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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 069130 Ali versus Federal Bureau of Prisons.

Mr. Andre.

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

The text of Section 26 (a)(c) Federal court claims act establishes -- provision underlying purpose confirm that Congress did not intend the provision to broadly bar all claims arising out of all the tensions 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 at issue at Circuit City v. Adams. Circuit City v. Adams this court applied a ejusdem generis to limit a sweepingly broad residual phrase that is meaningfully indistinguishable from the "any other law enforcement phrase" at issue here. In particular, in Circuit City the court was asked what kinds of employment contracts were exempted from the mandates of the Federal Arbitration Act. The particular provision at issue in that case 9 U.S.C.

1 Section 1 exempted from the act's coverage any and I
2 quote contracts of employment of sea men, railroad
3 employees or any other class of workers engaged in
4 foreign or interstate commerce. That residual phrase
5 read in isolation is broad and sweeping on its face it
6 certainly would appear to apply not only to
7 transportation workers, but also to retail store clerks
8 like the Respondent in Circuit City, none the less under
9 a ejusdem generis, this court limited that residual
10 phrase to just to transportation workers.

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

20 MR. ANDRE: Well, first of all, Your Honor,
21 if I could point out that if the Government had made the
22 argument that you have to have a list, and I think under
23 the Government's interpretation you had to have at least
24 three items, two specific and one general. In Norfolk
25 -- Norfolk and Western Railway, this Court says that

1 need not be the case. There the Court said that you
2 could have a singular general term preceded by a
3 singular specific term. So it's our position that --
4 that even if you were to read this statute as -- as
5 possessing only two items, that you could still apply
6 ejusdem generis, but we don't read the statute that way.
7 We believe that the statute actually contains a list of
8 three items, and that Congress to save itself a couple
9 words, decided to say "any officer of customs or excise,
10 or any other law enforcement officer," instead of saying
11 the more wordy version, "any officer of customs, any
12 officer of excise or any other law enforcement officer."
13 I don't think we can fault Congress for its pick in that
14 scenario.

15 To get back to the residual phrase, the "any
16 other law enforcement officer phrase" here, ripped from
17 its moorings, as we believe the Government is trying to
18 do, would certainly seem to apply to all law enforcement
19 officers, including Bureau of Prisons officials which by
20 statute are law enforcement officers. But Section
21 2680(c) contains a number of contextual cues that
22 Congress didn't have general law enforcement functions
23 in mind when it passed the provision. It had customs
24 and tax functions in mind. In particular, the detention
25 clause preserves sovereign immunity for the detention of

1 goods and merchandise by any officer of customs or
2 excise.

3 CHIEF JUSTICE ROBERTS: Well, not just goods
4 or merchandise. Goods, merchandise or other property.
5 And does other property include any type of property?

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

12 CHIEF JUSTICE ROBERTS: So "goods and
13 merchandise or other property" are just examples, and
14 then a residual phrase that includes everything; but
15 "customs or excise or any other law enforcement
16 officer," that's subject to ejusdem generis - all in the
17 same sentence.

18 MR. ANDRE: Well, we actually don't think --
19 or I guess I cannot necessarily agree with the first
20 part of what you just said, Mr. Chief Justice. We don't
21 believe that -- that other property necessarily, or that
22 "goods and merchandise and other property," the goods
23 and merchandise are examples of "other property." We
24 think in that situation, goods and merchandise refer
25 specifically to goods and merchandise as -- as explained

1 historically in the United States Code, which are, you
2 know, more movable things other than cash, tangible
3 items other than cash, and "other property" then covers
4 cash and real property.

5 Excuse me. Getting back to the contextual
6 cues in this case, in addition to the four contained in
7 the detention clause itself, the assessment clause
8 contains four additional contextual cues. It preserves
9 sovereign immunity for the assessment of any tax or the
10 collection of any customs duty, and because we have this
11 great quantity of contextual cues in a very short
12 statutory provision, we believe that we would also
13 prevail under an application of the *Noscitur a sociis*
14 canon, that this Court most recently applied two terms
15 ago in *Dolan v. Postal Service*. In that case what was
16 at issue is whether the term "negligent transmission" in
17 Section 2680(b) of the Federal Tort Claims Act reached
18 all negligent transmissions, in particular a parcel left
19 on the foot of someone's front door that causes them a
20 fall injury, or instead, it was limited by its
21 antecedent contextual cues, namely -- I'm sorry --
22 namely, loss and miscarriage, which would tend to
23 indicate that Congress intended really only to preserve
24 sovereign immunity for instances in which delivery was
25 untimely or went to the wrong location. The Court again

1 sensibly looked past the superficially broad negligent
2 transmission language and instead said no, we have to
3 read it in context; and in context Congress did not
4 intend us to just pluck those two words out of the
5 dictionary and apply a dictionary meaning.

6 In fact, in that case, the Government
7 implored this Court to apply dictionary definitions to
8 negligence and transmission, and that's essentially what
9 the Government is trying to ask this Court to do here.

10 JUSTICE SCALIA: Counsel, what do you do
11 about the later -- the later statute that makes an
12 exception to the exception?

13 MR. ANDRE: We don't believe that that
14 changes -- we don't believe that changes the meaning of
15 the detention cause at all beyond the small change that
16 Congress made.

17 JUSTICE SCALIA: I mean it clearly, the
18 exception to the exception says that -- that the
19 exception is applicable to any claim based on injury or
20 loss of goods or merchandise, if among other
21 requirements, the property was seized for the purpose of
22 forfeiture under any provision of Federal law providing
23 for the forfeiture of property.

