

In the

CECIL D. ANDRUS, SECRETARY OF
THE INTERIOR, et al.,

Petitioners,

V.

SIERRA CLUB, et al.,

Respondents.

No. 78-625

Washington, D. C.
April 18, 1979

Pages 1 thru 31

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IN THE SUPREME COURT OF THE UNITED STATES

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CECIL D. ANDRUS, SECRETARY OF
THE INTERIOR, et al.,

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v.

SIERRA CLUB, et al.

Respondents
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No. 78-625

Washington, D. C.

April 18, 1979

The above-entitled matter came on for argument
at 1:50 p.m.

BEFORE:

WARREN E. BURGER, Chief Justive of the
Supreme Court
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN M. HARMON, ESQ., Assistant Attorney General
Office of Legal Counsel, Department of Justice,
Washington, D. C.; on behalf of Petitioners

JAMES H. COHEN, ESQ., Washington, D. C.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Andrus v. Sierra Club

ORAL ARGUMENT OF JOHN M. HARMON, ESQ.

ON BEHALF OF PETITIONER

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

This case is here on writ of certiorari to the United States Court of Appeals for the District of Columbia. The question presented is whether the National Environmental Policy Act requires executive agencies to prepare environmental impact statements for their annual budget estimates submitted to OMB for consideration in the preparation of the President's Budget.

Section 1022(c) of NEPA provides that all agencies shall include an environmental impact statement in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.

Respondents brought this action in July, 1974 against the Secretary of Interior and the Director of OMB alleging that the members of their respective organizations were adversely affected in their use of the national wildlife refuge system by certain proposals by the Department of Interior and OMB for the operation and maintenance of the refuge

system.

Respondents claimed that the annual budget request prepared by the Secretary of the Interior and submitted to OMB were proposals for legislation and other major federal action within the meaning of the National Environmental Protection Act and, therefore, required the preparation of environmental impact statements. Respondents sought a declaratory judgment to this effect. They also sought a declaration that NEPA requires OMB to prepare procedures and guidelines to identify budget submissions by other agencies which require the preparation of environmental impact statements.

The District Court granted Respondents' Motion for Summary Judgment, holding that every budget estimate of an agency whose activities significantly impact on the environment is a proposal for legislation and other major federal action.

QUESTION: I suppose, Mr. Harmon, that some of the actions of the 400 plus District judges in the United States and well over 100 Circuit judges, to say nothing of other judges, might have an impact on the human environment. Does that mean the judicial budget would have to have an impact statement?

MR. HARMON: Mr. Chief Justice, in the sense of the theory in this case that in fact the actions, a decision would necessitate action below that may be major federal action significantly affecting the environment. On that theory, again,

that would be the follow through. However, the environmental impact statement requirements of NEPA do not apply to the Judicial Branch or to the President. It is our contention that they apply to all agencies -- executive agencies -- within the Executive Branch.

QUESTION: But the thrust of my question was partly that impact is really pretty difficult to measure, isn't it, to define and to bound.

MR. HARMON: Well, that is certainly our contention. In the sense that the argument made by Respondents throughout this case, indeed adopted by the District Court, was that the budget estimates submitted by an agency in fact were proposals for all the actions which would be financed by the appropriation and that, in that sense, the budget decision was a decision to take those major federal actions with the significant environmental impact. And that is the broad reading that the District Court, in fact, accepted in this case.

The District Court ordered, directed the Secretary of Interior and the Director of OMB to prepare and consider environmental impact statements for each annual budget request for the National Wildlife Refuge System. In addition, the District Court held that NEPA requires OMB to prepare procedures to identify all budget estimates which require an environmental impact statement.

QUESTION: Do you understand this holding to be for

the presumed benefit of the agencies who are submitting their requests to OMB or for OMB in submitting its recommendations to the President?

MR. HARMON: It is our understanding of the holding, Your Honor, that it is, in fact, for the benefit of the identification for the agencies who will be submitting their requests to OMB. That is the point at which the Respondents have sought the filing of an environmental impact statement. The Court below did not discuss the submission of OMB to the President for the consideration of the budget.

QUESTION: Do you get any sense that the Respondents have taken "a new look" at their position from their brief in this Court?

