In the

Supreme Court of the United States

JAMES L. BUCKLEY, et al. Appellants, v. FRANCIS R. VALEO, SECRETARY OF THE UNITED STATES SENATE, et al. Appellees.	Nos. 75-436 75-437

Washington, D. C.
November 10, 1975

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JAMES L. BUCKLEY, et al., Appellants,	:	
v.	:	Nos. 75-436
FRANCIS R. VALEO, SECRETARY OF THE UNITED STATES SENATE, et al., Appellees.	:	and 75-437

Washington, D. C.,

Monday, November 10, 1975.

The above-entitled matter came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

On behalf of the Appellants:

RALPH K. WINTER, JR., ESQ., 127 Wall Street, New Haven, Connecticut 06520. [pro hac vice]

JOEL M. GORA, ESQ., American Civil Liberties Union, 22 East 40th Street, New York, New York 10016.

BRICE M. CLAGETT, ESQ., 888 Sixteenth Street, N. W., Washington, D. C. 20006.

APPEARANCES [Cont'd.]:

On behalf of the Appellees:

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530.

ARCHIBALD COX, ESQ., Langdell Hall, Cambridge, Massachusetts 02138.

LLOYD N. CUTLER, ESQ., Wilmer, Cutler & Pickering, 1666 K Street, N. W., Washington, D. C. 20006.

RALPH S. SPRITZER, ESQ., Special Counsel to the Federal Election Commission, 3400 Chestnut Street, Philadelphia, Pennsylvania 19174.

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C O N T E N T S

[Afternoon Session - pg. 87]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments today in Buckley against Valeo and others.

Counsel, you may proceed whenever you're ready.

ORAL ARGUMENT OF RALPH K. WINTER, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case was brought on January 2nd of this year, the first business day after the effective date of the Federal Election Campaign Act Amendments of 1974, which I will refer to as the FECA. It sought a declaratory judgment of unconstitutionality and a permanent injunction against the enforcement of major provisions of that law, the 1971 Federal Election Campaign Act, and Subtitle H of the Internal Revenue Code, as amended by the FECA amendments.

Pursuant to the expedited review provisions, the case was certified to the Court of Appeals for the District of Columbia Circuit.

After a remand to the District Court for fact finding, a framing of the constitutional issues, and a recertification to the Court of Appeals, the Court of Appeals and a three-judge District Court, considering only Subtitle H, rendered their opinions on August 15.

The majority below upheld the constitutionality of

every major provision of the law but one. That provision was not appealed, and is not in issue here.

The allocation of argument for both sides will be as follows:

I will discuss the statutory limits on campaign expenditures by political parties, committees, and candidates, limits on contributions to political candidates, and limits on independent expenditures.

My colleague, Mr. Gora, will discuss the challenge to the Act's disclosure provisions; and this afternoon Mr. Clagett will argue the unconstitutionality of federal subsidies to political candidates and parties and of the Federal Election Commission.

For the appellees, Mr. Friedman will discuss general principles and the disclosure provisions; Mr. Cox will discuss the limits on expenditures and contributions. In the afternoon, Mr. Cutler will discuss Subtitle H; and Mr. Spritzer, the constitutionality of the Federal Election Commission.

Let me briefly describe the statutory provisions relevant to my portion of the argument.

Candidates for all federal offices are limited by Section 608 in the amounts they may spend for purposes of influencing an election.

National Committee and State committees of a political party may make expenditures on behalf of candidates which are

in addition to the candidate's expenditures.

Section 608(e) prohibits expenditures independent of the candidate in excess of $1,000 so long as they are"relative to a clearly identified candidate" and "advocating the election or defeat of such candidate".

The statute also limits contributions to candidates. No person may contribute in excess of $1,000 to any candidate for federal office; and political committees, registered for six months, which have received contributions from more than 50 persons, and have contributed to five or more candidates for federal office, may make contributions to individual candidates, up to $5,000 each.

Candidates may expend personal funds or the funds of their immediate family up to $50,000 in the case of a candidate for President, $35,000 in the case of a candidate for the Senate, and $25,000 in the case of a candidate for the House.

Certain incidental out-of-pocket expenses incurred by volunteers in excess of $500 constitute a contribution.

QUESTION: Now, some of these limitations are annually, you can spend that much in any one year; is that true of all of them?

MR. WINTER: No. Most of the limitations apply to primary or to candidates --

QUESTION: To a specific primary or general election.

MR. WINTER: -- to races for the nomination, and then

also for the general election; and in some cases there are different limits, depending on whether it's a primary or general election.

QUESTION: But I'm correct, am I not, in my understanding that some of them are -- do permit annual expenditures or contributions of that amount?

MR. WINTER: Well, I'm not sure exactly what you mean, Justice Stewart.

QUESTION: Well, I'm asking the question.

MR. WINTER: I believe 608 -- well, certainly, the limits on expenditures apply to --

QUESTION: You'd have a federal election every two years, --

MR. WINTER: That's right.

QUESTION: -- presidential every four, and congressional every two.

MR. WINTER: Well, the limits on expenditures apply to each separate election, and it's not annual. The limits on independent expenditures says in any year. So that's just an annual expenditure.

QUESTION: Still, I'm not quite sure I understand your answer to my question.

MR. WINTER: Well, I think my answer is that it's not --

QUESTION: Within a year, in any year.

MR. WINTER: No, it's not annual. As I understand it, the --

QUESTION: They're geared to federal elections.

MR. WINTER: That's right.

QUESTION: And this is in -- any time during the federal election year; is that it?

MR. WINTER: Yes.

QUESTION: Is that it?

MR. WINTER: I think so. Yes.

QUESTION: Right.

QUESTION: Which is to say that the definition of a year is in relation to the election not the calendar.

MR. WINTER: That's right.

QUESTION: Is that it?

MR. WINTER: Yes, sir.

QUESTION: What difference does it make, really?

MR. WINTER: I'm not sure it makes any difference, sir.

QUESTION: Well, it would make a difference, I suppose, if some candidate was thinking about it and with one course of action he might be subject to a criminal charge, or other sanctions; and with the other course of action he'd be in the clear.

MR. WINTER: Well, that's certainly true. But the definition of expenditure is for the purpose of influencing an election. And that's a factual determination to be made in each

case as to which election the particular election was designed to -- you know, was intended to influence.

So that conceivably under the Act, I take it, that expenditures prior to a primary, prior to a nomination, can be said by the Commission or by a court interpreting it to in fact have been for the purpose of the general election. One of the principal duties of the Federal Election Commission will be to allocate, to make a determination of which expenditures in particular cases are for the purpose of which election.

The parties disagree as to the extent of congressional power to regulate political communication under the First Amendment, but they are agreed on one thing: which is that a statute which intrudes in a delicate area of this matter must be nondiscriminatory on its face. For if it were not, the State would be able to regulate the unpopular and, in effect, regulate the content of speech.

I want to confront directly and in detail the contention that the FECA is not facially discriminatory, for there are several clear cases of facial unconstitutionality.

Section 608 limits contributions to and expenditures by candidates, as defined in Section 591, essentially as anything of value given or employed to influence a federal election.

Title 39 U.S.C., Section 3210, which is on page 81 of our Volume III of the Appendix. That Section, subsections (e) and (f), makes explicit exception to the definitions of

contributions and expenditures. What the exceptions are are funds used in preparing material to be sent out under the frank, as well as the postal value of sending it out.

Section 3210(a)(3) defines the kinds of materials that may be sent out under the frank. That describes a variety of relevant materials, which clearly influence elections, but, most particularly, an influence, and I quote, "discussions of proposed or pending legislation or governmental actions, and the positions of the Members of Congress on an argument for or against such matters."

The only limitation is that the frank cannot be used within 28 days of an election.

Now, since the presentation of arguments for and against actions by Congress obviously influence elections, the effect is that Section 608 limits all contributions to or expenditures by challengers for purposes of mailings which debate governmental issues, while leaving totally unregulated and unlimited private contributions to incumbents to prepare material which is then sent out in unlimited amounts at government expense.

No party to this litigation, so far as I know, disagrees with this interpretation of the statute. Indeed, even in the proposed regulations of the Federal Election Commission relating to office accounts, the Commission was at pains not to treat funds supporting the activities described in Section

3210 as either contributions or expenditures.

The issue we raise is not whether Congressmen should be able to communicate with their constituents. The issue is whether Congress, under the First Amendment, may by law limit the ability of challengers to communicate with the very same constituents without similarly limiting itself.

Of course, public officials need to communicate with voters, but so do challengers. And if private contributions to challengers for use in mailings are to be limited, since they may corrupt or give the wealthy an unequal voice, then contributions to incumbents for the same purpose should also be limited.

The situation this statute establishes permits an incumbent Congressman, say, in a plausible hypothetical, to accept $40,000 from a source, any source, which can then be used to -- and that doesn't have to be disclosed -- which can then be used to prepare materials. You can give them or you can hire an advertising firm to prepare materials which can then be sent out under the frank.

So that an incumbent Congressman might accept -- give an advertising agency, say, $35,000 to prepare materials, send out 150,000 copies of something which I suppose is worth maybe roughly $15,000; none of which counts either as a contribution or an expenditure. If the challenger were to do exactly the same thing with matters debating the pros and cons of govern-

mental action, it would all be subject to the limits. And, indeed, in the hypothetical I've given, a challenger in the House would have used up well over half the expenditure limit, and that's before he has hired his lawyer and his accountant to help him comply with this statute.

QUESTION: Is this -- are you directing yourself to a Fifth Amendment attack or a First Amendment attack, or both?

MR. WINTER: I think it's both, Justice Stewart. It seems to me that it's a Fifth Amendment attack, in that it's an invidious discrimination. But it's also a First Amendment attack in that it clearly regulates content. It permits more speech, greater speech by incumbents than by challengers.

I think it is almost exactly the case that the Court decided in Police Department v. Mosley, involving a statute that prohibited all picketing, but picketing by a labor organization.

So I think that the attack goes on both grounds.

Now, if that's not facial discrimination, then these words have lost their meaning. It's not a minor exception.

QUESTION: But the First Amendment doesn't have much to do with discrimination as such, does it?

MR. WINTER: Well, I --

QUESTION: The Fifth Amendment does, of course.

MR. WINTER: Yes, it does. I find it difficult, Justice Stewart, though, to see why a statute which prohibits the speech of some but not others in a discriminatory fashion

does not violate the First Amendment --

QUESTION: Well, insofar as it's directed to content, it certainly does.

MR. WINTER: Well, that is content in a very real, a very, very real sense; and, not only that, the First Amendment at the core is the protection of those outside the government. This smacks very much of the repression of political opponents, in that people outside the government are not allowed to speak as much as people in, and I think that's -- if the Court finds the statute does that, it's a clear violation of the First Amendment.

It's not a minor exception. It involves millions and millions of dollars. More money is spent under frank by Congressman than is spent by all congressional challengers on all campaign activities.

In October 1974, on the eve of the congressional election, the Congress which passed Section 608 sent out almost 22 million pieces of franked mail. And the budget for 1976 includes $46 million for use of the frank.

Challengers to congressional incumbents in '74 spent only slightly over 20 million on everything.

Let me make it clear, we claim no misuse of the frank, we don't say 3210 is unconstitutional. It serves legitimate official purposes. Separating the proper use of the frank from the improper use is simply intractable. It would

make every mailing of the frank a constitutional issue. But the frank does influence elections, and, as stipulated by the parties and found by the District Court, its heaviest use is just prior to elections.

Attempts in Congress by Senator Scott to have the mailing privileges given to challengers, given to all candidates for federal office, have been defeated. It seems to me that the frank cannot be used in this way, or that you can't limit challengers in responding without either giving them franking privileges or limiting Congress's own use of it.

We do not abandon, by any means, our other contention. But if the Court were to find that this provision -- these provisions unconstitutional for these reasons, that would dispose -- that disposes of both contributions and expenditures under 608, and the other constitutional issues can be left to another day.

QUESTION: Both for the Senate and House and for the presidency?

MR. WINTER: Yes, sir. Not -- yes, sir -- the presidency might be difficult because it's penalty mail, but I would simply --

QUESTION: Well, then, you do have to say something else about the case, about the presidency case.

MR. WINTER: Yes, sir.

The presidency mail situation, sir, is precisely the

same, the President also has mailing privileges which are very similar to those which incumbent Congressmen have. I would think that it would clearly -- the theory would clearly fit within it, and, although 3210 doesn't explicitly make the same kind of explicit exception to the 591 definition, the case there is exactly the same. The President is permitted to send out mailings like that.

The statute -- I should say that basically this argument, I think, is applicable to all of the many resources which are available to incumbents which they can vote themselves at will, and which are detailed in the briefs and in the papers of the parties, and I won't go into.

I emphasized 3210 because it did have that explicit statutory language.

The FECA also -- and this applies to all federal races -- facially discriminates against independent candidates for office by permitting party committees to support their candidates over and above the candidate expenditure limit.

Candidates such as Senator McCarthy, who wish to demonstrate their independence from traditional political alliances, can do so only at the price of having less power to communicate with voters.

No matter how often the word "Watergate" is repeated, it really offers no valid explanation, much less justification.

Fourth, although the statute was passed in the midst

of rhetoric about reducing the influence of wealth and politics, in fact increases the advantage of wealthy candidates. A less wealthy candidate is prohibited from raising "seed" money or contributions for other purposes in amounts over a thousand dollars.

The wealthy candidate, on the other hand, can support his campaign from personal funds, including large early initial loans to the campaign which can later be repaid.

No reason which would stand scrutiny has been given to justify giving the wealthy this advantage in communication with voters.

Fifth, we also claim that it's facial discrimination for the statute to permit large contributions by political committees which have been registered for six months. They are permitted to spend five times as much as other kinds of committees, and we believe that that provision necessarily will help groups which have permanent organization -- which have continuous professional contact; namely, organized interest groups.

Ideology groups are less well-knit, their members are dispersed, they are not in continuous professional contact. They tend to be generated by campaign activities which will occurr too late for compliance with the six-month requirement, and they tend to coalesce only in response to unanticipated events.

It is certainly true that more ideological organizations, such as the National Committee for an Effective Congress or the Conservative Victory Fund, will continue to exist. They will, however, be limited by the $5,000 limit, and will be less able to proliferate the number of six-month committees in existence.

Organized interest groups, at least those with a geographic basis, which can organize horizontally, are able to proliferate committees; and that's why it seems to us that it's fairly clear that the practices of the Dairy Industry, which have been heavily relied upon in the court below, can continue to occur under this statute, since they can organize their political committees on a county basis.

Contrary to the rhetoric which accompanied passage of the FECA, the statute in particular favors the use of corporate and union money for political activities. Both are permitted to spend statutorily unlimited funds to raise money for so-called segregated funds, to finance the six-month political committees. Union or corporate money is thus spent to raise money, and that money is distributed without reference to wishes of the donors.

In effect, to some extent, the FECA reformed the problem of legal corporate contributions by making them less necessary. This isn't speculation; since the enactment of the statute there's been a very sharp increase in the number of

corporate political action committees with no visible increase in ideologically oriented groups.

I should say, the change in the statute in May was to include corporations with government contracts in the provisions permitting corporations to set up segregated funds.

Sixth, whatever facial neutrality the statute may have, it's only skin-deep. In its operation it inevitably works great discrimination among various candidates in various causes.

Candidates and political movements never begin from positions of equality. Some who are initially disadvantaged, moreover, can overcome the disadvantage only by heavy spending, no matter how much the opponent spends. Differences in name recognition, disadvantages on the issues. The record indicates, for example, in 1972, that Attorney General Kelly might well have been able to wage a stronger race against Sentor Griffin had he been able to obtain a level of campaign spending enabling him to focus the voters' attention more on economic issues, in which he was thought to be strong, rather than on the raging busing controversy, where he was thought to be weak.

In that kind of a situation, the busing was a controversial issue, independent of any activities of Senator Griffin, and could be overcome only by a vigorous campaign by Senator Kelly, no matter how many resources were available to Senator Griffin.

Appellees believe these propositions are common-sense

propositions. We don't think there is speculation at all. Indeed, they are now the law of the FECA, according to a ruling of the Commission.

In an advisory ruling involving Senator Bentsen, the Commission explicitly relied on the fact that an incumbent's exposure is the equivalent of substantial campaign expenditures. Senator Bentsen has announced that he intends to run in both the Texas presidential and senatorial primaries.

The Commission, fearful that his combined expenditures will influence each of these simultaneous campaigns, ruled that Senator Bentsen may only spend the amount permissible for the Senate primary altogether. His major anticipated adversary in the presidential primary, Governor Wallace, is thus free to outspend him two to one, since presidential primary candidates can spend twice the Senate limit.

In handing down this ruling, the Commission said, and I quote, "Within Texas, the reduced presidential primary expenditure limitations applicable to Senator Bentsen are compensated for by the fact that he is already the Senator from Texas, and thus, within Texas, begins with a significant exposure advantage over his rival."

QUESTION: Mr. Winter, how much can we get into a particular ruling like that? I mean, Senator Bentsen isn't a party here, Governor Wallace isn't a party.

MR. WINTER: The point I'm making, Justice Rehnquist,

is that while the Commission in this Court is claiming that kind of proposition is speculation and would not justify the Court holding expenditure limits unconstitutional for the reasons I've said.

The point is that they, themselves, are relying on that proposition to make decisions below. I'm not arguing whether the ruling was correct or incorrect. I'm just arguing that it's a well-known proposition, known to everyone, so well-known that the Commission relied on it and had no problems whatsoever.

And I think these propositions are as much common-sense propositions as the proposition that equal space statutes, say in Tornillo, made to deter newspapers from printing controversial editorials, I think every First Amendment of this Court involves judgments as to the factual impact of the statute.

QUESTION: But in Tornillo we were discussing the language of the statute as such, that is, as applied by the Florida courts; and here you're asking us to take into consideration a ruling by the Commission in a particular controversy.

MR. WINTER: I'm only asking you to take the rationale into consideration, I'm not asking you to address yourself to the merits of whether Governor Wallace and other presidential aspirants should be able to outspend Senator Bentsen two to one. I think the merits of that are irrelevant to the argument

here, except insofar as they demonstrate the belief of those -- the widespread belief that exposure is the equivalent of substantial campaign expenditures.

They are also relevant, I might say, to show the kind of deep intrusion the statute makes, in that the Commission will be asked time and again to address the question: How much will this candidate be able to spend on an election and how much will another?

I'm not sure I'm being responsive, Justice Rehnquist.

I think that similar disadvantages are visited upon challengers by the limits on contributions. Incumbents have, as we describe in our papers, large advantages in raising contributions under this statute, because of mailing lists they have developed from the frank, and the like.

Indeed, although one might have anticipated that fund-raising would be more difficult, the figures show that by September 30th of this year, incumbent Senators up next time have already raised over two million dollars; at a corresponding time in '74 they had raised less than a million and a half. So they're not having any trouble raising it, because they have all of this time to raise it, which challengers don't, and time is critical when you're raising small contributions.

There is one argument -- well, the argument that the statute helps challengers, because it offsets the superior fund-

raising ability of incumbents, seems to us to be in error. The greatest differential in funds is in those races in which the challenger simply has little or no plausible chance of election.

The limits in those circumstances have little impact, because the outcome is certain and because spending is often less than the limit.

The impact on those races which are competitive, however, will be drastic. But those races are the very races in which the differential in funds is least.

Thus, in 1974 in the House, if you take all the races in which the challenger did raise 70,000 or more, the amounts raised by all such challengers in fact substantially exceeded the amounts raised by the incumbents they faced. The limits have already had an effect on those races where equality is greatest at the present moment.

The burden of the FECA thus falls heavily on those challenging the status quo, by impairing the ability of challengers, both to raise and spend money, this legislation makes it acutely difficult for them to overcome the exposure incumbents already enjoy.

I don't think there could be any question about this. If there were five restaurants in a town, and someone was about to open a new one, an ordinance severely limiting the amount of newspaper advertising restaurants might buy would be recognized

by all for what it is: an attempt by the existing restaurants to freeze out newcomers.

I don't make claim of intent on the part of Congress to drive out or to freeze out newcomers. I do claim, however, that the effects will be to do that.

I think the record demonstrates these propositions. The vast majority of congressional challengers in the last two elections have spent over what are now the FEC limits, if appropriate adjustments are made for inflation.

Senator McCarthy's 1968 New Hampshire campaign, which seemed hopeless in the beginning, which was widely reported as a campaign run mostly by volunteers, was in fact a very heavily moneyed campaign, one of the most moneyed campaigns up to date. Senator McCarthy spent $12 per vote received, as against 77 cents spent in the general election by Richard Nixon.

In adjusting for inflation, that's around $18. If his spending had been otherwise, the outcome would have been otherwise -- had been limited, the outcome would have been otherwise; and the efforts of his many volunteer supporters, who were also helped by the heavy spending, would have been for naught.

The same is true of the reliance of challengers on large contributions. Again, the McCarthy campaign in '68 is detailed in the record, as is Senator Buckley's 1970 campaign, in which the landlords and the phone company wouldn't even talk to him unless he came up with certified checks for $36,000.

His beginning efforts were financed through a large loan which the FECA would outlaw.

The record also demonstrates, beyond any question, that Senator McGovern's campaign would have foundered if the FECA had been in effect.

From the beginning of his campaign until the New Hampshire primary -- until three days after the New Hampshire primary, Senator McGovern would have lost $636,882 in contributions, since the direct-mail techniques on which he was relying heavily require that much of the contributions of the return on contributions be plowed back in, these large contributions had to be critical to his early efforts.

The answer to the question, Is this law the reform it claims to be, is clearly no. Quite apart from its discriminatory effect. There's no rational relationship between its stated ends and the means adopted. In fact, there are remedies which are available, readily available, of greater efficacy and have considerably less impact on First Amendment values.

The record demonstrates something about the effectiveness of disclosure. In going to the record, it appears in 1972 that large, large numbers of the large contributions and the suspicious contributions which led to the passage of the FECA were passed before the disclosure provisions were in effect, or after the election, when it was too late for them to go before the record.

The appellees state that 153 contributors gave $20 million to the Nixon campaign. From the source they cited, we calculate that 16 million of that was given before April 7th, 1972. All parties have agreed, and the District Court found, that there was no effective disclosure before that date.

Indeed, on April 5th and April 6th, 5.5 million was raised, and a total of 20 million was raised by the Nixon campaign before the disclosure date.

Agreed finding 147 on page 204 to 05 of Appendix II lists contributions solicited by Herbert Kalmbach; 83 percent were made before April 7th.

Agreed finding 124, page 155, lists contributions by Ambassadors appointed by President Nixon.

QUESTION: Mr. Winter, from reading the briefs on the other side, with all their figures, and all these figures you've been throwing at us for the last half hour, what are we going to do, put them all in a computer?

MR. WINTER: I don't think that the figures that I've been throwing at you, Justice Marshall, need to go in a computer. It seems to me that these are -- if this statute --

QUESTION: In the first place, we don't have one, I just wanted to advise you of that.

[Laughter.]

MR. WINTER: That made my answer to the question easy.

It seems to me that most of the figures that are

there are fairly clear in their import, and there is another factor which I think is critical: that is, if the statute is upheld, you lose the control group. You will never again have high-spending challengers to look to to see whether high spending is necessary for them to defeat incumbents. Once the statute is in effect and running, there will be no more figures before you, or before any court, to be able to demonstrate what effect this statute is having.

