**Bound By Oath | Season 3, Episode 12 | SWAT at the Supreme Court**

**John**: Hello and welcome to Bound By Oath, a podcast on civil rights and constitutional history from the Institute for Justice's Center for Judicial Engagement. Two episodes ago, we told you about the case of *Martin v. United States*, where an FBI SWAT team made a mistake and raided the wrong house in Atlanta in 2017.

**Toi Cliatt**: When I tell you the feeling of helplessness that came across me as that door started to open, I just went numb.

**John**: The agents burst into the home before sunrise. They damaged property. And they pointed automatic weapons at Trina Martin, her seven-year-old son Gabe, and her then-boyfriend Toi Cliatt.

**Patrick Jaicomo**: The reason the FBI went to the wrong house is because the lead agent said that his GPS malfunctioned and took him to the wrong house, but he still went ahead and kicked in the door without even checking the address on the mailbox, which, of course, is something we'd expect from anyone who's delivering a pizza or an Amazon package.

**John**: It's been over seven years, and to this day there has been no accountability. When Trina, Gabe, and Toi sued, they lost. And they lost bad. Last year, the U.S. Court of Appeals for the Eleventh Circuit dismissed all of their claims in an unpublished, unsigned opinion without even holding oral argument, which the family's lawyers, who are top notch civil rights litigators in Georgia, had asked for. When we at the Institute for Justice had the opportunity to take over the case for an appeal to the Supreme Court, everyone agreed, this was one we should do. As with every petition, it was a long shot. But I am overjoyed to say that the justices decided to take this

one up. Oral argument will be held this coming Tuesday, April 29th, 2025.

**Patrick Jaicomo**: In the current posture of this case, if we win in the US Supreme Court, it doesn't mean that the Martin family gets money from the government, it just means that they get a chance to go to have a trial.

**John**: The legal claims that will be before the Court concern the Federal Tort Claims Act. Congress passed the FTCA in 1946 to allow lawsuits against the federal government for negligent or wrongful conduct committed by federal employees against everyday people – with an array of exceptions and limitations that we will discuss. Then, several decades later, in 1974, Congress amended the law to remove some exceptions and expand the types of wrongful acts that are covered. And as it happens, Congress did that in response to a very particular wrongful act.

> **Senate report**: The subcommittee heard testimony on two Collinsville, Illinois drug raids, which were made in error on the homes of two innocent families.

**Jack Boger**: Plainly, the one thing that was unmistakable is this came out of Collinsville and Senator Ervin's righteous anger about it, in the sense that, at a minimum, this must subject the United States to liability.

**Mark Gitenstein**: The fact was people were so outraged by what happened in Collinsville. And that's what this legislation has to do with. And the notion that 50 years later, in a case which is exactly on all fours with Collinsville, there’s any doubt about that is ridiculous. They get the wrong address. And there's no remedy for that?

**John**: On this episode, we'll explore the history of the FTCA. We'll hear from some folks who worked on getting the 1974 amendment passed into law. And we'll look at where things went so wrong to the point where even claims exactly like the ones that motivated Congress to act are being tossed out of court without much consideration. I'm John Ross. Thanks for listening to Bound By Oath.

**BBO montage – Justices saying the oath**

**Toi Cliatt**: What happened in 2017? Well, basically, there was a home invasion by the FBI at my residence.

**John**: That's Toi Cliatt, whose home was raided by the FBI by mistake.

**Toi Cliatt**: At that time, I was a truck-driver mentor, so I was training adults how to drive tractor trailers. And on that night, I had taken one of my students to North Carolina, and we returned back to Georgia around four o'clock in the morning. And luckily for me, I don't have any problems falling asleep, so I fell right asleep. And then all of a sudden, I heard like this loud bang. It sounded like a cannon. And around that time, there were a lot of home invasions going on in the City of Atlanta. So that was the first thing that came to my mind. We're about to be robbed.

**John**: Also asleep in the home that night were Trina, Toi's girlfriend, who was dressed only in a t-shirt with nothing below, and Trina's seven-year-old son, Gabe. When the FBI burst in, Trina's first instinct was to run to Gabe's room.

**Toi Cliatt**: I remember just naturally, I just grabbed her, like, come on.

**John**: Toi pulled Trina into a walk-in closet, where he had a firearm that he kept for self-defense.

**Toi Cliatt**: I live in a split level home, so when you enter the doorway, you have the choice of going up or down. And I hear people going down and coming up at the same time. And I'm saying to myself, Wow, that's a lot of people.

**John**: Toi could hear the intruders, as they got closer, yelling out “clear,” like police or soldiers on tv shows say as they move from room to room.

**Toi Cliatt**: It's real organized. This doesn't really sound like what I thought a home invasion would be. And I'm thinking, Okay, if I make a wrong move, this is gonna be it for us. Gabe is gonna be an orphan. And I'm just like I think I just better roll the dice on this one.

