

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: COLORADO REPUBLICAN FEDERAL CAMPAIGN  
COMMITTEE AND DOUGLAS JONES, Petitioners v.  
FEDERAL ELECTION COMMISSION

CASE NO: 95-489

PLACE: Washington, D.C.

DATE: Monday, April 15, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COLORADO REPUBLICAN FEDERAL :  
4 CAMPAIGN COMMITTEE AND :  
5 DOUGLAS JONES, :  
6 Petitioners :  
7 v. : No. 95-489  
8 FEDERAL ELECTION COMMISSION :  
9 - - - - -X

10 Washington, D.C.

11 Monday, April 15, 1996

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:03 a.m.

15 APPEARANCES:

16 JAN WITOLD BARAN ESQ., Washington, D.C.; on behalf of  
17 the Petitioners.

18 DREW S. DAYS, III, ESQ., Solicitor General, Department of  
19 Justice, Washington, D.C.; on behalf of the  
20 Respondent.

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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 now in Number 95-489, the Colorado Republican Federal  
5 Campaign Committee v. Federal Election Commission.

6 Mr. Baran. Is that correct pronunciation?

7 MR. BARAN: That is correct.

8 CHIEF JUSTICE REHNQUIST: Mr. Baran.

9 ORAL ARGUMENT OF JAN WITOLD BARAN

10 ON BEHALF OF THE PETITIONERS

11 MR. BARAN: Mr. Chief Justice and may it please  
12 the Court:

13 The Colorado Republican Party, like any party,  
14 has a lot to say about issues and candidates, but when it  
15 starts talking about congressional issues and  
16 congressional candidates it becomes subject to a Federal  
17 law that limits that type of core political speech. From  
18 the inception of this case, the Colorado Republican Party  
19 has asked that this Federal law, section 441a(d)(3), be  
20 declared unconstitutional because it needlessly prevents  
21 our speech, speech that we are ready, willing, and able to  
22 engage in.

23 The FEC has also accused my client of violating  
24 this statute by virtue of financing a radio advertisement  
25 known as Wirth Facts Number 1. The FEC would like my

1 client punished for this alleged violation.

2 Thus, this case presents two important issues to  
3 the Court. The first issue was alluded to in this Court's  
4 opinion in Buckley v. Valeo 20 years ago. At issue is,  
5 does the First Amendment permit Congress to limit a  
6 political party's speech, including speech that contains  
7 express advocacy in support of the party's own candidates?

8 If this Court upholds such a limit, then the  
9 second issue is raised, which is, are political parties  
10 entitled, at the very least, to clear guidance as to which  
11 of its speech is subject to a spending limit and which  
12 speech is not?

13 QUESTION: Well, Mr. Baran, I thought there was  
14 another possible question here, which is whether the  
15 statute as presently drafted covers this expenditure at  
16 all.

17 One could -- this was an advertisement, as I  
18 understand it, paid for by the Colorado political  
19 committee at a time when there was no Republican nominee  
20 for the Senate and, indeed, not officially a Democratic  
21 nominee, and one could read 441a(d) as not covering that  
22 at all.

23 Now, what if we think that's the situation? Do  
24 we reach some constitutional issue, or can we just say,  
25 gee, the statute doesn't cover it, and we'll postpone

1 those bigger issues for an occasion when it does?

2 MR. BARAN: If the Court reached such a  
3 decision, Justice O'Connor, it would still leave section  
4 441a(d) as limiting some form of speech, speech by my  
5 client.

6 QUESTION: Well, it would, but what do you think  
7 our doctrines are on reaching constitutional issues  
8 unnecessarily?

9 MR. BARAN: I believe that in prior cases  
10 involving restrictions on campaign speech the Court has  
11 addressed specific statutory limitations, including, of  
12 course, most expansively in the Buckley decision, but it  
13 did so also in the NCPAC decision in terms of evaluating a  
14 particular statute under a declaratory judgment request by  
15 a party such as my client.

16 QUESTION: You had a separate counterclaim  
17 asking for declaratory judgment and making a facial attack  
18 on the statute so that even if we found against the  
19 Government's claim, against the Republican Party, we would  
20 still have to adjudicate the disposition that was made of  
21 your claim against the Commission, which was a facial  
22 challenge, as I gather.

23 MR. BARAN: Yes, Justice Scalia, that is our  
24 position. We've had a separate discrete counterclaim that  
25 was part of our answer. The discovery that took place in

1 the district court focused on that issue as well as the  
2 other issues.

3 QUESTION: And your grievance here is not just  
4 that you were punished for this violation, but you don't  
5 think you should be subject in the future to this  
6 provision at all.

7 MR. BARAN: Yes, that is --

8 QUESTION: For purposes of the counterclaim, is  
9 it your position that subsection (d) covers any  
10 expenditure that the party might make which is not a  
11 coordinated expenditure?

12 MR. BARAN: That is the interpretation of the  
13 statute that we have agreed with the Government on, that  
14 this limitation as it was intended, and certainly as it is  
15 applied by the Federal Election Commission, applies to  
16 both coordinated contributions which are, in fact,  
17 coordinated with the candidate and also contributions that  
18 may not factually be proved to be coordinated.

19 QUESTION: Well, I thought the Government's  
20 position was that all of your expenditures were  
21 coordinated.

22 MR. BARAN: As a de jure matter, yes.

23 QUESTION: Yes. Well, do you agree with that?

24 MR. BARAN: Well, we concur with the  
25 congressional judgment that a de jure coordination is good



1 policy, because it precludes what would otherwise --

2 QUESTION: No, but I just want to know what your  
3 position is in the litigation under your facial challenge.  
4 Do you agree with the Government that every expenditure  
5 you might make that could be subject to subsection (d) is  
6 a coordinated expenditure?

7 MR. BARAN: As a matter of law, yes. As a  
8 matter of fact, no.

9 QUESTION: Well -- I'm not quite sure where I go  
10 from there.

11 MR. BARAN: Well, we --

12 QUESTION: If it's a matter of --

13 (Laughter.)

14 QUESTION: If you agree that it's a matter of  
15 law, it is, what's left?

16 MR. BARAN: Well, we have what everyone seems to  
17 acknowledge is a unique relationship with candidates.  
18 It's unlike other --

19 QUESTION: Yes, but I thought you took the  
20 position here that this wasn't a coordinated expenditure.  
21 It was at a time when there wasn't even a nominee, and it  
22 was an independent expression of viewpoint.

23 Now, I understood from your briefs that was your  
24 position. Have you given that up?

25 MR. BARAN: We have pointed out in our briefs,

1 Justice O'Connor, that whether -- there was no inquiry by  
2 the Federal Election Commission as to whether or not this  
3 particular expenditure was coordinated.

4 QUESTION: No, but this is the facial challenge.  
5 It doesn't matter. For purposes of your facial challenge  
6 under (d), do you take the position that every expenditure  
7 is a -- every expenditure that you might make, subject --  
8 that could be subject to that as a matter of law is a  
9 coordinated expenditure?

10 MR. BARAN: We accept that proposition, Justice  
11 Souter.

12 QUESTION: Well, Mr. Baran, you can't just walk  
13 in off the street and make a facial challenge to a  
14 statute. You have to show that the statute affects you in  
15 some way, certainly.

16 MR. BARAN: Well, I don't believe there's any  
17 dispute that my client, the Colorado Republican Party,  
18 wishes to and indeed does engage in express advocacy in  
19 support of its candidates.

