OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LLOYD HENDERSON, Petitioner v. UNITED STATES

CASE NO: 95-232

PLACE: Washington, D.C.

DATE: Tuesday, March 19, 1996

PAGES: 1-57

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IN THE SUPREME COURT OF THE UNITED STATES

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LLOYD HENDERSON, :

Petitioner :

v. : No. 95-232

UNITED STATES :

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

Washington, D.C.

Tuesday, March 19, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

RICHARD A. SHEEHY, ESQ., Houston, Texas; on behalf of the Petitioner.

MALCOLM L. STEWART, 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

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 95-232, Henderson v. United States.

Mr. Sheehy, you may proceed.

ORAL ARGUMENT OF RICHARD A. SHEEHY

ON BEHALF OF THE PETITIONER

MR. SHEEHY: Thank you, Mr. Chief Justice, good morning, members of the Court:

The Court has granted review in this case on two issues. First, does the 120-day service requirement of Rule 4 of the Federal Rules of Civil Procedure supersede the forthwith service requirement of the Suits in Admiralty Act?

Number 2, if not, does the district court have authority to extend the time for service provided under the Suits in Admiralty Act under appropriate circumstances?

Petitioner Henderson submits to the Court that the answers to both questions are in the affirmative, and would request this Court to reverse the judgments of the lower courts and remand this case for trial on the merits.

First, the 120-day requirement in Rule 4 supersedes the forthwith service requirement of the Suits in Admiralty Act.

There are three basic reasons for this conclusion. Number 1, the forthwith service requirement is procedural, so it was invalidated by the Rules Enabling Act when Rule 4 was amended in 1966 and 1982.

Second, a holding that the forthwith requirement prevails would violate and frustrate congressional intent and the policies underlying the act and the Federal Rules of Civil Procedure.

Finally, even if the forthwith service requirement is not procedural, the 1982 amendments to the Federal rules were done by direct legislative action, so they would invalidate the forthwith requirement.

QUESTION: Well, the Rule 4(j) as I read it, Mr. Sheehy, simply says that if a complaint is not -- if service is not made on a defendant within 120 days it shall be dismissed. It doesn't say you invariably have 120 days in which to serve a complaint.

MR. SHEEHY: Mr. Chief Justice, I think that the legislative history and the comments made by the advisory committee, et al. indicate that the 120 rules, there is no exception to it, and that in fact the parties have 120 days to serve --

QUESTION: Well, and to what extent are we -- do we defer to legislative history in this area?

MR. SHEEHY: Your Honor, because in 1982 this

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particular rule was reviewed to great extent by Congress, as the Court is aware, the submission by the Court was not adopted in total by the Congress, and there was a review by the Congress and this very issue was discussed, namely, under what provisions would the 120 days be put into the rule.

QUESTION: It was discussed by whom?

MR. SHEEHY: There is a -- Professor Siegel in his analysis of the rules, the advisory committee, and the judicial conference.

The original submission by this Court to Congress for the 120-day rule, the 120 days was there. There was a suggestion by this Court about service by mail, which eventually was changed, and there was also no submission by this Court of a good cause extension.

What happened is, Congress, upon suggestions by lawyers, particularly in California, concerned about the certified mail provision and also about the fact that there was an absolute 120-day shall-be-dismissed provision, and the -- there were suggestions made that were discussed by Professor Siegel --

QUESTION: Well, how does that bear on how we read a written rule?

MR. SHEEHY: Well, my point exactly is that the rule itself says, and I think the Government has conceded

in its brief on page 20 that there's a clear implication that a party has 120 days to serve under Rule 4, that there are no exceptions for it, it's not a guideline, it's not a suggestion, but a party has 120 days, and I think --

QUESTION: Well, but there certainly is room for another statute, which we have here in the Suits in Admiralty Act, to have a different requirement, and you can read both statutes and give effect to both, that for a suit in admiralty it has to be served forthwith, and if it's not a suit under that act, then you might have a longer time.

I mean, that is the argument the Government makes, and it certainly is one that is plausible, isn't it?

MR. SHEEHY: With all respect, Your Honor, I disagree.

Let us assume for a moment, just to make it a little bit clearer, that instead of forthwith, the act would have said 50 days, or a particular number, so it becomes clear. So in effect, we have one statute that says the Government can be sued in 50 days in admiralty, the Government in all cases can be sued in 120 days. In effect --

QUESTION: But that's not what 4(j) says.

MR. SHEEHY: Your Honor --

QUESTION: What it says is that if a service is not made on a defendant within 120 days, it shall be dismissed. It doesn't say you invariably have 120 days.

MR. SHEEHY: With all respect, Your Honor, I understand the Court's position. I think that the legislative history of this, the discussions that were going forward, indicate that there was an attempt to have a bright line rule and to make uniform service in terms of time upon all defendants.

QUESTION: But they just weren't able to put it into words, I gather.

MR. SHEEHY: Well, Your Honor, with all respect, I think that they did. I think the way that the statute reads leaves the clear implication, if not expressly, that a party has 120 days before the Court will dismiss the case, and the way that I think that --

QUESTION: If we disagree with you on the reading, then what are you going to argue?

MR. SHEEHY: Well, if you find there is no conflict, then the Rules Enabling Act probably does not apply. Now --

QUESTION: But then that would be a question of first view for us, because the -- as I understand it, the district court and the court of appeals threw it out because they said it doesn't matter what Rule 4 means,

service must be made forthwith. It's only if you're wrong on your first point.

If Rule 4 takes over all service against the United States, then we have an argument about what 4, Rule 4 means. But the first question, I thought the only question before us is, is the admiralty statute, does it survive Rule 4? May there be more than one way, one time limit for serving the United States, or was Rule 4 meant to cover all service on the United States?

Is there any other instance besides this admiralty provision where there's an instruction for serving the United States other than Rule 4?

MR. SHEEHY: Your Honor, I am not aware of any. I am not aware of any.

And my point in the enactment of Rule 4 and the history of Rule 4, especially in the 1982 amendments, is that because the marshalls were being taken out of the process and prior to 1982 it was more or less a due diligence standard under Rule 4, governed, of course, by the parameters of the statute of limitations and also motions to dismiss for want of prosecution, this issue really did not arise very often.

In 1982, when the marshalls were taken out of the process to a large extent, there was then a suggestion that we have a time limit in order to make sure that there

was not undue delay, and I think that it is clear in the discussions in the various committees that there was a search for a bright line test and also a search for a time that would take the discretion out of the hands of the district court.

