

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-434

TITLE UNITED STATES, Petitioner v. CHARLOTTE JAMES, ET AL.

PLACE Washington, D. C.

DATE April 21, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
V. : No. 85-434
CHARLOTTE JAMES, ET AL. :
-----x

Washington, D.C.

Monday, April 21, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.
T. JOHN WARD, ESQ., Longview, Texas; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Pincus, I think you
3 may proceed whenever you are ready.

4 ORAL ARGUMENT OF ANDREW J. PINCUS, ESC.

5 ON BEHALF OF THE PETITIONER

6 MR. PINCUS: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 In the wake of the devastating Mississippi
9 River Flood of 1927, Congress embarked upon a massive
10 federal program to control flood waters, directing the
11 construction of public works on a massive scale in order
12 to prevent a recurrence of the destruction that
13 accompanied the 1927 flood. The statute implementing
14 this program included a comprehensive provision
15 regarding the liability that could be imposed upon the
16 federal government. The provision states "No liability
17 of any kind shall attach to or rest upon the United
18 States for any damage from or by floods or flood waters
19 at any place."

20 The question presented in this case is
21 whether, in light of this provision, which has been
22 codified as Section 702(c) of Title 33, the government
23 has unambiguously waived its sovereign immunity from
24 tort liability for damage caused by the release of flood
25 waters from a flood control project.

1 Now, this --

2 QUESTION: I take it, Mr. Pincus, if it
3 weren't for this provision, there would be little
4 question that it had waived that liability by virtue of
5 the Federal Tort Claims Act.

6 MR. PINCUS: Yes, Your Honor, that's correct.
7 It's the relationship between this provision and the
8 Tort Claims Act that is at issue here, and we think in
9 light of this provision, the Tort Claims Act could not
10 be taken to have unambiguously waived the government's
11 liability in this area.

12 Indeed, in light of the Tort Claims Act,
13 Respondents have the burden of showing that the
14 liability for which they seek to recover was
15 unambiguously not covered by the provision, because even
16 if the provision was ambiguous, then the Tort Claims Act
17 waiver could not be unambiguous.

18 So we think in a way they have quite a
19 difficult burden to overcome.

20 This particular case arises out of two
21 separate incidents in which Respondents suffered damage
22 as a result of the release of flood waters from flood
23 control projects. The first incident occurred at the
24 Millwood Reservoir, a project located near Ashdown,
25 Arkansas, designed to control flooding by the Red

1 River. On June 8, 1979, the reservoir was at flood
2 level, and entrapped flood waters were being released
3 through the reservoir's dam. Respondents James and
4 Butler were water skiing on the reservoir, and the
5 current created by the discharge of the flood waters
6 pulled Respondents and Respondent Butler's husband
7 through the dam's gates. Respondents were injured, and
8 Respondent Butler's husband died.

9 The District Court found that the government
10 had violated the duty of care imposed by state law by
11 willfully and maliciously failing to warn Respondents of
12 the danger caused by the current caused by the discharge
13 of the flood waters. The Court noted that the current
14 had swept away the buoys that usually marked the area in
15 front of the dam where the current was strong. The
16 District Court entered judgment in favor of the
17 government, however, holding that Section 702(c) barred
18 Respondents' tort actions because Respondents' injuries
19 were caused by flood waters.

20 The second incident at issue here occurred at
21 the Courtableau Drainage Structure, a flood control
22 project located near Opelousas, Louisiana. On May 17,
23 1980, the Bayou Courtableau was at flood level, and the
24 drainage structure's gates were open so that the bayou
25 would not overflow its banks. Kenneth and Joseph Clardy

1 were fishing in the bayou, and their boat became caught
2 in the current created by the discharge of water from
3 the bayou, through the drainage structure. The boat
4 overturned, and Kenneth Clardy died. The District Court
5 in that case granted the government's motion for summary
6 judgment, holding that Respondent Clardy's tort claim
7 was barred by Section 702(c). The Court found that
8 Section 702(c) applied because the drainage structures'
9 gates had been opened to prevent flooding, and the
10 diverted waters were flood waters within the meaning of
11 that provision.

12 The cases were consolidated on appeal, and the
13 panel of the Court of Appeals affirmed. The panel
14 stated that prior Fifth Circuit decisions bound it to
15 hold that Section 702(c) barred Respondents' claims, but
16 it indicated that it disagreed with those decisions.
17 The full Court of Appeals reheard the case en banc and
18 reversed by a vote of nine to six. The Court concluded
19 that Section 702(c) does bar certain tort claims, but
20 that the statutory immunity did not extend to the claims
21 asserted by Respondents in these cases. The dissenting
22 judges stated that Section 702(c) did bar Respondents'
23 tort claims and argued that the majority's decision was
24 contrary to the statute's plain language, its
25 legislative history, and settled judicial interpretation

1 of that provision.

2 We submit that the Court of Appeals
3 unprecedented construction of Section 702(c) is
4 incorrect for two separate reasons. First, the plain
5 language of the statute and the statute's legislative
6 history permit only one conclusion, that Section 702(c)
7 immunizes the United States from tort claims arising out
8 of damage caused by flood waters such as Respondents'
9 claims here

10 QUESTION: Mr. Pincus, at the time it was
11 enacted, I guess the federal government was not liable
12 for personal injury suits; it was before the Federal
13 Tort Claims Act had been passed.

