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Supreme Court, U. S.

MAR 31 1976

In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

JOSEPH V. ORLEANS, ET AL.,

Respondent.

LIBRARY

SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

No. 75-328

Washington, D.C.

Pages 1 thru 43

March 22, 1976

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IN THE SUPREME COURT OF THE UNITED STATES

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 UNITED STATES, :
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 Petitioner, :
 :
 v. : No. 75-328
 :
 JOSEPH V. ORLEANS, ET AL., :
 :
 Respondent. :
 :
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Washington, D. C.,
 Monday, March 22, 1976.

The above-entitled matter came on for argument at
 10:04 o'clock a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice of the United States
- 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
- JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

- HARRY R. SACHSE, ESQ., Office of the Solicitor
General, Department of Justice, Washington, D. C.;
on behalf of the Petitioner.
- WILLIAM E. PFAU, JR., ESQ., 900 Centre One,
Youngstown, Ohio 44503; on behalf of Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 75-328, United States v. Orleans.

Mr. Sachse, you may proceed whenever you are ready.

ORAL ARGUMENT OF HARRY R. SACHSE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on writ of certiorari to the Court of Appeals for the Sixth Circuit. The question presented is whether employees of the Warren-Trumbull Council for Economic Opportunity, in Warren, Ohio, are federal employees within the meaning of the Federal Tort Claims Act, and thus whether the United States may be held liable for an automobile accident that occurred on an outing sponsored by the Westlawn Neighborhood Opportunity Center, a program run by Warren-Trumbull.

The District Court granted the United States motion for summary judgment. The Court of Appeals reversed the District Court, in our view incorrectly, and contrary to this Court's decisions in *Logue v. United States* and *Maryland v. United States*.

The facts are shown in affidavits, exhibits and depositions that were filed with and against the motion for summary judgment. They show the following:

Warren-Trumbull is a nonprofit Ohio corporation,

organized at the instance of the City of Warren, Ohio, in 1965. The charter of the corporation is reproduced at Appendix 32. Its purpose is to aid in eliminating poverty in Trumbull County, Ohio. To do so, it may receive funds from any source, but its principal funding has always been through grants from the Office of Economic Opportunity.

QUESTION: Hasn't that been in fact its exclusive funding?

MR. SACHSE: It has been -- it is difficult to say. It has not been its exclusive source of support, because 20 percent of its support has come from donations in kind in the community, and there may have been some funding, but so far as we know, the only dollar grants that came to the organization were from the OEO.

To receive Federal funds, Warren-Trumbull had to satisfy the statutory requirements of the Economic Opportunity Act. Primary among these were the following: First, it had to have a board of directors that was composed one-third of locally elected officials, one-third of members of the business and professional community that it served, and one-third of members of the community of the poor for whose benefit this society was set forth. That is required by 42 U.S.C. 2791(a).

Secondly, no employees of OEO could serve on the board of directors or on any committee or administrative body of Warren-Trumbull.

Thirdly, at least 20 percent of its support had to come from sources other than Federal funds. To receive Federal funds, it also had to obey statutory requirements and regulations concerning the use of those funds. For instance, primarily the salary ranges that could be paid to its employees had to be in accordance with comparable salaries in the communities and could not exceed \$15,000 per annum per employee from Federal funds. Employees of the agency were prohibited from participating in unlawful demonstrations. I think that would go without saying, if they are unlawful demonstrations. And, thirdly, Warren-Trumbull would have to submit to full auditing by the OEO to see that the funds were expended in accordance with the conditions of the grant.

The Act also provided, the OEO Act also provided that OEO could not set national priorities for the use of its grant funds and that the local board of directors must have authority over policy, hiring and firing.

As the deposition of Wendell Verduin, the Chicago Regional Director of OEO, made clear -- and I am quoting from the deposition, at page 46 -- "The recruitment selection, the hiring and firing of staff members of the community action agency is done by that board of directors under its own policies and procedures."

And quoting from the seposition of Leaster Peterman, a former Executive Director of Warren-Trumbull, who had been fired

by the board of directors, he stated, "I received my directions from my board, which is a governing board, not an advisory board."

One of the programs of Warren-Trumbull was the Westlawn Neighborhood Opportunity Center. I think I should probably interrupt myself here to say that there are some 865 agencies of this sort funded through OEO throughout the country. One of the programs of this agency, of Warren-Trumbull, was Westlawn Neighborhood Opportunity Center. It was one of a number of neighborhood centers that Warren-Trumbull ran where, among other things, teenage children could come after school and play ping-pong or pool. It also organized dances and outings, and it was one of these outings that the respondent was hurt.

The outing was to a nearby lake, whose name I had intended to mention but will not because it seems to be too difficult to pronounce. It is something in the nature of Conneaut. Westlawn, in the outing, used one van that was purchased with OEO funds, grant money, they also used several cars owned by people in the community. One of the private cars had a wreck on the way --

QUESTION: Is Westlawn a separate corporate structure or is it just an activity that is conducted by Warren-Trumbull?

MR. SACHSE: So far as I know, it was just an activity conducted by Warren-Trumbull. One of the private cars had a wreck on the way back from the lake. While I don't want to get

into whether there was negligence or what, if there was negligence, it appears there were too many people in the car.

