ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WILLIAM McNEIL, Petitioner v. UNITED STATES

CASE NO: 92-6033

PLACE: Washington, D.C.

DATE: April 19, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM McNEIL, :

Petitioner :

v. : No. 92-6033

UNITED STATES :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, April 19, 1993

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

APPEARANCES:

ALLEN E. SHOENBERGER, ESQ., Chicago, Illinois; on behalf of the Petitioner.

WILLIAM K. KELLEY, ESQ., Assistant to the 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

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 92-6033, William McNeil v. the United States.

Mr. Shoenberger.

ORAL ARGUMENT OF ALLEN E. SHOENBERGER

ON BEHALF OF THE PETITIONER

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

The issue in this case today is a single one, whether or not Mr. McNeil can have his day in court on the merits in the case he alleged. His suit alleges experimentation for AIDS and hepatitis purposes without his consent. The Government answered agreeing that it had funded the research on male prisoners, but claims that the research was done on him voluntarily.

We believe the Court can answer the question presented in this case without reaching all of the many questions presented in the briefs in this case. In particular, we believe the case can be answered on the argument that Federal Rule of Civil Procedure rule 15(d) means that he perfected his March, 1989 filing by the August, 1989 letter for filing that he sent to the court. That appears in the Joint Appendix on page 10.

The case is not about exhaustion. Mr. McNeil

clearly exhausted the Federal administrative remedies. Indeed, we think he at least exhausted it twice, but certainly he exhausted it once and got a letter from the Federal Government saying that he had a right to sue.

However, the case is rather complicated on its facts and I would like to run through a number of those major facts to show the events.

The case began when he filed, in at least January of 1989, an administrative claim. In that same month, a letter was sent by the administrative agency saying that his administrative claim, which it was labeled, was being sent to a claims officer. And he was told that if the case was not settled, he would have to bring a lawsuit.

In February of 1989, he received another letter from that same administrative agency, this letter saying that no records could be found to indicate that such experimentation had been conducted with the Federal Government being involved.

After those two letters, Mr. McNeil believed, apparently, that he had an obligation to sue or his rights would be lost. He brought suit in March of 1989 and included with that suit a motion for leave to proceed in forma pauperis.

In 1989 in May --

QUESTION: Let me stop you there. Now, do you say that his claim was actually denied in writing? And if so, which letter do we look to?

MR. SHOENBERGER: He believes or he believed that his claim was denied.

QUESTION: What is your position? What letter do we look to as a denial?

MR. SHOENBERGER: You look to -- he believed that the combination of the January 24th letter and the February -- I believe it's 9th letter, put together, were a denial of his claim.

QUESTION: Is that your position on his behalf?

MR. SHOENBERGER: That is certainly a reasonable position. I believe a stronger position --

QUESTION: Well, is it your position on his behalf?

MR. SHOENBERGER: It's part of our -- my position on his behalf. I think the better position or the stronger position is that the August filing, the letter that was contained in August, certainly constituted an adequate filing for purposes of this suit.

QUESTION: But if we go this far, because that's where we are chronologically, you say that the two letters, somehow combined, are a denial. Because there certainly wasn't the passage of 6 months, was there?

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MR. SHOENBERGER: That's correct. There was -- well, there was by August of 1989, there was the passage of 6 months.

QUESTION: No, but by the time he filed suit in March.

MR. SHOENBERGER: That's correct, there were not --

QUESTION: 6 months had not elapsed.

MR. SHOENBERGER: That's correct.

QUESTION: So you would have to say somehow those two letters were a denial.

MR. SHOENBERGER: That's -- that was clearly what he believed. As a pro se litigant, he clearly believed that and he clearly articulated that to the Seventh Circuit in his reply brief.

QUESTION: But, we're -- Mr. Shoenberger, we're talking really a question of law here, not what someone may have reasonably believed, unless the law makes what someone reasonably believed, rather than what actually was, relevant.

MR. SHOENBERGER: I agree, Your Honor.

QUESTION: Then why do you keep mentioning your client's reasonable belief in something? Does the law -- does the statute give any reason why reasonable belief should be important?

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MR. SHOENBERGER: The statute on its text neither refers to reasonable belief -- nor does the statute, we believe, in its text indicate the remedy that should occur should a premature filing, if this is deemed a premature filing -- had been made.

