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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-792

TITLE GROVE CITY COLLEGE, INDIVIDUALLY, AND ON BEHALF OF ITS
STUDENTS, ET AL., Petitioners, v. TERRELL H. BELL, SECRETARY
OF EDUCATION, ET AL.

PLACE Washington, D. C.

DATE November 29, 1983

PAGES 1 thru 55



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GROVE CITY COLLEGE, INDIVIDUALLY, :
4 AND ON BEHALF OF ITS STUDENTS, :
5 ET AL., :
6 Petitioners, :

7 v. : No. 82-792

8 TERREL H. BELL, SECRETARY OF :
9 EDUCATION, ET AL., :
10 :

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12 Washington, D.C.

13 Tuesday, November 29, 1983

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:03 a.m.

17 APPEARANCES:

18 DAVID M. LASCELL, ESQ., Rochester, New York; on behalf
19 of the Petitioners.

20 PAUL M. BATOR, ESQ., Acting Solicitor General,
21 Department of Justice, Washington, D. C.; on behalf of
22 the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Thank you, Mr. Justice
3 Brennan.

4 We will hear arguments first this morning in
5 Grove City College v. Bell.

6 Mr. Lascell, you may proceed whenever you are
7 ready.

8 ORAL ARGUMENT OF DAVID M. LASCELL, ESQ.,
9 ON BEHALF OF THE PETITIONERS

10 MR. LASCELL: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 At issue in this case is whether a private
13 college called Grove City College which seeks to avoid
14 government entanglement, which seeks to remain
15 independent, and which seeks to operate efficiently,
16 must either expel students who receive federal
17 scholarships, or must agree that it is subject to
18 government regulation.

19 Grove City has never sought nor accepted any
20 federal aid nor grants. It therefore declined to
21 participate in the BEOG program or any other student
22 assistance program sponsored by state or federal
23 governments.

24 QUESTION: But that assumes one of the issues
25 in the case, that you have never received any federal

1 funds.

2 MR. LASCELL: That's correct, Mr. Justice
3 White.

4 QUESTION: Yes.

5 MR. LASCELL: But in terms of the statement of
6 the case, that is the position of the college.

7 QUESTION: All right, that's the position.

8 MR. LASCELL: The government acknowledged, as
9 a matter of fact, that Grove City was not participating
10 in the BEOG program, but it asked the college to help by
11 supplying forms for students who might be eligible to
12 participater in the BEOG program and by certifying
13 attendance and costs at the college in order that those
14 students might receive those awards.

15 The government now claims that what Grove City
16 did means that the college is operating a program which
17 receives federal financial assistance. There is no
18 claim in this case, nor has there ever been any claim,
19 that Grove City discriminates in any way, nor that it
20 claims any right to discriminate.

21 Now, the issues in the case can be a little
22 confusing, and we have tried to label them for the
23 convenience of the Court in three ways. First, we have
24 what we call the recipient issue, that is, whether
25 Grove City operates a program which receives federal

1 financial assistance because some of its students
2 receive BEOG grants.

3 QUESTION: They use the money to pay their
4 tuition?

5 MR. LASCELL: Perhaps, but certainly not,
6 not -- that is a theoretical possibility, Justice White,
7 but I don't think in this case, in fact, that is what
8 happened, nor do I think that that is what could
9 happen.

10 In this case the government selects the
11 students, the Court will recall --

12 QUESTION: But you would be here making the
13 same argument if, even if the students were just
14 conduits through which tuition money passed.

15 MR. LASCELL: Well, I would be making the same
16 arguments, but in fact, it seems to me that the BEOG
17 grant statute does not contemplate that the students are
18 conduits but instead contemplates that they are ultimate
19 beneficiaries.

20 QUESTION: That they could use the money for
21 anything they wanted to.

22 MR. LASCELL: They can use the money for
23 educational purposes --

24 QUESTION: Right.

25 MR. LASCELL: -- which could include

1 tuition --

2 QUESTION: Right.

3 MR. LASCELL: But in this instance, the two
4 students who are involved in this case in fact did not
5 use that money for tuition. You will recall that
6 neither student received that money until well after
7 tuition and fee payments were due at the college, and in
8 fact, if we closely examine the BEOG program, it is very
9 evident that that money cannot come to those students
10 until after they are in attendance for the semester
11 which they receive the award because the certification
12 does not occur until after students begin classes.
13 Under those circumstances, at Grove City, at least, the
14 money which the students receive would not go to the
15 institution but would be used for other educational
16 purposes, whether to repay loans, to take care of
17 housing, to buy books at off-campus stores, other
18 educational purposes allowed by the statute and the
19 regulations.

20 These BEOG awards go to students who are
21 picked by the government. The amount of the award is
22 determined by the government. And in this instance, the
23 award is paid by the government directly to the students
24 and not to the college. That is the first issue, the
25 recipient issue.

1 Grove City claims that it is not a recipient,
2 and if the Court agrees, it does not need to consider
3 what we have called issues two and three.

4 Issue two is the program issue. What is the
5 program or activity to be regulated if in fact Grove
6 City is a recipient?

7 Three theories have been offered to this
8 Court. One is that the program equals the institution,
9 institutionwide program at Grove City or any other
10 college. That's the government's historical position,
11 and it is the position which was adopted by the Third
12 Circuit.

13 The second position, the second theory offered
14 to this Court is the one that Grove City offers, that if
15 Grove City is a recipient, the program appropriately to
16 be regulated is the BEOG program itself.

17 The third theory is a new one which has been
18 offered to this court, and that is that the entire
19 financial aid program of a college like Grove City is
20 that which is to be regulated, including any private
21 money which is a part of that financial aid program.
22 That's the government's new position, offered for the
23 first time to this Court and never before offered to the
24 college. That is the program issue, what we have called
25 the program issue.

1 The third issue, which again needs to be
2 considered only if Grove City is determined to be a
3 recipient, is what we have called the funds termination
4 issue: whether aid to Grove City students can be
5 terminated solely because Grove City refused to execute
6 an assurance of compliance which the government itself
7 now says was overly broad when it asked Grove City to
8 execute it, but which the government also says now can
9 be saved by a new interpretation never before offered to
10 the college and despite the fact that there has never
11 been any claim of discrimination levied against this
12 institution.

13 Those, therefore, are the three issues which
14 we seek to address, the recipient issue, the program
15 issue, and the funds termination issue.

16 Turning first to the recipient issue, whether
17 or not Grove City is a recipient of federal financial
18 assistance depends obviously, as this Court well knows,
19 on the language of the statute itself. Title 9 talks
20 about receiving federal financial assistance and
21 operating a program or activity. It is the position of
22 the college that receive has plain meaning. It is not a
23 word which any one of us would have difficulty in
24 understanding were we not lawyers arguing about a case.
25 Receive has a plain meaning, and to the public and the

1 country, receive means to consciously participate, and
2 to receive, to obtain funds. Grove City does not do
3 that.