24 Now that's more than customs and tax -- any
25 provision of Federal law.

1 MR. ANDRE: Well, Your Honor --

2 JUSTICE SCALIA: Why do you need that
3 exception to the exception if the exception doesn't
4 cover anything except customs and tax in the first
5 place?

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

16 Customs and tax officers regularly apply
17 other forfeiture statutes, and in particular the one
18 they use a lot is 21 U.S.C. 881. That's the general
19 civil forfeiture statute. And so in many cases they
20 will bring a forfeiture action under either their
21 agency's specific forfeiture provision, or the general
22 21 U.S.C. 881. And so when Congress included that
23 language saying any provision of forfeiture, it was
24 simply Congress's sensible recognition that they don't
25 --

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

10 MR. ANDRE: There may be more, I was giving
11 you an example, but the one that I gave you, 21 U.S.C.
12 881, is the one most frequently used. It is the general
13 forfeiture provision. It's kind of the backbone of all
14 forfeitures, and so in many cases officers bring
15 forfeiture actions not only either -- either under their
16 own agency forfeiture provision or the general.
17 Sometimes they bring them under both. But the point is
18 that's a meaty statute there, and I -- I assume that
19 Congress wanted to make clear that if a customs or tax
20 officer were to bring a forfeiture proceeding under that
21 meaty provision, and maybe some other ones that they
22 would use from time to time, that the exception to the
23 exception would still work here.

24 JUSTICE SCALIA: What work does it do? What
25 work under your interpretation does that later provision

1 do, if property was seized for the purpose of forfeiture
2 under any provision of Federal law providing for the
3 forfeiture of property?

4 MR. ANDRE: Under our interpretation, if a
5 customs or tax officer or another law enforcement
6 officer acting in a custom or tax capacity detains
7 property and injures it -- and it doesn't matter under
8 which forfeiture law they detain the property --

9 JUSTICE SCALIA: Right.

10 MR. ANDRE: -- and the plaintiff is
11 ultimately successful, I'm sorry, I guess -- yes, the
12 plaintiff is ultimately successful in defeating the
13 Government's claim for forfeiture, then they can sue
14 under the FTCA for the damage to their property.

15 JUSTICE SOUTER: Mr. Andre, it may be that
16 things would fall into place easier if you would give us
17 an example or examples of instances in which any other
18 law enforcement officer would be engaged in detaining
19 property in -- in the course of enforcing customs or
20 excise laws. If we can understand that, then we are
21 going to have a better sense of how the exception might
22 work. Can you give me an example of the other law
23 enforcement officer engaged in customs excise?

24 MR. ANDRE: Sure. The best example that
25 comes to mind is pre-9/11 before the merger of the INS

1 and the Border Patrol -- or I'm sorry, the Customs
2 Bureau -- under the Department of Homeland Security.
3 When you drove across the border before 9/11 more often
4 than not you would see a gentleman or a woman in a green
5 jump suit. They were INS. But not only were they
6 asking you questions about your immigration status and
7 checking to see if you had ID; they were also asking
8 about what you were bringing in -- for example, oh, do
9 you have more than two bottles of liquor? Because
10 you're only allowed to bring in two. And if you said
11 yes, they would direct you over to secondary inspection,
12 and even there in secondary inspection certainly
13 sometimes there may have been officers in blue suits,
14 the customs enforcement officers. But more often than
15 not, they were still officers in green suits, INS
16 officers. And there they're taking this extra property
17 from you because they believe you are not supposed to
18 have it, and then sending you on your way.

19 There are many task forces in many other
20 instances in which officers can overlap or share
21 functions, postal inspectors working with the customs
22 enforcement agencies to keep --

23 JUSTICE GINSBURG: Did you say IRS officers,
24 because they would be covered? It's tax and customs.

25 MR. ANDRE: Right. We believe IRS officers

1 are expressly covered, but, for example, when the FBI is
2 conducting an investigation with the IRS into fraud and
3 other tax issues, then we believe that those FBI agents
4 would be covered.

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

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

16 MR. ANDRE: That's correct, Justice
17 Ginsburg. That's the Formula One case out of the Second
18 Circuit. And the reason why we relied on that case is
19 because the DEA agents were opening up a shipping
20 container that had not yet been opened since it came
21 from overseas.

22 JUSTICE GINSBURG: But they were doing it
23 for their primary business, which was to detect
24 narcotics.

25 MR. ANDRE: That's right. And we again

1 reference that case because we wanted to offer the Court
2 a broad construction or make sure the Court was
3 comfortable in knowing that we were comfortable with the
4 "other law enforcement officer" phrase being read
5 broadly to reach any -- you know, any loose tax or
6 customs function.

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

15 JUSTICE ALITO: Could we interpret the term
16 "law enforcement" -- "any other law enforcement officer"
17 to be limited to those law enforcement officers whose
18 duties generally include the detention of goods?

19 MR. ANDRE: Well, I don't think so, Justice
20 Alito, because we weren't really prepared to debate what
21 exactly "detention" means. In fact, we didn't petition
22 on that issue, and my client didn't press it below. But
23 we were just intuitively thinking -- I don't think the
24 word "detention" does much work for us here, at least in
25 --

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

9 MR. ANDRE: I agree. I should have been
10 more clear.

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

22 JUSTICE ALITO: Well, you don't think that
23 concept sheds light on what Congress had in mind when it
24 referred to any other Federal law enforcement officer?

