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

CAPTION: JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL  
OF MISSOURI, ET AL., Petitioners v. SHRINK  
MISSOURI GOVERNMENT PAC, ET AL.

CASE NO: 98-963 *C.2*

PLACE: Washington, D.C.

DATE: Tuesday, October 5, 1999

PAGES: 1-56

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THE FEDERAL COURTS

IN THE

UNITED STATES

CAPTION: JUDITH A. NIXON, ATTORNEY GENERAL  
OF MASSACHUSETTS, PLAINTIFF  
V.  
MILWAUKEE GOVERNMENT PAPER BOARD

CASE NO. 99-1000

PLACE: Washington, D.C.

DATE: October 7, 1999

PAGES: 10

FEDERAL BUREAU OF INVESTIGATION

1700 M STREET, N.W.

WASHINGTON, D.C. 20535

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEREMIAH W. (JAY) NIXON, :  
4 ATTORNEY GENERAL OF MISSOURI, :  
5 ET AL., :

6 Petitioners :

7 v. : No. 98-963

8 SHRINK MISSOURI GOVERNMENT :  
9 PAC, ET AL. :

10 - - - - -X

11 Washington, D.C.

12 Tuesday, October 5, 1999

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States at  
15 10:04 a.m.

16 APPEARANCES:

17 JEREMIAH W. NIXON, ESQ., Attorney General, Jefferson City,  
18 Missouri; on behalf of the Petitioners.

19 SETH P. WAXMAN, ESQ., Solicitor General, Department of  
20 Justice, Washington, D.C.; on behalf of the United  
21 States, as amicus curiae, in support of the  
22 Petitioners.

23 D. BRUCE LA PIERRE, ESQ., St. Louis, Missouri; on behalf  
24 of the Respondents.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	JEREMIAH W. NIXON, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	SETH P. WAXMAN, ESQ.	
7	On behalf of the United States, as amicus curiae,	
8	supporting the Petitioners	19
9	ORAL ARGUMENT OF	
10	D. BRUCE LA PIERRE, ESQ.	
11	On behalf of the Respondents	27
12	REBUTTAL ARGUMENT OF	
13	JEREMIAH W. NIXON, ESQ.	
14	On behalf of the Petitioners	53
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 98-963, Jeremiah Nixon,  
5 Attorney General of Missouri, v. Shrink Missouri  
6 Government PAC, et al. General Nixon.

7 ORAL ARGUMENT OF JEREMIAH W. NIXON

8 ON BEHALF OF THE PETITIONERS

9 GENERAL NIXON: Mr. Chief Justice, and may it  
10 please the Court:

11 23 years ago this Court decided in Buckley v.  
12 Valeo that a \$1,000 campaign contribution limit,  
13 applicable to elections for Federal office, was  
14 constitutionally valid. Legislatures and city councils  
15 across the country have adopted contribution limits  
16 relying on that holding. The holding of the Eighth  
17 Circuit is a direct challenge to the continuing validity  
18 of the Buckley ruling.

19 Respondents say that the Court's First Amendment  
20 decisions have supplemented Buckley, but this is a thinly  
21 veiled contention that the Court should overrule Buckley.  
22 Respondents' amici more honestly urge the Court to  
23 overrule the contribution holding in Buckley. Respondents  
24 have not made the convincing showing necessary to depart  
25 from settled principles of stare decisis.

1 QUESTION: Well, what about the inflation  
2 argument, General Nixon? I mean, supposing we had a  
3 campaign limit of contribution enacted instead of in 1974,  
4 in the depths of the Depression, and it came up many years  
5 later, would you say that that was an attack on stare  
6 decisis to say this at this level is too low?

7 GENERAL NIXON: There may be times, Mr. Chief  
8 Justice, where the level does get too low, but in this  
9 case they've clearly not proven that it's different in  
10 kind, nor have they proven the ultimate burden, which is  
11 that the speech of candidates in campaigns has been  
12 impaired. To the contrary is true. With the limits, the  
13 amount of money expended by candidates has expanded.  
14 Consequently, this situation is not the place in which  
15 inflation would drive this limit to be unuseful.

16 Nothing has happened, either legally or  
17 socially --

18 QUESTION: Excuse me. The fact that it's  
19 expanded doesn't prove anything. I mean, it might have  
20 expanded more than that. It's expanded, perhaps, because  
21 of the new electronic media that give candidates so much  
22 more opportunity to try to reach the public with their  
23 views, and it costs a lot of money, so the fact that more  
24 money is spent doesn't prove a thing. Ten times as much  
25 might have been spent. There might have been ten times as

1 much speech, but for the campaign limits.

2 GENERAL NIXON: It doesn't change their burden,  
3 however, Justice Scalia, and their burden is to show that  
4 the \$1,000 is different in kind, and that speech of a  
5 class of candidates has been dramatically impaired.

6 QUESTION: Well, do you -- is it not the case  
7 that the amount of time spent by candidates in the raising  
8 of money has radically increased?

9 GENERAL NIXON: Many candidates do have to spend  
10 more time, Your Honor.

11 QUESTION: An enormous amount of political  
12 campaigning consists of so-called fundraisers. Is that  
13 not a -- an obvious consequence of the extremely low  
14 amount they can get from each individual?

15 GENERAL NIXON: If it is, Your Honor, the threat  
16 of having candidates on the phone talking to members of  
17 their constituency, asking for their help and support,  
18 pales in comparison to the risk that the perception of  
19 corruption with large contributions raises.

20 QUESTION: Well, you say perception of  
21 corruption. Precisely what do you mean by that? Do you  
22 mean the sense that there is a quid pro quo that Mr. Smith  
23 gives \$5,000 to a legislator and in turn the legislature  
24 agrees to do something for Mr. Smith?

25 GENERAL NIXON: Your Honor, we do not believe

1 that it requires a quid pro quo under Buckley in order to  
2 have a perception of corruption.

3 QUESTION: Well, but tell me what you mean by  
4 perception of corruption, that phrase.

5 GENERAL NIXON: Well, corruption is dollars to  
6 influence action contrary to what the position of the  
7 elected or appointed official would be. The perception of  
8 corruption is really when the public sees a donor hand a  
9 candidate a large amount of money, I mean, it's fanciful  
10 to --

11 QUESTION: Are you convinced that that  
12 perception has diminished since Buckley?

13 (Laughter.)

14 GENERAL NIXON: No, I'm not, Your Honor, but --

15 QUESTION: Well, doesn't that make it very  
16 important for you to tell us precisely what interest is  
17 being served by the Missouri statute? Now, you say the  
18 burden is on the petitioner to show that his speech is  
19 diminished. I had thought it was quite the opposite. I  
20 had thought the burden was on you to show that there's a  
21 subsisting, existing interest that's served by this  
22 legislation.

23 GENERAL NIXON: Your Honor, in the ordinary  
24 case, there's a presumption of constitutionality of a  
25 statute. Now, the shift in the burden that occurs when

1 the First Amendment is at play is halted here, because  
2 Missouri passed a statute that mirrors the statute  
3 approved by this Court in Buckley.

4 QUESTION: Well, do you think that because of  
5 the holding in Buckley that it's no longer incumbent upon  
6 the State to establish the interest that the State has to  
7 support this?

8 I think that the -- if you read all the opinions  
9 in Buckley, the Court still said the State statute would  
10 have to pass rigorous First Amendment scrutiny, and that  
11 incorporates establishing what the State purpose is of the  
12 legislation and whether it's sufficiently important to  
13 justify whatever infringement may exist, so it is  
14 important to know exactly what Missouri has put forward to  
15 justify the legislation.

16 GENERAL NIXON: Yes, Your Honor, it is, and in  
17 this case we've put forth powerful testimony, not only the  
18 affidavit of the chairman of the committee who held  
19 hearings throughout the State and in a bipartisan fashion  
20 passed the campaign finance measure that's at play here,  
21 but also the plebescite of the people of our State, in  
22 which 74 percent people strong voted for a limit, one-  
23 third the limit of what this limit is.

