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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | July 2019

D.C. Circuit Upholds FINRA Pay-to-Play Rule

By D. Mark Renaud

On June 18, 2019, a panel of the U.S. Court of Appeals for the D.C. Circuit upheld the validity and the constitutionality of the pay-to-play rule of the Financial Industry Regulatory Authority (FINRA). *N.Y. Republican State Comm. and Tenn. Republican Party v. SEC*, No. 18-1111 (D.C. Cir. June 18, 2019). Despite the way in which the rule affects federal, state, and local political contributions and association for a large number of people across a given financial services enterprise, the court followed its own 1995 precedent and found the rule "closely drawn" to serve the sufficiently important government interest of avoiding corruption and the appearance of corruption.

FINRA Rule 2030, modeled on the U.S. Securities and Exchange Commission's (SEC) pay-to-play rule

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Sixth Circuit Upholds Kentucky Campaign Contribution and Gift Restrictions

By Carol Laham and Eric Wang

The U.S. Court of Appeals for the Sixth Circuit recently upheld the constitutionality of certain campaign finance and gift restrictions that Kentucky law imposes on state legislators, lobbyists, and lobbyist principals (i.e., employers and clients of lobbyists).

Specifically:

- Kentucky state legislators and legislative candidates may not accept any campaign contributions – at any time – from state lobbyists. Lobbyists also may not make such contributions.
- Kentucky state legislators and legislative candidates may not accept any campaign contributions during

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a regular legislative session from lobbyist principals and political action committees (PACs). Lobbyist principals also may not make such contributions.

- Kentucky state legislators and their spouses may not accept gifts from state lobbyists and lobbyist principals. Lobbyists and lobbyist principals also may not provide gifts to state legislators, legislative candidates, and their families.

A Kentucky state legislator and legislative candidate challenged these restrictions for violating their First Amendment rights to free speech and association. In 2017, a federal district court judge upheld the legislative session contribution ban, but struck down the year-round lobbyist contribution ban and lobbyist/lobbyist principal gift ban (*Election Law News*, **July 2017**). Both the plaintiffs and state defendants cross-appealed the district court's rulings.

On appeal, the Sixth Circuit panel cited a corruption scandal in Kentucky's state legislature in the early 1990s involving the horse racing industry as justification for the challenged provisions. With respect to Kentucky's year-round lobbyist contribution ban, the judges pointed to a 2011 U.S. Court of Appeals for the Fourth Circuit decision upholding a similar ban in North Carolina. The Sixth Circuit rejected the Kentucky plaintiffs' argument that more recent instances of corruption are required to justify the state's ongoing ban on lobbyist contributions.

Regarding Kentucky's legislative session ban on lobbyist employer and PAC contributions, the Sixth Circuit held that the law was "closely drawn" to "target[] the time when the risk of quid pro quo corruption – especially its appearance – is highest." When legislators are "poised to cast a favorable (or unfavorable) vote on a pet bill," the judges reasoned, contributions by lobbyist principals and PACs "could cause Kentuckians to question whether the contribution motivated the vote."

Finally, regarding Kentucky's ban on gifts from lobbyists and lobbyist principals, the Sixth Circuit rejected the plaintiffs' First Amendment claims on the ground that the ban "does not prevent lobbyists and legislators from meeting" and "does not forbid any interaction ... between the two." Rather, the court reasoned, the Kentucky law only prohibits lobbyists and lobbyist principals from paying for beverages, meals, entertainment, and other items while meeting with state legislators.

Most states impose restrictions of some form on gifts to government officials and employees, especially on gifts from lobbyists, lobbyist principals, and state vendors. There are also typically exceptions to these gift restrictions with varying degrees of permissiveness. Like Kentucky, a number of states also restrict campaign contributions from lobbyists or during legislative sessions. Wiley Rein's Election Law Practice advises clients on state and local gift and campaign finance restrictions in all 50 states. An **online 50-state lobbying and gift law summary** also is available by subscription. ■

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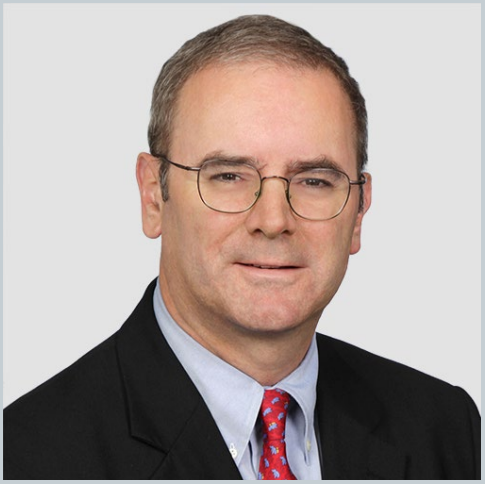
Michael Toner and Karen Trainer Co-Author Book Chapter on 2018 Midterm Spending and Implications for 2020 Election

Michael E. Toner and **Karen E. Trainer** co-authored a chapter of a recently released book titled *The Blue Wave: The 2018 Midterms and What They Mean for the 2020 Elections*. In Chapter 8, "The Money Wars: Emerging Campaign Finance Trends and Their Impact on 2018 and Beyond," Michael and Karen explore emerging campaign finance trends and their impact last year on what turned out to be the costliest midterm election in U.S history.

The book was edited by renowned University of Virginia political analyst Larry J. Sabato and Kyle Kondik, managing editor of the award-winning newsletter *Sabato's Crystal Ball*. The book features a compilation of well-respected authors from across the political spectrum, who examine the 2018 election and its implications for next year's presidential race.

The Blue Wave, edited by Larry J. Sabato and Kyle Kondik, is available for sale **here**. Chapter 8 is made available with the permission of Rowman & Littlefield Publishing Group, all rights reserved, and can be viewed **here.**



New Jersey to Regulate Certain 527 and 501(c)(4) Organizations as 'Independent Expenditure Committees'

By D. Mark Renaud and Louisa Brooks

On June 17, 2019, New Jersey Governor Phil Murphy signed Senate Bill 150 (S150), a campaign finance bill aimed at enhancing disclosure by so-called "dark money" groups operating in the state, including organizations engaged in gassroots lobbying and issue advocacy activities. Gov. Murphy had initially issued a 20-page conditional veto to an identical bill in May, but decided to sign S150 in light of an impending override by the state legislature.

The new law introduces a new creature to be regulated under New Jersey campaign finance law: the "independent expenditure committee" (IEC), defined as a 527 or 501(c)(4) organization that raises or expends at least $3,000 annually to influence elections; to influence "the passage or defeat of any public question, legislation, or regulation"; or to provide "political information" regarding "any candidate or public question, legislation, or regulation." As used in the statute, "political information" includes a statement made via virtually any medium that "reflects the opinion of the members of the organization" or "contains facts" about a candidate, public question, legislation, or regulations. In other words, under the new law an organization will qualify as an IEC in New Jersey if it spends $3,000 or more in a year not only on candidate advocacy, but also on efforts to influence or provide "political information" about legislation, regulations, or any public question.

A group that qualifies as an IEC must file quarterly reports that disclose all incoming contributions of $10,000 or more – including the identities of the contributors – and all expenditures of $3,000 or more. IECs are also required to file late reports if they meet certain activity thresholds in close proximity to an election.

