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Federal Tort Claims Act - Waiver of Sovereign Immunity

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FEDERAL TORT CLAIMS ACT—WAIVER OF SOVEREIGN IMMUNITY—The United States Supreme Court held that the Federal Tort Claims Act's exception to its waiver of sovereign immunity for claims arising in a "foreign country" includes claims arising on the continent of Antarctica.

Smith v. United States, 113 S. Ct. 1178 (1993).

John Emmett Smith ("decedent"), the spouse of the Petitioner, Sandra Jean Smith ("Smith" or "Petitioner"), was a carpenter working at McMurdo Station, Antarctica, for a construction company under contract with the National Science Foundation ("NSF").[1] While taking a recreational hike near McMurdo Station with two companions, the decedent wandered off the marked path, fell into a crevasse in the ice and died of exposure.[2] Smith brought a wrongful death action against the United States under the Federal Tort Claims Act ("FTCA").[3]

The FTCA provides for a waiver of the federal government's sovereign immunity for tortious acts or omissions committed by the United States.[4] The FTCA also grants the United States district courts exclusive jurisdiction over tort suits against the United States.[5] However, the FTCA's waiver of sovereign immunity is not

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1. Smith v. United States, 113 S. Ct. 1178 (1993). The National Science Foundation ("NSF") is an agency of the United States and its employees are considered federal employees for the purposes of the Federal Tort Claims Act. Smith v. United States, 702 F. Supp. 1480, 1483 (D. Or. 1989). The decedent was employed by ITT Antarctic Services, which was under contract to provide construction services to the NSF in Antarctica. *Smith*, 702 F. Supp. at 1483.

2. *Id.* at 1484. During the initial part of the hike the party followed a route that had been flagged, but later departed from the flagged route. *Id.* After deviating from the flagged route, the decedent and his companions encountered an obvious crevasse, and at another point in the walk two members of the party sank into snow above their knees. *Id.* The party continued on until the decedent and another member of the party suddenly disappeared from sight when they fell into a crevasse. *Id.* The decedent died as a result of injuries sustained from the fall and exposure. *Id.*

3. *Smith*, 113 S. Ct. at 1180. The FTCA is comprised of the following sections of title 28 of the U.S. Code: 1346(b), 1402(b), 2401(b), and 2671-2680. Each section is discussed below.

4. Section 2674 of the FTCA provides that: "[t]he 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 judgement or for punitive damages." 28 U.S.C. § 2674 (1989).

5. Section 1346 of the FTCA provides that:

Subject to the provisions of chapter 171 of this title the district courts, together

absolute, as the FTCA does not apply to a number of situations including claims arising in a foreign country.[6] The district court dismissed the suit on the grounds that the court lacked subject

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with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for personal 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.

28 U.S.C. §§ 1346(a) (Supp. 1993) and (b) (1976).

6. Section 2680 of the FTCA limits the application of the FTCA as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any 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.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claims arising, on or after the date of the enactment of this proviso out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

28 U.S.C. § 2680 (1965 and Supp. 1993).

matter jurisdiction stating, "[t]his court finds nothing in the FTCA that would indicate that Congress intended the FTCA to apply to acts or omissions which arose in Antarctica."[7] The judgment of the district court was affirmed by the Ninth Circuit Court of Appeals.[8] Upon a grant of certiorari, the ruling of the circuit court was upheld by the United States Supreme Court.[9]

The Court[10] viewed the controlling issue as, whether under the FTCA, Antarctica is a foreign country, and treated the question as one of statutory interpretation.[11] The majority opinion pursued three primary lines of inquiry to arrive at its decision: (1) an examination of the language of the FTCA, (2) a review of the legislative history to discern congressional intent, and (3) reliance on the presumption against extraterritorial application of United States statutes.[12]

The Petitioner argued that the purpose of the foreign country exception is to avoid subjecting the government of the United States to the laws of foreign countries.[13] The Petitioner contended that the foreign country exception is inapplicable because Antarctica has no civil law and that the conventional choice of law doctrine required the application of Oregon law to her claim.[14] While the Court conceded that Antarctica does not have civil law, it found that excluding Antarctica from the foreign country exception would be inconsistent with the language of the statute.[15]

The majority noted that the FTCA offers no definition of the term "country" and, therefore, consideration should be given to the ordinary meaning of the term. The Court noted that the first definition of country appearing in the dictionary defines the word as a region or tract of land.[16] This definition supported the Court's

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7. *Smith*, 702 F. Supp. at 1481. Smith brought the suit in the District of Oregon, the district in which Smith resided. *Id.* at 1482.

8. Smith v. United States, 953 F.2d 1116 (9th Cir. 1991). This decision contained a dissenting opinion in which Judge Fletcher argued that there was subject matter jurisdiction. *Smith*, 953 F.2d at 1121.

9. *Smith*, 113 S. Ct. at 1178.

10. *Id.* at 1180. (Rehnquist, C.J., joined by White, Blackmun, O'Connor, Scalia, Kennedy, Souter, and Thomas, J.J.) *Id.*

11. *Id.*

12. *Id.* at 1181-83.

13. *Id.* at 1181.

14. *Smith*, 113 S.Ct. at 1181.

