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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | May 2019

Federal Ethics Update: House Ethics Issues Advisory Memos on Fundraising for Nonprofits and on Non-Commercial Air Travel; OGE Invites Comments on Potential Legal Expense Fund Regulations

By Robert L. Walker

The Committee on Ethics of the U.S. House of Representatives recently issued two new advisory memoranda – or "Pink Sheets" – on topics of longtime and ongoing interest to the House community and to individuals and organizations interacting with that community. On May 2, 2019, the Committee issued an advisory memorandum on "Member, Officer, and Employee Participation in Fundraising Activities," focusing on fundraising for charities and other nonprofit organizations. With this memorandum, the Committee also introduced "a

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West Virginia Enacts Changes to PAC Reporting Requirements and Contribution Limits

By Carol A. Laham and Eric Wang

West Virginia recently enacted a package of legislative changes to its campaign finance laws. Under the changes: (a) additional PAC registration and reporting requirements will apply, including to federal PACs, trade associations, and other nonprofit groups that make political contributions or expenditures in the state; (b) additional independent expenditure reports will be required; and (c) foreign nationals will now be prohibited from spending in connection with state elections. The changes are not all more restrictive however; contributors will now be allowed to give more to state candidates and party committees.

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Massachusetts Reduces Contribution Limits for Organizations

By Carol A. Laham and Louisa Brooks

On May 9, the Massachusetts Office of Campaign and Political Finance (OCPF) issued a new regulation limiting contributions by non-political organizations – such as labor unions – to the same dollar limits that apply to individuals. When the regulation goes into effect on May 31, these organizations will be limited to contributing the following amounts in a calendar year: $1,000 to a candidate's committee; $500 to a state PAC; and $5,000 in aggregate to all political party committees of any one political party.

Relying on a decades-old interpretive bulletin, Massachusetts had previously permitted labor unions and other organizations to contribute up to $15,000, in aggregate, to candidates, PACs, and political party committees during a given calendar year. As the OCPF noted in its Statement of Reasons accompanying the new regulation, this limit "substantially exceeded any other limit found in the Massachusetts campaign finance law." Opponents of the provision argued that labor organizations regularly exploited this so-called "union loophole" to funnel large amounts of money to their favored candidates.

In 2015, several family-owned businesses filed a lawsuit challenging the state's corporate contribution ban and alleging – among other things – that state campaign finance law violated their equal protection rights by banning corporate contributions while permitting labor unions to contribute up to $15,000 per year. While the Massachusetts Supreme Judicial Court ultimately denied the businesses' claims, the court noted in its decision that an administrative bulletin – such as the one relied upon by OCPF to permit labor union contributions – does not carry the force of law. Thus, the court observed that it was "not clear to what extent unions and nonprofit organizations are free to make political contributions." Following this decision, OCPF initiated the rulemaking that resulted in the new regulation, which replaces the interpretive bulletin.

Massachusetts is the latest state to enact substantial changes to its campaign finance laws. If your organization plans to be active in the states this year, we are available to discuss any state-law provisions you should be mindful of. ■

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simplified form for requesting [Committee] permission to assist with fundraising activities." On April 10, 2019, the Committee issued an advisory memo on "Non-Commercial Aircraft Travel," to remind House Members and staff of the relevant – and somewhat complex – statutes, House rules, and Committee guidance.

On April 15, 2019, the Executive branch Office of Government Ethics (OGE) issued an "advance notice of proposed rulemaking and notice of public hearing" inviting comments for consideration in developing a regulatory framework for the establishment of legal expense funds by or for the benefit of Executive branch officials and employees.

House Ethics Advisory Memos

Fundraising Activities. For the most part, the substantive guidance provided in the May 2, 2019 House Ethics advisory memo on participation in fundraising activities is not new. The memo reminds House Members and staff of key points about, and limits on, their fundraising activities, including:

- The Anti-Solicitation Statute (5 U.S.C. §7353) – which generally prohibits fundraising solicitations by House Members and staff unless the Committee on Ethics has a provided a specific exception – does not apply to solicitations for political campaigns and other political entities.
- Without prior Committee permission, Members and staff may also fundraise for organizations recognized under Internal Revenue Code (IRC) § 170(c), such as charities recognized under IRC § 501(c)(3) (unless the organization was established or is controlled by current House Members or staff, in which case prior written Committee permission is required).
- Member and staff participation in fundraising activities for other nonprofit organizations – for example, organizations qualified under IRC §§ 501(c)(4) or (c)(6) – must be approved by the Committee in writing in advance.
- No personal benefit may result to the soliciting Member or staffer; no official resources (for example, staff time, official space or equipment) may be used in connection with the solicitation); no official House endorsement of the solicitation may be stated or implied (although Members may use such personal titles as "Member of Congress," "Representative," "Congresswoman" or "Congressman," or "The Honorable"); no suggestion should be made that donors will receive favorable consideration in official matters; no direct personal benefit may result to the solicitating Member or staffer; no employee of a lobbying firm and no lobbyist at any organization should be targeted in a solicitation (although non-lobbyist employees of a company or association that employs or retains lobbyists on its own behalf may be targeted).

The May 2 advisory memo does elaborate on previous Committee-published guidance to make clear that "fundraising activities" is a "broad term" that includes such varied activities as: asking for money or for in-kind contributions or memberships; using a Member's or staffer's name in any way

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for a fundraising event, such as on an invitation, on social media, on letterhead, or in a letter; and in-person or telephonic "appearances" asking for donations. The May 2 memo also provides very helpful answers to eight "Frequently Asked Questions." But the primary innovation accomplished through the Committee's May 2 advisory memo on fundraising is the issuance of a new "Solicitation Waiver Request" form to streamline the process of requesting Committee permission to assist with fundraising activities in connection with non-political organizations and organizations not recognized under IRC § 170(c).

The Committee on Ethics' advisory memo on fundraising may be found on the Committee's website at **https://ethics.house.gov/sites/ethics.house.gov/files/Solicitation%20Pink%20Sheet%20FINAL.pdf**.

