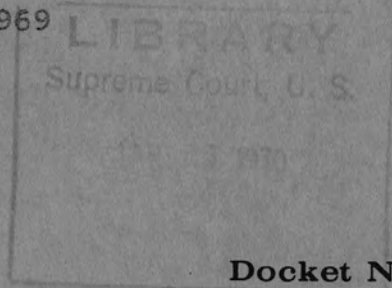


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PREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1969



In the Matter of:

Docket No. 395

THE UNITED STATES,
Petitioner
vs.

M. O. SECKINGER, JR., T/A
M. O. SECKINGER COMPANY,

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SUPREME COURT, U.S.
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Place Washington, D. C.

Date January 14, 1970

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ORAL ARGUMENT OF:

P A G E

James van R. Springer, Office of the
Solicitor General, on behalf of
Petitioners

2

John G. Kennedy, on behalf of
Respondents

26

NHAM

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1969

3 -----
4 THE UNITED STATES,)

5 Petitioner)

6 VS)

No. 395

7 M. O. SECKINGER, JR., T/A)

8 M. O. SECKINGER COMPANY,)

9 Respondent)

10 The above-entitled matter came on for argument
11 at 11:22 o'clock a.m. on Wednesday, January 14, 1970.

12 BEFORE:

- 13 WARREN E. BURGER, Chief Justice
- 14 HUGO L. BLACK, Associate Justice
- 15 WILLIAM O. DOUGLAS, Associate Justice
- 16 JOHN M. HARLAN, Associate Justice
- 17 WILLIAM J. BRENNAN, Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

18 APPEARANCES:

19 JAMES van R. SPRINGER,
20 Office of the Solicitor General
21 Department of Justice
Washington, D. C.
On behalf of Petitioner

22 JOHN G. KENNEDY, ESQ.
23 Kennedy and Sognier
24 24 Drayton Street
Savannah, Georgia

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

2 MR. CHIEF JUSTICE BURGER: Number 395, The United
3 States against Seckinger.

4 Mr. Springer, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT BY JAMES van R. SPRINGER,
7 OFFICE OF THE SOLICITOR GENERAL, ON
8 BEHALF OF PETITIONER

9 MR. SPRINGER: Mr. Chief Justice, and may it please
10 the Court: The question in this case is the meaning of the
11 standard clause in the Federal Government construction con-
12 tracts that provides the pertinent part of this clause.

13 "The contractor (the construction contractor) shall
14 be responsible for all damages to persons or property that
15 occur as a result of his faults or negligence in connection
16 with the prosecution of the work."

17 The Court of Appeals for the Fifth Circuit has up-
18 held the dismissal for the Government's complaint under this
19 clause, holding that this responsibility clause leaves the
20 United States solely liable for any injuries that arise from
21 concurrent negligence on the part of both the United States and
22 the contractor.

23 In other words, the Fifth Circuit has read this
24 clause as relieving the contractor of any obligation to in-
25 demnify the United States, unless the contractor's negligence

1 is the sole and exclusive cause of injury.

2 Q Well, even then, the clause doesn't say any-
3 thing about indemnifying anybody; does it?

4 A Well, the Fifth Circuit did treat it as -- in
5 general as an indemnity clause, saying it would operate as an
6 indemnity clause if, and only if the contractor was the sole
7 cause of the injury. It is true that the clause does say
8 "responsible," and doesn't use the word "indemnify," though I
9 will pursue that point a bit further on.

10 As I say, we submit that this was wrong and that the
11 responsibility clause must be read as shifting to the contrac-
12 tor as its words say, and specifically, under the facts in this
13 case, the full responsibility to pay all of the damages caused
14 by its negligence, regardless of the fact that the United States
15 may also have been negligent.

16 Certainly, it was improper by the courts below to
17 dispose of this case on the pleading, without a trial in which
18 the various pertinent facts relating to the contract, the
19 relationship between the parties and the facts of the accident
20 itself, could be explored.

21 The basic facts are as follows: The Seckinger
22 Company had a fixed price construction contract with the Navy
23 Department in an amount of, roughly, \$650,000 for the construc-
24 tion of outside steam pipes at the Parris Island Marine Depot
25 in South Carolina.

1 Ernest Branham was an employee of Seckinger, who was
2 a welder and steamfitter. On the day of the accident Branham
3 was working on a steam transmission pipe that was being in-
4 stalled above-ground across one of the streets at the base,
5 at a height of about 16 feet above the street.

6 A day or two before, this stretch of pipe crossing
7 the street had been put in place on its supports by a crane.
8 But on the day of the accident, Branham and another worker were
9 making certain adjustments in the positioning of the pipe in
10 preparation for welding to the pieces of pipe on either side
11 of the street to which it was to be connected.

12 Branham was working, shortly before the accident on
13 one side of the street and another man was working the other
14 side. The construction foreman in charge of the job, who was,
15 of course, an employee of Seckinger's, noticed that the man on
16 the other side was having some difficulty and directed Branham,
17 the employee, to go over and help him.

