

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1494
JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.,
TITLE Petitioners v.
ONILEA NEAL
PLACE Washington, D. C.
DATE January 19, 1983
PAGES 1 thru 42



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN R. BLOCK, SECRETARY OF :

4 AGRICULTURE, ET AL., :

5 Petitioners, :

6 v. : No. 81-1494

7 ONILEA NEAL :

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9 Washington, D.C.

10 Wednesday, January 19, 1983

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:03 o'clock a.m.

14 APPEARANCES:

15 CARTER G. PHILLIPS, ESQ., Office of the Solicitor

16 General, Department of Justice, Washington, D.C.;

17 on behalf of the Petitioners.

18 LENNY L. CROCE, ESQ., Oak Ridge, Tennessee; on behalf

19 of the Respondent

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Block against Neal.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court, this is a suit arising under the Federal Tort Claims Act, and specifically the issue is whether a suit against the United States alleging that a federal employee negligently inspected a home purchased from a private developer but with federal moneys is a claim arising out of a misrepresentation and therefore barred under the Federal Tort Claims Act, specifically, Section 2680(h) of the Act.

The Farmers Home Administration is an agency of the Department of Agriculture which, among other services, provides loans to low income rural housing residents to assist them in purchasing safe and decent housing. In 1977, the Farmers Home Administration granted Respondent's application for a loan, and Respondent then entered into a contract with a private developer -- the name of the company is Home Marketing Associates, Inc. -- to purchase a prefabricated house. The purchase price of the house was approximately

1 \$21,000.

2 During the construction of the house, and in
3 accordance with Farmers Home Administration regulations,
4 a county employee of the Administration inspected the
5 house when it was 2 percent completed, 99 percent
6 completed, and 100 percent completed. On each occasion,
7 she signed an inspection report indicating that there
8 were no major deviations from the housing plan and
9 specifications that she discovered in her inspection.

10 Each inspection lasted between 10 and 30
11 minutes. Ms. Wells and Respondent both participated in
12 the final inspection, and Respondent signed the final
13 inspection.

14 Two months after Respondent moved into her
15 house, she notified the Farmers Home Administration that
16 she was having difficulties with the heat pump that had
17 been installed.

18 QUESTION: It really wasn't much of an
19 inspection, was it?

20 MR. PHILLIPS: No, sir, it was not the best
21 inspection that one could have hoped for.

22 A second inspector went out to the house and
23 discovered that the heat pump that had been installed
24 was not the same heat pump that had been provided in the
25 plans and specifications, that it was indeed a

1 significantly smaller heat pump than they had
2 anticipated, made by a different manufacturer.

3 In addition, that inspector discovered other
4 defects in the house that are listed in the Respondent's
5 brief.

6 Efforts by the Farmers Home Administration to
7 convince the Home Marketing Associates company to
8 correct these defects proved unsuccessful for reasons
9 that do not appear in the record. When Respondent
10 failed to get satisfaction or to receive satisfaction
11 from the company, she filed suit in state court against
12 the Secretary of Agriculture, the head of the Farmers
13 Home Administration, various employees of the Farmers
14 Home Administration, and the United States. That suit
15 was removed to federal court, and the district court
16 dismissed the -- or, excuse me, granted the government's
17 motion to dismiss the complaint for failure to state a
18 claim.

19 The theory of the district court was
20 essentially that the statute and regulations created no
21 basis -- created no duty running to the Respondent to
22 guarantee the quality of the house based on the
23 inspections that had been undertaken.

24 The Sixth Circuit on appeal agreed with the
25 district court with regard to the contract theory. It

1 found nothing in the statute, regulations, or conduct of
2 the Farmers Home Administration that would create any
3 kind of a contractual duty to warrant the quality of the
4 house.

5 The court of appeals, however, reversed under
6 the -- on the tort issue, and held that the government's
7 inspection could legitimately be regarded or could
8 potentially, at least, be regarded as having violated
9 the good Samaritan doctrine. The good Samaritan
10 doctrine requires someone who acts on behalf of another
11 and engenders reliance from that other person to
12 exercise due care and to be responsible for any injuries
13 caused by the failure to exercise due care.

14 In addition, the court held that the
15 Respondent's claim regarding negligent inspection was
16 not barred by the misrepresentation exception.

17 QUESTION: Mr. Phillips, you referred two or
18 three times to the claim as one claiming a negligent
19 inspection. Actually, the claim involved a breach of
20 the duty to supervise as well as to inspect, didn't it?

21 MR. PHILLIPS: Well, the problem with that is
22 that there is nothing specific in the complaint with
23 regard to exactly what they meant by supervision. The
24 only supervision of the construction, Justice Rehnquist,
25 was in the inspection of the house.

1 QUESTION: Well, but the complaint never went
2 to trial, and under the federal rules you presumably are
3 entitled to adduce any number of facts in support of
4 even a generally pled allegation. The court of appeals
5 certainly referred to it. It says, failure to provide
6 technical assistance, including inspection and
7 supervision of construction.

8 MR. PHILLIPS: But that is only if there is
9 something in the statute that would provide for
10 supervision in addition to the inspection --

11 QUESTION: I realize --

12 MR. PHILLIPS: -- and there is nothing in the
13 statute to that effect, so that at issue -- the only
14 thing that could potentially be alleged and be
15 consistent with the statute is the negligent
16 inspection.

17 QUESTION: Well, you say that even the 1949 Act
18 doesn't authorize or require the government to supervise
19 as opposed to inspect.

