

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JO ANNE B. BARNHART, :

4 COMMISSIONER OF SOCIAL :

5 SECURITY, :

6 Petitioner :

7 v. : No. 01-705

8 PEABODY COAL COMPANY, ET AL. ; :

9 and :

10 MICHAEL H. HOLLAND, ET AL. , :

11 Petitioners :

12 v. : No. 01-715

13 BELLAI RE CORPORATION, ET AL. :

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15 Washington, D. C.

16 Tuesday, October 8, 2002

17 The above-entitled matter came on for oral

18 argument before the Supreme Court of the United States at

19 11:06 a.m

20 APPEARANCES:

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22 General, Department of Justice, Washington, D. C. ; on

23 behalf of Petitioner Barnhart.

24 PETER BUSCEMI, ESQ., Washington, D. C. ; on behalf of

25 Petitioners Holland, et al.

1 JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf
2 of Respondents Peabody Coal Company, et al.
3 JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of
4 Respondents Bellaire Corporation, et al.
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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 01-705, Jo Anne Barnhart v. Peabody Coal
5 Company and a related case.

6 We'll wait just a minute.

7 Ms. McDowell.

8 ORAL ARGUMENT OF BARBARA B. McDOWELL

9 ON BEHALF OF PETITIONER BARNHART

10 MS. McDOWELL: Mr. Chief Justice, and may it
11 please the Court:

12 The Coal Act states that the Commissioner of
13 Social Security shall, before October 1st, 1993, assign
14 each beneficiary to a signatory coal operator or related
15 person that remains in business. That provision
16 understood, in light of this Court's precedents,
17 establishes the deadline that is mandatory but not
18 jurisdictional. It does not deprive the commissioner of
19 the power or the obligation to complete the assignments
20 after that date, if necessary.

21 That understanding comports with the text and
22 structure of the Coal Act, as well as with -- with one of
23 its central purposes, that to the maximum extent possible,
24 each coal retiree's benefits would be paid for by a coal
25 operator that actually employed that miner or a related

1 person.

2 QUESTION: But that's not true. In fact, if
3 later research has showed that somebody should have been
4 assigned somewhere else, you -- you don't shift the
5 beneficiaries. It -- it isn't the case that -- that this
6 is designed to assure a perfect system in which somebody
7 who is responsible, no matter that a mistake was made in
8 the past, in the future that person will be reassigned the
9 way he should be.

10 MS. McDOWELL: Well, the statute does provide
11 for administrative review of assignment so that a coal
12 operator who was assigned a miner in error could challenge
13 that before the commissioner, and if the commissioner
14 found that the assignment was erroneous, the miner could
15 be assigned to a -- a more appropriate coal operator.

16 In addition, the regulations promulgated by the
17 commissioner for the administrative review process allowed
18 the commissioner herself to reopen an assignment if she
19 found that it had been erroneous within a 1-year period.

20 QUESTION: What happens to someone who wasn't
21 assigned before October 1st? They're -- they're not just
22 left out in the cold, are they?

23 MS. McDOWELL: No. Congress did provide a
24 fallback position for all of those who weren't assigned by
25 October 1st or -- or at any time because they had no

1 former employer or related person who remained in
2 business, and that is, that they will be treated as part
3 of the unassigned beneficiary pool. The benefits for
4 those miners are paid from an appropriation from the AML
5 Fund, a fund originally created to ameliorate the problems
6 of abandoned mines, and if that fund proves insufficient,
7 the funds will come from a -- a premium imposed on all of
8 the coal operators to whom beneficiaries who have been
9 assigned.

10 QUESTION: Ms. McDowell, there -- there is a
11 section, 9704(f)(2)(B), that deals with annual adjustment
12 of unassigned premiums. And it says that if there's an
13 assigned miner and the operator goes out of business in
14 any given year, then that assigned miner becomes part of
15 the pool. And it doesn't matter really whether the
16 initial assignment was before the October 1 deadline or
17 not. They just go into the pool in time. And that seems
18 to work somewhat against your interpretation.

19 MS. McDOWELL: I think the situation addressed
20 in that provision is quite different, even assuming that
21 it unequivocally establishes that the commissioner
22 couldn't reassign somebody after a company went into
23 bankruptcy. But assignments at the outset of the process,
24 the sorts of assignments that we're concerned with here,
25 are quite different from an assignment after bankruptcy

1 that could occur 20, 30, or 40 years down the road, and
2 Congress may well have been interested only in achieving a
3 correct initial assignment at the outset and not with
4 continuing to readjust the assignments --

5 QUESTION: Well, it does show at least that
6 much, that Congress didn't want to continue perpetually to
7 adjust these things for the --

8 MS. McDOWELL: Yes, that's correct. But the
9 fact that the -- that Congress directed that the
10 applicable percentage for calculating the assigned
11 beneficiary premium shall be adjusted in certain
12 circumstances doesn't suggest to us that Congress would
13 not have permitted it to be adjust in other -- adjusted in
14 other circumstances as well that Congress may not have
15 explicitly contemplated at the time that the Coal Act was
16 enacted. One of those was the fact that --

17 QUESTION: Is it possible that that deadline was
18 some kind of political compromise, so to speak, at the
19 time it was passed and the operators thought, well, that's
20 it? You know, after that deadline, it's fixed.

21 MS. McDOWELL: Well, there's -- there's no
22 indication in the text or legislative history that that
23 was contemplated. And indeed, since Congress was
24 legislating in light of this Court's opinions in Pierce
25 County and Montalvo-Murillo, the provision could not

1 readily be understood as providing coal operators with
2 that sort of assurance.

3 In addition --

4 QUESTION: Well, you -- you say Congress is
5 legislating in light of our decision in Pierce County.
6 You're -- you're just applying the general presumption
7 that Congress does that? Certainly there's -- is there
8 any indication here that Congress was legislating in light
9 of Pierce County?

10 MS. McDOWELL: Congress didn't explicitly say
11 so, no, but as, we have cited a number of statutes in our
12 briefs that made clear that when Congress wants to
13 terminate an agency's authority to make decisions at a
14 particular point, Congress knows how to say so explicitly
15 and it has done so in those situations. It has not done
16 so here.

17 QUESTION: Well, this is -- this is quite
18 different than Pierce County, though, at least certainly
19 on its facts. There you had a provision that the --
20 you're supposed to ferret out some sort of
21 misappropriations and saying that the inspector general,
22 whoever it was, was supposed to do it in 4 months. That's
23 simply a message to the agency to get going. And we -- I
24 think we said quite properly that didn't mean that you
25 couldn't ferret out this sort of thing after the 4 months.

1 But this thing has -- has somewhat different
2 ramifications, I think.

3 MS. McDOWELL: Well, I think it's clear that
4 Congress imposed deadlines, not only this deadline, but
5 other deadlines in the statute, because it wanted to get
6 the new funding mechanism established by the Coal Act into
7 place. Congress wanted the assignments to be made
8 promptly so that the Combined Fund could then send bills
9 for premiums to assigned operators.

10 But it wasn't essential to that scheme that
11 every last assignment was made by October 1st, and there's
12 no indication that Congress adopted the deadline in order
13 to provide any sort of certainty to coal operators. To
14 paraphrase the Court's decision in James Daniel Good, it
15 would seem somewhat curious that a deadline that was
16 intended to expedite the collection of premiums by the
17 Combined Fund could be construed to prevent the Combined
18 Fund in some circumstances from collecting premiums at
19 all. And that's the effect of --

20 QUESTION: Is there any limiting principle to
21 your interpretation? I mean, can this go on forever and
22 ever?

23 MS. McDOWELL: Oh, the statute doesn't itself
24 impose a limit on the commissioner's authority. However,
25 as a practical matter, the commissioner has not made

1 initial assignments for more than 5 years now and has no
2 intent to recommence them. Obviously, Congress can cut
3 off the authority to do this at -- at any particular time
4 by denying an appropriation for the process or by doing it
5 explicitly.

