

House of Representatives Passes Sweeping Campaign Finance and Lobbying Registration and Reporting Changes

By Mark Renaud and Eric Wang

The Democratic majority in the U.S. House of Representatives recently voted to pass H.R. 1, an omnibus package of election administration, campaign finance, lobbying, and ethics law changes. The bill is unlikely to pass the Senate, and President Trump has vowed to veto the bill if it were to pass Congress. Nonetheless, the bill is expected to set a benchmark for future Democratic legislative initiatives on these issues. The bill has several major provisions of relevance to *Election Law News* readers.

As originally introduced, the bill would have imposed sweeping new prohibitions on corporate political activity, including maintaining a corporate PAC, making corporate contributions in connection with state and local elections, communicating with eligible employees and

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Change in New York Campaign Finance Laws: Closing the LLC Loophole and Aggressive Campaign Finance/Pay-to-Play Proposals

By Carol Laham and Sarah Hansen

The New York legislature has taken steps to close a previous "LLC loophole" in its campaign finance laws, and the Governor has also proposed aggressive pay-to-play and corporate contribution bans. These changes introduce additional complexity for limited liability companies (LLCs) and other corporate entities in navigating the state's campaign finance regulatory maze. It

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stockholders about election-related issues, and even sponsoring nonpartisan get-out-the-vote and voter registration drives.

Foreign National Provisions. Specifically, the bill originally would have added several broad and vague criteria for when a corporation is regulated as a “foreign national.” These criteria included foreign ownership percentage thresholds and the presence of any foreign national having “the power to direct, dictate, or control” the corporation’s “decisionmaking process.” All (or substantially all) U.S. subsidiaries of foreign corporations would have been regulated as foreign nationals. Foreign nationals are prohibited under existing law from the election-related activities described above.

In addition, H.R. 1 prohibits foreign nationals from making certain payments to organizations that have funded, or that are expected to fund, “campaign-related disbursements.” These include communications that “promote,” “attack,” “support,” or “oppose” the election of federal candidates and elected officials – a new category of regulated speech. Corporations that trigger the expanded foreign national provision would be prohibited in many instances from making donations and dues payments to nonprofit groups and trade associations that engage in such activities.

H.R. 1’s foreign national provision appeared to follow a proposal by opponents of the U.S. Supreme Court’s *Citizens United* decision to expand the foreign national prohibition under the federal campaign finance statute in order to broadly restrict corporate political activity. This far-reaching regulatory approach proved to be a bridge too far, however, and the foreign national provision was dropped

from the bill after strong pushback from the business community.

Nonetheless, as passed by the House, H.R. 1 still requires a corporation’s CEO to certify annually to the Federal Election Commission (FEC) under penalty of perjury that no foreign national has “directly or indirectly” participated in the decision-making process related to the corporation’s political spending before the corporation may make disbursements in connection with federal elections during the calendar year. Similarly, H.R. 1 requires federal PACs to annually certify to the FEC that no foreign national participated in the PAC’s decision-making.

Shareholder Issues. In addition, as amended and passed by the House, H.R. 1 requires publicly traded corporations to have “assess[ed] the preferences” of their shareholders within the prior one-year period before making any “disbursement for a political purpose.” The assessment requires, among other things, asking shareholders whether the corporation’s disbursements “should be made in support of, or in opposition to, Republican, Democratic, Independent, or other political party candidates and political committees.”

Advocacy Disclosure. As noted above, H.R. 1 also regulates a new category of communications that “promote,” “attack,” “support,” or “oppose” (PASO) federal candidates and elected officials. PASO communications, along with express advocacy independent expenditures and “electioneering communications” – would be subject to new “campaign-related disbursement” reporting requirements under the bill.

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is important to consult counsel to ensure compliance with the new LLC requirement and to consider the potential pay-to-play implications of the Governor's proposals.

First, Governor Cuomo signed into law a bill that requires each LLC that makes an expenditure or contribution for political purposes to disclose the identity of all direct and indirect owners of the membership interests in the LLC as well as the proportion of each direct or indirect member's ownership interest in the LLC. Importantly, the bill would attribute LLC contributions to each of the LLC's members in proportion to their ownership in the LLC for the purposes of the contribution limits, although the LLC itself would also be subject to a \$5,000 aggregate annual contribution limit. Thus, under this new law, a contribution from an LLC would have to be within both the LLC's \$5,000 aggregate annual limit and the limits applicable to each of the LLC's members after the LLC's contribution is attributed to the owners.

Prior to this bill's enactment, the New York State Board of Elections had treated LLCs as individuals for purposes of state contribution limits, allowing LLCs to make contributions up to the much higher limits for individuals instead of the \$5,000 aggregate annual corporate contribution limit. The new law's attribution provision also means that owners/members of an LLC cannot circumvent the \$5,000 limit by using a number of LLCs that they own or control to make additional \$5,000 contributions.

By closing this "LLC loophole," the bill imposes a different, narrower view of permissible contributions, and LLCs and their members need to be aware of both the new information LLCs are required to report and the more demanding contribution rules. The

bill, however, does not make any changes to existing law that would affect federal or New York state PACs.

Second, continuing the theme of more onerous campaign finance rules in the state, Governor Cuomo has proposed a pay-to-play contribution ban, as a part of an aggressive pending omnibus campaign finance and lobbying bill. The ban would prohibit contributions by any prospective state contractor to: (1) any officeholders of the state agencies issuing the solicitation for bids at issue or evaluating such bids, or approving or awarding the final contract sought by the contracting entity; and (2) any candidate for such office. Moreover, contributions from a prospective contractor's subsidiaries and PAC would also be covered. From the face of the legislative text, the proposed ban does not appear to reach officers or directors of prospective state contractors.

In this proposal, the prohibition period would begin to run from the earliest time that a request or solicitation for proposals or invitation for bids is publicly posted. However, agency requests for information would not trigger the prohibition period. The prohibition period for successful bidders would continue for one year after the final contract is awarded and approved by the relevant state authorities. For unsuccessful bidders, the prohibition period would end at the time the final contract is awarded and approved.

