

IN THE SUPREME COURT OF THE UNITED STATES

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 MICHAEL N. SHERIDAN, ET UX., :
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 Petitioners. :
 :
 v. : No. 87-626
 :
 UNITED STATES. :
 :
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Washington, D.C.

Tuesday, April 26, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:33 o'clock p.m.

APPEARANCES:

MICHAEL J. KATOR, ESQ., Washington, D.C.; on behalf of the petitioners.

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the respondent.

I N D E X

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ORAL ARGUMENT OF:

PAGE:

MICHAEL J. KATOR, ESQUIRE,

on behalf of the petitioners

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CHRISTOPHER J. WRIGHT, ESQUIRE,

on behalf of the respondents

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MICHAEL J. KATOR, ESQUIRE

on behalf of the petitioners - rebuttal

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P R O C E E D I N G S

(1:33 p.m.)

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3 CHIEF JUSTICE REHNQUIST: We will hear argument
4 now in No. 87-626, Michael Sheridan against the United States.

5 We will wait just a moment, Mr. Kator, until the
6 Court clears.

7 (Pause.)

8 CHIEF JUSTICE REHNQUIST: Very well, Mr. Kator.
9 You may proceed whenever you are ready.

10 ORAL ARGUMENT OF MICHAEL J. KATOR, ESQUIRE

11 ON BEHALF OF THE PETITIONERS

12 MR. KATOR: Thank you, Mr. Chief Justice, and may
13 it please the Court, this statutory construction case
14 presents the question of whether Congress intended that the
15 intentional tort exception of the Federal Tort Claims Act
16 would preclude all suits from which the government
17 negligently failed to prevent an employee from committing an
18 intentional tort.

19 The court below held that this is in fact what
20 Congress intended. Thus the Court below sanctioned a
21 construction that would, for example, absolve the government
22 of its negligence in allowing a child at a federally run day
23 care center to be molested if the assailant happened to be a
24 federal employee, or indeed if the victim couldn't prove that
25 the assailant was other than a federal employee.

1 This construction would also absolve the government
2 of liability for injuries resulting from a weapon possessed
3 in contravention of a federal hospital's regulations if
4 the injuries happened to be intentionally inflicted and if
5 the assailant happened to be a federal employee. This con-
6 struction cannot be correct. Congress could not have
7 intended the government's liability to hinge on such
8 fortuitous circumstances. It could not have intended to
9 create the fine spun and capricious distinctions which this
10 construction requires.

11 QUESTION: Would that necessarily follow? I mean,
12 in the day care center cases couldn't you say that the dis-
13 tinction turns on whether the obligation to the plaintiff
14 arises from the government's status as an employer, or
15 rather arises from the government's status as the runner of
16 the center? Wouldn't that be enough to throw one case into
17 one category and the employment cases into another?

18 MR. KATOR: Certainly, Your Honor. That is
19 essentially the position that the dissent in the Court of
20 Appeals took. It is also a position that the government
21 seems to endorse. That is that the source of the duty
22 controls the applicability of the intentional tort exception.

23 In the day care center case, the government owes
24 its duty to the children at the day care center, not because
25 it may or may not employ the assailant, but because it has

1 chosen to run a day care center, and if indeed they do
2 assume this task voluntarily, then it is hornbook law that
3 they must use due diligence in performing that duty, so yes,
4 certainly you can more narrowly define it and say, yes, the
5 source of the duty determines the applicability of Section
6 2680(h).

7 QUESTION: You don't disagree with that?

8 MR. KATOR: Not at all. That was our principal
9 argument in the Court of Appeals. Duties can arise in one
10 of two ways. They can arise directly to the victim, as they
11 did in the day care center case, where we have children and
12 we will watch out for you, or they can arise indirectly, as
13 they do in a case of, for example, the instances the
14 government cites, where we have to control a mental patient
15 who is dangerous. The government owes that duty to whomever
16 that mental patient may come across and injure, so it owes
17 that duty indirectly, but either way it owes the duty to the
18 victim, and that --

19 QUESTION: You are talking about a duty imposed
20 by state law now.

21 MR. KATOR: Absolutely, Your Honor, not a duty
22 which grows out of the employment, out of the fact of
23 employment of the assailant, but simply a duty imposed by
24 state law, or, as in the day care center case, or in our
25 case, by the promulgation of regulations, a duty which the

1 government imposed upon itself.

2 QUESTION: You suggest the promulgation of
3 regulations by the government gives rise to a source of duty
4 independent of state law. Even if you -- it seems to me you
5 can win this case and still not be correct on that point. It
6 may be that the law of Maryland would say that government
7 regulations make someone negligent per se for violating them.
8 I don't know if the Federal Tort Claims Act itself creates
9 a -- imposes a duty by virtue of government regulations.

10 MR. KATOR: The Federal Tort Claims Act would
11 impose duty -- would impose liability on the United States
12 if there would be liability in Maryland. Maryland does follow
13 the doctrine of per se negligence and holds that if regula-
14 tions or statutes are adopted for the protection of person
15 and property and they are violated, then that can give rise
16 to an action for negligence, negligence per se.

