



In Defense of Political Anonymity

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Imagine if the [George W. Bush](#) administration, in its waning days, had introduced something called the Patriot II Act. To prevent terrorists and foreign agents from influencing American governments and political parties, the act would require political campaigns and other groups to report the names, addresses, and employers of their supporters to the federal government, which would enter the information into a database. The act would also give businesses access to this database, enabling them to make hiring decisions, credit determinations, and other choices based on political activity. Can anyone doubt that Patriot II would be widely considered a gross violation of civil liberties?

Fortunately, the government never passed such a bill. Unfortunately, it didn't need to: this is already the law, and it has been for over 30 years. It is, in fact, one of the most popular laws in America: the Federal Election Campaign Act, which does indeed require campaigns, political parties, and certain citizens' groups engaged in politics to report the names, addresses, and employment information of their financial supporters. This information is maintained in a government database that is available to anyone--businesses, union bosses, local officials, nosy neighbors, and whoever else might be curious about somebody's politics.

The idea of limiting financial support of politics remains deeply controversial, even seven years after the passage of the so-called McCain-Feingold bill, which extended many of the Federal Election Campaign Act's limitations on contributions to previously unregulated political activities. Yet even the most ardent opponents of McCain-Feingold seldom question the disclosure requirements of the original 1972 act. So widely accepted is the idea that campaign contributions and personal information about donors ought to be public that many people don't even consider it regulation. When the First Amendment counsel for the ACLU, the late Marv Johnson, met in 2006 with a prominent congressional reformer to argue against a proposal to regulate grassroots political activity, he was assured that no new "regulation" was contemplated--"just disclosure."

But it's far from clear that the forced disclosure of political contributions has benefited society. Disclosure has resulted in government-enabled invasions of privacy--and sometimes outright harassment--and it has added to a political climate in which candidates are judged by their funders rather than their ideas.

Despite its overwhelming acceptance today, the idea that political contributions should be widely disclosed is not deeply rooted in the nation's history. The earliest campaign-disclosure laws date to the late nineteenth century, and they were essentially meaningless until the 1970s. When pioneering researcher Louise Overacker wanted to examine federal campaign-finance reports in the 1930s, she was led to a closet in the Capitol where the reports were piled on the floor in no particular order. Candidates had to report only the contributions that they personally knew about, and there were no uniform reporting standards, requirements to correct or update reports, or prosecutions for those who didn't file them.

Things were largely the same with such state laws as existed. For example, through the 1960s, California politicians could comply with the state's disclosure law by providing an unalphabetized list of donors without amounts, addresses, or even full legal names. Moreover, in those pre-Internet days, viewing the reports was a major undertaking that required going to a central repository and working through stacks of paper--not a task undertaken lightly.

This started to change with the Federal Election Campaign Act's passage in 1972. At about the same time, states began mandating disclosure or adding teeth to laws already on the books. But there was some doubt that disclosure laws were constitutional, as the Supreme Court had repeatedly held that the First Amendment protected anonymous speech, striking down statutes that required union organizers and organizers of merchant boycotts to disclose their identities or sources of funding. In a 1958 decision, *NAACP v. Alabama*, the Court also protected the NAACP's right to keep its membership anonymous in the face of a state subpoena. The Court recognized that forced disclosure of members and financial contributors could have a broad chilling effect on political speech.

Nevertheless, in *Buckley v. Valeo*, decided in 1976, the Supreme Court upheld the constitutionality of the federal campaign-finance disclosure law. The curious result is that only in the realm of explicit political speech--perhaps the most important kind of speech protected by the First Amendment--has the Court broadly permitted government to mandate disclosure about speech that is neither fraudulent, false, nor an imminent threat to public safety.

Today, campaigns and citizens' groups in 49 states must report information on their financial supporters to the state as well as to the federal government. The feds and most states post the names and addresses of these contributors on the Internet. In federal races, information is public for all political contributions over \$200. But the threshold for mandatory disclosure is \$100 or less in more than 40 states, including Arizona, Iowa, Washington, and Wyoming (\$25); Colorado, Michigan, and Wisconsin (\$20); and West Virginia (just a buck). Thirty-six states and the federal government also require public disclosure of contributors' occupations and employers. And all 24 states that allow ballot initiatives extend these laws to cover contributions to ballot-issue committees.

The idea that you should be compelled to reveal your political activity to the government is often justified by "the public's right to know." But the public doesn't, of course, have a right to know about most things that you do--about your job-performance reviews, income-tax returns, credit history, birth-control purchases, school grades, employment history, book purchases, dieting habits, or voting choices, to give just a few examples. Some of this information may become available to the public, but only because you volunteer it, not because the government mandates it. Why should your donations be any different?

