

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SANDRA JEAN SMITH, Petitioner v. UNITED STATES
CASE NO: 91-1538
PLACE: Washington, D.C.
DATE: Monday, December 7, 1992
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IN THE SUPREME COURT OF THE UNITED STATES

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SANDRA JEAN SMITH, :
Petitioner :
v. : No. 91-1538
UNITED STATES :
- - - - -X

Washington, D.C.
Monday, December 7, 1992

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:38 a.m.

APPEARANCES:

DAVID J. BEDERMAN, ESQ., Atlanta, Georgia; on behalf of
the Petitioner.

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

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

2 (11:38 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in number 91-1538, Sandra Jean Smith v. the United
5 States. Mr. Bederman.

6 ORAL ARGUMENT OF DAVID J. BEDERMAN

7 ON BEHALF OF THE PETITIONER

8 MR. BEDERMAN: Mr. Chief Justice, and may it
9 please the Court:

10 Petitioner's husband, John Emmett Smith
11 travelled to Antarctica as an employee of a Government
12 contractor, and because of the Government's negligence
13 died in Antarctica.

14 This case comes under the Federal Tort Claims
15 Act, the sole avenue by which Mrs. Smith can sue the
16 Government, and concerns the proper construction of the
17 act's foreign country exception, which the Government
18 contends bar jurisdiction here.

19 Petitioner maintains that the sole purpose of
20 the foreign country exception is to ensure that the United
21 States' liability under the act is not governed by the
22 tort law of a foreign power. It is undisputed here that
23 Antarctica is a sovereignless region and has no civil tort
24 law of its own, and therefore Petitioner maintains that
25 Antarctica cannot be a foreign country for the purposes of

1 the FTCA.

2 Now, averring to that point, the chief point,
3 that the sole purpose of the Federal Tort Claims Act's
4 foreign country exception was to prevent intrusion of
5 foreign law into domestic litigation, we believe this
6 conclusion is amply supported by this Court's only
7 previous opportunity to review the foreign country
8 exception, which was in Spelar v. the United States.
9 Moreover, petitioner submits that the emphasis on the
10 presence or absence of a foreign tort law leads to
11 consistent results, particularly when there is ambiguity
12 over the presence or absence of a foreign territorial
13 sovereign.

14 And thirdly, on this primary point, petitioner
15 maintains that Congress is well aware of alternate
16 formulations dealing with the notion foreign country, as I
17 aver permissive, or in its mandatory forms, and therefore
18 we can fairly interpret the foreign country exception to
19 apply in this case to an area that is sovereignless, the
20 one area on earth, apart from the high seas, we contend
21 that is sovereignless.

22 If this is the case and if these premises are
23 accepted, again it is undisputed in this case that
24 Antarctica is, in fact, a sovereignless area having no
25 civil tort law of its own.

1 Now, in view of this, petitioner maintains that
2 it is, in fact, the Government's position which leads to
3 illogical and peculiar results. The first instance of the
4 Government's position would be to interpret the act so
5 that Antarctica is a foreign country, which would have the
6 effect, the Government maintains, of barring Mrs. Smith's
7 claim.

8 But it is clear on the record that if Mr. Smith
9 had died because of the Government's negligence just a
10 mile or two offshore of the McMurdo Station on the
11 southern ocean, that that claim would cognizable under the
12 Death on the High Seas Act, DOHSA, for the Suits in
13 Admiralty Act. It seems --

14 QUESTION: Is the -- does the Death on the High
15 Seas Act determine the law that will be applied?

16 MR. BEDERMAN: The Death on the High Seas Act,
17 the law applies in such an action is the Federal General
18 Maritime Law --

19 QUESTION: Okay.

20 MR. BEDERMAN: -- as distinct, of course, from
21 the Federal Tort Claims Act.

22 QUESTION: And as distinct from this -- under
23 the Tort Claims Act and hence is distinct in this case
24 because there isn't any law in Antarctica.

25 MR. BEDERMAN: Well, and --

1 QUESTION: I mean there's no law -- there's no
2 tort law of the place of the tort, is there here? So even
3 if you win on your argument, why don't you lose on the
4 ground that under the terms of the Tort Claims Act there
5 is no law that can be applied and therefore it must not be
6 intended to apply here?

