

In the  
**Supreme Court of the United States**

ORVAL C. LOGUE, et al.,  
Petitioners,  
v.  
UNITED STATES,  
Respondent.

No. 72-656

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Washington, D. C.

Tuesday, April 24, 1973.

The above-entitled matter came on for argument at  
10:09 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES DE ANDA, ESQ., 12th Floor, Wilson Building,  
Corpus Christi, Texas, 78403; for the Petitioners.  
  
MARK L. EVANS, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D. C.,  
20530; for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first today in 72-656, Logue against United States.

Mr. DeAnda.

ORAL ARGUMENT OF JAMES DE ANDA, ESQ., ON BEHALF  
OF PETITIONERS

MR. DE ANDA: Mr. Chief Justice, and may it please the Court:

This is a case arising under the Federal Court of Claims Act resulting from the suicidal death of a Federal prisoner confined in a State facility.

The District Court, in this instance, found both the marshal and the sheriff, the State official involved, negligent, found the marshal negligent in not making arrangements for constant surveillance of the deceased and found the sheriff negligent for making inadequate -- for having inadequate surveillance procedures.

The Circuit Court approved the findings of the trial court, but held that insofar as the marshal's negligence was concerned that the marshal had no authority to control jail functions and, therefore no duty of safekeeping of the prisoner, and that insofar as the sheriff was concerned that he was an independent contractor, as defined under the Tort Claims Act, and, therefore, the Government had no liability for his conduct.

Which brings us to the issue in the case, which is



whether or not the United States may exempt itself from liability under the Federal Tort Claims Act for a negligent injury to a prisoner by simply turning him over to a local jail.

This is extremely important because if this were the law, first of all, you would have two standards, insofar as persons in detainment are concerned; that is, Federal prisoners in non-Federal institutions would not have the benefit of the Tort Claims Act remedies, nor would they have the rights of the protection afforded by Section 40-42 and 40-86, which requires the Bureau of Prisons to safely keep the prisoner and requires the U.S. marshal, to safely keep his prisoners.

It would also result in a situation where actually, in the usual case, where a man has been convicted of a crime and is confined in a Federal institution has really more rights than one who is simply charged with a crime and has not yet been tried, because I believe the statistics show, that are in the record in this case, the persons that are confined in State institutions for the most part are persons who have not yet been convicted of crimes.

As a matter of fact, I believe, the record was that there were approximately 4,000 Federal prisoners in any one day that are confined in State institutions of various types, and for the most part, are waiting trial on different offenses.

The dissenting -- there was a motion for a hearing en banc before the Circuit, which was denied by the Circuit, but

there was a dissent filed in that matter, and the basis of the dissent was that the breach of the statutory duty on the part of the marshal occurred when the prisoner was confined in the jail under circumstances that the marshal knew were dangerous and without taking specific precautions.

In other words, the dissent stated that really whether or not the -- that this contract between the Government and the Nueces County jail was really irrelevant, and that the marshal himself was guilty of acts of negligence in taking this man and turning him over to the sheriff of Nueces County without making assurances that he would be cared for, knowing the very peculiar and special circumstances that surrounded the case.

Q Mr. DeAnda, would that be negligence in selecting the contractor, basically?

MR. DE ANDA: No, sir, I don't believe -- Mr. Justice, I do not believe that negligence would be in selecting the contractor. The negligence would be in -- and the negligence that the court found was in not making arrangements for the man to -- the arrangements that were necessary under the record to keep the man safely. That is, the marshal, for example, even though he took the man into jail could have -- just as they had a guard for him at the hospital after his first suicide effort, could have had a guard for him to watch him and maintain constant observation while the man was in jail.

Although the Government places a great deal of weight

on the inability of the marshal to control things in the jail, the truth of the matter is that everything that occurred in that jail, when this man was returned, was done so with the blessings and at the suggestion of the marshal.

Everything that the jailer did, the type of cell that the man was put in, was all done because the marshal wanted it done that way, and the contract between the Government and the jail permits this.

There is real pressure in my mind that there is anything approaching an infinite contractor situation here -- in a situation of this type, because the regulations of the Bureau of Prisons, as shown in the transcript, really leave it up to the marshal when a particular or unusual situation occurs, specifically, either a medical situation or one involving custodial problems that's not the run of the mill case where the sheriff is just simply babysitting with somebody that's in jail and charged with a crime, that he is to call the marshal and find out what the marshal wants done with the man and how he wants a particular situation handled.

Q Well, is this an argument that even if the State official -- the relationship between the United States and the State jail or prison was one of independent contractor, even if it was, that under these circumstances it was negligent for the marshal to have lodged the man there without first making certain that whatever the independent contractor did he did to

safeguard this fellow from committing -- attempting suicide again. Is that it?

MR. DE ANDA: Yes, Your Honor, that's exactly my position.

In other words, in this particular case, the man was removed from the hospital over the protests of the doctors. Now, the doctor did release the man, but he released the man because he thought he had been ordered to do so by a Federal judge.

That was the circumstances under which the man was released from jail. He was psychotic when he went in. He was psychotic when he went out. There had been absolutely no improvement or change in the prisoner's condition, psychiatrically, from the time he was put in jail to the time he was taken out. I am sorry -- in the hospital, Mr. Justice.