15. *Id.* at 1180. The Court readily admitted that Antarctica does not have its own tort law when the Court described the continent as " a sovereignless region without civil tort law of its own." *Id.*

16. *Id.* at 1181 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 609 (2d ed. 1945)).

notion that the foreign country exception to the FTCA's waiver of sovereign immunity applies to Antarctica, regardless of whether there is a recognized government.[17]

The language of the FTCA concerning jurisdiction and venue was also used by the Supreme Court to support its conclusion that Antarctica was a "country" for the purposes of the Act.[18] The Court pointed out that section 1346(b) contains a choice of law clause which states that the United States would be liable to the claimant "in accordance with the law of the place where the act or omission occurred."[19] However, the Court was of the opinion that this clause does more than just determine choice of law, it also determines the limits of the jurisdiction conferred by the FTCA.[20] The majority arrived at this conclusion by reasoning "[i]f Antarctica was not a "foreign country," and for that reason included within the FTCA's coverage, 1346(b) would instruct the courts to look to the law of a place that has no law in order to determine the liability of the United States—surely a bizarre result."[21]

The venue section of the FTCA was also used by the Court to support its holding that Antarctica is a "foreign country" for purposes of applying the FTCA.[22] Because the FTCA provides venue in either the location where the claim arose, or the judicial district where the plaintiff resides, the Court determined that if Antarctica was not included in the foreign country exception, a situation could arise where a foreigner injured in Antarctica would be provided a claim under the FTCA but no venue in which to bring the claim.[23] The Court concluded that it was unlikely that Congress would have intended such a result.[24]

The Supreme Court looked to its decision in *United States v.*

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17. *Id.* at 1181.

18. *Smith*, 113 S. Ct. at 1181-83.

19. *Id.* See note 6 for the complete text of § 1346(b) of the FTCA.

20. *Smith*, 113 S. Ct. at 1182.

21. *Id.*

22. *Id.* at 1182. Section 1402 (b) provides that "claims may be prosecuted only in the judicial district where the plaintiff resides or where the act or omission complained of occurred." 28 U.S.C. § 1402(2)(b) (1976).

23. *Smith*, 113 S. Ct. at 1182.

24. *Id.* The Court quoted Brunette Machine Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 710 (1972), wherein the Court stated that "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other." *Brunette Machine Works Ltd.*, 406 U.S. at 710. *Brunette* was a patent infringement suit which addressed the issue of federal venue laws concerning suits brought against aliens. *Id.* at 706.

Kubrick[25] to support the proposition that since the FTCA is a waiver of the United States government's sovereign immunity, the waiver should not be broadly construed.[26] According to the Court, construing the foreign country exception to the FTCA to exclude claims for torts committed in Antarctica was consistent with *Kubrick*.[27]

Finally, the majority discussed the traditional presumption against extraterritorial application of United States statutes as support for its conclusion that suits for torts arising in Antarctica were barred by the foreign country exception to the FTCA.[28] The Court also relied on *United States v. Spelar*,[29] to support the contention that Congress intended, by the foreign country exception, to bar suits arising in foreign countries.[30] The Court said that *Spelar* stood for the notion that the language and purpose of the FTCA clearly barred extraterritorial application of the statute's waiver of sovereign immunity.[31]

Justice Stevens was the sole dissenter to the majority opinion, and challenged the majority's three main arguments.[32] Justice Stevens relied heavily on the historical application of the FTCA, as well as the language of the statute, to conclude that the FTCA's foreign country exception to the waiver of sovereign immunity did

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25. 444 U.S. 111 (1979).

26. *Smith*, 113 S. Ct. at 1183. The case of *Kubrick*, 444 U.S. at 111, was a medical malpractice action brought against the United States, which interpreted the statute of limitations provision of the FTCA. *Id.* The Court quoted *Kubrick*, which stated on the subject of construing the FTCA: "We should also have in mind that the Act waives the immunity of the United States and that . . . we should not take it upon ourselves to extend the waiver beyond what Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress has intended." *Smith*, 113 S. Ct. at 1183 (quoting *Kubrick*, 444 U.S. at 117).

27. *Smith*, 113 S. Ct. at 1183.

28. *Id.* The Court cited the case of EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) to support the proposition that doubts as to the extraterritorial application of statutes should be resolved in favor of a non-extraterritorial application of the statute. *Arabian American Oil Co.*, 111 S. Ct. at 1230.

29. 338 U.S. 217 (1949). This case was the only case prior to the subject case in which the United States Supreme Court construed the foreign country exception to the FTCA's waiver of sovereign immunity. *Spelar*, 338 U.S. at 217. See notes 84-93 and accompanying text.

30. *Smith*, 113 S. Ct. at 1183.

31. *Id.* (quoting *Spelar*, 338 U.S. at 222). In a discussion of the presumption against extraterritorial application of the FTCA, the Court said, "[t]hat presumption, far from being overcome here, is doubly fortified by the language of this statute and the legislative purposes underlying it." *Id.*

32. *Smith*, 113 S. Ct. at 1184-89 (Stevens, J., dissenting).

not apply to Antarctica.[33] The dissent rejected the majority's broad construction of the FTCA's foreign country exception to the waiver of sovereign immunity.[34] Justice Stevens argued that the proper construction of the FTCA's foreign country exception applied only to territories subject to the jurisdiction of a foreign country.[35]

The dissent viewed the majority's opinion as restricting the FTCA's waiver of sovereign immunity to the territorial jurisdiction of the United States.[36] Objecting to the majority's narrow construction, Justice Stevens argued that the FTCA does not contain any territorial limit to its coverage.[37] Justice Stevens contended that congressional intent for an extraterritorial application of the Act is evidenced by the fact that section 2680(d)[38] contains a specific exclusion for claims brought under the Suits in Admiralty Act[39] or the Public Vessels Act.[40] He argued that such an exclusion would be superfluous unless the FTCA extends to the "sovereignless expanses of the high seas."[41] While he conceded that evidence of congressional intent to apply the Act's waiver of sovereign immunity to the high seas did not necessarily mean that it also applied to Antarctica, he regarded this as sufficient to rebut the majority's argument that the geographic reach of the FTCA should be narrowly constructed because of the presumption against extra-

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33. *Id.* at 1184.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Smith*, 113 S. Ct. at 1184 (Stevens, J., dissenting). Justice Stevens wrote, "[t]he FTCA includes both a broad grant of jurisdiction to the federal courts in section 1346(b) and a broad waiver of sovereign immunity in section 2674. Neither of these sections identifies any territorial limit on the coverage of the Act." *Id.* See note 5 for the text of § 1346(b) and note 6 for the text of § 2680.

