
14 work, he does happen to work for the Federal government,
15 instead of working for someone else --

16 MR. SHAH: Sure.

17 JUSTICE BREYER: -- and everybody else, you
18 have to respond, and you -- if liable, you'd have to pay
19 damages for the battery. Now, where -- where did the
20 immunity come from --

21 MR. SHAH: The theory was --

22 JUSTICE BREYER: -- if the Federal employee
23 did it?

24 MR. SHAH: The theory behind the individual
25 immunity was the same -- essentially, the same theory

1 behind the Westfall Act immunity that this Court
2 rejected in the Westfall Act decision. So, up until
3 Westfall, there was an argument that there was absolute
4 immunity, that -- that the individual government
5 employees had absolute immunity.

6 JUSTICE BREYER: Why?

7 MR. SHAH: It was a common law immunity
8 that -- it was an offshoot of the sovereign immunity,
9 and it conferred it on the individual employee. This
10 Court, of course, in Westfall, rejected that notion and
11 said -- you know, that immunity doesn't apply, unless
12 you are talking about both beings in the scope of
13 employment and that apply -- that involve discretionary
14 policy decisions at a high enough level.

15 The last point I would make, Your Honor, is,
16 even if you believed -- and I think you do -- that the
17 texts were more naturally read to favor Petitioner, that
18 is not enough. And I think you can look at this Court's
19 decision in Nordic Village.

20 The statutory provision in that case made
21 certain Bankruptcy Court determinations binding on the
22 government, "notwithstanding any assertion of sovereign
23 immunity." The relevant language is reproduced on
24 footnote 10, on page 41 of our brief.

25 That language, "notwithstanding any

1 assertion of sovereign immunity," sounds awfully like a
2 waiver of sovereign immunity. It seems pretty explicit.
3 But what this Court said, in applying the unequivocal
4 waiver requirement, in finding that there was no waiver
5 of sovereign immunity, despite that very explicit
6 language, was that the statute, nonetheless, performed a
7 significant function.

8 Here, the same is true. Section 1089(e),
9 though not authorizing monetary relief, still
10 undisputedly performs a function here. It performs a
11 function of securing the personal immunity conferred by
12 Section 1089(a), that is, for purposes of the Gonzalez
13 Act, the conferral of immunity under Section 1089(a).

14 Just -- just as in Nordic Village, that is
15 enough to construe the statute against a waiver of
16 sovereign immunity.

17 CHIEF JUSTICE ROBERTS: So you want us to
18 decide the case with the unequivocal question before us,
19 in other words, deciding whether that benefit to the
20 government applies in this type of case.

21 MR. SHAH: Yes.

22 CHIEF JUSTICE ROBERTS: It seems to me to be
23 you are really upping the ante here, and it may well --
24 I have no idea why the government took the opposite
25 position below, but that's -- that's putting a lot more

1 at stake in this case than the particular statutory
2 position.

3 MR. SHAH: Well, Your Honor, there are four
4 courts that have decided -- conclusively spoken -- to my
5 knowledge, four courts, in the history, that have
6 interpreted this provision, Section 1089(e). All have
7 come out in the government's favor. There were two
8 district court decisions before the Smith case. Both
9 came out in the government's favor.

10 The only two decisions I am aware of are the
11 two decisions in this case, conclusively interpreting
12 1089(e), the district court and the court of appeals.
13 Both courts in this case relied on the unequivocal
14 waiver requirement. And I think that that's -- it's not
15 a stretch, at all, to apply the unequivocal waiver canon
16 here.

17 In fact, this case is far afield from Dolan.
18 It would be a substantial expansion of the narrow
19 exception in Dolan to say that the unequivocal waiver
20 requirement didn't apply. There was no dispute that
21 sovereign immunity applied the day before the Gonzalez
22 Act was enacted.

23 So the only question is whether the Gonzalez
24 Act enacts a new waiver of sovereign immunity. That is
25 the type of situation in which the canon applies most

1 strongly.

2 And Congress did it in a separate statute.
3 Again, in Dolan, we were interpreting provisions that
4 everyone agreed were part and parcel of the FTCA that --
5 that altered the balance of sovereign immunity. Here,
6 the question is whether it even affects or amends the
7 FTCA in the first place, whether it means to affect the
8 sovereign immunity balance in the first place.

