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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, Defendants.	Docket No. 80 5124 C Chicqgo, Illinois June 8, 1983 1;30 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MILTON I. SHADUR

TRANSCRIPT ORDERED BY:

APPEARANCES:

For the Plaintiff:	Department of Justice Miss Peggy Gordon and
FOR THE DEFENDANT:	Mr. Robert Howard Mr. Hugh McCombs Mr. Robert Weissbourd
Intervenors, etc.	Mr. Thomas Heck Mr. Steven Diamond
Court Reporter:	Dolores Brennan 219 South Dearborn Street Chicago, Illinois

THE CLERK: 80 C 5124, United States vs. Board of Education of the City of Chicago; status.

MR. HOWARD: Robert Howard, Hugh McCombs and Robert Weissbourd for the Board of Education.

MS. GORDON: Sandy Ross and Peggy Gordon for the United States.

MR. HECK: Thomas Heck for Academy Square Partnership.

MR. SIAMOND: Steven Diamond for proposed intervenors.

THE COURT: Mr. Ross, have you had enough chance to take a look at the papers I know were dumped on you unceremoniously on short notice?

MR. ROSS: I read most of them, your Honor.

THE COURT: Before we get to the issues as between the United States and the Board, let me address the question of the proposed motion to intervene on behalf of the individuals challenging the Academy Square Project.

This is a matter as to which because I know that counsel were subject to very critical time restraints, I had my clerk apprise the two principally interested parties of the disposition yesterday, telling them that I would reflect the reasons today.

I have indeed denied the motion to intervene, and although there were several infirmities, it seemed to me that two of them were principally implicating.

One is that the intervention rule, Rule 24(a) of

the Federal Rules of Civil Procedure, requires a timely application. Here there can scarcely be a claim that this action, United States of America against Board of Education, and its status, were not known to the parties. Certainly, it is a subject of enormous public interest and concern, and at least when this Court approved the desegregation plan in January of this year as being within the broad range of constitutionally acceptable alternatives, there was national, rather than just local comment . Indeed, the petitioners could have come in before the plan was approved to ask for the kind of relief that they are now seeking. A lot of parties made submissions to the Board.

But, at the latest, as I say the January '83 action by this Court, triggered an obligation to tender that issue promptly to this Court, and not just to sit by as the petitioner did. Really, their response has offered no answer at all. Tendering affidavits that link timeliness to the time that petitioners became aware of the possibility of intervening here, is really not an answer. That would, in my view, impermissibly measure a legal standard if a party decided to consult a lawyer, or even how perceptive the lawyer might be.

The Donovan affidavit, one of those reflects a discussion back in August of last year of the fact that the Academy Square would have an adverse impact on the neighborhood, including schools. That was enough awareness to start

the timeliness clock running, if not, as I say, at the latest January, '83.

There is not a word at all of explanation in the memorandum as to the reasons for delay. It, really, rather deals with the claimed lack of identity of the parties who asserted the same arguments before Judge Aspen in the Gutreaux case, but only for purposes of meeting res judicata or collateral estoppel issues, and as I say, I don't find that responsive on the timeliness issue.

Now we have a somewhat unusual situation here. That is, 24(a) is really focused, primarily, as all of us know, on situations in which somebody is trying to intervene before a lawsuit gets decided, and for that reason, usually timeliness bears on its affect on the litigation, but there is no reason that that has to be the exclusive thrust. Whereas, in this case delay prejudice is another party, timeliness is equally at issue.

I have held that petitioners have failed to satisfy that threshold requirement.

Now, there is another important relevent issue that is really not addressed by this one, but I suspect it is the kind of thing that poses broad considerations, and that is related to the point that I made about the ordinary nature of Rule 24 on intervention.

There is a requirement in 24(a)(2) dealing with

intervention of right, that the applicants claimed interest has to be impaired or impeded by the disposition of the action, and that really points out why it is that I say that intervention, normally, talks about what happens before an action has been disposed of. In the sense that has been argued by petitioners here, every school closing, or every housing decision, incidentally, private or public, would give rise to potential intervention. That really proves too much, in our case.

Our case is one that has dealt, and continues to deal with the constitutionality of the plan, the Rule 24 Intervention standards focus more precisely on the pre-decision situation, disposition of the action, than a post-decree intervention, and the parties have really not demonstrated their right to come in under the circumstances.

It was principally for those reasons that I determined that they had come in with too little and too late, and I have therefore denied the motion to intervene, and the parties can go their own way.

MR. DIAMOND: Yes, your Honor. Your intention, this is to be the findings?

THE COURT: Yes. These constitute the Court's findings and conclusions on the basis of which I have denied intervention.

MR. DIAMOND: There will be no separate opinion?

THE COURT: This is it.

MR. DIAMOND: I understand. Thank you very much.

MR. HECK: Thank you, your Honor.

THE COURT: Now, let me turn to the current motion that I know has just been tendered to the United States, which is the motion by the Board of Education for an order pursuant to the consent decree to preserve for, what they characterize as a 14-day period, the status quo, as to certain Department of Education funds, pending further proceedings on the Board's petition to enforce the consent decree.

Mr. Ross, you have read it?

MR. ROSS: I have, your Honor. In anticipation of the filing of such a document, I brought with me today, not only documents for Mr. Howard, but also people from the Department of Education, and we sat down this morning up until 11:30, had a round table discussion, really to learn exactly how the Secretary's programs in question here work, what the effect of such an injunction might be, what might have been done other than what has been done in order to put the motion in context.

Mr. Howard and I, I believe, are agreed that we should now proceed to present our arguments to you on whether this 14-day, whatever you want to call it, is granted or not.

The government has quite a bit to say about that, but I want to advise you also, that we have what we would term as

resource persons from the Department of Education to help out if it turns out that Mr. Howard and I have any misunderstanding as to what has been done, or what could be done, or things similar to that.

THE COURT: Well, it seems to me, although I am sure that one of the team members for the Board might think that he would be more eloquent in person than on paper, that the ball is really in your court.

I have read the submission. It is a thoughtful submission, and it seems to me it places the burden on the government, so I am ready to hear you.

MR. ROSS: That is fine. I am prepared to go ahead.

THE COURT: Mr. Howard? Does that offend your sensibilities?

MR. HOWARD: No, I would be happy to go second. That is fine.

THE COURT: You have gone first. What you are saying is you would be happy to go third.