17 But you're quite right in saying that the Federal
18 Tort Claims Act does not necessarily create the negligence
19 per se claim.

20 We did principally argue in the court below that
21 it was the source of the duty that controlled, but we also
22 argue here, as the Ninth Circuit has held, that indeed the
23 statutory language is broader than has been attributed to it
24 by, for example, this Court in Shearer.

25 The Ninth Circuit held that Congress intended to

1 distinguish between intentional torts and negligent acts.
2 Intentional acts were excluded from coverage and negligent
3 ones were included, and that is the distinction that the
4 Ninth Circuit held, allowing claims for what are character-
5 ized as negligent supervision to go forward, while saying,
6 no, you may not hold the government responsible under the
7 theory of respondeat superior for the intentional torts of
8 its agents.

9 QUESTION: If the Ninth Circuit is completely
10 right, then you really wouldn't be giving full meaning, it
11 seems to me, to 2680(h). You wouldn't need the provision
12 that the waiver of governmental tort immunity doesn't apply
13 as it is set forth there.

14 MR. KATOR: There would be a distinction between
15 the -- if I understand your comment, you are suggesting that
16 2680(h) is somehow broader than simply for assault.

17 QUESTION: Well, as I understand it, it's an
18 exception to the liability imposed by the Federal Tort Claims
19 Act.

20 MR. KATOR: Yes.

21 QUESTION: Which makes the government ordinarily
22 liable for negligence.

23 MR. KATOR: Yes.

24 QUESTION: And so if there wouldn't be liability
25 for negligence in the first place in this situation, you

1 wouldn't need 2680(h).

2 MR. KATOR: I see. Well, Your Honor, I think
3 again what you have to do in that respect is go back into
4 the historical perspective and see what Congress was con-
5 sidering when it was enacting this particular provision. And
6 what it was looking at was the fact that, A, there was a
7 distinction between negligent supervision and intentional
8 torts, and B, many commentators, some states, were expanding
9 the doctrine of respondeat superior to reach intentional
10 torts simply as a matter of social policy. And the govern-
11 ment cites and we cite to legislative history where the
12 committee is stating, let's take it step by step. Let's
13 proceed cautiously. Let's forestall adoption of the
14 liability for intentional torts until considerable
15 experience is had under the Act, and we submit that what
16 Congress was talking about there was wanting to forestall
17 the inclusion of respondeat superior for intentional torts
18 of government agents, and that is all they were talking
19 about.

20 That is why Congress saw it was necessary to
21 say that, because some states do allow it. The Congress
22 didn't have the benefit, obviously, of this Court's
23 decision in Laird versus Nelms. It may have assumed that
24 these -- this conduct, wrongful conduct may have been
25 attributed to the United States.

1 So that, I submit, is what Congress was after in
2 adopting that language.

3 We have spoken briefly about the source of duty,
4 and we have briefed that fully. The only other point I'd
5 like to make about that is that it, unlike any of the
6 analyses the government has put forward, is consistent with
7 underlying tort law, which the Federal Tort Claims Act was
8 modeled after, and it doesn't have the internal consistencies,
9 it doesn't have all the exceptions popping up that we have
10 to navigate our way around. That is the central advantage
11 of the scope of the duty argument.

12 The final point I would like to make would be just
13 to address myself briefly to the government's argument, which
14 is that the intentional tort exception doesn't apply when
15 an excluded action is an essential element of the claim.
16 That argument is inconsistent with -- first of all, it's
17 inconsistent with Panella, which says that federal
18 employees -- non-federal employees who commit intentional
19 torts, that is not outside the scope. Those acts are just
20 as essential to a claim as would be the claim of a federal
21 employee having committed that identical assault.

22 It is also inconsistent with the source of the duty
23 argument which the government endorses. There is no reason
24 to say that this failing to control a prisoner or mental
25 patient and allowing him to commit assault is not an

1 essential element of a claim for negligence. That doesn't
2 follow. And another point that we raised in our brief which
3 I think is also important here is that the government
4 characterizes the language as, when governmental conduct
5 is essential, an essential element, and frankly, we don't
6 have here governmental conduct. What we have here is con-
7 duct of an individual who happens to be a federal employee,
8 and there is, quite obviously, a distinction between the
9 two.

10 QUESTION: But if he had been in a private
11 hospital, you clearly -- and had done the same things he
12 did, and the people had failed to restrain him, you would
13 have no action against the government, you concede, don't
14 you, even though he is in the service?

15 MR. KATOR: Sure. There would have to be a duty
16 on the part of the government. The duty on the part of
17 the government here arose out of the promulgation of regula-
18 tions. It arose out of three of its agents finding this
19 particular assailant roaming around the hospital in a
20 drunken state, brandishing a firearm. That's where the
21 government's duty arose in this case. It couldn't -- you
22 know, at least it wouldn't seem that it could arise in a
23 private hospital with private employees with private
24 regulations.

