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CONTROL OF CORPORATE AND UNION POLITICAL EXPENDITURES: A CONSTITUTIONAL ANALYSIS

The post Civil War industrial expansion stimulated the growth of large corporations and produced perhaps an undue concentration of wealth and power in such corporations. Toward the close of the 19th century there came a public reaction to the economic and political abuses which were consequent upon this corporate concentration of wealth.¹ Reforms took shape not only in income tax laws and in anti-trust legislation. Congress also recognized that in the concentration of wealth there lay a danger to our system of free and untrammelled federal elections. The impersonal legal entity organized primarily for non-political purposes was, when possessed of substantial wealth, found capable of exercising a disproportionate influence upon both the electorate and their representatives. The legislative restrictions upon the exercise of that potential influence have evolved over half a century, and currently operate to impose criminal liability upon corporations and labor organizations for making any "contribution or expenditure in connection with any [federal] election."² Such legislation poses several constitutional issues.

The question of the effect of the legislation upon the privilege of free speech under the first amendment arises from the fact that legal entities, being artificial persons, cannot act or communicate personally and always require the intervention of some medium of expression which of necessity involves some contribution or expenditure. It follows that a restriction upon such expenditures and contributions involves a restriction upon the speech of the corporation. Specifically, what is involved in a statute enacting such a restriction is the basic question of the power of the Congress to legislate in the field. May Congress, in effect, make a particular type of speech, that of legal entities in connection with federal elections, a crime? In turn, that question involves the issue of the constitutional status of a legal entity in so far as a claim of first amendment rights is concerned. Is an artificial person entitled to the first amendment's guarantee of free speech? Assuming both that Congress has the power to enact such legislation, and that a corporation or other legal entity has the status to challenge its constitutionality, the question next arising is whether the statute represents the achievement of a proper balance between the desirability of maintaining the integrity of first amendment rights on the one hand, and, on the other, the necessity of obviating evils or abuses which militate against the foundation upon which those rights are secured. Is the abridgment of free speech effected by this statute a reasonable limitation upon that first amendment privilege?

Assuming that the legislation is valid in respect to the first amendment, it is a penal statute and must meet the requirements of fifth amendment due process. Does the statute sufficiently define those acts which constitute the crime, i.e., does it give "fair warning"?

The Supreme Court has never squarely passed on the constitutionality of this statute, but has gratuitously expressed its grave doubts, and in both con-

1. See *United States v. International Union, UAW-CIO*, 352 U.S. 567, 569 (1957).

2. 18 U.S.C. § 610 (1952).

curing³ and dissenting⁴ opinions the validity of such a restraint upon the first amendment rights has been flatly rejected.

THE STATUTE

In applicable part, section 610 of title 18 provides that

It is unlawful for any . . . corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. . . .

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be . . . shall be fined not more than \$1000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.⁵

That Congress has the right to legislate respecting the conduct of federal elections is obvious. The Constitution entrusts to the state legislatures the right to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," but reserves to Congress the paramount power to "anytime by Law make or alter such Regulations, except as to the Places of choosing Senators."⁶ That power, however, is not limited merely to regulating the taking of the vote,⁷ but extends to the enactment of such rules and regulations surrounding the entire electoral process as the Congress considers necessary and advisable to insure the purity and freedom of federal elections.⁸ In particular, it has been held a valid exercise of that power to adopt measures calculated to protect the electoral process from the potential undue influence which great wealth holds.⁹ "To say that Congress is without power to pass appropriate legislation to safeguard . . . a federal election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection."¹⁰ The statute with which we are here concerned is but another exercise of that power of self-protection. Its genesis and develop-

3. *United States v. CIO*, 335 U.S. 106 (1948).

4. *United States v. International Union, UAW-CIO*, 352 U.S. 567, 593 (1957) (dissenting opinion).

5. 18 U.S.C. § 610 (1952).

6. U.S. Const. art. I, § 4.

7. *United States v. Mosley*, 238 U.S. 383 (1915); *In re Coy*, 127 U.S. 731 (1888); *Ex parte Clarke*, 100 U.S. 399 (1879); *Ex parte Siebold*, 100 U.S. 371 (1879).

8. *United States v. Classic*, 313 U.S. 299, 320 (1941); *Burroughs & Cannon v. United States*, 290 U.S. 534, 544-45 (1934); *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *United States v. Gradwell*, 243 U.S. 476, 482 (1917); *Ex parte Yarbrough*, 100 U.S. 651, 666-67 (1884).

9. *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

10. *Id.* at 545.

ment clearly reveal that its purpose also was the safeguarding of federal elections from the improper influence of money.

