

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: JOHN J. McCARTHY, Petitioner V. MR. MADDIGAN,  
ET AL.

CASE NO: 90-6861

PLACE: Washington, D.C.

DATE: December 9, 1991

PAGES: 1 - 52

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

LIBRARY  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

202 289-2260

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'91 DEC 17 A10:55



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
PAUL M. SMITH, ESQ.	
On behalf of the Petitioner	3
MAUREEN E. MAHONEY, ESQ.	
On behalf of the Respondents	26
REBUTTAL ARGUMENT OF	
PAUL M. SMITH, ESQ.	
On behalf of the Petitioner	48



1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 90-6861, John J. McCarthy v. Mr. Maddigan.

5 Mr. Smith.

6 ORAL ARGUMENT OF PAUL M. SMITH

7 ON BEHALF OF THE PETITIONER

8 MR. SMITH: Thank you, Your Honor. Mr. Chief  
9 Justice, and may it please the Court:

10 This case involves a Bivens action that was  
11 dismissed on the grounds that the Federal prisoner who  
12 brought the action had not exhausted the Bureau of Prisons  
13 grievance procedure.

14 Now, in seeking reversal of that ruling, we are  
15 not contending that Bivens plaintiffs could never be  
16 required to exhaust an appropriate administrative  
17 procedure. Here, however, there are two key features of  
18 the existing grievance procedure that in our view make it  
19 fundamentally ill-suited to being the first stage of  
20 Bivens litigation by Federal prisoners.

21 First, that grievance process provides no remedy  
22 whatever to a potential plaintiff seeking compensation for  
23 a past constitutional injury. Second, the procedure  
24 contains a series of mandatory hurdles, beginning with a  
25 15-day filing deadline, that create a very high risk of

1       inadvertent forfeiture of constitutional claims.

2               Now, these features of the grievance process are  
3       not surprising in light of its origin. What we have here  
4       is a process that was created to provide an informal  
5       outlet for any and all inmate complaints. It's not  
6       limited to legal claims, it contains no standards that  
7       have to be applied, and it creates no right to anything  
8       other than a written response. It's basically an  
9       opportunity for a dialogue with prison administrators.

10              QUESTION: If there is an adequate  
11       administrative remedy, then is there a Bivens option at  
12       all?

13              MR. SMITH: Well, Your Honor, I think there  
14       could be a situation where you would have an  
15       administrative remedy that would be adequate enough to  
16       justify exhaustion, but not so comprehensive that you  
17       would want to give it --

18              QUESTION: Have we had a situation like that?

19              MR. SMITH: You haven't. But there's an  
20       analogy, certainly, under the Civil Rights for  
21       Institutionalized Persons Act, where Congress has mandated  
22       under certain circumstances exhaustion by State prisoners  
23       in 1983 actions, but still left in place the opportunity  
24       to go to court thereafter. And I think if you had a  
25       process similar to what is mandated in CRIPA you could

1 have a process, for example, that offers \$2,000 in damages  
2 and doesn't have a lot of due process, but still has some  
3 reason to exhaust it and still say people should be able  
4 to go to court thereafter.

5 QUESTION: Now this prisoner is no longer in  
6 Federal prison, as I understand it.

7 MR. SMITH: He was transferred to Federal prison  
8 temporarily and then went back to State custody. In fact,  
9 his term of imprisonment is now over. He's not in prison  
10 anywhere at this moment, Your Honor. He left Federal  
11 custody last spring.

12 QUESTION: Is he seeking damages?

13 MR. SMITH: This case entirely involves damages,  
14 Mr. Chief Justice. There was never any claim for anything  
15 else in this case.

16 Now, consider what happens when you take this  
17 informal process that I described, this dialogue process,  
18 and you import it into the Bivens litigation system and  
19 say it has to be pursued in every case where somebody's  
20 trying to get to court on a damages claim. Basically what  
21 you do at that point is you say, this prisoner who is  
22 trying to get compensation for his injury has to exhaust a  
23 system that doesn't provide any compensation, and has  
24 three tiers of review. And I think it's important to get  
25 a little bit concrete about how this works in practice.

1           Imagine a prisoner like petitioner, who is  
2   complaining about the medical care he received in prison.  
3   That prisoner might convince the warden that -- the  
4   initial level of the three levels of the process -- that  
5   he hasn't in fact been getting very good medical care.  
6   And the warden might say that in writing in response to  
7   the grievance. But the one -- the two things the warden  
8   wouldn't do at that point, he wouldn't comment in any way  
9   on the legal merits of any constitutional claim for  
10  damages, and he certainly wouldn't provide any  
11  compensation for any injury received by the prisoner.

12           So at that point you've got your grievance,  
13  you've gotten some kind of a response, even a somewhat  
14  favorable response, but what are you supposed to do when  
15  you're still just trying to get to court on your  
16  constitutional claim? At that point, apparently, you  
17  would have to continue exhausting because you haven't  
18  received what you're seeking. You'd have to appeal even  
19  though you in a sense won at the initial level.

20           QUESTION: The Government refers to the capacity  
21  of the prison to give some money under the Federal Tort  
22  Claims Act and says that presents the situation you have  
23  described, that they do have the power to give some money.  
24  Now, does the cause of action of this plaintiff  
25  incorporate a Federal Tort Claims Act claim? And is that



1 in fact available?

2 MR. SMITH: The complaint that was filed in this  
3 case, Your Honor, was limited to a Bivens action against  
4 the individual medical personnel in the prison. It did  
5 not include a Federal Tort Claims Act claim. It could  
6 have. The kind of claim he brought, medical malpractice,  
7 could be brought under the Federal Tort Claims Act. He  
8 would have had to exhaust the entirely separate Federal  
9 Tort Claims Act administrative procedure before he could  
10 have brought such a claim. And he didn't.

11 QUESTION: Did the Federal regulations  
12 explicitly note that as an exception?

13 MR. SMITH: The point I would make in response  
14 to the Government's argument about how you should file a  
15 grievance, because it might give you a settlement under  
16 the Tort Claims Act, is you've got two different  
17 procedures here; a grievance procedure that says it's not  
18 for tort claims, and the procedure for tort claims, which  
19 is an entirely different part of the CFR. And what  
20 they're saying in kind of a Rube Goldberg thing, is you  
21 should go over to this procedure because although it's not  
22 for tort claims, we might nevertheless consider it as a  
23 tort claim, and on our own initiative offer you a  
24 settlement under this other authority over here that you  
25 haven't pursued.

1           And I think there are several problems with that  
2   kind of a theory if you're going to make that the basis  
3   for justifying exhaustion of the grievance procedure.  
4   First of all, the petitioner had no way of knowing that he  
5   had this golden opportunity to get a settlement offer for  
6   damages by filing under the grievance process, which  
7   expressly says it's not for tort claims and it doesn't  
8   have any damages in it. So there's kind of a notice  
9   problem to begin with.

10           I also think basically the whole scenario is a  
11   little bit implausible. The idea that these Federal  
12   prison officials are sitting around taking these  
13   grievances that come in and plucking out those that look  
14   meritorious and making on their own initiative settlement  
15   offers to people that haven't even made any indication  
16   that they want to pursue a legal claim for damages, either  
17   under the Tort Claims Act or in court, strikes me as  
18   unlikely. And if it doesn't happen in any significant  
19   number of cases, then it certainly doesn't justify putting  
20   everybody through this three-level process.

