

In the

ORIGINAL

Supreme Court of the United States

CASPAR W. WEINBERGER)	
SECRETARY OF DEFENSE, ET AL.,)	
)	
v.)	NO. 80-1990
)	
CARLOS ROMERO-BARCELO, ET AL.)	

Washington, D. C.

February 23, 1982

Pages 1 thru 54

ALDERSON  REPORTING

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CASPAR W. WEINBERGER, :
SECRETARY OF DEFENSE, ET AL., :
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Petitioners, :
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v. : No. 80-1990
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CARLOS ROMERO-BARCELO, ET AL. :
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- - - - - :

Washington, D. C.
Tuesday, February 23, 1982

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:05 o'clock a.m.

APPEARANCES:
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D.C.; on behalf of Petitioners.
JOHN A. HODGES, ESQ., Peabody, Rivlin, Lambert &
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D.C; on behalf of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Weinberger against Romero-Barcelo. Mrs. Stillman, you may proceed whenever you are ready.

ORAL ARGUMENT OF ELINOR H. STILLMAN

ON BEHALF OF THE PETITIONERS

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

This case is here on Writ of Certiorari to the United States Court of Appeals for the First Circuit. Petitioners seeking reversal of the Court of Appeals judgment are the Secretary of Defense and officers of the Navy and the Marine Corps.

This action, which was brought by the Governor of Puerto Rico and others to enjoin the Navy's use of Vieques Island for weapons training, raised claims under a number of different statutes. But the issue for review in this Court is simply whether a district court, upon finding a violation of Section 301(a) of the Clean Water Act respecting discharges of ordnances, is required, regardless of circumstances, to enter an order directing the immediate cessation of the activity producing the discharge.

The court of appeals read the Act as imposing

1 such a constraint on the court's remedial discretion,
2 and it thus held that the district court lacks
3 discretion to enter a less extreme order requiring the
4 Navy promptly to seek a National Pollutant Discharge
5 Elimination System Permit, commonly termed an NPDES
6 permit, for the intermittent discharge of pollutants
7 into the waters of Vieques Island that are part of the
8 principal Naval Weapons Training area for the Atlantic
9 fleet.

10 Petitioners submit that neither the language
11 nor the purposes of this Act require this constraint on
12 a district court's traditional exercise of discretion in
13 shaping equitable relief. Indeed, the court of appeals'
14 holding represents an unprecedented construction of the
15 Clean Water Act, requiring an all-or-nothing approach to
16 enforcement which would preclude any kind of credible
17 enforcement program by EPA or by authorized state
18 agencies.

19 Before discussing these larger implications of
20 the court of appeals' holding, however, I would first
21 like briefly to summarize some of the factual findings
22 which led the district court to conclude that the order
23 it entered adequately vindicated the interests of the
24 Clean Water Act.

25 The eastern half of Vieques Island is part of

1 what is known as the inner range of the Atlantic Fleet
2 Weapons Training Facility headquartered at Roosevelt
3 Roads Naval Station on the main island of Puerto Rico.
4 Ships, planes and Marines landing in amphibious
5 maneuvers fire at air-to-ground targets, ship-to-shore
6 targets, and artillery targets located in a narrow zone
7 on the eastern end of Vieques. Both inert and live
8 ordnance is used.

9 The exercises which take place some 200 days a
10 year are coordinated from Roosevelt Roads and from an
11 observation point on Vieques. They are essential to the
12 maintenance of operational qualification standards for
13 the Atlantic Fleet. Vieques is the only location
14 presently available in which the fleet can engage in a
15 full range of exercises simulating the conditions of
16 actual combat.

17 In the course of these exercises, some of the
18 ordnance misses the land-base targets and drops into
19 waters within the three mile limit of Vieques. Under
20 terms of the Clean Water Act, this is a discharge of a
21 pollutant from a point source, requiring an NPDES
22 permit. This is so because the definition of pollutants
23 includes munitions, and a point source is any discrete
24 conveyance including vessels.

25 EPA has never developed any effluent

1 limitation guidelines for a point source class or
2 category of military forces conducting weapons
3 exercises. Hence, the Navy committed no violation of
4 any existing technology-based effluent limitation under
5 the Act. And the district court, following the trial of
6 some 50 days, determined that the Navy's activities did
7 not violate any of Puerto Rico's water quality laws,
8 that no credible evidence established that the
9 discharges had any measurable deleterious effect on the
10 Vieques waters, and indeed, that there was no
11 appreciable harm to the Vieques ecology.

12 In fact, the court concluded that the Navy's
13 presence on Vieques had, on the whole, worked to the
14 benefit rather than the detriment of the environment
15 there. And this was so because the Navy had to place
16 restrictions on a large area around the area in which
17 the weapons training is carried on, and these
18 restrictions limited the amount of human trespassing
19 that had caused problems for some of the area -- would
20 have caused problems absent these restrictions.

21 In sum, on the record there appeared to be no
22 violation of any water quality standards or any
23 technology-based standards, and the Navy's lack of an
24 NPDES permit was the only apparent violation of the
25 Clean Water Act.

1 QUESTION: Mrs. Stillman, I take it that the
2 EPA was prepared to issue a permit, but was unable to do
3 so because Puerto Rico had refused to certify compliance
4 with local water quality standards. Is there no way
5 that the Navy can challenge Puerto Rico's refusal, or is
6 that going to be a permanent -- ?

7 MRS. STILLMAN: The Navy can challenge the
8 refusal. I must say that that is still in litigation at
9 the administrative stage in Puerto Rico. There is still
10 a motion for reconsideration pending, at least the last
11 time I checked. And we understand that the
12 Environmental Quality Board there will probably issue a
13 decision on that February 26.

14 QUESTION: And if that happened, it would
15 solve the problem.

16 MRS. STILLMAN: Well, if they grant the
17 certification I think the permit probably would issue
18 then because EPA has developed a draft permit under
19 which, I might add, the Navy would be required to
20 monitor water quality and make reports.

21 QUESTION: And also, I understand the
22 President could give an exemption from the permit
23 requirement. Is that right?

24 MRS. STILLMAN: Yes, he could. I was going to
25 get to this later in my talk, but since you bring it up

1 I'll address it now.

2 Section 313 of the Act provides for a
3 presidential exemption. There are two kinds of
4 exemptions. There is one exemption for an effluent
5 source of any agency, Executive Branch agency or
6 department, for one year. It's an exemption from
7 Sections 306 and 307 of the Act, if the President finds
8 it in the paramount interest of the United States to do
9 so.

10 There's a second exemption provision which may
11 be given for three years. It has to be done by
12 regulation. And this can be for weapons of the military
13 forces and related military equipment.

14 Now, respondents have suggested, and
15 certainly, the court of appeals seemed to rely on this
16 also, that the existence of this exemption provision
17 somehow meant that the district court was denied
18 discretion to do what it did in the case here. That
19 this exemption provision must be the only way that you
20 can ever allow, even for a limited time, any carrying
21 out of military exercises without a permit.

