

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ABDUS-SHAHID M.S. ALI :

4 Petitioner :

5 v. : No. 06-9130

6 FEDERAL BUREAU OF :

7 PRISONS, ET AL. :

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9 Washington, D.C.

10 Monday, October 29, 2007

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:08 a.m.

15 APPEARANCES:

16 JEAN-CLAUDE ANDRE, ESQ., Los Angeles, Cal.; on behalf of
17 Petitioner.

18 KANNON K. SHANMUGAM, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of Respondents.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-9130, *Ali v. Federal Bureau of Prisons*.

Mr. André.

ORAL ARGUMENT OF JEAN-CLAUDE ANDRE

ON BEHALF OF THE PETITIONER

MR. ANDRE: Thank you, Mr. Chief Justice, and may it please the Court:

The text of section 2680(c) of the Federal Tort Claims Act establishes, and the provision's legislative history and underlying purpose confirm, that Congress did not intend the provision to broadly bar all claims arising out of all detentions of all property by all law enforcement officers.

As in any statutory construction case, we need to, of course, begin with the text. And with respect to the text in this case, we believe that the statutory language is simply no different than the statutory language at issue at *Circuit City v. Adams*. In *Circuit City v. Adams*, this Court applied *eiusdem generis* to limit a sweepingly broad residual phrase that is meaningfully indistinguishable from the "any other law enforcement officer phrase" at issue here.

In particular, in *Circuit City*, the Court was

1 asked, what kinds of employment contracts were exempted
2 from the mandates of the Federal Arbitration Act? The
3 particular provision at issue in that case, 9 U.S.C.
4 section 1, exempted from the Act's coverage any -- and I
5 quote -- "contracts of employment of seamen, railroad
6 employees or any other class of workers engaged in
7 foreign or interstate commerce."

8 That residual phrase, read in isolation, is
9 broad and sweeping. On its face, it certainly would appear
10 to apply not only to transportation workers, but also to
11 retail store clerks, like the Respondent in Circuit City.
12 Nonetheless under ejusdem generis, this Court limited that
13 residual phrase to just to transportation workers.

14 CHIEF JUSTICE ROBERTS: I suppose there's a
15 difference between a sufficient laundry list in a
16 residual phrase and an example in a residual phrase. In
17 Circuit City, you have a couple of examples -- seamen,
18 railroad workers. Here it's just a customs or excise
19 worker. I regard customs and excise as kind of the same
20 thing. So why isn't it more like the cases where we've
21 said, you have an example in a residual phrase; the
22 example is not limiting?

23 MR. ANDRE: Well, first of all, Your Honor,
24 if I could point out that the government had made the
25 argument that you have to have a list, and I think under

1 the government's interpretation, you had to have at least
2 three items, two specific and one general.

3 In Norfolk -- Norfolk and Western Railway --
4 this Court said, that need not be the case. There the
5 Court said that you could have a singular general term
6 preceded by a singular specific term. So it's our position
7 that --
8 that even if you were to read this statute as -- as
9 possessing only two items, that you could still apply
10 ejusdem generis, but we don't read the statute that way.

11 We believe that the statute actually contains a
12 list of three items, and that Congress to save itself a
13 couple words, decided to say "any officer of customs or
14 excise, or any other law enforcement officer," instead of
15 saying the more wordy version, "any officer of customs, any
16 officer of excise or any other law enforcement officer."
17 I don't think we can fault Congress for its pith in that
18 scenario.

19 To get back to the residual phrase, the "any
20 other law enforcement officer" phrase here, ripped from
21 its moorings, as we believe the government is trying to
22 do, would certainly seem to apply to all law enforcement
23 officers, including Bureau of Prisons officials, which by
24 statute are law enforcement officers. But section
25 2680(c) contains a number of contextual cues that

1 Congress didn't have general law enforcement functions
2 in mind when it passed the provision. It had customs
3 and tax functions in mind. In particular, the detention
4 clause preserves sovereign immunity for the detention of
5 goods and merchandise by any officer of customs or
6 excise.

7 CHIEF JUSTICE ROBERTS: Well, not just goods
8 or merchandise. Goods, merchandise or other property.
9 And does "other property" include any type of property?

10 MR. ANDRE: We believe it does, and we
11 believe that when Congress added that language, it was
12 simply Congress's sensible recognition that customs and
13 tax officers will detain or seize cash and real property
14 which wouldn't be covered or wouldn't be subsumed under
15 "goods and merchandise."

16 CHIEF JUSTICE ROBERTS: So "goods and
17 merchandise or other property" are just examples, and
18 then a residual phrase that includes everything. But
19 "customs or excise or any other law enforcement
20 officer," that's subject to ejusdem generis, all in the
21 same sentence.

22 MR. ANDRE: Well, we actually don't think --
23 or I guess I cannot necessarily agree with the first
24 part of what you just said, Mr. Chief Justice. We don't
25 believe that -- that other property necessarily, or that

1 "goods and merchandise and other property" -- the goods
2 and merchandise are examples of "other property." We
3 think in that situation, goods and merchandise refer
4 specifically to goods and merchandise as -- as explained
5 historically in the United States Code, which are, you
6 know, more movable things other than cash, tangible
7 items other than cash, and "other property" then covers
8 cash and real property.

9 Excuse me. Getting back to the contextual
10 cues in this case, in addition to the four contained in
11 the detention clause itself, the assessment clause
12 contains four additional contextual cues. It preserves
13 sovereign immunity for the assessment of any tax or the
14 collection of any customs duty. And because we have this
15 great quantity of contextual cues in a very short
16 statutory provision, we believe that we would also
17 prevail under an application of the *noscitur a sociis*
18 canon, that this Court most recently applied two terms
19 ago in *Dolan v. Postal Service*.

20 In that case, what was at issue is whether the
21 term "negligent transmission" in section 2680(b) of the
22 Federal Tort Claims Act reached all negligent
23 transmissions, in particular a parcel left on the foot of
24 someone's front door that causes them a slip-and-fall
25 injury, or if instead, it was limited by its antecedent

1 contextual cues, namely -- I'm sorry -- namely, "loss" and
2 "miscarriage," which would tend to indicate that Congress
3 intended really only to preserve sovereign immunity for
4 instances in which the delivery was untimely or went to the
5 wrong location.

6 The Court, again, sensibly looked past the
7 superficially broad "negligent transmission" language and
8 instead said, no, we have to read it in context. And in
9 context, Congress did not intend us to just pluck those two
10 words out of the dictionary and apply a dictionary meaning.

11 In fact, in that case, the government
12 implored this Court to apply dictionary definitions to
13 "negligence" and "transmission," and that's essentially
14 what the government is trying to ask this Court to do here.

15 JUSTICE SCALIA: Counsel, what do you do
16 about the later -- the later statute that makes an
17 exception to the exception?

18 MR. ANDRE: We don't believe that that
19 changes -- sorry, we don't believe that changes the meaning
20 of the detention clause at all beyond the small change that
21 Congress made by adding "property" --

22 JUSTICE SCALIA: I mean, it clearly -- the
23 exception to the exception says that -- that the
24 exception is applicable to any claim based on injury or
25 loss of goods or merchandise, if among other

1 requirements, "the property was seized for the purpose of
2 forfeiture under any provision of Federal law providing
3 for the forfeiture of property."

4 Now, that's more than customs and tax. Any
5 provision of Federal law.

6 MR. ANDRE: Well, Your Honor --

7 JUSTICE SCALIA: Why do you need that
8 exception to the exception, if the exception doesn't
9 cover anything except customs and tax in the first
10 place?

