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ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PUBLIC CITIZEN, Appellant V. UNITED STATES
DEPARTMENT OF JUSTICE, ET AL.; and
WASHINGTON LEGAL FOUNDATION, Appellant V. UNITED
STATES DEPARTMENT OF JUSTICE, ET AL.

CASE NO: 88-429 & 88-494

PLACE: WASHINGTON, D.C.

DATE: April 17, 1989

PAGES: 1 thru 54

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IN THE SUPREME COURT OF THE UNITED STATES

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PUBLIC CITIZEN, ;
Appellant ;

v. ; No. 88-429

UNITED STATES DEPARTMENT OF ;
JUSTICE, ET AL.; ;

and ;

WASHINGTON LEGAL FOUNDATION, ;
Appellant ;

v. ; No. 88-494

UNITED STATES DEPARTMENT OF ;
JUSTICE, ET AL. ;

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Washington, D. C.

Monday, April, 17, 1989

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:45 o'clock a.m.

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APPEARANCES:

PAUL D. KAMENAR, ESQ., Washington, D.C.; on behalf of
the Appellant, Washington Legal Foundation.

ERIC R. GLITZENSTEIN, ESQ., Washington, D.C.; on behalf
of the Appellant, Public Citizen Litigation Group.

DAVID L. SHAPIRO, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Appellees.

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1 P R O C E E D I N G S

2 (11:45 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 88-429, Public Citizen v. United States
5 Department of Justice; No. 88-494, Washington Legal
6 Foundation v. United States Department of Justice.

7 Mr. Kamenar?

8 ORAL ARGUMENT OF PAUL D. KAMENAR
9 ON BEHALF OF THE APPELLANT, WASHINGTON LEGAL FOUNDATION

10 MR. KAMENAR: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 The Issue before the Court in this case is
13 whether American Bar Association Standing Committee on
14 the Federal Judiciary constitutes an advisory committee
15 under the Federal Advisory Committee Act in the way it
16 is utilized by the Department of Justice in obtaining
17 the ABA's advice and recommendations on the
18 qualification of Federal judicial candidates. And if
19 so, whether applying that statute to the ABA Committee
20 would violate the President's power under Article II to
21 nominate Federal judges, and thereby violate the
22 separation of powers.

23 The lower court ruled, correctly in our view,
24 that the ABA Committee is indeed an advisory committee
25 under the statute, but how that applying that statute to

1 the ABA Committee would violate the President's power
2 under Article II.

3 It's our position that the District Court
4 incorrectly struck down an entire statute of Congress
5 without giving the government an opportunity to apply
6 any of its various provisions.

7 I would like to begin my argument by briefly
8 describing for the Court how the ABA Committee operates,
9 and describing its institutional relationship with the
10 Department of Justice.

11 Since 1952 the Department of Justice has
12 consistently utilized the ABA Committee as a preferred,
13 if not exclusive, source of advice on the qualifications
14 of Federal Judicial candidates to the Courts of Appeal
15 and the District Courts.

16 QUESTION: How do you know that?

17 MR. KAMENAR: Your Honor, we know that from
18 information provided by the ABA and the Department of
19 Justice.

20 QUESTION: Where did you -- where did you get the
21 notion, though, that -- that it is exclusive? You say,
22 perhaps, exclusive source of information.

23 MR. KAMENAR: Your Honor, I believe if we look at
24 the --

25 QUESTION: Did the Department of Justice ever

1 concede that?

2 MR. KAMENAR: I think, Your Honor, in terms of the
3 qualifications of individuals nominees, the Department
4 of Justice has stated that -- in my statement of
5 material facts, I'm looking at joint appendix on page
6 56. We stated, "The Department of Justice does not ask
7 any outside committees, other than the ABA committee,
8 for advice on the suitability and qualifications of
9 possible nominees for Federal Judgeships."

10 QUESTION: That's a -- that's a -- that's a far
11 cry from saying it's the only source of information.
12 Just because that's the only committee they employ.
13 There's a lot of other ways of getting information
14 besides calling on the Committee.

15 MR. KAMENAR: That's correct, Your Honor, but the
16 Department of Justice did admit that the ABA Committee
17 is relied upon in terms of providing it with advice on
18 the qualifications of the nominees.

19 QUESTION: Of course they do -- of course. Of
20 course, of course. But you see, certainly, you
21 shouldn't say that -- suggest that it's the exclusive
22 source of information about candidates.

23 MR. KAMENAR: If I did, Your Honor, I misspoke, and
24 I apologize.

25 QUESTION: Well, that's what you said.

1 MR. KAMENAR: I apologize to the Court for
2 misspeaking on that.

3 Once a candidate has been identified by the
4 Department of Justice as a serious candidate, that
5 person is required to fill out a personal data
6 questionnaire, which is designed by the ABA Committee.
7 That questionnaire is then given to the ABA circuit
8 member, as well as the ABA Committee chairman. No other
9 outside group gets that information.

10 QUESTION: How long has that been --

11 QUESTION: Has that always been in effect?

12 MR. KAMENAR: As far as we can tell, Your Honor,
13 that's what the record shows; that that personal data
14 questionnaire --

15 QUESTION: You know, we've all been -- we've all
16 been through this wringer.

17 MR. KAMENAR: Well, I'm sure, Your Honors, you
18 have, although it has been episodic with respect to some
19 Supreme Court nominees. It's consistent with respect to
20 Courts of Appeals and District Court nominees, and it's
21 episodic with respect to --

22 QUESTION: Well, some of us have been on the Court
23 of Appeals also.

24 MR. KAMENAR: That's right, Your Honor, you have --

25 QUESTION: And I never made out such a form.

1 QUESTION: And it's not been true since 1952, I can
2 assure you.

3 MR. KAMENAR: Well, Your Honor, I didn't mean to
4 say that that form has been filled out since 1952, I'm
5 talking about what the current practice is for the last
6 -- this last -- the last several Administrations, and
7 what was --

8 QUESTION: Well, how -- how long a practice are we
9 talking about?

10 MR. KAMENAR: Your Honor, I do not know that,
11 unfortunately. I think the Department of Justice could
12 best ask that. Again, this Committee operates in
13 secret, and that's what's part of the problem here.

14 QUESTION: Well, it was done when I was appointed.

15 QUESTION: I filled out a form, both in 1971 and
16 1986, I think.

17 MR. KAMENAR: Well, again, Your Honor, this
18 probably illustrates what kind of confusion we have
19 here. Perhaps if we applied this Federal Advisory
20 Committee Act, we can find out exactly how this
21 Committee is operating, and see whether they apply it
22 sometimes, and they don't apply it in others.

23 And that precisely gets to the point I'm trying to
24 make here.

25 QUESTION: Well, if -- but it may be just a matter

1 of the written form having been introduced at a
2 particular point, and the members of this Court
3 obviously came to -- came to the bench at different
4 times.

5 MR. KAMENAR: That's correct, Your Honor.

6 The ABA Committee member then interviews this
7 candidate, they interview judges and practitioners in
8 the area to get their views on the qualifications of the
9 potential nominee.

