OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: FEDERAL DEPOSIT INSURANCE, CORPORATION,

Petitioner v. JOHN A. MEYER, ET AL.

CASE NO: 92-741

PLACE: Washington, D.C.

DATE: Monday, October 4, 1993

PAGES: 1-54

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202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - X

3 FEDERAL DEPOSIT INSURANCE, :

4 CORPORATION, :

5 Petitioner :

6 v. : No. 92-741

7 JOHN A. MEYER, ET AL. :

8 - X

9 Washington, D.C.

10 Monday, October 4, 1993

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:04 a.m.

14 APPEARANCES:

15 PAUL BENDER, ESQ., Deputy Solicitor General, Department of

16 Justice, Washington, D.C.; on behalf of the

17 Petitioner.

18 GENNARO A. FILICE, III, ESQ., Oakland, California; on

19 behalf of the Respondents.

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

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 first this morning in Number 92-741, the Federal Deposit

5 Insurance Corporation v. John A. Meyer. Mr. Bender.

6 ORAL ARGUMENT OF PAUL BENDER

7 ON BEHALF OF THE PETITIONER

8 MR. BENDER: Mr. Chief Justice and may it please

9 the Court:

10 This case arises out of the financial failure of

11 a large California savings and loan institution in the

12 early 1980's. The bank had been suffering very serious

13 financial losses. It's net worth had gone down from about

14 $100 million to about $15 million in the several months

15 preceding the seizure of the bank.

16 In the week preceding the seizure, depositors

17 removed about $70 million from the bank's deposits. The

18 bank was seized by the California Savings and Loan

19 Commissioner because she thought the bank was operating in

20 an unsafe manner. She appointed the F-S-L-I-C -- FSLIC,

21 which has since been replaced by FDIC -- as the receiver,

22 and FSLIC was also appointed receiver under Federal law.

23 Under FSLIC's policy then, which is still FDIC's

24 policy, when a thrift institution fails for financial

25 reasons, they immediately terminate all the top management

1 of the bank, for obvious reasons.

2 That's the management that got the bank into the

3 financial condition that required the seizure, those are

4 the highest paid people, but perhaps most importantly, the

5 receiver's job is either to terminate the bank, or to

6 merge it with another going institution, and for the

7 purposes of doing that, it's very important not to have

8 the top management there, because the institution into

9 which it's merged will have its own management.

10 Pursuant to that policy, the four top officers

11 of Fidelity were terminated -- the president, the

12 plaintiff in this case, Mr. Meyer, who is the president's

13 brother, and two other people. The bank was -- what

14 happens is, the bank is terminated -- the receiver takes

15 over at the end of one day, and at the beginning of the

16 next day the bank reopens as a new institution which is

17 chartered by the Federal Home Bank Board. Six months

18 later, that new institution merged the bank into Citibank,

19 I think, in California, and it continues to exist in that

20 form.

21 QUESTION: What position did the respondent here

22 occupy, Mr. Bender?

23 MR. BENDER: He was the head of the branch

24 operations. I think he was called a service manager, but

25 his primary responsibility, I think, was to be in charge

1 of branch operations.

2 He brought a lawsuit based on many different

3 claimed rights. The only ones which proceeded to trial

4 were claims not of a breach of contract but claims under

5 the due process clause. The lawsuit was based on an

6 alleged implied contract of continued employment which he

7 said that California law gave him as a long-term employee

8 of the bank, but he didn't -- the suit that got to trial

9 before the jury was not a suit based on the breach of

10 contract, it was a suit based on the alleged deprivation

11 of his contract rights without due process. He says --

12 QUESTION: May I interrupt you, sir? If he had

13 been fired by the bank, if there hadn't been the takeover,

14 would he have had a contract claim under State law against

15 the bank?

16 MR. BENDER: If the bank had continued to

17 operate and he had been fired, yes, so far as we can tell,

18 he would have --

19 QUESTION: He did have a right under his

20 contract to pre -- in effect, to pre-deprivation process,

21 then?

22 MR. BENDER: No, I don't think it was a right to

23 process, it was a contract right. If the bank had

24 continued --

25 QUESTION: No, but his due process claim was

1 that he didn't get pre-deprivation process. Would he have
2 had a contract claim to the same effect against the bank?
3 MR. BENDER: No. I think the contract claim
4 would have just been for breach of his contract of
5 employment. He makes no suggestion, and I know nothing in
6 California contract law, that would suggest he had any
7 procedural rights. His remedy under California contract
8 law would have been a suit for breach of contract against
9 the bank for terminating him without just cause. That's
10 not the suit that he brought here.
11 The suit that he has recovered on, a jury -- the
12 two suits that went to the jury were a claim against FDIC
13 for the deprivation of his property without due process,
14 and a claim against the receiver for deprivation of his
15 property, his contract right, without due process.
16 The jury found for the receiver on the ground
17 that he had qualified immunity, but the jury found for the
18 plaintiff against FDIC in the amount of $130,000.
19 QUESTION: Mr. Bender, he didn't have a State
20 law tort claim, did he?
21 MR. BENDER: He brought State law tort claims,
22 but they didn't proceed to trial. They were dismissed by
23 the trial judge.
24 QUESTION: But as we analyze the case, don't we
25 assume he has no tort remedy as a matter of State law? It

1 goes to the question of whether it's cognizable, and so
2 forth.
3 MR. BENDER: I don't think -- I don't think it
4 matters whether he has a tort remedy under State law. The
5 particular tort remedy --
6 QUESTION: If he had a tort remedy, couldn't it
7 arguably be said then the Federal Tort Claims Act would
8 prevail?
9 MR. BENDER: Well, if he had a tort remedy under
10 State law, he could try to assert that State law remedy
11 against the Federal Government under the Federal Tort
12 Claims Act, but that's not the right he alleges in this
13 case. Here he's alleging a violation of his Federal
14 constitutional rights.
15 QUESTION: If you're right, Mr. Bender, about
16 your argument that there is no due process right of the
17 nature claimed, wouldn't that go to the receiver,
18 Pattullo, as well as to the -- FSLIC?
19 MR. BENDER: Yes. Yes, it would.
20 QUESTION: So your position, if you would
21 prevail on that second argument that you make that there
22 is no due process right to tenure as against this Federal
23 agency, then Pattullo should never have gone to trial.
24 MR. BENDER: That's right.
25 QUESTION: You would never get to the question

1 of qualified immunity.

2 MR. BENDER: That's right. This case should

3 have been dismissed before trial, because there was no

4 deprivation of property, nor -- even if there was a

5 deprivation of property, it wasn't without due process,

6 and -- well, let me turn to that first, because I think

7 that's really the most fundamental question in this case.

8 There was no deprivation of property because the

9 only property right he asserts, the right to continued

10 employment, ended by virtue of the failure of the bank and

11 its seizure by the receiver. When the bank fails and it's

12 seized by the receiver, it's just as if the bank had

13 itself gone out of business, because --

14 QUESTION: Mr. Bender, the first question you

15 present in your petition for certiorari is whether FSLIC

16 can be held liable for tort damages arising on a Bivens

17 cause of action. Now, you're choosing, I take it, to

18 argue the second question you present first?

19 MR. BENDER: Yes. I think it's a little easier

20 to understand the case if you understand first what the

21 tort right is, what the constitutional tort right is that

22 he's asserting.