21           QUESTION: Why didn't you bring your action  
22   under the Tort Claims Act? You didn't think you could  
23   win, I suppose.

24           MR. SMITH: Well, Your Honor, I think the  
25   decision was certainly made by a pro se inmate at the

1 time, and I actually don't know the answer to that  
2 question.

3 QUESTION: What would you think now about the  
4 Torts Claim Act?

5 MR. SMITH: Well, there are differences between  
6 the two in terms of the relief that's available and --

7 QUESTION: Yes. What's the standard -- what  
8 would you have to prove to win under the Tort Claims Act?

9 MR. SMITH: In this kind of case you would have  
10 to -- in some sense the standard of proof would be less.  
11 It would be more of a negligence case than the deliberate  
12 indifference standard that you'd have to meet under  
13 Estelle v. Gamble in a medical constitutional case under  
14 Bivens.

15 QUESTION: Well, what would the -- you think if  
16 you just proved negligence in this case you could win on  
17 your Tort Claims Act?

18 MR. SMITH: If he had brought a Tort Claims  
19 Act -- as I understand it, the Government has waived  
20 sovereign immunity and therefore, if there was a  
21 tort -- State law tort committed by these Federal  
22 prison --

23 QUESTION: Well, why should -- if there's this  
24 alternative route to go, why would we put up with a Bivens  
25 action?

1           MR. SMITH: Well that's the -- that whole issue  
2 was discussed at length in Carlson v. Green 11 years ago.  
3 And the Court indicated in that case that there are  
4 differences between the two causes of action, that Bivens  
5 claims give you greater deterrence because you can sue the  
6 individual wrongdoer, that they don't depend on the  
7 vagaries of State law. And sometimes there is no State  
8 analog, and you have no claim at all under the Tort Claims  
9 Act, or there are exceptions to the Tort Claims Act.  
10 There's also no jury trial under the Tort Claims Act, and  
11 there's no potential for punitive damages. So those are  
12 the four reasons --

13           QUESTION: That hasn't been regarded as  
14 dispositive in other cases where we've had, held -- Bivens  
15 claims have been preempted.

16           MR. SMITH: More recently, Mr. Chief Justice --

17           QUESTION: This is a suit against Federal prison  
18 officials, isn't it?

19           MR. SMITH: Yes, they were medical officials at  
20 Leavenworth Prison in Kansas.

21           QUESTION: So the Federal Tort Claims Act is  
22 available?

23           MR. SMITH: It's available, sure, but this is  
24 not the route that was pursued. And there will be -- many  
25 case that could be brought under Bivens that are not



1 overlapping with the Tort Claims Act, although I think  
2 this one does. And so one of the things that one would  
3 have to do if you're going to eliminate Bivens cases is  
4 make sure that you don't eliminate them in situations  
5 where the Tort Claims Act --

6 QUESTION: You think the standard of deliberate  
7 indifference would be close enough to intentional conduct  
8 to be barred by the Tort Claims Act?

9 MR. SMITH: Well, the -- as I read the Tort  
10 Claims Act it doesn't say we bar all intentional torts, it  
11 just bars specific intentional torts like assault and  
12 battery and things like that. There probably is room in  
13 there for some medical malpractice cases to meet the  
14 deliberate indifference test and also still be State law  
15 torts that would qualify for the Tort Claims Act. There  
16 probably is some overlap, but it gets very messy trying to  
17 figure out how to separate these two sets of claims and  
18 make sure that they're covered by both.

19 The other point I would make about this  
20 opportunity that the petitioner allegedly had to get a  
21 Tort Claims Act settlement is if that's what we're going  
22 to justify exhaustion on the basis of, why don't we just  
23 have exhaustion of a procedure that directly addresses the  
24 issue of damages? I mean, the only reason we're talking  
25 about this grievance procedure is because it's the thing

1     that happens to by lying around in the CFR. But if  
2     exhaustion is going to be justified on the basis that  
3     somebody ought to have an opportunity to seek damages and  
4     this opportunity exists, why not have a procedure that  
5     says you can ask for damages administratively and get an  
6     answer to your request for damages administratively rather  
7     than going into this grievance process, where you don't  
8     even know whether the issue of damages was considered or  
9     not considered. It depends on the initiative of whatever  
10    prison official was responding to a grievance.

11                QUESTION: But there still may be some benefits  
12    though, I suppose, by having a prompt administrative look  
13    at the facts.

14                MR. SMITH: I don't dispute that.

15                QUESTION: There may be some public benefit to  
16    that kind of thing.

17                MR. SMITH: I don't dispute, Justice O'Connor,  
18    the possibility that there are State interests served by  
19    having exhaustion of an administrative remedy in this kind  
20    of case. The point I would make, though, is that there is  
21    no reason why we should serve those State interests  
22    without at the same time having features in the procedure  
23    that offer a remedy and at the same time don't interfere  
24    with the legitimate interests of the prisoner.

25                Why not -- there's no reason those couldn't be

1 served equally well in a more adequate administrative  
2 process.

3 QUESTION: Well, do we have to look on a  
4 case-by-case basis at whether the remedy, the  
5 administrative remedy is adequate, or do we take a more  
6 global look at it?

7 MR. SMITH: I don't think it would depend on the  
8 individual case. There is no dispute here that in the  
9 grievance process there is no compensatory remedy. So if  
10 you're talking about a Bivens claim, then I think you can  
11 decide that issue and say we're going to exhaust -- we're  
12 going to require exhaustion in pure Bivens cases. Where  
13 the issue is damages, there ought to be a compensatory  
14 remedy of some magnitude available in the administrative  
15 process.

16 QUESTION: Swear a suit against State prison  
17 officials.

18 MR. SMITH: If this were a suit against State  
19 prison officials, in most States there would be no  
20 exhaustion, because in most States the standards of CRIPA  
21 have not been met and the general rule that there's no  
22 exhaustion in 1983 cases would apply.

23 QUESTION: Well, isn't there a Federal statute  
24 about exhaustion?

25 MR. SMITH: Yes, that's CRIPA, the Civil Rights

1 for Institutionalized Persons Act. And it requires that  
2 either the Attorney General or a court certify that the  
3 State exhaustion -- the State grievance procedure meets  
4 certain standards before they will require exhaustion.  
5 And as I understand it, it's only about 10 States where  
6 that has occurred in most cases.

7 QUESTION: Well, what about one of those States?  
8 You have to exhaust under that statute even though there  
9 isn't a damages remedy.

10 MR. SMITH: As I understand it, Your Honor,  
11 that's not right. The court, first of all, has discretion  
12 about whether to require exhaustion under CRIPA. And the  
13 Attorney General in putting out the regulations in 1980  
14 indicated if it's a pure damages case and the State does  
15 not provide compensation, the court shouldn't require  
16 exhaustion.

17 QUESTION: At all?

18 MR. SMITH: At all.

19 The other thing about CRIPA is you file your  
20 case in court, and then it's held for 90 days. So you  
21 don't have this other problem which I want to get to, this  
22 potential forfeiture of claims by failure to file the  
23 grievance very quickly before you get to court. And I  
24 think that is in fact maybe even a more serious problem  
25 with this argument for exhaustion in this case, is the



1 deadlines that you have to meet and the hurdles you have  
2 to get over, and the risk of forfeiture of constitutional  
3 claims that it creates.