20 QUESTION: But you say even though we find the  
21 statute wouldn't apply to the activities that you've been  
22 challenged on here, nonetheless you can challenge it  
23 facially?

24 MR. BARAN: I believe that the declaratory  
25 judgment procedure has afforded parties -- allows them to

1 raise a claim that seeks --

2 QUESTION: Yes, but you have to have some sort  
3 of standing to challenge a statute even facially.

4 MR. BARAN: Well, we are a State committee, as  
5 defined by this statute, which specifically applies to  
6 State political parties and specifically limits our  
7 ability to spend money for some defined speech. Now,  
8 the --

9 QUESTION: In this case you did not name -- you  
10 did not name the Democratic candidate that you were  
11 opposing because the Democratic candidate hadn't been --  
12 or the Republican candidate that you were favoring because  
13 the Republican candidate hadn't even been named yet, isn't  
14 that right?

15 But in a future case, you might want to go  
16 beyond what you did in this case and actually favor a  
17 particular Republican candidate, isn't that right?

18 MR. BARAN: That was the claim in the district  
19 court when we made the --

20 QUESTION: And this provision would prevent it.

21 MR. BARAN: I don't think there's any dispute  
22 that this provision would apply to us or any other State  
23 committee that wished to engage in covered speech.

24 QUESTION: Even if you won -- even if you won  
25 with respect to the as-applied challenge.

1 MR. BARAN: Yes.

2 QUESTION: Even if you won with that, you'd  
3 still be subject to the limitation that you cannot support  
4 a Republican candidate except within the limitations of  
5 421(d).

6 MR. BARAN: That is correct.

7 QUESTION: But even if you made the expenditure  
8 that Justice Scalia referred to, you still take the  
9 position that it may be treated, as the Government says,  
10 as a coordinated expenditure.

11 MR. BARAN: Yes. Yes, Justice Souter.

12 QUESTION: Does it follow from that -- and I'm  
13 not sure that I'm understanding the terms that everybody  
14 uses, so forgive a question that maybe I shouldn't have to  
15 ask, but does it follow from your position that if  
16 everything that you might expend should be treated as a  
17 coordinated expenditure, that therefore every expenditure  
18 you make should be treated for constitutional purposes as  
19 a contribution to someone?

20 MR. BARAN: It's our position that it should be  
21 evaluated in two ways. One is, of course, what is it --  
22 how is it labeled under the statute and, of course,  
23 Congress has provided certain labels which may, in fact,  
24 have --

25 QUESTION: No, but I thought we've gotten

1 beyond. I thought we've gotten to the point of your  
2 saying, any such expenditure which could be covered by  
3 (d), about which we are complaining in the facial  
4 challenge, is a coordinated expenditure.

5 So taking that as the point from which the  
6 question starts, does it follow from that that every  
7 expenditure in question here should be treated for  
8 constitutional purposes as a contribution to someone?

9 MR. BARAN: It should be treated for  
10 constitutional purposes under the strict scrutiny that  
11 this Court requires, whether --

12 QUESTION: Well, how about a yes or no answer?  
13 Should it be treated as a contribution or not?

14 MR. BARAN: We don't believe that it should be  
15 treated as a contribution in terms of a shorthand  
16 resolution of whether or not this satisfies First  
17 Amendment --

18 QUESTION: Then explain to me the sense of  
19 coordinated expenditure that you're using, because I take  
20 it you are not using coordinated expenditure to mean  
21 coordinated with a particular named candidate, because at  
22 the time in question here, and I suppose at other times,  
23 there won't be one, so in what sense is it a coordinated  
24 expenditure?

25 MR. BARAN: I believe the answer, Justice

1 Souter, is that it's a coordinated expenditure by virtue  
2 of the predicament or situation that political parties  
3 in -- are in that no one else is in.

4 QUESTION: No, but tell me what you mean by  
5 coordinated expenditure. Define the term as you are using  
6 it, and as you understand the Government is using it.

7 MR. BARAN: Well, as I'm using the term, it can  
8 be in two contexts, because they are used interchangeably.  
9 One is a reference to a factual determination under a  
10 provision of section 441a as to whether or not there has  
11 been consultation with a candidate and coordination with a  
12 candidate. At the same time --

13 QUESTION: But that didn't happen in this case,  
14 I take it.

15 MR. BARAN: Er --

16 QUESTION: There wasn't any candidate.

17 MR. BARAN: There were three nameless candidates  
18 which were referred to in the record, and which are cited  
19 in the passages of the Government --

20 QUESTION: Well, would it be proper in this  
21 case, then, and hence in considering the facial challenge,  
22 to consider the expenditure as being coordinated with them  
23 and to treat them as candidates?

24 MR. BARAN: Yes, Justice --

25 QUESTION: Would that be fair?

1 MR. BARAN: Yes, I think --

2 QUESTION: All right. If that is fair, then,  
3 and that's the sense in which you are using coordinated  
4 expenditure --

5 MR. BARAN: Mm-hmm.

6 QUESTION: Then why isn't it the case that every  
7 expenditure that would be subject to your facial challenge  
8 is one which for constitutional purposes should be treated  
9 as a contribution, from which it would follow that, in  
10 judging the facial validity of the statute, we're really  
11 talking about a statute that regulates contributions  
12 rather than expenditures.

13 Maybe there's some point in the logic that I'm  
14 going astray, but I don't see where it is.

15 MR. BARAN: I don't believe that the  
16 contributions-expenditure dichotomy that's articulated in  
17 Buckley falls neatly into this type of situation --

18 QUESTION: Well, then I'm --

19 MR. BARAN: -- by virtue of our --

20 QUESTION: I'm just having trouble understanding  
21 the argument, because I thought you had -- you have agreed  
22 that it's a coordinated expenditure, that it's coordinated  
23 in the sense that it is to be attributed at least to the  
24 three, or perhaps to the ultimate winner of the three, and  
25 I don't see, once you get to that point, why we're not,

1 for constitutional purposes, talking about contributions,  
2 and hence the challenge goes to -- is a challenge to a  
3 limit on contributions. I'm just not understanding the  
4 terms of the discourse.

5 MR. BARAN: It can be viewed in that light,  
6 Justice Souter. It does not result in a conclusion as to  
7 the constitutionality of such a restriction.

8 QUESTION: Well, it -- I'm not saying what the  
9 conclusion is.

10 MR. BARAN: I understand that.

11 QUESTION: I'm just saying, what is the problem  
12 about which we must come to a conclusion, and it seems to  
13 me that, based upon the premises that you agree to, it  
14 must be a problem about contributions.

15 MR. BARAN: I would say that it could be in the  
16 same context as a limit by -- on a candidate which, of  
17 course, was reviewed by this Court in Buckley, and whether  
18 the candidate spends his or her own money, or whether a  
19 candidate does it in coordination with his or her campaign  
20 committee doesn't seem to have any constitutional  
21 significance once the analysis is conducted of strict  
22 scrutiny regarding what kind of speech and what kind of  
23 spending is affected by the restriction.

24 QUESTION: We reserved this precise question in  
25 Buckley, did we not?



1 MR. BARAN: I believe that is correct, Justice  
2 Scalia.

3 QUESTION: So evidently we did not deem that, if  
4 it is considered a contribution, that's an end of the  
5 matter.

6 MR. BARAN: That would be our position and,  
7 obviously, our hope, Justice Scalia.

8 The only analysis of this provision in Buckley  
9 was with respect to a Fifth Amendment equal protection  
10 claim.

11 QUESTION: I take it it's your position that  
12 even if it is treated as a contribution, the limit is  
13 still unconstitutional. I'm not suggesting that you give  
14 your case away, necessarily, by doing that, but is it fair  
15 to treat it as a contribution for analytical purposes  
16 here, based on your premises?

