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PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

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

CAPTION: UNITED STATES, Petitioner v.

THERESE A. BURKE, CYNTHIA R. CENTER AND  
LINDA G. GIBBS

CASE NO: 91-42

PLACE: Washington, D.C.

DATE: January 21, 1992

PAGES: 1 - 43

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 91-42  
THERESE A. BURKE, CYNTHIA R. :  
CENTER AND LINDA G. GIBBS :

Washington, D.C.  
Tuesday, January 21, 1992

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

APPEARANCES:

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Petitioner.  
JOSEPH E. FINLEY, ESQ., Baltimore, Maryland; on behalf of  
the Respondents.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 91-42, United States v. Therese  
5 A. Burke.

6 Mr. Minear.

7 ORAL ARGUMENT OF JEFFREY P. MINEAR

8 ON BEHALF OF THE PETITIONER

9 MR. MINEAR: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 The issue in this case is whether a taxpayer  
12 must include in her gross income amounts received in  
13 settlement of a title VII wage disparity suit. We submit  
14 the settlement award is gross income because it amounts  
15 simply to delayed payment of wages for services. Those  
16 wages should be taxed in the same manner as if they had  
17 been paid when earned.

18 The facts of this case are not in dispute. The  
19 taxpayers were female employees of the Tennessee Valley  
20 Authority. In 1984, the TVA was sued under title VII on  
21 the theory that it had increased the salaries of employees  
22 in certain male-dominated pay schedules without providing  
23 comparable increases to employees in certain  
24 female-dominated pay schedules. The complaint sought  
25 specific relief in the form of an order directing TVA to



1 eliminate prospectively the pay disparity and to provide,  
2 quote, back pay to all affected female employees in an  
3 amount sufficient to eliminate discrimination.

4 In 1987, the plaintiffs and TVA settled the  
5 lawsuit by entering into a settlement agreement. The  
6 taxpayers in this case shared in the settlement proceeds.  
7 TVA made payments to them, and in accordance with the  
8 terms of the settlement agreement, withheld amounts for  
9 Social Security and Federal income taxes. The taxpayers  
10 then filed claims for refund of the withheld taxes. The  
11 Internal Revenue Service disallowed those claims.

12 The taxpayers then brought this refund suit.  
13 They argue that the settlement payments should be excluded  
14 from gross income under section 104(a)(2) of the Internal  
15 Revenue Code, which states that gross income does not  
16 include, quote, the amount of any damages received on  
17 account of personal injuries or sickness. The district  
18 court rejected their claim; however, the court of appeals  
19 reversed.

20 The majority reasoned that title VII awards  
21 constitute damages on account of personal injuries or  
22 sickness because injuries resulting from discrimination  
23 are, quote, injuries to the individual rights and dignity  
24 of the person. Judge Wellford dissented. He concluded  
25 that title VII awards should be included in gross income

1 because they simply amount to a payment of wages for  
2 services.

3 We submit that Judge Wellford is correct. An  
4 equitable award of back pay is compensation for services.  
5 The Court recognized that principle in Social Security  
6 Board v. Nierotko, where it held that a back pay award  
7 under the National Labor Relations Act is subject to  
8 Social Security taxation. As the Court stated there,  
9 surely the back pay is remuneration. The same is true  
10 with respect to title VII back pay, which was patterned  
11 after the NLRA remedy.

12 Thus, the taxpayers back --

13 QUESTION: What if the taxpayer had been  
14 wrongfully dismissed because of race or sex and then sued  
15 to get back --

16 MR. MINEAR: We submit the same result would  
17 follow. Nierotko was --

18 QUESTION: Be payment for services?

19 MR. MINEAR: Yes, that's right.

20 QUESTION: But you would not have provided any  
21 services.

22 MR. MINEAR: That's right. But this was the  
23 very issue that was involved in Nierotko, actually. That  
24 was an unlawful discharge case also. And in Nierotko, the  
25 Court held that the person remained in the service of the

1 employee where he had been wrongfully discharged. The  
2 Court stated that services are -- that one remains to  
3 provide services even though one might not be active.

4 QUESTION: You're playing with words, it seems  
5 to me. Of course -- I mean, you can say he remained in,  
6 quote, in the service of the employer, but did not provide  
7 any services.

8 MR. MINEAR: Well, that's correct. But that was  
9 the issue that this Court faced in Nierotko and decided  
10 that in fact those were wages for services.

11 QUESTION: Well, would you give the same answer  
12 if there were a physical injury caused to an employee and  
13 the recovery is measured on the basis of lost wages?

14 MR. MINEAR: No, we would not. That is the very  
15 distinction we draw between personal injuries and wages  
16 for services. That where a person is unable to perform  
17 the service, that he has been disabled, in those cases  
18 he's receiving damages by the amount of the lost wages.

19 QUESTION: Well, how about a suit for sexual  
20 harassment?

21 MR. MINEAR: In those cases, title VII did not  
22 provide a monetary remedy for those types of cases in the  
23 past.

24 QUESTION: Well, under the new legislation are  
25 you going to have to face that question?

1 MR. MINEAR: Yes, I suspect that we will face  
2 that question.

3 QUESTION: And what's the position you would  
4 take?

5 MR. MINEAR: I don't believe that the IRS has  
6 had an opportunity to formulate a formal position on that,  
7 but I think the same principles would be applied in this  
8 case. We would look to whether there has been what  
9 amounts to a capital loss of some kind for the -- on  
10 behalf of the employee. If the employee, for instance,  
11 suffered emotional injury, that is a type of injury that  
12 is recognized by the Service as being within the 104(a)(2)  
13 exclusion.

14 QUESTION: You think the Treasury regulation  
15 puts forward the same approach that you're urging us to  
16 adopt here?

17 MR. MINEAR: Yes, that is correct.

18 QUESTION: It doesn't read that way. It says  
19 the phrase damages received means an amount received  
20 through prosecution of a legal suit based on tort or  
21 tort-type rights.

