

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: FEDERAL ELECTIONS COMMISSION Petitioner, v.  
NRA POLITICAL VICTORY FUND, ET AL.

CASE NO: 93-1151

PLACE: Washington, D.C.

DATE: Tuesday, October 11, 1994

PAGES: 1 - 56

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED  
SUPPLY OF LOGS  
MARSHAL'S OFFICE

194 OCT 18 49:24

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - - X  
3   FEDERAL ELECTIONS COMMISSION   :  
4                   Petitioner,                   :  
5                   v.                                   :   No. 93-1151  
6   NRA POLITICAL VICTORY FUND,   :  
7   ET AL.   :  
8   - - - - - X  
9   Washington, D.C.  
10   Tuesday, October 11, 1994  
11                   The above-captioned matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:03 a.m.  
14   APPEARANCES:  
15   LAWRENCE M. NOBLE, ESQ., General Counsel, Federal Election  
16   Commission, Washington, D.C.; on behalf of the  
17   Petitioner.  
18   PAUL BENDER, ESQ., Deputy Solicitor General, Department of  
19   Justice, Washington, D.C.; on behalf of the United  
20   States, as amicus curiae.  
21   CHARLES J. COOPER, ESQ., Washington, D.C.; on behalf of  
22   the Respondents.  
23  
24  
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	LAWRENCE M. NOBLE, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	PAUL BENDER, ESQ.	
7	On behalf of the United States, as amicus curiae	25
8	ORAL ARGUMENT OF	
9	CHARLES J. COOPER, ESQ.	
10	On behalf of the Respondents	36
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 this morning in Number 93-1151, Federal Election  
5 Commission v. NRA Political Victory Fund, et al.

6 Mr. Noble.

7 ORAL ARGUMENT OF LAWRENCE M. NOBLE

8 ON BEHALF OF THE PETITIONER

9 MR. NOBLE: Mr. Chief Justice, and may it please  
10 the Court:

11 This case presents two issues: first, whether  
12 Congress violated the Constitution's requirement of  
13 separation of powers when it appointed the Secretary of  
14 the Senate and the Clerk of the House as nonvoting ex  
15 officio members of the Federal Election Commission where  
16 all the decisions of the Commission are made by six voting  
17 members who are appointed by the President and confirmed  
18 by the Senate, pursuant to Article II.

19 The second issue is whether, if the FEC is  
20 unconstitutional, whether the actions taken prior to the  
21 Court's decision should be afforded the fact of validity  
22 as was done some 18 years ago in Buckley v. Valeo.

23 The United States Court of Appeals for the D.C.  
24 Circuit applied a bright line rule to the separation of  
25 powers analysis and effectively said that the mere

1 presence of nonvoting, ex officio agents of Congress on an  
2 independent agency of the executive branch was a violation  
3 of the separation of powers.

4 After doing so, the court declined to apply the  
5 precedent of Buckley v. Valeo, and felt that because this  
6 was a defense to an enforcement action it must give the  
7 National Rifle Association some relief, and therefore  
8 reversed the district court's finding of a violation of  
9 the Federal Election Campaign Act.

10 We believe that the court of appeals erred on  
11 both issues. The court's --

12 QUESTION: Are you also going to address whether  
13 you have authority to represent the FEC here?

14 MR. NOBLE: If the Court wishes, I can address  
15 that issue.

16 The Federal Election Commission was created in  
17 the wake of Watergate to be independent of the Department  
18 of Justice. The statute itself talks in terms of the  
19 Federal Election Commission having independent authority  
20 to institute actions and to conduct appeals of cases under  
21 title II.

22 The Solicitor General's position on this relies  
23 on a narrow reading of the word appeal to not include  
24 petitions for writ of certiorari.

25 QUESTION: Well, I suppose you could read 28

1 U.S. Code 518(a), giving the Solicitor General authority,  
2 as not being inconsistent with the statute 437d that you  
3 rely on. In other words, the Commission can appeal every  
4 place except here, and when coming here, it has to be the  
5 Solicitor General. I suppose you could give effect to  
6 both those statutes.

7 MR. NOBLE: You could give effect to both those  
8 statutes, though I think that would not be giving full  
9 effect to the intent of Congress in establishing the  
10 Federal Election Commission.

11 First, I would note that 518(a) also talks about  
12 the Solicitor General's authority to appeal, and does not  
13 specifically mention petitions for writ of certiorari, and  
14 this Court has recognized that's a congressional grant of  
15 authority, and that Congress can limit that authority in  
16 specific instances. Here, where you have --

17 QUESTION: You don't think the word suits in  
18 that statute helps the Attorney, the S.G.?

19 MR. NOBLE: As a general proposition, absent  
20 some other declaration by Congress that litigation  
21 authority should reside in another agency, yes, I think  
22 that does cover it. But in our instance, we have a  
23 situation where Congress clearly intended the Federal  
24 Election Commission to be independent of the Department of  
25 Justice.

1 QUESTION: Well, you're saying that appeals in  
2 518 indicates that it comprehends writs of certiorari. I  
3 thought that was your argument.

4 MR. NOBLE: The word appeal generally  
5 comprehends writs of certiorari. The word appeal is also  
6 used in our statute in title II authorizing the Commission  
7 to conduct appeals.

8 QUESTION: But in 518 it says, suits and  
9 appeals.

10 MR. NOBLE: Yes, but while that's a general  
11 grant of authority to the Solicitor General, we don't  
12 believe that it overrides the congressional -- the words  
13 of the statute and also the congressional intent to afford  
14 the Commission its own litigation authority.

15 QUESTION: Well, it doesn't override, it, but  
16 the point is, the mere fact that your statute says appeals  
17 is not contradicted by, or a limited reading of that  
18 statute is not contradicted by 518(a), which goes out of  
19 its way to say, not just appeals, but the Attorney General  
20 represents the United States in suits and appeals.

21 MR. NOBLE: Yes, Justice Scalia, but again I  
22 think if you look at the intent of Congress, the way the  
23 statute's constructed, also --

24 QUESTION: I'm looking at it. I'm reading  
25 518(a), and I'm reading 9010, and what do you do about



1 9040, which was enacted at the same time as the statute  
2 you're relying upon, which does say the Commission is  
3 authorized on behalf of the United States to appeal from  
4 and to petition the Supreme Court for certiorari to review  
5 judgments or decrees entered with respect to actions in  
6 which it is presumed to be provided in this section, which  
7 is not the present section. There it goes out of its way  
8 to say, not only appeal, but to petition for certiorari.

9 MR. NOBLE: That provision was not enacted at  
10 the same time as the Federal Election Campaign Act. In  
11 fact, that provision came into being in 1971, prior to the  
12 Commission even being created, and then what happened in  
13 1974 when the Commission was created, that statute was  
14 just modified to substitute the Commission for the  
15 Comptroller General, and we don't think that Congress had  
16 any intent in doing that.

17 QUESTION: It was not passed at that time? It  
18 was not reenacted?

19 MR. NOBLE: It was reenacted, but there was  
20 no --

21 QUESTION: I see. It was originally reenacted,  
22 just reenacted.

23 MR. NOBLE: And it was not -- it was not in any  
24 way substantially redrafted. They just substituted,  
25 effectively, the FEC for the Comptroller General, so in

1 effect what you have is two statutes created at two  
2 different times, and they were originally created for two  
3 different agencies, and so we think that the looking at  
4 title 26 as a proscription on title 2 authority is  
5 inappropriate in this situation. Also, though --

6 QUESTION: How many other agencies have the  
7 authority to petition here without the S.G.?

8 MR. NOBLE: Excuse me, I'm --

9 QUESTION: How many other agencies, or how many  
10 agencies, perhaps I should say, have the authority to  
11 petition here without the S.G.?