6 QUESTION: Would you tell us what percentage of
7 the assignments were made after the deadline, and how long
8 after the deadline was the most recent assignment?

9 MS. McDOWELL: Yes. The -- to answer your last
10 question first, the last one was made in 1997.

11 Congress made a total of approximately --
12 rather, the commissioner made a total of approximately
13 40,000 assignments before the deadline, in addition to
14 another 15,000, approximately, assignments that the coal
15 operators had agreed to.

16 After the deadline, the commissioner made 10,000
17 more assignments. A quarter of those were made in October
18 1993 or a handful in February 1994. The rest were made
19 primarily in 1995 and 1996 and a few more, about 55, in
20 1997. And the process has been completed.

21 QUESTION: When there is a reassignment or
22 taking somebody out of the unassigned pool and attributing
23 that person to an operator, does the operator who has now
24 gotten the assignment have to pay interest for the period
25 from October '93 on, or is it just that you pay now the

1 bill that we would have sent you if we had charged you in
2 '93?

3 MS. McDOWELL: The latter. There's no interest
4 charged. So to the extent --

5 QUESTION: So that the --

6 MS. McDOWELL: -- the operator benefits by
7 having the use of the money during the period before the
8 obligation is imposed.

9 QUESTION: What about the argument that the
10 Social Security Administration stood before Congress and
11 said, we can make this date? Then the operators who might
12 be saddled with additional responsibility could breathe
13 easily and say, well, we don't have to set up any reserve
14 for the assignment of more operators to us.

15 MS. McDOWELL: Well, in fact, Your Honor, the
16 commissioner didn't say we will make the deadline. The
17 commissioner did express optimism in September of 1993
18 that the deadline could be complied with.

19 QUESTION: I thought there were quotations in
20 the record that had an official from the Social Security
21 Administration telling Congress we are going to do it. It
22 was more than, it's a hope. I -- I don't have that at my
23 fingertips now.

24 MS. McDOWELL: I think it could have been only
25 an expression of hope in -- in September 1993, and then

1 the operators would have received, in many cases, and --
2 and these respondents certainly did -- assignments of
3 additional beneficiaries during October 1993, so that
4 should have put them on notice to make inquiry as to
5 precisely when the assignment had been made.

6 I think a particularly more telling and -- and
7 earlier statement from a -- an acting commissioner came in
8 February 1993 when the acting commissioner was testifying
9 before a House appropriations subcommittee. He said at
10 that point that it did not appear that the assignments
11 could be completed by the deadline.

12 One Member of Congress asked, well, what is the
13 -- the crucial date, then? When is it that beneficiaries
14 will lose benefits if the assignments aren't made? And
15 the acting commissioner went on to explain that, well,
16 because there was a -- a \$70 million transfer coming into
17 the Combined Fund on October 1st, 1993 from the United
18 Mine Workers 1950 pension fund, there would be money in
19 the Combined Fund for some time to pay benefits, and that
20 the assignments could be done on a rolling basis to bring
21 money into the fund. So it was clearly understood at that
22 point that there was no jurisdictional cutoff of the time
23 to make assignments contemplated by the statute.

24 QUESTION: Ms. McDowell, what do you do with the
25 provision of 9704(a)(3)(D) which makes an assigned

1 operator's unassigned beneficiaries' premium equal to the
2 operator's applicable percentage, which is defined as its
3 percentage of total assigned beneficiaries, quote,
4 "determined on the basis of assignments as of October 1,
5 1993"?

6 MS. McDOWELL: The statute then goes on to
7 provide for adjustments in years after 1993 for two
8 circumstances: when a change has been made as a result of
9 the administrative review process, and when a change has
10 been made as a result of coal operators going out of
11 business.

12 QUESTION: Right, but -- but --

13 MS. McDOWELL: And the fact that Congress --

14 QUESTION: -- but does not make a third
15 exception; that is, a change is made as a result of the --
16 the finding of additional assigned beneficiaries under the
17 -- under the commissioner's ability to -- to find it after
18 October 1.

19 MS. McDOWELL: That's correct, Your Honor, but
20 the fact that Congress said that these adjustments shall
21 be made doesn't suggest that Congress did not intend to
22 permit other appropriate adjustments to be made as well.

23 QUESTION: No, but what does -- what does
24 suggest that is the language, determined on the basis of
25 assignments as of October 1, 1993. And then there's no

1 provision for -- elsewhere that would enable you to -- to
2 make the other adjustment.

3 MS. McDOWELL: Well, Congress was obviously
4 contemplating, at the point that it enacted the statute,
5 that the deadline would be made, satisfied. So it's --
6 it's therefore somewhat understandable that Congress
7 didn't discuss all the permutations of what would happen
8 if -- if the deadline was, in fact, not satisfied.

9 And an additional point is even if one assumed
10 that the unassigned beneficiary premium, the applicable
11 percentage used to calculate it had to remain fixed as of
12 October 1st, 1993, that doesn't really address the
13 commissioner's assignment authority after that date, and
14 it is not essential to the statute --

15 QUESTION: Well, no, it isn't essential but it
16 makes --

17 QUESTION: It has to because then you'd be
18 paying more than your share. You'd be paying based on the
19 assumption that you only had X number of -- of permanent
20 beneficiaries, but then your -- you'd be paying that
21 premium, but then you have additional beneficiaries that
22 you must take care of on their own account because they're
23 assigned to you. So you -- so you are hurt if you can't
24 -- if you can't change the formula.

25 MS. McDOWELL: Well, I'm not sure that it would

1 significantly change the -- the percentage of the whole
2 that the operator would be required to pay for.

3 But in any event, in practice the Combined Fund
4 has gone back and taken subsequent assignments, just like
5 subsequent reassignments, into account in calculating the
6 applicable percentage, and the statutory scheme has worked
7 quite satisfactorily in that respect.

8 QUESTION: Would you clarify one thing for me?
9 I don't know whether the -- the fallback position to
10 finance the unassigned -- the benefits for the unassigned
11 miners -- they -- there are two -- some money comes out of
12 the first pension fund. Later it comes out of a
13 Government fund. And then there's the third possibility
14 that that money may run out and the miners will be
15 assessed for the payment -- for the unassigned -- the
16 companies will be assessed for the payments for the
17 unassigned miners.

18 Now, what is the Government's position with
19 respect to a company that, say, had nobody assigned prior
20 to the October date, but after the October date, say, 500
21 miners were assigned? Now, as I read the statute, that
22 would mean the -- that company would have no
23 responsibility to contribute to the payments for the
24 unassigned miners. Am I right about that? Or would you
25 adjust it based on post-October assignments?

1 MS. McDOWELL: I'm not aware of any company in
2 that situation, but I think it would be adjusted for post-
3 October assignments as well.

4 QUESTION: Despite the language of the statute
5 that Justice Scalia referred to.

6 MS. McDOWELL: Yes, Your Honor. We think it's
7 flexible enough to allow those additional adjustments to
8 be taken into account.

9 QUESTION: When do you do the adjusting in the
10 -- I gather that's what you're doing. When do you
11 actually make the adjustments?

12 MS. McDOWELL: That's a task that's left to the
13 Combined Fund to do. It's not an adjustment that the
14 commissioner herself made.

15 QUESTION: But is -- is the percentage
16 recalculated as of the beginning of -- of each kind of
17 fiscal year following the -- the initial October 1 date?
18 Or -- or in the middle of a company's -- in the middle of
19 a year running from October 1, are they suddenly socked
20 with a -- or at least liable to be socked with an
21 assignment for which they had no reason to plan on October
22 1?

23 MS. McDOWELL: You know, I think the
24 commissioner typically made one round of assignments a
25 year during the time --

1 QUESTION: Annually.

2 MS. McDOWELL: -- when she was making additional
3 assignments.

4 QUESTION: Annually.

5 MS. McDOWELL: Sometimes two rounds, I believe.

6 QUESTION: And is that made in advance of
7 October 1 each year to commence on October 1 or be
8 effective as of October 1 each year?

