This Is Ground Control to Major Tom . . . Your Wife Would Like to Sue but There's Nothing We Can Do . . . . The Unlikelihood that the FTCA Waives Sovereign Immunity for Torts Committed by United States Employees in Outer Space: A Call for Preemptive Legislation

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I. INTRODUCTION

Under the sovereign immunity doctrine, the United States cannot be sued in domestic or foreign courts without its consent.\(^1\) The Federal Tort Claims Act (FTCA)\(^2\) is a legislative vehicle through which the United States has consented to be sued for damages caused by its tortious behavior under circumstances in which a private person's similar acts or omissions would trigger liability under local law.\(^3\) The Act waives sovereign immunity for all civil actions or:

- 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.\(^4\)

\(^\dagger\) Adaptation of words to the song *Space Oddity* by David Bowie. (Tintoretto Music/Main Man S.A. 1983, 1992). Even if the Federal Tort Claims Act did apply in outer space, the *Feres* doctrine would prevent "Major Tom" from suing the United States for damages if incurred in the line of military duty. *See* *Feres v. United States*, 340 U.S. 135, 146 (1950).


\(^2\) 28 U.S.C. §§ 1346(b), 2671-80 (1994) [hereinafter FTCA or Act].

\(^3\) *See* Rayonier, Inc. v. United States, 352 U.S. 315 (1957).

Congress further explained its intent “to create in the federal government a responsibility for its actions akin to that borne by the average citizen” by enacting 28 U.S.C. § 2674, which states, “[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 . . . .”

The Act provides thirteen specific exceptions to its immunity waiver, one of which excludes claims “arising in a foreign country.” Courts and commentators have traditionally viewed this exception as Congress’s method of avoiding United States exposure to foreign tort law. Although no court has addressed the issue to date, space law commentators have uniformly posited that the FTCA will apply to tort claims brought by individuals who are not parties to an outer space activity that results in an accident in which they are damaged. That assumption is rendered invalid by the Supreme Court’s ruling in Smith v. United States that Antarctica, a territory similar to outer space in its status as “sovereignless,” is a “foreign country” in which the FTCA does not apply.

This Article explores whether the Federal Tort Claims Act provides a remedy for third-party victims of United States negli-

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5 Smith v. United States, 953 F.2d 1116, 1120 (9th Cir. 1991) (Fletcher, J., dissenting).
6 Id.
8 See infra note 19 and accompanying text.
11 The Antarctic Treaty states that no party to the agreement may assert a claim of sovereignty over any portion of the continent while the Treaty is in force. See Antarctic Treaty, Dec. 1, 1959, art. IV, para. 1, 12 U.S.T. 794, 796; 402 U.N.T.S. 71, 74 [hereinafter Antarctic Treaty]. The United States recognizes no claims to sovereignty over Antarctica by any nation, whether or not a party to the treaty. For a discussion of territorial claims to Antarctica, see Note, Thaw in International Law? Rights in Antarctica Under the Law of Common Spaces, 87 YALE L.J. 804 (1978).
SOVEREIGN IMMUNITY IN SPACE

II. HISTORICAL INDICATIONS THAT THE FTCA APPLIES IN OUTER SPACE

Those inclined to predict how the United States would treat third-party victims of United States torts in outer space had ample reason to look to The Federal Tort Claims Act. The background and wording of the Act itself, as well as a substantial history of case law and numerous other national commitments all suggested that, prior to the Supreme Court's 1993 decision in Smith, courts would not except outer space from the FTCA as a "foreign country" and the Act's scope would indeed encompass those damage claims. This history is relevant to highlight the Supreme Court's error in Smith and the problematic implications that decision poses for the future of FTCA application in outer space.

A. CONGRESSIONAL INTENT

The Act, a result of "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment," was Congress's expression of "a desire on the part of the federal government in the interests of justice and fair play to permit a private litigant to satisfy his legal claims for injury or damage suffered at the hands of a United States employee acting in the scope of his employment." As a practical matter, the Act was not designed to create new causes of action, but only to free Congress from having to deal with tort claims on an individ-

13 COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, SOVEREIGN IMMUNITY: THE TORT LIABILITY OF GOVERNMENT AND ITS OFFICIALS 43 (1979). The committee also stated the following purposes for enacting the FTCA:
(2) the need of the Congress to be relieved of the burden imposed by multitudinous bills for private relief arising from tort claims against government employees;
ual, private bill basis.\textsuperscript{14} In keeping with "[t]he . . . trend in waiving the immunity of the United States from suit,"\textsuperscript{15} Congress rejected a proposal that the Act exclude claims brought by or "in behalf of an alien"\textsuperscript{16} and another that limited the scope of the FTCA to specific geographical territories under U.S. domain.\textsuperscript{17} Congress's rejection of these proposals suggests an intent to accept responsibility for our nation's tortious acts in a broad range of scenarios. This underscores the notion that the "foreign country" exception was not included to insulate the United States from liability to individuals under U.S. law, but only to preclude government liability under foreign law.\textsuperscript{18}

B. LEGAL PRECEDENT

Forty-five years of case law preceding the \textit{Smith} decision supports this suggestion. The United States Supreme Court inter-

\begin{itemize}
\item[(3)] the advantage of an impartial judicial forum for both the complainant and the Government in which to discover the facts in the same manner as private law suits;
\item[(4)] a desire of Congress to expedite the payment of just claims.
\end{itemize}

\textit{Id.}

\textsuperscript{14} See \textit{id.}; see also United States v. Yellow Cab Co., 340 U.S. 543, 548-49 (1951), where the Court stated:

This Act does not subject the Government to a previously unrecognized type of obligation. Through hundreds of private relief acts, each Congress for many years has recognized the Government's obligation to pay claims on account of damage to or loss of property or on account of personal injury or death caused by negligent or wrongful acts of employees of the Government. This Act merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims. It suggests no reason for reading into it fine distinctions between various types of such claims.

For a brief discussion of the private bill procedure, see DeBusschere, \textit{supra} note 9, at 106.

\textsuperscript{15} \textit{Yellow Cab}, 340 U.S. at 550 n.8 (listing diverse legislative waivers of sovereign immunity dating back to 1855).

\textsuperscript{16} \textit{Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary}, 77th Cong. 29, 35, 66 (1942); see \textit{Spelar}, 338 U.S. at 220 nn.7-8.

\textsuperscript{17} See \textit{Tort Claims Against the United States: Hearings on S. 2690 Before the Subcomm. of the Senate Comm. on the Judiciary}, 76th Cong. 65 (1940) (rejecting the proposal that the FTCA be limited to claims arising in the United States, Alaska, Hawaii, Puerto Rico, and the Panama Canal Zone).