25 Certainly a claim would lie against the private

1 hospital.

2 QUESTION: You would have a suit against the
3 hospital but not against --

4 MR. KATOR: Exactly, and if you have a suit against
5 the hospital, the primary motivation of the Federal Tort
6 Claims Act, as made clear in the statutory language, was
7 to hold the United States liable in situations where it would
8 be liable if it were a private citizen, so that is something
9 that the government conceded in the court below, that indeed
10 all the facts being the same here, if this were a private
11 individual instead of the government, there would be
12 liability, and that's crucial.

13 QUESTION: But that isn't -- that isn't the
14 object of the Act, to the extent it has that exception. I
15 mean, a private individual would be held for claims arising
16 out of assault, battery, false imprisonment, false arrest,
17 et cetera, all the exceptions in (h). I mean, obviously (h)
18 intended to do something different from what would happen
19 to the private individual. Isn't that right?

20 MR. KATOR: What I submit that (h) intended to do,
21 Your Honor, again was to say, you may have respondeat
22 superior liability for intentional torts in this state.
23 You will not have it against the United States. We are
24 simply not comfortable with that potentially limitless
25 incursion of liability onto the United States.

1 That's what we submit.

2 QUESTION: So you think the only effect of that
3 language is that in all government employment situations
4 the claim for assault by a government employee will now not
5 be based on respondeat superior but a claim of negligent
6 failure to supervise?

7 MR. KATOR: If such --

8 QUESTION: You can bring all of those things
9 whenever there's a government employee, so long as you
10 allege negligent failure to supervise?

11 MR. KATOR: We made two arguments. Our first
12 argument, that the statute is that broad, yes, that would
13 be a viable claim. You could say the government was
14 negligent in failing to prevent this, and if you could prove
15 it, if you could prove that the government was negligent,
16 then there's no reason to suggest that Congress intended to
17 withhold liability in that situation.

18 QUESTION: Except when they use the term "arising
19 out of assault," you are giving it a very, very narrow
20 meaning. Certainly your client's claim arises out of
21 assault. There is not the slightest doubt about that.

22 MR. KATOR: Your Honor, that's correct. It
23 arises out of assault, and if it were not for the fact that
24 it also arose out of antecedent negligence, then you could
25 say that it arose only out of assault, but --

1 QUESTION: The statute doesn't say, "arising only
2 out of assault." It says, "arises out of assault."

3 MR. KATOR: What the statute says is, "arising out
4 of assault," and what arising means, if you look in the
5 dictionary, which is the first place we must look when we are
6 construing these statutes, arising means originate or
7 spring up. This claim, this injury, even, originated in the
8 government's negligence. That was the first step.

9 So if you're going to look at arising out of and
10 focus very narrowly on exactly what the words say, then we
11 submit it must go to the genesis of the claim, not to the
12 immediate act which preceded the injury. So, no, I don't
13 see that our reading of "arising out of" is in any way incon-
14 sistent with Congress's intent or artificial in any sense.

15 QUESTION: Had there not been an assault, there
16 wouldn't have been any case, would there?

17 MR. KATOR: That's correct, Your Honor. There's
18 no question that the assault is a cause in fact.

19 QUESTION: And that's arising out of.

20 MR. KATOR: And it is one of the elements --

21 QUESTION: It's arising out of.

22 MR. KATOR: I guess my answer to that is, it's
23 arising out of in the -- in the sense that, yes, that is a
24 central -- it's an element which is a cause in fact, but my
25 interpretation of arising out of says, don't look at the

1 most immediate act. But go back and look at the genesis of
2 the claim.

3 QUESTION: When he was born?

4 MR. KATOR: Well, I'm sure that there are some
5 limitations, Your Honor, but my point would be that we can
6 isolate governmental conduct, which is a cause in fact of
7 this injury, and the first negligent governmental act
8 presumably is where the claim arises. That may be more a
9 semantic argument than anything else, because principally
10 it's clear what Congress was after, if you look again in
11 the historical perspective. Congress was trying to forestall
12 respondeat liability for an intentional tort, and if that is
13 what they're doing, then it's perfectly acceptable to read
14 "arising out of" as the genesis of which, or indeed as the
15 Shearer court said, read it as for assault, because that
16 is indeed what Congress was after.

17 I think unless the Court has any more questions I
18 might answer, I'll just reserve my time for rebuttal.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kator.
20 We will hear now from you, Mr. Wright.

21 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQUIRE
22 ON BEHALF OF THE RESPONDENT

23 MR. WRIGHT: Thank you. Mr. Chief Justice, and
24 may it please the Court, I'd like to begin with the
25 language of the statute, where we recently ended. It does

1 indeed refer to any claim arising out of battery, and I
2 think as Justice Marshall just pointed out, without the
3 battery in this case there would be no claim. Certainly
4 Mr. Carr's action in taking a rifle and shooting it at the
5 petitioner's car is where this claim originated.

