In the

Supreme Court of the United States

HATZIACHH SUPPLY CO., INC.,

PETITIONER

V.

UNITED STATES,

RESPONDENT.

No. 78-1175

Washington, D. C.
December 5, 1979

Pages 1 thru 45

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

HATZLACHH SUPPLY CO., INC., Petitioner, v. UNITED STATES, Respondent.	No. 78-1175

Washington, D. C.,

Wednesday, December 5, 1979.

The above-entitled matter came on for oral argument at 1:55 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NATHAN LEWIN, ESQ., Miller, Cassidy, Larroca & Lewin, 2555 M Street, N. W., Washington, D. C. 20037; on behalf of the Petitioner

KENT L. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1175, Hatzlachh Supply Company v. United States.

Mr. Lewin, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LEWIN: Mr. Chief Justice, and may it please the Court:

This case which is here on certiorari to the Court of Claims presents the question whether the United States may be sued as a party to an implied contract of bailment when goods seized by the Customs Service are lost while in the custody of Customs.

The Court of Claims granting summary judgment for the United States, held that by reason of a provision in the Federal Tort Claims Act, particularly Subsection (c) of Section 2680, the United States is totally immune from any consequences which follow -- and here's the language of the statute itself -- "the detention of any goods or merchandise by any officer of Customs or Excise or any other law enforcement officer."

This reading of Section 2680(c) conflicts with the 1958 holding of the Court of Appeals for the 2nd Circuit in a case called Alliance Assurance Company v. United States,

which is recorded in 252 Fed. 2d, and also with a very recent construction of that statute by the 9th Circuit. And this Court has now granted certiorari to resolve that conflict.

QUESTION: Mr. Lewin, it has been my experience in my service here that the Court of Claims is usually astute to seize opportunities to broaden its jurisdiction. It resolves doubtful questions frequently in favor of its jurisdiction, and if it were a very close case, I would have thought the Court of Claims would have decided it the other way.

MR. LEWIN: Well, I think quite frankly the Court of Claims did not consider in this case the location of and the language of this particular subsection as compared with those that were near it, nor indeed did it consider the legislative history of Section 2680(c), which we've set out in our brief.

I think the Court of Claims was quick, maybe, to seize on the language of 2680(c) and to view it as applying to these kinds of situations because it viewed that subsection as granting broad protections to the Customs Service. We think that is not what the legislative history shows about Subsection (c) and we think that's not what Congress intended.

It did not intend to say Customs Service is immune from suits against it as for example the Tennessee Valley Authority is under the provision of 2680, the last subsection, or other agencies of government, the military service or others.

QUESTION: But this is a detention of property, isn't

it, Mr. Lewin?

MR. LEWIN: It was a detention; yes, Mr. Chief Justice.

QUESTION: You think it changed its character at a point?

MR. LEWIN: Well, of course, this case was decided on summary judgment. All the facts were not presented, in terms of the history of how this property came into the possession of the United States and what steps led up to the notice of seizure.

An interesting fact which appears just from the record, and of course that would have to be amplified, if there ultimately had to be a trial on this question, is that there were 11 weeks between the time that these goods came into the United States and until a notice of seizure was sent out. Now, the notice of seizure, of course, is not a forfeiture, contrary I think to implications that might emerge from the brief filed by the Solicitor General. A notice of seizure in the Customs procedure, ordinarily, just initiates the process. It says to the importer, "Now, look. We expect you now to proceed. If you want to claim that there should not be a forfeiture, if you want to claim that there are circumstances which relieve us of the right to forfeit these goods, file a petition," which is exactly what was done.

But in this case, the notice of seizure didn't

immediately even follow upon the arrival of the goods to the United States. The goods arrived. Let me just go through those facts very briefly.

The goods arrived in March and April from Hamburg. There was apparently a discrepancy between what appeared on the Bills of lading, with regard to these goods, which described them all as razor blades, although in a corner it described film, and the invoices, which were equally available to Customs and were just open and notorious. The invoices specified there were camera supplies and film and things of that kind.

The importer, upon being notified that the goods had arrived, has the alternative under the Customs procedure, by statute and indeed, I am advised, this is routine with Customs, they encourage it, that you ask for immediate delivery rather than going through all the paper work, you can go to a Customs House broker, you can fill out a few papers and say, "Under the provision of the statute, we want immediate delivery," and then the rest of the paper work is done later.

That was done through a Customs House broker who took the description of the goods from the bill of lading. From all that appears, it was a totally innocent mistake that the Customs House broker made. It was submitted to Customs and they said, "Look, there's a discrepancy between what appears on your application for immediate delivery and what appears on these invoices. Consequently, we're not releasing the goods."

This led to various --

QUESTION: By paying $60,000, though, to dispose of this matter, there is some intimation, at least, that it wasn't totally inadvertent.

MR. LEWIN: Well, Mr. Chief Justice, let me point this out: What happened, those goods contained, and the first letters that went to the Customs Service contains strong protest about the fact that these goods were dated film, most of them were dated film which would expire a year and a half later. By the time the Customs Service sent a notice of seizure, which was in May, by the time the protest -- protests were filed a week after the notice of seizure; within a week the requests for remission were filed -- Customs waited four months, until October of 1970 before saying, "Now, you have to submit $40,000 to get these goods out."

