

# Casenote

## Of Two Minds about Plain Meaning: The Supreme Court's Interpretation of the Word "Any" in 28 U.S.C. § 2680(c)

### I. INTRODUCTION

Can a word have a plain meaning that is independent of linguistic context, or is a word's plain meaning always relative to and dependent on linguistic context? The United States Supreme Court often faces this question, as it did when deciding whether the word "any" has a commonly understood, independent meaning, and whether context affects that meaning. In a heated linguistic battle, the Court held in *Ali v. Federal Bureau of Prisons*<sup>1</sup> that 28 U.S.C. § 2680(c)<sup>2</sup> exempted from the government's waiver of sovereign immunity any and all law enforcement officers from claims arising out of the detention of property.<sup>3</sup> Justice Thomas, writing for the majority, concluded that § 2680(c) barred federal prisoners from bringing a claim under the Federal Tort Claims Act (FTCA)<sup>4</sup> against the Federal Bureau of Prisons

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1. 128 S. Ct. 831 (2008).

2. 28 U.S.C. § 2680(c) (2006).

3. *Ali*, 128 S. Ct. at 840-41.

4. 28 U.S.C. §§ 1346(b), 2671-2680 (2006).

for personal property lost by prison officers during a prison transfer.<sup>5</sup> The dissenters argued that § 2680(c) only exempted customs and excise officers, not federal prison officers, from the government's waiver of sovereign immunity.<sup>6</sup> This five to four decision could significantly alter the government's accountability for property that is negligently lost or damaged while detained by federal law enforcement officers.

## II. FACTUAL BACKGROUND

Most travelers know the precarious nature of checking luggage, which despite being sent to the same destination seems, all too often, to encounter an obstacle the traveler does not. Abdus-Shahid M.S. Ali was such a traveler. After being confined for nearly two years in the United States Penitentiary in Atlanta, Georgia, Ali was transferred in December 2003 to the United States Penitentiary Big Sandy (USP Big Sandy) in Inez, Kentucky. His luggage arrived at USP Big Sandy several days after he did. Missing from his luggage were several items worth an estimated \$177, a small amount were it not for the religious significance of the items to Ali. The missing items included religious magazines, a prayer rug, and two copies of the Qur'an.<sup>7</sup>

When Ali first received his luggage at USP Big Sandy, he signed a receipt form. Ali's signature on the receipt was meant to acknowledge, among other things, that Ali had received all the items that were in his luggage when he left Atlanta. Despite signing the receipt, Ali later filed an administrative tort claim seeking damages for the missing items. The administrative agency denied Ali relief, claiming that he had waived his right to bring claims for missing property by signing the receipt form. This denial prompted Ali to file a claim under the Federal Tort Claims Act<sup>8</sup> (FTCA) in the United States District Court for the Northern District of Georgia. The district court dismissed the claim for lack of subject matter jurisdiction because the Bureau of Prisons (BOP) successfully argued that § 2680(c) exempted all federal law enforcement officers from tort claims arising out of the detention of property.<sup>9</sup>

Ali appealed the judgment of the district court, but the BOP's interpretation of § 2680(c) was upheld in the United States Court of Appeals for the Eleventh Circuit. In holding that the BOP's interpretation of § 2680(c) was correct, the Eleventh Circuit cited not only its own

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5. *Ali*, 128 S. Ct. at 834.

6. *Id.* at 842 (Kennedy, J., dissenting); *id.* at 849 (Breyer, J., dissenting).

7. *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 834 (2008).

8. 28 U.S.C. §§ 1346(b), 2671-2680 (2006).

9. *Ali*, 128 S. Ct. at 834.

precedent<sup>10</sup> and that of the United States Supreme Court,<sup>11</sup> but it also cited the decisions of other circuits.<sup>12</sup> While some circuits advocated an interpretation of § 2680(c) similar to the BOP's interpretation,<sup>13</sup> other circuits interpreted § 2680(c) to apply only to customs or excise officers and officers acting in a customs or excise capacity.<sup>14</sup>

To resolve the circuit split, the Supreme Court granted certiorari and Ali's claim was given one last chance for success.<sup>15</sup> In a five to four decision, the Court held that § 2680(c) exempted all federal law enforcement officers from tort claims arising out of the detention of property, thus affirming the Eleventh Circuit's ruling.<sup>16</sup>

### III. LEGAL BACKGROUND

#### A. Statutory History

By passing the Federal Tort Claims Act (FTCA)<sup>17</sup> in 1946, the United States government waived sovereign immunity for torts inflicted by government employees acting within the scope of their employment.<sup>18</sup> Sovereign immunity is a doctrine that arose, at least in part, in medieval England.<sup>19</sup> The doctrine arose from the idea that tenants should not be able to sue their lords in the very courts that the lords established.<sup>20</sup> The doctrine further developed into the political maxim that "the King can do no wrong," signifying that the state could not be liable to citizens in the civil courts.<sup>21</sup> In 1821 the United States Supreme Court first recognized the concept of sovereign immunity in *Cohens v. State of*

10. *Id.* (citing *Schlaebitz v. U.S. Dep't of Justice*, 924 F.2d 193, 195 (11th Cir. 1991)).

11. *Id.* (citing *Kosak v. United States*, 465 U.S. 848, 854-59 (1984)).

12. *Id.*

13. *Id.* at 835 n.1 (citing *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 806-07 (9th Cir. 2003); *Chapa v. U.S. Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003); *Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir. 2002); *Cheney v. United States*, 972 F.2d 247, 248 (8th Cir. 1992); *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988)).

14. *Id.* (citing *ABC v. DEF*, 500 F.3d 103, 107 (2d Cir. 2007); *Dahler v. United States*, 473 F.3d 769, 771-72 (7th Cir. 2007); *Andrews v. United States*, 441 F.3d 220, 227 (4th Cir. 2006); *Bazuaye v. United States*, 83 F.3d 482, 486 (D.C. Cir. 1996); *Kurinsky v. United States*, 33 F.3d 594, 598 (6th Cir. 1994)).

15. *Id.* at 834-35.

16. *Id.* at 834, 841.

17. Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680 (2006)).

18. *See id.*

19. Aman Pradhan, *Rethinking the Eleventh Amendment: Sovereign Immunity in the United States and the European Union*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 215, 217 (2008).

