In the

Supreme Court of the United States

Russell E. Train, Administrator,
United States Environmental
Protection Agency,

Petitioner,

v.

City of New York et al

and

Russel E. Train, Administrator,
United States Environmental
Protection Agency,

Petitioner,

v.

Campaign Clean Water, Inc.

No. 73-1377

No. 73-1378

Washington, D. C.
November 12, 1974

Pages 1 thru 55

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

etofi

IN THE SUPREME COURT OF THE UNITED STATES

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Petitioner,	:	No. 73-1377
v.	:	
CITY OF NEW YORK ET AL	:	
and	:	
RUSSEL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Petitioner,	:	No. 73-1378
v.	:	
CAMPAIGN CLEAN WATER, INC.	:	

Washington, D. C.

Tuesday, November 12, 1974

The above-entitled matters came on for argument at 1:47 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D. C.
for the Petitioners

JOHN R. THOMPSON, ESQ., Assistant Corporation Counsel, New York City, Municipal Building, New York City, N.Y. 10007 For the City of New York

W. THOMAS JACKS, ESQ., Suite 700, 2000 P Street, N.W., Washington, D. C. 20036
For Campaign Clean Water, Inc.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1377, Russell E. Train against the City of New York and No. 73-1378, Russell E. Train against Campaign Clean Water.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONER

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

These cases are here on writs of certiorari to the Courts of Appeals for the District of Columbia and the Fourth Circuit.

Each is an action seeking to compel the Administrator of the Environmental Protection Agency to increase allotments he has made under Title II of the Water Pollution Control Act Amendments.

I had best describe the statutory process which is deeply involved in this case.

This Act provides federal funds to pay 75 percent of the cost to state municipalities of the construction of sewage treatment facilities and the act -- the funding process operates in several stages.

First, Congress must enact an authorization for

appropriations of a certain size.

Now, that is not an appropriation. It is more of a statement of intent to appropriate at a later date and it begins this process.

Second, the Administrator of the Environmental Protection Agency, working within that authorization, allots various amounts to states on the formula suggested by the Act. When that has been done and the allotments have been made, the states make proposals for construction of water treatment facilities, sewage treatment facilities that they think are most pressing and if these are approved as meeting the criteria, that approval by the Administrator constitutes an obligation of the United States and all that remains to be done is for the grantees to make the expenditures. Congress appropriates the funds and they are paid over to the grantees.

Now, the issues we have today are two and the first is whether the President, acting through the Administrator, has discretion at the second stage of this process, that is, the allotment stage, to allot the states amounts less than Congress has authorized to be appropriated.

And second, if he has such discretion, whether that discretion is reviewable in the courts.

The Court of Appeals for the District of Columbia held that there is no discretion at the allotment stage but

there is some discretion at the obligation stage, the approval of the plant.

The Fourth Circuit assumed that there was discretion at the allotment stage because the Respondents claimed it below in that case, conceded it and the District Court had found it and the Court of Appeals remanded for a trial de novo of whether, assuming the discretion, the Administrator had abused it or exceeded it.

In a word, I think everybody agrees in this case that the President has discretion at some stage of this process.

Now, I would like to make it very clear at the outset to remove any element of drama from this case, we are not here asserting --

QUESTION: Drama or grammar?

MR. BORK: I may eliminate both, Mr. Justice Stewart, but I meant to say drama.

QUESTION: D-R-A-M-A?

MR. BORK: Correct.

QUESTION: Yes.

MR. BORK: I will try not to eliminate grammar as I go along.

We are not asserting any constitutional power of the President in this case. There is here no element of confrontation between the President and the Congress. We

rely entirely upon the discretion Congress gave the President intentionally in the Act and in that, we are supported by Respondents' concessions that some discretion is built into the Act, although they do not agree with us or, indeed, sometimes with each other about how or when it is to be exercised

QUESTION: This case, in other words, everybody seems to agree, is a matter of statutory construction.

MR. BORK: That is correct, Mr. Justice Stewart.

QUESTION: Rather than any kind of a constitutional question, implicit or explicit.

MR. BORK: That is correct. We are making no constitutional argument.

I should also say that these statutes under which impoundment has occurred in the past -- and in many of which I think impoundment is no longer occurring, come in a wide variety of shapes and forms and processes so that these cases today before us are quite unlikely to settle the issue of withholding of funds under other statutory programs.

This statute is unique.

Well, to get to these cases. Congress authorized the appropriation of not-to-exceed $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

The Administrator of EPA, at the direction of the President, allotted for those years respectively $2 and $3 billion, a total allotment of $5 billion as opposed to

the $11 billion authorized for appropriation.

Now, I should also say that the remainder, the administration's position is, that the remainder of these allotments will be made in the future so that this case concerns a rate of spending rather than the total amount to be spent on this program over time.

I will address first the issue raised by the City of New York, which is the stage of the process at which discretion may be exercised and then I will discuss the issue raised by Campaign Clean Water, the case from the Fourth Circuit, the scope and reviewability of the discretion.

We think it is clear that the President's discretion is to be authorized at the allotment stage and we have for that the rather mundane reason that that is what the statute says and we agree with Campaign Clean Water on that point and disagree with City of New York on that point.

Now, City of New York makes much play of the fact that in the debates, various Congressmen who were engaged at that point in stressing the legitimacy of the President's impoundment of funds under this statute.

However, in stressing that discretion that the President was to be given, used words like "discretion over spending," "discretion over obligation," and it is almost entirely from that slim foundation that the Respondent tries

to argue that Congress deliberately ruled out discretion at the allotment stage.

We think that in the face of the explicit language of the statute that argument is altogether too thin and it is worth noting, I think, that this is a very natural way to talk about impoundment issues.

Indeed, public discussion generally talks about the President's ability to control spending, even when, under a technical statute, the discretion is authorized at some other stage than the actual payment of the money.

And that is an accurate way to speak, because when the President directs the Administrator not to allot the whole sum, the result, of course, is a deferral of obligations and a deferral of spending as well and that is what the discretion is all about, ultimately, the federal spending

So naturally, the Congressmen talk about it in those terms. And we can't place all that much weight on their failure in these debates constantly to use the quite technical terms of a very novel process, which this Act contains.

What we do know, unmistakeably, from the debate and the legislative history is that Congress intended to give the President discretion and that it did that, its vehicle for giving discretion, were the amendments proposed by REpresentative Harsha, who was the chief sponsor of the Act

and those amendments were proposed to Section 205-a and Section 207.