6 QUESTION: But this isn't an action for an
7 assault. It's an action for negligence, and it is claimed
8 that the -- that without the negligent act there never would
9 have been an assault.

10 MR. WRIGHT: That's right, and it's also true that
11 without the assault, without the battery there wouldn't be
12 a claim, either, and this Court has said and held in Block
13 v. Neal that where a claim is an -- where an action is an
14 essential element of the claim, the claim is part --

15 QUESTION: Did Block hold that, or did Neustadt?

16 MR. WRIGHT: Block held that in distinguishing
17 Neustadt.

18 QUESTION: What do you do with the escaped mental
19 patient, who assaults someone? There is negligence in
20 letting him escape, and it is perfectly clear that if he
21 escapes, he will assault someone. Liability or no
22 liability?

23 MR. WRIGHT: Well, under Panella, the government
24 is liable, or section -- the intentional tort exception
25 doesn't bar that claim.

1 QUESTION: Why not?

2 MR. WRIGHT: Because the Court --

3 QUESTION: Doesn't it arise out of the assault in
4 the same way?

5 MR. WRIGHT: The Second Circuit in 1954 essentially
6 read the phrase "committed by a government employee" into
7 the statute. It is right there on Page 624 of the opinion.
8 The government has not quarreled with that gloss on the
9 statute in the last 34 years.

10 QUESTION: But at least in terms of your literal
11 argument it is equally inconsistent with it, isn't it?

12 MR. WRIGHT: Well, that's right, and I will say that
13 if -- Mr. Kator points to a number of difficult lines that
14 are to be drawn, all of which I would submit are caused by
15 that gloss on the statute. We don't think that those line
16 drawing problems are particularly difficult. They
17 occur in a fairly small number of cases. The vast bulk of
18 cases where the government is to be held liable are inten-
19 tional torts committed by employees.

20 If the choice is between the gloss on the statute
21 and the words of the statute, we think it's the gloss that
22 has to go, but we think that the statute can -- that the
23 gloss added the phrase "committed by a federal employee"
24 is not something that has caused great problems over the
25 last 34 years.

1 I'd also, while discussing the extremely sweeping
2 language of this statute like to point to the Court's
3 opinion in Kosak, too, where the Court -- where the whole
4 issue, the dispute between the majority and the dissent was
5 whether "arising in respect of" is as broad as "arising out
6 of," which everybody agreed was simply extremely broad
7 language.

8 Petitioners have made three arguments designed to
9 evade the sweeping language of the statute, and I'd like to
10 address each in turn. Their broadest argument is their
11 argument that Congress meant to bar claims involving batteries
12 only when the plaintiff asserts that the government is liable
13 under respondeat superior.

14 There is no basis for the distinction petitioners
15 urge and that the Ninth Circuit has reasonably found. The
16 language of the statute arising out of, any claim arising
17 out of assault and battery doesn't hint at a distinction
18 between respondeat superior and negligent supervision, as
19 four Members of this Court noted in Shaarer, and as
20 petitioners demonstrated in their brief, and noted a few
21 minutes ago, both theories, respondeat superior and
22 negligent supervision, were known to courts at the time the
23 Federal Tort Claims Act was passed in 1946.

24 QUESTION: But the gloss words "committed by a
25 federal employee" does kind of remind us of respondeat

1 superior, doesn't it?

2 MR. WRIGHT: Well, but of course negligent
3 supervision claims arise most frequently for a tort
4 committed by an employee. Section 317 of the restatement of
5 torts sets out the broadest case where someone can be
6 responsible for the tort -- for the intentional tort of
7 another, and that frequently occurs when an employee is
8 diligently supervised. We have reprinted Section 317 in
9 a footnote in our brief, but the language covers both. If
10 Congress had intended to limit it in some way, it could have
11 done so, as the plurality noted in Shearer, by saying any
12 claim for assault and battery, because a respondeat superior
13 claim is a claim for the battery rather than arising out
14 of the battery.

15 If that's what Congress had meant, especially
16 since it was well known that there were these two theories
17 at the time the Act was passed, we think Congress would have
18 done something to make that clear, and it certainly didn't.

19 QUESTION: Let me just go back for a second to my
20 mental patient. If the mental patient were a government
21 employee, the case would be different than if the mental --
22 both of them, assuming they're in a government hospital, and
23 one case involves an assault by an escaped mental patient
24 who is an employee and the other an escaped mental patient
25 who just happens to --

1 MR. WRIGHT: Well, that's the hardest case, and
2 that is where the line has to be drawn.

3 QUESTION: Would you give a different result in the
4 two cases?

5 MR. WRIGHT: I have two responses to that. First,
6 if you take the gloss added in Panella seriously, as if it
7 were really part of the statute, then in the one case where
8 with the government employee the intentional tort exception
9 would bar the suit, in the other case, where there's a non-
10 employee, the intentional tort exception would not bar the
11 suit.

