OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SHIRLEY W. IRWIN, , Petitioner

V. VETERANS ADMINISTRATION, ET AL.

CASE NO: 89-5867

PLACE: Washington, D.C.

DATE: October 1, 1990

PAGES: 1 thru 53

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IN THE SUPREME COURT OF THE UNITED STATES

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SHIRLEY W. IRWIN, :

Petitioner :

v. : No. 89-5867

VETERANS ADMINISTRATION, :

ET AL. :

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Washington, D.C.

Monday, October 1, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 p.m.

APPEARANCES:

JON R. KER, ESQ., Hewitt, Texas; on behalf of the Petitioner.

JOHN G. ROBERTS, JR., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(1:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now on No. 89-5867, Shirley W. Irwin against the Veteran's Administration.

Mr. Ker, you may proceed whenever you're ready.

ORAL ARGUMENT OF JON R. KER

ON BEHALF OF THE PETITIONER

MR. KER: Mr. Chief Justice, and may it please the Court:

The issue of whether or not 2000e-16(c) is a jurisdictional requirement upon title VII Federal Employee Claimants can be addressed with -- from four bases, the first one being that of the plain meaning of the statute, the second being legislative intent, third being from the case law itself and from -- the fourth being Bowen v. the City of New York as what petitioner asserts as being squarely in point here.

Looking to the plain meaning of the statute this has been a broad waiver of immunity and there -- within in the statute itself is no clear jurisdictional language. There is not the language of no action may be commenced or actions are prohibited such as was the case in the Hallstrom v. Tillamook case.

With that in mind, this Court in Bowen,

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addressing the argument of whether or not 405(g) was a jurisdictional requisite cited that the traditional meaning of words applies. In that respect, Taylor v. the United States, 110 Supreme Court 2143, looked at the generic or contemporary meaning of words. The ordinary meaning of words as being used as in INS v. Cardoza-Fonseca. And then again the language from this Court in Consumer Product Safety Commission v. GTE you look at the common usage of words being used.

With that backdrop we submit that the traditional view of filing periods is that they are subject to equitable tolling.

QUESTION: Well, Mr. Ker, now -- excuse me, let me get my microphone on -- it seems to me that the Court in a number of cases has adopted a rule of strict construction where the Government itself has given up its sovereign immunity and permitted suit against itself. Just last term we had a case, U.S. v. Dalm. I don't think you cited --

MR. KER: I did not cite Dalm.

QUESTION: But again it relied on the sovereign immunity principle to construe a statute worded like this one as not providing equitable tolling relief. So how do you reconcile those cases?

MR. KER: Thank you, Justice O'Connor. With

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respect to the Dalm case, I did not cite that one, and to be perfectly honest with Your Honor, I don't know the facts of that case. However, I would address your attention to again the Bowen case, but also the Hallstrom v. Tillamook case. Both of those cases support the petitioner here.

In Bowen the Court, looking at the sovereign immunity argument, stated that the Court adopts the strict construction requirement where there has been a waiver of sovereign immunity. But went on to state that under -- even though we look at it in a strict sense, they're not to look too narrowly where the congressional intent is clear that it wasn't to be construed narrowly. That again in Bowen and I can -- also in Hallstrom, Your Honor, it's stated concerning that particular provision -- and that upheld the Government's side in that case -- but in Hallstrom we were looking at a different type of situation where the statute itself provided for the action that was not taken and it was distinguishable from Bowen. And I -

-

QUESTION: But, Mr. Ker --

MR. KER: Yes.

QUESTION: -- I thought in Bowen the Court said there was language by which Congress had expressed its clear intention to allow tolling in some cases. Now,

that's distinguishable here. There is no such language. There's just a language that says you'll sue within 30 days.

MR. KER: Yes, Your Honor, but the provision in Bowen was similar to this one by the use of the word may. The statute itself, looking at the language within the statute, talks about the claimant may file a suit within 30 days.

QUESTION: Well, maybe the Court hasn't been entirely consistent in its cases, but I do suggest that when you look at cases like Mottaz and Soriano and the case last term, U.S. v. Dalm, they just aren't consistent with your theory. Now, I don't know where we ought to be, but it seems to me there's some tension there and we may have to work it out.

MR. KER: Thank you, Justice O'Connor. I would submit that where we ought to be is, following the overall objectives of title VII being to literally construe that statute to protect the intended class. With -- with that in mind --

QUESTION: Mr. Kerr.

MR. KER: Yes, Mr. Chief Justice.

QUESTION: The Library of Congress v. Shaw, do you cite that in your brief?

MR. KER: I did not, but the Government did.

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QUESTION: But that was a case dealing with title VII as I recall, and nonetheless the Court said that when you're dealing with the Government, you don't necessarily draw the same inferences from language as you do in a law that affects only private litigants.

MR. KER: That's correct, Mr. Chief Justice. However, in the Library of Congress v. Shaw, the issue is dealing with interest upon attorneys' fees and that's clearing an area that the Federal Government has never, historically, never waived sovereign immunity as to that factor.

QUESTION: Well, that question in that case was whether they'd waived it and the Court said they haven't by general language. And here you're talking about general language and the argument is here if they waived their immunity to the extent that you are arguing for it here.

MR. KER: However, Your Honor, in -- again, I submit that Shaw is distinguishable upon that fact because in Shaw the issue was whether or not the interest upon attorneys' fees had been waived. And, again, I submit that the Bowen case is more analogous.

In Bowen, which deal with 405(g), in that case this Court stated that even though we're dealing with an area of sovereign immunity that should be strictly

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construed, that does not mean that you should narrowly restrict or overly be restrictive upon the congressional intent in the broad waiver of sovereign immunity through title VII itself.

Additionally, in -- in the area of --

QUESTION: On the other hand, we said in Soriano -- and I don't even think Bowen -- I don't even think Bowen mentioned Soriano. But we said in Soriano very clearly to permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time limit consent act passed by the Congress. But Congress was entitled to assume that the -- limitation period prescribed meant just that period and no more. I think we sort of have to choose between Soriano and Bowen, don't you think?