18 In order to get there Branham did not climb down to
19 the street and walk across the street, but instead, walked
20 across the pipe itself, which is about 20 inches in diameter.
21 And as he came near to the place where the other man was work-
22 ing he bumped into an uninsulated power line which was running,
23 which was strung along poles in the normal way, running parallel
24 with the street at the side of the --

25 Q By whom had that power line been strung?

1 A That was a Government-owned power line which
2 was one of the regular lines that provided power to the base.
3 I believe it was undisputed in that trial that this power
4 system covered about a third of the whole base.

5 The wire was about four or five feet above the top
6 of the pipe and, as I say, when Branham got to the other side
7 where he was going, he bumped into the pipe and the shock
8 knocked him off the pipe and he fell to the street, which was
9 16 or 17 feet below. And he was, of course, seriously in-
10 jured.

11 Branham collected Workmen's Compensation from
12 Seckinger under state law and also, being unable to collect
13 anything more from his employer, he sued the United States
14 under the Federal Tort Claims Act in the District Court for
15 the Eastern District of South Carolina.

16 After trial, that court found that the accident had
17 been caused by negligence on the part of the Government and
18 awarded Branham damages in the amount of \$45,000. Specifi-
19 cally the court, in that case, found that the United States
20 had been negligent in two respects, one or the other of which
21 it found had caused the accident.

22 First it found that the Government's construction
23 inspector, who was in general supervision of the job, was
24 negligent in failing to have the power line deenergized before
25 Branham was sent by the foreman to work near it.

1 And secondly, the court found that the same inspec-
2 tor was negligent in failing to warn Branham of the danger
3 of the wire.

4 The United States in that action in South Carolina,
5 filed a third party complaint against Seckinger in which it
6 sought indemnity under the responsibility clause referred to,
7 saying that any injury to Branham was caused by Seckinger, the
8 contractor's own negligence, and therefore the United States
9 should not bear the damages.

10 The South Carolina District Court dismissed that
11 third party complaint without prejudice on the theory that
12 trying it in that case would unduly complicate the proceedings
13 there. So, accordingly, the United States had to bring, and
14 did bring, a separate action of this case, against Seckinger.
15 It was unable to sue Seckinger in connection with this case
16 in South Carolina, so the case comes here from the Southern
17 District of Georgia, through the Fifth Circuit.

18 The Government's complaint in the indemnity suit,
19 like the third party complaint that had been dismissed, alleged
20 that Branham's injuries was caused by the negligence of
21 Seckinger employees. In particular, trumping the findings of
22 the South Carolina District Court, which had held the Govern-
23 ment liable, the complaint alleged as follows:

24 As to the failure to deenergize the power line the
25 complaint alleged that Seckinger, the contractor, was

1 responsible for requesting that the power be turned off before
2 it sent for him to work near the wires; or else that Seckinger
3 should have either put some insulation on the wires, or re-
4 quested the Government to do so.

5 And as to the second element of negligence, the
6 South Carolina District Court had found, the complaint alleged
7 that Seckinger should not have directed Branham to work near
8 the wires and should have prevented him from proceeding in a
9 dangerous manner.

10 Q How much of a rating did Branham get?

11 A \$45,000.

12 Q Therefore, this complaint alleged that
13 Seckinger's negligence was the cause of the injuries to Branham
14 and the contractual responsibility clause made Seckinger sole
15 liable for them; and therefore, Seckinger should indemnify
16 the United States for the damages that it paid.

17 The Government was prepared to prove these allega-
18 tions, of course, at a trial, though it never had a chance to.
19 It was prepared to prove not only that Seckinger was negligent
20 and that negligence caused the accident, but also that the
21 circumstances were such that Seckinger was primarily negligent
22 and the Government only secondarily so.

23 If, as the South Carolina Court has held the Govern-
24 ment should have turned the power off, the relationship between
25 the parties was such that the Government could rely on

1 Seckinger, the contractor, to inform him when it was necessary
2 to turn the power off. In this regard the Government would
3 show that Seckinger had a full-time foreman on the job at the
4 time of the accident, as the contract required; whereas, the
5 Government's inspector, who was charged only with inspection
6 of the performance under the contract, was concerned not only
7 with this job, but with a number of other jobs going on at the
8 same time and, in fact, was not present at the site of this
9 job when the accident occurred, but was somewhere else, super-
10 vising another job.

11 As to the Government's breach of its duty to warn
12 Branham, the South Carolina District Court has found, the
13 Government would further have relied, had it been able to have
14 a trial on its indemnity clause, on the specific instructions
15 that were given to Seckinger in the contract to assure safety
16 and --

17 Q May I ask: Is the only question before us one
18 of the scope of the clause under which Seckinger found himself
19 to be responsible for "all damages" as a result of his fault
20 or negligence? Is that the only issue we have to ascertain?

21 A Yes. It might be helpful to --

22 Q I understand that. That's the only -- so, it's
23 nothing but the construction of a contract clause that's before
24 us?