Non-Commercial Aircraft Travel. The House Committee on Ethics' April 10 advisory memo addresses the rules and guidance on acceptance and use by House Members and staff of travel on non-commercial or private aircraft. The memo addresses a central tension in the rules and statute applicable to such travel: Under certain specified circumstances, a House Member or staffer "may use personal, official, or campaign funds to pay for or reimburse the cost of a flight on a non-commercial aircraft"; however, the Honest Leadership and Open Government Act of 2007 (HLOGA) "generally prohibits candidates for the House from using campaign funds to pay for campaign-related travel on non-commercial aircraft."

In its April 10 memo, the Committee describes the following circumstances under which – consistent with House Rule 23, clause 15 – a Member may pay for or reimburse the cost of a flight on non-commercial aircraft using, personal, official, or campaign funds:

- The travel is on aircraft operated by a carrier or operator with a proper, government-issued license (for example, a chartered airline);
- The flight is offered to the Member in his or her personal capacity, by a personal friend or by another Member; the aircraft is operated by a domestic government entity, federal, state, or local;
- The aircraft is owned or leased by a Member or a family member of a Member; ***or***,
- The owner or operator of the aircraft is paid a pro rata share of the fair-market value of the normal and usual charter fare or rental charge for a comparable aircraft "as determined by dividing such cost by the number of Members, Delegates, or the Resident Commissioner, officers, or employees of Congress on the flight." The Committee provides this example of how this "pro rata" valuation formulation is to be applied:

  > [I]f a non-commercial aircraft flight costs $25,000 and only one Member is on the flight, the Member's pro rata share of the flight is $25,000, regardless of the number of non-congressional participants.

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Federal Ethics Update: House Ethics Issues Advisory Memos on Fundraising for Non-Profits and on on-Commercial Air Travel; OGE Invites Comments on Potential Legal Expense Fund Regulations

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The April 10 advisory memo also summarizes those circumstances under which travel on a non-commercial aircraft may be accepted without the requirement to reimburse, that is, as a gift. These circumstances, as described by the Committee on Ethics, include when the travel is provided:

- By a unit of federal, state, or local government;
- By a relative;
- On the basis of personal friendship, and all the requirements of the relevant gift rule exception are met;
- By another Member or employee of the House or Senate (except, generally, from a staffer to his or her supervising Member or supervising staffer);
- "[F]rom Point A to Point A," for example, when the flight is for observational purposes only and takes off from and returns to the same location; ***or***,
- In connection with outside business, employment, or other activities, when such travel is customarily provided to others in similar circumstances and the mode of travel was not enhanced because of the traveler's official position.

As to use of campaign funds to pay for travel on non-commercial aircraft, as pointed out above, the Committee on Ethics' April 10 advisory notes: "Members generally may not use campaign funds to pay for travel on a non-commercial aircraft if the travel is for campaign purposes." The advisory also states, however, that "Members may use campaign funds for officially-connected travel in connection with their duties as officeholders." The Committee advisory memo takes a similarly dichotomous approach in explaining when travel in connection with campaign activity may be accepted without reimbursement: The Committee notes first that "House candidates and those traveling on behalf of a House candidate are generally prohibited from flying on private aircraft," under any circumstances; but the Committee then goes on to note that House Members and staff "who are not acting in their capacities as candidates for the House, or in support of a House candidate, may accept travel on a non-commercial aircraft if offered by a political organization in connection with a fundraiser or campaign event sponsored by that political organization."

The guidance by the Committee on Ethics as to when the HLOGA-imposed restrictions on use by incumbent House candidates of non-commercial aircraft apply, and when they do not, is consistent with guidance by the FEC on this question:

> Candidates are only considered campaign travelers when they are traveling in connection with an election for federal office. This term does not include Members of Congress when they engage in personal travel or any other travel that is not in connection with an election for federal office.
>
> **https://www.fec.gov/help-candidates-and-committees/making-disbursements/travel-behalf-campaigns/**

But, particularly when multipurpose trips are involved, determining when an incumbent

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House Member is traveling in a campaign capacity, as opposed to in an officially related capacity, can involve making some careful distinctions. In light of the very fact-specific nature of the questions of when campaign funds may be used to pay for non-commercial air travel and when such travel may be accepted for a campaign purpose, the most important line in the Committee on Ethics' April 10 advisory may be this: In such situations, Members and staff "are highly encouraged to consult with the Committee and the FEC before accepting travel."

The House Ethics advisory on non-commercial air travel includes 10 helpful, illustrative examples and may be found on the Committee's website at: **https://ethics.house.gov/sites/ethics.house.gov/files/Private%20Plane%20pinksheet%20FINAL.pdf.**

Office of Government Ethics Request for Comments

In its April 15 "Notice and Request for Comments: Legal Expense Fund Regulation," OGE notes that, in contrast to the situation in both the House and the Senate, "[t]here is currently no statutory or regulatory framework in the executive branch for establishing a legal expense fund" for the benefit of executive branch employees. OGE notes that, historically, it has fulfilled the limited role of "providing guidance to help ensure that executive branch employees" who may receive distributions from such a fund "will be in compliance with the ethics laws and rules [for example, the gift regulations]" in so doing. But, OGE further notes, because this approach does not "fully address potential appearance concerns with the creation and operation of legal expense funds," it is seeking "stakeholder input" on such issues related to legal expense funds as:

- Limitations on the types of donors to legal expense funds;
- Contribution limits;
- Donation of pro bono legal services;
- Limits on permissible beneficiaries, on the number of beneficiaries to a fund, and on the use of donated funds;
- Transparency of legal expense funds, including reporting requirements; ***and***,
- Establishment, management, and termination of legal expense funds, including oversight authority over such funds.

Comments must be received by OGE by June 14, 2019. In addition to inviting and accepting written comments, OGE has scheduled a virtual public hearing on potential legal expense fund regulations for May 22, 2019. Persons wishing to present comments at the public hearing, or to listen to the hearing, must register by May 17, 2019. The Notice and Request for Comments may be accessed at **https://www.federalregister.gov/documents/2019/04/15/2019-07390/notice-and-request-for-comments-legal-expense-fund-regulation.** ■

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West Virginia Enacts Changes to PAC Reporting Requirements and Contribution Limits

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PAC Registration and Reporting.