11 MR. ANDRE: Well, we believe that the fact
12 that Congress decided to not only preserve the detention
13 clause, but also mimic its language in the exception to
14 the exception, means that Congress intended to kind of
15 bring forward the, of course, original meaning, as of 1946,
16 of that clause. But I think to get what you're
17 asking me, the government's position, that because the
18 exception to the exception references "any provision of
19 forfeiture" -- the government's suggestion that that
20 somehow broadens the scope of the statute is misplaced.

21 Customs and tax officers regularly apply
22 other forfeiture statutes. And in particular, the one
23 they use a lot is 21 U.S.C. 881. That's the general
24 civil forfeiture statute. And so in many cases, they
25 will bring a forfeiture action under either their

1 agency's specific forfeiture provision, or the general
2 21 U.S.C. 881. And so when Congress included that
3 language saying "any provision of forfeiture," it was
4 simply Congress's sensible recognition that they don't
5 --

6 JUSTICE SCALIA: They didn't -- they didn't
7 need that if indeed it covered all seizures by -- by
8 customs and tax officers, and nobody else. If that's all
9 it -- it covered, what -- you know, this doesn't achieve
10 anything. The purpose of "under any provision of Federal
11 law." It seems to me that that envisions seizure under
12 laws other than tax and customs. Now you're saying
13 there's one -- one such law that tax and customs officers
14 sometimes use?

15 MR. ANDRE: There may be more. I was giving
16 an example, but the one that I gave you, 21 U.S.C.
17 881, is the one most frequently used. It is the general
18 forfeiture provision. It's kind of the backbone of all
19 forfeitures. And so in many cases, officers bring
20 forfeiture actions not only either -- either under their
21 own agency forfeiture provision or the general.
22 Sometimes they bring them under both.

23 But the point is that's a meaty statute there,
24 and I -- I assume that Congress wanted to make clear that
25 if a customs or tax officer were to bring a forfeiture

1 proceeding under that meaty provision, and maybe some other
2 ones that they would use from time to time, that the
3 exception to the exception would still work here.

4 JUSTICE SCALIA: What work does it do? What
5 work, under your interpretation, does that later provision
6 do, if the property was seized for the purpose of
7 forfeiture under any provision of Federal law providing for
8 the forfeiture of property?

9 MR. ANDRE: Under our interpretation, if a
10 customs or tax officer or another law enforcement
11 officer acting in a customs or tax capacity detains
12 property and injures it -- and it doesn't matter under
13 which forfeiture law they detain the property --

14 JUSTICE SCALIA: Right.

15 MR. ANDRE: -- and then the plaintiff is
16 ultimately successful, I'm sorry, I guess -- yes, if the
17 plaintiff is ultimately successful in defeating the
18 government's claim for forfeiture, then they can sue
19 under the FTCA for the damage to their property.

20 JUSTICE SOUTER: Mr. André, it may be that
21 things would fall into place easier if you would give us
22 an example or examples of instances in which any other
23 law enforcement officer would be engaged in detaining
24 property in -- in the course of enforcing customs or
25 excise laws. If we can understand that, then we are

1 going to have a better sense of how the exception might
2 work. Can you give me an example of the other law
3 enforcement officer engaged in customs and excise?

4 MR. ANDRE: Sure. The best example that
5 comes to mind is pre-9/11, before the merger of the INS
6 and the Border Patrol -- or I'm sorry, the Customs
7 Bureau -- under the Department of Homeland Security.
8 When you drove across the border, before 9/11, more often
9 than not, you would see a gentleman or a woman in a green
10 jump suit. They were INS. But not only were they
11 asking you questions about your immigration status and
12 checking to see if you had ID; they were also asking
13 about what you were bringing in -- for example, oh, do
14 you have more than two bottles of liquor? Because
15 you're only allowed to bring in two.

16 And if you said yes, then they would direct you
17 over to secondary inspection. And even there, in secondary
18 inspection, certainly sometimes there may have been
19 officers in blue suits, the customs enforcement officers.
20 But more often than not, they were still officers in green
21 suits, INS officers. And there they're taking this extra
22 property from you because they believe you are not supposed
23 to have it, and then sending you on your way.

24 There are many task forces in many other
25 instances in which these officers can overlap or share

1 functions, postal inspectors working with the customs
2 enforcement agencies to keep --

3 JUSTICE GINSBURG: Did you say IRS officers?
4 Because they would be covered, if it's tax and customs.

5 MR. ANDRE: Right. We believe IRS officers
6 are expressly covered, but, for example, when the FBI is
7 conducting an investigation with the IRS into fraud and
8 other tax issues, then we believe that those FBI agents
9 would be covered.

10 So we don't believe it's hard at all to find
11 a number of examples of where other law enforcement
12 officers are assisting tax and customs officers,
13 standing in the shoes of tax and customs officers, or
14 just doing something sufficiently akin to what tax and
15 customs officers do. And --

16 JUSTICE GINSBURG: You gave an example in
17 your brief that didn't seem to fit. I mean, you spoke of
18 a DEA agent who was searching for narcotics, and that
19 sounds to me like what DEA agents do. They were not
20 auxiliary to a customs officer.

21 MR. ANDRE: No. That's correct, Justice
22 Ginsburg. That's the Formula One case out of the Second
23 Circuit. And the reason why we relied on that case is
24 because the DEA agents were opening up a shipping
25 container that had not yet been opened since it came

1 from overseas.

2 JUSTICE GINSBURG: But they were doing it
3 for their primary business, which was to detect
4 narcotics.

5 MR. ANDRE: That's right. And we, again,
6 reference that case because we wanted to offer the Court
7 a broad construction, or make sure the Court was
8 comfortable in knowing that we were comfortable with the
9 "other law enforcement officer" phrase being read
10 broadly to reach any -- you know, any loose tax or
11 customs function.

12 If the Court wants to construe that phrase
13 more narrowly, we still win this case, and we have no
14 problem if the Court wants to do that. But we think
15 that, given that the residual phrase of the detention
16 clause starts out with the word "any," the way to give
17 -- to give credence to Congress's use of that word is to
18 then construe the phrase as reaching conduct such as the
19 conduct in the Formula One case.

20 JUSTICE ALITO: Could we interpret the term
21 "law enforcement" -- "any other law enforcement officer"
22 to be limited to those law enforcement officers whose
23 duties generally include the detention of goods?

24 MR. ANDRE: Well, I don't think so, Justice
25 Alito, because we weren't really prepared to debate what

1 exactly "detention" means. In fact, we didn't petition
2 on that issue, and my client didn't press it below. But
3 we were just intuitively thinking -- I don't think that the
4 word "detention" does much work for us here, at least in --

5 JUSTICE ALITO: Well, why doesn't it? It's
6 not clear to me. Maybe this is not within the question,
7 but why were your client's goods detained? "Detention"
8 seems to connote holding the goods against the wishes of
9 the owner, and that wasn't the situation here. He gave the
10 goods -- he gave them to the Bureau of Prisons officer for
11 the purpose of having them sent on to his new prison.

12 MR. ANDRE: I agree. I should have been
13 more clear. We don't believe that the word "detention"
14 necessarily sheds a lot of light on how you construe
15 what "other law enforcement officer" means, but
16 certainly, yes, we believe that if the detention issue were
17 alive in this case, we have a very strong case, because
18 there's a very passive kind of bailment here, as you
19 referenced, where our -- or my client was, you know,
20 told to leave his property with a receiving/discharge
21 clerk and go to a new institution, and the property was
22 going to follow him along. There was no seizure. There
23 was no investigation.

24 JUSTICE ALITO: Well, you don't think that
25 concept sheds light on what Congress had in mind when it

1 referred to any other Federal law enforcement officer?

