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COMMENT

CORPORATE POLITICAL ACTION COMMITTEES: EFFECT OF THE FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976

The number of political action committees and the amount of their contributions to political campaigns have recently experienced substantial growth. On March 28, 1976, in a prescient article entitled "Business Builds Its Political War Chest—Legally," *The New York Times* reported:

What began as a slow but steady stream of corporate "political action committees"—formed last year following a landmark ruling by the Federal Election Commission—is turning into a torrent.

American business and professional groups, already sitting on top of a \$9 million political war chest, are rushing to form new committees which aim to raise additional millions of dollars for this year's Presidential and Congressional candidates.

At least 100 new corporate committees were registered with the election commission in the first 10 weeks of 1976, virtually equaling the number of such committees established during all of 1975.¹

A study released on February 14, 1977 by Common Cause, the public affairs lobby, stated that from 1974 to 1976, the number of corporate political action committees registered with the Federal Election Commission rose from 100 to about 450.² Just as dramatically, contributions from business and professional groups to congressional candidates rose from \$2.5 million in 1974 to \$7.1 million in 1976, an increase of 184%.³

1. N.Y. Times, Mar. 28, 1976, § 2, at 2, col. 1.

2. N.Y. Times, Feb. 15, 1977, § 1, at 1, col. 4. There are several reasons why corporations are only now establishing political action committee (PAC) funds in any great number while labor organizations have had functioning PAC's since the 1940's. Pragmatically, corporations have recognized PAC funds as convenient, legal vehicles to influence both elections and legislation, as well as to counterbalance the impact of labor organizations and other special interest groups. See, e.g., Wall St. J., May 20, 1976, at 1, col. 6, & 37, col. 3-4; N.Y. Times, Dec. 14, 1975, § 3, at 1, col. 1; Wash. Post, Nov. 19, 1975, § A, at 1, col. 7. Further, uncertainty about the legality of corporate PAC's was quelled to some extent first by the passage of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 103, 88 Stat. 1272 (1974), (current version at 2 U.S.C.A. § 441b (Cum. Supp. 1977)), and later by the Federal Election Commission's *Sun Oil* advisory opinion. F.E.C. Advisory Opinion 1975-23, 40 Fed. Reg. 56,584 (1975).

3. N.Y. Times, Feb. 15, 1977, § 1, at 1, col. 4. Contributions to congressional

Because political action committees (PAC's) are involved with federal elections, they are subject to certain restrictions designed to assure the integrity of the federal electoral process. The Supreme Court has recently underscored the constitutional power of Congress to regulate federal elections,⁴ and pursuant to this specific constitutional authority, a series of legislative enactments in the last seventy years has prohibited or controlled particular electoral activities.⁵ Accordingly, while recognizing the right of both

candidates from all special interest groups had risen to more than \$22.5 million in 1976, nearly twice as much as in 1974. A partial explanation for the significant increase is that the 1976 presidential general election was for the first time financed entirely by government funds. Consequently, the major parties' presidential nominees were prohibited from accepting private contributions to defray expenses incurred in the general election, making more special interest funds available to congressional candidates. See I.R.C. § 9003(b).

4. See *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court in *Buckley* was referring to a constitutional power: "[T]he Times, Places and Manners of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators. . . ." U.S. CONST. art. I, § 4, cl. 1. In 1932, Chief Justice Hughes characterized § 4 of article 1 as containing:

authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932). Soon after that interpretation, the Court construed this constitutional power as extending to presidential elections. See *Burroughs v. United States*, 290 U.S. 534 (1934).

5. For a thorough examination of the history of federal election legislation, see *United States v. UAW*, 352 U.S. 567, 570-84 (1957); H. ALEXANDER, *FINANCING THE 1972 ELECTION* (1976); H. ALEXANDER, *FINANCING THE 1968 ELECTION* (1971); A. HEARD, *THE COSTS OF DEMOCRACY* (1960); Clagett & Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327 (1976); King, *Corporate Political Spending and the First Amendment*, 23 U. PITT. L. REV. 847 (1962); Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U.L. REV. 1033 (1965); Redish, *Reflections on Federal Regulation of Corporate Political Activity*, 21 J. PUB. L. 339 (1972); Comment, *Control of Corporate and Union Political Expenditures: A Constitutional Analysis*, 27 FORD. L. REV. 599 (1958-59); Comment, *First Amendment—Corporate Freedom of Speech*, 7 SUFFOLK U.L. REV. 1117 (1973); Comment, *Of Politics, Pipefitters and Section 610: Union Political Contributions in Modern Context*, 51 TEX. L. REV. 936 (1973). See generally Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389 (1973); *Campaign Spending Controls Under the Federal Election Campaign Act of 1971*, 8 COLUM. J.L. & SOC. PROB. 285 (1972); Comment, *The Federal Election Campaign Act of 1971: Reform of the Political Process?*, 60 GEO. L.J. 1309 (1972); Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148 (1974).

corporations and unions to establish political action committees, Congress has also placed restrictions on corporate and union sponsored PAC's.

The most recent legislation regulating PAC operations, the Federal Election Campaign Act Amendments of 1976,⁶ has substantially restricted both the class of persons a corporate PAC may solicit for contributions and the permissible frequency of solicitation. These amendments responded primarily to the Federal Election Commission's *Sun Oil* advisory opinion⁷ and to the Supreme Court decision in *Buckley v. Valeo*⁸ that invalidated on constitutional grounds the composition of the Federal Election Commission (FEC). However, the amendments have limited PAC operations further than necessary to achieve the legitimate and well-established purposes of federal election legislation. Those purposes have traditionally been "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital,"⁹ and to prevent corporate and union officials' use of general treasury funds for political purposes without the consent of the beneficial owners.¹⁰ Collaterally, federal legislation has sought to protect minority interests from those of corporate and union leadership.

Those purposes constitute valid state interests which have been found sufficiently compelling to justify some infringement on the first amendment rights of expression and association. Nevertheless, certain provisions of the 1976 amendments invaded basic first amendment rights by unnecessarily and unjustifiably limiting the scope of the audience which a corporate PAC may solicit. With no essential change in the state interests underlying federal election legislation, the 1976 amendments raise substantial constitutional questions.

I. STATUTORY FRAMEWORK: THE POLITICAL ACTION COMMITTEE CODIFIED

Prior to the enactment of the Federal Election Campaign Act of 1971¹¹

6. 2 U.S.C.A. §§ 431-56 (Cum. Supp. 1977).

7. F.E.C. Advisory Opinion 1975-23, 40 Fed. Reg. 56,584 (1975).

8. 424 U.S. 1 (1976).

9. *United States v. UAW*, 352 U.S. 567, 585 (1957). See also *Pipefitters Local 562 v. United States*, 407 U.S. 385, 415-16 (1972); *United States v. CIO*, 335 U.S. 106, 113 (1948).

10. See *Pipefitters Local 562 v. United States*, 407 U.S. 385, 413-14 (1972); *United States v. CIO*, 335 U.S. 106, 113, 115 (1948); *Ash v. Cort*, 496 F.2d 416, 422 (3d Cir. 1974), *rev'd on other grounds*, 422 U.S. 66 (1975).

11. Pub. L. No. 92-225, tit. III, 86 Stat. 11 (codified at 2 U.S.C. § 431 *et seq.* (Supp. V 1975)).

(FECA), the statutory law regulating campaign and election activities by private organizations was relatively simple. In response to a general feeling at the beginning of the century that the forces of vast corporate wealth were too great an influence on elections,¹² Congress passed the Tillman Act of 1907,¹³ which prohibited contributions from corporations and national banks in connection with federal elections. Congress intended to remove the undue influence of corporate funds on the electoral process and, secondarily, questioned the moral right of corporate officials to make political contributions from corporate funds without the prior approval of shareholders.¹⁴ The Corrupt Practices Act of 1925¹⁵ broadened the effects of the Tillman Act by prohibiting any "contribution," not merely "money contribution," from a corpo-

12. For example, in his 1905 message to Congress, President Theodore Roosevelt proposed that:

All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts [generally, ineffectual state laws requiring the reporting of sources of contributions aimed at discouraging corporate contributions].

40 CONG. REC. 96 (1905).

13. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907), which provided:

That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.

14. See 40 CONG. REC. 96 (1905); 41 CONG. REC. 1451-55 (1907); *Hearings Before the House Comm. on the Election of the President*, 59th Cong., 1st Sess. 76 (1906). See also *United States v. UAW*, 352 U.S. 567, 575 (1957); *United States v. CIO*, 335 U.S. 106, 113 (1948).

15. Ch. 368, tit. III, 43 Stat. 1070 (1925). Underscoring the same basic purpose that prompted passage of the Tillman Act, Senator Robinson, one of the Senate leaders, commented that:

We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests 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 unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.

65 CONG. REC. 9507-08 (1924). See Lambert, *supra* note 5, at 1037 n.20.

ration or national bank.¹⁶ While both the Tillman Act and the Federal Corrupt Practices Act focused on the ill effects of amassed corporate wealth, their primary intent was to curtail the general impact of aggregated wealth on the electoral process rather than to restrict the freedoms of those in control of sizeable wealth.

In 1947, the Labor Management Relations Act¹⁷ (the Taft-Hartley Act) extended the existing prohibition to unions¹⁸ and made "expenditures," as well as contributions, illegal.¹⁹ During debate on the 1947 Act, a crucial distinction was made between contributions or expenditures from a union's general treasury fund and those from funds financed by voluntary donations. The latter were unequivocally distinguished as not being statutorily prohibited.²⁰ In subsequent years, the Supreme Court reaffirmed the vital sig-

16. Section 313 of the Act was the critical portion, since it changed the 1907 prohibition of "money contribution" to "contribution," which was defined to include "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." Corrupt Practices Act, ch. 368, tit. III, § 302(d), 43 Stat. 1071 (1925).

17. Ch. 120, § 304, 61 Stat. 159 (1947). Section 313 then read, in part:

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution *or expenditure* in connection with any election to any political office, *or in connection with any primary election or political convention or caucus held to select candidates for any political office*, or 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*, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. . . .

[The additions of 1947 are italicized, and the penalty provisions are omitted.]

18. The prohibition against contributions by corporations, found in § 313 of the Federal Corrupt Practices Act of 1925, had been extended to labor organizations by the War Labor Disputes Act of 1943, ch. 144, § 9, 57 Stat. 163, 167-68 (1943), but the prohibition ran only until the end of World War II.