These are the only figures that are ever going to be available to make a thorough judgment on the constitutionality of this law.

The only figures you will have from now on are the incumbency rate, you will never know whether high-spending challengers -- whether the high spending is necessary to challengers or not.

The figures I'm discussing right now demonstrate, in their totality, only that both large contributors and contributors with improper motives fear disclosure to the voter.

QUESTION: Well, Mr. Winter, is it your contention that these people would not have contributed had they had to do so under a disclosure requirement?

MR. WINTER: I think that's very likely true in a large number of cases. I would say --

QUESTION: But what's your basis for that? It doesn't seem to me it's proved by showing that because they could con-

tribute without any disclosure before April 7th, they chose to do that rather than contribute after April 7th.

MR. WINTER: Well, I think that the best way -- I, of course, cannot give an unequivocal answer that they would not have contributed. But April 7th is a very, very early date, and contributions, large contributions after an election or too late for disclosure, particularly in an election like 1972 where there was little doubt about the outcome, it seems to me, strongly suggests a powerful desire to avoid disclosure.

Now, whether they would have given or not, I don't know. I suspect the milk people probably would not have. I suspect in the case of the Ambassadorships, they probably would not have.

But disclosure does have one virtue that no other remedy has, and that is, it leaves it to the voter. Even if they did continue to give, the voter would be able to decide in each case whether he -- whether that voter thought that a particular candidate was going to be overly beholden to, if you want to call them, special interests, was receiving very large contributions from a particular source.

Whether people will continue to give after effective disclosure depends on what the voters think. And that is the way it should be in a democratic system.

QUESTION: Well, but, now, Congress has apparently decided otherwise in this case. They have said that they don't

want people to appear to be beholden, even though the voters, knowing that they appear to be beholden, would, nonetheless, elect them. Is that an impermissible judgment for Congress to make?

MR. WINTER: I don't -- I don't -- yes, I think it is impermissible for Congress to attempt to bring about these remedies by lowering the level of political communication, when disclosure is available, and when other remedies are also available; remedies such as prohibitions on large late contributions, which is certainly a viable remedy, it responds to everything that was cited in support of the FECA, and it is not in the statute.

I think that while Congress, in deciding to have disclosure, has considerable discretion in determining what kind of disclosure and when, but I don't think that they can really try -- that they can remedy this by stopping essentially political speech.

Certainly, limits on candidate expenditures, Justice Rehnquist, cannot be justified by any theory that the FEC -- any evil the FEC claims to remedy. Clearly, limits on independent expenditures, it seems to me, can't be justified that way.

The problem has to be, if there is a problem, in the equality argument and in the argument that candidates, once they assume office, will be overly beholden and obligated to certain

contributors.

In the case of the equality argument, I think it is demonstrated in the record that you cannot bring about equality without producing more inequality. Either that or silence itself. That the challengers, people challenging the status quo, rely heavily on money and you have to -- if you have to freeze them out in the name of equality, and that's wrong.

Second, equality is an impermissible goal, in any event, because the danger sought to be remedied when you try to reduce equality, inequality and political voice; the danger stems from the communicative nature of the Act itself, it's not like O'Brien, where you had a congressional purpose unrelated to free speech. It's like Tinker and other cases, where the danger was perceived in the communicative act.

So, as for the obligation of candidates, I think candidates are obligated to their voters. They want votes, they don't want money. They need money to communicate with the voters, and I think their ultimate obligation is to them, and I think if there is effective disclosure, they will not become overly burdened with obligations.

I might also say, if you speculate for a moment about when obligations are most likely to be created, it won't be in the case of safe seeds, it will be in the case of close or highly competitive seeds. That's where people do need money to run effective campaigns.

But those are also cases in which the person has to be the most fearful of what the voter thinks, has to be the most sensitive to voters' wishes. When you're dealing with safe seeds, large contributions do create real dangers. But the remedy for that is to be sure that the candidate receiving the contributions makes expenditures only for voter persuasion, and is not permitted, as the present statute does -- permits him to use campaign funds for a variety of non-speech purposes. By regulating expenditures, you can solve the obligation problem in safe seeds.

Now, there virtually are large numbers of the contributions -- large contributions or improper contributions -- described in the Appendix, were made well before April 7th or after the election.

This statute violates, I think, the coherent and established case law in this Court. It seems to me that New York Times v. Sullivan, Tornillo, Mills, O'Brien, Red Lion and Letter Carriers are not inconsistent, that the principle of noninterference in political communication in every case is consistent with the outcome in those decisions.

It seems to me that this statute, there is no way that this statute can be viewed other than as an attempt to regulate political communication; indeed, to regulate the content of political communication by an intricate web of statutory and administrative rulings which redirect and rechannel political

speech as well as limit it.

The greatest campaign reform law ever enacted was the First Amendment; we rely on the proposition that good speech will drive out bad, and all appellants ask is that the Court enforce that.

MR. CHIEF JUSTICE BURGER: Mr. Gora.

ORAL ARGUMENT OF JOEL M. GORA, ESQ.,

ON BEHALF OF THE APPELLANTS

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

I will address myself to the disclosure provisions of the challenged legislation, and in that argument I occupy, I think, a unique role in this proceeding, in that these are provisions that we do not challenge as inherently invalid. In fact, we think, as Professor Winter indicated, that disclosure provisions properly and carefully drawn to focus on the problems that generated this legislation provide the proper solution.

QUESTION: Now, are you going to argue that the present disclosure provisions do this?

MR. GORA: They do, but, unfortunately, Justice Brennan, they do much more than that. By virtue of their sweep, in terms of the coverage and in terms of the depth of reporting, they go well beyond, in our submission, the valid area of regulation supported by governmental interests.

QUESTION: Do you relate that to the amounts?

MR. GORA: Yes, I do, Mr. Chief Justice. Both the amounts, in terms of the threshold of reporting, and the scope, in terms of who is covered.

This statute requires that all political committees must keep a detailed and exact account of the identification -- that's a statutory term, it means name and resident address -- the identification of each person who contributes in excess of $10 a year. That's a virtual monitoring of everyone who makes a political contribution in the United States.

Similarly, all candidates and political committees, whether they be the Committee to Reelect the President or a local small-minority party in California, all political committees for all offices have to file reports disclosing the identity of their contributors in excess of $100 a year.

And, finally, any citizen who, on his own, spends more than $100 a year on federal politics, independent of any candidate, just goes out and prints up some leaflets attacking his local Member of Congress, must register and file reports with this Commission, indicating the source and nature of his expenditures, his funds.

QUESTION: What is the penalty for failure to comply?

MR. GORA: The penalty for noncompliance with the disclosure reporting requirements is, I believe, one year in jail and I believe it's $1,000 fine.

QUESTION: For a citizen who fails to report a $100

contribution?

MR. GORA: A hundred-dollar independent expenditure of contribution. If I, for example, run an ad in the Village Voice in New York or some comparable paper, spend $125 on it, saying, "Defeat so-and-so, Vote for so-and-so", I have to file a detailed report with the Commission, giving the source of my money, how it was spent and so forth.

QUESTION: Well, if we were to agree that to that extent the disclosure provisions go too far, and strike them to that extent, would you then be satisfied with what's left?

MR. GORA: Well, striking independent -- the disclosure requirements of independent speech --

QUESTION: Those aspects of it.

MR. GORA: Yes, I think we would, Your Honor. I think if this Court were to indicate that the statute reached too deeply in terms of the threshold and swept too widely in terms of the reach, yes, we would be -- that's our position, that it's not properly focused to those interests that the government can properly require disclosure for it.

The problem is that the government interests and associational privacy run up against each other in this area, depending on where Congress draws the line will determine, for example, for a small or unpopular party, whether they in their adherence are going to be essentially free from government harassment or have to expose their contributors.

But even for the contributor to a major -- the Democrats or the Republicans, the $125 contributor, where the threshold is drawn is going to determine whether his name might go on an enemies list or not.

And we suggest that we're --

QUESTION: Well, except for its being very awkward and unwieldy, perhaps, and maybe impractical to sweep so broadly, how, constitutionally, does it differ? How, constitutionally, is it a greater violation of John Jones's rights to private associational confidentiality if his $125 expenditure needs to be recorded, how is that a greater violation than it is with Mr. Mott's or Mr. Stone's rights if, as you concede, Congress could enact a statutory provision requiring that he make a disclosure of his million-dollar contribution?

MR. GORA: I think in principle --

QUESTION: What's the difference?

MR. GORA: There is no difference. However, I think that disclosure of one's political activities at whatever volume is presumptively invalid. But, at the volume of the large contribution, counterveiling government interests in informing the electorate of those individuals who make large contributions, in preventing corruption, those counterveiling interests come into play.

So that that's how I would make the distinction between the interest in knowing -- in breaching the privacy

of the $125 contributor and the interests in breaching the political privacy of the $125,000 contributor. That's how I would draw the line.

QUESTION: One other question now that I've interrupted you. You said you'd be quite satisfied if the -- with what would be left after the Court accepted your position and struck down these disclosure provisions. What would be left, vis-a-vis disclosure?

Nothing, would it?

MR. GORA: Well, it would depend on how the Court chose to approach that remedy. There is a severability section in the disclosure provisions, which --

QUESTION: Well, but you say you'd be quite satisfied with what would be left with respect to disclosure requirements after we struck down what you tell us we should strike down. That is, after we had held that the Constitution makes it impermissible. There would be nothing left with respect to any disclosure requirements, would there?

MR. GORA: You mean in terms of this present statute?

QUESTION: Exactly.

MR. GORA: Well, that would depend, Justice Stewart, on the remedy that this Court chose to employ.

Now, in terms of dealing with sweeping and overbroad statutes, one remedy, the potent medicine, is to invalidate it, on its face. I'm not sure that's necessary here.

Section 454 of the Act has a, in effect, severability section, which reads: "if any provision of this title or the application thereof to any person or circumstance is held invalid, the rest of the Act stands."

If this Court were to determine, for example, that the failure to make distinctions between the two major parties and all the other small minor parties, in terms of disclosure, warranted invalidating the statute, I assume a ruling of that kind would leave the regular disclosure provisions in effect.

It might be more difficult for the Court to make a separation out in terms of the thresholds, I would grant that. But I think that the statute itself obviously contains lines for separating out major and minor parties.

QUESTION: Mr. Gora, how long have we had disclosure in political contributions in this country?

MR. GORA: Technically, Justice Marshall, since 1910. Practically, since April 7th, 1972.

QUESTION: Well, you say it's bad; it's been bad all that time?

MR. GORA: Pardon me?

QUESTION: It's been bad all that time?

MR. GORA: It just hasn't been challenged, that we're aware of, in terms of the kinds of First Amendment association and political privacy arguments that we're making here.

QUESTION: How many States have disclosure provisions?

MR. GORA: Justice White, the bulk of them do. The count varies, you get a different figure in each of the briefs on the other side.

QUESTION: And would the bulk of those be vulnerable under your approach?

MR. GORA: I think not necessarily, I think there are two differences.

We argue the minor-party point and the threshold point. Now, it seems to me that at the State level, the level of spending for any comparable race, a State Senate seat, a State Assembly seat, a Governor's seat, is probably, on the whole, much lower than the level of spending in any comparable congressional or presidential race. I doubt that there are very many congressional -- pardon me, State Representative races that spend 70 or 80 or 100 thousand dollars. So that --

QUESTION: Are you suggesting that constitutionally the State case could come out differently than this one?

MR. GORA: Yes. I'm suggesting that it might be shown that since the average that's spent, let's say, in a House race, in a State Assembly race, is $20,000; that this Court might find a threshold disclosure there might have to be lower than it is in the case where the spending limits in a congressional race are $100,000.

QUESTION: So we should pick out some figure, some threshold figure, --

MR. GORA: No, I'm not suggesting that. All I -- I'm trying to respond to your concern about the effect of the decision that we seek on State law, and I'm suggesting that in terms of threshold, the difference between federal elections and State elections is such that it wouldn't necessarily be controlling.

And I would say the same thing about the problem of minority parties.

QUESTION: Well, before you leave that point, if we say $100 is too low a threshold, we would surely have to articulate some basis for our reasoning as to why $100 is too low but some other figure would be acceptable.

MR. GORA: Well, I think the basis is to look to the purpose of disclosure. The primary purpose that has been advanced for it is the preventing of corruption and improper influence on governmental officials.

I think this Court could, in a constitutional way, require that the disclosure provisions be geared to the level at which improper influence can be brought to bear by virtue of the contribution.

QUESTION: Can you pinpoint that point, Mr. Gora?

MR. GORA: Well, I think, Justice Brennan -- I don't think it's this Court's obligation to pinpoint that, I think it's --

QUESTION: Well, are you suggesting that we should

pick out a thousand-dollar figure, 500, or some such?

MR. GORA: No. No. I think that this Court should require the Congress to look at these problems and to draw some lines. I've looked at a good chunk of the legislative --

QUESTION: I must say, if that's so, then the answer to Mr. Justice Stewart's question is that there isn't anything left and we'd have to strike it down facially, wouldn't we?

MR. GORA: Well, there I think there is a difference between the minority party point, where there are lines in the other sections of this Act, regrettably, lines which discriminate against a minority party, and the threshold problem, which is a little harder to make distinctions on.

But I would suggest that the problem is that Congress seemed to me, in my study of the legislative history, to be essentially indifferent to these problems. And I think what we would request of this Court is that Congress be required to think about these things, to think about whether you really want to require the public identification of the $125 contributor to the small party or even to the presidential party.

QUESTION: Well, should we include that in our opinion, that the Congress ought to think more carefully about this?

MR. GORA: Well, one would certainly hope so, but I think that, as I said, there are bases in the statute, Justice Rehnquist, for invalidating the application to small and minor parties. The threshold problem presents a different one.

QUESTION: I take your argument, Mr. Gora, to be that there is no valid, rational public interest in flushing out and publicizing the names of $100 contributors or $101 contributors, none that can be justified constitutionally; but that there is, indeed, a real public interest in knowing about 10,000 or 100,000 or 500,000. Is that your --

MR. GORA: Yes, that is our position, and we're saying --

QUESTION: But you're saying that you can't pick the point where the line should be drawn.

MR. GORA: Well, again, the point, I think, has to be attempted to be drawn in reference to the purpose of having disclosure. The purpose is not just promiscuous, to find out whether your neighbor gives 125 bucks to the local congressional candidate. There is a presumption that one's politics are one's own business.

That's why, when the purpose is in terms of the prevention of corruption, then this Court and the Congress must ask whether the disclosure levels are drawn to meet that purpose.

QUESTION: You must mean in there that the public, the public interest in knowing about the large one is that 10,000 or 100,000 or 500,000 might conceivably buy something improperly, but that 100 or 125 could not conceivably buy anything --

MR. GORA: Precisely our point.

QUESTION: -- these days, at least.

[Laughter.]

MR. GORA: Yes, Mr. Chief Justice; that's our point.

QUESTION: It doesn't buy much radio time, it doesn't buy much newspaper space, and certainly not much influence.

MR. GORA: That's the argument.

QUESTION: And when you get to figuring it, will it go up each year according to the cost of living?

MR. GORA: Well, I think it certainly might. I mean, there are cost-of-living adjustments in the statute. But again I think that the major point we're trying to make is that this Court has to require the Congress to think about these problems, to think about these line-drawing problems, both in terms of the threshold of reporting the $10 recordkeeping and the $100 reporting, and in terms of the application to minor parties.

Finally, let me just turn for a moment to section 434(e). As I indicated in response to questions, that section requires that any private citizen -- it has nothing to do with the candidate, political committee, not making contribution to a counter political committee -- wants to get involved in political activity, wants to condemn his local Congressman and run off some leaflets and spend more than $100 doing it, that person has to register with the Federal Election Commission and supply the reports required of political committees.

We think that provision is virtually impossible to

justify. It seems to us that it is flatly in contravention of the principles in the Talley case, where this Court protected the right of political speech and anonymity; and we think it is also in conflict with the principles of the Thomas case, where this Court rejected the application of just a mere registration requirement upon giving a speech.

Section 434(e) runs afoul of both of those decisions.

And let me, finally, if I might -- in terms of the discrimination against small and minor parties that this disclosure statute involves, it has been our contention that Congress simply failed to consider what alternatives were available to deal with the valid interests served by disclosure.

The same Act which did draw sharp and unconstitutional distinctions, when it came to disbursing the benefit of public financing, for example, drew no such distinctions in imposing the burdens on associations entailed in reporting and disclosure.

Instead, Congress indiscriminately cast a net across the entire range of political association that is manifest by contributions to a party, without regard to the very widely varying interests at stake.

Analytically this Court found such an approach insufficient in Robel and the other Communist membership cases, and we would submit that it should find that approach insufficient here.

QUESTION: Mr. Gora, unless I missed something, and perhaps I did, I think neither you nor Mr. Winter specifically separated and identified section 608(e) for special attention; did you?

MR. GORA: No, we have not. Section 608(e) is a flat ceiling on the speech of persons completely unconnected to any political candidate or committee. In a statute with a lot of unconstitutionality, we submit that that stands out.

QUESTION: Well, I should think if there's a problem in requiring someone who spend $100 to disclose it, there would be even more of a problem in flatly prohibiting a person from spending over a thousand dollars.

MR. GORA: That is our submission, Mr. Justice Rehnquist.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Gora.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLEES

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

As has been indicated, I will begin by outlining the problems that Congress was dealing with in this statute, and then rather briefly showing how the particular solutions selected accomplish those objectives; and then I will discuss in some

detail the reporting and disclosure provisions. Mr. Cox will then follow and discuss the contribution and expenditure limitations.

Since early in this century there has been, in the language of this Court in the Auto Workers case, a long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from use of money by those who exercise control over large aggregations of capital.

Congress first faced this problem back in 1907 by enacting a statute prohibiting certain contributions by corporations in connection with elections.

In the Auto Workers case, this Court traced at some length the history of the congressional regulation of this problem. It was described as a series of acts to protect the political process from what Congress deemed to be the corroding effect of money employed in elections by aggregated power.

Unfortunately, however, as these statutes were enacted, they proved to have so many loopholes that they were virtually ineffective in doing anything about the problem.

And beginning in the 1960's, in the late 1960's, Congress held a series of detailed hearings exploring all aspects of the problem. These culminated in a 1971 Act, the initial Federal Election Campaign Act, and was followed by the present amendments in 1974.

Now, this statute, therefore, is not something that

came out of the blue, it represents the result of many, many years of study, three-quarters of a century, by the Congress, the body that is particularly expert in knowing the problems resulting from the use of money, the corrupting effect of money on federal elections, and Congress has studied the problem, has recognized that when things do not work, changes are necessary; and Congress has been willing to change in this area, and to try to devise a scheme that will once and for all, we hope, put an end to this problem.

The present statute, of course, is a direct outgrowth of the disclosures of the 1972 campaign. There's no need to go into any detail of that sorry and sordid story; it's set out in the record, it's a matter of public knowledge, the huge campaign contributions, the gifts from people who wanted to be Ambassadors, the campaign's specific large contributions in connection with anticipated favorable government action, such as the milk producers, a large number of corporate officials who were convicted, and many of whom pleaded guilty to illegal campaign contributions. And the evidence that developed of the vast increase in the cost of campaigns in this country.

QUESTION: Mr. Friedman, when you speak of three-quarters of a century of study of this problem by the Congress, do you suggest that that was sustained study or sporadic study?

MR. FRIEDMAN: I would say, Mr. Chief Justice, it was sporadic in the sense that Congress was not constantly looking

at the problem, but over a number of times, there are a large number of statutes over the years, starting in 1907 and 1910, in the middle of the second decade the Corrupt Practices Act of 1925, gradually over the years Congress realized that what it had done up to then was not enough to solve the problem, and it looked at the situation and devised what appeared to be more and more comprehensive regulatory things. It expanded the type of controls, it expanded during the war the prohibition on gifts from corporations to unions; as problems developed, Congress studied them.

But my point is that over a long period of time Congress has considered these problems, studied them and devised schemes to deal with what it perceived to be an increasingly serious evil in the body politic, the corruption of federal elections by the use of money.

And the cost of these campaigns has risen at a staggering rate, really a staggering rate. On page 35 of Mr. Cox's brief there's a chart which shows the increase in campaign costs reflected to show increases in the consumer price index. And what it shows is that over a twenty-year period, from 1952 to 1972, after adjustments to reflect increases in the cost of living, the cost of congressional races increased more than 300 percent; and over the ten-year period 1962 to 1972, the cost of presidential races, with a similar adjustment, increased more than 450 percent. And by 1972 it was estimated that the

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total cost of elections in this country exceeded approximately $400 million.

Now, what is the consequence of this escalating cost? It's a vicious circle, because when one candidate sees another candidate spending more and more, he feels impelled to spend more and more. As the cost of these campaigns increase, the candidates naturally turn to where the money is, the easiest source of money, those of the wealthy interests.

Once a wealthy interest gives a campaign contribution, his competitors, other businessmen, also feel obliged to give, because they're concerned that if they don't give, either they will be discriminated against by government officials, or their competitors will gain an advantage as a result of these contributions.

And thus the candidates, as a result of this thing, feel more and more obligated to the sources, the large sources of campaign contributions.

And it's not surprising, with this history, that by the early 1970's there was a tremendous feeling in this country that you couldn't trust the government; a lack of electorate confidence in our government officials; the notion that somehow people could be bought. If you gave enough money -- if you gave enough money, people could be bought.

And conversely -- correspondingly, really, the average man who is not very affluent, who didn't have access to all these

sources, he believed that it was rather futile for him to try to play an active role in the campaign.

For one thing, if he wanted to run for office, he knew he couldn't raise these sources of money. And, secondly, if he wanted to try --

QUESTION: Now, why couldn't he? Why couldn't he?

MR. FRIEDMAN: Well, Mr. Justice, --

QUESTION: It isn't -- you've painted it with a very simple brush; it's considerably more subtle than the way you described it to us, isn't it?

MR. FRIEDMAN: Well, I think --

QUESTION: People often make contributions to a candidate who expresses the donor's views. They don't go out and buy him, do they?

MR. FRIEDMAN: Well, --

QUESTION: It's not as simple, at least; it's a little more subtle than you've described it.

MR. FRIEDMAN: It may not be --

QUESTION: You would concede that, would you not?

MR. FRIEDMAN: It may not be quite as simple, Mr. Justice, but I do think it's a very serious problem. A good example, I think, of this is evidenced in the record, that in many campaigns in recent years the same interests have contributed to two candidates who are running against each other.

QUESTION: Yes.

MR. FRIEDMAN: And that hardly suggests that they have a strong commitment to one candidate. Those people are obviously hopeful that -- .

QUESTION: But if it's the same amount of money, it's the same as though that donor had made no contribution at all, isn't it?

MR. FRIEDMAN: Well, perhaps and perhaps not. But with this exception, Mr. Justice, that both of these people, whoever is the victor, is likely to feel the sense of obligation to the person who gave him this contribution. This --

QUESTION: And he hopes the victor never hears about the contribution to the loser.

MR. FRIEDMAN: I'm sorry?

QUESTION: The donor hopes the victorious condidate doesn't hear about the donor's contribution to the loser.

MR. FRIEDMAN: I would assume so. I suspect perhaps some people in the Congress are aware of this, and I think this is one of the things that influenced them to require both limits on contributions and disclosure.

QUESTION: Let's analyze that a little bit. You made it as a very broad general statement.