23 QUESTION: But I take it you're also going to

24 argue, eventually, your --

25 MR. BENDER: Absolutely. Both points are

1 important, and both points are raised by the case. Either
2 one is sufficient to dispose of the case.
3 If he worked for the bank with a contract of --
4 an implied contract of continued employment and the bank
5 went out of business for financial reasons, I don't think
6 anyone would think that he had a right of continued
7 employment with a bank which had failed and was no longer
8 in business, and that's exactly what happens when a bank
9 goes into receivership. You can tell that by the
10 notion -- the common law notion of receivership, which has
11 been absorbed into the Federal statutes, cases going way
12 back, including decisions of this Court, that --
13 QUESTION: Does this California law agree with
14 that? In other words, if there is a receivership of a
15 business in California law, there's an absolute right to
16 terminate all the employees and hire all the new ones?
17 MR. BENDER: We think so, but that's irrelevant,
18 because Federal law clearly supersedes California law, and
19 the receiver here was appointed under Federal law.
20 Remember, this is a bank insured by the Federal
21 Government.
22 QUESTION: Well, but your theory is, is that the
23 company has gone out of business, and I just have some
24 trouble with that. Most receiverships, including the
25 FDIC, operate the business on a routine basis subject to

1 the supervision of the FDIC. Could they fire all the
2 janitors because they didn't like the way they parted
3 their hair?
4 MR. BENDER: In fact, FDIC now has a policy of
5 firing all employees immediately upon the onset of a
6 receivership and hiring back those that it wants to hire
7 back to do whatever the bank wants to do.
8 I think it's a mistake to assume that the bank
9 always continues operating in exactly the same form. The
10 receiver has the right to terminate, wind up the affairs
11 of the bank, he has the right to consolidate or merge it
12 with another bank, he has a right to draw it in, draw in
13 its scope of operations to make it profitable, new
14 management takes over, the receiver feels it needs new
15 management in order to accomplish those things, and to
16 have the old top management staying on in the bank as
17 you're trying to merge it with another bank, which they
18 may have resisted doing for a number of years, as you're
19 trying to wind up its affairs, would be really disruptive.
20 QUESTION: Perhaps so, but why is it so that you
21 would be without liability for breaking those contracts
22 any more than you would be without liability for breaking
23 other contracts? You certainly don't say that money that
24 the bank owes to some people is no longer owed because the
25 bank is now out of existence, right?

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1 MR. BENDER: No. No, I -- that's a really good
2 point.
3 QUESTION: I mean, it's just a contract like
4 that, I assume.
5 MR. BENDER: No, it's not. There -- I think you
6 have to distinguish between two different kinds of
7 contracts. For example, this employee had accrued
8 vacation pay coming to him, or perhaps even accrued
9 severance pay. That he would be entitled to, because that
10 is pay for past services, and similarly, a company that
11 had supplied desks, let's say, to the bank, which already
12 had them, and they hadn't paid the bill yet, that company
13 would be entitled to recover that out of the assets of the
14 bank.
15 QUESTION: Suppose it was a contract to provide
16 desks, not just in the past, but in the future, wouldn't
17 you be liable for the profit that is lost --
18 MR. BENDER: It's quite clear --
19 QUESTION: -- by terminating that contract?
20 MR. BENDER: It's quite clear that the receiver
21 has the power to terminate those kinds of executory
22 contracts which haven't yet taken place. At that time the
23 regulations said that the receiver had the power to reject
24 or repudiate any lease or contract which it considers
25 burdensome.

1 QUESTION: Without liability?

2 MR. BENDER: Without liability for future

3 profits, without liability for services that had not been

4 rendered. It can repudiate contracts for past services

5 where the money had already be earned, and then there

6 would be liability. It would be contract liability, and

7 it would be contract liability that would come out of the

8 remaining assets of that bank, not liability that would be

9 paid by the assets of the Federal Government.

10 QUESTION: Well, it doesn't make much sense to

11 talk about repudiating past -- or liability for past

12 contractual breaches, does it? I mean, you're going to be

13 held liable on a contract measure of damages whether you

14 technically repudiate the thing or just admit you didn't

15 perform.

16 MR. BENDER: That's right, and so the main

17 burden of the repudiation clause, it seems to me, has to

18 be towards these future contracts. If you were going to

19 let him recover on that contract, how much could he

20 recover?

21 QUESTION: Well but, I mean, you can say

22 repudiate -- any businessman can repudiate a contract, but

23 the issue is whether you're liable for the money under it.

24 To say you can repudiate it doesn't establish that you're

25 not liable for the breach.

1 MR. BENDER: Right, but maybe the most
2 fundamental point is, if you're liable, you're liable only
3 on contract out of the assets of the bank. That's not the
4 claim that Mr. Meyer has brought here. Even if he did
5 have a contract right, it would be a right that was
6 enforceable only by a suit for breach of contract, and
7 that suit would be payable only out of the remaining net
8 assets of the bank, so that if the bank in fact had no net
9 assets, he wouldn't get any money.
10 What he has tried to do here is to turn that
11 contract suit out of no -- which would have to be paid out
12 of no assets, into a suit where he wants to be paid from
13 the taxpayer's money through the Federal appropriations to
14 the FDIC, or FSLIC, by saying that I'm not suing under
15 contract, I'm suing for the breach of the contract without
16 due process, as if he had a constitutional right to a
17 hearing before that.
18 QUESTION: So it's not an essential part of your
19 case, and you don't really argue here that when there is a
20 repudiation there is necessarily no liability for the
21 breach of future --
22 MR. BENDER: Not at all, although we do feel
23 that there is no liability for the future work he was
24 going to do, that the contract terminates.
25 If you want to -- you could look at it this way.

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1 When that contract --

2 QUESTION: I don't have to agree with that.

3 MR. BENDER: No, you don't have to agree with

4 that.

5 QUESTION: And I suppose it's perhaps restating

6 the same point that I take it you're not claiming that the

7 Government is scot-free here of liability on the claim

8 asserted simply because it was acting as a regulator and

9 not as a mere successor to the originally contracting

10 party?

11 MR. BENDER: No. No, we're not arguing that at

12 all. We're arguing that the Government here did not

13 deprive him of his property without due process, first

14 because we don't think he had any property, but if, as

15 Justice Scalia believes, you think he was deprived of

16 property, that was still not without due process, because

17 he has a completely adequate remedy, the normal remedy,

18 the remedy he would have had if the bank had terminated

19 him itself, namely, to sue the bank under California law

20 of contract, which he is able to do.

21 QUESTION: But isn't there an inconsistency in

22 your position, though, Mr. Bender, because you say that

23 the receiver's rights are not dependent on State law, and

24 that -- that it has rights coming from the Federal

25 regulations and that sort of thing, and yet his remedy is

1 purely State law?

2 MR. BENDER: Well, because the receivership

3 doesn't -- although the receivership has the power,

4 Federal law has the power to totally supersede State law,

5 it hasn't done that, and it's clear that the receivership

6 permits suits to be brought against the remaining assets

7 of the bank for contracts on which the money had already

8 been earned, such as contracts for past services. If

9 Federal law tried to wipe out those contracts as well, I

10 think there would be a problem with the takings clause.

11 In any event, the receiver has never -- has never -- as

12 far as I know has never alleged that that happened.