12 MR. NOBLE: I'm aware of -- there -- I'm not  
13 specifically sure. I think there are a couple of other  
14 agencies, and there are situations where agencies have  
15 voluntarily given, or ceded authority to the S.G. to  
16 petition this Court.

17 QUESTION: Do you know what the other agencies  
18 are that you think have that authority?

19 MR. NOBLE: I think the International Trade  
20 Commission has that authority. Beyond that, I'm not sure.

21 QUESTION: Doesn't the FTC have the same, a  
22 similar statute to yours?

23 MR. NOBLE: I don't know that it has the same  
24 exact language, and it clearly does not have the same  
25 legislative history with regard to the intent of the

1 Federal Election Commission to be independent of the  
2 Department of Justice.

3 If I can address for a moment the question of  
4 title 26, and how -- the reading that title 26 gives the  
5 FEC authority while title 2 does not would result in what  
6 we consider a conflicting scheme, because under title 26  
7 and under title 2, the Federal Election Commission can  
8 bring suits for injunctive relief for violations of the  
9 public financing statutes.

10 And under the Solicitor General's position, we  
11 would have a situation that if the FEC cited title 2, the  
12 Solicitor General would have authority in the Supreme  
13 Court, if the FEC cited title 26 as its authority, the FEC  
14 would have authority in the Supreme Court, and if the  
15 SEC -- if the FEC, as is probably most likely, would cite  
16 both statutory sections, then you would have conflicting  
17 authority in the Supreme Court, and we suggest that that  
18 is not the scheme that Congress intended.

19 The -- what runs throughout our statute, the  
20 creation of our statute, was the idea that the Federal  
21 Election Commission confined itself in litigation involved  
22 with a sitting President, or a sitting President's  
23 opponent, and that there should be independence from the  
24 Department of Justice, from the Attorney General.

25 QUESTION: Well, the statute in title 26

1 expressly gives the FEC authority. I suppose that all  
2 these statutes could be read so as to say the FEC does not  
3 have authority to petition this Court in this case today.  
4 If we were to say that, do you think that the subsequent  
5 permission given by the Solicitor General could possibly  
6 cure the jurisdictional problem?

7 MR. NOBLE: Yes.

8 QUESTION: Because the consent wasn't given  
9 until long after the petition was filed.

10 MR. NOBLE: Yes. The petition was clearly filed  
11 within time. There is nothing that we read in 518(a) that  
12 puts a time limit on when the Solicitor General can  
13 authorize a petition to be filed, and I think the  
14 Solicitor General would be in a better position to speak  
15 to that issue, but we don't see anything, and nothing's  
16 been cited that would limit the Solicitor General's  
17 authority to authorize the petition.

18 QUESTION: So 2 years can go by, and we really  
19 don't know whether the case is here or not until the  
20 Attorney General chooses to retroactively give life to the  
21 suit? That doesn't seem -- it's very strange to me.

22 MR. NOBLE: Well, I don't think you would have a  
23 situation, because the Court would rule on the petition,  
24 presumably, before that point, but I don't think that's a  
25 situation --



1 QUESTION: Oh, at least there's that in mind.  
2 After we've ruled on the petition, and we rule that the  
3 agency is not properly represented, the Attorney General  
4 at that point cannot give life to the suit, right, but any  
5 time up to then, we really don't know until he speaks  
6 whether the suit is properly here or not?

7 MR. NOBLE: I -- that is a possibility. That is  
8 not the situation you have in this case.

9 QUESTION: Well, maybe the Clerk should just  
10 refuse to accept the filing in the first instance, if it  
11 comes in here without the Solicitor General's  
12 participation, and that ends it.

13 MR. NOBLE: Well, I -- that would end it. I  
14 think one of the problems you have in this case is that  
15 for approximately 18 years the Federal Election Commission  
16 has exercised what I think many presumed was its own  
17 independent litigating authority, so there was no question  
18 in this case earlier on that -- whether we had the  
19 authority, and no previous Solicitor General has ever  
20 raised an objection, so I think everybody just assumed  
21 that the Federal Election Commission did, in fact, have  
22 the authority.

23 QUESTION: Sort of a de facto authority  
24 doctrine, you might say.

25 (Laughter.)

1 MR. NOBLE: Yes.

2 If I may move on to the first substantive issue  
3 in the case, the court's application of the bright line  
4 test is contrary to the functional analysis that this  
5 Court has used with regard to separation of powers cases,  
6 and that functional analysis requires the Court to look at  
7 whether or not there has been aggrandizement of power by  
8 one branch, or interference with the exercise of power by  
9 another branch.

10 In this case, we have a threshold question: do  
11 the ex officios exercise any power? The statute itself  
12 provides that the ex officio members of the Commission  
13 have no vote on the Commission. All decisions are made by  
14 the six voting members of the Commission, so as a  
15 threshold matter you have no direct exercise of power.

16 But moving on to see what else the ex officios  
17 can do, the statute provides that they can neither be  
18 Chair nor Vice Chair of the Commission and, moving beyond  
19 that, the Commission's rules of procedure provide that  
20 they cannot serve for purposes of a quorum, they cannot  
21 vote to adjourn, they cannot select the presiding officer  
22 --

23 QUESTION: Well, they can certainly sit in on  
24 all the discussions of the Commission, can't they?

25 MR. NOBLE: Yes.

1 QUESTION: And might not those discussions be  
2 less than full and frank in the presence of those two  
3 congressional representatives?

4 MR. NOBLE: Whatever influence they would have  
5 to chill the discussions would be very minimal,  
6 considering the fact that this agency, as all agencies,  
7 works under the Freedom of Information Act, the Sunshine  
8 Act, the Federal Advisory Committee Act, so the  
9 Commissioners do not sit at a meeting with an  
10 understanding that what they say will forever be secret.

11 QUESTION: You mean the Freedom of Information  
12 Act would authorize the release of the private  
13 deliberations of the Commission?

14 MR. NOBLE: Not until an enforcement action is  
15 over. By statute, within our statute, there is a  
16 provision that makes enforcement actions confidential  
17 during their pendency. That provision applies to the ex  
18 officio members as well as it applies to the Commissioners  
19 and the staff.

20 QUESTION: But do they keep transcripts of these  
21 deliberations that are later made public?

22 MR. NOBLE: Yes. They're taped.

23 QUESTION: Verbatim transcripts?

24 MR. NOBLE: They are taped. The tapes are then  
25 made public and are then released, with few exceptions

1 dealing mainly with settlement discussions. They are then  
2 publicly released upon request.

3 QUESTION: These members do participate in the  
4 discussion, though, and they say -- I mean, they can say,  
5 well, you're making a good point but it seems to me that  
6 point is refuted by thus-and-such, don't they?

7 MR. NOBLE: Yes, Justice Scalia, they do  
8 participate in the discussion, but that's all they can do.

9 QUESTION: Yes, well, my -- you know, judges,  
10 when they are recused from a case, consider themselves  
11 recused not just from voting in the decision, but from  
12 participating in the discussion, because that is -- that  
13 is part of the action of any body, the discussion which  
14 leads to the decision, and when you're out of the case,  
15 you're out of it for the discussion, not only for the  
16 vote.

17 Why isn't a similar rule an appropriate one for  
18 deliberations of an executive agency? If you ought to be  
19 out, you ought to be out. You shouldn't influence the  
20 decision. Not just not vote on it, you shouldn't  
21 influence it.

22 MR. NOBLE: The rules regarding recusal are  
23 different rules, and the ex officio members may very well  
24 end up recusing themselves from specific cases, but here  
25 you're not dealing with a question of interest in the case



1 that would require recusal. Rather, what you're dealing  
2 with is a question of, is it some leverage or some  
3 coercion of power that they're exercising on the  
4 Commission?