At that point the importer felt that he had written to Customs, these were dated films, the summer season had passed for which the films really were originally hoped to be out on the market, and he paid the $40,000. I can represent to the Court again, it's not in the record, there was a petition submitted afterwards to seek to return that $40,000 to Customs because it was felt that it was inappropriate. But the importer is in a position in those circumstances where he can't really argue with the United States. They've got his dated film, which is perishable. They have stainless steel razor

blades, which were in there, too, and the record reflects that the attorney then representing the importer wrote to Customs and said, "Look, chromium-plated blades are coming out on the market. There's a very limited period of time in which we can still sell stainless steel razor blades. So we really have to get those off the dock and out into the market as quickly as possible."

Under those circumstances, the importer had no choice other than to pay the money to get what was really close to $600,000 worth of goods, and hope that a subsequent petition might result in some remission of that $40,000 demand by the United States.

Of course, when the goods came back, 165,000 was missing, and that's what gives rise to the issue in this case. And the question in this case is, whether if the United States finally, having taken these goods -- certainly the importer was not voluntarily surrendering them to the United States, but the United States having taken the goods -- having taken them under a statute and under a procedure whereby it was really inviting the importer to submit applications following the time that these goods were being detained -- now, the statute provides that if there's any case of forfeiture, it can't be done unless there's a libel, a proceeding filed, judicial determination with regard to forfeiture.

So during the entire period of time that Customs had

these goods, it was subject specifically to the statute, and this is not disputed, to 19 USC 1605, which says, "Pending such disposition, the property shall be stored in such place as in the collector's opinion is most convenient and appropriate with due regard to the expense involved, whether or not the place of storage is within the judicial district," and so on and so forth.

The statute says it shall be placed and remain in the custody of the collector for the district in which the seizure was made to await disposition according to law. It's in his custody to await disposition according to law.

QUESTION: Mr. Lewin, out of that language, I take it you infer a commitment to return the goods on the part of Customs?

MR. LEWIN: Yes, sir.

QUESTION: And I take it the opposition will take just the opposite approach to these facts?

MR. LEWIN: I suppose so, although I think the government's brief in this Court, at least, asserts mainly that there is no bailment in this case, not because the statute does not provide for it but because in some way the custody of the United States is inconsistent with title remaining in the importer. And of course --

QUESTION: They say it's a bailment imposed by law, rather than a bailment in fact, so it isn't the kind of a

bailment contract that's subject to suit in a Court of Claims?

MR. LEWIN: Our position on that is that whether something is a bailment implied in fact depends of course, when you're dealing with the government, on what the government knows about its obligations under the law. Of course, the law says to the Collector of Customs, you're the custodian of these goods until such time as the court acts. That means that when the Collector of Customs takes them, he knows, not by operation of law in the sense that it's contrary to his --

QUESTION: Mr. Lewin, I suppose that if the Court of Claims was wrong in saying that 2680(c) provides no remedy, let's assume that when you don't return goods back, you can sue the United States under the Court of Claims Act. If you negligently lose them.

MR. LEWIN: Yes.

QUESTION: Of course, this case wouldn't amount to a whole lot, would it?

MR. LEWIN: No, it wouldn't, of course. We've made the point in our brief --

QUESTION: You say we've granted cert on that?

MR. LEWIN: Well, I think you've granted cert because the Court of Claims has said that by reason of 2680(c) we can't bring a contract action.

QUESTION: I understand, because this means that the United States intends to be immune generally?

MR. LEWIN: It tends to be immune even under the Tucker Act, even under implied contract.

QUESTION: But if they were wrong on that, say they're wrong on that, it wouldn't change their position that this is not an implied contract?

MR. LEWIN: Well, I don't think the Court of Claims really said it was not an implied contract.

QUESTION: Well, it wouldn't change the United States position?

MR. LEWIN: Oh, it wouldn't, I agree, and I think the United States really in this Court has, we have said in our reply brief, relegated to a secondary role the Court of Claims reasoning, which I think the Court of Claims seized on the 2680(c) language, and now the United States mainly argues in this Court there's no implied --

QUESTION: We've granted cert on this conflict on (c)?

MR. LEWIN: That's what we argued in our petition. I assume that that's what you've granted cert on. We filed a short petition, we said this conflicts with the 2nd Circuit, and you granted cert.

QUESTION: Do you think that old case of United States v. Sole is no longer the law?

MR. LEWIN: Well, the case, the one I --

QUESTION: It's the case in which the --

MR. LEWIN: Schmaltz' case?

QUESTION: It is the settled doctrine of this Court that the property, the specific property shall be forfeited, and the forfeiture takes place, takes effect immediately upon the commission of the act.

MR. LEWIN: Oh. The United States v. Sole, Mr. Chief Justice, involved the still that was being run on a premises and the language in, which is quoted in 19, which very specifically says that title remains in the party until judicial condemnation refers, it seems to me, not to the Customs situation --

QUESTION: I thought the language was not quite that, the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed. In other words, as soon as they seized the still out in the woods, without --

MR. LEWIN: Right.

QUESTION: -- any judicial proceeding, the U. S. Marshals or Revenue agents took the title, they took physical possession and title.

MR. LEWIN: Well, I think the language immediately preceding that, Mr. Chief Justice, is the right to the property vests in the United States although their title is not perfected until judicial condemnation.

So the title doesn't pass at that point. There is

a right in a certain possessory sense, and we don't doubt that even as applied to Customs. And we think that the Stowell case does not apply to the Customs procedure. It's really quite different.

Stowell is a case where if Revenue officers seize a still, from that point on it's clearly contraband, it's clearly illegal. They say, "All right, we have now possession of this property which is contraband."

