In the

Supreme Court of the United States

STEWART S. CORT, ET AL.,	)	
PETITIONERS,	)	
V.	)	NO. 73-1908
RICHARD A. ASH, ETC.,	)	
RESPONDENTS.	)	

WASHINGTON, D.C.
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IN THE SUPREME COURT OF THE UNITED STATES

STEWART S. CORT ET AL, Petitioners,	:	
v.	:	No. 73-1908
RICHARD A. ASH, ETC.	:	

Washington, D. C.

Tuesday, March 18, 1975

The above-entitled matter came on for argument at 1:45 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EDWIN P. ROME, ESQ., Four Penn Center Plaza, Philadelphia, Pennsylvania 19103
For Petitioner

DAVID BERGER, ESQ.,P.A., 1622 Locust Street, Philadelphia, Pennsylvania 19103
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1908.

Mr. Rome, you may proceed whenever you are ready.

MR. ROME: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the United States Court of Appeals for the Third Circuit, a three-judge panel of which, in a divided opinion, reversed the grant of summary judgment which had been entered by Judge Trautman of the United States District Court of the Eastern District on Pennsylvania on behalf of the Defendants -- the Petitioners here.

Chief Judge Seitz, writing for himself and also for Judge Hastie, reversed the grant of summary judgment.

Judge Aldisert wrote a dissent.

The factual background of the case is the following:

Mr. Ash filed a complaint just a little bit more than five weeks before the Presidential election of November, 1972, asserting a claim against Bethelehem Steel Corporation and 12 of its directors and senior executive officers, claiming on behalf of himself as voter-citizen and stock-holder and, deritivatively on behalf of Bethlehem Steel

Corporation itself, claiming a violation of 18 USC Section 610 on the basis of a charged plan by the Defendants to violate 610 by utilizing the resources of the Bethlehem Steel Corporation, including the expenditure of corporate funds to bring about a Republican victory in 1972.

More specifically, it was asserted by the Plaintiff below that corporate funds were expended for ads which appeared in magzazines of national circulation and also in newspapers which appeared in 19 towns where the company had plants, which ads were said to be "blatantly partisan."

The ad in question, only one, which was attached to the complaint, appears at page 16 of the record and is also reproduced at the end of the Petitioners' brief here.

There was also a second count under which pendent jurisdiction was asserted, based on assertion of ultrabriberies and illegality under Delaware law, going back again to the same element of expenditure of corporate funds.

Injunctive relief, including the corrective advertising to be placed at the expense of the individual defendants, compensatory and punitive damages, as well as attorneys' fees and costs were sought.

A temporary restraining order was sought which appears at page 17 of the record in which there was sought a prohibition against Bethlehem Steel Corporation from purchasing or paying for advertising identical to or

substantially similar to Exhibit A.

That was refused and thereafter, there was an application made for preliminary injunctive relief and I wou ld invite and request your Honors' attention to the language of the prayer for preliminary injunction which appears at 826 of the record because there the Plaintiff sought to prohibit the individual defendants from causing Bethlehem to purchase or pay for any advertising in connection with any federal action, including but not limited to advertisements identical or substantially similar to Exhibit A prohibiting Bethlehem from purchasing or paying for any advertising in connection with any federal electinn, including but not limited to advertisements identical to or substantially similar to Exhibit A, directing Bethlehem Steel to cancel all advertising previously ordered in connection with any federal election, including but not limited to advertisements identical to or substantially similar to Exhibit A.

QUESTION: Mr. Rome, the Court of Appeals didn't, in its opinion, necessarily approve that form of relief, did it?

MR. ROME: I believe, sir, the necessary consequence of the majority opinion is, indeed, not only to approve the form of relief, but, in actuality, to sanction injunctive relief as a preferred remedy contrasting with the

criminal remedy set out in the statute itself and this, thereby, in our contention, Mr. Justice Rehnquist, at once creating an entire problem of prior restraint because my purpose in reading this language to the Court is to show that there was, in actuality, a prior restraint not only of the particular ad but, indeed, of ads that had not yet been prepared or published.

QUESTION: Well, didn't the Respondent seek damages also?

MR. ROME: Yes, your Honor, damages both compensatory and punitive were sought and the majority of the Court of Appeals below held that there was an implied ~~rate~~ right of action on behalf not only of stockholders but also on behalf of all voters as a result of which, in our submission, there is an unparalled implication of a private right of action, in this case going far beyond anything which to our knowledge has ever occurred before.

Most particularly, the majority panel below concluded that it was not bound by this Court's decision in AMTRAK but turned, rather, to Borak and although it held under Borak that the implication of a private remedy was appropriate, to use Chief Judge Seitz' words, he went on to conclude that it was appropriate for a variety of reasons, including the availability of a more expeditious remedy, including the possibility of some sort of partisanship on

the part of the governmental authorities charged with the enforcement of the Act and also because it was appropriate and necessary to carry out the purposes of the statute.

Judge Aldisert dissented based upon this Court's ruling in AMTRAK saying, indeed, that the majority had defied this Court's ruling in AMTRAK.

The trial judge, who was reversed by the majority panel, had concluded on the basis of the advertising which was presented to him that there was not an implied right of action, that 610 had to be narrowly construed in order to avoid a constitutional infringement of the First Amendment and that, as so construed, the expenditures here involved did not come within active electioneering, which would come within the prohibition of the Act and he also said that to enjoin the expenditures here would raise the gravest constitutional issues under the First Amendment.