25 A Yes.

1 Q The Court of Appeals said it wouldn't ever cover
2 a case where the Government was negligent?

3 A Yes; that's correct.

4 Q Which renders it meaningless.

5 A That is --

6 Q Well, it has no scope at all, then?

7 A Yes, because the Government cannot be liable
8 under the Tort Claims Act, unless it or one of its agents is
9 negligent and, in fact, there is no authority under that act
10 for the Government even to settle a case, unless the person who
11 authorizes the settlement and believes that the Government was
12 negligent and I suppose if a non-negligent Government settled
13 a case and then sued for indemnity under the interpretation
14 the Fifth Circuit has given to this clause, the person sued
15 could then say the settlement was improper because the Govern-
16 ment had no authority to settle the case.

17 Q Mr. Springer, is this a standard clause?

18 A Yes, this is, in fact, has been standard, at
19 least, since the late 1930s. This clause is now prescribed
20 actually in two places in the Armed Services Procurement
21 Regulations, which are issued by the Defense Department and
22 also in the General Service Agency Administration's regula-
23 tions which govern, generally speaking, all Government con-
24 tracts.

25 Q Well, they --

1 A They both use the same clause, though under
2 separate --

3 Q If the Court of Appeals was sustained by us can
4 this clause be written so as to protect the Government under
5 future contracts?

6 A That is certainly true, Mr. Justice Brennan.

7 Q It can be?

8 A Yes. In fact, these clauses are written until,
9 by an interagency committee with a good deal of consultation
10 with the industry, so, although they are prescribed, there is
11 some of the flavor of contract negotiations that goes into
12 formulating these provisions since the industry is consulted.

13 Q What would you do with the clause; add onto it
14 that you really meant it; or what?

15 A I would say that that's all you would really have
16 to do. I think I could certainly draft a more ironclad, in-
17 exorable indemnity clause. For one thing, you couldn't use the
18 word "indemnity." You could say, with a proviso at the end that
19 this clause means what it says, even if the Government itself
20 is negligent. But, we would submit, that that isn't necessary.

21 In answer to your next question, MR. Justice Brennan,
22 the clause could be changed, but of course, it's not a simple
23 matter, some person decreeing that it would be to have it that
24 way, obviously is --

25 Q Isn't there some suggestion as to the number of

1 contracts that are now extant with this clause.

2 A I don't have figures on the number of actual
3 contracts, but I have been told, and we say in our petition
4 that there are 200 cases pending --

5 Q But it also said, "many thousands of contracts."

6 A Oh, I am sure there would be many thousands,
7 since it covers all fixed-price construction contracts that the
8 Government, or virtually all that the Government, whether the
9 Defense Department or the rest of the Government.

10 Q You say there are some 200 cases pending and
11 awaiting a decision of this case?

12 A Well, they are in the District Courts.

13 Q Yes.

14 A In fact, this is the only, so far as I am aware,
15 the only case that has gotten to the Court of Appeals.

16 Q Right.

17 A On this specific issue?

18 Q Now, there are 200 in the District Court now?

19 A A fair number of decisions, one way or the other.
20 Most of them unreported.

21 Q And prior to the decision in this case, what had
22 been the fate of this clause in cases such as this arising in
23 the District Courts. Do you say this clause has been in Govern-
24 ment contracts since the 30's. I should think there would be a
25 great deal of law one way or the other.

1 A I have to say that this clause has not, at
2 least until the 60's been used by the Government, generally
3 speaking, as an indemnity clause. I think that may seem
4 strange, but I think probably the simplest explanation for
5 that is that it was not until relatively recent years that
6 employees who were barred from pursuing their employers under
7 Government contracts, thought up the notion of suing the
8 Government under the theory that the Government was negligent
9 and was a handy third party.

10 Q The Federal Court Claims Act goes back to the
11 -- about 1947? '46 or '47?

12 A Yes.

13 Q Did I understand you to suggest that this
14 problem might be eliminated by simply putting it after the
15 clause referring to the statement that the clause means what
16 it says?

17 A That certainly could be done, Mr. Justice
18 Black. But that could be done in any contract.

19 Q We would still have to construe what it meant,
20 wouldn't we?

21 A Well, I think you would say in other language,
22 you would say, as I would say in argument that you could put
23 the various different means, forming some words in saying what

24 Q You underestimate the abilities of our pro-
25 fession; don't you?

1 A Increasingly less, Mr. Justice Black.

2 The Fifth Circuit, of course, treated this clause,
3 and we think erroneously, as an insurance clause. It thought
4 that the Government was basing its case on the proposition
5 that this clause entitled the Government to indemnification
6 from a contractor, even if the contractor was utterly innocent
7 of any negligence. Of course, that's not the theory of our
8 case. The theory of our case, and the allegations of our
9 complaint are that the Seckinger Company was negligent; that
10 its negligence caused the accident, and therefore, and only
11 therefore, the Seckinger Company is obligated to bear, as the
12 clause says, the responsibility for its negligence.

13 Q Are you asking for construction that would
14 hold where both parties are negligent, that the Government
15 should not be held liable; are you asking -- where both parties
16 are negligent -- the question is whether both parties are
17 negligent and if the Government is shown not to be and the
18 contractor is shown to have been the prime cause, that he
19 shall -- which are you arguing about?

