

*Despite reformers' calls for disclosure, anonymity may better prevent influence peddling.*

# Should Campaign Donors Be Identified?

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**A**BOUT THE ONLY CAMPAIGN finance issue on which there is a strong consensus is the belief that the law should force candidates to disclose the identity of contributors. A growing group of scholars and advocates believe that mandated disclosure should be the only campaign finance regulation; they argue that other restrictions are counterproductive because they tend to shift money to less accountable forms of political speech such as “independent expenditures” and “issue advocacy.”

Representative John T. Doolittle (R-Calif.) has proposed the “Citizen Legislature and Political Freedom Act” that essentially would repeal all limits on political campaign contributions and merely require immediate disclosure by candidates when they do receive contributions. This type of “pure disclosure” reform has garnered support from a wide spectrum of political activists, from Sen. Mitch McConnell (R-Ky.) to Stanford Law School dean Kathleen Sullivan.

But there exists in our polity a counter-image—the voting booth—that stands against the cult of disclosure. Ballot secrecy was adopted toward the end of the nineteenth century to deter political corruption. Voting booth privacy disrupted the economics of vote buying, making it much more difficult for candidates to buy votes because, at the end of the day, they could never know for sure who voted for them.

A similar pro-anonymity argument can be applied to campaign finance. We could harness similar anonymity benefits by creating a “donation booth”: a screen that forces donors to funnel campaign contributions through blind trusts that would keep candidates from learning the identity of their supporters. Just as the secret ballot makes it more

difficult for candidates to *buy* votes, mandating anonymous donations through a system of blind trusts might make it harder for candidates to *sell* access or influence because they would never know which donors had paid the price. Knowledge about whether the other side actually fulfills his or her promise is an important prerequisite for trade. People—including political candidates—are less likely to deal if they are uncertain whether the other side performs.

## MITIGATING CORRUPTION

The impetus for disclosure is that a public armed with knowledge about political contributions would be able to punish candidates who sell their office or who are otherwise inappropriately influenced by wealthy donors. It has, however, proved exceedingly difficult to infer inappropriate influence from the mere fact of contributions; politicians claim they would have acted the same way regardless of whether a questionable contribution had been made. Moreover, there is no legal prohibition against selling access (i.e. “face time”) in return for contributions, and today’s jaded citizenry rarely imposes any electoral punishment on candidates known to have sold political access. In sum, mandatory public disclosure would do little to deter *quid pro quo* corruption: types of corruption that could be proven (contributions for access) are legal and are of little interest to voters, while types of corruption that are illegal (contributions for influence) cannot be proven. At most, disclosure would deter only the most egregious and express types of influence peddling.

In contrast, a regime of mandated anonymity interferes with an informational prerequisite for corruption. Put simply, it would be more difficult for candidates to sell access or influence if they did not know that a donation was made. An anonymous “donation booth” would severely impede *quid pro quo* corruption, whether in the form of explicit trades (donations for nights in the Lincoln bedroom, presidential coffees, legislative activity) or implicit deals such as the assumption that an officeholder would “owe one” to a donor.

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**KNOW YOUR DONOR:** Republicans Alfonse D'Amato (l), Christine Todd Whitman, George Palaki, and Betsy McCaughey at a Pataki-McCaughey fundraiser in 1994.



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Mandated anonymity could also deter politicians from extorting donations. Politicians can now threaten potential donors with unfavorable treatment unless a sufficiently large contribution is made. The potential for such extortion could explain why several corporations have privately agreed not to make soft money contributions. Fear of extortion may keep private interest groups from organizing because politicians will have a harder time shaking down an unorganized mass of private interests. Mandated donor anonymity would allow such private interests to organize without fear of becoming targets for extortion.

**Disrupting feedback** Even when politicians do not condition their behavior on contributions, they may nonetheless expect that taking certain positions will cause donors to give more money. And even when wealthy donors do not expect their giving to change a candidate's behavior, they may reasonably believe that giving to a candidate with whom they agree will increase that candidate's chance of (re)election. In the first instance, the possibility exists that a contribution has a corruptive influence on the candidate's behavior. In the second, even though the candidate's positions are uncorrupted (that is, "unchanged") by the contribution, the contributions of those with disproportionate wealth corrupt the process by increasing the likelihood that positions favored by the wealthy will be disproportionately favored in our political sphere.