19. Congressional investigations of the 1944 and 1946 federal elections found that because of a loophole in the Federal Corrupt Practices Act, organizations were able to avoid the prohibition against making contributions by making "expenditures," or indirect contributions. As a result, unions in particular were expending large sums of money, for example, to distribute campaign literature or to sponsor radio broadcasts on behalf of a candidate through partisan communication with the public. The investigations focused largely on the Political Action Committee of the Congress of Industrial Organizations (CIO). See, e.g., S. REP. NO. 101, 79th Cong., 1st Sess. 20-24 (1945).

20. See 93 CONG. REC. 6437-40 (1947). Senator Taft, sponsor of the Senate labor bill and one of the Senate conferees, stated in his floor explanation:

If [union members] are asked to contribute directly . . . to the support of a labor political organization, they know what their money is to be used

nificance of the source of funds used for campaign contributions or expenditures.²¹

The Federal Election Campaign Act of 1971²² required full disclosure of campaign expenditures and contributions in federal primary and general elections. FECA contained a radical departure from prior election legislation. An amendment to the House version of FECA, introduced by Representative Orval Hansen, and ultimately included in the final bill,²³ quite clearly expanded the definition of a prohibited contribution or expenditure.²⁴ It also

for and presumably approve it. From such contribution the organization can spend all the money it wants to with respect to such matters. But the prohibition is against labor unions using their members' dues for political purposes, which is exactly the same as the prohibition against a corporation using its stockholders' money for political purposes, and perhaps in violation of the wishes of many of its stockholders.

Id. at 6440.

21. See, e.g., *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972); *Machinists v. Street*, 367 U.S. 740 (1961).

22. Pub. L. No. 92-225, § 101, 86 Stat. 3 (1971) (current version at 2 U.S.C.A. § 431 *et seq.* (Cum. Supp. 1977)). There was substantial pressure for passage of election reform because the Federal Corrupt Practices Act of 1925 was considered so full of loopholes that it could neither inform nor guide the public and candidates on the election process. As one Senator remarked during debate on S. 382, 92d Cong., 1st Sess. (1971), the Senate version of the FECA of 1971:

In fact, [it] is a sham. It is a dangerous sham because over the years it has created an illusion of regulation of the Federal elective process. As an illusion it has retarded meaningful reform in an area that particularly needs reform. It has provided an easy excuse for maintaining the status quo.

117 CONG. REC. 28,812 (1971) (remarks of Senator Prouty).

23. H.R. 11060, 92d Cong., 1st Sess., 117 CONG. REC. 43,379 (1971), amending 18 U.S.C. § 610 (1970). The amendment provided:

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization; provided, that it shall be unlawful for such a fund to make a "contribution or expenditure" by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination or financial reprisal; or by dues, fees or other monies required as a condition of membership "in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

24. "The effect [was] to carry out the basic intent of section 610, which is to pro-

exempted from the definition three types of corporate or union activities: (1) communications to shareholders or members,²⁵ (2) nonpartisan registration and get-out-the-vote drives, and (3) the establishment and administration of a separate segregated fund to solicit contributions for political purposes. The amendment intended to clarify that, by using "separate segregated funds," corporations and labor organizations could legally operate political action committees. However, the purpose and scope of the separate segregated fund exemption was particularly ambiguous.²⁶ Corporations were hesitant to rely on that exemption.²⁷ The resulting confusion led to the Federal Election Commission's *Sun Oil* advisory opinion.²⁸

hibit the use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election." 117 CONG. REC. 43,379 (1971) (remarks of Rep. Hansen).

25. Some years earlier in *United States v. CIO*, 335 U.S. 106 (1948), the Court had distinguished between communications from a union to its members and communications aimed at the general public. The Court suggested that prohibiting publications by corporations and unions advising their members, stockholders, or customers of dangers or advantages of issues or candidates would raise grave constitutional doubts. *Id.* at 120-24.

26. Of the three exemptions created by the amendment, the separate segregated fund exemption was given the least attention and considered the least imperative during debate on the FECA. Interview with former Representative Orval Hansen, in Washington, D.C. (Jan. 7, 1977).

27. The litigation which arose from one corporation's establishing a PAC must have had a particularly chilling effect. Although the 1971 Act had expressly allowed corporations to establish separate segregated funds under 18 U.S.C. § 610, it had failed to include the same language in § 611, relating to government contractors. Consequently, on May 15, 1972, Common Cause brought suit against TRW, a major defense contractor, alleging that TRW's PAC violated § 611. *Common Cause v. TRW*, CA 980-72 (D.D.C. 1972). Common Cause argued that § 611 had been enacted "to prevent the use of political contributions by those in a contractual relationship with the United States to subtly influence the treatment afforded them by government officials." *Id.* at 5. The controversy was resolved on August 9, 1975, when TRW voluntarily disbanded its political fund. Stipulation of Dismissal, *id.* The 1974 Amendments extended the right to establish a separate segregated fund to corporations that are government contractors. Act of Oct. 15, 1974, Pub. L. No. 93-443, Title I, §§ 101(e)(2), 103, 88 Stat. 1267, 1272 (recodified at 2 U.S.C. § 441c by Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, § 322, 90 Stat. 475, 492 (1976)).

28. F.E.C. Advisory Opinion 1975-23, 40 Fed. Reg. 56,584 (1975). The FECA Amendments of 1974 created an eight-member Federal Election Commission and vested in it primary responsibility for administering and enforcing the Act. See 2 U.S.C. § 437c *et seq.* (Supp. V 1975). The FEC is the principal repository of all reports and statements required under the FECA, and is authorized "[t]o prescribe suitable rules and regulations to carry out the provisions of [the Act]." 2 U.S.C. § 438(a)(10) (Supp. V. 1975).

Section 437f(a) authorizes the FEC upon request to render advisory opinions as to whether any specific activity by the federal officeholder, candidate for federal office, or political committee requesting the opinions was or would be in violation of the Act.

The Sun Oil Company sought FEC approval of its proposed program to use general treasury funds to establish, administer, and solicit voluntary contributions to a political action committee.²⁹ Although the FECA of 1971 appeared to permit just such an activity, questions remained about the ramifications of creating and running a PAC. Sun Oil, therefore, sought clarification of the operating procedures for a corporate PAC. In a divided opinion, the FEC appeared to resolve doubts in five areas: (1) general treasury funds can be expended in establishing, administering, and soliciting contributions to the PAC if it is maintained as a separate segregated fund, (2) the company can make political contributions in federal elections if they are made solely from PAC funds which have been obtained voluntarily, (3) the company can control the disbursements of funds from its separate segregated fund, (4) the company can solicit contributions from its shareholders and employees, and (5) the company can accept contributions to its PAC from any source that would not otherwise be unlawful.³⁰

The corporate community was most pleased with the opinion,³¹ particularly because it allowed solicitation of all employees, including hourly wage employees. But labor spokesmen and some congressional Democrats were not pleased. They expressed concern about the potential for coercion by an employer over an hourly wage-earner.³² They also recognized the very serious possibility of increased corporate activity through the legal means of a PAC and were particularly troubled by the unrestricted solicitation provision. Disapproval of the FEC's opinion was vitriolic enough to begin immediate pressure for legislative action.³³ In addition, on January 30, 1976, the

The effect of such an advisory opinion is that "[n]otwithstanding any other provision of law, any person with respect to whom an advisory opinion is rendered . . . who acts in good faith in accordance with the provisions and findings of such advisory opinion shall be presumed to be in compliance with the provision[s] of [the Act]." 2 U.S.C. § 437f(b) (Supp. V 1975).

29. Sun Oil also sought approval of a proposed trustee plan where the corporation would open separate checking accounts for each contributing participant. That donor would then designate whom he wished to receive contributions deposited in the account. Because the participant would at all times maintain control over who would receive his funds, the FEC did not deem this type of program to involve a contribution under 18 U.S.C. § 610. 40 Fed. Reg. 56,584-86 (1975).

30. The apparently artificial distinction drawn between the right to solicit and the right to accept contributions is not insignificant. See notes 116-24 & accompanying text *infra*.

31. The United States Chamber of Commerce reported that on the day of the *Sun Oil* advisory opinion (Dec. 3, 1975), 137 corporations had PAC's registered with the FEC, but by March 1, 1976, 197 committees had registered. 8 NAT'L J. 470, 471 (1976).

32. See *id.* at 473.

33. Representative Brademas, a majority member of the Committee on House Ad-

Supreme Court had ruled in *Buckley v. Valeo*³⁴ that the FEC's composition violated the appointments clause of the Constitution.³⁵ These two factors taken together led to the hurried passage, with hearings only in the Senate, of the FECA Amendments of 1976 and their enactment into law on May 11, 1976.³⁶ Besides resurrecting the FEC through the constitutional process, the amendments sought other "reforms."

A significant portion of the bill sets forth limitations on whom a corporation may solicit for contributions to its political fund. The statute provides that a corporation may solicit any of its employees twice yearly, provided that the corporation will not learn who has contributed \$50 or less.³⁷ Only

ministration, remarked that "[t]he current controversy has arisen solely because the Federal Election Commission, through the advisory opinion process, has sought to change the rules notwithstanding the clearly articulated intent of Congress." 122 CONG. REC. H3782 (daily ed. May 3, 1976) (remarks of Rep. Brademas). Several other representatives expressed similar views. See *id.* at H3780 (remarks of Rep. Wiggins and Rep. Thompson); *id.* at H2613 (daily ed. Mar. 31, 1976) (remarks of Rep. Gaydos).

34. 424 U.S. 1 (1976).

35. As originally constituted, two of the six members of the Commission were nominated by the President, but confirmation had to come not only from the Senate, but also from the House of Representatives. Of the other four members, two were appointed by the Speaker of the House, and two by the President *pro tempore* of the Senate. As a result, none of the members was appointed as required by the appointments clause. U.S. CONST. art. 2, § 2, cl. 2. But the Court did not invalidate the Commission for that reason alone:

Thus, on the assumption that all of the powers granted in the statute may be exercised by an agency whose members *have been* appointed in accordance with the Appointments Clause, the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners, none of whom *was* appointed as provided by that clause. . . .

Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.

