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IN THE SUPREME COURT OF THE UNITED STATES

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EDWIN MEESE, III, ATTORNEY :

GENERAL OF THE UNITED STATES, :

AND JOSEPH E. CLARKSON, :

Appellants :

v. : No. 85-1180

HARRY KEENE :

- - - - -x

Washington, D.C.

Tuesday, December 2, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:00 o'clock a.m.

APPEARANCES:

DONALD B. AYER, ESQ., Washington, D.C.;

on behalf of Appellants.

JOHN G. DONHOFF, ESQ., Larkspur, Calif.;

on behalf of Appellee.

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1 The Foreign Agents Registration Act as enacted
2 in 1938 and amended several times since then sets up a
3 scheme of registration and reporting by agents of
4 foreign principals. The agents under the Act are
5 required to first register and provide information
6 concerning themselves and concerning their foreign
7 principals, also to provide information in separate
8 reports about the dissemination of political advocacy
9 material, which is referred to under the statute by the
10 term "political propaganda."

11 Finally, the agents are required to label any
12 such political propaganda or foreign political advocacy
13 material as defined in the statute with a label setting
14 forth certain information, including their identities
15 and the identities of their procedure principals and a
16 number of other matters as well.

17 The label itself which is required to be
18 attached to the material does not use the words
19 "political propaganda."

20 The district court in this case noted in its
21 rather lengthy opinion that the definition of "political
22 propaganda" as set forth in the statute is in fact
23 neutral and in no way carries negative connotations.
24 Notwithstanding that and notwithstanding the fact that
25 this statute by its direct requirements and restrictions

1 in no way touches upon this defendant, who is not a
2 foreign agent, who is not an agent of a foreign
3 principal, who is not a foreign principal, and who is
4 not required to file any report under the statute, and
5 indeed is not even barred from removing or omitting to
6 show a label attached to any material which he does have
7 which comes within the statute, the district court
8 nonetheless found:

9 First, that the Appellee had standing, on the
10 ground that he was a person whose reputation would be
11 impaired by association with material that had been
12 classified as political propaganda;

13 And secondly, on the merits of the case, found
14 that the negative impact on the reputation of anyone
15 associated with the material was such as to amount to a
16 First Amendment violation; and indeed, went on to say
17 that Congress in enacting the statute deliberately set
18 forth to suppress speech, that is the category of speech
19 covered by the terms "political propaganda."

20 And on that basis the district court enjoined
21 the enforcement of four sections of the statute which
22 apply with reference to political propaganda.

23 QUESTION: Which sections are those, Mr.
24 Ayer?

25 MR. AYER: They're Section 611(j), which is

1 the definition of "political propaganda"; and Section
2 614(a), (b), and (c), which pertain to the dissemination
3 report requirements and the labeling requirements.

4 QUESTION: Well, also the public inspection
5 requirements, I gather.

6 MR. AYER: That's correct. That's section
7 (c).

8 QUESTION: That although the statute says that
9 "copies of political propaganda required by this
10 subchapter to be filed with the Attorney General shall
11 be available for public inspection," the district court
12 enjoined the enforcement of that part of the statute?

13 MR. AYER: I believe that's Section (c), Your
14 Honor, and that is correct, yes.

15 We think that the character of the challenge
16 which was brought here -- that is, a challenge to
17 terminology rather than a challenge to the substantive
18 requirements of the statute -- is very important to both
19 the standing and merits issues that are presented.
20 Because it is that sort of narrow challenge to the
21 precise use of words by Congress, any analysis both for
22 standing purposes and for merits purposes must go
23 forward with the idea in mind that the substantive
24 scheme, leaving aside the words "political propaganda,"
25 is itself valid.

1 It has not been challenged. It has not been
2 challenged here and it's not been questioned seriously
3 before. So that in determining what effect the words
4 have, the words "political propaganda," we must keep in
5 mind that we have in effect a registration requirement
6 for foreign agents, an updating requirement as to that
7 registration requirement.

8 A great deal of material is required by those
9 requirements: The singling out of political advocacy
10 material by whatever definition or set of words one
11 wants to describe it, nonetheless the same mechanism is
12 in place by different words, if not by the words
13 "political propaganda," the labeling of that advocacy
14 material with the label that is set forth at page 4 of
15 our brief and the filing of dissemination reports with
16 regard to the material that is defined as political
17 propaganda, or by whatever term you would use.

18 So that what is at issue here is not the power
19 of the Congress or the Government to in the abstract
20 single out certain material and simply refer to it by
21 the words "political propaganda." It is rather whether
22 Congress can use the words "political propaganda" as an
23 internal legislative classification device, defined in
24 the statute in a non-pejorative way consistent with at
25 least one meaning, one common usage meaning of the word

1 "propaganda," and in a statute whose clear purpose is to
2 disclose and to require disclosure of information,
3 rather than to suppress or in any way restrict the flow
4 of material.

5 We think the narrow character of that
6 challenge is relevant, first of all, on the question of
7 standing. Just as the Appellee here had no standing, I
8 think, clearly to challenge the substantive provisions
9 of the statute, because he is not affected by them in
10 any way, we think that he had no standing to nitpick
11 about the particular terminology that Congress chose to
12 use.

13 QUESTION: Mr. Ayer, in that regard I guess
14 Senator Keene submitted uncontroverted affidavits that
15 exhibiting the films would harm his re-election
16 efforts. Could that give him sufficient injury to give
17 him standing, do you think?

18 MR. AYER: Well, when one looks at the
19 declarations that were filed in this case, declarations
20 in particular by Mr. Bistrin and Mr. Freed and Mr.
21 Peterson, at least two of those, Bistrin and Peterson,
22 deal with the re-election campaign problem.

23 I think what one sees is a primary concern
24 with resentments in the district toward foreign
25 influences, particularly foreign competition. There's

1 discussion about a high unemployment rate, people are
2 anxious and concerned about anybody who would be
3 involved with --

4 QUESTION: Well, he submitted affidavits
5 showing third party resentment or consequences to him if
6 he exhibited the films, isn't that right?

7 MR. AYER: Well, I think in a sense yes, Your
8 Honor. But what is important is that those consequences
9 must be measured. What you must be measuring, since the
10 challenge is only to the words "political propaganda,"
11 we must be looking at how the words "political
12 propaganda" make more severe or distinct or aggravate a
13 harm which I think is clearly implicit to some degree in
14 the statute itself.