4 In fact, it consciously has chosen not to
5 participate in any federal aid program of any kind,
6 despite the fact that those --

7 QUESTION: Well, you can certainly -- a
8 legatee can certainly receive funds from a testator
9 without having consciously participated at all, and the
10 testator -- I don't see why you put consciously
11 participate into your definition of receive.

12 MR. LASCELL: Only here, Justice, because I
13 think that the grant program contemplates some
14 deliberate action on the part of the college. I don't
15 disagree that a legatee could receive something without
16 doing anything except being there. But in this
17 instance, I think that the scope of the grant statute
18 itself contemplates some activity.

19 QUESTION: Then you are not talking about the
20 generic meaning of the word "receive." You are talking
21 about the word "receive" as it appears in the statute.

22 MR. LASCELL: That's correct. That's
23 correct.

24 QUESTION: Is there any federal statute that
25 the college would be violating if it announced and

1 enforced a policy of refusing to accept any student who
2 received federal aid?

3 MR. LASCELL: None of which I am aware. I do
4 not --

5 QUESTION: Wouldn't that be a discrimination?

6 MR. LASCELL: Well, I don't think that it's a
7 discrimination, though, for any protected class. I
8 think that the college could say we choose to accept
9 only those students who take no federal aid programs.

10 The difficulty with that, Mr. Chief Justice,
11 is that of the college does that, what it would be doing
12 would be to discriminate in one way, maybe not in a
13 protected way, but discriminate in one way against those
14 students who in fact the Congress chose to help by these
15 aid programs, and certainly in this instance, those
16 students might include minorities, particularly poor
17 minorities who would be unable to attend a college like
18 Grove City even -- I'm sorry, without these kinds of aid
19 programs.

20 That seems anomalous to us because the
21 Congress clearly intended with these aid programs to aid
22 such students.

23 QUESTION: Does the record give us any
24 breakdown on the composition of the students receiving
25 this particular form of aid at Grove City?

1 MR. LASCELL: There is very little in the
2 record about that. Grove City has been, Justice
3 O'Connor, co-educational since its founding, as the
4 Court knows. At the time that this case arose, 140 of
5 about its 200 -- 2200 students, received BEOG awards
6 under this alternate disbursement system. There is,
7 however, nothing in the record which indicates the
8 proportion by which those students were divided, whether
9 by sex, by minority, by race, by religion, by anything
10 else.

11 Don't forget that that -- the reason for that
12 is that the government chooses those students; Grove
13 City does not. Grove City simply takes the students who
14 were there and allows them to attend once they have
15 received those awards.

16 The other important point, I think, about
17 Grove City which we should say and which should be clear
18 and which is a part of the record is that its efficiency
19 and operation has resulted in very high quality
20 educational programs at very low cost. Its tuition fee,
21 room and board costs at the time that this case arose
22 were just over \$4000 per year, not per semester as all
23 of us are accustomed to seeing at high quality private,
24 independent universities and colleges in this country.
25 One of the reasons that it has been able to do that has

1 been because of its refusal to be entangled with any
2 kind of government authority, and at the same time, its
3 refusal as a part of its conscience and heritage, to
4 discriminate against any class of people who wish to
5 attend that institution.

6 That is something of which the college is very
7 proud, and rightfully so, it seems to me.

8 Now, the recipient issue is one which we find
9 very difficult. The Court will recall that at the time
10 Title 9 was enacted, there were in fact three pieces of
11 legislation before the Congress, one a proposal from
12 Senator Bayh, one a proposal from Congresswoman Greene,
13 and one, an administrative proposal, and the Congress
14 made a conscious choice about which of those proposals
15 it chose to accept.

16 The position of the college is that the
17 proposal which it chose to accept is one which includes
18 a definition of receive which does not encompass this
19 college operating in this way. The Congress did not say
20 in that statute receive or benefit or assist. It said
21 receive. It is only the regulations which expanded that
22 receipt concept to benefit or to assistance.

23 QUESTION: Well, wasn't the legislation, Title
24 9, passed as part and parcel of a financial aid bill? I
25 mean, it was passed in connection with precisely this

1 kind of assistance.

2 MR. LASCELL: We agree entirely, Justice
3 O'Connor.

4 QUESTION: And North Haven v. Bell of this
5 Court indicated we give it a broad reading.

6 So how do you explain that? And there are
7 references in the legislative record that discuss the
8 intent of the drafters of that legislation.

9 MR. LASCELL: I agree entirely.

10 Title 9 was a part of the Education Act's --
11 Education Act of 1972. There were 20 parts to that
12 act. Those parts included such things as library
13 grants, as continuing education programs, establishment
14 of a National Institute of Education, and among the other
15 17 which were remaining, both Title 9 and the federal
16 financial assistance program about which we are
17 talking.

18 Now, the BEOG program was just one small part
19 of that federal financial assistance program. There
20 were, as the Court will recall, several other parts to
21 that.

22 The statutory language, the college would
23 agree, should be given as broad a scope as possible
24 under the circumstances. It is remedial legislation.

25 QUESTION: Well, do you think then that -- all

1 right. Do you think that the receipt cannot be
2 indirect?

3 MR. LASCELL: Yes.

4 QUESTION: Do you think it has to be direct?

5 MR. LASCELL: I believe that that was the
6 choice which the Congress made.

7 QUESTION: Well, how do you account for
8 Senator Humphreys' statements to the contrary?

9 MR. LASCELL: Well, I think that Senator
10 Humphrey's statements related to Title 6, and I think
11 that they also related later to the proposal which
12 Senator Bayh made in 1971, and the Court will recall
13 that between 1971 and 1972 when the legislation was
14 enacted, there was a dramatic change in what was
15 proposed as Title 9.

16 The '71 version, for instance, applied only to
17 public schools and to private graduate programs, and we
18 know that in the '72 version which was eventually
19 enacted, both those circumstances were eliminated in
20 1972. We also know that the administrative proposal,
21 the administration proposal, and the proposal from
22 Representative Greene, were different than that which
23 Senator Bayh had proposed in 1971.

24 We read that legislative history as very
25 confusing. It was interesting to me as I reread the

1 briefs this weekend, to see that every one of us, both
2 amici -- every amici and every litigant, cited that
3 legislative history from Senator Bayh as supportive of
4 our own positions.

5 Now, that means to me, Justice O'Connor, that
6 really the only thing that we can examine which shows
7 any clear change or distinction is the differences, or
8 are the differences between the '71 legislation and the
9 '72 legislation which was enacted. And it is the
10 college's position that in that change it became as
11 clear as we can hope that recipient under these
12 circumstances did not mean beneficiary or did not
13 mean -- did not mean benefit or did not mean
14 assistance.

15 We do not believe, by the way, that that
16 interpretation of the statute means that discrimination
17 will affect American higher education in ways that would
18 be entirely improper, nor do we believe that that means
19 the end of Title 9 enforcement. We simply do not think
20 that that's correct. This Court acknowledged in North
21 Haven the Finch reading of infection, it has done so
22 before, and that is the position with which this college
23 agrees.