38. Section 2680 of the FTCA provides: "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (d) Any 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." 28 U.S.C. § 2680 (1965 and Supp. 1993).

39. The Suits in Admiralty Act controls the limits of liability and remedies for suits in admiralty brought by or against vessels or cargoes of the United States. 46 U.S.C. app. §§ 741-752 (1993).

40. The Public Vessels Act provides procedures, remedies, and limitations on liability for suits in admiralty against the United States for damages caused by public vessels or for towage or salvage services. 46 U.S.C. app. §§ 781-790 (1993).

41. *Smith*, 113 S. Ct. at 1185 (Stevens, J., dissenting). Justice Stevens further supported this point by citing United States v. Continental Tuna Corp., 425 U.S. 164 (1976), wherein the Court noted that claims for maritime negligence which could not be brought under the Suits in Admiralty Act or the Public Vessels Act could be maintained under the FTCA. *Smith*, 113 S. Ct. at 1185 (Stevens, J., dissenting).

territorial application of federal statutes.[42]

Justice Stevens characterized the FTCA's waiver of sovereign immunity as "sweeping" and indicative of congressional intent to extend the coverage of the FTCA beyond the territorial boundaries of the United States.[43] The dissent stated that in order to give the statute the broad application that Congress intended, any exceptions to the waiver of sovereign immunity should be construed narrowly.[44]

The dissenting opinion also rejected the Court's argument that Antarctica should be included under the FTCA's foreign country exception because there is no law in Antarctica.[45] Justice Stevens stated that under the doctrine of personal sovereignty, which is well recognized in American law, the proper law to apply is the law of the State of Oregon.[46]

Justice Stevens was also not swayed by the Court's contention that the venue provisions of the Act indicate that Congress did not intend the FTCA to waive sovereign immunity for torts arising in Antarctica.[47] He interpreted Congress' failure to mention Antarctica within the FTCA's foreign country exception as evidence that Congress simply failed to consider the possibility, and not that Congress meant to prohibit a cause of action under the FTCA for torts arising in Antarctica.[48]

The doctrine of sovereign immunity has its roots in the common law of England and simply means that the government is not liable when acting in its official capacity unless it consents to be sued.[49]

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42. *Id.* at 1185-86.

43. *Id.* at 1186.

44. *Id.* Justice Stevens cited United States v. Nordic Village, 112 S. Ct. 1011 (1992), as support for the proposition that exceptions to the FTCA's waiver of sovereign immunity should be construed narrowly. *Smith*, 113 S. Ct. at 1186. In *Nordic Village*, the Internal Revenue Service was sued and prevailed on a defense of sovereign immunity. *Nordic Village*, 112 S. Ct. at 1011. The majority opinion mentioned that the Court had, on occasion, narrowly construed exceptions to waivers of sovereign immunity where it was consistent with the clear intent of Congress, such as in the "sweeping" language of the FTCA. *Nordic Village*, 112 S. Ct. at 1014.

45. *Smith*, 113 S. Ct. at 1187 (Stevens, J., dissenting).

46. *Id.* The dissent cited American Banana Co. v. United States Fruit Co., 213 U.S. 347 (1909), wherein Justice Holmes said: "[n]o 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." *American Banana Co.*, 213 U.S. at 355-56.

47. *Smith*, 113 S. Ct. at 1188 (Stevens, J., dissenting).

48. *Id.* at 1188-89.

49. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE

The doctrine is also recognized in the United States.[50] Until the passage of the FTCA in 1946[51] the only way that an individual could be compensated for a tort committed by the United States government was the passage of a private bill by Congress.[52] The FTCA changed this by providing for civil actions for injuries caused by acts of negligence caused by the United States.[53] However, the FTCA's waiver of sovereign immunity was not absolute as it contained fourteen specific exceptions to the waiver of sovereign immunity, including "acts arising in foreign countries."[54]

An early United States Supreme Court case interpreting the limits to the FTCA's waiver of sovereign immunity was *United States*

TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, v.1 sec. 246 (Rothman Reprints 1969)(1803).

According to Blackstone the essential principle behind sovereign immunity was the notion that the king could do no wrong and that the doctrine meant two things; one was that wrongful conduct could not be attributed to the king in the course of his public affairs, nor was he personally answerable to the people for his conduct. *Id.* This doctrine was based on the idea that to hold the king personally responsible for his public conduct would destroy the independence necessary to govern, and also on the notion that the king governs for the good of the people; therefore, he could do nothing to the prejudice of the people. *Id.*

50. *See* Monaco v. Mississippi, 292 U.S. 313 (1934). In discussing the United States Constitution and the doctrine of sovereign immunity the Court stated:

> [T]here is no express provision that the United States may not be sued in the absence of consent. Clause 1 of section 2 of article 3 extends the judicial power 'to Controversies to which the United States shall be a Party.'. . . But by reason of the established doctrine of the immunity of the sovereign from suit except upon consent, the provision of clause 1 of section 2 of article 3 does not authorize the maintenance of suits against the United States.

