

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner

v. THOMAS M. GAUBERT

CASE NO: 89-1793

PLACE: Washington, D.C.

DATE: November 26, 1990

PAGES: 1 - 54

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
v. : No. 89-1793
THOMAS M. GAUBERT :
- - - - - X

Washington, D.C.
Monday, November 26, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

STUART M. GERSON, ESQ., Assistant Attorney General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.
ABBE DAVID LOWELL, ESQ., Washington, D.C.; on behalf of the
Respondent.

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C O N T E N T S

| <u>ORAL ARGUMENT OF</u> | <u>PAGE</u> |
|-----------------------------|-------------|
| STUART M. GERSON, ESQ. | |
| On behalf of the Petitioner | 3 |
| ABBE DAVID LOWELL, ESQ. | |
| On behalf of the Respondent | 21 |
| <u>REBUTTAL ARGUMENT OF</u> | |
| STUART M. GERSON, ESQ. | |
| On behalf of the Petitioner | 49 |

1 regulatory charge, provided managerial guidance to the
2 leadership of the independent American Savings Association,
3 a federally insured, State-chartered thrift in which
4 Respondent was an investor.

5 Assuming the Fifth Circuit did so err, the second
6 question for this Court is whether the policy relationship
7 of the challenged regulatory act is so clear as to allow
8 this Court to hold as a matter of law that the discretionary
9 function exception applies to them.

10 QUESTION: Well, Mr. Gerson, you say there are two
11 questions presented. In your Petition for Certiorari you
12 only have one question. Are the two questions you stated
13 both comprised within that question?

14 MR. GERSON: Yes, they are, Mr. Chief Justice.

15 Although the Fifth Circuit held that the
16 discretionary function exception covered the board's
17 decision to merge IASA with another company, obtain a so-
18 called neutralization agreement from the respondent, and
19 replace the IASA board of directors, it held that the
20 board's agents lost the protection of section 2680 when they
21 began to advise management and participate in management
22 decisions; when they hired a consultant regarding finance
23 and asset management to advise them and the board members;
24 when they directed IASA to convert to a Federal charter, so
25 that it would become the only governmental entity with power

1 to control IASA; when they supervised the filing of
2 litigation on behalf of IASA and consulted with the Federal
3 Home Loan Bank Board in Washington about it; and when they
4 advised and recommended which of the institution
5 subsidiaries should be placed in bankruptcy and how, if at
6 all, that should be done; and lastly when they intervened
7 with State authorities who had attempted to install their
8 own supervisory agent.

9 Seizing upon a footnote in this Court's opinion
10 in Berkovitz against United States adverting to the earlier
11 Indian Towing decision, which was not a discretionary
12 function case, the Fifth Circuit held that the board's
13 officials "were only protected by the discretionary function
14 exception until their actions became operational." Inasmuch
15 as the court recognized that the board officials were acting
16 within their authority, saying that that was unchallenged,
17 and also recognized that since there were no regulations
18 guiding them at every turn, their acts were discretionary.
19 And hence the operational criterion imposed by the court,
20 we suggest, represented an erroneous understanding of both
21 this Court's decisions in Berkovitz and Indian Towing.

22 The discretionary function exception, which is
23 categorical and makes no distinction as to operational
24 activities, has meaning and antecedents which go back at
25 least as far in this Court as Marbury against Madison in

1 1803. The Congress had that in mind when it crafted the
2 discretionary function exception as a safeguard, it not
3 appearing in earlier versions considered in several
4 Congresses.

5 But of course this Court recognized that every act
6 has some element of choice in it. And hence, culminating
7 with Berkovitz, this Court has adopted a two-part test for
8 evaluating whether or not the discretionary function
9 exception should be given application.

10 The first of those aspects of that two-part test
11 is the question was there a discretionary act? Absent that,
12 the Court has not recognized any uniquely governmental
13 function --

14 QUESTION: What is the case authority for this
15 two-part test?

16 MR. GERSON: Berkovitz, Your Honor.

17 QUESTION: Berkovitz?

18 MR. GERSON: I think that that bifurcation is set
19 forth clearly. I think also that the first tine is rather
20 easily met, that the court of appeals agreed that the
21 actions were discretionary but held applying this
22 operational distinction as a starting point, which was kind
23 of an ending point in Indian Towing, that the second, or
24 didn't get to the second test, which is was the discretion
25 based upon policy considerations. The court of appeals

1 didn't engage in this inquiry at all. That, under Dalehite,
2 Varig, and Berkovitz, we suggest, alone requires reversal
3 of the judgment below.

4 We believe that all of the acts that I described
5 earlier were indeed based upon policy considerations for two
6 reasons. First, each of them was part of the judgmental
7 process of enforcing the regulatory program. They were
8 literally in compliance with the regulatory scheme set out
9 in the statute and ultimately refined in a resolution of the
10 Federal Home Loan Bank Board.

11 QUESTION: Mr. Gerson, what if the Federal
12 officials undertook to actually supervise the granting of
13 particular loans, deciding loan by loan whether this
14 particular real estate is likely to be valuable enough to
15 be sound collateral, and so forth? Does that meet your
16 test?

17 MR. GERSON: It might.

18 QUESTION: I know it might. It also might not.

19 (Laughter.)

20 MR. GERSON: I don't think one can say as an
21 absolute. The Court has made clear that the discretionary
22 function exception is not inherently categorical. If it
23 could be said in the facts of a particular case that the
24 survival of the institution, that the monitoring was close
25 enough to require, with respect to the regulated person,

1 like respondent here, that there was activity that closely
2 involved in day-to-day operations, I suggest that it would
3 be protected.

4 QUESTION: That is what makes it a policy
5 decision?

6 MR. GERSON: I think there are two things that
7 make it a policy decision. One, as I said, is it being
8 consistent with the regulatory scheme and involving
9 judgmental process and furtherance of it. The second, which
10 I believe is reflected in this Court's opinion in Boyle
11 against United Technologies, is that it's action derived
12 from essentially or uniquely Federal interest. What is
13 different about these supervisory regulators from a normal
14 director of the bank is their focus. The normal director
15 is going to have as his primary activity, or her primary
16 activity, maximizing the profit of investors. The
17 supervisory regulator --

18 QUESTION: Let me get those two. Those two things
19 that make it policy are, number one, it has to be in
20 pursuance of a Federal purpose?

21 MR. GERSON: Judgmental. It has to involve
22 judgment in pursuance of the regulatory purpose.

23 QUESTION: And secondly?

24 MR. GERSON: And second, it has to be derived from
25 what is a unique Federal interest.

1 QUESTION: Does that answer the loan example?
2 That's what I don't follow.

3 MR. GERSON: Well, under the regulations in effect
4 at the time, and indeed in a different place today but still
5 in effect, the supervisory regulators were responsible for
6 going into the institution, and rather than exercising
7 ultimate authority, putting it into receivership, their goal
8 was to work very closely with management, making a number
9 of suggestions, to see whether management could eliminate
10 unsafe or unsound practices.

11 QUESTION: I don't mean to interrupt you, but just
12 to focus on Justice Scalia's hypothetical. A particular
13 judgment on whether to approve a particular loan or not,
14 without the Federal regulators, they want to be sure they
15 had good collateral and that the loan would be paid off.
16 Would those same factors bring it within the discretionary
17 function if a Federal official made the decision?

18 MR. GERSON: It might. And why I say --

19 QUESTION: You say it might, but what other facts
20 do you need?

21 MR. GERSON: Well, what is the unsafe or unsound
22 practice that the regulators are looking at and attempting
23 to remedy? If indeed it involved the loan practice of the
24 bank, if that is something that they're looking at
25 specifically, I would answer the question yes. I don't --

1 QUESTION: No, they decide what the standards are
2 for all the loans, and then they're applying those standards
3 in a particular application, to a particular loan
4 application. And they can either approve it or not,
5 depending on whether they think the collateral is good. Is
6 that covered by the discretionary --

7 MR. GERSON: Well, the way that that would be done
8 under this regime is to suggest it to the board that was in
9 place. If the board refused to go along with those
10 suggestions, if it didn't comply with what the regulators
11 thought was a sound policy, the regulators would then move
12 to another step, a cease and desist order or a
13 conservatorship or receivership. I don't know that -- we
14 don't have it here, and I don't know that we would ever have
15 a realistic situation in which the regulators actually were
16 making the loans.

17 QUESTION: Well, here you have an allegation that
18 the defendants arranged for the hiring of a particular
19 consultant on operational and financial matters. And
20 supposing you had two qualified -- consultants and they
21 chose -- I mean two that met the same standards, but they
22 chose one rather than the other because they didn't really
23 check their background and find out they were a bunch of
24 thieves, or something. Is that covered?

25 MR. GERSON: Yes, I suggest that it would be. The

1 discretionary function exception protects a negligent act.
2 So the fact, if the exception applies, it isn't going to
3 matter whether or not the regulator exercised due care. So
4 that's a secondary question. So the only relevant
5 consideration is was there an act of discretion, and was it
6 in furtherance of policy. Here the regulators were
7 concerned about the quality of the bank's portfolio or the
8 institution's portfolio and where it was going, and I
9 suggest that on the face of it hiring an advisor to look at
10 transactions is both a reasonable and proper exercise of
11 discretionary authority that ought to be protected.

12 QUESTION: Suppose the advisor was absolutely
13 unqualified, had no experience in banking whatsoever?

14 MR. GERSON: Again, the discretionary function
15 exception ought to protect that.

16 QUESTION: How is that any different than, say,
17 in the Varig case? You'll recall that was the spot-
18 inspection policy. But not involved in that case was an
19 instance, a hypothetical instance where an inspector might
20 have made an inspection and missed a structural defect in
21 the aircraft. I take it you would concede that in Varig
22 that if the inspector had made an inspection of a specific
23 aircraft and had done it negligently, there would be
24 liability?

25 MR. GERSON: I would, because there there would

1 be no discretion. That would be very much the same as the
2 Berkovitz decision, where there would be a Federal
3 regulation program or directive which preempts --

4 QUESTION: You say there's discretion to hire a
5 totally unqualified, incompetent consultant?

6 MR. GERSON: The issue is whether or not there is
7 discretion to hire a consultant. Again, if there is
8 discretion to do that, the act ought to be protected.

9 QUESTION: Well, then it depends on how you phrase
10 the issue. The issue is whether or not you have to inspect
11 an aircraft.

12 MR. GERSON: Well, I agree, there is no regulation
13 that requires a particular method of hiring or a particular
14 evaluation. There is -- there was a regulation and
15 resolution in effect at the time that allowed these
16 regulators to tailor supervision depending upon the changing
17 facts of any -- of any individual case. Within that, and
18 indeed both courts below found that this hiring was a
19 discretionary act, so that the question is, under Berkovitz,
20 was it an act that was derived from policy. There was
21 nothing that set forth a particular method of hiring a
22 consultant, that set forth particular criteria for the
23 hiring of a consultant, or particular acts that the
24 regulators had to perform.

25 And so that's the reason that I suggest (a) that

1 they had discretion, (b) that that discretion related to
2 policy, hence if they were negligent in that decision it
3 would be protected by the literal terms of the discretionary
4 function exception.

5 QUESTION: Excuse me. It relates to policy if
6 there is no regulation that governs it? Is that the test
7 of whether it relates to policy?

8 MR. GERSON: No. No, sir.

9 QUESTION: What is the test of whether it relates
10 to policy?

11 MR. GERSON: The -- as I suggested earlier, is it
12 -- under Berkovitz the Court reflected on the activity being
13 part of the judgmental process of enforcing the regulatory
14 program. In Boyle the Court looked to what it found to be
15 a uniquely Federal interest, essentially a governmental
16 function different from what would --

17 QUESTION: I don't care what all the cases say.
18 What is your test of whether it relates to policy? Just,
19 you know --

20 MR. GERSON: That it's part of the judgmental
21 process --

22 QUESTION: Part of the judgmental process --

23 MR. GERSON: -- of enforcing the regulatory
24 program.

25 QUESTION: -- of enforcing the regulatory program.

1 MR. GERSON: I suggest also in this case that
2 there is involved a uniquely Federal interest, and that that
3 is useful language derived from the statute to describe the
4 applicability or not of the discretionary function
5 exception.

6 QUESTION: So, so I assume that if one of the
7 problems with these banks was they were getting sued too
8 often for automobile accidents by negligent -- because of
9 their negligent employees driving the bank's cars, and if
10 the Federal examiners should prescribe how to drive the car,
11 you know, don't take a left turn, or something like that,
12 and if that should cause an accident, that would be a policy
13 judgment then? Right? Because it was in furtherance --
14 judgmental in furtherance of the Federal program.

15 MR. GERSON: Well, I would suggest that that did
16 not involve a uniquely Federal interest, given the
17 legislative history which preserves almost above anything
18 else the automobile accident as the common law tort --

19 QUESTION: Oh, I see.

20 MR. GERSON: -- reserved. And I would suggest
21 that in that instance, where, for example if hypothetically
22 this respondent were involved in a traffic accident with the
23 regulator who was performing his duties, that there would
24 be Federal -- the potential for Federal liability because
25 there is no regulatory discretion.

1 Similarly, if the regulator insisted upon the
2 directors hiring the regulator's brother-in-law, to the
3 extent that that would violate Federal conflict of interest
4 law, there would be no discretion to violate a particular
5 law which sets forth something, a Federal duty.

6 If the regulator decided, consistent with his
7 discretion, to take his papers home at night that he was
8 working on in pursuit of the regulatory supervision, and he
9 lost them, that negligent act of losing the papers wouldn't
10 be part of the judgmental process of enforcing the
11 regulatory policy, and so it wouldn't be protected.

12 I can think of some cases that bring to mind
13 Indian Towing. If it's part of their -- if they had greater
14 authority than what they exercised in this case, and
15 actually decided to shut down the lights on top of a tall
16 building that had a lightning rod and a plane crashed in it.
17 Or if they negligently maintained machinery. There is no
18 Federal policy interest involved there, and so, under Indian
19 Towing, Rayonier, other cases like that, there would be the
20 potential for liability.

21 QUESTION: Even if that was done to save money?

22 MR. GERSON: Yes. I think that that's right.

23 QUESTION: Well, you're saying, for example, that
24 the Federal policy to have the institution not make any bad
25 loans would be enough to justify discretion on selecting

1 which loans are acceptable and which are not.

2 MR. GERSON: Well, it could, Justice Stevens.
3 That's not the case that we're facing here, where the role
4 of the regulators was to evaluate the portfolio and to use
5 an advisor in making that evaluation. But I suggest that
6 if that were the focus of the regulation, if the cited
7 practice were the making of bad loans, that, consistent with
8 the regulatory purpose, and exercising the judgment with
9 respect to that, it would be a protected act for the
10 regulators to involve themselves at that level in that way.

11 QUESTION: And if there's a Federal policy to
12 favor good management, then hiring the consultant, of
13 course, you get discretion on which managers to pick.

14 MR. GERSON: I don't disagree with that. In this
15 case --

16 QUESTION: I mean, that would be -- I think that's
17 your position. The Federal policy is to run the company
18 efficiently and effectively, and so anything that relates
19 to choices on the effectiveness or efficiency of the
20 business would be implementing Federal policy.

21 MR. GERSON: I don't disagree with that. The
22 Federal policy -- the direct Federal policy at play here is
23 to try to restore this institution to what the regulators
24 consider to be safer, sounder financial practices, and
25 returning it to management and leaving. That didn't occur.

1 But that is not an unknown function. It's one that this
2 Court recognized in terms of its cousin, the banking
3 industry, back in the Philadelphia National Bank case, where
4 it noted that the Federal supervision of banking has been
5 called probably the outstanding example of the Federal
6 Government of regulation of entire industry through methods
7 of supervision, also noting, as in this case, that the,
8 because of the way that the system works, that the
9 regulators are likely to follow the suggestions that the
10 supervisory -- that the directors are likely to follow the
11 suggestions that the supervisory regulators make.

12 QUESTION: Mr. Gerson, I -- it doesn't seem to me
13 that it's fair play to simply make an automobile-driving
14 exception to your principle because the legislative history
15 makes that clear. I mean, it seems to me automobile driving
16 is excluded because it's not a discretionary function, and
17 whatever your definition of discretionary function is, it
18 has to exclude automobile driving.

19 And I don't see how -- let's say the post office,
20 if the post office were still a full dress Federal agency,
21 and you have a post office driver who's delivering the mail.
22 I mean, that's certainly a Federal policy, and in the act
23 of it he gets into an automobile accident. It seems to me
24 that that would meet your definition of being in performance
25 of a Federal function.

1 MR. GERSON: I respectfully disagree, Justice
2 Scalia. The distinction that I would draw is that the
3 driver is not exercising regulatory discretion. Of course
4 he's deciding whether to turn left or turn right or speed
5 up or slow down, but what he is not doing is making any
6 evaluation of the matter at hand, of the health of the
7 institution, the policies that the institution ought to
8 undertake to return itself to what the regulators consider
9 to be healthy. There is no regulatory discretion.

10 QUESTION: Well, the post office doesn't regulate.
11 It gets mail from here to there. He is performing that
12 function in getting the mail from here to there. Are you
13 saying the function only applies to regulatory agencies?

14 MR. GERSON: No, I'm saying that the discretionary
15 function exception doesn't apply to the driver. It doesn't
16 apply to the Federal Government with respect to the action
17 of the driver, because the driver is not exercising
18 regulatory discretion. That's the distinction that I would
19 draw.

20 QUESTION: Regulatory discretion.

21 MR. GERSON: Yes. Acting with judgment in
22 furtherance of the particular regulatory policy. I suggest
23 that that's what the Congress intended to --

24 QUESTION: So, if it's a Federal Government that
25 does not regulate, but that just provides Federal services,

1 there is no regulation of private activity involved, it
2 gives out money or it does things of that sort, there is no
3 possibility of having a discretionary function exception at
4 all?

5 MR. GERSON: I think there's a possibility in as
6 much as in Berkovitz the Court described the second fork of
7 the test as being in furtherance of policy. I am sure --

8 QUESTION: So it doesn't have to be regulatory
9 policy.

10 MR. GERSON: I am sure that some -- I think it's
11 most likely to come up in a regulatory sense, but one can
12 envision activities that are not purely regulatory but that
13 further policy.

14 QUESTION: A whole lot of activities.

15 MR. GERSON: Of course, the individual who commits
16 the particular act in question has got to be charged with
17 carrying out that particular policy or creating it, or doing
18 something along those lines.

19 QUESTION: (Inaudible.)

20 MR. GERSON: Except that that is an activity which
21 I think is likely spelled out in regulations as to how one
22 performs it and what one does. There is very little choice
23 that relates to policy that is left to the driver of the
24 wagon or car.

25 QUESTION: That depends on how you define policy.

1 MR. GERSON: I think that that is correct, and I'm
2 trying to define it in terms of what this Court has had to
3 say in cases on the subject, and what the Congress had to
4 say when it created the exception and the limitation to the
5 exception with particular reference to automobile accidents.
6 I agree one ought to have a consistent, a theoretical view
7 that supports the exception to the exception, and I think
8 that there is one, which is that that driver is not
9 exercising any policy judgment. All he is doing is driving
10 the car.

11 QUESTION: Does your exception apply whenever
12 policy considerations might influence the judgment, or when
13 they do influence the judgment?

14 MR. GERSON: I think that the answer has to be the
15 former rather than the latter. If, if it's not the case,
16 what we would end up with is a full-scale trial in every
17 case that involves the raising of the defense of
18 discretionary function. Even in this case, while the
19 respondent suggests that his case is unique and there is no
20 flood gates, we now have in the Justice Department 321 tort
21 cases involving the savings and loan system.

22 And I would suggest that what the Court had to say
23 in Dalehite, which was that one only need read the
24 discretionary function exception in its entirety to conclude
25 that Congress exercised care to protect the Government from

1 claims, however negligently caused, that affected the
2 governmental function, that you would be acting contrary to
3 that if we had to have a full-scale hearing to decide in
4 each and every case what the regulator did rely on. So the
5 test ought to be susceptibility.

6 QUESTION: Well, it seems to me your test
7 necessarily is fact specific in many cases.

8 MR. GERSON: I agree that it's fact specific in
9 many, if not most cases, because you need to look at the
10 facts to see whether there is an activity that requires the
11 exercise of discretion. But if you reach that plateau, and
12 if it's susceptible, if the activity is susceptible to the
13 exercise of discretion and the furtherance of policy, that
14 that ought to end the inquiry.

15 I would like to reserve the remainder of my time,
16 if I might, for rebuttal.

17 QUESTION: Very well, Mr. Gerson.

18 Mr. Lowell, we'll hear now from you.

19 ORAL ARGUMENT OF ABBE DAVID LOWELL

20 ON BEHALF OF THE RESPONDENT

21 MR. LOWELL: Mr. Chief Justice, and may it please
22 the Court:

23 Using the current savings and loan crisis as its
24 cover, the United States mischaracterizes the Fifth
25 Circuit's holding and the factual setting of this case to

1 raise the stakes for your review. As to the facts, the
2 Court is being asked to make what amounts to initial
3 findings of fact from extra-record materials not relied on
4 or even mentioned by the district court, and not submitted
5 to nor even used by the court of appeals. For example, that
6 Independent American was an unhealthy thrift in 1985 and
7 1986 when those regulators acted. What the motives of the
8 regulators were when they took action. That the respondent
9 was not the intended beneficiary of the regulator's actions.
10 Or what reports were available to the regulators in 1986.

11 This is not the appropriate place for that kind
12 of fact finding, and where there was a similar need for
13 record development in Berkovitz, this Court required a
14 remand. As Justice Kennedy just pointed out, these are very
15 fact-specific decisions that have to be made. Indeed, of
16 the Joint Appendix before this Court, 15 of the 21 pages are
17 the complaint in this case. And that indicates all the
18 lower courts had before them. And it is the lower courts
19 opinion, based on these facts, that is on review before this
20 Court.

21 QUESTION: Did the district court dispose of this
22 as a motion to dismiss or a motion for summary judgment, Mr.
23 Lowell?

24 MR. LOWELL: Justice Rehnquist, as a motion to
25 dismiss on the pleadings, excepting, theoretically, the

1 respondent's allegations as being true, but developing such
2 a broad exception under the Federal Tort Claims Act that no
3 balancing, no policy, nothing was considered.

4 The Government's argument is essentially that the
5 Fifth Circuit applied some mechanical policy versus
6 operational test to decide this case. However, to posture
7 it that way the United States mischaracterizes the Fifth
8 Circuit as stating that anything labeled as operational
9 necessarily falls out of the discretionary function
10 exception. Challenge the Government when it rises in
11 rebuttal to point to the Fifth Circuit saying that anything
12 that could be labelled operation necessarily falls out of
13 the function.

14 QUESTION: But, Mr. Lowell, the Fifth Circuit
15 opinion, as I read it, did rely on some sort of distinction
16 which I don't find in our cases between operational on the
17 one hand as the counterpart of discretionary.

18 MR. LOWELL: Justice Rehnquist, I think the Fifth
19 Circuit followed --

20 QUESTION: I'm the Chief Justice.

21 MR. LOWELL: -- your precedents to a letter. They
22 start with --

23 QUESTION: I'm the Chief Justice.

24 MR. LOWELL: Sorry. Mr. Chief Justice, I do
25 suggest that the Fifth Circuit followed your precedents to

1 the letter. What they did was start with the phrase
2 operational, as used in Indian Towing.

3 QUESTION: Which, which was not a discretionary
4 function case.

5 MR. LOWELL: Only because the Government conceded
6 it. Clearly the --

7 QUESTION: Mr. Lowell, the Court said in Indian
8 function, we're not dealing with discretionary function
9 because the Government didn't make that argument.

10 MR. LOWELL: But what the Fifth Circuit did was
11 not -- look at the appendix to the Government's petition for
12 cert. at 7a. If the Government were correct and all that
13 was done here was a mechanical application of Indian Towing,
14 the court of appeals would not have said, as it precisely
15 says, that Indian Towing is not dispositive of this case.
16 And look what the Fifth Circuit did thereafter. It went
17 right into the analysis of Dalehite, right into the analysis
18 of Varig, and right into the analysis of Berkovitz. What
19 better could they do to pay ligeance to your precedents than
20 doing the balancing that you set out?

21 QUESTION: So, if -- your answer to the question
22 where does the word operational come from in our
23 discretionary function cases, you say it comes from Indian
24 Towing.

25 MR. LOWELL: No. I think the --

1 QUESTION: Well, where does -- what case does the
2 word operational come from?

3 MR. LOWELL: Go back to this Court's holding in
4 Dalehite, where the Court said that the negligence in that
5 case was on the planning rather than the operational level.
6 But what's interesting is that many courts and the
7 Government think that that's all the Supreme Court said in
8 that case. But, you know, Justice Reed's opinion went on,
9 and it had a very important conjunctive. Justice Reed's
10 opinion states that it was at the planning rather than
11 operational level, and, and it's a very important and,
12 involved considerations more or less important to the
13 practicability of the program.

14 You start with a decision about how you
15 characterize it, as planning or operation, but that's not
16 enough. You go on to see how it fits into the regulatory
17 scheme. That's exactly what the Fifth Circuit did in this
18 case. It calls it operational on the first part, but then
19 it does that same kind of balancing as Justice Reed
20 suggested in Dalehite to get to the determination of how
21 important that decision was to, in the words of Dalehite,
22 the program or the practicability of the program.

23 Under the proper analysis that this Court has set
24 out --

25 QUESTION: Excuse me, if you go on to that second

1 step anyway, what's the use of the first step? I mean,
2 what's the use of deciding whether it's planning or
3 operational?

4 MR. LOWELL: I think it is an aid, and only an
5 aid, to look back at some antecedent policy to determine
6 whether or not the act, as later this Court determined in
7 Berkovitz or in Dalehite, is the kind of act that is so
8 governed by regulation -- for example, in Dalehite. I mean,
9 down to the level of what bags to be used in fertilizer,
10 what coating to be used, how the temperature should be, were
11 all governed by regulation. I think when you use a handy
12 phrase as planning or operational or policy, it just means
13 that it's a way to characterize the activity. But it's not
14 all it does --

15 QUESTION: What's the use of characterizing it,
16 is what I want to know. It could be at the planning level
17 and not be so important to the furtherance of the program,
18 or it could be at the operational level and be important.

19 MR. LOWELL: Justice Scalia, I think it's --

20 QUESTION: So why take that first step?

21 MR. LOWELL: I think it just helps in determining
22 the scrutiny a court gives. I mean, I think there's an
23 extra warning, if you will, for decisions that courts
24 concede are on the planning level. I think therefore -- I
25 guess the Government has a better presumption, if you will,

1 that it affects some kind of regulatory policy than when it
2 can be characterized -- and many words have been used by the
3 courts: operational, proprietary, and ministerial. I think
4 it's just a kind of a careful way that you can determine
5 what kind of presumption. The Government would stretch that
6 to be a total presumption. I think it's just a handy
7 phrase.

8 I think what's important, though, and what the
9 Government mischaracterizes, is that the Fifth Circuit did
10 not simply do this mechanical operation versus policy. If
11 that was the case, the Fifth Circuit's decision could have
12 been as short as the district court and be three pages long.
13 Instead it went on to the kind of balancing that you talked
14 about -- the Court talked about just 2 years ago.

15 Under that proper analysis, Justice Scalia, what
16 happened was that the Fifth Circuit looked at two things.
17 They looked at Varig's quotation of the nature of the
18 conduct, not the level, to determine that only 10 of the 31
19 initial paragraphs in the amended complaint could survive.
20 Interestingly, all those occurred at the same operational
21 level. They then looked at Berkovitz to see if there was
22 any choice involved, and then, if there was a choice
23 involved, whether it was the kind Congress intended to
24 protect, in sifting through the normal regulatory acts, of
25 whether to merge Independent American, what kind of people

1 to send into Independent American, versus the extraordinary
2 acts of setting salaries, picking consultants, handing
3 collateral, dealing with loans.

4 As much as they may try to disguise it, the
5 petitioner --

6 QUESTION: Mr. Lowell, does the fact that the
7 things the Government did in a particular case were
8 extraordinary, does that bear on operational versus policy?

9 MR. LOWELL: No, not necessarily at all. I think
10 the fact that they are extraordinary here points out -- it's
11 not so much, you know, again --

12 QUESTION: Well, but -- you say it doesn't make
13 any difference?

14 MR. LOWELL: I think it's -- it's not outcome
15 determinative. It's not that because it's --

16 QUESTION: Well, why does the Fifth Circuit
17 mention it, then, if it has nothing to do with it?

18 MR. LOWELL: I think when you can label something
19 -- because it points out that there was no antecedent
20 policy. The fact that it's extraordinary gives you warning
21 and gives you insight to determine whether there was any
22 policy that governed, dictated, or in any way blessed the
23 acts that were taken below. When it --

24 QUESTION: Does the fact that it was
25 extraordinary, you think that militates against the exercise

1 of the discretionary exemption or for it?

2 MR. LOWELL: I think the fact that it's
3 extraordinary means that there is no policy that is
4 implicated --

5 QUESTION: Can you answer my question? I asked
6 you do you think, does the presence of something that's
7 extraordinary militate in favor of the discretionary
8 exemption or against it?

9 MR. LOWELL: I think, in the way you've asked it,
10 the fact that it's extraordinary militates against the --

11 QUESTION: Against it?

12 MR. LOWELL: -- application of the discretionary
13 function exemption. That's not -- it's not impossible to
14 hypothesize some facts that have never been done by a
15 regulatory agency, but would still be somehow caught up in
16 a policy or dictated. For example, I guess in Dalehite, I
17 think it was rather extraordinary in Dalehite that there was
18 all these activities -- bagging, coating, fertilizer at
19 certain temperatures. Up until that point, that was fairly
20 extraordinary. However, there were very precise regulations
21 antecedent to those actions that protected it under the
22 discretionary function exemption. Here there are no such
23 regulations of any kind.

24 I think as much as they may try to disguise it,
25 petitioner is seeking immunity for any act taken by the

1 Federal Home Loan Bank Board, and by extension, to other
2 regulatory agencies, as long as some choice had to be made,
3 without an inquiry into what kind of choice or why the
4 choice was made. That is, whether the choice was part of
5 or not part of a real regulatory scheme.

6 In the district court the Government asked for and
7 got this very broad exception which encompasses the rule so
8 that any act taken "in extension of the discretionary
9 function" is itself discretionary and protected. In the
10 court of appeals, with victory in its hands, the Government
11 asked and said there is simply no such thing in a thrift
12 regulatory context as a decision to regulate on one hand and
13 a decision to take over the management on the other.

14 And just in oral argument, Mr. Gerson stated that
15 now what they were doing was looking for any act protection
16 which was, quote, "consistent with regulatory scheme" or,
17 in answer to Justice Scalia's point, quote, "part of the
18 judgmental process of enforcement." This is just the next
19 in a line of cases in which the United States is asking this
20 Court for a broader exemption from liability than Congress
21 ever intended, or, as the Court has stated repeatedly, when
22 it says the Federal Tort Claims Act is a broad waiver of
23 immunity.

24 In Varig they asked for an exception for what they
25 then called core governmental activities. In Rayonier they

1 asked for what they then wanted, which was uniquely
2 governmental capacity. In Indian Towing they asked for what
3 was then called uniquely governmental function. In
4 Berkovitz they asked for an exemption in the same words they
5 use on page 2 of their brief before this Court, for acts
6 "arising out of regulatory programs." And just 6 minutes
7 or 10 minutes ago, the Government asked for acts which "are
8 derived from uniquely Federal interests." In each of these
9 cases the Court has rejected the Government's attempt for
10 such broad exemption in words almost remarkably similar to
11 that Mr. Gerson stated just a few minutes ago.

12 In the district court the Government got its broad
13 rule, that is, it got protection for any act which is an
14 extension of a discretionary function. And so the district
15 court did not carefully analyze the conduct alleged or allow
16 any discovery to develop the kind of record this Court had
17 before it in Dalehite, in Varig, in Indian Towing, in
18 Rayonier, and the kind of record the Court stated it needed
19 to deal with the second part of its recent Berkovitz
20 decision. The United States seems to acknowledge this
21 scanty record by feeling compelled to add so many facts of
22 their own from so-called background materials, which dispute
23 the facts as they are alleged to be.

24 For determining the issues in this case as
25 required by looking at conduct, as spoken to in Varig, and

1 the method and manner of the choices made, as spoken in
2 Berkovitz, there are only a handful of facts that are
3 necessary. First, respondent left his thrift, Independent
4 American, in 1984, for reasons having nothing to do with
5 Independent American. Second, at the time Independent
6 American was a healthy thrift with a positive net worth.
7 Third, the Federal Home Loan Bank Board, through individuals
8 on the scene, took over the day-to-day management of that
9 thrift, including picking employees, setting salaries,
10 resolving --

11 QUESTION: When you say took over, Mr. Lowell, do
12 you mean against, without the consent of the respondent or
13 with the consent?

14 MR. LOWELL: With the consent, Justice Rehnquist
15 -- Mr. Chief Justice. The issue of whether there's consent
16 --

17 QUESTION: And their action --

18 MR. LOWELL: -- is not dispositive of whether or
19 not the discretionary function exemption applies.

20 QUESTION: Their actions constituted more than
21 simply giving advice?

22 MR. LOWELL: Yes. I like that the Government even
23 recently in oral argument characterizes this as giving,
24 quote, "managerial guidance." As the court of appeals
25 rightly noted, out of the mouths of the regulators on the

1 scene came the actions of the people in the thrift. This
2 wasn't advice; this was direction. This was actually doing.
3 They may try to characterize this as advice, but --

4 QUESTION: Well, did the regulators purport to be
5 exercising legal control over the actions and the policies
6 of the thrift?

7 MR. LOWELL: I don't think that there was a
8 predicate. Well, there was no predicate that would
9 traditionally be in place, for example, a conservatorship
10 or receivership, cease and desist order, no supervisory
11 agreement of any kind. So if you say to me were they
12 exerting some legal authority, they weren't predicating
13 their acts on any piece of paper or decision by the Bank
14 Board to justify their intrusion into this thrift.

15 QUESTION: Well, are there any specific acts that
16 they took in the name of the savings and loan on their own
17 initiative?

18 MR. LOWELL: Oh, yes, they took many acts in the
19 names of the savings and loan. They hired a new consulting
20 firm. They set the salary of the chief operating officer,
21 who used to be an employee of the Federal Home Loan Bank of
22 Dallas.

23 QUESTION: I thought that was -- was that
24 mediation or did they set the salary? Did they order --

25 MR. LOWELL: They -- not only did they set the

1 salary, the man who got the money was the man who set the
2 salary.

3 Your -- this is one of the problems with a record
4 that is in the state that it's in right now, which is on a
5 motion to dismiss when you have notice pleading. If we were
6 developing the record you would find many of these acts were
7 not even remotely taken in the name of any regulatory
8 agency. They were all taken in the name of Independent
9 American.

10 QUESTION: When you say they set the salary, you
11 mean they told the person who set the salary what salary he
12 would set?

13 MR. LOWELL: I mean that this man, who was an
14 employee of the Federal Home Loan Bank of Dallas and was
15 moved from the Federal Home Loan Bank of Dallas into
16 Independent American, set his own salary, and did so in this
17 mode of --

18 QUESTION: What do you mean by he set his own
19 salary? Did he sign a piece of paper that had the legal
20 effect of setting his salary? Or rather, did he tell the
21 person who had that power?

22 MR. LOWELL: He went to the place where --

23 QUESTION: The latter.

24 MR. LOWELL: -- checks are written in Independent
25 American, and he said write me \$108,000 check as a signing

1 bonus. That's about as close to setting your salary as you
2 could possibly get in a factual context. And that's what
3 he did.

4 QUESTION: The person to whom he said that was the
5 person who had the authority to pay that amount or not.

6 MR. LOWELL: Some person in the bursar's --

7 QUESTION: Correct? That person could have said
8 no.

9 MR. LOWELL: That person could have said no.

10 Justice Scalia, I don't think that any of the
11 discretionary function cases will turn on whether or not the
12 acts of the Government are taken kicking and screaming or
13 taken by the fact that the people go along. It is the
14 actions themselves that --

15 QUESTION: I just want to know what you mean by
16 the fact that he set his salary, and that he did it.

17 MR. LOWELL: I mean that he -- I don't mean that
18 in the dead of night he came and wrote himself a check.

19 QUESTION: Somebody else had the power to do it,
20 and he had power over that person.

21 MR. LOWELL: Correct.

22 QUESTION: Okay.

23 MR. LOWELL: That's exactly what happened.

24 In addition to these various acts which cannot be
25 deemed just --

1 QUESTION: Well, what power did he have over that
2 person?

3 MR. LOWELL: He was put into Independent American
4 as the chief operating officer. He had the power to hire
5 and fire everybody else in the thrift. And not only was he
6 the chief operating --

7 QUESTION: Where is this alleged in the complaint?

8 MR. LOWELL: This is not alleged in the complaint.
9 This is the problem I have with answering questions that are
10 factually based, as Justice Scalia did, from what I know to
11 be the facts, rather than the state of the record which --

12 QUESTION: Well, what is there in the complaint
13 that indicates that the Government and its regulators took
14 active control as opposed to simply offering advice?

15 MR. LOWELL: I think that the paragraphs of the
16 complaint to set out the appendix say that they actually set
17 the salaries.

18 QUESTION: No, it says it mediated the salary
19 dispute, if that's the one you're referring to. That's at
20 (d) at page 15.

21 MR. LOWELL: On 15.

22 QUESTION: That's all that it says.

23 MR. LOWELL: That reference covers the fact that
24 we are talking about, Justice Kennedy. Again, one of the
25 issues that I have to address with the Court is the fact

1 that in the complaint, which was written 3-1/2 years ago at
2 a time that the Government had all the documents in this
3 case and the Government had all the witnesses in this case,
4 the notice pleading required gave adequate notice to the
5 Government that this wasn't a failure to warn case. This
6 wasn't a Varig case where you were concerned about whether
7 or not to assert regulatory authority. I think that neither
8 the district court nor the court of appeals had any problem
9 discussing these facts and determining, especially in the
10 court of appeals level, which of the 31 paragraphs went to
11 things which could be called discretionary, and which are
12 the ones that deal with a kind of involvement that go beyond
13 the discretionary function exemption.

14 In light of all these active, not just advice,
15 activities taken by the Federal Home Loan Bank Board, the
16 fourth important fact was that there was no supervisory
17 agreement in place and no regulation, or no guideline
18 dictating any of the conduct that we challenge.

19 And the last important fact --

20 QUESTION: May I go back to your salary example
21 for a minute? Supposing the Government agency had a policy
22 that whenever they got in this position with a financial
23 institution, that they would set the management salary at
24 the prevailing level in the business community right there,
25 and this is exactly what they did. Would that be covered

1 by the discretionary --

2 MR. LOWELL: In the way you asked me the question

3 --

4 QUESTION: Yeah.

5 MR. LOWELL: -- yes, it would be, because you
6 started your question by saying let's say they had a policy
7 of setting --

8 QUESTION: Right.

9 MR. LOWELL: -- the Government, the salary with
10 the prevailing rate. The interesting thing in this case is
11 that the Government in all the litigation thus far, even in
12 the facts which they put into footnotes in the briefs before
13 this Court, can't point to a single policy antecedent to the
14 acts of --

15 QUESTION: So we should read your complaint as
16 saying that they did these things without any policy
17 preceding the specific acts that would have called for these
18 things being done?

19 MR. LOWELL: That's right, Justice Stevens.

20 QUESTION: I see.

21 MR. LOWELL: The last fact was that these actions
22 taken when the Federal Home Loan Bank Board was making
23 decisions caused Independent American to lose what they
24 estimate at some \$400 million when the respondent left his
25 thrift in a positive net worth situation.

1 In addition to adding facts --

2 QUESTION: Mr. Lowell, you know, just as agencies
3 sometimes make policy by regulation, they sometimes make it
4 by adjudication on a case-by-case basis. So you can't say
5 simply because they chose to do it this way that that wasn't
6 an expression of the agency policy. They might have been
7 doing it the same way elsewhere.

8 MR. LOWELL: That is --

9 QUESTION: The mere fact that there's no
10 regulation governing it does not mean it's not a policy
11 decision. You often make policy case by case. We make
12 policy case by case.

13 MR. LOWELL: Your question would assume that these
14 people at the time actually -- it depends on whether policy
15 is the result of any action taken by a regulator or the
16 motive of the regulator. It seems to me that if anything
17 a regulator does ergo makes policy, then you are right. On
18 a case-by-case basis, everything is policy, therefore you
19 don't need a policy qualification to the discretionary
20 function exemption. But your hypothetical strikes me as at
21 least indicating that there was some balancing involved
22 before the act was committed.

23 Policy is not the result of a regulator's action.
24 It should be the reason for a regulator's action. And in
25 this case there is no evidence that there was, and we allege

1 that there was not.

2 In addition to adding facts, the United States
3 urges this Court to look at its case in context, first in
4 context of the savings and loan crisis, and then in context
5 of its entire regulatory framework. Well, the real context
6 are the facts of this solvent thrift in 1984 and 1985, not
7 what the Government wants to allege the crisis to be in
8 1990, and the entire regulatory framework is an issue before
9 this Court only as the United States wants to raise the
10 stakes to have it so.

11 In addition to mischaracterizing the Fifth
12 Circuit, the United States asserts the wrong Supreme Court
13 precedents. This case arises in a torts setting similar to
14 that suggested by this Court in its recent Berkovitz
15 decision, that is a case where Federal officials act without
16 there being regulations governing their action. It is not
17 governed by Varig, despite the United States' attempt to
18 make it so. It is true that neither the FAA in Varig, nor
19 the Federal Home Loan Bank Board here, had extensive
20 regulations.

21 But that is where the similarity ends. Varig
22 dealt with the regulation of third parties, and here it is
23 their own conduct in dispute. That contrasts the
24 traditional regulatory law enforcement role of agencies
25 versus what some courts have called proprietary or

1 ministerial.

2 The challenge in Varig was in effect to the
3 decision about the degree of supervision, whether to include
4 all planes, some planes, whether to do spot checks or not.
5 The United States tries to make this case such a similar
6 challenge by raising what is in effect a red herring that
7 what we are challenging is the decision to do informally
8 that which they could do formally.

9 First, we are not challenging that decision. It
10 makes no difference to our analysis of the law whether or
11 not they took these actions in the most formal setting or
12 not. Second of all, the suasion that they talk about
13 occurred after the takeover. There was no individual
14 balancing for each of the acts that we alleged to have been
15 done negligently.

16 QUESTION: Mr. Lowell, does the board have
17 authority in some circumstances to appoint a conservator?

18 MR. LOWELL: Yes, it does.

19 QUESTION: Well, what if it had gone ahead and
20 appointed a conservator. Would you have any action against
21 the board if you found that the conservator, that they
22 appointed someone who was just a lousy conservator, and by
23 doing some research they could have gotten a much better
24 conservator?

25 MR. LOWELL: No.

1 QUESTION: Why not?

2 MR. LOWELL: I think that their decision of who
3 to put into the thrift would be protected as a discretionary
4 function -- as the Fifth Circuit, by the way, held that we
5 had no cause of action left as to who was sent to
6 Independent American. But if you then say that this
7 conservator, on the scene, decides not to collect on loans
8 and destroys collateral, and then hires employees in a poor
9 way, and then doesn't take the day-to-day functionary
10 activities, I think the people left at the thrift after the
11 conservator was done would have a cause of action if --

12 QUESTION: Against the conservator or against the
13 Government?

14 MR. LOWELL: Against the United States, whoever
15 put in the conservator. If, but only if, the conservator's
16 actions on not collection on the loans, setting the
17 salaries, taking those kind of management decisions, did not
18 have an antecedent policy that either dictated or blessed
19 what he or she did on the scene. It is simply not the act,
20 but you must go back and determine what the reason or what
21 the nature of the choice was.

22 QUESTION: And then the question that would be,
23 what was the Government's policy with respect to what kind
24 of a conservator to appoint?

25 MR. LOWELL: No, not what kind of a conservator

1 to appoint. I think that that decision, as you pose it,
2 that question as you pose it to me would be immune. I think
3 if they decide that John Doe ought to be their, as opposed
4 to Sally Roe, I think that decision, as the Fifth Circuit
5 rightly held, would be immune under the Federal Tort Claims
6 Act. I think --

7 QUESTION: Then what is the -- what is the
8 genesis, the nature of the claim against the Government in
9 this case, in that --

10 MR. LOWELL: They did not appoint a conservator,
11 number one --

12 QUESTION: I mean in the hypothetical case. You
13 say there would be a claim against the Government.

14 MR. LOWELL: If the conservator is an employee,
15 official of the United States, acting under the authority
16 of the regulations. Now, I don't know in our hypothetical
17 whether the conservator plays that role, but I am assuming
18 that he does, or she does, then the answer is yes. Their
19 duty would be, because they were still in the clothing of
20 the United States.

21 The cases, and there are very few of them that
22 have raised this, all say unanimously that such a fact
23 hypothetical that you and I are positing raises liability.
24 That's the Emch case of the Seventh Circuit, the Carter case
25 of the District of California, the Hartford decision in

1 Franklin National Bank. Now, they all say that under
2 certain circumstances -- few of which were found in the
3 facts of those cases, by the way, after discovery, after
4 they had a chance to prove their case -- rose to the level
5 of being actionable, but all of them say that the FDIC or
6 the FSLIC can be held liable for those kinds of negligent
7 acts on the scene.

8 QUESTION: Mr. Lowell, in your response to the
9 Chief Justice you insisted that there had to be -- that
10 there must have been an antecedent policy. That is really
11 what you're urging, that there has to be an antecedent
12 policy?

13 MR. LOWELL: I mean antecedent, not counting out
14 the possibility that you stated, that policy is made at that
15 time. It doesn't have -- I am not saying that you cannot
16 --

17 QUESTION: Oh, so there has to be antecedent, not
18 excluding the possibility that it doesn't have to be
19 antecedent?

20 MR. LOWELL: No, it has to be antecedent either
21 already existing, or the act has to take place on the basis
22 of some policy-oriented decision being made right then and
23 there. But it can't be after the fact they go back and say
24 by the way, everything a regulator does is policy.

25 QUESTION: Well, but isn't it in a sense? I mean,

1 if -- you can have a policy that says no, no loans on real
2 estate worth less than \$500,000, or you can have a
3 conservator in possession who then, who -- when the first
4 thing comes up to him, says I'm not going to make a loan on
5 property worth less than \$500,000. Why is one a policy
6 decision and the other one not?

7 MR. LOWELL: This Court has stated that in order
8 to be protected there has to be economic, social, or
9 political policy considerations. Now, I think that means
10 that either they have to preexist the decision, or the
11 decision has to be seen as being made pursuant to them. But
12 if what that means is that after the fact the Government can
13 say that it was policy by result, I don't think you have an
14 exception.

15 I think that therefore all you need to decide is
16 was the Federal Home Loan Bank Board wearing its Federal
17 Home Loan Bank Board jacket, did they go in that day, and
18 did they take action. And I don't think that's what the
19 precedents of this Court mean is the way that you apply the
20 discretionary function exemption. At least that's not what
21 they have said, and you have said as recently as 2 years ago
22 in Berkovitz.

23 One thread throughout all the cases, no matter if
24 they are expressed as policy or discretion or planning, has
25 been that actions are protected if their challenge threatens

1 or jeopardizes the feasibility or practicability of the
2 program. So stated in Dalehite, when it said that it must
3 be on the planning level and be important to the
4 practicability. So stated in Varig when they said that
5 decisions are covered only if they directly affect the
6 feasibility and practicability of the Government regulatory
7 program.

8 The Fifth Circuit distinguished carefully between
9 those acts that could affect the program: the merger of
10 Independent American, which kind of person to put into
11 Independent American, versus those that could not:
12 mediating actual salaries, hiring their own contacts as
13 consultants, deciding which litigation to bring, and
14 disposing of collateral through putting it into bankruptcy.
15 Those acts that are left hardly threaten the feasibility of
16 any program or existing policy. Indeed the only policy
17 pointed to in the Government's brief runs directly contrary,
18 pointing to informal suasion as being appropriate only in
19 cases of small problems, not cases, as they allege
20 Independent American to be, in desperate need of regulatory
21 oversight.

22 There is no policy threatened here except if the
23 United States is able to persuade the Court that immunity
24 is co-terminus with any regulatory choice that they make,
25 so that any choice they make, as second-guessed by any

1 court, goes to their regulatory authority.

2 QUESTION: Mr. Lowell, can I ask you one question?
3 Maybe it's too elementary, but the -- did the Fifth Circuit
4 hold that, as a matter of Texas law, the portions of the
5 complaint that are, do, that are not within the
6 discretionary function exemption actually state a cause of
7 action for a tort?

8 MR. LOWELL: They say that it does state a cause
9 of action for a tort and leaves the question of whether or
10 not Mr. Gaubert, the respondent, has standing to bring them
11 under Texas law. But that standing question, as the
12 discretionary function, is very fact laden, and I suspect
13 it would depend on what Texas law holds on those issues.
14 But they do say it goes back for that purpose.

15 QUESTION: Thank you.

16 MR. LOWELL: There can be no policy threatened
17 here unless the Court accepts the Government's proposition
18 that anything taken in a Government context by a regulatory
19 agency is policy laden. When the facts or law are weak, the
20 United States again raises the specter of the flood gates
21 of litigation or stopping the governments in its tracks.

22 So is the message of amicus in this case. They
23 did so in Varig, they did so in Rayonier, they did so in
24 Muniz, and they do so again here. While they point to many
25 cases in the Justice Department, they have only been able

1 to point to one in the courts, notwithstanding that there
2 is a year and a half since this decision has been made, and
3 that one is an Independent American case just brought by a
4 different plaintiff.

5 The United States wants this Court to consider the
6 context, but we would submit that the immunity they seek
7 takes one important player, the Federal Home Loan Bank
8 Board, out of the context of the checks and balances that
9 now exists. Directors and officers are liable civilly for
10 their actions. Congressmen can be voted out of office or
11 disciplined for their actions in the savings and loan
12 crisis. Only the Federal Home Loan Bank Board would be
13 taken out of the loop if the Government gets the extent of
14 immunity they want.

15 Mr. Gaubert is stuck in the middle of a struggle
16 between Congress, the Court, and the Executive, where the
17 Executive keeps seeking a broader immunity, says it doesn't
18 want absolute immunity, but only posits an automobile
19 accident again and again as the only kind of act which
20 arises under the Federal Tort Claims Act. They seek a rule
21 not so much that the king can do no wrong, but that the king
22 can do wrong only when he is driving his royal carriage.

23 One issue before the lower courts and the court
24 of appeals was whether or not the regulatory takeover of
25 day-to-day management of a healthy thrift can ever be

1 actionable. Not that it is actionable, but what it can be.
2 If the Government finds in the record that is developed
3 below that they have grounds to show discretionary function,
4 they can move again for summary judgment, the correct
5 vehicle for testing these very fact-laden decisions.

6 Therefore, for the reasons set out in our briefs,
7 and in its decision, the Court should affirm the Fifth
8 Circuit's case and decision, give Respondent his day in
9 court to prove, as those in Dalehite and Varig and Indian
10 Towing and in Berkovitz were able to prove, that the
11 Government has done him wrong, and that he has an apt
12 remedy.

13 QUESTION: Thank you, Mr. Lowell.

14 Mr. Gerson, do you have rebuttal?

15 REBUTTAL ARGUMENT OF STUART M. GERSON

16 ON BEHALF OF THE PETITIONER

17 MR. GERSON: Yes, Mr. Chief Justice.

18 Let us see what it is that the Fifth Circuit
19 actually did hold with respect to the operational
20 distinction. At 885 Fed. 2d, at 1287, the court
21 specifically held, relying upon -- that Indian Towing,
22 quote, "did however establish a principal distinction
23 between policy decisions and operational actions." This
24 distinction still retains its force today and is dispositive
25 of this case -- of these cases. At page 1289 the court of

1 appeals held, quote, "Thus the FHLBB and FHLB-Dallas
2 officials were only protected by the discretionary function
3 exception until their actions became operational in nature,
4 and thus crossed the line established in Indian Towing."

5 The Fifth Circuit's reference to Berkovitz cannot
6 represent any shorthand for the appropriate test. Any such
7 suggestion must be undone by the court's reference to Indian
8 Towing as the source of the operational distinction. In
9 terms of Indian Towing, which, as the Chief Justice pointed
10 out, was not a discretionary function case, operational
11 means no discretion at all, as well as no Federal policy
12 countervailing the statute -- the State, in that case good
13 samaritan law.

14 This complaint was amended after some period of
15 time, and the particular acts set forth are the ones that
16 the court of appeals relied on. However, it is very clear,
17 I suggest, that there is indeed an antecedent policy here.
18 There is a statute, two statutes, which are cited, a
19 regulation in furtherance of that, and in particular a
20 resolution, all designed to further the antecedent -- the
21 twin antecedent policies of protecting depositor accounts
22 and safeguarding the taxpayer supported Federal Savings and
23 Loan Insurance Fund. Those policies long predate this case,
24 as does the resolution statute and regulation which premise
25 the regulatory activity here.

1 As to the particular acts in question, I would
2 note that at least some courts of appeals, including the
3 Fifth Circuit in a case we cite in the brief, Williamson
4 against Department of Agriculture, has recognized that
5 decisions regarding the credit worthiness of individual loan
6 applicants are discretionary functions in the context of a
7 Federal loan program.

8 QUESTION: Mr. Gerson, could you give us an
9 example of an act that these regulators could have taken
10 that they thought was in furtherance of their mission to
11 salvage these S&L's, which would not come within the
12 discretionary function exemption? Anything at all other
13 than driving a car?

14 MR. GERSON: I suppose that they -- I set forth
15 more than just driving the car. I talked about the decision
16 to hire in violation of conflict of interest standard,
17 taking the papers home and losing them, the failure to
18 adequately maintain machinery that causes damages. I don't
19 think -- I can't think of anything with respect to Mr.
20 Gaubert as the regulated person or entity in this case, on
21 these facts, that would fall without the exception.

22 But I do suggest that there are any number of
23 things where, where the -- you can hypothesize that the
24 regulators here -- as in Berkovitz, I assume that the
25 regulators in Berkovitz did not intentionally violate the

1 policies and procedures that stripped them of discretion.
2 And if something -- if there was something like that here
3 and the regulators violated those policies, albeit
4 unknowingly, then, I think, under Berkovitz that the -- that
5 negligence would be actionable.

6 QUESTION: Just, just tell me again why failure
7 to maintain the machines or closing down the lights, the
8 other example that you gave, why that would not come within
9 the discretion -- I mean, it's all done to save money to
10 this institution that is losing money.

11 MR. GERSON: Well, I would --

12 QUESTION: Why would it not come within the
13 exemption?

14 MR. GERSON: I think it's unlikely that such
15 activities would involve directly the Federal regulatory
16 policy interest here and the exercise of judgment with
17 respect to those things. I would countenance that under
18 some circumstances where the life and death of the
19 institution was at issue, that perhaps there was a policy
20 interest that transcended the -- this activity. But I would
21 also suggest that in virtually every such case, and we have
22 nothing like it here, there is a specific Federal policy
23 mandate to obey the traffic laws, to maintain equipment, to
24 precheck vaccines before they're cleared.

25 QUESTION: Well, I would suppose --

1 QUESTION: In your brief it sounds as though --
2 in some places it sounds as though you're saying that
3 because advice, rather, is all that is involved, not any
4 orders or anything like that, that that's a separate defense
5 wholly aside from discretionary function.

6 MR. GERSON: No, I don't think that it -- I don't
7 think that -- I mean, if we're saying that, we shouldn't be
8 saying that.

9 QUESTION: Well, the Government --

10 MR. GERSON: That's not our --

11 QUESTION: So, just giving advice can, which
12 happens to be followed, could impose liability on the
13 Government, even though this is a private corporation that
14 has no -- is not compelled to follow the advice?

15 MR. GERSON: Well, the issue of suasion and the
16 fact that the advice could be avoided relates to what I
17 suggest is a different point, which is that what the
18 respondent here, we suggest, is trying to litigate is what
19 he calls in his brief the extra-regulatory takeover of the
20 institution. And I would suggest, in the sense that -- at
21 which point this individual felt that that had occurred,
22 there are other kinds of causes of action and other places
23 to litigate such a claim, that it's clearly within
24 congressional intendment that a tort activity -- a tort
25 action is not one of them. I suggest, though, that there

1 is no operative -- there is no inherently operative,
2 inherent distinction related to the use of moral suasion.
3 This Court has noted, as I say, in Philadelphia Bank, in
4 Philadelphia National Bank in 1963, that moral suasion was
5 commonly used, and that that's the, that's the backbone of
6 --

7 QUESTION: Moral suasion? Economic suasion --

8 MR. GERSON: Well, economic suasion I guess you
9 would call it.

10 QUESTION: I guess so.

11 MR. GERSON: That's a fair point. And that that
12 sort of advice is generally followed, and that's what makes
13 for a successful system, a system which is described in the
14 regulation here.

15 I see my time has expired.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gerson.

17 The case is submitted.

18 (Whereupon, at 11:01 a.m., the case in the above-
19 entitled matter was submitted.)

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CERTIFICATION

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#89-1793 - UNITED STATES, Petitioner V. THOMAS M. GAUBERT

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