15 We're talking about a statute that registers
16 and discloses information about foreign -- dissemination
17 of foreign information. And what we're having to
18 analyze here for standing purposes is the incremental
19 harm, if any, that results within that statute from the
20 particular selection of the words "political
21 propaganda."

22 And my point in looking at these affidavits is
23 that the resentments to foreign competition, the anxiety
24 or concern that would be expressed by the people on what
25 they describe as large naval and military bases within

1 the district toward foreign sources, those kinds of
2 concerns are not alleviated significantly by changing
3 the words "political propaganda" to something else.

4 Taking the conventional approach of analyzing
5 standing in terms of the --

6 QUESTION: May I ask one other question on
7 standing, Mr. Ayer. Does he allege at any time that the
8 statute adversely affects the number of people who will
9 see the films that he wants to exhibit?

10 MR. AYER: No, he does not. In fact, I think
11 in, I think it's footnote 14 of their brief, they
12 specifically indicate that they do not make that
13 allegation.

14 QUESTION: So that all they're really
15 complaining about is the reputational harm?

16 MR. AYER: That's correct, yes.

17 QUESTION: I gather that there wouldn't have
18 been this case if all that was required was that this
19 label be put on and with respect to some material that
20 was otherwise described?

21 MR. AYER: I think that's correct, Your
22 Honor. Certainly as the case ended up before the
23 district court at the cross-motions for summary
24 judgment, it is completely clear from both the words of
25 the Appellee's attorney and from the words of the

1 district court that the only issue is the use of the
2 words "political propaganda."

3 Now, we don't think, therefore, that -- for
4 the reasons that I gave in answer to Justice O'Connor,
5 we don't think that a distinct and palpable injury can
6 be said to be fairly traceable to the words, as distinct
7 from the requirements of the statute.

8 QUESTION: What about -- you don't think the
9 label itself is what was annoying the plaintiff?

10 MR. AYER: Well, a couple of points on that.

11 QUESTION: If that identified him with some
12 foreign source, wasn't that what he was complaining
13 about?

14 MR. AYER: Well, I think at one point in the
15 case an effort was made to complain about that. The
16 district court found at the initial preliminary
17 injunction hearing that there was no standing to
18 complain about the label. I think that's at pages 54
19 and 55 of the joint appendix -- I'm sorry, of the
20 appendix to the jurisdictional statement.

21 But more importantly -- well, I suppose not
22 more importantly, but in addition to that, it is clear
23 also from the district court and from the law that there
24 is no requirement of showing the label; that when he
25 shows the film he may physically remove the label, if

1 indeed it's on the film, or he may advance the film to
2 the point where the label isn't visible.

3 We think that, for the same reasons that there
4 is no distinct and palpable injury fairly traceable to
5 the words "political propaganda," the removal of those
6 words or the substitution of other words for those words
7 would not remedy the injury that's alleged.

8 The films would still possess the same label.
9 The Appellee would still be associated with foreign
10 source political advocacy material. And most of the
11 problems that are cited in the affidavits would still
12 exist.

13 Now, there is the remaining factor of the
14 affidavits of Mr. Newman and Mr. Doob, which relate to
15 the actual connotations of the words "political
16 propaganda." And a couple of, I think, points need to
17 be made from the statute itself.

18 One is that the words themselves are defined
19 in the statute in a neutral way, and so we have to
20 assume that people are going to learn about the words,
21 which do not appear on the label, but not learn about
22 how they're defined in the statute and not try to find
23 out, and jump to the conclusion based on common
24 connotations which people do sometimes draw from those
25 words that the material is somehow to be viewed in a

1 negative way and, furthermore, that people associated
2 with it, who show it, giving whatever introduction they
3 may want to give, that they too suffer from whatever the
4 negative connotations are of the material.

5 QUESTION: How would you distinguish the
6 Lamont versus the Postmaster General case? That
7 certainly discusses the coercive effect of labeling for
8 standing purposes.

9 MR. AYER: Well, I think in Lamont that the
10 main distinction that was drawn by the Court was the
11 requirement of some affirmative action, which I take to
12 mean something more than private affirmative action like
13 snipping the label off of a film.

14 The affirmative action required was the actual
15 request to the post office to deliver what had been
16 described under the statute as "communist political
17 propaganda." So that one has to go essentially on some
18 sort of public record saying that one wants that
19 material delivered to one's house.

20 QUESTION: Would this be a different case if
21 we were dealing with something that the Congress had
22 labeled communist political propaganda on these films?

23 MR. AYER: It would be a different case, but I
24 think the outcome would be the same. The different case
25 because attaching the word "communist" would accentuate

1 the negative connotations and perhaps increase the
2 argument for a genuine cognizable, recognizable injury.

3 But I think that the outcome would be the
4 same, primarily because the Congress ought to be free,
5 within some fairly wide parameters, to define its
6 terminology and use it in a way that it desires to. And
7 I think the important point here is that Congress has
8 not made up a definition that's completely unrelated to
9 the word.

10 It has taken one of the main line conventional
11 meanings of the word "propaganda" and applied it to the
12 word, to the word. And it has done it in a way that the
13 district court itself found to be completely neutral and
14 without negative connotations.

15 To suggest that Congress can't take a word and
16 select one of its definitions and say, now, we don't
17 want any mistake, this is what we mean, I think is to
18 say that courts are ready to invade very far into the
19 scope of Congress' authority --

20 QUESTION: Mr. Ayer, I think that goes to the
21 merits rather than the standing question. Confining it
22 for the moment to the standing issue, supposing they use
23 the word obscenity or obscene or pornographic or
24 something like that to classify a certain category of
25 motion picture, and it was an overly broad description,

1 it covered wearing your shirt sleeves or something like
2 that.

3 Could an exhibitor object to that on the
4 ground that it adversely affected his reputation to be
5 described as a person showing obscene films when he
6 didn't think they really were obscene?

7 MR. AYER: I think it would require an
8 analysis of the extent of the harm that might result.

9 QUESTION: He comes in and alleges, a lot of
10 people say you're a bad man because you show obscene
11 films. He makes sort of a general affidavit that it
12 harms his ability to get elected to be a state senator,
13 the same sort of affidavit you have here, in other
14 words.

15 MR. AYER: And your question is whether that
16 would --

17 QUESTION: Whether he's have standing to
18 object to that kind of a definition in a federal
19 statute.

20 MR. AYER: I think if the word was defined in
21 a way that was consistent with a conventional meaning
22 such that Congress was not making it up --

23 QUESTION: In other words, it seems to me that
24 whether the definition is a good one or not goes to --
25 you say that determines the standing as well as the

1 merits?