24 This college does not discriminate and does
25 not think that other colleges should, and thinks that if

1 a program is infected by discriminatory practices, then
2 the assistance to the federally funded program can and
3 should be terminated. That is a position which we will
4 advocate for the remainder of the life of this college.

5 QUESTION: Counsel, if the government prevails
6 here, what will be in your view the effect upon women's
7 colleges that are still women's colleges, like Wilson
8 and Mt. Holyoke, and others?

9 MR. LASCELL: And Wells, Your Honor.

10 I say that dear to my heart. I chair the
11 board of a women's college so that this is an argument
12 about which I have some great personal concern.

13 I think if the government prevails here in
14 this case, that the effect -- that there will be no
15 effect on women's undergraduate institutions. The Court
16 will of course recall that Title 9 exempts that.
17 Private, single-sex institutions are exempt from the
18 enforcement provisions of Title 9 currently, and I
19 believe as well that with a narrow reading of this
20 Court's decision in the Mississippi College case, that
21 that can continue, so that I don't see that that will be
22 a problem here.

23 What I think is important, and what I think
24 Congress did when it enacted Title 9, was to balance two
25 very important concerns, exceptionally important; one,

1 to prevent gender discrimination in post-secondary
2 education in the United States; and at the same time, by
3 very carefully constructing that Education Act of 1972,
4 by attempting to preserve diversity in American higher
5 education.

6 Not everyone, Justice Blackmun, would think
7 that a single-sex college is appropriate. Not everyone
8 would think that what Grove City believes is
9 appropriate. But the significance of those events, the
10 significance of that diversity in American higher
11 education I believe is what Congress carefully chose to
12 do as it balanced those interests in 1972.

13 The second issue, of course, if the Court
14 determines that Grove City is a recipient, is the
15 program specificity issue.

16 QUESTION: May I ask one question before you
17 leave this?

18 MR. LASCELL: Yes, Justice Stevens.

19 QUESTION: You take the position the
20 regulation is invalid?

21 MR. LASCELL: Yes, I do, as it is applied.

22 QUESTION: Right.

23 MR. LASCELL: The second issue is the program
24 specificity issue. There are, as I mentioned in the
25 beginning, three theories which have been propounded to

1 the Court, one, that the program equals the institution;
2 second, that the program is the BEOG program itself; and
3 third, the new government position that the entire
4 financial aid program, including private money, is the
5 program which is to be regulated if Grove City is a
6 recipient.

7 The program, so far as we can tell from our
8 examination of Title 9 and from the contemporaneous
9 history and from the statements of the commentators, the
10 program is defined and limited by the purpose of the
11 underlying grant statute. That is what determines what
12 is to be regulated. And I think that we find support in
13 that if we examine the funds termination provision.

14 The Court will recall that the funds
15 termination provision includes a section which says that
16 before funds can be terminated, the committee, the
17 congressional committee having responsibility for the
18 program must be notified of that proposed termination.
19 We think that that linkage is significant. The
20 committee having responsibility must be notified in
21 order for the program funds to be terminated.

22 We think that the statute and this Court's
23 interpretation in North Haven mean that the program
24 itself is to be regulated, and that the program is
25 defined by the grant statute involved. Here the grant

1 statute is the BEOG program statute, and it is therefore
2 the college's position that it is that program which is
3 to be regulated.

4 The third issue is the funds termination
5 issue.

6 QUESTION: Well, what's the upshot of your
7 second argument, that that's the program that should be
8 regulated?

9 MR. LASCELL: That if the college, Justice --
10 I'm sorry, if the Court determines that Grove City
11 College is a recipient of federal financial
12 assistance --

13 QUESTION: I get it now.

14 MR. LASCELL: Then the program which is
15 appropriately regulated is only the BEOG program.

16 QUESTION: And therefore?

17 MR. LASCELL: And therefore that the
18 regulations and the enforcement of the regulations which
19 the government propounds which says that that entire
20 college is to be regulated, is incorrect.

21 QUESTION: Well, you would say, though, that
22 the college could be forced to, if we get this far, that
23 the college could be forced to execute some kind of a
24 piece of paper --

25 MR. LASCELL: I would say that --

1 QUESTION: With respect to that program.

2 MR. LASCELL: That's correct. If there were a
3 program specific assurance of compliance correctly
4 drafted, which we say that the one involved in this case
5 is not, then the college could be required to execute
6 that with respect to its operation --

7 QUESTION: Well, the government seems to think
8 that its request was overbroad in the first place.

9 MR. LASCELL: I think that's correct. That's
10 the first time, of course, that that has been said as we
11 came through the Third Circuit --

12 QUESTION: But they -- but they still insist
13 on something broader than you think is necessary, even
14 if you are a recipient.

15 MR. LASCELL: I think that's exactly correct,
16 exactly correct.

17 The third issue is the funds termination
18 issue. The claim of the government is that it can
19 terminate the funds of these students even though Grove
20 City doesn't discriminate and even though there is this
21 overly admittedly broad, or admittedly overly broad
22 assurance of compliance.

23 The position of the college is that that is
24 fundamentally unfair to the beneficiaries of this grant
25 statute. There has never been a claim of discrimination

1 here. There is an admittedly overly broad assurance of
2 compliance, and yet the government still claims a right
3 to terminate this assistance.

4 QUESTION: Well, what if -- what if you're a
5 recipient, and what if the program is the grant program
6 and you then refuse to execute the proper kind of a
7 piece of paper limited to that program? Could the
8 government then terminate the funds to the student?

9 MR. LASCELL: I think that the contemplation
10 of the Congress has been that funds termination is to be
11 exercised only as a last resort.

12 QUESTION: Well --

13 MR. LASCELL: A last remedy.

14 QUESTION: So what if they got to the last
15 resort?

16 MR. LASCELL: Well, I don't think what the
17 Court has just suggested to me is the last resort.
18 There could be a proceeding before that --

19 QUESTION: Well, it may be, but all of that is
20 out of the way, and we get down -- your position is --

21 MR. LASCELL: Then the answer to the question
22 is yes.

23 QUESTION: And I thought your position was
24 that fund termination would never be proper in case of a
25 refusal to execute this piece of paper.

1 MR. LASCELL: No, if it were a last resort
2 which the Court has now suggested in its hypothetical,
3 then I think it would be appropriate, after the other
4 proceedings have been exhausted.

5 Thank you, Mr. Chief Justice. I will reserve
6 some time for more questions.

7 QUESTION: May I ask because I don't really
8 understand, I don't find any -- there is really nothing
9 to your third argument, then, is there?

10 If you were wrong on the first two arguments,
11 you wouldn't really even make the third argument.

12 MR. LASCELL: That's absolutely correct,
13 Justice Stevens.

14 QUESTION: So we can really just ignore that
15 third argument.

16 MR. LASCELL: Well, I hope that you won't
17 because I think it's unfair to the students who are
18 involved here.

19 (Laughter)

20 QUESTION: But only if you're right on one of
21 the other two.

22 MR. LASCELL: That's correct.

23 QUESTION: In which event we don't need to
24 reach it.

25 MR. LASCELL: They are absolutely intertwined

1 and nterrelated.