5 QUESTION: But if you're right, your opponent  
6 suggests that Congress could put ex officio members on  
7 this Court to sit in our conference, and under your  
8 theory, that's okay, because all they can do is discuss it  
9 with us. That's all right.

10 MR. NOBLE: No, Justice O'Connor, we think that  
11 that proposition is really based on an untenable  
12 proposition by the respondents, which is that what is good  
13 for an independent agency created by Congress and placed  
14 in the executive branch by necessity is good for this  
15 Court or the President.

16 QUESTION: Well, do you think it would be a  
17 violation of separation of powers if Congress were to send  
18 some ex officio members to this Court's conference?

19 MR. NOBLE: Yes. Yes, I think it would  
20 interfere -- it would also directly interfere with this  
21 Court's Article III powers. It is the same analysis, the  
22 same function --

23 QUESTION: Why? Why?

24 MR. NOBLE: Because --

25 QUESTION: Why does it interfere with us any

1 more than the ex officios are interfering with the FEC?

2 MR. NOBLE: Because the same rights that attach  
3 to either the President or this Court do not necessarily  
4 attach to independent agencies. I think --

5 QUESTION: So it's the textual difference, it's  
6 the independent textually established constitutional  
7 status of this Court?

8 MR. NOBLE: Yes, in large part.

9 QUESTION: Then on that reasoning there could be  
10 ex officio listeners in the court of appeals.

11 MR. NOBLE: No. I would say all, it would apply  
12 to all --

13 QUESTION: Why not? They don't have any textual  
14 basis in the Constitution, apart from the provision for  
15 creation of all the Federal courts.

16 MR. NOBLE: But you would still have to look at  
17 whether or not it interfered with the courts' Article III  
18 powers.

19 QUESTION: In what sense would it interfere, any  
20 more than this interferes with the FEC?

21 MR. NOBLE: In the sense that the Constitution  
22 gives Article III courts strong protection against  
23 partisan or political influence. You have lifetime  
24 tenure, without diminution in pay -- those are not the  
25 same type --

1 QUESTION: But it seems to me you are arguing  
2 just the other way. We can tell them to go to the devil,  
3 but the people on the FEC do not have lifetime tenure.

4 MR. NOBLE: But still the -- it is not the --  
5 the Court derives its power directly from Article III. We  
6 are a creature of Congress. We are an agency that was  
7 created by Congress for a specific purpose. The analysis  
8 that would say that --

9 QUESTION: Well, you keep telling me about  
10 textual bases or nontextual bases. You use the word  
11 interfere, which I think has a factual connotation. What  
12 is the interference in our case that does not exist, or  
13 would exist in our case that does not exist in the FEC?

14 MR. NOBLE: Clearly, the one mentioned before  
15 about the potential of a chill, because this Court's  
16 deliberations are not subject to the Freedom of  
17 Information Act, are not subject to the Sunshine --

18 QUESTION: Well, but a statute creating the  
19 listener simply subjects the listener to exactly the same  
20 confidentiality requirements that the Court imposes upon  
21 itself, so there's no -- we assume people will follow the  
22 law in good faith. There's no practical risk of our  
23 reading of the deliberations in the paper next week. Why  
24 wouldn't that satisfy your problem?

25 MR. NOBLE: Because I think it would still be

1 considered a direct interference with the Court's  
2 Article III powers. It is not -- again, the Freedom of  
3 Information Act --

4 QUESTION: Well, I think -- I agree with you,  
5 but I don't see how you're drawing the line between the  
6 two cases.

7 MR. NOBLE: Well, I -- if you cannot draw the  
8 line, then I think there would also be a problem with the  
9 application of the Freedom of Information Act and the  
10 Sunshine Act to independent agencies, because clearly the  
11 courts have gone out of their way to not apply, for  
12 example, the Federal Advisory Committee Act to the Office  
13 of the President, saying that to do so would raise serious  
14 constitutional doubts about the Federal Advisory Committee  
15 Act, but when you get to applying it to independent  
16 agencies, there is little doubt that the act can be  
17 applied, because --

18 QUESTION: Well, now, wait a minute. Now you've  
19 confused me. You've been talking up to now about  
20 independent agencies. I thought you were using that to  
21 mean the fourth branch of Government, the headless fourth  
22 branch, just those agencies that are not subject to the  
23 President. Is that what you mean?

24 MR. NOBLE: Yes.

25 QUESTION: But now your example about the



1     Advisory Committee Act, that applies to all agencies, not  
2     just independent agencies.

3             MR. NOBLE:   Correct, but it would not apply to  
4     the Office of the President.  All I'm suggesting there is  
5     that --

6             QUESTION:   But that's a quite different line,  
7     the line between the Office of the President and the rest  
8     of the Government.  Is that the line you're relying on?

9             MR. NOBLE:   I'm -- I'm relying on several lines,  
10    yes.  That is one clear line.  The difference between the  
11    Office of the President and also with this Court, or  
12    Article III courts.

13            QUESTION:   I think I agree with you.  We  
14    wouldn't have to worry about Congress putting listeners  
15    into the Office of the President, but what about their  
16    putting listeners into all other agencies, including the  
17    Defense Department, Interior, whatever?

18            MR. NOBLE:   Each one would have to be analyzed  
19    on a functional approach, and I would start with the  
20    proposition that there is a distinction with the Federal  
21    Election Commission that may not exist with other  
22    agencies, and that is that the Federal Election Commission  
23    deals in an area of law that directly interrelates with  
24    how Congress acts.

25            QUESTION:   So we really wouldn't know until they

1 try them one-by-one, agency-by-agency, right?

2 MR. NOBLE: Well, I think each one --

3 QUESTION: And then when they get here, you urge  
4 that we not apply the rule in the first case, anyway.

5 MR. NOBLE: I'm only urging it with regard to  
6 the Federal Election Commission. As you approach each  
7 case, I think you'd have to look at it with a functional  
8 analysis.

9 QUESTION: May I ask you two very brief  
10 questions? Do these Commissioners get paid?

11 MR. NOBLE: The ex officio members?

12 QUESTION: Yes.

13 MR. NOBLE: Yes.

14 QUESTION: For their duty, in addition to their  
15 salaries with Congress?

16 MR. NOBLE: No. My understanding is that they  
17 get paid by Congress, and that is what -- well, the --  
18 what we have is designees.

19 QUESTION: Are they paid for their services on  
20 the Commission?

21 MR. NOBLE: Not that I'm aware of separately  
22 from their other services.

23 QUESTION: And what are their responsibilities,  
24 if any?

25 MR. NOBLE: The responsibilities do not appear

1 in the statute, but pursuant to the legislative history  
2 the responsibilities were to act as an advisory and  
3 liaison function for the Commission.

4 I would also note that, even today, the Clerk of  
5 the House and the Secretary of the Senate have -- receive  
6 all reports for candidates for those bodies, and then have  
7 to submit those reports to the FEC, so there is a clear  
8 overlap between the authority of the FEC and, while the  
9 FEC has to independently exercise that authority, Congress  
10 believed that the FEC would be served by the advice of the  
11 ex officio members.

12 So I think that is -- also in partial response  
13 to Justice Scalia, I think that is a distinction that may  
14 very well exist. I think while the Court did not  
15 specifically reach the question of the Attorney General as  
16 ex officio member on the Sentencing Commission, I think  
17 the same type of analysis would apply there. There is no  
18 power, direct power, and the Attorney General brings a  
19 certain amount of expertise to the Sentencing Commission,  
20 so I think that you may very well have the same type of  
21 analysis in that situation.

22 If I may briefly turn to the --

23 QUESTION: You leave me defenseless when you  
24 talk about the Sentencing Commission.

25 (Laughter.)

1                   QUESTION: I just wanted to get specific with  
2 the question that's been asked down there a couple of  
3 times. Forgetting the law for a second, just thinking  
4 totally practically, I can imagine how having a  
5 Congressman sitting up at the bench here might cause a  
6 little problem. I mean, you'd be a little nervous about  
7 it, and in the conference it would be tougher to carry out  
8 our job. I can understand that.

