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

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in case 069130 Ali versus Federal Bureau of  
5 Prisons.

6 Mr. Andre.

7 MR. ANDRE: Thank you, Mr. Chief Justice,  
8 and may it please the court:

9 The text of Section 26 (a)(c) Federal court  
10 claims act establishes -- provision underlying purpose  
11 confirm that Congress did not intend the provision to  
12 broadly bar all claims arising out of all the tensions  
13 of all property by all law enforcement officers. As in  
14 any statutory construction case we need to of course  
15 begin with the text, and with respect to the text in  
16 this case, we believe that the statutory language is  
17 simply no different than the statutory at issue at  
18 Circuit City v. Adams. Circuit City v. Adams this court  
19 applied a ejusdem generis to limit a sweepingly broad  
20 residual phrase that is meaningfully indistinguishable  
21 from the "any other law enforcement phrase" at issue  
22 here. In particular, in Circuit City the court was  
23 asked what kinds of employment contracts were exempted  
24 from the mandates of the Federal Arbitration Act. The  
25 particular provision at issue in that case 9 U.S.C.

1 Section 1 exempted from the act's coverage any and I  
2 quote contracts of employment of sea men, railroad  
3 employees or any other class of workers engaged in  
4 foreign or interstate commerce. That residual phrase  
5 read in isolation is broad and sweeping on its face it  
6 certainly would appear to apply not only to  
7 transportation workers, but also to retail store clerks  
8 like the Respondent in Circuit City, none the less under  
9 a ejusdem generis, this court limited that residual  
10 phrase to just to transportation workers.

11 CHIEF JUSTICE ROBERTS: I suppose there is a  
12 difference between a sufficient laundry list in a  
13 residual phrase and example in a residual phrase. In  
14 Circuit City you have a couple of examples -- seamen,  
15 railroad workers -- here it's just a customs or excise  
16 worker. I regard customs and excise as kind of the same  
17 thing. So why isn't it more like the cases where we've  
18 said you have an example in a residual phrase; the  
19 example is not limiting.

20 MR. ANDRE: Well, first of all, Your Honor,  
21 if I could point out that if the Government had made the  
22 argument that you have to have a list, and I think under  
23 the Government's interpretation you had to have at least  
24 three items, two specific and one general. In Norfolk  
25 -- Norfolk and Western Railway, this Court says that

1    need not be the case.  There the Court said that you  
2    could have a singular general term preceded by a  
3    singular specific term.  So it's our position that --  
4    that even if you were to read this statute as -- as  
5    possessing only two items, that you could still apply  
6    ejusdem generis, but we don't read the statute that way.  
7    We believe that the statute actually contains a list of  
8    three items, and that Congress to save itself a couple  
9    words, decided to say "any officer of customs or excise,  
10   or any other law enforcement officer," instead of saying  
11   the more wordy version, "any officer of customs, any  
12   officer of excise or any other law enforcement officer."  
13   I don't think we can fault Congress for its pick in that  
14   scenario.

15               To get back to the residual phrase, the "any  
16   other law enforcement officer phrase" here, ripped from  
17   its moorings, as we believe the Government is trying to  
18   do, would certainly seem to apply to all law enforcement  
19   officers, including Bureau of Prisons officials which by  
20   statute are law enforcement officers.  But Section  
21   2680(c) contains a number of contextual cues that  
22   Congress didn't have general law enforcement functions  
23   in mind when it passed the provision.  It had customs  
24   and tax functions in mind.  In particular, the detention  
25   clause preserves sovereign immunity for the detention of

1 goods and merchandise by any officer of customs or  
2 excise.

3 CHIEF JUSTICE ROBERTS: Well, not just goods  
4 or merchandise. Goods, merchandise or other property.  
5 And does other property include any type of property?

6 MR. ANDRE: We believe it does, and we  
7 believe that when Congress added that language it was  
8 simply Congress's sensible recognition that customs and  
9 tax officers will detain or seize cash and real property  
10 which wouldn't be covered or wouldn't be subsumed under  
11 goods and merchandise.

12 CHIEF JUSTICE ROBERTS: So "goods and  
13 merchandise or other property" are just examples, and  
14 then a residual phrase that includes everything; but  
15 "customs or excise or any other law enforcement  
16 officer," that's subject to ejusdem generis - all in the  
17 same sentence.

18 MR. ANDRE: Well, we actually don't think --  
19 or I guess I cannot necessarily agree with the first  
20 part of what you just said, Mr. Chief Justice. We don't  
21 believe that -- that other property necessarily, or that  
22 "goods and merchandise and other property," the goods  
23 and merchandise are examples of "other property." We  
24 think in that situation, goods and merchandise refer  
25 specifically to goods and merchandise as -- as explained

1 historically in the United States Code, which are, you  
2 know, more movable things other than cash, tangible  
3 items other than cash, and "other property" then covers  
4 cash and real property.

5           Excuse me. Getting back to the contextual  
6 cues in this case, in addition to the four contained in  
7 the detention clause itself, the assessment clause  
8 contains four additional contextual cues. It preserves  
9 sovereign immunity for the assessment of any tax or the  
10 collection of any customs duty, and because we have this  
11 great quantity of contextual cues in a very short  
12 statutory provision, we believe that we would also  
13 prevail under an application of the *Noscitur a sociis*  
14 canon, that this Court most recently applied two terms  
15 ago in *Dolan v. Postal Service*. In that case what was  
16 at issue is whether the term "negligent transmission" in  
17 Section 2680(b) of the Federal Tort Claims Act reached  
18 all negligent transmissions, in particular a parcel left  
19 on the foot of someone's front door that causes them a  
20 fall injury, or instead, it was limited by its  
21 antecedent contextual cues, namely -- I'm sorry --  
22 namely, loss and miscarriage, which would tend to  
23 indicate that Congress intended really only to preserve  
24 sovereign immunity for instances in which delivery was  
25 untimely or went to the wrong location. The Court again

1 sensibly looked past the superficially broad negligent  
2 transmission language and instead said no, we have to  
3 read it in context; and in context Congress did not  
4 intend us to just pluck those two words out of the  
5 dictionary and apply a dictionary meaning.

6 In fact, in that case, the Government  
7 implored this Court to apply dictionary definitions to  
8 negligence and transmission, and that's essentially what  
9 the Government is trying to ask this Court to do here.

10 JUSTICE SCALIA: Counsel, what do you do  
11 about the later -- the later statute that makes an  
12 exception to the exception?

13 MR. ANDRE: We don't believe that that  
14 changes -- we don't believe that changes the meaning of  
15 the detention cause at all beyond the small change that  
16 Congress made.

17 JUSTICE SCALIA: I mean it clearly, the  
18 exception to the exception says that -- that the  
19 exception is applicable to any claim based on injury or  
20 loss of goods or merchandise, if among other  
21 requirements, the property was seized for the purpose of  
22 forfeiture under any provision of Federal law providing  
23 for the forfeiture of property.

24 Now that's more than customs and tax -- any  
25 provision of Federal law.



1 MR. ANDRE: Well, Your Honor --

2 JUSTICE SCALIA: Why do you need that  
3 exception to the exception if the exception doesn't  
4 cover anything except customs and tax in the first  
5 place?

6 MR. ANDRE: Well, we believe that the fact  
7 that Congress decided to not only preserve the detention  
8 clause, but also mimic its language in the exception to  
9 the exception, means that Congress intended to kind of  
10 bring forward the -- of course -- original meaning as of  
11 1946 of that clause. But I think to get what you're  
12 asking me, the Government's position, that because the  
13 exception to the exception references any provision of  
14 forfeiture -- the Government's suggestion that that  
15 somehow broadens the scope of the statute is misplaced.