25 MR. ANDRE: I -- I don't, but I don't want

1 to resist you too much either. You know, if the Court
2 would like us to reach that issue, we'd be happy to
3 brief if the Court wanted to issue an order akin to the
4 one it issued last term in U.S. v. Resendiz-Ponce.

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

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

23 CHIEF JUSTICE ROBERTS: But, I mean that's
24 always true when you have an example and a more general
25 phrase. And yet our cases indicate that we often read

1 the language that way.

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

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

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

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

24 MR. ANDRE: That's true.

25 CHIEF JUSTICE ROBERTS: Was that an obscure

1 statute in S.D. Marine?

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

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

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

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

25 And again, the Court need not adopt that

1 construction for us to prevail in this case. But that's
2 how we believe that our construction is faithful to the
3 word "any" to the extent that in this statute it's
4 relevant at all.

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

9 MR. ANDRE: No, there was not.

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

12 MR. ANDRE: Absolutely.

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

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

24 JUSTICE STEVENS: But it is clear -- there
25 are so many exceptions from exceptions from exceptions,

1 that you get a little mixed up, but I am clear, am I
2 not, that if it were not a detention, you would win?

3 MR. ANDRE: Absolutely.

4 JUSTICE STEVENS: Everybody agrees.

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

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

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

20 As I mentioned at the outset, we also
21 believe that the legislative history underlying purposes
22 for this particular provision support our reading. In
23 particular, I realize the legislative history is pretty
24 sparse, but in particular, there were six congressional
25 committee reports issued by Congress after the detention

1 clause was expanded to essentially its current form.

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

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

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

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

24 MR. ANDRE: No. That's true, Your Honor.
25 But when those members typically go up to the floor and

1 vote, they oftentimes don't parse the language. They
2 rely on the committee reports.

3 And so if the government's construction were
4 correct here, essentially what you would have is all of
5 those members' votes being overridden because they
6 couldn't possibly have known -- unless they took the
7 time to parse the text and we all know that a lot of
8 times they don't -- they wouldn't possibly know that
9 there'd be any chance whatsoever that this phrase could
10 broadly reach the detention of property by all law
11 enforcement officers. Even putting that kind of
12 legislative history argument aside, I think we're -- our
13 strongest footing, when we talk about how our
14 construction is faithful to Congress's underlying
15 purpose for this particular provision, on three
16 occasions, this Court has either suggested or expressly
17 stated that the purpose for this particular provision
18 was to avoid the creation of a redundant federally
19 funded remedy. As we explain in our opening brief,
20 there was a pre-existing federally funded remedy only
21 for the negligent conduct of tax and customs officers.

22 JUSTICE GINSBURG: Does that still exist
23 after the Westfall Act?

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

1 sure.

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

4 MR. ANDRE: Right.

5 JUSTICE GINSBURG: -- for the agent's
6 abuses.

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

18 But, historically, there was -- before the
19 Westfall Act, there was a pre-existing federally funded
20 remedy for only officers acting in a tax or customs
21 capacity or customs or tax officers by name. And so it
22 would be inconsistent with Congress's underlying purpose
23 to avoid creating a duplicative remedy to apply its
24 provisions so broadly because Congress wanted to provide
25 a cause of action for claims against law enforcement

1 officers other than those against whom a cause of action
2 was already available.

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

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

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

18 MR. ANDRE: And it's also based on the
19 testimony of Colonel O.R. McGuire, who is general
20 counsel for the Comptroller General. And it wasn't just
21 Judge -- well, Judge Holtzoff was probably the architect
22 of the detention clause and maybe this entire provision.
23 It was the Comptroller General's Office, and Judge
24 Holtzoff who jointly were responsible for preparing tort
25 claims legislation. So, essentially, of the two people

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

7 I'd like to save the rest of my time for
8 rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Andre. Mr. Shanmugam.

11 ORAL ARGUMENT OF KANNON SHANMUGAM
12 ON BEHALF OF THE RESPONDENTS

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

15 Section 2680(c) preserves the government's
16 immunity against tort claims concerning the detention of
17 property by any law enforcement officer. That reading
18 is consistent not only with the plain language of the
19 statute but also with Congress's underlying policy
20 objectives in creating the FTCA's exception.
21 Petitioner effectively asks this Court to engraft
22 language on to the statute by adding the amorphous
23 limitation "acting in a customs or tax capacity" to the
24 unambiguous statutory phrase "any other law enforcement
25 officer."

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

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

18 JUSTICE SOUTER: Right.

19 MR. SHANMUGAM: -- used that phrase, and he
20 may then have decided to expand it to other law
21 enforcement officers simply because he concluded that
22 there was no basis for treating other law enforcement
23 officers differently.

24 JUSTICE SOUTER: But wouldn't --

25 MR. SHANMUGAM: So --

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

14 MR. SHANMUGAM: I --

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

22 MR. SHANMUGAM: Justice Souter, it is
23 certainly true that Congress could have written that
24 statute that way and indeed could have omitted the
25 customs or excise officers entirely, and that certainly

1 would be a clearer statute in the sense that I don't
2 think that Mr. Andre would be here if we had a statute
3 that simply referred to any law enforcement officer.

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

19 JUSTICE SCALIA: It's also --

20 MR. SHANMUGAM: So --

21 JUSTICE SCALIA: It's also not entirely
22 clear what -- whether it's a tail or not. It depends on
23 what the dog is. If you can -- if you were trying to
24 identify the most common instances, especially at the
25 time this provision was enacted, the most common

1 instances in which property was detained by the
2 government, I mean you know, later -- later forfeiture
3 provisions are numerous, but at that time I think they
4 were relatively few. I think the dog would have been --
5 would have been customs and excise officers. And the
6 "or other officers" would have picked up probably very
7 little real -- real instances of property detention.