S150 is already being challenged in federal district court in New Jersey on First Amendment grounds. There is also some discussion that the legislature could pass a "cleanup" bill to address and revise certain provisions of the law, but no timeline or details have been offered for such an effort. ■

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Senator Grassley Introduces New Bipartisan FARA Reform Legislation

By Daniel B. Pickard and Tessa Capeloto

On June 10, 2019, U.S. Sen. Chuck Grassley (R-IA) introduced the Foreign Agents Disclosure and Registration Enhancement Act, which aims to improve compliance and enforcement of the Foreign Agents Registration Act (FARA) by enhancing the U.S. Department of Justice's (DOJ) investigative tools and increasing penalties for violations. In addition, the bill directs the U.S. Government Accountability Office (GAO) to audit FARA's Lobbying Disclosure Act (LDA) exemption to study whether the exemption is being misused or abused. The legislation is co-sponsored by Sens. Dianne Feinstein (D-CA), John Cornyn (R-TX), Jeanne Shaheen (D-NH), Marco Rubio (R-FL), and Todd Young (R-IN).

The Foreign Agents Disclosure and Registration Enhancement Act proposes a number of amendments to the FARA statute, including:

Providing the Attorney General with Civil Investigative Demand authority to investigate possible violations by those who should register as foreign agents;

Increasing criminal fines and establishing new civil penalties for noncompliance; requiring DOJ to develop and implement a comprehensive enforcement strategy for FARA; and

Requiring the GAO to produce a report on the effectiveness of these amendments.

In addition, the bill directs GAO to audit FARA's LDA exemption, including providing an analysis of whether the exemption leads to misuse or abuse of Federal lobbying registration and disclosure requirements.

This legislation is similar to Senator Grassley's Disclosing Foreign Influence Act, which he introduced in the 115th Congress, but with several important substantive and procedural differences. The old bill would have eliminated the LDA exemption, however, this new bill only calls for an audit of the exemption. Moreover, the 115th Congress featured an array of FARA reform bills in the Senate, which all failed to find traction. The Foreign Agents Disclosure and Registration Enhancement Act differs in that Senators who individually pushed FARA reform bills in the 115th Congress have now come together in a bipartisan manner to champion a single bill.

This new legislation pursues a more conservative approach to the LDA exemption and adds a strong bipartisan coalition of original co-sponsors. This makes the Foreign Agents Disclosure and Registration Enhancement Act immediately more popular than the Disclosing Foreign Influence Act and more likely to become law. ■

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FEC Notify System Provides Alerts for New FEC Filings

By Brandis L. Zehr and Karen E. Trainer

The Federal Election Commission (FEC) recently announced its "FEC Notify" system, which allows users to sign up to receive email alerts when particular political committees submit electronic filings to the FEC, including amendments. A beta version of the system was launched earlier this year.

In its press release regarding the new system, the FEC indicated that additional system capabilities will be introduced later in 2019. These additional capabilities include notifications of paper filings and a "Watch List" that will allow users to sign up for notifications when a candidate or committee files an initial registration.

The FEC Notify system can be accessed at **https://fecnotify.fec.gov/fecnotify/**. ■

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Ninth Circuit Ruling Continues Trend of Adding Sarbanes-Oxley Charges to Campaign Finance Violations

By Eric Wang

A U.S. Court of Appeals for the Ninth Circuit panel recently upheld the convictions of defendants involved in making prohibited foreign national contributions in connection with San Diego local elections. Notably, the court also upheld the defendants' convictions under the false records provision in the Sarbanes-Oxley law with respect to false campaign finance reports that were filed as a result of defendants' coverup of the prohibited contributions. The decision continues and extends a trend of courts upholding federal prosecutors' expansive applications of Sarbanes-Oxley to campaign finance violations.

Jose Azano, a foreign national, and his co-conspirators sought to influence San Diego local politicians during the 2012 election cycle with campaign contributions. To effectuate these contributions, the conspirators concealed Azano's identity using straw donors. In addition, Azano paid a campaign vendor to provide services free of charge to the politicians, resulting in in-kind contributions. Ravneet Singh, the vendor's CEO, misrepresented to the politicians that he was working for them "voluntarily" or vaguely stated that his bills had been "taken care of."

These schemes not only violated the federal ban against foreign nationals making contributions in connection with U.S. elections, but they also caused the candidates to fail to report the in-kind contributions and Azano as the true source of the contributions. Azano and Singh were convicted

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of, among other things, falsifying records in violation of Sarbanes-Oxley.

Appellants appealed the verdict on all counts, raising multiple arguments for reversal. Focusing on the expansive application of the Sarbanes-Oxley provision, appellants argued that the prosecutors did not establish the elements of the provision. Moreover, appellants argued that the federal government did not have jurisdiction because the provision is meant to cover federal conduct, and appellants' conduct pertained exclusively to a local election and violated only state and local law.

Section 1519 of Sarbanes-Oxley makes it a crime for anyone to "knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States."

With respect to his conviction, Singh argued that he did not personally prepare any of the campaign finance reports that provided the hook for Sarbanes-Oxley to apply. However, the Ninth Circuit held that Singh was still liable because Section 2(b) of Sarbanes-Oxley prohibits anyone from indirectly violating any of the law's provisions, and here Singh had indirectly caused the candidates receiving the in-kind contributions to file false reports.

As for jurisdiction, the court agreed that violations of state and local campaign finance reporting laws, in and of themselves, do not fall within the federal government's jurisdiction. However, the FBI investigates criminal violations of the Federal Election Campaign Act ("FECA"), which prohibits foreign nationals from contributing in connection with any federal, state, or local election. Thus, the court held that the fact that the reports were filed pursuant to state law has no bearing since they were sought in connection with the investigation of a federal crime—foreign national contributions. This last issue further expands the reach of the Sarbanes-Oxley provision, which, until now, has only ever been applied to federal reporting violations, and only in two other cases: *U.S. v. Benton* (U.S. Court of Appeals for the Eighth Circuit, 2018) and *U.S. v. Rowland* (U.S. Court of Appeals for the Second Circuit, 2016). In those cases, the courts held that a defendant may properly be convicted for violations of the FECA and Sarbanes-Oxley with respect to federal campaign finance reports. Here, by contrast, the defendants' Sarbanes-Oxley violations occurred in connection with local elections and violated state and local reporting requirements, while also violating the federal ban on foreign national contributions.

In its 2015 ruling in *Yates v. U.S.*, the U.S. Supreme Court held that applying Sarbanes-Oxley to a fisherman who had thrown illegally caught fish overboard to evade federal inspectors was a bridge too far. The Court warned against "cut[ting Section] 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent." Nonetheless, the recent decisions in the lower courts demonstrate that Sarbanes-Oxley, which was enacted in 2002 in the wake of the Enron accounting scandal, continues to creep into campaign finance prosecutions. Regardless of whether one is on the giving or receiving end of a campaign contribution, this broad application of the financial fraud law adds another layer of potential legal liability.

The Ninth Circuit decision is *U.S. v. Singh,* No. 17-50337 (9th Cir. May 16, 2019).

The Sixth Circuit decision is *Schickel v. Dilger,* Nos. 17-6456/6505 (6th Cir. May 30, 2019). ■

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Campaigns, Beware of Using Copyrighted Material!

By Richard W. Smith and Bruce L. McDonald

As the election cycle heats up, we think this might be a good time to remind everyone that careless use of songs or photographs in campaigns can give rise to copyright infringement challenges that can pose serious risks. Advance planning and careful coordination among those engaged in preparing campaign materials can save considerable pain.