4 I mean, you look at this procedure, you have to  
5 file your grievance within 15 days of a constitutional  
6 deprivation. And in fact, I think that's an overly  
7 generous way of describing it. What the regulations  
8 actually say is you have to complete whatever informal  
9 grievance resolution procedures the prison may have in  
10 place and then file your formal grievance -- all within  
11 that 15-day period after the alleged constitutional  
12 violation occurred.

13 At Leavenworth what that in means in practice is  
14 you have to file two forms: file an informal form, get a  
15 response, and then file your formal form all within 15  
16 days. And then when you lose, which is inevitable if  
17 you're seeking damages, since it doesn't provide damages,  
18 you have to appeal to the regional level and you have to  
19 appeal to the central office of the Bureau of Prisons.  
20 The first one has a 20-day deadline, the second one has a  
21 30-day deadline. I submit it's hard to imagine a system  
22 that could be better designed to make it likely that  
23 people who aren't represented by counsel will make a foot  
24 fault and forfeit their constitutional claims.

25 QUESTION: Did this petitioner comply with the

1 15-day period, or was he given some sort of excuse or  
2 extension?

3 MR. SMITH: This petitioner went directly to  
4 court thinking that he didn't have to exhaust because it  
5 was a pure damages claim. It was dismissed. He then went  
6 back and tried to exhaust. And his claim actually went up  
7 to the second level, the regional level, and was a few  
8 days late and was dismissed for being untimely at the  
9 second level back in the summer of 1990.

10 QUESTION: And then he did -- did he then file  
11 again or --

12 MR. SMITH: No, we're just reviewing the  
13 initial --

14 QUESTION: We were talking about the first suit.

15 MR. SMITH: Yeah. It was dismissed for failure  
16 to exhaust. What he argued to the court in the district  
17 court was essentially what we're arguing here, that  
18 because it's a damages case, exhaustion shouldn't be  
19 required, as several circuits have held.

20 QUESTION: Well, suppose he had included in the  
21 complaint injunctive or declaratory relief as a prayer?

22 MR. SMITH: If he included that --

23 QUESTION: Now there it might make a difference  
24 for administrative procedure. But would you still be here  
25 arguing that the 15-day deadline makes it inadequate even

1 if injunctive relief were sought?

2 MR. SMITH: I think that the consensus in the  
3 lower courts is that in an injunctive case you do have to  
4 exhaust because there's clearly a remedy. They can stop  
5 doing whatever they're doing. And the 15-day deadline is  
6 also a much less serious problem in the case involving  
7 prospective relief because if they're doing something  
8 every day, and you miss the deadline, you can just file it  
9 again. There's no forfeiture problem when -- because the  
10 clock essentially keeps running continuously for an  
11 ongoing problem as to which you're seeking prospective  
12 relief. So both the forfeiture problem and the remedy  
13 problem are quite different in an injunctive case, and  
14 that's why I think it's clear that no court has ever held  
15 that you should be able to go and seek an injunction  
16 against Federal prison conditions without trying to --

17 QUESTION: Mr. Smith, I'm not sure you've  
18 answered Justice O'Connor's question. What is your view  
19 about a mixed complaint?

20 MR. SMITH: Okay. A mixed complaint, I think,  
21 ought to be held as well. I think that that probably is  
22 the right way to handle it, that if you have both, you  
23 ought to go ahead and file.

24 Now, there could be different ways to handle it.  
25 It does get messy. For example, someone might file a

1 damages complaint and then still seek prospective relief  
2 from the grievance process and kind of split his claim  
3 that way. And it does get messy. I think the right way  
4 to handle that, frankly, is to have a grievance process  
5 that has some compensation in it and make everybody with  
6 every kind of complaint exhaust it.

7 QUESTION: I know, but we don't have that now.  
8 What about a mixed -- I'm still not quite clear. What  
9 should a judge do with a mixed complaint in which damages  
10 are sought and there's been no exhaustion?

11 MR. SMITH: I guess my view, Justice Stevens,  
12 would be that the court ought to hold on to the damages  
13 element of the case and tell them to go exhaust on the  
14 prospective relief and come back and then litigate the  
15 case at that stage so that there's no waste of judicial  
16 resources at the same time that the case is held at the  
17 district court level.

18 Now, this kind of maze that you have to go  
19 through, it seems to me, is the kind of thing that this  
20 court would never tolerate in any other context. And I  
21 would point out that one thing that it does is it creates  
22 severe discrimination against Federal constitutional  
23 claims vis-a-vis State law claims. For example, a  
24 prisoner who wants to bring a common law claim under the  
25 Federal Tort Claims Act has 2 years by statute to file his



1 initial administrative form. But if he wants to bring the  
2 same complaint under the Constitution under Bivens, he has  
3 this 15-day deadline.

4 And this Court has many times noted, certainly  
5 in Wilson v. Garcia and Felder v. Casey and elsewhere that  
6 in the 1983 context such discrimination against Federal  
7 claims is a severe problem in examining the kinds of  
8 statute of limitations that might or might be borrowed  
9 from State law in the 1983 context.

10 QUESTION: What you're comparing with here,  
11 though, is two Federal claims: one under the Federal Tort  
12 Claims Act and the other under the Constitution. The fact  
13 the Federal Tort Claims Act may subsume some State law  
14 claims doesn't make it any less a Federal remedy.

15 MR. SMITH: That may be. I guess -- the Federal  
16 Tort Claims Act can be viewed as a Federal remedy or as a  
17 waiver of sovereign immunity on State claims. And I guess  
18 in some sense it is a Federal remedy, certainly because it  
19 creates a different defendant, the United States, rather  
20 than the individual tortfeasor. That's true. The  
21 underlying issues, though, certainly are State law tort  
22 issues.

23 QUESTION: Why couldn't we hold that you have to  
24 exhaust for that as well, so even though it has a 2-year  
25 statute, if you haven't -- if you rendered it impossible

1 for you to exhaust, you're out of court?

2 MR. SMITH: Well, what the statute says --

3 QUESTION: Is that possible?

4 MR. SMITH: What the statute says is that you  
5 have 2 years to file your administrative claim with the  
6 agency that administers your -- that involves the torts.  
7 So I think it would be difficult for this Court to require  
8 some prior administrative filing under the Federal Tort  
9 Claims Act because the statute is quite clear that you  
10 have that 2-year period for your initial administrative  
11 filing.

12 QUESTION: Can you give us some examples of  
13 Bivens claims that would not have a counterpart under the  
14 Federal Tort Claims Act?

15 MR. SMITH: Sure. There are, for example,  
16 intentional assaults under the Tort Claim -- are not  
17 covered under the Tort Claims Act. There is an exception  
18 for law enforcement officials who do commit intentional  
19 assaults, that is covered. So the question then is what  
20 are prison guards, what are prison medical doctors? Are  
21 they law enforcement people? And that's an unsettled  
22 question.

23 Discretionary functions are not covered under  
24 the Tort Claims Act, and they could still give rise to  
25 constitutional claims -- if you were put into maximum

1 security for some punitive reason related to your exertion  
2 of First Amendment rights, things like that. There are  
3 others, as well. But there certainly are some cases.

4 Now, I want to recognize again that first of  
5 all, there's legitimate concern in all courts about  
6 frivolous prison litigation and the number of cases that  
7 are being filed. The point I would make about that is  
8 that this maze of hurdles that you have to go through is  
9 not a legitimate response to that. First of all, who's  
10 going to be injured by it? Not the person who files 25  
11 cases a year, who's a litigious prisoner. It's the  
12 unsophisticated prisoner who may have a very serious  
13 injury, but may not realize for a few weeks or months that  
14 he has a constitutional claim, at which time it will be  
15 too late.