9 MS. McDOWELL: Yes.

10 QUESTION: Okay.

11 QUESTION: I still don't see your basis for
12 doing it. You say it's flexible enough, but you're
13 confronted with language that says it will be determined
14 on the basis of assignments as of October 1, 1993. I
15 mean, there it is. It says it in cold, hard language.
16 There is no -- no exception elsewhere to do what you say
17 there's flexibility to do. Where do you get the
18 flexibility from?

19 MS. McDOWELL: Well, Congress didn't foreclose
20 additional adjustments to be assigned beneficiary premium
21 in addition to those specified in the statute.

22 QUESTION: What do you mean it didn't foreclose?
23 Yes, it did. It said, determined on the basis of
24 assignments as of October 1, 19 -- what -- what more does
25 it have to say?

1 MS. McDOWELL: Well, then if you will turn to
2 the next subsection of the statute, it provides for
3 adjustments for plan years after 1993.

4 QUESTION: For other -- exactly. That -- that
5 makes it even clearer that except for those expressed
6 exceptions, everything else has to be done as of October
7 1.

8 MS. McDOWELL: Well, in any event, Your Honor,
9 that particular provision is a separate section of the
10 statute from one addressing the commissioner's assignment
11 authority. It doesn't provide the sort of clear and
12 unambiguous indication that Congress intended to prevent
13 the commissioner after the statutory deadline from
14 completing the task that Congress thought was important.

15 QUESTION: No, but if -- if you don't read the
16 two provisions together, if you don't read the shall
17 clause and -- and the calculation clause together, you --
18 you get a system which is simply incoherent. You've got a
19 system in which assignments are being made, but in fact
20 the -- the Combined Fund is being operated as -- as if
21 they were not being made. And, you know, it seems to me
22 that you -- you've got to go the whole hog. You -- you've
23 simply got to say that the -- the October 1 deadline has
24 got to be read together with the shall clause, and if the
25 shall clause can be varied, then the October 1 deadline

1 can be varied, too, because otherwise you just get an
2 incoherent system Do you agree?

3 MS. McDOWELL: Well, that is certainly how it
4 has been applied.

5 QUESTION: That's what you're doing.

6 MS. McDOWELL: It has been applied flexibly and
7 adjustments in the applicable percentage have been made
8 retroactively.

9 Thank you. I'll reserve.

10 QUESTION: I have one question. I -- I take
11 it's possible if a company had received assignment of --
12 of all of its employees, that it could argue that it was
13 paying too much if there wasn't the adjustment. Have any
14 companies made that argument?

15 MS. McDOWELL: Not that I'm aware of, Your
16 Honor.

17 QUESTION: Thank you, Ms. McDowell.

18 Mr. Buscemi, we'll hear from you.

19 ORAL ARGUMENT OF PETER BUSCEMI

20 ON BEHALF OF PETITIONERS HOLLAND, ET AL.

21 MR. BUSCEMI: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 The respondents in this case are seeking a
24 windfall because the Social Security Administration didn't
25 complete its work on time. They should not get it.

1 It is conceded in this case that the
2 beneficiaries at issue were supposed to be assigned to
3 Bellaire and Peabody.

4 It's conceded that these respondents are not
5 being asked to pay a penny more than Congress wanted them
6 to pay.

7 It's conceded that Congress wanted as many
8 beneficiaries as possible to be assigned to particular
9 operators. Section 9706(a) itself directs SSA to assign
10 each beneficiary. Now --

11 QUESTION: Counsel, would you explain to us the
12 real world consequences at the end of the day for the
13 respective positions of the parties? Apparently the
14 miners will be covered one way or another.

15 MR. BUSCEMI: That is correct, Your Honor. And
16 respondents make a great deal of that as if the only
17 purpose of the statute was to ensure that the
18 beneficiaries would continue to receive their health
19 coverage. That was surely a major percentage.

20 QUESTION: Yes.

21 MR. BUSCEMI: But the financing method of the
22 benefits was also a key component of the statute.

23 QUESTION: Well, that's -- the next part of
24 Justice O'Connor's question is -- and I had this in mind
25 also -- is the fund will always have adequate funds to pay

1 for the unassigned miners, will they not? The plans.

2 MR. BUSCEMI: Well, the Combined Fund will --

3 QUESTION: The -- the plans in that sense aren't
4 hurt because they're -- they're not going to run out of
5 money.

6 MR. BUSCEMI: The Combined Fund will receive
7 funds in accordance with the provisions of the statute.
8 The answer to Justice O'Connor's question is threefold.
9 It is complicated.

10 For the first 3 plan years, beginning February
11 1, 1993 and ending October 1 -- I'm sorry -- September 30,
12 1995, if these beneficiaries are not assigned, as they
13 should be, to Bellaire and Peabody, all of the other
14 assigned operators will receive a greater assessment, and
15 they will -- because there will be an increased number of
16 unassigned beneficiaries during those first 3 plan years.

17 QUESTION: A backwards looking assessment --

18 MR. BUSCEMI: Correct.

19 QUESTION: -- for those early years.

20 QUESTION: But they're not complaining, as I
21 understand it, or am I wrong about that?

22 MR. BUSCEMI: Well, they -- they surely are
23 complaining. The Apogee case, for example, in the
24 Eleventh Circuit was a case that arose precisely because
25 of that sort of supplemental, after-the-fact assessment

1 designed to take into account the fact that there was a
2 greater number of unassigned beneficiaries in the plan.
3 And that, in particular, arose as a result of this Court's
4 decision in the Eastern Enterprises case.

5 QUESTION: But they're not in this case.

6 MR. BUSCEMI: They're -- they're not intervenors
7 in this case, no, Your Honor.

8 QUESTION: Why? I'm just -- as I understand it,
9 which may show I'm wrong, the -- the -- all this is about
10 is, since the -- this receptacle, the -- the -- what are
11 we calling it -- the fund -- is --

12 MR. BUSCEMI: UMWA Combined Benefit Fund?

13 QUESTION: Yes. That's financed by the coal
14 companies, too. So -- so that -- aren't -- isn't the
15 money that we're just talking about coming from them and
16 -- and -- the unassigned people go into a fund. The
17 unassigned people go into a -- what's the word? It's
18 escaped me.

19 MR. BUSCEMI: Your Honor, both the assigned
20 beneficiaries and the unassigned beneficiaries are
21 beneficiaries of the Combined Benefit Fund. The Combined
22 Benefit Fund receives premiums for each beneficiary from
23 the assigned operator, if the beneficiary is assigned. If
24 the beneficiary is not assigned, as I was starting to say
25 in response to Justice O'Connor's question, there is a

1 complicated system For the first 3 --

2 QUESTION: And you've given us step one. Right?

3 MR. BUSCEMI: Step one is the first 3 plan
4 years.

5 QUESTION: All right.

6 MR. BUSCEMI: During those 3 plan years, the
7 unassigned beneficiaries are paid for out of the transfers
8 from the UMWA 1950 pension plan. Those were transfers
9 that could not have been made but for the statute because
10 pension benefits and the health benefits are different.
11 And Congress intervened and said there will be \$210
12 million moving into the Combined Fund from the pension
13 plan. That money is used for unassigned beneficiaries'
14 premiums. It's used for death benefit premiums, and for
15 the first year and the first year only, it's used to
16 reduced the assigned operators' assigned beneficiary
17 premiums.

18 So every time the number of unassigned
19 beneficiaries goes up, a greater share of that \$210
20 million must be used to pay for the unassigned
21 beneficiaries. Less is left for death benefits and to
22 defray the first year assigned beneficiary premiums, and
23 accordingly, a supplemental assessment is made on all
24 assigned operators when the number of unassigned
25 beneficiaries goes up.

1 That's part one.

2 Part two. Beginning on October 1, 1995,
3 Congress says that there shall be annual transfers from
4 the interest earned by the Abandoned Mine Land Reclamation
5 Fund established under the Surface Mining Control and
6 Reclamation Act.