To provide context, we would like to recall an example that occurred during John McCain's 2008 campaign for President against Barack Obama. Anticipating an appearance by Senator Obama in Ohio during early August, the Ohio Republican Party created a pro-McCain television commercial criticizing Obama's suggestion that the country could conserve gasoline by keeping automobile tires properly inflated. A sound recording of Jackson Browne singing his platinum hit song *Running on Empty* played in the background. The commercial was broadcast in Ohio and Pennsylvania, posted on YouTube, and made available on various websites. Mr. Browne, an Obama supporter, objected that the commercial falsely suggested he sponsored, endorsed, or was associated with Senator McCain and the Republican Party. As owner of the song copyrights, he brought suit in Los Angeles federal court on August 14, 2008, naming as defendants John McCain, the Republican National Committee, and the Ohio Republican Party.

Such alleged infringements and suits can prove damaging in several ways. They can trigger adverse publicity in the media. They can interfere with the continued use of the subject piece in the manner its creators intended, even if injunctive relief is not sought. The litigation itself can be both expensive and distracting. Moreover, a copyright infringement suit can involve litigation discovery by hostile political interests that can provide them access to information that can lead to other difficulties.

If the defendant loses, he or she may be liable for any provable actual damages or, in the alternative, as much as $150,000 per infringed work in statutory damages. 17 U.S.C. § 504. In addition, there is the possibility that the court may order the infringer to pay the copyright owner's legal fees. *See, e.g. Long v. Ballantine*, 1998 U.S. Dist. Lexis 7813 (D.N.C. 1998) (awarding fees and costs following jury trial). There is also the possibility of being enjoined from future infringement. 17 U.S.C. §502.

This is not to suggest that all or most such lawsuits ultimately prove to have merit. To the contrary, numerous infringement defenses eventually can be effective in appropriate circumstances, but there is real risk and no silver bullet. Contrary to what many assume, the First Amendment right of free speech, while relevant, does not immunize political ads. "The mere fact that Plaintiff's claim is based on Defendants' use of his copyrighted work in a political campaign does not bar Plaintiff's claim as a matter of law." *Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009).

Many campaign defendants rely on the Copyright Act defense of "fair use," 17 U.S.C. § 107. That defense can succeed, as it did in one recent case in which Wiley Rein represented the defendant. *Peterman v. Republican National Committee*, 2019 U.S. Dist. Lexis 28828 (D. Mt. 2019) (involving copied photograph of candidate).

The fair use defense can have differing success in various circumstances, in part because it involves the court's applying the following somewhat ambiguous and fact-intensive standards provided by Section 107:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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4. the effect of the use upon the potential market for or value of the copyrighted work.

That framework means that often the fair use defense will not be decided on a threshold motion to dismiss, although there are exceptions. *See, e.g.*, *Galvin v. Ill. Republican Party*, 130 F. Sup. 3d 1187 (N.D. Ill. 2015) (claim based on altered photo of candidate dismissed as fair use). More commonly, however, the court will conclude that before the defense can be fairly assessed, the record needs to be developed beyond mere complaint allegations. That was the position taken by U.S. District Judge R. Gary Klausner (appointed by President George W. Bush) in the *Running on Empty* case. *Browne v. McCain*, 612 F. Supp. 2d 1125, 1131 (C.D. Cal. 2009) (citing "underdeveloped factual record, limited factual allegations in the Complaint, [and the] existence of potentially disputed materials facts"). Such rulings mean that more time may be spent in developing the record through discovery, with the attendant additional costs and risks. Moreover, there is no guarantee that the defense will succeed on summary judgment. *See, e.g., Henley v. Devore*, 2010 U.S. Dist. Lexis 67987 (C.D. Cal. 2010) (politicians failed to carry their burden to establish defense).

In some instances, it is possible to escape the litigation early based on lack of personal jurisdiction in the court where suit was brought. *See, e.g., Bigelow v. Garrett*, 299 F. Supp. 3d 34 (D.D.C. 2018) (no personal jurisdiction over Virginia Congressman or his campaign in District of Columbia). Indeed, in the *Browne* case, the Ohio Republican Party was dismissed because Judge Klausner found there was no personal jurisdiction over it in Los Angeles (it had constitutionally insufficient contacts). That ruling left Senator McCain and the Republican National Committee before the court, even though Senator McCain testified by declaration that he was not even aware of the Ohio advertisement until Browne brought suit.

Senator McCain and the Republican National Committee were alleged to be "vicariously liable" for the alleged copyright infringement, which was based on allegations that they had the right and ability to control the Ohio Republican Party and benefited directly from its infringements through media exposure and increased campaign contributions. Judge Klausner refused to dismiss such allegations in the absence of a more developed record. *Browne v. McCain,* 612 F. Supp. 2d 1125, 1131 (C.D. Cal. 2009).

By late July 2009 (long after the election was over), the *Browne* case was still continuing and no dispositive motions were pending. Judge Klausner had set a January 12, 2010 jury trial date. The remaining parties then entered a settlement, the terms of which were not disclosed, but which provided for dismissal of the suit with prejudice and a public apology by the defendants for using the song without permission from Browne.

The risks of such scenarios can be greatly reduced by careful and knowledgeable planning. *First*, it would be prudent for campaigns to place some person in a position of authority and ability to control the use of copyrighted material in campaign materials and events. That can reduce the chances of avoidable and unnecessary legal risks, e.g., by deciding to avoid protected material. *Second*, people involved in developing materials should be made to understand that just because you can find a song or photograph in some online source where it can be copied does not mean that it is lawful to use it. In general, publication of a work does not authorize other uses. Where multiple groups or companies are involved in the production of campaign literature, videos or advertisements, care should be taken to make clear who has the responsibility for securing any needed permissions.

In deciding what approach to take in developing a piece, bear in mind that the Copyright Act provides for the compulsory licensing of musical

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compositions and certain other works. One can license the words and music and then use one's own artists to record it. In that way, infringement can be avoided if care is taken to follow the specified licensing procedures. Also, rather than copying a picture, you can have your own photographer take a picture of the same subject, avoiding a slavish recreation.

Making your own version of a song – particularly one that obviously is a copy – has other benefits. Some singers claim, as Browne did, that their distinctive voices are a type of trademark, and that using their voice implies their support of a candidate or cause. As with copyright infringement, such claims are subject to many defenses, but they can be an expense and distraction and may lead to unfair adverse publicity.

If you believe you must copy and cannot obtain permission from the copyright owner, then bear in mind that the risks are lower when you copy a little, rather than the whole thing. *See, e.g. Thomson v. Citizens for Gallon Comm.*, 457 F. Supp. 957 (D.N.H. 1978) (copying of a copyrighted song for a few seconds for the purpose of political advertisement amounted to fair use). Also, where the use is "transformative" – using just a part of the protected work with new elements to create a new impression or to serve a new purpose – the fair use defense is significantly strengthened.

The bottom line is that using copyrighted materials can involve substantial risks. Indeed, we wind up handling cases of this type almost every year. For example, we defended an ad using recreated excerpts of a 1950s sci-fi monster, the Blob, to represent the federal deficit; an ad using the popular song "Our House" to mock an eco-candidate's lavish personal lifestyle; and use of "Eye of the Tiger" as an unofficial campaign theme song. Typically, the issues could have been avoided with a little advance legal planning. ■

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FARA: What You Need to Know About the Foreign Agents Disclosure and Registration Enhancement Act of 2019

Robert L. Walker, of counsel in Wiley Rein's Election Law and Government Ethics Practice, and **Daniel B. Pickard**, partner and co-chair of the firm's National Security Practice, discuss U.S. Senator Chuck Grassley's (R-IA) recent introduction of the S. 1762: Foreign Agents Disclosure and Registration Enhancement Act, which aims to improve compliance and enforcement of the Foreign Agents Registration Act (FARA). Listen **here**.

