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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | January 2019

DC Council Passes Pay-to-Play Legislation; Awaits Mayoral Action

By D. Mark Renaud and Sarah B. Hansen

In early December, the District of Columbia Council passed extensive campaign finance legislation that includes significant pay-to-play provisions. The legislation was transmitted to the DC Mayor on December 31, and she has until January 16, 2019 to respond. As *Election Law News* went to print, it was not clear whether she is going to veto or sign the legislation. Nonetheless, signed legislation would still have to lay before Congress for 30 legislative days (during which it could be struck down by Congress), and the pay-to-play provisions would not become effective until November 4, 2020, which is after the next DC general election.

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PAC Payroll Deduction and Disclaimer Errors Result in $92,650 Civil Penalty at FEC

By Brandis L. Zehr and Louisa Brooks

The Federal Election Commission (FEC) recently announced that a labor union and its political action committee (PAC) agreed to pay a $92,650 civil penalty for raising money for the PAC through improper payroll deduction practices. Although this enforcement matter involved a labor union, the payroll deduction rules at issue also apply to corporations and associations soliciting funds for their PACs.

In March 2016, a union member filed a complaint with the FEC alleging that the labor union had deducted funds from his paycheck for the PAC

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The legislation targets contractors holding and seeking government contracts and agreements valued in the aggregate at $250,000 or more. The contracts and agreements targeted go beyond the normal contracts for goods and services and include certain real estate transactions with the District, licensing agreements, tax exemptions, tax abatements, and loans. Like many similar laws around the country, the law would not be applicable to DC employees or to unions with collective bargaining agreements.

For normal contracts for goods or services, the legislation prohibits covered contributions during the procurement process, during the contract, and for one year after the termination of the contract. There are different time limits for other types of agreements.

The contributions banned are those made to the Mayor and mayoral candidates for contractors with agencies that report to the Mayor (with a separate provision affecting AG contributions for AG agencies). The ban extends to contributions to political committees affiliated with the Mayor or mayoral candidates and to constituent-service programs affiliated with the Mayor. Moreover, if a contract must come before the City Council or approved by the Council legislatively to take effect (such as with a tax abatement or tax exemption), then the contribution ban would apply to Councilmembers, candidates for the Council, political committees affiliated with Councilmembers and candidates, and affiliated constituent-service programs.

DC permits corporate contributions, so the pay-to-play ban would apply to contributions by the entity (including corporations) holding the contract. In addition, principals of the contract or agreement holder would also have their contributions banned by the legislation. Such principals include senior officers such as the president, executive director, CEO, COO, CFO, and, for educational institutions, deans.

The legislation would also add a series of reporting and certification obligations, including the provision of a list of covered principals as well as a certification that a bidder has not violated the pay-to-play law.

Violation of the law would be considered a breach of contract, which could lead to termination of the contract and/or disqualification for four calendar years from future contracts, at the discretion of the relevant contracting authority. ■

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without his authorization and refused to issue him a refund. The FEC found reason to believe that the labor union and its PAC had violated the law because they did not provide information showing that the member had affirmatively and voluntarily authorized the payroll deduction contributions for the PAC.

After further investigating the allegations, the FEC found that the labor union and its PAC appeared to be operating a "reverse check-off" system whereby union members were automatically enrolled in payroll deduction contributions for the PAC unless they opted out. Reverse check-off systems are *per se* prohibited under federal campaign finance law, which requires that individuals affirmatively opt-in for payroll deduction contributions. The FEC's investigation also revealed improper recordkeeping and disclaimer practices in the labor union's payroll deduction program for the PAC. Specifically, the FEC found that the labor union and its PAC obtained written payroll deduction authorizations for only 125 of the 1,310 members who contributed to the PAC through payroll deduction during the relevant time. FEC regulations require a PAC and its connected organization to obtain affirmative authorization from individuals for payroll deduction contributions and maintain records documenting such authorization for at least three years. The FEC also found that the 125 written payroll deduction authorizations did not conform with FEC regulations because they failed to inform members that contributions to the PAC are voluntary or of their right to refuse to contribute without reprisal, and listed preset contribution amounts without noting the amounts were suggestions or giving members the opportunity to contribute a different amount. Such disclaimers are legally required because they help ensure that contributions to the PAC are voluntary and made without coercion.

