COMMISSIONER HARRIS AND
COMMISSIONER TIERNAN, DISSENTING

A. SUN-PAC: Solicitation of Contributions.

We do not think that the statute permits Sun Oil to use its general funds to solicit donations to its political fund from persons other than Sun Oil's stockholders. This conclusion is based on the language and overall objective of §610, the legislative history of the Hansen Amendment, and the Supreme Court's opinion in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972). [Also, the effect of the Commission's decision appears to be to give corporations greater leeway than unions as respects solicitation for their political funds -- a result surely astounding to both supporters and opponents of the Hansen Amendment.]

1. The language added to §610 in 1972 by the Hansen Amendment creates three exceptions to the section's general ban on the expenditure of corporate or union funds in connection with any election to federal office. They are (a) "communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject;" (b) "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;" and (c) "solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization."

The first of these exceptions, i.e., as to communications, is paralleled in the definition of "expenditure" [2 U.S.C. §431 (f)(4)(c) and 18 U.S.C. §591(f)(4)(c)], which excludes from "expenditure" "any communication by any membership organization or corporation to its members or stockholders . . ." (Emphasis added).

The first two Hansen Amendment exceptions are restricted in terms to stockholders in the case of a corporation and members in the case of a union, while the third exception has no restriction. Thus, read 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. Such a construction of the third exception would however go far to destroy the general ban of §610 on the expenditure of corporate or union funds in connection with a federal election; and it would likewise undercut the provision in the first exception that corporations may communicate with stockholders and union with members and the parallel provision in the statutory definition of "expenditure". This is so because the "solicitation" of contributions to a political fund necessarily includes representations as to what sort of causes and candidates the fund will support, and as to why those solicited should contribute to it. If corporations and unions are free to use their general funds to solicit the public at large, they may legally carry on extensive political campaigns in support of particular candidates or types of candidates as a part of their solicitation efforts.

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. As §610 states and as its legislative history makes emphatic, Congress intended to assure that corporate communications on political subjects financed by treasury money would be directed only at stockholders and their families and that such union communications would be to members and their families. It creates an inexplicable exception to that 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. And, since there is in fact no dividing line between communication and solicitation, if such an exception were to be made there would soon be little if anything left of the rule. A corporation could then legally take out a full-page advertisement in the New York Times soliciting for contributions by stating who those contributions would be used to support and why. Except for the top and bottom line, such an advertisement would be no different than one communicating the corporation's views on those candidates to the general public through the expenditure of treasury money. That, of course, is precisely what §610 prohibits.

Since a construction which permitted corporations and unions to solicit the general public would go far to undercut §610, no one has urged it. Sun Oil has, subsequent to its initial presentation, disclaimed any purpose to solicit the

general public. However, as far as a simple reading of the statute goes, there is no basis for drawing any distinction between the use of corporate funds to solicit the general public and their use to solicit employees of the corporation.

2. Since the statute is thus ambiguous and not to be read literally, it is of course appropriate to examine the legislative history of the Hansen Amendment. Pipefitters Local 552 v. United States, supra. That history confirms that the first and third exceptions are to be read together, and that the Hansen Amendment was intended to sanction the use of corporate or union funds only to communicate with and/or solicit stockholders or members.

In explaining his Amendment to the House, Representative Hansen stated:

> Next, the amendment, in further defining the phrase "contribution or expenditure", draws a distinction between activities directed at the general public, which are prohibited, and communications by a corporation to its stockholders and their families and by a labor organization to its members and their families, on any subject, which the courts have held is permitted.
>
> The 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. (Emphasis added). (117 Cong. Rec. 43379)

Representative Hansen reiterated this distinction, between corporate political activity directed at stockholders (and union political activity directed at members) and political activity financed by treasury money directed at the general public, in three separate passages in his explanatory floor statement:

> Section 610 strikes a balance between organizational rights and the rights of those who wish to retain their shareholding interest or membership status but who disagree with the majority's political views. The balance presently obtaining provides, in my judgment, an optimum solution to the complex problem of accommodating these conflicting interests. This solution is sound in theory as I shall show, has proved workable in practice, and has generated a broad bi-partisan consensus in favor of continuation of the present rules. For this reason my amendment, with one exception, follows the present law.
>
> Thus, Section 610 as it stands, and under my proposal, represents a complete victory for those who believe that corporations and unions have no moral right to utilize their organizations' general funds for active public partisan politicking. It totally subordinates organizational interest to individual interests. (Emphasis added) (117 Cong. Rec. 43380)

* * *

> Recognizing that group interests must be given some play and that the interest of the minority is weakest when corporations and unions confine their activities to their own stockholders and members, the beneficial owners of these organizations, the second subdivision of the amendment sets out three precisely defined and limited permissions for corporate and union activity related to the political process.
>
> The courts, as well as other independent students of section 610 and its legislative history, have concluded that the 1947 Congress did not intend to prohibit corporations or unions from communicating freely with their members and stockholders -- see U.S. v. CIO, 335 U.S. 106 -- from conducting non-partisan registration and get-out-the-vote campaigns,

or from securing voluntary contributions made directly to the support of a labor or management political organization -- 93 Congressional Record 6440, remarks of Senator Taft." (Emphasis added). (117 Cong. Rec. 43380).

