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Federal Election Campaign Act--Political Committee (United States v. National Committee for Impeachment)

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struggle to stop a war which infected the United States. Perhaps now of minimal importance, *Holtzman* will be noteworthy if the United States ever again becomes embroiled in a "Vietnam." The recent passage of the Joint Congressional Resolution On War Powers[35] effects the methodology of the Second Circuit. This law, passed over President Nixon's veto, requires the President to report to Congress within 48 hours after commitment of armed forces to foreign combat. Such combat may be continued for only a 60 day period absent congressional approval with a 30 day extension allowed to permit safe withdrawal. Congress may, within this 90 day period, demand removal of American forces by resolution, and such resolution would not be subject to veto. By requiring affirmative congressional action to extend any troop commitment this law hopefully will provide "judicially discoverable and manageable standards" in the "twilight zone"[36] of shared war-making powers.

FEDERAL ELECTION CAMPAIGN ACT — POLITICAL COMMITTEE

United States v. National Committee for Impeachment

The Federal Election Campaign Act of 1971[1] (FECA) imposes a multitude of registration, reporting and disclosure requirements[2] on

and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations.

— F.2d at — (emphasis added).

35 H.R.J. RES. 542, 119 CONG. REC. 20093 (daily ed. Nov. 7, 1973).

36 Regarding the exercise of concurrent or interrelated war powers by the President and Congress, the remarks of Mr. Justice Jackson concurring in *Youngstown* are quite appropriate:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

343 U.S. at 637 (emphasis added).

1 Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. I-IV, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.), *formerly* Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1970. For the legislative history of the Act see 1972 U.S. CODE CONG. & AD. NEWS 1773. A manual of regulations for the Act has been issued by the Comptroller General. *See* 37 Fed. Reg. 6156 *et seq.* (1972).

2 The disclosure requirements of the Act are codified in 2 U.S.C. §§ 431-41, 451-54 (Supp. 1973). Section 443(a) requires any political committee which anticipates receiving contributions of more than $1,000 in a calendar year to file a "statement of organization." Section 443(b) sets forth what must be included in the statement, *e.g.*, the names and addresses of the committee's officers, the relationships of affiliated or connected organizations, and the names and addresses of candidates being supported. Section 434 directs the treasurer of the committee to file and publish financial reports indicating receipts and contributors, stating expenditures and identifying recipient candidates.

a "political committee." Though the Act defines political committee as "any committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000,"[3] the definition lacks specificity. An understanding of what is intended as a political committee subject to FECA's requirements necessitates analysis of the words "contribution"[4] and "expenditure."[5] FECA defines both in terms of an application of money or something of value "made for the purpose of influencing" the nomination or election of a candidate for federal office.[6] Though the purpose of the Act was to control the abuses of campaign spending,[7] the vagueness of definition renders the Act's scope unclear.[8]

In *United States v. National Committee for Impeachment*,[9] the Second Circuit limited the scope of FECA by construing narrowly the definition of political committee. The court of appeals reversed the district court which had granted the Government's petition enjoining the activity of the National Committee for Impeachment (National Committee) for non-compliance with FECA. In holding that the National Committee's activity fell without the scope of FECA, the Second Circuit avoided direct consideration of the "serious" first amendment issues that otherwise would have been raised.[10]

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3 2 U.S.C. § 431(d) (Supp. 1973).

4 Section 431(e) defines "contribution" as "(1) a gift, subscription, loan, advance, or deposit of money or anything of value, made for the purpose of influencing the nomination for election, or election, of any person to Federal office or as presidential or vice-presidential elector. . . ."

5 Section 431(f) defines "expenditure" as "(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of influencing the nomination for election, or election, of any person to Federal office, or as presidential and vice-presidential elector. . . ."

6 2 U.S.C. § 431(e), (f) (Supp. 1973).

7 S. REP. No. 92-96, 92d Cong., 2d Sess. (1972). Congress, however, by the use of vague definitions of "political committee," "contribution," and "expenditure" did not clearly indicate who was bound by the statute. In the instant case, the Second Circuit noted that "[h]ere as elsewhere Congress has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." United States v. National Comm. for Impeachment, 469 F.2d 1135, 1139 (2d Cir. 1972), *quoting* Rosado v. Wyman, 397 U.S. 397, 412 (1970). The court was guided not only by "those commonsense assumptions that must be made in determining direction without compass, but [by] some fundamental principles of freedom of expression in our democratic form of government." *Id.*

8 *See* note 10 *infra*.

9 469 F.2d 1135 (2d Cir. 1972).

