SUPREME COURT OF THE UNITED STATES

Nos. 03–339 and 03–485

JOSE FRANCISCO SOSA, PETITIONER
03–339 *v.*
HUMBERTO ALVAREZ-MACHAIN ET AL.

UNITED STATES, PETITIONER
03–485 *v.*
HUMBERTO ALVAREZ-MACHAIN ET AL.

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

[June 29, 2004]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

I join in full the Court's disposition of Alvarez's claim pursuant to 28 U. S. C. §1350. See *ante*, at 17–45. As to Alvarez's Federal Tort Claims Act (FTCA or Act) claim, see *ante*, at 4–17, although I agree with the Court's result and much of its reasoning, I take a different path and would adopt a different construction of 28 U. S. C. §2680(k). Alvarez's case against the Government does not call for any comparison of old versus newer choice-of-law methodologies. See *ante*, at 13–15. See generally Kay, Theory into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 525–584 (1983). In particular, the Court's discussion of developments in choice of law after the FTCA's enactment hardly illuminates the meaning of that statute, and risks giving undue prominence to a jurisdiction-selecting approach the vast majority of States have long abandoned. See Symeonides, Choice of Law in the American Courts in 2002: Sixteenth Annual Survey,

51 Am. J. Comp. L. 1, 5–6 (2003) (*lex loci delicti* rule has been abandoned in 42 States).

I

The FTCA renders the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. §2674. The Act gives federal district courts "exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." §1346(b)(1). Congress included in the FTCA a series of exceptions to that sovereign-immunity waiver. Relevant to this case, the Act expressly excepts "[a]ny claim arising in a foreign country." §2680(k). I agree with the Court, see *ante*, at 4–17, that this provision, the foreign-country exception, applies here, and bars Alvarez's tort claim against the United States. But I would read the words "arising in," as they appear in §2680(k), to signal "place where the act or omission occurred," §1346(b)(1), not "place of injury," *ante*, at 12, 16–17, and n. 9.[1]

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[1] In common with §2680(k), most of the exceptions listed in §2680 use the "claim arising" formulation. See §§2680(b), (c), (e), (h), (j), *(l),* (m), and (n). Only two use the "act or omission" terminology. See §2680(a) (exception for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . ."); §2680(e) (no liability for "[a]ny claim arising out of an act or omission of any employee of the Government in administering [certain provisions

A

On its face, the foreign-country exception appears to cover this case. See *ante*, at 4–5. Alvarez's suit is predicated on an arrest in Mexico alleged to be "false" only because it occurred there. Sosa's conduct in Mexico, implicating questions of Mexican law, is, as the Court notes, "the kernel" of Alvarez's claim. *Ante*, at 5. Once Alvarez was inside United States borders, the Ninth Circuit observed, no activity regarding his detention was tortious. See 331 F. 3d 604, 636–637 (2003). Government liability to Alvarez, as analyzed by the Court of Appeals, rested solely upon a false-arrest claim. *Id.*, at 640–641. Just as Alvarez's arrest was "false," and thus tortious, only because, and only to the extent that, it took place and endured in Mexico, so damages accrued only while the alleged wrongful conduct continued abroad. *Id.*, at 636–637.

Critical in the Ninth Circuit's view, "DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court in Los Angeles." *Id.*, at 640; see *ante*, at 5, n. 1. See also *Fermino* v. *Fedco, Inc.*, 7 Cal. 4th 701, 715, 872 P. 2d 559, 567 (1994)

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concerning war and national defense]"). It is hardly apparent, however, that Congress intended only §§2680(a) and (e) to be interpreted in accord with §1346(b). Congress used the phrase "arising out of" for §2680 exceptions that focus on a governmental act or omission. See §2680(b) (exception for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter"); §2680(h) (no liability for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, libel, slander, misrepresentation, deceit, or interference with contractual rights"). Given that usage, and in light of the legislative history of §2680(k), omission of a reference to an "act or omission of any employee" from that provision may reflect only Congress' attempt to use the least complex statutory language feasible. Cf. *Sami* v. *United States*, 617 F. 2d 755, 762, n. 7 (CADC 1979) ("We do not think that the omission of a specific reference to acts or omissions in §2680(k) was meaningful or that the focus of that exemption shifted from acts or omissions to resultant injuries.").