On the other hand, everything goes through Customs. Everything that comes in from abroad, in terms of commercial goods, goes through Customs. Customs detains them; Customs may say as it has, it did after a delay in this case, "All right, now we've seized them and we're asking you to invoke the procedures."

QUESTION: But if all this material had been seized at two o'clock in the morning when they were trying to land it on the coast of New Jersey or someplace, a smuggling operation, wouldn't it be in the same posture as the still in the Stowell case?

MR. LEWIN: I think if somebody -- I think, Mr. Chief Justice, if it were something different, if it were not going through the regular procedures and it were in that sense contraband, if it werelike narcotic drugs or something, I think it might be in that sense, because then the owner has no rights in it. But I think when something goes through the regular

Customs procedure, everybody knows -- we're talking about what the parties expect, what they anticipate, and really what is the tacit understanding, and I think that's really what implied contract in fact, implied bailment in fact means.

What is the tacit understanding of the parties? I think a Customs officer who seizes marihuana off the coast of the United States, his tacit understanding is he is not holding it as a bay leaf for anybody. But the Customs officer who says, "Well, this is coming in with all the routine goods that are being shipped into the United States," they're being processed, in that context Customs has a tacit understanding that it is holding these goods pursuant to the ordinary processes and pursuant to the procedures under which the importer makes his petition, if he thinks it ought not to be forfeited, if he thinks there is an innocent reason for the mistake in the documentation being submitted to the government, and consequently the statute -- indeed, it's not merely Section 1605, Mr. Justice Blackmun. It's also 28 USC 2465, which we quote at page 11 of our brief.

It says, "Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any act of Congress, such property shall be returned forthwith to the claimant or his agent." So the statute both says you're the custodian and you know that under the statute you have to return the property to the claimant or his agent.

QUESTION: Well, could it be that if the Court of Claims was wrong on the Tort Claims Act on 2680, could it be that there could be a tort claim, an action of the Tort Claims Act, and also an action in the Court or Claims, or not?

MR. LEWIN: Yes, I think it could. I think you could have both. Absolutely.

And -- but the Court of Claims was wrong and over board because they read the Tort Claims Act rule --

QUESTION: What you're saying is that these same facts gave rise to both the contract action and the tort?

MR. LEWIN: Yes, sir, it could give rise to a tort claim if you could prove -- it might be the highest burden of proof --

QUESTION: But yqu couldn't bring a tort claim in the Court of Claims?

MR. LEWIN: No, you couldn't bring a tort claim in the Court of Claims. And this action was brought only within the contract statute of limitations. That's why the contract theory is essential to the petitioner. It can only, the claim can only be asserted if it is a bailment or contract claim, because it's too late as a tort claim.

QUESTION: So you've got two shots at this case, one if you win on 2680, you'll win in any event; at least you can stay in court, in some other court, and if you win on the other end, you might stay in the Court of Claims because it's a

contract?

MR. LEWIN: Well, no. I think my point, if we win on just 2680 we're out of court on the tort theory because it's too late --

QUESTION: Oh, really?

MR. LEWIN: It's too late to bring a tort action.

QUESTION: Statute of limitations.

MR. LEWIN: So we're -- on the statute of limitations. So we're only in court under a contract action --

QUESTION: I see.

MR. LEWIN: -- and if the Court of Claims is right in its broad reading of 2680, contract actions are barred by 2680. Now, the government doesn't apparently make that argument here, that contract actions are barred. They say the Court of Claims is right in its general reading of 2680 and the contract action is barred in any event because there's no implied contract in fact.

QUESTION: You say that this would not fall within one of the exceptions to the tort claims act?

MR. LEWIN: Yes, sir.

If one looks at the language -- we've reprinted at pages 1A and 2A of our principal brief -- the language of the Tort Claims Act, the series of exceptions as originally enacted in 1947. Now, when Congress wanted specifically to say that a government agency should not be liable, should be immune

from any damage caused by loss, it knew very well how to say so, and it did in Subsection (b). It said, "Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." It would have been the simplest thing, had Congress really intended to do what the Court of Claims says, to say is to see any claim arising out of the loss of any goods or merchandise seized or taken by any officer of Customs or Excise. They didn't say that. They said any claim arising in respect of the detention of any goods or merchandise.

And that has, we submit, a very narrow and specific meaning. It means exactly, if one takes the film in this case, that if the ordinary government processes resulted in all the goods being given back to the petitioner, he got every last piece of film back, and the film was dated and therefore it was of no value because of the delay caused by detention alone, he'd have no tort claim. Detention is what causes the harm.

But when the film is missing, when it's lost or when it's damaged, that's not what Congress intended to protect against or intended to provide an exemption for. Congress didn't say loss or damage to the goods; it said merely detention.

Nor, for that matter, did Congress have the intention that the Court of Claims said it had to give this broad power to Customs officers to conduct their duties unfettered or unrestrained by any possibility of civil suit. Because when Congress wanted to have that intention in these exceptions, it

specifically provided for it.

Subsection (e), for example, says that there's no claim allowed for any act or omission in administering the provisions of the Trading With The Enemy Act. Now, had Congress wanted to say in administering the provisions of that, the Customs law, of the Tariff Act of 1930, or anything like that, it would have said it. Or, for example, Subsection (l) says any claim arising from the activities of the Tennessee Valley Authority. They didn't say any activities of the United States Customs Service. That's what Congress would have said had it really had the intention of immunizing the United States Customs Service, the way the Court of Claims thought.