7 MR. BEDERMAN: Justice Souter, petitioner
8 maintains that the primary object of the Federal Tort
9 Claims Act is to place the Government in exactly the same
10 position as a private individual if that private
11 individual were a tort feason.

12 There is no question that if this were a case
13 between Mrs. Smith and the Government contractor, here ITT
14 Antarctic Services, and that claim were brought in Oregon,
15 that the law that would be applied in this case under
16 either notions of personal sovereignty or under the
17 conflicts restatement balancing tests, is the law of
18 Oregon in this instance.

19 QUESTION: Well that -- that -- assuming that to
20 be the case, the fact is we've still got the Tort Claims
21 Act, and that's not what the Tort Claims Act provides.

22 MR. BEDERMAN: Agreed. The Federal Tort Claims
23 Act's choice of law provision refers to the place where
24 the act or omission occurred. There is no dispute in this
25 case that the relevant act or omission occurred in

1 Antarctica. This is not a headquarters claim.

2 But we maintain that the logical reading of that
3 provision in the context with the foreign country
4 exception and the rest of the statute, particularly the
5 object to place the Government in the same position as a
6 private individual, would be to allow the suit. And the
7 choice of law direction is clear and unambiguous. There
8 seems to be no dispute that under the relevant choice of
9 law principles, the clear direction is to apply Oregon law
10 here.

11 QUESTION: No, but doesn't the -- doesn't the
12 reference to the law of the place of the tort include the
13 choice of law rule of the place of the tort, so you don't
14 even have a choice of law rule to begin with in this case?

15 MR. BEDERMAN: Well, Justice Souter, that's
16 clearly the holding in Richards. And, of course,
17 petitioner does not dispute that holding nor does the
18 Government. What we believe is that implicit in the
19 choice -- even though Antarctica has no choice of law
20 rules embedded in its law, because it has no law,
21 nonetheless the appropriate choice of law rule to advocate
22 is the notion of personal sovereignty, which obviously has
23 limited relevance today because there are virtually no
24 places in the world aside from Antarctica that have no
25 civil tort law. Otherwise it is --

1 QUESTION: Well, how about Somalia? Do you
2 suppose they have one right now?

3 MR. BEDERMAN: Justice O'Connor, I would imagine
4 that despite the conditions in Somalia, no one would doubt
5 that Somalian sovereignty, as one would understand that,
6 is still intact. And Somalia's civil tort law, although
7 we might not recognize it as such, still continues in
8 force and that it would -- petitioner's submission would
9 not be that Somalia, because of its current difficulties,
10 ceases to be a foreign country.

11 Again, the petitioner's position is that the
12 notion of looking for the presence or absence of a foreign
13 tort law only comes into play when there is ambiguity over
14 whether there is a presence of a -- of a foreign
15 territorial sovereign. The Government's position would be
16 for you to apply -- to deviate from Spelar and apply a
17 bright line test.

18 But there are dangers in that that the courts in
19 this country have experienced, particularly a few years
20 back with the international legal status of Okinawa after
21 the end of World War II, where the courts struggled
22 mightily to determine whether the United States was
23 territorial sovereign on Okinawa, but ultimately concluded
24 that that issue was not important, as per Spelar, because
25 Japanese tort law was still in force.

1 Again, there isn't any concern in this case
2 about a foreign tort law intruding. And, again, if -- if
3 one recognizes that the purpose of the FTCA is to place
4 the Government in the same position as a private tort
5 feator, the Government's submission would basically make
6 Antarctica the legal equivalent of a black hole. That is,
7 people are governed by no law there. And in a case
8 brought by Sandra Jean Smith against a private contractor,
9 that -- that case would have to be nonsuited. That is not
10 a result which is countenanced in Anglo-American
11 jurisprudence.

12 QUESTION: Well, that -- that doesn't follow,
13 does it? Because in a case brought against a private
14 contractor they wouldn't be stuck with the provision of
15 the Federal Tort Claims Act saying you necessarily have to
16 apply the law of the place of the tort.

17 MR. BEDERMAN: Well --

18 QUESTION: You could then have no -- you then
19 would have no bar to such theories as personal sovereignty
20 and so on. You'd be able to figure out some way to find
21 some law.

