

EMILIO M. R. OSMEÑA AND PABLO P. GARCIA, PETITIONERS, VS. THE COMMISSION ON ELECTIONS, RESPONDENT.*G.R. No. 132231. March 31, 1998*

Ponente: MENDOZA, J.

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This is a petition for prohibition, seeking a reexamination of the validity of §11(b) of R.A. No. 6646, the Electoral Reforms Law of 1987, which prohibits mass media from selling or giving free of charge print space or air time for campaign or other political purposes, except to the Commission on Elections.[1] Petitioners are candidates for public office in the forthcoming elections. Petitioner Emilio M. R. Osmeña is candidate for President of the Philippines, while petitioner Pablo P. Garcia is governor of Cebu Province, seeking reelection. They contend that events after the ruling in *National Press Club v. Commission on Elections*[2] “have called into question the validity of the very premises of that [decision].”[3]

[There Is No Case or Controversy][to Decide,]

[Only an Academic Discussion to Hold]

NPC v. COMELEC upheld the validity of §11(b) of R.A. No. 6646 against claims that it abridged freedom of speech and of the press.[4] In urging a reexamination of that ruling, petitioners claim that experience in the last five years since the decision in that case has shown the “undesirable effects” of the law because “the ban on political advertising has not only failed to level the playing field, [but] actually worked to the grave disadvantage of the poor candidate[s]”[5] by depriving them of a medium which they can afford to pay for while their more affluent rivals can always resort to other means of reaching voters like airplanes, boats, rallies, parades, and handbills.

No empirical data have been presented by petitioners to back up their claim, however. Argumentation is made at the theoretical and not the practical level. Unable to show the “experience” and “subsequent events” which they claim invalidate the major premise of our prior decision, petitioners now say “there is no need for ‘empirical data’ to determine whether the political ad ban offends the Constitution or not.”[6] Instead they make arguments from which it is clear that their disagreement is with the opinion of the Court on the constitutionality of §11(b) of R.A. No. 6646 and that what they seek is a reargument on the same issue already decided in that case. What is more, some of the arguments were already considered and rejected in the *NPC* case.[7]

Indeed, petitioners do not complain of any harm suffered as a result of the operation of the law. They do not complain that they have in any way been disadvantaged as a result of the ban on media advertising. Their contention that, contrary to the holding in *NPC*, §11(b) works to the disadvantage of candidates who do not have enough resources to wage a campaign outside of mass media can hardly apply to them. Their financial ability to sustain a long drawn-out campaign, using means other than the mass media to communicate with voters, cannot be doubted. If at all, it is candidates like intervenor Roger Panotes, who is running for mayor of Daet, Camarines Norte, who can complain against §11(b) of R.A. No. 6646. But Panotes is for the law which, he says, has “to

some extent, reduced the advantages of moneyed politicians and parties over their rivals who are similarly situated as ROGER PANOTES.” He claims that “the elimination of this substantial advantage is one reason why ROGER PANOTES and others similarly situated have dared to seek an elective position this coming elections.”[8]

What petitioners seek is not the adjudication of a case but simply the holding of an academic exercise. And since a majority of the present Court is unpersuaded that its decision in NPC is founded in error, it will suffice for present purposes simply to reaffirm the ruling in that case. *Stare decisis et non quieta movere*. This is what makes the present case different from the overruling decisions[9] invoked by petitioners.

Nevertheless, we have undertaken to revisit the decision in NPC v. COMELEC in order to clarify our own understanding of its reach and set forth a theory of freedom of speech.

[No Ad Ban, Only a Substitution of]

[COMELEC Space and COMELEC]

[Time for the Advertising Page and]

[Commercials in Mass Media]

The term political “ad ban,” when used to describe §11(b) of R.A. No. 6646, is misleading, for even as §11(b) prohibits the sale or donation of print space and air time to political candidates, it mandates the COMELEC to procure and itself allocate to the candidates space and time in the media. There is no suppression of political ads but only a regulation of the time and manner of advertising.

Thus, §11(b) states:

Prohibited Forms of Election Propaganda. — In addition to the forms of election propaganda prohibited in Section 85 of Batas Pambansa Blg. 881, it shall be unlawful:

....

(b) for any newspapers, radio broadcasting or television station, or other mass media, or any person making use of the mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under Section 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcer or personality who is a candidate for any elective public office shall take a leave of absence from his work as such during the campaign period.

On the other hand, the Omnibus Election Code provisions referred to in §11(b) read:

SEC. 90. Comelec space. — The Commission shall procure space in at least one newspaper of general circulation in every province or city: Provided, however, That in the absence of said newspaper, publication shall be done in any other magazine or periodical in said province or city, which shall be known as “Comelec Space” wherein candidates can announce their candidacy. Said space shall be allocated, free of charge, equally and impartially by the Commission among all candidates within the area in which the newspaper is circulated. (Sec. 45, 1978 EC).

SEC. 92. Comelec time. - The Commission shall procure radio and television time to be known as “Comelec Time” which shall be allocated equally and impartially among the candidates within the area of coverage of all radio and television stations. For this purpose, the franchise of all radio broadcasting and television stations are hereby amended so as to provide radio or television time, free of charge, during the period of the campaign. (Sec. 46, 1978 EC)

The law's concern is not with the message or content of the ad but with ensuring media equality between candidates with "deep pockets," as Justice Feliciano called them in his opinion of the Court in NPC, and those with less resources.[10] The law is part of a package of electoral reforms adopted in 1987. Actually, similar effort was made in 1970 to equalize the opportunity of candidates to advertise themselves and their programs of government by requiring the COMELEC to have a COMELEC space in newspapers, magazines, and periodicals and prohibiting candidates to advertise outside such space, unless the names of all the other candidates in the district in which the candidate is running are mentioned "with equal prominence." The validity of the law was challenged in *Badoy, Jr. v. COMELEC*. [11] The voting was equally divided (5-5), however, with the result that the validity of the law was deemed upheld.

There is a difference in kind and in severity between restrictions such as those imposed by the election law provisions in question in this case and those found to be unconstitutional in the cases cited by both petitioners and the Solicitor General, who has taken the side of petitioners. In *Adiong v. COMELEC* [12] the Court struck down a regulation of the COMELEC which prohibited the use of campaign decals and stickers on mobile units, allowing their location only in the COMELEC common poster area or billboard, at the campaign headquarters of the candidate or his political party, or at his residence. The Court found the restriction "so broad that it encompasses even the citizen's private property, which in this case is a privately-owned car." [13] Nor was there a substantial governmental interest justifying the restriction.

[T]he constitutional objective to give a rich candidate and a poor candidate equal opportunity to inform the electorate as regards their candidacies, mandated by Article II, Section 26 and Article XIII, Section 1 in relation to Article IX(c) Section 4 of the Constitution, is not impaired by posting decals and stickers on cars and other private vehicles. Compared to the paramount interest of the State in guaranteeing freedom of expression, any financial considerations behind the regulation are of marginal significance. [14]

Mutuc v. COMELEC [15] is of a piece with *Adiong*. An order of the COMELEC prohibiting the playing of taped campaign jingles through sound systems mounted on mobile units was held to be an invalid prior restraint without any apparent governmental interest to promote, as the restriction did not simply regulate time, place or manner but imposed an absolute ban on the use of the jingles. The prohibition was actually content-based and was for that reason bad as a prior restraint on speech, as inhibiting as prohibiting the candidate himself to use the loudspeaker. So is a ban against newspaper columnists expressing opinion on an issue in a plebiscite a content restriction which, unless justified by compelling reason, is unconstitutional. [16]

Here, on the other hand, there is no total ban on political ads, much less restriction on the content of the speech. Given the fact that print space and air time can be controlled or dominated by rich candidates to the disadvantage of poor candidates, there is a substantial or legitimate governmental interest justifying exercise of the regulatory power of the COMELEC under Art. IX-C, §4 of the Constitution, which provides:

The commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections.

The provisions in question involve no suppression of political ads. They only prohibit the sale or donation of print space and air time to candidates but require the COMELEC instead to procure space and time in the mass media for allocation, free of charge, to the candidates. In effect, during the election period, the COMELEC takes over

the advertising page of newspapers or the commercial time of radio and TV stations and allocates these to the candidates.

Nor can the validity of the COMELEC take-over for such temporary period be doubted.[17] In *Pruneyard Shopping Center v. Robbins*, [18] it was held that a court order compelling a private shopping center to permit use of a corner of its courtyard for the purpose of distributing pamphlets or soliciting signatures for a petition opposing a UN resolution was valid. The order neither unreasonably impaired the value or use of private property nor violated the owner's right not to be compelled to express support for any viewpoint since it can always disavow any connection with the message.

On the other hand, the validity of regulations of time, place and manner, under well-defined standards, is well-nigh beyond question.[19] What is involved here is simply regulation of this nature. Instead of leaving candidates to advertise freely in the mass media, the law provides for allocation, by the COMELEC, of print space and air time to give all candidates equal time and space for the purpose of ensuring "free, orderly, honest, peaceful, and credible elections."

In *Gonzales v. COMELEC*, [20] the Court sustained the validity of a provision of R.A. No. 4880 which in part reads:

SEC. 50-B. Limitation upon the period of Election Campaign or Partisan Political Activity. — It is unlawful for any person whether or not a voter or candidate, or for any group, or association of persons, whether or not a political party or political committee, to engage in an election campaign or partisan political activity except during the period of one hundred twenty days immediately preceding an election involving a public office voted for at large and ninety days immediately preceding an election for any other elective public office.

The term "Candidate" refers to any person aspiring for or seeking an elective public office, regardless of whether or not said person has already filed his certificate of candidacy or has been nominated by any political party as its candidate.

The term "Election Campaign" or "Partisan Political Activity" refers to acts designed to have a candidate elected or not or promote the candidacy of a person or persons to a public office which shall include:

- (a) Forming Organizations, Associations, Clubs, Committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a party or candidate;
- (b) Holding political conventions, caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate or party; . . .

In *Valmonte v. COMELEC*, [21] on the other hand, the Court upheld the validity of a COMELEC resolution prohibiting members of citizen groups or associations from entering any polling place except to vote. Indeed, §261(k) of the Omnibus Election Code makes it unlawful for anyone to solicit votes in the polling place and within a radius of 30 meters thereof.

These decisions come down to this: the State can prohibit campaigning outside a certain period as well as campaigning within a certain place. For unlimited expenditure for political advertising in the mass media skews the political process and subverts democratic self-government. What is bad is if the law prohibits campaigning by certain candidates because of the views expressed in the ad. Content regulation cannot be done in the absence of any compelling reason.

[Law Narrowly Drawn to Fit]

[Regulatory Purpose]

The main purpose of §11(b) is regulatory. Any restriction on speech is only incidental, and it is no more than is necessary to achieve its purpose of promoting equality of opportunity in the use of mass media for political advertising. The restriction on speech, as pointed out in NPC, is limited both as to time and as to scope.

Petitioners and the dissenters make little of this on the ground that the regulation, which they call a ban, would be useless any other time than the election period. Petitioners state: “[I]n testing the reasonableness of a ban on mountain-skiing, one cannot conclude that it is limited because it is enforced only during the winter season.”[22] What makes the regulation reasonable is precisely that it applies only to the election period. Its enforcement outside the period would make it unreasonable. More importantly, it should be noted that a “ban on mountain skiing” would be passive in nature. It is like the statutory cap on campaign expenditures, but is so unlike the real nature of §11(b), as already explained.

Petitioners likewise deny that §11(b) is limited in scope, as they make another quaint argument:

A candidate may court media to report and comment on his person and his programs, and media in the exercise of their discretion just might. It does not, however, follow that a candidate’s freedom of expression is thereby enhanced, or less abridged. If Pedro is not allowed to speak, but Juan may speak of what Pedro wishes to say, the curtailment of Pedro’s freedom of expression cannot be said to be any less limited, just because Juan has the freedom to speak.[23]

The premise of this argument is that §11(b) imposes a ban on media political advertising. What petitioners seem to miss is that the prohibition against paid or sponsored political advertising is only half of the regulatory framework, the other half being the mandate of the COMELEC to procure print space and air time so that these can be allocated free of charge to the candidates.

[Reform of the Marketplace of Ideas,]

[Not Permissible?]

Petitioners argue that the reasoning of NPC is flawed, because it rests on a misconception that Art. IX-C, §4 mandates the absolute equality of all candidates regardless of financial status, when what this provision speaks of is “equality of opportunity.” In support of this claim, petitioners quote the following from the opinion of the Court written by Justice Feliciano:

The objective which animates Section 11(b) is the equalizing, as far as practicable, the situations of rich and poor candidates by preventing the former from enjoying the undue advantage offered by huge campaign “war chests.”[24]

The Court meant equalizing media access, as the following sentences which were omitted clearly show:

Section 11(b) prohibits the sale or donation of print space and air time “for campaign or other political purposes” except to the Commission on Elections (“Comelec”). Upon the other hand, Sections 90 and 92 of the Omnibus Election Code require the Comelec to procure “Comelec space” in newspapers of general circulation in every province or city and “Comelec time” on radio and television stations. Further, the Comelec is statutorily commanded to allocate “Comelec space” and “Comelec time” on a free of charge, equal and impartial basis among all candidates within the area served by the newspaper or radio and television station involved.[25]

On the other hand, the dissent of Justice Romero in the present case, in batting for an “uninhibited market place of ideas,” quotes the following from *Buckley v. Valeo*:

[T]he concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of the others is wholly foreign to the First Amendment which was designed to “secure the widest possible dissemination of information from diverse and antagonistic sources” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”[26]

But do we really believe in that? That statement was made to justify striking down a limit on campaign expenditure on the theory that money is speech. Do those who endorse the view that government may not restrict the speech of some in order to enhance the relative voice of others also think that the campaign expenditure limitation found in our election laws[27] is unconstitutional? How about the principle of one person, one vote,[28] is this not based on the political equality of voters? Voting after all is speech. We speak of it as the voice of the people - even of God. The notion that the government may restrict the speech of some in order to enhance the relative voice of others may be foreign to the American Constitution. It is not to the Philippine Constitution, being in fact an animating principle of that document.

Indeed, Art. IX-C, §4 is not the only provision in the Constitution mandating political equality. Art. XIII, §1 requires Congress to give the “highest priority” to the enactment of measures designed to reduce political inequalities, while Art. II, §26 declares as a fundamental principle of our government “equal access to opportunities for public service.” Access to public office will be denied to poor candidates if they cannot even have access to mass media in order to reach the electorate. What fortress principle trumps or overrides these provisions for political equality?

Unless the idealism and hopes which fired the imagination of those who framed the Constitution now appear dim to us, how can the electoral reforms adopted by them to implement the Constitution, of which §11(b) of R.A. No. 6646, in relation to §§90 and 92 are part, be considered infringements on freedom of speech? That the framers contemplated regulation of political propaganda similar to §11(b) is clear from the following portion of the sponsorship speech of Commissioner Vicente B. Foz:

MR. FOZ. . . . Regarding the regulation by the Commission of the enjoyment or utilization of franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges or concessions granted by the Government, there is a provision that during the election period, the Commission may regulate, among other things, the rates, reasonable free space, and time allotments for public information campaigns and forums among candidates for the purpose of ensuring free, orderly, honest and peaceful elections. This has to do with the media of communication or information.[29]

[On the Claim that the Reforms]

[Have Been Ineffectual]

Petitioners contend that §11(b) is not a reasonable means for achieving the purpose for which it was enacted. They claim that instead of levelling the playing field as far as the use of mass media for political campaign is concerned, §11(b) has abolished it. They further claim that §11(b) does not prevent rich candidates from using their superior resources to the disadvantage of poor candidates.

All this is of course mere allegation. As stated in the beginning, what petitioners claim to be the nation’s experience with the law is merely argumentation against its validity. The claim will not bear analysis, however. Assuming that rich candidates can spend for parades, rallies, motorcades, airplanes and the like in order to campaign while poor candidates can only afford political ads, the gap between the two will not necessarily be reduced by allowing unlimited mass media advertising because rich candidates can spend for other propaganda in addition to mass media advertising. Moreover, it is not true that §11(b) has abolished the playing field. What it has done, as already stated, is merely to regulate its use through COMELEC-sponsored advertising in place of

advertisements paid for by candidates or donated by their supporters.