Following the reversal, there was -- following the grant of the denial of the preliminary injunction, there was an appeal to the Third Circuit which affirmed the denial of the preliminary injunction. Thereafter, there was an application for security for expenses below, as a result of which the state pendent jurisdiction count was dropped out by my friend and thereafter there was a motion for summary judgment filed before Judge Trautman on the basis of the fact that there is no implied private right of action under

610. That is, 610 is inapplicable as a matter of law and that 610 is unconstitutional.

There was a motion for evidentiary hearing which was denied because Judge Hartman found that on the basis of the language of the Act, on the basis of the congressional history and the purpose of the Act, there was no implied right of action and he could rule that as a matter of law and summary judgment was then granted without opinion.

I would urge your Honors to examine the material that was published by Bethlehem admittedly, which is attached to the brief and in the record.

In our submission, an examination of that material will show that it is not to be identified with any anti-social conduct.

This kind of political speech, we submit, ought not to be characterized as a crime. It cannot be said to come from a corrupt or corrupting source.

As a matter of fact, in our urgent submission to this Court, it comes within the language of Justice Reid in the CIO case, if the earlier provision, 313, were construed to prohibit the publication by corporations, in the regular course of conducting their affairs, of periodicals advising their member stockholders and customers of danger or advantage to their interest from the adoption of measures or the election to offices of men espousing such measures,

the gravest doubt would arise in our minds as to its constitutionality.

In our contention here, the advertising and material that is before the Court represents nonpartisan sponsorship of issue-oriented advertising.

Contrary to the view taken by Chief Judge Seitz for the majority below, we say there are an abundance of countervailing reasons why this Court should not conclude that the implication of a private right of action is necessary here.

As your Honors are aware, the Government has filed an Amicus brief in this case. It has not contended that the implication of a private right of action is necessary. It is here simply to support the constitutionality of Section 610.

As a matter of fact, the implication of a private right of action in our view would come within the ban suggested by the National Milk case that such private right of action is subject to great potential abuse because here we have, as the result of the opinion by the Third Circuit, an ability on the part of all of the voters of the United States, all of the stockholders of corporations, to bring action for injunctive relief and damages and what this would mean by way of an engulfment of the courts throughout the country is going to be seen because it lends itself to the

possibility of conflicting judgments coming out of different courts on the same ads, a multitude of litigation coming throughout the country, ultimately coming to this Court.

Moreover, it is admitted in this case that there is nothing in the congressional history of the litigation which shows any intention on the part of the Congress to imply a private right of action.

On the contrary, as your Honors are aware, this is legislation which has for over 50 years evoked the continuing repeated concern and attention of the Congress.

It has been, as your Honors are aware, recently amended, not only in '71 but also in '74 and in our view, one of the countervailing reasons that militate against the implication of a private remedy is the fact that in the amendment of 1974, although there was an amendment which created a private right of action under Title III of the Act, there was no change by the Congress of that which appears in Title II of the Act and this comes within what Mr. Justice Stewart wrote in AMTRAK with regard to the application of exclusial onliness.

In addition, there is nothing in the language of the Act itself which speaks or hints in terms of the implication of a private right of action and as a matter of fact, this legislation shows a carefully-devised program elaborated by the Congress which now has set up a federal

election commission as the result of which there are procedures available for remedies including criminal remedies as well as specific civil remedies.

Under Mr. Justice Brennan's reference to the cross light in the Pipefitter's case we say that this kind of cross light is capable of being brought to bear upon Section 610 as the result of which it ought not to be held to imply a private right of action.

In addition, normal principles of statutory construction, we suggest, dictate the denial of the private right of action because there has, to the best of our research and knowledge, your Honors, never been a situation in which there has been the suggested implication of the private right of action which at once runs counter to First Amendment rights of the Defendants -- the Petitioners here -- and carried with it inevitably, inescapably, the possibility, the inevitability of prior restraint because, I repeat, Judge Seitz, for the majority below, literally said that there was a much more expeditious remedy to be found, particularly in the form of an injunctive relief by the implication of a private right of action and how that could occur or come about without necessarily, at once, leading to a prior restraint as is evidence by the nature of the language of the motion for preliminary injunction that was originally sought here, is something that really belies reality.

Now, in addition to that, we have the situation that the rules laid down by this Court, particularly in areas that intend to intrude upon First Amendment rights, call for a narrow construction, a restrictive construction, in order to avoid or save the constitutional issue.

But, on the contrary, that which the Court below has done has been to produce the most expanded kind of interpretation of expenditure.

Your HOnors will recall that the rationale back of the congressional legislation had to do with the thought of undue influence emanating from aggregations of wealth whether by corporations or by unions and a desire to protect the minority interests within the corporations or labor unions.

The reality of it is that the expenditure clause in 610, as interpreted by 591 which the court below did, runs in the face of that kind of understanding for the reason that the interpretation means that the expenditure of $1, even though it had the consent, unanimous consent of the stockholders or of members of a labor union would nevertheless come within the ban of the statute.

Moreover, our contention is that the ads on their face -- the ad, the speech, the folder -- cannot be construed as representing active electioneering.

They cannot be held because they do not mention

the name of a single candidate, nor do they mention the name of a political party.

They cannot be held, therefore, to come within the language that Mr. Justice Frankfurter used in the UAW case as something that was intended to influence the public at large to vote for a particular candidate or a particular party.