And, in fact, there was a discussion and a comment by a Member of Congress, and it's cited in the brief, having to do with the fact that we want to avoid extended and protracted litigation over the ambiguity of the time frames of Rule 4.

QUESTION: But I've got a question about your case that perhaps you can explain to me.

Could you not have said, we don't want to get into this whole problem that time has run so long and there have been snafus with the clerk's office, we're still safe under the 2-year statute of limitations, we'll just dump that first complaint, file a new complaint, serve it forthwith, and we're still under the 2-year limit.

Why wasn't -- could you have done that?

MR. SHEEHY: I think the trial counsel probably could have as a technical matter. I suspect -- two comments. Number 1, the statute of limitations was close to running, because the statute in fact ran at about the time that the Government was served, that is, the Attorney

General was served. Number 2 --

QUESTION: But you could have in August of '93.

MR. SHEEHY: Well, the statute of limitations --

QUESTION: It hadn't run yet, had it?

MR. SHEEHY: Well, the statute of limitation would have run August 27 of 1993, so therefore, it was --

QUESTION: Right.

MR. SHEEHY: It was very close.

QUESTION: So on August 1 you could have done this.

MR. SHEEHY: Probably so. Trial counsel I suspect believed that he had 120 days in which to serve, and therefore there was no need to dismiss and to refile.

But Your Honor is correct, and I think it's available to most litigants in this situation, you can dismiss and assuming that the statute of limitations hasn't run, start all over again.

But the Attorney General had received notice by mail pursuant to the statute back in May. It was the United States Attorney for the Southern District of Texas that created the problem, and if the Court will recall, there was a problem with getting the proper seals from the district court.

A motion to effectively extend time was filed, which was granted by the trial court at that point in

time, and again, I was not trial counsel, but I suspect that what happened is, once the trial judge granted that extension, there was no reason for counsel to believe that he had to file the suit all over again.

QUESTION: Well, it would have been safer if he had.

MR. SHEEHY: Certainly the duplicate effort would have been safer. We probably would not have been here.

QUESTION: There was something else about why this was filed in Galveston rather than Houston. What was that all --

MR. SHEEHY: Your Honor, I don't think it's in the record, but if I can make a couple of comments. First, Galveston is the port city for Houston. The Galveston court generally handles, and are very experienced in admiralty law.

The particular Federal judge there, Judge Kent, was a lawyer who practiced admiralty in the trial court. I don't think there is any prohibition between filing it in Galveston versus filing it in Houston. They are both part of the Southern District of Texas. But certainly, with all respect to the judges in the Houston Division, Judge Kent is extremely familiar with admiralty cases.

Secondly -- I hesitate to raise this in light of

the issue that we're here on, but also the docket is much quicker in Galveston than it is in Houston, in large part because of the criminal docket in Houston, in the Federal courts there.

Thirdly, the operator of the vessel was Lykes Brothers, and they are located or have an office in Galveston.

And again, I did not make the decision, but those are explanations as to why, and I think rational reasons why, the case was filed in the Galveston Division rather than the Houston Division, although I think as a matter of law it really doesn't matter much, because they are both part of the Southern District of Texas.

QUESTION: Are there cases from this Court where we have held that the Federal rules supersede a statute?

MR. SHEEHY: Yes, Your --

QUESTION: Or is this the first -- would this be the first case?

MR. SHEEHY: This is the first case of which I'm aware that reaches this specific issue about where you have a Federal statute dealing with service and the Rule 4 after the 1982 amendments. I think Hanna v. Plumer certainly deals with the issue about whether Federal statutes, Federal rules supersede State law in diversity cases and I think, Justice Kennedy, certainly we can look

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to those cases for some guidance.

QUESTION: But what about other rules, the Federal rules of Appellate Procedure, Federal Rules of Criminal Procedure, have any of those been deemed -- or the Federal Rules of Civil Procedure, because it contains the supersession provision. Have we ever interpreted those rules to supersede a statute?

MR. SHEEHY: Well, in the class action case, and it was the American Pipe & Construction v. Utah where the Court was interpreting Rule 23, having to do with class actions, there was a question as to whether the class certification process would toll the statute of limitations of a Federal statute.

And in that case this Court held that, in fact, the procedures and policies underlying Rule 23 were such that the Court did have the authority to toll the statute under Rule 23, the class action. That is, that class, people who would be members of the putative class, would have the right to sue dating back to the filing of the original class certification action.

So in that particular case, the Court held that Rule 23 allowed that tolling even though the petitioner had argued in that case that it should not because the remedy and the statute of limitations were contained within the same statute.

In addition, not exactly directly on point to Your Honor's question, but in the Sibbach case there was a question about Rule 35 having to do with physical examinations, and there was an argument in that case that the rule dealing with physical examinations was not permissible because, in fact, it was such a fundamental matter -- that is, the examination of the body -- and the Court held that in fact it was a proper rule under the Rule Enabling Act.

QUESTION: I'll look again at American Pipe. Did it say that the statute was superseded, or that the rules would just be used to elaborate on the tolling doctrine that's always available under a statute of limitations?

MR. SHEEHY: Well, with all respect, it probably held -- did not hold that there was a direct conflict.

QUESTION: Yes.

MR. SHEEHY: The Government -- I'm sorry, the American Pipe had argued that, in fact, the statute required one thing, and the rule could not be used to circumvent that.

In truth, I think what happened was the Court held that there is no direct conflict and, therefore, Rule 23 could be used and the court was not bound by the legislative intent in that case 'cos it was not clear,

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because it was not clear.

To answer Your Honor directly, this particular issue dealing with the forthwith requirement or a requirement in a Federal statute and Rule 4 to my knowledge has not been directly addressed by this Court, and I think it is a result of several things.

Number 1, most of the Federal statutes do not have this type of provision in them, and Number 2, that Rule 4, since it was amended in 1982, has the 120-day rule requirement.

The fundamental premise, and I agree it is --

QUESTION: Counsel, may I go back to the colloquy you were just having? There is certainly within the contemplation of Congress that there could be laws that would be displaced by the rules. That's what 2072(b) says. It says, the rules can't deal with substance, but all laws in conflict with the rules, or laws governing procedure in conflict with the rules shall be of no further force and effect once the rules take place, so it was Congress saying, if there are any laws governing procedure, those are displaced by the rules.

MR. SHEEHY: Yes, Your Honor.

QUESTION: If there's a conflict.

MR. SHEEHY: Yes, and that was going to be my next followup response to Justice Kennedy.