22 MR. BEDERMAN: Well, Justice Souter, I mean not
23 to get into a discourse about whether the lex loci delecti
24 rule is still the rule adopted in the common law of most
25 American States, it seems to me that notions of personal

1 sovereignty and the conflict restatement test are
2 perfectly consistent with the choice of law direction of
3 the Federal Tort Claims Act.

4 As this Court recognized in Richards, it is
5 incumbent in -- sort of in view of the interstitial
6 character of the Federal Tort Claims Act and recognition
7 of sort of even what one might call a Federalism concern
8 in applying, in this case, Oregon wrongful -- Oregon's
9 wrongful death statute, that we can countenance a case
10 where it proceeds on some notion of personal sovereignty
11 or under balancing of factors.

12 The -- the other -- again, the Government's
13 position, it seems to me, is the one that suffers from --
14 from difficulties. Because of the difficulty of
15 reconciling the -- the result if John Emmett Smith had
16 died on the southern ocean just offshore of the McMurdo
17 Station as opposed to having been unlucky enough to die on
18 land, that seems to be one powerful reason to -- to
19 interpret the foreign country exception. And
20 consistently, we think, with its language, to include
21 Antarctica or to conclude that Antarctica is not a foreign
22 country.

23 Likewise, I've averred to what I regard as their
24 peculiar position that Antarctica has no law, and
25 necessarily following from that that in a case of a

1 private action, that no -- that no law could be applied
2 and the case would be nonsuited. In view of this, it
3 seems to me clear that the -- that the proper, the clear,
4 the consistent interpretation of the foreign country
5 exception would be to hold that Antarctica cannot be a
6 foreign country.

7 That concludes my argument in chief. I'll
8 entertain questions.

9 QUESTION: Thank you, Mr. Bederman.

10 MR. BEDERMAN: I reserve, of course, the
11 remainder of my time.

12 QUESTION: Yes, certainly.

13 QUESTION: Mr. Wright.

14 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

15 ON BEHALF OF THE RESPONDENT

16 MR. WRIGHT: Mr. Chief Justice and may it please
17 the Court:

18 The Federal Tort Claims Act contains no
19 affirmative indication that Congress intended it to have
20 extraterritorial application. To the contrary, Congress
21 specified that the United States is not liable for any
22 claim arising in a foreign country.

23 As this Court stated in Spelar, the presumption
24 against extraterritoriality is doubly fortified by the
25 foreign country exception. Either together or separately,

11

1 the foreign country exception and the presumption against
2 extraterritoriality lead to the conclusion that the United
3 States has not waived sovereign immunity for torts arising
4 in Antarctica.

5 Let me turn first to the FTCA and the foreign
6 country exception. There's no question here that
7 Antarctica is foreign. It is also a country under the
8 primary dictionary definition since it's a -- a vast
9 expanse of land. Country also means sovereign nation, and
10 we acknowledge, as does petitioner, that -- that the
11 phrase can be read either way.

12 But the phrase shouldn't be read in isolation.
13 It should be read together with the other provisions of
14 the FTCA. Or as the dissenter in the D.C. Circuit case
15 put it, it would be perverse to give the explicit
16 exclusion of foreign claims the consequence of expanding
17 the act. And reading the foreign country exception
18 together with the FTCA's choice of law provision and the
19 venue provision of the act, seems to us to lead clearly to
20 the conclusion that petitioner's suit is barred.

21 QUESTION: Mr. Wright, I'd just like to raise a
22 question to have you comment on it at your convenience. I
23 take it your position would apply to a tort in outer space
24 where a -- the Government, through Government negligence
25 in Houston or someplace, caused a satellite to bump into

1 someone or an individual got injured. Now, you would take
2 the same position there, would you not?

3 MR. WRIGHT: Yes.

4 QUESTION: And you would say outer space is a
5 foreign country.

6 MR. WRIGHT: I -- I'm not sure we would say
7 outer space is a foreign country. In a -- in a sense, if
8 I may comment on this right now --

9 QUESTION: Yes.

10 MR. WRIGHT: -- I think that -- I think that
11 this hypothetical is useful in showing that even putting
12 the foreign country exception to one side, the United
13 States would prevail here. The presumption against
14 extraterritoriality would certainly apply in -- in the
15 case you hypothesize involving outer space. Since there
16 is no affirmative indication in the FTCA that it is meant
17 to apply extraterritorially, that would be enough, we
18 think, to support the conclusion that it does not apply in
19 outer space.