7 Now, obviously, you can't transfer interest that
8 you don't have. The interest earned by the AML Fund has
9 been declining. Interest rates have been going down, and
10 accordingly, the interest rates that are earned by the
11 fund goes down. The fund at one time earned \$80 million a
12 year in interest. It's now projected to earn only 30 in
13 fiscal 2003. So there's a limit to how much can be
14 transferred from the AML Fund.

15 The third component. If the AML Fund transfer
16 is not sufficient to pay for the beneficiaries, the
17 unassigned beneficiaries, then there must be an unassigned
18 beneficiary premium assessed against all assigned
19 operators, thereby shifting the cost of these
20 beneficiaries from these respondents to all assigned
21 operators.

22 QUESTION: Which hasn't happened yet in fact.

23 MR. BUSCEMI: It has not happened yet.

24 QUESTION: And how much are we talking about?

25 MR. BUSCEMI: Well, right now we're talking --

1 if everyone nationwide affected by this case, if the rule
2 were to change, and you were looking purely prospectively,
3 you have about 4,000 people. But if you go back to the
4 beginning --

5 QUESTION: Yes.

6 MR. BUSCEMI: -- you have about 10,000 people.

7 QUESTION: Yes.

8 MR. BUSCEMI: And as Mr. Tennielle's
9 declaration, which is in the joint appendix, shows, there
10 is approximately \$105 million that was already at stake as
11 of the time of his declaration in 1999, and that number
12 has been growing ever since.

13 QUESTION: What exactly is the interest of the
14 trustees that you represent?

15 MR. BUSCEMI: Your Honor, the trustees want to
16 see this statute operate the way it's supposed to operate.
17 The trustees --

18 QUESTION: But that's a fairly -- what is their
19 financial or pecuniary interest?

20 MR. BUSCEMI: The trustee -- it's -- it's not a
21 financial interest. The trustees believe that the policy
22 of the statute was to have the greatest possible amount
23 paid for from the private sector by the employers who
24 employed the beneficiaries, retired miners. And the
25 trustees have been, in each of these cases, arguing that

1 the system ought to work the way Congress intended.

2 Now, on the applicable percentage, I do want to
3 say one thing in response to Justice Scalia's several
4 questions on this, and that is, the "as of" language in
5 the statute is very important. Every time there is a
6 reassignment as a result of an administrative appeal, it's
7 made as of October 1, 1993. Every time there's an initial
8 assignment made after September 30, 1993, it's made as of
9 October 1, 1993. They all go back to the beginning
10 because these beneficiaries all need health care --

11 QUESTION: You can't read that language that
12 way. It -- it says applicable percentage is defined as
13 the percentage of total assigned beneficiaries determined
14 on the basis of assignments as of October 1, 1993. You're
15 -- you're telling me that means assignments made later,
16 but that you say on their face, we're making these
17 retroactive to October 1, 1993?

18 MR. BUSCEMI: It must be, Your Honor. It must
19 be because if there is a reassignment --

20 QUESTION: It must be because otherwise your
21 theory doesn't work.

22 MR. BUSCEMI: No. Otherwise the statute --

23 QUESTION: And -- and the other side's theory of
24 the case is -- is correct.

25 MR. BUSCEMI: No, Your Honor, because when

1 there's a reassignment after an administrative appeal, for
2 example, the reassignment occurs in 1995 or 1996. If an
3 administrative appeal is successful and there's a
4 reassignment, that reassignment is as of October 1, 1993,
5 even though the reassignment isn't made until later.
6 That's absolutely plain --

7 QUESTION: So there's a -- there's a retroactive
8 assessment?

9 MR. BUSCEMI: Absolutely, Your Honor. All of
10 these assignments, whether they're reassignments after
11 administrative appeals, whether they're initial
12 assignments during this period when the commissioner was
13 finishing the assignment process, they all go back to the
14 beginning. In fact, they go back to February 1, 1993
15 because that's the beginning of the first plan year.

16 I might say there are many provisions in this
17 statute that say do something by a date certain. The
18 trustees had to be appointed by a date certain. The \$70
19 million transfers from the '50 pension plan had to be by a
20 date certain. The merger of the '50 benefit plan, the '74
21 benefit plan into the Combined Fund had to be by a date
22 certain. Yet no one would argue that if any of those
23 dates was missed, then there was no authority at all.
24 And --

25 QUESTION: Wouldn't you have to give back money

1 if -- if your side does not prevail? Then these payments
2 have been made -- the assignments that were made,
3 payments have been made as of October 1, '93. And
4 wouldn't the fund have to give those payments back?

5 MR. BUSCEMI: That's precisely what Mr.
6 Tennielle's declaration points out, Your Honor. As of the
7 time of his declaration, there had been approximately \$105
8 million worth of payments by various assigned operators
9 who had received assignments, initial assignments of
10 beneficiaries that were made after September 30, 1993.
11 Those amounts would have to be refunded or credited.
12 Indeed, the respondents in this case sought just such
13 refunds or credits. If you look at Judge Kinneary's
14 opinion, for example, in the Bellaire case in the
15 appendix, he grants a credit to Bellaire in the amount of
16 the payments that they made on behalf of the beneficiaries
17 assigned to them

18 QUESTION: Well, of course. They were assigned
19 incorrect -- I mean, what's so extraordinary about that?
20 It just means you've been collecting money from the wrong
21 people.

22 MR. BUSCEMI: I was just responding to --

23 QUESTION: I -- I would hope you give it back.
24 I mean --

25 MR. BUSCEMI: And we did.

1 QUESTION: Thank you, Mr. Buscemi.

2 Mr. Roberts, we'll hear from you.

3 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

4 ON BEHALF OF RESPONDENTS PEABODY COAL COMPANY, ET AL.

5 MR. ROBERTS: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 The petitioners' position is that when Congress
8 said shall before October 1st, 1993, it meant may before
9 or after October 1st, 1993. That is so, according to the
10 petitioners because, as they read the statute, Congress
11 could not really have intended to limit the authority of
12 the commissioner to make assignments under the act.

13 But there is nothing implausible or even unusual
14 about reading the statute to mean what it says. The
15 consequence of not assigning a particular miner by the
16 statutory deadline is that the miner is unassigned under
17 the statute. The statute tells us what to do with
18 unassigned miners. There is an elaborate backup
19 provision, as the Solicitor General calls it, to deal with
20 unassigned beneficiaries.

21 First and foremost, they receive the same
22 benefits as assigned miners.

23 QUESTION: Mr. Roberts, all I -- all that, I
24 guess, is conceded in the argument, but the -- the -- when
25 all is said and done, there seems to be an -- an inequity

1 as among the operators. And I can understand your -- I do
2 understand, I accept your argument that at least to get
3 the plan going initially, that the objective of Congress
4 would have been, as it were, a good system rather than a
5 perfect system

6 What I don't see is why Congress would want --
7 would have wanted to make it impossible to improve on that
8 system later by eliminating the -- the inequity of an
9 erroneous failure to assign. And it's -- it's that issue
10 that makes it difficult for me to read the -- the shall
11 language as being, as -- as they say, jurisdictional or
12 providing a cutoff. Can you address what the reason
13 Congress would have had for wanting to preserve that
14 inequity?

15 MR. ROBERTS: Certainly. First of all, from
16 Congress's point of view, the overriding purpose is to
17 continue benefits. That's taken care of.

18 Second, the coal miners get the same benefits
19 whether they're assigned or unassigned.

20 Now, but the argument is this undermines the pay
21 for your own principle. But the pay for your own
22 principle itself is -- embodies rough justice. A company
23 that employs a miner for 2 years pays for all his
24 benefits. Another company may have employed him for 25
25 years. That's the compromise that was agreed to and

1 that's fine. But it doesn't mean that this pay for your
2 own principle is some unqualified desideratum that you can
3 assume Congress intended to pursue at all costs in
4 perpetuity. We know that's not the case. They had a
5 deadline and they imposed it.