2 MR. AYER: Well, I think in standing what
3 we're trying to look at is the nature of the injury, and
4 we're trying to determine whether there is a cognizable
5 injury, whether it rises to a sufficient level that it's
6 recognizable.

7 And I think that --

8 QUESTION: You think in my obscenity example
9 it would depend on how good, how accurate the definition
10 was?

11 MR. AYER: I think that would be a factor. I
12 think you would have to at least consider whether
13 Congress had taken a word which has --

14 QUESTION: Well, he alleges in his complaint
15 that the definition is an inaccurate one, as I guess
16 this -- here he concedes that the definition of
17 "propaganda" is a neutral definition, does he? The
18 judge found that, I know, but did the plaintiff also
19 concede that?

20 He doesn't object to the definition of
21 "propaganda"?

22 MR. AYER: I don't know whether the -- I think
23 the plaintiff may not concede that it's a neutral
24 definition. I believe that's true.

25 QUESTION: So in my hypothetical he's

1 challenging the accuracy of the definition of obscenity
2 and he also says that it harms his reputation because he
3 wants to show some films that would fit within the
4 definition. You'd say that he'd have no standing to
5 object?

6 MR. AYER: I think I can't answer that without
7 going to another question, which I think ultimately the
8 Court doesn't have to resolve here, and that is the
9 question of whether Government speech in pursuit of any
10 goal that Government, Congress, whatever, has the power
11 constitutionally to pursue, whether that speech may ever
12 be attacked on First Amendment grounds.

13 And I think -- I don't know the answer to
14 that, but --

15 QUESTION: Well, but even if it can't, that
16 again would be a merits answer, wouldn't it? You
17 wouldn't suggest that no one would ever have standing to
18 challenge it? It may be that the Government has an
19 absolute right to say what it wants to, but are you
20 suggesting that no matter how harmful the speech might
21 be, calling a person vile names and all, that there
22 would be no standing to challenge that? That's pretty
23 extreme.

24 MR. AYER: Well, I'm not saying that there
25 would never be standing.

1 QUESTION: Well, I'm only inquiring about the
2 standing at this point.

3 MR. AYER: I guess my answer -- maybe it's not
4 at all a complete one, but my answer is that you would
5 have to look at the particular case, at the nature of
6 the harm that is being alleged. And where you have a
7 statute such as the one you're describing, Justice
8 Stevens, which is solely Government speaking, it is not,
9 as I understand it, Government regulating in any way
10 other than its announcement --

11 QUESTION: Well, I could change the
12 hypothetical to say it is a general regulation of
13 obscene materials, and they have one chapter in the
14 statute that does just like -- that's a counterpart to
15 this one on progapanda.

16 I don't see that that really changes the
17 analysis.

18 MR. AYER: Well, I think you would have to
19 analyze the nature of the harm, and in that case I
20 think, assuming a power in Congress or in the
21 legislature you're talking about to regulate obscenity,
22 I think the Government would have the power to do that.
23 And if the harms that were -- I guess I'm not answering
24 the standing question.

25 The standing question is based on the nature

1 of the harms, and I think if a sufficient challenge to
2 reputation or some other interest that's cognizable is
3 alleged, then you would have standing to raise it. But
4 I do think you would have to look at precisely how the
5 term is being characterized to determine whether that
6 kind of a cognizable interest is involved.

7 Again, I think the analogy to this case is a
8 good one, in that if the statute which otherwise
9 regulates the material does in itself cast some sort of
10 a light over someone, but nonetheless it's within the
11 power of regulation, then the incremental effect of the
12 terminology may well be such that you would not have
13 standing to challenge just the terminology when you lack
14 standing to challenge the statute as a whole.

15 And that's the situation that we have here.
16 We have a person who lacks standing to challenge the
17 statutory scheme and claims to have standing to
18 challenge a particular term.

19 QUESTION: Well, suppose a pollster took a
20 poll in the community and said: When you see a label,
21 when you see the following label do you know what it
22 means, and suppose half the people in the community
23 said: Yes, we know that when we see that label that
24 there's a foreign source, we know the Attorney General
25 has classified it as political propaganda.

1 Would that make any difference?

2 MR. AYER: I would think that a person might
3 be able to put together affidavits that would give him
4 standing to come in and make that kind of an argument.
5 I'm not saying in this case, but in some kind of a case
6 that might be possible to do.

7 That has not been done here in terms of
8 showing harm to reputation.

9 QUESTION: Well, wasn't there a Gallup poll in
10 this case and affidavits of even Republicans as well as
11 Democratic campaign managers going to the effect on this
12 particular respondent's campaign?

13 MR. AYER: Well, I think the answer to that is
14 basically yes, Your Honor. But I think the problem with
15 the material that's been submitted is the one I alluded
16 to earlier, that it is not in any sense comparative or
17 relative.

18 It is simply looking at the effects of public
19 awareness of the words "political propaganda" associated
20 with the film that this Appellee shows.

21 QUESTION: Do you disagree with the standing
22 analysis that Justice Scalia, when he was serving as
23 Judge Scalia on the Court of Appeals, wrote in Block
24 against Meese?

25 MR. AYER: No, Your Honor, we don't, and we

1 think it supports the position that we are taking here
2 that there is no standing. The reason we believe that
3 is that there were three aspects in Block to the
4 standing issue.

5 The first was a challenge to the words
6 "political propaganda," supported by affidavits from Mr.
7 Block's customers who said, we will not buy film from
8 Mr. Block, we will not buy these films from Mr. Block
9 and maybe indeed other films from Mr. Block, if they are
10 classified as political propaganda. On that basis, Mr.
11 Block was found to have standing to come in and say: My
12 business is hurt. I think that's a different case than
13 this one.

14 The part of that case that is similar to this
15 one is that Judge Scalia in that opinion said that there
16 is no standing by Mr. Block, on the part of Mr. Block,
17 to come in and challenge the part of the statute that
18 requires his name to be reported on a dissemination
19 report as a person who receives more than 100 copies.

20 QUESTION: Mr. Ayer, do you plan to discuss
21 the merits as well as standing?

22 MR. AYER: I would like to, Your Honor. On
23 the merits of the case, we think first of all that the
24 merits can be resolved without deciding the extent of
25 the First Amendment protection of Government speech as

1 speech, that is Government simply speaking and stating
2 its view.

3 We think the issue here is simply whether
4 Congress in carrying out on unchallenged legislative
5 scheme, which is what we have, may for internal
6 classification purposes only utilize terminology which
7 it defines in a clear and non-derogatory way consistent
8 with one of several accepted common meanings of those
9 words.