Would you see any corrupt or improper motive if a very wealthy man said that he would put up half a million dollars or a million, whatever it takes, for a series of three national television debates between two candidates, or within a State

if it's a senatorial race.

Now, he's contributing to both sides, isn't he, when he finances that? Anything improper in that? Or is that --

MR. FRIEDMAN: No, no, this --

QUESTION: -- Could that be explained by a dedication to the First Amendment idea that the issues should be debated?

MR. FRIEDMAN: Surely, Mr. Chief Justice, but that I don't think was the problem that concerned Congress in this legislation.

QUESTION: But the limits would apply.

MR. FRIEDMAN: The limits -- the limits would apply if -- well, it would depend whether this -- they may not apply, because that would not be, I don't think, a contribution directed to the influencing of the election or nomination of a particular candidate. I don't think there would be anything in the statute prohibiting that kind of a sponsorship of a public forum.

QUESTION: And another occasion, in the situation you hypothesized with Mr. Justice Stewart, a man giving $10,000 to each of the two major party candidates perhaps just wants to make sure that one of two men that he regards as responsible will be elected and that the third-party candidate will not be elected. Those are all valid motivations, are they not?

MR. FRIEDMAN: Those would be valid motivations, Mr. Chief Justice; but I think that has to be weighed against the

judgment of Congress that over-all, over-all, the evils resulting from the substantial increase in campaign spending and the giving of large contributions, that these evils are such as to require some regulation to try to stop this increasing spiral of campaign costs, and try to restore public confidence.

I think it's an important element that the lack of public confidence, if the public believes -- if the public believes that large contributions have a corrupting effect upon the electoral process and upon government, and the record here contains a lot of evidence to that effect, that is a valid consideration for Congress to take into account.

QUESTION: Well, I took the argument of your friends to mean that, yes, indeed, there is public interest in limiting expenditures, but that when balanced against the First Amendment rights of the small contributor, the First Amendment rights should prevail over a $100 limit.

What do you have to say about that?

MR. FRIEDMAN: Well, let me, if I may, that's the $100 disclosure limit, on the small contributor it's $1,000.

Our answer to that is that disclosure --

QUESTION: That's the limit of -- the limit that he can give without having his name flushed out.

MR. FRIEDMAN: Without having his -- yes, but he can give up to a thousand, give up to a thousand, but if he gives more than a hundred, that has to be disclosed.

Our answer to that is disclosure serves two important objectives: one, which I think our opponents have recognized, is that it does serve an informing function, it tells the electorate who is backing whom. It shows who their friends are, and this is an important element, because in making the choice, when the electorate makes the choice, it should know who is behind whom in these cases.

Indeed, I just pose a rather simple hypothetical: suppose you have a key congressional race in which both candidates are urging that they are dedicated to improving and cleaning up the environment, and this is a keenly contested thing, each one accuses the other of not being sympathetic to the environment.

I think it would be highly significant to the voters in this district if they knew that a large number of officials of several of the firms in this district that were accused of being the leading polluters had all contributed to one of the candidates. That would be very significant.

Now, let me add one other thing on the hundred-dollar amount.

QUESTION: Mr. Friedman, are you going to leave the hypothetical you just put? If you are about to leave it, I'd like to ask this question:

As I understand it, corporations and unions are exempted from the spending and contribution requirements of

this Act.

MR. FRIEDMAN: To the extent that Section 610 permits it. That is, they have to have a separate independent fund from which contributions are made.

All that this Act does is --

QUESTION: Is there any limitation on that fund?

MR. FRIEDMAN: I don't think so, once it gets into the separate fund. But the --

QUESTION: That's right. And the union and the corporation, as the case may be, has the authority under 610 to organize that fund, and they solicit the money for the fund from stockholders, employees, and union members.

Now, you're talking about the corrosive or corroding effect of large concentrations of wealth, how do you explain the exemption of corporations and unions from this Act? I think the brief filed by your colleague, the Attorney General, stated in a footnote on page 31 that in the 1974 congressional elections, unions spent $4.3 million, corporations $1.6 million, medical associations $1,5 million, and so on.

MR. FRIEDMAN: Well, I --

QUESTION: What about those concentrations of corroding wealth?

MR. FRIEDMAN: I'm not sure, Mr. Justice, that all of those contributions would be permitted, because under this Court's decision in the Pipe Fitters case, the fund, the

independent fund, cannot be under the control of either the corporation or the union, it has to be an independent fund. And I don't know how many of those contributions that were -- you referred to, would in fact be permitted under this statute.

My other answer is that perhaps, perhaps at some point Congress will feel it necessary to close and cut down on the corporate and union contributions that are now permitted under 610. But that, it seems to me, is another matter. That, the fact that it's permitted under that particular provision, I don't think is a reason for saying that Congress cannot act under this statute as it has.

QUESTION: I had understood, Mr. Friedman, maybe mistakenly, that there was a difference of opinion in the briefs as to whether the limitations of the present statute would extend to the kind of committees permitted under our Pipe Fitters construction of Section 610. The question being whether or not they would be so-called "committees" under this statute.

MR. FRIEDMAN: There are problems --

QUESTION: Is there a difference of opinion?

MR. FRIEDMAN: I think there is a problem --

QUESTION: As to the applicability of the existing statute to the kind of organizations that my brother Powell has referred you to?

MR. FRIEDMAN: I think so, and that is an issue that

initially, I suppose, the Federal Election Commission will have to resolve.

QUESTION: Yes.

QUESTION: Well, 610 itself doesn't suggest, does it -- at least I can't find in 610 that any of the limitations say on contributions to a particular candidate, out of these segregated union or corporate funds, apply to those funds; does it?

Pipe Fitters is a 610 --

MR. FRIEDMAN: Section 610, yes.

QUESTION: -- as I remember.

MR. FRIEDMAN: No, but we have to kind of parse these two together and see how you fit them together. Congress did not intend, I don't --

QUESTION: All I'm suggesting is that I don't see anything in 610 itself which subjects contributions from those segregated funds to the limitations.

MR. FRIEDMAN: Not in terms, but it may --

QUESTION: The question is, would they be committees under the existing legislation?

MR. FRIEDMAN: Yes. But, in turn, 610, which is an old statute, --

QUESTION: That's a statutory question.

MR. FRIEDMAN: -- was not enacted with this in mind. But there will be problems of the extent to which the limitations

of this statute would apply to those --

QUESTION: Do you suggest in the first instance the Commission would have to determine that?

MR. FRIEDMAN: I would think it would. I would think it would, because that problem may come up with a particular fund of a corporation or a union can make a sizable contribution, and under the statute normally this would be put to the Commission, and the Commission could give an advisory opinion on it.

But, let me, if I may, --

QUESTION: Well, Mr. Friedman, before you go on, if your answer to Justice Powell is right, it certainly stands the cases of this Court on the subject on their head, because the thought had been that you could prohibit contributions from corporations and labor unions in a way that you couldn't prohibit them from individuals; and now, if you're right, Congress comes along and says we're prohibiting individual contributions, but corporations and labor unions are free to give what they want to.

MR. FRIEDMAN: Well, I don't say that they're free to give what they want to. But the question is whether or not these special funds have been locked in, if I may use the phrase, or subjected to the limitations of this statute.

Now, there is a provision saying that political committees may give up to $5,000. That applies not only to -- if these funds, if these funds are political committees.

I'm not suggesting, Mr. Justice, that Congress is barred in any way from imposing the limits upon corporations, but the only question is whether Congress in this statute -- whether Congress in this statute has not tied the knot and closed the ends as effectively as perhaps it might have. I don't think -- I don't think that Congress can be faulted because, in dealing with what it perceived as the general problem of large corporations, it did not specifically say "and no union fund or no corporation fund may exceed these limitations."

I think Congress left it somewhat unclear, because of the question whether these funds would be committees.

QUESTION: Yes, but the history of our cases has been, first, to sustain corporate limitations, with the thought that you probably would have a great deal more difficulty with individuals, and then to say, Well, you can treat unions the same way you do corporations; still intimating that you would have a great deal more difficulty with individuals. And now you say Congress has come along and stood the thing on its head, that individuals are limited, but corporations and unions aren't.

MR. FRIEDMAN: No. I'm sorry, Mr. Justice, perhaps I misspoke myself, or didn't make myself clear.

These provisions apply not only to individuals, but to unions and to corporations. Congress has not said that corpora-

tions and unions are to be treated differently from individuals, what Congress --

QUESTION: But the segregated funds are to be treated differently.

MR. FRIEDMAN: Perhaps. Perhaps segregated funds. But then, again, all that Congress -- all that has happened in this situation is that Congress has not gone as far as it might have gone in this statute.

QUESTION: Well, I gather, if what you suggested to me earlier, namely, whether or not these segregated funds are to be treated as political committees, there's a question in the first instance to be decided by the Commission; then, I take it, we don't reach that question in this case for the purpose of deciding the case here.

MR. FRIEDMAN: I would think not, Mr. Justice, because there has been, as far as I know, no ruling on that thus far.

QUESTION: Well, I think you suggested that there couldn't be, until after the Commission had, in the first instance, decided whether or not these are committees.

MR. FRIEDMAN: That is a difficult question of exhaustion of remedies, that I would be reluctant to take a position on, but I think the normal practice, the way the Commission functions, is that if there were a question, a request would be made to the agency for an advisory opinion.

If I may come back to the disclosure --

QUESTION: Mr. Friedman, I don't want to deter you from proceeding, but I would like to invite your attention to the statement in the brief filed by the Attorney General as amicus, on page 74, the brief says flatly that corporations and unions can accept and spend funds without limit supporting or advocating the defeat of candidates.

Now, of course, the brief could be wrong, as I think you suggest, but I wanted to call that to your attention. Page 74.

QUESTION: Well, a footnote in another brief, that I cannot locate at the moment, takes issue with it.

QUESTION: Takes issue with that?

QUESTION: Yes. Yes.

MR. FRIEDMAN: I think there is, I'd have to say, some doubt about that, because I don't -- let me say this, if I may, Mr. Justice, I don't think it's nearly as clear, it's nearly as clear as this statement in the amicus brief suggests, that corporations and unions, as a practical matter, may make unlimited contributions in the course of campaigns through the use of these funds.

If I may return again --

QUESTION: If there's that much doubt among the experts on this subject, I suppose some people will have to act at their peril in deciding what to do, without being sure whether they will or will not go to jail?

MR. FRIEDMAN: No, Mr. Chief Justice, they will not, because under the statute, the statute explicitly provides that anyone who is a candidate for office can ask for an advisory opinion from the Federal Election Commission, which the Commission is required to answer; and if he gets that opinion, it's presumed -- it's presumed -- that if he acts in reliance on this opinion, that he's acted in accordance with the law. So people are not left wholly at large to worry about it, they can get an advisory ruling, and the Commission has already given 20 or 30 advisory rulings on these topics.

So that there's not in this case the danger of somebody going to jail without being able to get some advice; they can get advice from the expert agency.

QUESTION: But if he doesn't ask for the opinion, and simply gets the opinion of his own lawyer, one way, and that turns out to be wrong, he's got problems, hasn't he?

MR. FRIEDMAN: I would suppose, in much the same way that anyone who is subject to a regulatory statute has problems about whether or not he's violated the statute.

But, again, that's not a problem, it seems to me, that is faced in this case. Because the time to really decide that question, I would suppose, is if and when someone is charged with having violated the statute by making that kind of a contribution.

QUESTION: Mr. Friedman, to back up a minute on your

disclosure point, the $100 point, you talk about the two parties, what about the third and unhappy and unliked and cursed parties?

MR. FRIEDMAN: Well, they, too, can play a role in an election. They can play a role in --

QUESTION: Yes, but the point is in disclosing those names, hasn't this Court said they didn't have to?

MR. FRIEDMAN: No, Mr. Justice, I --

QUESTION: Well, that's what they said.

MR. FRIEDMAN: I think that the -- the cases in which this Court has struck down disclosure requirements are cases in which one of two things have happened: either there's been a clear evidence that disclosure will produce harassment or chill, such as in some of the NAACP cases, in NAACP v. Alabama, where they put in uncontroverted evidence with respect to the adverse effects that resulted in this --

QUESTION: I'm talking about the Socialist Worker Party case.

MR. FRIEDMAN: Well, again -- well, now, let me come to the other, to the other aspect of the equation: all cases in which there is no showing of any substantial compelling State interest.

Now, the record in this case, as the Court of Appeals said, was slim. With respect to the possible harassment of disclosure, there were three minor instances in which there was

a slight suggestion -- in opposition to that, five representatives of minority parties indicated that as far as they could tell there was no indication, either that people would refuse to contribute if they were disclosed, or that anyone whose disclosure had been made public, whose contribution had been disclosed, was in fact subject to any harassment.

Now, these minority parties play an important role. They can affect the influence of an election by drawing votes away from one to the other.

At page 179, in footnote 210, of this blue brief filed by the Center for Public Financing of Elections and others, they give three indications, three examples of the so-called "stalking-horse" phenomena, in which a political party sponsors a minority candidate in the hope of drawing votes away from the opponent.

Now, there's another --

QUESTION: Pardon me, Mr. Friedman, it's in that brief that I've now located the footnote to which I earlier referred, footnote 124 on page 107, and the accompanying text. That takes issue with the government's amicus brief on pages 36 and 37 and the accompanying footnotes.

MR. FRIEDMAN: Thank you.

One other thing about these disclosure provisions, which I think is very important to remember. On its face, one might say, Well, who cares about $100 contribution? $100

contribution is not going to corrupt anyone, and why set the limit this low?

The answer, I think, is twofold:

First, this is a very useful method for enforcing the statute, because -- and particularly where the over-all limit is $1,000 -- a contribution of $100 cannot be said to be insubstantial.

But equally, or perhaps more important is the problem of culminating, of combining contributions, if you have a large number of people who are affiliated, who do combine contributions.

Again, in this blue brief, on page 174, an example is cited how a Senator on one day in his senatorial campaign received 247 individual contributions totalling $28,000 from the employees of one single corporation.

Now, that, it seems to me, is the kind of information that is very useful to the electors. They like to know if a large group of affiliated people have a sufficient community of interest that they all favor a candidate. That is again the same kind of thing as the general disclosure of who is backing the candidate. That is the sort of information that people would like to have.

This -- these --

QUESTION: And yet, Mr. Friedman, could that corporation have set up a segregated fund and solicited or set up a

desk in the front office, and said that anyone that wants to can contribute and 247 came along, made contributions totalling $28,025; and then under the Attorney General's suggestion, I gather that could have been spent by that fund any way they wanted, without any disclosure of the names of those 247.

MR. FRIEDMAN: If, in fact -- if the amicus brief is correct that this is not a political committee. But, again, Mr. Justice, I think the answer is that perhaps -- perhaps -- if it should turn out -- if it should turn out that this device of the contributions by independent funds is another technique that has been used to evade these statutory provisions, as we had these mobile committees in the past, Congress may at some future date see fit, once again, to amend the Federal Election Campaign laws, to close that loophole if it proves to be a loophole.

But our point is -- our point is that the present statute, the present statute, is a reasonable effort made by Congress to deal with this problem, and that, while we think there is very little if any chilling effect, to whatever extent there may be some slight chill, we think that is more than offset by the very strong compelling governmental interest in trying to protect the integrity of federal elections, a compelling interest which we think, under the decisions of this Court, justifies any possibly slight chilling effect that these provisions may have upon the exercise of that most funda-

mental of all our rights, the right to vote.

QUESTION: Mr. Friedman, necessarily, because of the massiveness and the detail of legislation before us, the arguments so far have been regrettably, but inevitably, I suppose, imprecise and unfocused -- made more so, perhaps, from the questions from the Bench -- by the questions from the Bench.

But, in an unfocused and generalized way, may I ask you this: Is it any part of the hypothesis or premise behind this legislation that the contributions or expenditures of vast amounts of money would tend to represent a particular political point of view?

MR. FRIEDMAN: I don't believe so, Mr. Justice. I think the theory is that -- and the record indicates that large contributions have been made on both sides of the aisle. I think Congress was not concerned that the large contributions were favoring one side or the other, --

QUESTION: That was my understanding.

MR. FRIEDMAN: -- Congress is concerned that the large contributions were having a corrupting effect on the electoral process.

QUESTION: Well, now, how does that -- if your answer is correct, and that's my understanding as well, I should say, doesn't this just reflect the -- doesn't free spending no more than reflect the basic philosophy of the First Amendment, which

is the constitutional provision with which we're here most concerned, that if you have free spending, it's like free speech, it tends to equalize out and the truth emerges.

MR. FRIEDMAN: Well, Mr. Justice, I would say that this is -- to us this is not speech, this is money; money obviously called is important in connection with speech, but it seems to me what Congress was concerned with here was not with attempting to, in any way, limit total speech, limit conduct.

Congress was concerned here with the effect, the effect that these large contributions, no matter what the political persuasion of the recipient, with the effect these large contributions would have upon the whole process. And I think Congress, as this Court's decisions have made clear, going way back to Burroughs and Cannon in 1934, Congress has the power -- Congress has the power to deal -- to deal with the corruption that results from this infusion of money.

And I don't think that Congress was attempting to say that, Well, there's too much speech here, and what we're going to do is cut down the amount of speech. Congress was saying, There's too much money being spent, and the money has bad effects, and we're going to try to cut down the amount of money.

Now, to some extent, to be sure, to some extent, cutting down the money is going to cut down on the volume,

necessarily, of speech; but it seems to me this is an incidental effect. The main thrust, the main --

QUESTION: Well, you're not suggesting that that issue is not a First Amendment issue --

MR. FRIEDMAN: No, no, of course not, Mr. Justice. I'm suggesting -- I'm suggesting that in this area, when we are dealing with this kind of a restriction, when we are dealing with this kind of a restriction, that the compelling interest --

QUESTION: Well, that's what I thought you said.

MR. FRIEDMAN: Yes.

QUESTION: It's a First Amendment problem.

MR. FRIEDMAN: Yes.

QUESTION: That any First Amendment rights are overridden by compelling governmental interests.

That's your basic argument, isn't it?

MR. FRIEDMAN: That's our basic argument. If I may rephrase it slightly, any adverse impact upon First Amendment rights is overridden by the compelling government interests.

QUESTION: Well, that's the First Amendment, that this case is all about, plus, perhaps, the Fifth Amendment; but we are talking about speech, money is speech, and speech is money, whether it be buying television or radio time or newspaper advertising, or even buying pencils and paper and microphones.

That's the -- that's certainly clear, isn't it?

MR. FRIEDMAN: Money affects speech, but I would not agree that money is the same thing as speech, because not every contribution that is made to a political candidate is used for speech, it may be used for many things.

QUESTION: Well, insofar as it's used to buy people to vote, that's covered by other criminal statutes, so we're obviously not talking about that.

MR. FRIEDMAN: Well, Mr. Justice, it's rather difficult to --

QUESTION: Well, that is covered by other and older criminal statutes, isn't it?

MR. FRIEDMAN: Specific bribery, yes.

QUESTION: Or purchasing of votes, giving --

MR. FRIEDMAN: Purchasing of votes in the crude sense is bribery.

QUESTION: Right.

MR. FRIEDMAN: But there are other subtle influences at work which may not come to the purchase of a vote, but which may, nevertheless, have the same effect.

QUESTION: Then the question is whether those so-called subtle influences are influences protected by the Constitution of the United States, specifically Amendment One thereof.

MR. FRIEDMAN: We do not question -- we do not question that there is a First Amendment protection to these interests.

As we see the issue, it is whether whatever adverse impact the statute has on the exercise of those rights is outweighed by what we deem to be the clearly compelling government interest underlying the legislation.

QUESTION: Again, just before you sit down, Mr. Friedman, you didn't precisely and separately discuss Section 608(e), did you?

MR. FRIEDMAN: No, I did not. Mr. Cox will, I think, will be discussing that.

QUESTION: Very good.

QUESTION: Mr. Friedman, in your peroration just before you were questioned by my brothers Stewart and Brennan, you said that you thought the chilling effect here was justified by the interest in the most fundamental of all our rights, the right to vote.

Is it your position that the United States Constitution places the right to vote in a position superior to the right to speak or publish?

MR. FRIEDMAN: No, I don't, I don't, of course not, Mr. Justice, but what I was suggesting is that this Court in a number of its decisions has recognized the key role that elections play in our democracy, and that what I was suggesting was that what Congress was doing in this statute was attempting to protect the integrity of that right, to protect the integrity of the whole electoral process.

QUESTION: Mr. Friedman, if I may break in, waste some more time, following through on what Justice Stewart indicated, it seems to me, in a distinct sense, that one of your problems is to joust with this suggestion that money is speech. And I think part of the argument of your opponents is very forceful in that respect, that it does produce speech.

Now, all of us, of course, recognize that there is a profound and disturbing problem that has existed. I suppose the question is, What are we going to do about it? And does this statute do it effectively without unduly violating the First Amendment?

MR. FRIEDMAN: We think the statute does, at least we think Congress is attempting to do it. I would suggest, Mr. Justice, that when you're dealing with restraints upon First Amendment rights, you have a spectrum, you have the immediate prohibition that someone cannot speak, cannot publish, then you begin to shift over. And it seems to me, as the impact upon First Amendment rights becomes less direct and more incidental, you can give greater weight, I would think, to the compelling interests of the State in imposing those limitations.

QUESTION: Well, I just wanted to emphasize that I think it's unnecessary, really, for your side of the case, to impress upon this Court that there is a problem. I think we are aware of this one.

MR. FRIEDMAN: I'm sure you are, and I hope you will resolve it the way Congress has resolved it.

MR. CHIEF JUSTICE BURGER: Mr. Cox.

ORAL ARGUMENT OF ARCHIBALD COX, ESQ.,

ON BEHALF OF THE APPELLEES

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

Although I come late in the argument, I cannot resist saying just a word in recognition of the importance and weight of the responsibility that rests upon this Court in this case.

Judging the constitutionality of a statute even when there are fewer issues, and less complicated issues than there are here, is always a solemn occasion. But here the issues are of even greater magnitude, indeed, of a magnitude greater than those in any federal legislation I can think of in several decades, except perhaps the Civil Rights Acts of the 1960's.

And certainly none go any closer to the heart of our political and governmental system.

The attack, I would emphasize, is leveled not only at the conclusions of the Congress and the President of the United States, but in substance it's leveled at the conclusions of a majority of the State Legislatures, and we must take it that much of this represents the conclusions of their people.

The 44 States that have disclosure statutes, in one form or another; there are 37 States that put limits on

expenditures, many of them going back a number of decades; and there are 10 States that have adopted public financing.

So that in addition to the weight of the judgment of the Congress and the President who signed the legislation, there is this added problem of the State Legislatures.

Now, of course, if it's the Court's responsibility to hold the Act unconstitutional, it will do it, as this Court always has; but I submit that those are considerations that should be weighed in the balance.

My argument is directed to the proposition that the ceilings upon contributions and expenditures are consistent with the First and Fifth Amendments, both as enacted on the face of the statute and as applied to any situation ripe for adjudication.

It's important at the outset to be clear about exactly what the ceilings on contributions and expenditures do and do not do. The Act deals with conduct, the giving and spending of money.

The conduct is speech related, I acknowledge, and, indeed, emphasize, because money buys the facilities of mass communications, and limiting the money available for political campaigns available for spending may, of course, to some degree, reduce the amount that is spent for mass communication.

But, even so, the conduct is speech related. I emphasize that it is conduct and not speech.