Further, Governor Cuomo has proposed prohibiting corporate contributions to New York state candidates altogether. Of course, if both provisions are enacted into law, the corporate contribution ban would make the pay-to-play contribution ban moot with respect to corporate contractors.

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As New York's campaign finance laws continue to change (perhaps drastically if Governor Cuomo's numerous proposals pass the legislature), it is important for LLCs and other corporate entities to consult counsel and ensure they are not running afoul of contribution limits or prohibitions. ■

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Organizations such as Section 501(c)(4) advocacy groups and Section 501(c)(6) trade associations that spend more than \$10,000 on campaign-related disbursements during an election cycle would have to report their donors that gave \$10,000 or more to the organization. Under certain circumstances, donors that give to organizations sponsoring campaign-related disbursements also would have to file their own reports and report their own donors (if applicable). In addition, organizations that sponsor campaign-related disbursements also would have to identify their top donors in their advertising disclaimers.

Lobbying Disclosure Act (LDA) Expansion.

H.R. 1 also expands the triggers for registration under the federal Lobbying Disclosure Act. The bill eliminates what has come to be known as the "Daschle exemption," which is named after former Senate Majority Leader Tom Daschle, who provided government affairs counseling after retiring from Congress but did not register as a lobbyist. The so-called "exemption" refers to the fact that, under current law, individuals who do not make direct lobbying contacts with government officials are not required to

register. Under H.R. 1, any individual with "authority to direct or substantially influence a lobbying contact" made by others, and who provides paid "counseling services in support of preparation and planning" for lobbying activities, is treated as making lobbying contacts that could trigger the registration requirement.

In addition, under current law, individuals are not required to register if their lobbying activities constitute less than 20% of their paid services to an employer or client during a calendar quarter. As amended and passed, H.R. 1 lowers this threshold to 10%.

Wiley Rein's Election Law Practice monitored H.R. 1's movement through the House legislative process and counseled clients on the bill's implications for their political programs. We will continue to closely monitor federal and state legislative developments on these issues. ■

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FEC and Lobbying Disclosure Filing Dates for 2019

By Karen E. Trainer

Monthly FEC Filing Dates for PACs

- 02/20/19 February Report
- 03/20/19 March Report
- 04/20/19 April Report
- 05/20/19 May Report
- 06/20/19 June Report
- 07/20/19 July Report
- 08/20/19 August Report
- 09/20/19 September Report
- 10/20/19 October Report
- 11/20/19 November Report
- 12/20/19 December Report
- 01/31/20 2019 Year-End Report

Note: Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date.

Additional information on FEC reporting is available at <https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines/>.

Semiannual FEC Filing Dates for PACs

- 06/30/19 Mid-Year Report

Note: A PAC that is a semiannual filer and makes contributions in connection with special elections may have additional reports due. Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition,

reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date.

Additional information on FEC reporting is available at <https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines/>.

Quarterly House and Senate Candidate Committee Filing Dates

- 04/15/19 First Quarter Report
- 07/15/19 Second Quarter Report
- 10/15/19 Third Quarter Report
- 01/31/20 2019 Year-End Report

Note: Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date. Campaigns for a candidate participating in a special election are subject to additional pre-election reporting requirements.

Additional information on FEC reporting is available at <https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines/>.

Lobbying Disclosure Act, as Amended by the Honest Leadership and Open Government Act (HLOGA), Filing Dates

- 04/20/19 First Quarterly Activity Report (LD-2) covering January 1-March 31, 2019

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FEC and Lobbying Disclosure Filing Dates for 2019

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- 07/20/19 Second Quarterly Activity Report (LD-2) covering April 1-June 30, 2019
- 07/30/19 First Semiannual § 203 Contribution Report (LD-203) covering January 1-June 30, 2019
- 10/20/19 Third Quarterly Activity Report (LD-2) covering July 1-September 30, 2019
- 01/20/20 Fourth Quarterly Activity Report covering (LD-2) October 1-December 31, 2019
- 01/30/20 Second Semiannual § 203 Contribution Report (LD-203) covering July 1-December 31, 2019

Note: When the due date falls on a weekend or holiday, it is extended to the next business day. Additional information on Lobbying Disclosure Act reporting is available online at <http://lobbyingdisclosure.house.gov/> and http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm .■

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It is not a joke!

Annual New Jersey Pay-to-Play Filing Due April 1!

Business entities that in 2018 received \$50,000 or more in contracts with state or local government agencies in New Jersey must file an annual disclosure statement of political contributions with the New Jersey Election Law Enforcement Commission by April 1, 2019.

This “Business Entity Annual Statement” (Form BE) requires electronic reporting of cash contributions of any amount and non-cash contributions in excess of \$300 to a long list of campaign, party, and political committees. Reportable contributions include those made by the business entity, the owners of more than 10% of the business entity; principals, partners, officers, directors, and trustees of the business entity (and their spouses); subsidiaries directly or indirectly controlled by the business entity; and a continuing political committee that is directly or indirectly controlled by the business entity.

Reports are due even if no reportable contributions have been made. For more information, see the [New Jersey Election Law Enforcement Commission website](#). Wiley Rein has extensive experience with this annual report as well as with the labyrinth of other pay-to-play laws in New Jersey and elsewhere around the country. ■

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2019-2020 Federal Contribution Limits

By Karen Trainer

The chart below outlines federal contribution limits for individuals and PACs for the 2019-2020 election cycle. The chart reflects adjustments to certain contribution limits for inflation made by the Federal Election Commission.