6 QUESTION: But, Mr. Roberts, didn't you omit one
7 of the other statutory purposes, which was, insofar as
8 possible, to assign responsibility for paying the benefits
9 to the company that had the best, the closest connection
10 with that particular miner?

11 MR. ROBERTS: Yes, and we know that was, for
12 example, not a purpose they wanted to pursue ueber alles.
13 If a company goes bankrupt, those miners--

14 QUESTION: But it was one of the major purposes,
15 was it not?

16 MR. ROBERTS: It was one of the purposes, yes,
17 and it was one that Congress said, spend a year trying to
18 make these assignments. But then we've got to launch this
19 fund and --

20 What is really going on here is that the
21 commissioner wants to do a different sort of job than
22 Congress delegated to her. This is the sort of project --
23 and I think this is a critical distinction from the
24 deadlines in Pierce County and those sorts of cases. The
25 agency could have done a reasonably good job on this

1 project in 4 months, a better job in a year, maybe a
2 nearly perfect job in 5 years. Congress said, we want the
3 1-year version. Why do we want the 1-year version and not
4 the nearly perfect version? Because the miners are going
5 to get the same benefits either way. Coal companies or
6 funds established by coal companies are going to pay for
7 them either way.

8 QUESTION: But they will pay in different
9 amounts. Different coal companies will be paying for some
10 of the miners under your proposal rather than the
11 Government's proposal.

12 MR. ROBERTS: Yes, and the question is--

13 QUESTION: And the specific hypothetical that
14 troubles me -- let me put it right out on the table.
15 Supposing a company had no assignments made to its prior
16 miners until after October 1st. If I understand the
17 system correctly, at the end of the line, if they have to
18 finance the payments for the unassigned miners out of a --
19 a pool contributed to by the operators, that company will
20 not have to contribute to that pool.

21 MR. ROBERTS: No. That's right. If it had no
22 assignments.

23 Now, Congress --

24 QUESTION: And -- and the company which had a
25 full assignment is going to be paying more than its pro

1 rata share.

2 MR. ROBERTS: And Congress knew --

3 QUESTION: And even though that there was -- you
4 say there's rough justice. This is making it even -- even
5 more rough, and if the companies are not paying the
6 proportion of the -- of the benefits that the statutory
7 scheme requires. They're paying more.

8 MR. ROBERTS: And Congress knew there was some
9 unfairness in requiring the companies to pay for
10 unassigned beneficiaries, and it cushioned that unfairness
11 by saying we're going to draw from this AML Fund that coal
12 operators established earlier. That will -- it has to
13 date ensured that there is no unassigned beneficiaries --

14 QUESTION: But I take it that fund itself is
15 maintained based on the -- your share of fully assigned
16 miners. More, the more you're assigned, the more you have
17 to pay to that fund. Or correct me if I'm wrong.

18 MR. ROBERTS: No. That -- it's a preexisting
19 fund that was established based, I believe, on per-ton
20 royalties.

21 The point is everybody is contributing in
22 different amounts to establish --

23 QUESTION: No, but Mr. -- let me just interrupt
24 you as to your answer to Justice Kennedy. It's true for
25 the first and second stages that it doesn't matter, but if

1 you have to go to the third stage where the unassigned
2 miners are paid by the companies, then what he says is
3 absolutely right.

4 MR. ROBERTS: If you have to get to the third
5 stage where there's an unassigned beneficiaries premium
6 assessed, yes. It's done pro rata. And Peabody Coal, for
7 example, will have a very sizeable bill if that reaches it
8 because they have over 4,000 assigned miners. This case
9 is about 330 miners who were assigned after October 1st.

10 But the point is not whether you could write a
11 funding mechanism that is more equitable or fair. It's a
12 question of whether that's the one that Congress wrote.
13 Congress --

14 QUESTION: What is the harm? That is to say, as
15 you agree -- I think we both agree there are many statutes
16 with deadlines in them. There are regulatory statutes
17 set, health regulations by such and such a date set,
18 consumer, trucking regulations. And the courts regularly
19 set that those dates, even though they use words like
20 shall, are not fixed because obviously Congress wanted the
21 regulations written, even if late.

22 Well, here they're saying this is roughly the
23 same thing. Obviously, Congress would have wanted this
24 assigned in the principle of pay for your own way, and
25 nobody is hurt by doing that late. Nobody is really hurt.

1 Now, I want you to reply to that. What's the
2 down side of trying to interpret this like we'd interpret
3 other regulatory statutes?

4 MR. ROBERTS: Well -- well, it's not like the
5 other regulatory statutes, first of all, because it's an
6 extraordinary grant of the authority to impose retroactive
7 liability. The grant exists nowhere other than in the
8 same sentence that says shall. I think that's quite
9 different than saying, EPA, in 2 years issue clean air
10 regulations. That's -- that's a different case. And
11 Pierce County is quite different. I think the Government
12 probably has inherent authority to recover misspent funds.

13 The harm is the same harm that comes from
14 disregarding any kind of deadline. As I said, this is the
15 sort of project you can spend 20 years on and always come
16 up with a more perfect assignment. Congress knew that.
17 They knew that a significant amount of work was involved.
18 They had to go and set up an interim funding system for
19 February to October to give the commissioner time. The
20 commissioner came back and said, we've done it. We've
21 completed the project.

22 QUESTION: Is there any way that you or your
23 clients or anyone have been hurt by the delay?

24 MR. ROBERTS: Oh, of course.

25 QUESTION: That is -- how? How were you hurt

1 specifically by the delay compared with if they had done
2 it all perfectly within 5 minutes? Imagine they got the
3 same assignments on time. Now imagine they got them late,
4 and how are you hurt by that?

5 MR. ROBERTS: Oh, sure. Well, it's the same
6 concern the Court noted last term in the Sigmon Coal case.
7 The coal industry is characterized by a significant amount
8 of transactions, mergers, acquisitions. You could be
9 looking at acquiring a coal company, and of course, given
10 the nature of the industry, the first question you ask is
11 what is your liability, and they're going to say, well,
12 it's this much. And then you -- then the -- the merger or
13 the acquisition takes place, and then you get another
14 notice, here are, you know, 40 new miners. And now, all
15 of a sudden, it's this much. That was a significant
16 concern in Sigmon Coal, and it is significant in this
17 instance as well.

18 QUESTION: But, Mr. Roberts, on the other hand,
19 you are, in fact your companies are paying less than they
20 would have paid had they been billed properly on time
21 because you have had the use of the money in the interim,
22 and Ms. McDowell said you're not being charged any
23 interest because you're paying in 19 -- or any adjustment
24 for inflation because you get to pay in 19-whatever, '97
25 dollars a bill that was due from October 1993 and you

1 don't get charged any interest on that.

2 MR. ROBERTS: I don't think interest is a
3 significant factor just the way the interest rates have
4 been over this time period. It certainly doesn't do much
5 to cushion the unfairness and inequity of getting a bill
6 retroactive as much as 5 years.

7 QUESTION: But my -- my point is simply had you
8 gotten that bill, that -- timely, it would have been more
9 costly than getting the bill later because you have had
10 the use of the money in the interim

11 MR. ROBERTS: The -- the interest is apparently
12 not -- not charged.

13 QUESTION: Unless you're -- unless you're a
14 company that had bought a company which, which had that
15 switch pulled, in which case you're -- you're out of
16 pocket a good deal. Despite the fact that you're -- that
17 it's less money than -- than would have been charged
18 originally, it's coming out of your pocket when you bought
19 a coal company that you did not believe had that
20 liability.

21 MR. ROBERTS: And the -- the key factor that
22 such transactions play in this particular industry may
23 well explain why you don't see any companies on this side
24 of the case. I think it's always wise to be skeptical of
25 fairness arguments that are raised by proxy. There are no

1 companies complaining about, oh, we're going to end up
2 potentially paying a higher pro rata assessment than
3 otherwise because -- a number of reasons.