The labor union contended it orally advised its members of the voluntary nature of PAC contributions, but the FEC found these arguments "unavailing" because the labor union and its PAC could not provide evidence they orally recited all of the legally required disclaimers and had no documentation demonstrating 1,185 members who contributed to the PAC through payroll deduction had, in fact, affirmatively authorized these deductions. In a pre-probable cause conciliation agreement with the FEC, the labor union and its PAC agreed to pay a $92,650 civil penalty and notify the 1,310 members that their payroll deduction contributions to the PAC were improper and they had the right to request and receive a refund of these improper contributions. ■

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The LDA Now Requires the Disclosure of Certain Criminal Convictions

By D. Mark Renaud

As a result of the Justice Against Corruption on K Street Act of 2018 or JACK Act (named after the notorious Jack Abramoff), federal lobbyists who have committed certain crimes must now disclose them on their LDA registrations and reports. The new law, P.L. No. 115-418, mandates that lobbyists disclose the date of their convictions and descriptions of the offenses if they were convicted in federal or state court "of an offense involving bribery, extortion, embezzlement, an illegal kickback, tax evasion, fraud, a conflict of interest, making a false statement, perjury, or money laundering." The JACK Act was signed by President Trump on January 3, 2019, and imposes this reporting requirement on both LDA registrations and LDA reports.■

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Contribution Blackout Periods: Risks Associated with State Political Activity During Legislative Sessions

By Carol A. Laham and Sarah B. Hansen

In an increasing maze of rules regarding when certain groups may contribute to legislative officials and candidates, states have adopted different approaches to "blackout" periods, or periods in which legislative officials and candidates may not accept contributions in general or from lobbyists in particular. Such state variance makes it important for companies and individuals alike to consult compliance counsel before giving gifts and contributions to legislative officials and candidates, especially when the state legislature is currently in session.

For example, in Kansas, corporations and lobbyists are prohibited from contributing to a statewide office holder, legislator, candidate, or political committee established by a state committee of any political party and designated as a recognized political committee for the legislature after January 1 through sine die adjournment of the legislative sessions, and at any other time the legislature is in session.

Vermont, on the other hand, only prohibits contributions during the legislative session from lobbyists. Thus, while there is no general prohibition, a registered lobbyist, lobbying firm, or registered lobbyist employer may not contribute or promise to contribute to a legislator, their campaign, or their leadership PAC (and legislators and administrative officials may not solicit contributions from those persons) when the general assembly is in session.

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Similarly, in North Carolina, "limited contributors," such as lobbyists or political committees that employ or contract with lobbyists, are prohibited from making contributions to a "limited contributee," a member of or candidate for the Council of State, a member of or candidate for the General Assembly, or an affiliated party committee. Further, no limited contributor can solicit a contribution from any individual or political committee on behalf of a limited contributee nor can a limited contributor make a contribution to any candidate or political committee, directing or requesting that the contribution be made in turn to a limited contributee. Finally, there is an exception to this "blackout" period rule three weeks prior to the day of a second primary if a limited contributee will be on the ballot in that second primary.

In a broader framework, Alabama prohibits candidates for state office from soliciting, accepting, or receiving contributions during a legislative session. The legislative-session blackout period does not apply within 120 days of a primary, runoff, or general election, and the period also does not apply to candidates participating in a special election called by the governor. There is no lobbyist-specific provision in Alabama's general "blackout" period.

Moreover, each state's contribution blackout rules are often tied to very specific exceptions. For example, in Maine, the Governor, legislators, constitutional officers, their staff, and PACs and party committees controlled by the above may not solicit or accept contributions from lobbyists, lobbyist associates, or lobbyist employers when the legislature is in session. However, there are exceptions for contributions for: (1) special elections to fill a vacancy from the time the election is announced until the election, (2) nonpartisan, charitable social events, (3) legislators' campaigns for federal office, and (4) qualifying contributions.

At the opposite end of the spectrum, some states, like Hawaii, Idaho, Massachusetts, and Michigan, have chosen not to adopt any rules on contribution "blackout" periods.