20 MR. PHILLIPS: That's correct, Your Honor. I
21 mean, the only supervision that is discussed is
22 supervised loans and the provision of information to the
23 Respondent, so that even to the extent that supervision
24 is alleged here, it is all -- it is still all based on
25 the exchange of information, and that exchange of

1 information is what this Court held in Neustadt as
2 barred under the misrepresentation exception.

3 QUESTION: Mr. Phillips, doesn't it -- Excuse
4 me.

5 QUESTION: Well, following up on this point,
6 then, if I may, what does Section 1476(a) mean, then,
7 when it says, "Buildings and repairs constructed with
8 funds advanced pursuant to this subchapter shall be
9 supervised and inspected as required by the Secretary?"

10 MR. PHILLIPS: Well, I mean, as required by the
11 Secretary. Nothing that we have specifically requires
12 us to do more supervision of the construction. We do
13 supervise to the extent that we provide plans and
14 general architectural information to contractors that we
15 hope -- that we expect that they will follow, and we
16 follow that up by inspecting the house to try to see
17 that there is some conformity between the plans and the
18 way the house is developed.

19 QUESTION: And it is your position that the
20 Secretary has never authorized any supervision of
21 construction?

22 MR. PHILLIPS: Not in the way that would be
23 anything other than by -- that would be covered -- not
24 in any way that is not covered under the
25 misrepresentation exception to the Tort Claims Act.

1 QUESTION: And Section 1822.7, which says,
2 "Supervision will be provided borrowers to the extent
3 necessary to achieve the objectives of the loan and to
4 protect the interests of the government?"

5 MR. PHILLIPS: Sure, because that doesn't --
6 that still is supervision of the borrowers. It is not
7 -- We don't supervise construction. It is not as though
8 the government assumes a position of foreman for Home
9 Marketing Associates. We go out and we inspect it.
10 That is the primary method by which we supervise. There
11 is additional supervision in that we supervise the loan
12 to make sure that the moneys are spent properly, and
13 there is additional information, and the provision of
14 architectural services is a form of supervision. But
15 all of that, I submit, is supervision that would be
16 barred under the misrepresentation exception if there is
17 a basis for it.

18 QUESTION: Are you arguing that the government
19 has under the laws established here no duty to the owner
20 of the home, that the law creates no duty in this area?

21 MR. PHILLIPS: Well, I mean, that is what the
22 district court held, and the court of --

23 QUESTION: Was that your position?

24 MR. PHILLIPS: We did not argue that in this --
25 It would be my position, that we owe no specific duty to

1 this -- to the Respondent in this case. That's
2 correct.

3 QUESTION: Under the law.

4 MR. PHILLIPS: Under the law. That while we do
5 -- I mean, there is no -- The regulations provide
6 general obligations to act, but the only duty that would
7 ever occur would have to come out of state law, and
8 that, we say, is -- and to the extent a duty would have
9 existed --

10 QUESTION: Well, how about the federal law? Do
11 you think that the federal law indicates that there is
12 no intention by Congress to benefit the homeowner --

13 MR. PHILLIPS: Well, no --

14 QUESTION: -- by these services?

15 MR. PHILLIPS: No, I -- no, that is not our
16 submission. We recognize, just as in Neustadt, that
17 this statute is designed to provide some benefits. I
18 mean, almost all federal statutes are designed to
19 benefit individual citizens. This is one of them. The
20 primary purpose of this statute, we have submitted, is
21 to protect the government's security interest. In doing
22 that, we will in most instances also protect the
23 homeowner, but that is only incidental to what I submit
24 is our primary mission, at least as interpreted by the
25 Farmers Home Administration, which is a reasonable

1 interpretation of the statute and the regulations.

2 QUESTION: And there is no secondary duty?

3 MR. PHILLIPS: No secondary duty that would
4 give rise to any kind of tort liability.

5 QUESTION: If the government is responsible or
6 assumes responsibility for anything like architectural
7 supervision, that certainly is -- the thrust of that
8 sort of a liability, if they fail to perform it, isn't
9 misrepresentation at all. If you are an owner and hire
10 an architect, and the architect defaults on his
11 obligation to supervise, the gist of your claim against
12 him isn't that he didn't tell you that a lot of things
13 were bad in the place, it is that he didn't have them
14 fixed.

15 MR. PHILLIPS: We recognize that there is a
16 difference between misrepresentation and various forms
17 of malpractice. But all we are saying here, I mean, we
18 didn't hire an architect of any sort. What we did was,
19 we had an architect draw up plans that would be usable
20 for all rural residents, and we have a variety of those
21 plans that exist, and we just hoped that they would be
22 followed. That's all.

23 QUESTION: I thought you identified the
24 question in the case as whether the United States has
25 waived sovereign immunity for this kind of a tort

1 action.

2 MR. PHILLIPS: Yes, Your Honor.

3 QUESTION: So whether you owed a duty or not or
4 whether you broke it is irrelevant to that question.

5 MR. PHILLIPS: Well, that is correct, except
6 that under this Court's decision in United States versus
7 Neustadt, the way the analysis should run is, first,
8 whether the basic activities of the government are
9 within the misrepresentation exception which we submit
10 means an inspection which may be negligently performed
11 followed by certification of some facts followed by
12 injury. That is what the misrepresentation exception is
13 designed to deal with.