24 QUESTION: I think Justice O'Connor is talking  
25 about evidence of this specter of corruption. What kind

1 of evidence of that was there?

2 GENERAL NIXON: Evidence of corruption, Your  
3 Honor?

4 QUESTION: Corruption or the appearance of  
5 corruption that would arise from allowing a person to give  
6 more than \$1,000 to a campaign.

7 GENERAL NIXON: Your Honor, we would --

8 QUESTION: Do you seriously think there is a  
9 serious risk of corruption or the appearance of corruption  
10 if you allow somebody to give more than \$1,000?

11 GENERAL NIXON: Yes, Your Honor, I think that  
12 there is. I think --

13 QUESTION: And what evidence of that is there in  
14 the legislative proceedings, or in the election? I don't  
15 know how the election has anything to do with that.

16 GENERAL NIXON: The affidavit of Senator Goode,  
17 the chairman of the committee, that took the testimony  
18 that passed the measure specifically indicates that that  
19 is an important part of their difference.

20 QUESTION: Did he give instances of where this  
21 corruption or appearance of corruption raised its ugly  
22 head?

23 GENERAL NIXON: He did not give specific  
24 instances in the affidavit, no, Your Honor.

25 QUESTION: So you're relying --

1 QUESTION: Did he say what he meant by the  
2 appearance of corruption?

3 GENERAL NIXON: In that testimony and in that  
4 affidavit he said that corruption, as I indicated before,  
5 Chief Justice Rehnquist, is when the public sees a donor  
6 hand -- you know, when a donor hands money to a  
7 politician, it is inherently likely to cause actual  
8 apparent corruption. It is inherent. When you -- when  
9 the public sees large amounts of money handed directly to  
10 candidates --

11 QUESTION: Mailed to them, rather than handed to  
12 them.

13 (Laughter.)

14 GENERAL NIXON: The perception would not change.

15 QUESTION: General Nixon, the inherent language  
16 you just quoted, that's straight out of Buckley v. Valeo.  
17 Is there a difference in the proof that Missouri presented  
18 and what was before the Court in Buckley?

19 GENERAL NIXON: You are correct, Justice  
20 Rehnquist, in saying that the language is exactly out of  
21 Buckley. Also, Judge Gibson of the Eighth Circuit  
22 indicated that our proof was stronger than the proof in  
23 this particular area in Buckley, and I think that our  
24 proof was stronger.

25 Both 23 years of history, the continuing problem

1 as it exists in our country, as well as the pacific  
2 evidence here of Senator Goode's affidavit --

3 QUESTION: Is it corruption for an official to  
4 mirror his views to the electorate just so that he can be  
5 reelected?

6 GENERAL NIXON: No.

7 QUESTION: Is that corrupt?

8 GENERAL NIXON: No, it's not, Your Honor.

9 QUESTION: There's worse -- that causes  
10 cynicism, I take it.

11 GENERAL NIXON: No. Mirroring, a politician  
12 mirroring his views to the people he represents is not  
13 corruption. That's democracy.

14 QUESTION: Is it corruption if he uses  
15 contributions as a proxy to assist him in making that  
16 determination?

17 GENERAL NIXON: No, it is not. It is only  
18 corruption when he acts contrary to what his other -- his  
19 position would otherwise be.

20 The every-day operation of Government in which  
21 campaigns run and politics occurs is part of the vibrancy  
22 of our democracy, and there's nothing corrupt about that  
23 particular general process.

24 QUESTION: Let me get this straight. You think  
25 it is -- I assume it's not just money, but it's anything

1 that could be bought with money in the campaign, all  
2 right.

3 Now, suppose a labor union tells a candidate,  
4 you know, we will go all out in working for you, getting  
5 out the vote, going door-to-door, ringing the doorbells,  
6 if you will support an increase in the minimum wage. And  
7 he thinks it over, he says, okay, I'll do it, and they go  
8 out and support him that way. Is that corruption?

9 GENERAL NIXON: No, it is not.

10 QUESTION: Ah.

11 GENERAL NIXON: And to the amount above the  
12 \$1,000 --

13 QUESTION: Wait. Wait. That's not corruption.  
14 But then let's assume a corporation comes to him and says,  
15 we will give you \$10,000 with which you can hire people to  
16 go door-to-door, ring bells, do the same thing the union  
17 would have done, okay, if you will oppose the minimum  
18 wage, and he says -- thinks it over and says, okay, I'll  
19 do that. Is that corruption?

20 GENERAL NIXON: It certainly lays out a  
21 perception of corruption, the dollars --

22 QUESTION: Well, but the first one doesn't, so  
23 it's a question of whether it's in kind or you're using  
24 money to buy it.

25 GENERAL NIXON: No, it's the question -- excuse

1 me, Your Honor, but the question would be --

2 QUESTION: We're talking the same activity.  
3 Some of it is being given in-kind by the labor union. The  
4 other is being purchased by the corporation, and you're  
5 saying the perception of corruption arises in one case and  
6 it does not arise in the other.

7 GENERAL NIXON: No, Your Honor. What I'm saying  
8 is, in the technical sense of our laws, actions by that  
9 labor union might also be illegal if they were a  
10 contribution to the candidate in above the amount of  
11 \$1,000.

12 QUESTION: Justice Scalia's asking not about the  
13 laws, but about the perception of corruption. Why is it  
14 different in one case than in the other?

15 GENERAL NIXON: The Missouri legislature, as  
16 well as --

17 QUESTION: No, I don't -- just your view as to  
18 why, when the union does it there's no perception of  
19 corruption, but when the business does it, there is a  
20 perception of corruption.

21 GENERAL NIXON: The amount of -- Your Honor,  
22 it's not different if the actions are the same. If you  
23 give \$10,000 or do \$10,000 as a direct contribution of  
24 some other sort, of working for someone, it's the same  
25 under the laws.

1           QUESTION: But what -- you say it's different if  
2 the services are actually in kind, with no exchange of  
3 cash, that we'll turn out our forces for you and we'll pay  
4 them rather than you have to pay them.

5           GENERAL NIXON: The Missouri legislature,  
6 Justice Rehnquist, has not found that that particular  
7 problem warrants the level of control that the handing of  
8 money does. They may, at some future time, indicate that  
9 that conduct is also of the type that might.

10          QUESTION: Oh, so it's up to them what's an  
11 appearance of corruption. It is whatever they say it is,  
12 and they can come down on some things because in their  
13 all-powerful discretion they can consider it an appearance  
14 of corruption, and something else that looks and smells  
15 exactly the same, they simply say, that is not an  
16 appearance -- can they behave that way?

17          GENERAL NIXON: Yes, they can, Your Honor.

18          QUESTION: In the First Amendment area?

19          GENERAL NIXON: Yes, they can, Your Honor.

20          QUESTION: Well --

21          GENERAL NIXON: As Buckley said, they are  
22 uniquely positioned to ascertain --

23          QUESTION: Well, I think we -- that brings us  
24 back to what is the test that we're going to apply. It is  
25 a First Amendment issue, is it not?

1 GENERAL NIXON: Yes, Justice.

2 QUESTION: And normally we apply strict  
3 scrutiny. Whose interests are we looking at, those of the  
4 contributor or those of the candidate, or both?

5 GENERAL NIXON: Both, but --

6 QUESTION: What's at issue here?

7 GENERAL NIXON: Both, but the paramount interest  
8 is that of the candidate, and his or her ability to speak.  
9 That is the greater speech question.

10 The secondary question of the contributor is  
11 more of an associational right, almost speech by proxy.  
12 When you give money to a campaign --

13 QUESTION: Do you think the candidate is  
14 asserting a right to require the State to facilitate his  
15 fundraising in some way? Is that what's being asserted?

16 GENERAL NIXON: I don't understand.

17 QUESTION: How far does this go? I mean, if a  
18 State requires a certain number of signatures to be  
19 gathered on a petition before one can be a candidate, is  
20 that burdening the candidate's First Amendment right?