MR. HARMON: Your Honor, that is our contention, the contention we have made in the reply brief which we have filed before this Court. In fact, we think that the application of the environmental impact statement requirement to a submission by OMB in its function, in its budget function and the parts of OMB which provide and specifically establish for the purpose of providing advice and information to the President in the preparation of the President's Budget are, in fact, beyond the reach of NEPA. And, for that reason, that application would raise a new issue in this case.

The Court of Appeals rejected the District Court's per se rule that every budget request is proposal for legislation.

Instead, the Court of Appeals adopted its own per se rule that every budget estimate, every budget request which is taken after a new look and in depth programmatic review of a program or which involved a significant change in the status quo in the current level of funding that those budget estimates were, in fact, proposals for legislation. However--

QUESTION: What is your position as to that?

MR. HARMON: It is our position that, one, these are not proposals; that the budget estimate submitted by--

QUESTION: Suppose we hold they are, then what?

MR. HARMON: Even if -- even if the budget estimate is found by this Court to be a proposal within the meaning of the Act, it is our position that they are not a proposal for legislation. It is our position that Congress observed the traditional distinction that is maintained between legislation and appropriations and did not intend to reach proposals for appropriations, as distinguished from legislation.

QUESTION: I think I follow you with respect to a positive proposal to build a dam. But suppose that Interior has already established an ongoing program for wildlife refuge and suppose then that the word comes down to cut Interior's budget by 10 percent and so they reflect this in their budget request by eliminating funds for that particular program. If a statement is not required there, it never will be required.

MR. HARMON: Your Honor--

QUESTION: I am drawing a distinction between a positive action and a negative one.

MR. HARMON: And I appreciate your point. Our position on that is that the first, in the real sense, the budget decision a 10 percent cut on a particular program, the decision is made the budget -- the appropriations decision, the funding decision, the economic decision and the political decision made by the President as to what the shape and content of his budget will be, that is made first. The implementation of that decision must await, of course, the approval by the full Congress of that appropriation request but in the real sense there is no concrete, in most instances, there is no concrete proposal with respect to what Interior will do with this program or that program, whether it will not complete this dam or will cut enforcement personnel in another area. Those decisions in the main, in the real sense, are made subsequent to the budget decision -- the paper decision. The decision to which you refer, the action, the major Federal action, if it might be determined to be so, is an underlying action, an underlying project, an underlying decision. [We acknowledge, as we must, that, in fact, the underlying project beginning or ending might, in fact, require an environmental impact statement, depending upon analysis of the given situation -- the given factual situation.] But it is the

underlying project, the underlying action and not the appropriation which is the major Federal action under the statute.

The Court of Appeals in this case again subsequent to the District Court's decision, the Department of Interior did prepare a detailed policy review of the Refuge System Program. The Court of Appeals had that review before it and held that this programmatic review satisfied the Government's current obligations under NEPA with respect to the annual budget request for the National Wildlife Refuge System. However, the Court of Appeals added and held that in the event of any significant change in the status quo or any reevaluation of the Refuge Program, the environmental impact statement requirements would apply anew.

The Court of Appeals went on to affirm that part of the District Court's decision that NEPA does require OMB to formulate procedures to identify the agency, the annual agency estimates which must be accompanied by an environmental impact statement. As I have tried to outline, we would make three arguments to support our position that the judgment below should be reversed:

The first, as I have again attempted to describe is that the annual budget estimate submitted to OMB for consideration in the preparation of the President's budget is not a proposal, as that term is used in NEPA. In the

Executive Budget process, the point at which there is a proposal, a formal proposal, as that term was defined by this Court's decision in Kleppe v. Sierra Club is when the President submits his budget to the Congress, the annual budget estimates which are prepared by the agencies submitted to OMB in September for consideration in the preparation of the President's Budget are but part of the germination process leading to the final proposal, again the President's Budget.

Respondents argued that these budget estimates are final proposals because the agency -- no further action is required by the Agency. But the fact that the Agency may have had its last word on a budget proposal, a budget estimate does not make that a final proposal. Indeed, Congress has vested in the President the exclusive statutory authority to prepare and submit to the Congress the budget. That was the budet in the Accounting Act in 1921. In that same statute Congress expressly prohibited the agencies from submitting independent budgets to the Congress.

Since the agencies neither have the authority, indeed they are expressly precluded from submitting these budget estimates to the Congress, those estimates can only be part of the process of the development of a final proposal, the President's Budget.

QUESTION: Would you analogize this, Mr. Harmon, to the process which a division of a Department submits to the

head of a Department, where the Department itself submits the total budget request to the OMB?