(defining as tortious "the nonconsensual, intentional confinement of a person, *without lawful privilege*, for an appreciable length of time, however short" (emphasis added and internal quotation marks omitted)); App. to Pet. for Cert. 184a (same). Once Alvarez arrived in El Paso, Texas, "the actions of domestic law enforcement set in motion a supervening prosecutorial mechanism which met all of the procedural requirements of federal due process." 331 F. 3d, at 637; see *ante*, at 5, n. 1.

Accepting, as the Ninth Circuit did, that no tortious act occurred once Alvarez was within United States borders, the Government's liability on Alvarez's claim for false arrest necessarily depended on the foreign location of the arrest and implicated foreign law. While the Court of Appeals focused on whether United States law furnished authority to seize Alvarez in Mexican territory, see 331 F. 3d, at 626–631, Mexican law equally could have provided—or denied—authority for such an arrest. Had Sosa and the arrest team been Mexican law enforcement officers, authorized by Mexican law to arrest Alvarez and to hand him over to United States authorities, for example, no false-arrest claim would have been tenable. Similarly, there would have been no viable false-arrest claim if Mexican law authorized a citizen's arrest in the circumstances presented here. Indeed, Mexican and Honduran agents seized other suspects indicted along with Alvarez, respectively in Mexico and Honduras; "Alvarez's abduction was unique in that it involved neither the cooperation of local police nor the consent of a foreign government." *Id.*, at 623, n. 23.

The interpretation of the FTCA adopted by the Ninth Circuit, in short, yielded liability based on acts occurring in Mexico that entangled questions of foreign law. Subjecting the United States to liability depending upon the law of a foreign sovereign, however, was the very result §2680(k)'s foreign-country exception aimed to exclude. See

United States v. *Spelar,* 338 U. S. 217, 221 (1949).

B

I would construe the foreign-country exception, §2680(k), in harmony with the FTCA's sovereign-immunity waiver, §1346(b), which refers to the place where the negligent or intentional act occurred. See Brief for United States in No. 03–485, p. 45 (urging that §2680(k) should be applied by looking to "where the prohibited act is committed"); *id.*, at 46 ("the foreign country exception must be viewed together with [§]1346," which points to "the law of the place where the [allegedly wrongful] act or omission occurred" (internal quotation marks omitted and emphasis deleted)).

Interpretation of §2680(k) in the light of §1346, as the Government maintains, is grounded in this Court's precedent. In construing §2680(k)'s reference to a "foreign country," this Court has "draw[n] support from the language of §1346(b), the principal provision of the [FTCA]." *Smith* v. *United States,* 507 U. S. 197, 201 (1993) (internal quotation marks omitted). In *Smith*, the Court held that a wrongful-death action "based exclusively on acts or omissions occurring in Antarctica" was barred by the foreign-country exception. *Id.*, at 198–199. Were it not, the Court noted, "§1346(b) would instruct courts to look to the law of a place that has no law [*i.e.*, Antarctica] in order to determine the liability of the United States—surely a bizarre result." *Id.*, at 201–202 (footnote omitted). Thus, in *Smith*, the Court presumed that the place "where the act or omission occurred" for purposes of the sovereign-immunity waiver, §1346(b)(1), coincided with the place where the "claim ar[ose]" for purposes of the foreign-country exception, §2680(k). See also *Beattie* v. *United States*, 756 F. 2d 91, 122 (CADC 1984) (Scalia, J., dissenting) ("[A] claim 'arises' for purposes of §2680(k) where there occurs the alleged [standard-of-care] violation . . . (attributable to government

action or inaction) nearest to the injury . . . ."); *Sami* v. *United States*, 617 F. 2d 755, 761–762 (CADC 1979) (looking to where "the act or omission complained of occurred" in applying §2680(k)).