20 QUESTION: So you don't -- you don't think
21 the -- the noncoverage in the Tort Claims Act of a foreign
22 country limits the extraterritorial area -- the
23 presumption against extraterritoriality --

24 MR. WRIGHT: That's right. Every time, every
25 indication from Congress is -- is contrary to the

1 suggestion that it has extraterritorial application.
2 Congress accepted foreign countries. It accepted the high
3 seas.

4 QUESTION: Of course, on that view, at least,
5 this exception is superfluous.

6 QUESTION: Exactly.

7 MR. WRIGHT: Um, Your Honor, I think that -- I
8 don't think that that's the case. I think it's an
9 affirmative indication --

10 QUESTION: But I think you would decide all the
11 cases that we hypothesize the same way under your
12 analysis, whether or not this exception were in the
13 statute.

14 MR. WRIGHT: I -- that -- that's correct.

15 QUESTION: Yeah.

16 MR. WRIGHT: We think that it's an affirmative
17 indication of Congress' intent that the act does not apply
18 extraterritorially. It covers 99 percent of the cases
19 that might arise, although perhaps that could change as
20 time goes by.

21 QUESTION: Mr. Wright, is it correct that the
22 Tort Claims Act contains a specific exception for high
23 seas torts?

24 MR. WRIGHT: Not exactly, Justice Souter. It
25 contains, in subsection (d) of 2680, a -- an exception for

1 suits arising under the Suits in Admiralty Act or the
2 Public Vessels Act.

3 QUESTION: Okay.

4 MR. WRIGHT: Those acts apply --

5 QUESTION: Why --

6 MR. WRIGHT: -- On the high seas, but they also
7 apply in navigable waters, so they include areas --

8 QUESTION: So that does not necessarily
9 implicitly defeat your position.

10 MR. WRIGHT: That's right.

11 QUESTION: Yeah, I see.

12 QUESTION: Mr. Wright, even -- even though you
13 say it's really just a -- the foreign country provision is
14 just a reaffirmation of the nonextraterritoriality, that
15 there is some reason, was there not, to have that
16 reaffirmation of nonextraterritoriality, when you have
17 before you a statute that calls for the application of the
18 law of the place where the tort occurred?

19 That -- were it not for that foreign country
20 exception, one might have been able to say that implicit
21 in that there was a notion of extraterritorial
22 application.

23 MR. WRIGHT: That --

24 QUESTION: You know, I'm trying to explain why
25 Congress would have put that in, since the ordinary

1 meaning of all statutes is that they don't have
2 extraterritorial application.

3 MR. WRIGHT: A case like Spelar arising in
4 Canada, lets say, would be much harder if the foreign
5 country exception weren't there. The foreign country
6 exception, as I say, makes 99 percent of the cases easy.

7 QUESTION: Right.

8 QUESTION: May I ask on the -- the language
9 about the law of the place where the act occurred, is that
10 the language in subsection (b) that we're talking about?

11 MR. WRIGHT: The -- it's the language in 1346 --

12 QUESTION: Which doesn't really say -- it
13 doesn't, in so many words, say that that law applies to
14 claims against the United States. It just says the United
15 States shall be liable if a private person would be liable
16 under the law of the place.

17 MR. WRIGHT: I'm not sure whether you're --

18 QUESTION: Or is there another law of the place
19 provision in the statute?

20 MR. WRIGHT: I was referring to section 1346(b).

21 QUESTION: Yes. The last line -- the last
22 clause is: If a private person would be liable to the
23 claim in accordance with the law of the place where the
24 act or omission occurred. I guess we've construed that as
25 implicitly indicating the court should apply the law of

1 the place when it's a claim against the Federal
2 Government, but it doesn't say so in so many words, does
3 it?