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The reasons, I suspect, this has not come up is because the Rule Enabling Act is clear in this area, that if there is a conflict between a prior procedural statute and a rule, the rule is going to prevail and, in this particular case, it is our position that the forthwith requirement is clearly procedural.

It has to do with the way that a party is brought into litigation, and I am not aware of any situation where a method or timing of service could be considered anything other than procedural.

Once we get to that conclusion, that is, that the rule is procedural, and we get to the conclusion that there is a conflict, which I believe is clearly supported by the legislative history and the committee reports underlying the 1982 amendments to the Federal rules, then it is our position that the Rule Enabling Act in effect gives the priority to Rule 4.

QUESTION: Well, may I ask, if we got that far, and I don't know that we do, section 2072 of the Rules Enabling Act refers to adoption of rules by the Supreme Court. This was not a rule adopted by the Supreme Court, so presumably subsection (b) doesn't apply here.

MR. SHEEHY: Your Honor, there are two ways we can go at this.

First, our third point is that, in fact, this

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was done by direct legislative action, so therefore we need not get into the situation about whether it's procedural, or substantive, or jurisdictional, because if, in fact, it was done by Congress as direct legislative action, that act would have equal priority with the Rule Enabling Act and the Suits in Admiralty Act, and therefore this Court can decide --

QUESTION: Well, of course, normally we try to give effect to all laws passed by Congress and, as the Solicitor General argues in its brief, it is possible to interpret and apply both the Suits in Admiralty provision and the Rule 4(j) adopted by Congress.

MR. SHEEHY: And I think --

QUESTION: In theory they can work, both be in effect at the same time.

MR. SHEEHY: But I think they only can be in theory is if the Court rules out or determines that the 120-day requirement is effectively irrelevant.

As the Fifth Circuit held in this particular case, there are two timeliness requirements in this stat -- that the plaintiff faced. Number 1, the forthwith requirement in the Suits in Admiralty Act, and Number 2, the 12-day requirement in Rule 4. My --

QUESTION: Well, that just gets back to the earlier part of your argument --

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MR. SHEEHY: Right.

QUESTION: -- where we expressed some disagreement with your reading of 4(j).

MR. SHEEHY: Yes, Your Honor, that's correct, and -- but I think that the -- that it is in my view, anyway, in the view of petitioner, it is clear that what was intended in 1982 was to have a bright line test, and there is no exception in Rule 4 for admiralty cases. There is no indication of any type that Congress intended to except admiralty cases from the provision of Rule 4.

Now, certainly --

QUESTION: But you know, we use a lot of different principles in trying to reconcile two statutes. Let's assume that we're dealing with two statutes. First of all, we do have a principle that repeal by implication is not favored. This would be a repeal by implication.

Secondly, we could certainly interpret, apply the rule that where you have an apparent conflict the more specific governs the more general. Here you have one rule governing all filings, and another rule governing just a filing in the suits against the United States situation. Why wouldn't we apply that?

MR. SHEEHY: Your Honor, especially in the second, in terms of the specific versus general, if a later act covers the subject matter of the earlier act and

is intended as a substitute, then that rule does not apply, and our position here --

QUESTION: Well, I know, but we're arguing about whether it is intended as a substitute.

MR. SHEEHY: That's right.

QUESTION: I mean, that's the conclusion that we're driving towards, and one way we reconcile conflicting statutes is to say, well, when there are two, the more specific governs. Don't you think that the admiralty statute, or the statute dealing with suits against the United States, covers a much more specific situation than the general Rule 4?

MR. SHEEHY: Yes, it does in terms of service, but my problem is, and our position is, is that Congress by -- and subsequently by this Court, that by the enactment of Rule 4 and the 120-day service requirement and the specific methods by which service is allowed upon the Government, that there was a clear intent to have a uniform and comprehensive way of serving the Government, and I think that was intended to supersede any prior statutes, and I think we believe that is not only a reasonable but a compelling conclusion in light of the other policies and the other congressional intent that we have.

And I understand the Court's position, Justice

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Scalia's position with respect to general versus specific, et cetera, but we also have a number of principles having to do with legislative history and legislative intent.

QUESTION: We've got a very peculiar situation in a way created by 2072(b), I take it, because if we assume there's a conflict, if this were a rule within the meaning of 2072(b), and it's procedural, then the rule is going to prevail, whereas if it's not a 2072(b) rule, and we're going to treat it as a congressional statute, we'd say that it wouldn't prevail, and that would be very odd to say that if it's a mere rule of this Court it prevails over the statute, but a specific act of Congress wouldn't.

MR. SHEEHY: I never would designate rules by this Court as mere rules --

QUESTION: No, I don't --

MR. SHEEHY: -- but I think either way --

QUESTION: I'll take care of the adjectives.

MR. SHEEHY: Either way, though, I think the petitioner prevails.

QUESTION: But it would be very strange if we said that a rule of this Court would prevail over the statute by virtue of 2071(b), but an intentionally enacted rule by Congress, i.e., one having kind of prime statutory force, wouldn't. That would be strange.

QUESTION: Yes, take that. He's helping you.

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QUESTION: Yes.

QUESTION: He's -- take it.

MR. SHEEHY: Yes, sir.

(Laughter.)

MR. SHEEHY: I'll take it. Yes, sir.

But I think, getting back to Justice O'Connor and Mr. Chief Justice, some of the comments you've made, and I want to talk for a second about this congressional intent, because I think it is important, because I think the Court has to view the whole question in terms of congressional intent.

What we know from the congressional history is, there was an intent to treat --

QUESTION: When you're talking about congressional history, would you be very precise about what written documents you're relying on?

MR. SHEEHY: Yes, sir.

First, there is clearly an intent to treat the United States in these cases in the same way as private parties.

QUESTION: Now, where do -- how do we deduce that?

MR. SHEEHY: I think that comes from the language of section --

QUESTION: From --

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MR. SHEEHY: -- 743 of the statute.

QUESTION: From the language of the statute itself.

MR. SHEEHY: Yes, sir, the Suits in Admiralty Act, and I think I would also point out that this Court has addressed at length the history of the Suits in Admiralty Act, the Shipping Act back in 1916 in prior court opinions, and so I'm not going to go through those in any great detail, but the Court has discussed all of these histories together, because issues having to do with the Public Vessels Act, et cetera, has arisen before the Court.

But clearly, because it is set forth in the statute itself, there is that intent to treat the United States as private parties, both in rules of procedure and in rules of substantive law, and that is in the statute, in section 743 of title 46.