The respondent was seriously injured and lost his right arm as a result of the accident. The car that had the accident was driven by a licensed driver and was insured. Now, as to --

QUESTION: Was any other entity joined as a defendant in the --

MR. SACHSE: No other entity. The suit was brought purely against the United States.

There is no evidence at all that OEO participated in hiring the personnel involved in this outing or in planning the outing, that it knew of the outing or that it had any control over it at all.

QUESTION: Was the driver an employed person of the local group or just a --

MR. SACHSE: No, Mr. Chief Justice, he was one of the teenage students, a 17 year old boy, who was going on the outing. He was using his father's car, with the father's permission, to take some of the students on the outing.

The respondent brought suit against the United States for \$1 million, and the respondent's father for \$100,000 additionally, stating that agents of the United States were in charge of the outing and were negligent.

QUESTION: That was a separate suit against the father,

the owner of the car?

MR. SACHSE: No, the suit was brought by the father individually and on behalf of his son against the United States. The owner of the car was not sued.

QUESTION: There was not suit of any court so far as we are concerned against the owner of the car?

MR. SACHSE: That is correct, Your Honor.

The United States moved for a summary judgment on the ground that the persons alleged to have been negligent were not employees of the United States. The District Court, in a written opinion, on the basis of the affidavits and depositions, held that Warren-Trumbull was a contractor with the United States and not a corporation acting as an instrumentality or agency of the United States.

On rehearing, in answer to arguments that its activities were controlled by the United States, the District Court held that Warren-Trumbull "still remains an independent, locally controlled and constituted nonprofit corporation; while the OEO has the power to cut off Federal funds if the council fails to meet Federal standards, they have no power to cut off funds from other sources which the council is encouraged to utilize."

On appeal -- and I think this may be the crux of the case -- the Court of Appeals held, agreed with -- these are the words of the Court of Appeals, "There was no showing that OEO controlled" -- this is in our petition, appendix to the petition,

at page 12a -- "There was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO" -- that is Warren-Trumbull -- "and Westlawn. Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the Warren-Trumbull County area." That is the Court of Appeals. The District Court, of course, agreed, had said the same thing.

But the court went on to say that it didn't consider the ties that Warren-Trumbull had with the OEO to be characteristic of an independent contractor, and that it thought that in reading the humanitarian purpose of the Tort Claims Act, together with the humanitarian purpose of the OEO, that an accident that occurred to one of the persons that OEO was designed to help, one of the people on the outing, should be covered by the Tort Claims Act.

The court noted that if a person who was hurt was a stranger, that the situation might be handled by traditional principles of contractor-employee relationship and the government might not be liable.

QUESTION: As you read the Court of Appeals opinion, Mr. Sachse, would there be a -- under the Sixth Circuit Review -- tort claim against a pedestrian who had been injured by this car with the young volunteer driver?

MR. SACHSE: The Sixth Circuit specifically declined to rule on that but said there might not be, that it based its ruling on a position that we find no support for in the Tort Claims Act, that whether there is a tort claim or not would depend on the nature of the plaintiff, on the status of the plaintiff.

Before I leave the statement of the case, I want to add one other thing. The respondents in the Court of Appeals used as one of their bases for liability an affidavit by a man named Sidney Roberts, that two years after this accident, in October of 1972 -- the accident was in September of 1970 -- that he was asked by OEO to be the new chairman of the board of Warren-Trumbull and that he was appointed directly by the Chicago office of OEO to that position. This is all there is in the record about it, this statement.

We had no -- we haven't thought it appropriate to go beyond the record, and all we can say on this is that if this man was appointed directly by OEO, it was in violation of the statutes and regulations and we don't see how it could have occurred, but it seems to us obviously did occur if something of this nature occurred.

QUESTION: But you didn't dispute it? You didn't file a contrary affidavit with the District Court, did you?

MR. SACHSE: No, there is no contrary --

QUESTION: So that stands uncontradicted?

MR. SACHSE: It stands as a statement that in 1972, two years after the accident, this man was appointed by the regional chairman of OEO to be the director of the board --

QUESTION: And it is uncontradicted?

MR. SACHSE: -- of Warren-Trumbull. It is uncontradicted except as to the legal conclusion in that this was a direct appointment, that it seems clear as a legal matter that OEO could threaten to withhold funds unless a new director of the board was appointed, and that apparently a new director of the board was appointed, all two years after the events at issue here.

QUESTION: There is an affidavit from Mr. Wendell Verduin on page 9 of the appendix. He is the regional director of the of the Office of Economic Opportunity in Chicago. And does he not say that Warren-Trumbull and Westlawn make their own decisions as to whom to hire, discipline and discharge?

MR. SACHSE: That is correct.

QUESTION: Do you view that as creating a conflict?

MR. SACHSE: Well, I think that reflects the same thing that we are saying -- well, I suppose the answer is yes, perhaps that does conflict with the other statement. I don't think, however, that there is a conflict of fact within these affidavits that requires resolution by this or any other court, because I think that whether or not OEO had an influence, assuming that the board was not in compliance with the statute of getting a new chairman of the board appointed before any other grants were

made, would not affect the day-by-day control of activities such as this one.

QUESTION: Let me get one other thing straight. The only thing you have is that one affidavit, is that right?

MR. SACHSE: I am not sure that I understand the --

QUESTION: In the record of this case, has the government put in anything other than one affidavit?