16 QUESTION: Well, you do concede then that the  
17 Government, with a properly drawn regulation under its  
18 existing statutory authority, could require an exhaustion  
19 process for a Bivens claim?

20 MR. SMITH: I don't believe the Government could  
21 require. I do think the Government could create an  
22 appropriate process and ask this Court to require it as  
23 the institution that controls Bivens procedure in the  
24 absence of action by Congress.

25 I don't know that an executive official can put

1 out a regulation that says, in constitutional litigation  
2 here's the route you have to follow. But I think if they  
3 create a procedure that's available that provides some  
4 compensation and gives you fair deadlines to meet and not  
5 lots of hurdles to cross over, this Court, I think, could  
6 reasonably at that point, even without action by Congress,  
7 require exhaustion.

8 QUESTION: Well, would there be statutory  
9 authority for such a properly drawn regulation?

10 MR. SMITH: Certainly there would be no problem  
11 with them creating a procedure that doesn't have a 15-day  
12 deadline and three levels of review. Whether they have  
13 statutory authority to provide monetary compensation on  
14 Bivens claims at the administrative level before they're  
15 filed in court is an issue on which I -- perhaps they  
16 could provide a better answer than I can, Your Honor. I  
17 think they probably could because they already have a  
18 regulation that seems to provide settlements to, in cases  
19 involving Federal employees, after they're in  
20 court -- that's 50.15, 28 CFR. And I don't know that  
21 there's any statutory authority for that either. So I  
22 assume they could probably back that up to the  
23 administrative level if they wanted to and create an  
24 analog to the Federal Tort Claims Act administrative  
25 procedure for Bivens claims.



1           Indeed, they probably could be built in  
2 together. You file in one place for both kind of  
3 procedures. You get an answer, we'll give you some money  
4 or we won't at that point, and then go to court. I think  
5 they probably have statutory authority to do that.

6           QUESTION: If Congress decided to do something  
7 like the legislation involving State prisons, it could do  
8 that.

9           MR. SMITH: Absolutely. Congress could do that.  
10 The only thing that would limit what Congress could do  
11 would be constitutional limitations. And I think there  
12 might be some if Congress created a procedure that was so  
13 unfair that -- you know, if they gave you 20 minutes to  
14 file your constitutional claim, or something like that.  
15 But other than that, Congress has the authority certainly  
16 to do that.

17           Now, let me just --

18           QUESTION: You consider a Bivens claim a  
19 constitutional claim, not -- it's not a sort of like a  
20 negative commerce clause, our guess as to what Congress  
21 wants in the absence of different provision by Congress?

22           MR. SMITH: Well, I guess it is a remedy for a  
23 constitutional claim. Clearly, it has to be -- the  
24 underlying violation has to be a constitutional claim.  
25 Whether or not there's a constitutional requirement that

1     this remedy exists in the absence of Congress, or whether  
2     it's a common law decision by this Court --

3             QUESTION: That's what I had always thought.

4             MR. SMITH: I think of it as a common law  
5     decision by this Court, just as the Court makes decisions  
6     in the statutory area or in other kinds of -- or State law  
7     courts make in other common law areas, this is the kind of  
8     field of Federal common law that has been created to help  
9     enforce the Constitution in the absence of congressional  
10    action.

11            QUESTION: And I suppose, though, although you  
12    might not -- and I think you gave some persuasive reasons  
13    why you should not hold that the Federal Tort Claims Act  
14    supersedes Bivens, what about the scheme of remedies  
15    provided in Federal prisons? Why -- I mean Congress has a  
16    number of statutes that interlock and that give prison  
17    officials the right to establish this grievance procedure  
18    for violations. Why could not that be interpreted as, in  
19    effect, Congress supplanting Bivens remedies with respect  
20    to those matters that it's given the prison authorities  
21    power to provide for?

22            MR. SMITH: Well, Your Honor, if there were a  
23    procedure created by Congress that provided compensatory  
24    relief of a substantial nature and had due process for  
25    that claim, I think that would be a situation in which

1 this Court could very seriously consider the issue, as in  
2 Bush v. Lucas or Schweiker v. Chilicky, the issue of  
3 whether that preempts Bivens claims.

4 QUESTION: Do you think the Constitution  
5 requires monetary relief? I thought you said it was  
6 common law that we're sort of filling in the interstices.  
7 I thought Congress could abolish that monetary relief if  
8 they wanted to.

9 MR. SMITH: The only point I'm making now is  
10 that if you're going to eliminate Bivens on the basis of  
11 some remedy that exists, it ought to be a significant  
12 remedy, or there at least ought to be some affirmative  
13 indication from Congress that it doesn't think there  
14 should be compensation, because this Court has already  
15 indicated its judgment that compensation is an appropriate  
16 remedy. And I would think at that point you'd want to  
17 wait for a pretty strong indication from Congress to get  
18 rid of compensation all together.

19 The other point I'd make is it's not like  
20 Congress has specifically encouraged grievance procedures  
21 or authorized this specifically. This is entirely a  
22 creation of Bureau of Prisons under statutes which say  
23 things like, you're authorized to run the prisons.

24 Just one more point about Congress, and then  
25 I'll reserve the balance of my time. I do think it's

1 important to recognize that CRIPA does not support  
2 exhaustion in this case for the reasons that I said  
3 before. CRIPA first of all prevents forfeitures of claims  
4 because you file in Federal court first. They then hold  
5 the case for 90 days, and say go exhaust there. So you  
6 don't have this inadvertent forfeiture beforehand based on  
7 some State law deadline for your grievance.

8 And as I said before, the Attorney General took  
9 the view when the regulations under CRIPA were put out,  
10 that you don't have to exhaust a futile procedure. If you  
11 have a damages claim, and there are no damages available,  
12 then you don't have to exhaust. So CRIPA, if anything,  
13 supports our side in the case. The point I'd make is  
14 ultimately you -- there could be a procedure. It's just  
15 that they haven't created it yet. And there's no reason  
16 to rush to borrow this one because it happens to be in the  
17 Code of Federal Regulations, even though it's clearly  
18 inadequate for the reasons I've stated.

19 Thank you.

20 QUESTION: Thank you, Mr. Smith.

21 Ms. Mahoney.

22 ORAL ARGUMENT OF MAUREEN E. MAHONEY

23 ON BEHALF OF RESPONDENTS

24 MS. MAHONEY: Mr. Chief Justice, and may it  
25 please the Court:



1           The dispute in this case really has come down to  
2   it's not a question of power. Everyone here is in  
3   agreement that this Court has the discretion to require  
4   exhaustion of this procedure as part of its power to  
5   fashion an appropriate Bivens remedy. The issue really is  
6   whether or not the Bureau of Prisons has designed an  
7   appropriate grievance procedure. And that issue, we  
8   submit, is firmly entrusted to the BOP and its expert  
9   judgment about what's going to work in this prison system.

