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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | November 2018

Nationwide Political Law Ballot Measure Roundup

By Carol A. Laham and Louisa Brooks

The November 6 election saw voters in several states adopt statewide ballot measures related to ethics, campaign finance, and lobbying. A few cities also adopted measures, including Portland, OR (campaign contribution limits); Phoenix (increased disclosure for persons making expenditures in connection with city elections); and New York City (decreased contribution limits, increased public matching funds). Below is a summary of the most notable changes at the state level.

Missouri – Broad Ranging Changes

Missouri voters passed Amendment 1, which enacts changes to the state's redistricting process, post-employment lobbying restrictions, campaign finance law, and gift rules. Most notably, the measure prohibits members and staff of the General Assembly from accepting any gift exceeding $5 in value from a lobbyist or lobbyist

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Prosecuting Public Corruption: Bad Actors and Regulatory Consequences

By Michael E. Toner and Sarah B. Hansen

A slew of recent convictions and sentencings demonstrates how bad actors can abuse the political process, applicable pay-to-play and bribery regulations, and the trust placed in them by their constituents. Given the complex and ever-changing regulations that dictate the bounds of acceptable behavior for public officials and the presence of these bad actors, it is important that companies consult compliance counsel before giving or receiving gifts and contributions.

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ALSO IN THIS ISSUE

Federal Courts Rule Against Missouri, Pennsylvania Campaign Contribution Restrictions

By D. Mark Renaud and Eric Wang

Two federal courts recently ruled against state campaign contribution restrictions. In one case, Missouri's ban on PAC-to-PAC contributions was again held to be unconstitutional on appeal. In the other case, Pennsylvania's ban on contributions from gaming interests was struck down. The decisions illustrate the constant push and pull of campaign finance laws, with legislators and voters attempting to enact more stringent restrictions and courts often finding that such laws go beyond what is constitutionally permissible.

In the Missouri case, a panel of the U.S. Court of Appeals for the Eighth Circuit upheld a federal district court judge's ruling last year that Missouri's ban on state political action committees (PACs) receiving contributions from other PACs is unconstitutional. The challenged provision was one of several that Missourians voted to enact in 2016 as an amendment to their state constitution. The district court had ruled that substantial portions of the 2016 amendment were impermissible under the First Amendment of the U.S. Constitution, but only the PAC-to-PAC contribution ban was at issue in the appeal sought by the Missouri Ethics Commission (MEC).

The MEC defended the PAC-to-PAC contribution ban as necessary to prevent circumvention of Missouri's contribution limits, which restrict individuals and PACs to giving no more than $2,600 per election to candidates for state office. Missouri argued that without the ban on PAC-to-PAC contributions, individuals would be able to direct more than the $2,600 amount to particular candidates "by laundering [funds] through a series of PACs that [the individual] controls." (Missouri does not limit the amount that an individual may give to any particular PAC.)

The Eighth Circuit panel found this argument to be unconvincing for several reasons. First, the panel faulted the MEC for failing to provide any "real-world examples" of PACs being used to engage in this type of circumvention. Second, the panel noted that donors could exceed the contribution limits simply by contributing directly to a number of PACs with the expectation that those PACs would support particular candidates of the donor's choice, as opposed to channeling a single contribution from one PAC to another.

Lastly, the panel noted that the type of circumvention the MEC purported to be concerned about is otherwise prohibited under Missouri law. As in most jurisdictions, Missouri prohibits what is commonly known as "making a contribution in the name of another" or "straw contributions." In other words, channeling a contribution from one PAC to another PAC with the ultimate goal of having the contribution reach a particular candidate to evade contribution limits is already otherwise illegal in Missouri.

In the 2014 U.S. Supreme Court case *McCutcheon v. FEC*, the Federal Election Commission had raised a similar anti-circumvention argument to justify a limit on the total amount that individuals may contribute to all federal candidates, political party committees, and PACs during a biennial period. The Supreme Court held that this "prophylaxis-upon-prophylaxis" rationale was an insufficient basis for regulating campaign contributions. Applying this holding in *McCutcheon*, the Eighth Circuit panel

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also found that Missouri's anti-circumvention justification for its PAC-to-PAC contribution ban was insufficient.

In a publication last month, the MEC noted that it "is considering whether or not to appeal" the Eighth Circuit's decision. While the deadline for seeking *en banc* review by the entire Eighth Circuit has passed, the MEC has until December 9, 2018, to ask the Supreme Court to consider an appeal.

In the Pennsylvania case, a federal district court judge invalidated the state's ban on campaign contributions from individuals who are applying for or who hold gaming licenses, or who are "principals" or "key employees" of gaming licensees or license applicants. (Corporate contributions are already prohibited in Pennsylvania.) In 2009, the Pennsylvania state Supreme Court had declared the state's ban to be impermissible under the state constitution because the state had failed to provide a sufficient justification for the law. In response, the state legislature amended the statute's preamble to explain that the ban on contributions from gaming interests was intended "to prevent corruption and the appearance of corruption that may arise when political campaign contributions and gaming ... are intermingled."

However, the federal judge held that simply because the legislature declared the state had a problem with political corruption in the gaming industry did not make it so. The judge faulted the state for offering "neither actual instances of corruption in Pennsylvania, nor any studies done to determine if pervasive corruption exists" in the state's gaming industry. As in the Missouri ruling, the judge cited to the U.S. Supreme Court's *McCutcheon* holding, but this time for the proposition that the U.S. Constitution does not permit Pennsylvania to ban campaign contributions based on "mere conjecture."

Pennsylvania has appealed the district court judge's decision to the U.S. Court of Appeals for the Third Circuit.

The rulings on the Missouri and Pennsylvania laws reflect the trend in recent years of federal courts taking a hard look at campaign contribution restrictions, as *Election Law News* **has reported previously**. Under the U.S. Supreme Court's framework, such laws must further a "sufficiently important" governmental interest and be "closely drawn" to impose no more of a burden on the constitutional right to make contributions than is necessary.