QUESTION: Does your argument here -- are you making a constitutional argument now or are you making a statutory construction argument?

MR. ROME: It runs both ways, Mr. Justice White for the reason that in our contention there ought not to be an implication of a private right of action when constitutional infringement occurs and, in addition, there is the constitutional argument in and of itself.

QUESTION: Yes, but if the statute plainly covered these kinds of expenditures, then you would reach the constitutional argument.

But now, how about -- involved here is Section 591, I gather?

MR. ROME: 610 and 591.

QUESTION: You don't disagree that 591 standards are relevant to 610?

MR. ROME: Oh, no, sir, I do not disagree. On the contrary, we say that 610 has to be interpreted and

defined by reason of 591.

QUESTION: And so you are saying that these expenditures aren't plainly covered by either section?

MR. ROME: We say that the sections were never intended to cover this kind of issue-oriented nonpartisan advertising or communication because --

QUESTION: And if not, I gather, if you are correct in that, then the constitutional arguments you make need not be -- they disappear.

MR. ROME: That is right, sir, if there is no --

QUESTION: Okay, using the constitutional argument is a reason for giving the construction to what you are arguing.

MR. ROME: Yes, sir, which is what has been done before, a narrow construction of expenditures so as to avoid running counter to the constitutional principles that are --

QUESTION: Well, then, you wouldn't have to decide whether there was a private right of action, either, if your narrow construction of the term "expenditures" is right.

MR. ROME: It would then reach the conclusion, Mr. Justice Rehnquist, that the complaint does not state a cause of action on its face because it does not then come within the ban of expenditure as used in 610 and 591.

QUESTION: The criminal sanction would not be

applicable.

MR. ROME: Would not be applicable because there would have been no wrongdoing committed by Bethlehem or the Defendant.

QUESTION: The Court of Appeals just plain disagreed with you that as a matter of fact these particular expenditures were partisan.

MR. ROME: It held only, Mr. Justice White, that --

QUESTION: Is it your position that --

MR. ROME: -- it was a suspended issue of fact as a result of which the grant of summary judgment was reversed and the case was remanded to the District Court for a trial with regard to that, although the earlier situation -- excuse me, sir -- the earlier situation was one in which the trial judge himself as a matter of law had concluded that there was not partisanship in the publications.

QUESTION: Yes, yes.

MR. ROME: One additional point that also emerges in this factual context is a denial of equal protection of the laws because 610 is applicable only to corporations and labor unions and obviously is not applicable to any of the other numerous groups that are as much capable of being permitted and have the same rights to express their views so that the electorate may hear their views because that is where also the First Amendment right goes as well as on the part

of the Defendants -- the Petitioners here -- to express their views and your Honors will recall that Mr. Justice Douglas, in his dissenting opinion in UAW speaks in terms of unions, associations of manufacturers, retail and wholesale trade groups, consumer leauges, farmers' unions, religious groups and every other association representing a segment of American life as having a First Amendment right to communicate their ideas and the electorate, in turn, having a right to hear those ideas.

QUESTION: That was a dissenting opinion.

MR. ROME: Yes, sir, it was. It was, indeed, Mr. Justice Rehnquist but it served to point up the fact that in the face of repeated expressions by this Court raising red flags, at least as to the constitutionality of Section 610, the Court below, instead of adopting a restricted interpretation of expenditure and the language of 610 for the purpose of influencing the nomination for election or the election to federal office, on the contrary, took a very expanded view so that there is no expenditure of any kind that could possibly come without the ban of the Act and definition hidden by the majority of the Court below.

Our view is that in actuality there is a denial of the equal protection of the laws because beyond mere problems of corporate aggregation of wealth, as your Honors, I believe, are well-aware, there are some 50 entities that

are not corporations which are traded on the New York Stock Exchange and there are all these other entities that are equally involved in the robust, vigorous discussion that your Honors have said was necessary in order to protect First Amendment rights.

QUESTION: Mr. Rome --

MR. ROME: Yes, sir.

QUESTION: If we were to disagree with your view of the scope of expenditures but agree that there was no implied right of action, what happens to the constitutional question?

MR. ROME: It is not then reached, your Honor.

If there is no implied right of action --

QUESTION: That ends this lawsuit.

MR. ROME: Yes, that ends this lawsuit. Yes, sir.

QUESTION: And you say the constitutional argument -- there's some criminal prosecutions.

MR. ROME: Except, your Honor, may I bring to your attention in that regard the fact that the amendment to the FECA of 1974 has created the Federal Election Commission which is intending to get underway.

We have a Presidential election coming up and this comes within the language of your Honors' decision in the Cox Broadcasting case.

There are enormously important First Amendment

rights which invite your Honors' determination now rather than the fact which has been the case that for 18 years there has been a miasmic cloud over this entire subject as the result of which it is difficult for us to conclude other than that there is an extremely chilling effect on the right of free speech, not only of corporations but of all other --

QUESTION: Well, under the new law, there is an administrative agency that has --

MR. ROME: Yes, sir.

QUESTION: -- responsibility for enforcing this law?

MR. ROME: This law, your Honor, as amended in 1974 is made up of a --

QUESTION: They have -- they just have cease and desist power? Does it have to go to court or what does it have to do?

MR. ROME: It has the ability to bring civil action and there is also the continuing criminal remedy available.