14 This Court went further and said it could well
15 be that even though this is within the misrepresentation
16 exception, there could be some -- there may have been
17 indication in the '34 Act at issue there that for some
18 reason Congress intended to supersede the
19 misrepresentation exception, and Respondents have seized
20 on differences between the '34 Act and the '49 Act to
21 suggest that that secondary analysis in Neustadt is
22 satisfied in this case.

23 Our position is that there is nothing different
24 in the '49 Act and the '34 Act. It is clear that
25 Congress did not intend for the government to warrant

1 the quality of the Respondent's house in this case.

2 As we have -- I may be going over some ground,
3 but Section 1346 obviously provides a general waiver for
4 -- of the government's sovereign immunity. The
5 exception that we are concerned with here is for
6 misrepresentations. Our submission is that the decision
7 of the Sixth Circuit is fundamentally inconsistent with
8 the decision of this Court in United States versus
9 Neustadt.

10 QUESTION: Mr. Phillips, let's assume for a
11 minute that the complaint did allege something beyond
12 misrepresentation, alleged that there was a duty on the
13 part of the agency to force the builder to fix the home
14 by some means, and the complaint alleges that. Now, is
15 that obligation of the government in your position a
16 discretionary act by the government?

17 MR. PHILLIPS: You mean, within the meaning of
18 Section 2680(a)?

19 QUESTION: The government has discretion?
20 Yes.

21 MR. PHILLIPS: Well, I would guess -- I mean,
22 it seems fairly clear -- it depends on how the
23 regulation would be stated, I guess. If there were a
24 regulation in this case that said that the government
25 must discover every defect and must make every defect

1 corrected before any moneys will be released, then it
2 would seem to me we would be hard pressed to argue that
3 that is a discretionary decision, because the regulation
4 will have essentially taken away all of our discretion.

5 But if the regulation merely suggests that we
6 should have inspections, and there is some general
7 possibility that we might withhold money depending on
8 the circumstances, then it would seem clearly to be
9 within the discretionary function exception.

10 QUESTION: Well, then, what is it -- what do
11 they require? Is it discretionary or not?

12 MR. PHILLIPS: Well, I think it is clear -- it
13 would clearly be discretionary. There is nothing in the
14 regulations -- I mean, I think it is important to
15 realize in this case that the Respondent has received
16 reimbursement for the heat pump and other major
17 structural defects in this house under an administrative
18 program, and the only defects we are talking about now
19 are essentially cosmetic defects.

20 It is inconceivable, and there is nothing in
21 the regulations that would provide to the contrary, that
22 Congress anticipated that we would hold up all loan
23 moneys for the correction of all potential cosmetic
24 defects in a house. As we suggest in our brief, and I
25 don't believe Respondents deny it, there is no new house

1 that I have ever known and that anyone has known and
2 that the contractor even in this case in his testimony
3 had ever seen that doesn't have some problems in it.
4 And it can't be that the government will be responsible
5 to correct all of those. And that is why there is
6 nothing in the regs.

7 So, clearly, there is some discretion. You
8 would release money and expect that the contractor would
9 make good on it.

10 QUESTION: Well, but Mr. Phillips, Mr.
11 Phillips, you are not suggesting there is discretion to
12 make a negligent inspection, are you?

13 MR. PHILLIPS: Well --

14 QUESTION: Assuming there were a duty to
15 inspect. I understand you deny there is such duty
16 running to the borrower, but assuming there were a duty
17 to inspect, would it not be a duty to inspect with due
18 care?

19 MR. PHILLIPS: If there were -- if this were a
20 private person who undertook -- we don't -- although
21 there is no development factually of what went on here,
22 we don't deny that it is certainly possible that a
23 private inspector could be held to a duty to exercise
24 due care under the good Samaritan doctrine.

25 QUESTION: All right, and if we accept the

1 allegations -- if we accept the allegation in the
2 complaint, must we not assume -- maybe it's not true --
3 that the inspection was conducted negligently?

4 MR. PHILLIPS: Well, that's right, and we don't
5 dispute that.

6 QUESTION: And had the inspection been
7 conducted properly, they would have discovered the
8 defect and they wouldn't have paid for the heat pump.

9 MR. PHILLIPS: Well, but I mean, that is just
10 as true under United States versus Neustadt. In that
11 case --

12 QUESTION: Well, but that goes to the issue of
13 misrepresentation. We are now talking about --

14 MR. PHILLIPS: You just want to ignore the
15 misrepresentation --

16 QUESTION: For this very narrow purpose.

17 MR. PHILLIPS: I would be prepared to concede
18 for purposes of this argument that that is right. There
19 would be a duty, and that would have been a violation of
20 the duty. We don't have any quarrel with the Court at
21 least here now with the Sixth Circuit's holding that
22 this might well violate the good Samaritan doctrine.
23 Our submission is obviously that it is also a
24 misrepresentation, and therefore --

25 QUESTION: Prior to 1946, would there have been

1 any action sustainable against the government, prior to
2 the Tort Claims Act?