10 When this investigation is completed by the circuit
11 member, he then, or she then makes an initial rating of
12 that candidate; whether he is extremely well qualified,
13 well qualified, qualified, or not qualified. And the
14 key part of this investigation is the following:

15 If they decide that this person is not qualified to
16 be a Federal judge, that is -- is -- is -- that
17 information is advised -- given to the Department of
18 Justice, and almost invariably, the not-qualified rating
19 results in the Department of Justice removing that
20 individual from further consideration to be a judge.

21 QUESTION: You -- you speak in extremes. Now you
22 say, almost invariably. Certainly there are cases where
23 persons who have been indicated as unqualified have been
24 confirmed.

25 MR. KAMENAR: That is the exception, not the rule,

1 Your Honor. I direct the Court to page 60 of the joint
2 appendix, where the Defendant, the Department of
3 Justice, states, "The Defendant admits that most
4 candidates for nomination, which have not received a
5 not-qualified rating by the ABA Committee have not been
6 recommended by the Attorney General for nomination to
7 the President."

8 QUESTION: Well, now you're saying the word most;
9 before you said almost invariably. I'm just a little
10 concerned about your use of extreme language.

11 MR. KAMENAR: Yes, Your Honor.

12 QUESTION: I'm sorry. Where did you read from on
13 page 60?

14 MR. KAMENAR: Page 60 of the joint appendix, Your
15 Honor.

16 QUESTION: But which paragraph?

17 MR. KAMENAR: It's paragraph 6, about middle of the
18 way down.

19 Nevertheless, Your Honor, this is important to show
20 that the -- the ABA Committee is heavily relied upon
21 by the Department of Justice in making its decisions as
22 to who to recommend to the President to be a Federal
23 judge.

24 Let me just sum up in this way, in terms of the
25 facts. The ABA --

1 QUESTION: Well -- go ahead, please. Go ahead.

2 MR. KAMENAR: The --

3 QUESTION: Well, they -- they get information from
4 the Committee, but they don't particularly rely on any
5 recommendation of the Committee as to who to send over
6 to the President.

7 MR. KAMENAR: I disagree with Your Honor on that,
8 they do rely on that information --

9 QUESTION: Well, you mean -- if the ABA says
10 they're unqualified, they won't be sending that name
11 over. But there are a lot of people who are -- who are
12 passed on as qualified. And the Department makes up its
13 own mind who to send to the President.

14 MR. KAMENAR: If it's qualified or better, the
15 Department does make up its own mind. It could very
16 well be, even if they did rate a person as qualified,
17 the Department would still not nominate that person to
18 the --

19 QUESTION: Of course, of course. Well, then, you
20 shouldn't say that they rely on that heavily, as to
21 whose -- what name to send to the President.

22 MR. KAMENAR: I don't mean to say that they rely on
23 it exclusively; they do rely on it in the way that
24 advisory committees are usually relied upon for their
25 advice.

1 If there's any doubt about -- I mean, both the
2 Department of Justice and the ABA have even acknowledged
3 that there is a semi-official or quasi-official
4 relationship established here between the Department of
5 Justice and the ABA.

6 And if there's any doubt about whether or not this
7 ABA Committee is a -- an advisory committee and utilized
8 as such, we think the Department of Justice answered it
9 best itself back in 1973 and 1974, when they concluded
10 that, "under any reasonable construction of utilization,
11 the ABA Committee is utilized by the Department." And
12 again, "an honest reading of the statute points in the
13 direction of inclusion."

14 QUESTION: Mr. Kamenar, do you suppose that a use
15 by a Democratic President of the advice of the
16 Democratic National Committee in making various
17 Executive Branch appointments or the use by a Republican
18 President of the Republican National Committee for
19 getting names and making appointments, is also covered
20 by FACA?

21 MR. KAMENAR: Your Honor raises a good question
22 there, and that brings to -- the answer to that brings
23 into question the -- the decision of this Court
24 recently, in the University of San Francisco Democratic
25 Party. In other words, there may be a special

1 relationship that the President -- the incoming
2 President enjoys with his own party, such that it would
3 be excluded from -- be considered an advisory committee
4 in that respect.

5 Although I must admit that, on the face of the
6 statute --

7 QUESTION: On constitutional grounds -- you -- you
8 -- you -- you --

9 MR. KAMENAR: On -- on constitutional grounds,
10 perhaps. But we are clearly far apart in this case
11 where they're relying on a private, special group, such
12 as the American Bar Association.

13 QUESTION: But what I -- I don't understand your
14 answer to Justice O'Connor. What about her
15 hypothetical? Why -- why isn't that covered?

16 MR. KAMENAR: It would be -- first of all we have
17 to determine --

18 QUESTION: You said it perhaps a special -- what
19 are you talking about, the statute? Are you talking
20 about a constitutional document?

21 MR. KAMENAR: Your Honor, we would first have to
22 determine whether or not there is a committee within the
23 RNC or DNC that advises the President on these
24 particular nominees. That's the first statutory hurdle
25 we have to get over.

1 If, in fact, it is, and there -- it's a preferred
2 source of advice, then the statute would seem to
3 indicate that if the President relies -- that a
4 preferred source of advice on that committee, it would
5 be an advisory committee. Then we would have to reach,
6 at that point, in a constitutional issue, if, in fact,
7 the government -- if it was going -- if it was going to
8 be determined that that DNC or RNC committee must come
9 under the strictures of the Act.

10 But that -- we don't have to reach that kind of a
11 question in this case because, what we are talking about
12 is what Congress intended to do in terms of trying to
13 have some public disclosure as to how private interest
14 groups are working in the decision-making process.

15 I think the American people realize that the
16 President is relying on his own party for advice, in
17 terms of how to make decisions, and perhaps the public
18 interest is not necessarily as well served, need to be
19 served, as opposed to the President or the Executive
20 Branch relying on a wholly private trade group, labor
21 group, or industry group, to tell it how to do its
22 business.

23 QUESTION: What about the Association of the Bar of
24 the City of New York? Did you find out that they were
25 having any influence?

1 MR. KAMENAR: In terms of giving their advice to
2 the Department of Justice, we think that the -- the
3 criteria that we've developed, with respect to the
4 preferred source of advice of this committee, how it is
5 utilized by the Department of Justice, would distinguish
6 the ABA from all the hypotheticals, including Your
7 Honor's hypothetical, in terms of whether or not they
8 would come under the Advisory Committee Act or not.

9 We think that -- if you look at the GSA
10 regulations, they look at whether they use a common
11 sense approach --

12 QUESTION: Well, did you? Did you look at what
13 influence, if any, that the Association of the Bar of
14 the City of New York had?