MR. KER: In all likelihood, that is correct, Mr. Justice Scalia. And in that respect I submit that in title VII where you have the overall objective of eradication of invidious discrimination and particularly in Federal Government under the 1972 amendments, the --

QUESTION: Are we going to decide this question on the basis of how important we think the particular policy of the statute is, and if we like the policy of that statute, we allow a tolling and if we don't like the policy, we don't. Is that how we suggest we should go?

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MR. KER: No, sir. No, sir. What I mean is is that following the plain language, clear intention of Congress argument, coupling those two -- and again, the language is not so plain as to do away with any ambiguity. I'm not saying that either. However, the language that is in 16(c) is so similar to 405(g) that that extension of the tolling into that area of sovereign immunity certainly comports with the overall objective of Congress.

QUESTION: You really think it's a big difference. It says no suit shall be brought later than 90 days and you think it really shows a different intent if it says, suit must be brought or shall be brought within 90 days?

That -- that's a distinction that you really think makes it --

MR. KER: Mr. Justice Scalia, I would say that probably the distinction is -- is fine in that area, but --

QUESTION: It sure is. I mean, we can distinguish the cases that way, but don't you think we ought to get --

MR. KER: Well, I --

QUESTION: -- get some sold line of jurisprudence that the lower courts can follow in all of these areas?

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MR. KER: Absolutely, Your Honor, and the --

QUESTION: So we should choose between Soriano and Bowen (inaudible).

MR. KER: Yes, sir, and the circuits are -- while they are divided I think the majority of the circuits support the petitioner's argument here that it is subject to equitable tolling, and I might add one other thing, too.

In the Hallstrom case, the language there was much more specific. It talked about actions prohibited. And you may not bring an action prior to 60-day notice. That type of language is the type of language that if Congress had used it, we wouldn't be here today. But the language as used has within, again, the meaning of the words used and within the intent of Congress, we submit, does show that equitable tolling was not to be specifically excluded. That had Congress intended such, they would have said so.

Even in the legislative history of the 1972 amendments we don't find any language specifically addressing any prohibition upon the -- the application of equitable tolling.

There's another fine distinction in the Bowen case. In the Bowen case the statute there allowed the Secretary of the -- I want to say Health, Education and

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Welfare -- it's Health and Human Services -- allowed a legal tolling in that case. That also is not a distinguishing factor here because even within Bowen, which had the legal tolling ability, still applied the equitable tolling principle. And the -- I submit that Bowen is applicable here.

An -- an additional factor, too, that addressed the subject matter jurisdiction is that the cases that this Court has decided concerning administrative remedies and the application of equitable tolling there, I submit that the administrative exhaustion of remedies is certainly more central to subject matter jurisdiction being exercised by the district court than the filing period. But in Bowen and in Zipes, Federal employee and private employee, in both of those situations, the exhaustion remedies has been held to be subject to equitable tolling.

I've gotten into my second point, that being of legislative intent to some degree. And I might add that the 1972 amendments were enacted against the backdrop of cases that were liberally construing the remedial nature of the statute to protect the intended class and that the Federal employees were intended to have essentially the same rights as the private employees.

In that respect, too, the Federal Government

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should be the example for all of our society in the eradication of discrimination. It would -- it would not be consistent in -- I would submit it this way. It's not consistent with the overall purpose of the act to allow the Federal Government to -- to not be subject to equitable tolling where there is, we submit, a broad waiver of immunity, where that would operate to preclude the intended class, where such would be in essence laying behind the law. It just wasn't the intent of Congress in my -- in my humble opinion to have that happen.

The legislative history again reveals that Congress had adopted the previous cases, both this Court's and the lower courts', concerning administrative exhaustion. Against that backdrop, Congress could have stated more specifically had they intended a nonwaiver.

The third basis is that of existing case law. Zipes and Crown, Cork and Seal held that filing requirements for the private sector employees were subject to equitable tolling. Albemarle Paper and Franks v. Bowman held that the administrative exhaustion was subject to equitable tolling. And even the Seventh Circuit in the Federal employee arena has recently held in Rennie v. Garrett at 896 Fed. 2d 1057th that -- and in that case they reverse Sims v. Heckler, held that the exhaustion of remedies was not a jurisdictional requirement for the

Federal employee stating a finding of jurisdictional subjects the Federal employees to summary dismissal resulting from factual determinations made beyond the face of plaintiff's pleadings, a determination of which is prohibited in the private sector cases.

If Congress intended the Federal employees to be treated similarly and essentially the same as private employees, we would submit that that language should hold true and that the equitable tolling apply.

The language that I was looking for in the Bowen v. City of New York is that the accepting of the proposition, quoting this Court, however does not answer the question whether equitable tolling can be applied to the statute of limitations, for in construing the statute we must be careful not to assume the authority to narrow the waiver Congress intended or to construe the waiver unduly restrictively.

QUESTION: Do you have a page citation for that, Mr. Ker? If you don't --

MR. KER: Yes, Your Honor, but I did not write it in my notes. I apologize.

QUESTION: Okay. Perhaps you can supply it later.

MR. KER: Yes, sir, I certainly will.

This Court further went on --

QUESTION: 479.

MR. KER: Thank you, Your -- I was just going to say 479. Thank you, Mr. Justice Scalia.

In the Bowen case this Court went on to state further that the application of the traditional equitable tolling principle is fulling consistent with the overall congressional purpose and nowhere eschewed by Congress. And I believe that is found on page 480.

In that respect, we had the same situation existing here that the equitable tolling is fully consistent with the overall congressional purposes, and the language, both in the statute itself and in the legislative history does not indicate that Congress had intended anything else.

The second issue before the Court is whether or not the notice must be had by the claimant himself or whether a constructive notice applies. And, again, I submit that there are a plain language argument to be made on behalf of the petitioner and that we look to the statute, the regulations, the notice letter itself, and again, case decisions.

