

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-618

TITLE JOSEPH A. KOSAK, Petitioner v. UNITED STATES

PLACE Washington, D. C.

DATE November 7, 1983

PAGES 1 thru 40



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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH A. KOSAK, :
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Petitioner :
:
v. : No. 82-618
:
UNITED STATES :
:
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Washington, D.C.
November 7, 1983

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:03 a.m.

APPEARANCES:

JEFFREY L. NAFTULIN, ESQ., Doylestown, Pennsylvania;
on behalf of the Petitioner.

KATHRYN A. OBERLY, ESQ., Office of the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the Respondent.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

JEFFREY L. NAFTULIN, ESQ.,
on behalf of the Petitioner

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KATHRYN A. OBERLY, ESQ.,
on behalf of the Respondent

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Kosak against the United States.

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

ORAL ARGUMENT OF JEFFREY L. NAFTULIN, ESQ.
ON BEHALF OF THE PETITIONER

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

When we got back Mr. Kosak's oriental and art collection in its damaged condition, we had a decision we had to make. Could we force the government or get some kind of trial to make the government pay for the damage that they did to Mr. Kosak's collection.

We came up with one viable alternative in which we could file a suit and that was the claim under the Federal Torts Claims Act.

This case comes down to a case of statutory construction. Eventually we reached the point of just determining the exact language of an exemption in the statute, but before I get to that exact language, which should be the starting point, there are a couple of principles which I think this Court should keep in mind and that is the Federal Torts Claims Act itself which gave the citizens the right to sue the government for

1 negligence in the same way as if they were suing a private
2 individual.

3 There is one main reason -- There is one main
4 area in which we disagreed with the Third Circuit and that
5 is whether the waiver of sovereign immunity was a broad
6 concept or not. We took the position that sovereign
7 immunity -- That the Federal Torts Claims Act waived
8 sovereign immunity broadly.

9 The Third Circuit said, no, that this was just a
10 narrow restriction and our position was that they were
11 misreading the teachings of this Court, although they
12 accused us of doing the same.

13 When Congress passed the Federal Torts Claims
14 Act, they did it for several reasons, one being that the
15 prevalent feeling at that time was that it should be
16 fundamental to a democracy that an individual who is
17 injured should not be deprived of redress merely because
18 that injury was caused by the government.

19 QUESTION: What has that got to do with
20 democracy? I thought democracy was the idea that the
21 majority rules and that if the majority decides that a
22 person can't sue the government, that certainly is
23 perfectly democratic, isn't it?

24 MR. NAFTULIN: Well, there are certain
25 principles that come into a democracy of providing for the

1 common good.

2 QUESTION: Well, how does the the principle --
3 Up to the time of the Federal Tort Claims Act that they
4 could not sue.

5 MR. NAFTULIN: That is correct, but you could
6 bring a private bill before the Congress, which was the
7 second reason why the Act came into being, because --

8 QUESTION: Yes, but, Mr. Naftulin, isn't
9 your difficulty here with the language of the Tort Claims
10 Act as far as any claim -- this is the language of it --
11 arising in respect of detention of any goods or
12 merchandise by any officer of Customs. Isn't that your
13 problem?

14 MR. NAFTULIN: Exactly, Justice Brennan.

15 QUESTION: On the face of it that seems -- What
16 happened here was there was a detention of your client's
17 goods or merchandise by an officer of Customs, wasn't
18 there?

19 MR. NAFTULIN: That is correct.

20 QUESTION: Then why doesn't that preclude
21 recovery under that Act?

22 MR. NAFTULIN: Okay, for the following reasons:
23 First of all, the exemption should be narrowly construed.
24 Now, what we did was we approached it several different
25 ways.

1 The first way we used the exact words. We went
2 to the exact wording, "any claim arising in respect of the
3 detention."

4 Now, we went to the dictionary definition of the
5 words "in respect of." We looked at several dictionary
6 definitions, but what we say cited to the Court were the
7 words that Judge Weis used in his dissent. They mean as
8 to, as regards, insofar as concerns, with respect to. I
9 think if you just look at the words themselves, they are
10 going to the fact of the detention itself and not
11 something that arises during the detention. Our first
12 argument is the words itself.

13 The second one, okay, is that you have to look
14 at all of the exemptions under 2680 and see the language
15 that was used there.

16 The Customs exemption, 2680(c), is the only one
17 that speaks in terms of in respect of, arising in respect
18 of. The others are all any claim arising out of that they
19 are speaking of in terms of the Postal Service. Any claim
20 for damages, period, when they are talking about the
21 operations of the Treasury. Any claim arising out of when
22 they are talking the military or combatant activities, any
23 claim arising in a foreign country, any claim arising from
24 the Tennessee Valley Authority, any claim from with the
25 Panama Canal Company, any claim arising from the

1 activities of it. There is a distinction. There is a
2 distinction in the language of the statute. The exception
3 for the Customs Service was the only one that used the
4 words "in respect of."

5 Now, Congress spent 30 years writing this Act
6 and what I submit to this Court is that there is a reason
7 for this distinction. As subtle as it might be, there is
8 a reason for this distinction.

