SUPREME COURT OF THE UNITED STATES

No. 91–1538

SANDRA JEAN SMITH, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 8, 1993]

JUSTICE STEVENS, dissenting.

In my opinion the Court's decision to grant certiorari in this case was a wise exercise of its discretion. The question whether the United States should be held responsible for the tortious conduct of its agents in the vast "sovereignless region" of Antarctica, *ante,* at 1, is profoundly important, not only because its answer identifies the character of our concern about ordinary justice, but also because Antarctica is just one of three vast sovereignless places where the negligence of federal agents may cause death or physical injury. The negligence that is alleged in this case will surely have its parallels in outer space as our astronauts continue their explorations of ungoverned regions far beyond the jurisdictional boundaries that were familiar to the Congress that enacted the Federal Tort Claims Act (FTCA) in 1946. Moreover, our jurisprudence relating to negligence of federal agents on the sovereignless high seas points unerringly to the correct disposition of this case. Unfortunately, the Court has ignored that jurisprudence in its parsimonious construction of the FTCA's "sweeping" waiver of sovereign immunity.[1]

In theory the territorial limits on the consent to sue the United States for the torts of its agents might be defined in four ways: (1) there is no such limit; (2)

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[1] "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 547 (1951).

territory subject to the jurisdiction of a foreign country is the only exclusion; (3) it also excludes sovereignless land areas such as Antarctica, but it includes the high seas and outer space; or (4) it has an "exclusive domestic focus" that applies "only within the territorial jurisdiction of the United States."[2] The "foreign country" exclusion in §2680(k)[3] unquestionably eliminates the first possibility. In my opinion, the second is compelled by the text of the Act.[4] The third possibility is not expressly rejected by the Court, but the reasoning in its terse opinion seems more consistent with the Government's unambiguous adoption of the fourth, and narrowest, interpretation. I shall therefore first explain why the text of the FTCA unquestionably requires rejection of the Government's submission.

The FTCA includes both a broad grant of jurisdiction to the federal courts in §1346(b)[5] and a broad waiver

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[2]See Brief for United States 16, 21–22.

[3]"The provisions of this chapter and section 1346(b) of this title shall not apply to—

. . . . .

"(k) Any claim arising in a foreign country." 28 U. S. C. §2680(k).

[4]In short, I agree with most of the analysis in Judge Fletcher's dissenting opinion in this case and Judge Wilkey's opinion for the Court of Appeals for the District of Columbia Circuit in *Beattie* v. *United States*, 244 U. S. App. D. C. 70, 756 F. 2d 91 (1984). Indeed, I am persuaded that the 79th Congress would have viewed torts committed by federal agents in "desolate and extraordinarily dangerous" lands as falling squarely within the central purpose of the FTCA. *Ante*, at 8.

[5]Title 28 U. S. C. §1346(b) provides:

"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have

of sovereign immunity in §2674.[6] Neither of these sections identifies any territorial limit on the coverage of the Act. That Congress intended and understood the broad language of those two provisions to extend beyond the territory of the United States is demonstrated by its enactment of two express exceptions from that coverage that would have been unnecessary if the initial grant of jurisdiction and waiver of immunity had been as narrow as the Government contends. One of those, of course, is the "foreign country" exclusion in §2680(k). See n. 6, *supra.* The other is the exclusion in §2680(d) for claims asserted under the Suits in Admiralty Act or the Public Vessels Act.[7] Without that exclusion, a party with a claim against the United States cognizable under either of those venerable statutes would have had the right to elect the pre-existing

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exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[6]Title 28 U. S. C. §2674 provides, in pertinent part:
"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

[7]Title 28 U. S. C. §2680(d) excludes from the coverage of the FTCA "[a]ny claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States."

remedy or the newly enacted FTCA remedy. Quite obviously that exclusion would have been unneces-sary if the FTCA waiver did not extend to the sovereignless expanses of the high seas.

Indeed, it was the enactment of the FTCA in 1946 that first subjected the United States to liability for maritime negligence claims that could not be maintained under either the Suits in Admiralty Act or the Public Vessels Act,[8] in particular, claims arising from death or injury on the high seas. As enacted in 1920, the Death on the High Seas Act (DOHSA) provided a remedy against private parties but contained no waiver of sovereign immunity.[9] That changed with the enactment of the FTCA, which waived the sovereign immunity of the United States for claims arising on the high seas under the DOHSA and the general maritime law. See, *e.g.*, *United States* v. *Gavagan*, 280 F. 2d 319, 321 (CA5 1960), cert. denied, 364 U. S. 933 (1961) (holding United States liable, under the FTCA and the DOHSA, for death resulting from negligent rescue efforts on the high seas); *Blumenthal* v. *United States*, 189 F. Supp. 439, 446–447 (ED Pa. 1960) ("In the same manner as a private person is liable under the Death on the High Seas Act, so, too, is the Government under the Federal Tort Claims Act"), aff'd, 306 F. 2d 16 (CA3 1962); *Kunkel* v. *United States*, 140 F. Supp. 591, 594 (SD Cal. 1956) (same); *Moran* v. *United States*, 102 F. Supp. 275 (D Conn. 1951) (holding that the FTCA waived the sovereign immunity of the United States for claims arising from both personal injury and death on the high seas). See also *McCormick* v. *United States*, 680 F. 2d 345, 349 (CA5 1982) (citing *Moran* with approval); *Roberts* v. *United States*, 498 F. 2d 520, 525–526 (CA9 1974) (noting that prior to 1960

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[8]See *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 172 (1976) ("Maritime tort claims deemed beyond the reach of both Acts could be brought only on the law side of the district courts under the Federal Tort Claims Act").

[9]Pub. L. 69–165, 41 Stat. 537, codified at, 46 U. S. C. App. §761 *et seq*.

amendments to Suits in Admiralty Act, FTCA waived sovereign immunity for claims under the general maritime law and the DOHSA).

In 1960, Congress amended the Suits in Admiralty Act so as to bring *all* maritime torts asserted against the United States, including those arising under the DOHSA, within the purview of the Suits in Admiralty Act and thus outside the waiver of sovereign immunity in the FTCA. See *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 176, n. 14 (1976). There can be no disputing the fact, however, that at the time it was enacted, the FTCA waiver extended to the sovereignless reaches of the high seas. Since the geographic scope of that waiver has never been amended, the Government's submission that it is confined to territory under the jurisdiction of the United States is simply untenable.

That the 79th Congress intended the waiver of sovereign immunity in the FTCA to extend to the high seas does not, of course, answer the question whether that waiver extends to the sovereignless region of Antarctica. It does, however, undermine one premise of the Court's analysis: that the presumption against the extraterritorial application of federal statutes supports its narrow construction of the geographic reach of the FTCA. As the Court itself acknowledges, see *ante,* at 7, that presumption operates "unless a contrary intent appears." Here, the contrary intent is unmistakable. The same Congress that enacted the "foreign country" exception to the broad waiver of sovereign immunity in §2674, subjected the United States to claims for wrongful death and injury arising well beyond the territorial jurisdiction of the United States. The presumption against extraterritorial application of federal statutes simply has no bearing on this case.

The Government, therefore, may not prevail unless

Antarctica is a “foreign country” within the meaning of the exception in subsection (k). Properly, in my view, the Court inquires as to how we are to construe this exception to the FTCA's waiver of sovereign immunity. *Ante*, at 6. Instead of answering that question, however, the Court cites a nebulous statement in *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979), and simply asserts that construing the foreign-country exception so as to deny recovery to this petitioner somehow accords with congressional intent. *Ante*, at 6–7.

I had thought that canons of statutory constructions were tools to be used to *divine* congressional intent, not empty phrases used to *ratify* whatever result is desired in a particular case. In any event, I would answer the question that the Court poses, but then ignores. And as I read our cases, the answer is clear: Exceptions to the “`sweeping'” waiver of sovereign immunity in the FTCA should be, and have been, “narrowly construed.” *United States* v. *Nordic Village, Inc.*, 503 U. S. ___ (1992) (slip op., at 4) (quoting *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 547 (1951)).[10] Accordingly, given a choice between two

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[10]See also *Block* v. *Neal*, 460 U. S. 289, 298 (1983) and *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 383 (1949). As we stated in the latter:

“In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement . . . : `The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'” *Ibid.* (quoting *Anderson* v. *Hays Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–

acceptable interpretations of the term "country"—it may designate either a sovereign nation or an expanse of land—it is our duty to adopt the former.

Even without that rule of construction, we should favor the interpretation of the term that the Court has previously endorsed. Referring specifically to the term as used in the FTCA, we stated: "We know of no more accurate phrase in common English usage than `foreign country' to denote territory subject to the sovereignty of another nation." *United States* v. *Spelar*, 338 U. S. 217, 219 (1949). That interpretation is consistent with a statutory scheme that imposes tort liability on the Government "in the same manner and to the same extent as a private individual under like circumstances", see n. 6, *supra*. As we explained in *Spelar:* "[T]hough Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." 338 U. S., at 221. Thus, the narrow interpretation of the term "foreign country" is precisely tailored to make the scope of the subsection (k) exception coextensive with its justification.

The Court seeks to buttress its interpretation of the "foreign country" exception by returning to the language of the jurisdictional grant in §1346(b). As I have noted, federal courts have jurisdiction of civil claims against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance

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30 (1926)).

with the law of the place where the act or omission occurred."[11] Emphasizing the last dozen words, the Court essentially argues that Antarctica is "a place that has no law" and therefore it would be "bizarre" to predicate federal liability on its governing law. *Ante*, at 4–5.[12]

Although the words the Court has italicized indicate that Congress may not have actually thought about sovereignless regions, they surely do not support the Court's conclusion. Those words, in conjunction with §2674, require an answer to the question whether a private defendant, in like circumstances, would be liable to the complainant. The Court fails even to ask that question, possibly because it is so obvious that petitioner could maintain a cause of action against a private party whose negligence caused her husband's

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[11]The Court inaccurately refers to the jurisdictional grant as the section that "waives the sovereign immunity of the United States," *ante,* at 4. It is actually §2674 that waives immunity from liability by simply providing: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." See n. 6, *supra.* The Court does not quote §2674.

[12]Apparently the Court is assuming that private contracts made in Antarctica are unenforceable and that there is no redress for torts committed by private parties in sovereignless regions. Fortunately our legal system is not that primitive. The statutory reference to "the law of the place where the act or omission occurred" was unquestionably intended to identify the substantive law that would apply to a comparable act or omission by a private party at that place. As long as private conduct is constrained by rules of law, and it certainly is in Antarctica, see *infra*, at 8–10, there is a governing "law of the place" within the meaning of the FTCA.

death in Antarctica. It is simply wrong to suggest, as the Court does, that Antarctica is "a place that has no law," *ante*, at 5.[13]

The relevant substantive law in this case is the law of the State of Oregon, where petitioner resides. As was well settled at English common law before our Republic was founded, a nation's personal sovereignty over its own citizens may support the exercise of civil jurisdiction in transitory actions arising in places not subject to any sovereign. *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021, 1032 (K. B. 1774). See also *Dutton* v. *Howell*, 1 Eng. Rep. 17, 21 (H. L. 1693). This doctrine of personal sovereignty is well recognized in our cases. As Justice Holmes explained in *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909):

> "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive." *Id.*, at 355–356.

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[13] Indeed, it borders on the absurd to suggest that Antarctica is governed by nothing more than the law of the jungle. The United States exercises both criminal jurisdiction, see 18 U. S. C. §7(7), and taxing jurisdiction, see 26 U. S. C. §863(d)(2(A), over the approximately 2,500 Americans that live and work in and around Antarctica each year. See National Science Foundation, Facts About the U. S. Antarctic Program 1 (July 1990). The National Science Foundation operates three year-round stations in Antarctica, the largest of which is comprised of 85 buildings and has a harbor, landing strips on sea ice and shelf ice, and a helicopter pad. *Ibid.* Transportation to and from New Zealand is frequent during the summer months. *Id.*, at 2.

Justice Holmes was referring to the assertion of extra-territorial jurisdiction by the United States rather than an individual State, but it is clear that the States also have ample power to exercise legislative jurisdiction over the conduct of their own citizens abroad or on the high seas. As we explained in *Skiriotes* v. *Florida*, 313 U. S. 69 (1941):

> "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress." *Id*., at 77.[14]

Surely the State of Oregon, the forum State, has a substantial interest in applying its civil tort law to a case involving the allegedly wrongful death of the spouse of one of its residents. Certainly no other State has an interest in applying its law to these facts. Moreover, application of Oregon's substantive law would in no way conflict with an Act of Congress because Congress has expressly subjected the United States to the laws of the various States for torts committed by the United States and its agents. It is thus perfectly clear that were the defendant in this case a private party, there would be law to apply to determine that party's liability to petitioner. Given the plain language of §2674, I see no basis for the Court's refusal to follow the statutory command and hold the United States "liable . . . in the same manner

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[14]Again, as Justice Holmes explained:

"[T]he bare fact of the parties being outside the territory [of the United States] in a place belonging to no other sovereign would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas." *The Hamilton*, 207 U. S. 398, 403 (1907).

and to the same extent as a private individual under like circumstances."

Petitioner's action was filed "in the judicial district where the plaintiff resides", as §1402(b) authorizes; there is, therefore, no objection to venue in this case. Because that provision would not provide a forum for a comparable action brought by a nonresident alien, the statute contains an omission that is no stranger to our law. In our opinion in *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U. S. 706, 710, n. 8 (1972), we identified examples of "cases in which the federal courts have jurisdiction but there is no district in which venue is proper" and stated that "in construing *venue statutes* it is reasonable to prefer the construction that avoids leaving such a gap." (emphasis added). Neither in that case nor in any other did we suggest that a venue gap should be avoided by adopting a narrow construction of either a jurisdictional grant or the scope of a federal cause of action. Yet that is the Court's perverse solution to the narrow venue gap in the FTCA.

Because a hypothetical handful of nonresident aliens may have no forum in which to seek relief for torts committed by federal agents in outer space or in Antarctica, the Court decides that the scope of the remedy itself should be narrowly construed. This anomalous conclusion surely derives no support whatsoever from the basic decision to include aliens as well as citizens within the protection of the statute, particularly since the overwhelming majority of aliens who may have occasion to invoke the FTCA are surely residents. As Judge Fletcher accurately observed in her dissenting opinion in the Court of Appeals:

> "Those who have no problem with venue should not be foreclosed from bringing suit simply because others cannot, particularly with respect to a statute such as the FTCA the primary

> purpose of which, as we have seen, was to expand the jurisdiction of the federal courts." 953 F. 2d 1116, 1122 (CA9 1991).

At most, the imperfections in the statute indicate that in 1946 the 79th Congress did not specifically consider the likelihood of negligence actions arising in outer space or in a sovereignless territory such as Antarctica. In view of the fact that it did authorize actions against the United States arising out of negligence on the high seas, see *supra*, at 2–5, I am bewildered by the Court's speculation that if it had expressly considered the equally dangerous area at issue in this case, it would have distinguished between the two. *Ante*, at 8. The claim asserted in this case is entirely consistent with the central purpose of the entire Act.

Indeed, given that the choice is between imposing individual liability on federal agents for torts committed in the course of their employment, on the one hand, or holding their employer responsible, on the other hand, the amendment to the FTCA adopted by Congress in 1988 sheds more light on the issue presented in this case than the Court's unfounded speculation about congressional intent. The congressional findings explaining the decision to immunize federal employees from personal liability for negligence in the performance of their duties indicate that Congress recognizes both the practical value and the justice of a generous interpretation of the FTCA.[15] Moreover, those findings are thoroughly

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[15]In enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, the stated purpose of which was "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States," §2(b), 102 Stat.

consistent with the interpretative approach of the unusually distinguished panel of Circuit Judges who, shortly after the FTCA was passed, wrote:

> "When after many years of discussion and debate Congress has at length established a general policy of governmental generosity toward tort claimants, it would seem that that policy should not be set aside or hampered by a niggardly

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4564, 28 U. S. C. §2671 note, Congress made the following findings:

"(1) For more than 40 years the Federal Torts Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

"(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

"(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

"(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

"(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

> construction based on formal rules made obsolete by the very purpose of the Act itself. Particularly should this be true as to the broad terms of coverage employed in the basic grant of liability itself." *Spelar* v. *United States*, 171 F. 2d 208, 209 (CA2 1948).[16]

The wisdom that prompted the Court's grant of certiorari is not reflected in its interpretation of the 1946 Act. Rather, it reflects a vision that would exclude electronic eavesdropping from the coverage of the Fourth Amendment and satellites from the coverage of the Commerce Clause. The international community includes sovereignless places but no places where there is no rule of law. Majestic legislation like the Federal Tort Claims Act should be read with the vision of the judge, enlightened by an interest in justice, not through the opaque green eye-shade of the cloistered bookkeeper. As President Lincoln observed in his first State of the Union Message:

> "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."[17]

I respectfully dissent.

"(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employees torts." §2(a), 102 Stat. 4563, 28 U. S. C. §2671 note.

[16] The members of the panel were Learned Hand, Chief Judge, and Augustus N. Hand and Charles E. Clark, Circuit Judges.

[17] Cong. Globe, 37th Cong., 2d Sess., App. 2 (1861).