16 Customs and tax officers regularly apply  
17 other forfeiture statutes, and in particular the one  
18 they use a lot is 21 U.S.C. 881. That's the general  
19 civil forfeiture statute. And so in many cases they  
20 will bring a forfeiture action under either their  
21 agency's specific forfeiture provision, or the general  
22 21 U.S.C. 881. And so when Congress included that  
23 language saying any provision of forfeiture, it was  
24 simply Congress's sensible recognition that they don't  
25 --

1 JUSTICE SCALIA: They didn't -- they didn't  
2 need that if indeed it covered all seizures by -- by  
3 customs and tax officers and nobody else. If that's all  
4 it -- it covered, what -- you know, this doesn't achieve  
5 anything. The purpose of under any provision of Federal  
6 law. It seems to me that that envisions seizure under  
7 laws other than tax and customs. Now you're saying  
8 there is one, one such law that tax and customs officers  
9 sometimes use?

10 MR. ANDRE: There may be more, I was giving  
11 you an example, but the one that I gave you, 21 U.S.C.  
12 881, is the one most frequently used. It is the general  
13 forfeiture provision. It's kind of the backbone of all  
14 forfeitures, and so in many cases officers bring  
15 forfeiture actions not only either -- either under their  
16 own agency forfeiture provision or the general.  
17 Sometimes they bring them under both. But the point is  
18 that's a meaty statute there, and I -- I assume that  
19 Congress wanted to make clear that if a customs or tax  
20 officer were to bring a forfeiture proceeding under that  
21 meaty provision, and maybe some other ones that they  
22 would use from time to time, that the exception to the  
23 exception would still work here.

24 JUSTICE SCALIA: What work does it do? What  
25 work under your interpretation does that later provision

1 do, if property was seized for the purpose of forfeiture  
2 under any provision of Federal law providing for the  
3 forfeiture of property?

4 MR. ANDRE: Under our interpretation, if a  
5 customs or tax officer or another law enforcement  
6 officer acting in a custom or tax capacity detains  
7 property and injures it -- and it doesn't matter under  
8 which forfeiture law they detain the property --

9 JUSTICE SCALIA: Right.

10 MR. ANDRE: -- and the plaintiff is  
11 ultimately successful, I'm sorry, I guess -- yes, the  
12 plaintiff is ultimately successful in defeating the  
13 Government's claim for forfeiture, then they can sue  
14 under the FTCA for the damage to their property.

15 JUSTICE SOUTER: Mr. Andre, it may be that  
16 things would fall into place easier if you would give us  
17 an example or examples of instances in which any other  
18 law enforcement officer would be engaged in detaining  
19 property in -- in the course of enforcing customs or  
20 excise laws. If we can understand that, then we are  
21 going to have a better sense of how the exception might  
22 work. Can you give me an example of the other law  
23 enforcement officer engaged in customs excise?

24 MR. ANDRE: Sure. The best example that  
25 comes to mind is pre-9/11 before the merger of the INS

1 and the Border Patrol -- or I'm sorry, the Customs  
2 Bureau -- under the Department of Homeland Security.  
3 When you drove across the border before 9/11 more often  
4 than not you would see a gentleman or a woman in a green  
5 jump suit. They were INS. But not only were they  
6 asking you questions about your immigration status and  
7 checking to see if you had ID; they were also asking  
8 about what you were bringing in -- for example, oh, do  
9 you have more than two bottles of liquor? Because  
10 you're only allowed to bring in two. And if you said  
11 yes, they would direct you over to secondary inspection,  
12 and even there in secondary inspection certainly  
13 sometimes there may have been officers in blue suits,  
14 the customs enforcement officers. But more often than  
15 not, they were still officers in green suits, INS  
16 officers. And there they're taking this extra property  
17 from you because they believe you are not supposed to  
18 have it, and then sending you on your way.

19               There are many task forces in many other  
20 instances in which officers can overlap or share  
21 functions, postal inspectors working with the customs  
22 enforcement agencies to keep --

23               JUSTICE GINSBURG: Did you say IRS officers,  
24 because they would be covered? It's tax and customs.

25               MR. ANDRE: Right. We believe IRS officers

1 are expressly covered, but, for example, when the FBI is  
2 conducting an investigation with the IRS into fraud and  
3 other tax issues, then we believe that those FBI agents  
4 would be covered.

5                   So we don't believe it's hard at all to find  
6 a number of examples of where other law enforcement  
7 officers are assisting tax and customs officers,  
8 standing in the shoes of tax and customs officers, or  
9 just doing something sufficiently akin to what tax and  
10 customs officers do. And --

11                   JUSTICE GINSBURG: You gave an example in  
12 your brief that didn't seem to fit. I mean you spoke of  
13 a DEA agent who was searching for narcotics, and that  
14 sounds to me like what DEA agents do. They were not  
15 auxiliary to a customs officer.

16                   MR. ANDRE: That's correct, Justice  
17 Ginsburg. That's the Formula One case out of the Second  
18 Circuit. And the reason why we relied on that case is  
19 because the DEA agents were opening up a shipping  
20 container that had not yet been opened since it came  
21 from overseas.

22                   JUSTICE GINSBURG: But they were doing it  
23 for their primary business, which was to detect  
24 narcotics.

25                   MR. ANDRE: That's right. And we again

1 reference that case because we wanted to offer the Court  
2 a broad construction or make sure the Court was  
3 comfortable in knowing that we were comfortable with the  
4 "other law enforcement officer" phrase being read  
5 broadly to reach any -- you know, any loose tax or  
6 customs function.

7           If the Court wants to construe that phrase  
8 more narrowly, we still win this case, and we have no  
9 problem if the Court wants to do that. But we think  
10 that, given that the residual phrase of the detention  
11 clause starts out with the word "any," the way to give  
12 -- to give credence to Congress's use of that word is to  
13 then construe the phrase as reaching conduct such as the  
14 conduct in the Formula One case.

15           JUSTICE ALITO: Could we interpret the term  
16 "law enforcement" -- "any other law enforcement officer"  
17 to be limited to those law enforcement officers whose  
18 duties generally include the detention of goods?

19           MR. ANDRE: Well, I don't think so, Justice  
20 Alito, because we weren't really prepared to debate what  
21 exactly "detention" means. In fact, we didn't petition  
22 on that issue, and my client didn't press it below. But  
23 we were just intuitively thinking -- I don't think the  
24 word "detention" does much work for us here, at least in  
25 --

1 JUSTICE ALITO: Well, why doesn't it? It's  
2 not clear to me. Maybe this is not within the question,  
3 but why were your client's goods detained? "Detention"  
4 seems to connote holding the goods against the wishes of  
5 the owner, and that wasn't the situation here. He gave  
6 those goods -- he gave them to the Bureau of Prisons  
7 officer for the purpose of having them sent on to his  
8 new prison.

9 MR. ANDRE: I agree. I should have been  
10 more clear.

11 We don't believe that the word "detention"  
12 necessarily sheds a lot of light on how you construe  
13 what "other law enforcement officer" means, but  
14 certainly, yeah, we believe that if the detention issue  
15 were alive in this case, we have a very strong case,  
16 because there's a very passive kind of bailment here, as  
17 you referenced, where our -- my client was, you know,  
18 told to leave his property with a receiving/discharge  
19 clerk and go to a new institution, and the property was  
20 going to follow him along. There was no seizure. There  
21 was no investigation.

22 JUSTICE ALITO: Well, you don't think that  
23 concept sheds light on what Congress had in mind when it  
24 referred to any other Federal law enforcement officer?

25 MR. ANDRE: I -- I don't, but I don't want

1 to resist you too much either. You know, if the Court  
2 would like us to reach that issue, we'd be happy to  
3 brief if the Court wanted to issue an order akin to the  
4 one it issued last term in U.S. v. Resendiz-Ponce.