And that's why it appears to me, in answer to your question, Mr. Justice Rehnquist, that the Court of Claims didn't look at the legislative history. They didn't compare it with these other provisions. They immediately read this section and they said, "Well, now, look. Here it says detention of goods and merchandise by any officer of Customs or Excise, and therefore that must have meant that the Customs Bureau is intended to be exempt in all its broad enforcement authority."

But that's just wrong. If one looks at the language, or if one looks at the legislative history, because we have set it out in our brief, and I certainly don't have the time to go into it in detail, but Judge Holtzoff, later Judge Holtzoff who was then a special assistant in the Department of Justice was

the principal proponent of this legislation on behalf of the Administration. He testified before the Congress that this provision, Subsection (c), was not like other provisions which were intended, like the Postal Service Provision, which were intended to immunize government agencies which were carrying out important functions and could not therefore be bothered or should not be restrained in some way by the possibility of civil suits.

He said certain provisions, including Subsection (c), were designed to simply preserve existing remedies for these kinds of situations. Well, the existing remedies with regard to any improper collection of Customs or duty were certain statutory provisions which, again we specified in our brief, which had nothing to do with whether you can bring a lawsuit if goods are harmed or lost or damaged in the course of custody.

QUESTION: But let's assume you construe Subsection (c) so it doesn't immunize. Under Testan, you still have to show that there is some affirmative duty imposed on the government to respond in money damages, do you not? I mean, you're not home free if you --

MR. LEWIN: No, we're not home free. But certainly so far as the rationale of the Court of Claims is concerned -- let me point out, the Court of Claims said, and the Court of Claims has been very careful in many cases and the government

has cited them -- the Court of Claims has been very careful in many cases to say, to keep this distinction between bailments implied in fact and bailments implied in law. And yet the Court of Claims said as to this particular bailment that on both, as a result of the statute and as a result of the fact that the notice of seizure, which was served on the petitioner in October of 1970, said, "Look, you give us $40,000, we'll give you your goods back," on that basis the Court of Claims said this is a strong case for a bailment in fact."

Page 30A of the appendix. The statute cited by the plaintiff, along with the action of the United States Customs Service in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh could make a strong case for the existence of an implied in fact contract, properly to preserve and redeliver all the goods to Hatzlachh.

All other things being equal, such a factual and legal combination might enable plaintiff to prevail. Now, this is from a court which in a whole line of cases has said, "We don't have jurisdiction over implied in law contracts," and they've drawn that distinction very clearly, and yet as to these facts, they recognize that both the statute and the fact that the notices of seizure anticipate this kind of a thing, makes a case under which they thought if not for 2680 (c) the plaintiff would prevail.

And we think that same thing applies here, because --

QUESTION: Suppose the language, Mr. Lewin, of Subsection (c) instead of using the words "or the detention," "or the failure to return and account for." Would you think that would make the statute different?

MR. LEWIN: I think that definitely would, yes.

QUESTION: Aren't they still in a sense detaining, when they do not return?

MR. LEWIN: No, I think detention, what Congress had in mind was you shouldn't be able to go and bring a Tort Claims Act to challenge the legality of detention. If one looks at what Judge Holtzoff was talking about, and he said there are other tax statutes and other ways of challenging the legality of detentions, I think what Congress was concerned with is, if we enact the Tort Claims Act and the Collector of Customs then detains property, people will be able to go in to a district court under the Tort Claims Act and say, "Look, this act of detention is a tort. It's illegal. The detention is illegal, and I can challenge it as a tort."

So therefore Congress said, "Look, you can't challenge it as a tort. We've got all the existing remedies under which you can challenge Customs seizures, Customs detentions." And they only had to do with the detention itself, not with what might happen after the goods were detained. If they were lost, if they were damaged in some other way, because I think as you pointed out, Mr. Chief Justice, the words simply could have

been, "or failure to return goods or merchandise by any officer of Customs."

QUESTION: Well, I would, on the contrary, I would read detention to mean just exactly that.

MR. LEWIN: Well, detention I think carries a very temporary meaning. A detention is something which is not a permanent loss. Failure to return I think is a permanent loss. A detention means you temporarily are keeping somebody, either keeping a person detained or keeping the goods detained, but it certainly has a limit, it sounds as if it's a limitation in time in some way by people who were responsible officers of the government.

QUESTION: Mr. Lewin, perhaps this, I guess it was suggested by my brother Rehnquist's question, but if there were no 2680(c) as it's been construed by the Court of Claims, you'd still have, there'd still be a question of whether or not the Court of Claims had jurisdiction of this lawsuit, would there not? You'd say that perhaps the answer is pretty clear, but in any event, there would be a question?

MR. LEWIN: There would be a question. I think the Court of Claims has indicated that it would view it very possibly as an implied contract.

QUESTION: It was brought under 1491, wasn't it?

MR. LEWIN: Yes, sir, the Tucker Act.

QUESTION: And as an implied contract claim, not as

a constitutional claim?

MR. LEWIN: Not as a constitutional claim, no; it was an implied contract.

QUESTION: And not founded upon an act of Congress?

MR. LEWIN: Well, that was an alternative claim that was made below; it wasn't passed on really by the Court of Claims, as to whether it was founded on an act of Congress.

QUESTION: But there would still remain questions to which you say the answers are reasonably clear, but in any event, there would be questions --

MR. LEWIN: Right.

