

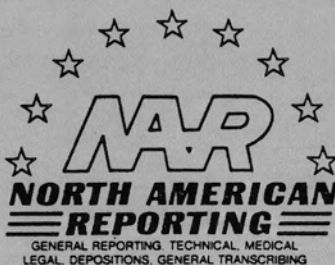
In the  
**Supreme Court of the United States**

CALIFORNIA MEDICAL ASSOCIATION, )  
ET AL., )  
 )  
APPELLANTS, )  
 )  
V. ) No. 79-1952  
 )  
FEDERAL ELECTION COMMISSION, )  
ET AL., )  
 )  
APPELLEES. )

Washington, D.C.  
January 19, 1981

Pages 1 thru 46

**ORIGINAL**



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IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA MEDICAL ASSOCIATION,	:
ET AL.,	:
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Appellants,	:
	:
v.	:
	:
FEDERAL ELECTION COMMISSION,	:
ET AL.,	:
	:
Appellees.	:
-----	:

No. 79-1952

Washington, D. C.

Monday, January 19, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:04 o'clock p.m.

APPEARANCES:

FREDERICK C. ZIMMERMAN, ESQ., Hassard, Bonnington, Rogers & Huber, 44 Montgomery Street, Suite 3500, San Francisco, CA 94104; on behalf of the Appellants.

CHARLES NEVETT STEELE, ESQ., General Counsel, Federal Election Commission 1325 K Street, N.W., Washington, D.C. 20463; on behalf of the Appellees.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

FREDERICK C. ZIMMERMAN, ESQ.,  
on behalf of the Appellants

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CHARLES NEVETT STEELE, ESQ.,  
on behalf of the Appellees

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FREDERICK C. ZIMMERMAN, ESQ.,  
on behalf of the Appellants -- Rebuttal

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P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments next  
3 in California Medical Association v. the Federal Election Com-  
4 mission. Mr. Zimmerman, I think you may proceed when you are  
5 ready.

6 ORAL ARGUMENT OF FREDERICK C. ZIMMERMAN, ESQ.,

7 ON BEHALF OF THE APPELLANTS

8 MR. ZIMMERMAN: Mr. Chief Justice, and may it please  
9 the Court:

10 This case arises under the Federal Election Campaign  
11 Act. It comes to this Court on appeal from an en banc deci-  
12 sion by the 9th Circuit Court of Appeals which sustained the  
13 validity of the \$5,000 calendar year limitation on contribu-  
14 tions to a political committee. The case comes here by way  
15 of the unique judicial review provisions contained in  
16 2 U.S.C. 437h, which provide for the filing of actions to  
17 construe the constitutionality of the Act and for the certi-  
18 fication of those actions to the court of appeals with ulti-  
19 mate review on appeal in this Court.

20 Appellants challenge that aspect of that \$5,000  
21 calendar year limit, which restricts the administrative sup-  
22 port an unincorporated association may contribute to its  
23 political committee. Appellants claim that the \$5,000 limit  
24 violates their rights under the First Amendment and that the  
25 statutory scheme which allows corporations and labor

1 organizations to contribute unlimited amounts of administra-  
2 tive support to their political committees violates the  
3 equal protection rights of appellants.

4 The term "administrative support" as used by the  
5 parties and the court below refers to anything of value used  
6 for the purpose of establishing, administering, or soliciting  
7 contributions to a political committee.

8 Appellant California Medical Association is an  
9 unincorporated membership organization. Its membership con-  
10 sists of approximately 25,000 physicians who practice in  
11 California. The CMA sponsors a political action committee  
12 known as the California Medical Political Action Committee.  
13 CALPAC receives in kind administrative support from CMA.  
14 CALPAC also receives contributions from physicians who choose  
15 to contribute to it. CALPAC supports candidates who run for  
16 federal office, among other things.

17 Appellants Foster and Rose are members of both CMA  
18 and CALPAC. Dr. Foster is the treasurer of CALPAC; Dr. Rose  
19 is a past president of CMA and has been an officer in CALPAC.

20 QUESTION: Mr. Zimmerman, I gather you disagree  
21 with the Court of Appeals for the 9th Circuit as to our  
22 jurisdiction in this case?

23 MR. ZIMMERMAN: Well, this Court does have jurisdic-  
24 tion, Your Honor.

25 QUESTION: Do you agree or disagree with the Court

1 of Appeals' treatment of the jurisdiction -- ?

2 MR. ZIMMERMAN: Well, I agree with it, Your Honor.  
3 They found that they had jurisdiction to hear the case.

4 QUESTION: Under what section?

5 MR. ZIMMERMAN: Well, the -- the majority, at any  
6 event, Your Honor, didn't hear the --

7 QUESTION: Well, that's what I mean.

8 MR. ZIMMERMAN: Right. They initially of course,  
9 I think, convened pursuant to 437h. However, the majority  
10 based its decision to hear the case, en banc, at least, not  
11 on Section 437h but on Rule 35; but that only deals with the  
12 aspect of an en banc panel or a three-judge panel, Your Honor.

13 QUESTION: But this was an inter -- if it were an  
14 ordinary case and not an FEC case, clearly the questions  
15 certified by Judge Orrick were interlocutory, and the Court  
16 of Appeals wouldn't be justified in simply resting its juris-  
17 diction on the en banc statute.

18 MR. ZIMMERMAN: Well, Your Honor, this isn't an  
19 interlocutory appeal. It isn't the certification under those  
20 general rules. It's a special statute which permits the  
21 certification of any questions of constitutionality arising  
22 under the Act. It's a unique provision.

23 QUESTION: Yes, but the majority didn't rest on that  
24 provision?

25 MR. ZIMMERMAN: Yes, I think they did, Your Honor.

1 As I read the decision, they didn't sit en banc pursuant to  
2 437h. They sat en banc pursuant to Rule 35.

3 QUESTION: Yes, but doesn't the special jurisdic-  
4 tional provision require them to sit en banc, not pursuant to  
5 Rule 35?

6 MR. ZIMMERMAN: I don't think it makes any differ-  
7 ence, Your Honor. It's exactly what the Court did in Buckley  
8 v. Valeo. They sat en banc pursuant to Rule 35. I under-  
9 stand that, last week, although I have not read the decision,  
10 that the 5th Circuit did the same thing in a case which has  
11 been cited in the briefs, FEC v. Lance. In that case the  
12 three-judge panel certified constitutional questions to the  
13 en banc panel. That case was just decided, and I only get  
14 this through counsel from the Commission, but I understand  
15 that they chose to sit pursuant to Rule 35 and hear the case  
16 en banc. I don't think it makes any difference, Your Honor.

17 The important aspect with respect to this Court's  
18 jurisdiction under 437h(b) is not whether the court below sat  
19 en banc pursuant to 437h(a) or sat en banc pursuant to Rule  
20 35, but rather whether there was a question properly certified  
21 to the circuit court, and whether there's been a decision on  
22 that matter. Now, that's what Section 437h(b) states.

23 QUESTION: What the Court of Appeals said in their  
24 opinion on the top of page A-3 was, "We hear the appeal en  
25 banc pursuant to Federal Rules of Appellate Procedure,

1 No. 35." and that jurisdiction is conferred by, among others,  
2 437h, confirming what you have just told my brother Rehnquist.