20 A Well, I think that, as I said in answer to
21 Mr. Justice White's question, if the Government is not
22 negligent, this case couldn't arise, because the Government
23 it is not subject to liability if it, itself is not negligent.
24 So that we are necessarily in the situation where both the
25 Government and the contractor are negligent.

1 Q And then what do you ask?

2 A We say that in any such case, that the meaning
3 of this clause is that the contractor shall bear full damages.

4 Q Full damages.

5 A Of course, now, we don't think that if that
6 proposition is rejected, that we are out of court in this
7 case. We think it's perhaps a less-sweeping rule, you could
8 say, that at least there shall be some allocation of liability
9 between the contractor and the Government. And, of course,
10 that's commonplace, at least where there is disparate
11 responsibility in the common law itself.

12 Q I guess if that were adopted, the easiest way
13 to work it out of court would be to say that each of you
14 are equally liable, without having to go through weeks of
15 evidence to find out which was the most liable; which was the
16 most negligent.

17 A That would be a possible rule. Of course,
18 there is a growing body of authority on comparative negligence
19 where the finder of facts does, in fact, allocate the respon-
20 sibility and of course, there is the more traditional rule
21 that where one party is primarily negligent and the other is
22 only secondarily so, which is clearly on the facts of this
23 case, the theory of the Government's point that --

24 Q The easiest way might be for the Government to
25 get a better contract.

1 A That's certainly true, Mr. Justice Black.
2 Of course that could be said, as I suggested, of any contract
3 that if you had drafted it better you wouldn't have a lawsuit.
4 You answered that --

5 Q The Government is going to continue in the
6 business of making contracts. Have they changed it any since
7 this case --

8 A No, it has not been changed, although there
9 are, in fact, I gather constantly, there are revisions of
10 these clauses under consideration, and the Department of
11 Justice has suggested that we could avoid these cases by more
12 explicit language. That may or may not be so.

13 Q Suppose the law allocates the responsibility,
14 the law of -- where was this, South Carolina, North Carolina?

15 A South Carolina.

16 Q And South Carolina, I suppose, like every other
17 state that I know anything about, makes this employer liable,
18 whether or not he is negligent, to the employee under some form
19 of workmen's compensation. I assume that's been paid and that
20 liability has been discharged by the employer in this case;
21 is that right?

22 A Yes, although I think it would be clear that if
23 the United States were otherwise entitled to some kind of
24 indemnity, you could not set up the South Carolina Workmen's
25 Compensation statute as any kind of a defense to his liability

1 to the United States, particularly under contract with the
2 Government, and perhaps even as a matter of --

3 Q That would be a matter of the state law, the
4 common law, then?

5 A Yes.

6 Q Of course, you don't win this lawsuit if you
7 win here, do you?

8 A No, certainly, but we have to prove negligence.

9 Q Yes.

10 A And we have to prove compensation, and perhaps,
11 although we think we should not have to, we might have to prove
12 the relative responsibility.

13 Q Did I understand you to suggest that perhaps
14 if you succeeded here and also in proving negligence, it
15 doesn't necessarily mean you'd get a judgment for \$45,000?

16 A Well, we would say that the literal language
17 of the contract clause is the contractor shall be responsible
18 for all damages as a result of his negligence. But I must say,
19 it is our first position that that, automatically assures us
20 full recovery.

21 Q I wasn't sure whether you were talking about
22 the joint contribution or comparative negligence.

23 A I am suggesting that that would be another
24 view that could be taken.

25 Q Well, if you prevail here you are going after

1 the whole \$45,000?

2 A Yes, first on the theory that the contract
3 gives it to us automatically. Secondly, on the traditional
4 common law indemnity theory that insofar as the United States
5 has a duty to this man it was justified in relying upon the
6 contractor to discharge the particular duties that gave rise
7 to the United States' liability.

8 Q Well, I suppose your basic claim of negligence
9 against the contractor is that they put the man where people
10 normally are not supposed to be and must take all of the burden
11 of that.

12 A Well, they did that, and of course, the con-
13 tractor himself says, in one of the clauses we have set forth
14 in our appendix, "that the contractor shall give his personal
15 superintendence to the work, or have a competent foreman or
16 superintendent on the work at all times during projects."

17 It was not, in fact, a situation that any Government
18 agent was on the scene at the time of this accident, or was
19 expected to be there. It's the responsibility of the contrac-
20 tor under the contract to give minute-by-minute supervision of
21 the work.

22 Q They could have turned the power off; couldn't
23 they?

24 A The United States could have, but --

25 Q Well, so could the contractor.

1 A Well, the contractor would have had to ask the
2 Government employee who was in charge of the power station to
3 turn it off, but that, in fact, is what had been done a day
4 or two before when the crane was operating, putting the pipe
5 in. It was clear that the crane boom would be within range
6 of the wires and there was a real danger, so that was done.

7 But, basically, our proposition is a commonplace
8 one, that the contractor was supervising the work and anything
9 that had to be done, either by way of warning or by having the
10 power turned off to protect his men was the contractor's
11 obligation, at least as regards the relationship between the
12 United States and the contractor.