It is finally argued that COMELEC Space and COMELEC Time are ineffectual. It is claimed that people hardly read or watch or listen to them. Again, this is a factual assertion without any empirical basis to support it. What is more, it is an assertion concerning the adequacy or necessity of the law which should be addressed to Congress. Well-settled is the rule that the choice of remedies for an admitted social malady requiring government action belongs to Congress. The remedy prescribed by it, unless clearly shown to be repugnant to fundamental law, must be respected.[30] As shown in this case, §11(b) of R.A. 6646 is a permissible restriction on the freedom of speech, of expression and of the press.

Dissenting, Justice Panganiban argues that advertising is the most effective means of reaching voters. He adverts to a manifestation of the COMELEC lawyer that the Commission “is not procuring [Comelec Space] by virtue of the effects of the decision of this Honorable Court in the case of Philippine Press Institute (PPI) vs. Comelec, 244 SCRA 272.”[31]

To be sure, this Court did not hold in PPI v. COMELEC that it should not procure newspaper space for allocation to candidates. What it ruled is that the COMELEC cannot procure print space without paying just compensation. Whether by its manifestation the COMELEC meant it is not going to buy print space or only that it will not require newspapers to donate free of charge print space is not clear from the manifestation. It is to be presumed that the COMELEC, in accordance with its mandate under §11(b) of R.A. No. 6646 and §90 of the Omnibus Election Code, will procure print space for allocation to candidates, paying just compensation to newspapers providing print space.

In any event, the validity of a law cannot be made to depend on the faithful compliance of those charged with its enforcement but by appropriate constitutional provisions. There is a remedy for such lapse if it should happen. In addition, there is the COMELEC Time during which candidates may advertise themselves. Resolution No. 2983-A of the COMELEC provides:

SEC. 2. Grant of “Comelec Time.” — Every radio broadcasting and television station operating under franchise shall grant the Commission, upon payment of just compensation, at least thirty (30) minutes of prime time daily, to be known as “Comelec Time”, effective February 10, 1998 for candidates for President, Vice-President and Senators, and effective March 27, 1998, for candidates for local elective offices, until May 9, 1998. (Emphasis added)

[Failure of Legislative Remedy Bespeaks]

[of More than Congressional Inaction]

The fact is that efforts have been made to secure the amendment or even repeal of §11(b) of R.A. No. 6646. No less than five bills[32] were filed in the Senate in the last session of Congress for this purpose, but they all failed of passage. Petitioners claim it was because Congress adjourned without acting on them. But that is just the point. Congress obviously did not see it fit to act on the bills before it adjourned.

We thus have a situation in which an act of Congress was found by this Court to be valid so that those opposed to the statute resorted to the legislative department. The latter reconsidered the question but after doing so apparently found no reason for amending the statute and therefore did not pass any of the bills filed to amend or repeal the statute. Must this Court now grant what Congress denied to them? The legislative silence here certainly bespeaks of more than inaction.

[Test for Content-Neutral Restrictions][33]

In *Adiong v. COMELEC*[34] this Court quoted the following from the decision of the U.S. Supreme Court in a case sustaining a Los Angeles City ordinance which prohibited the posting of campaign signs on public property:

A government regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incident restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (Id., at 377, 20 L Ed 2d 672, 88 S Ct 1673. (*City Council v. Taxpayers For Vincent*, 466 US 789, 80 L Ed 2d 772, 104 S Ct 2118[1984]))[35]

This test was actually formulated in *United States v. O'Brien*.^[36] It is an appropriate test for restrictions on speech which, like §11(b), are content-neutral. Unlike content-based restrictions, they are not imposed because of the content of the speech. For this reason, content-neutral restrictions are tests demanding standards. For example, a rule such as that involved in *Sanidad v. COMELEC*,^[37] prohibiting columnists, commentators, and announcers from campaigning either for or against an issue in a plebiscite must have a compelling reason to support it, or it will not pass muster under strict scrutiny. These restrictions, it will be seen, are censorial and therefore they bear a heavy presumption of constitutional invalidity. In addition, they will be tested for possible overbreadth and vagueness.

It is apparent that these doctrines have no application to content-neutral regulations which, like §11(b), are not concerned with the content of the speech. These regulations need only a substantial governmental interest to support them.^[38] A deferential standard of review will suffice to test their validity.

Justice Panganiban's dissent invokes the clear-and-present-danger test and argues that "media ads do not partake of the 'real substantive evil' that the state has a right to prevent and that justifies the curtailment of the people's cardinal right to choose their means of expression and of access to information." The clear-and-present-danger test is not, however, a sovereign remedy for all free speech problems. As has been pointed out by a thoughtful student of constitutional law, it was originally formulated for the criminal law and only later appropriated for free speech cases. For the criminal law is necessarily concerned with the line at which innocent preparation ends and a guilty conspiracy or attempt begins.^[39] Clearly, it is inappropriate as a test for determining the constitutional validity of laws which, like §11(b) of R.A. No. 6646, are not concerned with the content of political ads but only with their incidents. To apply the clear-and-present-danger test to such regulatory measures would be like using a sledgehammer to drive a nail when a regular hammer is all that is needed.

The reason for this difference in the level of justification for the restriction of speech is that content-based restrictions distort public debate, have improper motivation, and are usually imposed because of fear of how people will react to a particular speech. No such reasons underlie content-neutral regulations, like regulations of time, place and manner of holding public assemblies under B.P. Blg. 880, the Public Assembly Act of 1985. Applying the *O'Brien* test in this case, we find that §11(b) of R.A. No. 6646 is a valid exercise of the power of the State to regulate media of communication or information for the purpose of ensuring equal opportunity, time and space for political campaigns; that the regulation is unrelated to the suppression of speech; that any restriction on freedom of expression is only incidental and no more than is necessary to achieve the purpose of promoting equality.

The Court is just as profoundly aware as anyone else that discussion of public issues and debate on the qualifications of candidates in an election are essential to the proper functioning of the government established by our Constitution. But it is precisely with this awareness that we think democratic efforts at reform should be seen for what they are: genuine efforts to enhance the political process rather than infringements on freedom of

expression. The statutory provision involved in this case is part of the reform measures adopted in 1987 in the aftermath of EDSA. A reform-minded Congress passed bills which were consolidated into what is now R.A. No. 6646 with near unanimity. The House of Representatives, of which petitioner Pablo P. Garcia was a distinguished member, voted 96 to 1 (Rep. Eduardo Pilapil) in favor, while the Senate approved it 19-0.[40]

In his recent book, *The Irony of Free Speech*, Owen Fiss speaks of “a truth that is full of irony and contradiction: that the state can be both an enemy and a friend of speech; that it can do terrible things to undermine democracy but some wonderful things to enhance it as well.”[41] We hold R.A. No. 6646, §11(b) to be such a democracy-enhancing measure. For Holmes’s marketplace of ideas can prove to be nothing but a romantic illusion if the electoral process is badly skewed, if not corrupted, by the unbridled use of money for campaign propaganda.

The petition is DISMISSED.

SO ORDERED.

Narvasa, C.J., Regalado, Davide, Jr., Bellosillo, Kapunan, and Martinez, JJ., concur.

Romero and Panganiban, JJ., see dissenting opinion.

Melo, J., join separate opinion of Justice Puno and Justice Vitug.

Puno, and Vitug, JJ., has separate opinion.

Quisumbing and Purisima, JJ., join dissenting opinion of Justice Romero and Justice Panganiban.

[1] As petitioners filed their petition before they filed certificates of candidacy, they assert an interest in this suit “as taxpayers and registered voters” and “as prospective candidates.” Rollo, p. 6.

[2] 207 SCRA 1 (1992).

[3] Rollo, p. 3.

[4] Art. III of the Constitution provides:

SEC. 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

A related provision states:

SEC. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

[5] Rollo, p. 17.

[6] Memorandum for Petitioners, p. 21.

[7] Thus, this Court held in *NPC v. COMELEC*:

My learned brother in the Court Cruz, J. remonstrates, however, that “[t]he financial disparity among the candidates is a fact of life that cannot be corrected by legislation except only by the limitation of their respective expenses to a common maximum. The flaw in the prohibition under challenge is that while the rich candidate is barred from buying mass media coverage, it nevertheless allows him to spend his funds on other campaign

activities also inaccessible to his straitened rival.” True enough Section 11(b) does not, by itself or in conjunction with Sections 90 and 92 of the Omnibus Election Code, place political candidates on complete and perfect equality inter se without regard to their financial affluence or lack thereof. But a regulatory measure that is less than perfectly comprehensive or which does to completely obliterate the evil sought to be remedied, is not for that reason alone constitutionally infirm. The Constitution does not, as it cannot, exact perfection in government regulation. All it requires, in accepted doctrine, is that the regulatory measure under challenge bear a reasonable nexus with the constitutionally sanctioned objective. That the supervision or regulation of communication and information media is not, in itself, a forbidden modality is made clear by the Constitution itself in Article IX(C)(4). 207 SCRA at 14.

[8] Answer-in-Intervention, p. 2.

[9] Philippine Trust Co. v. Mitchell, 50 Phil. 30 (1927); Kilosbayan v. Morato, 246 SCRA 540 (1995).

[10] 207 SCRA 1, 13-14 (1992).

[11] 35 SCRA 285 (1970).

[12] 207 SCRA 712 (1992).

[13] Id. at 720.

[14] Id. at 722.

[15] 36 SCRA 228 (1970).

[16] Sanidad v. COMELEC, 181 SCRA 529 (1990).

[17] In Philippine Press Institute v. COMELEC, 244 SCRA 272 (1995), we held that for space acquired in newspapers the COMELEC must pay just compensation. Whether there is a similar duty to compensate for acquiring air time from broadcast media is the question raised in Telecommunications and Broadcast Attorneys of the Philippines v. COMELEC, G.R. No. 132922, now pending before this Court.

[18] 447 U.S. 74, 64 L.Ed2d 741 (1980).

[19] See, e.g., J. B. L. Reyes v. Bagatsing, 125 SCRA 553 (1983); Navarro v. Villegas, 31 SCRA 730 (1970); Ignacio v. Ela, 99 Phil. 346 (1956); Primicias v. Fugoso, 80 Phil. 71 (1948).

[20] 27 SCRA 835 (1969).

[21] Res., G.R. No. 73551, Feb. 11, 1988.

[22] Memorandum for Petitioners, p. 10.

[23] Id., p. 11.

[24] 207 SCRA at 7 (emphasis by petitioners).

[25] Ibid.

[26] 424 U.S. 1, 48-49, 46 L.Ed. 659, 704-705 (1976). The Solicitor General also quotes this statement and says it is “highly persuasive in this jurisdiction.” Memorandum of the OSG, p. 27.

[27] R.A. No. 7166, §13; OEC, §100.

[28] See *Macias v. COMELEC*, 113 Phil. 1 (1961).

[29] 1 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 624, Session of July 16, 1986.

[30] *Gonzales v. COMELEC*, 27 SCRA 835 (1969).

[31] *Compliance*, p. 4.

[32] The bills are S. Nos. 178, 595, 856, 1177 and 1224, which were consolidated into S. No. 2104.

[33] For helpful discussion of the distinction between content-based and content-neutral regulations, see generally GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, AND MARK V. TUSHNET, CONSTITUTIONAL LAW 1086-1087, 1172-1183, 1323-1334 (1996); GERALD GUNTHER AND KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1203-1212 (1997); Geoffrey R. Stone, Content-Neutral Restrictions, 54 Univ. of Chi. Law Rev. 46 (1987).

[34] 207 SCRA 712 (1992).

[35] *Id.* at 718 (internal quotations omitted).

[36] 391 U.S. 367, 20 L.Ed.2d 672 (1968).

[37] 181 SCRA 529 (1990).

[38] See, e.g., *Primicias v. Fugoso*, 80 Phil. 71 (1948).

[39] PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 25-26 (1949).

[40] 4 RECORD OF THE HOUSE OF REPRESENTATIVES 261 (Dec. 14, 1987); 1 RECORD OF THE SENATE 1644 (Oct. 19, 1987) .

[41] THE IRONY OF FREE SPEECH 83 (1996).

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[DISSENTING OPINION]

PANGANIBAN, J.:

The Court, by majority vote, decided to uphold the ban on political advertising, as provided under Section 11(b)[1] of RA 6646, and to reiterate the 1992 ruling in *National Press Club vs. Comelec*[2] for two main reasons:

1. To equalize "as far as practicable, the situations of rich and poor candidates by preventing the former from enjoying the undue advantage offered by huge campaign 'war chests.'" In other words, the intention of the prohibition is to equalize the "political playing field" for rich and poor candidates.

2. While conceding that Section 11(b) of RA 6646 "limit[s] the right of free speech and of access to mass media of the candidate themselves," the Court justifies the ad ban by alleging that: (a) it is limited, first, in its "duration," (i.e. the ban applies only during the "election period") and, second, in its "scope" (i.e. the prohibition on the sale and the donation of print space and air time covers only those for "campaign and other political purposes" and does not restrict the legitimate reporting of news and opinions by media practitioners who are not candidates); and (b) the Comelec is authorized to procure, by purchase or donation, media time and space which are to be fairly, freely and equally distributed among the candidates. Otherwise stated, the

grant of Comelec time and space, free of charge, to said candidate makes up for admitted infringement of the constitutional right to free speech and access to mass media during the campaign period.

With all due respect, I disagree with the majority's view and join the stirring Dissenting Opinions of Justice Hugo E. Gutierrez, Jr.,^[3] Isagani A. Cruz^[4] and Edgardo L. Paras^[5] in *NPC vs. Comelec*, and of Justice Flerida Ruth Romero in the present case. I will no longer repeat their cogent legal arguments. Let me just add my own.

[1. Ad Ban Not Pro-Poor]

[But Anti-Poor]

The majority argues that the ad ban is pro-poor, because it prevents the rich from buying media time and space which the poor cannot afford or match. This argument assumes that media advertising is expensive and, thus, beyond the reach of the poor.

I respectfully submit that such argument is bereft of factual basis. True, a full-page ad in a major broadsheet^[6] may be priced at about P100,000, a 30-second commercial in a major television,^[7] anywhere from P15,000 to P90,000 depending on the time and the program; while airtime of an equal duration in a radio station, anywhere from P300 to P4,500.^[8] But even with such price tags, media ads are not necessarily expensive, considering their nationwide reach, audience penetration, effectiveness and persuasive value.

Realistically, expenses are involved in a candidacy for a national office like the presidency, the vice-presidency, and the senate. In recognition of this, the law has limited campaign expenditures to ten pesos (P10) for every voter in the case of candidates for president and vice-president, and three pesos (P3) per voter in their constituencies, for other candidates.^[9] Sec. 100 Limitations upon expenses of candidates.- Authorized Expenses of Candidates and Political Parties. - The aggregate amount that a candidate or registered political party may spend for election campaign shall be as follows:

(a) For candidates - Ten pesos (P10.00) for President and Vice-President and for other candidates. Three pesos (P3.00) for every voter currently registered in the constituency where he filed his certificate of candidacy. Provided, That a candidate without any political party may be allowed to spend Five pesos (P5.00) for every such voter, and

(b) For political parties - Five pesos (P5.00) for every voter currently registered in the constituency or constituencies where it has official candidates.

Any provision of law to the contrary notwithstanding, any contribution in cash or in kind to any candidate or political party or coalition of parties for campaign purposes, duly reported to the Commission, shall not be subject to the payment of any gift tax."⁹ Anyone - whether rich or poor - who aspires for such national elective office must expect to spend a considerable sum, whether of his own or from allowable donations, to make himself and his platform or program of government known to the voting public.

[Media Ads]

[Comparatively Cheaper]

While a one-page black-and-white ad in a major daily costs about P100,000, it is replicated, however, in about 250,000 copies^[10] circulated to an equal number of offices and households nationwide on the very same day of its publication. Each newspaper copy has an average readership of six. Hence, the ad is exposed to about 1.5 million (250,000 x 6) people all over the country. Consider, too, the people discuss what they read while they congregate in barber shops, corner stores, and other places where people gather. Sometimes, radio and tv

broadcasters pick up and comment on what they read on newspapers. So, the reach, pass-on readership, multiplier effect and effectivity of a broadsheet ad are practically immeasurable.