The medical testimony is that the man's condition, mental condition, was exactly the same. He had been placed under some sort of drug treatment and had been administered some medication which did help.

Q Did the marshal have any choice but, when he was released from the hospital, to put him in this very jail?

MR. DE ANDA: Oh, yes, he had every choice in the world.

Q What could he have done?

MR. DE ANDA: He could have left him in the hospital.



He could have been moved within 24 hours, according to -- in an emergency situation.

In fact, the Federal judge had already ordered that the man be confined in a medical facility, and he was returned to the jail awaiting transfer, to Springfield, I believe, while someone came to get him.

Q But, locally, were the choices either to leave him in the hospital or put him in this jail? Did he have any other option? The marshal.

MR. DE ANDA: I do not believe he would have, Mr. Justice. I guess he could have put him anywhere he wanted to put him. I would suppose. But I do not believe that, from a realistic standpoint, I think his responses would have been --

Q Well, there did exist a contract with this jail to take these Federal prisoners, didn't there?

MR. DE ANDA: Yes, the jail had a contract to accept Federal prisoners.

Q Well, then, that did rather limit the marshall's options, did it not?

MR. DE ANDA: Well, it would limit him either to the -- well, that's what I said. I think from a practical standpoint that that's correct. It may be from a legal standpoint as well.

Q You are saying then the specific conduct of this Federal marshall in these circumstances was itself negligence?

MR. DE ANDA: Yes, Mr. Justice, in taking --

Q This could be true even if the conduct of the jailer, into whose custody he delivered the man, was not negligent.

MR. DE ANDA: This would be true.

Q And is it true in this case?

MR. DE ANDA: No, it is not, because -- the reason it is not was the trial court found that it wasn't. He found that both were negligent in the matter.

Q But absent this conduct of this particular Federal marshal, you aren't asserting that the United States would automatically be liable just because the jailer was negligent, are you?

MR. DE ANDA: Yes, that would be my second position, Mr. Justice, that -- this is what I think we are talking about non-delegable duties, which I haven't discussed yet -- but, in other words, it is our position that the statute places a mandatory duty on the marshal to safely keep his prisoner, and that he cannot delegate that --

Q But you don't need to get to that if the marshal's specific conduct here was negligent in itself?

MR. DE ANDA: I believe that's correct, Mr. Justice, that you would not necessarily reach that point if we were correct in what I have said here. And the trial court did find -- the trial court found that the marshal --

Q Himself was negligent?

MR. DE ANDA: Himself was negligent in not making

arrangements for constant surveillance of the man.

Q What did the District Court find with respect to the marshal's decision to move him from the hospital to the local jail?

MR. DE ANDA: The court found that that was a discretionary function and we did not appeal from that finding, Your Honor.

Q Discretionary function for which there could be no liability on the part of the United States.

MR. DE ANDA: Under the Tort Claims Act.

Yes, he found that.

But, he did find that the marshal, having made that discretionary decision, that then he had a duty to see that proper arrangements were made, wherever he took the man, to see that he was safely kept, in keeping -- that he had a duty of reasonable care, to see that the man was properly taken care of and the marshal admits in his testimony, the marshal that testified, the deputy marshals. The United States Marshal did not testify and had no actual knowledge of what transpired. But the people there admitted that it would have been wrong and unsafe to take this man and place him in jail without constant surveillance.

Q Absent some affirmative conduct by the marshal, though, your two positions then really run together, that the marshal -- that the United States, nor the marshal, could do

its duty unless it participated in the custody of this prisoner after he was delivered to this jailer?

MR. DE ANDA: Well, it is our position, Your Honor, that under the contract and under the practices that were followed, as reflected by this record, that the marshal did have a great deal to say with reference to the keeping of the man and the conditions under which he was kept.

Q Mr. De Anda, I'd rather understood your alternative position to be this: the District Court found that Deputy Bowers was negligent, in that he failed to make adequate specific arrangements, specific arrangements for the care and surveillance of the decedent in the jail, and that was met in the Court of Appeals by the finding that he had no power to make any such specific arrangements for the surveillance inside the jail.

And I thought that if one should accept that holding of the Court of Appeals, that, in fact, the marshal had no power whatsoever to control or to arrange or to provide for the proper kind of surveillance in the jail, then, indeed, it was negligence for him to turn him over to the jail.

MR. DE ANDA: Your Honor --

Q To a situation where he had no control over the proper kind of surveillance that the man was going to be given.

MR. DE ANDA: Your Honor, the Circuit Court points out that the marshal had no authority over the internal



operations of the jail, and in the ordinary case, certainly, that is true.

Q And if that's true, then wasn't it negligence, in your submission, trying to turn him over to a jail where he had no control over what was going to happen inside of it?

MR. DE ANDA: Yes, it is my position, Your Honor, that he did have a duty, knowing the man's propensity for suicide, that he could not just take him over and turn him over to someone -- it would be just like Judge Brown said, in his dissent, "If this man was physically ill and was dying, he couldn't just take him down to the jail and throw him in there and say that he did no wrong because it was not a hospital and he had no right to convert it to a hospital."

There is a place where the marshal still has the duty and the control of the prisoner and the absolute control of the prisoner. And that was in this instance, certainly, up until he returned him to the jail without, I may add, the jailer testified that all the marshal told him to do was to keep an eye on the prisoner, or words to that effect, rather than a constant surveillance.