Monaco, 292 U.S. at 321 (citation omitted).

51. WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT, ANALYZED AND ANNOTATED 1 (1957). The Federal Tort Claims Act was passed by Congress in 1946 as Title IV of the Legislative Reorganization Act. *Id.*

52. WRIGHT, cited at note 51, at 2. The private bill procedure eventually became cumbersome for Congress. During debate on the Legislative Reorganization Act, Congressman Michner of Minnesota stated: "Congress is overburdened by many local and private matters which divert its attention from national policy making . . . . It serves as a tribunal for the settlement of private claims . . . . Title IV provides for the administrative and judicial adjustment of tort claims against the United States which Congress is poorly equipped to settle." 92 Cong. Rec. 10,048 (1946).

53. WRIGHT, cited at note 51, at 5. The Federal Tort Claims Act provides for civil actions against the United States for money damages, based on injury or loss of property, or for personal injury or death caused by the negligence or wrongful act or omission of government employees while acting within the scope of their employment. *Id.* The Act provides a cause of action in circumstances where the United States, if it were a private person, would be liable to the claimant in accordance with the law of the place were the act or omission occurred. *Id.* The Act's intent was not to create a new cause of action, but was simply to make the United States liable in situations where a private party would be liable. *Id.*

54. 28 U.S.C. § 2680(k) (1965). See note 6.

v. Aetna Casualty.[55] *Aetna Casualty* was a worker's compensation case where the insurer brought suit against the United States under the FTCA.[56] The issue presented was whether an insurance company could bring suit against the United States upon a subrogated claim.[57] The issue required the United States Supreme Court to decide whether the federal "Anti-Assignment" statute[58] applied to claims brought under the FTCA.[59] The Supreme Court decided that the "Anti-Assignment" statute did not apply to claims brought under the FTCA.[60] The Court rejected the government's argument that the FTCA's waiver of sovereign immunity should be narrowly construed.[61] The Court specifically established that the breadth of the FTCA's waiver of sovereign immunity was not to be construed solely upon the doctrine that holds that waivers of sovereign immunity should be narrowly construed.[62]

Two years later, the United States Supreme Court again rejected an opportunity to construe the FTCA's waiver of sovereign immunity narrowly in *United States v. Yellow Cab*.[63] Plaintiffs were taxicab passengers injured in a collision between the cab and a United States mail truck.[64] The passengers sued Yellow Cab, the driver's employer, and Yellow Cab impleaded the United States as a third-party defendant.[65] The United States moved for dismissal based on the contention that suit was not authorized by the FTCA.[66] The

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55. 338 U.S. 366 (1949).

56. *Aetna Casualty*, 338 U.S. at 366.

57. *Id.* at 368.

58. *Id.* at 371-72. The Anti-Assignment statute essentially prohibits assignment of claims against the United States except in certain limited circumstances. *Id.* The current "Anti-Assignment" statute is 31 U.S.C. § 3727 (1989), which states in relevant part: "an assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727 (1983).

59. *Aetna Casualty*, 338 U.S. at 370-72.

60. *Id.*

61. *Id.* at 383. The Court wrote:

> 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 Federal Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Constr. Co.* (citation omitted): "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."

Id.

62. *Id.*

63. 340 U.S. 543 (1951).

64. *Yellow Cab*, 340 U.S. at 544.

65. *Id.*

66. *Id.* at 544-45.

Supreme Court did not find this argument persuasive as it found nothing in the language of the FTCA to support the government's contention.[67] The Court characterized the FTCA's waiver of governmental immunity as "sweeping", and once again rejected a narrow interpretation of the FTCA's waiver of sovereign immunity.[68]

In 1979, the United States Supreme Court interpreted the FTCA's statute of limitations[69] in *United States v. Kubrick*.[70] In *Kubrick*, the respondent had been treated at a Veteran's Administration hospital in 1968 for a leg infection and subsequently suffered hearing loss; he filed suit under the FTCA in 1972.[71] The Supreme Court was faced with the issue of interpreting when a "claim accrues" within the meaning of the FTCA.[72] In its decision, the Court declined to apply the statute of limitations to broaden the FTCA's waiver of sovereign immunity.[73] The Court concluded that the statute of limitations began to run when the respondent became aware of his injury in 1969, and held that the claim was barred by the statute of limitations.[74]

In 1983, the United States Supreme Court, in *Block v. Neal*,[75] interpreted the FTCA's exception to its waiver of sovereign immunity for "claims arising out of misrepresentation."[76] In this case respondent obtained a loan from the Farmers Home Administration ("FHA") for the construction of a house.[77] The contract required the construction to conform to FHA standards and required

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67. *Id.* at 553.

68. *Id.* at 547.

69. Section 2401(b) provides: "[A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim." 28 U.S.C. § 2401(b) (1978 and Supp. 1993).

70. 444 U.S. 111 (1979).

71. *Kubrick*, 444 U.S. at 113. Respondent was informed in January of 1969, by a private physician, that his hearing loss was quite probably caused by his treatment with antibiotics at the Veterans Administration hospital in 1968. *Id.* at 113-14. In June of 1971, respondent was informed by another private physician that the treatment with antibiotics probably caused his hearing loss, and that he should not have been administered antibiotics. *Id.* at 114.