Secondly, there is an intent to have cases decided on the merits. Of course, this is included in the legislative history of the 1960 amendments to the Suits in Admiralty Act which was passed in order to broaden the scope of the maritime law.

QUESTION: But that didn't change the forthwith requirement.

MR. SHEEHY: No, sir, it didn't. It did not --

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QUESTION: Are you suggesting that the forthwith requirement, it tends not to have suits decided on the merits?

MR. SHEEHY: Yes, sir, I do.

QUESTION: Well then, why do you rely on something that was enacted in 1960 that conceivably -- that, really, demonstrably did not change the forthwith requirement, to say we want suits decided on the merits? That didn't have the effect of displacing the forthwith requirement.

MR. SHEEHY: No, Your Honor, but I think it is clear -- I think that is an intent of Congress that has not changed, and I don't think it's an intent of this Court that has changed. That is, that we want cases decided on the merits --

QUESTION: Well, what do you think the --

MR. SHEEHY: -- rather than technical aspects.

QUESTION: What was the intent of Congress when it passed the forthwith requirement?

MR. SHEEHY: Your Honor, I think it is very unclear as to what it was. It is contained in about three lines of the legislative history which is cited, I think verbatim on page 5 of the Government's brief, where the question --

QUESTION: Well, you would agree, I take it,

that that tends to -- in fact, your argument is that that tends to determine that suits won't be decided on their merits.

MR. SHEEHY: Yes, sir.

QUESTION: So we have one act of Congress that says suits won't be decided on their merits.

MR. SHEEHY: I think we have a provision of an act of Congress that was passed in 1920 that does cast doubt on whether cases will be decided on the merits. I think we have got a rule that was suggested by this Court and adopted by Congress with some legislative changes in 1982 that make it clear that we want cases decided on the merits.

The trouble with the forthwith requirement, there are two problems. The first problem is that we don't know how many days is forthwith. There's no clear understanding, clear rule. We know that --

QUESTION: It didn't come out of the blue. I mean, this forthwith requirement came in the law long before there were any Federal rules, and so it was the rule for admiralty so you didn't have to conform to the State procedure, you had something, the forthwith requirement.

Then the Federal rules come in and provide rules about service of process, so I don't think there was a

decision that we didn't want to get to cases on the merits when the forthwith provision was made.

MR. SHEEHY: But I think as a natural result of the forthwith requirement there was a recognition that the forthwith requirement gave rise to situations where the cases were dismissed short of the merits because of an uncertainty as to what forthwith meant, and there is a -- the second half of this is, there is a disagreement and a misunderstanding as to the very definition of forthwith.

We have a disagreement between the Eleventh Circuit and the Fifth Circuit as to exactly what it means, and it's -- and so not only do we have an ambiguity in the text itself of forthwith, or the meaning of forthwith, we have an ambiguity as to how many days does it mean.

And I don't think there's any question that because of that ambiguity and the lack of a bright line test, there is a situation where lawyers representing parties in admiralty do not know exactly if something has, if a case has been filed forthwith, and it gives rise to a situation where cases are not decided on the merits, or the whole forthwith issue is then litigated at great expense to the parties.

QUESTION: Well, that's just saying that it's a bad statute, I mean, I guess, isn't it? I don't -- what does that have to do with our decision?

MR. SHEEHY: Because I believe --

QUESTION: The decision is whether the earlier statute prevails or the later rule, and to say that the earlier statute is a bad statute doesn't affect me as to whether it should prevail. However bad it is, it will prevail if it should.

MR. SHEEHY: Leaving aside, and agreeing, perhaps, with the implicit understanding that it's a bad statute, that is not our position, that simply because it's bad this Court has the authority or the right to overturn it.

Our position is, is that in fact the Federal Rules of Civil Procedure have preempted it to the Rules Enabling Act. It has nothing to do, really, with whether the statute is good or bad, although I certainly think the Court can consider the ramifications of the forthwith requirement in light of legislative history, in light of the purposes behind Rule 182, in reaching its decision that the Federal Rules of Civil Procedure were intended to and, in fact, did preempt the forthwith requirement.

QUESTION: At what point in time, because the admiralty rules didn't come under the civil rules until relatively recently.

MR. SHEEHY: I think the safest position for petitioner is, it would have been after 1982, because we

have not only the 1966 amendments, which unified admiralty and the civil rules, but then in 1982, for the first time we have, in our view, an express time limitation on service of process on the Government, which is 120 days.

With the permission of the Court, I will reserve further time for rebuttal.

QUESTION: Very well, Mr. Sheehy.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE RESPONDENT

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

The requirement that the complaint in a Suits in Admiralty Act action be served forthwith upon the United States Attorney and the Attorney General appears in the same code section upon which petitioner relied as the basis for his suit against the Government. That provision has not been expressly repealed, and petitioner's argument is that a repeal by implication has taken place.

QUESTION: Well, now, is service of process a matter of procedure, do you suppose?

MR. STEWART: In think as a general matter service of process would be more procedural than substantive. The sub --

QUESTION: What about the requirement, for

instance, in Suits in Admiralty Act 742, that a copy must be sent by registered mail to the Attorney General as opposed to the Rule 4 provision that it can be by registered or certified mail.

MR. STEWART: We would say that that's a provision as to which we think certified mail would be acceptable in this day and age. Certified --

QUESTION: And you would say that that's a matter of procedure and that the Rule 4 supersedes there, or what?

MR. STEWART: Well, we would say it's a matter of procedure. I --

QUESTION: How do we get there?

MR. STEWART: I think the analysis is a little bit more complicated. That is, first of all we have to decide whether there's a conflict, and we don't believe that there's a conflict between the forthwith service requirement and 4(j).

QUESTION: All right, but let's focus for a minute on the registered mail or certified mail, where you can see a conflict.

MR. STEWART: And the next question would be whether the application of the Federal rule to an action against the Government would have the effect of abridging or enlarging substantive rights or expanding or

diminishing the jurisdiction of the district court, and we think that in this day and age, certified and registered mail are practical equivalents for the purposes for which this requirement was designed.

Certified mail didn't exist when the Suits in Admiralty Act was passed. It didn't come into existence until --

QUESTION: Well, would you look to section 2072 of the Rules Enabling Act to say that the rule prevails?

MR. STEWART: I think we would. That is, even though this rule --

QUESTION: Even though it wasn't adopted by the court.

