

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION

4 UNITED STATES OF AMERICA,)

5 Plaintiff,)

6 vs.)

7 Docket No. 80 C 5124

8 BOARD OF EDUCATION OF THE)
9 CITY OF CHICAGO,)

10 Chicago, Illinois

11 July 13, 1984

12 2:00 p.m.

13 Defendant.)

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16 TRANSCRIPT OF PROCEEDINGS
17 BEFORE THE HONORABLE MILTON I. SHADUR
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21 APPEARANCES:

22 For the Plaintiff:

23 MR. ALEXANDER ROSS

24 MS. PEGGY GORDON

25 Asst. U. S. Attorneys

For the Defendant:

MR. ROBERT HOWARD

MR. HUGH McCOMBS

MR. ROBERT WEISSBOURD

1 THE CLERK: 80 C 5124, United States of America versus
2 Board of Education of the City of Chicago.

3 MR. HOWARD: Robert Howard, Hugh McCombs and Robert
4 Weissbourd for the Board.

5 MR. ROSS: Alexander Ross and Peggy Gordon for the
6 United States.

7 THE COURT: Good afternoon. At 11:30 I ended up with
8 an unanticipated TRO hearing in what I am advised our chance
9 assignment system in this court delivered to me as the second
10 case involving the Olympic Committee, and I disposed of that
11 TRO motion this morning. So I guess this is really sort of
12 a red letter day, because the other one is coming immediately
13 after yours, so I have two Olympics team cases sandwiching a
14 battle between the Olympians and I guess that is what this one
15 falls into.

16 MR. HOWARD: At least, your Honor, soon the Olympics
17 will come and go, and that flow of litigation will end.

18 THE COURT: Ah, yes.

19 MR. ROSS And the United States is not boycotting this
20 Olympics.

21 THE COURT: But this goes on forever.

22 Anyway, as far as I know, and you better correct me if
23 I am wrong aBout this, what I have in hand is the Board's
24 motion for partial release of restrained funds, and to modify
25 the schedule for submission of proposed orders, which was filed

1 a week ago, and then something that is stamped "Received" this
2 morning , called The United States Response to the Board's
3 Motion, which I understand Mr. Ross, you filed.

4 One problem that I have is that the copy that was
5 delivered to me, although it referred to an attached form of
6 order, didn't have one.

7 MR. ROSS: I know. Your Honor, I simply neglected
8 to file it, and I have it available should we get into that,
9 but I think that it would be putting the cart before the
10 horse, and perhaps we should discuss it.

11 THE COURT: No, I just wanted to make sure there
12 wasn't a piece of paper that hadn't gotten to me that was
13 supposed to.

14 MR. ROSS: No, it was simply the time schedule for
15 reporting to each other.

16 THE COURT: All right. Because I had in writing the
17 Board's motion, and now the United States' response; maybe I
18 ought to hear very briefly, and I have to stress, very, from the
19 Board as to any issues that they think are posed by the United
20 States' response that really were not addressed the first time
21 around by the Board.

22 MR. HOWARD: I can be very brief.

23 We believe that the second full sentence on page 3,
24 of the United States' document tells the tale as to both the
25 release of funds and the deferral of the schedule. To para-

1 phrase, partial release of funds makes the appellate process
2 less urgent.

3 So that the United States, I think, is indicating that
4 the deferral of the schedule is not so urgent a problem if
5 accompanied by the release of funds, and therefore, we think
6 the Court should do both.

7 As to new matters raised by the United States' respons
8 there is, what we regard as the rescissionist history proposal,
9 that we now address reformation or rescission of the Consent
10 Decree.

11 We think that is clearly inappropriate because the
12 enforceability of the decree has already been decided, not only
13 by this this court, but also at least in part by the Court of
14 Appeals, and so there is no need to deal with the hypothetical
15 unenforceability of the decree.

16 Finally, the last section of the United States' docu-
17 ment as to the release of frozen funds, really says nothing new
18 but we have two comments about it.

19 One is the United States says again, that if ultimatel
20 it loses on appeal it will comply. We still don't understand
21 what that means. If the frozen funds have been disposed of,
22 how would the government propose to replace them? We have never
23 heard anything about that.