And the record also shows that the cell that the marshal selected was an isolation cell which was not surrounded by bars, as you might expect, but was rather a sheet metal steel cell through which holes had been punched the size of a half dollar, and which was in a solitary area of the jail, and

surrounded by wire mesh enclosure, to boot.

So that no one could really keep an eye on this man except the jailer when he made his rounds. And this is what the jailer testified and what the court accepted, because it found that the marshal made no arrangements for the constant surveillance of the man, insofar as the situation in which the man was placed in this particular custodial type situation.

Q If he did have power to make the arrangements, he was negligent, on your submission, in not making the proper arrangements. And that's what the District Court found.

If, on the other hand, as the Court of Appeals found, he did not have any power to influence what arrangements were made inside the jail, then he was negligent in putting this man, knowing his condition and his propensity to commit suicide, into that jail which he had no power to control. Is that it, alternatively? At least on this branch of the case. I know there are other branches of it.

MR. DE ANDA: That would be a way of putting it, yes.

Q Well, isn't your answer to Justice Stewart's second question another way of saying the non-delegable duty?

MR. DE ANDA: The non-delegable duty phase of it comes in, Mr. Justice, when you have a situation -- I believe Judge Brown pointed it out in his decision -- in his opinion, excuse me -- where the marshal has a specific statutory duty and he has a set of circumstances that he recognizes to be

ultra-dangerous, unusual. That in that situation I believe the judge stated that the jailer, in effect, becomes an employee of the Government for purposes of the Tort Claims Act. In other words, that in accordance with the general law, you cannot contract someone to perform -- certainly this is the law of Texas -- that you cannot perform -- contract someone to perform a statutory duty that you have, and then when that person does not perform it, or performs it in a negligent manner, and breaches a duty, that at that time you can say, well, this man was an independent contractor and I have no -- it is not my problem any more.

That duty remains with the person upon whom it is imposed until it is carried out.

Q Mr. De Anda, what does your position leave of the statute, Section 2671, which reads, with some omissions, "As used in this chapter," as used in this Title? The term "Federal Agency" does not include any contractor with the United States.

It doesn't leave very much of it, does it?

MR. DE ANDA: Well, Your Honor, if it were not a non-delegable duty, Mr. Chief Justice --

Q Where does the statute speak about the non-delegable duties? What section?

MR. DE ANDA: Well, there is nothing in the statute that speaks of non-delegable duties, any more than there is anything in that statute that says that the marshal has duty to

certainly keep the prisoner -- it has been abrogated by the -- by this contract -- at least by the marshal's right to contract with the State authorities to keep the prisoners.

Q What would be the situation if this man had committed suicide while in the hospital? Was the hospital a contractor with the United States?

MR. DE ANDA: Well, Your Honor, the man was in the hospital, and at that time the marshal had taken over. There is no question at that time the marshal was paying guards around the clock while he was in the psychiatric ward to take care of the man, except that he was only in there for about a day, or perhaps a little less.

But, in that situation, if there were any negligence involved -- and, of course, you would always have to have negligence. If there were any negligence involved, then, of course, I believe that the Government would be liable.

Q That is, for example, if they had put him in the hospital and just dropped the matter there, you then might argue that that would be negligence in and of itself?

MR. DE ANDA: I don't believe there was any absolute -- the Government is not an insurer of this man's safety. The Government is required to use reasonable care under the circumstances to see that he is safely kept.

If taking him into the psychiatric ward of the hospital and providing him with physicians and other custodial



people to take care of him, would be considered reasonable care, why then the Government would have discharged its duty, and the man's suicide then would have been just an unfortunate thing.

Q What is your practical situation in Texas insofar as a lawsuit against the county is concerned?

MR. DE ANDA: Texas has passed a Tort Claims Act, but it does not encompass within it -- it would not take care of this situation.

Your Honor, I feel that there is a -- that this case, as it stands, and as our brief indicates, conflicts with the Witt case, which is a Second Circuit case, in this sense; this was not a -- there was no written contract between the military custodian and the contractor involved in that case.

This was a situation where the persons in custody of the military barracks were farmed out, so to speak, to do work for a private club, there in the vicinity, and the -- one of the prisoners was injured through the negligence of the -- through the negligence of the contractor, and the Government tried to escape liability in that situation by claiming that the contractor was not an employee of the Government.

And the Circuit Court held in that case that there was a duty on the part of the custodian -- the Government custodian -- to control and employ the offenders in his care and the fact that he was being transported back and forth by a private individual did not permit the Government to escape that

responsibility, and held that the Government would have to answer for liability in that particular case.

Is there any other question?

Q I would be interested in your comment about the Government's suggestion as between Deputy Bowers and Deputy Jones. As I understand, there were two involved.

And I think the Government's argument is that whatever Bowers did or did not do, that Jones made up for it with specific and definitive instructions to the jailer. Do you have any comment about that?

MR. DE ANDA: Well, Your Honor, of course, both these men are marshals.

I do not believe that the record supports this position, really, because the jailer testified that he did talk to Mr. Jones. This situation was a three-way situation where Mr. Jones, the Chief Deputy, was talking to the jailer and Mr. Bowers, the Deputy on the ground, was talking to his immediate superior.