424 U.S. at 137 (footnote omitted) (emphasis in original). With respect to its enforcement and administrative duties, however, the Commission was prohibited from functioning beyond a 30-day stay. As a result, the Commission as then constituted was unable to approve federal matching funds for the qualifying 1976 presidential primary candidates. This alone created great pressure to proceed with the reconstitution of the Commission, which the 1976 amendments effected. See generally *Federal Election Campaign Act Amendments, 1976; Hearings on S. 2911, S. 2912, S. 2918, S. 2953, S. 2980, and S. 2987 Before the Subcomm. on Privileges and Elections of the Senate Committee on Rules and Administration*, 94th Cong., 2d Sess. (1976).

36. Pub. L. No. 94-283, 90 Stat. 475 (1976) (codified in scattered sections of 2, 26 U.S.C.). The amendments also recodified 18 U.S.C. § 610, which included the Hansen amendment to the 1971 Act, as 2 U.S.C.A. § 441b (Cum. Supp. 1977). Section 441b contains the relevant portion of the 1976 amendments.

37. 2 U.S.C.A. § 441b(b)(4)(B) (Cum. Supp. 1977). The conference report ac-

stockholders and "executive or administrative personnel" may be solicited without limitation.³⁸ The conference report narrowly defines "executive or administrative personnel," using language which had not even appeared in the floor debates:

The term "executive or administrative personnel" is intended to include the individuals who run the corporation's business, such as officers, other executives, and plant, division, and section managers, as well as individuals following the recognized professions, such as lawyers and engineers, who have not chosen to separate themselves from management by choosing a bargaining representative but is not intended to include professionals who are members, of a labor organization, or foremen who have direct supervision over hourly employees, or other lower level supervisors such as "strawbosses."³⁹

By contrast, the statutory language suggests a more functional approach, defining executive or administrative personnel simply as salaried employees with "policymaking, managerial, professional, or supervisory responsibilities."⁴⁰

The other immediately relevant provisions of the 1976 amendments are the requirements that at the time of solicitation, the solicitor must inform the employee of the political nature of the fund and of the right to refuse to contribute without reprisal.⁴¹ Although the statute does not mention union members, the conference report notes that the same rules apply when a labor organization solicits its members.⁴²

A further restriction on the political activities of corporations and labor

companying the amendment advised that the twice yearly mail solicitations be conducted so that an independent third party receives all responses, keeps the necessary records, and informs the corporation only of those who give a single contribution of over \$50 or several contributions, in the aggregate totaling in excess of \$100. CONF. REP. NO. 94-1057, 94th Cong., 2d Sess. 63 (1976); [1976] U.S. CODE CONG. & AD. NEWS 978.

38. 2 U.S.C.A. § 441b(b)(4)(A) (Cum. Supp. 1977).

39. CONF. REP. NO. 94-1057, 94th Cong., 2d Sess. 62 (1976); [1976] U.S. CODE CONG. & AD. NEWS 977. For floor debates on this definition, see 122 CONG. REC. H3779, 3781 (daily ed. May 3, 1976); *id.* at H2533, 2537-42 (daily ed. Mar. 30, 1976); *id.* at S4153, 4157 (daily ed. Mar. 24, 1976).

40. 2 U.S.C.A. § 441b(b)(7) (Cum. Supp. 1977). Should the difference between the language of the statute and of the regulation be more than merely illusory, the PAC manager's compliance with the statute should, obviously, provide a good defense to FEC challenge founded on its regulation. The effect of the regulation's variance is discussed more fully at notes 87-89 & accompanying text *infra*.

41. *Id.* § 441b(b)(3)(B) & (C).

42. CONF. REP. NO. 94-1057, 94th Cong., 2d Sess. 64 (1976); [1976] U.S. CODE CONG. & AD. NEWS 979.

organizations is the "anti-proliferation" provision. Under the contributions and expenditures limitations, a multi-candidate political committee⁴³ may give a maximum of \$5,000 per election to any one candidate. However, the contributions from all PAC's established, administered, or controlled by a single corporation or by its parent, subsidiaries, divisions or branches, or by a union or any of its local units, are deemed to be made from a single political action committee and hence are collectively subject to the \$5,000 per candidate limitation.⁴⁴ Consequently, the parent corporation and, for example, each of its three subsidiaries, could not each give the maximum \$5,000 to one candidate through their four separate political action committees, thereby giving a total of \$20,000. Instead, the contributions to a single candidate from all four committees could not total more than \$5,000.

Faced with the necessity of drafting legislation to reconstitute the FEC as a result of *Buckley v. Valeo*, Congress took on the chore of extensive revision of the federal election laws. In its haste, it failed to give thoughtful and non-partisan attention to certain provisions, particularly those concerning corporate and labor organization PAC activities. As a result, the constitutionality of those provisions is in serious doubt.

II. THE LEGAL STATUS OF CORPORATE POLITICAL ACTION COMMITTEES

An examination of the traditional justifications for regulating campaign contributions—avoiding the effect of amassed wealth in federal elections and protecting minority interests on the ground that corporate officials have no moral right to use corporate funds without approval of the shareholders—is critical to an understanding of the current legislative and judicial sanctions and restrictions governing corporate political action committees. Assuming that first amendment rights exist when political expression is involved, the significance of these two state interests will determine the constitutionality of any restrictions placed on the exercise of such political expression.⁴⁵

The purpose of avoiding the effect of aggregated wealth is somewhat

43. Title 2 U.S.C.A. § 441a(a)(4) (Cum. Supp. 1977) defines a "multi-candidate political committee" as one which has been registered with the FEC for at least six months, has received contributions from more than 50 persons, and has made contributions to at least five federal candidates.

44. 2 U.S.C.A. § 441a(a)(5) (Cum. Supp. 1977).

45. *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Roth v. United States*, 354 U.S. 476 (1957); *Thomas v. Collins*, 323 U.S. 516 (1945). See also *Mills v. Alabama*, 384 U.S. 214 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Winters v. New York*, 333 U.S. 507 (1948).

ambiguous. The underlying aim could reflect a governmental interest in restricting any use of amassed wealth, without regard to its source, or it could be construed as a restriction only on the source of contributions. Interpreting the contribution restrictions imposed by pre-1971 law, the Supreme Court has adopted the latter explanation. In *Pipefitters Local 562 v. United States*, the Court said:

When Congress prohibited labor organizations from making contributions or expenditures in connection with federal elections, it was, of course, concerned not only to protect minority interests within the union but to eliminate the effect of aggregated wealth on federal elections. *But the aggregated wealth it plainly had in mind was the general union treasury—not the funds donated by union members of their own free and knowing choice.*⁴⁶

In effect, the Court indicated that if contributions came from a voluntary source, the policy of avoiding “the effect of aggregated wealth” was not violated. The Court believed that Congress had intended to restrict only the corporate or union source of contributions.

Whether the Court in *Pipefitters* intended to modify the dual purpose of eliminating the impact of amassed wealth and protecting minority interests by looking only for voluntariness has been mooted by the 1971 Act and subsequent legislation. Numerous statutory elements now define the restrictions and the sanctions of corporate PAC functioning. These include the separate segregated fund requirement, permissible treasury fund expenditures, control of the fund, the “voluntary” requirement, and the scope of the audience. The first four of these elements restrict the free exercise of first amendment rights only minimally and do advance the valid state interest of reducing the influence of money on federal elections. Indeed, regardless of which interpretation of that interest is applied, those four elements effectively accommodate the dual congressional concerns elaborated by the Court in *Pipefitters*. It is the fifth element, the scope of the audience provisions, that did not achieve a constitutionally sound balance.

A. The Separate Segregated Fund Requirement

The Hansen amendment to FECA carved out the separate segregated fund exception to the definition of “contribution or expenditure.” In his explanatory floor statement, Representative Hansen said only that “[t]his fund must be separate from any union or corporate funds,”⁴⁷ and offered no further interpretation of the nature of the fund.

46. 407 U.S. at 415-16 (emphasis added).

47. 117 CONG. REC. 43,379 (1971).

It remained for the Supreme Court in *Pipefitters* to clarify the definition of separate segregated fund. In that case the union and three of its officers had been convicted of conspiring to violate 18 U.S.C. § 610, which prohibited campaign contributions by banks, labor organizations, and corporations. From 1949 until 1962, the union had a political fund to which members were required to contribute. In 1962, the fund became a separate "voluntary" fund. However, certain of the union's officers still maintained control over the fund, and the method of soliciting remained the same—on union time at the job site, with a "contribution" rate based on hours worked. The proceeds of the solicitations were kept in a fund separate from the union's dues and assessments.⁴⁸ In its argument before the Court, the government reasoned that "a valid fund may not be the alter ego of the sponsoring union in the sense of being dominated by it and serving its purposes, regardless of the fund's source of financing."⁴⁹ The Court rejected the contention, finding that while "'separate'" could be construed as requiring "an apartness beyond 'segregated'; . . . the legislative history of § 205 [of the FECA of 1971] establishes that 'separate' is synonymous with 'segregated.'"⁵⁰ The Court held that a political fund "must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments."⁵¹ Since the Court had made no distinction between union and corporate PAC's, the *Pipefitters* definition would appear to apply to corporate PAC's. Further, because the 1976 amendments did not amend the separate segregated requirement established by the FEC of 1971 the *Pipefitters* analysis of fund separateness is still controlling.

The requirement that an organization's political fund be distinctly separate from its general treasury funds bolsters both the purpose of protecting minority interests and of minimizing the effect of amassed wealth. Representative Hansen placed special emphasis on this fact during the floor debate:

For the underlying theory of section 610 is that substantial general purpose treasuries should not be diverted to political purposes, both because of the effect on the political process of such aggregated wealth and out of concern for the dissenting member or stockholder. Obviously, neither of these considerations cuts against allowing voluntary political funds. For no one who objects to the organization's politics has to lend his support, and the money

48. 407 U.S. at 387-97.

49. *Id.* at 413.

50. *Id.* at 421-22, 426.

51. *Id.* at 414 (footnote omitted).

collected is that intended by those who contribute to be used for political purposes and not money diverted from another source.⁵²

If political contributions cannot be made from a commingled fund, then those members, shareholders, or employees who choose not to support a union's or corporation's political activities are assured that their interested shares of the general treasury funds will not be so used. Such an arrangement legitimately preserves a basic purpose of electoral law while only minimally infringing on first amendment rights attached to political expression. The corporation or union can still establish a PAC, and the shareholders or members can choose whether or not to contribute. In fact, the separate fund requirement appears essential to balancing the interests at stake in this campaign contribution mechanism.