Nationwide Round-Up: Changes to State Lobbying Laws

By Caleb Burns and Louisa Brooks

Several states have amended their lobbying laws in 2019, with a number of changes going into effect on July 1. Below is a summary of the most recent updates:

Idaho amended its lobbying law to expressly exempt members of a trade association from lobbyist registration when the trade association itself is registered and reporting as a lobbyist, and its members are acting at the trade association's request or direction. The amended law also clarifies the procedures for corporate entities that register and appoint a "designated" lobbyist for the purpose of avoiding registration for their individual employees.

Louisiana increased the dollar limit for its "meal and beverage" gift exception to $62 (previously $61).

Nevada amended its lobbying law to require lobbyists to file a supplementary registration statement within 24 hours if their registration information changes during a regular or special legislative session. For changes that occur when the legislature is not in session, the lobbyist has 14 days to file the supplementary registration statement. The amendments also clarify that the state's lobbyist gift ban prohibits a lobbyist from arranging, facilitating, or acting as a conduit for a gift to a member of the Legislative branch or a member of his or her immediate family.

Beginning with the next report due on October 9, **New Mexico** will require lobbyists to disclose the cumulative total of all individual expenditures of less than $100 made or incurred during the reporting period. (Previously, expenditures under $100 did not have to be disclosed at all.) Stay tuned for additional updates on the state's forthcoming independent ethics commission, which came into existence this month but will not have enforcement authority until January 1, 2020. ■

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JCOPE Extends Filing Deadline for Client Semi-Annual Reports and Source of Funding Disclosure

By Karen Trainer

The New York State Joint Commission on Public Ethics (JCOPE) updated its lobbying application system to allow lobbyist clients to file through the system beginning in early July. Because the July 15, 2019 deadline for submitting semiannual **client** reports and source of funding disclosure reports falls only a few days after the system update, JCOPE is granting an extension on filing these reports until July 31, 2019.

The extension does **not** apply to lobbyist bi-monthly reports. The deadline for filing lobbyist bi-monthly reports covering May and June remains July 15, 2019.

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House Amends and Accelerates Subpoena Enforcement Process

By Robert L. Walker and Louisa Brooks

The U.S. House Committee on the Judiciary continues to await a response to subpoenas it issued earlier this year to Attorney General William Barr and former White House Counsel Don McGahn. But, after a resolution recently passed by House Democrats, it may be only a matter of time before Judiciary Committee Chair Jerry Nadler (D-NY) seeks to enforce these subpoenas in the Federal courts. And, beyond impacting House enforcement of subpoenas to the Federal executive branch, the recent resolution will also accelerate the process through which the House may go to the Federal courts to enforce document or testimonial subpoenas issued to private individuals, corporations, and other organizations.

On June 11, 2019, by a party-line vote of 229 to 191, the U.S. House of Representatives passed House Resolution (H. Res.) 430, addressing the process by which the House may seek Federal court enforcement of committee subpoenas. In floor debate Rep. Doug Collins (R-GA) called the resolution "a novel, untested, and risky proposition" by an "audacious" majority. Conversely, bill sponsor and Chair of the House Committee on Rules Rep. James McGovern (D-MA) characterized it as "an appropriate response" to the "administration's constant obstruction" and stated it would "strengthen our hand in court as Congress tries to get the documents [the] administration is currently trying to hide . . ."

Whether H. Res. 430 represents a sea-change in House process and procedure for subpoena enforcement or merely affirms existing protocol, the resolution achieves two principal purposes: First, it substantially bolsters the legal position that committee chairs have standing to enforce subpoenas in Federal court, even without a supporting vote by the full House. Second, by facilitating committee chairs' inherent enforcement authority, it allows the majority to pursue enforcement of current and future subpoenas without repeated and protracted interruption of the public proceedings of the full House.

H. Res. 430 has two major prongs. First, it specifically authorizes the Chair of the Judiciary Committee "to initiate or intervene in any judicial proceeding in any Federal court" to seek declaratory judgments with respect to, or to otherwise seek enforcement of, the subpoenas issued to Attorney General Barr and to McGahn. Following a June 10, 2019 announcement that DOJ had agreed to comply with the Committee's subpoena, any potential enforcement litigation against Attorney General Barr is currently in abeyance. As to the outstanding subpoena to McGahn for his testimony, press reports at the time of this writing suggest that enforcement action under H. Res. 430 may be imminent.

Of note, neither the Judiciary Committee nor the full House has found Attorney General Barr or McGahn to be in contempt as a result of the outstanding Judiciary Committee subpoenas. Opponents of H. Res. 430 have pointed out that House authorization to seek enforcement in Federal court, without a preceding House finding of contempt, is unprecedented. As Rep. Debbie Lesko (R-AZ) observed during floor debate, "[t]he House has only sued for documents twice before. In both cases, the individuals in question were first found in contempt of Congress at both the committee level and by the full House. This has not happened here."

This innovation to House procedure and precedent regarding subpoena enforcement – that is, authorizing enforcement without a preceding finding that the subpoenaed individual is in contempt of the relevant committee or of the House – is taken even farther in the second major prong of H. Res. 430, which provides with respect to ***any*** House subpoena (i.e., not just subpoenas issued to the executive branch):

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House Amends and Accelerates Subpoena Enforcement Process

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> That the chair of each standing and permanent select committee, when authorized by the Bipartisan Legal Advisory Group, retains the ability to initiate or intervene in any judicial proceeding before a Federal court on behalf of such committee, to seek declaratory judgments and any and all ancillary relief, including injunctive relief, affirming the duty of the recipient of any subpoena duly issued by that committee to comply with that subpoena. Consistent with the Congressional Record statement on January 3, 2019, by the chair of the Committee on Rules . . ., a vote of the Bipartisan Legal Advisory Group to authorize litigation and to articulate the institutional position of the House in that litigation is the equivalent of a vote of the full House of Representatives.

The Bipartisan Legal Advisory Group (or "BLAG") comprises the Speaker, the Majority and Minority Leaders, and the Majority and Minority Whips; in other words, although BLAG is nominally bipartisan, the majority party controls it by a margin of 3 to 2. So, as now authorized by H. Res. 430, the chair of each standing and permanent select committee of the House needs only the authorization of the majority-controlled BLAG – without any action by the committee or full House, either on contempt or on subpoena enforcement – to seek a ruling in Federal court affirming the validity of the subpoena and the duty of the recipient to comply. If the recipient then refuses to comply with the subpoena, the court may initiate contempt of court proceedings.

Proponents have characterized H. Res. 430 as no more than a "reaffirmation" of authorization already provided by House Rule II(8)(b). This characterization of H. Res. 430's pedigree may be technically correct, but realistically it is a bit of a stretch. Here's why.

House Rule II(8)(b) provides as follows:

> There is established a Bipartisan Legal Advisory Group composed of the Speaker and the majority and minority leaderships. Unless otherwise provided by the House, the Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters.

The purpose of this clause in the House Rules is to explicitly authorize BLAG to act *as and for* the House in relevant Federal district court litigation – that is, to bolster BLAG's claim to legal standing on behalf of the House. But does the phrase "all litigation matters" as used in the Rule encompass all legal proceedings in Federal court relating to enforcement of a House committee subpoena? After all, the House adopted Rule II(8)(b) in 2015 in the context of a very specific historical backdrop – namely, BLAG's intervention on behalf of the House in lawsuits challenging the constitutionality of the Defense of Marriage Act. To address apparent concerns as to whether the authorization in Rule II(8)(b) also encompasses committee subpoena enforcement, Rules Committee Chair McGovern explained in a January 3, 2019 Congressional Record statement:

> If a Committee determines that one or more of its duly issued subpoenas has not been complied with and that civil enforcement is necessary, the BLAG, pursuant to House Rule II(8)(b), may authorize the House Office of General Counsel to initiate civil litigation on behalf of [that] Committee to enforce the Committee's subpoena(s) in federal district court.