QUESTION: -- as to the, to whether or not this lawsuit fits under the jurisdictional language of 28 USC 1491, would there not?

MR. LEWIN: Yes, sir; yes, sir.

QUESTION: Whereas if we agree with you on Subsection (c), it would be quite clear that you could bring an action in the United States District Court under the Tort Claims Act?

MR. LEWIN: The problem is, our time has run out.

QUESTION: Your time has run out.

MR. LEWIN: So we couldn't do that.

QUESTION: Well, you could have if you had decided rightly originally?

MR. LEWIN: We could have done that, yes. We could have done that, Your Honor.

I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Jones.

ORAL ARGUMENT OF KENT L. JONES, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. JONES: Mr. Chief Justice, and may it please the Court:

The Federal Tort Claims Act and the Tucker Act are not the only statutes that are relevant in this case, and they are not the only remedies that could be available in this context.

It is our position that petitioner brought his claim on the wrong theory and in the wrong forum. Petitioner has conceded in his reply brief that the very claim that he seeks to raise as a contract claim under the Tucker Act traditionally has been brought as a tort action against Customs officers individually in federal district court. For over 200 years it has been settled at common law that a Customs officer may be sued in tort for the negligent performance of his office, and in particular for the negligent loss of goods that have been seized for forfeiture, and for over 100 years, the United States has consented by statute, 28 USC 2006, to pay the tort judgment entered against the Customs officer, so long as the seizure was made with probable cause, as it surely was in this case.

QUESTION: Mr. Jones, on the question of negligence under such an action, would the mere failure to return be sufficient to make out a prima facie case of negligence? Say all they know is that the goods were seized and not returned.

MR. JONES: Well, you'd have to show title to the goods. He'd have to prove that they weren't forfeit, if that was an open issue.

QUESTION: Supposing he proved title but he doesn't know what happened to them. Would that be enough to prove negligence?

MR. JONES: Well, I think it would be enough to create a presumption of negligence, probably on a --

QUESTION: Res ipsa locutor?

MR. JONES: -- res ipsa locutor theory. It may depend on the context --

QUESTION: It's an action against the individual officer, isn't it, as opposed to against the United States?

MR. JONES: Yes, it is.

QUESTION: The traditional action?

MR. JONES: That's right.

QUESTION: And it's a presumption that the individual he happens to name as the defendant in the complaint has been guilty of negligence?

MR. JONES: Well, the individual that he happens to name has to be the Customs officer, and the presumption would

be that if the goods were lost, without explanation, the burden would be on the Customs officer to show that he exercised due diligence and that the goods -- that he was at fault for the loss of the goods. Here he was not at fault.

QUESTION: One cannot tell from the complaint whether the claim is -- all we know is that the goods disappeared, allegedly, and it could have been that they were negligently lost or it could have been that they were negligently stolen, or it could have been that they were converted.

MR. JONES: That's right.

QUESTION: Deliberately converted.

MR. JONES: That's right.

QUESTION: So far as the --

MR. JONES: But none of those would create a claim under the Tucker Act.

QUESTION: No, but in the case of stolen goods, say a third party broke into a government, Customs warehouse and stole the goods. There's no government negligence. There then would be no remedy under the Federal Tort Claims Act, although if your opponent is right here, there would be an implied contract, bailment remedy.

What I am suggesting is that the tort and the contract remedies are not necessarily coextensive?

MR. JONES: No. I think the contract remedy would be broader in two sense. First of all, the common law

negligence remedy against the collector, he never has to pay consequential damages for the goods, the detention of the goods. He only has to pay the value of the goods themselves that are lost. It is a basic principle of contractual bailment that the contractual bailee would be liable for all damages relating to the loss of the goods, including the consequential losses.

QUESTION: Who has to prove that the customs officer had possession of them in the first place? I know what the papers said, but does somebody have to prove that he actually received -- that these $165,000 worth of goods were actually there in the first place?

MR. JONES: I would think that he would have to prove they came into the possession of the customs officer. He would then have to prove that they were lost due to his negligence. But the unexplained absence would create the presumption of negligence. It would have to --

QUESTION: But there wouldn't be any presumption that he received them, would there?

MR. JONES: No, that would be subject to proof.

QUESTION: And if common law -- weren't there at least three different standards of proof, depending on whether you were a bailee for hire or a bailee for the benefit of the bailor or bailee for the benefit of the bailee?

MR. JONES: There were many different standards. Story, in the treatise that we both cited, specified a standard for quasi-bilees of the kind he thought the customs officers were and he said that their responsibility was simply what I have described, would be an ordinary negligence responsibility.

Well, for whatever reasons --

QUESTION: At least as I learned in law school, that was the standard exacted upon a gratuitous bailee, in contrast to the bailee for hire.

MR. JONES: I am not certain that that would be the standard for --

QUESTION: That is a mutual benefit, a mutual account. A gratuitous bailee is the slight negligence standard.

MR. JONES: We didn't study bailments in my --

(Laughter)

Petitioner never sought to invoke this traditional statutory tort remedy for the claimed loss of his goods. Instead, he sought to bring his tort claim as a contract action in the Court of Claims. But the jurisdiction of the Court of Claims over contracts with the United States extends, of course, only to consentual agreements. It doesn't encompass tort or quasi-contractual claims where by fiction of law a promise is imputed to perform a legal duty without

regard to the intent of the parties.