Other states, such as New Jersey and Louisiana, similarly ban campaign contributions from gaming interests, while several more states ban campaign contributions from a broader universe of regulated industries, such as insurance companies and public utilities. Many more states and municipalities ban or restrict contributions from government contractors (so-called "pay-to-play" laws). The recent court decisions do not necessarily mean that these other states' laws also will be found unconstitutional. However, these rulings are a reminder that states with such laws must have good justifications for them and may not rely merely on conjectural and attenuated claims about preventing corruption. ■

For more information, please contact:

D. Mark Renaud
202.719.7405 | mrenaud@wileyrein.com

Eric Wang
202.719.4185 | ewang@wileyrein.com

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Pennsylvania

In the U.S. District Court for the Eastern District of Pennsylvania, former Allentown, PA Mayor Edwin Pawlowski was sentenced to 15 years in federal prison following his conviction for soliciting donations to his U.S. Senate campaign from city vendors. In exchange for promises of lucrative municipal business, Pawlowski pursued contributions to his Senate campaign from city vendors and prospective city vendors that included law firms, an IT provider, a company seeking a streetlight contract, an architectural firm bidding to renovate a swimming pool, a firm that won roadway construction inspection work, and a local developer seeking zoning approvals.

New York

In the U.S. District Court for the Southern District of New York, former New York State Senate Majority Leader Dean Skelos was sentenced to four years and three months in prison for coercing businesses into directing payments to his son, Adam Skelos. For his role in the corruption scheme, Adam Skelos was sentenced to 48 months behind bars. Previously, Dean and Adam Skelos had been convicted and sentenced on federal charges of bribery, extortion, wire fraud, and conspiracy. Their convictions were vacated and remanded for retrial, however, by the Second Circuit in light of the Supreme Court's new articulation in *McDonnell v. United States* for what constituted an official act that could support a bribery charge. In July 2018, the pair were convicted again on the eight counts of conspiracy, extortion under color of official right, and soliciting bribes and gratuities. They were found to have used the senator's role as one of the state's most important politicians to threaten and coerce real estate, environmental consulting, and medical malpractice insurance businesses into hiring or paying Adam Skelos.

Alabama

In the U.S. District Court for the Northern District of Alabama, a former environmental attorney, Joel Gilbert, and a former vice president for government and regulatory affairs at a coal company, David Roberson, were sentenced to 5 years and 2.5 years imprisonment, respectively, for bribing an Alabama legislator to help the company dodge cleanup liability with the Environmental Protection Agency (EPA). The pair were convicted by a Birmingham jury based on their attempts to convince former Alabama legislator Oliver Robinson to oppose EPA actions in North Birmingham. Roberson's companies had been tagged by the EPA as "potentially responsible" for pollution migrating from a North Birmingham industrial site to surrounding neighborhoods. Federal prosecutors had accused Roberson and Gilbert of setting up an ongoing contract to pay Robinson's literacy foundation with the understanding that Robinson would attempt to influence state activity for the benefit of the Roberson's coal company and its subsidiary. This scheme was apparently hatched after Robinson alerted Gilbert that he was going to meet with high-level EPA officials after the EPA had proposed putting the entire site on the Superfund National Priorities List. In addition, Robinson allegedly used his Alabama House of Representatives letterhead to advocate on behalf the coal company, allowed Gilbert to ghostwrite a letter to the Alabama Department of Environmental Management, and helped pass a similarly ghostwritten resolution against "EPA overreach."

These recent cases demonstrate that even after the Supreme Court narrowed the definition of "official act" in its 2016 *McConnell* decision, federal prosecutors retain powerful tools to charge and combat public corruption.

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Nationwide Ballot Measure Roundup

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principal. This is a dramatic shift from existing law, under which lobbyists face few restrictions on providing gifts to Legislative branch personnel.

Separately, Amendment 1 lowers the state's existing contribution limits to $2,000 per election to a state representative candidate, and $2,500 per election to a state senate candidate. It also prohibits candidates from accepting contributions from a federal political action committee (PAC) unless the committee has filed the same reports required for a Missouri political action committee. It is not yet clear whether this prohibition will affect regulations, adopted by the Missouri Ethics Commission earlier this year, setting forth the requirements for federal PACs making contributions in Missouri.

Amendment 1 will become effective on Dec. 6, 2018, according to the Missouri Secretary of State's office.

North Dakota – Affects Gift Rules

Constitutional Measure 1 passed in North Dakota, adding a new article to the state constitution to establish the North Dakota ethics commission. The measure also contains a new prohibition on gifts from lobbyists to public officials, directing the new ethics commission to adopt gift rules within two years. The measure's general effective date is in January 2019, but the lobbyist gift ban will not take effect until two years thereafter, to allow for the adoption of the commission's gift rules.

South Dakota – Affects Contributions

In South Dakota, voters approved Initiated Measure 24, which prohibits out-of-state persons, political committees, and organizations from making contributions to statewide ballot question committees. Prior to the measure's passage, state Attorney General Marty Jackley issued a formal statement warning that the measure was likely to be challenged as unconstitutional if enacted.

A comprehensive campaign finance reform measure, Amendment W, also appeared on the South Dakota ballot, but voters rejected it by a margin of 54.9% to 45.1%. ■

For more information, please contact:

Carol A. Laham
202.719.7301 | claham@wileyrein.com

Louisa Brooks
202.719.4187 | lbrooks@wileyrein.com

Prosecuting Public Corruption: Bad Actors and Regulatory Consequences

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Although a bulwark of regulations and checks surround public officials and exist to prevent such corruption, bad actors can nevertheless find ways to abuse the process. In response, municipalities and states continue to crack down on corruption and impose more stringent and vigilant measures. For example, after Mayor Pawlowski's conviction, Allentown and Lehigh County adopted separate (but similar) pay-to-play laws, which allow contractors and prospective contractors to contribute no more than $250 to certain candidates and elected officials. These types of additional measures as well as the ever-present threat of bad actors highlight the need for relevant expertise to help public officials and contractors alike navigate this complicated, and potentially fraught, framework. ■

For more information, please contact:

Michael E. Toner
202.719.7545 | mtoner@wileyrein.com

Sarah B. Hansen
202.719.7294 | shansen@wileyrein.com

Sponsor of Congressional Travel to Azerbaijan Indicted for Submitting False Forms to House Ethics Committee

By Robert L. Walker

In a federal indictment unsealed on September 24, 2018, Kemal (also known as "Kevin") Oksuz – the former head of the Turquoise Council of Americans and Eurasions [*sic*] (TCAE) – was charged in the U.S. District Court for the District of Columbia with four felony counts of making false statements to the U.S. House Committee on Ethics and one felony count of devising a scheme to falsify, conceal, and cover up material facts to the Committee on Ethics in connection with pre- and post-travel forms submitted to the Committee for Member and staff travel to Azerbaijan in May 2013.