RECIPIENT			
DONOR		House, Senate, or Presidential Campaign Committee	National Party National Committee (RNC/DNC)
	Individual	\$2,800 per election	\$35,500 per year (main acct) \$106,500/year (convention) \$106,500/year (bldg. acct) \$106,500/year (legal acct)
	Traditional Multicandidate PAC	\$5,000 per election	\$15,000 per year (main acct) \$45,000/year (convention) \$45,000/year (bldg. acct) \$45,000/year (legal acct)

RECIPIENT					
DONOR		National Party Congressional Committee (NRSC/DSCC/ NRCC/DCCC)	State, District and Local Party Committee (Federal Accounts)	Traditional Multicandidate PAC	Super PAC (Independent Expenditure-Only PAC)
	Individual	\$35,500 per year (main acct) \$106,500/year (bldg. acct) \$106,500/year (legal acct)	\$10,000 per year combined	\$5,000 per year	Unlimited
	Traditional Multicandidate PAC	\$15,000 per year (main acct) \$45,000/year (bldg. acct) \$45,000/year (legal acct)	\$5,000 per year combined	\$5,000 per year	Unlimited

The FEC also announced that the reporting threshold for bundled contributions has been increased to \$18,700 for 2019. Federal campaign committees, leadership PACs, and party committees are required to file Form 3L when they receive two or more contributions totaling \$18,700 or more within a certain time frame that are bundled by (1) federally registered lobbyists, (2) entities that employ federally registered lobbyists, and (3) political committees, including PACs, that are established or controlled by a federally registered lobbyist or by an entity that employs one or more federally registered lobbyists. ■

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The FEC's Litigation Dilemma

By Lee E. Goodman

According to a recent article in *Mother Jones* ("Elections Commission Chief Uses the 'Nuclear Option' to Rescue the Agency from Gridlock," Feb. 20, 2019), FEC Chair Ellen Weintraub has decided to use her vote to block the agency from (1) defending itself in lawsuits challenging dismissals of enforcement matters (at least those dismissals that the Commissioner disagrees with) and (2) conforming its enforcement actions to federal court orders remanding matters to the Commission for further action. So long as the six-member Commission is operating with only four Commissioners, the Chair's vote amounts to a veto power in these litigation and enforcement decisions which, by law, require four affirmative votes. The Chair exercised this veto power in a recent case. The strategy has important short-term and long-term implications for the agency as well as for complainants and respondents.

Background

The Federal Election Campaign Act of 1971, as amended (the FECA), provides a statutory process by which citizens can file complaints against other citizens. Responsibility for enforcement of bona fide violations of the FECA then falls to the agency. The agency, which by statute consists of six Commissioners, votes on whether to proceed with enforcement or to dismiss matters. In all cases, the Commissioners must explain their decisions in writing and those decisions can be subjected to judicial review.

The law generally allows the private complainant (assuming she has constitutional standing) to sue the Commission when it dismisses the complaint in order for a court to determine if the agency's dismissal was "contrary to law." The law also authorizes the Commission to send its General Counsel

to court to defend such lawsuits, but the law requires four (4) Commissioners to vote affirmatively for the agency to defend itself in such a case.

If a federal court rules the Commission's dismissal was "contrary to law," it remands the matter to the agency to bring its action into conformity with the court's ruling. Sometimes this results in the agency changing its decision and proceeding with enforcement, and sometimes the agency dismisses again following the court's legal guidance. However, if the agency fails to comply with the court's order, the law affords the private complainant authority to sue the private respondent in a direct action to enforce the FECA violation.

The upshot of this statutory scheme is that, on a Commission temporarily constituted of only four Commissioners, one Commissioner can block the agency's defense of itself when sued by a complainant, and one Commissioner can block the Commission's efforts to conform its enforcement actions to court orders on remand. In the agency's default, the private complainant can gain standing to step into the agency's shoes and sue the private respondent directly to enforce the FECA. That is a result Chair Weintraub apparently desires to facilitate in cases where she disagrees with the Commission's original decision to dismiss.

Implications for the FEC

The Chair's voting strategy has both short-term and long-term consequences for the agency. The first question is whether the absence of agency counsel will skew judicial outcomes. The agency cannot "default" in the same way that a private litigant can default by not appearing and defending itself.

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Courts are bound to review each agency action, explained in the Commission's written statements of reasons, to determine whether the action is contrary to law.

In addition to silencing a legal defense or explication of the Commission's controlling rationale, the more profound impact of the Chair's "empty seat" litigation strategy will be to deny the courts a full briefing of all sides of the issues, an important predicate of the adversarial legal system. Thus, withholding a defense would shortchange the court as much as it would the controlling Commissioners with whom the Chair disagrees.

Significantly, the Commission has a good track record of being upheld by the courts over the last 10 years. During the past decade, the Commission has been upheld in the vast majority of lawsuits challenging its enforcement dismissals. One could count on one hand the number of Commission dismissals that have been found by courts to be contrary to law and remanded to the Commission. Whether the agency's success rate can be altered through an "empty seat" litigation strategy remains to be seen.

But even if the Commission does not authorize its General Counsel to appear in court to defend the agency's reasoning, it is unlikely courts will go without helpful adversarial briefs. There are several potential alternatives for affording Commission decisions a defense. One alternative is for respondents to intervene in lawsuits and defend the Commission's reasons for dismissing their cases. Another alternative is for friends of the court to file *amicus* briefs basically defending the Commission's actions.

The third and most consequential alternative, which has never been explored, is the

possibility for the U.S. Department of Justice to appear on behalf of the agency. Several statutes grant exclusive authority for agency litigation to the Department of Justice (see 28 USC §§ 516, 517, 518, 519) and, moreover, prohibit agencies from representing themselves in court (5 USC § 3106). The exclusivity of the authority, however, is limited by the phrase "except as otherwise authorized by law," and the FECA affirmatively authorizes the Commission to deploy its own agency lawyers to court. The question is whether the FECA provision displaces the Justice Department entirely or merely permits the Commission to represent itself if it so chooses. Neither statute may provide the *exclusive* mechanism for the Commission to be represented in court.

A strong argument can be made that the FECA provision is merely permissive and does not entirely displace the Justice Department's general authority to represent the agency. The FECA does not state that *only* the Commission can represent itself. And the Justice Department's statutory authority to represent agencies in appeals before the Supreme Court has trumped the FECA provision in a number of cases.