B. Permissible Treasury Fund Expenditures

One of the most significant practical effects of the Hansen amendment was to allow a corporation or union to underwrite the costs of establishing, administering, and soliciting contributions to a separate segregated fund.⁵³ Under FECA, supporting does not constitute prohibited contributions or expenditures. Representative Hansen did not believe that minority interests were subverted by treasury expenditures made to create and maintain a separate segregated fund. Rather, those interests were safeguarded through other means, primarily the voluntariness of the fund.⁵⁴

52. 117 CONG. REC. 43,381 (1971).

53. This use of treasury funds was one of three exceptions to the definition of prohibited contribution or expenditure. See notes 23-25 & accompanying text *supra*.

54. The historical rationale for creating this third exception and allowing treasury funds to be expended to defer the expenses of a separate segregated fund is found in earlier case law concerning a union's communications with its members. In *United States v. CIO*, 335 U.S. 106, 121 (1948), the Court declared:

If § 313 [of the Corrupt Practices Act, as amended by the Labor Management Relations Act of 1947, prohibiting corporate or union contributions or expenditures] were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

The Court circumvented the "minority protection" interest because

[m]embers of unions paying dues and stockholders of corporations know of the practice of their respective organizations in regularly publishing periodicals. It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication. . . .

The Supreme Court in *Pipefitters* acknowledged possible interpretational conflicts on this point, but indicated that prohibiting the use of treasury funds for administration and solicitation costs "is neither the plain meaning nor, as the legislative history of § 205 [of the FECA of 1971] shows, the intended construction of the provision."⁵⁵ Referring to the Hansen amendment, the Court spoke of the intent for separate segregated funds to be one of the three exceptions to the prohibition of the use of treasury funds. "In explaining the three exemptions, Hansen clearly regarded each of them as a permissible activity to be financed by general union funds, for each, in his view, was an activity where group interests predominated and the 'interest of the minority [was] weakest'"⁵⁶ The Court cited Hansen's rationale for the three exceptions:

. . . .

We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an "expenditure in connection with any election" of candidates for federal office intended to outlaw such a publication. We do not think § 313 reaches such a use of corporate or labor organization funds.

Id. at 123-24.

55. 407 U.S. at 429-30. An interesting, largely unresolved, question is whether the voluntary approval by shareholders, employees (with reservations as to just which employees), or members of a union regarding contributions from general treasury funds would overcome the general prohibition. Most likely, it would not.

The Court in *Pipefitters* noted that in *United States v. Lewis Food Co.*, 336 F.2d 710 (9th Cir. 1966), the court of appeals upheld an indictment under § 610 that failed to allege that a corporate expenditure in connection with a federal election had been made without shareholder approval. 407 U.S. at 415 n.28. The appellate court argued that mere shareholder approval would not be sufficient to legalize such an expenditure. In other words, the legislative purpose of avoiding the effect of corporate wealth on campaigns would be violated if by merely obtaining shareholder approval, a corporation could do what was otherwise forbidden by § 610. The court further noted that in *United States v. Auto Workers*, 352 U.S. 567 (1957), the Supreme Court had not required a showing in the indictment that union expenditures to finance political television broadcasts were made without member approval. *Id.*

The Court in *Pipefitters* suggested that the Ninth Circuit's reliance on *Auto Workers* was "misplaced." The indictment there alleged that the contribution was made from union dues which were not voluntarily contributed by its members. "In *Auto Workers*, therefore, we had no occasion to address the legitimacy of union-controlled political contributions financed from the knowing free-choice donations of union members." 407 U.S. at 416 n.28. However, the Court did not suggest that the court in *Lewis Food* was wrong, because a political contribution from corporate or union general treasury funds is indeed an offense. The Court only stated that the effect of voluntary approval of a political contribution from treasury funds was a specific issue which the Court has not yet decided. At most, such voluntary approval was said to be a defense. *Id.*

56. 407 U.S. at 430-31 (footnote omitted). The other 2 exemptions were communications to and non-partisan get-out-the-vote drives aimed at stockholders or union members and their families. *Id.* at 430.

"At the present time [Hansen summarized] there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language."⁵⁷

This "limited permission" to use treasury funds was also approved in the FEC's *Sun Oil* advisory opinion. The Commission's first conclusion was:

[I]t is lawful for Sun Oil to expend general treasury funds to defray expenses incurred in establishing, administering, and soliciting contributions to SUN PAC so long as it is maintained as a separate segregated fund. The language of section 610 and the supporting legislative history of the 1971 Amendment to the statute plainly permits such expenditures.⁵⁸

Although the FEC's opinion has been much maligned and actually altered in some respects by the 1976 amendments, the dissatisfaction centered on other aspects of the ruling, not on the decision's treatment of the costs of establishing and soliciting for the PAC. Consequently, one can reasonably look to *Sun Oil* as the FEC's interpretation of this aspect of campaign law. Nothing in either the 1976 amendments, the conference report, or the floor debates appears to change the scope of permissible treasury expenditures.

The significance of allowing the use of general treasury funds to underwrite the expenses of running a PAC cannot be overstated. The costs are myriad. Printing, mailing, and soliciting expenses are obvious. Hidden costs—such as allocable personnel salaries, equipment and even possible legal fees for the PAC—would likely be even greater than direct solicitation costs. For one company the mailing costs alone for a recent shareholder solicitation were between \$12,500 and \$15,000. There was a \$32,000 return on the solicitation.⁵⁹ It is easy to appreciate that unless the corporation or union underwrites all the expenses, a political action committee would hardly be able to

57. 407 U.S. at 431, *quoting* 117 CONG. REC. 43,381 (1971).

58. F.E.C. Advisory Opinion 1975-23, 40 Fed. Reg. 56,584 (1975).

59. Interview with David W. Twomey, public affairs consultant and secretary of SUN PAC Committee, Sun Oil Company, in Washington, D.C. (Jan. 7, 1977).

support itself, much less have surplus funds for contributions to candidates. At any rate, there is little doubt that general treasury funds may legally be expended to establish, administer, and solicit contributions to a political action committee.⁶⁰

Permitting the use of treasury funds for these specific purposes effectively gives the corporation or labor organization an indirect opportunity to encourage political activity which it considers a valid group interest. At the same time, the minority interests are not unjustly constricted, since the expended funds seek to further a legitimate institutional interest without a direct expenditure for political purposes. The separate fund requirement promotes the traditional purposes of federal election legislation without unduly limiting any first amendment freedoms.

C. Control of the Fund

Closely related to the separate segregated fund requirement is the matter of who may control the funds in a political action committee. This issue is apparently well resolved. The Court in *Pipefitters* remarked that "[n]owhere, however, has Congress required that the political organization be formally or functionally independent of union control or that union officials be barred from soliciting contributions or even precluded from determining how the monies raised will be spent."⁶¹ Indeed, the legislative history seems to propose no restrictions on the control of the fund.

In concluding the explanatory remarks on his amendment, Representative Hansen called attention to "a limited permission to corporations and unions . . . to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund."⁶² Admittedly, there is no express statement granting the corporation or union the discretion to determine how the fund is spent, but that conclusion is not a strained one.

The Federal Election Commission itself has adopted this interpretation. In its proposed regulations, the Commission unequivocally states that "[a] corporation, membership organization, cooperative corporation without capital stock, or labor organization may exercise control over its separate segregated fund."⁶³ Although little mention has been made either in cases or

60. There is, however, some indication that the Internal Revenue Service is considering a ruling which would prohibit deduction of these costs as ordinary business expenses. See *Wall St. J.*, May 20, 1976, at 1, col. 6, & 37, col. 3-4.

61. 407 U.S. at 415.

62. 117 CONG. REC. 43,381 (1971).

63. 41 Fed. Reg. 35,958 (1976). Proposed regulations may be prescribed in final

legislative history of the issue of control of a separate segregated fund, it is another critical element in a corporation's or union's interest in establishing a PAC.

The 1976 amendments have not altered an institution's right to control the political fund. The free exercise of that right is essential to the corporation or labor organization in pursuing its group interests. Minority concerns are in no way hindered because the fund which is being controlled is separate and segregated from general treasury funds. Just as allowing treasury fund expenditures for administrative costs is an appropriate balancing of the interests, so, too, is granting control of the fund to the institution.

D. The "Voluntary" Requirement

The requirement that contributions to a separate segregated fund be made voluntarily implies that they also be made with knowledge of the political nature of the fund. The voluntary requirement is, and has been, vital to the existence of a separate segregated fund. Without it, the most basic notions of fair play would be violated and the clear legislative intent to protect the rights of the minority would be ignored. Yet it is difficult both to apply and to enforce a standard of voluntariness because it is so highly subjective.

From the legislative inception of the separate segregated fund, there have appeared warnings that contributions to it must be voluntary. The Hansen amendment contained the proviso that it would be unlawful for a PAC to make a contribution out of funds "secured by physical force, job discrimination, financial reprisals [or the threat thereof], or by dues, fees or other monies required as a condition of membership 'in a labor organization or as a condition of employment.'"⁶⁴ Hansen explained that this language was to insure that contributions were voluntary. He recognized that certain situations may create residual aspects of compulsion, if only in the mind of the person being solicited—for example, the farmer solicited by the head of his local farm organization or the businessman solicited by one who happens to be his banker. "The proper approach, and the one adopted here," he reasoned, "is to provide the strong assurance that a refusal to contribute will

form by the FEC only after they have been before Congress for 30 legislative days and not disapproved within that time. 2 U.S.C.A. § 438(c) (Cum. Supp. 1977).

64. See note 23 *supra*. The Court in *Pipefitters* concedes that the term "threat" could be construed narrowly to mean only the actual intention to inflict harm. The legislative history, however, makes clear that the better interpretation is that it "includes the creation of an appearance of an intent to inflict injury even without a design to carry it out." 407 U.S. at 421-22, 427.

not lead to reprisals and to leave the rest to the independence and good sense of each individual."⁶⁵

The relative simplicity of Hansen's approach is attractive, but it has not been sufficient to quell all the problems arising in this highly sensitive area. In the *Pipefitters* case, contributors to the union's political fund generally signed authorization cards indicating that their contributions were "voluntary . . . [and] no part of the dues or financial obligations of Local Union No. 562," and testimony during the trial indicated that "no specific pressure was exerted, and no reprisals were taken, to obtain donations."⁶⁶ However, on cross-examination the union's attorney admitted that when the fund was established, he had counseled union officials that while contributions to the fund could not be made a condition of employment, it would not matter if members, when solicited, *thought* they were compulsory.⁶⁷

The Court in *Pipefitters* reversed the appellate court's finding that the fund was a subterfuge by which the union made contributions of treasury funds⁶⁸ and remanded the case because instructions to the jury had failed to require a showing that the contributions were actually dues or assessments.⁶⁹ In other words, the Court believed that the voluntariness of the contributions was critical in determining whether section 610 had been violated.⁷⁰ The test of voluntariness which the Court proposes—in addition to being free from physical force, job discrimination, or financial reprisal, or the "threat" thereof—is "whether the method of solicitation for the fund was calculated to result in knowing free-choice donations."⁷¹ The Court does not, however, develop any specific guidelines, beyond the statutory language of force and threats,

65. 117 CONG. REC. 43,381 (1971).