MR. HARMON: Mr. Chief Justice, it would be exactly our point that if the Respondent's contention were correct that the fact that the agency has had its final word, its last say that no further action is required by the agency, if that made this a final proposal, then, as you suggest, and that's the way the budget process works from the field office, from the person located in charge of an individual refuge area all the way up at each level of review with a broader perspective, that at each level there would be a final proposal, if that were the law.

QUESTION: Or at least a proposal?

MR. HARMON: That is correct.

QUESTION: You keep putting the word "final" in there -- final proposal -- the statute doesn't use that.

MR. HARMON: The statute does not use that, Your Honor, but this Court used that phraseology in Kleppe -- in its decision in Kleppe v. Sierra Club. In that case, as here, at various stages there is contemplated action. There is input from the various sectors of an agency, and in our case the various sectors of the Government, of the Executive Branch of the Government. And those suggestions, considerations, discussions are part of what the Court described as the germination process to produce a final proposal.

Our position is that in this case only the President, only the President has the authority to make a final proposal. And, in fact, he will, does, can revise, change the budget proposals as they come to him.

QUESTION: Of course, I must confess for me the word "proposal" wreaks of something that is not final.

QUESTION: Well, is it final as it goes up to the Congress from the President?

MR. HARMON: In that sense, the proposal in that sense, that gives us a good context in which to consider the finality of a proposal. The proposal itself as it goes to the Congress, of course, is not final. Our Constitution, returning to the first principles, does vest in the Congress the power to lay taxes, and appropriate monies.

QUESTION: When does the proposal become final?

MR. HARMON: The proposal becomes final--

QUESTION: I assume you're going to say that Congress acts. It's no longer a proposal then.

MR. HARMON: That is correct, Your Honor. That is not our position. The proposal--

QUESTION: Well, is it your position that you don't need any statements until after you get to Congress?

MR. HARMON: No, it is our position--

QUESTION: Well, when would you be obliged to file the statement?

MR. HARMON: It is our position that we would not be obliged to file a statement.

QUESTION: Ever. Do you mean that nobody will ever have to file a statement?

MR. HARMON: For the budget, right.

QUESTION: That's your position?

MR. HARMON: That's our position. If the budget, for example, appropriates money to build three dams, twelve nuclear power stations, the action would have to be considered -- the action would have to be considered at the time it was taken, the major Federal action to be considered is that underlying decision, that implementation, that spending of the money. At that time, we acknowledge that there might very well be required an environmental impact statement.

QUESTION: Why do you use the word "proposal" at all? According to you, you don't need any impact statements on any proposals. Isn't that your position?

MR. HARMON: No, Your Honor, it is not. The statute states that a proposal for major Federal action, a proposal for rulemaking, for example, that does have a significant impact--

QUESTION: Now, the Department of Interior wants to propose that you build a dam and somebody from Congress suggests that, and eventually it gets to Congress, and Congress adopts it, now all I am asking you is when is that

a proposal and when is it not? On this one item.

MR. HARMON: When the Secretary of Interior proposes, and let's suppose it is a proposal to build a dam, a piece of substantive legislation seeking the authorization to build the dam, that proposal could be a proposal for legislation which would significantly affect the human environment.

QUESTION: When does it need the impact statement?

MR. HARMON: When? When the Secretary of Interior has formulated, has before him a proposal and before he finalizes that proposal there may be at that point the requirement of an environmental impact statement.

QUESTION: What would be required in order to require the impact statement in the Interior Department?

MR. HARMON: That would be a proposal for legislation.

QUESTION: Well, what would make it a proposal?
The word "proposal"?

MR. HARMON: The fact the Secretary of Interior had a final plan before him, a final proposal.

QUESTION: Are all final plans proposals?

MR. HARMON: If they are proposals for legislation, yes, Your Honor.

QUESTION: All final plans for legislation are proposals under this Act?

MR. HARMON: If, in fact, they will be proposed by -- yes, yes, I think that would be my position.

QUESTION: Now I am really confused.

QUESTION: In this particular legislation, a Committee of the Congress, or the Congress as a whole, when any legislative proposal is submitted by any Department can say prepare an impact statement or we aren't going to hold any hearings.

MR. HARMON: Absolutely correct, Your Honor.

QUESTION: They could do that at every stage while they are considering the legislation, couldn't they?

