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## Liability and Consent of the United States to be Sued—Torts in General: The United States Supreme Court Interprets the Federal Tort Claim Act's Law Enforcement Proviso

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LIABILITY AND CONSENT OF THE UNITED STATES TO BE  
SUED—TORTS IN GENERAL: THE UNITED STATES  
SUPREME COURT INTERPRETS THE FEDERAL TORT CLAIM  
ACT’S LAW ENFORCEMENT PROVISIO

*Millbrook v. United States*, 133 S. Ct. 1441 (2013)

ABSTRACT

In *Millbrook v. United States*, the United States Supreme Court *held* the law enforcement proviso—an exception to the Federal Tort Claim Act’s (“FTCA”) preservation of sovereign immunity for intentional torts—applied to torts committed by law enforcement officers regardless of whether the officer was engaged in investigative or law enforcement activity. The Court, granting certiorari to address a division among circuits as to how the proviso should be interpreted, reasoned that a plain reading of the statute’s text revealed congressional intent for immunity determinations to depend on officers’ legal authority, not the specific activity they were performing during the alleged tort. Thus, under the Court’s holding in *Millbrook*, the question of whether the government has waived sovereign immunity to intentional torts via the law enforcement proviso depends on the powers invested in the officer, not whether the officer was conducting a search, seizing evidence, or making an arrest. The Court’s holding in *Millbrook* will increase the federal government’s liability in regard to torts committed by law enforcement officers, and it leaves certain significant questions unanswered.

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## I. FACTS

On January 18, 2011, Kim Millbrook filed suit under the Federal Tort Claims Act (“FTCA”) against the United States, asserting claims of negligence, assault, and battery.<sup>1</sup> Millbrook’s complaint alleged that on March 5, 2010, while he was incarcerated in federal prison, he was placed in a chokehold by one Federal Bureau of Prisons officer and forced to perform oral sex on another.<sup>2</sup> The district court dismissed Millbrook’s suit, finding that under the FTCA, the government had only waived sovereign immunity for intentional torts committed by law enforcement officers when such torts occurred during a search, seizure of evidence, or arrest.<sup>3</sup> In a per curiam opinion, the Third Circuit Court of Appeals agreed with the district court and summarily affirmed its decision.<sup>4</sup>

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1. *Millbrook v. United States*, 133 S. Ct. 1441, 1443-44 (2013).

2. Brief for Petitioner at 5, *Millbrook v. United States*, 133 S. Ct. 1441 (2013) (No 11-10362). The brief specifically alleged the following details:

Petitioner Kim Millbrook is a prisoner incarcerated in the Special Management Unit at United States Penitentiary Lewisburg (USP Lewisburg). On March 5, 2010, shortly after being transferred to USP Lewisburg, Millbrook was taken to a basement holding cell by a prison officer. The officer who had transported Millbrook later returned with two other officers. Millbrook was placed in restraints and removed from the cell. One officer placed Millbrook in a choke hold and forced him to his knees. Millbrook was then forced to perform oral sex on the second officer. Throughout the incident, the third officer stood watch by the door. The officers warned Millbrook that if he told anyone about the assault, they would kill him.

*Id.* (internal quotation and citation omitted).

3. *Millbrook v. United States*, No. 3:11-cv-131, 2012 WL 526000 (M.D. Pa. Feb. 16, 2012).

4. *Millbrook v. United States*, 477 Fed. Appx. 4, 6 (3d Cir. 2012) (per curiam). “Millbrook did not allege that the alleged conduct occurred in the course of an arrest for a violation of federal law, or during the course of a search . . . . As Millbrook’s appeal presents no substantial question, we will summarily affirm the District Court judgment.” *Id.* at 5-7 (internal quotation and citation omitted).

Millbrook subsequently filed an *in forma pauperis* petition,<sup>5</sup> and on September 25, 2012, the Supreme Court of the United States granted him a writ of certiorari.<sup>6</sup> The Court limited its review to the question of “[w]hether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within their scope of their employment but are not exercising authority to execute searches, to seize evidence, or to make arrests for violation of Federal law.”<sup>7</sup> Initially, the United States, represented by the Department of Justice, intended to defend the Third Circuit’s decision.<sup>8</sup> However, it later announced it agreed with Millbrook and that it would not defend the judgment below.<sup>9</sup> Thereafter, the Court appointed an *amicus curiae* to defend the Third Circuit’s ruling.<sup>10</sup>

## II. LEGAL BACKGROUND

Because it has sovereign immunity, the government of the United States cannot be sued in state or federal court.<sup>11</sup> “If Congress so chooses, however, it may waive the United States’ sovereign immunity and prescribe the terms and conditions on which the United States consents to be sued and the manner in which the suit shall be conducted.”<sup>12</sup> A discussion of the government’s waiver of immunity at the center of the dispute in *Millbrook*—the Federal Tort Claims Act—follows below. But to provide context for that discussion, an analysis of the history and development of sovereign immunity is essential.