13 In any event, we think it's clear that some of the
14 responsibility must be borne by the contractor in this clause.
15 The consequence of the Fifth Circuit's view of it is that the
16 United States has to pay the price for the negligence of its
17 contractor. They have gone so far to protect the contractor
18 from liability to the United States that they have thrown the
19 liability on the United States by denying it any opportunity,
20 whatever the relative faults may be, to have indemnity.

21 MR. CHIEF JUSTICE BURGER: You are just about out of
22 time, Mr. Springer, if you want to save any for rebuttal.

23 MR. SPRINGER: Yes. I would like to go on for just
24 a minute more. I notice I don't have the light.

25 MR. CHIEF JUSTICE BURGER: At 11:48 you are recorded

1 as being completely out of time.

2 THE MARSHAL: You have five and a half minutes. The
3 white light will come on.

4 MR. SPRINGER: Thank you.

5 I Might just review again, I think there are
6 substantial policy considerations to support what we say to
7 be the meaning of this clause. As I suggested, the contractor
8 is the person who is in the best position to prevent injury
9 of this kind, since he is on the job, and has direct super-
10 vision over his workmen. And I would suggest that imposing
11 this kind of responsibility on him, gives him a desirable
12 incentive to assure safety.

13 And whatever policies there might be in favor of
14 not shifting negligence to an innocent contractor, I suggest
15 they do not apply here at all. over the whole theory of the
16 Government's indemnity claim is that the contractor was
17 negligent, and in fact, was primarily negligent.

18 I would like to save the rest of my time.

19 MR. CHIEF JUSTICE BURGER: Mr. Kennedy.

20 MR. KENNEDY: If it please the Court, I suppose all
21 of this did start about in 1956 when our employee got hurt at
22 the Government installation at Parris Island Marine Base. He
23 came in contact with a Government wire which served a great
24 deal of the base other than this construction job. It helped
25 train Marines; it was not in the province of the contractor

1 to turn on or off.

2 Q But it had been turned off a short time before
3 at the contractor's request.

4 A This is not in the record, Mr. Justice, and
5 where it comes from is unknown to us.

6 Now, the Government got hit in the District Court of
7 South Carolina, for \$45,000 and properly looked for someone
8 else to help pay. They went through the contract, very thick,
9 very involved, forwards and backwards and finally they found
10 a clause which they thought might be close. This clause even
11 had a sneaky title. It said "permits and responsibilities for
12 work, et cetera." It never used the word "indemnification;"
13 it never used the word, "hold harmless;" it --

14 Q Does it have to?

15 A Yes, sir.

16 Q Why?

17 A We respectfully maintain that to doll up this
18 clause and make it one of indemnity, we don't add the word --

19 Q Well, what's magic in "indemnity?"

20 A --- It's the English language for indemnify.

21 Q Well, what do the words say here? "That he
22 will be responsible for all damages that occur as a result of
23 his fault or negligence." That's pretty plain; isn't it?

24 A Here is the way the A.I.A. has done it, which
25 might give us some --

1 Q Is it hard to understand "responsible?"

2 A Responsible is limited, Mr. Justice.

3 Indemnify means that if I, the Government, gets hit for
4 negligence I can then recover from somebody else. Now, the
5 A.I.A. has recognized this.

6 Q What is the A.I.A., the American Institute of
7 Architects?

8 A Yes. And this contract is very widely used
9 and they say in their contract "What the contractor shall
10 indemnify and hold harmless the owner." The Government was in
11 a comparable position. "And the architect and their agents
12 and employees, from and against all claims, damages, losses
13 and expenses, including attorney fees arising out of or
14 resulting from a performance of the work."

15 Q That is a lot longer.

16 A Yes, sir. And it also uses the word
17 "indemnify." Some of your courts have defined "responsible"
18 as the ability to respond; not will respond, but "I am able to
19 respond."

20 So, the definition of responsible is much more
21 limited than --

22 Q Would you think that the word "reliable," in-
23 stead of "responsible," would be different?

24 A I think, Your Honor, if a small amount of time
25 that was consumed in this case, from the Government's

1 standpoint, were devoted to writing a clause originally, this
2 case would have never happened. I, personally, would use the
3 word "indemnify," as the A.I.A. has used it and countless
4 other contracts use. They hit the word "indemnify." They
5 think there is magic in the meaning of indemnification.

6 Q Suppose they didn't use either one of those
7 words; they just chose to state what they wanted; and they
8 said that if any person is injured due to the negligence of
9 this contractor, he shall make the Government hold for any
10 damages imposed on him.

11 A I think we would have much less argument, Mr.
12 Justice, Mr. Justice.

13 Q Yours hinges around those two words?

14 A Yes, sir; yes, sir. And the title of the
15 clause where it was found.

16 Q Mr. Kennedy, I understand that this clause has
17 been in hundreds, if not thousands, if not many, many thousands
18 of the Government contracts since the 30s. The Federal Tort
19 Claims Act has been in existence since 1946. I'm amazed that
20 there are not many, many court decisions construing this clause
21 in this basic context. Are there; or are there not?