Now, Section 205a, which was amended for this purpose, is an allotment provision and it is plain to us, therefore, that the discretion given is in making allotments.

As originally drafted, the House Bill said this, in Section 205a of the Allotment Provision, it said, "All sums to be appropriated pursuant to Section 207 shall be allotted by the Administrator," and Section 207 merely authorized the appropriation of the amount.

Now, that language about allotment sounded quite mandatory to some.

"All sums authorized shall be allotted."

Explicitly, to make sure that the President had discretion, the Harsha Amendment changed that. The word "All" was deleted from Section 205a so that the Administrator was merely told to allot sums authorized under Section 207 and Section 207, in turn, was amended to read that there was authorized to be appropriated -- and then they added the words, "Not to exceed" $5 and $6 billion for the two years in question here.

Now, if the intention, as the City of New York contends, were to place discretion at the obligation stage, then, as the other Respondent points out, it would be quite extraordinary for Congress to choose to amend those

allotment sections. They would have amended Section 203, which is the obligation -- which provides for the obligation process -- to say that you may not obligate more and you may obligate less.

So when we are faced with the statute which provides discretion -- provides discretion in the allotment provision and when those amendments are known to have been intended to provide that discretion from the legislative history, I fail to see how the President or the Administrator could responsibly have ignored that text, allotted all the sums and then begun to exercise discretion at the obligation stage.

If the President had done that, I think the City of New York would have sued us. I think they might well have contended that discretion is lodged at the allotment stage and once the allotments are made, the rest is ministerial and that they are entitled to the funds.

And I think they would have had a better argument than the one that they have now.

QUESTION: In vetoing the bill originally, was there a veto message?

MR. BORK: There was a veto message which related to the objection to the level of spending, Mr. Justice Stewart.

QUESTION: Anything in the veto message bearing on

the issues here?

MR. BORK: I think not. He does refer to the fact that he is worried about federal spending but I think that was not -- the President was worried about federal spending and the effect on inflation and taxes and so forth. I do not recall -- I may be corrected if I am wrong -- I do not recall that there is anything that addresses this kind of technical question.

QUESTION: Well, I was wondering as to his discretion, if you can answer that.

MR. BORK: I do not recall it. As to his discretion, yes. He thought that he didn't have enough in the veto message and, indeed, overriding the veto, Congress -- a number of Congressmen explicitly said, it is too bad he thought that because it is plain he does have discretion.

But that goes to the existence and width of the discretion, rather than the stage at which it must be exercised and I should say this, that as a practical matter, the Government has very little interest in which way -- at what stage the discretion must be exercised.

We brought this case up, the City of New York case, because if we acquiesced in a judgment that there was no discretion at the allotment stage, we thought we were quite likely to be whipsawed by another lawsuit in which a court said, any discretion you had was at the allotment

stage. Now you must obligate.

And so, although everybody agrees we have discretion in there some place, we would have lost it.

QUESTION: I suppose, General Bork, that so long as there is discussion at some stage, that the ability of the states to plan will be affected.

MR. BORK: That is correct.

QUESTION: Whether it is at one or the other. So that an argument based entirely on ability to plan runs into that obstacle.

MR. BORK: Well, Mr. Justice Blackmun, it seems to me that there are a variety of arguments in these briefs which are quite persuasive until you realize that they are all arguments that Congress should have written a different statute and that if the statute is applied as written, their ability to plan or something else will be harmed.

That may be true but I think the ability to plan is such that the lead time in these things is fairly estensive. They can plan from the allotments given.

QUESTION: But it is subject to a lot of error about the plan.

MR. BORK: That is correct. They are not about to commit themselves, Mr. Justice.

QUESTION: Yes. Well, they aren't about to plan anything, excpet beyond whatever is allotted to them.

MR. BORK: That is correct. On the other hand, due to --

QUESTION: If they are allotted something, they may plan knowing perfectly well they are going to have to submit some plans that will get by.

MR. BORK: Oh, I think they are now able to begin to plan in that sense.

QUESTION: Well, not beyond their allotment.

MR. BORK: To plan -- yes, Mr. Justice White, maybe we are using the words in a different sense, but the Administration construes this statute to require that all of the sums be expended and there is now under discussion a variety of ways of timing of the release of these funds.

As I understand it, no final decision has been made so that planning for where would we use these funds and in what way when they become available could go on now.

Obviously, it would be unwise to enter into commitments, contractual commitments now for the unallotted funds.

QUESTION: What happens if the Congress ultimately refuses to appropriate?

MR. BORK: Well, I would hesitate to give a firm answer to that, Mr. Justice Blackmun, because we might have a suit in the Court of Claims which we might have to defend.

I don't envision Congress having encouraged states

by saying we will appropriate at some future date a total of $18 billion and the sums have been allotted and plans are put in and the states make the expenditures. I really can't contemplate that Congress at that stage would say, we were quite mistaken. We don't intend to appropriate the funds.

QUESTION: Yet it is not an uncommon phenomenon, is it, for Congress to authorize substantially more money for a given project than is ultimately appropriated?

MR. BORK: Well, that may be, Mr. Justice Rehnquist, but I think here it may authorize it but if states have gone forward and expended their own funds and got themselves into commitments which are legally binding, I would think it would be extraordinary if Congress then backed down on its promise and, furthermore, there might be at that stage, I think, litigation about the obligation of the United States.

QUESTION: Well, you said a moment ago that this was a unique or a -- well, a unique way of going about appropriating or making funds available, different from the ordinary budgetary process.

MR. BORK: As I understand it, yes.

QUESTION: What is that difference, do you think?

MR. BORK: In part, it is this process of authorizing for appropriation.

QUESTION: Well, isn't that pretty usual to

authorize in advance? As Mr. Justice Rehnquist says, more than they may eventually appropriate?

MR. BORK: I don't think it is usual to have a process in which you authorize for appropriation and then go through the allotment stage and the obligation stage and then appropriate it. I may be quite wrong about that.

QUESTION: It is the allotment stage that is unique here in the budgetary process, isn't it, rather than the authorization of the appropriation?

