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SUPREME COURT OF THE UNITED STATES

In the Matter of:

RICHARD SCHWEIKER, ET AL., Petitioners, v. JAMES CHILICKY, ET AL.	No. 86-1781

Pages: 1 through 40

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1 PROCEEDINGS

2 CHIEF JUSTICE RHENQUIST: General Fried, you may
3 begin whenever you are ready.

4 ORAL ARGUMENT BY CHARLES FRIED,ESQ.
5 ON BEHALF OF PETITIONERS

6 MR. FRIED: Thank you, Mr. Chief Justice and may it
7 please the Court:

8 In this case the Plaintiff Respondents were
9 terminated from the Social Security disability roles and
10 subsequently their disability benefits were restored either
11 through the appeals process or by new application, and they
12 were restored retroactively either through the appeals process
13 or in compliance with the 1984 Reform Act.

14 Separately, they brought this Bivens action against
15 the Secretary of Health and Human Services; the Commission of
16 Social Security; and the head of the state agency charging that
17 their due process rights, their constitutional rights, had been
18 violated in that those three individuals had caused them to be
19 subject to advertently inaccurate and legally unwarranted
20 determination which resulted in the loss of their benefits in
21 the first instance.

22 Our contention is that whether or not there was a due
23 process violation here, and whether or not ultimately the three
24 individual defendants are found to be qualifiedly immune, this
25 cause of action is precluded for three reasons: it is

1 precluded by the statute itself; it is precluded because the
2 statute occupies the field and is a comprehensive scheme so-
3 occupying the field; and it is precluded because there are here
4 special factors counselling hesitation.
5 Taking the statutory preclusion first, 405(g)
6 provides an unusually capacious system for raising any kind of
7 claim, statutory or constitutional, and allows a wide variety
8 of relief: class action relief; injunctive relief, and allows
9 constitutional as well as statutory claims to be read.
10 405(h) says that this scheme is to be the exclusive
11 scheme for raising issues regarding social security benefits,
12 and the third sentence, the second sentence -- one might say,
13 says what you must do -- which is to have recourse to 405(g)
14 scheme; and the third sentence, what you may not do.
15 What you may not do is try an end-run around the
16 405(g) scheme by having recourse to Section 1331 General
17 Federal Question jurisdiction, which is precisely what the
18 Respondents did in this case.
19 The second reason that this cause of action is
20 precluded is that there is here an unusually comprehensive and
21 complex scheme, which over -- which occupies the field. And
22 it's a scheme which is not only complex, but is continuously
23 fine-tuned by Congress, so that Congress has, as it were, not
24 only laterally, but over time, occupied this field, so that it
25 quite inappropriate to overlay that scheme with a personal

1 action for damages against high government officials out of
2 their own pockets.
3 And finally, there are special factors counselling,
4 hesitation.
5 Now, these three bases for preclusion are each of
6 them in our view quite sufficient to dispose of the claim. But
7 in fact they converge and work together. The 405(g) and (h)
8 scheme precludes a Bivens action here because the scheme is so
9 comprehensive. And the scheme is so comprehensive because of
10 the special factors which counsel hesitation.
11 Congress was surely aware how contentious it was to
12 deal with and to take away or to deny social security benefits,
13 and the numbers of cases in which these contentious issues
14 would arise.
15 So these three reasons are separately, but they work
16 together jointly as well, and together they make quite clear
17 that this is not a case in which the Bivens action is
18 appropriate.
19 I would suggest that after a certain amount of
20 oscillation, this Court came to rest in Bush v. Lucas on the
21 proper role of the Bivens action. There were two extreme poles
22 in which the argument proceeded.
23 One pole would have had -- and no member of this
24 Court I believe ever took up a position there -- one pole would
25 have said that there must be constitutional damages where there

1 is a constitutional right, and that damages are specified by
2 the Constitution itself. That would make every constitutional
3 clause carry with it a constitutional damage remedy in the way
4 that this Court in the First English case last term, said that
5 the 'just compensation" clause is a constitutionally-mandated
6 damage remedy.

7 The other way, the opposite pole, was taken up by
8 Justice Black in his dissent in Bivens, which said, 'only if
9 the Congress has specifically authorized the Court to grant a
10 damage remedy, should there be one.

11 Where Bush v. Lucas came to rest is to see that there
12 is here an interpretive partnership between the Court and
13 Congress, a partnership which, in the end, should leave the
14 area of law with a scheme that makes sense. But it is a
15 partnership in which Congress is necessarily the senior
16 partner; it is the senior partner because it's been recognized
17 that Congress can preclude a damage remedy; and Congress can
18 act in such a way -- and this is where I think Bush
19 contributed, can act in such a way that it no longer makes
20 sense to imply that damage remedy which otherwise the Court
21 under 1331 would have the power to do.

22 Now, this case seems to us to be just like Bush.
23 There is one and only one point of departure, and that is the
24 obvious fact that persons who are terminated from social
25 security benefits are often likely to suffer greater hardship

1 than those who have been fired from federal jobs.

2 QUESTION: And there are many of them.

3 MR. FRIED: There have been many of them, yes.

4 QUESTION: However, the initial determination has

5 been upset.

6 MR. FRIED: There have been many of them. We have

7 set out in our brief the finding from the Senate Report

8 explaining why those initial determinations are likely to have

9 been upset. New evidence comes in at later stages; the ALJ

10 stage is the first stage at which there is a personal

11 confrontation with a decisionmaker, so I don't think it would

12 be appropriate to lay all the incorrect decisions at the door

13 of callousness or malice.

14 The hardship is greater, but it is a kind of hardship

15 which this Court specifically confronted in Mathews v.

16 Eldridge, and there held that post-termination restoration of

17 benefits were sufficient to satisfy the requirements of due

18 process.

19 Working in the opposite direction, this case seems to

20 us clearer than Bush, because the fine tuning which Congress

21 has engaged in, is a fine tuning which has occurred frequently.

22 Congress has revisited this problem time and time again, and

23 has in fact addressed many of the complaints which are raised

24 in this case.

25 And most importantly, unlike Bush, the constitutional

1 violations, if they occur, occur in the course of an
2 administrative, adjudicative process, such that the process
3 itself carries with it a means for redress.
4 The crucial point in our view is that the Respondents
5 are profoundly wrong in saying that it is necessary to imply a
6 Bivens remedy, lest the Respondents here are left voiceless in
7 respect to their constitutional claims, lest their
8 constitutional wrongs remain voiceless, because we have in
9 405(g) a remedy which this Court, together with Congress, and I
10 think this Court particularly, has made particularly receptive
11 to all kinds of claims, and most recently in the City of New
12 York case.
13 in the City of New York case, we had precisely the
14 same complaints that are being raised here in this case. And
15 the Court found a way to make 405(g) perfectly adequate to
16 respond to those claims.
17 So those claims, whether constitutional or statutory,
18 whether factual or legal, can be raised and can be raised
19 within what has been described as the unusually protective
20 scheme of 405(g).
21 QUESTION: What the Respondents are saying, General
22 Fried, is that's a remedy, but a remedy for a different wrong;
23 that they're not complaining here about the denial of benefits.
24 Those sections will indeed allow us to remedy the denial of
25 benefits.

1 But what they're complaining about is not the denial,
2 but the denial of due process that led to the denial, and
3 that's what they want a remedy for.
4 MR. FRIED: They are, of course, complaining of the
5 denial of benefits, but they add adverbs to that complaint:
6 they say we were denied benefits and we were done so illegally,
7 unconstitutionally.
8 They complain that 405(g) gives them a remedy for
9 everything but the adverbs. Now it seems --
10 QUESTION: What damages are they seeking here
11 MR. FRIED: They are seeking damages for emotional
12 distress and the Complaints states that they are seeking
13 damages for loss of the food, medicine, and other necessities
14 which they were deprived of.
15 Now, there is a certain puzzle about that, because
16 there is, of course, they received the financial award with
17 which they would have purchased that.
18 QUESTION: They did get benefits retroactively?
19 MR. FRIED: They did. All three of them. Chilicky
20 got them, not as a result of the administrative process, but in
21 compliance with the 1940 and 1984 Act, but all three have
22 received retroactive benefits, so that the Complaint must be
23 for what we must describe as consequential damages: emotional
24 distress; and the loss that comes about from not having had
25 that money when you wanted it; and where obviously, you could

1 have used it; and perhaps when you desperately needed it.

2 QUESTION: General Fried, is their claim comparable

3 to the claim the Court sustained in First English?

4 MR. FRIED: I don't believe so, because the First

5 English case dealt with a Fifth Amendment taking violation.

6 QUESTION: I understand the legal theory is

7 different, but they, in effect, are saying it's not enough to

8 give us our property back after all the litigation is over.

9 And that's what the Court said with respect to the

10 interference with the use of property in that context.

11 MR. FRIED: The Court certainly did. But the reason

12 that the Court came to that conclusion, and it focused its

13 conclusion on the point was that the Constitution itself in so

14 many words, requires "just compensation."

15 So the damage remedy awarded in First English was a

16 damage remedy which was itself required by the Constitution.

17 And that is how the Court in, may I say, rejecting a suggestion

18 of the Solicitor-General, decided that case.

19 QUESTION: In adhering to a precedent that had been

20 decided some fifty years before, you might also say.

21 QUESTION: And rejecting a very persuasive dissent.

22 [Mirth.]

23 MR. FRIED: It was an exciting case.

24 [Mirth.]

25 But it was a case which dealt with a very special set

1 of circumstances; a constitutional provision which carried with
2 it its own damage -- a constitutional remedy -- and which was
3 focused quite specifically on traditional kinds of property,
4 which this Court has several times held social security
5 benefits are not.

6 QUESTION: I'm not sure the plain language is quite
7 as persuasive as you make it, because the clause says, "No
8 property shall be taken without just compensation." It
9 doesn't say there shall be just compensation; they went ahead
10 and took it.

11 And it also says, "No person shall be deprived of
12 property without due process of law." They're both phrased in
13 the negative.

14 MR. FRIED: That is correct.

15 QUESTION: Yes.

16 MR. FRIED: But the "due process of law" clause does
17 not say "without just compensation."

18 QUESTION: No.

19 MR. FRIED: And that, I think, is -- thereby hangs
20 that particular tale, I would suggest.

21 QUESTION: You would say that you remedy the one by
22 providing the "just compensation" that was not provided; and
23 you remedy the other by providing the "due process" not
24 provided, I presume?

25 MR. FRIED: Well, that, I would say that the

1 Constitution requires no more than that you provide the 'due
2 process." This Court has said --
3 QUESTION: Unless it is too late to provide the "due
4 process."
5 MR. FRIED: -- that you may apply more, but there is
6 no constitutional requirement that you do so.
7 And yet, Respondents argue as if there were a
8 constitutional requirement that you do so.
9 QUESTION: Well, how do you supply the "due process"
10 when it's too late? Do we do that in damages? How do we do
11 that?
12 MR. FRIED: Well, you supply the "due process" by
13 applying due process, and that means in this case, you give
14 that which, if you have taken away that which the law says you
15 should not take away, you think again and you said, "No, we
16 were wrong;" and you give it to the person.
17 Now, there is no additional requirement that you also
18 pay something extra for having gotten it wrong the first time.
19 QUESTION: Is there a requirement that you give
20 retroactive benefits?
21 MR. FRIED: There is a statutory requirement that you
22 do so.
23 QUESTION: Is there a constitutional requirement?
24 For the purposes of our determining whether or not there is a
25 Bivens action?

1 MR. FRIED: The fact that there are retroactive
2 benefits, I should think, would help mightily in determining
3 whether what 405(g) has done here is sufficient to displace a
4 _Bivens_ action. I don't believe that, absent _Bivens_, there is a
5 constitutional requirement that you give retroactive benefits.
6 After all, if a person has been incorrectly imprisoned and is
7 then released because a constitutional error has been made, the
8 complete, at constitutionally complete, answer is he is now a
9 free man. There is no constitutional requirement that he
10 somehow be compensated from what might be years of unjust
11 incarceration.
12 QUESTION: But you would say that, in determining
13 whether there should be a _Bivens_ action here, the sufficiency
14 of the compensation is highly relevant?
15 MR. FRIED: It is certainly relevant. It is relevant
16 just as it was in the _Bush_ case, where the compensation was
17 precisely what it is here in this case.
18 I should say that Bush being fired is indeed
19 stigmatizing. I think the claim that being removed from the
20 disability roles is somehow stigmatizing, is a somewhat
21 unwarranted stretch.
22 If I may, I would like to reserve the remainder of my
23 time for rebuttal.
24 CHIEF JUSTICE RHENQUIST: Thank you, General Fried.
25 We'll now hear from you, Mr. Tribe.

1 ORAL ARGUMENT BY LAURENCE H. TRIBE, ESQ.

2 ON BEHALF OF RESPONDENTS

3 MR. TRIBE: Mr. Chief Justice and may it please the
4 Court:

5 The Respondents in this case spent their working
6 lives paying into Title II's disability insurance program, and
7 they have no quarrel with its comprehensive design, the one
8 that the Solicitor-General praises, for deciding who gets what
9 benefits; how errors are reviewed and corrected; how
10 mistakenly-withheld benefits are to be recovered from the
11 Government. As he correctly points out, the benefits were
12 recovered, and they don't really complain about where Congress
13 chose to locate what the Solicitor-General in his reply brief,
14 calls the "ballast of the social security system;" how tight a
15 ship Congress chose to run.

16 Their point is, they didn't fall overboard; they
17 allege that they were pushed. And their complaint is that the
18 individual Petitioners in this case deliberately abused this
19 well-designed machine; and abused their power by setting
20 arbitrary quotas. And these, we think, are not simply
21 "adverbs" of constitutional import, even if one doesn't agree
22 to the exciting First English decision.

23 I think there was no disagreement with at least that
24 part of Justice Stevens' dissent that suggests that when there
25 are improperly motivated, or fairly conducted, or unnecessarily

1 protracted facts of government decisionmaking. That's a
2 separate due-process violation.
3 And it has been quite traditional for courts to
4 recognize intentional abuse of process as a tort quite distinct
5 from any benefits lost and recovered along the way according to
6 the exclusive government system for recovering those benefits.
7 I think Judge Friendly was the first to see it in the
8 Title II context in the Second Circuit in 1981 in Ellis v.
9 Blum, when he held that abusive termination of Title II
10 benefits, which are later restored retroactively, give rise to
11 a Bivens action under 1331 for emotional distress and
12 consequential damages.
13 Actually, he may not have been the first, although
14 the context was a bit different. Justice Kennedy, in Flores v.
15 Pierce, in the Ninth Circuit, held that, when state officials
16 deliberately and for unconstitutional reasons, interfere with
17 the attempt of a licensed applicant to obtain the license, the
18 fact that the license is ultimately obtained according to the
19 normal course of the normal process does not prevent the 1983
20 action seeking consequential damages and damages for emotional
21 distress for the deliberate abuse of the process putting them
22 through the ringer, when they ought not to have been put
23 through it.
24 Now, the Solicitor-General, I think, paints quite a
25 false picture when he says --

1 QUESTION: Mr. Fried -- at some point -- it doesn't
2 have to have been -- I'd appreciate your describing just
3 briefly in perhaps more detail what it is that the Respondent
4 claimed that the Petitioners did?
5 MR. TRIBE: Yes, Mr. Chief Justice: they claim in
6 the Complaint, and the case arose on the dismissal of that
7 Complaint -- they had arbitrary quotas saying a fixed number of
8 people, regardless of any evidence of disability, have got to
9 be cut from the rolls -- we call it being tossed overboard --
10 in order to meet the pressure from "on high." Budgetary
11 pressure.
12 We will go through the motions," they claim the
13 Petitioners said, but we won't really look at the evidence."
14 And we also claim that certain diseases were arbitrarily
15 blacklisted; that this was an arbitrary exertion of power.
16 Of course, they haven't had the chance through
17 discovery to prove it. But what they want is a chance to prove
18 it against officials who, under this Court's decision, are not
19 entitled to absolute, but only qualified, immunity.
20 And they want a chance to prove it, not as the
21 Solicitor-General suggests, by somehow reconstructing this
22 comprehensive machine that Congress has ably developed for
23 getting back the benefits that were wrongfully withheld; or
24 mistakenly withheld; you don't have to show any wrong; it's an
25 honest mistake -- to get the benefits back.

1 What is at stake here is quite another system
2 altogether: it is a system that this Court began to construct
3 in 1971 in the Bivens case using the Constitution's substantive
4 provisions as a navigation chart using the historic,
5 traditional, common law remedies as a compass; and it is that
6 system that which the Solicitor-General says ought now to be
7 withheld in this case.
8 QUESTION: As to the individual benefit denials -- if
9 a particular respondent felt that he had been "tossed off"
10 because deliberately they were paying no attention, he could
11 have challenged that in court, could he not, under the Social
12 Security Act?
13 MR. TRIBE: Mr. Chief Justice, as the Solicitor-
14 General calls them, "generous provisions of 405," he could have
15 run immediately to court, and that is what it appears, the
16 Solicitor-General counsels, that the best solution is not
17 damages which might deter this misconduct, but judicial
18 interference without even exhausting remedies, he suggests,
19 immediate declaratory and injunctive relief.
20 Now, some of these disabled people are not
21 necessarily capable of gearing up machinery that well.
22 But we don't disagree with this Court's decision as
23 giving them that option. What we suggest is that that option,
24 unlike the quite-normal Bivens option, number one, leaves
25 victims uncompensated if they don't get to court on time.

1 QUESTION: But that's true of any option --
2 MR. TRIBE: Well, it is true --
3 QUESTION: -- if you don't take advantage of it, it
4 doesn't do you any good.
5 MR. TRIBE: Well, if you take advantage of Bivens, at
6 least after the fact, it won't, to answer Justice O'Connor's
7 question, be too late.
8 That is, the Bivens remedy -- presumably, you know,
9 it's conceivable that in Bivens they could have detected a
10 pattern of FBI abuse and gone to court to get some kind of
11 relief. But that didn't prevent this Court from giving them
12 damages.
13 The point about this episodic intervention through
14 injunctive relief, is that it raises all of the prospects --
15 QUESTION: I don't mean injunctive relief. Couldn't
16 you have gone into court and say that, "My benefits were denied
17 in the administrative process for the precise same reason you
18 say now because there was an unconstitutional scheme afoot,
19 they weren't listening to evidence." A district court could
20 have reversed that.
21 MR. TRIBE: Well, these particular Respondents did go
22 to court and filed the Complaint under 1331 seeking that
23 relief. The reason that this case is not here under 405(g) and
24 (h) is that they do not make a claim that arises under the Act.
25 It is their point -- and I want to make this as clear

1 as I can -- that 405(g) and (h) are fine provisions designing a
2 limited waiver of sovereign immunity for getting something from
3 the Government.

4 When 405(g) and (h) were written in 1939, it would
5 have been quite impossible, as the Solicitor-General points out
6 in his brief, to preclude Bivens remedies -- impossible,
7 indeed, because it was to be three decades until a right of
8 action under Bivens for this kind of abuse was recognized by
9 the Court.

10 But the fact is that that limited exposure of the
11 federal treasury under 405(g), and the Court called it "a
12 limited waiver of sovereign immunity" under City of New York v.
13 Bowen, does not, as the Solicitor-General suggests, purport to
14 provide, as he put it in his words, an "exclusive scheme for
15 raising all issues regarding social security benefits."

16 The fact that social security benefits exist in the
17 background did not prevent Judge Friendly from seeing in Ellis
18 v. Blum that these claims arise under the Constitution, and not
19 under the Act.

20 QUESTION: Mr. Tribe, could I ask you: suppose there
21 hadn't been any constitutional violation and simply a denial of
22 benefits wrongfully under the statute, in all good faith, but
23 it was wrongfully denied. Now, surely the people who were
24 subjected to that non-constitutional violation could have the
25 same kind of damages that you ask us to give to your clients

1 for here. They too, could have been deprived of their
2 residences; evicted; or whatever else. They could have had all
3 those consequential damages; but Congress has chosen to give,
4 as relief, only the amount of money that should have been paid,
5 even though the same consequential damages would have been
6 fair.

7 Now, don't you think that that may be some indication
8 of what Congress wants to be done with respect to any Bivens
9 claims that there are?

10 MR. TRIBE: Well, there are several answers, I think,
11 Justice Scalia.

12 First of all, the fact is that here, unlike the Civil
13 Service area, Congress did not calibrate what it wants to be
14 done to the existence of any abuse. Congress simply provided a
15 way of getting these benefits delivered to the right people.

16 QUESTION: But why not the consequential damages
17 along with those benefits, which would follow?

18 MR. TRIBE: It seems to me that, to answer the
19 question of what Congress sort of had in mind in this area as
20 it revisited it over and over," as the Solicitor-General says
21 it did in the '80s, it is important to understand what was
22 going on in Congress during the period when this fine-tuning
23 occurred.

24 Late last week, in Bowen v. Galbreath, this Court
25 pointed out that, when it fine-tuned one of the titles; that

1 is, when it passed Title XVI of the Act, Congress, in a telling
2 omission, did not include certain language that had appeared in
3 Title II.
4 And that led me to inquire over the weekend what
5 proposals did Congress have before it that might bear on this
6 question, during the period of the 1980s when it was fine-
7 tuning the delivery system?
8 And the fact is that in December 1981, ten months
9 after the Second Circuit had applied Bivens to the abusive
10 termination of Title II beneficiaries, Secretary Schweiker, the
11 Petitioner in this case, joined several other Cabinet members
12 in officially urging Congress to pass S.1775, which would have
13 ended Bivens liability for most federal officers, including
14 most particularly, officials of Health and Human Services, when
15 plaintiffs allege what Secretary Schweiker called
16 "constitutional torts" in the denial or termination of
17 benefits. That law had some predecessors in the late '70s that
18 this Court took note of in Carlson.
19 1775 would have actually given liability damages from
20 the U.S. Treasury from the people who were cut off as for
21 others who were denied Bivens remedies. And yet it was opposed
22 on really two grounds; first that it was not sufficiently
23 protective of victims; and second, that it wouldn't deter
24 future abuses well enough.
25 In the end it died in committee. And Majority Leader

1 Baker in January 1984, said on the Senate floor, that _Bivens_
2 reforms of that kind had proved too controversial to press as
3 part of any other kind of reform.
4 Later that year, unanimously, Congress passed the
5 Social Security Reform Act of 1984. Now, to take from history,
6 where Congress is adjusting and fine-tuning the system for
7 returning benefits withheld by honest mistake, to take from
8 that the lesson in this partnership between Congress and the
9 Court, that Congress has implied a negative with respect to
10 _Bivens_ actions, for abusive termination, seems to me to take
11 the possibility of employing implied repeal of the _Bivens_
12 background much further than is justifiable.
13 I don't think you can read either in what Congress
14 did in 1939, before anyone dreamed of _Bivens_, when it was
15 really enacting a limited waiver of sovereign immunity, for
16 what it did do in the 1980s as somehow suggesting that it
17 wouldn't make sense for this Court to do here what it did in
18 such cases as _Bivens_ and _Davis_ and _Carlson_.
19 QUESTION: This case seems a lot closer to _Bush_
20 against _Lucas_ than any of those, I must say.
21 MR. TRIBE: Well, Justice O'Connor, the principal
22 reason that is given by the Solicitor-General that this is a
23 lot like _Bush_ against _Lucas_ in his brief, is that the social
24 security system is too big; too complex; and the remedies are
25 too comprehensive.

1 The remedies, as I have just tried to indicate, are
2 remedies against the system for failing to deliver what it
3 promised, not for those who deliberately abused the system.
4 But the suggestion that it's vast; and that its size
5 is somehow the criterion that should make it rather like Bush,
6 the elaborate civil service system, we think is not defensible.
7 In Bush, and indeed later in Chappell and in Stanley,
8 the special factors were all qualititative: they related not
9 to size, but to subject matter, like the commitment of federal
10 personnel policy, or the incidence of military status to the
11 political branches.
12 Size; complexity, I don't think provide a judicially-
13 manageable line. In any event, if the social security system
14 is too big and too complex; then why not the federal law
15 enforcement administration?
16 That is, Bivens itself imposed damages remedies in a
17 context where there are tens of thousands of law enforcement
18 officers; why not prison administration?
19 QUESTION: Mr. Tribe, of course there you have the
20 same complex remedial system in the law enforcement area.
21 MR. TRIBE: Well, but --
22 QUESTION: But let me ask you a different question:
23 Justice Scalia asked you about -- you may have the same kind of
24 damage from statutory violations. I wonder if you could not
25 also have the same kind of damage from constitutional

1 violations; arbitrary quotas; the same things you allege here;
2 but as the result of carelessness and poor staffing and all the
3 rest rather than as a result of deliberateness?
4 My question is, is your emphasis of deliberate
5 wrongdoing because you think that's a part of the
6 constitutional violation, or you think as a matter of prudence,
7 the remedy should be so-limited?
8 MR. TRIBE: We think, Justice Stevens, after Daniels
9 and Davidson, that it's part of the constitutional violation.
10 From the point of view of the poor person who can't
11 buy food and medicine, whether the deprivation is the result of
12 some arbitrary quota or some honest mistake, may be a matter of
13 only academic interest that he couldn't really care much about.
14 But this Court, I think, made a point, of which I
15 know that in those cases you were not in full accord, that the
16 ordinary concept of constitutional command draws a line between
17 deliberate abuse of power and honest mistakes; the kind of
18 thing that, in First English could happen as the regulatory
19 process drags on.
20 And we do not think we could make out a procedural
21 due-process, or an equal protection violation, for mere honest
22 error. We think that, therefore, the fundamental predicate of
23 this notion of abuse of process as a constitutional tort, is
24 that the abuse be knowing, intentional and deliberate; and
25 that's what we seek to be able to prove at trial.

1 QUESTION: So there would be a defense in this case
2 if the Secretary put on evidence that he got bad staff advice;
3 he thought he was doing something reasonable; so that would be
4 a complete difference?
5 MR. TRIBE: Well, in Harlow v. Fitzgerald, the Court
6 spelled out really the contours of that defense: if it would
7 have been in good faith and a reasonable person could have
8 thought he was complying, it was constitutional.
9 QUESTION: Well, that's an immunity. I'm saying
10 there would be an absence of a violation rather than an
11 immunity.
12 MR. TRIBE: There may well be. There may well be in
13 the two, sometimes, though not always -- certainly not in
14 Stanley -- sometimes coalesce.
15 But the concern that officials not move with great
16 trepidation, fearing that every error of judgment in running a
17 massive bureaucracy may expose them to liability, is quite
18 well-dealt with by Harlow v. Fitzgerald immunity.
19 QUESTION: And is emotional distress recovery lie at
20 the core of this violation that you posit?
21 MR. TRIBE: Well, Justice Kennedy, I think emotional
22 distress and other kinds of consequential damages lie at the
23 core. Certainly in Carey v. Piphus, emotional distress is
24 separately, judicially, cognizable if provable.
25 And in the Flores case in the Ninth Circuit, that was

1 at the heart of it.

2 But let me return for a moment, if I might, to

3 Justice O'Connor's question about Bush v. Lucas, because I

4 think there is a deeper irony here, in that making the

5 magnitude of the system, its complexity a special factor

6 counselling hesitation under Bush, if you go back to the

7 majority opinion in Bivens and the Justice Harlan's

8 concurrence, both of those opinions stressed that damage

9 liability is especially appropriate for federal officers

10 because of how much power they can wield; how many people they

11 can hurt.

12 It inverts, I think, the logic in Bivens to say that

13 the more people an official can hurt, the less a court should

14 worry about ordinary garden-variety compensation and

15 deterrence.

16 The fact is that Petitioners in this case were in a

17 position to inflict more injury without ever getting out from

18 behind their desks, than the agents in Bivens could inflict by

19 breaking into Bivens' home.

20 You don't have to send agents to grab the social

21 security checks that Solicitor-General Fried says he's not

22 really sure are property; or to repossess the groceries and the

23 medicines that were purchased with those checks. They didn't

24 have to do that. All they had to do was put in place arbitrary

25 quotas that pay no attention to the evidence; and send a

1 functionary out with a computer-generated postcard to someone
2 like Mr. Chilicky, who is recovering from open-heart surgery
3 telling him, "you're fine. Go back to work; you're a dead-
4 beat."
5 I don't think it's too speculative to say that that
6 is stigmatizing.
7 Now, the fact that, when Mr. Chilicky, when
8 recovering from open heart surgery might be able -- and after
9 all, he did join a lawsuit quite early -- might be able to seek
10 some other form of judicial relief -- does not really bear on -
11 -
12 QUESTION: But any time someone is denied workmens'
13 compensation benefits; disability benefits; because the Agency
14 says, "Well, your claim of disability really hasn't been
15 proven, that's stigmatizing?"
16 MR. TRIBE: No, Chief Justice Rhenquist. My
17 suggestion is that, if they deliberately set out to send that
18 kind of message to people without regard to whether they really
19 are disabled, then in that case it is plausible to say that
20 this is not just an "adverb" of constitutional import; it is a
21 deliberately-inflicted stigma.
22 QUESTION: Well, but to say it's deliberately
23 inflicted would be right; but to say it's a stigma is something
24 else, I think, because I thought our cases used the word,
25 "stigma" in the sense of something that is generally recognized

1 perhaps as a badge of obloquy or something like that.

2 And I just don't think that a determination that

3 you're no longer disabled carries that connotation.

4 MR. TRIBE: Well, some might regard it as good news

5 to be told that you are no longer disabled, but others might

6 say that if they spent their working lives putting into a

7 system, and are then told that they're lying about their

8 disability, which is what this message is, it might be

9 stigmatizing.

10 But I'm not sure this bears on the question whether

11 there should be a Bivens action.

12 QUESTION: I'm not sure it bears on a question of

13 what the damages ought to be either. Once again, the obloquy,

14 if that's what it is, is the same whether it was done

15 intentionally or not.

16 The obloquy would be the same if some ALJ just simply

17 decided the facts wrong. And the fellow that's --

18 MR. TRIBE: Well, of course the ALJ --

19 QUESTION: -- the emotional distress; the trauma; is

20 the same; your client is lying in this hospital bed; he gets

21 exactly the same news; and you're telling us that in the one

22 case, if he sues on a Bivens theory, he's entitled to

23 consequential damages; whereas under the statute, where the

24 same thing happens as far as the effect on him is concerned,

25 all he's entitled to is to get the benefits that were denied.

1 That's seems to be a strange system.

2 MR. TRIBE: Justice Scalia, let me -- in fact, that

3 does not sound so sensible. Let me recall this Court's

4 decisions in <u>Daniels</u> and <u>Davis</u> -- a prisoner slips on a pillow

5 and is badly injured. The injury feels the same whether the

6 pillow as left there negligently or whether it was left there

7 in a deliberate decision to "get" the prisoners.

8 This Court says that that difference is the very

9 difference that, under the Constitution, draws a line between

10 the existence of a 1983 action, and the fact that it's simply a

11 misfortune.

12 QUESTION: That may be quite true, but then you

13 import the term, "stigma' as if that somehow adds to the fact

14 it's been a deliberate violation of the Constitution.

15 MR. TRIBE: Mr. Chief Justice, if I am understood as

16 suggesting that stigma retroactively colors the existence of a

17 violation, I don't mean to be suggesting that.

18 And it's somewhat premature to talk here, I think,

19 about the precise damages that can be proven. After all, in

20 order to get to that stage, one has to recognize that the

21 threshold -- and answer one way or the other to the question

22 whether there is an implied cause of action at all for damages?

