wiley

NEWSLETTER

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

May 2019

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

Background – Alabama Justice

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

In the 1940s and 1950s, as the national civil rights movement intensified at state and local levels, the NAACP was in the forefront of organizing civil rights protests, advocating civil rights legislation and

Practice Areas

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

policy changes, and litigating civil rights challenges to discriminatory laws, especially in southern states. These efforts were increasingly successful, as evidenced by the Supreme Court's decision in *Brown v. Board of Education of Topeka, Kansas* in 1954.[1]

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

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

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

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

"including the membership lists."[10]

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

Within five days, the NAACP produced virtually all of the records required under the order – except for its membership lists. The NAACP asserted that Alabama could not compel disclosure of its membership lists under the First and Fourteenth Amendments to the Constitution. The NAACP declined to produce its list of Alabama members because, in its view, the state court's discovery order "*per se* constituted an abridgement of its rights and those of its members to freedom of association and free speech, and because of its belief that to comply with the order would subject [the NAACP] to destruction and its members to reprisals and harassment, thereby effectively depriving [the NAACP] and its members of the right to the exercise of freedom of association and free speech."[12]

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

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

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

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

The NAACP's Arguments

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

"Negroes who seek to secure their constitutional rights do so at peril of intimidation, vilification, economic reprisals, and physical harm."[20]

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

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

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

The State of Alabama's Arguments

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

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

The Supreme Court's Unanimous Ruling

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

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

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

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

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

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

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

Significance and Progeny of the Supreme Court's Decision

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

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

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

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

The Legacy of *NAACP v. Alabama*

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

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

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

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

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

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

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

[5] *Id.*

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

[7] *Id.* at 453.

[8] *Id.*

[9] *Id.*

[10] *Id.*

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

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

[13] *Id.*

[14] 357 U.S. at 454.

[15] *Id.*

[16] *Id.*

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

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

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

[20] *Id.* at *17.

[21] *Id.* at *26.

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

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

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

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

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

[27] *Id.* at 8.

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

[29] *Id.* at *29.

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

[31] 357 U.S. at 459.

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

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

[34] 357 U.S. at 462.

[35] *Id.*

[36] *Id.* at 463.

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

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

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

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

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

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