The 1907 Act

The proscription of contributions for the purpose of influencing the outcome of federal elections was first enacted in 1907.¹¹ In substance, the 1907 act declared it unlawful for a corporation organized under authority of any federal statute to make a money contribution in connection with federal, state, or local elections, and declared it unlawful for any corporation, regardless of the authority under which organized, to make a money contribution in connection with any federal election. The hearings and debates preceding enactment of the 1907 act reflect that the primary factor motivating its enactment was a grave concern on the part of Congress over the strong influence brought to bear on elections by corporations. Complaint that corporate contributions exercised great influence is recorded as early as 1892, and it was estimated that a sum in excess of 16 million dollars was spent in the presidential campaign of 1896.¹² The attitude of Congress toward this legislation was clear:

The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. . . . The time has come when something ought to be done to put a check to the giving of \$50,000 or \$100,000 by a great corporation toward political purpose upon the understanding that a debt is created from a political party to it.¹³

The 1909 Act

When the federal penal law was codified in 1909, the 1907 statute was repealed and re-enacted without change.¹⁴ The debates on the bill demonstrate the continuing concern of Congress over the undue influence of corporations over elections.¹⁵ Consideration was even given to extending the proscription of political contributions by corporations to elections of state legislatures, since, at that time, United States Senators were elected by state legislatures. It was further suggested that the prohibition of "money" contributions by corporations was inadequate, and that the prohibition should be extended to contributions of "anything of value."¹⁶ However, because of doubt as to the constitutionality of the proposal to extend the proscription to elections of state legislatures, and because the bill before the Congress was only a bill for codification of all the penal laws, no changes were effected.

11. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864.

12. Hearings Before the House Comm. on the Election of the President, March 12, 1906, 59th Cong., 1st Sess. 38-39 (1906).

13. *Id.* at 12.

14. Act of March 4, 1909, ch. 321, § 83, 35 Stat. 1103.

15. 42 Cong. Rec. 695-703 (1908).

16. "It was the intention of Congress to prohibit corporations . . . from contributing their assets to political contests. But under the section as it now stands it simply prohibits the contribution of money. . . . [I]t ought to be extended so as to include the contribution of any other thing of value. . . ." *Id.* at 696.

The 1925 Act

In 1921, the Supreme Court, in *Newberry v. United States*,¹⁷ held federal corrupt practices legislation, as applied to primary elections of candidates for the Senate, unconstitutional. The Court held that elections within the original intentment of section 4 of Article I of the Constitution were those wherein Senators should be chosen by state legislatures. The seventeenth amendment, providing for election of Senators by the people, did not modify the congressional power under the same section to regulate the times, places and manner of holding elections. *Newberry*, although it has subsequently been impliedly overruled by silence and distinctions,¹⁸ at the time was generally considered to have invalidated all of the federal corrupt practices legislation relating to nominations. Accordingly, a number of bills were introduced in the House and Senate for the purpose of completely revising the federal corrupt practices legislation in the light of that decision. The proposed legislation was enacted as the popularly entitled Federal Corrupt Practices Act of 1925.¹⁹

In this act the proscription against corporate contributions for political purposes was re-enacted as section 313 thereof. The significant amendments were as follows: (a) The phrase "money contribution" appearing in the 1907 and 1909 acts was changed to "contribution" and "contribution" was nonexclusively defined as, "a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution."²⁰ (b) The prohibition of corporate contributions in connection with "any election by any State legislature of a United States Senator" was changed to "any election at which . . . a Senator . . . is to be voted for . . ." to conform to the change in the manner of senatorial elections. The proscription was also extended to elections of Delegates and Resident Commissioners to Congress. (c) A provision was added making it unlawful "for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section."²¹ (d) Primaries and conventions were excluded from the scope of the act to conform to the *Newberry* decision.²²

The debates preceding the 1925 Act again emphasized the concern felt in respect to the influence exerted on elections by large aggregations of money:

One of the great political evils of the time is the apparent hold on political parties which business interest and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is

17. 256 U.S. 232 (1921).

18. See note 25 infra.

19. Act of Feb. 28, 1925, ch. 368, 43 Stat. 1070.

20. Id. § 302(d), 43 Stat. 1071.

21. Id. § 312, 43 Stat. 1073.

22. Id. § 302(a), 43 Stat. 1070. See H.R. Rep. No. 721 to accompany H.R. 8956, 68th Cong., 1st Sess. 3 (1924).

unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.²³

The Labor Management Relations Act of 1947

Section 304 of the Labor Management Relations Act of 1947²⁴ amended section 313 of the Federal Corrupt Practices Act in three significant aspects: (a) The proscription against political "contributions" was extended to "expenditures." (b) Whereas the provision formerly applied only to elections, the law as amended was applied also to primaries, conventions and caucuses held to select candidates for federal office.²⁵ (c) The application of the provision to labor organizations, which under the War Labor Disputes Act of 1943 had been temporary, was made permanent.

The extension of the statute to "expenditures" is not mere verbiage. It was the result of a careful analysis by a house committee appointed to study evasion of the statute. The committee reported:

It has been the contention of union groups that money expended by them for or against a political candidate or party and not given directly to candidates or political parties, is not a contribution as defined in the law but is an expenditure not restricted by law.