In April 2013, Oksuz's organization TCAE invited a number of Members of the House and their staff on a trip to Turkey and Azerbaijan; while in Azerbaijan, the Members and staff were to attend a convention in Baku focusing on energy and trade issues. The indictment in this matter alleges that, in pre- and post-travel forms required to be filed with the House Committee on Ethics in connection to House Member and staff travel paid for by a private source, Oksuz falsely disclosed and certified that TCAE had "not accepted from any other source funds intended directly or indirectly to finance any aspect" of this trip. The indictment further alleges that, in fact, as "Oksuz well knew, TCAE accepted [for this trip], both directly and indirectly, funds from other sources including": the State Oil Company of Azerbaijan Republic (SOCAR), a wholly state-owned oil and gas company; Practical Solutions Group (PSG), a consulting firm based in Azerbaijan; and the Assembly of Friends of Azerbaijan (AFAZ), a nonprofit organization focused on promoting U.S.-Azerbaijan relations and also led by Oksuz.

Ultimately, according to the House Committee on Ethics, 10 House Members and 32 House staff accepted privately sponsored travel to Azerbaijan in connection with the May 2013 conference. All House travelers sought and received preapproval from the Committee on Ethics for this travel; forms submitted for this preapproval included false information and certifications from Oksuz. In its July 31, 2015 report on its investigation into this matter, the Committee on Ethics concluded: "The evidence demonstrates that the House travelers submitted their forms in good faith, and there is no evidence that the House travelers knew, or should have known, of the sponsors' false statements regarding the true source of funding for the travel." The Committee also concluded, however, that there was "evidence of concerted, possibly criminal efforts by various non-House individuals and entities to mislead the House travelers and the Committee about the Trips' true sponsors and the funding sources used to pay for Member and House employee travel to Azerbaijan." The Committee referred its finding regarding these "non-House individuals," presumably including Oksuz, to the U.S. Department of Justice.

As evidenced by the Oksuz criminal indictment and the preceding ethics investigation, the congressional ethics committees (both House and Senate) and (on referral from the ethics committees) the Department of Justice scrutinize privately sponsored travel forms

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Senate Campaigns Required to File Reports Electronically

Senate campaigns are now required to file FEC reports and related documents electronically with the FEC. The change is a result of a provision in an appropriations bill that was signed by President Trump in late September. Prior to the bill's signing, Senate campaigns were required to submit reports and related documents on paper to the Secretary of the Senate.

As a result of the change, Senate reports will be made publicly available much more quickly. FEC databases will also reflect data from Senate reports much sooner after the reports are submitted. ■

For more information, please contact:

Karen E. Trainer
202.719.4078 | ktrainer@wileyrein.com

FEC Post-General Reports Due December 6

All federally registered PACs and party committees and all federal campaign committees for candidates participating in the 2018 general election are required to file Post-General Reports with the FEC by midnight EST on Thursday, December 6.

The Post-General Report will cover activity between October 1 and November 26 for PACs and party committees that were not required to file a Pre-General Report. The report will cover activity between October 18 and November 26 for PACs and party committees that were required to file a Pre-General Report and federal campaign committees for candidates participating in the 2018 general election. ■

For more information, please contact:

Karen E. Trainer
202.719.4078 | ktrainer@wileyrein.com

Maryland Pay-to-Play Report Due November 30

Please note that Maryland's semiannual pay-to-play report is due on November 30 from certain state and local government contractors, even if no reportable contributions have been made.■

For more information, please contact:

D. Mark Renaud
202.719.7405 | mrenaud@wileyrein.com

The First Amendment Right of Political Privacy Chapter 1 – The Edgerton Dissent

Lee E. Goodman

The newfound value *The New York Times* ascribes to anonymous speech critical of the President is refreshing. Defending its decision to publish a September 5 op-ed without identifying its author, other than as "a senior administration official," *Times* publisher A.G. Sulzberger stated that the anonymous commentary "added to the public understanding of this administration and the actions and beliefs of the people within it." He continued, "We didn't think there was any way to make that contribution without some guarantee of anonymity."[1]

First Amendment libertarians couldn't articulate the point more convincingly. They have argued, with varying judicial results and limited editorial support, that speech itself is protected by the First Amendment and that forced government disclosure of speakers and supporters of associations necessarily reduces the number and candor of valuable ideas that benefit speakers, listeners, and the democracy as a whole.

The *Times*' protection of this "senior administration official's" anonymity against the government's demand – made by the President himself – to name the author, in the interest of enforcing good and faithful government service, implicates the important question of whether the First Amendment protects anonymous political speech and association. Recent appellate decisions have indicated that it does in some circumstances, while upholding state laws requiring disclosure to the government of the names of nonprofit organizations' major financial contributors. *Americans for Prosperity Foundation v. Becerra*, 2018 WL 4320193 (9th Cir. 2018); *Citizens United v. Schneiderman*, 882 F.3d 374 (2nd Cir. 2018).

The history of this First Amendment doctrine is long and somewhat wavering in its evolution. The present is the first of several *Election Law News* articles that will explore that history and seek to illuminate the constitutional right to anonymous speech and association and the circumstances under which the right will be protected by the courts.