24 And, secondly, insofar as the United States speculates
25 on the last page of its document about what the Secretary might

1 do if he had the funds back in his hands, we certainly don't
2 see that speculation as any reason for the release of the funds,
3 but we would be very interested to hear from the government,
4 either in court or between counsel, if they have anything more
5 concrete about that.

6 Again, we don't think that has any bearing on the
7 present issue before the Court, which is a partial release of
8 funds and the deferral of the schedule.

9 THE COURT: Mr. Ross, I don't know if you are able to
10 take notes on all those items at once or not. Was there any-
11 thing else, Mr. Howard

12 MR. HOWARD: No.

13 MR. ROSS: A brief response. First of all, your Honor,
14 on that same page of our document, I would like to --

15 THE COURT: Page 3?

16 MR. ROSS: Yes -- to correct the language in the next
17 paragraph down.

18 THE COURT: You are going to put in a "not" where you
19 didn't have one.

20 MR. ROSS: No. For clarity, to take out the word
21 "either" in the second line and the word "alternatively" in the
22 third line, I think makes more sense read that way.

23 THE COURT: This is the paragraph beginning "we", is
24 that right?

25 MR. ROSS: Yes.

1 THE COURT: You want to do what, now?

2 MR. ROSS: Strike "either" from there in line 2, and
3 "alternatively" from line 3. In that regard I would stress ---

4 THE COURT: But isn't that something that you already
5 lost, at least in my June 8th opinion. That is, the question
6 whether we ought to have something that is only declaratory.
7 Unless I missed something.

8 MR. ROSS: Well, I think that the issue of a judgment
9 and the timing of an order are several --

10 THE COURT: No. My limited question --

11 MR. ROSS: I understand what the Court is saying.

12 THE COURT: My limited question had to do with your
13 comments about the judgment being wholly declaratory.

14 MR. ROSS: What I am saying, a judgment now that is
15 of a declaratory nature to get the appeal, the appellate process
16 going, does not preclude an order with respect to the funds, or
17 a more specific order against the United States later. I think
18 that a declaratory judgment could get the process going.

19 MR. HOWARD: Your Honor, I think --

20 THE COURT: Wait just a minute. I want to make a note
21 of this.

22 Go ahead, Mr. Ross. You said that there were a couple
23 of other comments you wanted to make.

24 MR. ROSS: Yes. I think that, as we have been saying
25 here, that our motion to release the funds has been pending since

1 February 8, and the Court has said it would rule on that, and
2 it seems to me that the Court could rule on that motion.

3 While we think that all of the funds in Special
4 Programs in Title IV, and the Discretionary Fund should be re-
5 leased to the Secretary, if the Court is not inclined to do so,
6 we are prepared to discuss several alternatives that are more
7 rational and practical than the ones suggested by the Board.

8 The first of those would be that all Special Programs
9 in Title IV funds above the 12 million dollar level, plus one-
10 fourth of the Discretionary Fund, be released now, and I say
11 one fourth because that would take us to September 30, which
12 seems to me is a more rational date to have a partial release
13 of funds because it does coincide with the end of the fiscal
14 year, and if we don't do that we will have to come back here
15 again in any event.

16 THE COURT: What about -- you ought to link, it seems
17 to me, that response with the response of Mr. Howard's question
18 about how does the United States propose to, what it character-
19 izes as comply, if funds are released, because the essence of
20 the position here has been--and this is one on which I think
21 there is no difference between the parties--is that if these
22 defined funds are not available then we can't magically create
23 availability, and that, I guess, is the thrust, is it not, of
24 Mr. Howard's question.

25 MR. HOWARD: Yes, sir.

1 MR. ROSS: If all the funds are released?

2 THE COURT: No. Let us just say for the sake of
3 hypothesis, if a million dollars is released, that makes one
4 million dollars less available. How does the United States'
5 "compliance" enter into that? How does the Board get, and the
6 Court get the assurance that the release doesn't carry with it
7 the consequence of less available relief to the Board?