The Commission is made up of six members, the clerk of the Senate, the Secretary of the Senate, the clerk of the House and then --

QUESTION: Let me ask you, do you think that under the new law there will be an argument about there being a

private cause of action?

MR. ROME: I would think, your Honor, that there is bound to be because this case in itself --

QUESTION: There is nothing in the new statute that says, whatever this agency may do, that what it may do is exclusive.

QUESTION: Well, but the Congress has interposed an administrative agency which has civil remedies available.

MR. ROME: But that comes within Title III of the Act. Section 610 comes within Title II of the Act, sir, and this is why we say that the cross light to be brought to bear here indicates that Congress quite knowingly never intended that there be the implied private right of action because this is not the kind of statute that is just once treated by the Congress. On the contrary --

QUESTION: But if you think you have a strong argument under the old statute, you certainly would have a strong argument under the new statute.

MR. ROME: Indeed, your Honor, and this is one reason why, since the matter is here and certiorari has been granted, that covers because we did, indeed, raise the constitutional question and we hope and request that your Honors would give consideration to the constitutional issue because it has ongoing enormous impact and inevitably there will be other cases that will follow or attempt to follow the

precedent of the Third Circuit.

With your HOnors' permission, unless there are other questions, I would reserve --

QUESTION: What do you think the new law means when it says, "The commission has primary jurisdiction with respect to the civil enforcement of such provisions," and "such provisions" includes 610, doesn't it?

MR. ROME: Yes, sir, I --

QUESTION: What does that mean?

MR. ROME: I think that there was an intent by Congress to create an administrative commission that would bring uniformity and a growing body of expertise to this problem and thereby not intending to create a private right of action which would lead to a variety of diverse, inevitably conflicting opinions because every district court in the country would be engulfed by the possibility that every voter within that district as well as every shareholder in any corporation within that district would be able to go into court and would not be barred by the fact that somebody else has gone in on that same ad or material that is substantially identical to it.

QUESTION: I take it you have petitioned for -- you raise questions here besides the constitutional issue.

MR. ROME: Yes, sir.

QUESTION: But you don't want us to decide those?

MR. ROME: Oh, I would hope that your Honor would give consideration to all the issues that we have --

QUESTION: YOu don't care on what ground you win, as long as you win.

MR. ROME: I hope desperately to win, your Honor.

[Laughter.]

If there are no other questions, then, I would reserve my time.

MR. CHIEF JUSTICE BURGER: You may reserve the balance.

Mr. Berger.

ORAL ARGUMENT OF DAVID BERGER, ESQ.

ON BEHALF OF PETITIONERS

MR. BERGER: Mr. Chief Justice and may it please the Court, may I first answer Mr. Justice Stewart's question to respond to Petitioner's counsel.

It is true, sir, that the new Act uses the phrase, "primary jurisdiction" and that is going to be a keystone of my argument.

To the extent to which the new Act sheds any light, cross or crosseyed on this problem, it is in favor of the position which I advocate here today because, as the Joint Committee Conference Report says, and I have quoted it on page 35 of my brief, this was for the purpose of assuring that private citizens would exhaust their administrative

remedies and as Congressman Braddom has put it, first -- which means, of course, as a precondition to bring a private right of action or cause of action.

Now, may it please the Court, I disagree with my friend's characterization of what the lower court did here.

The Petitioner's argument proceeded, it seemed to me, as though the Court of Appeals for the Third Circuit had granted summary judgment in favor of the plaintiff below, the Respondent here.

It did no such thing. And may I say on the constitutional point as a footnote that the district judge never even mentioned the constitutionality, much less passed on it or addressed the question.

The Court of Appeals did not address the constitutional question. So that there is before this honorable Court now a decision which merely remands the case to the trial court for trial.

Not only is there an insufficient record with respect to the constitutional question, there is no record.

May I further point out to your Honors that the posture of the case is extremely significant in addition to what I have just said.

My friend has correctly told you that the complaint averred a plan on the part of the Defendants,

Bethlehem Steel Corporation and its directors, to use the vast resources of that corporation for the specific partisan political purpose of influencing the 1972 election for one of the candidates.

That is what the complaint alleged and it said, using the good old lawyerese English, "Interalia the actions taken pursuant of the plan included the ad which the Petitioner said referred to him."

That ad was widely published throughout the United States. Pamphlets of Mr. Cort's speech -- pamphlets were distributed and reprints of the speech were very widely distributed.

It happens therefore that because of the motion for preliminary injunction, we have not only the avowance of the complaint but we also have admissions by the Defendants of certain facts included within which are these publications which I have described.

I would put before your Honors the issue as follows:

The first question is whether or not the complaint states a valid cause of action for the violation of Section 610 of the Act.

Secondly, whether the facts averred in the complaint and already admitted make out a prima fascie case of a violation of Section 610 and,

Thirdly, if your Honors agree with me on those first two questions, whether the Act, Section 610, is unconstitutionally facially or as applied by the Third Circuit.

Your Honor Mr. Justice Rehnquist was entirely correct in observing that the court below did not grant any relief nor did it intimate that whatever kind of relief that was requested by the Plaintiff in the District Court, whether by way of injunction or otherwise, was proper and correct and should be granted.

All it said was, let the matter go back to Judge Trautman for a full trial.

QUESTION: Mr. Berger --

MR. BERGER: Yes, sir.

QUESTION: You mentioned and emphasized the size of Bethlehem Steel. Does not the Act apply to any corporation of any size?

