

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICHARD WILL, ET AL., :

4                      Petitioners                      :

5 v. : No. 04-1332

6 SUSAN HALLOCK, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Monday, November 28, 2005

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

13      APPEARANCES:

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16 Washington, D.C.; on behalf of the Petitioners.

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

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DOUGLAS HALLWARD-DRIEMEIER, ESQ.	
4	On behalf of the Petitioners	3
5	ALLISON M. ZIEVE, ESQ.	
6	On behalf of the Respondents	24
7	REBUTTAL ARGUMENT OF	
8	DOUGLAS HALLWARD-DRIEMEIER, ESQ.	
9	On behalf of the Petitioners	47
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Hallward-Driemeier.

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

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

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

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

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

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

6             And -- and that is the kind of protection  
7     that section 2676 provides. It establishes that the  
8     judgment in the suit against the United States shall be  
9     a complete bar against any action against the employee.

10     So it's the action itself that is precluded, and it is  
11     precluded completely. And that --

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

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

25             JUSTICE SOUTER: Digital I remember.

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

2 --

3 JUSTICE SCALIA: So do I.

4 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 would be governed by collateral --

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

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

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

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

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

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

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

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

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

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

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

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

1 appearing at trial as a witness.

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

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

16           MR. HALLWARD-DRIEMEIER: Yes.

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

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

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

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

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

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

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

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

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

1 provision of section 2679(a) with respect to sue and  
2 be sued agencies -- if you said that 1346(b) shall not  
3 apply to a suit against the Postal Service because the  
4 suits against the Postal Service regarding miscarriage  
5 of letters is excluded from 1346(b) by that same  
6 language, shall not apply, well, that would render the  
7 Postal Service exception meaningless and you would sue  
8 the -- the Postal Service pursuant to its sue and be  
9 sued authority instead of suing the United States under  
10 1346(b).

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

13 MR. HALLWARD-DRIEMEIER: The -- the --  
14 2679(a) says that the authority of an agency to sue and  
15 be sued in its own name shall not extend to claims  
16 cognizable under section 1346(b). The argument might  
17 be made, with respect to a suit against the Postal  
18 Service for miscarriage of the mail, that -- that claim  
19 is not cognizable under section 1346(b) because section  
20 2680(b) says that 1346(b) shall not apply to claims  
21 relating to the miscarriage of mail. So by the same  
22 reading of shall not apply, one would come to the  
23 conclusion that -- that the claim relating to the  
24 miscarriage of mail is not cognizable under 1346(b),  
25 and therefore you sue the -- the Postal Service.

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

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

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

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

21 JUSTICE BREYER: -- in 2679(b)?

22 MR. HALLWARD-DRIEMEIER: Right. And -- and  
23 --

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

1 action.

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

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

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

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

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

4 Now, there's nothing in this statute that  
5 says that the Government -- that the Congress wanted to  
6 achieve that result. What order you bring the suit in  
7 shouldn't really make any difference here. The Bivens  
8 action is totally different from all the other tort  
9 actions in that respect, and it's listed separately in  
10 2679 to make clear that it isn't -- it is different.

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

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

17 MR. HALLWARD-DRIEMEIER: Well, there --

18 JUSTICE BREYER: A lot of things.

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

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



1 construed 2676 to apply to Bivens claims.

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

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

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

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

21 MR. HALLWARD-DRIEMEIER: But --

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

1 Bivens.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

8 MR. HALLWARD-DRIEMEIER: That's right. The  
9 -- the statute makes the test whether there has been a  
10 judgment in an action under 1346(b), and plainly, under  
11 any reading of that language, it means where there is a  
12 judgment that finally resolves the liability of the  
13 United States under section 1346(b), there has been a  
14 judgment in an action under 1346(b). And I don't think  
15 that the language is susceptible to any other reading.

16 So if the claim, as Your Honor suggested, finally  
17 resolves whether the United States could be liable  
18 under section 1346(b), then the judgment bar applies.

19 Unless there are no further questions --

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

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

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

11 JUSTICE STEVENS: That's correct.

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

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

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

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

5 JUSTICE STEVENS: Correct.

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

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

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

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

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

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

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

1 JUSTICE BREYER: All right. So, therefore,  
2 if in fact we had words mean what they seem to mean,  
3 Congress would have both removed the State lawsuits in  
4 2679(b) and reinstated them or set them in the  
5 exceptions. But that would have the statute defeat  
6 itself, and therefore, that case that you're citing  
7 came to a correct result.