10 Or on the other side, taking the other view,
11 Congress can be barred from doing that because some
12 terms that it uses and defines neutrally may be
13 misunderstood as having negative connotations, which in
14 everyday usage at times at least it may have. We think
15 this falls plainly on the permissible side of the First
16 Amendment line, first of all because it is, in terms of
17 sorting different kinds of speech, it is viewpoint
18 neutral.

19 Now, I wouldn't say and I wouldn't allege that
20 it is applied completely without regard to any reference
21 to content. It applies with regard to a certain
22 category of speech, like the contribution reporting
23 requirements in Buckley versus Valeo.

24 It applies to the category of foreign source
25 political advocacy. And we think, given the interest

1 that Congress had in mind when they adopted the statute,
2 that that certainly is a suitable categorization to rely
3 on.

4 We think it's particularly important on the
5 merits to look to the minimal nature of the harm that
6 we're talking about. And again, it's the incremental
7 harm. It's the harm from the words "political
8 propaganda" over and above whatever effect on reputation
9 results from the statute, which is unchallenged, because
10 the only challenge here is to the words "political
11 propaganda." We're not litigating the underlying
12 statute.

13 The closest cases I think that the Appellees
14 have come up with are the compelled disclosure of
15 affiliation cases, NAACP versus Alabama and that line of
16 cases. And there are several distinctions to be made.
17 I think one is that there is no affirmative disclosure
18 required here at all, as there is in that case.

19 Another is that I think the governmental
20 interest here is more substantial. And finally, even if
21 you accept that those cases apply and you apply the test
22 which was invoked in those cases for creating an
23 exception to the disclosure requirement, the test is
24 whether they have made a reasonable showing of likely
25 threats, harassment, or reprisals, and I think it's

1 clear that no such showing has been made here.

2 QUESTION: Does it make any difference if
3 there was no definition of "political propaganda" in the
4 statute? It just said label this "political
5 propaganda"?

6 MR. AYER: I think if there were no definition
7 there would be a stronger argument that Congress
8 intended to state a negative view by relying on the
9 negative connotations. Here Congress has explicitly
10 adjured any such negative connotations.

11 QUESTION: So the incremental effect would
12 just be, would just result from people who knew it was
13 labeled "political propaganda" but didn't know what the
14 definition was?

15 MR. AYER: Well, it would result from the
16 entire -- the incremental effect would, that's correct,
17 yes.

18 If there are no further questions, I'd like to
19 save my remaining time.

20 CHIEF JUSTICE REHNQUIST: Very well, Mr.
21 Ayer.

22 We'll hear now from you, Mr. Donhoff.

23 ORAL ARGUMENT OF
24 JOHN G. DONHOFF, ESQ.,
25 ON BEHALF OF APPELLEE

1 MR. IONHOFF: Thank you, Mr. Chief Justice,
2 and may it please the Court.

3 Unlike the characterization of Mr. Ayer, my
4 opponent, about the issue in this case, I'd like to
5 begin with what we think is the issue and the district
6 court felt was the issue, too. This case is about a
7 regulatory scheme that so denigrates the material within
8 its scope that it imperils the good name and standing
9 within the community of those who associate themselves
10 with it by its use.

11 It classifies speech as the political
12 propaganda of a foreign power on the basis of no more
13 substantial determination of what that speech contains
14 than that it does contain political material that either
15 is intended to influence the foreign policies of the
16 United States or may reasonably be adapted to be so
17 used, without referring to whether or not that
18 reasonably adaptation should be seen to be on the part
19 of the foreign agent or the foreign government, but in
20 fact if any material spoken, produced, and disseminated
21 by any registered foreign agent, without regard to their
22 interests or furthering their foreign policy interests
23 or domestic policy interests or trying to influence
24 anybody here in this country, but simply is the result
25 of a nonprofit educational association producing

1 material of high quality journalistic standards for
2 dissemination.

3 If that kind of material is produced without
4 any intent to influence the American public, if somebody
5 in this country who wishes to receive that material may
6 so reasonably adapt that material to influence this
7 country's public policies, persons connected with those
8 public policies, then that material too may be
9 classified as political propaganda under the Act.

10 QUESTION: Would it make any difference in
11 your argument, Mr. Donhoff, if instead of political
12 propaganda Congress had used the term "foreign
13 advocacy," so that you had to say it was a foreign
14 advocacy film?

15 MR. DONHOFF: Mr. Chief Justice, I think it
16 would make enough of a difference so that this case
17 wouldn't have been brought, except for two matters.
18 There is no evidence in the record that denominating
19 objective journalism or any other kind of speech, but
20 singling it out from the stream of commerce and
21 classifying it as foreign political advocacy would be
22 any less harmful to Senator Keene's reputation or any
23 more harmful to Senator Keene's reputation, or is at all
24 on a par with the harm that arises from the "political
25 propaganda" classification, about which evidence is

1 replete in the record with regard to that harm.

2 QUESTION: So you would regard it as something
3 for another evidentiary inquiry, really?

4 MR. DONHOFF: I think some other plaintiff,
5 some other time, perhaps might have some question
6 regarding that particular characterization. We have not
7 argued that political advocacy is something in and of
8 itself a term that we have a problem with.

9 After all, Senator Keene is a professional
10 politician who advocates all the time political points
11 of view. However, one must look at the classification
12 scheme itself.

13 (a), (b), and (c) of Section 614 were enjoined
14 by the district court, Mr. Chief Justice, because they
15 each use the term "political propaganda" and refer to
16 the material classified as "political propaganda," and
17 thus could not be enforced with regard to these
18 particular films because the Department was enjoined
19 from classifying these films in a pejorative manner.

20 QUESTION: Well, what I'm trying to get at is
21 how far the district court's pejorative manner ruling
22 goes. Supposing that the statute had just said, this is
23 classified as a foreign film.

24 MR. DONHOFF: Yes, sir.

25 QUESTION: Now, do you think the district

1 court, if you had presented a poll saying that a lot of
2 people don't like the idea of legislators looking at
3 foreign films, would then have enjoined that sort of a
4 classification?

5 MR. DONHOFF: No, sir, I do not, nor do I
6 think this suit would have been brought in the first
7 place. Certainly the gravamen of the injury here is the
8 pejorative classification which springs from the statute
9 when a classification uses the terminology "political
10 propaganda."