22 MR. MINEAR: Yes. And I think that that  
23 regulation is referring specifically to what we mean by  
24 the term damages received. It's not speaking to what we  
25 mean by a personal injury. And I think the important



1 distinction that that regulation is making -- which, by  
2 the way, appears on page 12 of our reply brief -- the  
3 important distinction that that regulation is making is  
4 between a damage remedy and a remedy for equitable relief,  
5 for specific relief.

6 It says the term damages received means an  
7 amount received through prosecution of a legal suit or  
8 action based on tort or tort-type rights.

9 QUESTION: Well, why isn't a suit brought, as in  
10 this case under title VII, a suit for damages based on a  
11 tort-type right?

12 MR. MINEAR: Because instead, Your Honor, that  
13 is a suit for equitable relief, for specific relief. What  
14 title VII provides is an equitable remedy for specific  
15 relief in the form of reinstatement and an additional  
16 award of back pay.

17 QUESTION: Can't you get damages as a form of  
18 relief?

19 MR. MINEAR: This -- I would look to the same  
20 distinction that this Court drew in *Bowen v. Massachusetts*  
21 between -- the term damages and the term specific relief.  
22 Damages are provided as a monetary substitute for a loss,  
23 while specific relief is provided as the very thing to  
24 which the plaintiff is entitled. And in fact, in *Bowen*,  
25 the majority opinion used the back pay award as an example

1 of that type of specific relief where a monetary award is  
2 provided.

3 Now as I was saying, the taxpayers' back pay  
4 award in this case falls squarely within the Internal  
5 Revenue Code's definition of income, which expressly  
6 includes compensation for services. And the only question  
7 then is whether some other provision of the code  
8 nevertheless removes back pay from that definition.

9 As a starting point, we note that this Court has  
10 repeatedly stated that exclusions from income must be  
11 express and not implied. And this Court has repeatedly  
12 emphasized that even express exclusion should be construed  
13 with restraint in light of Congress's policy to tax  
14 comprehensively.

15 Now there is no express exclusion for title VII  
16 back pay awards, and we believe that the court of appeals  
17 erred in construing section 104(a)(2) as providing that  
18 kind of exclusion.

19 QUESTION: So, Mr. Minear, if Congress in  
20 enacting title VII had provided for damages for this sort  
21 of discrimination and allowed a jury trial so that  
22 Albemarle would have come out the other way, then this  
23 award would be excluded?

24 MR. MINEAR: Not necessarily. That only passes  
25 the first hurdle here. The question in front must first

1 be damages. And it also must be received as compensation  
2 for personal injuries or sickness. So there still would  
3 have to be a determination whether the damages were  
4 received as compensation for personal injury. And that  
5 would be the remaining question. And that would depend on  
6 the gravamen of the complaint.

7 QUESTION: Mr. Minear, the phrase we're talking  
8 about here is: on account of personal injuries or  
9 sickness. Why did the Government abandon its original  
10 interpretation of that in which personal injuries would  
11 mean physical injuries? I mean, when you say personal  
12 injuries or sickness, it seems to me -- the phrase feet or  
13 inches, you wouldn't think that feet referred to a part of  
14 the human anatomy, given the word feet as used with  
15 inches. And when you say personal injuries or sickness, I  
16 mean, it obviously connotes to me physical injuries.

17 MR. MINEAR: Well, I agree with you.

18 QUESTION: And the Government used to take that  
19 position.

20 MR. MINEAR: It took that position in 1920, I  
21 think.

22 QUESTION: Why did it abandon that high ground  
23 and now try to argue that somehow the word personal  
24 injuries means expenditure of capital?

25 MR. MINEAR: Well, I think the original --

1 QUESTION: I mean, it just does not connote  
2 that, frankly.

3 MR. MINEAR: Yes, I agree with you, Your Honor,  
4 with regard to that point. It becomes even stronger when  
5 one looks to the original language of the 1918 statute.  
6 And in 1920, based on that language, the IRS took the  
7 position that personal injuries meant physical injuries.  
8 However, that same year, this Court decided the case of  
9 Eisner v. Macomber, and that indicated, at least  
10 suggested, that income for purposes of the Sixteenth  
11 Amendment referred only to gains from labor or capital.

12 The IRS, looking at that definition,  
13 reconsidered this question, and it said, well, regardless  
14 of what what is now section 104(a)(2) might say, this  
15 wouldn't be income in any regard because a damage award is  
16 not a gain from labor or capital. That is the approach  
17 that continued. In other words, that the exclusion here  
18 just became irrelevant, based on the Service's view of the  
19 meaning of income. That question was finally resolved in  
20 1955, when this Court decided Glenshaw Glass, and made  
21 clear that income includes all accessions to wealth.

22 Nevertheless, the interpretation of personal  
23 injury somehow carried on. And I think the best example  
24 of this was a case --

25 QUESTION: I thought it was not until something



1 like 1983 that the Government acquiesced in the  
2 proposition that the phrase goes beyond physical injuries.  
3 Am I wrong about that?

4 MR. MINEAR: Well, actually the first  
5 case -- that was the first court of appeals opinion,  
6 Roemer, the Ninth Circuit case, I think is the first court  
7 of appeals case where that was squarely decided. It also  
8 arose in a tax court case in 1972 called Say v.  
9 Commissioner. Now perhaps the IRS made the mistake of not  
10 pressing that argument further and continuing to draw the  
11 line between physical injuries and other types of  
12 injuries.

13 However, by that time there had been this  
14 accumulation of practice, you know, from the -- as a  
15 result of the original Eisner decision. And the IRS  
16 instead decided to expand slightly the definition of  
17 personal injury to include what are analogous nonphysical  
18 injuries. And it was a limited set until the last few  
19 years. This included only defamation or injury to in the  
20 case of emotional distress.