\textsuperscript{18} See \textit{Spelar}, 338 U.S. at 221 ("[T]hough Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power. The legislative will must be respected."); \textit{id.} (citing Mark Dean, Note, \textit{Smith v. United States: Justice Denied Under the FTCA "Foreign Country" Exception}, 38 St. Louis U. L.J. 553, 556 nn.92-93 (1994)).
interpreted the foreign country exception to the FTCA on only one occasion prior to its decision in Smith. In United States v. Spelar, the Court held that the foreign country exception applied to an air base in Newfoundland that the United States operated under a long term lease from Great Britain. The Court accordingly denied the respondent, whose husband had been killed in a takeoff from that base, the opportunity to state a claim under the Act. Noting the language of the Act itself, the majority concluded that the term "foreign country" referred to "territory subject to the sovereignty of another nation." It supported its conclusion with quotes from the Act’s legislative history, which indicate that Congress included the foreign country exception in the Act because "it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power."

Other language in that opinion, however, sets the stage for future disagreement regarding extraterritorial application of the Act. The sentence in the Spelar opinion immediately following the one in which the Court defined foreign country to mean "territory subject to the sovereignty of another nation," states that in meaning to so define foreign country, Congress accordingly geared the Federal Tort Claims Act to "the sovereignty of the United States." Outer space, as well as Antarctica and the high seas, fall into neither category. The Court’s juxtaposition of these statements indicates its failure to consider the existence of territory that is neither subject to the sovereignty of the United States nor the sovereignty of anyone else. The fact that Congress has never addressed the resulting confusion created with regard to sovereignless territories suggests that it, too, simply never thought about the issue. Therefore, in determining the appropriate application of the FTCA to these territories now

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20 See Spelar, 338 U.S. at 221.

21 See id. at 219.

22 Id. (citing De Lima v. Bidwell, 182 U.S. 1 (1901) (“A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States.”)).

23 Id. at 221 (citing Hearings, H.R. 5373 and H.R. 6463, 77th Cong. 29 35, 66 and H.R. 6463 § 402 (12)).

24 Id. at 219. See also id. at 220-21 (“The amended version identified the coverage of the Act with the scope of United States sovereignty.”).
that the issue has arisen, it is helpful to examine other contexts
in which the Court interpreted the scope of the Act and the
exceptions thereto.

The Supreme Court originally interpreted the FTCA to pro-
vide a broad waiver of sovereign immunity. In the same year it
decided Spelar, the Court heard United States v. Aetna Casualty &
Surety Co.,\textsuperscript{26} which consisted of four separate cases brought by
insurance companies against the United States. The primary is-

issue in each case was whether the federal anti-assignment statute\textsuperscript{26} for-
bade the subrogee to an insurance claim (as opposed to
the insured) from suing the United States in its own name
under the FTCA. In rejecting the government's argument that
the Court should narrowly construe the FTCA's waiver of sover-
eign immunity and allow suits brought only by the real party in
interest,\textsuperscript{27} the Court stated:

In argument before a number of District Courts and Courts of
Appeals, the Government relied upon the doctrine that statutes
waiving sovereign immunity must be strictly construed. We think
that the congressional attitude in passing the Tort Claims Act is
more accurately reflected by Judge Cardozo's statement in Ander-
son v. Hayes Construction Co. (citation omitted): "The exemption
of the sovereign from suit involves hardship enough, where con-
sent has been withheld. We are not to add to its rigor by refine-
ment of construction where consent has been announced.\textsuperscript{28}

Shortly after its Aetna decision, the Court restated the broad
scope of the FTCA in United States v. Yellow Cab Co.\textsuperscript{29} In that
case, Yellow Cab Company impleaded the United States as a
third-party defendant in an action for damages arising from a
collision between a taxicab and a United States mail truck.\textsuperscript{30}
The Court denied the government's assertion that the FTCA
failed to authorize a suit for contribution claimed by a joint
tortfeasor.\textsuperscript{31} It explained its refusal to construe the Act nar-
rowly by quoting from the lower court opinion in one of the cases consolidated into *Aetna.* "Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule (of strict construction) cannot be had in order to enlarge the exceptions."32

Having determined that the FTCA affords a broad waiver of sovereign immunity, the Supreme Court next addressed how broadly it should construe the limitations on that waiver. In *United States v. Kubrick,*33 the Court examined the Act’s two-year statute of limitations.34 The plaintiff in that case was a veteran who entered a Veterans’ Administration hospital for treatment of a leg injury.35 Approximately six weeks after receiving a strong antibiotic therapy for that injury, he sustained a hearing loss.36 The plaintiff determined shortly thereafter that the antibiotic had caused his nerve deafness, but did not file his lawsuit until after the limitations period had expired because he claimed not to know that the administering physician had been negligent.37 The Court rejected the plaintiff’s argument that his claim did not accrue and the limitations period therefore did not begin until he realized, or reasonably should have realized, that the antibiotic treatment constituted medical malpractice.38 In a rather obvious comment, the Court stated its standard for interpreting exceptions to the FTCA:

We should . . . 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. [citations omitted]. Neither, however, should we assume the authority to narrow the waiver that Congress intended. [citations omitted].39

32 *Id.* at 548 n.5 (quoting Employers’ Fire Ins. Co. v. United States, 167 F.2d 655, 657 (9th Cir. 1948)).
34 28 U.S.C. § 2401(b) (1994) states:
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 accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.
35 See *Kubrick*, 444 U.S. at 113.
36 See *id.* at 133-14.
37 See *id.* at 114.
38 See *id.* at 118.
39 *Id.* at 117-18.
The Court strove to neither widen nor restrict Congress's intended waiver by seeking a proper definition of the term "accrue" in light of the legislative history of the Act and the prevailing case law at the time the Act was passed. The Court held that the claim accrued when the plaintiff became aware of his injury and its cause, not at the later date on which he realized that the cause amounted to a violation of his rights.

Although the plaintiff in Kubrick argued for a narrower interpretation of the Act's statute of limitations than the Court was willing to grant, an interpretation that was contrary to all traditional interpretations of time limitations for filing tort actions, the Court noted that its holding was, if anything, a narrower version of the limitation than Congress intended. "Indeed, to the extent that the Report touches the [accrual] issue at all, the Report seems almost to indicate that the time of accrual is the time of injury," which is even earlier than the time of discovery. This comment seems to indicate that if Congress's imprecise drafting forces the Court to guess at the meaning of an exception, it would rather err by construing that exception to include more people than Congress intended rather than to exclude more people than Congress intended.