22 We strongly believe this is wrong. For one
23 thing, I think it's got to be understood that the
24 exemption is not the equivalent of what the district
25 court did here. Under the three-year exemption, the

1 Navy would not be required to do what it will be
2 required to do under this permit.

3 Under the permit, if it issues, the Navy will
4 be required to monitor, I believe, nine different, they
5 call them parameters, but it's monitoring for things
6 like iron and acidity and so on.

7 QUESTION: Mrs. Stillman, couldn't the
8 President take care of that? Couldn't he say to the
9 Navy, we would like you to follow these restrictions?
10 He would have the authority, I suppose.

11 MRS. STILLMAN: He could, but under the
12 statute we think, that --

13 QUESTION: Well, he presumably wants to obey
14 the law, I suppose.

15 MRS. STILLMAN: But he could issue the
16 exemption without disobeying the law.

17 QUESTION: He would have the power to grant a
18 total exemption, but do you think it's correct to assume
19 that he would never exercise his discretion in a sort of
20 a discretionary way and say well, I'll grant the
21 exemption but only with these strings attached.

22 MRS. STILLMAN: No, I don't suggest there are
23 limits on his discretion. We're simply saying that we
24 think the best accommodation under the best way of
25 accommodating the interests of the Clean Water Act here

1 is to find a solution where the court doesn't have to
2 choose between on the one hand saying that national
3 defense efforts will be held up, and on the other hand
4 saying get an exemption, which may not require you to do
5 anything.

6 QUESTION: But if you lose in the proceedings
7 going on in Puerto Rico, aren't you going to be
8 confronted with exactly that choice?

9 MRS. STILLMAN: Well, that's right, the Navy
10 would be confronted with that choice, but we think
11 unless --

12 QUESTION: And then what relief should the
13 district court give?

14 MRS. STILLMAN: Excuse me?

15 QUESTION: If that happens, then what relief
16 would be appropriate?

17 MRS. STILLMAN: If -- may I say that one of
18 the factors in deciding whether or not to seek an
19 immediate cessation order on the part of the government
20 is whether you think the applicant seeking the permit
21 will ever be able to comply. If the handwriting is on
22 the wall --

23 QUESTION: The answer would be no, if you lose
24 in Puerto Rico, wouldn't it?

25 MRS. STILLMAN: If we lose. But -- that's

1 right. If you came to some point where it was clear
2 there were no appeal procedures, that they were going to
3 refuse the certification, at that point I think the
4 exemption clearly -- we think that that is what the
5 exemption was created for.

6 These exemptions were not created to be a
7 routine use; that is, the --

8 QUESTION: But you've already told us this is
9 not a routine case, this is a very important military
10 area.

11 MRS. STILLMAN: Well, that's true. But we
12 think that it's better to have water quality standards
13 set by the EPA than by the Office of Management and
14 Budget, the President's Executive Branch. That is, it
15 better serves the purposes of the Act to let the
16 situation be handled under the processes of the Act, if
17 that's possible.

18 QUESTION: But what is the process of the Act
19 if you lose in Puerto Rico? I don't understand your
20 position.

21 If you just can't get a permit, which is
22 certainly conceivable --

23 MRS. STILLMAN: That's right, it's conceivable.

24 QUESTION: -- then your only choice, it seems
25 to me, is either to comply with the statute or to get a

1 presidential exemption.

2 MRS. STILLMAN: Well, that's true at that
3 point, but we are not at that point in the case, and the
4 district court was not at that point when it issued the
5 order here.

6 QUESTION: But you may be there in about three
7 days.

8 MRS. STILLMAN: No, because there --

9 QUESTION: Didn't you say February 26th is the
10 decision date?

11 MRS. STILLMAN: But there are appeal
12 procedures from that. That is not a final order.

13 QUESTION: Mrs. Stillman, then I take it the
14 government does not contest the need to get the permit?

15 MRS. STILLMAN: Does not contest the need to
16 get the permit? Oh, no, no, we did not appeal from the
17 finding of a violation of the Act. That is a technical
18 violation. We did not appeal the court's finding that
19 this was covered by the permit provisions.

20 QUESTION: And if the remedy had comported
21 with what you thought was proper, they just wouldn't
22 have enjoined you from doing it, from continuing with
23 the activity.

24 MRS. STILLMAN: That's right.

25 QUESTION: That is sort of a declaratory

1 judgment.

2 MRS. STILLMAN: Well, there is an order
3 entered. The order says to the Navy, you have to apply
4 for a permit.

5 QUESTION: Yes, but if you applied and you
6 didn't get it, then an injunction would be proper, you
7 think. In this case.

8 MRS. STILLMAN: If it were absolutely clear
9 that no permit -- at the very end where it becomes clear
10 that the denial of certification is going to stick and
11 that there is no further recourse, at that point we
12 might say the injunction is proper. But even there,
13 there might be provision, an equitable provision for
14 reasonable time to get the exemption issued. I don't
15 want to give up on that.

16 QUESTION: I suppose if we took this case
17 under advisement and if the average time of getting an
18 opinion out is 60 days, that the case might be moot by
19 that time.

20 MRS. STILLMAN: I doubt that very much, Your
21 Honor, simply because this opinion that may issue from
22 the Environmental Quality Board on the 26th is not the
23 final word, necessarily. We have various appeal routes
24 that we can take, and so I don't see how the case would
25 be moot at that point.

1 QUESTION: Suppose you get the permit.

2 MRS. STILLMAN: If we get the permit --

3 QUESTION: Would it be moot then? Or is that

4 subject to review, administrative or otherwise?

5 MRS. STILLMAN: There are review provisions

6 for attacking the permit. I think once we have the

7 permit in its final -- if the permit is only in draft

8 form -- now, once we have the permit in its final,

9 certainly the case would probably be moot at that point.

10 QUESTION: Probably would be. Will we know

11 this by the 26th?

12 MRS. STILLMAN: We would advise -- oh, well,

13 we wouldn't have the permit by the 26th. There are a

14 lot more procedures that have to be gone through.

15 QUESTION: Even if the Board says yes, you may

16 have it, how long is it going to take you to get it?

17 MRS. STILLMAN: Your Honor, I don't know

18 exactly how long these procedures take.

19 QUESTION: Should we decide the case, if the

20 Board says yes, you may have a permit but it will take

21 us some time to get it out?

22 MRS. STILLMAN: I am advised that it might

23 take 90 days to get the final permit, even after the

24 certification is issued.

25 QUESTION: Is the certification appealable by,

1 say, the Governor who is opposing the whole thing?

2 MRS. STILLMAN: I suppose the Governor could
3 object to -- I don't think it's a case in which only one
4 side can take an appeal.

5 I should say that the Environmental Quality
6 Board is part of the Governor's office. I was just
7 reminded. However, it may be one of those agencies like
8 the National Labor Relations Board -- it may be a split
9 agency where there would be someone who could take an
10 appeal.