3 MR. PHILLIPS: No, Your Honor.

4 QUESTION: The Tort Claims Act, did it waive
5 all sovereign immunity, or did it have some exceptions?

6 MR. PHILLIPS: It has a very lengthy set of
7 exceptions.

8 QUESTION: For governmental functions,
9 primarily discretionary governmental functions.

10 MR. PHILLIPS: That's correct, Section
11 2680(h).

12 QUESTION: But again, you are not relying on
13 that in this case.

14 MR. PHILLIPS: No, we don't rely on the
15 discretionary functions.

16 QUESTION: You are just relying on the
17 misrepresentation exception.

18 MR. PHILLIPS: That's correct, Your Honor.

19 Our position here is that there is no -- that
20 this Court cannot affirm the holding of the Sixth
21 Circuit without overruling its prior decision in United
22 States versus Neustadt, and that it would be wholly
23 inappropriate to do that. Neustadt involved simply an
24 interpretation of Section 2680(h), a provision that
25 Congress enacted in 1946 and has allowed to remain in

1 effect since 1961, when this Court decided Neustadt.

2 If its feeling was that the interpretation of
3 this Court was improper or unduly restricted the rights
4 of recovery of individuals in Respondent's position, we
5 can only presume that it would have changed it.

6 Instead, what Congress has done is, one, passed
7 additional legislation providing for inspections relying
8 upon this Court's decision in Neustadt, and more
9 fundamentally, has passed 42 USC Section 1797(c), and
10 this case --

11 QUESTION: You find no difference in the two
12 Acts, the one involved --

13 MR. PHILLIPS: No difference that would make
14 any kind of a difference to take the case out of the
15 misrepresentation exception. I don't believe that
16 anything in the 1949 Act provides any stronger basis for
17 arguing that the government has warranted the quality of
18 the house, and that is the only thing that I can
19 understand the Court to have meant in the second part of
20 its holding in Neustadt, because otherwise -- I mean, it
21 is within the misrepresentation exception, but it may be
22 that the government went ahead and warrants the house,
23 but the '49 Act makes clear that that was not the
24 intention, and no other court has ever held that it was
25 the intention. You know, no court in reviewing the

1 legislative history has indicated that Congress intended
2 to warrant the quality of all of these houses.

3 QUESTION: Isn't there a difference that in
4 Neustadt the misrepresentation was made before the
5 purchase, and here it was made after the purchase?

6 MR. PHILLIPS: Well, there is some dispute
7 about that. Nothing in the record indicates precisely
8 when the check was delivered to the Respondent in this
9 case. The employees of the Farmers Home Administration
10 have informed us that while the check was formally
11 dispersed from the Farmers Home Administration's central
12 office on the date listed in the record in the Joint
13 Appendix --

14 QUESTION: That is not in the record.

15 MR. PHILLIPS: I am sorry?

16 QUESTION: That is not in the record.

17 MR. PHILLIPS: No, Your Honor, that is not in
18 the record. To the extent you are interested in the
19 extra record facts, a check was handed over --

20 QUESTION: I didn't say -- I didn't say I was
21 interested in facts outside the record.

22 MR. PHILLIPS: Okay, Your Honor. What we can
23 say, I think, is that it is inconceivable that the
24 Farmers Home Administration would hand over a check
25 without having made its final inspection, and therefore

1 we believe it is a fair inference from all of the
2 circumstances to conclude that we didn't actually send
3 the check away until after we had engaged in the final
4 inspection. At least that is the standard practice, and
5 there is no reason to think that it was deviated from in
6 this case.

7 QUESTION: Suppose the inspection had not been
8 made at all. What would be your position?

9 MR. PHILLIPS: Well, the regulations don't
10 actually require us -- I don't -- my recollection is
11 that the regulations suggest that we make inspections at
12 various times. I would guess that if it turned out that
13 the Farmers Home Administration had good reason that it
14 couldn't -- simply was not in a position to inspect a
15 house at the times that it had to, that that would not
16 violate the regulations.

17 The most we would do is tell her that we are
18 having some difficulty, but I don't see that that would
19 create any cause of action. Again, all this -- all tort
20 liability --

21 QUESTION: That is essentially this case, isn't
22 it?

23 MR. PHILLIPS: I'm sorry?

24 QUESTION: That is essentially this case. It
25 is true she went out, but her testimony on the stand is

1 rather devastating. She wasn't trained. She didn't
2 know what to do on an inspection, and didn't inspect,
3 and filled out the papers.

4 MR. PHILLIPS: Well, she looked through the
5 house. I don't know what -- I mean, presumably any kind
6 of obvious defects in the house could have been
7 discovered, even on the -- even with that kind of an
8 inspection. It is not likely she would have been able
9 to discover whether the proper manufacturer's name
10 appeared on the heat pump based on the kind of
11 inspection we are talking about here.

12 QUESTION: Well, someone else went out later
13 and discovered all kinds of things.

14 MR. PHILLIPS: But, see, there is an inherent
15 advantage, if somebody has been living in the house for
16 two months, and has started to use the house and the
17 dwelling. You find out things as you go along. It is
18 simply not reasonable to expect the government -- even
19 if we had the best inspectors in the world and took
20 time, it is most unlikely we would discover every
21 conceivable defect in a house prior to the moving in of
22 the -- or prior to the final settlement of the house.

23 The Court in -- This Court in United States
24 versus Neustadt made plain what I think is the proper
25 approach in these cases. The question is -- It

1 recognized that the traditional common law rule of
2 misrepresentation recognized tort in the situation where
3 there is an inspection followed by certification of a
4 fact followed by injury in reliance on that fact. And
5 that is precisely what is involved in this case, and a
6 misrepresentation exception should be applied in this
7 case, just as it was in Neustadt.

