

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: AMERICAN NATIONAL RED CROSS, Petitioner v.

S. G. AND A. E.

CASE NO: 91-594

PLACE: Washington, D.C.

DATE: Tuesday, March 3, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AMERICAN NATIONAL RED CROSS, :

4 Petitioner :

5 v. : No. 91-594

6 S. G. AND A. E. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, March 3, 1992

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf of
15 the Petitioner.

16 RONALD J. MANN, ESQ., Assistant Solicitor General,
17 Department of Justice; Washington, D.C.; on behalf of
18 the United States, as amicus curiae, supporting the
19 Petitioner.

20 J. GILBERT UPTON, ESQ., Concord, New Hampshire; on behalf
21 of the Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 91-594, American National Red
5 Cross, Petitioner, v. S. G. and A. E.

6 Mr. Englert.

7 ORAL ARGUMENT OF ROY T. ENGLERT, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. ENGLERT: Mr. Chief Justice, and may it
10 please the Court:

11 The question presented in this case is whether
12 the sue and be sued clause in the Red Cross charter gives
13 jurisdiction to the Federal courts or, instead, merely
14 confers on the Red Cross the capacity to sue and be sued.

15 The clause gives the Red Cross, quote, the power
16 to sue and be sued in courts of law and equity, State or
17 Federal, within the jurisdiction of the United States, end
18 quote.

19 The phrase State or Federal, on which we rely,
20 was added to the charter in 1947. From 1905 to 1947, the
21 Red Cross had the same power to sue and be sued in courts
22 of law and equity, but the Federal courts were neither
23 excluded from nor specified in that grant of capacity.

24 There is no possible basis to doubt that the Red
25 Cross had the capacity to sue and be sued in Federal court

1 between 1905 and 1947. Nevertheless, the First Circuit
2 construed the 1947 amendment as merely conferring that
3 very same capacity. That, we submit, was the court's
4 first error.

5 But the case for giving a jurisdictional reading
6 to the sue and be sued clause rests on much more than the
7 fact that the First Circuit construed the 1947 amendment
8 to be meaningless. It rests on two venerable decisions of
9 this Court: Osborn v. Bank of the United States, and
10 D'Oench, Duhme & Co. v. FDIC.

11 The Osborn decision, written by Chief Justice
12 Marshall, has been regarded as a landmark decision of this
13 Court for 168 years. The D'Oench decision, now 50 years
14 old, is famous in its own right in the banking field. And
15 it's especially important because it was decided just
16 before the amendments to the Red Cross charter were
17 drafted.

18 The Court in Osborn construed the sue and be
19 sued clause in the charter of the Second Bank of the
20 United States as a grant of jurisdiction. In fact, the
21 Court thought the point so clear that it said that the
22 words could not be made plainer by explanation.

23 The Court recognized that some sue and be sued
24 clauses will merely confer the capacity to sue and not
25 jurisdiction.

1 QUESTION: And I suppose we could explain the
2 result in Osborn by saying that that was an
3 instrumentality of the United States. I think there is no
4 question that the bank was an instrumentality. Wouldn't
5 you agree with that?

6 MR. ENGLERT: I agree with that; and there is no
7 question that the Red Cross is an instrumentality of the
8 United States. This Court has so held.

9 QUESTION: Well, but was the Bank of the United
10 States not an instrumentality in another sense? In other
11 words, it was an arm, an instrument, an instrumentality in
12 the United States, an agency of the United States?

13 MR. ENGLERT: I believe not, Justice Kennedy.
14 The Bank of the United States was 80 -- the second Bank of
15 the United States was 80 percent privately owned.

16 QUESTION: Well, then McCulloch v. Maryland was
17 wrong.

18 MR. ENGLERT: No, Your Honor, McCulloch v.
19 Maryland was right, and McCulloch v. Maryland was applied
20 to the Red Cross in the Department of Employment v. United
21 States, and has been applied to Army post exchanges -- to
22 other similar entities, that while not agencies of the
23 United States are tax-immune instrumentalities of the
24 United States.

25 QUESTION: Does the Red Cross have a special tax

1 exemption?

2 MR. ENGLERT: It has been held by this Court to
3 have a special tax exemption, by virtue of its status as
4 an instrumentality of the United States.

5 QUESTION: But as a matter of our jurisprudence
6 and not just some statutory -- expressed statutory
7 provision?

8 MR. ENGLERT: That's correct. It receives
9 special tax treatment under a variety of statutes. But
10 its immunity from State taxation is -- was held by this
11 Court to exist in Department of Employment v. United
12 States, by a line of cases directly descending from
13 McCulloch v. Maryland.

14 QUESTION: Well, I thought the international
15 charter of the Red Cross made it rather clear that a
16 national organization should not be any part of
17 governmental entity. And it seems to me that that's quite
18 inconsistent with what you're saying now.

19 MR. ENGLERT: No, Your Honor, that argument,
20 too, was made to this Court in the Department of
21 Employment v. United States case, and rejected -- and has
22 been rejected by the Ninth Circuit in subsequent cases.

23 It is certainly true that the charter of
24 the international -- not the charter, the statutes of the
25 International Committee of the Red Cross do require that

1 the national organizations be autonomous from their
2 Federal governments. And the Red Cross does have
3 sufficient autonomy to comply with that statute. It has
4 been certified as being in compliance with that statute.

5 At the same time, however, it partakes
6 sufficiently of governmental status that it is, under this
7 Court's decisions, a tax-immune instrumentality. It was
8 referred to by the Court in the Department of Employment
9 as virtually an arm of the United States Government.

10 QUESTION: Did you cite Department of Employment
11 to the Court of Appeals for the First Circuit?

12 MR. ENGLERT: Yes, Your Honor.

13 QUESTION: Mr. Englert, don't you think language
14 in Osborn is really quite different? I mean, there it
15 refers to jurisdiction. The grant was the right -- the
16 power to sue and be sued in all State courts having
17 competent jurisdiction, and in any circuit court of the
18 United States. It's clear that the Congress that wrote
19 that had jurisdiction in mind.

20 MR. ENGLERT: Well, we think it's equally clear
21 that the Congress that wrote the Red Cross charter had
22 jurisdiction in mind.

23 QUESTION: Well, what's the first half of it in
24 this one?

25 MR. ENGLERT: State and Federal courts are

1 referred to in parallel fashion in the Red Cross charter.
2 It says any court of law or equity, State or Federal.