So the text is absent that would answer this case, except for Federal Rule of Civil Procedure, rule 15(d), which explicitly speaks to the case and we believe explicitly cures any defect that might have been made in the original filing.

QUESTION: Well, but if one were to read the text of 2675(a), which is one of the statutes with you, "an action shall not be instituted upon a claim against the United States for money damages unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing."

That suggests that whatever you -- whatever you filed in March simply was not -- was not permissible under the statute because "an action shall not be instituted."

MR. SHOENBERGER: Well, what -- we contest, of course, whether "instituted" means the same as commenced.

QUESTION: Well --

MR. SHOENBERGER: But he believed that he had his denial, and the statute is only clear if you look at

the method it specifies for notifying the denial, which refers to certified or registered mail.

Unfortunately, Mr. McNeil was a prisoner, and as a practical matter unless a letter includes within its text a reference to certified or registered mail, he would not know whether or not the letter was certified or registered, because that kind of documentation does not normally come forward to prisoners, at least in most of the prisons that I'm aware of.

QUESTION: Well --

MR. SHOENBERGER: And so he had -- he had a gap in knowledge.

QUESTION: Well, was the letter which he received -- was it certified or registered?

MR. SHOENBERGER: The record does not indicate whether either the January, 1989 letter or the February, 1989 letter were either registered or certified.

QUESTION: Was this point raised by you in the district court?

MR. SHOENBERGER: I did not represent him in the district court.

QUESTION: Was it raised by whoever represented him in the district court?

MR. SHOENBERGER: He represented himself pro se.

QUESTION: Was it raised by him?

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MR. SHOENBERGER: He did raise the argument that he had made a sufficient filing --

QUESTION: I'm asking you a very specific question, Mr. Shoenberger, and I think it's capable of being answered yes or no.

MR. SHOENBERGER: I believe he did assert specifically that he had notice in March of 1989 in connection with these two letters that allowed him the right -- a permission to sue. He said that specifically to the Federal district court. In --

QUESTION: Well, so he wasn't contending there, then, that the mailing he received was inadequate.

MR. SHOENBERGER: No. I think he thought the mailings were adequate to inform him that the Federal Government had said his claim was denied.

QUESTION: Well then are you -- are you here making a -- I thought from what you remarked a moment ago that you are here making a point that because there was -- there's no evidence the denial was sent by certified or regisetered mail, that that has some bearing on it.

MR. SHOENBERGER: In the August, 1989 filing that he made, in his letter requesting to commence the litigation, attached to that letter -- that letter was the sum certain denial that was sent in July of 1989. And internally, that says that it was sent by certified mail,

return receipt requested.

QUESTION: Well --

MR. SHOENBERGER: That is, the letter contained that particular language.

QUESTION: Do you make a point here of your claim that the denial from the agency was not sent by certified or registered mail?

MR. SHOENBERGER: That as far as we know, in August -- in July of 1989 it was sent by certified mail, because that's what the letter says.

QUESTION: And am I right in thinking you make no point of failure to certify or register here, in your case here?

MR. SHOENBERGER: We certainly don't, because there's no evidence in the record -- and the only evidence in the record would seem to suggest it was, but we don't know that as a fact. And as I said, Mr. McNeil doesn't know that as a fact, can't know that as a fact by the way mail is processed in the prison.

But in any case, the Government, as we understand it, agrees that that July, 1989 letter was a sum certain denial. We think that's uncontroverted in the record and any of the briefs that have come up on appeal, either in the Seventh Circuit or in briefs to this Court.

However, rule -- rule 15(d), it seems to us, is

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a completely adequate way of dealing with the particular problem. If I could ask your Court -- the Court to refer to the Joint Appendix, page 10, that's his August filing. And that filing in its text seems quite clear.

It says he got his second sum certain denial, which was attached to that -- it's the July, 1989 sum certain denial. And it's -- he says he's sending that second text, second denial, to the Federal district court. It also states he was, in fact, infected with hepatitis. It tells the court that he had paid the filing fee for the case in May of 1989, although in June of 1989 the Federal district court did not apparently know that and stayed all further proceedings until it ruled on the in forma pauperis motion.

There were a number of documents that apparently were mislaid in Mr. McNeil's case by the Federal district court.

QUESTION: Well, now, you don't take the position, do you, that the August 7th letter is a complaint --

MR. SHOENBERGER: We --

QUESTION: -- For an action? You rely on the complaint filed back in March.