5 And I think to get more directly to what  
6 you're saying, whatever Congress intended as far as  
7 other law enforcement officers, the fact that we have a  
8 case here where, again, there is this very passive  
9 bailment by a Bureau of Prisons receiving/discharge  
10 clerk, I think exemplifies how the government's  
11 construction of the statute is too broad. And I think  
12 that might be what you were trying to tease out of me  
13 there.

14 And to get back to the government's  
15 construction, we believe that their construction would  
16 render a number of words in this statute superfluous,  
17 which is sort of our third textual reason for reading  
18 the statute our way. The detention clause contains a  
19 total of 22 words. Under the government's construction  
20 it would simply read: "Any detention of any property by  
21 any law enforcement officer." Fourteen words would be  
22 excised right out of the statute.

23 CHIEF JUSTICE ROBERTS: But, I mean that's  
24 always true when you have an example and a more general  
25 phrase. And yet our cases indicate that we often read



1 the language that way.

2 In other words, it's giving you, perhaps,  
3 the most common example in which you're going to have a  
4 detention of goods, but it's not limiting it to those  
5 officers.

6 MR. ANDRE: Well, there certainly are some  
7 cases that would appear to go both ways, although I  
8 think if you take a look at the cases cited by the  
9 government, those cases involve pretty -- I realize we  
10 have an unclear, bizarre statute here as well, but those  
11 are pretty bizarre statutes the government is relying on  
12 where the Court has, and more often than not, it has  
13 also been as an alternative statement, you could even  
14 say possibly dicta, where the Court has said, oh,  
15 Congress can give examples.

16 But more often than not, the Court applies  
17 the *ejustem generis* canon and the *noscitur a sociis*  
18 canon to confine or limit a superficially broad residual  
19 phrase. And if that weren't the case, then *Gutierrez v.*  
20 *Ada* would have come out the other way, *Dolan v. Postal*  
21 *Service*, of course, *Circuit City*.

22 CHIEF JUSTICE ROBERTS: Yes, but *S.D. Marine*  
23 wouldn't have come out the other way.

24 MR. ANDRE: That's true.

25 CHIEF JUSTICE ROBERTS: Was that an obscure

1 statute in S.D. Marine?

2 MR. ANDRE: I'm sorry. I'm not that  
3 familiar with the statute that we have in that case.

4 CHIEF JUSTICE ROBERTS: Doesn't the word, as  
5 your brother argues, doesn't "any" cut against you? If  
6 they intended the other law enforcement officer to be  
7 limited to similar to customs or excise, it seems to me  
8 they wouldn't have thrown in "any other law enforcement  
9 officer."

10 MR. ANDRE: Well, as kind of a practical  
11 matter, we don't think that when you have a statute like  
12 this, the word "any" really does a lot of work. I mean  
13 if you had taken out the word "any" and instead  
14 pluralized the word "officer," I don't think the statute  
15 really would work any differently.

16 But even taking -- taking as true this  
17 Court's oft-repeated statement that "any" is evidence of  
18 expansive meaning by Congress, we believe our  
19 construction is faithful to that, because we are willing  
20 to bring in to our construction of the statute some of  
21 these other law enforcement officers who may be  
22 performing their ordinary functions, such as DEA  
23 officers, enforcement of drug laws, but they are doing  
24 it akin to customs laws.

25 And again, the Court need not adopt that

1 construction for us to prevail in this case. But that's  
2 how we believe that our construction is faithful to the  
3 word "any" to the extent that in this statute it's  
4 relevant at all.

5 JUSTICE STEVENS: May I ask, following up on  
6 Justice Alito's question, has there ever been a debate  
7 in earlier stages in this litigation as to whether this  
8 was a detention?

9 MR. ANDRE: No, there was not.

10 JUSTICE STEVENS: Because if it were not a  
11 detention, then you'd win.

12 MR. ANDRE: Absolutely.

13 JUSTICE STEVENS: I'm just wondering why you  
14 didn't make the argument somewhere along the line.

15 MR. ANDRE: Well, my client was pro se in  
16 the Court of Appeals, and he didn't raise it there. And  
17 to be -- again, we didn't think that the issue of  
18 whether a detention had to be a seizure, something more  
19 forceful, or whether it was so broad as to include more  
20 of a passive bailment like we have here, we didn't  
21 believe that that issue had percolated enough in the  
22 courts of appeals to warrant petitioning on. So we  
23 figured we'd fight this fight here today.

24 JUSTICE STEVENS: But it is clear -- there  
25 are so many exceptions from exceptions from exceptions,

1     that you get a little mixed up, but I am clear, am I  
2     not, that if it were not a detention, you would win?

3                 MR. ANDRE:   Absolutely.

4                 JUSTICE STEVENS:   Everybody agrees.

5                 MR. ANDRE:   If there was not a detention or  
6     if the BOP guard was not an any other law enforcement,  
7     we would win under either two of those independent  
8     analyses.

9                 JUSTICE STEVENS:   And is it also not clear  
10    that under the government's -- I guess I should ask  
11    them, but I got it right in front of me now -- if you  
12    deleted the words "officer of customs or exercise or any  
13    other," if you just took those words out of the statute,  
14    it would then mean exactly what the government contends  
15    it means?

16                MR. ANDRE:   That's exactly right.   And  
17    that's why we believe that the rule against superfluity  
18    is another reason why our construction is more faithful  
19    to Congress's intent in this case.

20                As I mentioned at the outset, we also  
21    believe that the legislative history underlying purposes  
22    for this particular provision support our reading.   In  
23    particular, I realize the legislative history is pretty  
24    sparse, but in particular, there were six congressional  
25    committee reports issued by Congress after the detention

1 clause was expanded to essentially its current form.

2 And in all six of those reports, Congress  
3 conspicuously omitted to make any reference to the fact  
4 that this phrase could possibly reach the detentions of  
5 all property by all law enforcement officers.

6 Now, we're not suggesting that this case is  
7 at all like *Arlington v. Murphy*, for example, where we  
8 are going to have legislative history try to overrule a  
9 clear statutory text. I think it's pretty clear that  
10 this text is ambiguous, and so legislative history is  
11 relevant to give that text meaning.

12 And so the reason why we focus here on those  
13 particular committee reports is, as the Court of Appeals  
14 has stated, the committee reports are the most helpful  
15 form of legislative history because when many members of  
16 Congress go up to vote, they haven't parsed particular  
17 provisions in the text; they rely on the committee  
18 reports, the reports prepared by the committee that  
19 marked up and presented the language to the floor. And  
20 so, if when all those members --

21 CHIEF JUSTICE ROBERTS: But the President  
22 doesn't rely on those when he signs the statute into  
23 law.

24 MR. ANDRE: No. That's true, Your Honor.  
25 But when those members typically go up to the floor and

1 vote, they oftentimes don't parse the language. They  
2 rely on the committee reports.

3 And so if the government's construction were  
4 correct here, essentially what you would have is all of  
5 those members' votes being overridden because they  
6 couldn't possibly have known -- unless they took the  
7 time to parse the text and we all know that a lot of  
8 times they don't -- they wouldn't possibly know that  
9 there'd be any chance whatsoever that this phrase could  
10 broadly reach the detention of property by all law  
11 enforcement officers. Even putting that kind of  
12 legislative history argument aside, I think we're -- our  
13 strongest footing, when we talk about how our  
14 construction is faithful to Congress's underlying  
15 purpose for this particular provision, on three  
16 occasions, this Court has either suggested or expressly  
17 stated that the purpose for this particular provision  
18 was to avoid the creation of a redundant federally  
19 funded remedy. As we explain in our opening brief,  
20 there was a pre-existing federally funded remedy only  
21 for the negligent conduct of tax and customs officers.

22 JUSTICE GINSBURG: Does that still exist  
23 after the Westfall Act?

24 MR. ANDRE: Well, we believe it would if --  
25 well, actually that's a very good question. I'm not

1     sure.