13 QUESTION: In addition is the process that is

14 due, is the claim that can be asserted against the assets

15 of the failed association --

16 MR. BENDER: Exactly.

17 QUESTION: And that is the full extent of the

18 process that is constitutionally due.

19 MR. BENDER: Exactly, right. That's all the

20 process he would have had due if the bank had gone out of

21 business itself, or if the bank had fired him, and there's

22 absolutely no reason why he should suddenly get an entry

23 into the Federal Treasury because the bank goes into

24 receivership.

25 His rights -- kind of ironic that management

1 that would run a bank and run it into the ground so that
2 the depositors lose all their money except for the Federal
3 insurance should then be able to have a key into the
4 Federal Treasury to recover on contracts that they
5 couldn't recover on against the banks.
6 QUESTION: But Mr. Bender, isn't it at least
7 theoretically possible that even -- if he had a State law
8 right to recover assets from the bank which in turn would
9 give him a right to pretermination hearing, maybe he would
10 lose against the -- on his State contract claim but
11 nevertheless be able to argue that if you'd given me the
12 hearing to which I was entitled, I could have persuaded
13 you not to fire me, because I really wasn't involved in
14 all this stuff?
15 MR. BENDER: He can argue that, and he does, but
16 that is not a -- that is not a convincing argument,
17 because the Federal law made clear at the time, then in
18 the regulations, now in the statute, that the receiver can
19 repudiate any contract which it considers burdensome.
20 I think you can't read language like that to say
21 that that's something you have a hearing over and an
22 adjudication over. It's any -- it can repudiate a
23 contract that the receiver considers burdensome. It's in
24 the sole discretion of the receiver, and it has to be.
25 If you seize a bank with 20 or 30 top management

1 people and you have to give them all hearings before you
2 can terminate their services and move on with the business
3 of reorganizing the bank, that's going to make
4 receiverships much less efficient.
5 The whole purpose of these receiverships is to
6 go into a failing institution and save what's still there
7 for the depositors and for the Federal taxpayers. To have
8 to go through a bunch of hearings and then, once you have
9 the initial hearing there will probably be an asserted
10 right to some kind of review of the question of whether
11 this is a burdensome contract, those are not questions
12 that the receiver is easily going to be able to answer in
13 a short period of time before an independent hearing
14 examiner.
15 QUESTION: Do ordinarily Federal agencies have
16 to do that? I mean, let's assume a regular Federal agency
17 wants to terminate a contract. Does it have to give a due
18 process hearing?
19 MR. BENDER: I don't think so, because the right
20 to recover damages for the breach of contract is the
21 process that is due in the commercial world.
22 You're dealing here with the FDIC and FSLIC --
23 and let me move now to the second part of our argument.
24 QUESTION: Before you do, let me just ask one
25 question. In the normal Government situation, supposing

1 the head of the agency has a right to terminate the
2 employment of anyone whom he thinks is not performing
3 adequately in his sole discretion with no review, but he
4 has to make a determination that he's not performing
5 adequately. Right to a hearing, or no?
6 MR. BENDER: You're talking about a Federal
7 agency?
8 QUESTION: Yes.
9 MR. BENDER: I think that if the statute makes
10 it clear that it's in his sole discretion, then there
11 wouldn't be a right to a hearing.
12 The cases in which this court has found there
13 were rights to hearings are cases where the statute says,
14 you can be fired, but only for cause. I don't think we
15 have cases in which the State law which creates these
16 property rights made it clear that it was in the sole
17 discretion of the person.
18 It's like a contract at will. Once the bank
19 goes into the receivership, the employment of the people
20 that work for the bank is employment at will. The
21 receiver can terminate it at any time, just like a private
22 employer could.
23 QUESTION: Mr. Bender, you will get to your
24 first point?
25 MR. BENDER: I'm about to, I hope.

1 The question here is whether, if there were a
2 constitutional right in this case, a violation of
3 procedural due process, there would be a suit against the
4 FDIC, the successor of FSLIC. The only ground for urging
5 that there would be such a suit is the sue-and-be-sued
6 clause of the agencies.
7 If an official in the Department of Justice were
8 to commit a constitutional violation, there's no suit
9 against the Department of Justice for that. It has no
10 sue-and-be-sued clause. There's no suit, it's clearly
11 established, against the United States for Bivens-type
12 constitutional tort actions. So the only way that the
13 plaintiff can claim here that there's any ability to
14 recover against FDIC for the constitutional tort is
15 because of the sue-and-be-sued clause.
16 I think if you just -- even if you just had the
17 sue-and-be-sued clause, you would have to hold that that
18 does not authorize constitutional torts, suits for
19 constitutional torts. The sue-and-be-sued clauses were to
20 enable these entities to engage in commerce in the
21 commercial marketplace, and they were meant to be able to
22 sue and be sued on ordinary, commercial kinds of causes of
23 action -- contracts and torts growing out of the running
24 of a private business.
25 QUESTION: So you say we reach that result

1 without even referring to the Federal Tort Claims Act,
2 just the --
3 MR. BENDER: Right, just --
4 QUESTION: -- sue-and-be-sued clause alone. Is
5 that some implied exemption --
6 MR. BENDER: Yes.
7 QUESTION: -- we read into the language?
8 MR. BENDER: Yes, that --
9 QUESTION: Just intuitive, we know that
10 intuitively it means sue-and-be-sued commercially?
11 MR. BENDER: That's the -- that was the reason
12 for the creation of the sue-and-be-sued liability, but you
13 don't have to reach that here, because Congress clarified
14 that, made that absolutely clear.
15 QUESTION: Well, we might not have to reach
16 that, but we have to understand it, I think, to follow
17 your argument.
18 MR. BENDER: Right -- no, you don't. You
19 could -- even if you thought that constitutional torts
20 could come under the general sue-and-be-sued language,
21 Congress has made it clear that they're -- it doesn't
22 intend that they do by specific language in the Federal
23 Tort Claims Act, but I do think it's important to
24 recognize that the sue-and-be-sued authority is not just
25 an open-ended -- I don't think it was intended to be an

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1 open-ended sue-and-be-sued authority. It was intended to
2 facilitate the operation of these agencies in the
3 commercial marketplace, and I don't think you should infer
4 a waiver of sovereign immunity for a wholly different kind
5 of thing, a tort action growing, implied by the court out
6 of the Constitution from that sue-and-be-sued authority,
7 but Congress made it entirely clear that that's what it
8 was thinking in the enactment of the Federal Tort Claims
9 Act.
10 QUESTION: What about a false imprisonment
11 claim, would that be under the sue-and-be-sued clause, or
12 is that outside of the commercial realm? I mean, this is
13 a very difficult jurisprudence you're asking us to adopt
14 here.
15 MR. BENDER: I don't think so. If the tort
16 claim comes under State law, then I think it can be made
17 against the agency under the sue-and-be-sued clause, but I
18 don't think the sue-and-be-sued clauses were meant to
19 create liability in those agencies arising out of the
20 Federal Constitution.
21 So in your ordinary false imprisonment case
22 there's probably a State law claim, which is the same kind
23 of a claim which could be brought against a private
24 company. That's the test I'm asking you to use. The
25 kinds of claims that could be brought against a private