In the statute it states that within 30 days of receipt of notice of final action an employee or applicant may file a civil action. Had Congress intended constructive notice to comply, Congress could have

inserted --

QUESTION: Excuse me, I -- I'm not sure this is the right -- I don't think this is the right terminology. You're not talking constructive notice. Constructive notice is -- real notice was sent to nobody, but -- but somehow he got word of it. That -- that would be constructive notice. But here the only issue is whether the normal laws of agency are going to apply. Isn't that it? Whether service on your agent will be service on you. It seems strange to me to call that constructive notice.

MR. KER: Well, Mr. Justice Scalia, in this case notice was received at my office at a time when I had departed the country for the Republic of Korea, and the court applied the constructive notice standard to say that receipt at my office was -- was --

QUESTION: (Inaudible).

QUESTION: Did -- did some agent in your office --

QUESTION: What -- what's unusual about that?

MR. KER: Well, what's unusual about that, Mr. Justice -- Mr. Chief Justice, is that that -- that step actually is a double constructive notice. Receipt at my office is not actual receipt by myself.

QUESTION: Well, I practiced law for 16 years --

MR. KER: Yes, sir.

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QUESTION: -- and it was certainly always my assumption, and I think most of my clients assumed, that when a notice of an opinion or decision came to my office as a lawyer it was -- came to me as of that time and it came to the client as of that time.

MR. KER: Yes, sir, but the cases have held. The cases that I've --

QUESTION: What specific cases?

MR. KER: Well, the cases I had cited in my brief.

QUESTION: Cases from this Court?

MR. KER: No, sir. The lower circuits are even here divided because the Fifth Circuit applied the constructive notice, but in Craig v. the Department of Health, Education and Welfare, in Rea v. Middendorf, and in Bell v. Brown, the D.C. Circuit, the Eighth Circuit, and I believe it was the Sixth Circuit, applied the standard that actual notice was what was intended by Congress.

Now two of those cases stated --

QUESTION: Said that a lawyer could leave his office for 3 months and no effect would be given to the receipt of a no -- a decision in that office until the lawyer returned?

MR. KER: Well, Mr. Chief Justice, the --

QUESTION: Is -- is that the import of those cases?

MR. KER: I believe that's correct, yes, sir. And the rationale behind that is that even though there may be a counsel representing a title VII claimant through the administrative process, there's nothing in that relationship that says that absolutely that -- that relationship wouldn't continue thereafter. So, consequently, had the claimant specifically designated in accordance with the -- as I understand the EEOC regulations -- that he can designate his -- his representative to receive actual notice. But actual notice is what is intended under the act.

QUESTION: When did your client receive actual notice in this case?

MR. KER: April -- April the 7th. Now that -- there was an affidavit submitted. And the copy of the envelope was also submitted to show that it was April the 7th. The return receipt for the claimant's acceptance of the notice has never been produced. And I -- so, as far as that return receipt, we don't know. But the affidavit of Mr. Irwin was that he received it on or about April the 7th, but April the 7th was the date that it shows on the envelope itself.

Receipt at my office was March the 23d preceding

that. Actually receipt by myself was April the 10th upon my return to my office from both Korea and from the hospital at Ft. Hood.

But the cases that have in -- the lower court cases that have interpreted this issue, the -- the -- and it's frankly even in the Fifth Circuit, Polly Soto v. Weinberger, which was cited by myself, by Mr. -- Judge Sessions prior to his becoming of the head of the FBI. He even stated, in view of Eastland v. Tennessee Valley Authority, which said that all of this was jurisdictional anyway, by the Fifth Circuit, that even in view of that, that constructive notice would be applicable if it was actually received by the attorney and receipted by him.

So, in that scenario, it's nothing unduly burdensome upon the EEOC. Indeed, the regulations --

QUESTION: That question isn't whether it's unduly burdensome on the EEOC. The question is really what the statute means.

MR. KER: Yes, sir, and I would -- in addition to the statute which talks in terms of the complainant himself so does the regulations by the EEOC. Specifically, 29 C.F.R. 1613.281 deals with the statutory right to bring an action. Again, this is the regulations. But it talks in terms of the employee or the applicant being authorized to file a suit.

Now, in that particular language, the transition from the consumer -- the CSC, the Civil Service Commission, to the EEOC, there was the deletion in that particular provision of the word his. And the Government has argued that, well, that clearly shows an intent that constructive notice or these rules of agency apply.

And we submit that the dropping of the word his did not change any of the case law and that it simply was to make that particular regulation neutrally -- as far as gender, to make it neutral. It has nothing to do with whether or not constructive notice would apply. Because in the very next regulation, 1613.282, Notice of Right to Sue, says an agency shall notify an employee or applicant of his right to file a civil action and of the 30-day time limit for filing.

None of that speaks to anything other than the claimant himself receiving actually notice. And the -- at the point of time of actual notice to the claimant is the point in time initiating the 30-day filing period.

Now, we would concede one thing, that if the claimant does in fact designate his representative to receive actually notice and he does that in writing, which was not present in this case, specifically authorizing notice to be sent to his counsel of record, the actual notice then to the -- to the attorney or the

representative would indeed constitute actual notice in the initiation of the 30-day period.

QUESTION: Don't you think under our system generally that when somebody has an attorney representing them we -- we traditionally think that notice furnished the attorney is notice to the litigant?

MR. KER: Thank you, Justice O'Connor. Traditionally, as in Link v. Wabash, if that's what Your Honor is referring to, in Link v. Wabash this Court looked at the traditional concept of representation and said, we have a long history of representative-type government. I don't fault that at all.

But Link v. Wabash relied upon rule 5. Rule 5 applies to service under these rules. We don't have that situation here. What we have is a situation of an administrative process, then the initiation of an action. Once that action was initiated, yes, rule 5 becomes part and parcel of any proceedings thereafter under these rules.

We don't have that dealing with the administrative process. And, again, I submit that simply because Mr. Irwin or indeed any title VII claimant may have legal counsel representing him through the administrative process does not mean that that particular representation would continue through the filing of an

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action.

QUESTION: Are you relying in -- are you saying that whenever any statute or rule says nothing more specific than the phrase "receipt of notice" that we should interpret that to mean always that there has to be personal receipt and service upon an agent and not --

MR. KER: Not in every situation. No, sir.

QUESTION: Well, why -- why is this different?