15 MR. KAMENAR: We didn't investigate the Bar
16 Association of New York, but it's our --

17 QUESTION: My point is, you put the ABA out there
18 all by itself, and there are several others.

19 MR. KAMENAR: Your Honor, the big distinction
20 between the ABA and the Bar Association of New York is
21 that the ABA gets inside information. The Bar
22 Association of New York does not get the personal data
23 questionnaire, does not get the first crack, if you
24 will, at whether or not that judge is going to be
25 nominated -- if that person is going to be nominated as

1 a Federal Judge.

2 And that distinguishes, we believe, all the
3 hypotheticals that the appellees and the amici try to
4 scare this Court into thinking that they would be --

5 QUESTION: It just -- it just happened that often
6 the Association of the Bar of the City of New York
7 interviews and passes upon people before the Justice
8 Department has even moved. That just so happens.

9 MR. KAMENAR: But, Your Honor, I don't think the
10 Justice Department gives them the name ahead of time,
11 and relies on their advice before the Department of
12 Justice moves on that regard.

13 QUESTION: Just leaked it to the press.

14 MR. KAMENAR: Well, then -- they may be -- it
15 depends upon how fast the AB-- the Bar Association of
16 New York may come under the statute, but I don't think
17 that the facts -- haven't been developed in that
18 particular case as it has in this case, where the
19 Department of Justice has conceded in their earlier
20 memorandum that the ABA is utilized as an advisory
21 committee under the statute.

22 QUESTION: May I ask, under the terms of the
23 statute, what difference does it make that the name is
24 given in advance, and that they utilize the
25 questionnaire and so forth?

1 MR. KAMENAR: Your Honor, I think the fact that
2 their names are given in advance, and the questionnaire,
3 and so forth, basically underscores the institutional
4 and advisory relationship that they enjoy with the
5 Department of Justice.

6 QUESTION: But supposing they didn't give the names
7 in advance, and the ABA did it on its own, but the
8 Department, nevertheless, continued to utilize their
9 recommendations on a regular basis?

10 MR. KAMENAR: That may be a different situation if,
11 in fact --

12 QUESTION: But not --

13 MR. KAMENAR: -- the Department of Justice
14 announced that this is the person we're considering to
15 be a Federal judge, and anybody who wants to comment on
16 this person's qualifications, feel free to do so and
17 send it to the Department of Justice. That would be a
18 different situation.

19 QUESTION: Why would it be different under the
20 terms of the statute if they regularly, as a matter of
21 practice, gave special deference to the ABA thinking
22 they --

23 MR. KAMENAR: Well, Your Honor --

24 QUESTION: They would still be utilizing --

25 MR. KAMENAR: -- If you look at the GSA

1 implementing -- implementing regulations, it has to show
2 whether it's a preferred source of advice. If it does
3 develop that they are invariably relying upon the
4 Department of Justice -- I mean, the --

5 QUESTION: What if the President announces it as a
6 matter of policy, I think these people give -- give us
7 very reliable advice and I want you to rely on them
8 regularly. That would still be the same, whether they
9 got questionnaires or confidential information, wouldn't
10 it?

11 MR. KAMENAR: That -- that would probably -- if
12 they -- if they consistently relied on the ABA, that
13 would probably come under the terms of the -- of the
14 regulations. However, we think that it -- it -- by not
15 having that information public, by using them
16 exclusively, that highlights the importance that the ABA
17 --

18 QUESTION: Well, now, when you say use them
19 exclusively, but you just earlier agreed they do not use
20 them exclusively, they have lots of sources of
21 information about candidates.

22 MR. KAMENAR: Yes, Your Honor. They use them
23 primarily as a preferred source for the --

24 QUESTION: Well, that's my hypothetical. They
25 don't have any secret -- they don't have any

1 questionnaires or anything. They just say, as a matter
2 of policy, we don't think we want to confirm any -- or
3 submit any name to the Senate that the local bar
4 association doesn't endorse, or doesn't find qualified.

5 Wouldn't the local bar association, then, be
6 utilized in exactly the same sense that these people
7 are? Just as -- Justice Marshall's question, really, I
8 guess.

9 MR. KAMENAR: Yes. I think at -- at a certain
10 point we would see -- see that that kind of relationship
11 would probably come under the terms of the statute, but
12 I think that the Justice Department should make the
13 first opportunity as to whether or not this statute
14 applies in that kind of a situation. And they haven't.

15 Your Honor, I would like to reserve the remainder
16 of my time for rebuttal.

17 QUESTION: Very well, Mr. Kamenar. We'll recess
18 for lunch.

19 (Whereupon, at 12:00 o'clock noon, the Court
20 recessed, to reconvene at 1:00 o'clock p.m., the same
21 day.)

1 AFTERNOON SESSION

2 (12:59 p.m.)

3 QUESTION: Mr. Glitzenstein?

4 ORAL ARGUMENT OF ERIC R. GLITZENSTEIN
5 ON BEHALF OF THE APPELLANT, PUBLIC CITIZEN

6 MR. GLITZENSTEIN: Mr. Chief Justice, may it
7 please the Court:

8 The Advisory Committee Act applies to entities that
9 are structured as committees, that are established or
10 utilized for obtaining advice or recommendations by a
11 Federal agency or by the President.

12 We think that the structure of the language of the
13 statute itself makes it plain that what Congress was
14 attempting to do with utilized committees, was cover
15 those entities that are essentially used by the
16 Executive Branch in the same manner as committees that
17 are formally established by the Executive branch.

18 And, indeed, that is exactly what the General
19 Services Administration's regulations clarify, spell
20 out. And, indeed, that is what the Executive Branch,
21 ever since the enactment of the Advisory Committee Act,
22 has basically said what a utilized committee means.

23 And I think it's useful to focus on the GSA
24 regulations because this is the interpretation which all
25 Federal agencies are supposed to comply with. And under

1 this Court's precedent, it is the interpretation which
2 is entitled at least a substantial deference.

3 The GS--

4 QUESTION: How does it -- how does it happen that
5 GSA, rather than some other agency, promulgated the
6 regulations here?

7 MR. GLITZENSTEIN: Your Honor, there was an
8 Executive Order, I believe it was issued in 1977 by
9 President Carter, who authorized the General Services
10 Administration to undertake the function of providing
11 guidance.

12 And, indeed, that is consistent with the statute
13 itself. I believe it is section 7 of the law, states
14 that an agency should undertake the function of
15 providing government-wide guidance and -- in appropriate
16 circumstances, rules that would be followed by the other
17 agencies.

18 And, indeed, that has been done by the Federal
19 Government ever since FACA was first enacted in 1972.
20 And interestingly, even before the statute was enacted,
21 the Executive Branch had issued several Executive
22 Orders, which contained very parallel provisions and
23 requirements, and coverage, to what the GSA currently
24 says the coverage of the statute and the various
25 requirements of the law should be.

1 President --

2 QUESTION: Now the GSA maintains lists of
3 committees that are covered, is that right?

4 MR. GLITZENSTEIN: Your Honor, what GSA does is
5 essentially take from each of the various agencies those
6 committees which have been chartered in compliance with
7 the law; and it puts all of those committees together in
8 an annual report -- we're up to the 17th annual report
9 this year -- and submits those to the President. Then
10 the President, under the Act, is required to take that
11 list and, in turn, provide that to the relevant
12 committees of Congress.