If such a distinction stands, then national banks, corporations, and groups, as well as labor organizations, might avail themselves of this avenue to avoid the provisions of the existing law.²⁶

The following year a similar committee investigating the expenditures of union political committees and organizations asserted:

The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term "making any contribution" related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing directly to a candidate and yet permit the expenditure of large sums in his behalf?

The committee is firmly convinced, after a thorough study of the provisions of the act, the legislative history of the same, and the debates on the said provisions when it was pending before the House that the act was intended to prohibit such expenditures.²⁷

23. 65 Cong. Rec. 9507-08 (1924).

24. 61 Stat. 159 (1947), 2 U.S.C. § 251 (1952).

25. It can be said therefore, that although never expressly overruled, the decision in *Newberry v. United States*, 256 U.S. 232 (1921), "rests on so insecure a basis as to make its reversal highly probable if the issue should again come before the Court." *Rottschaefer*, *Constitutional Law*, 154-55 (1939). It might be said, in view of the later decision in *United States v. Wurzbach*, 280 U.S. 396 (1930), which upheld a federal statute prohibiting candidates for Congress from soliciting funds from federal officeholders to finance his activity in a primary contest, that the *Newberry* case has indeed already been ignored.

26. House Special Comm. to Investigate Campaign Expenditures, H.R. Rep. No. 2093, 78th Cong., 2d Sess. 11 (1945).

27. House Special Comm. to Investigate Campaign Expenditures, H.R. Rep. No. 2739, 79th Cong., 2d Sess. 39-40 (1947).

The Special Committee to Investigate Senatorial Campaign Expenditures of 1946 also considered these problems, and in 1947 recommended that primaries and conventions be included, that "contribution" and "expenditure" be re-defined, and that "expenditures" as well as "contributions" be included in the ban.²⁸ The paramount reason for extending the prohibition to include expenditures arose out of the not uncommon situation in which corporate stockholders who did not share the political views of the board of directors were required to contribute to the support of a party, candidate or proposition which the corporation chose, but to which the members were opposed.²⁹ It was emphasized in the debates that the proscription against contributions and expenditures by corporations and labor organizations as well, would apply only to corporate or union funds, and was not intended to apply to voluntary contributions by stockholders or union members for a political purpose. The debates also made it clear that such business associations as the National Association of Manufacturers and the United States Chamber of Commerce, even if not corporations themselves, were prohibited by the act from expending money for political purposes if the funds were contributed to them by corporations.³⁰

It would appear clear, therefore, that the steps taken by the Congress to curb abuses of the electoral process were legitimate and thoroughly considered exercises of its constitutional power and responsibility. The specific measures adopted were designed to meet particular abuses of which Congress was aware, and with the correction of which it was properly concerned. Not unmindful of their further duty to respect the rights granted by the first amendment, the members debated the validity of such a restriction on the right of free speech, and, assured of the necessity and consequent reasonableness of the measure, adopted it by a clear majority.

THE FIRST AMENDMENT PROBLEM

Preliminary to any³ evaluation of the restriction which section 610 imposes upon the free exercise of the right to speak, it must be questioned whether the scope of the first amendment rights applies with equal force to both natural and artificial persons.³¹ It has been held that the provision of the fifth amendment that "no person shall . . . be deprived of life, liberty, or property without due process of law," so far as it concerns property rights, applies equally to private corporations and natural persons,³² but the provision against self-incrimination in the same amendment does not.³³ Likewise, a corporation has been held to be a person within both the equal protection clause and the

28. S. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 36-39 (1947).

29. 93 Cong. Rec. 6437 (1947).

30. 93 Cong. Rec. 6439 (1947).

31. See analyses of cases at 20 Ann. Cas. 737 (1911), 31 Ann. Cas. 1305 (1914A), 7 Ann. Cas. 1104 (1907).

32. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886); *San Mateo County v. Southern Pac. R.R.*, 116 U.S. 138 (1885).

33. *In re Bornn Hat Co.*, 184 Fed. 506 (S.D.N.Y.), *aff'd*, 223 U.S. 713 (1912).

due process clause of the fourteenth amendment.³⁴ The Supreme Court, however, has never squarely passed on the application of the first amendment to corporations.

A New Jersey court flatly rejected the contention of applicability, holding that "the rights . . . [under the state constitution equivalent to the first amendment] run only to natural persons . . . and the corporation itself has no constitutional right to conduct a meeting, or, by its agents, to speak."³⁵ The approach suggested by dicta in Supreme Court cases, being more liberal, would not wholly except business or economic activity from application of first amendment rights and privileges,³⁶ especially where corporate property, which in reality is that of its members,³⁷ will be protected by their invocation.³⁸ Moreover, the Court in *Grosjean v. American Press Co.*³⁹ held that the due process clause of the fourteenth amendment channelled the first amendment guarantee of a free press so as to bar an unreasonable control by the states. If the Court holds that an artificial person is protected under the first amendment guarantee of a free press, why should it not hold that such a person is protected under the first amendment guarantee of free speech?⁴⁰ It is true that freedom of the press, because of its nature, is one which a corporation must be deemed to possess if the privilege is to have any practical meaning and this is not necessarily so in respect of freedom of speech. Nevertheless, as has been noted, the Court has recognized that there may be instances in which a corporation should have the right to speak. The complexities of modern corporate organization are such that on many issues respecting the interests of its members only the corporation as such is really qualified to speak. Rather than attempt to qualify the specific instances in which the corporation should have the right to speak, it seems sounder to hold that a corporation has the right to free speech under the first amendment subject to the reasonable limitations generally applicable to such rights.