MR. KER: Because the statute and the regulations both state the terms "claimant" or "applicant," and "you," speaking to the --

QUESTION: Where is that? I don't understand why that makes a difference. It says receipt of -- notice by the claimant, I assume. Right?

MR. KER: Yes, sir. The clear language of that is receive notice by the claimant.

QUESTION: And you say whenever a statute says receipt of notice by someone, we should interpret that to mean that that person has to receive it personally and it's not enough to give it to his attorney?

MR. KER: I can't think of a situation outside of title VII --

QUESTION: Do you think you can live with that, really?

MR. KER: -- but under title VII, yes, sir.

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QUESTION: I'm not talking about title VII. I'm talking about generally. I-- we'll talk next about why title VII is any different. But do you think we can live with a rule like that? Statutes that say receipt of notice by X, meaning that X has to personally be given?

MR. KER: Yes, sir, the plain language of that would be that the claimant receive actual notice, yes, sir.

QUESTION: (Inaudible) here, at least you could say that service on his attorney isn't enough. It might be that service at his house might be enough even if he wasn't there.

MR. KER: Well, I believe that under the private employee situation that has been held to be the case. But there we're dealing with a much longer period, 90 days. Here we're dealing with a 30-day period and the specific language of the statute as well as the regulations does speak in terms of the claimant. It -- it may not necessarily be --

QUESTION: Why does it have to mean actual notice by the claimant? Isn't there some way of serving -- suppose the actual notice -- name a specific person. Can he just leave the country and avoid service of process all the time?

MR. KER: I'm sorry, Mr. Justice White, I didn't

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understand your question. You are saying if the claimant was to leave the country to avoid service?

QUESTION: Well, you say that it would never be possible to have -- to give notice to the claimant unless he actually receives it.

MR. KER: No, sir.

QUESTION: Well, you've just been saying it all the time.

MR. KER: Well, I also stated that we would --

QUESTION: Haven't you been saying that, actual notice to the claimant?

MR. KER: Actual notice or if there is a designation by the claimant to the EEOC that actual notice be given to --

QUESTION: He gives no designation. He just has an address. They have his address, and they try to -- they want to give him notice. They send him registered mail to his address or they go and leave it at his house.

MR. KER: There is case law, Your Honor, to --

QUESTION: What about it?

MR. KER: There is case law to assert that if, say, for instance he moves and doesn't give notice of -- to the EEOC. That could be constructive notice. Yes, sir.

QUESTION: Well, so it isn't actual notice, is

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it?

MR. KER: Yes, sir, I believe that it is actual.

QUESTION: You mean, actual constructive notice.

MR. KER: No, sir.

QUESTION: Excuse me, is a registered letter a notice?

MR. KER: Pardon me, Your Honor?

QUESTION: A registered letter notice?

MR. KER: A registered letter signed by the claimant would be actual notice, yes, sir.

QUESTION: Well, then you don't read actual notice.

MR. KER: If it's signed by the claimant, then that is actual notice to the claimant.

QUESTION: Well, I always thought actual notice was you tell him, not by mail.

MR. KER: Well, the regulations provide --

QUESTION: (Inaudible) notice by mail.

MR. KER: Yes, sir, the regulations of the EEOC provide for certified or registered mail, return receipt requested, and that would be actual notice.

QUESTION: And that's what you mean by actual notice?

MR. KER: Yes, sir. Yes, sir.

If there would be no further questions, I'll

reserve the balance of my time for rebuttal.

QUESTION: Thank you, Mr. Ker.

Mr. Roberts, we will hear from you.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE RESPONDENT

MR. ROBERTS: Thank you, Mr. Chief Justice, and may it please the Court:

Section 717(c) of title VII authorizes a Federal employee who is dissatisfied with the EEOC's disposition of his claim of employment discrimination to sue the head of his agency or department, "within 30 days of receipt of notice of final action taken," by the EEOC.

Petitioner urges this Court to imply an exception to that provision so that in some circumstances the employee may file his lawsuit more than 30 days after receipt of notice. The Fifth Circuit below, in a unanimous opinion by Judge Higginbotham, ruled that the 30-day period set by Congress was a jurisdictional limitation that was not subject to judicial enlargement. That decision should be affirmed.

The Federal Government --

QUESTION: Mr. Roberts, what do you make of our cases which seem to go really in different directions. The Bowen case, which was unanimous and contains language in it that says statutory time limits are traditionally

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subject to equitable tolling, and other cases like maybe Soriano and Dalm which point in the other direction, the Library of Congress v. Shaw.

MR. ROBERTS: Your Honor, I don't think the cases are inconsistent. I don't think we have to choose between Bowen and Soriano. My brother relies heavily on Bowen in his reply brief. He quotes the statute at issue in that case thus: the social security claimant may maintain a civil action, quote, within 60 days after the mailing to him of notice of such decision, dot, dot, dot, period, end quote. He notes that the court in Bowen held that that period was tollable and then says that that language is virtually identical to the language at issue in this case. But it's only virtually identical by virtue of the ellipses. What the statutes actually provides is the suit may be filed, quote, within 60 days after the mailing to him of mailing to him of notice of such decision or within such further time as the Secretary may allow.

And as this Court noted in Bowen --

QUESTION: Briefly, briefly. The Court noted that -- that language briefly in Bowen and seems to have made up its mind before it got to that point. I read that point as a make-weight.

MR. ROBERTS: Well --

QUESTION: And rightly so, because way does that cut? It seems to me if you have a statute that specifically provides one means for extending the time period. That is, the Secretary can provide for whatever extension there should be, I would think the principle of inclusio unius est exclusio alterius would say a fortiori -- gee, I'm using a lot of Latin today.

(Laughter.)

QUESTION: I would think you would say that even more than usual there's obviously no justification in permitting tolling.

MR. ROBERTS: No, I think that would be a non sequitur. The --

(Laughter.)

QUESTION: Touche.

MR. ROBERTS: The language that was deleted from petitioner's quotation showed, as the Court noted in Bowen that Congress itself in the statute waiving sovereign immunity, had expressly provided for tolling in certain circumstances and therefore it was reasonable to assume that the 60-day period was not an absolute jurisdictional bar.