11 QUESTION: This whole thing has been going on
12 for about 20 years, hasn't it?

13 MRS. STILLMAN: Excuse me?

14 QUESTION: This whole problem has been going
15 on for about 20 years, trying to get the Navy off of
16 there.

17 MRS. STILLMAN: It has a long history, Your
18 Honor.

19 QUESTION: I don't know exactly how many years.

20 MRS. STILLMAN: Well, the Navy has been there
21 since World War II, and there has been some kind of
22 target practice going on there since I believe at least
23 the late sixties and early seventies, and it started, I
24 think the findings indicated in its present intensity at
25 least, in 1975.

1 And I might say that a witness from EPA who
2 testified in the trial hearing indicated that EPA had
3 never had any requests from the Environmental Quality
4 Board in Puerto Rico to find that the shelling activity
5 was a violation of the Clean Water Act. They had had
6 some notification concerning suits.

7 QUESTION: Well, they couldn't bother with
8 that they were so busy arguing it in the newspapers.

9 MRS. STILLMAN: Well, I don't know about
10 that. I do know that their complaint was something of a
11 shotgun complaint and they did seem to be relying on a
12 number of grounds and the Clean Water Act was only one
13 part of the case, and that is the part that has come up
14 here.

15 QUESTION: Incidentally, Mrs. Stillman, are
16 the exercises now suspended?

17 MRS. STILLMAN: No, they are not. They are
18 not.

19 And I want to make clear that we're concerned
20 about this case not just because of the Navy, although
21 certainly that's a very strong interest here. We're
22 concerned about the workings of the Clean Water Act as a
23 whole because the use of compliance schedules has just
24 been commonplace in this statute.

25 If it were really the case that when EPA

1 wanted to take an enforcement action against a
2 discharger of pollutants who is in violation of 301(a)
3 of the Act, which covers a number of -- you can be in
4 violation in terms of your permit or not have a permit
5 and so on -- . If the question they have to face is
6 either we don't take any action at all or we have -- we
7 go to court, and the only action that can be taken is
8 that they're going to shut down the whole operation, it
9 really would make this Act unworkable, and the Act has
10 never worked that way.

11 This decision of the First Circuit really was
12 quite unprecedented and just simply not consistent with
13 the way the statute has worked.

14 QUESTION: Is there any power under the
15 statute in the EPA to grant any kind of temporary relief
16 pending the final resolution of these questions?

17 MRS. STILLMAN: On the part of EPA
18 administratively?

19 QUESTION: Yes.

20 MRS. STILLMAN: Well, EPA can issue
21 administrative compliance orders -- .

22 QUESTION: A temporary permit or anything of
23 that kind?

24 MRS. STILLMAN: Well, the court, by -- this
25 action was in court, so it's really a question of what

1 the court was going to do here.

2 QUESTION: Right, but I'm asking whether there
3 is administrative relief available as well.

4 MRS. STILLMAN: Well, under Section 309, the
5 Administrator can issue compliance orders, and -- I
6 don't know what you mean by temporary relief. I guess
7 that's what I'm not sure.

8 What we're trying to suggest is that there are
9 a whole range of remedial responses, either
10 administratively or judicially, which can take the form
11 of, for example in some of these consent decrees, having
12 civil penalties for every day that they are not meeting
13 the schedule.

14 But this, of course, comes up in a citizens'
15 suit, and so it is not in the framework of a general
16 enforcement action.

17 QUESTION: Do you think the framework of the
18 whole statute indicates an intention on the part of
19 Congress to take it out of the realm of the courts, if
20 you will, and have these problems solved
21 administratively, in effect?

22 MRS. STILLMAN: Your Honor, do I understand --
23 are you touching on the point that respondents made that
24 somehow the discretion that we want to give the court
25 here is undermining EPA's permit review?

1 QUESTION: Yes, I think that was argued by the
2 respondents.

3 MRS. STILLMAN: Well, I don't think that's
4 happening here. For one thing, when a citizens' suit is
5 filed, EPA gets notice and the Administrator can
6 intervene or file his own suit, or -- and he is free at
7 any time. If the Administrator thought that there was a
8 situation here that demanded emergency action, that
9 demanded immediate cessation remedy, he has emergency
10 powers under Section 504 of the Act to go in and ask the
11 court for that.

12 Evidently, EPA did not think that was the
13 case. And also, I might point out that the order that
14 the court has given here is to invoke the EPA review
15 processes. That is, they ordered the Navy, go get the
16 permit, at which point the Navy has to submit an
17 application to EPA. And EPA has not been left out of
18 this process. It is not cordoned off by what the court
19 did here in any way, and we don't think that it really
20 undermines EPA's participation or EPA's role.

21 I would like to also touch on the reliance
22 that the other side has placed on TVA against Hill and
23 Steelworkers against United States, because they
24 suggested that this is just a case in which we are
25 trying to say pay no attention to what Congress did;

1 Congress did something very unwise here, and do it this
2 way because we think this is a better way of doing it.

3 We think TVA v. Hill was a very different
4 case. In that case, the injunction sought was to enjoin
5 the closing of the gates of Tellico Dam. If, in fact,
6 those gates had been closed, this would have resulted in
7 the destruction of the critical habitat of an endangered
8 species, against the direct prohibition of the statute.
9 And this kind of irreversible and prohibited result was
10 inconsistent with what Congress seemed clearly to
11 require.

12 In the Steelworkers case there was a very
13 specific remedial directive from Congress -- upon making
14 these factual findings, give the 80-day Taft-Hartley
15 injunction. Now, that is a very different situation
16 from the provision for judicial relief in this case. As
17 I said, there is a provision for immediate cessation
18 orders; that is in Section 504 of the Act. And that is
19 upon certain emergency findings.

20 Now, we don't, of course, suggest that the
21 fact that that remedy is specified in Section 504 means
22 it would be unavailable in federal enforcement suits
23 under 309 or in citizens' suits under 505. We only
24 suggest that since Congress didn't even mention it in
25 these other two statutes, it can't have meant that that

1 was the only remedy that could be given in those
2 statutes.

3 I also want to make it clear that the kind of
4 discretion that we are talking about here is a
5 discretion to time final compliance. We are not
6 suggesting that there's any discretion to vary standards
7 of the Act. In other words, the court would not be free
8 to say well, this discharger is not harming water
9 quality standards; therefore, he is not going to have to
10 comply with the technology-based effluent limitation.
11 The court can't do that.

12 The court also couldn't say well, there's a
13 discharge here but it's quite harmless and it looks to
14 us pretty unimportant, and so therefore, we're going to
15 excuse him from compliance with the permit.

16 QUESTION: Let me interrupt if I may. You say
17 it's just a question of timing then, when they must stop
18 completely, assuming you don't get --

19 MRS. STILLMAN: That's right.

20 QUESTION: Why is it any different to stop six
21 months from now instead of now? I don't understand what
22 -- it's not as though you had to build a facility to get
23 in compliance; just get them to stop shooting off the
24 artillery.

25 MRS. STILLMAN: Well, the timing in this case

1 -- if they get this permit, the draft permit, they won't
2 have to stop.

3 QUESTION: No, but it seems to me you are
4 conceding that if you lose in the other proceeding, then
5 relief would be appropriate. And then would relief
6 forthwith be appropriate?