4 MR. WRIGHT: Certainly, that -- this Court's
5 understanding in cases like Richards and Spelar has -- has
6 been that. The United States would be liable in
7 accordance with the law of the place where the act or
8 omission occurred. I -- I guess I've read in accordance
9 with to mean that that -- that is the law that applies,
10 and it --

11 QUESTION: But it comes in the clause about if a
12 private person would be liable.

13 MR. WRIGHT: And I -- I think it's quite clear
14 under this Court's precedent that the law of the place
15 where the act or omission occurred applies.

16 Now petitioner's sole response to the 1346(b)
17 point is to -- is to act as if it's merely a choice of law
18 question, and applying the restatement he hypothesizes
19 that it's reasonable to -- to apply Oregon law. But --
20 but that, of course, overlooks the language of the statute
21 that says the law of the place where the act or omission
22 occurred applies.

23 Antarctica doesn't have tort law, it doesn't
24 have choice of law rules, so in our view the law of the
25 place where the act or omission occurred is -- is not

1 being applied. If Antarctica has had foreign law -- had
2 its own law, rather, it would be even more clear, I think,
3 that this claim would be barred since, of course, any
4 Antarctica law would be foreign and petitioner concedes
5 that one of the primary purposes of the FTCA is to avoid
6 the application of foreign law.

7 Let me mention the venue provision briefly too,
8 if I might. It provides for venue in the place where the
9 act or omission occurred. It also provides for venue
10 where the plaintiff resides. And so venue would lie in
11 this particular case, although it would not lie in other
12 cases like the D.C. Circuit case in Beattie, where the
13 plaintiffs were not U.S. citizens.

14 Now this would, in effect, reinstate, rewrite
15 the statute to say that claims arising in a foreign
16 country in behalf of an alien are barred. But -- but that
17 precise language was in front of Congress and it struck
18 out at the Justice Department's request, the phrase in
19 behalf of an alien from the draft bill. So with respect
20 to Antarctica, petitioner's position, in effect rewrites
21 the bill in a way -- it rewrites the law to reinsert
22 language that Congress explicitly rejected.

23 QUESTION: Mr. Wright, a moment ago you referred
24 to what you say is petitioner's response to your 1346(b)
25 point. What precisely is your 1346(b) point?

1 MR. WRIGHT: I'm -- I'm sorry, Your Honor. That
2 is the provision that says that the United States is
3 liable, quote, in accordance with the law of the place
4 where the act or omission occurred.

5 QUESTION: And what deduction do you draw from
6 that language?

7 MR. WRIGHT: That that -- that it points you to
8 Antarctica, there is no law to apply there, therefore the
9 United States is not -- has not waived sovereign immunity
10 for torts arising in Antarctica.

11 QUESTION: Thank -- thank you.

12 MR. WRIGHT: The point I think Justice Souter
13 well made a few minutes ago.

14 So even without the presumption against
15 extraterritoriality, we would say that it's clear that
16 Congress didn't intend to waive sovereign immunity for
17 torts arising in Antarctica. But -- but that longstanding
18 presumption resolves any doubt, in our view.

19 In EEOC v. Aramco this Court recently reiterated
20 that a statute does not apply overseas unless there is
21 evidence of an affirmative congressional intent to extend
22 its provisions beyond our territorial waters. For the
23 reasons I've just outlined, not only is there no
24 affirmative intent, to the contrary, the opposite
25 conclusion should be drawn.

1 The principle provision points to Antarctica, in
2 our view. The venue provision would be rewritten to
3 reinstate a result that Congress rejected, under
4 petitioner's view. And, of course, rather than suggesting
5 that the act applies overseas, Congress expressly stated
6 that it does not apply in a foreign country.

7 I think it's useful to compare this case with
8 EEOC v. Aramco and I'd like to take a moment to do that.
9 In that case, of course, this Court held that title VII
10 doesn't apply overseas. Now, title VII contained an alien
11 exemption provision stating that title VII didn't apply to
12 the employment of aliens outside any State.

13 This Court acknowledged that by negative
14 implication the alien exemption provision suggested that
15 U.S. citizens might be covered overseas, but held that
16 that was not clear enough to overcome the presumption.
17 Moreover, there was nothing in title VII that would have
18 been rendered incoherent by a holding that it applied
19 overseas. And in our view, section 1346(b), the provision
20 directing courts to the law of the place where the act or
21 omission occurred, would have no meaning.