No similar language appears in title VII. The language in title VII is unambiguous: within 30 days of receipt of notice.

QUESTION: (Inaudible) concede that if the Government wasn't involved that the 30-day time limit is jurisdictional?

MR. ROBERTS: Well, if the Government wasn't involved, of course, it would be the 90-day time period for private employees. The Court seems to have held that it is jurisdictional in two footnotes in two different cases, and that's -- doesn't detract from the Government's position, because our case hinges on the applicability of sovereign immunity.

QUESTION: Both cases held are not jurisdictional.

MR. ROBERTS: I'm sorry. Yes, not jurisdictional.

QUESTION: So, the same words mean different things --

MR. ROBERTS: Well --

QUESTION: -- except for 30 days?

MR. ROBERTS: It's a different that Congress noted. And the difference -- it's the parallel that petitioner seeks to draw.

QUESTION: I know.

MR. ROBERTS: This is what applies in the case of a private employee. Congress intended to treat them the same. Therefore, the tolling should apply in the case

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of the Federal employee. But this Court has consistently rejected that parallel when it has bumped up against considerations of sovereign immunity.

QUESTION: Well, but now come back to the question which I asked you and which you have not answered to my knowledge. What do you make of the language in Bowen when it says that statutory time limits traditionally are subject to equitable tolling?

MR. ROBERTS: Your Honor, I think that language is perfectly correct and as noted in the Zipes case in the private sector and it's traditionally true. It is not traditionally true in cases in which the time limit is a condition on the waiver of sovereign immunity.

Bowen is a different case.

QUESTION: Well, that language was used in a case involving waiver of sovereign immunity.

MR. ROBERTS: In the Bowen case?

QUESTION: Yes.

MR. ROBERTS: Yes, I think the distinguishing factor in Bowen is that there Congress itself in the statute had provided for tolling of the limitations period and, therefore, this Court concluded it could not be regarded as an absolute jurisdictional limitation.

Here, in title VII --

QUESTION: Excuse me, provided for tolling by

someone else, by the Secretary. And if -- if you were going to use absolute jurisdictional limitation you'd have to say Congress said what it said and no more can be allowed. But we allowed more.

MR. ROBERTS: Well, the Government's argument in Bowen was to that effect.

QUESTION: Seems right to me.

MR. ROBERTS: Well, but the distinction is that Congress, which has -- it's an interpretation of congressional intent in each case. And in Bowen the statute at issue -- Congress had provided for some tolling under some circumstances. And this Court determined that that meant that there may be other circumstances in which tolling would be appropriate as well.

QUESTION: Well, in cases like Soriano and Mottaz you can point to the fact that the statute said something like suit shall be barred if not brought within so many days. There was something more than the mere time limit set for it here.

MR. ROBERTS: Your Honor, that distinction is there, but I don't think it's a distinction that makes a difference. I think that type of language has more to do with the legal rhetoric at the time the statute was passed. There are many statutes and rules that are unquestionably jurisdictional that don't have the shall be

forever barred language.

This Court's rule about the time to petition for cert., the Federal rule of appellate procedure governing the time to appeal -- it doesn't say you must appeal within 30 days and the appeal will be forever barred if you don't. It just says you may -- shall file your notice of appeal within 30 days. This provision, which is similar to a notice of appeal -- after all, it's coming after an agency determination -- we think is as jurisdictional as that other provision.

QUESTION: Your regulations, I understand it, provide for extending the 30-day period if the time falls -- if the 30th day is on a Sunday?

MR. ROBERTS: And they've been interpreted -- an Eleventh Circuit case has held that that was the intent of Congress when it specified the time period to incorporate the normal rules about what to do when the last day falls on a Sunday.

QUESTION: Well, why not incorporate the normal rules about equitable tolling?

MR. ROBERTS: Because of the consideration of sovereign immunity and the case that Justice O'Connor noted, the Soriano case, which says you do not imply the time limits set in statutes waivering sovereign immunity are subject to tolling. And that's true even if the time

period is subject to tolling when suit is not against the United States.

That's the holding of the Soriano case, involved claims by Philippine citizens for furnishing goods to the United States forces that was filed after the applicable 6-year period of limitations. The claimant said the period should be tolled during the dependency of hostilities. And they cited private sector cases. This Court dismissed those cases, saying they don't apply here because here you have to take into account sovereign immunity.

QUESTION: Mr. Roberts, with respect to Justice Kennedy's question, isn't there a statute on calculation of time in the general section of the United States code that says it? Isn't there a statute that says when -- when --

MR. ROBERTS: I know there's a provision in the Federal rules that so provides. Yes.

QUESTION: No, I'm not thinking of the rules. I thought there -- well, all right, if you're not aware of it, I --

MR. ROBERTS: The provision of the Federal rules is the only one I know of.

QUESTION: Mr. Roberts, what do you understand to be the general basis for tolling statutes where tolling

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applies? Is it things like being out of the jurisdiction, being a minor, that sort of thing?

MR. ROBERTS: No, Your Honor, my understanding of equitable tolling is the -- a diligent effort to comply with the time period and failure to do so through no fault of your own.

QUESTION: Does that principle govern many statutes of limitations, do you think?

MR. ROBERTS: Well, as the Court noted in Hallstrom and in Bowen, it traditionally applies when -- at least when suits -- it doesn't involved considerations of sovereign immunity. But I'd point out that --

QUESTION: So, that if, say, to a State tort says you have to bring a claim for personal injury in 2 years after the cause of action occurred. I come into court 2 years and 10 days late and I say, you know, I was sick and I just -- I just couldn't get to a lawyer in time and we did the best we could. Is a State court going to say, well, that's tolled for that reason?

MR. ROBERTS: I don't think that would be adequate either.

QUESTION: I don't think it is either.

MR. ROBERTS: And there's nothing here on this record to indicate that there would be any equitable tolling of the statute at all. Petitioner left his law

office without arrangements for handling time-sensitive matters that may come in and returned and still had plenty of time, 12 days, to meet the statutory deadline and yet -- and yet failed to do so.