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5. “In the manner of an indigent who is permitted to disregard filing fees and court costs.” BLACK’S LAW DICTIONARY 386 (4th pocket ed. 2011). See 28 U.S.C. § 1915 (West, Westlaw through P.L. 113-31 approved 8-9-13); FED. R. APP. P. 24.

6. Petition for Writ of Certiorari, *Millbrook*, 133 S. Ct. 98 (No. 11-10362).

7. *Id.* (internal quotation omitted).

8. Brief for the United States at 2, *Millbrook*, 133 S. Ct. 98 (2013) (No. 11-10362).

9. Transcript of Oral Argument at 20-21, *Millbrook v. United States*, 133 S. Ct. 1441 (2013) (No. 11-10363) (Question from Justice Scalia: “[T]he United States didn’t take this position below, right?” Government’s reply: “[W]e determined that the position [below] was . . . not correct under the text.”). *Id.*

10. Brief for Court-Appointed *Amicus Curiae*, *Millbrook*, 133 S. Ct. 98 (2013) (No. 11-10362).

11. See *Alden v. Maine*, 527 U.S. 706, 749 (1999) (“It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts.”).

12. *Mader v. United States*, 654 F.3d 794, 797 (8th Cir. 2011) (internal quotations and citation omitted).

## A. THE DOCTRINE OF SOVEREIGN IMMUNITY

The United States inherited the doctrine of sovereign immunity from England.<sup>13</sup> “When the Constitution was ratified, it was well established in English law that the crown could not be sued without consent in its own courts.”<sup>14</sup> As early as 1651, Thomas Hobbes attempted to explain the rationale behind the rule: “The sovereign . . . is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him . . . .”<sup>15</sup> The doctrine originated during feudal times.<sup>16</sup> “[N]o lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord. Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued.”<sup>17</sup> Many have lamented that such a doctrine is antithetical to a democratic system. Justice Miller, reflecting on the differences between the English Monarchy and the United States, remarked:

Under our system the *people*, who are there called *subjects*, are the sovereign . . . . The citizen here knows no person . . . . to whom he must yield the rights which the law secures . . . . there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.<sup>18</sup>

Others have found legitimacy in the doctrine. Despite their professed abhorrence to monarchial tyranny, prominent constitutional framers such as “Alexander Hamilton, James Madison, and John Marshall, publicly endorsed the concept of sovereign immunity during the ratification process for the United States Constitution.”<sup>19</sup> Madison declared: “[J]urisdiction in controversies between a state and citizens . . . is much objected to . . . . It is not in the power of individuals to call any state into court.”<sup>20</sup> Similarly, Hamilton wrote: “It is inherent in the nature of sovereignty not to be

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13. See *United States v. Lee*, 106 U.S. 196, 205 (1882) (“[T]he doctrine is derived from the laws and practices of our English ancestors . . . it is beyond question that from the time of Edward the First until now the king of England was not suable in the courts of that country, except where his consent had been given on petition of right . . .”).

14. *Alden*, 527 U.S. at 715.

15. THOMAS HOBBS, *THE LEVIATHAN* 190 (A.R. Waller ed., 1904) (1651).

16. See *Nevada v. Hall*, 440 U.S. 410, 414-15 (1979) (“The doctrine, as it developed at common law, had its origins in the feudal system.”).

17. *Id.*

18. *Lee*, 106 U.S. at 208-09 (emphasis in original).

19. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443 (2005).

20. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1208 (2001).

amenable to the suit of an individual without its consent . . . . This is the general sense, and the general practice of mankind . . . Unless, therefore, there is a surrender of this immunity . . . it will remain with the states.”<sup>21</sup>

Remain with the states it has<sup>22</sup>—and also the federal government. The Supreme Court, in a triad of landmark decisions, has defined the doctrine’s applicability to the federal government.<sup>23</sup> Initially, the doctrine was largely discredited by a 5-4 majority vote in the historically captivating case of *United States v. Lee*.<sup>24</sup> In a country still reeling from a devastating civil war, the Court was tasked with deciding the fate of present-day Arlington National Cemetery.<sup>25</sup> The descendent of John Park Curtis—the adopted son of George Washington—Mary Anna Curtis inherited a tract of land and mansion then called the Arlington Estate.<sup>26</sup> In the main hall of the Arlington Mansion, Curtis married a man who would later become the commander of the Confederate Army—Robert E. Lee.<sup>27</sup> After General Lee accepted his commandship, the Lee family fled the Arlington Estate for Confederate-held territory.<sup>28</sup> For obvious reasons, Mary Anna could not return to Union-held Alexandria, Virginia to pay taxes on the estate, so she sent a relative to pay the taxes for her.<sup>29</sup> Because an owner of the estate was not tendering the money, the tax commissioner refused the proffered payment.<sup>30</sup> The United States subsequently purchased Arlington at a tax sale; a Union general used it as his headquarters, and later it became the final resting place for Union casualties.<sup>31</sup>

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21. The Federalist No. 81 at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (1788).