20. *Id.*

21. *Id.*

*Virginia*,<sup>22</sup> stating, “It is an axiom in politics, that a sovereign and independent State is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent.”<sup>23</sup>

The FTCA was enacted to limit sovereign immunity by providing a general waiver of the government’s immunity from legal liability.<sup>24</sup> While allowing claims “for money damages . . . for injury or loss of property” resulting from the tortious actions of government employees, the FTCA nevertheless exempted specific claims from the government’s general waiver of immunity.<sup>25</sup> Section 2680(c) of the FTCA exempts “[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or *any other law enforcement officer*.”<sup>26</sup> In 2000, § 2680(c) was amended by adding subsections (1) through (4), which restored the waiver of immunity for tort claims relating to the detention of property if the property was detained pursuant to a federal forfeiture law.<sup>27</sup>

### B. *Caselaw History*

About half of the United States courts of appeals have broadly interpreted the word “any” in § 2680(c) of the FTCA.<sup>28</sup> As a result, these circuits have consistently held “any other law enforcement officer” to include officers other than customs and excise officers and officers acting in a customs or excise capacity.<sup>29</sup> For example, in *Schlaebitz v. United States Department of Justice*,<sup>30</sup> the Eleventh Circuit affirmed that the district court lacked subject matter jurisdiction under § 2680(c) to hear a parolee’s claim against several United States marshalls for releasing the parolee’s detained property to a third party.<sup>31</sup> The court chose to follow several other circuits and give the statute its literal, or

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22. 19 U.S. 264 (1821).

23. *Id.* at 303.

24. *See, e.g.*, *Feres v. United States*, 340 U.S. 135, 139-40 (1950).

25. 28 U.S.C. §§ 1346(b)(1), 2680 (2006).

26. *Id.* § 2680(c) (emphasis added).

27. *See* Civil Asset Forfeiture Reform Act, Pub. L. No. 106-185, § 3(a), 114 Stat. 211 (2000) (codified as amended at 28 U.S.C. §§ 2680(c)(1)-(4)).

28. *See* *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 806-07 (9th Cir. 2003); *Chapa v. U.S. Dep’t of Justice*, 339 F.3d 388, 390 (5th Cir. 2003) (per curiam); *Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir. 2002); *Cheney v. United States*, 972 F.2d 247, 248 (8th Cir. 1992) (per curiam); *Schlaebitz v. U.S. Dep’t of Justice*, 924 F.2d 193, 195 (11th Cir. 1991); *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988).

29. *See, e.g.*, *Chapa*, 339 F.3d at 390.

30. 924 F.2d 193 (11th Cir. 1991).

31. *Id.* at 194-95.

plain, meaning.<sup>32</sup> Although the court noted that this meaning comported with the statute's purpose,<sup>33</sup> the court chose not to employ any other interpretative tools, such as legislative history or statutory canons.<sup>34</sup> Thus, the court held that subject matter jurisdiction was lacking because the marshalls were law enforcement officers exempted under the "any other law enforcement officer" clause in § 2680(c).<sup>35</sup>

Similarly, the United States Court of Appeals for the Ninth Circuit reached the same holding regarding "any other law enforcement officer" in *Bramwell v. United States Bureau of Prisons*.<sup>36</sup> There, a federal prisoner tried to file a claim under the FTCA for the detainment and destruction of his eyeglasses, but the Ninth Circuit ruled that the prison officers were exempted from FTCA liability under § 2680(c).<sup>37</sup> Following the Eleventh and Ninth Circuits, the United States Court of Appeals for the Fifth Circuit in *Chapa v. United States Department of Justice*<sup>38</sup> held that prison officers were exempt from a prisoner's FTCA claim arising out of the loss of his personal property when being transferred from one prison to another.<sup>39</sup> The Fifth Circuit looked to § 2680(h), which defined law enforcement officer as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."<sup>40</sup> The court also examined statutes that defined "law enforcement officer" as meaning any and all law enforcement officers.<sup>41</sup> According to the Fifth Circuit, § 2680(c) should be interpreted consistently with the examined statutes.<sup>42</sup> Thus, the Fifth Circuit held that prison officers are "law enforcement officer[s]" for purposes of 28 U.S.C. § 2680(c).<sup>43</sup>

In contrast, approximately half of the circuits have held that § 2680(c) does not include law enforcement officers other than customs and excise

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32. *Id.*

33. *Id.* at 194.

34. *See id.* at 194-95. Textual canons are interpretative rules of thumb that courts use in determining the meaning of statutory language. *See* L. JELLY & D. HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 145-89 (2006).

35. *Schlaebitz*, 924 F.2d at 195.

36. 348 F.3d 804, 808 (9th Cir. 2003).

37. *Id.* at 805, 808.

38. 339 F.3d 388 (5th Cir. 2003).

39. *Id.* at 389-90.

40. *Id.* at 390 (quoting 28 U.S.C. § 2680(h) (2006)).

41. *Id.*; 28 U.S.C. § 2680(h); *see also* 5 U.S.C. §§ 5541(3), 8331(20), 8401(17) (2006); *see* 42 U.S.C. § 3796b(6) (2000 & Supp. V 2005).

42. *Chapa*, 339 F.3d at 390.

43. *Id.* (alteration in original) (quoting 28 U.S.C. § 2680(c)).

officers and officers acting in a customs or excise capacity.<sup>44</sup> For example, in *ABC v. DEF*,<sup>45</sup> the United States Court of Appeals for the Second Circuit reviewed an appeal by a prisoner whose personal property was lost during his transfer from one prison cell to another.<sup>46</sup> Noting that “statutes are not construed in isolation,”<sup>47</sup> the court determined that “any other law enforcement officer” is “confined by context to customs and excise.”<sup>48</sup> In support of this holding, the Second Circuit, among other arguments, employed two linguistic canons: the rule against surplusage and *ejusdem generis*.<sup>49</sup> Linguistic canons function as interpretive guides by helping judges extract meaning from statutory language.<sup>50</sup> The rule against surplusage requires courts to interpret a statute so that no word, clause, or sentence is rendered superfluous.<sup>51</sup> Not only does this canon demand that every word, phrase, and clause have an independent meaning, but it also demands that the same meaning not be applied to two different words, phrases, or clauses in the same section.<sup>52</sup> According to the court in *ABC*, if “any other law enforcement officer” means “any law enforcement officer doing anything,” then the other references in § 2680(c) to customs and excise officers are superfluous.<sup>53</sup>

The other linguistic canon raised by the court in *ABC* was *ejusdem generis*.<sup>54</sup> *Ejusdem generis* stands for the principle that a general, catchall phrase following a list of specific items should be “understood as a reference to subjects akin to the one[s] with specific enumera-

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44. See *ABC v. DEF*, 500 F.3d 103, 107 (2d Cir. 2007); *Dahler v. United States*, 473 F.3d 769, 771-72 (7th Cir. 2007) (per curiam); *Andrews v. United States*, 441 F.3d 220, 227 (4th Cir. 2006); *Bazuaye v. United States*, 83 F.3d 482, 486 (D.C. Cir. 1996); *Kurinsky v. United States*, 33 F.3d 594, 598 (6th Cir. 1994).