1 company were the kinds of claims that were intended to be
2 authorized by the sue-and-be-sued clause.
3 QUESTION: Mr. Bender, is it part of your
4 argument that the Bivens claim simply doesn't extend to
5 agencies as distinguished from individuals, so that in no
6 case -- forgetting about the sue-and-be-sued clause --
7 should one think of a Bivens claim as against an entity as
8 distinguished from an individual?
9 MR. BENDER: That's right, and that's because
10 there are only two kinds of agencies. The ones without
11 sue-and-be-sued clauses, it's clear that they cannot be
12 sued. You'd have to sue the United States, and it's plain
13 you cannot sue the United States on a Bivens-type tort.
14 The other kinds of agencies are the sue-and-be-
15 sued agencies, and there Congress made it clear in the
16 Tort Claims Act that it wanted to make the tort liability
17 of sue-and-be-sued agencies exactly the same as the tort
18 liability of other agencies.
19 QUESTION: I thought your argument went beyond
20 that. I thought you were also arguing that even without
21 the Federal Tort Claims Act, and even without the sue-
22 and-be-sued argument, there simply is no such thing as a
23 Bivens action that is against the Government and not
24 against a private individual.
25 MR. BENDER: That's right. There is --

1 QUESTION: Did you make that argument below as
2 well, or is that being made for the first time here?
3 MR. BENDER: I believe we made that argument
4 below, yes. I don't think it's being made for the first
5 time here. That argument was certainly made in the
6 petition for certiorari, and there was no claim that it
7 had not been made below.
8 QUESTION: -- Mr. Bender, the sue-and-be-sued
9 clause came in when, as opposed to when the Bivens claim
10 was created?
11 MR. BENDER: I think it's important to
12 understand that. The sue-and-be-sued clauses were first.
13 Many of them were first, and by the time of the tort
14 claims act in 1946, there had been a number of tort suits
15 brought against the sue-and-be-sued agencies, State law
16 tort suits, because there were no Bivens claims at that
17 time.
18 In enacting the Federal Tort Claims Act,
19 Congress said that Government, the Federal Government is
20 now going to be liable on the torts of all Federal
21 agencies, sue-and-be-sued or not, with certain important
22 limitations and at the same time it said -- in the statute
23 that is now 2679(a), it said that the sue-and-be-sued
24 agencies should also not be sued, and all tort claims
25 should be brought against the Federal Government, and the

1 legislative history -- let me read you a brief excerpt of
2 the committee report that accompanied that statute.
3 It says, "Section 404" -- that's the predecessor
4 of the statute we now have -- "provides that Federal
5 agencies suable in their own name prior to the enactment
6 of this bill will no longer be suable for torts cognizable
7 under that bill. This will place torts of suable agencies
8 of the United States on precisely the same footing as
9 torts of nonsuable agencies."
10 I don't see any way you can read that language
11 except to say that you could no longer sue the sue-and-
12 be-sued agencies for tort --
13 QUESTION: That language in the legislative
14 history is not in the statute itself.
15 MR. BENDER: Well, I think the language in the
16 statute itself is just as clear, because it refers to --
17 it says the authority of any Federal agency to sue and be
18 sued in its own name shall not be construed to authorize
19 suits against such Federal agency on claims which are
20 cognizable under the tort claims act, and it's clear from
21 the legislative history that when they said, claims
22 cognizable under the tort claims act, they meant all tort
23 claims.
24 QUESTION: Well --
25 QUESTION: Except that was pre-Bivens.

1 QUESTION: Right.

2 MR. BENDER: That was pre-Bivens.

3 QUESTION: And that statement was true pre-

4 Bivens. It was quite true pre-Bivens, right?

5 MR. BENDER: Well, it wasn't true before the

6 tort claims act. Before the tort claims act, you could

7 sue the sue-and-be-sued agencies under tort, and so

8 Congress was clearly doing something important here.

9 QUESTION: I understand, but pre-Bivens, and

10 given the new enactment of the tort claims act, that

11 statement in the legislative history would be quite true,

12 but it says nothing about what the effect of that act

13 would be after you have Bivens.

14 MR. BENDER: All right, then the question for

15 this Court is, when the Court creates the Bivens cause of

16 action, finds the Bivens cause of action in the

17 Constitution, is that now going to be the only tort claim

18 that you can bring against the agencies, even though you

19 can't bring it against the United States? I think

20 Bivens --

21 QUESTION: Why not?

22 QUESTION: -- is not cognizable under 1346(b).

23 MR. BENDER: No, I think by cognizable under

24 1346(b), they meant tort claims, otherwise they could not

25 possibly have said what they say in the next sentence of

1 the committee report. This will place torts of suable
2 agencies on precisely the same footing as torts of
3 nonsuable agencies.
4 QUESTION: Again, you're referring to
5 legislative history -- legislative history prior to
6 Bivens?
7 MR. BENDER: Yes, right.
8 QUESTION: And you're simply reading out of the
9 statute the description of the Government's liability as
10 if it were a private party. I mean, that qualification
11 isn't in the legislative history you were reading, but it
12 is in the statute, and that is what excludes its reference
13 to Bivens, because there is no analogous private
14 liability.
15 MR. BENDER: That's right, but it's still a tort
16 claim cognizable under the tort claims act for purposes
17 of --
18 QUESTION: How do you define cognizable to reach
19 this conclusion?
20 MR. BENDER: I define it as a tort claim.
21 QUESTION: The word "cognizable" doesn't mean
22 tort claim.
23 MR. BENDER: Well, it says, cognizable under the
24 tort claims act, which I think means recognizable under
25 the tort claims act. That's the most natural meaning of

1 the word, which I think means a tort claim.

2 QUESTION: Well, how could it be cognizable if

3 the court doesn't even have jurisdiction under the

4 statute?

5 MR. BENDER: Well, take, for example, a case of

6 the post office's negligent delivery of mail. You cannot

7 recover under the tort claims act for that -- there's a

8 specific exception -- and yet everyone agrees that that's

9 cognizable under the tort claims act, even though it's

10 specifically excluded because it's a tort claim, and

11 Congress has --

12 QUESTION: Well, because it has a State analog

13 for private parties, which a constitutional tort doesn't.

14 MR. BENDER: Right, but just -- that's a

15 different reason. Here -- there they exclude it because

16 they don't want the post office burdened with that

17 liability. Here they exclude it because they don't want

18 the Federal Government burdened with liability unless it's

19 the kind of liability that an entity would be subject to

20 under State law. Just because it's a different reason for

21 Congress excluding it, it's still an exclusion --

22 QUESTION: Well --

23 MR. BENDER: -- and it's clear that many things

24 excluded --

25 QUESTION: -- Mr. Bender, I mean, if you just

1 read the plain language of the statute, I think you have a
2 hard time reaching your interpretation of what cognizable
3 means.
4 MR. BENDER: I think if all you had was the
5 language of the statute there would be a difficulty in
6 reading it that way, but when you start to think about it
7 and realize that a suit against the post office for
8 negligent delivery of mail cannot be successfully brought
9 under the tort claims act, nevertheless it is held
10 cognizable. You can't sue -- the post office is a sue-
11 and-be-sued agency.
12 QUESTION: That's this Court's determination?
13 MR. BENDER: What is --
14 QUESTION: Have we said that it's cognizable,
15 that that instance --
16 MR. BENDER: No.
17 QUESTION: -- that you gave is cognizable? Is
18 it your position that this is the respondent's concession?
19 MR. BENDER: No. I think it's clear in --
20 QUESTION: You said everybody agrees that this
21 is cognizable. It seems to me that's the issue in the
22 case, and I don't think respondent agrees with --
23 MR. BENDER: I think everybody agrees that you
24 cannot sue the United States Postal Service for negligent
25 delivery of the mail.