17 MR. BARAN: I think it presents difficulty  
18 either way because of the nature of the party, the nature  
19 of what is being limited here, and it's still -- there's  
20 no other participant in political debate, or politics,  
21 that is in our shoes, none. No corporation, no political  
22 action committee, no individual contributor.

23 QUESTION: Not only not a political action  
24 committee. Why do you differ from a political action  
25 committee?

1 MR. BARAN: They do not nominate candidates.  
2 There is a legal and substantive distinction between  
3 political parties and other participants. Now, that  
4 distinction doesn't necessarily automatically lead to a  
5 particular constitutional result, but it is a difference  
6 that I believe must be acknowledged, and --

7 QUESTION: So it's like a candidate expenditure,  
8 you're saying.

9 MR. BARAN: I believe the closest analogy to  
10 this limit is with respect to the relationship of a  
11 candidate to his or her own campaign, and the campaign is  
12 the candidate's own effort.

13 In this case, in fact, we are being portrayed  
14 as, I think one of the amicus called us a joint venturer  
15 with the candidates, which is --

16 QUESTION: But there's this difference, is there  
17 not, Mr. Baran, that one who contributes to the candidate  
18 is not thereafter blocked from also contributing to the  
19 party, so you can't just put them all in the same pot.

20 MR. BARAN: I believe that there -- the  
21 candidates are -- in their campaigns have to raise their  
22 money subject to contribution limits and all the same  
23 prohibitions.

24 QUESTION: If I cede my -- if I make up to the  
25 limit my contribution to the candidate I can nonetheless

1 make an independent contribution to the party without  
2 exceeding the candidate limit.

3 MR. BARAN: Only if you do not designate or  
4 condition your contribution to the party, and there is a  
5 specific provision --

6 QUESTION: Yes.

7 MR. BARAN: -- that says that you cannot go to  
8 the party and say, I would like to give you now my \$5,000,  
9 and I would like it to be used only for the benefit of  
10 Candidate Smith, who already has received my \$1,000  
11 contribution.

12 QUESTION: But let's assume we're already into  
13 the election season, the candidate has been nominated, is  
14 being sponsored by the party, I make my contribution to  
15 the candidate, I can make another contribution to the  
16 party.

17 MR. BARAN: As a statutory matter, Justice  
18 Ginsburg, I believe that this restriction on contributions  
19 of that sort apply at all times, and cannot be earmarked  
20 for the benefit of any candidate without counting towards  
21 the contributor's \$1,000 contribution limit.

22 QUESTION: Yes, but I'm just trying to establish  
23 the basic point that they're not one and the same. The  
24 party, you can contribute to the party, unrestricted, and  
25 to the candidate and you're not estopped, because you have

1 contributed to the candidate, from also contributing to  
2 the party.

3 MR. BARAN: That is correct.

4 QUESTION: But there's a limit on the party.

5 MR. BARAN: There is a limit -- it was --

6 QUESTION: A limit on the amount you can give to  
7 the party.

8 MR. BARAN: I'm sorry, I didn't --

9 QUESTION: Isn't there a limit on the amount you  
10 can give to the party?

11 MR. BARAN: Yes, there are limits. They were  
12 imposed on parties in the 1976 amendments. There is a  
13 \$5,000 annual limit on any individual or political  
14 committee contribution to my client, the State party.  
15 There is a category of national party committees that have  
16 a higher limit, \$20,000.

17 All of those contributions from any individual  
18 are further subject to an annual \$25,000 limit, so if, in  
19 the hypothetical case that's been advanced in some of the  
20 briefs, an individual contributed \$20,000 to a national  
21 party committee, that individual may not contribute more  
22 than \$5,000 additional dollars through the rest of the  
23 year for all political purposes relating to Federal  
24 elections.

25 QUESTION: It does remain under your theory

1 that -- you say the political party is unique. In  
2 response to Justice Scalia's question, it's different from  
3 a PAC because you nominate candidates.

4 Suppose four or five PAC's put up a candidate in  
5 a primary and backed that candidate for the party, and  
6 maybe the institutional party leaders might prefer someone  
7 else. Why couldn't it be said that they are nominating a  
8 candidate?

9 I'm not -- I'd like you to just explore for me a  
10 little bit more this distinction you make between the  
11 party on the one hand and the PAC on the other, because  
12 you see, where your reasoning would take us, it could very  
13 well be that we'd have to strike down the limits on  
14 spending by PAC's as well.

15 MR. BARAN: I don't believe that is the case,  
16 Justice Kennedy. A political party is separately defined.  
17 It has to meet separate criteria legally.

18 Not only in the Federal Election Campaign Act,  
19 but under virtually every State law, there are provisions  
20 that specify what a party is, and a party obviously has to  
21 have some continuity, and it must have some demonstration  
22 of support.

23 It must have nominated candidates, which  
24 candidates then have attracted some level of voter support  
25 and, in fact, if that doesn't happen, the parties either

1 as a practical matter go out of existence, or under  
2 virtually every State law, whoever they nominate do not  
3 automatically qualify for the ballot, so there is an  
4 entire statutory body of law at both the Federal and State  
5 level that deals with parties differently.

6 And that difference is accountable for the fact  
7 that, unlike any other group, they join together, they  
8 call themselves something, they select their members to  
9 run for office, and they present them to the public.

10 And what this statute does is, it says, well,  
11 once you have done all that, and you want to tell not just  
12 the public but you want to even tell party members why  
13 they should support the candidates you have nominated, the  
14 Federal law says you can only do it up to a limit, and  
15 thereafter you have to stop --

16 QUESTION: But maybe it should work the other  
17 way. If the party has all those attributes of what we can  
18 loosely call a State actor, perhaps it should be subject  
19 to more restrictions, quite properly so, than a group of  
20 citizens who form a PAC.

21 MR. BARAN: I'm not aware of any precedent that  
22 characterizes political party speech as the State's  
23 speech, in that we are actually speaking for ourselves and  
24 our adherents, and hopefully with the support of the  
25 candidates who have agreed to associate with us and to run

1 for public office.

2 QUESTION: But that's even more true of private  
3 groups, organizations that contribute through PAC's, is it  
4 not?

5 MR. BARAN: Well, each group is going to have to  
6 be evaluated in terms of how they relate to the compelling  
7 Government interest that is being advanced to justify what  
8 everyone has to acknowledge is a restriction on our  
9 speech, and to that extent, is the relationship of a  
10 political party in terms of its activities different than  
11 that of a PAC, is it different from that of a corporation  
12 or a union or an individual contributor?

13 And our position is that the answer has to be  
14 yes, it clearly is different, and why is because their  
15 whole purpose for being is to engage in political  
16 activity, to advance a common philosophy, and to nominate  
17 candidates who necessarily are part of the party. They're  
18 party members, and we present them.

19 Now, what the statute then does is says, well,  
20 unlike even corporations, unlike unions, unlike any other  
21 association in America, when it comes to communicating on  
22 political issues with your own members, you become subject  
23 to this limit and, in addition, if you start  
24 communicating --

25 QUESTION: Well --

1 MR. BARAN: -- to the public you become subject  
2 to this limit.

3 QUESTION: In exchange for not being subject to  
4 the other limit -- and you want to get out of this one and  
5 not get into the other one, right?