45. 500 F.3d 103 (2d Cir. 2007).

46. See *id.* at 105.

47. *Id.* at 107 (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)).

48. *Id.*

49. See *id.* at 107-08.

50. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

51. *ABC*, 500 F.3d at 107; see also *Hibbs v. Winn*, 542 U.S. 88, 89 (2004).

52. JELLUM & HRICK, *supra* note 34, at 147. Certain circumstances, however, require an exception to the rule. In *Chickasaw Nation v. United States*, the Supreme Court noted that the rule against surplusage “is sometimes offset by the canon that permits a court to reject words ‘as surplusage’ if ‘inadvertently inserted or if repugnant to the rest of the statute.’” 534 U.S. at 94 (quoting K. LLEWELLYN, *THE COMMON LAW TRADITION* 525 (1960)). After all, canons are meant to help guide a court in interpretation and their application is not mandatory. *Id.*

53. *ABC*, 500 F.3d at 107.

54. *Id.* at 108.

tion.”<sup>55</sup> Hence, “[w]hen a general term such as ‘any other law enforcement officer’ follows the enumeration of specific types of law enforcement officers,” then “any other law enforcement officer” should be limited to those types of law enforcement officers specifically mentioned, which in this instance were customs and excise officers.<sup>56</sup> Thus, the court held that the exemption in § 2680(c) only applied to “law enforcement officers who are functioning in a capacity akin to that of a customs or excise officer” and allowed the prisoner to bring a claim under the FTCA.<sup>57</sup>

Applying *ejusdem generis*, the United States Court of Appeals for the Fourth Circuit held that while a prison officer is “in the abstract . . . assuredly a ‘law enforcement officer,’”<sup>58</sup> a prison officer is not a “‘law enforcement officer’ within the meaning” of § 2680(c).<sup>59</sup> In reaching its decision, the court also applied the linguistic canon *noscitur a sociis*,<sup>60</sup> which means that a “word is known by the company it keeps.”<sup>61</sup> In

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55. *Id.* (alteration in original) (quoting *Norfolk & W. Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991)). *Ejusdem generis* is most often used when a list of items is followed by a final, catchall phrase, such as that found in 42 U.S.C. § 407(a) (2006): “execution, levy, attachment, garnishment, or other legal process.” The scope of the catchall phrase in this last list of items was at issue in *Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382-84 (2003). In *Keffeler* the Court noted that “‘other legal process’ should be understood to be process much like the processes of execution, levy, attachment, and garnishment.” *Id.* at 385 (quoting 42 U.S.C. § 407(a)). While all the items “specifically named . . . involve the exercise of some sort of judicial or quasi-judicial authority to gain control over another’s property,” the state’s action did not involve this shared attribute, and therefore the Court held that the state’s action was not a legal process under 42 U.S.C. § 407(a). *Id.* at 386.

Similarly, in *Dolan v. United States Postal Service*, the Court applied *ejusdem generis* and noted that the phrase “or negligent transmission” in the clause “loss, miscarriage, or negligent transmission of letters or postal matter” was limited by “loss” and “transmission,” which both referred to “failings in the postal obligation to deliver mail in a timely manner to the right address.” 546 U.S. 481, 485, 487 (2006). Consequently, the Court held that the statute only referred to postal employee torts involving the transmission of “mail [or] damage to its contents.” *Id.* at 487, 499.

56. *ABC*, 500 F.3d at 108 (quoting 28 U.S.C. § 2680(c)).

57. *Id.* at 105.

58. *Andrews*, 441 F.3d at 223 (quoting 28 U.S.C. § 2680(c)).

59. *Id.* at 228 (quoting 28 U.S.C. § 2680(c)).

60. *See id.* at 224-25.

61. *S.D. Warren Co. v. Me. Bd. of Env’tl. Prot.*, 547 U.S. 370, 370 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). The Supreme Court has explained that “‘where the meaning of any particular word is doubtful or obscure,’” *noscitur a sociis* provides that “‘the intention of the party who has made use of [the ambiguous word] may frequently be ascertained and carried unto effect by looking at the adjoining words.’” *Neal v. Clark*, 95 U.S. 704, 709 (1877) (quoting *BROOM’S LEGAL MAXIMS* 450). Upon encountering an ambiguous word, a reader employs *noscitur a sociis* simply by examining those words surrounding the ambiguous word in order to determine the ambiguous word’s meaning from textual context. For example, in *Gutierrez v. Ada*, the Court determined

other words, an ambiguous “word or phrase ‘should be determined by the words immediately surrounding it,’”<sup>62</sup> which in this case were the words “customs or excise” officers.<sup>63</sup> Citing the canons of *ejusdem generis* and the rule against surplusage, the United States Court of Appeals for the District of Columbia Circuit came to a similar conclusion in *Bazuaye v. United States*<sup>64</sup> regarding the meaning of “any other law enforcement officer.”<sup>65</sup> The District of Columbia Circuit held that non-customs and non-excise officers are exempted only when “acting under the authority of the tax or customs laws” in a manner that would make them eligible for indemnification under a separate revenue officer statute.<sup>66</sup> Thus, the circuit courts were split on the proper interpretation of § 2680(c).

Although the Supreme Court never had “occasion . . . to decide what kinds of “law-enforcement officer[s],” other than customs officials, are covered by the exception” in § 2680(c) until *Ali*, it had interpreted the word “any” several times in other statutes.<sup>67</sup> For example, in *Harrison v. PPG Industries, Inc.*,<sup>68</sup> the Court interpreted the word “any” in the phrase “any other final action” to have a broad, limitless scope.<sup>69</sup> At issue in this 1980 case was whether the Fifth Circuit had jurisdiction to review actions of the Administrator of the Environmental Protection Agency (EPA) that were not specifically enumerated for review under § 307(b)(1) of the Clean Air Act.<sup>70</sup> Section 307(b)(1) provides for the review of the Administrator’s actions in implementing a number of enumerated sections, plus “any other final action of the Administrator.”<sup>71</sup> On review, the Supreme Court held that because the phrase “any other final action” was unambiguous, and neither legislative history nor anything else limited its scope, it should “be construed to mean

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that the phrase “in any election” in 48 U.S.C. § 1422 (2000) meant any *gubernatorial election* by noting the two preceding references and four following references to gubernatorial elections. *Gutierrez*, 528 U.S. 250, 254-55 (2000). “With ‘any election’ so surrounded, what could it refer to except an election for Governor . . .?” the Court asked. *Id.* at 254-55 (quoting 48 U.S.C. § 1422).