If the Barr Justice Department were to take up litigation defense of the Commission, it would open the door to politicized representations that reflect the priorities and philosophical preferences of future Justice Departments. In the long term, the door once opened would be difficult to close. It would be difficult for the agency to reclaim its own independence. Likewise, the agency's regulatory positions could become less predictable, a liability for an already complicated agency that should strive to regulate consistently given the First

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Amendment rights it regulates.

In sum, institutionalists warn about the harm done to the judicial process generally, the potential politization of Commission litigation under the control of future Justice Departments, and more specifically about the abrogation of responsibility and the unseemly tactic of placing the agency in effective contempt of court remand orders.

Implications for Complainants, Respondents, and Friends of the Court

Reformer-complainants cheer the “empty chair” strategy because it empowers them to take up enforcement and rectify what they perceive as unreasonable inaction by the agency. This happened in a recent case where the Chair announced she had blocked the Commission from conforming its decision to a remand order of the federal district court. That action allowed Citizens for Ethics and Responsibility in Washington (CREW) to sue American Action Network (AAN) directly to enforce the FECA. The case is pending in the U.S. District Court for the District of Columbia. Wiley Rein is counsel to AAN.

Respondents, on the other hand, decry the strategy as intentional weaponization of enforcement, turning their enforcement fate over to politically motivated ideological opponents who can misuse the enforcement process to hobble them with litigation

expense, intrusive discovery, and the vicissitudes of selection bias and uneven judicial results.

So long as there are only four Commissioners on the Commission, respondents in matters involving deep-pocketed institutional complainants and legal issues at the heart of the philosophical divide must plan early for the possibility of being required to defend Commission decisions in their favor in a federal court. This will require additional planning at the early stages of the enforcement process and can add to the length of time and cost of defending complaints. Respondents facing complaints would be wise to plan early for such an extended process.

Likewise, the role of *amici* briefs may become more critical and influential when lawsuits challenging Commission decisions are lodged. Therefore, groups interested in upholding agency dismissals and vindicating the regulatory policy reflected in statements of reasons should track lawsuits carefully, submit briefs early, and recast their briefs as defense arguments explaining the reasonableness of agency decisions. ■

For more information about the implications of the Commission's litigation positions, contact:

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Tips for Campaign Participation

By Caleb P. Burns and Louisa Brooks

As candidates begin to ramp up their campaigns for the 2020 elections, clients often have questions about opportunities to get involved, whether by hosting a candidate meet-and-greet or fundraiser or by volunteering their time to support a campaign. When considering participation, it is critical to ensure that the activity in question will not cause you or your company to run afoul of the law. Here are a few reminders and compliance tips for common situations:

Tip No. 1: Corporate Resources Are Corporate Contributions.

Corporations are prohibited from making contributions – whether monetary or in-kind – to candidates for federal office. Twenty-two states similarly prohibit corporate contributions to candidates. When considering an activity, remember that a “corporate contribution” also includes the use of corporate resources: office space, supplies, mailing lists, compensated employee time, and any other company-owned resource. A federal campaign that uses any facilities or resources of a corporation must reimburse the corporation, within a commercially reasonable time, at the usual and normal charge for such items. Some types of expenses – such as personnel time and catering costs – must actually be paid in advance under the federal rules. For state campaigns, the law will vary by jurisdiction.

Tip No. 2: Corporate Officers and Employees May Volunteer – on Personal Time.

As a general rule, any volunteer fundraising by corporate employees must be conducted on personal time, not during paid work hours. Federal law permits employees to engage in limited volunteer campaign activities in their

office – up to one hour per week or four hours per month – but only if doing so does not increase any overhead or operating expenses of the corporation.

Tip No. 3: Executive Volunteering Doesn't Include Executive Assistants.

Compensated staff time is a corporate resource with monetary value. Thus, even when an executive is engaging in permissible volunteer fundraising activities, he or she should not ask an administrative assistant or another subordinate to assist with these activities. Under federal law, campaign-related work performed by subordinates results in a prohibited in-kind corporate contribution to the campaign unless the campaign has *paid in advance* for the fair market value of the subordinate's services.

Tip No. 4: Limit Solicitations to Personal Contacts via Personal Email.

Officers or employees who plan to solicit contributions for a candidate should limit their solicitations to peers and superiors whom they know personally and should avoid soliciting contributions from subordinates. They should not solicit co-workers while in the office, use company letterhead to make solicitations, or refer to their company title or position when soliciting contributions. Though technically permissible, it is advisable to avoid using company email.

Tip No. 5: Different Rules apply to Different Events.

Candidate-related gatherings can take many forms, from an in-home fundraiser, to a meet-and-greet at a corporate office, to a PAC-sponsored fundraising event. Different rules apply to each type of event, and state law

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Federal Judge Rebuffs Congressional Bid to Eliminate Super PACs

By Andrew Woodson and Brandis L. Zehr

On February 28, federal District Judge Emmet Sullivan rejected an attempt by Sen. Jeff Merkley, Rep. Ted Lieu, and the late Rep. Walter Jones (among others) to invalidate the legal precedent that recognized super PACs. While the outcome was expected given existing judicial precedent, the continued progression of this case through the federal court system is worth watching to see whether other courts reconsider the lawfulness and constitutionality of super PACs.

The federal case began when a group of elected officials, activists, and organizations – spearheaded by a group called Free Speech for People – filed a July 2016 complaint with the Federal Election Commission (FEC) against 10 super PACs. The complaint alleged that these committees, including those aligned with both Democratic and Republican interests, were accepting contributions greater than the \$5,000 annual limit that the federal campaign finance statute permits committees to accept. While the D.C. Circuit’s *en banc* decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), held that this statute was unenforceable after the U.S. Supreme Court’s *Citizens United* decision, the complainants alleged that developments since 2010 have shown that the “widespread perception of quid pro corruption” associated with super PACs requires reinstatement of the \$5,000 limit.