3 MR. ZIMMERMAN: Yes, that's my understanding,  
4 Your Honor.

5 QUESTION: Well, why would they purport to sit under  
6 the Rule rather than under the statute?

7 MR. ZIMMERMAN: Oh, very simple, Your Honor. When  
8 the case was certified to the court, Judge Browning, the  
9 presiding judge, issued an order asking the parties to ad-  
10 dress the constitutionality of the requirement that the court  
11 sit en banc. His question to counsel was directed at the  
12 issue of the requirement the court impanel itself en banc.

13 QUESTION: I see, okay. All right.

14 MR. ZIMMERMAN: And at oral argument there was  
15 considerable debate about whether Congress had the power to  
16 do that.

17 QUESTION: Is that why the other courts are doing  
18 it too?

19 MR. ZIMMERMAN: Well, I suspect they're doing it  
20 because the 9th Circuit, for the reason the 9th Circuit indi-  
21 cated that they wanted to avoid that question.

22 QUESTION: You mean, whether or not Congress con-  
23 stitutionally could require them to sit en banc?

24 MR. ZIMMERMAN: Yes, that's it, Your Honor. The  
25 question --



1 QUESTION: Well, I can understand that argument as  
2 addressed to this Court, but I have trouble following it  
3 addressed to the courts that are created by the Congress.

4 MR. ZIMMERMAN: Well, that's right, Your Honor.

5 QUESTION: Anyway, they avoided it --

6 MR. ZIMMERMAN: They did, Your Honor.

7 QUESTION: By going on the Rule.

8 QUESTION: Well, did they successfully avoid it?

9 Look at page A-26 of the Jurisdictional Statement, the para-  
10 graph at the bottom of the page:

11 "Delicate questions such as those here suggested  
12 are to be decided only when necessary. We think the  
13 better course is to let our decision to hear the case  
14 en banc rest on our authority under Federal Rules of  
15 Appellate Procedure 35."

16 MR. ZIMMERMAN: I read that, Your Honor, as meaning  
17 to sit en banc, not to hear the case, to hear the case en  
18 banc. The question that the court was confronted with, and  
19 which they addressed to counsel, was why do we have to get  
20 together en banc? At that time the 9th Circuit had 13 active  
21 judges; 11 of them were actually impanelled and only nine par-  
22 ticipated in the decision. I think the Circuit now is up to  
23 22 or 23. It's a real problem in getting a panel that large.  
24 That was the concern that Judge Browning had when he asked us  
25 to address that question.

1 QUESTION: Did you as counsel pursue or press  
2 Rule 35 on the court?

3 MR. ZIMMERMAN: No, we didn't, Your Honor, not at  
4 all. But I think the court took its cue from Buckley v.  
5 Valeo. That's exactly what the D.C. Circuit did on that case.

6 QUESTION: Do you see any reason why Congress  
7 can't tell any court of appeals in the country that they must  
8 hear certain cases en banc?

9 MR. ZIMMERMAN: No, I don't see any reason, Your  
10 Honor, at least initially. Now, I can understand if at some  
11 point Congress would say, all appeals from an adverse deci-  
12 sion of a social security hearing officer must be heard by  
13 an en banc panel of the appropriate court of appeals, well,  
14 obviously, the courts would be inundated with litigation.  
15 That would be an impossibility.

16 QUESTION: Well, it might be inconvenient, but  
17 would it be unconstitutional?

18 MR. ZIMMERMAN: Only if it involved a problem with  
19 the separation of powers, which a massive volume of litigation  
20 might. I don't think so.

21 QUESTION: Well, no one has ever suggested, as I  
22 recall it, that Congress's requirement that district judges  
23 sit in panels of three in certain cases had any constitu-  
24 tional infirmity.

25 MR. ZIMMERMAN: No, I don't think there is any

1 problem with it at all, but --

2 QUESTION: But in any event, whatever problem there  
3 is was avoided.

4 MR. ZIMMERMAN: That's right, Your Honor.

5 QUESTION: Have you read the Western Pacific case,  
6 345 U.S.?

7 MR. ZIMMERMAN: I'm sorry, Your Honor?

8 QUESTION: Have you read the Western Pacific case?

9 MR. ZIMMERMAN: Not recently, Your Honor.

10 QUESTION: Have you ever read it?

11 MR. ZIMMERMAN: I may have, Your Honor, in prepara-  
12 tion for the hearing before the 9th Circuit.

13 Now, in further addressing the jurisdictional ques-  
14 tion, I think it's helpful to take a look at the procedural  
15 history of the case. This case was actually filed on May 7,  
16 1979. However, it's important to note that earlier on, in  
17 October of 1978, the Commission found reason to believe that  
18 violations of the \$5,000 limit had occurred, because CMA's  
19 in kind support of CALPAC exceeded \$5,000 during the years  
20 1976 through 1978.

21 QUESTION: Under this Act, what is the limit that  
22 each doctor involved in this enterprise may contribute to a  
23 political committee?

24 MR. ZIMMERMAN: \$5,000, Your Honor.

25 QUESTION: Each one may contribute \$5,000?

1 MR. ZIMMERMAN: That's correct, Your Honor. The  
2 general limit on contributions to a political committee as  
3 contained in this section, 441a(a)(1)(C) is \$5,000. I'm sor-  
4 ry, there is a parallel provision which states the same  
5 amount. A multicandidate committee may contribute \$5,000  
6 to another committee; all other persons may contribute \$5,000  
7 to a political committee.

8 QUESTION: Is there any limitation on the number of  
9 political committees that the \$5,000 could be given to?

10 MR. ZIMMERMAN: I don't believe so, Your Honor.  
11 There is one possible --

12 QUESTION: So you could have 50 and still make  
13 \$5,000 to each of 50?

14 MR. ZIMMERMAN: Well, there are two problems, Your  
15 Honor. One is, there's a \$25,000 maximum aggregate limit  
16 per year on individuals. You can only give that much each  
17 calendar year. Secondly, if the committees are in any way  
18 affiliated, the anti-proliferation rule contained in  
19 441a(a)(5) would apply, and that subjects committees under  
20 common control to a maximum aggregate limit.

21 QUESTION: Does every single dispute between the  
22 Federal Elections Commission and a potential contributor  
23 come up under these jurisdictional provisions that we've been  
24 discussing?

25 MR. ZIMMERMAN: No, not at all, Your Honor.

1 These provisions only involve the constitutionality of pro-  
2 visions of the Act. And indeed there have been decisions  
3 where the district court determined that, for example, the  
4 constitutional question was frivolous. One example is  
5 Gifford v. Congress, and the district judge acting to screen  
6 out a frivolous lawsuit dismissed the case. So it's not  
7 every case, number one, where a constitutional question is  
8 alleged which will come up under these provisions. And  
9 secondly, of course, if the case does not involve a consti-  
10 tutional issue, these provisions aren't available.

11 QUESTION: Do you agree with Judge Kennedy's obser-  
12 vation that the as applied/facially unconstitutional distinc-  
13 tion is a rather vague and metaphysical one?

14 MR. ZIMMERMAN: Well, I think I do, Your Honor.  
15 I'm not sure that it makes a big difference in this case.  
16 The claims really are facial claims. We challenge this  
17 provision on its face. We are most interested in that aspect  
18 of the prohibition which limits administrative support as  
19 opposed to across-the-board support for a political committee.