12 That, we think, is a perfectly reasonable reading
13 of what Congress might have meant. After all, the Court in
14 Panella didn't just grab committed by a federal employee out
15 of thin air, as I might say some of the other exceptions
16 that have been proposed do come out of thin air. It looked
17 at what Congress was doing in 1946, and it is true that
18 Congress was focusing on torts committed by federal
19 employees. That was what was uppermost in their mind. The
20 postal truck hitting a pedestrian was the prime case Congress
21 was after.

22 I might note that if a postal driver purposely
23 runs over somebody, the intentional tort exception bars that
24 claim, which certainly would seem anomalous from the stand-
25 point of the person who got hit, who suffers the same injury

1 whether or not the driver negligently hit him or intentionally
2 ran him over, and in cases like that the pedestrian has to
3 argue that the -- in order to collect, that the postal driver
4 intentionally hit him -- did not intentionally hit him,
5 wasn't out to get him. So there is that anomaly that flows
6 from the language of the statute.

7 We think it's reasonable, Congress could well have
8 decided, as the Panella gloss has it, that Congress wanted
9 to preserve sovereign immunity in those vast bulk of cases
10 where an intentional tort was committed by a federal
11 employee.

12 QUESTION: But on your intentional, your driver
13 intentionally running over somebody, supposing he does it
14 20 times and his boss knows it and keeps him on the job.
15 There would be no claim against the boss for negligent
16 supervision or negligent hiring, on the ground that each --
17 the totality of the facts all arise out of intentional tort.

18 MR. WRIGHT: Well, that would be fight.

19 QUESTION: You think it's quite clear Congress
20 would not have wanted liability in that extreme situation?

21 QUESTION: Well, I can't believe that that par-
22 ticular example would actually happen.

23 QUESTION: Well, but that's basically the underly-
24 ing theory of all these cases, that there was notice to the
25 government that the person might commit an assault if he

1 were not adequately supervised, and all the rest of it.

2 MR. WRIGHT: Right. Well, I think that the 1974
3 amendment to the Act makes quite clear that Congress under-
4 stood the Act to bar negligent supervision claims. After all,
5 what the 1974 amendment did was, it's an exception to the
6 exception, so that when batteries are committed by law
7 enforcement officers under certain circumstances the govern-
8 ment becomes liable, and the background of that amendment was
9 that there were several incidents of no-knock raids repeated
10 over time. As the Court noted in Shearer, these obviously
11 flowed from negligent supervision of the policemen doing
12 that, and the amendment --

13 QUESTION: But there's a proviso. There's
14 liability on the respondeat superior authority, isn't there?

15 MR. WRIGHT: Excuse me?

16 QUESTION: Am I wrong in thinking under the
17 proviso there's a liability under respondeat superior. You
18 don't have to prove negligent supervision. All you have
19 to do is prove the law enforcement officer committed that
20 one illegal search.

21 MR. WRIGHT: Well, within the scope of his
22 employment.

23 QUESTION: Right.

24 MR. WRIGHT: Or committed a battery within the
25 scope of his employment.

1 QUESTION: Correct.

2 MR. WRIGHT: It is actually much more difficult
3 to prove that a battery was --

4 QUESTION: But there doesn't have to be any
5 negligent supervision, is what I am trying to say.

6 MR. WRIGHT: Well, that's right, but the exception
7 waives that as well, and indeed it's the negligent super-
8 vision cases that are far the greater number of cases. It
9 was very unusual in 1946 --

10 QUESTION: Surely you can forgive Justice Stevens
11 for thinking that that maybe was all that it waived. I mean,
12 you say it waives that as well. Maybe that's all that it
13 waived, because -- although you say that Congress under-
14 stood that the rest couldn't be sued on. Maybe Congress
15 understood the rest could be sued on, and the only reason
16 they added this was so you could get the FBI agent who
17 though properly supervised goes crashing in and commits
18 an intentional tort.

19 MR. WRIGHT: Well, one would have thought that
20 Congress would have said something about that, especially
21 when the background seems to me to plainly be one of remedying
22 negligent supervision cases rather than respondeat superior
23 cases.

24 QUESTION: On the facts of this case if -- his
25 name was Carr, the man that committed the assault?

1 MR. WRIGHT: Yes.

2 QUESTION: If he'd have been a law enforcement
3 officer, what result?

4 MR. WRIGHT: Well, he wasn't. I have to remind
5 myself of the exact words of the proviso.

6 It appears that if he had been a law enforcement
7 officer, then the government would be liable, or stated
8 another way, the intentional --

9 QUESTION: For negligence?

10 MR. WRIGHT: Well, liable for the injury caused
11 to the -- caused to the petitioners, which, yes, there would
12 still have to be shown to be some negligence somewhere.

13 QUESTION: But then you are suing for negligence.

14 MR. WRIGHT: That's right. But the intentional
15 tort exception doesn't apply in that case. We admit --

16 QUESTION: You are quite wrong, aren't you? There
17 wouldn't have to be negligence. It would just be the
18 intentional tort of the law enforcement officer who shot
19 the gun.