62. *Andrews*, 441 F.3d at 224 (quoting BLACK’S LAW DICTIONARY 1087 (8th ed. 2004)).

63. 28 U.S.C. § 2680(c).

64. 83 F.3d 482 (D.C. Cir. 1996).

65. *See id.* at 486-87.

66. *Id.* at 486 (citing 28 U.S.C. § 2006 (2006)).

67. *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 836 n.3 (alteration in original) (quoting *Kosak v. United States*, 465 U.S. 848, 852 n.6 (1984)).

68. 446 U.S. 578 (1980).

69. *See id.* at 589.

70. 42 U.S.C. § 7607(b)(1) (2006); *see Harrison*, 446 U.S. at 579-81.

71. 42 U.S.C. 7607(b)(1) (emphasis added).

exactly what it says, namely, *any other* final action.”<sup>72</sup> Thus, the word “any” meant all other actions and was not to be limited to a category of actions determined from the broader context in which the statutory clause was found.<sup>73</sup>

Notably, the Court rejected the argument that *ejusdem generis* should restrict “any other final action” to only those “final actions based on an administrative record reflecting at least notice and opportunity for a hearing.”<sup>74</sup> Although such final actions constituted one category of final actions specifically enumerated in the statute, the Court noted that there were other specifically enumerated final actions outside that category.<sup>75</sup> Thus, it would not make sense to limit the general, catchall phrase “any other final action” to only those final actions in a single category, namely, those for which there was an administrative record showing notice and a hearing.<sup>76</sup> *Ejusdem generis*, even if applied, “would not significantly narrow the ambit of ‘any other final action’ under §307(b)(1).”<sup>77</sup> The Court also chose not to apply *ejusdem generis* because, according to precedent, the canon is only applied when the meaning of a word or phrase is uncertain or ambiguous.<sup>78</sup> The Court did not believe that the meaning of § 307(b)(1) was uncertain, and it thus held the application of *ejusdem generis* inappropriate.<sup>79</sup>

In 1997 the Supreme Court again considered the meaning of the word “any” in an unrelated statute in *United States v. Gonzales*.<sup>80</sup> The issue before the Court was whether a prison sentence imposed under 18 U.S.C. § 924(c)<sup>81</sup> could run concurrently with a prison sentence imposed under a state statute.<sup>82</sup> Resolution of the issue depended on the interpretation of § 924(c), which provides that no prison sentence “shall run concurrently with *any other* term of imprisonment.”<sup>83</sup> In reference to the phrase “any other term of imprisonment,”<sup>84</sup> the Court asked if it “means what it says, or whether it should be limited to some subset’ of

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72. *Harrison*, 446 U.S. at 588-89.

73. *See id.*

74. *Id.* at 588.

75. *Id.*

76. *Id.*

77. *Id.* (quoting 42 U.S.C. § 7607(b)(1)).

78. *Id.*

79. *Id.* at 589.

80. 520 U.S. 1 (1997).

81. 18 U.S.C. § 924(c) (2006).

82. *Gonzales*, 520 U.S. at 2-3.

83. 18 U.S.C. § 924(c)(1)(D)(ii) (emphasis added).

84. *Id.*

prison sentences.”<sup>85</sup> After noting that Congress failed to limit the scope of the word “any” by adding specific language that might categorize a subset of prison sentences, the Court concluded that “[r]ead naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”<sup>86</sup> Applying this interpretation of the word “any,” the Court determined that the “straightforward” statutory language meant all terms of imprisonment, not just federal.<sup>87</sup> Consequently, the Court held that the respondents’ two prison sentences could not run concurrently.<sup>88</sup>

Justices Breyer and Stevens dissented in *Gonzales*, both arguing that legislative history and context provided no evidence that Congress intended § 924(c) to apply to both federal and state sentences.<sup>89</sup> Moreover, Justice Stevens argued that interpreting § 924(c) to apply to state and federal prison sentences would result in severe sentencing penalties when a defendant was punished pursuant to similar crimes under state and federal laws.<sup>90</sup> According to Justice Stevens, Congress did not intend for such severe punishments.<sup>91</sup> The majority rejected these arguments because its reading of the “straightforward statutory command” in § 924(c) required neither legislative history nor speculation on congressional intent to interpret its meaning.<sup>92</sup> Interpreting § 924(c) in light of legislative history only led to inconsistencies between § 924(c) and 18 U.S.C. § 3584(a)<sup>93</sup> (another federal sentencing statute), as well as violating the rule against surplusage by making § 924(c) “effectively meaningless” in light of § 3584(a).<sup>94</sup> In support of this conclusion, the majority noted that Congress specifically excluded any restrictive language in § 924(c), whereas in another section, Congress specifically added restrictive language (that is, limiting “‘any crime’ to only federal

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85. *Gonzales*, 520 U.S. at 5 (quoting *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)).

86. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)).

87. *Id.* at 9.

88. *Id.* at 11.

89. *Id.* at 12-13 (Stevens, J., dissenting); *id.* at 14 (Breyer, J., dissenting).

90. *Id.* at 13 (Stevens, J., dissenting).

91. *Id.*

92. *Id.* at 6, 9 (majority opinion).

93. 18 U.S.C. § 3584(a) (2006).

94. *Gonzales*, 520 U.S. at 7-9.

crimes”).<sup>95</sup> Thus, the Court held that Congress intended § 924(c) to apply broadly to all prison sentences, whether state or federal.<sup>96</sup>

#### IV. THE COURT’S RATIONALE

##### A. *The Majority Opinion*

After assuming that the Federal Bureau of Prisons (BOP) officers had “detained” Abdus-Shadis M.S. Ali’s lost property, as required by 28 U.S.C. § 2680(c)<sup>97</sup> of the Federal Tort Claims Act (FTCA),<sup>98</sup> the majority addressed three different arguments to resolve the statutory interpretation issue.<sup>99</sup> The five-justice majority opinion,<sup>100</sup> written by Justice Thomas, first addressed caselaw and the importance of precedent.<sup>101</sup> Second, the majority examined recent amendments to § 2680(c) to determine if its interpretation of “any” in the statutory phrase “any other law enforcement officer” was consistent with the amendments.<sup>102</sup> Finally, the majority addressed Ali’s argument that the statutory canons of *ejusdem generis*, *noscitur sociis*, and the rule against surplusage supported a limited meaning of the word “any” in § 2680(c).<sup>103</sup>

Ali’s first argument was that textual context limited “any other law enforcement officer” to only officers acting in a customs or excise capacity.<sup>104</sup> The majority began its opinion by remarking that Ali’s argument was inconsistent with the statutory meaning of the word “any.”<sup>105</sup> This inconsistency was immediately apparent to the majority

95. *Id.* at 5 (quoting 18 U.S.C. § 924(c)). This argument employs the statutory canon *expressio unius est exclusion alterius*, meaning “the inclusion of one thing excludes the other.” JELLUM & HRICK, *supra* note 34, at 165. “It is a rule of negative implication: by including some things, the legislature intentionally left out others.” *Id.* For example, if I say that my classes this semester are civil lawsuits, law and religion, and statutory law, then it is ordinarily understood that I am not taking constitutional law this semester. *Expressio unius* functions as a named canon for a “syntactical implication” that most readers already subconsciously make when discerning the meaning of a sentence. *Id.* at 165-66 (quoting *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 899 (9th Cir. 2005) (Bea, J., dissenting)).