3 QUESTION: State or Federal. Is it conferring
4 jurisdiction over State courts that don't have
5 jurisdiction?

6 MR. ENGLERT: No, Your Honor. I don't think
7 that Congress has the power to do that.

8 QUESTION: Of course not. So it's possible to
9 think in this grant, that jurisdiction is not referred to.
10 It is impossible in Osborn to think that jurisdiction is
11 not referred to.

12 MR. ENGLERT: Well, Professor Wright certainly
13 disagrees with that proposition. He has been known to --

14 QUESTION: Well, maybe he is wrong.

15 MR. ENGLERT: -- question the Osborn ruling.
16 Well, maybe he is wrong.

17 (Laughter.)

18 MR. ENGLERT: In any event, Your Honor, that is
19 the First Circuit's reasoning. And the court might have
20 read the charter in Osborn as a grant of jurisdiction for
21 that reason. But it didn't.

22 It read the charter in Osborn as a grant of
23 jurisdiction for a quite different reason. It said the
24 difference between this charter, and the charter of the
25 First Bank of the United States is that the charter of the

1 First Bank did not mention the courts of the Union. And
2 because this charter mentions the courts of the Union, it
3 must be construed as a grant of jurisdiction.

4 QUESTION: Did the First Bank -- the First Bank
5 of the United States provision say in all State courts
6 having competent jurisdiction, as well?

7 MR. ENGLERT: No, it referred to courts of
8 record. It didn't --

9 QUESTION: Courts of record. It didn't refer to
10 jurisdiction at all.

11 MR. ENGLERT: It did not refer to jurisdiction
12 at all.

13 But again, whatever validity that argument might
14 have had as an initial matter, that that's the reason why
15 the charter in Osborn grants jurisdiction, is not the
16 reason that was advanced by counsel, or by Chief Justice
17 Marshall for the Court. The only justice who cited that
18 provision in Osborn was Justice Johnson in his dissent.
19 It played no role in this Court's reasoning in Osborn.

20 Osborn aside, the charter in D'Oench, Duhme &
21 Co. v. FDIC is exactly like the Red Cross charter. It
22 refers to any court of competent -- a court of law or
23 equity, State or Federal, in exactly parallel fashion.
24 And this Court observed in D'Oench, Duhme that that clause
25 was a grant of jurisdiction.

1 Now, that was just 5 years before the Red Cross
2 charter was amended. And the Congress was entitled to
3 accept this Court's representation in D'Oench that
4 amending a charter so that it said that an entity may sue
5 and be sued in any court, State or Federal, is a grant of
6 jurisdiction.

7 QUESTION: Mr. Englert, do you plan to address
8 the constitutional concerns that were raised in the
9 respondents' brief, and tell us in what way cases arise
10 under Federal law within the meaning of article 3, simply
11 because the Red Cross is a litigant?

12 MR. ENGLERT: Well, that question was addressed
13 and answered for the first time in Osborn. And the
14 holding of Osborn in that respect has been reiterated
15 through the years, up to as recently as the Verlinden case
16 in 1983.

17 QUESTION: Well, don't you think in Verlinden
18 and more recent cases this Court has been wary of that
19 kind of a -- an approach?

20 MR. ENGLERT: This Court has been wary of
21 extending that kind of approach. There's no question.
22 But we're not asking for an extension of that kind of
23 approach, by any means.

24 What the Court said in Osborn, what it
25 reiterated in Bankers Trust, what it reiterated in Puerto

1 Rico v. Russell & Co., what it reiterated in Gully, was
2 that a lawsuit against a federally chartered entity,
3 necessarily has an ingredient of Federal law because that
4 entity has no powers, save those granted by its charter.

5 QUESTION: Well, what law is going to apply in
6 the tort suit, do you suppose?

7 MR. ENGLERT: State law. That does no prevent
8 the case from arising under Federal law for purposes
9 of --

10 QUESTION: Well, it does, as in the -- it
11 certainly does, as a matter of plausible, logical
12 argument, even if not precedent.

13 MR. ENGLERT: Well, Your Honor, as was pointed
14 out in Verlinden, the Court has taken two divergent paths
15 in interpreting arising under, under the statute and under
16 the Constitution. The Court has construed arising under
17 very narrowly, under section 1331. It has construed
18 arising under very broadly under the Constitution. And
19 again, it has been established, since 1824, that if the
20 suit is against a federally chartered entity, that
21 entity's capacity to sue and be sued is an ingredient of
22 the action that gives it the necessary Federal element to
23 satisfy article 3.

24 And again, I would say that has -- that aspect
25 of Osborn has, to my knowledge, never been questioned. It

1 is not the aspect that Justice Frankfurter questioned in
2 his Lincoln Mills dissent. It is not the aspect that is
3 questioned in Hart and Wechsler; it is something that, to
4 the contrary, this Court has reaffirmed. In Gully, the
5 Court said that the doctrine of the charter cases --
6 although to be treated as exceptional -- is not being
7 questioned within its own realm.

8 We do not think, ultimately, the constitutional
9 question -- in light of this Court's decisions -- is a
10 serious one. I put it that way because obviously the
11 Court shies away from serious constitutional questions in
12 construing statutes, but --

13 QUESTION: Do you have any further justification
14 for the doctrine on its merits, rather than on the basis
15 of stare decisis?

16 MR. ENGLERT: Yes, Your Honor. The Red Cross,
17 as I was saying in response to some of Justice Kennedy's
18 questions, is an important Federal instrumentality. It
19 exists for the purpose of fulfilling treaty obligations of
20 the United States. It was chartered in 1905 for the
21 explicit purpose of putting it under Government
22 supervision. It was re-chartered in 1947 for the explicit
23 purpose of recognizing its national stature.

24 This is exactly the kind of very special entity
25 that logically fits within the jurisdiction of the Federal

1 courts, if Congress wishes to place it there -- which is,
2 of course, what we submit Congress has done.

3 This is not a corner grocery store, or -- to
4 take an example from this Court's cases -- a railroad that
5 the Congress has chartered. This is the American National
6 Red Cross, a very important national and international
7 entity. And we think that there is no question that
8 article 3 is broad enough to allow the Federal courts to
9 give party-base jurisdiction.

10 If I might return to this Court's precedent --
11 notwithstanding the Chief Justice's question -- in FSLIC
12 against Ticktin, decided 3 years ago, the Court explained
13 at some length that there was party -- party-based
14 jurisdiction -- that was the Court's phrase -- over
15 the -- over cases brought by or against the Federal
16 Savings and Loan Insurance Corporation.

