

No. 12-710

In the Supreme Court of the United States

ALFREDO SEMPER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988), precludes petitioner from bringing suit under the Tucker Act to challenge his removal from his position as a probation officer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 694 F.3d 90. The opinion of the United States Court of Federal Claims (Pet. App. A14-A57) is reported at 100 Fed. Cl. 621.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2012. The petition for writ of certiorari was filed on December 6, 2012. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former probation officer for the District Court of the Virgin Islands. Pet. App. A2. He was removed from that position in 2010 for negligent supervision of a defendant who was killed while on release pending sentencing. *Ibid.*

Petitioner attempted to challenge his removal by filing a suit for damages against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1). Pet. App. A2; see 28 U.S.C. 1491(a)(1) (granting the Court of Federal Claims “jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort”). He sought, among other things, reimbursement for lost wages under the Back Pay Act of 1966, 5 U.S.C. 5596. Pet. App. A2, A15. In petitioner’s view, his firing had violated both the Due Process Clause and 18 U.S.C. 3602(a), which states that a court may remove a probation officer only “for cause.” Pet. App. A2. The Court of Federal Claims dismissed petitioner’s complaint on the ground that he had not identified a “money-mandating” statute or regulation of the sort that could support a Tucker Act suit. *Id.* at A3; see *id.* at A14-A57; see also *United States v. Bormes*, 133 S. Ct. 12, 20 (2012) (discussing the money-mandating test).

2. The court of appeals affirmed on the alternate ground that petitioner’s claim was barred by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.* Pet. App. A3. The court of appeals observed that Chapter 75 of the CSRA grants a right of administrative and judicial review for particular adverse employment actions, including removals, only to certain types of federal employees and not to other types of employees, such as Judicial Branch employees like petitioner. *Id.* at A3-A5; see 5 U.S.C. 7511(a)(1), 7512. The court of appeals also observed that this Court’s decision in *United*

States v. Fausto, 484 U.S. 439 (1988), had found the CSRA’s judicial-review provisions to be exclusive and had required the dismissal of a claims-court suit challenging the suspension of an employee not covered by Chapter 75. Pet. App. A6-A7.

The court of appeals concluded that petitioner’s statutory claim was likewise barred. Pet. App. A7-A12; see *id.* at A12-A13 (noting that petitioner could potentially seek equitable relief on his constitutional claim in district court). The court reasoned, among other things, that Congress had extended the CSRA’s coverage following *Fausto* but had not elected to cover Judicial Branch employees like petitioner and that Congress had in fact “closed a loophole in the statutory scheme that had granted CSRA review rights to certain employees of the Administrative Office of the United States Courts.” *Id.* at A10. The court of appeals additionally noted that “[s]everal other circuits have reached the same conclusion that we reach here: that Congress’s withholding of CSRA review rights was not inadvertent, and that Congress did not intend for Judicial Branch employees who were not entitled to review under the CSRA to have alternative routes to judicial review for adverse agency actions such as termination.” *Id.* at A11 (citing *Dotston v. Griesa*, 398 F.3d 156, 169-171 (2d Cir. 2005), cert. denied, 547 U.S. 1191 (2006); *Blankenship v. McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999), cert. denied, 528 U.S. 1153 (2000); *Lee v. Hughes*, 145 F.3d 1272, 1274-1275 (11th Cir. 1998), cert. denied, 529 U.S. 1138 (1999)).

ARGUMENT

Petitioner renews (Pet. 10-15) his contention that the Court of Federal Claims has jurisdiction to review his Tucker Act suit challenging his removal. The court of appeals correctly concluded that petitioner’s claim is

barred by *United States v. Fausto*, 484 U.S. 439 (1988). No further review is warranted.

In *Fausto*, this Court held that, in light of the CSRA’s “integrated scheme of administrative and judicial review,” the absence of a provision in the CSRA for certain employees to obtain judicial review of a suspension meant such employees were precluded from seeking such review through a Back Pay Act suit against the United States under the Tucker Act. 484 U.S. at 445, 448. The Court concluded that the comprehensive nature of the CSRA made it “evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type [at issue].” *Id.* at 448-449. Observing that the Back Pay Act permits an award of back pay only if “‘an appropriate authority under applicable law’” determines that such an award is warranted, the Court emphasized that “under the comprehensive and integrated review scheme of the CSRA, the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an ‘appropriate authority’ to review an agency’s personnel determination.” *Id.* at 454 (quoting 5 U.S.C. 5596(b)(1)) (emphasis omitted).

The reasoning and result of *Fausto* are controlling here. Petitioner does not dispute that his suit (a Tucker Act claim based on the Back Pay Act) is procedurally identical to the suit the Court found to be precluded in *Fausto*. See Pet. 13. Nor does he dispute that, like the plaintiff in *Fausto*, he lacks a right to judicial review under the CSRA itself. See Pet. 5-6. He contends (Pet. 13-15), however, that his claim can be distinguished from

Fausto because, under 18 U.S.C. 3602(a), probation officers may only be removed for cause and should thus be considered “favored” employees.* That contention lacks merit. Whether or not probation officers may in some sense be considered “favored” employees, nothing in Section 3602(a) (or any other statute) designates the Court of Federal Claims as an “appropriate authority” to review a personnel action against a probation officer under the Back Pay Act or otherwise authorizes that court to entertain a damages suit based on a probation officer’s termination. Instead, as the court of appeals recognized (Pet. App. A10-A11), Congress left it up to the Judicial Branch itself to provide administrative remedies for employees of that Branch who believe that they have wrongfully been subjected to adverse employment actions.

This Court has recently reiterated that “the CSRA’s ‘elaborate’ framework * * * demonstrates Congress’ intent to entirely foreclose judicial review to employees to whom the CSRA denies statutory review.” *Elgin v. Department of Treasury*, 132 S. Ct. 2126, 2133 (2012)

* Petitioner does not contend that this case is distinguishable from *Fausto* on the ground that he has raised due process, as well as statutory, arguments challenging his termination. Any such contention would lack merit. The Due Process Clause is not itself the sort of “money-mandating” statute that would support a Tucker Act suit for damages against the United States. See, e.g., *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1076 (Fed. Cir.), cert. denied, 513 U.S. 961 (1994). Petitioner has thus relied on the Back Pay Act, and not directly on the Due Process Clause, as the basis for the government’s asserted damages liability. Pet. 7. That is the same statute on which the plaintiff in *Fausto* relied, and neither it nor any other statute provides a basis for petitioner to bring a damages suit in the Court of Federal Claims.

(quoting *Fausto*, 484 U.S. at 443) (emphasis omitted); see *United States v. Bormes*, 133 S. Ct. 12, 18 (2012) (noting that the Court’s “more recent cases have consistently held that statutory schemes with their own remedial framework exclude alternative relief under the general terms of the Tucker Act” and citing *Fausto* as an example). Petitioner provides no sound reason for revisiting that conclusion. He errs in characterizing (Pet. 11) the court of appeals’ recognition of Congress’s preference for Judicial Branch administrative remedies over Tucker Act suits as “an impenetrable barrier to enforcement of” Section 3602. He similarly errs in asserting (Pet. 10-12) that this case involves an inter-Branch dispute that might warrant this Court’s intervention. Indeed, it is petitioner’s own proposed approach—in which an Article I court (the Court of Federal Claims) would review the employment actions of the Judicial Branch—that would create the potential separation-of-powers anomaly.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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