MR. HARMON: That is our position and that goes to the question of the appropriateness of judicial intervention in a process where Congress has before it the means, as it always has, to require the information that it needs to make its decisions. And it also raises the question of whether, in fact, the imposition of an environmental impact statement requirement at this stage might interfere with the ability of Congress to obtain the information, the candid views, the frank opinion of the members of the Executive Branch who are appearing before an Appropriations Subcommittee to respond to questions because not all proposals for Federal funding come from the Executive Branch. In fact, many, many are interjected just at that stage. The Subcommittee, the Appropriations Subcommittee, with the idea, with the constituent with the interest group, with the proposal that appears before the Committee makes that proposal beyond the President's Budget.

And there, again, the Congress will be considering that proposal and will be seeking the advice and opinions of the Executive Branch, the Department of Interior.

QUESTION: Suppose Congress doesn't do it in a particular Act? Would it violate this statute? I didn't say Congress did, I said did the Department of Interior do it? I don't understand it was whether Congress asked for something.

MR. HARMON: No, Your Honor. It is our position that this Act does not apply to the budget process.

QUESTION: At all.

MR. HARMON: That Congress did not intend it to apply.

QUESTION: Well, Congress could have said that, couldn't they, very easily?

MR. HARMON: That is our position exactly.

QUESTION: But Congress didn't say that?

MR. HARMON: Congress didn't say that, and there is nothing in the legislative history to suggest that Congress considered this Act as applying to the budget process. Furthermore, it is inconceivable to imagine that Congress, aware of the significant disruptive impact that such a requirement would have on the Executive and Congressional budget process would have imposed this requirement without discussion. Indeed, Congress, when Congress seeks information from -- seeks

additional budget information, it has traditionally done so by amending the Budget and Accounting Act. It was done in 1950 - - '58, and as recently as '74, after the passage -- after the passage of NEPA. Again, with those amendments, the Congressional Budget Act of 1974, no mention--

QUESTION: In order to maintain your position, you don't have to go so far as to say all budgetary items are immunized, do you?

MR. HARMON: Our position is that all budgetary items, that the budget process is not covered, and is not subject to the environmental impact statement requirements.

Our third argument, the response to a contention by Respondents that there is an alternative basis for upholding the decision of the Court below, the Court of Appeals in this case, they argue that the budget estimates are not only proposals for legislation, but they are also proposals for major federal action. Their argument is that at the time an agency puts together its proposed proposal, its budget estimates, that at that time it is making a decision, a proposal for all the major -- all the actions, all the Federal actions that will be funded by that Appropriation.

The District Court agreed with that proposition. The Court of Appeals rejected it on the grounds it would lead to the absurd result that every budget estimate, every budget estimate would require an environmental impact statement.

QUESTION: In zero budgeting I guess it would.

QUESTION: That approach.

MR. HARMON: Your Honor, it is our submission that the logic of that position is necessarily that, with all the actions that are funded by each budget appropriation that, in fact, it would apply practically to all agencies and all budget proposals.

Mr. Justice, I would like to reserve additional time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Cohen.

ORAL ARGUMENT OF JAMES H. COHEN

ON BEHALF OF RESPONDENTS

MR. COHEN: Mr. Chief Justice, and may it please the Court: The National Environmental Policy Act of 1969 is this Nation's charter for the protection of the environment. The action forcing mechanisms in Section 1022(c) of NEPA are intended to serve an invaluable management tool for the purposes of Agency decision-making. By so doing, NEPA has, over the course of time, actually reduced cost and mitigated adverse affects on the environment by increasing the planning process during the development of Agency proposals for either legislation or proposals for major Federal action.

This case involves the plain language of NEPA, Section 1022(c), and indicates that every Agency is to use all practicable means at the earliest possible stage in decision-making and to the fullest extent possible in incorporating

NEPA into its decision-making process. Under the terms of this Court's opinion in Flint Ridge, the Court has indicated that unless there is an express prohibition or unless compliance is impossible with NEPA, NEPA and the action forcing requirements of the environmental impact statement are intended to apply to that. NEPA's language, the legislative history of the Act, the consistent and contemporaneous interpretations by the Council on Environmental Quality for nearly a decade--

QUESTION: Let me ask you a question, Mr. Cohen, if I may, about the regulations by the CEQ. Congress did not grant the CEQ authority to issue rules and regulations interpreting the substantive provisions of the Act, did it?