Mandated anonymity would reduce the corrupting influ-

ence of contributions on candidates' behavior by reducing both the candidates' feedback about how particular positions affect giving and the willingness of donors to make large donations to influence candidate behavior. Candidates would still learn the total amount of money that had been contributed to their campaigns, but they would not learn how particular positions translated into particular contributions.

Mandated anonymity would create a kind of Tiebout model for candidates' policies. In the original Tiebout model, different towns committed to particular taxes and amenities, and then potential citizens voted with their feet by moving to the towns with the tax and expenditure package they most preferred. Mandated anonymity would push the contribution market in the same direction. Politicians would announce policies, and then wait and see whether those policies garnered financial support. Granted, such waiting is not true independent leadership, but it is likely to be more independent than the current regime – one in which private interests can immediately bestow gifts on a politician to show appreciation for certain policies.

**The donor's paradox** Just as it is irrational to vote when there is an infinitesimal chance that one's vote will affect the election, it is also irrational to donate to a campaign if one's gift imperceptibly increases the chance of a candidate's victory. Under the current regime, politicians overcome this "donor's paradox" by developing a reputation for giving donors special consideration; large donors expect

their contributions to yield concrete benefits concerning a candidate's policy, legislative activity, or—at the very least—the candidate's willingness to meet with the donor. But mandated anonymity greatly diminishes the expected return on an individual donation and, in all likelihood, will substantially reduce the number of large donations. It would be difficult for candidates to provide favors or special access to individual contributors without knowing the contributors' identities.

Mandating donor anonymity would reduce the disproportionate influence of wealth on our political system, not only by reducing the number of large donations but also, possibly, by increasing the number of small donations. Under the current system, small donors have virtually no

ed disclosure, if it were effective in deterring political corruption, would also be likely to shift some direct contributions toward issue ads (where disclosure cannot be required).

No one has ever worried that mandated disclosure has caused a shift toward issue advocacy. The lack of concern is strong evidence of disclosure's ineffectiveness. The simple reason why mandated disclosure is unlikely to push money "hydraulically" toward issue advocacy is that disclosing the identity of donors deters very little corruption. If disclosure did deter some types of corruption, hydraulicists would have to predict that the deterred contributions would resurface as issue advocacy. It is analytically impossible to be a hard-core hydraulicist (who believes that any campaign restriction causes a dollar-for-dollar shift toward unrestrictable issue advocacy) and an advocate of mandatory disclosure. To advocate disclosure, you must concede that at least some restrictions are not completely undone by hydraulicism.

Disclosure regimes may make us feel good about ourselves, but they probably produce much the same results as a true *laissez-faire* regime in which contributors have complete freedom to remain anonymous or to disclose their identities to the candidate or the public. Reasonable

people could disfavor mandated anonymity—for example, because of the predictable shift of resources toward less accountable issue advocacy—but they should not particularly favor mandated disclosure because it generates substantial benefits beyond a *laissez-faire* regime.

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impact on the electoral process. By reducing the importance of large donations, mandated anonymity would make small donors relatively more important and thus might induce less affluent donors to give more.

### ANONYMITY VS. DISCLOSURE

So, which is better: mandated disclosure or mandated anonymity? If we were to repeal all contribution or expenditure limitations and were only to regulate information about contributions, which form of regulation should we prefer? I believe that mandated anonymity would be preferable because it is a less restrictive alternative and it is more likely to deter political corruption.

Mandated anonymity can be structured to give contributors more liberty—for example, allowing them to say anything about how much they gave—than under mandatory disclosure regimes and thus should be presumptively superior from a libertarian perspective. Mandated disclosure forces contributors to speak whether they want to or not, while mandatory anonymity would allow donors to tell candidates anything (or nothing) that they want about their contribution. While neither regime is truly *laissez-faire* (because mandated anonymity does not allow a contributor to *prove* that he has given a large gift), mandated anonymity clearly dominates mandated disclosure on libertarian grounds.