66. 407 U.S. at 394.

67. *Id.* at 395 & n.8.

68. 407 U.S. 385 (1972), *rev'g* 434 F.2d 1127 (8th Cir. 1970).

69. 407 U.S. at 435-42.

70. In the Court's words,

We hold . . . that, although solicitation by union officials is permissible, such solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power. . . .

. . . [T]he test of voluntariness under § 610 focuses on whether the contributions solicited for political use are knowing free-choice donations. The dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member. Whether the solicitation scheme is designed to inform the individual solicited of the political nature of the fund and his freedom to refuse support is, therefore, determinative.

Id. at 414-15.

71. *Id.* at 439.

for a reasonable solicitation method. The opinion suggests that the court questioned the union counsel's approval of leaving the solicitee with the impression that contributions were a condition of employment. Justice Powell, in his dissenting opinion, addressed the method-of-solicitation problem more directly. He was critical of the "authorization" card procedure adopted by Local 562:

If, on remand, the techniques of local 562 should be sanctioned, other unions and corporations could easily follow Local 562 and obtain from members, employees, and shareholders a consent form attesting that the contribution (or withholding) is "voluntary." The trappings of voluntariness might be achieved while the substance of coercion remained. Union members and corporate employees might find themselves the objects of regular and systematized solicitation by the very agent which exercises direct control over their jobs and livelihood.⁷²

The very sensitive employer-employee relationship has been cited by other sources as inherently susceptible to coercion. The FEC acknowledged this problem, and in its *Sun Oil* advisory opinion recommended three guidelines to minimize or remove the possibility of coercion: "First, no supervisor should solicit a subordinate. Second, the solicitor should inform the solicited employee of the political purpose of the fund for which the contribution is solicited. Third, the solicitor should inform the employee of the employee's right to refuse to contribute without reprisal of any kind."⁷³ The third Commission guideline reiterated the proviso of the 1971 Act, prohibiting use of threat of reprisals. The first and second guidelines were, in addition, conscientious attempts to assure the voluntariness of the contribution.

Despite the Commission's somewhat elaborate safeguards, congressional reaction to the *Sun Oil* opinion was largely negative primarily because of its approval of corporate solicitation of employees. Senator Cannon, Chairman of the Senate Committee on Rules and Administration, in his explanatory remarks on S. 3605 (the Senate version of the 1976 amendments) equated the FEC's widened audience with the chance of coercion. "It is felt that such an interpretation [the FEC's ruling] creates extraordinary pressure and potential for coercion, which was even acknowledged by the Commission in its advisory opinion, in a situation where management of a corporation is permitted to solicit political contributions from all its employees."⁷⁴

72. *Id.* at 449.

73. 40 Fed. Reg. at 56,585 (1975).

74. 122 CONG. REC. S3518 (daily ed. Mar. 16, 1976).

Representative Thompson, ranking majority member of the House Administration Committee, appeared to ignore the FEC's guidelines during debate on the 1976 amendments. He cited one of the ill effects of the FEC's opinion as "the coercion inherent in the solicitation of employees by employers" and continued, "[t]he employee is going to be intimidated and coerced, because the entity soliciting the funds is, for all practical purposes, the same as, or closely related to the one which also gives the salary raises and promotions."⁷⁵ Thompson saw this almost inevitable coercive effect as a major reason for "the particular balance established by section 610 in 1971, which the SUN PAC advisory opinion so drastically altered in 1975."⁷⁶ Although the potential for coercion exists in the employer-employee relationship, Representative Thompson did not directly support his assertion that coercion is an inherent, unretractable element of that relationship.

The Court's concern in *Pipefitters* that the method of solicitation would determine the presence of coercion seems to be a more reasonable approach than the broad assumption that coercion will inevitably be present in the solicitation of employees. Admittedly, *Pipefitters* dealt not with employer-employee, but rather with union-member, solicitation. Nevertheless, circumstances can exist where a union, as collective bargaining agent in negotiating wages and benefits, for example, is in as much a "livelihood-determining" position toward a member as an employer is toward an employee. Furthermore, if fear of coercion were to halt all or most solicitation of this kind, the employee, shareholder, or member would effectively be denied the ready opportunity to join together with those of shared interests for the purpose of influencing federal elections.

The 1976 amendments appear to accommodate the possibility of avoiding or minimizing coercion without entirely halting previously allowed solicitations. Congress kept the Hansen proviso and added two of the three FEC proposed guidelines, requiring that all solicitees be informed of the political nature of the fund and of their right not to contribute without reprisal.⁷⁷ It is not clear why Congress failed to include the third guideline which was a part of the Senate bill as first introduced.⁷⁸ It would certainly not be a strong deterrent to the operation of a PAC if a supervisor were not allowed to solicit a subordinate, and it might tend to reduce the appearance or fact of coercion.

The FEC's proposed regulations follow the statute directly, abandoning the

75. *Id.* at H2612 (daily ed. Mar. 31, 1976).

76. *Id.*

77. See 2 U.S.C.A. §§ 441b(b)(3)(B) & (C) (Cum. Supp. 1977).

78. S. 3065, 94th Cong., 2d Sess. § 321(b)(2)(B) (1976).

Sun Oil supervisor-subordinate prohibition.⁷⁹ Beyond the statutory provisos, little attention is given to regulating methods of solicitation as a means of reducing the possibility of coercion. The statute also makes available to labor organizations any method of solicitation permitted by law to corporations.⁸⁰ Accordingly, the proposed regulations appear to emphasize the creation of circumstances from which corporate and union PAC's can operate with relative equality.⁸¹

The twice yearly solicitation, section 441b(b)(4)(B), is seemingly the only other attempt by the 1976 amendments to prevent coercion by controlling the means of solicitation. Under the provisions of this section, a solicitation may be addressed to any employee and must be in writing to the home address and designed so that the corporation, labor organization, or separate segregated fund conducting the solicitation cannot determine who makes or does not make a contribution of \$50 or less as a result of such solicitation. In the context of the wider audience solicitation, therefore, maintaining confidentiality is intended to avoid coercion. Senator Cannon explained that "[t]his restriction is valuable protection against person-to-person coercion, and provides a degree of anonymity so corporations or unions cannot set up elaborate systems to monitor who contributes and who does not."⁸² He provided the further caveat that a payroll checkoff system to withhold contributions automatically from an employee's paycheck could not be used in connection with the twice yearly solicitation. "[O]nce you permit the use of the checkoff, you put the [corporation, union, or PAC] in a position to maintain a list, and to be able to say, 'Here are the people who have contributed by a checkoff; we better see about the people who did not.'"⁸³ Although the statute does not prescribe a method to assure confidentiality, the FEC's proposed regulations recommend a custodial arrangement, where an independent third party receives and keeps records of all contributions.⁸⁴

79. 41 Fed. Reg. at 35,958 (1976).

80. See 2 U.S.C.A. § 441b(b)(5) (Cum. Supp. 1977).

81. 41 Fed. Reg. at 35,959-60 (1976).

82. 122 CONG. REC. S4151 (daily ed. Mar. 24, 1976). The only way that anonymity will not be maintained is if the individual so elects, or if the contribution or total contributions in any calendar year, exceed \$100.00, so that reporting requirements are triggered. See *id.* at S4151, 4156; § 114.6 of the proposed regulations, 41 Fed. Reg. at 35,959-60 (1976); F.E.C. Advisory Opinion 1976-47, 1 Camp. Prac. Rpt. 4:118.

83. 122 CONG. REC. S4156 (daily ed. Mar. 24, 1976). Cf. Letter from H.E. Petersen, Assistant Attorney General, Criminal Division, U.S. Dep't of Justice, to Richard D. Godown, General Counsel, Nat'l Ass'n of Manufacturers (Aug. 28, 1973) (because checkoff systems "are so potentially coercive," regardless of good intentions, any corporation or union using such a system "must be prepared at all times to demonstrate that contributions made through it are truly voluntary").

84. 41 Fed. Reg. at 35,959-60 (1976).

The requirement that all contributions to a separate segregated fund be given voluntarily, without coercion, may well be the most difficult part of establishing and soliciting contributions to a political action committee. Because of its particularly subjective nature, the issue of voluntariness could prove to be the most controversial and, perhaps the most litigated aspect of political action committees.

Prescribing specific methods of solicitation may infringe more on first amendment rights than either the separate segregated fund, permissible treasury fund expenditures, or control requirements. But protecting against coercion of the minority who may not wish to contribute has been clearly identified as a deserving and valid interest. Restrictions designed to assure the voluntary character of a political fund, therefore, may not be too great an intrusion into the corporation's or labor organization's first amendment rights. However, restrictions on the class of persons whom a PAC may solicit present a far greater infringement.

E. The Restricted Audience

The greatest effect of the 1976 amendments on the operation of PAC's was the limitation placed on the audience which a corporate PAC can solicit. Prior to the 1976 amendments, no such artificial audience restrictions had been imposed.⁸⁵ At present, by allowing unlimited solicitations to be directed only to executive or administrative personnel,⁸⁶ the statute unreasonably impedes the corporation's communication of political ideas to its employees. This is a substantial infringement of the corporation's first amendment rights which is not justified by a significant furtherance of any valid purpose of federal election legislation. Given the other restrictions on a PAC's functioning, the minority receives no protection by limiting the corporate employees who may be solicited.