Under the existing law, PACs that are registered with the Federal Election Commission are not required to additionally register and report in West Virginia if they make contributions to West Virginia state candidates and political party committees. (Federal PAC contributions to state PACs are generally prohibited, except to PACs of state affiliates.) The new law eliminates this exemption.

It is still not entirely clear, however, the extent to which federal PACs that make West Virginia state contributions will now be required also to register and report under the state's PAC requirements. Arguably, under the new law's revised PAC definition (discussed more below), if a federal PAC does not have "the primary purpose" of supporting or opposing West Virginia state candidates, it would still be exempt from state registration and reporting.

However, in discussing the change for federal PACs in an op-ed explaining the new law, the West Virginia Secretary of State indicated that "all PACs" will now be required to register and report in the state. On the other hand, the Secretary of State's general counsel also has publicly stated that "the primary purpose" standard in the new PAC definition will be subject to additional clarification through an agency rulemaking.

Therefore, it is possible that federal PACs could still be exempt if, for example, not more than 50% of the PAC's spending is in connection with West Virginia state elections (a potential threshold the general counsel floated). Adding to the lack of clarity is in the preamble in the bill, which only specifies in that federal PACs are no longer "exempt from requirement to file state-level [] reports," but does not state that all federal PACs making any state contributions will be categorically required to register and report in the state.

Wiley Rein's Election Law Group will be monitoring the Secretary of State's rulemaking to determine how the new "primary purpose" standard in the PAC definition will be applied to federal PACs.

Relatedly, trade associations and other nonprofit groups that "support or oppose" the nomination or election of West Virginia state candidates will now be required to register and report as PACs if such activity is determined to be their "primary purpose." Under the existing law, a group is regulated as a PAC if "supporting or opposing" state candidates is "the purpose" of the group. This language has been interpreted as meaning that a group is not regulated as a PAC unless supporting or opposing state candidates is its exclusive purpose. Thus, the effect of the new definition is to expand the scope of entities that may be regulated as PACs.

Lastly, the new law requires quarterly reporting for PACs for election as well as non-election years. Under the existing law, in non-election years, PACs are only required to file an annual report.

Independent Expenditure Reporting.

Under the existing law, independent expenditure (IE) reports are only required (within 24 hours) for expenditures totaling $1,000 or more made within 15 days before an election. Under the new law, additional IE reports will be required (within 48 hours) for any expenditures totaling $10,000 or more made at any time up to 15 days before an election. However, for the 24-hour reports

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required within 15 days before an election, the new law raises the threshold to $5,000.

Foreign National Prohibition.

West Virginia law currently does not address spending by foreign nationals in connection with state elections. However, spending by foreign nationals in connection with state elections is already prohibited by federal law.

The foreign national ban under the new West Virginia law mirrors the foreign national ban under the federal law. However, the West Virginia ban specifically also applies to foreign national spending in connection with state ballot measures, as well as state electioneering communications.

Currently, there are still various states whose laws do not specifically address foreign national spending on state elections, and that rely on the ban under federal law. As concerns about foreign meddling with U.S. elections continue to reverberate, expect to see additional states enacting their own foreign national bans. Some of these state bans may be much more expansive than the federal ban and may impact domestic subsidiaries of foreign corporations, publicly traded companies with foreign shareholders, and trade associations that receive payments from such entities.

Contribution Limit Increases

The new West Virginia law raises the limit on contributions to state candidates to $2,800 for each primary or general election (up from the existing $1,000 limit). Contributions to state party and legislative caucus committees also will increase from the current $1,000 limit to $10,000 per calendar year. ■

All of these changes will go into effect on June 7. For more information, please contact:

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Events & Speeches

Common Pitfalls Regarding Federal Lobby Reporting

Lorman Education Services

Carol A. Laham, Speaker

June 24, 2019

Federal Court Upholds FEC Debate Regulation

By Lee E. Goodman and Brandis L. Zehr

On the eve of a 2020 presidential election featuring over 20 significant Democratic contenders, the U.S. District Court for the District of Columbia has upheld the use of poll standings to qualify for debate participation.

FEC regulations permit nonprofit corporations and press corporations to sponsor candidate debates so long as the sponsor "does not structure the debate[] to promote or advance one candidate over another" and "use[s] pre-established objective criteria to determine which candidates may participate in a debate." Historically, the FEC has afforded debate sponsors wide discretion to set "objective criteria," including the use of candidates' poll standings.

The Commission on Presidential Debates (CPD) over several elections has sponsored presidential debates and, since 2000, has screened candidates according to three criteria: (1) evidence of the candidate's constitutional eligibility to serve; (2) evidence of ballot access on enough state ballots to constitute a mathematical chance of winning the general election; and (3) support of at least 15% across five national polls.

An organization called Level the Playing Field filed an enforcement complaint against the CPD alleging that the CPD's 15% threshold systematically discriminated against third-party candidates and effectively supported only the major party candidates. Level the Playing Field also petitioned the FEC to open a rulemaking to change the debate regulation to prohibit the use of poll standings as a criterion for debate participation in federal elections. The FEC dismissed Level the Playing Field's enforcement complaint against the CPD on the basis that poll standing is an objective criterion with a long history of use. The FEC also declined to open a rulemaking to change the debate regulation. The FEC issued a Supplemental Notice of Disposition explaining its rationale for the decision (82 Fed. Reg. 15468-15474, Mar. 29, 2017). Commissioner Goodman issued a Concurring Statement elaborating on his view that press-sponsored debates should not be regulated in any event because the press is exempt from regulation under the "Press Exemption" of the Federal Election Campaign Act (**https://www.fec.gov/resources/about-fec/commissioners/goodman/statements/Concurring_Statement_of_Commissioner_Lee_Goodman_to_Notice_of_Disposition_re_Candidate_Debate_Rulemaking.pdf**) and debates staged by press outlets is bona fide news coverage.