22. “[T]he Constitution’s structure, its history, and the authoritative interpretations by [the Supreme] Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . . Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document specifically recognizes the States as sovereign entities.” *Alden v. Maine*, 527 U.S. 706, 713 (1999) (internal quotation and citation omitted). *See* *Printz v. United States*, 521 U.S. 898, 919 (1997) (noting, as examples of Constitutional reservations of state immunity, “the prohibition on any involuntary reduction or combination of a State’s territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the “Citizens” of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4 . . .”).

23. Sisk, *supra* note 19, at 466.

24. 106 U.S. 196, 205 (1882).

25. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1634 (1997).

26. Sisk, *supra* note 19, at 447.

27. *Id.*

28. *Id.*

29. Siegel, *supra* note 25, at 1634.

30. *Id.*

31. Sisk, *supra* note 19, at 447-48.

In protest, Mary Anna's son brought a suit in ejectment against military officers occupying the property.<sup>32</sup> Recognizing what the dissent characterized as a clear end-around the doctrine of sovereign immunity, the Court allowed the suit to go forward:

No man in this country is so high that he is above the law . . . All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it . . . Courts of justice are established, not only to decide upon the rights of the citizens against each other, but also upon rights in controversy between them and the government.<sup>33</sup>

Accordingly, the Court allowed Lee to recover the Arlington property from the United States because he was suing officers of the government, and not the government itself.<sup>34</sup> Justice Gray, in a dissenting opinion, objected to the Court's disregard for sovereign immunity:

To maintain an action for the recovery of possession of property held by the sovereign through its agents . . . is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents . . . is to invade the possession of the sovereign, and to violate the fundamental maxim, that the sovereign cannot be sued.<sup>35</sup>

In *Larson v. Domestic & Foreign Commerce Corporation*,<sup>36</sup> the Court looked more favorably on the doctrine. *Larson* was decided on the heels of World War II; the plaintiff alleged the War Assets Administration had breached a contract regarding a sale of coal.<sup>37</sup> Again, rather than suing the agency or government itself, the plaintiff sued the agency's director.<sup>38</sup> This time, the Court, finding legitimacy in the doctrine of sovereign immunity, framed the question narrowly:

The issue here is whether this particular suit is . . . in effect, a suit against the sovereign . . . If it is, then the suit is barred . . . because it is, in substance, a suit against the government over which the court, in the absence of consent, has no jurisdiction . . . The district

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32. *Id.* at 448.

33. *United States v. Lee*, 106 U.S. 196, 220 (1982).

34. *Id.* at 221. Following the Supreme Court's decision, Lee sold Arlington back to the federal government for the sum of \$150,000, and today it remains a national military cemetery. Sisk, *supra* note 19, at 448.

35. *Lee*, 106 U.S. at 226.

36. 337 U.S. 682 (1949).

37. *Id.* at 684.

38. *Id.*

court held that this was relief against the sovereign and therefore dismissed the suit. We agree.<sup>39</sup>

In *Malone v. Bowdoin*,<sup>40</sup> the Court “reinforced and extended the Larson rule and thus further solidified the doctrine of federal sovereign immunity.”<sup>41</sup> Justice Stewart admitted *Lee* had never been overturned, but nonetheless found sovereign immunity barred yet another suit against a federal officer:

[T]he *Lee* case has continuing validity only where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation . . . No such claim has been advanced in the present case . . . [I]t was rightly dismissed by the District Court as an action which in substance and effect was one against the United States without its consent.<sup>42</sup>

In sum, the Court has “reinvigorated the doctrine of federal sovereign immunity, and today it is well-ensconced within the legal structure of federal government civil liability.”<sup>43</sup> Justice Holmes’s reflections on the logical and practical underpinnings of the doctrine, made more than a century ago, still find truth today:

Some doubts have been expressed as to the source of the immunity of a sovereign from suit without its own permission, but the answer has been public property since before the days of Hobbes. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.<sup>44</sup>

#### B. THE FEDERAL TORT CLAIMS ACT AND THE LAW ENFORCEMENT PROVISIO

Yet, despite the entrenched doctrine of sovereign immunity, citizens were sometimes able to acquire redress for tortious injury caused by the federal government before passage of the FTCA in 1946.<sup>45</sup> Rather than suing the United States, citizens could petition Congress to enact special legislation—called private bills—for the purpose of compensating them for

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39. *Id.* at 688.

40. 369 U.S. 643 (1962).

41. Sisk, *supra* note 19, at 455.

42. *Malone*, 369 U.S. at 648.