MR. SACHSE: No, there is a full affidavit by -- there is a full deposition by Wendell Verduin, the head of the Chicago office of OEO, in which he states very firmly that OEO did not interfere in the --

QUESTION: The question is what else is there in the record on behalf of the government?

MR. SACHSE: There is a series of affidavits. There is the affidavit of Wendell Verduin, there is the --

QUESTION: Was it submitted by the government?

MR. SACHSE: Yes, it was submitted by the government. It was the only affidavit submitted by the government, as I recall.

QUESTION: That is what I meant.

MR. SACHSE: The other affidavits and depositions were submitted by --

QUESTION: So far the government stands on that and whatever they can get out of the other affidavit, but the government only put in the one?

MR. SACHSE: The government put in the one, that is correct.

QUESTION: Well, insofar as there is any material conflict in the affidavits, the government should have gotten summary judgment in the District Court, I suppose?

MR. SACHSE: So far as there is any material conflict with the emphasis on material --

QUESTION: Right.

MR. SACHSE: -- and conflict on a point that would be determinative in this case. But we don't think either of those points are determinative in this case.

I would like now to turn to the Tort Claims Act. The Tort Claims Act, 28 U.S.C. 1346(b), and it is quoted, of course, in our brief, makes the United States liable for wrongful acts of any employee of the government while acting within the scope of his office or employment. The employee of the government is defined so as to include all true government employees but not to go beyond that. An employee of the government includes employees of any federal agency, under the Act, and a federal agency is defined as including the Executive Departments, the military departments, independent establishments of the United States, and corporations acting primarily as instrumentalities or agencies of the United States, but does not include any contractor with the United States. These terms are not unclear. Independent establishments of the United States rather clearly refers to

the independent regulatory commissions and makes clear that this was not limited to the pure Executive Branch, which is the word that precedes it. It covers the Federal Trade Commission, Interstate Commerce Commission, and that sort. It is not strictly part of the Executive Department.

Corporations primarily acting as instrumentalities of the United States -- and, remember, this was an Act passed in 1946 -- instrumentalities of the United States was defined in an earlier bill that led to this Act as corporations whose primary function it is to act as agencies of the United States, whether or not authorized to sue or be sued. And whether authorized to sue or be sued gives a pretty good clue to what Congress had in mind. It had in mind federal corporations, whether they were so close that they couldn't sue or whether they were far enough removed so that they had the authority to sue or be sued.

I want to give you the source for this. This is not in our brief. This is from House Report No. 2245, 77th Congress, 2d Session.

QUESTION: Or the Federal Deposit Insurance Corporation, Reconstruction Finance Corporation, or --

MR. SACHSE: Commodity Credit Corporation, Federal Deposit Insurance Corporation, there is a whole list.

QUESTION: What about OEO itself?

MR. SACHSE: Sir?

QUESTION: What about OEO itself?

MR. SACHSE: Well, OEO itself I think would just be an executive agency. An OEO employee would be covered as a federal agency.

QUESTION: There is no doubt about that?

MR. SACHSE: The Senate report No. 1399, 79th Congress, 2d Session, page 31, makes this equally clear.

QUESTION: Give me that first number again, would you?

MR. SACHSE: It is Report 1399, 79th Congress, 2d Session, page 31. "This section" -- referring to the definition section -- "This section defines the terms used in the title and makes it clear that its provisions cover all federal agencies, including government corporations." It goes along with what we have said and it is pretty obviously what Congress had in mind when it passed the Federal Tort Claims Act.

The exclusion of contractor with the United States also shows that Congress only intended to make the United States liable for the torts of its employees or, at the most, those within its direct control. There is no reason to assume that under this statutory scheme that Congress intended to make the United States responsible for the torts of employees of its grantees, who typically would be universities, hospitals or, in later times, community activities that the government chooses to support with grant funding. Their employees are even further removed from federal employment than are the employees of a contractor, because a contractor does something specific for the

United States in accordance with detailed plans and specifications, whereas a grantee is aided by federal money in performing a general program that the government wishes to encourage, without being in control of it even to the extent that it is in control of the performance of a contractor.

In determining whether employees of a body receiving federal funds, be it a contractor or some other body, whether those employees are federal employees under the Tort Claims Act, the court has looked to two primary sources, and both make a great deal of sense, if I may say so.

First, the statute that establishes the relationship between the United States and the body at issue, thus in *Maryland v. United States* -- it did this both in *Maryland* and in *Logue* -- but in *Maryland v. United States*, the court held that the *Maryland National Guard* was not a federal instrumentality, even though it received its funding from the United States, and even though its employees, to advance and to perform their duties appropriately, had to follow detailed federal regulations. It held this both as to the military employees and to the caretaker employees who were in fact taking care of property admitted to be federal property, but the statute didn't set this up as a federal agency in time of peace. It set it up as a state agency.

And the second test the court has looked to is the degree of day-by-day control over the activities of the employee, and this is appropriate, too, because the person who controls the

day-by-day activities of the employee is the person who can keep accidents from happening, is the person that ought to be responsible if an accident does happen.

In either test, this Warren-Trumbull Community Program is not a federal instrumentality and its employees are not federal employees.

QUESTION: Is it conceded that the driver of this car was an employee of the Warren-Trumbull organization?

MR. SACHSE: No, he was not paid for driving the car. He was one of the citizens who was going on this outing and who, as a favor to Warren-Trumbull, drove the car.