Level the Playing Field then sued the FEC in federal court claiming that the FEC's actions were arbitrary, capricious, and contrary to law. On March 31, 2019, the federal district court ruled that the FEC had acted lawfully and the CPD's 15% polling threshold was reasonable and objective. The federal court also declined to force the FEC to open a new rulemaking. The decision was written by Judge Tanya S. Chutkan in *Level the Playing Field v. Federal Election Commission* (Civil Action No. 15-cv-1397).

Level the Playing Field has filed a notice of appeal to the U.S. Court of Appeals for the

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FEC Warns Business About Use of Company Logo in Campaign Ad

By Caleb P. Burns and Andrew G. Woodson

The Federal Election Commission (FEC) recently sent a caution letter to a North Dakota business that allowed its company logo to be used in an advertisement for a U.S. Senate candidate. While the Commission ultimately dismissed the underlying enforcement matter as an exercise of prosecutorial discretion, the FEC's decision is an important reminder to corporations and other businesses that allowing campaigns to use their intellectual property can be problematic.

In late 2017, the American Legal Democracy Fund filed a complaint against North Dakota congressional candidate Tom Campbell's campaign, alleging that Mr. Campbell used equipment from his potato-growing business, Campbell Farms, in his campaign advertising. In particular, the complaint explained that, in one of his campaign commercials, Mr. Campbell stood in front of a Campbell Farms truck with the business logo featured prominently behind him.

This eight seconds of Campbell Farms imagery was enough to get the FEC's attention. The Commission-approved legal analysis cited prior precedent to conclude that allowing a campaign committee to use corporate logos and other intellectual property "in a manner suggesting the corporation's support or endorsement may constitute an in-kind contribution." The Commission referenced, for example, an earlier matter involving campaign advertisements that included the name and logo of the candidate's plumbing company, as well as images of the company's storefront. In that matter, the Commission dismissed the case as likely involving a *de minimis* use of corporate resources. Nevertheless, as here, the Commission cautioned the candidate's business to take steps to properly adhere to the law.

In reciting this past history, the Commission also referred back to other, past dismissals that involved the use of corporate logos on mailers and fundraising invitations. The Commission did not dismiss these matters outright, but rather declined to pursue these claims based on the agency's prosecutorial discretion.

Though the Commission will not punish every use of corporate intellectual property in a federal campaign, there appears to be bipartisan consensus that the use of corporate imagery will at least result in careful review by the FEC. To avoid potential problems, businesses should not let a candidate use any corporate intellectual property in any campaign materials. ■

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Maryland Pay-to-Play Report Due May 31

Please note that Maryland's semiannual pay-to-play report is due on May 31 from certain state and local government contractors, even if no reportable contributions have been made. For more information, please contact:

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Changes in Utah State Lobbying and Gift Law

By Mark Renaud and Jeannette K. Nyakweba

In March, Governor Gary Herbert of Utah signed House Bill 64 and Senate Bill 147 respectively into law. Both laws, which become effective on May 14, 2019, make amendments to Utah's state lobbying requirements.

House Bill 64 creates disclosure requirements for lobbying local government and board of education members. The new requirements include quarterly reports and prohibit expenditures of over $10 by lobbyists (and lobbyists' principals, if necessary). Expenditures for food, beverage, travel, lodging, or admission to or attendance at a tour or meeting are excluded.

Senate Bill 147 modifies the requirements for the ethics and harassment training course for lobbyists to include specific dates for completion as well penalties for non-completion. ■

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Federal Court Upholds FEC Debate Regulation

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District of Columbia Circuit. Nonprofit and press debate sponsors might consider filing *amicus curiae* briefs in support of the FEC's position.

Unless overturned by the Court of Appeals, the district court's decision will provide debate sponsors in the upcoming 2020 election cycle confidence that they may use poll standings at the 15% level, or lower, to select candidates. ■

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Clearing Up Misconceptions About Corporate PACs

By Brandis L. Zehr

As an increasing number of Democratic federal candidates pledge not to accept contributions from corporate political action committees (PACs), misconceptions about corporate PACs are becoming more prevalent in the media. Below are responses to three common myths about the role corporate PACs play in federal elections.

Myth 1: Corporations fund corporate PACs.

Contrary to some media reports, corporate PACs do not use corporate money to contribute to federal candidates. Instead, corporate PACs are funded by voluntary, individual contributions from eligible employees. Although eligible employees may contribute up to $5,000 per calendar year, corporate PACs largely rely on recurring, small-dollar contributions from eligible employees. This provides eligible employees with a way to pool their small-dollar contributions and collectively support federal candidates with one voice.

Myth 2: Corporate PACs are 'dark money' groups.

Corporate PACs are transparent, "hard dollar" organizations regulated by the Federal Election Commission (FEC). Like federal campaigns and political parties, corporate PACs must fully disclose their fundraising and spending on public reports filed with the FEC. These disclosure reports itemize contributions received from individuals who contribute more than $200 in a calendar year; contributions made to candidates, political parties, or other committees are itemized regardless of amount. By contrast, so-called "dark money" groups generally are not required to publicly disclose their donors and disclose only certain types of spending with the FEC.

Myth 3: Corporate PACs are responsible for "big money" in politics.

Corporate PACs must comply with the same contribution limits as labor union PACs, trade association PACs, membership organization PACs, leadership PACs, and other types of traditional PACs. The maximum amount that any of these PACs may contribute to a federal candidate is $5,000 per election, which is less than the $5,600-per-election maximum that spouses may jointly contribute to a federal candidate. According to FEC statistics, corporate PAC contributions comprised only 6.4% of the funds Senate and House candidates raised during the 2017-18 election cycle.[1] Put simply, corporate PACs may only make limited contributions and federal candidates overwhelmingly are funded by contributions directly from individuals. ■

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1 FEC, PAC Contributions to Candidates: Jan. 1, 2017 – Dec. 31, 2018 (rev. Mar. 8, 2019), **https://transition.fec.gov/press/summaries/2018/tables/pac/PAC2_2018_24m.pdf**; FEC, House & Senate Financial Activity: Jan. 1, 2017 – Dec. 31, 2018 (rev. Mar. 7, 2019), **https://transition.fec.gov/press/summaries/2018/tables/congressional/ConCand1_2018_24m.pdf**.