34. *Minneapolis & St. Louis R.R. v. Beckwith*, 129 U.S. 26 (1889).

35. *American League of the Friends of New Germany v. Eastmead*, 116 N.J.Eq. 487, 174 Atl. 156 (1934).

36. *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

37. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886).

38. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

39. 297 U.S. 233 (1936).

40. The Court in *Grosjean* noted, "freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process clause of the fourteenth amendment. . . ." 297 U.S. at 244. It is settled law that both of these rights are protected against state and federal abridgment in regard to their exercise by natural persons. This is not to say, of course, that an artificial person has the constitutional right to free speech but the language of the Court certainly would favor such a conclusion. If the rights are of the same "fundamental character" and *Grosjean* held that a corporation has the right of free press, would not the Court be inclined to say that corporations also have the right of free speech. It would be clear that if due process of the fourteenth amendment in respect to corporations included the right of free speech, due process of the fifth amendment would require no less. But on the federal level there would be no need to establish such a right under the concept of due process since the first amendment already provides for it.

Although there "are divergent views which the Supreme Court may have to resolve at some future date,"⁴¹ the recorded attitude of the Court appears to presage first amendment protection of "the expression of bloc sentiment,"⁴² and adoption of the concept that "first amendment rights are part of the heritage of all persons and groups in this country . . . not to be dispensed or withheld merely because the Court or the Congress thinks the person or group is worthy or unworthy."⁴³ Assuming for our purposes that a legal entity, whether a corporation or unit of organized labor, is competent to contest the reasonableness of the restraint effected by section 610, broader issues emerge.

Achieving a Balance

Although the basis of the first amendment is the hypothesis that free debate of ideas will result in the wisest governmental policies,⁴⁴ the rights included within its grant are not absolute or unlimited. Where necessary for the public welfare, they must on occasion be held subordinate.⁴⁵ "Legislation restricting freedom of speech has been sustained whenever the acts prohibited have been clearly injurious to the safety of the nation or state, or have been done with the intention of bringing about those substantive evils which the nation . . . or state has a right to prevent."⁴⁶ Most clearly, restrictions abridging freedom of political speech concerning matters of internal security have repeatedly been successfully defended as reasonable protective measures designed to cope with particular substantive evils.⁴⁷ There is no doubt, as the legislative history of section 610 makes abundantly clear, that corporations in the past have wielded their power to corrupt elections. The realist must accept the same potential influence in organized labor as in organized capital. Predicating the existence of such a substantive evil, and the exercise by the Congress of its power to combat it, the factors then to be considered in determining whether the legislature has exceeded its constitutional bounds are the nature of the right protected, the extent of the abridgment, and the seriousness and imminence of the danger to the right which is protected.⁴⁸

Section 610 would not appear an unreasonable choice. Its interdictions are aimed at nothing but entities which, as such, have no vote. No individual member thereof is affected by the statute—personal rights remain intact and unabridged. In view of the fact that contributions and expenditures voluntarily assented to by the members are not prohibited, and since nothing in the statute bars corporate stockholders or union members from combining together and expressing a joint viewpoint, the statute would appear to have been as

41. Ruark, *Labor's Political Spending and Free Speech*, 53 *Nw. U.L. Rev.* 61 (1958).

42. *United States v. CIO*, 335 U.S. 106, 143 (1948).

43. *United States v. International Union, UAW-CIO*, 352 U.S. 576, 597 (1957).

44. *Dennis v. United States*, 341 U.S. 494, 501 (1951).

45. See Rottschaefer, *Constitutional Law* (1939).

46. *Id.* at 758.

47. *United States v. Dennis*, 341 U.S. 494 (1951); cf. *United States v. Harriss*, 347 U.S. 612 (1954).

48. *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Bridges v. California*, 314 U.S. 252, 261-63 (1941).

"narrowly drawn"⁴⁹ as is required. A claim of unreasonableness must answer the argument of history, since this section and similar state statutes⁵⁰ have thus far survived the test of years. In one lower court decision, *United States v. United States Brewers Ass'n*,⁵¹ in which the issue of constitutionality was directly raised, the statute was upheld. The court there considered an indictment of the defendant corporation for making a money contribution in connection with a congressional election. The issue was whether the statute unreasonably restricted first amendment rights in that it attempted to prohibit freedom of speech and freedom of press in the discussion of candidates and of political questions involved in such elections.