Well, the fundamental defect with the petitioner's action in the Court of Claims is that the traditional duty of customs officers to care for seized goods is quite plainly imposed by law and not by any agreement. In this Court's decision in the Thomas case in 1872, and in Justice Story's opinion in Burke v. Trevitt in 1816, the duty of customs officers to care for seized goods was held to derive from their official obligation to perform their office with due care or due diligence. It was not derived from any implied contractual undertaking entered into at the time of seizure. And there is in fact nothing at all contractual or consentual about the seizure of goods for forfeiture.

As Justice Story stated in his commentaries, there is no voluntary election at seizure. The goods are seized by justifiable force and not by consent or agreement. There is --

QUESTION: Do you thnk there is any difference in the kind of seizure, whether it is somewhere just off the coast or while they are unloading a ship at midnight or seized in the customs house, as a matter of law?

MR. JONES: I think as a matter of law, the only difference is that the person who brings the goods into the port under a false declarations is engaging in white collar smuggling. It is only necessary to prove that the goods

are forfeit to show that the false declaration was made negligently, and it hasn't been disputed. I am not sure it was disputed in the petitioner's opening argument, but it hasn't been disputed before, that this was negligent when these false statements were negligent. They were in fact concededly made, obvious errors were conceded and no explanation was given other than that we were negligent in making those obvious mistakes.

Well, the government's interest in preventing negligent these kind of unexplained negligent entries into the country is just as important as its interests in preventing intentional entries into the country.

QUESTION: You say that they seized the goods in either situation, that title leaves the ostensible owner, whatever title was in the possessor has gone even if the title of the United States does not become perfect, is that your position?

MR. JONES: I would think that the result would be the same for any kind of forfeiture. The question is whether Congress has decreed the forfeiture. In 1592 it decreed that forfeiture for if you were negligent false statements.

QUESTION: And then it is redeemed, as it was here, if that is the right word, that is in effect a sale back, is that the idea?

MR. JONES: No, it is --

QUESTION: Buying it back?

MR. JONES: -- it is under 19 U.S.C. 1618, the Secretary of the Treasury can upon petition remit any forfeiture if he decides that the violation of the customs laws was not done with willful fraud or there are other mitigating circumstances. Well, as I understand the petitions in this case, it appears that what was made out was a case of negligent misstatement and not willful fraud, so the Secretary determined that he would exact only a $40,000 penalty and then returned the remaining goods in his possession. Now, there is no question that the goods that were missing in this case were missing long before the forfeiture was remitted.

I also think I should point out that our brief wasn't sure whether petitioner was trying to say that their remission was itself a contract, and so we brief the issue, although we didn't think it was presented in the case. It is clear to me from petitioner's reply brief that they don't think that the remission is a separate contract. All they are saying is that it evidences the intention of the government at the time they seized the goods. Well, I think it may evidence our intention, and what it indicates is that we thought the goods were forfeited but we decided on reflection that we would exact a lesser penalty.

Justice Story described customs officers as quasi-bailees of seized goods because the duty imposed on them by law bears only some analogy to the duty created in a true contractual bailment. In a contractual bailment, goods come into the possession of the bailee by mutual assent, and it is fundamental that the contractual bailee cannot dispute the title of the bailor. But when the United States seizes goods for forfeiture, it does so for the very purpose and with the very intent of disputing title and a seizure is accomplished by lawful force and not by agreement.

Well, the quasi-bailee status of customs officers has been recognized by federal statute since the First Congress. Some of them have been referred to -- 1605, 19 U.S.C. 1605 directs the customs officer to hold the goods in his possession.

And one aspect of the quasi-bailment under both common law and --

QUESTION: Now, the Court of Claims didn't deal with whether this was a claim under federal statute?

MR. JONES: The claim wasn't presented. I think under this Court's reasoning in Testan, it couldn't be sustained. The statute doesn't by its terms purport to create any action in money damages against the United States. It simply says to the collector -- rather the customs officer, in its current words, to hold the goods while the --

QUESTION: But there is a provision somewhere that says if at the end of some litigation the government loses, they are suppose to return it.

MR. JONES: Okay. That is 2465. That provision says that if a forfeiture proceeding is brought and the claimant prevails in the forfeiture proceeding, then the goods must be returned. That is what the law would require, and that is by statute.

QUESTION: I suppose you would say that wouldn't create any claim under the federal statute.

MR. JONES: It wouldn't create a claim against the United States.

QUESTION: Why?

MR. JONES: Well, if you trace the history of that provision, which goes back to the First Congress --

QUESTION: I know, but the reason I take it is that that statute created no substantive right, is that it?

MR. JONES: It created no right of money damages against the United States. It created a right of the return of the goods and that right is enforceable against the customs officer. He has the duty to return the goods. If he doesn't return the goods, then the injured party can go to federal District Court to sue the customs officer personally in negligence.

QUESTION: So you would say that in order to sustain

the action against the United States, that statute would have said that upon failure to return the United States shall pay damages? It would have to say that?

MR. JONES: I think it would have to come close to -- much closer to saying that than what it does say. I don't think it would have to use those talismatic words, but it should come much closer. As the statute stands now, it is a direction for the disposition of the property and there are other alternative remedies for --

QUESTION: Although if somebody said there was a bailment contract here, you wouldn't require some express provision in the contract, you would just say everybody knows a contract that is breached calls for damages.

MR. JONES: Well, the Tucker Act creates jurisdiction for claims brought under the contracts, so you wouldn't have any trouble finding a source of authority for that. But the Tucker Act, in creating jurisdiction for statutory claims doesn't specify what kinds of claims can be brought under the statute. This Court has grappled with that and did so on Monday. I don't think it is -- I know it is not relevant in this case in terms of deciding the case because the petitioner hasn't claimed that he has any right against the United States under the --

QUESTION: He claims there is a contract.