2 QUESTION: Okay.

3 MR. LASCELL: Thank you.

4 CHIEF JUSTICE BURGER: Mr. Bator?

5 ORAL ARGUMENT OF PAUL M. BATOR, ESQ.,

6 ON BEHALF OF THE RESPONDENT

7 MR. BATOR: Mr. Chief Justice, and may it
8 please the Court:

9 The government's position in this case is that
10 Grove City College does conduct an education program or
11 activity that receives federal financial assistance
12 within the meaning of Title 9. Title 9 doesn't say that
13 the college has to receive funds. It says it has to
14 conduct a program that receives financial assistance.
15 The purpose of Title 9 is to assure that education
16 programs that are subsidized by federal money will not
17 discriminate.

18 We think that the government's BEOG grants,
19 whether they funnel through the college or whether they
20 go directly to the students, directly and unequivocally
21 subsidize a financial aid program and scholarship
22 program at Grove City.

23 QUESTION: What if a person is on some kind of
24 a welfare program, any kind of a program that funnels
25 federal funds, and they are received by an individual,

1 and that individual then decides to go to the local
2 secretary school to learn to become a secretary, is that
3 institution then receiving federal funds, the
4 secretarial school?

5 MR. BATOR: If the money that goes out is like
6 Social Security funds or some other kind of totally
7 un -- not directed, that is, not -- it's purpose is not
8 to subsidize a feature of the educational program, we
9 would think that it would be rather difficult, although
10 there might be close cases, Mr. Chief Justice, depending
11 on the situation. There are complicated or mixed
12 cases.

13 QUESTION: Well, what would be close about a
14 Social Security recipient?

15 MR. BATOR: The Social Security recipient --
16 just because a Social Security recipient goes to college
17 would not mean that the college is receiving federal
18 financial assistance.

19 QUESTION: Are food stamps used to pay for the
20 food in the cafeteria?

21 MR. BATOR: No. I think that would be a
22 very -- I don't think that that would be covered.

23 The big thing about the BEOG program --

24 QUESTION: Well, it is certainly
25 subsidizing -- if you want to talk just about resultant

1 aid, I don't know how you distinguish that case.

2 MR. BATOR: We are talking about a mix of
3 result and purpose. The purpose of the BECG program is
4 to subsidize something that colleges are in the business
5 of doing, which is to provide financial aid in order to
6 better improve their admissions program. It is -- it is
7 as conventional a feature of an educational enterprise
8 to have a scholarship program as it is to have an
9 athletic program --

10 QUESTION: Well, colleges provide dormitories,
11 they provide food, and a person uses Social Security
12 money to pay for his -- to pay his board and room to the
13 college.

14 MR. BATOR: Your Honor, the Social Security
15 money that the federal government is sending out does
16 not have as a constituent purpose the purpose of
17 subsidizing an educational program.

18 QUESTION: It certainly includes that. It
19 certainly includes that as long as people are free to
20 use it to pay board and room to a college.

21 MR. BATOR: It may have that economic effect.

22 QUESTION: May? It certainly does. How can
23 you say it doesn't?

24 MR. BATOR: But, Your Honor, the difficulty is
25 that if we -- if we interpret --

1 QUESTION: I know it's difficult

2 (Laughter)

3 MR. BATOR: If we interpret this statute as
4 encompassing the ripple effects of every federal
5 intervention in the economy, the statute will go way
6 beyond what Congress was contemplating as to some
7 extent.

8 QUESTION: I agree with you.

9 QUESTION: That sometimes happens with acts of
10 Congress, doesn't it?

11 (Laughter)

12 MR. BATOR: I think we can walk the plank here
13 on a middle line. We can say that this statute, Title
14 9, which as Justice O'Connor said was enacted in the
15 context of Congress' creating the BEOG program at a time
16 when Congress, as the legislative history shows, was
17 extremely concerned about discrimination in the
18 provision of financial aid and scholarships, that was
19 not a marginal concern. That was a central concern.

20 QUESTION: Mr. Bator, my hypothetical question
21 did not focus on Social Security or anything of that
22 kind but on a straight welfare grant. Social Security
23 is something to which contributions are made, and I
24 would distinguish it.

25 Do you take that position with respect to an

1 unlimited, voluntary grant by the federal government for
2 which the recipient has tendered no consideration by way
3 of contributions?

4 MR. BATOR: No, Your Honor, we cannot go that
5 far. That is, we cannot say that every time the federal
6 government gives somebody money and that person buys
7 something with that money, that that is financial
8 assistance to the vendor.

9 QUESTION: You are pretty close -- the federal
10 government is pretty close to it right here.

11 MR. BATOR: No, Your Honor, we think that the
12 key limiting conception here must be whether the federal
13 money subsidizes a program and is designed to subsidize
14 a program that is a part, that is designed to aid that
15 program.

16 QUESTION: So an aid to dependent children
17 that is keyed to whether a person is in school or not
18 is -- you get it if you are in school and you don't get
19 it if you aren't.

20 MR. BATOR: If it is -- if the federal
21 government gives scholarship money to dependent
22 children --

23 QUESTION: It isn't scholarship money. It is
24 just that you get -- there's aid provided to the family
25 if this child is in college, and it isn't provided if he

1 isn't.

2 MR. BATOR: If the money is restricted so that
3 it must be used for purposes of an education, then we
4 think it is assistance to the educational institution.

5 Justice White, I think that Grove City way
6 overstates its distance from this program, even though
7 the program is channelled to the students.

8 To read to --

9 QUESTION: What about the answer to Justice
10 White's question? Supposing that someone is enrolled in
11 college and as a result of that they get Aid to
12 Dependent Children, now, would that result -- would that
13 mean that the college was regarded as federal --
14 receiving federal funds?

15 MR. BATOR: No. I think the answer is no.
16 Justice White's question I think hypothesized a variant
17 of Aid to Dependent Children that is earmarked for
18 spending that money --

19 QUESTION: No, you just get it, no, you just
20 get -- the money is paid to the family if a child is in
21 school, and --

22 MR. BATOR: If it is totally unrestricted
23 money --

24 QUESTION: -- and isn't paid if it isn't.

25 QUESTION: But the person has to be in college

1 to get it.

2 QUESTION: And this is unrestricted money.

3 MR. BATOR: But that distinguishes it from
4 BEOGs. That is really the point I was about to make.

5 It is not the case, as Grove City seems to be
6 saying, that the federal government just sends this
7 money out and the students are free to do whatever they
8 want with it. the purpose of these grants is to finance
9 students' education at Grove City. The amount is
10 measured by the cost of education, tuition, food,
11 lodging, books. The federal government limits the
12 amount, but the cost is figured on the basis of the
13 actual expenses at the actual college.