11 When everything else that is required with
12 regard to that speech flows from that initial
13 determination that, by a neutral arm of the government
14 exercising the power and authority of the internal
15 security section of the Criminal Division of the
16 Department of Justice, this material is foreign
17 political propaganda, that's the gravamen of the injury,
18 with one small caveat or footnote.

19 And that would be that with regard to the
20 label, particularly in respect to Mr. Justice White's
21 question, that is not a neutral label and we've never
22 conceded that it was. Nor is the definition neutral.
23 But sticking with the label for a moment, I would think
24 that some of the same issues would arise if Congress
25 substituted "political advocacy" for "political

1 propaganda" in the Act, but left 614 otherwise unchanged
2 and the government was therefore able to continue to
3 require source identification to be affixed to these
4 films or any other political speech subject to the Act
5 --

6 QUESTION: Yes, but the label --

7 MR. DONHOFF: -- in the same terms.

8 QUESTION: -- the label isn't at issue here, I
9 take it?

10 MR. DONHOFF: Yes, it is, sir.

11 QUESTION: How is that?

12 MR. DONHOFF: Well, we complained of it. The
13 district court, because of a stance taken by the
14 Department of Justice in response to our lawsuits, found
15 that we had no standing to complain of it, and that was
16 based upon the court's finding, which we did not
17 strenuously argue against, that was based upon the
18 court's finding that in fact if we had the freedom, as
19 the Justice Department said we did, to remove the label,
20 well then why are we harmed by the label?

21 We have, however, come to this Court under
22 Elum-Yaretsky with all the arguments we can bring to
23 bear with respect to the unconstitutionality of this
24 particular statutory scheme.

25 One of those arguments is that appending this

1 particular source identification label is not just
2 simply source disclosure, which we don't complain of.
3 At least we don't have any standing -- we haven't
4 reached the issue of whether, you know, if I were a
5 foreign agent whether I would object to having my speech
6 burdened to the extent of being required to truthfully
7 represent in a speech who the source of it is.

8 What we do complain of is that that label is a
9 red flag. It doesn't simply say this is made by the
10 government of Canada, let alone this is made by a
11 non-political arm of the government of Canada. It goes
12 on with regard to statutory language that is to the
13 ordinary viewer intimidating and ends with the
14 statement, after saying that this material is being
15 distributed by a registered foreign agent and all of
16 these records are on file with the Department of
17 Justice, public records, anybody can go look at them, as
18 if ordinarily we examine speakers that way or the
19 government requires speakers to be on record that way,
20 but it ends by saying that the government, by allowing
21 the film to be shown or the material to be distributed,
22 does not approve the contents therein.

23 We do not have a system whereby the government
24 ordinarily stands astride the stream of commerce in the
25 marketplace of ideas, in the stream of ideas in speech

1 and debate, and assumes the power to approve or
2 disapprove speech, foreign or domestic. If this
3 particular label were required to be affixed to material
4 produced here by domestic speakers and classified on the
5 same basis, that it spoke to the foreign policies of
6 this nation, I don't think this Court would find it to
7 be constitutional.

8 QUESTION: Well, is it true that the terms
9 "political propaganda" are not part of the label --

10 MR. DONHOFF: Oh, yes.

11 QUESTION: -- to the film?

12 MR. DONHOFF: Oh, yes.

13 QUESTION: And is it also true that Senator
14 Keene can show the film without showing the label?

15 MR. DONHOFF: Well, yes, it is, assuming that
16 we either take it off, black it out, or, as the
17 government suggest --

18 QUESTION: Or just not run that part of the
19 film?

20 MR. DONHOFF: -- advance the film. But
21 there's a further problem. Now what we've done is hide
22 something from the American public, which the government
23 has contended all along is the whole reason for Section
24 614's disclosure requirement in the first place. That
25 is, to let sunshine shine where darkness otherwise was,

1 to inform the American public of the source so they
2 could better appraise --

3 QUESTION: But the statute at least does not
4 require your client to show that label, isn't that so?

5 MR. DONHOFF: The district court found -- I
6 think that's correct. The district court found that it
7 is a surprised reader who would read that statute and
8 find that he could remove the label. But indeed, the
9 Justice Department says they interpret the statute as
10 not requiring recipients to affix the label or use the
11 label or show the label, and I think the district court
12 was right in accepting the government's
13 characterization.

14 QUESTION: Mr. Donhoff, do you think that the
15 government as such and government officials have any
16 leeway for free speech --

17 MR. DONHOFF: Yes, ma'am, I do.

18 QUESTION: -- of their own?

19 MR. DONHOFF: I do.

20 QUESTION: And almost any official government
21 pronouncement on any subject, for instance denouncing
22 the Ku Klux Klan, might in some sense suppress free
23 expression by somebody.

24 MR. DONHOFF: I have no doubt that that's
25 entirely incorrect. And the reason is because

1 individuals who come to government to become public
2 officials were private individuals with First Amendment
3 rights before they came to their government posts and
4 don't lose those rights when they assume them.

5 There are certain responsibilities in the
6 exercise of governmental authority, however, which they
7 are now uniquely qualified to do because they are no
8 longer private citizens, but do have a public
9 responsibility, which must be constrained by
10 constitutional restraints, one of which is the First
11 Amendment.

12 If the government chooses to denounce the Ku
13 Klux Klan or those in the Ku Klux Klan --

14 QUESTION: It's your position that the
15 legislative body --

16 MR. DONHOFF: -- and follows due process in
17 doing so --

18 QUESTION: -- cannot use its collective voice
19 to characterize certain actions in a certain way?

20 MR. DONHOFF: That is not our position at
21 all. That is the government's characterization of our
22 position and a misreading of the district court below
23 and a disregard of all of the argument and evidence with
24 respect to this issue that was presented in the district
25 court.

1 We are challenging a regulatory act on the
2 part of the government of the United States, an exercise
3 of authority, not an expression of opinion. We don't
4 care what Mr. Clarkson thinks or feels about these
5 films. But as head of the registration unit, if he
6 decides that they are political propaganda and
7 classifies them as such and requires them to be
8 regulated as such, that removes those films from the
9 universe of all the speech that my client, the Appellee
10 here, can use to speak to his constituents or inform
11 himself.

12 I think that's --

13 QUESTION: I don't understand that argument.
14 Why does it remove it? Why can't he show the film with
15 the label on it? He gets the message across he wants to
16 get across. He just has to disclose a fact he'd prefer
17 to omit.

18 MR. DONHOFF: All right.

19 QUESTION: The label is truthful, isn't it?

20 MR. DONHOFF: The disclosure --

21 QUESTION: Take the case for the moment that
22 it's impractical to take the label off. What is wrong
23 with requiring the label on the film even if they did?
24 It's a truthful statement, isn't it?