**John**: The agents did identify themselves, but in the dark of night, behind a closet door, how do you know? Fortunately, instead of reaching for his gun, Toi made the split-second decision to surrender.

**Toi Cliatt**: When I tell you the feeling of helplessness that came across me as that door started to open, I just went numb. If it's the bad guys, they got us, and I let my family down. But I think I took the lesser of two evils.

**John**: They were dragged out at gunpoint.

**Toi Cliatt**: I see all these automatic weapons. It’s probably six or seven guys standing over me. They were interrogating me with questions. And I'm just like, I have no idea what you guys are talking about.

**John**: Eventually, the lead agent asked Toi to state his address.

**Toi Cliatt**: And so I told him what the address was, and it went completely silent, and I heard him whisper to someone, and then I can hear that person walking out of the room. And he came back in maybe 30 seconds, 45 seconds later. I heard him whisper something back to the lead guy. He pulled me off the floor. He unhandcuffed me, and he said, don't move. I'll be right back.

**John**: The agents left the house, went down the street to the correct house, and captured their suspect. When they returned, the lead agent apologized, gave Toi his supervisor's business card, and that was that. From that day to this, there has been no form of accountability or any kind of remedy.

**Toi Cliatt**: It's been a lot of emotional trauma for us, a lot of mental trauma for us. My family is broken. Gabe is distraught. Gabe would wake up every night around that time of the invasion and just jump up and run in our room and just dive into bed. Every night. He was very consistent with that.

**Patrick Jaicomo**: So after this incident, which was, of course, incredibly traumatic, the whole family had to deal with all sorts of psychological second-order effects, like going to therapy, of course. But also both for Toi and Trina, every single night, they would constantly be walking around vigilantly, looking out the windows, checking the doors, unlocking, re-locking, checking the alarm system, turning it off, turning it on, just constantly living in fear that this could happen to them again.

**John**: That's my colleague at the Institute for Justice, Patrick Jaicomo. This Tuesday, he will be

arguing the Martin's case at the Supreme Court.

**Patrick Jaicomo**: And the effects were even worse for Gabe, who was seven at the time, and as a result of what happened, developed a bunch of developed a bunch of obsessive tics. Like he would unthread his clothing, his socks, thread by thread. And so he'd come home and half of his pant leg would be missing. Or he would sit and pick paint off of the walls as a coping mechanism. And as a result of that, Trina actually had to take Gabe out of school and home school him for a number of years. But thankfully, he and the family have been quite resilient, and now he's doing very well. He's back in school. He's a very smart 14 year old, and he's actually a very gifted athlete. He just recently broke the county 100-dash record.

**John**: Even so, the raid is still fresh in the family's minds.

**Patrick Jaicomo**: There is no depth to the level of trauma here, because you talk to Trina she's still, to this day, struggling with the guilt of not being able to protect her son from this. And Toi is struggling with the guilt of not being able to protect Trina and Gabe from all this.

**Toi Cliatt**: We want to make a change. We want to prevent this from happening to someone else. The officers had a duty to do. I understand that, and I know that their senses were really heightened. But there's a term they use, trust but verify, and you didn't do that. You have to do that in a situation like that.

**Patrick Jaicomo**: According to the lead agent, Special Agent Guerra, the reason he raided the wrong home was because of a malfunction with his personal GPS device. But when the Martin's asked to see it to see if they could recreate the malfunction, he conveniently explained that he had thrown it away.

**John**: If we succeed at the Supreme Court and the case is remanded for a trial, maybe one day we'll learn more about why Agent Guerra went to the wrong house. But under the Federal Tort Claims Act, it doesn't really matter why a mistake was made. It's enough that there was a mistake of the kind for which Congress waived its sovereign immunity. As we talked about way back on Season 2, the federal government has total, absolute, sovereign immunity from legal liability for the conduct of federal employees.

**Patrick Jaicomo**: Sovereign immunity is this ancient concept that said, the king can do no wrong, and you can't sue the king in his courts without his consent. And while that seems completely antithetical to what we're doing in the American constitutional republic, it's nevertheless a principle that our Supreme Court adopted into American law very early on.

**John**: When Congress passed the Federal Tort Claims Act, that was, first and foremost, a waiver of sovereign immunity – Congress' consent to being sued subject to terms and conditions that we'll discuss shortly. In any event, that's why this case is called *Martin v. United States* instead of *Martin v. Special Agent Guerra*. It's not a suit against Special Agent Guerra. In 1946 and then again in 1974, Congress waived its immunity and said sue us, not our employees, when they commit a tort – that is, a negligent or wrongful act resulting in injury or death or damage to property. Prior to the passage of the FTCA, if a federal employee committed a tort against you or otherwise violated your rights, you had two options. One option, as we just mentioned, was to sue that official directly. That option has now all but disappeared when it comes to federal officials, which is a topic that we explored way back on Episode 2 of Season 2. The other option was a private bill.

