wiley

NEWSLETTER

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

January 2019

To read the opening chapter in this series, click here.

Introduction

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

The New Dealers Investigate Conservatives, Too

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

Practice Areas

Election Law & First Amendment Litigation
Election Law & Government Ethics
Privacy, Cyber & Data Governance

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

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

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

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

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

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

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

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

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

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

Prettyman Turns for Rumely and the CCG

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

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

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

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

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

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

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

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

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

The Supreme Court Weighs In – A Jurisprudential Opening

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

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

Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas.... A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the

potential restraint is equally severe. The finger of government leveled against the press is ominous. Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears.[26]

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

Aftermath

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

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

---

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

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

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

[4] *Id.* at 55.

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

[6] Beito at 56.

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

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

[9] *Id.* at 170.

[10] *Id.*

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

[12] *Id.*

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

[14] *Id.* at 173.

[15] *Id.* at 171.

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

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

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

[17] 197 F.2d at 172.

[18] *Id.* at 174.

[19] *Id.* at 174.

[20] *Id.* at 173.

[21] *Id.* at 174.

[22] *Id.* at 175.

[23] *Id.* at 176.

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

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

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

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

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

[29] *Id.*