23 And then one can figure out what the damages are.

24 Part of what I think is --

25 QUESTION: That's what we're talking about

1 damages. We're talking about damages; not whether there is a
2 cause of action. That's why the prison example you give isn't
3 really parallel.
4 Yes, whether there is a constitutional violation or
5 not may well depend on the intent; but what intelligent damages
6 are; what we as courts should determine are intelligent
7 damages, it seems to me is no different in the case where it's
8 intentional and where it's not intentional.
9 The harm suffered by the individual is quite the
10 same.
11 MR. TRIBE: Well, certainly the harm -- for example,
12 if monthly benefits needed to purchase medicines are withheld,
13 once you've crossed the threshold of saying that they were
14 withheld as a result of a deliberate violation, then in
15 calculating the damage, the lost health -- which will have
16 nothing to do with the number of dollars that the government
17 saved by not paying for the medicine, may be quite right,
18 Justice Scalia.
19 Most of the damage at the end of the day will be the
20 same, the medical, quantifiable damage. Whether there was a
21 constitutional abuse that led to the problem or not. That is
22 always the case, I think, in drawing the line.
23 If, for example, in Bivens, they had entered the home
24 in good faith, subject to a Malley v. Briggs kind of immunity,
25 and had proceeded when there to do exactly the same kinds of

1 things that they did, from the point of view of the person who
2 occupied that home, it might have felt just the same.
3 But since they would not have violated the
4 Constitution the Bivens remedy would not be available.
5 That's really not unique to this situation: I think
6 that observation goes to the question whether Bivens itself
7 should somehow be overruled. And I don't think that any
8 argument has been made here that it ought to. The only
9 argument that's been made really is that somehow this is more
10 like Bush v. Lucas.
11 But what was peculiar in Bush v. Lucas, and absent
12 here, was the close relationship between federal employer and
13 federal employee, which led Congress over a 60-year period
14 continually to revisit the area and provide closely calibrated
15 remedies; that is, if someone were fired as part of an
16 efficiency reorganization, even though himself perfectly
17 innocent: no remedy.
18 A decision was made for impermissible reasons not to
19 hire him, there would be a limited remedy, a petition to the
20 OSC. If he was demoted or fired abusively the remedy would be
21 greater.
22 There is no evidence at all within this area Congress
23 has calibrated the decision to return the benefit to the
24 wronged; indeed, the Solicitor-General's argument about Mathews
25 v. Eldridge proves the opposite.

1 The point about Mathews v. Eldridge is that there was
2 no violation from the mere mistaken termination of benefits.
3 As this Court held in Mathews v. Eldridge, Title II, as opposed
4 to Title XVI, the Constitutional requirement that the risk
5 error be kept within acceptable bounds, is fully met by a post-
6 deprivation mechanism for correction; it's very much like the
7 provision of just compensation for a taking. The taking
8 doesn't violate the Constitution as long as the compensation is
9 provided.
10 It's strange the language, as well as an
11 understanding of what Congress was doing to say that the
12 mechanism for internal correction requires simply to keep the
13 ship within the bounds of Mathews v. Eldridge is somehow a
14 correction, a remedy, for quite separate constitutional abuse.
15 The very fact that --
16 QUESTION: May I ask you one more question?
17 MR. TRIBE: Yes?
18 MR. TRIBE: It's a question about the deliberate
19 element of your tort, because I really haven't been able to
20 think it through: when you say "deliberate," do you mean that
21 they just -- they intended that people would not get benefits
22 the statute entitled them to; or that they deliberately
23 violated some constitutional procedure? What is the
24 deliberateness here?
25 MR. TRIBE: The notion is that, fully-knowing, a

1 significant number of the persons that they would terminate
2 under these quotas were deserving, and would, if they pursued
3 reinstatement and retroactive benefits, be likely to succeed,
4 nonetheless, they decided for fiscal or other reasons, knowing
5 that this had no relationship to particular evidence in the
6 case, to impose and enforce these quotas -- whether they also
7 had to have it in their heads that this Court in 1994 in the
8 <u>Hertado</u> case said that such arbitrary action violates the
9 Constitution, I'm not sure.
10 I suspect that, in order to be liable of deliberate
11 constitutional abuses of this kind, officials do not have to
12 couch their improper intent in constitutional terms; but they
13 would surely, though I'm sure that this is somewhat of a
14 different issue, the <u>Harlow v. Fitzgerald</u> defense, if they
15 acted in an objectively reasonable belief, that what they did
16 comported with the requirements of the Constitution.
17 The suggestion that the bureaucratic apparatus of the
18 social security system is too complex and too large to be
19 subjected to a system of judicially-developed, quite ordinary
20 remedies, is one that might be made to Congress, as it has
21 been; but when it was made to Congress -- when Petitioner
22 Schweiker, for example, joined other Cabinet members in urging
23 Congress to get rid of <u>Bivens</u> it's striking that he did not
24 say, or even suggest, that those who are injured through what
25 he described as "constitutional torts" in abusive terminations,

1 ought to be left without any damages at all. The suggestion
2 rather was that there should be damages from the United States
3 Treasury; the precise measure of those damages is a question
4 for a different day.

5 And even that Congress resisted. So the idea that,
6 if you look at Congress not only laterally over time, but you
7 find some implicit congressional determination, that the
8 ordinary judicial approach of after-the-fact damages for
9 deliberately inflicted harm in violation of the Constitution,
10 the idea that one can find a congressional mechanism --

11 QUESTION: Have you computed the realistic exposure
12 of the defendants in this case, assuming you're right?

13 MR. TRIBE: Justice Stevens, the suggestion of the
14 Solicitor-General that it's in the billions of dollars, I think
15 assumes the capacity of proof on the part of Respondents, that
16 in my wildest imagination, I would not assume. It seems to me
17 that if the problem --

18 QUESTION: What is the damages? How much do they
19 pray for?

20 MR. TRIBE: They pray for at least $10,000 each
21 against each Respondent.

22 QUESTION: And how many members of the class?

23 MR. TRIBE: It's not a class action. There are
24 remaining three and only three Respondents. They are people in
25 their fifty's and sixties; the class is not a certified class.

1 So that the problem -- I mean, I suppose one could
2 try to compute what would happen under all of the Bivens
3 remedies authorized by this Court if the millions of people who
4 could potentially sue were all to sue the government, it would
5 be staggering.
6 But the suggestion of an avalanche of liability is
7 rather belied; as I understand it, in all of the years since
8 Bivens was decided in 1971, there have been a grand total of
9 some two dozen, as of several years ago, of actual damage
10 recoveries under Bivens. It's not so easy to prove that
11 government officials deliberately set out to violate your
12 constitutional rights.
13 And I wouldn't be too sanguine about the ability of
14 people to prove that in a way that would pose grave threats for
15 the fiscal stability of the government.
16 But if such threats were posed, it is the Congress
17 that has the power of the purse; it is Congress who can decide
18 whether deliberately abusive officials should be indemnified;
19 and Congress who could put realistic caps on damage recovery.
20 But in the absence of such action by Congress, the
21 course on which this Court embarked in 1971 in Bivens seems to
22 me not really to stop short of this case. It seems to me Judge
23 Friendly was right in recognizing that cases like this do not
24 arise under the Social Security Act; but arise under the
25 Constitution; it seems to me that the traditional recognition

1 that abuse of power is quite separate from material things that
2 one happens to have lost; points to Bivens in this case; and
3 not to Bush v. Lucas.
4 Bush, Stanley, Chappell, deal with special matters
5 with special status.
6 CHIEF JUSTICE RHENQUIST: Your time has expired, Mr.
7 Tribe.
8 MR. TRIBE: Thank you, Mr. Justice.
9 CHIEF JUSTICE RHENQUIST: Thank you, Mr. Tribe.
10 General Fried, you have 12 minutes remaining.
11 ORAL ARGUMENT BY CHARLES FRIED
12 ON BEHALF OF PETITIONERS -- REBUTTAL
13 MR. FRIED: First it's important to note that Judge
14 Friendly's decision in Ellis preceded Bush v. Lucas; and I
15 don't think he would have decided the case the same way after
16 this Court's guidance in Bush v. Lucas.
17 Second, I would like to call attention to the third
18 sentence of 405(h), "No action against the United States, the
19 Secretary, or any office or employee thereof, shall be brought
20 under Section 1331 to recover on any claim arising under this
21 subchapter.
22 QUESTION: Well, Mr. Fried, do you think the Court
23 gave that less than a literal reading in Bowan against Michigan
24 Academy?
25 MR. FRIED: The Michigan Academy case is very

1 important on that point because the Court recognized that it
2 had -- that it was rowing uphill; but that it was willing to do
3 so because, had there not been a remedy that was implied under
4 1331, there would have been no way for those particular claims
5 to be brought before any court whatsoever.
6 And that, this Court said, was weighing powerfully in
7 their interpretation; second, it found a little bit of leeway
8 because in any event, I believe the Court said, in any event,
9 we are not operating directly under 405(h) in the third
10 sentence; but only by its incorporation through Section 1395,
11 that was a Part B of Medicare case.
12 That would seem to me to suggest that, if you were
13 square in the middle of 405(h), rather than in one of those
14 peripheral applications dragged in by reference that you would
15 not have had the same conclusion.
16 The attempt to do in rungs around the third sentence
17 goes back to Weinberger against Salfi, the attempt to say,
18 well, this is a declaratory judgment; well, this is procedural;
19 this is prospective-only.
20 Each time the Court has said, look, what you are
21 doing is something which has to do with getting benefits.
22 These people didn't slip and fall on the steps of the Social
23 Security office and bring an action for that reason; they are
24 bringing an action because something that happened in respect
25 to the granting of benefits.

1 And I ask myself, if Congress wanted to proscribe
2 1331 jurisdiction for a situation like this, how much more
3 really could it have spoken? Should it have said, "and we mean
4 Bivens, too?"
5 So I think 1331 -- I think that 405(h) is quite clear
6 on this point; I do think that it's important to have a little
7 perspective on this case, particularly given the very powerful
8 presentation of the factual context.
9 First, the respondents at page 6 of their brief say
10 that there are perhaps 200,000 people whose benefits were
11 unjustly terminated and then later reinstated.
12 But the perspective I would like to suggest is a
13 different one. There is in the United States no general system
14 at the national level of income maintenance. There is food
15 stamps; there is AFDC; there is unemployment compensation,
16 which is time-limited; and then there is social security.
17 In times of economic dislocation in the late '70s and
18 early '80s, when most of these cases arose, were such times,
19 there is tremendous pressure on the system and on Congress to
20 somehow stretch what is a rather gappy safety net to cover more
21 and more serious cases which seem to fall through.
22 How to respond to those pressures is a serious
23 problem. I do not think it is sensible to respond by making
24 the Cabinet Secretary personally liable as is being sought to
25 be done in this case.

1 If there are no further questions, I think the Court

2 for its attention.

3 CHIEF JUSTICE RHENQUIST: Thank you, General Fried.

4 The case is submitted.

5 (Whereupon, at 2:38 p.m. the above-captioned case was

6 submitted.)

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REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-1781

CASE TITLE: RICHARD SCHWEIKER, ET AL v. JAMES CHILICKY, ET AL

HEARING DATE: March 1, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the SUPREME COURT OF THE UNITED STATES.

Date: March 1, 1988

Margaret Daly

Official Reporter

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