The court held, "The section itself neither prevents, nor purports to prohibit, the freedom of speech or of the press. Its purpose is to guard elections from corruption, and the electorate from corrupting influence in arriving at their choice."⁵² The court reasoned that any law, the purpose of which is to enable a free and intelligent choice and an untrammelled expression of that choice, "is a regulation of the manner of holding the election. . . ."⁵³ The court did not feel that the statute involved abridgment of first amendment free speech. It should be noted, however, that the statute as it was before this court prohibited only corporate *contributions* in connection with federal elections. The present statute prohibits both contributions and *expenditures*. It may be plausible to argue that a corporation need not *contribute* to campaigns in order to exercise its power of speech and, therefore, a statute prohibiting contributions does not limit speech. As a practical matter, however, a corporation cannot speak without making *expenditures* of some kind, thus the present statute certainly involves the first amendment problem. As the court noted, the benefit of any doubt as to constitutionality lies with the statute.⁵⁴ It is submitted that Congress in the present statute has, in fact, struck a reasonable balance between its duty to protect the electoral process and its duty to recognize the first amendment privilege of free speech. If this be so, then the conclusion of *Brewers Ass'n* as to constitutionality would seem valid in respect to the statute as it presently exists.

Similarly, statutes prohibiting government employees or members of Congress from soliciting or receiving money from federal employees have been held not to be an unreasonable infringement upon the constitutional rights of such workers.⁵⁵ As the Supreme Court noted recently in *United Pub. Workers v. Mitchell*,⁵⁶ the argument that a statute prohibiting political contributions by

49. *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940).

50. See, e.g., Conn. Gen. Stat. 816-a (Supp. 1955); Ill. Ann. Stat. ch. 24, §§ 19-35 (Smith-Hurd); Mass. Ann. Laws ch. 55 § 7 (1953); N.Y. Pen. L. § 671 (1); Pa. Stat. Ann. tit. 25, § 3226 (Supp. 1957).

51. 239 Fed. 163 (W.D. Pa. 1916).

52. *Id.* at 169.

53. *Ibid.*

54. *Id.* at 170.

55. *United States v. Wurzbach*, 280 U.S. 396 (1930); *Ex parte Curtis*, 106 U.S. 371, 373 (1882).

56. 330 U. S. 75, 98 (1947).

federal employees to members of Congress constituted an unreasonable infringement upon the political rights of a citizen was, by the time of *United States v. Wurzbach*,⁵⁷ dismissed in a sentence. Thus, in substance, the Court has held that the right to give money to a political candidate is not an absolute constitutional right.

Congress was acutely aware of the necessity of balancing the guarantees of the first amendment against its duty to keep the electoral process free from corruption. The probable impairment of those rights was anticipated, considered and debated. Yet, by an overwhelming majority, the prohibition was enacted. In the judgment of the legislature the danger to free elections was sufficiently great to warrant and justify any incidental impairment of first amendment rights which might result therefrom.⁵⁸

Judged in relation to the power of Congress to maintain free elections for federal office, the ban on expenditures is as reasonable as the ban on contributions. If the contribution by a corporation of funds in support of a candidate is a danger to free elections which Congress has the right to control, the expenditure of funds by the same entity for the same purpose should also be a matter which Congress has a right to control.

Corporations and labor organizations cannot speak personally. The intervention of a medium is always a condition to communication; and media involve a necessary expenditure. In this respect, an analogy may be drawn between electioneering by a legal entity, and picketing by a labor organization.⁵⁹ The exercise of free speech by either necessarily involves two elements: an idea and a medium. In the former the medium may take various forms, all reducible to characterization as an expenditure of funds; in the latter the medium is the common trade practice, the act of picketing. Although precedent may be found for considering picketing as a constitutional right,⁶⁰ being considered only a form of free speech, later cases have qualified the rule.⁶¹ Picketing is a trade practice which may or may not contravene federal or state statutes, depending upon the excesses to which it is carried. Statutory restrictions on picketing, although resulting in a necessary limitation of the right to free speech which is being thereby exercised, have been held valid. Such a result obtains when the act of picketing constitutes in effect an unlawful combination to restrain trade.⁶² In much the same fashion, section 610 prohibits resort to that element without which free political speech cannot be exercised at election time; and if the reasonableness and propriety of the prohibition be established, the restriction must likewise be upheld.⁶³

57. 280 U.S. 396 (1930).

58. 65 Cong. Rec. 9507-65 (1924).

59. Cf. Ruark, *supra* note 41.

60. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

61. *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

62. *Giboney v. Empire Storage & Ice Co.*, *supra* note 61.