25 MR. DONHOFF: Of course it's a truthful

1 statement, Justice Stevens.

2 QUESTION: Well, is it any different from
3 saying you've got to put a copyright statement on the
4 film?

5 MR. DONHOFF: It's also a truthful statement
6 to make a witness say, no, I stopped beating my wife
7 last -- I don't know when I stopped beating my wife
8 last. It's a statement, truthful though it may be, that
9 raises and begs the question.

10 It raises the hackles of suspicion in the
11 audience. It's intended to do so.

12 QUESTION: It's intended to advise the
13 audience of the source of the film, and what's so wrong
14 about that?

15 MR. DONHOFF: If source disclosure here was
16 narrowly crafted to appraise the audience of the source
17 of film, we would not be here today.

18 QUESTION: Why isn't it crafted just to do
19 precisely that?

20 MR. DONHOFF: I recommend to you the actual
21 language of that label, which I'm sure you've examined.
22 That label to an audience doesn't say this is the source
23 of the film. It says also the source of the film is a
24 registered foreign agent --

25 QUESTION: Which is true.

1 MR. DONHOFF: -- whose records are on file in
2 the Department of Justice.

3 QUESTION: Which is true.

4 MR. DONHOFF: Oh, no question. I'm assuming
5 all of this is true, and in fact we've taken the
6 position and posture here that these films are correctly
7 classified. So there's no question of the construction
8 of the statute, as to whether they should be applied to
9 these particular films.

10 The label is true, but it raises the hackles
11 of suspicion on the part of the audience and is intended
12 to do so.

13 QUESTION: By pointing out that the speaker
14 might be biased by the interest that is reflected in the
15 label.

16 MR. DONHOFF: Well, why --

17 QUESTION: I mean, your case is an attractive
18 one because it's a Canadian film, but supposing at the
19 time the statute was first drafted it was a German film
20 or something like that. The audience would be
21 particularly interested in the source and so forth.

22 Why doesn't the same consideration apply?
23 Maybe I just missed something obvious.

24 MR. DONHOFF: All right. Perhaps the source
25 of the problem is in the discrimination inherent in

1 using that particular way of, in effect, setting up an
2 ad hominem argument to whatever the speech might
3 actually have to say on the merits and raising the ad
4 hominem argument on the basis of the foreign source.

5 All it requires to be classified under 614 is
6 that it's distributed by a foreign agent. There's no
7 showing that the foreign agent is lying, misleading,
8 intending to further his own interests at the expense of
9 the audience, or in any way even furthering his own
10 interests.

11 For example, Justice Stevens, should the
12 National Film Board of Canada decide to do a documentary
13 on the problems of clearing the Brazilian rain forest
14 and in that documentary mention that American foreign
15 aid money goes to help finance some of the clearing, the
16 Canadian government probably doesn't even know about the
17 film, let alone feel that it's in its own interests to
18 produce it and disseminate it.

19 But the Film Board through its policies and
20 practices may wish to do so, and distribute the material
21 into this country. And at that point that material,
22 because it mentions a foreign policy of the United
23 States and could, not intended to but could reasonably
24 be adapted to by someone in this country affect those
25 foreign policies, now is going to be designated as

1 political propaganda and, further, must have affixed to
2 it this red flag of a warning label that the government
3 doesn't approve the contents of this material.

4 I think that it is a mistake to take this case
5 piece by piece, without reference to the other portions
6 of the statute. Primarily what we're looking at is the
7 political propaganda designation, and that then
8 impregnates the rest of the statute.

9 As the government concedes --

10 QUESTION: You spoke of the pejorative impact
11 of those words. Suppose somebody saw the label and he
12 accepted the invitation to look at what was all behind
13 this and said, this is political propaganda under the
14 statute and I read the definition.

15 Now, would the impact on that person be
16 pejorative in your mind?

17 MR. DONHOFF: Oh, I think so.

18 QUESTION: He's read the definition.

19 MR. DONHOFF: I don't think that's a neutral
20 definition, Your Honor. That's the other thing we have
21 not conceded.

22 In fact, the district court assumed really
23 that the definition was neutral, because the argument
24 was with regards to the ordinary principles of statutory
25 construction. You read that statute and you find a

1 clause here and a clause here and a clause there that
2 seem to come up with an objective standard, you ignore
3 all the rest of it.

4 Now, this Court has in a number of cases
5 indicated that you don't read statutes that way. I
6 think in McGrath at least one of the opinions --

7 QUESTION: Counsel --

8 MR. DONHOFF: Yes.

9 QUESTION: I think in one of your responses to
10 Justice White you said that the use of the term
11 "political propaganda" impregnates the whole statute.
12 Is it your position the entire statute is
13 unconstitutional?

14 MR. DONHOFF: No, sir. I'm sorry, I
15 misspoke. All the sections of 614 that were enjoined by
16 the court, (a), (b), and (c).

17 QUESTION: You are challenging only the
18 sections that the district court in its revision of its
19 final order enjoined?

20 MR. DONHOFF: Yes, sir.

21 QUESTION: While I have you interrupted, is
22 your client's name on any published list anywhere?

23 MR. DONHOFF: With respect to these films?

24 QUESTION: Sir?

25 MR. DONHOFF: With respect to these films?

1 QUESTION: Yes. Any published list?

2 MR. DONHOFF: What the district court did in
3 May of 1983 is enjoin the classification of these films
4 or the regulation of them as political propaganda. So
5 no dissemination reports have been filed, no --

6 QUESTION: But prior to the bringing of this
7 suit, was your client's name on any published list with
8 respect to --

9 MR. DONHOFF: As a purveyor of or exhibitor of
10 these films?

11 QUESTION: Yes.

12 MR. DONHOFF: No, sir, because we didn't show
13 them or arrange to receive them so that we could show
14 them prior to getting the injunction.

15 QUESTION: Was his name on any published list
16 as a recipient of them?

17 MR. DONHOFF: Prior to bringing the suit and
18 getting the injunction, no.

19 QUESTION: Mr. Donhoff, supposing that
20 Congress in its labor statute decides that it wants to
21 regulate certain activities which it calls
22 strike-breaking activities, and among the forms of
23 regulation it adopts it says that people engaging in the
24 following activities have to register as a
25 strike-breaker.

1 And your client in this new case is not the
2 state senator from California; he's a labor organizer
3 who falls within that definition. Do you think he can
4 challenge the definition because he says that's not a
5 neutral definition of strike-breaker?