10           The way that the system is designed is to serve  
11   a variety of purposes. And in fact, the petitioner does  
12   not dispute that this system does serve very, very  
13   important institutional purposes. The 15-day requirement  
14   that they say is so prejudicial to the inmate is for the  
15   benefit of not only the inmate complaining but also the  
16   other inmates within that system. Unless the prison  
17   has --

18           QUESTION: Ms. Mahoney, what if the prisoner is  
19   beat up and unconscious in the hospital for 2 weeks?

20           MS. MAHONEY: Your Honor, that would be -- he  
21   would certainly be excused from meeting the 15-day  
22   deadline. If I could just describe how the 15-day  
23   deadline works, I think it would satisfy any concern that  
24   this is somehow --

25           QUESTION: Are there provisions for excuses?

1 MS. MAHONEY: Absolutely, Your Honor. The  
2 regulations specifically provide that the inmate is to  
3 file his complaint, which is a simple one-page statement,  
4 within 15 days of the date of occurrence, but that the  
5 Bureau of Prisons shall -- and I emphasize shall -- waive  
6 that time limit if there is any, quote, "valid reason for  
7 delay." And even if there is no valid reason for delay,  
8 the Bureau of Prisons would retain discretion to waive the  
9 time limits.

10 QUESTION: Have you ever been in a Federal  
11 prison?

12 MS. MAHONEY: Your Honor, I've been in a State  
13 prison. I don't believe I've ever been in a Federal  
14 prison.

15 They do retain the authority to waive the time  
16 limits, and as I indicated, it is mandatory if there's any  
17 valid reason. In practice, it is liberally applied. In  
18 fact, in cases such as Mr. McCarthy's, where the  
19 allegation is one of medical negligence, it is the  
20 practice of the BOP not to hold them to the 15-day  
21 requirement even if they miss it, because of the serious  
22 nature of the problems that stem from having doctors who  
23 are not carefully treating patients.

24 And in fact, I'd like to point out that in this  
25 case, when Mr. -- the record indicates from the Tenth

1 Circuit that when Mr. McCarthy went back to the prison to  
2 try to exhaust his claim, the warden did in fact  
3 investigate his claim of medical malpractice, even though  
4 it was filed more than 2 weeks late, and did not dismiss  
5 it for lack of timeliness. It was only after the  
6 petitioner appealed to the regional director 2 days late  
7 that it was dismissed, that the appeal was dismissed for  
8 untimeliness. But there was an investigation of the facts  
9 and it was considered on the merits. And we don't know  
10 why Mr. McCarthy --

11 QUESTION: Well, if the prison did not excuse a  
12 delay in filing an administrative grievance, would the  
13 Bivens action, then, have to be dismissed by the court for  
14 the failure to exhaust in a timely fashion?

15 MS. MAHONEY: Your Honor, I think it would be up  
16 to this Court in its equitable discretion to determine  
17 whether the reason for failure to follow the procedural  
18 rules established by the system should be excused. That's  
19 precisely the type of analysis that this Court has  
20 conducted for years in the habeas context. And in cases  
21 where there is a deliberate bypass of those procedural  
22 rules, the Court has not excused the failure. And I think  
23 the same should apply in this case.

24 QUESTION: Do you think that the procedure, the  
25 grievance procedure is adequate when only monetary damages

1 are sought as relief?

2 MS. MAHONEY: Yes, Your Honor, for a number of  
3 reasons. First of all, we have to measure the system in  
4 accordance with the way it works in practice. Even though  
5 Mr. McCarthy may say he only wants damages, in most cases  
6 there are other things that the inmate wants. In this  
7 case, he wanted more medication. He wanted different  
8 medication. He wanted a new cell. If in fact he had  
9 filed his grievance and the warden had decided to give him  
10 any one of those things, he probably never would have  
11 filed his damage action. And that's what the Fifth  
12 Circuit in fact found in the Catalanotto case dealing with  
13 1997(e) procedures. It said even if there is no monetary  
14 remedy, we still should require exhaustion because in many  
15 of these cases there will be a remedy that satisfies the  
16 inmate, even though he claims he only wants damages.

17 Second, in this case --

18 QUESTION: Of course, that's pretty speculative  
19 on your part, isn't it, Ms. Mahoney?

20 MS. MAHONEY: No, Your Honor, I don't think it's  
21 speculative at all. It's the practice --

22 QUESTION: I heard you say probably he wouldn't  
23 bring his case. Probably.

24 MS. MAHONEY: Your Honor, the experience of the  
25 BOP is that many, many inmates who obtain some sort of



1 relief in the administrative process never file a claim  
2 even if they theoretically, or even if they've asked for  
3 money to begin with. It simply -- and in addition, Your  
4 Honor, they also find that many never file a claim even if  
5 they don't get relief. We have to keep in mind that  
6 these -- that prisoners often have a motivation to sue for  
7 harassment and intimidation and that if we make it easy  
8 for them to file a complaint in Federal court against one  
9 of their guards or their doctor the day that they have a  
10 disagreement with them --

11 QUESTION: Well, I agree with all that, but  
12 nevertheless, you were confronted with the fact there's no  
13 provision for damages in a grievance procedure, is there?

14 MS. MAHONEY: Your Honor, there is the potential  
15 to settle the claim. And I will turn to that right now.  
16 This works both as -- this procedure works as an  
17 opportunity for the BOP to give an administrative remedy  
18 such as new medication or changing a cell, but it also  
19 works as an opportunity to give them notice of a claim so  
20 that they can use their settlement authority to settle the  
21 claim if they believe there is some merit or --

22 QUESTION: Ms. Mahoney, are there any examples  
23 in the record that you can call our attention to where the  
24 Government has in fact paid money to any prisoners on  
25 Bivens claims?

1 MS. MAHONEY: Your Honor, there is no record in  
2 this case to speak of. The Government --

3 QUESTION: You described the general practice  
4 and what happens, but there's nothing in the record. Can  
5 you point to any objective support for the proposition  
6 that in the past there have in fact been monetary payments  
7 on Bivens claims?

8 MS. MAHONEY: Your Honor, the only thing I can  
9 do, I'd be happy to submit something supplemental. I can  
10 make a representation to this Court on behalf of the  
11 United States that yes, in fact there are claims that have  
12 been asserted by inmates in this grievance procedure, that  
13 theoretically could have been cast as Bivens claims that  
14 have been settled. Because what --

15 QUESTION: Settled by the payment of money?

16 MS. MAHONEY: Settled by the payment of money.  
17 That's correct, Your Honor. Because the way this works is  
18 that the inmate files his notice --

19 QUESTION: And those claims also could have been  
20 brought as Federal Tort Claims Act claims?

21 MS. MAHONEY: Yes, Your Honor.

22 QUESTION: Are there any that could not have  
23 been brought as Federal Tort Claims Act claims where a  
24 Bivens payment of money has been made?

25 MS. MAHONEY: In settlement or after judgment?

1 QUESTION: In settlement.

2 MS. MAHONEY: Not that I know of, Your Honor. I  
3 can --

4 QUESTION: That's, of course, where the problem  
5 is critical because there is a category of Bivens claims  
6 for which there's no Federal Tort Claims Act remedies.

7 MS. MAHONEY: Well, Your Honor, if I could --

8 QUESTION: And if you addressed yourself to that  
9 problem, then I find you more persuasive.

10 MS. MAHONEY: All right, I'll address myself to  
11 that one. I think that that category is probably quite  
12 small because if we look to the FTCA --

13 QUESTION: But this case isn't in that category.

14 MS. MAHONEY: It is in -- excuse me, it is in  
15 the category of cases that could be settled under FTCA  
16 authority, Your Honor, because this case, while he claims  
17 it is a Bivens case, a case of deliberate indifference, it  
18 certainly can also be characterized as a malpractice  
19 claim, which is --

20 QUESTION: Well, correct me if I'm wrong, but I  
21 thought that in that case the regulation doesn't apply at  
22 all because it exempts tort claims.