1 QUESTION: But the question is, does everybody
2 agree that that's what cognizable means?
3 MR. BENDER: No. This is the first case to
4 raise that, to raise the question.
5 QUESTION: Mr. Bender, what you're -- you're
6 making the argument that Congress really mean to bracket
7 sue-and-be-sued agencies with all other agencies for tort
8 claims act purposes but they used incomplete language so
9 the court should kind of fix up the language and --
10 MR. BENDER: It's not incomplete. It's not as
11 exact as we would like it to be. It's somewhat uncertain
12 what cognizable means, but I think when you start to think
13 about the consequences of holding that it means that it's
14 only those cases that you could succeed under the tort
15 claims act under, you will realize it can't mean --
16 cognizable can't mean claims you can win under the tort
17 claims act.
18 QUESTION: No, but it could mean claims that
19 have a counterpart in State law.
20 MR. BENDER: It could mean claims that have a
21 counterpart in State law, that's true, but Bivens, then, I
22 think makes clear that you shouldn't assume -- you
23 shouldn't imply a cause of action against the agency.
24 Bivens itself said that there are certain factors
25 counseling hesitation in creating Bivens actions, and one

1 of them, the first one Justice Brennan mentioned there,
2 was an impact on the Federal fisc, and you couldn't get a
3 clearer case of an impact on the Federal fisc than the
4 tort action in this case.
5 And so even if you think that it would be
6 possible to imply some kinds of Bivens actions against
7 Federal agencies, although we don't think you should, you
8 certainly would not imply one in this kind of situation,
9 where it is a direct attack on the Federal Treasury, and
10 exactly the kind of action that Bivens says you should
11 not --
12 QUESTION: Does it also counsel hesitation that
13 you'd have this anomaly of the difference between the sue-
14 and-be-sued agencies and other agencies?
15 MR. BENDER: I think it does. I think Congress
16 made clear that it wanted all the -- that in tort cases it
17 wanted all the agencies to be treated the same, and I
18 think the Court should hesitate before creating a major
19 exception to that kind of --
20 QUESTION: It didn't make clear that it wanted,
21 even if you read the legislative history. They just made
22 clear that they thought that was the effect of what they
23 were doing. I mean, had they said, the object of this
24 legislation is -- it didn't say that. It just said, it
25 will do this.

1 MR. BENDER: May I answer Justice Scalia's
2 question?
3 I think when you read the legislative history
4 you'll see that one of the objectives -- not just the
5 result of what they were doing, but one of their
6 objectives was to unify the procedure so all Federal
7 agencies would be treated the same for the purposes of
8 tort claims.
9 Thank you very much.
10 QUESTION: Thank you, Mr. Bender. Mr. Felice,
11 we'll hear from you.
12 ORAL ARGUMENT OF GENNARO A. FILICE, III
13 ON BEHALF OF THE RESPONDENTS
14 MR. FILICE: Mr. Chief Justice and may it please
15 the Court:
16 Counsel suggests that there's a rule somewhere
17 that the FSLIC will terminate all top-level management
18 when a savings and loan is seized. It's interesting that
19 counsel suggests that. That rule is written in no
20 regulation, no policy manual, no document anywhere.
21 That was the excuse that was given when we filed
22 this lawsuit and when we went to the person who actually
23 made the decision with respect to Mr. Meyer and told us
24 that's why that decision was made, because he was a top-
25 level manager.

1 It turns out that there were a number of top-
2 level managers at Fidelity Savings that were not
3 terminated.
4 QUESTION: What about the regulation that allows
5 the receiver to terminate a contract that he deems
6 burdensome?
7 MR. FILICE: Yes, that regulation exists, and
8 the thrust of our case, Mr. Chief Justice, is that
9 Mr. Meyer was entitled to due process in the decision-
10 making process that led to a determination that his
11 contract was burdensome. This Court has said on a number
12 of occasion that where an administrative rule permits the
13 deprivation of a liberty or property interest the impacted
14 individual has a right to notice and an opportunity to be
15 heard.
16 QUESTION: And so that would be true of any
17 employee that the receiver came in and decided to fire for
18 the good of the institution. Every one of them would have
19 a right to notice and an opportunity for hearing, and
20 presumably a right to pursue in court any claim that they
21 have.
22 MR. FILICE: Not an opportunity for a hearing,
23 Your Honor. We believe that the due process required was
24 not elaborate. We believe he was entitled to notice and a
25 reasonable opportunity to give reasons, in writing or in

1 person, as to why he should not have been terminated.

2 QUESTION: And I assume that's true for all

3 Government contracts. The Federal Government, unlike the

4 private businessman, just can't come to the conclusion on

5 its own that this contract is no longer worth it? It has

6 to give some rudimentary notice and opportunity for a

7 hearing to all people that have contracts?

8 MR. FILICE: Not necessarily so, Justice Scalia.

9 In this particular case, Mr. Meyer had a property

10 interest, and I will describe where his property interest

11 came from, and the regulation in question said not that

12 immediately upon the seizure that Mr. Meyer's contract

13 interest ceased to exist, but rather his contract ceased

14 to exist when and if it was found to be burdensome.

15 Counsel has suggested that the regulation now is

16 that all employees are terminated at the time of seizure.

17 Under that regulation, perhaps Mr. Meyer wouldn't have a

18 claim, but under the regulation in effect at the time of

19 this seizure, there had to be a determination that his

20 contract was burdensome.

21 QUESTION: Well, you're -- then you're not

22 claiming a violation of the Constitution, but just of the

23 regulation. You're saying the Constitution doesn't

24 require such a hearing, but you only have the right to the

25 hearing by reason of the regulation, is that --

1 MR. FILICE: No. We are saying that under Board
2 of Regents v. Roth, we look not to the Constitution to
3 define Mr. Meyer's property interest, instead, we look to
4 independent sources such as State law.
5 State law in this circumstance, under California
6 law, Mr. Meyer had an implied employment contract that he
7 would not be terminated absent just cause for dismissal,
8 and that implied employment contract was consistent with,
9 in effect was ratified and permitted by Federal
10 regulations at the time, which were also different at that
11 time.
12 At that time, the Federal regulation provided
13 that employees of savings and loans could have contracts
14 and they would not be deemed to be an unsafe or unsound
15 practice so long as they had an adequate, appropriate
16 termination for cause provision, so the Federal regulation
17 contemplated that there could be employment contracts with
18 employees of savings and loans that had exactly what the
19 California implied contract had --
20 QUESTION: Well, if the Federal law is more
21 favorable to the employee and says you must show that it's
22 unsafe or unsound, we must find it burdensome -- the
23 Federal law's more favorable, then there is a
24 constitutional right, but if the Federal law is harsher
25 and just says, everyone goes, there is no constitutional

1 right, that's a strange --

2 MR. FILICE: I don't believe that is strange,

3 Your Honor, because if you look at Roth, which is the

4 touchstone of the property interest we're talking about,

5 it talks about reasonable expectations of the employee,

6 and if you go to a savings and loan today and get a job,

7 you know, under regulations as I understand them, that

8 your job is forever subject to being terminated

9 immediately upon a seizure, but at that time, Federal

10 regulations provided that you could have an employment

11 contract with your employer, and it was not prohibited so

12 long as there was an adequate termination for cause

13 provision.