9                   Thinking in those practical terms, what happens  
10 when the FEC makes the prosecutorial decision, we will  
11 prosecute X, or we won't. Is the congressional  
12 representative sitting in the room? Is, are there other  
13 members of the public in the room? Is the congressional  
14 representative formally or informally -- I mean, what  
15 happens?

16                   Is he interfering in some way, as a practical  
17 matter, with the ability of the regular members to make up  
18 their own minds independently about whom to prosecute? Is  
19 he interfering in a way that's different from what the  
20 ordinary citizen might interfere? Does he only appear at  
21 public meetings? Are there private meetings where he  
22 appears but the others don't? That's what I'm trying to  
23 get a sense of.

24                   MR. NOBLE: The ex officio members are able to  
25 appear to participate in the executive sessions where



1 administrative investigations are discussed, and members  
2 of the public are not allowed to appear in those sessions.

3           However, as a practical matter, their influence  
4 is really limited to the ability to give advice. The  
5 statute puts no burden on the agency to follow that  
6 advice, to explain why it's not following that advice; it  
7 doesn't require the agency to delay a decision if the  
8 Commissioners, voting Commissioners disagree with the ex  
9 officio members.

10           Unlike some other statutes that the lower courts  
11 have upheld, there is no leverage that the ex officios  
12 have, other than the leverage that exists with this agency  
13 and every agency, which is the leverage of oversight.

14           QUESTION: Is it correct to say they're part of  
15 the decisional process?

16           MR. NOBLE: They are part of the deliberative  
17 process. I would not say they're part of the decisional  
18 process in the same sense that when the time comes to make  
19 that decision, what is very, what is as a practical matter  
20 very clear to everybody is that they have no vote, because  
21 when the motion is called -- and they cannot make the  
22 motion. When the motion is called, they are silent at  
23 that point.

24           They cannot vote, and I would say whatever  
25 weight is carried by the ex officio members having the

1 right to speak is overridden by the fact that they have  
2 absolutely no vote, and also the fact that we are subject,  
3 as the court of appeals below noted, to normal oversight,  
4 and the -- which can include hearings, can include private  
5 meetings with Commissioners, and all of that is much more  
6 -- has much more weight on an agency, on every agency,  
7 than just the sitting of the ex officio members.

8 QUESTION: Is there any rule of the Commission  
9 or any rule generally that would prohibit one of these  
10 members from speaking to one of the voting members on the  
11 way down the hall before the meeting starts?

12 MR. NOBLE: No.

13 QUESTION: So there wouldn't be anything that  
14 would prevent such a member from saying, you know, 37  
15 Senators are going to be furious if you go after so-and-  
16 so, on the way into the meeting?

17 MR. NOBLE: No, but -- but that doesn't  
18 really -- is not necessarily a function of sitting at the  
19 table.

20 QUESTION: Well, but it's also a function that  
21 the general public doesn't get to perform, either. They  
22 don't walk down the hall from their offices to the meeting  
23 rooms with the Commissioners, so that there are  
24 opportunities, even within the technical rules there are  
25 opportunities to influence which members of the general

1 public wouldn't have.

2 MR. NOBLE: Yes. There is that opportunity, but  
3 again, I think that opportunity pales in comparison to the  
4 opportunity, when the tapes are made public, for Congress  
5 in oversight functions to see what the agency has done.

6 As a practical matter, all they can do is say  
7 what they think, and that's where it stops.

8 What I'd like to just briefly say is that in  
9 terms of the remedy involved in this case, make two very  
10 quick points. One is that what we're asking for is the  
11 application of Buckley v. Valeo, and to find that the  
12 agency was, in fact -- all the actions of the agency were,  
13 in fact, de facto valid, and second, that we wanted to  
14 point out that contrary to the NRA's position, there is a  
15 remedy in this case.

16 QUESTION: Thank you, Mr. Noble.

17 Mr. Bender, we'll hear now from you. Perhaps  
18 you might touch briefly on the de facto matter which you,  
19 I believe you argue in your brief.

20 ORAL ARGUMENT OF PAUL BENDER

21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

22 MR. BENDER: Yes. Thank you, Mr. Chief Justice,  
23 and may it please the Court:

24 First of all, with regard to the question of the  
25 Commission's independent litigating authority, we take the

1 position, as you know from the brief we filed in response  
2 to the Court's invitation, that the Commission does not  
3 have independent litigating authority.

4 The right procedure, I think, would be for the  
5 Clerk to reject the brief or petition filed by an agency  
6 without such authority, and ask the Solicitor General  
7 whether the Solicitor General in fact authorizes the  
8 petition.

9 In this case, we did, in response to the Court's  
10 question, authorize the petition. I think that  
11 authorization is valid.

12 QUESTION: I guess we have accepted petitions  
13 from the FEC in the past that weren't authorized.

14 MR. BENDER: Yeah, and I think that's --

15 QUESTION: There seems to be kind of a practice  
16 of it, so it's quite understandable that the Clerk  
17 accepted this one, I suppose.

18 MR. BENDER: Right, and I think it's also  
19 understandable that the FEC did not ask us for authority  
20 before filing its petition. They notified us, I believe,  
21 the day before they filed it as a matter of courtesy.

22 QUESTION: Well, how would the subsequent  
23 consent or authorization relate back? I mean, if the  
24 thing isn't properly filed, isn't that the end of the  
25 matter?



1 MR. BENDER: It -- no, I don't think so. It's  
2 similar to the practice that's followed throughout the  
3 appellate courts of the United States with regard to  
4 notices of appeal.

5 Agencies of the United States often file  
6 protective notices of appeal without first getting the  
7 Solicitor General's authorization because time does not  
8 permit that, and after the notice of appeal is filed, the  
9 Solicitor General often authorizes the appeal and it goes  
10 ahead.

11 QUESTION: But now, is that the same sort of  
12 statutory situation that you have in petitions to this  
13 Court?

14 MR. BENDER: I think it is. The Solicitor  
15 General has the same authority to authorize appeals by the  
16 United States as it does to authorize participation in  
17 this Court.

18 QUESTION: So a U.S. Attorney filing a notice of  
19 appeal from the district court to the court of appeals,  
20 you say that notice of appeal would be, not be any good so  
21 far as the court was concerned, unless the S.G. approved  
22 it?

23 MR. BENDER: I think the appeal would not be any  
24 good, unless the Solicitor General approved, authorized  
25 the going forward with the appeal, but I think the

1 approval does not have to be given before the time for the  
2 notice of appeal to be filed, because of the time  
3 pressure.

4 QUESTION: In the courts of appeals you're  
5 saying that they are invalid?

6 MR. BENDER: No, no. I'm saying that they are  
7 valid, even though the authorization comes after the  
8 filing of the notice of appeal.

9 QUESTION: They are valid because the U.S.  
10 Attorneys have authorization to proceed immediately,  
11 without the prior consent of the Solicitor General, so  
12 they have authorization. You're saying the practice of  
13 the Justice Department is to give them authorization to  
14 file appeals.

15 MR. BENDER: Right. It's an acquiescence  
16 practice.

17 QUESTION: Now, have you given the FEC  
18 authorization to file petitions for certiorari?

19 MR. BENDER: I think no.

20 QUESTION: Then it's not a parallel situation.

21 MR. BENDER: In light -- I agree it's not an  
22 entirely parallel situation, but in light of what Justice  
23 O'Connor mentioned, that is the general understanding that  
24 they were reasonable in having that they could file this  
25 petition without our authorization, the petition should

1 not be deemed to be out of time because they did that and  
2 we only authorize it after --

3 QUESTION: Is it the case that --

4 MR. BENDER: -- the petition is filed.

5 QUESTION: -- when a person reasonably believes  
6 he is an agent, he is an agent?

7 MR. BENDER: I think it's -- I wouldn't analyze  
8 it as a technical question of the law of agency. I would  
9 analyze it as a question of whether the jurisdictional  
10 limits on the filing of the petition were met in this  
11 case, and I think that since an agency of the United  
12 States did file a petition and signify their intention to  
13 go forward with the case, and since we relatively promptly  
14 authorized that petition after the Court noticed the  
15 problem, it should be deemed to relate back, and you  
16 shouldn't apply technical concepts of the law of agency to  
17 the question.