As demonstrated by the snapshot of various states' laws, this compliance area is fraught with risk. Because many states have adopted different approaches and specific prohibitions as well as carved out various exceptions, it is imperative that companies consult compliance counsel to successfully navigate this complicated, time-sensitive web of "blackout" period rules. ■

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Federal Appeals Court Upholds Missouri Lobbying Law Against Challenge

By Carol A. Laham and Eric Wang

A panel of the U.S. Court of Appeals for the Eighth Circuit recently upheld, by a 2-1 vote, Missouri's lobbying registration and reporting laws as applied to an unpaid volunteer lobbyist. The ruling underscores the varying thresholds and circumstances that trigger state lobbying registration and reporting requirements, and the very minimal or nonexistent thresholds in some states.

The challenge to Missouri's lobbying laws was brought by Ronald Calzone, a citizen activist who is the president of a nonprofit organization called Missouri First. Mr. Calzone often meets with Missouri state legislators and staff to urge the passage or defeat of legislation and represents himself as a director of Missouri First. Mr. Calzone is not paid for this volunteer activity, and the dissenting opinion characterized Missouri First essentially as Mr. Calzone's "alter ego."

The challenge raised the question of whether Missouri's lobbyist registration and reporting requirements are unconstitutionally broad as applied to an individual who receives no compensation and makes no expenditures when lobbying. In addition, the lawsuit alleged Missouri's requirement that anyone "designated" to lobby on another's behalf is, on its face, unconstitutionally vague. Missouri law, like a number of other states' laws, purports to require lobbyist registration and reporting even in the absence of any compensation or expenditures if an individual is "designated" to lobby.

Applying an intermediate "exacting scrutiny" standard of judicial review, the majority of the Eighth Circuit panel reasoned that requiring unpaid lobbyists to register and report furthered a "sufficiently important governmental interest in avoiding the fact or appearance of public corruption" because "unpaid lobbyists could still offer things of value to legislators." This was notwithstanding the fact that, even as the majority acknowledged, in this particular as-applied challenge, both Mr. Calzone and the state stipulated that he did not make any expenditures for lobbying or for purchasing items of value for legislators. The majority also reasoned that the government and public have a "sufficiently important interest in knowing who is pressuring and attempting to influence legislators" that is not limited only to paid lobbyists.

In a strong dissenting opinion, Judge David Stras suggested that perhaps a more demanding "strict scrutiny" review standard should apply to lobbying reporting laws. Judge Stras also criticized the majority for acting as a mere "rubber stamp" for Missouri's law under the more relaxed "exacting scrutiny" standard. Even under "exacting scrutiny," Judge Stras concluded that Missouri had failed to identify a "substantial relation" between requiring unpaid lobbyists who make no expenditures on lobbying to register and report and preventing any "real-world examples" of corruption. Judge Stras criticized the application of the law to Mr. Calzone as "transparency for transparency's sake."

Illustrating what is often known as "goodwill lobbying," Judge Stras also pointed out that Missouri law otherwise requires anyone who spends $50 or more during a calendar year "for the benefit of one or more public officials or one or more employees of the legislative branch" in connection with

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lobbying to register as a lobbyist. Therefore, Judge Stras reasoned, the majority's concern about corruption caused by unpaid lobbyists who "offer things of value to legislators" is already regulated and was not at issue in this case.

The majority also held that Missouri's registration and reporting requirements for individuals who are "designated" to lobby on another's behalf are not unconstitutionally vague. The majority defined "designated" to mean "anyone who has been chosen or appointed to lobby the legislature on behalf of" an organization. Of particular concern for trade associations and other membership organizations, Judge Stras warned that regulating anyone who is "designated" to lobby as a lobbyist could require unpaid participants in a "Lobby Day" to register and report. (Also called "fly-ins," "Lobby Days" are when trade associations and membership organizations organize their members to travel from all over the state or the country to speak with legislators and staff about issues important to the group.)

Lobbying registration and reporting requirements are often burdensome and violations can carry steep penalties, even for minimal unregistered lobbying. As Judge Stras pointed out, Missouri requires up to 14 reports per year and annual registration renewals, and imposes jail time of up to four years and fines of up to $10,000 for violations. This is not unusual; many other jurisdictions have even more draconian penalties. **As *Election Law News* reported last year**, the city of Chicago fined one company $92,000 for an employee who failed to register as a city lobbyist after sending one e-mail to the mayor.