**Patrick Jaicomo**: A private bill is a piece of legislation that you take to Congress asking them to

pass a law that essentially would just provide you with a remedy. So maybe Congress says something bad happened to Patrick, therefore we will all vote and agree to give Patrick $5,000 and this was, of course, a very cumbersome process for handling hundreds or thousands of harms that happened every year.

**John**: According to the Supreme Court, private bills were quote "notoriously clumsy."[1] All the way back in 1832, former President John Quincy Adams complained that Congress was spending half its time on private bills, a task for which legislators, he said, were ill-equipped, requiring Congress perform what is essentially a judicial task: weighing evidence and adjudicating disputes of all sorts.[2]

**Patrick Jaicomo**: And so, practically speaking, a big motivation behind the FTCA was to relieve that burden on Congress. And the quintessential example that everyone in Congress understood that the government should pay for was a mail truck driver negligently crashing into something.

**John**: When a government employee caused a car accident, that was the example of something that Congress said the government should be liable for. The Federal Tort Claims Act is also inextricably linked to another kind of accident.

[sound of aircraft engine whining overheard … growing louder … then a crash]

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[1] See *Dalehite v. US*, 346 U.S. 15 (1953)
[2] See, e.g., Diary Entry (Feb. 23, 1832), in 8 MEMOIRS OF JOHN QUINCY ADAMS 480 (1876) ("There ought to be no private business before Congress. There is a great defect in our institutions by the want of a Court of Exchequer or Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice.") via David Keenan, Discretionary Justice: The Right to Petition and the making of Federal Private Legislation

**John**: In July 1945, the pilot of a B-25 bomber got lost in a fog and accidentally flew through midtown Manhattan.

**MBS radio host**: It's 12:25, eastern war time in New York City. This morning at about 10 o'clock an Army bomber crashed into the tallest building in the world, the Empire State building here in New York City.

**John**: As the pilot passed LaGuardia airport before reaching Manhattan, the control tower radioed the pilot to say, you might want to just land here. But the pilot chose to continue.

**News reel**: The Empire State building, like all New York, was hidden by fog as a Mitchell bomber, trying to reach Newark airport, crashed into the tallest structure in the world. Thirteen died, including the crew members, two Army men and a Navy hitchhiker.

**John**: Congress passed the Federal Tort Claims Act the following year, but they made sure to make the law retroactive to 1945, which allowed the victims of the crash to file some of the first lawsuits under the Act. So what does the FTCA say? There are several things that are noteworthy. For one, it does not provide for jury trials. Instead, petitioners get what's called a bench trial – where a judge serves as the factfinder. There are significant limitations on attorney's fees. And before you go to court, you must go through an administrative process with the agency responsible for the harm, here the FBI. Another feature is that the whole thing is based on state tort law. If the incident giving rise to the lawsuit in occurred in Georgia or in New York, that state's law about the various elements that constitute a tort are incorporated into the FTCA.

**Patrick Jaicomo**: When it comes to things like negligence and trespass, the law differs across

the states, although it's fairly similar. ~~and so~~ And so it does seem a little bit strange that Congress would want to adopt state principles that would vary from place to place. But it makes a lot of sense when you realize that what Congress was really trying to accomplish was to place itself in a position of parity with private employers. So in a given state, Congress wanted to accept the same liability that a private employer would be accepting in that state, and that way, the actions of a government official were treated no differently than the actions of a private employee.

**John**: However, while Congress was comfortable assuming liability for some kinds of accidents and misconduct, the FTCA also contains a long list exceptions and limitations. For example, Congress did not want to be liable for decisions that were made during war time in combat, so there's an exception for that. Nor did Congress want to be held liable for the acts of officials abroad generally. And you can see why they might have hesitated there because liability would then be based on foreign law in different jurisdictions all around the world. Another exception is the so-called intentional torts exception. The original, 1946 version of the FTCA specifically lists 11 torts that are excluded. Those torts are things like assault, battery, false arrest, false imprisonment, and malicious prosecution. Things that are generally not accidental or negligent.

**Patrick Jaicomo**: And the reason that Congress decided to have this exception was because – calling back to that same concept of parity with private employers – in most states' common law, an employer is not liable for the criminal, intentional actions of his employee. He's allowed to presume that his employee will follow the law, and that means when the employee breaks that presumption, it's not going to fall on the employer's shoulders.

**John**: That said, even with the intentional torts exception, our clients, the Martins, do have claims under the original, 1946 version of the FTCA. Those claims include trespass, which can

be intentional or accidental, and also negligence. But, we'll put that to the side for now, because, as we'll discuss shortly, Congress in 1974 put some of the 11 intentional torts it had initially excluded back in. For now, there is one more exception to liability under the FTCA that we need to talk about.