17 Again, the Court was not troubled by the idea
18 that jurisdiction could depend on who the party is and not
19 what the questions raised are -- which is, again, what we
20 submit is true in this case.

21 Now, FSLIC, like the --

22 QUESTION: Well, maybe the Court wasn't, but the
23 Constitution was. I mean, it really does -- it speaks
24 about certain categories of party-based jurisdiction --
25 cases affecting ambassadors, controversies to which the

1 United States shall be a party. It lists a bunch of
2 party-based bases of jurisdiction, but not among them
3 cases to which any instrumentality of the United States
4 shall be a party.

5 MR. ENGLERT: No, and that's exactly why in Bank
6 of the United -- in Osborn v. Bank of the United States,
7 Chief Justice Marshall examined for the Court the meaning
8 of the grant of arising under jurisdiction in the
9 Constitution and not one of those other grants of
10 jurisdiction in article 3, section 2, and held that it was
11 within the jurisdiction, within the constitutionally
12 granted jurisdiction that Congress could confer, to have
13 that kind of party-based jurisdiction in suits by and
14 against an instrumentality of the United States.

15 If the Court thinks it necessary to look to the
16 legislative history of the Red Cross charter, it will find
17 further support for our position on the statutory
18 question.

19 The reports to the Foreign Relations and Foreign
20 Affairs Committees refer the reader to the Harriman
21 Committee Report. The Harriman Committee Report, in turn,
22 explains the reference to State and Federal courts as one
23 that was being added, quote, in view of the limited nature
24 of the jurisdiction of the Federal courts.

25 There is just no way that the limited nature of

1 the jurisdiction of the Federal courts can have anything
2 to do with the grant of capacity to sue. The language of
3 the Harriman Committee Report makes sense only if one
4 construes the charter as a grant of jurisdiction.

5 No decision of this Court --

6 QUESTION: What -- may I -- excuse me. What do
7 you say to the argument that it may have been intended to
8 answer a question about the possibility of diversity
9 jurisdiction?

10 MR. ENGLERT: Your Honor, I don't think there
11 was any serious question about the possibility of
12 diversity jurisdiction at any time since 1905. The
13 difficulty that federally chartered entities sometimes
14 encounter in invoking diversity jurisdiction is that,
15 because they are not citizens of any State, they lack a
16 basis for diversity jurisdiction. That's no true of the
17 Red Cross.

18 In the 1905 charter, the section now codified at
19 36 U.S.C. section 1, and again in the 1947 charter, the
20 section codified at 36 U.S.C. section 1A, the Red Cross is
21 stated to be a citizen of the District of Columbia. In
22 light of that, the cases that say Federal corporations
23 can't sue in diversity have no bearing on the Red Cross,
24 and never had any bearing on the Red Cross.

25 Even if one were to suppose that something in

1 the charter had res diversity jurisdiction, it would
2 surely be sections 1 and 1A, no the sue and be sued clause
3 in section 2.

4 The First Circuit relied heavily on this Court's
5 1916 decision in the Bankers Trust case. But in our view,
6 it simply got that decision wrong.

7 The sue and be sued clause at issue in that case
8 made no reference to the Federal courts. And it was not a
9 serious candidate to be construed as a grant of
10 jurisdiction.

11 The court, quite naturally, said that Congress
12 would have used altogether different words had it wished
13 to confer jurisdiction. Congress did use altogether
14 different words in the Red Cross charter. And the Bankers
15 Trust case doesn't stand for anything more sweeping than
16 that.

17 I'd like, if I may, to reserve the balance of my
18 time for rebuttal.

19 QUESTION: Very well, Mr. Englert.

20 Mr. Mann, we'll hear from you now.

21 ORAL ARGUMENT OF RONALD J. MANN

22 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE PETITIONER

24 MR. MANN: Thank you, Mr. Chief Justice, and may
25 it please the Court:

1 If I may, I'd like to start by addressing the
2 constitutional question which seems to have troubled some
3 of the justices. We agree entirely with the Red Cross,
4 that article 3 of the Constitution permits Congress to
5 extend jurisdiction to cases of which the Red Cross is a
6 party.

7 In article 3 section 2 there are two clauses of
8 the Constitution that are relevant to cases of this sort.
9 One clause that says that the judicial power shall extend
10 to all cases arising under this Constitution, the laws of
11 the United States, and treaties made under their
12 authority; the second clause says that the jurisdiction --
13 the judicial power shall extent to controversies to which
14 the United States shall be a party.

15 In our view, this case involves a sufficient
16 Federal issue that -- it arises under Federal law, not
17 just because this Court has said clearly in the past that
18 it does, but as a matter of logic and sound constitutional
19 interpretation.

20 First, as a matter of fact in this particular
21 case, the Red Cross is likely to raise issues of Federal
22 law in defense to the lawsuit. We understand the Red
23 Cross will contend that it is not subject to punitive
24 damages because of its relation to the Federal Government,
25 and also that it, in some cases, has resisted demands for

1 jury trials because of its relation to the Federal
2 Government.

3 QUESTION: Is that established law, Mr. Mann,
4 that if someone -- if in a corporation is, quote, related,
5 close quote, to the Federal Government it's not subject to
6 punitive damages?

7 MR. MANN: No, it is not established Federal
8 law, but it is an issue of Federal law that the Red Cross
9 plans to raise in this particular case. We express no
10 view on the merits of it. But I'm pointing out that --

11 QUESTION: Well, that sounds like bootstrapping,
12 though, to say we're going to raise an issue of Federal
13 law; we have no cases to support it. And then you say
14 because they're going to raise an issue of Federal law
15 that tends to support Federal jurisdiction?

16 MR. MANN: I must have misunderstood your
17 question. There are cases to support that argument.
18 There do not appear to be any cases squarely on point
19 applying those types of immunities to the Red Cross.

20 The Red Cross -- the second reason why this case
21 falls --

22 QUESTION: Well, I thought Mr. Englert had
23 indicated a concession that State law would apply to this
24 suit.

25 MR. MANN: I believe that --

1 QUESTION: And it seems to me you're now arguing
2 that, at least in some areas, Federal law is applicable.

3 MR. MANN: No, Justice O'Connor. I believe that
4 Mr. Englert's concession was that State law will apply to
5 the substantive determination of whether the Red Cross was
6 liable as a matter of negligence or under some other State
7 tort theory. They do plan to introduce Federal defenses.