The FECA does not prohibit, punish, or attach liability to any utterance, communication, or publication, except in the very limited sense that in the case of expenditures one may have to look at the publication to see whether it urges the election or defeat of a candidate. So it will be evidence as to purpose, but in no other sense.

QUESTION: That would be only under --

MR. COX: 608(e).

QUESTION: -- 608(e), would it not?

MR. COX: That's correct, Mr. Justice.

But there's no attempt under 608(e) or anywhere else to censor, directly or indirectly, the ideas expressed or the verbal or pictorial form of communication.

Equally important, the public injuries at which the Act is directed are the consequences not of speech but of conduct. Congress was not saying that there is too much speech, that dangerous thoughts were being expressed, or that the wrong people were expressing them, or that they were expressing them in dangerous ways.

Congress was concerned with what we may call the arms race in political expenditures, with the pressure to raise vast financial resources, the corrosive influence of obligations to big contributors upon the conduct of government, with the loss of public confidence in the honor and integrity of government, when money spent plays too big a role; and with

the political inequalities resulting not from the volume of speech but from the need to raise money and indebtedness to those who provide big money.

And I think those two characteristics of the statute fix the applicable First Amendment principle, although I do not suggest for a moment that they render the First Amendment irrelevant.

When the government attempts to deal with speech directly, then the case for regulation has to be made, wholly or in part, at least, in terms of the danger of the consequences of the ideas.

Mills v. Alabama is a very good example. Now, the Alabama statute forbade last-minute newspaper editorials on election day. The only conceivable justification was that the ideas expressed would somehow have too much impact upon the public.

And it was quite right for the Court to reply as it did in that case. No test of reasonableness can save such a State law.

The reason is that censorship, concern for the ideas expressed, may suppress the information or criticism essential to self government; it carries danger of discrimination among ideas or speakers, and has sometimes been said it carries the seeds of an official ideology.

And, of course, in such cases, there is little or

perhaps no room for balancing, because the very purpose of the First Amendment, as James Madison said, is to withhold the censorial power from government and retain it in the people.

The cases that illustrate this proposition are the case of the Pentagon Papers, New York Times v. Sullivan, Miami Herald v. Tornillo, and the Red Lion Broadcasting case.

I want to make it plain that we are not quarreling with those cases, and we have no need to invoke any of them in our support.

Cases like the present, which involve the regulation of speech related conduct, because of the public injury done by the conduct, quite apart from the speech, calls for an entirely different standard. Such a law carries few if any of the peculiar risks of censorship. It does not suppress criticism, ideas, or information; it risks no discrimination; it carries no seeds of official ideology.

Balancing in such cases is appropriate, and has often been sustained by the Court. Branzburg v. Hayes is an admirable example. There the conduct, the duty to testify, was of grave public importance, just as giving evidence by all of us is of grave public importance.

It was our view that regulating the conduct imposing that duty would tend to chill or deter the flow of information to the public. Both the opinion of the Court and the principal dissenting opinion, as I read them, agreed that the test was

whether the consequential effect upon the flow of speech was justified by the public interest served by imposing the duty to testify.

The draft-card burning case, United States v. O'Brien, is another example. After observing that the possession of the draft card contributed to the effective administration of the Selective Service laws, the Court observed: The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication is itself thought to be harmful.

And the Court will recall that it went on to speak of the need for balancing and to hold that the public purposes, if compelling or paramount, were sufficient to justify the purely consequential and, in that sense, coincidental impact upon speech.

I hold this point so important that I want to take one last example to elaborate it.

The appellants and the Solicitor General assert that limiting the money spent to publish a newspaper would violate the First Amendment, and they liken this case to the case of the newspaper.

I submit that they both speak too indiscriminately. A limitation on the publisher's expenditures would violate the First Amendment if it rested upon some notion that the columns were too long, the editorials were too frequent, the circulation

was too wide, there were too many editions, or something of that kind.

But consider, during a wartime shortage Congress certainly could limit the money that could be spent to buy newsprint, even though the consequence was to reduce the circulation of the paper or the number of editions --

QUESTION: But, Mr. Cox, it would have to limit it even-handedly, wouldn't it? It couldn't --

MR. COX: Oh, yes. But we say this statute does limit even-handedly.

QUESTION: Well, but it limits the amount of money that can be spent on political contributions or, on 608(e), the amount that can be spent for individual expressions in support of a candidate, but it doesn't limit any other kind of expenditures.

MR. COX: I would have to agree that because the dangers that the statute is directed to operate in the area of political campaigns, the only speech that is consequentially affected is political speech. I can't dispute that.

I would certainly say that that again was not based on a congressional judgment, as to something desirable or undesirable about political speech; and certainly contain no kind of discrimination between different political ideas or parties or candidates.

QUESTION: Well, it does limit only a certain kind of

political speech. Now, whether or not that may be helpful to you, but I --

MR. COX: Yes, I was speaking in kind in terms of ideas, Mr. Justice. You're quite right, it will bear, of course, on the least personal forms of speech.

Well, it doesn't bear on an individual's personal activity.

QUESTION: General political views, if he wants to, under 608(e), he can spend a million dollars.

MR. COX: That's correct. I think we have the same idea. I may have misspoken myself.

QUESTION: Well, all right.

MR. COX: And I think that it does, in a very real sense, help us out.

But I would say that this kind of discrimination, Justice Rehnquist, is coincidental or consequential, and it is not the sort of selectivity or undesirability that would be enough to make a different test applicable.

QUESTION: Mr. Cox, could the limits, that is, the disclosure limit, the $100 limit, the $1,000 limit, the expenditure limit, could they be so low or if they were cast so low, do you agree that they might then impinge on First Amendment rights?

MR. COX: I would. I would agree to two things: that if they are set so low as really not to allow any use of

the mass media, or that that would present a very different case than the one here.

I would agree, too, that if they were set very, very low, they might then discriminate against challengers to incumbents. But, on both points, I submit, Mr. Chief Justice, that the record is very clear that that is not the consequence of this statute.

In terms of the expenditure ceilings, it is quite clear, and the figures are all in our brief, that the ceilings are very close to those which have governed in political campaigns in the past.

For example, in 1972 and 1974, lumping the whole 2,000 candidates for the House together, 97 percent spent less than the ceiling. There's no suggestion that there was inadequate speech in those 97 percent of the campaigns. Or even in the case of presidential elections, the figure set is very close to the average amount spent by the two candidates in 1968. Oh, it's a little bit below the amount spent by Senator McGovern in 1972; it is way below the amount spent by his opponent.

But it's higher than was spent in any previous campaign. So that we say that it is so closely related to what took place in the past, that one has to conclude that Congress had a solid basis for judging that this would not seriously curtail the volume of political speech.

QUESTION: I want to be sure that I understand your answer to the Chief Justice's question. You said that you would agree, or you would believe that if the limits were set lower, that there could be a point where they were impermissibly low as a constitutional matter; is that your answer?

MR. COX: Yes.

QUESTION: Now, the limits on what? Contributions and expenditures alone, --

MR. COX: I was speaking --

QUESTION: -- or disclosure?

MR. COX: I was speaking of over-all limits on expenditures.

QUESTION: But how about disclosure?

MR. COX: Disclosure? I didn't, in my answer, have that in mind. I don't think the limit on disclosure, that there's any reason to suppose that it will affect the volume of speech at all. Not the slightest.

QUESTION: In other words, it would be just as constitutional, would it, in your submission, to require disclosure of a one-dollar contributor as it would be a million-dollar contributor, so far as the Constitution goes?

MR. COX: Well, the constitutional argument is stronger in the case of requiring a disclosure of the --

QUESTION: Why? Why?

MR. COX: Because there's more danger of the million-

dollar contribution being corruptive. And there is more reason for the --

QUESTION: But isn't there --

MR. COX: There's more reason for the public to wish to know who is giving a million dollars to a political campaign.

QUESTION: But, is there a greater invasion with respect to the --

MR. COX: A greater which?

QUESTION: Invasion of privacy with respect to the large contributor than the small?

MR. COX: No. I think the change in balance, if any, is on the justification, not on the invasion. So far as this record shows, there's very little -- there's no showing of any deterrent effect of disclosure.

QUESTION: So, in brief, you're --

MR. COX: And these laws have been on the books for a very long time. Of course, if one can contribute, especially if it's a group of corporate executives that are contributing, they would rather contribute before the disclosure law becomes effective than after. But, as one of the Justices pointed out, that doesn't show they wouldn't contribute after.

QUESTION: Mr. Cox, as I understood you, you expressed the view that a challenger is not disadvantaged by this Act. May I put this hypothetical to you:

Suppose the challenger is in a district from which

the Member of Congress -- which the Member of Congress has served, say, for ten or fifteen years, and therefore is very well known.

Assume further that the entire media in that district supports the incumbent.

Would you think he would have much of a chance? I realize it would depend on the facts and circumstances, but isn't he disadvantaged?

MR. COX: I was -- I was speaking, Justice Powell, in terms of the general impact. I will agree that you can think of cases where the only way in which a man could win was by having to spend enormous sums of money himself, because everything else was stacked against him.

And I was thinking of the generality. I got into it by attempting to grant to the Chief Justice, in answer to the Chief Justice's question, that if the over-all limit on spending were very, very low, then the man who has recognition to begin with, of course, would have an advantage.

The point I was seeking to make was that the ceilings here at not that low. And I think that again is shown by experience, and of course the burden of showing isn't on those defending the statute; it's on those attacking it.

But if you look at the ceilings, on the basis of the 1974 election, it seems that they give ample chance to challengers to gain recognition; and, second, that taking the

Act as a whole, they hurt incumbents who probably have the greater money-raising capacity, more than challengers.

Let me give just a few figures.

I pointed out a moment before that only three percent of all the candidates in the House races -- it's a little less than three percent -- exceeded the ceilings in 1972 and 1974, even after '72 was adjusted for inflation.

Of the 40 successful challengers in 1974, only one exceeded the ceiling. Of the 28 challenger winners in close races, that is where the winner got less than 55 percent of the vote, the average spent was only $95,000 out of an over-all ceiling of $168,000 for the combined primary and general elections.

Of the candidates in close races in both primary and general elections in '74, only 4 of 59 exceeded the combined ceiling.

So there really is very little ground for arguing that these ceilings, which really check the skyrocketing increase rather than cut anything very much back, and particularly in the congressional races, don't allow adequate opportunity to become known; and I can find no basis for arguing that on the whole they fail -- they discriminate against challengers.

I think, if they do anything, they hurt incumbents more than challengers.

QUESTION: Mr. Cox, does the legislative history

show that the kind of analysis you've just given us --

MR. COX: Did Congress what?

QUESTION: Did Congress make the kind of analysis, in fixing these limits, that you've just been suggesting?

MR. COX: I am not able to say that it did.

QUESTION: Except that --

MR. COX: I think one must assume that many members of the staff, and others, did study these things, and I am informed that --

QUESTION: Well, I just wondered whether the legislative history revealed that kind of analysis.

MR. COX: Perhaps I'll have a moment after lunch in which I could answer your question, Justice Brennan.

QUESTION: But at least Congress decided what the limits were going to be.

MR. COX: Oh, yes. After considerable discussion.

QUESTION: It apparently thought that this would be enough money for anybody to spend.

MR. COX: And these were men who had run in many, many races, sometimes most recently as winners, but I have no doubt that many of them sometimes lose.

QUESTION: But the deference that you might give to a congressional judgment as to how much money might be appropriate may not be the same if, when we're talking about how much incumbents thought challengers might need.

MR. COX: Well, I find it hard to believe that all 435 favor incumbents entirely.

I recognize --

QUESTION: But your answer --

MR. COX: I recognize, too, that this is a First Amendment case, and that the judgment perhaps requires a somewhat closer scrutiny; but I wouldn't think that the Court should simply act as a legislative body, I -- excuse me.

QUESTION: But your answer apparently is what you've already given, that, based on history, the incumbents won't do any better under this than challengers?

MR. COX: That is correct. And, indeed, I think that if the history shows much either way, it shows that the incumbents are hurt more, because they always, nearly always spend more, both when they're successful and unsuccessful.

And this we draw from the figures on the close races.

QUESTION: Well, I take it, your answer gives some weight to the fact that incumbents have a lot of built-in assets that challengers do not have; namely, large office staffs and branch offices out in districts, and that sort of thing?

MR. COX: I recognize that --

QUESTION: Plus the newsworthiness to what they do, that the challengers don't always have.

MR. COX: There's no question but that incumbents

have advantages; sometimes there are disadvantages, but there are likely, through name recognition, to be advantages.

My proposition is that this statute does not make the challengers any worse off in that respect than they were before. Now, some have mellifluous voices and others don't' there are all kinds of injustices in the world.

I say this statute doesn't make it any worse. And we have developed that at some length in our brief.

I would add to that, Mr. Chief Justice, that the most that is contended is that on the average, as I understand it, because the word "generally" is included in the heading in the brief, that on the average they contend, statistically, somewhat more incumbents may benefit and challengers be hurt than the other way around.

But, of course, one doesn't make a case of unconstitutional discrimination by that kind of statistical average.

Furthermore, all it seems to me to say is that challengers gain more from the pernicious practices than incumbents, and we would say that the pernicious practices or the evils Congress was meeting are such that they justify, certainly, any chance differentiation between them.

QUESTION: Well, then, I suppose you'd say that where the whole area is foggy, then the line-drawing should be left to the Congress?

MR. COX: I would certainly say that, yes, sir.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

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AFTERNOON SESSION

[1:02 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Cox.

ORAL ARGUMENT OF ARCHIBALD COX, ESQ.,

ON BEHALF OF THE APPELLEES - Resumed

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

Before the recess I had to confess to Justice Brennan my ignorance on one point, but it's now been relieved, Mr. Justice.

An analysis of the relationship between possible spending ceilings and past experience, based, of course, on '72 rather than '74, because '74 hadn't happened, was submitted to the congressional committees, chiefly by common cause, and it was essentially the same kind of analysis that I made.

If you care for the references, you will find it in the hearings on H. R. 7612, 93rd Congress, First Session, which was in October and November 1973; and similarly the hearings on S. 1103, at the same Congress and the same Session.

At that time, I may say, and then I'd like to go on,

the common cause representatives were arguing that care must be taken not to set the ceilings too low. And the quotations that my friends refer to, complaining that if the ceiling was too low, it would discriminate against challengers, was during a time when much lower ceilings were being discussed than appear in this statute.

Now, I would like, during the moments remaining to me, to address myself to Section 608(e) of the statute, which has been mentioned several times this morning. That is the section which deals with the so-called independent expenditures.

If an expenditure -- a spending of money, in the loose sense -- is requested by a candidate or his committee, or is otherwise made with his authority, then it's a contribution and counts against his over-all ceiling.

If the spending is done without any kind of authority from the candidate, then it falls under Section 608(e); and if it exceeds $1,000, it would be unlawful.

To put the discussion of that section in context, may I first recall portions that I will have to leave to my brief, having stated, as we did, the applicable constitutional principle this morning, then, of course, a complete exposition would call, first, for showings I did seek to show, that adequate opportunities for speech remained; second, that the purposes of this legislation were, indeed, compelling.

The purposes, as we see them, are: first, to protect

the honor and integrity of government operations in both the Legislative and Executive Branches against the corrosive influence of large contributions, the pressure to raise large money, and the resulting sense of indebtedness -- which of course does not affect every contribution, but there appear to have been too many of that character.

Its concern with the public confidence in its government against the appearance of things. When government favors follow such large contributions.

And its concern with giving the small donor an equal voice with the large donor -- not in speaking, but in opportunity to reach the candidate, the large donor of money.

Now, we say that Section 608(e), the limit on independent expenditures, is essential to the effectuation of those purposes.

Well, very briefly, if there were no such provision in the statute, then, instead of making a contribution of 5, 10 or 50 thousand dollars, someone would just spend it; take over all the candidate's advertising in Lawrence, Massachusetts; or take over the broadcasting of film clips of his previous speeches or his television spots.

And surely, in this aspect of 608(e), it's essentially like a contribution, it's money that the person who spends it is putting out; he's not putting out his own words or his own ideas, he's not engaged in personal activities.

QUESTION: Well, Mr. Cox, I notice that distinction in your brief, too. How about the ad that was bought in New York Times v. Sullivan, would that be under your definition of personal activity, or would that just be money?

MR. COX: I think the ad in -- of course, that isn't in support of a candidate. We both understand that.

QUESTION: No, but I mean just the ad.

MR. COX: It wouldn't be affected at all. It would depend how much the individual contributed to its composition, very frankly.

QUESTION: Well, my act in just signing an ad that someone else has prepared doesn't have the same First Amendment protection as if I had prepared the ad myself?

MR. COX: Well, I would think -- I suggest that it is -- it's under the First Amendment, of course; I don't say that --

QUESTION: So, does it have a --

MR. COX: I would say it was entitled to less protection than it is when you, yourself, compose the ad or make the speech.

QUESTION: Why?

MR. COX: I have a lesser role if I -- I used to have a lesser role when I signed a brief as Solicitor General that Mr. Spritzer had written, other than when I wrote the brief myself. And I'm suggesting that there is something of a

likening.

Now, I'm not making anything turn on that, except my assertion that in the case where the individual has no personal participation, it's just like a contribution. Then, I say, --

QUESTION: How about a picket that is carrying a placard that someone else wrote? I mean, is he pretty well down at the bottom of the First Amendment values?

MR. COX: I -- I think these cases shade indistinguishably one into another. And I cannot draw an intelligible line. Indeed, my essential proposition is that an intelligible line cannot be drawn and that the reason Congress included 608(e) as it did was that it decided that the most sensible line was between personal participation in campaigning or in speaking, in doing things yourself, in personal services, and spending money.

And it drew the line there because there was no other very satisfactory way of doing it.

QUESTION: But if they could -- if there is no intelligible line to be drawn, then, presumably, under your analysis, they could equally well have forbidden the expenditure of more than a certain number of hours of personal service?

MR. COX: No -- well, I think where it is truly personal services, that is distinguishable from spending money.

QUESTION: Then you do make something turn on the

point, then.

MR. COX: I make something turn between truly personal services and speaking, and putting up money. I agree that they shade one into the other, and that the question is: where is the most satisfactory place to draw a line?

And I suggest that the most satisfactory place to draw the line, which Congress considered very carefully, was between allowing people to do things themselves and allowing -- and seeking to spend more than $1,000, also really more than $1500, because you get $500 in incidental expenses if you do it yourself. But I --

QUESTION: This is the least -- this is the least unintelligible.

MR. COX: This is --?

QUESTION: This is the least unintelligible?

MR. COX: This is the most they can claim.

QUESTION: Yes.

MR. COX: This is, of course.

[Laughter.]

MR. COX: I would make, if I may, just two further sentences.

First, I would say that in fact individuals do not -- just as a matter of observation -- spend large sums of money broadcasting their own speeches, or putting their own writings in newspapers.

And second, the reason I emphasize my agreement with the proposition that the line can hardly be drawn between personal involvement in a paid advertisement and no real personal involvement in the paid advertisement, the reason I stress that is that there it shows the importance of Section 608(e) to the whole plan, that this would be, as the court below recognized, an exceedingly serious loophole.

I don't think it would render the whole plan inoperable. But it would be an exceedingly serious loophole. It would raise the whole pressure over again.

But I express just one last thought on this point, Mr. Chief Justice.

I point out that there is no plaintiff here who alleges that he or she desires to spend money publicizing his or her own speech, and that this most extreme application of 608(e) might well be treated as hypothetical and not properly before the Court, and the argument of overbreadth could, and I think should, be rejected on the ground that through most of its application, Section 608(e) is like the restriction on contributions, and that, therefore, the doctrine of overbreadth doesn't apply, and the particular cases can be dealt with if and when they ever arise.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cox.

QUESTION: Mr. Cox, before you sit down, may I ask

this question?

Section 608(e) limits citizens in what they may spend advocating the election or defeat, and I think the language is, a clearly identified candidate.

Does the Act give any assistance as to how one determines who is a "clearly identified candidate", or does the citizen act at his peril?

MR. COX: Well, any citizen may ask the Federal Election Commission for a ruling on that point, and will be protected in following the ruling.

QUESTION: Take the present situation, suppose that question were put to the Commission today in this form: As of today, who are candidates for President in 1976?

What could the Commission say? That would be accurate.

MR. COX: I don't think the Commission would have any occasion to answer that question. The question that would be put to it would be whether the speech, with sufficient clarity, identified a candidate, and whether it urged nomination or election. But I suppose in this sense if the --

QUESTION: You mean even as to a candidate not formally declared to be such, the Commission might find him, nevertheless, a candidate? On an advisory opinion, for purposes of 608(e)?

MR. COX: Section 591(b), on page 37 of the statute,

defines a candidate as an individual who seeks nomination for election, and so forth. So it involves some seeking on the part of the person.

QUESTION: You mean a formal declaration that he is a candidate?

MR. COX: Well, I suppose there's a question what "seeking" means. I'm not aware of --

QUESTION: Well, there are, as I read the newspapers and listen to these television news reports and so forth, some individuals who say they have not yet decided whether they are candidates or not.

MR. COX: I know nothing other than --

QUESTION: You say they are --

MR. COX: I know nothing beyond the statute on this point. I would take it that someone who is disclaiming concern, who says they wouldn't accept the nomination, is not a candidate, whatever the newspapers say.

QUESTION: Mr. Cox, before the Republican Convention in 1916, Charles Evans Hughes, I take it, was not a candidate, but suppose citizens had been spending large amounts of money promoting him -- indeed, some people did -- would this Act apply to him?

MR. COX: I confess that I don't recall the facts of the 1916 election well enough to say that.

[Laughter.]

MR. COX: I would -- 1924 I can speak to, when Calvin Coolidge said, "I do not choose to run", I suppose he was not seeking the nomination.

QUESTION: How about 1952? Up to a point Adlai Stevenson was very shy.

MR. COX: Well, there's -- I don't deny that cases could be put pretty close to the line on this point, Mr. Justice; I don't think there is any statute that could possibly avoid that question.

The same problem has come up in deciding whose names must go on primaries and election lists. I just can't imagine anyone seriously risking prosecution under 608(e) because of writing a letter urging that so-and-so, who was not yet a candidate, ought to run, or something like that.

QUESTION: And gave him a $1,000 check.

QUESTION: But there are criminal penalties.

MR. COX: It's a certain -- [conferring with co-counsel] -- I'm referred, and I don't want to take the Court's time to be enlightened in my ignorance, for which I apoligize.

I think if you will read 591(b) with care, you will find that it throws more light than I have been able to give on this question. I'm sorry, Justice Powell.

QUESTION: Well, I gather, Mr. Cox, that advisory opinions are not available to any citizen, only to candidates and political committees, aren't they?

I can't go to the Federal Election Commission and ask them if John Jones is a candidate.

MR. COX: Well, you would have no statutory right to it; I'm not sure that the Commission will refuse it.

MR. CHIEF JUSTICE BURGER: Mr. Winter.

REBUTTAL ARGUMENT OF RALPH K. WINTER, JR., ESQ.,
ON BEHALF OF THE APPELLANTS

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

Let me just briefly clear up one apparent point of confusion. Volume I of our Appendix, page 39, it is alleged that Stewart Mott desires to make independent expenditures on behalf of candidates in excess of $1,000, and the other candidates who are plaintiffs, appellants here, make allegations that they wish to have people make such expenditures on their behalf.