7 MRS. STILLMAN: Well, I was trying to suggest
8 that it might be open to a court of equity to provide
9 time to get --

10 QUESTION: Time to do what?

11 MRS. STILLMAN: Get the exemption.

12 QUESTION: You mean from the President? That
13 the Navy is asking time to appeal to the
14 Commander-in-Chief?

15 MRS. STILLMAN: Well, --

16 QUESTION: I mean, are you serious about that
17 argument? If it is determined that there is no way to
18 comply with the statute, is there any reason why an
19 injunction should not then issue forthwith? If there is
20 a reason, what is it?

21 MRS. STILLMAN: I see the logic of your
22 position, Your Honor. I'm reluctant to make these kinds
23 of concessions, but no, I consider if --

24 QUESTION: All right, well, I won't ask you
25 to. May I ask you this question.

1 MRS. STILLMAN: I understand that it certainly
2 makes sense to say if it's clear that a discharger
3 cannot comply with the Act ever, that probably the
4 rationale for certainly compliance schedules don't make
5 too much sense.

6 However, I should say --

7 QUESTION: As I understand the rationale of
8 the compliance schedule problem it is that the entity
9 just needs time to build the appropriate facility or
10 something. But that's not involved here. You just
11 either are going to continue the activity or discontinue
12 it, one of the two.

13 MRS. STILLMAN: While we are seeking to comply
14 with the Act. It takes a while to go through the permit
15 process. We think the principle should operate in both
16 cases.

17 I might say also on the other point, that
18 sometimes a discharger will say to EPA, we've decided,
19 we understand that we are never going to be able to meet
20 these effluent limitations. And in that case, they
21 announce an intent to cease their activity. But even in
22 that case, sometimes schedules are worked out --

23 QUESTION: Well, sure, because there's a big
24 economic investment that has to be taken care of. I can
25 understand that. But I don't quite see how that applies

1 to this case, particularly when you've got such a clear
2 remedy available.

3 MRS. STILLMAN: Well, Your Honor, are you
4 suggesting that this was an abuse of discretion or that
5 there is no discretion? Because I think the question of
6 the exercise of discretion is not really up here.
7 What's up here is what the First Circuit said, which is
8 the court simply has no discretion in these cases, and
9 that's really what we are --

10 QUESTION: Well, is there a case -- do you
11 have any support -- I know you rely on the Hecht case --
12 but any case in which a government agency has been
13 violating the law and it is within its power to cease
14 the violatin forthwith, and the court has said well, go
15 ahead and continue violating?

16 MRS. STILLMAN: Well, I'm not sure there's any
17 case that has quite the facts of this where ceasing the
18 violation forthwith is ceasing an activity which would
19 be permitted under the permit that it's seeking.

20 QUESTION: But it's illegal as of today.

21 QUESTION: Well, what -- could the court have
22 said you are enjoined until you get the permit?
23 Wouldn't that sort of urge you to get it a little faster?

24 MRS. STILLMAN: Well, it might, but we are
25 only suggesting that the court didn't have to do that.

1 QUESTION: Well, wouldn't the court -- doesn't
2 the court have that authority?

3 MRS. STILLMAN: We say the court has --
4 certainly, the court has equitable discretion. And even
5 a court of equity exercising the kind of discretion that
6 we're saying it has here, of course, has discretion to
7 enter an injunction upon a proper balance of factors.
8 But as we understand the question that we are asking
9 this Court to resolve, it is does the court have
10 discretion to enter this kind of order upon a proper
11 showing of factors. And that is what the First Circuit
12 said, is they don't. Once there's a violation, once
13 there is a literal violation of the Act, that's it, and
14 you have to have an immediate cessation of the discharge.

15 QUESTION: Well, what would happen under this
16 if this case had not come up here, and 20 years from now
17 they have never gotten a permit?

18 MRS. STILLMAN: Well, I know the mills grind
19 slowly, but I expect that there will be a final answer
20 before 20 years are out.

21 QUESTION: Well, it's sort of repealing the
22 law, isn't it?

23 MRS. STILLMAN: No, we don't believe so. We
24 think that the Navy has been ordered to apply for this
25 permit, it's going through the process in good faith,

1 it's doing the best it can to get the permit.

2 What slowed it up, quite frankly, is the
3 refusal of the Environmental Quality Board of Puerto
4 Rico to certify, even though the district court and the
5 court of appeals both looking at this discharge didn't
6 think it was covered -- or violated Puerto Rico water
7 quality laws.

8 QUESTION: If we read the court of appeals'
9 opinion literally, I take it you're suggesting that that
10 court has narrowed the traditional jurisdiction of a
11 court of equity.

12 MRS. STILLMAN: That's correct.

13 QUESTION: Now, could the Congress -- I don't
14 know that we need to decide it, but could Congress alter
15 the scope of equity jurisdiction which is vested in
16 federal courts?

17 MRS. STILLMAN: Congress may. We don't
18 believe it did so in this case, Your Honor. I would
19 like to reserve the balance of my time, if I could.

20 CHIEF JUSTICE BURGER: Mr. Hodges?

21 ORAL ARGUMENT OF JOHN A. HODGES, ESQ.

22 ON BEHALF OF THE RESPONDENTS

23 MR. HODGES: Mr. Chief Justice, and may it
24 please the Court:

25 This case presents a simple and stark fact.

1 The district judge, Judge Torruella, made a
2 determination that Congress determined should be made by
3 the President of the United States.

4 QUESTION: Mr. Hodges, before you get too far,
5 I would just like to call your attention to our Rule 34
6 with respect to a summary, 34(1)(h). Your summary is
7 nine lines long and covers one paragraph. It doesn't
8 appear to me that that is a very adequate summary. I
9 just call your attention to that for future reference.

10 MR. HODGES: Your Honor, I appreciate that.
11 We do feel that this case does present a simple question.

12 QUESTION: Well, that's just a conclusory
13 statement in your summary. And if that's all you needed
14 to say, you didn't need to file the rest of your brief.

15 MR. HODGES: Your Honor, we believe that this
16 case presents an overriding consideration of the proper
17 allocation of functions among the three branches of the
18 government. If ever there was a comprehensive statute,
19 it is the federal Water Pollution Control Act. In fact,
20 this Court pounded that point home again and again in
21 the City of Milwaukee v. Illinois.

22 Indeed, Congress addressed and resolve the
23 very question that is at issue here. It laid down an
24 explicit requirement that prohibited federal facilities
25 from discharging munitions into the navigable waters of

1 the United States without a permit.

2 The permit is, indeed, the core of this Act.
3 It defines and facilitates both compliance and
4 enforcement. And the legislative history of this Act
5 indicates --

6 QUESTION: Mr. Hodges, what is the language of
7 the Act you rely on to cover discharge of munitions?

8 MR. HODGES: Your Honor, Section 30 -- a
9 combination of Section 301(a) of the Act which states
10 that except as in compliance with, among other things,
11 Section 402 of the Act, all discharges are prohibited.
12 I then tie that into Section 313(a) of the Act, which
13 provides that the federal facilities shall comply with
14 the requirements of the Act. And then I tie into the
15 definitions section of the Act, which defines pollutants
16 as including munitions.