13 QUESTION: So it doesn't include in the list any
14 committees that are not chartered?

15 MR. GLITZENSTEIN: That is correct, Your Honor. It
16 does not include and of the committees which have not
17 been chartered under the law. That is GSA's cut-off
18 point for what it will include in the list.

19 In other words, if an agency is not using a
20 committee in compliance with the statute, it doesn't,
21 therefore, come to GSA and say, we have committee X, Y
22 and Z, which has not been chartered under the law, that
23 will not be included in the list.

24 QUESTION: And the ABA Committee has, of course,
25 never been on the list?

1 MR. GLITZENSTEIN: That is correct, Your Honor.

2 QUESTION: Does the record tell us how many of
3 those committees receive any kind of government
4 financing for their activities?

5 MR. GLITZENSTEIN: Your Honor, the GSA guidelines
6 do not provide for that particular breakdown and, in
7 turn, the President's handbook on the Advisory Committee
8 Act has never spelled out which -- which committees take
9 Federal funding and which do not.

10 It does include both established and utilized
11 committees. For the Department of Transportation, for
12 example, it submits to the GSA committees that are
13 pre-existing, independent entities that are simply
14 utilized by the government.

15 So the Department of the Transportation, which uses
16 a substantial number of advisory committees, would
17 include some that are not committees taking Federal
18 funds. But I cannot answer precisely how many.

19 QUESTION: Does the committee have to be utilized
20 over a period of time before it's utilized within the
21 statutory definition? That is to say, suppose the
22 Attorney General said, the next three judges I am going
23 to appoint in this state I want to consult -- then fill
24 in the blank: American Trial Lawyers Association, NAACP.

25 MR. GLITZENSTEIN: Your Honor, I --

1 QUESTION: And -- and I want to use them in the
2 same way I use the ABA.

3 MR. GLITZENSTEIN: Your Honor, I think that the
4 effort on the part of Congress was to apply the statute
5 to those committees that are being used in the same
6 manner as an established committee. And therefore, it
7 doesn't matter so much whether it's prospective or
8 whether it's something which is on-going.

9 If the Federal Government, for example, were to
10 establish a committee and say, we are now formally
11 establishing an advisory committee to report on subject
12 X, and from henceforth, it will provide recommendations
13 on a particular subject, say, for example, ethics in
14 government, to take a recent advisory committee that has
15 been in the news, that would clearly be subject to the
16 law.

17 The question is whether the intent is to use that
18 committee as a preferred source of advice over a period
19 of time, and that can apply, I believe, Your Honor, to a
20 committee which is going to be used prospectively --

21 QUESTION: So there -- so there is a time
22 component? And if you use the American Trial Lawyers or
23 the NAACP for three appointments, then you're within the
24 statute?

25 MR. GLITZENSTEIN: Your Honor, I think that the

1 test is not so much whether it's a particular period of
2 time, so much as it is a question of whether on a
3 particular subject matter that entity will be used as a
4 preferred source of advice or recommendation.

5 QUESTION: So if that -- so, then it's true even if
6 only there -- there is consultation with only -- with
7 respect only to one appointment?

8 MR. GLITZENSTEIN: And, indeed, Your Honor, there
9 is case law which would support that result. The
10 National Nutritional Foods Association case involved a
11 one-time meeting; the Edwards case, which we cite,
12 involving a committee set up to provide advice and
13 recommendations which involved a Department of Energy
14 policy was a one-time meeting.

15 The focus, again, is upon the nature of the
16 committee and how it is being utilized, not so much upon
17 the number of meetings that are being held.

18 Now I would say that you have a much easier case,
19 as here, where the committee, over a significant period
20 of time, has performed the same or substantially the
21 same function of providing advice or recommendations on
22 a particular subject matter.

23 And, indeed, that is precisely what the GSA
24 regulation said. And I think that also may relate to a
25 question that Justice Stevens asked before, about the us

1 of confidential information.

2 I think that a committee can still be an advisory
3 committee if it doesn't use confidential governmental
4 information. But if it does use confidential
5 governmental information that the government does not
6 otherwise have to provide to it, and, indeed, does not
7 provide to any other member of the public, then you have
8 very heavy support for the proposition that it is an
9 advisory committee.

10 And I think that is supported by the Justice
11 Department itself when it first looked at this question
12 in the early 1970s.

13 And I'm quoting from a February 1974 Office of
14 Legal Counsel memorandum on this subject, which says,
15 "The major function of the ABA Committee is to provide
16 to this Department advice as to the qualifications of
17 persons being considered for Federal judgeships. A
18 semi-official relationship has been established. The
19 Committee obtains confidential information from the
20 Department, without which the Committee could not
21 function. In effect, the Department solicits the
22 Committee's views; the Committee could not judge the
23 qualifications of prospective nominees without its
24 special relationship with the Department."

25 And I think the point being made, Justice Stevens,

1 was that where an agency goes to a committee or an
2 entity and says, here is otherwise confidential
3 information. We would like your views on that subject.
4 It certainly supports the proposition that the
5 government is intending to use that entity as an
6 advisory committee.

7 QUESTION: But the statement says it couldn't
8 function without it. It functioned many years without
9 it, didn't it?

10 MR. GLITZENSTEIN: Well, Your Honor, in terms of --

11 QUESTION: Didn't it? Didn't it? Yes or no,
12 didn't it?

13 MR. GLITZENSTEIN: It functioned, but not in this
14 sense.

15 QUESTION: But it functioned?

16 MR. GLITZENSTEIN: It did not function as an
17 advisory committee in the sense that it obtained
18 information from the government and was asked to
19 participate in that process.

20 QUESTION: I understand that's all in that opinion
21 letter, but what is the statutory foundation for the --
22 this emphasis on confidential information?

23 MR. GLITZENSTEIN: Your Honor, I think the
24 statutory emphasis, once again, is the parallel between
25 established committees and utilized committees. And

1 that's not to say that every established committee is
2 necessarily obtaining confidential information.

3 But I think the notion was, when the government
4 establishes a very unique relationship with a particular
5 entity and says, we're providing you with this
6 information so that you can advise us, that suggests
7 that you do have strong support for an advisory
8 committee.

9 I'm not saying, once again, Your Honor, that that
10 is the only criteria that is relevant to --

11 QUESTION: I don't understand why it's even -- even
12 a single criteria. I mean, I -- it may make a
13 difference in the way it functions, but just reading the
14 statute, I don't see why it makes a bit of difference
15 whether the ABA Committee has confidential information
16 or not, as long as they meet and discuss the
17 qualifications of the candidate, come up with a -- a
18 not-qualified or qualified recommendation.

19 MR. GLITZENSTEIN: I agree with Your Honor, even if
20 the ABA Committee did not get confidential information,
21 it would fall within the terms of the statute. The only
22 point I'm trying to make, and I don't want to carry it
23 too far, is that where they go even further than that,
24 that, in our minds, resolves and doubt on this score,
25 and suggests that you clearly have the government

1 admitting that it is seeking this information as --
2 advice -- as a preferred source of advice.