The Supreme Court again stated its preference for a narrow construction of FTCA exceptions in Block v. Neal. In that case, the plaintiff sued the Farmers' Home Administration (FHA) under the FTCA for negligently inspecting the construction of her home. The government argued that the plaintiff's claim was barred by the FTCA exception that precludes recovery under the Act for "any claim that arises out of... misrepresentation." The Court disagreed with the government's reasoning and distinguished United States v. Neustadt, the case on which the government primarily relied. The Court explained that the plaintiff's claim in Neustadt, which was based on an inflated FHA appraisal of the house he purchased, arose purely from misinformation provided to him by the government, a claim that fit

40 See id. at 119-20.
41 See id. at 123.
42 See id. at 119-20.
43 See id. at 121 n.6.
44 Id.
46 See id. at 292.
47 Id. at 293 (citing 28 U.S.C. § 2680(h)).
squarely within “the traditional legal definition of ‘negligent misrepresentation’ as would have been understood by Congress when the Tort Claims Act was enacted.” The Court further stated that although the government had negligently misrepresented certain facts to the current plaintiff in connection with its negligent inspections of her property, “the partial overlap between these two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well.” The Court supported its unwillingness to make obtaining relief from the federal government any more difficult than the sovereign immunity doctrine already makes it by citing Aetna and restating Judge Cardozo’s admonishment against increasing the hardship that the doctrine causes.

One Court of Appeals case merits attention in this survey. The D.C. Circuit’s 1984 case, Beattie v. United States, was the first case that, like Smith, addressed an FTCA claim arising from events in Antarctica. That court’s decision also followed the historically broad judicial interpretation of the Act and the narrow interpretation of its exceptions when it allowed an FTCA claim arising from an Air New Zealand plane crash on Antarctica. Citizens of New Zealand and Great Britain in that case alleged that U.S. Navy personnel at McMurdo Station in Antarctica and the U.S. Department of Defense, which selected, trained and supervised those personnel, were liable for negligence in connection with the crash. The court declared the issue to be one of first impression and held that it had subject matter jurisdiction over the claim because the “foreign country” exception to the FTCA does not apply to the sovereignless continent of Antarctica. The court reasoned that our nation’s “extensive involvement” on the continent is evidence that the United States does not treat Antarctica as a foreign country. Characterizing Antarctica as “something of an international anomaly,” it applied a “common sense approach to the plain language of the statute” and determined that the exception did not apply because Ant-

49 Block, 460 U.S. at 296 (quoting Neustadt, 366 U.S. at 706-07).
50 Id. at 298.
51 See supra note 28 and accompanying text.
52 756 F.2d 91 (D.C. Cir. 1984).
53 See id. at 93-94 (citing NATIONAL SCIENCE FOUNDATION, FACTS ABOUT THE UNITED STATES ANTARCTIC RESEARCH PROGRAM 1-3, 6 (1984)).
54 See id. at 93.
55 See id.
56 See id. at 94.
57 Id. at 93.
arctica’s lack of foreign domination insured that the United States would not be liable under the laws of a foreign state.\textsuperscript{58}

The government argued that, foreign country or not, the statute’s venue and choice of law provisions nullified the action. It argued that the FTCA’s venue provision, which requires claims to “be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred,”\textsuperscript{59} invalidated the claim because the plaintiffs all resided outside the United States and the acts or omissions occurred outside the United States as well.\textsuperscript{60} Because the plaintiffs did not reside in a “judicial district” and the acts or omissions did not occur in a “judicial district,” the government argued that there was no proper venue in which to hear the claims against the Navy personnel, who allegedly committed their misdeeds in Antarctica (as opposed to the Department of Defense, which made its allegedly negligent decisions in Washington D.C.). In declaring the District of Columbia the proper venue, the court refused to accept that “venue exists—nowhere”\textsuperscript{61} and chose to construe the venue statute in a way that did not create a Congressionally unintended venue gap.\textsuperscript{62}

The government also argued that the FTCA’s choice of law provision nullified the claims, or the portions that arose from acts or omissions occurring in Antarctica, because the provision required that the United States be “liable to the claimant in accordance with the law of the place where the act or omission occurred.”\textsuperscript{63} Antarctica, it pointed out, has no tort law to be liable in accordance with.\textsuperscript{64} The court responded that because the foreign law entanglements that Congress sought to avoid did

\textsuperscript{58} See id. at 94.
\textsuperscript{59} Id. at 100 (citing 28 U.S.C. § 1402(b) (1982)).
\textsuperscript{60} See id. at 100.
\textsuperscript{61} Id. at 104.
\textsuperscript{62} See id. (“The development [of Congress’s 1966 amendment of the general venue statute] supports the view 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. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.”) (quoting Brunette Machine Works v. Kockum Indus., 406 U.S. 706, 710 n.8 (1972)). The court stated that the case before it was either an example of a “single cause of action with two grounds for relief” and therefore joinder was appropriate, or it was an example in which the doctrine of “pendent venue” should be the basis to hear both cases together. See id. It held that whichever was the case, the D.C. District was the proper venue in which to hear all of the claims. See id.
\textsuperscript{63} Id. at 104 (citing 28 U.S.C. § 1346(b)).
\textsuperscript{64} See id. at 104-05.
not exist in this situation, it should treat the absence of foreign law as an issue that the statute failed to address rather than one that should cause the claims to be dismissed. It looked to the Restatement of Laws and determined that there simply was no conflict of laws because only the United States had an interest in the outcome of the case.

_Beattie_ is significant to this survey of indications that the FTCA would apply in outer space for three reasons. First, the case was the first in which a federal court addressed specific statutory arguments against application of the FTCA to Antarctica, a territory similar to outer space in its sovereign-less status. Those arguments are likely to resurface if the FTCA, as currently written, becomes the basis for a claim arising in outer space. Second, then-Judge Scalia vehemently dissented from the majority opinion, agreeing with and elaborating on the government's argument that a claim arising in Antarctica is incompatible with the FTCA's venue and choice of law provisions. That dissent became the basis for the United States Supreme Court's majority opinion in _Smith v. United States_. Finally, Judge Wilkey, who authored the _Beattie_ opinion, analogized Antarctica to outer space. He used that analogy to support his belief that Antarctica is not a foreign country under the FTCA and described current space law with the following statement:

> [T]he basic principle is that in the sovereignless reaches of outer space, each state party to the [Outer Space] treaty will retain jurisdiction over its own objects and persons. Like the decisions . . . holding that Antarctica is not a “foreign country” for various purposes, the treatment of outer space is persuasive by analogy.