14 MR. PINCUS: Yes, Your Honor.

15 QUESTION: And there is some indication from
16 the language of the full statute and the history that
17 Congress was worried in Section 702 about property
18 damage claims. And it certainly didn't speak in the
19 statute in terms of personal injury, did it?

20 MR. PINCUS: Well, Your Honor, it didn't
21 specifically refer to personal injury, but it did
22 specifically state, wrote quite broadly, it said no
23 liability of any kind, and it specifically wrote any
24 damage. Certainly, if Congress was only concerned about
25 property damage, it could easily have just written in

1 property damage there, and this Court has construed
2 other statutes in which any damage is used to refer to
3 both personal injury and property damage.

4 In addition --

5 QUESTION: It just seemed to me that the
6 legislative history didn't paint the clear picture that
7 you say it did here.

8 MR. PINCUS: Well, Your Honor, we think in
9 light of the broad language of the statute that the
10 question really is whether Congress somehow intended a
11 more limited meaning to be given to the provision, and
12 that in light of this Court's cases, there would have to
13 be a clear indication that that was so in order to read
14 the language narrowly, and the legislative history does
15 have quite a bit of discussion of the injuries that were
16 caused by the 1927 flood and --

17 QUESTION: Well, and then you have the concern
18 that even if the language should be read broadly as you
19 suggest, then what is the effect of the subsequent
20 passage of the Federal Tort Claims Act?

21 MR. PINCUS: Well, Your Honor, we -- even
22 Respondents don't contend that the Tort Claims Act is an
23 implied repeal of Section 702(c), and we think that the
24 proper result would be to read the statutes together,
25 and that section -- that the Tort Claims Act would waive

1 sovereign immunity in the areas not covered by Section
2 702(c). Section 702(c) would be analogous to one of the
3 exceptions contained in the Tort Claims Act, and that
4 area was an area that Congress declined to waive its
5 sovereign immunity.

6 QUESTION: It is kind of curious, isn't it,
7 that the Congress didn't make this an exception when it
8 was making out its exceptions for the Tort Claims Act?

9 MR. FINCUS: Well, Your Honor, we just don't
10 know why Congress might not have done that, but this --
11 it may well be that they knew the statute was on the
12 books and felt it wasn't necessary. There is no
13 indication one way or the other. But certainly there is
14 a list in the Tort Claims Act legislative history of the
15 statutes that the Tort Claims Act was meant to repeal,
16 and this statute is not included among them. And we
17 think, given the high standard that has to be satisfied
18 in order to find an implied repeal, there certainly
19 couldn't be an implied repeal in this case.

20 And we think what Congress was really doing in
21 1928 was embarking on a new venture. It was a very
22 large construction project, the largest kind of public
23 works project the federal government had ever engaged
24 in, and it was a project involved in an area of
25 considerable danger and hazard, as evidenced by the

1 flood that had just occurred the year before, and we
2 think that 702(c) is really read as an insurance clause,
3 to make sure that whatever happened, the entry of the
4 federal government into this area could not be
5 interpreted by any court or anyone else as waiving any
6 aspect of the government's sovereign immunity except to
7 the limited extent that there were certain exceptions in
8 the statute itself. We think Congress just wanted to
9 make very sure that in this expensive and dangerous
10 enterprise there was not going to be any unexpected
11 liability because the cost was already so great that the
12 legislature was concerned that it not be increased.

13 QUESTION: Mr. Pincus, the Millwood project
14 was constructed, as I recall, and a statute enacted in
15 what, 1946?

16 MR. PINCUS: Yes, Your Honor, 1946.

17 QUESTION: And there was no provision in it
18 comparable to Section 702(c).

19 MR. PINCUS: No, Your Honor, there isn't.

20 QUESTION: And how do you reason that 702(c)
21 applies to subsequently authorized dam projects?

22 MR. PINCUS: Well, for several reasons,
23 Justice Powell. First of all, the language of Section
24 702(c) does not restrict its application. It says it
25 applies to damage at any place, and --

1 QUESTION: Are there any other provisions of
2 the Act of 1928 that apply to all subsequent water
3 control projects?

4 MR. PINCUS: No, Your Honor, and we think that
5 is one of the striking differences. Most of the other
6 provisions are restricted to the Mississippi River or
7 the specific projects authorized in the statute, and
8 they contain limiting language of that type. But the
9 immunity language of 702(c) does not contain that
10 particular, any kind of limitation. And also --

11 QUESTION: But is there any other provision in
12 the 1928 act that applies to all subsequent?

13 MR. PINCUS: No, Your Honor. No. I'm sorry.

14 QUESTION: And may I ask one other question in
15 this connection?

16 You cite a number of authorities, Court of
17 Appeals decisions that on the face appear to support
18 your position.

19 Does any one of those address the issue raised
20 here with respect to the Millwood project, or did it --
21 what I am saying is did any of those cases involve a
22 project built under a subsequent statute to the statute
23 of 1928?