MR. HOWARD: There were two other matters which we took up yesterday, and which I think we can report on preliminarily.

First, your Honor indicated yesterday the intention to enter the type of preliminary order the Board had requested calling for certain reports by the United States, and we were to confer with the United States as to accelerated dates for

some of those reports.

As Paragraph 7 of our motion indicates, we have agreed on the following schedule.

A report to be submitted tomorrow on the availability or asserted unavailability of Title 4 and discretionary fund moneys. We have already received some preliminary written information about that, but a report on that tomorrow.

Secondly, a report on the availability or asserted unavailability of other Department of Education funds by next Tuesday, June 14.

Third, the United States will prepare a financial plan within the 45-day period we originally proposed. That is by July 22, if I count right, and with respect to our request for a report on the availability of fiscal 1983 funds in the control of agencies other than the Department of Education, I think we are not yet in agreement about it. That is a matter we are still considering as to the timing of that report.

I am not sure, finally, where we are on the question of Paragraph 8 of our original prayer for relief, which is a report on funds that might have been available in the two past fiscal years, and steps that could have been taken to provide those funds.

I would suggest with respect to that Paragraph 8 report, I would suggest a 30-day date.

THE COURT: How do you perceive that, the significance

of that provision?

MR. ROSS: I think --

THE COURT: That is, what the United States could have, or perhaps, should have done.

MR. HOWARD: I think that it relates to the pattern of conduct on the part of the United States, which is part of the basis for determining what its future course of conduct should be.

THE COURT: What you are saying is that that information is important in terms of prospective conduct.

MR. HOWARD: Yes.

THE COURT: So that still would call for a relatively short timetable, and you are asking for 30 days rather than the 45 days that were originally identified in Paragraph 8.

MR. HOWARD: I think the proceedings seem to me to move more quickly than we originally thought.

THE COURT: We need some telescoping.

MR. ROSS: Your Honor, that 30-day period is consistent with the 30-day period that they have asked for in their expedited discovery request. My preliminary response to that, which I read about 45 minutes ago, is that I think that most of those things can be produced in 30 days.

THE COURT: We will set up 30 days and you are not about to be held in contempt if you miss it by a couple of days.

So we will then have a 30-day provision for that,

which will mean July 8.

MR. ROSS: And as Mr. Howard pointed out, we have not agreed on the reports on other federal agency money. I told him, only partly facetiously yesterday, that on the 13th Floor of this building there are available copies of the Catalog of Domestic Assistance, and that I will be happy to give him the address.

THE COURT: All of us need at least some rice that we can strew along with us as we make our way through the federal funding forest.

MR. ROSS: Well, I am told that that document is very useful, and I am also told that it is four inches thick, and that --

THE COURT: All the more reason we ought to have a girl scout.

MR. ROSS: That's right, but all the more reason for me to have absolutely no idea how long it would take me to put such information together in the way that they want it. But, I will do my best, in addition to telling him where the catalog can be located.

MR. HOWARD: Your Honor, can I suggest 30 days for that provision also?

THE COURT: Yes. We will have July 8 for that one as well.

MR. HOWARD: The other matter, your Honor, is that

as we indicated we would yesterday, yesterday afternoon we served discovery requests on the United States, which Mr. McCombs has met with Mr. Ross on, and can report on.

MR. MC COMBS: We are slowly progressing through a 12(d) conference, your Honor, with respect to our seven-day request. Some of those will be seven days, some will be 30.

Mr. Ross and I have agreed to meet further tomorrow morning, or discuss it further over the telephone tomorrow morning. If there is a problem Miss Gordon and I will be back to see you, probably tomorrow afternoon.

THE COURT: In the best tradition of the rule, and the very reason it is drafted that way, I trust I won't see you.

MR. MC COMBS: I trust that is correct.

THE COURT: I expect you will resolve those issues.

MR. MC COMBS: Fine.

THE COURT: Now, can we get to the merits.

MR. ROSS: Your Honor, I would like to start, if I could, with a little background on how the government's obligation in the consent decree came about, what it means, and I want to start out by assuring you that we view that as a serious obligation,and one that we continue to be bound by.

During the '79s, and all the period preceding both general and specific dealings with Chicago, the major source of extra funds for desegregation, for desegregating school boards and systems, came from what was called the Emergency

School Aid Act, which was passed in June of 1972, and which supplanted its predecessor, the Emergency School Aid Program.

As I recall, Congress at that time changed the statute to prevent the Department of Health, Education & Welfare from giving out that money for school desegregation unless it really was for school desegregation. In other words Congress was worried that it was just another way to supplement the budget of the school systems, and so for the period, several years after that, there were a set of tough requirements.

You couldn't get your ESA, and if you will pardon me for using that bureaucratize, it is a little quickier, you couldn't get your ESA money unless you satisfied a number of rather strict conditions about showing you were a non-discriminatory school system.

I can say from my own experience dealing with school systems that we sued, that there was always a question of, if we do this, how much money do we get for it. And the standard answer from the Department of Justice and from HEW under similar circumstances where voluntary plans were being negotiated, is that you don't get the money for the desegregation. You have a constitutional and statutory duty to desegregate. You will become eligible for that money when you have a satisfactory plan.

Chicago was told that time and time again, and as we

approached the consent decree, they asked, and we agreed, that the United States would do, as it says there in the consent decree, to help Chicago get money for its desegregation plan.

I just, by way of illustration, I can tell you some of the things I was involved in during the first few weeks and months after the consent decree was executed.

Under the ESA statute, as it then was constituted, a rather complex application process, with a lot of very tight time schedules, and difficult to understand time schedules, were required. They were different parts of the ESA pot. One of them was money that Congress appropriated that was distributed to the states generally on a per-capita basis for distribution within the states, and there was another much larger amount of money called, out-of-cycle -funds.

The way that worked over the eight or nine years up to this time, was that the school districts that were desegregating that year, competed on a national basis for those funds, and that meant that some years -- that the amount that an individual school district would get, depended almost entirely on these factors:

How much money Congress appropriated, which by the late 70s was something like two hundred million for this out-of-cycle program; the quality of the substantive programs that the school board wanted to carry out with the ESA money, and

that meant the quality of the Magnet School Programs, and a variety of other specific, substantive matters where there were certain things that would be funded under ESA, and some that wouldn't.