The FEC dismissed the administrative enforcement case unanimously in May 2017,

noting that the agency had even issued a 2010 advisory opinion recognizing that *SpeechNow* was binding precedent. The complainants, however, were undeterred by this authority, sought review of the FEC’s dismissal from the federal courts, and argued that the FEC should have refused to acquiesce to the *SpeechNow* decision. Judge Sullivan was clear, however, that as a lower court judge, he was bound by existing legal precedent and upheld the FEC’s dismissal of the enforcement action. The judge’s opinion explained that he was not prepared to label a “binding precedent of the D.C. Circuit [as] unlawful.”

Based on public sources, the larger aim of those behind the lawsuit is to continue pursuing this case through the appellate courts until the case reaches a level where those hearing the case are authorized to overrule existing precedent. Originally, supporters of this strategy expected that Hillary Clinton would likely defeat Donald Trump in the November 2016 elections, replacing the late Justice Antonin Scalia with a more moderate Justice who would be willing to reconsider the rationale behind super PAC-related decisions. While that did not happen, as President Donald Trump appointed conservative Justice Neil Gorsuch to succeed Scalia, proponents of the lawsuit nevertheless believe that “Chief Justice Roberts has given signals that might suggest he would be willing to sustain limits on contributions to super PACs even within the framework of *Citizens*

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United.” So the litigation appears likely to continue for the foreseeable future.

Given that super PACs are now well-established players in modern political campaigns, any reversal in the underlying judicial opinions would have a significant impact on the political process and the First Amendment rights of individuals and entities. Wiley Rein will continue to track developments in this litigation as they occur.

Judge Sullivan’s opinion is available from the FEC’s website at https://www.fec.gov/resources/cms-content/documents/Lieu_dc_opinion.pdf. ■

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governing these events will vary widely. For example, federal law permits an individual to spend up to \$1,000 for food, drinks, and invitations, per candidate, per election, to host a fundraising event in the individual’s home. Money spent under this “in-home exemption”—up to the \$1,000 limit – does not count toward the individual’s \$2,800 contribution limit.

To ensure your activities are within the law, consult legal counsel before any of your executives engage in volunteer fundraising.

While the tips above address some of the most common questions that arise, we can provide specific guidance tailored to the facts of your proposed activity or event. ■

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The First Amendment Right to Political Privacy

Chapter 3 - Red Monday, Paul Sweezy, and the Frankfurter Concurrence

By Lee Goodman

[Chapter 1](#) recounted the plight of the “Hollywood Ten” communists, who went to prison and lost their careers rather than disclose the names of fellow communists to the House Committee on Un-American Activities (HUAC) in 1947. Their fate was decided by the U.S. Court of Appeals for the District of Columbia, and the Supreme Court was unwilling to wade into the Red Scare. [Chapter 2](#) covered the First Amendment protection the U.S. Court of Appeals for the District of Columbia and the Supreme Court afforded, a few years later, to the conservative Committee on Constitutional Government and its political efforts to thwart the New Deal. This Chapter 3 recounts how the Supreme Court slowly began to intervene in the Red Scare, culminating with a significant concurring opinion by Justice Felix Frankfurter in the case of Marxist political activist Paul Sweezy one decade after the Hollywood Ten appeared before the HUAC.

No Judicial Relief from the Red Scare – In Calmer Times?

By 1950, the Red Scare was in full bloom and enjoyed general public favor. Many of the Hollywood Ten were serving prison sentences. Both houses of Congress, the Executive branch, and states were actively investigating former or current communists in various settings, exposing them, and punishing them. The First Amendment was deemed a weak defense in light of the Hollywood Ten outcome. Some subpoena recipients invoked their Fifth Amendment rights to avoid inquiry, but that entailed implicating oneself in a criminal act, so it was imperfect. Many just named names and

cooperated in order to avoid punishment.

Dozens of court cases were underway challenging the various governmental actions. Judicial conservatives on the Supreme Court were not impressed by the constitutional claims and either denied certiorari or affirmed lower court decisions, ruling against communists in various contexts.^[1] The prevailing view was that the government had a right of self-preservation and Congress was pursuing the national security interest justly by rooting out communists. In the words of one communist defense attorney of the day, “The courts were of no help whatsoever.”^[2]

Congress had enacted the Smith Act in 1940, which made it a crime to advocate the overthrow of the U.S. government by force or violence.^[3] Over a hundred American citizens were indicted for alleged violations of the Smith Act.^[4] In 1948, the conviction of Eugene Dennis, General Secretary of the Communist Party USA, was affirmed by the U.S. Court of Appeals for the Second Circuit.^[5] The Supreme Court granted certiorari for the purpose of deciding if the Smith Act violated the First Amendment.

In a 6-2 opinion, issued in 1951, the Supreme Court unremarkably affirmed the convictions and found no First Amendment violation.^[6] Majority opinions ranged from the important governmental interest in self-preservation to relatively carte blanche deference to the Legislative branch. As in the Hollywood Ten case, two Justices dissented, William O. Douglas and Hugo Black, the former Senator and KKK member who was an absolutist defender of First Amendment

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rights. Both Justices recognized the First Amendment right of communists to associate and advocate their ideas short of organizing overthrow of the government. Justice Douglas observed simply that the party leaders taught communist economic ideology, but never did anything to incite actual armed overthrow of the government. In one of the more pertinent observations of the time, Justice Black prophesized:

There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.^[7]

Calmer Times Ahead – First Amendment Jurisprudence Evolves

By the early 1950s, the HUAC had resumed its investigations into communists soon after the Supreme Court denied certiorari in the Hollywood Ten case in 1950, under the leadership of Georgia Democrat John Stephens Wood. Meanwhile, in the Senate, a first-term Senator from Wisconsin named Joseph McCarthy focused investigations on Soviet spies in the State Department and the Defense Department from his perch as chairman of the Senate Permanent Subcommittee on Investigations. The nation was gripped by televised hearings and headlines about communist spies and other subversives.