24 MR. PINCUS: Yes, Your Honor. We cite both in
25 our opening brief and on page 19 of our reply brief

1 three cases that specifically address the question, and
2 there are --

3 QUESTION: That specifically address the
4 question I have asked you.

5 MR. PINCUS: Yes, and they all hold --

6 QUESTION: All apply 702.

7 MR. PINCUS: -- that 702(c) applies to all
8 statutes, and in fact, there are many other Court of
9 Appeals decisions that do not address the question
10 expressly but that apply 702(c) where it is clear that
11 the project was not authorized under the '28 Act. I
12 think, in fact, that most -- the vast majority of the
13 Court of Appeals decisions that we cite apply Section
14 702(c) to statutes not authorized under the -- to
15 projects, rather, not authorized under the 1928 act.

16 And I just wanted to add one more point in
17 response to your question, Justice Powell. In the
18 debate on the '28 act and in the statute itself, it is
19 clear that Congress viewed this as the first step in a
20 larger flood control project. There are many references
21 in the legislative history to subsequent projects that
22 would be authorized in the future, and the statute
23 itself contains a provision directing the Army Corps of
24 Engineers to study future projects, including projects
25 to control the flooding on the Red River that the

1 Millwood Dam eventually was built to control, so that it
2 is clear that when Congress enacted the '28 statute, it
3 wasn't just looking at those projects, it was aware that
4 it was establishing a new program and that there would
5 be subsequent statutes in the future authorizing
6 additional projects.

7 In addition to the language in the legislative
8 history which we think clearly supports our position,
9 the settled interpretation of Section 702(c) we submit
10 is an additional reason for this Court to construe the
11 statute in our favor. Since the first appellate court
12 construed Section 702(c) in the National Manufacturing
13 Company case in 1954, every Court of Appeals has
14 concluded that the statute bars actions against the
15 United States for damage caused by flood waters. And in
16 other contexts, this Court has observed that it is
17 reluctant to overturn a statute's settled, traditional
18 interpretation where there has been unanimity among the
19 Courts of Appeals.

20 QUESTION: What reason does the Court ascribe
21 for its reluctance?

22 MR. PINCUS: I think the Court has said that
23 where Congress -- well, generally, it promotes a settled
24 interpretation of the law, and also, where there is a
25 settled interpretation, Congress can be assumed or in

1 some cases as been made expressly aware of the
2 interpretation.

3 QUESTION: Have we ever said that it simply
4 can be assumed that Congress knew about it without any
5 indication, that Congress in fact did know about it?

6 MR. PINCUS: I don't think you have said that,
7 but there is an indication in this case that Congress
8 did know about the construction of Section 702(c) to
9 which we refer. In 1960 a private bill seeking recovery
10 for flood damages was referred to the Court of Claims
11 for an assessment by Congress, and the Court of Claims
12 in its report back to Congress specifically noted that
13 the claimants would have no action against the United
14 States at law because Section 702(c) was a settled bar
15 to any tort liability.

16 QUESTION: And was this claim one for property
17 damages or one for personal injury?

18 MR. PINCUS: This was a -- this was a property
19 damage claim, but the Court of Claims did not
20 distinguish between property damage and personal
21 injuries.

22 QUESTION: I just wanted to ask another.
23 Maybe this is the same thing, but is the footnote
24 accurate in the majority opinion, there are 23 cases in
25 all, and only two of them really deal with personal

1 injuries, and those two didn't answer the question
2 squarely? Is that a fair summary?

3 MR. PINCUS: Yes, Your Honor, that's a
4 summary. Let me make two other observations. Those two
5 cases didn't -- did not not address the question because
6 of any concern that the rule might not apply. They
7 didn't address the question for other reasons.

8 QUESTION: There's another reason for granting
9 immunity to the government? I remember, yes.

10 MR. PINCUS: Right.

11 QUESTION: And that the 24 cases that have
12 found immunity have not in any way limited their
13 decision, the rule of decision that they adopt to
14 property damage. They just have not had occasion to
15 address it. And they --

16 QUESTION: But are they not at least
17 consistent with the suggestion that Justice O'Connor
18 made at the outset that if one reads the statute as
19 primarily directed at property damage, those cases just
20 don't shed any light one way or another on the
21 question. You may still be right, but aren't they kind
22 of neutral on the basic issue as to whether the statute
23 should be limited to property damage claims?

24 MR. PINCUS: Well, they are neutral to the
25 extent that they don't expressly hold either way, but

1 certainly they all read the section as very broad. They
2 don't accept -- they don't see the tort immunity as
3 flowing out of any concern with property. They see the
4 tort immunity as an expression of a global congressional
5 concern not to have any liability associated with the
6 project. So I think to that extent they do support our
7 position because they don't -- they don't really look at
8 those cases as property cases. They look at them as
9 liability cases, and they conclude that no liability
10 should be imposed on the government.

11 In view of the clarity and breadth of the
12 language of the statute, we submit that Respondents
13 really bear the burden of trying to find in the
14 legislative history some narrowing principle that would
15 allow them to assert their claims against the
16 government. The Court has stated many times, most
17 recently in the Dimension financial case this term that
18 where the language of the statute is clear, the quest
19 for the meaning of the statute is at an end because it
20 is through the language of the statute that Congress
21 most directly expresses its intent, and here the
22 language of the statute is very clear, and we think that
23 Respondents have to come forward and show clear
24 congressional intent to limit that broad language, and
25 they just haven't done so.