21 GENERAL NIXON: It could. It well could, Your  
22 Honor, burden a candidate's right.

23 QUESTION: And what standard do we apply, then?

24 GENERAL NIXON: I think the standards -- the  
25 standard for expenditures is clearly strict scrutiny. The

1 Court in Buckley held that the standard in this case was  
2 less than that, in essence what they quote as a rigorous  
3 standard of review. We would argue that that standard's  
4 somewhat under the standard of strict scrutiny for  
5 expenditures.

6 QUESTION: May I ask you a question, General  
7 Nixon?

8 GENERAL NIXON: Yes.

9 QUESTION: If we look at the impact on the  
10 candidate's ability to communicate to the electorate, does  
11 the record tell us what the situation was before the  
12 statute was passed with respect to what portion of the  
13 money they raised was by contributions over \$1,000, what  
14 portion was raised by contributions under \$1,000?

15 GENERAL NIXON: The record indicates, Justice  
16 Stevens, that a very small percentage of the money, less  
17 than 2 percent of all candidates, was raised at levels  
18 above \$1,000. It also indicates --

19 QUESTION: So that would indicate that there's  
20 maybe a 2-percent diminution in the candidate's ability to  
21 speak? Is that about it?

22 GENERAL NIXON: Yes, Your Honor, as far as the  
23 number.

24 QUESTION: That was 2 percent of all candidates,  
25 right?

1           GENERAL NIXON: 2 percent of the State-wide  
2 candidates involved in the --

3           QUESTION: Of all the State-wide candidates  
4 involved?

5           GENERAL NIXON: Yes.

6           QUESTION: But it might have been the case that  
7 some candidates raised the vast proportion of their funds  
8 that way and would not have been able to run had they not  
9 had a few angels who came in and gave them enough money to  
10 run. That's quite possible.

11           GENERAL NIXON: It might be the case in another  
12 State. That is not the case in the State of Missouri,  
13 Your Honor.

14           QUESTION: Now, as the argument is made here,  
15 and I suppose it's made everywhere, or could be made  
16 everywhere, that the kind of statute that you have is one  
17 which significantly favors incumbents. Would you agree?

18           GENERAL NIXON: Your Honor, I believe it  
19 disfavors corruption. I --

20           QUESTION: Well, that's a good statement, but it  
21 isn't responsive to the question.

22           (Laughter.)

23           QUESTION: How about the question?

24           GENERAL NIXON: I -- no, I don't --

25           QUESTION: Isn't this a scheme -- aren't

1 incumbents more likely to have a developed broad base of  
2 contributors, a campaign network that has been built up in  
3 the past, and hence be able to go out and get lots of  
4 smaller contributions, whereas the new kid on the  
5 political block may very well have to depend on a smaller  
6 group and need more cash from each one?

7 GENERAL NIXON: They may have more, Your Honor,  
8 but I would posit that the ability of someone who's in  
9 office to sell their vote, that vote is worth a lot more  
10 than a challenger, and consequently the level of  
11 corruption and potential corruption is dramatic, and  
12 consequently, as -- you know, so I think there are a  
13 number of factors involved in the practicalities of  
14 politics and running races, and incumbents and  
15 challengers, but the system has been vibrant and alive  
16 with these limits across this country for 23 years.

17 QUESTION: General Nixon, the Buckley case has  
18 been criticized by some people for being imprecise in the  
19 standard. It mentions rigorous. It doesn't say strict.  
20 What is the standard that you are asking, do you extract  
21 from Buckley that you are asking this Court to apply? How  
22 would you formulate it?

23 GENERAL NIXON: The formula, the standard of  
24 scrutiny would be a rigorous standard of review, somewhat  
25 less than strict scrutiny.

1 QUESTION: Which means what? Is it just a  
2 common-sense notion that the burden is really severe, then  
3 there's a stronger justification required, and if the  
4 burden is not so severe, then a lesser justification?

5 GENERAL NIXON: Well, clearly the level of proof  
6 of the burden to show the harm varies with the type of  
7 harm at issue here, and there's a significant and real  
8 harm.

9 Your Honor, we are comfortable with the standard  
10 established in Buckley, a rigorous standard of review. We  
11 feel that standard is appropriate. It's stood the test of  
12 time. It has allowed across this country courts where  
13 limits were too low to be thrown out in trial courts such  
14 as here in the District, as well as in California, as well  
15 as in Missouri, in our first case.

16 QUESTION: What do you mean, it's stood the test  
17 of time? Do you have a feeling there's great contentment  
18 and satisfaction with the election campaign process as  
19 would be, you know, the half a baby delivered up by  
20 Buckley, where they struck down the expenditure limits but  
21 upheld the contribution limits? You have a sense that  
22 that's worked out real well.

23 GENERAL NIXON: Worked out much better than the  
24 alternatives, Your Honor, and quite frankly, walking away  
25 from Buckley at this particular point would consign the

1 vast majority of the citizens of our country to a  
2 situation in which they believed, if there were no limits,  
3 that their Government was literally for sale.

4 QUESTION: Do you believe that the Buckley  
5 standard is tougher than O'Brien? I mean, the Court  
6 clearly didn't adopt O'Brien, but it had two different  
7 issues before it, which may explain why. Do you think  
8 with respect to the contribution limits Buckley exacts a  
9 higher standard than O'Brien would?

10 GENERAL NIXON: Our sense is yes, Your Honor,  
11 that it does.

12 I'll reserve the remainder of my time for  
13 rebuttal.

14 QUESTION: Very well, General Nixon.

15 General Waxman, we'll hear from you.

16 ORAL ARGUMENT OF SETH P. WAXMAN

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

18 SUPPORTING THE PETITIONERS

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

21 Buckley's validation of the \$1,000 contribution  
22 limit was based on three holdings, each of which remains  
23 as valid today as it was in 1976. First, that a \$1,000  
24 limit on contributions imposed only an attenuated burden  
25 on First Amendment rights.

1           Second, that of all forms of political support,  
2 large contributions pose the greatest threat to the  
3 integrity of the system because the potential for and the  
4 appearance of corruption are what this Court deemed  
5 inherent in a regime of large financial contributions.

6           QUESTION: General Waxman, whose First Amendment  
7 interests are being burdened?

8           GENERAL WAXMAN: There are two, Justice  
9 O'Connor, and there are three different interests. The  
10 contributor has a First Amendment right in expression, and  
11 a First Amendment right in association. The candidate has  
12 a First Amendment right in amassing sufficient resources  
13 in order to produce and project effective advocacy.

14           Looking at all three of those, either separately  
15 and together, the Court in Buckley concluded that a \$1,000  
16 limit imposed only an incidental burden, or an incidental  
17 restriction, or an attenuated burden on the three rights  
18 taken together, and for that reason, and this responds to  
19 Justice Ginsburg's question, the Court applied a less-  
20 than-strict standard of scrutiny that it formally  
21 announced and unanimously adopted in another election-  
22 related case shortly after, a case called *Burdick v.*  
23 *Takushi*, in which the Court said, in an election context,  
24 when First Amendment rights are subjected to severe  
25 restrictions, the regulation must be narrowly drawn to

1 advance a governmental interest of compelling importance.  
2 But when an election-related provision imposes  
3 only reasonable nondiscriminatory restrictions against  
4 First Amendment rights, the Government's important  
5 regulatory interests are generally sufficient to justify  
6 the restriction, and that --

7 QUESTION: Burdick was a ballot access case,  
8 wasn't it?

9 GENERAL WAXMAN: Yes, it was, and the Burdick  
10 standard has been -- first of all, it was agreed upon as a  
11 standard I believe by all members of the Court in Burdick,  
12 both the majority and the dissent, and it was also  
13 affirmed by this Court in Timmons and in the American  
14 Constitutional Law Foundation last term.

15 QUESTION: But this isn't, strictly speaking,  
16 ballot access.

17 GENERAL WAXMAN: No, that's --

18 QUESTION: Do we apply the same test?

19 GENERAL WAXMAN: I think you do, in -- the  
20 Burdick standard has been applied not just in ballot  
21 access cases, but really in all election-related cases,  
22 cases like Timmons, for example.