MR. BORK: Well, I had this -- the authorization for appropriation and its purpose explained to me and I was told that it is quite unique in this kind of statute. I can, perhaps, shed further light upon that later. I can't now. One of the reasons is, usually, when you have to go to a project, you go through the Appropriations Committee. At this stage, Congress, in effect, authorizes the appropriation without going through the Appropriations Committee, which does, considerably, limit the Appropriations Committee's discretion at a later date.

I think that is what is unique about it.

QUESTION: You think that is unique?

MR. BORK: I think it is, Mr. Justice -- Mr. Chief Justice.

QUESTION: So that it takes it outside of what has been a common rubric in the Appropriations Committee that

Congress proposes but we, the Appropriations Committee, dispose.

MR. BORK: Well, I think this does tend. I don't think this is, if I may say so, central to the issue we have before us, but I think this does, to some degree, limit the Appropriation Committee's influence on the size of the appropriations but I think that, in effect, does not -- it may account for some of the confusion in this entire process, but it does not go to the question, I think, which is before us, which is the President's discretion and how broad it is.

As I say, that is --

QUESTION: Mr. Solicitor General, initially, I think, did not the Government take the position that this commitment of $18 billion -- perhaps that is not the right word, but this $18 billion did not necessarily have to be spent but now I gather the position of the Government is that it must be spent under this legislation.

MR. BORK: That is the --

QUESTION: But the discretion is such that it may be spent over a period of time.

MR. BORK: The amount we now believe is firm. It may be stretched out in the expenditure.

QUESTION: Well, to that extent, when you say it must be spent -- to that extent, that is to say it has been appropri

MR. BORK: Oh, no, no, I mean, we think the Executive, under the statute, has an obligation to allot the $18 billion ultimately, but the Executive, we think, was given discretion to control the timing.

QUESTION: Yes, I understand you to say that, but to the extent that the $18 billion must be spent, Congress has indicated that it is going to be there.

MR. BORK: Congress has certainly indicated that.

QUESTION: But yet you think that something else may be necessary in the nature of Congressional appropriations, in fact, to make the $18 billion?

MR. BORK: I think so, but I think they have to pass an appropriations bill. They simply have -- the statute itself provides that we will appropriate the money at a later date so that under this scheme, they must do that.

QUESTION: But you now say that whatever discretion the Executive got, it doesn't extend to deciding that $X million or $X billion will not be spent at any time.

MR. BORK: That is correct, Mr. Justice White. The discretion is timing.

QUESTION: Yes.

MR. BORK: Rate of spending.

QUESTION: The fact that the Executive doesn't have that rate of spending doesn't necessarily mean that Congress will ultimately appropriate all of the money that

is now authorized.

MR. BORK: That is quite true, Mr. Justice Rehnquist. I said to that only, one, that I would find it extraordinary if Congress got states into this position and then let them down and I would think that there might well be litigation in the Court of Claims over it.

Litigation as to which I ought not now to take a position.

QUESTION: Ordinarily, the mere fact of an authorization doesn't give any assurance to anyone that necessarily would be an appropriation.

MR. BORK: That is correct, sir.

QUESTION: Here there is something more. It may not be complete assurance of appropriation but I gather you are saying that they can't let the states down -- almost, they'll have to.

MR. BORK: I beg your pardon?

QUESTION: The Congress certainly will have to. Or it has indicated that definitely it will.

MR. BORK: They have certainly indicated that and I take it that is a moral commitment at the very least.

QUESTION: To that extent, this is a little different than the ordinary --

MR. BORK: Yes.

QUESTION: -- case, is it?

MR. BORK: I believe so, Mr. Justice Brennan.

QUESTION: The mechanism would be that if the House Appropriations Committee declined to appropriate and the Senate Appropriations Committee also, you are suggesting the House and the Senate could override and reject.

MR. BORK: Oh, yes, sir.

QUESTION: And that would take care of it.

MR. BORK: I think so, but I think the main effect of this process is that a moral commitment is made which the Appropriations Committee, I think, would be bound to respect.

But I wanted to discuss the scope of this discretion because I think it is enough of a case, rather than the stage at which it occurred and Campaign Clean Water tells us that we really shouldn't pay too much attention to the Harsha Amendment, which I have described, which were supposed to give discretion to the President, the Amendments to Section 205-a and 207 because, he says, they are a considerable monkey-wrench thrown into the statute in order to achieve a political compromise with the President and, of course, ultimately, they were used to achieve the gathering of votes to override the President's veto.

And it is important to remember at this stage, when you address a question of what the discretion is, what the fight was about, there was no fight about the President's

discretion not to squander money if he found it could not be spent advantageously on sewage treatment facilities.

He has the power to refuse to spend money in a wasteful fashion under the Antideficiency Act already. There was no reason to put that kind of discretion into this statute.

What the fight was about, what the veto message was about and what the fight in Congress was about, was the President's authority to withhold spending, withhold obligation or withhold allotment, whichever stage you put it at, for fiscal policy reasons as well as program reasons.

QUESTION: Is the veto message somewhere in these?

MR. BORK: It is in the Joint Appendix, Mr. Justice Stewart, in this brown book. And it is --

QUESTION: Sorry to bother you.

MR. BORK: -- oh, I trust - it is in the record, I am sure. Maybe I can make a check --

QUESTION: Maybe one of your colleagues can do it without taking up your time.

MR. BORK: The -- and I would point out that when Congress -- before the veto, when Congress was explaining these amendments, Harsha Amendments, when they were talking about them, before the veto representative of Harsha on page 18 of our brief -- I will not quote all the language on page 18 of our brief -- he was quite clear that the

language said that the President can spend anything up to the sum but not to exceed the sum of $5 and $6 billion for those two years and Senator Cooper, who was a Senate conferee on page 19 of our brief, specifically said that the President had the responsibility for evaluating the program needs in relation to other national priorities, which certainly means the President had the power to make a trade-off between the variety of priorities.

After the veto, Senator Harsha -- Representative Harsha came back again and he, in urging the House to override the veto, he said, we have emphasized over and over again that if federal spending must be curtailed and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.

That is on page 20 of our brief.

And on page 21, we quote Representative Clausen, another conferee, who says repeatedly that if the President must hold the reins on the federal budget, these amendments, this discretion, gives him the power to hold the reins on the federal budget and the statutory language itself, of course, contains no restriction upon the discretion authorized.