14 If the student just takes this money off
15 and -- Grove City has to certify that this student is a
16 student at Grove City. It is not really quite accurate
17 to say that the federal government chooses the
18 students. The students have to be admitted to Grove
19 City. That is the relevant population. That is, the
20 federal government cannot say we are hurling a student
21 at you. The admissions program is run by Grove City.

22 Now, I want to make one other point about
23 Grove City's admission in this case, and we do respect
24 their sincerity in saying that they want to stay out of
25 the clutches of the federal government, and they say it

1 is harsh and unfair that we who do not want federal aid
2 have to be engulfed in this federal embrace just because
3 our students show up here with federal dollars in their
4 pockets.

5 I think the answer to that, Your Honor, is
6 that it is quite easy for Grove City to stay out of the
7 federal embrace. All they have to do is to say to their
8 students, don't take federal scholarship money; we will
9 give you our scholarship money. That's exactly what
10 they would have had to do before '72 when there was
11 federal scholarship money. They would have had to go to
12 their own alumni and support groups --

13 QUESTION: Do you think that the college would
14 violate any federal statute if it announced and enforced
15 a program of refusing to admit any student or retain any
16 student who accepted federal aid?

17 MR. BATOR: Your Honor, it certainly would not
18 be if it gave equivalent scholarship aid of its own. If
19 it didn't have that --

20 QUESTION: No, that's not my hypothetical.

21 MR. BATOR: I understand.

22 QUESTION: They simply say we aren't going to
23 get entangled with the federal government, and any
24 student that gets federal aid is out.

25 MR. BATOR: I think it has got to be our

1 position and is our position that the college must be
2 free to opt out in that way. It must be free to opt out
3 in that way.

4 QUESTION: Because you in effect tell them
5 either file this piece of paper or expel the students.

6 MR. BATOR: Your Honor, it isn't really that
7 we are expelling the students. We are saying that Grove
8 City is free to go back to the pre-federal aid days,
9 which is exactly where it says it wants to be.

10 QUESTION: Well, you also say it is free to
11 expell the students.

12 MR. BATOR: Prior to '72 Grove City was in a
13 position in which if a student couldn't get private
14 scholarship aid, there wasn't any government aid, you
15 couldn't come to college.

16 QUESTION: Mr. Bator, you have been addressing
17 primarily whether this program is fair to the college,
18 but what do you think about the fairness with respect to
19 the student who may be foreclosed the opportunity to
20 attend the college of his or her choice?

21 MR. BATOR: That is true, it has that effect,
22 that the student either has to find scholarship money
23 elsewhere or go to a different college.

24 QUESTION: Does that deprivation of liberty
25 seem unfair to the government of the United States?

1 MR. BATOR: Well, Your Honor, it does not seem
2 unfair to us in light of what we are asking Grove City
3 to do.

4 QUESTION: But we are not just talking about
5 Grove City. Perhaps Grove City is unique. It certainly
6 has never discriminated against anybody according to the
7 record, and it seems to me that --

8 MR. BATOR: Your Honor, we are asking Grove
9 City to certify that it is not discriminating in its
10 scholarship program. Now, that seems to us not to be a
11 harsh quid pro quo in return for the federal government
12 subsidy of that program.

13 Now, if Grove City does not want to be harsh
14 to its students, it can go to private sector and raise
15 its own scholarship money.

16 QUESTION: The certificate, though, the
17 certificate though would make the college confess that
18 it is subject to this law.

19 MR. BATOR: The assurance of compliance simply
20 asks the college to say that insofar as the law is
21 applicable, we assure that we will comply with it.

22 QUESTION: Yes, but it would also involve that
23 then the federal government could invoke all the
24 rigamarole of the statute against the college if it
25 happened to think it was discriminating.

1 MR. BATOR: Your Honor, our position is -- and
2 this leads us to the second branch of this case -- that
3 the coverage of Grove City's financial aid and
4 scholarship program, including its own, does not
5 automatically trigger college-wide coverage. It is at
6 that stage of our submission that we try to meet
7 Congress' other purpose in this statute.

8 QUESTION: Well, arel you suggesting the
9 regulation is invalid?

10 MR. BATOR: No, Your Honor.

11 QUESTION: To any extent?

12 MR. BATOR: Your Honor, we think that this
13 Court should do here exactly what it did in North Haven,
14 and which is what the government is doing.

15 QUESTION: You mean construe it.

16 MR. BATOR: To construe it according to its
17 terms.

18 QUESTION: Construe it -- well, I hadn't
19 thought your position was this prior to now.

20 Has the government --

21 MR. BATOR: Our position has not been a
22 monolith.

23 QUESTION: You've been defending the
24 regulation in its broadest reading.

25 MR. BATOR: We are not defending the

1 regulation in its broadest possible reading. We are
2 defending the regulation as we think it ought to be read
3 in light of this Court's language in North Haven, and we
4 are really doing exactly what the Court itself did in
5 North Haven, which is to say to read this regulation not
6 in order to render it invalid, but to render it valid in
7 light of the Court's reading of the statute.

8 QUESTION: What has been the agency's
9 position?

10 MR. BATOR: The agency's position --

11 QUESTION: That issue the regulation. What is
12 their position?

13 MR. BATOR: Historically, the agency's position
14 for a certain time in the mid-'70s was that financial
15 aid triggers collegewide coverage.

16 QUESTION: Collegewide, and that was a
17 contemporary construction.

18 MR. BATOR: No, Your Honor, that was a
19 '75-'76 construction.

20 QUESTION: Well, it was early, anyway.

21 MR. BATOR: Right.

22 QUESTION: Earlier than now.

23 MR. BATOR: It was before this Court's opinion
24 in North Haven.

25 But I don't want to quibble with you, Justice

1 White, there has been here a restudy and a
2 reconsideration of this matter. What led us to that, I
3 think, is exactly what led the Court to its language in
4 North Haven which is that the contrary position, that
5 is, that if one student with one dollar of BEOG money
6 shows up at this college, that triggers collegewide
7 coverage.

8 The difficulty with that --

9 QUESTION: So tell me again, what coverage do
10 you think is triggered by the acceptance of these
11 monies, the entire grant program of the college?

12 MR. BATOR: We think that the entire
13 scholarship and grant program of the college is
14 covered.

15 QUESTION: And therefore the college could not
16 discriminate in giving out those grants.

17 MR. BATOR: In any way in dispensing
18 scholarship aid.

19 QUESTION: How about hiring people who
20 dispense the scholarship aid?

21 MR. BATOR: That would also be covered.

22 Hiring, of course, would be covered
23 independently on a non-program specific basis in any
24 event because Title 7 applies.

25 QUESTION: Yes.

1 QUESTION: Could you tell us what would not be
2 covered? You said the entire grant aid program would be
3 covered, but if a student, for example, has a loan and
4 that student attended, as usually happens, 20 or 30
5 classes in different areas of learning during his four
6 years, would each of those classes be covered simply
7 because a student attended it?