6 MR. BARAN: Well --

7 QUESTION: I mean, there are other limits that  
8 apply to PAC's which the Government has tried to present  
9 its case as presenting that one --

10 MR. BARAN: Well, we are put in the --

11 QUESTION: It sets up a separate limit for  
12 political parties which is different from the limits that  
13 apply to PAC's.

14 MR. BARAN: Yes.

15 QUESTION: And you want to get out of this one  
16 but not get into the other one. Will you be happy if we  
17 put you in with the PAC's?

18 (Laughter.)

19 MR. BARAN: Obviously not, Justice Scalia, and  
20 the reason is that --

21 QUESTION: Well then, you really can't paint  
22 yourself as being so much put upon. I mean, maybe more  
23 put upon than a political party ought to be. You can say  
24 that, but you can't really paint yourself as being in an  
25 even worse position than PAC's.



1 MR. BARAN: I believe that we are. In fact, we  
2 would be better off if we called ourselves a union and  
3 called every member of the Republican Party a union  
4 member.

5 Then we would be able to spend unlimited,  
6 undisclosed amounts of money in our partisan  
7 communications with our members and then, in addition, we  
8 could then, as a union party, create a political action  
9 commission -- committee which in addition can then raise  
10 voluntary donations to fund those political activities  
11 which may include unlimited independent expenditures.

12 What I have just described is speech activity  
13 that is provided to that element of unions or corporations  
14 with respect to their stockholders and management, but  
15 comes subject to this limit.

16 Nobody else is in the predicament where they  
17 have no alternative, legally, to some form of unlimited  
18 partisan expression, either with their core constituency  
19 of members or with respect to the public in general, as  
20 would be the case with independent expenditures.

21 QUESTION: Mr. Baran, there's a basic question I  
22 wonder if you would indulge, and that is, you have  
23 conceded, I think, that the statute calls this a  
24 coordinated expenditure, and it ranks it specifically as a  
25 contribution.

1           In your uneasiness in answering what this animal  
2 was, are you suggesting to this Court that it ought to  
3 rethink the distinction between contribution and  
4 expenditures, or are you willing to go along with that and  
5 say, even though it's a contribution, it's still  
6 unconstitutional?

7           MR. BARAN: I believe that even as a  
8 contribution under this situation, the Government has not  
9 justified this burden, and it would have to be declared  
10 unconstitutional.

11           I wish to reserve the balance of my time for  
12 rebuttal.

13           QUESTION: Very well, Mr. Baran.

14           General Days, we'll hear from you.

15           ORAL ARGUMENT OF DREW S. DAYS, III

16           ON BEHALF OF THE RESPONDENT

17           GENERAL DAYS: Mr. Chief Justice, and may it  
18 please the Court:

19           I wanted to take a few minutes to just clarify  
20 the scheme that's at work here under the campaign act.

21           Under the act, an expenditure is defined as  
22 something that's extended for purposes of influencing an  
23 election, and expenditures are considered coordinated  
24 expenditures where a political party is concerned, and if  
25 they are coordinated expenditures, then they are viewed as

1 contributions, which would then be covered by the  
2 contribution limits and the doctrines that this Court has  
3 announced.

4 The petitioners have accepted this scheme, and  
5 accepted that their expenditures should be viewed as  
6 coordinated expenditures, so they've accepted this as a  
7 theoretical matter. But I would like to point out also  
8 that on this record there's evidence of actual coordinated  
9 expenditures.

10 The party chairman in this case admitted that  
11 even though there wasn't a Republican candidate at the  
12 time, that he was coordinating with all three Republican  
13 candidates, and certainly the Federal Election Commission  
14 has held for some years --

15 QUESTION: If there was no candidate -- you say  
16 there was no candidate nominated, but the party chairman  
17 was coordinating with all three candidates.

18 GENERAL DAYS: That's right.

19 QUESTION: You mean putative candidates, or --

20 GENERAL DAYS: No, they were candidates for the  
21 nomination of the party to run for the Senate against the  
22 already declared Democratic candidate.

23 QUESTION: So the Republican Party in power had  
24 not nominated anyone, but several people were angling, or  
25 seeking the nomination.

1           GENERAL DAYS: That's correct, and the Federal  
2 Election Commission has pointed out that there's nothing  
3 in the act that requires that there have been a nominee  
4 selected before this principle applies. The statute  
5 itself refers to candidates, it does not refer to  
6 nominees, and there are parts of the statute where the  
7 Congress has used nominee when it intended to make that  
8 point. That's not the case in this particular situation.

9           So we're -- in analyzing this particular  
10 situation, faced with a coordinated expenditure that is a  
11 contribution, it's a form of contribution, it strikes us  
12 that the petitioners have refused to accept, Justice  
13 Ginsburg, the distinction that this Court has drawn for  
14 many, many years, since Buckley, between limiting  
15 contributions and limiting expenditures. As this Court  
16 has said, there's a fundamental constitutional difference  
17 between --

18           QUESTION: Yes, but --

19           GENERAL DAYS: -- those two types of  
20 limitations.

21           QUESTION: But the party's point here is that if  
22 you regard it as an entirely separate entity from the  
23 candidate, yes, you can view it as a contribution, but the  
24 party is itself running, in a way. The party engages in  
25 the election, and viewed at from -- you know, viewed in

1 that light, it constitutes an expenditure.

2 To be sure, it's coordinated with the candidate.  
3 They're sort of saying the party and the candidate are  
4 one.

5 GENERAL DAYS: Well, I understand their  
6 position, but this Court has held that if we're talking  
7 about contribution limits, Congress had a compelling  
8 justification for imposing such limitations in order to  
9 prevent corruption or the appearance of corruption. So  
10 the question is, are the limitations that are imposed on  
11 coordinated expenditures in the form of -- or  
12 contributions in the form of coordinated expenditures by  
13 parties subject to that same type of analysis --

14 QUESTION: How much can I buy --

15 GENERAL DAYS: -- or in the same compelling  
16 applications.

17 QUESTION: How much can I buy for \$20,000, given  
18 to the Colorado Republican Party with no strings attached?

19 GENERAL DAYS: What do you mean, how much can  
20 you buy?

21 QUESTION: What quid pro quo? We're talking  
22 corruption here. I have to give the Colorado Republican  
23 Party \$20,000 -- that's the limit, right, 20 thou, and --  
24 no, not 20 thou, 5 -- 5 thou, I'm told.

25 GENERAL DAYS: Five thousand to the party,

1 20,000 to the national --

2 QUESTION: To the national, okay. I give 5,000  
3 to the Colorado Party, no strings attached. They can give  
4 it to any candidate at all. What do you think I can  
5 purchase for that?

6 GENERAL DAYS: Well, I --

7 QUESTION: I don't think too much.

8 GENERAL DAYS: I'm not sure that I can tell you  
9 as a factual matter, but I think the point is, 1) we're  
10 talking about corruption as defined by this Court. What  
11 this Court said was that corruption is a subversion of the  
12 political process. Elected officials are influenced to  
13 act contrary to their obligations of office by the  
14 prospect of financial gain to themselves or the infusions  
15 of money into their campaigns.

16 QUESTION: But I would think it's quite diffused  
17 if it flows to the party without designation. You're --

18 GENERAL DAYS: Well, Justice --

19 QUESTION: It's a step removed, isn't it, from  
20 anything that we've upheld? You have to acknowledge that.

21 GENERAL DAYS: I do acknowledge that, but this  
22 Court in the California Medical Association case was  
23 confronted with the same argument, that the PAC there  
24 served as a buffer, or a filter, between contributions by  
25 the medical association to the candidate, and this Court

1 rejected that argument and nevertheless saw that as a  
2 problem for preventing evasion of the limitations on  
3 individual contributions.