20 QUESTION: Do you think, if Congress passed an  
21 amendment to this statute next year, you would be entitled to  
22 the same rapid-fire consideration as you got in this case?

23 MR. ZIMMERMAN: Well, Your Honor, as long as the  
24 requirements of Article III have been satisfied, yes. When you  
25 have to have a case or controversy, you have to have a party

1 that's got standing to bring that litigation.

2 QUESTION: I agree with that; surely.

3 MR. ZIMMERMAN: But if the requirements of Article  
4 III are met and there is a constitutional question, yes, I  
5 think that's true. What gets to --

6 QUESTION: I'm not too sure about your immediate  
7 past statement. Are you limiting your challenge to the facial  
8 constitutionality of the Act?

9 MR. ZIMMERMAN: Your Honor, I'm not sure I can  
10 describe it only as that, but I think that that's the way it  
11 frames up. We question 441a(a)(1)(C). That provides for a  
12 \$5,000 limit on contributions to a political committee. How-  
13 ever, we really are only interested in that prohibition to the  
14 extent that on its face it limits administrative support for  
15 a political committee, as opposed to some other kind of sup-  
16 port.

17 QUESTION: Mr. Zimmerman, does the record tell us  
18 exactly what this administrative support includes?

19 MR. ZIMMERMAN: Well, Your Honor, it does, I be-  
20 lieve. The reference is in the complaint and the answer to  
21 furnishing goods and services used to establish, administer,  
22 and solicit contributions to CALPAC.

23 QUESTION: But does it include the telephone bills?

24 MR. ZIMMERMAN: Yes, it would include everything,  
25 Your Honor. And the way this works is, these things are just

1 provided for CALPAC. It's provided in kind. CALPAC has an  
2 office that CMA provides, and so forth.

3 Now, if I may turn, for a moment, to the merits of  
4 the case. I think it's important to deal with the question  
5 of the nature of administrative support. In this instance it's  
6 in kind. I'm sure there are cases where it would not be in  
7 kind, but this is a reference to all support used for estab-  
8 lishing, administering, or soliciting contributions to the  
9 political committee. This in-kind support does a couple of  
10 things. Number one, it enables the committee to function  
11 without any offset for administrative expenses. In other  
12 words, the committee can collect voluntary contributions from  
13 various donors, and use those donations to engage in political  
14 actions, make contributions to candidates, and make indepen-  
15 dent expenditures, and otherwise engage in political activity.

16 QUESTION: Well, do we judge the case here on the  
17 assumption that the limit that's placed on contributions to  
18 these committees for nonadministrative purposes is valid?

19 MR. ZIMMERMAN: Well, Your Honor, I think that some  
20 of the arguments which would go to invalidate the limit with  
21 respect to administrative support also apply to the statute  
22 across the board. Let me give you one of them. The nexus  
23 that has been --

24 QUESTION: Well, so your answer is, no? We don't  
25 judge the case on that basis? You don't concede or suggest

1 that the statute is valid, is otherwise valid?

2 MR. ZIMMERMAN: I think there are two inquiries that  
3 have to be made, Your Honor. One, what is the nature of the  
4 support for the political committee? If it's administrative  
5 support, I think there's absolutely no reason to presume that  
6 a limit on that administrative support prevents corruption or  
7 the appearance of corruption, which is the underlying ration-  
8 ale that justifies limits at all.

9 QUESTION: Would it make any difference if they gave  
10 a check instead for administrative support?

11 MR. ZIMMERMAN: No, I don't think that would make  
12 any difference, Your Honor, presuming, of course --

13 QUESTION: Would that be administrative support  
14 under your approach or not?

15 MR. ZIMMERMAN: It depends on the reason the  
16 check was given and the --

17 QUESTION: Well, if it was "gifts" written on it,  
18 what it was for?

19 MR. ZIMMERMAN: Well, then if it was used only for  
20 those purposes, that's fine, Your Honor, there is no harm.

21 QUESTION: Well, they just put it in their bank  
22 account and they pay their expenses.

23 MR. ZIMMERMAN: Well, that's fine. That is adminis-  
24 trative support; we know --

25 QUESTION: How do you -- define administrative



1 support?

2 MR. ZIMMERMAN: Anything of value, Your Honor,  
3 used for the purpose of establishing, administering, or soli-  
4 citing contributions to a political committee.

5 QUESTION: Well, for example?

6 MR. ZIMMERMAN: An office, a staff, a secretary,  
7 postage expenses, the heat, the gas --

8 QUESTION: Solicitation expenses?

9 MR. ZIMMERMAN: Yes, Your Honor. Of course, the  
10 cost of stationery --

11 QUESTION: Telephone and telegrams --

12 MR. ZIMMERMAN: Telephones. By all means.

13 QUESTION: Transportation, all like that.

14 MR. ZIMMERMAN: Postage; everything. Printing  
15 costs.

16 QUESTION: But in Mr. Justice White's example, the  
17 size of the check might have something to do with it. A check  
18 for \$50 million, simply because it was labeled for adminis-  
19 trative support, would not be necessarily for administrative  
20 support if the showing were that all the administrative  
21 expenses, however liberally construed, amounted to no more  
22 than \$50,000.

23 MR. ZIMMERMAN: Yes, that's true, Your Honor, but  
24 then it depends on what happens to the balance of that check  
25 and how it's used. But the basic nature of administrative

1 support is not corruptive. This wherewithal is provided for  
2 the committee to function. It allows the members of the  
3 Political Action Committee to engage in political action, and  
4 there is no inherent corruptive potential in administrative  
5 support.

6 QUESTION: To the extent that it used for adminis-  
7 trative purposes, it isn't going to some candidate?

8 MR. ZIMMERMAN: That's correct, Your Honor.

9 QUESTION: So there's no connection between the  
10 donor and the candidate, is that correct?

11 MR. ZIMMERMAN: That's right, Your Honor. There are  
12 two different relationships. One is the relationship of  
13 donor to committee. The second is the relationship of  
14 committee to candidate, or contributor to candidate. That's  
15 the nexus which requires regulation. That's the regulation  
16 which the Court sustained in the Buckley decision, to prevent  
17 quid pro quos. This is one step removed --

18 QUESTION: Why is there any difference in terms of  
19 corruptive influence between giving a candidate \$200,000 in  
20 cash and giving him an airplane and a band to go around with  
21 him, and pay all his phone bills and do all his canvassing,  
22 spend \$200,000 that way? Why is one more corruptive than  
23 the other?

24 MR. ZIMMERMAN: Well, Your Honor, again, it's not  
25 something given to a candidate at all. These are donations --

1 QUESTION: Well, but if you're talking about it,  
2 would you say then that the distinction between cash and  
3 administrative support would not be a valid distinction if  
4 the donations went right to a candidate as opposed to a  
5 committee?

6 MR. ZIMMERMAN: That's correct, Your Honor. If  
7 the nexus is donor-candidate, then there's a need for limits  
8 and regulations. If the nexus is donor and committee, I  
9 would say, no. Now, if that committee happens to be the  
10 candidate's authorized committee, that's another matter alto-  
11 gether. But I'm speaking here of a multicandidate committee  
12 which supports a number of different candidates, in this in-  
13 stance, which is nonpartisan and has participated on that  
14 basis --

15 QUESTION: I'm really just questioning your dis-  
16 tinction between cash and administrative support, as to whe-  
17 ther there's really any strength to that at all.