As I recall at the time, one of the things that the Chicago School Board needed to know, was just what kind of programs should we include and what we are planning here so they can be paid for with ESA funds, because there are certain things that ESA would fund and certain things that they wouldn'

So I remember going through, entirely through the Cleveland Program to see the types of programs Cleveland had successfully applied for under ESA, and relating that to the School Board and by way of suggesting that the track record was the type of program that could be funded.

But, more importantly than the quality of your program was who else was applying that year. So that a school board, any school board in the country applying the same year that Chicago, or Los Angeles, or St. Louis, or Milwaukee, or St. Louis, or Buffalo was beginning their desegregation plan, would be fighting over a limited amount of dollars with another deserving school system.

So that our obligation to help never, in my view, contemplated giving Chicago a leg up over another school system that was desegregating and also entitled to compete for those funds. But it did contemplate showing them how. Procedural

help, when to apply, how to apply, and I will give you some other examples that may help also to illustrate.

I recall having an all-day conversation with a lawyer at the Department of Education,then I guess, about a clause in a lease that between the Chicago School Board and GSA, had to do with surplus property that GSA was going to give to the School Board.

When we had the discussions with the School Board before the consent decree was signed, we did not limit the money that Chicago could get to just the programs that dealt with school desegreation. We said, If it fits and if you are eligible, there are many ways that Chicago can be the receipent of federal funds.

THE COURT: But, if you are saying that the purpose of the provision of the consent decree was a procedural one, an informational one, surely the use of the language that obligated the United States to make every good-faith effort to find and provide every available form of financial resources

MR. ROSS: I understand that. I will get to that.

THE COURT: That is an inartful way to have expressed that purpose.

MR. ROSS: I am not saying it is limited to the procedural assistance, but it is limited to not giving Chicago an unfair leg up with competition with other school districts for a limited amount of money, and I would insist it is limited

in that regard.

By way of another illustration before I move on, the Department of Energy had an application from the School Board for a Solar-heated school building under a grant that was directly aimed at promoting solar-energy, and at the time, before the consent decree was signed, you must remember that Chicago was ineligible because it had been held to be in violation of Title 6 for a grant of this kind.

So I had to explain to the counsel at the Department of Energy that the operative effect of the consent decree committing the Board to develop a plan that was consistent with the Constitution, was sufficient to remove, if you will, that cloud from their eligibility so that the Board could proceed with its application.

Again, in a way, that is procedural help that helps the School Board along, and doesn't, in that sense perhaps, a competitor for that Department of Energy grant may have been indirectly handicapped by my action because now I pointed out to someone that the Chicago Board is eligible for that grant, and the funds are limited, so perhaps the applicant at the bottom of the list suffered. But I don't think that is the same as affecting the substantive competition.

In any event, moving along, there seems to me to be four ways that the government can -- or, let me rephrase that, if I can. Four ways that the School Board by its , either

directly or by implication had suggested in its papers, the government ought to act in furtherance of that part of the consent decree.

There is one we can agree on. That is, that for all programs where the statutes and regulations make the School Board an eligible recipient, the government is willing to give all the help it can to Chicago with the caveat that it cannot not, under the law, unfairly give Chicago an advantage in competition with other school districts. We have been, and we continue to be willing to help, and do all we can in that regard.

The next category that the School Board states, and I will use the Department of Education as my example, but certainly, the principle applies to possibly other agencies, but they would take money from programs where the statutes and regulations direct the money go elsewhere and have it redirected to Chicago.

I don't think that, and if I understand that, that they really, since that can't be done, they must not be asking for that.

THE COURT: That is not my understanding of the Board's proposal at all.

When you are talking about statutes and regulations, that is not my understanding of the Board's proposal.

MR. ROSS: Well, it is in this limited extent.

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important method, and the fourth, I will mention that for a moment before I skip back, the fourth, which is to seek new legislation on behalf of Chicago or on behalf of desegregating districts in general, and Chicago specifically.

I can only say in that regard, that the Secretary tells us that he told the School Board that he would pass on to the Office of Management and Budget, a request for legislation; that he had done so, and so far has no positive result from that.

But, I should also tell you, and it certainly was reported in the paper this morning, that the House yesterday passed, what was essentially a recreation of the ESA statute, and it was reported to me in the paper, and also by my colleagues at the Department of Education, that the Administration in general, the Executive Branch in general, has not supported that legislation.

So that, I would, for purposes of this argument, maintain that seeking legislation on behalf of Chicago is consistent with the government's obligation under the consent decree, but in no circumstances could it be required by the consent decree, and I think everyone would agree with that.

The Board has asked in its papers that the government report on its legislative efforts, and I see nothing wrong with that. I think that is as far as the government's obligation to the Board could, or should go, in that regard because I

think we all would agree that no one wants to have this Court supervise the quality of lobbying for legislation that would favor the Chicago School Board.

Now, that gets me back to the third catetory, and the one that is really the subject of this hearing. That is money that the School Board would say is there appropriated to the agency, and subject to the Secretary's discretion, on how to spend it.

I will tell you by way of background that Mr. Howard and I have had a number of conversations about the Title 4 appropriation and the discretionary account, and we had long ago arrived at some disagreement as to the meaning of the word "discretionary," and the limits of the Secretary's discretion under the statute. But, let me try to summarize where we are on that.

Title 4, which is Title 4 of the 1964 Civil Rights Act, has up until fiscal 1982, included in it, money that was spent by the Secretary for aiding school districts in desegregation.

As a matter of fact, in fiscal '81, out of a total $37 million in that appropriation,the Chicago School Board applied for, I am not sure how much they applied for, but I am quite certain that they got around $300,000 that year from Title 4. Is that right?

MR. HOWARD: Which year?

MR. ROSS: Fiscal '81.

MR. HOWARD: Roughly.

MR. ROSS: That is not to say that all of the thirty-seven million was available to local school districts, because ever since 1965, I believe, there have been set up by, and funded by the Department of Health, Education & Welfare first, and now the Department of Education, desegregation assistance centers which are essentially nests of desegregation experts who are available, and paid by federal funds, to assist local school districts with, first, it was desegregation plans and that has, as you might well imagine, multiplied over the years, to assistance with bi-lingual students, and assistance with overcoming problems of sex discrimination.

In addition to that there have been moneys over the years under Title 4, go to the State Boards of Education for similar projects.