Mr. Calzone and his attorneys have asked for a rehearing of his case by the entire Eighth Circuit, which has yet to grant or deny the request as of this article's publication date.

Wiley Rein's Election Law practice group advises clients on all federal, state, and local lobbying laws and also assists with preparing and filing reports.■

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Full disclosure: Eric Wang is a pro bono Senior Fellow at the Institute for Free Speech, which represents Mr. Calzone in this litigation.

New FEC Password Requirements

By Karen E. Trainer

The Federal Election Commission (FEC) is in the process of instituting new requirements for electronic filing passwords. As a result of these requirements, filers must set up new passwords through the FEC's online password assignment system.

We strongly recommend completing this process as soon as possible. Filers who do not complete this process may be prevented from filing reports with the FEC in the future. To begin the process, go to **https://webforms.fec.gov/psa/getstarted.htm**.

For assistance with setting up a new password or with other reporting issues, please contact us.■

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Expansion of District of Columbia Lobbying Laws

By Caleb P. Burns and Louisa Brooks

The District of Columbia recently expanded the scope of its lobbying law to cover procurement lobbying activities. Effective Jan. 1, the definition of "administrative decisions" covered by the lobbying law includes action by an Executive agency or Executive branch official to "make a[] contract, grant, reprogramming, or procurement of goods or services." D.C. Code Ann. § 1-1161.01.

The District also altered its lobbyist filing schedule and some of its reporting requirements. Formerly semi-annual, reports must now be filed quarterly by the 15th of January, April, July, and October, covering activity in the preceding quarter. The reports must also now include, among other things, "a precise description of the subject matter" of all lobbying communications, including the titles of bills, contracts, or other government actions. All filers will need to obtain new electronic filing credentials from the DC Board of Ethics and Government Accountability. ■

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Former Lobbyist Indicted for Providing Bogus Lobbying Report to Investigators

By Jan Witold Baran and Andrew G. Woodson

Late last year, the U.S. Department of Justice (DOJ) charged a former lobbyist with obstructing an investigation and, ultimately, a multimillion-dollar fraud trial when the lobbyist provided investigators with a fake quarterly lobbying report that he claimed to have filed with the U.S. Congress. The matter is an important reminder of the risks associated with misleading the government in connection with one's lobbying activities and reporting.

The indictment arose out of an investigation conducted by the U.S Postal Inspection Service and centered around a company operating in North Carolina called Niyato Industries, Inc. According to the DOJ, Niyato's chief executive officer and others were operating a "high-yield investment fraud scheme" involving the company. As part of the government's trial preparations, a law enforcement agent contacted lobbyist Christopher Petrella, who was working to promote the company, and informed him that he may be called upon as a witness at trial. During the course of a pretrial interview, Petrella provided the agent with a quarterly lobbying report that he represented to the agent had been filed with the government.

According to the DOJ, however, the report was "bogus," had never been transmitted to Congress, and represented an attempt by Petrella to mislead the government into thinking he was a whistleblower reporting on malfeasance rather than a participant in Niyato's activities. (For example, the lobbying report Petrella handed over to the agent claimed in one field that his client had "been posting 'Tweets' which are misleading or fictitious [and] may be a violation of state and federal law.") In a subsequent follow-up telephone conversation, Petrella again purportedly reaffirmed to federal law enforcement that he had filed the lobbying report "with the United States Congress pursuant to certain requirements applicable to federal lobbyists." Shortly after this second discussion, the DOJ charged Petrella with attempting to obstruct and impede the underlying judicial proceedings.

Further proceedings in the case are scheduled for later this month. The case is pending in federal court in the Western District of North Carolina. ■

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Federal Court Enjoins Maryland Internet Disclosure Law

By Michael E. Toner and Lee E. Goodman

A U.S. District Court has preliminarily enjoined Maryland's implementation of the Maryland Online Electioneering Transparency and Accountability Act. The law, enacted in May 2018, requires social media and press websites that carry online advertising to collect information about the sponsors of political ads and to publish that information for state and public inspection. The law would impose burdens on websites such as *The Washington Post*, *The New York Times*, Facebook, Twitter, and similar websites that sell online advertising space.