I don't think there would be any basis for equitable tolling here. And there certainly is no basis for waiver. The Government moved to dismiss promptly in the district court. And as far as estoppel, there is no estoppel against the Government. And even if there were, there's no showing of any affirmative misconduct that would justify it.

The EEOC did everything it was supposed to do. It sent the notice to the claimant and to the lawyer he had designated to handle this matter for him. So, there is no basis for estoppel, no basis for waiver, nor for equitable tolling.

But more importantly, as I've indicated, certainly Congress intended to treat Federal employees and private sector employees the same. But as this Court has held repeatedly and consistently, when that parallel runs into considerations of sovereign immunity, an express waiver of immunity is required.

QUESTION: The trouble with that argument for me is doesn't it always run into consideration of sovereign immunity? Because whenever you can sue the Government,

you've had a sovereign -- waiver of sovereign immunity.

MR. ROBERTS: Well, I think not, Your Honor. For example, in the Chandler case, the issue was what type of a trial do you get when you file your lawsuit. I don't think considerations of sovereign immunity were implicated there in terms of whether it was a trial de novo or administrative review.

Here, however, the issue is whether the suit can be brought at all beyond the time period that Congress had specified. And their considerations of sovereign immunity are paramount, as they were in the Shaw case, for example. The court had previously held private parties were entitled to an award of interest on attorneys' fees. Congress intended to treat the United States like a private employer. Therefore, the argument was made that United States should be liable for interests on attorneys' fees. The court rejected the parallel, noting that considerations of sovereign immunity, the no interest rule, required an express waiver.

The same result in Brown v. GSA. The Court has previously held that title VII was not the exclusive remedy for private employment discrimination. The argument was made Congress intended the United States to be treated like a private employer and rejected it, Justice Stewart noting for the Court that those private

cases did not involve sovereign immunity.

To cite just one more example, Lehman against Nakshian. The Court had previously had held that under the Age Discrimination Act, private sector employees had a right to trial by jury. When Congress extended the protections of that act to Federal employees, modeled after title VII, it intended to treat Federal employees that same. Therefore, the argument was made that Federal employees should have a right to trial by jury. The Court rejected the argument, noting that sovereign immunity required an express waiver of the Government's immunity from jury trial.

QUESTION: Isn't it true, of course, in the franchised export case involving the Postal Service we took just the opposite view. He said -- we quoted some cases back from the thirties, '39 and '40, saying we always construe sovereign immunity very broadly because that's Congress' power. We've gone kind of back and forth in the issue, haven't we?

MR. ROBERTS: Well --

QUESTION: The Court was much more liberal 50 years ago I guess is the answer.

(Laughter.)

MR. ROBERTS: Well, 50 years ago was when it decided the Soriano case, which is I think as I've

indicated perhaps the strongest support on the precise question that petitioner seeks to raise, the tolling of statutes of limitations.

Now --

QUESTION: Do you think the EEOC -- do you think this time limit could be waived? I guess not.

MR. ROBERTS: No, Your Honor, it's at the executive --

QUESTION: It has to be done by the Congress.

MR. ROBERTS: Correct. And the Court emphasized in the Soriano case that the Court had no authority to enforce relief against the sovereign beyond the limits set by Congress and that in this area as no other, Congress is entitled to assume when it set a time period, that it meant that time period and not a longer one.

Now, my brother points to the language of the statute that says the Federal employees may bring an action as provided in section 2000e-5 where the private action is authorized. But nothing in 2000e-5 authorizes the tolling of statute -- statutes of limitations.

And, in fact, this would seem to be the one provision that you would not look to subsection 5 for, because there's a different provision here. Congress it self has expressly distinguished between the Federal sector and the private sector: 30 days for the Federal

employee, 90 for the private sector employee. So, that would be the one area you would not look back to the other section.

Now, on the second question presented, the position of the United States is that the normal rule should apply and that notice to an attorney that one has designated to handle his affairs in a particular manner constitutes notice to the claimant himself.

Here, the EEOC did what the petitioner asked him to do, sent notice to his -- designated counsel of record. Notice was accepted at the offices of the designated counsel of record by an employee authorized to do so. That's when the 30-day period began to run, not the later time when the notice was actually received by the employee or the still later time when petitioner's counsel actually read the notice.

This Court doesn't have to envision hypotheticals to understand how unworkable a rule would be that depended upon when the lawyer actually read the notice. It has pending before it a case in which the lawyer acknowledged receipt of the notice on a June 22d and then claims she didn't read it until a couple of days later and that the time should begin to run from that later period. That would be an entirely unworkable rule for triggering the jurisdictional period.

QUESTION: What would have happened if somebody in the lawyer's office got in touch with the EEOC and asked them -- told them that he was over in Vietnam?

MR. ROBERTS: Your Honor, in fact the EEOC has a regulation warning claimants that if they're going to be --if they're going to be a prolonged absence from the residence, the address they've given them, to notify the EEOC precisely for that contingency.

QUESTION: That's what happens.

MR. ROBERTS: Well, in that case the EEOC would be sure not to send a notice until the prolonged absence was over, or the claimant could make other arrangements for handling the matter if his lawyer was going to be absence from the country.

QUESTION: That applies to claimants. Does it refer to attorneys or just claimants?

MR. ROBERTS: The regulation, which is 29 C.F.R. 1607, a subsection of that, speaks in terms of claimants. It says that claimant should provide his address to the EEOC, any change of address -- which was not done in this case -- and any prolonged absences that he anticipates.

QUESTION: I suppose it's nowhere in the record. Can you tell me how often the claimants are not represented by attorneys?

MR. ROBERTS: I don't have information on that,

Your Honor. What I do know is that it's -- more claimants are represented at the later stages than at the early stages.

QUESTION: Is this a later stage?

MR. ROBERTS: It's a later stage. Actually this claimant was represented from prior to the initiation of the administrative process. And as the district court noted -- my brother made some point about the danger of people not having the same lawyer. The district court noted that there was no dispute here, that petitioner's counsel represented petitioner throughout the litigation.