23 MS. MAHONEY: Well, Your Honor, there is a  
24 separate procedure for tort claims, but it's not that it  
25 does not apply. If the inmate brings the grievance to the

1 attention of the prison officials through this  
2 administrative remedy process, and they wish to treat it  
3 as a claim that could be settled under its FTCA authority,  
4 they simply ask the inmate to file an additional form and  
5 exercise their authority to settle the claim.

6 QUESTION: Well, Ms. Mahoney, though, it says in  
7 the regulation filings will not be accepted under the  
8 administrative remedy procedure for tort claims.

9 MS. MAHONEY: Your Honor, the way that that has  
10 been applied by the Bureau of Prisons is if an inmate says  
11 the only thing I want is a Federal Tort Claims Act suit,  
12 they will treat it as an FTA suit which has a separate  
13 administrative claims process. And let me explain why  
14 there's a separate process. Congress established under  
15 the Federal Tort Claims Act that there should be  
16 administrative exhaustion of FTCA claims, and they  
17 provided a variety of aspects of that system. And it has  
18 not been up to the Bureau of Prisons to establish its own  
19 system for pure FTCA claims. And for that reason those,  
20 the pure FTCA claim needs to be -- it's a very similar  
21 process, but it has some separate provisions.

22 QUESTION: Well, do you take the position that  
23 this particular claim is a pure Federal Tort Claims Act  
24 claim?

25 MS. MAHONEY: No, Your Honor, he has styled it



1 as both a -- he has styled it as a Bivens action. It's a  
2 question of --

3 QUESTION: Well, do you say that the Federal  
4 Tort Claims Act covers his entire complaint?

5 MS. MAHONEY: No, Your Honor, if he were correct  
6 that these doctors engaged in wanton and deliberate  
7 conduct subjecting him maliciously to injury, he might  
8 well be entitled to damages above and beyond that which he  
9 could get in a Federal Tort Claims Act suit. But Your  
10 Honor, we're not submitting that he's required to take a  
11 settlement under our FTCA authority. He would certainly  
12 have the option, if we offered him money -- if we said we  
13 can settle your claim and we'd like to do so, he could say  
14 no, thank you very much, I have finished my exhaustion,  
15 and I'm heading to Federal court because what I want are  
16 punitive damages paid out of the pockets of these  
17 defendants. He retains that right.

18 All we are asking for is an opportunity to let  
19 the grievance process work, to let us sort through these  
20 claims. Let us determine if there is some way to settle  
21 it short of coming to Federal court. It's a very quick  
22 process, it's an easy process. In the ordinary case, the  
23 remedy is complete within 3 months.

24 QUESTION: Why -- can you tell me, why is it  
25 that a Bivens claim can't be categorized as a tort claim?

1 MS. MAHONEY: No, Your Honor, I'm sorry. This  
2 could be categorized as either a Bivens claim or a tort  
3 claim. There's an overlap.

4 QUESTION: Why can't a -- isn't a Bivens claim  
5 also --

6 MS. MAHONEY: Oh, under our regulation?

7 QUESTION: Yes. Why isn't it that a Bivens  
8 claim can't be thought of as a tort claim under your  
9 regulation?

10 MS. MAHONEY: Because simply, it could be except  
11 that it's not. The BOP established this regulation and  
12 it's interpreted its own authority, and it has  
13 consistently interpreted it to apply to any claim relating  
14 to any aspect of imprisonment, except for those claims in  
15 which a prisoner says I want an FTCA remedy only.

16 QUESTION: Did it make that -- did it change  
17 that interpretation after Congress passed the 1983  
18 grievance process statute?

19 MS. MAHONEY: No, Your Honor. It has been using  
20 the regulation in this way for --

21 QUESTION: It has been consistent at all times?

22 MS. MAHONEY: Your Honor, I don't want to say  
23 that it's been consistent at all times. I don't know  
24 enough about what other things may have happened in the  
25 past, but I can say that there has been a persistent

1 effort to require inmates to bring any kind of grievance  
2 that they have, whatever it relates to through this  
3 process, because it serves such important interests of the  
4 institution to get notice within 15 days to investigate it  
5 and to serve its purposes.

6 I don't think that this inmate --

7 QUESTION: Why wouldn't the regulation be  
8 rewritten to make that clear if that's the situation?

9 MS. MAHONEY: Your Honor, if that's what  
10 required, BOP certainly would do that. But I think that  
11 that would be sort of an unnecessary hurdle at this point.  
12 There's no indication that this inmate, that Mr. McCarthy  
13 did not understand that the BOP in fact required him to  
14 bring this claim under his administrative -- under the  
15 administrative grievance process.

16 And in fact, when he filed his Federal  
17 action -- the Tenth Circuit's been quite clear on it, Your  
18 Honor, for more than 10 years since Brice v. Day. So this  
19 inmate knew, and in fact he fully briefed the issue of the  
20 exhaustion cases in other circuits at the time that he  
21 went to Federal court. In addition, the judge in this  
22 case dismissed his claim for failure to exhaust, telling  
23 him he needed to go exhaust before his 15 days had even  
24 expired. So he didn't lack notice that he was required to  
25 do it. And when he filed his grievance with the warden,

1 they didn't reject it because it was a tort claim. They  
2 went ahead and considered it on the merits, had a factual  
3 investigation, and responded to him saying that they  
4 thought what was appropriate was for him to get  
5 psychiatric care, and they were making it available.

6 So it is clear from this record that they have  
7 in fact encouraged inmates to use this grievance system  
8 and that it has in practice not worked any undue  
9 prejudice. Again, though, if Mr. McCarthy came to the  
10 Federal district court, filed a new complaint and said, I  
11 didn't exhaust because it was absolutely unclear that I  
12 had to resort to that procedure, that would presumably be  
13 a reason to provide equitable relief. On this record,  
14 though, it is clear that he cannot say that. He knew he  
15 was required to exhaust, the court told him so. And the  
16 warden went ahead and considered his claim, even though it  
17 was 2 weeks late. So I don't think that we have that  
18 problem in this case.

19 QUESTION: What authority does the Bureau of  
20 Prisons have to provide monetary relief under this  
21 particular procedure where the claim is not under the  
22 Federal Tort Claims Act?

23 MS. MAHONEY: Your Honor, this particular  
24 procedure does not spell out what relief will be available  
25 and whether it be monetary or nonmonetary.



1 QUESTION: Oh, I know, but what  
2 authority -- where does it get the -- where does the BOP  
3 get the authority to pay money?

4 MS. MAHONEY: The Attorney General has delegated  
5 authority to the Bureau of Prisons to settle claims for  
6 tortious conduct against Federal prison officials pursuant  
7 to the authority under the Federal Tort Claims Act.

8 QUESTION: Well, I know, but this is -- I just  
9 said, what authority is there for a non-Federal Tort  
10 Claims Act to give money?

11 MS. MAHONEY: Well, Your Honor, it's all a  
12 question of characterization. Mr. McCarthy could have  
13 easily styled this action as an FTCA claim, and certainly  
14 in our settlement powers we could characterize it as  
15 exactly that. We could say, look, you called this a  
16 Bivens action, but what you're really complaining about is  
17 the malpractice of our doctors.

18 QUESTION: Well, I know, but you say that  
19 what -- if this plaintiff wants to prove deliberate  
20 indifference he might be able to get much more money than  
21 the Federal Tort Claims Act, so it would not be a Federal  
22 tort claims procedure.