MR. SHOENBERGER: No. We take -- we believe that the August letter is at least construable in two

different ways. That it's a proper rule 15(d) supplement that perfects the original March filing, or, alternatively, that it is, in fact, a complaint under Haines v. Kerner, to be construed liberally in terms of its text.

So that on either of those grounds -- if you find for Mr. McNeil on either of those grounds, the case was validly -- was validly filed and perfected, either filed in August of 1989 or perfected in August of 1989, and that he has an ability to go forward with the suit.

QUESTION: Well, is there anything to indicate that the district court acted to grant this implied motion under 15 -- under rule 15(d)?

MR. SHOENBERGER: There is no indication that the Federal district court ever saw this letter of August 7th and the attachments. There is no reference in the opinion at the district court level that it was ever paid any attention to, and so the answer to that is no.

QUESTION: Well, it's rather odd to rely, then, on an implied motion that the district court has not even seen, much less acted on --

MR. SHOENBERGER: But it was filed.

QUESTION: -- To cure a defective pleading.

MR. SHOENBERGER: But it was filed. And I would suggest if you look at the language that is the last part,

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sentence, "plaintiff prays this Honorable court accepts this letter as a proper request, whereas plaintiff can properly commence his legal action accordingly."

If -- and we disagree. If the word "commenced" is the same as the word "instituted" -- that's the word in 2675 -- and both of those words mean filed, if the statutory language is to bear that interpretation, his letter should bear that same interpretation, being in the same context. And that means that this particular last sentence or last half sentence should be interpreted as him saying I want to file a case right now, let's get the case going.

QUESTION: Well, no, it doesn't say I am filing a case right now. It says -- it says if you accept the letter, then I can -- I will be able to commence my legal action. It doesn't say I am hereby commencing it.

MR. SHOENBERGER: If the -- if commencing means filed, if that's the statutory interpretation from 2675 that's correct.

QUESTION: Yeah, but it says it "can properly commence." It says, "whereas plaintiff can properly commerce his legal action accordingly."

MR. SHOENBERGER: Right.

QUESTION: That means I am now able to commence my legal action. Not I have commenced it or I am

commencing it, but I can commence it.

MR. SHOENBERGER: Well, I think -- I think his subjective intent may very well have been that he simply wanted the prior filing to start going forward. But he was a layperson and he certainly had no great familiarity with rule 15(d). He also had no great familiarity with the 120 plus odd words that are the first two sections of section 2675.

QUESTION: Well, I don't think it's too much to insist if you want one -- one document to be accepted for another one, that he's saying I'm filing a complaint. I mean, not if you accept this letter, I'll be able to file a complaint or I can file a complaint. Really, you don't have to be a law school graduate to speak English, and I don't know why we have to bend over backwards for pro se litigants to make them say something they haven't said.

MR. SHOENBERGER: Well, I don't think you have to bend over backwards. I think it's quite reasonable to interpret this language, without any stretching of the language, to say here is a filing. The case is filed, I have a right to sue, I have complied with the exhaustion requirements of 2675 twice, I have two sum certain denials, that he explicitly says.

He explicitly says I have been infected with hepatitis. There is reference to the theories, through

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some of the attachments to the letter that was contained. It's clearly a Federal Tort Claims Act case that he's dealing with. He cites the caption number of the prior case. He doesn't, indeed, label it a complaint, but it's only the absence of the word "complaint" that means that this is not a sufficient new filing.

QUESTION: Was a copy of that letter served on or sent to the Government?

MR. SHOENBERGER: I do not believe so. There's nothing in the record to indicate so. In fact, it's -- since the only time the Federal Government and the district court indicated it was aware that an administrative claim had been filed in January of 1989 is in their response brief to his response to their motion to dismiss, I don't believe they ever checked the record in this case to see what was in the record --

QUESTION: Well, but I mean it stretches -- it stretches again the argument for the implied rule 15(d) motion to say that it's a -- it's a motion for a supplemental pleading when it's not even served on the Government.

MR. SHOENBERGER: In -- this Court in decision -- in Matthews v. Diaz, it was even more stretched than that. In Matthews there was not even a filing with the court. There was an informal notice to

the court that a -- that an event had occurred in the context where this Court said that it was dealing with an unwaivable jurisdictional issue.