9 So, aside from the plain meaning of the words
10 itself, you then have, looking at the entire Act itself --
11 In fact, in the Second Circuit decision, in the Alliance
12 case -- The Alliance case analyzed the exception for the
13 Postal Service which was any claiming arising out of the
14 loss, miscarriage, or negligent transmission of letters or
15 postal matter. It actually used the word "negligent,"
16 negligent transmission of letters.

17 And, the Alliance court's argument was, well, if
18 the Customs Service was going to be excused for their
19 negligence, that that wording would have gone into the
20 statute as well.

21 There is a couple of other things, too, that I
22 want to point out to the Court. For instance, this Court
23 made a decision in the case of United States versus
24 Munez in which the Court ruled that the Federal Tort
25 Claims Act did not bar a case against the United States

1 for the negligence of a federal employee, namely, a
2 prisoner worker, someone working in a prison.

3 Now, one of these exceptions here says it bars
4 under 2680(h) any claim arising out of a false
5 imprisonment.

6 Now, go back to the Munez facts in which Mr.
7 Munez was in prison and he was eventually beaten up in
8 prison, he claimed, because of negligence of the guards.
9 Suppose Mr. Munez is put in the prison -- that he is
10 falsely in prison, that the government imprisoned the
11 wrong Mr. Munez, all right? Should that exemption, any
12 claim arising out of false imprisonment now bar suit under
13 these circumstances? I think there is certain
14 distinctions that are made in these exemptions and that
15 these exemptions must be narrowly construed.

16 In fact, in the case of Block versus Neill,
17 which was a decision by Justice Marshall, the government
18 tried to assert the exemption, any claim arising out of
19 the misrepresentation. And, this Court again saw these
20 distinctions and allowed the suit to be brought on another
21 theory, on the good samaritan theory, because the
22 government had agreed to undertake certain action in that
23 case.

24 QUESTION: But, there the Court held that what
25 the Plaintiff was suing on was not a misrepresentation, so

1 it simply wasn't covered by that exception.

2 MR. NAFTULIN: That is right, but it is still
3 arguable that it is any claim arising out of the
4 misrepresentation.

5 And, what I am saying -- My point is that these
6 exemptions should not be broadly construed, but they
7 should be very narrowly construed. In fact --

8 QUESTION: Why should they be very narrowly
9 construed?

10 MR. NAFTULIN: Because of the reasons for the
11 exemptions themselves. The exemptions are meant to
12 prevent a harm to the government. If there is no harm to
13 the government, then the exemption shouldn't bar the suit.

14 QUESTION: Well, that really doesn't make much
15 sense to me. I mean the exemption speaks for itself in
16 its language and Congress has described in language what
17 it thought might cause harm to the government in terms of
18 allowing exemption. And, if the thing is within the
19 language of the exemption, the fact that arguable there is
20 no harm to the government in this case, I don't think
21 would take it out of the exemption, do you?

22 MR. NAFTULIN: Well, I am not trying to tell you
23 to take it out of the exemption. It is a question of how
24 you interpret the exemption. If there is an exemption for
25 this, then you just can't bring the suit and that is

1 actually what you have to determine. But, if you went
2 back to that Block versus Neill case, you could interpret
3 it broadly of any act arising out of a misrepresentation
4 or you can look at it much finer by saying, well, there is
5 a second theory here on which to go to. Therefore, that
6 general language doesn't block the suit.

7 There had to be a reason why Congress used the
8 words "in respect to" here.

9 QUESTION: Mr. Naftulin, generally speaking, if
10 you view the Federal Tort Claims Act as a whole, hasn't
11 this Court interpreted the waiver of sovereign immunity
12 narrowly so that it is a little inconsistent to argue that
13 you should view the exemption narrowly. If you fit the
14 exemption into the Act as a whole, hasn't the Court
15 generally given the waiver a narrow interpretation?

16 MR. NAFTULIN: No, I don't think that this Court
17 has given the waiver a narrow interpretation. If you go
18 into cases like Indian Telling versus the United States
19 and Rainier, Inc. versus the United States, and even if
20 you took the Dalehite case which is the leading case on
21 sovereign immunity, it spoke in terms of the general grant
22 of sovereign immunity.

23 The Indian Telling case spoke in terms of --
24 used the word "broad" in talking about sovereign immunity.
25 The Rainier case spoke in terms of the new and novel

1 theories of tort were going to come into being. There is
2 probably only --

3 QUESTION: Well, maybe it is time for us to
4 narrow it then.

5 MR. NAFTULIN: I am sorry, I didn't hear that,
6 sir.

7 QUESTION: Maybe it is time for us to narrow it
8 so people like you won't misunderstand it.

9 MR. NAFTULIN: Well --

10 QUESTION: I never understood that when you
11 waive sovereign immunity you do it on the broadest terms.
12 I have never heard that. They don't go together.
13 Sovereign immunity and waiver and moral rights and equity,
14 they don't all together. They are different ball parks,
15 aren't they?

16 MR. NAFTULIN: I don't think that --

17 QUESTION: Sovereign immunity just says that you
18 can't sue on anything. Is there anything broader than
19 that?

20 MR. NAFTULIN: That is correct.

21 QUESTION: Well, now, when you waive that --
22 They could have passed a law and said you can sue on
23 anything, but Congress didn't. Do you know why? They
24 didn't intend to waive everything.