23 QUESTION: Well, election-related cases where  
24 the State has to manage the election. You have to have  
25 some rules, and those rules have to be laid down for the

1 State, or you can't have an election. You have to know  
2 who the candidates are, how you qualify as a candidate,  
3 and so forth and so on, in the nature of things.

4 In the nature of things, however, the State does  
5 not have to control how people who want to be elected go  
6 out and convince the people of the United States to vote  
7 for them.

8 GENERAL WAXMAN: That's precisely --

9 QUESTION: It does not require the State to make  
10 one decision or another, and it's quite -- with Buckley it  
11 was quite new that the State should intervene in what  
12 previously had been a matter of private First Amendment  
13 activity.

14 GENERAL WAXMAN: Yes, Justice Scalia, and that's  
15 why the Burdick standard, or what this Court referred to  
16 or what Justice O'Connor referred in her concurrence and  
17 dissent in American Constitutional Law Foundation as the  
18 variable standard also applies, as it did in the other  
19 Buckley case, in a nonballot access case where the  
20 Government is restricting what people have to do to get  
21 their message out, and in McIntyre, and in other campaign  
22 finance cases like California Medical Association and  
23 Massachusetts Citizens for Life.

24 I'm just suggesting that there is not some novel  
25 standard that was applied and inappropriately enunciated

1 in Buckley, but rather that Buckley and these other cases  
2 that I've described fall into a rather unbroken line of  
3 jurisprudence that this Court has announced where in the  
4 election context, where First Amendment rights are  
5 involved, particularly where what's being regulated is not  
6 speech directly itself, but conduct that includes speech  
7 as part of that --

8 QUESTION: One of the parts of Buckley's  
9 reasoning, I think, was that you can have campaign limits  
10 of the kind, contribution limits that were upheld in  
11 Buckley, because alternate channels are available for the  
12 potential contributor. Is that true under Missouri law?  
13 Can the potential contributor, say, join together with  
14 others and buy a newspaper ad saying, I support Joe Blow?

15 GENERAL WAXMAN: It is, indeed, I think, Mr.  
16 Chief Justice, that it is even more true in Missouri than  
17 it is under Federal law, because, for example,  
18 candidate -- individuals can make unlimited contributions  
19 to political party committees, that is, political parties  
20 can create committees and, unlike the Federal law, which  
21 limits how much one can give to a political party or to a  
22 PAC, Missouri doesn't apply any limits, and it permits  
23 independent expenditures, and volunteer --

24 QUESTION: Would that support a particular  
25 candidate, as opposed to a particular party? I mean,

1 suppose you're a one-issue person, and you want to support  
2 a particular candidate?

3 GENERAL WAXMAN: If you're a one-issue person,  
4 Justice Scalia, you have the same rights under Missouri  
5 law that the Court recognized under Federal law in Buckley  
6 and its progeny. You can run an independent expenditure.  
7 You can contribute to PAC's. You can contribute without  
8 limit to political party committees. All of these  
9 alternative means exist.

10 QUESTION: Do you think that corruption is as  
11 defined by the Attorney General from Missouri that it's  
12 the chance that the official will change his mind based on  
13 the amount of contribution, is that the corruption that's  
14 involved?

15 GENERAL WAXMAN: I really think, Justice  
16 Kennedy, that the definition of corruption that this Court  
17 gave in NCPAC, which borrowed some of the language from  
18 Buckley, really applies.

19 This Court said in NCPAC that contribution is a  
20 subversion of the political process. Elected officials  
21 are influenced to act contrary to their obligations of  
22 office by the prospect of financial gain to themselves, or  
23 the infusion of money into their campaigns.

24 QUESTION: But if a contribution is speech, and  
25 we assume that it is, it's hard to say that speech is a

1 subversion of the political process.

2 GENERAL WAXMAN: Well, I -- let me say two  
3 things in response to that. It's a very difficult  
4 question. First of all, I think it's fair to say that  
5 contributions are conduct that has an expressive  
6 component, and the potential for corruption comes from the  
7 nonspeech element of the large contribution.

8 Second of all, it is true that there may be  
9 other forms of activity that might beholden a candidate to  
10 act in his own self-interest, rather than in the  
11 disinterested conduct of his public functions, but  
12 Congress and legislatures are surely entitled to focus at  
13 least first on the conduct that it concludes forms the  
14 most immediate basis for corruption, or the perception of  
15 corruption, and which -- and I think this goes to some of  
16 your earlier questions -- poses the fewest First Amendment  
17 problems in terms of regulation, and I think that's really  
18 what the contribution limit --

19 QUESTION: That's a traditional principle of a  
20 rational basis scrutiny. You know, the legislature can  
21 address one evil at a time, it doesn't have to take in --  
22 but I don't know that we've applied that very literally in  
23 First Amendment law.

24 GENERAL WAXMAN: Well, I think if one looks at  
25 Buckley itself, what the Court did in Buckley, in looking

1 at the First amendment interests involved and deeming them  
2 not to be substantial, it found with respect to the  
3 contributor -- well, first of all, with respect to the  
4 candidate, that the candidate's interest was in having  
5 sufficient money, or sufficient fuel in order to make his  
6 message known, and the qualitative test this Court  
7 established, and this goes to the inflation questions that  
8 were asked, is whether the contribution restrictions have  
9 a severe impact on political dialogue such that they  
10 prevent candidates and political committees as a class  
11 from amassing the resources necessary for political  
12 advocacy.

13 Now, with respect to the candidate's rights, the  
14 rights of association, which are stronger than the  
15 candidate's rights to speech, which can be extinguished if  
16 a candidate agrees to take matching funds, as the  
17 Presidential Funding Act allows, what this Court found  
18 under the level of scrutiny that was applied in Buckley  
19 was that the contribution limit, and I'm quoting here,  
20 focuses precisely and only on the narrow aspect of  
21 political association where the actuality and potentiality  
22 for corruption have been identified, while leaving persons  
23 free to engage in independent political expression, to  
24 associate actively through volunteering their services,  
25 and to assist to a limited but substantial extent in

1 supporting candidates.

2 That, I would respectfully submit, Mr. Chief  
3 Justice, is not the language of rational basis scrutiny.  
4 It's the language, at least, of intermediate level  
5 scrutiny.

6 QUESTION: Thank you, General Waxman.

7 GENERAL WAXMAN: Thank you very much.

8 QUESTION: Mr. La Pierre, we'll hear from you.

9 ORAL ARGUMENT OF D. BRUCE LA PIERRE

10 ON BEHALF OF THE RESPONDENTS

11 MR. LA PIERRE: Mr. Chief Justice, and may it  
12 please the Court:

13 Let me start by noting a couple of comments in  
14 response to the argument so far. The argument shows the  
15 difficulty with using an appearance of corruption as a  
16 justification for imposing limits on campaign  
17 contributions. An appearance of corruption arises  
18 whenever an individual does something that pleases his or  
19 her contributors.

20 And second, with respect to the difference of  
21 evidence before Congress in 1974, as opposed to the  
22 evidence before the State of Missouri in 1994, Congress,  
23 when it acted in 1994, and the Court noted this point when  
24 it referred to the court of appeals opinion, the court of  
25 appeals specifically found that the record before Congress

1 was replete with specific examples of improper attempts to  
2 obtain governmental favor in exchange for large campaign  
3 contributions. Missouri's only evidence is the affidavit  
4 of Senator Goode.

5 With respect to the effect of the Missouri  
6 contribution limits on the amount of contributions, the  
7 record shows only -- and this is with regard to two  
8 elections that the State of Missouri examined in 1992 --  
9 the contribution limit in 1994 would have been \$1,000  
10 under Missouri law. It's been raised to \$1,075.

11 With respect to the two elections, that the  
12 State of Missouri examined 1.49 and 2.38 percent of the  
13 contributions made in the 1994 elections would have been  
14 barred by the \$1,000 limit. It hardly seems like  
15 contributions in excess of \$1,000 could be any real  
16 problem if the contributions that are barred were such a  
17 very small number.