18 MR. ZIMMERMAN: Well, Your Honor, I think you have  
19 to look at the nexus that's being regulated, who is the contri-  
20 bution going to? But with respect to the difference between  
21 cash and in-kind support, I think that common sense says  
22 that administrative support given in kind has virtually no  
23 potential to be corruptive. Cash given for administrative  
24 expenses perhaps has that potential if it's misused, if it's  
25 not used for administrative services, et cetera. That's the

1 only distinction I can draw, Your Honor, but I think as long  
2 as this wherewithal is used for administrative purposes, then  
3 there's no potential of corruption. I think there is only  
4 the most attenuated potential for corruption with contribu-  
5 tions to --

6 QUESTION: I suppose mainly it depends on what you  
7 think of as corruption. If you're talking about the candi-  
8 date putting the money in his pocket and just using it for  
9 personal matters, that's one thing. But if you're talking  
10 about feeling under a very definite obligation to a donor, I  
11 don't see that it makes much difference.

12 MR. ZIMMERMAN: Again, Your Honor, we're not dealing  
13 with the contributors --

14 QUESTION: I understand. I am just now questioning  
15 the validity of your distinction between cash and in-kind  
16 services.

17 QUESTION: Mr. Zimmerman, to put it another way, sup-  
18 posing I come up and say I'll pay all of your administrative ex-  
19 penses?

20 MR. ZIMMERMAN: That would be wonderful, Your Honor,  
21 because that means that --

22 QUESTION: It would be perfectly all right?

23 MR. ZIMMERMAN: -- if I was a committee, Your Honor?

24 QUESTION: I don't care how you do it, you just --  
25 well, if an individual did it it would be bad?

1 MR. ZIMMERMAN: Well, Your Honor, if --

2 QUESTION: Wouldn't it? I'm going to pay all of  
3 your administrative expense. That includes your airplanes,  
4 your limousines, your liquor, and everything else.

5 MR. ZIMMERMAN: I don't think it makes any differ-  
6 ence, Your Honor, if your support is to a political committee  
7 and that committee uses that support for administrative ser-  
8 vices. The real potential for corruption is --

9 QUESTION: You don't see any potential corruption?

10 MR. ZIMMERMAN: No, not there, Your Honor, because --

11 QUESTION: With somebody saying, I'll pay all of  
12 your expenses?

13 MR. ZIMMERMAN: No; to the committee, Your Honor.  
14 If you say that to a candidate, that's quite another matter,  
15 but if you say to a political committee, we will provide for  
16 your administrative expenses, that will allow you to use  
17 those voluntary contributions received from various donors  
18 in order to make contributions to candidates. What happens  
19 there is, it enhances the committee's ability to make contri-  
20 butions and otherwise participate in the political process  
21 because the voluntary contributions the committee receives  
22 are not eaten up by these administrative expenses. Each dol-  
23 lar that's collected; whether it's on a street corner or  
24 from an individual contributor through a mail solicitation,  
25 can be used for political action, it can be used for an

1 independent expenditure, or it can be used for making a con-  
2 tribution to a candidate, and you don't have to have 25 cents  
3 or 35 cents or 40 cents going to pay the administrative costs.  
4 And that's the important thing, that's why there's an impor-  
5 tant associational right here, because the wherewithal pro-  
6 vided by CMA for CALPAC allows CALPAC to function effectively  
7 and to use those voluntary contributions CALPAC receives in  
8 order to participate in the political process. That's the  
9 magic of the political action committees, that's where it  
10 comes from, when somebody --

11 QUESTION: Glad you used the word magic.

12 MR. ZIMMERMAN: When someone subsidizes the adminis-  
13 trative expenses, it enhances the committee's ability to  
14 engage in protected speech and associational activities.

15 Now, in the Buckley case, the court of course found  
16 the contribution limits valid but invalidated the expenditure  
17 limitations in part, I think, because of the absence of any  
18 quid pro quo relationships between the person making the  
19 expenditures. The same is true here. There is no quid pro  
20 quo relationship between CMA and candidates. CMA provides  
21 administrative support for CALPAC, no potential for corrup-  
22 tion. So, I don't think that there's any valid governmental  
23 purpose served by this regulation.

24 Now, secondly, one of the requirements when regu-  
25 lating in this area is that the regulatory means be narrowly

1 and directly defined, that they only deal with that part of  
2 the situation which requires regulation. Here the regula-  
3 tions are overbroad. They regulate all support for political  
4 committees, not just in-kind support, not just administrative  
5 support, but any kind of support. The ACLU brief, for example,  
6 points out that if support for a political committee is given  
7 and it's earmarked for independent expenditures, there is no  
8 corruptive potential to that, and it's not going to be in-  
9 volved in a candidate-contributor nexus. The money is going  
10 to go for independent expenditures. The corruption and pre-  
11 vention of corruption rationale does not apply. The same is  
12 true in administrative support. The ban regulates too  
13 broadly.

14 In addition, in the Buckley case, the court found  
15 that there has to be an absence of less drastic means. And I  
16 think in this instance there are less drastic means already  
17 operating, already available, dealing with the problem of  
18 corruption and the prevention of the appearance of corruption.

19 QUESTION: Well, would you agree with with the  
20 underlying theory of the Buckley decision, or would you agree  
21 that the underlying theory is that money is speech?

22 MR. ZIMMERMAN: Absolutely, Your Honor. Money is  
23 speech. Money is association, Your Honor. Money and some-  
24 thing of value provided to a political action committee makes  
25 that committee work. It's the wherewithal to allow

1 individuals to solicit contributions, to have meetings, to  
2 make decisions on how to contribute to candidates, and solicit  
3 further contributions.

4 QUESTION: So, presumably, the Corrupt Practices  
5 Act of 1907 and the amendments to it in the late '40s  
6 applying to labor unions are unconstitutional.

7 MR. ZIMMERMAN: No, Your Honor, that deals with an  
8 entirely different problem. The problem that those statutes  
9 deal with is, number one, the use of treasury money, that is,  
10 the vast accumulations of wealth acquired by corporations  
11 and labor organizations, number one.

12 And secondly, the nonvoluntary nature of the use of  
13 that money.

14 QUESTION: Well, aren't corporations persons under  
15 at least since First National Bank v. Bellotti?

16 MR. ZIMMERMAN: Well, they are, Your Honor, in the  
17 sense that corporations have First Amendment rights. And I'm  
18 not here to defend the limits on corporate and labor activity  
19 but I think that those limits were imposed for different  
20 reasons than the limits imposed here.