One oft-heard answer is that the public has a right to be informed of influences, including financial influences, that might affect the judgment and actions of its elected representatives. It happens that the degree to which campaign contributions actually influence legislative behavior is hotly disputed in the professional literature. But set that aside for now and assume, as most casual observers and the Supreme Court do, that the possibility is there. Federal and state laws would still set the threshold for disclosure far too low. People who donate \$20 to a Michigan candidate, or even \$200 to a federal one, will exercise zero influence on the candidate if he's elected. That their contributions--and addresses and employers--need to be publicly disclosed to prevent corruption is a proposition that can scarcely be stated with a straight face.

Even where it arguably offers public benefits--as in the case of truly large individual contributions or institutional contributions from political action committees, corporations, or unions--compulsory disclosure brings with it rarely appreciated costs. Above all, it invites government officials to abuse their power. From 1995 through 2006, when Republicans controlled Congress, they executed the "K Street Project," using compulsory-disclosure data to compile a list of the 400 largest political action committees and their giving patterns. Affiliated lobbyists were then called into the offices of Republican leaders and shown their place in either a "friendly" or an "unfriendly" column. Democrats complained endlessly about the project, but when they regained the majority in 2007, they took advantage of compulsory disclosure and employed the same tactic. As one understandably anonymous lobbyist told the Wall Street Journal in 2007, Democrats quickly put out the word that "if you have an issue on trade, taxes, or regulation, you'd better be a donor and you'd better not be part of any effort to run ads against our freshmen incumbents." Disclosure is what makes the threats work.

Nor is the government the only entity likely to use disclosure information to punish people. In the summer of 2006, Gigi Brienza, an employee at the pharmaceutical company Bristol-Myers Squibb, was notified by the company's security department that her name and home address appeared on a list of "targets" posted online by the radical animal-rights group Stop Huntingdon Animal Cruelty (SHAC). SHAC's ultimate target was Huntingdon Life Sciences, a London-based lab that tested drugs on animals. The previous year, the FBI had identified SHAC as a leading domestic terrorist threat whose members had, among other things, assaulted a Huntingdon manager in the United Kingdom with a baseball bat and vandalized the house and car of a Huntingdon executive in the United States.

Brienza had been targeted because Bristol-Myers Squibb did business with Huntingdon, even though Brienza herself had no contact with the lab. But how had SHAC learned that Brienza worked for Bristol-Myers Squibb? And how had the terrorist group located her address, and the addresses of some 100 other Bristol-Myers employees, before posting them under the ominous heading now you know where to find them? Simple: in 2004, Brienza had contributed \$500 to John Edwards's presidential campaign. The FBI eventually confirmed that SHAC culled Brienza's employer information and address from the records that the campaign had to file with the government.

Of course, most donors won't end up on a terrorist group's hit list, but less violent forms of retaliation and discrimination have become routine. After last year's passage in California of Proposition 8, which amended the state's constitution to ban same-sex marriage, the proposition's financial backers found themselves subjected to a wide range of retaliatory measures. Richard Raddon, director of the Los Angeles Film Festival, had contributed \$1,500 in support of Prop 8; he was forced to step down after opponents of the proposition threatened to boycott the Festival. El Coyote, a popular restaurant in Los Angeles, faced weeks of protests and boycotts because the owner's daughter had contributed \$100 to support Prop 8; police were eventually called to control the protesters, and the daughter left town. Scott Eckhern, the longtime artistic director of Sacramento's California Musical Theatre, was forced to resign because he'd contributed \$1,000 to the campaign. The Cinemark movie-theater chain suffered boycotts because its CEO, Alan Stock, had donated \$9,999.

The question isn't whether opponents of Proposition 8 had a right to initiate peaceful, lawful boycotts and protests. It's whether the government should compel the disclosure of political activity, thus enabling such boycotts. "Years ago we would never have been able to get a blacklist that fast and quickly," pointed out Candace Nichols of the Las Vegas Gay and Lesbian Community Center. (Apparently, we have made progress since the McCarthy era.) Yet gays, of all people, should feel threatened by forced disclosure of political contributions. Many doubtless prefer that their sexual orientation remain unknown to their coworkers, employers, and customers. For such people, a contribution to the Log Cabin Republicans, the Human Rights Campaign, or other political organizations that promote gay rights amounts to an involuntary outing, courtesy of the government.