4 QUESTION: But in Massachusetts Citizens for  
5 Life the Court narrowed a reading of the statute because  
6 it felt that not-for-profit corporations were in a  
7 different position than corporations for profit.

8 GENERAL DAYS: Yes. Yes, Mr. Chief --

9 QUESTION: So we have accounted for differences  
10 in -- factual differences with -- either -- different  
11 readings of the statute.

12 GENERAL DAYS: Mr. Chief Justice, I respectfully  
13 disagree. I think that what this Court was addressing in  
14 the Massachusetts Citizens for Life was the question of  
15 how expenditures should be defined, and what this Court  
16 concluded was, 1) expenditures in the form of independent  
17 expenditures should be viewed as covered by the act only  
18 where there was express advocacy, but there was no  
19 treatment of the question of limitations on contributions.  
20 What we're talking about here --

21 QUESTION: Well, in your eyes --

22 GENERAL DAYS: -- are limitations on  
23 contributions.

24 QUESTION: That construction was given because a  
25 nonprofit corporation was involved. Previously it had

1 appeared that corporations generally were subject to this  
2 general rule.

3 GENERAL DAYS: That's certainly correct, but  
4 Mr. Chief Justice, what the party -- what the petitioners  
5 are arguing for here is an unlimited right to spend funds  
6 that are coordinated either in fact or in theory, without  
7 any of the limitations that presently exist under the act.

8 QUESTION: General Days, I just -- one part is  
9 cloudy to me about what falls within coordinated  
10 expenditures that equal contributions.

11 GENERAL DAYS: Yes.

12 QUESTION: Suppose before Wirth announced his  
13 candidacy for the Senate, but he's in Congress, and the  
14 Republican Party thinks, well, this guy may some day run,  
15 so they do the same kind of advertizing.

16 GENERAL DAYS: Yes.

17 QUESTION: But he -- not only isn't there any  
18 Republican candidate, Wirth himself hasn't declared  
19 himself as in the ring for the Senate. What would such an  
20 expenditure be then?

21 GENERAL DAYS: My reading of that, given what  
22 the Federal Election Commission has done up to this point,  
23 is that that would not be viewed as covered by this  
24 particular provision.

25 The fact that Wirth might at some point become a



1 candidate does not mean that the party can't comment on  
2 issues that affect his discharging of his responsibilities  
3 as a representative of Colorado, or a district in Colorado  
4 in the United States House of Representatives.

5 QUESTION: So what is the line at which this  
6 statute starts to run? Is it when either party has a  
7 declared candidate, not yet nominated but declared?

8 GENERAL DAYS: Well, Justice Ginsburg, I don't  
9 know whether there's any precise temporal point, but one  
10 can imagine an ad run by the party with respect to Tim  
11 Wirth that says, we disagree with Tim Wirth's position and  
12 by the way, he's likely to run for the Senate and  
13 therefore we want you to know about this.

14 It seems to me that the inclusion, even though  
15 it might be out of the structure of the election  
16 framework, would nevertheless be focused on an election,  
17 and that's one of the things that's important about this  
18 particular ad, Wirth Facts Number 1.

19 It not only talks about Tim Wirth's positions  
20 with respect to defense and the balanced budget, it makes  
21 specific reference to the fact that he's running for the  
22 Senate. It struck the Commission that this was not a  
23 difference in degree, but a difference in kind insofar as  
24 the act was concerned.

25 QUESTION: General Days, isn't your argument

1 broad enough, though, that if the morning after this  
2 senatorial election was over the Republican Party in  
3 Colorado started running advertisements generally favoring  
4 Republicans and disfavoring Democrats -- there's not  
5 going -- there isn't going to be another election for at  
6 least 2 years.

7 GENERAL DAYS: Yes.

8 QUESTION: Isn't it your position, or the FEC's  
9 position that that would still be a coordinated  
10 expenditure?

11 GENERAL DAYS: No, it would not. In this  
12 regard --

13 QUESTION: Then how do we draw this line,  
14 because I mean, I thought your answer to Justice Ginsburg  
15 might be, well, there's no line to be drawn, but if there  
16 is going to be one to be drawn, how do we draw it, or how  
17 does the FEC draw it?

18 GENERAL DAYS: The Commission has attempted to  
19 deal with this issue, and we refer to it on, I believe,  
20 page 3 of our brief. There's something called generic  
21 communications --

22 QUESTION: Yes.

23 GENERAL DAYS: -- which say, vote Republican,  
24 support the Republican Party --

25 QUESTION: Yes, now, are those --

1 GENERAL DAYS: -- get our candidates in.

2 QUESTION: Are those independent, or are they to  
3 be treated as coordinated?

4 GENERAL DAYS: They're viewed as expenditures  
5 but they're not coordinated, because there's no one to be  
6 coordinated with.

7 QUESTION: Exactly, so what do we do if we think  
8 there is such a thing, there is such an animal -- contrary  
9 to what your opponent here says today, suppose we think  
10 there is such a thing as an independent party expenditure,  
11 there is such an animal, and that they can't be  
12 constitutionally limited, do we narrow the construction of  
13 441a(d)? What do we do?

14 GENERAL DAYS: Justice O'Connor, I think that  
15 the act already recognizes that there are matters that can  
16 be addressed by the party that are not regarded as  
17 coordinated expenditures, money for get-out-the-vote slate  
18 cards, ballots, and things of that kind, which the act  
19 does not even regard as contributions or expenditures --

20 QUESTION: But this sounds like the express --

21 GENERAL DAYS: -- so the parties are able to do  
22 that.

23 QUESTION: This sounds like the express advocacy  
24 theory, which you don't want us to adopt.

25 GENERAL DAYS: No. We don't think the express

1 advocacy standard is the correct one, because express  
2 advocacy --

3 QUESTION: But the examples you're giving are  
4 examples that would not be acts of express advocacy. You  
5 know --

6 GENERAL DAYS: That's correct.

7 QUESTION: Get out the vote.

8 GENERAL DAYS: Yes.

9 QUESTION: That's not an -- you know.

10 QUESTION: Well, what about the case, supposing  
11 the day after the election Congressman X, a Democrat, is  
12 reelected in Colorado, and the Republican Party publishes  
13 an ad saying, we didn't work hard enough, let's get him in  
14 the next election.

15 GENERAL DAYS: I think -- well, that's a very  
16 difficult one to resolve, but I think that this would be a  
17 situation where it was so distant from the electoral cycle  
18 that that might not fall within the limits. I think the  
19 mention of the election --

20 QUESTION: But it would be --

21 GENERAL DAYS: The mention of the election would  
22 push it in terms of what the Commission has viewed more on  
23 the side of being a coordinated expenditure in connection  
24 with the campaign than otherwise.

25 QUESTION: Wouldn't it be easier, at least, to

1 resolve if we did adopt the express advocacy limitation,  
2 because in that case, in the Chief Justice's example, you  
3 would be engaging in express advocacy for a particular  
4 individual who is at least assumed to be a candidate next  
5 time around, and so that would be an easier problem to  
6 resolve, and --

7 GENERAL DAYS: Well --

8 QUESTION: May I just ask kind of a broader  
9 question --

10 GENERAL DAYS: Yes.

11 QUESTION: -- of which this is just an example.  
12 If we adopted the express advocacy limitation, then  
13 wouldn't the problem that concerns Justice Ginsburg,  
14 Justice O'Connor and me disappear, because we really  
15 wouldn't have the kind of line-drawing problem that we  
16 would have on your view absent the express advocacy  
17 limitation.