MR. STEWART: That's correct. Even though this rule was enacted by act of Congress rather than promulgated by the court, we think that section 20729(b) provides the best indication of congressional intent.

QUESTION: Well, if that's the case, then how about the time for notifying the United States? Is that not procedural as well?

MR. STEWART: I think it is procedural, but again, the first question is whether there's a conflict, and in saying that 2072(b) in our view governs the interpretation of these statutes, we want to make clear that we regard this as a concession rather than an

affirmative claim.

That is, if 2072(b) were out of the picture, if all we had was section 42 and Rule 4(g), we would be prepared to make very vigorously the argument that Justice Scalia was outlining to the effect that, even if there is a clear and irreconcilable conflict, the specific statute would prevail over the general.

We believe that 2072(b), by stating that a law in conflict with a Federal rule is of no further force and effect makes it difficult for us to make that argument, so -- but we still believe that 2072(b) and its requirement that laws be superseded only if they're in conflict with the Federal rules governs the proper construction of --

QUESTION: Mr. Stewart, let me ask you about the Government's contention that there is no conflict here. Your position is that all that Rule 4 says is that it will be dismissed after 120 days, not that it can't be dismissed before that.

MR. STEWART: That's correct.

QUESTION: Is that correct? I take it, then, that the Government believes that under Rule 83, a district court could enact a provision requiring -- requiring service to be made sooner than 120 days.

MR. STEWART: Well, the district courts have

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local rulemaking authority under 2071 -- 28 U.S.C. 2071, which says that the district courts may make local rules not inconsistent with the --

QUESTION: That's right.

MR. STEWART: -- the Federal rules.

QUESTION: And you say that such a rule requiring service to be made within 30 days, for example, instead of 120 is not inconsistent with rule --

MR. STEWART: Well, we would say it's not in conflict with. I think the meaning of the phrase, not inconsistent with, may be a little bit different, but even if we assume that they are the same thing, I think we'd have a different situation if a district court had made a local rule that purported to govern all Federal civil actions.

That is, the test we've enunciated for determining whether the rules are in conflict is first, is compliance with both possible, and second --

QUESTION: But Mr. Stewart, if we go on that, it seems to me you're just saying Hanna & Plumer is not at all relevant here. I mean, you could have service under the Federal rules and in-hand service as well, you could meet the State requirement and the Federal requirement, but there, this Court has said very clearly the extra requirement of State law does not apply, Rule 4 governs,

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because this is a procedural matter and it isn't substantive.

Why shouldn't the same apply to a Federal statute as applied to the Massachusetts law in the diversity context?

MR. STEWART: Well, first of all, the Court in Hanna v. Plumer didn't rely on the language which says that laws in conflict with the Federal rules are of no further force and effect and, indeed, it didn't frame the inquiry as whether a rule that --

QUESTION: Well, of course it couldn't because it was dealing with a State law, not a Federal law.

MR. STEWART: That's correct, and I think the inquiry --

QUESTION: So the question was, is it a procedural question or à substantive question, and the court's position I thought was, if the rule covers it, it governs procedure in the Federal courts.

MR. STEWART: Well, I think the question whether a particular State rule should be incorporated into Federal practice is a fundamentally different one from the question of whether a Federal statute passed by Congress specifically intended to regulate the filing -- the service of complaints in the Federal courts should be of no further force and effect.

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It's a serious thing to reach the conclusion that an act of Congress has been impliedly repealed, more serious than to say that a State rule which is primarily intended for State court actions will not be incorporated into Federal practice.

QUESTION: Mr. --

QUESTION: Is there -- there's another instance, -- it's the question that I had asked counsel for the petitioner. I don't know of any other instance where there's a separate instruction for how you serve United States where the Rule 4 on service is not the instruction. Is there another statute, other than this admiralty statute, that says something different from what Rule 4 says?

MR. STEWART: No.

QUESTION: So it is one of a kind.

MR. STEWART: That's correct.

QUESTION: Mr. Stewart, do you know of any cases in the district courts or the courts of appeals in which the 120-day requirement has been read as you have read it, as being merely an outer limit rather than as establishing a right?

MR. STEWART: Well, there -- I remember reading one district court case in which the plaintiff raised both title VII and State law claims, and the complaint was

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served within 120 days, but the district court held that it had not been served -- the plaintiff had not exercised diligence in filing the suit as promptly as it could have -- in serving the complaint as promptly as it could have been filed, and held that the lack of diligence was dispositive as to dismissal of the State law claim but not as to the Federal law claim.

QUESTION: Leaving a State law claim aside, then, I take it your theory has never recommended itself to any lower court.

MR. STEWART: Well, the lower court simply haven't passed on this question one way or the other.

QUESTION: But why would it be? I mean, if you tell your children, if you don't make your room tidy by bedtime, no television. So then they clean up their room, and you say, no television. I didn't say what would happen if you did. You try that one.

(Laughter.)

QUESTION: I mean, that's why I say, what conceivable reason could there be for the -- what reason would there be when you have a set of rules which say at the heading, statutes to the contrary, laws to the contrary are to be wiped out, and you also have a specific congressional statute here, don't we at least have to have some reason, some theory why Congress would have wanted

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this to survive, and I can't think of one.

I mean, as far as my knowledge of this is concerned, the reason that they had this forthwith at the beginning was because at that time the marshalls served after you filed the complaint, and so it was always forthwith, and they didn't want that rule to govern because it happened the particular admiralty rules required you to arrest the defendant, and that wouldn't be very happy when the U.S. was the defendant, and therefore they wrote this word into a statute at a time when it made sense.

Now it makes no sense, and so, unless it makes some sense, why wouldn't we assume that Congress wanted this new statute that they passed with uniform rules to apply? So what sense is it, what reason could Congress have had for not wanting to get rid of this now out-of-date requirement?

MR. STEWART: Well, it was certainly the case in 1920, and I think it is still to some extent the case, though not as greatly, that admiralty cases are different in the sense that the witnesses are ordinarily likely to be seamen, they may be transient, they may take off at a moment's notice, it's a little bit more difficult to put your case together after the fact, and Congress had that evidence before it in 1920, and the question of whether

changes in the modern world have made that notion superfluous is really one for Congress rather than for --

QUESTION: Well, is there any indication that their reason for passing this word forthwith was other than what I said?

That is, is there any reason to think that their reason for putting forthwith in the statute related to the fact that sailors might leave port, as opposed to the fact of what I'd said, that the normal practice was, the marshall made the service, it always happened forthwith, the admiralty rules which had the libelant make the service didn't really seem to work because of the arresting requirement, and therefore we'll write the rule forthwith, because that's what always seems to happen. That's one theory.