The Mueller Report: Is Information a Contribution?

By Lee E. Goodman

Summaries and commentaries about the Mueller Report are ubiquitous. The first, written by the Attorney General of the United States, proved highly controversial, reflective of the polarized environment. If a summary is not to one's liking, however, the Report itself is widely available and the redactions are actually modest. Most redactions appear in Volume I of the Report, which covers Russian election meddling and concludes there was no conspiracy with the Trump campaign. Most of the redactions cover ongoing proceedings that have been referred by the Special Counsel to U.S. Attorneys for further investigation or prosecution (e.g., Roger Stone). There are few redactions in Volume II of the Report, which covers the politically and legally sensitive subject of obstruction of justice.

Russian 'Active Measures'

Volume I recounts the "active measures" by Russian operatives to meddle in American politics. The measures fall into three basic categories:

1. Russian military intelligence agents (the GRU) hacked American computers, stole emails and other sensitive information, and disseminated the stolen emails on the Internet (including via WikiLeaks);
2. Russian operatives at the Internet Research Agency purchased false American identities, opened bank accounts in false names, purchased socially divisive ads on media platforms, and assumed false identities on several social media platforms to disseminate propaganda and organize politically themed rallies;
3. Russians attempted to contact and recruit unwitting American citizens, including individuals in the Trump campaign, often through social media contacts.

Many of these facts were previously set forth in Mr. Mueller's criminal indictments of Russian computer hackers and military generals. And Russian "active measures" to spread disinformation and influence American elections have been part of Russian and Soviet espionage for many decades.

No Trump Coordination or Conspiracy

According to the Mueller Report, "the investigation examined whether these contacts involved or resulted in coordination or a conspiracy with the Trump Campaign and Russia, including with respect to Russia providing assistance to the Campaign in exchange for any sort of favorable treatment in the future." The Report concludes that "the investigation did not establish such coordination."

The Report states that the Special Counsel considered several potential violations of law. For example, the Report analyzes whether any Trump campaign consultant served as an unregistered foreign agent under the Foreign Agents Registration Act (FARA) (18 U.S.C. §§ 611-621) or 18 U.S.C. § 951. On this score, the Report concludes that the "investigation did not … yield evidence sufficient to sustain any charge that any individual affiliated with the Trump Campaign acted as an agent of a foreign principal within the meaning of FARA or, in terms

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of Section 951, subject to the direction or control of the government of Russia, or any official thereof."

Campaign Finance Law Analyzed

The Report also concludes that no Trump campaign official violated the foreign national prohibition of the Federal Election Campaign Act (FECA). Specifically, the Report grapples with a difficult legal issue: whether intangible *information* constitutes a contribution, a "thing of value," and therefore whether solicitation or receipt of *information* from a foreign national violates the prohibition against foreign national contributions.

The Report recounts the 20-minute meeting between Donald Trump Jr., Jared Kushner, Paul Manafort, and a Russian citizen named Natalia Veselnitskaya in Trump Tower on June 9, 2016. The Report analyzes that meeting through the paradigm of a potential in-kind contribution of negative information about Hillary Clinton. That is, the Report states that the Special Counsel tried to determine if Donald Trump Jr. unlawfully solicited a cognizable "thing of value" from a foreign national by agreeing to meet with the Russian with the expectation of learning negative information about Hillary Clinton or whether he accepted a "thing of value" in the form of the information imparted during the meeting. As it turns out, however, the meeting was decidedly non-informative. The Russian imparted no information about Hillary Clinton.

The Report, in tepid reasoning, observes that "[t]here are reasonable arguments that the offered information would constitute a 'thing of value' within the meaning" of the FECA definition of "contribution" and analogizes negative information to paid professional opposition research. But the Special Counsel declined to make a case because there was no way to place a *value* on the information that never materialized at the Trump Tower meeting and, moreover, he did not believe he could establish a "willful" violation in any event.

Significantly, in the next passage, the Report acknowledges that "no judicial decision has treated the voluntary provision of uncompensated opposition research or similar information as a thing of value that could amount to a contribution under campaign-finance law."

On this point, absent from the Report is any citation of FEC analyses of the issue. The FEC is the agency tasked by Congress with interpreting and implementing the FECA. It has treated similar issues over the years. Under FEC precedents, the sharing of non-public information is not generally considered a cognizable contribution. For example, in Matter Under Review (MUR) 6938, the Commission found there was no contribution where author Peter Schweizer, the author of *Clinton Cash*, provided to Senator Rand Paul non-public, politically significant, negative information about Hillary Clinton which Senator Paul in turn used in connection with his presidential campaign. In another matter, MUR 6958, a controlling group of Commissioners concluded that Senator Claire McCaskill did not make a contribution to the campaign of her eventual general election opponent, Todd Akin, by authorizing her pollster to discuss polling data during a telephone conversation with a representative of the Akin campaign. As a general rule, mere *information* imparted in verbal conversation has been considered too nebulous to constitute a "*thing of value*." Were the rule otherwise, every conversation

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on the street could be deemed a valuable in-kind contribution to campaigns if it imparts non-public but politically useful information.

In any event, the Report describes a meeting that produced no definitive information, no opposition report, no dossier, no emails – nothing useful or even informative that could have been used by the Trump campaign. Accordingly, the Special Counsel concluded that no violation of the ban against foreign national contributions could be inferred from the meeting with a Russian citizen in Trump Tower.

Omitted or Redacted Matters

As noted above, the Report redacts information about 14 ongoing investigations or prosecutions referred to other offices. However, some issues appear to have been omitted from th Report. The Mueller Report devotes many pages to describing details about each conversation and contact, however remote from the campaign, between Russian nationals and Trump campaign advisors. It likewise documents in detail the Trump campaign's abiding interest in the WikiLeaks revelations about Clinton. It analyzes at great length the legal significance of Donald Trump Jr.'s meeting with a Russian citizen in Trump Tower. And it devotes many pages to Paul Manafort's connections with Ukrainians before, during, and after his service on the Trump campaign. That is in addition to the Special Counsel's prosecution of Manafort and Rick Gates for serving as unregistered agents for the Party of Regions under the FARA. The Report even states that the Special Counsel devoted resources to determining whether George Papadopoulos was an agent of the Israeli government. These detailed accounts reflect hundreds or perhaps thousands of hours of investigative time by the Office of Special Counsel.