But Chairman McGovern's individual January 3 statement, even though included in the Congressional Record, was not an action, or an authorization, by the full House regarding the authority of House committees in subpoena enforcement actions. H. Res. 430, on the other hand, *does* provide such full House authorization. Further, it materially expands on Chairman McGovern's statement to make clear that, following an authorizing vote by BLAG, subpoenas may be enforced by committee

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FEC Clears Partisan Commercial Fundraising Platform

By Lee E. Goodman

In June, the Federal Election Commission (FEC) dismissed a complaint against Crowdpac, Inc., a for-profit online fundraising platform devoted almost exclusively to raising funds for Democratic candidates and liberal causes. The Commission voted unanimously to find no reason to believe that Crowdpac was a political committee or that it made corporate contributions or expenditures in behalf of the campaigns for which its platform raised funds. The Crowdpac matter is noteworthy because it marks the first unanimous vote by the Commission concluding that online platforms that raise funds for one political party are commercial services and not political committees. The Crowdpac matter also is noteworthy because Crowdpac was funded in significant part by voluntary donations in addition to nominal transaction fees paid by platform users.

The background of the matter is significant. In 2014, Crowdpac requested an advisory opinion seeking clearance to operate as a nonpartisan fundraising platform that would cover its overhead and make a profit through the transaction fees it charged the contributors who used its algorithmic matching service. It promised to match platform users with any candidate, Republican, Democrat, or other, who shared their values and policy positions and to facilitate their financial support to those candidates. Based on those representations, the Commission unanimously issued an advisory opinion concluding that Crowdpac's fundraising service did not constitute a contribution or expenditure in behalf of candidates and Crowdpac was not a political committee. It was a bona fide commercial service exempt from FEC contribution restrictions and reporting requirements.

Since 2014, Crowdpac's business model changed. It removed virtually all Republicans from its website and began raising contributions almost exclusively for Democratic candidates and liberal causes. Crowdpac claimed that "commerical interests drove its decision to

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House Amends Subpoena Enforcement Process

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chairs; may include initiation of or intervention in subpoena enforcement actions in Federal court; and may include seeking declaratory judgments and any other ancillary relief.

Will the procedure created/affirmed by H. Res. 430 accelerate the actual civil enforcement process with respect to House subpoenas issued to an Administration or its agencies, or to private individuals or entities? Yes, but perhaps only marginally. By clarifying that a vote of the full House is not required, H. Res. 430 will certainly cut down on the time needed within the House to authorize an enforcement action and to place the issue before a court. But this may shave only days, or at most weeks, off the total process. At least with respect to subpoenas to Administration officials or to executive branch agencies, the exceedingly rare cases that have reached Federal court for civil enforcement have taken years to resolve – when they have been resolved at all. At this time, the subpoena enforcement action commenced in August 2012 by the House Oversight and Government Reform Committee against then-Attorney General Eric Holder is still pending final, formal resolution. ■

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FEC Clears Partisan Commercial Fundraising Platform

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suspend Replublican candidates from its site." Crowdpac also sponsored the controversial fundraising campaign that targeted Maine Senator Susan Collins over her vote to confirm Supreme Court Justice Brett Kavanaugh, a campaign that purports to have raised nearly $4.5 million for Senator Collins' eventual Democratic opponent. Additionally, Crowdpac started accepting voluntary donations as an integral part of its revenue model. The combination of partisan fundraising services funded by donations made Crowdpac look like a political action committee to two Republican candidates whose opponents received contributions through Crowdpac, so they filed complaints with the FEC.

Historically, the Commission has approved nonpartisan online fundraising services by analogy to more traditional nonpartisan contribution delivery services, such as UPS or Federal Express, which deliver contributions to candidates as a commercial service to the contributors who pay their delivery fees without regard to the partisanship of the contributors or recipient campaigns. The Commission concluded that so long as the contributors were paying a fee for a nonpartisan commercial delivery or fundraising service, the service was provided to the contributor rather than the recipient campaign.

But the Commission was divided over the issue of partisan selectivity in the provision of fundraising services. For example, in Advisory Opinion 2015-3, for-profit company MyChange.com planned to offer a service to contributors that allowed them to round up their credit card purchases to the nearest dollar and contribute the rounded-up funds to a list of candidates selected by MyChange because MyChange judged the candidates to share its "users' ideology and values." Although the Commission generally approved MyChange's proposal, the advisory opinion included a lengthy explanation (footnote 3) about the Commission's sharp disagreement over the legal significance of MyChange's selectivity in choosing the candidates on its limited list of eligible recipients. Three Democratic commissioners believed MyChange's selection of the recipients based upon "ideology and values" rendered MyChange's platform a service to the recipient committees (rather than the contributors), while three Republican commissioners believed MyChange was free to offer a service to contributors who desired MyChange's professional assistance in identifying candidates who shared their values.

Subsequently, in Advisory Opinion 2017-06, the Commission approved, by a 4 to 1 vote, an opinion clearing the way for a for-profit company to identify for its customers the most competitive Democratic candidates whose election could change control of Congress to the Democratic Party and to facilitate their contributions to those campaigns. The opinion contained a footnote giving lip service to the lingering disagreement over the legal implications of the company's partisan selectivity, but the four-vote majority represented movement in favor of commercial fundraising services with a partisan bias.

The Crowdpac vote in June 2019 marks the first unanimous vote of commissioners endorsing avowedly partisan online fundraising services, and this matter had the added dimension of a commercial service funded in significant part by user donations. This precedent will be important to all future fundraising services offered to contributors.

Incidentally, a week after the FEC matter closed, Crowdpac announced it was closing operations. Its website now directs interested contributors to Act Blue's website, an exclusively pro-Democratic fundraising platform that is registered as a political committee with the FEC. ■

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New IRS Electronic Filing Requirements for Tax-Exempt Organizations

By Thomas W. Antonucci and D. Mark Renaud

Per the Taxpayer First Act, signed by President Trump on July 1, 2019 (Pub. L. No. 116-25), all tax-exempt organizations are required to file IRS Form 990 electronically. Moreover, the new law requires that 527 political organizations file IRS Form 8872 electronically. (Note that federal PACs do not file Form 990 nor Forms 8871 or 8872.)