43. Sisk, *supra* note 19, at 446.

44. *Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (internal citations omitted).

45. Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1109, 1109 (2009).



torts inflicted by the government and its agents.<sup>46</sup> This system was criticized “as being unduly burdensome to the Congress and as being unjust to the claimants, in that it [did] not accord to injured parties a recovery as a matter of right but [based] any award that may be made on considerations of grace.”<sup>47</sup>

Many called for reform: “John Quincy Adams complained about the inordinate time Congress spent on claims matters. Millard Fillmore urged that a tribunal be established to handle private claims. Abraham Lincoln called for . . . change in his first annual message to Congress.”<sup>48</sup> Relief finally came in 1946 as Congress attempted to cope with a government that had dramatically increased in size due to the Great Depression, World War II, and general Roosevelt Era Reforms.<sup>49</sup> Part of the Legislative Reorganizing Act of 1946, Congress passed the FTCA.<sup>50</sup> The Act’s objective was “to waive a part of the governmental immunity to suit in tort and permit suits on tort claims to be brought against the United States . . . .”<sup>51</sup>

Upon its passage, the Act made the United States liable for damages caused by “any employee of the Government while acting within the scope of his office or employment . . . if [under the same circumstances] a private person would be liable . . . .”<sup>52</sup> However, many legislators expressed concern with such a “radical innovation,” and certain exceptions to the Government’s general assumption of tort liability were made.<sup>53</sup> One of these various exceptions—the intentional tort exception—was at the center of the dispute in *Millbrook*.<sup>54</sup> Under the intentional tort exception, Congress has maintained governmental immunity from most intentional torts.<sup>55</sup> Specifically, Congress has not waived governmental immunity from “any claim arising out of assault, battery, false imprisonment, false arrest,

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46. David W. Fuller, *Intentional Torts and other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 378 (2011).

47. H.R. DOC. NO. 1287, at 662 (1945).

48. Figley, *supra* note 45, at 1108.

49. Fuller, *supra* note 46, at 378.

50. Figley, *supra* note 45, at 1109.

51. H.R. DOC. NO. 1287, at 661 (1945).

52. 28 U.S.C. § 1346(b)(1) (West, Westlaw through P.L. 113-31).

53. Fuller, *supra* note 46, at 384. For example, the federal government still maintains immunity against suits based on government action of a discretionary nature, lost letters by the Postal Service, and claims arising in a foreign country. 28 U.S.C. § 2680 (West, Westlaw through P.L. 113-31).

54. *Millbrook v. United States*, 133 S. Ct. 1441, 1444 (2013) (“We granted certiorari to resolve a Circuit split concerning the circumstances under which intentionally tortious conduct by law enforcement officers can give rise to an actionable claim under the FTCA.”) (internal citation omitted).

55. 28 U.S.C. § 2680(h) (West, Westlaw through P.L. 113-31).

malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”<sup>56</sup> In 1974, however, Congress carved out an exception to this reservation of immunity “by adding a proviso covering claims that arise out of the wrongful conduct of law enforcement officers.”<sup>57</sup> This exception-to-the-exception has been dubbed the “law enforcement proviso.”<sup>58</sup> It “extends the waiver of sovereign immunity to claims for six intentional torts, including assault and battery, that are based on the ‘acts or omissions of investigative or law enforcement officers.’”<sup>59</sup> “As a result of the law enforcement proviso, the FTCA now permits suits based on tortious conduct by federal law enforcement officers . . . .”<sup>60</sup>

Congress decided to add this proviso, and waive immunity from torts committed by law enforcement officers, “in response to a national outcry over certain widely publicized law enforcement excesses in the early 1970’s.”<sup>61</sup> Raids conducted by federal drug enforcement agents (“DEA”) in Collinsville, Illinois were specifically mentioned in the statute’s legislative history.<sup>62</sup> In an account detailing the alleged raids, the New York Times reported:

The long haired, unshaven, poorly dressed men who burst into the [victims’] homes shouting obscenities were federal narcotics agents hunting, with no known warrants, for something or someone. They went, however, to the wrong houses. . . . [They threw one victim] down on the bed, handcuffed his arms behind his back and said: you move and your [sic] dead . . . . There were crashes elsewhere. A television set among other things was thrown across a room. An antique plaster dragon was shattered. Cameras were smashed on the floor. Papers were strewn about.<sup>63</sup>

Against this background, in *Millbrook v. United States*, the Court was tasked with determining how much of its sovereign immunity the federal government had actually intended to forfeit.

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56. *Millbrook*, 133 S. Ct. at 1443.

57. *Id.*

58. *Id.*

59. *Id.* (quoting 28 U.S.C. § 2680(h)).