MR. BERGER: Yes, sir, I emphasized this, may it please your Honor Justice Powell, because I am about to turn to the underlying policy of the statute and that is to prevent the application of vast resources improperly to the influence/federal electoral process. That is why I emphasized that.

QUESTION: But would the statute apply to the small one-man corporation with assets of $1,000?

MR. BERGER: Yes, your Honor.

QUESTION: It would apply to a nonprofit corporation?

MR. BERGER: I do not believe so.

QUESTION: Why? Is there any exemption?

MR. BERGER: I don't find any exemption but I find that this Court has put a gloss upon the interpretation -- and Mr. Justice Frankfurter has said in the UAW case it has got to be active electioneering.

I am unaware of any nonprofit corporation which correctly could actively electioneer.

QUESTION: Are you familiar with the League of Women's Voters?

MR. BERGER: To a certain extent I am, sir.

QUESTION: It may or may not be a corporation but it could be and there are very large foundations in the United States that might very well urge the public to get out to vote. Would you consider that to come within this statute?

MR. BERGER: I would say that if the League of Women Voters -- assuming it were a corporation and it sent these messages out to its own stockholders, if that is what your Honor is telling me, that that is explicitly excepted by the Act, sir.

QUESTION: Suppose they ran ads in the same

publication?

MR. BERGER: It could be arguably urged that that would violate it. That is not this case.

QUESTION: Right.

MR. BERGER: We do not have that case here, your Honor, and I am not asking your Honors to make a decision on anything except the affirmance in this case.

It may very well be that if that kind of case came up, there would be a reason for concluding that the Act -- it was not within the Act's coverage but that is not this case.

QUESTION: To what extent is the content of the exhibits relevant to the case in its present posture, in your view?

MR. BERGER: Only, Mr. Chief Justice, to the extent that they constitute admissions already of record but in my view of the case, it is the averments of the complaint that counts and these averments add substance -- these admissions add substance to the averments in the complaint.

I must say I quite agree with the opinion of the Court below that, taken in the context in which these ads, this speech, the reprint of the speech and the pamphlets appear that under all the circumstances, a jury -- and this was a request for a jury trial -- a jury could

reasonably conclude that this constituted acts of electioneering for one of the candidates.

Now, the argument made by the Defendants in the Court below proceeded on the theory that simply because the name of a candidate was not mentioned, there could be no violation of the Act.

Nothing could be further from correct because, as Chief JUdge Seitz pointed out in the Third Circuit, you have to look at all the circumstances and if a reader of this material of average intelligence would perceive or could perceive that it was indeed a partisan proclamation on behalf of one of the two candidates, then simply because neither candidate's name was mentioned would give no immunity from a violation of the Act or the coverage of the Act.

QUESTION: Would it be relevant at all -- and perhaps this -- in your point of view we haven't reached this stage yet -- but would it be relevant at all to inquire whether this content would be appropriate in a lecture by a political science professor?

MR. BERGER: Your Honor, anybody can say what was in these materials. Mr. Cort could say it. The corporation can say it. The shareholders can say it. The directors can say it. The officers can say it.

All that this Act, whose constitutionality you

are asked to destroy today, does is to say that if they wanted to exercise that freedom of speech, let them use their own money and not the money of the shareholders.

That is all this Act does.

Now, may I proceed with --

QUESTION: But the same might be said with reference to the lecture that I was suggesting hypothetically, that if the professor wants to make a particular speech, he can make it anyway he wants, but he can't make it as professor in the lecture hall at the statesupported university. Is that --

MR. BERGER: That may be. But if he were required to use a different room or, let's say, if he had to make his speech on his own time instead of on the school's time, I don't think that would call into play the First Amendment.

QUESTION: I take it your point is now that the content of this is really irrelevant in spite of what you said about his giving some support to your position?

MR. BERGER: Well, I wouldn't call it entirely irrelevant. I say two things about it. I say that first the case must be considered on the basis of the averments and the complaint and they aver very clearly and plainly and give notice to the Defendants under the federal rules that what is charged is precisely what this Court has said in Pipefitters,

for example.

Now, Mr. Justice Brennan and Mr. Justice Powell, I believe, agreed to that extent it would constitute a violation of Section 610.

Now, what was admitted for the purpose of a preliminary injunction motion is relevant in showing that the complaint was not just something that was frivolous or thought up in somebody's head. In other words, there was serious basis for the averments.

I may say another thing, in the posture of the procedure. In my judgment, what brought about the confusion here is that lower court is under the impression -- I am talking now about the District Court -- that simply because the district judge denied the motion for preliminary injunction which is based essentially on the stipulation of facts which they admitted to, that that foreclosed the Plaintiff from proving the whole case.

As a matter of fact, pending before the Court of Appeals and still pending is the issue of the right of the Plaintiff for full discovery in an evidentiary hearing.

The district judge in a one-paragraph order on page A87 denied the right to trial, denied the right to discovery, denied the right to evidentiary hearing and simply sumarily dismissed the case.

Now, all the Third Circuit did was send it back

for trial.

Now, with your Honors' permission, I would like to address private cause of action point because I agree with Mr. Justice Brennan that might be an easy way out but this Court has never been known to take the easy way out.

QUESTION: Well, it is rarely known to decide constitutional questions.

MR. BERGER: I was not asking your Honors to decide it. I don't think it has to be decided today.

QUESTION: What? The constitutional issue?