8 I think it is important to realize that this is
9 not an overreaching use of the sovereign immunity
10 doctrine. Respondent has received recovery. The
11 Congress provided for her under an administrative relief
12 program that was adopted in clear recognition that she
13 would not have recovery under the Federal Tort Claims
14 Act because of this Court's decision in Neustadt, and
15 unless -- and in order to hold as the Sixth Circuit did,
16 it would have to be in absolute disregard of that
17 enactment.

18 We submit that is incorrect, and we ask this
19 Court to reverse that judgment.

20 If there are no other questions, I would
21 reserve the balance of my time.

22 CHIEF JUSTICE BURGER: Very well.

23 Mr. Croce.

24 ORAL ARGUMENT OF LENNY L. CROCE, ESQ.,

25 ON BEHALF OF THE RESPONDENT

1 MR. CROCE: Chief Justice, and may it please
2 the Court, despite the government's attempt to torture
3 the allegations in the complaint in this case to fit the
4 misrepresentation exception to the Tort Claims Act, this
5 case was not, is not, and cannot be a case that arises
6 out of misrepresentation.

7 First, I will state the bases of Ms. Neal's
8 claim, and then secondly, I will show that the
9 relationship and conduct of the parties created a duty
10 of care running from Farmers Home to Ms. Neal.

11 Ms. Neal asserts in her complaint that Farmers
12 Home employees negligently planned and supervised the
13 construction of her home. This claim included the
14 following omissions and commissions.

15 QUESTION: Mr. Croce, are you reading from the
16 complaint now, or summarizing it?

17 MR. CROCE: I am not reading from the
18 complaint. The complaint alleged negligent planning and
19 supervision of her home, and that they breached a duty
20 of care to her in exercising those activities.

21 QUESTION: And then you are about to go into a
22 list of the omissions.

23 MR. CROCE: Yes.

24 QUESTION: Are those contained in the
25 complaint?

1 MR. CROCE: Those are contained in the factual
2 allegations of the complaint, which preceded the cause
3 of action, the statement of a cause of action.

4 First, that Farmers Home failed to recommend
5 and approve a reputable and competent builder. The
6 complaint alleges that the builder was disbarred
7 subsequently, and the depositions had attached a letter
8 which showed that builder had nine other complaints
9 against it, not just Ms. Neal.

10 Secondly, that the officials failed to obtain
11 accurate and complete plans for Ms. Neal's home. In the
12 complaint we allege they received a totally different
13 set of plans that what they were supposed to be for Ms.
14 Neal, and that those plans didn't have any plans for the
15 heating and cooling duct system.

16 Third, that the Farmers Home did not properly
17 review the plans and specifications of Ms. Neal's home.
18 Ms. Wells admitted she didn't look at the plans.

19 Fourth, that the Farmers Home did not properly
20 supervise the expenditure of Ms. Neal's loan proceeds.
21 There was money paid out before the first inspection was
22 made. Farmers Home failed to detect defects in Ms.
23 Neal's home. That is quite evident. They failed to
24 reject defective working materials or to require their
25 correction.

1 Finally, they failed to carefully inspect her
2 home. Out of this extensive negligent conduct, which
3 lasted over a period of months and involved several
4 Farmers Home employees, the government extracts out one
5 single inspection report and seeks to rely upon it to
6 deny Ms. Neal her day in court.

7 An examination of the facts alleged in the
8 claim and gleaned from the record here shows that the
9 graveman of Ms. Neal's complaint is negligence, not
10 misrepresentation.

11 We must review the conduct in relationship in
12 the transaction between the parties. When we do, that
13 shows that a duty -- that Farmers Home undertook
14 activities which they had a duty to perform with due
15 care.

16 In 1976, Ms. Neal was a 48-year-old cafeteria
17 worker in a local elementary school. The home she was
18 living in was falling down around her, literally. She
19 didn't make much money, a little over \$3,000 a year.
20 When she couldn't find housing she could afford herself,
21 she went to the lender of last resort, her local Farmers
22 Home Administration office.

23 Ms. Neal filled out an application. She was
24 certified eligible. Ms. Neal was referred by the county
25 supervisor to a local builder of prefabricated homes.

1 They reviewed plans which purported to be for her home.
2 They supplied a form construction contract which had a
3 special clause in it which gave Farmers Home the right
4 to inspect, test, and examine materials, and to reject
5 defective materials and require correction.

6 Before construction began, she executed a
7 promissory note to pay back the loan. She executed a
8 deed of trust to secure the note. And then the proceeds
9 were put in a supervised account which required not only
10 her signature but an official from Farmers Home's
11 signature to release the funds. Three disbursements
12 were made. The last one that we know of was made on
13 September 30th, and then they made three on-site
14 inspections, the last one occurring on October 3rd.

15 Now, after she moved into the house, she
16 discovered things weren't right. She didn't have any
17 heat. The ducts were falling apart. The plumbing had
18 90-degree bends in it. She couldn't find her water
19 heater. The concrete block foundation had blocks
20 missing.

21 QUESTION: What time of year did she move in?
22 Does the complaint say?

23 MR. CROCE: What time did she move?

24 QUESTION: What time of year did she move in?

25 MR. CROCE: She moved in some time in October,

1 Justice Rehnquist.

2 QUESTION: Well, couldn't she figure out the
3 minute she moved in that she didn't have any heat?

4 MR. CROCE: Your Honor, that was not in the
5 record, and I can answer your question. Whenever the
6 confusion came up, when the exact payment was made, I
7 said, we never did find out when you moved in, Ms.
8 Neal. I called her up. She said, well, I had to move
9 in October 1st because the owner of the house I was in
10 was tearing it down and said I had to be out before
11 October 1st

12 The house presently is not even now fastened to
13 the foundation, and there is no exterior sheathing which
14 provides any moisture barrier, which subjects the house
15 to weather conditions.