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65 See id. at 105.
66 See id. (citing _E. SCOLES & P. HAY, CONFLICT OF LAWS_ 551-606 (1984) and _RESTATEMENT (SECOND) OF CONFLICT OF LAWS_ § 6 (1971)).
67 The D.C. Circuit's treatment of these issues was presumably still good law in January 1993, just five months before the Supreme Court decided _Smith_. See _Environmental Defense Fund v. Massey_, 986 F.2d 528 (D.C. Cir. 1993); Suzanne B. Krolikowski, _Note, A Sovereign in a Sovereignless Land? The Extraterritorial Application of United States Law: EDF v. Massey, 19 N.C.J. INT'L L. & COM. REG. 333_ (1994). In _Massey_, the court held that the National Environmental Policy Act (NEPA) could be applied to waste disposal procedures in Antarctica because the presumption against extraterritoriality is less significant in situations in which there is no potential conflict "between our laws and those of other nations." _Massey_, 986 F.2d at 533 (citing _E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244_ (1991)).
68 See generally 756 F.2d at 142 (Scalia, J., dissenting).
69 See _infra_ notes 107-115 and accompanying text.
70 See 756 F.2d at 99-100.
71 _Id._ at 100.
Thus, even Judge Wilkey of the D.C. Court of Appeals assumed that the "foreign country" exception is not a basis on which the United States can dodge liability to third-party tort victims in outer space.

C. FTCA Application to the High Seas

Another, and perhaps the strongest indication that courts would apply the FTCA to outer space is Congress's waiver of sovereign immunity for torts that the United States commits on the high seas. Like Antarctica and outer space, the high seas, defined as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State,"72 are not subject to the sovereignty of any nation.73 Lack of U.S. sovereignty notwithstanding, individuals can bring damage claims against the United States for torts committed on the high seas under the Suits in Admiralty Act74 and the Public Vessels Act.75 Prior to the 1960 Amendment of the Suits in Admiralty Act,76 however, "[m]aritime tort claims deemed beyond the reach of both Acts could be brought only on the law side of the district courts under the Federal Tort Claims Act."77 It was, in fact, the FTCA

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the [high seas] or its resources, nor shall any State or natural or judicial person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.
2. All rights in the resources of the [high seas] are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation.
See also Convention on the High Seas, supra note 72, art. 2 (stating that "[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty").
74 46 U.S.C. app. §§ 741-752 (1994) (permitting a "proceeding in personam ... against the United States").
75 46 U.S.C. app. §§ 781-790 (1994). Section 781 states that "[a] libel in personam in admiralty may be brought against the United States ... for damages caused by a public vessel of the United States." Id. § 781.
76 Most courts have interpreted the 1960 amendment as "a legislative attempt to bring all maritime torts asserted against the United States within the purview of the SIA." Roberts v. United States, 498 F.2d 520, 525-26 (9th Cir. 1974).
that first made the United States liable for maritime negligence claims. Prior to the FTCA's enactment, the Death on the High Seas Act (DOHSA) provided a remedy for death or injury on the high seas only against private parties. The courts' regular and express application of the FTCA to the sovereignless region of the high seas between the time it was enacted and 1960, when the SIA was amended to provide an exclusive but comparable remedy, undermines any suggestion that the Act should not be applied extraterritorially.

D. Acceptance of Government Liability in Other Space Law Contexts

Historical case law, then, indicates a judicial willingness to hold the United States liable for its tortious acts committed outside of the United States absent some foreign conflict. Additionally, courts have unequivocally applied that principal to the sovereignless territory of the high seas. Finally, our government has assumed a series of obligations in connection with its space program that reflect a similar commitment to compensate individuals for torts it commits in outer space. The Multilateral Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty) was the first such obligation. Article VI of the Treaty makes the United States, as a party to the treaty, internationally liable for damage caused by American outer space activities, "whether such activities are carried on by governmental agencies or by non-governmental enti-

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ties." In addition to placing the burden for damages on the government, whether or not it caused those damages, Article VI requires that the United States accept the additional responsibility to regulate and supervise American non-governmental activities in outer space. Article VII of the Treaty explains how to determine whether an activity is one for which the United States is liable and to whom that liability flows:

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies.

More directly applicable to the issue of FTCA application in outer space, Article VIII of the Outer Space Treaty grants control and jurisdiction over any object launched into outer space to the country in whose name the object is registered.

The liability provisions contained in Articles VI and VII of the Outer Space treaty are more completely addressed in the Convention on International Liability for Damage Caused by Space Objects of 1972 (Liability Convention). Article II of the Liability Convention imposes absolute liability on launching states for damage caused by their space objects, irrespective of whether that damage occurs on the surface of Earth or to aircraft in flight. Although it is likely that the drafters of the Liability Convention were more concerned with damage caused by debris falling to Earth than with damage caused by debris colliding with other objects in outer space, Article III imposes fault-based liability for damage caused to another state’s space objects.

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81 Outer Space Treaty, supra note 80, art. VI.
82 See id.
83 Id.
84 See id. art. VIII.
86 See Liability Convention, supra note 85, art. II.
87 See DeBusschere, supra note 9, at 100.
in outer space. The provisions of the convention apply to the signatory nations’ military and civilian space activities, and include the possibility of exoneration from liability if the damage caused by a State Party’s space object is the result of the gross negligence or malice of a third party.

Like the Outer Space Treaty, the Liability Convention provides relief only to foreign states. Although the offending nation is liable to persons under a foreign state’s jurisdiction, the injured individual’s government must file on his behalf. Because it is unlikely that the Convention drafters thought it fair to provide a remedy for every possible victim of space mishaps except citizens of their own countries, they probably assumed that those citizens already had a remedy under existing domestic law.

Congress enacted the Commercial Space Launch Act of 1984 (CSLA), in which it consolidated all licensing authority for private launches into one regulatory body, to encourage development of the private space industry. Recognizing the necessity to compensate individuals for damages incurred in the course of space exploration, a necessity brought painfully to the nation’s attention by the explosion of the Space Shuttle Challenger on January 28, 1986, Congress amended the CSLA in 1988. These amendments added provisions for mandatory cross-waivers of liability and limits on required insurance and availability of government funds to satisfy legitimate damage claims against private launch contractors and other private licensees to the extent that those licensees’ mandatory insurance coverage is insufficient. Section 70113(a) of the CSLA states the following:

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88 See Liability Convention, supra note 85, art. III.
89 See id. art VI.
90 Article VII excludes liability to nationals of the launching state. See id. art. VII(a).
91 See, e.g., DeBusschere, supra note 9, at 105-06 (assuming that the FTCA applies to damages sustained in outer space and explaining the procedure for filing a claim under the FTCA for damage caused by the United States to a U.S. citizen in that situation).
93 For a discussion of the CSLA, see Showalter, supra note 9, at 816-32.
94 The estate of Christa McAuliffe, the only civilian casualty of the Challenger disaster, settled with the government for an undisclosed amount. See Glenn H. Reynolds & Robert P. Merges, Outer Space Problems of Law and Policy 308 (2d ed. 1997). No claims related to that accident were filed under the FTCA.
[T]he Secretary of Transportation shall provide for the payment by the United States Government of a successful claim (including reasonable litigation or settlement expenses) of a third party against a licensee or transferee under this chapter, a contractor, subcontractor, or customer of the licensee or transferee, or a contractor or subcontractor of a customer, resulting from an activity carried out under the license issued or transferred under this chapter for death, bodily injury, or property damage or loss resulting from an activity carried out under the license.\footnote{49 U.S.C. § 70113(a) (1994). For commentary and additional sources on the CSLA, see Reynolds & Merges, supra note 94, at 372.}

The United States has therefore committed itself to pay for negligence claims to which it was not even a party when the plaintiff in those cases has already received maximum compensation under an insurance policy.\footnote{The U.S. government will pay up to $1.5 billion of a claim that exceeds the insurance coverage of a non-government entity involved in a launch. See 49 U.S.C. § 70113(a)(1) (A), (B) (1994).} One could logically assume, therefore, that the U.S. government is willing to compensate individuals for damage it causes them, especially since those individuals have no one else against whom to claim.

III. SMITH V. UNITED STATES CASTS DOUBT ON FTCA APPLICATION IN OUTER SPACE

When the United States Supreme Court handed down its decision in Smith v. United States,\footnote{See Smith v. United States, 702 F. Supp. 1480 (D. Or. 1989), aff’d, 953 F.2d 1116 (9th Cir. 1991), aff’d, 507 U.S. 197 (1993).} in which it held that Antarctica falls within the “foreign country” exception to the FTCA, all bets were off on whether space travellers could expect to be covered by the Act. Much of the Court’s reasoning and commentary in that case can be directly applied to tort claims arising from the United States’ acts or omissions in outer space.

John Emmett Smith was a carpenter employed by ITT Antarctic Services, Inc. ITT had a contract with the National Science Foundation (NSF) for construction projects at McMurdo Station in Antarctica.\footnote{See id. at 1483. The NSF is the United States Government agency with responsibility for the United States’ research effort in Antarctica. See id.} Smith’s employer sent him to Antarctica in 1986 to participate in that construction.\footnote{See id. at 1484.} Slightly more than a month after arriving on the continent, Smith and some friends took a hike away from the station.\footnote{See id.} The party left...
the hiking path, and Smith fell into an unmarked crevasse and died.\textsuperscript{102}

Sandra Jean Smith, Smith's widow and his estate's personal representative, filed a wrongful death action under the FTCA in the United States District Court for the District of Oregon, her home state.\textsuperscript{103} She claimed that U.S. employees had failed to properly warn her husband of dangerous crevasses along the marked hiking paths.\textsuperscript{104} The district court dismissed the case, holding that the FTCA only applied within the territorial jurisdiction of the United States.\textsuperscript{105} The United States Court of Appeals for the Ninth Circuit affirmed.\textsuperscript{106} The United States Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit's holding in \textit{Smith} and the D.C. Circuit's holding in \textit{Beattie}.\textsuperscript{107}

Relying heavily on then-Judge Scalia's dissent in the D.C. Circuit's \textit{Beattie} opinion, the Court determined that United States courts had no jurisdiction over Mrs. Smith's claim because the tortious acts she alleged were committed in a "foreign country."\textsuperscript{108} It based its decision on "norms of statutory construction" that it believed led it "to the same conclusion that the 79th Congress would have reached had it expressly considered the question [the Court then] decide[d]: It would not have included a desolate and extraordinarily dangerous land such as Antarctica within the scope of the FTCA."\textsuperscript{109}

The Court initially determined that Antarctica is a foreign country because the first definition of "country" it found in the dictionary was "[a] region or tract of land."\textsuperscript{110} The Court opined that "the ordinary meaning of the language itself, we think, includes Antarctica, even though it has no recognized government."\textsuperscript{111} It conceded, however, that the term could have

\textsuperscript{102} See \textit{id}. There were no signs posted either at the beginning or along the flagged hiking path warning hikers not to leave the path or that crevasses surrounded it. \textit{See id.}

\textsuperscript{103} See \textit{id}. at 1481.

\textsuperscript{104} See \textit{id.}

\textsuperscript{105} See \textit{id}. at 1482.

\textsuperscript{106} See \textit{Smith}, 953 F.2d at 1117.

\textsuperscript{107} See \textit{Smith}, 507 U.S. at 200.

\textsuperscript{108} See \textit{id}. at 204-05.

\textsuperscript{109} \textit{Id}. at 205.

\textsuperscript{110} \textit{Id}. at 201 (citing \textsc{Webster's New International Dictionary} 609 (2d ed. 1945)) (alteration in original).

\textsuperscript{111} \textit{Id}.
a variety of meanings and that it should therefore examine the rest of the statute.\textsuperscript{112}

The Court then found that the FTCA’s choice of law provision, which waives sovereign immunity under certain 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,” makes it clear that Antarctica is excluded from the Act.\textsuperscript{113} If not, the statute “would instruct 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.”\textsuperscript{114}

The Court continued to follow Judge Scalia’s (by then, Justice Scalia’s) \textit{Beattie} reasoning when it found that the statute’s venue provision contained a gap if district courts were given jurisdiction over claims arising in Antarctica. That gap would appear when non-residents of the United States had a valid claim arising from occurrences in Antarctica, yet had no venue in which to be heard because they could neither bring their action “in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.”\textsuperscript{115} It quoted the statement from \textit{Brunette Machine Works} regarding Congress’s intent to not remove with one hand what it had given with another\textsuperscript{116} to support the opposite proposition from the one the D.C. Circuit’s majority used in \textit{Beattie}. Instead of interpreting that statement as an instruction to construe a statute so as to avoid a venue gap, the \textit{Smith} Court used it to support its inclination to deny application of the statute altogether if the gap appeared.\textsuperscript{117}

Finally, the Court relied on the “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”\textsuperscript{118} The Court commented that avoidance of international clashes is only one basis for the presumption against extraterritoriality, another being “the commonsense notion that Congress generally legislates with

\textsuperscript{112} See id.

\textsuperscript{113} Id. (quoting 28 U.S.C. § 1346(b)).

\textsuperscript{114} Id. at 201-02.

\textsuperscript{115} Id. at 202-03 (citing 28 U.S.C. § 1402(b) (alteration in original)).

\textsuperscript{116} See supra note 62 and accompanying text.