3 QUESTION: But you want us to look at all advisory
4 committees that have been established, and then somehow
5 draw those common characteristics and apply them to
6 private entities. I haven't reviewed the statute, but I
7 would imagine every private -- every advisory committee
8 established by the Congress is different.

9 And that has simply no footing in this statute.

10 MR. GLITZENSTEIN: Your Honor, I think, once again,
11 and this has been spelled out, not only by GSA, but also
12 by OMB when it had this authority in the early '70s, by
13 the Justice Department itself, and even prior to that by
14 Executive Orders which were very similar to the approach
15 taken by GSA, that the question is, is it being used in
16 a manner which is similar to an established committee?
17 Does it have fixed membership? Does it have a structure
18 as a committee? Is it being asked to provide advice or
19 recommendations on particular issues over -- at a
20 particular point in time? And, does it have all those
21 kinds of criteria?

22 And I think you will have to ask that question with
23 respect to each committee.

24 If I might turn quickly to the constitutional
25 argument, because I think it is something which is

1 addressed significantly in the briefs. The most
2 important point I would like to make about it is that
3 this is a law which has been in effect for 17 years now,
4 and which hundreds, indeed, thousands of advisory
5 committees, some which are very similar to the ABA
6 Committee, peer review committees of the National
7 Science Foundation, the National Institutes of Health,
8 have complied with. It's a statute which builds into it
9 a significant amount of flexibility in application by
10 the Executive Branch.

11 And perhaps the most important point that I would
12 make on that score involves the exemptions to the open
13 meeting and the open document provisions. In essence,
14 what the statute says is that where meetings or
15 documents would fall within exemption to the Freedom of
16 Information Act or the Sunshine Act for meetings, that
17 material can be protected.

18 The Justice Department, in the early 1970s, and I
19 don't think really disputes at this stage of the game,
20 that the exemption in the statute for personal privacy
21 material, which this Court handed down opinion on in the
22 FOIA context just a few weeks ago, would apply to the
23 majority, if not all, of the specific discussions of
24 individual candidates for Federal Judgeships.

25 We would submit that the statute clearly allows the

1 ABA to function in a manner that is consistent with any
2 genuine need for confidentiality.

3 On the other hand, where there are discussions of
4 matters which do not fall within the exemptions, then
5 presumably those could be open to the public.

6 To take an example, a general discussion by the
7 Committee as to the role that political ideology may
8 play in its deliberations is something which would not
9 appear to fall within any of the exemptions.

10 Surely the Justice Department would have the
11 opportunity to argue that it does, but assuming that it
12 doesn't, there has not been a single word expressed in
13 any of the briefs that that kind of meeting, a general
14 discussion of role, of function, of criteria, of
15 procedure, would, in fact, need to be protected under
16 the statute.

17 To take another one of the statute's very basic
18 threshold requirements, that of filing a charter.
19 That's contained in section 9(c) of the law. The
20 fundamental purpose of that provision is to have the
21 agency that's using a committee set out the agency's
22 statement as to why it's using the committee.

23 Now we all know, and the record in this case
24 suggests, that there has been some confusion as to
25 exactly what the ABA Committee's role in the process

1 is. And, more importantly, what the Justice
2 Department's position on what the role of that process
3 is.

4 And a charter, which would spell out the Justice
5 Department's statement as to why the Committee is being
6 used, whether, for example, it is supposed to be
7 considering ideology, whether it's supposed to be
8 considering political views, and, if not, whether,
9 indeed, it is supposed to provide an ultimate
10 recommendation for whether someone should be put on the
11 Court. All that could be spelled out in a charter.

12 There is no reason, in any of the briefs, why that
13 kind of material should not be made available to the
14 public.

15 QUESTION: Thank you, Mr. Glitzenstein.

16 Mr. Shapiro?

17 ORAL ARGUMENT OF DAVID L. SHAPIRO

18 ON BEHALF OF THE APPELLEES

19 MR. SHAPIRO: Thank you, Mr. Chief Justice, and may
20 it please the Court:

21 The question in this case is not whether it is a
22 good idea or a bad idea for the President and his
23 Judicial Selection Committee to rely, as Presidents have
24 relied for some 35 years, on the Council of the ABA
25 Committee when it comes to judicial nominations.

1 The questions, rather, are whether, in enacting the
2 Federal Advisory Committee Act in 1972, Congress
3 intended to intrude, to regulate that relationship, and
4 if it did, whether that intrusion is consistent with the
5 constitutional separation of powers and, in particular,
6 with the President's function to nominate officers of
7 the United States.

8 The answers to both questions, we submit, is no.

9 The answer to the first question, that of statutory
10 construction, is no because the long-standing and well
11 known relationship between the Executive and this
12 private group, with respect to the exercise of the
13 nominating power, was wholly outside the scope of
14 Congress' interests and concerns when the enacted the
15 Advisory Committee Act.

16 And the answer to the second question, the question
17 of constitutionality, is no because if the Act applies
18 to this relationship, the resulting constraint on the
19 President's ability to seek advice from whomever he
20 chooses, and in whatever manner he chooses on this
21 matter would be an unconstitutional invasion of his
22 discretion on a subject on which he is accountable, not
23 to the Congress or to the Judiciary, but solely to the
24 electorate through the political process and to his own
25 conscience.

1 QUESTION: Mr. Shapiro, does -- if we reach the
2 constitutional issue, does that require us to know a
3 little more about how the operation of this law would
4 affect the process?

5 I'm a little concerned that we're deciding the
6 question, potentially, with very little understanding of
7 how, in fact, it would impact on the operation of the
8 Committee, or the Presidents, or the Department of
9 Justice's use of the Committee.

10 MR. SHAPIRO: Your Honor --

11 QUESTION: It's a little like a facial challenge
12 when we -- we don't know how it would play out. There
13 was something in the material circulated to us from the
14 early assessment of it by the Department of Justice to
15 the effect that, well, we think the plain language makes
16 it apply to the ABA Committee, but we don't think it'll
17 have any substantial effect.

18 Now that's the very inquiry we have been making in
19 separation of powers cases around here.

20 MR. SHAPIRO: Your Honor, the case has the quality
21 of a facial challenge. Unfortunately, it seems to us,
22 both inappropriate, undesirable, and inconsistent with
23 the statute, to have a trial run to see how, in fact, it
24 operates.

25 But I do believe that it's essential, especially

1 because this is the first occasion on which this Court
2 has considered the meaning and scope of this statute,
3 even though it's been on the books for some 17 years.

4 I think it's appropriate, at least, to spell out
5 what we believe the significant and inescapable impacts
6 would be. And for the Court, then, to determine, in the
7 light of those impacts, both the question of statutory
8 construction and the constitutional issue.