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

14 JUSTICE STEVENS: If you --

15 MR. SHANMUGAM: You know --

16 JUSTICE STEVENS: No, but -- but a short
17 time ago you said there was no basis for distinguishing
18 between excise officers and all other law enforcement
19 officers. But there was indeed a basis for it, namely
20 that there was an alternative remedy for people
21 specifically named in the statute, which is not true of
22 all other officers. It's true now, but it wasn't then.

23 MR. SHANMUGAM: Well, we believe, first of
24 all, that if one looks at this Court's decision in
25 Kosak, the Court did not in any way suggest that the

1 availability of alternative remedies was the sole
2 purpose --

3 JUSTICE STEVENS: I'm not suggesting that,
4 but that is a reason for drawing a distinction between
5 all others and this particular claim.

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

12 JUSTICE STEVENS: It didn't serve that
13 purpose before 2000.

14 MR. SHANMUGAM: It did serve that purpose,
15 Justice Stevens, because there was an alternative
16 remedy, albeit one that was not federally funded and
17 that was a common-law action against a law enforcement
18 officer in his personal capacity for negligence.

19 JUSTICE GINSBURG: Why wasn't it federally
20 funded? I thought there was a provision for
21 indemnification.

22 MR. SHANMUGAM: There was a provision for
23 indemnification for revenue officers and other officers
24 essentially acting in a revenue capacity, I believe that
25 the exact statutory language was "collectors and other

1 revenue officers" -- and that indemnification provision,
2 to be sure, would not have applied to garden variety law
3 enforcement officers.

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

14 JUSTICE BREYER: Do you actually have any
15 information about the early 1940s, about who was a
16 Federal law enforcement officer? I think the FBI, the
17 Bureau of Prisons -- there were a lot of people being
18 detained. There were goods that were having to do with
19 contraband, foreign goods, maybe domestic, things you
20 weren't supposed to have, food stamps. Illegal
21 rations -- OPA -- I mean, you know, there were, you were
22 only supposed to have so much food.

23 Have we any notion who other law enforcement
24 officers might have applied to at that time?

25 MR. SHANMUGAM: It's very difficult to

1 quantify, Justice Breyer, but I do think we have some
2 sense historically of the state of play at various law
3 enforcement agencies; and the FBI was in a relatively
4 nascent stage in 1946. I think the FBI dates from
5 approximately the turn of the 20th century. Certainly
6 the Bureau of Prisons, while it existed, was detaining
7 far fewer people than it does now.

8 JUSTICE BREYER: I think the FBI had quite a
9 big job in World War II.

10 MR. SHANMUGAM: It did. To be sure, but
11 there were not --

12 JUSTICE BREYER: I thought there were
13 thousands and thousands and thousands of FBI people.

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

15 JUSTICE BREYER: So do we know? I'm getting
16 from you that you don't know and I don't know. Is that
17 right?

18 MR. SHANMUGAM: Yeah. I don't have exact
19 numbers. I attempted to find them out. But --

20 JUSTICE BREYER: We don't even have a
21 ballpark.

22 MR. SHANMUGAM: I can't offer you a
23 ballpark, but I think what I can say, and this accords
24 with observations that various members of this Court
25 have made over the years, is that there were simply far

1 fewer Federal criminal provisions than there are
2 now, and I think that that is one of the reasons why
3 we've really seen an explosion in the number of these
4 cases as time has gone on, while the FTCA --

5 JUSTICE BREYER: Well, well that might be.
6 But I'm sitting in Congress, I read this statute, I
7 think maybe they were talking about customs people and
8 the like. Now, there is this other word in there,
9 that's true. So we look up, where does the other word
10 come from? The other word comes from Judge Holtzoff.
11 He explained it, we don't have to guess. We can read
12 his explanation. His explanation comes in a paragraph
13 having to do with customs and excise, and beginning
14 with, I'm talking about customs and excise, and the
15 additional proviso as special reference, where they use
16 this phrase, and then he says it's all supposed to be
17 like the Crown Proceedings Committee in England in 1927,
18 which in fact had nothing to do with anybody but customs
19 and excise.

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

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

24 JUSTICE SCALIA: Did he testify to this
25 effect before one of the committees?

1 MR. SHANMUGAM: He did testify before one of
2 the committees. He did not address this specific issue,
3 but as this Court --

4 JUSTICE SCALIA: 15 years before it was
5 passed, right?

6 MR. SHANMUGAM: 15 years before it was
7 passed, Judge Holtzoff wrote this report, and as both
8 the majority and Justice Stevens in his dissenting
9 opinion in Kosak observed, there was no evidence that
10 this report was even introduced into the legislative
11 record.

12 JUSTICE BREYER: So -- so if it was not -- I
13 mean, I would suspect at that time Judge Holtzoff was a
14 pretty well known person in the legal community and I
15 would suspected if we are guessing at such a thing that
16 quite a few did know who he was. And I suspect that
17 when Congress passes a technical bill, they are
18 interested in the views of the Department of Justice and
19 these were those views.