18 There's no unfairness here to the respondents.  
19 They had notice that the petition was being filed at the  
20 time.

21 QUESTION: You can say that about any agency  
22 coming here without the approval, that there was no  
23 unfairness because the respondent knew that the agency was  
24 filing a petition for certiorari, but that doesn't get you  
25 over the hurdle.

1 MR. BENDER: I think, Chief Justice Rehnquist,  
2 in a case where it was clear that the agency did not have  
3 the authority, a case might be made that the petition  
4 should be deemed out of time, but I think it's important  
5 to take into account here the reality that this Court had  
6 in the past --

7 QUESTION: Well, but I --

8 MR. BENDER: -- accepted those petitions.  
9 Excuse me.

10 QUESTION: I thought it was clear here,  
11 according to your brief, that the agency does not have  
12 that authority.

13 MR. BENDER: It was -- it is clear to us that  
14 they do not, but the agency might very reasonably have  
15 thought that they did, because in the past they have filed  
16 petitions without authorizations from the Solicitor  
17 General and the Court has gone ahead and granted the  
18 petitions and heard the cases on the merits.

19 QUESTION: So is there an agency theory that if  
20 you reasonably think you have authority you're more likely  
21 to have it than if you don't, is that the --

22 MR. BENDER: I don't think you should analyze  
23 this as a matter of agency theory. I think you should  
24 analyze it as the correct interpretation of the Court's  
25 jurisdictional limits on the time of filing a petition,



1 and I think if it is unclear whether the agency has the  
2 authority, and the agency reasonably believes it has the  
3 authority, and the Solicitor General's authorization is  
4 given relatively promptly afterwards, that there's nothing  
5 that prevents you from having that authorization relate  
6 back.

7 QUESTION: Mr. Bender, you agree -- you disagree  
8 with FEC on the merits and say that this is a violation of  
9 separation of powers.

10 MR. BENDER: Yes.

11 QUESTION: Do these members have to be appointed  
12 by the President? Are they officers of the United States?

13 MR. BENDER: I think all members of the  
14 Commission would have to be appointed by the President. I  
15 think they are officers.

16 QUESTION: So you think they're covered by the  
17 Appointments Clause --

18 MR. BENDER: Yes. I think --

19 QUESTION: -- and that ends it as far as you're  
20 concerned.

21 MR. BENDER: -- the Appointments Clause is a  
22 simple way to decide this case on the merits, and for the  
23 reason the Court has given in its questions, we think that  
24 the fact that they don't have the vote is not  
25 determinative. They can participate in discussions, they

1 can put items on the agenda, they can make motions as far  
2 as we know, they can supervise the staff, they can  
3 participate in private discussions between petitioners,  
4 they are colleagues of the other commissioners.

5 I would like to spend the rest of my time on the  
6 question of remedy, which the FEC did not have a chance to  
7 explore at length in its argument. Our view is similar to  
8 theirs. We agree with the FEC with regard to the remedy,  
9 that the Court should follow the same practice it followed  
10 in Buckley and Valeo.

11 In Buckley and Valeo the Court went out of its  
12 way, even though it held that the structure of the  
13 Commission was unconstitutional, to delay its mandate for  
14 30 days in order not to interrupt enforcement of the  
15 provisions, the substantive provisions that the Court  
16 sustains.

17 QUESTION: Of course, in Buckley, the thing was  
18 just a declaratory judgment, so the mandate was really  
19 meaningless anyway.

20 MR. BENDER: Right, and this challenge should  
21 also have been a declaratory judgment, and if it had been  
22 a declaratory judgment, then I think Buckley would be  
23 directly on point, and you would follow that procedure.

24 I don't think you ought to change --

25 QUESTION: Why should this have been a

1 declaratory judgment? I thought -- I thought that this  
2 respondent was prosecuted for a violation.

3 MR. BENDER: Right, but the structural defect  
4 that the respondent points to was never alleged by the  
5 respondent to be prejudicial at all to the respondent, and  
6 in fact the respondent did not make the claim, as it could  
7 have before the Federal Election Commission when they were  
8 considering the bringing of the enforcement action against  
9 them.

10 And so a structural challenge like this,  
11 especially in light of Buckley, which says that  
12 enforcement can go forward even though the structure is  
13 unconstitutional, I think Buckley holds that that kind of  
14 challenge should be made not in an enforcement proceeding  
15 but in a declaratory judgment proceeding.

16 QUESTION: Buckley holds that if it's made in a  
17 declaratory judgment proceeding you don't issue an  
18 immediate -- but it -- I don't know that Buckley holds  
19 that it should be brought, it must be brought in a  
20 declaratory judgment proceeding.

21 MR. BENDER: No, but -- although Buckley holds  
22 that if made in a declaratory judgment proceeding, it  
23 operates only prospectively.

24 Buckley further holds that pending enforcement  
25 proceedings, indeed, enforcement proceedings that weren't

1 even pending at the time but that might be initiated  
2 within 30 days after the decision in Buckley, should not  
3 be interfered with. That's a holding of Buckley, also,  
4 and I think if you read that in connection with this case,  
5 the conclusion is inevitable that you cannot raise this as  
6 a defense in the pending enforcement proceeding.

7 Now, one technical difficulty with that, I  
8 should point out, is that there is a declaratory judgment  
9 proceeding in the FEC statute, section 437h, and it is --  
10 the procedures are very similar to the procedures that  
11 happened in this case, but there is a technical  
12 difference.

13 Under the declaratory judgment procedure in the  
14 statute, the district court is not to decide the  
15 constitutional question. It is to refer it immediately to  
16 the court of appeals en banc. That didn't happen here.

17 QUESTION: Why do you refer to it as a technical  
18 difference?

19 MR. BENDER: It's a difference in the -- it's a  
20 difference in the procedures that take place. I don't  
21 think it affects the ability of this Court to consider the  
22 issues. In this case, it's true that the court of appeals  
23 did not consider the question en banc, but the court of  
24 appeals did consider the questions extensively. The  
25 questions are being argued to you here. I think that it



1 would have been --

2 QUESTION: Well, are you saying that this is not  
3 a proper defense to an enforcement action?

4 MR. BENDER: Yes, right. I think Buckley holds  
5 that, that this is not a proper defense in an enforcement  
6 action, because Buckley holds that --

7 QUESTION: So if there's a constitutionally  
8 defective structure, constitutionally defective entity  
9 that brings an enforcement action against you, that  
10 constitutional defect is not a defense?

11 MR. BENDER: Right. I think that's the holding  
12 of Buckley, and also the holding of Northern Pipeline with  
13 regard to similar-type structural defects in the  
14 bankruptcy courts.

15 QUESTION: Well, that really seems quite a weird  
16 result, that you can be proceeded against by an agency  
17 that is totally improperly constituted but you can't raise  
18 that as a defense to the proceeding.

19 MR. BENDER: I think that's what Buckley holds,  
20 and I don't think it's that weird, because -- I think that  
21 should not apply in a case where there is demonstrated  
22 prejudice from the structural defect, but I think the  
23 basis for Buckley's holding that, and I think it is  
24 sensible, is that when there isn't any prejudice from it,  
25 it makes sense not to disrupt, cancel, invalidate hundreds

1 of pending proceedings, throwing the whole scheme of the  
2 Federal statute into disruption.