Although the right to speak and associate anonymously had been asserted by the Ku Klux Klan as a privacy right under the Privileges and Immunities Clause of Article IV of the Constitution and the substantive Due Process Clause of the Fourteenth Amendment as early as the 1920s, the Supreme Court had rejected the existence of such a constitutional right.[2] Twenty years later, however, the right was reasserted under the First Amendment in the context of government efforts, in the 1940s and 1950s, to root out "communists." And that is where this jurisprudential history begins.

Post-War Government Investigations

The "Red Scare" period that commenced in earnest immediately following World War II was complicated. There indeed were disloyal communists in the federal government who passed secrets to the Soviet Union.[3] But caught up in the mix also were ideological communists who, before the onset of the Cold War, conceived of American communism as the next progression of New Deal ideology and a bulwark against Fascism. This latter category included progressives in Hollywood who had no access to government secrets and whose alleged transgression was spreading communistic ideology in popular films.[4] Some indeed were card-carrying members of the Communist Party USA, and they did feature socialist themes in their films

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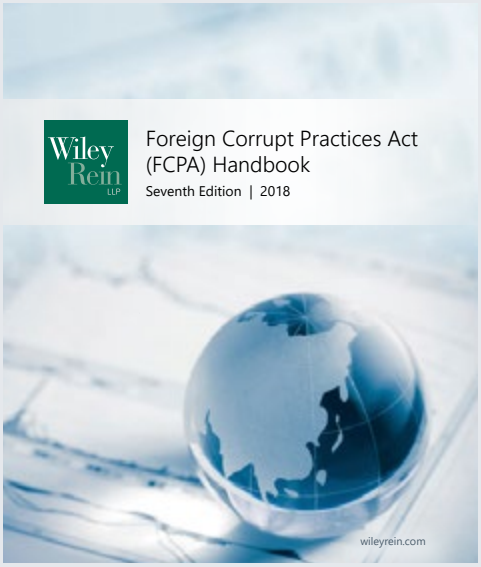
Updated Foreign Agents Registration Act (FCPA) Handbook

Wiley Rein's Foreign Corrupt Practices Act (FCPA) and Anti-Corruption Practice has published an updated FCPA Handbook (Seventh Edition). Since 1977, U.S. companies conducting business with foreign government entities and government officials have had to comply with the FCPA, which prohibits U.S. companies from bribing any foreign official to obtain or retain business. Companies and individuals found in violation of the FCPA may be subject to substantial fines, imprisonment, and/or forfeiture of property.



The handbook briefly reviews the principal provisions of the FCPA, outlines issues and factors likely to signal FCPA-sensitive situations, and summarizes recent developments that have returned international bribery and corruption to the political spotlight. U.S. companies should rigorously review their FCPA compliance programs and ensure that their overseas branches, subsidiaries, managers and agents are aware of corporate procedures for handling contracts with foreign government entities or involving government officials. A well-conceived compliance program is an essential element for avoiding trouble and, should problems arise, a critical mitigating factor under the corporate sentencing guidelines.

An excerpt of the updated handbook can be read **here**.

To view the 2018 Annual FCPA Mid-Year Review webinar, click **here**.

For more information about FCPA, please contact:

Daniel B. Pickard
202.719.7285 | dpickard@wileyrein.com

Sponsor of Congressional Travel to Azerbaijan Indicted for Submitting False Forms to House Ethics Committee *continued from page 6*

carefully to assure that the representations made on those forms are true, accurate, and complete. Attorneys in Wiley Rein's Election Law and Government Ethics Group are experienced in assisting prospective sponsors of congressional travel in completing the required forms and in navigating all steps of the congressional travel approval process. ■

For more information, please contact:

Robert L. Walker
202.719.7585 | rlwalker@wileyrein.com

Podcast: Wiley Rein Attorneys Discuss Congressional Investigations Landscape Following Midterm Elections

Wiley Rein partner **Peter S. Hyun** and of counsel **Robert L. Walker**, both members of Wiley Rein's **Election Law & Government Ethics** and **White Collar Defense & Government Investigations** practices, co-hosted a podcast focusing on the congressional investigations landscape following last week's historic midterm elections. With Democrats gaining control of the U.S. House of Representatives and Republicans retaining their majority in the U.S. Senate, the Wiley Rein attorneys had much to discuss regarding the new congressional session that will begin January 3, 2019, under divided leadership.

Mr. Hyun recently joined Wiley Rein after serving as chief counsel to Senator Dianne Feinstein, Ranking Member on the Senate Judiciary Committee, and he is also a former Assistant U.S. Attorney in the Eastern District of Virginia, and Assistant Attorney General in the New York State Attorney General's office. Mr. Walker previously served as Chief Counsel and Staff Director of the Senate and House ethics committees, and is a former federal prosecutor, with extensive trial, investigative, and advisory experience.

Wiley Rein's multidisciplinary **Congressional Investigations and Oversight Team** draws on the extensive experience of Mr. Walker, Mr. Hyun, and a deep bench of other attorneys to help clients navigate the spoken and unspoken rules by which congressional investigations are conducted.

Click here to listen to the podcast.

The First Amendment Right of Political Privacy Chapter 1 – The Edgerton Dissent *continued from page 8*

seeking to influence American public opinion, sometimes upon orders from the Communist Party.[5] But they were not Soviet spies embedded in the State Department or passing government secrets to the Soviets, and they did not engage in espionage or threaten the operations of government.

Beginning in the late 1940s, Hollywood communists became a focus of investigations by the House Un-American Activities Committee (HUAC) under the leadership of both political parties. Preserving the United States' democracy and its national security against communist ideas was a bipartisan enterprise for almost a decade.