* * *

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. (Emphasis added). (117 Cong. Rec. 43381).

* * *

Representative Hansen further emphasized this distinction by quoting Senator Taft's explanation of §610 as it was enacted in 1947:

The dividing line established by 610 is between political activity directed at the general public in connection with Federal elections which must be financed out of political donations and activities directed at members or stockholders which may be financed by general funds . . .

Finally, there can be no doubt that union members or stockholders should have the right to set up special political action funds supported by voluntary donations from which political "contributions and expenditures" can lawfully be made. As Senator Taft stated in his floor explanation of section 610:

If [union members or stockholders] are asked to contribute directly . . . to the support of a labor [or management] political organization, they know what their money is to be used 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. 93 Cong. Rec. 6440 (Emphasis added). (117 Cong. Rec. 43381).

Earlier in the debate the following colloquy occurred among Rep. Hansen and Reps. Dellenback and Hayes:

> May I ask as a general question, Mr. Hansen, is it your intent by the way you have drafted the amendment to propose that corporations and unions be treated absolutely equally?
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> Mr. Hansen of Idaho. That is correct.
>
> Mr. Dellenback. And, further, if a situation is proper for a corporation, it is also proper for a union and if it is proper for a union, then it is also proper for a corporation.
>
> I think it is extremely important that what you have here proposed is an amendment that seeks to bring about equity. I think it is important that a union be able to communicate with its members and do what the law already permits it to do, and likewise I feel it is important that a corporation be able to do that same thing with its stockholders.
>
> Mr. Hayes. I join in support of this particular amendment. It seems to me that it does work equity in what has been a very troublesome situation in the past. (Emphasis added). (117 Cong. Rec. 43380).

This statement of Congressional intent, involving as it does the author of the amendment (Rep. Hansen) and the Chairman of the House Committee (Rep. Hayes) is entitled to special weight.

3. In line with this legislative history, the Supreme Court stated in the Pipefitters case that the first and third exceptions of the Hansen Amendment are integrally related and similarly limited to stockholders and members:

> With the exemption for communications to stockholders or union members and their families apparently in mind, Hansen stated, for example, 117 Cong. Rec. H11478:
>
> "[E]very organization should be allowed to take the steps necessary for its growth and survival. There is, of course, no need to belabor the point that Government policies profoundly affect both business and labor . . . If an organization, whether it be the NAM, the AMA or the AFL-CIO, believes that certain candidates pose a threat to its well-being or the well-being of its members or stockholders, it should be able to get its views to those members or stockholders. As fiduciaries for their members and stockholders the officers of these institutions have a duty to share their informed insights on all issues affecting their institution with their constituents. Both union members and stockholders have the right to expect this expert guidance.
>
> This reasoning, of course, applies as well to solicitations for contributions to voluntary political funds." (Emphasis added). (Pipefitters, supra at 431 no. 42).

4. The interpretation given §610 by the majority of the Commission seems to be to be slanted in favor of corporate political fund solicitations, as compared with union. Congress meant to hold the balance even.

In introducing his Amendment, Rep. Hansen stated:

> The net effect of the amendment, therefore, is to tighten and clarify the provisions of section 610 of title 18 United States Code, and to codify the case law. It spells out more clearly the rules governing election activities that apply equally to labor unions and corporations. While prohibiting abuses that involve activities directed at the general public, the amendment recognizes that the constitutional guarantee of free speech protects the right of labor organizations and corporations to communicate with their own members or stockholders. (Emphasis added). (117 Cong. Rec. 43379).

The Commission's ruling destroys that balance. Unions are presumably limited to communicating with and soliciting their members, while corporations may solicit not only their stock-

holders, but all employees, whether union members or not. This is a curious result to flow from the union-supported and corporation opposed Hansen Amendment.