And the jurisdictional issue -- the complete issue was that the person there had to apply to the secretary and have exhausted, after a hearing, a particular administrative route. He hadn't even applied, before the court filing occurred, to the administrative agency. He also never exhausted, as a practical matter. But this Court said that the informal notice to the court that occurred during the litigation should be construed as adequate for supplemental pleading. I'll draw the attention of the Court to rule -- to footnote 8 in that decision.

In this case, Mr. McNeil at least tried to let the court know that he had -- he had the second sum certain denial, which certainly is an effective sum certain denial. It's actually more than what the court had in Matthews v. Diaz.

I'll also draw the Court's attentions to the Miller Act cases that are cited in the briefs, the U.S. v. C.J. Electric and the Haydis decision.

QUESTION: Do you cite Matthews against Diaz in your brief?

MR. SHOENBERGER: Yes, we do.

QUESTION: Oh, I didn't see it in the index.

MR. SHOENBERGER: I believe it's in the -- it's in the supplemental.

QUESTION: In your reply brief.

MR. SHOENBERGER: Yes, in the reply brief.

QUESTION: Mr. Shoenberger, you know I didn't really think we were going to get into whether -- I didn't think we had taken the case to try to figure out whether this August 7 letter was a proper commencement of the suit or not. How is this set forth in the questions presented?

MR. SHOENBERGER: We think it's a question that's a subsidiary question to the one that was presented in the petition for certiorari. Pages 3 and 6 of the petition for certiorari certainly averred to this question and make it clear -- we thought it made it clear to the Court that it was part of the question that was being -- was being brought to the Court.

QUESTION: Well, what -- which question being what? How?

MR. SHOENBERGER: The question is whether or not the August -- the August filing of 1989 was sufficient either as a complaint itself, as a stand-alone complaint with the attachments associated with it, or as a perfecting of the March filing, if this Court should determine that the March filing was perfected.

QUESTION: Well, what -- that's fine. As I have your questions presented in your brief, and you cannot bring in -- since you're seeking to overturn the decision below, you can't bring in outside arguments for the purpose of sustaining it.

Your question presented in your brief is whether an incomplete filing of a Federal Tort Claims Act -- an incomplete filing may be perfected by filing a notice of final agency denial. Not a document which could be considered a proper complaint, but by filing a notice of final agency denial prior to substantial progress. That was your first question.

Your second question is may the United States bar a suit when the pro se prisoner files a premature suit but satisfies the congressional requirement by filing a final agency denial prior to substantial progress.

Now, that is a significant legal issue on which there's dispute around the country. There really isn't very much dispute around the country on the meaning of this letter of August 7, and I don't think we would have taken the case to decide that.

MR. SHOENBERGER: I agree.

QUESTION: Well, can we talk about the legal issues that were the subject of the petition.

MR. SHOENBERGER: Yes, Your Honor. The question

is whether or not the failing to exhaust generates a particular remedy. The remedy that the solicitor general's office is seeking is dismissal, to treat as a nullity the March filing.

We don't believe that is consistent with what Congress said. We don't believe that's consistent with any of the congressional history. There is a total absence of any reference in floor debate or in committee reports to Congress of a suggestion that this particular remedy, dismissal of the case, is to occur if there is a premature filing. There was no question that Congress intended that exhaustion occur. Exhaustion did occur in this particular case.

QUESTION: And you concede that as a jurisdictional requirement.

MR. SHOENBERGER: That exhaustion has to occur. Congress clearly meant that exhaustion had to --

QUESTION: And that it is jurisdictional.

MR. SHOENBERGER: It's something that is certainly necessarily to occur. Whether it's jurisdictional or condition precedent to recovery or condition precedent to the case going forward, I can't -- I can't say. Whether it's a -- would be --

QUESTION: Well, if it were jurisdictional the answer would be a rather neat answer, wouldn't it?

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MR. SHOENBERGER: Well, Matthews v. Diaz, I think, gives a rather neat answer to that. And that answer is that even if it's jurisdictional, it's a 15(d) supplemental thing relating to events that occurred subsequent to the filing. The case is now perfected and under 15(d) the case can go forward --

QUESTION: So you lose nothing if we do treat is as jurisdictional.

MR. SHOENBERGER: That's correct. That's correct.

QUESTION: Well, if your client had failed to file any sort of a paper in court in March, eventually his claim would have simply disappeared by virtue of the running of the -- either the statute of limitations, wouldn't it?