Gradually, however, public and political support for communist hunting waned. McCarthy had taken on powerful institutional opponents in two Presidents, Truman and Eisenhower, neither of whom appreciated his embarrassing charges that their administrations did too little to root out Soviet

spies. Increasingly, his Senate colleagues seized on reckless tactics to discredit valid claims and marginalize the Senator. In June 1954, McCarthy had perhaps bitten off more than he could chew in taking on the U.S. Army's recalcitrant measures to remove disloyal spies and fix lax security at the Army base in Monmouth, New Jersey – culminating in ethics counter-charges and a sharp exchange with Army attorney Joseph Welch who famously turned an audience against McCarthy with the line “Until this moment, Senator, I think I never really gauged your cruelty or your recklessness,” and after further verbal jousting, “Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency?” Some historians have credited that televised retort as the end of Joe McCarthy's career, regardless of the merits of his charges.

Shortly thereafter, on December 2, 1954, the Senate voted to “condemn” McCarthy for abusive conduct by a vote of 67-22.^[8] After Democrats took over the Senate, McCarthy no longer held a committee chairmanship as a platform for his investigations. In May 1957, McCarthy died at the age of 48. Ever since, his political legacy – often referred to as “McCarthyism” – has been painted by American liberals, as well as some conservatives, as the ruin of reputations, livelihoods, and progressive causes through unfair intrusions into private realms of political belief and associations, public disclosure, and ridicule.^[9]

Something else was happening in the mid-1950s. Four new Justices were appointed to the Supreme Court between 1950, when the Court denied certiorari to the Hollywood Ten, and 1957. The departing Justices were

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judicial conservatives Stanley Reed, Robert Jackson, Fred Vinson, and Sherman Minton. The new Justices were Earl Warren, William Brennan, Charles Whittaker, and John Harlan. They joined the two First Amendment libertarians – Hugo Black and William O. Douglas – along with Felix Frankfurter, Harold Burton, and Tom Clark.

This was the situation in 1957 when the Supreme Court finally took up several challenges to Red Scare investigations at various levels of government.

The Case of Paul Sweezy

Investigations of communists were not limited to the federal government and Congress. Many states decided they too had a role to play in protecting the United States from communist subversion. States adopted a variety of policies to purify state governments, public schools, and universities, state bars, and society at large from communists.

New Hampshire was such a state. It had adopted a law in 1951 authorizing the state attorney general to investigate, with subpoena power, any citizen suspected of being a “subversive person” – defined to mean any person who so much as attempted or encouraged “any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence.”^[10] The statute declared “subversive persons” to be ineligible for employment by the state government and required all public employees to make sworn statements they were not “subversive persons.” The law declared “subversive organizations” to be unlawful and dissolved.

In January 1954, as Senator McCarthy was preparing to launch public hearings into security leaks at the Army’s facility in Monmouth, the New Hampshire attorney general, Louis Wyman, issued subpoenas to Marxist economist Paul Sweezy as a suspected “subversive person.”

Paul Marlor Sweezy (1910-2004) was a committed Marxist economist. According to one biographer, “Paul M. Sweezy, referred to by *The Wall Street Journal* in 1972 as ‘the ‘dean’ of radical economists,’ was, in the words of John Kenneth Galbraith, ‘the most noted American Marxist scholar’ of the second half of the twentieth century.”^[11] The son of a prominent New York banker, he was educated at Exeter and Harvard, ultimately receiving his Ph.D. in economics. He had been an avid New Dealer, working in various posts in the Roosevelt Administration. He later served in the U.S. Army during World War II as an officer in the Army’s Office of Strategic Services, where he studied the European economy. After the war, he settled in Wilton, New Hampshire, and married Nancy Adams and had three children. He was an active writer and lecturer. He was politically active too, supporting the presidential candidacy of Progressive Party nominee Henry Wallace (former Vice President of the United States from 1941-1945) in 1948 and founding the Progressive Party of New Hampshire. The Progressive Party was a meeting point for many American communists. In addition to writing several books and monographs on Marxist economic theory,^[12] Sweezy founded the Marxian economic journal *Monthly Review* in 1949, a journal still published today.^[13]

Sweezy must have appeared to the New Hampshire attorney general to be a shiny

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object in an otherwise sleepy state. At a time when socialist economic thought was equated in broad brushes with communist overthrow of the American democratic system, Attorney General Wyman bore down on Sweezy as the embodiment of a “subversive person.” Wyman subpoenaed Sweezy to testify on two separate occasions, and Sweezy complied and testified at length for two full days, January 5, 1954 and June 3, 1954.

However, before he testified, Sweezy prefaced his first sitting with a statement of principle. He defended the right of political conscience against government inquiry:

[T]here are those who are not Communists and do not believe they are in danger of being prosecuted, but who yet deeply disapprove of the purposes and methods of these investigations.... Our reasons for opposing these investigations are not captious or trivial. They have deep roots in principle and conscience.... Whatever their official purpose, these investigations always end up by inquiring into the politics, ideas, and beliefs of people who hold what are, for the time being, unpopular views.^[14]

Seeking to eliminate the Attorney General’s statutory predicate for intruding into his political beliefs, he denied ever advocating the overthrow of the United States government by force or violence, or knowing anyone else who ever had:

I have studied the subversive activities act of 1951 with care, and I am glad to volunteer the information that I have absolutely no knowledge of any violations of any of its provisions; further, that I have no knowledge of subversive persons presently located within the state.^[15]

Having inoculated himself, and having laid a foundation for his subsequent constitutional challenge to contempt proceedings, Sweezy qualified the extent of his intended cooperation:

I shall respectfully decline to answer questions concerning ideas, beliefs, and associations which could not possibly be pertinent to the matter here under inquiry and/or which seem to me to invade the freedoms guaranteed by the First Amendment to the United States Constitution.^[16]

Sweezy then appeared and testified for two full days of questioning. He answered questions about his own political activities, his military service, his ideology (which was fully public in numerous writings), which he characterized as “classical Marxist,” and he denied that he had ever been a member of the Communist Party.^[17]