\textsuperscript{117} See \textit{Smith}, 507 U.S. at 202-03.

\textsuperscript{118} Id. at 204 (quoting E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).
domestic concerns in mind." The Court ruled, therefore, that in the absence of "clear evidence of congressional intent to apply the FTCA to claims arising in Antarctica," the presumption against extraterritoriality holds fast.

The language of the Smith opinion and the reasoning that underpins it bode ill for those who would seek redress against the United States for torts committed in outer space. If a place need only be a "region or tract of land" outside of United States territory to be a "foreign country," outer space is certainly a foreign country. Moreover, outer space has no more law of its own for choice of law purposes than does Antarctica, and the Outer Space Treaty makes it clear that space will have no "district" that can provide a venue for claims made by nonresidents of the United States. If the Court believes that the FTCA is governed by the presumption against exterritoriality, then surely it believes it subject to a presumption against extraterrestriality.

Those who would point to Article VIII of the Outer Space Treaty, which states that the United States retains jurisdiction over the objects and persons it puts in space, as evidence that the FTCA will apply to outer space need only review the Antarctic Treaty. Article VIII of the Antarctic Treaty grants a state jurisdiction over its nationals who are serving in Antarctica as observers (pursuant to Article VII) or as scientific personnel or support staff thereto, provided those persons "are in Antarctica for the purpose of exercising their functions." Article VIII(1) specifically confers jurisdiction "in respect of all acts or omissions occurring while" those persons are in Antarctica. That provision was little comfort to Mrs. Smith, against whose claim the United States retained sovereign immunity.

The very mind set of the Supreme Court as expressed in Smith appears to exclude outer space from consideration for FTCA coverage. The Court was convinced that Congress would never have intended to accept responsibility for its tortious actions in such "a desolate and extraordinarily dangerous land . . . as Ant-

\footnotesize{119 Id. at 204 n.5.  
120 Id. at 204.  
122 Antarctic Treaty, *supra* note 11, art. VIII(1). Article VIII applies only to those persons described, not to other members of the general population.  
123 Id.}
arctica." In light of that view, the Court is unlikely to consider outer space populous and safe enough to merit application of the Act.

IV. THE FTCA SHOULD APPLY IN OUTER SPACE, AS IT SHOULD HAVE APPLIED IN ANTARCTICA

A. MISPLACED PREJUDICE AGAINST EXTRATERRITORIALITY

Justice Stevens, the sole dissenter in Smith v. United States, exposed the folly of the majority’s opinion and pointed out that “[t]he negligence that is alleged in this case will surely have its parallels in outer space as our astronauts continue their explorations of ungoverned regions far beyond the jurisdictional boundaries that were familiar to the Congress that enacted the Federal Tort Claims Act (FTCA) in 1946.” His bases for belief that the FTCA should apply to torts committed in Antarctica are equally applicable to torts committed in outer space. Justice Stevens restated the widely accepted fact that “the FTCA includes both a broad grant of jurisdiction to the federal courts [as well as] a broad waiver of sovereign immunity.” Neither the grant nor the waiver, he added, is subject to territorial limitations other than those expressly stated in the exclusions for claims arising in a foreign country and for those asserted under the Suits in Admiralty Act or the Public Vessels Act. Had Congress not intended the Act to extend to the sovereignless high seas, it would have had no reason to include the second territorial limitation. Justice Stevens could not explain, nor did he believe that the majority could explain, their contention that a law that had applied outside United States territory for forty-five years should now be restricted by the presumption against extraterritoriality.

B. MISAPPLICATION OF THE “FOREIGN COUNTRY” EXCEPTION

In addition to its misplaced application of the presumption against extraterritoriality, the Smith Court contorted the “for-
eign country" exception to justify excluding claims arising in Antarctica (and presumably outer space) from FTCA coverage. In narrowing the scope of the FTCA's waiver of immunity and broadening the scope of that exception to include Antarctica as a foreign country, the Court completely controverted the only legislative history available that directly addresses the exception, as well as more than four decades of judicial interpretation of the Act. It also rejected the preferred interpretation of the term "foreign country" as stated in Spelar, the only Supreme Court case to address the issue. That Court stated, "[W]e know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation."

C. MISCONSTRUED CHOICE OF LAW PROVISION

The Court again mischaracterized congressional intent when it stated that Congress could not have intended to include sovereignless Antarctica under the FTCA because the jurisdictional grant contained in 28 U.S.C. § 1346(b) would then predicate federal liability on the law of "a place that has no law . . . surely a bizarre result." The Court ignored 28 U.S.C. § 2674, which makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances." As Justice Stevens pointed out, those words were unquestionably intended to identify the substantive law that would apply to a comparable act or omission by a private party at that place. As long as private conduct is constrained by rules of law, and it certainly is in Antarctica, . . . there is a governing "law of the place" within the meaning of the FTCA.

It is difficult to imagine why the Court considered it more bizarre to apply Oregon law to a case in which an entity deemed a "private individual" had allegedly injured an Oregon resident than to leave that resident with no redress whatsoever. The governing law of the place where the United States allegedly dam-

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131 Spelar, 338 U.S. at 219.
132 Smith, 507 U.S. at 201-02.
133 Spelar, 338 U.S. at 217.
134 Id. at 211 n.12. Justice Stevens voiced his assumption that the majority, based on its reasoning that Antarctica has no law, would rule "that private contracts made in Antarctica are unenforceable," and that private parties can commit torts there with no fear of redress. Id.
aged Mr. Smith was that of the State of Oregon, exactly where the suit was filed. Both English common law and American law have consistently recognized that a country's right to exercise sovereignty over its own nationals supports its exercise of civil jurisdiction in sovereignless places. That tradition addresses a nation's preference to impose its societal norms and responsibilities upon its citizens, wherever they are. The tradition is not about the place in which people act, it is about the actions themselves. The American judiciary should continue to protect individual rights and enforce individual obligations in any place it can do so without becoming entangled in the laws of another sovereign.

D. Overreaction to the Narrow Venue Gap

The Supreme Court also distorted the FTCA's venue provision in Smith. The Court did not dismiss Mrs. Smith's case because she filed it in an improper venue. Instead, the Court dismissed her case, in part, because someone, somewhere may eventually have a similar claim, yet be unable to obtain proper venue as a nonresident alien. The Court's perverse interpretation of an earlier Court's comment, contained in a footnote, that "in construing venue statutes it is reasonable to prefer the

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135 See id. at 212-13 (citing Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1032 (K.B. 1774)); Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (stating, "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress."); American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909) (containing Justice Holmes's statement that, "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."); Dutron v. Howell, 1 Eng. Rep. 17, 21 (H.L. 1693). See also Old Dominion Steamship Co. v. Gilmore, 207 U.S. 398, 403 (1907) (holding that Delaware could apply its wrongful death statute to a claim for death on the high seas because both parties were Delaware corporations, and stating that "the bare fact of the parties being outside the territory in a place belonging to no other sovereign [does] not limit the authority of the State").