8 MR. BATOR: No, Your Honor, we, we --
9 uncomfortable as it is, our position is that the --

10 QUESTION: What would the limits be?

11 MR. BATOR: -- the money does not follow the
12 student around to every activity the student engages
13 in.

14 QUESTION: What would the limits be?

15 MR. BATOR: Our submission, Your Honor, is
16 that the central question to ask is what program does
17 the federal government subsidize here?

18 Now, we think the program is the scholarship
19 program and not the math department and the athletic
20 department.

21 QUESTION: Well, in practical terms, you are
22 the president of the university, what do you do?

23 MR. BATOR: In practical terms, if I am trying
24 to limit --

25 QUESTION: Yes.

1 MR. BATOR: The federal coverage as much as
2 possible --

3 QUESTION: Yes.

4 MR. BATOR: I would execute the assurance of
5 the compliance and insist that the federal regulatory
6 intervention be limited to investigations of the
7 scholarship and financial aid program.

8 QUESTION: Well --

9 MR. BATOR: We also, I should add, just to
10 complete the statement of the government's position,
11 that it is also the government's position that
12 presumptively, at least, discrimination in admissions is
13 a form of discrimination that infects all of the
14 activities of the college so that wherever federal aid
15 goes, discrimination in admissions --

16 QUESTION: What about discrimination in
17 employment, the city -- the school janitor?

18 MR. BATOR: Looking only at Title 9, our
19 position is, as the Court said in North Haven, that
20 Title 9 deals with employment discrimination only on the
21 same program-specific basis. But that problem is
22 dissolved by the fact that Grove City, whoever wins this
23 case, is in any event covered by Title 7 and may not in
24 any way discriminate in its employment.

25 QUESTION: When you -- I take it, then, you

1 say that even though you are supposedly limiting your
2 submission to the entire grant-in-aid program, that
3 includes the entire admissions program.

4 MR. BATOR: In effect, our position is that
5 unless Congress has --

6 QUESTION: With respect to any student who
7 receives any of this aid.

8 MR. BATOR: Yes. Your Honor, that has a
9 special application in the case of Grove City and
10 private undergraduate colleges. That is, the
11 government's position is that unless the statute
12 explicitly exempts admissions from Title 9,
13 discrimination in admissions infects the entire
14 operation.

15 Now, it happens that private undergraduate
16 colleges are explicitly exempted in their admissions so
17 that Grove City does not have to, as it were, is not
18 swept up in this aspect of the government's position.

19 QUESTION: You have already told us, Mr.
20 Bator, that Grove City College could announce and
21 enforce a policy of rejecting any student who accepts
22 aid.

23 Now, that would hit a certain category of
24 people who can't afford to pay their own way. Wouldn't
25 that be a discrimination in itself?

1 MR. BATOR: Your Honor, in a sense,
2 empirically it is a discrimination, but we are caught
3 here in this dilemma, that it's the kind of
4 discrimination that existed before the federal
5 government created this program. That is, you either
6 got private scholarship money, or if you couldn't afford
7 it, you couldn't go.

8 Now, the federal government has come into this
9 situation with this special kind of statute provision
10 that says we will help finance scholarship aid for you,
11 but what we want in return is an assurance that you do
12 not put your scholarship program on a discriminatory
13 basis.

14 Now, we don't think that that is a harsh or
15 terrible thing. In fact, we are being cudgeled also on
16 the ground that that doesn't go far enough because we
17 are being told that that leaves open the possibility
18 that there will be discrimination in other parts of the
19 college, and many of the amici asked the question, well,
20 how can it be that Congress would have wished a student
21 with federal money to show up in a college which
22 discriminates in certain of its parts? And I think our
23 answer to that must be, Your Honor, that Congress in '72
24 was not thinking of this statute as whether you are for
25 or against discrimination. It seems to me we must say

1 and it is clear that Congress opposed discrimination in
2 all its forms, but --

3 QUESTION: Could you give me an example of
4 what a discrimination in the grant program might consist
5 of?

6 MR. BATOR: Well, as the '72 and '71 --

7 QUESTION: It certainly couldn't be with
8 respect to someone who is getting federal aid. I take
9 it the federal government wouldn't be discriminating.

10 MR. BATOR: Well, Your Honor, even with
11 respect to the dispensing of federal aid, if the
12 college's certification of students, if it used a -- I
13 mean, this would be a sinister case --

14 QUESTION: Yes.

15 MR. BATOR: But if the college in its
16 certification of the question whether the student is in
17 good standing, if it used different rules for men and
18 women, that would affect even the federal program.

19 But what is really at issue here is what
20 Congress found historically to have been occurring at
21 universities prior to '71 and '72.

22 QUESTION: May I ask a specific question?

23 Supposing they gave football scholarships but
24 no scholarships for female athletes?

25 MR. BATOR: If men students get more

1 scholarship aid than women students --

2 QUESTION: My specific example, football
3 scholarships, and they only have men on the football
4 team, would that be covered by your submission?

5 MR. BATOR: That would be covered. That is,
6 athletic scholarships cannot be a device for favoring
7 men over women. That is clearly a part of our
8 submission.

9 And Congress in '71 and '72 found that one of
10 the major problems of discrimination in American
11 education was that men were getting higher scholarships
12 and better financial aid than women, and that's what
13 Congress wanted to end.

14 QUESTION: May I ask one other question?

15 You said -- I think you said that you would
16 say the regulations are all valid as they stand,
17 including the definition of recipient and all the other
18 provisions?

19 MR. BATOR: Your Honor, we think that the
20 regulations as currently construed and as we understand
21 we would enforce them are all valid.

22 QUESTION: As currently written.

23 MR. BATOR: Yes, that is our submission.

24 QUESTION: If we construe them as you
25 suggest.

1 MR. BATOR: The regulations have this funny
2 circularity in them in that they say -- in effect, they
3 say this regulation applies insofar as it is valid.
4 That's built into the regulation. So there is, if you
5 will, a circularity in the regulation that permits
6 some --

7 QUESTION: But you wouldn't have to reach
8 that. You would just construe it narrowly.

9 MR. BATOR: Right.

10 QUESTION: So you would never have to wonder
11 whether it is valid or not.

12 (Laughter)

13 MR. BATOR: The regulation says that Grove
14 City must comply with Title 9 insofar as it applies.

15 QUESTION: That can't be invalid, can it?

16 MR. BATOR: No, no, no.

17 (Laughter)

18 MR. BATOR: That's the pithy way of putting
19 it.

20 QUESTION: In the government's opposition to
21 the petition for certiorari, it said that the proper
22 interpretation of the program-specific question was not
23 at stake in the Court of Appeals and we shouldn't reach
24 it. Now the government has briefed it and is arguing
25 it.

1 Suppose that the Court were to agree with the
2 government's position as to who is a recipient, what
3 should the Court do with the program-specific question
4 which I thought the government had argued we shouldn't
5 reach?