22 QUESTION: We'll resume there at 1:00, Mr.
23 Wright.

24 (Whereupon, at 12:00 p.m., oral argument in the
25 above-entitled matter was recessed, to reconvene at 1:00

1 p.m., this same day.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Wright, you may
4 resume your argument.

5 MR. WRIGHT: Thank you, Mr. Chief Justice.

6 I'd like to say a word about the purposes of the
7 foreign country exception in the FTCA and the presumption
8 against extraterritoriality. Petitioner essentially hangs
9 her whole argument on the fact that one purpose of those
10 rules is to avoid the application of foreign law, but they
11 have other purposes as well.

12 By limiting FTCA claims to, quote, claims
13 arising in this country, as Assistant Attorney General
14 Shea said when he proposed the language of the exception,
15 Congress solved various other problems. For instance, in
16 this case suppose that the accident had occurred as the
17 hikers approached the New Zealand base and had been
18 witnessed by persons at the base.

19 Deposing those witnesses, subpoenaing them for
20 trial in Oregon, wouldn't be simple matters, as -- as the
21 Ninth Circuit recognized in the Meredith case and as the
22 Fourth Circuit recognized in the Burna case. As Assistant
23 Attorney General Shea put it, barring such claims -- or
24 not barring such claims, rather, would, quote, lead to a
25 great deal of difficulty, unquote.

1 In addition, petitioner overlooks the general
2 purpose of the FTCA. It's a waiver of sovereign immunity,
3 but it's subject to many limitations and exceptions, some
4 of which are broad, like the discretionary function
5 exception. Essentially, before 1946 Congress itself
6 handled all tort claims and Congress' broader purpose was
7 to get rid of the cumbersome tort claim procedure, or at
8 least to limit it sharply by waiving torts -- in our view,
9 waiving liability for torts committed in this country.
10 But petitioner and others injured overseas, in our view,
11 are simply in the position that all plaintiffs were before
12 1946.

13 The presumption against extraterritoriality,
14 this Court said in the Foley Brothers case, is premised on
15 the notion that Congress -- Congress' concern is assumed
16 to be domestic. And, indeed, in that case which involved
17 application of the 8-hour rule in Iraq, this Court held
18 that the law did not apply there. There -- there was no
19 suggestion or discussion in the Court's opinion, on how
20 this might conflict in any way with Iraqi law.

21 Petitioner also finds it odd that she might have
22 a claim had the accident occurred on the high seas off the
23 Antarctic shore. Well, in our view that just shows that
24 Congress knows how to waive immunity. It has done it on
25 the high seas and it hasn't done it in foreign countries.

1 Line drawing problems are, of course,
2 unavoidable unless Congress waives immunity altogether or
3 not at all. If a diplomat driving to Ottawa gets in a
4 traffic accident, the United States will be liable under
5 the FTCA if the accident occurs on this side of the
6 border, but not on the other side.

7 Petitioner has also suggested that it's unfair
8 in some way that the United States has extended the tax
9 and the criminal laws to Antarctica, but hasn't waived
10 sovereign immunity for torts there. Again, we think this
11 helps us. The tax statute specifically mentions
12 Antarctica and the criminal law statute is phrased to make
13 clear that it applies in all areas without a sovereign.
14 Congress knows how to cover Antarctica, it's done it in
15 other statutes, it hasn't done it here.

16 In sum, petitioner is seeking this Court --
17 asking this Court to infer an extraterritorial waiver of
18 sovereign immunity. There is no presumption in favor of
19 such waivers. In fact, they're doubly -- the presumptions
20 doubly run the other way.

21 QUESTION: To whom does the United States
22 criminal law apply in Antarctica? Does -- it has to be an
23 American citizen, or --

24 MR. WRIGHT: If either the victim or the
25 criminal is an American citizen under 18 U.S.C. 677 --

1 QUESTION: Either the victim or the criminal.

2 MR. WRIGHT: -- it's covered.

3 We don't think that there's any basis to
4 infer --

5 QUESTION: Mr. Wright, I don't see how you can
6 say it's inferring -- an inference. It would expressly
7 cover it but for the exception.