QUESTION: Well, then, even if Warren-Trumbull were a federal agency, how could he qualify as an employee?

MR. SACHSE: Well, I think he couldn't. The argument, of course, is that he would have been acting in that capacity at that moment and could be considered a federal employee.

QUESTION: An agent?

MR. SACHSE: Yes.

QUESTION: I don't read the complaint as predicating negligence on the part of the driver but, rather, in the supervision of the outing.

MR. SACHSE: I agree. I think the complaint basically says that the activities should have been more tightly supervised.

QUESTION: So it is not a respondeat superior theory,

is that it?

MR. SACHSE: As I understand it, the complaint doesn't make that argument as to the driver of the car, but in some of the briefs and so forth, argument is made by the respondents that the driver of the car was acting for Warren-Trumbull, and that Warren-Trumbull was a federal agency and that therefore --

QUESTION: But if your answer to my Brother Stevens is correct, the theory of the complaint was not the negligence of the driver as such but the negligence of Warren-Trumbull in allowing this young man to drive the car in a not more closely structuring and supervising of the outing.

MR. SACHSE: That is correct. That is the theory of the complaint. Now --

QUESTION: Is there anything in the record about whether some of the people came in their own automobiles, in the complaint?

MR. SACHSE: In one of the depositions, the deposition of the driver shows pretty well what happened, that a number of the kids came in cars that their parents owned, driven by licensed drivers, but then some of them wanted to stay late and two cars stayed later than the rest, and then to get the boys and girls together in this same car, eight of them got into one car and just a few in the other, and it was the car with eight that had the wreck.

Now, turning to the statute, the Economic Opportunities

Act makes it clear that, as is pointed out -- I want to move quickly as I want to save a minute or so for rebuttal, if I can -- that the federal government can only lend money to a community agency if it has this board of directors on which no federal person can sit, if the charter is a state charter, not a federal charter, and if it has local support and so forth.

But one of the points that is most persuasive to me is that in the same Act, in setting up the Job Corps, Congress specifically said that the Tort Claims Act would apply to members of the Job Corps. Now, it is incredible to me that Congress would have intended the Tort Claims Act to apply to the Job Corps and felt that it had to say so, but would have felt that the community action program, where it went to such pains to make these -- to only allow money to be given to local programs, that their people would be employees of the government, without saying a word about it.

And also as to the Job Corps, you will notice that there is a tick-off as to which federal employment benefits will apply, and as to the CAA programs, there is nothing like that. Congress obviously didn't intend these people to be federal employees.

MR. CHIEF JUSTICE BURGER: If you want to save any time, you had better begin saving it, Mr. Sachse.

MR. SACHSE: I will say one more thing and then I will sit down, and that is the Court of Appeals found as a fact that

there was not the day-by-day control that would make for a useful federal responsibility. And the board of directors of these programs are blue ribbon boards in the sense that it is local elected officials, local business people and the members of the poor. That is where the liability ought to be. They should be responsible for having proper insurance, they should be responsible for making sure the activities are carried out right, and if they don't do that, they should be personally liable for it, and in that way you can keep these accidents from happening. But by putting the responsibility on Uncle Sugar in Washington, it will mean locally that there is no responsibility.

MR. CHIEF JUSTICE BURGER: All right, Mr. Sachse.

Mr. Pfau.

ORAL ARGUMENT OF WILLIAM E. PFAU, JR., ESQ.,
ON BEHALF OF THE RESPONDENTS

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

In 1964, the administration and Congress declared war on poverty in the United States. The Economic Opportunity Act was at that time enacted. The Economic Opportunity Act was an ambitious program which included, among other programs, the community action program. This was a particularly unique approach that Congress was taking in its war on poverty to try to get to the impoverished people on a local level. They set up guidelines in the statute for the setting up of such a community

action program.

They set up also the Office of Economic Opportunity, a federal agency. This, an exhibit in the case, shows some of the suggestions necessary for organizing a community action agency.

A community action agency was uniquely -- must be uniquely constituted and, by the creation of this definition, Congress caused these community action agencies to be set up throughout the country.

The basic, major basic difference with a community action agency and the ordinary charitable agency in its constitution was that it was required to be governed by a board made up of one-third local public officials, one-third representatives of the poor to be served, democratically elected, and one-third representatives of the community.

QUESTION: How were the board members elected?

MR. PFAU: The public officials were either the chief public official in the community or his appointee and then certain other public officials selected by him, a complex process that --

QUESTION: Would this be the mayor, for example?

MR. PFAU: The Mayor of the City of Warren, in this instance, and the county commissioner, yes, Your Honor.

QUESTION: And the charter of the corporation authorizes the chief executive officer of the city to appoint certain

members of the board?

MR. PFAU: This corporation, as the affidavits filed by the respondents show, and especially that of Mr. Breckenridge, who was at the outset one of the founders and was an attorney who helped in the setting up of the corporation, this corporation was created and set up for the sole and special purpose of qualifying as a community action agency. The charter specifically provided and followed the numerous guidelines for setting up community action agencies, as to the board, the by-laws and so forth. And it was set up in just that fashion, yes, Your Honor.

QUESTION: Right. But I am still curious -- perhaps it is in the record, but I didn't observe it -- how many members of the board are there and how were they chosen?