Given that searching approach to contacts with Russians, Ukrainians, and Israelis by the Trump campaign, the absence of any detailed discussion of the Clinton campaign's employment of Christopher Steele to reach out to Russians for "dirt" on Trump, the extent of those contacts, the use of that information, and the legal significance of that situation is a curious omission. It is possible that matter was referred to a U.S. Attorney's office and therefore is among the redacted list of 14 ongoing matters.

Likewise, there is no mention in the Report of the Democratic National Committee's apparent efforts to obtain and deploy negative information about Paul Manafort from the Government of Ukraine and its U.S. embassy. The Report does acknowledge that Manafort was forced to resign from the Trump campaign "amidst negative media reporting about [Manafort's] political consulting work for the pro-Russian Party of Regions in Ukraine," but beyond that factual statement indicates no attention to the Ukrainian government's role in instigating that negative media or any American's participation. It is at least possible that matter also is one of the 14 redacted ongoing matters.

Obstruction of Justice

Finally, the Report recounts many details about the President's frustration with then-Attorney General Jeff Sessions, Deputy Attorney General Rod Rosenstein, and Special Counsel Robert Mueller and his many and varied efforts to fend off what he viewed as an unfair investigation. The Report concludes that the President's exercise of

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Podcast: Attorney Rob Walker Discusses How the U.S. House and Senate May Enforce Subpoenas

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The Mueller Report: Is Information a Contribution?

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official Article II powers of the presidency, such as firing the FBI director, are not prosecutable by the Department of Justice but rather a subject for constitutional checks and balances under Congress' impeachment powers. As for non-Article II actions by the President, the Report defers to the Attorney General. As we all know, Attorney General William Barr and Deputy Attorney General Rod Rosenstein determined that none of the conduct detailed in the Report constituted obstruction of justice. ■

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The First Amendment Right to Political Privacy Chapter 4 - NAACP v. Alabama

By Lee Goodman

The first three chapters of this series traced the jurisprudential evolution of the First Amendment right to political privacy – the individual right to keep political beliefs and associations private against government inquisition. Chapter 1 considered the unsuccessful attempts by the KKK, in the 1920s, and by American communists, in the 1940s, to preserve the anonymity of their fellow travelers. Chapter 2 covered a successful legal effort by an American conservative to preserve the anonymity of like-minded book purchasers in 1953. And Chapter 3 covered a successful legal challenge by a Marxist economist to keep secret the names of fellow Progressive Party partisans in 1957. The First Amendment's protection for political privacy started as a dissenting idea but gradually made its way into concurring opinions and eventually majority opinions. But it had yet to predicate the holding of a Supreme Court majority. That finally occurred in 1958, when a consensus of Justices held the First Amendment prohibited the State of Alabama from forcing the National Association for the Advancement of Colored People (NAACP) to turn over to the State its list of members and donors. The Supreme Court's unanimous First Amendment ruling in *NAACP v. Alabama* is the subject of this chapter.

Background – Alabama Justice

The NAACP was founded in 1909 and incorporated in 1911 in New York for the purpose of advocating for racial justice and equal rights through various political, social and legal means.

In the 1940s and 1950s, as the national civil rights movement intensified at state and local levels, the NAACP was in the forefront of organizing civil rights protests, advocating civil rights legislation and policy changes, and litigating civil rights challenges to discriminatory laws, especially in southern states. These efforts were increasingly successful, as evidenced by the Supreme Court's decision in *Brown v. Board of Education of Topeka, Kansas* in 1954.[1]

The NAACP's legal and other political efforts to change the status quo were not popular among white elected officials. This was true in Alabama where, among other activities, beginning in 1955, the local NAACP chapter instigated the civil disobedience of Rosa Parks. Rosa Parks was the Secretary of the Alabama Chapter of the NAACP. She was drafted to take a "white seat" on a bus in order to provoke a police response. Thereafter, the NAACP helped organize the year-long bus boycott under the hand-picked leadership of the young local Reverend Martin Luther King, Jr. The NAACP's Legal Defense Fund then funded the successful challenge to Montgomery's segregated bus system in the courts, effectively ending the boycott.[2] Such inconvenient political activism in Alabama by a national organization from New York must have gotten the Alabama political establishment to thinking about ways to impede its continuation, much the same way other southern states were doing, by investigating and exposing members and financial supporters,[3] and much the same way that the House Un-American Activities Committee sought to root out and discourage American communists (see Chapter 1) and the Buchanan Committee sought to disrupt the

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free market advocacy of the Committee on Constitutional Government (see Chapter 2).

Since 1918, a state chapter of the NAACP had operated in Alabama as an unincorporated association. Members of the Alabama chapter constituted membership in the national organization. In 1951, the NAACP, headquartered in New York, had opened a regional office in Alabama, employing three people. But the NAACP had not complied with Alabama's state law requiring foreign corporations doing business inside the state to register with the Secretary of State and designate a place of business and agent to receive legal service.

In 1956, while the bus boycott was ongoing, the Attorney General of Alabama, John Patterson, filed a civil action in state court in Montgomery to enjoin the NAACP from conducting further activities within Alabama and effectively "to oust it from" Alabama.[4] The Attorney General pointed to numerous activities the NAACP had engaged in within Alabama: It had opened and operated a regional office, solicited financial contributions from citizens of Alabama, recruited members, organized state affiliate organizations, funded lawsuits in the state, and supported the bus boycott.[5] The state court issued an *ex parte* restraining order prohibiting the NAACP from engaging in further activities and forbidding the organization from taking any steps to qualify to do business.[6] The NAACP demurred, arguing that the statute did not apply to its political activities and, in any event, the objective of the Attorney General's suit "would violate rights to freedom of speech and assembly guaranteed under the Fourteenth Amendment to the Constitution of the United States."[7]