9 That's an especially strong case in which we
10 would want an unequivocal waiver requirement.

11 JUSTICE GINSBURG: Mr. Shah, does it make
12 any sense to distinguish between a medical malpractice,
13 negligence and this unconsented operation, to split
14 those two and say the government is liable for
15 malpractice, but not for this unconsented action.

16 MR. SHAH: Your Honor, I think it makes a
17 lot of sense, and here's why: When Congress enacted the
18 intentional tort exception itself in 1946, one of the
19 principal reasons it -- it did that was because
20 intentional tort claims are sometimes easier to allege
21 but more difficult to disprove.

22 That is particularly true with respect to
23 these sort of lack of consent claims, where you have a
24 patient who has signed consent forms, agreed to a
25 surgery, and says -- and the facts of this case, I

1 think, are illustrative -- says right before the
2 anesthesia kicked in, "I said I don't want the procedure
3 anymore."

4 Now, here, the government was successful in
5 winning on summary judgment dismissal of the actual
6 medical negligence claim, that the doctor's standard of
7 care didn't -- that the doctor's care didn't meet the
8 standard of care.

9 The government won summary judgment on that
10 because there -- there was no evidence -- no expert
11 testimony that supported Petitioner's claim. But his
12 claim that, "I said no right before the anesthesia
13 kicked in," survived summary judgment.

14 And I think it was correct to survive
15 summary judgment, but the problem is that that survived
16 summary judgment, even though the deposition testimony,
17 as pointed out in the government's brief, everyone else
18 in the operating room, including the doctor, said that
19 this patient did not so object, just shows that these
20 claims --

21 JUSTICE SCALIA: Mr. Shah, can I ask you
22 why -- if your interpretation is correct, Subsection (e)
23 did not read -- not for purposes of this section, but
24 rather for purposes of Subsection (a), the provisions of
25 2680(h) shall not apply?

1 MR. SHAH: Well, Your -- may I -- may I
2 respond, Your Honor?

3 For -- this section -- Subsection (a), (b),
4 and (c) all work in tandem. (D) is a settlement
5 provision that really doesn't really have anything to do
6 with this. So, when it says, "for purposes of this
7 section," "Subsection (a)" and "this section" are
8 essentially the only operative provisions of the Act.

9 The only other provisions that do any work
10 are (e) and (f), which come after, obviously, Subsection
11 (e). So, when Congress used the term "for purposes of
12 this section," I think the fair statement is it was
13 referring to Subsections (a) through (c).

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Feldman, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF JAMES A. FELDMAN

18 ON BEHALF OF THE PETITIONER

19 MR. FELDMAN: I -- I just wanted to make a
20 couple of quick points. One is the Court has not
21 applied the clear statement -- the unequivocal statement
22 standard at any time in the Tort Claims Act, not just
23 when it's dealing with exceptions, but, if you go back
24 to the very early cases, the Aetna case, the Yellow Cab
25 case, really, right after the Act was passed, you can

1 see that the Court is saying there, no, we want to
2 interpret this Act to -- consistent with Congress's
3 intent, the way it wanted it interpreted, which is with
4 a fair reading of its words, not in one direction, not
5 in the other.

6 I just also wanted to clarify, in the Smith
7 case because, of a possible misunderstanding, the Court
8 definitely addressed the Gonzales Act, repeatedly, in
9 its opinion in the Smith case, but it didn't -- the
10 Court did not actually address 1089(e).

11 The reason the government, though -- this
12 was important to the government, and, actually, the
13 government's reply brief in the Smith case was, I think,
14 a hundred percent about the Gonzales Act -- was that the
15 other side of the Gonzales Act was saying, if you
16 construe the Westfall Act the way the government wants,
17 that will be an implied repeal, but the Gonzales Act
18 will have nothing left to do.

19 And it was important for the government --
20 that's why they kept saying it. It was important for
21 the government to say, no, the Gonzales Act does have
22 things to do, this is not an implied repeal. And one of
23 the things it does is exactly what we say Section
24 1089(e) does.

25 If there are no further questions?

1 CHIEF JUSTICE ROBERTS: Mr. Feldman, the
2 Court invited you to brief and argue this case as an
3 amicus curiae, and you have ably discharged that
4 responsibility, for which the Court is grateful.

5 MR. FELDMAN: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is
7 submitted.

8 (Whereupon, at 11:05 a.m., the case in the
9 above-entitled matter was submitted.)

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