8 MR. ROSS: I think the only answer to that is, aside
9 from the argument that with respect to Title IV, the Board has
10 shown a maximum of 12 million that would be used in this fiscal
11 year for Title IV purposes, which is a separate argument.

12 But apart from that argument I think the answer simply
13 is that in the long run the Board has to rely on the duty that
14 the Court has found --

15 THE COURT: On full faith and credit of the United
16 States.

17 MR. ROSS: No, to seek funds and ultimately if the
18 United States must seek funds through legislation, which I think
19 we all recognize is the only way that the Board will substan-
20 tially come close to the funds that it claims, then it should
21 rely --

22 THE COURT: So you are saying they should make the
23 gamble on futures.

24 MR. ROSS: That's right because I think there is some
25 doubt as to whether all of the money that is frozen would go to

1 them in any event, and I think you balance those two doubts,
2 it is reasonable to let 25 percent of the funds go.

3 THE COURT: Okay. Was there anything else that you
4 wanted to deal with in response to the few points that Mr.
5 Howard had made?

6 MR. ROSS: I think that if the Court were not inclined
7 to release the Title IV and Special Programs funds above the
8 12 million, that an overall reasonable formula would be 25 per-
9 cent across the board release, it would take them all to September
10 30, but as a last fall-back position, the United States would
11 argue that --

12 THE COURT: When you say across the board, you use that
13 term advisedly, I trust. That is across the, capital B, Board.

14 MR. ROSS: The pun was yours and not mine.

15 THE COURT: No, the pun was yours. Go ahead.

16 MR. ROSS: That there is no reason to select among
17 grantees and that if we are going to do it piecemeal like a
18 six weeks basis, it ought to be six-fiftyseconds.

19 THE COURT: Mr. Howard, the one thing that I would
20 appreciate your responding to is the point that was made in the
21 papers by the United States, and also now again by Mr. Ross,
22 on what I characterize as the \$12 million question. Do you want
23 to deal with that?

24 MR. HOWARD: Yes. I think there are two principal
25 points, your Honor.

1 One is that the Court has found in its June 8 opinion,
2 as well as in its June, 1983 opinion, that the United States
3 obligation is a multi year obligation, and that the types of
4 programs which have been found necessary and appropriate for
5 this year, are likely to be necessary in future years, and in
6 similar funding amounts.

7 Therefore, even if the funds are limited to Title IV
8 uses, a point which I will address in a second, there is a clear
9 need, I think, for future year funding, and given the government
10 position in the case, and especially Mr. Rosses answer just now
11 as to the total speculative character of any future compliance,
12 even if the United States tries to comply in the future, it
13 seems to me that the continued preservation of those funds for
14 future years is appropriate.

15 There is another question, however, which is whether
16 those funds are indeed limited to a Title IV character, or to
17 Title IV uses, and I acknowledge that this is a new question that
18 we are raising. That is, it seems to us it is possible that
19 the funds any also be capable of more immediate use under the
20 follow-through authorizing statute; follow-through in general
21 provides fairly broad authorization for programs which are
22 chronologically supplemental to Head Start programs. That is,
23 for programs in the early grades for children who have been in
24 Head Start programs.

25 There are some 12,000 students in Head Start programs

1 in the City of Chicago, most of those come into the Board of
2 Education and most of them are in the very same racially isolated
3 schools who are the principal beneficiaries of the educational
4 components for which most of the funding is intended. So there
5 is a possibility of these funds being used more immediately
6 this year under that authorization.

7 THE COURT: Well that is certainly a new issue, and
8 it is not one that I am about to resolve today, and I am not
9 going to call on Mr. Ross to comment on it today.

10 MR. ROSS: I think, your Honor, that the issue of some
11 how holding these funds in limbo for other fiscal years, is a
12 new issue also, and I think that --

13 THE COURT: Well, not really because essentially,
14 what you are saying, as I understand it, is that you would prefer
15 that the Board gamble on an all or none basis. That if the
16 Board is right, in terms of what the United States responsibility
17 is, then the Board is going to have plenty of opportunity to
18 be dealing with the United States on a year by year basis, but
19 you are unwilling to address the possibility that you are right
20 in terms of the limited access, in which case the available
21 funds might be a pool and none of us knows, of course, what
22 Congress will or will not do, and therefore, the available funds
23 will be a limited pool, and you are asking that the Board
24 surrender its prospect of access to those.