Let me also address the question of the meaning of Section 610 and the segregated funds. I must confess that we see vagueness there, as elsewhere, and we are not able to endorse the Attorney General's flat position that unions and corporations may spend unlimited amounts from segregated funds.

I don't think, in any sense, that even if it is read to mean that they must spend through six-month political committees, the statute still gives them relatively far more power than they had previously. They are permitted -- first,

under Pipe Fitters, the unions and the corporations clearly control the disbursal of the funds. That's the explicit language of Mr. Justice Brennan's decision, I believe it was, is that we hold -- at page 384: We hold that such a fund must be separate from the sponsoring union only in the sense that there must be strict segregation of its moneys from union dues and assessments.

And I take it that continues now, otherwise it would violate -- if the union or corporation did not control the funds, it would violate the prohibition on earmarking. So that they do control the fund.

Now, they are permitted --

QUESTION: Mr. Winter, --

MR. WINTER: Yes, sir?

QUESTION: -- while you are on this subject, is there any limitation, assuming that the committee limitation applies to unions and corporations, on the number of committees that a union or a corporation could organize?

MR. WINTER: We see nothing in the statute, Your Honor.

QUESTION: None in the Pipe Fitters, is there?

MR. WINTER: No. I would think that it would have to -- I would think that they, the FEC, would have to rule by fiat or however they do it.

QUESTION: You could probably have a committee at

the minimum for each subsidiary corporation and each local union.

MR. WINTER: I would certainly think that's true. Yes. And where you have interests, like the dairy interests, on a county basis, that can be done horizontally across the country.

There are three reasons why unions and corporations have great power under this statute relative to other groups. The first is that they can engage in unlimited spending, to raise money for the segregated funds. As far as we can tell from the statute, they are permitted to spend as much as they want from their treasuries to raise the money from members, employees, and stockholders.

Second, they can spend unlimited funds to communicate with employees, members, and stockholders; and this is alleged, or is believed to be of great value, because communications with those people necessarily reach large numbers of other voters.

QUESTION: How does this fit into your constitutional argument? You say that corporations and unions have great power; but that, by itself, does not demonstrate the statute is unconstitutional.

MR. WINTER: I think it does, and that fits in two ways:

One, I think it's a facial discrimination and a

regulation of content. Here we have almost exactly the situation faced by the Court in Mosley, where there is a general prohibition on a certain kind of an activity -- of speech, with an exception made for labor organizations.

Secondly, Justice Rehnquist, I think it shows beyond any question that there's no rational relationship between the ends that are used to justify this statute and the means employed.

This record, this Appendix is thick with contributions by business and union interests, which the statute is alleged to diminish, whose influence the statute was supposed to stop; and, indeed, the allegation is made, over and over again, that the prime source of corruption or improper obligation comes from organized economic interest groups.

I think if we can show that in fact under this statute -- and I think we have shown convincingly -- that under this statute that those groups have more power, relatively more power, because of the limitation placed on other groups and the freedom left to them, I think we have shown its unconstitutionality.

The third way in which they are made relatively more powerful is that the six-month political committee provision is really tailored to their use for purposes I've explained before, and allows them to spend five times as much as other kinds of committees and individuals.

There is nothing anywhere that I know of in the legislative history of this statute suggesting in any way that any justification for those provisions, that have to do with the asserted justifications for the statute.

Now, reference has been made to the legislative history of the limits. I think when the Court addresses the legislative history, it will find that it's quite simple. They kept going down.

QUESTION: They kept doing what?

MR. WINTER: They kept going down. From the original proposals, they got lower and lower, and, indeed, we are in some disagreement with Mr. Cox's description of the situation in, I believe it was, November 1973, when common cause testified before Congress.

I am reading from Mr. Gardner's testimony. The bill passed by the Senate would allow candidates for the House to spend $90,000 in primary races and another 90,000 in the general election.

Some have advocated expenditure limits substantially lower than those contained in that bill, 35,000; 42,500; 50,000 are among the figures which have been mentioned as preferable.

Common cause considers that any substantial reduction of the figures in S. 372, which was 90,000 in both elections, would virtually guarantee permanent reelection of incumbent Members of Congress.

Now, of course, they did reduce the limits after that, and, in fact, if one adjusts for inflation, the limits of the Senate bill at that time were $100,800 for each election, so that there was a very substantial reduction after that.

The legislative history in the Senate: repeatedly the floor managers and the like in the Senate stated that the House could write their ticket, that the Senate ought not review what the House was doing.

Now, I think it's clear in our brief what our objections to their statistical figures, and in particular the comparison with the over-all combined limit, in that the statute in no way permits candidates to aggregate. You have to spend to influence a particular election, and comparing previous spending with an over-all combined limit -- comparing that with previous spending by candidates who had one serious race, simply does not make any sense.

I might also say, suppose it doesn't hurt challengers, suppose it is as even-handed; no one really denies that it's not going to affect the outcome of elections. No one really claims that this isn't going to have an impact, indeed, the whole reason was to reduce the amount of political speech in which people were engaging.

Now, it seems to me that clearly it will affect the outcome of elections, it doesn't matter who is affected, it is still a First Amendment problem. The public will suffer,

because it is exposed to less and less information, less and less debate; there will be less participatory activity by volunteers and the like.

Virtually all the evils that have been suggested in this Court in no real sense call for limitations on candidate expenditures. The ones we have now, because it cost so much to raise large contributions, really induce candidates to try and raise contributions in as high an amount as they possibly can, because they save that much on fund raising.

Also, there's no reason, certainly, to limit campaigns -- the amount campaigns can spend, whether or not they are raising it in large contributions.

This statute limits -- would have put limits on the campaign of a candidate like Ramsey Clark, who has announced that he -- who did announce that he would not spend over -- would not receive contributions over $100.

Now, I haven't heard anything today which would call for limits on expenditures, extraordinary spending provisions for State and National Party Committees, distinctions between kinds of committees which permit greater freedom to some than others. And, indeed, I would think that if Congress were serious about what it was claiming it was doing, or if it had sat and considered a far simpler law, it might have had a better solution; not just a better one, but one more constitutional.

A law that restricted total contributions of individuals

to candidates or committees to, say, something like a total of $35,000 in an election year, and adequate disclosure provisions for timely notice of large contributions, would prevent corruption, bring about equality, at least as much as the FECA, and yet would not have the same stringent impact on challengers to incumbents or other candidates.

We don't say it's constitutional, but of all the major constitutional issues in this Court, all but one disappear with a law of that kind.

Nothing demonstrated in Congress or in the record here calls for either the complexities or the intrusiveness of the FECA.

The appellees and amicus attack us for the extent of our challenge, but this complex network of intricate distinctions is wholly unrelated to the purposes of the statute and itself is a signal that more loopholes, more inequalities are being created.

I think that 608(e) demonstrates the intrusiveness of this law. The idea that a law putting almost a flat ban on the purchase of political advertising by individuals can be called a loophole closing provision, is not only contrary to the major thrust of this Court's decisions for years, but demonstrates just how intrusive this statute is on the free political debate in this country.

QUESTION: Mr. Winter, we were told by Mr. Cox, and

perhaps others, that a vast majority of the individual fifty States have analogs, statutory analogs to the disclosure provisions of this legislation, and to the limitations provision of this legislation, both upon contributions and expenditures.

Do you know, are there any State analogs to 608(e)?

MR. WINTER: I think in Florida -- Florida, I believe, has one, yes.

Most of the State laws -- as I understand it, the Florida law is the stringent, most of the State laws resemble the prior federal law, which was not --

QUESTION: Which was disclosure primarily, right?

MR. WINTER: Well, no, it had limits --

QUESTION: And limitations.

MR. WINTER: But not effective limitations.

QUESTION: I know.

MR. WINTER: So that --

QUESTION: But you say that you know of at least one State out of --

MR. WINTER: I understand Florida -- that I believe, and I might be wrong, but the Florida provision, I believe, gives the candidate a veto on expenditures. I'm not sure, but it's similar to --

QUESTION: To the predecessor of 608(e)?

MR. WINTER: Right. Right. I think that's right, but I could be wrong.

QUESTION: Right.

MR. WINTER: I think that the extent of upheaval in First Amendment law is nowhere better demonstrated than in the arguments and briefs presented here. Every time the appellees put their First Amendment positions in the form of a generalization, it is just foreign to establish notions of freedom of expression. Instead of a robust, uninhibited debate, they draw analogies between oral arguments in courts with equal page length and equal time for argument, an explicit call for what I would say is a drastic application, I would think, of something like Red Lion to the whole political process.

QUESTION: Mr. Winter, what do you suggest Congress was trying to do in this statute? I understand perfectly well that you think whatever it was trying to do is unconstitutional. What do you think it was trying to do?

I suppose we must accept what, on its face, it seems it was trying to do; it was aimed at limiting corruption, I suppose. Do you say it was aimed at something else?

MR. WINTER: I have trouble -- I think that Congress, because of Watergate, was under enormous political pressure to do something.

QUESTION: Well, you're just explaining why. Now, tell me, what do you think it was trying to do if it wasn't trying to do that?

MR. WINTER: Well, Your Honor, our opinion, I gather

that --

QUESTION: Well, I know, you probably don't have to speculate on it.

MR. WINTER: -- drawing on inferences, is that they were under pressure to do something, and as one unidentified Congressman was alleged to have said and was quoted in the papers: Any time they could vote for reform and freeze out -- vote for what they call reform and freeze out opponents at the same time, well, there was only one thing they could do.

Now, I agree with you, I think I --

QUESTION: So you have no --

MR. WINTER: -- could make an argument. I think I -- but that's our opinion.

QUESTION: Well, I don't know, I think it -- do you accept the goal that Congress was aiming at or not?

MR. WINTER: The elimination of corruption?

QUESTION: Yes.

MR. WINTER: Yes, sir. Yes, sir.

QUESTION: And they were trying to do that?

MR. WINTER: No. I accept that as a proper goal. I don't think that --

QUESTION: Well, but you don't -- you say Congress was not really seriously attempting to --

MR. WINTER: Yes, sir, and I can point to explicit provisions. They reduced the statute of -- they dropped the

statute of limitations by two years for Watergate-related crimes, they passed the provision explicitly permitting them to spend their excess campaign funds.

QUESTION: But as far as limitations on expenditures or contributions, you won't accept those as any serious effort by Congress to move toward those goals?

MR. WINTER: No, I think that -- I think, arguably, the limit on contributions does seem to move in that direction; expenditures, absolutely. I think that that does not move in that direction at all.

QUESTION: Well, what is your alternative suggestion of what they were trying to do with expenditure limitations?

MR. WINTER: For what they were trying to do? I think that both of those provisions badly damage challengers to incumbents. And I --

QUESTION: You think that was just -- the incumbents were just writing themselves into a permanent seat, is that what you're saying?

MR. WINTER: Well, they were under a lot of political pressure to do something, and this was the most palatable thing that could be done.

QUESTION: Were you suggesting in a polite way that this was cosmetic legislation?

MR. WINTER: Well, it's a -- if so, it's something that the Consumer Product Safety Commission should look at,

because it's a cosmetic that involves acid and is given only to challengers, I suspect. I see very few limits in here on things that might lead to corruption.

For instance, they can take unlimited, undisclosed funds for office accounts and for preparing materials to send out under the frank. That is simply inconsistent with a desire to eliminate corruption, it's just totally inconsistent with it. Quite apart from the discriminatory effect against challengers.

QUESTION: Mr. Winter, it's not clear to me what happens to excess contributions. Take a Congressman, he's limited to $70,000; suppose his contributions total $100,000, what does he do with that $30,000?

MR. WINTER: Well, he can do several things. He can put it in an office account --

QUESTION: His office account?

MR. WINTER: Yes. Or he can -- the statute explicitly says he can use it for any lawful purpose, "to any lawful purpose" is the given words.

QUESTION: Does that mean give a party for constituents?

MR. WINTER: That's the way we read it, sir.

QUESTION: What happens to the fellow who loses, who has $30,000 in excess?

MR. WINTER: I don't -- it doesn't say what he can do.

QUESTION: Can he give a party for his clients?

MR. WINTER: That, I suppose, would be up to the FEC. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Clagett.

ORAL ARGUMENT OF BRICE M. CLAGETT, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Appellants' position is, first, that any mechanism for direct federal funding of political parties and candidates is unconstitutional; and, second, that the particular mechanism Congress has chosen embraces a number of unconstitutional discriminations among particular candidates and parties.

With the Court's indulgence, I will reverse the order of our brief, and discuss the second question first.

I begin with Chapter 95, which provides for general election federal subsidies for some but not all presidential candidates.

The basic device, of course, is the distinction between major parties which won more than 25 percent of the vote in the prior election, minor parties which won between 5 and 25 percent, and so-called "new" parties which either really are new or else are old but won less than 5 percent at the prior election.

Major party candidates are wholly relieved of the

need to seek private contributions. They are furnished their entire expenditure limit, $20 million, at the outset of the campaign.

Minor parties, if there are any,-- which there won't be in 1976 -- receive a pro rata share dependent on the ratio of their prior vote to the average vote of the major parties.

New parties receive nothing, but if they win over 5 percent of the vote in the current election, they purportedly can receive post-election funding; though we shall see that that alleged entitlement is almost completely illusory.

Independent candidates, not identified with a party, receive nothing at any stage, no matter what their vote.

A most serious problem with this scheme is the treatment of new parties. We think the 5 percent threshold first, although this isn't the most serious objection, is too high. It is much more onerous than the nominally similar threshold sustained for ballot access in Jenness vs. Fortson, because that scheme allowed petitions signed by persons who, at the prior election, had voted for other parties, since this is pure a prior vote qualification, it requires that the member of the 5 percent not have voted for anyone else and not stay at home.

The Jenness Court relied heavily on the open aspects of the 5 percent, that anyone could sign the petition, even if he just voted in a primary two weeks before that for another

party. And in Jenness you upheld that 5 percent figure with strong intimations that were it not for those open features not present here, 5 percent would be too high.

QUESTION: Mr. Clagett, I know this is not -- I just wanted to get this: If one, if a presidential candidate elects to take public funding financing, he can't take private contributions, can he?

MR. CLAGETT: Not if he's a major-party candidate, Justice Brennan, then he gets his full 20 million, and he has to promise in advance that he won't take any private contributions.

QUESTION: And if any is contributed, what happens to it?

MR. CLAGETT: I think the practical answer would be that he would -- he would know, he isn't the major-party candidate who qualifies until after the convention --

QUESTION: Yes.

MR. CLAGETT: -- and surely, by the time of the convention or immediately thereafter, he'd make his decision, which route he's going.

If he's a minor-party candidate, he just has to agree not to take any contributions that would put him over the limit, and it's his, in addition to whatever public funds he gets.

QUESTION: What about primary expenses?

MR. CLAGETT: Primary expenses, well, that's Chapter 96, which I'd like to deal with separately, if I may.

QUESTION: All right. Thank you.

QUESTION: That's matching funds, isn't it?

MR. CLAGETT: That's matching funds, and the issues are quite different.

QUESTION: Very different.

MR. CLAGETT: The 5 percent requirement involved in this statute is very much like the 5 percent requirement which you were unable to accept in Storer vs. Brown; very much like it, functionally.

It's relevant here, by the way, I think, that 42 States, for ballot access, have one percent or less as a petition requirement. The other side has relied for other purposes on State practice, and the general State practice is that one percent is about the maximum which is thought reasonable to require on petitions for ballot access.

QUESTION: That's just for ballot access?

MR. CLAGETT: Yes, Justice Stewart.

QUESTION: It has nothing to do with financing, as such.

MR. CLAGETT: Well, except to the extent that the two factors may be comparable, by analysis.

QUESTION: But I understand the States do publicly finance their elections.

MR. CLAGETT: Ten or fewer.

QUESTION: Yes.

MR. CLAGETT: Yes, sir.

The most egregious discrimination in Chapter 95 is that no way is provided for new parties to qualify by petition at all. They are excluded entirely on the basis of prior vote performance.

I want to make it clear again throughout I'll be using "new" parties in the sense the statute does; the party could be 100 years old and still be a "new" party.

In view of the dead hand of the prior election in wholly excluding new parties, the reliance of appellees and of the Court of Appeals, indeed, on Jenness vs. Fortson we think is completely misplaced. Because the statute upheld in that case permitted a petition requirement, the 5 percent there was a petitioned 5 percent, not a prior-vote 5 percent.

Indeed, every one of the ballot access cases involved a petition alternative route to get on the ballot, instead of being limited or excluded on the basis of prior-vote statistics.

Some of those means you have held too onerous, some of them you have held reasonable. But in every one of the cases there was a route; here there is no route. No way. If a party, one year after the 1976 election or three years after the 1976 election, comes into existence, there will be no way it can receive prior -- pre-election funding in the 1980

election.

Appellees have failed to suggest any reason whatever why a qualification for federal funds by petition could not and should not have been incorporated in Chapter 95. Such a readily available mechanism, while not solving all constitutional problems, would have provided a new party with some means to qualify. It would have avoided the plain irrationality of making eligibility for these subsidies depend entirely on four-year-old election statistics, when conditions may have been totally different.

Post-election funding, which this statute purports to provide is no solution. Obviously, funds provided after the election is over are of no use whatever to a party in trying to win the election or to make a substantial impact on it.

Moreover, if that weren't enough, this theoretical entitlement to post-election funding is rendered almost completely illusory by the provision that it can be used only to repay loans -- which is what the statute says. The result will be that only a tiny fraction of a new party's expenditures, if any, will be reimbursable, even though the party otherwise qualifies.

No reason has ever been suggested, to our knowledge, why that restriction could not have been omitted, and new parties allowed to recover post-election funding if they qualify for the five or some other percent, could recover subsidies

equivalent to the amount of their expenditures, not of their expenditures made through loans; then they could have used that money for their general party purposes or to prepare for the next election. They at least would have gotten something that might do them some good in the future, even though it wouldn't do them any good in the current election.

QUESTION: Which of the appellants, Mr. Clagett, is a "new" party, as defined in the statute?

MR. CLAGETT: The Libertarian Party, the Conservative Party of New York.

QUESTION: How about the Republican Party of Mississippi?

MR. CLAGETT: No, sir, that is a part of the National Republican Party, which is a major party.

[Laughter.]

MR. CLAGETT: If we had congressional public financing, it might well qualify, and the appellees are trying to get that to them.

Senator Metcalf's amicus brief points out entirely accurately that this incredible restriction, that you can only get post-election funding to pay back loans that you've made -- that you've incurred, that this restriction penalizes new parties for having been able to raise contributions rather than make expenditures on credit.

Whereas, for major parties, under Chapter 96, major-

party candidates at the primary stage are rewarded for getting contributions. It just makes no sense to us. Unless the purpose is discriminatory; certainly the result is.

This system, especially when coupled with the expenditure and contribution limits, leaves new parties far worse off than they are now. They are declared unworthy of federal funding, because of their modest support, but simultaneously they are denied the right to try to increase that support by seeking large contributions to pay for heightened campaign activities.

In fact, in presidential general elections, since the major parties are fully subsidized, the contribution limits apply only to minor and new parties and independent candidates. Only they must bear the burden of those limitations and incur the large cost of trying to raise small contributions.

The contribution limits at the presidential election, the general election stage, have no effect whatever on the major parties.

QUESTION: Well, would it cure your problems if the minor parties or the new parties weren't subject to the contribution limits?

MR. CLAGETT: No, Justice White, it would not. We think that --

QUESTION: Nor the expenditure limit?

MR. CLAGETT: Well, the expenditure limits are a bit

academic as applied to minor parties, at least at the presidential level.

QUESTION: But the contribution limits --

MR. CLAGETT: The contribution limits are by no means academic. But even if minor parties were free to raise large contributions, they would still have to raise money privately, while the major parties were being subsidized by the federal government. And we know of no rational basis for that discrimination. Certainly not at a five percent prior vote threshold level. Possibly at a one percent current petition threshold level, maybe. And we're not saying there's no threshold that might not be constitutional, -- excuse me, that might be constitutional.

Appellees' answer to all these discriminations is that third parties and independents are benefitted by the expenditure limitation, since they will now be able to spend more in relation to major-party spending, but you can't spend money if you can't raise it, and nobody gives it to you.

Even besides that, a major -- a minor party is not concerned with what a major party spends. Its sole interest is being able to raise and spend, itself, enough to wage a viable campaign. Thus, for someone like the appellant Libertarian Party, I can assure you that it does not feel fortunate because the Democrats and Republicans are now limited to $20 million each, when it is cut off from every reasonable source of funds

to wage any kind of campaign that could get itself better known and maybe gradually, over a process of years, make some progress towards becoming a major party -- which is, of course, its aim.

QUESTION: You mean to say that a party of the kind you've just described is waging an issue campaign, without any real hope of electing its candidate, necessarily?

MR. CLAGETT: I do not believe the Libertarian candidate for President this year believes he will be elected. But it's not only an issue campaign. I think any party of this nature will be looking ahead, down the road, to future elections. Maybe eight years from now, maybe twelve years from now.

That's a party of the kind of the Libertarian Party's nature. Now, there are other kinds of third parties, which would be also new parties under this statute.

The American Independent Party would have been a new party in 1968, and would have been completely shut out from campaign financing.

QUESTION: Would the Republican Party, under this statute, have been a new party in 1860, when Abraham Lincoln first ran?

MR. CLAGETT: No, sir. It would have been a new party in 1856, and that's when it would have had its throat cut.

[Laughter.]

QUESTION: Then they would never have gotten to 1860,

in your submission?

MR. CLAGETT: Precisely. Precisely.

One bizarre result of this statute is that if a third party ever does manage to qualify for federal funds, its life will be unnaturally and artificially prolonged. If these provisions had been in effect in 1972, John Schmitz would have received more than $6 million in federal general election subsidies on the basis of George Wallace's election-day performance in 1968.

QUESTION: The other side of that coin, of course, is that Governor Wallace made a lot of noise and was heard four years before.

MR. CLAGETT: Yes, sir. But third parties typically arise, we think, and George Wallace's 1968 candidacy is maybe not wholly typical, but it's not wholly atypical, either.

They typically arise either to give some outlet to a transient wave of popular sentiment, or as the vehicle of a particular candidate, which was certainly true of Wallace in '68; John Schmitz just didn't have the capacity to draw that kind of vote.

If a party of that sort makes a substantial impact in one election, then the usual consequence is that it goes on to higher things, or else the other parties adjust and it's absorbed back into one of the major parties.

But artificial preservation of third parties, as time

has past, is an inevitable result of basing federal subsidies on prior election performance.

I must say something about Chapter 96, the matching-grant provision.

The subsidy amount that candidates can receive under matching grants is made wholly dependent on the private contributions a candidate has raised; that is, it's a wealth criterion similar to the one you struck down in Bullock vs. Carter and Lubin vs. Panish.

Surely what should matter is the number of contributors to or supporters of a candidate. Instead, a single contributor can command the matching funds checked off by 250 of his fellow citizens on their tax returns. The entire scheme rewards the candidate who gets into the race earliest, who can command the largest number of $250 contributors, and who is supported by special interests which can easily help him meet the 20-State requirement.

A candidate who comes in at a later stage, perhaps in response to some new development or some newly perceived political issue, is heavily disadvantaged.

The provision is, in fact, working exactly in this way. That is demonstrated by the figures on page 52 of our Reply Brief, showing what the presidential candidates have raised to date and what they have on hand. It is apparent from those figures that the great bulk of available federal funds is

likely to go to only two of the twelve present candidates: Governor Wallace and Senator Jackson.