The imbalance resulting from the majority's ruling can readily be discerned by reference to statistical data. The Sun Oil Co., 1/ which had gross earnings in excess of 3.7 billion dollars at the end of 1974, has almost five times as many stockholders as it does employees. As of December 31, 1974, the company had 126,555 stockholders holding 57,301,668 shares of preferred and common stock in the company. At the end of the same period, the company had only 27,707 employees. Under the majority's ruling, Sun Oil is now permitted to solicit partisan political contributions from well over 127,000 individuals including employees who are not also stockholders. On the other hand, the labor union affiliated with Sun Oil is restricted in its solicitation to the small percentage of the 27,000 employee workforce which holds membership in the union. The union presumably cannot even solicit employees who must go through its hiring halls for employment with Sun Oil if those employees are not also union members. 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

1/ The statistics on the Sun Oil Co. may be found in Moody's Industrial Manual, 2351-57 (Vol. 2, 1975).

workers, only 18,000,000 of them (or about 21%) are members of labor unions including AFL-CIO, independent, CNTU, and CLC 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.

5. Finally, the majority ruling is inconsistent with scholarly writings dealing specifically with the solicitation question. These writings demonstrate in clear terms that a reasonable interpretation of §610 would restrict corporations to soliciting only their stockholders.

For instance, corporations have been advised in the Business Lawyer, a regular journal of the American Bar Association's Section of Corporation, Banking and Business Law, to direct solicitations of partisan political money to their stockholders. R. Garrett, "Corporate Contributions for Political Purposes," 14 Bus. Law. 365 (1959). Mr. Garrett closely examined §610 and cases construing the statute including United States v. CIO, 335 U.S. 106 (1948) and United States v. UAW, 352 U.S. 567 (1957). On the basis of these and other

Federal court decisions and labor union practices, particularly in operating COPE, Mr. Garrett reached the following conclusions:

> Since Section 610 in terms applies equally to labor organizations and to corporations, certain conclusions relative to corporations under that section may be derived from the labor cases and the known practices of the unions:
>
> * * *
>
> (3) Corporations may use corporate facilities for soliciting voluntary contributions from stockholders to a fund to be donated or used for political purposes. (Emphasis added). Garrett, supra, at 375-76.

Mr. Garrett explained further that:

> Corporate management eager to do something, but unwilling to put its neck in the noose for the purpose of making some law at the risk of heroic sacrifice, might well be advised to use the corporate facilities to arouse stockholders to voluntary contributions and political awareness. The New York Stock Exchange has estimated that there are over 8 1/2 million holders of stock in American corporations. They constitute a group who might be aroused to contribute and work for political purposes with possibly great effect. 2/ Where corporate soliciting of contributions from stockholders is bipartisan, as, for example, where stockholders are invited to contribute a very small percentage of a dividend to the party which they designate individually, there would seem to be little real danger of prosecution. (Emphasis added). Id. at 377.

Another writer, the General Counsel of the United States Chamber of Commerce, reached similar conclusions. Speaking in the American Bar Association Journal, the General Counsel said, after a thorough and careful analysis of Section 610 and Federal court decisions, that:

2/ This was the 1959 estimate. As previously noted, the current estimate of stockholders in American corporations exceeds 30 million.

> As for the Federal Corrupt Practices Act, the corporation can play safe in its partisan political activity only if it limits its appeals, whether written or oral, so as to avoid the general public and communicate rather to its stockholders. On principle it seems a corporation should be allowed to appeal also to its employees, along with its stockholders, although there is no decision which settles this point. (Emphasis added). W. Barton, "Corporation in Politics: How Far Can They Go Under the Law," 50 ABA Journal 228, 231 (1964).

There have been no court decisions which have held that under §610 corporations are authorized to solicit contributions from employees.

We see no warrant for the construction of §610 adopted by the majority.

B. The Establishment of SUN-EPA.

We also dissent from the majority's ruling that §610 permits Sun Oil to spend treasury monies to establish a "trustee" plan contribution program for its employees.

1. As previously noted, the intent of the Hansen Amendment was to set forth in "clear and unequivocal statutory language" the "limited circumstances" under which corporations could spend treasury money in connection with federal elections. Those "limited circumstances" included the establishment of segregated funds. They did not include any other types of political contributions or expenditures from general corporate funds. The majority ruling, permitting corporations to subsidize "trustee" plans with treasury funds, simply does violence to the plain language of §610 which authorizes only three types of activities which are supportable with corporate or union treasury money.

2. The meanings of the terms "expenditure" and "in connection with a federal election," as used in §610, are broad enough to embrace the "trustee" plan proposed by Sun Oil. Certainly, the expenditure of treasury funds for SUN-EPA is intended to be "in connection with a federal election" inasmuch as Sun Oil has admitted that as a result of these expenditures, its employees will have a facility through which they can make contributions to candidates for federal office. The Justice Department made a similar observation in its comments when it said that "the general objective of the program is certainly 'political' in that it encourages employees to participate voluntarily in politics through personal contributions."