But the marshals -- there is a conflict in the testimony of Chief Marshal Jones and that of Mr. Lawrence, the county jailer, in that the county jailer testified that the only instructions he got were to keep an eye on the prisoner, to watch out for him, this type of language.

I think that the very important point -- and the Trial Court resolved that issue against the Government, because

the Trial Court found that it made no such arrangements, as did the Circuit Court.

But the important thing, and the reason that they found this, I believe, Your Honor, is that Mr. Bowers, after talking to Mr. Jones, went to the jail and examined this place where this man was to be lodged and approved everything.

There was only, incidentally, one bunk in the cell, so that common sense dictates that the marshal knew there would be no one in there with this man, that he was going to be isolated in this cell by himself.

Q Does the record show how the suicide was committed?

MR. DE ANDA: He hung himself. He had tried to commit suicide the day before, on the 23rd, Mr. Justice, by cutting his wrist. He was taken to the hospital and a long bandage was applied to his arm to close that wound.

Q He used the bandage?

MR. DE ANDA: I beg your pardon?

Q He used the bandage?

MR. DE ANDA: Yes, he used the bandage.

The cell was so fixed that it had these holes everywhere, on the ceiling and on the sides, and all he had to do, of course, was to affix the bandage to one of the holes.

It was in that way that he used the bandage to hang himself.

Q It was a Kerlix bandage, whatever that means.

MR. DE ANDA: Kerlix. It was a very long bandage. The doctors testified that the bandage would not have been dangerous in the hospital because he was under medication, he was in a room where he could not hurt himself. But, apparently, when the bandage was applied, it was not contemplated that he would be removed to the jail.

Q Of course, suicides take place in hospitals, too.

I take it you are not pinning your case on the removal to the jail. You regard this as a discretionary act?

MR. DE ANDA: Yes, Your Honor. We have to live with that position.

I believe the marshal testified the suicides -- or attempted suicides were the chief cause of hospitalization among Federal prisoners in -- awaiting trial in State facilities. I believe there is something in the record on that.

But there is no indication or inkling in the record anywhere that this man could have successfully taken his life had he remained in the hospital.

I don't believe anyone does take that position at all.

If there are no other questions, thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Evans.



ORAL ARGUMENT OF MARK L. EVANS, ESQ., ON BEHALF  
OF THE RESPONDENT

MR. EVANS: Mr. Chief Justice, and may it please the Court:

The Government's position, simply stated, is this. First, although the United States would be liable under the Federal Tort Claims Act for injury to a Federal prisoner caused by the negligence of a Federal marshal, the deputy marshals here acted reasonably in accord with due care and they violated no duty owed to Reagan Logue.

Second, because the United States had no right to control the physical conduct of the jailers employed by the county jail, the Government cannot be liable under the Tort Claims Act for injury resulting from the negligent conduct of those employees.

I think in light of Mr. DeAnda's argument, that it might be fruitful to start with a focus on the precise findings that the District Court made with respect to both of these points.

They appear in Volume 2 of the Appendix, at pages 608 and 609.

The important point to make, I think, is that the only Federal officer whom the District Court found to be negligent was Deputy Bowers. That is the deputy who was on the scene in Corpus Christi. And his negligence, in the Court's view,

consisted solely of failing to make "specific arrangements" for Logue's surveillance while he was confined to the jail.

There is no finding that Bowers was negligent in removing Logue from the hospital. And, as Mr. DeAnda stated here, the District Court found that to be a discretionary act and that matter was not argued on appeal.

Moreover, there is no finding that any other Federal officer was negligent in any way.

Q What page are you reading?

MR. EVANS: This is page 608 and 609 of Volume 2.

Q Thank you.

MR. EVANS: Second, at the top of page 609, the District Court found that the jail's employees were negligent in failing to provide adequate surveillance while Logue was confined in the jail.

The Court of Appeals did not disturb the District Court's findings of fact. That is, it did not disagree that Bowers had failed to make specific arrangements for Logue's surveillance. It held, however, that in the circumstances of this case, that failure did not violate any duty owed to Logue.

In our view, the record fully supports this holding because it shows that the specific arrangements for Logue's surveillance, that is the arrangements that Bowers failed, personally, to make were, in fact, made by Bowers supervisor,

Deputy Jones.

I think a little background might be helpful.

Q Do you think there would have been a duty then for the Federal Government to have made some arrangements when they delivered the prisoner to the jail?

MR. EVANS: I think that knowing that a man is imminently suicidal, as they did here, that they had a duty to take precautions to insure that he did not commit suicide while he was in the jail.

Q Yes. And they had at least a duty to say enough to the contractee.

MR. EVANS: That's right.

Q If you are saying that having a contractee insulates the United States from liability for the contractee, you are not saying that the United States must not tell the contractee what his duty is.

MR. EVANS: That's right.

Q There is no question the marshal knew he had this bandage.

MR. EVANS: It is not clear, from the record, whether the marshal was aware of the type of bandage that had been placed on the man's arm.

Q Well, didn't he see it?

MR. EVANS: Well, he saw it, but, you know, the bandage -- it could have been, so far as it can be told from the

record, that it wasn't clear whether it was a gauze with tape, or whether it was a wrap-around bandage, as, in fact, it was.

Q But he did see it was a bandage.

MR. EVANS: He knew there was a bandage on the arm, yes.

Q And he saw the room he was put in?

MR. EVANS: Yes, he did.

Q And there is no question about that?

MR. EVANS: That's right.

Q Is there any question that he could have left him in the hospital?

MR. EVANS: He could have left him in the hospital. The decision was made to remove him from the hospital because of the lapse of time that would be necessary to -- before he could be transported to the Springfield, Missouri, Medical Center for Federal Prisoners, where the District Court in Laredo had ordered him to be sent, or was about to order him to be sent. The order had not yet been signed when he had been removed from the hospital.

Q The record shows that he was in a hospital. --

MR. EVANS: That's right.

Q Being treated for a mental disorder.

MR. EVANS: No, sir, he was not being treated. He was being held there for his safety, but he was not under medical treatment at the time.

Q He was under medication.

MR. EVANS: He was under -- he had been given a tranquilizer at the time of his admission.

Q Because he was suicidal.

MR. EVANS: Because he was psychotic.

Q Because he was psychotic.

And he was going to be transferred to Springfield, right? Which is another hospital.

MR. EVANS: That's right.

Q And so, what the marshal did was in between the transfer from one hospital to another he puts him in a jail.

Is that right?

MR. EVANS: That's correct, Mr. Justice.

Q Does that make any sense at all?

MR. EVANS: In the context of this case, it does.

The marshal was very conscientious; the deputy on the scene. Deputy Bowers was very conscientious to find out the purpose of Mr. Logue's confinement -- hospitalization. He discussed it both with the admitting physician, and with the physician who took over the case, the psychiatrist.

And the information he was given was that the man was hospitalized because he was suicidal and there was some danger that he might hurt himself.

He was not any longer hospitalized for any physical or medical treatment purposes.



At that point, the question came up when there was going to be a lapse of time, before he was to be transferred to Springfield, what to do with him in the meantime.

The marshal on the scene, Deputy Bowers, was concerned that the security at the hospital was inadequate, and he communicated that concern to his superior.

His superior said, well, let's see if we can make some kind of safe arrangements with the jail. And if we can -- and if the doctor will release him, let's move him to the jail.

Q Was there any prohibition of the marshals giving him the necessary protection in the hospital?

MR. EVANS: There was a guard, full-time, while Mr. Logue was in the hospital, but I must add that the record shows that what the marshals refer to as "key control" was very loose, and, of course, a man in a psychotic state, it is not inconceivable he could overtake a single guard.

The kind of surveillance -- the man was sitting outside the room, as I understand it. There was a window to the room, and every now and again he'd look, but -- if you have a situation where key control is loose, where a man is psychotic, there is always the chance that he can be overtaken.

The judgment, as I understand it, of the marshal's superiors, was that where the security was inadequate, it would be best, if possible, and if the doctor would release the man,

to put him back in the jail.

Q Primary responsibility was to make sure he was held and not his health?

MR. EVANS: No. The principle point -- and the marshals reiterated this during the trial, was the man's health and safety.

Q Health and safety and put him in a hole like that?

MR. EVANS: Well, the point was that there was no need for him to be in the hospital save to protect himself from injuring himself, and the marshals had, I think, reasonably assured themselves that he would be protected against injuring himself if he were placed back in the jail. There was no other need for him to be in the hospital.

Q Didn't the District Court review all that and hold, in fact, made a finding and a conclusion, that even if it was a mistake in judgment, it was a mistake in judgment under the discretionary provisions of the Federal Tort Claims Act for which there could be no liability?

MR. EVANS: That's exactly right, Mr. Chief Justice.

Q And I understood Mr. DeAnda to concede that that's out of the case because he did not file a cross-petition.

MR. EVANS: I understood him to say the same thing.

Q And that leads to what? By doing so, the marshal took on the additional responsibility of seeing that the man did not

commit suicide.

MR. EVANS: That's right. As I was suggesting before, I think that the marshals did undertake that duty and did satisfy it. It turned out that they didn't foresee every possibility, but, in our view, they did satisfy the duty that they had under the circumstances.

And I think the circumstances are important to have clearly in mind. It was at the suggestion of Logue's physician in the hospital, and with the help of Logue's attorney, that Bowers -- that the Deputy on the scene again -- had arranged for a court order committing Logue to Springfield, Missouri, for a competency determination, and also for his safekeeping during this period of his psychosis.

As I indicated before, it was because of the lapse of time that was to be involved that they determined that something had to be done with him in the meantime, and the determination was made for reasons that I think are satisfactory in the record, but in any event are within the discretionary function aspect of the Act, that they ought to keep him at the jail rather than at the hospital, if the jail's facilities could be adequately prepared for a man in this person's condition.

Deputy Bowers' supervisor, Deputy Jones, who was located in Laredo, telephoned the chief jailer of Nueces County Jail. He explained the situation in some detail. He indicated

the man was suicidal, and asked whether --

Q Is that set of facts the subject of any finding of the District Judge?

MR. EVANS: No, sir.

Q Isn't that important?

MR. EVANS: Well, it is important only in the sense that he did not resolve those facts against us, as Mr. DeAnda suggested.

Q Yes, but he did find that there was no specific arrangement made by Bowers with respect to certain things.

And you are saying that if there was a deficiency it was made up by Jones.

We haven't any findings about that.

MR. EVANS: Well, this, in our view, is the essence of what the Court of Appeals holding was.