For most tax-exempt organizations, the requirement applies to the entity's next taxable year beginning after July 1, 2019. For smaller organizations (generally those that are permitted to file a Form 990-EZ, i.e., with receipts less than $200,000 and assets less than $500,000) and Form 990-T filers, the new law provides that the Secretary of the Treasury can delay the electronic filing requirement until the taxable year beginning on or after July 1, 2021. ■

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Events & Speeches

Compliance Workshop: Prior Approval and Association PAC Compliance
Public Affairs Council
Michael E. Toner, Speaker
July 16, 2019 | Washington, DC

Foreign Corrupt Practices Act (FCPA) Midyear Review
Wiley Rein LLP
Daniel Pickard, Speaker;
Laura El-Sabaawi, Speaker;
Kevin Muhlendorf, Speaker
July 16, 2019 | Webinar

Basics of the Federal Election Campaign Act 2019
Practising Law Institute
Jan Witold Baran, Speaker
August 1, 2019 | Audio Briefing

Recent Changes in State Campaign Finance Laws
Republican National Lawyers Association Election Law Seminar
Eric Wang, Speaker
August 2, 2019 | Charlotte, NC

When Congress Investigates: Breaking Down the Nuts and Bolts of Congressional Investigations
2019 FBA Annual Meeting & Convention
Peter S. Hyun, Panelist
September 5, 2019 | Tampa, FL

Corporate Political Activities 2019: Complying with Campaign Finance, Lobbying and Ethics Laws
September 5-6, 2019 | Washington, DC
Practising Law Institute
Jan Witold Baran, Chair & Speaker,
Caleb P. Burns, Speaker

Hot Regulatory Topics for Hedge Fund Managers
Hedge Fund Management 2019
D. Mark Renaud, Speaker
September 10, 2019 | New York, NY

Corporate Political Law Compliance 2019
Practising Law Institute
Jan Witold Baran, Chair & Speaker,
Caleb P. Burns, Speaker
October 3, 2019 | San Francisco, CA

Fort Wayne, Indiana's Pay-to-Play Law Enjoined

By D. Mark Renaud and Carol Laham

Fort Wayne, Indiana's pay-to-play ordinance has been permanently enjoined by an Indiana trial court as an impermissible regulation of campaign finance by a municipality under Indiana state law. *Witwer v. City of Fort Wayne*, Cause No. 02D03-1904-MI-318 (Allen Cnty. Super. Ct. Jun. 11, 2019) (order granting permanent injunction). This decision did not involve any First Amendment analysis.

The city had until July 11, 2019 , to appeal the decision, but the city reportedly was unlikely to do so. *See* Darrin Wright, Fort Wayne "unlikely" to appeal "Pay-to-Play law" ruling, WOWO. COM (Jun. 26, 2019), **https://www.wowo.com/fort-wayne-unlikely-to-appeal-pay-to-play-law-ruling/**. ■

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D.C. Circuit Upholds FINRA Pay-to-Play Rule

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and enacted to prevent circumvention of the SEC's rule, prohibits, among other things, a FINRA broker-dealer member from receiving compensation for investment advisory services from state and local pension and other funds for two years after the FINRA member and its covered associates make a prohibited contribution to a candidate for, or holder of, an elected office that awards such investment advisory business or appoints the persons who make such awards.

The opinion can be found at **https://www.courthousenews.com/wp-content/uploads/2019/06/staterepubsec.pdf**. ■

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The First Amendment Right to Political Privacy, Chapter 5 – Talley, McIntyre, Jehovah's Witnesses and the Right to Speak Anonymously

By Lee Goodman

So far, this series has traced the jurisprudential seeds and growth of the First Amendment's protection against forced disclosure of members of private associations, beginning with American communists and following the doctrine through a series of diverse organizations. In Chapter 4, we considered the Supreme Court's unanimous, full-throated ruling in *NAACP v. Alabama* that the First Amendment protects associational privacy. In this Chapter 5, we will pick up with the first significant doctrinal extension of *NAACP,* to protect anonymous speech, in *Talley v. California* and follow that doctrine through a series of opinions decided over the next four decades by solid Court majorities.

From Associational Privacy in *NAACP* to the Right to Speak Anonymously

The NAACP's reply brief in the *Alabama* case was remarkable for the breadth with which it argued an issue that did not appear obvious from the facts of the case. The NAACP's opening brief hewed closely to the Supreme Court's rulings in *Rumely*, *Sweezy*, and *Watkins*, all cases about associational privacy and efforts by organizations to resist exposing their financial supporters and fellow partisans. Associational privacy was the relevant issue in the *Alabama* case too. Yet the NAACP briefed a much broader, and seemingly off track, issue in its reply brief: the right to *speak anonymously*.

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.[1] The NAACP's argument echoed the ideas of Judge Edgerton's dissent in *Barsky v. United States*, which had observed that "[p]ersons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail."[2]

The *NAACP* Supreme Court did not bite. Its decision closely tracked the associational privacy principles articulated in *Rumely* and *Sweezy*. The following year, however, before the ink could dry on the *NAACP* decision, the Court was squarely presented the right to speak anonymously, in *Talley v. California.*

Talley v. California (1960)

Manuel Talley was the Action Director for a Los Angeles-based social justice organization called National Consumers Mobilization.[3] The organization printed handbills urging readers to boycott certain merchants because "they carried products of 'manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals.'"[4]

The Los Angeles ordinance provided:

> No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:
>
> (a) The person who printed, wrote, compiled or manufactured the same.
>
> (b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear.[5]

Mr. Talley was distributing handbills on the street when, upon inspection, Los Angeles officials

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determined the flyers violated the city ordinance requiring all handbills to post "the names and addresses of the persons who prepared, distributed or sponsored them."[6] Mr. Talley was arrested, convicted of violating the ordinance, and fined $10. His conviction was affirmed by the California appellate court.[7]

In a succinct opinion authored by the First Amendment purist Justice Black, the Court observed "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."[8] The Court went on to acknowledge the long tradition of anonymous speech in England and the United States, observing that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind"[9] and further that "[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes."[10]

Then, invoking *NAACP* and its offspring, *Bates v. City of Little Rock*, the Court concluded:

> [T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it … is void on its face.[11]

The *Talley* decision was decided by a vote of 6 to 3, and the majority opinion was met with a dissenting opinion authored by Justice Clark (joined by Justices Frankfurter and Whittaker). Justice Clark wrote in dissent that "I stand second to none in supporting Talley's right of free speech—but not his freedom of anonymity. The Constitution says nothing about freedom of anonymous speech."[12]

Significantly, the Court struck the ordinance facially while making no mention of any kind of threats or actual retaliation against Mr. Talley, the National Consumers Mobilization organization, or any of its members. In fact, the "record is barren of any claim, much less proof, that [Talley] will suffer any injury whatever by identifying the hand-bill with his name," the dissent lamented. "Unlike [*NAACP*], which is relied upon, there is neither allegation nor proof that Talley or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility.'"[13]

The unconditional right to political privacy was now definitively established in American jurisprudence, not just in the realm of political association, but in the realm of political and arguably commercial speech (a consumer boycott is arguably commercial speech discouraging consumers from engaging in certain commercial transactions).

Talley in Repose

The right of anonymous speech and *Talley* were left in repose for over three decades. In the meantime, the Court's jurisprudence of political privacy meandered through compulsory disclosure rules in discrete contexts, such as making contributions directly to candidates. The most significant decision came in 1976, in *Buckley v. Valeo*, where the Supreme Court upheld the constitutionality of compelled disclosure of financial contributors to federal campaigns for public office as well as those who made independent expenditures to expressly advocate the election or defeat of federal candidates for the objective of preventing corruption of federal officeholders and informing voters of the interests to which they might be beholden.[14] The Court acknowledged the deleterious effects on free speech and association under *NAACP* and *Talley*, but found a sufficient governmental interest justifying compelled exposure of contributors

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and independent spenders. The Court went further by establishing a special exception for small or unpopular political organizations especially vulnerable to harassment, threats, or reprisals due to dissident beliefs in accordance with *NAACP*.[15]

The Court also endorsed compelled exposure – in *dicta* – in two other cases. In 1978, in *First National Bank v. Bellotti*, the Court struck a state law prohibiting corporations from making expenditures to advocate the passage or defeat of popular referenda, but in a footnote invoking *Buckley* observed that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."[16]

And in 1981, in *Citizens Against Rent Control v. City of Berkeley*, the Court struck as unconstitutional contribution limits to ballot issue committees, because issues cannot be corrupted in the way that candidates can (*per Buckley*), but in *dicta* observed that "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions."[17]

In yet a fourth decision, in 1982, the Court returned to privacy in *Brown v. Socialist Workers '74 Campaign Committee*, which applied *Buckley*'s exception from compelled exposure for minor political parties and harkened to *NAACP*.[18]

McIntyre v. Ohio (1995)

Talley's right to political privacy returned front and center in 1995, when the Court reaffirmed the unadulterated right to speak anonymously by a resounding vote of 7 to 2, with a set of opinions rich in history and legal reasoning.