17 QUESTION: If I hit a golf ball into the
18 ocean, am I polluting it?

19 MR. HODGES: Your Honor, that -- it is quite
20 possible that you might be. That case is not this case.

21 QUESTION: Do you think a federal judge can't
22 exercise any discretion in distinguishing between a golf
23 ball or an old sweater that gets blown off the deck of a
24 fishing vessel or something, and some other genuine
25 pollutant?

1 MR. HODGES: Your Honor, I think that there
2 may be other cases. Congress has not indicated that a
3 court would have that kind of discretion. I would say,
4 however, Your Honor, that in this particular case,
5 Congress has specifically identified munitions to fall
6 within this prohibition. It has addressed this question
7 and has resolved it.

8 Other questions could come up -- shooting a
9 duck, for example. I know that's been raised by the
10 government. Some day we may end up with a duck case,
11 but the duck case doesn't decide that case here.

12 QUESTION: Do you think equity jurisdiction in
13 the federal district judge today is different from what
14 it was in 1787 in terms of traditional discretion?

15 MR. HODGES: Your Honor, in regard to that I
16 would like to Your Honor's decision, this Court's
17 decision and Your Honor's opinion in TVA v. Hill, which
18 indeed, this Court has applied in the City of Milwaukee
19 v. Illinois case in which it stated that the concepts of
20 equity jurisprudence only go so far. And once a court
21 is facing a statutory violation, and once Congress has
22 spoken and has said what it wants done, and if the
23 statute is not unconstitutional, and there's no question
24 about that here, then should enforcement be sought and
25 liability be shown, enforcement should be given by the

1 court.

2 QUESTION: And you think this statute is as
3 categorical as the three statutes involved in TVA
4 against Hill.

5 MR. HODGES: Absolutely, Your Honor. In fact,
6 I think there is no distinction between thou shalt not
7 kill this three-inch fish, and thou shalt not pollute
8 without a permit.

9 QUESTION: Why go to a court?

10 MR. HODGES: Your Honor, we --

11 QUESTION: You don't want the court to be a
12 rubber stamp, do you?

13 MR. HODGES: Your Honor, the reason we went to
14 court was because of the fact --

15 QUESTION: Why doesn't the statute require you
16 to go to court?

17 MR. HODGES: Your Honor, Section 505 of this
18 statute provides for a citizens' suit where a federal
19 facility or other person is violating the Act, and that
20 is what happened in this case.

21 QUESTION: Well, all you want the court to do
22 is to grant you an injunction.

23 MR. HODGES: That is correct, Your Honor.

24 QUESTION: And it can't do anything else.

25 MR. HODGES: Your Honor, again, I would like

1 to point out the distinction between this case and all
2 other cases that may arise under this Act. What we are
3 trying to do --

4 QUESTION: But am I right that the only action
5 the court can take is to grant an injunction?

6 MR. HODGES: Your Honor, what we are asking is
7 an affirmance of what the court of appeals did, which is
8 that forthwith, the district court should take all steps
9 to assure that no further illegal discharges of
10 munitions are taking place until the permit is obtained
11 or a presidential exemption is --

12 QUESTION: Is there any way to do that without
13 an injunction?

14 MR. HODGES: Yes, Your Honor, if the Navy --

15 QUESTION: How?

16 MR. HODGES: If the Navy would halt its --

17 QUESTION: No. I mean how could the court do
18 it outside of giving an injunction?

19 MR. HODGES: The court --

20 QUESTION: Why don't you admit that you want
21 an injunction or nothing?

22 MR. HODGES: Your Honor, that is what we
23 want. What I'm trying to do here is --

24 QUESTION: I want to know what other statute
25 can you point to me that says that the only thing the

1 court can do is to put you in jail?

2 MR. HODGES: Well, Your Honor, this would not
3 be going to jail. I would like to --

4 QUESTION: What statute says the only thing
5 the court can do is issue an injunction?

6 MR. HODGES: Your Honor, in this --

7 QUESTION: Won't you agree there's no such
8 statute?

9 MR. HODGES: This raises a very good point,
10 because --

11 QUESTION: Wouldn't you agree there's no such
12 statute?

13 MR. HODGES: Your Honor, the traditional test
14 under --

15 QUESTION: You don't have to agree.

16 MR. HODGES: Your Honor, the traditional test
17 -- and we try to point this out -- reconciling the Hecht
18 case, the Rondeau case, and --

19 QUESTION: I read that. The only thing they
20 relied on was Hill.

21 MR. HODGES: Your Honor, I think the point
22 here is the fact that we have prohibitions. We have a
23 Congress that has addressed the particular question
24 involved and it has said exactly how it wants it to be
25 handled.

1 Now, it provided a grace period. The federal
2 facility had a choice. It was given by Congress a grace
3 period which expired in 1974, and if it didn't want to
4 have that permit, it could go to the President of the
5 United States. Which then, if that exemption were
6 granted, would have to be reported to Congress.

7 Now, the judges -- the Judicial Branch was the
8 only branch of the three that was left out of the
9 exemption process. If there is any example of expressio
10 unius est exclusio alterius, this is it. The Judiciary
11 was kept out of this process, and for a very good reason.

12 First, Congress said that's the way they
13 wanted to handle it, and secondly, the presidential
14 exemption procedure is inherently a political, technical
15 and indeed, a military determination that a district
16 court really isn't very good at making that kind of
17 determination.

18 But what did the district court do in this
19 case? The Navy, when it was finally sued, went to the
20 district court and induced it to release it for the
21 interim period until it -- while it was attempting to
22 get a permit --

23 QUESTION: May I correct you. Did the Navy go
24 to court or did you take them there?

25 MR. HODGES: We took them to court, and what

1 they sought at that point -- and they succeeded -- was
2 the district judge made a determination at that point --
3 and I quote his words, taking judicial notice of the
4 present state of world affairs and other factors that he
5 considered, that he considered to be reasonable and
6 equitable, and he determined that it would be in the
7 paramount interest of the United States of America, in
8 his determination, that the Navy be allowed to continue
9 to violate the statute while it sought to get that
10 permit.

11 Now, the court of appeals did not do that.
12 The court of appeals did exactly what the various
13 determinations of this Court has been; it applied the
14 statute with an acute view towards the purposes of
15 indeed this statute. It saw that compliance could be
16 immediate; there were no facilities that had to be built
17 or anything else. It focused on these particular
18 requirements, which was 301, the requirement with 402.
19 You need to have that permit before you pollute. He
20 said, if you want to get out of this thing, you go and
21 you see the President.

22 But he did not do what the district court did,
23 and I think that properly held that under those
24 circumstances, was an abuse of discretion.

25 QUESTION: Do you think there is a difference

1 in the power of the court to exercise discretion on a
2 temporary basis as it was attempted here by the district
3 court, and the case of a permanent injunction?