72. *Id.* at 116-17.

73. *Id.* at 117-18. The Court stated, "[w]e should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended. *Id.*

74. *Id.* at 122-23.

75. 460 U.S. 289 (1983).

76. *Neal*, 460 U.S. at 290. Section 2680(h) of the FTCA contains an exception to the waiver of sovereign immunity for any claims arising out of misrepresentation. 28 U.S.C. § 2680(h) (1965 and Supp. 1993). See note 6 for complete text of this provision.

77. *Neal*, 460 U.S. at 291.

the FHA to inspect the work.[78] When respondent moved into the house, she found a number of defects and filed suit against the FHA under the FTCA for failure to properly inspect the house.[79] The issue facing the Court was whether respondent's complaint was one arising out of misrepresentation, and therefore, barred by the FTCA's exception for "claims arising out of misrepresentation."[80] The Supreme Court interpreted the term "misrepresentation" narrowly and found that respondent's complaint was grounded in negligence as well as misrepresentation and allowed the claim.[81] The Court cited *Aetna Casualty*[82] as support for its narrow interpretation of an exception to the FTCA's waiver of sovereign immunity.[83]

The only United States Supreme Court case prior to *Smith v. United States* to interpret the foreign country exception to the FTCA was *United States v. Spelar*.[84] Respondent's decedent was killed during takeoff from an airbase in Newfoundland which was leased and operated by the United States Government.[85] Respondent brought a wrongful death action against the United States under the FTCA.[86] In deciding *Spelar*, the Court relied on the language and legislative history of the FTCA, as well as the Court's prior interpretation of the term "foreign country."[87] Justice Reed wrote for the majority in *Spelar*, and concluded that the language of the FTCA alone was sufficient to define a foreign country as territory subject to the sovereignty of another nation.[88] The Court also cited earlier Supreme Court opinions that held a foreign coun-

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78. *Id.*

79. *Id.* at 292.

80. *Id.* at 293-94.

81. *Id.* at 298-99.

82. 338 U.S. 366 (1949).

83. *Neal*, 460 U.S. at 298.

84. 338 U.S. 217 (1949).

85. *Spelar*, 338 U.S. at 218. Respondent's decedent was an employee of American Overseas airlines and was killed in a plane crash while taking off at Harmon Field, Newfoundland. *Id.* at 218. The airbase was used by the United States pursuant to a ninety-nine year lease between the United States government and the government of Great Britain. *Id.* at 218-19.

86. *Id.* Respondent sued the United States under the FTCA, alleging that the death of her decedent was caused by the United States' negligent operation of Harmon Field. *Id.* The local law that grounded her action was the wrongful death statute of Newfoundland. *Id.* The District Court found that the claim was one "arising in a foreign country" and dismissed the suit for lack of subject matter jurisdiction. *Id.* The Court of Appeals reversed and the Supreme Court granted certiorari. *Id.* at 219.

87. *Id.*

88. *Id.*

try was defined as one within the sovereignty of a foreign nation.[89] The majority opinion in *Spelar* utilized the legislative history of the FTCA as additional support for its position.[90] The Supreme Court relied primarily on discussions relating to proposed drafts of the foreign country exception which were not adopted by Congress.[91] The Court interpreted this history as demonstrating an intention on the part of Congress to avoid subjecting the government of the United States to the laws of a foreign power.[92] The Court also noted that neither the language of the FTCA, nor the legislative history overcame the cannon of construction that holds that United States statutes are normally only applicable within the territorial jurisdiction of the United States.[93] While *Spelar* was the only United States Supreme Court case prior to *Smith v. United States* to interpret the foreign country exception, there have been a number of federal circuit court of appeals cases that have construed the FTCA's foreign country exception.

For example, *Cobb v. United States*[94] presented the question of the interpretation of the FTCA's foreign country exception in the unusual setting of the United States as an occupying power in a foreign land.[95] The claim in *Cobb* arose during the United States

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89. *Id.* at 219 n.5. The Court cited De Lima v. Bidwell, 182 U.S. 1, 180 (1900), wherein the Court quoted Chief Justice Marshall and Justice Story as defining a foreign country as one "exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States." *Id.* (citations omitted).

90. *Spelar*, 338 U.S. at 220-21.

91. *Id.* The Court discussed a 1942 draft considered by the House Committee on Judiciary which exempted "all claims arising in a foreign country in behalf of an alien." *Id.* at 220. The final version of the FTCA did not contain the phrase "in behalf of an alien." *Id.* The Court quoted the following exchange between Assistant Attorney General Francis M. Shea and Congressman Robsion of the House Committee on the Judiciary:

> Mr. Shea . . . Claims arising in a foreign country have been exempted from this bill, H.R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.
>
> Mr. Robsion You mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?
>
> Mr. Shea That is right. That would have to come to the Committee on Claims in Congress.

Id. at 221 (quoting *Draft of the Federal Tort Claims Act, 1942: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 35 (1942)). The Court concluded that this quote supported the notion that the finally adopted coverage of the Act was within the scope of the United States sovereignty. *Spelar*, 338 U.S. at 220-21.

92. *Id.*

93. *Id.* at 222.

94. 191 F.2d 604 (9th Cir. 1951).