Critically, however, Sweezy declined to answer several targeted questions. First, he declined to disclose the names of other members of the Progressive Party or a predecessor organization, Progressive Citizens of America, both considered congregating places for American communists.^[18] Second, he declined to answer the question “Do you believe in Communism?”^[19] And third, Sweezy refused to discuss the substance of a lecture he delivered at the University of New Hampshire.^[20]

For his refusals to answer these questions, Attorney General Wyman filed a petition in state court seeking to compel Sweezy to answer. The state court ruled the questions pertinent to the Attorney General’s statutory charge and inquiry, and propounded the

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questions directly to Sweezy. When Sweezy persisted in refusing to answer, the state court ruled Sweezy to be in contempt and ordered him to be confined in jail until he purged himself of contempt.^[21]

Sweezy appealed, first to the New Hampshire Supreme Court, which upheld Sweezy's conviction for refusing to disclose members of the Progressive Party.^[22] Sweezy then appealed to the U.S. Supreme Court. The Supreme Court, which had denied certiorari to the Hollywood Ten a decade earlier, granted review to Sweezy.^[23]

“Red Monday” – June 17, 1957

Monday, June 17, 1957, marked a turning point in the Red Scare. That day, the Supreme Court issued four decisions curtailing government efforts to root out communists.

In *Yates v. United States*,^[24] the Court overturned the conviction of Oleta O'Connor Yates, a Communist Party leader in California for many years, under the Smith Act on the narrow basis of confusing and inadequate jury instructions.

In *Service v. Dulles*,^[25] the Court unanimously ruled that the State Department improperly terminated John Service, widely considered to be a pro-communist foreign service officer who shared agency secrets with pro-communist publications, from employment on technical procedural grounds.

Two decisions significantly curtailed government interrogations of communists. In *Watkins v. United States*,^[26] the Court clipped the wings of the House Un-American Activities Committee (HUAC), ruling that Congress' authorizing resolution was overly vague and the committee's explanation to

labor leader John Watkins was “woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under inquiry.”^[27] In a significant concurring opinion, Justice Frankfurter, a judicial conservative, opined that the HUAC's subpoena failed to provide Watkins “awareness of the pertinency of the information that he has denied to Congress.”^[28] Watkins, unlike the Hollywood Ten a decade earlier, had answered almost all of the HUAC's questions about himself, but, like Sweezy, had declined to “answer any questions with respect to others with whom I associated in the past.”^[29] He continued, “I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.... [U]ntil and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates.”^[30]

Finally, in *Sweezy v. New Hampshire*, the Court overturned Paul Sweezy's contempt conviction on the grounds that the Attorney General of New Hampshire exceeded his authority under the New Hampshire Subservice Activities Act of 1951 – as well as First Amendment grounds.^[31]

J. Edgar Hoover was incensed. According to legal scholar Arthur Sabin, Hoover prided himself in protecting the nation from those he considered dangerous political dissenters. “Then came June 17, 1957, a day he called ‘Red Monday’ – not because of the red-hot weather, but because, as he saw it, that day

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the United States Supreme Court handed down four decisions favoring the ‘Reds.’”^[32] Hoover publicly denounced the Warren Court for weakening the United States’ defenses to foreign influence and subversion.

Sweezy v. New Hampshire – The Supreme Court Weighs In

Sweezy was the most important decision for First Amendment jurisprudence. The vote was 6-2 for reversal. Chief Justice Warren, writing for the four-Justice majority, observed that the New Hampshire Attorney General’s subpoenas encroached upon constitutional rights:

There is no doubt that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.^[33]

The Court continued:

Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread.^[34]

Yet, after further elaborating on the “political freedom of the individual” and the concomitant rights of associations of adherents, as well as the right of dissent (perhaps ideas insisted upon by Justices Black and Douglas), the majority opinion held that the New Hampshire Attorney General acted *ultra vires*, beyond the scope of the authority clearly prescribed in the New Hampshire legislature’s authorizing statute. “As a result,” the Court observed, “neither we nor the state courts have any assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry.”^[35] The Court went on to reason that without a clear writ, the Court could not adequately assess the state interest. The Court concluded that the “lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from [*Sweezy*] must be treated as the absence of authority. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment.”^[36]

Thus, in the final analysis, the majority holding was narrow and limited in scope, similar to the *Watkins* decision on pertinence. The First Amendment rights were implicated but not decisively violated.

The Frankfurter Concurrence – The First Amendment Protects Political Privacy

Justice Frankfurter, joined by Justice Harlan, had difficulty joining Chief Justice Warren’s broad attack at state legislative and prosecutorial authority.^[37] Frankfurter reasoned that the New Hampshire Supreme

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Court definitively had decided that the Attorney General acted well within the legislative authority granted to him by state statute, so the United States Supreme Court was in no position to second-guess the state court or the Attorney General's authority. Therefore, Frankfurter addressed the First Amendment (as applied to the state through the Fourteenth Amendment) challenge head-on. He concluded that the Attorney General's inquisition, and specifically the questions requiring Sweezy to disclose the names of Progressive Party members, violated the First Amendment right of "political privacy." Based solely upon the First Amendment, he decided to reverse Sweezy's contempt conviction. The language written by Frankfurter was particularly declarative of the right to "political privacy" against government inquisition:

[T]he inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in [Sweezy's] relations to these. In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority.^[38]

Frankfurter opined that "the right of a citizen to political privacy" wholly outweighed New Hampshire's interest in "self-protection."^[39] This was the clearest statement yet on the Supreme Court that the First Amendment protects political privacy against the government's demand for disclosure of political associations.

Ironically, it was Justice Frankfurter, the conscientious judicial conservative, who carefully avoided a head-on First Amendment ruling in *United States v. Rumely* five years earlier, providing the full-throated First Amendment rebuke to communist inquisition, while First Amendment libertarians Justice Black and Justice Douglas, who issued a broad First Amendment concurrence in *Rumely*, joined the more restrained main holding authored by Chief Justice Warren. But significantly, Frankfurter and Harlan had now signed on fully to the First Amendment right of all citizens to political privacy.