Now, Congress could have written a different statute. It can still write a different statute. But this is the one we have and I think it would be quite wrong -- it

is quite wrong, I think, for the Respondents to ask that that discretion, which is clearly in the legislative history, which is clearly in the statute itself, should be excised by courts on the theory that they want to forward the goal of clean water.

That is -- if that process is to be speeded up, that is a process that can be worked out between the President and the Congress.

QUESTION: Well, isn't there -- I guess they can speak for themselves, but I thought they disagreed on -- as to when.

MR. BORK: The stage of the process at which --

QUESTION: The other -

MR. BORK: -- the discretion occurs.

QUESTION: Your opponents don't say the discretion should be excised completely, do they?

MR. BORK: Well, they want to cut it down to -- it's very odd, Mr. Justice White, to see, for example, the scope of judicial review of the discretion that is suggested by the Campaign Clean Water brief. One is told really only that the discretion may not be authorized, may not be exercised in a way that would in any way jeopardize the goals of the program and the deadlines of the program.

Well, that is to say that there is almost no discretion and it is to say that these Congressmen who said

that if the federal budget and the demands of fiscal policy ran counter to the expenditure of all these funds, then the President had the authority to protect the federal spending levels by cutting back on the water program.

QUESTION: Do you say that as you presently view the Act in terms of whether the $18 billion must be allotted at some time, do you say that there really is not much difference between you and the City of New York?

MR. BORK: No, I think the City of New York thinks that, except for program-related reasons, not federal fiscal policy reasons, that the money must be obligated.

The discretion occurs at the obligation stage, but I think they have a quite narrow view of what the discretion is.

QUESTION: So there are major differences, major gulfs between you and --

MR. BORK: The major gulf between Government and both of these Respondents is the scope of the discretion and I think that is the nub of the case.

QUESTION: Not the time.

MR. BORK: Not the time.

QUESTION: The scope.

MR. BORK: The scope. I think the statute is clear on the time but as a practical matter, the scope is what counts and I think the scope is quite clear from the

from the way these amendments were used to override a Presidential veto on fiscal considerations and it was explicitly said that these amendments give him control if he thinks the spending is too high, the total spending, not the spending related to this particular program.

QUESTION: Mr. Solicitor General, on page 9 of your brief, as I understand it, down at the bottom, page 9, you say, in effect, that there is no practical difference between exercising control over the rate of spending at the two stages.

If I understand that and if that is correct, what is the difference between the parties here today?

MR. BORK: Well, I think -- as I mentioned, Mr. Justice Powell, we felt that the statute clearly places it at the allotment stage and if we didn't come up to this Court with that, that we could get whipsawed by a later Court saying, you have already allotted and now your discretion is gone.

QUESTION: So, in effect, you are protecting a future position, the ultimate effect, I judge, in your opinion, unless you were outflanked in this way, will be the same.

MR. BORK: If this -- if I understand the issue, Mr. Justice Powell, if this Court, for example, were to write an opinion saying that the discretion operates

contrary to our submission at the obligation stage rather than the allotment stage, it would make almost no difference but the question of what that discretion is and whether it is reviewable by a court putting itself in the position of the President and looking at the program, the size of the budget at the time, the other competing national priorities at stake and making a balance and saying, no, a reasonable President would have spent more, that is the nub of this case. That is what we think is a political question.

Congress gave this discretion. The President has exercised it and we think it violates the political question doctrine.

QUESTION: If the only issue that we thought was presented was just a timing question, if the discussion --

MR. BORK: It is not the only issue, Mr. Justice White. In Campaign Clean Water, the Fourth Circuit repealed, reversed and remanded for a trial de novo of the President's extent of discretion.

QUESTION: I understand. But if the only issue were a timing, there wouldn't be much to argue about. You wouldn't really care much.

MR. BORK: Well, I wouldn't care much if this Court told me which stage it was at, Mr. Justice White, but if a lower court did, then I would be in a position of perhaps getting caught by a court in a different jurisdiction

disagreeing.

QUESTION: But the important thing here is, whether we say allotment or obligation, your real concern is the breadth of discretion of the President.

MR. BORK: That is, I think, the real nub of this case and I think that the statute itself, on its face, gives an unconfined discretion and the variety of congressional expressions.

QUESTION: I see that your light is running out, Mr. Bork. Are you going to say anything about this? I haven't had a chance to read it. It only arrived this morning.

MR. BORK: I will say only about that, Mr. Justice Brennan, that that brief proves, in our opinion, mathematically, that the new Act does not affect this case.

QUESTION: I see. All right.

MR. CHIEF JUSTICE BURGER: Counsel, in view of the way the timing is working out here today, we'll extend for your side of the table, six minutes and give the Solicitor General six minutes more. That will finish us up approximately right at 3:00 o'clock. So you can pace yourself accordingly, Mr. Thompson.

ORAL ARGUMENT OF JOHN R. THOMPSON, ESQ.,

ON BEHALF OF NEW YORK CITY

MR. THOMPSON: Thank you very much, sir.

While these are two --

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

These are two very separate cases. Because they were consolidated by the Court on the grant of certiorari, we have agreed with the Respondent in the other case, the Campaign Clean Water case, to divide our time.

I will attempt to stay within the 15 minutes which I had originally planned on for the City of New York.

As we see it, the issue in this case, in the New York City case, is very different -- is very definitely the timing at which any kind of executive controls over the rate of spending is to be exercised, not the scope of that discretion.

We believe that the legislative history shows clearly and unmistakeably that the Harsha Amendments and whatever control they gave the Executive over the rate of spending was not to be operative at the allotment stage.

Thus, full allotments were required to be made by Congress after the Harsha Amendments, as they were before the Harsha Amendments. Whatever discretion was conferred by the Harsha Amendments or confirmed by the Harsha Amendments over the rate of spending was to be operative, as the Court of Appeals found -- decided -- only at the obligational stage.

Now, in point 1 of our brief, at pages 8 to 17,

we have summarized that part of the legislative history which goes to the time at which whatever the discretion is, the time at which it should be exercised and we believe that it is far clearer than the Solicitor General would have you believe.

Let me back up just a minute. The legislative history of the Harsha Amendment shows two strands, if you will, two interwoven strands.

One does show, as the Government maintains, that the objective, the overall objective of those Harsha Amendments, was, in the words of several of the legislation sponsors, to emphasize the flexibility of the President's control over the rate of spending.

We do not -- we have no difference with the Government. That was the overall objective. Where we differ with the Government is as to when that control, whatever its scope, was to be exercised.