MR. SHOENBERGER: Yes, it would have. It would have. And I also want to mention one point in this connection. He believed -- and I believe this is incorrect, but he believed that he had a 6 month obligation to file suit after what he considered to be his filing. He was wrong.

QUESTION: Again, yeah, why -- why is this at all important in our disposition of the question presented, what he believed?

MR. SHOENBERGER: Because the Federal Tort

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Claims Act proceedings, particularly now with the administrative proceedings, are proceedings that are frequently instituted by people proceeding pro se.

QUESTION: Where in the statute does it talk about anybody's honest belief?

MR. SHOENBERGER: It does -- it does not. It does not appear.

QUESTION: Then why do you raise it here?

MR. SHOENBERGER: Because the -- this Court has in a number of cases, in particular in relationship to the -- to Title VII in the Zipes case, and in the -- a DEA case, indicated then -- when petitioners proceed pro se or can start processes pro se, that it will not strictly construe the language in a way that prevents them from going forward.

In the one case, this Court actually ordered that the condition of notifying the State agency. which had not been performed, be performed by staying the Federal action until after the State agency had an opportunity to act.

In Zipes it found that the failures to exhaust, which were clear on the record, did not bar the case from going forward. We're asking for the same ruling. It seems to make -- we believe it's a sensible ruling in this case. If Congress didn't say the same thing as it said in

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the Hallstrom context in the context of RCRA and environmental statutes, we do not have a case here, like there where Federal Rule of Civil Procedure, rule 3, the word "commenced" is, in fact, used. And Congress used the word "institute."

QUESTION: Well do you think "institute" -- well do you think "instituted" means something much different from commenced?

MR. SHOENBERGER: We believe it does, Your Honor. We believe the dictionary definitions are different and the common usage is different. Everybody would understand if I say I'm commencing a trip to the Grand Canyon. If I said I'm instituting a trip to the Grand Canyon, it doesn't mean the same thing. I think there's ambiguity there.

QUESTION: Well, but the fact that you -- you can't use one word for everything you can use the other word for doesn't mean that in the -- in the area where they have common application the meaning may not be the same.

MR. SHOENBERGER: That's correct, Your Honor. However, Congress has, in fact, used the word "institute," including in the some of the cases that the solicitor general -- some of the statutory examples the solicitor general cites, which we refer to in our supplemental, in

our reply brief -- to mean something different. To mean, at least in some cases, two different events as what is referred to by "institute."

In one case at least the service of process is necessary to finally commence. So it's not just a commencement by filing; "institute" means the service of process and the filing. In another case it's the consent to be --

QUESTION: Is this definition of the word "institute" out of a dictionary?

MR. SHOENBERGER: We have both cited dictionary definitions of the word "institute," yes, Your Honor.

QUESTION: And it talks about a service or a filing.

MR. SHOENBERGER: No, no. The dictionary definitions are not identical, and we believe the common usage is not identical either.

QUESTION: Well --

MR. SHOENBERGER: And statutes that Congress -- I'm sorry.

QUESTION: Well, what statutory definition of "institute" are you talking about?

MR. SHOENBERGER: There is no statutory definition in this statute of the word "institute."

QUESTION: Well, I thought you were referring a

moment ago to -- that the word "institute" meant two stages or something like that.

MR. SHOENBERGER: In a number of the examples cited by the solicitor general's office, which we discuss in the reply brief on page 8 and 9, the word "institute" is used, in these cases, in the same statutory sections along with the word "commenced." And I believe it's quite clear that the word "institute" means something somewhat different than the word "commenced" when Congress is using them in the same statutes -- the same statutory sections and subsections, the same words.

In particular, if you take a look at the section 256 that's on page 9, in that case "consent to be included in the lawsuit" is required. And that consent can clearly occur at a later point in time than the initial instituting of the lawsuit, the filing of the lawsuit, the commencing of the lawsuit as a whole, but it "commences" as far as a particular litigant only when that litigant agrees to be part of the lawsuit.

QUESTION: Mr. Shoenberger, as I understand your position, it's that the failure to comply with 2675(a) should not automatically result in dismissal; that it should depend on how far the lawsuit has progressed. And the further it's progressed, the more ready you should be to dismiss it.

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MR. SHOENBERGER: We believe that the line that several circuits have drawn that substantial progress had not -- has not occurred is a reasonable line to be drawn.