Aftermath

The Red Monday decisions marked a critical point of political and law enforcement inflection. According to legal scholar Sabin:

In sum, the Justice Department and the FBI recognized the Red Monday decisions of June 17, 1957 as confirmation of a changed majority position on the Supreme Court on Red Scare issues. The *Yates* decision of Red Monday meant that further Smith Act prosecutions of communists would be a waste of time, money, and effort... What had begun in 1948 with the indictment of the top eleven Communist Party members pragmatically ended in 1957. The Supreme Court gave a green light to criminal charges under the Smith Act with the *Dennis* decision in 1951; in 1957, the light turned red.^[40]

Although Smith Act prosecutions would be curtailed after Red Monday, the Supreme Court would nevertheless later retreat, in subsequent cases, from its defense of communists under government investigation generally.^[41] The Court's retreat, and particularly Frankfurter's reticence, came in

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response to withering political attack from J. Edgar Hoover, Congress, and the general public. So the long-term indications for the Court's protection for communists was limited.

But the First Amendment implications of *Sweezy*, though subtle at the time, were more profound and lasting jurisprudentially. *Sweezy's* significance in First Amendment doctrine cannot be gainsaid. What started as a cogently articulated but losing idea in the Edgerton Dissent in the late 1940s had blossomed in the Douglas Concurrence in *Rumely* in 1952, and now had expanded into the thinking of the traditional judicial conservative Justice Frankfurter in *Sweezy*. The Court was developing a majority for the principle. Frankfurter did not waver. Liberals Warren and Brennan were soon to join. It surely represented an emerging majority position for the kind of constitutional protection of political association and privacy that the Hollywood Ten had hoped for. A decade later, the First Amendment doctrine of political privacy had reached its tipping point. And it would tip into consensus Supreme Court jurisprudence the following year in the famous case of *NAACP v. Alabama*, to be treated in the next chapter. ■

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ENDNOTES

[1] Robert M. Lichtman, *The Supreme Court and McCarthy Era Repression: One Hundred Decisions* (University of Illinois Press 2012) (collecting cases).

[2] Victor Rabinowitz, *Unrepentant Leftist: A Lawyer's Memoir* (University of Illinois Press 1996) at p. 130.

[3] 18 U.S.C. § 2385.

[4] Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday* (University of Pennsylvania Press 1999), at p. 11 ("Following the *Dennis* decision in 1951, fifteen groups of multiple defendants (second-string state Party leaders) were indicted and prosecuted between 1951 and 1953; the lower courts, using *Dennis* as precedent, affirmed convictions in all but one Smith Act case.") & at p. 12 ("Between 1948 and 1957, 129 indictments were obtained against alleged CPUSA members. Convictions were secured and sustained by federal appellate courts, including the Supreme Court, in almost every case until June 17, 1957.").

[5] *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950)

[6] *Dennis v. United States*, 341 U.S. 494 (1951).

[7] *Id.* at 581 (Black, dissenting).

[8] United States Senate, *The Censure Case of Joseph McCarthy of Wisconsin* (1954) (https://www.senate.gov/artandhistory/history/common/censure_cases/133Joseph_McCarthy.htm). For a point-by-point defense of McCarthy and his investigations see M. Stanton Evans, *Blacklisted by History: The Untold Story of Senator Joe McCarthy and His Fight Against America's Enemies* (Crown Publishing 2007).

[9] Victor S. Navasky, *Naming Names* (The Viking Press 1980).

[10] N.H. Rev. Stat. Ann. 1955, c. 588, § 1 (1955).

[11] John Bellamy Foster, "The Commitment of an Intellectual: Paul M. Sweezy (1910-2004)," *Monthly Review* (Oct. 1, 2004), citing "The Unorthodox Ideas of Radical Economists Win a Wider Hearing," *Wall Street Journal* (Feb. 11,

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1972); John Kenneth Galbraith, *Economics in Perspective* (Boston: Houghton Mifflin, 1987) at p. 189.

[12] See, e.g., Paul Marlor Sweezy, *The Theory of Capitalist Development* (Monthly Review Press 1942); Paul M. Sweezy, *Theory of Capitalist Development* (Dennis Dobson Ltd. 1946); Paul M. Sweezy, *Socialism* (McGraw Hill Books 1949); Paul M. Sweezy (editor), *Lenin Today: Eight Essays on the Hundredth Anniversary of Lenin's Birth* (Monthly Review Press 1971); Paul M. Sweezy, *Four Lectures on Marxism* (Monthly Review Press 1981).

[13] Available at www.MonthlyReview.org.

[14] Sweezy's full statement is reprinted at footnote 6 of *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[15] *Id.*

[16] *Id.*

[17] *Sweezy v. New Hampshire*, 354 U.S. 234, 238 (1957).

[18] *Id.* at 241-242.

[19] *Id.* at 244.

[20] *Id.* at 243-244. Sweezy's refusal to answer questions about his lecture at the University of New Hampshire gave rise to an entirely distinct First Amendment jurisprudential principle of *academic freedom*, which is often touted by faculty on college campuses today. That subject is beyond the scope of this article on the First Amendment right of political privacy.

[21] *Id.* at 244-245.

[22] *Wyman v. Sweezy*, 100 N.H. 103, 121 A.2d 783 (1956).

[23] *Sweezy v. New Hampshire*, 352 U.S. 812 (1956)

[24] 354 U.S. 298 (1957).

[25] 354 U.S. 363 (1957).

[26] 354 U.S. 178 (1957).

[27] *Id.* at 215.

[28] *Id.* at 217 (Frankfurter, concurring).

[29] *Id.* at 185.

[30] *Id.*

[31] 354 U.S. 234 (1957).

[32] Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday* (University of Pennsylvania Press 1999) at p. 1.

[33] 354 U.S. at 245.

[34] *Id.* at 250.

[35] *Id.* at 254.

[36] *Id.* at 254-255.

[37] Sabin at p. 157-158.

[38] 354 U.S. at 265.

[39] *Id.* at 266-267.

[40] Sabin at p. 11.

[41] See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959).

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