21 Getting back to the less drastic means available,  
22 just for a moment here, the Act contains comprehensive regis-  
23 tration requirements, comprehensive reporting requirements.  
24 There are limits on contributions by individuals, \$1,000 per  
25 candidate per election. There is a \$5,000 limit on



1 contributions by multicandidate committees to candidates.  
2 And in addition there's a \$25,000 limit on aggregate contri-  
3 butions during the year by an individual. In addition, there  
4 are several anti-evasion provisions already in effect. Con-  
5 tributions to an authorized committee are considered as con-  
6 tributions to the candidate. Expenditures made in coopera-  
7 tion or in coordination with a candidate are treated as  
8 contributions, are subject to the limits. The republication  
9 of a candidate's printed materials or messages or graphics of  
10 any kind is treated as a contribution. Earmarked contribu-  
11 tions, that is, contributions which are given to a committee  
12 with a designation, this contribution shall go to Congressman  
13 X and that one shall go to Congressman Y, those are treated  
14 as contributions by the contributor, the original donor, and  
15 the committee is viewed as a conduit or intermediary. And in  
16 addition there is the antiproliferation rule, committees sub-  
17 ject to common control are subject to a maximum aggregate  
18 limit. So, I think, if you look at these provisions in light  
19 of the Commission's extensive regulations and numerous  
20 advisory opinions, you have to come back with a conclusion  
21 that there's a comprehensive regulatory scheme already in  
22 place. And there are less drastic means to deal with  
23 problems which might be involved when there is support pro-  
24 vided to a political committee.

25 I will conclude at that point and reserve whatever

1 time is remaining for rebuttal.

2 MR. CHIEF JUSTICE BURGER: Mr. Steele.

3 ORAL ARGUMENT OF CHARLES NEVETT STEELE, ESQ.,

4 ON BEHALF OF THE APPELLEES

5 MR. STEELE: Mr. Chief Justice, and may it please  
6 the Court:

7 There are two matters here, the jurisdictional  
8 matter and the substantive regulation. While I will try and  
9 use the majority of my time to deal with the substantive regu-  
10 lation, I would like to spend a few minutes on the jurisdic-  
11 tional question, because it is something that I think has  
12 caused great difficulty to the courts of appeals below.

13 The question is really one, I think, of statutory  
14 interpretation, of the proper interpretation of 2 U.S.C.  
15 437h. We urged upon the Court of Appeals for the 9th Circuit,  
16 as we have urged on other circuits, that that statute should  
17 be narrowly construed, that the words in that statute "as may  
18 be appropriate to construe the constitutionality of the Act,"  
19 do not mean that any question certified up to the court must  
20 be dealt with with the very extraordinary provisions that  
21 437h provides, not only of en banc hearings in front of the  
22 court of appeals, but then a direct right of appeal  
23 to this Court, in an era, of course, when there has been at  
24 least in other instances some indication of trying to limit  
25 that kind of direct appeal.

1           So, we have urged that there should be a narrow  
2 interpretation of that phrase, "as may be appropriate," and  
3 that in circumstances such as this case here, where there  
4 was already a proceeding which had commenced in front of the  
5 Commission, that it was not appropriate for the Court of  
6 Appeals to hear that case.

7           The Court of Appeals took what seems to have been a  
8 middle course. They asked, as noted in the record, that the  
9 parties address the question of the constitutionality of the  
10 requirement that they sit en banc, and then at least in our  
11 opinion, did not sit pursuant to 437h because they specifically  
12 said that they would not follow the requirement set forth in  
13 the statute by Congress that they be required to sit en banc.

14           There is -- I do not want to go through the various  
15 cases that have dealt with 437h, because they have been set  
16 forth at length in our brief and in our opponents' brief.  
17 I would like to call attention to the case that was just re-  
18 cently decided last week, on January 15, in FEC v. Lance,  
19 which is cited at page 15 of our brief, Note 21.

20           There in a subpoena -- that was a case in which the  
21 Commission had brought an enforcement of its subpoena action.  
22 The subpoena was enforced early in 1978, the Court of Appeals  
23 stayed that action, and stayed that action pending hearing on  
24 the defenses that had been raised, including constitutional  
25 defenses. A panel decision was rendering, saying that the

1 subpoena should be enforced, that it did not find the defen-  
2 ses acceptable, but that due to the presence of 437h they  
3 felt that the constitutional defenses raised to the subpoena  
4 should be certified to the en banc Court of Appeals.

5 The en banc Court of Appeals in the decision that  
6 was rendered last week, following the 9th Circuit, indicated  
7 that it felt that due to the same kinds of considerations that  
8 had bothered the 9th Circuit, that it should hear that case  
9 pursuant to Rule 35.

10 QUESTION: And did the panel members sit on the  
11 en banc?

12 MR. STEELE: Yes, they did.

13 QUESTION: Under 35?

14 MR. STEELE: Of the panel members, there was some  
15 disagreement as to the requirement, but the court as a whole  
16 in a vote that was 20 to 4 felt that they should sit pursuant  
17 to Rule 35.

18 QUESTION: And would you suggest, whether, had there  
19 been 437, that they would have sat at all?

20 MR. STEELE: Well, the suggestion is that they felt  
21 that they did not have to sit pursuant to 437h; since the  
22 case had only come to them that way from the panel, I don't  
23 think that there was any indication that they would have  
24 judged it by the standards of Rule 35.

25 Again, with regard to the underlying constitutional

1 question that I think that the courts of appeals have now --  
2 three of them, including the Court of Appeals for the District  
3 of Columbia here, I think the considerations, the fears, are  
4 set forth in the dissenting opinion in the court below, that  
5 at some juncture a command to the courts to sit en banc be-  
6 comes an interference with the internal proceedings.

7 In response to Mr. Justice Rehnquist's question,  
8 my understanding of the Western Pacific case was that absent  
9 a statutory provision that the courts of appeals were free to  
10 set rules for the hearings of their cases en banc, it would  
11 seem here that that case would not govern, in the sense that  
12 there is a specific statutory provision.

13 QUESTION: But Western Pacific also held that there  
14 had to be some proceeding for a hearing. In those days there  
15 just wasn't any hearing en banc in the 9th Circuit. You had  
16 your three-judge opinion and you would file a paper with the  
17 clerk asking for a petition for rehearing en banc and you  
18 never heard anything more about it. And this Court held that  
19 the court was free to establish any reasonable proceedings,  
20 as I understand it, for granting or denying a petition for re-  
21 hearing en banc, but there had to be some proceeding whereby  
22 the petition was at least considered.

23 MR. STEELE: I think that's correct, resolving the  
24 conflict with the 3rd Circuit, which had held that it had had  
25 that power in the Textile Mills case, and I think Western

1 Pacific follows that. I don't think it reaches the question  
2 here where Congress has explicitly put forward the en banc  
3 requirement. It is our contention, however, that that does  
4 seem to be a serious question, one that does seem to have  
5 constitutional dimensions, at least in the thought of many of  
6 the judges in the courts below, and certainly one that would  
7 lend support in our mind that either to avoid that question  
8 or to avoid that kind of use of resources, that this Court  
9 should narrowly construe 437h as a whole not to reach such  
10 cases as ones like this where the Commission after an investi-  
11 gation and a notification to parties where they are allowed  
12 to raise defenses, where there were not only the matters that  
13 are at issue here, but were matters of excessive contribu-  
14 tions to particular candidates raised, of failure to register  
15 affiliation, that when proceedings like that have started,  
16 or in the Lance case where, in effect, the Commission under  
17 a command to investigate things expeditiously is trying to  
18 obtain enforcement of a subpoena; that to read 437h to require  
19 the courts of appeals to sit, listen and try and decide in  
20 the most abstract kind of setting all constitutional questions  
21 that might be raised is certainly not a good use of judicial  
22 resources and one that would not seem to be mandated by the  
23 words of the statute, which, as I say, seem to leave discre-  
24 tion in the courts of appeals, the language, "as may be  
25 appropriate."