QUESTION: Why --

MR. SHOENBERGER: That speaks to the efforts that are involved in the progressing on behalf of the Government and the conservation of the Government's resources in terms of litigating these kinds of cases. I think it's an appropriate line to be drawn.

QUESTION: If it hasn't gone -- if it hasn't proceeded very far, you dismiss it. Or if --

MR. SHOENBERGER: It's certainly reasonable to dismiss it at that -- it's reasonable -- no. If it hasn't progressed at all, it should not be dismissed. It's --

QUESTION: I don't understand that. I mean I would think just the opposite ought to be true, that if it has come a long way you shouldn't dismiss it. Why does your rule make any more sense than the opposite?

MR. SHOENBERGER: Well, as a practical matter, if Congress was concerned with conserving the governmental resources, we think that purpose is disserved by letting a case go forward and be litigated perhaps months, or as in the Hallstrom case, years until the point happens to be raised.

In this case, however, as the facts of the case

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indicate, the Government didn't move to dismiss until 13 months after the August filing of the 1989 letter. So no process occurred, literally. The Federal court didn't find the filing fee had been paid until approximately 9 months later after the filing of the August 7th letter.

So for purposes of this case, we think it's a perfectly appropriate rule --

QUESTION: But you say if the Government wants to -- wait a minute, now. The further along it is, the more -- the more ready you should be to dismiss it, yeah?

MR. SHOENBERGER: If the Government makes that motion.

QUESTION: Gee.

MR. SHOENBERGER: We believe that the Government has a --

QUESTION: Well, so the Government should really let all these suits go on as long as possible, waste as much judicial resources as possible, and only then when the judgment is about to come down, the Government gets up, Your Honor we move to dismiss for --

MR. SHOENBERGER: No, at some point --

QUESTION: It doesn't seem to me to make a whole lot of sense.

MR. SHOENBERGER: At some point there may be an estoppel that would apply. But we think that this

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particular whole statutory area is a question of Congress waiving its sovereign immunity in 1946. There is no evidence in the 1966 statutory amendments or in the congressional history, including the Senate report, to indicate that it intended to retract that waiver.

What is being asked now is the adoption of a special defense available only to the Government, for the -- for these kinds of cases. We don't think Congress explicitly adopted that special defense, and we think it rejected the idea in 1949 of adopting special defenses for the Government.

I'd like to reserve the rest of my time.

QUESTION: Very well, Mr. Shoenberger.

Mr. Kelley, we'll hear from you.

ORAL ARGUMENT OF WILLIAM K. KELLEY

ON BEHALF OF THE RESPONDENT

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

We believe that the question in this case is resolved by the language of section 2675(a), which has received little attention thus far this morning. As the court of appeals found, that statute is plain and it is unambiguous. It states that a plaintiff may not institute an FTCA action unless he first files an administrative claim and that claim is finally denied by the agency.

Petitioner failed to meet that condition and the district court was therefore correct to dismiss his complaint.

Now, my colleague, Mr. Shoenberger, has made much of the August 7th letter to the court and the rule 15 he seeks to make. Our position is that a prematurely filed complaint that is barred by the terms of section 2675(a) cannot be rescued by a supplemental pleading. To do so would be squarely inconsistent with the terms of an Act of Congress, something that rule 15 simply cannot authorize. Rule 15 does not speak in terms of permitting an action to be filed that otherwise could not be; it speaks in terms of correcting a defect in the original complaint.

Now, Matthews against Diaz, which --

QUESTION: Well, suppose that within the limitations period, a formal rule 15(d) motion is applied moving that the court construe the complaint that was previously filed as a newly filed complaint. Is there any problem with that?

MR. KELLEY: We would have a problem with that, Your Honor. We believe that section 2675(a) states that an action may not be instituted. And if one is, that action is forever lost. Now if within the limitations period a plaintiff tried to file a new action, that would not be a problem. But we don't think that a amendment or

a supplemental pleading of an existing action would be sufficient to comply with the terms of the Federal Tort Claims Act.

And I would also point out --

QUESTION: -- I want to file a complaint now and please -- this is within the limitations period, I assume?

MR. KELLEY: Yes.

QUESTION: And the complaint I want to file is the complaint I filed some months ago and paid the fee on.

MR. KELLEY: We believe that would be insufficient, Your Honor.

QUESTION: Why?

MR. KELLEY: It's merely a formal matter.

QUESTION: It says please -- there's a paper in your file that I want you to incorporate in my letter which says this is a complaint.