1 Indeed, what is particularly striking about
2 this case is that neither Respondents nor the Court of
3 Appeals have suggested a narrow construction of the
4 statute that is consistent with the language or
5 supported by the legislative history or common sense.
6 They have come up with five or different -- five or six
7 different interpretations of the statute, but that in
8 itself shows that there is no clear congressional intent
9 as to the one limiting interpretation because the
10 parties trying to limit the statute have simply been
11 unable to agree among themselves. And at bottom, we
12 think that Respondents and the Court of Appeals simply
13 disagree with the policy determination that underlies
14 the rule of immunity adopted in Section 702(c) and that
15 their narrow constructions of the statute are designed
16 to implement that contrary policy determination.

17 We submit that those are arguments that should
18 be addressed to Congress, and Congress may well decide
19 that it is appropriate to change the rule. But in light
20 of the plain language of the statute, that course is not
21 available here.

22 I would just like to address briefly, Justice
23 C'Conner, your concern about the legislative history and
24 property damage. It seems to me that one problem with
25 limiting the statutory immunity to tort -- to barring

1 tort liability only when related to property damage,
2 it's difficult to see why Congress -- there is nothing
3 in the legislative history that indicates that
4 particular result. There's nothing that divides tort
5 liability between personal injury and property damage.

6 QUESTION: Well, it's just that the government
7 was immune from personal injury suits at that time;
8 probably didn't think about it very much.

9 MR. PINCUS: But it also would -- it also was
10 immune from property damage liability suits. I mean,
11 that's -- the reason that we think that the provision is
12 best interpreted as a broad assertion of immunity is
13 that there -- it was immune from all these things.

14 QUESTION: But it wasn't immune from takings
15 claims.

16 MR. PINCUS: No, Your Honor, but no one claims
17 that the provision bars actions for damages required by
18 the Fifth Amendment.

19 QUESTION: No, but Congress may have focused
20 on the sort of invasion of property interests that do
21 not amount to a taking but that might nevertheless have
22 given rise to some sort of a claim for property damage
23 in connection with a takings claim more readily than if
24 we are simply looking at the whole spectrum of tort
25 liability.

1 MR. PINCUS: Well, Your Honor, it is possible,
2 but again, that kind of distinction doesn't appear in
3 the legislative history, and it certainly doesn't appear
4 in the language of the statute, and the Court has said
5 in its previous cases that even if -- that are cited in
6 our brief, even where the examples in the legislative
7 history may be limited to a particular area where
8 Congress writes broadly in the statute, then the
9 statute, absent some congressional intent to limit the
10 statutory language, the statute should not be limited to
11 those examples in the legislative history, and we think
12 that is true here, although the legislative history
13 history may have focused on one particular kind of
14 example or another. It also indicates that there was a
15 broad concern with liability of all kinds, and we think
16 that the provision, that the broad language of the
17 statute reflects that and was an intent to just set a
18 firm rule to avoid any questions that might arise in the
19 future.

20 QUESTION: Mr. Pincus, may I ask one other
21 general question?

22 I am kind of puzzled by the fact that although
23 there are some 23 or 24 cases in the Courts of Appeals,
24 that apparently only twice before did this issue even
25 surface, and I don't know whether it means the statute is

1 just as clear as you say it is or whether cases get
2 lost. There's so few cases since the Tort Claims Act
3 was passed, is there a lot of litigation in the District
4 Courts that we just haven't had called to our attention,
5 or is this representative sample correct?

6 MR. PINCUS: Not that I'm aware of, Your
7 Honor. I don't know what the answer might be.

8 QUESTION: Because certainly there must have
9 been a fair number of accidents that are somewhat
10 similar to this. It's a strange situation.

11 MR. PINCUS: If possible, I just -- I can't
12 explain it, and again, I think, I think it equally could
13 be plaintiffs that are deterred because of the statute
14 as anything else, and that may well be the likely
15 answer, and there are not that many appellate court
16 cases, given the long period of time that the statute
17 has been in effect. So that may well explain it.

18 MR. PINCUS: If there are no other questions,
19 I would like to reserve the rest of my time.

20 CHIEF JUSTICE BURGER: Mr. Ward?

21 ORAL ARGUMENT OF T. JOHN WARD, ESQ.

22 ON BEHALF OF RESPONDENTS

23 MR. WARD: Mr. Chief Justice, and may it
24 please the Court:

25 Respondents would like to present two of the

1 arguments set forth in their brief this morning in
2 support of their position. The two arguments that we
3 will present, we contend that Section 702(c) was not
4 contend -- not intended to immunize the government from
5 tort claims from which it was already immune, but
6 rather, it was enacted and the intent was to deal with a
7 special problem created by Congress' decision to
8 compensate certain property owners for certain types of
9 flood damages. And secondly, even if 702(c) does bar
10 ordinary tort claims, it is not applicable to the claims
11 of the Respondents because the Respondents' injuries in
12 this case, these cases, arose from the government's
13 mismanagement of recreational activities, totally
14 unrelated to flood control.

15 Now, we would like to start out and direct the
16 Court to the second argument there, that is, that if we
17 assume for purposes of argument only here this morning
18 that 702(c) does grant immunity, then even assuming
19 that, it doesn't dispose of the Respondents' claims
20 because the immunity has no applications to the
21 Respondents' damages which were caused by the
22 government's negligence in the management of
23 recreational activities unrelated to flood control.

24 QUESTION: Do you think the majority of the
25 Court of Appeals would have agreed with this position of

1 yours, Mr. Ward?