BOSTON CONTENT

1           QUESTION: Although every -- as I understand it,  
2 at least, every court of appeals has accepted the basic  
3 appealability provisions of 437h, and what they've done is  
4 duck the en banc requirement of 437h. Is that correct?

5           MR. STEELE: I think that's correct. They have  
6 dealt with it in various different ways.

7           QUESTION: Right.

8           MR. STEELE: For instance, in the 2nd Circuit,  
9 in the CLITRIM case, they there took their case on the 437h  
10 certification but turned around and said, but the only way  
11 we can see to deal with these issues that are being raised  
12 is to send it back to the district court where you have, in  
13 effect, the trial of the 437g proceedings. All the defenses  
14 were raised there, the Commission put on its case, the de-  
15 fense put on its case. It came back up to the Court of  
16 Appeals and the Court of Appeals says, as a matter of statu-  
17 tory construction the Commission is wrong, there is no  
18 offense stated. So in effect, though they retained that  
19 there is a 437h case; they really as a matter of practice  
20 did that which it seems to us that this Court should indicate  
21 to the courts of appeals that they can do under 437h.

22           QUESTION: But in this case, the Court of Appeals  
23 for the 9th Circuit, while it avoided what it thought to be  
24 an issue, a serious issue as to the constitutionality of the  
25 en banc requirement, nonetheless accepted the merits of the

1 appeal under 437h, although I guess it would have been an  
2 interlocutory appeal and not appealable under the general  
3 appeal statute.

4 MR. STEELE: That seems to be -- it seems almost  
5 there to be a bootstrapping, it seems to me that they took  
6 half the loaf and I would argue, anyway, that by not obeying  
7 the commands of 437h, they therefore despite the statement  
8 in there, in their opinion, were not hearing the case pur-  
9 suant to their 437h jurisdiction.

10 QUESTION: Although they said they were.

11 MR. STEELE: They said they were.

12 QUESTION: And, indeed, that's pretty much what  
13 the Court of Appeals for the District of Columbia said it was  
14 doing in Buckley v. Valeo, a case in which we accepted juris-  
15 diction under 437h, appellate jurisdiction.

16 MR. STEELE: I think that's correct. I think those  
17 issues were not fully explored there.

18 QUESTION: Perhaps not.

19 QUESTION: Mr. Steele, does this bring you out that  
20 if we were to agree with you that this had to be a 437 en  
21 banc or not at all, and that really it wasn't 437 en banc,  
22 that they had no jurisdiction?

23 MR. STEELE: Yes. And that the decisions that they  
24 reached would then be reached in the course of the 437g  
25 proceeding, which is presently on appeal in the course of



1 normal events, it's on appeal in front of the United States  
2 Court of Appeals for the 9th Circuit.

3 QUESTION: You would say it was a jurisdictional  
4 matter?

5 MR. STEELE: Yes. We would say it was jurisdic-  
6 tional and that was our brief to the 9th Circuit. We said  
7 that you should dismiss, alternately, if you conclude that  
8 you have 437h jurisdiction, that you should decide the con-  
9 stitutional questions --

10 QUESTION: What if in that section of the opinion  
11 that Mr. Justice Rehnquist read to you, they had said, we are  
12 in doubt as to the source of our jurisdiction here, so we  
13 will consider ourselves sitting under 437h and the rule,  
14 both. Any problem?

15 MR. STEELE: It would seem to me that where they  
16 refuse to follow -- I think the problem is that where they  
17 refuse to follow the commands of the statute, for them then  
18 to say that they're sitting under that jurisdiction. And it  
19 also seems to me that though there are exceptions, I know --

20 QUESTION: If they have the requisite number of  
21 people there, what difference does it make whether they're --  
22 under which statute they say they're sitting any more than  
23 it would make difference whether they did or did not wear  
24 their robes?

25 MR. STEELE: Well, they would have to find, and

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1 you would have to approve of their finding jurisdiction under  
2 437h but not following the commands of en banc, because other-  
3 wise it would seem, or at least we would argue, there was no  
4 other statute that gives them jurisdiction. Rule 35 certainly  
5 doesn't given them jurisdiction. It would be like an interlocu-  
6 tory appeal which could not --

7 QUESTION: This has something of the ring of common  
8 law pleading of some centuries ago. As long as you have the  
9 proper people there, I repeat, what difference does it make  
10 which statute they said they were operating, they were  
11 gathered and assembled under?

12 MR. STEELE: Well -- Excuse me.

13 QUESTION: Mr. Steele, am I not correct in thinking  
14 your fundamental position is that the district court did not  
15 have jurisdiction, isn't that right?

16 MR. STEELE: Yes.

17 QUESTION: And everything else follows from that --

18 MR. STEELE: Yes.

19 QUESTION: Under your argument. Now, if the dis-  
20 trict court did have jurisdiction, and therefore an appeal  
21 was properly -- or the question was properly certified to the  
22 Court of Appeals, and if in fact they sat en banc, then there  
23 will be no jurisdictional problem?

24 MR. STEELE: I think that's correct. ~~Thank~~

25 QUESTION: Except, were we to review the exercise

1 of their decision to sit en banc under Rule 35, because that  
2 does lay down some standards for a court convening en banc  
3 under Rule 35 in an exceptional case, and hearings en banc  
4 are not favored, and that sort of thing?

5 MR. STEELE: It does seem to me that you would have  
6 to look at that. I'm not sure that's responsive to your  
7 point.

8 QUESTION: It is.

9 QUESTION: In any event, Mr. Steele, if in fact --  
10 I understand that the district court had jurisdiction.  
11 I know you argued it didn't, but if it did, then what the  
12 Court of Appeals said in their opinion, that they were sitting  
13 under 35 and not under 437h, would be immaterial?

14 MR. STEELE: I think that's correct. I think, how-  
15 ever, that the opinion of the Court of Appeals as the opinion  
16 of the Court of Appeals for the 5th Circuit suggests, that  
17 the courts of appeals are concerned to understand whether or  
18 not they are required, every time there is an arguable consti-  
19 tutional question that comes up, as to whether they are re-  
20 quired to sit en banc. So that though you might find that  
21 there was appropriate jurisdiction to decide this case because  
22 they had rested it in part on 437h, though I would argue that  
23 their failure to follow it would destroy the jurisdiction.

24 QUESTION: And your argument that the district court  
25 has no jurisdiction relies on the fact that there was then

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1 pending a proceeding before the Commission?

2 MR. STEELE: Yes. I should -- the pendency -- the  
3 Commission's proceeding had been pending for a period of  
4 approximately a year, and we would rely on that fact. We had  
5 not yet filed in the district court. We had announced our  
6 intention to in order to try and see if we could settle the  
7 case without going further. But the pendency of the pro-  
8 ceedings -- because what seems to us the unfortunate result  
9 here is that you really get a bifurcation, you get a bifurca-  
10 tion in the sense that the question, the constitutional  
11 question goes up in its barest form; meanwhile the other pro-  
12 ceeding continues; and you get a waste of resources both at  
13 the Commission, but more prominently, you really get a great  
14 loss of resources in the courts of appeals. I mean, the en  
15 banc -- of course, the 5th Circuit is now being split so the  
16 20 to 4 is no longer there, but as Mr. Zimmerman has indicated  
17 the 9th Circuit is now approaching that difficulty too. And  
18 that's an immense use of judicial resources, so that an indi-  
19 cation that they could narrowly construe their jurisdiction  
20 and refuse to hear those questions, I think, would avoid this  
21 whole question of whether or not they're required to sit en  
22 banc.