21 QUESTION: Logic will out, Mr. Minear. It might  
22 have been a limited set for a while, but logic will out.

23 MR. MINEAR: Well, that's true and that is a  
24 difficulty we continue to struggle with. Nevertheless,  
25 that is the position the Internal Revenue Service has

1 taken.

2 I would like to go back and just clarify a few  
3 points with respect to this distinction between damages  
4 and specific relief, because I do think it's important.  
5 And it is reflected in the D.C. Circuit's recent decision  
6 in Sparrow v. Commissioner.

7 QUESTION: Mr. Minear, can I ask you a  
8 preliminary question before that?

9 MR. MINEAR: Yes, Your Honor.

10 QUESTION: The court of appeals placed heavy  
11 reliance on a decision called Threlkeld against the  
12 Commissioner, a 15 to 1 decision of the tax court. You  
13 don't even cite that case in either your principal brief  
14 or your reply brief. And that case said we should look  
15 at the origin of the claim rather than the results in  
16 terms of damages and the like.

17 Why don't you have anything to say about  
18 Threlkeld? And what's your view of that case and the  
19 analysis in that case?

20 MR. MINEAR: Your Honor, the Threlkeld, at its  
21 most general level, that you looked at the nature of the  
22 injury, I think is correct. And we do distinguish  
23 between --

24 QUESTION: You look at the nature of the injury  
25 rather than the consequences in terms of damages or back

1 pay or results. Isn't that right?

2 MR. MINEAR: Why, and it's that latter point  
3 that I have some difficulty with here, because I think  
4 that leads to a certain amount of confusion. The question  
5 in Threlkeld, it was attempting to deal with a difficulty  
6 that had originally arisen in the Roemer tax court  
7 decision. And in Roemer the tax court had tried to make a  
8 distinction between personal reputation and business  
9 reputation, saying that one could get an exclusion for  
10 injuries to one's personal reputation, but not to one's  
11 business reputation.

12 And what Threlkeld did, and I think quite  
13 correctly, was eliminate that distinction and said no, we  
14 simply look to the fact that there was an injury to one's  
15 reputation. That's as far as we need to go. And I think  
16 that's what Threlkeld really stands for. Judge Wellford  
17 makes this very point in his dissenting opinion below.

18 But I think that it's mistaken to suddenly to  
19 exclude any consideration of what type of injury was  
20 actually suffered here, and that's how it is being used by  
21 respondents, I believe. The injury that was actually  
22 suffered in this case was a underpayment of earnings. The  
23 female employees were not paid as much as their male  
24 counterparts.

25 QUESTION: Well, you can't really say that

1 that's the only injury, can you?

2 MR. MINEAR: Well, that was the only injury that  
3 title VII provides recompense for. And I think that's  
4 significant, too, that the settlement award has to be based  
5 on the cause of action that's allowed under title VII.  
6 Now, title VII provided for equitable relief in the form  
7 of reinstatement and back pay sufficient to make the  
8 person's earnings whole. The back pay award is simply  
9 part of the specific relief that is --

10 QUESTION: So even if he was -- even if he  
11 suffered great embarrassment and he worried a lot, lost a  
12 lot of weight, things like that?

13 MR. MINEAR: Title VII does not --

14 QUESTION: And title VII just isn't designed to  
15 recompense --

16 MR. MINEAR: Until recently amended, it was not  
17 designed to compensate for that. Now the new provisions,  
18 the Civil Rights Act of 1991, actually do provide a damage  
19 remedy. And as I said, the distinction there will be  
20 between damages that are in fact personal injuries and  
21 those that are not.

22 QUESTION: So what's going to -- I suppose we'll  
23 have another case up here under the new act.

24 MR. MINEAR: Well, it's always possible that the  
25 Government will win these cases, and I think that with



1 respect to the personal injuries aspect of this, I think  
2 the question will focus on what is the nature of the  
3 particular injury. If there is something akin to  
4 emotional distress, for instance, it seems to me that the  
5 IRS has already provided the proper analogy.

6 QUESTION: And up until now, the -- title VII  
7 has never allowed recovery for emotional distress.

8 MR. MINEAR: That's correct. That's correct.  
9 And I think it's also interesting to note that all of this  
10 entire matter here is a matter of rather recent origin.  
11 For many years, there was no question that back pay awards  
12 under the NLRA were in fact included as gross income.  
13 These cases have all arisen in the past few years,  
14 actually. And it's been a --

15 QUESTION: Under the new statute, Mr. Minear, is  
16 there a jury trial provided -- under the new statute?

17 MR. MINEAR: I believe that a jury trial is  
18 provided. That is correct.

19 QUESTION: Would that change your position so  
20 that this would become legal and not equitable?

21 MR. MINEAR: Well, again, I think the question  
22 here is we shouldn't allow the existence of a jury trial  
23 to determine that question but rather the nature of the  
24 cause of action that's provided. And in the cases where  
25 you're receiving money as a substitute for loss, it seems

1 to me that those are damages. And again, that only  
2 answers the first half of our question.

3 Now, I'd like to turn to the --

4 QUESTION: I'm sorry, but I would like to ask  
5 one further question. You say that if it's an  
6 underpayment of wages, that's the easy case. And then you  
7 answered Justice Scalia by saying if there was also a  
8 discharge, you'd treat it the same. What about a refusal  
9 to hire?

10 MR. MINEAR: Well, in the case of a refusal to  
11 hire, it might be that there's no monetary award that  
12 title VII provides under its equitable remedies. What it  
13 provides would be in fact a requirement the person be  
14 hired.

15 QUESTION: Well, assume under the new statute we  
16 got a refusal. Would you draw a different --  
17 analytically, would you draw a distinction between a  
18 refusal to hire and a discharge?