6 MR. BATOR: Your Honor, there is a part of it
7 which the Court has to reach in view of Grove City's
8 argument. It is the case that we in our opposition said
9 that the Court does not necessarily have to define the
10 relevant program, if Grove City is a recipient, it
11 doesn't have to completely answer the question of the
12 relevant program.

13 I think the Court does have to at least say
14 that there is a relevant program that is receiving
15 federal financial assistance, so the Court does at least
16 have to say that the financial aid program or some part
17 of it is a relevant program. The Court does not have to
18 go on and say whether there is broader spillover
19 coverage in this case.

20 We felt after our opposition the Court did
21 grant cert, and one of the questions presented was this
22 question of the relevant program. So we did feel
23 duty-bound to brief and indicate what the government's
24 enforcement philosophy with respect to Grove City would
25 be.

1 QUESTION: Would they comply with your demand
2 for a certificate if they executed a piece of paper that
3 said we are in compliance with Title 9 insofar as it
4 applies?

5 (Laughter)

6 QUESTION: Validly applies.

7 MR. BATOR: Your Honor, in effect, if you read
8 the compliance certificate that was offered to them,
9 which is printed in the Appendix to the Petition, that
10 in effect is what it says.

11 QUESTION: So your answer is yes, that would
12 be all they have to do.

13 MR. BATOR: That is really all that is at
14 stake here.

15 They took the position, and they have a little
16 bit, I think, put a slightly different --

17 QUESTION: I thought at the close of your
18 opponent's argument he in effect said he would be
19 willing to sign that certificate.

20 MR. BATOR: They certainly were unwilling to
21 sign it when they thought that the government's
22 interpretation of that would be that it would lead to
23 institutionwide coverage.

24 Your Honor, on the other hand, we are not
25 willing to live with the proposition that only the

1 federally financed BEOG program is the relevant
2 program. Actually, in their brief and in the Court of
3 Appeals, the petitioners here have argued that there is
4 no relevant program at Grove City, that it is not
5 conducting any program.

6 QUESTION: Well, that's part of the
7 recipient.

8 MR. BATOR: No, no, even on the program
9 specificity point, they are saying there is no, no
10 relevant program. That is why that is an interesting
11 feature of this case, Your Honors, that the Court of
12 Appeals in Grove City came into this court more or less
13 saying its all or nothing; there is either no program or
14 the whole college is the program.

15 Now, that then led them to diametrically
16 opposite conclusions. Grove City said it's got to be
17 nothing because if it's all, that destroys program
18 specificity. The Court of Appeals said it's got to be
19 all because if it's nothing, it leads to this weird
20 conclusion that the broader the grant, the less the
21 coverage.

22 Now, it is that dilemma that the government
23 seeks to dissolve by attacking its premise, which is
24 that it's got to be all or nothing.

25 I want to go back to what it seems to me, at

1 least in my thinking and emotions about this case, is a
2 difficult point. It is the one that I was led to by
3 Justice Powell's questions, which is how can we suppose
4 that Congress created a statute which would permit
5 discrimination to continue in some part of an
6 institution which had students with federal
7 scholarships?

8 Our answer to that is that although Congress
9 was opposed to discrimination in all its forms, what
10 Congress was thinking about in '72 was not whether to be
11 for or against discrimination in the abstract, but how
12 broad a federal regulatory intervention should be
13 authorized, because regulation is -- always has an
14 element of overkill and overenforcement. And what
15 Congress decided in that statute -- and there was a very
16 definite shift from '71 which was institutionwide, to
17 '72, Congress decided in '72 that the regulatory
18 intervention should be this more surgical intervention.

19 Now --

20 QUESTION: Well, they had some concern about,
21 I suppose, about their authority to intervene, if the --
22 I take it that if -- you suggest or seem to concede that
23 if Grove City just wouldn't accept any students
24 accepting federal funds, federal intervention would be
25 nil, except for the Title 7.

1 MR. BATOR: I think, Your Honor, they were
2 worried about that, but they were also worried about the
3 breadth of intervention on the Court of Appeals theory
4 of this case, which is a dollar of federal aid anywhere
5 sets up this economic ripple effect and leads to
6 regulation on a pervasive basis.

7 And we think that Congress, the size of the
8 gap that is left by the government's theory should not
9 be overstated because subsidized programs are covered,
10 we think admissions are covered unless explicitly
11 exempted.

12 Congress had in mind, too, that there are
13 other laws in play here, Title 7, the Constitution is in
14 play in the case of public institutions, as we learned
15 from Justice O'Connor's opinion in the Mississippi
16 Nursing case, state law is in play, and there are
17 fundamental ethical laws here that are in play that for
18 some of us, I hope a lot of us, mean that we don't
19 discriminate, whatever the statute says.

20 What we are trying to do here is to reconcile
21 a complex assortment of purposes. Congress wanted to
22 end discrimination in the handing out of financial aid.
23 There is no doubt about that.

24 QUESTION: Why wouldn't the purposes of
25 Congress be satisfied if the application of these

1 restraints or limitations were confined to benefits
2 received by the college for which the college had made
3 an application, an affirmative application?

4 MR. BATOR: Your Honor, I think we think that
5 if the college benefits in the sense of this subsidy,
6 that it has to do more than just refrain from the
7 formality of an application. It is really required to
8 undergo a greater abnegation here. It is required, in
9 effect, I think it is required to go to its own
10 supporters and to put its own money where its mouth is,
11 which is to raise private scholarship funds.

12 QUESTION: Well, if a student's family
13 receives food stamps, that maybe relieves the student of
14 the necessity for taking part time jobs, and therefore
15 there is an indirect federal aid, is there not?

16 MR. BATOR: In terms of the cash economic
17 effects. We don't think that it counts as federal
18 assistance to an educational program or activity.

19 QUESTION: Mr. Bator, I am somewhat surprised
20 about -- wasn't Title 9 re-enacted at some point?

21 MR. BATOR: Your Honor, I don't believe so,
22 no.

23 QUESTION: There was no re-enactment?

24 MR. BATOR: No.

25 QUESTION: Were there any amendments?

1 MR. BATOR: There was, as far as -- there were
2 amendments which excluded certain categories of
3 activity.

4 QUESTION: Well, how about re-enactment of the
5 grants legislation?

6 MR. BATOR: The BEOG legislation? I'm not on
7 absolutely certain grounds on that, but I assume that
8 that has been re-enacted from time to time, yes, Your
9 Honor.

10 QUESTION: At a time when it was perfectly
11 clear how those grants were being looked upon by the
12 Title 9 administrators?

13 MR. BATOR: I think that from the beginning
14 the Department has assumed that all BEOG grants, whether
15 direct or this alternative system, do trigger Title 9
16 enforcement. That has been a -- on that one at least we
17 have been consistent, Justice White.

18 QUESTION: Okay, thank you.

19 QUESTION: Professor Bator, I did not quite
20 understand what you said the government's position was
21 with respect to the unisex private colleges?