MR. PFAU: Well, there I do not know other than to say that --

QUESTION: Is there a copy of the charter in the record?

MR. PFAU: A copy of the charter is filed --

QUESTION: But it is not in the appendix, is it?

MR. PFAU: I think it is.

QUESTION: Is it?

MR. PFAU: Yes, Your Honor, it is.

QUESTION: It is?

MR. PFAU: It is attached to the affidavit which we

filed of Mr. William McLain, who was then City Solicitor for the City of Warren.

QUESTION: Well, that may answer my question.

MR. PFAU: I am not sure that it will. I am not sure that it is in that much detail.

QUESTION: The Articles of Incorporation are here.

QUESTION: What page?

QUESTION: Page 32.

QUESTION: You go ahead and if I want to ask you further, I will.

MR. PFAU: Now, it is of the utmost importance that it be recognized that this was not a local agency in any ordinary sense of the word. This was a local agency set up to act as an agency of Congress, of the Office of Economic Opportunity, to carry out the purposes of the Act.

Now, it has been suggested by petitioner that instead of being a corporation acting primarily as an instrumentality of the United States, this agency was a contractor with the United States. The Solicitor General indicates that you should look to the Act to see -- to interpret this situation.

Section 2795 of the Economic Opportunity Act clearly makes a distinction between grantees and contractors. The affidavit of Wendell Verduin does not say that this organization was a contractor but, rather, that it was a grantee.

There are federal regulation provisions, about 80--some

pages of them, applying to these community action agencies, and Code of Federal Regulation No. 1026 distinguishes between contractors and grantees. Contractors must bid for the contracts, and so forth. This clearly is not under the definitions in the Act and in the Code of Federal Regulations a contractor with the government, as has been the major contention of the government.

Furthermore, contractors --

QUESTION: That doesn't necessarily make it an instrumentality or agency of the United States, though, does it, or a corporation primarily acting as such?

MR. PFAU: Not necessarily, but there has not been any real contention that it was not prior to this, and all of the facts and circumstances would indicate that this was a corporation acting primarily as an instrumentality of the United States.

QUESTION: But that is really what you have to prove, isn't it, not simply the fact that it was a contractor?

MR. PFAU: Yes, Your Honor. The contractor is an exception and, as Your Honor pointed out, in the Logue case, at the very outset of the case, there was in that case a contract. There is no contract in any ordinary sense here under the common law. A contract under the common law is most simply defined in American Jurisprudence Second, is a legally enforceable promise. This promise was not legally enforceable. The Code of Federal Regulations provides that the Office of Economic Opportunity could unilaterally and peremptorily terminate assistance -- they

don't say breach the contract or end the contract -- terminate assistance to any community action agency, and from that termination the ultimate appeal was to the director of the agency itself. So that in the ordinary sense of the term, there was no contract.

Now the question then is, was this a corporation acting primarily as an instrumentality of the United States. The Congress, in the Federal Tort Claims Act, had various considerations, various language they considered which would have limited that portion of the Act, corporations acting primarily as instrumentalities of the United States to federal corporations and that sort of thing, as suggested by Mr. Sachse. They decided not to so limit it and left the language unlimited.

Now, in this case you have a corporation which was enacted for the -- was created for the sole purpose of getting federal funds, never received a dollar from anyone else. The only other contributions it received were in kind services. And it might be noted at this point the deposition of Mrs. Ellen Stanton, who was the person employed by the Westlawn Neighborhood Center in charge of this outing. In that deposition she said that the driver of the car filed what they called an in kind slip, in other words he was acting as an employee of the particular agency at the time of this accident. That really is not in issue here, but the questions of the Court have put it to some extent in issue, and Mr. Sachse's comment that he was not

an employee is, I believe, not correct.

QUESTION: Do you suggest that this young man driving the car was essentially in the same standing and position as the driver of the bus that would be furnished by the local bus company as a contribution to the program?

MR. PFAU: Yes, Your Honor, this --

QUESTION: The man that came down the street and got into the line of cars, would he be in the same position?

MR. PFAU: No, Your Honor. In this instance --

QUESTION: Why not? Why not?

MR. PFAU: Perhaps I don't understand --

QUESTION: You say that this man is an employee. What does he have to show that he is an employee?

MR. PFAU: What he has is this, Your Honor. He signed a slip which was filed with the agency indicating that he was acting as an employee and rendering an in kind service to the Warren-Trumbull Council --

QUESTION: Did his father file one, too, for the car?

MR. PFAU: I don't know. That does not appear --

QUESTION: I assume so, so he could deduct it from his income tax.

MR. PFAU: Well, that might well be. The record is silent on that, Your Honor.

QUESTION: But that turns it upside down, doesn't it? Ordinarily an employee gets paid something. Here you are saying

that he contributed something.

MR. PFAU: Correct. There is an 80-20 setup on these corporations, 80 percent of the funding is to be in cash from the United States. The other 20 percent is supposed to be locally furnished. I think it is in part a fiction. But they do keep track of any employment activity that anyone does on behalf of the agency and file in kind service slips. In other words, then they put on those in kind service slips their tax value, and in the report to the Office of Economic Opportunity, those are given a dollar value to make up this 20 percent.

QUESTION: But what you are saying is not that this fellow got paid something and was therefore an employee, but that he paid something and was therefore an employee.