25 MR. ROSS: I think I am saying something a little

1 bit different than that.

2 If I understand Mr. Howard's argument, he is saying
3 that the pool, that 65 million, whatever it is, is there now.
4 Or let us just look at Special Programs and Title IV together
5 with his 47 million, and change. That if the Board has only
6 shown that 12 million of their programs go to Title IV in the
7 '84-'85 school year, that somehow the remaining 12 from 47,
8 remaining 35 million, will be suspended and in limbo, and used -
9 which is a 1984 appropriation, somehow this Court can change
10 what Congress made into a one year appropriation into a
11 multi-year --

12 THE COURT: No. It is really a question of whether it
13 ought to be retained as available for Congress to do that, as I
14 understand.

15 MR. HOWARD: Well, we have not addressed, none of us
16 have really addressed the question of how it is preserved, but -

17 MR. ROSS: But if it is preserved for Congress,
18 Congress has an unlimited set of choices that are not confined
19 by that set of funds.

20 THE COURT: I understand, but the prospect of going
21 from a B-1 bomber to education funds may be a somewhat differen-
22 one from the Congressional perspective than going from education
23 funds to education funds.

24 MR. HOWARD: I should also -- when I say we have not
25 addressed it, I mean we have not all addressed it in court. We

1 We do believe the funds are capable of preservation either
2 administratively or judicially.

3 THE COURT: That is something I can take a further look
4 at because I don't think that that issue is necessarily posed
5 by what we are dealing with now.

6 Let me just, if I may, and I understand, I believe I
7 understand what your presentations are, let me just focus
8 what they are and then deal with them.

9 At this point the Board has asked for a modification
10 of -- for two things. One is a modification of the restraining
11 order for a partial release of funds to cover, basically, A,
12 what amounts to a six week period, out of the Special Programs
13 and Populations Account, and also out of the Discretionary Fund,
14 both of those items being for fiscal year '84 appropriations.

15 And, second, the Board is asking to defer the schedule
16 for submission of the proposed judgment order to August 13, for
17 some reasons, but I will just summarize them basically as being
18 intended to enable Congress to make its judgment about what
19 it may deal with in terms of funds availability.

20 The United States is opposing both aspects of those
21 and it is making several arguments in addition to those that
22 Mr. Ross has just identified now.

23 I am not faulting that because I asked him not to
24 treat with the things that were dealt with on paper, but which
25 I have read.

1 This puts matters into a sort of, in a sense, extra-
2 ordinary posture, it seems to me. It is perhaps the height of
3 irony that the Board of Education, beset as it is by financial
4 problems, facing not only inadequate funding for meeting its
5 obligations under the desegregation plan which my June 8 opinion
6 dealt with at such length, but also facing what all of us read
7 about in the newspapers as a massive deficit for its general
8 educational goals, is somehow thrust into the position of
9 triggering either the release or the retention of funds for other
10 agencies elsewhere that are also in desperate circumstances.

11 My, for lack of a better term, my pen pals around the
12 country who write me, frustrated because the United States has
13 remained obdurate, and their own what appear to be worthwhile
14 educational programs are drying up for lack of funds, continue
15 to proliferate. Mostly people involved in the National Diffusion
16 network, but others as well. But who is really choking them off
17 Make no mistake about it. Cut through all their verbiage if
18 you want, but it is the Secretary of Education and the Executive
19 Branch that are doing that. It is not this Court and this
20 Court's order, the order that has been upheld by our Court of
21 Appeals.

22 Now what happens is that the United States accuses
23 the Board of trying, and this is on page 2 and page 3 of the
24 United States' response, trying to get this Court to place
25 pressure on Congress by holding restrained funds hostage,

1 thereby inviting pressure from the intended grantees.