Margaret McIntyre of Westerville, Ohio, was not a politician or director of a think tank or advocacy organization. She was a regular citizen concerned about the cost of education and tax burdens in her local community. The citizens of Westerville were considering a town referendum to raise taxes in order to increase funding for public schools.

On the evening of April 27, 1988, outside the Blendon Middle School in Westerville, Mrs. McIntyre; her son, a student in the Westerville schools; and a friend distributed leaflets opposing passage of the school tax to be voted on the following week.[19] Mrs. McIntyre distributed the leaflets at the school that evening because the Westerville superintendent of schools was holding a meeting inside the school explaining the merits of the tax. Mrs. McIntyre stood outside the school near the doorway to the meeting room and handed leaflets to people as they entered the building while her son and a friend distributed additional leaflets in the school parking lot by placing them under automobile windshield wipers. The leaflets stated:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY

> Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.
>
> Now we find out there is a 4 million dollar deficit—WHY?
>
> We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed—WHY?
>
> A magnet school is not a full operating school, but a specials school.
>
> Residents were asked to work on a 20 member commission to help formulate the new boundaries. For 4 weeks they worked long and hard and came up with a

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> very workable plan. Their plan was totally disregarded—WHY?
>
> WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.
>
> **PLEASE VOTE NO**
> **ISSUE 19**
>
> THANK YOU,
> CONCERNED PARENTS
> AND
> TAX PAYERS

Apparently Mrs. McIntyre's message bothered the superintendent, because he responded to it in the presentation while the assistant superintendent confronted Mrs. McIntyre and informed her that her flyers violated Ohio election laws.

The next evening, on April 28, 1988, a similar school meeting was held at the Walnut Springs Middle School. Mrs. McIntyre appeared outside that school and again distributed her leaflets opposing the school tax levy to persons entering the building to attend the meeting. The assistant superintendent again informed her that the leaflets violated Ohio election laws.

The following week the school tax failed to pass. Subsequently, it was defeated in a second election, but in November of 1988, on the third try, it finally passed.

What ensued was a six-year legal saga. On April 6, 1989, five months after the passage of the school tax referendum, and a year after her leafletting, Mrs. McIntyre received a letter from the Ohio Elections Commission informing her that a complaint had been filed against her by the assistant superintendent, a Mr. Hayfield. She was charged with violating Ohio Revised Code § 3599.09 (as well as two other statutes) because the leaflets she had distributed at the Blendon and Walnut Springs Middle Schools, during the two evenings in April of the previous year, did not contain her name and address. That statute provided (in pertinent part):

> No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement *the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore*.[20]

Initially, the charges were dismissed for want of prosecution. A short time later, they were reinstated at the request of the very determined assistant superintendent. On March 19, 1990, a hearing was held before the Ohio Elections Commission, which found Mrs. McIntyre had violated the law by omitting her name from the leaflets. She was fined $100.

Mrs. McIntyre appealed the violation to the Franklin County Court of Common Pleas, which reversed, holding that § 3599.09 was unconstitutional as applied. Subsequently, the Ohio Court of Appeals reversed the Court of Common Pleas and reinstated the fine.[21] That decision was affirmed by the Ohio Supreme Court on September 22, 1993, which concluded the statute and its application to Mrs. McIntyre were

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well within the bounds of the First Amendment.[22] Both decisions featured majorities and dissents that grappled with the competing lines of Supreme Court authority. The majorities relied more heavily upon *Buckley* while the dissents nodded to *Talley*.

By the time the Supreme Court granted certiorari in the case, Mrs. McIntyre had passed away. Her husband, as executor of her estate, continued the litigation, an indication of the importance of the principles at stake for his late wife and no doubt his interest in her posthumous vindication.

Justice Stevens wrote the opinion of the Court joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Justice Thomas, concurring in the judgment, thought it was important to articulate the First Amendment right under the doctrine of original intent, rather than reasoning the right into existence, and so wrote his own opinion which is a fascinating lesson in early American publishing practices.

The Court held the Ohio law unconstitutional under the First Amendment, because it banned anonymous speech on issues. The Court's analysis drew upon several lines of precedent in reaching this result.

First and foremost, the Court relied on *Talley* for the fundamental principle that the First Amendment protects anonymous speech.[23] Of course, Mrs. McIntyre cited *Talley* throughout her briefs; it was the only precedent cited "passim" in her table of contents.[24]

But the Court found mere citation to *Talley* an inadequate legal analysis and went on to expound on the right to the point of expanding it beyond the boundaries of dissident speech that might be curtailed due to the kinds of threats presented in *NAACP*. In the broadest, most unqualified exposition of the right to speak anonymously, the Court observed:

> Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[25]

Having so broadly conceived of the right, the Court went on to extend it "beyond the literary realm" or even Manuel Talley's call for an economic boycott to the "respected tradition of anonymity in the advocacy of political causes," which the Court analogized to the hallowed right to cast a secret ballot.[26]

Expanding the analysis even further, the Court reasoned that government-compelled disclaimers identifying speakers are a form of forced speech the Court had ruled unconstitutional in *Miami Herald Publishing Co. v. Tornillo*.[27] "[T]he identity of the speaker is no different from other components of the document's content that the author is free to include or exclude," the Court ruled.[28] And from that reasoning the Court conceived of the Ohio law requiring disclaimers of the speaker's identity as a categorical speech ban based on its content. That is, the Court likened anonymous speech as a "category of speech" like any other category and therefore the Ohio statute banned the entire category of speech – speech that chose to exclude from its content the name of the speaker.[29]

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Having recognized the First Amendment right (which Justice Thomas asserted was originally intended by the Founders), the Court then considered Ohio's asserted interests in infringing the right under "exacting scrutiny," which required Ohio to prove its ban against anonymous speech was "narrowly tailored to serve an overriding state interest."[30]

Ohio asserted two governmental interests. First, the ban prevented fraudulent and libelous information. Second, the ban provided Ohio citizens relevant information. In support, Ohio naturally relied upon the intervening decision of *Buckley* and the dicta in *Bellotti*.

The Court distinguished the two decisions. First, the Court observed that *Bellotti*'s brief reference to the "prophylactic effect" of exposure was only *dicta* and the Court implied that it might reach only corporate speech,[31] but ultimately disposed of *Bellotti* on the basis that the brief *dicta* relied on *Buckley*. As to that decision, the Court distinguished the government's interest in exposing financial contributors and independent spenders on behalf of candidates for public office, which was at issue in *Buckley*, from speech about issues, at issue in *McIntyre*. People can be corrupted, the Court reasoned, but issues cannot.[32] Mrs. McIntyre's speech was about political issues, and Ohio could not justify infringing her right to express her opinions anonymously.

Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton (2002)

Justice Stevens would be presented another opportunity to cement his concept of First Amendment anonymity in the law seven years later, in yet another pamphleteering case from Ohio. This time, the case was not about political advocacy, but religious proselytizing by Jehovah's Witnesses who desired to distribute religious materials door to door. The Court decided this case by a 8 to 1 vote margin (with only Chief Justice Rehnquist dissenting). The same Justices made up the majority opinion, while this time Justice Scalia joined Justice Thomas in a concurring judgment.