14 QUESTION: So when you're hired by the State

15 entity, or by the savings and loan, you're -- to determine

16 the nature of your property interest, you're looking to

17 the day when that institution is going to go under and be

18 taken over by a Federal receiver, and that's --

19 MR. FILICE: I believe that really is a legal

20 fiction, but what you look to under Roth v. Board of

21 Regents to define the property interest that Mr. Meyer is

22 asserting is independent sources such as State law which

23 define -- which first of all create the property right,

24 and at the same time define its scope, and California law

25 defined the scope of this property interest as a right to

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1 continued employment absent just cause for dismissal, and
2 that definition was completely consistent with Federal law
3 on point.
4 So our argument is that Mr. Meyer had a property
5 interest defined by California law, and also that that
6 property interest did not cease to exist at the moment of
7 regulatory seizure --
8 QUESTION: Do you -- I'm sorry. Finish your
9 sentence.
10 MR. FILICE: As apparently it would now, Justice
11 Souter.
12 QUESTION: Do you claim that the State law has
13 anything to do by way of -- by way of law or analogy with
14 defining the degree of process that you are entitled to,
15 and protection of the right?
16 MR. FILICE: No. I believe that once you have
17 defined the property interest, as you do by looking at
18 State law, then you look at the U.S. Constitution and the
19 rulings of this Court to see what you are entitled to.
20 QUESTION: Now, in deciding that, should we --
21 could we reasonably ask the question, what process he
22 would have had against the bank as a private entity if the
23 bank had simply terminated him prior to the assumption by
24 FDIC, or whatever, of the receivership?
25 MR. FILICE: I'm not sure that that is a

1 relevant question, because that's not -- not --

2 QUESTION: You should assume it's a relevant

3 question, since it's asked by a member of the --

4 (Laughter.)

5 MR. FILICE: I'm sorry, Chief Justice. I'm not

6 sure that that question is critical to our analysis of the

7 case.

8 (Laughter.)

9 QUESTION: Well said.

10 MR. FILICE: Because the definition of

11 Mr. Meyer's property right was that he was entitled to

12 continued employment absent just cause for dismissal, and

13 so when -- when the savings and loan was taken over, at

14 that point in time he had an interest in continued

15 employment the same as if he had had a written contract

16 that said that he wouldn't be discharged except for just

17 cause.

18 QUESTION: Let me ask you a different question.

19 QUESTION: Could I follow on this one before you

20 let him off?

21 (Laughter.)

22 QUESTION: I really don't follow it. It seems

23 to me you've looked to the State to find the property

24 right, and you claim to be looking to the Constitution for

25 finding the procedural right, which is the basis of your

1 suit, but when I ask you, where is that procedural right
2 in the Constitution because if it's there, everybody who
3 has a contract with the Government would have it, you fall
4 back upon the regulation, and you say, well, the
5 regulation entitles you to this procedure.

6 Where do you get the constitutional right just
7 by virtue of having the State property right and without
8 aversion to the regulation?

9 MR. FILICE: The constitutional right, Justice
10 Scalia, comes from the Fifth Amendment, and when we are
11 looking at property interests in employment, there's no
12 question the Court has said this on numerous occasions,
13 that you look to independent sources such as State law, so
14 this is an employment case --

15 QUESTION: For the property, not for what
16 procedure is due.

17 MR. FILICE: That's correct.

18 QUESTION: Okay.

19 MR. FILICE: And then the procedure that is due,
20 you look to the Fifth Amendment, and you look to this
21 Court's rulings in a number of cases, the most recent one
22 being Burns v. United States, that says where an
23 administrative regulation permits the Government to take
24 property, or to -- I'm sorry, it shouldn't be a taking --
25 to deprive somebody of a liberty or property interest,

1 that person should be entitled to due process, and if
2 the --
3 QUESTION: But you've tacked onto the State-
4 created property right the Federal regulation. You said
5 you have to judge it by this man's expectancy, and his
6 expectancy at the time was that you would have this State
7 law right to employment, and tacked onto that this Federal
8 regulation that says, can't get rid of you unless it's
9 unduly burdensome, or whatever, so you are -- you're not
10 relying just on the State law to create this right that
11 attracts the due process guarantee.
12 You said, it's State law plus Federal
13 regulation. You need the Federal regulation in there to
14 create that right.
15 MR. FILICE: I believe that we need to have a
16 Federal regulation which permits California to imply that
17 contract right. I believe that if the Federal regulation
18 said, as it apparently does today, that employees of
19 savings and loans can never have any contract except for
20 at-will employment, then I don't believe that California,
21 under the Supremacy Clause, could say no, we're going to
22 allow these contracts to be other than at-will.
23 QUESTION: You know, we've had so many
24 discussions about what is this -- the contours of this
25 right, it occurred to me that the qualified immunity

1 defense that was available to Pattullo, why wasn't that
2 available to the FSLIC as well?
3 MR. FILICE: Well, first of all, the qualified
4 immunity defense was not submitted, not pled, not raised
5 as a defense by FSLIC. Secondly, however, I would say
6 that insofar as sue-and-be-sued agencies are concerned,
7 the qualified immunity doctrine should not be applied
8 because the rationale of the qualified immunity doctrine
9 is to protect Federal employees from personal liability so
10 that they will zealously complete their tasks.
11 Where you're talking about an agency, and where
12 you are saying an agency should have appropriate
13 constitutional safeguards and what it does, you don't have
14 the same concerns that are raised by the qualified
15 immunity doctrine, and indeed, you have the converse.
16 You, I think, would like to encourage Federal agencies to
17 comply with constitutional --
18 QUESTION: Except that Congress has made all
19 other agencies totally immune.
20 MR. FILICE: Well, Congress --
21 QUESTION: That's my -- what sense does it make
22 to say that this agency, unlike the individual, is liable
23 without a qualified immunity defense, and all other
24 agencies are totally immune?
25 MR. FILICE: Well, I would say that there is

1 some sense in this sense: this agency was an independent
2 corporation that had both Government and nongovernmental
3 funds, that operated with its own board of directors, that
4 had its own budget, that was authorized to commit
5 corporate funds for various expenses, so this agency in
6 fact is different than a standard agency that is not an
7 independent, sue-and-be-sued corporate agency. I think
8 there is a difference between this agency and other
9 governmental agencies.
10 QUESTION: Have we ever held an agency liable on
11 a Bivens cause of action as opposed to individuals?
12 MR. FILICE: You have not, Your Honor, and I
13 don't think you have been asked to do that, so far as I
14 can tell.
15 QUESTION: I take it you're asking us to in this
16 case?
17 MR. FILICE: Yes, we are, and the reason why we
18 are, other -- if I can move on to the sue-and-be-sued
19 argument that we've gotten --
20 QUESTION: Can I ask you one question before you
21 do?
22 MR. FILICE: Yes.
23 QUESTION: It's not going to work into your
24 argument later on. You're not depending on State law as
25 the source of the process that is due, and you're not