Most of the others, even those who have raised substantial private funds, have dissipated almost all of them before the campaign for votes even begins.

QUESTION: What page of your Reply Brief?

MR. CLAGETT: Page 52.

QUESTION: Thank you.

MR. CLAGETT: -- have dissipated almost all the funds they have raised. You can see that by the right-hand column, showing what they have on hand. In a desperate attempt to raise more small contributions.

Most of these candidates will be so crippled for funds that whatever federal matching grants they receive will not prevent them from being driven out of the race at a very early stage.

This legislation has made money more important in campaigning than it was before, not less important, as it allegedly was supposed to do.

Those problems are compounded by the fact that the mechanism for disbursing the matching grants is so fraught with uncertainty and so dependent on diaphanous prophecies that have to be made long before they can be made, that the results may be unfair or random in the extreme.

We set out some of these problems at pages 70 through

73 of our Reply Brief.

The day after that brief was filed, the Assistant Secretary of the Treasury, testifying before the Federal Election Commission, confirmed every one of those concerns we had expressed, and added some new ones. We have lodged his testimony with the Court.

It is now clear, after his testimony, that funds may be inadequate to pay all the candidates who qualify, and that what funds are made available will depend on guesses as to what third parties may enter the ultimate general election campaign, and what their election-day performance might be; this, in December or January.

And there is a distinct possibility that all the available funds will be exhausted by the first two candidates who qualify, Wallace and Jackson, thus discriminating against those who qualify thereafter.

Finally, the difficult decisions that must be made by a partisan political appointee: President Ford's Secretary of the Treasury is going to decide how much money President Ford and Mr. Reagan get for the New Hampshire primary. That's a curious Watergate reform.

Now, there are other discriminations that I haven't even been able to touch on, like the exclusion of Appellant McCarthy, solely on the ground that he's an independent rather than affiliated with a political party,from any subsidies at

any stage.

We think that some problems of this nature, whether the same ones or other ones, will be present in any kind of federal subsidy scheme that's formulated; any such scheme will establish some parties by favoring them over others, just as this scheme establishes the two existing major parties.

As Mr. Justice Douglas wrote in Abington School District vs. Schempp, the most effective way to establish any institution is to finance it.

Such political establishments, we think, cannot be squared with freedom of speech and association, or with the general welfare, or, indeed, with the provisions of Articles I and II which contemplate free elections in this country.

Most of these objections wouldn't apply to a genuine check-off scheme, whereby each citizen would designate a party or a candidate to receive the sum he checked off. There's nothing impractical about a scheme like that, as we have shown in our Reply Brief.

If there is any warrant for federal involvement in the campaign funding mechanism at all, such a method would plainly be a less intrusive means.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Cutler.

ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.,

ON BEHALF OF THE APPELLEES

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

Since Mr. Clagett has not invested much of his oral argument in his arguments as to the power of the federal government, under the general welfare clause, to provide for public financing of election campaigns, and since he has not devoted much time to his argument that any such plan violates the establishment clause of the First Amendment, which he moves by implication over into the free speech section of the First Amendment, I shall concentrate, as he did, on the alleged discriminatory effects of this particular proposed public financing plan against the smaller parties.

I'd like to first stress that the appellants show little proof of injury to them to support their claim that these provisions should be voided, before they've had a chance to work in a single election.

Of the 12 plaintiffs in this action, only four assert any interest in the public financing of presidential campaigns. One is Eugene McCarthy, whose claim is wholly academic as to discrimination, because he has testified on deposition in this case that he would not accept public financing, even if he was eligible.

QUESTION: Well, does he have no standing for that

reason to complain that somebody else is getting it?

MR. CUTLER: If this were an attack on any public financing, Mr. Justice Rehnquist, yes. But the attack, at least on the discrimination front, is an attack that the public financing provided to the so-called major parties is a discrimination against him.

QUESTION: And you say he can't attack that because he wouldn't use --

MR. CUTLER: We say he presents no case to you that he is being discriminated against, by reason of the five percent provision or the money before or money after provisions, when he says, "I would not take it, anyway, if it were offered."

The same is true, of course, of his party, his Committee for a Constitutional Presidency, which is the second plaintiff.

The same is true of the Libertarian Party, which testified on deposition that it would not accept public financing if offered.

And in the case of the fourth plaintiff, the Conservative Party of New York, the Conservative Party of New York has never nominated a presidential candidate who was not also a candidate of a major party and thus entitled to the full allotment.

And no other political party, nor any present aspirant for their '76 nominations, is before you in this case,

although the Socialist Workers Party has filed an amicus brief.

So most of the fascinating hypotheticals which fill appellants' briefs and our replies, what would have happened in 1856, Mr. Justice Stewart, whether the equal amount for the first and second parties are unfair as between the two of them, or vis-a-vis a third party, what would have happened to Bull Moose and Eugene Debs, we say are just, at the moment at least, fascinating hypotheticals for the political hot-stove league that can justly and should better be left for another day.

QUESTION: Mr. Cutler, refresh my recollection, if you can, on the largest percentage of votes that any third party has ever received in our history.

MR. CUTLER: It depends on how you define third party, Mr. Chief Justice. If you define --

QUESTION: Well, the third ranking one after the first two, in any particular election.

[Laughter.]

MR. CUTLER: Well, if you say "after the first two in any particular election" and if you ignore some of the very early elections in the 1832 period, and thereabouts, I suppose the largest percentage would be the percentage compiled by Bull Moose, by Mr. Roosevelt, when he was running in 1912, which I believe is of the order of 29 to 30 percent.

The reason I asked about how you define third party is there are several other "new" parties running for the first

time in a new election that did much better than that. There are some -- if I can find my reference in a moment -- such as --

QUESTION: Would the next nearest to Mr. Theodore Roosevelt's vote be Senator LaFollette, back in the Twenties.

MR. CUTLER: Senator LaFollette got about 9 percent, I believe.

All of these figures are -- well, I believe they're in the Joint Appendix, at about pages 34 and 35 of Volume II-A.

But there are candidates, of course, like Mr. Fremont, the Republican candidate in 1956, who finished as the second candidate in that year. There are candidates like Governor Wallace in '68, who got, I believe, something like 12.5 to 13.5 percent of the total vote.

Indeed, there are, in the 36 elections since 1832, defining small parties as parties coming on the scene for the first time or true small parties, there are 10 examples in that table I referred you to, pages 35 to 42 of Volume II-A; 10 examples in 36 elections of candidates who achieved better than five percent.

So it's in no sense an impossible dream.

The appellants focus on the five percent floor, based on votes in the preceding election as a condition of pre-election financing, and based on votes in the current election as a condition of post-election financing, as their principal claim of discrimination.

And I'd like to deal with that first from the standpoint of the floor itself, and second from the standpoint of the alleged discrimination between pre-election and post-election financing.

These provisions are attacked as showing a studied congressional disregard for third parties. But, to the contrary, as the Court of Appeals found, the Congress took great care neither to favor nor to disfavor the smaller parties, and it fixed on the five percent floor and the other objectively measurable features of this plan in a careful effort and belief that it was following the guidance of this Court.

The original public financing measure, as you may recall, was enacted in 1966. It set a floor of seven percent, based entirely on results in the preceding election. Nothing whatever was provided based on results in the current election.

That law was suspended by Congress the following year. And the next year, in '68, you decided Williams v. Rhodes; and in 1971 you decided Jenness v. Fortson, and it was based on the guidelines provided by those two opinions that Congress, in 1971, just a few months later, enacted the forerunner of Chapter 95.

And the five percent figure was taken directly, as I said, from Jenness, based on the holding that before providing access to the printed ballot, a State can reasonably require a showing of a significant modicum of support, and that five per-

cent was a reasonable floor for that purpose.

And if you look at the Report of the Senate Rules Committee proposing that legislation, you will see it refers specifically to Jenness and to Williams v. Rhodes, that it specifically recognizes the constitutional right of a minor party to grow into a major political force and that it correctly, we believe, said, quoting Jenness, that its bill did not freeze the political status quo.

QUESTION: Mr. Cutler, do you think that perhaps the State might have more latitude than Congress, since it's the State that's responsible for the physical preparation of the ballot and the limitation, somehow, of the size of the ballot; whereas, presumably, Congress doesn't face exactly that problem in doling out money.

MR. CUTLER: I see a distinction, Justice Rehnquist, between the preparation -- or between a standard for qualification to be on the printed ballot, perhaps, and qualification to receive federal financing. But I don't see any other distinction between the constitutional standards applicable to the State and those applicable to the federal government, or the need that either is trying to serve in disposing of frivolous candidacies and doing its best to see that the election itself does not suffer from splintering, and serves the ideal of a two-party system, as long as it does not favor two particular parties.

QUESTION: Well, what interest is Congress pursuing in,

as you say, making sure that the thing doesn't splinter? I mean, how would you define that as a legitimate or desirable goal on the part of Congress?

MR. CUTLER: Well, I would define it in precisely the way, I believe, this Court defined it in Storer v. Brown, in American Party v. White and in others, of the State ballot and State primary financing cases, in which you held that one of the legitimate public aims of the government would be to foster some stability in the political process by having the ultimate election, at least, be one that was not an opportunity to continue the sort of intra-party fight that had gone on during primaries and during the preparatory process; so that the ultimate outcome of the election could come as close as possible to reflecting the views of a majority.

QUESTION: And you see no distinction in a State's role and Congress's role in fostering that?

MR. CUTLER: Well, I don't see it, Justice Rehnquist, in the sense that the same interest, if it's applicable at the State level, is infinitely more applicable at the national level, considering the many responsibilities on the national government and the interest that must exist at the national level, not to have the problems of many, many splinter parties, none of which has a majority, and not to have a President elected either by a plurality or perhaps even by a minority of the electorate.

Now, appellants have argued that the five percent figure upheld in Jenness was less restrictive because it was a figure for a petition that could include voters who had voted for other candidates in the preceding election, or who had signed other petitions. But the five percent in this law may well be a less onerous requirement, because it's five percent of a much smaller universe. It's five percent of the 60 or 70 percent of the electorate that votes, which is something of a national scale of the order of four million people, rather than five percent of those registered as eligible to vote, which must be well over five million, because the number of eligible -- I correct myself, not eligible to vote; registered to vote -- because the number of eligible voters in 1976 is estimated to be something of the order of 150 million people, of whom probably well over 100 million will actually be registered.

Appellants have not proven, as the Court said in Jenness, that one five percent goal is any significantly harder to reach than the other, and it would seem to us that this one satisfies not only the test of Jenness but also the test of Storer v. Brown, which also was five percent of the votes cast in the preceding election, although it was a petition basis.

But the Court had trouble with that level in Storer v. Brown, not because it was five percent of the voters in the preceding election, but because excluded from that universe were any people who had voted in the primary; something that does not

happen here.

We would also say that even if Congress was constitutionally wrong in setting a five percent floor of votes, as a condition for public financing, that wouldn't require the Chapter to be invalidated in its entirety. When a statute discriminates unconstitutionally because of under-inclusion, the Court need not declare that statute a nullity, but can extend the coverage of the statute to those who are aggrieved by the exclusion, if that would better effectuate the legislative purpose.

And of course you did that last term in Weinberger v. Wiesenfeld, in which you found it was unconstitutional to bar social security coverage for widowers while giving it to widows, you did not declare it unconstitutional to pay widows; instead, you took care of it on an under-inclusion basis by saying that widowers also had to be paid.

Applying the same theory here, we say it would certainly be more consistent with the congressional intent, rather than to strike down the entire public financing scheme, to extend public financing on a proportional basis to parties or to candidates who garners less than five percent of the votes in the preceding election.

Next, the attack is on any floor based on results in the preceding election, because it bars the candidates of parties falling below that floor, as well as candidates of no

parties or of new parties, from receiving any public financing before the election.

They haven't suggested any more workable method of proving before an election a significant modicum of support. The latest idea that Mr. Clagett has put forth, signatures of five percent of the eligible voters on a petition, as in the case of Jenness, we would say is highly impractical and certainly, whether or not Congress could have chosen that method, one it is entitled to have rejected.

Five percent of the registered voters in Georgia was 88,000 voters. Five percent of the registered voters in the United States, as I indicated earlier, is probably well over five million voters.

For a candidate to compile and for the FEC, the Election Commission, to have to verify some five million signatures of voters in 40 to 50 States, raises enough questions about cost and feasibility -- in Jenness, according to the stipulation in that case at page 87 on file with the Court, the cost to Georgia of verifying the 88,000 signatures was approximately a dollar per signature. The cost was something like 75 to 80 thousand dollars for each of the two petitions that Georgia had recently cleared in that case.

Moreover, as the Court of Appeals found, the appellants have failed to show that the inability of those who fail the five percent test to obtain pre-election financing disadvantages

them in any way. Of course, pre-election money would be better than post-election money.

But, even before the advent of major party financing, the -- public financing, I'm sorry; the major-party candidates were able to raise pre-election money to a vastly greater extent than the smaller party candidates, and Chapter 95 is not going to change that differential to the detriment of the smaller candidates.

In '72 the Republican candidate raised nearly $60 million privately, most of it before the election. The Democratic candidate nearly $39 million privately, most of it before the election.

Even if you applied retroactively the rule of the new statute against contributions in excess of $1,000 and eliminated all of those excesses from the '72 figures, each candidate raised well over $24 million.

All of the minor-party presidential candidates combined raised approximately $1 million. One percent of the hundred million that the major-party candidates raised, if you ignore the $1,000 ceiling, and two percent of what they raised if you apply the $1,000 ceiling.

So we would say to you that in '76, at least if you look at the '72 figures, the small-party candidates and any no-party candidates certainly are not going to be worse off vis-a-vis the major-party candidates in terms of pre-election funding,

because of Chapter 95.

In fact, if you take into account the ceilings on contributions and the ceilings on expenditures, it looks as if they would very likely be better off, and, at the very least, as the Court of Appeals agreed, they have not proven any real danger that they are going to be worse off.

Next, I'd like to come to Mr. Clagett's point about the constitutionally required alternative means for pre-election financing, leaving aside the distinction between pre-election and post-election financing, of course, an alternative means is provided in this statute, because the party which does achieve the five percent level in the current election will receive post-election money -- and I'll get to Mr. Clagett's point about the loan distinction in just a moment.

QUESTION: Mr. Cutler, if a First Amendment violation is found to exist, determined to exist, does it make any difference, then, whether it operates against small and new parties, or for them, or against or for the major parties?

MR. CUTLER: I would suppose not, Mr. Chief Justice, but I do not apprehend the argument about discrimination in this statute to be a First Amendment argument.

I understand it to be a Fifth Amendment argument.

Their only First Amendment argument against public financing is one which Mr. Clagett did not really address himself to in the oral argument, both of us have discussed it

extensively in our briefs, that's the claim that it somehow violates the establishment language of the religion clause of the First Amendment, which he would move, by osmosis, into the speech and assembly portion of the First Amendment.

QUESTION: But doesn't the Fifth Amendment question take on a different aspect if you are in the voting and election area? In terms of what you have to -- what the government might have to show.

MR. CUTLER: Well, I would certainly agree, Justice White, that any public financing scheme or ballot access scheme which discriminated unfairly against minor parties or new parties would be unconstitutional, perhaps it's just as unconstitutional under the First Amendment as under the Fifth Amendment; but the essence of the showing would be a showing of discrimination. And, absent the showing of discrimination, it would seem to me that the power to provide for the public welfare --

QUESTION: And you aren't saying that there's discrimination, but it's justified; you're saying there's no discrimination?

MR. CUTLER: We're saying there is no constitutionally invidious discrimination, --

QUESTION: Well, then, there is some discrimination?

MR. CUTLER: There is recognition of the differences between the larger parties and the fringe parties, just as there

was recognition of those differences in Jenness v. Fortson.

QUESTION: So there is discrimination, and you say there's reason enough for them?

MR. CUTLER: I would go back to Mr. Justice Stewart's phrase that sometimes --

QUESTION: The answer is yes?

MR. CUTLER: Yes.

QUESTION: Yes. Your answer is yes.

[Laughter.]

MR. CUTLER: I won't quote his phrase.

QUESTION: Differentiation?

MR. CUTLER: Yes.

[Laughter.]

MR. CUTLER: I would like to come back, though, to the alternative means that have been provided for pre-election financing.

First, just as the Court in Jenness found, that this was one of the alternative means there, an individual aspirant for the presidency instead of competing for the nomination of a minor party or going it alone could, as Plaintiff McCarthy did in 1968, compete for the nomination of a major party; and if he succeeds, he would of course get the full entitlement of funds.

If he prefers the nomination of the minor non-qualifying party, Chapter 95 permits its candidate, as well as those

who are entitled to some public financing but less than the full allotment, to continue to raise private contributions; while it requires those who qualify and accept the full 20 million not to raise any private contributions.

So that any small-party or no-party candidate who demonstrates sufficient strength will be free to raise pre-election funds commensurate with that strength and, as was noted a few moments ago, George Wallace did precisely that in 1968. He raised almost $7 million, which was 12.5 percent of what all presidential candidates raised, at a time when he accounted for 13.5 percent of the total presidential vote; and certainly a lot of that strength was visible before the election, and that's why he was able to raise the money.

And it's --

QUESTION: Mr. Cutler, are you directing yourself to the situation where a candidate runs in, let's say, Democratic Party primaries in the various States, wins some, runs well in some, runs badly in others; and then, at the Democratic National Convention, is not nominated. And then that same man decides to run as a no-party person, an independent person; what happens to the matching funds that he has collected as a primary candidate, if they are unexpended?

MR. CUTLER: I have to admit, Justice Stewart, that is a question I have not thought of, that any candidate would have unexpended matching funds.

QUESTION: Well, there may not be, but it is a speculative situation.

MR. CUTLER: No, no. But I would think his funds are his funds, if he was running in the primary, and that they would be available to him thereafter, and certainly he could thereafter run as an independent; and, having run as an independent, he might make himself eligible for funds in the next election.

I'd like to deal very briefly, if I could, with the point that post-election financing isillusory, because it can only be used to repay loans.

Well, of course, it's perfectly possible to raise money before the election on a contingent-loan basis. Many, many contributions, so-called, are given in the form of loans, to be repaid if the candidate is in a position to repay those loans.

QUESTION: Incidentally, this is taking us back to the subject of this morning. Are these limitations on contributions and on expenditures -- contributions particularly, do they cover loans or do they deal with loans?

MR. CUTLER: A loan -- a contribution includes a loan --

QUESTION: It does?

MR. CUTLER: -- except for this particular purpose of defining what a recipient of post-election public financing can spend. He may repay, use some of that money to repay a

loan, and that loan is excluded from the definition of contribution for that purpose.

QUESTION: Just for that purpose?

MR. CUTLER: Right.

QUESTION: I see.

MR. CUTLER: I'd like to go very briefly to Plaintiff McCarthy, who says that he can never be entitled to this public financing he distains, because he is not a party candidate.

The answer to that, as the Court of Appeals indicated, is there is no definition of party in this portion of the statute. He has a Committee for a Constitutional Candidacy,[sic] I believe it's called, McCarthy '76; that committee could very well be defined as a party, and the FEC is holding rule-making proceedings considering that very issue right now.

I haven't had time to get to the less restrictive means of the voucher plan and the tax return check-off; I'd like to discuss them, if I could, just very briefly.

The voucher plan has a number of difficulties, of which the most significant is the danger of block trading of vouchers, vouchers would be like money, people could buy them. There would also be very high administrative costs in dealing with vouchers worth only a dollar or two dollars; the cost of collecting those might very well turn out to be more than what they would be worth in the end.

So far as the check-off for a candidate of your choice

is concerned, since the check-offs are keyed to the four tax dates, it's not even clear on the last of those dates, April 15, 1976, who the candidates are really going to be.

Moreover, Congress wanted -- and I think, again, this was a legitimate congressional purpose -- to have equal allotments of funds to any party that got over 25 percent, in order, as much as possible, to balance things out for a two or three-party race in the next election.

And a candidate of your choice check-off provision could not be accommodated to that sort of a system.

Lastly, there is the matching suggestion, which is not advocated by appellants, because they object to matching on other grounds, but is suggested by the Attorney General, and matching, we submit, suitable as it may be for the primary period, is wholly unsuitable for the regular election, for the very same reason I mentioned earlier, Mr. Justice Rehnquist, the legitimate interest of either the federal government or the State government in trying to develop some kind of a majority choice at the federal election.

So a proliferation of many, many candidates in the final election is something Congress, we say, could constitutionally prefer not to encourage.

Finally, with respect to the primary system, the matching for primaries, we'll have to rely on our brief for most of that; but I do want to point out to the Court that there

is not a single plaintiff before it who intends to enter the primaries or who has pleaded that he intends to do that.

Of all the hypothetical issues raised in this case, all put before you by non-plaintiffs or involving non-plaintiffs, the one least related to these particular plaintiffs is entering a national primary.

QUESTION: Mr. Cutler, in view of your contentions about standing, it becomes fairly important whether this public financing question is regarded as a First Amendment question or a Fifth Amendment question, doesn't it? Because ordinarily we wouldn't apply overbreadth if it were just a Fifth Amendment thing.

MR. CUTLER: Well, certainly the appellants have raised First Amendment issues, which I did not cover, namely, these establishment clause issues. That aside, we would argue it is essentially a Fifth Amendment rather than a First Amendment question.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cutler.

Mr. Clagett, you've reserved five minutes for rebuttal.

REBUTTAL ARGUMENT OF BRICE M. CLAGETT, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. CLAGETT: Thank you, Mr. Chief Justice.

One of Mr. Cutler's last points was that the check-off

was impractical because designations are keyed to the April 15th income tax date.

The answer to that is found in our brief. There's no reason in the world why there need be. You could have a check-off which was made by a separate form immediately after the nominating conventions, for example, or something of that nature. And that could apply for all the four years.

You wouldn't have a one-dollar check-off every year, but a four-dollar check-off, say, immediately after the Conventions in election years. A perfectly practical, simple system, which would avoid all this business of Congress's deciding who gets the money and when and on what basis.

That would mean that the government was acting as a simple conduit for money that went from the taxpayers.

QUESTION: Are you going to address the standing argument of Mr. Cutler?

MR. CLAGETT: Yes, Your Honor.

We definitely have a First Amendment argument as well as a Fifth Amendment argument here. If you consider, for example, your decision in International Machinists Association vs. Street, where you held that it violated First Amendment freedom of speech for a labor union, with a union shop contract, to spend members' dues to support political candidacies with which some members disagreed.

Just here, tax money is used to pay candidates without

reference to which candidates the taxpayer wishes to support.

Appellees' argument that the check-off is voluntary is wholly beside the point. A taxpayer not checking off does not have his taxes reduced, the money for the fund comes out of the general treasury, and thus is involuntarily contributed by all taxpayers.

QUESTION: Well, Mr. Clagett, isn't this constitutionally equivalent simply to an appropriation by Congress from the general funds to spend for this purpose?

MR. CLAGETT: No. No, because --

QUESTION: And wouldn't the check-off really constitutionally have to do this?

MR. CLAGETT: No. The check-off is illusory, that's my whole point.

QUESTION: Well, that was the point of my question.

MR. CLAGETT: It's just like a general appropriation, --

QUESTION: Yes.

MR. CLAGETT: -- it's just like the appropriation out of its general funds that the labor union made in the Street case. And what made that unconstitutional was that money was being used to support some and not all political speech without regard to what political speech the people whose money it was wished to support.