60. Fuller, *supra* note 46, at 385.

61. *Id.*

62. Pooler v. United States, 787 F.2d 868, 874 (3d Cir. 1986) (citing Sen. Rep. 93-588, reprinted in 1974 U.S. Code Cong. & Admin. News at 2791). For an in-depth discussion of the Collinsville raids and Congress’ response, see Nguyen v. U.S., 556 F.3d 1244, 1254-57 (11th Cir. 2009).

63. Andrew Malcom, *Drug Raids Terrorize 2 Families—by Mistake*, N.Y. TIMES, April 29, 1973, at 1-2 (internal quotations omitted).

### III. ANALYSIS

Justice Thomas delivered the Court's unanimous opinion.<sup>64</sup> It held the FTCA's waiver of sovereign immunity for intentional torts committed by law enforcement officers applies to such torts "regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest" when the tort was committed.<sup>65</sup> First, the Court discussed its reason for granting certiorari.<sup>66</sup> Next, it explained the proviso should be interpreted using a plain text approach.<sup>67</sup> And last, the Court applied the interpretive canon of *in pari materia*.<sup>68</sup>

#### A. THE COURT'S REASON FOR GRANTING CERTIORARI: THE CIRCUIT SPLIT

The Court granted certiorari "to resolve a Circuit split concerning the circumstances under which intentionally tortious conduct by law enforcement officers can give rise to an actionable claim under the FTCA."<sup>69</sup> Specifically, the Court cited disagreement between the Third and Ninth Circuits' narrow interpretation of the proviso and the Fourth Circuit's broad interpretation.<sup>70</sup>

In *Pooler v. United States*,<sup>71</sup> the Third Circuit found the plaintiffs' complaint insufficient to state a cause of action under the FTCA.<sup>72</sup> The plaintiffs sued the Veteran's Administration ("VA") alleging a police officer employed by the VA had unlawfully arrested them.<sup>73</sup> The court interpreted the proviso to waive immunity only for torts committed by law enforcement officers during the specific law enforcement activities of

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64. *Millbrook*, 133 S. Ct. at 1442.

65. *Id.* at 1446.

66. *Id.* at 1444 ("We granted certiorari . . . to resolve a Circuit split concerning the circumstances under which intentionally tortious conduct by law enforcement officers can give rise to an actionable claim under the FTCA.") (internal citation omitted).

67. *Id.* at 1445 ("The plain language of the law enforcement proviso answers when a law enforcement officer's 'acts or omissions' may give rise to an actionable tort claim under the FTCA.").

68. *Id.* at 1446 ("Congress adopted similar limitations in neighboring provisions . . . but did not do so here. We, therefore, decline to read such a limitation into unambiguous text.").

69. *Id.* at 1444.

70. *Id.*

71. 787 F.2d 868 (3d Cir. 1986).

72. *Id.* at 873.

73. *Pooler*, 787 F.2d at 869 ("The arrests were made pursuant to warrants issued by a Pennsylvania judicial officer on charges that Pooler and Bradley sold marijuana on the premises of the VA hospital . . . [W]ith respect to the investigation, they allege that [authorities], in engaging the services of a VA employee . . . to serve as an informant, selected an unreliable person with known past drug involvement, and of less than average mental capacity.").

performing a search, seizing evidence, or making an arrest.<sup>74</sup> Because the court found the plaintiffs' complaint did not alleged a tort had occurred during one of those specific law enforcement activities, it upheld the lower court's dismissal of the complaint.<sup>75</sup> The court based its reasoning on the fact that § 2680(h) defined law enforcement officers as individuals "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."<sup>76</sup> Thus, under the holding in *Pooler*, the government retained immunity for all torts committed by law enforcement personnel—provided they were not committed during the three specific law enforcement activities enumerated in 2680(h)'s definition of a law enforcement officer.<sup>77</sup>

Although not as strictly as *Pooler*, the Ninth Circuit, in *Orsay v. United States Department of Justice*,<sup>78</sup> also defined the proviso narrowly.<sup>79</sup> The plaintiffs, Deputy United States Marshalls, sued the Department of Justice<sup>80</sup> for an alleged assault by their supervisor.<sup>81</sup> The complaint claimed that on a number of occasions the supervisor pointed a loaded gun at them and pretended to pull the trigger.<sup>82</sup> Although not requiring the tort be committed during specific types of law enforcement activity, the court held the "waiver reaches only those claims asserting that the tort occurred in the course of investigative or law enforcement activities."<sup>83</sup> The court reasoned that the proviso's legislative history, showing Congress was concerned with remedying federal law enforcement abuses, "lends support to a statutory construction that limits the government's waiver of its immunity to intentional torts committed in the course of investigative or law enforcement activities."<sup>84</sup>

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74. See *Pooler*, 787 F.2d at 872 ("[T]he *Pooler* and *Bradley* complaints do not state claims falling within the proviso to section 2680(h) because no federal officer is charged with a tort in the course of a search, a seizure, or an arrest.").