"All compelled disclosure laws implicate the Free Speech Clause," the court wrote, "but laws imposing those burdens on the media implicate a separate First Amendment right as well: the freedom of the press." (Slip op. at p. 31). After noting the lack of clarity in case law over whether disclosure in the campaign finance area triggers "strict scrutiny" or "exacting scrutiny," the court applied "strict scrutiny," demanding Maryland to prove its law directly advanced a "compelling" governmental interest that could not be achieved by a lesser restricted means.

The court ruled the Maryland law did not meet the "strict scrutiny" test for restrictions upon First Amendment rights of the press because it forces them to collect and post publicly information that they, in their editorial judgment, otherwise would choose not to publish, in violation of legal precedents proscribing such government dictates on the press. The court also ruled that Maryland could obtain the same information by imposing legal responsibilities directly upon ad sponsors rather than the neutral third-party web platforms.

The court stopped short of enjoining the law altogether, choosing instead to enjoin its application to the specific press plaintiffs who brought the challenge (*The Washington Post*, *Baltimore Sun*, Capital-Gazette Communications LLC, APG Media of Chesapeake LLC, Community Newspaper Holdings Inc., Ogden Newspapers of Maryland LLC, Schurz Communications Inc., and the Maryland-Delaware-D.C. Press Association, Inc.).

The case is *Washington Post, et al. v. David J. McManus, Jr., et al.* (Case No. PWG-18-2527) and is pending in the U.S. District Court for the District of Maryland. The judge is federal District Court Judge Paul Grimm.

The court decision has important implications for legislative efforts, like the Honest Ads Act in Congress and other state laws, that attempt to regulate Internet-based advertising platforms. In several respects the Maryland law is less burdensome than the burdens (including civil and criminal liability) proposed for web and press platforms in the Honest Ads Act. The court decision will likely introduce caution in Congress.

The decision also has implications for potential efforts by the Federal Election Commission (FEC) to impose legal responsibility and liability upon advertising platforms for the posting of disclaimers. The issue arose in a matter resolved by the FEC in early 2018 involving a political ad run in the *Chesterland News*, an Ohio

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The First Amendment Right to Political Privacy
Chapter 2 – The New Deal Witch Hunt

By Lee E. Goodman

Introduction

The opening chapter in this series revealed the seed of First Amendment protection for anonymous political speech and association in the 1940s Red Scare cases of *Barsky v. United States* and the "Hollywood Ten" in the U.S. Court of Appeals for the District of Columbia Circuit. In *Barsky*, Judge E. Barrett Prettyman authored the 2-1 majority opinion elevating Congress' right to investigate American communists over any vague "private right" to political belief and association. That opinion was met by Judge Edgerton's dissent, an early articulation of the First Amendment right to political privacy. In 1950, the Supreme Court of the United States chose not to wade into the debate and denied review. Although the Edgerton Dissent did not protect the Hollywood Ten, the legal concept reverberated as a powerful jurisprudential idea. And the Edgerton Dissent would impress judges in future cases – including Judge E. Barrett Prettyman and a number of Supreme Court Justices.

The New Dealers Investigate Conservatives, Too

After the Supreme Court denied certiorari to the Hollywood Ten, congressional investigations of communists resumed and indeed intensified. At the House Un-American Activities Committee (HUAC), conservative Georgia Democrat John Wood had assumed the chairmanship. In the U.S. Senate, a new Republican Senator from Wisconsin named Joseph McCarthy entered the enterprise, focused principally on communist spies within the federal government.

While conservatives of both political parties investigated progressives from Hollywood to the U.S. Department of State, New Deal liberals in Congress exercised their subpoena powers to investigate conservative antagonists, too, proving that the use of government subpoenas and compelled exposure was an ecumenical political weapon.