In its brief, the Government had virtually ignored the legislative history going to the second strand, as to when it should be exercised, but included in our -- in the materials in point one of our brief, are statements by sponsors of the Act in both Houses, both before and after the veto message, which we believe clearly show that the Court of Appeals was correct in deciding that Congress intended that discretion be exercised only at the

obligational stage.

QUESTION: Mr. Thompson, are you going to suggest what the practical difference is, the timing --

MR. THOMPSON: Yes, Mr. Justice Brennan, and that was raised by questions from your Honor and from Justices Black and Blackmun -- White and Blackmun.

The function -- the function of allotment, essentially, in this so-called "contract authority funding," the main function of allotment is to give the states and their political subdivisions a justification for going ahead with the very intricate planning for all of the vast construction which Congress intended to induce the states to perform in order to clean up the waters of the country in a very short period of time.

Now, there is a statement which is quoted almost in full at page 23 of our brief by Representative Harsha on that planning process. It indicates several things.

First of all, how important the planning process was to those who conceived and labored and drafted this statute.

Secondly, it showed that they were interested, not in bits and pieces, stop and go planning, as various amounts of money might be allotted and allotted and allotted under the Government's theory. They had in mind, and Mr. Harsha emphasized, coordinated, long-range planning so that any

locality that was a beneficiary of Title II would be able to plan whatever its share was of $18 billion worth of projects.

QUESTION: In other words, you know in advance that you are going to get $350 million?

MR. THOMPSON: Yes.

QUESTION: That puts you in a position where you can plan around a possibility of $350 million.

MR. THOMPSON: Not only a position, your Honor, where you can plan, but you may even not be able to plan as a local official --

QUESTION: Unless.

MR. THOMPSON: -- unless you have some kind of ticket from the Government, some kind of go-ahead, something you can point to, to the rest of your bureaucracy, to your city council, your aldermen, whatever it happens to be, and to your constituents, who are also affected by this, to the people.

That same statement on page 23 of the brief, in that same statement, Mr. Harsha mentions the kind of things that are included in the planning process and there are a lot more than just simply drawing up engineering and architectural plans and specifications. As long as that takes, and difficult as that is, he mentions planning generally, by which I take it he meant community planning, deciding where these various plants -- and collection

systems, I might add, where they will be located, how they will be fitted in with other capital projects of that municipality.

He mentions site acquisition. He mentions feasibility studies and he mentions getting authorization for any necessary bonds that had to be sold under this statute; while the Federal Government is putting up a great deal of money, the states and localities have to put up one quarter, which comes to $6 billion and it is not easy these days, or any day, perhaps, for states and localities to raise their proportionate share of that.

That has to be coordinated with their other needs. It is a vast undertaking to make a coordinated plan in the broadest sense of the word to -- for projects that would be able to qualify for the then-federal grants and it seems to us that if one remembers the function, the main function of allotment to lay a basis for the cities and towns to go ahead and engage in that planning process, then it becomes clear that, absent any specific Congressional intent otherwise, that the only discretion conveyed, conferred or emphasized in the Harsha Amendments applied not to allotment if full allotments had to be made, it applied at the obligation stage and in the course of our point one, we point to a statement by Mr. Harsha in which he said, he talked about the obligation stage, that is at which after

the full planning of a project has taken place and it is reviewed by the Administrator, reviewed, certainly, for compliance with the conditions in the statute and, perhaps, we would -- for New York we would concede this, perhaps, also for some fiscal considerations.

At that point is when the Administrator, by approval, would either subject the United States to an obligation to pay that grant or, by holding it up, by non-approval, he would not subject the United States to that obligation.

It is at that point, after all of the planning, that we believe, under appropriate circumstances, the Executive could impose what might be called the "hold" on either a certain type of projects or otherwise. That would be the point right before the United States became obligated but, at any rate, at that point, when the United States wanted to exercise the flexibility the Act talks about, when the fiscal stringency had vanished, if you will, the plans would all have been made.

You would have a shelf-full of plans and the tap, so to speak, could be turned on.

That, we think, is much more consistent with the underlying intent of Congress that this was a massive, ambitious program and they wanted it done just as fast as it could possibly be done.

The allotments, you will notice, were said to be -- the allotments were to be made no later than particular dates. The first date was no later than 30 days after enactment of the Act.

The second allotment for the next fiscal year came along six weeks thereafter and the final allotment was to be six months before the fiscal year for which it was being made.

Almost at the earliest possible stage Congress wanted these allotments made.

QUESTION: Mr. Thompson, do you think that the Administrator, under your theory, his discretion is confined to the obligation stage. Do you think he has the same order of discretion or degree of discretion at that stage, that the Solicitor General contends he has at the allocation stage?

MR. THOMPSON: I have never heard the -- until today seen any indication from the Government as to exactly how broad they thought the discretion was. I -- that has been, in our view of this case, of our case, that is an iffy question which is not before the Court, how much -- how wide the discretion is.

Mr. Justice Rehnquist, it is a difficult question left open by the fact that, in my view, at any rate, the statute does not clearly delineate that. It looks to me,

from references that Representative Harsha made, to the procedure the Executive was then following under the Federal Highway Act, which was later held to be improper by the Eighth Circuit, but the references that Representative Harsha made to that, it seems to me in all honesty, that some discretion would lodge at the obligation stage in the Executive beyond just the criteria which are in the Act, which are environmental, engineering and financial.

But, as I say, that is an iffy question because it is -- and it might -- it might have to be settled in future litigation, although I think that has become much less likely since this new Budget Act of 1974, which now provides for quite a clear way in which Congress and the President can work cooperatively.

If this Court should declare, should affirm and thereby declare that the full allotments have to be made, and then, perhaps, adding that the Harsha Amendments conferred some discretion at the obligation stage, then the President would presumably make the allotments. Then at a later stage, if it should be desirable for the -- if the President and his Administrator should think it desirable to put a hold on the obligation of funds, that action would be subject to the new Budget Act. The President would have to submit a special message to Congress. He would propose that deferral and the deferral would be effective for the

rest of that fiscal year, unless either House of Congress adopted a resolution rejecting, disapproving of the deferral.

It provides a mechanism which we have not had before for cooperative effort between the --

QUESTION: Do you think there is any difference between you and the Solicitor General, other than the claiming of this discretion?