On the other hand, let us consider the alternative of printing and distributing a poster or handbill of similar size. The actual printing cost of such handbill on newsprint is twenty centavos (P.20) per copy.^[11] The cost of 250,000 copies (the circulation of a major daily) would thus be P50,000 (250,000 x P.20). But that is only the printing cost. To disseminate these handbills nationwide on the same day of printing without the distribution network of a major newspaper is almost impossible. Besides, the cost would be horrendous. To approximate the circulation of a major newspaper is almost impossible. Besides, the cost would be horrendous. To approximate the circulation of a major newspaper, the most practical substitute would be the mails. Ordinary mail is now P4.00 per posting. Hence, the distribution cost through the mails would be P1 million (250,000 x P4.00). And this does not include the manual work and cost of sorting, folding and individually addressing these 250,000 pieces of mail matter. (This alternative assumes the availability of a mailing list equivalent to the reach of a newspaper.) Even if third-class mail is used, the distribution cost alone will still be P3.00 per individual mailing, or P750,000 for all 250,000 copies.^[12]

This alternative is not only much more expensive but much less effective as well, because it has no guarantee of same-day delivery, has a diminished readership multiplier effect and is tremendously cumbersome in terms of sorting and distribution.

Furthermore, a candidate need not buy one-page ads. He can use quarter page ads at one fourth the cost or about P25,000 only per issue. To be effective in his ad campaign, he may need to come out once every three days (to be spread out among the different dailies) or 30 times during the 90-day campaign period^[13] for national candidates. Hence, he will spend, for the entire duration of the campaign, about P750,000 (P25,000 x 30). I repeat, to advertise a one-fourth page ad at least 30 times in various major dailies, a candidate needs to spend only P750,000 - an amount less than the alternative of printing and distributing nationwide ONLY ONCE a less timely and less effective equivalent leaflet or poster.

A similar detailed comparison of cost-benefit could be written for radio and television. While, at the initial glance, the rates for these electronic media may appear high, still they could be proven more beneficial and cheaper in the long term because of their "value-for-money" appeal.^[14] vs. Dans Jr., 137 SCRA 628, 635-636, July 19, 1985, through Justice Hugo E. Gutierrez Jr., described the pervasive effect of broadcast media in the wise:

"The broadcast media have also established a uniquely pervasive presence in the lives of all Filipinos. Newspaper and current books are found only in metropolitan areas and in the poblaciones of municipalities accessible to fast and regular transportation. Even here there are low income masses who find the cost of books, newspaper, and magazines beyond their humble means. Basic needs like food and shelter perforce enjoy high priorities.

On the other hand, the transistor radio is found everywhere. the television set is also becoming universal. Their message may be simultaneously received by a national or regional audience of listeners including the indifferent or unwilling who happen to be within the reach of a blaring radio or television set. The materials broadcast over the airwaves reach every person of every age, persons of varying susceptibilities to persuasion, persons of different I.Q.s and mental capabilities, persons whose reactions to inflammatory or offensive speech would be difficult to monitor or predict. The impact of the vibrant speech is forceful and immediate. x x x"¹⁴

[Candidates Should Not Be Denied]

[Option to Use Media Ads.]

From the foregoing, it is clear that mass media truly offers an economical, practical, and effective means by which

a relatively unknown but well-qualified political candidate who has limited resources, particularly one running for a national office, may make known to the general public during the short campaign period^[15] his qualifications, platform of government, stand on vital issues, as well as his responses to questions or doubts about his capabilities, his character or any other matter raised against him. Deprived of media ads, the rich candidate, unlike his poor opponent, resorts to expensive propaganda - the holding of public meetings and rallies before large but oftentimes "paid" crowds, helicopter stops and motorcades spanning several towns and cities, the production of ingenious materials, giveaways and other products, and the incessant printing and distribution of various campaign paraphernalia. These forms of electoral promotion ineluctably require a large political machinery and gargantuan funds (organization + people / supporters + communication gadgets + vehicles + logistics). To combat this formidable and expensive election behemoth, the poor candidate's most viable alternative may be media advertising.

In *NPC vs. Comelec*, it was feared that the "unlimited purchase of print space and radio and television time x x x by the financially affluent [was] likely to make a crucial difference." But I say such fear is unfounded. First, because campaign expenses are limited by law, Second, the possibility of the abuse and misuse of media ads by the "financially affluent" is not an argument in favor of their total withdrawal, for - to use the very words of the majority in *NPC* - "there is no power or authority in human society that is not susceptible of being abused."^[16] Third, the absence of access to media advertising totally deprives the poor candidate of his most formidable weapon in combating the "huge campaign war chests" of rich contenders.

THE POINT IS: IT IS INCORRECT TO SAY THAT MEDIA ADVERTISING SHOULD BE BANNED BECAUSE ONLY THE RICH CAN AFFORD IT OR FOR THAT MATTER, THEY MAY ABUSE OR MISUSE IT. Quite the contrary, in terms of reach, pass-on readership, multiplier effect and cost-benefit advantage, media advertising may be the cheapest and most effective campaign mechanism available. I am not suggesting that every candidate should use media ads. In the final analysis, it is really up to the candidates and their campaign handlers to adopt such mode and means of campaigning as their budgets and political strategies may require^{16a16a} What I am stressing is that the candidates, whether rich or poor, should be given the option of campaigning through media, instead of being forced to use other forms of propaganda that could turn out to be less effective and more expensive.

[2. Ad Ban Not Limited;]

[Comelec Time and Space Inutile]

I now come to the second major point. The majority rationalizes the ad ban by saying that it has a very limited duration and scope and that, in any event, the Comelec's grant of free media time and space to candidates more than makes up for the violation of their constitutional right. I disagree.

[Ad Ban Not]

[Limited in Duration]

The ad ban is constitutional because, according to the majority, it is limited in duration for the reason that it is enforced only during the election period. In my humble view and with all due respect, this is both erroneous and illogical. A political advertisement is relevant only during the campaign period - not before and not after. As petitioners put it, a ban on mountain-skiing during the winter season cannot be said to be limited in duration, just because it is enforced during winter. After all, skiing is indulged in only when the mountain slopes are covered with snow. To add a further parallel, a ban against the planting of rice during the rainy season is not limited simply because it covers only that season. After all, nobody plants rice during summer when the soil is parched. In

the same manner, campaign ads are not resorted to except during the campaign period. And their prohibition does not become any less odious and less comprehensive just because the proscription applies only during the election season. Obviously, candidates need to advertise their qualifications and platforms only during such period. Properly understood, therefore, the prohibition is not limited in duration but is in fact and in truth total, complete and exhaustive.

[Ad Ban Neither]

[Limited in Scope]

The majority also claims that the prohibition is reasonable because it is limited in scope; that is, it refers only to the purchase, sale or donation of print space and air time for "campaign or other political purposes" and does not restrict news reporting and commentaries by editors, columnists, reporters, and broadcasters. But the issue here is not the freedom of media professionals.[17] The issue is the freedom of expression of candidates. That the freedom of the press is respected by the law and by the Comelec is not a reason to trample upon the candidates' constitutional right to free speech and the people's right to information. In this light, the majority's contention is a clear case of non sequitor. Media ads do not partake of the "real substantive evil" that the state has a right to prevent[18] and that justifies the curtailment of the people's cardinal right to choose their means of expression and of access to information.

Besides, what constitutes "campaign or other political purposes"? Neither RA 6646 nor the majority provides an explanation. If candidates buy 30 column-inches of newspaper space or one hour of prime radio/tv time everyday, and if they retain professional journalists to use such space/time to defend them from attacks and to promote their platforms of government, should such purchase be covered by the ad ban, or should it be allowed as an exercise of the freedom of journalist to express their views? Even more insidiously, should regular columnists' daily defense of their chosen candidates and daily promotion of their platforms of government constitute donated space for "campaign and other political purposes"?[19]

[Ad Ban Not Compensated for or]

[Justified by Free "Comelec Time"]

Finally, the majority opines that the grant of free Comelec media time and space to candidates more than makes up for the abridgment of the latter's right to buy political ads.[20]:

"Plebiscite issues are matters of public concern and importance. The people's right to be informed and to be able to freely and intelligently make a decision would be better served by access to an unabridged discussion of the issues, including the forum. The people affected by the issues presented in a plebiscite should not be unduly burdened by restrictions on the forum where the right to expression may be exercised. Comelec spaces and Comelec radio time may provide a forum for expression but they do not guarantee full dissemination of information to the public concerned because they are limited to either specific portions in newspaper or to specific radio or television times" (Emphasis ours.)²⁰ With due respect, I believe this is hollow and shallow.

In its Compliance dated March 13, 1998, Comelec tells us that under its Resolution No. 3015, it gave due course to eleven candidates for president[21] nine for vice president,[22] and forty for senators.[23] It is claimed however that, all in all, there are really about 100,000 candidates running for about 17,000 national and local positions in the coming elections, from whom a voter is expected to choose at least 30[24] to vote for. With so many candidates, how can the ordinary, sometimes nonchalant, voter ever get to know each of the political hopefuls from whom he will make an intelligent selection? In the crucial choice of president alone, how can ordinary citizens intelligently and sufficiently assess each of the 11 candidates in order to make a sensible choice

for a leader upon whom to entrust the momentous responsibility of carving the country's path in the next millenium?

The Comelec answers these questions with Resolution No. 2983-A, promulgated on March 3, 1998, in which it asks "every radio broadcasting and television station operating under franchise [to] grant the Commission, upon payment of just compensation, at least thirty (30) minutes of prime time daily, to be known as 'Comelec Time' effective February 10, 1998 for candidates for President, Vice President and Senators, and effective March 27, 1998 for candidates for local elective offices, until May 9, 1998," to be allocated "by lottery" among candidates requesting its use. But Comelec, in the same Compliance, informed the Court that "it is not procuring 'Comelec Space' (in any newspaper) by virtue of the effects of the decision of this Honorable Court in the case of Philippines Press Institute (PPI) vs. Comelec, 224 SCRA 272." [25] 25

In sum, the Comelec intends to secure 30 minutes of "Comelec time" for every radio and broadcasting station to be allocated equally to all candidates. The Comelec does not state exactly how it intends to allocate - except "by lottery" - these 30 minutes per station to the 17,000 candidates, considering that these stations do not have the same reach, audience and penetration. The poll body does not say exactly how many stations are involved, what budget allocation, if any, it has for the purpose, [26] 26 when each candidate will be allowed to speak and for how long, how the Comelec intends to cover the 77 provinces, 68 cities and 42,000 barangay nationwide, and many other details. Moreover, while the Comelec smugly speaks of free Comelec time being effective on "February 10, 1998" for national candidates, Resolution 2983-A itself was promulgated only on March 3, 1998.

Up to this writing, I have yet to hear of any major candidate using this so-called free Comelec broadcast time. In fact, during the oral argument of this case on March 5, 1998, Comelec Chairman Bernardo P. Pardo frankly admitted that no candidate had applied for an allocation of Comelec time. Not even petitioners. This is the best testament to the utter inutility and ineffectivity of Comelec time. Indeed, it cannot be a substitute, much less a viable alternative, to freely chosen but paid for media ads. It cannot compensate for the violation of the candidates' right to free speech and media access, or for the electorate's right to information.

If the real objective is to level the playing field for rich and poor candidates, there must be, as there already are, a cap on election expenses and a shortening of the campaign period. The incapability of the Comelec to effectively monitor and strictly implement such expense and time limitations should not take its toll upon constitutionally enshrined liberties of the people, including the candidates. To prohibit access to mass media, except only through Comelec time -- which has been indubitably shown to be sorely insubstantial, insignificant and inutile -- is not, and is far from being, a solution to the problems faced by poor candidates. The simple remedy is to lift the media ban.

[Epilogue]

The ad ban is a blatant violation of the candidates' constitutional right to free speech [27] and the people's right to information. [28] Being the last refuge of the people and the guardian of the Constitution, this Court should then, with alacrity, view the ban with suspicion, if not with outright rejection. [29] To repeat, the alleged limitations are in reality nonexistent; and the "pro-poor" justification, without logic.

To say that the prohibition levels the playing field for the rich and the poor is to indulge in a theoretical assumption totally devoid of factual basis. On the contrary, media advertising may be -- depending on a contender's propaganda strategy -- the cheapest, most practical and most effective campaign medium, especially for national candidates. By completely denying this medium to both the rich and the poor, this Court has not leveled the playing field. It has effectively abolished it! Far from equalizing campaign opportunities, the ban on media advertising actually favors the rich (and the popular) who can afford the more expensive and burdensome

forms of propaganda, against the poor (and the unknown) who cannot.

The allegation that the prohibition is reasonable because it is limited in duration and scope is itself most unreasonable, bereft as it is of logic and basis. Even more shallow is the argument that the Comelec-given media time and space compensate for such abridgment. In fact, the Comelec is not even procuring any newspaper space. In any event, the fact that not even the poorest candidates have applied for available opportunities is the best testament to its dubiousness. That petitioners who are seasoned political leaders prefer to pay for their own media ads rather than to avail themselves of the Comelec freebies refutes the majority's thesis of compensation. Indeed, the free things in life are not always the best.[30] They may just be bureaucratic waste of resources.

Before I close, a word about stare decisis. In the present case, the Court is maintaining the ad ban to be consistent with its previous holding in NPC vs. Comelec. Thus, respondent urges reverence for the stability of judicial doctrines. I submit, however, the more important than consistency and stability are the verity, integrity and correctness of jurisprudence. As Dean Roscoe Pound explains, "Law must be stable but it cannot stand still." Verily, it must correct itself and move in cadence with the march of the electronic age. Error and illogic should not be perpetuated. After all, the Supreme Court, in many cases,[31] has deviated from stare decisis and reversed previous doctrines and decisions. It should do no less in the present case.

Elections can be free, honest and credible not only because of the absence of the three execrable "G's" or "guns, goons, and gold." Beyond this, the integrity and effectivity of electoral democracy depend upon the availability of information and education touching on the three good "P's" - principles, platforms and program of the candidates. Indeed, an intelligent vote presupposes a well-informed voter. If elections must be rid of patronage, personalities and popularity as the main criteria of the people's choice, we must allow candidates every opportunity to educate the voters. And corollarily, the people must be accorded every access to such information without much effort and expense on their part.

With all due respect, I submit that the ad ban is regressive, repressive and deceptive. It has no place in our constitutional democracy.

WHEREFORE, I vote to GRANT the petition and to CONDEMN Section 11(b) of RA 6646 as UNCONSTITUTIONAL and VOID.

[1]"Sec. 11. Prohibited Forms of Election Propaganda - In addition to the forms of election propaganda prohibited under Section 85 of Batas Pambansa Blg. 881, it shall be unlawful:]

x x x x x x x x

b) for any newspaper, radio broadcasting or television station, other mass media or any person making use of the mass media to sell or give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under Sections 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcer who is a candidate for any elective public office shall take a leave of absence from his work as such during the campaign period."

[2] 207 SCRA 1, March 5, 1992, per Feliciano, J.

[3] Ibid., pp. 28-30. The following are excerpts:

"Sec. 11(b) of R.A. No. 6646 will certainly achieve one result - keep the voters ignorant of who the candidates are and what they stand for."

"The implementation of Section 11(b) will result in gross inequality. A cabinet member, an incumbent official, a movie star, a basketball player, or a conspicuous clown enjoys an affair advantage over a candidate many times better qualified but less known."

"x x x We owe it to the masses to open all forms of communication to them during this limited campaign period. A candidate to whom columnists and radio-television commentators owe past favors or who share their personal biases and convictions will get an undue amount of publicity. Those who incur the ire of opinion makers cannot counteract negative reporting by buying his own newspapers space or airtime for the airing of his refutations."

"Section 11(b) of R.A. No. 6646 is censorship pure and simple. It is particularly reprehensible because it is imposed during the limited period of the election campaign when information is most needed. x x x"

[4] Ibid., pp. 31-43.

I quote significant, enlightening portions as follows:

"The citizen can articulate his views, for whatever they may be through the many methods by which ideas are communicated from mind to mind. Thus, he may speak or write or sing or dance, for all these are forms of expression protected by the Constitution. So is silence, which 'persuades when speaking fails.'

x x x The individual can convey his message in a poem or a novel or a tract or in a public speech or through a moving picture or a stage play. In such diverse ways may he be heard. There is no of course no guaranty that he will be heeded, for acceptability will depend on the quality of his thoughts and of his person, as well as the mood motivation of his audience. But whatever form he employs, he is entitled to the protection of the Constitution against any attempt to muzzle his thoughts."