18 GENERAL DAYS: It might be clearer, but there  
19 are other clear rules that this Court could adopt. It  
20 could say that any ad that mentions a clearly identified  
21 candidate with nothing else about electioneering message,  
22 would certainly be a coordinated expenditure.

23 QUESTION: General Days --

24 QUESTION: As I understand the proposal that  
25 Justice Souter makes, this would allow the Republican

1 Party of Colorado to spend as much as it wanted on  
2 negative ads, right, but --

3 GENERAL DAYS: No, I don't think that's correct.  
4 Negative ads that would be talking about --

5 QUESTION: When you say --

6 GENERAL DAYS: -- a specific candidate, which  
7 said don't vote for the Democratic candidate? That would  
8 not --

9 QUESTION: Oh, I see --

10 GENERAL DAYS: That would be express advocacy.

11 QUESTION: I thought the discussion was talking  
12 about an identifiable candidate that the Republican Party  
13 is supporting. By an identifiable candidate you mean, on  
14 either side.

15 GENERAL DAYS: Yes, absolutely.

16 QUESTION: Even if you're just opposing the  
17 Democrat.

18 GENERAL DAYS: Absolutely. Absolutely.

19 QUESTION: General Days --

20 QUESTION: Did I -- may --

21 QUESTION: -- I think there are two things that  
22 seem to be getting blended that should be kept separate.  
23 You are not questioning -- you say the statute doesn't  
24 cover speech by the party on issues unrelated to an  
25 election campaign.

1 GENERAL DAYS: That's correct.

2 QUESTION: And therefore you never get -- with  
3 respect to items unrelated to a campaign, you never get to  
4 anything about express advocacy because it's simply not  
5 covered.

6 GENERAL DAYS: Well, that's right, and also --

7 QUESTION: So to get into the box, first of all  
8 it has to be in connection with a campaign.

9 GENERAL DAYS: Yes.

10 QUESTION: That answers in good part Justice  
11 Souter's question.

12 GENERAL DAYS: Well, it does, and it also is  
13 talking about contributions. This Court has never adopted  
14 the express advocacy standard with respect to  
15 contributions, but rather with regard to expenditures.

16 QUESTION: Can I ask one question in respect to  
17 that, focusing on expenditures for a person --

18 GENERAL DAYS: Yes.

19 QUESTION: -- but independent, really  
20 independent --

21 GENERAL DAYS: Yes.

22 QUESTION: -- forgetting what the law says.  
23 Vote for X. Don't vote for Y. He's a good Republican,  
24 he's a good Democrat, or -- I'm focusing on that.

25 I take it -- and I don't understand the

1 constitutional basis for the distinction. Under the First  
2 Amendment, what would the theory be? An individual, if  
3 he's really independent, can spend as much as he wants.

4 GENERAL DAYS: Yes.

5 QUESTION: A PAC, if he's really independent,  
6 can spend as much as he wants, but a political party, the  
7 function of which is to help democracy by translating  
8 people's wishes into a Government, cannot spend anything.  
9 Now, what's the -- if I've stated that correctly, what's  
10 the justification under the First Amendment for that?

11 GENERAL DAYS: The justification, Justice  
12 Breyer, I think is reality, that everyone recognizes that  
13 it's inconceivable to think in terms of a party making a  
14 truly independent expenditure independent of the  
15 candidate.

16 QUESTION: Right, so which way does that cut?

17 GENERAL DAYS: Well, I think it cuts in terms of  
18 1) justifying the view that any expenditure by a party is  
19 a coordinated expenditure --

20 QUESTION: But which way does that cut? If you  
21 can't draw the line, does that mean everything should be  
22 treated as if it were a contribution, or does it mean that  
23 everything should be treated as if it were an expenditure?

24 GENERAL DAYS: I think it should be treated as a  
25 contribution. The Congress --



1 QUESTION: Because?

2 GENERAL DAYS: Well, the Congress was concerned  
3 that if there were unlimited amounts of money used as  
4 contributions to candidates during the political process,  
5 that that might lead to either actual corruption or the  
6 appearance of corruption.

7 QUESTION: But you've told us here today that  
8 you think there are some independent expenditures possible  
9 for a political party, so that doesn't quite track.

10 GENERAL DAYS: Well, let me be clear --

11 QUESTION: And also, under this statute I think  
12 we are still dealing, are we not, with 441a(d)?

13 GENERAL DAYS: Yes, we are.

14 QUESTION: I mean, that -- we're trying to  
15 interpret --

16 GENERAL DAYS: That's correct.

17 QUESTION: -- and then determine, I gather, it's  
18 constitutionality --

19 GENERAL DAYS: Yes.

20 QUESTION: -- as interpreted.

21 GENERAL DAYS: Yes.

22 QUESTION: And subsection (3) prohibits -- says  
23 that a national or State or local committee may not make  
24 any expenditure in connection with the general election  
25 campaign of a candidate for Federal office in a State who

1 is affiliated with such party.

2 GENERAL DAYS: Yes.

3 QUESTION: Who is affiliated with such party, so  
4 in this case it would mean it would have to be a  
5 candidate, a Republican candidate for a Federal office for  
6 this to even apply.

7 GENERAL DAYS: Yes. I -- but I guess I'm not  
8 following you, Justice O'Connor --

9 QUESTION: Well --

10 GENERAL DAYS: -- as to how that operates here.

11 QUESTION: That would leave room for lots of  
12 independent expenditures, in my view, and maybe it leaves  
13 open all negative adds --

14 GENERAL DAYS: No, I think that --

15 QUESTION: -- against the other party.

16 Conceivably it does, and do we normally try to give  
17 statutes a narrow interpretation to avoid striking them  
18 down as unconstitutional?

19 GENERAL DAYS: Yes, but I think, Justice  
20 O'Connor, what the Federal Election Commission has done in  
21 interpreting the act has 1) concluded that any  
22 expenditures by parties are coordinated expenditures and  
23 are contributions, and then what we have in 4a(d)(3) is  
24 really an authorization for the parties to spend more  
25 money than any other entity can, or it could under the

1 regular provisions of the act.

2 That is, in this case, it could have spent  
3 \$100,000, the Republican Party, the petitioners, but  
4 decided not to do that, so the contribution limit is one  
5 that has to be evaluated using the principles that this  
6 Court has announced in Buckley and other cases, and what  
7 we are arguing is that Congress' limitation on  
8 contributions by political parties is consistent with that  
9 norm.

10 Although parties and candidates may share some  
11 agreement, there's no reason to think that if, as the  
12 petitioners want, there would be unlimited contributions  
13 made by the party, that that might not stimulate  
14 corruption, or at least the appearance of corruption.

15 And secondly, if this were an open spigot, so to  
16 speak, there might be room for evasion of the individual  
17 limits, as this Court was concerned about in Buckley, with  
18 respect to the --

19 QUESTION: Going back to 441a(d)(3) that Justice  
20 O'Connor just asked you about --

21 GENERAL DAYS: Yes.

22 QUESTION: -- it says a political party may not  
23 make an expenditure in connection with the general  
24 election campaign. It certainly isn't ineluctably clear  
25 that general election campaign doesn't mean after both

1 parties have nominated their candidate.