23 MS. MAHONEY: Well, Your Honor, he would have  
24 the option, if he chose to go to Federal court and try to  
25 do that. And no, we couldn't pay him a settlement for

1 punitive damages. But if we offered him \$2,500 or \$5,000  
2 under our FTCA authority, he might well jump at the  
3 chance. And in fact, I'd be highly surprised if he  
4 didn't, Your Honor. So I think that while he may want to  
5 characterize it as a Bivens action when he arrives at the  
6 courthouse, that doesn't eliminate the fact that he may be  
7 quite content.

8 QUESTION: I think you still haven't really  
9 answered the question. Let me see if I can ask you  
10 another one. Assume a claim that could not be  
11 characterized as a Federal Tort -- discretionary function  
12 or a willful assault and -- there must be a category of a  
13 claim that could only be brought as a Bivens action.  
14 Could you -- do you have any statutory authority to settle  
15 that case for dollars without recasting it as a Federal  
16 Tort Claims Act claim?

17 MS. MAHONEY: Your Honor, I believe that the  
18 Attorney General does, but that the Bureau of Prisons does  
19 not.

20 QUESTION: So this regulation really does not  
21 authorize a monetary settlement in that hypothetical case,  
22 which you say is a very rare case.

23 MS. MAHONEY: That's correct, Your Honor. And  
24 on that point, in terms of it being a very rare case, it  
25 is important to emphasize that under the Federal Tort

1 Claims Act, intentional claims for assault and battery by  
2 law enforcement officials are still compensable torts  
3 and --

4 QUESTION: Does the Attorney General take the  
5 position that correction guards are law enforcement  
6 official representatives?

7 MS. MAHONEY: Yes, Your Honor.

8 QUESTION: Let me ask you another sort of more  
9 basic question. It seems to me that there is some rule  
10 making that's going to be required by either this  
11 Court -- you're asking the Court to approve a 15-day  
12 statute of limitations waivable and so forth and so on.  
13 Isn't this whole area something in which Congress could  
14 really do a much better job than we could of fashioning  
15 the right kind of rules as they've done for State  
16 prisoners? Why isn't the right thing to do is to go  
17 Congress and get them to draft a statute that will clear  
18 up all these problems so we don't have to meet them one at  
19 a time?

20 MS. MAHONEY: Your Honor, I think Congress  
21 already delegated the power to the Bureau of Prisons to  
22 come up with a system that's workable. And that's why we  
23 have --

24 QUESTION: Why do you suppose they wrote a  
25 statute for the States and not the -- you think that the

1 authority was already clearly there?

2 MS. MAHONEY: Yes, Your Honor, under 18 USC,  
3 section 4001, the Congress established that the Attorney  
4 General and the Bureau of Prisons would have the authority  
5 to establish a system of government for prisons, to  
6 control and manage and adopt whatever regulations are  
7 necessary. These regulations governing the administrative  
8 grievance procedure are really a fundamental part of the  
9 government of those prisons. It is of critical importance  
10 not just to reduce the need for answering complaints in  
11 Federal court, but also to provide a system where  
12 prisoners will have some recourse, will have some chance  
13 to meet with prison officials to talk about their  
14 concerns, and to obtain speedy and effective relief. And  
15 that's what this system does, Your Honor.

16 QUESTION: What if a prisoner gets beat up the  
17 day before he's let out of prison?

18 MS. MAHONEY: Your Honor, if a prisoner gets  
19 beat up --

20 QUESTION: What would his remedy be?

21 MS. MAHONEY: If he got beat up the day before,  
22 I would still believe --

23 QUESTION: You still say he has to exhaust.

24 MS. MAHONEY: I would still believe that he  
25 would have to exhaust. And the reason I say that, Your



1 Honor, is because this does not benefit just the prisoner.  
2 It benefits all the other prisoners who live in this  
3 closed environment. If the prison officials do not know  
4 that he was beaten up that day, they have no opportunity  
5 to take corrective action by disciplining the particular  
6 prison guard. It's absolutely vital that they have that  
7 notice.

8 In addition, just as this Court found in Coit,  
9 it's very efficient and useful to have a process that  
10 requires claims for money damages to be brought to the  
11 attention of the agency before the Federal action is filed  
12 so that if they think there is any merit, and if they want  
13 to settle the claim, they have the opportunity to do that.

14 And I would submit that the 15-day deadline,  
15 which we do not view as a statute of limitations in any  
16 sense -- it is simply a procedure that is readily waivable  
17 both by the BOP and in appropriate cases by this  
18 Court -- serves that function. The 15-day deadline isn't  
19 to erect some sort of barrier for inmates with meritorious  
20 claims, it's to protect the interest that the system was  
21 established for in the first place. It allows for very,  
22 very speedy relief which helps to reduce tensions. It  
23 also helps to eliminate the harassment suits that might be  
24 filed if the prisoner is allowed to go straight to court,  
25 when 2 months later he may change his mind.

1           And in the Bureau's experience this system,  
2     including that 15-day deadline has been -- has worked very  
3     well. It has not caused forfeiture of rights as the  
4     petitioner would suggest. In fact, 97 percent of all of  
5     the grievances filed in the last 11 months -- and I think  
6     there were some 9,000 of them -- were filed within the  
7     15-day period. The prisoners know how to comply with this  
8     rule. The staff helps them.

9           QUESTION: How long is the -- when did the rule  
10    come into effect, Ms. Mahoney? How long have these  
11    regulations been in place?

12          MS. MAHONEY: In the early 1970's, I believe  
13    1974, Your Honor. And I would also note that these  
14    regulations, including the 15-day deadline, have been used  
15    in the habeas context by the lower Federal courts and they  
16    have required that this regulatory system be exhausted  
17    before filing an action for habeas under 2241 regarding  
18    conditions of confinement.

19          Therefore, in other words, the horrors that the  
20    petitioner is talking about, these artificial barriers,  
21    these problems, they simply have not come up. If you do  
22    look through the cases of the lower Federal courts, you  
23    will not find any significant number of cases dealing with  
24    whether or not to waive the 15-day deadline. And again,  
25    without that system -- without that time limit, how can we

1 in the Bureau of Prisons insure that this process will be  
2 quick and effective so that if they then want to file a  
3 judicial action at the conclusion --

4 QUESTION: Yes, but you don't -- do you require  
5 this procedure in a Federal Tort Claims Act situation?

6 MS. MAHONEY: Your Honor, we don't --

7 QUESTION: Why doesn't all the policy arguments  
8 apply there as well?

9 MS. MAHONEY: They do, Your Honor. Congress --

10 QUESTION: But then why don't they -- why don't  
11 you insist it? Why don't you impose it? I don't  
12 understand.

13 MS. MAHONEY: The reason that we don't, Your  
14 Honor, is because Congress established the procedure for  
15 the Federal Tort Claims Act, for the Federal Tort Claims  
16 Act remedy. And it did that with all Federal agencies in  
17 mind, not with the Bureau of Prisons specifically in mind.

18 QUESTION: I know, but if you have this  
19 wonderful record of the wonderful benefits of 15-day rule,  
20 why don't you tell Congress about it and say, let's make  
21 this exception for Federal prisons? We'd get tremendous  
22 benefits from it.

23 MS. MAHONEY: Well, Your Honor, in most cases,  
24 inmates who want to pursue a Federal Tort Claims Act case  
25 will bring -- they also want something else, too. And so

1       they will come and they will file a grievance.