2                   JUSTICE GINSBURG:   Because now, the -- there  
3     wouldn't be -- the United States would be substituted --

4                   MR. ANDRE:   Right.

5                   JUSTICE GINSBURG:   -- for the agent's  
6     abuses.

7                   MR. ANDRE:   Right, but then in that  
8     situation, once the United States substituted, they  
9     could seek dismissal because the Westfall Act doesn't  
10    override any exceptions to the FTCA.   So, yes, Justice  
11    Ginsburg, in that particular case, if you're dealing  
12    with an officer of customs or tax or another law  
13    enforcement acting in that capacity, and they were sued  
14    personally for the negligent handling of property, the  
15    government could certify they're acting within the scope  
16    of their employment, step into the case, and then move  
17    to dismiss under this provision, under 2680(c).

18                   But, historically, there was -- before the  
19    Westfall Act, there was a pre-existing federally funded  
20    remedy for only officers acting in a tax or customs  
21    capacity or customs or tax officers by name.   And so it  
22    would be inconsistent with Congress's underlying purpose  
23    to avoid creating a duplicative remedy to apply its  
24    provisions so broadly because Congress wanted to provide  
25    a cause of action for claims against law enforcement

1 officers other than those against whom a cause of action  
2 was already available.

3 JUSTICE ALITO: How do we know -- how do we  
4 know that that's the only purpose of this exception?

5 MR. ANDRE: Well, as I mentioned, this Court  
6 suggested in Kosak that that was the only only purpose,  
7 but then in Hatzlachh and in Gutierrez v. Martinez, this  
8 Court twice stated that that was the only purpose, and  
9 the Court did so for good reason. Again, although the  
10 legislative history is sparse, the only statements  
11 whatsoever in the legislative record about the purpose  
12 for this particular provision was that Congress was  
13 intending to avoid creating a duplicative remedy.

14 JUSTICE ALITO: This is all based on Judge  
15 Holtzoff's testimony? That's the basis for the  
16 conclusion that this is the only purpose for this  
17 exception?

18 MR. ANDRE: And it's also based on the  
19 testimony of Colonel O.R. McGuire, who is general  
20 counsel for the Comptroller General. And it wasn't just  
21 Judge -- well, Judge Holtzoff was probably the architect  
22 of the detention clause and maybe this entire provision.  
23 It was the Comptroller General's Office, and Judge  
24 Holtzoff who jointly were responsible for preparing tort  
25 claims legislation. So, essentially, of the two people



1 who were most relevant to the preparation of the FTCA,  
2 and granted we're talking 15 years before its actual  
3 enactment, but two people who were most important for  
4 preparing this tort claims legislation, they both agreed  
5 that the only purpose for this particular provision was  
6 to avoid creating a redundant remedy.

7 I'd like to save the rest of my time for  
8 rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 Mr. Andre. Mr. Shanmugam.

11 ORAL ARGUMENT OF KANNON SHANMUGAM

12 ON BEHALF OF THE RESPONDENTS

13 MR. SHANMUGAM: Thank you, Mr. Chief  
14 Justice, and may it please the Court:

15 Section 2680(c) preserves the government's  
16 immunity against tort claims concerning the detention of  
17 property by any law enforcement officer. That reading  
18 is consistent not only with the plain language of the  
19 statute but also with Congress's underlying policy  
20 objectives in creating the FTCA's exception.

21 Petitioner effectively asks this Court to engraft  
22 language on to the statute by adding the amorphous  
23 limitation "acting in a customs or tax capacity" to the  
24 unambiguous statutory phrase "any other law enforcement  
25 officer."

1 JUSTICE SOUTER: Mr. Shanmugam, may I ask  
2 you -- this goes to your ambiguity point. May I ask you  
3 this question? If Congress wanted to cover all law  
4 officers, the only reason for mentioning the customs and  
5 excise people would be to make it very clear that they  
6 were within that category of all law enforcement  
7 officers, and I take it that's basically what you're  
8 saying.

9 MR. SHANMUGAM: Yes, I think that's correct  
10 with one caveat, Justice Souter, and I don't mean to  
11 quibble, but I think that this is important. I think  
12 when one looks at the evolution of the statute, it may  
13 very well have that when Judge Holtzoff drafted the  
14 relevant statutory language, he started with customs or  
15 excise officers because the British bill that was  
16 apparently the model for the detention of property  
17 clause --

18 JUSTICE SOUTER: Right.

19 MR. SHANMUGAM: -- used that phrase, and he  
20 may then have decided to expand it to other law  
21 enforcement officers simply because he concluded that  
22 there was no basis for treating other law enforcement  
23 officers differently.

24 JUSTICE SOUTER: But wouldn't --

25 MR. SHANMUGAM: So --

1 JUSTICE SOUTER: But wouldn't the way to do  
2 that would have made it at least clearer that that's  
3 what Congress or what he had in mind and what Congress  
4 was getting at would have been to provide that the --  
5 that the exception referred to law enforcement officers  
6 including an officer or customs or excise? In other  
7 words, they would have made it clear that at that point,  
8 the old historical customs and excise rule was sort of  
9 the tail on the dog, and the dog was law enforcement  
10 officers. Instead, however, the order is exactly  
11 different. On what your reading is -- on your reading,  
12 what is now the tail of the dog comes first, and the  
13 general clause "law enforcement officer" comes second.

14 MR. SHANMUGAM: I --

15 JUSTICE SOUTER: So, number one, it is less  
16 clear and it really raises the question: Weren't they  
17 trying to get simply at law enforcement officers who  
18 were doing the customs and excise function? So my  
19 question is, why doesn't the order of the words cut  
20 against you by putting, on your theory, the tail of the  
21 dog before the dog?

22 MR. SHANMUGAM: Justice Souter, it is  
23 certainly true that Congress could have written that  
24 statute that way and indeed could have omitted the  
25 customs or excise officers entirely, and that certainly

1 would be a clearer statute in the sense that I don't  
2 think that Mr. Andre would be here if we had a statute  
3 that simply referred to any law enforcement officer.

4 But the United States Code is replete with  
5 provisions that fit this model, that start with specific  
6 examples and then contain a general residual clause.  
7 And, indeed, even the Constitution has similar  
8 provisions. To take one concrete example that we cite  
9 among the many examples in footnote 11 of our brief, the  
10 Extradition Clause in Article IV of the Constitution  
11 refers to extradition for treason, felonies, and other  
12 crimes, and there is no doubt that the framers could  
13 have simply referred to crimes, but they cited those  
14 examples. As this Court held in a case way back when,  
15 Kentucky v. Denyson, the reason that Congress used those  
16 examples was for emphasis to make clear that political  
17 crimes such as treason and other felonies that would  
18 qualify as political crimes were covered.

19 JUSTICE SCALIA: It's also --

20 MR. SHANMUGAM: So --

21 JUSTICE SCALIA: It's also not entirely  
22 clear what -- whether it's a tail or not. It depends on  
23 what the dog is. If you can -- if you were trying to  
24 identify the most common instances, especially at the  
25 time this provision was enacted, the most common

1 instances in which property was detained by the  
2 government, I mean you know, later -- later forfeiture  
3 provisions are numerous, but at that time I think they  
4 were relatively few. I think the dog would have been --  
5 would have been customs and excise officers. And the  
6 "or other officers" would have picked up probably very  
7 little real -- real instances of property detention.

8 MR.SHANMUGAM: Assuming for present  
9 purposes, Justice Scalia, that the dog here is any  
10 officer of customs or excise, I think that the critical  
11 point is that the tail was indeed smaller than it would  
12 be today because customs and excise officers were among  
13 the most important federal law enforcement officers.