20 MR. WRIGHT: Well, under the basic provision of
21 the Federal Tort Claims Act you have to show a negligent
22 or wrongful act by some government actor.

23 QUESTION: Well, Justice Kennedy is hypothesizing
24 a law enforcement officer who did exactly what the --

25 MR. WRIGHT: I'm sorry. Okay.

1 QUESTION: And that would just -- all he has to do
2 is prove that's who he was and he shot the guy.

3 MR. WRIGHT: I stand corrected. If a federal law
4 enforcement officer got drunk and started shooting people,
5 I think that that's wrongful, and we wouldn't need to show
6 any additional negligence. Of course, even if -- if it were
7 close to the line as to whether or not the battery was
8 negligent or reasonable, nevertheless if it was a sort of
9 repeated situation where this particular officer kept making
10 these kinds of mistakes, you could establish liability to show
11 that he was negligently supervised, and that these sorts of
12 incidents were occurring with great regularity, and establish
13 liability on that basis.

14 The proviso just reads the exception out of the Act
15 in certain cases.

16 I'd like to note that petitioners say that one
17 of the advantages of their rule is that there are no line-
18 drawing problems. That is because, I would submit, there
19 would be very few cases in which the government would --
20 where the intentional tort exception would bar liability, and
21 as was pointed out, the whole point of the intentional tort
22 exception is to bar government liability in cases where a
23 private party would be liable under the same circumstances.

24 We don't think a --

25 QUESTION: That isn't right, is it? There must be

1 a lot of cases in which a government employee without any
2 notice to any of its supervisors or any reason for the
3 government to expect this to happen goes out and beats
4 somebody up. That is just a typical assault and battery
5 one-incident case. There would be no government liability.

6 MR. WRIGHT: You would have to show it was within
7 the scope of employment, and the dissenting judge below --

8 QUESTION: Well, he is driving a mail truck or
9 something like that, gets in a fight, in a traffic dispute
10 or something of that kind. These things happen.

11 MR. WRIGHT: Well, those cases, the courts are
12 divided on those cases as to whether that is within the
13 scope of employment. It is by no means --

14 QUESTION: Well, but this makes it perfectly
15 clear there will be no liability in that kind of case,
16 even if it is in the scope of employment.

17 MR. WRIGHT: It does do that, but of course the
18 government might not --

19 QUESTION: And I would submit there must be quite
20 a number of those cases where there really isn't any
21 colorable basis for claiming negligent supervision or
22 negligent employment. They have no notice of this thing
23 going to happen.

24 MR. WRIGHT: Well, when a government employee
25 commits a battery, it is always alleged that the employer

1 should have known that.

2 QUESTION: Yes, I know, but they have to prove it.
3 People can make false allegations.

4 MR. WRIGHT: And the fact that the employee was
5 hired, and did this terrible thing usually goes a long way
6 to proving that he was negligently supervised.

7 I'd like to point out in this connection, I think
8 it's useful to take a look at exactly what the law is on
9 when people can be responsible for batteries committed by
10 third parties. The restatement sections, 315 to 320, set
11 that out in some detail, and it's worth noting that Section
12 315 is quite clear that there's no general duty to prevent
13 someone from committing a battery. It's only where a
14 special circumstance exists, and Section 317, as I mentioned,
15 is one of those that sets out the employer-employee relation-
16 ship, and employers are liable for intentional torts
17 committed by their employees outside the scope of their
18 employment under that section in a number of circumstances.

19 And I'd like to note that under Panella, under the
20 Panella gloss we think it quite clear at least that the
21 government can never be liable under Section 317. We think
22 that it's enough that if the tort was committed by a federal
23 employee, it's plainly -- the action is plainly barred. But
24 in any event, it is certainly the case that the plaintiff
25 cannot bring a suit based on the fact of the

1 employee-employer relationship or anything like that, and I
2 think that petitioners agree with that. They, however, just
3 sort of broadly state that of course the owner of the
4 hospital in this case would be liable even if Carr were just
5 a drunk who wandered in off the street.

6 We don't think that that's clear at all, and
7 petitioners have never specified where they think that
8 result comes from. Nor did the dissenting judge below, who
9 seemed to assume it as well, although the majority plainly
10 agreed with us.

11 There are only a handful of exceptions, and none
12 of them apply here. There is no parent-child rule, or
13 anything else of that nature.

14 Finally, I'd like to turn to the Doe v. United
15 States argument, the argument that -- is that when there is
16 a special relationship to protect -- a special duty to
17 protect the victim, that those cases are different than
18 others.

19 The Seventh Circuit in January did indeed
20 essentially agree with that reading, and read, as the
21 dissent in that case pointed out, the phrase "except where
22 the government has a special duty to protect the victim"
23 into the statute, that's based on Section 320 of the
24 restatement of tort, which says that in such circumstances
25 people can be liable for batteries committed by others.