95. *Cobb*, 191 F.2d at 605-06. Petitioner was employed by a contractor engaged in

occupation of Okinawa after World War II.[96] Despite the United States occupation of the island, the court determined it to be a foreign country within the meaning of the FTCA, and dismissed the claim for lack of subject matter jurisdiction.[97]

Another case involving the United States' use of foreign land was *Meredith v. United States*,[98] which concerned a tort claim against the United States for acts that occurred within the physical confines of the American Embassy in Bangkok, Thailand.[99] The plaintiff argued that since Congress has the power to punish conduct occurring outside the physical territory of the United States, the claim should not be barred by the FTCA's foreign country exception.[100] The Ninth Circuit Court of Appeals rejected this argument as being contrary to the holding of *Spelar*.[101] The court noted that the tort law of Thailand would presumably be applicable to the premises of the American Embassy and to subject the United States to the laws of a foreign power would be contrary to Congress' intent as interpreted by the United States Supreme Court in *Spelar*.[102]

In 1984, the specific issue of whether the continent of Antarctica is a "foreign country" within the meaning of the FTCA was addressed in the case of *Beattie v. United States*.[103] In a lengthy

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military construction on the Island of Okinawa, and was injured in an automobile accident that was allegedly caused by the negligence of an employee of the United States. *Id.* at 605. Petitioner brought suit under the FTCA for damages. *Id.*

The court noted that subsequent to the United States' conquest of Japan in World War II, the only government in existence on Okinawa was the United States Military Government. *Id.* at 606. The court discussed the issue of whether the United States or Japan held sovereignty over the island and concluded that sovereignty was in a state of "solution." *Id.* at 608. However, the court determined that since the United States had no power to alter the tort law in effect on Okinawa, the tort law in effect was that of Japan, the last sovereign of the island. *Id.* at 609. The court then followed *Spelar*, 338 U.S. at 217, and held that the claim was barred by the FTCA's foreign country exception. *Cobb*, 191 F.2d at 609. The court interpreted *Spelar* as holding that as long as the United States would be subject to the laws of a foreign nation, the claim was barred under the FTCA's foreign country exception. *Id.*

96. *Cobb*, 191 F.2d at 605-06.

97. *Id.* at 611.

98. 330 F.2d 9 (9th Cir. 1964).

99. *Meredith*, 330 F.2d at 10.

100. *Id.*

101. *Id.* at 11. See notes 84-93 and accompanying text.

102. *Meredith*, 330 F.2d at 11.

103. 756 F.2d 91 (D.C. Cir. 1984). This case was a wrongful death action brought against the United States under the FTCA for an airplane crash on the continent of Antarctica. *Beattie*, 756 F. 2d at 93. The plaintiff alleged that the crash was caused by the negligence of United States Navy air traffic controllers stationed in Antarctica, as well as negligent acts on the part of naval officers stationed in Washington, D.C. *Id.*

opinion from which then Judge Scalia dissented, the Court of Appeals, District of Columbia Circuit, concluded that Antarctica was not a foreign country within the meaning of the FTCA.[104]

To determine whether the FTCA was applicable to tort claims arising in Antarctica, the majority opinion in *Beattie* divided the question into three components: subject matter jurisdiction, venue, and choice of law.[105] In addressing the question of subject matter jurisdiction, the court followed the reasoning of *Spelar* to conclude that the purpose of the FTCA's foreign country exception was to avoid subjecting the United States government to the laws of other countries.[106] The circuit court also examined the nature of Antarctica, and the United States' treatment of Antarctica, to determine whether the continent was a foreign country within the meaning of the FTCA.[107] The opinion also noted that a review of a broad range of cases demonstrated that courts have consistently viewed Antarctica as not being a foreign country for the purpose of applying a variety of statutes.[108] Having determined that Antarctica was not a foreign country within the meaning of the FTCA, and therefore, that subject matter jurisdiction did exist, the court next addressed the question of whether the FTCA provided a venue for tort claims arising in Antarctica.[109]

The court determined that the plaintiff's claim involved two claims of negligence, one for acts arising in the United States, and the other for acts arising in Antarctica.[110] Although the court determined that venue was satisfied by the claim of negligence at na-

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 93. The court analyzed the treatment of Antarctica by the United States government and noted that through the Antarctic Treaty of 1959 and subsequent statements of government officials, the United States has consistently reaffirmed the position that it does not recognize any territorial claims of sovereignty to Antarctica. *Id.* The opinion stated simply "Antarctica is not a foreign country; it is not a country at all; it is not under the domination of any other foreign nation or country." *Id.* at 94.

108. *Beattie*, 756 F.2d at 99. For example, the court noted that United States Tax Court held in Larry R. Martin v. Commissioner, 50 T. C. 59 (1968), that Antarctica was not a foreign country within the meaning of the income tax regulations. *Id.* at 98.

109. *Beattie*, 756 F.2d at 100.

110. *Id.* The plaintiff's suit was for wrongful death, alleging negligence on the part of naval officers occurring in the Pentagon, as well as negligence of naval personnel stationed in Antarctica. *Id.* The court viewed the plaintiff's suit as a single cause of action with two separate grounds of relief, stating that the: "[p]laintiffs seek damages for an essentially single wrong . . . They allege against the same defendant two separate grounds for relief . . . Recognizing that there is but a single cause of action, venue under section 1402(b) is satisfied for the entire case by virtue of the headquarters claim." *Id.*

val headquarters, it elected to address the issue of whether venue existed separately for the claim arising in Antarctica.[111] The court noted that even if the Antarctic claim was sued on alone, the District Court of the District of Columbia might well be the most convenient forum since many of the witnesses would be in Washington D.C.[112] The circuit court also was of the opinion that hearing the Antarctic claim in the District of Columbia district court allowed the court to comply with congressional intent and United States Supreme Court precedent.[113]