4 Again, Congress cushioned the unfairness; they
5 recognized it by making the AML Fund available.

6 Second of all, this is a statute that is
7 suffused with concepts of rough justice. It is not
8 necessarily a more perfect result to pursue 5 years
9 instead of 1 year to pay for your own principle. That
10 does not necessarily lead to a more perfect result. It
11 may mean that more companies who employed miners for 2
12 years are paying over all of those benefits than companies
13 -- when companies who employed the same miner for 20 years
14 don't have to pay for any.

15 But the critical --

16 QUESTION: But there is -- I mean, Congress did
17 provide that if you think you were assigned people who
18 belonged to someone else, you can complain and then
19 there's an adjustment long after the 1993 --

20 MR. ROBERTS: Yes. We think that helps us, of
21 course, because it's an express provision for an
22 assignment after October 1st. There are no other such
23 provisions and because --

24 QUESTION: But isn't -- isn't it true that with
25 regard to the as -- with regard to as of language that

1 Justice Scalia is emphasizing, isn't it true that those
2 post-October changes are made as of the October date?

3 MR. ROBERTS: The reassignment provisions, yes.
4 Now, I'm not aware of a situation where it's reassigned to
5 someone who never had any assignments --

6 QUESTION: No, but at least the cancellation of
7 -- of an assignment would be made as of the earlier date
8 even though it took later -- took place later.

9 MR. ROBERTS: That's right.

10 But the other point is that although there's a
11 provision for --

12 QUESTION: So -- so you -- you admit that that
13 language doesn't really mean what it says.

14 MR. ROBERTS: Oh, no. It means as of October
15 1st. What I'm saying, in the case of a reassignment, they
16 say you can go back and -- and reassign it. The
17 applicable percentage is based on the assignments a
18 particular company had as of October 1st.

19 QUESTION: If you can do it with a reassignment,
20 why can't you do it with an initial assignment?

21 MR. ROBERTS: Because there's --

22 QUESTION: Without doing violence to the
23 language?

24 MR. ROBERTS: Because there's a specific
25 exception that allows reassignments. There's no exception

1 for reassignments. And, I would point out, there is no
2 provision that allows changes in the case of an unassigned
3 miner, and that is what has been going on here primarily.
4 The commissioner has been revisiting the unassigned pool,
5 and that's why this is quite different from a lot of the
6 other deadline cases. This is -- we think the
7 commissioner did get the job done on time. She just wants
8 to do a different job.

9 QUESTION: But Congress didn't think so, at
10 least the Congress that made an appropriation so that the
11 -- the administration could get the job done. There was a
12 supplemental appropriation, wasn't there?

13 MR. ROBERTS: Yes.

14 QUESTION: And part of it was supposed to be
15 spent to enable the administration to finish the job.

16 MR. ROBERTS: Yes, part of it. And the one
17 thing Congress did not do, with being told, you know,
18 we're coming up with the deadline, they didn't change the
19 deadline. They kept that in place.

20 Look at what the Solicitor --

21 QUESTION: I thought that supplemental
22 appropriation was made after October 1st, 1993.

23 MR. ROBERTS: No, before. In June I believe.
24 It was asked for in February, made in June or early July.

25 QUESTION: It's a little hard for me to accept

1 your argument that the equitable structure of the statute
2 is enhanced because the commissioner didn't get his work
3 done on time.

4 MR. ROBERTS: Well, I think the commissioner did
5 get the work done on time. It's just she just wants to do
6 a more perfect job. And what I'm saying is it's
7 reasonable for Congress to determine we don't need the
8 more perfect job. We need a good-enough job. And this
9 job is good enough to get the fund launched.

10 The one thing that's clear is that the way the
11 petitioners read the statute, if that had been proposed
12 when the Coal Act was -- was enacted, it never would have
13 gotten off the ground. The idea of giving the
14 commissioner significant discretion on an open-ended
15 timetable was certainly not in the cards. This is the
16 legislative equivalent of trench warfare, parties fighting
17 over every inch. They had the black lung model which did
18 give the Secretary of Labor significant discretion in
19 allocating responsibility for that consequence of -- of
20 the -- of coal mining, and they wanted nothing to do with
21 it. That's why --

22 QUESTION: How -- how do we know this, Mr.
23 Roberts? I -- I take it there's no helpful statement in
24 the legislative history saying, you know, by the way, this
25 is, you know, the linchpin of the deal, that with respect

1 to unassigned miners, there will be no monkeying around
2 after October 1st, '93?

3 MR. ROBERTS: I think we know it primarily --
4 no. There's no statement like that. I think we know it
5 from the structure of the statute which is carefully
6 reticulated. There is no delegation of discretion to the
7 commissioner. The compromises in the statute are spelled
8 out.

9 And when you talk about revisiting fairness,
10 keep in mind you're looking at one particular provision
11 and you say, well, that looks unfair. It may be because
12 another provision that's not at issue balances that out.

13 This is, as the Court noted in *Sigmon*, an
14 instance of legislative horse trading and log rolling, and
15 they're setting up a system and everybody has to pitch in
16 some. The older pension funds pitched in some. The
17 operators pitched in. Congress came forward with the AML
18 Fund, and it moved forward. And it had to be in place by
19 October 1st or the wheels would have fallen off. This is
20 not a deadline of the sort you've got 120 days to issue a
21 decision.

22 Thank you, Your Honor.

23 QUESTION: Thank you, Mr. Roberts.

24 Mr. Sutton, we'll hear from you.

25 ORAL ARGUMENT OF JEFFREY S. SUTTON

1 ON BEHALF OF RESPONDENTS BELLAIRE CORPORATION, ET AL.

2 MR. SUTTON: Thank you, Mr. Chief Justice. May
3 it please the Court:

4 I'd like to start with a legal point, and I want
5 to start by looking at 9706(a), which I'm sure you have
6 handy. I'm going to -- 9706(a). I'm going to be reading
7 from the red brief, Bellaire's brief, at A19. And this is
8 the assignment provision we've been discussing. And there
9 are two things that are important about the language of
10 9706(a).

11 The first is, of course, that it says, shall
12 before October 1st, 1993, and I think you understand our
13 arguments there.

14 But the second point --

15 QUESTION: Which one are you reading from, Mr.
16 Sutton?

17 MR. SUTTON: The Bellaire --

18 QUESTION: I know, but where on the page?

19 MR. SUTTON: A19, 9706(a), section (a), 9706(a).

20 QUESTION: Oh, thank you.

21 MR. SUTTON: And the -- the first point you
22 notice is the shall before October 1st, 1993 language.
23 And of course, you -- we've made our point there.

24 But the second point is that it's the same shall
25 term that modifies other clearly mandatory jurisdictional

1 requirements under the act. The commissioner would agree
2 that she had no option of assigning these miners to
3 nonsignatories or to assigning them to people that were
4 out of business or to not following the statutory
5 prescribed order of priority. It's one term, shall. As
6 the Court made it clear in another deadline case, Mohasco,
7 we're going to assume the same word has the same meaning
8 throughout and --

9 QUESTION: No, but -- I mean, that -- that's an
10 assumption we can't make. I mean, I think there is a
11 clear understanding that when someone is given an
12 either/or choice, shall may be -- mean one thing. When
13 one is given a timing or a deadline choice, it may mean
14 something else. The statute is addressing different
15 issues and the same verb may well have different meanings
16 in -- in the different contexts.

17 MR. SUTTON: Well, Your Honor, I -- I'm not
18 aware of a case from this Court that has said one word in
19 one sentence can have different meanings in the statute.

20 QUESTION: It doesn't have different meanings.
21 It has the same meaning. But in fact, it doesn't tell you
22 what happens if you don't do it. All right. So they
23 didn't do it.