14 JUSTICE STEVENS: If you --

15 MR. SHANMUGAM: You know --

16 JUSTICE STEVENS: No, but -- but a short  
17 time ago you said there was no basis for distinguishing  
18 between excise officers and all other law enforcement  
19 officers. But there was indeed a basis for it, namely  
20 that there was an alternative remedy for people  
21 specifically named in the statute, which is not true of  
22 all other officers. It's true now, but it wasn't then.

23 MR. SHANMUGAM: Well, we believe, first of  
24 all, that if one looks at this Court's decision in  
25 Kosak, the Court did not in any way suggest that the

1 availability of alternative remedies was the sole  
2 purpose --

3 JUSTICE STEVENS: I'm not suggesting that,  
4 but that is a reason for drawing a distinction between  
5 all others and this particular claim.

6 MR. SHANMUGAM: Justice Stevens, it  
7 certainly was one of Congress's primary purposes in  
8 creating the exceptions generally, but we do believe  
9 that our interpretation of the statute serves that  
10 purpose, albeit to a lesser extent perhaps than it  
11 serves the other congressional purposes, but that was --

12 JUSTICE STEVENS: It didn't serve that  
13 purpose before 2000.

14 MR. SHANMUGAM: It did serve that purpose,  
15 Justice Stevens, because there was an alternative  
16 remedy, albeit one that was not federally funded and  
17 that was a common-law action against a law enforcement  
18 officer in his personal capacity for negligence.

19 JUSTICE GINSBURG: Why wasn't it federally  
20 funded? I thought there was a provision for  
21 indemnification.

22 MR. SHANMUGAM: There was a provision for  
23 indemnification for revenue officers and other officers  
24 essentially acting in a revenue capacity, I believe that  
25 the exact statutory language was "collectors and other

1 revenue officers" -- and that indemnification provision,  
2 to be sure, would not have applied to garden variety law  
3 enforcement officers.

4 But in looking at the availability of  
5 alternative remedies, this Court has never suggested  
6 that whether that congressional purpose is served  
7 somehow turns on whether the money came directly from an  
8 officer or whether it came from the Federal fisc. And  
9 Petitioner in his reply brief cites Dolan for that  
10 proposition but whether the alternative remedy was  
11 federally funded was simply not at issue in Dolan. At  
12 most the Court concluded that the alternative remedy  
13 available there was insufficient.

14 JUSTICE BREYER: Do you actually have any  
15 information about the early 1940s, about who was a  
16 Federal law enforcement officer? I think the FBI, the  
17 Bureau of Prisons -- there were a lot of people being  
18 detained. There were goods that were having to do with  
19 contraband, foreign goods, maybe domestic, things you  
20 weren't supposed to have, food stamps. Illegal  
21 rations -- OPA -- I mean, you know, there were, you were  
22 only supposed to have so much food.

23 Have we any notion who other law enforcement  
24 officers might have applied to at that time?

25 MR. SHANMUGAM: It's very difficult to

1 quantify, Justice Breyer, but I do think we have some  
2 sense historically of the state of play at various law  
3 enforcement agencies; and the FBI was in a relatively  
4 nascent stage in 1946. I think the FBI dates from  
5 approximately the turn of the 20th century. Certainly  
6 the Bureau of Prisons, while it existed, was detaining  
7 far fewer people than it does now.

8 JUSTICE BREYER: I think the FBI had quite a  
9 big job in World War II.

10 MR. SHANMUGAM: It did. To be sure, but  
11 there were not --

12 JUSTICE BREYER: I thought there were  
13 thousands and thousands and thousands of FBI people.

14 MR. SHANMUGAM: Well, I don't --

15 JUSTICE BREYER: So do we know? I'm getting  
16 from you that you don't know and I don't know. Is that  
17 right?

18 MR. SHANMUGAM: Yeah. I don't have exact  
19 numbers. I attempted to find them out. But --

20 JUSTICE BREYER: We don't even have a  
21 ballpark.

22 MR. SHANMUGAM: I can't offer you a  
23 ballpark, but I think what I can say, and this accords  
24 with observations that various members of this Court  
25 have made over the years, is that there were simply far



1 fewer Federal criminal provisions than there are  
2 now, and I think that that is one of the reasons why  
3 we've really seen an explosion in the number of these  
4 cases as time has gone on, while the FTCA --

5 JUSTICE BREYER: Well, well that might be.  
6 But I'm sitting in Congress, I read this statute, I  
7 think maybe they were talking about customs people and  
8 the like. Now, there is this other word in there,  
9 that's true. So we look up, where does the other word  
10 come from? The other word comes from Judge Holtzoff.  
11 He explained it, we don't have to guess. We can read  
12 his explanation. His explanation comes in a paragraph  
13 having to do with customs and excise, and beginning  
14 with, I'm talking about customs and excise, and the  
15 additional proviso as special reference, where they use  
16 this phrase, and then he says it's all supposed to be  
17 like the Crown Proceedings Committee in England in 1927,  
18 which in fact had nothing to do with anybody but customs  
19 and excise.

20 JUSTICE SCALIA: Do the members of Congress  
21 who voted on this language, when it was presented to  
22 them, did they even know who Judge Holtzoff was?

23 MR. SHANMUGAM: Well, they may very well --

24 JUSTICE SCALIA: Did he testify to this  
25 effect before one of the committees?

1                   MR. SHANMUGAM: He did testify before one of  
2 the committees. He did not address this specific issue,  
3 but as this Court --

4                   JUSTICE SCALIA: 15 years before it was  
5 passed, right?

6                   MR. SHANMUGAM: 15 years before it was  
7 passed, Judge Holtzoff wrote this report, and as both  
8 the majority and Justice Stevens in his dissenting  
9 opinion in Kosak observed, there was no evidence that  
10 this report was even introduced into the legislative  
11 record.

12                  JUSTICE BREYER: So -- so if it was not -- I  
13 mean, I would suspect at that time Judge Holtzoff was a  
14 pretty well known person in the legal community and I  
15 would suspected if we are guessing at such a thing that  
16 quite a few did know who he was. And I suspect that  
17 when Congress passes a technical bill, they are  
18 interested in the views of the Department of Justice and  
19 these were those views.

20                  MR. SHANMUGAM: Yes. I want to --

21                  JUSTICE BREYER: So if we are going to play  
22 a magic game that we don't pay attention to what sheds  
23 light on it, fine, then we don't, but I would.

24                  MR. SHANMUGAM: Well, Justice Breyer, I  
25 wanted simply to make the point that in the pantheon of

1 legislative history sources for those members of the  
2 Court who are interested in legislative history, we  
3 recognized that the Holtzoff report should not be  
4 afforded great weight. But that having been said, I  
5 want to address directly the language you cite from the  
6 Holtzoff report, because I believe that that language if  
7 anything supports our position, and not Petitioners,  
8 because in the relevant sentence of the Holtzoff report,  
9 Judge Holtzoff wrote that the additional proviso,  
10 meaning the detention of property clause, has special  
11 reference to the detention of imported goods in  
12 appraisers' warehouses or customs houses as well as  
13 seizures by law enforcement officials, Internal Revenue  
14 officers and the like. Now Petitioner --

15 CHIEF JUSTICE ROBERTS: Is there any  
16 legislative history about what Judge Holtzoff meant by  
17 that?

18 MR. SHANMUGAM: Well, one could make the  
19 argument that that legislative history is itself  
20 ambiguous; and indeed the D.C. Circuit in adopting  
21 Petitioner's construction itself acknowledged that at  
22 best, the legislative history was as unclear as the  
23 statute.

24 All I mean to suggest is that Petitioner  
25 does not have available to him any sort of ejusdem

1 generis argument in construing that sentence.