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Federal Court Enjoins Maryland Internet Disclosure Law

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newspaper (Matter Under Review 7210). For over 35 years the FEC has imposed legal responsibility for ad disclaimers solely upon ad sponsors, who control funding and content of the ads, not advertising platforms. Yet, two Commissioners proposed to alter that long-standing rule in the *Chesterland News* matter. The effort failed. The issue was detailed in a Concurring Statement of Commissioner Lee E. Goodman dated February 12, 2018, which invoked the First Amendment rights of the press to resist such liability: **http://eqs.fec.gov/eqsdocsMUR/18044436380.pdf**. ■

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The First Amendment Right to Political Privacy *Chapter 2 – The New Deal Witch Hunt*

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New Deal Democrats had won control of the House of Representatives in the 1950 election, and in 1951 the House Select Committee on Lobbying Activities, also known as the Buchanan Committee (after the name of its Chairman, Frank Buchanan, a New Deal Democrat from Pennsylvania), turned its investigative sights on the political activities of Edward Rumely, an American anti-communist and free marketer, an outspoken opponent of New Deal economic policy, and Executive Secretary of the Committee for Constitutional Government, Inc. (CCG) a conservative free market advocacy organization.

The Buchanan Committee purported to investigate the CCG not in the name of national security, as in the case of communists, but in the name of good government and the regulation of money, influence, and lobbying.

The CCG was formed in 1937 for the purpose of resisting New Deal thought and policies.[1] It was very active, for example, in opposing President Roosevelt's court-packing plan in 1938. According to historian David Beito, the organization "in mobilizing against 'court packing' (a term it did much to popularize), led perhaps the first successful political offensive against the New Deal and pioneered the use of direct mail to gain supporters. Over the next seven years, the group distributed more than 82 million pieces of literature declaiming such policies as expanded government medical insurance, public housing, and labor legislation."[2]

The CCG's outspoken advocacy made it a perennial target of Democratic investigative interest. In 1938, Democratic Senator Sherman Minton of Indiana announced that the Senate Select Committee on Lobbying would conduct an investigation into the CCG's advocacy activities. In addition to dispatching staffers to rummage through CCG records at its headquarters, Minton obtained Rumely's tax returns from the U.S. Department of the Treasury. Like communist sympathizers, the CCG would remain "subject to almost constant investigation over the next twelve years" by New Deal officials in government and liberal organizations.[3] CCG's liberal critics accused it of being pro-Nazi and seditious.[4]

Since the early 1940s, one of the CCG's principal communications strategies had been to influence public opinion through the publication and distribution of pointed ideological books.[5] The CCG sold books in bulk to ideological supporters who would direct the CCG to distribute the books to certain audiences. In 1950 and 1951, CCG was distributing nearly a million copies of the book *The Road Ahead: America's Creeping Revolution* by John Flynn. The book "warned that leftist pressure groups were edging the United States into socialism through a Fabian strategy of incremental change."[6]

Democrats developed a good government reform plan and promised to scrutinize – exclusively – pro-business lobbies. The Buchanan Committee "sent out a probing questionnaire to more than 170 businesses and organizations," defining lobbying in the broadest possible terms to include efforts to influence public opinion, and inquiring about the funding of such efforts.[7]

In June 1950, the Buchanan Committee subpoenaed Rumely to, among other things, name the people or organizations

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that purchased books and pamphlets from CCG.[8] Rumely answered 25 questions, but declined to disclose the names of the people and organizations that purchased books and pamphlets.[9] "I am perfectly willing to give everything except one thing," Rumely testified before the Buchanan Committee on June 28, 1950. "I haven't withheld anything, except the names of the buyers of our books. Those you can't have."[10] The Committee was persistent and continued to press him to disclose the names. Again on June 29,[11] Rumely repeated:

> "I certainly refuse to disclose those names – not contemptuously, but respectfully, because I feel it is my duty to uphold the fundamental principles of the Bill of Rights. I think there is no power to require of a publisher the names of the people who buy his products, and that you are exceeding your right."[12]

For that Rumely was prosecuted and convicted of contempt of Congress in the U.S. District Court for the District of Columbia. Rumely appealed.