THE COURT: If my numbers are right, it would take 190 years at $300,000 a year to make up a year's budget of desegregation of $57 million, wouldn't it?

MR. ROSS: Well, if I may get aside for the moment -- Let me pause where I am to talk about numbers for a minute, your Honor.

Under the old ESA statute, which was in effect at the time this consent decree was signed in 1980, Chicago had a right not to a promise, but they had a right to an

expectation of substantial sums under the ESA statute, as it then existed.

For example, Cleveland, which is less than a sixth the size of Chicago, got something like $27 million over a five-year period. Wilmington, going back a little bit farther in time, Wilmington itself is a very small school district. The whole City of Wilmington that was ordered in the case there to have an interdistrict remedy with the surrounding districts, but as I recall, Wilmington itself only had about 12,000 students in say 1975, and Wilmington was relatively a huge beneficiary of the ESA money in getting some four, ffive million dollars in one year.

By the time Chicago's turn was coming, if you will, most of the large urban school districts -- they are not large compared to Chicago, but most of those in that same size range with Cleveland, St. Louis and Milwaukee, and Indianapolis, were already partaking of the ESA funds. So I can understand that Chicago was feeling, Well, we are next. We are going to get a lot of money out of this.

And, I would only say parenthetically, that if Chicago had desegregated its schools ten years earlier, they wouldn't have been stunned by the Congress ending of the ESA statute, but I know that is not before us today.

THE COURT: You are saying in the well-known phrase, Something funny happened on the way to the White House.

MR. ROSS: I think that is exactly right.

In 1981, we are still talking about the number, the ESA statute ended, and it was changed, and it was changed by putting ESA along with about 30 other programs into a block grant statute.

Now, the block grant statute, very briefly, carves up the money on a per-capita basis, sends it to the states, and says, States, this is the money contributed on roughly a per-capita basis, with some emphasis on students that are more costly to educate. It represented a political decision, with a small p, to shift from Washington to the state capitols the responsibility, and the autonomy, over that money.

So that in 19, FY 83, as I recall, Illinois' share of the total appropriation was about $21½ million, and the statute allows the state to take 20 per cent of that off the top, and essentially do what it wants with it, and the rest of the 80 per cent has to be distributed, roughly, on a per-capita basis.

Chicago, this year, got a little over five million out of that, and I would like to break that down a little bit because that replaced, that five million replaced all the money that Chicago was getting under ESA, or could have gotten under ESA, and those other 30 categorical grants. If you follow me on that.

So that the five-plus million that they got meant

that -- But, with one big difference, your Honor. At this point Chicago had the discretion, pursuant to the intent of the statute, to spend the entire five million on school desegregation, or the entire five million on library, whereas before, getting all that five million through categorical clearance, it was limited on how much could be spent on various items. I won't bother going through any of the others in the 30, but I am sure you can imagine what they are. Various programs for the schools that had accrued over the years as various ideas for kinds of grants to the schools accumulated.

So that the School Board in its paper saying, Well, it is not getting directly any federal money for desegregation this year. That is true because the scheme shifted, and they got the money through the State of Illinois, and they got the same amount as they would have gotten under all the categorical grants, but they were free to spend more then on desegregation.

But, the key thing that the change in the ESA statute did to them was that they now could not compete on a nationwide basis for that large pot of money that went to school desegregation, and that is where Chicago lost out by the change in the ESA statute, and those amounts of money were extremely large, and that so much larger than the other amounts of money that we are talking about today, that that, essentially, makes the loss of ESA the key to the motion that the

Board has before you today.

As I was saying, as you rightly pointed out, the $300,000 they got in 1981, was three hundred thousand out of $37 million, that was as much as a school district like Chicago could have expected to get out of Title 4.

THE COURT: Mr. Ross, all the things you have said seem to cut in precisely the other direction. That is, the smaller the pot that is available, the more critical it becomes for the Board that has the benefit of a commitment from the government, to make certain that it is not tapped out by the time the government is responding to it, and that is precisely the subject of the motion that is before me now.

The motion that is before me now is basically a standby motion,and I know that what you are saying is, effectively there is no point in talking about a status quo motion if the result at the end of the line is going to be just loss of time because Chicago is not going to be held entitled to money. But, again, the smaller the amount of funds that is available, the more critical these decisions become. There is room for a lot of latitude and slippage, perhaps, although we don't like to acknowledge it, in the manner in which government funding is done when we are dealing with large sums, but when we are dealing with smaller ones, much more critical that the fine-tuning is there.

MR. ROSS: Your Honor, I agree with the overall logic

of your proposition, but that proposition is unrelated to what the small pot is intended by Congress, and what the Secretary's authority is to do with that money, which is what I will move to now.

THE COURT: We will be getting to that, I trust.

MR. ROSS: The subject at hand -- Well, let me start with Title 4.

The Secretary, or let us say the United States, the United States in recommending and creating the Block Grant Statute in 1981, recommended that, for example, Title 4 be put into the Block Grant Statute, and Congress did not do that; and in the process of recommending that Title 4 be put into the Block Grant Statute, the Secretary of Education did not ask for any money for Title 4. Congress said, not only are we not going to put it in the Block Grant Statute, we are going to give you $24 million under Title 4.

So, in 1982, and again in 1983, the budget passed by a continuing resolution, the Secretary of Education asked for no funds for Title 4, and in each case $24 million was appropriated.

Now, the Secretary could have used the Title 4 funds as they were in the past, which would have meant that some of the $24 million could have gone to local school districts, as well as the State Boards of Education, and the desegregation assistance centers that I mentioned previously,

but had the Secretary done that, he would have had to create a competition for those funds on a nationwide basis.

The law simply does not allow the Secretary to say, Here, Chicago. Here is your money. That is unfair to the other school districts, and it is not allowed by statute. The only thing analogous would be a sole-source contract, and a sole-source contract is only allowable in those situations where the government is procuring goods or services.

THE COURT: Are you talking about legal restrictions? When you shift from saying the law doesn't permit, to say it wouldn't be fair, I detected some change of emphasis.

MR. ROSS: No, I did not shift. Both unfair and illegal.

THE COURT: And what is the legal restriction?

MR. ROSS: That the Secretary has no authority to select individual recipients of federal funds other than the authority to enter into sole-source contracts, which is extremely limited, and which has, essentially, nothing to do with this proceeding.

I was about to say it does involve situations for goods or services being procured, which is not this situation, and where the justification for the sole-source contract is that only this contractor can provide these goods or services.