96. *Gonzales*, 520 U.S. at 11.

97. 28 U.S.C. § 2680(c) (2006).

98. 28 U.S.C. §§ 1346(b), 2671-2680 (2006).

99. *See* *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835-38 (2008).

100. Justice Thomas was joined by Chief Justice Roberts, Justice Scalia, Justice Ginsburg, and Justice Alito. *See id.* at 833.

101. *See id.* at 835-37.

102. *See id.* at 837-38.

103. *See id.* at 838-40.

104. *Id.* at 835.

105. *Id.*

because the meaning of “any” had been established in previous United States Supreme Court decisions.<sup>106</sup> The majority relied primarily on two cases:<sup>107</sup> *United States v. Gonzales*<sup>108</sup> and *Harrison v. PPG Industries, Inc.*<sup>109</sup> As noted above, both cases established that the word “any” should be interpreted broadly, barring exceptional circumstances.<sup>110</sup> The meaning of “any,” the majority explained by quoting *Gonzales*, is “an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”<sup>111</sup>

The majority recognized, however, that the word “any” is not always intended to have a broad, expansive meaning that refers to “one or some indiscriminately of whatever kind.”<sup>112</sup> Adding restrictive language to a sentence can limit the scope of “any” to a certain subset of a category.<sup>113</sup> For example, the Court noted that if the legislature intended to limit “any other law enforcement officer” to only those law enforcement officers acting pursuant to customs or excise laws, then the legislature “could have written ‘any other law enforcement officer *acting in a customs or excise capacity.*’”<sup>114</sup> In a footnote, the Court gave further examples of when the word “any” could be limited, such as when the presence of a term of art requires “any” to be interpreted narrowly or interpreted to apply to a certain subset of a category.<sup>115</sup> Unable to find any additional language that might limit the expansive reach of the phrase “any other law enforcement officer” in § 2680(c), the majority determined the phrase to be “all-encompassing.”<sup>116</sup> Relying on prece-

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106. *Id.* at 835-36 (citing *United States v. Gonzalez*, 520 U.S. 1, 5 (1997); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980)).

107. *See id.* at 835-37.

108. 520 U.S. 1 (1997).

109. 446 U.S. 578 (1980).

110. *See Gonzales*, 520 U.S. at 5; *Harrison*, 446 U.S. at 588-89. In *Gonzales* the Court held that the phrase “any other term of imprisonment” meant all terms of imprisonment of whatever kind, which in our judicial system is limited to federal or state terms of imprisonment. *Gonzales*, 520 U.S. at 11. Likewise, in *Harrison* the Court determined that the statutory language “any other final action” had a certain meaning, and because there was no indication in the statute that the language should be in any way limited, the Court held that the language referred to *any and all* final actions. *Harrison*, 446 U.S. at 589.

111. *Ali*, 128 S. Ct. at 835-36 (quoting *Gonzales*, 520 U.S. at 5).

112. *Id.* at 836 (quoting *Gonzales*, 520 U.S. at 5).

113. *See id.*

114. *Id.* at 840 (quoting 28 U.S.C. § 2680(c)).

115. *Id.* at 837 n.4 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-16 (2001) (giving a limited meaning to “any other class of workers engaged in . . . commerce,” 9 U.S.C. § 1 (2006), because the term of art “in commerce” has previously been interpreted to have a narrower meaning)).

116. *Id.* at 837.

dent, therefore, the majority concluded that it must reject Ali's interpretation of § 2680(c).<sup>117</sup>

The majority then addressed whether recent amendments to § 2680(c) would also support the government's interpretation.<sup>118</sup> Congress amended § 2680(c) in the Civil Asset Forfeiture Reform Act<sup>119</sup> by adding subsections (1) through (4), which relinquished the government's exemption from the FTCA with respect to the seizure of property under federal forfeiture laws.<sup>120</sup> The majority explained that the interpretation of § 2680(c) the Court accepted "must, to the extent possible, ensure that the statutory scheme is coherent and consistent."<sup>121</sup>

The majority reasoned that if Ali's interpretation of § 2680(c) was correct, then the waiver of sovereign immunity would have been restored only for "cases in which customs or excise officers, or officers acting in such a capacity, enforce forfeiture laws."<sup>122</sup> Yet Congress "restored the waiver with respect to the enforcement of *all* civil forfeiture laws," and the majority believed it was more reasonable to attribute this broad restoration to the fact that § 2680(c) applied to all officers, not just customs or excise officers.<sup>123</sup> If § 2680(c) applied to only customs or excise officers, then it would have made more sense for Congress to restore the waiver only for civil forfeiture laws related to customs or excise officers or officers acting in a customs or excise capacity.<sup>124</sup> Therefore, the majority held that a broad, all-encompassing interpretation of "any other law enforcement officer" was consistent and coherent with the amendments to § 2680(c), which pertain to all civil forfeiture laws and not just those forfeiture laws related to customs or excise.<sup>125</sup>

Ali next argued that the application of three statutory canons supported his view that "any other law enforcement officer" should be

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117. *See id.*

118. *See id.* at 837-38.

119. Pub. L. No. 106-185, § 3(a), 114 Stat. 211 (2000) (codified as amended at 28 U.S.C. §§ 2680(c)(1)-(4)).

120. *Id.*

121. *Ali*, 128 S. Ct. at 837 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The idea that an interpretation of statutory language should be consistent with the interpretation of other parts or sections of the same statute, or even consistent with an entirely different statute, is the basis of the canon *in pari materia*. JELLUM & HRICIK, *supra* note 34, at 172-73. *In pari materia* means "part of the same material," and it reflects our common sense belief that a statute should be both internally consistent and consistent with other similar statutes. *Id.*

122. *Ali*, 128 S. Ct. at 837.

123. *Id.* at 837-38.