The United States also freely exercises criminal jurisdiction over Americans who commit crimes outside U.S. territory, provided it faces no threat of entanglement in foreign legal systems. See, e.g., United States v. Flores, 289 U.S. 137, 155 (1933) (extending criminal jurisdiction under admiralty and maritime law to a murder committed upon an American vessel that was attached to shore by cables at a port 250 miles inland from the mouth of the Congo River).
construction that avoids leaving [a venue] gap,"\textsuperscript{136} so unreasonably widened the narrow venue gap contained in the FTCA that it effectively constricted the scope of the Act altogether. The Court could have avoided this classic exercise of "throwing out the baby with the bath water" by adhering to the facts of the case at bar. Mrs. Smith had a proper forum for her case and she used it. The Court could have determined, as it has in cases too numerous and varied to name, that this case did not require it to resolve the problematic issue of, in this particular case, venue for nonresident aliens who have FTCA claims arising in sovereignless places. In so doing, the Court would have alerted Congress to the looming problem of FTCA application in Antarctica and outer space without denying justice to Mrs. Smith, to whom the act clearly should have applied. Congress could then amend the FTCA to clarify the enigmatic portions of the statute, as this Article suggests it should.

E. DID THE COURT REACT TO PERCEIVED OPPORTUNISM?

The Supreme Court went to extraordinary lengths in \textit{Smith} to put select words of the FTCA in a context that would justify its ruling. Its wooden application of "statutory norms of construction" to arrive at an interpretation that diametrically differs from that of most other courts seems to indicate a fundamental belief on its part that the United States should not be liable for the damages it causes if it can avoid that liability. Having examined what the Supreme Court did in \textit{Smith}, the question becomes, "Why?"

As we have been told by a master of our craft, "Some theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent."\textsuperscript{137}

What policy did the Court serve by denying those who visit, work or live in sovereignless areas the right to seek redress for damages caused by employees of the United States? Two comments, each from one of the two opinions that the Supreme Court wholeheartedly adopted in \textit{Smith}, shed some light on the "why." The first was then-Judge Scalia's comment in his dissent to the

\textsuperscript{136} See \textit{supra} note 62 and accompanying text.

\textsuperscript{137} \textit{Beattie}, 756 F.2d at 130 (Wald J., concurring) (citing Dalehite v. United States, 346 U.S. 15, 49 (1953) (quoting \textit{Benjamin Cardozo, The Growth of the Law} 102 (1924))).
D.C. Circuit's opinion in *Beattie*. There, he stated that "[t]he fact that what few activities take place in Antarctica are governmental activities or are heavily dependent upon governmental activities for their support, suggests that this may not be the last multi-million dollar tort suit against the world's deepest of pockets, arising from events in that desolate region . . . ."\(^{138}\) The second is the Ninth Circuit's statement in *Smith*, the opinion in which it "agree[d] with the approach and conclusions of then Judge Scalia [in *Beattie*]."\(^{139}\) That statement was that "the search for legislative intent [should not] begin[ ] with the objective of enlarging the pool of solvent defendants for plaintiffs who think 'someone ought to pay' for a particular loss . . . ."\(^{140}\)

These statements imply a suspicion that individuals who seek redress against the United States government for property damage, injury or loss of life are engaging in some distasteful form of opportunism. Even if it were appropriate for the courts, rather than Congress, to act on such a determination, the reality is that those damaged by United States activities in outer space, or elsewhere else for that matter, face tremendous disadvantages compared to claimants against private tortfeasors. This is so despite the statutory language deeming the United States liable "to the same extent and in the same manner as a private individual under like circumstances."\(^{141}\) Were the Court to interpret the FTCA to authorize claims arising in sovereignless regions, it would hardly give carte blanche to tort claimants in search of "deep pockets" or "someone to pay for their loss." The exceptions to the Act seriously restrict the categories of persons who may claim against the government under the FTCA.\(^{142}\) They also restrict the circumstances under which those persons may claim.\(^{143}\)

\(^{138}\) *Id.* at 130 (Scalia, J., dissenting).

\(^{139}\) *Smith*, 953 F.2d at 1118.

\(^{140}\) *Id.* at 1120.


\(^{143}\) See 28 U.S.C. § 2680 (1994) (excluding claims relating to acts or omissions by government employees involving, for example, governmental discretionary functions, postal matters, assessments or collections of any tax or customs duty, suits in admiralty, most intentional torts committed by non-law enforcement officers, fiscal operations of the treasury, and combatant activities of the military during time of war).
In addition to the exceptions to the Act, the FTCA also bars claims for punitive damages and prejudgment interest,\(^{144}\) so any delay between the date of loss and the date of trial can seriously erode the value of a plaintiff's recovery.\(^ {145}\) Those restrictions remain regardless of applicable state law provisions to the contrary and the degree of the government's recklessness or culpability.\(^ {146}\) Moreover, unlike other tort victims, most FTCA claimants do not have the right to submit their case to a jury\(^ {147}\) and may seek only monetary damages as opposed to injunctive or other equitable relief.\(^ {148}\)

Perhaps the greatest restriction upon application of the FTCA comes not from the exceptions enumerated in the Act, but from the judicial interpretation of the words, "negligent or wrongful act or omission." In *Laird v. Nelms*,\(^ {149}\) the Supreme Court determined that the government, unlike a private tortfeasor, is liable under the FTCA only for proven acts of negligence. The resulting preclusion of claims against the government on strict or absolute liability theories forecloses any possibility of suits for products liability, ultrahazardous activity, or inherently dangerous activity,\(^ {150}\) all of which could have ample application in the field of space exploration. This interpretation of the Act creates a tough pill to swallow: in accidents caused by American space-related activity for which negligence cannot be proven, a foreign national may recover against the United States through a claim made by his government under the Liability Convention while a U.S. citizen damaged in the same accident remains remedi-

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\(^{145}\) See Bosco, *The United States as Defendant*, supra note 9, at 594 n.50 (citing Tompkins, *Litigation of an Airplane Hull Suit Against the United States of America*, 27 TRIAL LAW. GUIDE 329, 334 (1983)).

\(^{146}\) See id.


\(^{149}\) 406 U.S. 797 (1972).