2 MR. ANDRE: I -- I don't, but I don't want
3 to resist you too much either. You know, if the Court
4 would like us to reach that issue, we'd be happy to
5 brief it, if the Court wanted to issue an order akin to the
6 one it issued last term in U.S. v. Resendiz-Ponce.

7 And I think, to get more directly to what
8 you're saying, whatever Congress intended as far as
9 other law enforcement officers, the fact that we have a
10 case here where, again, there's this very passive
11 bailment by a Bureau of Prisons receiving/discharge
12 clerk, I think exemplifies how the government's
13 construction of the statute is too broad. And I think
14 that might be what you were trying to tease out of me
15 there.

16 And to get back to the government's
17 construction, we believe that their construction would
18 render a number of words in this statute superfluous,
19 which is sort of our third textual reason for reading
20 the statute our way. The detention clause contains a
21 total of 22 words. Under the government's construction,
22 it would simply read: "Any detention of any property by
23 any law enforcement officer." Fourteen words would be
24 excised right out of the statute.

25 CHIEF JUSTICE ROBERTS: But, I mean, that's

1 always true when you have an example and a more general
2 phrase. And yet our cases indicate that we often read
3 the language that way.

4 In other words, it's giving you, perhaps,
5 the most common example in which you're going to have a
6 detention of goods, but it's not limiting it to those
7 officers.

8 MR. ANDRE: Well, there certainly are some
9 cases that would appear to go both ways, although I
10 think if you take a look at the cases cited by the
11 government, those cases involve pretty -- well, I realize
12 we have an unclear, bizarre statute here as well, but those
13 are pretty bizarre statutes the government is relying on
14 where the Court has, and more often than not, it has
15 also been as an alternative statement, you could even
16 say possibly dicta, where the Court has said, oh,
17 Congress can give examples.

18 But more often than not, the Court applies
19 the ejusdem generis canon and the noscitur a sociis
20 canon to -- to confine or limit a superficially broad
21 residual phrase. And if that weren't the case, then
22 *Gutierrez v. Ada* would have come out the other way; *Dolan*
23 *v. Postal Service*; of course, *Circuit City*.

24 CHIEF JUSTICE ROBERTS: Yes, but *S.D. Marine*
25 wouldn't have come out the other way.

1 MR. ANDRE: That's true.

2 CHIEF JUSTICE ROBERTS: Was that an obscure
3 statute in S.D. Marine?

4 MR. ANDRE: I'm sorry. I'm not that
5 familiar with the statute that we have in that case.

6 CHIEF JUSTICE ROBERTS: Doesn't the word, as your
7 brother argues, doesn't "any" cut against you? If they
8 intended the other law enforcement officer to be limited to
9 similar to customs or excise, it seems to me they wouldn't
10 have thrown in "any other law enforcement officer."

11 MR. ANDRE: Well, as kind of a practical matter,
12 we don't think that when you have a statute like this, the
13 word "any" really does a lot of work. I mean,
14 if you had taken out the word "any" and instead
15 pluralized the word "officer," I don't think the statute
16 really would work any differently.

17 But even taking -- taking as true this
18 Court's oft-repeated statement that "any" is evidence of
19 expansive meaning by Congress, we believe our
20 construction is faithful to that, because we are willing
21 to bring in to our construction of the statute some of
22 these other law enforcement officers who may be
23 performing their ordinary functions, such as DEA
24 officers, enforcement of drug laws, but they are doing
25 it akin to customs laws.

1 And again, you know, the Court need not adopt
2 that construction for us to prevail in this case. But
3 that's how we believe that our construction is faithful to
4 the word "any" to the extent that, in this statute, it's
5 relevant at all.

6 JUSTICE STEVENS: May I ask, following up on
7 Justice Alito's question, has there ever been a debate
8 in earlier stages in this litigation as to whether this
9 was a detention?

10 MR. ANDRE: No, there was not.

11 JUSTICE STEVENS: Because if it were not a
12 detention, then you'd win.

13 MR. ANDRE: Oh, yes, absolutely.

14 JUSTICE STEVENS: Yes. I'm just wondering why
15 you didn't make the argument somewhere along the line.

16 MR. ANDRE: Well, my client was pro se in
17 the court of appeals, and he didn't raise it there. And
18 to be -- again, we didn't think that the issue of
19 whether a detention had to be a seizure, something more
20 forceful, or whether it was so broad as to include more
21 of a passive bailment, like we have here, we didn't
22 believe that that issue had percolated enough in the
23 courts of appeals to warrant petitioning on. So we
24 figured we'd fight this fight here today.

25 JUSTICE STEVENS: But it is clear. I just

1 want to be -- you get so many exceptions from exceptions
2 from exceptions, you get a little mixed up. But I am
3 clear, am I not, that if it were not a detention, you would
4 win?

5 MR. ANDRE: Absolutely.

6 JUSTICE STEVENS: Everybody agrees, of course.

7 MR. ANDRE: If there was not a detention or
8 if the BOP guard was not an "any other law enforcement
9 officer," we would win under either two of those
10 independent analyses.

11 JUSTICE STEVENS: And is it also not clear
12 that under the government's -- well, I guess I should ask
13 them, but I got it right in front of me now -- if you
14 deleted the words "officer of customs or excise or any
15 other," if you just took those words out of the statute,
16 it would then mean exactly what the government contends
17 it means?

18 MR. ANDRE: That's exactly right. And
19 that's why we believe that the rule against superfluity
20 is another reason why our construction is more faithful
21 to Congress's intent in this case.

22 As I mentioned at the outset, we also
23 believe that the legislative history underlying purposes
24 for this particular provision support our reading. In
25 particular -- I realize the legislative history is pretty

1 sparse, but in particular, there were six congressional
2 committee reports issued by Congress after the detention
3 clause was expanded to essentially its current form.

4 And in all six of those reports, Congress
5 conspicuously omitted to make any reference to the fact
6 that this phrase could possibly reach the detentions of
7 all property by all law enforcement officers.

8 Now, we're not suggesting that this case is
9 at all like *Arlington v. Murphy*, for example, where we
10 are going to have legislative history try to overrule a
11 clear statutory text. I think it's pretty clear that
12 this text is ambiguous, and so legislative history is
13 relevant to give that text meaning.

14 And so the reason why we focus here on those
15 particular committee reports is, as the court of appeals
16 has stated, the committee reports are the most helpful
17 form of legislative history because when many members of
18 Congress go up to vote, they haven't parsed particular
19 provisions in the text; they rely on the committee
20 reports, the reports prepared by the committee that
21 marked up and presented the language to the floor. And
22 so, if when all those members --

23 CHIEF JUSTICE ROBERTS: But the President
24 doesn't rely on those when he signs the statute into
25 law.

1 MR. ANDRE: No. That's true, Your Honor.
2 But when those members typically go up to the floor and
3 vote, they oftentimes don't parse the language. They
4 rely on the committee reports.

5 And so if the government's construction were
6 correct here, essentially what you would have is -- is all
7 of those members' votes being overridden because they
8 couldn't possibly have known -- unless they took the
9 time to parse the text, and we all know that a lot of
10 times they don't -- they wouldn't possibly know that
11 there'd be any chance whatsoever that this phrase could
12 broadly reach the detention of property by all law
13 enforcement officers.

14 Even putting that kind of legislative history
15 argument aside, I think we're on our strongest footing when
16 we talk about how our construction is faithful to
17 Congress's underlying purpose for this particular
18 provision. On three occasions, this Court has either
19 suggested or expressly stated that the purpose for this
20 particular provision was to avoid the creation of a
21 redundant federally funded remedy.