It is for the purpose of properly informing the electorate of the credentials and platforms of the candidates that they are allowed to campaign during the election period. x x x

It is curious, however, that such allowable campaign activities do not include the use of the mass media because of the prohibition is Section 11(b) of Rep. Act No. 6646 x x x"

"The lawful objective of Section 11(b) may be readily conceded. The announced purpose of the law is to prevent disparity between the rich and the poor candidates by denying both of them access to the mass media and thus preventing the former from enjoying an undue advantage over the latter. There is no question that this is a laudible goal. Equality among the candidates in this regard should be assiduously pursued by the government if the aspirant with limited resources is to have any chance at all against an opulent opponent who will not hesitate to use his wealth to make up for his lack of competence.

To pursue a lawful objective, only a lawful method may be employed even if it may not be the best among the suggested options. In my own view, the method here applied falls far short of the constitutional criterion. I believe that the necessary reasonable link between the means employed and the purpose sought to be achieved has not been proved and that the method employed is unduly oppressive."

"But the most important objection to Section 11(b) is that it constitutes prior restraint on the dissemination of ideas. In a word, it is censorship. It is that officious functionary of the repressive government who tells the citizen that he may speak only if allowed to do so, and no more and no less than what he is permitted to say on pain of punishment should he be so rash to disobey."

"I remind the Court of doctrine announced in *Bantam Books v. Sullivan* that any system of prior restraint of expression comes to this Court bearing a heavy presumption against its validity. That presumption has not been refuted in the cases subjudice. On the contrary, the challenged provision appears quite clearly to be invalid on the

face because of its undisguised attempt at censorship. The feeble effort to justify it in the name of social justice and clean elections cannot prevail over the self-evident fact that what we have here is an illegal intent to suppress free speech by denying access to the mass media as the most convenient instruments of the molding of public opinion. And it does not matter that the use of these facilities may involve financial transactions, for the element of the commercial does not remove them from the protection of the Constitution."

"I submit that all the channels of communication should be kept open to insure the widest dissemination of information leading up to the forthcoming election. An uninformed electorate is not likely to circumspect in the choice of official who will represent them in councils of government. That they may exercise their suffrage wisely, it is important they be apprised of the election issues, including the credentials, if any, of the various aspirants for public office. This is especially necessary now in view of the dismaying number of mediocrities who by an incredible aberration of ego, are relying on their money, or their tinsel popularity, or their private armies, to give them the plum of victory.

For violating the liberty to know, to utter and to argue freely according to conscience, above all liberties, the challenged law must be struck down. For blandly sustaining it instead, the majority has inflicted a deep cut on the Constitution that will ruthlessly bleed it white, and with it this most cherished of our freedoms."

[5] Ibid., pp. 43-44, where he said in this part:

"The freedom to advertise one's political candidacy in the various forms of media is clearly a significant part of our freedom of expression and of our right of access to information. Freedom of expression in turn includes among other things, freedom of speech and freedom of the press. Restrict these freedoms without rhyme or reason, and you violate the most valuable feature of the democratic way of life.

The majority says that the purpose of the political advertisement provision is to prevent those who have much money from completely overwhelming those who have little. This is gross error because should the campaign for votes be carried out in other fora (for example, rallies and meetings) the rich candidate can always be at a great advantage over his less fortunate opponent. And so the disparity feared will likewise appear in campaigns other than through media. x x x"

[6][Like the Philippine Daily Inquirer, the Manila Bulletin and the Philippine Star.]

[7] Like ABS-CBN Channel 2 or GMA Channel 7

[8] Petition in Intervention, p. 28.

[9] Sec. 100. BP Blg. 881, as amended by Sec. 13, RA 7166, which provides:

[10] This is the claimed circulation of the three major broadsheets - Philippine Daily Inquirer, Manila Bulletin and Philippine Star.

[11] This is the present cost actually paid by a major broadsheet for every page of printing, including the paper and the ink used. Commercial printing presses actually charge 3 to 4 times this amount for posters smaller than a one-page newspaper ad.

[12] The cost is P3 for the first 50 grams in bulk mailing, a method which would entail add-on for the materials to reach the individual voters. Hence, to factor out these add-on costs while approximating the reach of a newspaper, the cost of mailing by piece was computed instead.

[13] Sec. 3 BP. Blg. 881, as amended by Sec. 5, RA 7166.

[14] The Court, in Eastern Broadcasting Corp.

[15] 90 days for candidates for president, vice president and senator, and 45 days for the other elective positions (Sec. 3, BP Blg. 881, as amended by Sec. 5, RA 7166).

[16] In *national Press Club*, supra, at pp. 12-13, the Court gives this argument:

"It seems appropriate here to recall what Justice Laurel taught in *Angara v. Electoral Commission* [63 phil 139, 177 (1936)] that the possibility of abuse is no argument against the concession of the power or authority involved, for there is no power or authority in human society that is not susceptible of being abused."

16a In his column in the *Manila Standard* on March 30, 1998 entitled "A survey about political ads," Mahar Mangahas, president of the Social Weather Stations, explains why "it pays to advertise" political candidates, "judging from the results of the Social Weather Stations survey of Feb. 21-27, 1998." Interestingly, the SWS survey showed that the 1998 political ads best recalled by the public were those of the two leading candidates -- Joseph Estrada (55%) and Alfredo Lim (54%) - followed by Jose de Venecia (37%), Lito Osmeña (35%), Renato de Villa (19%), Raul Roco (11%), Miriam Defensor Santiago (9%), Imelda Marcos (3%), and Juan Ponce Enrile (2%). Interestingly also, the topnotchers in the ad survey cannot be termed "rich" nor the bottom dwellers, "poor," thereby reinforcing my thesis that the effectiveness of political ads is not dependent on financial fortunes. Rather, political ads are complementary to the overall political strategy of each candidate.

[17] This specific issue has been resolved in *Standard v. Comelec*, 181 SCRA 529, January 29, 1998, per *medialdea, J.*, where the Court ruled:

"However, neither Article IX-C of the Constitution [Comelec's power to supervise and regulate the operation of public utilities and the mass media during the election period] nor Sec. 11 (b) 2nd par of RA 6646 can be construed to mean that the Comelec has also been granted the right to supervise and regulate the exercise by media practitioners themselves of their right to expression during the plebiscite periods. Media practitioners are neither the franchise holders nor the candidates. x x x Therefore Section 19 of Comelec Resolution No. 2167 [prohibiting columnists, commentators or announcers to use their column, radio or TV time to campaign for or against plebiscite issues] has no statutory basis.

x x x x x x x x

Anent respondent Comelec's argument that Section 19 of Comelec Resolution No. 2167 does not absolutely bar petitioner-columnist from expressing his views and/or from campaigning for or against the organic act because he may do so through the Comelec space and/or Comelec radio/television time, the same is not meritorious. While the limitation does not absolutely bar petitioner's freedom of expression, it is a restriction on his choice of the forum where he may express his views. No reason was advanced by respondent to justify such abridgment. We hold that this form of regulation is tantamount to a restriction of petitioner's freedom of expression for no justifiable reason." [*Italics in the original*]

[18] Using the "clear and present danger test" as enunciated in *Gonzales vs. Comelec*, 27 SCRA 835, 877, April 18, 1969, per *Fernando, J.*, citing *Schenk v. United States*, 249 US 47, 52, 63 L. ed. 470, 473-474 (1919); *Whitney v. California*, 247 US 357, 373, 71 L. ed. 192, 202-203 (1927); *Dennis v. United States*, 341 US 494, 510, 95 L. ed. 1137, 1153 (1950); and several other cases. See also *Primicias vs. Fugoso*, 80 Phil 71, 87-88, January 27, 1948, per *Feria, J.*, *Adiong vs. Comelec*, 207 SCRA 712, 715, March 31, 1992, per *Gutierrez Jr., J.*, *Eastern Broadcasting Corp. vs. Dans Jr.*, supra.

[19] "PPI appeals to media companies not to sell space, air time to pols," *Philippine Daily Inquirer*, March 5, 1998. The following are excerpts:

"The appeal was made as the PPI expressed `grave concern and alarm over the overnight proliferation of `fly-by-night' newspaper who take advantage of the political campaign season for racketeering

"The institute is dismayed by the reported abdication by a number of media owners and editors of their journalistic responsibilities by selling their editorial pages and air time to political caniffates, PPI executive director Ermin Garcia said in a statement"

See also " Ad ban worsens corruption in media, "Philippine Daily Inquirer, March 31, 1998, which reads in part:

"A Media officer of a candidate revealed that in one national daily, the going price for a page one photo is P5,000. The reporter who acts as broker gets P1,000, the editor who puts it out gets P4,000. That s cheaper than the price of an equivalent column space for advertisement in the inside pages.

A presidential candidate's photo on the front page fetches P15,000, while for a senatorial candidate it is P10,000.

A banner story costs P25,000. A front page above the fold costs P20,000. A small press release costs P5,000."

[20] In contrast, this was what the Court said in unanimity in Standard, supra

[21]"1. Jose C. De Venecia, Jr. -- LAKAS-NUCD UDMF

2. Renato S. De Villa -- Partido para sa Demokratikong

Reporma/Lapiang Manggagawa

Coalition

3. Santiago F. Dumlao, Jr. -- Kilusan para sa Pambansang

Pagpapanibago

4. Juan Ponce Enrile -- Independent (LP)

5. Joseph E. Estrada -- Partido ng Masang Pilipino -

LAMMP

6. Alfredo S. Lim -- Liberal Party

7. Imelda R. Marcos -- Kilusan Bagong Lipunan

8. Manuel L. Morato -- Partido Bansang Marangal

9. Emilio R. Osmeña -- Progressive Movement for

Devolution of Initiative Political

Party of Central Visayas

10. Raul S> Roco -- Aksyon Demokratiko

11. Miriam Defensor Santiago -- People's Reform Party"21

[22]22"1. Edgardo J. Angara -- LDP/LAMMP Coalition

2. Gloria Macapagal-Arroyo -- LAKAS-NUCD UMDP

3. Oscar M. Orbos -- PDR-LM

4. Sergio Osmeña III -- Liberal Party
5. Reynaldo R. Pacheco -- KPP
6. Camilo L. Sabio -- Partido Bansang Marangal
7. Irene M. Santiago -- Aksyon Demokratiko
8. Ismael D. Sueño -- PROMDI
9. Francisco S. Tatad -- People's Reform Party
- [23]"1. Lisandro C. Abadia -- LAKAS-NUCD UMDP
2. Rolando R. Andaya -- LAKAS-NUCD UMDP
3. Teresa Aquino-Oreta -- LDP/LAMMP Coalition
4. Luduvico D. Badoy -- KPP
5. Ramon S. Bagatsing, Jr. -- LDP/LAMMP Coalition
6. Robert Z. Barbers -- LAKAS-NUCD UMDP
7. Rodolfo G. Biazon -- LDP/LAMMP Coalition
8. Eduardo D. Bondoc -- KPP
9. David M. Castro -- KPP
10. Renato L. Cayetano -- LAKAS-NUCD UMDP
11. Raul A. Daza -- LIBERAL PARTY
12. Roberto F. De Ocampo -- LAKAS-NUCD UMDP
13. Renato B. Garcia -- KPP
14. Adolfo R. Geronimo -- PDR-LM Coalition
15. Ricardo T. Gloria -- LAKAS-NUCD UMDP
16. Teofisto T. Guingona -- LAKAS-NUCD UMDP
17. Abraham S. Inbani -- PDR/LM Coalition
18. Robert S. Jaworski -- LAMMP
19. Fidel C. Lagman -- LAMMP
20. Reynante M. Langit -- PDR/LM Coalition
21. Loren B. Legarda-Leviste -- LKAS-NUCD UMDP
22. Oliver O. Lozano -- INDEPENDENT
23. Fred Henry V. Marallag -- KPP
24. Blas F. Ople -- PMP-LAMMP Coalition

25. John Reinner Osmeña -- NPC/LAMMP
26. Roberto M. Pagdanganan -- LAKAS-NUCD UMDP
27. Charito B. PLaza -- LIBERAL PARTY
28. Hernando B. Perez -- LAKAS-NUCD UMDP
29. Aquilino Q. Pimentel -- LAMMP(PDP/LABAN)
30. Santanina C.T. Rasul -- LAKAS-NUCD UMDP
31. Ramon B. Revilla -- LAKAS-NUCD UMDP
32. Miguel Luis R.Romero -- LAMMP
33. Roberto S. Sebastian -- PDR-LM Coalition
34. Roy B. Señeres -- PDR-LM Coalition
35. Vicente C. Sotto III -- LDP/LAMMP Coalition
36. Hadja Putri Zorayda -- PDR-LM Coalition
- A. Tamano
37. Ruben T. Torres -- LAMMP
38. Jose M. Villegas, Jr. -- LM (Workers Party) /
PDR
39. Freddie N. Webb -- LDP/LAMMP
40. Haydee B. Yorac -- Independent"

[24]. 1 each for president, vice president, congressman, governor, vice governor, mayor and vice mayor, 12 for senator, at least 5 for Sangguniang Panlalawigan members; also at least 5 for Sangguniang Bayan/Panlungsod members; and 1 for party list representatives.

[25] Compliance dated March 13, 1998, p. 4

[26] The Comelec has not even paid the per diem and allowances of the public school teachers who served during the last barangay elections. How can it expect to pay for the Comelec TV and radio time? (Memorandum of Petitioners-in-Intervention, p. 33.)

[27] Article III of the Constitution provides:

"Sec 4 No law shall be passed abridging the freedom of speech of expression or of the press, or the people peaceably to assemble and petition the government for redress of grievances"

[28] Article III of the Constitution also provides:

"Sec 7 The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law."

[29] The time-honored doctrine against prior restraint is stated in *New York Times v. United States*, 403 US 713 (1971), which has been invariably applied in our jurisdiction, in this wise: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The Government `thus carries a heavy burden of showing justification for the enforcement of such a restraint.'" (Bernas, *The Commission of the Republic of the Philippines*, 1987 ed., Vol. I., p. 142.)

[30] With apologies to Lew Brown and Buddy (George Gard) De Sylvia, "the Best Things in Life Are Free," *Good News*, 1927, as quoted by John Bartlett in *Bartlett's Familiar Quotations*, 1980 ed., p. 825.

[31] For instance, *Elmulong vs. Division Superintendent of Schools of Cebu*, 219 SCRA 256, March 1, 1993, reversed the Court's 34-year-old doctrine laid down in *Gerona vs. Secretary of Education*, 106 Phil 2, August 12, 1959, and upheld the right to Jehovah's Witnesses "to refuse to salute the Philippine flag on account of their religious beliefs." Similarly, *Olague vs. Military Commission*, 150 SCRA 144, May 22, 1987, abandoned the 12-year-old ruling in *Aquino Jr. vs. Military Commission*, 63 SCRA 546, May 9, 1975, which recognized the jurisdiction of military tribunals to try civilians for offenses allegedly committed during martial law. The Court likewise reversed itself in *EPZA vs. Dulay*, 149 SCRA 305, April 29, 1987, when it vacated its earlier ruling in *National Housing Authority vs. Reyes*, 123 SCRA 245, June 29, 1983, on the validity of certain presidential decrees regarding the determination of just compensation. In the much earlier case of *Philippine Trust Co. vs. Mitchell*, 59 Phil. 30, December 8, 1933, the Court revoked its holding in *Involutionary Insolvency of Mariano Velasco & Co.*, 55 Phil 353, November 29, 1930, regarding the relation of the insolvency law with the then Code of Civil procedure and with the Civil Code. Just recently, the Court, in *Kilosbayan vs. morato*, 246 SCRA 540, July 17, 1995, also abandoned the earlier grant of standing to petitioner-organization in *Kilosbayan vs. Guingona*, 232 SCRA 110, May 5, 1994.