MR. COHEN: That is correct, Mr. Justice Rehnquist. Under the terms of NEPA, CEQ was created and under the terms of two separate Executive Orders issued by the President, CEQ was empowered to develop guidelines and ultimately regulations implementing and interpreting NEPA.

QUESTION: But that authority stems from an Executive Order and not from an Act of Congress?

MR. COHEN: That is correct, Your Honor, except insofar as CEQ itself was directed under the terms of NEPA to assist in Agency decision-making in terms of the interpretations for implementing NEPA. I am speaking now in terms of Section 1022(b) of the Act.

QUESTION: Do you think that's the same thing as the authority Congress has conferred on some agencies to issue rules and regulations interpreting the meaning of the legislative section itself?

MR. COHEN: We certainly feel, Your Honor, that the ability by CEQ to prepare these guidelines and regulations has at least the same authority as those which would emanate from the Congress. CEQ was created under NEPA. It implemented regulations through two separate Executive Orders and perhaps more importantly this Court has given deference to agency regulations, including the Council on Environmental Quality.

QUESTION: You are relying on an Executive Order, yet the Executive Branch is here arguing against you.

MR. COHEN: That is correct, Your Honor, insofar as the authority for CEQ to actually interpret the Act, that is correct. We are relying on the Executive Order and, as I indicated, the inherent authority under NEPA itself.

QUESTION: Is CEQ still of the view that you suggest?

MR. COHEN: CEQ is not still of the view, Mr. Justice.

QUESTION: Which view do we give deference to?

MR. COHEN: Well, it is our contention, as I have indicated, Your Honor, that the deference ought to be accorded to 8 years of consistent and contemporaneous interpretation--

QUESTION: So if this suit had come up 10 years from

now you would give deference to the most recent one?

MR. COHEN: We are concerned, as we have indicated, Your Honor, that the interpretations are without any reasonable basis insofar as under the new interpretation they provide an express exclusion for budget requests from the definition of legislation. Now, under the previous three sets of guidelines from the Council on Environmental Quality, the definition of legislation was not provided. In point of fact, there was a definition of actions which incorporated explicitly the terms of budget requests, including appropriations requests. And we believe that this consistent interpretation, particularly in view of the General Electric Case which Mr. Justice Rehnquist wrote, indicate that there is no new development, that there is no new source of--

QUESTION: Is it correct or not that CEQ now is before this Court, through the United States, indicating that these requests should not be within the reach of NEPA?

MR. COHEN: I believe CEQ has indicated in its regulations themselves that it felt that the budget process--

QUESTION: Which view is essentially being represented here by the United States?

MR. COHEN: I believe that is correct, Your Honor.

The critical importance of the budget process itself in Federal agency decision-making, we feel ought not to be underestimated. The legislative history of the budget process

indicates quite clearly, we believe, that the action-forcing mechanism of budget allocations and resource decisions at the agency level which go on for nearly 10 months represent a significant stage in agency decision-making. In point of fact, the legislative history has indicated that the budget process represents the judgment book by which agencies live and by which agencies die. And feel that under those circumstances the critical process whereby a decision comes from the agency in the form of a proposal to OMB and ultimately for legislation or major Federal action to the Congress represents an appropriate stage under the terms of Kleppe where the proposal has reached a stage of sufficient maturity and sufficient definiteness to be accorded the weight that it should be accorded in the form of an EIS.

Q And what about OMB's proposals to the President or recommendations?

MR. COHEN: Well, under the terms of the Budget and Accounting Act, Your Honor, you will recall that the President--

QUESTION: Thank you.

MR. COHEN: Excuse me, Your Honor.

QUESTION: I'm sure I don't recall.

MR. COHEN: The President transmits the budget to the Congress whereas under Section 206 -- 201, rather, of the Act, the agency head is required to prepare the budget. And this preparation goes on for some 10 months. And we

believe that by the time it has reached the stage where it is forwarded to OMB--

QUESTION: I understand that, but what is the next step after that?

MR. COHEN: After it goes through OMB, Your Honor, it then is transmitted to the President--

QUESTION: What about that stage? Because a lot of changes go on in OMB.

MR. COHEN: That is correct.

QUESTION: Do you think another round of statements?

MR. COHEN: We certainly do not, Your Honor. We feel there is one environmental impact statement is all that needs to be required. It needs to be required.

QUESTION: Well, what if OMB just cancels out a proposal or decides to shut down an existing program?