63. In this respect, expenditures, like "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent." *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950). Further, it is "to deal in pernicious abstraction to compare . . . picketing

Although the language of the Court in *United Pub. Workers v. Mitchell*⁶⁴ could be construed to except the exercise of congressional power over elections from the popularly known "clear and present danger"⁶⁵ test the statute should not be found lacking even if the test be applied.⁶⁶ That test requires that the prohibited act be such as would cause as a necessary result a substantive evil, and that the probability of that substantive evil resulting be both clear and imminently expected. There are not involved here, however, any of the distinctions between the realm of ideas and that of action. The imminence of the resultant substantive evil lies in the very essence of the act which produces it and which is prohibited. Vigorous electioneering by artificial persons with their vast resources may very easily subvert the exclusive right of the citizens to participate in a representative government, by "persuasion or coercion of the individual possessing that right, and by furnishing the means by which the individual may be persuaded or coerced."⁶⁷ The test in such an instance must, therefore, be reduced to consideration only of the existence of a substantive evil properly within the scope of the remedial power of Congress. By passing this legislation, Congress has determined, in effect, that the use of the aggregate wealth of corporations by persons in control thereof, for political purposes

which may easily amount to economic coercion to the kind of speech contemplated by the constitutional guarantee." Schwartz, *The Supreme Court* 251 (1957). Consequently, in answer to the argument that "legislative intervention can find . . . justification only by dealing with the abuse and the rights themselves must not be curtailed," *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937), it seems perfectly clear that since the expenditure itself to achieve a result which the owner of the money expended does not seek is the abuse involved, the fact that it is a sine qua non in the exercise of the right should not prevail. An apparent difficulty in the analogy arises from the fact that picketing is not the sole manner of exercising labor's right to speak in a trade dispute, whereas the ban on expenditures and contributions leaves no alternative method where politics are concerned. Thus, though it may be perfectly reasonable to restrain picketing in particular instances, there then remaining other media of expression, it may be unreasonable to effect a total restraint on political speech at election time by leaving no alternate media. On the other hand, if the purpose of corporations and unions is not limited to electioneering, but be more broadly considered as an intention to influence subsequent legislation, then electioneering is but one manner of achieving that result, and, like picketing in a trade dispute, when restricted, is done so reasonably and not without recourse to other forms of communication at other times.

64. 330 U.S. 75, 102 (1947). "We have said that Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power."

65. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919).

66. The district court in *United States v. CIO*, 77 F. Supp. 355 (1948) applied that test, however, and found the statute lacking.

67. *United States v. United States Brewers' Ass'n*, 239 Fed. 163, 168 (W.D. Pa. 1916).

which may not accord with the views of those who contributed to that wealth, is a substantive evil constituting a clear and present danger to both free federal elections and the continuance of a truly representative government.

Officially, the Supreme Court has never taken a position on the validity of the abridgment effected by section 610. It has affirmed and reversed lower court decisions, but only on the question of whether or not an offense was stated in the indictment. Thus, the Supreme Court in the *CIO* case⁶⁸ affirmed the dismissal of an indictment which had been based upon a determination that the statute was unconstitutional. However, the sole ground of the affirmance was that a publication in a union newspaper which was distributed to members and a few other persons should be excepted from the statute. The Court indicated that to do otherwise would render the constitutionality of the statute "exceedingly doubtful." The Second Circuit followed by reversing a conviction based upon the expenditure of a small sum for newspaper advertising and a radio broadcast, because the court found it impossible to distinguish, on those facts, the earlier rule of the Supreme Court in the *CIO* case.⁶⁹ Then a district court found that the proscribed "expenditures" would not include certain sums paid by a union to its employees for election activity.⁷⁰ The continued expansion of the exception was halted, however, when in 1957 the Supreme Court reversed another district court's dismissal of an indictment for failure to state an offense,⁷¹ finding that union sponsorship of a televised broadcast endorsing an election candidate was a patent violation of the act.⁷²

The constitutional issues, however, "unenlightened by the considerations of a single judge,"⁷³ were consistently avoided by the majority of the Court. Some members of the Court have, in accord with a philosophy giving first amendment rights a preferred position, clearly voiced their sentiments, and forecast that in any subsequent case in which the issue must be decided, their vote will deny constitutionality. One observer notes that even the government apparently considers very real the possibility that the statute will be invalidated, and, as a result, hesitates to prosecute indiscriminately, thus indicating its "willingness to have the statute on the books as a caution."⁷⁴

Whether this should be so is open to doubt. A proper balance between the evil and the restraint involved in its remedy appears to have been struck. Congress has recognized a substantive evil and taken steps to cope with it. Although it is possible that the Supreme Court will endorse this restriction of the first amendment, not all the problems which section 610 raises will be settled thereby. Yet to be considered is the clarity of the terms of the statute. Does it clearly state the offense which it proscribes? If it does not, in spite of its reasonableness under the first amendment the statute will fail under the fifth and sixth amendments.

68. 77 F. Supp. 355, aff'd, 335 U.S. 106 (1948).

69. *United States v. Painters Local 481*, 172 F.2d 854, 856 (2d Cir. 1949).