**Patrick Jaicomo**: The exception at the heart of this case is the discretionary function exception, and through that exception, Congress was intending to protect itself from judicial second guessing and prevent the ability of plaintiffs to use tort claims as a back door way of attacking either the constitutionality or the wisdom of federal policy making.

**John**: Part of the reason that the Martins lost in the Eleventh Circuit is because the court transmogrified the discretionary function into something else entirely.

**Patrick Jaicomo**: In this case, the government's definition of discretionary function is really just anything that involves any element of judgment or choice, which means that it would exclude from the FTCA the quintessential thing that Congress was trying to provide liability for: crashing a car. Because driving a car or flying a plane is something that necessarily involves all sorts of-on-the spot decision making.

**John**: Nevertheless, the Eleventh Circuit agreed with government, holding that the steps that FBI agents do or do not take to prepare for a SWAT raid are within their discretion. The FBI has not produced a checklist or policy directive telling agents to make sure to double check the house number before a raid, so failing to do that is just a choice that's up to individual agents. But, we submit, that can't be right. If Congress wanted to accept liability for the on-the-spot decisions made while flying a plane or driving a car, so too with raiding a house. Otherwise, the discretionary function exception swallows the rule. And the Supreme Court has said as much.

**Patrick Jaicomo**: The Supreme Court has interpreted the discretionary function exception, by our count, six or seven times over the last 80 years, and every single time it's done so has been in a highly regulated area, where what the court is considering are costs and benefits being weighed by policy makers, not simple mistakes or intentional wrongs.

**John**: For example, the first Supreme Court ruling on this question, *Dalehite v. United States*, involved an enormous industrial accident in 1947 in the harbor of Texas City, Texas. The United States government had made the policy decision to repurpose ordnance factories after World War II to produce and ship fertilizer to Europe to assist with rebuilding agricultural capacity. For reasons unknown, however, a fire started in the cargo hold of a ship. Hundreds of tons of fertilizer exploded, setting off a chain of explosions on other ships as well as industrial facilities ashore. Over 500 people died. Over 3,000 were injured.

**Patrick Jaicomo**: But there wasn't evidence that someone smoking a cigarette or some similar accident had caused this explosion. And for that reason, the only way that plaintiffs could get through the case was by attacking the policy made in Washington DC about how to feed Europe after World War II. And that policy is exactly the kind of thing that the discretionary function exception was designed to protect.

**John**: Which is a harsh outcome. And four dissenting justices said it was reasonable to infer that the fire was caused by some act of carelessness. Nevertheless, all nine justices agreed that discretion to make policy and regulate is the discretion that is excepted from liability. In the words of Justice Jackson, who wrote the dissent, quote: “It is not a tort for the government to govern.” Which is a point the Court reiterated in the case of *United States v. Varig Airlines* decided in 1984. The case involved a policy called the spot-check policy, where commercial

airplanes had to pass an inspection by federal employees before they were put into service and then again at certain intervals after that. Two planes that had passed their inspections nevertheless caught fire in separate instances leading to over a hundred deaths.

**Patrick Jaicomo**: And the Court again, said, if you can show us somebody who messed up doing the spot checks, that's one thing, but you can't simply challenge the policy of spot checking. Because spot checking is the very sort of cost benefit analysis that we expect regulators to make that will weigh, on the one hand, the benefit of checking every plane against, on the other, the incredible cost of doing that.

**John**: And not for nothing, but petitioners have won these cases, too. For instance, the case of *Hatahley v. United States* from 1956, which involved claims by Navaho Indians that white ranchers had, at gunpoint, forced them off land in Utah where they had every right to be. And further, the Navaho plaintiffs had shown at trial that federal Bureau of Land Management agents had assisted the ranchers by seizing and destroying all of the Indians' livestock, about 150 horses and burros in total, impoverishing them and destroying their way of life.

**Patrick Jaicomo**: So in *Hatahley*, the Court didn't get into the bigger picture about what the ranchers were doing because they were private people. But as to the government agents, the Supreme Court said these folks are mere trespassers, and so of course, they don't get the protection of the discretionary function exception.

**John**: The Navaho weren't challenging rules or policies, they were challenging the trespass against their property, the horses. Anyway, bringing this back to the Martin case, all of this is to say that even under the original 1946 version of the FTCA, our clients should prevail. The FBI agents were not making big policy decisions; they were merely attempting to execute a warrant,

and that is not the discretion that is excepted. But then in 1974, Congress made the FTCA even stronger.

> **Senate report**: The subcommittee heard testimony on two Collinsville, Illinois drug raids, which were made in error on the homes of two innocent families. … [The] families testified that they were terrorized by gun-wielding unshaven, shabbily dressed intruders who shouted obscenities, destroyed property, and threatened their very lives.

**John**: One night in April 1973, Herbert and Evelyn Giglotto were awakened by federal narcotics agents who had gone to the wrong address.