124. *See id.*

125. *Id.*

limited to officers acting in a customs and excise capacity.<sup>126</sup> Under § 2680(c), the FTCA's waiver of sovereign immunity does not apply to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."<sup>127</sup> Turning first to Ali's argument for the application of *ejusdem generis*, the majority noted that the statutory language at issue did not consist of a general, catchall phrase immediately following a list of specific items.<sup>128</sup> Unlike instances where *ejusdem generis* is applicable,<sup>129</sup> the statutory language in this case was "disjunctive, with one specific and one general category, not . . . a list of specific items separated by commas and followed by a general or collective term."<sup>130</sup> Without a specific list, the majority would not construe "any other law enforcement officer" to be restricted by "officer of customs or excise."<sup>131</sup> Thus, the majority rejected the use of *ejusdem generis* because § 2680(c) lacked the appropriate form.<sup>132</sup>

Additionally, the majority refused to apply *ejusdem generis* because the majority could not determine how to limit "any other law enforcement officer[s]" with a single common attribute that conceptually connected customs officers and excise officers.<sup>133</sup> Ali suggested that the common attribute was a shared mission in enforcing customs and excise laws, but the majority concluded that this attribute was not the only perceivable common attribute.<sup>134</sup> The majority reasoned that the common attribute could also have been the officers' involvement in activities such as "the assessment and collection of taxes and customs

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126. *See id.* at 838-40.

127. 28 U.S.C. § 2680(c).

128. *Ali*, 128 S. Ct. at 839.

129. The majority opinion suggests that application of *ejusdem generis* is only appropriate when a general catchall phrase follows a list of specific items, *see id.*, such as in "medical students, law students, and M.B.A. students, and all other similar students." Here, "all other similar students" would be understood as limited to graduate students and most likely not including undergraduate students. It is graduate studies, not undergraduate, that connect the three specific types of students listed. Presumably, the majority opinion would always find application of *ejusdem generis* inappropriate when a phrase does not contain a list and is disjunctive, separating a general category from a specific one. *See id.* For example, "parking rules apply to law students or any other students" would be read to apply to any and all students, with the specific reference to law students being understood as an emphasis on the inclusion of law students.

130. *Id.*

131. *Id.*

132. *See id.*

133. *Id.*

134. *Id.*

duties *and* the detention of property.”<sup>135</sup> An attribute such as the detention of property would presumably include many different kinds of officers, not just customs and excise officers.<sup>136</sup> The lack of a single common attribute further supported the majority’s decision to reject the application of *ejusdem generis*.<sup>137</sup>

The majority quickly disposed of the remaining two statutory canons that Ali argued should be applied.<sup>138</sup> Regarding *noscitur a sociis*, the majority concluded that “nothing in the overall statutory context suggests that customs and excise officers were the exclusive focus of the provision.”<sup>139</sup> The majority addressed the cases Ali cited in support of applying *noscitur a sociis*, explaining that in both instances the ambiguous word or phrase was surrounded by several other words that provided definitive contextual meaning.<sup>140</sup> After acknowledging that customs and excise are twice referred to in § 2680(c), the majority nevertheless determined that the references to customs and excise were not sufficiently prevalent to preclude the interpretation that “any other law enforcement officer” refers to any and all law enforcement officers.<sup>141</sup> Consequently, the majority eschewed *noscitur a sociis* as a guide for interpretation of the statutory language at issue.<sup>142</sup>

The final linguistic canon the majority considered was the rule against surplusage.<sup>143</sup> The majority dismissed Ali’s argument that the government’s interpretation rendered “‘any officer of customs or excise’ superfluous”<sup>144</sup> because “any other law enforcement officer” would obviously include customs and excise officers.<sup>145</sup> The purpose of referring specifically to “any officer of customs or excise,” according to the majority, might simply have been to “remove any doubt that officers of customs or excise were included in ‘law enforcement officers.’”<sup>146</sup> The majority then countered that it was Ali’s interpretation of § 2680(c), not its own, that violated the rule against surplusage.<sup>147</sup> Interpreting

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135. *Id.* (emphasis added).

136. *See id.*

137. *See id.*

138. *See id.* at 839-40.

139. *Id.* at 840.

140. *Id.* (citing *Gutierrez v. Ada*, 528 U.S. 250, 254-58 (2000); *Jarecki v. G.D. Searle & Co. Polaroid Corp.*, 367 U.S. 303, 306-09 (1961)).

141. *Id.*

142. *See id.* at 839-40.

143. *See id.* at 840.

144. *Id.* (quoting 28 U.S.C. § 2680(c)).

145. *See id.*

146. *Id.* (quoting 28 U.S.C. § 2680(c)).

147. *Id.*

§ 2680(c) to apply only to customs and excise officers would result in “any other law enforcement officer” becoming superfluous, as “it is not clear when, if ever, ‘other law enforcement officer[s]’ act in a customs or excise capacity.”<sup>148</sup> Consequently, the majority rejected Ali’s argument to apply the rule against surplusage and affirmed the Eleventh Circuit’s decision that Ali’s claim was barred under § 2680(c).<sup>149</sup>

### B. *The Dissenting Opinions*

Justice Kennedy and Justice Breyer both dissented.<sup>150</sup> In his dissent,<sup>151</sup> Justice Kennedy acknowledged the importance of “respect for the text,” but he nonetheless emphasized the critical role that context plays in statutory interpretation.<sup>152</sup> According to Justice Kennedy, textual context makes clear that the meaning of the word “any” is plainly limited in scope to customs and excise officers.<sup>153</sup> For example, an initial reference to customs and tax duties and the overall presence of four references to tax and customs duties make “customs and excise officers [the statute’s] most salient features.”<sup>154</sup>

Justice Kennedy next criticized the majority’s decision to read a single word of a statute in isolation and noted that the word “any” can have various meanings depending on the purpose and overall context of the statute.<sup>155</sup> Part of the overall context includes the statute’s concern with “detention,” which is a word pertaining to forced or compulsory containment and not the voluntary delivery of property to another.<sup>156</sup> Ali’s situation was far more similar to a bailment, in which a voluntary delivery of property occurs, than to forced or compulsory containment of property.<sup>157</sup> Also, most of the other federal statutes referencing the “detention of goods, merchandise, or other property are specific to customs and excise.”<sup>158</sup> Justice Kennedy noted that the legislative

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148. *Id.* (alteration in original) (quoting 28 U.S.C. § 2680(c)).

149. *Id.* at 841.

150. *See id.* at 833.

151. Justice Kennedy was joined by Justices Stevens, Souter, and Breyer. *See id.* at 841.

152. *See id.* (Kennedy, J., dissenting).

153. *Id.* at 842.

154. *Id.*

155. *Id.* at 844 (citing *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)).

156. *Id.* at 845 (citing AM. HERITAGE DICTIONARY 494 (4th ed. 2000); BLACK’S LAW DICTIONARY 459 (7th ed. 1999)).