23 QUESTION: Your view of the jurisdiction is that it  
24 determines on a proceeding being pending before the Commis-  
25 sion? As soon as a proceeding is instituted before the

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1 Commission in some informal way, the district court will lose  
2 jurisdiction?

3 MR. STEELE: Well, of course, the proceedings in  
4 front of the Commission really don't begin in informal ways.  
5 There's a process for filing of a complaint and notice to the  
6 parties which sets forth the factual and legal basis.

7 QUESTION: I meant, is it a formal proceeding  
8 before the Commission would oust the district court of juris-  
9 diction under 437h?

10 MR. STEELE: I would certainly say in those circum-  
11 stances it would not. I'm not sure that there might not be  
12 informal proceedings if the Commission was holding rulemakings  
13 on a particular subject or some other forum. But it might not  
14 not --

15 QUESTION: Aren't you really asking us to rewrite  
16 the statute?

17 MR. STEELE: No, I think that I'm only asking you  
18 to say that the statute vests in the courts a discretion under  
19 the terms, "as may be appropriate," only to take under 437h  
20 jurisdiction very, very specialized kinds of cases which  
21 raise basically facial issues. I must agree that in any  
22 facial issue you probably run into matters of statutory  
23 construction that are at least peripherally related, but that  
24 that was really the sole purpose of 437h.

25 QUESTION: We have a facial issue here, don't we?

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SUPERIOR COURT

1 MR. STEELE: Well, you have a facial issue here as  
2 well as issues of how it's applied, because the trial in the  
3 court below is related to questions of allocation, is related  
4 to other offenses, so that you may have a facial question, but  
5 you may never reach it, which is of course the other reason  
6 that I would argue that you should limit the jurisdiction is  
7 because you may never need to reach that question in this  
8 case. It may be resolved in other fashions.

9 QUESTION: Procedurally, then, you agree with Judge  
10 Wallace?

11 MR. STEELE: I think, yes, I think that the line be-  
12 tween -- you asked earlier the question about the line between  
13 "as applied" and "facial" and I'm not sure that it is totally  
14 clear in all instances, but I think that's a basic line that  
15 is sufficiently clear that that should be hewed to; that  
16 "as applied" is really remitted by the statute to the advisory  
17 opinion proceedings and the 437g enforcement proceedings.

18 I would note in contrast to when the statute was  
19 before this Court in Buckley that the advisory opinion section  
20 of the statute has been altered in 1979 amendments to allow  
21 any person to require of the Commission an interpretation on  
22 any transaction they're involved in, so that in vagueness  
23 terms the problem that the Court there was concerned with  
24 has to some extent been mitigated by the fact that there is  
25 an advisory opinion proceeding, where the Commission can

1 indicate its interpretation of the law. So that in effect  
2 I think that those proceedings in front of the Commission are  
3 adequate to take care of "as applied" situations as opposed  
4 to "facial."

5 I would like to turn to the substantive issue here  
6 raised, because it seems to me to be one of considerable im-  
7 portance. Basically, the underlying thrust of the entire  
8 statute, which I think that appellants here do not really  
9 contest, is that the Congress had a right to battle the per-  
10 ception that sizable campaign contributions channeled through  
11 various sources should not be perceived, that the appearance  
12 cannot be there, that sizable campaign contributions, not the  
13 public interest, is what controls.

14 In effect, they do not really challenge the overall  
15 interest in the statute. Their real challenge, it seems to  
16 me, is to the extent of the limitation. They argue that the  
17 statute sweeps too broadly, that the statute could and does  
18 in more limited means achieve the same effect.

19 The question there, it seems to me, is what inter-  
20 ests are at stake? You have, in effect, a statute which seeks  
21 to protect the public interest against the corrupting power  
22 of money in elections. On the other side you clearly have  
23 important individual interests at stake, individual inter-  
24 ests in speech and individual interests in association. And  
25 those are very precious individual freedoms.

MILLERS FALLS  
REBRASS  
COTTON CONTROL

1 But this is not a statute which proscribes all  
2 kinds of speech. Indeed, the statute speaks very narrowly.  
3 Each one of the individual doctors, the 43,000 doctors that  
4 are members of this association, can give that association  
5 \$5,000. Each one of those doctors can give \$1,000 to any  
6 candidate of his choice. Each one of those doctors can  
7 engage in activities, volunteer activities which are exempted  
8 by the statute from the contribution definitions.

9 QUESTION: So far as contributions go, each doctor  
10 is limited to a total of \$25,000 per annum, isn't he?

11 MR. STEELE: Yes. The individual -- And it seems  
12 to us that the very rationale that this Court used in  
13 approving the \$25,000 limitation and the \$1,000 limitation on  
14 contributions to candidates, is the same rationale that is  
15 involved here, to wit: that you do not have a situation --  
16 I mean, in effect, that the holding in Buckley in that area  
17 was that the contribution limitation served a strong interest  
18 in limiting impropriety from permitting unlimited contribu-  
19 tions.

20 Congress could -- and this is quoting from page 30  
21 of Buckley -- "provide that the opportunity for abuse inherent  
22 in the raising of large contributions could be controlled by  
23 contribution limitations."

24 And at page 38 of that opinion invalidating the  
25 \$25,000 limitation, that same language was used. And what



1 Congress did in 1976 following the Buckley decision in its  
2 attempt to try and put the statute, to enact the statutes  
3 back after -- to reenact the Commission, et cetera, what it  
4 did was to say that, well, what we see is the possibility that  
5 if you do not put a limitation on contributions by persons to  
6 committees, that you will have inherent in that a system where  
7 there will be many more committees, where committees -- either  
8 by direct or indirect means, people will not be abiding by the  
9 contribution limits, because they will be able to give amounts  
10 to this committee, amounts to another committee. Because per-  
11 sons, unlike individuals, are not limited, so that associa-  
12 tions such as CMA could give \$5,000 to -- could give unlimited  
13 amounts without the \$5,000 limits, to as many committees as  
14 they wanted, and that while there are in the statutes the nar-  
15 row proscriptions which Mr. Zimmerman has referred to,  
16 441a(a)(7), -a(a)(8), and -a(a)(5), limiting conduits, limit-  
17 ing, making as a contribution anything done in coordination with  
18 candidates, and limiting the proliferation of committees, that  
19 the very thrust of the Court's reasoning in upholding the  
20 contributions limit previously was that Congress did not need  
21 to rely on those prohibitions, that the contribution limits  
22 served an independent purpose by, as the Court says,  
23 "avoiding the opportunity for abuse inherent in the raising  
24 of large contributions."

25 QUESTION: Do you see a constitutional objective,

1 a proper constitutional objective, in limiting what you call  
2 the proliferation of committees?

3 MR. STEELE: I think that the legitimate constitu-  
4 tional objective there is to deal with the problem that  
5 Congress had met under the old statutes that the prolifera-  
6 tion of committees was used as a method for avoiding the con-  
7 tribution limitations, that the history of the statutes before  
8 1971 and the history of the hearings, particularly, I think,  
9 in the '47 hearings, are full of the instances that by  
10 creating a variety of committees that the then-existing limi-  
11 tations were avoided and so I think that there is a very dis-  
12 tinct constitutional underpinning for the limitation of the  
13 proliferation of committees.