22 A I think we share your surprise and I think
23 only lately have they started pushing it.

24 Q Well, are there any court decisions: District
25 Court, Courts of Appeals?

1 A In the briefs for the Circuit Court you'll
2 find a District Court decision out of Texas which construed
3 this favorably.

4 Q Favorably to which side?

5 A To our side. The Government cites Porello
6 when they try to get into the Ryan Doctrine and leave the
7 narrow question of the interpretation of the word and go to
8 implied warranty, which also is an issue in this case. And
9 Porello has a similar clause, although it was much longer.
10 And beyond these two cases, neither side has been able to come
11 up with much.

12 Now, in that context, remember this clause was born
13 in its present form in 1938 at a time when indemnity by the
14 United States would have been impossible because there was no
15 Federal Tort Claims Act.

16 Q You mean indemnity to the United States.

17 A Right.

18 Q You mean they could not have been held liable.

19 A Exactly. So, how, in 1954 when this contract
20 was drawn, can it get added meaning to cover a situation which
21 was not in effect when the present wording of the contract was
22 born.

23 Q Don't we take it from the time it was born,
24 to use your term, by the signatures of the two contracting
25 parties, the contract speaks as of that date; doesn't it?

1 A Yes, sir; very true.

2 Q At that time there was a Federal Tort Claims
3 Act.

4 A Very true. But, the language was born at a
5 time when indemnity was impossible. My point is, although
6 your point is correct, how could the Government expect it to
7 be an indemnity clause when there was no indemnity at the time
8 they developed it.

9 Q Well, it could easily have gone into the con-
10 tract in the abundance of caution by a Government lawyer who
11 wanted to seal the Government off from any possible respon-
12 sibility for the negligence of its contractor who might be
13 thought by someone, to be its agent.

14 A But it was put in with that abundance in 1938
15 when indemnity wasn't possible. And, if you would like an
16 abundance of precaution you would certainly use the word
17 "indemnify."

18 Now, the title to this clause is misleading. The
19 first sentence has nothing to do with responsibility; it has
20 nothing to do with indemnity; it has nothing to do with this
21 subject. Only in the second sentence of the paragraph that they
22 find, do they get to the responsibility clause. And then they
23 devote 19 words and expect this to serve as a real indemnity
24 clause.

25 Somewhere in these printed briefs or record is there

1 -- is the context of this clause apparent? All I have is on
2 page 2 of the Government brief where they have simply the
3 clause itself.

4 A Yes, sir; I think that on page 36 of the
5 Government's brief you will find the whole clause. It's
6 number 11, Mr. Justice, and it says, it's titled: "Permits and
7 Responsibilities for Work." Now this, to us, is a little bit
8 sneaky for an indemnity clause.

9 Q A little bit what?

10 A Sneaky. Nothing about indemnity; nothing in
11 the first sentence about indemnity. Then they talk about
12 responsibility in the second sentence and then they have a
13 perfect opportunity to say "indemnity," but they leave the
14 subject entirely.

15 I see I have a red light, Mr. Justice.

16 MR. CHIEF JUSTICE BURGER: We will stop for lunch,
17 sir.

18 (Whereupon, at 12:00 o'clock p.m. the argument int
19 the above-entitled matter was recessed, to reconvene at 12:30
20 p.m. the same day.

1 (The argument in the above-entitled matter resumed
2 at 12:30 o'clock p.m.)

3 MR. CHIEF JUSTICE BURGER: Mr. Kennedy, you may
4 proceed.

5 FURTHER ARGUMENT OF JOHN G. KENNEDY

6 ON BEHALF OF RESPONDENTS

7 MR. KENNEDY: Thank you, sir. We left off when we
8 were taking a close look at the clause and we were making the
9 point that it had a title which does not say anything about
10 indemnification and has a first sentence which lacks any
11 words of indemnification and, we submit, falls short of being
12 a real indemnification clause.

13 The scope of the paragraph is not indemnity. The
14 intention of the paragraph is not indemnity and we feel that
15 this clause is not sufficient to require the contractor to
16 pay back what the government has lost as a result of its
17 negligence.

18 Q Do you make that argument against the propo-
19 sition that you are or are not liable for any part of the fault
20 here; that you did not contribute to the injury or that you
21 did; which way?

1 A In a general sense. We paid Workmen's
2 Compensation, whether we are liable or not.

3 Q No, I didn't make myself very clear. Let me
4 try again.

5 Do you make that argument against the background of
6 the claim that there was no negligence on the part of your
7 client, or do you make it against the background that it's
8 making no difference whether your client was guilty or not
9 of any negligence.

10 A I think the latter would be closer. As a tax-
11 payer, I would certainly prefer for the Government to have
12 included an indemnity clause, so that the Exchequer would not
13 be out the entire \$45,000. But, we've got to accept the
14 clause as it is and the clause as it is, we maintain, does not
15 provide for a situation where the Government is negligent.
16 It's \$45,000 negligent and wants to get it back from Seckinger,
17 the contractor.