MR. BERGER: It need not be decided on this issue.

QUESTION: Assume we disagreed with the other side on implied action?

MR. BERGER: I think you should disagree with them, your Honor.

QUESTION: Yes, I know.

MR. BERGER: And in that event I think you should agree with me that the averments of the complaint and the record as it is show enough to go to the factfinder to determine whether there has been a violation of Section 610 and that that kind of interpretation of the Act is not unconstitutional because it amounts to saying that the Act is unconstitutional on its face.

QUESTION: Oh, yes, but I gather the Third Circuit held that if you prove what you claim you can prove, that the

610 may prevent it.

MR. BERGER: I think that is correct.

QUESTION: And then they said that is constitutional for us to decide.

MR. BERGER: No, they didn't pass on it. The Third Circuit didn't reach that point. They said, we are sending the whole thing back to Judge Trautman.

QUESTION: Yes, but they said it is not unconstitutional on its face.

MR. BERGER: They didn't reach the constitutional point, your Honor, with due deference, sir.

QUESTION: How about the question of this overbreadth?

MR. BERGER: They didn't get into that. They got into the -- the real gist of it was, the private cause of action, may it please the Court -- and they said that the complaint avers a valid cause of action in the 610.

QUESTION: Well, Mr. Berger, suppose you are right about all that?

MR. BERGER: Yes.

QUESTION: Some time the constitutional question has got to be decided, even though they didn't -- if we were to agree with you that they were right as far as they went -- at least when we sent it back, we'd say, now, you address the constitutional question before you go to trial.

MR. BERGER: I think --

QUESTION: Because this is the facial claim?

MR. BERGER: Well, then, I am prepared to argue that it is constitutional.

QUESTION: I would think you would.

MR. BERGER: And I would like very briefly, with your Honor's permission, first to cover the private cause of action.

I heard the government lawyer this morning give his analysis of the cases. I am relying on the same cases and they began with Texas and Rigsby and Mr. Justice Stewart wanted to know when that was decided. It was 1916, your Honor.

QUESTION: 1916?

MR. BERGER: Yes, sir. 241 U.S.

QUESTION: That was the Safety Appliance Act?

MR. BERGER: Yes, sir. And in my analysis of these cases going right on through Case and Borak, Wyandot, Bivens, Time and AMTRAK is this:

It goes back to what Mr. Justice Pitney said in the Rigsby case, that where there is a federal statute and where there has been a violation of that federal statute which imposes standards of conduct, this Court will fashion a remedy to right that wrong and there is nothing more, nothing startling about that. That is the old common law

and, indeed, Judge Kirkpatrick in the Cardin case in the Eastern District of Pennsylvania, in 1946, decided the landmark decision of whether or not a private person could bring a private cause of action for violation of Section 10(b).

Now, that is heavily engrained in our law but he addressed that question and went right back to Rigsby and cited the restatement of torts. That is all that is involved.

QUESTION: Aren't federal courts' jurisdiction -- isn't to really create commonlaw the way the state courts do.

MR. BERGER: No, I am inclined to agree, Mr. Justice Rehnquist. But this is based on a violation of a federal statute, sir.

QUESTION: Yes, but you referred to it "Just like the commonlaw." It isn't commonlaw.

MR. BERGER: No, the principle of the commonlaw. Where there is a violation which causes a wrong, the court will fashion a remedy. That is all I meant.

Now, as I analyze these cases we come down to this, that the allowance that the court will allow the person harmed by conduct which violates a federal statute which imposes standards of conduct, if the allowance of the private cause of action will effectuate the underlying purpose of the statute and there is nothing in the statute

or the legislative history to preclude that -- that is my analysis. Now --

QUESTION: Even if that means that you have got between 400 and 500 district judges who might be dealing separately and independently with the question.

MR. BERGER: I believe, sir, that the federal judicial system is capable of bringing uniformity into that kind of situation. I think that is one of the basic reasons why the private right of action should be recognized.

QUESTION: Well, ultimately, we bring the uniformity here, don't we?

MR. BERGER: Yes, sir.

QUESTION: But that is quite a lot of expended effort before that happens.

MR. BERGER: Your Honor, Chief Justice, a lot less effort than if you let it just go to 50 states.

Now, in CIO in 335 U.S. 1948, this Court told us what the policy of the Congress was and what the purposes of the Act 610 and its predecessors are.

And they are twofold and or equal importance. The first, is to protect the federal electoral process and the second, equally important, is protect the shareholder or, later, a union member, against the use of the company's funds which he contributed to or the union dues for partisan political purposes without the consent of the shareholder or

the union member. Those are the two Congressional purposes which are involved. I --

QUESTION: I suppose it wouldn't be hard to either discern from the legislative history or to infer from one's reasoning processes that the purpose of almost any federal criminal statute, of which there are hundreds, if not thousands -- and it seems to me that test that you told us you submitted to us, this appropriate test would result in a private cause of action based on almost every criminal statute in 18 United States Code.

MR. BERGER: Your Honor, with all due deference, I disagree. First --

QUESTION: I hope you do, but tell me why.

MR. BERGER: First, we are deciding this case and I am going on the basis of the cases that came before this Court.

It is not every criminal statute. It is the particular criminal statutes that come here and I have already analyzed them.

QUESTION: Yes, but let's apply your test, this very broad test of yours. You can't find anything in the legislative history to the contrary that would militate against a civil proceeding, a civil cause of action.