MR. KELLEY: Well if as an administrative matter a district court wished to accept that complaint as a new action and if, further, as an administrative matter they retained the same number, I suppose nothing would bar that. I think, however, that a new filing fee would have to be paid, or a new in forma pauperis motion would have to be made. Because section --

QUESTION: But in any event, August was beyond

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the limitations period in this case.

MR. KELLEY: August was not beyond the limitations period in this case.

QUESTION: It was not.

MR. KELLEY: It was within.

QUESTION: All right.

MR. KELLEY: The administrative denial was on July 21st, 1989, the letter was sent August 7th, so it was within the required time. But as I said, it --

QUESTION: Why would it take a new filing fee? I would think they -- if that filing was void they ought to send his fee back.

MR. KELLEY: Well, a plaintiff who files a case prematurely, Your Honor, has disserved the court, in effect, and used its resources when he wasn't entitled to. But this is somewhat beside the point.

I would on -- just further on the August 7th letter, as I've said, I don't think that a rule 15 supplemental pleading argument would work, for the reason that it would be barred by the statute. The letter also cannot be treated as a new complaint, we believe, for two reasons. One, the terms of the letter, I think, are insufficient to do that.

But more importantly for this Court's purposes, Mr. McNeil did not make that argument in the court of

appeals. And, in fact, the opinion of the court of appeals noted that he disclaimed that argument.

Moreover, that argument simply was not presented in the question presented in the cert petition and, in fact, it's quite inconsistent with the question that petitioner presented. It would be extraordinary to present a question on which the circuits are in conflict, that is directly inconsistent with an argument you wish later to make, to get the Court to grant certiorari, and then later seek reversal on that ground. We don't believe that that argument is properly before the Court. And in any event, it is far afield from the legal issue that has divided the circuits and on which we believe this Court's ruling is necessary.

Now, also without much mention in my colleague's argument was the Court's decision in Hallstrom against Tillamook County. There the Court concluded that the language of the statute at issue meant what it said, and we believe here, as well, the Court should enforce the terms of section 2675(a) as they are written. And those terms simply do not permit a plaintiff to file an FTCA action unless he first complies with the administrative process and that process is completed.

Now, the rest of the FTCA confirms that that reading is correct. Section 2675(a) itself provides

exceptions for certain kinds of pleadings. Conspicuously absent from that are pleadings under rule 15(d), and we believe that the provision of some exceptions and not others should exclude the remaining exceptions that petitioner has sought to have this Court adopt.

Similarly, the Westfall Act amendments in 1988 were enacted on the premise that section 2675(a) requires an action that is prematurely filed to be dismissed.

Section 2679(d)(5) deals with the situation where the United States is substituted as the defendant in an action that is originally brought against a Government employee. Rather than permitting the administrative claim process to be done away with, or rather than having the action stayed pending an administrative claim, the act extends the statute of limitations to permit a plaintiff to file an administrative claim after his cause of action is dismissed, and later to file a new cause of action. So we think the FTCA as a whole confirms our reading.

Now, the Court should also not overlook the extent to which it is disruptive to the administrative process to file a lawsuit prematurely under the FTCA. The administrative process is very valuable and very important -- a great many cases are settled -- and it would very much disrupt the system to permit plaintiffs to go to court prematurely and vitiate the effectiveness of

that process.

As the Court stated in Hallstrom, positions become hardened once litigation is initiated. and settlement becomes less likely. More practically, FTCA cases for the Government are litigated typically by the U.S. Attorneys offices, and the administrative claims process is cut off by the filing of a lawsuit.

The statute itself provides that. Section 2672 gives the head of the concerned agency the authority to settle a case prior to litigation being filed, subject to regulations promulgated by the Attorney General. Section 2677 lodges that authority to settle in the Attorney General after a lawsuit is filed. It is entirely a separate process. An agency cannot, on its own, settle a case after a -- after the lawsuit is filed.

QUESTION: Does that mean that at the time this man wrote his letter to the agency, the agency really didn't have any authority to settle?

MR. KELLEY: Well, on -- these facts are somewhat unusual, Justice Stevens, because the agency did not have notice that the lawsuit had been filed. I suppose, as an abstract matter, that would be correct, although the Attorney General's regulations respecting settlement of administrative claims do not specifically state that they may not settle claims after a lawsuit is

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filed.