Harmonious construction of §§1346(b) and 2680(k) accords with Congress' intent in enacting the foreign-country exception. Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Spelar,* 338 U. S., at 221. The legislative history of the FTCA suggests that Congress viewed cases in which the relevant *act or omission* occurred in a foreign country as entailing too great a risk of foreign-law application. Thus, Assistant Attorney General Francis M. Shea, in explaining the finally enacted version of the foreign-country exception to the House Committee on the Judiciary, emphasized that, when an *act or omission* occurred in a foreign country, §1346(b) would direct a court toward the law of that country: "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*." Hearings on H. R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess., 35 (1942) (emphasis added); see *ante*, at 12.[2] In the enacting Congress' view, it thus appears, §§1346(b) and 2680(k) were aligned so as to block the United States' waiver of sovereign immunity when the relevant act or omission took place overseas. See *supra*, at 2–3, n. 1.

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[2] The foreign-country exception's focus on the location of the tortious act or omission is borne out by a further colloquy during the hearing before the House Committee on the Judiciary. A member of that Committee asked whether he understood correctly that "any representative of the United States who *committed a tort* in England or some other country could not be reached under [the FTCA]." Hearings on H. R. 5373 et al., at 35 (emphasis added). Assistant Attorney General Shea said yes to that understanding of §2680(k). *Ibid.*

True, the Court has read *renvoi* into §1346(b)(1)'s words "in accordance with the law of." See *Richards* v. *United States,* 369 U. S. 1, 11 (1962) ("the [FTCA] . . . requires application of the *whole* law of the State where the act or omission occurred" (emphasis added)).[3] That, however, is no reason to resist defining the place where a claim arises for §2680(k) purposes to mean the place where the liability-creating act or omission occurred, with no *renvoi* elsewhere. It is one thing to apply *renvoi* to determine which State, within the United States, supplies the governing law, quite another to suppose that Congress meant United States courts to explore what choice of law a foreign court would make.[4]

In 1948, when the FTCA was enacted, it is also true, Congress reasonably might have anticipated that the then prevailing choice-of-law methodology, reflected in the Restatement (First) of Conflicts, would lead mechanically to the law of the place of injury. See Restatement (First) of Conflicts §377 (1934) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."); *Richards*, 369 U. S., at 11–12 ("The general conflict-of-laws rule, followed by a vast majority of the States, [wa]s to apply the law of the place of injury to the substantive rights of the parties." (footnote

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[3] *Renvoi* is "[t]he doctrine under which a court in resorting to foreign law adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum." Black's Law Dictionary 1300 (7th ed. 1999).

[4] Reading *renvoi* into §1346(b)(1), even to determine which State supplies the governing law, moreover, is questionable. See Shapiro, Choice of Law Under the Federal Tort Claims Act: *Richards* and Renvoi Revisited, 70 N. C. L. Rev. 641, 679 (1992) ("It is only fair that federal liability be determined by the law where the federal employee's negligence took place, as Congress intended. The simplicity of the internal law approach is preferable to the complexity and opportunity for manipulation of *[Richards']* whole law construction.").

omitted)); *ante*, at 10–11, 13, n. 5 (same). Generally, albeit not always, the place where the negligent or intentional act or omission takes place coincides with the place of injury.[5] Looking to the whole law of the State where the wrongful "act or omission occurred" would therefore ordinarily lead to application of that State's own law. But cf. *ante*, at 12, 16–17 (adopting a place-of-injury rule for §2680(k)).

II

The Ninth Circuit concluded that the foreign-country exception did not bar Alvarez's false-arrest claim because that claim "involve[d] federal employees working from offices in the United States to guide and supervise actions in other countries." 331 F. 3d, at 638. In so holding, the Court of Appeals applied a "'headquarters doctrine,'" whereby "a claim can still proceed . . . if harm occurring in a foreign country was proximately caused by acts in the United States." *Ibid.*

There is good reason to resist the headquarters doctrine described and relied upon by the Ninth Circuit. The Court of Appeals' employment of that doctrine renders the FTCA's foreign-country exception inapplicable whenever some authorization, support, or planning takes place in the United States. But "it will virtually always be possible to assert that the negligent [or intentional] activity that injured the plaintiff was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United

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[5] Enacting the FTCA, Congress was concerned with quotidian "wrongs which would have been actionable if inflicted by an individual or a corporation," *Feres* v. *United States,* 340 U. S. 135, 139–140 (1950), such as vehicular accidents, see S. Rep. No. 1400, 79th Cong., 2d Sess., 31 (1946). See also *ante*, at 10–11, n. 4. The place of injury in such torts almost inevitably would be the place the act or omission occurred as well.