2 JUSTICE BREYER: But I think in reading  
3 that, I think that's a good point. My actual reading of  
4 it, of that paragraph 2, is that it's not free of  
5 ambiguity. I completely agree with you. And if I read  
6 through it, then I'm making up my mind as a judge, well,  
7 how do I feel about what these words likely show and how  
8 people in Congress would have interpreted that kind of  
9 reference or statement in testimony by a person who  
10 thought this? Free of ambiguity, I agree with you, it  
11 isn't. But it might cut somewhat more in favor of the  
12 Petitioners than the Respondents.

13 MR. SHANMUGAM: Well, I think, Justice  
14 Breyer, with all respect, that this is not a case in  
15 which very much of a conclusion can be drawn from the  
16 legislative history one way or another. We have this  
17 language from the Holtzoff report which I admit, you  
18 know, could be susceptible to the same sorts of  
19 arguments that Petitioner is making with regard to what  
20 we feel is the unambiguous language of the statute. But  
21 other than that the only thing that my friend has Mr.  
22 Andre has cited are these summaries in various  
23 congressional reports which essentially summarize in  
24 shorthand, often in a single sentence, all of the  
25 proposed exceptions in the FTCA; and none of those

1 summaries so much as refers to the "and any other law  
2 enforcement officer" language at all. In fact, some of  
3 the summaries on which Petitioner relies do not even  
4 cite the detention of property exception at all.

5               So this is, in our view, a case in which at  
6 most, the legislative history is simply silent. And we  
7 are left, I think, and indeed we should start with the  
8 text of the statute, and we have the unambiguous phrase  
9 "or any other law enforcement officer" in this case.

10              JUSTICE GINSBURG: You have a difference  
11 with Mr. Andre on the extent to which other law  
12 enforcement officers assist customs and revenue agents.  
13 In your brief you say that's a rare occurrence. And  
14 Mr. Andre says oh no, it's quite common. So which is  
15 it?

16              MR. SHANMUGAM: Well, we do believe that it  
17 is a rare occurrence, but in some sense, Justice  
18 Ginsburg, I think that the answer to that question  
19 depends on exactly what it is that Petitioner means when  
20 he says that an officer is acting in a customs or tax  
21 capacity. And with the Court's leave, I'd like to offer  
22 at least three possible explanations for what that means  
23 and then explain why each of them would be an erroneous  
24 interpretation for this Court to adopt, and each of  
25 these three explanations I should add, appear at various

1 points in Petitioner's brief.

2           The first is that an officer is acting in a  
3 customs or tax capacity when the officer is actually  
4 acting in a revenue collecting capacity. And we believe  
5 that if the Court were to adopt that limitation, there  
6 really are no actual cases of which we are aware that  
7 would fall within that language. And indeed, it would  
8 cast some doubt on the meaning of the preceding phrase  
9 "any officer of customs or excise" because one might  
10 very well wonder whether under Petitioner's construction  
11 that phrase should also be limited to a revenue  
12 collecting capacity.

13           The second possible explanation is that an  
14 officer is acting in a customs or tax capacity when the  
15 officer is more generally acting to enforce the customs  
16 or tax laws, that is to say, the provisions of Title 19  
17 or 26 of the United States Code. But we believe that  
18 that interpretation, too, would suffer from the same two  
19 deficiencies that I've already identified and would also  
20 suffer from a third, namely, to the extent that  
21 Petitioner relies for his noscitur a sociis argument on  
22 the assessment of taxes clause, that limitation would  
23 actually sweep more broadly than the mere assessment of  
24 taxes.

25           So the third possible interpretation and the

1 one that we're left with, I think, is that an officer is  
2 acting in a customs or tax capacity whenever the officer  
3 is actually performing a function that is performed by  
4 customs or excise Internal Revenue officers. But if  
5 anything, that limitation would exclude only a very  
6 small number of cases apart from cases in the prison  
7 context such as this one, because as Petitioner himself  
8 recognizes, customs officers have virtually plenary  
9 authority to enforce the criminal provisions of the  
10 United States Code.

11 JUSTICE ALITO: Are all customs and excise  
12 officers law enforcement officers?

13 MR. SHANMUGAM: All customs officers, by  
14 statute, have law- enforcement authority, and that is  
15 under, I believe, 19 U.S.C. 1589(a).

16 Now, to be sure, there are people employed  
17 by the Customs Service, now ICE and CBP components of  
18 the Department of Homeland Security, who wouldn't  
19 qualify as customs officers.

20 There are secretaries and other people  
21 employed there that don't that statutory definition.

22 JUSTICE ALITO: Are there other  
23 circumstances in which, let's say, goods are being  
24 shipped into the country, and the -- the shipment is  
25 detained by someone who is not a law-enforcement

1 officer, at least under the definition in subsection  
2 (h), someone who has the power to execute searches,  
3 seize evidence, and make arrests?

4 MR. SHANMUGAM: I think they typically would  
5 be, and I'm not aware of any examples in which they  
6 would not be, because customs officers are the vast  
7 majority of people who are employed by the various  
8 customs-related agencies.

9 And the same is true, I would note, with  
10 regard to Internal Revenue officers. One of the  
11 oddities of this statute is that Judge Holtzoff, rather  
12 than using the known term "Internal Revenue Officer,"  
13 actually used this phrase "officer of excise," seemingly  
14 borrowing from the British bill.

15 And we believe that, at most, that phrase  
16 would have to refer to an Internal Revenue officer  
17 acting in an excise- collecting capacity. But, to the  
18 extent that "excise officer" has a narrower meaning than  
19 "Internal Revenue officer," we believe that that  
20 actually supports our construction, because it would  
21 have been quite peculiar for Judge Holtzoff and Congress  
22 to have referred only to an excise officer and not to an  
23 Internal Revenue officer if they had meant to limit the  
24 residual phrase "any other law-enforcement officer" to  
25 officers acting in a customs or tax capacity.



1 JUSTICE BREYER: Have you -- have you found  
2 any -- any research on that? I mean I think that's a  
3 very interesting point that -- that -- have you found  
4 any book I could look at or report that -- that would  
5 cast some light on whether at that time, 1946, the  
6 phrase "other law enforcement officers" referred to a  
7 large number of people who had a lot of different tasks  
8 that had not much to do with customs or excise?

9 If so, this would be an odd way of sneaking  
10 them into the bill. That's who it would look like.

11 On the other hand, if there were just a few  
12 of them, well, then, the bill, at worst, is a little bit  
13 more than somebody might have thought; and it would  
14 appear perfectly normal to a legislator. So is -- is  
15 there anything to look at?

16 MR. SHANMUGAM: I wish that I could point to  
17 such a book, Justice Breyer. I know that, in doing my  
18 own research, what I did was simply to go on the  
19 Internet and go to the website's of various Federal  
20 law-enforcement agencies and try to get a sense of when  
21 they were established.

22 But, unfortunately, as I said earlier, I was  
23 just unable to obtain any numbers as to how much  
24 officers these various agencies had, and the like.

25 But I think that, more broadly, certainly

1 Congress knew what the phrase "any other law enforcement  
2 officer" meant. And Judge Holtzoff proposed this  
3 language in what would become the bill that was  
4 introduced in December of 1931.

5 The FTCA was, of course, ultimately enacted  
6 in 1946, and I think that one of the difficulties in  
7 attempting to look to this legislative history, which,  
8 as I say, we believe is silent, is that you're talking  
9 about, you know, a number of Congresses over many years.

10 And, to be sure, this Court has looked to  
11 these same legislative history sources in prior  
12 decisions construing the FTCA. But, you know, I do  
13 think that we are left with the plain language here.  
14 And we are also left with Congress's underlying policy  
15 objectives, and I do want to say a word about the other  
16 two policy objectives on which this court relied in  
17 Kosak which --

18 JUSTICE SOUTER: Mr. Shanmugam, before you  
19 get into policy, may I just suggest that there is a  
20 possible fourth category, really. You had mentioned  
21 three, and one -- a fourth possibility might be  
22 "law-enforcement officer," in a very broad sense of the  
23 term, but one who is simply providing, let's say,  
24 protective service in aid ultimately of the revenue  
25 laws.