6 MR. DONHOFF: Well, I think I have to agree
7 with Mr. Ayer to a certain extent, and that is that one
8 must look, rather than for absolute principles, for
9 particular injuries under particular circumstances.

10 The labor organizer's or disorganizer's, as
11 the case may be, status as defined by a statute to the
12 extent that it harms his reputation, if he quarrels with
13 that status, may indeed give him standing.

14 QUESTION: That's a fairly broad principle,
15 isn't it, if you can look at Congressional
16 classifications which involve any sort of registration
17 or that sort of thing and say, it's not a fair
18 description of what I'm doing?

19 MR. DONHOFF: I'll go this far, I think, in
20 meeting the government's objection with regard to the
21 camel's nose under the tent argument. That is, at least
22 when we're dealing with the expression of pure political
23 core value protected speech and nothing else, that the
24 government is constrained from so classifying the
25 material, irrespective of the regulations that they may

1 otherwise be justified in imposing. But so classifying
2 the material as to impair the usefulness of that
3 material to citizens of this country or those within its
4 borders and expressing themselves in public debate.

5 To the extent that labor organizing or
6 disorganizing also is a matter of activity which may be
7 illegal or made illegal or otherwise regulated that is
8 not pure expression, then maybe the standard would be
9 lesser.

10 However, when you're dealing with pure speech
11 one must ask, what's the reason for this designation. I
12 think we can start, certainly, with talking about
13 standing and the harm, and I intend to get to --

14 QUESTION: Let me just interrupt with one
15 question. You said impair the usefulness of the
16 speech. Have you in connection with your standing
17 argument alleged or contended that the number of people
18 who will see the film is lessened by this?

19 MR. DONHOFF: No, sir.

20 QUESTION: Well then, how does it impair the
21 usefulness of the speech?

22 MR. DONHOFF: We're not a commercial
23 exhibitor. We don't measure our harm by box offices.

24 QUESTION: But if you have the same audience,
25 as big an audience as you otherwise would have, why is

1 the speech less useful?

2 MR. DONHOFF: Because we can't use it. That's
3 the simple answer.

4 QUESTION: Why can't you?

5 MR. DONHOFF: And then we get back to the
6 original question you asked --

7 QUESTION: You mean you can't use it because
8 somebody might say you're a purveyor of foreign
9 propaganda?

10 MR. DONHOFF: We use it and it harms our
11 reputation, it's that simple.

12 QUESTION: But the affidavits say people will
13 -- your political opponents and the like will say you
14 drive foreign cars and you have foreign sympathies, and
15 so forth.

16 MR. DONHOFF: That's happened in the past.

17 QUESTION: But you can't really totally
18 prevent that kind of rather irresponsible criticism.

19 MR. DONHOFF: No, sir. But the government
20 didn't classify the foreign cars as the agent of foreign
21 subversion either.

22 QUESTION: No, but even if they changed the
23 name from "political propaganda" to "political advocacy"
24 or just foreign source material, these critics can still
25 make precisely the same criticism of your candidate.

1 MR. DONHOFF: They may, but here's the
2 difference. If they call my client a propagandist, a
3 foreign political propagandist --

4 QUESTION: They can do that no matter what the
5 government label says.

6 MR. DONHOFF: They can do that no matter
7 what.

8 QUESTION: Yes.

9 MR. DONHOFF: But if the government classifies
10 these materials to be such, it makes reasonable the
11 inference my client is a purveyor of such material. We
12 have no standing then under New York Times-Sullivan to
13 complain in a plain state law action, a tort action for
14 defamation, should we wish to do that rather than, as is
15 the normal case, take the slings and arrows of political
16 debate.

17 In other words, irrespective of what the
18 government's intent was with regard to these particular
19 films. This scheme itself serves to segregate out some
20 speech from all the rest of the speech and impose a
21 penalty or a risk created or connected with it,
22 depending upon who you are.

23 QUESTION: The penalty is just telling the
24 truth about the source of the speech.

25 MR. DONHOFF: No, sir. The penalty is

1 associating somebody who would speak with that speech,
2 through that speech, to express his own views and the
3 purveyor of political propaganda. I believe that the
4 phrase and the likelihood of the injury is established
5 by competent and substantial evidence in the record.

6 But if you want to look at the evidence, we
7 had a poll designed by a very competent poll designer
8 and then taken by the Gallup organization throughout the
9 country, which showed that if you told people that a
10 legislator showed films that the Justice Department had
11 classified as foreign political propaganda they would be
12 as disinclined to vote for that individual, thus harming
13 his reputation, one measure of harming his reputation,
14 as they would be if he had lied about his academic
15 credentials or a juvenile conviction for robbery.

16 I mean, this is not a quibble over
17 terminology. We have clearly a derogatory, pejorative
18 term that makes people shy off as if it were a land mine
19 and avoid that speech. Depending upon who you are, how
20 much public opinion means to you, that I think is the
21 gravamen of our injury.

22 If it does not appear to be sufficient to this
23 Court that is the gravamen of our injury, then we would
24 lose. But I think it's very, very important that the
25 reputations of persons who wish to speak do not get

1 threatened, not by the slings and arrows of political
2 debate and opponents drawing conclusions or editorial
3 writers drawing conclusions, but by the neutral exercise
4 of governmental authority designating materials.

5 QUESTION: Where in the record is the question
6 that the poll takers asked to get this?

7 MR. DONHOFF: It's in the appendix under the
8 declaration of Leonard Wood, 78 et seq., and I think
9 very close to 78. The question asked is -- well, it
10 appears on 80 and 81 of the joint appendix.

11 I think perhaps this would be an appropriate
12 time to mention a couple of points on standing. This is
13 not a Laird-Tatum case. We're not speculating about
14 what happens to us. We have introduced competent and
15 substantial evidence to show what the public's reaction
16 to public officials who disseminate the political
17 propaganda of foreign powers is in this country, and
18 we're concerned about our reputation if we use the films
19 and-or if we don't get the injunction or the injunction
20 is listed we can't use the films.

21 There is a myriad of things that occur in the
22 political process that is a basis for calling in
23 analogies, even with Lamont's very narrow constrictions
24 that you have to have some affirmative act to show
25 impairment. And that would be that, should be show the

1 films without the injunction, they're classified, we
2 have to both take steps to hide the label because it's a
3 warning flag --

4 QUESTION: Your challenge is a facial one to
5 the section, isn't it? Are you just challenging it as
6 applied to your client?