MR. COHEN: Indeed, that represents the particular instance where an environmental impact statement would be most needed and most valuable because it would serve--

QUESTION: I thought you said you didn't need a statement supporting an OMB recommendation to the President.

MR. COHEN: That is correct, Your Honor. The EIS would be prepared by the agency--

QUESTION: Well, I know the agency has prepared one -- let's assume the agency has prepared one and it wants to have a new program, or it wants to continue an existing program,

and the OMB disagrees with it on both counts. It won't start the new program and it won't continue the old one, does that decision require--

MR. COHEN: We would submit that it does not, Your Honor. The EIS has served its purpose of assisting in identifying and considering environmental consequences by the time the forwarding agency which has prepared the budget forwards its submission to OMB.

QUESTION: You don't argue that an agency that just wants the same money that it did last year for the same program needs to prepare an environmental impact statement, do you?

MR. COHEN: I'm sorry, Your Honor.

QUESTION: Say the Department of Interior has program X that has been going on for 20 years and every year it is taking Y dollars and, again, it submits its budget proposal to OMB, Program X for Y dollars, does that require an EIS?

MR. COHEN: We are supporting the proposition articulated by the Court of Appeals that only in those instances where the agency has actually undergone a careful review of its program and has determined--

QUESTION: All right. So your answer is no to my question?

MR. COHEN: That is correct, Your Honor.

QUESTION: And then it goes to OMB and OMB says

we look at this X Program for Y dollars has gone on long enough, no more X Program for Y dollars. Now, there is a -- that's quite a change and it might be eliminating a duck pond somewhere.

MR. COHEN: It may be, Your Honor, and we would submit that so long as the environmental considerations have been identified and analyzed--

QUESTION: They have never been. The agency has never submitted an EIS on this program. It has been going on for 20 years.

MR. COHEN: If the program commitment of resources to the program represents a programmatic course of action following a review, then we would submit that the agency forwarding its budget request would have to prepare an EIS.

QUESTION: I understand that, but in my example it did not have to submit one, but the OMB cut the program out, on its own. The agency didn't propose it. OMB just decided that this program has gone on long enough. And you say you still wouldn't need an EIS there?

QUESTION: Suppose the program that we are talking about that Mr. Justice White has postulated is a program of \$200 million for clean air, and the OMB just cuts it out.

QUESTION: Isn't this the question I asked opposing counsel?

MR. COHEN: Your Honor, the question which Mr. Justice

Blackmun addressed to opposing counsel, as I understood it, was it involved a situation where the forwarding agency had determined that it wished to dramatically reduce or to eliminate a program from its program commitments. I did not understand the hypothetical which you presented to be one where the OMB itself--

QUESTION: Does it make a difference?

MR. COHEN: We would submit it is -- it does make a difference insofar as the EIS serves in the agency decision-making process at the budget forwarding level. Now, if the Court is suggesting that there may be a proposal which is made by the Office of Management and Budget in the form of a dramatic cutback of a program, of course, we would suggest that that may be the time when there is a proposal. We have indicated in our pleadings before the District Court, as well as in the Court of Appeals, that a proposal is made by the time it is -- the budget request is forwarded to the President of the United States. We believe that the EIS needs to be prepared at the time it leaves the forwarding agency and before it gets to OMB.

QUESTION: What you're saying then is that -- you really said it two ways, it's a proposal when it goes from OMB to the President but it's also a proposal when it goes from the agency to the OMB in the first instance.

MR. COHEN: We would suggest, Your Honor, that it is

a proposal by the time it leaves the agency and goes to OMB.

QUESTION: Mr. Cohen, supposing that the National Wildlife and Refuge Service proposes a 100 percent increase in its budget to OMB so they can acquire a great deal of new land for wildlife refuges, under your view, I take it, it ought to submit an EIS in connection with that. And then OMB says, "To the contrary, we are going to dissolve NWRS and sell it off to private investors to build condominiums", now, do you need two EISs, one from the agency and one from OMB in that case?

MR. COHEN: We would submit that only one EIS needs to be prepared.

QUESTION: Where?

MR. COHEN: From the agency.

QUESTION: The President might be too busy to know what the agency proposed. Then he is going to perhaps be victimized and the environment victimized by the OMB.