2               QUESTION: Yes, but they don't have to.

3               MS. MAHONEY: That is correct, Your Honor, they  
4       don't have to. And I think you're right. I think we  
5       would like for that to be changed. It simply is a  
6       consequence of having a system that was designed --

7               QUESTION: It's not important enough to ask  
8       Congress for its help, though.

9               MS. MAHONEY: Well, Your Honor, we have  
10      been -- as I say, the experience has been that these  
11      claims ordinarily will be brought to us. And more  
12      importantly, Your Honor, I would also note that while the  
13      system is different, it still does require that the claim  
14      be brought to the attention of the Bureau of Prisons  
15      before it could be filed in Federal court. And that is  
16      one aspect of this system that is of great importance.

17              QUESTION: I realize that, but most of these  
18      claims will be Federal Tort Claims Act. You've  
19      demonstrated that earlier. And I find it rather  
20      surprising that you don't have regulations that would  
21      implement the very strong policy arguments you've been  
22      making here in that area, which covers most claims.

23              MS. MAHONEY: Well, again, Your Honor, most of  
24      these claims such as this one, even if they may seek an  
25      FTCA remedy, they do bring them under this system as well



1 in order to try and obtain some other kind of relief.

2 In addition, Your Honor, I think that the thing  
3 that we really do not want to lose sight of here is that  
4 we are talking about a system that has been designed by  
5 the Bureau of Prisons based upon its experience and  
6 expertise and it has found that it has very, very  
7 substantial benefits. The exhaustion jurisprudence of  
8 this Court suggests that it is entirely appropriate, even  
9 if full relief cannot be given to the claimant, that  
10 exhaustion be required in order to accommodate the  
11 benefits and the policies of the agency that is adversely  
12 affected when exhaustion is not required, and the  
13 petitioner in this case doesn't even contest that those  
14 benefits apply here.

15 Therefore, we would submit that it is  
16 appropriate to defer to the scheme that's been established  
17 by the BOP, and if there are problems associated with a  
18 meritorious claim where an inmate believes that he has not  
19 had an adequate opportunity to present his claim, this  
20 Court still would retain equitable jurisdiction to provide  
21 relief in those circumstances.

22 One last point on the issue of the FTCA remedy.  
23 One reason why in the Bivens context it's very important  
24 that the 15-day deadline and the process that's been  
25 established here be exhausted is that the statute of

1 limitations for Bivens is not uniform. And in some  
2 jurisdictions it would only be 1 year. And  
3 therefore -- and under the FTCA procedure they would not  
4 necessarily exhaust it by the time that statute of  
5 limitations would run. So by funneling  
6 Bivens -- potential Bivens actions through the  
7 administrative grievance procedure, we help to insure the  
8 protection of the litigant's rights to ultimately bring  
9 that action, even in the States that have the shortest  
10 known statutes of limitations.

11 If there are no further questions.

12 QUESTION: Thank you, Ms. Mahoney.

13 Mr. Smith, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF PAUL M. SMITH

15 ON BEHALF OF THE PETITIONER

16 MR. SMITH: Thank you, Mr. Chief Justice. Just  
17 a few quick points. First of all, on the issue of whether  
18 or not there can be extensions of time of the 15-day  
19 deadline, Ms. Mahoney referred to it as a mandatory  
20 requirement that they get extensions. But it's mandatory  
21 only where somebody determines that there's a valid reason  
22 for the extension. And the regulations provide no  
23 standards whatever for what reasons will be considered  
24 valid or invalid. So you're left either with two  
25 possibilities on this extension of the 15-day deadline.

1     Either it's going to be entirely up to the unguided  
2     discretion of the Bureau of Prisons to decide when to give  
3     an extension, or -- and Ms. Mahoney suggests this is what  
4     would really happen -- you're going to kick this issue  
5     over to the courts. And whenever somebody doesn't get the  
6     extension, they're going to be in court saying, well I  
7     should have gotten it because I had a valid reason, and  
8     this Court's going to have to develop a whole new  
9     jurisprudence about which reasons are valid and which ones  
10    aren't, exactly similar to the habeas situation, which --

11             All this arises because you have a procedure  
12    which was not created with litigation in mind. And if you  
13    had a situation -- procedure that was created as a basis,  
14    as a possible prelude to litigation, you wouldn't have a  
15    standardless provision like we'll give you an extension  
16    when you have a valid reason. You'd have something  
17    entirely different.

18             Also on that point, the suggestion was made that  
19    this issue hasn't arisen in the courts, and therefore it  
20    must not be creating a lot of problems. But the reality  
21    is that they only require -- the requirement of exhaustion  
22    of the grievance procedure only exists in the Tenth  
23    Circuit. In other places the requirement in damages cases  
24    does not apply. So people have no reason to end up in  
25    court fighting about extensions of time on the grievance

1 process.

2 On the issue of whether people might be  
3 satisfied by some relief other than compensation, and  
4 therefore there might be some purpose served by  
5 people -- making people go through the grievance process,  
6 obviously that is a possibility, but it's not an interest  
7 which can justify requiring everybody to exhaust. The  
8 respondent's brief says that you still have to exhaust  
9 this process when you're out of prison altogether when the  
10 only interest it could possibly -- the only interest that  
11 you could possibly have is a compensatory interest, but  
12 they still want you to exhaust that.

13 QUESTION: But the argument for doing so isn't a  
14 classic exhaustion argument, it's a kind of help the  
15 Government argument, really. They're saying this is the  
16 way of making sure that the Government is informed that  
17 there is a problem, if indeed there is one, and that  
18 independent benefit ought to be sufficient to justify it.

19 MR. SMITH: That is a different argument. I  
20 think the problem with that argument from the Government's  
21 point of view is they are making contradictory points.  
22 First they're saying everybody's rushing off to court to  
23 bring these Bivens claims, and at the same time, they're  
24 saying they're not getting adequate notice of what's going  
25 on in the prison in time to fix it.



1           The third thing that Ms. Mahoney now says, in  
2     the Federal Tort Claims Act situation this doesn't arise  
3     because 95 percent of the Federal Tort Claims Act claims  
4     do get brought to the grievance procedure within that  
5     2-year period before they go to the Tort Claims Act  
6     procedure -- so they're sort of telling us everybody's  
7     going to file a grievance, everybody's rushing off to  
8     court. But at the same time, that somehow they just don't  
9     know what's going on in these prisons and they don't have  
10    enough notice about which guard is beating up on people.

11           I submit to you that the arguments don't make  
12    any sense if you put them right next to each other.

13           The final point about this idea that you're  
14    going to get Federal Tort Claims Act monetary settlements,  
15    first of all, it ignores entirely the issue of notice.  
16    Nobody in any court that I'm aware of has ever suggested  
17    until after cert was granted in this case that the reason  
18    we were going to go through this grievance process in  
19    Bivens cases is because of a monetary settlement you might  
20    get under the Tort Claims Act. And every court that's  
21    looked at this issue, including the Tenth Circuit, has  
22    assumed there's no damages available, that damages is not  
23    something that justifies sending people through the  
24    grievance process. And petitioner certainly had no reason  
25    to know otherwise.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.  
2 The case is submitted.

3 (Whereupon, at 10:59 a.m., the case in the  
4 above-entitled matter was submitted.)  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

NO. 90-6861- JOHN J. McCARTHY, Petitioner V. MR. MADDIGAN,

ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Michelle Sander

(REPORTER)