QUESTION: Well, isn't it the essence of authoritarian

government, Mr. Clagett, to have Congress appropriate money for a variety of different purposes, that many taxpayers think are quite wrong?

MR. CLAGETT: Yes, Your Honor. And the Street decision made the same distinction. It said: We're not saying that a labor union can't take dues and do lots of things with which individual union members disagree.

The one thing it can't do, you held, was to subsidize political speech with which some members disagreed, to support political candidates with whim some members disagreed.

You said that was different. That posed a First Amendment problem. We think exactly the same analysis applies here.

QUESTION: But did Street suggest that a labor union couldn't solicit from its members contributions for political purposes?

MR. CLAGETT: Not at all, Justice White.

QUESTION: And did it suggest that if it did solicit for political purposes it could only spend it for the particular candidate that individual contributors designated?

MR. CLAGETT: No, sir. This was dues it was talking about. Just as here we're talking about --

QUESTION: And also it was dues that the law required them to collect.

MR. CLAGETT: Yes, sir.

QUESTION: It wasn't just some voluntary item, it was because the force of law was behind it.

MR. CLAGETT: That's absolutely correct. Just as here, the collection of taxes has the force of law behind it, and the check-off is academic, because the money comes out of the general treasury.

QUESTION: Well, it may not be that different, Mr. Clagett, but there, of course, the remedy was for the union member to get it back. And here he may check-off or not, as he pleases, but he doesn't get his dollar back; it goes into the general treasury as taxes.

QUESTION: And he certainly has consented that his dollar be used for political -- to subsidize political speech.

MR. CLAGETT: The people who haven't checked off haven't consented to that, and it's their money that's really being used. That's my point.

QUESTION: Well, the parson who checks if off, however, is --

MR. CLAGETT: He's consented.

QUESTION: He has consented.

MR. CLAGETT: He has consented, there's no question.

QUESTION: But if other people complain because if there hadn't been a check-off this would be in the general fund. Somebody else's taxes are being reduced.

MR. CLAGETT: That's exactly right.

QUESTION: All of them would have been resolved, would they not, largely if not all, if the check-off had been to add a dollar to the taxpayer's bill and then give that money to this general fund?

MR. CLAGETT: Yes, Mr. Chief Justice.

We would have no problem with that, along the lines I've indicated, if it resulted still in the money being paid out pursuant to an allocation by Congress, we would still have at least the discrimination point, and perhaps more.

MR. CHIEF JUSTICE BURGER: Very well, your time has expired, Mr. Clagett.

MR. CLAGETT: Yes. One final word on the -- on this credit point that Mr. Cutler mentioned.

The exemption of loans from the contribution definition, or rather from the contribution limits for post-election funding apply only to bank loans. And banks aren't going to lend money to new or minor political parties without a guarantee, and the contribution limit does apply to the guarantee.

Therefore, the remedy Mr. Cutler suggests is utterly illusory.

QUESTION: Mr. Clagett, one final question. You're not saying, as I understand your position, that public financing by the government out of the general treasury, for example, is invalid, per se; you are saying it is invalid when it is discriminatory?

MR. CLAGETT: We don't believe there can be a non-discriminatory system.

QUESTION: Oh, you do not?

MR. CLAGETT: No, we do not.

QUESTION: No way?

MR. CLAGETT: No way.

But this certainly isn't the one that comes closest to it. I can think of a lot less discriminatory ones than this.

QUESTION: As I understand it, from your brief at least, that you say that even assuming there could be a non-discriminatory system, it's nonetheless unconstitutional, violative of the First Amendment?

MR. CLAGETT: Yes, sir, and --

QUESTION: Don't you say that? That's my understanding.

MR. CLAGETT: Indeed. Indeed.

QUESTION: Yes, that's what I thought.

MR. CLAGETT: And one reason I suggest that is that in the Ripon Society case, the D. C. Circuit, just a couple of weeks after it decided this case, said that this very public financing scheme probably turned all political party activities into State action --

QUESTION: Right.

MR. CLAGETT: -- for Fifth and Fourteenth Amendment purposes.

And in Cousins v. Wigoda and O'Brien vs. Brown, you expressed great concern that political parties have some substantial measure of control over their own affairs.

This would destroy all that. That's one of the several reasons why we believe that, yes, it is, per se, unconstitutional.

QUESTION: Thanks a lot.

MR. CHIEF JUSTICE BURGER: You may now proceed to your argument in chief, then, on the third point, Mr. Clagett.

ORAL ARGUMENT OF BRICE M. CLAGETT, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. CLAGETT: Yes, sir.

This part of the case presents the question: whether Congress may establish, to administer and enforce the Federal Election law, with the complete panoply of powers appropriate to that end; an agency which is neither a part of the Executive Branch nor an Independent Agency, but rather an alter-ego of Congress itself, which the Commission is conceded to be.

No one, I think, denies that the question is substantial and, indeed, serious.

Certainly Congress's normal function in our constitutional scheme is to pass laws, not to administer or enforce them.

It is urge at the outset that these questions are not ripe for decision, and that we have no standing to raise them.

I turn, then, first, to ripeness.

Insofar as we attack the method of appointment of the Commission, its right to exist is constituted, we are talking, of course, about appointments which were made many months ago. The Commission, as so appointed, is in full operation. Every day it is taking actions which have vast impact on the political process.

QUESTION: But I would think, Mr. Clagett, that if you were to be able to challenge that with the Commission ever having done anything to any of your clients, you would have to validate virtually a taxpayer's action for the federal government, which this Court has never done.

MR. CLAGETT: Not at all. I submit, Justice Rehnquist, the appellants are all members of the class which have a right to seek advisory opinions; as political candidates and parties and committees, they are directly impacted by the Commission's rules and regulations. The Commission has done things that affect them directly and which harm them.

Just two or three examples:

As challengers, which most of these appellants are, and as parties in interest supporting challengers, these plaintiffs are drastically injured, not by what the Commission did, ironically, in the office account rule, but in Congress's veto of that rule, which the Commission passed.

The Commission passed a rule which would, to some

slight modest extent, have mitigated incumbent advantages, and therefore benefitted appellants. And Congress used the legislative veto on it.

So the result of the establishment of the Commission as a legislative agency and subject to the legislative veto is that appellants were injured.

QUESTION: Well, but they were injured not by the action of the Commission but by Congress's action in overturning the Commission.

MR. CLAGETT: They were injured by the establishment of the Commission, by the vesting of enforcement and interpretation power of this statute in an agency which couldn't insist on its own rule, but which was subject to Congress's legislative veto.

QUESTION: But, then, that stems from the availability of the veto and not the composition of the Commission.

MR. CLAGETT: What we challenge is the Commission as a legislative agency. It is made a legislative agency by several things, but essentially by two things:

First, the appointment power; second, the legislative veto.

In this particular instance, it was the legislative veto that was the more conspicuous element of legislative control.

This isn't the only thing the Commission has done that

hurts appellants. The advisory opinion, subjecting lawyers' and accountants' fees to the expenditure limits, which came down about ten days ago, I believe, and which we've lodged with the Court, was, as the two dissenting Commissioners said, terribly hostile to the interest of newcomers and challengers to the political scene, who have greater burdens in trying to figure out what this legislation means and to comply with it, than incumbents do.

This advisory opinion expressly injured challengers, directly injured them in that sense.

Senator McCarthy, the Commission has tried to audit him, they have threatened him with the use of their civil enforcement power, they backed off a bit; after this litigation is terminated, we query whether they will continue backing off on that. Certainly he believes that he is directly injured by attempts to audit him, to find out the identify of his contributors down as low as $100, and so on.

The disclosure regulations, which there's just a notice so far on them, they haven't been formally adopted yet. The great burdensomeness of those regulations, what a number of observers have called the almost incredible complexity and the new conditions, the new requirements that the Commission is piling on top of the statutory requirements. For example, keeping photostats of every check, which there is nothing about in the statute.

These similarly impact directly on appellants, to the extent that they have to file reports, which almost all of them do, they have filed them; and they injure appellants certainly insofar as they are challengers and newcomers.

It emerges clearly from the statutory scheme that the law is to be administered and enforced primarily by the Commission itself, through a whole spectrum of powers: Statements of general policy, both interpretative and substantive rule-making, advisory opinions, entertaining complaints, conducting investigations and audits, holding hearings on complaints and undertaking conciliation procedures.

That battery of powers, in the overwhelming majority of cases, should be sufficient to compel compliance with the Commission's view of the law.

Resort to a civil enforcement proceeding, whether brought by the Commission itself or by the Attorney General at its direction should rarely be necessary.

The bulk of these powers have already been exercised. The Commission has made rules, it's issued advisory opinion, it's administering the federal subsidy provisions, certifications, and whatnot. It has also investigated complaints and conducted audits, and it has, we are informed, procured compliance with its view through conciliation proceedings in at least fifty cases so far.

Those proceedings are secret, so they are not announced

to the public, but we're told there have been at least fifty of them that have been brought to conclusion so far.

The Commission has even exercised the power which the Commission's counsel tell you the Commission does not possess; that is, the power to issue rules governing both the meaning and the administration of the expenditure and contribution limits.

I confess to a lively curiosity as to what Professor Spritzer is going to tell you about that.

But as to all the powers except for rule-making and bringing enforcement proceedings, the Commission and its counsel are in agreement that they apply to the expenditure and contribution limits as well as to the disclosure provisions.

In any event, Congress gave the Commission all its powers, those exercised and those few, such as the power to disqualify a candidate, which are yet unexercised; and the issue here is the facial constitutionality of legislation which does that when the depository of power is an arm of Congress.

Can Congress validly set up this sort of agency with all these statutory powers by this method of appointment, and subject to this legislative veto?

QUESTION: Well, you say the facial constitutionality, but, now, what does that mean, outside of the First Amendment area?

MR. CLAGETT: Separation of powers, Justice Rehnquist.

QUESTION: Well, do you say that there is no need for the person challenging the Commission to have been affected or be in a controversy with it if he challenges the separation of powers?

MR. CLAGETT: Well, let me -- that's a standing question. And as to our standing, the Court of Appeals, of course, had no problem with it.

The citizen or taxpayer analogy we think is certainly wrong. I've mentioned a number of aspects where we've been hurt by specific things that the Commission does. But, even beyond that, separation of powers was not put in the Constitution for the benefit of federal office holders. It was put there to avoid tyranny, that's what Madison said.

He said: If the legislature determines the powers, the honors and emoluments of the office, we should be insecure if they were to designate the officer also.

Now, we think this case is just like Glidden Company vs. Zdanok. There the litigant was held to have standing to raise the Article III question because the Court held that the Article III provisions were put in there, at least in part, for the benefit of litigants.

QUESTION: But he had a case decided against him on the merits by a court, including a judge, of whom he complained.

MR. CLAGETT: Yes, sir.

QUESTION: And my question really is, not so much

that, to suggest that you don't have an actual case or controversy, but why do you refer to it as a facial attack? If in fact the Commission has harmed you, why do you need to talk about the facial unconstitutionality of it?

MR. CLAGETT: We think the Commission harms us by existing in violation of the separation of powers, and exercising regulatory control over us, which it is doing every day.

We have had to file reports with them. We are subject to their opinions. We are subject to their rules.

If we do something they don't like, they will take us through these conciliation proceedings; and if we don't knuckle under then, then they will take us to the court or have someone else do so.

Now, it is particularly poignant, I think, on that point that, although far from necessary to our standing, that appellants represent primarily challengers and newcomers to the political process, and we say that,by having these laws administered by a legislative agency, Congress has deliberately retained enormous discretion, power, and control over the enforcement and administration of these statutes, which trench so sharply upon the comparative fairness and equity as between challengers, on the one hand, and incumbents on the other.

One side has retained the power not only to set but to administer and enforce the rules of the political game.

As challengers and newcomers, we think we have to have standing to question that.

And we don't think it goes anywhere near as far as standing in a great many of your cases.

As to the merits, once the Commission is conceded to be a legislative agency, which can do nothing that Congress could not do itself, how can its appointment and powers and the legislative veto possibly be justified?

The Commission's answer is that there is something special about political campaigns, which makes regulation of them different from every other subject of federal law --

QUESTION: But you say -- before you get to that, you say once it's conceded to be a legislative agency, you say it is a legislative agency --

MR. CLAGETT: Yes, sir.

QUESTION: -- because of its membership, because of who appointed a majority of its membership, or because of its functions?

MR. CLAGETT: Who appoints the membership --

QUESTION: Which?

MR. CLAGETT: Who appoints the membership, plus the legislative veto. There are some ancillary things, for example, the oversight and budget function, which Congressman Hays has so vividly said is going to be used to the hilt. But that, to some extent, at least, is true of any federal agency.

QUESTION: But it's primarily that a majority of its members are appointed by the Congress, two ex officio agents of Congress are members.

MR. CLAGETT: Yes, sir. Yes.

QUESTION: And then four others, out of the total of eight -- six voting members --

MR. CLAGETT: Yes.

QUESTION: -- are appointed by the Congress. That's one reason.

MR. CLAGETT: And all six are confirmed by both houses.

QUESTION: Right. And then the other reason, you said, is that because Congress has an absolute veto over everything -- anything it does.

MR. CLAGETT: Exactly.

QUESTION: Anything important it does.

MR. CLAGETT: Exactly.

QUESTION: It isn't just Congress, it's one house, isn't it?

MR. CLAGETT: Excuse me?

Either house, yes, Justice Rehnquist; either house.

QUESTION: Suppose all the members were presidential appointees, but either house could veto, as it is now?

MR. CLAGETT: We think it would then be an Executive agency; but the legislative veto would be bad.

QUESTION: So that just the legislative veto itself renders the scheme unconstitutional?

MR. CLAGETT: Yes. Oh, yes, we think so, Your Honor.

QUESTION: Insofar as it relates to enforcement?

MR. CLAGETT: Yes.

QUESTION: I mean, would you say that if it were an Executive agency, but that Congress retained the power to veto a regulation?

MR. CLAGETT: That, there's been a great deal written about that, sir, --

QUESTION: Well, what's the answer? What do you say the answer should be here?

MR. CLAGETT: I'm sort of a purist about it. I think they are all unconstitutional.

QUESTION: Of course if --

QUESTION: But even if Congress gives an agency power to flesh-out the statute, by regulation --

MR. CLAGETT: Yes.

QUESTION: But Congress says, "We want you to submit it to us, first, to see if it really conforms with our legislative intent".

MR. CLAGETT: Yes.

QUESTION: You say that's unconstitutional?

MR. CLAGETT: Yes, because the Congress --

QUESTION: Even though the President -- the President

can't require it.

MR. CLAGETT: The President can't --?

QUESTION: The President couldn't require it.

MR. CLAGETT: Couldn't require what?

QUESTION: From an Independent Agency, couldn't require them to submit some regulation to him.

MR. CLAGETT: That's correct.

QUESTION: Unh-hunh.

QUESTION: Of course, if you're right, all --

MR. CLAGETT: But the President -- But, the President can -- the President is entitled to participate in the making of new law.

QUESTION: I suppose I'm -- maybe our rules, maybe the rules of procedure are unconstitutional.

MR. CLAGETT: Well, that doesn't pose an Executive-Legislative problem, in any event.

QUESTION: Yes. Just a Judicial one, --

MR. CLAGETT: Yes.

QUESTION: -- it's a judicial one rather than a legislative one.

MR. CLAGETT: Yes.

QUESTION: Well, if you're right, all the Associate Justices of this Court would apparently still be making $39,000 a year; wouldn't they? I mean, all the Federal Salary Acts provide for one-house veto.

MR. CLAGETT: Justice Rehnquist, the legislative veto can arise in a great number of different contexts. For example, in the executive agreement context, which so much has been written about, there it's a question of whether Congress is unduly intruding into the foreign affairs power.

There's no question of that sort here.

In some circumstances it can arise when Congress is essentially making new law, passing new statutes; and there it has to have the concurrence of the President.

Here, you have the legislative veto added to the appointment mechanism, and we think that those two things put together clearly make this Commission an arm of Congress, a Legislative agency.

Now, all parties are agreed as to that. The question, then, becomes: Can a Legislative agency, can an arm of Congress perform the functions, exercise the powers which Congress has been given here?

Could Congress perform these functions directly? And, if not, can it perform them through its controlled agent?

In other words, you do not, to resolve this case, have to hold that the legislative veto, either as a general proposition or, even in this one manifestation, is itself unconstitutional. The legislative veto comes in as one of those facts of life which make the Commission an arm of Congress. And the question becomes: whether an arm of Congress can do this?

QUESTION: Just give me one example. What has the Commission done to you, specifically, which in so doing represents a legislative rather than an executive function? Or as an executive function rather than a legislative function?

MR. CLAGETT: They are executive functions.

QUESTION: Yes? Well, name me one. Name me one.

MR. CLAGETT: All right, the advisory opinion on attorneys' and accountants' fees.

QUESTION: Well now, that would be no different than a regulation, would it?

MR. CLAGETT: It could have done it by regulation, we assume it will.

QUESTION: So it's really -- so you put that in the same category as the -- as Congress retaining the power to pass on a regulation?

MR. CLAGETT: Yes, sir.

QUESTION: But it's no more -- it's no worse than that?

MR. CLAGETT: Well, it all depends on --

QUESTION: Is there anything any closer to sort of an enforcement action?

MR. CLAGETT: Oh, yes.

QUESTION: Well, what is it?

That it has done to any of these plaintiffs?

MR. CLAGETT: Well, they asked to audit Senator

McCarthy's records. Senator McCarthy said, "I object."

They wrote back -- this is an Appendix to our brief, our first brief not the Reply Brief.

QUESTION: Yes.

MR. CLAGETT: They wrote back a letter, which is attached there, it's pages B-1 and B-2, the very last page of our first brief, in which they said:

"The Act assigns civil jurisdiction to the Commission of all apparent violations of the Act and of" and then it goes and list the expenditure and contribution limits, and "we have a right to conduct audits", and so forth, and "we're charged to correct any apparent violations by informal methods of conciliation and, if that doesn't work, we can bring an enforcement proceeding."

QUESTION: Well, are you saying that the litigating function is exclusively an Executive function?

MR. CLAGETT: To enforce compliance with criminal statutes? Yes, Mr. Chief Justice, indeed I am.

QUESTION: Including the investigative, the pre-enforcement investigative functions?

MR. CLAGETT: Yes, indeed. We see no reason why Congress directly or through an agent can go around investigating alleged violation of the Election Law, any more than it can of the Antitrust Laws for purposes of enforcement.

QUESTION: Except for legislative purposes?

MR. CLAGETT: Except for legislative purposes. And that's --

QUESTION: The problem I have, you say the statute is facially unconstitutional, and all you bring us is what the Commission has done.

Does that have anything to do with whether it's facially unconstitutional or not?

MR. CLAGETT: The statutory language gives the Commission power to do those things, some of which it has done, some of which it hasn't done. We think that --

QUESTION: Well, are we free to interpret that without considering what the Commission has tried to do? Or do we have to be bound by what the Commission has done?

MR. CLAGETT: We think the former, Your Honor.

You can consider not only those powers which the Commission has exercised, but those which it has; it has exercised most of them. There are only two, as far as I know, --

QUESTION: You included that statement of the Commission and all in some memorandum, I saw the other day you also referred us to a New York Times article; do you want us to consider that, too, while we're at it?

MR. CLAGETT: I think that was in the subsidy section, wasn't it?

QUESTION: Well, wherever it was, it had your name on it.

MR. CLAGETT: We think -- we think that all you need is the statute; all you need is the statute. The powers which are given and the qualities that make it a legislative agency, all are plain, and set forth in the statute.

The only reason I have dwelt to any extent on what the Commission has done is that ripeness and standing have been raised as issues.

QUESTION: How would you classify the power to strike a candidate from the ballot, in which of the three categories would you say that falls?

MR. CLAGETT: I would have to put that in a fourth category, Mr. Chief Justice, and say that it's something that no one can do, whether the Executive, the Legislative or the Judiciary.

And I think Powell vs. McCormack stands for that proposition. It addressed it at a later stage, at the stage of exclusion; but if you can't exclude a Member when he comes before the House with the qualifications and the credentials, I don't see how either Congress or anyone else could strike him off the ballot.

QUESTION: You don't think the judicial review saves it any, if the initial power rests with the Commission?

MR. CLAGETT: No, I don't think that saves it at all, Mr. Chief Justice.

It seems to me to be a power which the Constitutional

Convention is quite clear, it should not be exercised by anyone. All the comments of the Framers, which are set out at such great length in Powell vs. McCormack, to the effect that it must be the people who choose their representatives, and that if there are to be any limitations on who can become representatives, it must be the Constitution itself which imposes them, and no others -- no others can sneak in there in any way whatsoever.

Madison and Hamilton were both crystalclear about that, and it's all set forth in Powell vs. McCormack. And we think it follows, necessarily, from that that the disqualification power is unconstitutional.

QUESTION: Well, what about a candidate who was demonstrably not eligible to be a candidate, was not a citizen of the United States for an office which required that? You say no branch of the government would have any power to take him off the ballot?

MR. CLAGETT: Well, there's no question that the House, of course, can exclude him.

QUESTION: After he's elected?

MR. CLAGETT: After he's elected. The question then becomes whether one branch, and, if so, which one could anticipate that and say, "We don't want you cluttering up the ballot when you're sure to be excluded when you show up."

I have not -- I cannot say I have thought exhaustively

about that question, but the answer that immediately suggests itself to me is that that should be left to the house at the time he shows up. That it is to that house that the enforcement of those constitutional qualifications have been given. And for anyone else to take him off the ballot would be to make someone other than the house the judge of the qualifications of its new members.

QUESTION: You think that would be like the candidates who were refused their seats because they held commissions as Generals or, in one case, held a commission as a United States Attorney; that would be the same kind of a mechanism?

MR. CLAGETT: Yes, sir.

QUESTION: Would you go so far as to a residential requirement?

MR. CLAGETT: Well, a residential requirement is one of the constitutional requirements, I believe.

QUESTION: Yes. But do you think anyone -- that no branch of government could enforce that except the house itself to which the person is elected?

MR. CLAGETT: Well, the State can certainly keep him off the ballot, and I assume would do so.

QUESTION: Well, it succeeded in doing so in one of the Carolinas last time, didn't it?

MR. CLAGETT: I'm not familiar with that, Your Honor.

Oh, yes, of course, I know; the governorship.

QUESTION: How about a candidate for the presidency who was not a native-born citizen of the United States?

Natural-born, excuse me; natural-born citizen of the United States.

MR. CLAGETT: I would think in pursuance of its power to regulate the time, place and manner of elections, Congress could certainly set up some mechanism to be administered by someone other than itself to make sure that people like that didn't get on the ballot.

There's no question that the power -- that the federal congressional power over elections is very broad. But it is a legislative power, it is to be exercised by law, and there's all the difference in the world between saying that Congress can legislative broadly on this subject on the one hand, and saying that it can retain to itself the enforcement and administrative power.

That's what is wrong with this statute.

And the disclosure -- the disclosure provisions don't have anything to do, in our submission, with the information-gathering function, on the ground that they are justified. And appellees themselves, and Mr. Friedman this morning made it perfectly clear that legislative oversight isn't the reason for the disclosure provisions.

The reason for the disclosure provisions are, first, to inform the public and, second, to enforce the contribution

and expenditure limits.