3 QUESTION: Well, I can see how you'd say that,  
4 some sort of de facto theory that these six people who are  
5 concededly present and functioning, and properly so, would  
6 have done exactly the same thing, but it seems to me when  
7 you say the -- you can't even make the argument in an  
8 enforcement proceeding, that that's rather extreme.

9 MR. BENDER: I think you can make it if you can  
10 show prejudice.

11 Thank you, Mr. Chief Justice.

12 QUESTION: Thank you, Mr. Bender.

13 Mr. Cooper, we'll hear now from you.

14 ORAL ARGUMENT OF CHARLES J. COOPER

15 ON BEHALF OF THE RESPONDENTS

16 MR. COOPER: Mr. Chief Justice, and may it  
17 please the Court:

18 I should like to speak only for a moment on the  
19 jurisdictional question that the Court has discussed.

20 Our position is this case is JOT and, Mr.  
21 Justice Scalia, I think your point regarding this issue  
22 going away if the Court rules on the cert petition is not  
23 the case, because in this case the Court ruled on the cert  
24 petition and granted it, and obviously the issue is still  
25 here.

1           The issue is a jurisdictional one. The  
2       Solicitor General says that he can retroactively approve a  
3       cert petition filed by the Federal Election Commission,  
4       says that is like a protective notice of appeal. I think,  
5       Justice Scalia, your points were right on target in that  
6       regard. My own experience is there's never been a  
7       protective notice of appeal filed without the Solicitor  
8       General's approval. The point, Your Honor, again is this  
9       case is jurisdictionally out of time.

10           QUESTION: Was it -- it was filed within 90 days  
11       by the FEC, and then there's, I gather a justice for good  
12       cause can extend it for 60 days in addition under the  
13       statute, at least as I read that. Is that right, and if  
14       that is right, was the approval given by the S.G. within  
15       that 60 days or outside of that 60 days, too?

16           MR. COOPER: Justice Breyer, it was given  
17       outside of the 60-day period of time, so there's no  
18       understanding of the time limits of this Court, of which I  
19       am aware anyway, that would bring the authorized petition  
20       within the time limits of this Court, so if it is -- if  
21       the Court has jurisdiction, it must be because the  
22       Solicitor General is empowered after the fact to authorize  
23       the petition.

24           And of course if -- in this case it would mean  
25       that the Solicitor General has the power to decide not to

1 authorize it and to pull this case from this Court's  
2 docket by his own unilateral action. We don't think that  
3 is within the Solicitor General's authority.

4 Moving now to the merits of the ex officio  
5 point, Your Honor, I think that counsel for the  
6 Commission's concession that ex officio members on this  
7 Court disposes of this case, the --

8 QUESTION: There is a difference, Mr. Cooper. I  
9 suppose that ex officio members on this Court would invade  
10 our independent authority, but your theory is a little  
11 different, I think. Your theory is one of aggrandizement,  
12 that the Congress is aggrandizing itself or enhancing its  
13 own powers by putting its people on another branch. It  
14 seems to me the theory is different in the two cases.

15 MR. COOPER: Well, Your Honor, I think actually  
16 our theory is both that Congress is invading the  
17 executive's domain, and it is doing so in a way that  
18 aggrandizes its own, so I believe we have the benefit of  
19 all of this Court's separation of powers jurisprudence.

20 QUESTION: As to the invasion point, it seems to  
21 me rather clear that we would react rather promptly if  
22 somebody said somebody's going to sit on our conferences,  
23 and it's interesting to me that for some 20 years or so,  
24 the FEC doesn't seem to have been bothered at all by the  
25 presence of these members. Nobody ever complained about



1 it, did they?

2 MR. COOPER: Well, Your Honor, they were  
3 certainly forewarned by the Ford administration that, were  
4 the ex officio's retained in the statute, that that would  
5 be an unconstitutional invasion of the executive branch.

6 QUESTION: Well, they're not really the  
7 executive branch, is the reason for that, isn't it? I  
8 mean, they are the fourth branch.

9 MR. COOPER: Your Honor --

10 QUESTION: It isn't as though, if the President  
11 objected to it they would stand up and assert the Chief  
12 Executive's prerogatives, would they?

13 MR. COOPER: Excuse me?

14 QUESTION: It is not as though, if the President  
15 objected to it, the members of the Federal Election  
16 Commission would stand up and assert the President's  
17 prerogatives on his behalf.

18 MR. COOPER: Your Honor, it is not at all like  
19 that, and in fact that brings this ex officio issue into a  
20 very sharp focus. This -- placing ex officio members on  
21 an independent agency, so-called, is doubly  
22 unconstitutional. It goes beyond just placing them, for  
23 example, at the President's Cabinet table.

24 Counsel for the Election Commission throughout  
25 their briefs have made clear that not only is the

1 Commission statutorily independent from the control of the  
2 President, but the Commission is even free from its so-  
3 called partisan influence, the President's partisan  
4 influence.

5 In the next breath, they quite frankly admit  
6 that the congressional agents are on the Commission for  
7 the purpose of representing the Congress, and for the  
8 purpose of influencing the Commission through their sound  
9 advice, so not only has the Congress stripped the  
10 President of a purely Article II function, enforcement of  
11 law, and placed it in a Commission, if the Commission is  
12 right, that is free from the President's control, but it  
13 has also installed on that agency two agents of its own  
14 for the purpose of influencing the Commission in its  
15 Article II functions. This is more unconstitutional, Your  
16 Honor, than if Congress had simply said, we'll place an ex  
17 officio tenth justice on this Court.

18 QUESTION: But the members of the -- the voting  
19 members of the Commission are appointed by the President,  
20 aren't they?

21 MR. COOPER: Yes, Your Honor, they are, as a  
22 result of Buckley, so --

23 QUESTION: So why would one say this is out of  
24 the control of the President?

25 MR. COOPER: Your Honor, the President has got

1 influence to the extent that the appoints the members. He  
2 has no influence beyond that, according to the Commission,  
3 and I think according to a fair reading of everything we  
4 know about Congress' intentions for this Commission.

5 He has no -- our position is he has no removal  
6 authority at all, let alone the at-will removal authority  
7 that it is our submission the President must have if this  
8 Commission is to exercise the purely executive function of  
9 law enforcement.

10 QUESTION: What about the FTC? I mean, there  
11 you have to have removal for cause --

12 MR. COOPER: Yes, Your Honor.

13 QUESTION: -- as I recall, and yet surely the  
14 FTC enforces -- is a law enforcement agency.

15 MR. COOPER: Yes, it is, Your Honor, and it is  
16 our submission that if Congress is going to place  
17 authority in the FTC or the FEC to, as the exclusive civil  
18 enforcement authority over an entire regulatory statute,  
19 then it must ensure that that authority is subject to the  
20 at-will removal control of the President.

21 QUESTION: Well, what about Humphrey's Executor,  
22 the case that held that FDR could not remove a member of  
23 the FTC at will?

24 MR. COOPER: Well, Your Honor, the FTC at the  
25 time the Court made that ruling, according to the Court,

1 did not participate at all in the executive authority.  
2 Its powers were judicial. Its powers were legislative.  
3 It did not at that time have civil enforcement authority  
4 such as the Commission here has, and in fact the  
5 Commission's authority --

6 QUESTION: You don't have to go this -- you're  
7 not fighting the lost battle of the headless fourth  
8 branch. I gather your point just is that it's worse to  
9 have Congress install some of its agents in an independent  
10 agency than it is to have Congress install some of its  
11 agents in an agency that the President at least has  
12 control over. That's the only point you're making --

13 MR. COOPER: I think it's doubly  
14 unconstitutional for that reason, yes, Your Honor. I'm  
15 making three separation of powers arguments: the presence  
16 of the ex officios as participating members on the  
17 Commission, with full rights to advise and in fact to  
18 influence through their sound advice the Commission, is an  
19 unconstitutional invasion of the executive's powers  
20 because the Commission itself exercises exclusively  
21 Article II powers.