4 MR. HODGES: Your Honor, no. We would say
5 that because -- Congress didn't write the law in that
6 way. What Congress said, as it has been repeatedly
7 construed by this Court, that you must have a permit
8 before you pollute. And because of that fact, it didn't
9 say --

10 QUESTION: Of course, here we're dealing with
11 inherent equity powers of the court. And there is
12 nothing express in the Act saying that courts should not
13 have their inherent powers. Isn't that true?

14 MR. HODGES: Yes, Your Honor, in this
15 particular case I would say that there is. We have a --
16 all that is necessary we believe in the case is the
17 substantive prohibition; the substantive prohibition
18 that comes from Section 301(a) combined with Section
19 402. You need to have that permit before you pollute.
20 And there's a good reason for it -- to allow the expert
21 agencies to take a look at this thing.

22 You do not need --

23 QUESTION: All that says is that, you know,
24 you've made out a substantive violation, but
25 traditionally that is not all that a court of equity

1 requires.

2 MR. HODGES: Your Honor, what the court of
3 equity has required -- again, it depends on what kind of
4 tradition we're speaking of. I would agree with that if
5 we were speaking of a situation where there was no
6 statute that was being violated.

7 But where a statute has been violated, -- and
8 I now refer to the decision in the Rondeau v. Mosinee
9 Paper Corporation, and in the facts of the Hecht case
10 where compliance has been achieved -- there was a
11 violation but there was no further violation -- there
12 was no need to grant an injunction.

13 But where -- and I'm now referring to the
14 Rondeau case -- the traditional test of the granting of
15 injunctive relief is, one, is there a violation, and
16 secondly, is that violation ongoing. And that is
17 precisely the case here. There is no question that the
18 Navy has violated the statute, and there's no question
19 that they continued to violate it at the time the act
20 was done and they are doing it now.

21 Over 1000 bombs were dropped into the coastal
22 waters of Vieques in the first seven months of 1981. If
23 there ever was an ongoing violation, that's it.
24 Congress said you can't do that. Now, you can go to the
25 President, the President can release you, but you can't

1 do it in the way that the Navy has done it.

2 The district courts simply don't have that
3 competence to be able -- to make the determination. The
4 President and the courts are drinking out of different
5 wells, as it were.

6 Think of the way in which a determination is
7 reached by a court and the way it's reached by the
8 President. The President has the panoply of materials,
9 computers, position papers, he can draw on anybody he
10 wants to. He can draw on the Navy, he can draw on the
11 State Department, he can draw on a number of things.
12 The district court is faced with the record; it can't
13 even take judicial notice of the President's state of
14 affairs --

15 QUESTION: Mr. Hodges, does the Act apply with
16 the same force to a private operation, as you say it
17 does to a government operation?

18 MR. HODGES: Yes, Your Honor, it does.
19 Section 313 of the Act ties the federal facilities into
20 the other requirements of the Act, but it does apply to
21 private persons, also.

22 QUESTION: Let me put this case to you. Let's
23 assume, for example, that Pepco were operating a power
24 plant on the Potomac River that served the city of
25 Washington, and that the facts in all other respects

1 were identical to this case. And assume further that
2 the problem cannot be corrected in short of, say, three
3 months. Would the court have no authority to enter
4 anything except an injunction?

5 MR. HODGES: Your Honor, I think that -- let
6 me address it in a couple of ways. First, we are
7 restricted here to a situation of operation without a
8 permit. There are many cases in which someone does have
9 --

10 QUESTION: All right, let's assume all the
11 facts are exactly the same.

12 MR. HODGES: Your Honor, I think that if
13 compliance is physically possible, then yes, --

14 QUESTION: Physically possible within three
15 months.

16 MR. HODGES: If it is physically possible to
17 comply forthwith, compliance should be required.

18 QUESTION: But we are told it's not physically
19 possible to comply in this case forthwith.

20 MR. HODGES: Yes, Your Honor, it is. All they
21 have to do is stop dumping those things in the water.

22 QUESTION: Well, in answer to Justice Powell's
23 hypothetical, are you assuming that compliance on the
24 part of Pepco could be attained simply by shutting down
25 its plant?

1 QUESTION: And shutting down the city?

2 MR. HODGES: That is quite possible, Your
3 Honor. I think we are not dealing here with this case.

4 QUESTION: You think the Act requires that?

5 MR. HODGES: I think the Navy has raised the
6 point where they said look, dams are a point source.
7 There again, I --

8 QUESTION: I am asking you, do you think the
9 Act requires the shutting down of the plant in the
10 example I gave?

11 MR. HODGES: Your Honor, I think that in a
12 case where compliance is physically possible --

13 QUESTION: Could you possibly answer it yes or
14 no?

15 MR. HODGES: If it is physically possible,
16 yes, it would require it. Because --

17 QUESTION: In three months.

18 MR. HODGES: During that interim period if it
19 is physically possible, they would be required --

20 QUESTION: And you define physically possible
21 as shutting down the plant.

22 MR. HODGES: Yes, sir, I would.

23 Let me refer again to the other cases which
24 this Court has decided. In E.I. Dupont versus Train,
25 again, the court was faced with the situation of a new

1 source performance situation. And the court was asked
2 please agree to the variance here, and the court refused
3 to do that. They said look, the question isn't whether
4 or not this is what is generally appropriate. The
5 question is what did Congress intend with respect to
6 these particular questions, these particular provisions.

7 There is no exception -- there is no different
8 timetable than the one that the court -- that Congress
9 established. It provided for a grace period already.
10 That's been slipped. I don't think that we're going to
11 find ourselves in a wholesale situation where everybody
12 in the world is going to be shut down.

13 What is the class of people who are going to
14 be gotten by this? We're going to have the people who
15 slipped that deadline, somehow snuck through and didn't
16 get -- didn't meet the deadline and now have been caught
17 dead to rights. Generally, that is what is going to be
18 happening.

19 And under those circumstances, -- Congress can
20 change this Act if it wishes to do so. And maybe the
21 Navy has made a case that they should be presenting to
22 the Congress. But it is not up to the courts to do
23 this. And indeed, the concept of separation of powers
24 is extremely important, and indeed, I would rely on the
25 fact that in the City of Milwaukee case, this Court

1 applied TVA v. Hill to this particular statute, saying
2 that the usual concepts of separation of powers are too
3 important to turn on the -- what a court may think is
4 equitable. And indeed, it stated that this particular
5 statute should not be construed in general terms of
6 equity jurisprudence when Congress has, indeed,
7 addressed and resolved the question.

8 Again, --

9 QUESTION: But there, though, the people who
10 had originally brought the action and seeking judicial
11 relief were trying to get a different kind of relief
12 than the EPA provided for. And here it seems to me your
13 people are trying to invoke the EPA statute and have the
14 courts just issue an injunction whenever you see fit.

15 MR. HODGES: Well, what we're trying to do is
16 -- indeed, we are trying to do nothing more than what
17 the statute provides. And what the Navy is attempting
18 to do --

19 QUESTION: Well, where does the statute say in
20 so many words that anytime a citizens' suit is brought,
21 the court shall issue an injunction if it finds a
22 substantive violation? Does it say that anywhere?