\(^{150}\) See id. (stating that FTCA does not authorize suits against the United States for claims of strict or absolute liability for ultrahazardous activity); Dalehite v. United States, 346 U.S. 15, 45 (1953) (holding that plaintiff must plead negligence for FTCA claim and that United States is not liable under absolute liability theory); Toppi v. United States, 332 F. Supp. 513, 518 (E.D. Pa. 1971) (holding that the United States has no liability without fault under the FTCA).
Although the applicable discussion is beyond the scope of this Article, Congress should amend the FTCA to bring the remedies it affords to American citizens in line with the remedies available to foreign nationals under the Liability Convention. Injustice already exists by virtue of the gross discrepancy in this area. In light of that injustice, it is unconscionable for courts to use the "foreign country" exception to prevent U.S. citizens from recovering against their government even when they can prove that it acted wrongfully or negligently.

G. FAIRNESS MANDATES FTCA APPLICATION TO THE UNITED STATES' TORTIOUS ACTS IN OUTER SPACE

The United States has much to gain from humanity's exploration of, and adaptation to, outer space. Microgravity environments promise fascinating advances in technologies ranging from manufacturing to communications. Tourism in space could provide a thriving new sector to the nation's economy. Extraterrestrial resource exploitation could ease pressure on our nation caused by depletion of earthly resources. A "go early and often" mentality towards space exploration can only enhance our military status.

The men and women who move the United States into the true space age will do so at tremendous personal peril. There is no valid policy reason for the government to refuse compensation for its own negligence to civilians who are willing to take risks from which the country will benefit so extensively.

Majestic legislation like the Federal Tort Claims Act should be read with the vision of the judge, enlightened by an interest in justice, not through the opaque green eyeshade of the cloistered bookkeeper. As president Lincoln observed in his first State of the Union Address: "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."152

V. CONGRESS SHOULD AMEND THE FTCA

Congress should amend the FTCA to guarantee a remedy for citizens of all countries who are damaged by negligent or wrong-

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151 See 406 U.S. at 803 (Stewart, J., dissenting) (stating that majority's rule undermined the whole policy of the FTCA: liability for the United States as if it were a private person).

152 Smith, 507 U.S. at 217 (Stevens, J., dissenting) (citing Cong. Globe, 37th Cong. app. 2 (1861)).
ful acts committed by agents of the United States government in sovereignless areas. The following is proposed wording for that amendment and the accompanying report.

1998 AMENDMENT

The Federal Tort Claims Act is amended by the following provisions:

28 U.S.C. § 2680(k) is amended to replace the former wording with the following: “Any claim arising in a territory that is subject to the laws of any sovereign other than the United States.”

28 U.S.C. § 1346 is amended to add the following sentence to the end of subsection (b)(1): “'The law of the place where the act or omission occurred' means, for purposes of this section, the substantive law that would apply to a comparable act or omission by a private party at that place.”

28 U.S.C. § 1402(b) is amended to replace the former wording with the following: “Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides, the judicial district wherein the act or omission complained of occurred, or if the plaintiff does not reside in a judicial district of the United States and the act or omission complained of did not occur in a judicial district of the United States, then in the judicial district of Washington D.C.”

REPORT

SUMMARY AND PURPOSE

The 1998 Amendment to the Federal Tort Claims Act has two main purposes. The first is to overrule the Supreme Court’s decision in Smith v. United States, where the Court held that the Federal Tort Claims Act does not apply to the sovereignless territory of Antarctica. The second is to clarify the venue and jurisdiction portions of the Act to ensure that the remedy it provides will be available to victims of negligent or wrongful acts committed by United States employees in outer space.

DISCUSSION

The 1998 Amendment to the Federal Tort Claims Act is designed to restore and strengthen the remedies provided by the Act to victims of the wrongful or negligent acts or omissions of United States government employees. The Amendment re-
sponds to the Supreme Court’s ruling in *Smith v. United States* that Antarctica, a sovereignless territory, is a foreign country under 28 U.S.C. § 2680(k), and is therefore excepted from the Act. The rewording of 28 U.S.C. § 2680(k) clarifies that the exception intends only to insulate the United States from liability under foreign tort law. Because tort claims that arise in the sovereignless territories of Antarctica and outer space pose no threat of entanglement with the laws of another sovereign, no presumption against extraterritoriality applies and sovereignless territories are hereby included within the scope of the Act.

The 1998 Amendment also addresses the Court’s contention that the Act’s choice of law provision renders it inapplicable to sovereignless territories. The addition to 28 U.S.C. § 1342(b)(1) of a definition for the term “the law of the place where the act or omission occurred” is designed to contradict the Court’s reasoning that if “the place where the act or omission occurred” has no local laws of its own, the FTCA does not apply. The addition clarifies that the United States does not retain sovereign immunity for claims arising from wrongful or negligent acts or omissions for which it would be liable under the tort laws of any state in the United States if it were a private individual.

Finally, the Amendment eliminates the venue gap that existed under the former wording of the Act and that formed yet another basis for the Court’s determination that the FTCA does not apply to sovereignless regions. Under the former wording of 28 U.S.C. § 1402(b), the Act provided no proper venue in which non-residents of the United States could bring FTCA actions for claims arising in sovereignless territories. The Amendment expands the Act’s venue provision to allow non-residents of the United States to bring FTCA claims in the judicial district of Washington D.C., where the headquarters of many U.S. agencies are located.

VI. CONCLUSION

Man has always sought, and will continue to seek, new frontiers. The United States should maintain a national goal of encouraging Americans to take leadership positions in all such quests. The nation as a whole stands to benefit tremendously from the risks taken by adventuresome Americans who see a role for themselves in the exploration of outer space. The United States government accordingly should accept responsibility for the wrongful or negligent acts its employees commit,
which cause damage to those who are willing to take those risks, provided there is no valid policy reason to deny that liability. Some exceptions to the government’s waiver of immunity for its tortious acts that are listed in 28 U.S.C. § 2680 can produce harsh, even draconian results. Individuals who are gravely harmed by the wrongful or negligent acts of United States employees may be left with no possibility of compensation. Those exceptions, however, are based upon Congress’s legitimate attempt to balance national concerns against private concerns. There is no valid policy reason or national concern that justifies the dismissal of an otherwise tenable tort claim simply because that claim arose in a region that is excluded from United States sovereignty. There is also no valid reason for Congress to wait until an individual in outer space is damaged by United States activity to which he or she is not a party before it faces the issue of FTCA application to the resulting claim. The outcome of waiting will undoubtedly be a replay of the injustice rendered in *Smith v. United States*. The price of waiting may be enormous to the individual or family who must bear it alone. Congress should respond to the impetus provided by the Supreme Court in *Smith v. United States* and amend the FTCA before a similar injustice occurs.