Do you think there is some difference between you and him with respect to the scope? Or have you even reached that?

MR. THOMPSON: Mr. Justice White, we have not been discussing -- we have not been thinking ourselves, except academically, and we have not been arguing with the Government in our case over the scope of the discretion.

Our argument has always been, the Government has said they had complete discretion, complete and unreviewable discretion --

QUESTION: Well, you seem to concede there is some discretion sometime.

MR. THOMPSON: And now they also, they have changed their position since the early days of this litigation to say that the full amount of the $18 billion must be allotted sometime.

In the lower courts they took the position that the Harsha Amendments said they didn't have to allot them

if the President didn't want to anytime. Now they say they have to be allotted, they just don't say exactly when they will do it.

QUESTION: I am not sure this is fair as a question but do you concede that, at the commitment stage --

MR. THOMPSON: The obligation stage?

QUESTION: The obligation stage, yes. The obligation stage there is discretion to refuse to obligate because the Executive does not want to spend money that fast?

MR. THOMPSON: I don't believe that is an unfair question but as I replied to Mr. Justice Rehnquist, I would be -- that would be a gratuitous answer that I would give you I think it would depend upon the circumstances and whether the President could really make out a case that fiscal needs did actually require it.

QUESTION: Does that not concede discretion?

MR. THOMPSON: It certainly -- excuse me -- we would concede that there was a measure of discretion. We don't know how broad that would be and I think it would be fair -- I certainly wouldn't be in a position to say that it was just if the President decided overnight for some whim that suddenly all spending should stop here.

QUESTION: But, to take a more extreme example, if suddenly we got into some peripheral war, that might have a lot to do with it.

MR. THOMPSON: I think under the statute that certainly would authorize it and then, as I indicated, under the Budget Act, anyway, it would be subject, if he were getting way off base, to, in effect, to correction by Congress.

QUESTION: By resolution.

MR. THOMPSON: By resolution,yes, sir.

QUESTION: Mr. Thompson, perhaps you addressed yourself to this but if so, I missed it.

Do you agree with the basic thrust of this most recent brief filed by the Solicitor General as to the non-applicability of the new legislation?

MR. THOMPSON: We have not been favored with a copy of it, your Honor.

QUESTION: We only were favored with it last night.

MR. THOMPSON: But from what the Solicitor General said, we would agree with it with one caveat, that this proposed deferral of allotment has been included in the special message that the President sent to Congress.

He included it for information only, saying it was not really within Congress' purview under the new Act, but said he would like further guidance.

Now, if -- he also said that he would abide the decision of this Court on the legal points involved here but if the -- either House of Congress, taking advantage of

the President's submission in that form should pass a resolution disapproving of the further deferral of allotments of the unallotted $9 billion, then it would seem to me reasonable to suppose that the Solicitor General would promptly advise this Court and then give the Government's view as to whether they then agreed that they would comply with what Congress was either asking or ordering them to do and at that point, if it came before your decision in this case -- when and if, I say -- conceivably that could alter -- it could alter the situation.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Thompson.

Mr. Jacks, you will have about 18, 18 and a half minutes now.

ORAL ARGUMENT OF W. THOMAS JACKS, ESQ.

ON BEHALF OF CAMPAIGN CLEAN WATER

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

I'd like to start my argument on an agreeable note. I'll begin agreeing with General Bork when he said that he thinks the scope of the discretion is at the nub of this case. I agree.

My client, Campaign Clean Water, is in some respects, I suppose, at the middle of the road in this case. We are flanked on the one hand with the City of New

York, which takes the position that the Administrator has absolutely no discretion to withhold funding at the allotment stage.

On the other hand, we are flanked by the Administrator of EPA, who claims that he has unbounded discretion to withhold allotments, as General Bork pointed out in turning to the language of Representative Harsha on the floor, that they can allot anything up to the $18 billion at least initially.

We take what I think is a more reasonable view of the statute than either of these. That is that, yes, there is some discretion intended at the allotment stage, but that discretion is limited and we think was abused in the situation.

I'd like to address myself --

QUESTION: Do you think the discretion is only at the allotment stage?

MR. JACKS: Yes, sir, we do. We do.

QUESTION: It isn't an either/or proposition?

MR. JACKS: No, sir.

QUESTION: As posed, isn't it, or --

MR. JACKS: Well, we think, our reading of the statute and legislative history -- we think it is pretty clear that the discretion was intended to be exercised at the allotment stage because it was the section on allotments

and not the section on obligations that was amended.

QUESTION: That was amended.

MR. JACKS: They could have just as easily changed the mandatory language in Section 203 on obligations to be discretionary, if they had wanted to let the Administrator exercise his discretion there.

QUESTION: So you would not think that the -- once the Executive allots, he cannot later, at the obligation stage, say we are spending money too fast?

MR. JACKS: I believe that is correct, Mr. Justice White.

I'd like to focus primarily on the question this afternoon of how do we know that the Administrator's discretion was intended to be limited and how do we gauge where those limitations lie?

I think perhaps the principal point of departure between Campaign Clean Water and the Administrator is over what interpretive tools the Court relies on in determining whether there is discretion, whether there are limitations on the discretion and where the limitations lie.

The Solicitor General, in his argument, pointed primarily to the floor language, to the remarks of Representative Harsha and said, "It is clear from this that Congress intended to give discretion notwithstanding the remainder of the statute."

The Solicitor General would have this Court look more to what was done in the 11th hour in this statute and accuses us of ignoring this floor language.

I suppose we would accuse the Administrator of ignoring the entire remainder of the statute.

I think it is useful, in answering the question, "How do you know what the limitations are?" to do two things.

First, to take a general overview of what went on here, of what went on in the Congress over this two-year period during which the statute was pending.

I think it is useful, secondly, to look at some of the specific provisions of the statute and just ask what do these provisions mean? Are they still effective if the Administrator's view is upheld that his discretion is virtually unbounded.

First the overview. This statute, as we pointed out in our brief, was two years in the making. It was very carefully constructed.

From the beginning, the proponents of this statute sought to eliminate completely the discharges of pollution into our nation's waters and to do so in accordance with a prescribed timetable. They were fought every step of the way by the Executive branch, by the Administration. The Administration opposed the level of funding.

The Administration opposed the contract authority

mechanism of funding. The Administration opposed having rigid deadlines. It opposed having mandatory enforcement provisions.