**Shifting money** Critics are quick to point out that mandated anonymity is likely to convert some direct contributions into independent, "issue advocacy" expenditures (where anonymity cannot be required), but fail to see that mandat-

**Anonymity's benefits** Mandatory anonymity — even if perfectly implemented — is not a panacea. Candidates would still have incentive to take certain positions in order to generate contributions, and the wealthy would continue to have a disproportionate voice in electioneering. But the donation booth offers three key benefits over the current system:

- Anonymity would make it more difficult for politicians to reward their contributors.
- Anonymity would substantially reduce the number of large donors.
- Anonymity might increase the number of small donors.

In contrast, mandatory disclosure is much less likely to produce those outcomes. Monetary influence and inequality could only be deterred if voters punished candidates who pandered to contributors or received disproportionate contributions because of their position favoring wealthy contributors. America's experience with mandatory disclosure is that the benefits to a candidate of having extra contributions for the campaign almost always outweigh any possibility that some voters will be put off by the fact of the contribution itself. At the end of the day, a workable regime of mandated anonymity is likely to have a much larger effect than mandated disclosure on monetary influence

and inequality for the simple reason that it is likely to reduce the number of five- and six-figure contributions.

### HOW WOULD IT WORK?

All candidates, political parties, and political action committees (PACs) would establish blind trust accounts at private trust companies with substantial, preexisting assets (of say, more than \$100 million). Representatives of the blind trust could not be employed in positions influencing access or policy—and, as a prophylactic, should be required not to communicate privately with candidates or campaign workers.

The core regulation would require that all donations to candidates, political parties, and PACs be made by mail to the blind trusts. Campaigns would no longer be allowed to accept money in cash or check. Large donors would have the option of having the trust disclose that they had given at least \$200, but under no circumstance would the trust identify a donor as having contributed more than \$200.

The blind trusts would then report to the candidates on a weekly or a biweekly basis the total amount that had been donated, but not detail any individual donations exceeding \$200. Candidates could still ask individuals for support, but could not close the deal. That, by itself, might free politicians from the current fundraising marathon of constantly seeking contributions. A candidate could still have fundraisers and limit invitations to rich, registered voters of the same party. But under a regime of mandated anonymity, the dinner could not be priced above cost. Instead, campaign workers could do no more than distribute postage-free envelopes addressed to the blind trust so that attendees could later mail in a contribution.

The trust's books would be publicly audited only some number of years after the candidate left office. The ex post auditing would allow donors to be sure that their donations had in fact gone to their candidate and to allow the public to assess whether donations were, notwithstanding the trust, purchasing access or influence.

**Improper disclosure** What is to stop a donor from telling a candidate on the sly about a large “soft money” contribution? Absolutely nothing. But talk is cheap. Anyone can claim to have donated to a candidate, just like anyone can claim to have voted for a candidate. But the voting booth makes it impossible for a voter to prove that he voted for a particular candidate, and just so, an anonymous donation booth would make it impossible for a donor to prove that he gave to a particular campaign. What is more, non-donors could easily mimic the signals of real donors, making it difficult for unscrupulous candidates to determine to whom they owe favors.

But what if people were to try to get around the system by having campaign officials witness the mailing of the

donations? We could defeat that practice by adopting a 10-day cooling-off period in which contributors could cancel their contribution. A cooling-off period would give non-donors as well as donors the ability to cancel checks that were sent to the trust.

Of course, candidates would still know a lot about some of the sources of their campaign funds. Ross Perot would know how much he gave to himself. Bill Clinton would know how many New Hampshire cocktail parties a particular supporter threw on his behalf. Donating your time to fundraising might still get you an ambassadorship. But the effect would be muted, because the candidate would not be able to see how much money a particular person raised.