9 There are a number of very difficult questions of
10 statutory construction posed by this statute. I don't
11 think they need all to be resolved in order to make
12 these threshold determinations of what significant
13 impact the statute would have. Because regardless of
14 how they are resolved, if the statute is held applicable
15 to the Committee, there would be, I think, four direct,
16 immediate and significant impacts.

17 First, there would have to be a designated Federal
18 officer who would have to attend each and every meeting
19 of the advisory committee. This Federal officer would
20 have the authority to call those meetings, to adjourn
21 those meetings, and, we believe, would also have, under
22 the statute, control over the agenda.

23 So the immediate result would be that the Committee
24 would lose a good deal of its private autonomy and would
25 become subject to a significant measure of Federal

1 control.

2 Secondly --

3 QUESTION: That officer would be appointed by the
4 Justice Department, I take it?

5 MR. SHAPIRO: Yes, Your Honor.

6 QUESTION: So it would be somebody out of the
7 Attorney General's office?

8 MR. SHAPIRO: It would be a government official who
9 would be appointed by the Justice Department, so long as
10 the Committee were working with the Justice Department.

11 QUESTION: From the standpoint of a facial or free
12 speech analysis, I think that raises serious concerns,
13 but it's not clear to me that we have enough information
14 to say that it raises a real systemic problem with
15 reference to separation of powers.

16 MR. SHAPIRO: Your Honor, we believe that it
17 fundamentally affects the relationship between what, up
18 to now has been, the Executive on the one hand, and a
19 purely private group on the other. So that the process,
20 which -- of which this is just one part, the process of
21 essentially federalizing that private group, there are
22 other aspects of which that will happen, seems to us,
23 will dramatically affect the relationship, will
24 dramatically affect the extent to which the President,
25 acting through his Judicial Selection Committee, can

1 seek outside, private help in this matter.

2 Because not only is there a designated Federal
3 officer, there is, under the statute, a designated
4 management officer, whose job will be to take custody,
5 to keep control of, all the records of this advisory
6 committee; not simply the records of communications from
7 the advisory committee to the Executive, but the records
8 of the records of the advisory committee itself, the
9 internal records of the advisory committee itself.

10 Again, an effort we believe towards federalizing
11 the operation of this advisory committee in a way which
12 may lead the Committee itself to feel it can't function
13 under that regime, or will, I think, dramatically affect
14 the relationship.

15 Third, the committee is, under the statute, made
16 subject to the mandatory and continuing oversight of
17 both the General Services Administration and the
18 committees of the Senate and the House that supposedly
19 have jurisdiction in this area, which presumably would
20 be the Judiciary Committees of each house.

21 Finally, the records, and these include the
22 internal records of the Committee, together with all
23 meetings of the Committee, would be subject to the open
24 access provisions of the Act. And the decision on
25 whether or not to apply the exemptions that are

1 available, would not be up to the Committee, but would
2 be up to the Federal officers who are in charge of
3 administering that part of the statute.

4 Unfortunately, we don't feel that we can readily
5 and completely accept the offer of Public Citizen, that
6 all of the matters that need to be protected from the
7 viewpoint of the Executive and the Committee would, in
8 fact, be protected by those exemptions.

9 We know that the Washington Legal Foundation itself
10 takes a different view on some of these. We have no
11 doubt that they would be involved in litigation if the
12 Act were held subject to this committee.

13 There are a number of other related provisions
14 which are not so important. Apparently the relationship
15 would have to terminate immediately, could only be
16 renewed on the filing of a charter and other matters.
17 There would be requirements of reporting and so on.

18 So that the overall effect would be one of really
19 destroying the private character of this organization as
20 a consultant, with respect to the relationship to the
21 Executive and to the President.

22 QUESTION: If -- If you can say all of that on this
23 record, I'm not sure why you said in your brief in a
24 footnote that you don't need to address the First
25 Amendment. I understand that they are alternative

1 points, but it seems to me that these sound -- each of
2 these, like a First Amendment analysis, and if you don't
3 need a trial or further proceedings for the separation
4 of powers point, I don't see why you'd need it for the
5 First Amendment either.

6 MR. SHAPIRO: The First Amendment -- let me say two
7 things about the First Amendment point on which we've
8 taken a very limited position in our brief.

9 First, the First Amendment is being raised for the
10 first time in this whole litigation in this Court. The
11 First Amendment question may raise issues of statutory
12 construction and the reach of the statute that we do not
13 believe have to be resolved to resolve the questions of
14 application and constitutionality that we are raising.

15 It is our position that, to the extent and advisory
16 committee functions in some sort of preferred capacity,
17 receiving confidential information that is not generally
18 available, that there is no sustainable First Amendment
19 claim that that committee can make.

20 But, in any event, we think that because the First
21 Amendment issue may raise its own difficult issues of
22 statutory construction, that that issue should be
23 remanded to the lower courts if it's --

24 QUESTION: Well, Mr. Shapiro, is it the
25 government's position that it has really two rounds of

1 litigation, that it can take one position in the lower
2 courts the first time, and then raise an issue in the
3 Supreme Court and say, we didn't raise it below, but we
4 think it's important, so send it back for another round?

5 MR. SHAPIRO: Your Honor, we have not raised the
6 First Amendment issue in our brief. We commented on it
7 in a footnote only because the American Bar Association
8 raised it as Appellee.

9 We do not believe that that issue should be reached
10 in this case. We believe that if the Court thinks it's
11 not too late to consider the ABA's raising of the brief,
12 then it would be appropriate to remand it.

13 We have not raised the issue here. We have only
14 tried to respond in a footnote to the ABA's effort to
15 raise it.

16 It's against this background, then, that we think
17 the question -- the very difficult question of statutory
18 construction must be considered.

19 I think at the outset, with the question -- the
20 question of statutory construction, we should emphasize,
21 is not really a question of plain meaning or not plain
22 meaning. The Appellants come here clad in the armor of
23 plain meaning, or at least purport to, but the fact is
24 that this statute is so broadly and sweepingly written
25 that it has been consistently recognized not to have any

1 ascertainable plain meeting.

2 The broadest possible reach of the definition of an
3 advisory committee under this statute could apply to any
4 situation in which the Executive tries to obtain the
5 help of two or more people if one of those people is not
6 a Federal employee.

7 To give the statute that kind of broad reading has
8 been consistently recognized to threaten to cripple the
9 Executive process of consultation and to raise the most
10 serious issues of separation of powers.

11 The result is that from the very beginning, the
12 statute has not been given the broadest, most sweeping
13 construction that the language might justify. There are
14 many examples of that. A few of most significant, I
15 think, for our purposes include some, which the
16 Appellants have conceded in this Court.

17 For example, despite the sweeping language of the
18 statute, it is thought to apply to consultation of
19 informal or ad hoc groups, at least where the advice
20 sought is not clearly spelled out in advance.

21 Second, it is thought, under the regulations of the
22 GSA, and again, appellants appear to concede this point,
23 that the Act probably does not apply if the advisory
24 group does not have some sort of preferred position in
25 the hierarchy of those groups whose advice is sought,

1 which may, indeed, require the communication of some
2 confidential information.