Prettyman Turns for Rumely and the CCG

So, in 1952, the First Amendment right to private association was back before the U.S. Court of Appeals for the District of Columbia and Judge E. Barrett Prettyman in a case styled *Rumely v. United States*.[13]

Rumely asserted two defenses similar to the arguments asserted unsuccessfully by the Hollywood Ten. First, he argued the Buchanan Committee violated the First Amendment by forcing him to disclose the names of book purchasers. Second, he contended that the Buchanan Committee was acting beyond its legitimate writ to investigate "lobbying" when it inquired about the CCG's efforts to influence public opinion by communicating directly with citizens.[14] The government argued that the Buchanan Committee was well within its rights to investigate "subterfuges to evade the Federal Regulation of Lobbying Act, i.e., to mask contributions as purchases," because the Lobbying Act required lobbying organizations like CCG to disclose their donors.[15]

The appeal came before a panel of the Court of Appeals that included Judge Prettyman, who had rejected similar First Amendment arguments asserted by communists in *Barsky* four years earlier. Neither Judge Edgerton nor Judge Clark (author of the Hollywood Ten decision) was on the panel.

In a 2 to 1 opinion,[16] a newly enlightened Judge Prettyman (perhaps channeling Judge Edgerton), ruled that the publication, sale, and distribution of books discussing national issues was protected speech under the First Amendment. He rejected the argument that the names were pertinent to the Committee's investigation "since the Committee might wish to question those persons as to possible subterfuges," finding that "so slim a semblance of pertinency is not enough to justify inquisition violative of the First Amendment."[17] Sounding more like the Edgerton Dissent (though not acknowledging it), Judge Prettyman found that publicizing the names and addresses of book purchasers "is a realistic interference with the publication and sale of those writings," and that "the realistic effect of public embarrassment is a powerful interference with the free expression of views."[18]

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Judge Prettyman moved from his prior opinion in *Barsky* in two distinct ways. First, in somewhat revisionist style, he interpreted *Barsky*, with clarity missing in the original opinion, to have ruled that public inquiry and disclosure of names "was an impingement upon free speech."[19] Second, the judge distinguished *Barsky* on the grounds that it allowed the inquisition into the names of communists for the "public necessity" of national security.[20]

> In that case it was shown that the President and other responsible Government officials had, with supporting evidentiary data, represented to the Congress that Communism and the Communists are, in the current world situation, potential threats to the security of this country. For that reason, and for that reason alone, we held that Congress had the power, and a duty, to inquire into Communism and the Communists.

The CCG inquisition, by contrast, implicated less weighty governmental interests that did not justify intrusion into the private First Amendment rights of the CCG.

Judge Prettyman took a decidedly narrow view of government's legitimate inquiry into "the public distribution of books and the formation of public opinion through the processes of information and persuasion," which he characterized as "the healthy essence of the democratic process."[21] Congress had no power to investigate or regulate the right of people to share ideas among themselves under the power to regulate "lobbying."[22] And further, Judge Prettyman found that "anonymous donations of printed material to Congressmen appear to be a danger too insignificant to support abridgement of freedoms of speech, press and religion," for Congressmen could choose to read the materials or not.[23]

The similarities between the Prettyman decision in *Rumely* and the Edgerton Dissent in *Barsky* are noteworthy. Finally, Judge Prettyman had come around to the First Amendment paradigm articulated by Judge Edgerton.

The Supreme Court Weighs In – A Jurisprudential Opening

The government appealed to the Supreme Court, which took up the case in late 1952. The Court, in a decision by Justice Felix Frankfurter, a Roosevelt New Deal appointee, affirmed the Court of Appeals, though on narrower grounds. While recognizing the First Amendment right articulated by Judge Prettyman, the Court scrupulously invoked the doctrine of constitutional avoidance to parse the meaning of "lobbying activities" in the Congressional resolution authorizing the Buchanan Committee's investigation and concluded the phrase did not include "all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process."[24]

Justices Douglas and Black, who had dissented on the denial of certiorari in the Hollywood Ten case, issued a concurring opinion giving full-throated protection for the obvious First Amendment rights at stake. "Of necessity," Justice Douglas wrote, "I come then to the constitutional questions."[25]

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> Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas…. A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe. The finger of government leveled against the press is ominous. Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears.[26]

The concurring justices observed that government cannot do by inquiry, investigation, or public harassment that which it cannot do by direct legislation.[27]

Aftermath

According to historian Beito, although Edward Rumely won in the courts, sustained "Buchananism"[28] and multiple investigations and legal proceedings had the effect of draining the CCG's resources, stigmatizing the organization, chasing off donors, and ultimately undermining the organization.[29]