2 MR. WARD: Possibly. I just don't know, Your
3 Honor. I have a hard time -- we did not present that in
4 our brief per se in the Court of Appeals originally. We
5 argued that at the time before the Fifth Circuit, but
6 that was not -- what it went off on is close to it, but
7 I believe that they go -- the Court of Appeals' opinion
8 is broader than what we argued, and what we --

9 QUESTION: Yes, and in -- the decision cast in
10 those terms would not really be an affirmance of the
11 reasoning of the Court of Appeals.

12 MR. WARD: That is correct, not of the
13 reasoning; of the result only.

14 We brought these claims pursuant to the Tort
15 Claims Act, and under the District Court's findings of
16 fact and under the allegations in the Clardy case, it is
17 clear that we are dealing with the government's
18 negligence that is unrelated to flood control, and that
19 they are solely related to the mismanagement of
20 recreational facilities.

21 The government has continued throughout this
22 case to try to ignore the recreational context in which
23 these claims arise. For instance, here this morning
24 we asked about cases, different cases, and about the
25 consistency of the Court of Appeals opinions. There's

1 two cases, only two, that have even sort of addressed
2 it. That was the Hayes case and the Morici case, and
3 their recreation was involved to the extent that the
4 discharge of the water in both cases was for
5 recreational purposes, and they got different results.
6 The Hayes case says the plaintiff can recover when the
7 discharge is solely for recreational cases, and the
8 Morici case says the plaintiff can't recover.

9 So when you -- that's the only two cases that
10 really ever addressed in any way the recreational
11 aspect.

12 QUESTION: Well, but isn't -- isn't there a
13 recreational aspect to almost all flood control
14 projects?

15 MR. WARD: Well, there is now, Your Honor, but
16 that was not true in 1928. That was not even considered
17 in 1928, and no where in the legislative history. The
18 first time that I have been able to find that the
19 government was into -- interested in or authorized to
20 take on recreational activity at flood control projects
21 was in 1946, and I believe that's codified in 16 U.S.
22 Code 460(d). So that was just not a consideration. But
23 it is true that in most flood control projects, they
24 have now taken on the management of recreational
25 facilities as a separate and distinct function for

1 fundamentally different purposes than flood control.

2 QUESTION: Well, but it is still the control
3 of flood waters, isn't it?

4 MR. WARD: Well, the recreational use doesn't
5 have anything to do with flood waters.

6 QUESTION: Well, you -- though you get a
7 recreational use by virtue of backing up waters behind a
8 dam, to keep up the waters.

9 MR. WARD: To that extent, yes, sir, I agree
10 with that.

11 QUESTION: So that there is a considerable
12 relationship between the two.

13 MR. WARD: Well, they have a common place,
14 that is true, Your Honor, that they conduct -- they
15 conduct both activities at the same premises, that is --

16 QUESTION: Well, you wouldn't have the
17 recreational use if you didn't have the flood control
18 dam.

19 MR. WARD: I agree, yes, sir.

20 We rely on the District Court's findings of
21 fact which in summary is they find that the government
22 recognized that it had a duty to provide for the safety
23 of recreational users, it recognized that this duty was
24 continuing, even though they were in flood control, they
25 recognized that specifically, and the findings of fact

1 specifically recognize that the government had installed
2 a system of buoys to warn of the danger of the discharge
3 structure, and on the date of the accident, only one of
4 the buoys was anywhere close to being where it should
5 have been, and it did not provide any warning to a
6 prudent recreational user. The purpose of these buoys
7 had nothing to do with flood control. The government
8 had voluntarily elected to engage in the establishment --
9 establishment, establishment and management of
10 recreational activities, and this was a fundamentally
11 different activity from flood control.

12 The government made this decision to install
13 the system of buoys. The system's only purpose was for
14 the warning of recreational users. The government
15 encouraged the use of these facilities by recreational
16 users, and we urge that 702(c) have a more narrower
17 interpretation than this broad, sweeping interpretation
18 that the government is urging this Court to adopt in the
19 recreational context.

20 QUESTION: Well, Mr. Ward, when you -- it's
21 hard to think of a statute cast in more sweeping terms.
22 As Judge Gee pointed out in his dissent, no liability of
23 any kind shall attach to or rest upon the United States
24 for any damage from or by floods or flood waters in any
25 place.

1 How could Congress have written a broader
2 exemption than that?

3 MR. WARD: If that's all we looked at, I would
4 agree, Your Honor.

5 QUESTION: Well, why, when the legislative
6 history -- when the legislative history is clear, why do
7 you look any further?

8 MR. WARD: I suggest to Your Honor that if you
9 look at the situation such as Justice O'Connor
10 described, that at that time that the government enjoyed
11 complete immunity from tort claims, then the statute in
12 effect is rendered meaningless at the time of its
13 enactment. It's superfluous. That violates some
14 principles of statutory construction that you never
15 presume that Congress puts meaningless language in a
16 statute. It would have had no meaning. It would have
17 laid there dormant from 1928 until 1946 when we acted --
18 enacted the Tort Claims Act, and suddenly, by the
19 breathing of life, if you will, through the Tort Claims
20 Act in this dormant provision, and I am suggesting that
21 they should be read consistently and that we should give
22 consideration to the congressionally declared policy in
23 the Tort Claims Act that the government will be liable
24 for its negligence the same as an ordinary person would.