25 What you want us to do is to rewrite the

1 statute. You can rewrite it, but we can't. Am I right?

2 MR. NAFTULIN: I don't agree with you, Justice
3 Marshall.

4 QUESTION: You think we can rewrite statutes?

5 MR. NAFTULIN: I agree with you on that
6 principle. I am not asking you to rewrite the statute. I
7 am not asking you to do that. But, when Congress says --
8 When Congress passes a --

9 QUESTION: You want us to do something about two
10 words, in respect -- three words. You want us to rewrite
11 those three words?

12 MR. NAFTULIN: No, I don't want you to rewrite
13 them. I just want you to apply them and interpret them
14 the same way that Congress meant to do it. That is all
15 that I am asking this Court to do. When Congress passed
16 the Federal Torts Claims Act, it waived sovereign immunity
17 except in certain specific situations, the exemptions
18 under 2680.

19 There were also certain other safeguards, which
20 I will call administrative safeguards, which were also put
21 in such as the statute of limitations or you get a
22 non-jury trial or you can't get interest or penalties, but
23 when they passed this Act, they said that you can sue the
24 government in the same situation as if you were suing an
25 individual if the individual was negligent. They did away

1 with sovereign immunity when they did that. And, then
2 they came up with these specifics --

3 QUESTION: Where do we get all these cases on
4 sovereign immunity if they waived it? How did we get this
5 case if they waived it?

6 MR. NAFTULIN: Because sometimes these acts have
7 to be interpreted by this Court

8 QUESTION: Do I correctly understand, Mr.
9 Naftulin, in essence what you are arguing is that the
10 exception against any liability applies only to the fact
11 of the tension of the group and --

12 MR. NAFTULIN: That is correct.

13 QUESTION: And that harm is done while they are
14 detained the exception doesn't apply.

15 MR. NAFTULIN: That is correct.

16 QUESTION: And, you arrive at that primarily by
17 emphasis on in respect of as distinguished from arising
18 from?

19 MR. NAFTULIN: That is one of the ways I do it.
20 That is one of my arguments.

21 Another one of my arguments is the plain
22 dictionary definition of the words. I think that probably
23 even more importantly than that we come to what I call the
24 area of the legislative intent.

25 The exemptions were brought in because, as a

1 policy matter, the government should be free from certain
2 claims or that there is certain other machinery that is
3 available in order to bring the claim.

4 When Judge Alexander Holtzoff was testifying
5 before the Senate Judiciary Subcommittee, he made certain
6 remarks which this Court even cited that footnote in the
7 Hatzlachh decision where he brought in these two
8 principles that as a policy matter the government should
9 be free from claims or that there was other machinery and
10 he gave certain examples. He spoke about the Postal
11 Service and he spoke about intentional torts and at that
12 time he said as a policy matter the government should be
13 free of all -- free from suit, not situaton.

14 Then he spoke about the Customs Service and when
15 he spoke about the Customs Service he said, because this
16 is an area in which other remedies are available. Now,
17 the only other remedies that were available at this time
18 were remedies to challenge unlawful detentions or to
19 challenge the amount of the duty.

20 QUESTION: On that point, may I ask you this
21 question. Toward the end of the government's brief, they
22 discusson a common law remedy against the Customs officer
23 for negligence and then a provision, as I understand it,
24 that the government would, in effect, pay the judgment if
25 there was a recovery against the officer.

1 Would you comment on that argument? You said
2 when you started out that you thought your only remedy was
3 under the Federal Tort Claims Act, but what about the
4 existence of this common law remedy?

5 MR. NAFTULIN: I agree that there is that
6 common-law remedy. The problem that we had in our case
7 was that when the Customs agents were executing the search
8 warrant, one particular agent dropped a cork carving of a
9 pagoda in front of him. That was the only act of
10 negligence that we actually saw. Other than that, okay --
11 Other than that, Your Honor, we couldn't prove any
12 specific act of negligence against any specific Customs
13 agent and that is why we didn't sue that.

14 If we could have done that, then we would have
15 sued the individual Customs agents themselves.

16 QUESTION: But, you could have sue one of them
17 for that one item then?

18 MR. NAFTULIN: Correct.

19 QUESTION: And, you couldn't possibly in
20 discovery in that case have asked questions about the
21 handling of the other items?

22 MR. NAFTULIN: Well, we thought about that, but
23 I am sure -- We felt certain at that time that the answers
24 that we would have gotten were that we know nothing about
25 this. We know nothing about how this happened or why this

1 happened. We considered that theory.

2 We considered filing an action under the Tucker
3 Act for a breach an implied contract of failment. We
4 considered an action under the Federal Torts Claims Act.
5 And, this one really seemed to us to be the only viable
6 alternative.

7 We figured that -- Well, we really balanced
8 whether the government -- The reason is here really for
9 the exemption.

10 We recognized the need for the Customs Service
11 to be able to seize property. We really didn't dispute
12 that. But, the reason why that is a necessity is so that
13 it won't hinder them in what they are doing. They should
14 have free reign in being able to seize and detain. They
15 shouldn't have to worry about whether they are going to be
16 sued for doing it.

17 But, after they do that, there is no reason why
18 they shouldn't have to handle the property with care.
19 Customs seizes items which are very valuable, which are
20 worth a lot of money. In fact, in this particular case,
21 there was an oriental clock, the equivalent of a
22 grandfather clock, which they just decided it was too
23 impossible for them to move that clock, that it definitely
24 would have been damaged if they did that.

25 You really have to balance what we are trying to

1 protect here in determining whether the exemption applies
2 or not.

3 And, our point is that the basis of the
4 exemptions were in order to protect a harm against the
5 government and when you are -- Well, our point is that it
6 wasn't the intention of Congress to give the Customs
7 Service a license to be negligent.

8 QUESTION: Mr. Naftulin, the government also
9 noted, I think, in its brief that Judge Holtzoff, who was
10 apparently the drafter of this section, had analogized the
11 draft to a provision in the British Tort Claims Act and
12 patterned it after that under which very clearly damage
13 caused by negligence of the Customs officers would not be
14 covered. Is that relevant to our inquiry then by way of
15 the legislative history?

16 MR. NAFTULIN: I think it is to some extent.
17 And, I also felt that that section helped us to a great
18 degree, Justice O'Connor, because the British Act, the
19 Crown proceeding that the government was referring to
20 there was speaking primarily of damages for deterioration
21 to the property or damages for delay. I will concede that
22 the general language of the Crown proceeding said more
23 than that, but the words about the detention or the
24 detention were not in the part of the original statute.
25 They were added on and I think that it supports our

1 position that they were added on to clearly specify that,
2 well, you can't sue them for the delay or for the
3 deterioration of the goods. It went to the fact of the
4 detention, not so much during the detention.

5 QUESTION: Is there -- Why was the seizure made
6 in this case initially?

7 MR. NAFTULIN: The Customs agents accused Mr.
8 and Mrs. Kosak of smuggling their collection into the
9 country.

10 QUESTION: I suppose that you might say that in
11 some cases an initial seizure would be negligently made in
12 the sense that there really wasn't any basis for it. What
13 if that were the case?

14 MR. NAFTULIN: It doesn't go to the legality of
15 the seizure, okay? You have thrown the word "negligently"
16 in there.

17 QUESTION: Well, if the agents had acted
18 carefully, they wouldn't have seized the goods. They
19 acted carelessly in seizing the goods. Would you say that
20 the -- Assume that that were the case, that they acted --
21 It was negligent. Would you think that the government
22 would be liable for deterioration?

23 MR. NAFTULIN: No, I wouldn't in that situation.
24 The Act didn't mean to go to that, Justice White.

25 QUESTION: So, in any event, in some instances

1 at least you would concede that the government would be
2 immune from claims for negligence?

3 MR. NAFTULIN: Well, I don't -- You have thrown
4 the word "negligence" in there. I don't think --

5 QUESTION: You are quite right.

6 MR. NAFTULIN: I don't think that that is really
7 a case of negligence.

8 You might be able to use negligence, okay, for a
9 reason of illegality of a seizure, but the key words in
10 that situation aren't the negligence. The key words are
11 the legality of the seizure. And, it is for these reasons
12 that we think the rights of the citizen --

13 QUESTION: The case Justice White poses, as I
14 understand it, the test is probably cause, isn't it? And,
15 if there was no probable cause, the agent is absolutely
16 liable, isn't he, as a matter of common law? Isn't that
17 what the common-law remedy was?

18 MR. NAFTULIN: I agree with that, Justice
19 Stevens.

20 I will save the rest of my time for rebuttal.

21 CHIEF JUSTICE BURGER: Ms. Oberly?

22 ORAL ARGUMENT OF KATHRYN A. OBERLY

23 ON BEHALF OF THE RESPONDENT

24 MS. OBERLY: Mr. Chief Justice, and may it
25 please the Court:

1 This is a straightforward case of statutory
2 construction that is governed by the Plain Meaning Rule.
3 There is nothing the least bit ambiguous about the
4 statutory language even if there were the legislative
5 history and the policy reasons that lead Congress to enact
6 the various exemptions to the Tort Claims Act. All
7 support the Court of Appeals construction --

8 QUESTION: Can you raise your voice a little,
9 Ms. Oberly?

10 MS. OBERLY: Yes, sir.

11 Turning first to the statutory language, the
12 exemption in Section 2680(c) is about as broad as anything
13 Congress could have written. Congress retained sovereign
14 immunity for any claim arising in respect to the detention
15 of goods held by Customs officers.

16 Petitioner's property in this case was seized
17 and detained because the Customs Service suspected that he
18 brought it into the country in violation of the Customs
19 laws and clearly --

20 QUESTION: Isn't it possible to read that
21 language though, Ms. Oberly, as dealing in kind of a
22 common-law notion of detainee, intentional detention by the
23 Customs agent and not reaching just negligent mishap while
24 it is in the process of being detained?

25 MS. OBERLY: It is our position, Justice

1 Rehnquist, that there is just nothing in the wording of
2 the statute or in its grammatical construction that
3 supports a distinction between the fact of detention alone,
4 such a delay damages, and damages that happen to property
5 while it is in the possession or while it is being
6 detained by the Customs Service.

7 QUESTION: The language would certainly allow
8 that distinction, don't you think? I mean it isn't really
9 terribly precise language.

10 MS. OBERLY: If the Court were to construe the
11 language as allowing that distinction, it would simply be
12 reading something into the language that is not there.
13 There is nothing in the language that purports to
14 distinguish among different types of harm that might occur
15 in relation to a detention.

16 In both situations --

17 QUESTION: But, you are reading it as if instead
18 of it saying in respect to it said in the course of, and,
19 those are two different phrases I think.

20 MS. OBERLY: Justice Rehnquist, one Petitioner's
21 main arguments was that there is some special significance
22 to the phrase "in respect of," and that somehow limits
23 detention to damages caused by the fact of detention
24 alone. And, the dissenting Judge in the Court of Appeals
25 also relied on that same distinction.

1 But, in fact, throughout the legislative history
2 of the Tort Claims Act, Congress described this exemption
3 as barring claims arising out of the detention of property.
4 Congress interchangeably used in the legislative history
5 in the statute the phrase "in respect of" and the
6 description "arising out of."

7 So, we think it is quite clear that by that
8 interchangeable use that Congress could not have intended,
9 or it would have said so, to be attaching some special
10 limited significance to the phrase "in respect of."

11 Whenever Congress described the exemption, it
12 used the broad language that the dissenting opinion in the
13 Court of Appeals would have found sufficient to bar
14 Petitioner's claim.

15 Just to repeat, there is simply nothing in the
16 legislative history to suggest that Congress ever thought
17 about making the sort of precise distinction you are
18 talking about.

19 QUESTION: It is true though that there is a
20 difference in the language.

21 MS. OBERLY: There is, but it is negated in this
22 case by the fact that Congress in every committee report
23 described this exemption, which is phrased "in respect
24 of" as barring claims arising out of the detention of
25 property.

1 QUESTION: You mean in effect that Congress, in
2 saying "in respect of," in fact, is simply using another
3 way of saying from.

4 MS. OBERLY: Or arising out of or --

5 QUESTION: Arising out of or from.

6 MS. OBERLY: Or from, that is correct.

7 Congress -- In the legislative history --

8 QUESTION: Is there any other subdivision or
9 section where "in respect of" appears?

10 MS. OBERLY: No, there isn't, Your Honor, but
11 it is clear, we think, from the legislative history that
12 Congress had no special intention in mind when it used the
13 phrase "in respect of."

14 There is no explanation in the legislative
15 history for one cause having "in respect of" and other
16 having "arising out of," but the most logical one is that
17 these exemptions were not all enacted at the same time or
18 by the same people.

19 QUESTION: And, some people used "from" rather
20 than either "arising out of" or --

21 MS. OBERLY: I don't believe that any of them
22 use "from." "Arising out of" is the most common.

23 QUESTION: Well, if you have to go to the
24 legislative history, it is hardly a plain-language case,
25 is it?

1 MS. OBERLY: I don't think -- I think "in
2 respect of" is virtually identical to "arising out of" and
3 I think it is quite a hypertechnical dictionary
4 construction for the Court to conclude that "in respect
5 of," without regard to the legislative history, really has
6 this special, limited meaning. But, if the Court
7 disagrees, the minute you turn to the legislative history,
8 it is apparent that Congress didn't view there to be any
9 distinction between those two phrases because --

10 QUESTION: What would be the case if there were
11 an intentional damage to the goods.

12 MS. OBERLY: It would depend on the facts, but
13 it is possible that it would be beyond -- It would be
14 possible that it would not be covered by the Tort Claims
15 Act at all. The agent might be acting beyond the scope of
16 his employment. It might be one of the intentional torts
17 that is exempted by another section of the Tort Claims
18 Act.

19 QUESTION: Or he might be subject -- The agent
20 might be subject to suit.

21 MS. OBERLY: He obviously would be subject to
22 civil suit in any event just for negligence or for
23 intentional damage.

24 QUESTION: I know, but I want to know what would
25 you say about it in light of the "respect of" language?

1 Let's assume that his only defense was that he has been
2 exempted from liability by the statute.

3 MS. OBERLY: Well, the United States only
4 generally waives sovereign immunity for the acts of its
5 employees acting within the scope of their employment.
6 So, if you have as a hypothetical a customs agent who just
7 comes to work one day and decides to smash every fifth
8 object that passes by his inspection line, he might well
9 not be --

10 QUESTION: That may be so. That may be so, but
11 would it be in respect of the detention? I want to know
12 how you would react to an intentional tort if the only
13 defense was, well, the statute -- I just listened to the
14 Solicitor General's representative say that this language
15 is plain and it exempts all kinds of -- It excludes any
16 kind of --

17 MS. OBERLY: The plain meaning of the statute
18 would, in my view, be broad enough to cover the example
19 you are giving, but that is not necessarily a reasonable
20 construction and there would be other ways of dealing with
21 an agent's misconduct in those circumstances.

22 QUESTION: You wouldn't have to get into all
23 those other difficult questions if this is a plain meaning
24 of this statute at issue here is that it would also
25 foreclose any actions for intentional torts. That would

1 be the end of the case.

2 MS. OBERLY: Congress, Your Honor, specified the
3 situations in which it was willing to assume the common
4 law liability of the Customs collector. It specified
5 those limitations in 28 U.S.C. 2006, which was enacted
6 over 100 years ago in 1863. And, one of the conditions
7 for shifting the common-law liability of a collector to
8 the United States is that the collector had made his
9 seizure based on probable cause or on the directions of a
10 superior officer.

11 In the example you are giving, his seizure or
12 his detention almost certainly would not satisfy a
13 probable cause requirement.

14 QUESTION: I just assume that if it was a proper
15 seizure the only thing is the Custom officers -- one of
16 them deliberately damaged the goods.

17 MS. OBERLY: I think the most appropriate remedy
18 in that case would be to sue him personally.

19 QUESTION: But, you would purport to -- I take
20 it you think the statute we are talking about here would
21 bar an action for intentional torts as well as negligent.

22 MS. OBERLY: As well as Subsection (h) of the
23 Tort Claims Act exemptions which also bars intentional
24 torts.

25 QUESTION: May I ask a question on the

1 legislative history. You say that, as I understood you,
2 that repeatedly in the legislative history Congress
3 referred to arising out of rather than in respect of.
4 What is the clearest example in the legislative history
5 that supports that statement?

6 MS. OBERLY: I can give you cites to a Senate
7 report and a House report. Senate Report No. 1400 --

8 QUESTION: Is it quoted in your brief?

9 MS. OBERLY: No, it is not, Your Honor.

10 QUESTION: So this is a new argument.

11 MS. OBERLY: So you should write it down.

12 QUESTION: I was wondering because I hadn't seen
13 the argument before.

14 MS. OBERLY: Senate Report No. 1400, 79th
15 Congress, 2d Session, at page 33 of the 1946 Report and
16 House Report No. 1287, 79th Congress, 1st Session, at page
17 6, a 1945 Report.

18 There are other examples which I could provide
19 by letter. It was a constant repetition throughout the
20 committee reports, but those --

21 QUESTION: Can you quote one?

22 MS. OBERLY: I don't have the reports with me.

23 QUESTION: This is really your principal
24 argument though, because the language is different. If
25 one just looks at the "respect of" language and the

1 "arising out of" language one would note immediately there
2 is a difference and the "arising out of" is broader.

3 Would you also explain something else to me? Do
4 you agree that there is a common-law remedy against the
5 individual officer which the government would actually
6 have to pay the liability?

7 MS. OBERLY: Yes, Your Honor. For more than 200
8 years there has been recognized a common-law tort
9 action --

10 QUESTION: What is the force to your argument in
11 the brief that one of the purposes of the exemption was to
12 avoid all this kind of litigation?

13 MS. OBERLY: It wasn't just to avoid litigation.
14 It was to avoid creating additional or inconsistent
15 remedies where Congress was satisfied that the existing
16 remedies were adequate.

17 QUESTION: Well, do you think the existing
18 remedy is adequate if there is some difficulty in
19 identifying which officer caused the damage?

20 MS. OBERLY: I think there would be no problem
21 in Petitioner suing the Customs Director for the Port of
22 Philadelphia, who was clearly the superior --

23 QUESTION: So, what your case really boils down
24 to is that they filed the wrong kind of complaint. They
25 should have sued the Customs officer in common law and

1 asked for relief against the United States if they get the
2 judgment.

3 MS. OBERLY: That is correct and it makes a
4 difference.

5 QUESTION: So what is all the fight about?

6 MS. OBERLY: It is not an academic distinction
7 between our position and Petitioner's. The reason is that
8 in 28 U.S.C. 2006 Congress attached conditions to the
9 circumstances under which is was willing to accept the
10 liability of the Customs collector.

11 QUESTION: Namely that there was probable cause
12 for the seizure.

13 MS. OBERLY: That there was probable cause or he
14 was acting on the orders of a superior officer.

15 QUESTION: Which is true in 99 percent of the
16 cases, isn't it? So, what you are trying to do is
17 preserve the government's immunity in that one percent.

18 MS. OBERLY: I don't know whether it is 99
19 percent. I assume it is true in most cases.

20 QUESTION: Well, certainly they don't seize
21 property without probable cause very often.

22 MS. OBERLY: Most Customs searches are without
23 warrants. This case is somewhat unusual in that there was
24 a search warrant. I assume that they are usually with
25 probable cause even though --

1 QUESTION: But, am I correct in believing that
2 the practical significance of the government's position
3 relates only to those cases where the seizure itself was
4 unjustified?

5 MS. OBERLY: Yes, Your Honor, but it is
6 significant because Congress has provided one remedy and
7 attached a condition to it and it is -- Under those
8 circumstances we think it is inappropriate for the Court
9 to wipe those conditions or those restrictions out of
10 Congress' earlier statute by providing Plaintiff with an
11 additional remedy.

12 QUESTION: Well, under 2006 do you get a jury
13 trial?

14 MS. OBERLY: The Customs collector would.

15 QUESTION: So that is an additional difference
16 between the Tort Claims Act and --

17 MS. OBERLY: That is true. It would be an
18 ordinary tort action in state court which we might, if we
19 were defending the Customs collector, might remove to
20 federal court, but I would assume the Customs collector is
21 entitled to a jury trial.