22 MR. BATOR: That on their -- that --

23 QUESTION: With respect to this case. Does
24 this case have any effect on that?

25 MR. BATOR: Your Honor, the statute, Title

1 9 --

2 QUESTION: Yes.

3 MR. BATOR: Very carefully spells out the
4 rules of the game on when undergraduate institutions and
5 graduate institutions may continue to be unisex
6 institutions. It says that private undergraduate
7 institutions, as far as this statute goes, may continue
8 to be unisex institutions. Public undergraduate
9 institutions have this rather more ambiguous formula
10 that their admissions may be restricted to one sex if
11 there is a tradition of one sex attendance at that
12 school, and that, of course, was the statute that
13 created the statutory and of course constitutional
14 problem in the Mississippi Nursing.

15 QUESTION: And the graduate schools of unisex
16 private colleges would be covered?

17 MR. BATOR: Graduate schools cannot, if they
18 get any kind of federal aid under Title 9, whether
19 private or public, graduate schools may not continue to
20 be unisex colleges. That is our understanding of the
21 statute.

22 If there are no further questions --

23 CHIEF JUSTICE BURGER: Mr. Lascell, do you
24 have anything further?

25 ORAL ARGUMENT OF DAVID M. LASCELL, ESQ.,

1 ON BEHALF OF PETITIONERS -- REBUTTAL

2 MR. LASCELL: Just one short comment, Mr.
3 Chief Justice.

4 I remain confused about the government's
5 position with respect to these regulations. I thought
6 that I had understood it before this argument, but I am
7 not certain that I do once again.

8 It is clear, Justice Stevens, that the
9 assurance of compliance which this college was asked to
10 execute did more than simply say we will agree to abide
11 by Title 9 to the extent that it applies to us. The
12 government's consistent position has been that that
13 assurance of compliance is not only institutionwide but
14 contractually binds that institution, Justice White,
15 forever and ever to the federal government. It is that
16 with which this college disagrees.

17 QUESTION: Yes, but haven't they said since
18 then they will accept a lesser certificate?

19 MR. LASCELL: And what will they say
20 tomorrow?

21 QUESTION: Is the certificate they have said
22 they will accept in the record?

23 MR. LASCELL: The only certificate is in --
24 the only assurance of compliance ever propounded is in
25 the record, yes. It is in the Joint Appendix.

1 QUESTION: But their proposed substitute has
2 not been --

3 MR. LASCELL: That's correct.

4 QUESTION: -- reduced to writing.

5 MR. LASCELL: That is only a part of their
6 brief and what we have heard here this morning.

7 We suggest, however, that this Court should
8 not interpret these regulations, that these regulations
9 are operating in a very sensitive area, and that they
10 ought to be clearly stated and clearly understood so
11 that those colleges like Grove City can operate at
12 something less than peril.

13 QUESTION: Has the -- weren't these grants
14 created by an amendment to Title what, Title 9?

15 MR. LASCELL: There were -- this was in the
16 Education Act of 1972. It was a whole grant statute --
17 it was a whole education amendment statute.

18 QUESTION: But was there an amendment to Title
19 9?

20 MR. LASCELL: No. Title 9 was a part of that,
21 Justice Brennan.

22 QUESTION: Just a part of that.

23 MR. LASCELL: That's correct. The initial
24 Title 9 was a part of that. It was amended in 1976.

25 QUESTION: What was?

1 MR. LASCELL: Title 9.

2 QUESTION: Well, now, how about this, the

3 grant statute?

4 MR. LASCELL: The grant statute was extended

5 during the life of the BEOG awards.

6 QUESTION: So it has been re-enacted.

7 MR. LASCELL: That's correct.

8 QUESTION: And it was re-enacted at a time

9 when -- was it still in the same legislative basket with

10 Title 9?

11 MR. LASCELL: Yes, yes.

12 QUESTION: So that the regulations under Title

13 9 saying that receipt of these -- not the receipt, but

14 the --

15 MR. LASCELL: This whole proposition.

16 QUESTION: The whole proposition.

17 MR. LASCELL: Yes.

18 QUESTION: This agency interpretation of the

19 regulations was well known at the time.

20 MR. LASCELL: Well, it was known in 1975 when

21 there were some studies done of it, that's correct.

22 QUESTION: Well, and since then, since then

23 the grant legislation has been re-enacted.

24 MR. LASCELL: No, no, that has not occurred.

25 The regulations have not been examined since 1975,

1 and --

2 QUESTION: Well, I know, but has the grant
3 program been?

4 MR. LASCELL: It has been extended, but the
5 regulations --

6 QUESTION: With the regulations on the books.

7 MR. LASCELL: Yes.

8 QUESTION: With the meaning that the agency
9 had been giving to it.

10 MR. LASCELL: With the meaning that the agency
11 has been giving to it since 1975, that's correct.

12 QUESTION: Do you think that re-enactment
13 against that background is really just post-legislative
14 history or post-enactment history, or is it not?

15 MR. LASCELL: I think it is, at best,
16 post-enactment legislative history, and I am very
17 uncomfortable suggesting to the Court just what that
18 means in this instance.

19 QUESTION: Well, I think it's -- isn't it
20 something you have to deal with?

21 MR. LASCELL: Oh, yes, I don't disagree with
22 that because as this --

23 QUESTION: These regulations were presented to
24 Congress under a now invalidated procedure, and --

25 MR. LASCELL: Well, two invalidated --

1 (Laughter)

2 MR. LASCELL: We have two invalidated
3 procedures here, of course. We not only have the
4 procedure which this Court invalidated --

5 QUESTION: In any event, neither house
6 rejected this interpretation of the regulations.

7 MR. LASCELL: That's correct, that's correct.
8 In 1975, that's correct.

9 QUESTION: And nevertheless extended the grant
10 program which was part of Title 9.

11 MR. LASCELL: That's also correct. And that,
12 of course, is what this Court examined in North Haven.
13 We do not think that precisely the same issues are
14 involved in this instance as were in North Haven, but we
15 recognize that as a problem.

16 Thank you, Mr. Chief Justice.

17 CHIEF JUSTICE BURGER: Thank you, gentlemen.
18 The case is submitted.

19 We will hear arguments next in Consolidated
20 Rail v. LeStrange.

21 (Whereupon, at 11:06 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

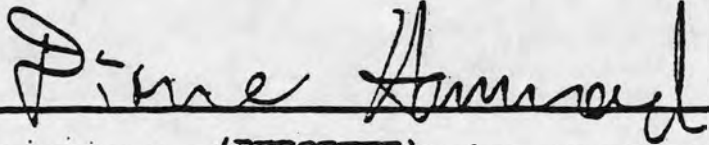
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GROVE CITY COLLEGE, INDIVIDUALLY, AND ON BEHALF OF ITS STUDENTS, ET AL., Petitioners v. TERRELL H. BELL, SECRETARY OF EDUCATION, ET AL.
#82-792

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BY

A handwritten signature in cursive script, appearing to read "Pierre Hunsford", written over a horizontal line.

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