18 Now, nothing in this paragraph says a word about
19 "hold the Government harmless." That is found in a lot of
20 indemnity clauses. It is found in a lot of leases where the
21 owner is held harmless and if there is negligence, one party
22 picks it up and pays the other party back. This, we think, is
23 the basis or the distinction between "indemnity" and "respon-
24 sibility." There is nothing in there that says "We'll
25 indemnify the Government." There's nothing in the heading that

1 says "permits responsibilities and indemnity."

2 How can it be said that this contractor, when he
3 went and signed at the place he was supposed to sign, in the
4 Government contract, intended to pay back the Government for
5 \$45,000 of their own negligence? It doesn't say anything
6 about "We will pay the Government its share of damages in the
7 event the Government is held responsible." This would be one
8 more sentence which would knock our argument in the head. But
9 it's not there. It's a mere responsibility clause.

10 The Government, in its brief, prefers to call it
11 an "indemnity."

12 Q Let's call it a "responsibility clause."

13 A I think that's a good approach. What does
14 this clause mean? This clause means, probably, three or four
15 things. If our truck is going to the job and runs over some-
16 body we are responsible for our negligence. If our piping is
17 defective which we are hired to go in and fix, we are respon-
18 sible for the negligence. This clause becomes meaningless and
19 ineffective only --

20 Q Well, why would the Government have to get
21 that commitment from you? What does the Government gain by
22 getting a commitment limited to that extent?

23 A It would be hard for me to answer that.
24 Certainly the Government had reason to put it in there in 1938
25 when indemnity was not in existence.

1 Now, where the Government get its forms, or why they
2 put them in there, I don't know, but certainly those two
3 fields of situation that this clause becomes meaningful in, and
4 it only becomes meaningless and has no value when you try to
5 torture it into a full-blown indemnity clause. If you leave
6 it alone, let it protect our plumbing; let it protect our
7 negligence when we run over a truck, run over a car, there is
8 no problem.

9 Now, certainly the surrounding circumstances of this
10 contract would be important. The question has been raised:
11 "Why didn't we turn off the power?" We are a plumber on a
12 Marine base and we were in about as good a position to turn
13 off the power as I am today to turn off the lights in this
14 courtroom. We went on there to fix the plumbing. We weren't
15 in charge of the base; nobody gave us command of that base.
16 We were doing a plumbing job. What control did we have over
17 the operation of the base.

18 And also in this context, we are really looking for
19 the intention of the parties. What could we have intended
20 regarding indemnity when we merely went on that base to do one
21 small operation.

22 Now, the Government brings in the Ryan Doctrine and
23 they try to reinforce --

24 Q Well, that issue is not before us; is it?

25 A Yes; it's in the brief.

1 Q I didn't understand that the Government was
2 allowing them to walk on the Ryan Doctrine for a reversal.

3 A It would please us if they were not. We
4 don't think it's applicable and perhaps they have adopted that
5 position --

6 Q I gather you litigated this in the Court of
7 Appeals; the Ryan Doctrine, did you?

8 A Yes, sir. But it was brushed aside in the
9 Court of Appeals. But, just briefly on the Ryan Doctrine,
10 Ryan was the employee of a stevedore who had the operation of
11 the whole ship; he was loading it. He could have turned off
12 the electricity. He's charged with loading that ship right.
13 But the Ryan Doctrine has nothing to do with this case.

14 Now, we can't comment specifically on the number of
15 cases that are pending on this particular problem. We are in
16 no position to document the number; we are in no position to
17 document the amount that is at stake, but certainly, if con-
18 tractors are required to go onto a Government installation and
19 to indemnify the Government for its negligence there's going
20 to be a much higher bill for Government contracts. The Govern-
21 ment is urging the position that although their negligence was
22 \$45,000 worth and was sufficient to sustain the verdict of
23 \$45,000, we, the contractor, have to pay them back. This is a
24 long and hard burden for a contractor to assume and I don't
25 know how many or how the dollars would work out, but certainly

1 it's arguable that it would cost the Government more money to
2 require indemnification from these plumbing contractors and
3 the like that go on the Government installations to do their
4 work, than it would to redraft the clause and to say, in
5 effect, we expect such and such.

6 From all of those standpoints the matter should be
7 considered.

8 This contract also puts the Government in a very
9 involved position as far as inspecting the work. The Govern-
10 ment is as close to the job as the contractor and perhaps
11 closer. The contractor has to have a set of plans for the
12 Government to look at; the Government has an inspector that
13 goes there almost daily; almost several times a day.

14 Q Just precisely what was being done in this
15 case?

16 A We went on the base to fix the plumbing.

17 Q To do what?

18 A The plumbing. We were doing an outside dis-
19 tribution system.

20 Q A whole system?

21 A Just a part of it; yes, sir.

22 Q On the outside?

23 A Yes, sir.

24 Q Was the pipe on which he was walking, the
25 employee was walking at the time, one of the pipes that was

1 being installed?