22 But, it is particularly inappropriate for the
23 courts to imply out of this Tort Claims Act an additional
24 remedy for the Plaintiff here or any similar plaintiff
25 when Congress specifically said that one of the reasons it

1 was enacting this exemption was that it was satisfied that
2 the existing remedies were adequate. We would be
3 completely undoing Congress' decision that it was
4 perfectly happy to rest on the existing remedies and not
5 add an additional remedy if the Court were to take the
6 position that really there is no difference between these
7 two remedies and so will we let Petitioner or any other
8 plaintiff have access to his choice of remedies. Congress
9 didn't intent for there to be a choice of remedies in this
10 situation, because, in fact, it knew about and was
11 satisfied with the long-standing common-law remedy and the
12 conditions under which it was willing to assume the Custom
13 collector's liability.

14 There is another statutory remedy which we also
15 did not mention in our brief and which would not have
16 afford complete relief to Petitioner, but is, in fact,
17 useful in the type of situation we are talking about.

18 Before Congress enacted the Tort Claims Act in
19 1946, it had passed a Small Claims Act in 1922. That
20 statute was for the most part repealed when the Tort
21 Claims Act was passed, but there was one important
22 exception to the repeal. Congress provided that the Small
23 Claims Act could still be used by agency heads as a grant
24 of discretionary authority to settle any tort claims that
25 were for less than \$1,000 and that could not be brought

1 under the Tort Claims Act because of one of the
2 exemptions.

3 That statute is now codified at 31 U.S.C. 3723
4 and what it allows the Customs Service or any other
5 federal agency to do is grant them discretionary authority
6 to settle claims for under \$1,000 --

7 QUESTION: Was that remedy available to this
8 Petitioner?

9 MS. OBERLY: Yes, it was, if he was willing to
10 waive \$11,000 of his claim, because there is no judicial
11 review under that statute and acceptance of the settlement
12 under that statute constitutes final settlement of the
13 claim.

14 QUESTION: The limit here is \$1,000, is it?

15 MS. OBERLY: Yes.

16 So, we recognize that it wouldn't have provided
17 the complete relief he wanted, but what is worth noting
18 about the statute is that the Customs Service frequently
19 does use it to compensate similiar types of accidents.

20 For example, if a traveler is passing through
21 Customs inspection at an airport and a Customs inspector
22 accidentally drops the traveler's camera, if the value of
23 the camera is less than \$1,000, the agency can and does
24 use the authority of the Small Claims Act to reimburse
25 that traveler for the injury or damage to his camera.

1 We thinks that represents a reasonable
2 compromise that Congress was willing to undertake.

3 QUESTION: May I ask again, this is 31 U.S.C.
4 3723?

5 MS. OBERLY: Right. And, that is the most --

6 QUESTION: Is that statute cited in your brief?

7 MS. OBERLY: No, it is not, Your Honor.

8 QUESTION: This is another new argument?

9 MS. OBERLY: Yes, although I called Petitioner's
10 counsel on Friday and told him about the statute.

11 We think this is a reasonable compromise
12 legislative judgment that Congress made, whereby it is
13 willing to assume or have agency heads assume liability
14 for small claims under \$1,000, but it is not willing to
15 assume liability for the potentially much larger claims
16 like Petitioner's or others, and the reason Congress would
17 not have wanted to do that is the vast scope of Customs
18 Service operations.

19 As we pointed out in our brief, Customs last
20 year, in 1982, made 59,000 separate seizures, not
21 including seizures related to the drug laws. This is
22 really one of the most enormous programs the government
23 runs and Congress could reasonably decide that it was
24 unwilling to assume responsibility for such a large
25 program.

1 QUESTION: May I ask one other question about
2 2680(c)? Is the exemption there limited to Customs
3 officers or does it apply to any seizure by any law
4 enforcement officer?

5 MS. OBERLY: It is the government's position
6 that it applies to any seizure by any law enforcement
7 officer. It clearly covers Internal Revenue officers as
8 well as Customs officers by its expressed terms.

9 And, then the phrase, "any other law enforcement
10 officer," we think means what it says, any other law
11 enforcement officer --

12 QUESTION: Well, does that mean that if there is
13 an -- An FBI agent executes a warrant and gets custody of
14 some physical objects and they are negligently damaged
15 while in his custody, is there any remedy in that
16 situation?

17 MS. OBERLY: I don't think so, Your Honor. I
18 think --

19 QUESTION: That is unlike the other, there is no
20 common-law remedy of any kind there?

21 MS. OBERLY: Well, there might be a Bivens
22 action or something against the agent, but I don't
23 think --

24 QUESTION: No, no, I am assuming that there was
25 probable cause, but he just dropped the clock or something

1 like that.

2 MS. OBERLY: The Ninth Circuit, which is the
3 only court to address this, originally in a concurring
4 opinion by Judge Tang -- Judge Tang expressed the view
5 that it did not include any other law enforcement officer,
6 that it was limited to Customs or Revenue officers or
7 other officers acting in that capacity.

8 But, in the subsequent opinion, the Ninth
9 Circuit, noting Judge Tang's opinion, said it disagreed
10 with that and that the plain language of the statute did,
11 in fact, cover any other law enforcement agency.

12 So, the statute frequently has been used to
13 cover agencies like the Food and Drug Administration when
14 they seize potentially adulterated food.

15 QUESTION: It would clearly protect them for the
16 delay and the alleged conversion, but it also has been
17 held that it protects them from damage to the property.