MR. PFAU: Well, in this instance, there were two buses which were to be used. One of the buses was not available -- two buses owned by the agency -- one of the buses was not available, so two cars were used in this fashion, and the man in effect made a donation of his services to the agency. In other words, he volunteered to act as an employee of the agency to --

QUESTION: Well, now, to say you donate your services doesn't make you a volunteer to act as an employee. Ordinarily, an employee is somebody who gets some benefit from his work.

MR. PFAU: That's true, but I don't believe that that excludes the possibility of this man being an employee. At any

rate, that is not the question now before the Court. That is a question that might require factual determination ultimately by the trial court.

QUESTION: Mr. Pfau, I am interested, has there been an action against the driver of the automobile?

MR. PFAU: The record is silent on that, Your Honor. For Your Honor's information, the driver of the automobile had \$12,500 insurance coverage, and a covenant not to sue was taken in that respect, that hardly being adequate compensation for the loss of a young man's right arm at the shoulder.

QUESTION: Under the Sixth Circuit holding, in your view of the case, if on this outing one of the boys or girls had been drowned while swimming in the lake, assuming they went swimming on the picnic, would there be, in your view, a cause of action against the United States for not furnishing adequate supervision to see that no one drowned?

MR. PFAU: If there were such factual basis, yes, assuming that, surely. It would --

QUESTION: Or if they started a little league baseball team and one of the boys took the bat and got hit in the eye by the pitcher's throw, a cause of action against the United States?

MR. PFAU: Under the Ohio law, of course, there is an assumption of risk of that sort of thing, but absent that, the agency, it is our position that the activities of the Warren-

Trumbull Council are just as much activities of the United States as activities of the Office of Economic Opportunity or any other federal agency, that it is within the definition a federal agency.

QUESTION: On these two buses that you described, which are owned by the local council --

MR. PFAU: Yes.

QUESTION: -- suppose there had been a serious accident with one of those, the same result, the United States is responsible?

MR. PFAU: Yes. Of course, the agency might hire independent buses, Greyhound or something like that, charter them, and there would be no such responsibility. But as long as they are being operated by employees of the agency, yes. That is our position and --

QUESTION: How do we find that this young man was an employee rather than an independent contractor? He just donates his services.

MR. PFAU: It is our position, Your Honor, that the agency --

QUESTION: What control did the federal government have over him?

MR. PFAU: They told him when to leave, what route to go, what route to follow. They had the same control as any other federal agency sponsoring an outing --

QUESTION: I submit that another agency, if they tell you to do something and you don't do it, you get fired. What control did they have over him, not to take his services?

MR. PFAU: Correct, not to take his services, to have someone else --

QUESTION: That would have broken his heart, wouldn't it? I just don't see this man volunteers his services and at this late date you find that he is an employee.

MR. PFAU: Well, that, I respectfully submit, is not an issue before this Court.

QUESTION: Well, doesn't the Tort Act say employee?

MR. PFAU: The Tort Act says --

QUESTION: Doesn't it use that word?

MR. PFAU: The Tort Act says that employees of a federal agency are employees of the United States, and the issue --

QUESTION: Well, would the other children that were in that bus, would they have any action against the government?

MR. PFAU: Yes.

QUESTION: Have they sued?

MR. PFAU: To my knowledge, none of the others were hurt.

QUESTION: Well, if they had been hurt, they would have a right of action, too?

MR. PFAU: Yes, Your Honor.

QUESTION: And that would go to everybody in that

caravan?

MR. PFAU: Yes, Your Honor. If they don't have that protection -- these agencies were set up in such a way that they were immensely controlled by federal guidelines.

QUESTION: You say they are immensely controlled, what are you going to do with the Court of Appeals finding that they were not?

MR. PFAU: Day-to-day, the Court of Appeals --

QUESTION: Yes, day-to-day is a magic word in this Act.

MR. PFAU: All right.

QUESTION: A magic series of words.

MR. PFAU: They --

QUESTION: Didn't the court hold that?

MR. PFAU: The Court of Appeals -- I read from its opinion the portion that was not read by Mr. Sachse -- he did not read this portion: "On the other hand, by withholding" --

QUESTION: What page?

MR. PFAU: I'm sorry, 12a.

QUESTION: Thank you.

QUESTION: Why don't you read before that, "On the other hand"?

MR. PFAU: All right. "Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the

Warren-Trumbull County area. They are more in the nature of general instructions to be followed in order to assure that certain policies which Congress had adopted in establishing OEO are respected and adhered to. On the other hand, by withholding approval of its operations, OEO had for all intents and purposes put WTCEO out of business for a period of time and had in October 1972 selected a new chairman of its board who completely reorganized the agency. These are not powers usually possessed by a principal in dealing with an independent contractor."

QUESTION: Well, I think that a principal usually, if he says I will give you money providing you do thus and so, and you agree to do thus and so and you stop doing thus and so, you stop getting the money.

MR. PFAU: Correct. And if there is a contract, you have a right of action to claim that you did do thus and so in substance. Now, Mr. Justice --

QUESTION: Before we move on, suppose the Mayor of Warren had been driving the car, would the young man injured have the same cause of action that you are defending here?

MR. PFAU: If the Mayor --

QUESTION: If the Mayor was one of the directors of the community action agency?

MR. PFAU: That was a point made by the District Judge.