18 QUESTION: Well, if you first accept the  
19 proposition that you mentioned a moment ago that the  
20 appearance of corruption in effect is not really a serious  
21 argument here.

22 If it is a serious argument here, then the  
23 elimination of corruption to the percentages that you  
24 mentioned I suppose would be a legitimate and significant  
25 justification.

1 MR. LA PIERRE: Yes, Mr. Justice Souter, with I  
2 think one significant qualification. The appearance of  
3 corruption is amorphous. It's difficult to establish, and  
4 what the Eighth Circuit --

5 QUESTION: Well, I mean, is it difficult to  
6 estab -- I mean, I assume a couple of things are meant by  
7 appearance of corruption, and you know, tell me if I'm  
8 wrong. One has been mentioned, and that is, I think most  
9 people assume -- I do, certainly -- that someone making an  
10 extraordinarily large contribution is going to get some  
11 kind of an extraordinary return for it. I think that is a  
12 pervasive assumption.

13 And number 2, there is certainly an appearance  
14 of, call it an attenuated corruption, if you will, that  
15 large contributors are simply going to get better service,  
16 whatever that service may be, from a politician than the  
17 average contributor, let alone no contributor.

18 Now, those are at least two perceptions, and  
19 aren't they sound ones?

20 MR. LA PIERRE: The political science  
21 literature, Mr. Justice Souter, would suggest that the  
22 general perception that those who give a lot of money in  
23 essence are buying votes, or obtaining some type of  
24 special favoritism, the political science literature  
25 suggests that that is not, in fact --

1           QUESTION: But I'm not sure -- and I recognize  
2 that you've got that in the record, and I think that's  
3 important, but I'm not sure that it really goes to the  
4 justification here, because the justification here is, we  
5 need a political system in which there is some kind of a  
6 basic level of confidence on the part of the people  
7 governed in the integrity of the system.

8           And political scientists may be reasonably  
9 sure -- I -- they're not unanimous, I understand, but some  
10 of them may be reasonably sure that the money does not buy  
11 what most people think it buys, but I don't think there  
12 has been a refutation that most people do think that it  
13 buys something that shouldn't be bought, and as long as  
14 that is the case, the argument against the appearance of  
15 corruption is in part an argument against the cynicism  
16 that that induces, and I would suppose that was still a  
17 sound argument and a sound justification.

18           MR. LA PIERRE: Well, it would be difficult to  
19 argue, Mr. Justice Souter, that Government should never  
20 care about an appearance of corruption, but the Eighth  
21 Circuit tried to address that problem by insisting that  
22 the State have reasonably objective evidence of some  
23 appearance of corruption, so instead of running the risk  
24 that simple public cynicism, concern about the quality of  
25 our politicians, instead of letting ungeneralized fears

1 about the conduct of Government overwhelm significant  
2 First Amendment interests, the Eighth Circuit tried to  
3 make sure that there was some real basis, something more  
4 than just --

5 QUESTION: May I ask about -- excuse me. You're  
6 finished, are you?

7 QUESTION: May I ask one more question?

8 QUESTION: Yes.

9 QUESTION: And I would agree with that approach  
10 but for this point. What we -- it seems to me that what  
11 courts need to require, certainly in First Amendment or  
12 any other areas, by way of empirical justification in  
13 support of legislation, depends on the probability or  
14 improbability of what is being asserted as the  
15 justification, and it seems to me -- I will speak as one  
16 judge -- highly plausible that people assume that  
17 something very, very good and extraordinary is going to be  
18 purchased by an extraordinary contribution.

19 And therefore the justification for appearance  
20 of corruption and cynicism and so on seems inherently  
21 plausible to me, and therefore I don't know why a court  
22 should require as high degree of empirical justification  
23 as we do, for example, when effects of the Internet are  
24 suggested, and nobody knows how the Internet works.

25 So what is your answer to the question, why do

1 we need an unusual empirical, or a heavily empirical  
2 justification for something which seems so intuitively  
3 plausible?

4 MR. LA PIERRE: The short answer is that we  
5 don't need any heavily empirical justification, and that's  
6 certainly not what the Eighth Circuit required.

7 It's important to remember that this case was  
8 decided on cross-motion for summary judgment, and Missouri  
9 had as its evidence only the affidavit of Senator Goode.  
10 Senator Goode's affidavit was not sufficient to raise any  
11 question of material fact with respect to the question  
12 whether campaign contributions in Missouri cause any real  
13 harm.

14 QUESTION: May I interrupt you? If Missouri had  
15 brought in 10 supposedly representative citizens who all  
16 said, yeah, I believe that for big amounts of money they  
17 get big returns, would that have been enough?

18 MR. LA PIERRE: Absolutely not, because there  
19 would be no way of knowing whether this impression of the  
20 public, which may well be mistaken, should override  
21 important First Amendment interests in --

22 QUESTION: But the impression of the public, I  
23 thought you had conceded, was certainly itself an  
24 important datum.

25 MR. LA PIERRE: And I recognize that public

1 impression is important, but it is the court's  
2 responsibility and the Eighth Circuit exercised that  
3 responsibility by attempting to make sure that vague  
4 impressions that there may be some problem were, in fact,  
5 more than just vague impressions.

6 QUESTION: But this Court --

7 QUESTION: Ordinarily we don't try issues of  
8 fact that are involved in a legislative act before the  
9 court. I mean, the proponents of the law don't ordinarily  
10 have to come into court and prove that all of the  
11 assumptions behind the law were correct. I don't know  
12 that it's completely different in a First Amendment case.

13 MR. LA PIERRE: Mr. Chief Justice, I believe  
14 you're correct, but the issue here is whether Missouri has  
15 any evidence whatsoever of a problem that it needs to  
16 address, absent some evidence of a real harm.

17 QUESTION: Mr. La Pierre, the Buckley case says  
18 there was inherent --

19 QUESTION: Would you let him finish the answer  
20 to my question?

21 QUESTION: Yes, I'm sorry, Chief.

22 QUESTION: Please finish your answer.

23 MR. LA PIERRE: I'll try and make my response  
24 brief.

25 Missouri first imposed campaign contribution

1 limits in 1994. There's no evidence on this record  
2 whatsoever that prior to 1994 there was any problem with  
3 actual corruption, and the only evidence that the State  
4 has with respect to an appearance of corruption is one  
5 affidavit from Senator Goode.

6 QUESTION: Now, will you -- let -- answer --  
7 Justice Ginsburg has a question.

8 MR. LA PIERRE: Yes, Mr. Chief Justice.

9 QUESTION: Yes. There was some anecdotal  
10 evidence in Buckley, but the Court stressed that inherent  
11 in large contributions is this perception, and so what  
12 puzzles me is why, if Congress could act on that  
13 assumption, that inherent assumption, why the Eighth  
14 Circuit could then say to the Missouri legislature, but  
15 you must show us, even though Congress was not required to  
16 do that, unless the Eighth Circuit is rejecting Buckley to  
17 that extent.

18 MR. LA PIERRE: I believe the Eighth Circuit  
19 correctly recognized that in Buckley Congress had some  
20 evidence of real corruption, and when there's evidence of  
21 real corruption, one can say that a reasonable inference  
22 of an appearance of corruption arises. Missouri does not  
23 have the starting --

24 QUESTION: But that's not the point that Buckley  
25 made when it said, inherent. It's inherent in large

1 contributions --

2 MR. LA PIERRE: Well --

3 QUESTION: -- that there will be this perception  
4 that if I give you a whole lot of money, you're going to  
5 be favorably disposed to me.

6 MR. LA PIERRE: I don't mean to quibble, and  
7 that's certainly one possible reading of Buckley, that an  
8 amorphous general concept of some appearance of corruption  
9 was sufficient to justify campaign contribution limits,  
10 but it's worth noting that there was in fact actual  
11 evidence of corruption in Buckley from which that  
12 appearance of corruption --

13 QUESTION: But is human nature any different in  
14 Missouri than it is in Washington, D.C.?

15 (Laughter.)