Despite this opposition, the Bill was submitted to the Congress, was passed. The President, as was his constitutional prerogative, vetoed it and he listed as his chief reason the level of spending called for.

He would have suggested a lower level of spending.

The bill was returned to the Congress and the veto was overridden and was overridden overwhelmingly in both Houses and during the course of the debates on the veto override, people on both sides of the aisle -- the Democrat, Senator Muskie, the Republican representative Harsha, all agreed that Congress was dictating that the job be done, that they knew it was expensive, they knew it would tax the nation's resources to some extent, but that Congress had made that decision.

The question I think we have got to ask in taking this overview is, is it reasonable to assume that in making this last minute change, to achieve what was essentially a political compromise in its attempt to avoid a veto.

Is it reasonable to assume that, in making that change, the Congress intended to eviscerate the remainder of the statute? I think the answer has got to be clearly not. And yet I think if you turn to some of the specific

provisions of the statute, you will find that that would, indeed, be the effect.

QUESTION: Doesn't the Solicitor General's representation, the Government's policy or position with respect to the commitment of the entire $18 billion at least cut some of the foundation away from that argument?

MR. JACKS: It doesn't give me much satisfaction, Mr. Chief Justice, because, under the statute, there was a time frame intended as well as an intent as to the job to be done.

In other words, Congress intended not only that the nation's waters be cleaned up, but that they be cleaned up in accordance with the prescribed schedule. So it does not give me much comfort when the Solicitor General tells us, don't worry, we are going to release the entire $18 billion. We are just not going to tell you when we are going to do it.

That doesn't give me much comfort when I look at Title III of the statute and I see that under Title III, there are two deadlines. One is that by 1977, municipalities must achieve a secondary level treatment.

The other is that by 1983 they must achieve -- their plants must feature the best practical technology.

That gives me problems.

QUESTION: Doesn't the power of Congress to deal with this by resolution at any time give any comfort to

you?

MR. JACKS: No, sir, it does not, because I agree with the Solicitor General that the new Budget Control Act, which became effective on July 12 of 1974, doesn't apply -- at least not right now -- to the impoundment actions which are at issue in this case.

I think that his construction of that statute is correct when he says that the triggering action by the Executive must be one which was commenced after July 12, 1974.

I don't think the Congress can do anything, really, about this. At least, not right now. Now, at some point in the future, he may -- the Administrator may take some further action which would trigger the provisions of that statute. But --

QUESTION: I have --

MR. JACKS: I beg your pardon, sir.

QUESTION: I have some difficulty with that, Mr. Jacks. You say Congress can't do anything about it now.

Now, as a practical matter, it might be very clumsy, very slow, very burdensome, but Congress can do anything it wants to on this, the day after tomorrow, couldn't they?

MR. JACKS: Well, clearly, when we are dealing with the Congress, they can do pretty nearly anything they

want to within the limitations of the Constitution and at any time they want to. I don't think that we, as litigants, should be forced to rely on the hope that at some time in the future, Congress is going to bail us out when Congress has already said, I think, pretty clearly, what it intends to be done.

That would be our position, really, on that statute.

I think, not only -- let me look -- let me spend one more minute on this question of deadlines. We cited in our brief to a survey that was done by EPA last year for their 1973 needs survey which was prepared pursuant to the statute that is at issue in this case.

In that survey, EPA concluded that -- and I'll speak here of the State of Virginia since that is the state I know best. That is where my group came from. They said Virginia is going to need $650 million, roughly, just to meet the 1977 deadlines -- just to meet that secondary treatment deadline in 1977.

Now, 75 percent of that, of course, should come from the Federal Government under this legislation. That would be about $489 million. If Virginia had gotten all the sums that were authorized for fiscal '73, '74 and '75, it would have had slightly more than enough -- there would have been slightly more than enough federal money to enable

Virginia to meet that '77 deadline.

As it is, with the withholding of 55 percent of the funding for the first two fiscal years, Virginia has gotten $243 million rather than the $489 million in federal money they need just to meet that deadline.

In other words, even if you take EPA's own estimates of what construction needs are to comply with the statute, it is clear we are in trouble.

I think another specific provision of this statute that is instructive and one that has been addressed already to some extent this afternoon is the contract authority provision of Title II of the Act.

Those provisions are relevant because when you study the legislative history, it is clear that Congress intended, in enacting this advance funding mechanism, to give municipalities and states the opportunity to plan ahead so that they would know, in looking several years down the road, what federal money they could expect and could plan accordingly.

Now, when the Administrator construes his authority under the Act to mean that he can make an initial allotment in whatever amount he pleases and then can dole out further allotments from time to time, from year to year as he sees fit, I think it is clear that that entirely frustrates that very-carefully-contrived legislative scheme.

I think, then, that when one studies the entire legislative history of this statute, when one looks at the deadlines provisions, when one looks at the contract authority provisions, it becomes clear that Congress must have intended some limitation on the discretion the Administrator was being given leave to exercise.

In other words, I think that these are far more useful tools than merely turning to Representative Harsha and seeing that he said we can do anything up to that amount.

I think it is far more useful and it is indeed in accordance with general rules of statutory construction for this Court to look at the entirety of the statute and ask the question, does it make sense that Congress intended to give the Administrator unfettered discretion in light of what that would do to the remainder of the statute.

If the Court has no further questions, I believe I have concluded.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jacks.

Mr. Solicitor General, you have a few minutes left.

REBUTTAL ARGUMENT OF

ROBERT H. BORK, SOLICITOR GENERAL OF THE UNITED STATES

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

Let me -- allow me, please, to explain the supplemental brief and its problems. I was informed that the City of New York had been served with page proof last Thursday and I hope it had been.

The only purpose of that supplemental brief was to quiet any concern that this case might have become moot by the new statute. This brief is really not in discussion here because it is quite clear whatever view one takes of the new statute, these deferrals would not become moot unless Congress took some further action, which it has not taken.

On the question of discretion, which I think is the main question we all agreed we have before us, I wish to point -- I did point out -- that if the discretion is as broad as the Congressmen repeatedly said it was in getting the votes to override the veto, then it would be impossible for a judge to place himself in the position of a President balancing the budget or trying to control inflation and make the choices.

But I think it is worth saying something else.

I think --

QUESTION: Your point is that it is unreviewable, judicially unreviewable discretion.