Two common refrains of HUAC questioning delved directly into privacy of individual and associational conscience: "Are you now or have you ever been a communist?" and "Name the names of other communists." Those who refused to answer were prosecuted for contempt crimes and many went to prison, among them the "Hollywood Ten," a group of ten screenwriters, producers, and directors who refused to answer the HUAC's questions about their political associations when subpoenaed to testify in 1947. Ever since, American liberals have vilified this forced government intrusion into

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Wiley Rein Welcomes Peter S. Hyun

Wiley Rein is pleased to announce that **Peter S. Hyun**, former Chief Counsel to Sen. Dianne Feinstein, Ranking Member on the Senate Judiciary Committee, has joined the firm's **White Collar Defense & Government Investigations Practice** as a partner. At Wiley Rein, Mr. Hyun will defend clients in criminal and civil government enforcement actions, congressional investigations, and State Attorneys General investigations.

Mr. Hyun joins Wiley Rein after having served as the chief legal advisor to Senator Feinstein on law enforcement issues – including asset forfeiture, False Claims Act enforcement, bank fraud, money laundering, cybercrime, white collar fraud, wire fraud, firearms, juvenile justice, domestic violence, child exploitation, sexual violence, and human trafficking, among other issues. He further worked on bipartisan, bicameral legislation, and also assisted on oversight of the U.S. Department of Justice (DOJ), the U.S. Department of Homeland Security, and the Federal Bureau of Investigation.

Prior to his tenure on Capitol Hill, Mr. Hyun served as an Assistant U.S. Attorney in the Eastern District of Virginia, Affirmative Civil Enforcement Unit, where he investigated and litigated procurement fraud, health care fraud, and mortgage fraud, primarily under the False Claims Act. He also served as an Assistant Attorney General in the New York State Office of the Attorney General.

Mr. Hyun will help clients navigate increasingly common multifront federal, state, regulatory, and congressional investigations. His additional insights from working on cutting-edge law enforcement-related policy matters – in areas such as artificial intelligence, cybersecurity, facial recognition, drones, and electronic data privacy – will further enable Mr. Hyun to work across several of Wiley Rein's practices, including White Collar; Election Law; International Trade; Telecom, Media & Technology; Corporate; Privacy & Cybersecurity; Intellectual Property; and Government Contracts.

View his full bio **here**.

Mr. Hyun recently published an opinion piece in *The Hill* titled "How Republicans are likely to handle Democrat-led investigations," to read the article **click here**.

2019 Lobbying and Gift Law Guide
50 States Plus the District of Columbia

Wiley Rein's **State Lobbying & Gift Law Guide** provides a comprehensive summary of lobbying, gift, and relevant ethics laws in all 50 states plus the District of Columbia.

Revised in full each year, our Guide provides an invaluable reference for corporate counsel and others in determining whether your organization's contemplated state-level activities are permissible and what registration and reporting requirements might apply, in addition to pertinent gift rules. Unlike many other products on the market, our in-depth Guide includes citations to relevant authority as well as analysis based on advisory opinions and relevant interpretations of law issued on a state-by-state basis.

The Guide is written in a narrative format for legal practitioners and non-practitioners alike. Its focus is on clarity, organization, and comprehension. Among other information, each individual state includes a discussion of the following:

- The definition(s) of legislative and executive branch lobbying and how the administrative agencies have interpreted the definition(s), including exemptions;
- The threshold for registration and reporting as a lobbyist and as a lobbyist employer as well as the details of the process;
- The lobbying laws covering government contracting and procurement;
- The registration, reporting, and disclaimer requirements applicable to grassroots lobbying;
- The general gift rules applicable to legislative and executive branch officials and employees; and
- Special gift and campaign finance rules applicable to lobbyists, lobbyist employers, and vendors (such as gift bans, contribution bans, and the like).

View a sample of the web portal which contains 2014 information for Illinois and North Dakota, here.

The username is **wileydemo**, and the password is **demo123**.

PRE-ORDER HERE

For more information on the **2019 State Lobbying & Gift Law Guide**, or to pre-order, please contact Carol A. Laham at 202.719.7301 or claham@wileyrein.com.

The Guide is available for purchase either as a subscription service by jurisdiction or as a complete set. Both options include access to our web portal with timely updates to state laws throughout the year.

the privacy of political conscience, lionized the brave women and men who refused to disclose their political associations, and castigated those who disclosed names of fellow communists.[6]

From this complicated experience began to emerge First Amendment jurisprudence and, significantly, a First Amendment right of political privacy. The right evolved over the period of a decade in fits and starts, born first of a dissenting opinion on the U.S. Court of Appeals for the District of Columbia – the "Edgerton Dissent" – and eventually blossoming as a consensus principle of the Supreme Court.

The Hollywood Ten Inquisition Case

Nowhere in the country was farther from government secrets and the threat of armed revolution than Hollywood, California. But Hollywood was a haven for liberal, socialist, and even Marxian ideology during the New Deal era. Affluent liberal (*avant-garde*) filmmakers and actors made for dramatic and unsympathetic targets of official suspicion and investigation. They were accused not of supporting the violent overthrow of the government, but of planting collectivist ideas and themes in their movies and thereby negatively influencing public opinion.[7] This effort to steer American public opinion toward communism was cited as justification for a vigorous investigation and triggered denouncements from conservative Hollywood producers and actors.[8]

The HUAC had been established in 1938 to investigate subversive activities in the United States. At that time, pro-German Nazi sympathies were deemed as dangerous as any other foreign influence. But by the mid-1940s, the HUAC focused like a laser beam on communist ideologues and sympathizers within the United States, and America's second Red Scare of the 20th century was launched in the name of protecting national security – from dangerous ideas.[9]

The first major legal test for the right of private political conscience and association arose from the HUAC's subpoenas in 1947 to many individuals, including dozens of Hollywood actors, directors and screenwriters, many of whom had associated with the Communist Party USA, to testify about their political beliefs and activities and to name the names of others who had attended party meetings. These hearings dominated the headlines as one after another well-to-do Hollywood figures were paraded before the HUAC and press cameras and asked questions like "Are you now or have you ever been a member of the Communist Party," and to name the names of their fellow political associates.