19 MR. MINEAR: Why, I think that, again, insofar  
20 as the pay is -- is what the person is receiving is  
21 compensation that they should have received --

22 QUESTION: For work performed.

23 MR. MINEAR: -- for work performed.

24 QUESTION: So, that doesn't cover the discharge,  
25 either.

1 MR. MINEAR: Yes, but in the discharge cases, I  
2 said in Nierotko the Court took a rather broad view of  
3 what is service --

4 QUESTION: He's constructively working.

5 MR. MINEAR: -- as constructive work. It might  
6 be appropriate --

7 QUESTION: But you couldn't say he's  
8 constructively working in he'd never been hired. That's  
9 why I asked the next question.

10 MR. MINEAR: Yes. And why -- I'm not sure what  
11 our position would be on that, quite frankly.

12 QUESTION: (Inaudible) have to be right now.

13 MR. MINEAR: Well, that's true. And in this  
14 case, I think it does bear emphasis that in this case the  
15 employees did continue to work for the TVA and the back  
16 pay is definitely here, wages for work that was performed.

17 QUESTION: What all this suggests, at least, is  
18 if we're looking for bright lines, I suppose your opponent  
19 has a brighter line than you do.

20 MR. MINEAR: But their bright line, with all  
21 respect, Your Honor, is quite far removed from what the  
22 statutory language is here, which is damages received on  
23 account of personal injury or sickness.

24 QUESTION: Right.

25 MR. MINEAR: Now the ordinary meaning of the

1 term personal injuries or sickness does not embrace, as  
2 the court of appeals would have it, I think, every legally  
3 cognizable injury. And that is the reductio ad absurdum  
4 of their position, that every injury would in fact be  
5 covered -- every legally cognizable injury to an  
6 individual would be covered. As various courts and  
7 commentators have observed, the term personal injury has a  
8 more limited meaning. And as a result of various tax  
9 court rulings, the Internal Revenue Service has applied  
10 the term to certain analogous nonphysical injuries,  
11 primarily injury to one's reputation and injury to one's  
12 emotional well-being, that, like physical injuries, can be  
13 roughly related to a loss of human capital.

14 We think it's clear, however, that the taxpayers  
15 here did not receive that kind of loss. The resulting  
16 settlement agreement here provided for specific relief in  
17 the form of certain affirmative action and also back pay.  
18 And the monetary award -- the monetary portion of that  
19 award clearly compensates wages for services.

20 Now, the Government's position here is not only  
21 reasonable, it also consistent with prevailing law and  
22 produces a just result. As I noted earlier, this Court  
23 has already concluded in *Nierotko* that a back pay award is  
24 a payment of wages for purposes of FICA taxation. There  
25 would be -- there is no reason to depart from that rule in



1 the case of Federal income taxation.

2           Additionally, the IRS has consistently treated  
3 back pay awards under other statutes, such as the Fair  
4 Labor Standards Act, as gross income. We simply urge that  
5 a title VII back pay award be treated in the same manner.  
6 And to hold otherwise would produce anomalous results. If  
7 earnings received through a back pay award had been paid  
8 when earned, they certainly would have been subject to  
9 taxation. There's no reason why the earnings should now  
10 become tax exempt simply because they are paid at a later  
11 date.

12           Indeed, if the court of appeals's approach were  
13 followed, the Federal Government would end up subsidizing  
14 discrimination. An employer could engage in wage  
15 discrimination, and if sued under title VII, make up the  
16 difference in wages through a back pay award based on  
17 after tax earning, which would make the employee whole --  
18 whole. And it could then pocket the taxes that should  
19 have been paid. And we do not believe that Congress  
20 intended to provide that sort of tax reward or incentive  
21 for unlawful discrimination.

22           I would like to reserve the remainder of my  
23 time.

24           Thank you, Your Honor.

25           QUESTION: Very well, Mr. Minear.

1 Mr. Finley, we'll hear from you.

2 ORAL ARGUMENT OF JOSEPH E. FINLEY

3 ON BEHALF OF THE RESPONDENTS

4 MR. FINLEY: Mr. Chief Justice, and may it  
5 please the Court:

6 I detected at the outset a really --  
7 misstatement of the question presented that has veered  
8 from what I thought we addressed in our briefs. Counsel  
9 for the Solicitor General and for the Government talked  
10 about it as a accession to wealth or gross income case.  
11 We all agree that it would be an accession to wealth.  
12 This is a question of exclusion by section 104(a)(2) from  
13 taxation. It's an exclusion case. And to reach the  
14 exclusion case, we have to look at the statute, and that's  
15 where this case begins. And the regulation that follows  
16 thereunder.

17 And the statute says in language that one may  
18 think clear until we start bouncing it around, but the  
19 statute says, excluding the amount -- the amount -- of any  
20 damages received on account of personal injuries. Now, a  
21 regulation follows --

22 QUESTION: Or sickness.

23 MR. FINLEY: Yes, but sickness wasn't involved  
24 in this case, and I'm trying to confine it to this case  
25 and the scope of the problem.

1                   Now, the regulation comes. It's the  
2 Government's regulation, not ours, a regulation which we  
3 are entitled to follow and entitled to honor because the  
4 regulation is in accord with the statutory language. And  
5 the regulation helps to expound and expand what is  
6 excluded. And 26 CFR 1-104-1(c) excludes the amount of  
7 any damages received on account of personal injuries.  
8 Then it goes further to make an express definition. The  
9 term damages received means an amount received -- we're  
10 not talking about legal or equitable; it's an amount  
11 received -- through prosecution of a legal suit or action.  
12 Through prosecution of an action.

13                   In this case, the underlying case was an action  
14 brought in court to redress the wrong of sexual  
15 discrimination. And it says, through prosecution of a  
16 legal suit or action based upon a tort or tort-type  
17 rights. And we suggest and argue and present that the  
18 inquiry must be focused on those terms, used by Congress,  
19 and used by the Treasury. And the facts of this case fit  
20 exactly into the statutory language and the regulation,  
21 point by point, step by step.