1 We think, first, that that case was wrongly
2 decided, that unlike the gloss added by the Court in Panella,
3 the court -- the Seventh Circuit in Doe v. United States
4 simply did not identify any basis in the history or
5 structure of the Federal Tort Claims Act for the -- for what
6 it was reading into the Act, and petitioners haven't identi-
7 fied any other reason for reading such an exception into the
8 Act.

9 QUESTION: I thought the -- if you are questioning
10 what the basis of the government's responsibility here
11 would be if it wasn't just the employment, I thought what
12 they are contending is the adoption of regulations, which
13 perhaps they didn't have to be adopted, but the government
14 was a volunteer, and of course it's an old tort theory that
15 if you act as a volunteer you'd better do it right.

16 MR. WRIGHT: Well, that's right, and that's our
17 second argument here, that in any event the special duty
18 argument doesn't arise here because contrary to
19 petitioner's -- the enactment of a regulation, the
20 regulation in this case anyway doesn't come close to
21 establishing a duty to protect petitioners.

22 Under restatement section 320 you have a special
23 duty to protect your wards, people you are custodians of,
24 like children in a day care center.

25 QUESTION: That all goes for the basis of

1 imposing liability, which is a matter of state law. I
2 don't think that has anything to do with 2680(h).

3 MR. WRIGHT: Well, that's true. And our first
4 argument is that 2680(h) bars the claim on that basis. But
5 we don't think that the Court actually even needs to reach
6 the issue of the day care center type case, because the
7 facts here are so short of showing any special duty to
8 protect the victim that -- the Court of Appeals essentially
9 dismissed this argument in one paragraph, and we think
10 correctly, because there's just no basis here.

11 The Navy was never the custodians of petitioners.
12 Petitioners were driving down a public street in their
13 car. The regulation prohibits the keeping of firearms in
14 the barracks. It doesn't prohibit the keeping of firearms
15 anywhere else. The regulation was not aimed at protecting
16 petitioners.

17 Mr. Kator mentioned negligence per se in connection
18 with the regulation. Negligence per se has nothing to do
19 with this sort of claim. Negligence per se is used to con-
20 clusively show negligence on the part of the actor in
21 certain cases. If Carr had kept the gun in his barracks
22 and it had discharged and injured someone, negligence per se
23 would be used to show that Carr was negligent. Carr's
24 culpability is not at issue here. He was more than
25 negligent, and the fact that the Navy --

1 QUESTION: He didn't have the rifle by assignment.
2 He got it surreptitiously, didn't he?

3 MR. WRIGHT: He kept it in his barracks.

4 QUESTION: Wasn't that against the rules?

5 MR. WRIGHT: It was against the rules.

6 QUESTION: And couldn't that be negligence?

7 MR. WRIGHT: For him it --

8 QUESTION: Couldn't it be negligent that they
9 allowed him to do it?

10 MR. WRIGHT: Certainly it could be.

11 QUESTION: Well, you just say it's not there.

12 MR. WRIGHT: It's not negligence per se that that
13 aspect doesn't add anything to the case. The government
14 Carr was definitely negligent. The government could have
15 been negligent for not finding out, but we don't think
16 negligence per se analysis adds anything to this case. We
17 don't think it would make any sense, moreover, for the Navy
18 to become liable because --

19 QUESTION: I think the Navy is liable for allowing
20 people to take guns when they are not authorized to take them
21 if they are loaded.

22 MR. WRIGHT: He wasn't allowed to have the gun in
23 the barracks, and he did so.

24 QUESTION: And if it hadn't been for that, these
25 people wouldn't have been injured.

1 MR. WRIGHT: That's true, but it seems that the
2 regulation hardly matters one way or another here. If the
3 Navy hadn't had the regulation, it would seem backwards to
4 make the Navy liable because it enacted this sort of
5 regulation if it wouldn't have been liable in the absence
6 of the regulation.

7 QUESTION: I just don't want anybody giving
8 people rifles. That's all. Unless there's a reason for
9 it.

10 MR. WRIGHT: It is certainly the case that if
11 Carr did not have a rifle, and did not get drunk and start
12 shooting at Metro buses and cars passing by, no injury
13 would have resulted here.

14 QUESTION: Mr. Wright, I am trying to find some
15 justification for the Panella gloss other than the gloss
16 itself. I'm not very happy with the notion that if
17 somebody who breaks out of a mental institution because of
18 poor supervision is a government employee you can't sue the
19 government but if he is anything other than a government
20 employee you can. That seems to me purely an accidental
21 distinction.

22 Would it be possible -- I mean, you seem to be
23 resigned to the gloss, if not enthusiastic about it.
24 Wouldn't it be a better gloss to say that if the govern-
25 ment's negligence consists of its negligence in its capacity

1 as an employer versus its negligence in its capacity as
2 something else, why couldn't one adopt that gloss just as
3 easily, if not more likely?