1 depending on the Federal regs as the source for the
2 process that is due.
3 You're saying the process that is due somehow
4 should be appropriate to the State law contract right,
5 property right, and that is a right to continued
6 employment in the absence of cause to discharge. Why,
7 then, do you say that the process that is due includes
8 merely a right on the part of the employee to say why he
9 shouldn't be discharged, as opposed to an obligation on
10 the Government to establish that cause for why he should
11 be?
12 It seems to me the only reason to make that --
13 to choose the former rather than the latter is that it's
14 probably a little -- may look a little easier to win the
15 case. It puts less of a burden on the Government, but I
16 don't see in principle why you take that position.
17 MR. FILICE: Well, Your Honor, I said that that
18 way -- and let me just make clear what our position is.
19 We do not doubt the broad discretion of the FSLIC during a
20 regulatory takeover to terminate those contracts --
21 leases, employment contracts, whatever -- that it
22 considers burdensome.
23 We believe, however, that Mr. Meyer, having a
24 constitutionally protected property interest as defined by
25 State law, was entitled to notice and a reasonable

1 opportunity to be heard in person or in writing why that
2 action should not be taken.
3 I don't know that I have made a -- that I have a
4 position on who should bear the burden of proof in that
5 regard.
6 QUESTION: I mistook you, I'm sorry.
7 MR. FILICE: I would say, however, that we do
8 not gainsay the Government's right, broad right to act
9 boldly when there's an FSLIC takeover of a savings and
10 loan that has financial problems.
11 Let me turn briefly to the --
12 QUESTION: When you were talking about the scope
13 of this, you didn't mean to imply that this would be a
14 right that all employees would have. You have to have
15 somebody who has kind of tenure expectancy, is that --
16 MR. FILICE: That's correct, and apparently, the
17 way the Government now operates, probably nobody could
18 make this claim, because the way the Government now
19 operates, apparently you can only have an at-will
20 employment contract with a savings and loan.
21 To move on to the sue-and-be-sued language, we
22 believe that the Government's argument is a circular
23 argument with respect to the sue-and-be-sued language.
24 The Government identifies the appropriate statutes, and
25 the issue boils down to whether this action is cognizable

1 not under the Federal Tort Claims Act, as Mr. Bender
2 said -- 2679(a) says the issue is whether it is cognizable
3 under 1346(b), and 1346(b) does not say torts, as the
4 Government would wish it says.
5 1346(b) says that actions cognizable under the
6 Federal tort claims actions are those actions for which a
7 private individual would be liable under local law. I
8 don't believe we need to go beyond the wording of the
9 statute to look at the legislative history to interpret
10 that plain language.
11 The sue-and-be-sued clause and the Federal Tort
12 Claims Act draw the same distinction that we wish to draw.
13 That is, common law torts are covered by the Federal Tort
14 Claims Act, but those actions that are other than common
15 law torts are not cognizable, and if there is an
16 appropriate sue-and-be-sued clause, that gives
17 jurisdiction against a sue-and-be-sued agency.
18 QUESTION: If you have to rely on --
19 QUESTION: May I just make one -- ask one point.
20 If we agree with the Government that this claim must be
21 brought under 1346(b) or not at all, and if we say there's
22 no Bivens action against a Federal agency, is that the end
23 of your case?
24 MR. FILICE: In other words, if you say that the
25 sue-and-be-sued clause does not waive sovereign immunity?

1 QUESTION: Yes, except to the extent that it's
2 waived under 1346(b).
3 MR. FILICE: I believe that probably would be
4 the end of our case. However, I would like to point out
5 that in the footnote in our brief we make the point that a
6 number of judicial riders have commented that sovereign
7 immunity as a doctrine should not really be applied in
8 cases of constitutional torts. Sovereign immunity does
9 not retain its medieval connotation that the sovereign
10 cannot be sued merely because the king can do no wrong.
11 QUESTION: Then you wipe out the entire -- the
12 Federal Tort Claims Act is beside the point, because the
13 immunity -- we should go back and rethink the entire
14 immunity doctrine, but even if you -- even if we did that,
15 you have a problem of extending Bivens to an agency,
16 something you conceded has never been done before.
17 Why aren't there the factors that counsel
18 hesitation here against extending Bivens to an agency when
19 that's never been done before, when the payment will have
20 to come out of the Federal fisc as distinguished from an
21 individual's pocket?
22 MR. FILICE: I don't believe, Your Honor, that
23 in fact this case is very different than the majority of
24 Bivens cases, in that what we are talking about is an
25 indirect impact on the Federal fisc. Bivens defendants

1 are routinely provided indemnity by their Federal
2 employers. That is an indirect impact on the Federal
3 fisc.
4 This would also be an indirect impact in that
5 FSLI -- this would not be a judgment against the United
6 States. This would be a judgment against the FSLIC, an
7 independent corporation, having its own budget, having
8 sources of funds that are both private and public, so I
9 believe that both the standard Bivens action against an
10 individual and a Bivens action against a sue-and-be-sued
11 agency would in fact only have an indirect impact on the
12 Federal Treasury.
13 QUESTION: Well, except there is one difference,
14 and that is the Federal Government chooses, for whatever
15 reason, voluntarily to pay in the one case and it doesn't
16 choose in the other.
17 MR. FILICE: Well --
18 QUESTION: The question -- the issue of what is
19 appropriate for the Court is what is it -- in recognizing
20 the Bivens action is a question of what is appropriate for
21 the Court to do in imposing liability involuntarily, and
22 you're suggesting an analogy with liability voluntarily
23 assumed. I don't see the point.
24 MR. FILICE: Well, it is voluntarily assumed
25 only with a gun at its head, so to speak. In other

1 words --

2 QUESTION: Where does the gun come from? You

3 don't have to reimburse these people.

4 MR. FILICE: Well, the gun comes from the

5 practical consideration that if the Federal Government,

6 after the creation of Bivens, then had a policy that it

7 was not going to indemnify or provide a defense, which is

8 another expense to any of its employees that were charged

9 with Bivens actions, that would cause a tremendous morale

10 problem among Federal employees and would be, in a

11 practical sense, an impossible situation, so in fact --

12 QUESTION: Well, it might cause timidity, and

13 that may be why the Government wants to pay the bill. I

14 can understand that, but it still is a voluntary

15 assumption of a responsibility.

16 MR. FILICE: Well, it's voluntary in a sense,

17 but it would cause timidity, or lack of zealousness in

18 Government employees, or lack of morale, and so in a

19 sense, when the court came down with the Bivens decision,

20 it wasn't directly impacting the Federal fisc, but in a

21 practical sense it was indirectly impacting the Federal

22 fisc, because it would be hard for me to believe that the

23 Government would ever take the position that it is never

24 going to provide a defense, let alone indemnity, on every

25 Bivens claim no matter how specious the claim is.

1 QUESTION: Of course, you --
2 QUESTION: Mr. Filice, the Government says, I
3 think with some reason, that your argument about
4 cognizability based on 1346 runs contrary to our decision
5 in Smith. What is your answer to that?
6 MR. FILICE: Your decision in Smith dealt with
7 the 1988 legislation, the 1988 Federal Employees Reform
8 Act, which was in turn a response to your Westfall
9 decision.
10 Your Westfall decision dealt with Federal
11 employee liability, and it dealt with liability for common
12 law torts. That was the problem that Congress was looking
13 at when it passed that 1988 legislation. It was looking
14 at a situation involving Federal employees and common law
15 torts.
16 Congress made no attempt in the 1988
17 legislation, which you then construed in Smith, to look
18 one way at the other at sue-and-be-sued clauses, let alone
19 Federal agencies, and indeed, if we look at what Congress
20 did, I believe it is more consistent with our position,
21 namely what Congress did in the 1988 legislation was, they
22 drew a distinction between common law torts and
23 constitutional torts and said common law torts are
24 cognizable under the Federal Torts Claims Act and
25 constitutional torts are not.