22 Secondly, we believe that in fact the removal,  
23 the lack of removal power is a constitutional dimension  
24 problem, and not Humphrey's Executor, not Morrison v.  
25 Olson, none of this Court's cases dealing with the



1 headless fourth branch, Justice Scalia, have ever  
2 foreclosed the proposition we advance here, which is that  
3 when you have principal officers who control a Commission  
4 charged with purely Article II powers, the civil  
5 enforcement of a Federal regulatory statute, including the  
6 ability to get penalties as the Commission did in this  
7 very case, and you cannot divorce the President from the  
8 control of that activity, and none of this Court's cases  
9 have held otherwise.

10 Finally, we think that the -- I'm sorry, Justice  
11 Stevens.

12 QUESTION: I was going to ask you if you would  
13 take the same view if the two individuals were not  
14 actually agents of Congress but rather the statute in  
15 effect had designated a public member to sit in on all  
16 meetings for information purposes and periodically report  
17 to Congress. Would that be subject to the same attack?

18 MR. COOPER: Your Honor, I think that would be a  
19 tougher case for me to win, largely for the point you  
20 mentioned earlier, the aggrandizement --

21 QUESTION: Right. That would --

22 MR. COOPER: -- of Congress, but I don't -- I  
23 think that if -- if Mr. Bender is correct, and I think he  
24 probably is, that the exercise of this authority, this  
25 participatory authority as a member of the Commission, is

1 an authority that only an officer of the United States can  
2 hold, then --

3 QUESTION: So you'd say that would violate the  
4 Appointments Clause.

5 MR. COOPER: It would.

6 QUESTION: But supposing you let the President  
7 appoint that public member, a member to be appointed by  
8 the President to perform this function of advising  
9 Congress and passing messages from Congress to the  
10 Commission.

11 MR. COOPER: Oh, well, under those circumstances  
12 I think the objectionable features would be drawn out very  
13 thin.

14 QUESTION: So it's the fact that the two  
15 individuals are actual officials of Congress that are  
16 critical to your case.

17 MR. COOPER: I don't think it's necessarily -- I  
18 don't think I would lose your first hypothetical,  
19 necessarily. I think my case would be weaker. I think  
20 the fact that Congress has installed two plainly  
21 congressional agents makes my case very strong, Your  
22 Honor.

23 QUESTION: Isn't part of your argument, too,  
24 that Congress has selected A and B and said you're going  
25 to do this, rather than speaking for a general class, say,

1 a public member, and saying the President may appoint a  
2 member of the public? That would be better for the  
3 constitutionality, I take it, of your -- than for the  
4 Congress to say XY is going to be the public member?

5 MR. COOPER: Yes, Mr. Chief Justice. The  
6 President gets to appoint six members from the public, so  
7 long as they are three Democrats and three Republicans, a  
8 feature which we also think is an invasion of his  
9 nomination authority.

10 QUESTION: A case that runs through my mind is  
11 the problem Congress might have, say, with the CIA, some  
12 agency that doesn't make its deliberations public, but  
13 nevertheless Congress wants to know what goes on. Does  
14 Congress have the power to appoint either a public member,  
15 or maybe one of its agents, to sit in on all policy  
16 discussions of the CIA as a method of keeping itself  
17 informed about sensitive national security matters?

18 MR. COOPER: Your Honor, I think that would fall  
19 afoul of the very points we're making here. It seems to  
20 me that the CIA is engaged in an executive function,  
21 probably a purely executive function. The Congress has at  
22 its disposal a range of constitutional means to keep  
23 itself informed. It can subpoena the CIA, and except for  
24 executive privilege matters it can learn whatever it needs  
25 to learn about what is going on at the CIA. What it can't

1 do is invade the CIA with an agent there for the purpose  
2 of influencing --

3 QUESTION: Say it's just for the purpose of  
4 informing. Of course, they could perform some influence.

5 One of the things that puzzles me about this  
6 case is, I don't know what these two people really do that  
7 has that much significance to it.

8 MR. COOPER: Well, Your Honor, they do  
9 everything --

10 QUESTION: Nobody seems to have complained for  
11 20 years. That's the puzzling thing. I would think  
12 somebody would have been unhappy with them if it was a  
13 serious problem.

14 MR. COOPER: Well, Your Honor, I think they do  
15 everything that the other members, the other six members  
16 do, except vote, and in fact --

17 QUESTION: And except paid, I guess, to.

18 MR. COOPER: Well, no, they just don't get  
19 paid --

QUESTION: For what they do.

20 MR. COOPER: Well, I'm not --

21 QUESTION: They get paid for being agents of  
22 Congress, which is what they are in this capacity.

23 MR. COOPER: What they are in this capacity --

24 QUESTION: Mr. Cooper --

25 MR. COOPER: Yes, sir.



1 QUESTION: -- are you going to address  
2 retroactivity?

3 MR. COOPER: Yes, Your Honor, I would like to do  
4 that.

5 QUESTION: Mr. Cooper, before you go into  
6 retroactivity, just explain to me, if you would, how it is  
7 that the Attorney General can be a member of the  
8 Sentencing Commission, and that's not a problem.

9 MR. COOPER: Your Honor, the Sentencing  
10 Commission -- it may well be a problem, Your Honor. I'm  
11 not sure it isn't a problem, but I think the case against  
12 the Attorney General's ex officio membership on the  
13 Sentencing Commission is probably weaker, because the  
14 activities that the Sentencing Commission performs are  
15 themselves not activities that the executive branch can't  
16 perform.

17 They are executive, quasi judicial, quasi  
18 legislative, the kind of activities that the Justice  
19 Department performs, so the fact that the Attorney General  
20 is a part of that ex officio is not necessarily the  
21 investing in the Attorney General powers that the  
22 Constitution doesn't allow him to have.

23 These ex officio congressional agents have  
24 powers of an executive nature, the enforcement of a  
25 regulatory statute, the participation in the decision-

1 making for that enforcement. That is a power they cannot  
2 have.

3 Now, if Mr. Bender is right, however, and that  
4 is also a power that requires an officer appointed under  
5 the Appointments Clause, then the Attorney General is  
6 clearly unconstitutional as far as the Sentencing  
7 Commission is concerned.

8 QUESTION: On the retroactivity point, would we  
9 have held that if there are certain deficiencies in the  
10 grand jury's structure, if the case proceeds and there's a  
11 conviction, the grand jury deficiency is essentially  
12 harmless error in some contexts. Why isn't that true  
13 here?

14 Wasn't there an enforcement proceeding that went  
15 ahead in the district court? There was an adjudication of  
16 liability? Why doesn't that cure any defect that occurred  
17 in the investigative stage of the case?

18 MR. COOPER: As opposed to the actions that took  
19 place from the filing of the complaint in our --

20 QUESTION: Yes.

21 MR. COOPER: Well, Your Honor, I think the case  
22 against the presence of the ex officios with respect to  
23 investigation is weaker in the sense that this Court in  
24 Buckley recognized that Congress itself can perform  
25 investigatory powers, and that the Federal Election

1 Commission, even with members, voting members appointed by  
2 the Speaker of the House, for example, can have those  
3 powers.

4 QUESTION: Was the case prosecuted in the  
5 district court by attorneys for the Commission, or by the  
6 Justice Department?

7 MR. COOPER: By attorneys for the Commission.

8 QUESTION: So that you say that -- would you say  
9 that there's an ongoing violation of the structural nature  
10 because those attorneys are under the supervision of the  
11 Commission which has these ex officio members on it? Is  
12 that your theory?