24 Now what? If you don't do what it says, then
25 what? And there the statute is silent.

1 MR. SUTTON: And the point --

2 QUESTION: And furthermore, the argument is that

3 the shall merely enhances and makes more meaningful the

4 other shalls. I mean, that's --

5 MR. SUTTON: Well, there's just one shall. And

6 the petitioners would agree that there's a clear

7 consequence if they had not assigned to a signatory

8 operator. Why isn't there the same mandatory --

9 QUESTION: Because it's a -- look. It's not a

10 linguistic point. The point is, what happens if you don't

11 do it, what you shall do? And there, the consequence in

12 the case -- you said you couldn't go back. You're

13 absolutely right. And now our question is what's the

14 consequence here?

15 MR. SUTTON: Well, the consequence here -- and

16 that's what makes this an easy case -- is the fact that

17 unlike Pierce County, the statute did provide a

18 consequence. It did provide a fail-safe safety net for

19 all miners.

20 QUESTION: Well, it provided -- it had a default

21 provision. In effect, it says, if there hasn't been an

22 assignment to an operator, this is where the person goes

23 for purposes of this tripartite calculation.

24 But the fact that there may be a default

25 provision in the case of -- of inaction, I don't think

1 necessarily is -- is equivalent to saying that there is a
2 provision for all time about what shall happen. It's just
3 that their immediate object was there had to be a grouping
4 of these miners as of October 1 or there would have been
5 no way to calculate the -- the sources of the -- the
6 various assessments to pay for it. But that -- all that
7 does is say, okay, you've got a default in place --
8 default position -- provision in place so that you know
9 what to do as of October 1. But it doesn't answer the --
10 the question here.

11 MR. SUTTON: The proof, Your Honor, that this
12 was not that mysterious in terms of language is the fact
13 that the commissioner had no problem doing what -- just
14 what we say the statute required. As of October 1st,
15 1993, she did just what Congress said she should do, which
16 is to divide the world of miners into two parts, assigned
17 or unassigned.

18 After October 1st, 1993 -- and keep in mind this
19 was a statutory beginning, not a statutory --

20 QUESTION: Well, she could have done that if she
21 had done absolutely nothing at all. If -- if she had done
22 zero on -- on October 1st, the -- the default provision
23 would have -- would have come into play and there would
24 have been a result of October 1st. And -- and I assume
25 you would not take the position there that a -- a total

1 default by the Government of any action at all would --
2 would be required to go unremedied for all time.

3 MR. SUTTON: Well, no. Of course, the statute
4 wouldn't have worked in that setting.

5 QUESTION: No.

6 MR. SUTTON: There's no doubt, you would have
7 required a congressional fix. But the point --

8 QUESTION: But there would have been a result as
9 of October 1st.

10 MR. SUTTON: But the point I'm making is there
11 were only 5,000 out of these 80,000 miners that they ran
12 out of time on. As of October 1st, what did they do with
13 these miners? They put them in the unassigned pool. The
14 statute has very specific requirements for transferring --

15 QUESTION: Yes, but the unassigned pool wasn't
16 created just for that purpose. It was also created to
17 take care of people who couldn't be hooked up with any
18 particular company.

19 MR. SUTTON: But to use Justice Souter's words,
20 all default provisions cover everything. It would be an
21 odd safety net that said, some in and some out.

22 QUESTION: But you would agree that the default
23 position was not just to take care of the timing problem

24 MR. SUTTON: No, of course, not. But -- but
25 this gets to --

1 QUESTION: The universe -- the universe of
2 assigned and unassigned was, I don't think, intended by
3 Congress to include people that the commissioner didn't
4 get around to.

5 MR. SUTTON: Well, there's one thing that
6 Congress clearly appreciated, and let's make sure we're --
7 I -- I make this clear. Of the 10,000 people that have
8 been reassigned, i.e., original assignments after the
9 date, 7,500 are folks that the commissioner originally
10 did, quote, "designate" in the unassigned pool. They
11 reviewed the records. They looked at them. They said, we
12 can't find anyone to whom they belong. They're going to
13 the unassigned pool.

14 Now, the proof that Congress contemplated that
15 possibility is exactly the administrative review
16 provisions we've been talking about. What were they
17 about? Fact error. And so they were aware of --

18 QUESTION: Can you give me that number again?
19 What is the percentage of the unassigned we're talking
20 about that were initially determined properly to be
21 unassigned for other criteria?

22 MR. SUTTON: 20,000 were initially decided. If
23 you look at the Herrin affidavit at JA179 to 184, it
24 specifically says that 20,000 were initially designated
25 unassigned. And this proves Mr. Roberts' point that

1 what's going on here is not a missed deadline case. They
2 met the deadline. What's going on is they decided to
3 reinvent the task.

4 QUESTION: So we're talking about 20,000, and --
5 and what's the total universe that we're talking about
6 here of unassigned?

7 MR. SUTTON: Oh, well, they started with 80,000
8 altogether. I'm making the point that 20,000 were
9 initially designated unassigned. Out of that 20,000,
10 7,500 later they decided we can do a better job with that.
11 And our point -- our point is -- I mean, there's a
12 cost-benefit analysis here. Congress could have said,
13 Commissioner of Social Security, you can keep doing this
14 into perpetuity until you get the job just right. They
15 didn't say that.

16 QUESTION: All right. So their -- their
17 reassignments cost your clients money. I understand that.
18 What I don't quite understand is Mr. Roberts' point which
19 he mentioned. If they're right in the case -- I mean, if
20 -- if you're right in the case, then other companies
21 should have had to pay more, isn't that right, to balance
22 what you paid by way of less?

23 MR. SUTTON: But, Your Honor, I mean --

24 QUESTION: And why weren't they are on the other
25 side of the case? I'm genuinely puzzled about that.

1 MR. SUTTON: Well, that's an important question.
2 But ultimately, it's robbing Peter to pay Peter. All of
3 these funds, at the end of the day, came from coal
4 companies.

5 QUESTION: Yes, that's my understanding. So I
6 would appreciate why they aren't -- I mean, Mr. Roberts
7 brought that up.

8 MR. SUTTON: Because of the cushion.

9 QUESTION: And I'm just curious why they're not
10 here.

11 MR. SUTTON: The cushion, Your Honor. The
12 cushion. A critical part of the compromise that led to
13 the enactment of the act was a cushion of funds to provide
14 for the benefits of unassigned beneficiaries. That
15 cushion has been sufficient. So there's no -- there's --
16 there's not been a concern yet for this pro rata --

17 QUESTION: Yes, but it isn't assumed it will
18 always be sufficient, is it? It's been sufficient up to
19 now. But isn't it assumed that in time that they will
20 have to resort to a -- a company financed pool of money to
21 pay for the unassigned miners?

22 MR. SUTTON: Your Honor, the Government all the
23 time relies on much less reliable proxies than this one.
24 Keep in mind that 93 to 94 percent of these miners'
25 records were reviewed. The risk that somehow this pro

1 rata unassigned beneficiary premium is going to awkwardly
2 hurt one company I think is fanciful. I can't imagine how
3 that could happen given the numbers --

4 QUESTION: Well, do you not agree -- I'm not
5 sure you're responding to my question. Do you not agree
6 that there is a significant possibility, even a
7 likelihood, that you'll reach the third stage of financing
8 for the unassigned pool?

9 MR. SUTTON: I don't know, and the reason I
10 don't know is that you -- these AML transfers have done
11 the job. Since 1995 they have done the job, and this is a
12 declining population.

13 QUESTION: Where would that money go?

14 QUESTION: Assume there is a significant risk.

15 QUESTION: But they haven't eliminated the
16 unassigned pool.

17 MR. SUTTON: No, they haven't. Of course, not.

18 QUESTION: And the question is who -- who should
19 pay for those?

20 MR. SUTTON: And the rough justice calculation
21 that the Congress made is we're going to do it on a pro
22 rata basis. If I could just step back for one second, I
23 think this, I hope, puts the 1992 decision in context.

24 Through -- from 1946 forward, they paid for
25 these benefits in two ways. One was pay for your own.

1 The employer paid for his or her employee. And the second
2 one was pay as a group. They've been doing that through
3 -- since 1946. That's what the AML tax does. That's on
4 all coal companies.