1 QUESTION: Well, but that's your theory, and it
2 may be factually distinguishable from Smith, but certainly
3 the entire analysis of Smith suggests that your definition
4 of cognizable is too narrow.
5 MR. FILICE: Well, as the court of appeals
6 noted, it is difficult to interpret the sounds of
7 legislative silence. In the 1988 legislation, and what
8 the Government is talking about and seeking to draw
9 conclusions from, the Government -- the Congress did not
10 in fact pass a completely symmetrical statute. In other
11 words, they dealt with employees, but they didn't deal
12 with agencies.
13 QUESTION: I'm not talking about the legislative
14 history of what happened in -- I'm talking about our
15 opinion in Smith, which assumes a much broader definition
16 of cognizable, I think, than you're willing to concede.
17 MR. FILICE: Except that your definition, Your
18 Honor, respectfully, in the Smith case again dealt with
19 common law torts and with employees, and what you said in
20 Smith was, excluded common law torts, implicitly or
21 explicitly, excluded common law torts, would arguably
22 still be cognizable under the act.
23 But that is a different question than whether
24 constitutional torts are cognizable, and I think we have
25 to go back to 1346(b) to determine the answer to that

1 question, and the last sentence, or last phrase of 1346(b)
2 makes very clear what Congress' intent was. Congress'
3 intent was to recognize, to take cognizance of those
4 wrongs for which a private individual would be liable
5 under local law.
6 QUESTION: But at the time Congress legislated
7 1346(b), which was 1946, there were no such thing as
8 constitutional torts recognized.
9 MR. FILICE: That's true, but --
10 QUESTION: You can argue one way or the other
11 from that, but just like you say that you can't really
12 draw much analysis from the 1946 action since Bivens came
13 much later, the whole idea of constitutional torts came
14 much later.
15 MR. FILICE: That's true, and as a matter of
16 fact, the sue-and-be-sued clause was -- that we're talking
17 about for the FSLIC was drafted in the 1930's, but the
18 point we are making is, is this Court has held that sue-
19 and-be-sued clauses are to be liberally construed as
20 general waivers of sovereign immunity unless one of three
21 things occur, unless the suit in question is inconsistent
22 with the statutory scheme, unless an implied restriction
23 on the general waiver is necessary to avoid a grave
24 interference with a governmental -- performance of a
25 governmental function, or unless it was clearly the

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1 purpose of Congress to use a sue-and-be-sued clause in a
2 narrow sense.
3 None of those three conditions exist here, so in
4 the 1930's when Congress created the FSLIC and decided how
5 broadly it would waive immunity for the FSLIC, at that
6 point in time, what Congress decided to do was, rather
7 than delineate all of the ways --
8 QUESTION: With no thought at all, Mr. Filice,
9 of anything like a Bivens claim.
10 MR. FILICE: That's true. What Congress
11 intended to do, Your Honor, was to waive immunity
12 generally for that agency, subject to those exceptions
13 that may later occur.
14 Now, the Government has identified that later
15 came the Federal Tort Claims Act, and possibly the Federal
16 Tort Claims Act could have been written to exclude this
17 kind of an action. It was not. Congress could today --
18 Congress could today take a look at the issue, and could
19 say, we're also going to include constitutional torts
20 under the Federal Tort Claims Act with these rules, but
21 when Congress decided to launch this agency, Congress used
22 a broad waiver of sovereign immunity which waives all
23 immunity for the universe, subject to such exceptions as
24 may be made later on.
25 QUESTION: Mr. Filice, 1346(b) provides

1 liability if a private person would be liable to the
2 claimant in accordance with the law of the place where the
3 act or omission occurred.
4 Suppose you have a State that allows no recovery
5 for psychological torts. It must be physical injury.
6 Does that mean that psychological torts are not cognizable
7 under 1346(b), and therefore the Government is liable for
8 all cognizable torts?
9 MR. FILICE: Well, there is jurisprudence by
10 this Court that would say no, that that is cognizable.
11 QUESTION: Right, and it seems to me you're
12 repudiating that jurisprudence.
13 MR. FILICE: No. No, the way I just --
14 QUESTION: Tell me why you're not.
15 MR. FILICE: The way I justify our position,
16 Your Honor, is that those actions are at least common law
17 torts. I think the Court could look at those actions and
18 could say it was clearly the purpose of Congress to
19 include within the Federal Tort Claims Act those actions
20 that are common law torts.
21 That's the meaning of that last phrase, so that
22 if there is a common law tort that is not -- that is
23 accepted either implicitly or plicitly by the Federal Tort
24 Claims Act, then that still would be cognizable, but here
25 we're talking about constitutional torts.

1 QUESTION: So the difference between you and the
2 Government is that the Government says cognizable means
3 all torts, and you say that cognizable means just common
4 law torts. Is that what we're arguing about, essentially?
5 MR. FILICE: I believe that is one way to put
6 it, Your Honor, yes.
7 QUESTION: There's little choice in rotten eggs,
8 it seems to me. Why shouldn't we take the Government's
9 unrealistic interpretation rather than your unrealistic --
10 (Laughter.)
11 QUESTION: It seems to me it means neither one
12 of those things.
13 MR. FILICE: Well, we believe that our -- well,
14 I would say this about your hypothetical, your
15 hypothetical, while certainly I am duty bound to answer
16 it, is not the case that we have today.
17 QUESTION: But you are asking us to extend the
18 Bivens doctrine to so far new territory. Whatever the
19 tort claims act -- whatever our role with respect to that
20 is, the Bivens doctrine is a Court-created doctrine --
21 MR. FILICE: Yes --
22 QUESTION: -- and you're asking us to extend
23 that to one class of agency uniquely.
24 MR. FILICE: Yes, I am, and it's my position
25 that the logic of the Bivens action, namely, that this

1 Court has the primary duty to enforce constitutionally
2 protected rights, and that it should not be surprising
3 that Article III courts, in protecting constitutionally
4 protected rights, would turn to traditional judicial
5 remedies like damages to do that, applies with equal logic
6 to a sue-and-be-sued agency, and that sue-and-be-sued
7 agency has a waiver of sovereign immunity by Congress, so
8 I believe that -- I believe that your logic in Bivens
9 makes perfect sense for a sue-and-be-sued agency, and
10 there has been a waiver of sovereign immunity.
11 But to get back to what I was saying to Justice
12 Scalia, what I was trying to say was, perhaps my answer to
13 the hypothetical was nonsensical, but my answer to the
14 Government's position in this case makes sense. No matter
15 how you read the language of that statute, 1346(b), you
16 can't squeeze in a constitutional claim. That language
17 says that it is concerned with wrongs for which a private
18 individual would be liable under local law, and that
19 cannot include a constitutional tort.
20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Filice.
21 The case is submitted.
22 (Whereupon, at 11:04 a.m., the case in the
23 above-captioned matter was submitted.)
24
25

CERTIFICATION

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Federal Deposit Insurance Corporation v. John A. Meyer, Et Al

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BY Ann Mari Federico

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