1           And the reason I have thought of this is  
2   that this sort of situation went on in my -- my native  
3   State in this past month, in which the United States  
4   Marshal Service, which at the time all of these statutes  
5   were enacted was a fairly large agency, took control of  
6   some real estate in -- in New Hampshire which had been  
7   the property, or was the property, of tax protesters.

8           And they -- they held custody of that. They  
9   took control of that real estate for about a week to  
10  make sure that there were no booby traps and bombs that  
11  -- that would -- that would blow up the IRS people when  
12  they went in there to enforce their tax liens.

13           That would be an example of "law-enforcement  
14  officer" in a very broad sense. It could cover the  
15  Marshal service, the FBI, and whatnot; and, yet, the --  
16  and No. 2, they would be exercising, you know, typical  
17  law-enforcement functions, protective functions. And,  
18  yet, they would be doing so in -- in aid of -- of the  
19  tax or the revenue laws.

20           That would be a plausible reason for -- for  
21  sticking in the general phrase, and it would be a  
22  plausible reading of the phrase, wouldn't it?

23           MR. SHANMUGAM: Well, Justice Souter, I  
24  think, with no disrespect to the good law-enforcement  
25  officers of New Hampshire, that these cases come up far

1 more rarely in the Federal context, because both customs  
2 officers and Internal Revenue officers are  
3 law-enforcement officers who have, I think, quite a  
4 refined capability. They carry weapons, and they are, I  
5 think, usually very well prepared to kill if --

6 JUSTICE SOUTER: Do IRS agents have -- have  
7 expertise in -- bomb detection and dismantling?

8 MR. SHANMUGAM: There certainly might very  
9 well be cases in which they would feel the need to call  
10 in the FBI or other law-enforcement agencies. But I do  
11 think that it is telling that in the 60-year history of  
12 the FTCA there don't appear to be any cases that fall  
13 into that category.

14 JUSTICE SOUTER: Well, there don't seem to  
15 be many cases because -- I mean that's why we've got  
16 this one at this point.

17 MR. SHANMUGAM: Well, there are quite a few  
18 cases more generally. I think that there are something  
19 in the neighborhood of 17 prior decisions in the courts  
20 of appeals alone involving these fact patterns or  
21 similar ones.

22 JUSTICE SOUTER: Over what period of time?

23 MR. SHANMUGAM: Over the 60-year period of  
24 the enactment of the FTCA.

25 JUSTICE SOUTER: Well, I mean that's not --

1     that's not a deluge of litigation. I mean it seems to  
2     me there is reason to assume that no matter what reading  
3     we give it, there is a plausible reading that can come  
4     up that -- that confines the actual application of the  
5     "other law-enforcement officer" fairly narrowly.

6                     MR. SHANMUGAM: But our fundamental  
7     submission, Justice Souter, is that there is no good  
8     textual reason for confining the phrase "any other  
9     law-enforcement officer," because that phrase, in our  
10    view, is unambiguous.

11                    And, notably, Petitioner in his brief and at  
12    oral argument does not directly contend that there is  
13    any ambiguity in that phrase, itself. And this Court  
14    has noted, in applying both the noscitur a sociis and  
15    the ejusdem generis canons of construction, that where  
16    the relevant phrase to which a limiting construction is  
17    being applied is itself unambiguous, that that is the  
18    end of the inquiry.

19                    JUSTICE SOUTER: Yes, but the question of  
20    what is -- what is ambiguous or not is -- is a question  
21    of context. And if you take the phrase "law-enforcement  
22    officer," and you say is that ambiguous, and you say  
23    well, gee, no.

24                    But if you stick it in this particular  
25    statute and it happens to follow these specific

1 references to tax gatherers and tax and excise laws,  
2 then it seems to me it's fair to say it does become  
3 ambiguous, because it gives rise to a reasonable  
4 question.

5                   Were they just getting at law-enforcement  
6 officers who were performing these kinds of functions,  
7 or did they really mean it as broadly as the phrase in  
8 real isolation would have meant? That's ambiguity, and  
9 that's what we've got here.

10                   MR. SHANMUGAM: I don't believe that that's  
11 correct, Justice Souter, and the reason that I don't  
12 believe that that is correct is because this Court has  
13 suggested that the starting point is the relevant phrase  
14 that is being interpreted.

15                   And here we have the phrase "any other law  
16 enforcement- officer."

17                   JUSTICE SOUTER: But then you are saying,  
18 don't read the statute as a whole. That argument, in  
19 effect, is saying isolate the phrase -- and we don't do  
20 that.

21                   MR. SHANMUGAM: Well, no, Justice Souter. I  
22 think that where the phrase is unambiguous, this Court  
23 has suggested that the inquiry is at an end, and, to  
24 take an example --

25                   JUSTICE SOUTER: I agree with you. And if I

1 make the assumption that it's unambiguous, your argument  
2 is unassailable. But if I don't make that assumption,  
3 then your argument risks circularity.

4 MR. SHANMUGAM: Well, let me --

5 JUSTICE SOUTER: And my suggestion is that  
6 it is the context that makes your argument a tough sell.

7 MR. SHANMUGAM: Let me try to explain to you  
8 why you should make that assumption, and it is because  
9 Congress here used the word "any."

10 And this Court has repeatedly noted that  
11 where Congress uses the word "any," it is substantial  
12 evidence that Congress intends a phrase to be construed  
13 broadly. And this Court has specifically refused to  
14 apply the ejusdem generis canon to phrases introduced by  
15 the word "any" on precisely the ground I cite, namely,  
16 because they conclude that that phrase is unambiguous.

17 JUSTICE STEVENS: But you are talking about  
18 the use of the word "any" all by itself. Here it says  
19 "any officer or customs or excise or other" -- "or  
20 other," and you would just take those words out of the  
21 statute.

22 MR. SHANMUGAM: Well, we wouldn't be taking  
23 the words out of the statute, because we do believe --

24 JUSTICE STEVENS: But you believe they add  
25 nothing to the text of the statute.

1                   MR. SHANMUGAM: They add nothing to the text  
2 of the statute in the sense that Congress could have  
3 written the statute to refer to any law-enforcement  
4 officer. That is certainly true. That is also true  
5 with regard to all of the statutes and constitutional  
6 provisions that we cite in footnote 11 of our brief.  
7 And, indeed, in some sense, it would be true with regard  
8 to Petitioner's proposed construction insofar as  
9 Congress could easily have written a statute that simply  
10 referred to any law-enforcement officer acting in a  
11 customs or tax capacity.

12                   JUSTICE SCALIA: There are two "anys" here.  
13 I'm not sure that --

14                   MR. SHANMUGAM: I'm certainly referring to  
15 the "any" that modifies "any other law enforcement  
16 officer."

17                   JUSTICE SCALIA: Any other. So it says any  
18 goods by any officer of customs or excise, or if it just  
19 had said "other law enforcement officer," you might --  
20 you might disregard the force of any because it was way  
21 back there.

22                   MR. SHANMUGAM: That's right. And contrary  
23 --

24                   JUSTICE SCALIA: But if they repeat "or any  
25 other law enforcement" --



1                   MR. SHANMUGAM: That's right. And contrary  
2 to Mr. Andre's submission, this Court has made precisely  
3 that point in Harrison v. PPG Industries, in which the  
4 Court was construing a similar phrase that referred to  
5 "any other final action by an EPA administrator." And  
6 that came after a series of specific final actions to  
7 which the statute referred. And the Court actually  
8 said, in so many words, it might be different if the  
9 word "any" were omitted, but we believe that the  
10 inclusion of "any" renders that phrase unambiguous.

