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Bruce, Jr. G. Hart

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MEDICAL MALPRACTICE PROTECTION UNDER THE FEDERAL TORT CLAIMS ACT: PROTECTING BOTH PHYSICIANS AND CLAIMANTS

INTRODUCTION

Under the doctrine of sovereign immunity, a government is not liable for the tortious acts of its employees. The Federal Tort Claims Act ("FTCA"), however, provides a limited waiver of the federal government's sovereign immunity. It exposes the government to tort liability only "to the extent that Congress has affirmatively waived sovereign immunity." In section 2680 of the FTCA, Congress set out the circumstances in which the government is exempt from liability. Under section 2680(k) (the "foreign country exception"), the government is not liable for torts committed by federal employees in foreign countries. The definition of foreign country includes American military bases on foreign soil, United States embassies and occupied territories.

Over the years, Congress has given special protection to federal em-

1. See Ricco, Developments in Tort Liability of the Federal Government Under The Federal Tort Claims Act, 1987 Annual Survey of Amer. Law 619, 619. The idea that "the King could do no wrong" was clearly established in English common law at the time of the colonies' independence from Great Britain. Although the newly independent states repudiated the political theory of sovereign immunity, the legal doctrine that the government is "immune from any suit to which it has not [yet] consented" was incorporated into the law of the United States. See Feres v. United States, 340 U.S. 135, 139 (1950); K. Davis, Constitutional Torts 5-6 (1984). According to the Supreme Court, "without specific statutory consent, no suit may be brought against the United States." United States v. Shaw, 309 U.S. 495, 500-01 (1940); accord United States v. Sherwood, 312 U.S. 584, 587 (1941).
3. Davis, supra note 1, at 6 (emphasis omitted). "Since no suit may be brought against the sovereign without its consent," one commentator noted, "a statutory waiver of immunity is a sine qua non to providing a judicial remedy for tort claims against the Government. The Tort Claims Act is such a statutory waiver." See 1 L. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies, § 66.01 at 3-8 (1989).
5. See 28 U.S.C. § 2680(k) (1982). Section 2680(k) of the FTCA states that the FTCA does not apply to "[a]ny claim arising in a foreign country." Id. For purposes of this section, foreign country has been defined as a "territory subject to the sovereignty of another nation." United States v. Spelar, 338 U.S. 217, 219 (1949). If the territory is under another nation's control, the law of the location where the tort occurs governs the suit. See 28 U.S.C. 1346(b) (1982). The government retained its immunity because Congress "was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." Spelar, 338 U.S. at 221; see also Benderman, Exploring the Foreign Country Exception: Federal Tort Claims in Antarctica, 21 Vand. J. Transnat'l L. 731, 734 (1988) ("Congress intended to bar claims arising under foreign law"); 2 L. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies, § 263 at 13-155 ("coverage of the [FTCA] geared toward sovereignty of United States") (emphasis in original).
ployees, particularly medical personnel who, due to the nature of their jobs, are at a greater risk of being sued for torts committed in the scope of their employment. Congress enacted several statutes making the FTCA remedy the exclusive remedy for medical malpractice claimants. These statutes preclude civil action against the employee by substituting the remedy prescribed under the FTCA. This Note discusses the effect of the foreign country exception of the FTCA on malpractice protection provided by the Medical Malpractice Immunity Act (the "MMIA").

Under one view, the MMIA makes the remedy under the FTCA exclusive of any other civil action directly against the defendant medical personnel, even if the plaintiff is later barred from recovering against the federal government because the government retained its immunity under the foreign country exception of the FTCA.

In 1988, with the enactment of the Federal Employees Liability Reform and Tort Compensation Act (the "FELRTCA"), Congress amended the FTCA to make it the exclusive remedy for any suit in tort against a federal employee while acting in the scope of employment. The purpose of the act is to "provide immunity for Federal employees from personal liability for common law torts committed within the scope of their employment." H.R. Rep. No. 700, 100th Cong., 2d Sess. 2, reprinted in 1988 U.S. Code Cong. & Admin. News 5945. Congress modeled the Act after the malpractice protection statutes. See id. at 5947. Unfortunately, there is an inconsistency within the Act's legislative history as to its effect on claimant's suits. On the one hand, the report states that "no one who previously had the right to initiate a lawsuit will lose that right." Id. at 5951. Yet the report also states that "suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery." Id. at 5950; see also Smith v. Marshall, 885 F.2d 650, 654-56 (9th Cir. 1989) (discussion of conflicting legislative history). Fortunately, because the FELRTCA is plain on its face, courts can avoid its confusing legislative history. See Marshall, 885 F.2d at 656. See generally 2A N. Singer, Sutherland Statutory Construction § 46.01 (1984) (discussing Plain Meaning Rule). Despite the government's arguments that the FELRTCA applies to all federal employees, including medical personnel, the courts that have ruled on both statutes hold that malpractice suits against medical personnel based on a tort arising in a foreign country are not affected by the FELRTCA because it is part of the FTCA, and applies only in situations in which the FTCA applies. See Marshall, 885 F.2d at 654-55; Newman v. Soballe, 871 F.2d 969, 970-71 (11th Cir. 1989). Thus, the same circumstances that allow suits to be brought against the individual physician under the MMIA denies those same physicians protection under the FELRTCA because the FTCA is inapplicable. See infra notes 49-85 and accompanying text.