The *Beattie* court noted that past interpretations of the FTCA's choice of law provision directed the district courts to apply the tort law where the act or omission occurred.[114] The court was of the opinion that the application of the choice of law provision to Antarctica was not addressed by the statute because it directed the court to adopt the law of a place where there is no civil law.[115] Thus, the court decided to treat the choice of law issue as one of first impression.[116]

To support the proposition that District of Columbia law could be applied to a claim arising in Antarctica, the circuit court relied on the principle of international law that allows a nation to exercise jurisdiction over its nationals.[117] The court mentioned that the District of Columbia held a strong interest in resolving the case, and also pointed out that no foreign sovereignty had any competing interest in resolving the case.[118]

The court characterized the government's argument as bifurcating the world into only two areas: foreign countries and the United States.[119] The majority noted that there were obviously other areas where people operate, such as the high seas, outerspace, and Antarctica.[120] The court further noted that while the other non-United States and non-foreign country areas were covered by some law, unless United States law covered the actions of United States citizens in Antarctica, it would become a land with-

111. *Beattie*, 756 F.2d at 104.
112. *Id.*
113. *Id.*
114. *Id.* The choice of law provision of the FTCA is section 1346(b). *Id.* See note 5 for a complete text of this provision.
115. *Id.*
116. *Beattie*, 756 F.2d at 104.
117. *Id.* at 105.
118. *Id.*
119. *Id.*
120. *Id.*

out law.[121] Thus, the court concluded that United States law should be applied to the claim arising in Antarctica.[122]

In *Beattie,* Judge Scalia's dissent relied on the same FTCA venue and choice of law clauses used in the majority opinion to arrive at an opposite conclusion regarding subject matter jurisdiction over claims arising in Antarctica.[123] Judge Scalia characterized the majority's opinion as holding that the word "country" as used in section 2680(k) of the FTCA meant "sovereign state", and if Antarctica was not a sovereign state then the foreign country exception would not apply there.[124] The dissent found little support for this conclusion in the language of the FTCA.[125]

Judge Scalia asserted that if the majority's interpretation of the term "foreign country" was correct, then the venue provision of the FTCA would make no sense because there would be no judicial district in which a suit for negligence arising in Antarctica could be brought by a person residing outside the United States.[126] The dissenting opinion noted that courts normally assume that Congress does not intend to create venue gaps, and by interpreting "foreign country" to include Antarctica no such venue gap would exist.[127]

Judge Scalia also viewed the FTCA's choice of law provision as support for the argument that Congress intended the foreign country exception to include claims arising in Antarctica.[128] Judge Scalia reasoned that since a literal reading of the choice of law provision would direct the court to apply the nonexistent law of Antarctica, then the FTCA does not envision suits for torts occurring in sovereignless regions.[129]

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121. *Beattie,* 756 F.2d at 105.

122. *Id.*

123. *Id.* at 105-130 (Scalia, J., dissenting). Judge Scalia rejected the notion accepted by the majority that the plaintiff's claim was one cause of action containing two claims, one arising in Antarctica, the other arising in Washington D.C. *Id.* In Judge Scalia's view the negligent acts or omissions took place in Antarctica; thus, the claim arose in Antarctica. *Id.*

124. *Id.* at 109.

125. *Id.* at 105-130.

126. *Beattie,* 756 F.2d at 110 (Scalia, J., dissenting). Section 1402(b) of the FTCA provides for venue under the FTCA. 28 U.S.C. § 1402(b) (1976). See note 5.

127. *Id.* By "venue gap", Judge Scalia was referring to situations where a statute would give a plaintiff a claim, but no venue in which to bring suit. *Id.* Judge Scalia also asserted that it was unlikely that Congress would create a venue gap by oversight, as evidenced by the fact that Congress had specifically addressed possible venue gaps in other legislation dealing with Antarctica. *Id.*

128. *Id.* at 111. Section 1346(b) of the FTCA contains the choice of law provision and essentially directs the court to apply the law of the place where the act or omission occurred. *Id.* See note 5 for the complete text of the venue provision.

129. *Id.*

The dissent of Judge Scalia dismissed the legislative history of the FTCA and prior case law as unhelpful in deciding the question of whether Antarctica was a foreign country within the meaning of the FTCA.[130] The dissenting opinion observed that the FTCA was formulated over a long period of time, and there was scant evidence that some of the proposed amendments were ever seriously considered by Congress.[131] Thus, Judge Scalia concluded that the legislative history was of little use in resolving the question at issue.[132] Likewise, Judge Scalia also perceived prior case law as offering little guidance because the FTCA foreign country exception had never been interpreted in the factual setting of a claim arising in Antarctica.[133]

In sum, the state of the case law prior to *Smith v. United States* was that Antarctica was not considered a foreign country within the meaning of the FTCA, as *Beattie* was the only opinion on the matter. Although Judge Scalia's reasoning did not prevail in *Beattie*, much of his reasoning is reflected in Justice Rehnquist's majority opinion in *Smith*.[134]

In the final paragraph of the majority opinion in *Smith*, the Court stated that its conclusion was the same one that the Seventy-Ninth Congress would have reached, had it expressly considered whether Antarctica was within the scope of the FTCA.[135] The statement is purely speculative, as the majority opinion offers little to demonstrate how the Seventy-Ninth Congress may have felt about Antarctica, or whether Congress even implicitly considered the nature of Antarctic when adopting the FTCA. How the Seventy-Ninth Congress would have decided the question in *Smith* remains a complete unknown.