7 MR. DONHOFF: It's a facial challenge to the
8 section, yes, it is, sir.

9 QUESTION: And would you say that you can
10 think of no circumstance in which it would be valid as
11 applied?

12 MR. DONHOFF: Yes, I can say that with some
13 confidence.

14 QUESTION: Don't you have to?

15 MR. DONHOFF: Pardon?

16 QUESTION: Don't you have to make that
17 allegation, or don't you have to make that claim? Or is
18 your claim partially overbreadth, or what?

19 MR. DONHOFF: No, sir, it's not partially
20 overbreadth. It's that classifying any protected speech
21 as political propaganda is unconstitutional.

22 QUESTION: Well, so you're saying that there
23 is no application of the statute that would be valid?

24 MR. DONHOFF: There's no application of this
25 statute that would be valid, that's true.

1 QUESTION: Well, in spite of then all the
2 material about the particular aspects of your client
3 being a state legislator and what people think about
4 state legislators really doesn't make any difference?

5 MR. DONHOFF: It does for standing, sir, as I
6 understand it. We have to show a palpable and distinct
7 injury fairly traceable to the statute that is
8 redressable by the court before we can even come into
9 court to complain that this is an unconstitutional
10 statute.

11 QUESTION: But then it makes no difference on
12 the merits, because the statute is invalid even as
13 applied to someone who has none of his specific
14 problems?

15 MR. DONHOFF: I will accept that as a
16 proposition.

17 QUESTION: Well, I'm not peddling it. I just
18 want to know your view.

19 (Laughter.)

20 MR. DONHOFF: All right. I think we still
21 have to complain of -- the overbreadth doctrine is like
22 an accordian at times, as I read the cases. We are not
23 talking about overbreadth in the standard sense of, say,
24 an obscenity case, where we may be obscene but some
25 other person wouldn't because of the definitions in the

1 statute or the way it's enforced.

2 What we are talking about, though, is a
3 statute that on its face is unconstitutional as applied
4 to any speech, not just these three films, although the
5 injunction was narrowed to the three films.

6 QUESTION: Well, I know, but you mean, is the
7 judgment only -- I thought there was an injunction
8 against applying the statute at all?

9 MR. DONHOFF: To the three films.

10 QUESTION: But how about the declaratory
11 relief?

12 MR. DONHOFF: No, the declaratory -- the
13 declaration was that the statute was unconstitutional on
14 its face because of the use of the term "political
15 propaganda." I would go further and say because of the
16 way the source disclosure is required.

17 I don't assume that simply because we have
18 standing because we have some palpable injury that we
19 need not show any further First Amendment injury. At
20 least I haven't assumed it throughout litigating this
21 case.

22 What we do show is harm sufficient to impair
23 us or keep us from availing ourselves of using this
24 speech or, if we don't get an injunction, we are going
25 to be penalized or must take some affirmative acts to

1 forestall the public reaction that's going to result
2 should we be identified as a purveyor of political
3 propaganda.

4 QUESTION: Are the films still available? Do
5 you still want to show them?

6 MR. DONHOFF: We have alleged, yes, sir, in
7 the record that we -- I would think probably some time
8 next year. There are no specified times, but yes.

9 QUESTION: Has the judgment been stayed? Was
10 it stayed?

11 MR. DONHOFF: No, it was not stayed.

12 QUESTION: Well, have you shown the films?

13 MR. DONHOFF: We have shown the films. After
14 we received the preliminary injunction, we showed them
15 almost immediately after receiving the injunction,
16 before the opinion came out, and then again some months
17 later.

18 A couple of years have passed now since the
19 last time they were shown.

20 QUESTION: Could you explain one thing to me.
21 If you have shown the films and the statute's still on
22 the books, why isn't your client getting the same
23 terrible criticism that he would have gotten without the
24 injunction?

25 MR. DONHOFF: Well --

1 QUESTION: Couldn't a critic of your client
2 say, he has shown three films that were classified by
3 the United States Department of Justice as foreign
4 propaganda?

5 MR. DONHOFF: But they haven't been allowed to
6 be, or at least --

7 QUESTION: The third party can't make that
8 statement?

9 MR. DONHOFF: Oh, certainly.

10 QUESTION: I mean, all the people that might
11 harm his reputation can still say exactly what you said
12 they might.

13 MR. DONHOFF: Anybody can lie, Justice
14 Stevens.

15 QUESTION: But it's not a lie. They were in
16 fact classified as political propaganda.

17 MR. DONHOFF: And we have the rebuttal that
18 the court found that the government was wrong in so
19 classifying.

20 QUESTION: Well, and that's the difference,
21 and that protects you from this grievous harm?

22 QUESTION: When you showed them, did you take
23 the label off or not?

24 MR. DONHOFF: The label was not affixed to
25 them, sir.

1 QUESTION: I see.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Donhoff.

4 Mr. Ayer, you have three minutes remaining.

5 REBUTTAL ARGUMENT OF

6 DONALD B. AYER, ESQ.,

7 ON BEHALF OF APPELLANTS

8 MR. AYER: Mr. Donhoff indicated that it would
9 be a mistake to determine these issues piece by piece in
10 this instance by singling out the words "political
11 propaganda" and taking them in isolation. I would like
12 to agree with that and go a step further with the
13 standing argument which I made earlier, focusing on the
14 injury, the palpable injury, and the redressability of
15 the injury.

16 And I'd like to suggest that perhaps this case
17 is much like other cases that this Court has decided,
18 where it has found no justiciable claim to exist, where
19 the claim is of incidental effects, but there is no
20 direct regulation, proscription, compulsion, or any
21 other kind of direct adverse treatment involved. Allen
22 versus Wright and Laird v. Tatum I think are to such
23 cases.

24 And the reason I suggest that is I think
25 that's the only way that one is going to avoid the kind

1 of piecemeal litigation that Mr. Donhoff agrees ought to
2 be avoided. If we're going to let people come in and
3 pick at words because they are arguably affected in some
4 remote and incidental way, we're going to end up with
5 litigation focusing on pieces of statutes, rather than
6 going to the main crux of what someone is arguing
7 about.

8 I think that's particularly important here,
9 where the issue is whether Congress can choose words and
10 indeed also, because this is a case involving foreign
11 policy, where I think if any case is proper to Congress'
12 choice of words and Congress' judgment this is one.

13 Thank you very much.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Ayer.

16 The case is submitted.

17 (Whereupon, at 10:59 a.m., argument in the
18 above-entitled case was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

85-1180 - EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES AND

JOSEPH E. CLARKSON, Appellants V. BARRY KEENE

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)