Ten prominent screenwriters and directors[10] appeared before the HUAC and each declined to answer the Committee's questions – particularly the request to disclose the names of their political associates.[11] They argued that the First Amendment forbade the government from forcing them to disclose their political associations. For their resistance they were charged and later convicted of contempt of Congress. They were fined and sentenced to prison terms of several months to a year.

Private Economic Punishment Too

On December 3, 1947, the Motion Picture Association of America, under pressure from conservatives in Congress, issued the "Waldorf Statement," which said, in part:[12]

> Members of the Association of Motion Picture Producers deplore the action of the 10 Hollywood men who have

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> been cited for contempt by the House of Representatives. We do not desire to prejudge their legal rights, but their actions have been a disservice to their employers and have impaired their usefulness to the industry.
>
> We will forthwith discharge or suspend without compensation those in our employ, and we will not re-employ any of the 10 until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist.

The Waldorf Statement went on to announce that the major Hollywood studios would not employ communists or other "subversives" in the future.

The First Amendment Issue Is Joined (1947 – 1949)

The Hollywood Ten appealed their convictions, hopeful that a federal appellate court or the Supreme Court would protect their political privacy under the First Amendment. The HUAC defended its right to inform itself of communist activities and partisans in the United States.

In March 1948, before the Hollywood Ten appeals were heard, the U.S. Court of Appeals for the District of Columbia issued its ruling in *Barsky v. United States*,[13] which upheld the convictions of representatives of "the Joint Anti-Fascist Refugee Committee" for failure to produce documents subpoenaed by the HUAC.[14] That inquiry did not concern movies. The targeted committee "was a private voluntary association engaged in the collection of funds from the public in this country upon representations that such funds were to be used for relief purposes abroad."[15] The inquiry arose from "complaints that the funds collected by appellants' organization were being used for political propaganda and not for relief."[16]

The appellants contended that the subpoenas issued to them were invalid unless the House resolution authorizing the HUAC's inquiries itself was completely within the lawful authority of the House. In response, the court evaluated the full resolution, including the authorities not directly related to the subpoenas and upheld the resolution in its entirety. Judge E. Barrett Prettyman, joined in the majority by Judge Bennett Clark, observed that: [17]

> [T]he governmental ideology described as Communism and held by the Communist Party is antithetical to the principles which underlie the form of government incorporated in the Federal Constitution and guaranteed by it to the States, is explicit in the basic documents of the two systems; and the view that the former is a potential menace to the latter is held by sufficiently respectable authorities, both judicial and lay, to justify Congressional inquiry into the subject.

"If Congress has power to inquire into the subjects of Communism and the Communist Party," the majority reasoned, "it has power to identify the individuals who believe in Communism and those who belong to the party."[18] From there Judge Prettyman's opinion discussed vague distinctions between "belief and activity,"[19] which analysis was of no significance given the holding that "Congress has the power to make an inquiry of an individual which may elicit the answer that the witness is a believer in Communism or a member of the Communist Party."[20] The majority also invoked the "public necessities" that outweighed any "private rights."[21] Although not clearly articulated as such, the opinion adopted a vague scrutiny standard, weighing

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"the relative necessity of the public interest as against the private right."[22] Based on this balancing, the majority concluded that "unless democratic government … can protect itself by means commensurate with danger, it is doomed."[23]

But what did the opinion make of the asserted "private rights"? Judge Prettyman's opinion did not rate them very highly. It also struggled even to classify the right. The government argued that "freedom of speech does not encompass freedom to remain silent."[24] The court's opinion observed "[t]here is justification for the contention that the latter is a freedom of privacy, different in characteristics and governed by different considerations from the constitutionally protected freedom of speech."[25] Ultimately, the majority said it would "assume, without deciding, for purposes of this case, that compulsion to answer the question asked by the Congressional Committee would impinge upon speech and not merely invade privacy."[26]

The majority also belittled the burden placed upon the claimed rights by the HUAC's investigation, calling them the "private rights of the timid" and concluding that although public revelation of communist beliefs and affiliation "would result in embarrassment and damage" to the individuals, "[t]his result would not occur because of the Congressional act itself," rather the "result would flow from the current unpopularity of the revealed belief and activity."[27] Congress was not punishing the belief, just exposing it to public view. Based on this reasoning, the criminal convictions were affirmed.

The Edgerton Dissent

Judge Henry Edgerton, dissenting, saw the case very differently. The dissenting opinion was articulate – with more clarity, purpose, and record citations than the majority opinion – in laying bare the ideological war afoot as well as the First Amendment rights at stake. Judge Edgerton started succinctly: "In my opinion the House Committee's investigation abridges freedom of speech and inflicts punishment without trial."[28] He elaborated on both the free speech rights and the HUAC's impingement upon them:[29]

> The investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. Persons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views.
>
> The investigation also restricts freedom of speech by forcing people to express views. Freedom of speech is freedom in respect to speech includes freedom not to speak….

That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have

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grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak.

As to the court's dismissive characterization of the "private rights of the timid," Judge Edgerton responded:[30]

> There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure. But nothing turns on this question of fact. The views of timid people are not necessarily worthless to society. No one needs self-expression more. The Constitution protects them as it protects others.

The Edgerton Dissent then candidly assessed and documented with extensive record evidence the real politic afoot – that government officials were waging an ideological war against ideological opponents against whom they would be proscribed from legislating. "The Committee and its members have repeatedly said in terms or in effect that its main purpose is to do by exposure and publicity what it believes may not validly be done by legislation. This is as much as to say that its purpose is to punish or burden propaganda. The Committee has embarked upon a systemic campaign to suppress freedom of political and economic opinion."[31] He continued, "What Congress may not restrain, Congress may not restrain by exposure and obloquy…. The First Amendment forbids Congress purposely to burden forms of expression that it may not punish."[32]

Finally, engaging the court on the balance between First Amendment rights versus the government's need to invade those rights, Judge Edgerton relied upon the obvious fact that "[t]here is no evidence in the record that propaganda has created danger, clear and present or obscure and remote, that the government of the United States or any government in the United States will be overthrown by force or violence."[33] The exercise of freedoms of belief and expression, Edgerton concluded, "does not support the conclusion that Congress may compel men to disclose their personal opinions, to a committee and also to the world, on topics ranging from communism, however remotely and peaceably achieved, to the American system of checks and balances, the British Empire, and the Franco government of Spain."[34]