16 QUESTION: What's changed between now and  
17 Buckley?

18 MR. LA PIERRE: I don't believe --

19 QUESTION: Other than we've seen that Buckley  
20 hasn't worked very well.

21 MR. LA PIERRE: Justice Kennedy, I don't believe  
22 that human nature is different in Missouri than in the  
23 rest of the Nation.

24 QUESTION: In Heartland America? I can't --

25 (Laughter.)

1 QUESTION: May I ask a question? We're  
2 talking --

3 QUESTION: Well --

4 QUESTION: Sorry.

5 QUESTION: -- but it was a serious point.

6 Why is it that we can depart from the  
7 conclusions that the Congress reached in Buckley, is that  
8 big contributions have lead to real instances of  
9 corruption, and therefore we're going to stop it? Why  
10 wouldn't the same thing happen today in Missouri?

11 MR. LA PIERRE: Justice Kennedy, I believe it  
12 would be a mistake to view Buckley as a grandfather  
13 governor of all \$1,000 campaign contributions, regardless  
14 of when, why, or how they were adopted.

15 If there were problems in 1974, and there was  
16 evidence of actual corruption back in 1974 that warranted  
17 limits on campaign contributions, that does not mean that  
18 the same conditions necessarily prevailed in Missouri in  
19 1994 when the Missouri legislature acted.

20 All we're looking for is that the Missouri  
21 legislature have some evidence of some real problem before  
22 they impose limits on significant First Amendment  
23 interests.

24 QUESTION: May I ask a question about, we're  
25 talking about corruption and appearance of corruption, and

1 I'm not sure those are the -- actually the words that  
2 capture what may be at issue in a case like this.

3 It seems to me that a large contributor buys  
4 access to an official when he makes a contribution. He  
5 assumes that the legislator, if elected, will be able to  
6 see him more readily than if he had not made a  
7 contribution, so he can present to the legislator the  
8 reasons why he thinks something he -- is in the public  
9 interest or in the interests of his company, or something  
10 like that.

11 Would it be reasonable for the people of  
12 Missouri to think everyone should have the same right of  
13 access to legislators after elected, and that if you allow  
14 people to contribute \$25,000 or so, they will have a  
15 special access that the ordinary citizen would not have.  
16 That's not exactly corruption, but it's an appearance of  
17 unequal treatment that borders on an appearance of  
18 corruption. Would that be relevant in the analysis?

19 MR. LA PIERRE: Allowing access or granting  
20 access to those who give a lot as opposed to those who  
21 give little or nothing would be entirely inappropriate,  
22 and there is, of course, no evidence on this record that  
23 anything like that occurs.

24 QUESTION: Is it not reasonable to assume that a  
25 person who's received a large contribution would be more

1 willing to see the contributor than someone who did not  
2 contribute at all?

3 MR. LA PIERRE: Yes, but there might well be a  
4 benign explanation. Individuals make contributions to  
5 like-minded individuals. Individuals seek to present  
6 their views to like-minded individuals.

7 QUESTION: And you're willing to acknowledge  
8 that it's corruption, or the appearance of corruption, for  
9 a candidate to give more time to the people who  
10 contributed most to his campaign, whether they contributed  
11 most -- you know, with sweat equity, or whether they did  
12 it with cash?

13 MR. LA PIERRE: No, I --

14 QUESTION: Or is there a difference? I mean,  
15 can he give more time to the person who was his campaign  
16 manager?

17 MR. LA PIERRE: I'm not willing to make the  
18 concession that giving more time to those who have made  
19 contributions is corruption.

20 QUESTION: Oh, I thought that's what your answer  
21 to Justice Stevens was.

22 MR. LA PIERRE: My concern --

23 QUESTION: I thought you said it would be  
24 inappropriate to give more time to those --

25 MR. LA PIERRE: If it's given solely on the

1 basis of having made the contribution or not having made  
2 the contribution.

3 QUESTION: You know, before we had the Hatch  
4 act, we had a spoils system at the Federal levels, and I  
5 think it still exists at some State levels, where once you  
6 get in, you can appoint people who supported you to the  
7 jobs that exist in the State. Now, it may be a very bad  
8 idea, but would you call it corruption?

9 MR. LA PIERRE: Not in the sense that this Court  
10 has defined corruption, which is a financial quid pro quo,  
11 no.

12 QUESTION: Well, let's try a thought  
13 experiment --

14 QUESTION: My question is, even if you don't  
15 call it corruption, is it nevertheless relevant to the  
16 question before us?

17 MR. LA PIERRE: Not unless the Court changes the  
18 standard.

19 QUESTION: You see, there are cases, I think,  
20 when people will give large contributions to candidates  
21 running against one another, because they want to be sure  
22 of having access regardless of who wins. I had a client  
23 who did that once.

24 MR. LA PIERRE: Well --  
25 (Laughter.)

1           MR. LA PIERRE: Once again, there may be a more  
2 benign explanation. A contributor might take the view  
3 that a healthy business climate was good for everybody in  
4 the State, that wide expression of views was something  
5 that those with more wherewithal than others should  
6 promote, and while one might take a jaded view of  
7 contributions to opposing candidates, it's at least  
8 possible to take a more kind view of such contributions.

9           QUESTION: Well, could, say, the Missouri  
10 legislature, really wanting to clamp down on this access,  
11 say that no legislature should see any person for more  
12 than 15 minutes?

13           (Laughter.)

14           MR. LA PIERRE: That would seem to disrupt in  
15 very, very significant ways the legislator's  
16 responsibility to meet with constituents, learn their  
17 views, and make informed judgments.

18           QUESTION: I suppose the most likely scenario  
19 for significant contribution would be the notion that I  
20 will give this money, and expect in return that if and  
21 when I ever call this particular official, if the official  
22 is elected, they'll pay attention to me. They'll receive  
23 that call, respond, get in touch with me, and take  
24 seriously what I have to say. Is that -- does that give  
25 rise to enough of a negative picture that it could justify

1 the State regulation?

2 MR. LA PIERRE: No, because as I've tried to  
3 state earlier, there are a variety of reasons why access  
4 might be accorded. It might be simply because the  
5 contributor offered a lot of money in the past, or might  
6 offer money in the future, but another explanation is  
7 simply that the contributor and the politician, or the  
8 candidate, or the Government official, share views, or  
9 that the sources proved to be reliable in the past.

10 QUESTION: But the first explanation would be  
11 bad. You're prepared to concede that if I think it is  
12 quite human nature that somebody that gives a lot of  
13 money, helps me a lot in my campaign, is going to have my  
14 ear. If I think that, then you lose, because that is  
15 indeed corruption or an appearance of corruption.

16 MR. LA PIERRE: It's not enough to justify  
17 limits on important First Amendment freedoms that some may  
18 think conduct is bad when, in fact, there is a very  
19 reasonable and important reason for that very same  
20 conduct.

21 QUESTION: No, this is the reason for it. Don't  
22 invent some other imaginable reason. The reason is, this  
23 is one of my major campaign contributors. When he comes  
24 around to the White House, or wherever I've been elected  
25 to, I'm going to see this man. You don't really think

1 that's not going to be the case.

2 MR. LA PIERRE: I'm sure the individual would be  
3 seen, and there's nothing corrupt about the individual  
4 being seen.

5 QUESTION: Even if there isn't corruption --  
6 maybe that's the wrong word. Imagine Ebenezer Scrooge, a  
7 rich man. He writes out a check for \$15 million for a  
8 particular candidate. The public might think he owns that  
9 candidate, whatever goes into that word owns, though  
10 others could own candidates for other reasons without  
11 money.

12 Why can't a State say, in our democracy, in this  
13 State, we believe the important democratic interests are  
14 furthered by not having very rich people own a candidate.  
15 We want to equalize the opportunity, though we will never  
16 make it totally equal, but we want to spread it around a  
17 bit, so a person with \$1,000, which means as much to him  
18 as \$15 million to Ebenezer Scrooge, also has a chance to  
19 participate and is not drowned out by the \$15 million.