Rumely was more successful jurisprudentially. Justices Douglas and Black had introduced the First Amendment right to anonymous financial support for a political speaker, in this case an ideological book publisher, into Supreme Court case law. And although Justice Frankfurter had avoided an explicit First Amendment holding, his opinion (joined by four other justices) nodded to the First Amendment argument. Unfortunately for the communists in Hollywood, their efforts to influence public opinion through films, unlike CCG's publication and dissemination of books to shape public opinion against New Deal philosophy, did not receive the same First Amendment protection against government inquiry and public disclosure. But Justice Frankfurter would revisit the First Amendment right to anonymous political association four years later in the case of Marxian economist and political activist Paul Sweezy, in an opinion announced on June 17, 1957 – a day J. Edgar Hoover called "Red Monday," the subject of our next chapter in this series. ■

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Endnotes

[1]The organization originally was named the Committee to Uphold Constitutional Government in 1937. It changed its name to Committee for Constitutional Government in 1941.

[2]David Beito & Marcus Witcher, "New Deal Witch Hunt" – The Buchanan Committee Investigation of the Committee for Constitutional Government, The Independent Review Vol. 21 No. 1 (Summer 2016) at p. 47-48 (hereinafter cited as "Beito").

[3]*Id.* at 50-52, *citing* Joanne Dunnebecke, The Crusade for Individual Liberty: The Committee for Constitutional Government 1937-1958 (M.A. Thesis, University of Wyoming, 1987).

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[4]*Id.* at 55.

[5]The books included *The Road Ahead* by John T. Flynn, *Labor Monopolies and Freedom* by John W. Scoville, *Compulsory Medical Care and the Welfare State* by Melchior Palyi, *Why The Taft-Hartley Law* by Irving McCann, and hundreds of thousands of copies of the U.S. Constitution and the Bill of Rights.

[6]Beito at 56.

[7]*Id.* at 57, *citing* Congressional Record, House, June 15, 1950, 8676.

[8]*Rumely v. United States*, 197 F.2d 166, 168 (D.C. Cir. 1952) (the Select Committee's subpoena demanded disclosure of "(1) the name and address of each person from whom a total of $1,000 or more has been received by the Committee during the period, January 1, 1947, to May 1, 1950, for any purpose, including but not limited to (a) receipts from the sale of books, pamphlets, and other literature, (b) contributions, (c) loans; (2) as to each such person the amount, date, and purpose of each payment which formed a part of the total of $1,000 or more.").

[9]*Id.* at 170.

[10]*Id.*

[11]*Id.* So intensive was the Buchanan Committee's investigation into CCG that it subpoenaed Edward Rumely twice, and he appeared for testimony on June 6, 27, 28 and 29, 1950. *Id.* at 170.

[12]*Id.*

[13]197 U.S. 166 (D.C. Cir. 1952).

[14]*Id.* at 173.

[15]*Id.* at 171.

[16]Judge Prettyman was joined by Judge James Proctor. Judge David L. Bazelon, who had been appointed to the bench two years earlier, dissented on the basis of *Barsky* and more pointedly on the rationale, heard often today, that

The First Amendment is not violated merely because disclosure might conceivably deter some from implementing their political views with financial support…. The Buchanan Committee has restricted no one in the free exercise of his rights to say what he pleases, or to assemble and to petition for any purpose…. The CCG's right to promote, retard and otherwise influence legislation is inviolate. But that right does not extend to protection from disclosure of its financial support.

197 F.2d at 187 (Bazelon *dissenting*). All three judges had been appointed by President Truman.

[17]197 F.2d at 172.

[18]*Id.* at 174.

[19]*Id.* at 174.

[20]197 F.2d at 173.

[21]*Id.* at 174.

[22]*Id.* at 175.

[23]*Id.* at 176.

[24]*United States v. Rumely*, 345 U.S. 41, 46 (1953).

[25]*Id.* at 56 (Douglas *concurring*).

[26]*Id.* at 56-57 (Douglas *concurring*).

[27]*Id.* at 58 ((Douglas *concurring*).

[28]Beito at p. 68, *citing* Frank Chodorov, Is Lobbying Honest?, Freeman 3, No 21 (July 13, 1953) at p. 742).

[29]*Id.*

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