8 But that's not the real, main point. The main
9 point is that this case would arise under Federal law for
10 purposes of article 3, without regard to any particular
11 issue raised in the case. And that's the point that this
12 Court has repeatedly made, and that's what I would like to
13 address.

14 It's important to realize that the Red Cross is
15 powerfully affected with the Federal interest. The United
16 States has entered into quite a number of treaties
17 requiring it to maintain an institution such as the Red
18 Cross. The Red Cross is the entity that performs the
19 United States' obligations under various Geneva
20 Conventions.

21 In fact, the charter provides that if the United
22 States subsequently enters into treaties, the Red Cross
23 will do this.

24 QUESTION: Well, what's the general principle
25 that you're arguing, that it is then an instrumentality of

1 the United States, unlike, say, a railroad that has a
2 Federal -- charter?

3 MR. MANN: In our view, it's also well
4 established that a railroad chartered by Congress
5 would -- cases to which a railroad was a party, would
6 arise under Federal law. That was decided in the Pacific
7 Railroad Removal cases, and this Court has repeated --

8 QUESTION: So then all of these important
9 international and national attributes of the Red Cross are
10 really quite beside the point so far as your standard is
11 concerned?

12 MR. MANN: I think they're beside the point
13 under this Court's precedent. But what I'm trying to
14 address is, to the extent that people are concerned that
15 those precedents may go too far, and it is suggested that
16 Congress could extent the judicial power to cases that
17 would be improper, this case does not present a serious
18 problem under that.

19 It does not raise that concern because the Red
20 Cross is so closely related to the United States
21 Government that it's clear that Congress could extend it
22 to the Red Cross.

23 QUESTION: So your legal standard is the
24 proximity of relation to the United States Government is
25 controlling?

1 MR. MANN: I believe that it would -- if this
2 Court wished to cut back on the constitutional rule that
3 it has articulated in the Pacific Railroad Removal cases,
4 it would be unlikely that it would do so to an extent that
5 would deprive entities that are as closely related to the
6 Federal Government as the Red Cross, and perform statutory
7 and treaty-mandated function as important as those that
8 are performed by the Red Cross.

9 And I would suggest that that would be an
10 appropriate lending principle that would allow this Court
11 not to have to face a significant constitutional question
12 in this case.

13 I would also point out that this Court's
14 decision in *Osborn v. Bank of the United States*
15 specifically acknowledged that -- a number of limits on
16 the rule that are articulated. It did not say that
17 Congress could merely throw a cloak over a State
18 corporation and thereby bring the corporation into Federal
19 court. It pointed out there, as in this case, that
20 Congress didn't just make this entity a Federal
21 corporation just to get it into Federal court. Congress
22 created the Bank of the United States to serve important
23 Federal purposes. Congress gave the Bank of the United
24 States all of its powers, capacities, authorities, and
25 imposed obligations under it -- on it -- under Federal

1 law.

2 Congress has done just the same with the Red
3 Cross. Congress created the Red Cross to perform
4 important Federal purposes. Those purposes are the very
5 reason for the Red Cross' being. Accordingly, the ability
6 of the Red Cross to incur any obligations necessarily
7 raises some ingredient of Federal law in each and every
8 case to which it's a party. And we believe that that
9 analysis makes the constitutional question much less
10 serious here.

11 QUESTION: Well, of course, to the extent that
12 you're saying there's almost a Federal issue in every case
13 that they're a party to you don't -- you don't have to win
14 this case. You can get in Federal court on Federal
15 question jurisdiction.

16 MR. MANN: No, that's not entirely accurate,
17 Justice Stevens, because to get in under Federal question
18 jurisdiction you have to come in under section 1331 of
19 title 28. And as you know from the opinion in Merrill Dow
20 there's a variety of rules that this Court has articulated
21 to limit the statutory, arising-under jurisdiction to a
22 much narrower field of play than the constitutional
23 arising-under jurisdiction -- even though both clauses
24 have the same meaning.

25 This case, for example, would no satisfy the

1 well-pleaded complaint rule this Court has articulated as
2 a limitation on section 1331. On the other hand, it's
3 quite a different thing to say that Congress could not
4 constitutionally extend the jurisdiction to cases
5 involving the Red Cross. And so there are quite a number
6 of cases involving the Red Cross to which section 1331
7 would not extend.

8 I -- the issue in this case in substance and
9 effect is whether or not those cases can be brought into
10 Federal Court under the separate grant of jurisdiction.

11 QUESTION: Well, one of the first questions is
12 whether we should adopt a construction of the statute that
13 makes it entirely unnecessary to even consider the
14 constitutional problem. Maybe you're dead right on it.
15 But generally, we try to avoid -- construe statutes so we
16 don't have to express a judgment on a constitutional
17 question.

18 MR. MANN: That's entirely accurate. That's my
19 point, as I don't believe that there is a substantial
20 constitutional question --

21 QUESTION: There's just not a substantial
22 question.

23 MR. MANN: -- in this case. If the issue in
24 this case were a neighborhood grocery store in the
25 District of Columbia that, for some patronage reason,

1 Congress cloaked with a Federal charter simply to get it
2 into Federal court, and it had no significant relation to
3 the Federal Government, and for which there was no reason
4 for its having a Federal charter except to get into
5 Federal court, I think this Court might step back and say
6 well, we've said that any Federal charter will satisfy but
7 that one does not. And, in fact, the analysis in Osborn
8 suggests such a limitation.

9 The last thing I would like to point out on this
10 point is the criticisms to which Justice O'Connor refers
11 are, for the most part, directed at this Court's
12 interpretation of the statutory jurisdiction. It is true
13 that this Court repeatedly has criticized the notion that
14 Congress would have wanted to extend with the general
15 Federal question statute all of the permissible
16 jurisdiction permitted by article 3 to the courts.

17 And Justice Frankfurter, in the Lincoln Mills
18 case, and the Court in the Romero case, rightly, suggested
19 that it would be unwise to believe that Congress, in a
20 general statute, intended to commit every single piece of
21 jurisdiction that the arising-under clause permits.

22 But that criticism is not directed at the notion
23 that Congress constitutionally could take an entity that
24 is an arm of the United States -- to use this Court's
25 phrase -- and create Federal jurisdiction over cases to

1 which it is a party.