9. Congress has given medical personnel a very broad definition, including in it physicians, nurses, dentists, pharmacists, paramedics, and other "supporting personnel." See 10 U.S.C. 1089(a) (1988).


11. See supra note 10 and accompanying text.

12. 10 U.S.C. § 1089 (1988). While most of the cases discussed in this Note focus on the MMIA, the statutory interpretation and subsequent analysis should apply to all four malpractice protection statutes.

that if the claimant is prevented from pursuing a cause of action under the FTCA because of the foreign country exception, the exclusive remedy provision of the MMIA does not apply.\textsuperscript{14} This permits the plaintiff to bring suit against defendant medical personnel individually.\textsuperscript{15} This Note supports the position that the FTCA acts as the exclusive means of recovery for the plaintiff only when it allows a suit against the United States. When the foreign country exception bars the claimant's cause of action, she should be allowed to maintain her suit against the medical personnel individually.

Part I of this Note examines the legislative history and purpose of the FTCA and MMIA. Part II focuses on the decisions discussing the MMIA and the foreign country exception. Part III argues that Congress intended the MMIA to protect government medical personnel either by substituting the government as the sole defendant or by providing malpractice insurance when the government cannot be sued because the FTCA does not apply. In either instance, Congress intended to provide a remedy for legitimate claimants.\textsuperscript{16} This Note concludes that in enacting the MMIA, Congress intended the FTCA to be used to protect government medical personnel from suit only in cases in which there is a possible means of recovery against the federal government.

I. THE FEDERAL TORT CLAIMS ACT AND THE MEDICAL MALPRACTICE IMMUNITY ACT

A. Federal Tort Claims Act

Under the FTCA, Congress gave plaintiffs the option of suing the government rather than the federal employee "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."\textsuperscript{17} As originally enacted, the FTCA did not bar suits against the federal employee. The claimant had the option of suing the United States in addition to the employee, but could only recover from one defendant.\textsuperscript{18}

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\textsuperscript{14} See Smith v. Marshall, 885 F.2d 650, 653-54 (9th Cir. 1989); Newman v. Soballe, 871 F.2d 969, 972-73 (11th Cir. 1989); Jackson v. Kelly, 557 F.2d 735, 740-41 (10th Cir. 1977).

\textsuperscript{15} See Marshall, 885 F.2d at 656; Newman, 871 F.2d at 977-78; Jackson, 557 F.2d at 740-41.


\textsuperscript{17} 28 U.S.C. § 1346(b) (1982). Prior to the enactment of the FTCA, the only way to get any relief from the government was the passage of private bills by Congress. See Feres v. United States, 340 U.S. 135, 139-40 (1950); 1 L. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies, §§ 51, 65.01 (1989); Rico, supra note 1 at 619; Santoro, A Practical Guide to the Federal Tort Claims Act, 63 Conn. Bar J. 224, 224 (1989).

\textsuperscript{18} See Henderson v. Bluemink, 511 F.2d 399, 403-04 (D.C. Cir. 1974). The FTCA states in part that "[t]he judgment in an action [against the United States] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676 (1982); see also S. Rep. No. 1264, 94th Cong., 2d Sess. 4 (1976), reprinted
Many plaintiffs have opted to sue the government because in most instances federal employees do not have the resources to pay large damage judgments. The United States, on the other hand, is "the world's largest self insurer" and pays any damage judgment levied against it in suits brought by private individuals. 19