> **Herbert Giglotto**: I hear a crash sounds and I get – sound asleep – and I get up out of the bed. And I take about three steps, look down my hall, and I see men running up the hall, dressed like hippies with pistols yelling and screaming. I turn to my wife and I said: God, honey, we're dead.

**John**: Without identifying themselves as law enforcement, the agents handcuffed Herbert, threw him down on the bed, and put a gun to his head, saying, according to Herbert: "You move, you're dead." Evelyn, wearing only a negligee, was also forced down onto the bed and handcuffed.[3]

> **Evelyn Giglotto**: My attitude, I'm not bitter. But I feel like our country is – at the sake of being overemotional – decaying from within.

[3] Senate subcommittee proceedings, p. 461; Boger, The Federal Tort Claims Act Intentional Torts Amendment

**John**: The agents broke furniture, made a huge mess, and, when they discovered they were at the wrong address, they left without explanation or apology. 30 minutes later, they raided another totally innocent family's house.

> **Boston Globe**: Two essential facts about the raids were never disputed. The officers acted without warrants, and no illicit drugs were found.[4]

**John**: Public outrage over the raids was immediate and dramatic. Within days, Collinsville became front-page news across the nation with write-ups in *The St. Louis Post-Dispatch*, *The New York Times*, and the *Associated Press*. Coverage ran in papers large and small all across the country. Within weeks, the Giglottos had been interviewed on national TV and given testimony under oath before a Senate subcommittee hearing. On the floor of the Senate, Senator Sam Ervin of North Carolina gave a speech condemning the raids. In that speech, he included over a dozen outraged letters from constituents demanding action. And very soon thereafter, Senator Ervin proposed amending the Federal Tort Claims Act to add back in some of the 11 intentional torts that had been excluded – legislation that was initially drafted by a law professor at the University of North Carolina.

**Paul Verkuil**: And that's when I met Senator Ervin, coming to Chapel Hill to address the students at commencement, and I had the pleasure of picking him up.

**John**: That is Professor Paul Verkuil, who 50 years ago was teaching at UNC Law. As luck would have it, just weeks after the raid, Senator Ervin came to UNC to give a speech, giving Prof. Verkuil a chance to speak with him one-on-one about the raids in Collinsville.

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[4] Paul Galloway, "Drug raiders 'bungle' … and win." *Boston Globe*, April 14, 1974, p. 29.

**Paul Verkuil**: And along the way, I figured you know this is a great opportunity to lobby him.

**John**: As it turned out, the senator did not need a lot of persuading.

**Paul Verkuil**: He was indignant about what had happened. And I said, here's the solution. Maybe we could use the Federal Tort Claims Act. And we chatted, and he said, Yeah, that sounds good. That sounds good. He then gave a commencement address, in which I believe he mentioned the Giglotto situation. And so that's how I know it's at the heart of the statutory amendment.

**John**: If you will permit a small aside, I feel we should also mention that in addition to being a law professor, Professor Verkuil was also a pioneering civil rights litigator who led a titanically important sovereign immunity case that we talked about on Season 2, the case of *Scheuer v. Rhodes*.

**Paul Verkuil**: My interest in sovereign immunity problems back in the 70s all started for me with Kent State. I ended up representing the students of Kent State in on the issue of whether the governor of Ohio should be responsible for actually conducting the National Guard. He was there on the scene. He was there fomenting all kinds of trouble. And those four students who were on this knoll, which I had to walk through when I met all the students, were shot by the National Guard for no good reason about 100 yards away. I mean, they were making noise and stuff. It was the Vietnam War. Protesting. So the question was whether Ohio sovereign immunity law would protect the governor from liability.

**John**: The Supreme Court said no.

**Paul Verkuil**: So what we won was the end of sovereign immunity as a defense against agents in state government.

**John**: State officials, like a governor, now get qualified immunity, not absolute sovereign immunity. Anyway, back to Collinsville and claims over the conduct of federal officials.

**Mark Gitenstein**: So the way I remember this happening was I got a call directly from the senator. I was like the youngest guy on the staff. So to get a call from Sam Ervin was a big deal, and he told me about having this conversation, and he wanted me to follow up with Paul.

**John**: That is Ambassador Mark Gitenstein, who until recently was the United States' Ambassador to the European Union. Back in 1973, however, he was fresh out of law school and working on Capitol Hill as a junior staffer to Senator Ervin, who told him to get in touch with Professor Verkuil.

**Mark Gitenstein**: And my recollection is I called Paul, and I said, tell me about this conversation. I knew nothing about sovereign immunity. I guess I hadn't covered it in my constitutional law course embarrassed to say. Anyhow, I learned a lot about sovereign immunity.