22                   QUESTION: Mr. Finley, the Government says, and  
23 I think accurately, that that definition is just a  
24 definition of damages, that the -- the regulation that you  
25 read. And they're not relying for their point in this

1 case upon the word damages, although the D.C. Circuit in a  
2 recent case did. They are relying on the words personal  
3 injuries.

4 MR. FINLEY: Well --

5 QUESTION: So that definition really doesn't  
6 help you. It's a definition of damages.

7 MR. FINLEY: Well, if they are relying on  
8 personal injuries, and I struggle to determine what their  
9 position really is. In the reply brief, the Government  
10 says that we can't establish that a personal injury was  
11 involved. Now, it seems to me the analogy may be drawn  
12 readily from this Court's ruling in Goodman v. Lukens  
13 Steel. And this poses a hypothetical to which I don't  
14 believe the Government has an answer. And in fact, its  
15 whole argument treats Goodman v. Lukens Steel as it never  
16 existed.

17 In Goodman v. Lukens Steel, there was a combined  
18 section 1981 case and a title VII case. It was the same  
19 wrong, the same injury complained of. The case proceeded  
20 under section 1981 through the district court and the  
21 court of appeals because obviously there was a wider,  
22 broader remedy.

23 Now this Court has held, and it's undisputed,  
24 that in section 1981 claims and title VII claims, the  
25 gravamen of the injury is the same, the proof required is



1 the same, the treatment is the same. And the bottom line  
2 is that the only difference in those statutes in  
3 application in a practical world is the actual remedy.

4 Now, this Court earlier said in Davis v. Passman  
5 that you must separate the wrong from the remedy. And  
6 that's what we believe clearly, clearly the statute  
7 provides and the regulation.

8 Now to answer your question further, Justice  
9 Scalia, and go back to the 1981 analogy, in our particular  
10 case -- let's take that. If the taxpayers in this case  
11 had been black persons instead of females, they could have  
12 brought the same action under section 1981. The same  
13 wrong would be complained of, the same proof would have  
14 been necessary, and the result -- let's say the outcome or  
15 the settlement was based -- same dollars, same everything  
16 else, except this is under section 1981.

17 So the question becomes if a violation of  
18 section 1981 is a personal injury, there -- and it's also  
19 a part of title VII, discrimination is a personal injury.  
20 And this Court in Goodman made a ringing affirmation that  
21 discrimination is a personal injury. And it cannot be  
22 said otherwise. And I can't understand the Government  
23 saying otherwise. And so the Government has not  
24 unequivocally answered the question, was a -- is a  
25 violation of title VII a personal injury.

1 QUESTION: Well, Mr. Finley, in what context was  
2 the statement used in the case you're referring to -- the  
3 discrimination is a personal injury?

4 MR. FINLEY: In Goodman?

5 QUESTION: Yes.

6 MR. FINLEY: It was racial discrimination, Your  
7 Honor.

8 QUESTION: But what was the question the Court  
9 was answering?

10 MR. FINLEY: Well, the question obviously in the  
11 case was a statute of limitations question. That was the  
12 --

13 QUESTION: So they were trying to decide whether  
14 the statute of limitations would be the personal injury  
15 statute?

16 MR. FINLEY: That is correct. And the Court  
17 first had to decide -- if it was a personal injury, you  
18 apply the personal injury statute of limitations of the  
19 State of Pennsylvania in Goodman v. Lukens Steel. The  
20 Court made that decision, and affirmatively stated that it  
21 was indeed a personal injury.

22 QUESTION: Well, do you think a statement like  
23 that in a case where we're trying to find the proper  
24 statute of limitations and States categorize statutes of  
25 limitations -- frequently one will be for personal --

1 necessarily carries over body and soul into this area of  
2 the law?

3 MR. FINLEY: Yes, sir. My answer is clear cut  
4 and unequivocal on that. It does because we are  
5 addressing -- and we come back again to 104(a)(2), which,  
6 as the inquiry before the Court today -- because it is a  
7 commission of a tort or tort-type right created by  
8 statute.

9 QUESTION: But there you're relying on the  
10 regulation, of course. Now the Government interprets the  
11 regulation differently than you do. Under our cases,  
12 isn't it -- isn't the Government entitled to some  
13 deference for the way it interprets the regulation?

14 MR. FINLEY: I don't know how the Government --  
15 I don't believe it's entitled to deference. If it departs  
16 from what the regulation states, and it's doing that in  
17 this case.

18 QUESTION: It's saying what it thinks the  
19 regulation means.

20 MR. FINLEY: Yes, it is saying that, but where  
21 is the support for it? I see no support because the  
22 language is clear and unequivocal, and we follow that  
23 language that it's an amount received based upon a tort or  
24 tort-type right. And the Court has held, and that's  
25 why the Goodman v. Lukens Steel is so important. We come

1 back to Davis against Passman, where the Court found that  
2 a -- discrimination on the basis of gender was a violation  
3 of a personal right. And the remedy was somewhat  
4 different.

5 QUESTION: Can you think of any rights that are  
6 not personal, Mr. Finley?

7 MR. FINLEY: We can think of -- the right to  
8 contract --

9 QUESTION: That is not a personal right?

10 MR. FINLEY: It doesn't come under the statute  
11 because it's not a tort-type right.

12 QUESTION: Well -- but you're using language  
13 from Davis against Passman, in which you say the Court  
14 said it was a personal right. And I'm asking you isn't it  
15 rather difficult to conceive of any right that isn't  
16 personal? What does personal right mean?

17 MR. FINLEY: A right that inures to the person  
18 as a human being in the eyes of the law. And the law is  
19 going to establish what that right means.

20 QUESTION: And then what would be a right that  
21 is not personal under that definition?

22 MR. FINLEY: Well, it might be a contract right  
23 but -- because the contract right is not involved in what  
24 we are confronted with, the exclusionary language of the  
25 statute and the regulation.