THE COURT: Suppose the Secretary were ordered to do so? Is there any provision in the law that would prevent

his compliance with an order?

MR. ROSS: If the Secretary were ordered -- Let me distinguish between money that was discretionary, and whereas he could have sent it, could possibly be ordered to -- No, I don't think so because the decision is entirely up to the Secretary. I am not talking about a statutory reason now. I am shifting to another reason, and that is that the discretion is vested in the Secretary, and so long as he doesn't abuse it, in order for him to spend the money some other way -- In other words, if the Secretary makes a choice between two worthy recipients, the Court has no business saying, Secretary, you made the wrong choice, and here is the one you have to make.

THE COURT: You are talking about the familiar principles that apply to mandamus proceedings. It is very different from what we are looking at now, it seems to me, but I wanted you to focus on the question not subsumed within your notions, your general notion of discretion, but to be responsive directly to my question. If it were to turn out, and I am not foreshadowing the results, but I am trying to get a handle on what the legal restrictions are, if it were to turn out that an order was deemed appropriate, is there some legal inhibition on the Secretary's honoring that obligation?

MR. ROSS: Well, it is just so fantastic to me, that

I hadn't even considered it before. I assume we did have a separation of powers, and the Court would not be ordering the Secretary to exercise his discretion in one way or the other.

THE COURT: Mr. Ross, I am not talking about ordering the Secretary to exercise his discretion. Again, I think you missed the thrust, so maybe you ought to go on to your next issue.

MR. ROSS: Do you mean would he be subject to other lawsuits? You mean, would he be subject to --

THE COURT: Is there some law that would be violated by his doing that? Is there some Congressional directive, some mandate?

MR. ROSS: Are you excluding constitutional provisions for the moment?

THE COURT: No, I am not excluding constitutional provisions. I think we will address the subject, separation of powers throughout.

MR. ROSS: I am talking merely about if the Secretary is duly authorized to delegate, and signed a contract that says that the X School District has been awarded such-and-such amounts of money, and to use the Secretary's word of art, has been obligated to such a recipient, and he was ordered not to give that money, to stop, to hold up the mail, and to take the checks that are in the mail out and tear them up.

THE COURT: And suppose a contract is one to provide every available form of financial resources?

MR. ROSS: You mean he is ordered to?

THE COURT: To live up to that contract.

MR. ROSS: To tear up Checks A and B, and write a new check to Chicago to live up --

THE COURT: No, just a minute. The Board's motion is for the government not to make any future commitments for some limited period of time so we can look at what funds are, in fact, available, and then in turn, the second stage of the Board's motion is looking forward to the future, but they are not asking that be passed on at this point.

But the second contemplated stage is that when it is determined what financial resources are available, that that might then be the subject of an order to honor that contract.

MR. ROSS: So you want me to answer the question without regard to the merits of their likelihood to prevail on the merits, or any of that?

THE COURT: Right.

MR. ROSS: And, narrowly within the confines of ordering them not to obligate funds for two weeks. Is that what you are saying?

THE COURT: No, no, because that one we are going to look at.

My question, again is, you seem to regard one kind of contract by the Department of Education, and that is the commitment to pay so many thousands of dollars to a particular school district that results in cutting a check and putting it in the mail, somewhat differently from the contract that is represented by 15.1 of the consent decree.

MR. ROSS: Not so, as long as the two can be carried out consistently.

THE COURT: All right, go ahead.

MR. ROSS: You are positing a situation where the two cannot be simultaneously executed, and I would submit that is not the case.

THE COURT: Go ahead, Mr. Ross.

MR. ROSS: I believe I was talking about Title 4.

THE COURT: Yes.

MR. ROSS: And that the choice that the Secretary made, and the choice that the Board quarrels with, is that I would maintain that he could have made a choice to channel that money to school districts in a general way,and he chose not to. And,I will submit that his choice is not only one not subject to review by this Court, but that it was reasonable, not inconsistent with the government's obligation to help Chicago get money, and that for that reason the Court should not interfere with the discretion that the Secretary has exercised.

And so, the position I am saying, is that as a matter of law, we are in no different situation now where we are ten days away from the contracts being signed, and the money going out to these people than we would have been the day that the Secretary decided that this was the way he was going to spend that money. That in the context of the government's obligation to the School Board, the Secretary still had that obligation because he can meet both, all his obligations, and they are not inconsistent, and that his choice to do that is not arbitrary, not capricious, and is not inconsistent with the obligation under the consent decree.

Moving quickly to the Secretary's discretionary fund, I would construct a similar argument, except to a smaller amount of money, and let me explain, if I can.

The Board and the government are agreed that certain of the monies committed by the Secretary are mandated by statute, and they are not in contention.

Then there are, beyond that, there are some items that the people from the Department of Education characterize as directed by appropriations language, and I should explain that. We have explained that to Mr. Howard, and I am going to try and summarize that for the Court.

The appropriations language that says this is what we expect you to spend the money on, is the product of the

give and take between the Agency and Congress. That is essentially, a negotiation. We want to spend it on this. We think you ought to spend it on this. All right, this is how much you are going to get, and this is what we would like you to spend it on.

Now, the Secretary is not bound, as a matter of law, to spend that because it is in the appropriations language. He is bound by principles, by his obligation to fill his office in, and carry out his duties in a reasonable manner. He is bound by commitment, and the necessity to get along with the Congress.

THE CONGRESS: So much for separation of powers.

MR. ROSS: That's right. But he is not bound, and I want to make sure you understand that is our position.

THE COURT: What if he is bound to a Court?

MR. ROSS: Now, beyond that there are monies that are in the Secretary's discretionary fund, which are not even subject to direction by Congress, and there are various types of funds. I would like to describe a couple of them to try and give you an idea.

We determined by consultation with the people from the Department of Education, there was about a little over $6,000,000 left in that fund, or started in that fund. Let me put it that way. That got there because the Secretary, under the law, has in his discretion, the authority to spend

six percent of the overall money appropriated to the block grants statute that replaced ESA, and all the other ones, and the 6,000,000 was, and is being spent by the Secretary by such things as a grant announcement which was made recently. Applications are coming in, and in addition to specific items that are suggested in the grant announcement, there is available unsolicited grant applications, and I must say, one, that the Chicago School Board is fully entitled to participate in.