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[SEPARATE CONCURRING OPINION]

PUNO, J.:

In G.R. No. 132231, petitioners assail the constitutionality of Sec. 11(b) of R.A. No. 6646 and Resolution No. 2974 of the COMELEC implementing said law. They contend:

"I

THE POLITICAL AD BAN IS MOVED BY AN INVALID LEGISLATIVE INTENT, ULTRA VIRES ON THE PART OF CONGRESS, AND VIOLATIVE OF THE VERY CONSTITUTIONAL PROVISION UPON WHICH IT IS SOUGHT TO BE GROUNDED.

II

CONTRARY TO THE HOLDING IN *NATIONAL PRESS CLUB*, THE POLITICAL AD BAN IS NOT LIMITED IN TIME AND SCOPE OF APPLICATION.

A. THE POLITICAL AD BAN IS NOT LIMITED IN DURATION; IT IS ABSOLUTE, ALL-ENCOMPASSING, COMPREHENSIVE AND UNLIMITED.

B. THE POLITICAL AD BAN IS NOT LIMITED IN SCOPE OF APPLICABILITY. INsofar AS THE CANDIDATE'S FREEDOM TO EXPRESS THROUGH THE MASS MEDIA, IT IS ABSOLUTE,

ALL-ENCOMPASSING, COMPREHENSIVE AND UNLIMITED.

III

THE POLITICAL AD BAN UNDER SECTION 11(B), R.A. 6646 CONSTITUTES PRIOR RESTRAINT, AND CARRIES A HEAVY PRESUMPTION AGAINST VALIDITY.

IV

THE POLITICAL AD BAN IS NOT A REASONABLE NECESSARY MEANS TO ACHIEVE THE DESIRED END.

A. INSTEAD OF ‘LEVELING THE PLAYING FIELD,’ INsofar AS THE USE OF MASS MEDIA FOR POLITICAL PURPOSES IS CONCERNED, THE POLITICAL AD BAN HAS ABOLISHED THE PLAYING FIELD.

B. THERE IS NO REASONABLE NECESSITY FOR THE AD BAN, BECAUSE IT DOES NOT PREVENT THE RICH CANDIDATE FROM USING HIS SUPERIOR RESOURCES TO THE UNDUE DISADVANTAGE OF THE POOR CANDIDATE.

C. THERE IS NO REASONABLE NECESSITY FOR THE POLITICAL AD BAN BECAUSE ADEQUATE SAFEGUARDS ARE LEGALLY IN PLACE IN ORDER TO PREVENT THE RICH CANDIDATE FROM TAKING UNDUE ADVANTAGE OF HIS SUPERIOR RESOURCES.

V

THE POLITICAL AD BAN VIOLATES THE RIGHT OF THE PEOPLE TO BE INFORMED ON MATTERS OF PUBLIC CONCERN.

VI

THERE IS NO NEED FOR ‘EMPIRICAL DATA’ TO DETERMINE WHETHER THE POLITICAL AD BAN OFFENDS THE CONSTITUTION OR NOT.”

The Solicitor General and the petitioners-in-intervention likewise contend that section 11(b) of R.A. No. 6646 is unconstitutional principally because it impairs freedom of speech and of the press.

A quick glance at petitioners’ arguments against section 11 (b) of R.A. No. 6646 will show that they are mere rehash of arguments in the NPC case. The lack of new arguments is a tribute to the brilliant majority decision and equally enlightening dissenting opinions in said case which petitioners now seek to reexamine. A repetition of the NPC rationale is thus unnecessary.

I wish, however, to advert to the dissent of Madam Justice Romero which cites *Buckley v. Valeo*,^[1] a 1976 case where a divided US Supreme Court ruled that limits on campaign expenditures violate the guarantee of freedom of speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment ...”.^[2]

A reading of American legal literature, however, will reveal that *Buckley* has been widely criticized by libertarians because its pro-business thrust has pernicious effects on efforts to achieve much needed electoral reforms.^[3] Typical of the criticisms is the observation of Wright that the *Buckley* Court “... has given protection to the polluting effect of money in election campaigns. As a result, our political system may not use some of its most powerful defenses against electoral inequalities.”^[4] The barrage of criticisms caused the US Supreme Court

to modify its absolute support for free speech in *Buckley*. In the 1990 case of *Austin v. Michigan State Chamber of Commerce*,^[5] it upheld the constitutionality of a Michigan law that prohibited corporations from using corporate treasury funds to support or oppose any candidate for office. Retreating from *Buckley*, the *Austin* Court recognized the state's compelling interest in regulating campaign expenditure. Writing for the majority, Mr. Justice Thurgood Marshall, an icon of libertarians declared: "Michigan identified as a serious danger the significant possibility that corporate political expenditures will undermine the integrity of the political process, and it has implemented a narrowly tailored solution to that problem." In his concurring opinion, the last of the libertarians in the US High Court, Mr. Justice Brennan, held: "In *MCFL*, we held that a provision of the Federal Election Campaign Act of 1971 (FECA), x x x similar to the Michigan law at issue here, could not be applied constitutionally to a small, anti-abortion advocacy group. In evaluating the First Amendment challenge, however, we acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace should not gain unfair advantage in the political marketplace."

There is less reason to apply the discredited *Buckley* decision in our setting. Section 11 (b) of R.A. No. 6646 is based on provisions of our Constitution which have no counterparts in the US Constitution. These provisions are:

"Art. II, section 26. The State shall guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law.

Art. XIII, section 1. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

Art. IX (c) (4). The Commission may, may during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits from the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor for public information campaigns and forms among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections."

A member of the Constitutional Commission, now our distinguished colleague, Mr. Justice Hilario Davide, Jr., well explained these new wrinkles in our Constitution, viz.:

x x x

"Aware of the lamentable fact in the Philippines, no gap between these two unavoidable extremes of society is more pronounced than that in the field of politics, and ever mindful of the dire consequences thereof, the framers of the present Constitution saw it fit to diffuse political power in the social justice provisions. Ours has been a politics of the elite, the rich, the powerful and the pedigreed. The victory of a poor candidate in an election is almost always an exception. Arrayed against the vast resources of a wealthy opponent, the former, even if he is the most qualified and competent, does not stand a fighting chance. Of course, there have been isolated instances – but yet so few and far between – when poor candidates made it."^[6]

He stressed that this thrust for political equality is an improvement of our past Constitutions which merely sought to establish equality in the economic and social fields.^[7]

It is difficult to think why such an egalitarian law like Section 11(b) of R. A. No. 6646 should be condemned when it equalizes the political opportunities of our people. The gap between the perfumed few and the perspiring many in our country is galloping at a frightening pace. As the cost of election spirals at an immoral speed, the levers of political power are wielded more and more by the wealthy alone. The subject law attempts to break this

control by reducing the purchasing power of the peso of the rich in the political freemarket.

Political equality is a touchstone of democracy. The guaranty of freedom of speech should not be used to frustrate legislative attempts to level the playing field in politics. R.A. No. 6646 does not curtail speech as it no more than prevents the abusive use of wealth by the rich to frustrate the poor candidate's access to media. It seems to me self-evident that if Congress can regulate the abuse of money in the economic market so can it regulate its misuse in the political freemarket. Money talks in politics but it is not the specie of speech sanctified in our Consitution. If we allow money to monopolize the media, the political freemarket will cease to be a market of ideas but a market for influence by the rich. I do not read freedom of speech as meaning more speech for the rich for freedom of speech is not guaranteed only to those who can afford its exercise. There ought to be no quarrel with the proposition that freedom of speech will be a chimera if Congress does not open the opportunities for its exercise. When the opportunities for exercise. When the opportunities for its exercise are obstructed by the money of the rich, it is the duty of Congress to regulate the misuse of money --- for in the political marketplace of ideas, when money win, we lose.

Let us not also close our eyes to the reality that in underdeveloped countries where sharp disparities in wealth exist, the threat to freedom of speech comes not only from the government but from vested interests that own and control the media. Today, freedom of speech can be restrained not only by the exercise of public power but also by private power. Thus, we should be equally vigilant in protecting freedom of speech from public and private restraints. The observation of a legal scholar is worth meditating, vis.: "With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition. The world in which an essentially rationalist philosophy of the first amendment was born has vanished and what was rationalism is now romance." [8]

I vote to dismiss petition.

[1] 424 US 1 (1976); see also *First National Bank of Boston v. Bellotti*, 435 US 765 (1978).

[2] *Id.* At pp. 48-49.

[3] Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 Col. L. Rev. No. 4 (May 1982); Abrogast, *Political Campaign Advertising and the First Amendment: A Structural-Functional Analysis of Proposed Reform*, 23 Akron L. Rev. 2091 (1989); Blum, *the Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58, N.Y.U.L. Rev. 1273 (1983).

[4] Wright, *op cit*, p. 609.

[5] 494 US 652 (1990).

[6] *Concurring Opinion in NPC v. COMELEC*, 207 SCRA 19 (1992).

[7] *Id.*, at p. 18.

[8] Barron, *Access to the Press-A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

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[DISSENTING OPINION]

ROMERO, J.:

“A foolish consistency is the hobgoblin of little minds....”[1]

Not wishing to be held hostage by Emerson's “hobgoblin,” I dare to break away from a past position and encapsulize my ruminations in a dissenting opinion.

[When, If At All, May The Court Reverse Itself?]

The majority, reiterating the 1992 decision *NPC v. COMELEC*, holds that Section 11(b) of R.A.6646 is a reasonable restriction on the freedom of expression guaranteed by the Constitution.[2] Our six-year experience with the ban on political advertisements, however, constrains me to dissent. While it is desirable, even imperative, that this Court, in accordance with the principle of stare decisis, afford stability to the law by hewing to doctrines previously established, said principle was never meant as an obstacle to the abandonment of established rulings where abandonment is demanded by public interest and by circumstances.[3] Reverence for precedent simply as precedent cannot prevail when constitutionalism and public interest demand otherwise. Thus, a doctrine which should be abandoned or modified should be abandoned or modified accordingly. More pregnant than anything else is that the court should be right.[4]

I submit that our country's past experience in the 1992 and 1995 elections, as well as contemporary events, has established that Section 11(b) of R.A. 6646 falls short of rigorous and exacting standard for permissible limitation on free speech and free press.

In 1992, this Court, in *NPC v. COMELEC*, gave constitutional imprimatur to Section 11(b), pronouncing the same to be authorized by Article IX(C), Section 4 of the Constitution which reads:

“Section 4 The Commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchise or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the object of holding free, orderly, honest, peaceful and credible elections.”

Prefatorily, it must be borne in mind that Article IX(C), Section 4 of the Constitution, is essentially an express manifestation of the comprehensive police power of the State.

Police power, it has been declared often enough, rests upon public necessity and upon the right of the state and the public to self-protection. For this reason, its scope expands and contracts with changing needs.[5] In the words of Mr. Justice Isagani A. Cruz:

“Police power is dynamic, not static, and must move with the moving society it is supposed to regulate. Conditions change, circumstances vary; and to every such alteration the police power must conform. What may be sustained as a valid exercise of the power now may become constitutional heresy in the future under a different factual setting. Old notions may become outmoded even as new ideas are born, expanding or constricting the limits of the police power. For example, police measures validly enacted fifty years ago against the wearing of less than sedate swimsuits in public beaches would be laughed out of court in these days of permissiveness...(T)he police power continues to change even as constraints on liberty diminish and private property becomes more and more affected with public interest and therefore subject to regulation” (Italics ours).[6]

Thus, when the temper and circumstances of the times necessitate a review, this Court should not hesitate to reverse itself, even on constitutional issues; for the legal problems with which society is beset continually cannot be merely considered in the abstract, but must be viewed in light of the infinite motley facets of human experience. As aptly stated by Mr. Justice Holmes, “The life of the law has not been logic: it has been experience.”

By way of illustration, we first held, in the celebrated Flag Salute Case,[7] that:

“the flag is not an image but a symbol of the Republic of the Philippines, an emblem of national sovereignty, of national unity and cohesion and of freedom and liberty which it and the Constitution guarantee and protect. Under a system of complete separation of church and state in the government, the flag is utterly devoid of any religious significance. Saluting the flag does not involve any religious ceremony. The flag salute is no more a religious ceremony than the taking of an oath of office by a public official or by a public candidate for admission to the bar”

XXX XXX XXX

The children of Jehovah’s Witnesses cannot be exempted from participation in the flag ceremony. They have no valid right to such exemption. Moreover, exemption to the requirement will disrupt school discipline and demoralize the rest of the school population which by far constitute the great majority.

The freedom of religious belief guaranteed by the Constitution does not and cannot mean exemption from or non-compliance with reasonable and non-discriminatory laws, rules and regulations promulgated by competent authority.”

The Court further predicted that exempting Jehovah’s Witnesses from participating in the flag ceremony would ultimately lead to a situation wherein:

“[T]he flag ceremony will become a thing of the past or perhaps conducted with very few participants, and the time will come when we would have citizens untaught and uninculcated in and not imbued with reverence for the flag and love of country, admiration for national heroes, and patriotism—a pathetic, even tragic situation, and all because a small portion of the school population imposed its will, demanded and was granted an exemption.”

Thirty-two years later, events caught up with the changing political climate, such that an undivided Court pronounced, in *Ebralinag v. The Division Superintendent of School of Cebu*[8] that:

“the idea that one may be compelled to salute the flag, sing the national anthem, and recite the patriotic pledge, during a flag ceremony on pain of being dismissed from one’s job or of being expelled from school, is alien to the conscience of the present generation of Filipino who their teeth on the Bill of Rights which guarantees their right to free speech and the free exercise of religious profession and worship

XXX XXX XXX

The sole justification for a prior restraint or immitation on the exercise of religious freedom is the existence of a grave and present danger of a character both grave and imminent, of a serious evil to public safety, public morals, public health or any other legitimate public interest, that the State has a right (and duty) to prevent. Absent such a threat to public safety, the expulsion of petitioners from the schools is not justified.”

The Court held that its earlier prediction of dire consequences had not come to pass. It concluded that exempting Jehovah’s Witnesses from attending flag ceremonies would not produce a nation “untaught and uninculcated in and not imbued with reverence for the flag and love of country, admiration for national heroes and patriotism.”

In much the same manner, in the early case of *People v. Pomar*,[9] the Court struck down as a violative of the

freedom of contract, a statute prescribing a thirty-day vacation with pay both before and after confinement arising from pregnancy. The Court said:

“The rule in this jurisdiction is, that the contracting parties may establish any agreements, terms, and conditions they may deem advisable, provided they are not contrary to law, morals or public policy.”

Citing American cases that espoused the prevailing *laissez faire* doctrine, the Court ruled that the right to contract about one’s affairs is a part of the liberty of the individual guaranteed by the due process clause. The Court also cited the “equality of right” principle, holding that “(I)n all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land...Police power, the Court conceded, is an expanding power; but it cannot grow faster than the fundamental law of the state... If the people desire to have the police power extended and applied to conditions and things prohibited by the organic law, they must first amend that law.[10]

Sixteen years later, the validity of the above pronouncement was rejected by the Court in *Antamok Goldfields Mining Co. v. CIR*.^[11] which rationalized its *volte-face* stance, thus: (I)n the midst of changes that have taken place, it may likewise be doubted if the pronouncement made by this court in the case of *People v. Pomar*...still retains its virtuality as a living principle. The policy of *laissez faire* has to some extent given way to the assumption by the government of the right of intervention even in contractual relations affected with public interest.”

Similarly, events subsequent to the Court’s ruling in *Avelino v. Cuenco*^[12] impelled the Court to reverse its original position. In this case, the Court initially refused to take cognizance of the raging controversy to determine who was the rightful president of the Philippine Senate, ruling that in view of the separation of powers, the question was a political one not within its jurisdiction. Despite such a ruling, almost one-half of the members of the Senate refused to acknowledge Mariano Cuenco as the acting President, as a result of which legislative work came to a standstill. In other words of Justice Perfecto, “the situation has created a veritable national crisis, and it is apparent that solution cannot be expected from any quarter other than this Supreme Court The judiciary ought to ripen into maturity if it has to be true to its role as spokesman of the collective conscience, of the conscience of humanity.” The Court, thus, assumed jurisdiction over the case, rationalizing that supervising events justified its intervention.

From the foregoing, it can be seen that the inexorable march of events, and the liberalizing winds of change may very well signal a needed shift in our conception of the permissible limits of regulation in the name of police power. Verily, while the validity of *NPC v. COMELEC* may have been etched on granite at the time of its promulgation, events subsequent thereto now call into question the very underpinnings of said ponencia. To my mind, the hoary maxim that “time upsets many fightings faiths” still holds true, and the Court must be ever resilient and adaptable in order to meet the protean complexities of the present and future generation.