5 QUESTION: Suppose the Secretary had gotten
6 around to only half instead of what it was.

7 MR. SUTTON: Right.

8 QUESTION: You're saying she couldn't -- she --
9 she should not have tried to make it perfect. It was good
10 enough for Government work. But suppose it was only --
11 she -- she was much slower and she only did, say, one-
12 third. Then what?

13 MR. SUTTON: There's -- there's -- I'm sorry.

14 There's clearly some point at which the wheels
15 of the statute would fall off, but I think from the
16 Court's perspective of construing what the statute means,
17 it's appropriate to assume the commissioner is going to
18 act in good faith. She did act in good faith. She did
19 get --

20 QUESTION: When you say it would fall off, do
21 you mean that in that event, if she had been slower than
22 she was, then she would have been permitted to make
23 assignments after the deadline?

24 MR. SUTTON: No, Your Honor, I don't mean to be
25 saying that. The point I'm making is that --

1 QUESTION: Well, what would have happened?

2 Let's say she did only one-third of the job and you had
3 this large pool of unassigned people.

4 MR. SUTTON: Well, the bigger problem would have
5 been the assigned miners and they wouldn't have had enough
6 money to pay for them. When I say the wheels fall off the
7 statute, if they didn't get this job done by October 1st,
8 they've got a very serious problem on their hands because
9 the statutory beginning that starts on that date is they
10 began sending out these premium requirements. The first
11 ones went out on October 22nd, 1993. And if they hadn't
12 done a sufficient number, you wouldn't have enough money
13 to pay for their benefits. You'd be back --

14 QUESTION: I thought the first 3 years they got
15 the money from the pension fund.

16 MR. SUTTON: Those were used primarily for
17 unassigned. They were used some to help with assigned,
18 but most were used to pay for unassigned benefits. So
19 that's the point I'm making there.

20 I'd like to make a point about Pierce County
21 that I think is helpful in thinking about deadline cases
22 in general. Here's why we're not saying that when a
23 statute says you must complete this FOIA request in 20
24 days, our -- our case would control it. In Pierce County,
25 as in that situation, these governmental agencies have

1 preexisting general grants of authority to do these acts;
2 i. e. , go get misspent Federal funds. There are general
3 statutes. There was one in Pierce County. If you look at
4 page 257 of Pierce County, the plaintiff conceded there
5 was otherwise jurisdiction to get this money.

6 Here -- and so what Pierce County means is we're
7 not going to say there's a repeal by implication of that
8 general grant of authority merely because we now have
9 another statute that says do it quickly, get it done.
10 That's not this case.

11 9706(a) is the only provision either petitioner
12 has pointed to that gives you this grant of authority. So
13 the grant comes with a limit.

14 QUESTION: May I just interrupt with -- with one
15 more question, if I may? In response to the as of
16 argument that Justice Scalia identified, Mr. Buscemi gave
17 a -- a list of a whole bunch of things that are as of
18 October 1st. What would be your response to his -- his
19 list of as of things that really happened later than that
20 October date?

21 MR. SUTTON: There are express exceptions to the
22 October 1st deadline, and under this Court's decision in
23 Sigmon, you follow the Russello rule. They knew about the
24 possibility --

25 QUESTION: It was an express exception like on

1 the appointment date of the trustees and so forth?

2 MR. SUTTON: Oh, I'm sorry. The other shalls.
3 I'm sorry. The other shall -- I'm sorry. Thank you.

4 The other shalls throughout this statute --
5 you've got two different issues there. One of them is
6 that they apply -- there's no contingency plan if you
7 miss. Here we've got a contingency plan. That's one
8 inference.

9 The second is they all regulate private
10 entities. This goes back to the point I just made about
11 Pierce County. If a private entity is told do something
12 by this date, they don't do it, a court clearly has
13 authority to say, we said do it by this date, do it. They
14 had -- they had -- you don't have a authority problem with
15 a private entity. They can do what they want.

16 With the Government, however, and particularly
17 when it comes to these extraordinary retroactive
18 assignments of liability, the commissioner is not born
19 with that authority. It's not inappropriate to ask the
20 Government to turn square corners in that kind of a
21 setting as opposed to a setting where they're merely
22 exercising a general power to get misspent Federal funds,
23 fulfill a FOIA request. There --

24 QUESTION: Mr. Sutton, I -- I thought that or
25 maybe I just hoped that Justice Stevens was -- was asking

1 about why it is that the -- the crucial language
2 determined on the basis of assignments as of October 1,
3 1993 is in fact not so crucial, that -- that as Mr.
4 Buscemi said, there are other instances in which something
5 was not determined before October 1, 1993, but
6 nonetheless, it is deemed to have been determined before
7 October 1, 1993.

8 MR. SUTTON: By the statute. It says that if
9 they -- if a company goes out of a -- goes into
10 bankruptcy, we're going to alter the applicable percentage
11 as of October 1st, 1993 because they went into bankruptcy.
12 If there's a reassignment, it goes back to October 1st.

13 QUESTION: Well, does the statute say it goes
14 back to October 1st? Does the statute say the
15 reassignment shall be deemed to have been made as of
16 October 1?

17 MR. SUTTON: Let's go back to it right here.
18 You've got -- in the provision you're talking about,
19 9704(f), the applicable percentage, it has the general
20 rule.

21 QUESTION: Where is that? What page?

22 MR. SUTTON: A13 of the appendix.

23 QUESTION: Okay.

24 MR. SUTTON: The general rule is stated in
25 9704(f) and then you have the adjustments to the general

1 rule.

2 QUESTION: Right.

3 MR. SUTTON: And then it says, look at number 2:
4 by making the following changes to the assignments as of
5 October 1st, 1993. They -- they stuck with it. I mean,
6 they understood what was going on, and that's -- that's
7 what's so inappropriate here.

8 QUESTION: Okay.

9 MR. SUTTON: I mean, Justice Ginsburg, you made
10 the point that there's no interest running on this, but
11 keep in mind we don't get interest when they make mistakes
12 on our assignments. That's a wash. Right? I mean, if
13 they mistakenly assign someone to us, we don't get
14 interest there. But -- thank you, Your Honor.

15 QUESTION: Thank you, Mr. Sutton.

16 MS. McDowell, you have 1 minute remaining.

17 REBUTTAL ARGUMENT OF BARBARA B. McDOWELL

18 ON BEHALF OF PETITIONER BARNHART

19 MS. McDOWELL: Justice Breyer asked why there
20 weren't coal companies on our side of the courtroom. It's
21 because we, that is, the Federal Government, has been
22 paying through the AML Fund for the benefits for the last
23 few years. It appears that in the next few years that
24 interest is going to run out, and at that point, there
25 will be coal operators who will be bearing a larger burden

1 through the unassigned beneficiaries' premium

2 QUESTION: What would the interest be used for
3 if it weren't being used to make up the --

4 MS. McDOWELL: It would be used for correcting
5 the severe health and safety problems caused by abandoned
6 mines from the period before 1977.

7 The suggestion was made that coal operators were
8 being denied certainty in making transactions. If that
9 had actually been a concern, there is a remedy provided by
10 the Administrative Procedure Act, section 7061, an action
11 for administrative action unreasonably delayed. A coal
12 operator conceivably could have brought an action under
13 that statute.

14 QUESTION: But they said that -- they answered
15 that by saying, how did we know there was going to be? We
16 didn't know there was going to be anything reassigned to
17 us.

18 MS. McDOWELL: They received initial assignments
19 at -- for the first time in October 1993. That was at a
20 time when no reassignments were being made through the
21 administrative review process. It therefore should have
22 occurred to them that these were post-October 1st, 1993
23 assignments.

24 In terms of there having been a political
25 compromise that the October 1st, 1993 date would have

1 jurisdictional effect, in light of Pierce County and
2 Montalvo-Murillo, no such compromise could be assumed.

3 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
4 McDowell.

5 The case is submitted.

6 (Whereupon, at 12:06 p.m., the case in the
7 above-entitled matter was submitted.)

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