22 As we explain in our opening brief,
23 there was a pre-existing federally funded remedy only
24 for the negligent conduct of tax and customs officers.

25 JUSTICE GINSBURG: Does that still exist

1 after the Westfall Act?

2 MR. ANDRE: Well, we believe it would if --
3 well, actually, that's a very good question. I'm not
4 sure.

5 JUSTICE GINSBURG: Because now, the -- there
6 wouldn't be -- the United States would be substituted --

7 MR. ANDRE: Right.

8 JUSTICE GINSBURG: -- for the agent's
9 abuses.

10 MR. ANDRE: Right, but then in that
11 situation, once the United States is substituted, they
12 could seek dismissal because the Westfall Act doesn't
13 override any exceptions to the FTCA. So, yes, Justice
14 Ginsburg, in that particular case, if you're dealing
15 with an officer of customs or tax or another law
16 enforcement acting in that capacity, and they were sued
17 personally for the negligent handling of property, the
18 government could certify they're acting within the scope
19 of their employment, step into the case, and then move
20 to dismiss under this provision, under 2680(c).

21 But, historically, there was -- before the
22 Westfall Act, there was a pre-existing federally funded
23 remedy for only officers acting in a tax or customs
24 capacity or customs or tax officers by name. And so it
25 would be inconsistent with Congress's underlying purpose

1 to avoid creating a duplicative remedy to apply its
2 provisions so broadly, because Congress wanted to provide
3 a cause of action for claims against law enforcement
4 officers, other than those against whom a cause of action
5 was already available.

6 JUSTICE ALITO: How do we know -- how do we
7 know that that's the only purpose of this exception?

8 MR. ANDRE: Well, as I mentioned, this Court
9 suggested in Kosak that that was the only purpose,
10 but then in Hatzlachh and in Gutierrez v. Martinez, this
11 Court twice stated that that was the only purpose, and
12 the Court did so for good reason. Again, although the
13 legislative history is sparse, the only statements
14 whatsoever in the legislative record about the purpose
15 for this particular provision was that Congress was
16 intending to avoid creating a duplicative remedy.

17 JUSTICE ALITO: This is all based on Judge
18 Holtzoff's testimony? That's the basis for the
19 conclusion that this is the only purpose for this
20 exception?

21 MR. ANDRE: And it's also based on the
22 testimony of Colonel O.R. McGuire, who was general
23 counsel for the Comptroller General. And it wasn't just
24 Judge -- while Judge Holtzoff was probably the architect
25 of the detention clause and maybe of this entire provision,

1 it was the Comptroller General's Office and Judge
2 Holtzoff who jointly were responsible for preparing tort
3 claims legislation.

4 So, essentially, of the two people who were
5 most relevant to the preparation of the FTCA -- and
6 granted we're talking 15 years before its actual enactment
7 -- but two people who were most important for preparing
8 this tort claims legislation, they both agreed that the
9 only purpose for this particular provision was to avoid
10 creating a redundant remedy.

11 I'd like to save the rest of my time for
12 rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. André.

15 Mr. Shanmugam.

16 ORAL ARGUMENT OF KANNON SHANMUGAM

17 ON BEHALF OF THE RESPONDENTS

18 MR. SHANMUGAM: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 Section 2680(c) preserves the government's
21 immunity against tort claims concerning the detention of
22 property by any law enforcement officer. That reading
23 is consistent not only with the plain language of the
24 statute, but also with Congress's underlying policy
25 objectives in creating the FTCA's exceptions.

1 Petitioner effectively asks this Court to engraft
2 language onto the statute by adding the amorphous
3 limitation "acting in a customs or tax capacity" to the
4 unambiguous statutory phrase "any other law enforcement
5 officer."

6 JUSTICE SOUTER: Mr. Shanmugam, may I ask
7 you -- this goes to your ambiguity point. May I ask you
8 this question? If Congress wanted to cover all law
9 enforcement officers, the only reason for mentioning the
10 customs and excise people would be to make it very clear
11 that they were within that category of all law enforcement
12 officers, and I take it that's basically what you're
13 saying.

14 MR. SHANMUGAM: Yes, I think that that's
15 correct with one caveat, Justice Souter, and I don't mean
16 to quibble, but I think that this is important. I think
17 that when one looks at the evolution of the statute, it may
18 very well have been that when Judge Holtzoff drafted the
19 relevant statutory language, he started with customs or
20 excise officers, because the British bill that was
21 apparently the model for the detention of property
22 clause --

23 JUSTICE SOUTER: Yes.

24 MR. SHANMUGAM: -- used that phrase, and he
25 may then have decided to expand it to other law

1 enforcement officers simply because he concluded that
2 there was no basis for treating other law enforcement
3 officers differently.

4 JUSTICE SOUTER: But wouldn't --

5 MR. SHANMUGAM: So --

6 JUSTICE SOUTER: Wouldn't the way to do that
7 would have made it at least clearer that that's
8 what Congress, or what he had in mind and what Congress
9 was getting at, would have been to provide that the --
10 that the exception referred to law enforcement officers
11 including an officer of customs or excise? In other
12 words, they would have made it clear that at that point,
13 the old historical customs and excise rule was sort of
14 the tail on the dog, and the dog was law enforcement
15 officers. Instead, however, the order is exactly
16 different. On what your reading is -- on your reading,
17 what is now the tail of the dog comes first, and the
18 general clause "law enforcement officer" comes second.

19 MR. SHANMUGAM: I --

20 JUSTICE SOUTER: So, number one, it is less
21 clear, and it really raises the question: Weren't they
22 trying to get simply at law enforcement officers who
23 were doing the customs and excise function? So my
24 question is, why doesn't the order of the words cut
25 against you by putting, on your theory, the tail of the

1 dog before the dog?

2 MR. SHANMUGAM: Justice Souter, it is
3 certainly true that Congress could have written that
4 statute that way and, indeed, could have omitted the
5 customs or excise officers entirely, and that certainly
6 would be a clearer statute in the sense that I don't
7 think that Mr. André would be here if we had a statute
8 that simply referred to any law enforcement officer.

9 But the United States Code is replete with
10 provisions that fit this model, that start with specific
11 examples, and then contain a general residual clause.
12 And, indeed, even the Constitution has similar
13 provisions. To take one concrete example that we cite
14 among the many examples in footnote 11 of our brief, the
15 Extradition Clause in Article IV of the Constitution
16 refers to extradition for treason, felonies, and other
17 crimes. And there's no doubt that the framers could
18 have simply referred to crimes, but they cited those
19 examples. And as this Court held in a case way back when,
20 Kentucky v. Dennison, the reason that Congress used those
21 examples was for emphasis to make clear that political
22 crimes such as treason and other felonies that would
23 qualify as political crimes were covered.

24 JUSTICE SCALIA: It's also --

25 MR. SHANMUGAM: So --

1 JUSTICE SCALIA: It's also not entirely
2 clear what -- whether it's a tail or not. It depends on
3 what the dog is. If you can -- if you were trying to
4 identify the most common instances, especially at the
5 time this provision was enacted, the most common
6 instances in which property was detained by the
7 government, I mean you know, later -- later forfeiture
8 provisions are numerous, but at that time, I think there
9 were relatively few. I think the dog would have been --
10 would have been customs and excise officers. And the
11 "or other officers" would have picked up probably very
12 little real -- real instances of property detention.

13 MR. SHANMUGAM: Assuming for present
14 purposes, Justice Scalia, that the dog here is any
15 officer of customs or excise, I think that the critical
16 point is that the tail was indeed smaller than it would
17 be today, because customs and excise officers were among
18 the most important federal law enforcement officers.

19 JUSTICE STEVENS: If you --

20 MR. SHANMUGAM: You know --

21 JUSTICE STEVENS: No, but -- but a short
22 time ago, you said there was no basis for distinguishing
23 between excise officers and all other law enforcement
24 officers. But there was indeed a basis for it, namely
25 that there was an alternative remedy for people

1 specifically named in the statute, which was not true of
2 all other officers. It's true now, but it wasn't then.

3 MR. SHANMUGAM: Well, we believe, first of
4 all, that if one looks at this Court's decision in
5 Kosak, the Court did not in any way suggest that the
6 availability of alternative remedies was the sole
7 purpose --

8 JUSTICE STEVENS: I'm not suggesting that,
9 but that is a reason for drawing a distinction between
10 all others and this particular class.

11 MR. SHANMUGAM: Justice Stevens, it
12 certainly was one of Congress's primary purposes in
13 creating the exceptions generally, but we do believe
14 that our interpretation of the statute serves that
15 purpose, albeit to a lesser extent perhaps than it
16 serves the other congressional purposes, but that was --

17 JUSTICE STEVENS: It didn't serve that
18 purpose before 2000.

19 MR. SHANMUGAM: It did serve that purpose,
20 Justice Stevens, because there was an alternative
21 remedy, albeit one that was not federally funded, and
22 that was a common-law action against a law enforcement
23 officer in his personal capacity for negligence.

24 JUSTICE GINSBURG: But why wasn't it federally
25 funded? I thought there was a provision for

1 indemnification.

2 MR. SHANMUGAM: There was a provision for
3 indemnification for revenue officers and other officers
4 essentially acting in a revenue capacity. I believe that
5 the exact statutory language was "collectors and other
6 revenue officers" -- and that indemnification provision,
7 to be sure, would not have applied to garden-variety law
8 enforcement officers.

9 But in looking at the availability of
10 alternative remedies, this Court has never suggested
11 that whether that congressional purpose is served
12 somehow turns on whether the money came directly from an
13 officer or whether it came from the Federal fisc. And
14 Petitioner in his reply brief cites Dolan for that
15 proposition, but whether the alternative remedy was
16 federally funded was simply not at issue in Dolan. At
17 most, the Court concluded that the alternative remedy
18 available there was insufficient.

19 JUSTICE BREYER: Do you actually have any
20 information about the early 1940s, about who was a
21 Federal law enforcement officer? I think the FBI, the
22 Bureau of Prisons -- there were a lot of people being
23 detained. There were goods that were having to do with
24 contraband, foreign goods, maybe domestic, things you
25 weren't supposed to have, food stamps, illegal

1 rations, OPA -- I mean, you know, there were -- you were
2 only supposed to have so much food.

3 Have we any notion who "other law enforcement
4 officers" might have applied to at that time, when it was
5 --

6 MR. SHANMUGAM: It's very difficult to
7 quantify, Justice Breyer --

8 JUSTICE BREYER: Yes. We just don't know?

9 MR. SHANMUGAM: -- but I do think that we have
10 some sense historically of the state of play at the various
11 law enforcement agencies. And the FBI was in a relatively
12 nascent stage in 1946. I think the FBI dates from
13 approximately the turn of the 20th century. Certainly
14 the Bureau of Prisons, while it existed, was detaining
15 far fewer people than it does now.

16 JUSTICE BREYER: Well, I know. The -- the FBI
17 had quite a big job in World War II.

18 MR. SHANMUGAM: It did, to be sure, but
19 there were not --

20 JUSTICE BREYER: That's why I thought there
21 were thousands and thousands and thousands of FBI people.

22 MR. SHANMUGAM: Well, I don't --

23 JUSTICE BREYER: So do we know? I'm getting
24 from you that you don't know and I don't know. Is that
25 right?

1 MR. SHANMUGAM: Yes. I don't have exact
2 numbers. I attempted to find them out, but --

3 JUSTICE BREYER: We don't even have a
4 ballpark?

5 MR. SHANMUGAM: I can't offer you a
6 ballpark --

7 JUSTICE BREYER: Okay.

8 MR. SHANMUGAM: -- but I think what I can say
9 -- and this accords with observations that various members
10 of this Court have made over the years -- is that there
11 were simply far fewer Federal criminal provisions then than
12 there are now. And I think that that is one of the reasons
13 why we've really seen an explosion in the number of these
14 cases as time has gone on, while the FTCA --

15 JUSTICE BREYER: Well, that might be.
16 But I'm sitting in Congress, I'd read this statute, I'd
17 think maybe they were talking about customs people and
18 the like.

19 Now, there is this other word in there,
20 that's true. So we look up, where does the other word
21 come from? The other word comes from Judge Holtzoff.
22 He explained it. We don't have to guess. We can read
23 his explanation. His explanation comes in a paragraph
24 having to do with customs and excise, and beginning
25 with "I'm talking about customs and excise," and "the

1 additional proviso has special reference," where they use
2 this phrase, and then he says it's all supposed to be
3 like the Crown Proceedings Committee in England in 1927,
4 which in fact had nothing to do with anybody but customs
5 and excise.

6 JUSTICE SCALIA: Do the members of Congress
7 who voted on this language, when it was presented to
8 them, did they even know who Judge Holtzoff was?

9 MR. SHANMUGAM: Well, they may very well --

10 JUSTICE SCALIA: Did he testify to this
11 effect before one of the committees?

12 MR. SHANMUGAM: He did testify before one of
13 the committees. He did not address this specific issue,
14 but as this Court --

15 JUSTICE SCALIA: Fifteen years before it was
16 passed, right?

17 MR. SHANMUGAM: Fifteen years before it was
18 passed, Judge Holtzoff wrote this report, and as both
19 the majority and Justice Stevens in his dissenting
20 opinion in Kosak observed, there was no evidence that
21 this report was even introduced into the legislative
22 record.

23 JUSTICE BREYER: So -- so if it was not -- I
24 mean, I would suspect at that time Judge Holtzoff was a
25 pretty well-known person in the legal community. And I

1 would have suspected, if we are guessing at such a thing,
2 that quite a few did know who he was. And I suspect that
3 when Congress passes a technical bill, they are interested
4 in the views of the Department of Justice, and these were
5 those views.

6 MR. SHANMUGAM: Yes. I want to --

7 JUSTICE BREYER: So if we are going to play
8 a magic game that we don't pay attention to what sheds
9 light on it, fine, then we don't, but I would.

10 MR. SHANMUGAM: Well, Justice Breyer, I
11 wanted simply to make the point that in the pantheon of
12 legislative history sources for those members of the
13 Court who are interested in legislative history, we
14 recognize that the Holtzoff report should not be
15 afforded great weight.

16 But that having been said, I want to address
17 directly the language you cite from the Holtzoff report,
18 because I believe that that language, if anything, supports
19 our position, and not Petitioner's, because in the relevant
20 sentence of the Holtzoff report, Judge Holtzoff wrote that
21 "the additional proviso," meaning the detention of property
22 clause, "has special reference to the detention of imported
23 goods in appraisers' warehouses or customs houses as well
24 as seizures by law enforcement officials, Internal Revenue
25 officers and the like." Now, Petitioner cannot make --

1 CHIEF JUSTICE ROBERTS: Is there any
2 legislative history about what Judge Holtzoff meant by
3 that?

4 MR. SHANMUGAM: Well, one could make the
5 argument that that legislative history is itself
6 ambiguous. And indeed the D.C. Circuit, in adopting
7 Petitioner's construction, itself acknowledged that, at
8 best, the legislative history was as unclear as the
9 statute.