In *NPC v. COMELEC*, the court held that:

“(N)o presumption of invalidity arises in respect of exercises of supervisory or regulatory authority on the part of the Comelec for the purpose of securing equal opportunity among candidates for political office, although such supervision or regulation may result in some limitation of the right of free speech and free press. For supervision or regulation of the operations of media enterprises is scarcely conceivable without such accompanying limitation. Thus, the applicable rule is the general, time-honored one – that a statute is presumed to be constitutional and that he party asserting its unconstitutionality must discharge the burden of clearly and convincingly proving that assertion.”

This upends the familiar holding that “any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity, with the Government carrying a heavy burden of showing justification for the enforcement of such a restraint.”[13] This presumption was even reiterated in the recent case of *Iglesia ni Cristo v. CA*,[14] wherein we ruled that “deeply enconced in our fundamental law is its hostility against all prior restraints on speech...Hence, any act that restrains speech is hobbled by the presumption of invalidity and should be greeted with furrowed brows. It is the burden of the respondent... to overthrow this presumption. If it fails to discharge this burden, its act of censorship will be struck down.” *NPC v. COMELEC*, insofar as it bestows a presumption of validity upon a statute authorizing COMELEC to infringe upon the right of free speech and free press, constitutes a departure from this Court’s previous rulings as to mandate its re-examination.

In this connection, it bears emphasis that *NPC v. COMELEC* was the product of a divided court, marked as it was by the strong dissents of Mr. Justices Cruz, Gutierrez, and Paras. This fact gains significance when viewed in light of the changes in the composition of the court. While a change in court composition, per se, does not authorize abandonment of decisional precedents, it is apropos to keep in mind the pronouncement by the Court in *Philippine Trust Co. and Smith, Bell and Co. v. Mitchell*,[15] which reads as follows:

“Is the court with new membership compelled to follow blindly the doctrine of the *Velasco* case? The rule of stare decisis is entitled to respect. Stability in the law, particularly in the business field, is desirable. But idolatrous reverence for precedent, simply as precedent, no longer rules. More important than anything else is that the court should be right.” (Italics ours)

[Are the Restrictions Imposed by Sec. 11(b) of R.A.]

[6646 on Freedom of Expression Valid?]

Preliminaries having been disposed of, we proceed to the crux of the matter. Freedom of speech has been defined as the liberty to know, to utter and to argue freely according to conscience, above all liberties. It thus includes, not only the right to express one’s views, but also other cognate rights relevant to the free communication ideas, not excluding the right to be informed on matters of public concern.

The Court, in *NPC v. COMELEC*, found the restrictions imposed by Section 11(b) on the freedom of expression, to be valid. First, the prohibition is limited in the duration of its applicability and enforceability to election periods. Precisely, this is what makes the prohibition more odious. It is imposed during the campaign period when the electorate clamores for more and accurate information as their basis for intelligent voting. To restrict the same only defeats the purpose of holding electoral campaigns – to inform the qualified voter of the qualifications of candidates for public office, as well as the ideology and programs of government and public service they advocate, to the end that when election time comes, the right of suffrage may be intelligent and knowingly, of not always wisely, exercised. Opening all avenues of information to the estimated 36.4 million voters is crucial for the intelligent exercise of the right of suffrage in the May 11 polls, considering that they will be voting for an average of thirty elective position.[16]

Second the prohibition is of limited application, as the same is applied only to the purchase and sale of print space and air time for campaign or other political purposes. “Section 11(b) does not purport in any way to restrict the reporting by newspapers or radio or television stations of news or newsworthy events relating to candidates, their qualifications, political parties and programs of government.” It does not reach commentaries and expressions of belief or opinion by reporters or broadcasters or editors or commentators or columnists in respect of candidates, their qualifications, and programs and so forth. To be sure, newspaper, radio and television stations may not be restricted from reporting on candidates, their qualifications, and programs of government, yet, admittedly, the

freedom of expression of the candidates themselves in the manner they choose to, is restricted. Candidates are thereby foreclosed from availing of the facilities of mass media, except through the filtering prism of the COMELEC.

Not to be overlooked is the stark truth that the media itself is partisan. In a study^[17] commissioned by the COMELEC itself to determine whether certain newspaper adhered to the principles of fairness and impartiality in their reportage of the presidential candidates in the 1992 elections, the results disclosed that newspapers showed biases for or against certain candidates. Hence, the contention that “Section 11 (b) does not cut off the flow of media reporting, opinion or commentary about candidates, their qualifications and platforms and promises” simply is illusory. Editorial policy will always ensure that favored ones will get minimal exposure, if at all. This underscores the need to give candidates the freedom to advertise, if only to counteract negative reporting with paid advertisements, which they cannot have recourse to with the present prohibition. Worse, the ban even encourages corruption of the mass media by candidates who procure paid hacks, masquerading as legitimate journalist, to sing them paeans to the high heavens. Wittingly or unwittingly, the mass media, to the detriment of poor candidates, occasionally lend themselves to the manipulative devices of the rich and influential candidates.

Finally, it is alleged that while Section 1(b) prohibited the sale or donation by mass media of print space or air time for campaign or other political purposes, COMELEC, by way of exception, was mandated to purchase print space or air time, which space and time it was required to allocate, equally and impartially, among the candidates for public office. Hence, whatever limitation was imposed by Section 11 (b) upon the right to free speech of the candidates was found not to be unduly repressive or unreasonable inasmuch as they could still realize their objective as long as it was coured through COMELEC. COMELEC it was that shall decide what, who, which media to employ and the time allocation for the candidates who signify their desire to avail of the agency’s airtime and print space. Why accord to COMELEC such powers in the name of supervision and regulation at the expense of the constitutionality hallowed freedom of expression?

Given the conditions then prevailing, the Court’s ruling in *NPC v. COMELEC* may have been valid and reasonable; yet today, with the benefit of hindsight, it is clear that the prohibition has become a woeful hindrance to the exercise by the candidates of their cherished right to free expression and concomitantly, a violation of the people’s right to information on matters of public concern. As applied, it has given an undue advantage to well-known popular candidates for office.

In the hierarchy of fundamental civil liberties, the right of free expression occupies a preferred position,^[18] the sovereign people recognizing that it is indispensable in a free society such as ours. Verily, one of the touchstones of democracy is the principle that free political discussion is necessary if government is to remain responsive to the will of the people. It is a guarantee that the people will be kept informed at all times sufficiently to discharge the awesome responsibilities of sovereignty.

Yet, it is also to be conceded that freedom of expression is not an absolute right. The right of privilege of free speech and publication has its limitations, the right not being absolute at all times and under all circumstances. For freedom of speech does not comprehend the right to speak whenever, however, and wherever one pleases, and the manner, and place, or time of public discussion can be constitutionally controlled.^[19]

Still, while freedom of expression may not be immune from regulation, it does not follow that all regulation is valid. Regulation must be reasonable as not to constitute a repression of the freedom of expression. First, it must be shown that the interest of the public generally, as distinguished from that of a particular class requires such regulation. Second, it must appear that the means used are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

As to the first, *NPC v. COMELEC*, this Court declared that the ban on political advertising aims to assure equality of opportunity to proffer oneself for public service by equalizing, as far as practicable, the situations of rich and poor candidates by preventing the former from enjoying the undue advantage offered by huge campaign “war chests.”

While there can be no gainsaying the laudable intent behind such an objective, the State being mandated to guarantee equal access to opportunities for public service, the prohibition has had the opposite effect. Instead of “equalizing” the position of candidates who offer themselves for public office, the prohibition actually gives an unfair advantage to those who have wide media exposure prior to the campaign period. Instead of promoting the interest of the public in general, the ban promotes the interest of a particular class of candidates, the prominent and popular candidates for public office. What is in store for the relatively obscure candidate who wants to pursue his candidacy? Eager to trumpet his credentials and program of government, he finds himself barred from using the facilities of mass media on his own. While incumbent government officials, show business personalities, athletes and prominent media men enjoy the advantage of name recall due to past public exposure, the unknown political neophyte has to content himself with other for a, which given the limited campaign period, cannot reach the electorate as effectively as it would through the mass media. To be sure, the candidate may avail himself of “COMELEC Space” and “COMELEC Time,” but the sheer number of candidates does not make the same an effective vehicle of communication. Not surprisingly, COMELEC Chairman Pardo, at the Oral Argument held by the Court en banc, admitted that no candidate has as yet applied for COMELEC air time and space.

More telling, the celebrities are lavished with broader coverage from newspaper, radio and television stations, as well as via the commentaries and expressions of belief or opinion by reporters, broadcasters, editors, commentators or columnists, as they are deemed more newsworthy by media, thus generating a self-perpetuating cycle wherein political unknowns, who may be more deserving of public office, campaign in relative obscurity compared to their more popular rivals. Instead of equalizing opportunities for public service, the prohibition not only perpetuates political inequality, but also invisibly discriminates against lesser-known candidates.

While Article IX(C), Section 10 of the Constitution provides that “(b)ona fide candidates for any public office shall be free from any form of harassment and discrimination,” Article IX (C), Section 4 is nothing if antithetical to the former provision as, in its application, it is productive of a situation wherein political neophytes are blatantly discriminated against. Much as we recognize the basic canon in Constitutional construction that the Constitution must be interpreted in such a way as to harmonize all its provision if the Charter is to be construed as a single, comprehensive document and not as a series of disjointed articles or provisions, the predictable effect is for one provision to negate the other.

As to the second requisite, experience shows that the ban on political advertisements has not been reasonably necessary to accomplish its desired end. First, there are more than 70 provinces, more than 60 cities and more than a thousand municipalities spread all over the archipelago. Previous elections have shown that the ban on political advertising forces a candidate to conduct a nationwide whistle-stop campaign to attain maximum exposure of his credentials and his program of government. Obviously, this necessitates tremendous resources for sundry expenses indispensable for political campaigns, all within a limited period of 90 days. Given the enormous logistics needed for such a massive effort, what are the chances for an impecunious candidate who sincerely aspires for national office?

On the other hand, radio and television reach out to a great majority of the populace more than other instruments of information and dissemination, being the most pervasive, effective and inexpensive. A 30-second television advertisement, consting around P35,000.00 at present rates, would, in an instant, reach millions of viwers around the country in the comfort of their homes. Indeed, the use of modern mass media gives the poor candidate the

opportunity to make himself known to the electorate at an affordable cost. Yet, these means of communication are denied such candidates due to the imagined apprehension that more affluent candidates may monopolize the airwaves. This fear, however, need not materialize as the COMELEC is precisely empowered to regulate mass media to prevent such a monopoly. Likewise, the ceiling on election spending imposed by law upon all candidates, regardless, will also serve as a deterrent.

Second, the means employed is less than effective, for with or without the ban, moneyed candidates, although similarly barred from buying mass media coverage, are in a position to lavish their funds on the propaganda activities which their lesser-endowed rivals can ill-afford. Furthermore, we take judicial notice of the inability of COMELEC to enforce laws limiting political advertising to “common poster areas.” Many places in cities have been ungainly plastered with campaign materials of the better off candidates. What use is there in banning political advertisements to equalize the situation between rich and poor candidate, when the COMELEC itself, by its failure to curb the political excesses of candidates, effectively encourages the prevailing disparities? Why then single out political advertising? What is the reasonable necessity of doing so?

To be realistic, judicial notice must be taken on the fact that COMELEC, in narrowing down its list of “serious” candidates, considers in effect a candidate’s capability to wage an effective nationwide campaign – which necessarily entails possession and/or availability of substantial financial resources. Given this requirement, the objective of equalizing rich and poor candidates may no longer find relevance, the candidates ultimately allowed to run being relatively equal, as far as resources are concerned. Additionally, the disqualification of nuisance candidates allegedly due to their inability to launch serious campaigns, itself casts doubt on the validity of the prohibition as a means to achieve the state policy of equalizing access to opportunities for public service. If poor and unknown candidates are declared unfit to run for office due to their lack of logistics, the political ad ban fails to serve its purpose, as the persons for whom it has been primarily imposed have been shunted aside and thus, are unable to enjoy its benefits.

It must be kept in mind that the holding of periodic elections constitute the very essence of a republican form of government, these being the most direct act and participation of a citizen in the conduct of government. In this process, political power is entrusted by him, in concert with the entire body of the electorate, to the leaders who are to govern the nation for a specified period. To make this exercise meaningful, it is the duty of government to see to it that elections are free and honest and that the voter is unhampered by overt and covert inroads of fraud, force and corruption so that the choice of the people may be untrammelled and the ballot box an accurate repository of public opinion. And since so many imponderables may affect the outcome of elections -- qualifications of voters and candidates, education, means of transportation, health, public discussion, private animosities, the weather, the threshold of a voter’s resistance to pressure – the utmost ventilation of opinion of men and issues, through assembly, association and organizations, both by the candidate and voter, becomes a sine qua non for elections to truly reflect the will of the electorate.

With the prohibition on political advertisements except through the Comelec space and time, how can a full discussion of men, issues, ideologies and programs be realized? Article III, Section 4 of the Constitution provides that “(n)o law shall be passed abridging the freedom of speech, of expression, of the press, or the right of the people peaceably to assemble and petition the government of redress of grievances.” Implicit in this guarantee is the right of the people to speak and publish their views and opinions on political and other issues, without prior restraint and/or fear of subsequent punishment. Yet Section 11(b), by authorizing political advertisements only via the COMELEC effectively prevents the candidates from freely using the facilities of print and electronic mass media to reach the electorate. A more blatant form of prior restraint on the free flow of information and ideas can hardly be imagined. To be sure, it does not constitute an absolute restriction, but it is restriction nonetheless, as

odious and insidious as any that may be conceived by minds canalized in deepening grooves.

I hold that, given our experience in the past two elections, political advertisements on radio and television would not endanger any substantial public interest. Indeed, allowing advertisements would actually promote public interest by furthering public awareness of election issues. The objective, equalizing opportunities for public service, while of some immediacy during election times, does not justify curtailing the citizen's right of free speech and expression.

“Not only must the danger be patently clear and pressingly present but the evil sought to be avoided must be so substantive as to justify a clamp over one's mouth or a writing instrument to be stilled. For these reasons, any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other context might support legislation against attack on due process grounds, will not suffice. These right rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the greatest abuses, endangering permanent interests, give occasion for permissible limitation.”[20]

No such clear and present danger exist here as to justify banning political advertisements from radio and television stations.

Past experience shows that the COMELEC has been hard put effectively informing the voting populace of the credentials, accomplishments, and platforms of government of the candidates. There are 17,396 national and local elective public positions[21] which will be contested by an estimated 100,000 candidates[22] on May 11, 1998. For national positions, the list has been trimmed down to 11 candidates for president, 9 candidates for vice-president, and 40 candidates for senator. It is difficult to see how the number of candidates can be adequately accommodated by “COMELEC Space” and “COMELEC time” Resolution No. 2983 of the COMELEC, issued in compliance with Section 92 of B.P. 881, mandates that at least thirty minutes of prime time be granted to the Commission, free of charge, from February 10, 1998 until May 9, 1998.[23] Thirty minutes of prime-time for eighty-nine days (89) is scarcely enough time to introduce candidates to the voters, much less to properly inform the electorate of the credentials and platforms of all candidates running for national office. Let us be reminded that those running for local elective positions will also need to use the same space and time from March 27 to May 9, 1998, and that the COMELEC itself is authorized to use the space and time to disseminated vital election information.[24] Clearly “COMELEC Space” and “COMELEC Time” sacrifices the right of the citizenry to be sufficiently informed regarding the qualifications and programs of the candidates. The net effect of Section 11(b) is, thus, a violation of the people's right to be informed on matters of public concern and makes it a palpably unreasonable restriction on the people's right to freedom of expression. Not only this, the failure to “Comelec Space” and “Comelec Time” to adequately inform the electorate, only highlights the unreasonableness of the means employed to achieve the objective of equalizing opportunities for public service between rich and poor candidates.