Three rationales have been advanced for limiting a corporate PAC to addressing only its executive or administrative personnel in an unrestricted solicitation, that is, not the twice yearly solicitation. First, management-level employees and shareholders have a presumed direct interest in the fate of the corporate enterprise. Second, as a result of concern over employee-perceived coercion resulting from any political solicitation by an employer, the audience should be limited only to those least likely to be coerced. Third, the *Sun Oil* advisory opinion destroyed the parity which existed be-

85. See 40 Fed. Reg. at 56,585 (1975).

86. These restrictions are specifically set out at 2 U.S.C.A. §§ 411b(b)(4)(A) & (7) (Cum. Supp. 1977).

tween corporate and union PAC solicitation by allowing a corporation to solicit all its employees. In order to restore balance between the two, the audience available to the corporation will be restricted.

The first rationale is open to criticism on two grounds. To begin with, Congress had drawn a very hesitant and unclear definition of the group termed "executive or administrative personnel."⁸⁷ Therefore, it is difficult to understand why such a vaguely defined class can be deemed to be one with a greater stake in success of the corporate venture. During the joint House-Senate conference on the 1976 amendments, the broader Senate term "executive or administrative personnel" was substituted for the House's "executive officer."⁸⁸ The conference report then proceeded to define "executive or administrative personnel" to exclude "foremen who have direct supervision over hourly employees, or other lower level supervisors such as 'strawbosses'."⁸⁹ The exclusion of foremen had not been raised during the debate in either house.

To add to the confusion, the FEC's proposed regulations refer to the Fair Labor Standards Act (FLSA),⁹⁰ and to the regulations issued pursuant to that Act,⁹¹ "as a guideline in determining whether individuals have policy-making, managerial, professional, or supervisory responsibilities."⁹² Section 541 of the FLSA regulations is generally concerned with defining jobs in order to determine whether certain positions are exempt from or covered by the Fair Labor Standards Act.⁹³ The regulations do not establish fixed definitions of various jobs. Rather, they go through lengthy functional analyses to decide whether a job is exempt or nonexempt.⁹⁴ As a result, by reference to these regulations, certain foremen might reasonably be classified as exempt from provisions of the Fair Labor Standards Act. Does it follow that, if the FEC's regulations were finally issued with the reference to the Fair Labor Standards Act intact, then for the purposes of corporate PAC solicitations, some foremen could be solicited (those whose job functions make them exempt employees) and others could not be solicited? The FEC regulations imply an affirmative answer.

87. 2 U.S.C.A. § 441b(b)(7) (Cum. Supp. 1977).

88. CONF. REP. NO. 94-1057, 94th Cong., 2d Sess. 62 (1976); [1976] U.S. CODE CONG. & AD. NEWS 977.

89. *Id.*

90. 29 U.S.C. § 201, *et seq.* (1970).

91. 29 C.F.R. § 541 (1974).

92. 41 Fed. Reg. at 35,936 (1976).

93. 29 C.F.R. § 541 (1974).

94. *See, e.g., id.* §§ 541.1 (definition of "employee employed in a bona fide executive . . . capacity"); 541.2 (definition of "employee employed in a bona fide . . . administrative . . . capacity"); 541.115 (definition of "working foremen").

Furthermore, it may be possible to include certain foremen within the class of executive or administrative personnel by reference to a recent FEC advisory opinion.⁹⁵ In that opinion the FEC suggested the possibility of rebutting the presumption that the supervision of hourly employees—if that is the main function of a supervisor—places him outside the class of “executive or administrative personnel.” “Where . . . the supervision of hourly employees is the principal function of the supervisory employee, as is the case with most line supervisors, then, *absent strong evidence to the contrary*, that employee would not be within the class of executive and administrative personnel.”⁹⁶

It follows that one whose job title is “foreman” could possibly be included within the executive or administrative personnel class either by reference to the Fair Labor Standards Act job function definitions or by the “strong evidence” approach suggested in the recent advisory opinion. In either case the process is unpredictable. Congress has not, in fact, fixed a class of employees that can be said to have a close affinity with the corporate enterprise. The rationale for restricting the audience to those with a “greater stake” in the enterprise is seriously undermined when the definition of that class of employees is so difficult a task.

Limiting unrestricted solicitations to executive or administrative personnel is questionable for another reason. It is difficult to accept wholly the notion that some employees have a “greater stake” than others. Representative Brademas spoke of the “legitimate interests of [the corporation’s] owners and management” and the corresponding “legitimate interests” of members in their unions.⁹⁷ The better view would seem to be that any employee whose livelihood flows from his corporate employer has a direct interest in that employer’s success or failure.⁹⁸ It is illogical to conclude that an executive vice president has a greater dependence on his employer than an assembly-line worker does. Though the former may have a larger salary, his or her relative stake is no more significant. Limiting solicitation to higher salaried employees is essentially inconsistent with the notion of excluding monetary wealth as a criterion for election contributions. Indeed, if preventing money from speaking louder than ideas is a legitimate concern, then re-

95. See F.E.C. Advisory Opinion 1976-75 (Oct. 1, 1976), 1 Camp. Prac. Rpt. 4:129.

96. *Id.* (emphasis added).

97. 122 CONG. REC. H3782 (daily ed. May 3, 1976).

98. In a different context, Justice Powell, dissenting in *Pipefitters*, drew attention to the close relationship between employees and the corporate employer. He described the latter as “the very agent which exercises direct control over their jobs and livelihood.” 407 U.S. at 449. Interestingly, Justice Powell made no distinction between classes of employees and, in fact, was speaking directly of the union members involved in that case.

strictions should not be placed on the solicitation of lower-salaried or hourly-wage employees. In sum, the direct interest rationale does not seem to support the statutory limitation placed on the audience.

The second possible explanation for restricting corporate PAC solicitation is to avoid potential coercion of those considered most susceptible. The amendments limit solicitation of nonexecutive and nonadministrative personnel to twice yearly solicitations. Although the limitation in the amendment reflects a valid intent, the operation of the amendment does not adequately accommodate that intent. Certainly the purpose of avoiding coercion is laudable, and to the extent that limiting the scope of the audience would avoid coercion, it might be a justified restriction. Simple logic, however, suggests that it is not necessarily hourly employees or those without policy-making, managerial, supervisory, or professional responsibilities who are the most vulnerable to coercion. Rather, it is the executive, managerial, or supervisory personnel who may be the most susceptible. They will feel the subtle, perhaps unintentional, pressure to participate, to "go along," to "give their fair shares." A corporate PAC would find it far more lucrative to be overly persuasive in the board room than on the assembly line.

Assuming this to be the case—and this line of reasoning is compelling—then Congress has either: (1) recognized the possible coercion in a solicitation of executive or administrative personnel and satisfied itself that the safeguards written into the statute as solicitation provisos will suffice, or (2) failed to recognize what group is most effectively vulnerable to coercion. Given the great emphasis on the voluntariness of contributions, it is improbable that Congress altogether overlooked the possibility of coercion of executive personnel. Therefore, if Congress has adequately protected the right of an executive or administrative employee to refuse to participate without fear of or actual reprisals, then similar safeguards would seem adequate to protect those for whom Congress provided special "protection."

The final rationale—preserving parity between union and corporate PAC's—is frequently mentioned in congressional debates. Moreover, in their *Sun Oil* dissent, Commissioners Harris and Tiernan argued forcefully that it was Representative Hansen's and Congress' intent "to hold the balance even" between union and corporate solicitations to political funds.⁹⁹ They argued that the majority destroyed that balance by allowing SUN PAC to solicit its 126,555 shareholders and 27,700 employees (figures as of December 31, 1974), while labor would be restricted to soliciting the small percentage of the employees who were actually union members.¹⁰⁰

99. 40 Fed. Reg. at 56,587 (1975) (Comm'rs Harris & Tiernan dissenting).

100. *Id.* As the dissenting Commissioners projected that imbalance:

In addition, Commissioners Harris and Tiernan urge other than a literal interpretation of the Hansen amendment.

[R]ead literally, the third exception would permit a corporation or union to solicit not only stockholders or members, but the general public, that is, anybody and everybody. . . .

A more rational construction of the statute is that the first and third Hansen Amendment exceptions are to be read together. Individuals cannot be solicited to make a voluntary contribution except by communicating with them It creates an inexplicable exception to [congressional] intent to read the permission to solicit contributions as separate from the permission to communicate with stockholders and members rather than reading these two clauses of the same sentence together.¹⁰¹

Thus, the *Sun Oil* dissent argues that the Hansen amendment intended to restrict solicitations to separate segregated funds to an audience of corporate shareholders and union members.

During debate on the 1976 amendments, the parity theory was frequently cited as the purpose behind the Hansen amendment, and reestablishment of parity was declared the goal of the most recent legislation. "Congress [in 1971] sought to establish a balance between the political activities allowed to corporations and labor unions in order that the extent of political activities carried on by either kind of entity might not burgeon so as completely to overwhelm the activities of the other."¹⁰² This argument continues by noting that the 1976 amendments reestablish the "congressionally determined balance between the interests of the business community and its stockholders, and the interests of the labor community and its membership."¹⁰³ In the

On a national scale, the majority ruling grants corporations as a group an unfair advantage over labor unions in the solicitation of political contributions. It is estimated that over 30,900,000 individuals own shares of stock in American corporations. 1975 *World Almanac* 94. But, out of the nation's total workforce of 84,000,000 workers, only 18,000,000 of them (or about 21%) are members of labor unions . . . 1975 *World Almanac* 108. Had corporations been restricted to soliciting only their stockholders, they could have solicited almost twice as many individuals as labor unions. Under the majority's ruling, however, corporations now have the potential of soliciting almost the entire workforce of the nation. Congress certainly did not intend to create such a gross disparity in the solicitation power of corporations and unions, by enacting the segregated fund exception to § 610, as the majority of the Commission now permits in its interpretation of the statute.

Id.

101. *Id.* at 56,586.

102. 122 CONG. REC. H3782 (daily ed. May 3, 1976) (remarks of Rep. Brademas).