The structure of the statute suggests that and in the administrative process the way it works, as a practical matter, is that once a case is filed and we know -- typically, we're served when a complaint is filed; we were not here -- the agency simply cannot do it by itself. But I don't believe that we would be forced to say that a settlement of this case administratively would have been unauthorized. I'm not sure the statute strictly requires that, and the regulations do not either.

QUESTION: May I ask with regard to the issue before -- you know, the particular legal issue -- are the cases that go the other way from the Seventh Circuit and say that you can treat the case as being filed after there's a denial if there's been no substantial progress in the litigation, are they all pro se cases?

MR. KELLEY: I honestly don't know, Justice Stevens.

QUESTION: I haven't read them. I just --

MR. KELLEY: I don't recall. I don't believe that all of them are, no, although I really am just guessing. So I'll just say I don't know.

QUESTION: Because those that -- where there's a lawyer involved, it's kind of puzzling as to know why -- you know, the statute is pretty plain. It's puzzling as

to why a lawyer would --

MR. KELLEY: The statute is plain. And we believe, frankly, it is plain -- it should be plain to a layperson. Mr. McNeil, as is reflected by his pro se pleadings, is not someone who is completely unfamiliar with the legal system. And I would actually have to say that he did a pretty good job as a pro se litigant in terms of his pleadings; he cited the right statutes, for example. And he -- he made a mistake.

Now, section 2678 of the statute, which deals with the extent of allowed attorneys fees in these cases, which is reprinted in the appendix to our brief, also confirms that there is a big difference between pre-litigation settlement and post-litigation settlement. Under that statute, a settlement pursuant to section 2672, that is the pre-litigation settlement by the agency, is -- allows an attorney to collect a contingency fee of up to 25 percent of the award.

That section also says, however, that once a lawsuit is filed and a case is settled pursuant to section 2677, the percentage of the allowable attorneys fee is reduced to 20 percent, and that is a criminal penalty if a lawyer violates that.

So this all goes to the point that it's important to have a bright line here. We believe that it

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is important to know when a lawsuit may be instituted and when one actually is. Petitioner offers no line, much less one that is clear.

If there are no further questions, we would submit the case.

QUESTION: Thank you, Mr. Kelley.

Mr. Shoenberger, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF ALLEN E. SHOENBERGER

ON BEHALF OF THE PETITIONER

MR. SHOENBERGER: Thank you, Your Honor.

I believe through inadvertence, there was a misstatement of the 20 percent and 25 percent attorneys fees. It's 25 percent if you go to court, and we don't think the difference between 20 percent, if you can settle out of court, and 25 percent is enough to encourage attorneys to go ahead and try to avoid the administrative process, as a practical matter.

In this case, Judge Ripple quite clearly didn't understand, in the Seventh Circuit, that the August filing could be treated as a separate and new complaint. This is not a new issue in this case. That was the basis for his dissent.

QUESTION: But he stated that he thought it was unnecessary for the court to decide, the majority to decide as it did, the question on which the circuits are

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split, didn't he?

MR. SHOENBERGER: That's correct. That's correct. And we're basically suggesting that that is one alternative way for not having to reach the issue that's involved.

We would also suggest that --

QUESTION: It's a way for not having to reach the issue we granted cert to decide.

MR. SHOENBERGER: That's right. Because what you granted cert on is also the case. The case has to be decided. That goes back to Cohens. That's the obligation of this Court, and we don't think you have to reach that broader question.

But more importantly --

QUESTION: You mean whenever we grant certiorari, we don't know what issues we're going to have to decide --

MR. SHOENBERGER: No.

QUESTION: -- Even on behalf of the petitioner.

MR. SHOENBERGER: No.

QUESTION: I mean I can understand the person who's trying to sustain the judgment below coming in and saying, you know, this wasn't raised in the petition, but I'm entitled to my judgment on the basis of this other issue. But for the petitioner to come in and give us one

issue in -- you know, a teaser in the petition, and then come in and argue a totally different issue.

I, you know -- I, frankly, would not have been interested in discussing the meaning of this August 7 letter. I know it's important to your client, but I don't think it is to the country.

MR. SHOENBERGER: I agree, I agree. But the obligation is a different one. And we did think that that issue, as originally stated, did include as a subsidiary issue the issue that we've also addressed in the argument today.

Thank you, Your Honor.

QUESTION: Thank you, Mr. Shoenberger.

(Whereupon, at 11:43 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)