**John**: One of Ambassador Gitenstein's very first duties for Senator Ervin was to work on the FTCA amendment.

**Mark Gitenstein**: I had never been around a senator or gotten to know a senator anything like Sam Ervin. But he he taught me more about constitutional law than I learned in law school. And he had a favorite quote from William Pitt, he could do this from heart. And the line was, and I can even hear Ervin doing this: It may be frail, its roof may shake, the wind may blow through it,

the storm may enter, the rain may enter, but the King of England cannot enter. All his force dares not cross the threshold of the ruined tenement. That's the derivation of our Fourth Amendment. Ervin would quote that. He really believed in it.

**John**: He believed in it, and he was in a position to do something about it.

**Mark Gitenstein**: I don't remember any controversy in the Senate over what Ervin was trying to do. Ervin was an icon by then.

**John**: At the very same time he pushing through legislation to amend the Federal Tort Claims Act, Senator Ervin was also chairing the Watergate hearings.

> **Sen. Ervin**: You said something about the burglarizing of the office of the psychiatrist of Ellsberg was justified by the president's inherent power under the Constitution, didn't you?
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> **Witness**: Yes, sir.
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> **Sen. Ervin**: And you referred to certain statutes. It says here that this statute that makes it unlawful …
>
> **Witness' lawyer**: May I get into this? … You read the end of that sentence, which says "or to protect national security information against foreign intelligence activities."
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> **Sen. Ervin**: against foreign intelligence activities. The foreign intelligence activities had nothing to do with the opinion of Ellsberg's psychiatrist about his intellectual or emotional or psychological state.
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> **Witness**: How do you know that, Mr. Chairman?
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> **Sen. Ervin**: Because I can understand the English language as my mother taught.

**John**: As we said earlier, Senator Ervin received many letters from constituents about the raids, which we'll link to in the show notes, and one thing they show is that everyday people readily drew a connection between Collinsville and Watergate.

**Mark Gitenstein**: People were so outraged. And what they were primarily concerned about with Watergate was a president who was deliberately using law enforcement to achieve his partisan political goals. They were going after tax returns of people who criticized him, for example. That's what happened in Watergate. And they felt like Collinsville just illustrates, on a granular level, what happens when you have law enforcement out of control. So it didn't take long for Ervin to become sort of an icon. There were people walking around with T shirts that had a drawing of Sam Ervin. Uncle Sam.

**John**: So if you wanted to get legislation passed, Sen. Ervin was a pretty good Senator to have take up your cause. But even so, legislation to create a remedy for victims of wrong-door raids was not a tough sell.

**Mark Gitenstein**: Congress was not ambivalent about this legislation. As a matter of fact, on the Senate side, it passed practically unanimously. On the House side, they used a procedure called suspension of the rule, which requires a two-thirds vote. Which they got on this legislation. The other thing that was interesting about this, and I remember this very vividly, was the diversity politically of those who supported what we were trying to do. I remember going with Ervin to the House side, and it was some very conservative House Democrat who was from West Virginia who when Ervin, in his inimical way, explained what was going on, said, Well, I sure agree with you. If anybody came in my holler and did this, we'd throw them out. We'd tar and feather them, that sort of thing.

**John**: In a minute, we're going to get into some of the details about what the law enforcement proviso says and does. But one thing we know beyond doubt is that it covers wrong-door raids.

**Mark Gitenstein**: Look, if you were to ask the two thirds of the House of Representatives who voted for this legislation, they would have said, Look, don't get me into these details. I'll tell you this, if you break into a house and you have the wrong house, there's got to be liability in the government for that. If you would have presented the Martin case to the Congress, there'd be no equivocation on this, none whatsoever.

**John**: According to Professor Verkuil, the Eleventh Circuit's opinion dismissing the Martin's case is essentially a repeal of the statute.

**Paul Verkuil**: This case represents a repeal of our statute. It's essentially repealing it by judicial fiat if they do not find liability here.

**John**: After the law enforcement proviso was enacted, Professor Verkeuil and Ambassador Gitenstein co-authored a law review article detailing the back-and-forth between Senator Ervin, his staff, the Justice Department, and other elected officials. The primary author on the article, however, was Jack Boger, who was a law student when he started writing it and who went on to become the Dean of UNC Law.

**Jack Boger**: Plainly, the one thing that was unmistakable is this came out of Collinsville and Senator Ervin's righteous anger about it, in the sense that, at a minimum, this must subject the United States to liability.

**John**: That is of course Dean Boger. He assembled all the various drafts of the legislation and

wrote up all the twists and turns as the bill became law.

**Jack Boger**: In the middle of my third year of law school, I agreed to take on the drafting of a paper about the passage of the statute. So to me, the advantage of this, the excitement of it, was that I was going to be able to get from somebody in Washington who had been involved with the creation of and drafting and the negotiation around this provision, and get those papers, the letters back and forth between the Department of Justice and Mark and others, and craft a paper. And the article begins with a fairly careful walk through the process of negotiation.