The other theory is the sailors are going to run back to England or something.

MR. STEWART: Well --

QUESTION: What's your view of it?

MR. STEWART: Under the old rules, it did not follow automatically upon service of a libel in personam in admiralty, that the person would be arrested. That was discretionary and it depended on various factors set forth in the rule.

Second, as to what Congress had within its

contemplation, we know that Congress was informed during the consideration of the Suits in Admiralty Act that it was particularly important to have admiralty suits promptly disposed of because of the possibility of sailor witnesses disappearing. We don't know whether that had anything to do with Congress' decision to enact the forthwith service requirement. The forthwith service requirement was inserted earlier on, pursuant to a brief colloquy between the proctor in admiralty and the committee.

As to why it still might make sense, we do think there is still a need on the part of the Government, albeit a lessened need, to have service as promptly as possible both in order to accumulate evidence and in order to assess as accurately as possible the scope of its contingent liability.

QUESTION: I was going to ask you if the Justice Department had ever recommended that Congress put the courts out of their misery by repealing this statute. I take it from your answer that that wouldn't necessarily be your recommendation.

MR. STEWART: Well, I don't know that we've made a recommendation one way or the other. I do know in --

QUESTION: It is a trap for the attorneys. There's no --

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MR. STEWART: Well, we would disagree with that. First of all, the requirement that the complaint be served forthwith is not buried in an obscure provision of the code. It's in section 742, the same section that petitioner's trial counsel had to read in order to know that he had a waiver of sovereign immunity.

QUESTION: Well, Mr. Stewart, would you answer my question, since I think it is relevant to whether it is a trap or not, suppose on August 1st, counsel said, I see I'm running into this technical problem. They have actual notice, because the notice got to the U.S. Attorney and they're arguing in court about this, so I'm going to withdraw this complaint, start a new one, I'm still under the 2-year limit, serve forthwith. That could have been done, couldn't it?

MR. STEWART: That could have been done.

QUESTION: So this is -- it's not a case about actual notice, because there was timely notice to the Attorney General, right, so it's only the local U.S. Attorney.

MR. STEWART: That's correct.

QUESTION: When did the United States have actual notice of this lawsuit?

MR. STEWART: Well, I suppose you would say that when the Attorney General's Office received the complaint,

that the Government as a Government had notice, and that was in May of 1993.

QUESTION: So we're not talking about actual notice to the U.S. We're talking about something that could have been cured by withdrawing one complaint and filing another, no substantive difference, and yet the United States is insisting that this is somehow under subject matter jurisdiction. It really is very strange.

MR. STEWART: Well, again, part of your question, in essence, goes to the wisdom of requiring plaintiffs in suits against the United States to serve both the United States and the Attorney General, and a plausible argument could be made that service on the Attorney General should be good enough.

The Congress that passed the Suits in Admiralty Act didn't believe that to be the case, and the Federal rules require --

QUESTION: I wasn't questioning that. I was just saying, we look at this whole picture, and we say, it was imperfect service, certainly, but there was actual notice, yes. Service could have been perfected very easily. And then we have Federal rules that say, you can amend, and that relates back -- I'm just wondering in this case why we couldn't say, gee, we should treat it as though that lawyer had filed a fresh complaint. He still

-- as long as he would have been under the wire with the statute of limitations.

MR. STEWART: I mean, that is not the way it's done even under -- where Federal Rule 4(j), or now 4(m), is the only requirement.

That is, it may often be the case that a suit is filed way before the statute of limitations is going to expire, and the person may delay for more than 120 days without good cause and may have his suit dismissed even though he could have dismissed on his own and moved for leave to refile. That's not an anomaly that's unique to the Suits in Admiralty Act.

I think our basic point is that in the individual case the Government gained something from immediate service. In any particular --

QUESTION: Well, what does the Government gain that a private party wouldn't gain? I was going to ask that question anyway. Why is the Government's interest in forthwith service somehow different from that which a private defending party would have?

MR. STEWART: I think in part it's the idea that, because it's the Government, there are an enormous number of potential suits filed against us, and consequently an increased desire for expeditious resolution of each one, but I think --

QUESTION: But I mean, why? Why does it matter whether these enormous number of suits first come to your attention within 10 days or 120 days? I mean, I just don't see the point.

MR. STEWART: And I think -- I think perhaps the stronger argument for making a different rule for the United States would be that every potential maritime defendant has this interest to some degree, but as to suits against private parties, it may often be impracticable to locate a defendant immediately.

QUESTION: Yes, but of course, the United States has the same interest in all the litigation against it. It really doesn't differentiate the Federal tort claims.

Let me ask you another question that --

MR. STEWART: I mean --

QUESTION: -- Justice O'Connor -- may I just get this one out first. I just want to be clear. How is it that you can say the requirement of -- the permission to make service on the Attorney General by certified mail does not conflict with the statute, where as the time question does? That's the one thing I just don't understand your position on.

MR. STEWART: We didn't say it wouldn't conflict. We would -- in fact, we say the reverse. We say that the time provision in the SAA does not conflict

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with the Federal rule.

QUESTION: But the certified doesn't, either, because that's just a broader permission in the same way that 120 days is.

MR. STEWART: Well, the certified mail I think is a closer question. The --

QUESTION: I don't see how you can reconcile your inconsistent positions here.

MR. STEWART: The provision in the Federal Rules of Civil Procedure say -- says that the Attorney General shall be served by registered or certified mail, and I think we could plausibly read that as conferring --

QUESTION: Well, it also says they shall be served within 120 days. They both use shall.

MR. STEWART: No, actually the Federal rule -- Rule 4(j) doesn't say the complaint shall be served within 120 days. It says, a complaint that is not served with 120 days shall be dismissed. It really doesn't, by its terms, address at all --

QUESTION: It certainly requires service within 120 days.

MR. STEWART: It certainly provi --

QUESTION: So that if the earlier statute had said, you can serve in 130 days, it clearly would have been in conflict.

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MR. STEWART: That's exactly right, and when petitioner's counsel, Mr. Sheehy, says that Rule 4(j) admits of no exceptions for particular categories of cases, we quite agree. That is, there is no statutory provision that permits a suit to go forward when the complaint has been served more than 120 days after filing without a showing of good cause.