Before I go on, the most important aspect of the $6,00,000 is that it is being spent for items that have national significance, and that is because the role of the Secretary under the statute, is to deal with attempts to disseminate quality education, ideas about improvements in education, technology about improvements in education throughout the country, and that contrast sharply with the money that is given to the block grants directly to the state for use as the state wants to use that money.

So that, for example, if Chicago were to apply for a grant under that statute saying we have a model desegregation plan, one that is successful and how we can show why it is successful, this lesson can be disseminated to other parts of the country, that would qualify as a grant in that category.

But, the Court must understand that that amount of

money available for unsolicited applications, has to be spread very thinly over a number of programs which would include, for example, a continuing grant to educational television to preserve educational films that have been made for ETV in the past.

There even is money in that part of the discretionary account that the Secretary uses to sponsor conferences around the country, and too, if I can get the right verb, to solicit ideas from school boards that would be consistent with the recent National Commission Report on Excellence on Education to try to obtain ideas that can be disseminated around the country to generally raise up educational standards and performances.

So, I say that in some detail to give you an idea of where that money goes, and I say it not only to impress upon the Court that the Secretary's discretion in using relatively small amounts of money available to him on a national basis in this way, is always going to be a choice between worthy alternatives. That is what the Secretary is paid for. He has the discretion to choose between worthy alternatives, and that he chooses one does not make the United States performance under the consent decree fail because it simply can't be inconsistent for the Secretary to attend to his other duties.

I would submit that in addition to the reasonableness

of the choices he has made, that is shows the Court that even a two week suspension or restraint, or whatever the school board characterizes in their motion for the entire amount of all this, would be extraordinarily unfair to all other potential beneficiaries of the federal funds, and particularly on the speculation that Chicago would be entitled to more than something approximating their aliquot share, had the Secretary chosen to spend the monies originally in the way that the School Board proposes. That is to say, for Title IV monies for local school districts.

5fls

Ms. Gordon points out to me that the Department of Education regulations require the grant under Title IV to be competitive, and I say that only because I am unsure as to the import of your questions because if, presumably if the Court has the power to interfere with the separation of powers, it has the power to ignore a regulation that says that the grants have to be competitive.

THE COURT: That was your suggestion, not mine.

MR. ROSS: But, in answer to your question, yes, there are regulations that require the grants to be competitive, and I would add to that, your Honor, that the whole history of granting these monies through competition is firmly embedded in the way the education establishment expects and should expect the national government to operate, and that is to set up fair criteria where limited sources can be competed for, and I say that in total sympathy for the needs for Chicago to get the money for its desegregation plan, and in total sympathy with the fact that the School Board has worked extremely hard, and put a lot of money and effort, and in my view, as I said in the report that I filed with you a couple of weeks ago, doing a good job.

But, as sympathetic as the government may be, that sympathy is not a reason to get carried away right now. I don't know what we can do to reenact the ESA statute, but I don't think you and I are here to settle that problem.

Unless you have some questions, I think I have had my say.

THE COURT: No. I am very appreciative. I would like to hear from the Board representative, and then we will see whether there are any other questions that have to be posed.

Thank you very much.

Now, Mr. Howard, I don't mean to impose any extraordinary restraints, but please be mindful of the fact that I read everything you wrote.

MR. HOWARD: I appreciate that, Judge, and I will try to be very brief.

First of all, the consent decree contains an obligation on the part of the United States which it is for this Court to interpret. It is not what Mr. Ross may have thought in August of 1980, or indeed, what he may think today personally, that the consent decree language may mean. It is language in an agreement embodied in a court order, which is for this court to interpret what the obligations of the United States are.

Second, it is not necessary for us today to explore the full scope of what that obligation may mean. It may be of interest for future consideration that the Department of Education may have hundreds of millions of dollars of excess money in its student loan fund which can be reprogrammed by Congress in a very routine fashion.

That may be of interest for the future, but we don't have to decide today, whether the obligation of the United States under the consent decree reaches that money.

What we have to decide today is whether some funds appropriated by Congress under statutes that explicitly provide for desegregation grants to local school boards, whether those funds should be held in the status quo by the United States, for a period, we suggest 14 days, during which we can receive the report from the United States, receive the expedited discovery responses, and engage in further discussion with the United States so that we can then make a more complete presentation to the Court about the nature of these funds, about the Board's entitlement to the funds, and perhaps about the extension of preliminary relief while this matter is litigated.

It is true that eventually the Court will have to decide, and I address this because our view of it is so different from Mr. Ross, eventually the Court will have to decide whether, indeed, the Secretary of Education's discreton to choose where to spend his money is totally unaffected by this consent decree.

Mr. Ross and I, I think, are in agreement that the Title 4 funds and discretionary funds, could have gone down a very different path than they have in this fiscal year. There is nothing in the statutes and nothing in the regulations that prevent that money from flowing to the Board of Education. There is only a series of policy decisions and

discretionary decisions by the Secretary of Education resulting in no funding for Chicago, which brings us to the point where the Secretary now says the money is unavailable. But, he could have followed a different course of action, and in our view the consent decree required a different course of action than has been followed.

I think it is worth trying to quantify, for a moment, what the course of conduct on the part of the Secretary of Education, over not this year but the past three years, has meant for the Chicago School Board. I will be very brief, but I think that is worth having, at least, a general idea.

6 fls

In fiscal years 1981 and 1982, the Buffalo School Board, for example, received $230 per pupil in desegregation funding. At least that amount. It may have been more. Other school districts received over $150 per pupil. Wilmington, apparently received over $400 per pupil at an earlier time. The Chicago School Board in those two years received $4.77 cents per student.

If Chicago were funded at the same level as Buffalo, in that two year period the Board would have received 101 million dollars. If Chicago were funded at the same level as Cleveland, as I understand Mr. Ross' numbers, the Board would have received 33 million dollars a year, and if it were Wilmington, at the same level as Wilmington, 90 million dollars a year.

You could say the Board has received somewhere in the neighborhood of 1 percent to 2 percent of what other school boards in other years have received. But, we are not here today to decide what is the proper amount of money for the Chicago School Board's plan. We are not here today to decide exactly what the scope is of the United States obligation, or of its agent, Secretary Bell's obligation.

We are here to decide whether approximately 42 million dollars in funding, which has been on a discretionary basis, devoted by the Secretary of Education to purposes other than Chicago, should be held in abeyance for two weeks

so we can obtain some discovery, obtain some reports, and be back in court for further proceedings on the Board's petition.