1 QUESTION: A right to contract would not be a  
2 right that inures to the person? To whom would it inure,  
3 then?

4 MR. FINLEY: Well, it would in that sense inure  
5 the person. But I don't think, again, it resolves the  
6 question before us here in this case, because we are  
7 dealing -- and we must come back to that over and over  
8 again, because the statute and the regulation and, whether  
9 the Government tries to interpret it differently or not,  
10 we still have a definition of an amount received through  
11 prosecution of a legal suit or action based upon a tort or  
12 tort-type claim. And the underlying claim in this case  
13 was a claim of discrimination.

14 QUESTION: Mr. Finley, what if -- is it any more  
15 within the meaning of the statute, or any less within the  
16 meaning of the statute a damages on account of personal  
17 injuries if, instead of being discharged -- wrongfully  
18 discharged by reason of sex, a plaintiff is wrongfully  
19 discharged in violation of the National Labor Relations  
20 Act?

21 MR. FINLEY: Your Honor, I would apply the  
22 National Labor Relations Act situation and look at it to  
23 ask the question is it a tort or tort-type right. And in  
24 that context, to answer you specifically, I think that  
25 question ought to be revisited, and we could find and hold

1 that it is a personal injury.

2 QUESTION: I think we could. I think probably  
3 minimum wage, failure to pay someone a minimum wage. That  
4 seems to me a tortious act, too. Don't you think?

5 MR. FINLEY: It's more nearly in the contract  
6 area, but it could be.

7 QUESTION: How much tax money are talking here?  
8 Do we have any idea?

9 MR. FINLEY: In this particular case?

10 QUESTION: Well, no. If we --

11 MR. FINLEY: I don't know.

12 QUESTION: If we recategorize all of these  
13 things as damages on account of personal injuries -- I  
14 mean, all those have been excluded: minimum wage  
15 violations, NLRA violations.

16 QUESTION: You agree with that, don't you?

17 MR. FINLEY: Sir?

18 QUESTION: You agree with that, don't you?

19 MR. FINLEY: That it would broaden --

20 QUESTION: No, that these categories have been  
21 excluded?

22 MR. FINLEY: In past holdings and past rulings?

23 QUESTION: Well, in NLRB cases, wrongful  
24 discharge.

25 MR. FINLEY: The only court decision --

1 QUESTION: They're not excluded. They're not  
2 excluded -- from taxation?

3 MR. FINLEY: I would not agree to that. I would  
4 not agree to that. Because I don't think that question's  
5 been answered as yet.

6 QUESTION: It's been the practice, though,  
7 hasn't it?

8 MR. FINLEY: Well, in practice, that's been the  
9 case. And the situation here, as Mr. Minear pointed out,  
10 as I have experienced, since this case was brought, the  
11 law has been in an evolving state.

12 And the cases have been coming down, and there's  
13 been an examination and reexamination of the statute and  
14 the regulations, as the full tax court did just a few  
15 months ago in the Downey case -- which again, the  
16 Government seems to ignore because the tax court in the  
17 Downey case in July or August of 1991, after this case was  
18 decided, reviewed the history of 104(a)(2), the purposes  
19 of it, exclusion, the place where you start the inquiry,  
20 and incidentally, concluded over and over again that the  
21 Burke case in the Sixth Circuit, our case here, was  
22 rightly decided and the basis of the tax court's treatment  
23 in the future should be these standards set by the court  
24 of appeals below. And the tax court reversed a string of  
25 prior holdings in the Downey case.

1 QUESTION: So the only actions you would exclude  
2 are contract actions. Do you have any other actions that  
3 you think don't come within this principle of personal  
4 injuries?

5 MR. FINLEY: If they can be defined as personal  
6 injuries, they meet the statutory and the regulatory  
7 language, and then the problem becomes --

8 QUESTION: But you think contract actions don't?

9 MR. FINLEY: I think that's right.

10 QUESTION: They do not. They are not personal  
11 injuries.

12 MR. FINLEY: They are not personal injuries.

13 QUESTION: Okay. Well, what about a suit for  
14 wrongful breach of -- a tort suit for wrongful breach of  
15 statutes, which some State -- some States have now.

16 MR. FINLEY: Or a tort case interference with  
17 contractual relations?

18 QUESTION: Right. Right.

19 MR. FINLEY: That's a tougher example, you see,  
20 because --

21 QUESTION: Or wrongful breach of -- of contract.  
22 Some States have a tort of that, an intentional,  
23 malicious, tortious breach of contract.

24 MR. FINLEY: And I would go back in a  
25 comparative sense to Goodman v. Lukens Steel, even though



1 as Chief Justice Rehnquist appropriately pointed out and  
2 we agreed, that was a statute of limitations case, but the  
3 analysis of this Court in that case because the -- section  
4 1981 dealt with contract rights, and the petitioners  
5 there, who sought to extend the limitations to 6 years for  
6 contract rights, were arguing this was basically a  
7 contract situation.

8 QUESTION: Well, would you say that under  
9 1981 -- if the recovery was under 1981 only, that there  
10 would be a personal injury, based on Goodman v. Lukens  
11 Steel?

12 MR. FINLEY: Because of the statute, Your Honor,  
13 yes. We go to the personal injury aspect of the statute.

14 QUESTION: So if there's a suit for refusal to  
15 make a contract under 1981, that's a personal injury?

16 MR. FINLEY: Yes, because it was for invidious  
17 discrimination based on race. That's why it becomes a  
18 personal injury. And invidious discrimination under title  
19 VII on race, just as section 1981 is based on race, and  
20 title VII goes further, and of course, sex, national  
21 origin, religion, and even to the age discrimination cases  
22 under another statute, which the Government seeks to wipe  
23 out here as well.