157. *Id.* (citing AM. HERITAGE DICTIONARY, *supra* note 156, at 134).

158. *Id.*

history of § 2680(c) never referenced property detainment generally but only contained an “exclusive reference to customs and excise.”<sup>159</sup>

Further, Justice Kennedy attacked the majority’s refusal to use the linguistic canons.<sup>160</sup> He argued that *ejusdem generis* can be applied even when a general, catchall phrase follows a specific phrase and not just when a general phrase follows a list of items.<sup>161</sup> Moreover, he believed it was imprudent to reject the helpfulness of *noscitur a sociis* because the officers and duties listed in § 2680(c) are related and share the common attribute of “functions most often assigned to revenue officers.”<sup>162</sup> The inclusion of “any other law enforcement officer” also relates to this common attribute, and in support of this contention, Justice Kennedy cited numerous cases in which Drug Enforcement Administration or Federal Bureau of Investigation agents performed or assisted in “functions most often assigned to revenue officers.”<sup>163</sup>

Justice Breyer dissented separately to argue that other “contextual feature[s] support[ed] Justice K[ennedy]’s conclusion” besides the surrounding text and linguistic canons.<sup>164</sup> First, Justice Breyer pointed out that the phrase at issue is “within a provision that otherwise exclusively concerns customs and revenue duties,” as evidenced by the legislative history of the FTCA.<sup>165</sup> Second, legislative history also shows that § 2680(c) was meant, in part, to exempt the government from suits for which there were other adequate remedies.<sup>166</sup> While adequate remedies existed for property damaged or lost during the enforcement of customs or excise laws, no adequate remedies existed for property damaged or lost during the enforcement of all laws by any and all federal officers.<sup>167</sup> Finally and perhaps most importantly, Justice Breyer noted that the majority’s interpretation of § 2680(c) caused the exemption to apply to more than 100,000 federal officers.<sup>168</sup> One would expect an exemption of this magnitude to be readily apparent on the face of the statute.<sup>169</sup> Instead, the far-reaching implications of this

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159. *Id.* at 846.

160. *See id.* at 842.

161. *Id.* at 842-43 (citing *Norfolk & W. Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117 (1991)).

162. *Id.* at 843.

163. *Id.* at 843-44 (citing *United States v. Gurr*, 471 F.3d 144, 147-49 (D.C. Cir. 2006); *United States v. Boumelhem*, 339 F.3d 414, 424 (6th Cir. 2003)).

164. *Id.* at 850 (Breyer, J., dissenting).

165. *Id.* at 850-51.

166. *Id.* at 851 (citing S. REP. NO. 1400, at 33 (1946); H.R. REP. NO. 1287, at 6 (1945)).

167. *Id.* (citing *Bazuaye v. United States*, 83 F.3d 482, 485-86 (D.C. Cir. 1996)).

168. *Id.*

169. *Id.*

statute appear as though hidden in a statute concerning only customs and excise laws.<sup>170</sup>

In sum, Justice Kennedy and Justice Breyer argued that a common sense understanding of the role context plays in statutory interpretation demanded that the scope of § 2680(c) not be determined solely by the dictionary meaning of the word “any.”<sup>171</sup> As Justice Breyer wrote in his dissent, “[t]he word ‘any’ is of no help because all speakers . . . who use general words such as . . . ‘any’ . . . normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work.”<sup>172</sup> Ultimately, Justice Kennedy concluded that Congress would not “give sweeping immunity to all federal law enforcement officials from liability for the detention of property” by tacking “this phrase onto the end of the statutory clause so as to appear there as something of an afterthought.”<sup>173</sup>

#### V. IMPLICATIONS

The result in *Ali v. Federal Bureau of Prisons*<sup>174</sup> could have far-reaching implications. First, *Ali* could have a near universal effect on the property rights of all United States citizens, but especially on federal prisoners. *Ali* effectively exempts from civil liability all federal law enforcement officers involved even in the most trivial of property detentions.<sup>175</sup> Although the majority did not expressly address the issue of whether the property was detained, interpreting “detention of any goods” consistently with “any other law enforcement officer” would seem to imply that “detention” is to be given a broad scope. Such an interpretation is likely because 28 U.S.C. § 2680(c)<sup>176</sup> applies not just to property detained pursuant to customs or excise laws but also to property “detained” by any and every kind of federal law enforcement officer.<sup>177</sup>

Consider *Ali*'s effect on the negligent or intentional taking of property in federal prisons. Federal prison officers can now take the personal property of prisoners without civil liability.<sup>178</sup> For example, suppose that *Ali*'s missing religious items were intentionally discarded by a

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170. *Id.* at 851-52.

171. *See id.* at 841-49 (Kennedy, J., dissenting); *id.* at 849-52 (Breyer, J., dissenting).

172. *Id.* at 849-50 (Breyer, J., dissenting).

173. *Id.* at 849 (Kennedy, J., dissenting).

174. 128 S. Ct. 831 (2008).

175. *Id.* at 848-49 (Kennedy, J., dissenting).

176. 28 U.S.C. § 2680(c) (2006).

177. *See id.*

178. The officers would, of course, still be subject to criminal liability.

federal officer prejudiced against Islam. If bringing suit under the Federal Tort Claims Act (FTCA)<sup>179</sup> was the only procedural route Ali had to recover damages, then Ali would be without a civil remedy for his loss. This result appears unjust and, arguably, unintended by Congress.

The implication of the holding in *Ali* is not limited to federal prisons, however. As Justice Breyer's dissent noted, the holding in *Ali* applies to over 100,000 law enforcement officers.<sup>180</sup> While previously law enforcement officers (acting outside of customs and excise laws) might have been subject to civil liability for wrongfully detaining property or negligently harming or losing detained property, these officers may now handle detained property without any concern for civil liability. An entire area of liability that once gave a remedy to citizens whose property had been unreasonably harmed or destroyed while detained by federal law enforcement officers is now obsolete. The possible magnitude of the holding in *Ali* could lead to a reaction by the legislature. As with dissatisfying holdings in other cases, it is possible that the legislature might seek to undo any perceived harm from *Ali* by amending § 2680(c) with more specific language.<sup>181</sup>

Additionally, the holding in *Ali* raises concerns about the Fourteenth Amendment<sup>182</sup> and its procedural due process guarantee. Under our American constitutional system, the government is not to deprive any person of property without providing due process of law.<sup>183</sup> Due process of law requires that notice and an opportunity to be heard must be given "at a meaningful time and in a meaningful manner."<sup>184</sup> Yet the holding in *Ali* bars a citizen from seeking normal avenues of due process in recovering damages for property lost or damaged while detained by federal law enforcement officers. The essence of sovereign immunity is that the government may act without civil liability. Hence, the thought that due process can conflict with sovereign immunity seems to miss the very point of sovereign immunity. Nonetheless, constitutional scholars have argued that the presence of the ancient English doctrine of sovereign immunity in our American constitutional democracy is

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179. 28 U.S.C. §§ 1346(b), 2671-2680 (2006).