103. 122 CONG. REC. H2612 (daily ed. Mar. 31, 1976) (remarks of Rep. Thompson).

general context of the debate, Democratic members of the House of Representatives appear, just as the *Sun Oil* dissent did, to define parity as having two elements. First, the groups which corporate and union PAC's each may solicit should be of relatively equal size, so that, second, each will receive proportionate contributions as a result of the solicitations.¹⁰⁴

The difficulty with this third rationale for restricting the audience, restoration of pre-*Sun Oil* advisory opinion parity, is that numerical parity per se may not be justified and that there is no clear evidence that numerical parity was intended by the Hansen amendment. There is little to be said in favor of creating solicitation rights based on equalizing the numbers to be solicited and the predicted contributions to be received. If a right is created, it ought not to be whittled away until the same *number* of people will benefit from that right. While there are justified and reasonable means to restrict the application of a right, for example, restricting it to those with a direct interest, numerical parity lacks reasonableness.¹⁰⁵

To the extent that it is based on the intent of the Hansen amendment, restoration of parity is also a weak rationale for limiting the audience. The language of the amendment itself does not clearly indicate who could be solicited. Nor do Representative Hansen's remarks during floor debate clarify his intent on this subject.¹⁰⁶ During the 1976 debate, supporters of

104. For example, Representative Maguire argues that allowing corporations to solicit only their shareholders while unions solicit their members would not give a numerical advantage to unions. In support of this numerical parity argument, he cites the fact that AT&T has 2.9 million shareholders and 999,796 employees, that the New York Stock Exchange Review of 1974 says there are 31 million shareholders in the United States, with a shareholder to employee ratio among major corporations of 3 to 2. "All in all," he concludes, "the provision now in the bill appears equitable and symmetrical with respect to the rights and privileges of solicitation for funds by corporations and unions." *Id.* at H2614.

105. In its 1976 shareholder solicitation, Sun Oil, one of the very few corporations actually to solicit shareholders, solicited 43,000 selected shareholders (those with individual and joint ownership of over 100 shares, excluding employees and most retirees, except for retirees with over 1,000 shares) by mail. Personal phone calls were made to 200 of the largest shareholders. Of the 43,000 solicited, 850 shareholders contributed. Thirty percent of the 200 largest shareholders contributed, and 1.9% of the remaining group contributed. Whether or not these figures indicate a good result, officials at Sun Oil are pleased. They feel that such shareholder communication is very important and that they now have 850 people with whom they can communicate. Interview with David W. Twomey, *supra* note 59.

106. See 117 CONG. REC. 43,379-81 (1971). While not specifically resolving the issue of who can be solicited, the Court in *Pipefitters* referred to the right to use treasury funds to solicit contributions. "The dissent, too, appreciates 'the freedom of union members, as well as that of *employees and stockholders* of corporations, to make uncoerced political contributions.'" 407 U.S. at 401-02 n.12 (emphasis added). *But*

restricting the corporate audience frequently referred to Hansen's "balancing" of corporate and union rights. But in fact, the balance which Hansen sought was much broader. It was the balance between impermissible corporate and union political activities—the use of general treasury funds, and permissible activities—the amendment's three exceptions.¹⁰⁷

Former Representative Hansen has himself recently stated that by introducing his amendment he did not intend to restrict the audience which could be solicited. The specific issue of who could be solicited to contribute to a separate segregated fund was not even raised at the time. The real focus was registration and get-out-the-vote drives.¹⁰⁸

None of the three rationales offered to support audience restriction appears to justify adequately its inclusion in the 1976 amendments. Explaining why the provision was adopted is perhaps not as difficult as finding an acceptable rationale. Representative Moore offers one explanation:

What then is the reason the current law is so radically altered

see 122 CONG. REC. H2538 (daily ed. Mar. 30, 1976), in which Representative Brademas noted:

It is of very great importance . . . to note that throughout consideration in the House of the Hansen amendment, Mr. Hansen's remarks and those of other Members of the House who took part in the debate without exception linked the valid political interests of corporations to those of their stockholders, and the valid political interests of labor unions to those of their members.

107. 117 CONG. REC. 43,381 (1971).

At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language.

Id. (Remarks of Rep. Hansen).

108. Interview with former Representative Orval Hansen, in Washington, D.C. (Jan. 7, 1977). He suggested that the real history of the amendment has not been told. He considered his amendment a tactical move designed to save the entire bill by securing union support. Labor had opposed the alternative Crane amendment, which also attempted to codify prior court decisions, but which would have restricted union activity in get-out-the-vote drives. The Hansen amendment was, therefore, a substitute amendment. If the presiding officer in the House had not recognized Representative Hansen before Representative Crane, his amendment might never have come to a vote. From his present vantage point, Representative Hansen assumed that a corporation would only attempt to reach certain employees, primarily executives, since they would be most likely to respond with contributions. *Id.*

in this bill? Since no hearings were held to develop evidence for the need for such, one can only conclude the obvious—"politics." The strongest and most effective coalition of political action committees in the Nation, those of labor unions, oppose any challenge to their current collective political dominance as the most powerful special interest group in American politics today.¹⁰⁹

In summarizing recent federal election legislation it is clear that new guidelines for the establishment and operation of PAC's are in effect. Consideration of the voluntary-coercion problem and the audience limitation requirements is especially critical, for it is these two matters that are left most unsettled following the enactment of the 1976 amendments. To the extent that litigation arises, it will likely fall in one of these two areas. The issue of whether participation in a PAC has been mandatory is highly subjective and tends to be volatile. That subject will probably be a matter of ongoing debate. The restricted audience limitations, on the other hand, may seem unjustified so that certain corporate interests will challenge their basic legitimacy.

III. CONSTITUTIONAL INFIRMITIES IN THE 1976 AMENDMENTS

Because of the broad scope of the audience provisions, challenges to the constitutionality of section 441b can be expected.¹¹⁰ One could argue that allowing unrestricted corporate solicitations of shareholders and executive or administrative personnel, plus restricted, twice yearly solicitations of all other employees, is a reasonable compromise. A politically convenient compromise will not, however, justify legislating away rights, particularly first amendment rights. The scope of audience limitations may also reasonably be read as supplementing the anti-coercion provision. This additional restriction, however, is really not necessary. The pure anti-coercion provision, ill-directed as it is, should adequately protect nonparticipating minorities. One not persuaded by the arguments offered in justification for the scope of audience provisions can imagine the basis for a constitutional attack.

The guarantee of first amendment rights is well established: a "preferred

109. 122 CONG. REC. H2539 (daily ed. Mar. 30, 1976).

110. The Supreme Court has, until now, avoided a direct ruling on the constitutionality of either § 441b or its predecessor, § 610. See *United States v. UAW*, 352 U.S. 567 (1957) (remand before reaching constitutional issues); *United States v. CIO*, 335 U.S. 106 (1948) (the Court avoided the constitutional issue by ruling that Congress could not have meant to prohibit political recommendations through a union newspaper). However, the constitutionality of § 610 was upheld in *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

place [is] given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."¹¹¹ It is through the first amendment that political expression has been granted the widest protection, "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹¹² The Supreme Court has declared that "speech concerning public affairs is more important than self-expression; it is the essence of self-government."¹¹³ The Court has, of course, fashioned tests to determine whether any infringement on first amendment rights is justified. In *Buckley v. Valeo*,¹¹⁴ the Court elaborated on the importance of first amendment rights and the narrow circumstances under which they can be restricted:

In view of the fundamental nature of the [first amendment] right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, [357 U.S. 449], 460-461 [1958]. Yet, it is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." [*Civil Service Commission*] v. *Letter Carriers*, 413 U.S. 548, 567 (1973). Even a "significant interference" with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms. *Cousins v. Wigoda*, 419 U.S. [477], 488 [1975]; *NAACP v. Button*, [371 U.S. 415], 438 [1963]; *Shelton v. Tucker*, [364 U.S. 479], 488 [1960].¹¹⁵

The Court in *Buckley* placed the right to contribute within the protected rights of association. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals."¹¹⁶

Federal election legislation has not granted the right to solicit contributions the same protection as has been judicially recognized for the right to make contributions. During debate on the 1976 amendments, it was pointed out that restrictions on corporate solicitations "in no way limit[s] the class of con-

111. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

112. *Roth v. United States*, 354 U.S. 476, 484 (1957). See also *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Winters v. New York*, 333 U.S. 507, 510 (1948).

113. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

114. 424 U.S. 1 (1976).

115. *Id.* at 25.

116. *Id.* at 22.

tributors, but only the class which may be solicited."¹¹⁷ The FEC's proposed regulations support this position that a corporation can receive contributions from anyone allowed by law to make contributions.¹¹⁸ In other words, the audience which can contribute to a PAC remains unrestricted while only the audience which can be solicited has been restricted. The 1976 amendments, therefore, appear to be constitutionally sound in regard to the right to contribute.

The right to solicit, however, is distinct from the right to contribute. Still, it is arguably within the category of expression protected by the first amendment. Representative Hansen and Commissioners Harris and Tiernan all referred to solicitation as a communication:

The [Hansen] amendment sets forth the limited circumstances where such communications are permitted in connection with an election. These include:

- (1) non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families.
- (2) the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization.¹¹⁹

Indeed, when construing the \$1,000 personal contribution limitation in *Buckley*, the Supreme Court stated that "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."¹²⁰ As the Court found the direct expenditure of funds protected by the first amendment, it is difficult to believe that mere solicitation of such "communications," whether by the candidate directly or by a PAC, should deserve any less protection.

The 1976 amendments too far restrict the constitutional rights of the corporation to communicate. The Supreme Court has held that a corporation has first amendment rights,¹²¹ and in *United States v. CIO*,¹²² the Court

117. 122 CONG. REC. H2612 (daily ed. Mar. 31, 1976) (remarks of Rep. Thompson).

118. 41 Fed. Reg. at 35,959 (1976).

119. 117 CONG. REC. 43,379 (1971) (remarks of Rep. Hansen). See note 100 & accompanying text *supra*, for reference to Commissioners Harris and Tiernan's argument that solicitation is a communication.

120. 424 U.S. at 16.

121. See, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). See also *NAACP v. Button*, 371 U.S. 415 (1963); *United States v. Security Nat'l Bank*, 546 F.2d 492 (2d Cir. 1976); *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974); *Writers Guild of Am., West v. FCC*, No. CV75-3641-F (C.D. Cal., Nov. 4, 1976); *Clagett & Bolton*, *supra* note 5.

122. 335 U.S. 106 (1948).

implied that any statute which restricted a corporation's right to communicate with its shareholders on political issues would cause "the gravest doubt [to] arise in our minds as to its constitutionality."¹²³ The Court did not, however, indicate whether political content in a corporate communication aimed at the general public was protected by the first amendment.¹²⁴

The Second Circuit has been more precise in affirming the constitutional rights of corporations. In one case the court asserted that "a corporation . . . is a 'person' entitled to both equal protection and due process under the Constitution"¹²⁵ In another case involving first amendment issues, it noted that "corporate contributors, . . . like individuals, are guaranteed freedom of speech and petition."¹²⁶ Accepting the Second Circuit's view that a corporation is entitled to the full panoply of first amendment rights, the conclusion follows that the corporation's right to communicate extends to its employee contacts. But even applying the more restrictive theory, a question remains as to the outer limits of a corporation's first amendment rights. Freedom to communicate directly with its employees should be considered among the most basic corporate first amendment rights. The employer-employee relationship is a natural one in which each party has a direct economic interest in the other. Moreover, information vital to the employer is also vital to the employee, even if it happens that such information is of a political nature.