Before a hearing could be held, the Attorney General moved for a court order requiring the NAACP to produce voluminous organizational business records as well as "records containing the names and addresses of all Alabama 'members' and 'agents' of the Association."[8] The Attorney General argued these records were necessary to establish that the organization was indeed doing business in the state.[9] Over the NAACP's objections, the state court ordered the NAACP to produce the majority of the records sought, "including the membership lists."[10]

By the time of a hearing, the NAACP had offered to comply with the registration requirements for out of state enterprises doing business in Alabama. However, it did not comply with the state court's discovery production order. The state court ruled that the NAACP was in civil contempt and fined the organization $10,000. The state court's order provided that the fine would be forgiven if the organization complied within five days or increased to $100,000 if it failed to comply.[11]

Within five days, the NAACP produced virtually all of the records required under the order – except for its membership lists. The NAACP asserted that Alabama could not compel disclosure of its membership lists under the First and Fourteenth Amendments to the Constitution. The NAACP declined to produce its list of Alabama members because, in its view, the state court's discovery order "*per se* constituted an abridgement of its rights and those of its members to freedom of association and free speech, and because of its belief that to comply with the order would subject [the

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NAACP] to destruction and its members to reprisals and harassment, thereby effectively depriving [the NAACP] and its members of the right to the exercise of freedom of association and free speech."[12]

In support of this contention, the NAACP submitted to the state court "affidavits showing that members of the N.A.A.C.P. in nearby counties had been subjected to reprisals when identified as signers of a school desegregation petition, and a showing of evidence of hostility to the purposes and aims of the organization in Alabama, and evidence that groups in the state were organized for the express purpose of ruthlessly suppressing [the NAACP's] program and policy."[13]

On this basis, the NAACP moved the state court to modify or vacate the contempt ruling or to stay its enforcement pending appellate review.[14] The state court denied the motion.[15] The Alabama Supreme Court denied certiorari on two appeals by the NAACP.[16]

Moreover, the state courts put the NAACP into a catch-22. Until it purged itself of contempt by producing the membership list, the NAACP could not contest the underlying civil action on the registration requirement or register itself. This effectively banned the NAACP from conducting any activity in the State of Alabama. And all of this was happening in 1956 while the NAACP was funding litigation before the Alabama federal court over bus segregation and the bus boycott was ongoing.

The NAACP appealed to the U.S. Supreme Court, and the Court granted certiorari in 1957.[17]

The NAACP's Arguments

The NAACP asserted before the Supreme Court, as it had argued before the state court, that disclosure and exposure of its members and financial supporters would violate the First and Fourteenth Amendments because of "bitter opposition" to its political objectives at all levels of government and in society at large in Alabama.[18] "Threatened and actual loss of employment and other forms of economic reprisals have accompanied legislation intended to punish financially those persons who advocate orderly compliance with the law as well as those who advocate equal rights for all," as well as violence, the NAACP asserted.[19] "Negroes who seek to secure their constitutional rights do so at peril of intimidation, vilification, economic reprisals, and physical harm."[20]

In this environment, the NAACP argued that "[d]isclosure of petitioner's members or threat of such disclosure will necessarily tend to curb the activities of petitioner and its members and weaken the strength and effectiveness of the organization in pursuit of its objectives in Alabama."[21]

In June of 1957, the Supreme Court had ruled in favor of efforts by American communists to resist government subpoenas in two Red Monday cases, *Sweezy v. New Hampshire*[22] and *Watkins v. United States*.[23] Both decisions figured prominently in the NAACP's brief, which cited *Sweezy* 12 times and *Watkins* 10 times.[24] The NAACP also cited *United States v. Rumely*,[25] another successful defense against government subpoena, 7 times. Citation to these Court decisions, and

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copious quotation of Justice Frankfurter's concurrence in *Sweezy*, formed a refrain throughout the NAACP's cogent briefs.

The NAACP also pressed a broader argument in its reply brief – that the First Amendment protects "anonymous speech."[26] The NAACP invoked the history of anonymous publications in England, colonial America, and the early days of the United States, as well as the right to a secret ballot, and Justice Frankfurter's concurrence in *Sweezy*. "Anonymity, secrecy, privacy, however it may be called, thus has a special value in a democratic society," the NAACP argued.[27]

The State of Alabama's Arguments

In response, Alabama pressed principally three arguments. First, it argued that the NAACP did not have standing to assert the First Amendment rights of its individual members.[28] Second, it argued that any burden on the NAACP's associational rights would be the result of private opprobrium, not official state action.[29] And finally, the state argued that it had an overriding need for the membership lists in order to establish, in state court, that the NAACP was indeed conducting activities within Alabama in violation of the state corporate registration statute.[30] The existence of dues-paying members in Alabama would prove activity in the state.

Significantly, Alabama did *not* argue against First Amendment protection for private association. And it conceded that the NAACP, as a corporation, could assert its own First Amendment rights, but not its members.

The Supreme Court's Unanimous Ruling

In a unanimous decision written by Justice John Harlan, and without any concurring or dissenting opinions, the Court held in favor of NAACP.

The Court first held that the NAACP had standing to assert the protection of the First Amendment "because it and its members are in every practical sense identical."[31] In drawing this conclusion, the Court pointed to the "reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled…."[32]

On the First Amendment right asserted, the Court analogized the exposure of NAACP members to the government forcing members of certain faiths and political parties to wear arm-bands identifying their affiliations, a practice the Court had disapproved, in *dicta*, in *American Communications Association v. Douds* in 1950.[33] The Court then ruled explicitly that forced disclosure of an organization's members and financial supporters restrains free speech and association indirectly by discouraging the exercise of those rights:

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action …. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations …. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[34]

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Crediting the NAACP's showing that "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility,"[35] the Court then rejected the state's argument that citizens are not protected against private reprisals facilitated by government-forced disclosure:

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power … that private action takes hold.[36]

Finally, the Court rejected Alabama's professed need for the membership lists as unconvincing. The Court found that Alabama could establish the NAACP's activities in Alabama through other more obvious sources – including the NAACP's admission that it had engaged in activities in Alabama since 1918.[37]

Significance and Progeny of the Supreme Court's Decision

Clearly, *NAACP* was a watershed decision in the history of the First Amendment. It was definitive in its recognition of the First Amendment right to political privacy. It was a unanimous decision attracting even the support of judicial conservatives. It was a landing pad for the Justices finally to assemble their respective concurring and dissenting opinions over the prior decade. And it trounced state authority because of the obvious recalcitrance of Alabama.