23 MR. HODGES: Your Honor, --

24 QUESTION: Can you answer it yes or no?

25 MR. HODGES: Yes, it does.

1 QUESTION: Where?

2 MR. HODGES: And I will say that it does that
3 in the substantive prohibitions, and it does --

4 QUESTION: Can you refer me to a section where
5 it says that?

6 MR. HODGES: Yes, sir, I can. Section 301(a)
7 and Section 402, and Section -- again, the requirement
8 that as construed by this Court that you must have a
9 permit prior to this.

10 I'd like to --

11 QUESTION: Is the word "injunction" in any one
12 of those sections?

13 MR. HODGES: Your Honor, there -- injunctions
14 are specified --

15 QUESTION: Is the word "injunction" there.
16 Now, you certainly can answer that yes or no.

17 MR. HODGES: Yes, Your Honor.

18 QUESTION: Is the word "injunction" in any one
19 of those things?

20 MR. HODGES: Not in those substantive
21 sections, no, that is correct.

22 However, Your Honor, we rely on the
23 substantive sections, and I also rely on the fact that
24 in -- that this Congress did not write on a clean slate
25 when it enacted the 1972 statute. It took away a

1 provision from the old statute, which indeed had existed
2 since 1948, that allowed for the formulation of decrees
3 by the court on the basis of equity and other factors.

4 That was gotten rid of by the court in -- by
5 the Congress in 1972 and in its place it substituted an
6 elaborate scheme -- extraordinary, 125 pages in the
7 committee print -- of exactly how Congress wanted to
8 have these matters handled.

9 And under those circumstances, Your Honor, we
10 feel that the thrust of this Act is to, with respect to
11 having a permit, is categorical; it is required where
12 compliance is, indeed, possible.

13 I'd like to briefly address certain questions,
14 if I can, that were posed by the Navy here. The fact
15 that there were no effluent guidelines does not make --
16 does not release the Navy from having to have a permit.
17 Section 402 says that prior to the time that any
18 effluent guidelines or other provisions may have been
19 enacted, a permit -- that the EPA could put in any
20 provision that it wishes to have.

21 Furthermore, the facts -- the Navy says that
22 well, they feel that this would be the best particular
23 accommodation, that they think is necessary. But again,
24 this Court has said not what is appropriate, but what
25 did Congress provide.

1 Let me make one other point. The Navy has
2 said that the interests of Puerto Rico really were
3 protected by the district court. But what this does is
4 to really secondguess the entire process. It
5 secondguesses the administrative process, it
6 secondguesses what the President had done. And with
7 respect to the administrative process, the
8 administrative process that the EPA will go into is more
9 than -- well, are things being banged up out there.

10 They are going to look into monitoring, they
11 are going to look into -- which the Navy has already
12 admitted is one of the criteria that is going to be
13 looked into, or was provided in this particular permit.

14 When the EPA looks at this, it will cover
15 other things like what kind of limitations, when, where,
16 how, and a number of things that a district court simply
17 does not look at. And therefore, the interests of the
18 particular state are, indeed, not protected by what the
19 district court, this district court, did in this
20 particular case.

21 QUESTION: Mr. Hodges, don't you really think
22 that TVA versus Hill can be read as establishing the
23 principle that normally, federal courts will, of course,
24 enforce federal statutes and violations, but -- and as a
25 matter of good jurisprudence, the court would not

1 decline to enforce a clear statutory provision.

2 However, that is not the same thing as saying
3 that the court has no reserved equitable power. I don't
4 think the court in Hill said that we have no power
5 reserved in the federal courts to refuse an injunction
6 within the equitable discretion of the court.

7 MR. HODGES: Your Honor, I think that, again,
8 the thrust of TVA v. Hill was to say what did Congress
9 provide. And it is the job of the courts to do what
10 Congress provided when it's addressed the problem and it
11 has resolved it.

12 And really, I think that is the thrust of that
13 particular case. It's a recognition of the proper roles
14 of the three functions -- proper roles of the three
15 branches of government. And under those circumstances, I
16 think that a traditional balancing of equities would be
17 improper, and that a court should do what the court of
18 appeals did in this case, which is to take a look at the
19 statute, the statutory purposes, and look at this with
20 the statutory purposes clearly in mind and with an acute
21 sense of what Congress driving at in this statute, and
22 then proceed to act.

23 There is, certainly --

24 QUESTION: Or decline to act. Is there not
25 that reserved power? Isn't it a question of how you do

1 it and the things you should properly look at?

2 MR. HODGES: Your Honor, that is correct. But
3 in the context of this case, to decline to act, to
4 enforce, a clear directive of how Congress said it
5 wanted to have something done, when it really has
6 addressed the question, would we think be an abuse of
7 discretion. And under these circumstances, we feel that
8 the unanimous court of appeals --

9 QUESTION: Even on a temporary basis to
10 actually facilitate the operation of the congressional
11 statutory scheme.

12 MR. HODGES: Your Honor, there may be other
13 cases, but this case, what the district court did did
14 not facilitate the compliance, because what it said was
15 I am making a determination -- or what it did was to
16 make a determination that was to be made by the
17 President of the United States in clear contravention of
18 what this particular statute said.

19 Under these circumstances, and since there is
20 a direct requirement that there be a permit prior to
21 discharges, we would say that it would be an abuse of
22 the court's discretion under those circumstances.

23 QUESTION: Let me give you a more concrete
24 hypothetical than the one I suggested before of a golf
25 ball being dropped into the ocean.

1 A fishing fleet goes out and catches tons of
2 fish in a day, and many of them clean the fish onboard,
3 some mechanically and some manually, and dump the
4 refuse, the heads and entrails of fish, overboard. And
5 -- now, that's presented without a permit, no permit.
6 They go to the district court to get an injunction and a
7 marine biologist says that far from being bad, this is
8 good. Big fish eat smaller fish and small fish eat
9 still smaller fish. And that therefore, there is no
10 harm to the environment, and on the contrary, it's an
11 aid, a natural process.

12 Are you suggesting that a district judge could
13 not exercise his discretion, and weighing the testimony
14 of the marine biologist against the opposing testimony
15 say no, I will not grant an injunction here?

16 MR. HODGES: Your Honor, I would have to take
17 a look at this particular statute to find out how that
18 has been dealt with. I --

19 QUESTION: Well, the statute we're talking
20 about here. You're more familiar with it than we are.
21 You've been living with it longer.

22 MR. HODGES: Your Honor, I would think that
23 the thrust of what we are dealing with is that the law
24 -- that a court should carry out what the law provides.
25 When enforcement is sought --

1 QUESTION: What's your answer to my
2 hypothetical, then?

3 MR. HODGES: When enforcement is sought and
4 liability is found and a continuing violation takes
5 place. And if it's physically possible to stop, then we
6 would say that --

7 QUESTION: Then your answer is that the
8 district judge could not exercise his discretion and
9 deny an injunction in the case I have just given you
10 hypothetically.