Although they have the right to contribute to a PAC, members of the "middle group" of employees who are neither union members nor "executive or administrative personnel" could argue that their complete freedom of speech and association is restricted by their exclusion from the group which can be solicited without limitation. In addition, the employee has a right

123. *Id.* at 121. In his concurring opinion, Justice Rutledge elaborated on the corporation's freedom of speech:

There are of course important legal and economic differences remaining between corporations and unincorporated associations, including labor unions, which justify large distinctions between them in legal treatment. But to whatever extent this may be true, it does not follow that the broadside and blanket prohibitions here attempted in restriction of freedom of expression and assembly would be valid in their corporate applications. Corporations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression.

Id. at 154-55.

124. *Id.* at 121.

125. *United States v. Security Nat'l Bank*, 546 F.2d 492, 494 (2d Cir. 1976) (a corporation cannot be placed in "double jeopardy" for the same allegedly unlawful political contribution).

126. *Schwartz v. Romnes*, 495 F.2d 844, 852 (2d Cir. 1974) (a corporation can make political contributions in support of its interests in a bond referendum campaign).

to information concerning the corporation's best political interests. Representative Wiggins, one of the conferees, explicitly urged that attention be focused on the rights of those who contribute to a PAC:

The bill mistakenly focuses upon the special interests of the PAC's. The rights of the soliciting PAC are not to be neglected, of course, but the rights of the donors to the PAC are of at least equal importance. It is the right of the donor which is seriously and unjustifiably diminished by this bill.¹²⁷

Senator Packwood introduced an unsuccessful amendment to permit both corporate and union PAC's to solicit the "middle group" of employees, citing their significance as comprising about half the work force of major corporations.¹²⁸

Given these first amendment rights and apparent infringements on these rights by section 441b(b)(4)(A), it is necessary to determine whether Congress has a sufficiently important interest to justify permitting the infringements, and, if so, whether the amendments provide the least restrictive method of protecting or advancing that interest. Several rationales have been offered for implementing such a scope of audience restriction. The "direct interest" theory, which suggested that only shareholders and certain employees, not easily identifiable, were closely enough related to the corporation to be solicited, is hardly a sufficient governmental interest to justify restricting first amendment rights. All employees are economically dependent upon their employers, so that no one group can accurately be said to have a greater direct involvement than any other group. Similarly, the parity theory, which sought to equalize the numbers of corporate and union people solicited and the resulting contributions, provides an insubstantial governmental interest.¹²⁹

127. 122 CONG. REC. E1703 (daily ed. Mar. 31, 1976).

128. *Id.* at S3699 (daily ed. Mar. 17, 1976).

129. It is argued . . . that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

424 U.S. at 48-49, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964), quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and *Roth v. United States*, 354 U.S. 476, 484 (1957).

Finally, the coercion theory requires maintaining confidentiality in any solicitation of the "middle group" and arises from the general, but secondary, purpose of the original section 610—the protection of minority interests within a corporation or labor organization. However, section 441b, added by the 1976 amendments, may reach the erroneous conclusion that the "middle group" of employees is most vulnerable to coercion. If executive employees are actually more susceptible to the effects of coercion, however unintentional or subtle, and if Congress deemed the three provisos given at the time of solicitation sufficient to avoid coercion, then it is not logical to impose even greater restrictions on solicitations of the "middle group." On the other hand, if there is a legitimate need to protect the "middle group," then maintaining the confidentiality and the voluntariness of contributions very likely provides adequate protection without also restricting the frequency with which that group can be solicited. Under either view, adequate protection of minority interests may be accomplished with less infringement on first amendment rights than is now imposed by the scope of the audience restrictions.

Leaving the subject of apparent interference with corporate rights to communicate and employees' rights to contribute freely to campaigns, we again consider the most basic purpose of the federal election legislation. That goal—more fundamental than protecting the interests of the corporate and union minorities—is avoiding the improper influence of aggregated wealth. According to the rationale of *Buckley v. Valeo*, the contribution limitations alone may be adequate to safeguard this congressional purpose, without any restrictions on the scope of the solicited audience.¹³⁰ In ruling on the constitutionality of the \$1,000 contribution limitation by individuals and groups to candidates and authorized campaign committees,¹³¹ the Court found that the "Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions"—was "constitutionally sufficient justification" to uphold the limitation.¹³²

The Court gave some indication that the \$1,000 contribution limitation adequately safeguards the primary purpose of the Act while leaving individuals free to express their political views in other ways. The Court proceeded to discuss these alternative means without any indication that they either are

130. In finding aggregate expenditure limitations unconstitutional, the Court held that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19.

131. Those limitations are contained in 18 U.S.C. §§ 608(b), 591(g), § 591(e) (Supp. V 1975).

132. 424 U.S. at 26.

or should be restricted beyond the contribution limitation in order to carry out the legislative purpose.¹³³

Two possibly contradictory meanings can be derived from the Court's discussion of alternative means of political expression and the separate segregated fund. First, because the separate segregated fund exception was not at issue, the Court chose not to comment on it directly, but rather expressed veiled concerns about its use as a means of subverting the primary aim of the Act—"to limit the actuality and appearance of corruption resulting from large individual financial contributions."¹³⁴ If the Court were taking the position that the separate segregated fund exception ultimately reinjects the appearance of aggregated wealth into federal elections, when confronted with the issue, the Court would likely uphold certain "closely drawn" means of limiting the deleterious effects of the separate segregated fund. On the other hand, the Court may think that the primary purpose of the Act is sufficiently protected by the contribution limitation, so that the alternative means are freely available to corporations or labor organizations.

There are strong suggestions that the Court intended the first alternative. It expressly noted that the problem of large campaign contributions was "the narrow aspect of political association where the actuality and potential for corruption have been identified."¹³⁵ Perhaps the Court anticipates or acknowledges that other aspects of political association either will become, or already are, sources of corruption, which somehow had escaped legislative

133. *Id.* at 28-29. The Court went even further, and in a footnote elaborated on the type of political expression left open to individuals:

While providing significant limitations on the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special interest groups through the combined effect of individual contributions from adherents or the proliferation of political funds each authorized under the Act to contribute to candidates. As a prime example, § 610 permits corporations and labor unions to establish segregated funds to solicit voluntary contributions to be utilized for political purposes. Corporate and union resources without limitation may be employed to administer these funds and to solicit contributions from employees, stockholders, and union members. Each separate fund may contribute up to \$5,000 per candidate per election so long as the fund qualifies as a political committee under § 608(b)(2).

Id. at 28 n.31, citing S. REP. NO. 93-1237, at 50-52 (1974); Federal Election Commission Advisory Opinion 1975-23 (Nov. 24, 1975), 40 Fed. Reg. 56,584 (1975). The 1976 amendments' anti-proliferation provision has, of course, limited the contributions from related PAC's to a single candidate to a total of \$5,000. See note 44 & accompanying text *supra*.

134. *Id.* at 26.

135. *Id.* at 28.

sanction and were not then before the Court for adjudication. If so, it may have issued a forewarning against the potential undermining of the Act's purpose as a result of "substantial contributions to candidates by some major special interest groups through . . . the proliferation of political funds."¹³⁶ But the 1976 amendments may have forestalled any possibility of such an undermining through the anti-proliferation provision. Section 441a(a)(5) now curtails the vertical proliferation of contributions by political committees by treating certain labor or corporate political committees as one for contribution purposes.¹³⁷

The sound conclusion appears to be that the Court will find the contribution limitations adequate of themselves, without further particular restrictions on political funds, particularly in light of the anti-proliferation provision. One could argue that vast sums of money will be spent in establishing, administering, and soliciting contributions to corporate and union funds. Very likely that will be so. However, money spent in that way is not a direct contribution and is expressly permitted by the 1976 amendments.

Without impermissibly restricting the first amendment rights of either the corporate PAC managers, the corporation itself, or the employees and shareholders who would be solicited, the contribution limitation adequately assures that elections will not be corrupted by the effects of aggregated wealth. This, combined with such safeguards against coercion as the statutory provisos, appears to reach an acceptable balance between first amendment rights and legitimate governmental interests. The solicitation provisions, however, fail to contribute to that balance because of the excessive first amendment restrictions discussed earlier.

IV. CONCLUSION

Perhaps because federal election legislation is so close to the heart of Congress, there has been little dispassionate debate in this area. The subject of corporate and union political action committees has understandably generated particularly partisan responses. As a result, the Federal Election Campaign Act Amendments of 1976 were not drafted with complete objectivity and may be subject to constitutional challenge. Drafting carefully reasoned federal election legislation is obviously a difficult task. In structuring and regulating PAC's, Congress has for the most part performed its duties well, except with respect to the scope of audience restrictions. One

136. *Id.* at 28 n.31.

137. 2 U.S.C.A. § 441a(a)(5) (Cum. Supp. 1977).

effect of these particular provisions contrary to basic democratic principles is to stifle participation in the electoral process.¹³⁸

In his dissenting opinion in *United States v. UAW*,¹³⁹ Justice Douglas addressed what is perhaps the crucial factor in corporate and union political action committee legislation:

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate.¹⁴⁰

Congress has not yet addressed the issue from a similar vantage point. Until it does, it is, in effect, allowing first amendment rights of participation in the electoral process to be sacrificed to the haste, passion, or carelessness of the legislative process.

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138. See, e.g., 122 CONG. REC. H2539 (daily ed. Mar. 30, 1976).

The whole purpose in political action committees is to allow persons with like philosophical and/or economic interests to band together and to promote those interests through a political action committee. This is participation in our political system and certainly any participation in politics should be encouraged and not hindered. Our democracy needs greater, not less, participation by our citizenry. Political action committees can be justified only on this basis. They currently meet this need by encouraging citizens by the thousands to become more politically active. *There should be no "political" hindrances on who can join and participate in such committees* (emphasis added).

Id. at H2539-40 (Remarks of Rep. Moore).

139. 352 U.S. 567 (1957).

140. *Id.* at 597.