This conclusion is consistent with judicial interpretations of the terms "expenditure" and "in connection with." As noted by the D.C. Circuit United States Court of Appeals in Buckley v. Valeo, 519 F.2d 821, 852-53 (D.C. Cir. Aug. 29, 1975):

> An expenditure may obviously inure to the benefit of a candidate even though the expenditure was not directed by the candidate and the candidate was not in control of the expenditures or of the goods or services purchased.

Similarly, Mr. Justice Rutledge, concurring in United States v. CIO, supra, characterized the broad reach of the terms "expenditure" and "in connection with" as used in section 610. (Id. at 133):

> The crucial words are "expenditure" and "in connection with." Literally they cover any expenditure whatever relating at any rate

> to a pending election, and possibly to prospective elections or elections already held. The broad dictionary meaning of "expenditure" takes added color from its context with "contribution." The legislative history is clear that it was added by the 1947 amendment expressly to cover situations not previously included within the legislative interpretation of "contribution." The coloration added is therefore not restrictive, it is expansive. * * * (Emphasis added).

Mr. Justice Frankfurther applied these same principles, regarding the breadth of the term "expenditures," in upholding an indictment prosecuted under section 610. See, United States v. UAW, supra, at 585.

It matters not that Sun Oil will exercise no control over the operations of SUN-EPA or the activities of employees participating in the program. The law prohibits expenditures in connection with Federal elections -- it does not go behind those expenditures to determine whether they will be made with a benevolent or patriotic intent. By facilitating employee contributions, through its subsidization of SUN-EPA, Sun Oil is necessarily using treasury funds in connection with Federal elections.

3. The majority concluded that expenditures for SUN-EPA were not prohibited by §610 because they would not represent "any direct or indirect payment by Sun Oil to any candidate, campaign committee, or political party or organization." (Emphasis added). This conclusion apparently relies on the definition of the terms "contribution" and "expenditure" added to §610 by the 1971 Amendment. But, that definition says that these terms "shall include" certain transactions. Since this

is not language of limitation, it is clear that the majority's interpretation of these terms is too narrow. Mr. Justice Rutledge's broad interpretation of these terms in the CIO case has still survived the 1971 Amendment and is controlling. Accordingly, the majority should have restricted its focus to the broader concept of an expenditure "in connection with a federal election" which would have made expenditures for SUN-EPA unlawful. The Justice Department recently prosecuted a §610 case against a labor union official where it expressed its views on the meaning of "contribution" and "expenditure" prior to the 1971 Amendment. In United States v. Boyle, 482 F.2d 755 (D.C. Cir.), cert. denied _____ U.S. _____, 94 S. Ct. 593 (1973), the Justice Department advised the trial court that:

> It is important to note that Section 610 itself does not speak in terms of contributions to candidates for office but rather in terms of "in connection with any election." (Emphasis added).
>
> Trial Brief for Department of Justice at 11, United States v. Boyle, No. 1741-71 (D. D.C.)

The trial court sustained this view of the law in rejecting the defendant's motion to dismiss the indictment on the grounds that Section 610 was unconstitutional or vague. United States v. Boyle, 338 F. Supp. 1028, 1031-32 (D. D.C., 1972). This case shows that what makes an expenditure of treasury funds unlawful is simply the fact that it is "in connection with" an election.

4. The majority's narrow interpretation of §610, to permit expenditures for SUN-EPA, has the effect of overruling by implication practically all of the advisory opinions which have dealt with indirect contributions or expenditures. Three opinions which immediately come to mind are (1) AO 1975-4, 40 Fed. Reg. 29793 (July 15, 1975), in which the Commission held that the guarantee of a loan made to the Democratic National Committee, to the extent that the loan was not repaid, was a contribution even though the loan itself was not; (2) AO 1975-14, 40 Fed. Reg. 34084 (Aug. 13, 1975), in which the Commission held that the donation by a corporation of a computer, to analyze the results of a non-partisan public issue opinion poll issued by a Congressman, was a violation of Section 610; and (3) AO 1975-27, 40 Fed. Reg. 51351 (Nov. 4, 1975), in which the Commission held that expenses incurred by a candidate for legal and accounting fees for the purpose of complying with the election laws were expenditures.

For these reasons,we see no merit in the majority view that expenditures for SUN-EPA are lawful under §610.

Sun Oil has not asked and the Commission has not ruled whether the two plans are permissable under §611, assuming that Sun Oil is a government contractor. It should be noted, however, that the language of §611 is even broader than that of §610. It provides severe criminal penalties for any government contractor who "directly or indirectly makes any contribution of money or other thing of value . . . to any person

for any political purpose or use." And while §611 contains a special proviso, added by the 1974 Act, validating a "separate segregated fund" which meets the requirements of §610, it contains no exception in favor of a trustee plan, such as SUN-EPA.

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