I think other than that, unless you have questions, I have nothing else to add to the briefs and to the motion.

THE COURT: Thank you very much.

MR. ROSS: Your Honor, may I say two minutes worth of rebuttal?

THE COURT: You may. It usually goes by an inverse pyramid. He spent so little time in response that --

THE COURT: No, I need it.

THE COURT: All right.

MR. ROSS: The amounts he talked about depended on competition. So I want to make sure you understand that.

THE COURT: You are saying Chicago wasn't in the game then.

MR. ROSS: That's right, and if, in the best of all possible worlds, you could reenact the ESA statute, Chicago would be in the competition with other school districts because there are a lot of others out there that need money for desegregation, and that is exactly what the Board wants you to do. It wants you to make it well after Congress has done it in the eye.

Well, that would be nice, but I don't think it can. The Board wants you to construe the consent decree as

an anticipatory mandate for a breach of contract that was about to come up. I just think that is entirely unreasonable.

Lastly, that with respect to any amounts of reprogrammed money that Mr. Howard is talking about, that would have to be competitive too, but I would say to the Court that if the Court is inclined to hold up, or temporarily restrain, I would like to be heard further on the damage that would do if the whole thing were restrained, and plead for some pinpointing that is based on two principles.

One, don't do harm that is irreparable. And, secondly, don't hold up more money than Chicago would ever be able to get in the first place. And, those two are related.

That is all I have, unless you have more questions.

THE COURT: You better speak now or forever hold your peace.

Don't tell me that you are going to tell me something in the future that bears on this order.

MR. ROSS: All right. Title IV money is going to go to two places that employ what the Department of Education estimates is 560 people who are working for two kinds of institutions, universities and state Boards of Education, whose institutions are expecting that their money be paid, the money to employ those 560 people, be paid with grants that have already been negotiated.

THE COURT: When does that money have to go out?

MR. ROSS: That money has to go out the 17th of June. I am told that their prior grants expire on the 30th of June. That they need to be told by the 17th of June whether they are going to get it. So with respect to that, I can assure you that the money is not going to be spent before June 17th, and I don't understand Mr. Howard to be saying that the planning in anticipation that they can eventually spend the money the way they intend to, can't go forward.

MR. HOWARD: So long as nothing happens from this day forward creates any obligation that doesn't exist today.

fls

MR. ROSS: So that I think that we understand each other, as far as the Title IV money to the states are concerned. And, I am going to ask one of my colleagues if this is incorrect, with respect to the discretionary money that has not been obligated.

I have informed Mr. Howard as to what is obligated and what is not. I would ask the Court that for money that has already been obligated in the sense the grant contracts have already been signed, to let that go ahead, and that by my calculations is --

THE COURT: The proposed form of order talks about extending or taking any further action to obligate in any way. So that would not --

MR. ROSS: So we agree. But, I want to let you know as of the date that these documents were prepared, what had been obligated.

THE COURT: That is something we don't have to pause on. The Board is not asking that, is not addressing that.

They are asking that future action to obligate not be taken.

MR. ROSS: I am sorry to waste your time, but in our conversation earlier, Mr. Howard had told me he had not made up his mind whether he was going to go after money that had been obligated, and I have not had a chance --

MR. HOWARD: That is why the order is written, not to

disturb any existing obligations, but to forestall any new obligations.

MR. ROSS: That's fine. So we understand each other on that. But, there are small amounts in the unobligated that I believe ought to be allowed to the Secretary to continue to be obligated and spend, which includes, for example, and I make this only as a small example, traveling to Minneapolis tomorrow to participate in the conference that relates to the Commission's Report on Excellence in Education.

That is why I have reference to a request to you that the obligation -- that any order that would prevent Education from obligating money, not be sweeping as to the unobligated funds, but be definite as to something that Chicago could have reasonably anticipated had the Secretary decided way back that he wanted to exercise his discretion in a different way, because beyond that I just think it would be quite harmful and unfair.

THE COURT: Well, it sounds to me as though you are talking about some kind of shallow pooket notion that perhaps could be dealt with by excluding some finite amount, because you are talking about the sort of thing you are referring to now, is the petty cash items.

MR. ROSS: Could you give me a moment to consult?

THE COURT: You will have a chance to consult. Let me give you my views, if I may. You can talk about the items,

if we get ourselves through that. So you can confer with your co-counsel on that.

MR. ROSS: Thank you.

THE COURT: Ordinarily, confronted with a proposed order of this kind that is really a sort of stand by order, a status quo order, it might seem inappropriate to look ahead, at least somewhat, to the underlying prinicples, but both parties have addressed them, the Board in its written submission and then its brief reply, the government at some length, and it is obviously necessary to do that because if we were to view this in the traditional context of a possible order for temporary injunctive relief, obviously one of the principle criteria, I think the principle criterion, and indeed the one that the Court should address first, is reasonable likelihood of success on the merits, and that of course implicates the problems we have been talking about here.

Now, in this case the Board has submitted with, I think, total accuracy, that this is not an effort to create any new liability of the United States. This is an obligation that was imposed and consented to in the original consent decree, and I know that Mr. Ross, you were indeed a principle author of the decree.

What is at issue now, it seems to me, looking ahead now to the ultimate determination, is whether and how the government, the federal government, is in a position to

discharge what are essentially solemnly undertaken commitments, both contractual in nature, and embodied in a formal court order.

Certainly, we are not now at D-Day where there might be any kind of confrontation. All that is asked by the Board at this stage is to preserve the status quo, that the United States not proceed to denude itself of the ability to live up to its commitments.

It struck me as I was listening to the arguments, that a visitor from another planet would almost certainly be confused in an important way, that I think maybe doesn't occur to all of us as lawyers.

You know, if what we had here were a wealthy corporation, if we had General Motors or AT&T coming in here, there wouldn't be any need for any status quo order. Its promise could be enforced readily.

8 fls

But, the government, although it is far wealthier is, of course, a special case. The government is the sovereign. It can be sued for money and can be compelled to pay money, only to the extent that it has consented to be sued, it has consented to pay. That is the reason that we are wrestling with notions that in the case of a private litigant, we wouldn't even be bothering with.

