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CAMPAIGN FINANCE

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

Should Campaign Donors Be Identified?

By Ian Ayres
Yale Law School

About 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-boo 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.

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 coffee, legislative activity) or implicit deals such as the assumption that an officeholder would “owe one” to a donor.

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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 influence 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 spe-
cific access to individual contributors without knowing
the contributors’ identities.

Mandating donor anonymity would reduce the dis-
proportionate 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
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 expen-
diture limitations and were only to regulate information
about contributions, which form of regulation should we
prefer? I believe that mandated anonymity would be prefer-
able because it is a less restrictive alternative and it is more
likely to deter political corruption.

Mandated anonymity can be structured to give con-
tributors more liberty—for example, allowing them to say
anything about how much they gave—or under manda-
tory disclosure regimes and thus should be presumptive-
ly superior from a libertarian perspective. Mandated dis-
closure 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), man-
dated 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-
ed disclosure, if it were effective in deterring political cor-
ruption, would also be likely to shift some direct contribu-
tions 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 rea-
son 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 certain types of corruption, hydrologists would have
to predict that the deterred contributions would resurface as
issue advocacy. It is analytically impossible to be a hard-core
hydrologist (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 restric-
tions are not completely undone by hydrologism.

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 contribu-
tors have complete freedom to remain anonymous or to disclose their identities
to the candidate or the public. Reasonable
people could favor mandated anonymity—for exam-
ple, because of the predictable shift of resources toward
less accountable issue advocacy—but they should not par-
ticularly favor mandated disclosure because it generates
substantial benefits beyond a laissez-faire regime.

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 gen-
erate contributions, and the wealthy would continue to have
a disproportional voice in electioneering. But the donation
booth offers three key benefits over the current system:
• Anonymity would make it more difficult for politi-
cians to reward their contributors.
• Anonymity would substantially reduce the num-
er 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 inequal-
ity 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 dis-
closure 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 and people can claim anything.

**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 continue 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—provides 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:

"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.

**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.

The predictability of mandated anonymity as unduly burdening voters' 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.

**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.
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.

For more on the campaign finance debate, visit Cato’s special website:  
www.cato.org/campaignfinance

READINGS
• Voting With Dollars, by Bruce Ackerman and Ian Ayres. New Haven, Conn.: Yale University Press, 2002.