And to call everything that the Commission does in the way of enforcing the disclosure provisions mere information-gathering is just, we think, completely specious. They're just as -- administering those is just as bad as administering the expenditure and contribution limits directly.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Spritzer.

ORAL ARGUMENT OF RALPH S. SPRITZER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SPRITZER: Mr. Chief Justice, may it please Your Honors:

I'd like to take a moment, at Mr. Cutler's request, to provide an item of information in response asked earlier, I think by Justice Stewart. He would like to point out that it is Section 9038(b)(3) which deals with the matter of unexpended primary matching funds, and it does require that they be returned.

I propose, of course, to address myself to the question of the legitimacy of the Commission and of the powers that have been accorded it by the legislation.

And we do think, as Justice Rehnquist's questions have highlighted, that there is a question of standing with respect to this part of the case, which does lie at the threshold, and does have to be addressed here.

By and large, appellants accept the view that if this Commission had been appointed, all of its members, by the President, that it would be able to exercise the powers that have been accorded it.

QUESTION: Didn't he answer --

MR. SPRITZER: There may have been an exception -- excuse me?

QUESTION: Didn't he answer that, the absence of the veto power also?

I thought he coupled the two.

MR. SPRITZER: He did, Your Honor, but I think at least the fundamental objection to this Commission's legitimacy, as they put it, and to its having particular powers -- and I shall come to this veto, legislative veto point also.

I think their fundamental concern is that -- is the claim that this violates the President's constitutional prerogative to appoint officers of the United States.

And our point as to that is that it's hard to see how appellants have standing to act here as the President's champion. Because this is a question which goes solely to the allocation of the appointed power within the federal establishment.

There's no question here that all of these Commissioners meet the statutory qualifications. And when Mr. Clagett says that the Commission is engaging in various forms of regula-

tion, it doesn't seem to us that supports an attack upon the legitimacy of the Commission. Because the allocation of the appointive power, as between the President and the Congress, is not designed for the protection of the public at large or of taxpayers or of citizens.

Of course, there is a --

QUESTION: Well, since this Commission is doing something to restrict any one of these plaintiffs, --

MR. SPRITZER: Indeed.

QUESTION: -- then surely the plaintiffs have standing to attack the constitutional validity of the Commission. And it's not -- they're not being champions of the President; they're being champions, self-appointed if you will, of the Constitution.

MR. SPRITZER: Insofar, Your Honor, as they are claiming that any action by the Commission violates a power that an agency can exercise, or that the Commission has gone beyond the statute, I fully agree.

Insofar as the challenge is based solely on the proposition that the appointments were made by the President, I think we have a quite different question. A question much like Ex parte Levitt, in which a member of the bar sought to challenge a Justice of this Court on the ground that the appointive process was defective.

QUESTION: I know, but the Court hasn't done anything

to him yet.

QUESTION: Hasn't this Commission undertaken to do something to Senator McCarthy already? They've made demands on him of some kind.

MR. SPRITZER: Oh, I don't question for a moment, Your Honor, that this Commission has functions to perform, and if any of the actions which it takes, or orders which it issues, or regulations which it promulgates are unconstitutional for reasons apart from the question as to the allocation of the appointive power, that they can be raised.

QUESTION: How about when --

QUESTION: Do you think that's the only question that Senator McCarthy could raise? Just the power of the Commission to ask him some questions.

MR. SPRITZER: He can raise any question going to the constitutionality of action taken by the Commission which affects him.

QUESTION: Mr. Spritzer, --

MR. SPRITZER: Yes?

QUESTION: -- how about Glidden v. Zdanok, there the claim wasn't that the Court of Appeals had made an improper decision for other reason, but that a judge was sitting on it who had no business sitting on it?

MR. SPRITZER: Quite so, and I think the Court was at pains to point out in Glidden that the provision for life tenure

is for the benefit of litigants, and that that was an exception to the general rule of standing that a party is required only to raise his own interests and not a claim that somebody else's prerogatives have been impinged.

QUESTION: Well, how about cases like United States v. Muskrat, where they said the original Court of Claims couldn't be asked to do what it did? That was a litigant challenging that, wasn't it?

MR. SPRITZER: And I think a litigant could challenge, just as he could challenge the failure of a judge to have life tenure in Glidden, the jurisdiction of a court.

But there's no question here that the Commissioners here meet the statutory qualifications. The sole claim is that by adopting the method of appointment that it did, Congress impinged on executive prerogatives.

QUESTION: Well, there was no question in Muskrat that the judges of the then Court of Claims met the statutory qualifications, but this Court held that wasn't enough; there was a constitutional problem.

QUESTION: Why isn't this just a claim, Mr. Spritzer, of saying that this is a legislative body that can do some things but it hasn't any jurisdiction to perform some of the functions that are assigned to it. And some of the functions it doesn't have jurisdiction to perform are being exercised against these plaintiffs.

MR. SPRITZER: Well, I certainly do not stand, though I think it essential to raise it since it is a jurisdictional question, on the standing question alone. And, indeed, there are three propositions that I hope to develop in my remaining time.

The first proposition is that Article II, Section 2, Clause 2, the section of the Constitution dealing with the appointment power, is not preclusive of congressional authority to make appointments to offices where it appears that the function of those officers is substantially related to a constitutional responsibility of the Congress.

The second proposition we hope to develop is that the Congress has unique and pervasive responsibilities, which are not confined solely to the passage of legislation, in relation to the federal electoral process.

And that leads us to the third proposition, that the powers which have been accorded this Commission, an examination of them shows that they are substantially related, or incidental to those constitutional responsibilities of the Congress.

It's true, of course, that Article II does provide for appointment of officers of the United States by the President. It then does go on, however, in the "but" clause, with which Your Honors are familiar, to state that Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or

in the heads of departments.

And we think it fairly implicit in that section, at least when it is read in the light of constitutional history and practice and a number of decisions of this Court, that, though Congress is not expressly granted the same power as it may delegate to the heads of departments or to the courts of law, that there is implicit in it the assumption that Congress may appoint officers when they are going to perform functions related to congressional functions.

Indeed, Madison, who was, I suppose, the strongest advocate of a strong executive, was very clear, that he thought that each of the three departments should have authority to appoint its own officers with as little interference as practicable from the others.

QUESTION: Under that rubric, then, the Commission -- Congress could constitutionally have provided that all members of the Commission would be selected by Congress, and that all enforcement authority was exclusively placed in the Commission and bypass the Attorney General.

MR. SPRITZER: Your Honor, we do not at all agree, and I shall come to this, with Mr. Clagett's characterization that all enforcement power is in the Commission. We think the Commission's enforcement powers are very limited, and that almost -- and that much of the enforcement power, that which is constitutionally required certainly, to be in the executive is

in the Attorney General under this statute.

QUESTION: What happens if he refuses to carry out a request for a prosecution from the Commission?

MR. SPRITZER: I think the Attorney General has prosecutorial discretion, as he asserted only the other day, as to whether to prosecute any case which is referred to him by the Commission.

I recognize, Your Honor, that --

QUESTION: The language of the statute is "shall", is it not?

MR. SPRITZER: Yes. The language does say, on reference to the Commission the Attorney General shall proceed.

The Court of Appeals examined the legislative history relating to that, and was persuaded that despite the use of the word "shall", which often appears where the sense is permissive rather than mandatory, that there was no intention by Congress to take away from the Attorney General his traditional discretion as prosecutor.

Congress, to my knowledge, has never done so, and there is no intimation whatever in the legislative history that it intended to do so in this instance, and both the Commission and the Attorney General are of the view that the Attorney General retains his normal discretion.

QUESTION: But does the Commission retain the power to proceed independently if the Attorney General declines?

MR. SPRITZER: No. The civil injunctive powers of the Commission do not go to violation of the substantive limits of the statute. The only power that the Commission has to seek an injunction is when documents are not produced or reports are not produced.

In other words, it has the power to go to court that legislative committees characteristically have, that legislative study commissions have been given, that independent regulatory agencies exercise all the time in seeking to implement their information-gathering function, to get data, to get reports.

QUESTION: Do they have cease-and-desist order authority?

MR. SPRITZER: No. They can subpoena and they can go to court to get documents.

If you will refer to page 25, I believe, of this statutory supplement, you will note expressly that under subparagraph (5) of the enforcement provision, the Commission may go to the district court to enforce the reporting and disclosure provisions when they are not complied with, to get data or information. Just as a legislative committee could get.

A function, in other words, akin to the enforcement of subpoena.

When you come down to subparagraph (7), which has to do with violations of the substantive limits on contributions and expenditures that are contained in the Criminal Code, there

it says that when the Commission is of the view that there has been a violation of the reporting and disclosure provisions or of the violations of the Criminal Code, it may refer the matter to the Attorney General who shall thereafter proceed.

QUESTION: Well, what about deciding who is entitled to money?

MR. SPRITZER: The certification of money for public financing, Your Honor?

The Commission, under the public financing provisions, has the duty of examining the submissions to determine whether they meet the statutory qualifications --

QUESTION: And finally deciding --

MR. SPRITZER: -- and certifying then to the Secretary of the Treasury.

QUESTION: Or refusing to. How about a refusal?

MR. SPRITZER: The functions under that heading are largely ministerial. I suppose one can conceive of a refusal.

QUESTION: If somebody is refused, it isn't always ministerial.

MR. SPRITZER: I think he would have to seek mandamus at that point, if the Commission refused to perform its function.

QUESTION: So that, in that sense, the Commission is enforcing the terms of the statute, and its decision is final unless you can get mandamus.

MR. SPRITZER: In that sense, yes.

I was speaking of enforcement, Your Honor, in the sense that the Attorney General had raised it in his brief, namely, whether there was some invasion or possible invasion of the Attorney General's prerogative to sue in court.

Of course, when it comes to criminal enforcement, it's perfectly clear that, though the Commission may investigate and bring to the attention of the Attorney General the facts which it uncovers in the course of administering the statute, that only the Attorney General can bring a criminal prosecution.

QUESTION: And the "shall proceed", does that mean he must proceed without --

MR. SPRITZER: No, we think that though the statute says he "shall proceed", that there is always the normal prosecutorial discretion which Congress in no instance has ever attempted to withdraw from an Attorney General.

QUESTION: Mr. Spritzer, in Section (5), that you were just referring to on page 25 of the Joint Appendix, --

MR. SPRITZER: Yes.

QUESTION: -- the first sentence says:

"If the Commission determines, after investigation, that there is reason to believe that any person has engaged, or is about to engage in any acts or practices which constitute or will constitute a violation of this Act" --

MR. SPRITZER: Yes.

QUESTION: -- then the last sentence says:

"Upon a proper showing that such person has engaged or is about to engage in such acts or practices, the court shall grant a permanent or temporary injunction".

That sounds like it's talking about substantive --

MR. SPRITZER: It is the substance of reporting or giving data. This Act, to which Your Honor referred in reading, is the 1971 Election Campaign Act as amended, which contains the reporting and disclosure provisions.

If you will look further down, into subparagraph (7), you will find in, oh, the fourth and fifth lines, "acts or practices which constitute or will constitute a violation of any provision of this Act or of" -- and then it elaborates all the substantive limits that are contained in Title 18.

QUESTION: Well, Mr. Spritzer, --

MR. SPRITZER: "This Act" is the reporting and disclosure provisions of the Act. Its structure is a little complicated because the '74 amendments did things in three different places: it amended the '71 Act relating to reporting and disclosure; it added provisions to the Criminal Code and to the Internal Revenue Code; but this Act has to do with reporting and disclosure.

QUESTION: And what were you just referring to just now, still on page 25?

MR. SPRITZER: Page 25, subsections (5) and (7)

under the 437g.

QUESTION: (7). I followed you through (5) -- followed my brother Rehnquist through (5), and then you --

MR. SPRITZER: Yes, and then I went into (7).

QUESTION: -- went to (7).

MR. SPRITZER: Yes. Which brings out the distinction as this statutory complex developed between this Act and the substantive limits which are not in the Election Campaign Act of '71 as amended, but, rather, in the Criminal Code.

QUESTION: I see. Thank you.

QUESTION: You apparently -- you must, then, assert and claim that Congress could itself, through its own agency, through some of its committees, do all the investigation necessary to recommend to the Attorney General that a criminal prosecution be pursued?

MR. SPRITZER: Yes.

And Congress did many of these things under the 1910 Act, under the 1925 Act, through the Secretary of the Senate and the Clerk of the House.

QUESTION: They could have their own federal bureau of investigation to carry things out and present them to the Attorney General?

MR. SPRITZER: Well, they certainly --

QUESTION: Under Title 18, under any of the Title 18 provisions.

MR. SPRITZER: Pardon?

QUESTION: Under any of the Title 18 crime provisions?

MR. SPRITZER: No, I am only contending that it is permissible for Congress itself, or the Clerk of the House or an officer of Congress, or an agency created by Congress, to perform information-gathering functions and to administer the reporting and disclosure provisions, and to report violations, to refer that, the facts relating to violations, to the Attorney General.

QUESTION: I take it, after the reference, if an indictment is necessary, they would have to go to the grand jury, would it?

Or is --

MR. SPRITZER: Oh, no.

QUESTION: Or does the Commission function --

MR. SPRITZER: The Commission's function is exhausted when it turns over its information to the Attorney General.

QUESTION: I know, but does the grand jury intervene before an indictment?

MR. SPRITZER: Oh, yes. Yes.

And the reason I support -- rely on for support, that Congress in this area can do much more than merely enact legislative prescriptions and prohibitions, stems from constitutional provisions.

QUESTION: Well, what about the commerce power?

They have pretty tough power in the field of commerce, --

MR. SPRITZER: Well, I think I could --

QUESTION: -- could it investigate and recommend in all the commerce crimes?

MR. SPRITZER: Whether Congress could do that through its own staff?

QUESTION: Unh-hunh.

MR. SPRITZER: I don't need to take that on, because it seems to me that the Constitution gives prerogatives to the Congress, duties to the Congress in this area, that don't have a counterpart elsewhere. And that's a point I'd like to take a moment to develop.

QUESTION: Mr. Spritzer, before you do, I think I misunderstood. You said when the matter is referred to the Attorney General, he refers it to a grand jury. That's not automatically true.

MR. SPRITZER: No, he might --

QUESTION: He makes an independent investigation himself, doesn't he?

MR. SPRITZER: Oh, yes. Yes. And I thought the question merely went to the question whether an Attorney General -- a grand jury proceeding would have to be initiated before an indictment could be returned here.

QUESTION: Oh.

MR. SPRITZER: Before I leave this matter of enforce-

ment, I should emphasize that in any case -- in any case in which the Commission itself could bring a civil injunctive proceeding; and in my view that is the only -- in the situation where it is seeking information, to enforce a subpoena or something of that character -- in any case in which the Commission can act in its own name, there's no question the statute expressly provides that it may also refer to the Attorney General.

So we're dealing here with this question of enforcement, with an issue that is in no sense ripe. This Commission has never brought any proceeding in any court at all to date. And it would only arise, this question, if the Commission did institute a proceeding.

But I did want to attempt to develop for a moment the reasons why I think that Congress has pervasive responsibilities in relation to the federal electoral process.

It's not only that Congress has the responsibility to provide for the time, manner, and place of holding elections. In addition, Congress, each house of Congress is the judge of the elections, qualifications, and returns of its members.

And Chief Justice Hughes, in Smiley v. Holm, in referring to this aggregate of constitutional powers, said, and I'd like to quote one sentence:

"It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional

elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."

In Classic, this Court held that those powers extend to the primary as well as to the general election.

In Burroughs, the Court made clear that the same implied powers that Congress has in relation to the control and the safeguarding of congressional elections apply as well to presidential elections.

So far as the presidential election is concerned, Congress also has the constitutional responsibility to judge the qualifications of electors when there is a contest. And a hundred years ago in the Hayes-Tilden election, when there was such a contest, it is notable that Congress created and appointed a commission to judge the qualifications of those electors, their decision to be final unless overridden by both houses of Congress acting concurrently.

The reliance on the Powell case by appellants is wholly misplaced. There was no suggestion in Powell that someone who was guilty of fraud or of corruption had to be seated; that wasn't in issue in Powell.

It's quite true that Powell said that Congress can't add to the constitutional qualifications of Members of Congress.

But the constitutional provision in question isn't restricted to qualifications, Congress is also the judge of elections and returns; and an election which is bought or obtained by fraud is a matter within Congress's power to judge, and it certainly is disentitling.

Turning specifically, then, to the aggregate of functions that the Commission has, functions which we think are, all of them, related to the constitutional responsibilities of Congress.

The main core of the Commission's job is in the area of administering the reporting and disclosure requirements, the function which has been performed, prior to the 1974 legislation, by legislative officers, by the Clerk of the House and the Secretary of the Senate.

In this area, the Commission is told by the statute to develop the forms for reporting; to make interstitial rules for the reporting of unusual items, such as petty cash disbursements; to provide a manual for uniform bookkeeping; to give advisory opinions as to how filing requirements apply to specific transactions; and to investigate, from the information provided and by auditing, whether there has been compliance with these reporting and disclosure requirements.

Now, it seems to us that all of those are intimately related to the responsibility that Congress has in judging elections, in judging whether fraud has been committed in the

electoral process.

We think it clear that Congress's function as the judge of elections is not confined to reviewing a case which has already crystallized, a dispute that has already occurred, to find out whether a particular candidate bought his office or gained it by fraud.

We think it plain that Congress, in order to perform these responsibilities, may impose on-going requirements, prophylactic measures designed to discourage and deter corruption and fraud before it takes place, and to uncover it before it does its work.

And all the legislation, from 1910 on, does indeed proceed on that premise.

It's perfectly true that the earlier legislation, though it provided for administration and for reporting in disclosure, proved to have very serious loopholes. But there's no question that the electoral legislation for two-thirds of a century has proceeded upon the premise that an agency created by Congress, or legislative officers indeed designated by Congress, might perform these responsibilities in aid of the constitutional responsibilities of the Legislature.

This Court has expressed, no doubt, I think perhaps the most notable instance was the Springer case, that Congress may delegate to an officer or an agent the performance of functions which will be in aid of constitutional responsibilities.

Though that was a case in which the Court concluded that Congress was seeking to delegate to legislative officers purely executive functions.

We don't think that is the case here.

I've spoken of the matter of enforcement.

For a moment turning to the matter of regulations, it seems to us that if Congress were administering these reporting requirements now, as it has in the past, through the Clerk of the House and his staff, it would have to make rules, or the Clerk would have to make rules. He was indeed authorized to do so.

It's inconceivable that you could have anything like fair administration of this statute without making rules. As soon as you draw up a form, you're necessarily doing some line-drawing, however informal.

Appellants say that the making of rules is quintessentially an executive prerogative -- that's their phrase. I find it rather surprising, I would have thought that one would have typically described rule-making as quasi-legislative if one were going to affix labels.

But I don't think you can resolve this question by affixing labels at all. All of the departments of government of course adopt rules.

The real question is whether, viewing in their totality, the responsibilities of Congress in relation to the

electoral process, these functions delegated to the Commission are reasonably related to that task.

The Court has also said, in dealing with separation of powers concepts in the past, that the concept is not inflexible. Its main role is to prevent one department of the government from taking over the other department.

There is no "taking over" here.

The Court said in the Siebold case that the question was whether a particular appointment would be inappropriate or incongruous. And Siebold, I would remind Your Honors, was a case in which Congress delegated to federal judges the duty of appointing election supervisors; and that was upheld.

I think that goes much further than delegating to this agency the responsibilities that Congress has in relation to the federal electoral process. After all, the courts' relation to the federal electoral process is a much narrower one than is the Congress's.

So far as propriety is concerned, I would stress, in conclusion, that there were strong reasons persuading Congress to create a bi-partisan agency and to disperse the appointing power.

The President is personally involved, as well as officially involved, in presidential elections. He is not only chief of state, he is chief of his party, and he may well be, in a given case, a candidate for re-election.

If there is need for a watchdog agency, and few today have doubt of that, then it seems to us highly appropriate that Congress should disperse the authority to appoint the membership of that watchdog agency among the three institutions of government that are involved in the electoral process, the three categories of officers who depend on election.

That is what has been done here, and it seems to us that Congress was justified in believing that that was an appropriate solution. The President, of course, concurred in that when he signed the legislation.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Clagett.

REBUTTAL ARGUMENT OF BRICE M. CLAGETT, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Mr. Spritzer has skillfully argued that really all the enforcement powers in this statute deal with the disclosure provisions. It is astonishing to me that, after what we said in our Reply Brief and after the sort of obnoxious invitation I gave him during my prior argument, he still declines to tell us one word about the discrepancy pointed out at pages 98 and 99 of our Reply Brief, where he is arguing that the Commission has no rule-making power over the expenditure and contribution provisions, and yet the Commission has already exercised

precisely such rule-making power explicitly.

This is a puzzlement at the heart of the case, that since Mr. Spritzer won't give you any explanation of it, I suggest you could only resolve by looking at what the Commission does and not by what its counsel say.

Secondly, even as to disclosure, we think the case of Watkins vs. United Statesis dispositive. Mr. Spritzer says, of course, any legislative committee can go in to subpoena documents and subpoena witnesses; yes, but only in pursuance of a legitimate legislative purpose.

And we say that to enforce these disclosure provisions enacted not for purposes of legislative oversight, enacted not for purposes of giving Congress continuing information about elections, or anything of that nature, but expressly, as Mr. Friedman argued, to disclose information to the public and to aid in enforcement of the expenditure and contribution limits.

That kind of disclosure, that kind of information-gathering, has nothing to do with the kind of information-gathering that Congress can enforce and administer, itself. It is a substantive provision of law, just like the Antitrust Laws, the Tax Laws, or anything else, and Congress has no more business administering it than it does administering those laws.

As Justice White pointed out, of course, Congress has also given its agent the power to administer the federal

subsidy provisions, and what they are supposed to have to do with information-gathering and legislative oversight is beyond me. It's just like administering the Internal Revenue Code.

Next, as to Mr. Spritzer's argument that Powell vs. McCormack doesn't hurt him.

In Powell vs. McCormack itself, at footnote 82 on page 545 of 395 U.S., the Court, in listing the so-called precedents of exclusions that Speaker McCormack was there relying on, included one exclusion in 1925, where the Senate refused to seat a member-elect because of improper campaign expenditures, and one concerted effort for a similar such exclusion in 1947.

The Court characterized these, along with the other instances that had been presented to it, as unconstitutional congressional exercises of exclusion power, and commented that an unconstitutional action has been taken before, surely does not render that same action less unconstitutional at a later date.

And that is on page 546, 547 of Powell.

Now, as to the political reasons for not entrusting the President with the appointment power here:

Plainly, the Constitution provides ample safeguards, through the confirmation power, through fixed terms of office, and the congressional setting of qualifications.

Commissioners could be appointed for life or for 15

years, like the Comptroller General; they could be required to be retired federal judges; they could be forbidden to be persons who held political office for X number of years. Congress could impose any qualifications which it wished.

But how it can be argued that instead of doing that Congress can retain the appointment power and the confirmation power and the legislative veto for itself, and then use those powers and use that legislative veto in the interest of incumbents and against challengers, as they have already begun to do, passes my understanding.

I would conclude with the comment made by my brother Cox in a speech last spring. He said: The wrongs disclosed by Watergate and the agonies of Vietnam were produced not by defects in the constitutional plan, but by departures from it.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:33 o'clock, p.m., the case in the above-entitled matter was submitted.]

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