20 Why can't a State decide that, if that's the  
21 kind of democracy that it wants?

22 MR. LA PIERRE: Because in short order there is  
23 a much more limited response to the difficulty that may be  
24 posed by that exceptionally large \$15 million  
25 contribution.

1           Large contributions that may carry a general  
2 perception that some candidate is in the hands or  
3 particularly beholden to the contributor are easily  
4 redressed by the electorate, who can make its own judgment  
5 about whether there is improper allegiance, or debt owed,  
6 or whether simply the contributor believes very strongly  
7 about the ideological interests being advanced by the  
8 candidate.

9           QUESTION: Yes, I thought your response was that  
10 even Ebenezer Scrooge has the right to participate as  
11 fully as he is able in the American political process.

12           MR. LA PIERRE: That would have been a better  
13 response.

14           (Laughter.)

15           QUESTION: It would, because suppose the State  
16 of Missouri believes there is an important constitutional  
17 interest on the other side, the constitutional interest in  
18 giving everyone in Missouri a more equal chance to  
19 participate in this democratic system. A big megaphone  
20 can drown out the smaller ones, and if Missouri wants the  
21 smaller ones also to have a voice, maybe it has to limit  
22 the size of the larger one, and if that's so, isn't that  
23 just as important a constitutional interest as the First  
24 Amendment interest of Ebenezer Scrooge?

25           MR. LA PIERRE: The interest that you --

1 QUESTION: Or whatever the name was I made up.

2 MR. LA PIERRE: The interest that you've  
3 articulated would require a fundamental overruling of a  
4 point in Buckley, that Government should not limit the  
5 voice of some in order to ensure that the voices of others  
6 are amplified. That's not a basis --

7 QUESTION: But don't we do that every day of the  
8 week? I thought there were time limits in the House of  
9 Representatives so that a person -- or in the Senate -- I  
10 don't know about the Senate, but I mean, I thought that  
11 people were limited every day of the week. You can't talk  
12 for more than an hour, and the reason we're only allowing  
13 you to talk for an hour is so that others can talk, too.  
14 What do you mean, you never can limit the voice of some so  
15 that others can't speak?

16 MR. LA PIERRE: I believe in the circumstances  
17 that you're raising there is a scarcity -- there's only a  
18 certain amount of time, 1 hour for oral argument, as  
19 opposed to potentially --

20 QUESTION: Red light limited the voice of some  
21 so that others had a chance to speak.

22 MR. LA PIERRE: In the context in which there's  
23 only so much time for all who would want to speak.

24 QUESTION: And if, in fact, we decide that this  
25 big megaphone drowns out everybody else?

1 MR. LA PIERRE: Then we could try trusting the  
2 American public, which has shown a lot of good judgment in  
3 the past and seems ready to recognize when politicians  
4 take too much money from particular sources, and to hold  
5 that against the politicians who make those decisions.

6 QUESTION: Maybe a better analogy where  
7 everybody has equal time to speak would be not limiting  
8 their time, but perhaps stuffing a sock in the mouth of  
9 the more eloquent speakers so that they will all speak  
10 with exactly the same effect.

11 MR. LA PIERRE: That analogy would be similar to  
12 limiting how many candidate contributions --

13 QUESTION: It sounds as though you think the  
14 most important First Amendment interest in this case is  
15 not the interest of the candidate in amassing money, but  
16 the interest of Ebenezer Scrooge in getting his message  
17 across, and that was downplayed very severely in Buckley,  
18 because he can get his message across with a symbolic  
19 contribution of \$10, and he can say anything he wants to  
20 on his own with his million and a half that he wants to  
21 give to the candidate to let the candidate decide what to  
22 do with it.

23 I thought your main point was restriction on the  
24 candidate, not the contributor.

25 MR. LA PIERRE: And that is a correct

1 perception. The most important point is for the candidate  
2 to be able to garner the funds to allow him or her to  
3 express political views, and whatever was said in Buckley  
4 about the effect of contribution limits, that was said in  
5 the context of what was essentially a challenge to the  
6 statute on its face.

7 In this case, we can see the actual application  
8 of the Missouri statute to a particular contributor and to  
9 a particular candidate, and the record shows that the  
10 particular contributor would have given more, the  
11 candidate would have accepted that contribution, and with  
12 that contribution would have been able to make a greater  
13 expression of his political views.

14 QUESTION: And is it not somewhat worrisome that  
15 for a full year after the announcement of the candidate,  
16 this candidate relied exclusively on that one PAC, and  
17 when he was subjected to the Missouri law, did appeal more  
18 generally to the electorate, and the idea of having one  
19 supporter alone, and then appealing to a broader segment  
20 of the population, as he eventually did, isn't there  
21 something disconcerting to say that I can rely on one  
22 large funder and forget the rest of the public?

23 MR. LA PIERRE: I think, if you -- if we look at  
24 the record there is passage of time from June and July  
25 1997, until February 1998, and the committee was formed in

1 June of 1997, the first contribution was made shortly  
2 thereafter.

3 But one has to look at that record in light of  
4 the political realities in Missouri. Things did not come  
5 to a head in the auditor's race until February 1998.  
6 There was an incumbent Republican auditor, Margaret Kelly.  
7 It was not clear whether she would or would not continue,  
8 would seek reelection. A prominent Republican, a Senator  
9 Charles Pearce, State Senator, was considering running for  
10 auditor.

11 In February 1998, Margaret Kelly decided not to  
12 seek reelection. Peter Kinder, the prominent Republican  
13 State Senator, decided not to seek the office, and then  
14 Margaret Kelly began the process of anointing an  
15 individual in her office, Charles Pierce, who was also a  
16 first-time candidate for State-wide office.

17 At that point, there was a window of opportunity  
18 for another candidate like Zev Fredman, also a first-time  
19 candidate, to seek seed money and try and make his way in  
20 the Republican Party.

21 QUESTION: I suppose it's the law in Missouri,  
22 as it is elsewhere, that ultimately before you get elected  
23 you have to have the support of the majority of the  
24 people.

25 MR. LA PIERRE: Yes.

1 QUESTION: Okay.

2 QUESTION: May I ask a question about --

3 (Laughter.)

4 QUESTION: -- about your show-me position? Do I  
5 take it that you would say that the ban on honoraria for  
6 Federal judges who make speeches is unconstitutional  
7 because there were -- there was no proof that Federal  
8 judges were corrupted by getting paid for giving speeches?

9 MR. LA PIERRE: It's correct that in National  
10 Treasury Employees Union the Court looked only for  
11 evidence of harm with respect to low-ranking Government  
12 employees and said, although it was not directly raised by  
13 the case, that there might be assumption of some problem  
14 if honoraria were offered to high-ranking Government  
15 officials.

16 QUESTION: But I'm asking you the hypothetical  
17 and how you would answer it on your show-me theory. Is  
18 that ban unconstitutional if we assume that there is no  
19 concrete proof that any Federal judge has been corrupted  
20 by the fee that he or she received for giving a speech?

21 MR. LA PIERRE: That would not be enough to  
22 justify the restriction.

23 One might think of looking at 28 U.S.C. section  
24 455(a), which addresses disqualification of Federal judges  
25 in any proceeding in which their impartiality might

1 reasonably be questioned, and that's the important point  
2 about the Eighth Circuit's judgment.

3 It looked for objectively reasonable evidence of  
4 some harm, and it held Missouri to the standard of having  
5 some objectively reasonable evidence before it could  
6 impose limits on important First Amendment interests.

7 QUESTION: But you would say on that reasoning  
8 that the Federal judges, the ban on federal judges'  
9 honorariums would not be reasonably justified without  
10 actual evidence of corruption by a judge.

11 In other words, I take it, on your view, that  
12 the reasonable appearance statute would require something  
13 more than appearance in order to require just  
14 disqualification, is that right?