14 I would like to turn momentarily to the charge that  
15 there is discrimination here, in the sense that the provision  
16 limiting unincorporated associations, all persons, to \$5,000,  
17 discriminates in a way against those organizations because  
18 corporations and labor organizations, which are separately  
19 regulated and have been, again since 1907, are permitted to use  
20 their internal funds for the costs, of the administrative  
21 costs, the very argument that is here made by appellants.

22 In effect, it seems to me that that's a question of  
23 classification. The Congress over the course -- since 1907  
24 is the first statute, again, I would not go back through all  
25 the history of these statutes, because I think it's set forth

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1 in the great trilogy of cases of U.S. v. CIO, the UAW case,  
2 and then the Pipefitters' case, of the evolution of these  
3 statutes. But the provisions now in 441b, back then in  
4 18 U.S.C. 610, are really a product of the dialogue between  
5 this Court and Congress, where Congress having put a total  
6 prohibition on corporations and labor organizations, having  
7 concluded that those organizations, because of their direct  
8 relationship to the economy, deserved specialized treatment;  
9 having put that total prohibition on, was warned by this  
10 Court that that prohibition could not be used as a means of  
11 keeping the organization from fostering its communication to  
12 its members and of fostering its legitimate purposes.

13           So that you have there a compromise that was worked  
14 out back and forth, of course, majorly in the Hansen amend-  
15 ment, which was indirectly before this Court but heavily  
16 covered in the Pipefitters' decision, saying that the prohibi-  
17 tion of direct contributions, to the prohibition of making  
18 direct expenditures in elections, is balanced in the statute  
19 by provisions that specifically provide for communication and  
20 specifically resolved the then-unanswered question under the  
21 previous statute, of that one of the matters that could be  
22 done was to provide for this kind of administrative support.

23           To suggest, as the dissent below does -- and as I  
24 think Mr. Zimmerman does in his argument -- that because  
25 Congress in making that balancing out has allowed corporations

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1 and labor organizations to spend those administrative ex-  
2 penses, that that is a benefit that can be seen apart from  
3 and distinguished from the overall total scheme of regulation  
4 which substantially prohibits corporations and labor organiza-  
5 tions in the way that no other persons are, is to suggest,  
6 I think, as the majority of the court below indicated, is  
7 to suggest a false question.

8           Because, in effect, the classification -- I think  
9 the classification of corporations and labor organizations  
10 would even withstand strict scrutiny, but I don't think that  
11 this Court in looking at that has ever even thought that  
12 strict scrutiny applied to such a classification. But those  
13 organizations, what they do is really an offshoot of their  
14 economic interests, and that very powerful, very strong  
15 economic interest is what has led to the congressional regu-  
16 lation of them.

17           In effect, to sum up the Commission's argument,  
18 on the statutory issue, it seems to us that the \$5,000 limi-  
19 tation on contributions, five time that which could be given  
20 by an individual to a candidate of its choice, where that  
21 was spoken of as, albeit, a limitation on a matter of First  
22 Amendment values, was a limitation that was on speech that was  
23 not direct speech, but was really speech that was only -- it  
24 was less direct than the independent expenditures issue. And  
25 the same limitation on the \$25,000, that the \$5,000 limitation

COTTON CONTENT

1 on contributions to political committees, serves the same  
2 purposes and falls well within the parameters of this Court's  
3 decision on contributions in Buckley v. Valeo.

4 Similarly, I think this Court should reject the  
5 argument that because Congress in adhering to the express  
6 doubts on the constitutionality of the structure of 610,  
7 now 441b, had worked out a special system of regulation that  
8 you would find invidious discrimination because of that  
9 careful constitutional balancing which Congress went through  
10 in response to this Court's decisions. Thank you.

11 MR. CHIEF JUSTICE BURGER: Do you have anything  
12 further, Mr. Zimmerman? You have about two minutes left.

13 ORAL ARGUMENT OF FREDERICK C. ZIMMERMAN, ESQ.,

14 ON BEHALF OF THE APPELLANTS -- REBUTTAL

15 MR. ZIMMERMAN: Mr. Chief Justice; may it please  
16 the Court:

17 Counsel's interpretation of two separate provisions  
18 regarding jurisdiction would in effect merge two very differ-  
19 ent statutes. One looks backwards, it deals with enforce-  
20 ment, with the correction of a wrong already done, with the  
21 potential fine for a violation. That's 437g.

22 The other looks forward. It allows actions for  
23 declaratory relief, actions to construe the constitutionality  
24 of the Act. It's an extraordinary provision because the  
25 rights involved here are extraordinary. It's important to

COTTON CONTENT

1 keep the distinction clearly in mind that the statutes should  
2 not be merged. They are separate for a very important rea-  
3 son.

4 QUESTION: But here your defense to the 437g action  
5 was precisely the same as your offense in the 437h action,  
6 was it not?

7 MR. ZIMMERMAN: Yes, Your Honor, and to cause us  
8 to wait for the Commission to file an enforcement proceeding,  
9 and to wait for them to move it through the courts, and to  
10 rely on the vagaries of their administrative processes lead-  
11 ing up to an enforcement action, means that we have to put  
12 off the resolution of those questions.

13 QUESTION: Of course, that's the fate of most liti-  
14 gants.

15 MR. ZIMMERMAN: Well, Your Honor, we are partici-  
16 pating in a political process and the Commission indicates  
17 that we violated the law in an administrative ruling. We have  
18 no recourse but to wait for them to do something, or to bring  
19 an action to construe the constitutionality of the --

20 QUESTION: Well, you can just go ahead and do what  
21 you think is right, and then maybe they will bring an action.

22 MR. ZIMMERMAN: Well, that's fine, Your Honor, but  
23 that's done then at our peril, and that's the purpose of this  
24 section.

25 QUESTION: That's right. And that's what most

COTTON CONTENT

1 litigants have to do.

2 MR. ZIMMERMAN: Well, Your Honor, but in the election --

3 QUESTION: You say Congress has provided that you  
4 don't have to do that? Congress has provided that you

5 MR. ZIMMERMAN: Absolutely. It's so important that  
6 we need this section. Secondly --

7 QUESTION: You wouldn't say that your case and the  
8 Commission's case, if it brought one, couldn't go ahead simul-  
9 taneously?

10 MR. ZIMMERMAN: It did go ahead simultaneously.

11 QUESTION: And if they came to judgment first --

12 MR. ZIMMERMAN: That's fine.

13 QUESTION: Then you might seek review of that.

14 MR. ZIMMERMAN: Your Honor, there was a motion to  
15 stay in the enforcement action. We made the motion, to pre-  
16 serve -- you know, working in two places at once.

17 QUESTION: And you were turned down? Now?

18 MR. ZIMMERMAN: Judge Orrick denied that.

19 MR. CHIEF JUSTICE BURGER: Thank you, counsel.  
20 The case is submitted.

21 (Whereupon, at 3:01 o'clock p.m., the case in the  
22 above-entitled matter was submitted.)

CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1952

CALIFORNIA MEDICAL ASSOCIATION ET AL.,

V.

FEDERAL ELECTION COMMISSION ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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