MR. COHEN: We would submit, Your Honor, that the preparation of an EIS, even if it were not publicly disclosed and not made available to comment by the public until the budget request was submitted to the Congress, at very least OMB and the President of the United States would have the benefit of reviewing and determining the environmental consequences--

QUESTION: You don't really think the President going

through budgets which are like several New York telephone books is going to be able to look at the impact statements on very many of those programs?

MR. COHEN: We would assume, Your Honor, in a very limited number of instances where an EIS would need to be prepared under the articulation of the Court of Appeals opinion, that in those few instances, the President and his staff would be available to review significant environmental consequences of a considered programatic review which ushers in a programmatic course of action.

QUESTION: Mr. Cohen, is there anything to stop the President from asking for it, assuming that none -- couldn't he ask for an EIS?

MR. COHEN: I believe--

QUESTION: You believe?

MR. COHEN: We believe the President certainly could ask for an EIS.

QUESTION: You believe? Do you have doubt that he can ask for it?

MR. COHEN: We have no doubt, Your Honor.

QUESTION: All right. And it's the same thing, Congress could ask for it?

MR. COHEN: That is correct, Your Honor. And we believe--

QUESTION: Well, doesn't that solve your problem?

MR. COHEN: It doesn't solve the problem, Your Honor.

QUESTION: If the President wants it, he can get it.

MR. COHEN: That is correct.

QUESTION: Your point is the one that is required.

MR. COHEN: Our point is that one is required under the terms of NEPA itself but, more importantly, that the primary purpose of an environmental impact statement is to serve the agency which is making a proposal for legislation or making a proposal maybe for a Federal action, and that the EIS needs to be prepared not as a post hoc justification for an allocation on the part of an agency for a particular program but, rather, in order to analyze the potential consequences of a proposal. In fact, the terms of NEPA itself speak as if a proposal might be implemented. Section 1022(c) says that should a proposal be implemented indicating that not all of the final decisions will have been made regarding budget allocation and regarding commitments to funding for a given program.

Under the terms of NEPA we would suggest that if the Congress had intended to exclude such a major function of the Governmental process from the terms of NEPA, it would have done so expressly. Indeed, the Freedom of Information Act passed approximately four years prior to NEPA did expressly exclude various forms of documents from public disclosure and Congress could well have said, in passing NEPA, that it intended

to exclude budget requests from proposals for legislation or proposals for major Federal action. It did not do so. Those Federal courts which have interpreted NEPA and the budget process have also suggested and held that EISs need to be prepared for budget requests. In addition, CEQ has consistently stated, as we indicated, that budget requests for appropriations need to be accompanied by environmental impact statements, even implementing agency regulations have indicated that NEPA covers budget requests, although none have ever complied.

The proposal for legislation in this case, we believe, clearly covers a budget request and that the term "legislation" is intended to embrace an appropriation. In addition, the term "major Federal action", we believe, embraces the term "budget request" or a "request for appropriations". In many instances, discreet Federal projects have been accorded environmental impact statements coverage. And we believe that an instance where a discreet Federal project is subject to the terms of the Act that certainly a decision by the agency to commit major resources represents the first and critical significant decision at the agency level which would warrant an EIS for that proposal.

The Government has indicated that there is a conflict between the terms of the Budget and Accounting Act of 1921 and the terms of NEPA. And we would submit that that, in fact,

is not the case. There is no conflict. There is no conflict and under the terms of the Act itself confidentiality is not provided. An environmental impact statement is an independently prepared document, one which can serve the purpose of agency decision-making and which would not require the disclosure of actual budget material. In addition, any documents which are made available for the public can be made available in accordance with the Freedom of Information Act. And we would submit that in this circumstance where there are a limited number of instances involving a limited number of programs that the budget request process is covered by NEPA.

Thank you, Your Honor.

QUESTION: Do you have anything further, Mr. Harmon?

ORAL ARGUMENT OF JOHN M. HARMON

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. HARMON: Mr. Chief Justice, in response to counsel's point, attempt to describe the consistent interpretation of the NEPA requirement, I would simply like to point out that the Congress which passed NEPA has for 10 years received and acted upon budget proposals from the President without the preparation of environmental impact statements by the agencies making their individual proposals. I make this point simply to underline that this illustrates a common understanding of both Congress and the Executive Branch as to the inapplicability of NEPA to the budget process.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you very much,
gentlemen. This case is submitted.

(Whereupon, at 2:39 p.m., the case in the above-
entitled matter was submitted.)

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