25 QUESTION: Well, are you saying that there was

1 an implied repeal of 702(c)?

2 MR. WARD: No, no, Your Honor. I am not
3 saying that. I am saying that because of the fact that
4 the statute was superfluous, because of the fact that it
5 had no meaning until you enacted the Tort Claims Act,
6 and the fact that the government had been engaging in
7 activities which would create a risk up until the time
8 of the Tort Claims Act that they never saw fit to
9 codify, that you should look behind the plain meaning of
10 the statute for those reasons, and when you look behind
11 the plain meaning of the statute, I think you will see
12 what Congress' intent was, and it did not consider
13 that. We will get into that in our second point.

14 But the third reason that I believe that we
15 have to limit the application of this statute and its
16 breadth is that we are talking about an immunity
17 statute, and the fundamental principle of immunity
18 doctrine is that you never extend it beyond its
19 justifying purposes.

20 QUESTION: Where do you get that from?

21 MR. WARD: Cases that we have cited there in
22 our brief.

23 QUESTION: Well, name one of them.

24 MR. WARD: Nixon v. Fitzgerald.

25 QUESTION: Well, but that's a kind of an

1 immunity that is created -- announced by this Court.
2 That's not created by statute, is it?

3 ME. WARD: No, no, Your Honor, but I believe
4 it still stands for the proposition that in any immunity
5 doctrine, you're still talking about the function.
6 You're talking about in this case whether or not you
7 will extend the immunity to a fundamentally different
8 function than flood control, that is, the function of
9 recreational management, and in those cases that we cite
10 in our briefs dealing with immunity, you are still
11 talking about whether or not it should extend past the
12 function that was intended and it was justified for in
13 its enactment, whether it be by statute or whether it be
14 by the Constitution in the case of the speech and debate
15 clause.

16 We don't believe there's any justification for
17 extending 702(c) immunity to an activity that is
18 unrelated to flood control, particularly where it didn't
19 engage in the activity, it wasn't authorized by statute
20 until 1946, and when the government voluntarily elects
21 to engage in an activity such as the management of
22 recreational facilities and affirmatively encourages
23 their use, an extension of immunity to those areas would
24 in no way enhance flood control or encourage the
25 government to engage in flood control.

1 Having made the decision, and having
2 physically installed these warning buoys as a system, we
3 believe that the government had a clear duty to maintain
4 these buoys in a non-negligent manner. This has been
5 the rule for over 30 years since this Court announced
6 its decision in Indian Towing v. United States.

7 We believe that when you look at the statutory
8 history, you will see that there was no consideration
9 given to recreational use of flood control activities,
10 there is nothing in there that would suggest that the
11 government considered recreational use at the time, and
12 clearly, to say that you are going to extend immunity to
13 whatever happens on a recreational reservoir or on a
14 reservoir for flood control activities, we believe that
15 that overstates the scope of the immunity, the
16 permissible scope of immunity.

17 In our brief we offered you two examples, that
18 702(c) should not extend to the government's negligence
19 in the management of toxic waste. If you are going --
20 if the government does that and then by reason of its
21 negligence these toxic wastes get into the flood waters,
22 with the breadth and scope that the government tries to
23 say that we ought to apply, there would be no -- there
24 would be total immunity for that. If they elect to go
25 out there on this same reservoir and establish a ferry

1 service and are negligent in the operation of that
2 ferry, the government says that if the person drowns out
3 there on the lake, that is flood waters, you can't
4 recover.

5 We believe that those examples indicate that
6 this particular immunity provision should be construed
7 more narrowly. We just believe it's inconceivable that
8 Congress could have intended the statutory immunity
9 intended for flood control activity to be expanded in
10 the fashion urged by the government, so that it should
11 not be expanded to cover fundamentally different
12 activities undertaken by the government for
13 fundamentally different reason.

14 QUESTION: How could the statute have been
15 more expansive in its absolute terms, Mr. Ward?

16 MR. WARD: I do not believe it could have,
17 intelligence.

18 QUESTION: How?

19 MR. WARD: I say I don't believe that it could
20 have been more expansive, I agree to that

21 QUESTION: Well, didn't it bar all liability?

22 MR. WARD: If --

23 QUESTION: Isn't that the language of the
24 statute?

25 MR. WARD: That is the language of the statute

1 without going further, yes, Your Honor, and we are
2 suggesting though for other reasons that the scope of
3 the immunity should be more narrowly construed. Just as
4 a prosecutor loses his immunity when he engages in an
5 administrative activity or an investigative activity, so
6 should a government agency lose 702(c) immunity when it
7 elects to engage in the management of recreational
8 facilities unrelated to flood control.

9 To some extent, the government appears to
10 contend in the reply brief that our examples are too far
11 removed from the situation of recreational management
12 and that it's fundamentally different from flood
13 control. But we suggest to you if you look at the
14 example of the ferry, that they are saying that they
15 would be liable for the negligent operation of the
16 ferry, the danger that the ferry operator had to
17 navigate around was caused under that example by the
18 discharge of flood waters. So we think that it is very
19 analogous, it is just as -- that the same principle
20 should apply as to that situation as to the recreational
21 users in the instant case.