2 If I could just, in brief, in closing -- the
3 real gist of our argument on the merits is that the 1947
4 statute was enacted in an historical context. Congress
5 created the Red Cross in 1905. They clearly, at that
6 time, gave jurisdiction over cases to which it was a
7 party. They also clearly gave it capacity.

8 When Congress, in 1925, passed the general
9 statute that is now section 1349, it took away
10 jurisdiction over cases to which the Red Cross was a
11 party. It did nothing to alter capacity. There is not a
12 suggestion in the materials that the Red Cross did not
13 have the capacity to sue in Federal courts in the period
14 just before the 1947 charter amendment statute.

15 QUESTION: How do you explain the statement of
16 Mr. Spofford that the only amendment of section 2 is to
17 make it clear that suits can be maintained in Federal as
18 well as States' courts, which has not been clear?

19 MR. MANN: The --

20 QUESTION: You can answer that question, I
21 think.

22 MR. MANN: My understanding of the context of
23 the discussion in the hearings is that the discussion in
24 that case -- the discussion in the hearings was focused on
25 the question as to why the charter did not also include a

1 right to sue in foreign courts. And there is --

2 QUESTION: No, that came up later. But this
3 came -- this came before all that colloquy.

4 MR. MANN: At the very beginning, his
5 explanation of it?

6 QUESTION: Yeah.

7 MR. MANN: We believe that that is a precursor,
8 and substantially means the same thing as the explanation
9 and the discussion after recommendation 22, which states
10 that what they meant by that was that there was a doubt
11 regarding the jurisdiction because of the limited nature
12 of the jurisdiction of the Federal courts.

13 It doesn't use the word capacity. It refers to
14 right to sue.

15 QUESTION: Thank you, Mr. Mann.

16 Mr. Upton, we'll hear from you.

17 ORAL ARGUMENT OF J. GILBERT UPTON

18 ON BEHALF OF THE RESPONDENTS

19 MR. UPTON: Mr. Chief Justice, and may it please
20 the Court:

21 We would state the issue in this case a little
22 differently from the petitioner. We believe the real
23 issue here is whether Federal jurisdiction over ordinary
24 tort actions with no Federal issue and no limit on the
25 amount in controversy should be implied from doubtful and

1 ambiguous language in the Red Cross charter.

2 Now, Red Cross claims that the sue and be sued
3 clause in its charter is a grant of Federal jurisdiction.

4 Sue and be sued clauses are generally construed
5 as simply a grant of capacity to litigate. They
6 ordinarily appear in corporate charters, whether they be
7 Federal or not. They're not usually construed to be
8 anything other than the capacity to litigate, unless there
9 is some very clear and specific language. We would say
10 that they -- the courts have construed sue and be sued
11 clauses as grants of Federal -- of court jurisdiction, but
12 usually it's only when there's very specific and clear
13 language, and usually there's a reference to particular
14 courts.

15 There's got to be some way that you distinguish
16 the language which relates to capacity to litigate to the
17 language which is a conferral of jurisdiction, especially
18 if it's all mingled into one sentence, as this is. And
19 that's why the courts have ordinarily required some very
20 specific language referring to particular courts.

21 There are a couple cases this Court has
22 considered. The first one was the Deveaux case in 1809,
23 and later the Bankers Trust case in 1916. The language is
24 very general in those two cases, and this Court ruled in
25 each of them the language was not specific enough to be a

1 grant of jurisdiction.

2 In the case of Osborn v. the Bank of the United
3 States, which was handed down in 1824, there was -- this
4 Court did rule that there was a grant of Federal
5 jurisdiction there. And this is the case that the Red
6 Cross relies primarily on.

7 But we would suggest that the language in the
8 Osborn case, especially the bank charter, is quite
9 distinguishable from the Red Cross charter.

10 The Bank of the United States, the second --

11 QUESTION: In other words, you're not asking us
12 to overrule the Osborn case?

13 MR. UPTON: I don't think it's necessary in this
14 case, Your Honor. I think the charters -- the language in
15 the two charters are quite different. The Red Cross is
16 seeking to extend the holding in Osborn. And I certainly
17 don't think that should be done.

18 QUESTION: We seldom overrule Chief Justice
19 Marshall, I suppose.

20 MR. UPTON: I'm not suggesting that. I think
21 that if it's limited to the language that's there, it's a
22 good decision -- at least on that point.

23 What was provided in that second bank charter
24 was to sue and be sued in all State courts of competent
25 jurisdiction, and in any circuit court of the United

1 States.

2 As I suggested -- as I've said, we think those
3 charters are markedly different. The Red Cross charter
4 simply provides sue and be sued in courts of law and
5 equity, State or Federal, within the jurisdiction of the
6 United States. The Red Cross charter is general and
7 unspecific. The bank charter is quite specific, and uses
8 the language of jurisdiction. The bank charter, in our
9 view, is carefully drafted. It allows each State to
10 determine the jurisdiction of its own courts. And there
11 is a recognition and there's deference paid to the State
12 court system of each State -- State courts of competent
13 jurisdiction.

14 However, as to Federal jurisdiction, it
15 designates the circuit courts of the United States which,
16 at that time, were the Federal courts of original
17 jurisdiction. So this is quite a specific and carefully
18 drafted charter.

19 And as I've said, I think if it's confined to
20 the language in that charter, it's a good decision. It
21 shouldn't be expanded, as the Red Cross suggests, because
22 I think it will make that decision almost meaningless.

23 The Red Cross charter uses the words State or
24 Federal. And I would suggest that those two words are so
25 general, they encompass the entire judicial system of the

1 United States.

2 QUESTION: Yes, but let me ask you this
3 question, if I may --

4 MR. UPTON: Sure.

5 QUESTION: -- why did they have to add the word
6 Federal? Because there can't have been -- and wasn't it
7 true that before the amendment the American Red Cross was
8 a -- specifically designated as a citizen of the District,
9 so there couldn't be any question about its diversity
10 jurisdiction?

11 MR. UPTON: I don't think that's true, Your
12 Honor, because -- I don't think that --

13 QUESTION: Your opponent told us it was true. I
14 guess one of you has to be --

15 MR. UPTON: Yes, I think that -- that part of it
16 is true. What I am saying is that I think that there
17 still was a question on diversity jurisdiction, because
18 although this corporation was a citizen of the District of
19 Columbia, the Tidewater decision didn't come down until
20 1949. And that was when it was ruled that a grant of
21 jurisdiction -- or put it this way -- that if a
22 corporation is domiciled in the District of Columbia, then
23 it was a citizen of a particular State, even though it
24 wasn't a State. That's what they ruled in Tidewater. But
25 that wasn't handed down --

1 QUESTION: And before that -- what you're saying
2 is that --

3 MR. UPTON: -- until after --

4 QUESTION: -- time it was not clear that a
5 corp -- a corporation domiciled in the District was a
6 citizen of the State for diversity purposes.