2 That characterization is, in my view, as "bankrupt as
3 the assertions that have marked the United States position since
4 the funding issue arose over a year ago. Maybe we ought to
5 put this whole matter into words of one syllable for total
6 understanding.

7 There is really one very fundamental point on which
8 all of us, I think, agree, the United States, the Board and this
9 Court, and that is that it is Congress' ultimate decision, sub-
10 ject of course, to the President's role in the legislative
11 process, that controls the United States financial responsibilit
12 In the words of Paragraph 15.1 of the Consent Decree, that
13 determines what "financial resources" of the United States are
14 "available."

15 That seems to me to be the one unexceptionable proposi-
16 tion that nobody quarrels with. I take silence as being
17 acquiescence on that score.

18 Now, where the parties really differ though very
19 fundamentally, and I recognize that what I am going to say on
20 this is overly simplistic because, except in a very long, very
21 bad joke which I won't trouble the record with, you can't
22 possibly distill 260 pages of this June 8 opinion into a simple
23 statement of principle, but I think in essence, it is that the
24 Board, whose position I found legally sound, under the Consent
25 Decree, and under the Constitution and under case law, contend

1 that the Executive Branch has committed itself to take affirma-
2 tive steps to be positive, to encourage Congress to make finan-
3 cial resources available.

4 Now, conversely, the United States says that the
5 Executive Branch, despite the commitment that is represented by
6 Paragraph 15.1 of the Consent Decree, should be entitled to go
7 to Congress to make funds unavailable rather than available.

8 What it says in its two most recent findings is that
9 a change in administration permits the United States to renege
10 on its contractual commitments, just as if one Secretary of
11 the Treasury's signature on a ten dollar bill should not bind
12 the next one to honor it when somebody tenders it to the bank.

13 Now the United States is saying, as a fall back
14 position, that the Consent Decree, that the contract that the
15 United States signed, ought to be reformed, a fancy word for
16 rewritten, because the United States now doesn't like the
17 contract that it made four years ago.

18 Maybe the ten dollars ought to be reformed to a one,
19 or maybe nothing at all. As you can see, I used the term
20 bankruptcy a little earlier advisedly when I characterized
21 that kind of argument, at least in my perception.

22 Now on this present motion, what I find is the
23 responsible approach to take is to, in fact, give Congress the
24 maximum opportunity, especially because everybody agrees that
25 ultimate power of the purse resides there, to make financial

1 resources available to the Board so that the United States can
2 indeed live by and not flout this solemnly undertaken contrac-
3 tural commitment. So the United States can maintain credibility
4 by keeping its word just as every other promissor is expected to
5 keep his or her word.

6 I also find that the Board has acted responsibly in
7 being mindful of the interests of these other parties that may
8 be innocent victims of the United States intransigence in this
9 area.

10 My own question, frankly, is whether the six week
11 period of release that is represented by the Board's tendered
12 motion, and order, are enough to cover the time period for
13 Congressional action because one thing that I think would not
14 make a lot of sense, if we are looking at the moderate modifica-
15 tion of that, is to pick a date that could have a short fall
16 in terms of the time table that we are looking at, both for
17 Congressional action and for the parties to return with the
18 proposed judgment order.

19 Mr. Howard, I guess I ought to ask you, or Mr. McCombs
20 about that.

21 MR. HOWARD: I think there are two points in that
22 respect. One is we think we have provided sufficient time al-
23 ready, in part because as we understand the congressional
24 schedule the House is scheduled to recess again approximately
25 August 6. So that we have already allowed, in effect, an extra

1 week beyond what we perceive as the point at which the prospects
2 for Congressional action will be definitively known.

3 THE COURT: That is, six weeks would end, roughly,
4 August 10 or 11th, is what you are saying.

5 MR. HOWARD: The 13th I think.

6 THE COURT: Well, six weeks beginning with July 1
7 would end, I guess, August 11.

8 MR. HOWARD: Okay. But even that day is some several
9 days after the prospects of Congressional action will certainly
10 be known.