MR. BORK: Mr. Justice Stewart, if Congress said to the President, spend this money unless you think inflation is getting out of hand or other priorities are

more important, but we'd like you to spend this money unless you find something like that.

It seems to me at that point you have a political judgment in the classical sense by the President and for a court to try to apply its standards to how that judgment should have been made would be a classic violation of the political question doctrine.

QUESTION: So your answer is yes.

MR. BORK: Yes.

QUESTION: It is judicially unreviewable.

MR. BORK: At that stage. But I want to point out that Campaign Clean Water attempts to give us a narrower form of review which is a form of review about can the program go forward effectively with this kind of withholding of funds?

I would point out to you that that form of review is also -- has a spurious attractiveness -- what the President has authority to do is to make a cost/benefit analysis under the Antideficiency Act or inherently of whether spending more funds this year rather than next would merely inflate the cost of the resources and whether it is worth it and that, too, is a kind of discretion that I think it would be quite difficult for a court to review because it's a cost/benefit analysis and the President is saying, is 20 percent more dollars worth 10 percent more

output or not?

So I think that is an executive kind of decision which would be exceedingly difficult to review. But in any case, the deadlines in the Act, it is now quite clear, probably cannot be met even if all this money were spent.

The Administrator has reported to Congress that, far from $18 billion, the Act's objectives are going to require $340 to $350 billion.

So I think we are not realistically --

QUESTION: Do you?

MR. BORK: As I am informed, that the Administrator of OMB has reported to Congress that the total needs for water purification in this country are going to amount to well over $300 billion.

So that I think we are not -- and I think there is going to be trouble with these deadlines, no matter what happens and the appropriate thing for these states to do is to apply for rule-making procedures because the Administrator controls the standards which must be met by the deadlines and if they cannot meet those standards, then there is a mechanism in the Act by which that can be accommodated.

One thing that can't be changed is that this Act was sold to Congress and the President's veto overridden on a view of discretion which included discretion to control total spending and not just discretion with relation to the

effectiveness of this program.

QUESTION: Is there anything in the legislative history at this time, Mr. Solicitor General, which suggests that this astronomical figure that you now mention was in contemplation when they got their foot in the door with the $18 billion?

MR. BORK: No, I think, Mr. Chief Justice that the problem was vastly underestimated when --

QUESTION: Nobody really knows. Is that it?

MR. BORK: Nobody knew at that time. I -- one hopes that the later estimates become progressively more accurate; except for the amounts involved, one would hope that. But the sums, apparently, are much larger than were anticipated and I think those deadlines of the statute would not be met if this money were paid out.

QUESTION: I gather, Mr. Solicitor, that if we were to agree with you, you would still feel, whether the choice was at the allotment stage or at the obligation stage, that there ought to be reversals in both these cases or the remands for dismissal of both complaints?

MR. BORK: That is precisely what I think should happen, Mr. Justice --

QUESTION: The latter on the ground that this is a nonreviewable discretion and therefore, the critical question in that sense.

MR. BORK: It could be put either in the form of nonreviewable or in the form of Congress intended it to be this broad and therefore, there is no function --

QUESTION: Yes.

MR. BORK: -- to be served. And I think the latter is the case, although I think it is also non-reviewable.

QUESTION: It could be very, very broad and still be reviewable or it could be relatively narrow, as you pointed out and still be nonreviewable.

MR. BORK: That is quite true. I suugest that I think it was given in such a broad fashion that, reviewable or not, there is really nothing wrong has happened here.

But, secondly, I think if one began to review it, that one would immediately be into an area where there are no standards for courts to apply and the courts would essentially be making a judgment that is reserved for an executive in our form of government.

QUESTION: Well, an executive, especially, presumably, especially informed in the field.

MR. BORK: That is correct, Mr. Chief Justice, an executive with a delegated authority in this case.

QUESTION: And with standards?

MR. BORK: The only standards that are apparent in the legislative history -- there are none apparent

on the face of the statute. It is an unbounded discretion.

The only standards which are apparent in the legislative history are, to control federal spending because of inflationary pressures.

QUESTION: Well, that would not preclude an administrator from suis ponte promulgating regulations or inviting rule-making, as you intimated, would it?

MR. BORK: No, that would not prevent the Administrator from inviting rule-making.

QUESTION: And if it is $300 or $350 billion, that might well be indicated.

MR. BORK: I was suggesting as much, Mr. Chief Justice. I think that if those figures are accurate, then the expenditure of sums from this case is going to have very little to do in general with the meeting of deadlines. And the standards may have to be changed or Congress may have to be approached.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General --

QUESTION: May I just go back one second?

Your position is that the discretion must be exercised at the obligation stage.

MR. BORK: At the allotment stage.

QUESTION: At the allotment stage. Now, the judgment below disagree with that, do they?

MR. BORK: One judgment below does. The Court of Appeals for the District of Columbia says no, the obligation stage.

QUESTION: Yes.

MR. BORK: The Court of Appeals for the Fourth Circuit says, the court below found the allotment stage was correct. Nobody contests it. So we assume it is correct.

QUESTION: Yes, well, insofar as it was held below, the judgment at the allotment stage, wouldn't we have to affirm in that respect?

QUESTION: If we agreed.

QUESTION: If we agreed with that.

QUESTION: Affirm the Fourth Circuit.

QUESTION: No --

MR. BORK: Affirming the respect that the discretion is at the allotment stage, I would ask you to reverse the remand for a trial de novo on the discretion issue.

QUESTION: And send it back for dismissal.

MR. BORK: For dismissal.

QUESTION: But if we disagreed with you as to when and said it was only at the obligation stage, then we wouldn't be reversing the New York case?

MR. BORK: No, you would not.

QUESTION: We'd be affirming it.

MR. BORK: But the -- the -- I suppose the Fourth Circuit case would drop out and there would be new litigation when the discretion was exercised at the obligation stage.

MR. CHIEF JUSTICE BURGER: Mr. Thompson and Mr. Jacks, it appears that you have not, until recently, and perhaps only today, will have received the Supplemental Brief. If you find that there is something in the Supplemental Brief that you would like to comment on, will you kindly inform the Clerk so that the Court will be advised and for consideration, until we have any comments that you wish to make?

MR. THOMPSON: We certainly shall, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you.

Thank you, gentlemen, the case is submitted.

[Whereupon, at 2:57 o'clock p.m., the case was submitted.]