24 And it's -- that is the personal nature of the  
25 injury as this Court has pointed out.

1                   QUESTION: Mr. Finley, would we have an easier  
2 time with this case if instead of focusing on fine  
3 distinctions in personal injury and fine distinctions  
4 about damages, we focused instead on the further  
5 requirement under 104 -- 104(2), which speaks of damages  
6 received on account of personal injuries.

7                   Can't we say that even assuming you are correct,  
8 that this is a personal injury here, the damages were not  
9 received on account of the personal injury, simply because  
10 they bear no relationship and the inquiry in determining  
11 them bears no relationship to the personal injury which  
12 you say occurred?

13                   In the award of the damages, it doesn't matter  
14 whether the discrimination was egregious or not. It  
15 doesn't matter whether the person discriminated against  
16 was hurt or otherwise psychologically injured. The only  
17 thing that matters is the amount of the wages. And since  
18 that bears no relationship to the extent of the personal  
19 injury, why isn't the easy answer to say that the damages  
20 are not awarded on account of the injury?

21                   MR. FINLEY: Because, Your Honor, these are the  
22 consequences of the injury that the Government has focused  
23 on wrongfully. And as this Court held in Albemarle Paper  
24 v. Moody, the purpose of the statute, of the title VII  
25 statute is to compensate and make whole the injured

1 person.

2 QUESTION: So you're saying the very nature of  
3 the statute focuses it solely on personal injury, and as a  
4 matter of law, we would have to say here that a back pay  
5 award is on account of the injury because that indeed is  
6 the object of the statute. Is that it?

7 MR. FINLEY: That is exactly what happened in  
8 this case, Your Honor. That is correct. It is the -- we  
9 must establish, and in this case -- I, as counsel for the  
10 plaintiffs in this case had to establish that there was a  
11 wrong committed by the defendant TVA, that TVA had  
12 discriminated against these employees based upon their  
13 sex. And we were able to present proof to the district  
14 court that this was indeed so.

15 QUESTION: But doesn't your answer suffer from  
16 the fact that under the statute, different kinds of relief  
17 could be rewarded? I mean, there need not necessarily be  
18 a back pay award, and there could indeed be equitable  
19 relief to remedy the discrimination without the payment of  
20 a penny.

21 MR. FINLEY: I would agree with the second part  
22 of your postulate, that there is these differences, but I  
23 don't think my case suffers from it because we are back  
24 again talking about remedies. And we have again, and I'll  
25 move to a point which I think is important in the case,

1 and maybe further responsive to Your Honor's question.

2 QUESTION: Well, Mr. Finley, suppose a  
3 wrongfully discharged employee the next day got another  
4 job across the street, and making the same thing, except  
5 he wanted back his old job -- it was easier. And he got  
6 it back. Would he get back pay?

7 MR. FINLEY: He would not get back pay under the  
8 statute.

9 QUESTION: And he couldn't sue for emotional  
10 distress, could he?

11 MR. FINLEY: Not under -- prior to the  
12 amendment, Your Honor is correct.

13 QUESTION: Well --

14 MR. FINLEY: This is a limitation of remedy.  
15 Again, a question addressed to Congress, and Congress  
16 addressed it in 1991 after this case arose, and it  
17 addressed it in such a way --

18 QUESTION: Yes, but if he -- if title VII  
19 allowed damages for personal injury --

20 MR. FINLEY: As it does right now, yes, sir.

21 QUESTION: Well, it doesn't. I mean, it doesn't  
22 allow a suit for emotional distress.

23 MR. FINLEY: Under the new statute, Your  
24 Honor --

25 QUESTION: Well, I know, but it didn't --



1 MR. FINLEY: Oh, yes, Your Honor, yes, you're  
2 correct.

3 QUESTION: In this case it did not allow a suit  
4 for emotional distress.

5 MR. FINLEY: That's right.

6 QUESTION: But if -- in my example, if title VII  
7 had allowed a suit for emotional distress, it wouldn't  
8 make any difference that he worked across the street and  
9 didn't lose any pay.

10 MR. FINLEY: On that component of the injury,  
11 you're correct, Your Honor.

12 Now, to go back to this whole question here, and  
13 here again is where the scope of the exclusion comes in in  
14 equality of treatment. In the ordinary personal injury  
15 torts case, the victim is recompensed for a portion of  
16 lost wages or lost earnings. And those are clearly not  
17 subject to tax. And using again the Lipelt case that this  
18 Court decided, an FELA case, where the employer visits an  
19 injury upon the employee, in that wrongful death case, the  
20 extension of earnings -- and that's all there was, was the  
21 lost earnings this individual was deprived of by his loss  
22 of life -- the court --

23 QUESTION: But usually in that kind of case, the  
24 employee does not perform the services for which the  
25 compensation is paid.

1 MR. FINLEY: He did not. That is correct. He  
2 could not.

3 And even in the refusal to hire example that  
4 Your Honor had raised before, the employee doesn't perform  
5 any services. The Government argued services he would  
6 have performed had he been properly, or she properly  
7 hired, but that becomes, again, irrelevancy of dealing  
8 with an amount received under the statute.

9 QUESTION: Mr. Finley, what about distinguishing  
10 those cases on the ground that there the economic injury,  
11 the loss of wages is consequential to the real injury,  
12 which is a personal injury. It's the loss of an arm, some  
13 physical injury. And these things are consequential. But  
14 the personal injury is not an economic injury, whereas in  
15 your case, the only real injury that's being sued for is  
16 initially an economic injury. The gravamen of the whole  
17 complaint is not the loss of an arm; it's simply the loss  
18 of wages. I think that's the distinction the Government  
19 is trying to make between those two cases.

20 MR. FINLEY: Well, the gravamen of our case was  
21 a discrimination visit on the persons affected, which  
22 Congress allowed a remedy for at that time of back pay in  
23 the monetary sense. And it still fits within the  
24 statutory definition and the regulations definition.