4 MR. WRIGHT: That is a gloss on the gloss. We
5 prefer just reading the gloss in its plain meaning, if you
6 will. I would like to point out, however, that if you add
7 that gloss to the gloss, certainly then any negligent
8 supervision claim based on the employment relationship goes
9 out the window, and that -- to our mind that includes all
10 of this case. It certainly includes much of it. It
11 certainly includes the claim made in the complaint that
12 hasn't been repeated today that the Navy should have known
13 that Carr was psychologically unstable and taken some step
14 to do something about it, since that was based on the
15 employee-employer relationship, and any other -- and most
16 of the other claims, it seems to us, could only have a chance
17 to succeed ultimately if they were based on Section 317 of
18 the restatement. Has that been responsive, Justice Scalia?

19 QUESTION: More than adequate.

20 MR. WRIGHT: Excuse me?

21 QUESTION: More than adequate.

22 MR. WRIGHT: Thank you.

23 If there are no further questions, thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.

25 Mr. Kator, you have 14 minutes remaining.

1 ORAL ARGUMENT OF MICHAEL J. KATOR, ESQUIRE

2 ON BEHALF OF PETITIONERS - REBUTTAL

3 MR. KATOR: Well, I hope I won't need them all,
4 Your Honor, but I guess my first point was, I'm sure that
5 there are a lot of people in Washington, D.C., who would be
6 surprised to know that regulations at Bethesda Naval are not
7 enacted for their protection. I submit that they are. In
8 any event, that is a question for the District Court.

9 Justice Kennedy, you asked the question, what if
10 the assailant had been an FBI agent, what would be the
11 liability in this case, and the government said, well, if
12 he is an FBI agent, therefore you could sue him directly for
13 his intentional tort.

14 I don't think that that's correct. The legislative
15 history of the 1974 amendment makes it quite clear that
16 Congress was only waiving that with respect to FBI agents,
17 law enforcement individuals acting within the scope. Now,
18 there is nothing in 2680(h) that says acting within the
19 scope, yet there is quite a bit elsewhere in the Federal
20 Tort Claims Act that says that. I believe it is 2674 and
21 1346(b) certainly says within the scope.

22 You asked about the Panella gloss and where does
23 it come from. Where it comes from is reading these
24 provisions together. There is nothing in 2680(h) admittedly
25 that says it has to be a federal employee who commits the

1 intentional tort, but it is all over 1346(b) and it is all
2 over the rest of the Federal Tort Claims Act. Indeed, what
3 Congress was concerned with was federal employees acting
4 within the scope of their employment, and that's the gloss
5 that needs to be read into Panella, not federal employees,
6 not people who happen to be federal employees, but people
7 who are federal employees, and it matters that they are a
8 federal employee, i.e., they are acting within the scope of
9 their employment.

10 If you apply that gloss, if you will, you end up
11 where we submit Chief Judge Winter was in the court below.
12 He says, if there is an independent duty, then the government
13 must be held to it. Now, I don't want to forsake my argu-
14 ment that the Ninth Circuit is correct because I believe
15 that they are. Historically, if you look at it, this is
16 what Congress was up to. It wanted to say, no respondeat
17 superior for intentional torts. That's what we're after in
18 2680(h). Negligent claims may proceed. That's what
19 Congress was doing.

20 But you know, as to which of our claims survive
21 depending on which, if any, of these arguments the Court
22 adopts, certainly our first claim of the Navy knew or should
23 have known that this man posed a threat would not be able
24 to survive if the Court only went with the scope of the duty.

25 The scope of the duty would focus on whether there

1 is a duty independent of the employment status, and that would
2 be gone if you are talking about duties that arise solely
3 out of employment.

4 On the other hand, of course, if you go with the
5 Ninth Circuit approach, the broader approach, negligent
6 supervision is allowed. There is no reason to distinguish
7 between the two, between negligent supervision and any other
8 kind of tort claim, and therefore that case may proceed.

9 Those are our two principal allegations. We
10 present arguments which take the statute straight down.
11 You follow the statute, you end up with a result. If you
12 take the government's argument, you do a lot of this, you end
13 up with all kinds of exceptions, you end up with all kinds
14 of anomalies. They suggest that it is merely line drawing,
15 and is an acceptable amount. It is clearly not.

16 Doe versus United States demonstrates the total
17 lack of principle in the government's argument. You
18 simply can't say, well, if you can't prove that he was
19 other than a federal employee you are out of here when in
20 fact the government's duty is the same, the breach of the
21 duty is the same, the injury is the same. It simply doesn't
22 make sense. It is inappropriate to attribute that intent
23 to Congress.

24 If there are no further questions.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kator.

1 The case is submitted.

2 (Whereupon, at 2:19 o'clock p.m., the case in the
3 above-entitled matter was submitted.)

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DOCKET NUMBER: 87-626
CASE TITLE: Sheridan v. U.S.
HEARING DATE: April 26, 1988
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court.

Date: May 2, 1988

Margaret Daly

Official Reporter

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