70. *United States v. Construction Union*, 101 F. Supp. 869, 876 (W.D. Mo. 1951).

71. *United States v. International Union, UAW-CIO*, 138 F. Supp. 53 (E.D. Mich. 1956).

72. *United States v. International Union, UAW-CIO*, 352 U.S. 567 (1957).

73. *Id.* at 591.

74. 53 Nw. U.L. Rev. 61, 66 (1958).

THE FIFTH AND SIXTH AMENDMENTS

At issue here is the clarity of the injunction against making "a contribution or expenditure *in connection with any [federal] election.*"⁷⁵ Although both "contribution" and "expenditure" are defined by the statute,⁷⁶ their specific meaning in a given case will depend upon the interpretation given the phrase "in connection with any [federal] election," the elements of which are not defined. When is a contribution or expenditure made in connection with an election?

Unless a reasonably intelligent man be capable of answering that question satisfactorily, section 610 must fail, since the terms of a penal statute must be sufficiently clear and explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.⁷⁷ Otherwise, a statute which forbids or requires the doing of a certain act in terms so vague that men of common intelligence must guess at its meaning and differently understand its application, violates a basic postulate of due process,⁷⁸ and contravenes the personal guarantees of both the fifth⁷⁹ and sixth⁸⁰ amendments. In determining the clarity or vagueness of a particular statute, resort to judicial precedent is often of doubtful value, since in each case, a choice of word or phrase is almost certain to be a novel employment thereof, or at least involve novel circumstances.⁸¹ Previous decisions do indicate, however, that the Court will uphold statutes using "words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . . or a well-settled common law meaning, *notwithstanding an element of degree in the definition as to which estimates might differ.*"⁸²

More broadly, however, statutes have been held valid when for reasons found to result either from the text of the statutes involved, or the subjects with which they dealt, a standard of some sort was afforded.⁸³ Thus, a statute prohibiting congressmen from being "*concerned in soliciting . . . for any political purposes whatever*" employed language "perfectly intelligible."⁸⁴ So also, a statute which barred holding companies from making any contribution "*in connection with . . . the federal election . . . of any person*" was held constitutional, the court failing even to consider the sufficiency of the phrase "in connection with."⁸⁵ To be considered in relation to the clarity of both the conjunctive "in connection with" and the larger phrase, "in connection with any [federal]"

75. 18 U.S.C. § 610 (1952).

76. 18 U.S.C. § 591 (1952).

77. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925).

78. *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914).

79. "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.

80. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." U.S. Const. amend. VI.

81. *Rottschaefer*, op. cit. supra note 45, at 766 (1939).

82. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (emphasis added).

83. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 108 (1909).

84. *United States v. Wurzbach*, 280 U.S. 396 (1930).

85. *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943).

election," is the decision of the Supreme Court in *Gorin v. United States*.⁸⁶ There the petitioner challenged the validity of a federal statute which made it a crime to transfer to a foreign nation any document or other thing "connected with" or "relating to" national defense. The Court, apparently not at all concerned with, or disturbed by the phrase "connected with," considered only that "the use of the words 'national defense' had . . . given them . . . a well understood connotation,"⁸⁷ and acceded to the government's claim that "national defense . . . is a generic concept of broad connotation referring to the military and naval establishments and the related activities of national preparedness."⁸⁸ Under such a view the language of section 610 proscribing contributions and expenditures in connection with a federal election should be upheld as was the statute in the *Gorin* case. Surely the concept of a "federal election" is no broader than that of "national defense"—it would appear, in fact, to be less vague. An interpretation of "in connection with any [federal] election" as common, active *electioneering*,⁸⁹ therefore, being no less specific or informative than that accepted by the Court for "national defense," is both reasonable and valid.⁹⁰

The fact that the burden is on the entity to realize when its activity borders more closely upon electioneering than on stating a candidate's record is no argument against the clarity of the statute. "The law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."⁹¹ One might even say, after

86. 312 U.S. 19 (1941).

87. *Id.* at 28 (emphasis added).

88. *Ibid.*

89. In *United States v. International Union, UAW-CIO*, 352 U.S. 567, 592 (1957), the majority noted that a distinction must be drawn between "active electioneering" and merely "stating the record" of a candidate, implying thereby that the proscription of § 610 extends only to "active electioneering."

90. Considering § 610 in relation to its place in the statutory scheme and its purpose as revealed by its legislative history, "expenditure in connection with an election" can have only one meaning: expenditure of assets influencing the result of an election. That such is the proper interpretation becomes perfectly clear when the section is read in relation to other provisions of the Federal Corrupt Practices Act. Thus, § 306 of the 1925 Act (43 Stat. 1072) requires a statement by every person other than a political committee who makes an expenditure "for the purpose of influencing in two or more states the election of candidates"; § 307 (43 Stat. 1072) requires a statement by a candidate of expenditures made by him or with his knowledge and consent "in aid or support of his candidacy for election, or for the purpose of influencing the result of the election." "In connection with" and election was apparently kept in § 313 of the same act because this section was taken over directly from the 1907 Act. It obviously was intended, however, to serve the same purpose as the more artistic phraseology in the sections quoted above. The conclusion reasonably follows that the prohibition against expenditures "in connection with" an election must mean affecting or influencing the result of elections—to work such influence is, in short, to actively electioneer.