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

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

24 MR. SHANMUGAM: Well, Justice Breyer, I
25 wanted simply to make the point that in the pantheon of

1 legislative history sources for those members of the
2 Court who are interested in legislative history, we
3 recognized that the Holtzoff report should not be
4 afforded great weight. But that having been said, I
5 want to address directly the language you cite from the
6 Holtzoff report, because I believe that that language if
7 anything supports our position, and not Petitioners,
8 because in the relevant sentence of the Holtzoff report,
9 Judge Holtzoff wrote that the additional proviso,
10 meaning the detention of property clause, has special
11 reference to the detention of imported goods in
12 appraisers' warehouses or customs houses as well as
13 seizures by law enforcement officials, Internal Revenue
14 officers and the like. Now Petitioner --

15 CHIEF JUSTICE ROBERTS: Is there any
16 legislative history about what Judge Holtzoff meant by
17 that?

18 MR. SHANMUGAM: Well, one could make the
19 argument that that legislative history is itself
20 ambiguous; and indeed the D.C. Circuit in adopting
21 Petitioner's construction itself acknowledged that at
22 best, the legislative history was as unclear as the
23 statute.

24 All I mean to suggest is that Petitioner
25 does not have available to him any sort of ejusdem

1 generis argument in construing that sentence.

2 JUSTICE BREYER: But I think in reading
3 that, I think that's a good point. My actual reading of
4 it, of that paragraph 2, is that it's not free of
5 ambiguity. I completely agree with you. And if I read
6 through it, then I'm making up my mind as a judge, well,
7 how do I feel about what these words likely show and how
8 people in Congress would have interpreted that kind of
9 reference or statement in testimony by a person who
10 thought this? Free of ambiguity, I agree with you, it
11 isn't. But it might cut somewhat more in favor of the
12 Petitioners than the Respondents.

13 MR. SHANMUGAM: Well, I think, Justice
14 Breyer, with all respect, that this is not a case in
15 which very much of a conclusion can be drawn from the
16 legislative history one way or another. We have this
17 language from the Holtzoff report which I admit, you
18 know, could be susceptible to the same sorts of
19 arguments that Petitioner is making with regard to what
20 we feel is the unambiguous language of the statute. But
21 other than that the only thing that my friend has Mr.
22 Andre has cited are these summaries in various
23 congressional reports which essentially summarize in
24 shorthand, often in a single sentence, all of the
25 proposed exceptions in the FTCA; and none of those

1 summaries so much as refers to the "and any other law
2 enforcement officer" language at all. In fact, some of
3 the summaries on which Petitioner relies do not even
4 cite the detention of property exception at all.

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

10 JUSTICE GINSBURG: You have a difference
11 with Mr. Andre on the extent to which other law
12 enforcement officers assist customs and revenue agents.
13 In your brief you say that's a rare occurrence. And
14 Mr. Andre says oh no, it's quite common. So which is
15 it?

16 MR. SHANMUGAM: Well, we do believe that it
17 is a rare occurrence, but in some sense, Justice
18 Ginsburg, I think that the answer to that question
19 depends on exactly what it is that Petitioner means when
20 he says that an officer is acting in a customs or tax
21 capacity. And with the Court's leave, I'd like to offer
22 at least three possible explanations for what that means
23 and then explain why each of them would be an erroneous
24 interpretation for this Court to adopt, and each of
25 these three explanations I should add, appear at various

1 points in Petitioner's brief.

2 The first is that an officer is acting in a
3 customs or tax capacity when the officer is actually
4 acting in a revenue collecting capacity. And we believe
5 that if the Court were to adopt that limitation, there
6 really are no actual cases of which we are aware that
7 would fall within that language. And indeed, it would
8 cast some doubt on the meaning of the preceding phrase
9 "any officer of customs or excise" because one might
10 very well wonder whether under Petitioner's construction
11 that phrase should also be limited to a revenue
12 collecting capacity.

13 The second possible explanation is that an
14 officer is acting in a customs or tax capacity when the
15 officer is more generally acting to enforce the customs
16 or tax laws, that is to say, the provisions of Title 19
17 or 26 of the United States Code. But we believe that
18 that interpretation, too, would suffer from the same two
19 deficiencies that I've already identified and would also
20 suffer from a third, namely, to the extent that
21 Petitioner relies for his noscitur a sociis argument on
22 the assessment of taxes clause, that limitation would
23 actually sweep more broadly than the mere assessment of
24 taxes.

25 So the third possible interpretation and the

1 one that we're left with, I think, is that an officer is
2 acting in a customs or tax capacity whenever the officer
3 is actually performing a function that is performed by
4 customs or excise Internal Revenue officers. But if
5 anything, that limitation would exclude only a very
6 small number of cases apart from cases in the prison
7 context such as this one, because as Petitioner himself
8 recognizes, customs officers have virtually plenary
9 authority to enforce the criminal provisions of the
10 United States Code.

11 JUSTICE ALITO: Are all customs and excise
12 officers law enforcement officers?

13 MR. SHANMUGAM: All customs officers, by
14 statute, have law- enforcement authority, and that is
15 under, I believe, 19 U.S.C. 1589(a).

16 Now, to be sure, there are people employed
17 by the Customs Service, now ICE and CBP components of
18 the Department of Homeland Security, who wouldn't
19 qualify as customs officers.

20 There are secretaries and other people
21 employed there that don't that statutory definition.

22 JUSTICE ALITO: Are there other
23 circumstances in which, let's say, goods are being
24 shipped into the country, and the -- the shipment is
25 detained by someone who is not a law-enforcement

1 officer, at least under the definition in subsection
2 (h), someone who has the power to execute searches,
3 seize evidence, and make arrests?

4 MR. SHANMUGAM: I think they typically would
5 be, and I'm not aware of any examples in which they
6 would not be, because customs officers are the vast
7 majority of people who are employed by the various
8 customs-related agencies.