This was petitioner's lawyer. Any question of what to do after the lawyer receives notice is a matter between the client and his lawyer and shouldn't affect the triggering of the jurisdictional period.

Now, in fact, the Court need not reach the question of when the time period began to run because either -- under either the view of the United States that it began when the notice was received at petitioner's counsel's office and accepted by someone authorized to accept it, or under petitioner's view that it begins only on a later day when the claimant himself receives suit, this lawsuit is still jurisdictionally out of time, because petitioner has never named the only proper defendant under title VII, which is the administrator of

the Veterans' Administration. Nor has he provided notice to that defendant within the 30-day period.

The statute on this point could not be clearer. It specifies that in the civil action that's authorized, quote, the head of the department, agency, or unit as appropriate shall be the defendant, end quote. And the notice that was received both by petitioner's counsel and by petitioner himself went overboard in emphasizing this fact, reading from the joint appendix on page 5.

QUESTION: Mr. Roberts, did you raise this point in your brief in opposition?

MR. ROBERTS: We did not, Your Honor. We should have. We did raise it in the district court. The district court did not decide it.

QUESTION: The real point is we should reach the questions we -- I -- like Justice O'Connor, I'm getting mixed by this.

(Laughter.)

QUESTION: I think your real point is we should not address the questions presented by the cert. petition.

MR. ROBERTS: I think the Court can, but it -- there is this alternative basis which it could reach which it wouldn't have to consider what the triggering event is. I don't know which would be in the exercise of discretion --

QUESTION: Well, sometimes we said when a respondent doesn't raise a question like this, we -- we'll leave that open on remand or something and go ahead and address what decided on -- raised by the cert. petition.

MR. ROBERTS: I understand that, Your Honor. And the Court does not have to reach this question if it agrees with the United States that the 30-day period is jurisdictional and that time began to run when the notice was sent to petitioner's -- received by petitioner's counsel.

I simply point it out because it is a jurisdictional bar. It is a condition of the waiver of sovereign immunity, just like the time period. And it's clearly not been complied with in this case. And the notice, as I was saying, is -- is unambiguous.

In reading in joint appendix, page 5, if you file a civil action, and this part is in bold face, you must name the appropriate official agency or department head as the defendant. Failure to provide the name or official title, again in bold face, of the agency head or where appropriate the department head, may result in the loss of any judicial redress to which you may be entitled.

And then it goes on to explain that the agency here is the national organization, not the local unit. Petitioner has never named the administrator of the

Veteran's Administration in either his original complaint or his amended complaint.

QUESTION: Is it your contention that you're justified in -- you know the language in Oklahoma City against Tull --

MR. ROBERTS: Yes, sir.

QUESTION: -- (inaudible) the new rules that if you don't -- unless it's jurisdictional -- if you don't raise it in your opposition to certiorari we're entitled to disregard it. Do you contend this is jurisdictional?

MR. ROBERTS: Yes, Your Honor, for the same reason the time limitation is. It's a condition on the waiver on sovereign immunity and there only Congress can waive that condition. As I said, we should have raised it in our brief and opposition and did not, but I do think it is jurisdictional and can be raised at any time.

It clearly was not satisfied in this case. The administrator --

QUESTION: It doesn't go to this Court's jurisdiction, does it?

MR. ROBERTS: With respect, Your Honor, I think it goes to the jurisdiction of any court to entertain this action. The Congress has waived the sovereign immunity for this title VII action only with respect to actions against the head of the department or agency, no other.

And that is a jurisdictional bar, as Justice Stone noted in a waiver of a condition case --

QUESTION: (Inaudible) dismissed right on down to the district court?

MR. ROBERTS: Yes, Your Honor, under a number of rationales. If the Court agrees with us that the period is jurisdictional and agrees with us further that it begins to run when the designated counsel of record --

QUESTION: So, the district court should not have entertained it.

MR. ROBERTS: No, Your Honor, it shouldn't have.

QUESTION: We've really been ill served by the Government in this case if -- if that is the proper disposition because we've invested a great deal of time and effort in looking into and examining the questions presented by the petitions for certiorari.

QUESTION: Did not the Government have the opportunity and didn't raise it in the district court?

MR. ROBERTS: We did raise it in the district court.

QUESTION: How about in the court of appeals?

MR. ROBERTS: We did not raise it in the court of appeals. But I don't think that the time expended is in any sense but wasted. The Court still must reach the first the question presented, which is whether the 30-day

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period is jurisdictional or not, and it can go on to reach the question of what triggers the running of that event.

I simply bring this other point up to note that the Court need not reach that issue and can decide it on this alternative basis. The Court can certainly decide on the other basis as well.

QUESTION: Do we have jurisdiction to decide this jurisdictional point?

MR. ROBERTS: Yes, Your Honor.

QUESTION: Doesn't 5 U.S.C. section -- I've sent for the book but it's not here yet -- section 557 or something like that say that you don't have to name the individual. You can just name the United States? I'm imagining a lot of codes sections this afternoon I suppose.

MR. ROBERTS: I'm not familiar with that section.

QUESTION: I thought the APA waiver of sovereign immunity --

MR. ROBERTS: It may well, but it doesn't apply in this case, because this suit is not brought under the APA, and in light of Brown v. GSA, could not be brought under the APA. The provision that's applicable here on that question is rule 15(c) which governs relation back which says you can amend to add a new party if that party

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received notice in the period provided by law for commencing the action against it. It was not the case here.

QUESTION: Mr. Roberts, could I ask you a question going to the second issue in the case, whether the service is sufficient when made on the lawyer rather than on the claimant personally, and ask you whether -- if the United States had had a claim -- one of the problems is we've got really a lawsuit starting as opposed to an administrative proceeding up to there. And if the United States had had a claim against this individual that had to be served, the suit had to be started within a short period, could they have -- and they couldn't find him, could they have gotten adequate service by serving his lawyer?

MR. ROBERTS: I believe rule 4 requires that the party itself, when the initial commencement of the lawsuit --

QUESTION: When it's commencing the lawsuit, then the party himself -- which lends a little support to the notion that this is a kind -- a little more important than just the normal notice of a deposition or something like that.