8 MR. WRIGHT: Your Honor, the -- I suppose --

9 QUESTION: There's a general waiver and then a
10 bunch of exceptions.

11 MR. WRIGHT: There's a general waiver of tort
12 immunity under circumstances where the United States, if a
13 private person, would be liable to the claimant in
14 accordance with the law of the place where the act or
15 omission occurred. A private person would not be liable
16 to the claimant in accordance with the law of the place
17 where the act or omission occurred because there's no law
18 in Antarctica to make that person liable.

19 QUESTION: Oh, I see your argument, yeah.

20 MR. WRIGHT: Thus, in our view, finding --

21 QUESTION: Do you think they waive sovereign
22 immunity where the foreign law would apply, but not if
23 domestic law applied? But that's what they did, you say.

24 MR. WRIGHT: No, Your Honor, we don't think that
25 they waived sovereign immunity anywhere foreign law would

1 apply. The -- the foreign country exception bars that.

2 We think that --

3 QUESTION: Well, I know. But you -- you don't
4 even need to get to the foreign country exception.

5 MR. WRIGHT: That's right. We think that
6 Congress has waived immunity for torts occurring in the
7 United States and has not waived it for torts occurring
8 outside the United States. The presumptions lead in that
9 direction and to hold otherwise would -- would require
10 this Court to conclude that in the FTCA Congress waived
11 sovereign immunity, but didn't create venue for many
12 plaintiffs and directed the courts to apply the law of a
13 place that doesn't have any tort law to apply.

14 QUESTION: Is it part of your submission that if
15 a private person sued another private person in
16 Antarctica, there could be no recovery because there's no
17 law applicable to the place where the act or omission
18 occurred?

19 MR. WRIGHT: No, it's not our submission. And
20 as --

21 QUESTION: Well, what -- what law do you think
22 would apply in such a case?

23 MR. WRIGHT: Well I -- I hesitate to -- to
24 attempt to apply the six-factor test set out in the
25 restatement.

1 QUESTION: But if you assume there is some law
2 that would apply to a tort at the place where the act or
3 omission occurred, why doesn't that bring it within the
4 statute?

5 MR. WRIGHT: Well, I -- I think Oregon can
6 decide. Oregon is not bound by the language of 1346(b) in
7 the case of a suit between two private parties and can --

8 QUESTION: Because of the -- what the statute
9 would be saying there is if a private person -- the
10 private person there would be liable in accordance with
11 the law of someplace other than the place where the act or
12 omission occurred.

13 MR. WRIGHT: Yes. But petitioner seeks to apply
14 Oregon law here and that's not where the act or omission
15 occurred. And that's why, in our view, we should --

16 QUESTION: But then Oregon law would govern
17 torts in the place where the act occurred for at least
18 Oregon citizens.

19 MR. WRIGHT: If -- if the Oregon court so
20 decided, nothing in 1346(b) --

21 QUESTION: Well, why couldn't the -- the
22 plaintiff in this case in an Oregon court say, well, just
23 as Oregon would apply Oregon law there, that's the law of
24 the place where the act occurred for the purposes of this
25 case?

1 MR. WRIGHT: Well, I -- I don't think Oregon law
2 becomes Antarctica law just because it might be applied in
3 a private suit.

4 QUESTION: You don't.

5 MR. WRIGHT: No, I don't.

6 QUESTION: In other words, you could say that
7 but it wouldn't be true.

8 (Laughter.)

9 MR. WRIGHT: I would --

10 QUESTION: Unless five of us said it was true.

11 (Laughter.)

12 MR. WRIGHT: Yes, Your Honor. If there are no
13 further questions, thank you.

14 QUESTION: Thank you, Mr. Wright.

15 Mr. Bederman, you have 20 minutes remaining.

16 REBUTTAL ARGUMENT OF DAVID J. BEDERMAN

17 ON BEHALF OF THE PETITIONER

18 MR. BEDERMAN: I hope just to -- Chief Justice,
19 I hope just to briefly aver to some points made.

20 First and most importantly, the Government
21 places very substantial reliance on what is known as the
22 Foley presumption, presumptioning its extraterritorial
23 application of Acts of Congress. It's petitioner's
24 submission, as is evident on the briefs, that the Foley
25 presumption is not even implicated here, as this Court has

1 consistently said that the Foley presumption comes into
2 play when there is a risk of clash with foreign laws, and
3 there is no possibility of such a clash in this case.