There are still advantages, however, to suing medical personnel individually. For example, the FTCA disallows punitive damage awards against the government. 20 Moreover, the FTCA-imposed two-year statute of limitations 21 may be shorter than the applicable statute of limitations if the claimant was to sue the medical personnel directly under state law. 22 Finally, in malpractice cases, many claimants prefer a jury trial, especially if the injury might elicit jury sympathy. 23 Under the FTCA, jury trials are unavailable. 24 Nevertheless, it appears that in many cases the advantages of suing the government outweigh the benefits of suing a physician individually, unless the plaintiff is prevented from proceeding against the government because of the FTCA's foreign country exception. 25

B. Medical Malpractice Immunity Act

Prior to the passage of the Medical Malpractice Immunity Act (the "MMIA"), 26 if a case fell under one of the exclusion provisions of the FTCA, 27 the claimant had no alternative but to sue the medical personnel directly; the FTCA left him without a remedy against the United States. This situation arose when the alleged malpractice occurred on a


19. See House Report 333, supra note 18, at 3; see also Davis, supra note 1, at 26 ("governments always pay judgments against them"). One commentator noted that in addition to relieving Congress of the burden of legislating private bills, judgments provide an end to the "hardship and injustice" for victims of the government's torts. See 1 L. Jayson, Handling Federal Tort Claims § 65.01 at 3-3 to 3-4, (1989).

20. See 28 U.S.C. § 2674 (1982). Given the uniquely personal nature of malpractice, claimants may have both emotional and vindictive reasons for suing the medical personnel individually. See Senate Report 1264, supra note 18, at 4446; House Report 333, supra note 18, at 3. Further, there is a strong financial interest because punitive damages by definition are a windfall to the claimant. See E. Shoben and W. Tabb, Cases and Problems on Remedies 661 (1989); see also W. Prosser & W. Keeton, The Law of Torts 9-11, 14 (1984) (when punitive damages may be awarded against a physician, claimant has financial interest in suing her personally).


military base on foreign soil, a type of injury which is excluded under section 2680(k) of the FTCA. Under such circumstances, it was likely that substantial liability would be imposed on individuals. This, combined with the increase in malpractice suits in the early 1970's, had a deleterious effect on the Defense Department's medical corps. Congress sought to remedy the situation with the enactment of the MMIA.

The purpose of the MMIA is to "meet[] the serious and urgent needs of defense and medical personnel by protecting them fully from any personal liability arising out of the performance of their official medical duties." In addition to protecting medical personnel against malpractice liability, the MMIA is intended to provide "adequate compensation for legitimate malpractice claims." The MMIA is designed to protect medical personnel in most instances by removing the claimant's option to

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28. See supra notes 5-8 and accompanying text. In Manemann v. United States, 381 F.2d 704 (10th Cir. 1967), the court held that the claimant, who complained of malpractice that occurred in Taiwan, was barred from suing the United States. See id. at 705. The court relied on the fact that section 1346(b) of the FTCA requires application of the "law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), and held that because Taiwan is a foreign country, the claim fell "within the exclusionary provision of section 2680(k)." Manemann, 381 F.2d at 705; see also Broadnax v. United States Army, 710 F.2d 865, 866 (D.C. Cir. 1983) (suit against federal government dismissed because FTCA is inapplicable to negligent acts committed in foreign country); Rafflery v. United States, 150 F. Supp. 618, 618 (D.C. Cir. 1957) (claimant barred from suing United States on malpractice claim because cause of action arose in Germany).

29. During the period 1963-1968, there were an average of 4.3 malpractice claims against military medical personnel each year. See Senate Report 1264, supra note 18, at 4446. This increased to 63.8 suits per year in the period 1969-1974. See id. During the first half of 1975 alone there were 63 malpractice claims filed. See id. Moreover, the Justice Department reported that in 1975, it was involved in over 494 suits arising out of alleged medical malpractice of officers or employees of the federal government. See House Report 333, supra note 18, at 3.

Defense medical personnel soon found it almost impossible to obtain their own malpractice insurance, and when available, it was extraordinarily expensive. See Senate Report 1264, supra note 18, at 4447. The cost of self-insuring in 1975 ranged from a low of $150 to as high as $19,000, depending on the physician's location and specialty. See id. at 4448. In contrast, the government predicted that the cost under the Medical Malpractice Immunity Act would range from $400 to $800 per year per physician. See id. at 4448. Indeed, malpractice insurance had become so expensive that many medical personnel simply went without coverage. In 1975, at the time of the House report, there were twenty malpractice lawsuits involving 37 defense department employees. See House Report 333, supra note 18, at 3. The total amount of the claims exceeded $13,700,000. See id. Yet, in all but three of the suits there was no insurance coverage, and of those that involved insurance, the limitations on liability fell well below the claimed damages. See id. Congress feared that the surge in malpractice litigation would result in defense medical personnel practicing "defensive medicine" by making decisions based on "the best interest of the physician rather than the patient." Senate Report 1264, supra note 18, at 4447; see also House Report 333, supra note 18, at 3 (tort liability encourages practice of "defensive medicine"); Davis, supra note 1, at 24-25 (same). Congress also realized that physicians might reject supervisory roles for fear of the added liability that such positions entail. See Senate Report 1264, supra note 18, at 4447.