As to the prior question about why has this -- why has our view not been accepted by the district courts, I think it hasn't either been accepted or rejected by the district courts simply because in the vast majority of cases there are no other statutes that would require the complaint to be served within a shorter period of time.

There are two senses in which a rule could be said to be exclusive. It could be exclusive if -- I'm sorry, Justice Stevens.

QUESTION: I just also want to be clear, is a complaint served within 20 days served forthwith?

MR. STEWART: I think there is no categorical answer to that question. Our view is that --

QUESTION: It clearly is under -- the plain language, certainly forthwith doesn't mean 20 days, does it?

MR. STEWART: I would agree. That is --

QUESTION: It has to be within 48 hours --

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MR. STEWART: Well, we would say that forthwith means as quickly as practicable, and --

QUESTION: Well, certainly you can always do it the same day.

MR. STEWART: Certainly almost always. There may --

QUESTION: So those cases that have allowed 30 days, or 40 days, they're all wrong.

MR. STEWART: Well, we think that they -- there are not --

QUESTION: They were not faithful to the rule.

MR. STEWART: There are not a lot of cases. There are a couple of them that have allowed delays on the order of 18 to 24 days. We think that as an initial matter, that's longer than the plaintiff's counsel should take.

As a practical matter --

QUESTION: Not what they should take, what they are required by the plain language of a statute to take -- forthwith.

MR. STEWART: No, I agree that as an initial matter we would say in virtually every case it would be practicable for plaintiff's counsel to serve the complaint in far less than 20 days from the date of filing.

As a practical matter, in terms of construing

the statute 75 years after its enactment, it may be that the cumulative experience of district courts have in some sense contributed a climate in which something that would not otherwise be reasonable may now be deemed reasonable.

QUESTION: But once you acknowledge that, why couldn't the climate be, well, we ought to treat all Federal cases the same? One hundred and twenty days is forthwith if 30 days is. Why couldn't you read it that way?

MR. STEWART: Well, I think the requirement that the complaint be served forthwith -- clearly, Congress was trying to do something in enacting the SAA. It could have allowed time for service simply to be governed by the background principles governing private parties, and it required that the complaint be served --

QUESTION: What were those before the Federal rules?

MR. STEWART: The admiralty rules of 1844 and then of 1920 would have governed the question of service upon the United States Attorney. Because the admiralty rules provided for marshall's service, timing --

QUESTION: Well, tell me what the period was. We have a statute in 19-whatever that says forthwith. What was it before there was that statute?

MR. STEWART: All the admiralty rule said that

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when the libel is filed with the court, the summons is given to the marshall, and the marshall serves it. It didn't state a time period.

As a practical matter, timing, even had there been no requirement of forthwith service, because you had marshall's service upon the United States Attorney, timing questions would have been unlikely to arise.

There would still have been a separate question of mailing to the Attorney General, which would still have been the plaintiff's responsibility. Timing questions could have arisen then had the plaintiff been dilatory, and probably those would have been resolved by incorporation of State law. That was the way district courts tended to approach procedural questions in admiralty cases that were not directly addressed by the admiralty rules.

QUESTION: Mr. Stewart, would you tell me again why it is that it doesn't have to be by registered mail, even though the provision you say governs requires that?

MR. STEWART: I think the way we would spin it out, and certainly either link in our chain is not infallible, we would say first the question is, are they in conflict, and we would say, we would interpret the current provision of the Federal rules that permits either registered or certified mail upon the United States

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Attorney, or upon the Attorney General, to confer an affirmative right to use either method, equivalent to a rule that says plaintiff may serve by either registered or certified mail.

Second, we would say that application of that rule to a Suits in Admiralty Act action would not have the effect of expanding or diminishing substantive rights, because for all practical purposes registered and certified mails are now equivalent. The reason you see the reference to registered mail only in the Suits in Admiralty Act was simply that certified mail did not exist at that time. It didn't come into being until 1955.

QUESTION: Well, you could say the same thing about E-mail. Are you going to allow them to do it by E-mail, too?

MR. STEWART: Well, if it was done by E-mail it would be in prohibition of the Federal rules as well as --

QUESTION: Well, that's only because E-mail didn't exist when the Federal rule was written. I really find that an extraordinary way to interpret a statute, that since the technology did not exist at the time, you don't have to use the technology that's set forth in the statute.

MR. STEWART: Well, it wouldn't be an interpretation of the statute alone. That is, it would be

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an interpretation of the statute in conjunction with the Federal rule, in conjunction with the Rules Enabling Act, which says, all laws in conflict with the Federal rules shall be of no further force and effect unless the effect is to expand or diminish substantive rights.

So I think we would be doing a fine analysis under the Rules Enabling Act. It wouldn't be that we were saying the SAA itself has been amended. We would be saying that the SAA can be superseded.

QUESTION: Wouldn't it help you out of this problem you have if you simply thought that later enacted statutes of Congress which specifically say that they're overturning laws to the contrary, or imply it because of the rule, do overturn laws to the contrary, and unless there is some good reason why this earlier law would be thought to survive, it doesn't.

MR. STEWART: We have no problem with that formulation.

QUESTION: All right, and then the only -- the reason that you've come up with for thinking that it is meant to survive is because it had to deal in part with the disappearing seamen witnesses, although that wasn't a strong enough reason for the rules makers to deal similarly with private people whom the SAA was designed to treat the Government similarly to.

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MR. STEWART: Well, the reason we think it survives is that first, it's in the statute and hasn't been repealed.

QUESTION: Yes, but it's a later rule that says the later -- well, you see the point.

MR. STEWART: I see your point, but in our view the Suits in Admiralty Act requirement simply is not in conflict with the Federal rule, and we have to presume that Congress used that phrase for a reason. That is, Congress could have said in the Rules Enabling Act, all laws governing procedure in the Federal courts or all laws governing the subject matter covered by these rules shall be of no further force and effect. It could have invoked notions of field preemption.

QUESTION: If they are in conflict, then what's the answer?

MR. STEWART: If they are in conflict, then the old statute is superseded except to the extent that application of the Federal rule would expand or diminish the jurisdiction of the district court.

QUESTION: Doesn't the Government have a longer time to answer a complaint than a private litigant?

MR. STEWART: That's correct. We have 60 days to answer a complaint.

QUESTION: Sixty days instead of 30?