7 MR. UPTON: That's correct, Your Honor. As I
8 understand it, that statute was enacted in 1940, the
9 District of Columbia statute, and it wasn't approved by
10 this Court until 1949.

11 So I think there was still was a question there
12 to be clarified. And I think Red Cross is playing it
13 safe.

14 Going on, I would say that in the Red Cross
15 charter, there's no concern there as to which States
16 have -- State courts have jurisdiction over the Red Cross.
17 And as to Federal courts, the language is so general, it
18 opens up the entire Federal system to the Red Cross, at
19 any level.

20 I would suggest that the word Federal has no
21 special or technical meaning which would give the Red
22 Cross access to the United States District Courts.
23 There --

24 QUESTION: Well, wasn't that true in D'Oench?

25 MR. UPTON: D'Oench is a case which can be

1 distinguished. Because in D'Oench, there is language very
2 similar to the Red Cross charter, but further on in the
3 same charter is language that says all cases against the
4 corporation shall be deemed to arise under the laws of the
5 United States.

6 So it's quite a different situation there.

7 QUESTION: This Court didn't rely on that
8 language, did it?

9 MR. UPTON: It's not clear what -- the case was
10 not even litigated on the jurisdictional issue, as far as
11 I can tell. And I don't think that the Court relied on
12 the language in the footnote or the language in the
13 decision as far as Federal jurisdiction because that
14 really wasn't litigated in the case. The real point at
15 issue in that case was which law governed and whether it
16 was -- and there was a suit on the enforcement of a
17 note -- suit for the enforcement of a note. And as I
18 recall it, the State law of Illinois or Missouri or the
19 Federal law was to control. And the Court finally
20 determined the Federal law was controlling.

21 And the jurisdictional issue as to whether
22 Federal court was -- this Court and lower courts had
23 jurisdiction over the D'Oench case was never actually
24 litigated. The parties all conceded that this Court had
25 jurisdiction. And that's what the circuit court observed,

1 too.

2 QUESTION: I suppose it's of no legal
3 consequence, but what is the comparative condition of the
4 court calendars in Federal court and State court in New
5 Hampshire?

6 MR. UPTON: Well, I understand from my limited
7 conversations with the Federal judges, that they're just
8 as busy as they can be. We keep adding another judge,
9 from time to time.

10 QUESTION: Well, if you stayed on the State
11 side, would this case come on sooner than if you were on
12 the Federal side?

13 MR. UPTON: I would say yes, Your Honor.

14 QUESTION: By very much?

15 MR. UPTON: Pardon me?

16 QUESTION: By very much?

17 MR. UPTON: I can't honestly say that's true. I
18 think the usual timeframe is a year and a half to 2 years
19 in Merrimack County Superior Court. And in Federal
20 court -- I'm sorry -- in Federal court, Brother Richardson
21 advises me, it's usually 3 to 4 years. So there is a
22 difference.

23 QUESTION: I might say that's not true
24 everywhere.

25 MR. UPTON: I'm sure that's true.

1 Well, I was saying, the word Federal to me has
2 no special or technical meaning that should open up the
3 Federal courts to the Red Cross. It's too general. I'd
4 also observe that State and Federal courts are treated
5 with equal generality, and there's no concern in the
6 drafting of that Red Cross charter for the peculiarities
7 of the State system and the Federal system. One is a
8 State of general -- has courts of general jurisdiction;
9 the other has courts of limited jurisdiction. And I think
10 we have a right to ask, when Federal jurisdiction is going
11 to be conferred, that it be done in a specific way, and
12 done clearly.

13 QUESTION: Mr. Upton, can I ask you another
14 question about your reliance --

15 MR. UPTON: Yes, sir.

16 QUESTION: -- on Tidewater. As I understand
17 what you're saying is that although the statute had
18 given -- had made a citizen of the District, a citizen of
19 the State, there was some doubt about the
20 constitutionality of that statute.

21 MR. UPTON: That's correct.

22 QUESTION: Well, why wouldn't the same
23 constitutional doubt apply to the amendment to the Red
24 Cross charter, if it related only to diversity
25 jurisdiction? If that was the doubt, and if they're

1 trying to be sure about the question, wouldn't they
2 have -- doesn't it mean that they must have been intending
3 to confer Federal question jurisdiction? Because it seems
4 to me if the constitutional doubt applied to the existing
5 Federal statute, it would equally apply to the amendment
6 to the Red Cross charter.

7 MR. UPTON: Well, let me say this. I find the
8 discussion in the legislative history concerning this
9 matter extremely ambiguous and confusing. I'm not sure
10 what Congress was talking about. And the only way I can
11 unravel any meaning out of it is to say I think they're
12 talking about diversity jurisdiction here.

13 Of course, one thing -- there've been some
14 developments over the years which pertain to this
15 situation. And that is, the Red Cross is a Federal
16 corporation. And in 1916, in the Bankers Trust case, this
17 Court ruled that a Federal corporation -- in this case the
18 railroad -- was doing business in no particular State, but
19 many States. So it had no base. And that may have had
20 some pertinence to the situation.

21 And in 1925, as has been observed, the
22 predecessor statute to 1349 was passed, which precluded
23 Federal corporations from invoking Federal jurisdiction,
24 unless they were owned or controlled by the United States.

25 Now, those developments may have had something

1 to do with the passage of this amendment in 1947.

2 QUESTION: Of course a simpler way, if they
3 wanted just to be sure, and avoid any question on
4 diversity jurisdiction was to make the corporation a
5 citizen of Maryland rather than the District.

6 MR. UPTON: That would have been --

7 QUESTION: Which would -- that would have made
8 it perfectly clear --

9 MR. UPTON: -- much better.

10 QUESTION: -- that that's all they wanted to do
11 was to give diversity jurisdiction.

12 MR. UPTON: That could well have been done.

13 My feeling is that the -- and the First Circuit,
14 too -- is that this amendment was very poorly drafted. It
15 should have been more specific as to exactly what they
16 were driving at.