11                   And I would note as well, Justice Souter,  
12 that in your dissenting opinion to be sure in Circuit  
13 City in footnote 2, you cited all of these very cases on  
14 which I'm relying now in support of your proffered  
15 construction of the statute.

16                   JUSTICE SOUTER: They were on point for my  
17 dissent. I know.

18                   (Laughter.)

19                   MR. SHANMUGAM: Well, I think -- I would  
20 respectfully submit that they are on point to our  
21 construction as well. But I do want to say a word about  
22 the underlying policy objectives here --

23                   JUSTICE GINSBURG: I know your time is  
24 running out, but I would like you also to say a word  
25 about what remedy, if any, does Ali have when you're

1 saying he had his prayer rug and Koran, and the  
2 government lost them and he didn't get any compensation?  
3 Does he have any remedy?

4 MR. SHANMUGAM: Sure, Justice Ginsburg. And  
5 the answer is, yes, that he does. He does have an  
6 administrative remedy.

7 And I'd like to say just a couple of things  
8 about the available administrative remedies.

9 First of all, any claimant who claims that a  
10 Federal agency, including a Federal law enforcement  
11 agency negligently damaged his or her property, would  
12 have a claim under 31 U.S.C. 3723 for up to \$1,000.  
13 That statute, which we cite in a footnote, I believe in  
14 our brief, would cover the vast majority of claims  
15 involving the Bureau of Prisons.

16 There's actually another Federal statute, 31  
17 U.S.C. 3724, which provides a further remedy against the  
18 Department of Justice for up to \$50,000 for personal  
19 injury or property damage caused by a law enforcement  
20 officer. And critically, that statute expressly makes  
21 clear that it applies where the FTCA does not. And so  
22 that administrative remedy would be fully available.

23 JUSTICE GINSBURG: But there's no court --  
24 there's no court role in that process.

25 MR. SHANMUGAM: There is no court role in

1     that process, but the Bureau of Prisons routinely  
2     processes these administrative claims. As we note in  
3     our brief, there were 12,000 such claims over the last  
4     three years. The Bureau of Prisons has procedures for  
5     processing those claims. It paid out something in the  
6     neighborhood of 1,100 of those claims.

7                     And there's no reason to think that the  
8     Bureau of Prisons would alter those procedures if the  
9     Court were to hold in this case that there is no  
10    judicial remedy. Indeed, the Bureau of Prisons has paid  
11    out on such claims even in circuits that have adopted  
12    our interpretation.

13                    I do want to say just a word about the  
14    underlying policy considerations, because to the extent  
15    that members of the Court feel that the statute is  
16    ambiguous, we believe that they strongly support our  
17    construction.

18                    In Kosak, this Court analyzed two other  
19    policy considerations in addition to the avoidance of  
20    duplicative remedies: First, protecting important  
21    government functions from the threat of suit; and  
22    second, avoiding exposure to fraudulent claims. And we  
23    believe that those concerns are particularly implicated  
24    in the prison context which constitutes the mine run of  
25    cases in this area. Thank you very much.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 Mr. Shanmugam.

3 Mr. Andre, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF JEAN-CLAUDE ANDRE  
5 ON BEHALF OF PETITIONER

6 MR. ANDRE: I'd like to first address the  
7 government's resistance to making any concession that  
8 the statute is ambiguous. First of all, if the  
9 statutory language in this case was so clear, then so  
10 must the statutory language in Circuit City. The  
11 language had started out with the words "any other," and  
12 clearly then were followed by words that have a very  
13 plain meaning out of context, "any worker engaged in  
14 interstate or foreign commerce."

15 We just don't believe that the government's  
16 position that the statute is unambiguous can be squared  
17 with that case. Nor do we think as a factual matter  
18 that the statute is unambiguous.

19 In particular, we think it would have been  
20 strange for this Court in Kosak to go out of its way in  
21 a footnote and expressly decline to resolve today's  
22 question presented if the detention of property clause,  
23 in particular the "law enforcement officer" phrase, had  
24 only one clear meaning.

25 And then on top of that, as we noted in our

1    reply brief, five courts of appeals have adopted our  
2    construction; two other circuit judges have written  
3    separately. The total is 16 circuit judges that have  
4    found our position to be credible, found the statute to  
5    be ambiguous, applied the canons of construction that we  
6    are urging the Court to apply today, and then resolved  
7    the case in our favor

8                    So if, if the statute is truly unambiguous,  
9    then those 16 circuit judges not only got this issue  
10   wrong, they got it very wrong.

11                   Justice Breyer, I unfortunately don't have an  
12   example either of what other types of law enforcement  
13   officers were out there at the time of the FTCA's  
14   enactment, but I do have one example, and that would be  
15   the Elliott Ness and the Al Capone investigation.

16                   Elliott Ness was in charge of running a group  
17   of -- in charge of supervising a group of government  
18   agents who were part of the Department of Justice, even  
19   though Elliott Ness himself was a treasury agent. And  
20   they were all trying enforce the Volstead Act, but -- to  
21   get Al Capone on charges of income tax evasion. And so  
22   we believe that that's a nice example from the early  
23   1930s when Judge Holtzoff drafted this language that  
24   shows that you could have a revenue officer working  
25   with -- in fact, supervising other law enforcement

1 officers, and they are all really doing the same thing.

2 As far as the policy considerations are  
3 concerned, we believe that the government's reliance on  
4 the two other general purposes for the FTCA exceptions  
5 just prove too much. Pretty much any governmental  
6 function is important. And so the government in every  
7 brief they filed on this issue below and in pretty much  
8 every FTCA exception case that we've seen has come in  
9 and said, oh, but our interests are served by these two  
10 other purposes, and therefore, this statutory exemption  
11 has to be construed narrowly.

12 Again, as a factual matter, we don't think that  
13 their concerns are really all that well founded, in any  
14 event. True, there were 12,000 administrative claims filed  
15 by Federal prisoners over the last three years. But as we  
16 pointed out in footnote 12 of our cert petition, there  
17 were only 16 cases filed in all of 2006 by Federal  
18 prisoners under this statute.

19 settlement process is working, and that also Federal  
20 prisoners are just not bringing suit and there is a very  
21 good reason for. That it's the Federal filing fee.  
22 That's \$455. My client's claim in this case is \$177.

23 Prisoners don't evaluate whether to sue based  
24 on some sophisticated reading of sovereign immunity  
25 doctrines and ambiguous statutory text. They, you know,

1 they think about their wallet. They make \$2.50 a day,  
2 and it's just not worth it for them to risk --

3 JUSTICE GINSBURG: Wouldn't they have IFP  
4 status?

5 MR. ANDRE: Even if a prisoner gets IFP  
6 status, they still have to pay the full filing fee. The  
7 IFP status only allows them to pay in installments. So  
8 it's debited off their account. So they still make a  
9 very real calculation when they decide whether to sue  
10 based on how much is at stake and how much is it going  
11 to cost me.

12 JUSTICE GINSBURG: Here there wasn't that  
13 much at stake.

14 MR. ANDRE: That's correct. There was \$177  
15 at stake and so perhaps my client shouldn't have sued  
16 because it didn't make a lot of sense, although he also  
17 did file the suit a couple years earlier when the filing  
18 fee was lower. But in our experience, prisoners they  
19 are not going to typically sue for these kinds of  
20 claims. This is nothing like the Prison Litigation  
21 Reform Act problem we had in Jones V. Bock, where there  
22 are 24,000 cases coming before the Federal courts every  
23 year. That's just not something we envisioned.

24 So we don't think that adopting any one of  
25 the four constructions discussed are debated between my

1 friend and Justice Souter would somehow open up the  
2 floodgates here and lead to a lot of prisoners suing  
3 under this particular provision. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Mr. Andre. The case is submitted.

6 (Whereupon, at 12:08 p.m., the case in the  
7 above-entitled matter was submitted.)

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