22 Clearly, we believe that the trial court's
23 findings conclusively establish that the government was
24 negligent in the management of recreational facilities
25 by failing to maintain the buoy warning system which it

1 had elected to install but which the buoys themselves
2 were in no way related to flood control. The only
3 common factor, as I mention, is the location of the
4 premises, and this is not different than a lot of tort
5 cases where you have two actors. In effect, the
6 government is out there doing two different, totally
7 unrelated functions. When you start analyzing it in
8 terms of traditional tort concepts, I don't see any
9 reason that we should extend immunity to such
10 fundamentally different activities.

11 QUESTION: Well, Mr. Ward, I guess the
12 District Courts, though, did find that the damages were
13 caused by flood waters.

14 MR. WARD: They found that one of --

15 QUESTION: They didn't find that damages were
16 caused by operation of the ferry boat on flood waters,
17 they found that here these people were drowned by the
18 flood water.

19 MR. WARD: That is correct, Justice O'Connor,
20 and --

21 QUESTION: So I think that answers part of
22 your argument, I must say.

23 MR. WARD: They also found that the negligence
24 in failing to maintain the buoys was a proximate cause
25 of the injuries as well.

1 We suggest that the appropriate analysis for
2 the Court is to provide that as a question of law, a
3 threshold question would be asked to determine whether
4 or not the government had engaged in activity other than
5 flood control which was a "but for" cause of the
6 Plaintiff's damages. If so, then the case would be
7 tried to the trier of fact on traditional tort
8 principles.

9 This approach, contrary to what the Solicitor
10 argues, would provide the government with a great deal
11 of protection. In virtually all of the Court of Appeals
12 cases that have been reported, the result would be the
13 same, and the government has been winning all of those
14 cases. So I think it is inconsistent to say that, in
15 their brief, that well, we are going to open up this
16 flood gate of claims because with this approach, you
17 wouldn't. You would have the same result in virtually
18 all of the cases. And additionally, the government
19 would still have the discretionary function exemption
20 available to it under the Tort Claims Act.

21 Turning to our other point, we believe that
22 702(c) was clearly intended not to immunize the
23 government against tort claims from which it is already
24 immune, but rather, to deal with special problems
25 created by Congress to compensate certain property

1 owners from flood damage.

2 We know that when you have got any statutory
3 construction, you have got to look at the plain meaning
4 of the statute. We have already talked about the fact
5 that it was superfluous at the time it was enacted.

6 Secondly, if you say we are going to apply
7 this literal meaning rule in this case, you are going to
8 have to have an exception. You are going to have to say
9 we will apply the literal meaning of 702(c) except in
10 the event of constitutional takings because that would
11 render the statute unconstitutional. And then the
12 additional reason that we have mentioned, that is, the
13 statute would have had no meaning, the Tort Claims Act
14 is what gave it life, I think we should consider the
15 policy as announced by Congress and the fact that there
16 were -- the government had been engaging up until the
17 time of the Tort Claims Act in many activities which
18 presented great risk, but at no time did the government
19 see fit to codify the doctrine of sovereign immunity.

20 Now, what was significant about this statute
21 is the fact that for the first time, the government was
22 agreeing to compensate property owners along the
23 Mississippi in two situations, for damages that did not
24 rise to the level of a taking; that is the proviso
25 section of 702(c); and 702(d) damages.

1 Now, the way that statute arose, this was the
2 first time that I found where the government ever agreed
3 to pay for anything other than what the Constitution
4 required in these type of cases. So Congress was very
5 concerned, and these statutes, the 702(c) proviso and
6 the 702(d) damages, came about as a result of a classic
7 case of congressional compromise, if you will. On the
8 one hand, you had the very generous provision that the
9 Senate had enacted in Senate Bill 3740 where they said
10 that -- it was overly generous. They were going to just
11 pay for all sorts of property damages, and one of the
12 things that -- in addition to the constitutional
13 takings, and additionally, they were going to pay for
14 relocating railroads, and that brought about
15 considerable concern in the House.

16 Now, the Senate provision was modified in the
17 House before the debate, so it came to the floor of the
18 House where the actual debate took place, with the
19 Senate's version on the one hand and the administration,
20 the Coolidge administration on the other, which
21 basically said we want to pay for constitutional takings
22 and not a dime more.

23 So what came about was 702(c) and 702(d), with
24 both sides giving some. And 702(c) was enacted as a
25 part of these package of amendments. And in those

1 debates there is no -- never an expression of concern
2 about tort liability. The only concern was about claims
3 that might arise under the overly generous provision of
4 the Senate bill where they were concerned about the fact
5 that they were going to be "fleeced" by local juries in
6 these property damage cases, that they were going to
7 have a situation of paying \$75 an acre for lands that
8 were only worth \$5 an acre. That's what all of that
9 congressional debate. Now, they can take a word out of
10 context, or one sentence, but when you read the entire
11 congressional debate between April 17 and about April
12 24th, it becomes abundantly clear that that was never
13 really considered in those debates; tort liability just
14 didn't come up. The one or two times that it was
15 mentioned was that, well, we know the government is not
16 liable for consequential damages, just very limited
17 mentioning, and then when it was mentioned, it was
18 always with the affirmative statement that we enjoy
19 complete immunity.