The Court issued the *NAACP* decision on June 30, 1958, a year after its Red Monday decisions in *Sweezy* and *Watkins*, both cited extensively by the NAACP. While the opinion authored by Justice Harlan cited *Sweezy* (including the Frankfurter-Harlan concurring opinion) and *Rumely*, it did not cite *Watkins*, a more modest decision about congressional subpoena pertinence. But *Sweezy* and *Rumely* were advanced in First Amendment jurisprudence.

Because other southern states also were demanding that the NAACP disclose the names of its members and donors, the ruling had a direct application to stopping those efforts in cases like *Bates v. City of Little Rock*,[38] *Louisiana ex rel. Gremillion v. NAACP*,[39] and *Gibson v. Florida Legislative Investigation Committee*,[40] all cases involving forced exposure, in one context or another, of members in civil rights organizations. Each time the Court ruled, it embedded political privacy more deeply into First Amendment jurisprudence.

The decision had less impact on the continuing saga of litigation over communist hunting, as judicial conservatives balked at extending the same analysis to communists, usually by affording greater deference to the government's proffered interest justifying the infringement – national security.[41] Justice Frankfurter was in full retreat after the *Sweezy* decision. In each case where a majority of the Court declined to extend *NAACP* to other contexts, Justice Douglas and Justice Black met them with dissents, often joined by Chief Justice Warren

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or Justice Brennan. The varying majority and dissenting opinions in that line of decisions are rich in wisdom and inform legal debates in this field today.

The Legacy of *NAACP v. Alabama*

Some modern observers, principally those who support greater exposure of private political associations and funders, argue that *NAACP*'s holding is quite limited to the unique civil rights context. For them, *NAACP* is a decision of quite limited import in today's debates over exposure, transparency, and political privacy.

Yet, stopping there would understate the profound First Amendment importance of *NAACP*. Thousands of court decisions have cited *NAACP* since 1958 in contexts far from the civil rights movement. Surely the same First Amendment protection afforded the NAACP protects the Edward Rumelys and Paul Sweezys as well as all American citizens with equal force.

Moreover, stopping with the civil rights movement would overlook one of the most important extensions of *NAACP* less than two years later, *Talley v. California*,[42] a decision recognizing, for the first time, the First Amendment right to speak anonymously. *Talley* was not a case arising from the civil rights movement in the south. This series will pick up at *Talley* and the right of anonymous speech in the next chapter. ■

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Endnotes

[1] 347 U.S. 631 (1954). Prior to the NAACP's legal problems with Alabama, other civil rights lawsuits funded at least in part by the NAACP had included *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Mayor v. Dawson*, 350 U.S. 877 (1955).

[2] *Gayle v. Browder*, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd* 352 U.S. 903 (1956).

[3] For a summary of similar southern state actions to expose members and financial supporters of the NAACP, *see* Jack Greenberg, *Crusaders in the Courts* (Basic Books 1994) at 219-221.

[4] *NAACP v. State of Alabama, ex rel. John Patterson*, 357 U.S. 449, 452 (1958).

[5] *Id.*

[6] *Id.* at 452-453.

[7] *Id.* at 453.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 453-454.

[12] *See* Brief of Petitioner in *NAACP v. Alabama* (1957WL55387 *11).

[13] *Id.*

[14] 357 U.S. at 454.

[15] *Id.*

[16] *Id.*

[17] 353 U.S. 972 (1957).

[18] *See* Brief of Petitioner in *NAACP v. Alabama* (1957WL55387 *12).

[19] *Id.* at *15-16.

[20] *Id.* at *17.

[21] *Id.* at *26.

[22] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[23] *Watkins v. United States*, 354 U.S. 178 (1957).

[24] *See* Brief of Petitioner in *NAACP v. Alabama* (1957WL55387).

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The 2019 edition of *Chambers USA: America's Leading Lawyers for Business* recognizes 31 Wiley Rein attorneys across 12 areas of law. The Election Law & Government Ethics practice was ranked as a nationwide leader. Attorneys in the Election Law & Government Ethics practice that are ranked include: Jan Baran, Caleb Burns, Carol Laham, Michael Toner, and Robert Walker. Mark Renaud is also singled out as a Recognized Practitioner.

The Chambers USA rankings for Wiley Rein attorneys can be found **here**.

The First Amendment Right to Political Privacy
Chapter 4 - NAACP v. Alabama

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[25] *United States v. Rumely* 345 U.S. 41 (1953).

[26] *See* Reply Brief of Petitioner in in *NAACP v. Alabama* (a pdf copy is available on Westlaw).

[27] *Id.* at 8.

[28] *See* Brief of Respondent in *NAACP v. Alabama* (1957WL55388 *25-27).

[29] *Id.* at *29.

[30] *Id.* at *19-24.

[31] 357 U.S. at 459.

[32] *Id.* at 459-460.

[33] *American Communications Association v. Douds*, 339 U.S. 382 (1950). The decision was not a particularly libertarian decision, upholding (by a vote of 5 to 1) the forced administration of anti-communist loyalty oaths for labor union leaders, but it nonetheless included the observation that a "requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously" an infringement of First Amendment rights. The Court seized upon this passage and compared forced disclosure of organizational members to this "obvious" infringement.

[34] 357 U.S. at 462.

[35] *Id.*

[36] *Id.* at 463.

[37] *Id.* at 464-465.

[38] *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

[39] *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961).

[40] *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

[41] *See, e.g., Beilan v. Board of Public Education*, 357 U.S. 399 (1958) (decided the same day as *NAACP* and upholding school system's dismissal of teacher who refused to answer questions about communist affiliations); *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961) (upholding law requiring the Communist Party USA to register with the federal government and disclose membership information because it was directed or controlled by the "world Communist movement").

[42] *Talley v. California*, 362 U.S. 60 (1960).

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