QUESTION: That's right.

MR. PFAU: And the Mayor of Warren or John Jones or

anyone else, if he were acting on behalf of the Warren-Trumbull Council, was in our contention a temporary perhaps employee --

QUESTION: Of the United States government.

MR. PFAU: -- of the United States government, and the Federal Tort Claims Act specifically provides that though the employee be only temporary, if he is an on an activity of the United States government, he is an employee of the United States and covered by the Federal Tort Claims Act, yes, Your Honor. The Mayor could very readily wear two hats as corporate president, as many people do, and work for more than one person on different occasions.

QUESTION: Well, isn't there some provision in this Act that members of the board cannot be employees?

MR. PFAU: Yes, Your Honor. Members of the Office of Economic Opportunity cannot be employees, obviously to prevent political interference and that sort of thing.

The employees -- we believe that this activity, the Warren-Trumbull Council of the OEO, was an instrumentality or agency of the United States and, if so, that makes this difference: If it is a corporation acting primarily as an instrumentality or agency of the United States, it would be assumed that that corporation would control largely the day-to-day activities of its employees.

QUESTION: Mr. Pfau, isn't there a certain incongruity if Mr. Sachse's right, that says that Congress' basic intent, in

talking about instrumentalities of the United States, corporations of the United States, the Reconstruction Finance Corporation, the Commodity Credit Corporation, all kind of national operations based in Washington, and then you say this too is that, and it is one of apparently 800 similar entities, each localized in a small part of one of the states?

MR. PFAU: There is no limitation in the Act to corporations of the nature pointed out by Mr. Sachse, and the Congress specifically considered limiting the Act to such corporations and saw fit not to do so. Now, if the facts of this case are looked at, you will see this corporation is acting on the local basis as an agency of the United States, it is acting primarily for the United States. It is in effect one of the platoons that is enlisted by Congress to carry on the war on poverty. They chose to set it up in this fashion. It was the congressional act that established this. In addition to this, they have all encompassing regulations that make this appear to be a federal agency.

For instance, their books and records must at all times be available and open to the public. All of their meetings must not only be open to the public but any member of the public must be recognized and heard.

QUESTION: Is there anything in the regulations that require these organizations to carry liability insurance?

MR. PFAU: No, there is not, Your Honor. There is not,

and it has been suggested that the Job Corps members were specifically recognized by Congress to be covered by the Federal Tort Claims Act, and it is significant that the Job Corps was set up in the same Economic Opportunity Act and that its members were to be recognized as covered by the Federal Tort Claims Act because the Job Corps members, of course, are not corporations, they are individuals, and, furthermore, it was contemplated that the members of the Job Corps might be working in all sorts of different activities; notwithstanding that, that activity Congress specifically said those persons who would not be covered with the corporation provision were to be members of the United States for Federal Tort Claims purposes.

QUESTION: Well, under the usual rules of construction of statutes, what inferences do you suggest are to be drawn from that?

MR. PFAU: From the construction of the statute, it would appear that organizations not contractors with the United States were to be covered in the intent of Congress by that provision. Certainly --

QUESTION: On the other hand, it shows that when Congress wanted to create liability, it did so explicitly.

MR. PFAU: It did so explicitly with Job Corps members because it might otherwise, they would be considered loan servants or that sort of thing on loan to various industries that they might be working at, and it --

QUESTION: The Job Corps itself is not a corporation, though, is it?

MR. PFAU: The Job Corps, I think that is correct, Your Honor, it is a --

QUESTION: So it wouldn't be covered by the general language of the Federal Tort Claims Act in the absence of a specific provision making it --

MR. PFAU: The Job Corps --

QUESTION: -- whereas your claim is that your client is a corporation and under the general language of the Tort Claims Act, a corporation primarily acting as an instrumentality or agency of the United States.

MR. PFAU: Yes, Your Honor, a rather remarkable --

QUESTION: And the Job Corps simply couldn't and wouldn't fit into that structure or definition.

MR. PFAU: Well, Job Corps members were appointed directly by the Office of Economic Opportunity. The rather remarkable thing is this phrase "primarily acting as an instrumentality of the United States" has never come for consideration by this Court before. It would appear that that is language that should be given its plain meaning. Instrumentality is defined by Webster as a quality or state or serving as a means or intermediary determining or leading to a particular result, something by which an end is achieved, something that serves as an intermediary or agent through which one or more functions of

a controlling force are carried out.

QUESTION: Haven't there been a good many decisions defining instrumentality of the United States?

MR. PFAU: Astonishingly, there have not been.

QUESTION: Well, not in this Court, but in District Courts and Courts of Appeals?

MR. PFAU: Astonishingly, Your Honor, there have not been. There have been a few cases where that phrase has been used, but the cases have not come to grips with saying what is -- how is this to be defined. The Court says it is an instrumentality, it is not, but we have cited in our brief the Law Edition 3d annotation covering this entire subject, and the cases are unbelievably absent in any real coming to grips with that term. No court has said what an instrumentality should be, for instance, that it should be given its plain meaning.