3 Third, the Act has been held not to apply to an
4 advisory committee that has operational as well as
5 advisory functions, the Bicentennial Commission being an
6 example of that. In a case prosecuted and lost by Public
7 Citizen in the courts below.

8 Finally, as an example, the Act has been held not
9 to apply in cases in which the advice of the group is
10 sought from the individual members of the group rather
11 than on some consensus basis from the group as a whole.

12 Now none of these constructions, all of which we
13 believe are sincere, good-faith efforts to come to terms
14 with a very sweeping statute, none of these
15 constructions can be explained solely on the basis of
16 the very sweeping language.

17 They can be explained, we believe, only on the
18 basis of a conscientious and intensive effort to figure
19 out what it was Congress was concerned about, what it
20 was that they were trying to do.

21 And that is the effort that we have tried to
22 undertake in our brief and that we urge this Court to
23 undertake.

24 We believe that if you do make that examination of
25 the history, background and concern of this Act, you

1 discover that the primary concerns of Congress were
2 first, with the waste of a great deal of Federal money
3 and effort. Money that, at the time the Act was
4 enacted, was approaching something like \$100 million a
5 year, and which, even under the statute has continued to
6 mount ever since.

7 The other principal concern, we believe, was
8 essentially with the undue influence that advisory
9 committees were thought to have on the implementation of
10 regulatory legislative policy; matters that are clearly
11 of continuing legislative concern and oversight.

12 Indeed, when this Act was introduced in the House,
13 both the chair of the committee and the minority chair
14 spoke of their concern that advisory committees were
15 usurping the proper role of Congress with respect to the
16 oversight of regulatory and legislative policy.

17 QUESTION: Mr. Shapiro, I take it that sooner or
18 later you are going to get down to the actual language
19 of the Act and see how you avoid that?

20 MR. SHAPIRO: Yes, Your Honor.

21 But I think that it has to be done against the
22 background of these two concerns.

23 As the Act was drafted, both in the House and
24 Senate, it spoke only of advisory committees established
25 by the Executive or by the President. Indeed,

1 presidential commissions, advisory commissions came into
2 the process --

3 QUESTION: But that isn't the way it was passed?

4 MR. SHAPIRO: No.

5 The conference committee added the word utilize
6 without any explanation. And, of course, it is
7 sometimes thought that conference committees are not
8 supposed to enlarge or significantly alter the effect of
9 the statute as it has come from both branches.

10 So one possible argument is that the word utilize,
11 in effect, did not actually change the scope of the
12 statute, but simply was designed to clarify it.

13 QUESTION: Well, you're -- you're saying we just
14 should ignore the word utilize?

15 MR. SHAPIRO: No, sir. No, sir.

16 QUESTION: Because -- there will be a lot of
17 committees, you would say, that are utilized that are
18 covered by the Act, I suppose?

19 MR. SHAPIRO: That's right. That's right. No, we
20 think the word utilize has had an effect, we simply
21 don't think that its proper scope can be determined
22 simply looking at its dictionary meaning, just as in the
23 O'Connor case, the proper scope of the word income taxes
24 could not be determined by looking at the four corners
25 of the treaty. And in the American Trucking Association

1 case, the proper scope of the word employees could
2 similarly not be determined.

3 The efforts that we've discussed before, to limit
4 the scope of the Act, do not turn on the dictionary
5 meaning of the word utilize, they turn on a concern that
6 application of the Act, giving it its full sweep, could
7 effectively cripple the operation of the Executive and
8 raise serious separation of powers problems.

9 Those issues, it seems to us, are intensified when
10 we are talking about powers like the nominating power,
11 the pardon power, the veto power; powers that are --

12 QUESTION: So what do you do to the word utilize?
13 What do you --

14 MR. SHAPIRO: I do to the word utilize -- or we do,
15 I think essentially what the Court did to the word
16 income taxes in the O'Connor case.

17 QUESTION: Well, what was that?

18 MR. SHAPIRO: The Court said that the exemption
19 from all income taxes under the treaty did not include
20 Federal income taxes because it was apparent from the
21 concerns of those who wrote the treaty that the desire
22 was to exclude people from income taxes levied by Panama
23 and not by -- from income taxes levied by the United
24 States.

25 We believe that it is equally true that there was

1 no purpose here to regulate the activities of the
2 committees -- those committees that made no use of
3 Federal funds, and that were in no way involved with the
4 implementation of legislative policy. But, rather, were
5 involved entirely, and at their own expense, with
6 advising the President on matters of his exclusive
7 concern.

8 There is not one reference in this very elaborate
9 legislative history to the very well known activities of
10 this Committee at the time, or indeed, to any activities
11 of the President that fall into the categories that we
12 are discussing.

13 QUESTION: You do not place much confidence in the
14 case of Church of the Holy Trinity?

15 MR. SHAPIRO: We do, Your Honor. We have cited the
16 history --

17 QUESTION: You certainly don't place much
18 confidence -- or emphasis on it in your brief.

19 MR. SHAPIRO: We've cited cases that cite it --

20 (Laughter)

21 MR. SHAPIRO: And we are happy to rely on it.

22 The case is very much like the O'Connor case, like
23 the American Trucking Association's case. There are
24 many cases in which words have been limited, not because
25 of their dictionary meaning, but because it -- it

1 appeared so evident that they fell so far beyond the
2 scope of Congressional concern.

3 In the Holy Trinity case, the -- the problem was
4 similar; the Catholic Bishop case, the problem was
5 similar. There are so many cases in which this rule has
6 been applied. And the cases we believe are most
7 significant, in which we are talking about serious
8 constitutional questions that were never addressed or
9 considered by Congress.

10 In those cases, we believe it is appropriate to
11 apply a clear statement rule. And, any version of that
12 rule, I believe, would lead to the result we are
13 contending for here.

14 Now, it's for all those reasons that we believe the
15 constitutional questions that we are raising do not need
16 to be reached. But we believe it's appropriate to
17 discuss them both because the Court may reach them, and
18 because we believe that they flesh out, lend substance
19 to the arguments of statutory construction that we're
20 making.

21 The effect of the Act, if it applies in this case,
22 is, we believe, severely to change the relationship
23 between the Executive and Bar Committee with respect to
24 the nominating power.

25 Now the nominating power is a very special power

1 under the Constitution, and I think must be
2 distinguished from the appointment process. The
3 appointment process involves both the exercise of the
4 presidential nominating power and the exercise of the
5 senatorial function of advice and consent.

6 But the nominating power itself is clearly the
7 prerogative of the Executive, and it is thought to be a
8 very special prerogative of the Executive from the very
9 beginning.

10 Hamilton, Jefferson, Washington, and others, at the
11 very beginning, and their successors ever since, have
12 felt that this process must be exclusively theirs, and
13 that they must be able to consult people whom they wish
14 to consult on an entirely confidential basis --

15 QUESTION: Mr. Shapiro, has this Act been applied
16 to some advisory committee on ambassadorial appointments
17 by the President?