MR. ROBERTS: Well, I think not, Your Honor, because this is a stage in an ongoing litigation.

QUESTION: Well, his litigation hasn't even started yet. If he didn't file in time, there's never been any litigation.

MR. ROBERTS: But the notice is not coming from the party that is commencing the action. The notice is coming from the adjudicatory body.

QUESTION: Right.

MR. ROBERTS: I think a more apt analogy would be sort of an arbitration, and the arbiter's notice is then sent out rather than one of the parties that's commencing the lawsuit. And in that situation, as here, I think notice to the individual, the attorney that's been designated by the party as his attorney is sufficient to --

QUESTION: Is that -- is that in the rules somewhere?

MR. ROBERTS: In terms of -- well, in terms of ongoing litigation, Federal rule 5.

QUESTION: I know, but is that -- does the EEOC say how it's supposed to give notice?

MR. ROBERTS: It sends notice to the claimant and his designated represented.

QUESTION: I know that's what it does, but is that written down somewhere that that's what they must do?

MR. ROBERTS: Yes, it's in -- it's in the EEOC

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regulations.

QUESTION: Then everybody should be familiar with the fact that notice to the attorney is notice to the claimant, is that right?

MR. ROBERTS: Well --

QUESTION: That isn't rightly what it says, is it?

MR. ROBERTS: The EEOC regulation doesn't say that. It says we will send notice to the claimant and, if he's designated a representative, to the designated representative.

QUESTION: So, it doesn't say at all that that -- they can just send the notice to the attorney?

MR. ROBERTS: No, it provides for notice for both.

QUESTION: So, what if the -- what if the general -- that seems to say that -- say that we will not expect notice to the attorney to be notice to the claimant.

MR. ROBERTS: Well, I think not, Your Honor. In terms of what starts --

QUESTION: Well, it says you have to send notice to the -- to the claimant.

MR. ROBERTS: Well, they send notice to both.

QUESTION: Well, I know, but it wouldn't comply

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with their own rules if they just sent a notice to the attorney.

MR. ROBERTS: It would not and suppose that's designed to take --

QUESTION: All right.

MR. ROBERTS: -- to take account of the fact that attorneys may be discharged or they change lawyers and they should notify the EEOC of that. Issues can arise as to whether the attorney-client relationship is still ongoing or was established. No question of that in this case. Petitioner --

QUESTION: I don't understand that. Supposing he had been terminated, but he just forgot to notify the EEOC and the lawyer's -- they've had a total falling out and the lawyer's not going to forward anything because he didn't pay his bill or something like that. It's still jurisdictional. That's the end of the ball game. They -- in your view they serve the discharged attorney and that takes care of everything.

MR. ROBERTS: Well, I -- notice to the --

QUESTION: That's correct, isn't it?

MR. ROBERTS: I don't think so, Your Honor. Notice to the party's attorney is notice to the party.

QUESTION: I'm assuming the attorney was properly retained at the outset, then the proceeding drags

along for 9 or 10 months and the client gets dissatisfied and fires him but does not tell the EEOC. So, the appearance is still sitting in your files. But nevertheless, under your view, they can serve the discharged attorney within the 30-day period and the attorney can tear it up and throw it away and the time is right.

MR. ROBERTS: That's not been the position of the United States, Your Honor.

QUESTION: Well, why not?

MR. ROBERTS: It is our position that the attorney-client privilege must still be ongoing.

QUESTION: Well, then how can it be jurisdictional?

MR. ROBERTS: Because we have not given notice that -- the jurisdictional period begins to run upon receipt of notice, and if the party has fired his lawyer -- he's no longer his lawyer. Notice to that lawyer can't be considered notice to the party. But there is no question of that sort here. Petitioner's counsel has represented him throughout this -- this litigation.

QUESTION: So, he could have saved his case by just saying, well, I'm sorry I fired that lawyer.

MR. ROBERTS: No. No, there would have been a hearing in the district court --

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QUESTION: As to whether it was true or not, but then there would have been jurisdiction to go through that proceeding and decide.

MR. ROBERTS: To determine when the notice began to run.

QUESTION: Under the EEOC's own rules, serving the lawyer is no substitute for serving the party.

MR. ROBERTS: Yes, it is. The EEOC's rule --

QUESTION: Well, it isn't. They can't under their own rule omit serving the party, giving notice to the party. They say give it to both of them. They can't -- they can't, under their own rule, omit sending the notice to the party.

MR. ROBERTS: I see my time has expired.

Thank you, Your Honor.

QUESTION: Thank you, Mr. Roberts.

Mr. Ker, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JON R. KER

ON BEHALF OF THE PETITIONER

MR. KER: Thank you, Mr. Chief Justice.

Concerning the notice -- the rules of the EEOC I submit do not speak to serving the claimant or the attorney nor does it speak to serving the claimant and the attorney. It speaks to an agency shall notify an employee or applicant of his right to file a civil action and of

the 30-day time limit. That's 1613.282.

QUESTION: (Inaudible) just notify the attorney, but the rule -- their own rule says --

MR. KER: The claimant. The practice --

QUESTION: Is that the EEOC regulation you're reading?

MR. KER: 29 C.F.R., Your Honor. The practice is, and it is not in the regulations. But the practice is to go ahead and send it to the attorney. Why not?

QUESTION: Alone?

MR. KER: No, sir, and the claimant as a courtesy to the attorney. But the claimant is the party to whom notice is to be given.

QUESTION: It's standard in the law that if you give it to my agent, you give it to me. I mean, agency is sort of an underlying background of every law, isn't it?

MR. KER: I also submit, Mr. Justice Scalia, that in this situation you don't look at the exact facts of this particular case and interpreting the provision, you look at what is applicable to all claimants. It's irrelevant whether or not I or anyone else represented Mr. Irwin through the administrative process. At the conclusion of the administrative process who's entitled to notice under both the statute and the regulations and that is the claimant. It doesn't matter whether or not -- I -

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ker.

The case is submitted.

(Whereupon, at 2:59 p.m., the case in the above-entitled matter was submitted.)

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