Given its plain meaning, it seems clear that this corporation was an instrumentality, and these corporations which were raised were instrumentalities. Even if they were not, a significant case was decided, *Buchanan v. United States*, Mr. Justice Blackmun wrote the opinion and outlined independent contractor relationship. In that case, the Federal Carthage Corporation had a contract to maintain an arsenal, and there wasn't any question in that case but what there was a contract. Nevertheless, notwithstanding the presence of the contract, the Court considered the amount of control that was exercised. In

that case, respondent respectfully submits, had there been the same control over the Federal Carthage Corporation as there was over this community action agency, had there been, as there is here, some 10 or 15 columns of guidelines and instructions -- which are on file with the Court -- that yellow stack this high -- had there been 80 or 90 pages of federal regulations and 30 or 40 pages of statutes controlling just how everything should be, controlling not only from the governing board -- suppose in Logue the federal statute for qualifying non-federal prisons to house federal prisoners required that the county or the state have on its governing board one-third representatives of the prisoners to be involved, that they required the records to be public, that anyone to be allowed to hear, isn't that in essence a public sounding corporation, when you have to have all of those elements to qualify?

Now, here --

QUESTION: You can have a public corporation, can't you, without it being an instrumentality of the United States or acting on behalf of the United States? There are many, I presume, public local corporations in the State of Ohio.

MR. PFAU: That is perhaps true, I don't know. In addition, the actual control that was exercised here is even broader. Counsel suggests that the board of directors, the governing board discharge Mr. Peterman, not so. Mr. Peterman's deposition:

"Question: The board was dissolved?

"Answer: Yes.

"Question: When was it dissolved?

"Answer: The board was dissolved on August 14th in a communication we had received from the regional office which notified us as of that date that that board was no longer considered a functional board.

"Question: And who dissolved it?

"Answer: The regional office.

"Question: In Chicago?

"Answer: Yes, sir."

So the board was discharged and dissolved and subsequently Dr. Sidney Roberts, a Youngstown University professor --

QUESTION: Counsel, how can a United States government official dissolve a state corporation?

MR. PFAU: It simply did it. They wrote to them and they said --

QUESTION: All they said was no more money.

MR. PFAU: No, they wrote and said your board of governors -- this is what they did, maybe they didn't have the power to do it, but they did it, and that was the power they took upon themselves.

QUESTION: If the regional director didn't have the power, isn't that quite significant? Isn't that something the Court must inquire into?

MR. PFAU: Perhaps the Court must inquire, but it is the fact as to how this agency, this particular agency was run and governed that is controlling in this particular case on the motion for summary judgment, and we respectfully submit that we have established here by these affidavits and depositions that this was a corporation acting primarily, acting exclusively as an instrumentality of the United States.

Thank you.

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

Mr. Sachse, you have a few minutes left.

MR. SACHSE: I have nothing else, unless the Court has questions.

QUESTION: Yes, I would like to ask you, if I may. If I understand your theory correctly, this organization would not have sovereign immunity, the WTCEO? It could be sued, it could --

MR. SACHSE: It would not through the United States. Whether it is so much a state corporation, I suppose it would be a question of local Ohio law.

QUESTION: I was just thinking of the impact of a judgment against this organization, if it is entirely funded by the United States, I suppose ultimately the judgment would be paid by the United States if it were to be paid at all, is that right?

MR. SACHSE: I think it would depend on whether the

corporation has funds in its accounts and also whether the suit was brought against the corporation as a corporation or against individual directors who failed to do --

QUESTION: But I think under the theory of this complaint, the suit would go against the corporation, would it not, assuming they named a different defendant instead of the United States? If your theory is correct, what you are saying is what the plaintiff should have done is sued the corporation as a corporate entity. Isn't that what your position is?

MR. SACHSE: I don't want to put myself into the position of telling the plaintiff what he should do, other than he shouldn't sue the United States.

QUESTION: Assuming that tort was committed, that no one is responsible?

MR. SACHSE: No. It is my position that --

QUESTION: That tort was committed by the corporate entity?

MR. SACHSE: -- that these vehicles should be insured and that the corporate entity should be insured and that the board of directors --

QUESTION: So that the proper defendant is the corporation?

MR. SACHSE: I think that would be correct, and if the board of directors had failed to provide adequate insurance, then the proper defendant may be the board of directors.

QUESTION: But if the corporate entity were insured, the defendant in this law suit would not be the insurance company, it would be the corporate entity?

MR. SACHSE: That's correct.

QUESTION: In fact it was not insured, but that doesn't detract from the appropriateness of the corporate entity being the defendant in this law suit. And the further fact is that its only funds are funds that came from the federal government.

MR. SACHSE: We actually don't know whether the corporate entity was insured.

QUESTION: Well, you told us earlier that it wasn't, I thought, or implied so.

MR. SACHSE: I don't think so. The vehicles were insured.

QUESTION: But whether or not it was insured has nothing to do with the appropriateness of the defendant as a defendant in this law suit.

MR. SACHSE: That is correct.

QUESTION: I think it was your friend who suggested the inadequacy of the insurance carried on the particular vehicle, is what entered into the decision, tactical decision about the law suit.

MR. SACHSE: Yes, sir.

QUESTION: May I ask you one other question before you

sit down. There is no issue in this case at all, is there, as to whether the driver of the car was an employee. The question is whether thi community action agency was a corporation primarily acting as an instrumentality or agency of the United States?

MR. SACHSE: I think that is correct.

QUESTION: That is the sole question, is it not?

MR. SACHSE: I think that is correct.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:08 o'clock a.m., the case in the above-entitled matter was submitted.]

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