75. *Id.* ("No matter how generously we read them . . . the complaints do not charge that [the officer] committed an intentional tort while executing a search, seizing evidence, or making an arrest.").

76. *Id.* (internal citations omitted).

77. *Id.*

78. 289 F.3d 1125 (9th Cir. 2002).

79. *Id.* at 1127.

80. The United States Marshall Service is a subdivision of the United States Department of Justice. *Id.*

81. *Id.*

82. *Id.* (The supervisor "allegedly pointed a loaded gun at Appellants on a number of occasions, and said things like: 'You're dead,' 'You're history,' 'Gotcha,' and 'You never had a chance.'").

83. *Id.* at 1136.

84. *Id.* at 1135. However, the court omitted any definition of "investigative or law enforcement activities."

In *Ignacio v. United States*,<sup>85</sup> the leading case on the other side of the split, the plaintiff sued the United States for an assault he allegedly suffered at the hands of a fellow employee while they were working as guards at a security checkpoint outside the Pentagon.<sup>86</sup> The lower court, following the holding in *Orsay*, dismissed the complaint because the alleged tort did not occur while the tortfeasor was “engaged in investigative or law enforcement activities.”<sup>87</sup> Reversing the lower court’s decision, the Fourth Circuit Court of Appeals held the law enforcement proviso “waives United States’ sovereign immunity regardless of whether an officer is engaged in an investigative or law enforcement activity when he commits an assault.”<sup>88</sup> The court found the plain language of the proviso required such a holding, and it opined the *Pooler* and *Orsay* Courts had erred in their interpretive methods: “[W]e note [those] courts relented to secondary modes of interpretation without first establishing the ambiguity of the statutory text. Where, as here, the text of the statute is unambiguous, we should not engage in an analysis of legislative history to find ambiguity.”<sup>89</sup>

#### B. THE COURT’S PLAIN TEXT INTERPRETATION

The Supreme Court agreed with the Fourth Circuit’s plain text approach: “The plain text confirms that Congress intended immunity determinations to depend on a federal officer’s legal authority, not on a particular exercise of that authority.”<sup>90</sup> It rejected the court-appointed amicus curiae’s argument that immunity should only be waived for torts arising out of searches, seizures of evidence, or arrest, noting “the FTCA’s only reference to searches, seizures of evidence and arrests is found in the statutory definition of investigative or law enforcement officer.”<sup>91</sup> The Court reasoned that while the statutory definition may focus on specific law enforcement tasks, the law enforcement proviso itself “focuses on the *status* of persons whose conduct may be actionable, not the types of activities that

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85. 674 F.3d 252 (4th Cir. 2012).

86. *See id.* at 254 (“[W]hile stationed at a security checkpoint for Pentagon employees, Lane and Ignacio had a disagreement over the caliber of an M-16 round. Initially, their disagreement led only to a bet. It escalated . . . when they were again stationed at a security checkpoint . . . Lane allegedly told Ignacio that he would ‘hurt him after work’ and then pretended to punch him in the face.”).

87. *Id.*

88. *Id.* at 253.

89. *Id.* at 255.

90. *Millbrook*, 133 S. Ct. at 1445.

91. *Id.* at 1445 (internal quotation omitted).

may give rise to a tort claim against the United States.”<sup>92</sup> Thus, the Court found “there is no basis for concluding that a law enforcement officer’s intentional tort must occur in the course of executing a search, seizing evidence, or making an arrest in order to subject the United States to liability.”<sup>93</sup>

### C. THE COURT’S USE OF THE INTERPRETIVE CANON *IN PARI MATERIA*

Along with its textual argument, amicus asserted that “[a] conduct based reading is far more consistent with common sense . . . . A status based reading . . . would make the United States financially responsible for law-enforcement officers’ intentional torts having nothing to do with their law enforcement duties . . . but not for identical torts committed by other federal employees.”<sup>94</sup> In responding to amicus’s argument, the Court relied on the interpretive canon of *in pari materia*—statutes should be construed together “so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”<sup>95</sup>

The Court reasoned that had Congress wanted to further narrow the scope of the proviso it would have: “Congress adopted similar limitations in neighboring provisions, but did not do so here.”<sup>96</sup> As an example, the Court referred to the law enforcement proviso’s neighbor—28 U.S.C. 2680(a)—which reserves immunity for “[a]ny claim based upon an act or omission of an employee of the Government . . . in the execution of a statute or regulation.”<sup>97</sup> The Court claimed that similar to 2680(a)’s “in the execution of a statute or regulation” language, Congress could have added “acting in a law enforcement or investigative capacity” to the proviso, had it intended such a limit.<sup>98</sup>

## IV. IMPACT

Overturing the Third and Ninth Circuits, the Court resolved a division among the Circuits regarding the interpretation of the FTCA’s law

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92. *Id.* (emphasis in original). The Court’s focus on status was based on the fact that only in the last sentence of § 2680(h), which provides a definition of “investigative or law enforcement officer,” is there any mention of specific law enforcement activities. The operational language of the waiver, found in the second sentence, plainly states immunity to intentional torts committed by officers, like other torts under the FTCA, shall be waived—it makes no mention of any requisite conduct or activity. 28 U.S.C. § 2680(h) (West, Westlaw through P.L. 113-31).