The FTCA was formulated over nearly a thirty year period and was finally passed by Congress in 1946.[136] Considering the level of the United States involvement in Antarctica during this time pe-

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130. *Id.* at 113-18.

131. *Beattie*, 756 F.2d at 113-18.

132. *Id.* at 115.

133. *Id.*

134. *Smith*, 113 S. Ct. at 1178.

135. *Id.* at 1183. The Court said:

> We think these norms of statutory construction have quite likely led us to the same conclusion that the 79th Congress would have reached had it expressly considered the question we now decide: it would not have included a desolate and extraordinarily dangerous land such as Antarctica within the scope of the FTCA.

Id.

136. WRIGHT, cited at note 51, at 5.

riod, it is highly unlikely that Congress even gave a passing thought to tort liability in Antarctica. The United States first involvement in Antarctica was an 1840 expedition by the explorer, Wilkes, who surveyed the coast but did not land.[137] There was then a gap of almost ninety years before any additional American activity concerning the continent occurred.[138] During the period of 1928 to 1935, Admiral Byrd carried out two private expeditions on the Ross Ice Shelf.[139] In 1939, Admiral Byrd launched an official United States expedition that was intended to support a claim, however, no such claim was made.[140] The first permanent settlement by the United States was not established until 1957.[141] This scant level of American involvement with the continent strongly suggests that the Seventy-Ninth Congress probably had no position on tort claims arising in a land that did not even have permanent settlements.

A review of the case law also indicates only one case where the United States Supreme Court addressed Congress's motivation for including the foreign country exception in the FTCA's waiver of sovereign immunity. In *Spelar*, the Court relied upon the congressional history of a never-adopted version of the FTCA to conclude that the purpose of the FTCA's foreign country exception was to avoid subjecting the United States to the laws of another nation.[142] Judge Scalia's dissenting opinion in *Beattie* provides an accurate description of the case law on the issue when he noted that it is not possible to tell whether the courts addressing the issue were concerned with the non-applicability of U.S. law or the applicability of foreign law.[143]

Thus, while the Supreme Court in *Smith* addressed the issue of prior case law and congressional intent, the decision really rested on the language of the FTCA. The Court used the language of the FTCA to support a narrow construction of the FTCA's waiver of

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137. F. M. AUBURN, ANTARCTIC LAW AND POLITICS 62 (1982).
138. *Id.*
139. *Id.*
140. *Id.* at 63-65.
141. *Id.*
142. *Spelar*, 338 U.S. at 220-21.
143. *Beattie*, 756 F.2d at 116 (Scalia, J., dissenting). Judge Scalia stated:

> There is in fact no way of telling whether the non-applicability of United States law or the applicability of foreign law was crucial to the Court's thinking - and indeed it seems highly unlikely that either the *Spelar* court or most other courts cited by the majority had any intent whatever on the point.

Id.

sovereign immunity.

Particularly illuminating of the fragile nature of the majority's argument is the hypothetical applied by the Court to the FTCA's venue and choice of law provisions. The majority noted that if Antarctica is not a foreign country within the meaning of the FTCA, then the possibility exists that a non-United States resident could have a claim but no venue in which to bring the suit.[144] The Court then noted that in general Congress does not intend to create venue gaps.[145] While the occurrence of this hypothetical situation is possible, it is not very likely that the Seventy-Ninth Congress gave a thought to such a remote possibility when drafting the FTCA. In sum, even the language of the FTCA offers little guidance on the question of whether Antarctica should be considered a foreign country for the purposes of the FTCA.

A review of United States Supreme Court decisions construing the limits of the FTCA's waiver of sovereign immunity demonstrates that the Court has, at different times, embraced both narrow and broad constructions of the FTCA's waiver of sovereign immunity. In *Aetna Casualty*[146], decided in 1949, *Yellow Cab*[147], decided in 1951, and the 1983 case of *Block v. Neal*[148], the Court opted for a broad construction of the FTCA's waiver of sovereign immunity. In the 1979 case of *United States v. Kubrick*[149], the Court narrowly construed the FTCA's waiver of sovereign immunity. Therefore, in deciding *Smith*, the Court was faced with conflicting case law on how the FTCA's waiver of sovereign immunity should be construed.

With no clear manifestation of congressional intent, nor a consistent line of prior United States Supreme Court decisions for guidance, the Court found itself faced with a policy decision. That the Court opted for a narrow construction of the FTCA's waiver of sovereign immunity is probably reflective of the current fiscal condition of the United States Government as well as the philosophy of the Court's members. The United States is currently several trillion dollars in debt, and the national debt has become a prominent public concern. The five most recently appointed Justices participating in the decision were nominated by Presidents that are con-

144. *Smith*, 113 S. Ct. at 1182.
145. *Id.*
146. *Aetna Casualty*, 338 U.S. at 383. See notes 55-62 and accompanying text.
147. *Yellow Cab*, 340 U.S. at 547. See notes 63-68 and accompanying text.
148. *Neal*, 460 U.S. at 298. See notes 75-83 and accompanying text.
149. *Kubrick*, 444 U.S. at 117, 118. See notes 70-74 and accompanying text.

sidered conservatives.[150] These factors were likely significant influences on the Court's decision to adopt a conservative approach to exposing the United States Government to tort liability.

James C. Conley

150. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES, ITS BEGINNINGS AND ITS JUSTICES, 1790-1991, 276 (1992). Justices O'Connor, Scalia and Kennedy were appointed by President Reagan, and Justices Souter and Thomas were appointed by President Bush. *Id.*