9 And the same is true, I would note, with
10 regard to Internal Revenue officers. One of the
11 oddities of this statute is that Judge Holtzoff, rather
12 than using the known term "Internal Revenue Officer,"
13 actually used this phrase "officer of excise," seemingly
14 borrowing from the British bill.

15 And we believe that, at most, that phrase
16 would have to refer to an Internal Revenue officer
17 acting in an excise- collecting capacity. But, to the
18 extent that "excise officer" has a narrower meaning than
19 "Internal Revenue officer," we believe that that
20 actually supports our construction, because it would
21 have been quite peculiar for Judge Holtzoff and Congress
22 to have referred only to an excise officer and not to an
23 Internal Revenue officer if they had meant to limit the
24 residual phrase "any other law-enforcement officer" to
25 officers acting in a customs or tax capacity.

1 JUSTICE BREYER: Have you -- have you found
2 any -- any research on that? I mean I think that's a
3 very interesting point that -- that -- have you found
4 any book I could look at or report that -- that would
5 cast some light on whether at that time, 1946, the
6 phrase "other law enforcement officers" referred to a
7 large number of people who had a lot of different tasks
8 that had not much to do with customs or excise?

9 If so, this would be an odd way of sneaking
10 them into the bill. That's who it would look like.

11 On the other hand, if there were just a few
12 of them, well, then, the bill, at worst, is a little bit
13 more than somebody might have thought; and it would
14 appear perfectly normal to a legislator. So is -- is
15 there anything to look at?

16 MR. SHANMUGAM: I wish that I could point to
17 such a book, Justice Breyer. I know that, in doing my
18 own research, what I did was simply to go on the
19 Internet and go to the website's of various Federal
20 law-enforcement agencies and try to get a sense of when
21 they were established.

22 But, unfortunately, as I said earlier, I was
23 just unable to obtain any numbers as to how much
24 officers these various agencies had, and the like.

25 But I think that, more broadly, certainly

1 Congress knew what the phrase "any other law enforcement
2 officer" meant. And Judge Holtzoff proposed this
3 language in what would become the bill that was
4 introduced in December of 1931.

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

10 And, to be sure, this Court has looked to
11 these same legislative history sources in prior
12 decisions construing the FTCA. But, you know, I do
13 think that we are left with the plain language here.
14 And we are also left with Congress's underlying policy
15 objectives, and I do want to say a word about the other
16 two policy objectives on which this court relied in
17 Kosak which --

18 JUSTICE SOUTER: Mr. Shanmugam, before you
19 get into policy, may I just suggest that there is a
20 possible fourth category, really. You had mentioned
21 three, and one -- a fourth possibility might be
22 "law-enforcement officer," in a very broad sense of the
23 term, but one who is simply providing, let's say,
24 protective service in aid ultimately of the revenue
25 laws.

1 And the reason I have thought of this is
2 that this sort of situation went on in my -- my native
3 State in this past month, in which the United States
4 Marshal Service, which at the time all of these statutes
5 were enacted was a fairly large agency, took control of
6 some real estate in -- in New Hampshire which had been
7 the property, or was the property, of tax protesters.

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

13 That would be an example of "law-enforcement
14 officer" in a very broad sense. It could cover the
15 Marshal service, the FBI, and whatnot; and, yet, the --
16 and No. 2, they would be exercising, you know, typical
17 law-enforcement functions, protective functions. And,
18 yet, they would be doing so in -- in aid of -- of the
19 tax or the revenue laws.

20 That would be a plausible reason for -- for
21 sticking in the general phrase, and it would be a
22 plausible reading of the phrase, wouldn't it?

23 MR. SHANMUGAM: Well, Justice Souter, I
24 think, with no disrespect to the good law-enforcement
25 officers of New Hampshire, that these cases come up far

1 more rarely in the Federal context, because both customs
2 officers and Internal Revenue officers are
3 law-enforcement officers who have, I think, quite a
4 refined capability. They carry weapons, and they are, I
5 think, usually very well prepared to kill if --

6 JUSTICE SOUTER: Do IRS agents have -- have
7 expertise in -- bomb detection and dismantling?

8 MR. SHANMUGAM: There certainly might very
9 well be cases in which they would feel the need to call
10 in the FBI or other law-enforcement agencies. But I do
11 think that it is telling that in the 60-year history of
12 the FTCA there don't appear to be any cases that fall
13 into that category.

14 JUSTICE SOUTER: Well, there don't seem to
15 be many cases because -- I mean that's why we've got
16 this one at this point.

17 MR. SHANMUGAM: Well, there are quite a few
18 cases more generally. I think that there are something
19 in the neighborhood of 17 prior decisions in the courts
20 of appeals alone involving these fact patterns or
21 similar ones.

22 JUSTICE SOUTER: Over what period of time?

23 MR. SHANMUGAM: Over the 60-year period of
24 the enactment of the FTCA.

25 JUSTICE SOUTER: Well, I mean that's not --

1 that's not a deluge of litigation. I mean it seems to
2 me there is reason to assume that no matter what reading
3 we give it, there is a plausible reading that can come
4 up that -- that confines the actual application of the
5 "other law-enforcement officer" fairly narrowly.

6 MR. SHANMUGAM: But our fundamental
7 submission, Justice Souter, is that there is no good
8 textual reason for confining the phrase "any other
9 law-enforcement officer," because that phrase, in our
10 view, is unambiguous.