The Village of Stratton, Ohio, had enacted an ordinance that prohibited "canvassers" from "going in and upon" private residential property for the purpose of promoting any "cause" without first having obtained a permit from the village mayor. In order to obtain a permit, the canvasser had to complete a registration form that, among other information, required disclosure of the canvasser's "name and home address" as well as the "name and address of the employer or affiliated organization" sponsoring the canvasser.[33]

The Watchtower Bible and Tract Society of New York published religious literature for the Jehovah's Witnesses ministry. It challenged the ordinance in federal court in Ohio as a violation of the First Amendment for, among other grounds, infringing the right of the Jehovah Witnesses ministry to distribute religious pamphlets anonymously under *McIntyre*. The federal District Court upheld the ordinance with narrowing constructions. The U.S. Court of Appeals for the Sixth Circuit affirmed.[34]

The Supreme Court focused directly upon the ordinance's requirement for the pamphleteer to disclose her name as a condition of obtaining a permit from the mayor and concluded that provision was sufficient to render the ordinance unconstitutional under the First Amendment.[35]

Like *Talley* and *McIntyre*, there was no record of any kind of financial reprisals, threats, or violence. The constitutional right started the analysis and the government failed to carry its burden to justify the infringement.

The Corollary Right to *Listen* Anonymously

Although not mentioned explicitly in *Talley*, *McIntyre*, or *Watchtower*, the decisions observe that the First Amendment protects the

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speech reaching the marketplace of ideas for the benefit of the listener as much as the speaker. Implicit is the corollary First Amendment right of each citizen to access information.[36] And the right to speak anonymously directly implies a right to *listen anonymously*.

This was essentially the subject of *Rumely* where the Court ruled people have a right to purchase books privately, free from exposure pursuant to congressional subpoena.[37] A decade later, the Court struck a law requiring citizens who wanted to receive "communist political propaganda" to register their names with the U.S. Postal Service.[38] Many lower courts have had occasion to rebuff governmental efforts to pry into citizens' book purchases, library choices, and Internet searches.[39]

Concluding Observations

First Amendment jurisprudence profoundly transformed from 1948, when the D.C. Circuit Court of Appeals denied the existence of a First Amendment right to political privacy and the Supreme Court declined to even hear the issue. Judge Edgerton and Justices Black and Douglas articulated a legal right in the wilderness. But 10 years later, their dissenting concept of the First Amendment right to speak and associate privately, secretly, and anonymously was firmly embedded in Supreme Court interpretation of the First Amendment, and Justice Thomas would opine the right existed from the time of the Founding.

Once recognized, the right would protect conservative anti-New Dealer Edward Rumely, Marxist economist Paul Sweezy, civil rights advocate NAACP, economic justice pamphleteer Manuel Talley, Ohio resident Margaret McIntyre, and the Jehovah's Witnesses. The First Amendment protected a wide range of opinions and organizations, not only dissidents or minority viewpoints. The diversity of these citizens and their causes speaks volumes about how profoundly important this right has been to all Americans to associate privately, speak anonymously, and listen secretly to ideas of their choice.

As definitive as the right to political privacy became, however, a parallel line of First Amendment jurisprudence was evolving which authorized government infringements of the right. *Buckley* and its progeny recognized overriding governmental interests in certain contexts, particularly financial contributions and expenditures to elect candidates. Consequently, as important as the right to political privacy has become, many complicated debates over the metes and bounds of the constitutional protection it actually affords, and the strength of governmental interests that might justify its infringement, persist today. The legal, policy, and political debates are intensifying. Chapter 6 of this series will look at some of the more complicated and controversial contexts, including the difficult issue of campaign finance disclosure. ■

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[1] Reply Brief of Petitioner in *NAACP v. Alabama at 8* (a PDF copy is available on Westlaw).
[2] *Barsky v. United States*, 167 U.S. 241, 255 (1948) (Edgerton, *dissenting*).
[3] *See, generally,* Clayborne Carson, *et al.*, eds., *The Papers of Martin Luther King, Jr. Volume III: Birth of a New Age December 1955 – December 1956* (University of California Press 1997) (publishing letter from Dr. King to Mr. Talley discussing bus boycotts) (available online at https://kinginstitute.stanford.edu/king-papers/documents/manuel-d-talley).
[4] *Talley v. California*, 362 U.S. 60, 61 (1960).
[5] Municipal Code of the City of Los Angeles § 28.06 (1958).
[6] 362 U.S. at 63.
[7] *California v. Talley*, 172 Cal.App.2d Supp. 797, 332 P.2d 447 (App. Dept. Los Angeles Co.) (1958).
[8] 362 U.S. at 64.
[9] *Id.*

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[10] *Id.* at 65.
[11] *Id.* (citing *NAACP v. State of Alabama*, 357 U.S. 449, 462 (1958) and *Bates v. City of Little Rock*, 361 U.S. 516 (1960)).
[12] *Id.* at 70 (Clark, *dissenting*).
[13] *Id.* at 69 (Clark, *dissenting*) (citing *NAACP v. State of Alabama*, 357 U.S. 449, 462 (1958)).
[14] *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976).
[15] *Id.* at 73-74.
[16] *First National Bank v. Bellotti*, 435 U.S. 765, 792 n. 32 (1978).
[17] *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 299-300 (1981). The issue before the Court was the constitutionality of Section 602 of City of Berkeley Election Reform Act of 1974, Ord. No. 4700-N.S. In striking that provision, the Court observed that another ordinance, Section 112, which required public disclosure of all donors to a ballot measure committee, adequately served the City's purported interests. But this was *dicta* because the constitutionality of Section 112 was not before the Court.
[18] *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-93 (1982).
[19] The facts are restated from the Petitioner's Brief in *McIntyre v. Ohio*.
[20] Ohio Revised Code § 3599.09 (1988) (emphasis added).
[21] *McIntyre v. Ohio Elections Commission*, 1992 WL 230505 (Ohio App. 10th Dist., April 7, 1992).
[22] *McIntyre v. Ohio Elections Commission*, 67 Ohio 391, 618 N.E.2d 152 (1993).
[23] 514 U.S. at 341-342 (*quoting Talley*).
[24] Petitioner's Brief in *McIntyre v. Ohio* (1994 WL 144557).
[25] 514 U.S. 341-342 (emphasis added).
[26] *d.* at 342-343.
[27] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
[28] *Id.* at 348.
[29] *Id.* at 357.
[30] *Id.* at 347.
[31] *Id.* at 353-354. To the extent the Court, in 1995, implied that corporations might not have First Amendment protections or might be subject to discriminatory infringements of speech rights, that analysis would not withstand the force of the Court's 2010 decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[32] *Id.* at 354-356.
[33] Village of Stratton Ordinance No. 1998-5, Sections 116.01, 116.02, 116.03 (1998).
[34] 240 F.3d 553 (2001).
[35] *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166-167 (2002).
[36] *See, e.g., Packingham v. North Carolina*, 137 S.Ct. 1730, 173 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more…. [T]he statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind…. In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas."); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) ("The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."); *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (stating that the right to receive information is "an inherent corollary of the rights of free speech and press" because "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them" and because the right is "a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read … and freedom of inquiry…."); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press has broad scope…. This freedom embraces the right to distribute literature … and necessarily protects the right to receive it.").
[37] *United States v. Rumely*, 345 U.S. 41 (1953).
[38] *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).
[39] *See, e.g.*, *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (2002) (collecting authority); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 Conn. L. Rev. 981 (1996) (collecting authority).

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