13 MR. COOPER: Oh, yes. Yes, Your Honor. I think  
14 that however murky it may be regarding the ex officio, the  
15 participation of the ex officios in investigatory  
16 activities, it's not murky at all that a complaint filed  
17 for the purpose -- by a Government agency for the purpose  
18 of effecting a civil penalty for a violation of the  
19 Federal regulatory statute is an executive action, and so  
20 that is what this Commission was disqualified by the  
21 Constitution from doing, because --

22 QUESTION: Why would this disqualify it? I  
23 mean, you've got six people, and they were the only six  
24 people who could vote, and they're clearly all right.

25 MR. COOPER: They are, Your Honor, but this

1 Court's decisions have always recognized that the -- that  
2 in raising a defense to a regulatory action of this kind  
3 the defendant doesn't have to show that a different  
4 decision would have been made. That's an impossible  
5 burden on a defendant raising a constitutional challenge  
6 to the structure, to the composition of the enforcement  
7 authority, and that would be an impossible burden to place  
8 on the respondent.

9 QUESTION: What case are you relying on for that  
10 proposition?

11 MR. COOPER: Well, Buckley, for example, I think  
12 Morrison v. Olson. If -- and this really gets into this  
13 retroactivity point.

14 QUESTION: May I ask you another question before  
15 you get to retroactivity?

16 Why isn't the proper way to characterize the  
17 case something like this. There's an automatic severance  
18 provision in effect in the statute for this agency.  
19 Therefore, the clear unconstitutionality is the activity,  
20 the presence of the ex officio members. The way to cure  
21 that unconstitutionality is, in fact, to declare it and,  
22 if there were need, to enjoin any further participation by  
23 them.

24 The only remaining question is whether those who  
25 were properly constituted, the six voting members, were



1 influenced either in the instigation of the prosecution or  
2 its continuance by the two who had a potential for  
3 improper influence. Therefore, the question is, find out  
4 whether in fact that happened and, if it didn't happen, or  
5 perhaps in the alternative if the six now wish to proceed,  
6 period, that is enough remedy for you. The  
7 constitutionality is cured, the remedy is prospective, and  
8 that's the end of the case.

9 MR. COOPER: Your Honor, it wouldn't because, at  
10 least it is our submission that the Commission was  
11 constituted such that it was disqualified from enforcing  
12 this statute. It was disqualified from bringing this --

13 QUESTION: You'd have a stronger argument if you  
14 didn't have a severance provision, wouldn't you?

15 MR. COOPER: Your Honor, I don't think so. I  
16 think that the severance provision allows for the  
17 correction of this statute and it to go forward without  
18 further involvement of the Congress, but it does seem to  
19 me that those acts it has taken which were invalid, which  
20 were void, can't just be somehow deemed valid, and that --

21

22 QUESTION: That's a way of characterizing the  
23 case.

24 MR. COOPER: Yes.

25 QUESTION: But it's clear from the severance

1 provision that the acts of the six are not, per se,  
2 facially unconstitutional merely from the -- because of  
3 the presence of the two.

4 MR. COOPER: Your Honor --

5 QUESTION: That's one distinction from a -- a  
6 non -- a statutory severance case from a nonstatutory  
7 severance case, isn't it?

8 MR. COOPER: Their acts were not invalid, but  
9 the acts of the Commission itself were invalid because of  
10 the presence --

11 QUESTION: Does it have anything to do with  
12 whether their acts are invalid? I thought it simply had  
13 to do with whether the statute continues to subsist as an  
14 operational statute.

15 MR. COOPER: That's what the severance point I  
16 think has to do with it, Your Honor, but --

17 QUESTION: So you can cut out a piece of the  
18 statute and let the rest continue to operate, as opposed  
19 to saying the whole statute's null and void.

20 MR. COOPER: Well, that's true, but you can't --

21

22 QUESTION: It doesn't speak to operational --  
23 operations at all.

24 MR. COOPER: You're right, Your Honor, and my  
25 point on the operation, Justice Souter, is that if this,

1 if these ex officios had had voting power, but only two  
2 out of eight, they couldn't have coerced or compelled the  
3 Commission, and it may well have been that they voted  
4 against this action, but in my opinion, that would clearly  
5 make it, the Commission itself, void.

6 QUESTION: Well, it would make it, because your  
7 argument would still be an influence argument, just as it  
8 is here.

9 MR. COOPER: Your Honor, my argument is a facial  
10 challenge.

11 QUESTION: You can't compel with -- two out of  
12 six does not compel, nonvoting two out of six does not  
13 compel, but your argument would be essentially the same,  
14 wouldn't it?

15 MR. COOPER: My argument is not an as-applied  
16 argument, it is a facial challenge based upon the  
17 membership of the ex officios, not upon whether or not  
18 they actually influenced this case in a way against my  
19 clients.

20 If the statute had said all of the Federal  
21 Election Commission members will be white, then that would  
22 be an invalid Commission, and the acts taken against me,  
23 even if they would have been taken by a perfectly  
24 constitutional Commission, would be void, in my opinion,  
25 and I would have a valid defense. If in --

1           QUESTION: Well, you think of a facial attack as  
2 being associated with the First Amendment. Other than  
3 that, to talk about something being void or invalid and  
4 something like that, it's not always that clear that it's  
5 totally across the board.

6           MR. COOPER: Well, Your Honor, if -- let's take  
7 the Morrison case, for example. If this Court had thrown  
8 out the independent counsel instead of upholding it, then  
9 surely it would follow, I would submit, that the criminal  
10 prosecution of the defendants in that case would have had  
11 to be dismissed. It couldn't have just been continued by  
12 that void independent counsel, or even by an independent  
13 counsel at that point somehow constitutionally repaired to  
14 go forward.

15           The same would be true in the Buckley case.  
16 Mr. Bender suggested that Buckley held that we can't raise  
17 a separation of powers defense in response to an  
18 enforcement action against us. Well, Buckley wasn't --  
19 did not arise in the context of a defense for an  
20 enforcement action. It was, as the Chief Justice pointed  
21 out, a declaratory judgment seeking only one thing,  
22 prospective relief. That's what they got.

23           But if the Buckley case had indeed arisen in the  
24 same context that this one is, with Mr. Buckley and others  
25 suffering under not only what we submit is



1 unconstitutional prosecution in a civil enforcement  
2 action, but the actual imposition of civil penalties  
3 against them, then surely this Court's invalidation of the  
4 Commission for the constitutional violations in that case  
5 would mean that those civil penalties in that prosecution  
6 under the Federal Election Campaign Act go away.

7 And that's what our submission is here, that the  
8 Court really, if we are correct on the merits, and the  
9 Commission itself is an unconstitutionally constituted  
10 body and therefore disqualified, we would submit, from  
11 enforcing a Federal regulatory statute in court, then the  
12 court can't just, I think in the words of the Harper case,  
13 disregard current law and allow the Commission to just go  
14 forward without interruption as the Commission would  
15 suggest.

16 QUESTION: If you prevail on the merits, can  
17 Congress act quickly and ratify all existing enforcement  
18 actions?

19 MR. COOPER: Your Honor, I don't believe that it  
20 can. My time is up.

21 QUESTION: No, you can answer the question,  
22 Mr. --

23 (Laughter.)

24 MR. COOPER: Your Honor, I don't think Congress  
25 has any greater authority to validate, or somehow deem

1 valid, an unconstitutional civil prosecution than I  
2 believe this Court has.

3 Thank you very much.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cooper.

5 The case is submitted.

6 (Whereupon, at 11:04 a.m., the case in the  
7 above-entitled matter was submitted.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## 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:*

*FEDERAL ELECTIONS COMMISSION Petitioner, v. NRA POLITICAL VICTORY FUND, ET AL.*

*CASE NO.:No. 93-1151*

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

BY *Don Mani Federico*

(REPORTER)