If a private litigant were to come in to say, I signed a commitment to my opponent and to the Court, but now I have changed my policy, I have changed my scheduling, I have changed my priorities, there really isn't any question about what would happen.

Many years ago one of the great justices of the Supreme Court, and I have to confess I never remember which one, I have a tendency to think it is Justice Brandeiss, and less likely Justice Holmes, spoke about the duty of citizens to turn square corners when they were dealing with the government.

It has always seemed to me we can't expect any less of the government in dealing with citizens, and dealing with citizens and, indeed, with the Court.

Counsel for the Board referred to that S&E contractor's case in which the Supreme Court said in a different context, a citizen has the right to expect fair dealing from the government.

Now, there is really a major conceptual difference between the exercise of discretion among various applicants, and honoring and complying with an obligation under a consent decree. That seems to me to be a difference of kind and not degree.

One is the decision that is represented by a contract already made. The other one is a decision that speaks to the future, a decision to make a contract. Nobody is asking the United States to pay all, or nearly all of the funds required for desegregation here. Rather, what the Board is seeking is for the United States to pay what it can within the limitations that are imposed on it.

Mr. Ross referred in an extended statement of some eloquence, to the need to spend for items of national significance. The implication in a sense, is that what we are looking at here is a parochial concern. Not in the sense it is usually used in the educational field, but in the classical sense. That is simply not so.

One significant factor that Mr. Howard pointed to in terms of what had happened in the past, and how that bore on Chicago or did not bear, more accurately on Chicago, is not really an effort to rewrite history. We are not yet in the era of revisionist history, although Walter Cronkite last night told us about 1984 Revisited.

What we are looking at here, significantly, is the

same sort of thing that I think Kant told us in Critique of Pure Reason, when you look at comparatives it is important you choose your polar coordinates properly, and if all you look at is in the future and in terms of dribs and drabs that Chicago may pick up in comparison with everyone else in the future, it strikes me that that may represent an unfair kind of comparison.

Mr. Ross referred to the government being bound -- when I talk about the government in this sense, the Secretary being bound to Congress as a matter of principle. But of course, the principle of honoring commitments made by the government in its totality, is in that sense, singular by its absence.

They speak again of being bound by comity. Comity is a term of mutual respect, but again no attention seems to be paid, significantly, to obligation which is a bond, as I was always taught, somewhat stronger than comity.

In summary, I must find that there is at least a substantial likelihood, although I hasten to say that as always in preliminary injunctive relief, I am not passing an ultimate judgment, obviously, on the merits. But, at least there is a substantial likelihood that the Board is going to prevail on its petition and its motions.

This does not even represent, under the teaching of the cases, a preponderance of the evidence, although at

least on first blush, it would appear to me that they have met that test as well.

There is certainly substantial evidence that the United States has breached its binding obligations under the consent decree, and that a disposition of all the money, or whatever money there is that remains at this point in these potentially available funds, would reflect a further violation.

Turning to the second standard that is applicable for the issuance of a preliminary injunctive relief, that is irreparability of harm.

That is a consideration that in this case really defines itself. The very nature of the limited ability to obtain funds from government because it is a sovereign, means that if the funds are not preserved, they are irrevocably lost. That, by definition, constitutes irreparabl harm, and that would, effectively,frustrate the ability of this Court to consider the problem at all. So that irreparability of injury and the inadequacy of any remedy at law are amply demonstrated.

By the third criteria we are mandated, and all of these are drawn from a host, I should have said from a host of cases. Our Court of Appeals is constantly repeating the criteria. I think maybe the most, I think O'Connor against Board of Education, a very different kind of Board of Education case, is one in which it articulated not only the standards, but the order in which they were to be given.

But, the third of these four criteria have to do with what I like to refer to as the balancing of harms. That is whether the party that is seeking the injunctive relief would be harmed to a greater extent by its denial, than the party against whom the injunction is sought would potentially be harmed by the granting of the relief.

On that score, just to state that proposition answers itself. There is no contest here. We have already indicated that the harm to the Board would be irreparable. The harm, if any, the hardship to the United States, if any, would be minimal, and indeed, could be defined in terms of very small dollars, and we are only talking about the two-week period.

So, the third consideration of balancing of harms also favors the applicant for the injunctive relief.

Finally, the last criteria that our Court of Appeals teaches, the familiar one is whether the granting of preliminary injunctive relief would disserve the publinc interest

It is difficult to articulate just how the potential, the preservation of the potential availability of funds for the desegreation plan that was adopted by the Board with a great deal of labor and effort; that received the favorable consideration and approval of the United States Government, its opponent in the litigation before this Court was ever called upon to pass on it. As I say, it is difficult to see how making funds available for that purpose, could conceivably disserve the public interest, and I find that that criterion has been satisfied as well.

For those reasons, I am prepared to, and I will order that the United States and its agent, Secretary of Education, are, in the language of the order tendered by the Board, are directed to refrain until June 22, 1983, from expending or taking any further action to obligate in any way, such portion of the $24 million appropriated for desegregation assistance under Title 4, and such portion of the $18 millions in the Secretary of Education's Discretionary Fund, as are subject to explicit Congressional mandate as to expenditure.

Now, one issue that is not addressed by the Board in its proposed order, is a provision of Rule 65(c) that deals with security.

I don't know whether that is an issue that any of the counsel for the Board would want to speak to.

MR. MC COMBS: Your Honor, we have taken a brief

look at that question, and we believe that the Board qualifies in this instance as an impecunious plaintiff in its financial condition in its affidavit submitted in support of the motion.

For that reason we will ask either your Honor set a nominal bond requirement, or waive it altogether.

THE COURT: Mr. Ross, do you want to respond to that one? Is the United States prepared to waive bond?

MR. ROSS: Yes, your Honor. But I would ask you to address what you refer to as the shallow-pocket problem.

THE COURT: No, it is not something I have to address. It is something you have to address because I assume by now you have had the opportunity to determine what kind of petty cash funds you are going to need for these interim items that really would be jeopardized by a freeze for a two-week period, until June 22nd.

MR. ROSS: I am going to have to speak to Mr. Howard so we can work out -- Can we leave it that the two of us will try to work out an amount, and to check back with you if we are in disagreement?

THE COURT: That is fine.

MR. ROSS: Is that all right with you?

MR. HOWARD: Yes.

THE COURT: And this order speaks now, although I haven't yet signed the order because I am going to await your position of that sort of safety-valve provision before I