2 A I cannot answer that correctly; I don't know.
3 There is nothing in this record, as I mentioned earlier, to
4 show one way or the other. In this record is the suit and the
5 motion to dismiss. The details of it we do not know and I
6 can't answer it off the record, because I was not in the case
7 at the time it got started.

8 Now, for all of these reasons we feel that the
9 District Court of the Southern District should be affirmed.
10 They dismissed the Government's petition. And the Circuit
11 Court; Judge Brown, Judge Haynesworth, Judge Goldberg, should
12 be affirmed in their dismissal of the Government's position.

13 Thank you.

14 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kennedy.
15 Do you have anything further, Mr. Springer?

16 REBUTTAL ARGUMENT BY JAMES van R. SPRINGER,

17 ON BEHALF OF PETITIONER

18 MR. SPRINGER: Thank you, Mr. Chief Justice. Just
19 several small matters.

20 Q Am I not right that the so-called Ryan
21 Doctrine is not in issue. I mean in the sense of any separate
22 basis of exploitation for the Government.

23 A I think we would be willing to argue the Ryan
24 Doctrine if we thought it were necessary, but I think under the
25 situation in this case --

1 Q That wasn't my question, Mr. Springer. You
2 haven't submitted it, as I understand it. The only issue we
3 have got is the -- as I asked you earlier -- what is the
4 meaning of the clause in the contract.

5 A I think, to answer strictly technically and
6 accurately, we have, I think, preserved the Ryan theory but we
7 do not primarily rely on it because I think that anything that
8 Ryan would give us we say we have explicitly in the clause.
9 And the Ryan line of cases does, in some sense, set a back-
10 ground for our statement of what we say this clause means is
11 not extraordinary, because at least in the Ryan -- whatever
12 area Ryan covers the Government contractors have been given by
13 implication, what we say here we are entitled to by a natural
14 reading of the clause.

15 Mr. Kennedy has referred to the absence of record in
16 this case. Obviously the reason there isn't a record is be-
17 cause we haven't had a chance to make one. The statements
18 that I've made about the facts of the accident are taken from
19 the findings made by Judge Timmerman in the earlier case in
20 the Eastern District of South Carolina and we have lodged,
21 in connection with this case, the record of that case and I
22 believe everything I've said, even what I've said about what
23 we would prove, which, of course, is really just me talking at
24 this point, since we haven't had a chance to make a record on
25 that. Everything in that is at least consistent, and I believe,

1 supported by testimony in the transcript of the earlier trial.

2 As I understand Mr. Kennedy's argument it's pri-
3 marily that this clause should not be considered as speaking
4 to the matter of indemnity at all. Of course, in that respect
5 he departs from the view that the Fifth Circuit itself took.
6 And I think it's plain the Fifth Circuit regarded this as
7 some kind of indemnity clause. It simply held that it wasn't
8 an indemnity clause which could stand up to this kind of case
9 where the Government was negligent or also negligent. But I
10 think the Fifth Circuit agrees with us at least to the extent
11 of saying, "This is where we look in this contract if we want
12 to know what kind of indemnity there is."

13 As to the historical origins of this clause, I
14 think it is, as I understand, the situation that prevailed
15 prior to the Tort Claims Act is not strictly accurate to say
16 that the Government was never subjected to Tort liability. I
17 believe what normally happened was that Congress would pass
18 a private bill or at least this happened in a number of cases,
19 which in effect, amounted to an "ad hoc" Tort Claims Act,
20 giving the Court of Claims jurisdiction to adjudicate whether
21 or not the Government should be liable. So, that kind of
22 situation could well have given rise to a situation where the
23 Government had been held liable and want to look somewhere for
24 indemnity.

25 Q Well, that would be an extreme claim under this

1 language; wouldn't it? Luckily, you don't have to argue
2 this.

3 A Luckily, I don't have to argue that.

4 Q Congress appropriates money to make, to come
5 up and say an injured party; that's a voluntary action.

6 A As I understand the practice, Congress
7 ordinarily did it through a judicial proceeding, it said. If
8 the Court of Claims determines that the United States should
9 be liable, then the money will be paid.

10 Also, it's true that these clauses are being, as I
11 said earlier, reconsidered, and to some extent, reworded from
12 time to time. This clause is, in fact, now slightly different
13 but not materially, from the way it was in 1956 when this con-
14 tract was signed.

15 Q But, if the Government paid out money by way
16 of a private bill, that would be a voluntary payment in which
17 they would have considerable difficulty asserting, by way of
18 indemnity under this clause, I suggest.

19 A I think that may well be so, Mr. Chief Justice,
20 but a careful draftsman in the Government contract, I think
21 would make an effort to take that possibility into account.

22 Q Well, I would suggest previously that this
23 clause might be simply all of the unknown possibilities; that's
24 all, including the one you suggest as one possibility.

25 A Yes. I was just trying to give a little more

1 concrete content, perhaps, to the unknown possibilities that
2 a careful draftsman may --

3 MR. CHIEF JUSTICE BURGER: I think your time is up,
4 Mr. Springer. Thank you very much. The case is submitted.

5 (Whereupon, at 12:50 o'clock p.m. the argument in
6 the above-entitled matter was concluded)

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