31. Senate Report 1264, supra note 18, at 4444.
32. Id. at 4445.
sue the physician individually. The statute also provides that the remedy against the government under the FTCA, when available, shall be the exclusive remedy for malpractice suits.

Upon the Attorney General's certification that defendants were acting within the scope of their employment, the MMIA permits the Attorney General to remove lawsuits from state to federal courts and substitute the United States as the defendant in the actions, with all provisions of the FTCA applying.

In addition to making the FTCA the vehicle for medical malpractice actions, the MMIA also protects defense medical personnel in situations in which the FTCA does not apply. The MMIA states that if a remedy against the United States is not available the case is to be remanded to state court. Section 1089(f) of the MMIA permits the head of the agency concerned to "hold harmless or provide liability insurance" to defense medical personnel acting in the scope of their duties while assigned to a foreign country, or working for a non-federal "department, agency or instrumentality," or if the circumstances are "likely to preclude the remedies of third persons against the United States" under the FTCA.
The legislative history and plain language of the MMIA combine to show Congress' dual purpose in enacting the statute: to protect defense medical personnel from the perils of malpractice litigation and to ensure worthy claimants of adequate compensation. There is confusion, however, over the application of the MMIA in situations where the United States is excluded from liability by section 2680 of the FTCA.

II. APPROACHES TO APPLICATION OF THE MMIA IN CONJUNCTION WITH THE FOREIGN COUNTRY EXCEPTION OF THE FTCA

The Ninth and Eleventh Circuits have held that, because the FTCA is inapplicable by its own terms to suits arising in foreign countries, the physician remains liable for any damages awarded in such a suit. These decisions hold that when the foreign country exception makes the FTCA inapplicable, district courts have no jurisdiction to remove cases from state court under section 1089(c) of the MMIA, and cannot substitute the United States as the proper party defendant. Although physicians remain liable for malpractice, they are spared any financial loss by the insurance or indemnification provided under section 1089(f) of the MMIA.

1089(a) of the MMIA and 1346(b) of the FTCA substitute the United States as the defendant in any suit against the physician, with the claimant's "exclusive" remedy coming under the FTCA. Unlike his stateside colleagues, however, a physician who is charged with malpractice in England or Germany is not so clearly covered by the MMIA because the United States cannot be sued for his tort under the FTCA. See supra notes 5-8 and accompanying text.

41. See Smith v. Marshall, 885 F.2d 650, 653-54 (9th Cir. 1989).
42. See Newman v. Soballe, 871 F.2d 969, 970 (11th Cir. 1989).
43. See Marshall, 885 F.2d at 655; Newman, 871 F.2d at 972-73. In Newman, the court noted that the legislative history of the MMIA demonstrates that the immunity conferred by the 'exclusive remedy' language of subsection (a) was limited to the reach of the FTCA and that where the FTCA did not extend, military physicians would continue to be susceptible to personal suit and would be liable for malpractice judgments rendered against them as individuals.” Id. at 972-73. The court reasoned that Congress chose to protect these individuals with insurance or indemnity under section 1089(f) because the FTCA, by virtue of 28 U.S.C. § 2680(k), [the foreign country exception], . . . did not extend jurisdiction in their situation.” Id. at 973. The Ninth Circuit concluded that section 1089(f) of the MMIA must cover malpractice suits arising in foreign countries no matter where they are brought, for applying it only to suits brought in foreign courts renders the section worthless. See Marshall, 885 F.2d at 652-53. This is not entirely correct, because insurance provided by section 1089(f) is needed in some instances to protect physicians assigned to private hospitals. See infra notes 63-67 and accompanying text. The Ninth Circuit’s interpretation of section 1089 of the MMIA runs counter to Congressional intent only in that it is unduly narrow. See generally N. Singer, 2A Sutherland Statutory Construction § 46.05 (1984) (describing “whole statute” analysis). Although ultimately reaching the correct conclusion, the Ninth Circuit, like the Fifth Circuit, has also interpreted section 1089(f) in an unreasonably constricted fashion.
44. See Newman, 871 F.2d at 977-78. In Marshall, the suit was in district court on account of diversity. See Marshall, 885 F.2d at 651.
45. See Smith v. Marshall, 885 F.2d 650, 656 (9th Cir. 1989); Newman v. Soballe, 871 F.2d 969, 970, 972-73 (11th Cir. 1989).
46. See Marshall, 885 F.2d at 653; Newman, 871 F.2d 975-76. The Tenth Circuit has taken a similar position regarding the purpose of section 1089(f). In Jackson v. Kelly,
The Fifth Circuit, however, has interpreted section 1089 to render government personnel immune from all medical malpractice actions. Under this approach, the claimant's exclusive remedy is through the FTCA.\(^ {47}\) If the claimant cannot recover against the United States because of the foreign country exception of the FTCA, the cause of action is dismissed, leaving the claimant without a judicial remedy.\(^ {48}\)

III. APPLICATION OF THE MMIA TO MALPRACTICE CLAIMS ARISING IN A FOREIGN COUNTRY

A. The Dual Intent of Congress

The Ninth and Eleventh Circuits correctly interpret the MMIA in light of its purpose and legislative history. Both circuits acknowledge Congress' intent to provide claimants adequate compensation as well as to protect medical personnel.\(^ {49}\) The Fifth Circuit's approach, however, is based on an erroneous interpretation of the MMIA. In \textit{Powers v. Schultz},\(^ {50}\) the Fifth Circuit asserted that the MMIA's legislative history indicates that Congress intended the statute to afford medical personnel "an immunity from civil suit and personal liability for acts of an alleged medical malpractice..."\(^ {51}\) The court reasoned that allowing the claimant to sue the physician individually "would tend to vitiate this purpose in most [sic] all medical malpractice cases in which the United States is immune from suit under the FTCA."\(^ {52}\) This interpretation, the court added, could not "be reconciled with the intent and purposes of the Act to grant... blanket immunity."\(^ {53}\)

\(^ {47}\) 557 F.2d 735 (10th Cir. 1977), the claimant alleged malpractice by a military physician stationed at an Air Force hospital in England. \textit{See id.} at 736. Although the MMIA was inapplicable because the cause of action accrued before its enactment, the court looked to it for guidance in reaching its decision. \textit{See id.} at 740. The court asserted that: Granting [the physician] official immunity would not only make 10 U.S.C. § 1089(f) superfluous, it would also contravene one of Congress' aims in enacting section 1089(f) in its present form. Instead of granting military medical personnel practicing in foreign countries absolute immunity from suits for acts within the scope of their employment, Congress elected to have the government protect them through indemnification or insurance. ... [S]ection 1089(f) is premised on the liability of military medical personnel in the first instance. \textit{Id.} at 740-41.


\(^ {49}\) \textit{See id.} at 298. In \textit{Powers}, the government removed the suit to federal court under section 1089(c) of the MMIA, and substituted itself for the physician as the proper party defendant under section 1089(a). \textit{See id.} at 295-96. The district court granted the government's motion to dismiss based on the United States' immunity to suits arising in a foreign country. \textit{See id.} The Fifth Circuit's affirmance left the claimant without a remedy at law. \textit{See id.} at 298.

\(^ {50}\) \textit{See Smith v. Marshall}, 885 F.2d 650, 653 (9th Cir. 1989); Newman v. Soballe, 871 F.2d 969, 972-73 (11th Cir. 1989).

\(^ {51}\) \textit{Id.} at 297 (quoting House Report 333, supra note 18, at 2).

\(^ {52}\) \textit{Id.} at 297.

\(^ {53}\) \textit{Id.}
Contrary to the Fifth Circuit's finding, a careful examination of the legislative history of the MMIA reveals that Congress intended to protect medical personnel, but not at the expense of claimants' right to seek a judicial remedy. Therefore, the legislative history suggests a different conclusion from that reached in Powers.

Congress did not select the FTCA as the scheme of compensation under the MMIA with the intention to divest potential claimants of their causes of action. Instead, the FTCA was selected over other proposed schemes because it was the least costly approach. Moreover, according to the Supreme Court, legislation does not pursue its purposes "at all costs." Rather, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice . . . ." Legislative intent is frustrated when courts assume that "whatever furthers the statute’s primary objective must be the law." In passing the MMIA, Congress also sought to ensure adequate compensation for legitimate claimants. Powers, by dismissing the cause of action, ignored this concern.

1. Section 1089(f) of the MMIA Protects Medical Personnel When the FTCA Does Not Apply

Powers argued that section 1089(f) provides indemnity or insurance to protect medical personnel only in the event that the malpractice suit is brought in a foreign country. Nothing in the legislative history, however, suggests such an interpretation. In fact, both the House and Senate reports state that section 1089(f) is intended to provide protection where the FTCA is not applicable.

54. See supra notes 29-40 and accompanying text.
55. Before Congress rendered the FTCA one of the possible solutions for malpractice actions, it rejected several alternative approaches to malpractice protection. See Senate Report 1264, supra note 18, at 4447-48. Among those considered were indemnification programs and special insurance coverage. See id. Congress settled on the FTCA because “[t]he statutory framework [was] already in place” and it was the “least costly approach.” See id. at 4447. In sum, Congress concluded that “extending protection through the Federal Tort Claims Act [was] simple, inexpensive, and effective.” Id. at 4448.
57. Id. at 526.
58. Id. (emphasis in original).
59. See supra note 32 and accompanying text.
60. See Powers v. Schultz, 821 F.2d 295, 297 (5th Cir. 1987).
61. See Newman v. Soballe, 871 F.2d 969, 975 (11th Cir. 1989). Section 1089(f) merely states that insurance may be provided if “such person is assigned to a foreign country.” 10 U.S.C. § 1089(f) (1988). It does not qualify the applicability of the provision on where the suit is brought.
62. The Senate report states: The Federal Tort Claims Act does not apply to actions arising in a foreign country. Also when a medical personnel is assigned to other than a federal department . . . he may not be covered under the [FTCA]. Subsection (f) authorizes the appropriate Secretary to provide protection through indemnification or insurance to medical personnel in those situations.
An explanation of other applications of section 1089(f) further undermines the Powers reasoning. Section 1089(f) states that it applies when medical personnel are "detailed for service with other than a Federal department, agency, or instrumentality." This clause protects military physicians sued for malpractice while working in private hospitals. Depending on a particular state’s borrowed servant doctrine, these physicians could act within the scope of their duties, yet simultaneously not be employees of the United States for purposes of respondeat superior. According to section 1346(b) of the FTCA, the government incurs liability only for torts of its employees “under circumstances where the United States, if a private person, would be liable to the claimant.” Under the “power of control standard,” a master who exercises control over a servant when the negligent act occurs is liable to the claimant. Consequently, in the states that employ this standard, physicians working in private hospitals are liable directly for malpractice because the FTCA does not apply. Section 1089(f) of the MMIA protects the physician by providing malpractice insurance or indemnifying her under these circumstances.

Furthermore, section 1089(f) applies to situations that are “likely to preclude the remedies of third persons against the United States.” This broad language implies that Congress intended that the insurance provision be flexible enough to cover unique situations that might escape FTCA coverage.

Thus, a full examination of section 1089(f) demonstrates that Con-

Senate Report 1264, supra note 18, at 4451.

The House report asserts:

[T]he bill would provide coverage through the Secretary of Defense for certain circumstances not included within the scope of the Federal Tort Claims Act, such as incidents arising in a foreign country or possibly in other than a Federal agency or institution where military or civilian personnel may be assigned. House Report 333, supra note 18, at 4; see also Smith v. Marshall, 885 F.2d 650, 653 (9th Cir. 1989) (section 1089(f) provides protection where FTCA does not apply); Newman v. Soballe, 871 F.2d 969, 974-75 (11th Cir. 1989) (same); Jackson v. Kelly, 557 F.2d 735, 740-41 (10th Cir. 1977) (same).


64. Compare Afonso v. City of Boston, 587 F. Supp. 1342, 1347 (D. Mass. 1984) (apply Massachusetts borrowed servant doctrine based on power of control standard, hospital was master for purposes of respondeat superior) with Green v. United States, 709 F.2d 1158, 1164 (7th Cir. 1983) (under Wisconsin borrowed servant doctrine, United States remained master for purposes of respondeat superior because it was primary beneficiary of physician’s residency).


66. See generally 1 C. LaBatt, Master and Servant 170-220 (1913) (discussing master-servant relationship).

67. See Afonso, 587 F. Supp. at 1347.

68. 10 U.S.C. § 1089(f) (1988). Section 1346(b) of the FTCA describes these persons as those with claims against United States employees for tortious acts committed while in the scope of their employment. See 28 U.S.C. § 1346(b) (1982).
gress sought to provide medical malpractice insurance for medical personnel subject to suits under the borrowed-servant doctrine. Congress also intended to offer insurance for suits brought against such personnel in foreign countries, or for any other situation "likely to preclude a remedy" under the FTCA. Moreover, Congress authorized automatic assumption of liability by the government for medical personnel who are covered by the FTCA. Therefore, courts should not infer that Congress would fail to provide any coverage at all for claims arising overseas that are brought in the United States.

This misconception about the application of section 1089(f) encourages claimants to file lawsuits in foreign countries, compelling the United States to pay any judgment against the physician. Ironically, this contradicts Congress' very purpose in enacting the foreign country exception: to avoid subjecting the United States to "liabilities depending upon the laws of a foreign power." Rather, Congress intended section 1089(f) to cover malpractice actions arising in foreign countries regardless of where the actions were brought.

2. The FTCA Must Provide a Remedy for Suits Removed Under the MMIA.

The Powers interpretation of the removal clause in section 1089(c) of the MMIA is also suspect. Interpreting section 1089(c) with section 1089(a), Powers concluded that, under 1089(c), all that is necessary for the suit to be removed to the district court is that the alleged negligence occur while the physician is in the scope of his employment. Suits should not be removed under 1089(c), however, unless a remedy against the United States is available. Powers failed to take into account the jurisdictional requirements of section 1346(b) of the FTCA. Indeed, sec-

69. See supra notes 63-67 and accompanying text.
70. See supra notes 60-62 and accompanying text.
71. See supra note 68 and accompanying text.
72. See supra notes 36-37 and accompanying text.
73. As one court noted:

[It is illogical to think that the United States would be willing to pay out claims for malpractice suits filed in the United States when the military physician is stationed stateside, and willing to pay out claims for suits filed in a foreign country when the physician is stationed overseas, but would be unwilling to pay out those same claims if filed in the United States when the physician acted while assigned overseas.

75. Section 1089(c) states in part that:

Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed [from a respective State court] is one in which a remedy by suit within the meaning of [section 1089(a)] is not available against the United States, the case shall be remanded to the State court.

76. See Powers v. Schultz, 821 F.2d 295, 298 (5th Cir. 1987).
tion 1089(a) qualifies the remedy by suit as one provided by section 1346(b), which in turn is dependent upon the exclusions found in section 2680 of the FTCA. When all three sections are considered together, it is clear that Congress intended the remedy under section 1089(a) of the MMIA to be not for any tortious cause of action, but only for causes of action that can be pursued under the FTCA.

Powers also erroneously relied on Jones v. Newton as precedent. The facts in Jones were quite different from those in Powers. In Jones, the claimant sued the United States under the FTCA and eventually lost the case on the merits. Only after the verdict was the claimant denied remand of the case to the state court to proceed against the physician. Unlike Powers, the circumstances of the case fell squarely within the requirements of the MMIA because the alleged malpractice occurred in the United States while the physician was acting within the scope of his employment. The claimant's only recourse was suit against the United States under the FTCA. Because the claimant lost the case, it was the end of the matter, and the court properly denied the motion for remand. Jones attempted to get a second bite of the proverbial apple by suing the physician in state court after being defeated in the federal system. Moreover, by moving for remand after the adjudication on the mer-

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77. See 10 U.S.C. 1089(a) (1988); 28 U.S.C. 1346(b) (1982). In short, according to the plain wording of the Act, if the plaintiff has no remedy against the United States under the FTCA, the suit is remanded to the state court.

Section 1346(b) of the FTCA lists who can bring suit against the United States, and under what conditions. It states, moreover, that any suit within the jurisdiction of the FTCA is “subject to the provisions of chapter 171” of title 28. Chapter 171 of title 28 contains the bulk of the FTCA. Section 2680 of the FTCA, which contains the exclusions through which Congress maintained sovereign immunity for the United States, is within Chapter 171. See 28 U.S.C. § 2680. Consequently, if an exclusion under section 2680 is applicable, there is no remedy to be had under the FTCA. See id.

78. See 10 U.S.C. § 1089(a) (1988); 28 U.S.C. §§ 1346(b), 2680 (1982). Only after denying remand of the suit to the state court did the Powers court take into account the provisions of section 2680 by dismissing the cause of action against the United States. See Powers v. Schultz, 821 F.2d 295, 298 (5th Cir. 1987). This violates another basic rule of statutory interpretation, in that “specific words within a statute... may not be read in isolation of the remainder of that section or the entire statutory scheme.” Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987); accord United States v. Morton, 467 U.S. 822, 828, (Supreme Court does not “construe statutory phrases in isolation”, rather, it “read[s] statutes as a whole”).

79. 775 F.2d 1316 (5th Cir. 1985). The Powers court stated that when “there can be no recovery against the United States, the plaintiff has reached the end of the line.” Powers v. Schultz, 821 F.2d 295, 298 (5th Cir. 1987) (quoting Jones v. Newton, 775 F.2d 1316, 1318 (5th Cir. 1985)).

80. See Jones v. United States, 729 F.2d 326, 327-28 (5th Cir. 1984). The claimant was the wife of a serviceman who was fatally injured in a motorcycle crash off base in Texas. See id. at 327.

81. See Jones v. Newton, 775 F.2d 1316, 1318-19 (5th Cir. 1985).

82. See Newman v. Soballe, 871 F.2d 969, 975 (11th Cir. 1989).


84. See Jones v. Newton, 775 F.2d 1316, 1318-19 (5th Cir. 1985); see also supra note 37 and accompanying text (discussing procedure under 1089(c)).
its, the claimant violated the plain wording of section 1089(c) of the MMIA, which requires such a motion to be made "before a trial on the merits." \(^8\)

B. **Dismissing a Cause of Action without Providing a Remedy Violates the Due Process Clause**

By dismissing a cause of action without affording the claimant an opportunity for a hearing on the merits, *Powers* ran afoul of the due process clause of the fifth amendment. \(^8\) The Supreme Court has asserted that a state tort cause of action is a "species of property" protected by the due process clause. \(^8\) Consequently, there are "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case." \(^8\) This is not an unlimited right, however, and can only be enforced "if litigation offers the only effective means, if not the exclusive means, of resolving the dispute at hand." \(^8\) In other words, the existence of an effective alternative scheme of recovery precludes the need for litigation, and eliminates possible due process problems. \(^9\)

In *Boddie v. Connecticut*, \(^9\) the Supreme Court, in waiving the plaintiff's filing fee for a divorce action, \(^9\) held that because the State controls the divorce mechanism and no one can be divorced outside of the judiciary system, denial of court access excludes the plaintiff "from the only forum effectively empowered" to grant her a divorce. \(^9\) In *United States v. Kras*, \(^4\) however, the Court upheld a filing fee for bankruptcy on the grounds that, unlike in *Boddie*, where litigation is the only means of settling the dispute, "bankruptcy is not the only method available to a

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85. See 10 U.S.C. § 1089(c) (1988); see also Newman v. Soballe, 871 F.2d 969, 975 (11th Cir. 1989) (claimant brought suit after trial on merits).
86. See U.S. Const. amend. V.
87. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). The due process clause protects "civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Id. at 429.
90. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Supreme Court held that "[t]he legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain". Id. at 375-76.
91. Id.
92. The plaintiff in *Boddie* could not afford to pay the filing fee because she was indigent. See id. at 372.
93. Id. at 376.
debtor for the adjustment" of his debts. Presumably, he could work out some type of payment schedule with his creditors.

Like the plaintiff in Boddie, malpractice claimants who are denied recovery under the FTCA do not have another statutory scheme that offers them compensation. Their only remedy is through the judicial process. In order to legitimately restrict their access to the courts, the government must have a "countervailing . . . interest of overriding significance", because "having made access to the courts an entitlement or a necessity, the [government] may not deprive someone of that access unless the balance of [government] and private interests favors the government scheme." Congress has a strong interest in protecting medical personnel assigned overseas from malpractice actions. This interest, however, is satisfied by the insurance protection provided by section 1089(f) of the MMIA. The presence of this less restrictive means tips the balance of interests in favor of maintaining the cause of action for the claimant. Consequently, the Powers interpretation of the MMIA violates the claimant's fifth amendment rights.

CONCLUSION

With the MMIA, Congress averted a potential crisis within the medical ranks of the military. Yet, when courts apply the MMIA to a malpractice suit and then dismiss the action because of the foreign country exception, they act in a manner contrary to the clear intent of Congress to protect claimants as well as physicians. Under these circumstances, the claimant should be allowed to bring suit against the defendant medical personnel, with the latter protected by government-supplied insurance. Only then is the intent of Congress satisfied.

Bruce G. Hart, Jr.

95. See id. at 445.
96. See id.
98. See supra note 29 and accompanying text.
99. See supra notes 60-74 and accompanying text.