Again, NPC v. COMELEC finds Section 11(b) valid, as paid political advertisement are allowed in for a other than modern mass media, thus: “aside from Section 11(b) of RA 6646 providing for ‘COMELEC Space’ and ‘COMELEC Time,’ Sections 9 and 10 of the same law afford a candidate several venues by which he can fully exercise his freedom of expression, including freedom of assembly.” A concurring opinion points to the mandate of COMELEC to encourage non-political, non-partisan private or civic organization to initiate and hold in every city and municipality, public fora at which all registered candidates for the same office may participate in, the designation of common poster areas, the right to hold political caucuses, conferences, meetings, rallies, parades, and other assemblies, as well as the publication and distribution of campaign literature. All these devices

conveniently gloss over the fact that for the electorate, as shown in surveys by the Ateneo de Manila University's Center for Social Policy and Public Affairs, mass media remains to be the most important and accessible source of information about candidates for public office.

It must be borne in mind that the novel party-list system will be implemented in the impending elections. The party-list system, an innovation introduced by the 1987 Constitution in order to encourage the growth of multi-party system is designed to give a chance to marginalized sectors of society to elect their representative to the Congress. A scheme aimed at giving meaningful representation to the interest of sectors which are not adequately attended to in normal legislative deliberations, it is envisioned that system will encourage interest in political affairs on the part of a large number of citizens who feel that they are deprived of the opportunity to elect spokesmen of their own choosing under the present system. It is expected to forestall resort to extra-parliamentary means by minority groups which would wish to express their interest and influence governmental policies, since every citizen is given a substantial representation.[25]

Under R.A. 7941, known as the Party-List System Act, the labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas worker and professional sectors[26] will have the opportunity to elect representatives to Congress. With the prohibition on political advertisements, however, those parties who wish to have their candidates elected as sectoral representatives, are prevented from directly disseminating their platforms of government through the mass media. The ban on political advertisements thus serves as a deterrent to the development of self-reliance, self-development, logistical and organizational capability on the part of sectoral parties/organizations, even as it inhibits them from reaching their target audiences. What more effective way of depriving them of the chance of consolidating a mass base sorely needed for a fair chance of success in a highly competitive political exercise. Likewise, with the inability of the candidates to reach the sectors as they seek to represent, the right of the people belonging to these sectors to be informed on matters of concern to them is likewise violated.[27]

Finally, NPC v. COMELEC invokes the specter of the "captive audience" to justify its stand against political advertisements. Describing political advertisements as "appealing to the non-intellective faculties of the captive and passive audience," it says that anyhow, the only limitation imposed by Section 11(b) upon the free speech of candidates is on their right to bombard the helpless electorate with paid advertisements commonly repeated in the mass media ad nauseam.

Suffice it to say that, with the exception of obscenity, seditious speech, libel, and the like, it is not for this Court to determine what the people may or may not watch or read. Even "mind-numbing" political advertisements are subject to the constitutional safeguard of due process.

[Freedom of Speech Expression Remains A Fresh]

[And Vital Verity]

The guarantee of the freedom of speech which has been defined by Wendell Philips as "the instrument and guarantee and the bright and consummate flower of all liberty," has always been granted a predominant status in the hierarchy of individual rights.[28] It is founded on the belief that the final end of the state was to make men free to develop their faculties and that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.[29] Its purpose is to preserve an uninhibited marketplace of ideas where truth will ultimately prevail.[30] "An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgement by exposing it to opposition and make full use of different minds. Discussion must be kept open no matter how certainly true an accepted opinion may be; many of the most widely accepted opinions have turned out to be erroneous. Conversely, the same principles

apply no matter how false or pernicious the new opinion may be; for the unaccepted opinion may be true and partially true; and even if false, its presentation and open discussion compel a rethinking and retesting of the accepted opinion.[31] As applied to instant case, this court cannot dictate what the citizens may watch on the ground that the same appeals only to his non-intellective faculties or is mind-deadening and repetitive. A veritable “Big Brother” looking over the shoulder of the people declaring: “We know better what is good for you,” is passe’

As to the puerile allegation that the same constitutes invasion of privacy, making the Filipino audience a “captive audience,” the explosive growth of cable television and AM/FM radio will belie this assertion. Today, the viewing population has access to 12 local TV channels,[32] as well as cable television offering up to 50 additional channels. To maintain that political advertisements constitute invasion of privacy overlooks the fact that viewers, with the surfeit of channels, can easily skip to other TV channels during commercial breaks - a fact which, coupled with the now ubiquitous remote control device, has become the bane of advertisers everywhere.

The line between gaining access to an audience and enforcing the audience to hear is sometimes difficult to draw, leaving the courts with no clearcut doctrine on issues arising from this kind of intrusion. This is specially true in cases involving broadcast and electronic media. The US cases cited as authorities on the captive audience phenomenon, which, incidentally, did not involve the issue of election campaigns,[33] provide little guidance as to whether freedom of speech may be infringed during the campaign period for national elections on account of the individual’s right to privacy.[34] Prudence would dictate against an infringement of the freedom of speech if we are to take into consideration that an election campaign is as much a means of disseminating ideas as attaining political office[35] and freedom of speech has its fullest and most urgent application to speech uttered during election campaigns.[36] In *Buckley v. Valeo*, a case involving the constitutionality of certain provisions of the Federal Election Campaign Act, the United States Supreme Court per curiam held that:

“the concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of the others is wholly foreign to the First Amendment which was designed to “secure the widest possible dissemination of information from diverse and antagonistic sources” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (italics supplied)[37]

The fear that the candidates will bombard the helpless electorate with paid advertisements, while not entirely unfounded, is only to be expected considering the nature of political campaigns. The supposition however that “the political advertisements which will be “introjected into the electronic media and repeated with mind deadening frequency” are commonly crafted not so much to inform and educate as to condition and manipulate, not so much to provoke rational and objective appraisal of candidates’ qualifications or programs as to appeal to the intellective faculties of the captive and passive audience” is not a valid justification for the infringement of so paramount a right granted by the Constitution inasmuch as it is the privilege of the electorate in a democratic society to make up their own minds as to the merit of the advertisements presented. The government derives its power from the people as the sovereign and it may not impose its standards of what is true and what is false, what is informative and what is not for the individual who, as a “particle” of the sovereignty is the only one entitled to exercise this privilege.

Government may regulate constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the said interest without unnecessarily interfering with the guarantee of freedom of expression. Mere legislative preference for one rather than another means for combating substantive evils may well be an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights to necessary to maintenance of democratic institutions.[38]

It should be noted that legislature has already seen fit to impose a ceiling on the candidates' total campaign expenditures[39] and has limited the political campaign period to 90 days for candidates running for national office and 60 days for congressmen and other local officials. With these restrictions, it cannot be gainsaid that the constitutional provision on social justice has been sufficiently complied with. We see no reason why another restriction, must be imposed which only burdens the candidates and voters alike. To make matters worse, we are not even certain as to the efficacy of the "adban" in curtailing the feared consequences of the object of restriction. Of course, this is not to say that the law is being struck down as unconstitutional mainly because it is efficacious or ineffectual. If this is the only issue which confronts us, there would have been no need to give due course to the petition inasmuch as we would be inquiring as to the wisdom of the law and treading into an area which rightfully belongs to the legislature. Verily, courts cannot run a race of opinions upon points of right, reason and expediency with the law-making power.[40]

[Freedom of Expression Incompatible With Social Justice?]

The Constitutional question at hand is not just a simple matter of deciding whether the "adban" is effective or ineffective in abridging the financial disparity between the rich and poor candidates. Sec. 11(b) of RA No. 6646 strikes at the very core of freedom of expression. It is unconstitutional not because we are uncertain as to whether it actually levels the playing field for the candidates but because the means used to regulate freedom of expression is on all points constitutionally impermissible. It tells the candidates when, where and how to disseminate their ideas under pain of punishment should they refuse to comply. The implications of the ban are indeed more complex and far reaching than approximating equality among the rich and the poor candidates.

The primacy accorded the freedom of expression is a fundamental postulate of our constitutional system. The trend as reflected in Philippine and American decisions is to recognize the broadest scope and assure the widest latitude to this guaranty. It represents a profound commitment to the principle that debate of public issue should be uninhibited, robust and wide open and may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger.[41]

The repression of expression in an attempt to level the playing field between the rich and the poor candidates is not only unrealistic but goes beyond the permissible limits of freedom of expression as enshrined in the constitution. Social justice is a laudable objective but it should not be used as a means to justify infringement of the freedom of expression if it can be achieved by means that do not necessarily trench on the individual's fundamental right. The case of *Guido v. Rural Progress Administration*,[42] is particularly enlightening. In said case, we had occasion to state that:

"Hand in hand with the announced principle, herein invoked, that 'the promotion of social justice to insure the well being and economic security of all people should be the concern of the state', is a declaration with which the former should be reconciled, that 'the Philippines is a Republican state' created to secure to the Filipino people 'the blessings in independence under a regime of justice, liberty and democracy.' Democracy as a way of life enshrined in the Constitution, embraces as its necessary components freedom of conscience, freedom of expression, and freedom in pursuit of happiness. x x x Social justice does not champion division of property or equality of economic status; what it and the Constitution do guarantee are equality of economic opportunity, equality of political rights, equality before the law, equality between values given and received x x x."

While we concede the possibility that the rich candidates may dominate the airwaves to the detriment of the poor candidates, the latter should not be prevented from replying. While they may be restricted on account of their financial resources, they are not denied access to the media altogether. This is what is meant by the phrase "equal time, space, equal opportunity and the right of reply" under Article IX (C)(4) of the 1987 Constitution which was inserted by the framers of the Constitution as a reaction to a 1981 ruling of the Supreme Court that when the

president speaks over radio or television, he speaks not as a representative of his party but of the people and therefore opposition parties have no right to demand equal time[43]

It is ironic that the guarantee of freedom of expression should be pitted against the constitutional provision on social justice because the freedom of speech is the most potent instrument of public opinion, not to speak of its being the most effective weapon for effecting political and social reforms. Certainly, an infringement of the freedom of speech in a less than heroic attempt at attaining social justice cannot be countenanced, for in the ultimate analysis social justice cannot flourish if the people's right to speak, to hear, to know and ask for redress of grievances is watered down.

A word in the intervenors' argument that Resolution No. 2983, Section 2, insofar as it directs every radio broadcasting and television to provide COMELEC with airtime free of charge constitutes taking of private property for public use without just compensation. The COMELEC, anticipating its vulnerability to said challenge passed Resolution 2983-A on MARCH 3, 1998 requiring that it pay just compensation for its COMELEC time.

[Buckley vs. Valeo and Existing US Jurisprudence]

The novelist George Orwell once said, "In a society in which there is no law, and in theory no compulsion, the only arbiter of behavior is public opinion. But public opinion, because of the tremendous urge to conformity in gregarious animals, is less tolerant than any other system of law." For want of legislature to equalize the playing field between the rich and the poor candidates, it has by imposing a complete prohibition on paid political advertisements, burned down a house to roast a pig. For fear of accusations that it might be treading into an area which rightfully belongs to the legislature, the Court today, by sanctioning an unnecessary infringement on the freedom of speech, has unwittingly allowed the camel's nose into the tent.

My colleague, Justice Reynato Puno, in his separate opinion, apparently overlooked the thrust of our dissenting opinion when we quoted the case *Buckley v. Valeo*.^[44] Lest we be misunderstood, we have in no way relied on the *Buckley v. Valeo* case for the grant of instant petition inasmuch as it has never escaped our notice that legislature has already seen fit to impose a ceiling on the candidates' total campaign expenditures^[45] Precisely, we have repeatedly emphasized in the dissenting opinion that we see no reason why another restriction must be imposed on the constitutional guarantee of freedom of speech which only burdens the candidates and electorates alike when legislature has already taken steps to comply with the constitutional provision on social justice by imposing a ceiling on the candidates' total campaign expenditures and limiting the campaign period to 90 days for candidates running for national office and 60 days for congressmen and other local officials. We have mentioned *Buckley* if only to underscore the fact the due to the primacy accorded to freedom of speech, court, as a rule are wary to impose greater restrictions as to any attempt to curtail speeches with political content. To preserve the sanctity of the status accorded to the said freedom, the US Supreme Court has, in fact, gone as far as invalidating a federal law limiting individual expenditures of candidates running for political office.

In any case, to address some misconceptions about existing jurisprudence on the matter, we now present a brief discussion on *Buckley* and the preceding US cases. In the case of *Buckley v. Valeo*, a divided US Supreme Court, per curiam held that a federal law limiting individual contributions to candidates for office served the state's compelling interest in limiting the actuality and appearance of corruption. However a law limiting expenditures by candidates, individuals and groups was held unconstitutional. The rationale for the dichotomy between campaign expenditures and contributions has been explained in this wise - campaign contributions are marginal because they convey only an undifferentiated expression of support rather than the specific values which motivate the support. Expenditures, on the other hand, as directly related to the expression of political views, are on a higher plane of constitutional values. The Court, in noting that a more stringent justification is necessary for legislative

intrusion into protected speech said, "A restriction on the amount of money a person or a group can spend on political communication necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating in today's mass requires the expenditure of money." [46]

A more discerning scrutiny of the US cases following *Buckley*, would show that while *Buckley* has been widely criticized, it has, to date, never been modified, much less discredited. In *California Medical Association vs. FEC*, [47] a law limiting the amount an incorporated association can contribute to a multi-candidate political committee was upheld. The spending was viewed not as independent political speech but rather as "speech by proxy," hence, the spending was deemed analogous to group contributions which can be regulated.

In *FEC vs. National Conservative Political Action Comm*, [48] the US Supreme Court invalidated a section of the Presidential Election Campaign Fund Act which makes it a criminal offense for an independent political committee to spend more than \$1,000 to further the election of a presidential candidate who elects public funding. National Conservative Political Action Committee (NCPAC) and the Fund for a Conservative Majority (FCM), two political action committees or PAC's, solicited funds in support of President Reagan's 1980 presidential campaign. The PAC's spent these funds on radio and television advertising in support of Reagan. The Court, relying on *Buckley v. Valeo* and the distinction it drew between expenditures and contributions, held that the independent expenditures of the political committees were constitutionally protected for they "produce speech at the core of the First Amendment" necessitating a "rigorous standard of review." Justice Rehnquist, for the court, likened the restriction to allowing a speaker in a public hall to express his views while denying him use of the amplifier. As in *Buckley*, independent expenditures, not coordinated with candidates' political campaign, were seen as presenting a lesser danger of political quid pro quos. The Court then proceeded to reject efforts to support the statutory limitation on expenditures on the basis of special treatment historically accorded to corporations inasmuch as the terms of the Campaign Fund Act "apply equally to an informal neighborhood group that solicits contributions and spends money on a presidential election campaign as to the wealthy and professionally managed PAC's."

In the case of *FEC v. Massachussets Citizens for life (MCFL)*, [49] a provision of the Federal Election Campaign Act prohibiting direct expenditure of corporate funds to a non-profit, voluntary political association concerned with elections to public office was struck down as unconstitutional. No compelling government interest was found to justify infringement of protected political speech in this case where a small voluntary political association, which had no shareholders and was not engaged in business, refused to accept contributions from either business corporations or labor unions.

In *Austin v. Michigan Chamber of Commerce*, [50] the case cited by Justice Puno, a Michigan statute prohibiting corporations from making campaign contributions from their general treasury funds to political candidates was held not to violate the first amendment even though the statute burdened expressive activity mainly because the statute was sufficiently narrowed to support its goal in preventing political corruption or the appearance of undue influence - it did not prohibit all corporate spending and corporations were permitted to make independent expenditures of political purposes from segregated funds but not from their treasuries. Notably, the non profit corporation involved in this case, the Michigan Chamber of Commerce (hereinafter referred to as the Chamber of Commerce), lacked three of the distinctive features of MCFL, the organization involved in the *FEC vs. National Conservative Political Action Comm* [51] case, namely: (1) The Chamber of Commerce, unlike MCFL, was not formed just for the purpose of political expression (2) The members of the Chamber of commerce had an economic reason for remaining with it even though they might disagree with its politics and (3) The Chamber of Commerce, unlike MCFL, was subject to influence from business corporations which might use it as a conduit for

direct spending which would pose a threat to the political marketplace.

From the foregoing, it should be obvious that Austin in fact supports the holding in *Buckley v. Valeo* and "refines" it insofar as it allows the regulation of corporate spending in the political process if the regulation is drawn with sufficient specificity to serve the compelling state interest in reducing the threat that "huge corporate treasuries" will distort the political process and influence unfairly the outcome of elections.