2 GENERAL DAYS: Mr. Chief Justice, I suppose one  
3 could read it that way, but we come back to the role of  
4 the Commission in the scheme, and the Commission is  
5 entrusted by the act with the responsibility for  
6 interpreting the act and enforcing it.

7 QUESTION: Well, when you're dealing with the  
8 First Amendment, I think some of our cases say that even  
9 an agency interpreting the act has to go kind of slowly.

10 GENERAL DAYS: Well, that's certainly the case,  
11 but there's nothing in the act that suggests that the  
12 reading that you are proposing is the correct reading.

13 QUESTION: But if you ask people on the street  
14 what do you mean when you say the general election  
15 campaign has started, I think you would say, a lot of  
16 people would say, well, it's when the two major parties  
17 have chosen their candidates. I think people are talking  
18 of the presidential campaign now just in those terms.

19 GENERAL DAYS: I think the reality that the  
20 Congress was looking at and that the Commission has viewed  
21 suggests that there should be a larger room for the  
22 applicability of 441a(d)(3).

23 QUESTION: Well, it doesn't say during the  
24 general election campaign anyway. It says in connection  
25 with.

1 GENERAL DAYS: Well, and also, when it says --

2 QUESTION: You can spend money before that  
3 campaign begins that's directed to that campaign as far as  
4 the text is concerned.

5 GENERAL DAYS: Yes, I think that's correct, and  
6 I mentioned the point that it mentions candidates, not  
7 nominees.

8 I wanted to turn, if I may, to the point that  
9 was made about whether this Court has to reach the  
10 constitutional issue. It strikes us that what the  
11 petitioners are presenting if, indeed, they win on the  
12 view that 4a(d)(3), 441a(d)(3) should not apply is highly  
13 theoretical.

14 This is a political party committee that has  
15 never shown an inclination to spend as much money as the  
16 statute allows. Indeed, it's turned back the money on  
17 each instance in which it's given that money, so it  
18 strikes us that the Court would not have to reach the  
19 constitutional issue, and as was suggested by you, Justice  
20 O'Connor, wait for another day to resolve this larger  
21 issue of its constitutionality.

22 QUESTION: Excuse me, why don't we have to reach  
23 it, even though it's been presented in a separate  
24 counterclaim? We -- because there's no standing?

25 GENERAL DAYS: No, I'm not suggesting that at

1 all. It has to do with, among other things, the  
2 prudential determinations by this Court that it should not  
3 reach a constitutional issue if it can resolve the case on  
4 something short of a constitutional --

5 QUESTION: But it can't resolve this case. It  
6 can't resolve this declaratory judgment request without  
7 resolving the constitutional issue. Do we have the  
8 authority to say we're not going to entertain this action  
9 for a declaratory judgment because we don't think it's  
10 prudent? I don't think we --

11 QUESTION: They specifically allege that they  
12 could and would have exceeded the limits but for the  
13 statute.

14 GENERAL DAYS: Yes, but I think that --

15 QUESTION: You think we should just --

16 GENERAL DAYS: I think that we have volunteers  
17 all over the place, Justice Stevens, who might in some  
18 future set of circumstances want to do something that the  
19 law does not allow.

20 QUESTION: So you say they have no standing.  
21 That's your argument, that they have no standing because  
22 in fact there's no indication that they had any --

23 GENERAL DAYS: Well, it can be either standing,  
24 or it can be the fact that they may have standing in some  
25 minimal sense, but that prudential reasons would justify

1 the Court's not resolving this because they are free of  
2 whatever coercive forces --

3 QUESTION: You say they have no right  
4 controversy because they've never -- although in theory  
5 they could certainly not give the money to the national  
6 party, they --

7 GENERAL DAYS: That's right. They're  
8 volunteer --

9 QUESTION: So it's premature.

10 GENERAL DAYS: Absolutely.

11 QUESTION: General Days, may I go back --  
12 assuming we reach that constitutional issue, may I go back  
13 to the, what is essentially a corruption point?

14 Let's assume that (d) (3) were to be declared  
15 unconstitutional facially. What would the Government's  
16 position -- what do you think your position could be under  
17 the statute if, following that, individuals made \$5,000  
18 contributions to the Colorado party and said, we want this  
19 \$5,000 to be used in X's campaign for the Senate, or Y's  
20 campaign for the House? Would the Government have any  
21 objection to the party's acceding to those requests?

22 GENERAL DAYS: Yes. I think that we would then  
23 turn to 441a(a), which is the basic statutory provision  
24 with respect to contributions and therefore, even if  
25 441a(d) (3) or a(d) were out of the picture, we would

1 nevertheless, if this were a coordinated contribution,  
2 have to go back to the central statute.

3 QUESTION: Well, where does your corruption  
4 argument go, because I thought your strongest corruption  
5 argument was that if you declare the statute  
6 unconstitutional in effect they can make a bypass of the  
7 limitation on contributions to candidates, and now you're  
8 saying, I think, no, they couldn't do that.

9 GENERAL DAYS: No. I think that one of the  
10 curious things about the position that petitioners have  
11 taken in this litigation is that they viewed 441a(d)(3) as  
12 a limitation, when in fact it's an authorization, and we  
13 think that the legislative history and the statute itself,  
14 that is, 441a(d) --

15 QUESTION: Well --

16 GENERAL DAYS: -- the fact that Congress viewed  
17 that as an exception to the otherwise --

18 QUESTION: Okay, but there then wouldn't be --  
19 then where does the end run argument go? Doesn't that  
20 defeat your end run argument?

21 GENERAL DAYS: Well, the end run argument has to  
22 do with the fact that they would be allowed to make  
23 unlimited contributions to the candidate, but that does  
24 not necessarily follow.

25 QUESTION: Okay, so that's -- you're not resting



1 your position on that --

2 GENERAL DAYS: No, but our point with respect to  
3 the corruption is that, although the limits of individual  
4 contributions and political committee contributions would  
5 remain the same, it would be possible to, if you will,  
6 focus and target these amounts of moneys in a way that  
7 would not be possible --

8 QUESTION: Well, the parties could. The parties  
9 could, right.

10 GENERAL DAYS: The parties could, and indeed --

11 QUESTION: Well, but that is -- may I ask you,  
12 then, one other question.

13 GENERAL DAYS: Yes.

14 QUESTION: That assumes that if subsection (3)  
15 falls, subsection (1) remains. Is it your position --

16 GENERAL DAYS: That is in --

17 QUESTION: Is it your position --

18 GENERAL DAYS: -- 441a(a).

19 QUESTION: Pardon me?

20 GENERAL DAYS: 441a(a) is -- if we're talking  
21 about the same provision.

22 QUESTION: Yes.

23 QUESTION: Your position is that (d) as a whole  
24 would have to fall.

25 QUESTION: That's what I'm getting at, yes.

1 GENERAL DAYS: Yes.

2 QUESTION: And then you're back to the beginning  
3 of the statute.

4 GENERAL DAYS: That's correct, so --

5 QUESTION: And they're under that tight a  
6 prohibition.

7 GENERAL DAYS: That's correct.

8 QUESTION: That's right, so if (d)(3) falls,  
9 (d)(1) falls, too, in your view. You can't pick off  
10 (d)(3) alone.

11 GENERAL DAYS: Oh, of course.

12 QUESTION: Right.

13 GENERAL DAYS: Of course. Yes, I'm sorry.

14 QUESTION: Yes.

15 GENERAL DAYS: I thought you were talking about  
16 the major statute.

17 QUESTION: Yes.

18 GENERAL DAYS: But going to this question of  
19 corruption, the Court has never concluded, nor did  
20 Congress, that for example, family members would be likely  
21 to seek undue influence with their own family members but  
22 nevertheless upheld the limitation on contributions by  
23 family members to their own sons and daughters and wives  
24 and husbands.