**Direct spending** Mandating anonymous donations would undoubtedly lead some donors to directly purchase television ads supporting a candidate. The U.S. Constitution prohibits the limiting of individuals' ability to speak directly. Direct speech, uncoordinated with candidate campaigns, would therefore allow rich individuals to contin-

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ue to signal their willingness to spend money on behalf of particular candidates.

But “direct speech” end runs would not completely undermine the effectiveness of mandated anonymity. Current law limits the ability of corporations and labor unions to engage in direct speech. Moreover, independent “direct speech” ads are not as valuable to candidates (and therefore would not purchase as much influence) because candidates cannot control their content. And few individuals have sufficient resources to purchase effective broadcast campaigns.

Under a regime of mandated anonymity, candidates might still take positions in order to induce independent issue ads on their behalf (and vice versa), but it will be more difficult for individuals who had been giving, say, \$10,000 or \$20,000 to a party and its candidates to find an equally effective issue ad substitute. To be sure, independent issue ad organizations will start soliciting contributions, but the organizations are likely to find it more difficult to convince the erstwhile political donor to contribute. This is because it will be less clear to potential donors that a contribution to an independent organization will lead candidates to give heightened access or influence, especially because the benefits to the candidate of truly independent issue advocacy are less pronounced.

While I concede that mandated anonymity would lead to an increase in independent issue ads, I simultaneously predict that a regime of mandated anonymity would nevertheless reduce quid pro quo and monetary influence corruption by reducing the overall level of direct and indirect contributions – i.e., both independent expenditures and issue advocacy. An anonymous donation booth is likely to dramatically reduce the number of large “soft money” contributions. Moreover, mandated anonymity would prohibit the current practice of PAC bundling, whereby PACs gain influence with candidates by bundling together contributions from individual donors.

The predictable shift of contributions toward less accountable issue advocacy—even if only partial—pro-

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

A donor’s burden of proving that she gave a candidate \$1,000 instead of \$200 should be considered only a marginal restriction upon the contributor’s ability to engage in free communication. And the burden of the restriction is mitigated by the donor’s unrestricted ability to speak independently in favor of a particular candidate.

## Mandatory anonymity accomodates the belief that “it’s my money and I have a right to support any candidate that I want.”

vides some reason for opposing a mandated anonymity regime. But that same concern should also undermine mandated disclosure regimes. If mandated disclosure could deter corrupt direct giving, the critics would have to fear that the same corrupt contributions would reappear as anonymous issue advocacy ads. Mandated disclosure might not deter corruption, but merely shift it to less accountable independent expenditures.

### IS IT CONSTITUTIONAL?

Mandated anonymity is clearly constitutional. It burdens speech less than mandated disclosure and is more likely to further the government’s compelling interest in deterring corruption. And while the Supreme Court has upheld the constitutionality of mandated disclosure, appreciating the possibility of mandated anonymity calls into question whether a disclosure regime constitutes the least restrictive alternative, as required by the First Amendment.

In locating the exact anonymity burden, we should begin by remembering what the proposal does not do. It does not affect how much a donor can contribute, and it does not limit the words a donor might say. The regime would even allow a donor to prove that she had given at least \$200 to a campaign. The only burden of the anonymity proposal is that donors could not prove that they had given more than \$200.

The Supreme Court’s jurisprudence suggests that the size of that burden is rather marginal, particularly because donors could prove they contributed \$200. The Court in *Buckley v. Valeo* found:

**The right to spend** Bruce Ackerman’s “brute property” argument, presented in his article “Crediting the Voters: A New Beginning for Campaign Finance,” correctly identifies a deeply held impulse in our polity: “It’s my property and I have a right to use it to support any candidate I want.” Mandatory anonymity accommodates the brute property impulse while simultaneously restraining property’s influence. The donation booth does not affect how property

can be used, nor does it limit the words (or other signals) a donor may employ to describe her use. But because the ability to prove credibly how one uses her property is not a firmly established concomitant of ownership, the anonymous donation booth does not directly contradict the brute property impulse.