The use of campaign-contribution databases as a tool of intimidation, as opposed to mere ostracism or boycott, is increasing. A growing number of websites, such as the Huffington Post and EightMaps, display the homes of donors to various candidates, parties, and political action committees on maps. In August 2008, a liberal group called Accountable America used compulsory disclosure data to send letters to nearly 10,000 prominent conservative donors, threatening publication of their names and, in the words of the New York Times, "digging through their lives" if they continued their financial support. The group was "hoping to create a chilling effect that will dry up contributions," the Times noted.

In the Republic's early days, it's important to remember, anonymous and pseudonymous political speech was common. The most famous example is The Federalist Papers, written by Alexander Hamilton, James Madison, and John Jay under the pseudonym "Publius." Countering their arguments for the proposed Constitution, prominent statesmen like Richard Henry Lee and Samuel Adams also wrote under pseudonyms, including "Federal Farmer," "Brutus," and "Candidus." Often, the newspapers in which these authors published their work were themselves supported by anonymous financiers. And in later years, many prominent Americans wrote anonymously, including Chief Justice John Marshall, who wrote as "a Friend of the Union" and "a Friend of the Constitution" to explain and elaborate his important opinion in *McCulloch v. Maryland*. Thomas Jefferson, Abraham Lincoln, and Winfield Scott anonymously subsidized political tracts and newspapers.

The great historian of The Federalist Papers, Clinton Rossiter, noted that the authors wrote pseudonymously for "sound political purposes." For one thing, they didn't want their disagreements to interfere with their other activities--a reason that remains valid today. For several years, Case Western law professor Jonathan Adler blogged pseudonymously as "Juan Non-Volokh" at the popular blog Volokh Conspiracy. As an untenured professor, Adler worried that his frank writing on political issues might compromise acceptance of his academic work. Former Bush speechwriter David Frum explains why several contributors to his new website, Frum Forum, prefer to use pseudonyms: "Often, the contributor is a government employee concerned about the consequences of speaking too frankly about the work of his bureaucracy. In one case, the author was writing about wrongdoing by someone he regularly encountered socially."

This argument for anonymity applies to financial supporters of campaigns as well. In 2007, John Kerry and congressional Democrats vetoed the nomination of Republican donor Sam Fox to be ambassador to Belgium--not because Fox was unqualified but because he had contributed to Swift Boat Veterans for Truth, a group Kerry felt had unfairly criticized him in his 2004 presidential race. As Senator Chris Dodd explained in support of Kerry, Fox's "unwillingness to . . . express regret for providing \$50,000 to bankroll the organization convinced me that he would not be an acceptable candidate to represent the United States." The message was clear: support a group that legislators deem too vigorous in its criticism, and the legislators will retaliate.

A second reason that the Federalist authors wrote pseudonymously, Rossiter pointed out, was that they wanted to have their arguments debated on the merits, rather than through personal attacks. But disclosure fosters exactly the opposite idea: that the identity of the speaker matters more than the force of his argument. For example, in the 1990s, as term limits stormed to success after success, they suffered their only state-level ballot defeat in Washington State, after voters learned that funders of the measure included the libertarian Koch brothers. As Brian Doherty recounts in *Radicals for Capitalism*, "suddenly the fight was not about the wisdom of term limits, but the probity of eliminating drug laws and Social Security." In fact, the Supreme Court stated in *Buckley v. Valeo* that disclosure laws would "allow voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." This

amounts to an endorsement of ad hominem argument, whose ability to debase political debate the Founders understood very well.

A political culture that focuses excessively on the "who" rather than the "what"--one that fosters the view that if we know who wrote an opinion, it is not necessary to read the opinion itself--is not healthy. Look at the comments section in almost any political blog, on the left or the right, and you'll see comments almost uniformly taking a quick turn into attacks on the identity and motivation of the writers. The decline in the quality of our civic discourse can't be dumped entirely at the foot of mandatory disclosure, of course. But laws that regard the identity of speakers as fundamental to the public's ability to judge arguments may well exacerbate a thoughtless, partisan, nasty brand of political debate.

For 35 years, mandatory disclosure of political contributions has been the most popular part of the campaign-finance "reform" agenda. Yet the idea that Americans should report their political activity to the government is, in many ways, the most un-American part of that agenda. Excessive disclosure invades privacy to little benefit and provides government--and others--the information they need to retaliate against people holding unpopular or inconvenient views. Moreover, compulsory disclosure sends the message that identity, not ideas, matter. Call the result "ad hominem democracy," an atmosphere in which serious, civil debate about issues seems ever harder to find.

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