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

9 JUSTICE BREYER: That's right?

10 MR. HALLWARD-DRIEMEIER: I --

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

13 MR. HALLWARD-DRIEMEIER: Well, certainly --

14 JUSTICE BREYER: Okay.

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

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

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. Zieve.

23 ORAL ARGUMENT OF ALLISON M. ZIEVE

24 ON BEHALF OF THE RESPONDENTS

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



1 please the Court:

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

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

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

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

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

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

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

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

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

1 before.

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

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

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

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

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

5 MS. ZIEVE: Well --

6 JUSTICE BREYER: So put in --

7 MS. ZIEVE: I don't --

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

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

13 MS. ZIEVE: Well, a couple things. First of  
14 all, the -- the bar to State law tort suits is in  
15 2679(b), which was passed in 1988, 42 years after the  
16 judgment bar and the -- and the bulk of FTCA. It was  
17 passed as an express effort to overturn this Court's  
18 decision in Westfall, which held that employees did not  
19 have immunity from State law -- certain State law  
20 torts. And in the findings that are incorporated into  
21 section 2 of the statute, Congress specifically called  
22 2679(b) an immunity provision, and this Court has since  
23 recognized that, for instance, in Gutierrez de  
24 Martinez. There is no comparable legislative history  
25 indicating immunity for -- for -- under 2676.

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

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

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

1 would have been true under the prior bill. This is  
2 around page 14 of my brief, the quote from -- from the  
3 1945 report. Not -- a bar to liability not only  
4 against the Government, as would have been true under  
5 the prior version, but also against the employee. And  
6 there was no bar to suit in the prior version of the  
7 bill. So the drafters' explanation could only have  
8 been referring to the normal operation of res judicata.

9 And this Court has used res judicata in Digital as  
10 sort of the quintessential example of a defense that is  
11 not subject to immediate appeal.

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

19 MS. ZIEVE: That's --

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

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

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

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

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

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

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

3 Statute of limitations, for instance, are in  
4 statutes and when the statute has expired, you could  
5 say that is a statutory bar to a right to stand trial.

6 But statute of limitations, like the res judicata  
7 defense, are just not appealable under the collateral  
8 order doctrine.

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

12 MS. ZIEVE: That's right. If there's no  
13 appellate court jurisdiction, the Court doesn't have to  
14 go on to construe the scope of the judgment bar. But  
15 --

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

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

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



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

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

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

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

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

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

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

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

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

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



1 litigation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 (Laughter.)

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

1 because the judgment bar only applies to actions under  
2 1346(b), it's something of a contradiction to say that  
3 an action that -- to which 1346(b) shall not apply at  
4 the same time an action under 1346(b).

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

16 But one difference is the -- the order in  
17 which those things happened. First, you would get the  
18 2679(b) exclusive remedy provision invoked before the  
19 question of whether 2680 applied would arise.

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

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

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

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

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

25 Now, Justice Stevens dissented, but he didn't

1 dissent on that ground.

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

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

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

14           MS. ZIEVE: But the reasoning --

15           JUSTICE BREYER: Yes.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

1 General uses in the legislative history.

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

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

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

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

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

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

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

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

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

24 (Laughter.)

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

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

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

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

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

7 REBUTTAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

8 ON BEHALF OF THE PETITIONERS

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

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

20 So there is no requirement that Congress  
21 invoked particular language to create an immunity. The  
22 question is what are the underlying concerns that are  
23 protected? And the respondents have admitted that  
24 2676, like the Westfall Act, was intended to protect  
25 employee morale against the threat of personal

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

4 This Court, in fact, in Gilman --

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

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

16 JUSTICE SCALIA: Give me a good reason for  
17 that.

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



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

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

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

18            And -- and respondents offer the example of  
19    the postal carrier as one of those quintessential cases  
20    that Congress meant to address. But, of course, the  
21    postal exception to the FTCA, another exception in  
22    2680, 2680(b), would bar many claims against the United  
23    States relating to a postal carrier's misdirection of  
24    the mail. Now, respondents would have the Court  
25    believe that if that suit was brought against the

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

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

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

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

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

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

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

16            CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17            The case is submitted.

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