16 To say that these activities undertaken by
17 Farmers Home engendered no reliance and created no duty
18 of care simply defies common sense. She couldn't find
19 housing. She couldn't afford it. She didn't have much
20 education. She went to Farmers Home for a house. They
21 took her application. They checked her credit. They
22 determined what amount she could pay back. They
23 determined how much of a house she could get. They set
24 the minimum standards. They set the maximum payments.

25 They engendered total reliance upon them to

1 supply the means, the know-how, the supervision and
2 inspections needed to provide Ms. Neal safe and decent
3 housing. This relationship between Farmers Home and
4 Onilea Neal and the extent of the supervision and
5 control of the exercise necessarily engendered reliance
6 by Ms. Neal upon Farmers Home.

7 QUESTION: Mr. Croce, under your theory, do you
8 suppose that when the federal government through its
9 agencies inspects a toy or a drug, for example, to
10 determine whether the product is safe, and then declares
11 it safe, that someone later injured because in fact it
12 is unsafe has a cause of action under your theory
13 against the government?

14 MR. CROCE: First, I want to make one thing
15 clear, Justice O'Connor. This is not an inspection
16 case. It is a negligence case. And in order to
17 establish a claim for negligence, you must determine
18 whether or not there is a duty of care running from the
19 government to the injured party. That depends upon the
20 relationship of the parties, the conduct and control
21 exercised by the government to prevent the injury, and
22 the foreseeability of it.

23 It is certainly foreseeable in the fact
24 situation you gave that a purchaser of a defective toy
25 would be harmed, and if the government had control over

1 that process, it may very well. I think the weakness in
2 that case is the first criteria, and that is the
3 relationship. In this case, Farmers Home and Ms. Neal
4 had a direct one-to-one relationship which was clearly
5 dependent. The question becomes whether or not that
6 particular factor in the fact situation you suggest is
7 strong enough to impose a duty.

8 QUESTION: Is it your position that Ms. Neal
9 had no responsibility at all?

10 MR. CROCE: No, Your Honor, but the actions by
11 the Farmers Home Administration and the extensiveness of
12 it barred her or precluded her from seeking outside
13 help. She assumed that Farmers Home was going to take
14 care of everything.

15 QUESTION: You said barred her from seeking --

16 MR. CROCE: I think it prevented her. I mean --

17 QUESTION: How?

18 MR. CROCE: Because they gave her, by their
19 conduct --

20 QUESTION: But she could have gone --

21 MR. CROCE: -- and activities, that she was --

22 QUESTION: She could have gotten a good
23 inspection made and paid for it, couldn't she?

24 Could she?

25 MR. CROCE: Yes. Yes, assuming she had the

1 money, but --

2 QUESTION: Well, then, you do say that the
3 whole basis is, she had no responsibility.

4 MR. CROCE: I don't say that. I think her
5 responsibility would be conditioned upon what Farmers
6 Home undertook or didn't undertake.

7 QUESTION: And?

8 MR. CROCE: In that they undertook what they
9 did, she necessarily relied upon them to exercise due
10 care.

11 QUESTION: And she had no responsibility.

12 MR. CROCE: That's correct.

13 This case does not violate or conflict with any
14 of the holdings in Neustadt or Indian Towing. In Indian
15 Towing -- This case is like Indian Towing, because a
16 duty of care was running from -- ran from Farmers Home
17 to Onilea Neal, and that duty of care arises out of
18 Farmers Home undertaking of services. If a private
19 party had undertaken to provide Ms. Neal the services
20 which Farmers Home undertook, and engendered the kind of
21 reliance which Farmers Home engendered, that person
22 would be obligated to use due care. If that party
23 failed in its duty of care and damages resulted,
24 liability would be found.

25 Unlike Neustadt, the inspection report relied

1 upon by the government is not an essential element to
2 sustain Ms. Neal's cause of action. You could take away
3 -- You could take away this inspection report and delete
4 it from the record, and Ms. Neal would still have a
5 cause of action. If you took away the appraisal report
6 in the Neustadt case, Mr. Neustadt simply does not have
7 a cause of action.

8 In conclusion, and I am going to be brief here,
9 it is important to keep in mind three considerations.
10 First, Ms. Neal is not asking this Court to hold Farmers
11 Home liable. What she is asking is that she have an
12 opportunity to prove her claim in court. Given a
13 colorable claim of negligence, which she has clearly
14 demonstrated, she should be entitled to pursue her claim
15 before a trier of fact.

16 If she had been given this opportunity --

17 QUESTION: Mr. Croce, do you think either the
18 Sixth Circuit or the district court in this case passed
19 on the question of whether her allegations apart from
20 the inspection theory stated a claim against the
21 government?

22 MR. CROCE: Yes, I think the court of appeals
23 clearly saw that we were talking more than just merely
24 an inspection report. We were talking about all the
25 activities that Farmers Home undertook.

1 QUESTION: Well, I don't read in the Sixth
2 Circuit's opinion any specific pronouncement one way or
3 the other about whether if you prove these facts, the
4 government under either the '34 Act or the '49 Act did
5 have an obligation imposed by statute to perform these
6 services.