93. *Id.*

94. Brief for Amicus at 6, *Millbrook*, 133 S. Ct. 1441 (2013) (No. 11-10362).

95. BLACK’S LAW DICTIONARY 386 (4th pocket ed. 2011).

96. *Millbrook*, 133 S. Ct. at 1446.

97. *Id.*

98. *Id.*

enforcement proviso.<sup>99</sup> Under the Court's holding in *Millbrook*, the law enforcement proviso's waiver of sovereign immunity for intentional torts committed by law enforcement officers applies "regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest."<sup>100</sup> The Court's ruling leaves two significant questions open to litigation: First, who qualifies as a law enforcement officer? And second, how will the Court's interpretation of the law enforcement proviso be reconciled with 2680(a)'s discretionary function exception?

#### A. WHO QUALIFIES AS A LAW ENFORCEMENT OFFICER?

Had the Court followed the *Pooler* holding and allowed suits to be brought against the government only for torts arising out of searches, seizures, or arrests, this question would likely be of little significance; most government agents who frequently engage in these types of activities are traditionally viewed as law enforcement officers. However, after *Millbrook*, all that is required to maintain a suit is that the government agent be *empowered* with those capabilities—they need not have ever employed them.<sup>101</sup> This clearly broadens the federal government's waiver of immunity; many government agents, such as, food inspectors, customs officers, and Forest Service employees, are empowered to conduct searches, seize evidence, and make arrests.<sup>102</sup> Whether Congress meant to include these types of government actors, who may not be traditionally viewed as law enforcement officers, is a question left unanswered.

The Court, during oral arguments, was clearly concerned with the issue; the first question posed by the Court was whether, under the more-relaxed *Ignacio* holding, the definition of law enforcement officer would include a government meat inspector.<sup>103</sup> Responding to the Court's question, the petitioner suggested that the proviso's utilization of the term *officer* was indicative of Congress's intent to limit liability to acts committed by those individuals traditionally viewed as law enforcement officers.<sup>104</sup> Petitioner suggested that a distinction could be made between

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99. *Id.*

100. *Id.*

101. 28 U.S.C. § 2680(h) (West, Westlaw through P.L. 113-31) defines the term *law enforcement officer* to mean "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."

102. Transcript of Oral Argument at 3-4, *Millbrook v. United States*, 133 S. Ct. 1441 (2013) (No. 11-10362).

103. *Id.* at 3.

104. *Id.* at 4.

individuals acting in a law enforcement capacity—core law enforcement officers—and those invested with the powers of search and seizure to perform inspections—administrative employees.<sup>105</sup>

While this position seems convincing, it is tempered by the Court’s traditional practice of reading statutory waivers of immunity strictly<sup>106</sup> and interpreting them using a plain text approach.<sup>107</sup> The Court may decide that had Congress desired to limit the government’s waiver of immunity only to intentional torts committed by “traditional law enforcement officers” it would have added such language to the text.<sup>108</sup> The language of the proviso clearly states that the term investigative or law enforcement officer “means any officer of the United States . . . empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law.”<sup>109</sup> Meat inspectors and other similar government agents are unquestionably vested with these types of powers.<sup>110</sup>

Yet, while the Court has often resorted to plain text interpretation, it has also “said on many occasions that a waiver of sovereign immunity must be unequivocally expressed . . . [and] [a]ny ambiguities in the statutory

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105. *Id.* Petitioner also argued a distinction could be made regarding the drafters’ use of the term *officer*, rather than *employee*: “The proviso doesn’t [say] [sic] any employee of the United States who is authorized to carry out a search, seizure, or arrest. It used the term ‘any officer of the United States.’ And I believe the term officer carries some water here . . . [W]e think it’s a plausible interpretation, that by using the term ‘officer’ rather than any employee of the United States, that there was a limiting factor imported into the statute . . .” *Id.*

106. *See, e.g.*, *United States v. Williams*, 514 U.S. 527, 531 (1995) (“The question before us is whether the waiver of sovereign immunity . . . authorizes a refund . . . In resolving this question, we may not enlarge the waiver beyond the purview of the statutory language. Our task is to discern the unequivocally expressed intent of Congress, construing ambiguities in favor of immunity.”) (internal quotation and citation omitted); *Dodd v. United States*, 545 U.S. 353, 359 (2005) (“[W]e are not free to rewrite the statute that Congress has enacted. When the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”) (internal quotation and citation omitted).

107. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996) (“A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text”); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (waivers of sovereign immunity must be “unequivocally expressed” and are generally not “liberally construed”).

108. The Court used similar reasoning in *Millbrook*: “Had Congress intended to further narrow the scope of the proviso, Congress could have [added the language] *acting in a law enforcement or investigative capacity*.” *Millbrook*, 133 S. Ct. at 1446 (emphasis in original).

109. 28 U.S.C. 2680(h) (West, Westlaw through P.L. 113-31 approved 8-9-13) (emphasis added).

110. *See, e.g.* 21 U.S.C. § 603 (West, Westlaw through P.L. 113-31) (“For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment . . . and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other [amenable species], and when so slaughtered the carcasses of said [amenable species] shall be subject to a careful examination and inspection . . .”).



language are to be construed in favor of immunity.”<sup>111</sup> To be sure, it now appears that the Court has decided to allow determinations of whether the proviso’s waiver of immunity will apply to a specific type of government agent to be made on a case-by-case basis. In sum, because the Court has resolved the question of *when* immunity is waived under the proviso, it is likely there will be litigation concerning *who* the proviso’s waiver applies to.

#### B. RECONCILING *MILLBROOK* WITH THE DISCRETIONARY FUNCTION EXCEPTION

Before *Millbrook*, the Circuits were already divided as to how the law enforcement proviso’s waiver of immunity should be reconciled with § 2680(a)’s discretionary function exception,<sup>112</sup> which reserves immunity for torts committed by government agents while they are engaged in duties of a discretionary nature.<sup>113</sup> In cases where a law enforcement officer is alleged to have committed a tort, some courts require the plaintiff both clear the discretionary function exception and meet the requirements of the law enforcement proviso’s waiver.<sup>114</sup> Other courts allow suits meeting the requirements of the law enforcement proviso to go forward, despite the fact they may be discretionary and thus fall under § 2680(a).<sup>115</sup>

Part of the reason for *Pooler*’s narrow holding was to “eliminate the likelihood of any overlap between” the two provisions.<sup>116</sup> “It is hard to imagine instances in which the activities of officers engaging in searches,

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111. *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012).

112. *See* *Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009) (“Although the Fifth Circuit agrees with our reconciliation of § 2680(a) with (h) . . . five other circuits have taken a different approach about how the two subsections interact.”).

113. 28 U.S.C. § 2680(a) (West, Westlaw through P.L. 113-31 approved 8-9-13). “[T]he discretionary function exception . . . generally shields the government from tort liability based on the acts or omissions of federal agencies and employees when they are exercising or performing a discretionary function.” *Nguyen*, 556 F.3d at 1250. “[C]onduct cannot be discretionary unless it involves an element of judgment or choice.” *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). “[I]t will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” *Id.* To be discretionary, acts or omissions must involve the use of “policy judgment.” *Id.* at 539. “[I]f the employee’s conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.” *Id.* at 536.

114. *See e.g.*, *Gray v. Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983) (plaintiffs must “clear the discretionary function hurdle *and* satisfy the investigative or law enforcement officer limitation”) (emphasis in original).

115. *See e.g.*, *Nguyen*, 556 F.3d at 1257 (“if a claim is one of those listed in the proviso to subsection (h), there is no need to determine if the acts giving rise to it involve a discretionary function; sovereign immunity is waived in any event.”).

116. *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986).

seizures or arrest would [be discretionary].”<sup>117</sup> Now, under *Millbrook’s* broader holding, there is a greater likelihood of occurrences where alleged intentional torts will fall into both categories because the Court has eliminated the requirement that torts occur during specific law enforcement or investigative activities—most of which are unlikely to be discretionary.<sup>118</sup> Thus, whether the Court will allow suits brought under the law enforcement proviso to go forward when they are of a discretionary nature is unknown. However, given the holding in *Millbrook*, the likelihood that this issue will arise in the future has certainly increased.

## V. CONCLUSION

In *Millbrook*, the Court decided that Congress, via § 2680(h)’s law enforcement proviso, intended to consent to suits alleging intentional torts committed by federal law enforcement officers “regardless of whether the officers are engaged in investigative or law enforcement activity.”<sup>119</sup> While the Court’s holding clarifies the circumstances under which the federal government has consented to intentional tort suits, it leaves two important questions unanswered: first, who qualifies as an “investigative or law enforcement officer,” and second, whether intentional tort suits may be brought against the government if the law enforcement officer was engaged in duties of a discretionary nature when the tort occurred.

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117. *Id.*

118. *Id.*

119. *Millbrook*, 133 S. Ct. at 1446.

\* 2015 J.D. candidate at the University of North Dakota School of Law. Thank you to my family and my wonderful fiance Kayla. Your love and support has been invaluable. I would also like to thank Claire Smith for her guidance in choosing this topic.