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MR. STEWART: That's correct, and you -- the fact -- Congress has seen fit to propound a special rule for Government defendants in admiralty cases. It has not --

QUESTION: But Mr. Stewart, that was done before there were Federal rules, and one can understand why there are no other laws in conflict, because when the rulemakers first came up with the Federal rules, the admiralty rules were separate, so the civil rules saw that there was no other way of serving the United States. It was all in Rule 4. Then it seems somebody wasn't looking in 1982 when the admiralty rules were made part of the Federal rules.

I don't understand why there would be this special provision only for admiralty. They're not the same -- the Federal Tort Claims Act is no different, and if we're concerned about sailors who might flee to some foreign country, isn't that more so of a private libel, where there might be a foreign sailor -- these are U.S. vessels, right?

MR. STEWART: Well --

QUESTION: We don't employ too many foreign sailors.

MR. STEWART: Well, in this case and the case of the Maritime Administration generally, they're cargo

ships, and in fact the MarAd's needs as to staffing levels fluctuate greatly depending upon national emergencies or need for transport generally, so it's not the case that people employed by MarAd typically stay employed by MarAd for long periods of time.

The one point we do want to stress is that to say that these two provisions are in conflict, and to state that as a general proposition, would, we think, have highly disruptive effects on other areas of law, both in terms of conflicts between Federal statutes and in terms of Federal preemption of State law.

That is, if it were the case that whenever Federal and State law generally govern the same subject matter, and the Federal law prohibited -- permitted something that the State law prohibited, the State law was thereby preempted because the two were in conflict.

QUESTION: No, but that's not --

QUESTION: We already have that in Hanna & Plumer. We have exactly that, and the State law was -- did have to be set aside.

MR. STEWART: Well, the holding in Hanna v. Plumer was that the State law would be -- would not be incorporated into Federal practice, not that it was of --

QUESTION: It meant that the Massachusetts

requirement of in-hand service would not apply. They would have been out of court if Massachusetts law applied. It was a provision that governed service, and it didn't apply. It seems to me that the two cases are very close.

MR. STEWART: Well, I think the crucial difference between them is that the court there was dealing with the question of whether to incorporate a State procedural rule that was intended for -- primarily for use in the State courts but might also be applied in Federal courts or in diversity actions.

QUESTION: Wasn't the consequence that the case would be out of court as untimely, if you had to follow the State procedure --

MR. STEWART: That's correct.

QUESTION: -- say it was timely, and the same thing here.

MR. STEWART: The same thing is true here, except that here the consequence of petitioner's argument is that a Federal statute passed by Congress specifically to regulate service of process in the Federal courts in this particular class of cases will be held to be impliedly repealed, and we think that the Court has repeatedly cautioned that implied repeals are disfavored. The Court should not --

QUESTION: Repealed it except for the service by

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registered mail. That's why it's been impliedly repealed --

MR. STEWART: Again, we think --

QUESTION: -- to test that one -- yes.

MR. STEWART: The point is, we get to that -- the Court could disagree with our treatment of certified mail. We get to that by saying that the rule --

QUESTION: It seems to me the Court must disagree with it in order to come out the way you want us to on the other issue.

MR. STEWART: No. Because of the way that the rules are worded -- that is, the rule governing registered or certified mail says, shall be served by --

QUESTION: If we disagree with you on whether there's a conflict we would certainly have to disagree with you on the registered mail point.

MR. STEWART: Well, I think even if you disagreed with us as to whether there was a conflict, it would still be plausible to say that the difference between -- to permit certified mail in addition to registered mail would not have the effect of enlarging or diminishing the substantive rights of the parties because those two are functional equivalents for present purposes, whereas to permit a suit to go forward when the time limitation that Congress deemed important enough to

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include in the suits in Admiralty Act to begin with has not been complied with would have the effect of both increasing the jurisdiction of the district courts and enlarging the substantive rights of the --

QUESTION: But then you're just backing off from your concession that it's procedural.

MR. STEWART: No, I don't --

QUESTION: I thought you conceded that it was.

MR. STEWART: I don't think we're -- we're not backing off from the concession that it's procedural. 2072(b) doesn't speak in terms of whether the rule to be superseded is procedural. It says that these rules -- meaning the Federal rules -- shall not expand or diminish substantive rights, and it can be --

QUESTION: I think within the context of the rule that's what procedural means. It's something that does not --

MR. STEWART: Well, it --

QUESTION: -- and I guess I was just misled by your use earlier in speaking of it as concededly procedural. You didn't mean to say that.

MR. STEWART: I think we would analo -- we would say it's procedural in the sense that it deals with the filing of documents rather than the --

QUESTION: But in terms of what counts for the

decision of this case, it's not procedural, it is substantive.

MR. STEWART: In terms of what counts for the decision of this case, nonapplication of the forthwith service requirement would have the effect --

QUESTION: It would.

MR. STEWART: -- of expanding or diminishing substantive rights, and the court has repeatedly stated --

QUESTION: So on that proposition you disagree totally with Judge Friendly in --

MR. STEWART: We do disagree with Judge Friendly as to that proposition, yes.

QUESTION: Thank you, Mr. Stewart.

Mr. Sheehy, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD A. SHEEHY

ON BEHALF OF THE RESPONDENT

MR. SHEEHY: Thank you, Mr. Chief Justice. Two quick points. Number 1, the concession by the Government that the certified versus registered mail analysis that in effect it does not matter in this procedure is also important to another argument that the Government made both in its brief and at the beginning here.

One of the arguments by the courts that have discussed this issue is the location of the forthwith

requirement being in section 2 of the act. The argument is, is that procedure is in section 3, substance is in section 2. The concession that the certified mail and registered mail is, in fact, procedural, falls into section 2 and therefore casts great doubt on the argument that there should be a distinction based on the location of the forthwith requirement in the statute.

Number 2, the point that Justice Souter was talking about, namely, a reason why the Government should be treated differently in admiralty, something about locating sailors, et cetera, three quick points.

Number 1, no reason to treat the Government differently than private parties in that context, because all parties have that problem.

Number 2, there is no reason to treat the Government differently in admiralty cases versus any other cases that the Government may be involved in.

And Number 3, recall that there's a statute of limitations of 2 years. If there's going to be problems with somehow locating witnesses, and that's the reason why we have a forthwith requirement, the statute of limitations of 2 years is going to cause a problem far beyond any service requirement.

For the reasons we have stated in the brief and in the argument, we would request that the Court reverse

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the judgments of the courts below.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr Sheehy.

The case is submitted.

(Whereupon, at 12:00 noon, the case in the above-entitled matter was submitted.)

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CASE NO: 95-232

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BY Ann Mari Federico

(REPORTER)