10 *Id.* at 1140. Where a statute is capable of two alternative interpretations, one of which would raise a conclusion of dubious constitutionality and the other of which would allow the statute to avoid an unconstitutional infirmity, the court has a duty to avoid the constitutional issue if possible. United States v. Rumely, 345 U.S. 41 (1953). The National Committee argued that FECA was unconstitutional on its face and as applied. It argued that FECA was violative of the constitutional guarantee of political expression and association and that the sweeping manner by which Congress sought to

The Government sought the injunction after the National Committee placed an advertisement in the May 31, 1972, issue of *The New York Times* entitled "A Resolution to Impeach Richard M. Nixon as President of the United States."[11] The advertisement listed various officers, sponsors and attorneys of the National Committee and contained two contribution coupons soliciting public donations. Reprinted in the advertisement was the text of House Resolution 976, introduced into Congress on May 10, 1972, calling for the impeachment of President Nixon for his alleged unconstitutional usurpation of Congress' war making powers by virtue of his conduct of the war in Vietnam. The general tenor of the advertisement derogated the President's conduct of the war and extolled the Congressmen who had introduced and co-sponsored the impeachment resolution by placing them on the National Committee's "Honor Roll,"[12] which was also printed in the

achieve its goals lacked the precision required of laws which purport to regulate such activity. *See* United States v. Robel, 389 U.S. 258 (1967) (statute by its overbreadth unconstitutionally abridged the right of association); Mills v. Alabama, 384 U.S. 214 (1966) (prohibition of election day editorials violates first amendment freedom of speech); NAACP v. Alabama, 357 U.S. 449 (1958) (compulsory disclosure of membership lists in a controversial organization held to be an unconstitutional restraint on freedom of association).

A Washington, D.C. three-judge panel recently struck down a section of FECA as an unconstitutional prior restraint on freedom of the press. ACLU v. Jennings, 336 F. Supp. 1041 (D.D.C. 1973). The section involved required a newspaper, if it sought compensation for publishing a political advertisement, to obtain a certificate from each "candidate" named in the ad, certifying that each such candidate had not exceeded his spending limitations imposed by the Act. The ACLU had sought to place an ad in *The New York Times* criticizing the President's antibusing legislation and listing an "honor roll" of 102 Representatives who had voted against such legislation. The *Times* refused to publish the ad after being notified by the Government that it was a partisan ad and that the paper would be required to obtain cerificates from all 102 Representatives.

In Pichler v. Jennings, 347 F. Supp. 1061 (S.D.N.Y. 1972), Judge Pollack dismissed a complaint brought by the New York State Conservative Party seeking declaratory and injunctive relief from certain provisions of FECA. Plaintiffs contended that the certification requirement gave the candidates a "veto power" over the efforts of unpopular groups to express their views concerning candidates since they could prevent publication by refusing the certificate. The plaintiffs also contended that the disclosure requirements would deter many persons from serving as officers of, and from contributing to, "unpopular" groups. The court rejected both contentions as nonjusticiable, finding the complaint "wholly speculative," involving only "imaginary hypotheses," and bare of factual context "which would allow the Court to clarify — rather than to divine — the interests of the public, the media, the candidates and their supporters." *Id.* at 1069.

For a discussion of the first amendment issues raised by campaign regulations see Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900 (1971); Note, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 214 (1972); *The Federal Election Campaign Act of 1971: Reform of the Political Process?*, 60 GEO. L.J. 1309 (1972).

11 The advertisement was a two-page spread consisting of 5,100 lines of type, costing $17,850. 469 F.2d at 1143.

12 The Committee "honored" Representative William F. Ryan "who filed the first [impeachment resolution] in the House of Representatives," as a member of the Committee on the Judiciary, Representative John Conyers, Jr. who initiated House Resolution

advertisement. In decrying the President and urging others to support the resolution, the ad went on to state:

> The National Committee for Impeachment will devote its resources in funds and publicity in aid of any new candidate for election to the House of Representatives or re-election of an incumbent Member, whether in a primary contest or the actual election contest, whether Republican, Democrat, Independent, or a new party [who will support the impeachment resolution], in the order in which their names are officially printed in The Congressional Record.[13]

Additionally, the National Committee gave notice that if the campaign for impeachment was unsuccessful as of a certain unspecified date,

> it [would] seek to establish, if possible, pursuant to the appropriate legal methods in each of the 50 States of the Nation, a new political party for the nomination and election of a new President and Vice-President of The United States, and of new incumbent members of the House of Representatives, known as The Puritan Party of The United States.[14]

The district court found the National Committee to be a political committee within the meaning of section 431(e) of the Act and granted a preliminary injunction,[15] enjoining the committee from performing the functions characteristic of such a committee, such as accepting contributions and disbursing funds,[16] pending compliance with the statutory requirements. The Second Circuit, per Judge Oakes, reversed, concluding that the National Committee was not an FECA political committee.

The court adopted a double-pronged test to determine what is a political committee within the meaning of FECA. First, the court construed the term "for purpose of influencing" in sections 431(e) and (f) to apply to "an expenditure made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candi-

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976, and Bella Abzug, Shirley Chisholm, Ronald Dellums, Charles Rangel, Louis Stokes, and Parren Mitchell as co-sponsors of the resolution. The Committee also honored Representative Paul N. McCloskey, Jr. as the first member of the House of Representatives to publicly call for impeachment as a way to alter the administration's Vietnam policy. In addition, the Committee promised to place on its "Honor Roll" any new Member signing the impeachment resolution. 469 F.2d at 1143.