**Comparison** The constitutionality of mandated anonymity can most clearly be demonstrated by comparing the constitutional costs and benefits of the specific proposal to two other free speech restrictions that have passed constitutional scrutiny: mandated voter anonymity and compelled disclosure of donor identity (reporting requirements). By showing that mandated anonymity is less burdensome and more supportive of the government’s interest in preventing corruption, the comparisons provide two *a fortiori* arguments for the constitutionality of anonymity regulation.

First, the constitutionality of the voting booth—i.e., mandated voting anonymity—suggests that mandated donor anonymity is also constitutional. It can be claimed that the voting booth burdens political expression; no matter how much a voter wants, she cannot prove that she voted for a specific candidate. Because voting is the quintessential act of political expression, denying citizens the right to prove for whom they voted is surely more burdensome than denying citizens the right to prove they gave a candidate more than \$200.

Although the privacy of the voting booth is an innovation of less than 100 years’ standing, we cannot conceive that the Supreme Court would strike down this form of mandated anonymity as unduly burdening voters’ free

speech rights. Opponents of mandated donor anonymity will be hard pressed to explain why mandatory anonymous donation is unconstitutional, but anonymous voting is not.

Second, the Supreme Court's willingness in *Buckley* to approve compelled disclosure of donor identity suggests that compelled nondisclosure is all the more constitutional. Mandated disclosure is more burdensome than mandated anonymity. The Supreme Court has traditionally protected the right to silence or anonymity much more than the right to speak credibly. Plenty of cases can be found in which the Supreme Court struck down regulations requiring speakers to identify themselves. But it is hard to find court decisions that support the notion that the First Amendment was abridged by a statute that prohibited a speaker from proving that what he says is true. Indeed, the strong anti-libel impulse enunciated by Justice Hugo Black and others makes it harder for speakers to signal the truth of their allegations credibly because false statements often do not expose the speaker to monetary damages.

Mandated disclosure also is less likely to further the government's interest in preventing corruption. Even though the Supreme Court suggested that mandated disclosure could deter corruption, it has proven exceedingly difficult to demonstrate either quid pro quo or monetary-influence corruption from the mere knowledge of identity. As adumbrated above, donor anonymity is more likely to deter corruption because uninformed candidates have less opportunity to peddle influence or change their positions in the hope of garnering greater contributions—and that effect is likely to be stronger than any voter discipline produced by a mandatory disclosure regime.

Indeed, the possibility of mandated anonymity calls into question the constitutionality of mandated disclosure. The First Amendment requires not only that the effect of furthering the government's compelling interest outweigh the speech burden, but also that government choose the least restrictive alternative for achieving its compelling interest. *Buckley* did not discuss the "least restrictive alternative" requirement when it allowed that mandated disclosure was constitutional, but that omission was probably the result of a belief by the court that lawmakers' only relevant informational regulatory options were mandated disclosure or laissez-faire regimes. Now that we realize that mandated anonymity could provide a smaller speech burden while deterring corruption, it becomes difficult to characterize mandated disclosure as the least restrictive alternative.

## CONCLUSION

This article stands against the strong consensus in favor of disclosure in campaigns. But then, the secret ballot stands against the one-time consensus in favor of disclosure in elections. We should remind ourselves why we chose to make voting a solitary act. Anyone opposing mandated donor anonymity needs to explain why we should not also jettison mandated voting anonymity.

Mandated anonymity provides a useful perspective from which to rethink mandated disclosure. In the end, reasonable people might reject the anonymous donation booth because of the likely increase in issue advocacy. If mandated anonymity induces even a partial shift of contributions toward that form of reckless and unaccountable speech, we might not want to extend the voting booth rationale to campaign finance. But mandated disclosure regimes—if effective—should give rise to similar effects. The visceral sense that mandated disclosure does not create a similar shift probably stems from the sense that few corrupt donations are in fact deterred by a disclosure requirement.

For those who favor the move to a pure disclosure regime largely on libertarian grounds, a pure anonymity regime gives donors even more freedom of speech—the cherished freedom not to speak. The donation booth is not a panacea, but it keeps faith with the simple and widely held belief that the size of your purse should not determine your access to government. **R**

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