11 I also want to emphasize that we have, with some
12 emphasis, proposed that the schedule be August 13, or before.

13 THE COURT: Yes, I know that.

14 MR. HOWARD: And if there is any development that
15 makes it clear to us that we should all deal with this matter
16 before the 13th, we will certainly do that.

17 The final thing I would say is that I think as this
18 process goes forward we may be able to make some progress in
19 shortening the schedule for consideration of an order when we
20 reach that point by having some exchange among counsel concerning
21 the form of possible order, and I think that we can try to
22 accomplish that without a formal submission schedule, so that
23 when we get to the end of this current period of time the ques-
24 tion of the order could be addressed very rapidly, as far as the
25 parties are concerned.

1 MR. ROSS: Your Honor --

2 THE COURT: Yes, Mr. Ross?

3 MR. ROSS: If I understand Mr. HOWard, he is arguing
4 for the six week release of funds on the 100 percent expectation
5 that Congress will have acted by the time it recesses, one way
6 or the other.

7 THE COURT: No, that it will have acted or not have
8 acted.

9 MR. ROSS: I am sorry -- acted or not acted by the
10 6th of August, and based on past experience --

11 THE COURT: That is a universe, is it not?

12 MR. ROSS: Well, it is but I don't think it is accurate
13 because the session resumes again in September, and I hope that
14 he is not going to come in here again on August 11. In other
15 words I am trying to extract a promise from Mr. HOWard that
16 if the Court grants this order that we are not going to come
17 back a month from now and say, let's wait until the end of
18 September.

19 MR. MC COMBS: From a practical standpoint, it is
20 obvious the Board needs 20 million long before the First of
21 September to continue the ESP program. If Congress has not act
22 we will go to the judicial process to try and get that money.

23 THE COURT: I find that under the circumstances then,
24 the six week period is adequate and I expect that the proposed
25 judgment order will indeed be provided on or before the

1 August 13 date.

2 On the second aspect, which is whether an order, a
3 declaratory judgment ought to be entered now, that really carves
4 out impermissibly, it seems to me, from the way I had resolved
5 the matter in terms of the June 8, opinion, a portion of the
6 controversy in a way that might not fairly characterize the
7 balance of it. It is, in a sense, like asking that a question
8 be decided rather than that a case be decided, and that is
9 inappropriate given all of the things, and here I am not even
10 going to attempt to begin summarizing all of the interrelated
11 aspects that forced this opinion to be much longer than any of
12 us would have hoped, so that it seems to me that it is really
13 inappropriate to consider the possibility of a piece of an
14 order which is what, essentially, declaratory judgment would
15 call for, so that I am going to do both those things. That is,
16 I am going to modify the entire restraining order for the
17 release that has been requested in the Board's submission. I
18 am changing the schedule for submission of the proposed order
19 to permit the Board to come in on or before August 13.

20 That, Mr. Ross, really poses the question to you.
21 If, in a worst case position you got it on the 13th, when would
22 you be in a position to respond?

23 MR. ROSS: You mean the worst case being I didn't
24 see anything before the 13th?

25 THE COURT: Exactly. What I would like to do, .

1 incidentally, rather than pick a date is to say some period of
2 time after you have received the proposed order.

3 MR. ROSS: Let us make it a week.

4 THE COURT: All right.

5 MR. ROSS: Do I understand, your Honor to be rejecting
6 my suggestion that the six-fiftyseconds be for all the --

7 THE COURT: Right. Now what I am going to do is to
8 modify the order in the way that the Board has presented it by
9 providing that the United States will respond within seven days
10 after the time of actual delivery of the proposed order to
11 Mr. Ross, so that they have a full week's opportunity, and
12 then what I am going to do, the one thing that is not included
13 here and you ought to recast this order and put it together, is
14 to set a next status date to deal with that, the order as
15 entered, and on that one I am going to set a specific date
16 but with the understanding that if you get the papers in earlier
17 I will accelerate that and I will have my minute clerk get in
18 touch with both sides for that purpose.

19 That will put it right during the period that I am
20 emergency judge so I suppose I can treat this one like any other
21 emergency, and I will do that for August 23, on the assumption
22 that I am going to -- that we are dealing with the worst time
23 table, which would mean the August 13 date and August 20. I
24 am going to set the status date for August 23 at 1:30.