11 MR. HODGES: Yes, Your Honor, that would --

12 QUESTION: Well, the same thing would go for
13 the net, then, even if they didn't dump anything in the
14 ocean. If they just put the nets in to fish and the
15 testimony was well, these nets are as clean as they can
16 be. Nevertheless, you're putting something in the water.

17 MR. HODGES: Your Honor, I do not believe that
18 that would be considered to be a discharge of a
19 pollutant.

20 QUESTION: Well, you're discharging something
21 out of the ship. Maybe only temporarily, but there it
22 is.

23 MR. HODGES: Your Honor, under -- there are
24 many instances where the EPA --

25 QUESTION: How about launching a new ship?

1 It's going to be on the water forever.

2 MR. HODGES: Your Honor, I don't know whether
3 or not a ship, indeed, will be considered to be a --
4 defined to be a pollutant in this regard.

5 Certainly, if there are problems with this
6 particular statute and certainly, this Congress has kept
7 its hands on the statute. I think the very length of
8 the statute and the extraordinary detail which the
9 statute has gone into, and indeed, the fact that the --
10 that Congress enacted very substantial amendments in
11 1977 has shown that it can deal with this question when
12 it wants to. It wants to keep its hands on; it does not
13 want to have this particular statute unraveled through
14 the -- through district courts not doing what they are
15 supposed to do under the statute.

16 Your Honor, in closing, we would say that we
17 feel in this particular case, the statute is clear, the
18 Navy has violated it, it continues to violate it.
19 Compliance is physically possible. The district court
20 made a determination of the kind that should have been
21 made by the President of the United States. And the
22 court of appeals, dealing with this particular violation
23 here, not any other violations of this particular Act,
24 felt that the Navy's -- that that particular discharge
25 should be halted until the Act was complied with.

1 The only final thing that I would say is that
2 we would urge this Court to reach its determination in
3 this case with respect to the facts before it. This
4 does not deal with every violation of the federal Water
5 Pollution Control Act. The Congress --

6 CHIEF JUSTICE BURGER: Your time has expired
7 now, counsel.

8 MR. HODGES: Thank you, Your Honor.

9 CHIEF JUSTICE BURGER: Do you have anything
10 further, Mrs. Stillman?

11 ORAL ARGUMENT OF ELINOR H. STILLMAN, ESQ.

12 ON BEHALF OF PETITIONERS -- Rebuttal

13 MRS. STILLMAN: Just three points, Your Honor.

14 First, I'd like to point out that Section 313
15 of the Act applicable to federal facilities does say
16 that federal facilities shall be covered in the same
17 manner and to the same extent as any non-governmental
18 entity. And therefore, if what the court of appeals
19 said about the Navy here is true, it would be true of
20 electric plants, it would be true of these dams that we
21 brought up in terms of the case we cited --

22 QUESTION: Ms. Stillman, I wanted to ask one
23 question about that, because I guess the whole part of
24 the opinion you object to is the pages 48 and 49 of the
25 Appendix to your cert petition.

1 MRS. STILLMAN: That's true.

2 QUESTION: It's just really one long
3 paragraph. And early in that part, the court of appeals
4 says there's an absolute statutory obligation, which
5 sounds like they mean there's always got to be
6 injunctive relief. But really they're talking about the
7 violation there, not the remedy.

8 MRS. STILLMAN: That's right.

9 QUESTION: And then later they point out that
10 -- they cite a couple of district court cases that I
11 have no read, and then they point out that this is not a
12 case where the statutory violation was deemed
13 technical. Here, the Navy has utterly disregarded the
14 statutory mandate.

15 It sounds to me there like they're saying
16 maybe it was an abuse of discretion for the district
17 judge to --

18 MRS. STILLMAN: Well --

19 QUESTION: Otherwise, why would they draw a
20 distinction between a technical violation and utter
21 disregard of the statutory mandate, when they're talking
22 about remedy?

23 MRS. STILLMAN: Your Honor, all I can say is
24 that certainly, we think the case might well be held --
25 I'll admit that they haven't spoken with utmost clarity

1 there, but we argued in our petition for cert that this
2 was a very far-reaching --

3 QUESTION: Well, I understand. Would the
4 government be satisfied with a remand for a decision
5 under the abuse of discretion standard rather than -- is
6 that all you're asking? What relief are you asking in
7 this case?

8 MRS. STILLMAN: We've never suggested that we
9 didn't think that the district court didn't have
10 equitable discretion to look at all factors and balance
11 and so on.

12 QUESTION: No, but would you have sought
13 review if the court of appeals had clearly said, we
14 think when there is a flagrant, utter disregard of a
15 statute, as there has been here, that in that case it's
16 abuse of discretion not to grant an injunction?

17 MRS. STILLMAN: Well, I have two answers to
18 that. We would strongly disagree with that finding on
19 the court of appeals' part. Whether we would regard the
20 case as cert worthy then might be another question. But
21 we certainly don't think that the Navy flagrantly
22 disregarded anything.

23 I think what the court of appeals might have
24 been meaning by that was just that there was a clear
25 statute and the Navy violated it. I might say that it

1 may look clear in hindsight. People just didn't think
2 that this kind of exercise was covered until these
3 matters finally got into litigation.

4 And this Act is full of surprises, may I say.
5 There may be, just like the dam case that we cited, you
6 might say that if it's true that those dams are all
7 point sources that they're in flagrant disregard of the
8 statute. And we don't think that that means that if you
9 bring a suit against one of those dams now that they
10 have to --

11 QUESTION: I hope the future doesn't do to
12 this case what the future did to the dam case.

13 MRS. STILLMAN: Excuse me?

14 QUESTION: The future did to the dam case, it
15 said that it wasn't true.

16 MRS. STILLMAN: I would also like to say that
17 it's not true that a permit can be obtained forthwith.
18 It's not like applying for a library card.

19 And also, I would like finally to address the
20 question that counsel posed, which is what did Congress
21 provide in this statute? What we say Congress provided
22 was some rather absolute prohibitions, and sections
23 governing enforcement which do not specify that there
24 has to be an injunction of the kind which we think that
25 the court of appeals specified.

1 QUESTION: Well, in other words, you agree
2 with the court of appeals to the extent that it says
3 there's an absolute statutory obligation.

4 MRS. STILLMAN: Yes. We don't agree that
5 there is no range of remedial responses when a violation
6 is found.

7 QUESTION: Of course, they don't say there's
8 no range of remedial responses. That's part of the
9 problem.

10 MRS. STILLMAN: Well, Your Honor, we assume
11 that cert was granted --

12 QUESTION: Well.

13 MRS. STILLMAN: -- because the court read it
14 as we did, or four members did.

15 Your Honor, we urge that the judgment of the
16 court of appeals should be reversed.

17 CHIEF JUSTICE BURGER: Thank you, counsel, the
18 case is submitted.

19 (Whereupon, at 11:08 a.m. the oral argument in
20 the above-entitled matter was concluded.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL. vs. CARLOS ROMERO-BARCELO, ET AL. # 80-1990

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