In essence, what the Court of Appeals held was that in light of all the circumstances on the record, the failure of Deputy Bowers, by himself, was not a breach of any duty, because the duty had already been satisfied, in effect, by his superior, and satisfied by Bowers because Bowers was aware that the duty had already been satisfied by his superior.

Q Your position, I take it, is that this being a non-jury case, the Court of Appeals was in as good a position as the District Court to make a finding on that subject?

MR. EVANS: I think that's a reasonable interpretation.

Q I don't follow this, Mr. Evans.

The specific finding of the District Judge was that the failure of Bowers to make specific arrangements for constant surveillance constituted negligence.

MR. EVANS: That's right.

Q And you now say that -- what as to the telephone conversation between the jailer and Jones? What's the significance of that?

MR. EVANS: Well, the significance is that Bowers' superior, supervisor, Deputy Jones --

Q What's the significance of his being supervisor?

MR. EVANS: Well, I am just relating him as what his function was in the operating. No significance to his being superior.

Q If Jones' conversation had not taken place, you wouldn't be here, I take it?

MR. EVANS: Well, we might be here anyway, but I wouldn't be making the same argument.

Q You don't concede then, you don't concede that whatever it was that Bowers did by himself was negligent? Absent Jones' conversation.

MR. EVANS: Absent Jones' conversation, I might make an argument, on the record, Mr. Justice, that he was not negligent, but I think that we would be bound and the Court of Appeals would be bound by the findings made by the District Court



But my point, Mr. Justice Brennan, to answer your question, is that the finding as to what Bowers did and did not do, in the Court of Appeal's view, -- the finding that the District Court made did not constitute negligence because there was no duty that was breached thereby.

In other words, the legal question, as to what duty was required of Deputy Bowers, was what the Court of Appeals was addressing attention to, as I understand it.

Q That everything that Jones did satisfied any duty, and no matter what Bowers did was immaterial?

MR. EVANS: That's not exactly right.

Bowers was made aware by Deputy Jones of the conversations with the jailer. Jones directed Bowers that since he was on the scene to inspect the cell and to assure himself that it was adequately prepared and that the arrangements that had been made with the jailer would be carried out, and he did so.

Q What are you doing with this finding that whatever Bowers did or failed to do constituted negligence?

MR. EVANS: Mr. Justice, I agree that we are not suggesting that Deputy Bowers made specific arrangements for the surveillance.

Q Are you suggesting that Deputy Bowers was not negligent?

MR. EVANS: That's right, we are suggesting Deputy Bowers --

Q Even though the District Court found that he was?

MR. EVANS: Even though the District Court found that he had failed to make specific arrangements, and that that was negligence. We agree that he failed to make the specific arrangements, but we do not agree that it was negligence, and we think that the Court of Appeals properly held that there was no duty to make those specific arrangements in the circumstances of this case.

Q Mr. Evans, was Bowers' supervisor ever a party to this case?

MR. EVANS: I don't believe any of the marshals, themselves, were made parties. I think it was a suit just against the United States under the Federal Tort Claims Act.

Q As I have understood your argument, and I think your brief, you excuse Bowers primarily on the ground that he was entitled to rely on the advice and instructions from his supervisor.

MR. EVANS: That's correct.

Q Now, if the supervisor had been sued, would you defend him?

MR. EVANS: Certainly, because in the circumstances of this case, the supervisor made the necessary arrangements with the jailer of the county jail. What he told the county jailer was that the man was suicidal. You have to prepare a special cell. Take out everything from that cell that a man

could possibly use to hurt himself. When he is brought back to the jail, strip him down to his shorts, and keep someone watching him.

Now, he specifically suggested to satisfy the observation part of his suggestion, that one or two trustees, that is, favored inmates, be placed either in the cell with the prisoner or right outside where they could watch him continually.

Now, in those circumstances, if his instructions had been carried out, and, incidentally, the chief jailer expressly agreed and indicated that he would carry out those instructions and suggestions.

If they had been carried out, it would have been -- I won't say impossible for the man to commit suicide because it is hard to say when a man truly intends to commit suicide that it would be impossible for him to do it. But it would have been much more difficult under the circumstances.

Our point, basically, is that if there was a failure here, the failure was not on the part of any of the Federal marshals involved, all of whom acted reasonably, but rather on the part of the county jailer.

Q Now, that was Bowers who had that conversation, not Jones?

MR. EVANS: No, that was Jones. Jones had the telephone conversation with the chief jailer in which he made these explicit arrangements. Bowers, at Jones' instructions,

personally visited the jail, inspected the cell, assured himself that all dangerous objects had been removed, determined that it was convenient for observation by the jail authorities, and later when he brought Logue to the jail he again inspected it, again determined that it was safe, had a conversation, evidently, with the jailers there, instructed them again as to what needed to be done in the way of surveillance and left.

Q Was that evidence disputed anywhere?

MR. EVANS: The only dispute was that the chief jailer of the Nueces County jail testified -- I characterize the testimony as somewhat hazy, but that may be a subjective view of it -- his memory only was that he did what he thought he had been told to do, which was to have the man placed in the cell, but to check him only periodically. What they had done is the chief jailer and his staff, when they had business on the second floor of the jail where Logue was confined, would look in on him.

Q Was the District Judge requested to address a finding on that subject at any time?

MR. EVANS: I am not sure I can answer that.