MR. JONES: That's right. He claims on contract

which is by definition a consensual relationship and, as I have already discussed, there isn't anything consensual about the origin of the relationship that he relies on which is the seizure of the goods.

But petitioner does try to make a reliance on the statute that you referred to, and the way he uses it is that he says that customs officers and importers are aware of this legal duty to return the goods in some circumstances and that because they are aware of that legal duty there is a tacit understanding or contract for the duty to be performed.

Well, under petitioner's logic, any duty imposed by law on federal officers could be said to create a contract with the public for the duty to be performed. For example, the warden of a prison could be said to contract to release a prisoner at the expiration of his prison term. Well, that is precisely the kind of reasoning that this Court has long rejected in cases holding that the Court of Claims lacks jurisdiction over contracts implied in law where a promise to perform a legal duty is imputed simply by fiction of law.

In fact, the Court of Claims rejected petitioner's reasoning under the very statute that he relies on, including 28 U.S.C. 2465, holding in 1868, in the Schmalz case that a general law cannot imply a contract with a citizen, there

must be a genuine consensual relationship.

Well, as we have already discussed, the Court of Claims --

QUESTION: Do you think it is similar to the case we heard argued on Monday involving the -- in which the government was also involved, involving the General Allotment Act and the duty of the United States with respect to the timber?

MR. JONES: I didn't head that lead into your sentence.

QUESTION: Well, is this part of your argument similar to the government's argument in that case?

MR. JONES: Well, it is not similar because it is inverted. Here he is claiming he has a contract right that is based on the tacit understanding that a statutory duty will be performed, whereas in Mitchell the petitioner --

QUESTION: Well, that is the same thing, I think. The Court of Claims went the other way. Of course, it didn't have 2680(c) to bother with.

MR. JONES: Well, Mitchell was a case based on a statute, not on a contract.

QUESTION: Right, but the claim was a trust.

MR. JONES: It was a claim based saying that a statute providing for a particular relationship is a statute that creates a money claim against the United States.

QUESTION: Didn't it also rely on the fact that there were powers of attorney between the United States and the Indians which is certainly a consensual sort of thing, isn't it?

MR. JONES: A Court of Claims in the Mitchell case?

QUESTION: No, Monday's case.

QUESTION: That was Mitchell.

MR. JONES: I am not aware that they relied on that. I think they decide a very broad proposition there and I think that that broad proposition shows up in their later decisions in the Cherry case, the broad proposition being that any statute that mentions or impliably talks about a trust relationship is a statute that requires the United States to pay money damages if the statute is breached.

QUESTION: Perhaps my question was a little wide of the mark and maybe also unfair, but that case was argued Monday and it is over.

MR. JONES: Well, we do agree with petitioner that the Federal Tort Claims Act has only a tangential relevance to this case. In fact, our dispute with petitioner about the proper construction of the act could be called hypothetical.

QUESTION: You don't defend the Court of Claims reasoning then?

MR. JONES: No, we think that the Court of Claims, for reasons that I don't know, was unaware of the private

tort action that has always been available, has been available -- has been decided as recently as 1974 by the Fourth Circuit and --

QUESTION: Was that called to the attention of the Court of Claims?

MR. JONES: It was not called to the attention of Court of Claims.

QUESTION: So you don't say that 2680, even if it means what the Court of Claims thought it meant, insulates the United States from any suit in the Court of Claims on a contract?

MR. JONES: No, we don't take the position that 2680(c) refers to contracts, contract claims.

QUESTION: Well, your position is that the United States doesn't need to be insulated against a suit in the Court of Claims, the plaintiff has to show an affirmative authorization to sue in the Court of Claims?

MR. JONES: Because he brought it under a contract theory, he has to show a contract. Maybe it would help if I pointed out that there is a Court of Claims remedy if need be for this kind of claim negligent loss of goods. After you sue the private customs officers, you get a judgment and the judgment, if there was probable cause for the seizure, is to be executed against the Secretary of the Treasury rather than the private party. Well, if for some reason the

Secretary of the Treasury refused to pay that judgment, he could bring the suit in the Court of Claims on the judgment presumably -- I think he could -- claiming that he had a statutory right for the judgment to be paid. The statutory right would be 28 U.S.C. 2006. So I don't want to say there is no remedy --

QUESTION: Do you know whether that has ever happened?

MR. JONES: I don't think it has ever been necessary.

QUESTION: That isn't what I asked you.

MR. JONES: The Treasury has always paid.

QUESTION: But it has never happened, so the answer is no, is that right?

MR. JONES: Yes. The Federal Tort Claims Act has a limited significance in this case. Both sides have agreed that Congress adopted the Tort Claims Act exception for customs detentions in section 2680(c) in recognition of the fact that there were adequate preexisting remedies for persons who were seized -- whose goods are seized by the customs officers.

There is an argument about whether the language of 2680(c) requires that construction, permits it or doesn't. I think that the answer is that it certainly permits the construction, and what we have to decide is whether the

legislative history of the act indicates Congress' intent to cover the situation where there is a private remedy under 28 U.S.C. 2006. And petitioner concedes that the traditional preexisting remedy is the remedy under 28 U.S.C. 2006 for negligent loss of goods.