11 And, notably, Petitioner in his brief and at
12 oral argument does not directly contend that there is
13 any ambiguity in that phrase, itself. And this Court
14 has noted, in applying both the noscitur a sociis and
15 the ejusdem generis canons of construction, that where
16 the relevant phrase to which a limiting construction is
17 being applied is itself unambiguous, that that is the
18 end of the inquiry.

19 JUSTICE SOUTER: Yes, but the question of
20 what is -- what is ambiguous or not is -- is a question
21 of context. And if you take the phrase "law-enforcement
22 officer," and you say is that ambiguous, and you say
23 well, gee, no.

24 But if you stick it in this particular
25 statute and it happens to follow these specific

1 references to tax gatherers and tax and excise laws,
2 then it seems to me it's fair to say it does become
3 ambiguous, because it gives rise to a reasonable
4 question.

5 Were they just getting at law-enforcement
6 officers who were performing these kinds of functions,
7 or did they really mean it as broadly as the phrase in
8 real isolation would have meant? That's ambiguity, and
9 that's what we've got here.

10 MR. SHANMUGAM: I don't believe that that's
11 correct, Justice Souter, and the reason that I don't
12 believe that that is correct is because this Court has
13 suggested that the starting point is the relevant phrase
14 that is being interpreted.

15 And here we have the phrase "any other law
16 enforcement- officer."

17 JUSTICE SOUTER: But then you are saying,
18 don't read the statute as a whole. That argument, in
19 effect, is saying isolate the phrase -- and we don't do
20 that.

21 MR. SHANMUGAM: Well, no, Justice Souter. I
22 think that where the phrase is unambiguous, this Court
23 has suggested that the inquiry is at an end, and, to
24 take an example --

25 JUSTICE SOUTER: I agree with you. And if I

1 make the assumption that it's unambiguous, your argument
2 is unassailable. But if I don't make that assumption,
3 then your argument risks circularity.

4 MR. SHANMUGAM: Well, let me --

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

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

10 And this Court has repeatedly noted that
11 where Congress uses the word "any," it is substantial
12 evidence that Congress intends a phrase to be construed
13 broadly. And this Court has specifically refused to
14 apply the ejusdem generis canon to phrases introduced by
15 the word "any" on precisely the ground I cite, namely,
16 because they conclude that that phrase is unambiguous.

17 JUSTICE STEVENS: But you are talking about
18 the use of the word "any" all by itself. Here it says
19 "any officer or customs or excise or other" -- "or
20 other," and you would just take those words out of the
21 statute.

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

24 JUSTICE STEVENS: But you believe they add
25 nothing to the text of the statute.

1 MR. SHANMUGAM: They add nothing to the text
2 of the statute in the sense that Congress could have
3 written the statute to refer to any law-enforcement
4 officer. That is certainly true. That is also true
5 with regard to all of the statutes and constitutional
6 provisions that we cite in footnote 11 of our brief.
7 And, indeed, in some sense, it would be true with regard
8 to Petitioner's proposed construction insofar as
9 Congress could easily have written a statute that simply
10 referred to any law-enforcement officer acting in a
11 customs or tax capacity.

12 JUSTICE SCALIA: There are two "anys" here.
13 I'm not sure that --

14 MR. SHANMUGAM: I'm certainly referring to
15 the "any" that modifies "any other law enforcement
16 officer."

17 JUSTICE SCALIA: Any other. So it says any
18 goods by any officer of customs or excise, or if it just
19 had said "other law enforcement officer," you might --
20 you might disregard the force of any because it was way
21 back there.

22 MR. SHANMUGAM: That's right. And contrary
23 --

24 JUSTICE SCALIA: But if they repeat "or any
25 other law enforcement" --

1 MR. SHANMUGAM: That's right. And contrary
2 to Mr. Andre's submission, this Court has made precisely
3 that point in Harrison v. PPG Industries, in which the
4 Court was construing a similar phrase that referred to
5 "any other final action by an EPA administrator." And
6 that came after a series of specific final actions to
7 which the statute referred. And the Court actually
8 said, in so many words, it might be different if the
9 word "any" were omitted, but we believe that the
10 inclusion of "any" renders that phrase unambiguous.

11 And I would note as well, Justice Souter,
12 that in your dissenting opinion to be sure in Circuit
13 City in footnote 2, you cited all of these very cases on
14 which I'm relying now in support of your proffered
15 construction of the statute.

16 JUSTICE SOUTER: They were on point for my
17 dissent. I know.

18 (Laughter.)

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

23 JUSTICE GINSBURG: I know your time is
24 running out, but I would like you also to say a word
25 about what remedy, if any, does Ali have when you're

1 saying he had his prayer rug and Koran, and the
2 government lost them and he didn't get any compensation?
3 Does he have any remedy?

4 MR. SHANMUGAM: Sure, Justice Ginsburg. And
5 the answer is, yes, that he does. He does have an
6 administrative remedy.

7 And I'd like to say just a couple of things
8 about the available administrative remedies.

9 First of all, any claimant who claims that a
10 Federal agency, including a Federal law enforcement
11 agency negligently damaged his or her property, would
12 have a claim under 31 U.S.C. 3723 for up to \$1,000.
13 That statute, which we cite in a footnote, I believe in
14 our brief, would cover the vast majority of claims
15 involving the Bureau of Prisons.

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

23 JUSTICE GINSBURG: But there's no court --
24 there's no court role in that process.

25 MR. SHANMUGAM: There is no court role in

1 that process, but the Bureau of Prisons routinely
2 processes these administrative claims. As we note in
3 our brief, there were 12,000 such claims over the last
4 three years. The Bureau of Prisons has procedures for
5 processing those claims. It paid out something in the
6 neighborhood of 1,100 of those claims.