10 All I mean to suggest is that Petitioner
11 does not have available to him any sort of ejusdem
12 generis argument in construing that sentence. And I
13 suggest --

14 JUSTICE BREYER: But I think in reading
15 that, I think that's a good point. My actual reading of
16 it, of that paragraph 2, is that it's not free of
17 ambiguity. I completely agree with you. And if I read
18 through it, then I'm making up my mind as a judge, well,
19 how do I feel about what these words likely show, and how
20 people in Congress would have interpreted that kind of
21 reference or statement in testimony by a person who
22 thought this? Free of ambiguity, I agree with you, it
23 isn't. But it might cut somewhat more in favor of the
24 Petitioners than the Respondents.

25 MR. SHANMUGAM: Well, I think, Justice

1 Breyer, with all respect, that this is not a case in
2 which very much of a conclusion can be drawn from the
3 legislative history one way or another. We have this
4 language from the Holtzoff Report, which I admit, you
5 know, could be susceptible to the same sorts of
6 arguments that Petitioner is making with regard to what
7 we feel is the unambiguous language of the statute.

8 But other than that, the only other thing that
9 my friend, Mr. André, has cited are these summaries in
10 various congressional reports which essentially summarize
11 in shorthand, often in a single sentence, all of the
12 proposed exceptions in the FTCA. And none of those
13 summaries so much as refers to the "and any other law
14 enforcement officer" language at all. In fact, some of
15 the summaries on which Petitioner relies do not even
16 cite the detention of property exception at all.

17 So this is, in our view, a case in which, at
18 most, the legislative history is simply silent. And we
19 are left, I think, and indeed we should start with the
20 text of the statute, and we have the unambiguous phrase
21 "or any other law enforcement officer" in this case.

22 JUSTICE GINSBURG: You have a difference
23 with Mr. André on the extent to which other law
24 enforcement officers assist customs and revenue agents.
25 In your brief, you say that's a rare occurrence. And

1 Mr. André says, oh, no, it's quite common. So which is
2 it?

3 MR. SHANMUGAM: Well, we do believe that it
4 is a rare occurrence, but in some sense, Justice
5 Ginsburg, I think that the answer to that question
6 depends on exactly what it is that Petitioner means when
7 he says that an officer is acting in a customs or tax
8 capacity. And with the Court's leave, I'd like to offer
9 at least three possible explanations for what that means,
10 and then explain why each of them would be an erroneous
11 interpretation for this Court to adopt. And each of
12 these three explanations, I should add, appear at various
13 points in Petitioner's brief.

14 The first is that an officer is acting in a
15 customs or tax capacity when the officer is actually
16 acting in a revenue-collecting capacity. And we believe
17 that if the Court were to adopt that limitation, there
18 really are no actual cases of which we are aware that
19 would fall within that language. And, indeed, it would
20 cast some doubt on the meaning of the preceding phrase
21 "any officer of customs or excise" because one might
22 very well wonder whether, under Petitioner's construction,
23 that phrase should also be limited to a revenue-collecting
24 capacity.

25 The second possible explanation is that an

1 officer is acting in a customs or tax capacity when the
2 officer is more generally acting to enforce the customs
3 or tax laws, that is to say, the provisions of title 19
4 or 26 of the United States Code. But we believe that
5 that interpretation, too, would suffer from the same two
6 deficiencies that I've already identified and would also
7 suffer from a third, namely, to the extent that
8 Petitioner relies for his noscitur a sociis argument on
9 the assessment of taxes clause, that limitation would
10 actually sweep more broadly than the mere assessment of
11 taxes.

12 So the third possible interpretation, and the
13 one that we're left with, I think, is that an officer is
14 acting in a customs or tax capacity whenever the officer
15 is actually performing a function that is performed by
16 customs or excise, Internal Revenue officers. But if
17 anything, that limitation would exclude only a very
18 small number of cases apart from cases in the prison
19 context such as this one, because as Petitioner himself
20 recognizes, customs officers have virtually plenary
21 authority to enforce the criminal provisions of the
22 United States Code.

23 JUSTICE ALITO: Are all customs and excise
24 officers law enforcement officers?

25 MR. SHANMUGAM: All customs officers, by

1 statute, have law enforcement authority, and that is under,
2 I believe, 19 U.S.C. 1589a.

3 Now, to be sure, there are people employed
4 by the Customs Service, now ICE and CBP, components of
5 the Department of Homeland Security, who wouldn't
6 qualify as customs officers. There are secretaries and
7 other people employed there who don't meet that statutory
8 --

9 JUSTICE ALITO: Are there never instances in
10 which, let's say, goods are being shipped into the country,
11 and the shipment is detained by someone who is not a law
12 enforcement officer, at least under the definition in
13 subsection (h), someone who has the power to execute
14 searches, seize evidence, make arrests?

15 MR. SHANMUGAM: I think they typically would
16 be, and I'm not aware of any examples in which they
17 would not be, because customs officers are the vast
18 majority of people who are employed by the various
19 customs-related agencies.

20 And the same is true, I would note, with
21 regard to Internal Revenue officers. One of the
22 oddities of this statute is that Judge Holtzoff, rather
23 than using the known term "Internal Revenue officer,"
24 actually used this phrase "officer of excise," seemingly
25 borrowing from the British bill.

1 And we believe that, at most, that phrase
2 would have to refer to an Internal Revenue officer
3 acting in an excise-collecting capacity. But, to the
4 extent that "excise officer" has a narrower meaning than
5 "Internal Revenue officer," we believe that that
6 actually supports our construction, because it would
7 have been quite peculiar for Judge Holtzoff and Congress
8 to have referred only to an excise officer and not to an
9 Internal Revenue officer if they had meant to limit the
10 residual phrase "any other law enforcement officer" to
11 officers acting in a customs or tax capacity.

12 JUSTICE BREYER: Have you -- have you found
13 any -- any research on that? I mean, I think that's a
14 very interesting point that -- have you found
15 any book I could look at or report that -- that would
16 cast some light on whether at that time, 1946, this
17 phrase "other law enforcement officers" referred to a
18 large number of people who had a lot of different tasks
19 that had not much to do with customs or excise?

20 If so, this would be an odd way of sneaking
21 them into the bill. That's what it would look like.

22 On the other hand, if there were just a few
23 of them, well, then the bill, at worst, is a little bit
24 more than somebody might have thought. And it would
25 appear perfectly normal to a legislator. So is -- is

1 there anything to look at?

2 MR. SHANMUGAM: I wish that I could point to
3 such a book, Justice Breyer. I know that, in doing my
4 own research, what I did was simply to go on the
5 Internet and go to the Web sites of various Federal law
6 enforcement agencies and try to get a sense of when they
7 were established, but, unfortunately, as I said earlier, I
8 was just unable to obtain any numbers as to how many
9 officers these various agencies had and the like.

10 But I think that, more broadly, certainly
11 Congress knew what the phrase "any other law enforcement
12 officer" meant, and Judge Holtzoff proposed this
13 language in what would become a bill that was
14 introduced in December of 1931.

15 The FTCA was, of course, ultimately enacted
16 in 1946, and I think that one of the difficulties in
17 attempting to look to this legislative history, which,
18 as I say, we believe is silent, is that you're talking
19 about, you know, a number of Congresses over many years.

20 And, to be sure, this Court has looked to
21 these same legislative history sources in prior
22 decisions construing the FTCA. But, you know, I do
23 think that we are left with the plain language here.
24 And we are also left with Congress's underlying policy
25 objectives. And I do want to say a word about the other

1 two policy objectives on which this Court relied in
2 Kosak, which --

3 JUSTICE SOUTER: Mr. Shanmugam, before you
4 get into policy, may I just suggest that there is a
5 possible fourth category where you had mentioned
6 three? And one -- a fourth possibility might be "law
7 enforcement officer," in a very broad sense of the term,
8 but one who is simply providing, let's say, protective
9 service in aid, ultimately, of the revenue
10 laws.