13 469 F.2d at 1143.

14 *Id.*

15 A stay of the district court's order was granted pending an appeal on the merits which was heard on an expedited basis. *Id.* at 1137 n.3.

16 *Id.* at 1137.

date or his agents."[17] Consequently, there must be some nexus between the group or organization and a particular candidate in a specific campaign.[18] Second, the court construed the Act "to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates,"[19] as distinguished from funding movements dealing with national policy or attempts to influence the thinking of the community on a particular issue or concern.[20] The court expressly reserved decision on whether the Act would be applicable if only one of the announced tests was satisfied.[21]

The instant facts satisfied neither test. In spite of the "Honor Roll" of Congressmen, the court found the required nexus with a particular candidate totally lacking,[22] noting that there had been no authorization or approval from anyone "honored" in the ad,[23] nor had any money been expended on any of those honored or on any other candidate. Applying the second test, the court found that the major purpose of the advertisement was not to influence elections but to advance the impeachment movement and to condemn presidential handling of the Vietnam war. The committee's professed intent was to use its funds to support candidates who would back the impeachment resolution, promising to assist candidates in general at some indefinite time and in some unspecified campaign.[24]

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17 *Id.* at 1141.

18 The language of several sections of FECA lend support to this position. For example, section 433(b)(6) requires that the organizational statement filed by the committee contain "the name, address, office sought, and party affiliation of (A) each candidate whom the committee is supporting, and (B) any other individual, if any, whom the committee is supporting for nomination for election, or election, to any public office whatever; or, if the committee is supporting the entire ticket of any party, the name of the party." Section 434(a) requires various reports to be filed by "[e]ach treasurer of a political committee supporting a candidate or candidates for election to Federal office. . . ."

19 469 F.2d at 1141.

20 The Second Circuit's construction of FECA parallels the Supreme Court's construction of the Lobbying Act in United States v. Harriss, 347 U.S. 612 (1954). The Court held the Lobbying Act's requirement of disclosure of information (concerning all those who engage in activities for the purpose of influencing, directly or indirectly, Congressional legislation) applicable only if the individual's main purpose was to influence legislation and there was "direct communication with members of Congress." *Id.* at 620.

21 469 F.2d at 1141.

22 The court noted that at the time the advertisement was printed two of those "honored," Representative Bella Abzug and the late Representative William F. Ryan, were competing against each other in a Congressional primary fight, implying that the election of a particular candidate was not the goal of the honor roll. *Id.* at 1139 n.9.

23 Representative Bella Abzug, one of the "honored" members of the House of Representatives stated that it was "highly improper" to use an advertisement about the impeachment drive to solicit funds to support the election campaign of any candidate. She said that she would not accept such funds. *Id.* at 1139 n.8.

24 *Id.* at 1140. The promise to support candidates was deemed incidental, however,

Though it construed FECA to exclude the National Committee, the court, nevertheless, gave the Act a lease on life by not deeming it unconstitutionally vague or violative of freedom of association.[25] Although the court did not reach the constitutionality of the Act,[26] the decision may be viewed in harmony with the body of law[27] which seeks to curtail the effects of the vast aggregate of wealth pouring into political coffers from various sources. The dual test announced by the Second Circuit to define a political committee — that there must be some nexus between the committee and a specific candidate and a primary purpose to influence elections — makes the Act less susceptible to constitutional challenge. The decision upholds the right to discuss political issues free from interference while preserving legislative supervision where appropriate.

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since if in the future the pledges of assistance came to fruition, a different result might occur. If the instant advertisement were to be run again during the presidential election, the main purpose of the activity might be deemed to be influencing the election. Even in the absence of direct contribution to a candidate, repeated advertisments calling for President Nixon's impeachment might be judged so close to campaign spending as to fall under the requirements of FECA.

[25] The Washington, D.C. three-judge panel which struck down portions of FECA declined the option of saving them by a narrow construction. *See* note 10 *supra*.

[26] *See* note 10 *supra*.

[27] *See, e.g.*, Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972) (statute interpreted to permit campaign expenditures from voluntarily financed union political funds); United States v. Harriss, 347 U.S. 612, 613 (1954) (statute requiring disclosure of activities for the purpose of influencing, "directly or indirectly," Congressional legislation interpreted to apply only where main purpose was to influence legislation and there was direct communication with members of Congress); United States v. Rumely, 345 U.S. 41, 47 (1953) (narrow construction of the term "lobbying" by restricting it to its commonly accepted meaning of "representations made directly to Congress, its members, or its committees"); United States v. CIO, 335 U.S. 106, 123 (1948) (Congress could not have intended to bar a union paper "from expressing views on candidates or political proposals in the regular course of its publication."); United States v. Painters Local No. 481, 172 F.2d 854 (2d Cir. 1949) (small expenditure by union to pay cost of radio broadcast and newspaper ad advocating rejection of certain candidates likened to expression of views in union publication in *CIO* case).