**John**: As always, we encourage you to read the article and the other articles we relied on to produce this episode. They can be found in the show notes.

**Jack Boger**: And so this modest, little piece of legislation as I looked through it, I was able to realize that it was put in the middle of a very complicated and in some respects messy and unresolved statute, the Federal Tort Claims Act.

**John**: The law enforcement proviso is a modest piece of legislation. As we said, it puts some, but not all, of the initially excluded intentional torts back in. Torts that are still outside the FTCA include libel and invasion of privacy, so if a federal officer maliciously lies about you in a way that damages your life or your reputation, which the FBI once regularly did to civil rights activists like Martin Luther King, Jr., that will still go unremedied. And it's also a messy statute that is built on exceptions, exceptions to the exceptions, and exceptions to those – that can raise thorny questions of statutory interpretation, and in a minute we'll get into that. But one thing that resolves some of the messiness is to remember that wrong-door raids have to be covered.

**Jack Boger**: If you had a case on all fours with Collinsville, this statute is meant to address it

and provide relief with liability to the United States. So when I then got called by John I went and looked at the Eleventh Circuit opinion and just was stunned. I mean, I did a lot of litigation in the Eleventh Circuit in capital punishment cases over the years, and I've had my disappointments with the Eleventh Circuit. But it was as if they were talking a different language. What struck me is this court agonizing over how carefully or how well the officer may have planned and then got his GPS wrong. It doesn't matter. Nobody's trying to hold him responsible.

**John**: In lawsuits directly against individual officers, in theory at least, an officer who committed a tort or violated the Constitution, could face personal, civil liability and be on the hook to pay a judgment. And that's why the Supreme Court has said that doctrines like qualified immunity are necessary, so that officers can do their work without fear of being bankrupted. As we said on Season 2, we don't think that is remotely justified because, as scholars we interviewed made clear, in actual practice officers are almost always indemnified. But with the FTCA, there is not even the theoretical possibility that a federal officer or employee will ever face personal liability. So whether a mistake was reasonable or in good faith or there was clearly established law about it, none of that matters. If a tort has been committed and none of the exceptions apply, Congress said liability should attach. Or at least it is supposed to.

**Jack Boger**: There's a tendency to sympathize with the law enforcement personnel engaged in dangerous tasks, in risky circumstances, and you see judges who look at that when it's gone wrong, and said, But, but, gosh, there was good faith there. And the response is, rejoice. You don't have to worry about that.

**John**: A big part of what the government is arguing in this case is that, courts should worry about that. That there will be a chilling effect, and government officials will be afraid to do their jobs if the Martins win.

**Patrick Jaicomo**: What the Eleventh Circuit held, and what the government's arguing for is that there should be an additional exception added to the FTCA that looks a lot like qualified immunity. We're arguing there shouldn't be any new exceptions because Congress wrote all the exceptions it wanted, and that's not in there.

**John**: So, what does the law enforcement proviso do? As we said earlier, it adds some of the intentional torts like assault and battery that were initially excluded back in.

**Patrick Jaicomo**: The reason that it's called the law enforcement proviso is because it allows claims arising out of the actions of federal police. Because Congress realized after the Collinsville raids that sometimes its agents were being asked to hit people or imprison them. And if they did that unlawfully, Congress wanted to provide a remedy for the mistake.

**John**: I am sorry to say that if a mail carrier punches you without justification, that is still excluded because the proviso only applies to claims for the actions of law enforcement officers. But in the Martin case, everyone agrees that FBI SWAT teams are law enforcement. Nevertheless, the Eleventh Circuit dismissed the Martin's claims under the law enforcement proviso by applying what it calls the Supremacy Clause bar.

**Patrick Jaicomo**: The Supremacy Clause protects as the supreme law of the land federal law anytime it might conflict with state law. And so this means that if the two laws clash, the federal law wins. Now the strange twist is what the Eleventh Circuit did in this case is it said, because the FTCA draws on state law principles of tort, if those principles prevent the federal if those principles prevent federal officials from doing their job, the FTCA has to yield. But this makes no sense, because it's in effect the Eleventh Circuit protecting Congress from itself.

**John**: Under the Supremacy Clause of the Constitution, if there is a conflict between state and federal law, federal law wins. And what the Eleventh Circuit said is that since FTCA claims are based on state law, they are really state law claims that can conflict with federal law anytime they might interfere with the actions of federal agents carrying out federal law. Which is, to use a legal term of art, bananas.

**Patrick Jaicomo**: But the flaw in the Eleventh Circuit's argument, is that the FTCA, as its name suggests, is a federal law passed by Congress. And if Congress wanted to incorporate state law, there's nothing in the Constitution that prevents it.