11 And the reason I have thought of this is
12 that this sort of situation went on in my -- my native
13 State in this past month, in which the United States
14 Marshals Service, which at the time all of these statutes
15 were enacted was a fairly large agency, took control of
16 some real estate in New Hampshire, which had been
17 the property, or was the property, of tax protesters.

18 And they -- they held custody of that. They
19 took control of that real estate for about a week to
20 make sure that there were no booby traps and bombs that
21 -- that would -- that would blow up the IRS people when
22 they went in there to enforce their tax liens.

23 That would be an example of "law enforcement
24 officer" in a very broad sense. It could cover the
25 Marshals Service, FBI, whatnot. And, yet, the --

1 and number 2, they would be exercising, you know, typical
2 law enforcement functions, protective functions, and yet
3 they would be doing so in -- in aid of -- of the
4 tax or the revenue laws.

5 That would be a plausible reason for -- for
6 sticking in the general phrase, and it would be a
7 plausible reading of the phrase, wouldn't it?

8 MR. SHANMUGAM: Well, Justice Souter, I
9 think, with no disrespect to the good law enforcement
10 officers of New Hampshire, that these cases come up far
11 more rarely in the Federal context, because both customs
12 officers and Internal Revenue officers are
13 law enforcement officers who have, I think, quite a
14 refined capability. They carry weapons, and they are, I
15 think, usually very well-prepared to deal with --

16 JUSTICE SOUTER: Do IRS agents have -- have
17 expertise in bomb detection and dismantling?

18 MR. SHANMUGAM: There certainly might very
19 well be cases in which they would feel the need to call
20 in the FBI or other law enforcement agencies. But I do
21 think that it is telling that in the 60-year history of
22 the FTCA, there don't appear to be any cases that fall
23 into that category. And, indeed, there is --

24 JUSTICE SOUTER: Well, there don't appear to
25 be many cases because -- I mean, that's why we've got

1 this one at this point in time.

2 MR. SHANMUGAM: Well, there are quite a few
3 cases more generally. I think that there are -- is
4 something in the neighborhood of 17 prior decisions in the
5 courts of appeals alone involving these fact patterns or
6 similar ones.

7 JUSTICE SOUTER: Over what period of time?

8 MR. SHANMUGAM: Over the 60-year period --

9 JUSTICE SOUTER: Okay. Well, I mean that's
10 not --

11 MR. SHANMUGAM: -- since the enactment of the
12 FTCA.

13 JUSTICE SOUTER: That's not a deluge of
14 litigation. I mean, it seems to me there's reason to
15 assume that no matter what reading we give it, there is a
16 plausible reading that can come up that -- that confines
17 the actual application of the "other law enforcement
18 officer" fairly narrowly.

19 MR. SHANMUGAM: But our fundamental
20 submission, Justice Souter, is that there is no good
21 textual reason for confining the phrase "any other law
22 enforcement officer," because that phrase, in our
23 view, is unambiguous.

24 And, notably, Petitioner in his briefs and at
25 oral argument does not directly contend that there is

1 any ambiguity in that phrase itself. And this Court
2 has noted, in applying both the noscitur a sociis and
3 the ejusdem generis canons of construction, that where
4 the relevant phrase to which a limiting construction is
5 being applied is itself unambiguous, that that is the
6 end of the inquiry.

7 JUSTICE SOUTER: Yes, but the question of
8 what is -- what is ambiguous or not is a question of
9 context. And if you take the phrase "law enforcement
10 officer" and you say, is that ambiguous? You say
11 well, gee, no.

12 But if you stick it in this particular
13 statute, and it happens to follow these specific
14 references to tax gatherers and tax and excise laws,
15 then it seems to me it's fair to say it does become
16 ambiguous, because it gives rise to a reasonable
17 question: Were they just getting at law enforcement
18 officers who were performing these kinds of functions,
19 or did they really mean it as broadly as the phrase in
20 real isolation would have meant? That's ambiguity, and
21 that's what we've got here.

22 MR. SHANMUGAM: I don't believe that that's
23 correct, Justice Souter, and the reason that I don't
24 believe that that is correct is because this Court has
25 suggested that the starting point is the relevant phrase

1 that is being interpreted. And here we have the phrase
2 "any other law enforcement officer."

3 JUSTICE SOUTER: But that, in effect, is saying
4 don't read the statute as a whole. That argument, in
5 effect, is saying isolate the phrase. And we don't do
6 that.

7 MR. SHANMUGAM: Well, no, Justice Souter. I
8 think that where the phrase is unambiguous, this Court
9 has suggested that the inquiry is at an end, and to
10 take an example --

11 JUSTICE SOUTER: I agree with you. And if I
12 make the assumption that it's unambiguous, your argument
13 is unassailable. But if I don't make that assumption,
14 then your argument risks circularity.

15 MR. SHANMUGAM: Well, let me --

16 JUSTICE SOUTER: And my suggestion is that
17 it is the context that makes your argument a tough sell.

18 MR. SHANMUGAM: Let me try to explain to you
19 why you should make that assumption, and it is because
20 Congress here used the word "any."

21 And this Court has repeatedly noted that
22 where Congress uses the word "any," it is substantial
23 evidence that Congress intends a phrase to be construed
24 broadly. And this Court has specifically refused to
25 apply the ejusdem generis canon to phrases introduced by

1 the word "any" on precisely the ground I cite, namely,
2 because they conclude that that phrase is unambiguous.

3 JUSTICE STEVENS: But you are talking about
4 the use of the word "any" all by itself. Here it says
5 "any officer of customs or excise or other" -- "or
6 other." And you would just take those words out of the
7 statute.

8 MR. SHANMUGAM: Well, we wouldn't be taking
9 the words out of the statute, because we do believe --

10 JUSTICE STEVENS: Because they add nothing to
11 the text of the statute?

12 MR. SHANMUGAM: They add nothing to the text
13 of the statute in the sense that Congress could have
14 written the statute to refer to any law enforcement
15 officer.

16 JUSTICE STEVENS: So --

17 MR. SHANMUGAM: That is certainly true. That
18 is also true with regard to all of the statutes and
19 constitutional provisions that we cite in footnote 11 of
20 our brief. And, indeed, in some sense, it would be true
21 with regard to Petitioner's proposed construction, insofar
22 as Congress could easily have written a statute that simply
23 referred to any law enforcement officer acting in a
24 customs or tax capacity. Given that language --

25 JUSTICE SCALIA: There are two "anys" here.

1 I'm not sure that --

2 MR. SHANMUGAM: Yes. And I'm certainly
3 referring to the "any" that modifies "any other law
4 enforcement officer."

5 JUSTICE SCALIA: Any other. So it's the
6 detention of any goods by any officer of customs or excise,
7 or if it just had said "other law enforcement officer," you
8 might -- you might disregard the force of "any" because it
9 was way back there.

10 MR. SHANMUGAM: That's right. And contrary to
11 --

12 JUSTICE SCALIA: But then they repeat "or any
13 other law enforcement" --

14 MR. SHANMUGAM: That's right. And contrary
15 to Mr. André's submission, this Court has made precisely
16 that point in Harrison versus PPG Industries, in which the
17 Court was construing a similar phrase that referred to
18 "any other final action by an EPA administrator." And
19 that came after a series of specific final actions to
20 which the statute referred. And the Court actually
21 said, in so many words, it might be different if the
22 word "any" were omitted, but we believe that the
23 inclusion of "any" renders that phrase unambiguous.