7 And there's no reason to think that the
8 Bureau of Prisons would alter those procedures if the
9 Court were to hold in this case that there is no
10 judicial remedy. Indeed, the Bureau of Prisons has paid
11 out on such claims even in circuits that have adopted
12 our interpretation.

13 I do want to say just a word about the
14 underlying policy considerations, because to the extent
15 that members of the Court feel that the statute is
16 ambiguous, we believe that they strongly support our
17 construction.

18 In *Kosak*, this Court analyzed two other
19 policy considerations in addition to the avoidance of
20 duplicative remedies: First, protecting important
21 government functions from the threat of suit; and
22 second, avoiding exposure to fraudulent claims. And we
23 believe that those concerns are particularly implicated
24 in the prison context which constitutes the mine run of
25 cases in this area. Thank you very much.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Shanmugam.

3 Mr. Andre, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF JEAN-CLAUDE ANDRE
5 ON BEHALF OF PETITIONER

6 MR. ANDRE: I'd like to first address the
7 government's resistance to making any concession that
8 the statute is ambiguous. First of all, if the
9 statutory language in this case was so clear, then so
10 must the statutory language in Circuit City. The
11 language had started out with the words "any other," and
12 clearly then were followed by words that have a very
13 plain meaning out of context, "any worker engaged in
14 interstate or foreign commerce."

15 We just don't believe that the government's
16 position that the statute is unambiguous can be squared
17 with that case. Nor do we think as a factual matter
18 that the statute is unambiguous.

19 In particular, we think it would have been
20 strange for this Court in Kosak to go out of its way in
21 a footnote and expressly decline to resolve today's
22 question presented if the detention of property clause,
23 in particular the "law enforcement officer" phrase, had
24 only one clear meaning.

25 And then on top of that, as we noted in our

1 reply brief, five courts of appeals have adopted our
2 construction; two other circuit judges have written
3 separately. The total is 16 circuit judges that have
4 found our position to be credible, found the statute to
5 be ambiguous, applied the canons of construction that we
6 are urging the Court to apply today, and then resolved
7 the case in our favor

8 So if, if the statute is truly unambiguous,
9 then those 16 circuit judges not only got this issue
10 wrong, they got it very wrong.

11 Justice Breyer, I unfortunately don't have an
12 example either of what other types of law enforcement
13 officers were out there at the time of the FTCA's
14 enactment, but I do have one example, and that would be
15 the Elliott Ness and the Al Capone investigation.

16 Elliott Ness was in charge of running a group
17 of -- in charge of supervising a group of government
18 agents who were part of the Department of Justice, even
19 though Elliott Ness himself was a treasury agent. And
20 they were all trying enforce the Volstead Act, but -- to
21 get Al Capone on charges of income tax evasion. And so
22 we believe that that's a nice example from the early
23 1930s when Judge Holtzoff drafted this language that
24 shows that you could have a revenue officer working
25 with -- in fact, supervising other law enforcement

1 officers, and they are all really doing the same thing.

2 As far as the policy considerations are
3 concerned, we believe that the government's reliance on
4 the two other general purposes for the FTCA exceptions
5 just prove too much. Pretty much any governmental
6 function is important. And so the government in every
7 brief they filed on this issue below and in pretty much
8 every FTCA exception case that we've seen has come in
9 and said, oh, but our interests are served by these two
10 other purposes, and therefore, this statutory exemption
11 has to be construed narrowly.

12 Again, as a factual matter, we don't think that
13 their concerns are really all that well founded, in any
14 event. True, there were 12,000 administrative claims filed
15 by Federal prisoners over the last three years. But as we
16 pointed out in footnote 12 of our cert petition, there
17 were only 16 cases filed in all of 2006 by Federal
18 prisoners under this statute.

19 settlement process is working, and that also Federal
20 prisoners are just not bringing suit and there is a very
21 good reason for. That it's the Federal filing fee.
22 That's \$455. My client's claim in this case is \$177.

23 Prisoners don't evaluate whether to sue based
24 on some sophisticated reading of sovereign immunity
25 doctrines and ambiguous statutory text. They, you know,

1 they think about their wallet. They make \$2.50 a day,
2 and it's just not worth it for them to risk --

3 JUSTICE GINSBURG: Wouldn't they have IFP
4 status?

5 MR. ANDRE: Even if a prisoner gets IFP
6 status, they still have to pay the full filing fee. The
7 IFP status only allows them to pay in installments. So
8 it's debited off their account. So they still make a
9 very real calculation when they decide whether to sue
10 based on how much is at stake and how much is it going
11 to cost me.

12 JUSTICE GINSBURG: Here there wasn't that
13 much at stake.

14 MR. ANDRE: That's correct. There was \$177
15 at stake and so perhaps my client shouldn't have sued
16 because it didn't make a lot of sense, although he also
17 did file the suit a couple years earlier when the filing
18 fee was lower. But in our experience, prisoners they
19 are not going to typically sue for these kinds of
20 claims. This is nothing like the Prison Litigation
21 Reform Act problem we had in Jones V. Bock, where there
22 are 24,000 cases coming before the Federal courts every
23 year. That's just not something we envisioned.

24 So we don't think that adopting any one of
25 the four constructions discussed are debated between my

1 friend and Justice Souter would somehow open up the
2 floodgates here and lead to a lot of prisoners suing
3 under this particular provision. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Andre. The case is submitted.

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

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