Hollywood Ten Appeals

When the appeals from the Hollywood Ten convictions reached the D.C. Circuit, *Barsky* had been decided. Understanding the critical significance of *Barsky* to their own fates, the Hollywood Ten filed an *amicus* brief urging the Supreme Court to grant certiorari.[35] Invoking the Edgerton Dissent, they pleaded with the Supreme Court to end the "governmental inquisition" into the "area of conscience and belief."[36] Public "exposure" of personal political beliefs and association, they argued, was "more effective than a Gestapo" at censoring speech, belief, and associations.[37] But the U.S. Supreme Court denied review, and the Prettyman decision stood as law.[38]

Therefore, it was perhaps a *fait accompli* when, in *Lawson v. United States,*[39] two of the Hollywood Ten convictions were affirmed. The opinion, written by Judge Clark (of the *Barsky* majority) was joined by Circuit Judge Wilbur K. Miller and

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District Judge George C. Sweeney (sitting by designation). Judge Edgerton did not participate. Each of the appellants, John Howard Larson and Dalton Trumbo, had been convicted for refusing to answer during October 1947 testimony "whether or not he was or had ever been a member of the Communist Party."[40]

Judge Clark's opinion ruled that the appellants' argument that they were protected by the Constitution "from being compelled to disclose their private beliefs and associations" had been decided in *Barsky* and "expressly decided contrary to the contention" raised by Lawson and Trumbo.[41] The court found that "holding controlling here."[42] That doomed the appeals, but Judge Clark elaborated that the general principle of compelled disclosure was necessary because "the destiny of all nations hangs in balance in the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world."[43] Given that the motion picture industry plays a critical "role in the molding of public opinion:"[44]

> [I]t is absurd to argue, as these appellants do, that questions asked men who, by their authorship of the scripts, vitally influence the ultimate production of motion pictures seen by millions, which questions require disclosure of whether or not they are or ever have been Communists, are not pertinent questions.

Lawson and Trumbo petitioned the Supreme Court for certiorari in hopes that it would come to their protection. Alas, however, the Supreme Court, in 1950, with the exceptions of Justices Hugo Black and William O. Douglas, who would have taken review, was not prepared to wade into the Red Scare. The Supreme Court denied certiorari on May 29, 1950.[45] This sealed the fate of all of the Hollywood Ten defendants, as the remaining eight cases had been held in abeyance in the trial court pending determination of the Lawson and Trumbo appeals. All of the Hollywood Ten were imprisoned, some for months, some up to a full year.[46]

Aftermath

The Hollywood Ten case and its impact on the people involved has been the subject of at least a dozen books and movies. The latest was the film *Trumbo* (2015), starring Bryan Cranston as the crotchety award-winning screenwriter who went to prison, lost his career and home, moved to Mexico, and wrote movies under pseudonyms to make a living until the Red Scare had passed. Among them were *Roman Holiday* (1953) and *The Brave One* (1956), both of which won Academy Awards for best screenplay and best story, respectively – awards Trumbo was unable to accept. He reemerged in his own name as the screenwriter of *Exodus* and *Spartacus* (starring Burt Lancaster) in 1960. His story was one of the more successful endurances, although his life was never the same.

The Hollywood Ten case also permanently disrupted First Amendment jurisprudence, although it would take years, and changes in the Justices, for the legal issues joined in the Prettyman and Edgerton opinions to be decided definitively by the Supreme Court. Significantly, the Edgerton Dissent would live to fight another day. Stay tuned for the next article in this *Election Law News* series. ■

For more information, please contact:

Lee E. Goodman
202.719.7378 | lgoodman@wileyrein.com

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ENDNOTES

[1]Paul J. Weber, "New York Times' publisher defends op-ed in meeting of US news leaders," *Associated Press*, Sept. 11, 2018.

[2]*New York v. Zimmerman*, 278 U.S. 63, 71-72 (1928) ("There are various privileges and immunities which under our dual system of government belong to citizens of the United States solely by reason of such citizenship…. But no such privilege or immunity is in question here. If to be and remain a member of a secret, oath-bound association within a state be a privilege arising out of citizenship at all, it is an incident of state rather than United States citizenship; and such protection as is thrown about it by the Constitution is in no wise affected by its possessor being a citizen of the United States. Thus there is no basis here for invoking the privilege and immunity clause. The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power.").

[3]M. Stanton Evans, *Blacklisted by History: The Untold Story of Senator Joe McCarthy and His Fight Against America's Enemies* (Three Rivers Press 2007); Herbert Romerstein, *The Venona Secrets* (Regnery History 2000).

[4]The House Un-American Activities Committee detected "un-American" propaganda inserted into motion pictures among other things by "innuendos and double meanings," "slanted lines," "by a look, by an inflection, by a change in the voice," as well as by references to "crooked" or dishonest members of Congress, a minister shown as the tool of his richest parishioner, and to avaricious bankers. *See* Brief of Herbert Biberman, Alvah Bessie, Lester Dole, Edward Dmytryk, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott and Dalton Trumbo as Amicus Curiae in *Eisler v. United States* (Appeal No. 255, October Term 1948) (Mar. 2, 1949) at 12-13 (*citing* U.S. House Committee on Un-American Activities Report on Un-American Activities, Hollywood Hearings 44 at pp. 15, 17, 50-52, 61, 94, 95, 114, 122-126, 225, 231-232, 234).

[5]Edward Dmytryk, *Odd Man Out: A Memoir of the Hollywood Ten* (Southern Illinois University Press 1996).

[6]Victor S. Navasky, *Naming Names* (Viking 1980).