180. *Ali*, 128 S. Ct. at 851 (Breyer, J., dissenting).

181. See *Employment Div. v. Smith*, 494 U.S. 872 (1990); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

182. U.S. CONST. amend XIV.

183. See *id.*

184. *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

problematic because sovereign immunity is at odds with the due process clause.<sup>185</sup>

*Ali* highlights this problem. After all, the purpose of the FTCA was to abolish sovereign immunity in most situations.<sup>186</sup> Courts have noted on more than one occasion that a primary legislative concern in passing the FTCA was to exempt the government from liability for torts in which adequate remedies were already available.<sup>187</sup> As Justice Breyer acknowledged in his dissent in *Ali*, while remedies existed for property lost or damaged during the enforcement of customs or excise laws, there have never been specific remedies for property lost or damaged by any federal law enforcement officer enforcing any law.<sup>188</sup> Thus, *Ali* adds to the list of disputed FTCA exemptions that provide no accountability for government actions through civil litigation. Such a circumstance seems better suited to a monarchy than our American constitutional democracy.

As with any constitutional case, the implications of the analysis ultimately reach beyond the immediate effects of the result. In *Ali* the majority employed a controversial, though not uncommon, analysis: when the Court finds language to be unambiguous (that is, when the Court perceives the “plain meaning” of the text), sources other than the text itself need not be consulted.<sup>189</sup> While the majority’s analysis included one linguistic canon (*in pari materia*), the analysis excluded three others precisely because the statute was allegedly clear.<sup>190</sup> Although application of the linguistic canons has never been required, their use has long operated as a helpful guide in statutory interpretation. The majority in *Ali*, however, held that the meaning of statutory language is predominantly determined by defining a provision’s words according to their ordinary meaning.<sup>191</sup> If contextual features support ordinary meaning, then their use is appropriate; if not, then contextual features (such as textual canons) should be excluded. The analysis in *Ali* affords contextual meaning a lesser value in statutory interpretation, while affording greater value to a judge’s ability to perceive the “plain meaning” of an isolated provision.

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185. See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1215-16 (2001).

186. See, e.g., *Feres v. United States*, 340 U.S. 135, 139-41 (1950).

187. See, e.g., *Kosak v. United States*, 465 U.S. 848, 858-62 (1984); *Bazuaye v. United States*, 83 F.3d 482, 484-86 (D.C. Cir. 1996).

188. *Ali*, 128 S. Ct. at 851 (Breyer, J., dissenting).

189. See *Ali*, 128 S. Ct. at 840-41 (majority opinion).

190. See *id.* at 834-41. The three excluded canons were *eiusdem generis*, *noscitur a sociis*, and the rule against surplusage. See *id.*

191. *Id.* at 840-41.

It is difficult to predict how the statutory interpretation approach in *Ali* may be used in the future, and it is even more difficult to predict who will use it. True, one can point to a general pattern of the Justices on the majority in *Ali* subscribing to textualism.<sup>192</sup> One can likewise point to a general pattern of the dissenting Justices in *Ali* subscribing to intentionalism<sup>193</sup> or to purposivism.<sup>194</sup> Regardless of the language at issue, the split is fundamentally between those jurists who see the plain meaning and those who see ambiguity and call for broader contextual interpretation. One side claims to know the “true” meaning of the language, and the other side charges the first with manipulating the language’s meaning to reach a preferred result. While textualists are often on one side of this argument and intentionalists and purposivists are on the other, jurists can and will switch back and forth between these interpretative approaches.<sup>195</sup> That is to say, the use of interpretative approaches can be manipulated, just as language itself is susceptible to manipulation. As some jurists would argue, language’s susceptibility to manipulation—namely, the ability to give a word any number of meanings—is unavoidable.

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192. Textualism is one of three dominant methods of statutory interpretation. JELLUM & HRICIK, *supra* note 34, at 95. In interpreting a statute, textualists only look at a statute’s text and generally refuse to consider legislative history or other contextual features unless the statutory language is ambiguous or absurd. *Id.* at 96. Textualists seek to determine the “plain meaning” of the text by looking at the text alone, thereby (purportedly) preventing the input of their own prejudices into the meaning of the statute. *Id.* at 95-96.

193. While intentionalists always consider the text of a statute first when interpreting a statute, they will also look to extrinsic sources (primarily legislative history), even when the text does not suffer from ambiguity or absurdity. JELLUM & HRICIK, *supra* note 34, at 97. The ultimate aim of intentionalism is to determine the legislature’s intended meaning of the statutory language. *Id.* at 97-98.

194. Purposivist judges interpret statutes with the aim to determine and further the statute’s purpose. JELLUM & HRICIK, *supra* note 34, at 99. While purposivists certainly consider a statute’s text and its legislative history, they give special attention to the purpose as described in the statute and to the problem the legislature sought to address in passing the statute. *Id.* at 99-100. Like intentionalists, purposivists will consider extrinsic sources even when the statutory language is neither ambiguous nor absurd. *Id.* at 100.

195. *See, e.g.,* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143-50, 182 (2000). Justice O’Connor authored the majority opinion and was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. *See id.* at 124-25. The Court’s holding was based on subsequent legislative history. *See id.* at 143-50. Justice Breyer dissented and was joined by Justices Stevens, Souter, and Ginsburg. *See id.* at 161 (Breyer, J., dissenting). The dissent argued that the statute should be read literally. *Id.* at 162. Notably, as the dissent pointed out, Justice Scalia had previously argued that subsequent legislative history should hold no weight in statutory interpretation. *Id.* at 182 (citing Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990)).

Perhaps human logic at times takes its orders from human intuition—a judge first has a subconscious or intuitive reaction to an issue and then accepts the interpretative approach that best supports that reaction. Afterwards, the judge attempts to justify the interpretative approach with legal argument. Yet at other times, a judge accepts an interpretative approach that must have been accepted solely on the basis of legal argument because the interpretative approach leads to a conclusion in opposition to the judge's biased preferences (intuitive reaction). If judicial reasoning is viewed as an interplay between human intuition and legal argument, then we should be mindful that a judge may at times be willing to use an interpretative approach to which he or she is ordinarily opposed. Despite the seemingly typical breakdown of interpretative camps, *Ali* is a reminder that determining whether a judge will accept an interpretative approach based on text, canons, or other contextual features is at times as uncertain as the meaning of the word “any.”

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