17 QUESTION: Mr. Upton, do you think the Bankers
18 Trust case, which involved a railroad, and applied to all
19 railroads in the country, really, is any different from
20 this case which applies to one corporation, the American
21 Red Cross?

22 MR. UPTON: I don't think there's any difference
23 in the principle --

24 QUESTION: From a pragmatic point of view, I
25 suppose the Court, as it was constructed back -- looked

1 with alarm on every railroad case coming into Federal
2 court.

3 MR. UPTON: Well, there could be some alarm with
4 whether or not other Federal corporations with similar
5 charters may attempt to invoke Federal jurisdiction, if
6 this case is -- if we construe this charter as a grant of
7 Federal jurisdiction.

8 QUESTION: So you think there are cases that
9 hang on this one then?

10 MR. UPTON: I think there are other Federal
11 corporations -- I can cite three -- which have very
12 similar charters.

13 Neighborhood -- excuse me -- Neighborhood
14 Reinvestment Corporation has a very similar charter;
15 Pension Benefit Guaranty Corporation has a very similar
16 charter; and Securities Investor Protection Corporation
17 has almost an identical charter -- and all three of these
18 corporations, sooner or later, will be seeking Federal
19 jurisdiction if this case is decided in the favor of Red
20 Cross.

21 As I stated, the way this is drafted, there's no
22 concern for the peculiarities of each -- court system, the
23 State and the Federal, one being -- one having courts of
24 general jurisdiction, the others having -- the other
25 having courts of limited jurisdiction.

1 And therefore, I think it's sound to construe
2 this statute not as a grant of jurisdiction, but as a
3 grant of capacity to litigate. There's not enough
4 specificity in it. And it resembles strongly the charter
5 in the Bankers Trust case, which this Court ruled was
6 a -- simply a grant of capacity to litigate.

7 Now in 1925, Congress, at the urging of three
8 justices of this Court, legislatively overruled the Osborn
9 case, insofar as it pertained to Federal corporations. At
10 that time, it precluded Federal corporations from access
11 to Federal courts unless they were owned or controlled by
12 the United States.

13 Now, that was a very strong, and definite
14 policy, which has been followed by this Court over the
15 last 50 years. And I would suggest that if Congress wants
16 to make an exception, as it has with certain Federal
17 corporations, it would have done so by very clear and
18 specific language -- such as the FDIC charter, and the
19 Federal Savings and Loan Insurance Corporation. Those
20 charters are very specific, and I suggest if they were
21 going to do so in this case, they would have used very
22 specific language to create an exception to that general
23 policy.

24 QUESTION: How does the 1925 statute, Mr. Upton,
25 fit into the analytic way you approach the case?

1 MR. UPTON: I think that that statute requires
2 clear and specific language, in the same way that if
3 you're going to create the exception to the usual rule in
4 construing sue and be sued clauses, you'd want clear and
5 specific language.

6 If you're going to create an exception to that
7 1925 policy, you would do so by clear and specific
8 language, in my view. And that has been done in many of
9 the cases -- in many of the Federal corporations.

10 QUESTION: Of course, if they use the language
11 that they used in D'Oench, Duhme, they might have created
12 the consequence that ensued in D'Oench, Duhme, which
13 would -- there would have been a Federal common law
14 governing the Red Cross, which perhaps they did not want.

15 MR. UPTON: Well, that's true, Your Honor.
16 I -- however, I -- I'm getting to the D'Oench case, and I
17 would like to discuss that for a moment.

18 And I think the D'Oench case is quite
19 distinguishable from the Red Cross case, and, in fact,
20 supports our position more than it does the Red Cross
21 position. To be sure, there's a sue and be sued clause
22 which is very similar -- to sue and be sued in courts of
23 law and equity, State or Federal -- very similar. But
24 just below that, in the same charter, it says that all
25 civil actions against the corporation shall be deemed to

1 arise under the laws of the United States.

2 That's a grant of Federal jurisdiction. And
3 Congress so stated in 1935, when it amended the charter.
4 In its report, it indicated, in 1935, when it adopted the
5 deemed to arise language, that the purpose was to grant
6 Federal jurisdiction. Now, why was that later amendment
7 required, if the earlier sue and be sued clause was a
8 grant of Federal jurisdiction?

9 Finally, I would suggest that the legislative
10 history of the 1947 amendment, the addition of the
11 language State or Federal, is both ambiguous and confused.
12 Courts have read that recommendation 22 -- number 22.
13 Some have said oh, all they're trying to do is clarify
14 capacity to litigate in Federal court where it otherwise
15 exist.

16 Other courts -- half of the courts below -- have
17 said no, that's a grant of Federal jurisdiction. Now, I
18 think that's an indication right there that this is a very
19 ambiguous piece of work.

20 I would also point out for the Court there is
21 language in recommendation number 22 which seems more
22 consistent with a grant of capacity to sue. They say we
23 should clarify the capacity to litigate in Federal court.
24 They use the word clarify, and then they go on to say make
25 it clear that the Red Cross can sue in Federal court. And

1 then further on they refer to power to sue.

2 These -- this is language of capacity to
3 litigate rather than jurisdiction. And like everything
4 else relating to this ill-starred amendment, it's
5 ambiguous. And I would suggest that the Senate hearing on
6 this amendment was quite confused. Senator George says,
7 at one point, that the purpose of the amendment is to give
8 the jurisdiction to the State and Federal courts. And
9 then a few pages later he says, we're going to give the
10 Red Cross the power to be sued in State courts. That, I
11 think, is the real purpose of this amendment. So, we
12 don't really know what Senator George was driving at. You
13 can't reconcile those two statements.

14 It's also significant that the House and Senate
15 reports don't even refer to the jurisdictional point at
16 all.

17 In conclusion -- I'm sorry -- I would just make
18 one other point, and that's on the constitutional issue.
19 That has been discussed here, and we did mention it in our
20 brief.

21 We believe that this case here is very similar
22 to the case of Mesa v. California. In Mesa, you had a
23 Federal officer who was sued in State court and attempted
24 to remove the case to Federal court. This Court ruled
25 that that was a pure -- that 1441 -- 1442(a)(1) was a pure

1 jurisdictional statute, that the officer tried to remove
2 the case to Federal court under. And -- but they did
3 infer into the statute a requirement that the Federal
4 defense had to be alleged.

5 Now, what I'm suggesting is that that case,
6 which dealt with a Federal officer, is analogous to this
7 case, where we have a Federal corporation. They're both
8 Federal entities of one kind or another. And why
9 shouldn't the same law apply to one that applies to the
10 other?