MR. BERGER: There isn't --

QUESTION: Well, then, why isn't there a civil

cause of action -- well, then why isn't there one?

MR. BERGER: Because in most instances, the criminal penalty is adequate. In this, it is not.

QUESTION: Well, who is to judge that?

MR. BERGER: This Court.

QUESTION: You mean, if it is a one-year penitentiary offense it is not adequate, but if it is 10 years, it is and then there is no civil cause of action?

MR. BERGER: Well, I mean, what the specific right is that is violated. I can't take it --

QUESTION: It is for Congress to say what the criminal penalties are.

MR. BERGER: The Congress has done so.

QUESTION: And having done so, by definition, it is adequate. That is what Congress has said.

MR. BERGER: Only to that extent. But if the underlying purpose of Congress can -- will be served -- only if you allow a private cause of action, that is when you allow it and that is what I am arguing for and I would like to explain why in this case you have to allow it.

The criminal penalties here are $10,000 fine. That is not going to help the shareholder. That is a fine levied against his own corporation.

I submit that the way you are going to satisfy the second purpose -- which, by the way, goes back to 1906 when

President Theodore Roosevelt sent his message to Congress asking for the first of these statutes and this has been uniformly recognized by the three coequal branches of our government, the Executive, the Legislative and this Court itself and I say that the only way you can effectuate this very important purpose -- we are not here dealing with just an ordinary run-of-the-mill criminal statute, the very foundation of our democracy, our government as it exists, depends on the purity of the federal electoral process.

The very foundation of our system of enterprise and business depends upon the recognition of what this Court has said is the moral right that officials of a corporation should not misuse the money of the corporation for purely partisan political purposes.

That is the reason why I submit that in this case it was correct to have a private right of action, not only correct but absolutely necessary. Now, may I --

QUESTION: Let's assume for a moment right on that, that a corporate officer is found guilty of violating the statute on 11 counts and the district judge imposes $110,000 maximum penalty available. Do you suggest that a stockholder would not have a remedy to bring suit against him to make him reimburse the corporation for the fine imposed for his misconduct?

MR. BERGER: That is what we are doing in our

case. We are saying right now, your Honor --

QUESTION: Not quite. Not quite. You want to shortcurcuit that process.

MR. BERGER: No, no, with due deference, Chief Justice, we are saying, let the criminal process proceed.

Well, while that proceeds, let the stockholder make the people who violated the law make restitution to the corporation.

QUESTION: At whose instance are you suggesting the criminal process proceed?

MR. BERGER: I talked to the Attorney-GEneral.

QUESTION: Well, but you want it to go back to the district judge.

MR. BERGER: No, that is for the criminal process. All I want --

QUESTION: Well, for the present process.

MR. BERGER: Well, that's -- the district judge is the forum in which this will be judged.

QUESTION: I am addressing my question to you on the basis of saying your statement that there is no remedy for the stockholder. There is quite a good remedy ultimately, isn't there?

MR. BERGER: Only if your Honors will agree with the Third Circuit that this is an appropriate case to say that the private cause of action exists. It is just like

in Case and Borak. The FEC is the expert commission. There were treble penalties, your Honor, provided in the Securities and Exchange laws but in Case and Borak and Deckert in the Affiliated Ute? case and the Superintendent of Banking, this Court has constantly recognized that private stockholders have the right to bring actions for damages and, indeed, if I could refer you to the brief that was argued this morning by the FEC itself, they recognize the validity of the principle I am arguing for and they said that where you have a kind of statute such as this which prescribes standards of conduct, it is appropriate to recognize a private cause of action because that will stimulate the enforcement and this Court has repeatedly held that the private actions by private stockholders is one of the most effective means of getting enforcement of that law.

QUESTION: Mr. Berger --

QUESTION: What about the statute that makes it a crime to rob a federally-insured bank? Do you think the bank has a civil action in the district court under federal question jurisdiction to recover the money that was taken?

MR. BERGER: I would have to review that. It might very well, but I would have to review the entire history of the Act and see what the underlying purpose was.

Now --

QUESTION: Mr. Berger --

MR. BERGER: Yes, sir.

QUESTION: The Third Circuit found this right to be implied to registered voters as well as to stockholders.

MR. BERGER: I don't think we have to go that far, Mr. Justice.

QUESTION: Well, I would like to know your view of the statute. There are 75 to 90 million registered voters so the Third Circuit's opinion says that that many people could bring this suit.

MR. BERGER: Mr. Justice POwell, I say, and my position is that we only have to sustain Mr. Ash's right because he is a stockholder and stockholders have not drowned out the federal courts yet.

Secondly --

QUESTION: You'd say --

MR. BERGER: Excuse me, sir. I'm sorry.

QUESTION: You are defending here only the stockholders' rights.

MR. BERGER: At this point I'd say, your Honors, you only have to uphold that. You don't have to confront the issue of registered voters.

If you ask me personally, my candor would compel me to say that I think they do have the vote but you have got nothing to worry about because they do have a right cause of action. You have nothing to worry about.

Your Honors, you are all aware of the tremendous cost of federal litigation and if you think that suddenly 200 million voters are going to rush to the federal courts and bring suits, believe me, that is not going to happen in the real world.

QUESTION: Could you have recovered -- had any recovery from these people in the state courts?

MR. BERGER: I think that there is that possibility but I don't think that --

QUESTION: Well, can you go into your state courts and say, these people have violated the federal statute in giving away this money and that we want to recover it from them?