7 MR. CROCE: It is our contention that the
8 statute, 506, and the regulations under that statute
9 clearly impose upon Farmers Home an obligation to
10 supervise and inspect.

11 QUESTION: I realize that.

12 MR. CROCE: I don't think that is really
13 material, because whether or not Farmers Home performed
14 those services under its statutory obligation or
15 regulatory obligation or voluntarily undertook them, the
16 fact is that they did. The crucial --

17 QUESTION: So part of your complaint is not
18 only that there was a duty to supervise that was
19 breached, but that the duty of supervision was
20 undertaken whether required by law or not, and that on
21 the good Samaritan theory it was negligently performed.

22 MR. CROCE: That's correct. The crucial thing
23 for the negligence claim is whether or not there was a
24 duty of care, and the duty of care only arises under
25 principles of common law, and in this case the principle

1 of common law applied is the voluntary undertaking
2 doctrine.

3 If Ms. Neal had been given her opportunity to
4 present her claim before a trier of fact, this Court and
5 the parties could have avoided some of the confusion
6 which has arisen regarding some of the facts. This
7 confusion in this statement is probably inevitable in
8 light of the fact that there was no trial, finding of
9 fact, or record, complete record produced.

10 We feel it would be inappropriate for this
11 Court to issue an opinion which may have important
12 consequences to tort law and federal housing policy on
13 the basis of an incomplete record.

14 Secondly, the government's assertion that Ms.
15 Neal's claim is really a misrepresentation is a red
16 herring. The facts alleged in the complaint and which
17 are contained in the record cannot support the
18 government's contentions. If the Farmers Home
19 interpretation of the misrepresentation exception
20 prevails, the Tort Claims Act itself will be
21 emasculated. What was intended by Congress to be a
22 narrow exception would in fact swallow the Act, and it
23 would block legitimate claims by aggrieved citizens
24 whenever there was communication in any form, and this
25 is the precise opinion which this Court rejected in

1 Indian Towing.

2 QUESTION: Neustadt began swallowing the Act,
3 didn't it?

4 MR. CROCE: We believe it did to a certain
5 extent, insofar as courts have had difficulty drawing a
6 line in the continuum between negligence and negligent
7 misrepresentation. It is our position that there are
8 three factors, and they are all factual findings which
9 must be made. You have to look at the relationship of
10 the parties, the conduct of the parties, and the
11 foreseeability in those three areas. You have to look
12 to see whether or not this is in fact misrepresentation
13 or negligence.

14 Finally, the government and Congress under the
15 Title V of the 1949 Housing Act created a program to
16 assist low-income residents in the country to obtain
17 decent and safe housing. This purpose of the Act is
18 being frustrated by the negligent acts of the agency
19 charged with this responsibility.

20 We contend that if Farmers Home is permitted to
21 deny Ms. Neal her day in court in this case, she and
22 borrowers like her would be denied any opportunity to
23 complain that Farmers Home by the negligence of its own
24 employees has violated a fundamental purpose of the
25 rural housing program. Farmers Home would be able to

1 finance construction of the very unsafe, substandard
2 homes which it is supposed to replace.

3 It is important to note that the government has
4 made a contention that the administrative relief under
5 the 509(c) program creates some kind of exclusive
6 remedy. First of all, the 509(c) program created the
7 remedy in order to get the program back on track. In
8 other words, Congress perceived there were problems
9 primarily because adequate inspections weren't being
10 made. However, there is nothing in the statute, nothing
11 in the legislative history which suggests that Congress
12 intended to cut off or substitute a remedy in lieu of
13 the one provided under the FTCA.

14 In essence, Congress didn't contemplate whether
15 or not there was the existence or non-existence of any
16 remedy under the Federal Torts Claim Act.

17 Finally, the fear of vast financial liability
18 is more properly addressed to Congress. Secondly, there
19 has been no factual support of this vast fear. Farmers
20 Home can exercise greater care in approving builders.
21 It can require construction bonds. It can conduct more
22 careful inspections. It can be more rigorous in
23 requiring contractors to correct shoddy construction,
24 and in fact, the claims paid out under the 509 program
25 have declined between 1981 and 1982 from 292 claims to

1 106. It doesn't look to me that there is this vast
2 financial liability lurking out there.

3 Ms. Neal has sufficiently alleged negligence by
4 Farmers Home employees. She is entitled to pursue her
5 claim by trial. And we ask that the judgment of the
6 court of appeals be affirmed.

7 QUESTION: Let me ask you just one additional
8 question. Did the parties in the proceedings below have
9 any occasion to discuss the application of Section
10 2680(a) of the Tort Claims Act, that possible
11 exclusion?

12 MR. CROCE: No, Justice O'Connor.

13 QUESTION: Oh, thank you.

14 MR. CROCE: It wasn't raised in any of the
15 courts below.

16 CHIEF JUSTICE BURGER: Do you have anything
17 further, Mr. Phillips?

18 ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,

19 ON BEHALF OF THE PETITIONERS - REBUTTAL

20 MR. PHILLIPS: Yes, Mr. Chief Justice, just
21 briefly.

22 The Respondent's submission goes -- details a
23 long series of problems with this house, and we don't
24 deny that there are problems with her house, but what
25 that submission does not indicate is what was the role

1 of the government and what was its responsibility under
2 this Act, and at bottom the responsibility of the
3 government remains to inspect the house.