18 MS. OBERLY: Yes. Let's say that the food is
19 stored in a negligent manner so that it becomes worthless
20 even though it is ultimately returned to the claimant. It
21 has been held that this section bars actions for the value
22 of the lost food.

23 QUESTION: And, drawing the distinction between
24 conversion and property damage.

25 MS. OBERLY: That is correct.

1 The vast scope of Customs operations that I was
2 referring to a moment ago is another important policy
3 reason that supports our reading of the statute.

4 In the legislative history of the Tort Claims
5 Act, Congress expressed considerable concern that certain
6 types of claims offered great potential for abuse and for
7 fraudulent or excessive claims.

8 Given the number of Customs seizures each year,
9 that certainly is a realistic possibility in this
10 situation.

11 The problems of proof for the government would
12 be enormous because it is simply not realistic to expect a
13 Customs inspector to be able to remember the details of
14 every inspection and yet when the owner of property comes
15 into court in a tort claims action and claims that his
16 property was in perfect condition and the Customs Service
17 really can't remember what happened with that seizure, it
18 has no effective way of rebutting the claim.

19 QUESTION: Yes, but they will be liable under
20 the common-law theory in all of those situations, won't
21 they? I mean, they have the same problem if it is
22 common-law theory or a tort claim.

23 MS. OBERLY: Except that the government has
24 protected itself to some extent by imposing limitations on
25 when it is willing to shoulder the Customs collectors'

1 common-law liability.

2 QUESTION: But, in all the cases in which the
3 seizure was lawful, the problem is identical?

4 MS. OBERLY: That is correct.

5 QUESTION: Which is most cases.

6 MS. OBERLY: That is correct.

7 QUESTION: Well, your answer to Justice Stevens
8 indicates that if this suit had been brought against the
9 individual Customs officer in this case, it would not have
10 been affected by this statute.

11 MS. OBERLY: By the Tort Claims Act, that is
12 right, it would not have been.

13 QUESTION: And, he might have won it?

14 MS. OBERLY: If he could have proved negligence,
15 he might have won and almost certainly the United States
16 would have paid the judgment in this case.

17 QUESTION: Is that action still open?

18 MS. OBERLY: No, it is not open to him because
19 the Pennsylvania statute of limitations has expired. It
20 is a two-year statute. We think what would be the
21 applicable statute --

22 QUESTION: It hasn't been tolled by this suit.

23 MS. OBERLY: I would see no basis on which it
24 could be considered tolled. It is an action under
25 Pennsylvania law. It is a two-year statute of

1 limitations.

2 QUESTION: The filing of one suit doesn't toll
3 another of the statute of limitations.

4 MS. OBERLY: No.

5 QUESTION: But, the suit, you say, would be
6 under Pennsylvania law?

7 MS. OBERLY: Pennsylvania seems the logical
8 place to me because the seizure occurred there, Petitioner
9 lives there, the Customs agents responsible are there from
10 the Philadelphia Customs office.

11 QUESTION: So, it wouldn't be state law barred
12 for federal law or anything?

13 MS. OBERLY: No.

14 Justice Stevens, it may appear to be an academic
15 distinction but that is simply no justification for the
16 Court to rewrite the Tort Claims Act. Even if in --

17 QUESTION: Well, it is no justification for
18 rewriting assuming this is what Congress intended, of
19 course, but Congress did use different words in this
20 section than used in any other section. And, of course,
21 we weren't aware of this legislative history that you
22 mentioned until today.

23 MS. OBERLY: It came to my attention through a
24 student note on this case and which the student said he
25 submitted to the Court. But, I can also provide

1 additional citations for the Court after the --

2 QUESTION: What is the student's bottom line in
3 that note?

4 (Laughter)

5 QUESTION: He thought the government was wrong,
6 I believe.

7 MS. OBERLY: Students tend to sympathize with
8 Mr. Kosak. The students seem to think that perhaps it
9 would be appropriate for this Court to sit as a committee
10 of Congress and rewrite the statute.

11 I really have very little further except to note
12 that it is our position that Congress has made a
13 reasonable legislative judgment about the limits of
14 liability that it was willing to undertake. That judgment
15 has to be respected by this Court. And for the remainder
16 of Petitioner's arguments about the stereo receiver and
17 the court pagoda we are willing to rely on our brief.

18 Thank you.

19 CHIEF JUSTICE BURGER. Do you have anything
20 further, Mr. Naftulin?

21 MR. NAFTULIN: I have nothing further, Mr. Chief
22 Justice.

23 CHIEF JUSTICE BURGER: Thank you, counsel, the
24 case is submitted.

25 We will hear arguments next in Daily Income Fund

1 against Fox.

2 (Whereupon, at 10:48 a.m. the case in the
3 above-entitled matter was submitted.)

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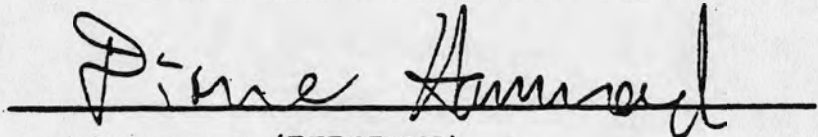
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#82-618 - JOSEPH A. KOSAK, Petitioner v. UNITED STATES

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BY

A handwritten signature in cursive script, appearing to read "Pina Amos", is written over a horizontal line.

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