MR. BERGER: I think that is an arguable position, Mr. Justice White, but I believe, sir, that that will not be adequate.

QUESTION: That isn't my question to you. My question to you, you are an experienced Pennsylvania lawyer - I just wondered if you --

MR. BERGER: I would have to say that under Delaware law, sir, that the doctrine of ultra vires would permit such a state suit but I do think that --

QUESTION: That is on ultra vires.

MR. BERGER: Yes, sir.

QUESTION: Does that depend at all on the

application of federal statutes?

MR. BERGER: It does.

QUESTION: It does, yes.

MR. BERGER: Yes, sir.

QUESTION: And so there is a remedy in the state courts under state law to vindicate this right.

MR. BERGER: That's possible, but it is inadequate, in my submission.

QUESTION: Oh, it's not only possible, but you just said that it is there.

MR. BERGER: Well, I said that I believe that the state law could remedy it to a certain degree but I also suggest that you are not going to get uniformity.

This involves a question of federal law and the expertise of the federal judiciary should be employed, in addition to which you have a very serious problem that in most states, judges are elected and they are subject to the political process.

One word if I may on AMTRAK. I believe AMTRAK and Time fall on the other side of the line of private auses of action. I agree with your Honors' decision in AMTRAK.

In AMTRAK, it did not have a statute which provided for recognized status of conduct. You had a completely new scheme, a concept for running a national

rail passenger railroad.

Now, in that context, not only would it not effectuate the purposes of the statute to give passengers the right to get discontinuances, it would have defeated the purposes of the Act because if every passenger could run in and get an injunction against the discontinuance, you would not be able to achieve that kind of rational rail passenger service including rational discontinuances.

That is the reason why AMTRAK falls outside of the line of cases without differeing from them, without overruling them and why it is consistent. It is just totally distinguishable.

Finally, I suggest that the case, on its face, the statute on its face, is constitutional. There is no restriction, contrary to what Mr. Rome said, on any free speech, whether it be the corporation -- and in our brief we have pointed out how very carefully this statute was drawn.

This Act in 1971 which you are dealing with follows your Honor's opinion in Pipefitters, Mr. Justice Brennan. It codifies it, precisely what the Court has said are the traditional and constitutional limits.

The Federal Government has very broad power to regulate federal elections, particularly the President and members of Congress.

In doing so, the only question is, were reasonable means employed?

I submit that when you have a narrowly-drawn statute which allows the corporation to say anything it wants to to its own stockholders and their families, including partisan political things, which allows the corporation to use its money to solicit funds and to administer separate segregated funds and which allows non-partisan get-out-the-vote and all that sort of thing but says that if you want to engage in active electioneering, you have to use your own money or get the segregated funds from voluntary contributions or shareholders, that doesn't present this horrendous picture which the Petitioner is shouting about.

QUESTION: And that is your answer to the constitutional argument Mr. Rome gave.

MR. BERGER: Yes, sir. Yes, sir and I say on the Fifth Amendment that everything that was done here has a rational basis to apply to the great aggregation of wealth of the corporation and the union and that there is no necessity to include all these other elements like the League of Women Voters that are in the coverage of the Act.

I don't think there is any violation of Fifth Amendment at all.

We submit that the Court of Appeals should be affirmed, the matter go back to the District Court for full trial.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Berger.

Mr. Rome.

REBUTTAL ARGUMENT OF EDWIN P. ROME, ESQ.

MR. ROME: With your Honor's permission, I would bring to your attention the fact that Judge Aldisert had earlier commented in the same way that Mr. Justice Stewart has suggested, to imply a private right of action here he says, is to suggest that for every written volume of Title 18 of the United States' Code, there is an unwritten volume of Title 28.

In actuality, contrary to what Mr. Burger has said, the congressional history of this legislation shows that the chairman of the House Conferees, Mr. Hayes -- and this appears on page 32 and 33 of our brief -- pointed out that there was an intention to assure that civil suits are not misused in a partisan manner and that the complex and sensitive rights and duties stated in the Act are administered expertly and uniformly and therefore the private civil action was created bia the Commission under Title III but not in Title II.

In actuality, also, I urge upon your Honors the recognition that what has been the heart of this case from the very beginning has been the speech, the ad and the folder and that alone.

There has been no doubt or dispute about that, even to the point that my friends on the other side sought to have the Third Circuit rule as a matter of law on summary judgment that those documents in and of themselves constituted a violation and they weren't seeking to bring in any other plan or any other activity on the part of the Defendant.

I would also point out that to the extent that there is discovery sought here, I think that that is a blatant intrusion into First Amendment areas because you would, under those circumstances, be inquiring of the individual defendants here about their political ideas and their views, their party membership which, in our submission, is absolutely impermissible under the First Amendment.

And in actuality, it is the fact that the district judge avoided coming to the constitutional issue only because he said that there was a mandate to narrowly restrict the interpretation and the definition of expenditure so as to avoid that result, to enjoin the expenditures made by Bethlehem in connection with the advertisement, the speech and the folder would prevent a

corporation from seeking an honest campaign and election which is adverse to its interest, thereby giving rise to grave First Amendment issues.

That is what happened in the district court and also, the Court of Appeals touched upon constitutional issues and that appears at page 108 of the record.

Thank you very much, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:46 o'clock p.m., the case was submitted.]