24 And I would note as well, Justice Souter,
25 that in your dissenting opinion, to be sure, in Circuit

1 City, in footnote 2, you cited all of these very cases on
2 which I'm relying now in support of your proffered
3 construction of the statute.

4 JUSTICE SOUTER: They were on point for my
5 dissent. I know.

6 (Laughter.)

7 MR. SHANMUGAM: Well, I think -- I would
8 respectfully submit that they are on point to our
9 construction as well. But I do want to say a word about
10 the underlying policy objectives here.

11 JUSTICE GINSBURG: I know your time is
12 running out, but I would like you also to say a word
13 about what remedy, if any, does Ali have? You're
14 saying he had his prayer rug and his Koran, and the
15 government lost them, and he didn't get any compensation.
16 Does he have any remedy?

17 MR. SHANMUGAM: Sure, Justice Ginsburg. And
18 the answer is, yes, that he does. He does have an
19 administrative remedy. And I'd like to say just a couple
20 of things about the available administrative remedies.

21 First of all, any claimant who claims that a
22 Federal agency, including a Federal law enforcement
23 agency, negligently damaged his or her property would
24 have a claim under 31 U.S.C. 3723 for up to \$1,000.
25 That statute, which we cite in a footnote, I believe, in

1 our brief, would cover the vast majority of claims
2 involving the Bureau of Prisons.

3 There's actually another Federal statute, 31
4 U.S.C. 3724, which provides a further remedy against the
5 Department of Justice for up to \$50,000 for personal
6 injury or property damage caused by a law enforcement
7 officer. And, critically, that statute expressly makes
8 clear that it applies where the FTCA does not. And so
9 that administrative remedy would be fully available.

10 JUSTICE GINSBURG: But there's no court --
11 there's no court role in that process.

12 MR. SHANMUGAM: There is no court role in
13 that process, but the Bureau of Prisons routinely
14 processes these administrative claims. As we note in
15 our brief, there were 12,000 such claims over the last 3
16 years. The Bureau of Prisons has procedures for processing
17 those claims. It paid out on something in the neighborhood
18 of 1,100 of those claims.

19 And there's no reason to think that the
20 Bureau of Prisons would alter those procedures if the
21 Court were to hold in this case that there is no
22 judicial remedy. Indeed, the Bureau of Prisons has paid
23 out on such claims even in circuits that have adopted
24 our interpretation.

25 I do want to say just a word about the

1 underlying policy considerations, because to the extent
2 that members of the Court feel that the statute is
3 ambiguous, we believe that they strongly support our
4 construction.

5 In Kosak, this Court analyzed two other
6 policy considerations in addition to the avoidance of
7 duplicative remedies. First, protecting important
8 government functions from the threat of suit. And
9 second, avoiding exposure to fraudulent claims. And we
10 believe that those concerns are particularly implicated
11 in the prison context, which constitutes the mine run of
12 cases in this area. Thank you very much.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Shanmugam.

15 Mr. André, you have four minutes remaining.

16 REBUTTAL ARGUMENT OF JEAN-CLAUDE ANDRE

17 ON BEHALF OF THE PETITIONER

18 MR. ANDRE: I'd like to first address the
19 government's resistance to making any concession that
20 the statute is ambiguous. First of all, if the
21 statutory language in this case was so clear, then so
22 must the statutory language in Circuit City. The
23 language had started out with the words "any other," and
24 clearly then were followed by words that have a very
25 plain meaning out of context, "any worker engaged in

1 interstate or foreign commerce."

2 We just don't believe that the government's
3 position that the statute is unambiguous can be squared
4 with that case. Nor do we think as a factual matter
5 that the statute is unambiguous.

6 In particular, we think it would have been
7 strange for this Court in *Kosak* to go out of its way in
8 a footnote and expressly decline to resolve today's
9 question presented if the detention of property clause,
10 in particular the "law enforcement officer" phrase, had
11 only one clear meaning.

12 And then on top of that, as we noted in our
13 reply brief, five courts of appeals have adopted our
14 construction; two other circuit judges have written
15 separately. That's a total of 16 circuit judges that have
16 found our position to be credible, found the statute to
17 be ambiguous, applied the canons of construction that we
18 are urging the Court to apply today, and then resolved
19 the case in our favor.

20 So if -- if the statute is truly unambiguous,
21 then those 16 circuit judges not only got this issue
22 wrong; they got it very wrong.

23 Justice Breyer, I unfortunately don't either
24 have an example either of what other types of law
25 enforcement officers were out there at the time of the

1 FTCA's enactment, but I do have one example, and that would
2 be Elliott Ness and the Al Capone investigation.

3 Elliott Ness was in charge of running a group
4 of -- was in charge of supervising a group of government
5 agents who were part of the Department of Justice, even
6 though Elliott Ness himself was a Treasury agent. And
7 they were all trying enforce the Volstead Act, but also to
8 get -- to get Al Capone on charges of income tax evasion.

9 And so we believe that that's a nice example
10 from the early 1930s when Judge Holtzoff drafted this
11 language that shows that you could have a revenue officer
12 working with -- in fact, supervising other law enforcement
13 officers, and they're all really doing the same thing.

14 As far as the policy considerations are
15 concerned, we believe the government's reliance on
16 the two other general purposes for the FTCA exemptions
17 just prove too much. Pretty much any governmental
18 function is important. And so the government in every
19 brief they filed on this issue below and in pretty much
20 every FTCA exception case that we've seen has come in
21 and said, oh, but our interests are served by these two
22 other purposes, and, therefore, this statutory exemption
23 has to be construed narrowly.

24 Again, as a factual matter, we don't think that
25 their concerns are really all that well-founded, in any

1 event. True, there were 12,000 administrative claims filed
2 by Federal prisoners over the last 3 years. But as we
3 pointed out in footnote 12 of our cert petition, there
4 were only 16 cases filed in all of 2006 by Federal
5 prisoners under this statute. So what that means is that
6 administrative settlement process is working, and that also
7 Federal prisoners are just not bringing suit, and there is
8 a very good reason for that. It's the Federal filing fee.
9 It's \$455. My client's claim in this case is \$177.

10 Prisoners don't evaluate whether to sue based
11 on some sophisticated reading of sovereign immunity
12 doctrines and ambiguous statutory text. They, you know,
13 they think about their wallet. They make \$2.50 a day,
14 and it's just not worth it for them to risk --

15 JUSTICE GINSBURG: Wouldn't they have IFP
16 status?

17 MR. ANDRE: Even if a prisoner gets IFP
18 status, they still have to pay the full filing fee. The
19 IFP status only allows them to pay in installments. So
20 it's debited off their account. So they still make a
21 very real calculation when they decide whether to sue,
22 based on how much is at stake and how much is it going
23 to cost me.

24 JUSTICE GINSBURG: And here there wasn't that
25 much at stake.

1 MR. ANDRE: That's correct. There was \$177
2 at stake. And so, you know, perhaps my client shouldn't
3 have sued because it didn't make a lot of sense, although
4 he also did file the suit a couple years earlier when the
5 filing fee was lower.

6 But in our experience, the prisoners, they're
7 not going to typically sue for these kinds of
8 claims. This is nothing like the Prison Litigation
9 Reform Act problem we had in Jones V. Bock, where there
10 are 24,000 cases coming before the Federal courts every
11 year. That's just not something we envision.

12 So we don't think that adopting any one of
13 the four constructions discussed or debated between my
14 friend and Justice Souter would somehow open up the
15 floodgates here and lead to a lot of prisoners suing
16 under this particular provision. Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. André.
18 The case is submitted.

19 (Whereupon, at 12:08 p.m., the case in the
20 above-entitled matter was submitted.)

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