The adban, undoubtedly, could hardly be considered as a regulation drawn with sufficient specificity to serve compelling government interest inasmuch as it imposes a complete prohibition on the use of paid political advertisements except through Comelec time and space despite the fact that Congress has already seen fit to impose a ceiling on the candidates' total campaign expenditures. While it seems a rather fair proposition that Congress may regulate the misuse of money by limiting the candidates how, when, and where to use their financial resources of political campaigns. Obviously, it is one thing to limit the total campaign expenditures of the candidates and another to dictate to them as to how they should spend it.

Freedom of expression occupies a preferred position in the hierarchy of human values. The priority gives the liberty a sanctity and a sanction not permitting dubious intrusions and it is the character of the right, not the limitation which determines what standard governs the choice.[52] Consequently, when the government defends a regulation on speech as a means to redress past harm or prevent anticipated harm, it must do more than simply "posit the existence of the disease sought to be cured.[53] It must demonstrate that the recited harms are real, not merely conjectural and that the regulation will alleviate these harms in a material way.[54]

As earlier pointed out, legislature has already seen fit to impose a ceiling on the total campaign expenditures of the candidates and has limited the campaign period for 90/60 days. We see no reason why another restriction must be imposed which only burdens the candidates and the voters alike. The fact alone that so much time has been devoted to the discussion as to whether the adban does in fact level the playing field among the rich and poor candidates should be a strong indication in itself that it is a dubious intrusion on the freedom of expression which should not be countenanced.

Illegitimate and unconstitutional practices make their initial foothold by furtive approaches and minimal deviations from legal modes of procedure. Hence, courts must be extremely vigilant in safeguarding the fundamental rights granted by the Constitution to the individual. Since freedom of expression occupies a dominant position in the hierarchy of rights under the Constitution to the individual. Since freedom of expression occupies a dominant position in the hierarchy of rights under the Constitution, it deserves no less than an exacting standard of limitation. Limitations on the guarantee must be clearcut, precise and, if needed readily controllable, otherwise the forces that press towards curtailment will eventually break through the crevices and freedom of expression will become the exception and suppression the rule.[55] Sadly, the much vaunted adban failed to live up to such standard and roseate expectations.

[Freedom of Expression in Historical Context]

At this juncture, as we celebrate the Centennial of our Philippine Independence, it is timely to call to mind that wars and revolutions have been fought, not only in our shores and in our time, but in centuries past, halfway around the globe to keep these subject rights inviolate. To stretch our memories, Spain's adamant denial of basic freedoms to our hapless forefathers, among others, sparked the Philippine revolution. Jose Rizal, in "Filipinas Despues de Cien Años"[56] described the reform a sine quibus non, saying, in "The minister,... who wants his reforms to be reforms, must begin by declaring the press in the Philippines free." The Filipino propagandist who sought refuge in the freer intellectual climate of Spain invariably demanded "liberty of the press, of cults, and of associations[57] through the columns of "La Solidaridad."

One of the more lofty minds unleashed his fierce nationalistic aspirations through the novels *Noli Me Tangere* and *El Filibusterismo*, necessarily banned from the author's native land. Eventually, the seeds of these monumental works ignited the flame of revolution, devouring in the process its foremost exponent, albeit producing a national hero, Jose Rizal. The mighty pen emerged victorious over the colonizers' sword.

The Malolos Constitution, approved before the turn of century on January 20, 1899, enshrined freedom of expression in Article 20 of its Bill of Rights, thus:

"Article 20 Neither shall any Filipino be deprived:

1. Of the right to freely express his ideas or opinions, orally or in writing, through the use of the press or other similar means." [58]

This right, held sacrosanct by the Filipino people and won at the cost of their lives found its way ultimately in the Constitutions of a later day, reenforced as they were, by the profound thoughts transplanted on fertile soil by libertarian ideologies. Why emasculate the freedom of expression now to accord a governmental agency a power exercisable for a limited period of time for the dubious purpose of "equalizing" the chances of wealthy and less affluent candidates?

In summary, I hold that Section 11(b) of RA 6646, in the six years that have elapsed since it was upheld as being in consonance with the fundamental law, has now become out of sync with the times and, therefore, unreasonable and arbitrary, as it not unduly restrains the freedom of expression of candidates but corollarily denies the electorate its fullest right to freedom of information at a time when it should flourish most.

For the reasons stated above, I VOTE to declare Section 11(b) of RA 6646 UNCONSTITUTIONAL.

[1] "Self-Reliance." Emerson's Essays, Emerson, Ralph Waldo, Books, Inc., N.Y.

[2] Article III, Sec. 4.

"No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances."

[3] *Olague v. Military Commission* No. 34, 150 SCRA 144 (1987).

[4] *Olague v. Military Commission* No. 34, 150 SCRA 145 citing *Phil. Trust Co. and Smith Bell and Co. v. Mitchell*, 50 Phil. 30 (1933) cited with approval in *Koppel (Phils.), Inc. v. Yatco*, 77 Phil. 496 (1946). See also *Tan Chong v. Secretary of Labor*, 79 Phil. 249 (1947).

[5] BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY, Vol. I, 1987 ed., p. 34.

[6] CRUZ, CONSTITUTIONAL LAW, 1993 ed., p. 43.

[7] *Gerona v. Secretary of Education*, 106 Phil. 2 (1959).

[8] 219 SCRA 256 (1993).

[9] 46 Phil. 440 (1924).

[10] BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY, Vol. II ed., p.40.

[11] 70 Phil. 340 (1940).

[12] 83 Phil. 17 (1949).

[13] Bernas, *The Constitution of the Republic of the Philippines: A Commentary* Vol. I, p. 142, citing *New York Times vs. United States* (403 U.S. 713).

[14] 259 SCRA 529 (1996).

[15] 59 Phil. 30 (1933).

[16] One president, one vice-president, twelve senators, one congressman, one party-list representative, one governor, one vice-governor, an estimated five Sangguniang panlalawigan members, one mayor, one vice-mayor, and an estimated five Sangguniang Bayan/Panglungsod members.

[17] The study was conducted by six senior students of the UP College of Mass Communications, covering *Manila Bulletin*, *Philippine Daily Inquirer*, *Philippine Times Journal*, *People's Journal* and *Tempo* – Report of the COMELEC to the President and Congress of the Republic of the Philippines on the Conduct of the Synchronized National and Local Elections of May 11, 1992, Vol. I, p. 56.

[18] *Philippine Blooming Mills Employees Organization vs. Philippine Blooming Mills, Inc.*, 50 SCRA 189 (1973).

[19] 16A Am Jur 2d, p. 341.

[20] *Blo Umpar Adiong vs. Comelec*, 207 SCRA 712 (1992).

[21] Education and Information Department, COMELEC.

[22] In 1992, there were 17,282 contested positions, while the total number of candidates reached 87,770 – Report of the COMELEC to the President and Congress of the Republic of the Philippines on the Conduct of the Synchronized National and Local Elections of May 11, 1992, Vol. I, p. 2.

[23] Sec. 2 Every radio broadcasting and television station operating under franchise shall grant the Commission, free of charge, at least thirty (30) minutes of prime time daily, to be known as “COMELEC Time,” effective February 10, 1998 for candidates for President, Vice-President and Senators, and March 27 for candidates for local elective offices, until May 9, 1998.

[24] Sec. 3. Uses of “COMELEC Time” – x x x “COMELEC Time” shall also be used by the Commission in disseminating vital election information.

[25] BERNAS, *THE INTENT OF THE 1986 CONSTITUTION WRITERS*, 1995 ed., p. 344.

[26] Section 3, R.A. 7941.

[27] As of February 9, 1998, 93 parties/organizations have filed certificates of candidacy under the party-list system – Law Division, COMELEC.

[28] *Mutuc v. Comelec*, 36 SCRA 228 (1970); *Victoriano v. Elizalde Rope Workers Union*, 59 SCRA 54 (1974); *Gonzales v. Comelec*, 27 SCRA 835 (1969).

[29] See concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 US 357 (1926).

[30] *Red Lion Broadcasting Co. v. FCC*, 395 US 367 (1969).

[31] Emerson, Thomas. *The System of Freedom of Expression*, p. 7 (1969).

[32] Channels 2, 4, 5, 7, 11, 13, 23, 27, 29, 31, 39.

[33] In *Columbia Broadcasting v. Democratic National Committee* (412 US 94) the court held that broadcasters may validly refuse to accept paid editorial advertisements from “responsible entities” wishing to present their views on public issues like, in this instance, the Business Executives’ Move for Vietnam Peace, expressing their views on the Vietnam conflict. See however *CBS v. Fox* (453 US 367 [1981]) where the US Supreme Court held that the Communications Act of 1934 grants an affirmative, enforceable and limited right of reasonable access to broadcasting media for legally qualified individual candidates seeking federal elective office. The Court quoted the observation of the Federal Communications Commission that “An arbitrary blanket ban on the use of the candidate of a particular class or length of time in a particular period cannot be considered reasonable. A Federal candidate’s decision as to the best method of pursuing his or her media campaign should be honored as much as possible under the “reasonable limits” imposed by the licensee.”

In *Public Utilities v. Pollak* (343 US 451 [1952]) which was cited in *Columbia*, the US Supreme Court rejected the claim that the broadcasting of special programs – in this case 90% music, 5% news and 5% commercial advertising – in public transit cars violated the right of the passengers who did not wish to listen to the programs.

In *Kovacs v. Cooper* (336 US 77 [1949]) the Court upheld an ordinance forbidding the use on public streets of sound trucks which emit “loud and raucous” noises. Justice Black in his dissent however cited the case of *Saia v. New York* (334 US 558 [1948]) where an ordinance banning the use of sound amplification devices except for dissemination of news items and matters of public concern – provided the police chief’s permission was obtained, was struck down as unconstitutional. The court in the *Saia* case held that, “Loudspeakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of campaign.” Adhering to his dissent in *Saia*, Justice Frankfurter concurred in *Kovacs* saying, “So long as the legislature does not prescribe what may be noisily expressed and what may not be, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection.”

[34] The case of *Lehman v. Shaker Height* (418 US [1974]) is not particularly in point in the case at bar where a complete prohibition is imposed on the use of newspapers, radio or television, other mass media, or any person making use of the mass media to sell or give free of charge print space or airtime for campaign and political purposes except to the Commission. In the case at *Lehman*, a city operating a public transit system sold commercial and public service advertising space for cards on its vehicles, but permitted no “political” or “public issue” advertising. When petitioner, a candidate for the Office of State Representative to the Ohio General Assembly failed in his effort to have advertising promote his candidacy accepted, he sought declaratory relief in the State courts. The US Supreme Court held that the city consciously has limited access to its transit system to minimize the chances of abuse, the appearance of favoritism and the risk of imposing upon a captive audience.

[35] *Illinois Board of Directors v. Socialist Workers*, 440 US 173 (1979).

[36] *Eu v. San Francisco Democratic Comm.*, 489 US 214 (1989).

[37] *Buckley v. Valeo*, 424 US 1 (1976) citing *New York Times v. Sullivan*, 84 S Ct. 710, quoting *Associated Press v. United States*, 326 US 1 (1945) and *Roth vs. United States* at 484.

[38] *Thorhill v. State of Alabama*, 310 US 88 (1940).

[39] Section 100 of BP 881, otherwise known as the Omnibus Election Code, states: “No candidate shall spend for his election campaign an aggregate amount exceeding one peso and fifty centavos for every voter currently

registered in the constituency where he filed his candidacy. Provided that the expenses herein referred to shall include those incurred or caused to be incurred by the candidate, whether in cash or in kind, including the use, rental or hire of land, water or aircraft, equipment facilities, apparatus and paraphernalia used in the campaign; Provided, further that where the land, water or aircraft, equipment, facilities, apparatus and paraphernalia is owned by the candidate, his contributor or his supporter, the Commission is hereby empowered to assess the amount commensurate with the expenses for the use thereof based on the prevailing rates in the locality and shall be included in the total expense incurred by the candidate.”

See also related Sections 94-112.

[40] Cooley, Thomas, I Constitutional Limitations. 8th Ed. (1927, p. 346.

[41] Gonzales v. Comelec, supra.

[42] 84 Phil. 847 (1949).

[43] 1 Record 632, 662-66.

[44] 424 US 1 [1976].

[45] See footnote 39.

[46] Supra at 19.

[47] 453 US 182 [1981].

[48] 470 US 480 [1985].

[49] 475 US 1063 [1986].

[50] 494 US 652 [1990].

[51] Supra.

[52] Thomas v. Collins, 323 U.S. 516 (1945), as cited in the dissenting opinion of Justice Fernando in Gonzales v. Comelec at p. 885 and in the case of Blo Umpar Adiong v. Comelec, 207 SCRA 712 [1992].

[53] Quincy Cable TV Inc. v. FCC, 786 F2d 1434 [1985].

[54] Edenfield v. Fane, 507 US [1993].

[55] Emerson, Thomas. The System of Freedom of Expression, [1967] pp. 10-11.

[56] The Philippines a Century Hence, p. 62 et seq.

[57] United States vs. Bustos, 37 Phil. 731 (1918). See Mabini, La Revolucion Filipina

[58] GUEVARA, THE LAWS OF THE FIRST PHILIPPINE REPUBLIC (THE LAWS OF MALOLOS) 1898-1899, 1972, p. 107.

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[SEPARATE OPINION]**VITUG, J.:**

I share the opinion of those who continue to uphold the decision in the *National Press Club vs. Commission on Elections* case that has sustained the validity of Section 11(b) of Republic Act (“R.A.”) No. 6646, otherwise also known as the Electoral Reforms Law of 1987.

Petitioners, in seeking a re-examination of the decision of this Court in the *National Press Club* case, no more than invoke anew Section 4, Article III, of the Constitution to the effect that –

“No law shall be passed abridging the freedom of speech, of expression, or of press, on the right of the people peaceably to assemble and petition the government for redress of grievances.”

It is their submission that Section 11(b) of R.A. No. 6646 and Section 18(e) of Comelec Resolution No. 2974 should be declared unconstitutional. These contested provisions state:

“Sec. 11. Prohibited forms of election propaganda. – In addition to the forms of election propaganda prohibited under Section 85 of Batas Pambansa Blg. 881, it shall be unlawful;

“xxx xxx xxx

“b) for any newspaper, radio broadcasting or television station, other mass media, or any person making use of the mass media to sell or give free of charge print space or airtime for campaign or other political purposes except to the Commission as provided under Sections 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcer or personality who is a candidate for any elective public office shall take a leave of absence from his work as such during the campaign period.”

Sec. 18. Prohibited forms of election propaganda. – it is unlawful

“xxx xxx xxx

“e. For any radio broadcasting or television or any person making use of broadcast media to sell or give free of charge, any air time for campaign and other political purposes, except thru ‘COMELEC time,’ allotted to the Commission pursuant to Section 92 of the Omnibus Election Code.”

I see however, in the above provision a faithful compliance and due observance of the language, intent and spirit of the Constitution itself, Article IX(C)(4) of which reads:

“Sec. 4. The Commission [on Elections] may, during the election period, supervise or regulate the enjoyment or utilization of all franchise or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections.”
(Italics supplied)

It might be worth mentioning that Section 26, Article II, of the Constitution also states that the “State shall guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law.” I see neither Article IX (C)(4) nor Section 26, Article II, of the Constitution to be all that adversarial or irreconcilably inconsistent with the right of free expression. In any event, the latter, being one of general application, must yield to the specific demands of the Constitution. The freedom of expression concededly holds, it is true, a vantage point in hierarchy of constitutionally-enshrined rights but, like fundamental rights, it is not

without limitations.

The case is not about a fight between the “rich” and the “poor” or between the “powerful” and the “weak” in our society but it is to me a genuine attempt on the part of Congress and the Commission on Elections to ensure that all candidates are given an equal chance to media coverage and thereby be equally perceived as giving real life to the candidates’ right of free expression rather than being viewed as an undue restriction of that freedom. The wisdom in the enactment of the law, i.e., that which the legislature deems to be best in giving life to the Constitutional mandate, is not for the Court to question; it is a matter that lies beyond the normal prerogatives of the Court to pass upon.

I vote to dismiss the petition.

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