11 QUESTION: Well, of course, the closer analogy
12 is Osborn, where the Court held that a similar provision
13 didn't violate article 3. I mean, that's your analogy.

14 MR. UPTON: In a sense, but I wonder if the law
15 of Osborn is still good law today on that point, since
16 it's been overruled legislatively already.

17 I'm not suggesting that the constitutional
18 interpretation is wrong. But I am suggesting that
19 the -- maybe that law pertaining to Federal corporations
20 is no longer viable law, as Justice Frankfurter said at
21 one point, in one of his opinions -- I think in the
22 Tidewater case.

23 Finally, I would just observe, as one of the
24 members of this Court has said, nothing is so wasteful as
25 litigation over where to litigate. We have been

1 litigating this case now for the last 2 years, and we've
2 done little else but talk about jurisdiction.

3 And I'm sure that both the Red Cross and the
4 respondents will be happy when this vexing issue is laid
5 to rest.

6 Thank you very much.

7 QUESTION: Thank you, Mr. Upton.

8 Mr. Englert, you have 5 minutes remaining.

9 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

10 ON BEHALF OF THE PETITIONER

11 MR. ENGLERT: Thank you, Mr. Chief Justice.

12 Let me make clear what I meant to say before.

13 State law governs the tort issues in this case.

14 That does not mean that we don't have Federal defenses.

15 There are Federal issues about jury trial and punitive
16 damages. And it is our position that the Red Cross shares
17 the Federal Government's immunity from jury trial and
18 punitive damages. The one court that has addressed the
19 punitive damages issue has so held.

20 QUESTION: What is the closest case in this
21 Court on the jury trial issue?

22 MR. ENGLERT: Lehman v. Nakshian.

23 QUESTION: What?

24 MR. ENGLERT: Lehman v. Nakshian.

25 The reason I -- one reason I didn't mention

1 those before is that under Osborn, they are not necessary.
2 The Federal chartering of the Red Cross is sufficient. If
3 the Court were inclined to cut back on Osborn --
4 notwithstanding its authorship -- that the other factors
5 that have been mentioned today would be relevant, perhaps
6 -- the fact that the Red Cross does have Federal defenses,
7 the fact that the Red Cross is a very important
8 instrumentality that carries out treaty obligations in the
9 United States.

10 But it's only if Osborn is overruled or cut back
11 on that the constitutional question can, in any way, be
12 deemed serious. And it is perfectly clear that
13 respondents are asking this Court to overrule Osborn's
14 constitutional holding. They say, on page 32 of their
15 brief, this Court must reach the issue of whether Osborn's
16 broad interpretation of article 3 remains good law. We
17 submit that it does not.

18 In the D'Oench case, in which the charter
19 language was absolutely indistinguishable from the
20 language put into the Red Cross charter 5 years later --

21 QUESTION: Yeah, but what about the fact that
22 that's -- that charter said, in so many words, any case to
23 which the Federal entity as a party shall be deemed to
24 arise under Federal law -- you are, in effect, saying that
25 we should treat the sue and be sued clause as though it

1 incorporated a similar sentence implicitly.

2 MR. ENGLERT: Absolutely not. We are not saying
3 that at all, Justice Stevens. Because the effect of that
4 additional arising-under clause, in D'Oench, the clause
5 cited in the footnote is, as Justice Scalia pointed out,
6 to require the development of a Federal law that will
7 govern all these cases. And we are not asking for that.

8 QUESTION: Well, you aren't asking for
9 development of Federal law. But you are asking us to hold
10 it is to be deemed to present a Federal question, aren't
11 you?

12 MR. ENGLERT: I think not, Your Honor. This is
13 party-based jurisdiction, we're talking about. Now, for
14 purposes of article 3, yes. We are saying that the
15 relevant clause of article 3 is the arising-under clause.

16 But that should not be confused with saying that
17 this is a section 1331 case. It is not. Section 1331
18 does not apply here. Only in the constitutional sense are
19 we asking this Court to hold -- as it held in Osborn, and
20 has reaffirmed since -- that cases like this arise under
21 Federal law, that it is party-based jurisdiction that
22 depends on the status of the party as a federally
23 chartered entity, and if the Court thinks it relevant, a
24 very important Federal instrumentality that will be
25 raising Federal defenses.

1 QUESTION: But in D'Oench, Duhme, the fact
2 remains that there was that other provision, and indeed it
3 was -- it was cited by the Court in the same breath in
4 which the Court said that the corporation brings this suit
5 under an act of Congress authorizing it to sue or be sued
6 in any court of law or equity, State or Federal.

7 MR. ENGLERT: Well, I could quarrel with the
8 same breath, since it's in a footnote.

9 QUESTION: Well, the best way you could do it in
10 the same breath is to put it in a footnote.

11 (Laughter.)

12 QUESTION: The whole statement in D'Oench, Duhme
13 is just a casual observation.

14 MR. ENGLERT: I don't think so, Your Honor.
15 It's more than a casual observation. I'm not familiar
16 with this Court making many casual observations.

17 The question in that case was what --

18 QUESTION: Well, you've read Justice Douglas'
19 opinions before, haven't you?

20 (Laughter.)

21 MR. ENGLERT: Yes, Your Honor.

22 The question was what law to apply, and one of
23 the factors bearing on what law to apply was what the
24 basis of jurisdiction was, whether it was diversity or
25 something else.

1 The Court said pointedly, the basis for
2 jurisdiction here is not diversity. It's something else.
3 It's the sue and be sued clause. And in a footnote,
4 whether or not in the same breath, it said the
5 clause -- the statute further provides something else.
6 That clause actually was omitted from the Solicitor
7 General's brief, curiously enough, in that case. The
8 Solicitor General certainly thought the sue and be sued
9 clause was adequate.

10 And our whole point is that Congress is entitled
11 to make the same assumption that the Solicitor General of
12 this Court made in 1942, that a sue and be sued clause,
13 with the words State or Federal, is adequate to confer
14 Federal jurisdiction. .

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Englert.

18 The case is submitted.

19 (Whereupon, at 10:58 a.m., the case in the
20 above-entitled matter was submitted.)
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25

CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies
that the attached pages represents an accurate transcription
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No. 91-594 AMERICAN NATIONAL RED CROSS,
Petitioner v. S. G. AND A. E.*

*and that these attached pages constitutes the original
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BY *Michelle Sanders*

(REPORTER)