4 The responsibility for the defects in the house
5 must remain in the first instance on the private
6 contractor. That is the person who builds the house,
7 who supervises its construction and its placement into
8 the --

9 QUESTION: Mr. Phillips, as I understand from
10 Mr. Croce, the allegation -- one of the allegations in
11 the complaint is that the government undertook to
12 supervise, and did so negligently.

13 MR. PHILLIPS: All that the complaint says is
14 that the government negligently supervised. It doesn't
15 in any way indicate anything other than through the
16 inspection process how that supervision could take
17 place.

18 QUESTION: But you don't indicate that in a
19 complaint under the federal rules. You can produce all
20 sorts of evidence that will support simply conclusionary
21 allegations in a complaint. You can't try the case in a
22 complaint.

23 MR. PHILLIPS: I appreciate that, Justice
24 Rehnquist, but if the only supervision provided for in
25 the regulations and provided for in any of the factual

1 statements is the inspection of that house, then to say
2 that there has been negligent supervision is to say no
3 more than that there was a negligent inspection of the
4 house, and that is all the complaint states. It doesn't
5 say that we did anything in any way other than our
6 inspection of the house.

7 QUESTION: Well, but if they say -- the
8 allegations they could introduce in support of an
9 allegation of negligent supervision go much further, I
10 would think, than just negligent inspection.

11 MR. PHILLIPS: Well, they couldn't -- I mean,
12 unless you are going to assume that there is something
13 outside of the regulations, and there is no indication
14 that anyone acted in addition to what the regulations
15 provide.

16 QUESTION: Well, but the case has never gone to
17 trial.

18 MR. PHILLIPS: I understand that, but there has
19 never been any claim anywhere that --

20 QUESTION: There is an allegation of negligent
21 supervision in the complaint.

22 QUESTION: Is there any allegation in the
23 complaint that there was an obligation by contract or by
24 statute or by regulation to supervise?

25 MR. PHILLIPS: No, Your Honor. There is

1 nothing in there to that effect, and the district court
2 expressly found that there is no such obligation.

3 QUESTION: Yes, Mr. Phillips, but is it not
4 true, there is a distinction between an obligation to
5 supervise and the authority to supervise, and is it not
6 true that the statute authorized the government to
7 supervise?

8 MR. PHILLIPS: It authorized the Secretary to
9 provide for supervision.

10 QUESTION: Right. It says -- The statute
11 specifically says, in addition to the financial
12 assessments -- this is Section 506 -- the Secretary is
13 authorized to furnish various things, including
14 construction supervision, and then the regulations say,
15 supervision will be provided borrowers to the extent
16 necessary to achieve the objectives of the loan.

17 MR. PHILLIPS: Yes, and that is --

18 QUESTION: Well, does not that in words
19 authorize the supervision?

20 MR. PHILLIPS: Sure, and it is --

21 QUESTION: Now, if it is authorized, even if it
22 isn't required --

23 MR. PHILLIPS: That's correct, but --

24 QUESTION: -- then if it is performed, doesn't
25 the good Samaritan doctrine come into play?

1 MR. PHILLIPS: Only to the extent that the only
2 way the supervision is performed is through the
3 inspection process. As I said earlier --

4 QUESTION: Well, but the statute says --

5 MR. PHILLIPS: -- we don't serve as the foreman
6 for the construction company.

7 QUESTION: The statute says, authorized to
8 provide construction supervision and inspection.

9 MR. PHILLIPS: Yes, I appreciate what the
10 statute says. All I am saying is that under the
11 regulations --

12 QUESTION: So you do have authority to
13 supervise.

14 MR. PHILLIPS: Our regulations say that we will
15 inspect, and that is done as our burden of supervision.

16 QUESTION: Your regulations say you will
17 supervise.

18 MR. PHILLIPS: I am sorry?

19 QUESTION: Your regulations say you will
20 supervise.

21 MR. PHILLIPS: To the extent necessary to help
22 the borrower, which in this case means to undertake an
23 inspection. That is the way I read them and understand
24 the way the regulations work.

25 Respondent at the end of his remarks mentioned

1 the administrative remedy one last time and suggested
2 that it is not intended as an exclusive remedy.
3 Recognize that this case turns exclusively on what
4 Congress has intended, and Congress has made clear what
5 its understanding and intent under the Rural Home Loan
6 Program would be, that is, that the program is designed
7 to look just like the situation under the 1934 Act that
8 was at issue in Neustadt, and it was because of Neustadt
9 that Congress first enacted administrative relief for
10 the FHA, extended it to the VA, and extended it to this
11 statute.

12 It was Congress's understanding that that is
13 what the 1949 Act would lead to in terms of claims such
14 as Respondent's in this case, and since it is this
15 Court's interpretation of Congress's intent that
16 controls, and the Sixth Circuit has disregarded that
17 intent completely, we ask that its judgment be
18 reversed.

19 QUESTION: Mr. Phillips, what is the specific
20 provision in the agreement on which the claimant relied
21 for the duty undertaken by the government? Is it the
22 inspection of work section in the construction contract,
23 Exhibit B to the complaint?

24 MR. PHILLIPS: You mean in her cause of action
25 for --

1 QUESTION: Yes, is that the section?

2 MR. PHILLIPS: Yes, ma'am. I believe that is
3 the one that is --

4 QUESTION: All right.

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

7 (Whereupon, at 10:47 o'clock a.m., the case in
8 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., Petitioners v. ONILEA NEAL # 81-1494

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