4 And moreover, if Foley is read carefully -- the
5 Government has already alluded to the case being won
6 regarding the application of the 8-Hour Act to Iraq, the
7 Court in that case, Justice Reed writing, made it a point
8 to say that where the U.S. does have authority, in other
9 words jurisdiction based on nationality, that that
10 presumption would not be read in relation to the act.

11 In Antarctica the United States does have
12 authority by virtue of jurisdiction based on nationality.
13 As the Government has conceded already, Congress has
14 exercised that jurisdiction regarding taxation and in
15 criminal matters. Again, the Foley presumption simply is
16 irrelevant in this case.

17 Now, likewise the Government places substantial
18 reliance on the venue problems, and the Government makes
19 the point that petitioner's submission would simply read
20 back into the statute language which had been dropped out
21 specifically by Congress, that language having to do with
22 a categorical ban on the claims of aliens.

23 Petitioner's submission does no such thing.
24 Petitioner is saying that where a claimant has a domicile
25 in the United States, venue is laid and the choice of law

1 direction is clear. It seems to me, in fact, to be an
2 impermissible canon of construction that would deny
3 jurisdiction to one claimant because a different claimant
4 would have difficulty in laying a venue. And, indeed, in
5 terms of canons of construction regarding venue, those
6 canons go, in fact, to construing venue statutes and not
7 jurisdictional statutes.

8 QUESTION: Mr. Bederman, how do you respond to
9 the Government's argument about 1346(b), that the United
10 States would be liable to the claimant in accordance with
11 the law of the place where the act or omission occurred?

12 MR. BEDERMAN: Chief Justice, my construction of
13 1346(b) is that if a private party would be liable as a
14 tort feisor in Antarctica -- to Mrs. Smith, say, as
15 plaintiff -- then it follows that the Government would
16 likewise be liable. And as the Government has conceded,
17 Antarctica -- pardon my colloquialism -- is not a legal
18 black hole, that law does apply there by virtue of these
19 choice of law principles.

20 QUESTION: Well, but the Government's argument,
21 as I understand it, is that there is no tort law governing
22 in -- in Antarctica, and therefore without regard to the
23 foreign nation exception, you are not brought within 1346.

24 MR. BEDERMAN: That would be so, Chief Justice,
25 if, under prevailing choice of law rules a private tort

1 feason would not -- there would be no law applicable in a
2 private action --

3 QUESTION: But the statute says the law of the
4 place where the act or omission occurred, which -- and
5 here the act or omission occurred in Antarctica, it's
6 conceded, didn't it?

7 MR. BEDERMAN: Yes, sir.

8 QUESTION: And if there -- if there is no law
9 there, I -- how do you get to choice of law?

10 MR. BEDERMAN: Well, I read the -- the
11 Government's reading of 1346(b) is, frankly, disjunctive.
12 They would prefer to eliminate the languages under
13 circumstances where the United States, if a private
14 person. They would prefer to read out that clause and
15 simply look at the last provision in isolation.

16 QUESTION: Whereas you would prefer to read out
17 the last clause?

18 MR. BEDERMAN: No, Chief Justice. If it were
19 true that under prevailing choice of law theories a -- no
20 private action was permissible because the lex -- lex loci
21 delecti was in Antarctica, we would have no case. But
22 that is not the law and therefore the fair reading of the
23 entirety of 1346(b), in conjunction with the remainder of
24 the statute including the foreign country exception, leads
25 inevitably to a finding that Antarctica is not a foreign

1 country and that this action can proceed.

2 I have no further substantive points.

3 QUESTION: Do you have any nonsubstantive
4 points?

5 (Laughter.)

6 MR. BEDERMAN: I will not rise to that
7 invitation, Chief Justice.

8 (Laughter.)

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Bederman. The case is submitted.

11 (Whereupon, at 1:12 p.m., the case in the
12 above-entitled matter was submitted.)

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The United States in the Matter of:

91-1538 Sandra Jean Smith

✓ United States

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BY Ann Marie Federico

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