There is an easy answer but it is -- the proposed findings are in the Appendix. I am not familiar enough with them at this point to answer your question.

Q Mr. Evans, I have looked from beginning to end again, at this opinion of the Court of Appeals. Jones is nowhere

mentioned. Nowhere.

MR. EVANS: That's right.

Q How do you -- look at page 34, would you please, of the Opinion.

I am looking at the Petition.

MR. EVANS: Yes, sir.

Q The paragraph that begins, "United States is subject to suit," and so forth. Then, it goes down, "We interpret this section as fixing the status of the county jail as out of the contract."

MR. EVANS: That's right.

Q "This insulates United States from liability under the FTCA for the negligent act or omission of the jail's employees. We find no support in the record for holding that Deputy Marshal Bowers had any power or authority to control any of the internal functions of the county jail. The Deputy Marshal, accordingly, violated no duty of safekeeping."

Now, where is any of that rested on any conversation with Jones or any participation, whatever, of Jones in this?

MR. EVANS: I agree that it is not explicitly rested on that, Mr. Justice Brennan, but in my view the final sense of the paragraph you just read is the sense that I am focusing on, and I am supporting that by the reasoning that the Court of Appeals didn't --

Q What it says is it disposes of the finding of the



District Court that -- about Bowers, by saying he couldn't have been negligent because he had no duty, rather than that he had a duty but it was satisfied by Jones.

MR. EVANS: That's right.

That may be the way the Court of Appeals viewed it.

Q But you conceded a moment ago, I thought, that Bowers had a duty.

MR. EVANS: Yes, we agree that Bowers had a duty.

I think what the Court of Appeals --

Q Well, the Court of Appeals hasn't considered the case on the legal basis that you now are talking about.

MR. EVANS: Well, the case was presented to the Court of Appeals. It is not clear from this opinion that the reasoning that underlies its decision is the same reasoning that I am urging on this Court, but I don't think that we are foreclosed from making the argument to support the judgment of the Court of Appeals.

Q Right. But it does involve a factual assessment that's normally not made here.

MR. EVANS: I would say that it, in a sense, involves a factual assessment.

Q Not a constitutional factual assessment?

MR. EVANS: That's right.

Q Would it follow then the case should be remanded for a determination -- or for that assessment of facts?

MR. EVANS: I'm not sure that the assessment that it is not clear has been made wasn't, in fact, made by the Court of Appeals.

I don't know that it is necessary for the Court of Appeals to have expressly stated that it was viewing the facts as I am suggesting the facts could be viewed. The record is there. It is basically undisputed. And, in my view, the judgment of the Court of Appeals can be supported by viewing the record as it stands.

Q In other words, you say we must read that last sentence as a finding based on the totality of the record?

MR. EVANS: That's correct.

I think that if the Court of Appeals had summarily affirmed, or summarily reversed, without opinion, in a case like this, I think we could be here making the same argument.

I don't think that the failure to express precisely the reasoning that we are urging is fatal.

Q But, once having gone into the subject, and discussed the activities of Marshal Bowers, it does leave some problems hanging in mid-air a little bit, doesn't it?

MR. EVANS: Well, I don't see the problems.

Q If, indeed, they were relying upon the conversation between Jones and the jailer, we have to surmise that the Court of Appeals was referring to that.

MR. EVANS: I think that we can surmise that the Court

of Appeals was aware of what was in the record, and that was clearly in the record.

I don't know that it is --

Q What they said made it irrelevant what was in the record.

They looked at it as a lack of duty case no matter what Bowers or Jones did.

You say it is not a lack of duty case.

MR. EVANS: Well, I think the -- that was one way of looking at it. I think what the Court of Appeals may have had in mind was that to their view the District Court was suggesting that the specific arrangements that Bowers neglected to make, or failed to make, would have required him, personally, to stand in the jail and watch the prisoner. And I think, in essence, what they are saying is that he had no duty to do that.

But, as I say, I think that the judgment can be supported on the reasoning I am urging, even though they haven't made it as explicit as I have.

I think we ought to turn to the second point here which has to do with whether assuming the marshals, themselves, were not negligent, the United States is nonetheless liable for the torts of the jail's employees.

In our view, the Federal Tort Claims Act forecloses that kind of derivative liability, and the Government is liable because the Government is liable under the Tort Claims Act only

for the torts of Federal employees.

The reasoning of that limitation is plain.

If the United States were held liable for the torts of the county jailers, over whom Government can exercise no direct supervision, the Government would face potentially large financial burden that it would be unable to avoid by its own conduct.

There are approximately 800 of these contract jails in the country, housing on any given day some 4,000 Federal prisoners.

The United States has no authority to place a Federal officer in each of these jails to supervise the physical conduct of the jail's operations, and I don't think the States would permit it even if they had the authority to do it.

And even if there were such authority, the burden would be immense. We are informed that in order to man a jail around the clock, with just one Federal employee, would require five employees per prison, taking into account vacations, holiday and weekends, and so forth.

Q Do they formalize these agreements?

MR. EVANS: Yes, the contract in this case is in Volume 3 of the Appendix, page 638 and following.

Q And that's the standard form?

MR. EVANS: That's right.

Q What about Mr. DeAnda's argument that even under Texas

law, under Federal law, the United States had a "non-delegable duty" here, that is couldn't, in effect, turn over to the State to perform?