25 QUESTION: Discrimination in the air is no

1 injury. The injury in this case was that the person  
2 hadn't been paid as much as others because of the  
3 discrimination. So it was an economic injury to start off  
4 with. It was not a personal injury.

5 MR. FINLEY: That were the consequences, Your  
6 Honor. That were the consequences. But as this Court has  
7 held, and Chief Justice Rehnquist in the Meritor Savings  
8 case pointed this out very nicely about the emotional  
9 effects of discrimination upon a victim.

10 Now, Congress didn't provide a remedy for it at  
11 that time, and Congress provided a remedy of back pay,  
12 which was all we could claim in our prayer for relief.  
13 The gravamen of the case, however, which had to be  
14 demonstrated and proved, was the wrongful discrimination  
15 of the employer. And in our prayer for relief, we prayed  
16 for an award of attorney's fees, too, but that didn't  
17 convert this into a case for attorney's fees. The  
18 monetary remedy we were entitled to receive at that time  
19 was limited to a back pay award. And we settled that  
20 case. And this --

21 QUESTION: If you were facing a question of  
22 summary judgment on liability only, and the only thing  
23 that you supported was the claim of discrimination, you'd  
24 lose, wouldn't you?

25 MR. FINLEY: No, sir. We had that very -- this

1       arose in this case. I faced a motion for summary  
2       judgment.

3               QUESTION: You should have lost, shouldn't you  
4       have?

5               (Laughter.)

6               MR. FINLEY: Well, not with the proof I had,  
7       Your Honor, no.

8               QUESTION: No, but in fact --

9               MR. FINLEY: I could not have lost in that  
10      modicum of proof.

11              QUESTION: In fact you put in the lost wages,  
12      didn't you?

13              MR. FINLEY: No, sir.

14              QUESTION: You didn't?

15              MR. FINLEY: In the motion for summary judgment,  
16      and I argued that case before the court, the lost wages  
17      were never discussed in -- at all except that it was the  
18      incident thereof. We were confronted with -- on the  
19      summary judgment aspect of the case, we were confronted  
20      with a problem: did TVA commit the wrong alleged in the  
21      complaint of discrimination. And that's what the  
22      plaintiffs had to prove and make a showing on, and which  
23      we did.

24              QUESTION: No, but was that because they simply  
25      disputed the discrimination or because you had simply



1 alleged discrimination as the sole basis for liability,  
2 leaving damages for another issue? Which was it? Because  
3 if it was the first alternative, then clearly you know, if  
4 you had any evidence of discrimination, you should have  
5 won. If it's the second alternative, it focuses the issue  
6 in this case.

7 MR. FINLEY: Well, to go back to the realities  
8 of this case, what happened, we -- the summary  
9 judgment -- the cross motions focused entirely on  
10 discrimination. And we would have as a practice, since I  
11 think after the court ruled, if we had gone into the  
12 remedy, remedial portions. We had a number of things to  
13 talk about, one of which was an award of back pay as  
14 remedial, which followed after the whole issue. The  
15 gravamen of the case was resolved as to whether or not  
16 there was discrimination involving a personal injury under  
17 the statute here.

18 QUESTION: Mr. Finley, did any men benefit from  
19 the recovery that was obtained here in the settlement?

20 MR. FINLEY: Your Honor, they did because there  
21 were a minority, a small number of men in the salary  
22 schedule who were also wage-depressed because of what TVA  
23 had done.

24 QUESTION: And you think as to the men that your  
25 argument still stands, that there's some personal injury

1 recovery as to them?

2 MR. FINLEY: In the emotional sense, no, but  
3 they were the -- they were the peripheral victims. They  
4 suffered as a result of the whole gravamen of the case.

5 Before I --

6 QUESTION: It just seems to me your theory  
7 doesn't apply as easily to them.

8 MR. FINLEY: Well, the males could not have  
9 brought the discrimination case in the first instance, but  
10 those who happened to be in the salary schedule profited.  
11 Yes, they did.

12 Now, there is another factor here which I think  
13 ought to be addressed. Employers in this country need to  
14 have the question resolved because they will be caused to  
15 expend far more monies if these proceeds are taxable, and  
16 the need to settle these cases, which Congress has  
17 specifically addressed itself to, will be greatly  
18 furthered by the fact that if these proceeds are not  
19 taxable, cases will be easier and more readily resolved.

20 QUESTION: You mean because the plaintiff will  
21 accept a smaller award than otherwise because the  
22 plaintiff would be able to keep all the award, rather than  
23 pay part of it in tax? Well, that really means then the  
24 Government would be subsidizing the thing in a way,  
25 doesn't it?

1 MR. FINLEY: Well, if you want to call it to  
2 that extent, yes. Except, once again, I go back to the  
3 statute in an argument addressed to Congress, not to this  
4 Court. And the Government's other theory, which hasn't  
5 been discussed here today, on human capital, which a  
6 number of us have struggled with to understand, if adopted  
7 would spawn a vast scope of litigation as to what it is,  
8 what it means, where does it go.

9 And I hope to conclude by and wish to conclude  
10 by again referring to the basics of this case. The facts  
11 of this case fit the statute and the regulation hand in  
12 glove, which entitles the taxpayers here to be exempt  
13 under the statute. And as the court of appeals below  
14 quite correctly held, that when we inquire as to the  
15 personal injury, we satisfy that. Amount received is  
16 satisfied by the regulation, the statute. And therefore,  
17 exclusion from 104(a)(2). And there it is.

18 Thank you, Your Honors.

19 QUESTION: Thank you, Mr. Finley.

20 Mr. Minear, you have 10 minutes remaining.

21 MR. MINEAR: Unless there are questions, Your  
22 Honor, I have no rebuttal.

23 CHIEF JUSTICE REHNQUIST: Very well. The case  
24 is submitted. Thank you.

25 (Whereupon, at 10:51 a.m., the case in the

## CERTIFICATION

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BY

*Michelle Sanders*

(REPORTER)