[7]Barbara Branden, *The Passion of Ayn Rand* (Anchor Books 1986) at p. 199 ("The purpose of the Communists in Hollywood is *not* the production of political movies openly advocating Communism. Their purpose is *to corrupt our moral premises by corrupting non-political movies* — by introducing small, casual bits of propaganda into innocent stories — thus making people absorb the basic principles of Collectivism *by indirection and implication*.").

[8]Conservative Hollywood figures such as Walt Disney, John Wayne, Ronald Reagan, Cecil B. DeMille, Gary Cooper, Ginger Rogers, Clark Gable, Barbara Stanwyck, Ayn Rand, and others formed the Motion Picture Alliance for the Preservation of American Ideals to counter communist ideological influence in the film industry. In 1947, in testimony before the HUAC, Ronald Reagan sounded a civil libertarian chord when asked if the Congress should outlaw the Communist Party: "As a citizen I would hesitate, or not like, to see any political party outlawed on the basis of its political ideology. We have spent 170 years in this country on the basis that democracy is strong enough to stand up and fight against the inroads of any ideology…. I detest, I abhor their philosophy, but I detest more than that their tactics, which are those of the fifth column, and are dishonest, but at the same time I never as a citizen want to see our country become urged, by either fear or resentment of this group, that we ever compromise with any of our democratic principles through that fear or resentment. I still think that democracy can do it." See Transcript at **http://historymatters.gmu.edu/d/6458/**.

[9]The first Red Scare occurred during World War I and focused on radical labor unions, agricultural organizations, and anarchists.

[10]The 1947 Hollywood Ten were Alvah Bessie, Herbert Biberman, Lester Cole, Edward Dmytryk, Ring Lardner, Jr., John Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott, and Dalton Trumbo. The list of suspected Hollywood Communists, including screenwriters, directors, playwriters, actors, musicians, poets, and other artists, would grow over time to nearly 200.

[11]One of them, Edward Dmytryk, after being imprisoned, would later cooperate with the HUAC and name names of political associates. Edward Dmytryk, *Odd Man Out: A Memoir of the Hollywood Ten* (Southern Illinois University Press 1996).

[12]The Waldorf Statement was a two-page press release issued by the association's president following a closed-door meeting of motion picture company executives at the Waldorf-Astoria Hotel in New York City. **https://en.wikipedia.org/wiki/Waldorf_ Statement**.

[13]167 F.2d 241 (D.C. Cir. 1948).

[14]*Id.* at 243.

[15]*Id.*

[16]*Id.*

[17]*Id.* at 247.

[18]*Id.* at 246.

[19]*Id.* at 248 ("Activity is different from thought.") & 249.

[20]*Id.* at 250.

[21]*Id.* at 249.

[22]*Id.*

[23]*Id.*

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Events & Speeches

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December 9, 2018 | Philadelphia, PA

The First Amendment Right of Political Privacy Chapter 1 – The Edgerton Dissent *continued from page 18*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 250.

[27] *Id.* at 249.

[28] *Id.* at 252 (Edgerton dissenting).

[29] *Id.* at 254-255 (Edgerton dissenting).

[30] *Id.* at 255 (Edgerton dissenting).

[31] *Id.* at 256 (Edgerton dissenting) (internal quotations and citations omitted).

[32] *Id.*

[33] *Id.* at 258 (Edgerton dissenting).

[34] *Id.* at 259 (Edgerton dissenting).

[35] *See* Motion for Leave to File Brief as Amici Curiae and Brief in *Barsky v. United States* (Appeal No. 766, October Term 1947) (May 26, 1948).

[36] *Id.* at 2-3.

[37] *Id.* at 10-11.

[38] *Barsky v. United States*, 334 U.S. 843 (1948).

[39] 176 F.2d 4 (D.C. Cir. 1950).

[40] *Id.* at 50-51.

[41] *Id.* at 51.

[42] *Id.* at 52.

[43] *Id.* at 53.

[44] *Id.*

[45] 339 U.S. 934 (1950).

[46] In his memoir, written 50 years later, Hollywood director Edward Dmytryk recounts the near five months that he spent in a federal work camp in the mountains of West Virginia. Edward Dmytryk, *Odd Man Out: A Memoir of the Hollywood Ten* (Southern Illinois University Press 1996).

Election Law Professionals

Thomas W. Antonucci	202.719.7558	tantonucci@wileyrein.com
Jan Witold Baran Practice Co-Chair	202.719.7330	jbaran@wileyrein.com
Louisa Brooks	202.719.4187	lbrooks@wileyrein.com
Caleb P. Burns	202.719.7451	cburns@wileyrein.com
Ralph J. Caccia	202.719.7242	rcaccia@wileyrein.com
Tessa Capeloto	202.719.7586	tcapeloto@wileyrein.com
Jason P. Cronic	202.719.7175	jcronic@wileyrein.com
Claire J. Evans	202.719.7022	cevans@wileyrein.com
Lee E. Goodman	202.719.7378	lgoodman@wileyrein.com
Sarah B. Hansen*	202.719.7294	shansen@wileyrein.com
Peter S. Hyun*	202.719.4499	phyun@wileyrein.com
Thomas W. Kirby	202.719.7062	tkirby@wileyrein.com
Carol A. Laham	202.719.7301	claham@wileyrein.com
Bruce L. McDonald	202.719.7014	bmcdonald@wileyrein.com
Daniel B. Pickard	202.719.7285	dpickard@wileyrein.com
D. Mark Renaud	202.719.7405	mrenaud@wileyrein.com
Roderick L. Thomas	202.719.7035	rthomas@wileyrein.com
Michael E. Toner Practice Co-Chair	202.719.7545	mtoner@wileyrein.com
Karen E. Trainer, Senior Reporting Specialist	202.719.4078	ktrainer@wileyrein.com
Robert L. Walker	202.719.7585	rlwalker@wileyrein.com
Eric Wang	202.719.4185	ewang@wileyrein.com
Andrew G. Woodson	202.719.4683	awoodson@wileyrein.com
Brandis L. Zehr	202.719.7210	bzehr@wileyrein.com

**Not admitted to the DC bar. Supervised by the principals of the firm.*