91. *Nash v. United States*, 229 U.S. 373, 377 (1913). See also *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223 (1914): "A criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree. . . ."

the fact, that in those cases in which the Court has already ruled that the indictment failed to state an offense, the defendants had rightly estimated the degree; and because the degree of the *connection* between their expenditures and the elections involved was slight, their activities were not included within the ban.⁹²

In *United States v. Petrillo*,⁹³ the Court clearly ruled that although many factors must be considered in determining the relevant meaning of the challenged phrase in a penal statute, such a necessity is not, by itself, sufficient grounds to strike down the statute. The Court reasoned that

the same thing may be said about most questions which must be submitted to a fact finding tribunal in order to enforce statutes . . . [and further] the Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used need only provide an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress.⁹⁴

In the same vein, the Court recognized in *CIO* that *expenditure in connection with an election* as used in section 610 is not a term of art, and in spite of the statutory definition of "expenditure" it has no definitely defined meaning. Because "the obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality,"⁹⁵ where the Court is presented with a fact situation which it can determine to have been included or excluded from the scope and operation of a statute, it should go no further than making such determination.⁹⁶ Then, by a process either of attrition or addition, the disputed word or phrase will become more specific, and, consequently, closer to recognition as a term of art with a special meaning commonly known. Then, too, "matter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface, and in the outcome constitutional questions may disappear."⁹⁷

In considering the effect which the ban on expenditures was likely to have, the members of Congress posed many questions involving borderline cases under the statute.⁹⁸ The Court, however, is in apparent sympathy with the

92. However, whether there should exist under the statutes a distinction of degree between large and small expenditures when all contributions, large or small, are banned is doubtful. "The fact that a contribution may be trivial is not enough to remove the contributor from the scope of federal regulation when the sum of all such contributions may be far from trivial." *Egan v. United States*, 137 F.2d 367, 374 (8th Cir. 1943).

93. 332 U.S. 1 (1947).

94. *Id.* at 6.

95. *United States v. CIO*, 335 U.S. 106, 120-21 (1948).

96. The same position was taken by Justice Holmes in *United States v. Wurzbach*, 280 U.S. 396, 399 (1930) in considering the vagueness objection to the "persons" covered by the statute: "There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns. . . . We imagine that no one not in search of trouble would feel any."

97. *United States v. International Union, UAW-CIO*, 352 U.S. 567, 592 (1957).

98. 93 Cong. Rec. 6439-40 (1947).

position taken during the hearings by Senator Taft. The Senator admitted that he could not "answer various hypotheses without knowing all the circumstances."⁹⁹ The Court, aware of the impossibility of absolute exactitude in this and similar statutes, noted that "because there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense."¹⁰⁰

It may not always be possible to fix with absolute certainty the moment when a person can be said to be a candidate for office; it may not always be possible to say beforehand whether a particular activity can be deemed to have been undertaken for the purpose of influencing a particular election. But no one who has lived through an election campaign in this country can fail to know the difference between general discussion of political issues which may have a remote effect on an election, and the type of activity commonly known as electioneering. No corporation or unit of organized labor, spending money actively to electioneer for the success of a particular candidate, can have any doubt that its activity in such respects contravenes the express prohibition of the statute. The language of section 610, it is maintained, "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."¹⁰¹

CONCLUSION

Section 610 represents a gradual evolution of congressional policy to control the power represented by the wealth of legal entities, by enforcing political neutrality on their part in federal elections. Congress most assuredly has the power to preserve the purity of federal elections, and the statute here involved is merely one aspect of the congressional exercise of that power. Legal entities, it is submitted, have standing under the Constitution to challenge the constitutionality of that particular exercise of the power. However, the enactment of this legislation represents a deliberate and reasonable legislative judgment that the danger to free elections arising from the abuse of large accumulations of capital is sufficiently great to warrant and justify the incidental impairment of freedom which might result therefrom. The abuse which section 610 was designed to remedy constituted a substantive evil in the very existence of which lies a clear and present danger to free elections and representative government. Finally, the language of section 610 appears perfectly intelligible both from the definitions given in the statute itself, and from the ordinary usage of language. While some members of the Court have expressed grave doubts as to constitutionality, it is questionable whether such doubts are wholly justified. If Congress has reasonably exercised one of its powers, it should not matter that the particular form which that exercise takes is not, in the view of the Court, the most desirable.

99. 93 Cong. Rec. 6440 (1947).

100. *United States v. Petrillo*, 332 U.S. 1, 7 (1947).

101. *Id.* at 8.