15 MR. LA PIERRE: Actual evidence of wrongdoing is  
16 the best evidence of an appearance of a problem.

17 QUESTION: Is it necessary evidence in the cases  
18 of the judges' honoraria?

19 MR. LA PIERRE: I believe it would be necessary,  
20 because otherwise one could lose the services of a judge,  
21 or, in the context of our case, individuals could lose  
22 their right to both make contributions to advance their  
23 political views, and to receive contributions to advance  
24 their political views, on the basis of what might be no  
25 more than mistaken perceptions.

1 QUESTION: You have opened the prospect of great  
2 financial gain to me.

3 (Laughter.)

4 QUESTION: Would you have to consider Federal  
5 judges as a separate category? That limitation was  
6 imposed upon judges at the same time as, and perhaps  
7 because the same limitation was imposed upon other high  
8 Federal officials.

9 Would the test group necessarily be just Federal  
10 judges, or all Federal officials? If you had evidence of  
11 corruption in the exception of speech honoraria by high  
12 Federal officials in general, couldn't you extend the  
13 prohibition to judges?

14 MR. LA PIERRE: It would be a beginning point to  
15 look at other Federal officials and draw conclusions, but  
16 not directly about Federal judges.

17 QUESTION: Well, can't Congress, or  
18 hypothetically the State -- impose conditions on the  
19 holding of a Federal office that it couldn't impose on  
20 just people who are not holding Federal office?

21 I mean, certainly Congress has limited the  
22 honoraria that Members of Congress can take, it limited  
23 the number of -- the amount of honoraria that Federal  
24 judges can take, and it couldn't -- it certainly couldn't  
25 do that to the general public, but it seems to me that the

1 legislature has a good deal more authority when it's  
2 dealing with holders of public office.

3 MR. LA PIERRE: That's correct, the standard of  
4 scrutiny under the First Amendment is lower with respect  
5 to restrictions on public employees than it would be with  
6 respect to candidates and contributors.

7 QUESTION: If we were to conclude that one of  
8 the collateral consequences of Buckley was that the system  
9 has become obsessed with raising money, that what was once  
10 a minor function of a Congressman or a Senator has now  
11 become his major activity, does that bear on our analysis?

12 MR. LA PIERRE: No. It seems inappropriate for  
13 Government to make a decision how much money is the right  
14 amount of money, or what type of approach to campaign  
15 fundraising should be taken by candidates.

16 QUESTION: I'm not sure you responded to my  
17 question. Suppose I thought that Buckley had caused a  
18 real problem. You now must spend much more time raising  
19 money than thinking about the interests of the public.  
20 Does that -- if I were to conclude that, and if there were  
21 record support for it, should that bear on the analysis of  
22 the case before us?

23 MR. LA PIERRE: Yes, and it would suggest --

24 QUESTION: And how?

25 MR. LA PIERRE: -- that contribution limits be

1 eliminated, because then candidates would not have to then  
2 spend so much time raising funds in small amounts.

3 QUESTION: Well, does that show that the  
4 legislative remedy was not, in fact, tailored to the evil?  
5 Is --

6 MR. LA PIERRE: It's difficult --

7 QUESTION: What legal standard would my fact-  
8 finding address?

9 MR. LA PIERRE: Your legal -- the standard  
10 should be strict scrutiny. We would look for some  
11 evidence of a compelling governmental interest, and then  
12 the regulation here, it's a contribution limit, would have  
13 to be narrowly tailored to address the particular problem.

14 The contribution limit would have to be one that  
15 did not unnecessarily limit what are most political  
16 contributions made for the purpose of advancing political  
17 interest in a vain attempt to single out or reach the set  
18 of contributions that are made for improper or corrupting  
19 purposes.

20 QUESTION: Well, Buckley was, of course, very  
21 well-tailored, because it contained not just contribution  
22 limits, but expenditure limits as well, and that would  
23 work. You wouldn't have to spend a lot of time raising  
24 money. You didn't have to raise money. Of course, that  
25 would give a great advantage to incumbents, incidentally,

1 but that was invalidated, so you're left with one half of  
2 the statute without the other.

3 MR. LA PIERRE: The assumption in our  
4 constitutional system is that limits on political speech  
5 are not the norm, and if it's a choice between striking  
6 expenditure limits or striking contribution limits, one  
7 should strike both.

8 QUESTION: Thank you, Mr. La Pierre.

9 General Nixon, you have 2 minutes remaining.

10 REBUTTAL ARGUMENT OF JEREMIAH W. NIXON

11 ON BEHALF OF THE PETITIONERS

12 QUESTION: General Nixon, I'd like to ask you  
13 just one question. I'm interested in the rationale that  
14 if you -- there's an appearance of corruption, and you've  
15 made that point very forcefully, that that's enough to  
16 regulate the amount of money in the process. Would that  
17 be a sufficient basis for regulating the amount of money  
18 that news organizations receive for political ads?

19 GENERAL NIXON: No, Your Honor, I don't believe  
20 that it would.

21 QUESTION: Why not? What right is being  
22 infringed upon?

23 GENERAL NIXON: Well, that would be speech,  
24 obviously, Your Honor, but that's --

25 QUESTION: Whose speech?

1 GENERAL NIXON: -- expenditure --

2 QUESTION: Whose speech? It's my -- let's say  
3 I'm running for office. It's my ad.

4 GENERAL NIXON: Maybe I misunderstood you, Your  
5 Honor. We're not asking to limit --

6 QUESTION: Well, let me restate it. Let's  
7 assume that a candidate raises large portions of money to  
8 run political ads --

9 GENERAL NIXON: Yes.

10 QUESTION: -- on television, radio, newspapers,  
11 et cetera, that you think that that raising of money has  
12 the potential of corrupting the political process, an  
13 argument that you've made for limiting the contributions.

14 GENERAL NIXON: Yes, Your Honor.

15 QUESTION: Can you now simply say that because  
16 money corrupts, we are going to limit the amount of money  
17 that can be charged by these organizations to run the  
18 political ads, not their editorials, not their news  
19 articles, but the amount they charge for the ads  
20 themselves?

21 GENERAL NIXON: No, I don't believe that you  
22 can.

23 QUESTION: Why? What's the distinction? What's  
24 the difference between limiting the amount that I can  
25 contribute to my candidate, and limiting the amount that

1 an organization charges to run an ad of mine?

2 GENERAL NIXON: That it's much more direct  
3 speech, Your Honor. That's --

4 QUESTION: Whose speech?

5 GENERAL NIXON: It's much more direct. It's not  
6 speech by proxy. It's a direct speech. It is the action  
7 of --

8 QUESTION: It's my ad.

9 GENERAL NIXON: -- expending. You as the  
10 candidate.

11 QUESTION: Yes.

12 GENERAL NIXON: I thought you said the limit of  
13 the expenditure that can be spent --

14 QUESTION: Can be charged by the newspaper  
15 organizations. I have an ad. I want to run it 200 times.  
16 It's -- the news organization wants to charge me \$100 per  
17 showing. Can you limit it to \$50 per showing?

18 GENERAL NIXON: Congress, or the Missouri  
19 legislature, might be so inclined at a later date.

20 QUESTION: No, I'm asking, do you -- using your  
21 rationale, would that pass First Amendment muster?

22 GENERAL NIXON: Yes, Your Honor, it could pass  
23 First Amendment muster based on the analysis of Buckley,  
24 but it is certainly not the case presented here.

25 QUESTION: I know it's not the case, but my

1 question is, would it serve -- if you can regulate the  
2 contributions, can you regulate the prices charged for  
3 running political ads?

4 GENERAL NIXON: Your Honor, I do not believe  
5 that you can.

6 CHIEF JUSTICE REHNQUIST: Thank you, General  
7 Nixon. The case is submitted.

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

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that  
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The United States in the Matter of:

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL.,  
Petitioners v. SHRINK MISSOURI GOVERNMENT PAC, ET AL.  
CASE NO: 98-963

and that these attached pages constitutes the original transcript of  
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BY Rick S. Sumb