**John**: The Supremacy Clause bar has been around since 2009 in the Eleventh Circuit. No other circuit has adopted it. And when you look back at that 2009 opinion, it's clear that what the court is doing is smuggling concerns about officers having flexibility and protection to do their work without worrying about personal liability. Which, again, is just not a concern that should be on the table with the FTCA. In effect, Congress had said, make us liable, and the Eleventh Circuit said: you can't really mean that. And now that the Supreme Court agreed to take up the *Martin* case, the government refused to defend this Supremacy Clause argument. So, the Court appointed a private attorney to defend the Eleventh Circuit's reasoning. And while I assure you we are preparing mightily for their arguments, we really think this case is about the discretionary function exception and whether it protects high-level policy choices or also individual agent-level decisionmaking.

**Patrick Jaicomo**: The government has walked away from the Supremacy Clause argument. Instead, it's focusing entirely on the discretionary function exception. In essence, its position is even though Congress enacted the proviso to allow claims just like the Martin family has here,

somehow the discretionary function exception actually takes them away.

**John**: The government is arguing that even though Congress added the law enforcement proviso to create a cause of action for assault and battery etc by federal officers, the discretionary function still wins out. Because, the government, says agent-level choices – rather than just high-level policy choices – are the discretion that is protected from liability. But what that argument means, is that Congress' attempt to create a cause of action for agent-level mistakes after the Collinsville raids was entirely nugatory. Congress attempted to create a remedy and failed. As Professor Verkeuil said, that is essentially a repeal of the statute.

**Patrick Jaicomo**: So one way – we think the best way – that the Court could decide this case is by holding that the discretionary function exception and the law enforcement proviso don't intersect at all. They're talking about categorically different things because agents never have the discretion to commit an intentional tort. That's the cleanest way to resolve this case.

**John**: There are a couple different ways we are urging the Supreme Court to resolve the case that not only helps the Martins, but would also help clear things up for lower courts and other litigants. One way is that, in cases about the law enforcement proviso, the discretionary function exception just doesn’t apply. Law enforcement proviso claims are always going to be about agent-level choices, so you just don’t need to get into bigger policy questions. However, some lower courts have disagreed with that, and if the Court follows that approach, it will have to decide which provision, when they conflict, controls.

**Patrick Jaicomo**: There is an ongoing circuit split in the appeals courts on this issue of which provision wins out of they are in conflict. And we think there are six separate textual clues in the language of the FTCA that show the proviso wins out and that indicate Congress meant for

claims to be allowed to proceed. Without getting into some of the finer details of that, again, our claim is that there is no way to read the amended FTCA in a way that thwarts Congress' intent to create a remedy for situations like Collinsville.

**John**: If you want to know about the six textual clues, those are on page 42 of our merits brief. I personally find them very persuasive. Particularly, textual clue number three. Which concerns a rule of statutory interpretation that says when a narrower provision – here, the proviso – conflicts with a broader provision – the discretionary function exception – the narrower provision should be read as an exception to the broader one, and the narrower one wins because it's so much more specific about the kind of stuff and the kind of people that it covers. Anyway, if you find a different clue more persuasive, I will not hold it against you.

**Patrick Jaicomo**: So there are two proposed paths to our victory. Either one would vindicate the intentions of Congress to create a remedy for situations like Collinsville. And we are very confident the Supreme Court will allow the Martins to proceed and hopefully provide solid guidance to lower courts and litigants in the future cases against federal law enforcement officers.

**John**: Back in 1973, Sen. Ervin said that the law enforcement proviso was only quote "a minimal first step in providing a remedy against the federal government for innocent victims of federal law enforcement abuses."[5] Since then, however, no further steps have been taken. And the Supreme Court has taken one approach to accountability, suing the officer directly instead of the United States, almost entirely off the board.

[5] Boger, The Federal Tort Claims Act Intentional Torts Amendment

**Patrick Jaicomo**: In its recent decision of *Egbert versus Boule*, the Supreme Court made it all but impossible to bring constitutional claims against federal officers. And its justification for doing so is that there was no statute allowing those claims. But with the FTCA, we do have a cause of action that's statutorily provided by Congress for certain intentional torts. What that means is the fight over the FTCA is really the fight over the last thread of federal accountability, and for that reason, it's incredibly important.

**John**: As we talked about on Season 2, Congress has never passed a law authorizing lawsuits directly against individual federal officials. It has authorized lawsuits against state and local officials, and it's probably high time to legislate and allow the same suits to go forward against officers like Special Agent Guerra. But in the meantime, until Congress decides to take that giant step forward, the Supreme Court can take this modest step, and tell lower courts to stop ignoring the law that Congress has already passed. Oral arguments are this Tuesday, April 29th. We hope you will tune in. And so until next time, this is Bound By Oath and we will return soon with more episodes about property rights.

**Credits**: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali and Charles Lipper. This episode was produced by John Ross. The theme music is by Patrick Jaicomo. With production assistance from Dylan Moore and Rima Gerhard.