States." *Beattie*, 756 F. 2d, at 119 (Scalia, J., dissenting); see *ante*, at 7 (same). Hence the headquarters doctrine, which considers whether steps toward the commission of the tort occurred within the United States, risks swallowing up the foreign-country exception.

Furthermore, the Court of Appeals failed to address the choice-of-law question implicated by both §§1346(b) and 2680(k) whenever tortious acts are committed in multiple states. Both those provisions direct federal courts "in multistate tort actions, to look in the first instance to the law of the place where the acts of negligence [or the intentional tort] took place." *Richards*, 369 U. S., at 10. In cases involving acts or omissions in several states, the question is which acts count. "Neither the text of the FTCA nor *Richards* provides any guidance . . . when the alleged acts or omissions occur in more than one state. Moreover, the legislative history of the FTCA sheds no light on this problem." *Gould Electronics Inc.* v. *United States*, 220 F. 3d 169, 181 (CA3 2000); see *Raflo* v. *United States*, 157 F. Supp. 2d 1, 9 (DC 2001) (same).

Courts of appeals have adopted varying approaches to this question. See *Simon* v. *United States*, 341 F. 3d 193, 202 (CA3 2003) (listing five different choice-of-law methodologies for §1346(b)(1)); *Gould Electronics*, 220 F. 3d, at 181–183 (same).[6] Having canvassed those different ap-

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[6] As cataloged by the Court of Appeals for the Third Circuit, these are: "(1) applying different rules to different theories of liability; (2) choosing the place of the last allegedly-wrongful act or omission; (3) determining which asserted act of wrongdoing had the most significant effect on the injury; (4) choosing the state in which the United States' physical actions could have prevented injury; and (5) determining where the 'relevant' act or omission occurred." *Simon*, 341 F. 3d, at 202. For cases applying and discussing one or another of those five approaches, see *Ducey* v. *United States*, 713 F. 2d 504, 508, n. 2 (CA9 1983) (considering where "physical acts" that could have prevented the harm would have occurred); *Hitchcock* v. *United States*, 665 F. 2d 354,

proaches, Third Circuit Judge Becker concluded that "clarity is the most important virtue in crafting a rule by which [a federal court would] choose a jurisdiction." *Simon*, 341 F. 3d, at 204. Eschewing "vague and overlapping" approaches that yielded "indeterminate" results, Judge Becker "appl[ied] [under §1346(b)(1)] the choice-of-law regime of the jurisdiction in which the last significant act or omission occurred. This has the salutary effect of avoiding the selection of a jurisdiction based on a completely incidental 'last contact,' while also avoiding the conjecture that [alternative] inquires often entail." *Ibid.* I agree.

A "last significant act or omission" rule applied under §2680(k) would close the door to the headquarters doctrine as applied by the Ninth Circuit in this case. By directing attention to the place where the last significant act or omission occurred, rather than to a United States location where some authorization, support, or planning may have taken place, the clear rule advanced by Judge Becker preserves §2680(k) as the genuine limitation Congress intended it to be.

The "last significant act or omission" rule works in this case to identify Mexico, not California, as the place where the instant case arose. I would apply that rule here to hold that Alvarez's tort claim for false arrest under the FTCA is barred under the foreign-country exception.

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359 (CADC 1981) (looking for the "relevant" act or omission); *Bowen* v. *United States*, 570 F. 2d 1311, 1318 (CA7 1978) (noting "the alternatives of the place of the last act or omission having a causal effect, or the place of the act or omission having the most significant causal effect," but finding that both rules would lead to the same place); *Raflo* v. *United States*, 157 F. Supp. 2d 1, 10 (DC 2001) (applying *Hitchcock*'s relevance test by looking for the place where the "most substantial portion of the acts or omissions occurred"); *Kohn* v. *United States*, 591 F. Supp. 568, 572 (EDNY 1984) (applying different States' choice-of-law rules on an act-by-act basis).

Accordingly, I concur in the Court's judgment and concur in Parts I, III, and IV of its opinion.