25 So the point is not necessarily that there would

1 be actual corruption, but the appearance of corruption,  
2 and I think that the -- what the statute reflects and what  
3 this Court's decisions reflect is that there is a  
4 significant corruptive potential in large amounts of  
5 money. That is --

6 QUESTION: I don't understand what you mean by  
7 corruptive potential. If you mean that by spending a lot  
8 of money for a particular candidate, that is, making a lot  
9 of speech on behalf of that candidate, you're likely to  
10 promote the ideas that you're interested in --

11 GENERAL DAYS: I'm not suggesting that.

12 QUESTION: That's not corruption.

13 GENERAL DAYS: No, that is -- that is not  
14 corruption.

15 QUESTION: You're going to get back some money  
16 for it. You're going to get the guy to do something that  
17 will line your pockets --

18 GENERAL DAYS: Well --

19 QUESTION: -- one way or another.

20 GENERAL DAYS: Not necessarily line your  
21 pockets, line the pockets of your campaign. That is,  
22 foster your political career in ways that are contrary to  
23 what otherwise would be your best judgment. I think that  
24 is the teaching of Buckley and the other decisions of this  
25 Court.

1 QUESTION: You mean, it is corruption to induce  
2 a candidate to support certain philosophical principles by  
3 making a donation to them?

4 GENERAL DAYS: It is not corruption, but I think  
5 the difference, Justice Scalia, is in the amount of money.  
6 I think Congress in the campaign act recognized that  
7 political parties could exert certain influence on their  
8 candidates and on their elected officials and make them do  
9 a variety of things.

10 QUESTION: It's called party discipline.

11 GENERAL DAYS: Yes.

12 QUESTION: It's called party discipline --

13 GENERAL DAYS: They always have, and they always  
14 will.

15 QUESTION: -- and so long as there's no exchange  
16 of money, I have never considered it corruption. I've  
17 considered it good old-fashioned democratic politics.

18 GENERAL DAYS: Well, I think that with respect,  
19 Justice Scalia, in Buckley this Court rejected the notion  
20 that the antibribery statutes would be a way of dealing  
21 with this particular problem, and that Congress --

22 QUESTION: But what is the problem?

23 GENERAL DAYS: -- could deal with the situation.

24 QUESTION: I mean, you're assuming -- you're  
25 assuming the problem. Justice Scalia's question is,

1 there's no problem. There's no problem when candidates  
2 feel sufficiently beholden to a party to act in accordance  
3 with the party's philosophy. Where is --

4 GENERAL DAYS: I --

5 QUESTION: Where is the Government's interest in  
6 destroying that relationship?

7 GENERAL DAYS: It's not destroying that  
8 relationship. It stems from the fact that with unlimited  
9 amounts of money there is a potential for the parties or  
10 other entities forcing a candidate to --

11 QUESTION: Well, wait a minute.

12 GENERAL DAYS: -- do things they would not  
13 otherwise do.

14 QUESTION: How about other entities? We're just  
15 talking about parties here.

16 GENERAL DAYS: Yes, but there are limitations on  
17 contributions that can be made. What we're talking about  
18 here, and what petitioners are urging, is money that in  
19 effect goes directly to the candidate in unlimited amounts  
20 of money, unlimited amounts.

21 QUESTION: Thank you, General Days.

22 Mr. Baran, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF JAN WITOLD BARAN

24 ON BEHALF OF THE PETITIONERS

25 MR. BARAN: I would like to clarify hopefully a

1 couple of statutory issues that were raised.

2 QUESTION: Before you get to that, Mr. Baran,  
3 let me tell you one thing that's really troubling me. Is  
4 it true that it doesn't make a whole lot of difference?

5 I mean, you complain in your brief and you  
6 complain here you can only spend a few pennies a head, and  
7 the Solicitor General says you don't want to spend more  
8 than that anyway. Does this make any real difference to  
9 party politics in the United States?

10 MR. BARAN: Any time the decisionmaking of a  
11 speaker becomes his or her own decision as opposed to the  
12 Government's decision, it matters, and in practical terms  
13 this does allow the political parties to make their  
14 decisions based on where they think their political speech  
15 would be most effective.

16 QUESTION: As a practical matter, it would give  
17 the parties through this form of speech an influence and a  
18 control over candidates which in the last few decades they  
19 have lost. That's the practical effect, isn't it?

20 MR. BARAN: It makes them more relevant than  
21 they have been in the last couple of --

22 QUESTION: It gives them clout. Let's -- it  
23 gives -- it will give them clout with their candidates,  
24 won't it?

25 MR. BARAN: Well, the --

1 QUESTION: Isn't that what's really at stake?  
2 That's why they want to engage in this kind of speech.  
3 You want to restore party discipline.

4 MR. BARAN: Justice Souter, political parties  
5 believe they have a proper role in public debate about  
6 campaigns and about issues, and about -- that's what party  
7 platforms are about. That's what nominating candidates  
8 are all about, and this section tells the parties they can  
9 only engage in that public debate up to a point.

10 QUESTION: So your answer is yes. Nothing to be  
11 ashamed about, party discipline.

12 (Laughter.)

13 QUESTION: Your answer is yes, you will  
14 influence your candidates to support Republican positions  
15 more than they otherwise would.

16 MR. BARAN: Yes.

17 QUESTION: You're ashamed of that.

18 (Laughter.)

19 MR. BARAN: I'm too sensitive to perhaps the  
20 jargon of some, and I don't mean you, Justice Souter,  
21 that, you know, having clout is a pejorative term, and it  
22 does allow them to say more and hopefully to have more  
23 persuasive effect.

24 I would point out that with respect to this  
25 assertion that this spending is highly theoretical, the

1 record is fairly clear that with respect to the 1986  
2 election cycle the Colorado party spent \$1.1 million for  
3 all of its activities, so it is theoretically possible,  
4 was then, is today, to spend money, if that were the  
5 party's decision, for the type of speech in excess of the  
6 limits as provided here.

7 With respect to when an individual is a  
8 candidate, which is a very important question raised by  
9 Justice Ginsburg, I point out that the definition of a  
10 candidate in the Federal Election Campaign Act is any  
11 individual who has raised or spent more than \$5,000 in  
12 campaign funds.

13 That means that every person across a street is  
14 a candidate under the act almost the day after election  
15 and, in fact, Congressman Wirth, before he became a  
16 candidate for the Senate, was, prior to that time, between  
17 1984 -- the 1984 election and up to the point where he  
18 declared his candidacy for the Senate, he was a candidate  
19 for reelection to the House of Representatives.

20 QUESTION: Which section defines candidate that  
21 way?

22 MR. BARAN: That is section 431, which is a  
23 definitional section of the act, Your Honor, and there is  
24 a discrete definition of a candidate.

25 I would also point out that in our --



1                   QUESTION: Your definition of -- what are the  
2 other words? In connection with -- is there a definition  
3 of general election campaign?

4                   MR. BARAN: There is not.

5                   CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baran.  
6 The case is submitted.

7                   (Whereupon, at 11:03 a.m., the case in the  
8 above-entitled matter was submitted.)

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## CERTIFICATION

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

*COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS JONES, Petitioners v. FEDERAL ELECTION COMMISSION*  
*CASE NO. 95-489*

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

BY *Ann Marie Federico*

(REPORTER)