MR. EVANS: I think the argument is foreclosed by the language of the Tort Claims Act and by the decisions of this Court.

The Act, itself, the provisions of which are set forth at page 41 of our brief, and as Mr. Chief Justice Burger indicated, applies only to negligence committed by an employee of the Government.

This Court, as recently as last term, and now in Laird v. Elms held that the requirement is of negligence of a Government employee and it has to be of a Government employee. There is no liability without fault in this case, and that's in essence what a -- under this statute -- and that's in essence what a non-delegable duty amounts to.

Even if a single Federal employee could be stationed in each of these contract jails to insure that Federal prisoners are handled properly, it would be impossible, I think, for an officer who has no authority to hire, fire, discipline or train the employees he was supervising to effectively deal with the problem.

And, in effect, the Government would be what Mr. DeAnda said he is not urging they be, namely, an insurer of the safety of Federal prisoners. And I don't think that Congress



intended that result under the Federal Tort Claims Act.

Q But this could be limited to where a person is in a hospital as a result of attempted suicide and is said by the hospital to be psychotic. You don't have 4,000 of those, do you?

MR. EVANS: No, sir, but the argument is, at this point, slightly different, not directed specifically to the decision to remove the man from the hospital, if that's the intent of your --

Q That leads me to what really worries me: the broad language of the Court of Appeals opinion that, under no circumstances, can the marshal be responsible.

I assume, from your argument, that you aren't urging us to go that far.

MR. EVANS: No, sir, I'm not.

Q Well, that's what I am saying, that there's a middle ground that in a particular case there could be circumstances where you have to do a little more, and it is your argument that in this case they did that little more. Is that your position?

MR. EVANS: That's right.

The Act, itself, provides for two possible grounds under which the jail's employees could conceivably be viewed as Federal employees for purposes of the Act.

One is that the jail is, in effect, a Federal agency for purposes of dealing with Federal prisoners. That, it seems

to me, is foreclosed by the provision Mr. Chief Justice Burger mentioned a little while ago, it excludes contractors. It is quite plain that this is a contractor. It functions as an independent contractor over whose employees the Federal Government has no right of physical control.

And that is the standard, under Texas law, for whether a master-servant relationship exists.

Second, they have an argument that nonetheless the jail's employees are, in effect, employees of the Bureau of Prisons, which is, obviously, a Federal agency, under the provisions of the Act that provide -- that define Federal employees as those who act on behalf of the United States in an official capacity temporarily in the service of the United States.

But, in our view, that provision is limited only to those people who -- over whom the United States does have a right to control.

And, an example of the kind of situations that would cover is where you have a Dollar-a-Year man serving without pay or where you have a loaned servant from the State, or where you have a member of a Presidential Commission, and so forth.

All of these people are under control of the Government but they are not employees, so to speak.

Finally, I think I ought to address the point that

Mr. Justice Blackmun alluded to: a holding in our favor in this case would not foreclose a remedy for people in Logue's situation.

At the time of Logue's death, there was sovereign immunity that would have protected the county and the State, but the sheriff was, personally, liable, and is liable for the acts of his deputies, namely, the county jailers.

And it is not an empty remedy because the sheriff is bonded in amounts between \$5,000 and \$30,000 under Texas State statutes, and the decisions in Texas have held that the surety must pay for the negligent acts of a sheriff's deputy.

And, in addition to the State remedy, there is a possibility of a remedy under the Civil Rights Act, Section 1983 of Title 42, which provides that anyone who is injured by a State officer acting under color of State law, to deprive the man of his Federal rights, will be liable in a civil cause of action.

Q I thought, Mr. Evans, I understood Mr. DeAnda to say that there was no remedy under State law. Perhaps he can --

MR. EVANS: I think Mr. DeAnda addressed himself to remedy against the county or against the State.

I am addressing myself -- I agree that there was no -- it is not clear to me that the Tort Claims Act in Texas did not waive that immunity as to governmental units. But I am addressing myself, specifically, to the sheriffs and his deputies who are

personally liable under the Texas law.

Q Well, perhaps he can clarify that on rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Evans.

Mr. DeAnda, you have a minute left, but you might address yourself to Justice Stewart's question.

REBUTTAL ARGUMENT OF JAMES DE ANDA, ESQ., ON  
BEHALF OF PETITIONERS

MR. DE ANDA: Do you have any other question,  
Mr. Justice?

You said something about --

Q I understood you to say that you thought there was no adequate remedy under State law, as against these county jailers?

MR. DE ANDA: The question was asked, I believe, and I referred to -- I may have misinterpreted the question -- there was no remedy under the Texas Tort Claims Act.

We have a new Act which excludes certain activities of which this is one.

And so there is no remedy under the Texas Tort Claims Act.

Q But, would there be --

MR. DE ANDA: Now, there may be a cause of action against the sheriff direct for negligence. The counsel may well be right on that, although I am not really prepared to make a statement on it.

Q One way or the other. But in any event, Texas' equivalent of the Tort Claims Act would exempt this kind of --

MR. DE ANDA: This would not fall within it,  
Mr. Justice,

MR. CHIEF JUSTICE BURGER: Thank you, Mr. DeAnda.

Thank you, Mr. Evans.

The case is submitted.

(Whereupon, at 11:07 o'clock, a.m., the case in the above-entitled matter was submitted.)