18 MR. SHAPIRO: I think there may have been a point
19 under President Carter's Administration, when there was
20 such a committee, which the Executive at that time may
21 have chosen to subject to the Act. I don't believe
22 there was any litigation over it.

23 At the present time there are a number of
24 presidential advisory commissions that are subject to
25 the Act. I don't believe any of them fit into the

1 category that we are talking about today.

2 QUESTION: None of them are private agencies?

3 MR. SHAPIRO: I believe, to the extent we have
4 looked into this and we have been able -- we have
5 checked, for example, all the committees cited in the
6 Appellant's brief, everyone of the committees cited uses
7 significant Federal funds. Many were created by the
8 Federal Government --

9 QUESTION: How about things like the Republican
10 National Committee?

11 MR. SHAPIRO: I know of no effort to apply the Act
12 to any communications between the Executive and the
13 Republican National Committee.

14 QUESTION: But, theoretically, if it applies here
15 to the ABA Committee, it would apply to that?

16 MR. SHAPIRO: It might. It might, depending on a
17 number --

18 QUESTION: Or the AFL-CIO committees in advising
19 the President or the Department of Labor?

20 MR. SHAPIRO: If the President, for example, were
21 to consult with the AFL-CIO and its Executive Council,
22 with respect to the appointment of the Secretary of
23 Labor, if the Act were held applicable to the ABA
24 Committee, I find it very difficult to see how it could
25 not be held applicable there. And it seems to me,

1 similar constitutional questions would arise.

2 The nominating power, we believe, is very special
3 because of the emphasis of the Framers on the
4 President's sole responsibility for the nomination, and
5 the essential aspect that, in order to exercise that
6 responsibility, he must have discretion to consult the
7 people he chooses to consult in the manner he chooses to
8 exercise. And every president since Washington, I
9 believe, has recognized that confidentiality is an
10 essential part of that process, because it is only
11 through that kind of confidentiality that he can have
12 the kind of candor --

13 QUESTION: So -- so would you say that Congress
14 could not enact any direct regulation of the nominating
15 process?

16 MR. SHAPIRO: Congress' power to regulate the
17 nominating process, Your Honor, we believe is extremely
18 limited. With respect to its ability to regulate the
19 President's discretion in seeking advice, it is our
20 position that Congress has no power of any kind.

21 QUESTION: Are there any instances where Congress
22 does attempt to regulate the nominating process, other
23 than the one before us?

24 MR. SHAPIRO: I think perhaps the most relevant is
25 in the area of qualifications for office. That is,

1 there are a number of situations where Congress has not
2 only defined a particular or Federal office, but, as
3 part of that process, has spelled out the qualifications
4 for that office.

5 QUESTION: That's not true with respect to judges,
6 is it, or is it?

7 MR. SHAPIRO: I believe that, I'm not certain, but
8 I believe that District judges have to be residents of
9 the state in which they're appointed. There is, I think
10 a residence requirement for judges.

11 QUESTION: By statute?

12 MR. SHAPIRO: Uh-huh, by statute.

13 Now we don't deny that reasonable qualifications on
14 eligibility for office are within the authority of
15 Congress to define those offices, but we do believe that
16 that authority is not subject simply to a rationality
17 test, because it does impose a very severe problem of
18 invading the President's authority to nominate.

19 If, for example, there were a statute that said
20 that members of this Court could only be nominated from
21 among those who were already Federal judges, that could
22 perhaps be rationally related to the job. But we
23 believe it would be too great an interference with the
24 President's authority to nominate.

25 So that a very close look, we believe, must be

1 taken, and questions of that sort. But the overlap
2 between --

3 QUESTION: So what's the test you propose?

4 MR. SHAPIRO: Well, in the area of qualifications,
5 we think that inevitably the test is one of balance. In
6 the area of the President's ability to seek advice from
7 the people he chooses and in the manner he chooses, we
8 submit the test is not one of balance. That this is a
9 matter over which Congress has no control; that
10 Congress' role in the appointments process, with respect
11 to advice and consultation, is limited to the advice and
12 consent role of the Senate after the nomination has been
13 made.

14 That the interference that this Act would impose on
15 the very important discretion of the President to seek
16 the advice of those he chooses and in the manner he
17 chooses, cannot be sustained with the authority of the
18 President under Article II.

19 If there are no further questions.

20 Thank you.

21 QUESTION: Thank you, Mr. Shapiro.

22 Mr. Kamenar, you have two minutes remaining.

23 REBUTTAL OF PAUL D. KAMENAR

24 MR. KAMENAR: Just briefly, Your Honor, to rebut
25 some of the points being made here by opposing counsel.

1 They're worried about interfering with the powers
2 of the President, in crippling the presidency in this
3 particular situation. They have yet to talk about how
4 filing a simple charter would somehow bring the
5 presidency to a grinding halt, to let the public know
6 what is the purpose of the ABA Committee in terms of
7 evaluating candidates.

8 They talk about having to have people attend these
9 meetings, yet the Attorney General, William Saxby
10 himself, stated that applying this law should, "have
11 little practical effect upon the ABA Committee,"
12 precisely because they have very few meetings in which
13 they conduct their business. So it would not be as
14 intrusive as they would say.

15 And it seems that the government is worried about
16 somehow federalizing this particular ABA committee, but
17 I would not that even the ABA themselves think of
18 themselves as a quasi-official or government official.

19 During Justice Kennedy's hearings, Senator Grassley
20 asked Judge Tyler, who is chairman of the ABA Committee,
21 "I'm trying to have a public dialogue with you based on
22 the quasi-public function that you serve. Maybe you
23 don't think that you serve that kind of function." Mr.
24 Tyler: "I agree, we do."

25 And again, that was reiterated during the hearings

1 for Judge Bork.

2 So it seems to me that Justice -- Justice Kennedy
3 is correct, that that's more of a First Amendment
4 argument, rather than whether or not this Committee
5 comes under the statute.

6 With respect to the statutory interpretation
7 argument, I think there is argument is pretty absurd,
8 because if they're talking about whether Congress
9 intended to regulate the presidential advisory
10 committees, they expressly provided in the statute a
11 provision for presidential advisory committees. I don't
12 see how Congress could get any clearer that that's what
13 they intended to do.

14 And certainly Congress knows that the President
15 exercises exclusive powers and exercises shared or
16 concurrent powers. And they did give exemptions to the
17 President for advisory committees for the CIA. And I
18 don't think we should carve out a special exemption for
19 the ABA in this statute.

20 Thank you, Your Honor.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kamenar.
22 The case is submitted.

23 (Whereupon, at 1:42 p.m., the case in the
24 above-entitled matter was submitted.)

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:

No. 88-429 - PUBLIC CITIZEN, Appellant V. UNITED STATES DEPARTMENT OF JUSTICE, ET AL.; and

No. 88-494 - WASHINGTON LEGAL FOUNDATION, Appellant V. UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

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

BY alan friedman

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