25 Is that a problem?

1 MR. ROSS: Your Honor, while they are conferring,
2 I may be repeating myself, but I understand Mr. Howard's pro-
3 posal to be that the Secretary funds one set of grantees under
4 the discretionary program for six weeks, but not others.

5 I mean, the Board apparently has chosen grantees it
6 wants the Secretary --

7 THE COURT: How do you respond to that issue?

8 MR. HOWARD: Your Honor, we are not selecting -- we
9 are not telling the Secretary what to do. What we are proposing
10 is that the Court identify certain funds to be released. What
11 the Secretary does with those funds is up to him. The funds are
12 identified in the following way.

13 The Secretary has already conditionally reserved
14 certain funds within the Discretionary Fund for the National
15 Difusion Network, an organization which your Honor refers to as
16 constituting many of your pen pals, as well as my telephone
17 buddies. They have programs --

18 THE COURT: It seems to me the entire State of New
19 Hampshire is corresponding with me.

20 MR. ROSS: I understand what he is saying, but I
21 understand him to be saying that the Secretary has the discreti
22 to partially fund a certain program or not partially fund a
23 certain program, and that if he funded twice as many grantees
24 with three weeks of funds that he would be in violation of the
25 Court's order.

1 MR. HOWARD: Absolutely not. In fact, as far as I am
2 concerned, the Secretary can rescind his earlier notice and give
3 the money to somebody else if he wants to.

4 THE COURT: I didn't understand that to be the inten-
5 tion. My understadning was this was a definition of the amount
6 to be released, but it was not intended to limit the Secretary's
7 discretion in terms of allocation of funds. But the basis on
8 which the amount was defined was because the Secretary himself
9 had set up certain allocations, and that was the predicate for
10 calculation.

11 Now if you are concerned about the language on that,
12 what I would suggest that you ought to do is get together while
13 you are here, and tender proposed order with modified language
14 to make it plain that it is not intended to limit how the
15 Secretary spends the dollars that are released. It is only a
16 matter of --

17 MR. ROSS: I understand what the Court is saying, but
18 it is the way that it comes out is that for the entire discre-
19 tionary program it only has three weeks worth of funds.

20 THE COURT: Mr. Ross, I don't know how to state it more
21 clearly than that the Secretary's determination of the funds
22 that are released is going to be the Secretary's determination.

23 MR. ROSS: That is exactly right, your Honor, but he
24 does not have enough money released to fund all the grantees
25 for more than three weeks because of an arbitrary number that

1 Mr. Howard has picked out.

2 MR. HOWARD: It is not arbitrary. It is based on
3 which programs have funding problems.

4 MR. ROSS: That's right, and so therefore, the Board
5 is indirectly suggesting how the Secretary should spend his
6 funds, and --

7 THE COURT: The Secretary's job is to decide, and if
8 he retains that job, and again, if you are concerned about how
9 the order functions in that respect, what I would suggest is
10 that you get together --

11 MR. ROSS: I don't think that is necessary because
12 I understand. The record is clear as to what --

13 THE COURT: All right.

14 MR. ROSS: -- what the number is.

15 THE COURT: I will await the modified form or order,
16 and I will enter it.

17 MR. HOWARD: Thank you, your Honor.

18 MR. MC COMBS: Judge, one other thing. We have a
19 motion to supplement the record.

20 THE COURT: Yes. Mr. Ross?

21 MR. ROSS: We don't know why the things are missing,
22 and we certainly don't object.

23 THE COURT: I don't know either except for the
24 possibility that they may have been delivered as part of the
25 mass of materials that were given to me, and maybe that include

1 what was supposed to be the file copies as well, because you
2 know, I have got a carload. I need a second chambers for this
3 case.

4 MR. MC COMBS: Thank you.

5 THE COURT: Leave is granted.
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9 CERTIFICATE
10

11 I HEREBY CERTIFY that the foregoing transcript is
12 a true and correct transcript of my shorthand notes.
13

14 Richard J. Pearson
15

7-17-84
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