20 What we believe that 702(c) did was it
21 answered the administration's concern and some concerns
22 in the House that they would not -- that the extra
23 damages over and above constitutional takings would be
24 limited to those specific situations described in the
25 702(c) proviso, that is, the situation where the damages

1 occur on the opposite side of the river from where
2 levies are built if you can't build them on both sides,
3 and then the intentional diversion of the stream in
4 702(d).

5 And additionally, they were saying that the
6 condemnation provision and procedure set forth in 702(d)
7 would be the only remedy, thereby that was where you
8 would have three Commissioners, and their award would be
9 final, and thereby allaying the fears about all these
10 judicial claims and these local juries. There would be
11 no judicial entitlement or enforcement of 702(c) proviso
12 damages or 702(d) damages.

13 In conclusion, I would call the Court's
14 attention to the statements in the government's brief
15 about the fact that they have over 9,000 of these
16 projects. Now, surely, as they have over 9,000
17 projects, I think it's clear that they have from the
18 same statistics that are available and known, is that
19 they have visitors in the recreational use of over
20 millions of people to these projects, and I think it's
21 clear and we can assume that -- and every time you've
22 got a flood control project, you've got to have a
23 discharge of water, and that the government has elected
24 I'm sure in most instances to install some type of
25 warning system for any dangers.

1 Now, then, the extreme position that the
2 government urges upon this Court is that it would enjoy
3 total immunity for its failure to maintain those warning
4 systems that it has elected to install, that it would
5 expose all, every citizen that visited this recreational
6 facility under the exclusive control and management of
7 the government to being injured or killed from the
8 government's negligence or worse such as we have in the
9 Butler case.

10 We believe that the Court should reject this
11 contention because it's contrary to the congressionally
12 declared policy as set forth in the Tort Claims Act;
13 it's contrary to the fundamental principles of immunity
14 doctrine that should be limited to its justifying
15 purposes; and it's contrary to the actual congressional
16 intent expressed by Congress in the legislative debates
17 when it enacted 702(c).

18 Thank you very much.

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

21 ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.

22 ON BEHALF OF PETITIONER -- Rebuttal

23 MR. PINCUS: A few things, Mr. Chief Justice.

24 First of all, with respect to Respondents'
25 first point, I think the cases that they rely upon in

1 arguing that the statute should be narrowly construed
2 are cases dealing with personal immunity, and the Court
3 has made it quite clear that when the government's
4 sovereign immunity is at issue, precisely the reverse
5 presumption is applicable.

6 With respect to their argument about
7 recreational versus flood control activities, I think as
8 Justice O'Connor pointed out, it's indisputable that the
9 flood waters caused the damage here, and that the damage
10 would not have occurred without the flood waters, and
11 certainly would not have occurred if the flood control
12 project hadn't been in existence, and we think that that
13 is enough for the -- to satisfy the language of the
14 statute which refers to any damage from or by flood
15 waters. Indeed, the release of flood waters that caused
16 the damage here is precisely what Congress would have
17 foreseen as what would happen in the operation of the
18 flood control projects that it was authorizing.

19 And finally, our position also comports with
20 what the Courts of Appeals have decided with respect to
21 this issue. They have all -- the courts that have
22 addressed this question of multiple activities or
23 multiple causation have all stated that the damage must
24 be wholly unrelated to flood control or flood waters in
25 order for Section 702 immunity to be withdrawn, and we

1 think if that --

2 QUESTION: So, Mr. Pincus, if a federal
3 employee was out on the reservoir in a motor boat to
4 carry out his duties and negligently ran over some
5 swimmer, and the swimmer then drowned in the flood
6 water, the government is immune?

7 MR. PINCUS: Yes, Your Honor, as long as the,
8 as long as the flood waters were a legal cause of the,
9 of the damage, which might be --

10 QUESTION: Well, the water in the reservoir
11 filled the lungs of the swimmer, and the swimmer died as
12 a result of being run over by the federal officer.

13 MR. PINCUS: Yes, that's our position, if the
14 two causes were completely unrelated, leaving aside, for
15 example, the intentional tort exception to the Tort
16 Claims Act, if the federal employee shot someone in a
17 boat --

18 QUESTION: No, my example was negligence.

19 MR. PINCUS: No, no, I understand. All I'm
20 saying is if there are two completely independent
21 causes, if the waters are not -- if the damage would
22 have been incurred without the presence of the water, we
23 don't assert that Section 702(c) applies, but if the
24 waters are necessary, then we think that's what Congress
25 intended because the statute represents a decision about

1 competing policies, compensating people versus building
2 this vast project, and we think that Congress decided
3 that in order to embark upon the flood control
4 activities, it had to ensure that its sovereign immunity
5 would be complete, and as a result of that, although
6 there may be people like Respondents who are unable to
7 obtain relief in court, there is a flood control system
8 that protects a great many people from damage due to
9 flood waters, and Respondents have other remedies
10 available. They can seek a private bill in Congress, or
11 they can seek to have the statute amended.

12 That's all I have.

13 CHIEF JUSTICE BURGER: Very well. Thank you,
14 gentlemen. The case is submitted.

15 We will hear arguments next in Atkins v.
16 Rivera.

17 (Whereupon, at 11:50 a.m.; the case in the
18 above-entitled matter was submitted.)
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CERTIFICATION

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#85-434 - UNITED STATES, Petitioner vs. CHARLOTTE JAMES, et al.

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BY Paul A. Richardson

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