Section 2006 provides only a limited remedy against the United States. The United States pays the judgment in the private action for negligent loss of goods only if the seizure is made with probable cause, and petitioner argues that the remedy is so limited that it is inadequate and thus Congress didn't mean to preserve it as the sole remedy for the loss of goods.

Well, the remedy in section 2006 is obviously adequate in all cases where the goods were seized for probable cause, for the reason I just mentioned. The judgment in those cases is not paid by the customs officer, it is paid by the United States Treasury.

In the relatively few cases where a seizure is made without probable cause, the United States will not pay the judgment but the customs officer then remains personally liable. Indeed, the officer is liable on a theory of conversion for consequential damages as well as the value of the goods themselves.

Well, that retained personal liability obviously serves the government's interests in preventing misconduct

by its offiers. The limitation in section 2006 seems designed to advance the government's interest in prohibiting unlawful seizures. It doesn't make the entire remedial scheme inadequate.

The relevance of the Tort Claims Act exception and the history of the act to this case to us seems to be simply that it evidences Congress' intent not to disturb the limited preexisting remedy under section 2006 by assuming a general tort responsibility for customs seizures.

As the Court of Claims reasoned in this case, the government cannot, as petitioner claims, impliedly assent in fact to a contract liability for acts that it has refused by law to be responsible for in tort. Or stated another way, the specific remedial provision in 28 U.S.C. 2006 should control over the more general provisions of either the Federal Tort Claims Act or the Tucker Act, and I think that was essentially the reasoning that this Court decided the Stanzilero case on.

For these reasons, we think that judgment of the Court of Claims should be affirmed. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Lewin, do you have anything further?

ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE PETITIONER--REBUTTAL

MR. LEWIN: Yes, sir. May it please the Court:

Mr. Jones has been speaking throughout his argument about the traditional remedy under 2006 and saying that we have conceded that that is a remedy that has traditionally been applicable. By no means, 2006 is not a statute which grants any remedy whatever. Although a hundred years ago and more, there were suits against individual collectors of customs, there are not suits today against individual collectors of customs which -- I think he said during the course of colloquy -- Treasury has always paid. These suits simply don't exist.

Since the Tort Claims Act has been enacted, since the United States has agreed to be sued directly, the only suits that I have found reference to in this regard have been, for example, the Alliance Insurance Company case, which was a suit that was brought --

QUESTION: That is because of the plaintiff's choice to sue the United States rather than the collector personally.

MR. LEWIN: But given that the United States has now decided that individual employees are no longer to be sued, they passed the Federal Tort Claims Act so you don't have to go running after the individual employee, it is just totally inconsistent with the current thrust of federal statute and remedies against the federal government to say you have to sue under the cause of action that you had 150

years ago against a collector of customs and under a Civil War statute, 2006, which appears in the footnote on page 27 of the government's brief, is a statute passed in 1863 to keep levies from being made against the property of collectors of customs -- executions shall not issue against a collector. It doesn't say you may bring a suit against the collector or you may bring a suit against the United States. It says don't execute -- when you bring one of these suits, which people have brought against individual collectors, you can't execute against his property because the United States will pay if he has been acting with probable cause. That is not a traditional remedy. It is just not framed in those terms, it never has been a traditional remedy.

In terms of this actually being an implied contract in fact, the fact that there isn't that much of a consensual arrangement still doesn't make it different from cases in which the United States, for example, in a taking, for example, has flooded somebody's property -- this Court has had cases such as the Dickenson and Lynah case, we quoted from the Lynah case --

QUESTION: That is involved in the Fifth Amendment, isn't it?

MR. LEWIN: That is partly involved in the Fifth Amendment, but this Court has very clearly said, language

by Justice Frankfurter, I think, in the Dickenson case, that in no circumstances does either a taking or there was an implied promise by the government to pay for it. We cited in our petition for certiorari the language of Judge Learned Hand in the C. F. Harms case, where a barge was taken. He said it is clearly an implied --

QUESTION: Well, it is a constitutional duty to reimburse, to pay for it.

MR. LEWIN: The same is true here. What you have done in carrying out a governmental purpose, you have taken custody of everybody's property as they come into the United States. You go through a procedure. The United States ought to pay if it is lost while it is in the United States possession during that period of time. It is certainly not fair to impose that obligation for that loss on an individual importer who is totally blameless.

QUESTION: Doesn't the Firth Amendment contemplate taking for the use of the government and not the negligent loss of it?

MR. LEWIN: That is why there is no claim that this is a taking. What we are saying is that it is an implied bailment in an implied contract in which the United States, if it has it for government purposes in its possession for temporary detention, if it gives it back that is fine, there is no suit for the detention. But certainly if the

United States for one reason or another doesn't give all the property back, then it is the one who should be held liable for policy reasons.

QUESTION: Dickenson and Lynah in part depend on the fact that where the government takes and doesn't bring an action, the person who is the victim of the taking has to bring an action for inverse taking and has to show an authority on the part of the government to take and the taking isn't enough. Isn't that what Frankfurter's language in Dickenson refers to?

MR. LEWIN: In Dickenson he talks about it being an implied promise to pay for the consequences of building a dam which spreads water on somebody's property, there is an implied promise. And Judge Hand spoke about the bailment, an implied contract where you take a barge in emergency circumstances, the Army had neither asked no leave of the railroad for anything it might do, it could move it when it chose. Everybody understood that. The railroad understood that and therefore there was nothing lacking that was essential to a bailment. He said that was a bailment.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:48 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -